Florida Law Review

Volume 44 | Issue 5 Article 2

December 1992

Settling Limits on Involuntary HIV Antibody Testing Under Rule 35 and State Independent Medical Examinatiuon Statutes

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SETTING LIMITS ON INVOLUNTARY HIV ANTIBODY TESTING UNDER RULE 35 AND STATE INDEPENDENT MEDICAL EXAMINATION STATUTES*

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I. INTRODUCTION

Rule 35 of the Federal Rules of Civil Procedure, and many similar state rules, require certain specified people to submit to independent medical examinations (IMEs).[1] Those rules are without a doubt "pow-

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1. *See* FED. R. CIV. P. 35; 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2231, at 665 (1970).

erful instrument[s] for ascertaining the truth."[2] However, the naked search for facts has always been balanced against countervailing concerns such as personal dignity and public health.[3] Thus, Rule 35 has always had closely guarded bounds.[4]

Those bounds have recently been tested in the Federal District Court for the Eastern District of Pennsylvania.[5] The court was asked to order the plaintiff in a products liability case to undergo an HIV antibody test.[6] Whether and under what circumstances an HIV test can be ordered in discovery is not clearly answered in Rule 35.[7] As most state's IME statutes are closely modeled after Rule 35, they also fail, save for one,[8] to take voluntary HIV testing into account.[9] Rule 35 and the state IME statutes simply do not give specific guidance regarding how HIV testing should be handled.[10] To answer whether and when HIV testing can be mandated under IME statutes, the balancing mechanism of the rule must be understood within the context of the realities of HIV testing.[11]

At stake is more than just balancing an individual's privacy against a party's right to challenge claims of physical illness. Keeping HIV testing voluntary is a matter of grave concern to public health[12] and, in most jurisdictions, the law.[13] By ordering the plaintiff to submit to the HIV test, the court haunts us with the specter of parties, at least those in high risk groups, routinely being required to submit to HIV tests.[14] Rule 35 and state IME statutes would then be working against

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2. 8 WRIGHT & MILLER, *supra* note 1, § 2231, at 665-66.

3. *See infra* text accompanying notes 53-82.

4. *See infra* text accompanying notes 53-82.

5. Pettyjohn v. Goodyear Tire & Rubber Co. (*Pettyjohn 3*), No. 91-CV-2681, 1992 WL 105162, at *1 (E.D. Pa. Apr. 29, 1992).

6. *Id.* The test is a two-part blood test. Doe v. Roe, 526 N.Y.S.2d 718, 721 (N.Y. Sup. Ct. 1988). It tests not for the presence of HIV itself, but for antibodies produced by the body when it comes into contact with HIV. *Id.* at 721 & n.1. The first test is the Enzyme-Linked Immunosorbent Assay (ELISA). *Id.* at 721. It is quite sensitive to HIV antibodies and prone to giving false positive results. *Id.* at 721 & n.1. Thus, if the ELISA is positive, a second more involved but more accurate test is given, called the Western Blot Test. *Id.* at 721. For convenience sake I shall refer to HIV antibody testing process as "HIV testing" throughout this article.

7. *See infra* text accompanying notes 38-50.

8. *See infra* note 189 and accompanying text.

9. *See infra* text accompanying notes 38-50.

10. *See infra* text accompanying notes 38-50.

11. *See infra* notes 51-82 and accompanying text.

12. *See infra* notes 86-136 and accompanying text.

13. *See infra* notes 140-99 and accompanying text.

14. *See infra* text accompanying notes 211-20.

privacy and public health policy. To avoid this, involuntary HIV testing must be limited under Rule 35 to only those situations where HIV status is put directly at issue as a matter of liability.[15]

II. THE MECHANIC'S CASE

In June of 1989, a mechanic was working on a multi-piece truck tire rim.[16] While he was trying to mount the rim on a tractor-trailer, the rim exploded.[17] The right side of the mechanic's face was ripped open, he lost his right eye, and most of the cartilage, bone, and teeth from the right side of his face.[18] The injuries required extensive reconstructive surgery.[19]

The mechanic sued the manufacturer of the rim, Goodyear Tire and Rubber Company, along with several other defendants.[20] As is normal in such a case, the mechanic claimed he would suffer future damages.[21] He claimed future wage loss, loss of earning capacity, future medical expenses, and future disability.[22]

During the course of discovery, the defendants subpoenaed the mechanic's medical records.[23] When the records from the Hospital at the University of Pennsylvania (HUP) arrived, they were incomplete.[24] They did not include any information concerning chemical abuse or AIDS/HIV testing.[25] The hospital refused to release those records without special authorization.[26] The defendants obtained a court order requiring the mechanic to authorize release of the records.[27]

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15. *See infra* notes 211-30 and accompanying text.

16. Pettyjohn v. Goodyear Tire & Rubber Co. (*Pettyjohn 5*), No. 91-2681, 1992 WL 203390, at *1 (E.D. Pa. Aug. 14, 1992).

17. *Id.*

18. Motion of Plaintiff James A. Pettyjohn for Protective Order Denying Additional HIV Testing, at 2, *Pettyjohn 3* (No. 91-CV-2681) [hereinafter Motion for Protective Order].

19. *Id.*

20. Memorandum of Plaintiff James A. Pettyjohn in Opposition to the Motion of Defendants Goodyear and Motor Wheel Corporation to Compel Plaintiff's Redeposition and for the Release of Plaintiff's Confidential Health Information, at 1, Pettyjohn v. Goodyear Tire & Rubber Co. (*Pettyjohn 2*), No. 91-2681, 1992 WL 94895 (E.D. Pa. Apr. 20, 1992).

21. *See* Pettyjohn v. Goodyear Tire & Rubber Co. (*Pettyjohn 4*), No. 91-2681, 1992 WL 176494, at *1 (E.D. Pa. July 16, 1992).

22. Motion to Compel Plaintiff's Authorization for Release of Confidential Medical Records, at 1, *Pettyjohn 2* (No. 91-2681) [hereinafter Motion to Compel].

23. *Id.* at 1-2.

24. *Id.* at 2.

25. *Id.*

26. *Id.*

27. Pettyjohn v. Goodyear Tire & Rubber Co. (*Pettyjohn 1*), No. 91-CV-2681 (E.D. Pa. filed Mar. 18, 1992).

The confidential records showed that the mechanic had a history of IV-drug use[28] and that in June 1989 the mechanic had taken an AIDS/HIV antibody test.[29] The test was negative.[30] That would seem to end the matter except that a half year after the negative test results, the mechanic was again seen at HUP's emergency room.[31] A scribbled note by an emergency room attendant indicated that the mechanic had said that he was HIV positive.[32] In a sworn affidavit, the mechanic stated that he had only tested the one time, that he had told the emergency room attendant he had tested negative, and that the note, therefore, must have been a mistake.[33]

Goodyear returned to court for an unprecedented order: an order requiring the mechanic to submit to another HIV test.[34] The attorneys for Goodyear argued that the notation in the hospital record indicated that between June and December of 1989 the mechanic had taken another test in which he tested positive.[35] The mechanic's lawyers opposed Goodyear's motion and requested a protective order to prevent the testing.[36] The Federal District Court in Pennsylvania sided with Goodyear. The court ordered: "That the record thus far demonstrates a genuine controversy as to plaintiff's HIV status and defendants have shown good cause for the testing. Defendant's Motion for a testing is GRANTED, and plaintiff's Motion for a Protective Order is DENIED."[37] The order raises grave concerns about the balance between privacy, public health, and factfinding in litigation under Rule 35.

III. INDEPENDENT MEDICAL EXAMINATIONS: RULE 35 AND ITS STATE COUNTERPARTS

The task faced by the Pennsylvania court was not one clearly answered on the face of the rule. Rule 35 does not make any explicit reference to HIV testing; it provides:

> When the mental or physical condition (including the blood group) of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a

28. Motion to Compel, *supra* note 22, at 2.
29. Motion for Protective Order, *supra* note 18, at 2.
30. *Id.*
31. *See id.* at 3.
32. *Id.*
33. *See id.* at 3-4.
34. *See Pettyjohn 3*, 1992 WL 105162, at *1.
35. Motion for Protective Order, *supra* note 18, at 3.
36. *See Pettyjohn 3*, 1992 WL 105162, at *1.
37. *Id.*

> physical or mental examination by a suitably licensed or certified examiner . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.[38]

Although the statute does refer to blood typing examinations, its failure to mention HIV testing is not surprising. Those who drafted and amended Rule 35 simply never contemplated HIV testing. The original drafters of Rule 35, in 1938, certainly never envisioned the AIDS crisis. Even those who amended the rule to add blood tests to the language were not doing so with AIDS in mind. That amendment was in 1970,[39] nearly a decade before AIDS was even identified.[40] None of the amendments since 1970 have dealt with the AIDS epidemic or HIV testing.[41] Since the rule itself does not indicate how to deal with HIV testing, we must appeal to the history and policies that inform the IME rule.

Requiring medical examinations has always been a touchy matter for American courts.[42] The first reported examination order did not occur until 1868;[43] still, for a long time after, many states forbade compulsory examinations entirely.[44] Traditionally, the federal courts had no power to compel an examination unless state law permitted examinations.[45] The courts were reluctant to compel examinations be-

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38. FED. R. CIV. P. 35(a).

39. *See* FED. R. CIV. P. 35 advisory committee's note, 1970 amend.

40. *See* Centers for Disease Control (CDC), *Pneumocystis Pneumonia — Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REP. 250, 251 (1981) (identifying for the first time what would later be called AIDS).

41. *See, e.g.*, Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7047(b), 102 Stat. 4401 (amending Rule 35 to allow examinations by psychologists); 8 WRIGHT & MILLER, *supra* note 1, at 311 nn.1 & 2-5 (stating that the 1987 amendment removed gender specific language, and the 1991 amendment allowed examinations to be made by a suitably licensed or certified examiner).

42. *See* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 239-42 (3d ed. 1985).

43. Walsh v. Sayre, 52 How. Pr. 334, 344 (N.Y. Super. Ct. 1868).

44. *See, e.g.*, Yazoo v. Robinson, 65 So. 241 (Miss. 1914); Stack v. New York N.H. & H.R., 58 N.E. 686 (Mass. 1900); Note, *Power of Court to Order Physical Examinations in Personal Injury Cases*, 25 VA. L. REV. 73 (1938) (stating that nine states share the minority view that courts do not have the inherent power to order physical examinations).

45. Camden & Suburban Ry. v. Stetson, 177 U.S. 172, 177 (1900) (permitting a federal court to order a physical examination because such an order was allowable under the laws of the state in which the action was brought).

cause they were concerned that such a requirement would violate the "sanctity of the person," or as we might call it today, privacy.[46]

An absolute prohibition, however, created a grave problem of basic justice: the malingering wolf could claim injury with impunity cloaked in the sheep's clothing of privacy.[47] Thus, over the years most states eventually allowed their courts to order examinations in limited circumstances.[48] The federal courts followed suit in 1938 by adopting Rule 35.[49] Because most states' rules are now very similar to Rule 35, many federal courts find state court rulings instructive for interpreting Rule 35.[50]

The rules allowing compulsory examinations did not constitute abandonment of the earlier concerns about involuntary examinations.[51] Rather, they resulted from a balancing of those concerns against the

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46. Union Pacific Ry. v. Botsford, 141 U.S. 250, 251-52 (1891).

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference. . . .
>
> . . . .
>
> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass. . . .

Id.

47. Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 280 (1939) ("This provision (also adopted over vigorous protests) should prove an effective barrier to much malingering and fraudulent testimony (heretofore so difficult to rebut) as to the real physical or mental condition of parties to civil actions.").

48. *See* Cecil M. Draper, *Medical Examinations of Adversary Parties*, 25 ROCKY MTN. L. REV. 163, 163-64 (1953). By the adoption of Rule 35 in 1938, 30 states allowed court-ordered physical examinations. *Id.* Eight states passed statutes giving the courts such power. *Id.* at 163. In another 22 states, the authority to do so was based on the inherent power of the courts. *Id.* at 164.

49. Vopelak v. Williams, 42 F.R.D. 387, 388 (N.D. Ohio 1967) (stating that Rule 35 was adopted to conform to federal practice regarding court-ordered examinations to state practice).

50. *Id.* (explaining that because many states have provisions substantially similar to Rule 35, state as well as federal decisions can be helpful in applying the federal rule); *see* Richard J. Barnet, *Compulsory Medical Examinations Under the Federal Rules*, 41 VA. L. REV. 1059, 1064 n.25 (1955) (stating that Delaware, Arizona, and New Jersey have statutes which adopt the language of Rule 35 verbatim). *Compare* MINN. R. CIV. P. 35 *and* N.Y. CIV. PRAC. L. & R. § 3121 (McKinney 1991) *and* PA. R. CIV. P. 4010 (stating in an explanatory note: "Prior Rule 4010 has been substantially revised to conform closely to Fed. R. Civ. P. 35.") *with* FED. R. CIV. P. 35.

51. *See* Barnet, *supra* note 50, at 1064 & n.25 (stating that state courts usually only ordered physical examinations in personal injury cases, and some states specifically limited the use of compulsory medical exams by statute).

needs of justice.[52] This is seen in the narrowness of the rules. The Federal Rules of Civil Procedure are a good example. In contrast to the wide-open scope of general discovery under Rule 26,[53] the scope of medical testing under Rule 35 is quite limited. Under Rule 35, medical examinations and testing can be ordered[54] only when "in controversy"[55] rather than for "any matter, not privileged, which is relevant"[56] as in general discovery. In addition, under Rule 35 "good cause"[57] for the examination must be shown rather than a mere reasonable calculation that the request would "lead to the discovery of . . . admissible evidence,"[58] as in the general provisions governing discovery.

