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AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders

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I. INTRODUCTION

Few subjects are as emotionally troubling as AIDS[1] and rape. The latter, of course, has plagued society throughout human history, but AIDS only recently has imposed itself upon our social and medical consciousness. Ever since AIDS became a familiar sight in the headlines nearly ten years ago,[2] society has reacted to it with a mixture of anxi-

1. AIDS is an acronym for Acquired Immune Deficiency Syndrome. BLACK'S MEDICAL DICTIONARY 18 (35th ed. 1987).

2. AIDS first began to gain attention in this country in the early 1980s when clusters of otherwise healthy young homosexual men began to exhibit symptoms of Kaposi's sarcoma. Sicklick

ety, confusion, and despair. One consequence of the new societal awareness is the increased hesitancy with which individuals approach intimate contact. When intimate contact is involuntary as in the case of rape, fear of exposure to the disease is especially pronounced. Society, however, seems ill-prepared to address rationally and uniformly the special problems faced by victims who fear they may have contracted AIDS as the result of rape.

Given the fear surrounding AIDS, calls to test certain groups of people for evidence of the AIDS virus were inevitable.[3] Responding to pleas from rape victims and victims' rights advocates, a number of states have enacted mandatory AIDS testing programs for sexual offenders, sometimes as part of comprehensive AIDS legislation packages.[4] Mandatory testing programs have proven problematic, however, because they often fail to provide for the defendant's interests, which can include such concerns as confidentiality, privacy, and presumption of innocence. A definite tension arises in pitting the victim's interests against the defendant's rights and in deciding whose concerns should take precedence.[5] No one has presented a uniform resolution to this question. Various approaches adopted by state legislatures reflect inconsistencies in dealing with the problem.[6]

With Proposition 96 California has adopted an administrative scheme that seeks to regulate mandatory human immunodeficiency virus (HIV) testing for accused sex offenders.[7] Commentators have

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& Rubenstein, *A Medical Review of AIDS*, 14 HOFSTRA L. REV. 5, 6 (1985). Kaposi's sarcoma is a type of malignant skin lesion not normally found in young individuals; it was aggressively malignant in these early AIDS patients. *Id.* at 5; *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* (June 1988) [hereinafter *Presidential Commission*].

3. Branham, *Opening the Bloodgates: The Blood Testing of Prisoners for the AIDS Virus*, 20 CONN. L. REV. 763, 763-64 (1988). In response to demands for legal and political solutions to the AIDS epidemic, various lawmakers have suggested that prostitutes and prisoners, Note, *Mandatory AIDS Testing: The Slow Death of Fourth Amendment Protection?*, 20 PAC. L.J. 1413, 1413 (1989) [hereinafter Note, *Mandatory AIDS Testing*], couples applying for marriage licenses, Chaski, Bagby, Northrup & Harmon, *The Missouri AIDS Law: A Public Health Perspective*, 53 Mo. L. REV. 643 (1988), and immigrants and illegal aliens applying for amnesty, Barnes, *AIDS and Mr. Korematsu: Minorities at Times of Crisis*, 7 ST. LOUIS U. PUB. L. REV. 35 (1988), be among the groups mandatorily screened for AIDS.

4. *See* Hoffman, *AIDS and Rape: Should New York Test Sex Offenders?*, VILLAGE VOICE, Sept. 12, 1989, at 35. As of September 1989, at least 18 states had adopted legislation that mandates AIDS testing of sex offenders. *Id.* at 36. Among states having some form of mandatory AIDS testing of sex offenders are Arkansas, California, Colorado, Florida, Idaho, Michigan, Nevada, Rhode Island, and Washington. *See id.* at 38.

5. *Id.* at 38.

6. *See infra* notes 165-203 and accompanying text.

7. CAL. HEALTH & SAFETY CODE §§ 199.95-199.99 (West Supp. 1990). The terms "AIDS testing" and "HIV testing" commonly are used interchangeably although neither precisely describes the actual procedure. *See infra* notes 15-20 and 38-44 and accompanying text.

praised the California statute as an effective approach to the problem.[8] Critics, however, remain skeptical that the statute adequately will protect the rights of the defendant.[9]

By passing a strict confidentiality law New York has placed itself in clear opposition to those states that have adopted mandatory testing programs for sex offenders. The New York law, with certain exceptions, requires that no one may be tested for AIDS without providing informed consent.[10] Because both New York and California bear the burden of a high AIDS rate,[11] the controversy surrounding these laws may have a broad national impact.

This Note examines the issues surrounding mandatory AIDS screening of sex offenders and some of the contrasting approaches to the problem with an emphasis on the legislative reactions to the controversy in New York and California. Part II provides a brief medical background of the AIDS epidemic. Part III examines the current efficacy of AIDS screening, the state of which makes mandatory testing a troublesome proposition. Part IV explores the fourth amendment requirements that, if met, justify a governmental intrusion on an individual's physical privacy. Parts V and VI, respectively, will consider two approaches to the involuntary testing issue: California's Proposition 96 and New York's AIDS Testing and Confidentiality Law. Finally, Part VII will examine the difficult balance that must be struck between the rape victim's interests and the defendant's legal rights.

II. MEDICAL BACKGROUND

By December 1986 an estimated 16,000 individuals had died from AIDS.[12] The AIDS death toll is expected to approach 180,000 by 1991,[13] and as of April 1989 more than 88,000 cases of AIDS had been reported nationally to the Centers for Disease Control.[14] The force underlying the AIDS epidemic is the insidious spread of HIV infection.[15] The HIV retrovirus[16] preys on the body's immune system, eventually leaving the

8. Hoffman, *supra* note 4, at 39.

9. *Id.*

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

11. *See* Mueller, *The Epidemiology of the Human Immunodeficiency Virus Infection*, 14 LAW, MED. & HEALTH CARE 250, 254 (Table 2) (1986).

12. This figure was deemed to be low at the time due to a low reporting rate. Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739, 742 n.9 (1986).

13. *Id.* at 742.

14. Joint Subcomm. on AIDS in the Criminal Justice System, Bar of City of N.Y., *AIDS and the Criminal Justice System: Executive Summary of the Final Report*, 44 RECORD OF ASSOCIATION OF BAR OF CITY OF N.Y., 601, 609 (1989) [hereinafter *Executive Summary*].

15. Mueller, *supra* note 11, at 252.

16. A retrovirus incorporates its genetic material into the host cell's DNA structure and

individual vulnerable to a host of opportunistic infections and illnesses[17] that normal, healthy individuals are able to resist.[18]

As the acronym indicates, AIDS is a syndrome: as such, it cannot be tied to a single medical condition. It is helpful to think of AIDS as a wide spectrum of HIV-related conditions ranging from simple HIV infection in an otherwise healthy individual, to recurrent nonopportunistic infections, to the presence of one or more "indicator" illnesses, which are the hallmark of full-blown AIDS as currently defined.[19] In reality, dealing with AIDS means that the medical community must consider two distinct epidemics: a visible "body count" of diagnosed AIDS cases and an invisible dispersion of HIV infections to infectious, but still relatively healthy, individuals.[20]

The passage of time connects the two epidemics, and the time link between the two, while uncertain, appears to be a lengthy one.[21] Originally, researchers underestimated the average time between HIV infection and the appearance of AIDS symptoms.[22] Recent investigation reveals that HIV's average latency period is at least 4.5 years and may be as long as a decade.[23] The disease's unpredictable progression inevitably creates problems in terms of testing for HIV and controlling its spread.[24]

As the illness progresses, the individual acquires more infections

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causes the cell to replicate the virus instead of performing normal cellular functions. Note, *Constitutional Questions: Mandatory Testing for AIDS Under Washington's AIDS Legislation*, 24 GONZ. L. REV. 433, 437 (1988-89) [hereinafter Note, *Constitutional Questions*].

17. Opportunistic infections are those that occur when the host individual's physiological state is altered or weakened. Certain antibiotics and viruses, such as HIV, may transform the body's immune system so that "certain microorganisms which would otherwise be nonpathogenic become pathogenic." Sicklick & Rubenstein, *supra* note 2, at 8 n.27 (quoting C. TABER, TABER'S CYCLOPEDIC MEDICAL DICTIONARY O-19 (13th ed. 1977)).

18. *Executive Summary, supra* note 14, at 604. AIDS victims are susceptible to many opportunistic diseases, including various forms of pneumonia and cancer. *See* Mueller, *supra* note 11, at 250. Evidence suggests that HIV infection also is linked to disorders of the central nervous system that may cause a variety of degenerative neurological conditions. *Executive Summary, supra* note 14, at 604.

19. Sicklick & Rubenstein, *supra* note 2, at 6. Those HIV-related diseases that are not classifiable as full-blown AIDS are identified as part of AIDS-related complex (ARC). *Id.*; *Executive Summary, supra* note 14, at 607.

20. Mueller, *supra* note 11, at 250. Early studies suggested that less than 20% of HIV-infected individuals would develop full-blown AIDS, but more recent investigation has shown that an increasing proportion of people with HIV infection eventually develop the symptomatic disease. Merritt, *supra* note 12, at 742; *Executive Summary, supra* note 14, at 607.

21. Mueller, supra *note* 11, at 250.

22. *Id.* at 254.

