

THE PRESUMPTION OF GUILT AND COMPULSORY HIV TESTING OF ACCUSED SEX OFFENDERS:

A Case Study of State ex rel. J.G., N.S., and J.T.

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*Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.*¹

I. INTRODUCTION

Recently, many states have enacted laws that allow individuals accused of sexual offenses to be compelled to submit to HIV testing.² These statutes may be divided into two major categories. The first category mandates that upon the request of a victim, a person convicted of particular sexual offenses may be compelled to submit to HIV testing.³ The second category mandates that upon the request of a victim, a person accused but not convicted of a particular sexual offense may be compelled to submit to HIV testing.⁴ This Comment examines the latter and most troubling category of laws by studying the constitutionality of testing persons accused of sexual offenses under a Fourth Amendment analysis. When analyzing these laws, courts generally focus on the Fourth Amendment and often dismiss challenges made under the Fourteenth and Fifth Amendments.⁵ Consequently, this Comment does not scrutinize other constitutional challenges, such as procedural and substantive due process under the

1. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

2. See Allison N. Blender, Note, *Testing the Fourth Amendment for Infection: Mandatory AIDS and HIV Testing of Criminal Defendants at the Request of a Victim of Sexual Assault*, 21 SETON HALL LEGIS. J. 467, 477-78 (1997); cf. Crime Control Act of 1990, § 1804, 42 U.S.C. § 3756(f) (1990).

3. See Barbara Danko, Comment, *The Fourth Amendment's Challenge to Mandatory AIDS Testing of Convicted Sexual Offenders — Has the AIDS Virus Attacked Our Constitutional Right to Privacy?*, 4 SETON HALL CONST. L.J. 279, 291 (1993); see, e.g., ARK. CODE ANN. § 16-82-101(d)(1) (Michie Supp. 1997) (mandating HIV testing of convicted sexual offenders upon the victim's request); WASH. REV. CODE ANN. § 70.24.340(1)(a) (West Supp. 1998) (allowing testing of convicted sexual offenders).

4. See Blender, *supra* note 2, at 483-84; see, e.g., ARK. CODE ANN. § 16-82-101 (Michie Supp. 1997) (allowing HIV testing of individuals arrested and charged with sexual offenses upon a finding of reasonable cause by courts); COLO. REV. STAT. § 18-3-415 (West Supp. 1996) (requiring HIV testing of individuals indicted for, or convicted of, sexual offenses involving sexual penetration); CONN. GEN. STAT. ANN. § 54-102a (West Supp. 1997) (allowing HIV testing of individuals accused of crimes involving sexual acts whose cases are pending before a court); N.J. STAT. ANN. §§ 2A:4A-43.1, 2C:43-2.3 (West Supp. 1997).

5. See *State ex rel. J.G., N.S., and J.T.*, 701 A.2d 1260, 1262 (N.J. 1997) (refusing to hear the Fourteenth Amendment procedural Due Process claim and rejecting a substantive Due Process claim in a challenge of the New Jersey law); see generally *Schmerber v. California*, 384 U.S. 757, 759-61 (1966) (rejecting the Fourteenth Amendment Due Process argument and the Fifth Amendment self-incrimination argument when a police officer ordered petitioner's blood to be withdrawn, even though the results of the blood test were subsequently used in a criminal trial against petitioner).

Fourteenth Amendment. This Comment focuses on the growing victim's rights movement, its effect on the enactment of state legislation allowing compulsory HIV testing, and courts' constitutional analysis of mandatory HIV testing laws. As an example, this Comment reviews legislation recently passed in New Jersey and the state court's analysis of this legislation.

II. BACKGROUND

A. HIV and AIDS – Transmission and Treatment

Acquired Immune Deficiency Syndrome ("AIDS") is an incurable disease caused by the Human Immunodeficiency Virus ("HIV").⁶ HIV is intensively studied, but much about the virus remains an enigma.⁷ However, scientists have drawn several widely accepted conclusions about HIV and the treatment of AIDS.⁸

HIV enters the bloodstream through open cuts or sores, mucous membranes and direct injection.⁹ HIV may be transmitted through blood or vaginal and seminal secretions, but not through "casual contact" such as handshakes, sneezes or coughs.¹⁰ The most common methods of transmission are intravenous drug use, anal or vaginal sex, and blood transfusions.¹¹ An HIV test is usually a blood test.¹² However, some testing facilities use an oral HIV test called Orasure.¹³ This test consists of a medically treated pad placed on the end of a stick.¹⁴ The pad is rubbed between a person's cheek and gums to detect antibodies to HIV.¹⁵

6. TRACY HOOKER, NATIONAL CONFERENCE OF STATE LEGISLATURES, HIV/AIDS FACTS TO CONSIDER: 1996, at 2 (1996); *Update: Trends in AIDS Incidence — United States, 1996*, MORBIDITY & MORTALITY WKLY. REP., Sept. 19, 1997, at 861.

7. HOOKER, *supra* note 6, at 1.

8. See Steven Eisenstadt, *An Analysis of the Rationality of Mandatory Testing for HIV Antibody: Balancing the Governmental Public Health Interests with the Individual's Privacy Interest*, 52 U. PITT. L. REV. 327, 333-35 (1991) (discussing various attempts at treatment); see also JOHN C. BARTLETT & ANN K. FINKBEINER, THE GUIDE TO LIVING WITH HIV INFECTION 77-78 (1993) (discussing the progression of HIV and AIDS, and the current two-pronged treatment of attacking HIV and attacking opportunistic infections).

9. HOOKER, *supra* note 6, at 4.

10. HOOKER, *supra* note 6, at 4.

11. HOOKER, *supra* note 6, at 5; *First 500 AIDS Cases — United States, 1995*, MORBIDITY & MORTALITY WKLY. REP., Nov. 24, 1995, at 849.

12. Blender, *supra* note 2, at 473-74.

13. Telephone Interview with Scott Foshee, Medical Services Technician, Whitman-Walker Clinic (Mar. 9, 1998).

14. *Id.*

15. *Id.*

Once HIV is contracted, the individual generally has a one to six month "window period" where blood tests cannot detect the virus.¹⁶ While most infected individuals test positive for the virus six to twelve weeks after infection, some people will test negative for up to a year.¹⁷ The virus remains latent for an average of ten years.¹⁸ Most people infected with HIV eventually develop AIDS, which severely weakens the immune system.¹⁹ AIDS inevitably results in death as the body succumbs to a variety of diseases, including pulmonary tuberculosis and recurrent pneumonia.²⁰ There is currently no cure for HIV or AIDS.²¹ Diagnosis is imperative to preventing the spread of HIV so that carriers may be encouraged to use precaution during sexual encounters or to practice abstinence.²² Diagnosis is also important so that doctors may prescribe life-extending drugs such as AZT and other protease inhibitors.²³

As of January, 1998, more than 750,000 people in the United States had been diagnosed with AIDS.²⁴ HIV has spread throughout the United States,²⁵ and estimates indicate that up to 40,000 people in the United States are newly infected with HIV each year.²⁶ Public education and drug therapy has helped to control the spread of HIV in

16. See Blender, *supra* note 2, at 475.

17. See BARTLETT & FINKBEINER, *supra* note 8, at 59 (noting that, on occasion, HIV antibodies may take up to a year or longer before becoming concentrated enough to produce a positive test).

18. HOOKER, *supra* note 6, at 2.

19. HOOKER, *supra* note 6, at 2.

20. HOOKER, *supra* note 6, at 2.

21. HOOKER, *supra* note 6, at 7.

22. HOOKER, *supra* note 6, at 8.

23. HOOKER, *supra* note 6, at 7; see also David Sanford, *Back to a Future: One Man's AIDS Tale Shows How Quickly Epidemic Has Turned*, WALL ST. J., Nov. 8, 1996, at A1 (explaining that even when an individual tests positive for HIV, doctors consider the individual's T-cell count and may not prescribe AZT immediately).

24. HOOKER, *supra* note 6, at 1; See Susan Okie, *AIDS: Health Officials Launch New Campaign to Determine How Widespread the Virus Is*, WASH. POST, Sept. 2, 1997, at Z12 (asserting that determining the number of Americans infected with HIV is difficult because most national databases track only those diagnosed with AIDS).

