

# **MANDATORY HIV TESTING OF ACCUSED RAPISTS: WHOSE RIGHTS ARE WE PROTECTING?**

## **AN ETHICAL AND LEGAL ANALYSIS**

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At times, the law appears confusing and unfair. Criminal defendants receive the strictest of all standards of review: "guilt beyond a reasonable doubt." But why are the accused afforded greater constitutional protections than the victim? One reason may be found by examining the intent of the authors of the United States Constitution. Our founding fathers wanted Americans to escape the kind of persecution suffered under English rule. From its inception, the Constitution and the laws that followed were based on public policy and ethics. This legal precedence is used to interpret new laws. However, because of precedence, laws often do not reflect the prevailing public opinion of all Americans. Law may not always make sense, but it plays an important role in codifying and uniformly resolving many dilemmas, including biomedical and ethical issues.

One such dilemma that has come under increasing scrutiny is whether an alleged sex offender may be forced to submit to an HIV test upon the victim's request. Although the victim may wish to know whether she has been exposed to the deadly virus, the offender has a constitutional right against unreasonable searches and seizures. Using the hypothetical in Section II, this paper will attempt to explain and resolve this dilemma through ethical principles. This resolution will then be compared with the numerous statutes that address the issue and the courts' resolutions.

### **I. SALIENT MEDICAL FEATURES**

Since Acquired Immune Deficiency Syndrome (AIDS) was first reported in the United States in 1981, it has become a major worldwide

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epidemic.<sup>171</sup> Since 1991, over 500,000 cases of AIDS have been reported in the United States and more are believed to be infected with Human Immunodeficiency Virus ( HIV), the alleged predecessor to AIDS.<sup>172</sup> HIV is a retrovirus, which means that the virus "reverses the usual flow of genetic information within the host cell."<sup>173</sup> Because the immune system is weakened, simple viruses, bacteria, fungi, and other organisms that are common to the body become harmful.<sup>174</sup> These opportunistic infections cause approximately eighty-eight percent of deaths related to HIV and AIDS, while seven percent are caused by cancer and five percent are due to other causes.<sup>175</sup>

#### A. Transmission

HIV may be transmitted one of three ways: sexual intercourse, transfusion of infected blood products, and perinatal contact. During sexual intercourse, the virus can enter the body through the lining of the penis, vagina, vulva, rectum, or mouth. The infection can also spread among drug users who share needles.

Although HIV has been detected in saliva, laboratory research reveals that saliva has natural compounds that inhibit the infectiousness of HIV and no evidence suggests that HIV is spread this way.<sup>176</sup> HIV is not spread through casual contact or mosquito bites.<sup>177</sup> Also, since blood products are now heat-treated, transmission through blood transfusions is very rare.<sup>178</sup>

#### B. Symptoms

When first infected, those with HIV look and feel healthy. Infected persons then face four symptomatic stages: "acute infection, asymptomatic, chronic or symptomatic, and AIDS."<sup>179</sup>

In three to eight weeks after initial infection, the acute stage may begin to develop.<sup>180</sup> Infected individuals may develop symptoms comparable to "influenza or mononucleosis: fever, sore throat, headaches, and swollen

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<sup>171</sup> See *HIV Infection and AIDS*, [http://www.mediconsult.com/frames/aids/shareware/hiv\\_aids/hivdefine.html](http://www.mediconsult.com/frames/aids/shareware/hiv_aids/hivdefine.html) (visited Apr. 13, 1997).

<sup>172</sup> *Id.*

<sup>173</sup> See GERALD J. STINE, *ACQUIRED IMMUNE DEFICIENCY SYNDROME: BIOLOGICAL, MEDICAL, SOCIAL, AND LEGAL ISSUES* 39 (1996).

<sup>174</sup> *Id.* at 75.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 170.

<sup>177</sup> *Id.*

<sup>178</sup> See *Transmission*, [http://mediconsult.com/frames/aids/shareware/hiv\\_aids/trans.html](http://mediconsult.com/frames/aids/shareware/hiv_aids/trans.html) (visited Apr. 13, 1997).

<sup>179</sup> See STINE, *supra* note 3, at 105.

<sup>180</sup> *Id.*

lymph nodes."<sup>181</sup> During this stage, high levels of viruses are produced and spread through the body.<sup>182</sup>

During the asymptomatic stage, an infected adult may be symptom-free from six months to ten years. In this stage, the virus continues to replicate and destroy white blood cells.<sup>183</sup>

At the chronic or symptomatic stage, the infected "individual develops a variety of symptoms such as fever, weight loss, malaise, pain, loss of appetite, abdominal discomfort, diarrhea, night sweats, headaches, and swollen lymph glands."<sup>184</sup> The lymphatic system breaks down and the individual may develop "thrush, oral lesions, and other fungal, bacterial and/or viral infections."<sup>185</sup>

AIDS itself is actually the collapse of the patient's immune system, with symptoms including an array of opportunistic infections, malignancies, and neurologic manifestations.<sup>186</sup> As of now, AIDS is incurable and fatal.<sup>187</sup>

### C. HIV Testing

There are currently several commercially available means with which to test for HIV infection. Of the two most frequently used tests, neither actually reveals the presence nor absence of the virus itself. Rather, each identifies the antibodies produced by the body's immune system in response to the presence of HIV protein components.<sup>188</sup> Both tests require only a small blood sample; which is generally risk-free and painless.