In deciding whether to order a physical examination, the court must balance whatever interests compete with the litigants' need to discover information. Generally those interests are thought to be the "personal dignity" or privacy issues that so troubled earlier courts.[59] Nothing in the rule, however, limits consideration to personal dignity issues,[60] as the privacy of medical matters has traditionally been founded upon both personal dignity and public health concerns.[61]

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52. *See id.* at 1061 (stating that many courts attempted to justify a litigant's duty to submit to an examination on a theory that the litigant had implicitly agreed to make any disclosure necessary to ensure justice).

53. FED. R. CIV. P. 26(b)(1). In general, discovery may be had of "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." *Id.* It is not even an objection, generally, that the information sought is inadmissible at trial as long as the request is "reasonably calculated to lead to the discovery of admissible evidence." *Id.* Monetary sanctions for failure to produce are presumed unless the court affirmatively finds that the refusal was "substantially justified." FED. R. CIV. P. 37(a)(4). Rule 26 generally assumes the production of relevant information. *See* FED. R. CIV. P. 26. Because a medical condition is classically privileged, it is excluded by the very language of the rule. FED. R. CIV. P. 26(b)(1).

54. The strict letter of the rule requires an actual order from the court and requires good cause before the order is issued. FED. R. CIV. P. 35(a). As a practical matter, however, plaintiffs in personal injury actions usually submit to examinations without a court order. This practice is not necessarily a dilution of the good cause requirement. It is simply a recognition by all concerned that there is good cause for an examination when the plaintiff voluntarily puts her health at issue. *See generally* FED. R. CIV. P. 35 advisory committee's note, 1970 amend.; Paula M. Becker, Note, *Court-Ordered Mental and Physical Examinations: A Survey of Federal Rule 35 and Illinois Rule 215*, 11 LOY. U. CHI. L.J. 725, 725 & n.3 (1980).

55. FED. R. CIV. P. 35(a).

56. *Id.* 26(b)(1).

57. *Id.* 35(a).

58. *Id.* 26(b)(1).

59. Becker, *supra* note 54, at 731-33.

60. FED. R. CIV. P. 35(a). The rule gives no specific guidelines for a court on when to refuse to order a party to submit to a physical examination. *See id.* The rule merely states that a court "may" order an examination. *Id.*

61. CLINTON DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 25, 28-29 (1958).

The most familiar example of medical privacy is the doctor-patient privilege. It represents the victory of public health concerns over the common law tradition of compelling physicians to testify.[62] Physicians need the unvarnished truth to properly diagnose and treat their patients and therefore protect public health.[63] To obtain such candor, patients must feel free to tell all to their doctor without the fear that their conversations will later be revealed.[64] Thus, public health policy was the driving force behind the creation of the privilege.[65] The public health policy of the doctor-patient privilege already limits discovery.[66] It is the reason a party often must obtain authorizations to discover past medical records.[67]

Special proscriptions beyond the doctor-patient privilege have been extended to areas such as psychiatric and chemical dependency treatment.[68] Here again, public health concerns are central. Without specific and serious privacy guarantees, people will hesitate to bare their souls to psychotherapists or admit their dependency and seek treatment. To obtain such information in civil discovery a litigant must meet the standards of the privacy statutes. Those specific guarantees of privacy take precedence over the general allowance of discovery found in the Rules of Civil Procedure.[69] Were this not the case, the public health

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62. *See id.* at 9-10. The common law did not recognize a privilege for physicians. *Id.* at 11. In setting that precedent, Lord Mansfield wrote:

> If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, and of great indiscretion; but, to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever.

Trial of the Duchess of Kingston, 20 How. St. Trials 355, 573 (1776). Circular the argument may be, but numerous American jurisdictions have echoed Lord Mansfield's judgment. *See, e.g.*, People v. Lane, 36 P. 16 (Cal. 1894); Estate of Koenig v. Barrett, 78 N.W.2d 364 (Minn. 1956); Commonwealth v. Edwards, 178 A.2d 20 (Pa. 1935). New York bucked the common-law idea and led the way for other states with its privilege statute in 1828. DEWITT, *supra* note 61, at 15 & n.3.

Interestingly, in the civil law of continental Europe, doctor-patient communications were "at all times considered confidential and sacred." *Id.* at 9 n.1.

63. DEWITT, *supra* note 61, at 27.

64. *Id.*; *see also* Edington v. Mutual Life Ins. Co., 67 N.Y. 185, 194 (1876).

65. DEWITT, *supra* note 61, at 28.

66. *Id.* at 277-78.

67. *See id.* at 278.

68. *See, e.g.*, Mental Health & Developmental Disabilities Confidentiality Act, ILL. REV. STAT. ch. 91½, ¶¶ 801-817 (1989); Alcoholism & Other Drug Dependency Act, *id.* ch. 111½, ¶ 6351-1 to 6351-8.

69. Roberts v. Norfolk & W. Ry., 593 N.E.2d 1144 (Ill. App. Ct. 1992); Becker, *supra* note 54, at 743-46.

concerns about the release of psychiatric and chemical dependency treatment would be mere shams. Thus, public health concerns similar to those underlying the prohibition of involuntary HIV testing are already a factor in the discovery of medical information in civil litigation.

The specific mechanism of balancing is contained in the rule itself:

> When the mental or physical condition (including the blood group) of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.[70]

Before ordering an examination the court must be satisfied that the physical condition is "in controversy" and that "good cause" has been shown for the examination.[71]

When deciding if a physical or mental condition is sufficiently "in controversy,"[72] the judge must decide "whether the issue to which the physical condition pertains is of sufficient importance to require a party to undergo the annoyance or discomfort of an examination."[73] One could just as well substitute the concomitant concerns of privacy and public health for "annoyance or discomfort" since they have even greater ramifications than mere annoyance or discomfort. As issues get farther from that core of the lawsuit, they are less and less likely to be sufficiently important to warrant an examination. As the annoyance, discomfort or impositions on privacy and public health increase, the closer the condition to be tested for must be to the center of the controversy.

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70. FED. R. CIV. P. 35(a); *see* Schlagenhauf v. Holder, 379 U.S. 104, 117 (1964); Guilford Nat'l Bank v. Southern R.R., 297 F.2d 921, 924-25 (4th Cir. 1962).

71. FED. R. CIV. P. 35(a).

72. *Id.*; *see* Coca-Cola Bottling Co. v. Torres, 255 F.2d 149 (1st Cir. 1958); Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940); Stuart v. Burford, 42 F.R.D. 591 (N.D. Okla. 1967); Raymond v. Raymond, 252 A.2d 345, 348-49 (R.I. 1969).

73. Barnet, *supra* note 50, at 1065. The first case to test the meaning of the "in controversy" requirement interpreted it to mean "immediately and directly" in controversy. Wadlow v. Humberd, 27 F. Supp. 210, 212 (W.D. Mo. 1939). Only on questions of ultimate liability for the plaintiff's claims could independent medical examinations be ordered. *See id.* That rule was quickly denounced as too narrow. *See Beach*, 114 F.2d at 479; 4a JAMES MOORE & JO D. LUCAS, FEDERAL PRACTICE § 35-03 (2d ed. 1992); 8 WRIGHT & MILLER, *supra* note 1, § 2231.

The most important question in any lawsuit is liability. As one of the partners in my former law firm used to say, "You need three things for a good personal injury case: liability, liability, and liability."[74] Other issues, such as procedure, damages, or credibility of witnesses revolve around the liability issue. Thus, it would be improper to perform a psychological examination on a witness, even a party, merely for an opinion about that person's propensity to tell the truth. Even though liability may hinge on credibility issues, it is still too far from the central core of the liability to warrant the inconvenience, let alone the stigmatization. The issue of damages is certainly very important to the pocketbooks involved in the litigation, but it is quite distinct from liability. No amount of damages makes or minimizes liability. Though IMEs are often granted for issues pertaining to damages,[75] it should only be for conditions actually claimed as damages.

Under most IME statutes an equally important requirement must also be met: the petitioner must have "good cause" to request the examination.[76] The good cause requirement is to be taken very seriously. It is the chief protector of privacy. Good cause is not "a mere formality," but an express limitation of the rule.[77] It means more than mere relevance to the case.[78] To meet the burden requires "an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination."[79] The motion should be denied if information is available from other sources.[80]

Good cause is, like the "in controversy" requirement, a flexible balancing standard; good cause is generally balanced against privacy. Because of this balancing requirement, if a court finds there is good cause for one examination, the court will not necessarily find that there is good cause for two examinations. Since a second examination is a greater imposition on an individual's privacy, the petitioning party

74. Conversation with David J. Moskal of Schwebel, Goetz, Sieben, & Moskal in Minneapolis, Minn.

75. *See Schlagenhauf*, 379 U.S. at 117-19; *Wadlow*, 27 F. Supp. at 212.

76. FED. R. CIV. P. 35(a); *Schlagenhauf*, 379 U.S. at 117-19.

77. *Schlagenhauf*, 379 U.S. at 117-18.

78. *See id.*

79. *Id.* at 118-19.

80. *See* Marroni v. Motey, 82 F.R.D. 371, 372 (E.D. Pa. 1979); Martin v. Tindell, 98 So. 2d 473, 475 (Fla. 1957), *cert. denied*, 355 U.S. 959 (1958).

must show even greater cause for a second examination.[81] Likewise, the more intrusive the examination, the greater the imposition upon privacy. Thus, as the intrusiveness of the requested examination increases, so does the requirement for a showing that the test is a necessity.[82]

The problem is that the HIV test is no ordinary medical test. Though its procedure is that of a simple blood test, its ramifications, for both society and the individual, are cataclysmic.[83] AIDS is a devastating, deadly disease that spawns irrational fears and blatant prejudice.[84] To combat the spread of AIDS, states across the country have joined with public health officials to require that HIV testing be voluntary.[85] The policy of voluntary testing is directly at odds with forcing someone to test under the IME statutes. Both privacy and public health concerns of the AIDS crisis must be balanced against the search for truth in litigation. Only then can it be determined how to interpret the "in controversy" and "good cause" requirements of the IME statutes.

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81. *Schlagenhauf*, 379 U.S. at 118. Since the examinations are an invasion of privacy, the number of examinations should be kept to a minimum. *See* Schlagenhauf v. Holder, 321 F.2d 43, 50 (7th Cir. 1963), *vacated on other grounds*, 379 U.S. 104 (1964). Thus, many courts have refused to grant more than one examination under Rule 35. Rutherford v. Alben, 1 F.R.D. 277, 278 (S.D. W. Va. 1940); *see* Enyart v. Sante Fe Trail Transp. Co., 241 S.W.2d 268, 269-70 (Mo. 1951) (interpreting a rule similar to Rule 35); Gardner V. Reynolds, 775 S.W.2d 173, 178-79 (Mo. Ct. App. 1989); Murdaugh v. Queens-Nassau Transit Lines, 113 N.Y.S.2d 804 (App. Div. 1952). When multiple examinations have been granted, it has been for substantial reasons such as claimed further deterioration in the party's condition, Roskovics v. Ashtabula Water Works, 174 N.E.2d 295 (Ohio Ct. Com. Pl. 1961), complaint of additional injury, City of Valparaiso v. Kinney, 131 N.E. 237 (Ind. Ct. App. 1921), or the initial report not covering all of the party's injuries. Mayer v. Illinois N. Ry., 324 F.2d 154, 155-56 (7th Cir. 1963). Even in cases where multiple examinations have been allowed, the courts have been cautious to note that multiple examinations are extraordinary. *See Roskovics*, 174 N.E.2d at 297 (stating that multiple examinations should not be allowed for a defendant to obtain cumulative evidence, but rather, they should be allowed for the defendant to ascertain the permanence of injuries). Thus before more than one examination is ordered, there must be a showing of good cause that is stronger than the level of good cause needed for an initial examination. *Vopelak*, 42 F.R.D. at 389.

82. Riss & Co. v. Galloway, 114 P.2d 550, 551 (Colo. 1941) (spinal tap denied because of invasiveness); Bartolotta v. Delco Appliance Corp., 4 N.Y.S.2d 744 (App. Div. 1938) (barium meal examination denied as too invasive); *Roskovics*, 174 N.E.2d at 298 (spinal tap denied because of invasiveness).

83. *See infra* notes 86-113 and accompanying text.

84. *See infra* notes 99-113 and accompanying text.

85. *See infra* notes 131-46 and accompanying text.

IV. MANDATORY HIV TESTING ADVERSELY AFFECTS BOTH PERSONAL PRIVACY AND PUBLIC HEALTH

Epidemics, though perhaps new in biological history,[86] are nothing new to the human age. The Black Plague, measles, and smallpox have all swept the globe. They devastated all in their path. The human cost was severe, but civilization may have taken an even heavier toll.[87] During the outbreak of the Black Plague in Europe entire communities died out and among those who survived ordinary routines and customary restraints broke down.[88] Bands of Flagellants, disdaining all authority, roamed the countryside beating themselves in bloody processions of passion to appease a wrathful God and attacking Jews, "witches," or any others they thought were spreading the plague.[89] Lepers, who often looked grotesque but were not suffering from a very contagious disease, were ostracized and unjustly imprisoned in leper colonies.[90] Thus, our responses to these epidemics have been less than charitable and humane. Fear has motivated us more than compassion.

We think ourselves beyond such responses. The past hysteria we may attribute to an age of ignorance. We live, after all, in a new age: an age of science and medicine. We now know, and can even look in on, the micro-cosmos of the pathogenic bacteria and viruses. With that knowledge we have created vaccines to control, if not eradicate, small pox, polio, dyptheria, measles, and influenza; we now have antibiotics which have all but eradicated the Black Plague, and we have public health measures to control cholera.[91] Into our self-congratulatory, secure, scientific world, a new plague has burst upon us: AIDS. It threatens to strip away our thin veneer of enlightened scientism.

