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**MANDATORY HIV TESTING FOR CONVICTED  
OR ACCUSED SEX OFFENDERS:  
TOWARD A MODEL SCHEME**

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By Kimberly Smith<sup>1</sup>

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**INTRODUCTION**

In late 1990, Congress amended<sup>2</sup> its Omnibus Crime Control and Safe Streets Act<sup>3</sup> to declare that any state not enacting a statute requiring mandatory testing of convicted sex offenders for the human immunodeficiency virus (HIV) would lose ten percent of funds allocated to it under the Bureau of Justice Assistance Grant programs.<sup>4</sup> To continue receiving full funding, the amendment required states to enact and enforce a law which "requires the State at the request of the victim of a sexual act" to conduct a compulsory HIV blood test on a person who has been convicted of a sexual act.<sup>5</sup> In addition, the results must be disclosed to both the offender and the victim, and the victim must be given counseling.<sup>6</sup> Although legislative history does not explain the policy reasons for the amendment, these policies were discussed in Congressional debates after its adoption: the main reason given for implementing such

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<sup>1</sup> Kimberly Smith received her J.D. from University of Cincinnati College of Law, 1998.

I would like to thank Jennifer Stainforth for patiently and generously commenting on earlier drafts of this Comment; Unity Dow, Esq., Executive Director, Methlaetsile Women's Information Centre, Mochudi, Botswana, whose work with rape survivors challenged me to write this testing scheme; Professor Bert B. Lockwood, Jr., College of Law, University of Cincinnati and Director, Urban Morgan Institute for Human Rights, who enabled me to spend a summer learning from Unity Dow; and Professor Christo Lassiter, College of Law, University of Cincinnati, for always being willing to aid students in their educational pursuits.

<sup>2</sup> Testing Certain Sex Offenders for Human Immunodeficiency Virus, Pub. L. No. 101-647, § 1804, 104 Stat. 4851 (1990). [hereinafter Testing Certain Sex Offenders for Human Immunodeficiency Virus].

<sup>3</sup> Omnibus Crime Control and Safe Streets Act of 1968, tit. I, § 506, 42 U.S.C. § 3756 (1995).

<sup>4</sup> Testing Certain Sex Offenders for Human Immunodeficiency Virus, *supra* note 2, § 1804(f).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

a testing scheme was the psychological benefit for the victim.<sup>7</sup>

To date, all but a few states, along with the District of Columbia and the Virgin Islands, have enacted codes which comply with the federal mandate.<sup>8</sup> A small number of these states had statutes which fulfilled the requirements even before the federal amendment was adopted.<sup>9</sup> Thus, even though mandatory testing has come under heavy criticism from both scholars and activist organizations, a great many state legislatures have passed such statutes.<sup>10</sup>

Courts have been left with the task of justifying the legality of these statutes. Most of the legal concerns raised in challenges to the statutes are questions about their constitutionality.<sup>11</sup> In analyzing these constitutional claims, courts have balanced the rights of the victim and the

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<sup>7</sup> This was mentioned in debates during which speakers lamented the failure of the passage of a federal law with the same provisions as those required of the states. [hereinafter Debates]. The text is as follows:

My amendment would require testing of accused sex offenders for HIV, with disclosure of test results to the victim. Test results would be inadmissible at trial. This provision passes as section 531 of the Omnibus Crime Control Act of 1991 (which did not pass into law). A number of States have passed laws providing for HIV testing of accused sex offenders. It's time now to pass a law allowing for HIV testing of accused sex offenders in Federal cases. The trauma of victims of sex crimes may be greatly magnified by the fear of contracting AIDS as a result of the attack. Victims have the right to know whether they have been exposed to the virus, without waiting months or years while the case is pending.

140 CONG. REC. H2415-04, H2433 (1994) (statement of Rep. Jon Kyl).

<sup>8</sup> The states and U.S. territories which currently have codes requiring mandatory HIV or AIDS testing for sex offenders are (note that some of these only require testing after conviction): Alaska, Arizona, Arkansas, California, Colorado, Connecticut, D.C., Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and the Virgin Islands.

<sup>9</sup> See, e.g., CAL. PENAL CODE § 1202.1 (Deering 1996).

<sup>10</sup> See Paula L. Andres, Comment, *Sticking it to the Fourth Amendment: The Failure of Missouri's Mandatory HIV Testing Law for Juvenile Sex Offenders*, 63 UMKC L. REV. 455 (1995); Raymond S. Franks, Comment, *Mandatory HIV Testing of Rape Defendants: Constitutional Rights are Sacrificed in a Vain Attempt to Assist the Victim*, 94 W. VA. L. REV. 179 (1991).

<sup>11</sup> See cases cited *infra* note 90. See also, *People v. Adams*, 597 N.E.2d 574 (Ill. 1992).

state against the rights of the (accused) offender.<sup>12</sup> The balancing of these interests is not easy. In the United States, persons who have been identified as having HIV or AIDS often become the victims of discrimination.<sup>13</sup> However, the existence of HIV and the fact that it is a deadly, communicable disease create public health issues which must be addressed.<sup>14</sup> It is an accepted medical fact that transmission of HIV is possible through sexual contact.<sup>15</sup> Victims of sexual offenses may be in greater danger of contracting HIV than persons who engage in consensual sexual activities because the sexual activity was forced, thus increasing the possibility of physical trauma to the victim.<sup>16</sup> This in turn increases the risk of transmission of the virus because bodily fluids such as blood and semen are more likely to be mingled as a result of the physical trauma.<sup>17</sup> As a direct result, the victim of a sexual offense is put at risk of HIV transmission.<sup>18</sup> This means that the victim suffers not only from the direct effects of the sexual offense,<sup>19</sup> but also has to worry about whether she is going to contract this deadly disease,<sup>20</sup> and if she is placing the people close to her in danger of transmission as well.<sup>21</sup>

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<sup>12</sup> 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 (1992).

<sup>13</sup> Evidencing the severity of this problem, the Legal Action Center recently launched a national project to assist persons with HIV or AIDS in their fight against employment, housing, health care and public benefits discrimination. *Legal Action Center Announces Anti-Discrimination Effort*, 8 ALCOHOLISM & DRUG ABUSE WEEK, June 1996, at 4.

<sup>14</sup> See Michael P. Bruyere, *Damage Control for Victims of Physical Assault-Testing the Innocent for AIDS*, 21 FLA. ST. U. L. REV. 945, 945 & n.2 (1994).

<sup>15</sup> See Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1021-22 (1989).

<sup>16</sup> Lawrence O. Gostin et al., *HIV Testing, Counseling, and Prophylaxis After Sexual Assault*, 271 JAMA 1436, 1437 (1994).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> Throughout this Comment, victims will be referred to in the feminine and offenders in the masculine. This is not meant to imply that all victims are female and all offenders male. It is merely done for readability and because, although not completely representative, this is the most common situation.

<sup>20</sup> In a survey of rape victims, 41% of those questioned indicated spontaneously that contraction of AIDS was a major concern. Ann W. Burgess & Timothy Baker, *AIDS and Victims of Sexual Assault*, 43 HOSP. & COMMUNITY PSYCHIATRY 447 (May 1992).

<sup>21</sup> Victims of sexual offenses should take precautions to prevent further transmission of the disease. The victim must be especially careful with those persons who come in frequent contact with the victim's bodily fluids. This includes the victim's

Society should provide a remedy for the harm of increased risk of HIV transmission to the victim of a sexual offense and should attempt to minimize the accompanying emotional harm.<sup>22</sup> In weighing the potential for discrimination and privacy rights of the accused against the public health risks associated with the transmission of HIV, society must strike a balance that encompasses ethical, humane and legal ways to deal with the many risks and implications of HIV transmission.<sup>23</sup>

Part I of this Comment evaluates the arguments in favor of the implementation of a mandatory HIV testing scheme for convicted or accused sex offenders. Part II discusses the arguments against the implementation of such a scheme and how these arguments have been addressed by the courts. Part III discusses the various provisions recommended for inclusion in a testing scheme and the goals served thereby. Part IV concludes that states, as well as the federal government, need to enact testing schemes which serve the goals of mandatory testing while protecting the legal rights of both the victim and the (accused) offender.

## I. ARGUMENTS FOR THE ADOPTION OF A MANDATORY TESTING SCHEME

An understanding of the goals served by a mandatory testing scheme may facilitate the success and acceptance of such a scheme. The major goals of testing are to stop the spread of HIV and to reduce the physical and psychological harm to the victim.<sup>24</sup> Knowledge of the (accused) offender's HIV status will allow the victim to make an informed

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sexual partner, family, and health care personnel. However, these precautions involve effort, expense, and inconvenience. Both society and the (accused) offender have the responsibility to try and lessen this burden as much as possible.

<sup>22</sup> It is not a complete remedy, but at least testing of the offender will allow the victim to take steps to limit this harm.

<sup>23</sup> It is in the best interest of society to try and stop the spread of this contagious and deadly disease. However, because HIV is spread through the transmission of bodily fluids, some types of human activities which are extremely personal and private are implicated. Discrimination against those with HIV has developed because, in this country, HIV was originally, and perhaps is still to some extent, perceived to strike only at those in society who in some way "deserved" it for their "immoral" behavior (i.e., homosexuals and intravenous drug users), and because the Supreme Court itself has held that it is acceptable to discriminate against homosexual sex. *See Bowers v. Hardwick*, 478 U.S. 186 (1986). With this history of discrimination, it is easy to understand why the hackles are raised and defenses arise when any mention of a mandatory testing scheme is made.

<sup>24</sup> *See supra* text accompanying note 7.

decision regarding the need for precautionary measures to protect those persons closest to her. Such knowledge will also allow her to weigh the costs and benefits of continuing drug therapy to prevent contraction of HIV.<sup>25</sup> These statutes are not meant to punish or stigmatize persons with an HIV positive status.<sup>26</sup> Rather, the statutes are aimed at limiting the harm that has been perpetrated upon the victim of a sexual offense and controlling the spread of HIV.<sup>27</sup>

In 1994, the Journal of the American Medical Association published the findings of the Working Group on HIV Testing, Counseling and Prophylaxis After Sexual Assault (Working Group).<sup>28</sup> After a thorough analysis of various issues involved with mandatory HIV testing of (accused) sex offenders, including legal, medical, and ethical issues, the Working Group supported testing for both accused and convicted sex offenders.<sup>29</sup> The Working Group advanced three main arguments for the adoption of a mandatory testing scheme.<sup>30</sup> The first was that mandatory testing serves the societal goal of preventing the spread of HIV.<sup>31</sup> The second argument was that a negative test allows the victim to discontinue

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<sup>25</sup> See Gostin et al., *supra* note 16, at 1441-42. See also *infra* notes 67-69 and accompanying text.