The enzyme-linked immunosorbent assay (ELISA) is used as an initial screening device.<sup>189</sup> "A blood sample is applied to cultured HIV protein material and a reagent is administered."<sup>190</sup> A spectrophotometer measures changes in the reagent's color, which show the level of HIV antibodies.<sup>191</sup> If the ELISA gives a positive result, another one is performed.<sup>192</sup>

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 106.

<sup>184</sup> *Id.* at 106–09.

<sup>185</sup> *Id.* at 109.

<sup>186</sup> *Id.* at 110.

<sup>187</sup> See Mueller, *The Epidemiology of the Human Immunodeficiency Virus Infection*, 14 LAW, MED. & HEALTH CARE 250 (1986).

<sup>188</sup> See *Virgin Islands v. Roberts*, 756 F. Supp. 898, 899 (1991) (citing Centers for Disease Control, *Update: Serologic Testing for Antibody to Human Immunodeficiency Virus*, 36 MORBIDITY & MORALITY WEEKLY REP. 833 (1988) (describing technical aspects of testing)).

<sup>189</sup> *Roberts*, 756 F. Supp. At 899.

<sup>190</sup> *Id.* at 899–900.

<sup>191</sup> *Id.* at 900.

<sup>192</sup> *Id.*

If the ELISA tests yield a double positive, the Western Blot test is used to confirm these results.<sup>193</sup> A blood sample is added to nitrocellulose paper that hold HIV component proteins.<sup>194</sup> If the blood sample contains HIV antibodies, the antibody will bond with the individual viral proteins, and will be "sandwiched by an antibody probe that is radioactive or bound to the enzyme."<sup>195</sup> The paper is then exposed to X-ray film and "hot spots" on the film indicate the presence of antibody.<sup>196</sup> The Western Blot is more specific and costly than the ELISA.<sup>197</sup>

Other less intrusive tests are available. Since saliva and urine also contain HIV antibodies, tests have been developed that require no blood sample.<sup>198</sup> Although AIDS tests are generally accurate, false positives and false negatives can occur.<sup>199</sup> A patient's medical condition or laboratory error can cause a false positive.<sup>200</sup> Also, false negatives can arise if the test is taken too soon after infection. This is because too few HIV antibodies have been produced in the body.<sup>201</sup> "Studies show that 50% of HIV infected persons seroconvert (demonstrate measurable HIV antibodies) by 3 months after HIV infection and 90% seroconvert by 6 months . . . [while] a small amount seroconvert at 1 year or longer."<sup>202</sup>

Health care providers are required in every state to report new cases of AIDS to their state health departments.<sup>203</sup> Thirty-five states require them to report cases of HIV infected persons, and twenty-five percent of these states require the patient's name.<sup>204</sup> Twelve states permit physicians to inform HIV/AIDS patients' partners.<sup>205</sup>

#### D. Treatment

When AIDS and HIV surfaced in 1981, no drugs existed in the United States which combated the deficiencies each caused in the immune system.<sup>206</sup> As of now, the Food and Drug Administration (FDA) has

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See STINE, *supra* note 3, at 335.

<sup>198</sup> *Id.* at 341.

<sup>199</sup> *Id.* at 330.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 344.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

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*See* *Treatment,*  
[http://www.mediconsult.com/frames/aids/shareware/hiv\\_aids/treat.html](http://www.mediconsult.com/frames/aids/shareware/hiv_aids/treat.html) (last visited Apr. 13, 1997).

approved eight drugs.<sup>207</sup> One set of drugs is called reverse transcriptase, which interrupt the early stages of virus replication: AZT (zidovudine), ddC (zalcitabine), ddI (dideoxyinosine), d4T (stavudine), 3TC (lamivudine) and nevirapine.<sup>208</sup> A second set of drugs are protease inhibitors, which "interrupt virus replication at a later step in its life cycle. This group of drugs includes include ritonavir (Norvir), saquinivir (Crixivan) and indinavir (Invirase)."<sup>209</sup> Other drugs may help with opportunistic infections associated with HIV.<sup>210</sup>

None of these drugs cure patients of HIV infection or AIDS, and all have severe side effects.<sup>211</sup> According to Mediconsult.com Limited, "AZT may cause the depletion of red or white blood cells, especially when taken in the later stages of the disease . . . [and] loses its effectiveness after a period of time."<sup>212</sup> Similarly, "DdI can cause an inflammation of the pancreas and painful nerve damage. The side effects associated with protease inhibitors are generally less severe . . . [and may] include diarrhea and other gastrointestinal symptoms."<sup>213</sup>

