

## NOTES

# TESTING THE FOURTH AMENDMENT FOR INFECTION: MANDATORY AIDS AND HIV TESTING OF CRIMINAL DEFENDANTS AT THE REQUEST OF A VICTIM OF SEXUAL ASSAULT

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It began like so many epidemics, with a few isolated cases, a whisper that caught the ear of only a few in the medical research. Today, that whisper has become a roar heard around the world. AIDS - acquired immunodeficiency syndrome - is

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now the epidemic of our generation, invading our lives in ways we never imagined - testing our scientific knowledge, probing our private value, and sapping our strength. AIDS no longer attracts our attention - it commands it.<sup>1</sup>

## I. Introduction

Today, with the presence of the AIDS virus, rape victims<sup>2</sup> do not only suffer the loss of dignities, they risk the loss of life.<sup>3</sup> Acquired Immune Deficiency Syndrome (AIDS)<sup>4</sup> is a deadly<sup>5</sup> and nondiscriminating disease.<sup>6</sup> As the epidemic nears the middle of its second decade,<sup>7</sup> the number of reported AIDS cases has

<sup>1</sup> See CENTER FOR DISEASE CONTROL AND PREVENTION, SURGEON GENERAL'S REP. TO THE AM. PUB. ON HIV INFECTION AND AIDS 1 (1993).

<sup>2</sup> For the purposes of simplicity and consistency, throughout this note the author will refer to rape victims using the feminine pronoun and to offenders using the masculine pronoun. Despite these references, the author is fully cognizant that not all rape victims are female and not all offenders are male.

<sup>3</sup> See *Rape Survivors Facing HIV Testing Require Special Treatment; AIDS Guide For Health Care Workers*, 2 AIDS ALERT 9, at S1 (1994) [hereinafter *Rape Survivors Facing HIV Testing*]. Survivors of sexual assault face a dual trauma - the emotional, psychological effects of being a victim and the intense fear of being infected with HIV. *Id.*

<sup>4</sup> See STEDMAN'S MEDICAL DICTIONARY 37-38 (25th ed. 1990). "AIDS" is an acronym for Acquired Immune Deficiency Syndrome. *Id.* The syndrome is characterized by opportunistic infections and malignancies. *Id.* See also *infra* Part II for an in-depth discussion of AIDS.

<sup>5</sup> See CENTER FOR DISEASE CONTROL AND PREVENTION, HIV/AIDS SURVEILLANCE REP. 5 (1995) [hereinafter SURVEILLANCE REPORT]. The number of AIDS cases surpassed one-half million in 1995. *Id.* Over 62% of the 513,486 persons with AIDS reported through 1995 have died. *Id.* Among persons ages 25 to 44 years, HIV infection is now the leading cause of death in men and the third leading cause in women. *Id.*

<sup>6</sup> See CENTER FOR DISEASE CONTROL AND PREVENTION, SURGEON GENERAL'S REP. TO THE AM. PUB. ON HIV INFECTION AND AIDS 1 (1994) [hereinafter SURGEON GENERAL'S REPORT]. HIV, human immunodeficiency virus, affects people of all races and ethnic groups. *Id.* at 2. Although gay men account for the majority of AIDS cases reported, AIDS is becoming more prominent in heterosexual men and women. *Id.* at 1. Gay and bisexual men account for a smaller percentage of newly diagnosed cases of AIDS primarily because AIDS is growing at a faster rate in other segments of the population. See THE HENRY J. KAISER FOUNDATION, NO.2 FACTS ON HIV/AIDS: REDUCING THE SPREAD OF HIV (March 1996) [hereinafter REDUCING THE SPREAD OF HIV]. See also Linda Farber Post, Note, *Unblinded Mandatory HIV screening of Newborns: Care or Coercion?*, 16 CARDOZO L. REV. 169, 169-70 n.3 (1994) (discussing that it is predicted that by the year 2000, pediatric HIV cases will reach 10 million).

<sup>7</sup> See IRVING J. SLOAN, AIDS LAW: IMPLICATIONS FOR THE INDIVIDUAL & SOCIETY 1 (1988). In June, 1981, the Center for Disease Control (hereinafter CDC), reported an outbreak of a unusual and deadly form of pneumonia in five homosexuals in the Los Angeles area. *Id.* Less than a month later, an additional ten cases were reported

reached over one-half million.<sup>8</sup>

By contrast and comparison, rape has plagued our society for many centuries, with the number of reported rapes estimated to be 683,000 incidents per year.<sup>9</sup> Rape not only desecrates the dignity of the individual at the time of the act, it also inflicts a penetrating wound that leaves behind a terminal emotional scar.<sup>10</sup>

Indeed, victims experience a relentless, eternal fear of contracting AIDS.<sup>11</sup> For one particular victim, the fear has become a

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in homosexual men. *Id.* At the same time, a rare form of cancer, Kaposi's sarcoma, began appearing in homosexual men with alarming frequency. *Id.* The CDC described the occurrence of these two diseases in patients as "highly unusual." *Id.* AIDS, although unrecognized as a discrete disease, had arrived on the medical scene. *Id.*

<sup>8</sup> See SURVEILLANCE REPORT, *supra* note 5, at 5.

<sup>9</sup> See *Rape Survivors Facing HIV Testing*, 9 AIDS ALERT 8, 113 (1994) [hereinafter *Rape Survivors Facing HIV Testing*]; see also *Sexual Assault Called 'Silent Violent Epidemic'; AMA Also Targets Family Abuse in New Prevention Campaign*, WASHINGTON POST, Nov. 7, 1995, at A3 [hereinafter *Sexual Assault Called 'Silent Violent Epidemic'*] (noting that according to the American Medical Association each year approximately 700,000 women in the United States are sexually assaulted). This is equivalent to one rape every 45 seconds, making sexual assault one of the most rapidly growing violent crimes. *Id.* According to the National Victim Center, it is estimated that out of the 683,000 women who are raped every year, six out of ten are below the age of 18. See *Rape Survivors Facing HIV Testing*, *supra* at 113.

Although these figures are disturbingly high, experts urge that rape is "hidden, underrecognized, underreported, and underdocumented." See Lawrence O. Gostin, et al., *HIV Testing, Counseling, and Prophylaxis After Sexual Assault*, 271 JAMA 1436 (1994). Quite significantly, only 16 percent of all rapes are reported to the authorities and only half of these result in arrest. *Id.* at 1436, 1439.

However, there is a growing concern that statistics on rape and sexual assault are overreported. See Bob Candor, *Incidence of Rape Stirs Debate Among Researchers*, CHI. TRIB., Aug. 13, 1996, at E4. First, inflated statistics unduly scare women. *Id.* Furthermore, they are used in persuading legislators to fund and support rape prevention programs. *Id.* In many studies, the definition of sexual assault is quite broad. *Id.* Sexual assault is not limited to rape but often includes unwanted touching, kissing, and other contact, including exposure to an exhibitionist. *Id.*

<sup>10</sup> See *Sexual Assault Called 'Silent Violent Epidemic'*, *supra* note 9, at A3. Extensive clinical studies reveal that sexual assault causes grim consequences for its survivors such as persistent fear, depression, problems in relationships, social phobia, anxiety, and loss of self-esteem. See Gostin, *supra* note 9, at 1437. Until recently, the psychological impact of victimization was limited. See *Sexual Assault Called 'Silent Violent Epidemic'*, *supra* at A3. Previous medical training focused on the physical injury rather than "addressing the psychological, behavioral and social implications of the assault." *Id.* Counseling should focus and educate victims on the psychological aspects of the "epidemic" in order to stop the deadly cycle of violence in our country. *Id.*

<sup>11</sup> See Tanya Bonner, *Ordeal Just Beginning for Victims After Sexual Assault - Crime Still Remains Underreported*, STATE JOURNAL-REGISTER, Apr. 30, 1995, at 1.

daily ordeal.<sup>12</sup> One evening, Karen came home to find her ex-husband unexpectedly waiting for her.<sup>13</sup> He was high on drugs; she begged him to leave.<sup>14</sup> He refused and told her that he was going to "make love" to his "wife."<sup>15</sup> Without warning, he pulled out a gun, forced her to take drugs with him, and then, against her will, he forcibly raped her.<sup>16</sup> Karen's life long dream of a happy marriage, two kids, and a house with a white picket fence have since been forgotten.<sup>17</sup>

Although there are no statistics on the number of women who contract AIDS through rape, the danger is real and the reason for fear is obvious.<sup>18</sup> The violent and non-consensual nature of rape sets it apart from other forms of exposure to the AIDS virus.<sup>19</sup> While other individuals choose to engage in consensual sexual intercourse, needle sharing, or other high-risk behavior, the uninviting rape victim has no choice.<sup>20</sup>

The threat of spreading AIDS, especially to innocent rape victims, has triggered a legislative response which would require the mandatory testing for AIDS of criminal defendants at the request

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See Bonner, *supra* note 11.

<sup>17</sup> See Bonner, *supra* note 11.

<sup>18</sup> See Jan Hoffman, *AIDS and Rape: Should New York Test Sex Offenders?*, VILLAGE VOICE, Sept. 12, 1989, at 36. To date, there are no reported cases in which a victim of sexual assault has contracted HIV. *Id.*

It is estimated that the risk of contracting AIDS from a single incident of sexual intercourse with an individual who definitely has HIV is between 1 in 500 and 1 in 1000. See David Moody, *AIDS and Rape: The Constitutional Dimensions of Mandatory Testing of Sex Offenders*, 76 CORNELL L. REV. 238, 242 n.23 (1990) (citing Norman Hearst, et. al., *Preventing the Heterosexual Spread of AIDS: Are We Giving the Our Patients the Best Advice*, 259 JAMA 2428, 2429 (1988)). Some estimate that in the case of a rape, if the offender was from a high risk group and the prevalence of HIV was 1 in 20 in that group, the probability of the victim getting the AIDS virus would be 1 in 10,000. *Id.* at 241-42. However, if the offender is in a low risk group whose prevalence is 1 in 10,000, the risk would be 1 in 5,000,000. *Id.*

<sup>19</sup> See SURGEON GENERAL'S REP., *supra* note 6, at 6. The two significant modes of transmission of HIV are unprotected sexual intercourse and needle sharing by intravenous drug users. *Id.* at 6-7. Additional methods of transmission are a blood transfusion, organ donation, and where a mother is infected, the virus can be transmitted to the fetus. *Id.* at 7, 9.

<sup>20</sup> See, e.g., *id.* at 6-7; see also DAN J. TENNENHOUSE, THE ATTORNEYS MEDICAL DESKBOOK §120.1, at 78-79 (2d ed. 1983 & Supp. 1992) (discussing various modes of transmission).

of victims of sexual assault.<sup>21</sup> However, this seemingly virtuous response has given rise to legal challenges<sup>22</sup> of constitutional dimensions.<sup>23</sup> Indeed, many courts are now faced with the judicial task of balancing the concerns<sup>24</sup> and fears<sup>25</sup> of sexual assault victims against the constitutional rights of sex offenders in a manner which

<sup>21</sup> See Martha A. Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J.L. AND MED. 34 (1990).

In AIDS, policy makers face a public health crisis in catastrophic proportions: the disease is fatal. No cure or vaccine exists. The number of infected people has been increasing at a geometric rate. These chilling facts and the public reaction to them make legislators want to do something, anything, that can make a difference.

*Id.* See also note 66 (discussing various states' statutory schemes).

<sup>22</sup> See Lawrence O. Gostin, *THE AIDS LITIGATION PROJECT III: A LOOK AT HIV/AIDS IN THE COURTS OF THE 1990's*, 1 (1996). AIDS and HIV have generated immense legal and social ramifications, affecting schools, workplaces, prisons, and homeless shelters. *Id.* As "litigation tends to reveal the broad social and constitutional concerns of the day . . .," the courts have the duty of adjudicating disputes "at the very heart of our society—the duties of government to intervene for the community's health and the responsibilities of government to intervene for the community's health and the responsibilities of individuals to behave so as to protect their own health and that of the public." *Id.* Although the AIDS epidemic poses many challenges, the epidemic must not be "allowed to recede into the background . . . or to be tossed on to [sic] the dustheap of 'intractable social problems.'" *Id.* at v. The AIDS epidemic must be confronted in medical, social, and legal arenas. *Id.*

According to the AIDS Litigation Project which examined over 300 cases litigated in state and federal courts over a 5 year period from January 1991 to January 1996, AIDS or HIV was a material issue in the following areas: HIV/AIDS education, family law, criminal law, tort law, protection of the blood supply, discrimination, confidentiality, fear of exposure and special groups such as prisoners, military, and the homeless. *Id.* at xix.