25. See Eleena de Lissar, *New AIDS Cases in U.S. Fall in Number for First Time in History of Epidemic*, WALL ST. J., Sept. 19, 1997, at B9 (stating that according to the Center for Disease Control and Prevention, although every region in the country has reported AIDS cases, between 1995 and 1996, numbers in all regions fell). From 1995 to 1996, the number of new cases reported fell by 12% in the West, 10% in the Midwest, 8% in the Northeast, and 1% in the South. *Id.*

26. HOOKER, *supra* note 6, at 2; See Okie, *supra* note 24, at Z12 (reporting that health officials estimate that this number has not changed since 1991). However, some researchers assert that the number of AIDS cases dropped six percent, from 60,620 to 56,730, between 1995 and 1996. Lissar, *supra* note 25, at B9. This drop in cases has been attributed to the use of combination drug therapies that help delay the progression of HIV to AIDS, as well as to HIV prevention measures and education. *Id.*

both the homosexual community and certain segments of the heterosexual community.²⁷

Despite public education about HIV, persons with HIV are still stigmatized.²⁸ People infected with the virus are often perceived as homosexuals or intravenous drug users,²⁹ and often face familial and social isolation.³⁰ In addition, HIV tests are routinely required of individuals applying for health insurance.³¹ HIV positive employees sometimes face discrimination in the workplace and have extreme difficulty obtaining health and life insurance.³²

B. *The Victim's Rights Movement*

During the 1960s, the Warren Court revitalized protections afforded to criminal defendants.³³ Driven by a liberal judicial view, the Warren Court focused on tangible access to constitutional rights and afforded criminal defendants greater protections.³⁴ This focus on the criminal justice system involved "judicializing" each stage of the criminal process and enhancing the opportunity for the accused to challenge the process.³⁵ Thus, the Warren Court followed the Due

27. Lisser, *supra* note 25, at B9. Between 1995 and 1996, new cases among gay men declined 11%. *Id.* New cases among gay men who inject drugs declined by 15%, and new cases among heterosexual men and women who inject drugs declined as well. *Id.* However, among heterosexual men and women as a whole, the incidence of AIDS has increased 11% for men and seven percent for women. *Id.* However, among minorities, AIDS cases increased 19% in African-American men, 13% among Hispanic men, 12% among African-American women, and five% among Hispanic women. *Id.*

28. See Robert D. Zaslow, *Child Custody, Visitation, and the HIV Virus: Revisiting the Best Interest Doctrine to Ensure Impartial Parental Rights Determinations for HIV-Infected Parents*, 3 J. PHARMACY & L. 61, 61 (1994) (stating that persons with AIDS are subject to prejudice and discrimination in medical care, work, school, and even the courts).

29. *Id.*

30. *Id.*

31. Hark H. Jackson, *Health Insurance: The Battle Over Limits on Coverage*, in AIDS AGENDA: EMERGING ISSUES IN CIVIL RIGHTS 147, 147 (Nan D. Hunter & William B. Rubenstein eds., 1992) [hereinafter AIDS AGENDA].

32. Chai R. Feldblum, *Workplace Issues: HIV and Discrimination*, in AIDS AGENDA, *supra* note 31, at 271.

33. See Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 471-74 (1985) (describing five agendas of the Burger Court in the area of criminal procedure and contrasting the approaches of the Warren Court and the Burger Court).

34. Robert Weisberg, *Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832, 832-38 (1985).

35. In a seminal article, Herbert L. Packer outlined two models of criminal justice in the United States. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). According to the Due Process model, the function of the criminal justice system is adversarial and judicial, and is limited by and subordinate to an individual's dignity and autonomy. *Id.* at 9. The Crime Control model is administrative and managerial, and sees efficiency, reliable screening and disposition of criminal cases as primary goals of the criminal justice system. *Id.*

Process model of criminal justice, which emphasizes an individual's integrity and autonomy.³⁶

Beginning in the 1960s and 1970s, America witnessed an increase in crime.³⁷ The public felt unsafe and crime soon became an issue of extreme political importance.³⁸ The increased constitutional protections afforded to criminal defendants resulted in the perception that the Warren Court was "soft on crime."³⁹ Many viewed the exclusionary rule, the right to counsel, and other rights as mere "technicalities" which allowed the guilty to "get off easy."⁴⁰ Eventually, the Court's composition began to reflect America's political shift away from the Due Process model, which emphasizes an individual's integrity and autonomy, and toward the Crime Control model, which emphasizes efficiency.⁴¹

The political debate over criminal procedure soon became overly simplistic. Rather than examining the competing interests of due process and crime control, the public perceived politicians to be either "tough" or "soft" on crime.⁴² In an effort to win elections, legislators embraced this oversimplification and passed legislation testing

36. Packer, *supra* note 35, at 14; see also Weisberg, *supra* note 34, at 833 (discussing the Burger Court's retrenchment on the Warren Court's due process jurisprudence).

37. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 568 (1997) (commenting on how this increase in crime resulted in the public's loss of confidence in community police departments).

38. See *id.* (reporting that, in response to a lack of confidence in urban police, citizens abandoned public places and community crime control efforts rose).

39. See Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 192 (1983) (reporting that President Richard Nixon declared that the Warren Court was soft on crime).

40. See *id.* at 191-92 (stating that the Warren Court's procedural safeguards and regulatory sanctions, such as the exclusionary rule, may have resulted in the undermining of the "public's confidence in the judicial system, when guilty defendants are released in order to vindicate fair process norms that the public often views as mere technicalities"). Today, many scholars agree that the cost to society due to these constitutional protections is minimal:

In the course of an opinion arguing that the exclusionary rule imposes unacceptable costs, Justice White was forced to concede that "[m]any . . . researchers have concluded that the impact of the exclusionary rule is insubstantial." A General Accounting Office study showed that in federal criminal prosecutions, 0.4% of cases were not prosecuted because of illegal search problems. Evidence was excluded in 1.3% of cases studied, and only 0.7% of those resulted in acquittals or dismissals.

Louis Michael Seidman, *Criminal Procedure As the Servant of Politics*, 12 CONST. COMMENTARY 207, 211 n.2 (1995) (citations omitted).

41. See Arenella, *supra* note 39, at 37 (relating President Nixon's promise to appoint "law and order" Justices who would narrow the scope of the decisions handed down by the Warren Court). Warren Burger's replacement of Earl Warren as Chief Justice signaled the beginning of the Court's move toward the "law and order" ideals of the Crime Control model. Whitebread, *supra* note 33, at 471-74.

42. See Arenella, *supra* note 39, at 192 (asserting that President Richard Nixon's charge that the Warren Court was soft on crime helped him win the 1968 election because the public believed procedural technicalities prevented police from stopping crime).

the boundaries of the doctrine of separation of powers and encroaching on personal liberties guaranteed by the United States Constitution.⁴³

In this context, crime victims expressed a growing desire to become an integral part of the criminal justice system.⁴⁴ Victims' increased participation included the ability to make statements at sentencing,⁴⁵ consultation in regard to plea bargains,⁴⁶ and rape shield laws protecting rape victims' past sexual histories.⁴⁷ The rights granted to victims include the right to be notified of the case's disposition, to receive protection from intimidation, to receive witness fees, and to regain property as soon as possible.⁴⁸ Many of these rights detract very little from protections provided by the United States Constitution and are commendable attempts to restore dignity and respect to victims in the criminal justice system.⁴⁹

However, the aforementioned rights do not include the right of a victim to infringe on the personal liberties or bodily integrity of a citizen merely *accused* and not *convicted* of a crime.⁵⁰ Victims' rights in

43. See The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501 (1994) (directing judges to admit voluntary confessions by criminal defendants in their criminal prosecutions, and offering judges a framework to determine whether a confession was voluntary); 21 U.S.C. § 848 (1994) (limiting the amount payable to attorneys appointed to represent capital defendants to \$125 an hour and limiting the amount payable to those attorneys for investigation and expert witnesses to a total of \$7,500); 28 U.S.C. § 2244 (1994) (limiting the time period in which defendants are able to file a writ of habeas corpus to one year from the final judgment, with a few exceptions).