The use of combined drugs is occasionally effective in reducing the virus to undetectable levels.<sup>214</sup> Researchers have not yet found which combinations are most effective, but all agree that combinations are more effective than the use of any single drug.<sup>215</sup>

#### E. The Societal Aftermath

Many who are diagnosed with HIV or AIDS suffer a "social death." Society does not reject persons with cancer, diabetes and other health problems, but those with AIDS are treated as social pariahs. Much of the discrimination is due to the transmission of the disease and the people who are typically most at risk: homosexuals, prostitutes and intravenous drug users. Some people believe that the infected person is to blame for his or her disease.<sup>216</sup>

Although AIDS cannot be contracted through casual contact, many Americans still feel at high risk for the disease.<sup>217</sup> A 1987 Gallop poll

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> See Medical Education Network, *New Frontiers in HIV II: Update on Combination Regimens*, [http://www.mediconsult.com/aids/shareware/11th\\_int\\_conf/update\\_comb.html](http://www.mediconsult.com/aids/shareware/11th_int_conf/update_comb.html) (last visited Apr. 13, 1997).

<sup>215</sup> *Id.*

<sup>216</sup> See WILLIAM A. RUSHING, *THE AIDS EPIDEMIC: SOCIAL DIMENSIONS OF AN INFECTIOUS DISEASE* 165 (1995).

<sup>217</sup> *Id.* at 151.

discovered that "20 percent of a national sample were 'very concerned' that AIDS would strike them personally and that another 22 percent were a 'little concerned.'"<sup>218</sup> Other polls showed similar findings.<sup>219</sup> These fears may be unrealistic since only about 0.57 percent of men and 0.15 percent of women may contract the disease.<sup>220</sup>

The history of AIDS has seen avoidance and mistreatment of people infected with HIV or AIDS. In the mid-1980s, surveys showed that many Americans believed that children who have AIDS should not be allowed to attend school with other children.<sup>221</sup> Some parents boycotted schools to protest HIV-infected children attending school. In 1985, Ryan White, a hemophiliac child with HIV, was forced to go to court to fight for his right to attend public school.<sup>222</sup> Reports appeared of the mistreatment of those infected or in high-risk groups: "landlords were evicting gay tenants, and . . . health care workers were refusing to have contact with persons who had AIDS . . . [and] funeral homes denied proper services to persons who had died from AIDS."<sup>223</sup> The *Wall Street Journal* reported the brutal beating of a Texas man with AIDS.<sup>224</sup> The man was told by his assailants that once they were done with him, they would kill his wife and kids in case they were also infected.<sup>225</sup> The man subsequently moved to West Virginia, and after swimming in a public pool, "mothers fled with their children and the pool was closed."<sup>226</sup> In 1989, an infected man was prohibited from coaching his daughter's intramural basketball team.<sup>227</sup> In Hinton, West Virginia, a woman was shot three times and dumped on a remote road.<sup>228</sup> Another was beaten and run over by a car.<sup>229</sup> Each was known to be infected.<sup>230</sup>

## II. CASE SCENARIO

Hope B. is a 22-year-old college student who is interested in a career in modeling. On April 8, 1997, she met Peter D. in a local bar who portrayed himself as a photographer with connections. He offered to photograph her and assist her with her career. When he took her back to his apartment, sexual intercourse took place. Later, Hope accused Peter of

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 154 (citing a Wall Street Journal/NBC nationwide poll of January 1987).

<sup>222</sup> *See id.* at 154.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 155.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *See* STINE, *supra* note 3, at 394.

<sup>228</sup> *Id.* at 397.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

raping her. Although he has not yet been convicted, she wishes to have him tested for HIV since she came into contact with his bodily fluid. Peter states that the intercourse was consensual and refuses to consent to a test.

### III. ETHICAL PRINCIPLES

Although there are far more principles available, this paper will discuss utilitarianism, autonomy, beneficence and justice as they apply to the case scenario discussed above. While some of these ethical models work together, others conflict.

#### A. Utilitarianism

The principle of utilitarianism generally mandates that "the right act in any circumstance is the one that produces the best overall result . . . [giving] equal weight to the interests of each affected party."<sup>231</sup> Utilitarians evaluate morality by the consequences of different available courses of action.<sup>232</sup> The goal is to promote the welfare of all.<sup>233</sup>

##### 1. Hope B.'s Interest

Hope, the alleged victim, wishes that the test be conducted so that her anxiety about HIV exposure may be alleviated. Not only does she fear her possible exposure to HIV, but these fears will also affect how she conducts her sex life. If she has been infected with the virus, she could further expose any potential sexual partners to the virus. In addition, early detection of the virus will lead her to early treatment. Although there is no cure for HIV and AIDS, new drug therapies have helped some patients halt or slow down the progress of the disease, possibly prolonging the functioning of their immune systems and their lives.

