Damage Control for Victims of Sexual Assault—Testing the Innocent for AIDS

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O multiplied misery! we die, and cannot enjoy death, because wee die in this torment of sicknes; we are tormented with sicknes, and cannot stay till the torment come, but preapprehensions and presages, prophecy those torments, which induce that death before either come . . . . Is [Man] a world to himselfe onely therefore, that he hath inough in himselfe, not only to destroy, and execute himselfe, but to presage that execution upon himselfe; to assist the sicknes, to antidate the sicknes . . . least the fever alone should not destroy fast enough, without this contribution . . . . O perplex'd discompostion, O ridling distemper, O miserable condition of Man!

I. INTRODUCTION

A CQUIRED Immune Deficiency Syndrome (AIDS) is a deadly and infectious disease. All who are infected with the devastat-ing human immunodeficiency virus (HIV) are victims; yet, victims of another sort are at risk of infection, and no steps to practice “safe sex” will reduce their risk of acquiring this life-destroying ill-

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2. As the former U.S. Surgeon General, Dr. Antonia Cello Novello, eloquently noted: It began, like so many epidemics, with a few isolated cases, a whisper that caught the ear of only a few in the medical research. Today, that whisper has become a roar heard around the world. AIDS - acquired immunodeficiency syndrome - is now the epidemic of our generation, invading our lives in ways we never imagined - testing our scientific knowledge, probing our private values, and sapping our strength. AIDS no longer attracts our attention - it commands it.

CENTERS FOR DISEASE CONTROL, SURGEON GENERAL'S REPORT TO THE AMERICAN PUBLIC ON HIV INFECTION AND AIDS (released 1993).

AIDS is the common name for acquired immunodeficiency syndrome; it remains fatal to all who contract it. Centers for Disease Control, The HIV/AIDS Epidemic: The First 10 Years, 40 MORBIDITY & MORTALITY WKLY. REP. 357-59 (June 7, 1991).

ness because it is forced upon them. They are the victims of physical assaults. Beyond the trauma of the crime itself, victims and their families must endure the realization that living through the attack or molestation is no guarantee of long-term survival. In response to these fears, state legislatures and national representatives have taken steps to test individuals accused or convicted of sexual battery and other offenses for HIV infection. Often lawmakers enact these measures in the name of "victims' rights." Although not a "zero-sum" proposition, the rights of two groups—victims and suspects—are at odds.

This Article examines the troubling concept of compulsory AIDS testing for those accused of physical, often violent, crimes through an analysis of the statutes various state legislatures have enacted and national legislation designed to inform victims of the HIV status of the alleged perpetrator of the alleged crime. The Article also focuses on the actions taken by the State of Florida and the constitutional issues involved, and proposes an amendment to legislation in the United States Congress encouraging all states to follow the lead of

4. See Ch. 93-227, § 8, 1993 Fla. Laws 2338, 2343 (to be codified at Fla. Stat. § 775.0877); see also infra note 132 and accompanying text.

5. See Mark Blumberg, AIDS: THE IMPACT ON THE CRIMINAL JUSTICE SYSTEM 83 (1990); see also infra note 41 and accompanying text.

A recent survey of rape victims indicates that 41% "spontaneously noted that AIDS was a major concern related to rape." N. W. Burgess & Timothy Baker, AIDS and Victims of Sexual Assault, 43 Hosp. & Community Psychiatry 447, 447 (May 1992). The survey also examined the perception of professional groups related to treatment of rape victims as to the important ethical and legal issues regarding the assault and HIV infection. Id. Of the 616 workers sampled, the top three ethical issues were "the victim's right to know their HIV status versus the assailant's rights to privacy, the public's concern for AIDS prevention versus the individual's right to refuse testing, and the health professional's duty to inform versus the duty not to cause psychological harm to the rape victim." Id. The survey also found "[t]he leading legal concerns regarded authorization of HIV tests, access to results, and reporting requirements." Id. Only 48% of the rape crisis programs sampled nationally had policies for dealing with the concerns of rape victims about AIDS. Id. at 448.

6. See Fla. Stat. § 960.003 (Supp. 1992); see also infra notes 43-44 and accompanying text. Although the test discussed in this Article determines the HIV status of an individual, the test is commonly referred to as an "AIDS test."


8. Throughout this Article, it is important to remember that the persons to be tested based on the AIDS legislation discussed herein are individuals who are only accused of committing a crime. Although a criminal act may have occurred and there is often an identifiable, emotionally distressed and physically harmed victim, the criminal process is only beginning for these incidents; the guilt or innocence of the person who may be tested is yet to be determined.
Florida, California, Texas and others in the area of victims’ rights and compulsory AIDS testing of alleged offenders. This Article is neither an exercise in statutory construction nor an attempt to canvas every conceivable justification for compulsory AIDS testing. The testing of prostitutes, correctional facilities inmates, health care workers and patients, and members of the armed forces are all controversial topics beyond the scope of this discussion. Instead, this Article identifies the rights at stake and the standard by which the courts will seek to safeguard those rights. This is followed by a discussion of some of the purported state interests for which these laws were enacted and an examination of the medical basis for those statutes which demand AIDS testing of the innocent.

Although this Article concludes that compulsory testing of accused offenders is constitutional, no one wins here. At best, these tests will offer a small amount of information to victims to help them make difficult decisions about their future. Accused offenders must involuntarily surrender blood and, more significantly, private information about their health and well-being. The information demanded of the accused may help physicians, counsellors, guardians, and victims themselves control or limit the tremendous damage caused by physical assaults.

II. LEGISLATING AIDS TESTING OF SEX OFFENDERS

Testing persons accused of sex offenses will not “cure” an infected victim. Although such testing could limit further spreading of the disease among the victim’s personal contacts, laws providing for testing the accused are more remedial than preventative. Lawmakers owe a responsibility to their electorate not only to carry out

12. Id. at 24-27; Rivera, The Military, in AIDS AND THE LAW 221 (Harlon L. Dalton et al. eds., 1987).
13. These statutes propose to test persons who are “innocent until proven guilty.” See supra note 8.
the will of the people, but also to uphold the provisions of the United States Constitution and the constitution of their state. Consequently, when enacting the legislation discussed below, the legislatures were confronted with a conflict between the rights of the accused and the rights of the victim.

A. Federal Efforts

Like many other nations, the United States has taken steps to curb the spread of AIDS and to treat the victims of the disease.

The Federal government is spending more money on, and devoting more resources and more attention to, the AIDS epidemic than to any other infectious disease ever. Not since the "War on Cancer" was launched 20 years ago has such a focus of time, energy and public and private money and resources been brought to bear on any one disease.

Although some legislators advocate the incorporation of mandatory testing for accused sex offenders into federal rape statutes, no such legislation has yet been enacted.

Because of apparent shortfalls in the criminal justice system, proponents of AIDS testing of defendants prior to conviction have gained ammunition to fight for legislation protecting victim's rights. In May 1993, the United States Senate Judiciary Committee released its report on violence against women. The findings outlined by the

15. For a compilation of responses to the AIDS epidemic worldwide, see World Health Organization, Legislative Responses to AIDS (1989).

16. In the United States, the Department of Health and Human Services estimated its AIDS-related expenditures for fiscal year 1990 to be in excess of $2,589,803,000. 1990 AIDS Expenditure Report of the Dep't of Health and Human Services 1.


17. U.S. Dep't of Health and Human Services, Strategic Plan to Combat HIV and AIDS in the United States - Summary 1 (n.d.) (introduction by Lewis W. Sullivan, Secretary, U.S. Dept. of Health and Human Services); see id. at Appendix 2 (projects total federal spending for fiscal year 1993 of approximately $4,917,000,000).