<sup>26</sup> This is evidenced by the confidentiality provisions included in most mandatory testing statutes. See, e.g., MD. ANN. CODE, art. 27, § 855(h) (1995). See also *People v. Adams*, 597 N.E.2d 574, 582 (Ill. 1992) ("The aim of [the mandatory testing statute] is not to ferret out evidence of misconduct but rather to provide reliable information.").

<sup>27</sup> See *supra* text accompanying note 7.

<sup>28</sup> Gostin et al., *supra* note 16. This article is extremely informative and

reports the conclusions of the Working Group on HIV Testing, Counseling and Prophylaxis After Sexual Assault. The Working Group was supported by grant 111011-12-PP from the American Foundation for AIDS Research, Washington, DC, to the American Society of Law, Medicine, and Ethics (Mr Gostin, principal investigator). The Working Group was interdisciplinary, including members working in infectious and sexually transmitted diseases, psychiatry, psychology, sociology, law, ethics, victim service programs, and a state health department.

*Id.* at 1443.

<sup>29</sup> *Id.* at 1439-41.

<sup>30</sup> *Id.* at 1441-42.

<sup>31</sup> See *id.* This is a goal of society as defined by then Surgeon General of the United States C. Everett Koop, who stated as early as 1986 that AIDS was an epidemic and steps needed to be taken to prevent its spread. C. EVERETT KOOP, M.D., Sc.D., SURGEON GENERAL REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 3 (United States Department of Health and Human Services, 1986).

any drug therapy being used to prevent contraction of the disease.<sup>32</sup> The third argument for testing was that the victim would benefit psychologically.<sup>33</sup> These arguments will be discussed in turn.

## A. SOCIETY'S GOAL OF PREVENTING THE SPREAD OF HIV

### 1. HIV Statistics

In the United States, one million people are currently HIV positive.<sup>34</sup> The World Health Organization predicts that by the year 2000, forty million people globally will be HIV positive.<sup>35</sup> While some medical authorities suggest that treatment may delay the onset of AIDS, no treatment currently available will prevent an HIV-positive patient from developing AIDS eventually.<sup>36</sup> Although the fatality rate of persons with AIDS was originally estimated to be around forty-one percent, it is now believed to be closer to one hundred percent.<sup>37</sup> Thus, the prognosis for HIV-infected patients is eventual death.<sup>38</sup>

The percentage of women comprising reported AIDS cases more than doubled in a single year, skyrocketing from seven percent in 1985 to eighteen percent in 1986.<sup>39</sup> In many parts of the world, women's infection rates are predicted to surpass men's by the year 2000.<sup>40</sup> The Center for Disease Control and Prevention (CDC) reported that in 1994, 14,081 women in the United States were diagnosed with AIDS.<sup>41</sup> The new cases arising in this single year constitute almost one-fourth (twenty-four percent) of the total number of AIDS cases ever reported among women.<sup>42</sup> CDC further reported that thirty-eight percent of women

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<sup>32</sup> Gostin et al., *supra* note 16, at 1441.

<sup>33</sup> *Id.* at 1442.

<sup>34</sup> Telephone Interview with Joyce Myers, Staff Member, Center for Disease Control National AIDS Hotline (Oct. 9, 1996) [hereinafter Myers].

<sup>35</sup> See ARTHUR S. LEONARD ET AL., AIDS LAW AND POLICY 9 (1995)[hereinafter Leonard]. Of the estimated 40 million who will be infected by the year 2000, the World Health Organization predicts that 13 million will be women. *Women's Empowerment Critical to Success in HIV/AIDS Prevention*, AIDS WEEKLY PLUS, Jan. 1996, at 11 [hereinafter HIV/AIDS Prevention].

<sup>36</sup> See Bruyere, *supra* note 14, at 957.

<sup>37</sup> See LEONARD ET AL., *supra* note 37.

<sup>38</sup> See Bruyere, *supra* note 14, at 957.

<sup>39</sup> Myers, *supra* note 36.

<sup>40</sup> HIV/AIDS Prevention, *supra* note 37.

<sup>41</sup> The Center for Disease Control and Prevention (CDC), *About Women and HIV* (last visited Oct. 30, 1997) <[http://ovchin.uc.edu/htdocs/aids/additionalinfo/About\\_Women\\_and\\_HIV.html](http://ovchin.uc.edu/htdocs/aids/additionalinfo/About_Women_and_HIV.html)> [hereinafter About Women].

<sup>42</sup> See *id.*

afflicted with AIDS in 1994 acquired HIV through heterosexual contact.<sup>43</sup> Heterosexual contact was reported to be the fastest growing category of transmission, infecting an increasing number of women more quickly than any other method.<sup>44</sup>

Since 1992, AIDS and other illnesses due to HIV infection have been the fourth leading cause of death in the United States among women who are aged twenty-five to forty-four.<sup>45</sup> For African-American women in this age group, AIDS and HIV were the number two cause of death in 1992 and, based on provisional data, the number one cause of death in 1993.<sup>46</sup> Another fact that causes a great deal of alarm is that women infected with HIV have the capability of passing HIV to their unborn children through bodily fluids.<sup>47</sup> The CDC estimates that during 1993, there were one thousand to two thousand infants born HIV positive because their mothers were infected.<sup>48</sup> These figures demonstrate that heterosexual sexual contact puts women and their unborn children at risk of contracting HIV. Although heterosexual contact as a means of transmitting HIV has not been as well publicized as some other methods, for women, the risk is serious and increasing.

## 2. Victims of Sexual Assault in Their Community

Victims of sexual assault remain members of their community. They have family members and sexual partners they must consider. Many victims of sexual assault do not cease their sexual relationships, and one study found that thirty-seven percent of victims resumed consensual sexual relations one day to five months after the assault.<sup>49</sup> In addition, HIV infection can be passed from a mother to her unborn child.<sup>50</sup> Thus, for a sexual assault victim who is either pregnant or thinking about becoming pregnant, the HIV status of her (accused) assailant has consequences not only for her and her partner, but also for her unborn child.<sup>51</sup> Therefore, mandatory testing of accused or convicted sex

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<sup>43</sup> *Id.*

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

<sup>47</sup> *See Gostin et al., supra note 16, at 1441.*

<sup>48</sup> About Women, *supra* note 43. This is based on data from the HIV Survey in Childbearing Women, which estimated that 7,000 HIV positive women had babies during 1993. CDC then based its figure on an assumed transmission rate of fifteen to thirty percent.

<sup>49</sup> *See Gostin et al., supra note 16, at 1441 & n.97.*

<sup>50</sup> *See supra* notes 49-50 and accompanying text.

<sup>51</sup> *See Gostin et al., supra note 16, at 1441.*



offenders may offer public health benefits by preventing the spread of the virus by victims of sexual assault to their loved ones.<sup>52</sup>

One objective of testing the (accused) sex offender is to allow the victim to determine the extent and types of precautions necessary to prevent further transmission of HIV.<sup>53</sup> It should be noted, however, that although currently available tests are relatively accurate, an initial testing of the accused will not always provide wholly conclusive results.<sup>54</sup> A scenario which is possible, albeit unlikely, is that the accused has only recently contracted HIV so that the testing procedures cannot yet detect the presence of HIV.<sup>55</sup> A victim is thus not able to place complete faith in test results for approximately six months, and perhaps up to one year.<sup>56</sup> Although the testing is not completely accurate, an initially negative test result can provide the victim with a great deal of relief and can aid her in determining what types of precautions she should continue before her own HIV status is detectable.<sup>57</sup> Because preventative measures entail substantial behavior changes and possible health risks to the victim, it is important for her to have as much information as possible when making such decisions.<sup>58</sup> The (accused) offender is also a member of society who

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<sup>52</sup> See *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MORBIDITY & MORTALITY WKLY. RPT. 509 (1987). This report was published by the United States Public Health Services and noted that:

Counseling and testing [of] persons who are infected or at risk for acquiring HIV infection is an important component of prevention strategy . . . . [t]he primary public health purposes of counseling and testing are to help uninfected individuals initiate and sustain behavioral changes that reduce their risk of becoming infected and to assist infected individuals in avoiding infecting others.

*Id.* at 509.

<sup>53</sup> See Gostin, *supra* note 16, at 1441. Testing the (accused) offender is not, of course, the only method the victim should use to protect the health of others. However, these other preventative measures entail substantial behavioral changes, some risk to others, as well as risks and costs to the victim, including alteration of life plans. See *id.* at 1441-42. Because it was the (accused) offender who caused the initial harm and created the situation, fairness dictates that at least some of the responsibility for limiting future harm should be placed on the offender. *Id.*

<sup>54</sup> See *id.* at 1442.

<sup>55</sup> Cf. *id.* at 1438.

<sup>56</sup> Cf. *id.* While the article speaks in terms of the victim not being able to rely on her own test results for this time period, the same holds true for the (accused) offender who has recently contracted the disease.

<sup>57</sup> See *id.* at 1441.

<sup>58</sup> See Gostin et al., *supra* note 16, at 1442; see also *infra* text accompanying note 66.

should take steps to minimize possible transmission of the disease.<sup>59</sup> Testing allows the (accused) offender as well as the victim to take precautions against spreading HIV and to begin making treatment decisions.

## **B. AVAILABILITY OF DRUG THERAPY TO MINIMIZE POSSIBILITY OF HIV CONTRACTION**

Although currently there exists no drug that prevents the contraction of HIV, is inexpensive, widely available, and proven effective, medical science has made significant progress in this area. Zidovudine (also known as AZT) is a drug which has been tested on HIV positive pregnant women<sup>60</sup> and health care workers who have been exposed to situations where HIV transmission is possible. Results of this testing indicate that AZT may prove useful to victims of sexual assault.<sup>61</sup> The American Medical Association recently endorsed mandatory HIV testing for all pregnant women and newborns because of AZT's proven effectiveness in preventing transmission from mother to fetus.<sup>62</sup>

Although AZT is recognized as an option for victims of sexual assault by the CDC, its use under these circumstances is still relatively new and thus the CDC has no guidelines for physicians in prescribing its use in such cases.<sup>63</sup> The CDC also has no data on the percentage of sexual assault cases in which physicians prescribe AZT.<sup>64</sup> However, the CDC has recently stated that the knowledge concerning the toxicity and

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<sup>59</sup> Again, the extent and types of precautions may depend upon whether the person's status is positive or negative.

<sup>60</sup> According to a report published in AIDS ALERT, perinatal transmission of HIV from a mother to her child has decreased in the past two years. *Perinatal Transmission of HIV has Decreased in the Past 2 Years*, AIDS ALERT, Sept. 1996, at 108. The report stated that: "[r]esearch shows that perinatal transmission dropped from 21% to 10% after the agency (CDC) developed guidelines for treating HIV positive mothers with AZT." *Id.* However, the report further stated that more prenatal care is necessary. *Id.* When CDC was contacted with questions regarding this report, the CDC representative was careful to point out that the study had been conducted with a very specific group of mothers and may not be indicative of the type of response rate that would be seen in the general population. Telephone Interview with CDC Representative, CDC's National AIDS Clearinghouse (Oct. 10, 1996) [hereinafter Telephone Interview].

