Pre-Conviction Mandatory HIV Testing: Rape, AIDS and the Fourth Amendment

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NOTE

PRE-CONVICTION MANDATORY HIV TESTING: RAPE, AIDS AND THE FOURTH AMENDMENT

I. INTRODUCTION

Acquired Immune Deficiency Syndrome ("AIDS")1 is a horrifying, tragic, and deadly disease.2 As the number of individuals infected with AIDS has increased,3 so too has the terror and hysteria surrounding the disease. AIDS has been characterized as the epidemic of our generation.4 The fear of contracting AIDS pervades most of society, although it is especially prevalent among rape victims.5 Because rape is a non-

1. Acquired Immune Deficiency Syndrome ("AIDS") is the result of an infection caused by the human immunodeficiency virus ("HIV"). See DAN J. TENENHOUSE, THE ATTORNEY'S MEDICAL DESKBOOK § 18:13, at 18-5 (3d ed. 1993). Once an individual is infected with HIV, the virus attacks the immune system and, over time, the infected individual ultimately acquires the fatal AIDS virus. See SURGEON GENERAL, U.S. PUB. HEALTH SERVICE, SURGEON GENERAL'S REPORT TO THE AMERICAN PUBLIC ON HIV INFECTION AND AIDS 5 (1994) [hereinafter SURGEON GENERAL'S REPORT].


3. In the mid 1980s, roughly 450,000 Americans were infected with the AIDS virus. See Susan Okie, AIDS: Health Officials Launch New Campaign to Determine How Widespread the Virus Is, WASH. POST, Sept 2, 1997 (Health), at 12. However, as of 1997, more than 750,000 individuals in the United States had been diagnosed with AIDS, and estimates indicate that up to 40,000 people are newly infected with HIV each year. See id. (proposing that determining the precise number of Americans infected with HIV is difficult because most national databases track only those individuals diagnosed with full-blown AIDS).

4. See SURGEON GENERAL'S REPORT, supra note 1, at 1. Currently, the two most common methods of transmitting HIV are unprotected sexual intercourse and needle sharing with intravenous drug users. See id. at 6-7. Other known modes of transmission include blood transfusions and organ donations. See id. at 9; see also Gerald H. Friedland & Robert S. Klein, Medical Progress: Transmission of the Human Immunodeficiency Virus, 317 NEW ENG. J. MED. 1125, 1132 (1987) (providing that additional, but less common, methods of transmissions include perinatal exposure and breast feeding).

5. See Lawrence O. Gostin et al., HIV Testing, Counseling, and Prophylaxis After Sexual
consensual crime of violence, the risk of contracting AIDS is arguably higher than in cases involving consensual sexual activity. Consequently, the brutal nature of rape distinguishes it from other forms of exposure to AIDS and increases the level of anxiety and fear that rape victims experience. In addition to the psychological anguish and physical trauma that rape victims endure, victims today must live with the fear of possible death. This is particularly troubling considering that in 1998 at least 643,000 women in the United States were victims of rape, attempted rape, or sexual assault.

The spread of AIDS, especially to rape victims, has compelled the federal government to provide AIDS testing programs for criminal defendants of sexual assault. Specifically, Congress enacted federal legislation requiring states to enact mandatory testing programs for sex offenders at the request of their victims in order to qualify for federal funds. However, because the federal government has not proffered any specific guidelines regarding the enactment of these mandatory testing schemes, the laws vary from state to state. As a result, some states limit involuntary testing to offenders actually convicted of rape, while

Assault, 271 JAMA 1436, 1437 (1994) (reporting that the fear of contracting HIV, which ultimately results in AIDS, adds "to the incidence, prevalence, and severity of psychiatric morbidity in rape survivors"); Rape Survivors Facing HIV Testing Require Special Treatment, AIDS ALERT, Aug. 1994, at 1 (noting that contracting the AIDS virus is the biggest fear that a rape victim encounters).

6. See Gostin et al., supra note 5, at 1437 (stating that "[t]he presence of lesions or blood from violent assaults may significantly increase the probability of [HIV] transmission"); CENTER FOR WOMEN POLICY STUDIES, MORE HARM THAN HELP: THE RAMIFICATIONS FOR RAPE SURVIVORS OF MANDATORY HIV TESTING OF RAPEST 6 (1991) [hereinafter MORE HARM THAN HELP] (reporting that "[b]ecause local trauma which dissolved mucosal barriers to infection is expected to increase a woman's risk of HIV infection, the risk of contracting HIV from rape is estimated to be greater than [transmission among consenting heterosexual partners]").

7. See Steven Eisenstat, An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing the Governmental Public Health Interests with the Individual's Privacy Interest, 52 U. PITT. L. REV. 327, 370-71 (1991) (noting that when a victim is faced with possible infection due to an unavoidable situation, the fear of HIV infection combined with the trauma attending the rape itself increases the level of anxiety suffered by the rape victim).


9. See CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1998: CHANGES 1997-98 WITH TRENDS 1993-98 3 (1999); cf. Gostin et al., supra note 5, at 1436 (noting that rape is often underreported and underdocumented); Sexual Assault Called 'Silent Violent Epidemic,' WASH. POST, Nov. 7, 1995, at A3 (stating that "[s]exual assault is the most rapidly growing violent crime in the country").

10. See infra Part IV.A. for an in depth discussion of the federal legislation.


12. See, e.g., MONT. CODE ANN. § 46-18-256 (1999); N.Y. CRIM. PROC. LAW § 390.15
other states compel testing when a defendant is formally charged or indicted for a sexual assault.13

These different testing schemes have sparked a heated debate within the legal profession that focuses primarily on implications raised by the Fourth Amendment.14 Because the Fourth Amendment protects privacy rights of individuals against unreasonable invasions by the government, many courts and public policymakers are now confronted with the difficult task of balancing the interests of a fearful public, the fears of the innocent victim, and the constitutional rights of the sex offender.

Although these concerns affect mandatory testing of both convicted and suspected sex offenders, this Note focuses on whether victims of rape have the right to compel their alleged assailants to undergo human immunodeficiency virus ("HIV") testing prior to conviction. The many concerns surrounding this debate include the suspect's expectation of privacy, the invasiveness of the test, the magnitude of the state's interest in performing the HIV test, the utility served in testing the alleged assailant, and the suspect's right to be presumed innocent until proven guilty.15 Moreover, concern for the victim's welfare and the state's interest in safeguarding the public must also be carefully balanced.16

This Note explores the constitutional issues surrounding pre-conviction mandatory HIV testing of criminal sex offenders, with particular concentration on New York's proposed pre-conviction mandatory HIV testing scheme. Part II briefly identifies the medical aspects of AIDS and HIV antibody testing.17 Part III discusses the constitutional framework in which blood tests are analyzed, including Fourth Amendment case law.18 Part IV examines the federal legislation, as well


14. See U.S. CONST. amend. IV. The Fourth Amendment provides, in part, 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." Id.

15. See infra Part V.

16. See infra Part VI.

17. See infra notes 23-58 and accompanying text.

18. See infra notes 59-100 and accompanying text.
as the current and proposed statutory schemes in the State of New York. Part V considers the constitutional implications of New York's proposed legislation. Part VI explores and evaluates the competing interests regarding pre-conviction HIV testing. Finally, Part VII concludes that New York's proposed pre-conviction mandatory HIV testing scheme is not only constitutional, but necessary as it benefits both rape victims as well as society at large.

II. AIDS AND HIV TESTING

A. AIDS

A fundamental understanding of the medical aspects of AIDS is crucial to adequately comprehend the mandatory testing legislation and the legislation's significance as it relates to arguments for and against mandatory testing. AIDS is the result of an infection caused by HIV. Once an individual is infected with HIV, the virus destroys the body's CD4+ cells, also known as T-helper cells or T4 cells. These T-helper cells are necessary to provide the proper functioning of the human immune response. Over time, the loss of the T-helper cells gradually destroys the immune system and thus, the body's ability to fight off ordinary infections gradually disappears.