19. Majority Staff of Senate Jud. Comm., The Response to Rape: Detours on the Road to Equal Justice II (May 1993) (on file with comm.).
Committee reveal that women, who are so often the targets of physical assault, cannot depend on the criminal justice system to find or punish their attackers:

- 98% of victims of rape never see their attacker caught, tried or imprisoned;
- Over half of all rape prosecutions are either dismissed before trial or result in an acquittal;
- Almost one quarter of convicted rapists never go to prison; another quarter receive sentences in local jails \textit{where the average sentence is eleven months};
- This means that almost half of all convicted rapists can expect to serve an average of a year or less behind bars.\textsuperscript{20}

This report details serious flaws in our criminal justice system: only one in ten rapes is reported to the police, and only one out of one hundred rapists is sentenced to more than one year in prison.\textsuperscript{21}

As a partial remedy to the violence which faces women in their everyday lives, Congress is considering legislation which might provide women more effective remedies than those available in the criminal justice system and enable them to achieve equality and protection under the law. This legislation is entitled the "Violence Against Women Act of 1993."\textsuperscript{22} Among the promising portions of this resolution and its companion in the Senate\textsuperscript{23} are grants encouraging states to more actively pursue arrest and punishment of spouse-abusers, and those charged with rape, sexual assault, domestic violence, and incest. Although the fate of this legislation remains uncertain, the United States Congress could follow the lead of Florida, California, and other states by amending the Violence Against Women Act to include a provision encouraging states to adopt and enforce laws which would enable victims of certain types of crime to receive the results of a court ordered HIV test of the alleged offender. Undoubtedly this legislation would be controversial as it has been in the states;\textsuperscript{24} however, the protection afforded victims in a

\textsuperscript{20} \textit{Id.} at 2.
\textsuperscript{21} \textit{Id.} at 11.
\textsuperscript{22} H.R. 1133, 103d Cong., 1st Sess. (1993).
\textsuperscript{24} Neil Gilbert, \textit{The Wrong Response to Rape}, \textit{WALL ST. J.}, June 29, 1993, at A18. Gilbert takes issue with the Senate report and its presentation of statistical data. In particular, Gilbert notes the high percentage of reported rapes that never result in conviction is less than the percentage of reported robberies that never result in a conviction or incarceration of the assailant. \textit{Id.} Gilbert also takes issue with the provisions in the Violence Against Women Act of 1993 which would "classify rape motivated by gender bias as a civil rights offense under which victims could sue for compensatory and punitive damages." \textit{Id.} See also Mary P. Coss, \textit{They Know They've Been Raped}, \textit{WALL ST. J.}, Aug. 3, 1993, at A-15 (letter to editor).
limited number of states should be extended throughout this nation to equally protect those who have suffered serious mental and physical harm.

At one point, Senator Joseph Liebermann considered such legislation for possible inclusion in the Federal Rape Statute. However, this would have had limited effect, and the United States Congress could better serve the victims by giving the states additional incentives to provide victims with information as to the HIV status of the accused. Given the predominant place which AIDS has taken in society, it should be beyond dispute that victims of certain crimes, especially sexual assault, will suffer severe anxiety and mental anguish regarding possible infection with the HIV virus.

In 1990, Congress enacted federal legislation requiring states to provide mandatory testing programs for HIV for certain convicted sex offenders. Although approximately one-third of the states had enacted statutes providing for such HIV testing, Congress decided to encourage the remainder of the states to act in the best interests of the victim. The importance of adopting legislation requiring such testing was underscored by Congresswoman Martin of Illinois when she stated that section 1804 was enacted because rape victims should not have to live in fear about exposure to the AIDS virus. . . . All states should make it possible for rape victims to find out if they have been placed at risk. They have the right to know. . . . We can. . . . demonstrate our compassion by preventing further traumatization of these victims who also face the possibility of exposure to the AIDS virus.

Section 1804 requires states to provide for HIV testing of convicted defendants at the request of a victim of a sexual assault and

25. See supra note 18.
27. BJA Guidance, supra note 26, at 1-2.
28. Id. at 2.
29. Section 1804 states:
   (f) Testing certain sex offenders for human immunodeficiency virus
   (1) For any fiscal year beginning more than 2 years after the effective date of this subsection—
      (A) 90 percent of the funds allocated under subsection (a) taking into considera-
provides for disclosure of test results to victims regarding the defendants' HIV status. Section 1804 affords no discretion to the states or the judicial process regarding testing of convicted defendants. The law also requires disclosure of test results to the defendant and to the victim without any room for discretion by the courts or law enforcement personnel. Furthermore, states must provide counseling regarding the HIV disease and testing. Notably this statute does not require states to provide any health care for individuals determined, pursuant to this statute, to have been infected by the HIV virus.

30. Id. § 3756(f)(2). For the purposes of this section, a sexual act is defined as:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; . . . .


30. Id. § 3756(f)(2)(B), (C).

31. 42 U.S.C. § 3756(f)(2). The lack of discretion or judicial review regarding testing of convicted defendants for HIV raises certain constitutional questions. However, the focus of this Article is on mandatory testing of persons not yet convicted of a crime.

32. Id.

33. Id.

34. Id.; BJA GUIDANCE, supra note 26, at 4-5. The services which states must provide are: "1. counseling regarding HIV disease; 2. HIV testing in accordance with applicable law; and 3. referral for appropriate health care and support services." Id. at 5. The Bureau of Justice Assistance further notes that state statutes must "make it clear that these victims are entitled as a matter of right to request and receive the counseling, testing, and referral services specified by Congress." Id. Importantly, the Bureau has informed the states that "[s]ection 1804 implies that these services are to be provided at the expense of State or local governments, rather than at the victim's expense." Id. The Bureau further stated "[s]tate offices
The Bureau of Justice Assistance prepared and distributed its guidance book and worksheet to the various states in an effort to foster compliance with section 1804. Notwithstanding the cost administering the Edward Byrne Memorial State and Local Law Enforcement Assistance Formula Grant Program should be prepared to inform BJA as to the sources of the funds to pay for these services and the authority therefore.

35. BJA GUIDANCE, supra note 26, at 6-7, i-iii (appendix). The worksheet provided to states to assist in completing a self-assessment of their compliance with section 1804 included the following provisions:

1. Victim Request.
   Does the State statute require an HIV testing procedure at the request of any victim of a sexual act for which the person to be tested was convicted in State court (or make such a test mandatory for all persons thus convicted regardless of victim request)?
   What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

2. Administration of the Test.
   Does the State statute require an agency of the State (such as a court, health department, correctional authority, etc.) to direct that a test be administered in such cases?
   Does the State statute specifically require testing in these cases for the presence of acquired immune deficiency syndrome (AIDS) or its precursor, human immunodeficiency virus (HIV)?
   What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

3. The Person to be Tested.
   Does the State statute require persons to be tested who have been convicted under State law of a defined sexual act?
   Does this either specifically or by definitional inclusion encompass persons found guilty of the offense by a jury or court, as well as those entering a plea [sic] of guilty? (Note: Because Question 6 below concerns the definition of juveniles as persons "convicted," please disregard that issue for Question 3).
   What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

4. Disclosure of the Test Results.
   Does the State statute provide for disclosure of the test results to the both [sic] the victim and the person tested?
   What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

5. Victim Services.
   Does the State statute provide for making the following services available to the victims of these sexual acts at their request:
   1. Counseling regarding HIV disease?
   2. HIV testing in accordance with applicable law?
   3. Referral for appropriate health care and support services?
   What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?
   What are the sources of the funds to pay for these services?
   What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

6. Definition of the term "convicted" as including Juveniles.
   Does the State statute require HIV testing for juveniles who have been adjudi-
plications or constitutional questions regarding mandatory HIV testing, many states are moving toward complying with the requirements of section 1804, and by mid-1993, approximately six states, including Florida, had officially complied. Apparently not all states are anxious to comply with section 1804 for political and financial reasons. Some states have expressed concern that legislation as required by section 1804 may lead to an obligation by the state to provide health care for individuals infected with HIV. New York, however, is the only state which has indicated it will not attempt to satisfy the requirements of section 1804.

B. The States

AIDS is not only a global problem, but a national one as well, and each state in this country faces a growing threat from this disease. Recognizing the magnitude of the problem and the concern it

36. Officials with the Bureau of Justice Assistance estimate that by mid-fiscal year 1994, over half of the states will either be in compliance with section 1804 requirements or have made substantial progress in adopting legislation to meet those requirements. Telephone interview with officials at U.S. Department of Justice, Bureau of Justice Assistance [hereinafter Telephone Interview] (The sources of this information were guaranteed anonymity. Notes and records of the conversations are on file with the author).