<sup>61</sup> See Gostin et al., *supra* note 16, at 1438.

<sup>62</sup> See *AMA Backs Mandatory HIV Testing of Pregnant Women and Newborns*, WASH. POST, June 28, 1996, at A2.

<sup>63</sup> See Telephone Interview, *supra* note 62.

<sup>64</sup> See *id.*

efficiency of AZT in uninfected persons is limited and uncertain.<sup>65</sup> The CDC recommends health care workers who have been exposed to possible transmission of HIV to begin drug therapy as soon as one to two hours after the transmitting accident.<sup>66</sup>

Because AZT may prove harmful to unaffected persons, it is important for a victim of sexual assault to know the HIV status of her assailant as soon as possible so that she may choose whether or not to continue the drug therapy. The short-term effects of toxicity associated with higher doses of AZT includes gastrointestinal symptoms, fatigue, and headaches.<sup>67</sup> As a result of these side effects, the CDC, in other situations, has recommended weighing the potential risk of exposure against the adverse side effects of drugs such as AZT.<sup>68</sup>

Preconviction testing provides the victim with information as to her particular infection risk based on her (accused) attacker's current HIV status, and thus enables her to better assess her need for drug therapy and weigh the risks and benefits associated with such therapy.<sup>69</sup> In addition, if AZT or a drug like it becomes readily available and recommended by the CDC as a preventative measure for victims against contracting HIV, the policy for testing (accused) offenders should already be in place so that victims, their families, and the public in general may benefit immediately.

### C. PSYCHOLOGICAL BENEFIT TO THE VICTIM

The psychological health of a person can have a significant impact on his or her physical health.<sup>70</sup> For victims of sexual assault, the physical

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<sup>65</sup> *Update: Provisional Public Health Service Recommendations for Chemoprophylaxis After Occupational Exposure to HIV*, 45 MORBIDITY & MORTALITY WKLY. REP. 468, 469 (1996).

<sup>66</sup> *Id.* at 470.

<sup>67</sup> *Id.* at 469.

<sup>68</sup> *Id.* at 470.

<sup>69</sup> See Gostin et al., *supra* note 16, at 1441. Even though the victim could not rely on a single negative test result to completely eliminate the risk of a false-negative result, this might provide substantial relief to victims who experienced serious side effects. See *id.*

<sup>70</sup> See, e.g., Elizabeth A. Sheehy, *Compensation for Women Who Have Been Raped*, in CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE 205, 205 (Julian V. Roberts & Renate M. Mohr eds., 1994) ("Sexual assault is one of the most serious harms that any woman could ever suffer.").

scars heal much more quickly than the psychological scars.<sup>71</sup> Improving the psychological health of the victim is thus essential in helping her to improve her overall health.<sup>72</sup> A recent study found that an increasing number of women who have been victims of sexual assault fear contracting HIV.<sup>73</sup> This means that the psychological harm from sexual assault includes not only the trauma of the original assault, but also the fear of HIV infection.<sup>74</sup> This fear has been reported as a "significant stressor adding to the incidence, prevalence, and severity of psychiatric morbidity."<sup>75</sup> This fear of HIV infection delays the healing process, and if the (accused) offender cannot be tested, the victim may have to wait as long as six to twelve months before she can rely on her own test results.<sup>76</sup> A comprehensive testing scheme for accused and convicted sex offenders would help reduce or even eliminate this stress for many victims.<sup>77</sup> Mandatory testing to determine the accused or convicted individual's HIV status is one vehicle which may aid the victim's psychological healing and thus commence complete recovery from the assault.<sup>78</sup>

Mandatory testing serves several societal goals. One of these goals is disease prevention through preventive measures taken by both the victim and the (accused) offender. Mandatory testing will also aid the victim in assessing the potential benefits of continuing or discontinuing any preventative drug therapy, and will help reduce the psychological trauma associated with sexual assault. Even with all these benefits, however, mandatory testing has been severely criticized on several

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<sup>71</sup> The victim of rape may be traumatized for as long as fifteen to twenty years. Exacerbating this is the fact that the emotional trauma is magnified many times by the fear of contracting AIDS as a result of the attack. *See, e.g.,* Jane N. Burnley, *The Transmission of AIDS Through Sexual Assault: A Deadly Problem in Search of a Policy*, 12 NAT'L ORG. FOR VICTIM ASSISTANCE NEWSL. 3 (May 1988).

<sup>72</sup> *See id.*

<sup>73</sup> *See* Gostin et al., *supra* note 16, at 1437.

<sup>74</sup> *See id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See id.* at 1442.

<sup>77</sup> *See id.* This is true even though the testing procedures are not completely accurate. *See id.* Of course, it is likely that a positive result will increase the psychological stress for the victim. This is why counseling must be provided when the victim receives the test results. Victims must understand that even a positive test result for the offender does not ensure that transmission to the victim occurred. Many victims fear that their attackers may be HIV positive. In reality, only a small percentage of victims actually contract HIV from their attackers. Thus, the majority of women who suffer from this fear will have it alleviated through mandatory testing. *See id.* Nevertheless, counselors must begin aiding the victim in preparing for her or his own test results.

<sup>78</sup> *Id.*

grounds.

## II. CRITICISMS OF MANDATORY TESTING

### A. FOURTH AMENDMENT GUARANTEE AGAINST UNREASONABLE SEARCH AND SEIZURE

Much of the controversy regarding mandatory HIV testing has centered on the question of whether such testing violates the (accused) offender's Fourth Amendment rights against unreasonable searches and seizures.<sup>79</sup> The Supreme Court determined as early as 1966 that an invasion of the body, including an involuntary blood test, is a search within the meaning of the Fourth Amendment.<sup>80</sup> Courts have ruled that the Fourth Amendment generally allows a search only after a court has issued a search warrant based upon a finding of probable cause.<sup>81</sup> In recognition of this constitutional right, the mandatory testing scheme advocated in this Comment requires either that the person tested be convicted for the offense giving rise to the possibility of transmission, or in pre-conviction cases, that a probable cause hearing be held prior to testing.

The laws of most states only allow the seizure of a bodily substance for use as identification evidence in a criminal trial.<sup>82</sup> A blood test to determine the (accused) offender's HIV status does not fall neatly into this definition because it is not being used as trial evidence.<sup>83</sup> The rule evolving from case law is that when the government seeks to achieve

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<sup>79</sup> The Fourth Amendment to the United States Constitution guarantees:

The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

<sup>80</sup> See *Schmerber v. California*, 384 U.S. 757 (1966).

<sup>81</sup> Notable exceptions are situations in which the evidence may be unavailable at a later date, such as a blood alcohol level, when there is an immediate risk to life (see *Mincey v. Arizona*, 437 U.S. 385 (1978)), when a person's actions lead a police officer to believe that they are armed (see *Terry v. Ohio*, 392 U.S. 1 (1968)), and administrative searches of heavily regulated businesses (see *United States v. Biswell*, 406 U.S. 311 (1972)).

<sup>82</sup> See Kevin A. McGuire, Comment, *AIDS and the Sexual Offender: The Epidemic Now Poses New Threats to the Victim and the Criminal Justice System*, 96 DICK. L. REV. 95, 101 (1991).

<sup>83</sup> See *id.*

an important public purpose (like the containment of HIV), and has a compelling interest in aiding victims, courts will uphold statutes that authorize mandatory testing provided the intrusion on privacy is not substantial.<sup>84</sup> One case that state courts have relied upon when dealing with the reasonableness of mandatory HIV testing statutes is *Skinner v. Railway Labor Executives Ass'n*.<sup>85</sup> The United States Supreme Court in *Skinner* stated that the taking of blood samples was a minimal intrusion because "such 'tests are a commonplace in these days of periodic physical examinations.'"<sup>86</sup>

California enacted a mandatory HIV testing scheme for convicted sex offenders in 1988, becoming one of the first states to do so.<sup>87</sup> This was before the federal government's 1990 amendment which pitted mandatory testing against a ten percent loss of federal funds.<sup>88</sup> California's various statutes mandating HIV testing are by far some of the most comprehensive.<sup>89</sup> Not only did the California legislature place procedural safeguards within the statutes mandating HIV testing, but they also wrote separate statutes dealing with sex offenders, prostitutes, and penalty enhancement for persons who commit a transmitting act with knowledge that they have HIV or AIDS.<sup>90</sup>

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<sup>84</sup> See *Johnetta J. v. Municipal Court*, 218 Cal. App.3d 1255 (1990). Cf. *People v. Adams*, 597 N.E.2d 574 (Ill. 1992); *People v. Cook*, 532 N.Y.S.2d 940 (N.Y. App. Div. 1988), *appeal denied*, 536 N.Y.S.2d 746 (1988).

<sup>85</sup> 489 U.S. 602 (1989).

<sup>86</sup> *Id.* at 625, *citing* *Schmerber v. California*, 384 U.S. at 771.

<sup>87</sup> CAL. PENAL CODE § 1202.1 (Deering 1996). Note that this code only deals with convicted, not accused, sex offenders. California has a separate code which deals with mandatory testing for accused sex offenders. CAL. PENAL CODE § 1524.1 (Deering 1995).

<sup>88</sup> Testing Certain Sex Offenders for Human Immunodeficiency Virus, *supra* note 2.

<sup>89</sup> Contrast California's statutes, *infra* note 92, with less comprehensive statutes including, for example, Alabama's code which does not provide any guidelines regarding probable cause requirements for accused offenders, counseling for the accused, penalties for unlawful disclosure of results, or confirmatory testing procedures. AL. CODE § 22-11A-17 (1992).

<sup>90</sup> Some of these codes are: CAL. HEALTH & SAFETY CODE § 120980 (Deering 1995) (declaring the confidentiality of mandated HIV blood testing results except where otherwise provided by statute and the civil and criminal penalties for wrongful disclosure); CAL. PENAL CODE § 1524.1 (Deering 1995) (dealing with mandatory HIV testing for accused sex offenders); CAL. PENAL CODE § 7510 (Deering 1995) (allowing law enforcement officers who believe that they came into contact with the bodily fluids of either an inmate, detainee, or parolee to request HIV testing); CAL. PENAL CODE § 7512 (Deering 1995) (allowing an inmate who believes that he or she has come into contact with the bodily fluids of another inmate to request testing); CAL. PENAL CODE § 1202.6 (Deering 1995) (requiring testing for persons convicted of soliciting prostitution); CAL.