23. *Id.* at 250, 254. Other research indicates that 35% of HIV-infected individuals will exhibit AIDS symptoms within six years and suggests that over time this figure will approach 100%. *Executive Summary, supra* note 14, at 607 (citing *Presidential Commission, supra* note 2, at 8).

24. *See infra* notes 38-91 and accompanying text.

and increasingly becomes debilitated.[25] At present, no known cure for AIDS exists. Very few of those with AIDS survive beyond two years after diagnosis.[26] Most research devoted to finding a cure centers around efforts to boost the infected individual's immune system and to discover an effective antiviral agent to combat HIV.[27] Thus far, effective remedies have eluded researchers,[28] and AIDS patients generally fall victim to the lethal, opportunistic infections that flourish in immunodeficient individuals.[29]

HIV has been discovered in blood, semen, vaginal fluids, tears, and saliva.[30] HIV causes an infection of low transmissibility, which means that transmission of the virus generally requires intimate sexual contact, direct exposure to infected blood, or perinatal exposure.[31] Doctors and public health officials emphasize that the disease is not spread through casual contact.[32] HIV transmission through means other than sexual, perinatal, or invasive blood exposure is, therefore, very low.[33]

AIDS occurs primarily among homosexual and bisexual men.[34] Intravenous drug abusers compose the second predominant group of individuals at high risk for HIV infection.[35] Recently, HIV infection has appeared in increasing numbers of individuals outside of these two populations. Evidence suggests that individuals who have heterosexual contact with members of high-risk groups also risk infection.[36] Hemophiliacs and other persons receiving blood transfusions after 1977, children born to a high-risk parent, and persons born in certain high-risk countries also have been categorized as separate risk groups since

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25. Sicklick & Rubenstein, *supra* note 2, at 8.

26. *Executive Summary, supra* note 14, at 609. One study has shown that only 13% of diagnosed AIDS patients survive for at least two years after diagnosis. *Id.*

27. Sicklick & Rubenstein, *supra* note 2, at 10.

28. The Food and Drug Administration has authorized limited distribution of azidothymidine (AZT), a drug that seems to prolong the lives of some AIDS patients. Merritt, *supra* note 12, at 745. AZT, however, is not a cure for AIDS, *id.*, and actually has some serious side effects. *See* Hoffman, *supra* note 4, at 39; *see also infra* note 220.

29. Sicklick & Rubenstein, *supra* note 2, at 8-9.

30. Mueller, *supra* note 11, at 256. Epidemiological evidence indicates that tears and saliva may not be "important" sources of HIV. *Id.*

31. *Id.* Some authorities have suggested that breast milk also may be a viable source of HIV. Sicklick & Rubenstein, *supra* note 2, at 8 & n.24. More research on mother-child infection is needed, but studies have shown that HIV transmission has occurred during the first few postnatal months. In this scenario, breast feeding is the most probable mechanism of contagion. Merritt, *supra* note 12, at 748.

32. Merritt, *supra* note 12, at 751. Professor Merritt notes that the Surgeon General has emphasized that "[y]ou *cannot* get AIDS from casual . . . contact." *Id.* at 751 n.54 (emphasis in original).

33. Mueller, *supra* note 11, at 256.

34. *Id.* at 251.

35. *Id.*

36. Merritt, *supra* note 12, at 751; Mueller, *supra* note 11, at 251.

the epidemic began in the early 1980s.[37]

III. AIDS TESTING

Prior to 1984 only nonspecific clinical and immunological tests were used to diagnose AIDS.[38] Current HIV screening tests determine whether an individual has antibodies[39] to HIV produced by the immune system in response to the presence of viral protein components.[40] Seroconversion, the process by which the immune system produces these antibodies, generally occurs within three months of HIV infection.[41] One may not assume accurately, however, that a person is free of HIV infection simply because HIV antibodies are not present.[42] Certain individuals do not develop antibodies for a year or more, and inexplicably, some asymptomatic persons may not develop them at all.[43] The absence of HIV antibodies, therefore, does not guarantee the absence of HIV infection.[44]

Conversely, the present HIV tests do not indicate the actual presence of HIV-related disease, but only can document exposure to the virus itself.[45] As of yet, researchers have not developed a test intended for mass screening that will indicate with certainty whether an individual has HIV and is infectious.[46] A majority of high-risk individuals who have undergone seroconversion are found to have culturable HIV and, therefore, must be assumed capable of infecting others.[47] In any event, a complete physical examination and detailed evaluation of an individual's immune system are necessary before a definitive AIDS diagnosis can be made.[48]

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37. Mueller, *supra* note 11, at 251; Wright, *AIDS: A Brief Overview*, 12 NOVA L. REV. 973, 975 (1988).

38. Sicklick & Rubenstein, *supra* note 2, at 9. These tests included assays to establish tbe ratio of helper to suppressor cells within an individual's immune system. *Id.* at 9 n.28. This information served as a general indicator of the health of the individual's immune system, but did not indicate specifically that the individual was infected with HIV because a sunilar ratio is often found in minor respiratory and HIV infections. *Id.* Thus, the assay was discarded as an HIV test. *Id.*

39. Antibodies are produced during a viral infection in an attempt to combat or at least to neutralize the invasion. *Executive Summary, supra* note 14, at 606.

40. Barry, Cleary & Fineberg, *Screening for HIV Infection: Risks, Benefits, and the Burden of Proof*, 14 LAW, MED. & HEALTH CARE 259, 260 (1986).

41. Note, *Constitutional Questions, supra* note 16, at 438.

42. *Id.*

43. *Id.*

44. *Id.*

45. Sicklick & Rubenstein, *supra* note 2, at 9; *see also* Barry, Cleary & Fineberg, *supra* note 40, at 260.

46. Barry, Cleary & Fineberg, *supra* note 40, at 260.

47. *Id.*

48. Sicklick & Rubenstein, *supra* note 2, at 9-10.

A number of serum antibody tests are used to indicate the likelihood of HIV infection.[49] The most common initial screening mechanism is the enzyme-linked immunosorbent assay (ELISA), also called enzyme immunoassay (EIA), which is a standardized commercial product.[50] Researchers originally developed the ELISA test to screen large quantities of blood products for HIV.[51] Designed to be expedient, the test is performed quickly and easily.[52] Additional antibody tests, such as the Western blot assay, are not as practical as ELISA for screening purposes; instead, these tests are used exclusively to confirm positive ELISA results.[53] When an ELISA is positive, standard testing protocol requires that the test be repeated; if the ELISA is still positive, the confirmatory test will be performed.[54]

A. ELISA Test Procedures

In ELISA technicians apply a blood sample to cultured HIV protein material and then add a reagent designed to detect the presence of HIV antibodies.[55] A spectrophotometer measures the change in the reagent's color:[56] the greater the color change, the higher the level of HIV antibodies produced in the blood in response to the viral proteins.[57] Because the test results are measured on a spectrum instead of simply identifying the presence or absence of antibodies, the technicians must decide which values on the scale constitute a positive test result and which are negative.[58] Obviously, the selected cutpoint will have a great impact on the relative numbers of positive and negative results[59] and, therefore, the number of repeat tests that will be necessary.

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49. Barry, Cleary & Fineberg, *supra* note 40, at 260.

50. *Id.*; *see also* Note, *Constitutional Questions*, *supra* note 16, at 440.

51. Barry, Cleary & Fineberg, *supra* note 40, at 260.

52. *Id.* For blood supply screening purposes, rejecting all blood that tests positive for HIV is undoubtedly a good practice because no harm can come of discarding some "good blood" in the interest of safety. Thomas, *The Perils of AIDS Testing*, 40 L.A. LAW. 39, 41 (Sept. 1988). The impact of a false positive is far more serious when ELISA is utilized for HIV diagnostic purposes.

53. Barry, Cleary & Fineberg, *supra* note 40, at 260. The Western blot test is labor intensive and, therefore, not as efficient in terms of time and expense as ELISA. *See id.*

54. Thomas, *supra* note 52, at 41.

55. *Id.*; Barry, Cleary & Fineberg, *supra* note 40, at 260.

56. Barry, Cleary & Fineberg, *supra* note 40, at 260; Thomas, *supra* note 52, at 41.

57. Barry, Cleary & Fineberg, *supra* note 40, at 260; Thomas, *supra* note 52, at 41.

58. Barry, Cleary & Fineberg, *supra* note 40, at 260.

59. *Id.* ELISA was a great success as the initial screening agent for the Nation's blood and blood-product supply precisely because of its variable cutpoint. Since the goal was to eliminate all suspicious units from the blood supply, a very low cutpoint served to screen out all blood that exhibited even the slightest possibility of HIV infection. *See* Thomas, *supra* note 52, at 41.