<sup>23</sup> See *In Re Juveniles A, B, C, D, E*, 847 P.2d 455, 460, 462 (Wash. 1993) (holding that the mandatory AIDS testing statute was constitutional, the court recognized that the need of the state to identify and educate HIV infected persons outweighs the burden that the testing places on the convicted individual); *Fosman v. Florida*, 664 So.2d 1163, 1166 (Fla. Dist. Ct. App. 1995) (determining that the mandatory AIDS testing statute did not violate the Fourth Amendment because the government had a compelling interest in protecting the victim); *In Re J.G., N.S., and J.T.*, 283 N.J. Super. 32 (Ch. Div. 1995), rev'd, 289 N.J. Super. 575, 592; 674 A.2d 625, 633-34 (App. Div. 1996), cert. granted, (holding that the Fourth Amendment rights of the defendant were not violated because the state's compelling interests in protecting victims outweighed any slight intrusion of privacy).

<sup>24</sup> See Ann W. Burgess & Timothy Baker, *AIDS and Victims of Sexual Assault*, 43 HOSP. & COMMUNITY PSYCHIATRY 447 (May 1992). A 1992 survey indicated that AIDS was a major concern of 41% of victims of sexual assault. *Id.* According to a national survey of rape crisis counselors, contracting HIV is the fastest growing concern among victims of sexual assault. See Michael Matza, *AIDS Conundrum, Victims Civil Libertarians Grapple Over Testing Rapists for HIV*, CHI. TRIB., Nov. 15, 1992, at Womanews 4. See also *Rape Survivors Facing HIV Testing*, supra note 3, at S1 (indicating that according to a

upholds the spirit of the Fourth Amendment.<sup>26</sup>

This note explores the emotionally and constitutionally charged issues surrounding mandatory AIDS/HIV testing of criminal defendants with particular concentration on the Fourth Amendment and New Jersey's relevant legislation.<sup>27</sup> Part II examines the critical medical aspects of AIDS and HIV.<sup>28</sup> Part III provides an in-depth overview of the current legislation in the State of New Jersey.<sup>29</sup> Part IV discusses prior Fourth Amendment case law and examines New Jersey's recent decision to strike the balance in favor of mandatory testing.<sup>30</sup> Part V provides an insightful analysis of the arguments for and against mandatory testing for HIV.<sup>31</sup>

## II. *The Medical Aspects*

### A. *AIDS and HIV*

One must be familiar with the underlying medical complexities of AIDS in order to fully comprehend the mandatory testing

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national survey, the fear of contracting HIV has become a primary concern in the past years).

However, Jill Greenroom, director of a rape crisis center in New Jersey, asserts that being infected with AIDS is not, contrary to public perception, a rape victim's first concern. See Frederick Kunkle, *HIV Fear Grips Rape Victims; State May Test Sex Criminals*, THE RECORD, Oct. 2, 1991, A1. Rather, a victim's primary concern is getting over the psychologically and physically painful experience of sexual assault. *Id.*

<sup>25</sup> See THE HENRY J. KAISER FAMILY FOUNDATION, NO. 5 FACTS ON HIV/AIDS: DISCRIMINATION AND AIDS (Mar. 1996) [hereinafter DISCRIMINATION AND AIDS]. Clearly, it is understandable that many people fear contracting AIDS given that the disease is fatal and communicable. *Id.* According to Robin Einbinder, assistant director of Mt. Sinai's rape crisis center, the biggest fear a rape victim faces is the fear of contracting HIV. See *Rape Survivors Facing HIV Testing*, *supra* note 3, at S1. See also Field, *supra* note 21, at 34.

<sup>26</sup> See U.S. CONST. amend. IV. The Fourth Amendment provides that the "[r]ight of the people to be secure in their persons, houses, and papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." *Id.* See also *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 613-14 (1989) (discussing that the Fourth Amendment does not prohibit all searches and seizures, but only those that are unreasonable); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528 (1967) (holding that the basic purpose of the Fourth Amendment is to protect an individual's privacy right against arbitrary invasions by government); *Schmerber v. California*, 384 U.S. 757, 768 (1966) (stating that the Fourth Amendment protects only against invasions which are not justified under the given circumstances).

<sup>27</sup> See *infra* Parts I-VI.

<sup>28</sup> See *infra* Part II.

<sup>29</sup> See *infra* Part III.

<sup>30</sup> See *infra* Part IV.

<sup>31</sup> See *infra* Part V.

legislation and to realize its intrinsic limitations.<sup>32</sup> AIDS is caused by an infection by the human immunodeficiency virus (HIV).<sup>33</sup> Once infected with HIV, the virus attacks and destroys the body's CD4 cells,<sup>34</sup> which play an integral role in assuring the proper functioning of the human immune system.<sup>35</sup> Upon infection, the CD4 cells manufacture and replicate the virus; this replication eventually causes the cell itself to die.<sup>36</sup> Over time, the loss of these vital CD4 cells and the chemical signals they produce slowly destroy the

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<sup>32</sup> See Harold W. Jaffe, *What Doctors Want to Tell Judges About AIDS*, 29 JUDGES 8, 9 (Spring 1990). AIDS is often a misunderstood disease as evidenced by the general public's confusion about the disease and attitude toward persons with the disease. See DISCRIMINATION AND AIDS, *supra* note 25. A number of public polls were conducted that found between 28% to 51% of the persons polled favored quarantining people with AIDS from the general public. See Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1019 n.6 (1989).

<sup>33</sup> See TENNENHOUSE, *supra* note 20, §120.1, at 78. HIV is an acronym for Human Immunodeficiency Virus, also called Human T-lymphotropic type III, the AIDS-associated retrovirus, and the Lymphadenopathy-associated virus. *Id.* HIV is a retrovirus which overwhelms the white blood cells in the human body's immune system, making the body vulnerable to opportunistic infections and other complications. *Id.* at 79.

<sup>34</sup> See SURGEON GENERAL REPORT, *supra* note 6, at 19. CD4+ cells, commonly referred to as T-helper cells or T4 cells, are necessary to fight off infections. *Id.* A person who is not infected with HIV has a CD4+ count which remains fixed over time, while a person who is infected has a CD4+ count which lessens over time. *Id.* The CD4+ "count is a measure of the damage to your immune system by HIV and of your body's ability to fight infection." *Id.* A doctor uses the CD4+ count to determine the particular medical treatment necessary for the infected person. *Id.* [Although most sources refer to the cell count as CD4, this source refers to it as CD4+. No explanation is given as to the this distinction].

When the number of CD4 cells goes below 300, an infected person is at a heightened risk for obtaining one or more of the opportunistic infections associated with AIDS. See THE HENRY J. KAISER FAMILY FOUNDATION, NO. 3 FACTS ON HIV/AIDS: PROGRESS IN TREATING AIDS, FACTS ON HIV/AIDS (March 1996) [hereinafter PROGRESS IN TREATING AIDS]. According to the CDC, when the CD4 count dips below 200, an infected person is said to have AIDS. *Id.*

<sup>35</sup> See TENNENHOUSE, *supra* note 20, §120.1, at 79. The most important defense mechanism against the HIV infection is the human immune system. *Id.* The immune system seeks to destroy microorganisms using antibodies manufactured by lymphocytes. *Id.* The HIV attacks the immune system itself and, for a variety of reasons, the immune system has a particularly hard time in fending off HIV. See PROGRESS IN TREATING AIDS, *supra* note 34.

<sup>36</sup> See PROGRESS IN TREATING AIDS, *supra* note 34. Because the viral shell of the cell mutates rapidly, the body must continuously redesign its immune response. *Id.* Overall health declines as the immune system progressively loses the healthy cells faster than it can replace them. *Id.* "Eventually the progressive, subtle weakening of the immune system opens the door wider for HIV and other diseases, known as opportunistic infections, that are the actual causes of death and illness in most people with AIDS." *Id.*

ability of an individual to fight off ordinary infections as well as deadly cancers.<sup>37</sup> At this point, the individual develops the deadly AIDS virus.<sup>38</sup>

### B. AIDS Testing

The term "AIDS testing" is somewhat misleading because presently there is no test for AIDS.<sup>39</sup> Rather, the "AIDS test" is a test for the HIV infection.<sup>40</sup> Enzyme-linked immunosorbant assay (ELISA) and Western Blot are the tests most commonly used to detect HIV infection.<sup>41</sup> These conventional blood tests detect the presence of HIV antibodies which are manufactured by the body to fight off the virus.<sup>42</sup> These tests do not detect the HIV virus itself.<sup>43</sup> By gaug-

<sup>37</sup> See PROGRESS IN TREATING AIDS, *supra* note 34.

AIDS-Related Conditions in Adult Patients Reported in 1994, United States.

<i>Most frequently reported conditions</i>	<i>Percent of Cases</i>	<i>Percent of Cases</i>
Immunosuppression, severe HIV related		81
Pneumocystis <i>carinii</i> pneumonia		9
HIV wasting syndrome		10
Candidiasis of esophagus		7
Mycobacterium tuberculosis infection		5
Kaposi's sarcoma		4
M. <i>avium</i> or M. <i>kansasii</i> infection		3

\* many patients have more than one condition

*Id.*

<sup>38</sup> See SURGEON GENERAL REPORT, *supra* note 6, at 5.

<sup>39</sup> See Field, *supra* note 21, at 37-38.

<sup>40</sup> See Field, *supra* note 21, at 37-38. A routine blood test will not detect the HIV infection. See SURGEON GENERAL'S REPORT, *supra* note 6, at 11. An individual must therefore specifically request to have his/her blood tested for HIV in order to determine whether the individual is infected. *Id.*

<sup>41</sup> See Schwartz et.al., *Human Immunodeficiency Virus Test Evaluation, Performance and Use*, 259 JAMA 2574, 2578 (1988). ELISA is the most commonly used screening test because it is relatively inexpensive, utilizes standard techniques, has a rapid turn around, and is significantly reproducible. *Id.* at 2574-75. If the ELISA test produces a positive result, generally the test will be performed again. *Id.* at 2578. Following a second positive result, the confirmatory Western Blot test is performed. *Id.* at 2575. This test "identifies antibodies to proteins of a specific molecular weight, and therefore helps to eliminate false positives." See Field, *supra* note 21, at 38 n.11 (1990) (citing AIDS AND THE LAW: A GUIDE FOR THE PUBLIC 130 (H. Dalton, S. Burris & the Yale AIDS Law Project 1987)).

<sup>42</sup> See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1993). Antibodies are specialized proteins produced by certain lymphocytes in response to the presence of an infection or to the administration of appropriate antigens. *Id.* Antibodies neutralize toxins, agglutinate cells or bacteria, and precipitate soluble antigens. *Id.*

<sup>43</sup> See Field, *supra* note 21, at 38.



ing the level of antibodies in a person's blood, doctors can infer the presence of HIV.<sup>44</sup>

Although the HIV antibodies are typically produced by most individuals within one to six months after exposure to the virus, the period between this initial infection and the point at which antibodies are detected may, in some cases, be much longer.<sup>45</sup> This medically undefined period of time is commonly referred to as the "window period."<sup>46</sup> Considering the temporal uncertainty, vis-à-vis this "window period," the danger becomes readily apparent that HIV test during this sometimes shifting "window period" may render a false negative result.<sup>47</sup>

Thus, the individual who erroneously believes that he or she is not infected, because the virus was still undetectable at the time of

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<sup>44</sup> See Field, *supra* note 21, at 38. The CDC asserts that the current HIV tests are highly reliable. See CENTER OF DISEASE CONTROL, SEROLOGICAL TESTING FOR HIV-1 ANTIBODY-UNITED STATES, 1988 AND 1989, *reprinted in*, 39 MORBIDITY & MORTALITY WEEKLY REP. 380, 383 (1990). The CDC figures on testing originate from the Model Performance Evaluation Program (hereinafter M.P.E.P.). *Id.* The accuracy of the tests is determined by measuring the sensitivity and specificity. *Id.* Test sensitivity refers to the proportion of infected specimens a test actually detects, and test specificity refers to the percentage of non-infected samples a tests reads as non-reactive. *Id.* at 382. In 1989, the M.P.E.P. figures showed that the sensitivity of the ELISA was 99.3% and the specificity was 99.7%, while the Western Blot test sensitivity was 98.9% and specificity was 97.8%. *Id.*

However, the CDC recognizes that such estimates should be interpreted cautiously because the methodology of the M.P.E.P. is less than optimal for determining performance of the tests under average testing conditions. *Id.* at 383. Specifically, the proficiency figures come from laboratories that voluntarily take part in the testing program and are thus cognizant that the results from certain tested samples will be utilized to evaluate lab performance. *Id.* at 380. Given the limitations, the CDC openly acknowledges the M.P.E.P. figures can only be realized under optimal conditions. See CENTER FOR DISEASE CONTROL, PUBLIC HEALTH SERVICE GUIDELINES FOR COUNSELING AND ANTIBODY TESTING TO PREVENT HIV INFECTION AND AIDS, *reprinted in*, 36 MORBIDITY & MORTALITY WEEKLY REP. 509, 510 (1987).