44. See Christopher R. Goddu, Comment, *Victim's "Rights" Or A Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 248-51, 272 (1993) (indicating that 17 states have adopted a Victim's Bill of Rights which preserves the victim's right to make a statement at sentencing). Among the state laws allowing victims to make a statement at sentencing are: ARIZ. CONST., art. 2, § 2.1 (West Supp. 1997); CAL. CONST., art. 1, § 28 (1983); DEL. CODE ANN. tit. 11, § 9401 (1995); 725 ILL. COMP. STAT. 120/4 (West 1993); KAN. STAT. ANN. § 74-7333 (1992); MICH. CONST. art. 1 § 24; N.H. REV. STAT. ANN. § 651:4-a (1996); OR. REV. STAT. § 147.405 (1997); 71 PA. CONS. STAT. ANN. § 180-9-3 (1990); S.C. CODE ANN. § 16-3-1530 (Law Co-op. 1991); TENN. CODE ANN. § 40-38-101 (1997); TEX. CONST. art. 1 § 30; UTAH CODE ANN. § 77-37-3 (1995); WASH. CONST. art. 1, § 35; WIS. STAT. § 950.04 (1996); WYO. STAT. ANN. § 1-40-204 (Michie 1997).

45. Goddu, *supra* note 44, at 245.

46. See Goddu, *supra* note 44, at 248-51, 272 (reporting that the Victim's Bill of Rights adopted by 17 states often includes this right).

47. FED. R. EVID. 412.

48. Goddu, *supra* note 44, at 248-51, 272.

49. See Scott M. Smith, *Validity, Construction, and Application of Child Victims' and Child Witnesses' Rights Statute* (18 U.S.C.A. § 3509), 121 A.L.R. FED. 631 (1994) (summarizing and analyzing federal cases that have ruled on the validity of the Child Victims' and Child Witnesses' Rights Statute, which provides various protections for children who are victims of sexual or physical abuse or have witnessed a crime). But see Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997) (arguing that a proposed Victims' Rights Amendment should not be adopted and warning of the ramifications its passage would have on defendants' rights).

50. See Mosteller, *supra* note 49, at 1711 (discussing how the Victim's Rights Amendment could infringe upon the rights of those merely accused simply by granting equal constitutional

this category come dangerously close to infringing on the rights of the accused⁵¹ and presuppose guilt.⁵² In these situations, there is a risk of legislative and judicial encroachment on the rights of the accused at the behest of victims' rights. An important question arises: Has the political climate surrounding the passage and scrutiny of victim's rights legislation resulted in the infringement on the constitutional rights of the accused?

III. THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution has been the subject of heated debates and guarantees:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵³

In order for the person who has been searched to receive Fourth Amendment protection, the government must have conducted the search.⁵⁴ In order to consider the governmental action a search, the individual must possess an actual or subjective expectation of privacy, and the expectation must be one society is willing to recognize.⁵⁵ Thus, in *Schmerber v. California*, the Supreme Court defined compulsory blood testing as a search within the meaning of the Fourth Amendment.⁵⁶ To determine the reasonableness of a search, the

status to the victim and the defendant); see also Goddu, *supra* note 44, at 271-72 (noting that while it is important to address the plight of victims, the Sixth Amendment provides clearly delineated limits to victim participation in the criminal trial process).

51. Cf. Goddu, *supra* note 44, at 260-63 (arguing that victim's rights at criminal trials must be limited when they unduly interfere with a defendant's constitutional rights).

52. See Goddu, *supra* note 44, at 260-63 (reporting that some courts have found that spectators wearing buttons violates a defendant's right to a fair trial). For example, in Alabama, victims or their representatives are allowed to sit at the counsel table with the prosecutor during trial, thus conveying the message that the defendant is guilty. ALA. CODE §§ 15-14-53, 15-14-56 (1996). The law is not justified by a compelling state interest or any right under the United States Constitution, and it conflicts with the Sixth Amendment right to a speedy and public trial by an impartial jury. U.S. CONST. amend. VI. However, the Court of Criminal Appeals, in *Crowe v. State*, failed to apply the applicable constitutional balancing test and upheld the law. *Crowe v. State*, 485 So. 2d 351, 363 (Ala. Crim. App. 1985).

53. U.S. CONST. amend. IV. The Fourth Amendment is binding on states through the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 26-28 (1949).

54. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

55. *Katz v. United States*, 389 U.S. 347, 361 (1967).

56. See *Schmerber v. California*, 384 U.S. 757, 767 (1966) (holding that when an individual exhibits signs of intoxication, the compulsory taking of blood following an automobile accident for the purpose of determining whether the individual was intoxicated constituted a valid warrantless search).

Court balances the need for the search against the intrusiveness of the search.⁵⁷ The Court applies the balancing test in three contexts.⁵⁸ A search may be for law enforcement aims, to implement administrative regulations, or for some "special need."⁵⁹

A. Law Enforcement Searches

Law enforcement searches are conducted in order to gain evidence for prosecution.⁶⁰ *Schmerber v. California* addressed the issue of whether compulsory blood testing constitutes a search within the Fourth Amendment.⁶¹ In *Schmerber*, the petitioner, who appeared to be intoxicated, was arrested at a hospital while receiving treatment for injuries suffered during an accident involving an automobile he had been driving.⁶² A police officer directed a physician to remove a portion of the petitioner's blood in order to perform blood alcohol tests; this blood sample was used in a criminal trial against the petitioner.⁶³

The Court found that the compulsory taking of blood was a search, but upheld the warrantless blood alcohol test,⁶⁴ reasoning that the driver's bloodshot eyes, breath, and other overt symptoms of intoxication, coupled with exigent circumstances involving the car accident, provided sufficient probable cause to justify the search.⁶⁵ The Court, relying on the fact that alcohol quickly dissipates from the body, found that a delay could result in the destruction of evidence.⁶⁶ The Court balanced the government's need to conduct the search

57. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

58. Raymond S. Franks, Note, *Mandatory HIV Testing of Rape Defendants: Constitutional Rights Are Sacrificed in a Vain Attempt to Assist the Victim*, 94 W. VA. L. REV. 179, 184 (1991).

59. See *Illinois v. Gates*, 462 U.S. 213, 245-46 (1983) (allowing searches conducted in the context of criminal investigations pursuant to the issuance of a warrant based upon probable cause for the purpose of gathering evidence to be used in prosecution); see also *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967) (allowing for warrantless searches where the presence of administrative guidelines were followed); *Skinner*, 489 U.S. at 619 (finding that a search may be reasonable despite being conducted with less than probable cause where the privacy interest implicated is minimal and the interests of the government could be placed in jeopardy by a requirement of individual suspicion).

60. Franks, *supra* note 58, at 184.

61. See *Schmerber*, 384 U.S. at 768-70 (holding the compulsory withdrawal of petitioner's blood constitutes a search for law enforcement aims, and dismissing Fifth and Fourteenth Amendment arguments); see also Danko, *supra* note 3, at 295 (summarizing the Court's holding in *Schmerber* as upholding the warrantless administration of a blood alcohol test).

62. *Schmerber*, 384 U.S. at 758-59.

63. *Id.*

64. *Id.*

65. *Id.* at 768-69.

66. *Id.*

against the individual's privacy interests.⁶⁷ By balancing the threat to the health and safety of the public against the severity of the intrusion upon personal dignity, the Court found the search justified.⁶⁸ The Court stringently limited its holding and stressed that "[i]t bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society."⁶⁹

B. Administrative Searches

Administrative searches have arisen in contexts of enforcing a regulatory health or safety code.⁷⁰ These searches usually require the same standard as law enforcement warrants.⁷¹ As a result, a prior warrant is usually required.⁷² However, if the need for the regulation is so pervasive, the added invasiveness of the search may be deemed so minimal as to allow a search without a warrant.⁷³ In a warrantless search, probable cause may be satisfied by the presence of reasonable administrative guidelines and a showing that these guidelines have been followed in the particular case.⁷⁴

*Camara v. Municipal Court*⁷⁵ involved an ordinance allowing the annual inspection of apartment buildings for housing code violations.⁷⁶ The appellant refused to allow the inspectors to enter his apartment and the inspectors issued him a citation.⁷⁷ The Court modified the traditional criminal search requirement of a warrant based on probable cause and held that for administrative inspections of buildings, probable cause may be satisfied by a reasonable governmental interest.⁷⁸ The balancing test employed weighs the government's interest in conducting the search against the competing individual privacy interest.⁷⁹ If the governmental interest outweighs an individual's privacy interest, an administrative warrant may be issued and will be up-

67. *Schmerber*, 384 U.S. at 770-71.