Once an individual has been infected with HIV, the disease advances in approximately three stages, each of which varies in duration.

19. See infra notes 101-28 and accompanying text.
20. See infra notes 129-207 and accompanying text.
21. See infra notes 208-49 and accompanying text.
22. See infra notes 250-56 and accompanying text.
23. See TENNENHOUSE, supra note 1, § 18:13, at 18-5.
24. See SURGEON GENERAL'S REPORT, supra note 1, at 19. For purposes of this Note, the term T-helper cells will be used. An individual who is not infected with HIV has a T-helper cell count that remains fixed over time, while an individual who is infected has a T-helper cell count that decreases over time. See id. The number of T-helper cells "is a measure of the damage to your immune system by HIV and of your body's ability to fight infection." Id. When the amount of T-helper cells drops below 300, an infected person is at risk of obtaining an opportunistic infection typically associated with AIDS; Progress in Treating AIDS, FACTS ON HIV/AIDS: AIDS PUBLIC INFORMATION PROJECT (Henry J. Kaiser Family Found., Menlo Park, Cal.), Mar. 1996 [hereinafter Progress in Treating AIDS]. When the T-helper cell count drops below 200, an infected person develops the AIDS virus. See id.
25. See TENNENHOUSE, supra note 1, § 18:15, at 18-6. The immune system destroys infections in the body using antibodies manufactured by lymphocytes. See id.
During the initial stage of HIV infection, also referred to as the "asymptomatic carrier state," individuals remain relatively healthy. The second stage, AIDS-Related Complex, is marked by manifestations of minor symptoms, including fatigue, weight loss, fever, and lymph node enlargement. The third and final stage is known as full-blown AIDS, or simply AIDS. As a result of the large scale destruction of the T-helper cells, an individual with AIDS is no longer able to ward off various opportunistic life threatening diseases, including pneumocystis carinii pneumonia, tuberculosis, and Kaposy's sarcoma, a form of cancer. These diseases, and not the AIDS virus, are the ultimate causes of death.

B. HIV Testing

The term "AIDS testing" is misleading because presently there is no test to determine the presence of the AIDS virus. Current procedures test for HIV infection, rather than AIDS. The Enzyme-Linked Immunosorbant Assay and the Western Blot are the most commonly used tests to detect the presence of HIV infection. These blood tests are not designed to specifically detect HIV. Rather, they are designed to detect the presence of HIV antibodies which the body manufactures.
in order to fight off HIV. By measuring the number of antibodies in an individual’s blood, physicians infer the presence of HIV.

An individual does not produce the HIV antibodies immediately after exposure to the virus. It typically takes anywhere from one to six months for the antibodies to develop, and in some instances, may take even longer. The time between exposure and the development of the HIV antibodies is commonly referred to as the "window period." It is during this latency period that the uncertainties regarding HIV testing become apparent. For instance, a test may render a false-positive or a false-negative result. A false-positive result classifies an individual as HIV-positive when, in reality, no HIV antibodies exist. This usually occurs due to imperfections in the test. A false-negative result, on the other hand, does not originate from imperfections in the test, but rather is a result of the latency period. A false-negative result occurs when an individual tests negative for HIV because that individual has not yet developed a detectable level of HIV antibodies, but nonetheless is still carrying the virus. Consequently, a person who incorrectly believes that he or she is not infected because of a negative HIV test result is still capable of transmitting the disease and thus, may unintentionally infect others.

Currently, there is neither a cure for AIDS nor a vaccine available to avert the disease. However, there are a number of drug and drug combination therapies available offering hope to individuals suffering from HIV infection. Antiretroviral treatments, for example, are drug

42. See id.
43. See Simotas, supra note 27, at 1887.
44. See Jaffe, supra note 32, at 10. According to the Centers for Disease Control, a majority of individuals infected with HIV will produce HIV antibodies within six months; Surgeon General’s Report, supra note 1, at 11. On occasion, however, HIV antibodies may take up to a year or longer before becoming concentrated enough to produce a positive test result. See John G. Bartlett & Ann K. Finkbeiner, The Guide to Living with HIV Infection 59 (1993).
45. See Jaffe, supra note 32, at 10.
46. See Field, supra note 37, at 41.
47. See id. at 39.
48. See Simotas, supra note 27, at 1887.
49. See id. at 1888. The ELISA test is reported to be approximately 99.8% accurate. See Gerald J. Stine, Acquired Immune Deficiency Syndrome: Biological, Medical, Social, and Legal Issues 294 (1993). This means that two out of every 1000 individuals tested will test positive despite the absence of HIV antibodies in their system.
50. See Simotas, supra note 27, at 1888.
51. See Field, supra note 37, at 41.
52. See id.
treatments that interfere with the ability of HIV to reproduce. These drugs neutralize the reverse transcriptase enzyme, an enzyme that HIV requires in the early stages of its reproductive lifecycle. The most common antiretroviral drug is zidovudine ("AZT"). When administered with other antiretroviral drugs, AZT has been shown to increase the number of T-helper cells and prolong an HIV infected individual's life. Although these treatment therapies do not cure individuals inflicted with HIV, they have been shown to delay the progression of the disease and increase survival.

III. THE CONSTITUTIONAL FRAMEWORK OF MANDATORY HIV TESTING

A. The Fourth Amendment

The Fourth Amendment to the United States Constitution 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." Consequently, the Fourth Amendment guarantees the privacy, integrity, and security of individuals against discretionary and invasive searches by the government. By virtue of the Fourteenth Amendment, the Fourth Amendment applies to states and their officials.

55. See id.
56. See id. Other antiretroviral drugs include ddI (dideoxyinosine, Videx®), ddC (dideoxycytidine, Hivid®), D4T (stavudine, Zerit®), and 3TC (lamivudine). See id.
57. See id. Zidovudine ("AZT") also has been shown to alleviate symptoms of impaired mental functioning, which occur at some point in more than half of those infected with HIV. See id.
58. See id. There is a relatively new class of antiretroviral drugs offering hope to HIV infected individuals, known as protease inhibitors ("Pis"). See id. These drugs neutralize the enzyme protease, which HIV requires toward the final stages of its reproductive lifecycle. See id. Individuals using PIs appear to experience fewer side effects and they may not develop resistance to these drugs as quickly as they would to the antiretroviral drugs. See TRACEY HOOKER, NATIONAL CONFERENCE OF STATE LEGISLATURES, HIV/AIDS, FACTS TO CONSIDER: 1996 31 (1996). The Federal Drug Administration recommends that PIs be administered in combination with other antiretroviral drugs, including AZT, to maximize effectiveness. See id.
59. U.S. CONST. amend. IV.
In *Schmerber v. California*, the United States Supreme Court held that a compulsory blood test is a search within the meaning of the Fourth Amendment. Since mandatory HIV testing involves the compulsory extraction of blood, it must meet the Fourth Amendment's mandate of reasonableness. The reasonableness of a particular search is based on the circumstances surrounding the search, in addition to the nature of the search and seizure. Thus, the reasonableness of a particular search is determined by balancing the individual's Fourth Amendment rights against the promotion of legitimate governmental interests.

In the majority of cases, a search will be found unreasonable unless it is conducted pursuant to a search warrant based on probable cause which includes individualized suspicion. However, in recent years, the absolute requirement of a search warrant has been abated under certain circumstances. Occasionally, in cases where a search warrant is impracticable or inappropriate, and the search is deemed reasonable, courts will waive the requirement of a search warrant. In order to determine the reasonableness of a warrantless search, courts apply a "special needs" analysis. Under this analysis, courts balance the government's interest in conducting the search, without a warrant, against the individuals' expectation of privacy.