<sup>45</sup> See Jaffe, *supra* note 32, at 10. The CDC reports that almost all individuals who are infected with HIV will produce HIV antibodies within six months. See SURGEON GENERAL REPORT, *supra* note 6, at 11.

<sup>46</sup> See Jaffe, *supra* note 32, at 10.

<sup>47</sup> See Field, *supra* note 21, at 39. A particular test protocol can render false positive or false negatives results. *Id.* A false positive is falsely naming a negative sample as positive and a false negative is falsely naming a positive sample as negative. *Id.* These tests are classified in terms of specificity and sensitivity. *Id.* The rate of false negatives and false positives depend on the population being tested and the quality, namely sensitivity and specificity, of the particular test. *Id.* at 40. Further, the testing procedures maintain "an inherent trade off between sensitivity and specificity such that the most sensitive tests are also the least specific." *Id.* at 39-40.

testing, may unwittingly infect others.<sup>48</sup>

Currently, there are other, more expensive nonconventional tests available which can detect HIV directly.<sup>49</sup> These tests include HIV culture, polymerase chain reaction (PCR), and HIV antigen tests.<sup>50</sup> Unlike conventional testing which detects the presence of antibodies, these tests measure the actual viral load of HIV in an individual's blood sample.<sup>51</sup> However, because the nonconventional tests are expensive and time consuming, they currently are used primarily for experimental and research purposes.<sup>52</sup>

At the present time, there is neither a cure for AIDS<sup>53</sup> nor a vaccine<sup>54</sup> available to prevent the disease.<sup>55</sup> Despite this seemingly grim reality, however, substantial advances have been made in the search for a cure.<sup>56</sup> For example, in 1987, Azidothymidine (AZT) was the only drug available to treat HIV, whereas today there are a number of more effective drugs and drug combination therapies available.<sup>57</sup> Although these new therapies offer renewed hope to

<sup>48</sup> See Field, *supra* note 21, at 41.

<sup>49</sup> See Gostin, *supra* note 9, at 1438.

<sup>50</sup> See PROGRESS IN TREATING AIDS, *supra* note 34. The viral load tests are very expensive. *Id.* As their importance becomes more apparent, viral load tests will move from the research area to the clinical setting. *Id.*

<sup>51</sup> See Gostin, *supra* note 9, at 1438.

<sup>52</sup> See PROGRESS IN TREATING AIDS, *supra* note 34.

<sup>53</sup> See The Henry J. Kaiser Foundation, Facts on HIV/AIDS: Paying for New AIDS Therapies - The AIDS Drug Assistance Program (ADAP) (Mar. 1996) [hereinafter PAYING FOR NEW AIDS THERAPIES]. Notwithstanding the realization that there is not a magic bullet to cure AIDS, prescription drugs can help a person infected with HIV live longer and healthier. *Id.*

<sup>54</sup> See SURGEON GENERAL'S REPORT, *supra* note 6, at 18. The number of HIV vaccines presently being tested in the early stages total more than a dozen. *Id.* The HIV vaccines potentially could be used in two ways: (1) to prevent the disease, much like a vaccine for measles and polio; and (2) to prevent further spread of the infection by building up the immune system. *Id.*

<sup>55</sup> See Field, *supra* note 21, at 34.

<sup>56</sup> See PAYING FOR NEW AIDS THERAPIES, *supra* note 53. See also *infra* note 59.

<sup>57</sup> See PROGRESS IN TREATING AIDS, *supra* note 34. AZT is the most common reverse transcriptase inhibitor. *Id.* Reverse transcriptase inhibitors (hereinafter RTI) are antiretroviral treatments which reverse the transcriptase enzyme, an enzyme which HIV needs at the outset of its reproductive stage. *Id.*

Although AZT was the first drug licensed to treat the virus, other RTI's now include ddi, ddc, D4T, and 3TC. *Id.* There is new class of drugs, protease inhibitors, which neutralize the protease enzyme, an enzyme that HIV requires at the final stages of reproduction. *Id.* Recent studies indicate positive results when 2 or more of the drugs are combined. *Id.*

At the 11th International Conference on AIDS, a scientist announcing the effectiveness of the protease inhibitors, stated that "the protease inhibitors - especially

those individuals who are now living with the virus, long-term viability remains uncertain.<sup>58</sup> In addition, it remains questionable whether the general public will have access to these costly drug therapies.<sup>59</sup>

### III. Legislation

#### A. The Federal Mandate

In 1990, Congress enacted federal legislation which requires states to provide mandatory testing programs for convicted sex offenders in order to qualify for federal funds.<sup>60</sup> Although one-third

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when combined with conventional therapies and with each other - was prodding researchers to move to new frontiers." See Kitta Mac Pherson, *Startling Gains Seen on AIDS: Drug Companies Race to Announce Test Results*, Star Ledger, July 8, 1996, at A7. In addition, another AIDS researcher, David Ho, emphasizes that the virus causing AIDS immediately infects the cells which thereafter become "virtual virus factories." *Id.* Given the immediacy with which the cells are infected, David Ho supports the use of combination therapies during the early stages of the disease. *Id.*

<sup>58</sup> See Mac Pherson, *supra* note 57, at A1. Evidence from a year long study revealed that the drug Crixivan destroyed the AIDS virus, boosted the immune system, and decreased viral levels to a point at which they were not detectable. *Id.* Further, the majority of individuals in the study who had undetectable viral levels after 24 weeks, continued to maintain undetectable levels for a nearly a year. *Id.* Crixivan falls into the class of drugs known as the protease inhibitors. *Id.* It works by bringing the virus to extremely low levels which allow a person to remain on the drug for an extended period without fear that the virus will mutate into a new and different form. *Id.*

Experts caution that overly optimistic reports of treatments for persons with AIDS will raise false hopes. See Daniel Q. Haney, *AIDS Experts Call For Caution*, THE RECORD, July 8, 1996, at A11. Many fear that the new drug treatments will not hold up when given for many years. *Id.* "The virus, which has outsmarted so many strategies in the past, also could evolve ways to elude the new approaches." *Id.* As Dr. Peter Piot, head of the U.N. AIDS program, stated, "[l]et's not switch from the very dark pessimism to hype and over-optimism so we will all have a hang-over within six months to a year." *Id.*

<sup>59</sup> See Mac Pherson, *supra* note 57, at A7. Most of the people infected with HIV are unable to pay \$12,000 to \$16,000 per year for the combination drug therapies. *Id.* Although the therapies are very costly, doctors hope such high costs would not be an obstacle in obtaining treatment or continuing research. *Id.* Methods need to be developed which will allow individuals to have access to the expensive drug therapies. *Id.* In the Netherlands, for example, the government underwrites care for individuals who cannot afford the expensive drugs. *Id.*

<sup>60</sup> See Crime Control Act of 1990, 1804, 42 U.S.C. § 3756(f) (1990). The legislation requires states to have certain testing laws enacted by October 1, 1993, in order to qualify for federal funds. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE, TESTING CERTAIN OFFENDERS FOR HUMAN IMMUNO-DEFICIENCY VIRUS - GUIDANCE FOR STATES ON SECTION 1804 REQUIREMENTS 1 (Apr. 1992) [hereinafter BUREAU OF JUSTICE ASSISTANCE]. Notwithstanding the fact that approximately 1/3 of the states

of the states had already enacted mandatory testing programs, the goal of the conditional federal funding was to persuade the remainder of the states to enact similar schemes.<sup>61</sup>

Specifically, Section 1804 of the Crime Control Act commands states to provide HIV testing of convicted sex offenders upon the request victims.<sup>62</sup> When testing is requested, disclosure of the test

had enacted similar laws prior to the federal legislation, Congress sought to encourage the remainder of the states to legislate accordingly. *Id.* at 1-2.

<sup>61</sup> See Bureau of Justice Assistance, *supra* note 60, at 2.

<sup>62</sup> See 42 U.S.C. § 3756(f). The relevant part provides:

- (f) Testing certain sex offenders for human immunodeficiency virus
- (1) For any fiscal year beginning more than 2 years after November 29, 1990-
    - (A) 90 percent of the funds allocated under subsection (a) of this section without regard to this subsection to a State described in paragraph (2) shall be distributed by the Director to such State; and
    - (B) 10 percent of such funds shall be allocated equally among States that are not affected by the operation of subparagraph (A).
  - (2) Paragraph (1)(A) refers to a State that does not have on effect, and does not enforce, in such a fiscal year, a law that requires the State at the request of the victim of a sexual act -
    - (A) To administer, to the defendant convicted under State law of such sexual act, a test to detect in such defendant the presence of the etiologic agent for acquired immune deficiency syndrome;
    - (B) to disclose the results of such test to such defendant and to the victim of such sexual act; and
    - (C) to provide to the victim of such sexual act counseling regarding HIV disease, HIV testing, in accordance with applicable law, and referral for appropriate health care and support services.
  - (3) For purposes of this subsection -
    - (A) the term "convicted" includes adjudicated under juvenile proceedings; and
    - (B) the term "sexual act" has the meaning given in subparagraph (A) or (B) of section 2245(1) of title 18.

*Id.*

Pursuant to 18 U.S.C. § 2246 (2) (A), (B) (1990) a sexual act includes:

- (A) contact between the penis and the vulva or the penis and the anus, and for the purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
- (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
- (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

*Id.*

results are made to both the victim and the offender.<sup>63</sup> This mandatory testing scheme is rigidly designed<sup>64</sup> so that courts have no discretionary power regarding the testing of convicted defendants.<sup>65</sup> However, these laws vary from state to state<sup>66</sup> because the federal government has not proffered any guidelines that might instruct the states on how to enact the mandatory testing laws.<sup>67</sup>

B. *The Enactment of N.J. STAT. ANN. §§ 2C:43-2.2 and 2A:4A-43.1*

In order to avoid the loss of federal grants currently received for victim support services, Governor Florio signed Assembly Bill 897/220<sup>68</sup> into law on January 4, 1994, without statement or cere-

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<sup>63</sup> See 42 U.S.C. § 3756(f)(2)(B)

<sup>64</sup> See *id.* § 3756

<sup>65</sup> See *id.* § 3756

<sup>66</sup> See *id.* § 3756. Several states provide for the mandatory testing of persons convicted of sex-related offenses. See, e.g., Illinois: ILL. ANN. STAT. ch. 38 para. 1005-4-3 (Smith-Hurd Supp. 1992); Missouri: MO. REV. STAT. § 191.663 (Vernon 1992 & Supp. 1993); North Dakota: N.D. CENT. CODE § 23-07-07.5 (1991); Oregon: OR. REV. STAT. § 135.139 (1990); South Carolina: S.C. CODE ANN. § 16-3-740 (Law Co-op. Supp. 1992); Texas: TEX. CODE ANN. CRIM. PROC. § art. 21.31 (West 1993); Washington: WASH. REV. CODE ANN. § 70.24.340 (West 1992); West Virginia: W. VA. CODE § 16-3C-2 (1991 & 1993). Several states provide for mandatory testing of persons accused of sex related offenses. See, e.g., Arizona: ARIZ. REV. STAT. ANN. § 13-1415 (Supp. 1993); Arkansas: ARK. CODE ANN. § 16-82-102 (Michie 1993); California: CAL. PENAL CODE § 1524.1 (West Supp. 1993); Colorado: COLO. REV. STAT. ANN. § 18-3-415 (West 1988 & Supp. 1993); Florida: FLA. STAT. ANN. § 960.003 (West 1990 & Supp 1996); Georgia: GA. CODE ANN. § 17-10-15 (Michie 1990 & Supp. 1993); Idaho: IDAHO CODE § 39-604 (1993); Indiana: IND. CODE ANN. § 16-1-9.5-2.5 (West 1990 & Supp. 1992); Kentucky: KY. REV. STAT. ANN. § 510.320 (Michie 1992); Michigan: MICHIGAN. COMP. LAWS ANN. § 333.5129 (West 1992); Minnesota: MINN. STAT. ANN. 611A.19 (West Supp. 1993); Nevada: NEV. REV. STAT. ANN. § 209.385 (Michie 1992); North Dakota: N.D. CENT. CODE § 23-07.7 (1987 & Supp. 1993); Ohio: OHIO REV. CODE ANN. § 2907.27 (Page 1993); South Dakota: S.D. CODIFIED LAWS ANN. § 23A-35B-3 (1988 & Supp. 1993); Utah: UTAH CODE ANN. § 76-5-503 (1990 & Supp 1993); Virginia: VA. CODE ANN. § 18.2-62 (Michie Supp. 1992).