##### 2. The State's Interest

Hope's interest is similar to the interests of the state in mandatory testing. The state wishes to protect victims of sexual assault and the health and safety of its citizens.<sup>234</sup> The information may help curb the transmission of HIV and aid in effective prison and probation management of the offenders, including treatment and counseling.<sup>235</sup> Once Hope and Peter know whether or not they are infected with the virus, they may take the proper precautions to prevent the further spread of the disease.

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<sup>231</sup> TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 47 (4th ed. 1994).

<sup>232</sup> *Id.* at 49.

<sup>233</sup> *Id.* at 55.

<sup>234</sup> See FLA. STAT. ANN. § 960.003(1) (West Supp. 1994).

<sup>235</sup> See *Virgin Islands v. Roberts*, 756 F. Supp. 898, 903 (1991).

### 3. Peter's Interest

On the other hand, Peter, the accused, has a privacy interest in his health and body. Even though the administration of the blood test is simple and relatively painless, the results of the test may cause Peter mental and emotional pain. He may not want to know the results. Not only will he find out his status, but so will Hope and the health department. A positive result for HIV often means "social death" to the infected person. Although HIV is transmitted through very limited means, a large portion of the American population fears that AIDS is more contagious than the medical community asserts. Much of the prejudice afforded to HIV positive persons comes from its historical association with sexuality, narcotics use and other disenfranchised groups.<sup>236</sup> The infected person feels condemned and is treated as untouchable.

### 4. Probable Consequences

Utilitarians would evaluate this case "in terms of the consequences of the different courses of action open" to the state.<sup>237</sup> There are only two avenues available: order the test or do not order the test. The goal is to "find the greatest good by balancing the interests of all affected persons."<sup>238</sup> Therefore, the probable outcomes must be evaluated.

*Outcome #1: The test is not conducted.* If the test is not conducted, neither Hope nor Peter will know their HIV status. Although that will meet Peter's interests, it will not meet Hope's nor the state's.

*Outcome #2: The test is conducted and the results are negative.* A negative test result may meet Hope's interest by alleviating some of her anxiety. However, since a false negative result may occur for a period of three months to a year, she would still have to be retested in another six months to be certain that she was not infected.<sup>239</sup> The information may end up being useless. Hope would still have to take precautions to avoid transmitting the virus until she has been tested again. To meet its interests, the state would have to order Peter to be retested in six months.

Although this result does not meet Peter's interest, it also does not harm him. Although his privacy interest has been violated, he will not suffer the social death associated with HIV infected persons.

*Outcome #3: The test is conducted and the results are positive.* Even if Peter is infected, Hope may still not have been. She would have to go through the same battery of tests to be sure. The result would place Hope's physician on notice and allow them to discuss her options for treatment

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<sup>236</sup> See generally RUSHING, *supra* note 47, at 165.

<sup>237</sup> BEUCHAMP & CHILDRESS, *supra* note 61, at 49.

<sup>238</sup> *Id.*

<sup>239</sup> See STINE, *supra* note 3, at 330.

and precautionary measures she must take to avoid further spread of the disease.

Unfortunately, Peter may then suffer the social death if others were to find out the result. Although treatment was not an interest of Peter, performing the test would allow him to receive treatment as early as possible and would be in his best interest.

A positive result would put both the state and the parties on notice of their condition. If the information is acted upon responsibly, further transmission of HIV may be halted. It would also aid the state in its retention of Peter should he be convicted and imprisoned.

## 5. The Greatest Good

If the test is not conducted, then only Peter's subjective interests are met. If he is infected, it is objectively in his best interest to be tested so that he may receive proper treatment. The social death may be avoided by restricting disclosure of the results to Peter, Hope and the state. Although the test may yield a false negative and a positive result is not conclusive of Hope's status, the results may alleviate her anxiety. She could then take proper precautions to avoid transmitting the virus and discuss her options with her physician. The state's interest in curbing the transmission may better be met if the test is conducted, as well. The greatest good would come from conducting the test.

### B. Autonomy

Although utilitarianism has many strengths, it often conflicts with another respected principle - autonomy. Autonomy may be defined as the "personal rule of the self that is free from both controlling interferences by others and from personal limitations that prevent meaningful choice . . . liberty and the capacity for intentional action are two essential conditions."<sup>240</sup> Autonomy means acting intentionally, with understanding and without controlling influences.<sup>241</sup>

"Being autonomous is not the same as being respected as an autonomous agent."<sup>242</sup> To respect autonomy is to "acknowledge that person's right to hold views, to make choices, and to take actions based on personal values and beliefs."<sup>243</sup> The right to autonomy has been extended to self-governance, liberty rights, privacy, individual choice and freedom of choice. Although there are differing interpretations of autonomy, it may be summed up as "[a]utonomous actions should not be subjected to

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<sup>240</sup> BEAUCHAMP & CHILDRESS, *supra* note 61, at 121.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 125.