37. Id.


39. See Telephone Interview, supra note 36.

40. See Telephone Interview, supra note 36.

41. See WORLD HEALTH ORGANIZATION, supra note 15. The Centers for Disease Control (CDC) estimate that during the period 1992 to 1994, the number of persons newly diagnosed with AIDS will increase by approximately 60,000 to 70,000 per year. This will bring the number of living persons diagnosed with AIDS to approximately 120,000 by January of 1995. However, the CDC readily admits, that its data is subject to "considerable uncertainty." Centers for Disease Control, Projections of the Number of Persons Diagnosed with AIDS and the Number of Immuno-Suppressed HIV-Infected Persons - United States 1992-1994, 41 MORTALITY & MORTALITY WKLY. REP. 1-2 (1992).

causes victims of certain crimes, at least seventeen states have enacted laws providing for compulsory testing of individuals accused of certain crimes.\textsuperscript{43} At least eight states now have laws providing for AIDS testing only after conviction.\textsuperscript{44}

Many courts have dealt with the constitutional issues under statutes providing for testing of accused offenders.\textsuperscript{45} In \textit{Johnetta J. v.}

through 1990, over 100,000 persons with AIDS died. The Centers for Disease Control (CDC) estimate that by 1989 AIDS was the second leading cause of death among men twenty-five to forty-four years of age. \textit{Id}. Additionally, AIDS is expected to rank among the five leading causes of death among women in the same age group. \textit{Id}. Approximately one million persons in the United States are infected with the disease, many of whom do not know they have HIV. \textit{Id}. at 44.

For an overview on the various actions states have taken to address the AIDS epidemic through legislation, see Larry O. Gostin, \textit{Public Health Strategies for Confronting AIDS}, 261 \textit{JAMA} 1621 (1989); see also \textit{infra} notes 43-44 and accompanying text. The federal government has tracked the actions of various states with regard to mandatory testing of defendants involved in crimes which have the potential for transmission of the HIV. \textit{PUBLIC HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES, AIDS LITIGATION PROJECT 4} (1990).


Municipal Court, a California court reviewed the constitutionality of a statute providing for AIDS testing of persons who "interfered with the official duties of a peace officer . . . by biting . . . or transferring blood or other body fluids on, upon, or through the skin or membranes of a peace officer . . . ."46 In Johnetta, the defendant had allegedly assaulted and bitten a police deputy officer, drawing blood.47 The State of California sought to have the defendant involuntarily tested for AIDS under the provisions of a 1988 California statute.48 The defendant attempted to prohibit the test claiming, inter alia, that the test constituted an unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution and the privacy provisions of the California State Constitution.49 In upholding the constitutionality of the statute, the judge reviewed medical testimony as to the possibility of transmission of the virus through human bites.50 The court concluded that although the likelihood of actual transmission of the disease was remote, it was nonetheless possible.51 The judge also noted that the test results of the accused could possibly relieve the victim's anxiety.52

California again became the center of judicial attention as a federal appellate court reviewed a case in which police took a blood
sample in order to test it for HIV. In 1991, the Ninth Circuit Court of Appeals reviewed Barlow v. Ground, a case involving the AIDS test of an individual charged with assault on police officers involving the transmission of saliva. In Barlow, an incident arose during a 1986 gay rights parade in San Diego, in which plaintiff Barlow became involved in a scuffle with police officers. During the scuffle, Barlow bit two of the officers sufficiently to draw blood. After his arrest, Barlow was taken to a hospital for treatment of his injuries. Police repeatedly asked him if he had AIDS to which he initially replied, "No." After subsequent questioning, Barlow stated, "for the officers' sake, you better take it that I do [have AIDS]." The police then took Barlow to the San Diego police department where they took a blood sample without consent and without a warrant. The police subsequently obtained a warrant for obtaining a second sample of blood, but the warrant did not authorize the testing of that sample for AIDS. The police later obtained authorization to test the second blood sample; however, the California Court of Appeals held that the warrant authorizing the collection of the second sample was invalid for lack of probable cause and neither sample was ever tested. At his trial for criminal charges, Barlow was acquitted. He then filed suit in state court for violations of his constitutional rights arising under 42 U.S.C. § 1983, as well as other state law claims.

The Ninth Circuit began its examination of the constitutionality of the seizure of Barlow's blood by noting that searches conducted without warrant are per se unreasonable unless they fall within a narrow group of exceptions to the Fourth Amendment's prohibition against unreasonable searches.

The court's initial evaluation of the threat of transmission of AIDS began by discounting the possibility of transmission of the virus through saliva. As discussed above, there is little dispute that

54. Id.
55. Id. at 1134.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id. at 1137 (citation omitted).
65. Id. at 1137-38.
transmission of the AIDS virus through saliva is possible, even though it is considered remote.\textsuperscript{66} The court then noted the fallibility of an AIDS test when it occurs close to the date of possible infection.\textsuperscript{67}

After establishing these doubts as to the value of an AIDS test of the accused, the court considered whether the seizing of Barlow's blood was within an exception to the Fourth Amendment's warrant requirement.\textsuperscript{68} The court found that the circumstances before it did not allow the police to seize a sample of Barlow's blood without a warrant.\textsuperscript{69} Drawing on limited medical evidence, the court stated:

> It makes no difference to the officers' health whether Barlow was tested immediately, without a warrant, or a short time later pursuant to a warrant. The crux of the exigent circumstances exception is that the officer or others may be harmed if the officer does not act immediately. In this case, the delay caused by waiting to obtain a warrant could not have caused or compounded any harm. Therefore, the exigent circumstances exception does not apply.\textsuperscript{70}

By making this evaluation, the court ignored medical authority which suggests that certain treatments may delay the onset of AIDS while recognizing that no treatment will prevent a victim who is infected from eventually developing full-blown AIDS and dying.\textsuperscript{71} Unfortunately, the court did not believe it necessary to provide the officers with information which could enable them to make a more informed choice regarding their health care decisions. As noted below, the court should refrain from substituting its judgment for that of the victim where so much remains unknown about this disease and the efficacy of any treatments.\textsuperscript{72} The court did not discuss California's statutory procedure allowing testing individuals charged with offenses involving the transmission of body fluids for AIDS.

The California Penal Code affirmatively authorizes a court to issue a search warrant for testing certain individuals charged with various crimes for HIV.\textsuperscript{73} For warrant purposes, the California Legislature has focused the discussion on the probable cause as to

\textsuperscript{66} See supra notes 50-51 and accompanying text; see also infra note 85.
\textsuperscript{67} Barlow, 943 F.2d at 1138.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 1138-39.
\textsuperscript{70} Id. at 1139.
\textsuperscript{71} See infra notes 165-66.
\textsuperscript{72} See infra notes 165-66 and accompanying text.
\textsuperscript{73} CAL. PENAL CODE § 1524.1 (West Supp. 1993).
whether the accused committed the offense and whether a body fluid capable of transmitting the disease was transferred from the accused to the victim. This direction by the California Legislature allows courts to focus on the proper discussion of the alleged offense. Rather than determining whether there is probable cause that the accused has been infected with HIV, courts should focus on whether there is probable cause that the defendant committed the alleged offenses and that body fluids were transferred. It would be impractical, if not impossible, to develop of medical test which would allow a court to make a probable cause determination as to whether an accused is infected with HIV. Such an inquiry would necessarily involve substantial invasion into the private lives of individuals as well as into the lives of persons and organizations associated with the individual.

In 1993, the Supreme Court of Wisconsin held that a court could not statutorily compel a person accused of assaulting a social worker and biting him to the point where she drew blood to submit to a blood test. As argued by the American Civil Liberties Union (ACLU) in its amicus brief, the court noted that not a single case of HIV transmission through saliva has been documented. Yet, the court did acknowledge that AIDS theoretically can be transmitted through saliva. The Supreme Court of Wisconsin took the somewhat unique approach of deciding that the circuit court did not have the statutory power to compel the accused to undergo an AIDS test but it did have the power in equity.

In Syring, the court reviewed a lower court’s conclusion that it did not have statutory power to compel a criminal defendant to undergo a physical examine which would include testing for HIV, even though the defendant had drawn blood by biting Syring, a social worker, and drawn blood. The lower court noted that following the

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74. Id. § 1524.1(b)(1).

When the court finds, upon the conclusion of the hearing described in paragraph (2), or in those cases in which a preliminary hearing is not required to be held, the court also finds that there is probable cause to believe that the accused committed the offense, and that there is probable cause to believe that blood, semen, or any other bodily fluid identified by the State Department of Health Services in appropriate regulations as capable of transmitting the human immunodeficiency virus has been transferred from the accused to the victim.