The California courts have been faced with challenges to these statutes on a variety of grounds.<sup>91</sup> In *Love v. Superior Court*,<sup>92</sup> persons convicted of soliciting prostitution challenged a statute requiring testing for those convicted of soliciting prostitution on the grounds that the statute violated the Fourth Amendment and the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.<sup>93</sup> The statute was upheld as constitutional on all counts.<sup>94</sup> Although the court's analysis of the equal protection and due process claims was specific to the statute which authorized testing for solicitation of prostitution, the court's Fourth Amendment analysis can be analogized to the testing of all sex offenders.<sup>95</sup>

The court in *Love* began by acknowledging that compulsory blood tests are indeed subject to the Fourth Amendment because they are searches.<sup>96</sup> The court then noted that the state's police power

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PENAL CODE § 12022.85 (Deering 1995) (providing for penalty enhancement upon a subsequent conviction of a person with knowledge that he or she has tested positive for AIDS).

<sup>91</sup> See *People v. McVickers*, 840 P.2d 955 (Cal. 1992)(holding that retroactive application of 1202.1, which allows mandatory HIV testing of convicted sex offenders, did not violate ex post facto clauses of either the United States or California constitutions because a blood test for AIDS is not punishment per se); *People v. Guardado*, 47 Cal. Rptr.2d 81 (Cal. Ct. App. 1995)(holding that the prosecutor cannot petition for AIDS testing where lewd and lascivious conduct was the crime charged and this was not included in 1202.1 and the victim did not request it); *People v. Frausto*, 42 Cal. Rptr.2d 540 (Cal. Ct. App. 1995)(holding that a person pleading no contest to a charge of gang rape may be required to undergo mandatory HIV testing, even though this crime is not specifically listed in 1202.1); *People v. Shoemake*, 20 Cal. Rptr.2d 36 (Cal. Ct. App. 1993)(holding that corpus delicti rule does not apply to sentence enhancements for a person convicted of certain offenses with knowledge that he has AIDS); *People v. Jillie*, 11 Cal. Rptr.2d 107 (Cal. Ct. App. 1992)(holding that attempts to commit the sexual offenses listed in 1202.1 are not covered by 1202.1).

<sup>92</sup> 276 Cal. Rptr. 660 (Cal. Ct. App. 1990).

<sup>93</sup> *Id.* at 662.

<sup>94</sup> *Id.* at 666-67.

<sup>95</sup> The plaintiffs maintained that because they could be convicted under the prostitution solicitation statute without having engaged in either a sexual act or an act which might result in transmission, that there was no "reasonable relation between the statute's means and ends." *Id.* at 666. The court claimed judicial deference to the legislature and stated that "on the record before us, we cannot say that the legislative determination or judgment concerning AIDS and this high-risk group is unreasonable." *Id.* As to the equal protection claim, the plaintiffs noted that the statute did not provide that the test results obtained under this section (for lesser offenses) were limited in use as those of section 1202.1 were (for violent offenders). *Id.* at 667. To this, the court replied that the "the limitation set forth in section 1202.1 applies with equal force to section 1202.6," and so the claim was rejected. *Id.*

<sup>96</sup> *Id.* at 740.

encompassed the right to control a communicable disease, and that a statute passed to affect this end need only be reasonable.<sup>97</sup> The court stated that there must be a balancing of the person's Fourth Amendment interests and the government's interest in conducting the search.<sup>98</sup>

The *Love* court then evaluated the "special needs" doctrine established by the Supreme Court in *Skinner*.<sup>99</sup> The "special needs" doctrine creates an exception to the usual determination that a search is unreasonable unless it is conducted pursuant to a warrant issued upon probable cause. The exception justifies a departure from these requirements when "special needs beyond the normal need for law enforcement make the warrant and probable-cause requirement impracticable."<sup>100</sup>

The California court proceeded to look to the state's codes dealing with mandatory testing for HIV as a whole and noted the "broad purpose[s] of the statute[s]."<sup>101</sup> Reviewing the legislative history of the statutes, the court found that the legislature perceived the threat of AIDS to be an "unprecedented major public health crisis"<sup>102</sup> in California.<sup>103</sup> The court also found that the legislature believed that testing offenders would help to prevent the spread of AIDS because it would enable infected persons to take precautions to avoid infecting others.<sup>104</sup> The court concluded that because the testing was meant to address the serious problem of AIDS transmission, it fit the "special needs" doctrine established in *Skinner* and was, therefore, constitutional.<sup>105</sup>

The Illinois Supreme Court in *People v. Adams*,<sup>106</sup> noted the *Love* decision when it was faced with a challenge to the constitutionality of an Illinois statute mandating HIV testing after conviction for a variety of offenses.<sup>107</sup> As in *Love*, the defendants in *Adams* had been convicted of

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<sup>97</sup> *Id.*

<sup>98</sup> The court stated that the "reasonableness of a particular search 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Id.* at 740-41 (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

<sup>99</sup> *Id.* at 662-63.

<sup>100</sup> *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 619 (1989)(quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

<sup>101</sup> *Love*, 226 Cal. Rptr. at 742.

<sup>102</sup> *Id.* (citing CAL. HEALTH & SAFETY CODE § 199.45 subd. (a) (Deering 1995)).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 743.

<sup>105</sup> *Id.*

<sup>106</sup> 597 N.E.2d 574 (Ill. 1992)

<sup>107</sup> *Id.* at 580.



prostitution.<sup>108</sup> The Illinois statute mandated that all individuals convicted of one of the listed offenses must undergo testing for HIV and other sexually transmitted diseases.<sup>109</sup> The constitutional issues addressed by the court in *Adams* included whether the HIV testing requirement violated the Fourth Amendment's proscription of unreasonable search and seizures.<sup>110</sup>

The *Adams* court, just like the *Love* court, began its Fourth Amendment analysis by noting that the statute constituted a public health measure and as such fell within the state's broad police powers.<sup>111</sup> The court acknowledged that although the state has broad powers in this area, it still must comply with constitutional mandates when formulating its regulations.<sup>112</sup> The state and the defendants in *Adams* agreed that the taking and testing of a blood sample was a search under the Fourth Amendment.<sup>113</sup> While the court noted that the Fourth Amendment was implicated both by the taking of blood from the offender and by the subsequent performance of the HIV test upon the blood sample,<sup>114</sup> it proceeded to analyze the entire testing procedure as a whole.<sup>115</sup>

To determine whether the statute met the Fourth Amendment's

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<sup>108</sup> *Id.* at 578.

<sup>109</sup> 38 ILL. REV. STAT., 5/5-5-3(g).

<sup>110</sup> *Adams*, 597 N.E.2d at 579.

<sup>111</sup> The state's police powers include a broad discretion in designing methods to protect the public health and safety. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905)).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. at 616; *Schmerber v. California*, 384 U.S. at 767.

<sup>114</sup> *Id.* The court quoted *Skinner*:

In light of our society's concern for the security of one's person [citation], it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests. [Citation].

*Id.*, quoting *Skinner*, 489 U.S. at 616.

<sup>115</sup> *Id.* at 580. In considering the impact upon the individual's privacy the *Adams* court stated:

We do not agree with the defendants, however, that [the consequences of performing an HIV test on the blood sample] make the test more objectionable for fourth amendment purposes, for the focus of the fourth amendment inquiry must remain primarily on the actual physical intrusion caused by the search.

obligations,<sup>116</sup> the *Adams* court stated that the proper analysis involved a balancing of the goals of the statute against the intrusion against the person being tested.<sup>117</sup> The defendants in *Adams* contended that the statute did not fulfill Fourth Amendment requirements because it did not require individualized suspicion prior to testing.<sup>118</sup> In its response, the *Adams* court invoked the "special needs" doctrine established by the Supreme Court in *Skinner*.<sup>119</sup> The court determined that the purpose of the statute was to prevent the spread of HIV and that this interest was a "special governmental need."<sup>120</sup> The *Adams* court then weighed this interest against the intrusion on the individual.<sup>121</sup>

The court advanced two reasons for its belief that the intrusion upon the individual was not as great as the state's interest in preventing the spread of HIV.<sup>122</sup> The first reason was that the statute fully satisfied one of the purposes of the Fourth Amendment, the protection of individuals against arbitrary acts of governmental officials, because it did not provide discretion to any official to decide who should be tested.<sup>123</sup> Instead, upon conviction, the state automatically tested any person who qualified under the statute.<sup>124</sup> In addition, the court denied the defendants' argument that the government was arbitrarily singling out a class.<sup>125</sup> Because it is difficult, if not impossible, to determine who is HIV positive merely by looking at them, and because the ways in which HIV transmission can occur are limited, the legislature reasonably chose membership in a high risk group as the criteria for selecting whom to test.<sup>126</sup>

The second reason the court advanced for its belief that the intrusion did not outweigh the government's goal was that a requirement of individualized suspicion might frustrate the important purposes of the statute. In making this determination, the *Adams* court relied on *Skinner*, in which the Supreme Court held that the governmental interest in being allowed to test without individualized suspicion is compelling when

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116 *Id.* at 580.

117 *Id.*, quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

118 *Id.* at 582.

119 *Id.* at 580, 582, citing *Skinner*, 489 U.S. at 619.

120 *Id.* at 581.

121 *Id.*

122 *Id.* at 581-82.

123 *Id.* at 581.

124 *Id.*

125 *Id.* at 583.

126 *Id.*

requiring such would impede the goals of the statute.<sup>127</sup> Further relying upon the Supreme Court's guidance, the *Adams* court noted the holding in *Schmerber v. California*,<sup>128</sup> in which the Supreme Court stated that blood tests are routine and occasion little harm to the individual.<sup>129</sup> Because the actual physical intrusion of a blood test is considered to be slight and the risks to the person being tested were minimal because the statute requires that only trained medical personnel perform the tests, the *Adams* court found that the intrusion upon the individual did not outweigh the government's interest in requiring the testing.<sup>130</sup>

## B. CONFIDENTIALITY OF HIV STATUS

The fear underlying much of the resistance to mandatory testing is based primarily upon concerns over the possible discriminatory uses of the information resulting from the disclosure requirements.<sup>131</sup> In order to allay these fears, confidentiality requirements must be incorporated into the testing scheme.<sup>132</sup> This concern for the individual's privacy rights stems from the history of discrimination against persons with AIDS in the United States. Such discrimination has been especially blatant in the areas of employment, health care, and housing.<sup>133</sup> The fear of discrimination is both for the (accused) offender and the victim. If the (accused) offender tests positive for HIV, one argument claims that others will then assume that the victim has contracted the virus, leading to discrimination against the victim, and thus exacerbation of her trauma.<sup>134</sup>

Depending on the state, a great many people may come to know the (accused) offender's HIV status because of the mandatory disclosure provisions contained in the statute.<sup>135</sup> The states with statutes requiring

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<sup>127</sup> *Id.* at 582. The court stated that "when the intrusion is minimal and an important governmental interest would be jeopardized by requiring individualized suspicion, a search may be deemed reasonable even though such suspicion is lacking." *Id.* (quoting *Skinner*, 489 U.S. at 624).

<sup>128</sup> 384 U.S. 757 (1966).