<sup>243</sup> *Id.*

controlling constraints by others . . . so long as their thoughts and actions do not seriously harm other persons"<sup>244</sup>

Immanuel Kant argued that "respect for autonomy flows from the recognition that all persons have unconditional worth . . . [t]o violate a person's autonomy is to treat that person merely as a means" to another's goal.<sup>245</sup> John Stuart Mill argued that persons should be able to shape their own lives as long as they do not interfere with the autonomy of others.<sup>246</sup>

If the state must respect Peter's right to autonomy, he cannot be forced to submit to the test. He would have the right to determine what is to be done to his body. Also, disclosing information about his medical condition would violate his autonomy. By refusing to be tested, Peter has not interfered with Hope's autonomy; she has the right to have herself tested.

However, if he had raped Hope, Peter may have lost his right to autonomy. By raping her and causing her to come into contact with his bodily fluid, how could he now argue that he has a right to autonomy in those fluids? By refusing to be tested, Hope is harmed both mentally and possibly physically. He may be preventing her from receiving timely results and treatment.

At this time, Peter has only been charged with rape; he has not been tried. The state will not know prior to the test whether or not Peter raped Hope. Therefore, there is no reason to believe, at this time, that Peter has lost his right to autonomy.

### C. Beneficence

Not only does morality dictate that we treat others autonomously, but we must also contribute to their welfare and refrain from harming them.<sup>247</sup> This principle forms the basis of beneficence - the "moral obligation to act for the benefit of others."<sup>248</sup> Beneficence is often encompassed in the principle of utilitarianism, but may conflict with the right to autonomy and justice.

There is a distinction between *specific* and *general* beneficence. Specific beneficence is directed at parties with whom there is a special relationship, such as family, friends, patients, etc.<sup>249</sup> General beneficence is directed beyond this circle. In the case scenario, it may be argued that

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<sup>244</sup> *Id.* at 126.

<sup>245</sup> *Id.* at 125.

<sup>246</sup> *Id.*

<sup>247</sup> *See id.* at 260.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 263.

the state has a special relationship with its citizenry and therefore must act to the benefit of both Hope and Peter.

To benefit Hope, the test must be performed. A negative result could alleviate some of her fears, even though the result may be a false negative. She would still have to be tested six months later, but her fears would be greatly reduced. A positive result would allow her to seek early treatment, which would increase her chances of successful therapy.<sup>250</sup>

Unfortunately, the test may both harm and benefit Peter. A negative result would alleviate any fears he had of infection, but a positive result would harm him mentally. He may become severely depressed or suffer mistreatment by others. However, Peter may also benefit from a positive result. He could benefit from the test in one of two ways. First, he could begin treatment and counseling. Second, if he is convicted of rape, the correctional facility will then be on notice and in a better position to care for his needs. This notice benefits the state as well.

Since all parties may receive some benefit from the results of the test, the theory of beneficence would dictate that the test be performed, although it would violate Peter's autonomy. Peter's harm may be alleviated by limiting the disclosure of his condition to himself, Hope and the proper state officials.

#### D. Justice

Often times, the term justice is equated with the legal system. Yet, justice plays a strong role in all aspects of life. How can ten percent of the population live with such luxuries as two cars and two televisions while some cannot even afford to keep a roof over their heads? The principle of justice involves what is "fair, equitable and appropriate treatment in light of what is due or owed to persons."<sup>251</sup>

Hope may be the victim of a violent crime, the result of which may be her slow and painful death. Is it fair that an innocent person must suffer the anxiety of a possible terminable disease because her accused rapist will not consent to an HIV test? Since Peter voluntarily exposed Hope to his bodily fluid, it would be just and fair if he were forced to have those fluids tested. Conversely, it would be unfair to allow Peter to refuse in light of what he did to Hope. Hope is owed the opportunity of an early diagnosis and treatment and the possible alleviation of fear.

What if Hope consented to intercourse? Even though Peter voluntarily exposed her to his bodily fluid, is she still entitled to have him tested? A change in the facts can change the outcome. If she wished to know his

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<sup>250</sup> See Medical Education Network, *supra* note 44.

<sup>251</sup> See BEAUCHAMP & CHILDRESS, *supra* note 61, at 327.

HIV status, she should have asked him to be tested prior to intercourse. It would not be just to now ask Peter to submit to the test.

Unfortunately, the state will not know whether Peter raped Hope until he is tried in court. Until then, what is just? Since the state had probable cause to believe that Peter had committed the crime, it would not be unjust to have him tested. Of course, probable cause is often based on the alleged victim's word alone. To avoid this injustice, frivolous charges could be punishable.<sup>252</sup> Maybe once he is tried, justice will be done.