<sup>67</sup> See *Experts, Senate Favor HIV Testing of Sex Offenders*, 9 AIDS ALERT 8, 111, (1994).

<sup>68</sup> See A. 897, 206 N.J. Leg. 1st Reg. Sess. (1992) [hereinafter A897]. On February 13, 1992, Assemblyman Stuhltrager introduced A897 to the Senate and General Assembly. *Id.* Bill 897 involved the "medical testing of persons charged with certain offenses or acts of delinquency and supplementing Title 2C of the New Jersey Statutes and Title 26 of the Revised Statutes." *Id.* According to Assemblyman Stuhltrager's statement, Bill No. 897:

would require a person indicted for, or formally charged with, aggravated sexual assault, sexual assault, aggravated criminal contact if these offenses involved, or were likely to involve, the transmission of bodily fluids, to be

mony.<sup>69</sup> As codified under New Jersey sections 2C:43-2.2 and 2A:4A-43.1, these provisions essentially empower victims of sexual

tested by means of an approved serological test for diseases which are transmitted by these means, if the victim requests.

*Id.*

The provisions in A897 are also applicable to juveniles. *Id.* Pursuant to the bill, the victim and the defendant, and in the case of a juvenile, the juvenile's parent(s) or guardian(s), would be informed of the test results. *Id.* Additionally, the Department of Health would be advised as to any positive tests. *Id.* The bill also provides that a positive test result can not be used against the defendant in a later criminal proceeding "for knowingly committing an act of sexual penetration while infected with a venereal disease." *Id.*

With respect to Assembly Bill 220, Assemblymen Catania and Zecker pre-filed it for introduction in the 1992 session. *See* A. 220, 206th Leg. 1st Reg. Sess. (1992) [hereinafter A220]. A220 was different from A897 in one significant way. In contrast to A897's mandatory requirement that individuals must undergo testing at the request of their victim, A220 allowed persons arrested for sexual assault to *voluntarily* submit to serological tests for AIDS. *Id.* A220 only compelled such testing at the request of the victim if the defendant was actually *convicted* of the offense. *Id.*

<sup>69</sup> *See* N.J. STAT. ANN. § 2C:43-2.2 (West 1993). The statute states in relevant part:

a. In addition to any other disposition made pursuant to law, a court shall order a person convicted of, indicted for or formally charged with, or a juvenile charged with a delinquency or adjudicated delinquent for an act which if committed by an adult would constitute, aggravated sexual assault or sexual assault as defined in subsection a. or c. of N.J.S. 2C:14-2 to submit to an approved serological test for acquired immune deficiency syndrome (AIDS) or infection with human immunodeficiency virus (HIV) or any other related virus identified as a probable causative agent of AIDS. The court shall issue such an order only upon the request of the victim and upon application of the prosecutor made at the time of indictment, charge, conviction or adjudication of delinquency. The person or juvenile shall be ordered by the court to submit to such repeat or confirmatory tests as may be medically necessary.

e. Upon receipt of the result of a test ordered pursuant to subsection a. of this section, the Office of Victim-Witness Advocacy shall provide the victim with appropriate counseling, referral for counseling and if appropriate, referral for health care. The office shall notify the victim or make appropriate arrangements for the victim to be notified of the test result.

*Id.*

In addition, Section 2A:4A-43.1 provides:

In accordance with section 4 of P.L. 1993, c. 364 (C.2C:43-2.2) and in addition to any other disposition authorized pursuant to N.J.S. 2A:4A-43, a court shall order a juvenile charged with delinquency or adjudicated delinquent for an act which if committed by an adult would constitute aggravated sexual assault or sexual assault as defined in subsection a. or c. of N.J.S.2C:14-2 [sic] to submit to an approved serological test for acquired immune deficiency syndrome (AIDS) or infection with the human immunodeficiency syndrome (HIV) or any other related virus identified as a probable causative agent of AIDS.

*See* N.J. STAT. ANN. § 2A:4A-43.1 (West 1993).

assault to demand that their offenders be subject to mandatory testing for AIDS and HIV.<sup>70</sup>

Despite the seemingly prompt enactment of these statutes, the underlying bills had been on the Assembly floor for a number of years.<sup>71</sup> The scope of the original bills and their applicability to sexual offenders were subject to many revisions,<sup>72</sup> and subsequently modified to expand the field of testing to provide for follow-up testing and specific disclosure procedures.<sup>73</sup> In addition, the bills were refined to insure that the results did not become a part of the individual's criminal record.<sup>74</sup>

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<sup>70</sup> See N.J. STAT. ANN. § 2A:4A-43.1, § 2C:43-2.2.

<sup>71</sup> See N.J. STAT. ANN. § 2A:4A-43.1, § 2C:43-2.2.

<sup>72</sup> See A. 897 and 220, 206 N.J. 1st Leg. Sess. (1992) [hereinafter A897/220]. On April 6, 1992, Assemblymen Stuhltrager, Catania, Wolfe, and Zecker introduced an Assembly Committee Substitute for A897/220. *Id.* Following the introduction of the A897/220, the Assembly Judiciary, Law and Public Safety Committee reported favorably to the Assembly Committee Substitute. See ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE STATEMENT FOR A. NOS. 897 and 220 (1992) [hereinafter ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE STATEMENT]. The bill in its original form did not require testing upon conviction or adjudication of delinquency which is now included in A897/220. *Id.* A897/220 required testing regardless of any showing that the offense involved or was likely to involve the transmission of bodily fluids. *Id.* In making this change, New Jersey comported with the federal requirements under 42 U.S.C.A. § 3756(f). *Id.*

The A897/220 also included a provision "that any order issued shall include a requirement that follow-up tests for HIV infection shall be performed six months and 12 months after the date of the initial test, if necessary after the committee heard testimony indicating that a single, initial test for HIV infection may not show the infection." *Id.* at 2. A897/220 provided that the results of the serological test were to be sent to the Department of Health. *Id.* Whereas in the original bill, the results were to be sent to the court. *Id.* Further, the Commissioner of the Department of Health shall keep a record of the names and addresses of persons tested and may not forward the lists to other persons outside the Department of Health. *Id.* The committee stated "that it is not the intention of the committee to infringe in any manner on a person's ability to communicate freely with a physician about the results of the test and possible courses of treatment." *Id.*

In addition, A897/220 changed the original bill and disallowed the results of the test to become part of a person's criminal or juvenile record. *Id.* A897/220 added a new subsection which provides that persons who perform the testing in accordance with the specifications of this act, will be provided immunity under the provisions of P.L. 1986, c. 189. *Id.* Finally, the Commissioner of the Department of Health shall approve the techniques and methods for the serological testing for AIDS, HIV, and any other sexually transmitted diseases. *Id.* at 2-3.

<sup>73</sup> See ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE STATEMENT, *supra* note 72.

<sup>74</sup> See ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE STATEMENT, *supra* note 72.

As a matter of economics, the proposed bills gave rise to certain budgetary concerns.<sup>75</sup> The predicted fiscal impact of these bills varied widely from the Department of Health to the Office of Management and Budget.<sup>76</sup> Ultimately, the Appropriations Committee conducted an independent cost analysis and presented an economically favorable forecast that was endorsed by the Legislature.<sup>77</sup> Only thereafter, and at the urging of Congress, were the

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<sup>75</sup> See FISCAL NOTE TO ASSEMBLY COMMITTEE SUBSTITUTE FOR A. NOS. 897 and 220 (1992) [hereinafter FISCAL NOTE]. On June 10, 1992, a fiscal note indicating the impact of the bills on the Department of Health was released which estimated yearly testing costs totaling a minimum of \$220,000. *Id.* The Office of Legislative Services stated that such costs are likely to be higher because the costs for certain tests are unknown and "if testing costs are charged off against federal accounts, testing costs will be higher as the federal government is billed for fringe benefits." *Id.*

The Office of Legislative Services used the following assumptions to form its estimate: (1) during 1990 approximately 220 convictions were made under N.J.S. § 2C:14-2 a. and c.; (2) only persons charged with petty disorderly persons or disorderly persons sex offenses were considered; (3) the costs per unit for the various tests are as follows: ELISA - \$4.75, and Confirmatory HIV - \$20.41; (4) the Department of Health estimated that six percent of persons tested for HIV/AIDS would test positive and require follow-up tests six and twelve months after the initial test; (5) the Department of Health will provide counseling, referrals, and information to all persons with HIV, AIDS, Hepatitis B, or any other sexually transmitted disease; (6) the costs of treatment will be absorbed by current funding and "no new treatment costs will be incurred, as the Substitute does not mandate that treatment be provided." *Id.*

On the other hand, the Department of Health and Office of Management and Budget provided substantially different estimates with regard to the fiscal impact of A897/220. *Id.* The following chart indicates the costs estimated by the two offices:

	Year 1	Year 2	Year 3
Health Administration	\$1,005,000	\$1,053,000	\$1,102,000
Other Services	\$3,102,000	\$3,257,000	\$3,420,000
	\$4,107,000	\$4,310,000	\$4,522,000

[sic].

*Id.* The Department of Health administrative costs included the hiring of approximately 26 public health workers and other services costs included HIV testing for approximately 20,000 persons and treatment for about 6,000 persons. *Id.*

The fiscal note stated that the information given by the Department of Health and the Office of Management and Budget:

is not in accord with the mandates of the A897/220 in that it (a) is limited to testing for the HIV virus and does not include data on the cost of testing for other sexually transmitted diseases; (b) includes costs associated with the treatment of persons with HIV and AIDS; and (c) broadly interprets the crimes subject to testing to include persons arrested for drug offenses and aggravated assaults even though such offenses are generally not disorderly persons or petty disorderly persons offenses.

*Id.*

<sup>76</sup> See FISCAL NOTE, *supra* note 75.

<sup>77</sup> See ASSEMBLY APPROPRIATIONS COMMITTEE STATEMENT FOR A. NOS. 897 and 220



bills passed into law.<sup>78</sup>

Significantly, however, New Jersey's statutes go beyond the federal legislation by permitting testing of those merely *charged with or indicted* for sexual assault or aggravated assault.<sup>79</sup> More specifically,

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(1992) [hereinafter ASSEMBLY APPROPRIATIONS COMMITTEE STATEMENT] Less than a year later, on February 22, 1993, the Assembly Appropriations Committee reported favorably on A897/220 and released a statement estimating substantially lower costs for initial testing. *Id.* According to the Division of Criminal Justice in the Department of Law and Public Safety, the percentage of instances where a victim would request testing for HIV or AIDS of a sexual offender is unknown. *Id.* at 2. The division, using the number of convictions annually, 1,300 in 1992, estimated the following fiscal impact on New Jersey: "[a]ssuming an unlikely 100% request rate, assuming that approximately 1,300 persons are arrested for sexual assault each year and assuming all offenders are tested at the victim's request, the division estimates the cost for all initial tests would be approximately \$13,000 . . ." *Id.* Furthermore, according to the Division of Criminal Justice, by enacting A897/220, New Jersey would avoid a loss of \$1.2 million or 10% of federal grants received for victim services. *Id.*

The Assembly Appropriations Committee noted that according to the Division of Criminal Justice in the Department of Law and Public Safety it was anticipated that most of the testing would be performed by the Department of Corrections. *Id.* at 2. The department would be able to accommodate the testing because the Department of Corrections already tests inmates on a voluntary basis. *Id.* According to the A897/220, the Office of Victim-Witness Advocacy would furnish counseling, support, assistance in obtaining testing, and any other necessary services to victims of sexual assault. *Id.* at 1.

