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NOTES

AIDS AND RAPE: THE CONSTITUTIONAL DIMENSIONS OF MANDATORY TESTING OF SEX OFFENDERS

Every victim of a violent sexual assault faces the possibility of becoming infected with acquired immune deficiency syndrome ("AIDS"). Since the incubation period for the AIDS virus is commonly six to twelve weeks, the only way a victim can immediately determine if she¹ has been exposed to AIDS is to know whether her attacker is an AIDS carrier.

In 1988, California amended its penal code to require that any person bound over for a violent sexual assault be tested for AIDS.² The result of the test is then released to the victim, so that she might take precautions to protect her own health and the health of others.³ In stark contrast, New York will not compel the attacker to be tested against his will.⁴ Further, should the attacker have been previously tested, New York will not allow the victim to receive the test results unless the prosecutor can demonstrate that there is a "clear and imminent danger to an individual whose life or health may unknowingly be at significant risk as a result of contact with the [accused]."⁵ New York and California represent two extremes of state response to this complex issue:⁶ California makes the victim's right to know

¹ Because female rape victims outnumber male rape victims twelve to one, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1987 221 (1988), this Note uses the feminine pronoun to refer to the victim.

² CAL. PENAL CODE § 1524.1(b)(1) (West Supp. 1990).

³ *Id.*

⁴ N.Y. PUB. HEALTH LAW § 2781.1 (McKinney Supp. 1990).

⁵ *Id.* § 2785.2(b) Delaware, Illinois, Iowa, and Vermont also do not allow the victim access to the defendant's test results unless the victim is able to demonstrate compelling need. In assessing compelling need, each of these states' statutes instructs the court to weigh "the need for disclosure against the privacy interest of the test subject and the public interest which may be disserved by disclosure which deters future testing or which may lead to discrimination." DEL. CODE ANN. tit. 16, § 1203(10)(a) (Supp. 1989); ILL. ANN. STAT. ch. 111½, para. 7309(i) (Smith-Hurd Supp. 1990); IOWA CODE ANN. § 141.23(g)(1) (West 1989); VT. STAT. ANN. tit. 12, § 1705(a) (Supp. 1989). Illinois also requires that the defendant give his informed consent to the testing procedure itself. ILL. ANN. STAT. ch. 111½, para. 7304. This requirement effectively blocks any chance of the victim obtaining the results of the test.

⁶ Colorado and Texas, like California, require that the accused be tested for AIDS, and that the results then be released to the victim. COLO. REV. STAT. § 18-3-415 (Supp. 1989); TEX. CRIM. PROC. CODE ANN. § 21.31 (Vernon 1989).

Georgia, Indiana, Michigan, North Dakota, South Carolina, and West Virginia provide for the testing of defendants, but not until the defendant is found guilty. *See* GA.

absolute as long as there is cause to believe that the assault involved the transfer of body fluids;⁷ New York protects the defendant's right to privacy by requiring that the prosecutor demonstrate "clear and imminent danger" before invading that right.

This Note examines the constitutionality of the California and New York statutes by considering whether a mandatory test for AIDS is reasonable in light of the fourth amendment, and whether disclosure of AIDS test results violates the accused's right to privacy. Part I briefly sketches the current medical knowledge regarding AIDS etiology, testing, transmission and treatment, and then outlines the California and New York statutes. Part II analyzes the constitutionality of the California and New York statutes in light of that medical knowledge from two perspectives. First, it examines the reasonableness of mandatory AIDS testing under the fourth amendment; second, it considers the effect that disclosure of AIDS test results may have on a constitutionally protected privacy right.⁸

CODE ANN. § 17-10-15 (1990) (testing is discretionary; any test result available as of right to victim); IND. CODE ANN. §§ 35-38-1-10.5 to -10.6 (Burns Supp. 1990) (mandatory testing at conviction; results disclosed to victim); MICH. COMP. LAWS ANN. § 333.5129 (West Supp. 1990) (mandatory testing at conviction; results available to victim); N.D. CENT. CODE § 23.07-07.5 (Supp. 1989) (mandatory testing); *id.* § 23.07-02.2 (results made available "to the extent necessary to protect the health or life of any individual"); S.C. CODE ANN. § 16-3-740 (Law. Co-op. Supp. 1989) (mandatory testing within fifteen days of conviction; victim to be notified of results); W. VA. CODE § 16-3C-2(f)(2) (Supp. 1990) (mandatory testing); *id.* § 16-3C-3(a)(8) (before victim receives results, court must "weigh the need for disclosure against the privacy interest of the test subject and the public interest").

Hawaii, Maine, North Carolina, Virginia, and Wisconsin allow access to the test results with a court order, but the defendant must give his informed consent before the test may be administered. HAW. REV. STAT. §§ 325-101(a), 325-16(a) (Supp. 1989); ME. REV. STAT. ANN. tit. 5, §§ 19203-A(1), 19203-D(2)(e) (1989); N.C. GEN. STAT. §§ 130A-143(6), 130A-148(h) (1989); VA. CODE ANN. §§ 36.1(7), 32.1-37.2 (1989); WIS. STAT. ANN. §§ 146.025(2), 146.025(5)(9) (West 1989). However, Maine and Virginia do not require informed consent when exposure occurs in a health care facility. ME. REV. STAT. ANN. tit. 5, § 19203-A(4) (1989); VA. CODE ANN. § 32.1-45.1 (Supp. 1990).

Florida requires that the victim obtain a court order before being granted access to the results of the accused's blood test, but the state does not require that the accused consent to the test. FLA. STAT. ANN. § 381.609(i)(6) (West Supp. 1990). Likewise, Oklahoma requires a court order, but does not address the issue of consent. OKLA. STAT. ANN. tit. 63, § 1-502.2(A)(1) (West Supp. 1990).

Rhode Island requires that the defendant be tested upon incarceration, R.I. GEN. LAWS § 42-56-37 (1989), but the results of that test may not be released to the victim without prior written consent of the defendant. *Id.* §§ 11-34-10, 23-6-14(h), 23-6-17.

⁷ CAL. PENAL CODE § 1524.1(b)(1) (West Supp. 1990).

⁸ Mandatory AIDS testing does not implicate the fifth amendment protection against self-incrimination because blood test results are not testimonial evidence. *See* *Schmerber v. California*, 384 U.S. 757, 767 (1966) (the fifth amendment only prohibits the admission of self-incriminating testimonial evidence, not real evidence like blood tests).

Moreover, although the presumption of innocence is a part of the defendant's constitutional right to a fair trial, *see* *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment [and]

Because neither statute fully recognizes the competing interests at stake or the peculiarities of AIDS testing and treatment, this Note concludes by proposing a statute that recognizes the victim's need to know the AIDS status of the accused, and at the same time acknowledges the privacy interests implicated by such disclosure.

I

BACKGROUND

A. Current Medical Knowledge Concerning AIDS

AIDS is caused by the human immunodeficiency virus ("HIV"),⁹ a retrovirus that enters the immune system¹⁰ and attaches itself to the host cell's reproductive machinery,¹¹ where it replicates and gradually renders the immune system inoperative.¹²

1. Testing

Two tests are used to determine if someone is an AIDS carrier: enzyme-linked immunosorbent assay ("ELISA") and the Western Blot.¹³ Neither of these tests actually detects the presence of HIV; rather, they test the individual's blood for the presence of anti-

[t]he presumption of innocence . . . is a basic component of a fair trial.") (citation omitted), *reh'g denied*, 426 U.S. 954 (1976), the presumption of innocence refers to the burden of proof and has no bearing on the pretrial rights of the accused. *See Bell v. Wolfish*, 441 U.S. 520, 533 (1979) ("The principle that there is a presumption of innocence in favor of the accused' . . . has no application to a determination of the rights of a pretrial detainee . . .") (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

⁹ David D. Ho, Tarsein Moudgil & Masud Alam, *Quantitation of Human Immunodeficiency Virus Type I in the Blood of Infected Persons*, 321 NEW ENG. J. MED. 1621 (1989). For detailed explanations of AIDS, see DR. VICTOR G. DANIELS, AIDS: THE ACQUIRED IMMUNE DEFICIENCY SYNDROME (2d ed. 1987); INSTITUTE OF MEDICINE, CONFRONTING AIDS: UPDATE 1988 33, 56, 123-509 (1988) [hereinafter CONFRONTING AIDS II]; INSTITUTE OF MEDICINE, CONFRONTING AIDS: DIRECTIONS FOR PUBLIC HEALTH, HEALTH CARE AND RESEARCH 37-76 (1986) [hereinafter CONFRONTING AIDS I].

¹⁰ The immune system is comprised of lymphocytes, which are special white blood cells composed of B-cells and T-cells. B-cells produce the antibodies that identify and begin to destroy disease-causing organisms; T-cells are divided into two groups—T4 helper cells, which encourage the B-cells to produce more antibodies, and suppressor cells, which work to shut down B-cell production once infection is overcome. V. DANIELS, *supra* note 9, at 147-48.

¹¹ HIV is termed a "retrovirus" because of its ability to attach itself to the host cell's reproductive machinery. HIV's genetic code is contained in a single strand of RNA which is transferred into the host cell's DNA via an enzyme (reverse transcriptase) which has been encoded by HIV. Since genetic information usually flows from DNA to RNA, the reversal of the virus's genetic flow of information makes the virus a retrovirus. CONFRONTING AIDS I, *supra* note 9, at 41.

¹² V. DANIELS, *supra* note 9, at 45-46. HIV shuts down the immune system by gradually killing off T4 helper cells. This depletion of T4 cells has two effects: first, B-cell antibody production drops sharply, limiting the body's ability to fight infection; second, the ratio of helper to suppressor cells (normally 2.4:1) is reversed, effectively shutting down what little antibody production is still taking place. *Id.* at 51, 148.