<sup>129</sup> *Adams*, 597 N.E.2d at 582, quoting *Schmerber*, 384 U.S. at 771.

<sup>130</sup> *Id.* at 584.

<sup>131</sup> *See id.* at 583.

<sup>132</sup> *See* Gostin et al., *supra* note 16, at 1443.

<sup>133</sup> MARTIN GUNDERSON ET AL., AIDS: TESTING AND PRIVACY 1 (1989).

<sup>134</sup> *See, e.g.*, Franks, *supra* note 10.

<sup>135</sup> *See, e.g.*, FLA. STAT. ANN. § 775.0877 (West 1995). This statute allows disclosure to the offender, the public health agency of the county in which the conviction occurred, the county of residence of the offender, the victim, the sheriff or chief correctional officer. New York also allows disclosure to a wide variety of people including "the victim,

testing are nearly uniform in their requirement of disclosure to the victim.<sup>136</sup> A great many states also allow the victim to disclose the results to others as necessary to protect the health and safety of herself, her family, and her sexual partner.<sup>137</sup> However, states differ as to who else may receive the results. For example, while about one-half of the states with testing statutes provide for disclosure to the Health Department,<sup>138</sup> relatively few states either mandate disclosure to the court in charge of the case,<sup>139</sup> or allow the correction facility responsible for the (accused) offender to receive the results.<sup>140</sup> New York's statute is the most liberal in that it allows "anyone to whom there is a reasonable risk of HIV transmission" to receive the results.<sup>141</sup> Thus, because unwarranted disclosure of results could increase the risk of discrimination against both the (accused) offender and the victim, a testing scheme should not only include confidentiality requirements, but also create civil liability for persons who make unauthorized disclosure of another's HIV status. California's HIV testing statute provides an exceptionally good model for this type of provision.<sup>142</sup>

### C. PRESUMPTION OF INNOCENCE

A third concern, which deals exclusively with preconviction testing, is that the presumption of innocence that is such a vital ingredient

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the victim's immediate family, guardian, physicians, attorneys, medical or mental health providers and past or future contacts to whom there was or is a reasonable risk of HIV transmission." N.Y. CRIM. PROC. LAW § 390.15 (McKinney 1995).

<sup>136</sup> Usually disclosure is mandatory upon the request of the victim. *See, e.g.*, COLO. REV. STAT. § 18-3-415 (1995). *But see*, KY. REV. STAT. ANN. § 438.250 (Michie 1995)(disclosure to the victim is not specifically provided for). Mississippi requires that the victim be given the results whether or not the results were requested. *See, e.g.*, MISS. CODE ANN. § 43-12-623 (1995).

<sup>137</sup> *See, e.g.*, CAL. PENAL CODE § 1524.1 (Deering 1995); D.C. CODE ANN. §§ 24-492 (1995).

<sup>138</sup> These states are: Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Kansas, Louisiana, Minnesota, Mississippi, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah and the Virgin Islands.

<sup>139</sup> *See, e.g.*, GA. CODE ANN. § 17-10-15(f)(2) (1995); IDAHO CODE § 39-604(5) (1995).

<sup>140</sup> *See, e.g.*, OHIO REV. CODE ANN. § 2907.27 (Anderson 1996); TENN. CODE ANN. § 39-13-521(b)(2) (1995).

<sup>141</sup> N.Y. CRIM. PROC. LAW § 390.15 (McKinney 1995).

<sup>142</sup> CAL. HEALTH & SAFETY CODE § 120980 (Deering 1995) (declaring the confidentiality of mandated HIV blood testing results except where otherwise provided by statute and the civil and criminal penalties for wrongful disclosure).

of the criminal justice system is corrupted by the coerced testing.<sup>143</sup> The argument is that requiring a person to undergo testing somehow implies guilt.<sup>144</sup> Although this argument has not been specifically addressed by courts in relation to HIV testing, analogous claims have been considered and rejected by the United States Supreme Court in other contexts.<sup>145</sup> Especially pertinent are those cases dealing with the rights of pretrial detainees.

In the case of *Bell v. Wolfish*, pretrial detainees challenged the conditions in a correctional center as unconstitutional because they contradicted the presumption of innocence.<sup>146</sup> The Supreme Court rejected the claim, stating that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun,"<sup>147</sup> and indeed, is rather a "doctrine that allocates the burden of proof in criminal trials."<sup>148</sup> Dealing with similar issues, the Third Circuit once noted that reading the presumption literally would invalidate pretrial procedures such as bail and pretrial detention.<sup>149</sup>

Thus, the Supreme Court has stated that pretrial confinement conditions do not violate the presumption of innocence.<sup>150</sup> This reasoning can be extended to pretrial requirements, such as mandatory HIV testing, as long as the testing meets other constitutional mandates. The presumption of innocence is a procedural requirement that allows the defendant to do nothing until the prosecution has met its burden to produce evidence and effect persuasion.<sup>151</sup> It does not relieve the defendant from the burdens of pretrial confinement or reasonable search and seizure, or other pretrial requirements.

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<sup>143</sup> See, e.g., Dennis Moore, *Victims v. Offenders with AIDS: Balancing Rights*, NAT'L ORG. OF VICTIMS ASSISTANCE NEWSL. 3 (1988).

<sup>144</sup> *Id.*

<sup>145</sup> See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979) (rejecting pretrial detainees' constitutional challenges to conditions of confinement).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 533.

<sup>148</sup> *Id.*

<sup>149</sup> *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 (3rd Cir. 1976)("[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.")

<sup>150</sup> See *Bell*, 441 U.S. 520.

<sup>151</sup> *Id.* at 533.

#### D. ACCURACY OF TEST RESULTS

To date, no initial test or confirmatory HIV test is one hundred percent accurate.<sup>152</sup> The initial test performed is usually the enzyme-linked immunosorbent assay (ELISA) test.<sup>153</sup> If this result is positive, the results are then subjected to a confirmatory test, the Western Blot test.<sup>154</sup> Because both tests rely on visual observation of the number of antibodies that appear in the sample, they employ a measure of subjectivity on the part of the person conducting the testing. The body produces these antibodies in response to the presence of the HIV.<sup>155</sup> Thus, the tests do not target the disease itself directly.<sup>156</sup> Although a result is not one hundred percent guaranteed, the results of these tests are considered to be "reasonably accurate."<sup>157</sup>

### III. TOWARD A MODEL TESTING SCHEME

#### A. BENEFIT TO THE VICTIM

One of the primary purposes of a mandatory testing and disclosure scheme is to benefit the victim of a sexual offense by informing her whether the accused or convicted sex offender is infected with HIV, and thus, identifying whether or not she has been exposed to the virus.<sup>158</sup> If the tests are negative, this information allows the victim to begin the healing process, to discontinue use of any drug therapy that is causing negative side-effects, and to resume any life plans or activities which she had postponed.<sup>159</sup> If the test is positive, the victim may take added precautions to prevent further transmission of the disease and may begin to consider potential treatment options. In order for this information to be beneficial, it is essential that testing take place as soon as possible after the victim requests it.<sup>160</sup>

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152 See Gostin et al., *supra* note 16, at 1441.

153 See Adams, 597 N.E.2d at 578.

154 *Id.* at 578.

155 See *id.*

156 See *id.*

157 See *id.*

158 See Debates, *supra* note 7.

159 See Gostin et al., *supra* note 16, at 1441-42.

160 See *id.* at 1438.

## B. PUBLIC HEALTH BENEFITS

In addition to benefiting the individual victim, another goal of mandatory testing is to promote public health objectives. This means limiting the spread of infection and protecting the health of the victim of a sexual offense, the accused or convicted sex offender, and others who may be at risk of transmission from these individuals. Depending on whether the results show a negative or positive HIV status, testing provides greater knowledge of the types and extent of precautions which should be employed by the individuals at risk, and allows any infected individuals to make informed treatment decisions as early as possible.<sup>161</sup>

## C. PROCEDURAL SAFEGUARDS

In order to protect the privacy of the individuals involved and to assure that testing is performed in a constitutional manner, several procedural safeguards should be incorporated into any HIV testing statute. It is important that the rights of both the victim and the (accused) offender are protected throughout the testing process, as well as after disclosure of the results. A model testing scheme that was developed after reviewing existing state statutes is provided in the Appendix of this Comment. The model scheme includes the following procedural safeguards.

### 1. Inform Victims of Their Right to Request Testing

Many people do not know their full rights under the law. Even lawyers are not aware of every statute on the books. Because of this, in all cases in which a person has been convicted of or charged with a sexual offense, the prosecutor needs to advise the victim of her right to request the testing of the (accused) offender's blood for the presence of HIV antibodies.<sup>162</sup>

### 2. Threshold Requirements: Conviction or Probable Cause Hearing

Required testing for both accused and convicted sex offenders is an integral part of the scheme.<sup>163</sup> Upon the written request of a victim, the court must issue a search warrant for the purpose of obtaining a blood sample from an accused or convicted sex offender which shall be tested

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<sup>161</sup> See *id.* at 1441-42.

<sup>162</sup> See, e.g., CAL. PENAL CODE § 1202.1(d)(Deering 1996).

<sup>163</sup> See Gostin et al., *supra* note 16, at 1439-41.

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for the presence of HIV and any other identified causative agent of AIDS.<sup>164</sup> In the case of an accused offender, no warrant shall be issued until after a probable cause hearing.<sup>165</sup> The hearing should be held within thirty days after the written request, to determine probable cause as to three elements: (1) that there was an offense committed; (2) that the person charged was the person who committed the crime; (3) that the crime was one that involved the transmission of bodily fluids so that exposure to AIDS or HIV may have occurred.<sup>166</sup> Both the victim and the accused must have the right to be present at the hearing and both should be notified of this right as well as the date, time, and location of the hearing.<sup>167</sup> During the hearing only affidavits, counter-affidavits, and medical records that relate to the material facts of the case should be admissible.