B. Western Blot Test Procedures

To confirm a double positive ELISA using a Western blot test, cultured HIV is broken down into its protein components and blotted onto special paper.[60] After technicians add a sample of HIV suspect blood, the paper is treated with a radioactive isotope and exposed to x-ray film.[61] "Hotspots" on the film indicate the presence of antibodies to separate HIV protein components.[62] The Western blot test is more specific in its findings than is ELISA. The Western blot is not a commercially manufactured product and, therefore, differs from ELISA in that its performance may vary to some degree in different laboratory settings.[63] Notwithstanding this difference, the Western blot test generally is recognized as the most sensitive test for HIV antibodies.[64]

C. The Reliability of AIDS Testing

In general, Americans wholeheartedly embrace the concept of laboratory testing. Ours is a testing culture that often uses diagnostic procedures as a barometer of an individual's health.[65] Individuals frequently rely on laboratory tests without questioning the authenticity of the results.[66]

Unfortunately, no screening or diagnostic test is perfectly reliable: every test has limited precision and accuracy, and neither ELISA nor the Western blot test is an exception.[67] Both tests, at various times, have failed to identify individuals infected with HIV, thus providing false negative results, and both have mistakenly labeled uninfected individuals as HIV carriers, thus providing false positive results.[68] In the short time that these two HIV tests have been in use,[69] both have demonstrated relatively high rates of sensitivity on occasion.[70] These

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60. Barry, Cleary & Fineberg, *supra* note 40, at 260. The various protein components separate into bands on the paper. *Id.*

61. *Id.*; Thomas, *supra* note 52, at 40.

62. Barry, Cleary & Fineberg, *supra* note 40, at 260.

63. *Id.*

64. Note, *Constitutional Questions*, *supra* note 16, at 441.

65. Thomas, *supra* note 52, at 40.

66. *Id.*

67. Barry, Cleary & Fineberg, *supra* note 40, at 261; Note, *Constitutional Questions*, *supra* note 16, at 441. Precision refers to a test's ability to provide consistent results when conducted repeatedly under similar circumstances. Even minor environmental and procedural factors can affect a test's precision. Accuracy, sometimes referred to as validity, is the extent to which a test actually exhibits the disorder it is intended to detect and no other condition. Barry, Cleary & Fineberg, *supra* note 40, at 261.

68. Note, *Constitutional Questions*, *supra* note 16, at 441.

69. As of September 1988 ELISA and the Western blot test had been in general use for HIV antibody screening for approximately three years. *See* Thomas, *supra* note 52, at 40.

70. Note, *Constitutional Questions*, *supra* note 16, at 441.

results, however, have been observed only when the tests are conducted under optimal laboratory conditions,[71] which are understandably uncommon in the average laboratory environment.

Some inaccurate test results are due to laboratory error, which may result from procedural inexperience or simple overwork.[72] Individual biological factors also can cause erroneous ELISA tests.[73] As a result, conducting a confirmatory Western blot test is important. On the other hand, the Western blot test is itself subject to erroneous readings because of the highly subjective nature of its interpretation.[74] Consequently, the Western blot test returns a relatively significant number of "indeterminate" results.[75] The impact of such a reading may be devastating. An individual unfortunate enough to have a positive ELISA result and an inconclusive Western blot reading would be subject to considerable mental strain and anguish.[76]

In addition, the tests may be ineffective in screening HIV-infected individuals, not because the tests are faulty, but because of the condition of the blood under examination. For example, the screening tests are generally more accurate when applied to persons suffering from a more advanced state of disease.[77] As previously noted, several weeks or even months may pass before an HIV-infected person develops antibodies to the virus, and some persons may never develop any at all.[78] This "window" between HIV infection and seropositivity represents a time in which an individual will test negative for HIV but still be infectious. HIV tests conducted at this early stage of infection, therefore, nearly always will yield a false negative result. Unfortunately, a laboratory has no way of identifying and distinguishing ELISA false negatives from

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71. *Id.* at 441-42.

72. *Id.*; *see also* Thomas, *supra* note 52, at 41-42.

73. Note, *Constitutional Questions*, *supra* note 16, at 441. As discussed in Part III(A), *supra*, ELISA is conducted with cultured viral components. Current methods of culturing virus do not allow for complete purification; therefore, the initial viral material also contains certain other cellular proteins, carbohydrates, and antigens. Thomas, *supra* note 52, at 41; Note, *Constitutional Questions*, *supra* note 16, at 442. If by chance the tested blood serum contains antibodies to these other viral components, ELISA will read this reaction as confirming the presence of HIV antibodies, thus producing a false positive test result. Note, *Constitutional Questions*, *supra* note 16, at 442.

74. Thomas, *supra* note 52, at 41. Due to a lack of experience in using the Western blot test and the absence of accepted national standards, the medical community has not settled upon a regularized method of reading the test to confirm a positive ELISA result. *Id.*; Note, *Constitutional Questions*, *supra* note 16, at 443.

75. Thomas, *supra* note 52, at 41.

76. *See id.*

77. Barry, Cleary & Fineberg, *supra* note 40, at 261.

78. *See supra* text accompanying notes 39-44; *see also* Barry, Cleary & Fineberg, *supra* note 40, at 261-62.

truly negative test results[79] because negative results rarely are subjected to confirmation via one of the more sensitive test procedures.

Judging the effectiveness and the consequences of mandatory screening tests is clearly a complicated and technical process.[80] Some authorities contend that testing large segments of low-risk groups will result in an abnormally high rate of false positives.[81] Conversely, false negative test results are often a major problem in screening members of high-risk populations.[82] In any event, the tests presently employed have some potential for error. Mandatory screening of a substantial number of subjects necessarily amplifies the errors inherent in the tests. Unfortunately, the tests and the dissemination of the results to "interested" parties can have an enormously harmful effect.[83] A positive HIV test result would devastate most individuals, and some undoubtedly would view a positive test as a death sentence regardless of its veracity.[84] Similarly, the recipient of a false negative test result might interpret incorrectly the result as a clean bill of health. Despite the potential for error in every testing procedure, most people are likely to interpret the test results as definitive.[85]

The potential benefits of organizing a broad mandatory HIV testing program for any segment of the population at this time are uncertain.[86] In addition to the individual psychological damage a positive HIV test result may cause,[87] a wide range of societal costs inevitably will accompany positive test results. Because HIV predominantly has affected groups that traditionally are targets of social and economic discrimination, any mandatory testing program may subject individuals who have tested positive to considerable stigmatization.[88] Because of

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79. Note, *Constitutional Questions*, *supra* note 16, at 442.

80. Barry, Cleary & Fineberg, *supra* note 40, at 265.

81. *See, e.g.*, Barry, Cleary & Fineberg, *supra* note 40, at 263; Note, *Constitutional Questions*, *supra* note 16, at 443; Thomas, *supra* note 52, at 42 (stating that "[i]t is axiomatic in laboratory testing that when large numbers of low-risk people are tested for anything, the numbers of false positive results increase").

82. Barry, Cleary & Fineberg, *supra* note 40, at 264. It is unclear whether sex offenders, as a group, constitute a high- or low-risk population. There is some indication that individuals who commit sex crimes may be at a higher risk for HIV infection than most other segments of the population. *See infra* notes 213-19 and accompanying text.

83. *See* Barry, Cleary & Fineberg, *supra* note 40, at 265-66.

84. Note, *Constitutional Questions*, *supra* note 16, at 444.

85. Barry, Cleary & Fineberg, *supra* note 40, at 266.

86. *See id.* at 265.

87. Such psychological damage may include severe stress, depression, and even possible contemplation of suicide. Doe v. Roe, 139 Misc. 2d 209, 213-14, 526 N.Y.S.2d 718, 722 (N.Y. Sup. Ct. 1988).

88. Note, *Constitutional Questions*, *supra* note 16, at 443. A New York court stated, "A person who has been involuntarily tested for AIDS and receives a positive result may suffer a number of possible injuries. Perhaps first . . . among these is the danger of stigmatization and

the significant possibility of error in interpreting the test results, mandatory screening for HIV is even more questionable.

Some commentators have suggested that researchers desperately need to undertake a thorough evaluation of the HIV testing process[89] and also that problems inherent in the current system should preclude the use of available testing procedures for mandatory screening purposes.[90] Meanwhile, the calls for mandatory testing of various groups continue unabated. A number of state legislatures have acceded to the demands made on behalf of rape victims by providing for the testing of accused rapists.[91] The question remains whether these legislative actions actually combat the AIDS crisis in general and protect the rape victim's interests in particular, or whether the measures serve only to heighten existing fears and violate the rights of certain members of society.

IV. The Constitutional Implications of Mandatory AIDS Testing: Fourth Amendment Protection Against Unlawful Search and Seizure

Most governmental responses to the AIDS crisis, including mandatory HIV testing of sex offenders, will set the government's power and duty to protect the public health against the individual's constitutionally guaranteed liberty interests.[92] An epidemic disease such as AIDS, which is both infectious and characteristically lethal, would seem to justify the exercise of the government's power to enforce laws designed to curb its spread.[93] Some well-intentioned state actions, however, may exceed constitutional boundaries.[94] A mandatory HIV testing law undoubtedly will interfere with the individual's right of privacy. Foremost among constitutional limits on the government's power to in-

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ostracism which may result." *Doe*, 139 Misc. 2d at 213, 526 N.Y.S.2d at 721.

89. Thomas, *supra* note 52, at 40.

90. Note, *Constitutional Questions*, *supra* note 16, at 443. These tests may he acceptable as screening devices when test subjects voluntarily consent to the testing and are counseled regarding the possibility of false positive or negative results. *See id.* at 443-44.