AIDS is a viral disease that breaks down the body's immune system allowing opportunistic diseases to invade.[92] The breakdown of the

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86. *See* WILLIAM MCNEILL, PLAGUES AND PEOPLES 40-41 (1976) (explaining that human beings were ineffective in dealing with micro-organisms before the modern scientific age and the advent of devices such as the microscope).

87. *See generally id.* (reviewing many epidemics throughout human history).

88. GEOFFREY MARKS & WILLIAM K. BEATTY, EPIDEMICS 86-91 (1976).

89. *Id.* For a chilling cinematic view of how the Plague affected people (as well as a parable for our own times) one should see Ingmar Bergman's THE SEVENTH SEAL (Embassy Home Entertainment 1987).

90. MCNEILL, *supra* note 86, at 46, 145.

91. *See generally* MARKS & BEATTY, *supra* note 88 (explaining various procedures used to treat and prevent various diseases).

92. *See* Abe M. Macher, *The Medical Background, in* AIDS AND THE LAW §§ 1.1, .14 (William H.L. Dornette ed., 1987) [hereinafter AIDS LAW]. It is caused by a retrovirus known

body's immune system is incurable;[93] the "constellation of opportunistic infections" almost inevitably moves in for the kill.[94] The picture of the AIDS victim is a shell of a man wasted by the opportunistic infections, his deeply recessed eyes staring out from a death's head skull in hopeless, disoriented pain, reminiscent of the visions of Heronious Boch. This disease causes its victims to experience a hell on earth; people are terrified out of their rational minds.

The emotional shock to a person who discovers she is seropositive is devastating.[95] It is, in an all too real sense, a death sentence. The despair leads a greater portion of the HIV positive to commit suicide than the average population.[96] Given the potential for profound psychological trauma, great caution should be exercised before mandating testing.

As if the physical and emotional effects of the disease were not enough of a shock, the method of transmission and the lifestyles of the majority of the victims have sent middle-America into paroxysms. The HIV virus that appears to cause AIDS is generally transmitted

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as the human T-lymphotropic virus type III/lymphadenopathy-associated virus (HTLV-III/LAV). Anthony S. Fauci et al., *NIH Conference — The Acquired Immunodeficiency Syndrome: An Update*, 102 ANNALS OF INTERNAL MED. 800, 800 (1985). The virus infects white blood cells called T-lymphocytes. *Id.* at 806. It destroys the T-helper/inducer cells which enable parts of the immune system to function together. *Id.* at 809. The immune system as a whole is suppressed and the body is thus vulnerable to the opportunistic infections. *Id.* Many now consider the disease to progress through three stages: the seropositive stage, the AIDS-related complex stage (ARC), and finally full blown AIDS. Richard Green, *The Transmission of AIDS*, *in* AIDS AND THE LAW: A GUIDE FOR THE PUBLIC 28, 29 (Harlon L. Dalton et al. eds., 1987) [hereinafter AIDS GUIDE]. The seropositive person simply tests positive of the presence of HIV antibodies without exhibiting any depression of immuno response. *Id.* at 29-30. That person carries the disease, and the damage to the immune system may cause the development of ARC or AIDS. *Id.* at 30. "ARC causes moderate damage to the immune system and is characterized by nonspecific symptoms of illness, such as" fever, lymphadenopahty, fatigue, and night sweats. *Id.* AIDS is a major collapse of the immune system allowing the opportunistic infections to invade and destroy the body. *Id.*

93. *See* Fauci et al., *supra* note 92, at 802.

94. Macher, *supra* note 92, § 1.16. There are any number of infections which can take advantage of the AIDS victim's suppressed immune system. *Id.* Some of the more common include the following: *Pneumocystis carinii* pneumonia, disseminated cytomegalovirus, disseminated *mycobacterium avium-intracellulare*, Candida esophagitis (oral thrush), Mucocutaneous *herpes simplex*, *Cryptococcus neoformans* meningitis, cerebral *Toxoplasma gondii*, and enteric cryptosporidiosis. *Id.*

95. Richard M. Glass, *AIDS and Suicide*, 259 JAMA 1369, 1369-70 (1988).

96. *Id.*; Peter M. Marzuk et al., *Increased Risk of Suicide in Person with AIDS*, 259 JAMA 1333, 1333 (1988).

to adults and adolescents through sex or IV-drug use.[97] Although the virus has affected all sectors of society, its initial victims were generally homosexuals and drug addicts, with a rapidly increasing number of poor, inner-city Blacks and Hispanics affected.[98] Somehow, the white picket fences, manicured lawns, and blue skies of the American dream seemed threatened. To get it, to be suspected of having it, or even to be tested for it, would effect the middle-American whispers of immoral sex and association with "undesirables."

The reaction of others to an HIV-infected person is severe and isolating.[99] It is a reaction that has characterized every plague over the years: pure and abject fear. Examples abound: a news crew once walked off a production set rather than tape and interview two people with AIDS.[100] Another crew taped the show, but only on the condition that the microphones be thrown away afterwards.[101] Hospitals and health care professionals have refused to treat and have neglected AIDS patients.[102] Children with AIDS have been denied access to school.[103] Many employers, upon discovering that employees are in-

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97. *See* Macher, *supra* note 92, § 1.12, fig. 1-1. This is not to diminish the fact that the HIV is transmitted in other ways such as blood transfusions, contaminated blood products for hemophiliacs, and unhygenic handling of infected body fluids. *Id.* Those methods of transmission simply are a very small percentage of the total cases. *See id.* Of the 33,245 cases of AIDS in adults and adolescents in the United States reported to the CDC as of April 6, 1987, 66% of those infected were homosexual or bisexual males, 17% were IV drug users, 8% were homosexuals who used IV drugs, and 4% were infected through heterosexual intercourse. *Id.* Only 2% of the victims were infected by blood transfusions, and 1% were hemophiliacs. *Id.* Since blood screening is much more accurate now, the number of those infected through transfusions or hemophilia treatments should be expected to decrease. *See* Green, *supra* note 92, at 33.

98. *See* CDC, *AIDS and the Human Immunodeficiency Virus Infection in the United States: 1988 Update*, 38 MORBIDITY & MORTALITY WKLY. REP. S-4, at 1, 11 (Supp. 1989); Huntly Collins, *Confronting AIDS' Next Wave*, PHILA. INQUIRER, June 28, 1992, at A1; Susan Okie, *AIDS Shifts to Drug-Plagued Inner Cities*, WASH. POST, Aug. 27, 1989, at A3.

99. *See Hospital Ousted Patient Over Fears About AIDS*, N.Y. TIMES, Nov. 17, 1984, at A8; Frank Prial, *TV Crew Leaves Set of AIDS Victims' Interview*, N.Y. TIMES, Mar. 28, 1985, at B6.

100. Prial, *supra* note 99, at B6.

101. *Id.*

102. Cheryl Frank, *AIDS Victims Are Wary of Discrimination*, A.B.A. J., Nov. 1985, at 19, 19 (stating that paramedics refused to give aid to a heart attack victim when they thought, wrongly, he had AIDS); *Hospital Ousted Patient Over Fears About Aids*, *supra* note 99, at A8 (reporting that a man was ordered to leave a Boston hospital because he had AIDS); *Municipal Hospital in Bronx Fined on Care of AIDs Victim*, N.Y. TIMES, Jan. 16, 1986, at B10 (reporting that a hospital was fined for refusing to give adequate care to a man with AIDS).

103. Ray v. School Dist., 666 F. Supp. 1524 (M.D. Fla. 1987); White v. Western Sch. Corp., No. IP-85-1192-C (S.D. Ind. Aug. 23, 1985) (LEXIS, Genfed Library, Dist. File); Board of

fected with HIV, attempt to fire them.[104] Those who test positive are often shunned, ostracized,[105] and sometimes even assaulted.[106] There have even been calls to quarantine.[107]

Educ. v. Cooperman, 507 A.2d 253 (N.J. Super. Ct. App. Div. 1986); District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (Sup. Ct. 1986). *See generally* Frederic C. Kass, *Schoolchildren with AIDS*, *in* AIDS GUIDE, *supra* note 92, at 29-31; Faye A. Silas, *Is School for All*, A.B.A. J., Nov. 1985, at 18.

104. *See, e.g.*, Leckelt v. Board of Comm'rs, 909 F.2d 820 (5th Cir. 1990) (allowing a nurse to be discharged for not disclosing HIV test results); Doe v. Rice, 769 F. Supp. 440 (D.P.R. 1991) (allowing a member of the National Guard to be discharged after testing positive for HIV); Perez v. United States, 779 F. Supp. 637 (D.P.R. 1991) (allowing a VA hospital employee to be discharged after testing positive for HIV); Aviles v. United States, 696 F. Supp. 217 (E.D. La. 1988) (compelling a member of the Coast Guard to retire because of a positive HIV test result); Doe v. Ball, 725 F. Supp. 1210 (M.D. Fla. 1988), *aff'd sub nom.*, Doe v. Garrett, 903 F.2d 1455 (1989), *cert. denied*, 111 S. Ct. 1102 (1991) (allowing a member of the Naval Reserve to be released because of a positive HIV test); Plowman v. United States Dep't of Army, 698 F. Supp. 627 (E.D. Va. 1988) (allowing a civilian musician employed by the Army to be dismissed after testing positive for HIV); C.J. v. Vuinovich, 599 A.2d 548 (N.J. Super. Ct. App. Div. 1991) (allowing a member of the National Guard to be discharged after testing positive for HIV); Griffin v. Tri-County Metro. Transp. Dist., 831 P.2d 42 (Ct. App. 1992), *review allowed*, 847 P.2d 409 (Or. 1993); Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814 (W. Va. 1990) (allowing termination after the employer discovered that the employee was HIV positive); Arthur S. Leonard, *AIDS in the Workplace*, *in* AIDS GUIDE, *supra* note 92, at 109-25; Frank, *supra* note 102, at 19 (stating that a gay store manager had been fired after he took the day off to see a doctor because his employer thought he had AIDS).

A personal experience exemplifies how many employers feel about AIDS: I was once approached by an employer who wanted to know if he could legally fire someone because the person had tested HIV positive. My shock was not so much that I was approached with the question, but rather, who was approaching me. This employer had an extensive background in biomedical engineering. He knew that all the evidence points to the conclusion that it is perfectly safe to work with someone who is HIV positive because casual contact cannot spread the virus. When I asked him about this, his response was uncharacteristically unscientific: "They don't know the exact mechanism of transfer; they haven't actually proven you can't get it from casual contact." From this encounter I concluded that if someone with that employer's intelligence and medical training is terrified by AIDS, people without his training must be even more terrified. Given the hysteria, we have all the more reason to be exceedingly careful about disclosure of HIV testing information.

105. *See* Citizens for Uniform Laws v. County of Contra Costa, 285 Cal. Rptr. 456 (Ct. App. 1991) (detailing citizens' fight against an ordinance which prohibits housing discrimination against the HIV positive).

106. *See* Florestine Purnell, *Firm Action Quashes Harassment of Gays*, USA TODAY, Dec. 4, 1990, at A6; Curtis L. Taylor & Peg Tyre, *Activists Hail Decision*, NEWSDAY, Nov. 21, 1991, at 5.

107. Ronald Bayer & David L. Kirp, *The United States: At the Center of the Storm*, *in* AIDS IN THE INDUSTRIALIZED DEMOCRACIES 7, 30-33 (David L. Kirp & Ronald Bayer eds., 1992).

Discrimination against those who might be HIV positive is not limited to the private sector. HIV-positive status can sway the judgment of courts.[108] Moreover, institutionalized discrimination has even been proposed. For example, although the Centers for Disease Control has found there is almost no risk of a health care worker transmitting the HIV virus to patients in treatment,[109] overly inclusive restrictions on health care workers have been proposed[110] and, in some cases, enacted.[111] From time to time, detention-camp-type quarantines have been seriously proposed.[112] The fear of discrimination rising to the level of governmental institutionalization is a valid fear.

As a Florida court has noted, "AIDS is the modern day equivalent of leprosy. AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment."[113] For some, the fear of testing is not just an ethereal notion of privacy, it is not just denial; it is a well founded fear for one's dignity, livelihood, and even one's very life.

V. HIV TESTING POLICY

A. *Public Health Policy*

The fear of disclosure creates a grave public health problem. The ultimate goal of public health policy is to find a cure for or a vaccine against the disease. Neither currently seems viable. There is little or

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108. *See* R.E.G. v. L.M.G., 571 N.E.2d 298 (Ind. Ct. App. 1991) (stating that the trial court abused its discretion by awarding a wife 60% of the marital estate because her husband's homosexuality may have exposed her to HIV).

109. CDC, *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, 40 MORBIDITY & MORTALITY WKLY. REP. (Supp. RR-8, at 5, 1991). There is "no [statistical] basis for recommendations to restrict the practice of [health care workers] infected with HIV . . . who perform invasive procedures not identified as exposure-prone, provided the infected [health care workers] practice recommended surgical or dental technique and comply with universal precautions and current recommendations for sterilization/disinfection." *Id.* Historical experience with Hepatitis B indicates there is little risk of transmission even in many invasive procedures, further supporting the belief that the risk is almost nonexistent. *Id.* at 4.

110. 137 CONG. REC. E2376-78 (daily ed. June 26, 1991) (statement of Rep. Dannemeyer) (speaking in favor of the Kimberly Bergalis Patient and Health Care Provider Protection Act of 1991 which Congress failed to pass, but if it had passed, it would have mandated testing of health care workers).

111. *See* Sean C. Doyle, Note, *HIV-Positive, Equal Protection Negative*, 81 GEO. L.J. 375, 388-93 (1992).