These procedural requirements safeguard the rights of innocent persons by minimizing the possibility that they will be subjected to arbitrary or wrongful testing. Specifically, they protect the accused from being tested based on false allegations (i.e., the person requesting the test wants the information for her own purposes, not because a crime was committed); misinformation (i.e., in the case of mistaken identity), or when the offense was not one which could result in HIV transmission. The probable cause hearing thus serves the societal goals of allowing the victim of the sexual offense to know the accused offender's HIV status as

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<sup>164</sup> For examples of state statutes which allow testing for accused or convicted sex offenders, *see* ALASKA STAT. § 18.15.300 (Michie 1995)(both accused and convicted); ARK. CODE ANN. § 16-82-101 (Michie 1995)(both); CAL. PENAL CODE § 1202.1 (Deering 1996)(convicted); CAL. PENAL CODE § 1524.1 (Deering 1995)(accused); COLO. REV. STAT. § 18-3-415 (1995)(both); CONN. GEN. STAT. § 54-102(a) (1994)(accused); CONN. GEN. STAT. § 54-102(b) (1994)(convicted); DEL. CODE ANN. tit. 10, §§ 1076-1077 (1995)(accused); FLA. STAT. ANN. § 960.003 (West 1995)(both); GA. CODE ANN. § 17-10-15 (1995)(both); IDAHO CODE § 39-604 (1995)(both); KAN. STAT. ANN. §§ 65-6000 - 65-6007 (1996)(both); KAN. STAT. ANN. § 38-1692 (1995)(both); KY. REV. STAT. ANN. § 438.250 (Michie 1995)(accused); LA. REV. STAT. ANN. § 15.535 (West 1996)(convicted); LA. CODE CRIM. PROC. ANN. art. 499 (West 1996)(accused); N.J. STAT. ANN. § 2C:43-2.2 (West 1994)(both); N.Y. CRIM. PROC. LAW § 390.15 (McKinney 1995); N.Y. FAMILY CT. ACT § 347.1 (McKinney 1995); S.D. CODIFIED LAWS § 23A-35B-3 (Michie 1996)(accused); TENN. CODE ANN. § 39-13-521 (1995)(both); TEX. CRIM. P. CODE ANN. art. 21.31 (West 1996)(accused); V.I. CODE ANN. tit. 5 §§ 3910-3912 (1994)(both). For a complete analysis of state statutes, *see* Appendix B.

<sup>165</sup> For examples of states which include this, *see* ALASKA STAT. § 18.15.300 (Michie 1995); S.D. CODIFIED LAWS § 23A-35B-3 (Michie 1996);

<sup>166</sup> *See* Gostin et al., *supra* note 16, at 1441.

<sup>167</sup> For an example of such requirements, *see* MD. ANN. CODE art. 27 § 855(1995).



soon as possible and protecting the rights of the accused.<sup>168</sup>

### 3. Counseling

AIDS is still a relatively new disease and as such it is widely misunderstood. Because of this, and because for most persons the specter of AIDS is such a terrible one, the state must provide counseling to both the victim and the (accused) offender.<sup>169</sup> The victim should receive counseling both at the time of the request for testing and also when the test results are disclosed.<sup>170</sup> The (accused) offender should receive counseling when the results are disclosed.

To assist the victim of the sexual offense in determining whether to make a request for testing, the prosecutor should refer the victim to a local health officer.<sup>171</sup> Because timing is of the essence, the health official should provide the victim with pre-test counseling within seven days of the referral. This counseling must include information that serves three goals.<sup>172</sup> The first goal is to help the victim understand the extent to which the particular circumstances of the sexual offense may have created a risk of HIV transmission.<sup>173</sup> This requires that the counselor know the particulars of the crime and explain to the victim the likelihood of exposure and transmission based on those facts. The second goal is to help the victim understand the current testing methods and each method's accuracy.<sup>174</sup> The victim needs to be psychologically prepared for the fact that the tests are not one hundred percent accurate.<sup>175</sup> The third goal is to help the victim decide whether to request the HIV test.<sup>176</sup>

It is also important that counseling is provided for both the victim and the (accused) offender after the results are disclosed. In the case of a negative result, the health official must explain that a positive status may not be detectable for six months to a year after the initial exposure. In the case of a positive result, counseling is extremely important for both the (accused) offender and the victim. The counselor should explain that a

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<sup>168</sup> See Gostin et al., *supra* note 16, at 1439-41.

<sup>169</sup> For examples of states that provide for counseling for both the victim as well as the (accused) offender, see ALASKA STAT. § 18.15.300 (Michie 1995); CAL. PENAL CODE § 1202.1 (Deering 1996); CAL. PENAL CODE § 1524.1 (Deering 1995); DEL. CODE ANN. tit. 10 §§ 1076-1077 (1995).

<sup>170</sup> See, e.g., MINN. STAT. § 611A.19(1)(b) (1995).

<sup>171</sup> See, e.g., CAL. PENAL CODE § 1202.1(d)(1) (Deering 1996).

<sup>172</sup> See Gostin et al., *supra* note 16, at 1437.

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> *See id.*

<sup>176</sup> *See id.*

person can live for many years with an HIV positive status and not acquire AIDS. In addition, the counselor should inform both parties of the risk of transmission from a single encounter with an HIV positive person, and explain the ways in which HIV is transmitted so that high risk behavior can be avoided.

#### **4. Confirmatory Test and Retesting**

As previously stated, current HIV tests are not one hundred percent accurate. For this reason, any initially positive results must be subjected to a confirmatory test before disclosure. The first test is usually an ELISA test. Its results should be subjected to the Western Blot confirmatory test in order to minimize the possibility of reporting a false positive result.

In rare circumstances, a positive status may not show up for as long as six months to one year after the initial testing, therefore, provisions should be made for retesting of the (accused) offender both six months and one year after any initially negative result.<sup>177</sup> The same disclosure provisions applicable to the original test should apply to the retesting so that both parties can be certain of the results. The retesting provision shall not apply in cases where an accused was tested and subsequently either the charges were dropped or a not guilty verdict was returned at trial.

#### **5. Timing Requirements for Testing**

In order to ensure that testing be conducted in a timely manner, a timetable should be provided within which events must take place.<sup>178</sup> Because timing is so crucial, both in terms of the potential psychological benefits and because the victim may choose to discontinue use of any drug therapy that is being taken if results are negative, it is essential that the test is carried out as quickly as possible.

#### **6. Mandatory Disclosure to the (Accused) Offender**

Stopping the spread of AIDS is a societal goal.<sup>179</sup> A person is not likely to take all the precautionary measures available without knowledge of infection. In the case of a non-recalcitrant individual, the fact that this

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<sup>177</sup> For an example of a code which provides for all HIV tests of the offender, conducted within two years of the initial testing, to be provided to the victim as a standing request, see V.I. Stat. Ann. tit. 5 § 3912 (1997).

<sup>178</sup> For examples of states whose statutes include a timing requirement, see N.M. STAT. ANN. § 24-2B-5.1 (1997); GA. CODE ANN. § 15-11-35.1 (1995).

<sup>179</sup> See *Adams*, 597 N.E.2d at 581.

person received results and therefore had knowledge of his HIV status may serve as a deterrent for subsequent transmission.<sup>180</sup> Therefore, the testing scheme should include mandatory disclosure to the (accused) offender.<sup>181</sup> In addition, people should be held responsible for knowingly transmitting HIV. In order to serve this goal, the results of the HIV test that are disclosed to the (accused) offender should be kept, sealed, in the tested person's permanent file so that, upon conviction for any subsequent AIDS transmitting offense, the results may be used for penalty enhancement.<sup>182</sup>

## 7. Disclosure

The victim must be allowed to disclose the results of the test as necessary in order to protect any other individual, to protect the health and safety of the victim (i.e., to any person who is providing counseling to the victim relating to the assault), the victim's sexual partner, or the victim's family.<sup>183</sup> In addition, the victim should be allowed to disclose the results to any other person who may be exposed to the bodily fluids of the victim and is therefore at risk of transmission, such as a health care provider.<sup>184</sup>

## 8. Confidentiality and Civil Penalties

Except as otherwise described above, the results of the HIV test should be confidential and any unauthorized disclosure should result in civil penalties.<sup>185</sup> Discrimination against persons with AIDS is not the purpose of the testing scheme and the possibility of discrimination should be lessened by confidentiality requirements. Similarly, any individual who

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<sup>180</sup> Many states make the knowing transmission of HIV either a crime unto itself or a penalty enhancement for a separate crime. *See, e.g.*, FLA. STAT. ANN. § 775.0877(3) (West 1995).

<sup>181</sup> For examples of states that include mandatory disclosure to the (accused) offender, *see* ALASKA STAT. § 18.15.300 (Michie 1995); ARK. CODE ANN. § 16-82-101 (Michie 1995); CAL. PENAL CODE § 1202.1 (Deering 1996); CONN. GEN. STAT. § 54-102(b) (1994); KAN. STAT. ANN. § 38-1692 (1995); KY. REV. STAT. ANN. § 438.250 (Michie 1995).

<sup>182</sup> *See, e.g.*, CAL. PENAL CODE § 1202.1(c) (Deering 1996).

<sup>183</sup> For examples of state codes that allow disclosure to protect the health and safety of the victim, the victim's sexual partner, or the victim's family, *see* CAL. PENAL CODE § 1524.1 (Deering 1995); D.C. CODE ANN. §§ 24-492 (1995).

<sup>184</sup> *See, e.g.*, N.Y. CRIM. PROC. LAW § 390.15(6)(a)(ii) (McKinney 1995).

<sup>185</sup> For examples of state codes that provide civil penalties for unauthorized disclosure, *see* CAL. HEALTH AND SAFETY CODE § 120980 (1995); MD. ANN. CODE art. 27 § 855(h) (1995).

files a false report of sexual assault in order to obtain test result information should be subject to criminal and civil liability. Individuals who disclose test result information should also be subject to criminal and civil liability for each separate disclosure of that information.

#### **IV. CONCLUSION**

A sexual offense is a violent crime with severe consequences to the victim. The psychological harm perpetuated upon the victim is one of the longest lasting effects of the crime. For a growing number of women, the possibility that the attack may have resulted in the transmission of HIV adds significantly to this psychological stress. The state governments, under the authority of their police powers, have a duty to protect the health and safety of their citizens. This includes preventing the spread of a deadly, infectious disease as well as mitigating the harm suffered by victims of violent crimes. One of the ways this can be accomplished is by adopting statutes that mandate HIV testing of accused and convicted sex offenders, at the victim's request.

When enacting a code that authorizes mandatory HIV testing of accused or convicted sex offenders, legislatures should consider the rights of the test subject as well as the victim. Ultimately, the rights of the parties as well as the interests of the state must be balanced to create a testing scheme which is both constitutional and ethical. States can ensure that these standards are met by adopting statutes which serve the goals elaborated in this Comment, and incorporating the recommended procedural safeguards.

The rights of the accused are best protected by allowing testing only after a court finds probable cause to believe that the accused has committed a sexual offense that may have resulted in transmission of HIV to the victim. In addition, confidentiality provisions and civil penalties for the unauthorized disclosure of test results protects the privacy rights of the test subject. The victim's interests are served by allowing disclosure of the test results to her and requiring that the state provide counseling.