68. *Id.*

69. *Id.* at 772.

70. *Camara*, 387 U.S. at 526-27.

71. *Id.* at 530-31.

72. *Id.* at 533-34.

73. *Id.* at 539-40; Franks, *supra* note 58, at 184-85.

74. Franks, *supra* note 58, at 184-85.

75. 387 U.S. 523 (1967).

76. *Id.* at 525-26.

77. *Id.*

78. *Id.* at 538-40.

79. *Id.* at 535.

held, even without individualized suspicion.⁸⁰ The Court in *Camara* upheld the search because it found that such programs have a long history of judicial acceptance, it doubted that any other canvassing technique would achieve acceptable results, and it believed that the inspections involved a relatively limited invasion of an urban citizen's privacy.⁸¹ To date, the Court has not extended administrative searches to include searches of people.⁸²

C. "Special Needs" Searches

The Court has since broadened its analysis of the Fourth Amendment by its creation of the "special needs" doctrine.⁸³ This doctrine is an alternative to the usual warrant requirement when "special needs" make the warrant and probable cause requirements impractical.⁸⁴ Once the Court determines that such a need exists, it applies the *Camara* balancing test to determine the reasonableness of the search.⁸⁵ The Court in *New Jersey v. T.L.O.* first recognized the "special needs" doctrine,⁸⁶ upholding the warrantless search of a student's pocketbook for cigarettes by a school administrator.⁸⁷ The evidence, which implicated the student in the sale of marijuana, was given to the police.⁸⁸

The Court held that such a warrantless search is permissible if two criteria are met.⁸⁹ First, the search must be justified at its inception by a reasonable suspicion of wrongdoing, and second, the search must reasonably relate in scope to the justification for the search.⁹⁰ The Court struck a balance between the school's need to maintain order and the student's expectation of privacy in personal effects brought to school.⁹¹ The Court held that school officials need not obtain a

80. *Camara*, 387 U.S. at 535.

81. *Id.* at 537.

82. Franks, *supra* note 58, at 188.

83. Franks, *supra* note 58, at 185 (arguing that in adopting a "special needs" doctrine, the Skinner Court disposed of the probable cause requirement that was historically necessary for a search to be deemed reasonable under the Fourth Amendment).

84. Franks, *supra* note 58, at 185.

85. *Skinner*, 489 U.S. at 618-19.

86. 469 U.S. 325 (1985); *see also* Danko, *supra* note 3, at 300 (stating that the Supreme Court created the "special needs" doctrine as an alternative to the usual warrant and probable cause requirements).

87. *T.L.O.*, 469 U.S. at 347-48.

88. *Id.* at 328.

89. *Id.* at 341.

90. *Id.*

91. *Id.* at 340-42.

warrant before searching a student who is under their authority, and that such a search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."⁹² Central to the holding was the fact that a warrant "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."⁹³

The Court extended the "special needs" doctrine to include warrantless drug testing in the companion cases of *Skinner v. Railway Executives' Ass'n*⁹⁴ and *National Treasury Employees Union v. Von Raab*.⁹⁵ In these cases, testing was allowed without individualized suspicion.⁹⁶ The issue in *Skinner* was an alcohol and drug testing program established in response to a high incidence of substance abuse and serious alcohol and drug related accidents involving railroad employees.⁹⁷ All employees associated with certain train impact accidents were required to undergo both blood and urine testing. A drug testing program was at issue in *Von Raab* as well.⁹⁸ In *Von Raab*, the United States Customs Service mandated drug testing as a pre-condition to employment or promotion for all officials who carried a gun or were involved in drug interdiction.⁹⁹

In *Skinner*, the Court found that drug testing implicates the Fourth Amendment because it is a compelled intrusion into an individual's bodily integrity¹⁰⁰ and it reveals personal information about an individual.¹⁰¹ Once the Fourth Amendment is implicated, the particular search or seizure must be found reasonable to withstand Fourth Amendment scrutiny.¹⁰² The reasonableness of a search or seizure is

92. *T.L.O.*, 469 U.S. at 340.

93. *Id.*

94. *Skinner*, 489 U.S. at 602.

95. *Id.* at 656.

96. *Id.* at 631.

97. *Id.* at 602-04.

98. *Von Raab*, 489 U.S. at 661.

99. *Id.* at 659-60.

100. *Skinner*, 489 U.S. at 616 (citing *Schmerber*, 384 U.S. at 767-68 (stating "[w]e have long recognized that a 'compelled intrusion into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search")).

101. *Id.* The Court reasoned that the Fourth Amendment is implicated because a urine test may reveal legal as well as illegal activity, and individuals have an expectation of privacy in any legal information that may be revealed. The Court gives the example of an employee that may not want her employer to know that she is pregnant or taking medication for epilepsy. Because there is a recognized expectation of privacy, the Court held that the collection and testing of urine is a search under the Fourth Amendment. *Id.*

102. *Id.*

"judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."¹⁰³ The Court requires that three conditions be met when conducting the balancing test. First, the privacy interest implicated by the search must be minimal;¹⁰⁴ second, the governmental interest must be important;¹⁰⁵ and finally, the circumstances must be such that a requirement of individualized suspicion would place the governmental interest in jeopardy.¹⁰⁶

The Court applied this test in *Skinner* and found that the drug tests were minimal intrusions into the employees' reasonable expectations of privacy.¹⁰⁷ The "special need" in *Skinner* was the threat to the lives and safety of the public posed by employees using drugs.¹⁰⁸ Furthermore, the Court concluded that a requirement of individualized suspicion threatens the government's interest.¹⁰⁹ In support of its conclusions, the Court emphasized several factors such as the special danger to life and property presented by the performance of sensitive tasks while under the influence of drugs or alcohol,¹¹⁰ the diminished expectation of privacy of employees working in an industry regulated to ensure safety,¹¹¹ employees' prior notice of the policy,¹¹² and the

103. *Id.* at 619.

104. *Skinner*, 489 U.S. at 619. The Court concluded that urine tests for drugs are minimal intrusions because the tests are not invasive, the regulations require that medical personnel cannot test for anything except illegal drugs, the regulations do not require direct observation of the urination process, and, because the tests are conducted at a medical facility and by medical personnel, they are similar to a routine physical exam. *Id.*

105. *Id.* The Court accepted the government's argument that there is a "special need" to drug test railroad employees involved in railroad accidents. The special need is the government's interest in guaranteeing the safety of railroad passengers, as well as gathering information about the causes of major accidents. *Id.*

106. *Id.* at 624, 631. The Court conceded that there are some instances in which a requirement of individualized suspicion would do more harm than good. If the ultimate objective is to ensure the safety of railroad passengers, that objective is jeopardized if individualized suspicion is required because it would be impossible for officials to assess at the scene of an accident which employees were involved and should be tested, and which were not. In this type of limited situation, the Court noted that individualized suspicion is not necessary. *Id.*

107. *See Skinner*, 489 U.S. at 624, 627 (stating that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety").

108. *Id.* at 620-21. The Court stated that the intent behind the federal regulation is "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Id.* (citing 49 C.F.R. § 219.1(a) (1987)).

109. *See id.* at 624, 633 (explaining that alcohol and other drugs only remain in an individual's system for a relatively short period of time and any warrant or individualized suspicion requirement would thwart the purpose of the test). For the test to be effective, samples must be taken as soon as possible after the triggering accident, and it would be difficult to assess at the accident scene which employees were involved and should therefore be tested. *Id.*

110. *Skinner*, 489 U.S. at 606-08.