¹³ CONFRONTING AIDS I, *supra* note 9, at 113.

bodies formed in reaction to HIV.¹⁴ ELISA is significantly less reliable than the Western Blot, but is also significantly cheaper.¹⁵ As a result, the standard methodology for HIV testing is to subject every positive ELISA result to a confirmatory Western Blot.¹⁶

Testing for HIV is inherently inexact. Since ELISA and the Western Blot test for the presence of antibodies rather than HIV, there is generally a three to twelve week delay after exposure before either test will yield a positive result.¹⁷ Although some individuals infected with HIV still test negative at twelve weeks, by six months HIV antibodies appear in virtually every case.¹⁸ During this latency period, an individual infected with HIV is fully capable of transmitting the virns, even though he would test HIV negative.¹⁹ This timing problem is compounded by a high incidence of false positives.²⁰ Both ELISA and the Western Blot were developed to test for the presence of HIV in donated blood, not to determine whether someone is an HIV carrier.²¹ As a result, the tests have been designed to err on the side of false positives rather than false negatives.²²

2. Transmission

The risk of contracting AIDS from a single incident of vaginal intercourse with someone who is a carrier of HIV is estimated at between 1 in 500 and 1 in 1000.²³ Several studies suggest that the

14 Michael J. Barry, Paul D. Cleary, Harvey V. Fineberg, *Screening for HIV Infection: Risks, Benefits, and Burden of Proof*, 14 LAW, MED. & HEALTH CARE 259, 260 (1986) [hereinafter *Screening*]. See also CONFRONTING AIDS II, *supra* note 9, at 71.

15 *Screening*, *supra* note 14, at 260.

16 *Id.*

17 *Id.* at 261. The point at which antibodies begin to form in reaction to the virus is termed seroconversion. CONFRONTING AIDS I, *supra* note 9, at 44.

18 CONFRONTING AIDS I, *supra* note 9, at 114. Some infected individuals have continued to test HIV negative for long periods of time, but it is impossible to estimate the prevalence of these virus-positive antibody-negative individuals in the population. *Id.* at 191.

19 V. DANIELS, *supra* note 9, at 69.

20 *Screening*, *supra* note 14, at 262.

21 *Id.*

22 *Id.* Among high risk populations, the risk of a false positive result is extremely small—only 0.5% of the individuals testing positive are not infected with HIV. *Id.* at 263. The Centers for Disease Control, which monitor the prevalence of AIDS in the United States, name homosexual men, bisexual men, and intravenous drug users as members of high risk populations. Centers for Disease Control, *AIDS and Human Immunodeficiency Virus Infection in the United States: 1988 Update*, 38 MORBIDITY & MORTALITY WEEKLY REP. S-4, 7 [hereinafter *1988 Update*]. However, among low risk populations the risk of a false positive result increases dramatically. Of those individuals testing positive, 28.2% are not infected with HIV. *Screening*, *supra* note 14, at 263.

23 Norman Hearst & Stephen B. Hulley, *Preventing the Heterosexual Spread of AIDS: Are We Giving Our Patients the Best Advice*, 259 J. AM. MED. A. 2428, 2429 (1988) (citing a paper presented by Nancy Padian, J. Wiley and Warren Winkelstein at the Third International Conference on AIDS). Taking the worst case scenario, if a rapist were from a high risk category in which the prevalence of HIV was 1 in 20, the risk of getting AIDS

risk of transmission is increased through either additional exposures²⁴ or anal intercourse.²⁵ However, the lack of any consistent correlation between transmission and either the number of encounters or the type of sexual practice suggests that transmission is more dependent upon biological factors such as the individual recipient's susceptibility to HIV and the infectiousness of the virus.²⁶

3. Treatment

Zidovudine ("AZT")²⁷ is the only drug proven to limit HIV production.²⁸ Although AZT is proven to extend the lives of persons with AIDS, its use raises several concerns. First, AZT is notoriously toxic—it suppresses bone marrow production, leaving the AIDS patient highly susceptible to bacterial infections.²⁹ In addition, users of AZT complain of numerous side effects including nausea, muscle pain, insomnia, and severe headaches.³⁰ Finally, AZT is very expen-

would be 1 in 10,000 (1/500 x 1/20). If the rapist were from a low risk category, in which the prevalence rate was 1 in 10,000, the risk would be 1 in 5,000,000.

²⁴ 1988 Update, *supra* note 22, at 8. Transmission risk between steady heterosexual partners, one of whom is HIV positive, has been documented to range from 0% to 58%. The disparate results of different studies stem from the sizes of the groups being tested, which in every case numbered under 100. *Id.*

²⁵ Nancy Padian, Linda Marquis, Donald P. Francis, Robert E. Anderson, George W. Rutherford, Paul M. O'Malley & Warren Winkelstein, *Male-to-Female Transmission of the Human Immunodeficiency Virus*, 258 J. AM. MED. A. 788, 789 (1987). Oral intercourse has not been shown to increase the risk of transmission, but this is probably a reflection of monitoring techniques—although HIV has been isolated in saliva, no transmission has been documented between subjects who have engaged solely in oral intercourse. *Id.*

²⁶ Gerald H. Friedland & Robert S. Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125, 1129 (1987). In fact, there are reported cases in which an individual who is HIV positive has been incapable of transmitting the virus to another. Note, *AIDS: Legal Issues in Search of a Cure*, 14 WM. MITCHELL L. REV. 575, 616 (1988) (authored by Wendy A. Weber).

²⁷ AZT is also known as azidothymidine and the trade name Retrovir. Centers for Disease Control, *Public Health Service Statement on Management of Occupational Exposure to HIV, Including Considerations Regarding Zidovudine Postexposure Use*, 39 MORTALITY & MORBIDITY WEEKLY REP., RR-1 (199) [hereinafter *PHS Statement*].

²⁸ Margaret A. Fischl, Douglas D. Richman, Michael H. Grieco, Michael S. Gottlieb, Paul A. Volberding, Oscar L. Laskin, John M. Leedom, Jerome E. Groopman, Donna Mildvan, Robert T. Schoolley, George G. Jackson, David T. Durack, Donnie King & the AZT Collaborative Working Group, *The Efficacy of Azidothymidine (AZT) in the Treatment of Patients with AIDS and AIDS-Related Complex*, 317 NEW ENG. J. MED. 185 (1987). AZT works by inhibiting HIV replication within the host cell. See *supra* notes 11 & 12.

²⁹ *Zidovudine in Symptomless HIV Infection*, *The Lancet*, February 25, 1989, at 415. AZT's suppression of bone marrow production causes severe anemia, and necessitates that individuals taking the drug undergo frequent blood transfusions. *N.Y. Times*, Jan. 17, 1990, at A6, col. 4.

³⁰ *Zidovudine in Symptomless HIV Infection*, *supra* note 29, at 415. Continued use of AZT also induces muscle disease in some individuals. *Id.*; see also A.J. Pinching, M. Helbert, B. Peddle, D. Robinson, K. James, D. Gor, D.J. Jeffries, C. Stoneham, D. Mitchell, A.E. Kocsis, J. Mann, S.M. Forster & J.R.W. Harris, *Clinical Experience with Zidovudine for Patients with Acquired Immune Deficiency Syndrome and Acquired Immune Deficiency Syndrome-*

sive—the annual cost to an individual being treated for AIDS is over \$3000.³¹

Until recently,³² doctors did not prescribe AZT unless the individual testing HIV positive had developed symptoms associated with AIDS.³³ However, in August 1989, the National Institute of Health (“NIH”) announced that AZT can delay the onset of AIDS in some individuals who are infected with HIV but are not yet symptomatic.³⁴ Moreover, in January 1990, NIH recommended cutting the recommended dosage of AZT in half.³⁵ In addition to making AZT somewhat more affordable, the reduced dosage ameliorates bone marrow suppression as well as other side effects.³⁶ Because of these new developments, AZT is now routinely prescribed to treat asymptomatic carriers of HIV.³⁷

NIH is also currently studying the effect AZT may have in actually preventing HIV from developing in persons who have been “massively exposed” to the virus through needle sticks, blood splashes or semen.³⁸ NIH believes that AZT may be effective as a prophylactic agent for two reasons. First, in animal studies AZT prevented the development of infection after the animals had been

Related Complex, 18 J. INFECTION (Supp. I) 33, 37-39 (1989) (clinical analysis of AZT's side effects); *PHS Statement*, *supra* note 26, at 4.

³¹ N.Y. Times, January 17, 1990, at A6, col. 4 (annual cost estimated at \$3285). Burroughs-Wellcome, the manufacturer of AZT, charges distributors \$1.20 for each 100mg capsule, to which distributors add approximately 30 cents. N.Y. Times, September 19, 1989, at A1, col. 1. Since the recommended dose of AZT is 600mg/day, the daily cost is \$9.00.

³² See N.Y. Times, August 19, 1989, at A1, col. 1. (announcement that AZT helps asymptomatic patients will lead many more doctors to prescribe AZT).

³³ The Centers for Disease Control list 19 diseases as indicative of AIDS. See CENTERS FOR DISEASE CONTROL, MMWR REPORTS ON AIDS: JUNE 1986-DECEMBER 1987 82-94 (1988) [hereinafter MMWR REPORTS].

³⁴ NATIONAL INSTITUTE OF ALLERGY AND INFECTIOUS DISEASES, AIDS CLINICAL TRIAL STUDY GROUP, PROTOCOL 019 (August 31, 1989) [hereinafter PROTOCOL 019]. Copies of the protocol may be obtained from the AIDS Clinical Trials Service at (800)874-2572.

The study shows that for those individuals who have tested HIV positive and whose T4 count is less than 500/mm³, AZT delays the progression of AIDS. As of January 1, 1990, Protocol 019 was still continuing for those with T4 counts greater than 500/mm³.

³⁵ N.Y. Times, January 17, 1990, at A6, col. 4.

³⁶ *Id.* See also *PHS Statement*, *supra* note 27, at 4.