112. *See supra* note 107 and accompanying text.

113. South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 802 (3d DCA 1985), *decision approved*, 500 So. 2d 533 (Fla. 1987).

no possibility of a cure for AIDS, and serious obstacles hinder the creation of a vaccine to prevent HIV infection. As June E. Osborn, the Dean of the School of Public Health at the University of Michigan, has written:

> As to a cure, the limited state of our basic knowledge of retroviruses makes quick success unlikely. As the first step in their reproductive strategy, retroviruses copy their RNA into DNA, which is then inserted among normal cell chromosomes. While molecular genetics is advancing rapidly, it is not yet near the stage where specific genes can be found in living cells and excised individually — which is what would be required to undo the outcome of initial infection. Thus, a person with antibodies to HIV can be assumed to be a carrier, if not of the virus itself, then of the genetic information to produce the virus in the future.[114]

As for a vaccine, though advances have been made, many obstacles remain.[115] At the very least, the fact that the HIV virus seems capable of mutating quickly makes the task of creating a vaccine a desperate and perhaps unwinable game of catch-up.[116] Even worse is the possibility, as proposed by several prominent AIDS researchers, that HIV

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114. June E. Osborn, *The AIDS Epidemic: Discovery of a New Disease*, *in* AIDS LAW, *supra* note 92, at 17, 25.

115. *See* PETER S. ARNO & KARYN L. FEIDEN, AGAINST THE ODDS: THE STORY OF AIDS DRUG DEVELOPMENT, POLITICS AND PROFITS 17-21 (1992); *Aids Vaccine Test*, THE TIMES (LONDON), May 19, 1992, at 9 (reporting that French researchers began testing an HIV vaccine on 50 volunteers); *Biotech Plunge Sparked Market Drop*, REUTER BUS. REP., Nov. 15, 1991, *available in* LEXIS, Nexis Library, BUSRPT File (reporting that an announcement that an expected HIV vaccine would have to undergo further tests had sent the stock market into a plunge).

116. Osborn, *supra* note 114, at 25-26. As Dr. Osborn writes:

> Among the scientific barriers that stand in the way of an HIV vaccine, the most ominous appears to be the fact that the virus can evade the immune response by antigenic variation. This capacity for antigenic change is well recognized in some other retroviruses, and recent studies showing differences among various isolates of HIV suggest that it too may have this property.

Id.

is not the sole cause of AIDS.[117] If so, the billions of dollars spent on finding an HIV vaccine may be a wild goose chase.[118] With treatment limited to prolonging life, cure doubtful, and hope for a vaccination perhaps little more than a cruel mirage, education and changing lifestyles may well be the last hope to stem the spread of AIDS.

To stop the spread of AIDS, people who are at risk must get testing, counseling, and treatment. The HIV positive should get medical treatment immediately because there is evidence that early treatment can prolong the life of the individual.[119] Although it is important for all people to practice safe lifestyles, it is imperative to discover who is infected with HIV and to educate those people about safe lifestyles. The challenge is to get those people tested while preserving the greatest possibility to secure their cooperation in changing their lifestyles.

Mandatory testing might seem a logical step,[120] but it has been rejected by the vast majority of public health officials.[121] Though con-

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117. *Discoverer Reworking View of AIDS*, UPI, Apr. 26, 1992, *available in* LEXIS, Nexis Library, UPI File. Professor Luc Montagnier, who discovered the HIV virus, now believes HIV might not be involved in all cases of AIDS. *Id.* Though he believes that HIV has something to do with AIDS, he does not see it as the only triggering mechanism because some people with HIV may never contract AIDS. *Id.* The search for an HIV vaccine may, therefore, be in vain. *Id.* Others, such as Professor Peter Duesberg of the University of California at Berkeley, take an even more dissident view. Neville Hodgkinson, *AIDS: Can We Be Positive?*, SUNDAY TIMES (LONDON), Apr. 26, 1992, at 12 [hereinafter Hodgkinson, *AIDS*]; Neville Hodgkinson, *Experts Mount Startling Challenge to AIDS Orthodoxy*, SUNDAY TIMES (LONDON), Apr. 26, 1992, at 1 [hereinafter Hodgkinson, *Experts*]. He argues that HIV is neither new nor infectious. Hodgkinson, *Experts*, *supra*, at 1.

118. *Discoverer Reworking View of AIDS*, UPI, Apr. 26, 1992, *available in* LEXIS, Nexis Library, UPI File (reporting that Professor Luc Montagnier, discover of the HIV virus, expressed the opinion that an HIV vaccine may not be effective); *see* William Leith, *New Theories, Old Prejudices*, THE INDEPENDENT, May 10, 1992, at 22 ("If HIV is not a necessary or a sufficient cause of AIDS, then the multi-million pound HIV vaccine industry is a waste of money.").

119. Ann C. Collier et al., *A Pilot Study of Low-Dose Zidovudine in Human Immunodeficiency Virus Infection*, 323 NEW ENG. J. MED. 1015 (1990); Neil M.H. Graham et al., 326 NEW ENG. J. MED. 1037, 1039 (1992) (stating that early treatment with AZT prolonged the life of the recipients); Hiroaki Mitsuya et al., *Molecular Targets for AIDS Therapy*, 249 SCIENCE 1533 (1990).

120. *See* Lawrence K. Altman, *U.S. Is Considering Much Wider Tests for AIDS Infection*, N.Y. TIMES, Feb. 4, 1987, at A1 (reporting that federal health officials may recommend testing for all marriage licenses, for all people hospitalized, treated for pregnancy, or treated for sexually transmitted diseases). Mandatory testing has been proposed. Bayer & Kirp, *supra* note 107, at 26 (stating that over 600,000 names were on a petition which placed measures such as mass testing on the California ballot).

121. *See, e.g.*, Bayer & Kirp, *supra* note 107, at 26; INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, CONFRONTING AIDS 120 (1986) (rejecting mandatory testing as

fidentiality is advocated as part of any mandatory testing program, there is justified fear that through negligence or mismanagement,[122] even well meaning, though misguided, official action will lead to public disclosure of test results.[123] The actual benefits of such universal testing may not be as good as they seem. A negative test result does not necessarily give someone a clean bill of health. Since it can take up to six months for the HIV antibodies to develop,[124] those recently infected would not necessarily have a positive test result. Testing would have to be done again in six months, and then again, and again. Likewise, a positive result alone does not necessarily mean that a person will develop AIDS.[125] Moreover, even if the funds were made available to do massive and repeated testing, the test results themselves do not instruct people how to modify their behavior. Therefore, counseling must be a part of the AIDS testing procedure.[126] However, counseling further multiplies the already massive costs of nationwide, repeated testing.[127] Even if confidentiality were insured, even if this country had the money for repeated massive testing, and even if counseling were provided for everyone, the coercive nature of massive involuntary testing is incompatible with the trust and cooperation needed to convince people to change their behavior.[128] Involuntary testing chills the cooperation with public health officials needed to combat HIV infection.[129] In the final analysis, mandatory testing is no panacea. It is inefficient at best and, more likely, counterproductive.[130]

Because of involuntary testing's abundant deficits, public health officials are nearly unanimous in calling for voluntary testing. Thus,

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incompatible with a free society); U.S. DEP'T OF HEALTH & HUM. SERVICES, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 33 (1986) (rejecting mandatory testing); Lawrence K. Altman, *Mandatory Tests for AIDS Opposed at Health Parley*, N.Y. TIMES, Feb. 25, 1987, at A1, A18.

122. *See* Wayne King & Irvin Molotsky, *Washington Talk: Briefing; Leak of Public Health Records*, N.Y. TIMES, Aug. 30, 1986, § 1, at 6.

123. District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325, 341 (Sup. Ct. 1986). Such a misguided official leak led to a child being prohibited from attending school. *Id.*

124. Lawrence K. Altman, *Citing AIDS, Officials Propose Tracking Transplants*, N.Y. TIMES, Dec. 15, 1991, § 1, at 38.

125. Mark A. Rothstein, *Screening Workers for AIDS*, *in* AIDS GUIDE, *supra* note 92, at 126, 130.

126. *See* Larry Gostin, *Traditional Public Health Strategies*, *in* AIDS GUIDE, *supra* note 92, at 47, 54-55.

127. *See id.* at 56.

128. *Id.*; *see* Doe v. Roe, 526 N.Y.S.2d 718, 724 n.9 (Sup. Ct. 1988).

129. Lawrence O. Gostin, *The AIDS Litigation Project*, 263 JAMA 1961, 1962 (1990).

130. *See* Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1287-89 (1986).

the Centers for Disease Control,[131] the National Academy of Sciences,[132] the American Medical Association,[133] the Surgeon General of the United States, the United States Public Health Service, and most state and local public health services have all strongly and publicly opposed mandatory testing.[134] It is not surprising, then, that when the Centers for Disease Control sponsored a major forum to discuss mandatory testing, "not . . . a single public health official at the conference advocate[d] mandatory testing" even for limited groups such as hospital patients or applicants for marriage licenses.[135] The clear consensus among public health professionals is that HIV testing must be voluntary as well as confidential.[136] It is the only practical means of getting those at risk to test and still securing the greatest possibility of their cooperation afterwards. One can be at least fairly certain that those concerned enough to voluntarily test are also going to be concerned enough to listen, learn, and modify their behavior, if they have not already.

B. *Legal Policy*

Legal policymakers have paid close attention to the consensus among public health officials. There has, it seems, been little agitation for mandatory testing. Even conservative scholars, like Richard Posner, have agreed that the best way to fight AIDS is by education and tolerance and thus, mandatory AIDS testing is a bad idea.[137] Thus, the vast majority of American jurisdictions have made voluntary testing the center pieces of their AIDS prevention laws.[138] In nearly all jurisdictions now only voluntary HIV tests can be given except in very limited circumstances.[139]

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131. *See* CDC, *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MORBIDITY & MORTALITY WKLY. REP. 509, 511 (1987); CDC, *Update: Serologic Testing for HIV-1 Antibody — United States, 1988 and 1989*, 39 MORBIDITY & MORTALITY WKLY. REP. 380 (1990).

132. INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, CONFRONTING AIDS 14-15 (1986).

133. Board of Trustees, AMA, *Prevention and Control of Acquired Immunodeficiency Syndrome*, 258 JAMA 2097, 2100 (1987).

134. New York State Soc'y of Surgeons v. Axelrod, 572 N.E.2d 605, 609 (N.Y. 1991) (approving of a state public health administrator's argument that mandatory testing and contact tracing inhibit people from cooperating with public health officials); Doe v. Roe, 526 N.Y.S.2d 718, 721 (Sup. Ct. 1988).

135. Altman, *supra* note 121, at A18.

136. *E.g.*, *id.*

137. RICHARD A. POSNER, SEX AND REASON 163-65, 209 (1992).

138. *See infra* notes 142-44 and accompanying text.

139. *See infra* notes 142-85 and accompanying text.

1. Legislative Prohibition of Involuntary Testing

Policymakers across the United States have been listening closely to public health experts. Nearly every state in the Union has now directly attacked the AIDS crisis with comprehensive legislative acts.[140] Many of the legislatures have specifically recorded their legislative intent. As the Kentucky Legislature wrote:

> The General Assembly finds that the use of tests designed to reveal a condition indicative of human immunodeficiency virus (HIV) infection can be a valuable tool in protecting the public health. The General Assembly finds that despite current scientific knowledge that zidovudine (AZT) prolongs the lives of acquired immunodeficiency syndrome victims, and may also be effective when introduced in the early stages of human immunodeficiency virus infection, many members of the public are deterred from seeking testing because they misunderstand the nature of the test or fear that test results will be disclosed without their consent. The General Assembly finds that the public health will be served by facilitating informed, voluntary, and confidential use of tests designed to detect human immunodeficiency virus infection.[141]

In like fashion, the Pennsylvania Legislature found:

> The incidence of acquired immune deficiency syndrome (AIDS) is increasing in this Commonwealth at a significant rate. Controlling the incidence of this disease is aided by providing testing and counseling activities for those persons who are at risk of exposure to or who are carrying the human immunodeficiency virus (HIV), which is the causative agent of AIDS. Testing and counseling are promoted by establishing confidentiality requirements which protect individuals from inappropriate disclosure and subsequent misuse of confidential HIV-related information. The General Assembly also finds that, since certain specific behaviors place a person at risk of contracting the virus, testing and counseling of persons who are at risk of exposure to the virus makes an efficient use of available funding.
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> . . . .
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> . . . It is the intent of the General Assembly to promote confidential testing on an informed and voluntary basis in

140. *See, e.g.*, 20A ARK. CODE ANN. §§ 20-15-901 to -906 (Michie 1991); PA. STAT. ANN. tit. 35, §§ 7602-7612 (1993).

141. KY. REV. STAT. ANN. § 214.181 (Baldwin 1991).

> order to encourage those most in need to obtain testing and appropriate counseling.[142]

The intent of the AIDS prevention acts, of which the Kentucky and Pennsylvania acts are typical, is to follow the recommendations of public health officials — that HIV testing should be voluntary and the results confidential.[143]

Central to AIDS prevention statutes that have recently been passed are provisions forbidding involuntary HIV testing and guaranteeing the confidentiality of test results.[144] Indeed, prohibiting involuntary HIV testing has been something of a cottage industry for legislatures in the early 1990s. Twenty states adopted such provisions between 1987 and 1991.[145] Almost every jurisdiction in the country now has a statute requiring consent before an HIV test can be given or a statute implying that the test must be voluntary.[146] Likewise, Congress has

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142. PA. STAT. ANN. tit. 35, § 7602(a), (c) (1993).

143. *See supra* text accompanying notes 131-36.