91. *See* Hoffman, *supra* note 4, at 38 (stating that HIV testing may be required in Arkansas and Idaho upon the filing of sex offense charges).

92. Dolgin, *AIDS: Social Meanings and Legal Ramifications*, 14 Hofstra L. Rev. 193, 202 (1985). Various groups of individuals have been designated to undergo mandatory testing for HIV. *See supra* note 3 and accompanying text. In addition, other governmental reactions to AIDS would bear significant scrutiny as possible encroachments on constitutional rights, including potential restrictions that would permit discrimination against HIV-infected employees and schoolchildren. *See* Dolgin, *supra*, at 202. Ominously, the idea of quarantining AIDS victims as a viable method of controlling the disease's spread has been discussed seriously in a number of influential forums. *Id.* at 202-03 n.60. A quarantine program clearly would present troubling constitutional questions.

93. *See* Dolgin, *supra* note 92, at 204.

94. *See id.*

trude on the right to privacy is the fourth amendment's protection against unreasonable search and seizure.[95] An examination of recent rulings in this area will help identify the standards that must be met to ensure the constitutionality of a mandatory AIDS testing statute.

The fourth amendment provides that "[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."[96] In *Katz v. United States*[97] the Supreme Court stated that governmental action that intrudes on an area in which a person has a subjective and reasonable expectation of privacy constitutes a search under the fourth amendment.[98] The fourth amendment does not prohibit all searches and seizures, but only those that are unreasonable.[99] The reasonableness of a search is determined by balancing the extent of a state's intrusion on an individual's privacy interests against the promotion of legitimate governmental interests.[100]

The Supreme Court has identified two primary categories of governmental searches. A criminal search involves a bodily intrusion with intent to discover and secure evidence to be used in a criminal proceeding.[101] An administrative search is a governmental intrusion into a person's body, home, or business to obtain information that can be used to protect public health or to ensure compliance with state regulations.[102]

In the criminal context, the Court has demonstrated that a search's reasonableness lies in following the procedures set out in the warrant clause of the fourth amendment.[103] With few exceptions, a search or seizure in a criminal case is not reasonable unless a magistrate first has

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95. A mandatory AIDS testing policy may implicate at least two other areas in which the government may be restrained from intruding on the individual. For a discussion of mandatory HIV testing and the generalized right of privacy found by the Supreme Court in the penumbra of the Bill of Rights in Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965), see Plowman v. United States Dep't of the Army, 698 F. Supp. 627, 632-35 (E.D. Va. 1988); Dolgin, *supra* note 92, at 203 n.61; Note, *Constitutional Questions*, *supra* note 16, at 461-64. For an analysis of epidemic disease and the government's police power to enact reasonable regulations to preserve public health, safety, morals, and welfare, see Dolgin, *supra* note 92, at 204-07, and Note, *Constitutional Questions*, *supra* note 16, at 464-67.

96. U.S. CONST. amend. IV (emphasis added).

97. 389 U.S. 347 (1967).

98. *Id.* at 361 (Harlan, J., concurring).

99. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1414 (1989).

100. *Id.*; *see also* Camara v. Municipal Court, 387 U.S. 523, 528, 534 (1967) (stating that the basic purpose of the fourth amendment is to protect an individual's privacy against arbitrary invasions by government officials and applying the same balancing test in the context of a warrantless search).

101. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1423; *see also* Schmerber v. California, 384 U.S. 757 (1966).

102. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1423; *see Camara*, 387 U.S. at 523.

103. *Skinner*, 109 S. Ct. at 1414. The warrant clause states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ." U.S. CONST. amend. IV.

issued a judicial warrant based on probable cause.[104] For a search warrant to issue in a criminal context, there must be probable cause to believe that a crime has been or is being committed.[105] Conversely, if the search is deemed administrative, warrants to inspect premises or persons are issued when there are reasonable legislative or administrative standards that authorize these intrusions.[106] Furthermore, some circumstances will justify a warrantless administrative search.[107] Thus, the standards that authorize criminal and administrative searches differ and perhaps are less rigorous in the latter. Whether a search of an individual's blood is reasonable, therefore, depends on whether the search is criminal or administrative in nature.[108]

A. Standards Governing Criminal Searches Under the Fourth Amendment

In *Schmerber v. California*[109] the Supreme Court held that compulsory administration of a blood test is a search under the fourth amendment.[110] While the Court determined that the police investigation of a vehicular homicide had provided probable cause to believe that the defendant had been driving while intoxicated, the defendant's blood alcohol test was conducted without a warrant.[111] The Court held, however, that under these circumstances a warrantless search was reasonable because the evidence of drunk driving would have been lost by the time the police had obtained a search warrant.[112] Therefore, promotion of a legitimate governmental interest outweighed the intrusion into the defendant's privacy.

Schmerber demonstrates that if the test of an individual's blood is intended to discover and secure evidence for use in a criminal proceeding, the government must obtain a search warrant founded on probable cause that the test will yield evidence of a crime unless a time delay would result in loss of the evidence altogether.[113] *Schmerber* and its progeny,[114] however, shed little light on the reasonableness of a blood

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104. *Skinner*, 109 S. Ct. at 1414.

105. *See Camara*, 387 U.S. at 534; Note, *Mandatory AIDS Testing*, *supra* note 3, at 1424.

106. *Camara*, 387 U.S. at 538.

107. *See* Note, *Mandatory AIDS Testing*, *supra* note 3, at 1424; *see also infra* notes 124-64 and accompanying text.

108. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1424.

109. 384 U.S. 757 (1966).

110. *Id.* at 767.

111. *Id.* at 768-69 & n.12.

112. *Id.* at 770-71; *see also* Note, *Mandatory AIDS Testing*, *supra* note 3, at 1425 (noting that the alcohol "would have dissipated from the defendant's blood before a search warrant could have been obtained").

113. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1427.

114. In Winston v. Lee, 470 U.S. 753 (1985), the Court refused to authorize removal of a

search in an administrative situation. Arguably, a program of mandatory HIV testing of sex offenders represents a search that is more administrative than criminal in nature. Because the primary purpose of mandatory testing is to protect some element or segment of public health and not to obtain evidence to be used in a criminal proceeding,[115] one must look closely at the way in which the Court has developed its doctrine of administrative searches in order to fit mandatory HIV testing for sex offenders within the fourth amendment framework.

B. Standards Governing Administrative Searches Under the Fourth Amendment

1. Warranted Searches

In *Camara v. Municipal Court*[116] the Supreme Court reversed the defendant's conviction, which was based on his refusal to allow state health inspectors to conduct a warrantless search of his home for housing code violations.[117] The Court held that an administrative search conducted to enforce state regulations in the public interest constitutes a significant intrusion on fourth amendment interests. When performed without a warrant, such a search lacks the necessary fourth amendment safeguards.[118] The *Camara* Court declared that an administrative search would be reasonable only if performed on the basis of a warrant that verifies the need for and delineates the scope of the search.[119] The Court did not impose criminal search standards for probable cause as a requirement for obtaining an administrative warrant. Rather, the Court sought to strike a balance between the public and private interests implicated in an administrative search by holding that there is probable

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bullet from the defendant's body that the Commonwealth of Virginia claimed would provide strong evidence of the defendant's guilt. Because the surgery was dangerous to the defendant, the intrusion was more severe than the one sanctioned in *Schmerber*. *See id.* at 761 & n.4. Further, because the Commonwealth had substantial additional evidence that would convict the defendant, the Court declared that the invasion of the defendant's body was unreasonable. *Id.* at 767.

115. *See supra* text accompanying notes 101-02. The Presidential Commission on the Human Immunodeficiency Virus Epidemic recommended legislation that would make knowing, intentional transmission of HIV a criminal offense. *Presidential Commission, supra* note 2, at 130. In this respect, a mandatory HIV test of a sex offender could be seen as a criminal search under the fourth amendment, since the government would be seeking evidence useful in a criminal proceeding. A few states, including Florida, Idaho, Louisiana, and Nevada, have passed criminal statutes specifically intended to cover intentional HIV transmission. *Id.* Furthermore, some states have chosen to use a positive HIV test to increase sentences in sexual assault convictions when the defendant was aware that he was HIV-infected at the time of the attack. Hoffman, *supra* note 4, at 39.

116. 387 U.S. 523 (1967).

117. *Id.*

118. *Id.* at 534.