³⁷ For a summary of recent treatment development, see Final Report of State-of-the-Art Conference on AZT Therapy for Early HIV Infection (March 3-4 1990). Copies of the Final Report may be obtained from the AIDS Clinical Trials Service at (800)874-2572.

³⁸ AIDS CLINICAL TRIALS INFORMATION SERVICE, CUSTOM DATABASE SEARCH, PROTOCOL NS 402 FOR MASSIVE EXPOSURE 1 [hereinafter PROTOCOL NS 402] (search performed October 24, 1989). Copies of the protocol may be obtained from AIDS Clinical Trials Service at (800)874-2572.

The United States Public Health Service has also released guidelines, *PHS Statement*, *supra* note 27, that recommend workers exposed to HIV in an occupational setting be told of AZT's potential as a prophylactic agent.

exposed to a retrovirus similar to HIV.³⁹ Second, prior studies⁴⁰ have demonstrated that AZT is effective in delaying the progression of AIDS in persons who have tested HIV positive but are not yet symptomatic.⁴¹

B. The Statutes

During its 1988 session, the California legislature enacted an AIDS testing statute as part of the Penal Code (the "California statute").⁴² The legislature's express purpose in passing this statute was

to benefit the victim of a crime by informing the victim whether the defendant is infected with the AIDS virus. It [was] also the intent of the Legislature . . . to protect the health of both victims of crime and those accused of committing a crime.⁴³

The statute requires the court to issue a search warrant to obtain and test the accused's blood whenever the court has probable cause to believe that blood or semen was transferred from the accused to the victim.⁴⁴ If the test result is positive, the results are confirmed⁴⁵ and then disclosed to the victim.⁴⁶

That same year, the New York legislature passed a comprehensive AIDS bill (the "New York statute") as part of its Public Health Law.⁴⁷ The New York statute differs from the California statute in two ways: it strictly limits mandatory HIV testing⁴⁸ and it guarantees the confidentiality of test results.⁴⁹

The New York statute limits testing by requiring that the test subject give his written, informed consent to be tested unless he has

³⁹ PROTOCOL NS 402, *supra* note 38.

⁴⁰ The Amsterdam Municipal Health Service conducted a study producing similar results to those reported in PROTOCOL 019. J.M.A. Lange, F. de Wolfe, J.W. Mulder, R.A. Coutinho, J. van der Noordaa & J. Goudsmit, *Markers for Progression to Acquired Immune Deficiency Syndrome and Zidovudine Treatment of Asymptomatic Patients*, 18 J. INFECTION (Supp. I) 85 (1989).

⁴¹ PROTOCOL 019, *supra* note 34, at 1.

⁴² CAL. PENAL CODE § 1524.1 (West Supp. 1990).

⁴³ *Id.* § 1524.1(a).

⁴⁴ *Id.* § 1524.1(b)(1). Prior to releasing the results of the HIV test, the health department must provide professional counseling to the recipients of the test results. *Id.* § 1524.1(g).

⁴⁵ *Id.* § 1524.1(f).

⁴⁶ *Id.* § 1524.1(g). The California statute specifically limits the test to informational purposes by providing that the results of the blood test may not be used in the criminal proceeding, nor as the impetus for a charging decision by the prosecutor. *Id.* §§ 1524.1(a), (k). Since the results may not be introduced at trial, the accused's right to a fair trial is protected. *See supra* note 8.

⁴⁷ N.Y. PUB. HEALTH LAW §§ 2780-2787 (McKinney Supp. 1990).

⁴⁸ *Id.* § 2781.

⁴⁹ *Id.* §§ 2782, 2783, 2785.

put his HIV status in issue, or the test is authorized by law.⁵⁰ Neither of these exceptions gives the victim of a sexual offense the right to have the defendant tested for AIDS. The statute's first exception refers directly⁵¹ to rule 3121 of New York Civil Practice Laws and Rules,⁵² which is designed to aid discovery in civil trials where one of the parties, as part of a claim or defense, has placed his or her own physical condition in issue. This discovery rule does not apply to mandatory testing of persons accused of sexual offenses because the victim's desire to test the defendant for HIV arises in a criminal context, and because the defendant has not put his own HIV status in issue.⁵³ The second exception to the requirement of informed consent allows an HIV test to be performed if it is authorized or required by state or federal law.⁵⁴ At present, no state or federal statute mandates HIV testing of those accused of sex crimes. The only law that might be read to require such a test governs court ordered discovery.⁵⁵ However, since there is no reason a prosecutor needs to discover the offender's HIV status in order to prosecute, the victim should be unable to obtain a court order for a mandatory test.⁵⁶

The New York statute also guarantees the confidentiality of HIV test results.⁵⁷ In certain limited applications, the New York

⁵⁰ *Id.* § 2781(1). In addition, the statute does not require informed consent if the individual is not competent to give his or her informed consent. In such a case, the victim must obtain the consent "of a person authorized pursuant to law to consent to health care for the individual." *Id.*

⁵¹ *Id.*

⁵² N.Y. CIV. PRAC. L. & R. 3121 (McKinney 1974 & Supp. 1990).

⁵³ See JOINT SUBCOMMITTEE ON AIDS IN THE CRIMINAL JUSTICE SYSTEM OF THE COMMITTEE ON CORRECTIONS AND THE COMMITTEE ON CRIMINAL JUSTICE OPERATIONS AND BUDGET OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, AIDS AND THE CRIMINAL JUSTICE SYSTEM: A FINAL REPORT AND RECOMMENDATIONS 72 (1989) [hereinafter FINAL REPORT].

⁵⁴ N.Y. PUB. HEALTH LAW § 2781(1) (McKinney Supp. 1990).

⁵⁵ N.Y. CRIM. PROC. LAW § 240.40(2) (McKinney 1982).

⁵⁶ See FINAL REPORT, *supra* note 53, at 72 n.85.

⁵⁷ N.Y. PUB. HEALTH LAW §§ 2782, 2783, 2785 (McKinney 1990). By ensuring strict confidentiality of all HIV test results, the legislature hoped to encourage voluntary HIV testing so that individuals would subsequently change their behavior to reduce the risk of transmission:

The legislature recognizes that maximum confidentiality protection for information related to human immunodeficiency virus (HIV) infection and acquired immune deficiency syndrome (AIDS) is an essential public health measure. In order to retain the full trust and confidence of persons at risk, the state has an interest both in assuring that HIV related information is not improperly disclosed and in having clear and certain rules for the disclosure of such information. By providing additional protection of the confidentiality of HIV related information, the legislature intends to encourage the expansion of voluntary confidential testing for the human immunodeficiency virus (HIV) so that individuals may come forward, learn their health status, make decisions regarding the appropri-

statute allows health care providers, public health officers, adoption agencies, parole officers, and correctional facilities severely restricted access to HIV test results.⁵⁸ The only instance in which the court may breach this confidentiality is upon an application showing "a clear and imminent danger to an individual whose life or health may unknowingly be at risk as a result of contact with the individual to whom the information pertains."⁵⁹ In assessing clear and imminent danger, the New York statute instructs the court to "weigh the need for disclosure against the privacy interest of the protected individual and the public interest which may be disserved by disclosure which deters future testing or treatment or which may lead to discrimination."⁶⁰

II

ANALYSIS

A. Mandatory Testing for HIV: Violation of the Fourth Amendment?

1. *Constitutional Framework*

The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁶¹ For a court to judge the mandatory HIV testing of accused sex offenders unconstitutional under the fourth amendment, the HIV test must be considered a "search" for the purposes of the fourth amendment, and that search must be unreasonable.⁶²

ate treatment, and change the behavior that puts them and others at risk of infection.

The legislature also recognizes that strong confidentiality protections can limit the risk of discrimination and the harm to an individual's interest in privacy that unauthorized disclosure of HIV related information can cause. It is the intent of the legislature that exceptions to the general rule of confidentiality . . . be strictly construed.

1988 N.Y. Laws ch. 584, § 1, *quoted in* N.Y. PUB. HEALTH LAW § 2780 (McKinney Supp. 1990).

⁵⁸ N.Y. PUB. HEALTH LAW § 2782(1) (McKinney Supp. 1990).

⁵⁹ *Id.* § 2785(2)(b).

⁶⁰ *Id.* § 2785(5). With the addition of "or treatment" in the New York statute, its language is the same as that in the Delaware, Illinois, Iowa and Vermont statutes. *See* DEL. CODE ANN. tit. 16, § 1203(10)(c) (Supp. 1989); ILL. ANN. STAT. ch. 111½, para. 7309(i) (Smith-Hurd Supp. 1990); IOWA CODE ANN. § 141.23(g)(1) (West Supp. 1989); VT. STAT. ANN. tit. 12, § 1705(a) (Supp. 1989).

⁶¹ U.S. CONST. amend. IV.

⁶² In addition, because the Bill of Rights only protects the people against government action, the search must be performed by the government or one of its agents. *See* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1411 (1989).

- a. *Three perspectives on the fourth amendment balancing test for reasonableness: law enforcement searches, administrative searches, and "special needs" searches*

In *Schmerber v. California*,⁶³ the Supreme Court held that a compulsory blood test constitutes a "search" under the fourth amendment.⁶⁴ Since ELISA and the Western Blot are blood tests,⁶⁵ they are both searches for the purposes of the fourth amendment.

However, the fourth amendment prohibits only "unreasonable searches."⁶⁶ Whether a search is reasonable is determined by balancing the government's need to conduct the search against the invasion which the search entails.⁶⁷ In application, the Court has approached the balancing test from three different perspectives, depending on whether the search furthers law-enforcement aims,⁶⁸ implements administrative regulations,⁶⁹ or fulfills some "special need."⁷⁰

Law-enforcement searches are conducted for the purpose of collecting evidence to be used in prosecutions. Generally, the Court has ruled that to be reasonable, these searches must be conducted pursuant to a warrant issued on probable cause.⁷¹ Since the government's need for the search does not vary within the context of law enforcement, departures from the warrant and probable cause requirements turn on the intrusiveness of the search. Minimally intrusive searches require less than probable cause,⁷² while some

⁶³ 384 U.S. 757 (1966).