Id.

75. Syring v. Tucker, 498 N.W.2d 370 (Wis. 1993).

76. Id. at 373.

77. Id. (citing Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666, 674 (Cal. Ct. App. 1990)).

78. Id. at 374-75.

79. Id. at 371.
incident "Tucker apparently yelled at him [Syring], after the bite, that she had AIDS." Syring brought an action against Tucker for assault and battery and sought damages including an award for pain and suffering and punitive damages. Syring sought to have Tucker tested for HIV pursuant to Wisconsin's statute compelling individuals to submit to physical examinations in certain circumstances. In response to this request, the trial judge stated "I conclude that the discovery rules under which testing is sought permit me to order the test, but specifically prohibit me in this or any other case, from enforcing by contempt any such order . . . ." The Court went on to suggest that should Tucker refuse to undergo the test, Syring could seek remedy in the form of monetary damages; however, the Court believed it was without power to compel Tucker to submit to a HIV test.

The Supreme Court of Wisconsin began its examination of the issue by reviewing literature regarding the likelihood that HIV could be transmitted to another though a bite. However, the Court rejected the view that early HIV testing of an offender is worthless, and it chose to recognize that early HIV testing of defendants "would still yield relevant information."

Lacking a statutory basis upon which it could order a criminal defendant to undergo an HIV test in these circumstances, the Supreme Court of Wisconsin utilized the scenario in Syring to formulate an equitable remedy by which victims could request and be informed of the HIV status of their alleged attackers.

The decisions in Johnetta, Barlow, and Syring, underscore the need for statutory guidelines which will allow the Court to more uniformly address the question of testing criminal defendants for HIV. It is not enough to leave these decisions to judicial discretion, when an identifiable victim seeks information which could fundamentally alter the victim's life the day that information becomes available. Without HIV testing of the accused, victims would be denied an im-

80. Id.
81. Id.
82. Id. at 372.
83. Id.
84. Id.
85. Id. at 373-74.
86. Id. at 374.
87. Id. at 374-78.
88. See generally id. at 377 ("A positive test will enable Syring to pursue proper medical treatment which could prolong his life. Knowledge of Tucker's HIV status, negative or positive, will help Syring and his wife to make a more fully informed decision about having children.")
portant piece of information with which they and their doctor could use to make decisions which reach far beyond the privacy rights of the accused.

C. Florida’s AIDS Testing of Sex Offenders

By the end of April 1993, Florida had nearly 30,000 reported cases of individuals diagnosed with the HIV virus.\textsuperscript{89} Fifty-nine percent of these individuals have died.\textsuperscript{90} Florida has recognized that the outbreak of HIV infection in the state is an epidemic and a public health emergency.\textsuperscript{91} Recent studies also indicate that AIDS has replaced accidents and cancer as the leading cause of death among young men in Florida.\textsuperscript{92} The rise of this disease has fueled concerns by victims of certain crimes that their lives may be in danger following an attack. This concern may have led to the following addition to the Florida Constitution:

Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.\textsuperscript{93}

Using this constitutional amendment as a springboard, the 1990 Florida Legislature launched a program to outline and protect the rights of victims of criminal conduct.\textsuperscript{94} Victims’ rights, though a nebulous concept, is a catchy phrase for legislators because it rings of being tough on crime and protective of the helpless. Based on a rec-

\begin{itemize}
\item \textsuperscript{89} Department of HRS, \textit{Florida HIV/Aids Monthly Surveillance Report, Disease Control and Aids Prevention, State Health Office} 106 (May 1993) [hereinafter \textit{Florida Monthly Report}]. During the period July 1991 through June 1992, Florida reported an annual rate of 38.88 cases per 100,000 people. \textit{Centers for Disease Control, HIV/AIDS Surveillance Report} 3 (July 1992). Note, however, the Centers for Disease Control have adopted a revised classification system for determining the number of individuals infected by HIV. Therefore, a portion of the increase in HIV in this country must be attributed to the expanded definition. \textit{Centers for Disease Control, 1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults, 41 Morbidity & Mortality Wkly. Rep.} 1-10 (1992).
\item \textsuperscript{90} \textit{Florida Monthly Report, supra} note 89, at 106.
\item \textsuperscript{91} \textit{Governor’s Red Ribbon Panel On AIDS, Report} 5-8 (Jan. 1993).
\item \textsuperscript{93} \textit{Fla. Const.} art. 1, § 16(b).
\item \textsuperscript{94} See Judy Doyle, \textit{Testing Accused Rapists for AIDS}, \textit{Tallahassee Dem.}, Apr. 17, 1990, at 4B.
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ommodation by the Crime Prevention and Law Enforcement Study Commission, Governor Bob Martinez’s office included a provision for AIDS testing of sex offenders in the Governor’s victims’ rights legislative package.95

1. The 1990 Version of Section 960.003, Florida Statutes

During the 1990 session, in the name of victims’ rights,96 the Florida Legislature enacted a statute providing for compulsory AIDS testing of persons charged with sex crimes and the release of the test results to victims.97 Representative Tom Mims98 and Senator Bob

96. See Fla. HB 1115 (1990); Fla. SB 914 (1990).

960.003. Human immunodeficiency virus testing for persons charged with or alleged by petition for delinquency to have committed certain sexual offenses; disclosure of results to victims.—

(1) LEGISLATIVE INTENT.—The Legislature finds that a victim of a criminal sexual offense which involves the transmission of body fluids is entitled to know at the earliest possible opportunity whether the person charged with or alleged by petition for delinquency to have committed the offense has tested positive for human immunodeficiency virus (HIV) infection. The Legislature finds that to deny victims access to HIV test results causes unnecessary mental anguish in persons who have already suffered trauma. The Legislature further finds that since medical science now recognizes that early diagnosis is a critical factor in the treatment of HIV infection, both the victim and the person charged with or alleged by petition for delinquency to have committed the offense benefit from prompt disclosure of test results. The Legislature finds that HIV test results can be disclosed to the victim of a criminal offense which involves the transmission of body fluids sexual offense while confidentiality is protected in other respects.

(2) TESTING OF PERSON CHARGED WITH OR ALLEGED BY PETITION FOR DELINQUENCY TO HAVE COMMITTED CERTAIN SEXUAL OFFENSE.—In any case in which a person has been charged by information or indictment with or alleged by petition for delinquency to have committed any sexual offense prescribed in chapter 794 or s. 800.04 enumerated in s. 775.0877(1)(a)-(l), which involves the transmission of body fluids from one person to another, upon request of the victim or the victim’s legal guardian, or of the parent or legal guardian of the victim if the victim is a minor, the court shall order such person to undergo HIV testing. The testing shall be performed under the direction of the Department of Health and Rehabilitative Services in accordance with s. 381.004. The results of an HIV test performed on a defendant or juvenile offender pursuant to this subsection shall not be admissible in any criminal or juvenile proceeding arising out of the alleged sexual offense.

(3) DISCLOSURE OF RESULTS.—
(a) The results of the test shall be disclosed, under the direction of the Depart-
Johnson introducted identical victims' rights bills intended to create

ment of Health and Rehabilitative Services, to the person charged with or alleged by petition for delinquency to have committed the offense, and, upon request, shall also be disclosed to the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor, and to public health agencies pursuant to s. 775.0877. The test results shall not be disclosed to any other person except as expressly authorized by law or court order.

(b) At the time that the results are disclosed to the victim or the victim's legal guardian, or to the parent or legal guardian of a victim if the victim is a minor, the same immediate opportunity for face-to-face counseling which must be made available under s. 381.004(3)(e) to those who undergo HIV testing shall also be afforded to the victim or the victim's legal guardian, or to the parent or legal guardian of the victim if the victim is a minor. The Department of Health and Rehabilitative Services is responsible for ensuring that test results are disclosed in accordance with the terms of this subsection.

(4) POST-CONVICTION TESTING.—If, for any reason, the testing requested under subsection (2) has not been undertaken, then upon request of the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor, the court shall order the offender to undergo HIV testing following conviction or delinquency adjudication. The testing shall be performed under the direction of the Department of Health and Rehabilitative Services, and the results shall be disclosed in accordance with the provisions of subsection (3). The test results shall not be disclosed to any other person except as expressly authorized by law or court order.