119. *Id.* at 531-33 & n.10.

cause to issue a warrant to inspect when "reasonable legislative or administrative standards" mandate the inspection.[120]

The probable cause standards for an administrative search are relatively vague as compared with those required in the criminal context. For example, the *Camara* Court found that the condition of the surrounding area, the passage of time, and the nature of the premises to be inspected are reasonable legislative standards upon which a search warrant can issue.[121] The Court did not demand that authorities have express knowledge of the premises' particular condition before requesting a warrant.[122] Legislative standards, however, must be rational and must represent a valid public interest in order to provide probable cause to issue a "suitably restricted" administrative search warrant.[123]

2. Warrantless Searches

Twenty years after *Camara* the Supreme Court modified its stance on the issue of whether an administrative search could be reasonable if conducted without a search warrant. In *New York v. Burger*[124] the Court expanded the scope of administrative searches to allow warrantless inspections in situations of special need: situations in which individual privacy interests are weakened, and governmental interests are concomitantly heightened.[125] In upholding a warrantless inspection of an automobile junkyard, the Court determined that closely regulated industries subjected to substantial governmental oversight have a lowered expectation of privacy.[126]

The *Burger* majority stated that a warrantless inspection may be reasonable under the fourth amendment if three criteria are met. First, following the *Camara* rationale,[127] the government must demonstrate that a substantial state interest justifies the regulatory scheme under which the inspection is made.[128] Second, the warrantless inspection must be necessary to further the regulatory scheme.[129] Finally, the state's inspection program must be sufficiently certain and regular in its application to serve as a constitutionally adequate substitute for a search warrant.[130] To satisfy this last requirement, the program of in-

120. *Id.* at 538.
121. *Id.*
122. *Id.*
123. *Id.* at 539.
124. 482 U.S. 691 (1987).
125. *Id.* at 702.
126. *Id.* at 700.
127. *See supra* text accompanying notes 116-23.
128. *Burger*, 482 U.S. at 702.
129. *Id.*
130. *Id.* at 703.

spection must alert a party to the possibility of being subject to a search, and the search must be limited in time, place, and scope.[131]

In *Burger* the Court did not discuss whether the three part reasonableness test would govern administrative searches of an individual's body and body fluids, but two years later the Supreme Court considered this issue in *Skinner v. Railway Labor Executives' Association.*[132] Finding that on-the-job intoxication is a significant problem in the railroad industry and that employees who abuse alcohol and drugs constitute a serious threat to public safety, the Court upheld administrative regulations mandating warrantless blood and urine tests of employees who are involved in specified accidents.[133] As in *Schmerber,*[134] the Court confirmed that blood, urine, and breath tests are searches under the fourth amendment.[135] Noting that a presumption in favor of a search warrant issued upon a degree of individualized suspicion still exists, the Court observed that individualized suspicion is not a constitutional requisite for every search.[136] Instead, judicial review of the railroad industry's drug testing program requires a balancing test similar to those applied in *Camara*[137] and *Burger.*[138]

In *Skinner* the Court observed that special needs necessitated a balancing of governmental and private interests and made warrant requirements impracticable.[139] Here, as in *Burger*, the Court found that the customary governmental regulation of the railroad industry had weakened privacy interests and heightened governmental interests thereby making a warrantless search constitutionally acceptable.[140] The Court held that a substantial state interest in regulating the conduct of railroad employees justified the regulatory program under which the state administered toxicological tests.[141]

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131. *Id.*

132. 109 S. Ct. 1402 (1989).

133. *Id.* at 1407, 1421-22. The Federal Railroad Administration found that from 1972 to 1983 at least 21 significant train accidents involved drug or alcohol intoxication, and that these incidents resulted in 25 fatalities, 61 injuries, and damage to property estimated at $19 million. *Id.* at 1407-08.

134. 384 U.S. 757 (1966).

135. *Skinner*, 109 S. Ct. at 1412-18.

136. *Id.* at 1417.

137. 387 U.S. 523 (1967).

138. 482 U.S. 691 (1987).

139. *Skinner*, 109 S. Ct. at 1414.

140. *Id.*; Note, *Mandatory AIDS Testing, supra* note 3, at 1430-31.

141. The Court remarked that the test regulations were intended to reduce or eliminate accidents and other fatal incidents, and that the "governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty . . . . This interest also 'require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed.' " *Skinner*, 109 S. Ct. at 1415 (quoting Griffin v. Wisconsin, 483 U.S. 868, 875 (1987)).

The Court further found that the warrantless inspection was necessary to implement the regulatory scheme.[142] Because the regulations relied principally on blood tests to evidence recent drug or alcohol use prior to an accident, the Court determined that any delay in obtaining a warrant would defeat the effectiveness of the blood assay because evidence of drug or alcohol use deteriorates rapidly in the bloodstream.[143] Furthermore, although employees know that an accident will trigger testing, the unpredictability of the occurrence of such an event enhances the deterrent effect of the penalties for the use of drugs or intoxicants.[144] Thus, the *Skinner* inspection program is regular enough in application to further the underlying administrative scheme and to alert the individual of the possibility of being subject to a suitably limited search. Because the government's interest in testing railroad employees outweighed the employees' justifiable expectations of privacy under these circumstances, and because the *Skinner* warrantless inspection program met the *Burger* standards for such a scheme, the Court found no fourth amendment violation.[145]

The Court followed a similar analysis in *National Treasury Employees Union v. Von Raab*[146] when upholding a suspicionless drug testing program for any customs officers who carried firearms or who directly participated in drug interdiction.[147] While holding that urine testing for illicit drug use clearly implicates the fourth amendment,[148] the Court determined that the realities of the workplace justify certain physical intrusions that might be unreasonable in other situations.[149] Finding that customs employees perform a function which substantially impacts public safety and welfare and that the safety of each employee depends largely on each employee's fitness for the job, the Court stated that these individuals should expect some inquiries that might be intrusive in other circumstances.[150] Certain forms of public employment, the majority concluded, result in a diminished expectation of privacy even with respect to intrusive physical searches.[151] Ultimately, under these circumstances the government has a compelling interest in ascertaining the trustworthiness and fitness of its drug interdiction force that out-

142. *See id.* at 1421.
143. *Id.* at 1420-21; *see also Schmerber*, 384 U.S. at 770-71.
144. *Skinner*, 109 S. Ct. at 1419-20.
145. *Id.* at 1418-21.
146. 109 S. Ct. 1384 (1989).
147. *Id.* at 1397.
148. *Id.* at 1390.
149. *Id.* at 1393.
150. *Id.* at 1394.
151. *Id.* at 1393.

weighs individual privacy expectations.[152] Persuaded that the drug testing program bore a close and substantial relation to the government's goal[153] and that the regulation clearly informed the employee of the rationale and scope of the test,[154] the Court applied the warrantless search standards of *Burger* and resolved the balancing test between public and private interests in the government's favor.[155]

At least one commentator has contended that the *Skinner* and *Von Raab* balancing test would apply to court-ordered HIV testing as well as to drug testing.[156] Under this rationale, involuntary HIV tests would be permitted if the physical intrusion served a special governmental need that outweighed the individual's expectation of privacy.[157] The Supreme Court has yet to consider whether compulsory HIV testing can meet that fourth amendment standard.[158] In *Glover v. Eastern Nebraska Community Office of Retardation*,[159] however, one federal court considered a policy that mandated HIV testing as a condition of state employment.[160]

The *Glover* court considered the constitutionality of an agency policy that required certain employees who had extensive contact with agency clients to undergo testing for HIV.[161] The court found that although the legislature might have enacted the policy to combat the spread of HIV, evidence showed that the risk of HIV transmission between agency employees and clients was so insignificant that the policy had no real effect in preventing the spread of HIV.[162] The court, therefore, decided that the government's interests in providing a safe environment for agency clients did not outweigh the employees' reasonable expectation of privacy in their blood.[163] Repeating that the governmental intrusion must be reasonable in both inception and scope, the court

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152. *Id.* at 1396.

153. *Id.* Presumably, the Court applied the *Skinner* deterrence rationale to the warrantless urine testing in *Von Raab*. The majority remarked that the petitioner's claim that such testing is ineffective and, therefore, not conducive to the regulatory scheme was unfounded because it is extremely difficult for a drug user to alter the test results by avoiding use of the drug after the test date is known. *Id.*

154. *Id.* at 1394.

155. *Id.* at 1396.

156. *See* CRIM. JUST. NEWSL., Apr. 17, 1989, at 3.

157. *Id.* (statement of Judge Mary C. Morgan).

158. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1431.

159. 686 F. Supp. 243 (D. Neb. 1988).

160. The governing board of the Eastern Nebraska Human Services Agency had adopted a policy that required certain employees to submit to mandatory testing for tuberculosis, hepatitis B, and HIV. *Id.* at 244. In addition, the policy contained reporting and disclosure requirements for employees who know or suspect they have one of the diseases or are treated for any of them. *Id.*

161. *Id.* at 247.

162. *Id.* at 249.

163. *Id.* at 250.

held that the mandatory blood testing policy was not justified at its inception and, therefore, was an unreasonable search in violation of the fourth amendment.[164]

V. An Administrative Scheme for Mandatory AIDS Testing: California's Proposition 96

On November 8, 1988, the California electorate approved an initiative known as Proposition 96. Added as Chapter 1.20 to the California Health and Safety Code,[165] Proposition 96 enables victims of sexual crimes as well as certain peace officers, firefighters, and emergency medical personnel who have been assaulted in their official capacity to request HIV testing of their assailants.[166] The Proposition 96 HIV test is administrative in nature because the test is structured to gather information that will be used to protect the public health, not as evidence in a criminal proceeding.[167] The HIV test is essentially a warrantless search that may be analogized to the search upheld in *Burger*.[168] It is also similar in nature to the physically intrusive searches discussed in *Skinner*[169] and *Von Raab*.[170]

Under Proposition 96 assault victims may petition the court for an order authorizing compulsory HIV testing of an assailant charged with either a sexual assault or with physical interference with the official duties of a peace officer, firefighter, or emergency medical officer.[171] Upon such petition, the court will conduct a hearing to determine whether probable cause exists to believe that a transfer of body fluids from the defendant to the victim occurred during the assault or altercation.[172] Upon finding probable cause, the court will order the defendant to undergo HIV testing.[173]

Proposition 96 states that a licensed medical laboratory will conduct the HIV tests[174] and that the results of the test will be disclosed to the defendant, the requesting victim, and if the defendant is incarcer-

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164. *Id.* The court commended the agency's adoption of a safety-oriented approach, but determined that achieving the goal could not overshadow the impermissible infringement on the personal liberty of the agency's employees. *Id.* at 251.