⁶⁴ *Id.* at 767. The following term, Justice Harlan enunciated a two-part test for determining whether a search fell within the protection of the fourth amendment: the person being searched must have a subjective expectation of privacy, and society must be prepared to recognize that expectation as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In *Smith v. Maryland*, 442 U.S. 735, 740 (1979), the Court adopted Harlan's test, and the Court in *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1412 (1989), applied the Harlan formulation to blood tests, finding it "obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable."

⁶⁵ See *supra* notes 13-16 and accompanying text.

⁶⁶ U.S. CONST. amend. IV.

⁶⁷ See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (law enforcement search); *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967) (administrative search) *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("special needs" search).

⁶⁸ See *infra* notes 71-73 and accompanying text.

⁶⁹ See *infra* notes 74-78 and accompanying text.

⁷⁰ See *infra* notes 79-107 and accompanying text.

⁷¹ See *United States v. Place*, 462 U.S. 696, 701 (1983); *United States v. United States Dist. Court*, 407 U.S. 297, 314-15 (1972).

⁷² See *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (stop and frisk of outer garments only requires that police officer have reasonable suspicion); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (roving border patrol stops require only reasonable suspicion); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976) (checkpoint border stops are even less intrusive than roving border patrol stops, so not even individualized suspicion is required).

searches may be so intrusive as to be unreasonable even if conducted pursuant to a warrant issued on probable cause.⁷³

Administrative searches are undertaken to enforce a regulatory health or safety code. As with law-enforcement searches, the Court has usually required that these searches be conducted pursuant to a warrant issued on probable cause,⁷⁴ but not every administrative search requires a warrant to be considered reasonable. In performing the reasonableness balance, the Court evaluates the intrusiveness of the search in light of the government regulation to which the entity⁷⁵ being searched is already subject. When government regulation of that entity is pervasive, the invasiveness of the search may be so minimal as to justify a warrantless search.⁷⁶

Even when the Court has found that a warrantless administrative search is not unreasonable, the Court has still insisted on a showing of probable cause. However, in contrast to the probable cause requirement in law enforcement and "special needs" searches, the probable cause requirement in the context of administrative searches does not mean that the government must show some quantum of evidence. Instead, the government must meet "reasonable legislative or administrative standards for conducting [the search]."⁷⁷ Thus, probable cause to conduct a housing code inspection exists so long as reasonable standards governing housing inspections exist, and those standards have been satisfied with respect to the particular inspection.⁷⁸

The Supreme Court has termed searches that neither aid law enforcement nor help implement regulatory schemes "special needs" searches, and evaluates these searches using a two-step approach. First, the Court balances the state interest against the intrusion occasioned by the search, as it does with law-enforcement and

⁷³ *Winston v. Lee*, 470 U.S. 753, 766 (1985) (surgery to remove bullet).

⁷⁴ *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316 (1978) (warrantless OSHA inspection unreasonable); *Camara v. Municipal Court*, 387 U.S. 523, 529 (1967) (warrantless housing inspection unreasonable).

⁷⁵ The Court has never found a search of an individual's person to fall within the category of administrative searches. Rather, this approach has been reserved for searches of homes, *Camara*, 387 U.S. at 525, and businesses, *New York v. Burger*, 482 U.S. 691, 702 (1987) (junkyards); *Donovan v. Dewey*, 452 U.S. 594, 598 (1981) (mines); *United States v. Biswell*, 406 U.S. 311, 313 (1972) (pawn shops).

⁷⁶ See *Burger*, 482 U.S. at 702; *Donovan*, 452 U.S. at 599; *Biswell*, 406 U.S. at 315.

⁷⁷ *Camara*, 387 U.S. at 538; see *Marshall*, 436 U.S. at 320; *Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Frankfurter, J., dissenting) ("Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference [in a] criminal investigation. . . ."); see also *Griffen v. Wisconsin*, 483 U.S. 868, 878 n.4 (1987) (differentiating the two different standards of probable cause).

⁷⁸ See *Camara*, 387 U.S. at 538-39; see also *Donovan*, 452 U.S. at 603 (Mine Safety and Health Act); *Biswell*, 406 U.S. at 314 (Gun Control Act).

administrative searches. Then the Court looks to see whether a “special need” exists that justifies the departure from the normal warrant and probable cause requirements. Since Justice Blackmun first introduced the concept of a “special needs” search in *New Jersey v. T.L.O.*,⁷⁹ the Court has used this rationale to justify warrantless searches of effects,⁸⁰ papers,⁸¹ houses,⁸² and persons⁸³ when the searches were conducted on less than probable cause.

b. “Special needs” balancing applied to searches of the person

The Court first applied its “special needs” analysis to warrantless searches of persons⁸⁴ in the companion cases of *Skinner v. Rail-*

⁷⁹ 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). Blackmun characterized the Court’s departures from the warrant and probable cause requirements as “exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”

⁸⁰ In *T.L.O.*, the Court held that a warrantless search of a student’s purse was reasonable because the state’s interest in maintaining discipline in its schools outweighed the student’s privacy interest in the contents of her purse. *Id.* at 340. In striking the balance, the Court found that this warrantless search was reasonable, even though it was conducted on less than probable cause, because of the “special need” created by “drug use and violent crime in the schools.” *Id.* at 339.

The warrant requirement was unsuitable because it would interfere with maintenance of the swift and informal disciplinary procedures of the school environment. *Id.* at 340. Similarly, to require that all searches be conducted only on probable cause would unnecessarily divert a teacher’s time from education. *Id.* at 342-43.

⁸¹ The more attenuated “special need” of workplace efficiency led the Court in *O’Connor v. Ortega*, 480 U.S. 709 (1987), to declare that a warrantless search of an employee’s desk and papers was constitutionally reasonable. The Court held that the government’s interest in the “efficient and proper operation of the workplace,” *id.* at 723, outweighed a government employee’s privacy interest in his desk and papers. The “special need” of workplace efficiency justified the government’s failure to obtain a warrant prior to conducting the search, even in the absence of probable cause. *Id.* at 725-26.

To require the government agency to obtain a warrant would “seriously disrupt the routine conduct of business,” *id.* at 722, and to insist that the government have probable cause to search an employee’s desk would delay corrections in employee misconduct, resulting in “tangible and often irreparable damage to the agency’s work.” *Id.* at 724.

⁸² In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), the Court used the “special needs” rationale to analyze a search of a probationer’s home, and held that the state’s need to closely supervise the probation system outweighed the probationer’s privacy interest, even though the state did not have probable cause to conduct the warrantless search. *Id.* at 876-79. The Court found that close supervision was a “special need” because it ensured the security of the community and reduced recidivism. *Id.* at 875.

To require a warrant would impermissibly interfere with the probation system in two ways: first, it would establish a magistrate rather than the probation officer as judge of how closely the probationer must be supervised; second, the delay occasioned by the warrant requirement would hinder quick response to misconduct and thereby reduce the deterrent effect of otherwise expeditious services. *Id.* at 876. Similarly, to require a showing of probable cause would also impair the deterrent effect of unannounced searches. *Id.* at 878-79.

⁸³ See *infra* notes 84-107 and accompanying text.

⁸⁴ In *Skinner v. Railway Labor Executives’ Ass’n*, 109 S. Ct. 1402, 1414 (1989), the court cites *Bell v. Woffish*, 441 U.S. 520 (1979), as an example of a “special needs”

way Labor Executives' Association⁸⁵ and *National Treasury Employees Union v. Von Raab*.⁸⁶ These cases are significant not only for extending the "special needs" approach to searches of the person, but also for rejecting the notion that any showing of probable cause is constitutionally mandated.

Skinner involved a drug testing program that required railroads to test all employees involved in a major train accident,⁸⁷ an impact accident,⁸⁸ or any incident that involved a fatality to an on-duty railroad employee.⁸⁹ The Secretary of Transportation promulgated this testing program in response to the high incidence of documented drug abuse and drug-related accidents involving railroad personnel.⁹⁰ In reaching the conclusion that the *Skinner* drug testing program was not an unreasonable search under the fourth amendment, the Court found that railway employee drug use posed a danger to human life, and therefore constituted a "special need" that justified this warrantless, suspicionless testing program.⁹¹

In *Von Raab*, a similar program required that all customs officials applying for certain positions—those that involved drug interdiction, required the official to carry a gun, or exposed the official to classified information—be tested for illegal drugs as a precondition to employment or placement.⁹² The Treasury Department offered three rationales to support its program: first, officers engaged in drug interdiction should be drug free because of the "obvious dangers" their position presents;⁹³ second, public safety

search of the person. In *Bell*, decided six years before the Court began its "special needs" balancing, a group of pretrial detainees argued that a prison regulation that required them to submit to a visual body cavity search after every contact visit was unconstitutional. In finding this search reasonable, the Court admitted that the intrusion into the pretrial detainees' privacy was significant, but nonetheless held that the government's interest in maintaining security in pretrial facilities outweighed this privacy interest and justified the invasiveness of the search. *Id.* at 558-61.

⁸⁵ 109 S. Ct. 1402 (1989).

⁸⁶ 109 S. Ct. 1384 (1989).