144. *E.g.*, ALA. CODE §§ 22-11A-51, -54 (Supp. 1992); DEL. CODE ANN. tit. 16, §§ 1202-1203 (Supp. 1992); GA. CODE ANN. §§ 24-9-40, 31-17-2 (Michie Supp. 1992); IOWA CODE ANN. §§ 141.22-.23 (West 1989 & Supp. 1993); KY. REV. STAT. ANN. § 214.181(5)(a), (c) (Baldwin 1992); N.C. GEN. STAT. §§ 130A-143, -148(h) (1992); OHIO REV. CODE §§ 3701.242, .243 (Anderson 1992 & Supp. 1993); OKLA. STAT. ANN. tit. 63, § 1-502.2 (West Supp. 1993); PA. STAT. ANN. tit. 35, § 7607 (1993).

145. They are Alabama, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Indiana, Kentucky, Maine, Maryland, Michigan, Montana, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, and West Virginia. *See* ALA. CODE § 22-11A-51 (Supp. 1992); ARIZ. REV. STAT. ANN. § 36-663(A) (Supp. 1992); ARK. CODE ANN. § 20-15-905(b), (c) (Michie 1991); COLO. REV. STAT. ANN. § 25-4-1401 (West Supp. 1992); CONN. GEN. STAT. ANN. § 19a-582 (West Supp. 1993); GA. CODE ANN. §§ 31-17A-2 to -3 (Michie 1991); HAW. REV. STAT. § 325-16 (Supp. 1992); IND. CODE ANN. § 16-1-9.5-2.5 (Burns Supp. 1992); KY. REV. STAT. ANN. §§ 214.181(5)(a), .625(5)(a) (Baldwin 1992); ME. REV. STAT. ANN. tit. 5, § 19203-A (West 1989 & Supp. 1992); MD. HEALTH-GEN. CODE ANN. §§ 18-336.1(b), -338.1(b), (c) (1991 & Supp. 1992); MICH. COMP. LAWS § 333.5133(2) (1991); MONT. CODE ANN. § 50-16-1007(1) (1991); N.C. GEN. STAT. § 130-148(h) (1992); OHIO REV. CODE ANN. § 3701.242(A) (Anderson 1992); OKLA. STAT. ANN. tit. 63, § 1-502.3 (West Supp. 1993); PA. STAT. ANN. tit. 35, § 7605(a) (1993); R.I. GEN. LAWS §§ 23-6-12 to -14 (1989 & Supp. 1993); TEX. HEALTH & SAFETY CODE ANN. § 81.105 (West 1992); W. VA. CODE § 16-3C-2(c) (1991).

146. *See* ALA. CODE § 22-11A-51 (Supp. 1992); ARIZ. REV. STAT. ANN. § 36-663(A) (Supp. 1992); ARK. CODE ANN. § 20-15-905(b), (c) (Michie 1991); CAL. HEALTH & SAFETY CODE § 199.22(a) (West 1990); COLO. REV. STAT. ANN. § 25-4-1401 (West Supp. 1992); CONN. GEN. STAT. ANN. § 19a-582 (West Supp. 1993); DEL. CODE ANN. tit. 16, § 1202 (Supp. 1992); FLA. STAT. § 381.004(3)(a) (Supp. 1992); GA. CODE ANN. §§ 31-17A-2 to -3 (Michie 1991); HAW. REV. STAT. § 325-16 (Supp. 1992); IDAHO CODE § 39-609 (Supp. 1992); ILL. ANN. STAT. ch. 111½, ¶ 7304 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 16-1-9.5-2.5 (Burns Supp. 1992); IOWA CODE ANN. §§ 141.8, .22 (West 1989); KAN. STAT. ANN. § 22-2913(c) (1988); KY. REV. STAT. ANN. §§ 214.181(5)(a), .625(5)(a) (Baldwin Supp. 1992); LA. REV. STAT. ANN. § 40:1300.13.A

endorsed the idea of prohibiting involuntary HIV testing by making written, informed consent a requirement for receiving grants under The Ryan White Comprehensive AIDS Resources Emergency Act of 1990.[147] At a minimum, most state statutes require that the person be informed that the test is voluntary.[148] Most statutes, however, require actual "consent,"[149] "informed consent,"[150] or written and informed consent.[151] The American jurisdictions which have ruled on the issue have unanimously endorsed voluntary testing and prohibited involuntary testing.[152] Those jurisdictions granted only limited exceptions.

(West 1992); ME. REV. STAT. ANN. tit. 5, § 19203-A (West 1989 & Supp. 1992); MD. HEALTH-GEN. CODE ANN. §§ 18-336, 338.1(b), (c) (1991 & Supp. 1992); MASS. ANN. LAWS ch. 111, § 70F (Law. Co-op Supp. 1992); MICH. COMP. LAWS § 333.5133(2) (1991); MINN. STAT. ANN. § 144.765 (West Supp. 1993); MISS. CODE ANN. § 41-41-16 (Supp. 1992); MO. ANN. STAT. § 191.674 (Vernon Supp. 1993); MONT. CODE ANN. § 50-16-1007(1) (1991); N.H. REV. STAT. ANN. § 141-F:5 (1990); N.M. STAT. ANN. § 24-2B-2 (Michie 1991); N.Y. PUB. HEALTH LAW § 2781.1 (McKinney Supp. 1993); N.C. GEN. STAT. § 130A-148(h).(1992); N.D. CENT. CODE § 23-07.5-02 (1991); OHIO REV. CODE ANN. § 3701.242(A) (Anderson 1992); OKLA. STAT. ANN. tit. 63, § 1-502.3 (West Supp. 1993); OR. REV. STAT. § 433.045 (1991); PA. STAT. ANN. tit. 35, § 7605(a) (1993); R.I. GEN. LAWS §§ 23-6-12 to -14 (1989 & Supp. 1993); S.C. CODE ANN. §§ 16-15-255, 44-29-230 (Law Co-op Supp. 1992); S.D. CODIFIED LAWS ANN. § 23A-35B-3 (Supp. 1993); TENN. CODE ANN. § 39-13-521 (Supp. 1991); TEX. HEALTH & SAFETY CODE ANN. § 81.105 (West 1992); UTAH CODE ANN. § 64-13-36 (Supp. 1992); VA. CODE ANN. § 32.1-37.2(A) (Michie 1992); WASH. REV. CODE ANN. § 70.24.330 (West 1992); W. VA. CODE § 16-3C-2(c) (1991); WIS. STAT. ANN. § 146.025(2) (West Supp. 1992).

147. 42 U.S.C. § 300ff-61(b) (Supp. III 1991).

148. IOWA CODE ANN. §§ 141.8, .22 (West 1989); MINN. STAT. ANN. § 144.765 (West Supp. 1993); W. VA. CODE § 16-3C-2(c) (1991).

149. IND. CODE ANN. § 16-1-9.5-2.5 (Burns Supp. 1992); OKLA. STAT. ANN. tit. 63, § 1-502.3 (West Supp. 1993); WASH. REV. CODE ANN. § 70.24.330 (West 1992).

150. CAL. HEALTH & SAFETY CODE § 199.22(a) (West 1990); FLA. STAT. § 381.004(3)(a) (Supp. 1992); KY. REV. STAT. ANN. §§ 214.181(5), .625(5) (Baldwin 1992); N.C. GEN. STAT. § 130A-148(h) (1992); OHIO REV. CODE ANN. § 3701.242(A) (Anderson 1992); OR. REV. STAT. § 433.045 (1991); TEX. HEALTH & SAFETY CODE ANN. § 81.105 (West 1992).

151. 42 U.S.C. § 300ff-61(b) (Supp. III 1991); ALA. CODE § 22-11A-51 (Supp. 1992); HAW. REV. STAT. § 325-16 (1992); ILL. ANN. STAT. ch. 111½, ¶ 7304 (Smith-Hurd Supp. 1992); LA. REV. STAT. ANN. § 40:1300.13.A (West 1992); ME. REV. STAT. ANN. tit. 5, § 19203-A (West & Supp. 1992); MD. HEALTH-GEN. CODE ANN. §§ 18-336, 338.1(b), (c) (1991 & Supp. 1992); MICH. COMP. LAWS § 333.5133(2) (1991); MONT. CODE ANN. § 50-16-1007(1) (1991); N.Y. PUB. HEALTH LAW § 2781 (McKinney Supp. 1993); PA. STAT. ANN. tit. 35, § 7605(a) (1993); R.I. GEN. LAWS §§ 23-6-12 to -14 (1989 & Supp. 1993); WIS. STAT. ANN. § 146.025(2), (3) (West Supp. 1992).

152. *See supra* note 146 and accompanying text. As of June 15, 1993, the following jurisdictions do not endorse, imply or require that consent is needed for HIV testing: Alaska, Nebraska, Nevada, New Jersey, Vermont, Wyoming, and the District of Columbia. *See supra* note 146 and accompanying text. Given the rush of legislatures dealing with this issue I would not be surprised if most, if not all, of these jurisdictions also have passed statutes prohibiting involuntary testing by the time you read this article.

2. Limited Exceptions

Exceptions to voluntary testing are closely limited in scope for extremely practical reasons. Most of the exceptions deal with medical necessity. Testing is typically allowed on body fluids or parts destined for medical research, transfusion, or transplantation.[153] In such cases, it is paramount to know whether the body fluids or parts are infected with HIV; whereas, there is little concern for privacy because the donor released his or her body to further life or science. Additionally, health care workers exposed to possibly contaminated body fluids are granted leave to demand an HIV test.[154] This exception recognizes that health care workers, who are on the front lines in the battle against AIDS, take great risks for the benefit of all and deserve extra protection.[155] Likewise, truly blind medical testing poses no privacy

153. ARIZ. REV. STAT. ANN. § 36-663(B)(1) (Supp. 1992); CONN. GEN. STAT. ANN. § 19a-582(e)(2) (West Supp. 1993); DEL. CODE ANN. tit. 16, § 1202(c)(3) (Supp. 1992); HAW. REV. STAT. § 325-16(b)(1) (Supp. 1992); IOWA CODE ANN. § 141.22(5)(a) (West 1989); LA. REV. STAT. ANN. § 40:1300.13(F)(1) (West 1992); MONT. CODE ANN. § 50-16-1007(9)(a) (1991); N.C. GEN. STAT. § 103A-148(b), (c) (1992); OHIO REV. CODE ANN. § 3701.24.2(E)(3) (Anderson 1992); PA. STAT. ANN. tit. 35, § 7605(g)(1)(i) (1993); TEX. HEALTH & SAFETY CODE ANN. § 81.102(a)(4)(B) (West 1992); W. VA. CODE § 16-3C-2(e)(1) (1991); WIS. STAT. ANN. § 146.025(2)(1) (West Supp. 1992).

154. ARK. CODE ANN. § 20-15-950(b) (Michie 1991); CONN. GEN. STAT. ANN. § 19a-582(e)(1) (West Supp. 1993); DEL. CODE ANN. tit. 16, § 1202(c)(4) (Supp. 1992); HAW. REV. STAT. § 325-16(b)(6) (Supp. 1992); ME. REV. STAT. ANN. tit. 5, § 19203-A(4) (West 1989); MD. HEALTH-GEN. CODE ANN. § 18-338.1(c) (Supp. 1992); MICH. COMP. LAWS § 333.5133(12)(b) (1991); MONT. CODE ANN. § 50-16-1007(10) (1991) (allowing a test only on previously drawn blood samples after requesting a voluntary test); OHIO REV. CODE ANN. § 3701.24.2(E)(6) (Anderson 1992); OKLA. STAT. ANN. tit. 63, § 1-502.3(A)(2) (West Supp. 1993); OR. REV. STAT. § 433.065 (1991); R.I. GEN. LAWS § 23-6-14(d), (e) (Supp. 1992); TEX. HEALTH & SAFETY CODE §§ 81.050, .102(a)(3), .107 (West 1992); WASH. REV. CODE ANN. § 70.24.340(4) (West Supp. 1992) (extending also to police, firefighters, and other categories of employment at risk of exposure to body fluids); WIS. STAT. ANN. § 146.025(2) (5) (West Supp. 1992).

155. *See* PA. STAT. ANN. tit. 35, § 7602(b)-(d) (1993). The Pennsylvania General Assembly specifically noted in its Confidentiality of HIV-Related Information Act:

> [I]ndividual health care providers are increasingly concerned about occupational exposure to human immunodeficiency virus (HIV), the causative agent for acquired immune deficiency syndrome (AIDS). Due to the nature of their work, individual health care providers and first responders frequently come into contact with the blood and/or body fluids of individuals whose HIV infection status is not known. Regardless of the use of universal precautions to prevent HIV transmission between patients and individual health care providers, there will be instances of significant exposure to the blood and/or body fluids of patients.
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> . . . .
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> . . . It is the further intent of the General Assembly to provide a narrow exposure notification and information mechanism for individual health care providers or first responders, who experience a significant exposure to a patient's blood and/or body fluids, to learn of a patient's HIV infection status . . . .