In addition, a court may order a defendant at his or her sentencing to pay for testing or the Office of Victim-Witness Advocacy, an office in the Division of the Criminal Justice in the Department of Law and Public Safety, shall reimburse the Department of Health or Department of Corrections for the cost of testing defendants. *Id.* Further, the Assembly Appropriations Committee Statement provides that the "victim may obtain any of the services required by the federal law from a combination of sources including the Office of Victim-Witness Advocacy, DOH Rape-Care program, and the Violent Crimes Compensation Board." *Id.*

<sup>78</sup> See N.J. STAT. ANN. §§ 2C:43-2.2, 2A:4A-43.1. On February 22, 1993, nearly a year after Assemblyman Stuhltrager's introduction of Bill 897, with support of Assemblymen Catania, Wolfe, and Zecker and additional sponsorship from Assemblyman Bagger, Assemblywomen Farrgher, Assemblymen Frelinghuysen, Gibson, Kamin, Kavanaugh, Lance, Mattison, Romano, Assemblywoman J. Smith, and Assemblyman Watson, the Committee Substitute for Assembly Bill Nos. 897 and 220 was adopted amending P.L. 1985, c. 404, P.L. 1991, c.329 and supplementing Titles 2A and 2C of the New Jersey Statutes. See A. 897 and 220, 206 N.J. Leg. 1st Sess. (1993) (enacted).

<sup>79</sup> See N.J. STAT. ANN. § 2C:14-2 (West 1989). The relevant part provides:

- a. An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances: (1) The victim is less than 13 years old; (2) The victim is at least 13 but less than 16 years old; and (a) The actor is related to the victim by blood or affinity to the third degree, or (b) The actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status, or (c) The actor is a foster parent, a

the statutes authorize the court to order testing at the request of the victim and upon the application of the prosecutor made at the time of indictment, charge, conviction, or adjudication.<sup>80</sup> In addition, the statutes permit the court to order repeat or confirmatory tests that are deemed medically necessary.<sup>81</sup> All test results are immediately furnished to the victim by the Office of Victim-Witness Advocacy.<sup>82</sup>

To a certain degree, these statutes facially afford the tested individual some confidentiality.<sup>83</sup> Specifically, it places a gag order on those privy to the test results by explicitly prohibiting them from disclosing the test results unless authorized by law or court order.<sup>84</sup> However, this confidentiality provision is of little effect because the informed victim is conspicuously absent from the controlling language of the provision and is therefore free to reveal the results to the public at large.<sup>85</sup>

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guardian, or stands in loco parentis within the household; (3) The act is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, homicide, aggravated assault on another, burglary, arson or criminal escape; (4) The actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object; (5) The actor is aided or abetted by one or more other persons and either of the following circumstances exists: (a) The actor uses physical force or coercion, or (b) The victim is one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated; (6) The actor uses physical force or coercion and sever personal injury is sustained by the victim.

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b. An actor is guilty of sexual assault if he commits an act of sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim.

*Id.*

<sup>80</sup> See N.J. STAT. ANN. §§ 2C:43-2.2, 2A:4A-43.1

<sup>81</sup> See *id.* §§ 2C:43-2.2, 2A:4A-43.1

<sup>82</sup> See *id.* §§ 2C:43-2.2, 2A:4A-43.1

<sup>83</sup> See *id.* §§ 2C:43-2.2, 2A:4A-43.1

<sup>84</sup> See *id.* §§ 2C:43-2.2, 2A:4A-43.1. Section (f) explicitly prohibits the Department of Corrections, the Office of Victim-Witness Advocacy, the health care provider, the health care facility or any counseling services from disclosing the test results unless authorized by law or court order. *Id.*

<sup>85</sup> See *supra* Part VI; see also N.J. STAT. ANN. §§ 2C:43-2.2, 2A:4A-43.1.

#### IV. *The Constitutional Ramifications of Mandatory Testing*

##### A. *The Fourth Amendment and the Special Needs Test*

Faced with the deadly AIDS epidemic, it is easy to understand why legislators have enacted mandatory testing programs for sexual offenders.<sup>86</sup>

However, in the rush to help innocent victims, specifically victims who may have been exposed to the virus, legislators have enacted laws which by their very urgency implicate the Fourth Amendment.<sup>87</sup>

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not infringe upon an individual's right to be free from unreasonable searches and seizures.<sup>88</sup> By virtue of the Fourteenth Amendment, the Fourth Amendment is applicable to states and their officials.<sup>89</sup> While the Fourth Amendment does not prohibit all searches and seizures, it proscribes only those activities which are deemed unreasonable.<sup>90</sup> In order to determine whether a search is reasonable, a court will probe the circumstances surrounding the search and examine the nature of the search itself.<sup>91</sup> Then, by balancing the individual's right against the government's interest, a court effectively determines whether a particular search is legitimate.<sup>92</sup>

In most cases, a search will be found to be unreasonable unless it is conducted pursuant to a warrant based on probable cause, including *ipso facto*, particularized suspicion.<sup>93</sup> However, in recent

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<sup>86</sup> See Field, *supra* note 21, at 34. See also *id.* at 36 (discussing that mandatory testing may be justifiable, "partly because there may be circumstances in which the information could have utility and also because it seems less objectionable to force the test when the person required to submit to it is culpable and hence can appropriately be punished.").

*Id.* at 36.

<sup>87</sup> See Field, *supra* note 21, at 34; see also Mary C. Morgan, *The Problems of Testing for HIV in the Criminal Courts*, 29 JUDGES' J. 22, 23 (1990).

<sup>88</sup> See U.S. Const. amend IV.

<sup>89</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985).

<sup>90</sup> See *Skinner*, 489 U.S. at 619 (citing *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Schmerber v. California*, 384 U.S. at 768)). See also *U.S. Carroll v. United States*, 267 U.S. 132, 146 (1925).

<sup>91</sup> See *Skinner*, 489 U.S. at 619 (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

<sup>92</sup> See *Skinner*, 489 U.S. at 619 (citing *Delaware v. Prouse*, 440 U.S. 648, 654; *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

<sup>93</sup> See *Payton v. New York*, 445 U.S. 573, 586 (1980).

years, the absolute requirement of probable cause based on individualized suspicion has been greatly abated on occasion.<sup>94</sup> Typically, the courts will subordinate the requirement for individualized suspicion in cases in which the suspicion-based requirement would be inappropriate or impracticable.<sup>95</sup> This special category of analysis has been labeled the "special needs" exception.<sup>96</sup> Thus, where the government has special needs for the search, beyond the normal need for law enforcement, the court will simply balance the government's interest against the individual's expectation of privacy without any requirement to show particularized suspicion.<sup>97</sup>

The special needs doctrine was developed in two companion cases involving the constitutional power of the government to test

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<sup>94</sup> See *Skinner*, 489 U.S. at 624. "We made it clear, however, that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561). Describing the demise of the Fourth Amendment, Justice Marshall stated that the Majority in *Skinner* took "its longest step yet toward reading the probable-cause requirement out of the Fourth Amendment." *Id.* at 636 (Marshall, J., dissenting). Moreover, probable cause is not "fair-weather friends, present when advantageous, conveniently absent when 'special needs' make them seem not." *Id.* at 637. See also *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (noting that the constitutional protections intended by the Framers would be completely abolished if the Court were to consider and balance the "multifarious circumstances presented by different cases . . ."); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528-29 (1967) (determining that warrantless searches pursuant to housing code regulations are constitutional if the appropriate person gives consent); *New York v. Burger*, 482 U.S. 691, 700 (holding that the warrantless search of a junkyard was reasonable because the industry was pervasively regulated and therefore an individual involved in such a highly regulated industry necessarily maintained a lessened expectation of privacy).

<sup>95</sup> See *Skinner*, 489 U.S. at 623.

[I]mposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating, the objectives of the Government's testing program. We do not believe that a warrant is essential to render the intrusions here at issue reasonable under the Fourth Amendment.

*Id.* at 624.

<sup>96</sup> See *infra* note 97.

<sup>97</sup> See *Skinner*, 489 U.S. at 624. The Court announced that in limited circumstances, a search may be reasonable despite the absence of individualized suspicion. *Id.* Specifically, this may occur only if the privacy interest intruded upon is slight, and an important state interest furthered by such intrusion would necessarily be placed in jeopardy by the requirement of individualized suspicion. *Id.*

individuals for illegal drug use.<sup>98</sup> In *Skinner v. Railway Labor Execs. Assoc.*,<sup>99</sup> the Federal Railroad Administration (FRA) instituted regulations which requiring mandatory warrantless blood and urine tests of railroad employees involved in a major train accident.<sup>100</sup> The *Skinner* Court concluded that the government's interest in protecting the safety of passengers and employees constituted a special need.<sup>101</sup> The Court determined that a warrant requirement would not only frustrate the objectives of the testing scheme but that it would also be impracticable to require a showing of particularized suspicion under the exigent circumstances.<sup>102</sup> The Court also concluded that the railroad employees expectations of privacy were diminished by virtue of their employment in the pervasively regulated railroad industry.<sup>103</sup>

Notably, the *Skinner* Court accented the fact that blood and urine tests were a very effective means of discerning on the job impairment and of deterring drug use.<sup>104</sup> The Court relied specifically on the record, which included detailed studies conducted by

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<sup>98</sup> See generally *id.* at 602; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

<sup>99</sup> 489 U.S. 602 (1989)

<sup>100</sup> See *Skinner*, 489 U.S. at 606. The "Post-Accident Toxicological Testing" is a mandatory regulation which provides that all employees directly involved in a major railroad accident give blood and urine samples to the FRA for toxicological testing. *Id.* at 609. A major train accident is any accident "that involves (i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or reportable injury, or (iii) damage to railroad property of \$500,000 or more." *Id.*

<sup>101</sup> See *id.* at 620-21.

<sup>102</sup> See *id.* at 631. The requirement of individualized suspicion of drug or alcohol use would undoubtedly "impede an employer's ability to obtain this information, despite its obvious importance." *Id.* In addition, the scene of a railroad accident is extremely chaotic and investigators may find it extremely difficult to determine if a particular employee is impaired. *Id.*

<sup>103</sup> See *id.* at 627. "We do not suggest, of course, that the interest in bodily security enjoyed by those employed in a regulated industry must always be considered minimal. Here, however, the covered employees have long been a principal focus of regulatory concern." *Id.* at 628.

<sup>104</sup> See *id.* at 632. The Court stated that the FRA regulations provide "an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place." *Id.* at 629. Furthermore, the regulations also have a deterrent effect because the employees know with certainty that they will be tested if a major train accident occurs. *Id.* at 630. "While it is impossible to guarantee that no mistakes will ever be made in isolated cases, respondents have challenged the administrative scheme on its face. . . . Respondents have provided us with no reason for doubting the FRA's conclusion that the tests at issue here are accurate in the overwhelming majority of cases." *Id.* at 632-33 n.10.

the FRA, that supported the conclusion that the tests were highly reliable.<sup>105</sup> Thus, in a 6 to 3 decision, the Court carved out the "special needs" exception to the Fourth Amendment, concluding that where the government's need to conduct warrantless searches outweighs any of the employees' privacy expectations, there is no Fourth Amendment violation.<sup>106</sup>

Following a similar analysis, the Court in *National Treasury Employees Union v. Von Raab*<sup>107</sup> upheld a policy based on the warrantless, suspicionless drug testing of U.S. Customs Service employees applying for promotions to positions that involved carrying firearms or directly participating in drug interdiction.<sup>108</sup> The Court determined that the government had a compelling interest in ensuring that front line Customs agents are physically fit and honest,<sup>109</sup> and such a warrant requirement would compromise the goals of the testing program.<sup>110</sup>

Evaluating the Customs agents' privacy interests, the Court determined that the agents' privacy expectations were lessened because they should reasonably expect inquiry into their fitness and character when applying for a promotion.<sup>111</sup>

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<sup>105</sup> See *Skinner*, 489 U.S. at 632-33 n.10.

<sup>106</sup> See *id.* at 634.

In light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served by toxicological tests in this context, and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees, we believe that it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired.

*Id.*

<sup>107</sup> 489 U.S. 656 (1989)

<sup>108</sup> See *id.*

<sup>109</sup> See *Von Raab*, 489 U.S. at 670.