(5) EXCEPTIONS.—The provisions of subsections (2) and (4) do not apply if:
(a) The person charged with or convicted of or alleged by petition for delinquency to have committed or been adjudicated delinquent for an a-sexual offense as described in subsection (2) has undergone HIV testing voluntarily or pursuant to procedures established in s. 381.004(3)(i)6. or s. 951.27, or any other applicable law or rule providing for HIV testing of criminal defendants, inmates, or juvenile offenders, subsequent to his arrest, conviction, or delinquency adjudication for the sexual offense for which he was charged or alleged by petition for delinquency to have committed; and

(b) The results of such HIV testing have been furnished to the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor.

(6) TESTING DURING INCARCERATION, DETENTION, OR PLACEMENT; DISCLOSURE.—In any case in which a person convicted of or adjudicated delinquent for an a-sexual offense described in subsection (2) has not been tested under subsection (2), but undergoes HIV testing during his incarceration, detention, or placement, the results of the initial HIV testing shall be disclosed to the victim or the victim's legal guardian, or to the parent or legal guardian of the victim if the victim is a minor, upon request. Except as otherwise requested by the victim or the victim's legal guardian, or the parent or guardian of the victim if the victim is a minor, if the initial test is conducted within the first year of the imprisonment, detention, or placement, the request for disclosure shall be considered a standing request for any subsequent HIV test results obtained within 1 year after the initial HIV test performed, and need not be repeated for each test administration. Where the inmate or juvenile offender has previously been tested pursuant to subsection (2) the request for disclosure under this subsection shall be considered a standing request for subsequent HIV results conducted within 1 year of the test performed pursuant to subsection (2). If the HIV testing is performed by an agency other than the Department of Health and Rehabilitative Services, that agency shall be responsi-
section 960.003, Florida Statutes, "providing for human immunodeficiency virus testing of persons charged with . . . certain sex offenses and for disclosure of test results to the victims or their guardians . . . ."100 Although the proposed legislation underwent changes during the session, the final version was quite similar to the original.101

The most significant changes to the proposed bills came after hearings by the House Health Care Committee, Legislative Task Force on AIDS.102 Based on concerns voiced by groups and individuals testifying before the committee and comments of the committee members themselves, the Task Force amended House Bill 1115 to ensure protection of the rights of the accused and the victim.103 The committee specifically noted the need to avoid AIDS hysteria when considering this sensitive legislation.104

The Committee considered six amendments to the original bill. Representative Lois Frankel sponsored the first five amendments; all were adopted and included in the Committee Substitute for House Bill 1115.105 The first two changes, designed to curb the cost of mandatory testing, provided for testing only upon the request of the victim or guardian.106 The next amendment prohibited the use of test

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100. See Fla. HB 1115 (1990); Fla. SB 914 (1990).
102. Id.
104. Id. (comments by Rep. Lois Frankel, Democrat, West Palm Beach).
106. Id.; see also Fla. H.R. Comm. on Health Care, Legis. Task Force on AIDS, tape recording of proceedings (Apr. 24, 1990) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).
results in a criminal proceeding. The fourth exempted from the statute persons who voluntarily underwent testing after arrest for the sexual offense. The fifth amendment provided for disclosure of any subsequent test results obtained within one year of the initial test.

Representative Richard Danzler, a Democrat from Winter Haven, offered the sixth amendment. The amendment provided for testing of persons who had contact with certain public employees (firefighters, paramedics, etc.) that may have resulted in transmission of HIV. After an objection to the amendment for germanity by Representative Frankel and expressions of concern that this amendment would harm the bill's chance of success, Representative Danzler withdrew the amendment.

The Senate Judiciary-Criminal Committee reviewed the Senate version of the bill and adopted all of the changes approved by the House Task Force.

Noting that ignorance is not bliss when there is the possibility of contracting a fatal disease, the Legislature specifically recognized the need to inform victims of sex crimes of the HIV status of the person charged with the offense. Because the state will perform the test on an individual not yet convicted of any crime, a conflict necessarily arises between the rights of victims and the rights of the accused. The Legislature has struggled with the constitutionality of

108. Id.
109. Id.
111. Fla. S. Comm. on Judiciary-Crim., tape recording of proceeding (May 7, 1990) (on file with comm.).
112. During the hearings before the House Task Force on AIDS, a female rape victim described the trauma she endured after her attack. The woman waited for over six months to have the defendant involuntarily tested. The victim then received the results without the benefit of any formal counseling. The only place she knew to turn was the toll free AIDS hotline. As a victim herself, she related to the Task Force the need for both immediate testing of the accused and immediate counseling of victims in conjunction with the dissemination of the HIV test result. Fla. H.R. Comm. on Health Care, House Task Force on AIDS, transcript of testimony (Apr. 1990) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.) (taped statement by "Jane Doe").
114. The statute requires only that the person be charged by information or indictment with certain sexual offenses which involve the transmission of body fluids. Id. § 960.003(2). See infra notes 130-35 and accompanying text; see also Robert C. Waters, AIDS AND FLOR-
testing innocent persons from the outset. A committee analysis of the proposed bill noted the possible conflict with the privacy provisions of the Florida Constitution and recent Florida Supreme Court decisions. Members of the legislative committees also echoed these concerns. Besides raising their own questions, the committees heard testimony from interested persons and agencies. Representatives from the medical community, the ACLU, and other groups expressed concern over testing innocent persons only to gain test results of questionable value to the victim or to the state. In response, the Attorney General’s Office prepared an analysis of the proposed legislation, the ostensible purpose of which was to assure legislators of the testing provision’s constitutionality. Both the House and Senate approved the bill without a dissenting vote. Yet, even staff members of the Governor’s office continued to question the constitutionality of the legislation.

As written, the statute provides that if the victim or the victim’s guardian requests testing and the accused does not voluntarily submit, the court must order the accused to undergo HIV testing. The tested individual must receive face-to-face counseling from the Department of Health and Rehabilitative Services (HRS). The results

IDA LAW § 14.01 (1989 & Supp. 1991) (in the context of health care worker exposure, Waters outlines the body fluids covered by the testing procedures and the testing protocols themselves).


117. See, e.g., Fla. H.R. Comm. on Health Care, Legis. Task Force on AIDS, tape recording of proceedings (Apr. 16, 1990) (available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.).

118. See supra notes 114-15 and accompanying text.


121. See Internal Memorandum prepared by Gregory C. Smith, Legal Analysis of Legislation CS/HB 1115, Office of the Gov. (June 25, 1990) (copy on file with author) (at the bottom of the form is a handwritten note: “This has real constitutional problems!”).

122. Id.; see also FLA. STAT. § 960.003(2) (Supp. 1992).

123. FLA. STAT. § 960.003(3)(b) (Supp. 1992). The statutory counseling requirements of
of the test must then be disclosed to the accused and, upon request, to the party that requested the test be performed. The disclosure of test results to a third party departs from the confidentiality requirements imposed in 1988. Nevertheless, the intentional, unauthorized disclosure of test results remains a criminal offense. Although lawmakers found these measures adequate to safeguard the privacy of the information, questions remain as to the role such information may inadvertently play in the criminal justice system.

section 381.004(3)(e), Florida Statutes, provide:
(e) No test result shall be revealed to the person upon whom the test was performed without affording that person the immediate opportunity for individual, face-to-face counseling about:
1. The meaning of the test results;
2. The possible need for additional testing;
3. Measures for the prevention of the transmission of the human immunodeficiency virus infection;
4. The availability in the geographic area of any appropriate health care services, including mental health care, and appropriate social and support services;
5. The benefits of locating and counseling any individual by whom the infected individual may have been exposed to the human immunodeficiency virus infection and any individual whom the infected individual may have exposed to such human immunodeficiency virus infection; and
6. The availability, if any, of the services of public health authorities with respect to locating and counseling any individual described in subparagraph 5.

Of course, the effectiveness of these provisions will rest, in great part, on the ability of the individual counselor to communicate the information in a understandable and meaningful manner. However, these provisions appear to address the concerns of victims, such as Jane Doe, who received little or no information with the results of the accused's HIV test. See supra note 112.


For an overview of counseling guidelines given to health care professionals in Florida, see STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE HEALTH OFFICE AIDS PROGRAM, FLORIDA'S OMNIBUS AIDS ACT: A BRIEF LEGAL GUIDE FOR HEALTH CARE PROFESSIONALS (September 1990).