165. Cal. Health & Safety Code §§ 199.95-199.99 (West Supp. 1990).

166. *Id.* §§ 199.96-199.97.

167. *Id.* §§ 199.95, 199.98(f); *see also* Note, *Mandatory AIDS Testing*, *supra* note 3, at 1438.

168. 482 U.S. 691 (1987); *see also* Note, *Mandatory AIDS Testing*, *supra* note 3, at 1438.

169. 109 S. Ct. 1402 (1989); *see supra* notes 132-45 and accompanying text.

170. 109 S. Ct. 1384 (1989); *see supra* notes 146-55 and accompanying text.

171. Cal. Health & Safety Code §§ 199.96-199.97 (West Supp. 1990).

172. *Id.*

173. *Id.*

174. Proposition 96 specifies that participating laboratories will conduct tests for "medically accepted indications of exposure to or infection by" HIV. *Id.* § 199.98(b). Presumably, this language refers to the testing procedures discussed *supra* at notes 55-64 and accompanying text.

ated, the incarcerating facility.[175] A disclaimer informing the recipient that the test may be inaccurate accompanies the results.[176] Test results which indicate that the defendant has been exposed to or is infected with HIV also will be transmitted to the California State Department of Health Services.[177]

Proposition 96 provides that anyone who receives information of the defendant's test results under the statute must maintain the confidentiality of any personal identifying data relating to the test results except for disclosure necessary to obtain medical or psychological care.[178] Any person who discloses test results pursuant to a statutory authorization is immune from civil liability.[179] Finally, no test results obtained pursuant to the statute are admissible as evidence in any criminal or juvenile proceeding.[180]

Proposition 96 is deceptive because it uses the term "probable cause" to justify a search of an individual's blood. This term seems to suggest that the statute authorizes a criminal search. The statute, however, does not authorize a court to issue a testing order based on probable cause to believe that a crime has been committed, but instead on probable cause to believe that there has been an exchange of body fluids between defendant and victim.[181] The question is whether this standard establishes a sufficiently articulated legislative scheme that makes the mandatory AIDS test a constitutionally legitimate warrantless administrative search.[182] In other words, Proposition 96 must conform to the criteria set out in *Burger* and utilized in *Skinner* and *Von Raab* in order for its compulsory HIV testing to be a valid administra-

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175. CAL. HEALTH & SAFETY CODE §§ 199.96-199.97 (West Supp. 1990). Disclosure to the incarcerating facility entails disclosure only to the officer in charge and the chief medical officer of the facility. *Id.* If the requesting victim is a peace officer, a firefighter, or an emergency medical technician, the statute also requires disclosure of test results to the victim's employing entity. *Id.* § 199.97. Finally, if the defendant is a minor, the test results will be communicated to the minor's parents or guardian. *Id.* § 199.98(d).

176. The disclaimer states: "The tests were conducted in a medically approved manner but tests cannot determine exposure to or infection by AIDS . . . with absolute accuracy. Persons receiving this test result should continue to monitor their own health and should consult a physician as appropriate." *Id.* § 199.98(d).

177. *Id.* § 199.98(c).

178. *Id.* § 199.98(e).

179. *Id.* § 199.98(g).

180. *Id.* § 199.98(f).

181. *Id.* §§ 199.96-199.97. Proposition 96 does not require that the court issue a formal search warrant in order to inspect the defendant's blood. The court's only role in the inspection process is to determine whether there is probable cause to believe that there was an exchange of body fluids between defendant and victim, *i.e.*, that the administrative standards authorizing the search have been met. Thus, the intrusion here is analogous to the warrantless search in *New York v. Burger*. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1438.

182. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1438.

tive search.

For a mandatory HIV test to be valid under the fourth amendment, the government's interest in conducting the test must outweigh the individual's expectation of privacy in his or her own blood.[183] If the government constitutionally can utilize blood tests for employment purposes, for ascertaining a driver's blood alcohol level, and for determining fitness for military service, the underlying safety rationale conceivably could be expanded to include testing of persons charged with a crime in order to provide their victims with information relevant to the victims' health.[184] Under such circumstances, the defendant arguably has a limited expectation of privacy.

Furthermore, the state has a substantial and perhaps compelling interest in curbing the transmission of HIV and in protecting crime victims.[185] The state's interest is reflected in the purpose of the regulatory program, which is to acquire vital information and to disclose it as necessary to allow interested parties to take precautions, or alternatively, to relieve the parties from groundless fear of contracting the virus.[186] Arguably, the inspection authorized in Proposition 96 furthers the regulatory scheme contemplated in the statute: the mandatory test purports to be an effective way of achieving the statute's stated goal. The question is whether the inspection scheme is necessary to further the regulatory scheme. Finally, because the statute alerts the individual to the timing, manner, and scope of the mandatory HIV test, the inspection program appears to be sufficiently regular in its application to provide a constitutionally adequate substitute for a search warrant. If a court were to consider Proposition 96 under the criteria governing the constitutionality of administrative searches, it appears that the statute could survive fourth amendment scrutiny.[187]

VI. THE NEW YORK AIDS TESTING AND CONFIDENTIALITY LAW: A DECISION NOT TO TEST?

As noted, New York State chose to promulgate a statute that does not authorize mandatory HIV testing for sex offenders.[188] New York deferred to individual privacy by enacting Article 27-F of its Public Health Law, known as the New York AIDS Testing and Confidentiality Law.[189] By prohibiting compulsory HIV testing and protecting the con-

183. *Id.* at 1439 & n.230.
184. *Id.* at 1443.
185. *See* CAL. HEALTH & SAFETY CODE § 199.95 (West Supp. 1990).
186. *Id.*
187. Note, *Mandatory AIDS Testing*, *supra* note 3, at 1445.
188. *See supra* note 10 and accompanying text.
189. N.Y. PUB. HEALTH LAW §§ 2780-2787 (McKinney Supp. 1990); *see also Executive Sum-*

fidentiality of legally obtained test results, the law will have a profound impact on the extent to which mandatory AIDS testing may be used in the state criminal justice system.[190] Interestingly, however, the New York law contains a gap that seems to remove some of its contemplated protections, notably for defendants in sexual assault cases.[191]

The law generally regulates HIV testing and counseling procedures.[192] Specifically, it imposes a prohibition against HIV testing without the test subject's written, voluntary, and informed consent.[193] When communicating the results of a voluntary AIDS test, the disclosing party must provide the test subject with counseling or referrals for counseling in order to help the subject handle the possible ramifications of the test results.[194] The law generally forbids disclosure of HIV-related information without an individual's informed consent,[195] except for disclosure to the individual, certain health care facilities, public health and welfare agencies and their officers, authorized insurance institutions, and specified individuals connected with the state correctional system.[196] Section 2785 of the law states that a court may order disclosure of confidential HIV-related information only when there is a "compelling need" to disclose such information for the adjudication of a proceeding or when there is a "clear and imminent danger" to an individual due to contact with the individual to whom the information per-

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mary, supra note 14, at 609.

190. *Executive Summary, supra* note 14, at 609. For example, state correctional facilities will be required to comply with the mandate of the law. *Id.* at 609-12.

191. *See infra* text accompanying notes 199-203.

192. *Executive Summary, supra* note 14, at 609-11.

193. The statute states:

> [N]o person shall order the performance of an HIV related test without first receiving the written, informed consent of the subject of the test who has capacity to consent or, when the subject lacks capacity to consent, of a person authorized pursuant to law to consent to health care for such individual.

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

Informed consent is evidenced under the law by the subject's signature on a form that explains, among other things, the purpose of the test, the benefits of early diagnosis and medical intervention, the possibility of withdrawing consent, and the built-in confidentiality protections of the law. *Id.* § 2781(2). Prior to obtaining written consent, the law requires that the test subject be apprised of information regarding HIV transmission, the nature of HIV-related illness, and potential discrimination due to disclosure of test results. *Id.* § 2781(3).

194. *Id.* § 2781(5).

195. In passing these statutes, the legislature remarked that "maximum confidentiality protection for information related to [HIV] infection and [AIDS] is an essential public health measure . . . . [T]he 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." *Id.* § 2780 (historical note) (McKinney Supp. 1990).