111. *See id.* at 627 (asserting that assuring the health and fitness of employees is an integral part of attaining the goal of passenger safety).

prescribed limitations on the discretion of the employers' use of drug testing.¹¹³ The Court found the deterrence value of the drug testing particularly persuasive.¹¹⁴

In *National Treasury Employees Union v. Von Raab*,¹¹⁵ the Court upheld the warrantless testing of United States Customs employees applying for or occupying positions directly involving the interdiction of illegal drugs and positions requiring the incumbent to carry a firearm.¹¹⁶ The Court extended its decision in *Skinner*—allowing drug testing in the absence of individualized suspicion—to include drug testing for positions that did not historically have a problem with drug use.¹¹⁷ Once the Court decided that the testing program was not designed to serve the ordinary needs of law enforcement, the Court applied the balancing test developed in *Skinner*.¹¹⁸ In short, the Court determined that the government's interest was not in the prosecution of agents for drug offenses.¹¹⁹ Rather, the government's "special need" was preventing drug users from obtaining positions that could threaten the nation's borders or the security of United States citizens.¹²⁰ The Court found that the government's need to prevent drug trafficking and protect the nation's borders outweighed the diminished expecta-

112. See *id.* at 627-28 (concluding that employees are on notice because the industry is highly regulated and it is standard industry practice to test for drugs).

113. *Id.* at 609. The federal regulation in question only allows drug testing of employees after a train accident has occurred. *Id.* The regulation defines a train accident as any involving a fatality, the release of hazardous material accompanied by an evacuation or a reportable injury, or damage to railroad property of \$500,000 or more. See *id.* (citing Federal Railroad Safety Act of 1970, 45 U.S.C. § 219.203(a) (1994)).

114. See *Skinner*, 489 U.S. at 629-30 (stating that employees are deterred from using alcohol or drugs while on duty when they know they will be tested if a triggering accident occurs). But see *id.* at 634 (Stevens, J., concurring in part) (rejecting the Court's conclusion that employees are deterred from alcohol and drug use by testing after an accident). Justice Stevens reasoned that most people do not go to work expecting to be involved in a major accident, and that the people who may consider the dangers involved will not be deterred by the threat of losing their job if they are not deterred by the prospect of personal injury. *Id.*

115. 489 U.S. 656 (1989).

116. *Von Raab*, 489 U.S. at 677. The Court did not reach the question of whether employees handling sensitive information should be included in the drug testing policy. *Id.* It remanded this issue to the Court of Appeals to decide the scope of the policy. *Id.*

117. See *id.* at 673-74 (holding that the safety and national security hazards that United States Customs agents risk justified drug testing of people in sensitive positions even without individualized suspicion or prior recorded drug problems). Justices Scalia and Stevens found suspicionless drug testing in *Skinner* reasonable, but dissented in *Von Raab* because the government failed to demonstrate the frequency of drug use or connection to harm. See *id.* at 680-87 (Scalia, J. and Stevens, J., dissenting).

118. See *Von Raab*, 489 U.S. at 666 (concluding that test results could not be used in a criminal prosecution of the Customs employee without the employee's consent).

119. *Id.*

120. The Court stated: "[T]he purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions." *Id.*

tion of privacy of the employees seeking promotion to these positions.¹²¹ The Court weighed several factors in its decision, including the advance notice given employees, the availability of jobs in the service not requiring drug testing, and the deterrent effect the program had on agents.¹²²

D. The Fourth Amendment and Compulsory HIV Testing

In *Schmerber v. California*,¹²³ the Court held that blood testing constituted a search within the meaning of the Fourth Amendment.¹²⁴ As a result, compulsory HIV testing implicates the Fourth Amendment. As discussed in Part III, the United States Supreme Court developed a balancing test that weighs an individual's expectation of privacy against the government's interest. The Court applies this test to searches conducted for law enforcement purposes, administrative purposes, and special needs.¹²⁵ The first step in conducting a Fourth Amendment analysis of compulsory HIV testing is deciding which category applies.

Current laws that allow compulsory HIV testing do not allow the results of the test to be used in the criminal prosecution of the defendant.¹²⁶ As a result, the compulsory HIV testing of accused sex offenders would not be analyzed under the test for law enforcement searches.¹²⁷ The analysis would not be conducted under the administrative search exception because the Court has limited administrative searches to buildings and has not extended it to people.¹²⁸

Arguably, compulsory HIV testing of individuals accused of sexual offenses would be analyzed under the "special needs" doctrine.¹²⁹ As

121. See *id.* at 672 (reasoning that Customs employees who are involved in drug interdiction or are required to carry firearms should reasonably expect inquiry into their fitness and probity because "successful performance of their duties depends uniquely on their judgment and dexterity").

122. *Id.* at 667-69.

123. 384 U.S. 757 (1966).

124. See *Schmerber*, 384 U.S. at 767 (holding that when an individual exhibited signs of intoxication, the compulsory taking of blood following an automobile accident for the purpose of determining whether the individual was intoxicated was a valid warrantless search).

125. See *supra* Parts IIIA-C.

126. CAL. PENAL CODE § 1202.6 (West Supp. 1998); COLO. REV. STAT. ANN. § 18-3-415(6) (West Supp. 1996); N.J. STAT. ANN. §§ 2C:43-2.2, 2A:4A-43.1 (West Supp. 1997); N.Y. CRIM. PROC. LAW § 390.15 (McKinney 1997); R.I. GEN. LAWS § 11-37-1 (1996); TENN. CODE ANN. § 39-13-521 (1997).

127. Franks, *supra* note 58, at 188.

128. Franks, *supra* note 58, at 188.

129. Franks, *supra* note 58, at 188 (arguing that mandatory HIV testing neither aids law enforcement, because all statutes bar the use of the results from being used as evidence, nor does the testing further any administrative scheme, because the courts, historically, limit these type

Skinner and *Von Raab* demonstrate, there are government interests that justify allowing suspicionless urine and blood testing for drug use.¹³⁰ The New Jersey Supreme Court extended *Skinner* and *Von Raab* to include compulsory HIV testing.¹³¹

IV. A CASE STUDY: COMPULSORY HIV TESTING OF ACCUSED SEX OFFENDERS IN NEW JERSEY

In 1990, Congress passed legislation to encourage states to provide for compulsory HIV testing for persons convicted of sexual offenses called the Comprehensive Crime Control Act of 1990 ("Crime Control Act").¹³² The Crime Control Act conditions federal funding on the states' passage of legislation that allows victims of sexual offenses to compel HIV testing of convicted sex offenders.¹³³ While one-third of the states had already passed similar legislation, the Crime Control Act was aimed at making victim's rights uniform throughout the states.¹³⁴ New Jersey was one state that did not compel HIV testing prior to enactment of the Crime Control Act.¹³⁵ In 1994, New Jersey passed sections 2A:4A-43:1 and 2C:43-2.2 of the New Jersey Code in response to the Crime Control Act.

A. New Jersey Legislation

The legislation passed in New Jersey went beyond the Crime Control Act's call for testing of convicted sexual offenders.¹³⁶ At the victim's request, the New Jersey law makes HIV testing compulsory for persons *charged* or *indicted* for sexual offenses.¹³⁷ These test results cannot be used against the accused in any criminal or civil trial,¹³⁸ but the results are only somewhat confidential.¹³⁹ The statute is also ap-

of searches to buildings, not people).

130. See *supra* Part III.C.

131. See *infra* Part IV.B.

132. Comprehensive Crime Control Act of 1990, § 1804, 42 U.S.C. § 3756(f) (1994).

133. *Id.*

134. See Blender, *supra* note 2, at 476-79 (discussing the federal act's mandate and the lack of discretion courts have once a victim has requested HIV testing of a convicted defendant).

135. See Blender, *supra* note 2, at 479-84 (explaining that the New Jersey State Assembly resurrected past bills and enacted compulsory testing as a result of the federal government's decision to cut funding to states that do not comply with its mandate).

136. N.J. STAT. ANN. §§ 2A:4A-43.1, 2C:43-2.2 (West Supp. 1997); Comprehensive Crime Control Act of 1990, § 1804, 42 U.S.C. § 3756(f) (1994).