B. The "Special Needs" Analysis

The "special needs" doctrine was first developed in the companion cases of *Skinner v. Railway Labor Executives' Association* and *Na-
tional Treasury Employees Union v. Von Raab. In both cases, the United States Supreme Court authorized the government to test individuals for illegal drug use without a warrant or any particularized suspicion. In Skinner, the Court upheld a scheme mandating blood and urine testing of railroad employees involved in a major train accident. The Court determined that the government’s interests in protecting the safety of railway passengers and employees constituted a “special need.” The Court concluded that a warrant was unnecessary because it would not substantially further the aims typically served by warrants and would frustrate the objectives of the drug testing scheme. Additionally, the Court noted that under the chaotic circumstances in which a railroad accident occurs, it would be impracticable to have a requirement of particularized suspicion. Moreover, the Court concluded that the railroad employees’ expectations of privacy were diminished by virtue of their employment in an industry that is pervasively regulated to ensure safety. Finally, the Court held that since the removal of blood for chemical testing is of such a minimal nature, under certain circumstances the intrusion can be justified in the face of a special need beyond the normal requirements of law enforcement, such as individualized suspicion or probable cause.

In Von Raab, the Supreme Court applied a similar “special needs” analysis. The Court upheld mandatory drug testing of United States Customs employees seeking a promotion to positions that involved the carrying of a firearm or participation in drug interdiction. The Court

72. See Skinner, 489 U.S. at 602-03.
73. See id. at 620-21. The Court’s determination was based, in part, on the record which stated that alcohol and/or drug use was the contributing factor in at least 21 significant train accidents resulting in fatalities, injuries, and property damage estimated at $19 million. See id. at 607.
74. See id. at 622. Federal Railroad Administration regulations, pursuant to which the searches are conducted, are defined narrowly and in light of the standardized nature of the tests, there is no need for a neutral magistrate. See id.
75. See id. at 623. A warrant requirement would impede the employer’s ability to determine drug and/or alcohol abuse. See id. at 631.
76. See id. The Court stated:

Investigators who arrive at the scene shortly after a major accident has occurred may find it difficult to determine which members of a train crew contributed to [the accident’s] occurrence. Obtaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident.

Id.
77. See id. at 627.
78. See id. at 624.
80. See id. at 677.
determined that the government had a compelling interest in ensuring that front-line Customs agents dealing with drug interdiction and firearms maintained unimpeachable integrity, judgment, and physical fitness. The Court further determined that a warrant requirement would compromise the objectives of the testing program. As in Skinner, the Von Raab Court concluded that the Customs agent’s privacy expectations were diminished by the nature of their employment. According to the Court “Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy [with] respect to the intrusions occasioned by a [drug] test.” The Court ultimately concluded that, under a “special needs” analysis, regulations allowing warrantless, suspicionless drug testing of certain Customs agents were reasonable under the Fourth Amendment.

Since Skinner and Von Raab many lower courts have applied the “special needs” analysis to compulsory HIV testing. For instance, in In re Juveniles A, B, C, D, E, the Washington Supreme Court held that

81. See id. at 670. The Court stated that “[t]he purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the [Customs] Service and to prevent the promotion of drug users to those positions.” Id. at 666.

82. See id. at 667. According to the Court, “[t]he Customs Service has been entrusted with pressing responsibilities, and its mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions.” Id. The Court also stated that “a warrant would provide little or nothing in the way of additional protection of personal privacy.” Id.

83. See id. at 672.

84. Id. The Court stated:

Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much of the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.

Id.

85. See id. at 679. The Court held:

The Government’s compelling interests 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 outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions.

Id.


87. 847 P.2d 455 (Wash. 1993).
when evaluating mandatory HIV testing schemes, the “special needs” analysis requires that the court determine:

(1) whether the blood testing scheme arises from a “special need” beyond the needs of ordinary law enforcement and (2) if so, whether the intrusion of compulsory blood testing for AIDS, without probable cause or individualized suspicion that the AIDS virus will be found in the tested person’s blood, is justified by that need.\(^8\)

The court noted several relevant factors in determining the first prong of the analysis.\(^9\) First, the testing scheme is not part of a criminal code, but rather it is in place to protect the victim and to regulate public health.\(^9\)

Second, the defendant is not being tested in an attempt to obtain criminal evidence for the purpose of a prosecution.\(^9\)

Third, a positive HIV test result does not place the defendant at risk for an additional conviction or a longer sentence.\(^9\)

Finally, conventional circumstances requiring individualized suspicion are not practical since sex offenders that are infected with HIV sometimes have no outward manifestations of the virus.\(^9\)

Taking these factors into consideration, the court concluded that mandatory HIV testing of sexual offenders clearly presents a special need and as such, the “special needs” analysis applies.\(^9\)

The court then went on to balance the individual’s interest in avoiding mandatory HIV testing against the government’s interest in testing.\(^9\)

The court determined that the government’s interest was so compelling that it outweighed the individual’s interest in avoiding the testing.\(^9\)

In arriving at this conclusion, the court noted that, in general, blood tests are minimal intrusions.\(^9\)

The court went on to state that

\(^8\) Id. at 459 (quoting Johnetta J., 267 Cal. Rptr. at 677).
\(^9\) See id.
\(^9\) See id.
\(^9\) See id.
\(^9\) See id.
\(^9\) See id.
\(^9\) See id. at 460.
\(^9\) See id.
\(^9\) See id.
\(^9\) See id.
\(^9\) See id. The court noted that when the government seeks to test a defendant who has been convicted, the intrusion on the individual’s interest is even more limited. See id. The court went on to state that “‘[b]ecause AIDS can be transmitted through sexual contact, there is a direct nexus between the criminal behavior and the government’s action. Therefore, the offender should reasonably expect that his blood will be tested for the virus. The assailant’s own actions work to weaken his expectation of privacy.’” Id. (quoting Bernadette Pratt Sadler, Comment, When Rape Victims’ Rights Meet Privacy Rights: Mandatory HIV Testing, Striking the Fourth Amendment Balance, 67 WASH. L. REV. 195, 207 (1992)).
"[c]ontrol of a communicable disease is a valid and compelling exercise of the State’s police power. . . . [And] [t]esting sexual offenders directly addresses this purpose." 8 The court recognized that an HIV test is not dispositive of either the victim or the offender’s HIV status, however, “it is effective enough to justify its use.” 9 As a result, the court held that mandatory HIV testing of sex offenders comports with the Fourth Amendment and, under the “special needs” analysis, presents an “obvious and compelling” need to justify testing. 10

IV. LEGISLATION

A. Federal Legislation

In 1990, Congress reacted to the AIDS epidemic by enacting the Crime Control Act which required states to provide mandatory HIV testing schemes for offenders convicted of sexual assaults in order to qualify for federal grants. 11 The Crime Control Act specifically mandates that states provide HIV testing of convicted sex offenders at the request of their victims. 12 When a victim requests testing, the results of

98. Id.
99. Id. at 461.
100. See id. at 462.
102. See 42 U.S.C. § 3756(f). In relevant part, the statute provides:

(f) Testing certain sex offenders for human immunodeficiency virus

(1) For any fiscal year beginning more than 2 years after November 29, 1990—

(A) 90 percent of the funds allocated under subsection (a) of this section without regard to this subsection to a State described in paragraph (2) shall be distributed by the Director to such State; and

(B) 10 percent of such funds shall be allocated equally among States that are not affected by the operation of subparagraph (A).

(2) Paragraph (1)(A) refers to a State that does not have in effect, and does not enforce, in such [a] fiscal year, a law that requires the State at the request of the victim of a sexual act—

(A) to administer, to the defendant convicted under State law of such sexual act, a test to detect in such defendant the presence of the etiologic agent for acquired immune deficiency syndrome;

(B) to disclose the results of such test to such defendant and to the victim of such sexual act; and

(C) to provide to the victim of such sexual act counseling regarding HIV disease, HIV testing, in accordance with applicable law, and referral for appropriate health care and support services.