<sup>110</sup> See *Von Raab*, 489 U.S. at 667. The Customs Service "mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions." *Id.* The *Von Raab* Court emphasized that a warrant would afford additional protections for an agent because the testing is not discretionary. *Id.* Also, there are no special facts for a magistrate to evaluate. *Id.* In addition, employees have no choice but to submit to a drug test when they apply for a covered position. *Id.* at 667 (citing *South Dakota v. Opperman*, 428 U.S. 364, 383 (1976) (Powell, J., concurring)).

<sup>111</sup> See *Von Raab*, 489 U.S. at 672. Pursuant to the testing scheme, only employees who have sought a promotion or transfer to named positions would be tested. *Id.* Applicants are aware at the outset that a drug test is required. *Id.* n.2. Furthermore, the applicants have advance notification as to the date of the test, "thus reducing to a

As in *Skinner*, the *Von Raab* Court also examined the record and established that the urinalysis testing bore a close and substantial relation to the government's interest in deterring drug users from seeking promotions.<sup>112</sup> The Court ultimately concluded, just as they had in *Skinner*, that the regulations permitting warrantless, suspicionless drug testing of certain Customs employees was reasonable and within the breadth of the Fourth Amendment.<sup>113</sup>

B. *The Constitutionality of N.J. Stat. Ann. §§ 2C:43-2.2 and 2A:4A-43.1*

Although the Supreme Court has yet to decide whether mandatory AIDS testing of sexual offenders is constitutional, several federal and state courts have addressed mandatory AIDS testing in other areas of the law.<sup>114</sup>

Several commentators agree that the mandatory testing of sex offenders would be evaluated under the special needs doctrine.<sup>115</sup> In fact, quite recently, the New Jersey Courts have engaged in such examination.<sup>116</sup>

On the afternoon of May 7, 1994, three juveniles forced a mentally retarded girl to engage in anal intercourse and perform fellatio on each of them.<sup>117</sup> Following this meretricious crime, the

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minimum any 'unsettling show of authority,' that may be associated with unexpected intrusions on privacy." See *id.* (noting *Delaware v. Prouse*, 440 U.S. 648, 657).

<sup>112</sup> See *Von Raab*, 489 U.S. at 676. The Drug Screening Task Force, established by the Commissioner of Customs, concluded that with the onset of new technology, urinalysis drug testing is reliable, accurate, and valid. *Id.* at 660. Petitioner argued that the testing procedures were ineffective because the employee can simply refrain from using the drugs before testing. *Id.* at 676. However, despite the fact that the testing scheme provides for advance notice, the Court was quick to dismiss petitioner's argument asserting "no employee reasonably can expect to deceive the test by the simple expedient of abstaining after the test date is assigned." *Id.*

<sup>113</sup> See *id.* at 677.

<sup>114</sup> See *e.g.* *People v. Adams*, 597 N.E.2d 574 (Ill. 1992) (mandatory HIV testing of prostitutes); *People v. C.S.* 583 N.E.2d 726 (Ill. App. Ct. 1991) (mandatory HIV testing of persons convicted of unauthorized use of hypodermic needle or syringe); *Johnetta J. Municipal Court*, 267 Cal. Rptr. 2d 666 (1990) (mandatory HIV testing of person charged with interfering with official duties of public safety employees); *Love v. Superior Court*, 276 Cal. Rptr. 660 (1990) (mandatory HIV testing of persons convicted of soliciting prostitutes); *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820 (5th Cir. 1990) (mandatory HIV testing of hospital employees).

<sup>115</sup> See *e.g.*, *Gostin*, *supra* note 9, at 1442; *Morgan*, *supra* note 87, at 24.

<sup>116</sup> See *In Re J.G.*, 283 N.J. Super. 32 (Ch. Div. 1995), *rev'd*, 289 N.J. Super. 575, 674 A.2d 625 (App. Div. 1995), *cert. granted*.

<sup>117</sup> See Petitioner's Brief at 2, *In Re J.G.*, N.S., and J.T., 283 N.J. Super. 32 (Ch. Div.

juveniles were charged with juvenile delinquency by acts which if committed by an adult would constitute first degree aggravated sexual assault.<sup>118</sup> The state, upon the request of the victim's parents, thereafter sought an order pursuant to N.J.S.A. §§ 2C:43-2.2 and 2A:4A-43.1 authorizing the mandatory testing of the three juveniles for HIV.<sup>119</sup> The juveniles, joined by the American Civil Liberties Union of New Jersey, opposed the state's order for testing on the ground that the statutes violated of Fourth and the Fourteenth Amendments.<sup>120</sup>

In *State of New Jersey in the Interest of J.G., N.S., and J.T.*, the trial court ultimately determined that N.J.S.A. §§ 2A:4A-43.1 and 2C:43-2.2 were unconstitutional because they violated the reasonableness requirement of the Fourth Amendment.<sup>121</sup> At the outset, the court reminded that the involuntary extraction of blood is a search within the purview of the Fourth Amendment.<sup>122</sup> Further, the court flatly rejected the traditional probable cause analysis, and instead applied the "special needs" test.<sup>123</sup>

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1995), *rev'd*, 289 N.J. Super. 575, 674 A.2d 625 (App. Div. 1995), *cert. granted*, (No. A-3585-94T5) (on file at Seton Hall Legislative Bureau).

118 *See In Re J.G.*, 283 N.J. Super. at 36, 660 A.2d at 1276.

119 *See id.*, 660 A.2d at 1276.

120 *See id.* at 37, 660 A.2d at 1276.

121 *See id.* at 55, 660 A.2d at 1287.

122 *See id.* at 49, 660 A.2d at 1284; *see also Schmerber v. California*, 384 U.S. at 767 (holding that the compulsory extraction of blood constitutes a search under the Fourth Amendment).

123 *See In Re J.G.*, 283 N.J. Super. at 50, 660 A.2d at 1284. The trial court at the outset determined that the correct Fourth Amendment test was the "special needs" test. *Id.* The trial court rejected the *Schmerber v. California* test and stated that because the testing was not to be utilized by the prosecution for law enforcement or evidentiary purposes, the traditional probable cause/warrant analysis was inappropriate. *Id.*

As a preliminary matter, the trial court held an evidentiary hearing to resolve the juveniles' assertion that the statutes do not further the governmental interest in protecting victims of sexual assault. *Id.* at 37, 660 A.2d at 1277. The State objected to the evidentiary hearing, maintaining that the judiciary cannot second guess and review the legislature's decision. *Id.* at 53, 660 A.2d at 1285. Notwithstanding this objection, the trial court offered each party the opportunity to present expert testimony on the contested issue of whether the mandatory testing scheme furthers the state's interest in aiding victims of sexual assault. *See* Brief of *Amicus Curiae* American Civil Liberties Union Of New Jersey in Support of Appeal and Petition For Certification at 7-8, *In Re J.G., N.S., and J.T.*, 283 N.J. Super. 32 (Ch. Div. 1995), *rev'd*, 289 N.J. Super. 575, 674 A.2d 625 (App. Div. 1995), *cert. granted*, (No. 42,298) [hereinafter ACLU Brief-Petition For Certification] (on file at Seton Hall Legislative Bureau)]. However, the state decided not to present any such evidence. *Id.*

At this hearing, counsel for the juveniles examined three experts witnesses who



The trial court first recognized that protecting victims of sexual assault is a legitimate and compelling governmental interest.<sup>124</sup> Next, the trial court found that the intrusion upon the defendant's privacy interest was substantial.<sup>125</sup> The trial court then turned its attention to the expansive breadth of the statutes which subject those persons who are merely *charged* with sexual assault to the same procedures as those convicted of the crime.<sup>126</sup> Without hesitation, the trial court stated that the statutes improperly presume guilt and thus tarnish the defendant before the defendant is even convicted of a crime.<sup>127</sup> Interestingly, the court maintained that a

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provided testimony on three specific areas: (1) the current testing for HIV, (2) the present treatment available for possible exposure to HIV; and (3) the psychological impact on the victim after learning the HIV status of the offender. *See In Re J.G.*, 283 N.J. Super. at 37, 660 A.2d at 1277.

On the heels of this testimony, the trial court determined that the evidence clearly established that the testing would be of no benefit in the diagnosis, treatment or psychological counseling of a victim of sexual assault. *Id.* at 53-4, 660 A.2d at 1286. Notwithstanding the truly dispositive import of this determination, the court went on to apply the special needs balancing test. *Id.* at 51, 660 A.2d at 1284.

<sup>124</sup> *See In Re J.G.*, 283 N.J. at 53, 660 A.2d at 1286. *See also* West Caldwell v. Caldwell, 26 N.J. 9, 30 (1958) (stating that safeguarding the health of the citizens of New Jersey is essential).

The state has an important interest in protecting the rights of victims. *See In Re J.G.*, 289 N.J. Super. at 588, 674 A.2d at 631. The information a victim obtains concerning the assailant's HIV status may ease the victim's anxiety may encourage the victim to monitor her status. *Id.*, 674 A.2d. 631-32. An appropriately counseled victim will have been advised that she must continue HIV surveillance. *Id.*, 674 A.2d 632. A court should be hesitant to dismiss a victim's request to know the HIV status of her assailant simply because a psychologist decides such information is not necessary. *Id.*, 674 A.2d 632. Moreover, the information derived from testing the assailant has yet another benefit. *Id.*, 674 A.2d 632. The information obtained can aid in effective probation and prison management of the offenders, including suitable treatment and counseling, if the assailant is infected. *Id.*, 674 A.2d 632.

<sup>125</sup> *See In Re J.G.*, 283 at 51-2, 660 A.2d at 1285. The trial judge stated that any compulsory medical procedure greatly intrudes on an individual's right to control his own body. *Id.* at 52. Observing the intrusion, the trial judge stated:

It is difficult to imagine a search and seizure more intrusive than forcing an individual to first submit to the withdrawal of blood from his body, and then testing that blood for a disease which subjects those who have it to widespread and invidious discrimination, and then revealing the results of that test to an individual who is free to pass that information on to whom-ever she wishes.

*Id.*

<sup>126</sup> *See id.*, 660 A.2d at 1285. The trial court emphasized that at the accusatory level, the defendants are entitled to the "entire panoply of due process protections" because they have not been convicted of any crime. *Id.* at 51.

<sup>127</sup> *See id.* at 51-52, 660 A.2d at 1285.

defendant at the charge or accusatory phase of the criminal justice system is entitled to an *undiminished expectation of privacy*.<sup>128</sup>

After resolving that the intrusion of privacy was substantial and that the government's interest was compelling, the trial court assessed the medical and psychological utility of testing defendants.<sup>129</sup> Relying on the medical testimony, the court found that the defendant's HIV status was irrelevant to the victim.<sup>130</sup> The court enunciated that the victim should be tested in order to determine her own HIV status.<sup>131</sup> Finally, the trial court found that the mandatory testing scheme failed the special needs test because the testing did not bear a close and substantial relation to the govern-

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<sup>128</sup> See *id.* at 51, 660 A.2d at 1285.

<sup>129</sup> See *In Re J.G.*, 283 N.J. Super. at 53-4, 660 A.2d at 1286.

<sup>130</sup> *Id.* at 54, 660 A.2d at 1286. According to expert testimony, since an individual can infect others for approximately 6 months without developing detectable antibodies, the victim must be tested. *Id.* at 43, 660 A.2d at 1280. Knowing the offender's HIV status would in no way affect the approach for diagnosing the victim. *Id.*, 660 A.2d at 1280.

The court proclaimed that a defendant's negative test result should have no effect on the victim's psychological or medical decisions due to the chance that the defendant could be in the "window period." *Id.* at 48, 660 A.2d at 1286.

Thus, this negative test result could provide the victim with a false sense of security. *Id.* Conversely, a positive result would be of no medical value since treatment would not begin until the victim herself tested positive. *Id.* at 45, 660 A.2d at 1274. A positive result simply means that at the time the test was rendered, the offender was HIV positive. *Id.* at 44, 660 A.2d at 1280. A physician cannot use this information to relate back and ascertain the offender's status at the time of the assault. *Id.*, 660 A.2d at 1280. According to the expert testimony, even if direct viral load tests were used, a physician would be unable to ascertain the HIV status of the victim. *Id.*, 660 A.2d at 1281.

In addition, there is no approved medical post-exposure treatment available for sexual assault victims. *Id.* at 45, 660 A.2d at 1281. However, there has been experimental use of AZT in limited instances such as when a hospital worker is stabbed with an infected needle. *Id.* at 46, 660 A.2d at 1281-82. Despite this experimental use, AZT is not recommended as a prophylactic in sexual assault cases. *Id.* at 45, 660 A.2d at 1281. According to the expert testimony, the needle stick program in which AZT is started within 12 hours of exposure and continued for six weeks, has been characterized "as a leap of faith with no basis for making that recommendation. To take that further, I guess, and say that someone who may have been sexually exposed would benefit if started within 12 hours with AZT, is I think a further leap of faith *based upon no evidence.*" *Id.* quoting testimony of Dr. Oleske at n. 10, 45, 660 A.2d at 1281 (emphasis added).