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125. Id.
127. FLA. STAT. § 381.609(6)(b) (Supp. 1990) (unauthorized, intentional disclosure is a second degree misdemeanor).
128. See Mary C. Morgan, The Problems of Testing for HIV in the Criminal Courts, JUDGES' J., Spring 1990, at 22, 68-69. The knowledge that a defendant is infected with the virus may result in a particular judge giving the defendant less than impartial treatment. Id. This concern, however, should not be restricted to knowledge about a defendant's HIV status. The need for judges to maintain their impartiality and set aside personal prejudice must be a
2. The 1993 Amendment - The Shotgun Approach

In 1993, the Legislature quietly amended section 960.003, *Florida Statutes*, to substantially broaden the class of persons subject to HIV testing pursuant to an arrest or charge by information. 129 Although section 960.003 previously governed only those charged with committing sexual offenses, the amended statute now purports to authorize testing for HIV of individuals charged with any criminal offense which involves the transmission of body fluids. 130 The statute pres-

cornerstone of the criminal system. Of course, the nature of AIDS and its fatal consequences separates it from other sexually transmitted diseases. Yet, judges are continually bombarded with material that could cause them to be less than partial (e.g., past convictions, out of court statements, inadmissible yet highly prejudicial evidence, outrageous courtroom conduct). In those cases, judges should recuse themselves and allow another member of the bench to carry out the will of the people and protect the rights of the accused.

130. The amended version of section 960.003 provides for HIV testing in situations involving most physical assault crimes contained in section 775.0877, *Florida Statutes*. Section 775.0877 states:

Criminal transmission of HIV; procedures; penalties.—

(1) In any case in which a person has been convicted of or has pled nolo contendere or guilty to, regardless of whether adjudication is withheld, any of the following offenses, or the attempt thereof, which offense or attempted offense involves the transmission of body fluids from one person to another:

(a) Section 794.011, relating to sexual battery,
(b) Section 825.04, relating to incest,
(c) Subsections (1), (2), and (3) of s. 800.04, relating to lewd, lascivious, or indecent assault or act upon any person less than 16 years of age,
(d) Section 784.011, s. 784.07(2)(a), and s. 784.08(2)(d), relating to assault,
(e) Section 784.021, s. 784.07(2)(c), and s. 784.08(2)(b), relating to aggravated assault,
(f) Section 784.03, s. 784.07(2)(b), and s. 784.08(2)(c), relating to battery,
(g) Section 784.045, s. 784.07(2)(d), and s. 784.08(2)(d), relating to aggravated battery,
(h) Section 827.03, relating to aggravated child abuse,
(i) Section 827.04, relating to child abuse,
(j) Section 827.071, relating to sexual performance by person less than 18 years of age,
(k) Section 796.03, s. 796.07, and s. 796.08, relating to prostitution,
(l) Section 381.004(11)(b), relating to donation of blood, plasma, organs, skin, or other human tissue, the court shall order the offender to undergo HIV testing, to be performed under the direction of the Department of Health and Rehabilitative Services in accordance with s. 381.004, unless the offender has undergone HIV testing voluntarily or pursuant to procedures established in s. 381.004(3)(i) 6. or s. 951.27, or any other applicable law or rule providing for HIV testing of criminal offenders or inmates, subsequent to his arrest for an offense enumerated in paragraphs (a)-(l) for which he was convicted or to which he pled nolo contendere or guilty. The results of an HIV test performed on an offender pursuant to this subsection are not admissible in any criminal proceeding arising out of the alleged offense.

Ch. 93-227, 1993 Fla. Laws 2343 (creating FLA. STAT. § 775.0877). Although paragraph (1) of this statute does not authorize testing individuals charged with these crimes, section 960.003, *Florida Statutes* still authorizes such preconviction testing.
ently takes a shotgun approach toward alleviating the mental distress that victims of certain attacks may suffer by mandating testing in a wide category of physical assault. Importantly, by substantially broadening this statute, the Legislature may have weakened arguments supporting the constitutionality of HIV testing. The legislative records neither clearly establish the need for the amendment nor disclose the intent of the Legislature in adopting it. Although the court in Schmerber v. California held that a routine blood test is not a substantial intrusion into one’s bodily integrity, when that test bears no relation to evidence prepared for criminal prosecution, the constitutionality of any such test or search becomes substantially more suspect.

After limited discussion by the House Criminal Justice Committee, the bill was withdrawn from House Appropriations and sent to the House floor on March 17, 1993. In the Senate, the bill was initially referred to the Criminal Justice and Appropriations Committees; however, it was withdrawn from the Committees and sent to the floor on April 2, 1993. This minor amendment to section 960.003 passed both houses of the legislature without a dissenting vote and became law without the Governor’s signature.

III. THE STANDARD OF REVIEW

Compulsory AIDS testing statutes contemplate the compulsory withdrawal of blood from an individual not convicted of a crime and
a release of test results on that sample to victims or their families.\textsuperscript{136} Undoubtedly, this raises problems of fundamental privacy interests which are protected by the Fourth Amendment to the United States Constitution\textsuperscript{137} as well as amendments to the \textit{Florida Constitution}.\textsuperscript{138} In 1966, the United States Supreme Court dealt with the constitutionality of withdrawing blood from an accused to determine if the individual was intoxicated while driving.\textsuperscript{139} Beyond the actual testing procedure, the disclosure of the test results to a third party also implicates privacy concerns.\textsuperscript{140} In the context of obtaining evidence for a criminal proceeding, the Court recognized the overriding purpose of the Fourth Amendment to protect a person’s ‘‘privacy and dignity.’’\textsuperscript{141} When such a fundamental right is at stake, the courts must determine if a compelling governmental or state interest exists, which

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  \item \textsuperscript{136} See supra notes 112-21 and accompanying text.
  \item \textsuperscript{137} U.S. CONST. amend. IV.
  \item \textsuperscript{138} FLA. CONST. art. I, §§ 12, 23. Notably, the people of the State of Florida expressly adopted the United States Supreme Court decisions regarding the application of the Fourth Amendment to searches and seizures. See Bernie v. State, 524 So. 2d 988 (Fla. 1988). As could be expected, however, the wording of this amendment is subject to rather wide variations of interpretation. Although the opinion held that the \textit{Florida Constitution} brings the ‘‘state’s search and seizure laws into conformity with all decisions of the United States Supreme Court rendered before and subsequent to the adoption of that amendment,’’ several justices took exception to this interpretation. \textit{Id.} at 992-96.
  \item \textsuperscript{139} Schmerber v. California, 384 U.S. 757 (1966). The court noted that the taking of blood itself did not give rise to a finding of an unreasonable intrusion into one’s privacy. See \textit{id.} at 771 n.13 (quoting Breithaupt v. Abram, 352 U.S. 432, 436 (1957)).
  \item \textsuperscript{140} The Supreme Court of Florida has also recognized the privacy implications of public disclosure of private information. In \textit{Rasmussen}, the court evaluated the need to maintain the confidentiality of blood donor records in the face of the threat of AIDS contamination of the state’s blood supply. \textit{Rasmussen} v. South Fla. Blood Serv., 500 So. 2d 533 (Fla. 1987). There, the court found that a blood donor’s rights were adequately protected through procedural safeguards. However, the court noted the continuing need to apply the compelling state interest standard to questions involving privacy rights found in the Florida Constitution. \textit{Id.} at 535. For a examination of various methods courts have employed to evaluate a compelling state government interest see Stephen E. Gottlieb, \textit{Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication}, 68 B.U. L. REV. 917 (1988).
  \item \textsuperscript{141} \textit{Schmerber}, 384 U.S. at 767 (citing Wolf v. Colorado, 338 U.S. 25, 27 (1949)). These concerns continue to dominate privacy issues in the administrative and regulatory realm as well. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989) (need to conduct suspicionless searches by the U.S. Customs programs outweighs individual privacy rights); Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 616 (1989) (citations omitted) (merely ‘‘obtaining and examining evidence’’ may subject government action to Fourth Amendment scrutiny if it violates an individual’s reasonable expectation of privacy).
\end{itemize}
cannot be accomplished by a less intrusive means, that outweighs the individual rights in jeopardy. 142

"The fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . . ." 143 Thus, under the aegis of the United States Constitution, all citizens are protected from unreasonable government intrusions into their interest of privacy. 144 To determine the reasonableness of a search, the court must look to the context within which the state conducts the search. 145 Even without a warrant or probable cause, a search may be reasonable and meet Fourth Amendment standards. 146 Consequently, the mandate of the Fourth Amendment has been characterized as not denouncing all searches, rather only those that are unreasonable. 147 Part of the reasonableness inquiry must include an examination of the discretion allowed government officials. 148 Of course, the challenge is determining where to draw the line between reasonable and unreasonable searches. 149

Although much of the case law in this area was developed in the context of obtaining evidence in a criminal proceeding, the Supreme Court, in Skinner v. Railway Labor Executives' Assoc., 150 considered the constitutional implication of requiring persons to submit to urinalysis and blood testing where the results of the test are to be used for administrative rather than evidentiary reasons. In Skinner, the Court was confronted with a challenge to regulations of the Federal
Railway Administration (FRA) which required employees to submit to alcohol and drug tests if involved in train accidents. Based on evidence of significant problems with on-the-job intoxication, the FRA promulgated regulations which mandated testing immediately after an accident with limited exceptions. The regulations were designed to ensure safety rather than promote prosecutions. Thus, in this noncriminal context, the Court applied a balancing test to determine if the search was reasonable.