(3) For purposes of this subsection—

(A) the term “convicted” includes adjudicated under juvenile proceedings; and
the test are disclosed to both the victim and the offender. This mandatory testing program is strictly structured so that courts have no power regarding the testing of convicted defendants. However, the government has not proffered any specific guidelines regarding pre-conviction mandatory HIV testing schemes and, as such, the laws vary from state to state.

B. New York's Current Legislation

New York responded to the federal mandate by enacting a statute requiring HIV related testing under certain circumstances. Criminal Procedure Law 390.15 was enacted on August 1, 1995 and applies to persons convicted and adjudicated following that date. Pursuant to the law, when a defendant is convicted of a felony offense in which "sexual intercourse" or "deviate sexual intercourse" is a component of the crime for which the defendant is convicted, "the court must, upon a request of the victim, order that the defendant submit to human immunodeficiency (HIV) related testing." The court-ordered test must then be executed within fifteen days. Furthermore, the statute mandates that the test re-
sults, which are not disclosed to the court, only be communicated to the defendant and the victim.\textsuperscript{110}

A "victim" is defined as "the person with whom the defendant engaged in an act of sexual intercourse or deviate sexual intercourse."\textsuperscript{111} The victim must file the request in writing prior to the defendant’s conviction or within ten days after the conviction, unless the court allows it to be filed late for good cause.\textsuperscript{112} Moreover, the statute permits a representative of the victim to request the HIV test when the victim is an infant or incompetent.\textsuperscript{113}

Criminal Procedure Law 390.15 has minimal legislative history. This includes a brief memorandum in support of the bill.\textsuperscript{114} The memorandum indicates two underlying justifications for enacting the legislation: (1) to attain federal anti-drug funding and (2) to lessen the trauma for those victims of certain sex crimes who are requesting the information.\textsuperscript{115} Additionally, a New York judge recently held that the statute is intended "not to punish, but to accomplish another legitimate govern-

\hspace{1cm} \textsuperscript{110} See id. § 390.15(1)(a). Section 390.15(1)(a) provides in relevant part: Test results, which shall not be disclosed to the court, shall be communicated to the defendant and the victim named in the order in accordance with the provisions of section twenty-seven hundred eighty-five-a of the public health law, but such results and disclosure need not be completed prior to the imposition of sentence.

\hspace{1cm} \textsuperscript{111} Id.

\hspace{1cm} \textsuperscript{112} Id. § 390.15(1)(b). Section 390.15(1)(b) provides in relevant part: The term "victim" means the person with whom the defendant engaged in an act of sexual intercourse or deviate sexual intercourse, as those terms are defined in section 130.00 of the penal law, where such conduct with such victim was the basis for the defendant’s conviction of an offense specified in paragraph (a) of this subdivision.

\hspace{1cm} \textsuperscript{113} Id.

\hspace{1cm} \textsuperscript{114} See id. § 390.15(2). Section 390.15(2) provides: Any request made by the victim pursuant to this section must be in writing, filed with the court and provided by the court to the defendant or his or her counsel. The request must be filed with the court prior to or within ten days after entry of the defendant’s conviction; provided that, for good cause shown, the court may permit such request to be filed at any time before sentence is imposed.

\hspace{1cm} \textsuperscript{115} Id.

\hspace{1cm} \textsuperscript{115} See id. § 390.15(4). Section 390.15(4) states in relevant part: The application for an order to compel a convicted person to undergo an HIV related test may be made by the victim but, if the victim is an infant or incompetent person, the application may also be made by a representative as defined in section twelve hundred one of the civil practice law and rules.

\hspace{1cm} \textsuperscript{116} Id.

\hspace{1cm} \textsuperscript{117} See Memorandum in Support, New York State Assembly, ch. 76, 1995 N.Y. Laws 1872 (supporting the testing of certain defendants for HIV).

\hspace{1cm} \textsuperscript{118} See id.
mental purpose—to ease the trauma of [the] victim of a sex crime with respect to the HIV related disease.”

C. New York’s Proposed Legislation

In the year following the enactment of New York’s HIV testing statute, state legislators, lobbyists and government officials began pushing to extend the law to sex offenders who have not yet been convicted. The impetus for the new legislation was an attack in December 1995 on a six-year-old-girl, Collete Lopez, who was stabbed in the leg with a hypodermic needle by an escaped mental patient on a New York City subway. The circumstances surrounding Collete’s plight gained attention among many politicians when it was disclosed that her assailant could not be ordered to submit to an HIV test. Following this event, the Governor of New York, George Pataki, called for a new bill to permit pre-conviction HIV testing of suspects. According to Governor Pataki, “[w]e must allow the victims of sexual assault to learn if their attackers are HIV positive so they can make informed decisions about their own health.” The call for pre-conviction testing has been echoed by Deidre Raver, executive director of the Washington based advocacy group Women Against Violence. Raver has expressed that “[i]t is unconscionably inhuman to deny rape victims the opportunity to learn if they have been exposed to HIV. Rape victims should be given as much medical information as possible; yet they now must face uncertainty.” In further support of pre-conviction testing, New York Attor-
ney General Eliot Spitzer has stated that "'[v]ictims should know immediately if the rapist is HIV positive because waiting could be deadly.'"\textsuperscript{123}

On January 6, 1999, State Senator Stephen M. Saland, a Republican from Dutchess County, introduced a bill into the New York State Senate proposing to amend the current mandatory HIV testing statute to include pre-conviction testing.\textsuperscript{124} The amendment calls for mandatory HIV testing upon the request of a victim when there is pending an indictment, charge, or information of a sex offender.\textsuperscript{125} A court will grant a victim's request if it finds that the victim was exposed to bodily fluid based on the defendant's conduct.\textsuperscript{126} The amendment further requires that the test results be disclosed exclusively to the victim and the alleged sex offender.\textsuperscript{127} Finally, the amendment mandates that the test results are not to be admissible at the defendant's trial.\textsuperscript{128}


\textsuperscript{124} See S. B. 718, 222nd Leg. Sess. (N.Y. 1999). Section (2)(b) of the proposed bill provides in relevant part:

\begin{quote}
In any case where a defendant (i) is convicted of a qualifying offense as defined in paragraph (e) of subdivision one of this section, or (ii) stands charged by information or indictment with a qualifying offense as defined in paragraph (e) of subdivision one of this section or an offense described in paragraph (a) of this subdivision; and the court has made a finding pursuant to paragraph (b) of subdivision six of this section, the court shall, upon request of the petitioner and pursuant to this section, order the defendant to submit to testing of his or her blood for the presence of one or more transmissible diseases.
\end{quote}

\textsuperscript{125} See id.

\textsuperscript{126} See id. Section (6)(b) of the proposed bill provides:

\begin{quote}
In the case of an application to test a defendant pursuant to paragraph (b) of subdivision two of this section, the court shall consider such application on an expedited basis and shall grant the application if it finds that the petitioner may have been exposed to bodily fluid of the defendant during, or as a proximate result of, the commission of the offense specified in the application in a manner which may have involved transmission from the defendant to the petitioner of one or more specified transmissible diseases.
\end{quote}

\textsuperscript{127} See id.

\textsuperscript{128} See id. Section (2)(c) of the proposed bill provides:

\begin{quote}
The testing of blood pursuant to this section is to be arranged by a state, county, or local public health officer designated by the order. Test results, which shall not be disclosed to the court, shall be communicated to the defendant and to the petitioner or victim named in the order in accordance with the provisions of section twenty seven hundred eighty-five-a of the Public Health Law.
\end{quote}

\textsuperscript{128} See id. Section (9) of the proposed bill states:

\begin{quote}
No information obtained as a result of a consent, hearing or court order for testing is-
V. THE CONSTITUTIONAL IMPLICATIONS OF NEW YORK'S PROPOSED PRE-CONVICTION MANDATORY HIV TESTING

There has been substantial controversy regarding pre-conviction testing, from which many relevant considerations have emerged. The first major consideration concerns the expectation of privacy held by the individual to be searched, in addition to the invasiveness of the proposed search. A second consideration relates to the magnitude of the state’s interest served by the test. A third concern entails the actual utility of the search. Finally, a fourth concern involves the suspect’s apparent right to be presumed innocent.