Id.; *see also* ARK. CODE ANN. § 20-15, legislative history (Michie 1991) (stating that "health care providers require early information relating to the HIV status of patients").

problem, has great potential for medical advancement, and thus, is often excepted.[156] Testing in an emergency situation where an individual is unable to give consent is also allowed as a matter of necessity.[157] Finally, testing in conjunction with an autopsy is often allowed since privacy is generally only a concern for the living.[158]

The criminal justice system is something of a different world.[159] Several states require convicts or suspects in sexual offense cases to be tested.[160] This exception recognizes that victims of sexual offenses

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156. ARIZ. REV. STAT. ANN. § 36-663(B)(2) (Supp. 1992); CONN. GEN. STAT. ANN. § 19a-582(e)(3) (West Supp. 1993); DEL. CODE ANN. tit 16, § 1202(c)(2) (Supp. 1992); HAW. REV. STAT. ANN. § 325-16(b)(2) (Supp. 1992); IND. CODE ANN. § 16-1-9.5-2.5(b)(3) (Burns Supp. 1992); LA. REV. STAT. ANN. § 40:1300.13(F)(2) (West 1992); MICH. COMP. LAWS § 333.5133(10) (1991); MONT. CODE ANN. § 50-16-1007(9)(b) (1991); OHIO REV. CODE ANN. § 3701.24.2(E)(2) (Anderson 1992); PA. STAT. ANN. tit. 35, § 7605(g)(1)(ii) (1993); TEX. HEALTH & SAFETY CODE § 81.103(e) (West 1992); WASH. REV. CODE ANN. § 70.24.330(2) (West 1992); W. VA. CODE § 16-3C-2(e)(3) (1991); WIS. STAT. ANN. § 146.025(2)(2) (West Supp. 1992).

157. ARIZ. REV. STAT. ANN. § 36-663(B)(4), (5) (Supp. 1992); CONN. GEN. STAT. ANN. § 19a-582(e)(1) (West Supp. 1993); DEL. CODE ANN. tit. 16, § 1202(c)(1) (Supp. 1992); HAW. REV. STAT. § 325-16(b)(5) (Supp. 1992); IND. CODE ANN. § 16-1-9.5-2.5(b)(1) (Burns Supp. 1992); IOWA CODE ANN. § 141.22(5)(b) (West 1989); KY. REV. STAT. ANN. § 214.181(3) (Baldwin 1992); LA. REV. STAT. ANN. § 40:1300.13(F)(3) (West 1992); MICH. COMP. LAWS § 333.5133(13) (1991); MONT. CODE ANN. § 50-16-1007(9)(c) (1991) (testing without consent only if relative, guardian, or significant other not available to provide consent); OHIO REV. CODE ANN. § 3701.24.2(E)(1) (Anderson 1992); PA. STAT. ANN. tit. 35, § 7605(g)(2) (1993); R.I. GEN. LAWS § 23-6-14(a)-(c), (f) (1989 & Supp. 1992); WASH. REV. CODE ANN. § 70.24.330(1) (West 1992); W. VA. CODE § 16-3C-2(e)(2), (f)(3)(1991); WIS. STAT. ANN. § 146.025(2)(3), .025(2)(4) (West 1991 & Supp. 1992) (allowing testing of mentally ill and children without consent).

158. ARIZ. REV. STAT. ANN. § 36-663(B)(3) (Supp. 1992); CONN. GEN. STAT. ANN. § 19a-582(e)(4) (West Supp. 1993); LA. REV. STAT. ANN. § 40:1300.13(F)(3) (West 1992); WIS. STAT. ANN. § 146.025(5)(12) (West 1991).

159. *Compare* Doe v. Roe, 526 N.Y.S.2d 718 (Sup. Ct. 1988) (denying involuntary HIV testing in a civil case by explaining that laboratories are specifically prohibited from testing for AIDS absent a signed consent, or where the physical conditions of a party are in controversy, and the testing is material and relevant with no less intrusive means of proving the facts in controversy) *with* People v. Durham, 553 N.Y.S.2d 944, 945-47 (Sup. Ct. 1990) (allowing involuntary HIV testing in a criminal case by simply explaining that the defendant put his physical condition in controversy by telling the victim he had AIDS prior to the alleged rape).

160. *E.g.*, LA. REV. STAT. ANN. § 40:1300.13(F)(7) (West 1992) (requiring involuntary testing in cases of rape or incest); TENN. CODE ANN. § 39-13-521(a)(2) (Supp. 1992) (requiring involuntary testing of convicted rapists at the request of the victim); WASH. REV. CODE ANN. §§ 70.24.340, .360, .370 (West 1992) (requiring involuntary testing of certain sex and drug related offenders, and of jail detainees and correction facility inmates who pose a possible risk to other persons); W. VA. CODE § 16-3C-2(f)(2) (1991 & Supp. 1992) (requiring involuntary testing of persons convicted of sex related offenses); *see also* Virgin Islands v. Roberts, 756 F. Supp. 898, 901 (D.V.I. 1991) (forcing a rape suspect to undergo HIV testing); Love v. Superior Court, 276 Cal. Rptr. 660, 664-66 (Ct. App. 1990) (holding HIV testing constitutional in prostitution cases); People v. Thomas, 529 N.Y.S.2d 429, 431 (Schoharie County Ct. 1988) (requiring HIV testing of convicted rapist); *Durham*, 553 N.Y.S.2d at 945-47 (allowing involuntary HIV testing of rapist who put HIV status in controversy by telling the victim that he had AIDS).

have already been traumatized and also should not have to suffer the uncertainty of their potential exposure to HIV.[161] In addition to testing sexual offenders, Illinois requires testing of individuals convicted of illegally possessing hypodermic needles, theorizing that IV-drug users are at particular risk and are far less likely to take measures to prevent spreading the disease than are others.[162] Controlling the serious AIDS problem in the prison system has given rise to another push for mandatory testing in the criminal justice environment. AIDS in prisons has spread rapidly and beyond proportion to the rest of society.[163] Despite the uniformity of policy in the civil area, the criminal justice system is divided about AIDS control policy.[164] One group follows the lead of public health officials and advocates voluntary testing and education in the prison system.[165] The other group believes that mandatory testing and segregation are necessary to prevent the spread of AIDS in prisons.[166] They argue that prisoners have a lower

161. *See Durham*, 553 N.Y.S.2d at 947 (stating that a rape victim has the right to know whether she was exposed to the AIDS virus).

162. ILL. ANN. STAT. ch. 38, ¶ 1005-5-3(h) (Smith-Hurd Supp. 1992); *see also* People v. C.S., 583 N.E.2d 726, 729 (App. Ct. 1991), *cert. denied*, 602 N.E.2d 461 (Ill. 1992) (citing studies and statistics showing that IV drug users are less likely to practice safe sex and more likely to spread HIV through blood transfusions); People v. Thomas, 580 N.E.2d 1353, 1365 (App. Ct. 1991), *cert. denied*, 587 N.E.2d 1023 (Ill. 1992) (holding that a statute requiring an individual convicted of unlawful possession of a hypodermic needle to undergo HIV testing was not unconstitutional).

163. *See* Myers v. Maryland Div. of Correction, 782 F. Supp. 1095, 1096 (D. Md. 1992).

164. Harris v. Thigpen, 941 F.2d 1495, 1519 (11th Cir. 1991).

165. *See, e.g.*, Robbins v. Clarke, 946 F. 2d 1331, 1332 (8th Cir. 1991) (holding that names of HIV positive inmates may be withheld from general prison population to protect privacy interests); Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 266-67 (S.D.N.Y. 1990) (holding that a prison's decision to integrate HIV positive inmates into the general prison population to protect privacy was not cruel and unusual punishment).

166. *See, e.g.*, ALA. CODE § 22-11A-17 (1990) (mandating that persons sentenced to city or county correctional facilities for more than 30 days be tested for sexually transmitted diseases); CONN. GEN. STAT. ANN. § 19a-582(e)(6)-(7) (West Supp. 1993) (allowing correction facility physician to test for HIV for diagnostic purposes, HIV-related treatment, or if an inmate's behavior poses a risk of transmission); MONT. CODE ANN. § 50-18-108 (1991) (allowing testing of anyone imprisoned within the state); OHIO REV. CODE ANN. § 3701.24.2(E)(4) (Anderson 1992) (allowing the testing of prisoners upon showing of good cause); S.C. CODE ANN. §§ 16-15-255 (Law. Co-op. Supp. 1992) (requiring the testing of convicted sexual offenders); UTAH CODE ANN. § 64-13-36(2) (Supp. 1992) (requiring tests of prisoners within the state's jurisdiction); *Harris*, 941 F.2d at 1518-21 (disclosing inmates HIV positive status as a result of segregating infected inmates from the general prison population did not violate constitutionally protected privacy interests because those rights were outweighed by legitimate penological interests); Muhammad v. Carlson, 845 F.2d 175, 179 (8th Cir. 1988) (holding that no constitutionally protected liberty interests exist in prison's procedures to identify, treat, and isolate HIV positive inmates).

expectation of privacy,[167] engage in high risk behavior,[168] and are recalcitrant, thus making the inmates unresponsive to education.[169] There is more than a hint of retribution too: that the testing is part of their punishment.[170] In addition to the division concerning the propriety of mandatory testing in the prison system, there is also a division regarding its constitutionality.[171] Because there is no consensus on how to deal with AIDS in the criminal justice system, mandatory testing of suspects and criminals stands on its own and should not muddle the analysis in the civil area where there is an overwhelming consensus for voluntary testing.

The only exception outside medical necessity and criminal law is for life insurance companies.[172] This exception was heavily lobbied for by the insurance industry as an underwriting necessity and a simple extension of the freedom already granted to insurance companies to

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167. Dunn v. White, 880 F.2d 1188, 1194 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990); Harris v. Thigpen, 727 F. Supp. 1564, 1571 (M.D. Ala. 1990), *aff'd in part and vacated in part*, 941 F.2d 1495 (11th Cir. 1991).

168. *See Harris*, 941 F.2d at 1520-21. Despite attempts to curb high risk behavior, it is generally acknowledged that IV-drug use and homosexual activity are a given in the prison situation. *Id.* Additionally, a "youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim." United States v. Bailey, 444 U.S. 394, 421 (1980).

169. *See Harris*, 941 F.2d at 1520.

170. *See Dunn*, 880 F.2d at 1194 (finding the violation of privacy in mandatory testing was justified given the already reduced privacy interest of prisoners); Bell v. Wolfish, 441 U.S. 520, 537 (1979) (stating that "loss of freedom of choice and privacy are inherent incidents of confinement").

171. *Compare* Walker v. Sumner, 917 F.2d 382, 386-87 (9th Cir. 1990) (holding involuntary HIV testing of prison inmates unconstitutional absent a legitimate penological objective related to the blood-testing policy) *with Harris*, 941 F.2d at 1568-72 (holding involuntary HIV testing constitutional because the testing was reasonably related to prime considerations of safety, security, and the spread of disease) *and Dunn*, 880 F.2d at 1195-97 (holding involuntary HIV testing of a prison inmate constitutional because the prison had a substantial interest in treating HIV-positive inmates and preventing transmission, which outweighed the inmates limited right to privacy).

172. Russel P. Iuculano & Julie A. Spiezio, *Summary of AIDS Related Laws, Regulations, and Bulletins Affecting the Ability to Underwrite for AIDS*, *in* AIDS LAW, *supra* note 92, app. U (Supp. 1991) (compiling laws related to HIV testing by insurance companies); *see* CONN. GEN. STAT. ANN. § 19a-582(e)(9) (West Supp. 1993); HAW. REV. STAT. § 325-16(b)(4) (Supp. 1992); IOWA CODE ANN. § 141.22(5)(c) (West 1989); OHIO REV. CODE ANN. § 3901.46 (Anderson Supp. 1992); PA. STAT. ANN. tit. 35, § 7605(g)(1)(iii) (1993); TEX. HEALTH & SAFETY CODE ANN. § 81.108 (West Supp. 1992); TEX. INS. CODE ANN. art. 21.21-4 (West Supp. 1992); WASH. REV. CODE ANN. § 70.24.325 (West 1992).

require physical examinations for genuine underwriting purposes.[173] However, only limited testing is allowed for underwriting purposes.[174]

In addition, it must be noted that several states have clauses in their voluntary testing statutes which allow involuntary testing when required by federal or state law.[175] Given that each of the jurisdictions has publicly pronounced its commitment to voluntary testing, these clauses should not be seen as broad avenues to allow general state and federal statutes to mandate HIV testing. To do so would enable the exceptions to swallow the rule. As with all other exceptions, they should be read narrowly. Thus, involuntary testing required by federal or state law should be limited to situations where the state legislature or Congress has affirmatively mandated HIV testing.

Strict safeguards are uniformly built into exceptions. All reasonable means to get consent must be exhausted.[176] Court or administrative orders are often required before the involuntary testing can take place.[177] Those hearings are in camera at the request of the individual,

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173. *See* Russel P. Iuculano, *Life Insurance*, *in* AIDS LAW, *supra* note 92, §§ 12.1-.21. There has been considerable controversy and quite a bit of industry lobbying over whether insurance companies should be allowed to test. *Id.* Several states have prohibited or severely restricted the use of HIV antibody tests for determining insurability. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 199.21(f) (West Supp. 1993) (prohibiting the use of HIV test results to determine insurability); D.C. CODE ANN. § 35-224(b) (Supp. 1988) (allowing the named insured to appeal a positive HIV test with the possibility of the insurer being ordered to disregard the result); HAW. REV. STAT. § 325-101(a)(9) (Supp. 1992) (allowing the release of HIV test results to insurer for reimbursement for services rendered to patient, unless patient agrees to make reimbursement directly); VT. STAT. ANN. tit. 8, § 4724(20)(a) (Supp. 1992) (prohibiting insurance companies from requiring or requesting HIV test results). New York and Massachusetts have adopted administrative regulations prohibiting testing by insurance companies, but both regulations were struck down as beyond the authority of the administering body. Life Ins. Ass'n v. Singer, 530 N.E.2d 168, 170 (Mass. 1988); Health Ins. Ass'n v. Corcoran, 551 N.Y.S.2d 615, 619-20 (App. Div. 1990), *aff'd*, 565 N.E.2d 1264 (N.Y. 1990). Many states prohibit the use of HIV tests taken prior to the application or require informed consent and counseling. Iuculano & Spiezio, *supra* note 172, app. U. A number of states have also considered and rejected strict restrictions on insurance use of HIV tests. *See id.*

174. *See supra* notes 172-73 and accompanying text.