⁸⁷ *Skinner*, 109 S. Ct. at 1408. A major train accident is defined as an accident that involves either a fatality, the release of hazardous material followed by evacuation, or damage to railroad property in excess of \$500,000. *Id.*

⁸⁸ *Id.* An impact accident is defined as a collision that results in a reportable injury or in damage to the railroad in excess of \$50,000. *Id.*

⁸⁹ *Id.* at 1409. Tested employees are required to give both urine and blood samples. Blood tests reveal the level of drug or alcohol intoxication at the time of the test. Urine tests are used for testing that occurs some time after the accident, because traces of the drug will remain in urine longer than in blood. *Id.*

⁹⁰ *Id.* at 1407-08. Between 1972 and 1983, 21 drug-related accidents occurred resulting in 25 fatalities, 61 non-fatal injuries, and \$19 million in property damage. *Id.* at 1408 (citing 48 Fed. Reg. 30,726 (1983)).

⁹¹ *Id.* at 1421-22.

⁹² *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1389 (1989). Employees already holding one of these positions would not be tested.

⁹³ *Id.* at 1388.

demands that officers who carry guns and who “‘are prepared to make instant life or death decisions be drug free;’”⁹⁴ and third, drug-using employees with access to classified documents might be blackmailed by drug smugglers into revealing sensitive information.⁹⁵ The Court held that *Von Raab's* warrantless, suspicionless testing program was reasonable⁹⁶ because “[t]he Government’s compelling interest[] in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation’s borders or the life of the citizenry”⁹⁷ outweighed the privacy interests of the employees.⁹⁸

The Supreme Court’s rejection of the probable cause requirement for mandatory drug tests in *Skinner* and *Von Raab* is central to the question of mandatory HIV testing: it suggests that suspicionless HIV tests might be reasonable under the fourth amendment. Prior to *Skinner* and *Von Raab*, the Court had always required some level of reasonable suspicion that what was being searched for would be found before concluding that a search of the person was reasonable.⁹⁹ In *Skinner*, the Court rejected this line of precedent noting that “a showing of individualized suspicion is not a constitutional floor.”¹⁰⁰ The Court then enunciated three conditions that must be satisfied in order for the search to be reasonable under the fourth amendment: first, the privacy interests implicated by the search must be minimal; second, the government interest must be important; and finally, the circumstances must be such that a requirement of individualized suspicion would place the government interest in jeopardy.¹⁰¹

Applying this analysis to the drug testing of railroad employees, the *Skinner* Court found the suspicionless testing program to be rea-

⁹⁴ *Id.* (quoting Commissioner Von Raab’s brief).

⁹⁵ *Id.*

⁹⁶ The Court limited its holding to the applicability of the testing program to those officials applying for positions that involved drug interdiction or required officials to carry guns. The Court remanded the case to determine whether the testing program was reasonable as applied to those who handled classified documents because it was unclear whether the testing program “encompasses only those Customs employees likely to gain access to sensitive information.” *Id.* at 1397. Some of the “sensitive” positions requiring testing were “‘Accountant,’ ‘Accounting Technician,’ ‘Animal Caretaker,’ ‘Attorney (All),’ ‘Baggage Clerk,’ ‘Co-op Student (All),’ ‘Electric Equipment Repairer,’ ‘Mail Clerk/Assistant,’ and ‘Messenger.’” *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1397-98.

⁹⁹ *See, e.g.,* *South Dakota v. Neville*, 459 U.S. 553 (1983) (blood test requires individualized suspicion); *Adams v. Williams*, 407 U.S. 143 (1972) (stop and frisk requires individualized suspicion); *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk requires reasonable suspicion); *Schmerber v. California*, 384 U.S. 757, 770 (1966) (blood test for alcohol requires clear indication that subject will test positive).

¹⁰⁰ *Skinner v. Railway Labor Executives’ Ass’n*, 109 S. Ct. 1402, 1417 (1989).

¹⁰¹ *Id.*

sonable in light of the fourth amendment. First, the blood tests required by the drug testing program are minimal intrusions into the employees' reasonable expectations of privacy.¹⁰² Second, the government interest in having only drug-free employees piloting the nation's railroads is important.¹⁰³ Finally, to require the government to show probable cause or reasonable suspicion before testing would jeopardize the government interest at stake because the hidden nature of drug impairment would not lead the railroad to suspect impairment of any particular employee.¹⁰⁴ Having satisfied the three-part test, the *Skinner* drug-testing program was held to be a reasonable search under the fourth amendment.

Similarly, the *Von Raab* Court held that the suspicionless testing of Customs employees who applied either for positions in drug interdiction or for positions requiring them to carry a gun was reasonable. First, as noted in *Skinner*, the drug tests are a minimal intrusion into employees' reasonable expectations of privacy. Second, the government has a "compelling interest in ensuring that front-line interdiction personnel are physically fit"¹⁰⁵ and a strong interest in preventing drug users from being promoted to positions that involve the deadly use of force.¹⁰⁶ However, unlike in *Skinner*, the Court did not address how the requirement of individualized suspicion might place the government's interest in jeopardy. Instead, the Court ignored this third requirement, holding that the government interest was so important as to "outweigh[] the privacy interests of [Customs] employees."¹⁰⁷

2. *The California Statute: No Violation of the Fourth Amendment in Most Cases*
 - a. *The statute is properly analyzed under the "special needs" approach*

Whether the California statute violates the fourth amendment proscription against unreasonable searches is determined by applying a reasonableness balance—if the State's interest in conducting

¹⁰² *Id.* at 1417-18. In reaching its conclusion that drug tests are minimal intrusions, the Court relied on a pervasive regulation rationale similar to that used in the context of administrative searches. See *supra* notes 74-78 and accompanying text. Privacy expectations of railroad employees are diminished because of "their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of . . . employees." *Skinner*, 109 S. Ct. at 1418.

¹⁰³ *Id.* at 1419.

¹⁰⁴ *Id.*

¹⁰⁵ *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1393 (1989).

¹⁰⁶ *Id.* However, the Court failed to find a strong enough government interest to justify the suspicionless testing of those employees exposed to classified documents. *Id.* at 1396-97; see *supra* note 96.

¹⁰⁷ *Von Raab*, 109 S. Ct. at 1392.

the HIV test outweighs the intrusion into the defendant's privacy interest, the test is reasonable.¹⁰⁸ How this balance is struck turns on the purpose driving the search.¹⁰⁹ Because the California statute's mandate for the HIV testing of sex offenders is part of the Penal Code,¹¹⁰ it appears to be related to law enforcement. However, the statute's bar against using any information obtained from the test as part of a charging decision¹¹¹ or as part of a criminal trial¹¹² indicates that the purpose of this test is not to obtain evidence to aid a criminal prosecution. Thus, the California statute is not law-enforcement related.¹¹³

Likewise, California's purpose in protecting the health of its citizens¹¹⁴ suggests that the HIV test might be evaluated as an administrative search.¹¹⁵ Following the Supreme Court's analysis in the context of administrative searches, the statute seems reasonable because the defendant is tested only pursuant to a warrant issued on probable cause.¹¹⁶ Moreover, the regulatory scheme contained in the California statute satisfies the relaxed probable cause standard used in the area of administrative searches.¹¹⁷ However, the Court has used the administrative search framework only when analyzing searches of buildings¹¹⁸ and HIV tests are searches of people. Since searches of people are inherently more intrusive than searches of buildings and thereby require more protection, the Supreme Court would likely approach the reasonableness of the California statute from a "special needs" perspective, as it did with the statutes involved in *National Treasury Employees Union v. Von Raab*¹¹⁹ and *Skinner v. Railway Labor Executives' Association*.¹²⁰

At first glance, the "special needs" analysis seems misplaced in an analysis of the California statute. Unlike the searches at issue in every other "special needs" case,¹²¹ the California statute requires that the search be conducted pursuant to a warrant issued on prob-

108 See *supra* text accompanying notes 66-67.

109 See *supra* notes 68-70 and accompanying text.

110 CAL. PENAL CODE § 1524.1 (West Supp. 1990).

111 *Id.* § 1524.1(a).

112 *Id.* § 1524.1(k).

113 See *supra* notes 71-73 and accompanying text.

114 CAL. PENAL CODE § 1524.1(a) (West Supp. 1990).

115 See *supra* notes 74-78 and accompanying text.

116 CAL. PENAL CODE § 1524.1(b) (West Supp. 1990).

117 See *supra* note 77 and accompanying text.

118 See *supra* note 75.

119 109 S. Ct. 1384 (1989).

120 109 S. Ct. 1402 (1989).

121 See *supra* notes 80-82 for discussion of searches of houses, papers, and effects. See *supra* notes 99-107 and accompanying text for discussion of probable cause in searches of the person.

able cause.¹²² The statute requires that before a warrant may be issued authorizing an HIV test of the defendant, the prosecutor must demonstrate that there is probable cause to believe both that the defendant committed the crime and that blood or semen was transmitted from the defendant to the victim.¹²³ By requiring this showing, the statute appears to meet the stricter balancing requirement imposed on law-enforcement related searches.¹²⁴ However, closer analysis reveals that California's probable cause requirement is really no requirement at all.

Probable cause means "there is a fair probability that contraband or evidence will be found."¹²⁵ In order for there to be a fair probability that HIV will be found, the prosecutor should have to demonstrate that there is probable cause to believe the defendant is HIV positive. The statute's probable cause requirement, while functioning as a strong and sensible limitation on mandatory HIV testing, is irrelevant to any determination of the defendant's HIV status. California's failure to require the prosecutor to show probable cause that the accused sex offender is HIV positive means that the search occasioned by the HIV test is entirely suspicionless. Suspicionless searches of the person are reasonable under the fourth amendment only in the context of "special needs."¹²⁶

b. *"Special needs" analysis of the California statute*

Under the Supreme Court's "special needs" analysis, the California statute must satisfy two requirements.¹²⁷ First, the search required by the statute must be reasonable—California's interest in conducting the search must outweigh the intrusion the search entails. Second, a "special need" must exist that justifies the suspicionless intrusion into the defendant's privacy.

(i) *The reasonableness balance*

California's stated purpose in testing accused sex offenders is "to benefit the victim of a crime by informing the victim whether the defendant is infected with the AIDS virus" in order "to protect the health of . . . victims of crime."¹²⁸ The Supreme Court has consist-

¹²² CAL. PENAL CODE § 1524.1(b) (West Supp. 1990).