#### IV. LEGAL FRAMEWORK

Within the last few years, many states have propounded laws allowing mandatory HIV testing upon the request of the victims of crimes involving the transmission of bodily fluids.<sup>253</sup> Others require conviction prior to testing.<sup>254</sup> Generally, the intent of such laws is to protect the health of both the victim and the offender.<sup>255</sup> An example of such intent is codified in a Florida statute:

The [L]egislature finds that a victim of a criminal offense which involves the transmission of body fluids is entitled to know at the earliest possible opportunity whether the person charged with . . . the offense has tested positive for human immunodeficiency virus (HIV) infection. The Legislature finds that to deny victims access to HIV test

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<sup>252</sup> See CAL. PENAL CODE § 1524.1(h) (West 1996) (stating that filing of frivolous claims is a misdemeanor).

<sup>253</sup> See, e.g., ALASKA STAT. § 18.15.310 (1996); ARIZ. REV. STAT. ANN. § 13-1415 (1995); ARK. CODE ANN. § 16-82-101 (Michie 1987 & Supp. 1993); CAL. PENAL CODE § 1524.1 (West 1996); COLO. REV. STAT. § 18-3-415 (1993); CONN. GEN. STAT. ANN. § 54-102 (West 1995); DEL. CODE ANN. tit. 10, § 1077 (1996); FLA. STAT. ANN. § 960.003 (West Supp. 1994); GA. CODE ANN. § 17-10-15 (1992); IDAHO CODE § 39-604 (1994); KY. REV. STAT. ANN. § 510.320 (Baldwin 1992); NEV. REV. STAT. § 441A.320 (1993); N.J. STAT. ANN. § 2C:43-2.2 (West 1995); N.M. STAT. ANN. § 24-2B-5.2 (Michie 1996); N.D. CENT. CODE § 23-07.7-01 (1993); S.D. CODIFIED LAWS ANN. § 23a-35B-4 (1993); VA. CODE ANN. § 18.2-62 (Michie 1993); WIS. STAT. ANN. § 968.38 (West 1993).

<sup>254</sup> See, e.g., D.C. CODE ANN. § 24-492 (1995); IND. CODE § 35-38-1-9.5 (1993); IOWA CODE ANN. § 709B.3 (West 1995); KAN. STAT. ANN. § 22-2913 (1996); LA. REV. STAT. ANN. 15:535 (West 1992 & Supp. 1996); ME. REV. STAT. ANN. § 19203-F (West 1996); MD. CODE ANN., CRIM. LAW, Art. 27 § 855(b) (1996); MINN. STAT. ANN. § 611A.19 (West 1995); MISS. CODE ANN. § 99-19-203 (1994); MO. ANN. STAT. 191.663 (Vernon 1996); NEB. REV. STAT. § 29-2290 (1996); N.H. REV. STAT. ANN. § 632-A:10-b (1995); N.Y. CRIM. PROC. § 390.15 (McKinney 1995); N.C. GEN. STAT. § 16-3-740 (1994); 35 PA. CONS. STAT. ANN. § 521.11a (1994); R.I. GEN. LAWS § 42-56-37 (1993); TENN. CODE ANN. § 39-13-521 (1994); UTAH CODE ANN. § 76-5-502 (1993); V.I. CODE ANN. § 3911 (1994); WASH. REV. CODE ANN. § 70.24.340 (West 1992); W. VA. CODE § 16-3C-2 (1993).

<sup>255</sup> See CAL. PENAL CODE § 1524.1(a) (West 1996).

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 . . . the offense benefit from prompt disclosure of the HIV test results.<sup>256</sup>

If the victim of sexual assault requests that the defendant be tested for HIV and the defendant refuses, a court may order or issue a search warrant mandating his submission if there is probable cause to believe that the accused committed the offense and body fluid had been transferred.<sup>257</sup> California and New Mexico allow for a hearing prior to the issuance of the warrant at which both the victim and the defendant have a right to be present affidavits and medical reports to support or oppose the warrant.<sup>258</sup>

The test is usually administered by a licensed physician through the local health department.<sup>259</sup> The results of the tests are disclosed to the victim, the defendant and the appropriate health department.<sup>260</sup> Otherwise, the results are kept confidential.<sup>261</sup> In California and Virginia, if an individual discloses the test result to others, he or she will be guilty of a misdemeanor.<sup>262</sup> In order to insure the health of third parties or to use information in a civil action on the same occurrence against the defendant, the victim may disclose the information to her spouse, boyfriend, fiancée, immediate family or house mates.<sup>263</sup> The results of the test may not be used in any criminal proceeding as evidence of guilt or innocence.<sup>264</sup>

If the results of the test are positive, many states provides free counseling and free testing to the victim for HIV and other sexually

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<sup>256</sup> FLA. STAT. ANN. § 960.003(1) (West Supp. 1994).