137. N.J. STAT. ANN. §§ 2A:4A-43.1, 2C:43-2.2.

138. N.J. STAT. ANN. § 2C:53-2.2(g).

139. The results may be disclosed to the victim, the accused, and several state agencies. The state agencies cannot disclose the results except as authorized by law. However, the victim is under no such restriction and may disclose the results to others. N.J. STAT. ANN. § 2C:43-2.2.

plicable to juveniles charged or indicted with sexual offenses.¹⁴⁰

The victim requests the HIV test through the prosecutor, who then petitions the court for the test.¹⁴¹ The court may order compulsory HIV testing and the test may be repeated as it is deemed necessary.¹⁴² The results are available to the victim, the accused, and several state agencies.¹⁴³ Upon receiving test results, victims are provided counseling, referrals, and health care as needed.¹⁴⁴ The prosecutor does not have access to the results and the state cannot disclose the results unless specifically authorized to do so.¹⁴⁵ However, the victim is conspicuously absent from this disclosure restriction and, therefore, may disclose the results to the public.¹⁴⁶

B. State ex rel. J.G., N.S., and J.T.

The New Jersey Supreme Court examined this law in *State ex rel. J.G., N.S., and J.T.*¹⁴⁷ This case involved three juveniles who were accused of forcing a mentally retarded ten year-old girl to engage in anal and oral sex.¹⁴⁸ Pursuant to sections 2A:4A-43:1 and 2C:43-2.2 of the New Jersey Code, the prosecutor petitioned the trial court to allow HIV testing of the juveniles accused of the sexual offenses.¹⁴⁹

The trial court found the testing constituted a search under *Schmerber*,¹⁵⁰ but did not apply the *Schmerber* test for law enforcement searches because the results would be inadmissible in the defendants' criminal trials.¹⁵¹ The court then applied the "special needs" analysis to the statute, finding the statute unconstitutional under the United

Thus, the results are only "somewhat" confidential.

140. N.J. STAT. ANN. § 2A:4A-43.1 (stating that juveniles charged with delinquency or delinquent acts that constitute sexual assault or aggravated sexual assault must comply with § 2C:43-2.2).

141. N.J. STAT. ANN. § 2C:43-2.2(a).

142. *Id.*

143. N.J. STAT. ANN. § 2C:43-2.2(f). The Department of Corrections; the Office of Victim-Witness Advocacy, which gives the victim the results; if the accused is a juvenile, the Juvenile Justice Commission; and health care providers that perform the HIV test all have access to the test results but are prohibited from disclosing the results.

144. N.J. STAT. ANN. § 2C:43-2.2(e).

145. N.J. STAT. ANN. § 2C:43-2.2(f).

146. See Blender, *supra* note 2, at 484 (noting the confidentiality provision is virtually meaningless because the victim is free to discuss the test results with anyone).

147. 660 A.2d 1274 (N.J. Super. Ct. Ch. Div. 1995), *rev'd*, 674 A.2d 625 (N.J. Super. Ct. App. Div. 1996), *aff'd in part, modified in part*, 701 A.2d 1260 (N.J. 1997).

148. *State ex rel. J.G.*, 660 A.2d at 1276.

149. *Id.* at 1276 & nn.2-3.

150. *Id.* at 1284.

151. *Id.*

States Constitution.¹⁵²

First, the court examined the intrusiveness of compulsory HIV testing upon the fundamental right of freedom from unreasonable searches and seizures.¹⁵³ The Court found such testing to be a substantial intrusion, reasoning that the withdrawal of blood alone is intrusive, but in this case, the results could also subject a person to widespread invidious discrimination due to the stigma attached to HIV¹⁵⁴ because under the statutory scheme, the victim is "free to pass that information on to whomever she wishes."¹⁵⁵

Second, the court considered the importance of the governmental interest being advanced by the state, namely, assisting victims of sexual assault.¹⁵⁶ The court found that assisting victims of sexual assault was a legitimate and compelling governmental interest.¹⁵⁷

Finally, the court applied the final prong of the balancing test to determine whether the interference with the fundamental right of freedom from unreasonable searches and seizures is narrowly tailored or necessary to achieve the advanced compelling governmental interest.¹⁵⁸ The court heard medical testimony pertaining to the importance of a victim's knowledge of the HIV status of the accused.¹⁵⁹ This testimony revealed that knowledge of the accused's HIV status was irrelevant to the steps a victim of a sexual offense should take in monitoring his or her own health.¹⁶⁰ A negative test result of the accused would not mean he or she was not infected with HIV.¹⁶¹ Rather, the accused could be in the "window period," where HIV tests would be inaccurate.¹⁶² The court found that a negative test result would give the victim a false sense of security.¹⁶³ If the accused did test positive, doctors would simply advise the victim to be tested as

152. *Id.* at 1286.

153. *State ex rel. J.G.*, 660 A.2d at 1285.

154. *Id.*

155. *Id.*

156. *Id.* at 1285. The court looked to N.J. STAT. ANN. §§ 52:4B-35, 52:4B-36 (West 1995) for help in defining "assistance" to victims of crimes. The New Jersey statute enumerates rights of crime victims, which include the right to receive medical assistance, financial assistance, and social services; to be informed about remedies; and to be free from intimidation. N.J. STAT. ANN. §§ 52:4B-36.

157. *State ex rel. J.G.*, 660 A.2d at 1285.

158. *Id.*

159. *Id.* at 1277-78, 1286.

160. *Id.* at 1286.

161. *Id.*

162. *State ex rel. J.G.*, 660 A.2d at 1286.

163. *Id.*

well.¹⁶⁴ If no signs of HIV were found, she would be advised to be re-tested and treatment would not commence unless a positive HIV result was returned.¹⁶⁵ The court thus found that the statute failed the *Von Raab* test because its scheme — requiring accused sex offenders to be tested for HIV and allowing the victim to know the test results — did not serve to achieve the compelling state interest of assisting crime victims, the justification for its enactment.¹⁶⁶ The court emphasized the fear and ignorance that shrouds HIV and AIDS and concluded that “it is the true measure of a free people to stand firm for the core principles that make them free, when the tide of ignorance and fear is running the other way.”¹⁶⁷

The appellate court reversed, finding the statute to be constitutional under *Skinner* and *Von Raab*.¹⁶⁸ The appellate court held that the trial court mistakenly focused on the supposed “lack of utility” of the statute.¹⁶⁹ Rather than analyzing the rationale behind the law, the trial court should have merely determined whether the statute was permissible under the Fourth Amendment.¹⁷⁰ The appellate court noted the changing nature of the medical field and refused to rule out the utility of testing those accused of sexual offenses for HIV.¹⁷¹ The appellate court considered it important to ease victims’ fears through a negative test result.¹⁷²

The New Jersey Supreme Court affirmed and modified the appellate court’s ruling.¹⁷³ The Supreme Court modified the holding by stating that a requirement of probable cause is necessary before the accused may be tested.¹⁷⁴ The state must show there was probable

164. *Id.*

165. *Id.*

166. *State ex rel. J.G.*, 660 A.2d at 1286. The *Von Raab* test requires the statute to “‘bear a close and substantial relation’ to declared government interest.” *See id.* at 1285 (quoting *Von Raab*, 489 U.S. at 676).

167. *Id.*

168. *State ex rel. J.G., N.S., and J.T.*, 674 A.2d 625 (N.J. Super. Ct. App. Div. 1996), *aff’d in part, modified in part*, 701 A.2d 1260 (N.J. 1997).

169. *See id.* at 632 (stating that neither *Skinner* nor *Von Raab* supports the proposition that the analysis of the state’s interest must be approached with the view that the state’s special need is dependent on the medical utility of the test).

170. *See id.* at 632-33 (citing United States Supreme Court cases, including *Skinner* and *Von Raab*, which demonstrate that a search’s utility is “not determinative of its reasonableness”).

171. *Id.* at 632-34.

172. *Id.* at 633-34. However, the shock to the victim might be more severe if she or he is lulled into a false sense of security because, during the first test, the accused was in the “window period” where the HIV test was negative, but later tests reveal a positive result.

173. *State ex rel. J.G., N.S., and J.T.*, 701 A.2d 1260 (N.J. 1997).