175. ARIZ. REV. STAT. ANN. § 36-663(A) (Supp. 1992); CONN. GEN. STAT. ANN. § 19a-582(a) (West Supp. 1993); N.Y. PUB. HEALTH LAW § 2781 (McKinney Supp. 1992); TEX. HEALTH & SAFETY CODE § 81.105 (West Supp. 1992) (granting involuntary testing "as required by law").

176. R.I. GEN. LAWS § 23-6-15 (1989); WASH. REV. CODE ANN. § 70.24.024(2) (West 1992).

177. CONN. GEN. STAT. ANN. § 19a-582(e)(8) (West Supp. 1993); GA. CODE ANN. § 31-17A-2 (Michie 1991); IND. CODE ANN. §§ 16-1-9.5-2.5(b)(2), -2.5(c) (West 1992); MO. ANN. STAT. § 191.674 (Vernon 1992); OKLA. STAT. ANN. tit. 63, § 1-502.3(A)(3) (West 1992); OR. REV. STAT. § 433.080 (1991); TEX. HEALTH & SAFETY CODE § 81.050 (West 1992); WASH. REV. CODE ANN. § 70.24.024 (West 1992). Even where court orders are not specifically required, they might still be sought either by those desiring the involuntary test so that they are certain they are not violating the general requirement of voluntariness or by the person to be tested in the form of a restraining order.

and the records are closed to the public.[178] In nearly all cases the information obtained from the involuntary tests is released only to a limited number of people.[179] Records of involuntary tests are in some states even prohibited from being included in the patient's records.[180] Counseling is usually required as part of the exception[181] or as part of the general statute.[182] Involuntary tests conducted outside the exceptions may subject the violator to criminal[183] or civil penalties.[184] Given the specificity of the exceptions and the safeguards to keep them in bounds, they must be seen as limited and discrete.[185] Courts should decline to create new exceptions and should read those granted quite narrowly.

C. *AIDS Prevention Statutes Specifically Dealing with IME Statutes*

Only New York and Delaware have confronted the issue of mandatory examinations in discovery. The New York statute requiring consent makes reference to the New York equivalent of Rule 35: "Except as provided in section three thousand one hundred twenty-one of the civil practice law and rules, . . . no person shall order the

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178. MO. ANN. STAT. § 191.674(2) (Vernon Supp. 1993).

179. *E.g.*, ARK. CODE ANN. § 20-15-905(b), -905(c) (Michie 1991) (providing for release of test results only to the health care worker, and his or her doctor, when the health care worker is involved in contact with patient's blood or body fluids, but only to patient when testing is done out of medical necessity); MICH. COMP. LAWS § 333.5131(3) (1991).

180. CONN. GEN. STAT. ANN. § 19a-582(e)(5) (West Supp. 1993); ME. REV. STAT. ANN. tit. 5, § 19203-A(4) (West 1992); MONT. CODE ANN. § 50-16-1007(9)(d) (1991).

181. DEL. CODE ANN. tit. 16, § 1202(e) (1991); MICH. COMP. LAWS § 333.5133 (14) (1991).

182. CONN. GEN. STAT. ANN. § 19a-582(b), (c) (West Supp. 1993).

183. *E.g.*, MONT. CODE ANN. § 50-16-1007(11) (1991) (punishing as a misdemeanor with up to six months imprisonment, a $1,000 fine, or both); WASH. REV. CODE ANN. § 70.24.080 (West 1992) (punishing as a gross misdemeanor with up to one year imprisonment, a $5,000 fine, or both).

184. *E.g.*, HAW. REV. STAT. § 325-16(d) (Supp. 1992) (providing a fine for willful violators of at least $1,000 and up to $10,000 plus reasonable attorney's fees and court costs); KY. REV. STAT. ANN. § 214.181(8) (Baldwin 1992) (providing that any violation may be grounds for a professional disciplinary action against the health care provider); PA. STAT. ANN. tit. 35, § 7610 (1993) (creating a cause of action against any violator for compensatory damages plus attorney's fees and court costs); WASH. REV. CODE ANN. § 70.24.084 (West 1992) (providing for a fine of $1,000 or actual damages, whatever is greater, plus reasonable attorney's fees, court costs, and other appropriate relief); *see* Woods v. White, 689 F. Supp. 874, 877 (W.D. Wis. 1988) (allowing a claim against prison medical personnel for releasing HIV status to nonmedical prison employees); Dotson v. St. Mary's Hosp., No. 090017, 1990 WL 284370 (Conn. Super. Ct. May 2, 1990) (allowing a claim against a hospital for releasing the results of an involuntary HIV test to plaintiff's employer).

185. *See* Doe v. Hirsch, 731 F. Supp. 627, 632 (S.D.N.Y. 1990).

performance of an HIV related test without first receiving the written, informed consent of the subject of the test who has capacity to consent. . . ."[186] Section 3121 of New York's Civil Practice Law is quite similar to Rule 35: "After commencement of an action in which the mental or physical condition or the blood relationship of a party . . . is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician."[187] The problem is that the statute fails to indicate the parameters within which a test may be ordered. One is left with no more guidance than before. However, the New York courts have considered the privacy and public health concerns and require the petitioner to show a compelling need for an HIV test.[188]

Delaware has gone much further in addressing mandatory testing in a Rule 35 type of situation. The Delaware statute has created an exception to voluntary testing when

> [t]esting is ordered by a court of competent jurisdiction within the confines of civil or criminal litigation where the results of an HIV-related test of a party, or a person in the custody or under the legal control of another party, is relevant to the ultimate issue of culpability and/or liability.[189]

This is not, however, a freewheeling invitation to courts to order HIV tests. The test can be ordered only after strict guidelines are met:

> Said order must be issued in compliance with the following provisions:
>
> a. No court of this State shall issue such order unless the court finds that there is a compelling need for such test results which cannot be accommodated by other means. In

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186. N.Y. PUB. HEALTH LAW § 2781(1) (McKinney Supp. 1993).

187. N.Y. CIV. PRAC. L. & R. 3121(a) (McKinney 1991).

188. *See* Doe v. Roe, 526 N.Y.S.2d 718, 721-22 (Sup. Ct. 1988). The court noted that most experts, medical organizations, and state and local health departments oppose mandatory testing because of the negative factors associated with a positive test result. *Id.* at 721. These factors include the lack of absolutely reliable testing, threats to civil liberties, the danger of ostracization and stigmatization, and psychic harm. *Id.* The court concluded that probable cause and a compelling need must be shown to subject a person to an involuntary blood test. *Id.* at 722; *see also* Anne D. v. Raymond D., 528 N.Y.S.2d 775 (Sup. Ct. 1988) (holding that an allegation of infidelity in a divorce case is not sufficient to compel an HIV test). *But see* People v. Durham, 553 N.Y.S.2d 944 (Sup. Ct. 1990) (interpreting N.Y. CIV. PRAC. L. & R. 3121(a) as requiring testing in a criminal case, where a rape suspect put his physical condition "in controversy" when he told the victim that he had AIDS).

189. DEL. CODE ANN. tit. 16, § 1202(c)(6) (Supp. 1992).

> assessing compelling need, the court shall weigh the need for testing and disclosure of the test results against the privacy interest of the test subject and the public interest which may be disserved by disclosure which deters future testing or which may lead to discrimination.
>
> b. Pleadings pertaining to ordering of an HIV-related test shall substitute a pseudonym for the true name of the subject of the test. The true name shall be communicated confidentially, in documents not filed with the court.
>
> c. Before granting any such order, the court shall provide the individual whose test result is in question with notice and a reasonable opportunity to participate in the proceedings if he or she is not already a party.
>
> d. Court proceedings as to disclosure of test results so ordered shall be conducted in camera unless the subject of the test agrees to a hearing in open court or unless the court determines that a public hearing is necessary to the public interest and the proper administration of justice.[190]

The first, and perhaps most important limitation, is that HIV-infection status must be relevant to liability, not damages.[191] For example, applying the Delaware statute to the Pennsylvania mechanic's case,[192] the defense attorneys' request for an HIV test would be denied because the test was requested to reduce damages, not to determine liability.[193] This is a prudent limitation. If courts were to allow tests on the issue of damages, HIV status would be relevant to any case where the plaintiff requested future damages because the virus is generally assumed to shorten one's expected life span. Because future damages are probably part of almost every personal injury case, possibly every personal injury plaintiff could be required to be tested for HIV. Considering the number of personal injury claims filed each year,[194] that would open a jumbo-jet-sized loophole in the voluntary testing scheme.

Even if HIV infection status is an issue of liability, the court must still find a "compelling need" for the test that overcomes the invasion of personal privacy and the resulting damage to public health policy.[195] The court also must find that no less intrusive means of discovering the information exists.[196] A test can be ordered, but only when HIV

190. *Id.*
191. *Id.*
192. *See supra* notes 16-37 and accompanying text.
193. *See supra* note 189 and accompanying text.
194. *See infra* note 210 and accompanying text.
195. *See supra* text accompanying note 190.
196. *See supra* text accompanying note 190.

status is directly an issue of liability.[197] Involuntary testing should be rare under the Delaware statute, but it represents a solid balance that will preserve the public health.

Several AIDS prevention statutes might arguably bring Rule 35 within their scope by including clauses allowing involuntary testing when required by federal or state law.[198] As seen above, however, those clauses should be read very narrowly and be applied only to specific exceptions enacted by state legislatures and Congress.[199] In particular, they should not be read to allow Rule 35 or its state counterparts to require mandatory testing. Since the IME statutes failed to address whether HIV testing should be mandated in litigation, one needs to look to the privacy and public health issues to balance them against the interests of fact finding in litigation. That brings one right back to the AIDS prevention statutes and their prohibition of mandatory testing. Thus, statutes allowing tests required by federal or state law give no guidance concerning the IME statutes, and they should not be construed to allow mandatory testing in discovery.

D. *Conclusion: Uniformity of Opinion Favoring Voluntary HIV Testing*

There is great uniformity across the country about voluntary HIV testing in general society.[200] Most public health experts have called for voluntary testing.[201] Nearly every state in the Union now requires voluntary testing by law.[202] It is probably only a matter of time before the jurisdictions that have not already done so pass their own voluntary testing laws. Only a few exceptions to voluntary testing have been outlined, and they deal almost entirely with contravening public health concerns and medical emergencies.[203] Two states, New York and Delaware, specifically reference IME statutes. New York has an old statute, in which the legislature put little thought into how the IME statute would affect voluntary testing.[204] Delaware, however, is a model for limiting involuntary testing only to situations where it is

197. DEL. CODE ANN. tit. 16, § 1202(c)(6) (Supp. 1992).

198. *See* ARIZ. REV. STAT. ANN. § 36-663(A) (Supp. 1992); CONN. GEN. STAT. ANN. § 19a-582(a) (West Supp. 1993); N.Y. PUB. HEALTH LAW § 2781 (McKinney Supp. 1992); TEX. HEALTH & SAFETY CODE § 81.105 (West Supp. 1992) (allowing involuntary testing "as required by law").

199. *See supra* text accompanying notes 153-85.

200. *See supra* notes 142-52 and accompanying text.

201. *See supra* text accompanying notes 131-36.

202. *See supra* note 146 and accompanying text.

203. *See supra* notes 153-85 and accompanying text.

204. *See supra* notes 185-88 and accompanying text.

vital to the case.[205] Both should be read as attempts to make the IME statutes work with the voluntary testing scheme rather than as true exceptions. Any sort of mandatory testing is truly an exception to the norm of voluntary testing.

VI. MAKING IME STATUTES WORK WITH THE AIDS PREVENTION STATUTES

The IME statutes, Rule 35 and its state counterparts, and the voluntary testing requirements of AIDS prevention statutes are potentially in conflict. To the extent that judges order HIV testing under the IME statutes, they are mandating testing. The AIDS prevention statutes require that testing be voluntary.[206] It is certain that the legislatures, had they considered it, would never have intended the conflict. Unfortunately, the IME statutes do not contemplate the AIDS epidemic, and the HIV testing statutes, for the most part, do not contemplate Rule 35 or its state counterparts.

It is vital to the fight against AIDS that IME statutes and AIDS prevention statutes work together. The problem is finding the balance that will allow the search for truth in litigation to live in harmony with the necessity for voluntary HIV testing. However, the engine for that balancing is already in place. It is the balancing that has always been done under Rule 35 and the state IME statutes.[207]

Because IME statutes have always balanced privacy issues, the heightened concerns for privacy in the HIV testing area should weigh heavily.[208] Mandatory HIV testing, however, threatens far more than mere individual privacy. It threatens the public health consensus that has developed in medicine and has been adopted into law in nearly every American jurisdiction.[209]

This threat is of ominous size. The threat of involuntary testing probably looms largest in personal injury cases where nearly every plaintiff will have some sort of future damages claim which would put life expectancy at issue. In 1990, nearly 1.8 million personal injury lawsuits were filed.[210] Because IME statutes may require testing in

205. *See supra* notes 189-97 and accompanying text.

206. *See supra* notes 144-48 and accompanying text.

207. *See supra* notes 38-82 and accompanying text.

208. *See supra* text accompanying notes 83-85.

209. *See supra* text accompanying notes 144-46.

210. According to the National Center for State Courts, 18.3 million civil suits were filed in state courts in 1990. Laurie Asseo, *Slugging It Out in Court, The American Way*, L.A. TIMES, Apr. 5, 1992, at A20. According to the NCSC, roughly 10% of those filings were for personal injury cases. Bert Bauman, *Increasing Attacks on Trial by Jury Jeopardizes Our Fundamental Rights*, N.Y. L.J., May 1, 1992, at 57.

situations far broader than personal injury alone, over two million people a year could be threatened with forced HIV tests if testing is freely allowed under such statutes. The IME statutes are not a mere exception; they are a gaping sinkhole waiting to swallow the public health consensus that testing be voluntary.