<sup>131</sup> See *id.* at 44, 660 A.2d 1281. Based on the expert testimony, the trial court determined that "the only rational, scientifically viable method of assisting the victim in diagnosing her HIV status is to test her. The assailants' test results are simply irrelevant." *Id.*, 660 A.2d at 1281.

mental interest of assisting victims.<sup>132</sup> Thus, the trial court declared that New Jersey Statute sections 2C:43-2.2 and 2A:4A-43.1 were unconstitutional on their face and as applied to the juveniles.<sup>133</sup>

However, the New Jersey Appellate Division disagreed and reversed the trial court's determination.<sup>134</sup> It held that the statutes were constitutional under the reasonableness requirement of the Fourth Amendment.<sup>135</sup> Relying on *Skinner* and *Von Raab*, the Appellate Division criticized the trial court for placing too much weight on the adjudged lack of medical utility of the testing.<sup>136</sup> The Appellate Division did not believe that this factor was dispositive as to whether the testing scheme bore a close and substantial relation to the governmental interest of assisting victims.<sup>137</sup> To the contrary, the Appellate Division proclaimed that inquiry must fo-

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<sup>132</sup> See *id.* at 55, 660 A.2d at 1287. Because the testing scheme did not further the state's legitimate goals, the trial court did not reach the issue of whether the defendants' privacy interests outweighed the state's goal of assisting victims of sexual assault. *Id.* at 54, 660 A.2d at 1286.

<sup>133</sup> See *id.*, 660 A.2d at 1287. In so deciding, the trial court proclaimed:

The 1990's have been classified as the 'plague years.' These are times when fundamental human interaction is shrouded with the specter of death. In our zeal to deal with a disease which at this time is one hundred percent fatal, we have lashed out at its victims, at times preventing children from attending schools, at times preventing people from earning a living, at times denying people the basic need for human contact. In our fear and ignorance we have sought to help those, who through no fault of their own, become exposed to this deadly illness. However, it is the true measure of a free people to stand firm for the core principles that make them free, when the tide of ignorance and fear is running the other way.

*Id.* at 54-55, 660 A.2d at 1286.

<sup>134</sup> See *In Re J.G.*, 289 N.J. Super. at 578, 674 A.2d 625 (1995).

<sup>135</sup> See *id.*

<sup>136</sup> See *id.* at 584, 674 A.2d at 629. The Appellate Division noted that a trial court judge can conduct an evidentiary hearing and take testimony when faced with a determination of a statute's constitutionality. *Id.*, 674 A.2d at 629. However, the difficulty arises in assessing the weight such testimony can be afforded. *Id.*, 674 A.2d at 629. Indeed, a statute is entitled to a presumption of constitutionality. *Id.* at 583, 674 A.2d at 629. Clearly, it is not for the judiciary to weigh the evidence and second guess the legislature. *Id.*, 674 A.2d at 629. Accordingly, the party claiming the statute to be unconditional has the burden to negate every plausible basis which may reasonably support the law. *Id.*, 674 A.2d at 629 (citing *Fair Housing Council v. New Jersey Real Estate Comm'n*, 141 N.J. Super. 334, 338, 358 A.2d 221, 222-23 (App. Div. 1976))

<sup>137</sup> See *id.* at 591, 674 A.2d at 633. The Appellate Division denounced the trial court for requiring the testing scheme to be narrowly tailored to achieve the governmental interest and for mandating that the government's special need be dependent on the medical utility of the testing procedure. *Id.* at 589, 674 A.2d at 632. The Appellate Division stated that neither *Skinner* nor *Von Raab* stood for this proposition. *Id.*, 674 A.2d at 632.

cus not on the rationale behind the testing but as to whether the means chosen by the government were permissible under the Fourth Amendment.<sup>138</sup> Nonetheless, considering the changing nature of the medical field, the uncertainties about the virus, and the recent breakthroughs in the treatment and diagnosis of AIDS, the Appellate Division was unwilling to rule that the mandatory testing scheme has no medical or psychological utility.<sup>139</sup>

Reapplying the special need test, the Appellate Division held that the compelling state interest in the health and welfare of both the victim and the public greatly outweighed the defendant's interest in preventing a bodily intrusion and disclosure of his HIV status.<sup>140</sup> The court acknowledged that although the HIV testing is not absolute, the testing will mark the defendant's HIV status "at a

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<sup>138</sup> See *id.*, 674 A.2d at 633. The Appellate Division reiterated that the issue before the court was not whether the State has selected the best means of determining whether a victim has been infected with the virus, rather the issue is whether the means selected are constitutionally sound. *Id.* at 592, 674 A.2d at 633. The court explicitly relied on the two "special needs" companion cases, *Von Raab* and *Skinner* to support the proposition that the utility of the test is not determinative of its reasonableness. *Id.* at 590-91, 674 A.2d at 632-33.

In *Von Raab*, the petitioner set forth similar arguments regarding the utility of the testing procedures and their dispositive value. *Id.* at 590, 674 A.2d at 632. Specifically, the petitioner argued that the program was not a sufficient mechanism to justify the invasion on the individual's Fourth Amendment privacy rights. *Id.* The Court held that: "the mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity." *Id.*, 674 A.2d at 633 (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674-75). The Court stated that the program was designed to prevent the promotion of drug users to sensitive positions, and it was also designed to detect persons using drugs. *Id.*, 674 A.2d at 633 (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674-75). Therefore, the Court concluded that "[w]here, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." *Id.*, 674 A.2d at 633 (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. at 656, 674-75).

<sup>139</sup> See *In Re J.G.*, 289 N.J. Super. at 591, 674 A.2d at 633. The Appellate Division was reluctant to give the medical and psychological testimonies any conclusive effect. *Id.*, 674 A.2d at 633. The Appellate Division noted that Dr. Oleske stated several times during the evidentiary hearing that "researchers and practitioners in the field of HIV testing and treatment are still unravelling the mysteries of the virus and its course." *Id.*, 674 A.2d at 633. The Court emphasized that the public is frequently informed of medical breakthroughs in the treatment and diagnosis of HIV. *Id.*, 674 A.2d at 633. Therefore, "[b]ecause the field is not static, a court should be very hesitant to rule that a legislative scheme of mandated testing is medically and psychologically useless to the victim or the treatment community." *Id.*, 674 A.2d at 633.

<sup>140</sup> See *id.* at 592, 674 A.2d at 633.

point in time."<sup>141</sup> Further, the court noted that the results may ease the victim's fears.<sup>142</sup> Accordingly, the Appellate Division concluded that the statutes were constitutional and remanded the order requiring the defendants to participate in the mandatory testing.<sup>143</sup>

### V. *The Mandatory AIDS Testing Debate: Opponents vs. Proponents*

In the continuing debate over the appropriate balances between individual rights and victim rights, the issue of mandatory HIV testing of sex offenders has created an unusual collision of values.<sup>144</sup> The following section is dedicated to exploring this collision of values which has left the opponents focusing on the defendant's right to privacy, the unreliability of the tests, and the false sense of security that a victim obtains; and the proponents focusing on the emotional relief the testing provides the victims and the importance of early prophylactic treatment.<sup>145</sup>

#### A. *Opponents*

According to the opponents, testing an offender is of no benefit to the victim.<sup>146</sup> Opponents stress that testing an offender does not provide a victim with reliable or timely information about her own risk of infection.<sup>147</sup> Because of this unreliability, opponents maintain that the offender's HIV status cannot be safely utilized for purposes of determining whether HIV transmission has in fact occurred.<sup>148</sup>

An offender's test results can give host to a variety of different

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<sup>141</sup> See *id.* at 592, 674 A.2d at 633.

<sup>142</sup> See *id.*, 674 A.2d at 633.

<sup>143</sup> See *id.*, 674 A.2d at 633-34.

<sup>144</sup> See *infra* notes 146-82 (discussing the mandatory AIDS testing debate).

<sup>145</sup> See *infra* notes 146-82 (discussing the mandatory AIDS testing debate).

<sup>146</sup> See *AIDS Test That Sounds Good But Helps Nobody*, RECORD, Oct. 7, 1991, at A12. [hereinafter *AIDS Test That Sounds Good*]. See also Gary Spencer, *Bill to Allow HIV Testing of Suspects; Approved by State Senate; Assembly Passage Likely*, N.Y.L.J., June 5, 1996, at 1.

<sup>147</sup> See Brief of Amicus Curiae American Civil Liberties Union Of New Jersey in Opposition to the State's Motion to Compel HIV Testing at 14, In Re J.G., N.S., and J.T., 283 N.J. Super. 32 (Ch. Div. 1995), *rev'd*, 289 N.J. Super. 575, 674 A.2d 625 (App. Div. 1995), *cert. granted*, [hereinafter ACLU Brief] (on file at Seton Hall Legislative Bureau).

<sup>148</sup> See *id.*

interpretations.<sup>149</sup> Among others, a negative test result could indicate that the offender was either in the window period and has not yet developed the HIV antibodies, or perhaps, that he was not infected at all.<sup>150</sup>

On the other hand, there is a chance that if the offender tests positive for the virus he could have been infected after committing the rape, in which case the women would be in no danger at all.<sup>151</sup>

Opponents even contend that obtaining knowledge about an offender's HIV status may actually be counterproductive to a victim's recovery.<sup>152</sup> Opponents insist that mandatory testing laws give the victim a false sense of security because a tested offender may render a negative result, yet still carry the lethal disease.<sup>153</sup> Consequently, opponents claim that such laws intentionally mislead survivors about their own risk of infection.<sup>154</sup> Critics thus contend that no true medical benefit may be derived by the victim from the often premature classification of her offender.<sup>155</sup> Undoubtedly, opponents maintain that the only way a victim can obtain accurate and reliable information about her HIV status is to be tested herself.<sup>156</sup>

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<sup>149</sup> See *infra* notes 150-51. "Although all of us wish that we could immediately tell the sex-crime victim whether he or she has been infected with HIV, medical technology just does not permit this result at this time." See Matza, *supra* note 24, at 4.

<sup>150</sup> See *AIDS Test That Sounds Good*, *supra* note 146, at A12. See also ACLU Brief, *supra* note 147, at 15.

<sup>151</sup> See *AIDS Test That Sounds Good*, *supra* note 146, at A12. See also ACLU Brief, *supra* note 146, at 15; Beth Barnhill, *HIV Test For Sex Offenders Isn't a Simple Issue*, DES MOINES REG., Mar. 16, 1993, at 7.

<sup>152</sup> See Brief of *Amicus Curiae* the New Jersey Women & AIDS Network and The Legal Action Center, at 8, Supreme Ct. Docket No. 42,298 App. Div. A-3585-94Y5, (Oct. 8, 1996) [hereinafter AIDS Network Brief] (on file at Seton Hall Legislative Bureau).

<sup>153</sup> See ACLU Brief-Petition for Certification, *supra* note 123, at 20. If the test is negative, the victim may have a false sense of security regarding the true implications of the attack and her need to be tested. *Id.* If the test is positive, she may have profound psychological effects, "needlessly producing a sense of doom when in fact the actual probability for infection is extremely low." *Id.* at 21 (citing *In Re J.G.*, 283 N.J. Super. at 48, 660 A.2d at 1283).

<sup>154</sup> See *In Re J.G.*, 283 N.J. Super. at 48, 660 A.2d at 1283. Whether the offender's test renders a negative or positive result for HIV, there is a definite possibility that the victim will misuse the information to draw an erroneous conclusion about her own HIV status. *Id.*, 660 A.2d at 1283.

<sup>155</sup> See Barnhill, *supra* note 151, at 7. See also Richard Nangle, *AIDS Activist Scannell Honored at Ceremony*, SUNDAY TELEGRAM, Feb. 4, 1996, at B6; AIDS Network Brief, *supra* note 152, at 8.

<sup>156</sup> See Barnhill, *supra* note 151, at 7.