APPENDIX A <sup>186</sup>

MODEL TESTING SCHEME

- (1) For purposes of this code:
  - (a) "HIV" means Human Immunodeficiency Virus identified as the causative agent of Acquired Immunodeficiency Syndrome ("AIDS"), a condition in which the body's immune system fails and life threatening illnesses develop.
  - (b) "Sexual offense" means:
    - (i) unlawful sexual contact between:
      - (A) the penis and vulva, or the penis and the anus, and for purposes of this section contact occurs upon penetration, however slight; or
      - (B) the mouth and the penis, the mouth and the vulva, or the mouth and the anus; and
    - (ii) the perpetration of any of the sexual offenses proscribed by the Penal Code
  - (c) "Victim" includes the person upon whom a sexual offense has been perpetrated, the legal guardian or the parent of such person if such person is a minor, or the legal guardian or the parent of such person if the victim is mentally retarded or mentally incapacitated.
  - (d) "Bodily fluids" means either semen, blood, or vaginal secretions.
- (2) The primary purpose of the testing and disclosure provided for in this section is to benefit the victim of a sexual offense by informing the victim whether the individual convicted of or charged with a sexual offense is infected with AIDS or HIV. However, in enacting this code, the Legislature intends to promote the public health objectives of stemming the spread of infection and protecting the health of both the victim of a sexual offense and those convicted of or charged with committing such offenses.
- (3) In all cases in which a person has been convicted of or charged with a sexual offense, the prosecutor shall advise the victim of the victim's right to request the testing of the convicted or charged person's blood for the presence of HIV antibodies. To assist the victim of the sexual offense in determining whether to make the request, the prosecutor shall refer the

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<sup>186</sup> A model testing scheme is presented herein. This model testing scheme was written by the author after completing an annotated statutory review of every state code which dealt with mandatory HIV testing for either convicted or accused sex offenders.

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victim to the local health officer who shall provide the victim, within 7 days, with pre-test counseling which shall include information that:

(a) helps the victim understand the extent to which the particular circumstances of the sexual offense may or may not have created a risk of transmission of HIV

(b) helps to ensure that the victim understands both the benefits and limitations of current tests for HIV.

(c) helps the victim decide whether to request such a test.

(4) Request for testing -- Upon conviction

(a) Upon the written request of a victim to the court in the jurisdiction where an offense occurred, the court shall issue a search warrant (court order) for the purpose of obtaining a blood sample from an individual convicted of committing a sexual offense which shall be tested for the presence of HIV and any other identified causative agent of AIDS.

(5) Request for testing -- Upon a charge of

(a) Upon the written request of a victim to the court in the jurisdiction where an offense occurred, the court shall issue a search warrant (court order) for the purpose of obtaining a blood sample from an individual charged with committing a sexual offense which shall be tested for the presence of HIV and any other identified causative agent of AIDS, but only after the court has held a hearing to determine probable cause, and has in fact found probable cause as described below:

(i) the Court is to hold a hearing within 30 days to determine probable cause that:

(A) there was an offense committed

(B) the person charged did in fact commit the crime

(C) the crime was one which involved the transmission of bodily fluids so that possible exposure to AIDS or HIV occurred.

(ii) both the victim and the person charged have the right to be present at the hearing and both shall be notified of:

(A) the date, time, and location of the hearing; and

(B) their right to be present at the hearing.

(iii) During the hearing only affidavits, counter-affidavits, and medical records that relate to the material facts of the case used to support or rebut a finding of probable cause for the issuance of a court order may be admissible.

(6) Local health officer -- duties --

(a) After conviction or a finding or probable cause by a court, the court shall, within 7 days, notify the local health officer of the warrant

(court order) for testing.

(b) Upon receipt of a warrant (court order) for the testing, the local health officer or the local health officer's designee from any other governmental entity shall:

(i) Within 30 days, collect the blood sample from the convicted or charged individual;

(ii) Within 15 days, conduct the test on the blood sample; and

(iii) Provide pretest and posttest counseling to the victim and the charged or convicted individual

(iv) Conduct a confirmatory test on any initially positive result within 15 days. The results of the initially positive test may not be disclosed to any person under any circumstances. Only the test results of the initially negative test or the confirmed positive test may be disclosed.

(c) Disclosure of Results. --

(i) After receiving the results of a test, the local health officer shall, within 7 days, notify the victim and the charged or convicted individual and the court which ordered the testing of the test results.

(ii) A local health officer may not disclose confirmed positive test results to a victim or a charged or convicted individual without also providing, offering, or arranging for the provision of appropriate counseling, which shall include information regarding HIV disease. The health officer shall also offer the victim HIV testing and referral to appropriate health care and support services.

(d) The local health officer and victim shall comply with all laws and policies relating to medical confidentiality subject to the disclosure authorized by this section.

(7) Disclosure. --

(a) A victim who receives notification may disclose the results of the test to any other individual to protect the health and safety of:

(i) The victim (i.e. to any person who is providing counseling to the victim relating to the assault)

(ii) The victim's sexual partner; or

(iii) The victim's family

(iv) Any other person who may be exposed to the bodily fluids of the victim, such as a health care provider

(b) Except as otherwise provided in this section, the results of the test are confidential and may not be disclosed to any other person.

(8) Admissibility of results as evidence.--The results of any test conducted under this section are to be sealed by the court. However, if at any future date, the person convicted of or charged with the sexual

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offense is convicted of a subsequent sexual offense after having been notified of a positive HIV test, the court shall use the disclosure of such positive test results as a factor for enhancing the penalty for such offense.

(9) Any person who is tested underneath this section who receives an initially negative test result shall undergo additional testing both 6 months and 1 year after the initial testing, unless the charges have been dismissed or the person has been found not guilty after a trial.

(10) **False Reports: Subject to criminal and civil liability:**  
Any individual who files a false report of sexual assault in order to obtain test result information pursuant to this section shall, in addition to any other liability under law, be guilty of a misdemeanor [punishable as state sees fit] and shall be liable in a civil action. Any individual as described in the preceding sentence who discloses test result information obtained pursuant to this section shall also be guilty of an additional misdemeanor for each separate disclosure of that information.



State	Statute(s)	Legal Event	Blood Fluids	Other STDs	Tested When Accused	Tested When Convicted
Alabama	Code of Ala. § 22-11A-17	All persons convicted of any crime	Yes		Yes 1	Yes, within 90 days of judgment
Alaska	Alaska Stat. § 16.15.300	An offense that includes sexual penetration	Yes	Yes	Yes 1	Yes
Arizona	Aliz. Rev. Stat. § 13-15.310 Aliz. Rev. Stat. § 13-15.310 Aliz. Rev. Stat. § 13-15.310	Sexual offense, or crime involving "significant exposure"	Yes	Yes	Yes 2	Yes
Arkansas	Ark. Stat. Ann. § 5-2-101	Sexual offense	Yes		Yes 3	Yes, upon request of victim
California	Cal. Pen. Code § 2602.1 Cal. Pen. Code § 1524.1	Sexual offense involving possible transmission	Yes		Yes 4	Yes, automatically
Colorado	C.R.S. 18-3-415	Offense involving sexual penetration	Yes		Yes 4	Yes
Connecticut	Conn. Gen. Stat. § 54-102a Conn. Gen. Stat. § 54-102b	Offense involving sexual act	Yes		Yes 5	Yes, upon request of victim
Delaware	10 Del. C. § 1076-1077	Sexual contact where possibility of transmission is present			Yes 5	Yes
D.C.	D.C. Code §§ 24-491 - 24-493	Any prohibited activity involving a sexual act	Yes		Yes	Yes, upon request of victim
Florida	Fla. Stat. § 775.087 and § 951.27 Fla. Stat. § 960.003	Any criminal act involving possible transmission of bodily fluids	Yes	No	Yes 5	Yes, upon request of victim
Georgia	O.C.G.A. § 17-10-1 O.C.G.A. § 17-10-15	Any criminal act involving possible transmission of bodily fluids	Yes	No	Yes 5	Yes, upon determination of court
Idaho	Idaho Code § 19-604	Any criminal act involving possible transmission of bodily fluids	Yes		Yes 3	Yes, mandatory
Illinois	705 Ill. Comp. Stat. 40-5/23	Sex offense of crime in which body fluid has likely been transmitted		Yes	Yes 6	Yes, when enter correctional facility
Indiana	720 Ill. Comp. Stat. 5-5-3(61)	Sexual Offenses		Yes	Yes	Yes
Iowa	Iowa Code § 31-37-19-12	Sexual Crime, Drug Use		Yes	Yes	Yes, mandatory
Iowa	Iowa Code Ann. § 709B.2, B.3	Sexual Assault, where there was "significant exposure"		Yes	Yes 5	Yes, mandatory
Kansas	K.S.A. §§ 65-6001-65-6007	Crime involving exposure to body fluids	Yes		Yes 5	Yes
Kentucky	KRS § 438.250	Crime by juvenile involving exposure to body fluids	Yes		Yes 6	Yes
Kentucky	KRS § 438.250	Crime involving exposure to body fluids	Yes		Yes 6	Yes, mandatory
Kentucky	KRS § 438.250	Sexual offense		Yes	Yes 7	Yes, mandatory
Kentucky	KRS § 438.250	Sexual offense		Yes	Yes 7	Yes, mandatory
Maine	5 Me. Rev. Stat. Ann. § 12603-F	Sexual offense committed by a juvenile		Yes	Yes	Yes, mandatory
Maine	5 Me. Rev. Stat. Ann. § 12603-F	Sexual offense		Yes	Yes	Yes, upon request of victim
Michigan	Mch. Comp. Laws § 333.5179	Prostitution, criminal sexual conduct, intravenous drug use		Yes	Yes 6	Yes, if court orders
Michigan	Mch. Comp. Laws § 333.5179	Sexual offense, any crime possibly leading to exposure		Yes	Yes 6	Yes, upon request of victim
Minnesota	Minn. Stat. § 611A.19	Criminal Sexual Conduct I if involved sexual penetration or transfer of body fluid		Yes	Yes 6	Yes, upon request of the victim
Minnesota	Minn. Stat. § 611A.19	Criminal Sexual Conduct II if involved sexual penetration or transfer of body fluid		Yes	Yes 6	Yes, upon request of the victim
Mississippi	Miss. Code Ann. § 43-21-623	Sexual offense committed by a juvenile		Yes	Yes	Yes, mandatory
Mississippi	Miss. Code Ann. § 99-19-203	Sexual offense		Yes	Yes	Yes, mandatory
Missouri	§ 191.663 R.S. Mo.	Sexual offense	Yes		Yes	Yes, upon request of victim
Montana	Mont. Code Ann. § 45-18-256	Sexual offense		Yes	Yes	Yes, upon request of victim
Montana	Mont. Code Ann. § 45-18-256	Sexual offense		Yes	Yes	Yes, upon request of victim
Nebraska	Nebr. Rev. Stat. § 29-2290	Offense involving sexual contact		Yes	Yes	Yes, upon request of victim
Nebraska	Nebr. Rev. Stat. § 29-2290	Offense involving sexual penetration		Yes	Yes	Yes, upon request of victim
Nevada	Nev. Rev. Stat. § 411A.320	Sexual offense		Yes	Yes	Yes, upon request of victim
New Hampshire	N.H. Stat. § 264:2	Sexual offense		Yes	Yes 5	Yes, mandatory
New Hampshire	N.H. Stat. § 264:2	Sexual offense		Yes	Yes 5	Yes, mandatory
New Mexico	N.M. Stat. Ann. § 24-2B-5.1 et seq.	Sexual offense, where transmission is likely		Yes	Yes 11	Yes
New York	NY CLS CPL § 390.15	Sexual offense		Yes	Yes 9	Yes, upon request of victim
New York	NY CLS Family Ct Act § 347.1	Juvenile sexual offender		Yes	Yes 9	Yes, mandatory
North Dakota	N.D. Cent. Code, § 23-07-07.5	Sexual offense, imprisonment, drug use		Yes	Yes 10	Yes
Ohio	Ohio Rev. Code Ann. § 2907.27	Sexual offense		Yes	Yes 10	Yes, mandatory
Oklahoma	Okla. Stat. tit. 63, § 1-524	Incarceration		Yes	Yes	Yes
Oregon	Or. Rev. Stat. § 155.139	Crime involving transmission of bodily fluids		Yes	Yes	Yes
Oregon	Or. Rev. Stat. § 155.139	Crime committed by youth involving transmission of bodily fluids		Yes	Yes	Yes
Pennsylvania	35 P.S. § 57111b	Sexual offense		Yes	Yes	Yes, upon request of victim
Rhode Island	R.I. Gen. Laws § 11-37-17	Sexual offense involving sexual penetration	Yes		Yes	Yes, upon request of victim
South Carolina	S.C. Code Ann. § 16-57-70	Specified sexual offenses, any crime involving exposure to body fluids	Yes		Yes	Yes, mandatory
South Carolina	S.C. Code Ann. § 16-57-70	Specified sexual offenses		Yes	Yes	Yes, mandatory
South Dakota	S.D. Codified Laws § 22-23-3	Sexual offense involving exposure to body fluids		Yes	Yes 1	Yes
Tennessee	Tenn. Code Ann. § 39-13-601	Sexual offense involving exposure to body fluids		Yes	Yes 6	Yes, for a certain offense
Texas	Tex. Code Crim. Proc. art. 21.31	Specified for specified sexual offense		Yes	Yes 7	Yes
Utah	Utah Code Ann. § 76-5-502	Sexual offense		Yes	Yes	Yes, upon request of victim
Virgin Islands	5 V.I.C. §§ 3910-3912	Sexual offense		Yes	Yes 1	Yes, upon request of victim
Virginia	Code Ann. § 18.2-62	Sexual assault		Yes	Yes 12	Yes, upon request of victim
Washington	Rev. Code Wash. (ARCW) § 70.24.340	Sexual offense, prostitution, drug use		Yes	Yes 12	Yes, upon request of victim/prosecutor
West Virginia	W. Va. Code § 15-36-2	Prostitution, sex crime		Yes	Yes	Yes, mandatory
Wisconsin	Wis. Stat. § 968.38	Significant exposure during commission of specified crimes		Yes	Yes 4,5,12	Yes, upon court order