It might be argued that it would be unthinkable that IME statutes would be used extensively to require HIV testing. That argument, however, ignores the very nature of advocacy in litigation.[211] Let us take, for example, personal injury cases. Personal injury defense lawyers, such as the defense lawyers in the Pennsylvania mechanic's case,[212] are constantly looking to reduce their clients' damages. If the HIV infection indeed lowers a plaintiff's life expectancy, any claim for future damages also will be lowered. But that is hardly where the calculus ends. There is a more sinister reason why plaintiffs' lawyers truly fear the test, and defense lawyers desire it. Juries are often moved to find for someone, particularly in the amount of damages awarded, in great proportion by empathy.[213] Given the AIDS hysteria of all too many Americans,[214] few juries would be empathetic to an HIV positive plaintiff. Though the plaintiff's HIV status would ostensibly be introduced only to mitigate future damages, it may also have a devastating impact on all damages: past, present, and future; general and special. It may even sway the jury against the plaintiff on the issue of liability.[215]

The calculus may not even stop with the individual case. Faced with the prospect of a mandated HIV test, potential plaintiffs with valid claims may choose not to pursue their rights. Although the insurance defense industry may not have contemplated this, it is hardly beyond the pale of claims calculations. If even a small fraction of the 1.8 million personal injury plaintiffs refrain from filing suit every year, the profits to the insurance industry could be immense.

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211. According to the Model Rules of Professional Conduct, a lawyer "has a duty to use legal procedure for the fullest benefit of the client's cause." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. (1983).

212. *See supra* notes 16-37 and accompanying text.

213. *See* ROGER HAYDOCK & JOHN SONSTENG, TRIAL THEORIES, TACTICS, TECHNIQUES § 2.3(o) (1990).

214. *See supra* text accompanying notes 86-136.

215. *See supra* note 213 and accompanying text. It might be questioned whether the HIV test information is so unfairly prejudicial that it should not be admitted under Rule 403 of the Federal Rules of Evidence and its state counterparts. *See* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . .").

Defense counsel has every advocacy reason to push HIV testing under IME statutes to its limit.[216] Thus, a restrictive limit must be set. Moreover, the standard applied must certainly be more than mere relevance. A standard of relevance would not even give litigants the protection they already have in more routine testing, where the relevance must somehow overcome basic medical privacy notions.[217]

Even a more stringent standard, such as requiring a compelling interest for the test, may not be enough. Judges could conceivably determine that membership in a high risk group triggers a compelling interest, thereby discriminating against homosexuals and IV-drug users, among others.[218] As most public health officials have determined that the best way to modify the behavior of high risk groups is through voluntary testing,[219] judicially mandated testing via the compelling interest standard may be ineffective if the compelling interest standard is used to target high risk groups.

The most troublesome problem with the compelling interest standard, however, is that risk groups are transitory and may very well disappear.[220] AIDS undoubtedly can be a heterosexually transmitted disease.[221] It is predominately so in Africa.[222] It appears that some strains of the virus flourish in the moist mucosal tissue of the genitals making heterosexual transmission easy.[223] Other strains thrive in the bloodstream making IV-needle and rough sex transmission easy.[224] While the former strain has not been prevalent in the United States,[225] that is hardly cause for solace. Given the virus' propensity to mutate, the heterosexual epidemic will almost surely expand in the United

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216. *See supra* note 211.

217. *See supra* notes 38-82 and accompanying text.

218. *See supra* notes 97-98 and accompanying text.

219. *See supra* notes 120-36 and accompanying text.

220. Behavioral changes in gay men seem to have slowed, if not controlled, the spread of the disease in the gay community. AIDS IN THE INDUSTRIALIZED DEMOCRACIES, *supra* note 107, at 364-70; DAVID E. KANOUSE ET AL., RESPONSE TO THE AIDS EPIDEMIC: A SURVEY OF HOMOSEXUAL AND BISEXUAL MEN IN LOS ANGELES COUNTY ix-x (1991); Marshall H. Becker & Jill G. Joseph, *AIDS and Behavioral Change to Reduce Risk: A Review*, 78 AM. J. PUB. HEALTH 394, 403-06 (1988). In contrast HIV infection has been on the rise among IV-drug users and inner-city Blacks and Hispanics thus changing the demographics of the risk. *See* ARNO & FEIDEN, *supra* note 115, at 198-206.

221. Christine Gorman, *Invincible AIDS*, TIME, Aug. 3, 1992, at 30, 33.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

States.[226] The heterosexual epidemic may already be happening.[227] AIDS clinics in San Francisco and New York City have reported that women constitute between thirty and fifty percent of their new patients.[228] As the heterosexual epidemic grows, the high risk group may grow to include everyone. Thus, a mere compelling interest test might eventually give no more protection than the reasonableness standard. The compelling interest standard does not work now and will certainly not work in the future. It must, therefore, be rejected.

To reject even the compelling interest standard, however, does not mean there are no situations in civil litigation where it would be proper to require HIV testing. It is one thing when the defense is on a fishing expedition looking for ways of reducing its damages; it is quite another when a party directly puts her HIV status in controversy. In such cases, HIV status is, as the Rule 35 says, "in controversy."[229] While this is surely a strict reading of the in controversy requirement, it is justified by the overwhelming privacy, public health, and justice concerns raised by involuntary HIV testing. HIV status should be considered in controversy only when placed in controversy as an issue of liability, not as an issue of damages.[230]

In the few states where AIDS prevention statutes have not been enacted, the analysis should not be different. The weight of medical and legal authority is so overwhelmingly in favor of voluntary testing[231] that it should be the guiding light for all decisions about mandatory testing. Courts in those states, therefore, should feel no difficulty in requiring HIV status to be in controversy as to liability and requiring a compelling need to be shown before ordering involuntary testing.[232]

In the federal courts the matter is a bit different. Because Rule 35 is a procedural rule, it is not dependent upon state law.[233] However,

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226. *Id.*

227. *See id.* at 34.

228. *Id.*

229. FED. R. CIV. P. 35.

230. *See* DEL. CODE ANN. tit. 16, § 1202(c)(6) (Supp. 1992).

231. *See supra* notes 131-52 and accompanying text.

232. *See supra* notes 144-48 and accompanying text.

233. Hardy v. Riser, 309 F. Supp. 1234, 1241 (N.D. Miss. 1970) (holding that Rule 35 should not be set aside, even when in conflict with state law); Leach v. Greif Bros. Cooperage Corp., 2 F.R.D. 444, 446 (S.D. Miss. 1942) (requiring a physical examination under federal law despite the fact that state law prohibited such an examination); Richard J. Barnet, *Compulsory Medical Examinations Under the Federal Rules*, 41 VA. L. REV. 1059, 1065 (1955) (explaining that the drafters of Rule 35 probably did not intend federal courts to be guided by state court decisions which might "frustrate the uniformity of decision which the Federal Rules contemplate.").

Rule 35 always has been closely tied in spirit to state IME rules.[234] When passed in 1938, Rule 35 was meant to conform to state practices, and now most state laws allowing IMEs are modeled substantially upon Rule 35.[235] The state statutes are similar enough that federal courts frequently look to them for guidance.[236] Given that Congress has now joined the public health community and the state legislatures in calling for voluntary testing,[237] it should be adamantly clear that involuntary testing should be avoided in all but the most egregious of situations. Thus, Rule 35 should be amended to severely limit HIV testing in a manner similar to the Delaware statute.[238] At the very least, the federal courts should use the independent status of Rule 35 to forge a uniform policy rejecting involuntary HIV testing in IMEs unless HIV status is in controversy as a question of liability and a compelling need exists for the test.

VII. Analysis of the Pennsylvania Mechanic's Case

The Pennsylvania mechanic's case[239] is a good example of how easily courts can stray. In this case, the court ordered the mechanic to submit to an HIV test because "the record . . . demonstrate[d] a genuine controversy as to plaintiff's HIV status and defendants ha[d] shown good cause for the testing."[240] What the record demonstrated was that the mechanic had been an IV-drug user; that he had tested negative for HIV antibodies; that an emergency room technician had scribbled a note that the mechanic had tested positive; that the mechanic swore in an affidavit that he only had one HIV test; and that the mechanic had told the ER technician only that he had tested negative.[241] The good cause was that HIV status might affect the ultimate amount of future damages the defendant would have had to pay.[242]

The court's order treated the HIV test as if it were as normal as a cholesterol check.[243] There was no mention of the severe privacy implications of HIV testing. The court apparently ignored the unani-

234. 8 Wright & Miller, *supra* note 1, § 2231, at 664.
235. *Id.* at 665.
236. Vopelak v. Williams, 42 F.R.D. 387, 388 (N.D. Ohio 1967).
237. 42 U.S.C. § 300ff-61(b) (Supp. III 1991).
238. Del. Code Ann. tit. 16, § 1202(c)(6) (Supp. 1992).
239. *See supra* notes 16-37 and accompanying text.
240. *See supra* notes 20-37 and accompanying text.
241. *See supra* note 33 and accompanying text.
242. *See supra* notes 16-37 and accompanying text.
243. *See supra* notes 38-41 and accompanying text.

mity of opinion among public health officials that testing must be voluntary. The court does not appear to have even considered that nearly every jurisdiction in the United States has prohibited involuntary HIV testing,[244] including Pennsylvania.[245] The court's first premise, that the HIV test is an ordinary blood test, is patently wrong.

Not having recognized the unique and troubling nature of involuntary HIV tests, the court continued to err by loosely enforcing the good cause requirement. The court believed that a "genuine controversy" regarding the mechanic's HIV status would suffice.[246] While the emergency room attendant's scribbled note may raise a suspicious eyebrow, it is far more likely a simple mistake.[247] The note was written barely six months after the negative test; given the short time span, the plaintiff's affidavit, which states that he had taken no other HIV test, is convincing.[248] Here, unfortunately, the court appears to have been swayed by the plaintiff's membership in a high risk group.[249] The minor suspicion created in this case should not be seen as good cause, let alone a compelling interest for mandating the test.

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244. *See supra* note 146 and accompanying text.

245. *See* PA. STAT. ANN. tit. 35, § 7605 (1993). The Pennsylvania Confidentiality of HIV-Related Information Act states:

> (a) Consent.—Except as provided in section 6 with respect to the involuntary testing of a source patient, no HIV-related test shall be performed without first obtaining the informed written consent of the subject. Any consent shall be preceded by an explanation of the test, including its purpose, potential uses, limitations and the meaning of its results.

Id. § 7605(a). Only limited exceptions are granted:

> (g) Exceptions.—
>
> (1) The provisions of subsections (a) . . . shall not apply to the following:
>
> (i) The performance of an HIV-related test on a cadaver by a health care provider which procures, processes, distributes or uses a human body or a human body part, tissue or semen for use in medical research, therapy or transplantation.
>
> (ii) The performance of an HIV-related test for the purpose of medical research not prohibited by subsection (f) if the testing is performed in a manner by which the identity of the test subject is not known and may not be retrieved by the researcher.
>
> (iii) The performance of an HIV-related test when the test result of a subject is required by an insurer for underwriting purposes. However, the insurer shall satisfy the requirements of subsection (h).
>
> (2) The provisions of subsections (a) . . . shall not apply to the performance of an HIV-related test in a medical emergency when the subject of the test is unable to grant or withhold consent and the test result is medically necessary for diagnostic purposes to provide appropriate emergency care to the subject.

PA. STAT. ANN. tit. 35, § 7605(g) (1993).

246. *See supra* note 37 and accompanying text.

247. *See supra* notes 28-33 and accompanying text.

248. *See supra* notes 28-33 and accompanying text.

249. *See supra* note 28 and accompanying text.

Perhaps the biggest problem, however, is how the court turned the "in controversy" requirement on its head. By holding HIV status to be in controversy when HIV status would only affect future damages, the court opened the door for abuse. To test every party making a claim for future damages would make a mockery of voluntary testing; to limit the testing to those in high risk groups blatantly strikes a discordantly coercive tone with the very groups with whom public health officials are seeking to strike a harmonious chord of cooperation.[250] This is exactly why the "in controversy" requirement should be viewed from the liability side rather than the damages side. Though the court found that the mechanic's HIV status was in controversy,[251] what was really in controversy was whether the defense should be allowed a fishing expedition into the plaintiff's HIV status.

VIII. CONCLUSION

Voluntary testing is the cornerstone to the public health drive to slow, if not stop, the spread of AIDS. There is an overwhelming, nationwide consensus that public health policy demands that HIV tests be voluntary.[252] But, voluntary testing is more than just a good idea, it is the declared law in nearly every state in the Union.[253] Thus, courts must factor that policy into any decision about mandating HIV tests as independent medical examinations.

This uniformity of policy should not be surprising. The spread of HIV is a national, indeed a global, problem and demands a united defense. The defense that will work the best is to convince people to change their ways. That will require cooperation, not coercion, and thus the defenders of the realm have girded themselves in the armor of voluntary testing, along with counseling and confidentiality. The civil justice system must also pay great deference to voluntary testing and should do so with the same uniformity which has characterized the rest of the legal system's response to the HIV crisis. The courts should interpret and the legislatures should make clear that HIV tests will be mandated in civil litigation only when HIV status is a direct issue of liability and there is a compelling reason to breach the general rule of voluntary testing. To do otherwise is to open a gaping hole in our defense. The civil justice system should not, indeed cannot, be the chink in the armor.

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250. *See supra* notes 119-36 and accompanying text.
251. *See supra* note 37 and accompanying text.
252. *See supra* notes 131-52 and accompanying text.
253. *See supra* note 146 and accompanying text.