174. *Id.* at 1272-73. The Supreme Court also held that the requirement of probable cause sufficiently protects due process rights afforded under the Fourteenth Amendment. *Id.* at 1274.

cause that an offense that could result in the transmission of HIV took place and that the accused was a party to the offense.¹⁷⁵ The probable cause requirement is satisfied by "a well grounded suspicion or belief"¹⁷⁶ that an offense has taken place and the individual is a party to it, but requires "more than a raw, unsupported suspicion."¹⁷⁷

If the evidence needed to make a probable cause determination is insufficient, a court may hold a preliminary hearing to allow the state an opportunity to show probable cause.¹⁷⁸ Evidence sufficient to support a finding of probable cause includes the evidence presented in seeking the arrest warrant; sworn statements of the victim, the offender, and law enforcement officers; grand jury testimony; and the indictment.¹⁷⁹ The court noted that in most cases, an order for an HIV test will be issued upon application to the trial court.¹⁸⁰

The court applied the *Skinner* and *Von Raab* test, relying on several factors in its ruling.¹⁸¹ First, the court held that the intrusion was not overwhelmingly substantial because the statute is tailored to protect the privacy right of the accused through procedural protections.¹⁸² The statute limits disclosure of the HIV status of the accused to the accused, the victim, and several state agencies.¹⁸³ The statute also prohibits the test results from being used against accused offenders in criminal proceedings.¹⁸⁴

Second, the court held that giving rights to victims is a substantial governmental interest.¹⁸⁵ The court recognized the political upsurge of the victim's rights movement and the legislature's aim of including

As previously mentioned, this Comment does not include an in-depth Fourteenth Amendment discussion.

175. *Id.* at 1272-73.

176. *See id.* at 1273 (quoting *State v. DeSimone*, 288 A.2d 849, 850 (N.J. 1972)).

177. *State ex. rel. J.G.*, 701 A.2d at 1273 (quoting *State ex. rel. A.J.*, 556 A.2d 1283, 1289-90 (N.J. Super. Ct. App. Div. 1989)).

178. *Id.* at 1273-74. In such a hearing, the rules of evidence would not apply, both the offender and the state must be given notice of the hearing, and the offender may cross-examine witnesses. *Id.*

179. *Id.* at 1273.

180. *Id.* The court cautioned that these hearings are limited in scope to the issues relevant to HIV testing and should not become a discovery device. *Id.* at 1274.

181. *State ex. rel. J.G.*, 660 A.2d at 1272-73.

182. *Id.* at 1271.

183. *Id.* at 1271. One state agency is the Office of Victim-Witness Advocacy. This agency provides the accused's test result to the victim, but, as are all other state agencies receiving the results, is barred from disclosing the result other than as authorized by the statute or a court order. *Id.* However, the victim is not barred from releasing the accused's HIV status.

184. N.J. STAT. ANN. § 2C:53-2.2(g) (West Supp. 1997).

185. *See State ex. rel. J.G.*, 660 A.2d at 1269-70 (describing the many benefits to the victim from testing the assailant and revealing his HIV status to the victim).

victims in the criminal justice process.¹⁸⁶

Finally, the court found that a victim's knowledge of his or her HIV status during the "window period" may be beneficial in treatment.¹⁸⁷ The court found that the evidence presented to the trial court did not accurately reflect a unanimous opinion in the medical field about whether this knowledge would be useful.¹⁸⁸ The court noted that even persons with potential infection may be treated with antiviral therapy, and an accused's HIV test result helps physicians determine the risk of infection in the victim and the necessary degree of monitoring.¹⁸⁹ The court balanced the potential psychological and medical benefits for the victim against the privacy rights of the accused and held that the rights of the victim outweighed the rights of the accused.¹⁹⁰

V. THE NEW JERSEY SUPREME COURT: MISAPPLICATION OF THE "SPECIAL NEEDS" TEST

The dangers of compulsory HIV testing of accused sex offenders is evident in sections 2A:4A-43:1 and 2C:43-2.2 of the New Jersey Code and the resulting case *State ex rel. J.G., N.S., and J.T.*¹⁹¹ The legislature acted upon a powerful political issue at both the state and national levels.¹⁹² In this political arena, opposing victim's rights legislation, even for its possible constitutional deficiencies, could result in political repercussions for legislators.¹⁹³

In *State ex rel. J.G., N.S., and J.T.*, New Jersey's Supreme Court misapplied the *Skinner* and *Von Raab* balancing test and widened the "special needs" doctrine. The "special needs" doctrine represents the Supreme Court's move toward a broader interpretation of the Fourth Amendment. Thus, state court decisions that further broaden the

186. *Id.* at 1267-69.

187. *Id.* at 1269-70.

188. *Id.* at 1269.

189. The court relied on a newspaper article to support the existence of treatment prior to the patient testing positive for HIV. Abigail Zuger, "Morning After" Treatment for AIDS, N.Y. TIMES, June 10, 1997, at C1. The court also relied on *Virgin Islands v. Roberts*, which included medical testimony. See *Virgin Islands v. Roberts*, 756 F. Supp. 898, 899-900, 903 (D.V.I. 1991) (explaining that the HIV status of the assailant is an important factor in determining which post-attack medical treatment a victim should obtain).

190. *State ex rel. J.G.*, 701 A.2d at 1271.

191. *Id.*

192. See *id.* at 1268 (commenting on how there has been a heightened awareness at both state and federal levels, illustrated through various recently enacted statutes).

193. See *id.* (noting how quickly the voters responded to the legislation). Senate Judiciary Committee, Statement to Assembly Bills No. 897 and No. 220, in N.J. STAT. ANN. 52:4B-44 (West 1995 & Supp. 1998).

holdings of *Skinner* and *Von Raab* pose a potential threat to the constitutional rights of individuals.

New Jersey's Supreme Court was correct in applying the "special needs" doctrine to this particular case, as the case did not implicate law enforcement or administrative searches.¹⁹⁴ However, the supreme court put forth a flawed analysis of the case under the "special needs" doctrine, as the court upheld and modified a ruling by the appellate court.¹⁹⁵ Consequently, the appellate court's ruling must first be examined.

The appellate court ignored the facts present in *Skinner* and *Von Raab* under which the Supreme Court allowed a warrantless body search without individualized suspicion. In *Skinner*, the Court found that the operation of trains by employees using alcohol or drugs jeopardized the lives of passengers and other employees.¹⁹⁶ In order to detect drugs and alcohol and to deter their use, all employees involved in a pre-determined type of accident were tested. The Court held that the persons tested were employees who had a lessened expectation of privacy because of their choice to work in a highly regulated area of industry.¹⁹⁷ The Court also found that requiring individualized suspicion would undermine the effectiveness of the regulations.¹⁹⁸ The Court stressed the deterrent value of the regulations and their role in preventing life threatening accidents. Finally, it found immediate tests were necessary because alcohol and other drugs easily dissipated from the body and a delay could result in the destruction of evidence.¹⁹⁹ The possible destruction of evidence was also a major factor relied upon in *Schmerber*,²⁰⁰ where the Court upheld compulsory blood testing of an individual suspected of driving while intoxicated.²⁰¹

These factors are not present in cases involving compulsory HIV

194. See generally *State ex rel. J.G.*, 701 A.2d at 1266 (noting that testing was not intended to aid in the criminal prosecution and also finding that requiring probable cause or individual suspicion would be impractical in that victims do not have outward manifestations of the disease and would frustrate governmental interest).

195. *Id.*

196. *Skinner*, 489 U.S. at 620.

197. See *id.* at 627 (explaining that most railroads require periodic physical examinations and thus "expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety").

198. *Id.* at 624-25.

199. See *id.* at 623 (noting that the Federal Railroad Administration recognizes that alcohol and drugs are "eliminated from the bloodstream at a constant rate" so that samples "must be obtained as soon as possible").

200. 384 U.S. 757 (1966).