<sup>257</sup> *See, e.g.*, CAL. PENAL CODE § 1524.1(b)(1) (West 1996); GA. CODE ANN. § 17-10-15(b) (1992); VA. CODE ANN. § 18.2-62(A) (Michie 1993).

<sup>258</sup> *See, e.g.*, CAL. PENAL CODE § 1524.1(b)(3)(A); N.M. STAT. ANN. § 24-2B-5.2(C) (Michie 1996).

<sup>259</sup> *See* ARK. CODE ANN. § 16-82-101(b)(2) (Michie 1987 & Supp. 1993).

<sup>260</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1415(D) (1995); COLO. REV. STAT. § 18-3-415 (1993); CONN. GEN. STAT. ANN. § 54-102a(C) (West 1995); DEL. CODE ANN. tit. 10, § 1077 (1996); FLA. STAT. ANN. § 960.003(3)(a) (West Supp. 1994); KY. REV. STAT. ANN. § 510.320(4)(b) (Baldwin 1992); NEV. REV. STAT. § 441A.320(2) (1993); VA. CODE ANN. § 18.2-62(A) (Michie 1993); WIS. STAT. ANN. § 968.38(4) (West 1993).

<sup>261</sup> *See* VA. CODE ANN. § 32.1-36.1(A) (Michie 1993).

<sup>262</sup> *See, e.g.*, CAL. PENAL CODE § 1524.1(h) (West 1996); VA. CODE ANN. § 32.1-36.1(B) (Michie 1993).

<sup>263</sup> ALASKA STAT. § 18.15.310(e) (1996); *see also* CAL. PENAL CODE § 1524.1(I) (West 1996); N.M. STAT. ANN. § 24-2B-5.2(D) (Michie 1996); VA. CODE ANN. § 32.1-36.1(A)(11) (Michie 1993).

<sup>264</sup> *See, e.g.*, ALASKA STAT. § 18.15.310(f) (1996); CAL. PENAL CODE § 1524.1(I) (West 1996); GA. CODE ANN. § 17-10-15(h) (1992).

transmitted diseases and counseling to the defendant upon his request.<sup>265</sup> The counseling includes accurate information about AIDS and HIV, an explanation of reducing the risk of transmission, information on confidentiality, medical and social implications of the disease and disclosure of available treatments.<sup>266</sup> If the defendant is then convicted and incarcerated, the state may be responsible for his treatment and safety.<sup>267</sup>

The costs of the test are usually the burden of the county or the appropriate department or agency, but some states place the burden of reimbursement on the defendant if convicted.<sup>268</sup> To avoid frivolous charges and to further protect the accused, California has a clause that states "[a]ny individual who files a false report of sexual assault in order to obtain test result information . . . shall be guilty of a misdemeanor."<sup>269</sup>

### Constitutionality

Although the United States Supreme Court has not yet decided the constitutionality of mandatory HIV testing laws, it has held that it was constitutionally permissible to test railroad workers for drugs who were involved in serious train crashes.<sup>270</sup> Like these drug tests, an HIV test would be considered a search within the meaning of the Fourth Amendment.<sup>271</sup>

The Fourth Amendment prohibits unreasonable searched and seizures.<sup>272</sup> Generally, warrantless searches are per se unreasonable. However, the Supreme Court explained that "[w]hen faced with such *special needs*, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context."<sup>273</sup> The "special needs" doctrine is applicable where the need for the search is beyond the normal need for law enforcement, "making the warrant and probable cause requirements impracticable."<sup>274</sup> Therefore, if the government has a compelling interest that outweighs the accused's right to privacy, the

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<sup>265</sup> See, e.g., ALASKA STAT. § 18.15.310(h) (1996); NEV. REV. STAT. § 441A.320(3) (1993).

<sup>266</sup> ALASKA STAT. § 18.15.310(I)(2).

<sup>267</sup> See IDAHO CODE § 39-604 (1994) (Opinion of the Atty Gen. 87-7).

<sup>268</sup> See, e.g., CONN. GEN. STAT. ANN. § 54-102a (West 1995); KY. REV. STAT. ANN. § 510.320(6) (Baldwin 1992) (placing burden on defendant); N.M. STAT. ANN. § 24-2B-5.2 (Michie 1996); S.D. CODIFIED LAWS ANN. § 23A-35B-4 (1993) (placing burden on defendant upon conviction).

<sup>269</sup> CAL. PENAL CODE § 1524.1(h) (West 1996).

<sup>270</sup> See *Skinner v. Railway Labor Executive Ass'n*, 489 U.S. 602 (1989).

<sup>271</sup> *Id.* at 616.

<sup>272</sup> See U.S. CONST. amend. IV.

<sup>273</sup> See *Skinner*, 489 U.S. at 619.