A. Expectation of Privacy

Non-consensual HIV testing unquestionably implicates a defendant’s interest in the privacy of his personal medical information.129 The Supreme Court, in Whalen v. Roe,130 recognized this implication when it evaluated the constitutionality of a New York statute which created a central computer database maintaining the names and addresses of all individuals who obtained prescriptions for certain drugs.131 In Whalen, the State asserted that it maintained the database because of its concern that prescription drugs were being used illegally.132 Disclosure of the names and addresses was prohibited by the statute and by a Department of Health regulation.133 While recognizing the privacy interests of patients in personal medical records, the Supreme Court held that the confidentiality safeguards in the statute were strict enough, and the State’s interest was vital enough, to withstand constitutional challenges regard-
The Court noted that New York had a compelling interest in protecting the health of its citizens and that the database was a reasonable attempt to further that interest. The Court concluded that New York’s statute did not pose a threat to the patients’ privacy interests.

The defendants in Whalen argued that if their identities as prescription drug users were revealed, a stigma would be attached to them. This contention presents a similar concern for defendants who test positive for HIV. Defendants in rape cases have a significant interest in avoiding the disclosure of their test results because of the stigma, discrimination, and prejudice that is typically attached to HIV-infected patients. The potential harms an individual confronts as a result of a positive HIV test, however, are a function of how widely the results are dispersed. According to the District Court for the Virgin Islands, “[t]he risk of stigmatic harm... speaks not to whether the search should transpire in the first instance, but rather to the extent to which the private medical facts learned from the procedure should be disclosed.”

New York’s proposed mandatory HIV testing scheme emphasizes privacy and confidentiality. According to the proposed amendment, only the victim and the defendant are privy to the results of the test. Thus, because of the limited disclosure of the HIV test results, it is apparent that the testing does not present a significant intrusion into the defendant’s privacy.

It has been argued, however, that a victim is not precluded from disseminating the defendant’s HIV status to others and, as such, a de-

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134. See id. at 597-604.
135. See id. at 597-98.
136. See id. at 600.
137. See id. at 595.
139. See id. In Roberts, the district court held:
   [B]ecause the important governmental interests served by the nonconsensual extraction of the defendant’s blood for HIV testing and the subsequent disclosure of its contents to [only the defendant, the alleged victim and their doctors] plainly eclipse[s] those of the defendant in preventing the search, the contemplated procedure is reasonable under the fourth amendment.
   Id. at 904.
140. Id. at 902.
141. See supra note 127 and accompanying text. Section 7(a)(ii) of the proposed amendment provides for the redisclosure of the test results, but it is limited to the petitioner, his or her immediate family, guardian, physician, attorney, medical or mental health provider, and to past or future contacts to whom there was or is a reasonable risk of HIV transmission. See S. B. 718, 222nd Leg. Sess. (N.Y. 1999).
fendant’s results are not truly confidential. However, the same stigma which might be attached to a defendant would conceivably attach to a victim if she were to reveal that she had been raped by an individual who had tested HIV positive. Consequently, “the specter of broad dissemination of [the] defendants’ HIV status is substantially reduced.”

Some commentators have noted that testing positive for HIV is the equivalent of receiving a death sentence. To require an individual to undergo an HIV test is to force an individual to face the prospect of ultimate death. In taking away the right of when to confront such a devastating prospect, mandatory testing imposes an intrusion upon the individual. The HIV test, however, is for the benefit of the victim. A defendant need not learn the results of the test and, thus, is not forced to confront potentially devastating news.

Non-consensual HIV testing additionally implicates a defendant’s expectation of privacy with respect to his bodily integrity. The Supreme Court has held, however, that the physical intrusion of a needle to extract blood is minimal. Specifically, the Court has noted that in today’s society, blood tests are commonplace and pose “virtually no risk, trauma, or pain” when conducted under the appropriate medical conditions. Moreover, it has been argued that a convicted or suspected sex offender has a diminished expectation of privacy regarding a blood test for HIV. Arguably, the sex offender, by engaging in criminal acts which are known to transmit the AIDS virus, has a reduced expectation of privacy regarding his bodily fluids. Since “AIDS [is] transmitted through sexual contact, there is a direct nexus between the criminal be-

143. See id.
144. Id.
146. See Franks, supra note 145, at 197.
147. See Eisenstat, supra note 7, at 365.
149. See id.
150. See Bernadette Pratt Sadler, Comment, When Rape Victims’ Rights Meet Privacy Rights: Mandatory HIV Testing, Striking the Fourth Amendment Balance, 67 Wash. L. Rev. 195, 207 (1992). In cases involving suspected sex offenders, statutes generally require a showing of probable cause that the accused committed the offense before testing is ordered by the court. See, e.g., Cal. Penal Code § 1524 (West Supp. 2000).
151. See Sadler, supra note 150, at 207.
behavior and the government’s action. . . . [And thus] [t]he assailant’s own actions work to weaken his expectation of privacy.”

B. Magnitude of the State’s Interest

Before determining that mandatory HIV testing of suspected sex offenders withstands constitutional implications, the state’s asserted interest must be examined. The state’s interest in attaining the HIV status of an accused sex offender is twofold. The first interest is the protection of and concern for the victims. The test results concerning an attacker’s HIV status serve to ease a victim’s anxiety regarding the potential transmission of the virus. Moreover, information concerning an alleged sex offender’s HIV status may propel a victim to seek necessary medical treatment and counseling. The result of an accused sex offender’s HIV test “supplies a vital ingredient in formulating an efficacious program of monitoring and treatment for the victim, [and it] directly affects the physical . . . well-being of a witness who continues to be imperiled by the consequences of the alleged offense.”

The second interest is the regulation of public health. The state has the responsibility to promulgate the well-being of its citizens. In Jacobson v. Massachusetts, for example, the Supreme Court established that a state’s power “must be held to embrace, at least, such reasonable regulations . . . as will protect the public health and the public safety.” There, the Court held that the state’s compulsory smallpox vaccination statute did not deprive the defendant of his liberty. The Court indicated that smallpox was a prevalent and increasing disease at the time the vaccination requirement was enacted, and as such, “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” The Court held that the power of

152. Id.
153. See In re J.G., N.S., and J.T., 674 A.2d 625, 631 (N.J. Super. Ct. App. Div. 1996). The court also noted that the defendants’ expectation of privacy was not violated because the state’s compelling interests in protecting victims outweighed any minimal intrusion on the defendants. See id. at 633.
154. See id. at 631.
155. See id. at 631-32.
158. Id. at 25.
159. See id. at 26.
160. Id. at 27.
the state included the authority to impose public regulations which protected the public health of its citizens.\textsuperscript{161}

The defendant in \textit{Jacobson} argued that the regulation imposed was unreasonable because some members of the medical community claimed that the vaccination provided little or no value in preventing the spread of smallpox.\textsuperscript{162} The Court responded by noting that it was the legislature’s responsibility to determine the most effective modes of protecting the public health of its members.\textsuperscript{163}

Many courts since \textit{Jacobson} have adhered to the decisions of states to enact public health regulations regarding the AIDS virus. For example, the Florida District Court of Appeals noted that there are “few, if any, interests more essential to a stable society than the health and safety of its members.”\textsuperscript{164} The court in this case went on to note:

Once persons who are carriers of the virus have been identified, the victims of their conduct and the offenders themselves can receive necessary treatment, and, moreover, can adjust their conduct so that other members of the public do not also become exposed to HIV. In this way, the spread of AIDS through the community at large can be slowed, if not halted.\textsuperscript{165}

The Florida District Court ultimately held that the state had a compelling interest in protecting and promoting the public health of its citizens by adopting reasonable measures designed to prevent the spread of AIDS.\textsuperscript{166}

The District Court for the Virgin Islands echoed this sentiment when it held, in \textit{Roberts}, that the “[g]overnment has a substantial inter-