¹²³ *Id.*

¹²⁴ See *supra* notes 71-73 and accompanying text.

¹²⁵ *Illinois v. Gates*, 462 U.S. 213, 233 (1983).

¹²⁶ See *supra* notes 99-107 and accompanying text.

¹²⁷ See *supra* notes 79-83 and accompanying text.

¹²⁸ CAL. PENAL CODE § 1524.1(a) (West Supp. 1990). The California statute also expresses an interest in "protect[ing] the health of . . . those accused of committing a crime." *Id.* This interest is not addressed by this Note, but the dangers of such a highly paternalistic attitude are obvious. It is only a short step from testing sex offenders for

ently found that a state's interest in the health of its citizens is compelling.¹²⁹

However, one might argue that because of the nature of HIV progression and the imprecision of the HIV test, the strength of this state interest is undercut in three ways. First, because of the three to twelve week latency period, the accused might test negative but still have transmitted HIV to the victim.¹³⁰ Testing the accused in this situation would not further California's interest in the health of either the victim or the accused—it would only create a false sense of security in both parties. Second, if the accused comes from a low risk population, there is a 28.2% chance that he will test positive for HIV even though he does not have AIDS.¹³¹ Rather than revealing information that can be used to preserve the health of the victim and the defendant, such information would only create a false sense of doom. Finally, even if the accused does have AIDS, there is, at most, a 1 in 500 chance that HIV will be transmitted.¹³² Thus, 500 positive test results would seem to implicate California's interest in the health of the victim only once.

Although these arguments all have merit, they do not render California's interest in protecting the victim's health any less compelling. First, the possibility of a negative result creating a false sense of security in the victim is outweighed by the probability that an accused with HIV will not be in his latency period, and thus will test HIV positive. This knowledge gives the victim the information she needs to begin AZT treatment¹³³ and to take precautions against further transmission. Second, the 28.2% risk of a false positive result is counterbalanced by a 71.8% true positive result, making it likely that the information imparted is correct. Moreover, if the accused is a member of a high risk group, the HIV test is nearly one hundred percent accurate.¹³⁴ Finally, equating the risk of transmission with the compellingness of the state interest misconstrues California's interest in the health of the victim. Because the purpose

their own good to testing other groups for their own good. Because this Note is concerned with the conflicting rights of victims and sex offenders, it analyzes California's stated interest only insofar as it is implicated by the victims of rape.

¹²⁹ See, e.g., *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (compelling state interest in potential life of fetus); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (compelling state interest in maternal health); *Roe v. Wade*, 410 U.S. 113 (1973) (compelling, but competing interests in the health of the mother and the health of the fetus); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (compelling state interest in health of occupants of housing stock subjected to housing code inspections).

¹³⁰ See *supra* notes 17-19 and accompanying text.

¹³¹ See *supra* note 22 and accompanying text.

¹³² See *supra* notes 23-26 and accompanying text.

¹³³ See *supra* notes 27-41 and accompanying text.

¹³⁴ See *supra* note 22.

of the California statute is to impart needed information to the victim, California's interest in the victim's health is implicated every time a woman is raped, not every time HIV is transmitted. Without knowledge of the defendant's HIV status, the possibility of transmission ranges anywhere from 1 in 500 to 1 in 5,000,000.¹³⁵ With knowledge of the defendant's status, this tremendous uncertainty is greatly reduced. If the defendant tests HIV negative, the victim can be almost certain that HIV was not transmitted. If the defendant tests HIV positive, the victim knows that there is a possibility HIV was transmitted, and she can take steps to protect her own health and the health of others.

Although the state interest in the health of its citizens is compelling, the "special needs" cases require that the state interest outweigh the intrusiveness of an HIV test on the defendant's reasonable expectations of privacy.¹³⁶ Blood tests, as *Schmerber* notes, constitute a minimal intrusion on individual privacy—they are widely used and "involve[] virtually no risk, trauma, or pain."¹³⁷ Relying on this rationale, the Supreme Court has found that blood tests undertaken to find evidence of alcohol intoxication¹³⁸ or drug use¹³⁹ are reasonable under the fourth amendment.

One could argue that the *Schmerber* rationale cannot be extended to justify HIV tests as minimally intrusive because HIV blood tests are fundamentally different from blood tests for alcohol or drugs. However, the difference between a drug test and an HIV test lies not in the intrusiveness of the search, but in the privacy interests affected when the results of the search are disclosed.¹⁴⁰ Since the fourth amendment is concerned with the physical intrusion the search entails and not with the impact of disclosure on the privacy interests of the defendant,¹⁴¹ a court should still consider an HIV blood test to be minimally intrusive.

Although the invasiveness of a blood test is minimal, whether the test is reasonable turns on whether California's interest in protecting the health of rape victims outweighs the intrusiveness of the search.¹⁴² Because of the nature of HIV's progression and the man-

¹³⁵ Hearst & Hulley, *supra* note 23, at 2429.

¹³⁶ See *supra* notes 79-83 and accompanying text.

¹³⁷ *Schmerber v. California*, 384 U.S. 757, 771 (1966).

¹³⁸ *Id.*

¹³⁹ *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1412 (1989).

¹⁴⁰ See *infra* notes 176-86 and accompanying text.

¹⁴¹ See, e.g. *Skinner*, 109 S. Ct. at 1412 (blood test is a search because it is a "physical intrusion, penetrating beneath the skin"); *Schmerber*, 384 U.S. at 768 (reasonableness of blood test determined by looking at the "means and procedures employed in taking [defendant's] blood").

¹⁴² See *supra* note 67 and accompanying text.

ner in which the presence of HIV is detected and treated,¹⁴³ this balance changes with the passage of time.

California's interest in the victim's health would outweigh the intrusion into the defendant's privacy only if the victim's sole means of determining whether she is at risk from the attack would be to know whether the defendant is HIV positive. Therefore, before the defendant may be tested, the victim must test herself for HIV. If the victim tests positive, either as the result of a prior encounter or through rapid seroconversion,¹⁴⁴ the necessity of testing the defendant would be obviated, and the defendant's privacy interest would outweigh the state's interest in the health of the victim.

If the victim tested HIV negative, the defendant should be tested only if less than six months have passed since the attack. Because seroconversion occurs in virtually every case within six months of transmission,¹⁴⁵ by six months after the attack, any knowledge that the victim might gain from an HIV test is just as easily obtained by testing herself rather than the defendant. Thus, after this point, California's interest in protecting the health of the victim would never be served by testing the defendant.

(ii) "*Special needs*" justify lack of probable cause

Although California's interest may outweigh the defendant's privacy interest for the six months immediately following the attack, the California statute might be considered unreasonable since it does not require a showing of probable cause before testing the defendant.¹⁴⁶ In *Skinner*, the Court held that probable cause is not constitutionally required in "special needs" searches, provided the search is minimally intrusive, the government interest is important, and a requirement of probable cause would jeopardize the important government interest being furthered by the search.¹⁴⁷ As discussed above, a blood test for HIV is minimally intrusive, and California's interest in the victim's health is compelling.¹⁴⁸ Therefore, whether the California statute passes the *Skinner* test turns on whether California's interest would be jeopardized by a requirement of probable cause. In other words, would California's interest in the victim's health be jeopardized if the prosecutor were required to demonstrate probable cause that the defendant was HIV positive?

The only method by which the prosecutor might demonstrate

¹⁴³ See *supra* notes 13-41 and accompanying text.

¹⁴⁴ See *supra* note 17.

¹⁴⁵ See *supra* notes 17-19 and accompanying text.

¹⁴⁶ See *supra* notes 121-26 and accompanying text.

¹⁴⁷ *Skinner*, 109 S. Ct. at 1417; see also *supra* text accompanying notes 99-107.

¹⁴⁸ See *supra* notes 137-41 and accompanying text.

probable cause would be to show that the defendant is a member of a high risk group. However, risk grouping is unworkable for three reasons. First, since prevalence rates of HIV infection vary both by group and by city, probable cause would turn on the geographic situs of the attack and the group of which the defendant is a member. If the attack occurs in New York City and the defendant is an intravenous drug user, there is probable cause to test the defendant since there is a fifty percent probability that the defendant is HIV positive.¹⁴⁹ However, if the same attack occurred in Los Angeles, probable cause disappears because there is only a four percent chance the defendant who is an intravenous drug user is infected with HIV.¹⁵⁰ The state's interest in the victim's health is the same in both cases, but whether that interest is jeopardized turns on what city the defendant is from.

Second, because of the geographical gaps in the prevalence rates and the mobility of the population whose HIV status is measured by those rates, the statistics do not lend themselves to determinations of probable cause. If the attack occurred in Los Angeles, but the defendant moved there four years ago from New York, the prosecutor would have no figure approximating the probability that the defendant is HIV positive; neither the New York nor the Los Angeles statistics would apply. Regardless of where the defendant is from, or whether a prevalence rate has been computed for that particular city, the state's interest in the victim's health is the same. Thus, except in rare "easy cases,"¹⁵¹ to require a prosecutor to demonstrate probable cause would jeopardize California's interest in the victim's health.

In addition to jeopardizing California's interest, demonstrating probable cause by risk grouping is morally repugnant. To prove that the defendant is a member of a high risk group, the prosecutor would have to show that the defendant is either homosexual or an intravenous drug user. Such a requirement invites stereotyping and would turn the probable cause hearing into a trial by innuendo and association.

Since there is no method other than risk grouping by which to determine probable cause of HIV infection, the California statute satisfies *Skinner's* three conditions for suspicionless searches: the HIV test is minimally intrusive; the state's interest in the victim's health is compelling; and the state interest would be jeopardized by

¹⁴⁹ 1988 Update, *supra* note 22, at 171.