The examination of reasonableness does not turn on the presence or absence of a warrant, probable cause, or even individualized suspicion. Rather, the courts must weigh both the privacy interest at stake and the government interest being furthered by the search. In Skinner, the Court noted that the context in which the individuals were to be tested was one which produced little interference with the individual's privacy and therefore was not unreasonable. The procedure for withdrawing blood samples also did not constitute a major intrusion into one's personal life. However, as no checklist to

151. Id. at 606.
152. Id. at 609-11. If a railroad representative determines that a particular employee played no role in the cause of an accident, then that employee need not be tested. Id. at 609-10 n.2. Additionally, if employees refused to submit to testing, they were presumed to be impaired at the time of the accident. Id. at 611.
153. Id. at 620.
154. Id. at 620-22.
155. Id. at 624-25. Further, the Court has noted that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [this Court has] not hesitated to adopt such a standard." New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).
156. Skinner, 489 U.S. at 624-25. As the Court later noted:

[j]our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989) (citation omitted) (emphasis added). The need to inform victims of the HIV status of the accused, based on the amendment to the Florida State Constitution, appears to be a state need which is "beyond the normal need for law enforcement." See id.
158. Skinner, 489 U.S. at 624-25 (citing Schmerber v. California, 384 U.S. 757, 771 (1966) for the proposition that such "tests are commonplace in these days of periodic physical examinations ....")

The Skinner Court went on to note that the employees of a highly regulated industry enjoy a diminished expectation of privacy. Id. at 627. This Article does not suggest that the expectation of privacy of defendants is somehow diminished due to their incarceration. It would not bode well for this society to take the position that persons under confinement are not entitled to equal constitutional protections before conviction simply by virtue of their arrest. This
follow to evaluate the reasonableness of this type of search exists, courts must look to the specific circumstances in which the search takes place to decide if it is an appropriate means to further a compelling governmental interest.\(^{159}\)

IV. THE COMPELLING STATE INTEREST

As noted above, the state must prove that its proposed infringement on a fundamental right is the least intrusive means to further a compelling state interest.\(^{160}\) As the Florida Legislature stated, the purpose of section 960.003 is to inform the victim at the earliest possible opportunity of the HIV status of the accused so that the victim may avoid undue "mental anguish."\(^{161}\) Further, lawmakers noted a medical benefit from early diagnosis of the disease in both the suspect and the victim.\(^{162}\) Whether these goals are compelling state interests, of course, can only be determined from the particular context in which the state is trying to achieve them.\(^{163}\)

At the heart of the controversy is what value, if any, can be placed on testing the accused.\(^{164}\) The Centers for Disease Control (CDC) has noted that in the area of occupational exposure of health care workers, it is important to test both the worker and the source individual.\(^{165}\) At the outset, one must recognize that the medical community places a great deal of emphasis on the need for early treatment of AIDS.\(^{166}\) However, there are at least five basic scenarios which one seems especially clear where there is no evidentiary reason to invade the individuals privacy before guilt or innocence can be established. However, the level of further intrusion vis-a-vis a blood test, after one has been arrested and confined as a suspect is a matter for examination. See supra notes 141-49 and accompanying text; see also infra note 178 and accompanying text.


160. See supra notes 128-52 and accompanying text.


163. See supra notes 145-49 and accompanying text.

164. See, e.g., Morgan, supra note 128; see also supra note 159 and infra notes 165-71 and accompanying text.


166. See D. Peter Drotman, Earlier Diagnosis of Human Immunodeficiency Virus (HIV) Infection and More Counseling, 110 ANNALS INTERNAL MED. 580 (1989). Among the advantages of early testing are the prevention of further transmission of the disease and the commencement of treatment. Id. at 681; Occupational Exposure, supra note 165, at 2-3. See also National Inst. Allergy & Infectious Diseases, AZT Therapy for Early HIV Infection, 8 CLINICAL COURIER 1, 1 (1990); Frank S. Rhame & Dennis G. Maki, The Case for Wider Use of Testing for HIV Infection, 320 NEW ENGL J. MED. 1248, 1249 (1989). Medical professionals have yet to assess with any certainty the usefulness of early treatment of individuals possibly
must consider when evaluating the risk of transmission: (1) the accused is not the individual who perpetrated the crime; (2) neither the accused nor the victim may be infected with HIV; (3) either the accused or the victim may be infected with HIV but the virus has not developed to a point where it will be detected during testing; (4) either the accused or the victim has the virus, but it was not transmitted during the commission of the crime; or (5) either the victim or the accused contracted the disease after the commission of the crime.

The above scenarios illustrate situations where the test may give the victim misleading information. It normally can take up to six months after infection for the HIV virus to be detected by standard testing procedures. These procedures themselves are not 100% reliable. If the victim is told that the accused tested negative, it does not mean that the victim did not contract HIV. Conversely, if the accused’s results are positive, it is not necessarily true that the disease was transmitted to the victim during the attack. The unshakable aspect of these test results, however, is that they represent some information which victims can use to make very serious decisions about their future. There is no doubt that in many circumstances, exposed to HIV with zidovudine (AZT). In the setting of an occupational exposure, CDC recommends the physician conduct a risk assessment of HIV infection. Occupational Exposure, supra note 165, at 7.

Risk evaluation should also include an assessment of factors that may increase or decrease the probability of HIV transmission after an individual occupational exposure. These factors are not well understood, but include the likelihood that the source fluid contained HIV and probably also the concentration of HIV in the source fluid, the route of exposure, and the volume of fluid involved.

Id. (emphasis added). Based on data concerning animal studies, the CDC recommended that if the decision is made to use AZT following a possible exposure to HIV, it “should be initiated promptly.” Id. The CDC also recommended that the exposed worker receive counseling which would include the risk that the exposed individual acquired HIV infection and information regarding the adverse effects of AZT as well as the diversity of opinions as to AZT’s effectiveness. Id. at 7-8. Although this study was directed towards individuals exposed to HIV in an occupational setting, it would seem that these guidelines should also apply to persons possibly exposed to HIV infection through physical attack.

167. Centers for Disease Control, Interpretation and Use of the Western Blot Assay for Serodiagnosis of Human Immunodeficiency Virus Type 1 Infections, 38 MORBIDITY & MORTALITY WKLY. REP. 1, 5 (1989) [hereinafter Interpretation].


170. Id.

171. To be reasonable, the search need not net conclusive evidence of the information sought.

[I]t is universally recognized that evidence, to be relevant to an inquiry, need not
even if the attacker tests positive for HIV, the likelihood that the disease was transmitted is remote. The basic message of the medical literature on the likelihood of transmission is that although the risk of infection for any given contact may be low, a risk nonetheless exists.

Although the extent of HIV transmission through sexual assault of children and adults is certainly less than other modes of transmission, the assumption that HIV transmission by this route is minimal or nonexistent is premature. . . . [It] is imperative that clinicians managing the victims of sexual assault formulate and follow formal or informal HIV antibody testing protocols, rather than deny the potential existence of such a tragic problem.

It is important to note that this statement is not a call for testing of the accused, but rather a recognition of both the uncertainty attached to transmission of the disease through sexual assault and the imperative not to dismiss the possibility of infection.