\textsuperscript{161} See id.
\textsuperscript{162} See id. at 30.
\textsuperscript{163} See id. The Court did not investigate the State’s motivations in passing the regulation; however, it did note that it would scrutinize more closely a public health statute that bore “no real or substantial relation” to justifiable public welfare goals or was “a plain, palpable invasion of rights secured by the fundamental law . . .” \textit{id.} at 31; see also Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666, 685 (Ct. App. 1990) (noting that “it is not for courts to judge the wisdom of legislation”).
\textsuperscript{164} Fosman v. State of Florida, 664 So. 2d 1163, 1165 (Fla. Dist. Ct. App. 1995) (quoting People v. Adams, 597 N.E.2d 574, 580-81 (Ill. 1992)). The District Court, in \textit{Adams}, held that the statute authorizing, upon the victim’s request, an order requiring the defendant charged with a crime involving the transmission of bodily fluids to submit to an HIV test was constitutional. \textit{See id.} at 1163.
\textsuperscript{165} Id. at 1166 (quoting \textit{Adams}, 597 N.E.2d at 581).
\textsuperscript{166} See id. (noting that “[e]ven if petitioner had a reasonable expectation of privacy, society’s interest in preventing members of the public from being exposed to HIV would be a sufficient compelling state interest to justify the infringement of that right”).
est in curbing the transmission of HIV." The court noted that this end is furthered by providing victims with all pertinent medical information regarding a potential source of HIV infection. Based on the results of these tests, victims can adjust their behavior accordingly by taking necessary precautions to prevent subsequent transmission of the virus. Mandatory pre-conviction HIV testing statutes allow infected individuals "to be identified, treated, counseled and provided with an opportunity to modify their behavior, which in turn may interrupt the transmission cycle of the virus."

C. Utility of Testing

Despite the magnitude of an asserted state interest, a search will be deemed unreasonable if the state's purpose is not significantly furthered by the search. In addition to asserting an important state interest, the state must prove that the utility of the search serves that interest. In Delaware v. Prouse, the Supreme Court held that to satisfy the utility requirement, the state must prove that the search is sufficiently productive to justify the intrusion upon a person's Fourth Amendment rights.

Although it has been argued that the state's interest in testing lacks utility because an attacker's test results do not offer the victim confirmation regarding his or her own HIV status, many professionals in the medical field have noted that there is "considerable medical utility' in examining the blood of the putative source of HIV infection." Providing...

167. Government of Virgin Islands v. Roberts, 756 F. Supp. 898, 904 (D.V.I. 1991). In this case, the court permitted a compulsory extraction and analysis of the defendant's blood to test for HIV in order to determine whether the alleged victim of rape was exposed to the virus. See id. at 898.

168. See id. at 904.

169. See Adams, 597 N.E.2d at 581.


171. See Delaware v. Prouse, 440 U.S. 648, 659 (1979) (noting that when alternative means exist to promote the state interest, the intrusion on the Fourth Amendment interests is not justified).

172. See id. at 658-59.

173. See id. Although the Court recognized that the state had a significant interest in ensuring that only qualified drivers were allowed to operate motor vehicles, and that only safe vehicles were in operation, it ruled that random stops by police to check for unlicensed motorists and unregistered vehicles were insufficiently productive to justify the intrusion. See id.

174. See Sadler, supra note 150, at 210 (noting that an "assailant's test results give the victim little or no useful information").

ing all pertinent information to victims and their doctors regarding the risks of possible exposure to HIV serves many purposes. For example, a negative HIV test of a potential source of infection can inform a victim that the risk of infection is decreased even further. Moreover, it helps the doctor assess the risk of infection, which in turn, affects the degree of monitoring required, as well as the precautions the doctor will prescribe to the victim. The information further assists the doctor in diagnosing the victim, as well as understanding the possible causes of certain medical problems that may arise. Additionally, a negative HIV test result considerably reduces the fear and anxiety of a victim.

On the other hand, a positive HIV test result of a possible source of HIV infection informs the physician that additional and more extensive monitoring of the patient’s medical condition is warranted than would be the case were the results of the test negative. Furthermore, the HIV status of a potential source of infection helps victims decide whether to undergo experimental prophylactic courses of treatment, such as AZT. In light of this information, many courts have concluded that, although the HIV test results of a potential source of HIV infection are not dispositive, it does not defeat the state’s asserted interest in testing.

D. Presumption of Innocence

Another issue raised by New York’s proposed pre-conviction legislation is that requiring an accused rapist to submit to a non-consensual HIV test appears to violate the suspect’s right to be presumed innocent.

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176. See Roberts, 756 F. Supp. at 903 (providing the expert opinion of Dr. Luce, the Chief of Staff at San Francisco General Hospital).
177. See id.
178. See id.
179. See id.
180. Id. (quoting Johnetta J., 267 Cal. Rptr. at 672) (providing the expert opinion of Dr. Drew) (alteration in original).
181. See id.; see also Gerald H. Friedland, Early Treatment for HIV: The Time Has Come, 322 New Eng. J. Med. 1000, 1001 (1990) (stating that AZT treatment in asymptomatic patients significantly delays the progression to symptomatic illness).
182. See, e.g., Roberts, 756 F. Supp. at 903 (stating that even though the test results are not dispositive, there is considerable medical utility in examining the blood of the putative source of HIV infection); Johnetta J., 267 Cal. Rptr. at 681-82 (noting that while the test results from the potential source of infection are not dispositive, they provide useful information).
The "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."\textsuperscript{183} In \textit{Coffin v. United States}, the Supreme Court noted that the presumption of innocence is "a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty."\textsuperscript{184} Based on the foregoing, opponents of statutes requiring suspected sex offenders to undergo testing based on allegations of rape assert that the suspect's right to be presumed innocent is violated.\textsuperscript{185} However, recent court decisions seem to suggest that this contention is not persuasive, especially when the immediate needs and rights of a rape victim are taken into consideration.\textsuperscript{186}

\textit{Bell v. Wolfish}, \textsuperscript{187} for example, was a case in which pretrial detainees challenged as unconstitutional the conditions in a New York City correctional center.\textsuperscript{188} The Supreme Court held that the presumption of innocence does not provide a basis for the fact that a pretrial detainee has a constitutional right to be free from certain conditions of confinement without justification shown by a compelling interest.\textsuperscript{189} The holding in \textit{Bell} prevents pretrial detainees from maintaining constitutional challenges on a presumption of innocence principle.\textsuperscript{190} Notwithstanding the significant role that the presumption of innocence plays in our legal system, the presumption "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."\textsuperscript{191} In other words, the presumption of innocence principle is intended to function primarily in the courtroom.\textsuperscript{192} This notion has been

\begin{itemize}
\item \textsuperscript{183} Coffin v. United States, 156 U.S. 432, 453 (1895).
\item \textsuperscript{184} Id. at 458-59.
\item \textsuperscript{186} See id.
\item \textsuperscript{187} 441 U.S. 520 (1979).
\item \textsuperscript{188} See id. at 523.
\item \textsuperscript{189} See id. at 532. The Court continued:
\begin{quote}
The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.
\end{quote}
\item \textsuperscript{190} See Sistrunk v. Lyons, 646 F.2d 64, 71 (3d Cir. 1981).
\item \textsuperscript{191} \textit{Bell}, 441 U.S. at 533.
\item \textsuperscript{192} See Estelle v. Williams, 425 U.S. 501, 503 (1976) (noting that all defendants are constitutionally entitled to the presumption of innocence principle as a basic component of a fair trial);
\end{itemize}
firmly adhered to throughout the years. For instance, arrest, bail-setting, and preventive detention all appear to violate the presumption of innocence, but the state is still empowered to take such actions. In fact, according to Justice Frankfurter, "[i]f the presumption of innocence is read literally to apply to all pretrial procedures, it is impossible to justify bail or pretrial detention, both of which are restraints upon an accused despite the presumption."