Yes 1 Upon request of victim and determination by the court that probable cause exists

Yes 2 Upon determination by a court that probable cause exists

Yes 3 Upon request of victim and determination by the court that probable cause exists

Yes 4 After a hearing

Yes 5 Upon request of the victim

Yes 6 Mandatory

Yes 7 Upon motion of court or victim request

Yes 8 Upon request of victim and if committed same type of offense within one year and if hold a hearing for probable cause

Yes 9 Only if has a previous conviction of the same type within one year and probable cause is established.

Yes 10 Upon request of the prosecutor, victim, or Court approved requestor

Yes 11 If formally charged

Yes 12 Upon request of prosecutor & determination by court that probable cause exists

State	Access to Results: Victim	Access to Results: Family of Victim	Access to Results: Surpavee/Offender	Access to Results: Health Dept.	Access to Results: Court	Access to Results: Copr./Family	Access to Results: Others with access to the results
Alabama	Yes, upon request	N/A	Mandatory	Yes, if positive	Yes	Yes	Others with access to the results
Alaska	Yes			Yes, if positive		Yes	Family of offender
Arizona	Yes, mandatory	Yes if victim is a minor	Mandatory	Yes	Yes		
Arkansas	Yes, mandatory	Yes if victim is a minor	Mandatory	Yes	Yes		Defense and Prosecuting Attorneys, Justice Department
California	Yes if requested	Victim may, to protect their health	Mandatory	Yes	Yes		
Colorado	Yes if requested			Yes	Yes		
Connecticut	Yes if requested			Yes	Yes		
Delaware	Yes	Yes, if victim is a minor or mentally incapacitated	Mandatory	Yes	Yes	Yes	
D.C.	Yes	Yes, if victim is a minor or mentally incapacitated	Yes, if requested	Yes	Yes	Yes, if positive	
Florida	Yes, upon request	Victim may, to protect their health	Mandatory	Yes	Yes	Yes, if positive	
Georgia	Yes, upon request	Yes, upon request	Mandatory	Yes	Yes	Yes	County where offense occurred, county where offender resides
Illinois	Yes, upon request	Yes, if victim is a minor or mentally incapacitated	Mandatory	Yes	Yes	Yes	Departments of Children and Youth Services, Corrections, and Human Resource
Idaho	Yes, upon request	Yes, if victim is a minor	Yes	Yes	Yes	Yes	State's Attorney if necessary to prosecute offender for criminal transmission
Indiana	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	
Iowa	Yes, through counselor	Yes	Yes, if requested	Yes	Yes	Yes	Victim's physician
Kansas	Yes, through designee		Mandatory	Yes, if positive	Yes	Yes, if positive	Designee of victim
Kentucky	Yes, through designee		Mandatory	Yes, if positive	Yes	Yes	Designee of victim
Louisiana	Yes, ambiguous	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	Department of Public Safety and Corrections, if positive
Maine	Yes, in discretion of court	Yes, if victim is a minor	Yes, in discretion of court	Yes	Yes	Yes	Department of Public Safety and Corrections, if positive
Maine	Yes, through designee	Yes, if victim is a minor	Yes, in discretion of court	Yes	Yes	Yes	
Michigan	Yes, upon request	Yes, if victim is a minor or incapacitated	Yes	Yes	Yes	Yes	
Minnesota	Yes	Yes, for safety	Mandatory	Yes, if positive	Yes	Yes	
Mississippi	Yes, upon request	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	Spouse of both offender and victim
Missouri	Yes, if positive	Yes, if victim is a minor	Yes, if positive	Yes	Yes	Yes	
Montana	Yes, mandatory if positive	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	Department of Corrections
Nebraska	Yes	Yes, if victim is a minor	Yes	Yes	Yes	Yes	Office of victim/witness assistance
Nevada	Yes	Yes, if victim is a minor	Yes	Yes	Yes	Yes	Office of Victim-Witness Advocacy
New Hampshire	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	Anyone to whom there is a reasonable risk of HIV transmission
New Jersey	Yes	Yes, if victim is a minor	Yes1	Yes	No	Yes, if positive	Anyone to whom there is a reasonable risk of HIV transmission
New Mexico	Yes	Yes, for safety	Mandatory	Yes, if positive	No	Yes, if positive	To the Court approved requestor
New York	Yes	Yes, for safety	Mandatory	Yes, if positive	Yes	Yes, if positive	Victim's physician
North Dakota	Yes, upon request	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	
Ohio	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	
Oklahoma	Yes, upon request	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	
Oregon	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	
Pennsylvania	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	
Rhode Island	Yes, upon request	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes, if positive	Prosecutor
South Carolina	Yes, mandatory	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes, if positive	Prosecutor
South Dakota	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes, if convicted	Yes	Law enforcement officer who requests it
Tennessee	Yes, mandatory	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	Prosecutor, physician
Texas	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	
Utah	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	
Virgin Islands	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	
Virginia	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	Department of Corrections
Washington	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	Physician of victim
West Virginia	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	
Wisconsin	Yes	Yes, if victim is a minor	Mandatory	Yes	Yes	Yes	

State	Counseling for Victim:		Counseling for Accused:		Who Pays?	State	Use as Evidence		Confidential Discipliner?	Confirmatory Test?
	Pre-test	Post-test	Pre-test	Post-test			Civil	Criminal		
Alabama		Yes								
Alaska		Yes, if positive		Yes, if positive and requested			Yes	No	Yes	
Arizona		Yes		Yes			Yes	No	Yes	
Arkansas		Yes, if requested		Yes						
California	Yes	Yes		Yes			Yes	No	Yes	Yes
Colorado	Yes	Yes, if positive		Yes, if positive					Yes	Yes
Connecticut						Yes			Maybe	
Delaware		Yes, if positive		Yes, if positive	Yes, unless indigent					
D.C.		Yes, if positive		Yes, if positive	Yes, unless indigent		?	No		
Florida		Yes		Yes			No	No		
Georgia		Yes					No	No	Yes	
Idaho		Yes			Yes, or victim: at discretion of court	Yes				
Illinois		Yes			Yes, based at court's discretion May be taxed to defendant	Yes, initially				Yes
Indiana		Yes								Yes
Iowa	Yes	Yes					No	No		Yes
Kansas		Yes					No	No	Yes	Yes
Kentucky		Yes			Yes, unless indigent		No	No	Yes	Yes
Louisiana		Yes, if positive and requested								
Maine	Yes	Yes, if positive and requested	Yes	Yes						
Michigan		Yes							Yes	
Maryland	Yes	Yes	Yes	Yes					Yes	
Minnesota		Yes, if positive and requested								
Mississippi		Yes, if positive								
Missouri		Yes, if requested			Yes					Yes
Montana		Yes, if requested			Yes, unless indigent					
Nebraska		Yes			Yes, on application of health authority					
Nevada		Yes, if requested		Yes						
New Hampshire		Yes			Maybe	Yes, initially				Yes, if needed
New Jersey		Yes		Yes		Yes				
New Mexico		Yes					No	No	Yes	
New York	Yes	Yes					No	No	Yes	
North Dakota		Yes								
Ohio		Yes, if positive		Yes, if positive	Yes, unless indigent	Yes, if indigent				Yes, if negative
Oklahoma		Yes, if positive			Yes, through restitution	Yes, initially				Yes
Oregon		Yes				Yes			Yes	
Pennsylvania		Yes								
Rhode Island	Yes	Yes			Yes, unless indigent				Yes	
South Carolina		Yes, if positive		Yes, if positive	Yes, unless indigent					
South Dakota		Yes, if positive				Yes, unless found guilty				
Tennessee		Yes		Referred for Counseling	Yes				Maybe	Yes, if needed
Texas		Yes							No	Maybe
Utah		Yes			Yes, unless indigent				No	Yes
Virgin Islands	Yes	Yes upon request		Yes					No	Yes
Virginia	Yes	Yes				Yes, initially				Yes
Washington		Yes								
West Virginia	Yes	Yes		Yes	Maybe have to pay/restitution	Yes, initially				Yes
Wisconsin		Yes								