¹⁵⁰ *Id.*

¹⁵¹ An example of an easy case is described in Jan Hoffman, *Aids and Rape: Should New York Test Sex Offenders*, Village Voice, Sept. 12, 1989, at 40, where the victim's attacker was arrested with a hypodermic needle in his pocket.

requiring a showing of probable cause. However, even though the California statute satisfies the *Skinner* test for suspicionless searches, the HIV test is constitutionally reasonable only for up to six months following the attack, and then only if the victim has not already tested HIV positive herself. After the six month period has passed, the state's interest in the victim's health does not outweigh the intrusion into the defendant's privacy interest. At this point, the HIV test would be an unreasonable search under the fourth amendment, and the search would therefore be unconstitutional.

3. *The New York Statute: No Challenge to the Fourth Amendment*

The New York statute does not create a fourth amendment problem because it requires that a person being tested give his written, informed consent before being tested,¹⁵² and does not provide an exception for mandatory HIV testing of sex offenders.¹⁵³ New York's failure to require testing of sex offenders in its comprehensive AIDS statute prevents the innocent victim from obtaining the information she needs in order to act. If New York provided for mandatory HIV testing as California does, the state's interest in the health of its citizens would certainly justify the invasion the search entails.

B. Disclosure of HIV Test Information: Violation of a Constitutionally Protected Right to Privacy?

1. *Constitutional Framework*

In *Roe v. Wade*,¹⁵⁴ the seminal case establishing a woman's right to an abortion as part of a constitutionally protected privacy right, the Supreme Court enunciated the test for evaluating statutes that limit the right to privacy. The Court held that if the privacy right is so fundamental as to be constitutionally protected, the statute limiting that right must be justified by a compelling state interest, and the statute must be narrowly drawn to effect only the legitimate interest at stake.¹⁵⁵ However, the Court failed to provide a methodology for determining whether the affected privacy right falls within the protection of the Constitution. After reviewing cases where a constitutional right to privacy had been found, the Court located the right to privacy "in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."¹⁵⁶

152 N.Y. PUB. HEALTH LAW § 2781 (McKinney Supp. 1990).

153 For a discussion of the two exceptions the statute does allow, see *supra* notes 50-56 and accompanying text.

154 410 U.S. 113 (1973).

155 *Id.* at 155.

156 *Id.* at 152.

In *Whalen v. Roe*,¹⁵⁷ a unanimous Supreme Court¹⁵⁸ defined the scope of the constitutional right to privacy and enumerated two kinds of protected interests: the individual interest in avoiding disclosure of personal matters,¹⁵⁹ and the interest in independence in making certain kinds of important decisions.¹⁶⁰ The privacy interest implicated by HIV disclosure clearly falls into the first category.

The statute at issue in *Whalen* required doctors to file copies of all prescriptions for amphetamines, cocaine, methadone, opium, and opium derivatives in a databank maintained by the New York State Department of Health.¹⁶¹ New York had implemented this statute as part of an extensive overhaul of its drug laws to prevent the widespread abuse of drugs available by prescription.¹⁶² Plaintiff doctors and patients opposed the new law, claiming that the statute violated the privacy rights of individuals with a legitimate need for these drugs. In addition to requiring involuntary disclosure of drug usage, plaintiffs argued that the possibility of further unauthorized disclosure created a fear of being stigmatized as a drug addict, which would influence individuals to decline needed medication.¹⁶³

In deciding whether the statute was constitutional, the Court considered the three ways in which disclosure might come about: first, Health Department employees charged with security of the information might violate the statute and disclose the information to others; second, the information might be revealed as part of a criminal proceeding; or third, the doctor or pharmacist might reveal the prescription information to a third party.¹⁶⁴ Since the third possibility existed before the databank's creation,¹⁶⁵ and the other two possibilities had no support, either on the record or in the experience of states with similar programs,¹⁶⁶ the Court concluded that the possibility of disclosure did not "pose a sufficiently grievous threat to

¹⁵⁷ 429 U.S. 589 (1977).

¹⁵⁸ Justice Stewart dissented from that part of the majority opinion that could be construed to create a privacy interest in disclosure. *Id.* at 610 (Stewart, J., concurring).

¹⁵⁹ *Id.* at 599 n.25 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 79 (1974) (Douglas, J., concurring); *id.* at 78 (Powell, J., concurring)).

¹⁶⁰ *Whalen*, 429 U.S. at 600 n.26 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)).

¹⁶¹ *Whalen*, 429 U.S. at 594.

¹⁶² *Id.* at 592.

¹⁶³ *Id.* at 595.

¹⁶⁴ *Id.* at 600.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 601.

either [privacy] interest to establish a constitutional violation."¹⁶⁷ Furthermore, the statute's requirement that doctors disclose prescribed drug use to the Health Department was not "meaningfully distinguishable from a host of other . . . invasions of privacy that are associated with many facets of health care."¹⁶⁸

Since *Whalen*, the Supreme Court has implicitly established a two-part test for determining whether the privacy interest in nondisclosure is implicated: first, the information disclosed must be of a peculiarly private nature; and second, the information must be disclosed beyond government officials. Several cases illustrate the Court's application of this test. In *New York v. Ferber*,¹⁶⁹ the Supreme Court found that children who had been depicted in pornographic films and pictures had a constitutionally protected privacy right in nondisclosure. According to the Court, the children's nudity was peculiarly private and the depictions of their bodies were distributed commercially.¹⁷⁰ When President Nixon attempted to invoke this privacy interest in nondisclosure of archival material in *Nixon v. Administrator of General Services*,¹⁷¹ the Court did not even reach the second part of the test, and held that the information was not private enough to be considered peculiarly personal.¹⁷² In *Skinner*,¹⁷³ the Court conceded that although information given in a medical history was extremely personal, it did not give rise to a constitutionally protected privacy right because there was no indication that the information was disclosed to anyone other than Government officials. Finally, in *Thornburgh v. American College of Obstetricians and Gynecologists*,¹⁷⁴ the Supreme Court struck down a Pennsylvania statute that required doctors who performed abortions to file detailed information regarding the woman, the doctor, and the circumstances surrounding the abortion, which the state then made available to the public.¹⁷⁵ Even though the Court did not use the test developed in *Whalen* and its progeny to find a privacy interest in nondisclosure, *Thornburgh* is consistent with *Whalen*: information regarding one's abortion is extremely private, and the Pennsylvania

¹⁶⁷ *Id.* at 600.

¹⁶⁸ *Id.* at 602. Because the *Whalen* Court did not find that the statute implicated a constitutionally protected right to privacy, the Court never reached the balancing test prescribed by *Roe v. Wade*. However, Justice Brennan noted in concurrence that if such a right were implicated, the statute would be constitutional only "if it were necessary to promote a compelling state interest." *Id.* at 607 (Brennan, J., concurring).

¹⁶⁹ 458 U.S. 747 (1982).

¹⁷⁰ *Id.* at 759 n.10.

¹⁷¹ 433 U.S. 425 (1977).

¹⁷² *Id.* at 457-58.

¹⁷³ 109 S. Ct. 1402 (1989).

¹⁷⁴ 476 U.S. 747 (1986).

¹⁷⁵ *Id.* at 766.

statute unconstitutionally required disclosure of this information to the public.

2. *The California Statute's Disclosure Requirements are Unconstitutional*

a. *California statute implicates the privacy right in nondisclosure*

Under the analysis of *Whalen* and its progeny,¹⁷⁶ the California statute implicates a constitutionally protected privacy right because the revealed HIV information is highly personal, and the statute does not limit disclosure to the government.

In contrast to the *Whalen* statute, which required the disclosure of prescription information, the California statute requires the defendant to disclose his HIV status. Unlike prescription information, one's HIV status is "meaningfully distinguishable from a host of other . . . invasions of privacy."¹⁷⁷ Examining the effect public disclosure of the information could have on the defendant illustrates that one's HIV status is inherently more private than one's drug use. At most, the plaintiffs in *Whalen* feared the social stigma that would result from being labeled drug addicts if their use of prescribed heroin or cocaine was publicly disclosed.¹⁷⁸ The Supreme Court held that this fear was unfounded.¹⁷⁹ In contrast, disclosure of HIV status is far more stigmatizing,¹⁸⁰ and is likely to lead to discrimination in housing, employment and health care.¹⁸¹ Individuals who have

¹⁷⁶ See *supra* notes 169-75 and accompanying text.

¹⁷⁷ *Whalen v. Roe*, 429 U.S. 589, 602 (1977).

¹⁷⁸ *Id.* at 596.

¹⁷⁹ *Id.* at 601-02.

¹⁸⁰ See generally Michael Closen, Susan Marie Connor, Howard L. Kaufman & Mark E. Wojcik, *AIDS: Testing Democracy—Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 840-41 (1986) [hereinafter *Testing Democracy*].

¹⁸¹ In its investigation into the spread of HIV in the United States, the Presidential Commission on the Human Immunodeficiency Epidemic (the Commission) was continually confronted with evidence of HIV discrimination: "At virtually every Commission hearing, witnesses have attested to discrimination's occurrence and its serious repercussions for . . . the individual who experiences it." PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY EPIDEMIC, REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY EPIDEMIC 119 (1988) [hereinafter PRESIDENTIAL REPORT]. The Commission pointed out by way of illustration that reports of HIV discrimination to the New York City Commission on Human Rights rose from three in 1983 to almost 600 in 1987. *Id.* at 120.

Reports of HIV discrimination arise in other contexts as well. HIV-infected defendants have been barred from courtrooms in Alabama, N.Y. Times, Dec. 14, 1988, at A21, col. 1, and Maryland, *Testing Democracy, supra* note 180, at 841 n.19. In California, a man with AIDS won a discrimination suit he brought against a salon that cancelled his pedicure appointment after learning he had AIDS. L.A. Times, Dec. 22, 1989, at B2, col. 1.