More recently, the presumption of innocence principle has appeared in cases involving the forfeiture of assets of defendants accused of violating the Racketeer Influenced and Corrupt Organizations Act and the Continuing Criminal Enterprise Act. The forfeiture provisions of these acts have been reinforced by the enactment of the Comprehensive Forfeiture Act of 1984. Pursuant to the Comprehensive Forfeiture Act, judges are permitted to issue restraining orders that prevent defendants from transferring property subject to forfeiture before trial. This is done to prohibit the assets of the defendant from being disseminated before the final adjudication of the case.

At least one critic of this law has commented that the freezing of a defendant’s assets, and identifying them as “forfeitable” based on the presumption that they were obtained through criminal activity, effectively denies the defendant of his or her right to be presumed innocent. However, the Tenth Circuit, in United States v. Nichols held that the Comprehensive Forfeiture Act did not deprive a defendant of the pre-
The court proffered two explanations for its decision. First, the government must prove a claim of forfeiture in an indictment in the same fashion that it must prove any claim in an indictment. Second, the court noted that the determination regarding the forfeiture of the property is not resolved until the actual trial. The court further commented that the notion of the presumption of innocence has no application to the determination of the rights of a defendant prior to trial.

Considering the decisions in these cases, the presumption of innocence argument is not a very strong argument against the mandatory HIV testing scheme that New York has proposed for alleged sex offenders. Inasmuch as New York's proposed statute bars the use of the test results in the defendant's criminal prosecution, the fairness concerns for the alleged assailant do not persuasively militate against pre-conviction testing.

VI. EVALUATING THE COMPETING INTERESTS

Ultimately, the constitutionality of mandatory pre-conviction HIV testing of sex offenders rests on balancing the suspect's rights, the victim's rights, and the state's interest in regulating public health. In exploring these conflicting interests, this Part focuses on the reliability and utility of the tests, the availability of possible prophylactic treatments, and the emotional and psychological relief that the victim will gain.

A. The Suspect's Interests

Opponents of mandatory HIV testing contend that the practical effect of such testing is minimal and offers limited benefits to rape victims. Because of the inherent unreliability of the tests, the suspect's
HIV status is futile to the victim for purposes of determining whether the virus has been transmitted. Therefore, the premature classification of a sex offender offers no real medical benefit to the victim. According to critics, the victim has to be tested herself in order to obtain reliable and accurate information concerning her HIV status.

Opponents of mandatory HIV testing schemes additionally assert that compulsory testing may be misleading. For instance, a suspect’s test results, whether positive or negative, could lead a victim to draw a mistaken conclusion regarding her own HIV status. Moreover, opponents maintain that mandatory testing may give the victim a false sense of security because, although a sex offender may yield a negative result, he still may be carrying the virus.

Additionally, opponents argue that mandatory HIV testing violates the sex offender’s right to privacy. For example, if the HIV status of the sex offender became public, it would negatively affect his self-respect and self-esteem. Moreover, in some cases opponents have argued that, since the victim is at liberty to tell whomever she wants, the mandatory testing schemes would jeopardize the accused’s expectation of privacy.

Finally, it has been argued that although HIV tests may be able to determine who is infected with HIV, the results do not prevent the transmission of the virus nor do they halt the fatal virus from spread-

209. See id. (providing that the HIV test would not divulge the alleged offender’s HIV status at the time of the rape).

210. See In re J.G., N.S., and J.T., 674 A.2d 625, 627 (N.J. Super. Ct. App. Div. 1996) (Patricia Kliser, Medical Director of AIDS Services at University Hospital stated: "HIV testing of the assailants is of no medical benefit to the victim and would be of no use in determining the appropriate diagnosis and treatment for the victim"); Spencer, supra note 117, at 7.

211. See Beth Barnhill, HIV Test for Sex Offenders Isn't Simple Issue, DES MOINES REG., Mar. 16, 1993, at A7; see also Jan Hoffman, AIDS and Rape: Should New York Test Sex Offenders?, VILLAGE VOICE (New York), Sept. 12, 1989, at 35 (noting that, since the HIV test detects the presence of antibodies, and these antibodies may take up to 18 months to develop, to protect the interests of the rape victim, rape counselors should be concerned with testing and re-testing the victim).

212. See In re J.G., N.S., and J.T., 674 A.2d at 627. In their testimony, Jill Greenbaum, Executive Director of the New Jersey Coalition Against Sexual Assault, James Oleske, a Professor of Pediatrics at the University of Medicine and Dentistry—New Jersey Medical School and Patricia Kliser, all discussed the misleading aspects of HIV testing. See id.

213. See id.

214. See id.; Spencer, supra note 117, at 7.

215. See William Kelly, Time to Value the Rights of Victims, CHI. TRIB., July 22, 1991 (Perspective), at 10; Poor, supra note 207, at 4D.

216. See Kelly, supra note 215, at 10.

In this vein, commentators have expressed that lawmakers and policymakers should stop focusing on mandatory HIV testing and start increasing public support and funding for programs and policies designed to stop HIV transmission.

B. The Victim’s Interests

Victims’ rights advocates concentrate not on the medical utility of HIV testing, but rather on the health and emotional relief that rape victims obtain from learning the HIV status of their attackers. According to proponents of mandatory HIV testing, an assailant’s negative test result helps to relieve many forms of psychological trauma experienced by rape victims, including the fear of potential HIV infection. The distress and anxiety that this fear causes can persist for a substantial duration due to the varying lengths of time the body takes to indicate HIV infection. Without testing the accused, a rape victim cannot rely on her own infection status for up to twelve months following the rape. Consequently, legislation authorizing early testing of the accused may ease a rape victim’s fears concerning possible exposure.

Additionally, some experts in AIDS research have noted that assuaging the fears of a potential HIV patient can be an important element in a treatment program. According to Dr. Luce, the Chief of Staff at San Francisco General Hospital, “anxiety itself can cause or complicate medical problems and can impede recovery. Where a fatal disease is involved, having access to all information bearing on the question of possible exposure can be of great assistance in relieving a patient’s anxiety.” This is especially significant since testing the victim may be

219. See id.; MORE HARM THAN HELP, supra note 6, at 15.
220. See Poor, supra note 207, at 4D (noting that negative test results may provide emotional relief for victims of rape); see also Jane Nady Burnley, The Transmission of AIDS Through Sexual Assault: A Deadly Problem in Search of a Policy, NAT’L ORG. FOR VICTIM ASSISTANCE, May 1988, at 4 (noting that a victim’s concern regarding the HIV status of her perpetrator would be alleviated if the accused was tested and the results were made known to the victim).
221. See Gostin, supra note 5, at 1442; Poor, supra note 207, at 4D.
222. See Gostin, supra note 5, at 1442.
223. See supra notes 44-51 and accompanying text.
224. See id.
225. See Gostin, supra note 5, at 1442.
226. Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666, 673 (Ct. App. 1990) (quoting Dr. Luce, Chief of Staff at San Francisco General Hospital). In Johnetta J., the California Court of Appeals upheld a statute requiring an HIV test for any persons charged with biting or transferring blood or other bodily fluids through the skin of a police officer. See id. at 685. The court found
inconclusive for several months. A negative test of the alleged assailant, while clearly not dispositive, informs the victim that there is less risk of infection, and the "[i]nformation of a negative test result significantly reduces the anxiety of the . . . victim." Consequently, supporters tenaciously advocate providing victims with as much emotional relief as possible.