196. *Id.* § 2782(1). A separate subdivision of the law's confidentiality and disclosure section contains an in-depth discussion of the circumstances under which a physician is authorized to communicate a subject's HIV test results to other individuals. *See id.* § 2782(4).

tains.[197] Finally, the statute stipulates that any person who violates the prohibition against compulsory HIV testing or unauthorized disclosure of the results of a voluntary test is subject to a civil penalty, and any willful violator of the law will be guilty of a misdemeanor.[198]

The New York AIDS Testing and Confidentiality Law forbids any "person" from mandating an involuntary HIV test or disclosing the information obtained through a consensual test.[199] Significantly, however, state and federal courts are not included under the statute's definition of the term "person."[200] Thus, at least one commentator has suggested that the law's general prohibition against nonconsensual testing and disclosure of such test results may not apply to the courts.[201]

With this in mind, a court could order, at its own discretion, a criminal defendant to submit to a mandatory HIV test. This apparent gap in the law's coverage, however, is arguably contrary to the spirit and purpose of the law, which is intended to protect individual privacy. The legislature stated that it intended that courts strictly construe the few exceptions to the confidentiality rule.[202] By analogy, the legislature presumably also intended its general prohibition against nonconsensual testing to be construed similarly; however, the New York law appears to leave the door open for judges to order involuntary testing.

New York courts have not tested the scope of the AIDS Testing and Confidentiality Law, but a court conceivably could decide that the law does not disallow a judicially ordered test. One New York judge has promised that he will challenge the law the next time a rape victim requests that a defendant undergo HIV testing.[203] Because New York has no administrative scheme to regulate involuntary testing, it is questionable whether this action could survive fourth amendment scrutiny.

VII. The Victim Versus the Defendant: Whose Interests Prevail?

The government has a definite interest in responding to the concerns of the rape victim in light of the AIDS crisis. In general, the government's position has been that victims of sexual assault deserve consideration and support.[204] The state also has recognized, however,

197. *Id.* § 2785. Note that this authorized disclosure pertains only to information obtained with the test subject's informed consent.

198. *Id.* § 2783.

199. *Id.* §§ 2781-2782. As defined in the statute, a "person" includes any "natural person, partnership, association, joint venture, trust, public or private corporation, or state or local government agency." *Id.* § 2780(11).

200. *See Executive Summary, supra* note 14, at 610.

201. *See id.*

202. N.Y. Pub. Health Law § 2780 (histerical note) (McKinney Supp. 1990).

203. Hoffman, *supra* note 4, at 41 (statement of Judge Nicholas Colabella).

204. *Presidential Commission, supra* note 2, at 131.

that while the rape victim has the right to be treated with fairness and dignity, a victim's request must be balanced against the constitutional rights of the alleged sex offender.[205] To the victim, this is a frustrating proposition. Many victims of sexual assault wonder why the government is sometimes more sensitive to issues of privacy and confidentiality than to public health.[206] Unquestionably, a rape victim has difficulty believing that testing the rapist is a terrible invasion of his privacy.[207]

Victims' rights advocates argue that the purpose of testing alleged sex offenders for HIV is to protect the victim's health and peace of mind and to reduce further spread of the AIDS virus.[208] In broad terms, it is a question of public health. A potential risk for HIV transmission in a sexual assault undoubtedly does exist and cannot be dismissed readily.[209] Research, however, has not established the extent of the victim's risk.[210]

HIV can be transmitted both homosexually and heterosexually.[211] The physical trauma associated with sexual assault serves to increase the vulnerability of body tissue so that the risk of infection rises commensurately.[212] In addition, the high-risk behavior of some sexual offenders may make HIV transmission during a sexual assault an even greater possibility.[213] Studies have indicated that sexual offenders often have relatively large numbers of victims and high rates of recidivism: even a limited number of HIV-infected offenders potentially could

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205. *Id.*

206. Hoffman, *supra* note 4, at 38.

207. *See id.* Furthermore, prior to enacting the AIDS Testing and Confidentiality Law, New York policy appeared to permit compulsory testing of certain sex offenders. In People v. Thomas, 139 Misc. 2d 1072, 529 N.Y.S.2d 429 (Co. Ct. 1988), the court determined that a defendant who pleaded guilty to attempted rape could be ordered to undergo an AIDS test at the victim's request and that the test was reasonable and proper. Balancing the "equities" of the circumstances, the court held that it had the discretionary power to compel the test "simply because it [was] the intelligent, humane, logical, and proper course of action" in this situation. *Id.* at 1074-75, 529 N.Y.S.2d at 431; *see also* People v. Cook, 143 A.D.2d 486, 532 N.Y.S.2d 940 (App. Div. 1988) (maintaining that the constitutional rights of a defendant who pleaded guilty to rape were not violated by a court-ordered HIV test conducted at the victim's request).

208. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 199.95 (West Supp. 1990).

209. Hoffman, *supra* note 4, at 36.

210. No reported and verified case of HIV contracted in a sexual assault has been documented to date. *Id.* Some commentators, however, have suggested that these cases exist, but have not yet been identified. *See id.* Compounding the problem is the fact that rape is a vastly underreported crime with some estimates indicating that for each reported rape, three to ten remain unreported. *Presidential Commission, supra* note 2, at 131. Furthermore, much time can elapse before HIV exposure is detectable, thereby making identification of the source more difficult. Hoffman, *supra* note 4, at 36; *see also supra* notes 77-79 and accompanying text.

211. Merritt, *supra* note 12, at 748.

212. *Presidential Commission, supra* note 2, at 131; Hoffman, *supra* note 4, at 36.

213. *Presidential Commission, supra* note 2, at 131.

transmit the virus to a considerable number of victims.[214]

If a rapist has spent time in jail, the possibility that he carries the virus and, therefore, can infect his victim, is even greater.[215] A substantial percentage of inmates engage in conduct and practices that put them at high risk for contracting HIV, and conditions at most state and federal prisons exacerbate this problem.[216] Prison inmates are approximately twice as likely to have used illegal drugs as persons in the general public.[217] In New York alone sixty percent of prison inmates have used intravenous drugs.[218] Nearly thirty percent of the United States prison population engages in homosexual acts while incarcerated; it is estimated that approximately nine to twenty percent of inmates are the targets of nonconsensual sex acts while in prison.[219]

These frightening statistics suggest a strong possibility of HIV transmission in a sexual assault. Consequently, it is not surprising that some legislators contend that any information with respect to an assailant's HIV status is valuable to the rape victim—not only for the victim's protection, but also for those with whom the victim has intimate contact.[220] Yet others argue that knowledge of the defendant's HIV status is of minimal use to the victim[221] primarily because of the vagaries of HIV incubation and test reliability.[222] For example, if a defendant's test result is negative, it may be a false negative result due to the window of time between HIV infection and a positive test result.[223] In

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214. *Id.* at 132; Hoffman, *supra* note 4, at 36.

215. Hoffman, *supra* note 4, at 36. Since 1984 AIDS has been the foremost cause of death in the correctional system and has been responsible for greater than 50% of inmate mortality in New York state prisons. *Id.*

216. Note, *In Prison with AIDS: The Constitutionality of Mass Screening and Segregation Policies*, 1988 U. ILL. L. REV. 151, 152 (1988) [hereinafter Note, *In Prison with AIDS*]. Seventeen percent of the New York state prison population—approximately 7000 individuals—may be HIV-infected. *Executive Summary*, *supra* note 14, at 603. Approximately 10,000 to 15,000 of the inmates who passed through the New York City prison system in 1988 carry the AIDS virus. *Id.*

217. Note, *In Prison with AIDS*, *supra* note 216, at 152 n.13.

218. *Id.* Incredibly, it is estimated that fully half of the 100,000 people who move through the New York City prison system annually are present or former intravenous drug users. *Id.*

219. *Id.* at 152 n.14.

220. *See* Dunne & Serio, *Confidentiality: An Integral Component of AIDS Public Policy*, 7 ST. LOUIS U. PUB. L. REV. 25, 28 (1988); Hoffman, *supra* note 4, at 38. Presumably, a sexual assault victim whose assailant tested positive would abstain from further sexual contact or engage only in "safe" sexual practices in order to protect other individuals. Despite efforts to protect the assault victim, no conclusive evidence has suggested that any "maintenance" treatment will prevent an individual exposed to HIV from developing full-blown AIDS. *See* Hoffman, *supra* note 4, at 41. Some preliminary research, however, has suggested that HIV-positive but symptomless individuals may develop fewer drug-resistant strains of the virus while under AZT treatment. USA Today, Jan. 30, 1990, at D1, col. 1; *see also* The Boston Globe, June 22, 1990, at 57, col. 1. Thus, a sexual assault victim may derive some benefit from early notification of the attacker's HIV status.

221. CRIM. JUST. NEWSL., *supra* note 156, at 3 (statement of Judge Mary C. Morgan).

222. Hoffman, *supra* note 4, at 36; *see also supra* notes 65-91 and accompanying text.

223. CRIM. JUST. NEWSL., *supra* note 156, at 3.

this scenario a victim might be given a false sense of security.[224] Similarly, a defendant's test result might be false positive[225] thus causing the victim to suffer needless mental anguish.