HIV discrimination has been the motivating force behind several statutes protecting HIV confidentiality. See, e.g., 1988 N.Y. LAWS 584, § 1, quoted in N.Y. PUB. HEALTH LAW § 2780 (McKinney Supp. 1990); R.I. GEN. LAWS § 23-6-10 (1989).

tested HIV positive have been burned out of their homes,¹⁸² denied entry into offices,¹⁸³ ordered not to touch the telephones and computers of coworkers,¹⁸⁴ and refused medical service by paramedics¹⁸⁵ and nursing homes.¹⁸⁶

The *Whalen* statute limited disclosure to the state. In contrast, the California statute permits the victim to disclose the defendant's HIV status as she deems necessary to protect the health and safety of herself, her sexual partners, and her family,¹⁸⁷ with total immunity from civil liability.¹⁸⁸ The potential of further disclosure from this ever widening circle of people who know the accused's HIV status increases the likelihood of discrimination, and clearly violates *Whalen's* requirement that disclosure be strictly limited to government officials. Since one's HIV status is peculiarly personal, and the California statute requires this information to be disclosed beyond government officials, the California statute implicates the constitutionally protected privacy interest in nondisclosure.

- b. *The California statute is not narrowly tailored enough to be constitutional in every application*

Although the California statute infringes upon the accused's right to privacy, the statute may still be constitutional under *Roe v. Wade*¹⁸⁹ if the state interest served by the statute is compelling, and the statute is narrowly drawn so as to effect only the interest at stake.¹⁹⁰ California's stated purpose in testing accused sex offenders is "to benefit the victim of a crime by informing the victim whether the defendant is infected with the AIDS virus" in order "to protect the health of . . . [the] victims of crime."¹⁹¹ As noted earlier, the Supreme Court has consistently found the states' interest in the health of their citizens to be compelling.¹⁹²

However, although California's interest in protecting the health of victims of sex offenses is compelling, the California statute is not narrowly drawn so as to serve only this interest. If the victim learns that she is HIV positive prior to learning the results of the defendant's HIV test, the state's interest in protecting the victim's health is

182 N.Y. Times, Oct. 2, 1988, § 1, at 20, col. 3.

183 *Testing Democracy*, *supra* note 180, at 841.

184 Newsday, Nov. 7, 1988, at 27 (Manhattan ed.).

185 Legal Times, Mar. 20, 1989, at 7.

186 Newsday, Sept. 14, 1989, at 6.

187 CAL. PENAL CODE § 1524.1(i) (West Supp. 1990).

188 *Id.* § 1524.1(j).

189 410 U.S. 113 (1973).

190 *Id.* at 155.

191 CAL. PENAL CODE § 1524.1(a) (West Supp. 1990).

192 *See supra* note 129.

not served by disclosing the results of the defendant's HIV test.¹⁹³ Similarly, six months after the attack, disclosure of the defendant's HIV status does not give the victim any knowledge that she could not obtain through testing herself.¹⁹⁴

Since the statute permits the victim to learn the defendant's HIV status even when that information is unnecessary for her to determine her own HIV status, the statute is not narrowly tailored to serve California's interest in protecting the health of the victim, and thus the California statute is unconstitutional.

3. *The New York Statute's Disclosure Requirements are Constitutional*

Under the *Whalen* analysis,¹⁹⁵ the New York statute implicates the constitutionally protected privacy right in nondisclosure. As discussed above, one's HIV status is peculiarly personal.¹⁹⁶ This fact, combined with the New York statute's provision allowing disclosure to health care facilities providing medical services to HIV positive individuals,¹⁹⁷ implicates the privacy right in nondisclosure of highly personal information.

However, disclosure doesn't render the New York statute unconstitutional because, under the framework set forth in *Roe v. Wade*,¹⁹⁸ the state's interest in requiring disclosure is compelling and the statute is narrowly tailored to serve the state's interest.¹⁹⁹ The statute ensures that the state interest in disclosure is compelling by requiring a court to find that "a clear and imminent danger" to the victim's life or health exists before allowing the court to order disclosure.²⁰⁰ Three provisions guarantee that the statute is so narrowly drawn that the court cannot order disclosure unless this compelling state interest is served. First, before ordering disclosure, the statute instructs the court to assess the need for the test by balancing the victim's need for disclosure against the privacy interests of the defendant.²⁰¹ Second, the statute expressly limits court-ordered disclosure to the "person[] whose need for the information is the basis for the order."²⁰² Finally, the statute expressly prohibits redis-

193 See *supra* text accompanying note 143.

194 See *supra* text accompanying note 145.

195 See *supra* notes 169-75 and accompanying text.

196 See *supra* notes 180-86 and accompanying text.

197 N.Y. PUB. HEALTH LAW § 2782.1(c) (McKinney Supp. 1990); see also *supra* text accompanying note 58.

198 410 U.S. 113 (1973).

199 *Id.* at 155.

200 N.Y. PUB. HEALTH LAW § 2785.2(b) (McKinney Supp. 1990).

201 *Id.* § 2785.5.

202 *Id.* § 2785.6(b).

closure to any persons other than the victim.²⁰³

Taken together, these provisions ensure that the New York statute is constitutional in every application because court-ordered disclosure of the defendant's HIV status will only occur when necessary to protect the health of the victim. The New York statute implicitly prohibits disclosure to a victim who already knows her HIV status, because her need for disclosure is outweighed by the defendant's privacy interest in nondisclosure.

C. A Proposal for Mandatory HIV Testing of Defendants Accused of Sexual Offenses

As California and New York have recognized, the deadly nature of AIDS and the inability to detect the virus immediately after transmission warrant some mechanism that allows victims of sexual offenses to have their attackers tested for AIDS, and for the results of those tests to be disclosed to the victims.²⁰⁴ At the same time, the very real fear of AIDS discrimination²⁰⁵ necessitates that the defendant's privacy be highly protected. Neither the New York statute nor the California statute fully recognizes the competing interests of the victim and the defendant.²⁰⁶

The New York statute strikes the ideal balance between the defendant's privacy interests and the victim's need for disclosure,²⁰⁷ but the statute fails to provide for testing the defendant.²⁰⁸ In comparison, the California statute's rough and ready rule for compulsory testing²⁰⁹ fails to consider whether testing²¹⁰ or disclosure²¹¹ is always warranted. An ideal statute would provide some mechanism by which an accused sex offender is tested for HIV, with the results of that test then being released to the victim in a manner that does not trample the defendant's privacy interests.

The statute should require the state's need for conducting the search to be balanced against the defendant's reasonable expectations of privacy prior to testing the defendant for HIV. In application, the state's interest in protecting the victim's health will justify the intrusion into the defendant's privacy interest so long as three

²⁰³ *Id.*

²⁰⁴ In addition to New York and California, 21 other states have recognized this same need. *See supra* notes 4 & 6.

²⁰⁵ *See supra* notes 180-86.

²⁰⁶ For a discussion of the New York statute's shortcomings, see *supra* notes 152-53 and accompanying text. For an analysis of the California statute's shortcomings see *supra* notes 127-51, 176-94 and accompanying text.

²⁰⁷ *See supra* notes 195-203 and accompanying text.

²⁰⁸ *See supra* notes 152-53 and accompanying text.

²⁰⁹ CAL. PENAL CODE § 1524.1 (West Supp. 1990).

²¹⁰ *See supra* notes 127-51 and accompanying text.

²¹¹ *See supra* notes 176-92 and accompanying text.

conditions are satisfied. First, the victim must demonstrate probable cause to believe that the defendant was her attacker, and probable cause to believe that semen or blood was transferred from the defendant to the victim. Although neither showing would establish a probability that her attacker had AIDS, this requirement would restrict compulsory testing to those individuals who could possibly have transmitted HIV to the victim. Second, the victim must be tested and the result of her test must be HIV negative. Finally, if the victim does test negative, the defendant must be tested within the six month period immediately following the attack.

Before disclosing the test results to the victim, the statute should require the court to engage in a balancing test similar to that contained in the New York statute.²¹² This balance would ensure that the state's compelling interest in the health of the victim was served by disclosure of the defendant's HIV status. Should the court decide that disclosure is warranted, the accused's right to privacy should be protected from further disclosure to anyone other than the victim's current sexual partner by the threat of civil penalties. In application, this balancing test for disclosure would not produce a different result from the balancing test for testing. If the victim were able to prevail in getting the defendant tested, she would also prevail in learning the results of that test.

Such a statute would acknowledge the victim's need to know her attacker's HIV status, and at the same time it would amply protect the defendant's privacy interest. The balancing required of the court ensures that the statute will not be rendered unconstitutionally invasive by advances in AIDS research.²¹³ For example, if a method were developed which tested for the presence of HIV itself, rather than the antibodies formed in reaction to HIV as both ELISA and the Western Blot do,²¹⁴ the lag between exposure to HIV and seropositivity would shorten to a predictable period of time, making it possible to test the victim conclusively, and obviating the need to test the accused. This proposed statute respects the divergent rights of all parties involved, and balances them in such a way as to allow for inevitable changes in our knowledge of AIDS.

CONCLUSION

This Note has analyzed the constitutional infirmities of two different responses to mandatory HIV testing of sex offenders and dis-

²¹² See *supra* notes 198-203 and accompanying text.

²¹³ Cf. Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1280 (1986) (arguing that any AIDS-related legislation should reflect rapid advances in medical technology).

²¹⁴ *Screening, supra* note 14, at 260.

closure of the offender's HIV status to his victim. This Note proposes a statute that instructs courts to balance the victim's need to know her attacker's HIV status against both the defendant's constitutionally protected fourth amendment privacy right, and the defendant's constitutionally protected privacy right in nondisclosure of peculiarly personal information, before requiring the defendant to be tested or disclosing the defendant's HIV status to the victim. In performing these balances, the court should evaluate the strength of the victim's need to know in light of any new developments in AIDS research that might inform its decision.

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