Proponents further assert that testing alleged rapists provides victims with knowledge of their assailant’s HIV status and with this information, victims can make choices about what, if any, types of medical treatment to seek. Although there is presently no cure for AIDS, rape victims do have some medical options, including antiretroviral treatment therapies. AZT, for example, slows the disease’s progression once the HIV infection has been identified. Because AZT is beneficial in decreasing the rate of infection, the earlier a victim finds out the status of her assailant, the earlier she can begin treatment, if necessary. It is important to note, however, that although AZT offers significant benefits to individuals with HIV, there are potential drawbacks. Commonly observed side effects include fatigue, headache, vomiting, diarrhea, and insomnia. Given that the use of AZT therapy presents a host of potential problems, an alleged assailant’s HIV test result can be a crucial factor in determining whether to submit to or continue with an arduous course of drug treatment therapy. For instance, if a rape victim starts AZT treatment immediately following a rape, and shortly thereafter the alleged rapist tests negative, the victim can discontinue

that although there was only the slightest risk that the victim would be infected with HIV through a bite, the result of the assailant’s HIV status would still be of some use to the victim. See id. at 681-82.

227. See supra notes 44-51 and accompanying text.
228. Johnetta J., 267 Cal. Rptr. at 673 (quoting Dr. Luce, the Chief of Staff at San Francisco General Hospital).
230. See Gostin, supra note 5, at 1441; Simotas, supra note 27, at 1911.
231. See supra notes 53-58 and accompanying text.
232. See Field, supra note 37, at 37; Jaffe, supra note 32, at 63. Antiretroviral drugs, such as AZT, assist patients inflicted with HIV because they enhance the body’s immune system by increasing the number of T-helper cells, which in turn, helps the body in resisting various opportunistic diseases. See Progress in Treating AIDS, supra note 24. There is also some evidence indicating that AZT may be used as a prophylactic treatment to prevent infection if administered immediately after exposure to the virus. See David K. Henderson & Julie L. Gerberding, Prophylactic Zidovudine After Occupational Exposure to the Human Immunodeficiency Virus: An Interim Analysis, 160 J. INFECTIOUS DISEASES 321, 322-23 (1989). For instance, AZT is used by health care workers following accidental needle piercings. See Simotas, supra note 27, at 1911.
234. See id.
the AZT treatment and avoid any potential side effects.\textsuperscript{235} Certainly, a rape victim cannot rely on a single negative test result to completely eliminate the risk of a false-negative result.\textsuperscript{236} However, it might provide substantial relief to victims who experience acute side effects.\textsuperscript{237} To this end, since the victim can benefit substantially from disclosure of HIV test results, mandatory HIV testing schemes provide "'considerable medical utility' in examining the blood of the putative source of HIV infection, even though the results are not dispositive."\textsuperscript{238}

C. The State's Interests

Supporters of mandatory HIV pre-conviction testing contend that it is necessary for the criminal justice system to focus on the social and medical implications affecting rape victims.\textsuperscript{239} It is of paramount importance to realize that mandatory HIV testing is a public health issue that affects the entire population, and as such, it cannot be viewed narrowly as a civil rights issue.\textsuperscript{240} The state has an unquestionable and compelling interest in regulating the public health of its citizens.\textsuperscript{241}

Since AIDS is emerging with alarming frequency in our society, a state's only hope in curtailing the spread of the disease is to reduce the rate of transmission.\textsuperscript{242} An accused assailant's test results alert the victim to possible exposure and allow her to take necessary precautions to avert further transmission.\textsuperscript{243} Victims of rape do not live in a vacuum.\textsuperscript{244}

\begin{footnotes}
\textsuperscript{235} See id.
\textsuperscript{236} See id.
\textsuperscript{237} See id.
\textsuperscript{239} See Nation Falls Short on Education, Support Efforts, supra note 218, at 34; Track HIV Patients, But Protect Privacy, Chi. SUN-TIMES, Jan. 18, 1996, at 25 [hereinafter Track HIV Patients].
\textsuperscript{240} See Track HIV Patients, supra note 239, at 25.
\textsuperscript{241} See Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).
\textsuperscript{242} For instance, the purpose clause attending California's HIV testing statute states:

The people of the State of California find and declare that AIDS, AIDS-related conditions, and other communicable diseases pose a major threat to the public health and safety.

... The purpose of this chapter is to require that information that may be vital to the health and safety of the public, victims of certain crimes, certain defendants and minors, and custodial personnel, custodial medical personnel, peace officers, firefighters and emergency medical personnel put at risk in the course of their official duties, be obtained and disclosed in an appropriate manner in order that precautions can be taken to preserve their health and the health of others or that [such] persons can be relieved from groundless fear of infection.

\textsuperscript{243} See Gostin, supra note 5, at 1441; Sadler, supra note 150, at 209.
\end{footnotes}
They may be involved in sexual relationships, pregnant, or possibly contemplating starting a family. Therefore, the state has a vested interest in providing alleged victims of rape with information regarding possible exposure to HIV so that they can adjust their behavior accordingly and prevent subsequent potential transmission.

In addition to the states’ interest in preventing the spread of AIDS, the states have a strong interest in protecting the victims of rape. Testing the alleged rapist represents the “intelligent, humane, logical, and proper course of action under the circumstances.”

As one supporter notes, “it is ‘unconscionable’ to force persons who involuntarily have been exposed to the fluids of another to ‘live with weeks and even months of anxiety, terror and disruption of their own sexual lives’ by withholding the information that HIV antibody testing of a putative source can reveal.”

VII. CONCLUSION

Mandatory HIV testing programs permit rape victims to learn whether their attackers test positive for HIV. Pre-conviction testing provides this information at the earliest possible opportunity. Rape victims suffer extreme mental anguish and to deny these individuals access to knowledge of possible exposure unnecessarily subjects them to additional pain and agony.

Professionals in the medical community have acknowledged that early diagnosis of HIV is a critical element in any type of treatment plan for an individual who is infected with HIV. Consequently, the victim can significantly benefit from the disclosure of HIV test results. Moreover, by taking proper precautions, victims can help prevent the spread of the deadly AIDS virus to the community at large.

[The] knowledge [of an offender’s HIV status] might legitimately lead the victim to modify her behavior, either by abstaining from sexual activity or by using more protective measures and informing her sexual partners of her exposure. Certainly the mere possibility of exposure should lead to some level of precaution, but the certainty of it could make a meaningful difference to the public health goal.


244. See Gostin, supra note 5, at 1441.

245. See id.

246. See Simotas, supra note 27, at 1909.


In recent years, a growing number of medical professionals and members of the legal community have recommended mandatory HIV testing schemes for criminal suspects. For example, in April 1996, the New York AIDS Advisory Council endorsed pretrial testing of sex offenders at the victim's request. Furthermore, the Federation of New York State Judges ("Federation") has endorsed the idea of mandatory HIV testing for sex offenders at the pretrial stage without endorsing the specific bill. According to the Federation, the rights of victims and defendants could be balanced if the confidentiality of the test was assured, if the results could not be used as evidence against the accused, and if judges ordering a test were required to weigh the nature of the exposure and 'the medical and psychological benefit' to the victim against 'the potential harm' to the defendant.

Currently, the proposed legislation calling for pre-conviction mandatory HIV testing is in the New York State Senate awaiting a vote. New York has the highest number of reported AIDS cases in the country. As of September 31, 1999, the number of individuals reportedly infected with AIDS was estimated to be 136,748. Since AIDS is 100% fatal, New York's only hope in preventing the spread of the disease, until a cure is discovered, is to reduce the rate of transmission. Thus, New York has a vested interest in providing victims of sexual assault with information regarding their possible exposure to HIV so that they can modify their behavior and prevent further potential transmission.

249. See Spencer, supra note 117, at 1.
250. See id. at 7. The New York AIDS Advisory Council suggested a statute that would require the judge to find that an "assault 'presented a significant risk of HIV transmission' and that the results would be 'of substantial medical benefit to the victim' before ordering a test." Id. (quoting the New York AIDS Advisory Council's plan).
251. See id.
252. Id. (quoting the Federation of New York State Judges).
254. See HIV/AIDS SURVEILLANCE REPORT, supra note 2, at 6. As of June 1999, New York, California, Florida, Texas, and New Jersey, respectively, had the highest number of reported AIDS cases in the country. See id.
Based on New York's responsibility to protect its citizens, the proposed legislation should be enacted into law.

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