Additionally, testing the victim is probably of little use to the physician other than to determine if the victim was previously exposed to the virus. The chances for infection from a single exposure are remote, but "[re]petitive exposures, as might occur in the sexually abused child or adolescent, would represent a different set of cir-

conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination . . . [of the fact at issue] more probable or less probable than it would be without the evidence."


See also Occupational Exposure, supra note 165, at 2-3.


cumstances with increased risk." The remoteness of possible transmission represents another factor for the victim to consider and is not a substitution for the test results.

A person at risk of HIV infection must decide what steps to take to prevent the transmission of the disease to others. That person must also decide what medical course of treatment, if any, to undergo. These types of decisions are undoubtedly difficult. The knowledge of the status of the accused offers victims at least a scintilla of information from which to begin a process which should involve both the counseling required by law and necessary discussions with a physician. Of course, the inquiry returns to evaluating the nature of the state interest in this context and the reasonableness by which the state seeks to reach its goal.

An additional concern with regard to delaying HIV testing until an accused is convicted is that incarcerated sex offenders are often brought into a "correctional system that has high numbers of prisoners with acquired immunodeficiency syndrome (AIDS)."

Given the actual, albeit limited, value of knowing the HIV status of the accused, the court must consider whether the testing is reasonable. When individuals are arrested and confined as suspects for crimes, then, a fortiori, they must bear certain infringements on their constitutional rights—not the least of these being confinement in a correctional facility. Assuming, as we must, that these persons arrested are innocent, the government has already made a substantial intrusion into their privacy by detaining and possibly searching them incident to a lawful arrest. What further intrusion then does the blood test contemplated by the statute impose? As the Court in *Schmerber* noted, blood tests do not represent a significant level of intrusion into one's privacy.

Accordingly, the taking and testing of blood should not be considered a serious intrusion upon the accused. When furthering the im-

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175. *Id.* at 645.

176. See, e.g., *Occupational Exposure, supra* note 165.

177. See generally Paul A. Volderding et al., *Zidovudine in Asymptomatic Human Immunodeficiency Virus Infection*, 322 NEW ENGL. J. MED. 941 (1990) (the administration of AZT therapy in persons who show no symptoms of AIDS can slow the onset of the illness); Gerald H. Friedland, *Early Treatment for HIV—The Time has Come*, 322 NEW ENGL. J. MED. 1000 (1990). Although these authorities do not address administering treatment prior to testing positive for HIV, they do underscore the possibility that beginning AZT treatment at the earliest stages of the infection increases the likelihood that the disease will progress at a slower than expected rate.


179. Schmerber v. California, 384 U.S. 757, 771 (1966); *see also supra* notes 158-59 and accompanying text.
portant and compelling governmental function of obtaining evidence, defendants must submit various body and fluid samples and undergo certain procedures. Both the Florida Rules of Criminal Procedure and the victims' rights amendment of the Florida Constitution limit the actions to those within constitutional boundaries. If obtaining this information for victims is a compelling state interest, then obtaining it in a manner similar to that used in obtaining other physical evidence should produce no greater threat to the rights of the accused than do the current criminal procedures. Nevertheless, before a court will compel the defendant to provide physical evidence, there must be factual allegations that the “desired evidence” will be found. This logic is based on the fundamental principle that the “interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained.” This reasoning does not prohibit the testing of accused for AIDS because the “desired evidence” is not that the accused has the disease; rather, the information sought is the defendant’s test results. Thus, there should be no required showing that the defendant may have the disease. Indeed, such a requirement could render section 960.003 ineffective.

The inquiry does not end here, however, because the statute requires the disclosure of test results to a third party, the victim. If such a disclosure were wholesale and without restraint, few would fail to see the potential damage to accused individuals who risk having their HIV status publicized. There can be no doubt that the stigma attached to being infected with the AIDS virus is often a cruel, unfair burden placed on victims of the disease. Many people

180. Fla. R. Crim. P. 3.220(c)(1)(G). This rule provides for the taking of blood, hair, and other materials from the body of the accused.
183. Id. (quoting Schmerber v. California, 384 U.S. 757, 769-70 (1966)).
185. As Ryan White described the effect of the treatment he received from others because of his illness: “It hurt. I tried to ignore the name calling.” Keith Greenberg, AIDS Victim Gives Tolerance Lesson, USA Today, June 2, 1988, at 2A.

in our society not only believe that individuals with AIDS are being rightly punished for some aberrant form of behavior, but also do not want to work or live alongside infected individuals. But the Legislature has taken substantial steps to prevent disclosure of the information to any party not authorized by law to receive it. Thus, the State has not given government officials wide or unchecked discretion in disseminating this information. Rather, the rights of the accused are still protected by the threat of criminal sanctions for those who make unauthorized disclosure. Perhaps the penalty of a second degree misdemeanor is insufficient to suppress such disclosures, but surely that decision is within the province of the Legislature and not the courts.

V. THE LEAST INTRUSIVE MEANS

Among the alternatives to preconviction testing of an accused are: (1) test the victim; (2) only test the assailant after conviction; or (3) attempt to alleviate the anxiety of the victim through professional counseling. If the goals of the Legislature are to give victims information with which to make decisions and to attempt to relieve some of the "mental anguish" associated with a sexual assault, then testing the victims is an inadequate method. Regardless of the HIV status of the accused, it is unlikely that the virus will be detectable by testing until possibly up to six months after exposure. Again, although the test results of the accused are not totally reliable, they do provide additional information to the victim. Counseling alone could possibly provide the victim with some relief from anxiety, but as the lawmakers of Florida have stated, the victim has a right to receive the information concerning the accused at the earliest possible time. This concept certainly appears to comport with the victims' rights amendment to the Florida Constitution.

186. See Blendon & Donelan, supra note 185, at 1023-25.
188. Id. § 960.003(3)(a).
189. Id. § 381.004(6)(b).
190. Id. § 960.003(1).
191. See supra notes 166-68 and accompanying text.
Testing only the victim or waiting until a conviction is obtained equates to requiring the victim to live in what could be a unnecessarily high state of anxiety. If the victim does indeed have a right to receive this information at the earliest possible time, then given the minimal further intrusion the test causes the accused and the safeguards against unauthorized disclosure, failing to test the accused at the earliest possible stage frustrates the intent of the Legislature. There is no less intrusive means to support the victims' rights in this unfortunate circumstance.

VI. CONCLUSION

The United States Congress should consider implementation of legislation to encourage states to adopt laws such as the 1990 version of section 960.003, Florida Statutes. Whether or not Congress chooses the Violence Against Women Act as its vehicle is irrelevant. Victims of sexual offenses should be afforded the opportunity to have the alleged offender tested at the earliest opportunity. Waiting for a conviction that may never come is no solution.

The people of the State of Florida spoke loudly and clearly when amending the Florida Constitution to include a provision for victims' rights. Much case law and legislation is devoted to the protection of the accused against state action. Nevertheless, the victims' rights amendment ensures that victims do not get swallowed up and forgotten in the criminal process. Part and parcel of protecting the interests of victims is ensuring that they are adequately informed concerning the serious and potentially life threatening aftereffects of the misfortune they have suffered. While testing the accused for AIDS is not a panacea for the unknown, it does give victims information to use in seeking medical advice and counseling, and in making important decisions about their future.

However, this information is not free. It comes at the sacrifice of certain rights to privacy and rights to be free from governmental intrusion. Yet, the people of Florida have indicated that the rights of victims deserve no less protection than do the rights of the accused. Though not significant, the testing procedure ultimately provides the information which contains the real potential for harm. To reduce the risk of unwanted disclosure, the Legislature has criminalized the unauthorized dissemination of AIDS test results. Consequently, the victim can obtain information which could be invaluable in pursuing treatment, while the private medical information of the accused remains protected by criminal sanctions. Should the sanctions prove insufficient, the lawmakers may make these penalties more severe.
As this Article indicated at the outset, there are no winners in situations such as these. The best the Legislature can do, as it has done, is to further the rights of victims while continuing to protect the rights of the accused. Unfortunately, the 1993 amendment to section 960.003, Florida Statutes, may be unconstitutional since there is little evidence to establish a compelling state interest requiring HIV testing of offenders in the broad classes of crimes enumerated in section 775.0877 (1)(a)(l), Florida Statutes.