201. *Id.* at 771.

testing of accused sex offenders. The employees in *Skinner* and *Von Raab* had a legal alternative to testing — they could cease employment in the regulated field. Unlike these employees, individuals accused of a crime have no way to opt out of HIV testing.²⁰² Prior to a criminal trial, the American legal system presumes the innocence of the accused.²⁰³ Thus, an individual who is quite possibly innocent has no alternative but to be tested for HIV and subject himself to the possible repercussions of a positive test result. In addition, there is little deterrent value in the case of compulsory HIV testing. It is highly unlikely that facing HIV testing will prevent the actions of sexual offenders.²⁰⁴ There is no destruction of evidence issue because HIV, unlike alcohol or drugs, will not dissipate from the body.²⁰⁵ On the contrary, the virus will be more readily detected with time.²⁰⁶

A. HIV Testing of the Accused and the Victim's Knowledge of His or Her Own HIV Status

In balancing the victim's need for pertinent information against the rights of the accused to privacy, the New Jersey Supreme Court failed to adequately discuss the effectiveness testing the accused would have in the victim's knowledge of her or his own status. The correlation between the HIV status of the accused and that of the victim is very attenuated and relies on assumptions that the accused is guilty; that the test will be accurate and that the accused is not in the "window period"; if the accused tests HIV positive, that the accused transmitted HIV to the victim; that the victim did not transmit the virus to the accused; and that the accused or the victim did not contract the virus after the crime in question.²⁰⁷ These assumptions may very well turn out to be false. Subjecting a possibly innocent person to a compulsory HIV test on the basis of these assumptions is unwise, and, given the possible consequences to the accused if the test result

202. N.J. STAT. ANN. §§ 2A:4A-43.1, 2C:43-2.2 (West 1995).

203. The presumption of innocence is not explicit in the Constitution but is derived from the Fourteenth Amendment to the United States Constitution. U.S. CONST. amend. XIV. The presumption has repeatedly been recognized by the Supreme Court. *Herrera v. Collins*, 506 U.S. 390, 390 (1993); *Taylor v. Kentucky*, 436 U.S. 478, 478 (1978); *Morissette v. United States*, 342 U.S. 246, 275 (1952); *United States v. Fleischman*, 339 U.S. 349, 363 (1950).

204. See WILLIAM L. MARSHALL, D. RICHARD LAW, & HOWARD E. BARBAREE, *HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, & TREATMENT OF THE SEX OFFENDER* 371 (1990) (charting the recidivism rates of sex offenders, some of whom have a recidivism rate of up to 71%).

205. See Paul H. MacDonald, Note, *AIDS, Rape and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders*, 43 VAND. L. REV. 1607, 1619 (1990) (noting that criminal searches without warrants will be deemed unreasonable).

206. See *id.* at 1615 (stating "[t]he screening tests are generally more accurate when applied to persons suffering from a more advanced state of disease").

207. *State ex rel. J.G., N.S., and J.T.*, 701 A.2d 1260, 1263 (N.J. 1997).

is positive, violates his right of privacy.

B. Treatment for HIV Absent a Positive Test by the Victim

Additionally, the New Jersey Supreme Court found evidence that some medical steps may be taken before the victim tests positive.²⁰⁸ However, the only evidence cited by the court that effective HIV treatment may be commenced prior to the victim's positive HIV test was a recent newspaper article.²⁰⁹ Due to the dangers posed by AZT and other drugs aimed at fighting HIV, treatment is normally not commenced before the victim tests positive.²¹⁰ A positive test result by the accused would accomplish little, as treatment would not commence until the victim tests positive.²¹¹ A negative test gives the victim a false sense of security. Ultimately, the victim alone has access to her or his HIV status.²¹²

C. The Probable Cause Requirement

The New Jersey Supreme Court held that before compulsory HIV testing may take place, the state must show probable cause that an offense that could result in the transmission of HIV took place and that the accused was a party to the offense.²¹³ This requirement appears to protect the accused from arbitrary HIV testing, but fails to accomplish this goal. Probable cause is required prior to or at the start of the defendant's first appearance in criminal adjudication.²¹⁴ Absent probable cause, a charge or indictment will not be allowed to continue against the defendant. Thus, requiring probable cause for compulsory HIV testing will add little or no protection to the constitutional rights of the accused. Rather, the court will summarily find probable cause or merely re-examine the testimony or evidence used

208. *Id.* at 1262-64.

209. See Zuger, *supra* note 189, at C1 (noting that "[n]ow that HIV has joined the roster of endemic sexually transmitted agents in the United States, doctors are cautiously beginning to use the powerful new drugs intended to treat established infections as 'morning after' pills to forestall H.I.V. transmission after risky sexual encounters").

210. David Kennan Moody, Note, *AIDS and Rape: Constitutional Dimensions of Mandatory Testing of Sex Offenders*, 76 CORNELL L. REV. 238, 243 (1990).

211. See Eisenstadt, *supra* note 8, at 349-60 (stating that there is no medical evidence that treatment within the first two weeks is effective as compared with treatment administered after six months when the victim receives the results of her own examination).

212. See Eisenstadt, *supra* note 8, at 358 (arguing that explosive testing fails to promote the public health goals because ultimately treatment and assurance should wait for the victim's own results rather than rely on false negatives).

213. *State ex rel. J.G.*, 701 A.2d at 1270-72, 1274.

214. *Gernstein v. Pugh*, 420 U.S. 103, 117-18 (1975); YALE KAMISAR ET. AL., MODERN CRIMINAL PROCEDURE 26 (8th ed. 1994).

to charge or indict the individual for the offense.²¹⁵

VI. COMPULSORY HIV TESTING AND ADHERENCE TO THE UNITED STATES CONSTITUTION

A. Constitutional Implications

Compulsory HIV testing subjects the accused to two forms of intrusion upon his or her body. First, blood is drawn from the individual's body against his or her will. Second, the blood is tested for HIV, which implicates disclosing personal information to the public. Due to the general public's ignorance, HIV carries a great stigma. Under New Jersey law, the victim is free to disclose the HIV status of the accused *prior to a criminal trial*.²¹⁶ What happens if the accused is innocent but tests positive for HIV? After an acquittal, the individual may face bitter discrimination, ostracism, and scorn from others. How can compulsory HIV testing based merely on probable cause be reconciled with the presumption of innocence and the right to privacy that our society holds so dear?

B. Raising the Burden: A Constitutional Approach

The Supreme Court has held that the right to privacy is not absolute.²¹⁷ Thus, it is doubtful that compulsory HIV testing is per se unconstitutional. It is most likely that the *Skinner* and *Von Raab* balancing test would allow compulsory testing under certain circumstances. However, the following measures could help bring compulsory testing in line with constitutional guarantees.

First, before the accused is tested for HIV, the victim should be tested for HIV. If the test is positive, there is no need to go further because the HIV test is used only for the victim's personal knowledge, not for prosecution. Testing the victim is absolutely necessary because testing the accused is unnecessary if the victim is HIV positive. Second, because probable cause is inevitably present if the accused has been charged with the crime, the state should demonstrate by a *preponderance of the evidence* at a preliminary hearing that the crime posed a threat of HIV transmission and that the accused was a party to the part of the crime that posed the threat of HIV transmission.

215. See Moody, *supra* note 210, at 253-54 (commenting on how the courts will get the facts into an exception or find probable cause).

216. *State ex rel. J.G.*, 701 A.2d at 1274.

217. See *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (observing that although the right to privacy is broad, "some state regulation in areas protected by that right is appropriate. . . . The privacy right involved, therefore, cannot be said to be absolute.").

To warrant intrusion into an individual's bodily integrity, a higher standard of proof such as the preponderance standard is necessary.

VII. CONCLUSION

Few harbor sympathy for sexual offenders. However, this Comment's critique of pre-conviction compulsory testing is not an emotional, but rather a constitutional critique. Laws allowing HIV testing of accused sex offenders are a danger to the presumption of innocence and the rights of privacy guaranteed by the United States Constitution. The government should be wary of any interference with an individual's bodily integrity. The implications of these intrusions are especially great when blood is drawn from an individual accused of a crime for a reason that is far short of compelling. Due to the nature of HIV, knowledge of a perpetrator's HIV status is largely irrelevant. Courts should consider the unique nature of HIV and apply the balancing test under *Skinner* and *Von Raab* accordingly.

The victim's rights movement has had some positive effects on the criminal justice system and has spurred politicians to pass laws with constitutional implications. When the United States Constitution is implicated, courts must uphold the ideals upon which this nation was founded while making decisions that may appear antithetical to modern views of retribution and victim protection. However, the whims and caprices of the public during elections should never be allowed to marginalize the ideals upon which this nation was founded.²¹⁸ Therefore, legislatures should carefully consider the alternatives before enacting laws requiring mandatory HIV testing of accused sex offenders. If legislatures determine that HIV testing is necessary, they should include the safeguards mentioned above to more effectively use the HIV test results and to ensure that the accused's constitutional rights are not violated.

218. See *Planned Parenthood v. Casey*, 505 U.S. 833, 943 (1992) (Stevens, J., concurring). Responding to Justice Scalia's argument that the democratic process rather than the Court should control issues relating to abortion, Justice Stevens asserted that "[a] woman's right to reproductive choice is one of those fundamental liberties" that "are not to be left to the whims of an election." *Id.*