Even if the defendant's test result is a true positive, this information may be of little use to the rape victim. If HIV antibodies are not currently detectable until six weeks to eighteen months after infection, determining when the defendant actually became infected is nearly impossible.[226] Thus, a perpetrator who carries the virus at the time he is tested could have been infected before he attacked the victim, at some point during the time between the attack and his arrest, or in jail awaiting trial.[227] Those who argue against mandatory testing because of the inaccuracy of the testing process contend that the best way to protect the interests of the rape victim is to concentrate on testing, retesting, and counseling the victim.[228]

Given the problems inherent in the HIV testing procedure, the defendant may have an expectation of privacy in his blood that would invalidate mandatory HIV testing. The government's interest in protecting victims of sexual assault is substantial, but it may not be well served by a program of mandatory, nonconsensual HIV testing of alleged sex offenders. Under *Burger*, *Skinner*, and *Von Raab*, a warrantless inspection will not be reasonable under the fourth amendment unless necessary to serve a special governmental need that outweighs the individual's privacy interest. If involuntary testing does not serve adequately the governmental need to provide real protection to rape victims, laws allowing mandatory testing will permit an unnecessary and unproductive invasion into the personal privacy of defendants.[229] Such testing would violate defendants' rights against unreasonable search and seizure. The information thereby obtained could have a profound effect on their constitutional and civil rights.

The defendant's privacy interest in not being tested for HIV involuntarily is substantial, primarily because of the inherent difficulty in keeping test results confidential and also because of the frequent discrimination against individuals known or thought to be HIV-positive.[230] Confidentiality of HIV-related information is essential to protect individuals who test positive against discrimination in the workplace, in

224. *Id.*
225. *See supra* note 73 and accompanying text.
226. Hoffman, *supra* note 4, at 38.
227. *Id.*
228. *Id.*; CRIM. JUST. NEWSL., *supra* note 156, at 3 (statement of Judge Mary C. Morgan).
229. Hoffman, *supra* note 4, at 36.
230. CRIM. JUST. NEWSL., *supra* note 156, at 3.

housing, and in the schools.[231] Supporters of mandatory testing generally recognize the need for confidentiality and strive to maintain a careful balance between confidentiality of HIV information and protection of the public health.[232] Opponents of nonconsensual testing, however, stress that policing confidentiality is a formidable task. Public debate over mandatory HIV testing frequently has focused on the adequacy of protection that current state confidentiality laws afford individuals who are tested for HIV.[233] Some states, like California, have enacted HIV-specific laws that seek to strike a workable balance between confidentiality and public health needs, but skeptics remain dubious. Critics claim that simply too many opportunities for improper dissemination of HIV test results exist even if a statute, such as California's Proposition 96, restricts disclosure to certain named parties and penalizes breaches of confidentiality.[234]

The privacy and confidentiality concerns of the incarcerated defendant may be even greater than those of most individuals subject to an HIV test. Given the fact that inmates are undoubtedly aware of the prevalence of HIV infection in the corrections system but suffer a lack of independent information regarding viral transmission, they are often overzealous in their own efforts to contain its spread.[235] From the inmate's point of view, he is better off if he is not tested.[236]

Prisoners' rights advocates point out that when an inmate is tested the results, positive or negative, are placed in his permanent record.[237] Keeping this information confidential in a correctional facility is practically impossible.[238] Any real or even rumored HIV infection could lead to discrimination, intimidation, or even violence among the prison population.[239]

An additional concern for defendants is whether a mandatory HIV

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231. *Executive Summary*, *supra* note 14, at 611; Thomas, *supra* note 52, at 44.

232. *See, e.g.*, *Presidential Commission*, *supra* note 2, at 126.

233. Dunne & Serio, *supra* note 220, at 28.

234. *See* Hoffman, *supra* note 4, at 39. Interestingly, Proposition 96 does not penalize the rape victim who discloses the defendant's test results to anyone for the purpose of obtaining medical or psychological care or advice. *Id.*; *see supra* text accompanying notes 178 & 179. Allowing disclosure for "medical or psychological care or advice" seems to allow for a broad range of communication of test results thereby creating a possible loophole in the statute's confidentiality protection.

235. Note, *supra* note 216, at 151.

236. Hoffman, *supra* note 4, at 39.

237. *Id.*

238. *Id.*

239. Note, *supra* note 216, at 171. For a lengthy treatment of the problems surrounding AIDS testing and confidentiality in correctional facilities, see Branham, *supra* note 3, at 763, and Hanssens & Jacobi, *Blood Testing of Prisoners for the AIDS Virus: A Brief Reply*, 20 CONN. L. REV. 813 (1988).

test might infringe on their rights to a fair and just trial. Some critics of nonconsensual testing have voiced a concern that any involuntary testing prior to conviction for a sexual offense turns the presumption of innocence on its head.[240] Knowledge of an involuntary test, performed at the behest of the victim of the alleged offense, might cause a jury to presume that the defendant actually committed the crime. Testing advocates may argue that a jury would not know that the test was performed, but the mere rumor that a defendant's HIV status is in question could have an adverse effect on the defendant's right to a fair trial.[241] Under some circumstances, a judge may take precautionary measures when a defendant who is thought to be HIV-positive is present in the courtroom.[242] Several of these measures would indicate to a jury that the defendant may carry the AIDS virus. The defendant thereby would be subject to considerable prejudice throughout the court proceedings.[243]

VIII. CONCLUSION

AIDS is a terrible, fatal disease, which thus far has eluded categorization, treatment, and cure. It has occasioned discrimination and hysteria among the ranks of society,[244] and it will continue to do so unless society begins to deal with it in a rational, orderly manner. Unquestionably, the government should be concerned with the safety of the rape victim and of the public in general with respect to HIV transmission, but it is presently unclear whether mandatory AIDS testing of sex offenders offers society any tangible protection against the ravages of the virus. In contrast, we must be alert to the fact that an involuntary testing program may violate the test subject's rights under the fourth amendment.

With proper counseling and confidentiality, the ELISA and Western blot tests are effective procedures for those individuals who volun-

240. *See, e.g.*, Hoffman, *supra* note 4, at 38 (statement of Judge Richard Andrias).

241. *See Executive Summary, supra* note 14, at 618.

242. *See* CRIM. JUST. NEWSL., *supra* note 156, at 3. For example, in 1988 the New York State Office of Court Administration (OCA), which is not subject to the New York AIDS Testing and Confidentiality Law, *see supra* note 196 and accompanying text, promulgated guidelines that allow judges to seek a waiver of defendants' rights to be present at their own trials and also allow court officers to employ certain precautions when a defendant is believed to have HIV infection. CRIM. JUST. NEWSL., *supra* note 156, at 3. These precautions might include allowing court officers to wear protective gloves and to guard defendants from a certain distance, notifying counsel and the jury of the defendant's suspected HIV status, or removing the defendant from the courtroom. *Id.* For an in-depth discussion of the OCA guidelines, see *Executive Summary, supra* note 14, at 616-20 & n.30.

243. *See Executive Summary, supra* note 14, at 616.

244. Doe v. Roe, 139 Misc. 2d 209, 220-21, 526 N.Y.S.2d 718, 726 (Sup. Ct. 1988).

tarily seek to ascertain their HIV status.[245] These procedures, however, do not appear sufficiently reliable to justify a mandatory HIV screening scheme for sex offenders. As medical technology improves and as doctors gain more knowledge of the disease, HIV testing someday may become reliable enough to make involuntary testing an effective method of curbing HIV transmission.

Following the reasonableness test set forth in *Burger*, the government may conduct warrantless administrative searches in situations of special need in which the governmental interest in protecting the public safety and welfare significantly outweighs the individual privacy interests. To satisfy the *Burger* test the warrantless inspection must be necessary to further the regulatory scheme. Because AIDS testing is currently unreliable, involuntary testing may not serve the contemplated regulatory scheme. California's Proposition 96 attempts to make mandatory testing of sex offenders fit into the *Burger* administrative search category, but the statute may violate the fourth amendment because of the uncertainties surrounding AIDS testing.

To this point, New York has eschewed a mandatory AIDS testing policy for alleged sex offenders in favor of a law that appears to provide total protection for the defendant's privacy interests. Yet a loophole in the statute could allow a court to compel a defendant to undergo HIV testing. If California's administrative scheme for involuntary testing cannot pass constitutional muster, a judge-ordered involuntary test is even less likely to satisfy the strictures of the fourth amendment.

Ultimately, the constitutionality of involuntary HIV testing of sex offenders rests on balancing the defendant's and the victim's respective rights and interests. While the victim's interests are significant, nonconsensual testing of the alleged attacker may not benefit the victim or society in general. Given the present status of HIV screening, testing and retesting the victim, not the defendant, may serve the government's interest most effectively. Additionally, the government could devote needed resources to AIDS education and counseling.

When the reliability of AIDS testing improves, an administrative scheme enabling nonconsensual testing of sex offenders will be more likely to meet constitutional standards. Even the New York City Bar Association, whose stern stance against involuntary testing of sex offenders approximates that of the American Civil Liberties Union, has noted that its position on the issue may change with time.[246] For now,

245. Note, *Constitutional Questions*, *supra* note 16, at 443-44.
246. Hoffman, *supra* note 4, at 36.

the test subject's privacy interests appear to be paramount. The government, and especially the court system, must be extremely wary of attacks on fourth amendment rights made in the guise of health-related AIDS claims.[247]

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247. *Doe*, 139 Misc. 2d at 221, 526 N.Y.S.2d at 726.