In addition to providing possibly false information as to the transmission of HIV, the information a victim acquires concerning her offender's HIV status may be emotionally debilitating.<sup>157</sup> Opponents contend that if a victim of a sexual assault focuses on her offender's HIV status, she, may form a dangerous reliance on the offender for the information only he can provide.<sup>158</sup> Thus, rather than concentrating on the offender's HIV status, opponents suggest that a rape victim should concentrate on taking care of herself and on regaining control of her life.<sup>159</sup>

Additionally, opponents urge that an offender's medical status would not affect a victim's medical treatment because there is no approved medical treatment or drug administration for victims who are merely exposed to the virus.<sup>160</sup> Critics support this position by proffering the bare statistics.<sup>161</sup> Specifically, they maintain that mandatory testing laws are simply not necessary because the chances of contracting AIDS from one unprotected sexual encounter are very slim.<sup>162</sup>

Opponents further assert that mandatory testing laws are punitive in nature<sup>163</sup> and insist that the money used for testing offenders would be better spent in rape education.<sup>164</sup> To this end, opponents maintain that while HIV testing may identify who is or is not infected, HIV testing of offenders does not prevent the actual

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<sup>157</sup> See ACLU Brief, *supra* note 123, at 21 (citing 283 N.J. Super. at 48, 660 A2d at 1283).

<sup>158</sup> See Nangle, *supra* note 155, at B6. According to Dr. Greenbaum, the Executive Director of New Jersey Coalition Against Sexual Assault, an expert in crisis counseling of victims, the information a victim obtains regarding her offender's status does not assist her in anyway. See *In Re J.G.*, 283 N.J. Super. at 47-48, 660 A.2d at 1283. The information necessarily ties the victim to her assailant. *Id.* Such a psychologically draining reliance prevents the victim from regaining control over her life. *Id.*

<sup>159</sup> See Deidre Raver, *Is the Feminist Group Becoming Rapists' Strongest Ally?* TULSA WORLD, Oct. 27, 1996, at G1; see also ACLU Brief-Petition for Certification, *supra* note 123, at 17, 19; AIDS Network Brief, *supra* note 152, at 8.

<sup>160</sup> See ACLU Brief, *supra* note 123, at 17; see also AIDS Network Brief, *supra* note 152, at 7.

<sup>161</sup> See *infra* note 162 and accompanying text.

<sup>162</sup> See *AIDS Test That Sounds Good*, *supra* note 146, at A12. See also ACLU Brief-Petition for Certification, *supra* note 123, at 20 (citing *In Re J.G.*, 283 N.J. Super. at 48, 660 A2d at 1283).

<sup>163</sup> See *Board Opposes Mandatory HIV Testing of Indicted Sex Offenders*, N.J.L.J., June 7, 1993, at 13.

<sup>164</sup> See Mona Charen, *NOW Doesn't Care About Welfare of Women*, DAYTON DAILY, Oct. 29, 1996, at 11A.

transmission of the virus nor does it halt the deadly epidemic.<sup>165</sup>

Finally, many opponents vehemently defend the offender's right to privacy.<sup>166</sup> Opponents focus on the effect this information will have on the offender and fear that he may lose his self esteem, self respect, and pride.<sup>167</sup> In addition, because the victim is free to tell whomever she wants, the offender may be forever ostracized in his community.<sup>168</sup> Many also believe that the mandatory testing laws will be used to discriminate against HIV positive people as a class.<sup>169</sup>

### B. *Proponents*

Contrary to opponents, proponents focus not on the medical utility of testing, but rather on the emotional relief victims will obtain from learning their perpetrators' HIV status.<sup>170</sup> Victims rights advocates praise the mandatory testing scheme because testing the offender helps relieve trauma experienced by a victim.<sup>171</sup> Consid-

<sup>165</sup> See *Nation Falls Short on Education*, CHI. SUN-TIMES, Dec. 11, 1995, at 34 [hereinafter *Nation Falls Short*]. Instead, education and the use of condoms and clean needles are necessary to stop the epidemic from spreading. *Id.*; see also *AIDS Test That Sounds Good*, *supra* note 146, at A12.

<sup>166</sup> See William Kelly, *Time to Value the Rights of Victims*, CHI. TRI., July 22, 1991, § Perspective, at 10. See also Nangle, *supra* note 155, at B2.

<sup>167</sup> See Kelly, *supra* note 166, at 10.

<sup>168</sup> See e.g., DISCRIMINATION AND AIDS, *supra* note 25.

<sup>169</sup> See Abigail Goldman & Chip Johnson, *Rapists Reveal HIV Status Under New Law*, L.A. TIMES, July 3, 1994, at B1 [hereinafter Goldman & Johnson].

<sup>170</sup> See Tim Poor, *New AIDS Testing Law Debated*, ST. LOUIS POST-DISPATCH, July 22, 1990, at 4D. Supporters advocate that negative test results may provide emotional relief for victims. See *In Re J.G.*, 289 N.J. Super. at 592, 674 A.2d at 633. According to Doctor Luce, the chief of staff at San Francisco General Hospital:

A negative test, even though not dispositive, can nonetheless be of great assistance in allaying the patient's fear. Allaying the fears of a patient can be a significant factor in treating that patient. Anxiety can cause or complicate medical problems and can impede recovery. Where a fatal disease is involved, having access to all information bearing on the question of possible exposure can be of great assistance in relieving a patient's anxiety.

See Transcript of Preliminary Hearing, 63 (November 29, 1994), In *Re J.G.*, N.S., and J.T., 283 N.J. Super. 32 (Ch. Div. 1995), *rev'd*, 289 N.J. Super. 575, 674 A.2d 625 (App. Div. 1995), *cert. granted*, [hereinafter Transcript] (on file at the Seton Hall Legislative Bureau).

<sup>171</sup> See Poor, *supra* note 170, at 4D. Even opponents of mandatory HIV testing concede that a victim and her family can experience peace of mind by knowing the offender's HIV status. See Transcript, *supra* note 170, at 42. Specifically, according to the testimony of Dr. Oleske: "If the victim and the victim's family were appropriately



ering the agony the offender has caused the victim, proponents urge that the victim, at the very least, is entitled to know her offender's HIV status.<sup>172</sup> Supporters assert that the anxiety experienced by victims cannot be quantified and that testing the offender should be permitted if only to alleviate the victims peace of mind.<sup>173</sup> To this end, proponents adamantly support giving victims any relief possible, even if it potentially threatens an attacker's right.<sup>174</sup>

Medically and socially, proponents claim that the AIDS epidemic has reached a point where mandatory testing is the correct thing to do.<sup>175</sup> Supporters maintain that there are clear medical benefits of early prophylactic treatment when testing is mandatory.<sup>176</sup> They purport that therapies like AZT are effective in slowing the disease's progression.<sup>177</sup> Supporters even suggest that early treatment with AZT after exposure to the virus may decrease the rate of infection.<sup>178</sup> Pragmatically, supporters believe that a blood test would assist the victim in deciding whether to begin or

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counseled by an individual who understands the medicine and science of HIV testing and after that was clearly explained to them, if they had a chance to question it and they still demanded testing because they didn't feel that they had peace of mind despite that, the subjective opinion of that family that [sic] they got peace may be satisfied by HIV testing." *Id.*

<sup>172</sup> See *AIDS Test That Sounds Good*, *supra* note 146, at A12.

<sup>173</sup> See *Poor*, *supra* note 170, at 4D. According to the current knowledge regarding the trauma a rape victim experiences, testing the offender could produce significant psychological benefits to the victim. See *Gostin*, *supra* note 9, at 1443. The testing of the offender could have a clear and appreciable impact on the mental health of the victim and her family. *Id.*

<sup>174</sup> See *Goldman & Johnson*, *supra* note 169, at B1. Some proponents argue that testing accused sex offenders is not intrusive. See *HIV Testing For Suspects Also Seeks Megan's Law*, *RECORD*, Feb. 14, 1995, A04 [hereinafter *HIV Testing Proposed For Suspects*]. At the very least, it is no more intrusive than current investigative practices, such as taking pubic hair, semen samples, or blood. *Id.*

<sup>175</sup> See *Amid David*, *Get Real on HIV Testing*, *NEWSDAY*, Aug. 11, 1992, at 81.

<sup>176</sup> See *Brief and Appendix on Behalf of the State of New Jersey*, at 26, *In Re J.G., N.S., and J.T.*, 283 N.J. Super. 32 (Ch. Div. 1995), *rev'd*, 289 N.J. Super. 575, 674 A.2d 625 (App. Div. 1995), *cert. granted*, (No. A-3585-94T5), (citing MASSACHUSETTS MEDICAL SOCIETY, *The Effects on Survival of Early Treatment of Human Immunodeficiency Virus Infection*, *THE NEW ENGLAND JOURNAL OF MEDICINE*, at 1037 (1992)) (on file at Seton Hall Legislative Bureau). As a result of an offender testing positive for HIV, a victim may undergo aggressive prophylactic treatment before she is tested in order to delay the start of AIDS. *Id.*

<sup>177</sup> See *David*, *supra* note 175, at 81.

<sup>178</sup> See *Spencer*, *supra* note 146, at 1.

continue such treatment.<sup>179</sup>

Finally, proponents argue that the current system fails to recognize the social, legal, and medical impact on the victim because it seeks only to assure that the defendant receives justice.<sup>180</sup> Proponents urge that it is of paramount importance to recognize that mandatory AIDS testing is more than a civil rights issue, rather it is public health issue that affects the entire population.<sup>181</sup> As such, advocates assert that any different treatment of the severity of HIV and AIDS would be counterproductive to the fight against AIDS.<sup>182</sup>

## VI. Conclusion

Most courts have upheld mandatory HIV testing schemes under the special needs doctrine of the Fourth Amendment. Following this direction, the New Jersey Supreme Court will likely uphold N.J.S.A. §§ 2C:43-2.2 and 2A:4A-43.1.

Mandatory HIV testing schemes allow a victim to know whether her offender tests positive for HIV. Pre-conviction testing provides this information at the earliest possible opportunity. To deny a victim access to her offender's HIV test result unnecessarily causes mental anguish to a person who has already suffered the significant trauma of being a victim of sexual assault. In essence, to deny a victim access to this information is to permit her to be raped for a second time.

The medical community recognizes that early diagnosis is a crucial factor in the treatment of HIV. To this end, both the victim and the offender can benefit substantially from disclosure of the HIV test results.

No one will dispute that the government has an important interest in assisting victims of sexual assault. It is unclear, however,

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<sup>179</sup> See Spencer, *supra* note 146, at 1. Indeed, recent evidence regarding the use of AZT in delaying the progression or onset of AIDS, greatly impacts societies attitudes toward mandatory testing. See Field, *supra* note 21, at 34. If AZT truly delays the onset of AIDS, then a stronger case can be made for mandatory HIV testing. *Id.*

<sup>180</sup> See generally *Nation Falls Short*, *supra* note 165; Kelly, *supra* note 166.

<sup>181</sup> See *Track HIV Patients, But Protect Privacy*, CHI. SUN-TIMES, Jan. 18, 1996, at 25 [hereinafter *Track HIV Patients*]. Indeed, proponents also realize the fiscal impact that mandatory testing laws have on the availability of federal resources. See 42 U.S.C. § 3756 (f) (1990). According to federal law, each state must enact mandatory testing laws in order to qualify for federal funding for victims rights. See *Rack HIV Patients* at 25.

<sup>182</sup> See *Track HIV Patients*, *supra* note 181.

whether mandatory testing laws adequately and effectively further this interest. Given the current medical technology, the best means of determining whether a victim has contracted HIV is to be tested herself. Will mandatory HIV testing laws cloud this reality and do more harm than good by giving victims a false sense of security?

Many question whether New Jersey's pre-conviction testing statutes violate the due process rights of a defendant. Sections 2C:43-2 and 2A:4A-43.1 effectively presume guilt by permitting testing before conviction. For critics, this mandatory testing scheme strikes at the heart of the American justice system; a system which requires that guilt be proven beyond a reasonable doubt. For critics, New Jersey's pre-conviction mandatory testing scheme rapes a defendant of his constitutional rights.

Unfortunately, drawing the distinction between conviction and pre-conviction testing renders the purpose of sections 2C:43-2.2 and 2A:4A-43.1 meaningless. We must consider the intrinsic shortfalls of the current justice system. We must consider that it takes approximately 256 days for a defendant to be convicted. We must consider the importance of early detection. And it is only then that we come to realize that by denying pre-conviction testing we are neglecting the needs of victims.

Ultimately, the issues discussed in this note must be resolved by the courts. The courts must balance the victims right to know against the defendant's right to privacy in light of medical advances and technology.