<sup>274</sup> See *State of New Jersey in the Interest of J.G., N.S., and J.T.*, 674 A.2d 625, 631 (N.J. Super. 1996).

search is reasonable and constitutional. The Court has allowed mandatory drug testing under the "special needs" test, without probable cause, of customs employees seeking transfer to positions involving the interdiction of drugs or requiring the possession of a firearm.<sup>275</sup> State courts have used the rationales of these opinions to support the constitutionality of state laws mandating HIV testing for those charged with or convicted of sexual assault.

1. *Reasonable Search: Virgin Islands v. Roberts*<sup>276</sup>

In 1990, a couple was picnicking at an isolated beach in the Virgin Islands when a man approached them, raped the woman, and murdered the man.<sup>277</sup> The defendant argued that forced extraction of his blood for analysis would violate his Fourth Amendment rights.<sup>278</sup> The U.S. District Court of the Virgin Islands found that there was probable cause to conclude that the defendant raped and exposed the victim to his bodily fluid.<sup>279</sup> It was also uncontested that an intrusion into one's skin to retrieve blood is a Fourth Amendment search.<sup>280</sup> Blood testing is quite routine and "for most people the procedure involves virtually no risk, trauma, or pain."<sup>281</sup> The court concluded that the intrusion was not significant or unduly excessive.

Hence, the Fourth Amendment does not "forbid 'all intrusions as such,' but only those 'which are not justified in the circumstances, or which are made in an improper manner.'"<sup>282</sup> Once probable cause is found, "it ordinarily is justifiable for the community to demand that the individual give up some part of his interest in privacy and security to advance the community's vital interest in law enforcement . . . ."<sup>283</sup> However, if the challenged intrusion is more substantial than that of a traditional search, "the court must balance the extent of the intrusion against the need for it."<sup>284</sup>

The court also found compelling reasons why the test should be conducted.<sup>285</sup> "First, the Government has an interest in protecting victims of sexual assault," not only so they may receive appropriate care, but also in the interest of law enforcement.<sup>286</sup> Second, "the Government has a

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<sup>275</sup> See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

<sup>276</sup> 756 F. Supp. 898 (D. Virgin Islands 1991).

<sup>277</sup> *Id.* at 899.

<sup>278</sup> *Id.* at 901.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* (citing *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 616 (1989)).

<sup>281</sup> 756 F. Supp. at 901 (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966)).

<sup>282</sup> *Id.* (quoting *Schmerber*, 384 U.S. at 771).

<sup>283</sup> *Id.* (citing *Winston v. Lee*, 470 U.S. 753, 759 (1985)).

<sup>284</sup> *Id.* (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

<sup>285</sup> *Id.* at 903.

<sup>286</sup> *Id.*

substantial interest in curbing the transmission of HIV."<sup>287</sup> The results of the test affects the degree to which a person will take precautionary measures not to spread the disease. It may also allow the victim and her doctor to take immediate medical steps to halt the advancement of the disease. It is also "unconscionable to force persons who involuntarily have been exposed to the fluids of another to live with weeks and even months of anxiety, terror, and disruption of their own sexual lives by withholding the information that HIV antibody testing of a putative source can reveal."<sup>288</sup> The court held that, because the government's interest weighed more heavily than the defendant's, the procedure was reasonable under the Fourth Amendment.

The court also addressed the concern that the chemical analysis associated with HIV testing may reveal private medical facts about the person. As previously discussed, disclosure of HIV status can have devastating consequences to the individual. Persons with AIDS suffer a "social death" due to the prejudice and apprehension that the diagnosis brings about. This stigma may be mitigated by only disclosing the results to the defendant, the victim and their doctors. The laboratory conducting the test will not know the identity of the blood supplier and the results of the test will not be disclosed at any proceeding.<sup>289</sup> Because the government will not even receive the results, a defendant's right to privacy will be protected to the fullest extent possible.

## 2. Right to Privacy: *Fosman v. Florida*<sup>290</sup>

Applying the "special needs" test, a Florida appeals court has also upheld the constitutionality of mandatory testing laws allowing judges to order defendants charged with rape to submit to HIV testing.<sup>291</sup> The defendant in *Fosman* also argued right to privacy. The Florida Constitution provides it citizenry the right to be let alone and free from government intrusion into their private lives.<sup>292</sup>

The court first determined whether the defendant has a "reasonable right of privacy."<sup>293</sup> The court concluded that "where there is probable cause to believe that a person has committed sexual battery and transmitted bodily fluids to the victim, there is no reasonable expectation

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<sup>287</sup> *Id.* at 904.

<sup>288</sup> *Id.* (citing Edgar, *Mandatory AIDS Testing: Public Health and Private Rights*, 124 F.R.D. 241, 305-06 (1988)).

<sup>289</sup> 756 F. Supp. at 902.

<sup>290</sup> 664 So. 2d 1163 (Fla. Dist. Ct. App. 1995).

<sup>291</sup> *Id.*

<sup>292</sup> See FLA. CONST. art. 1, § 23.

<sup>293</sup> See *Fosman*, 664 So. 2d at 1166 (citing *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985)).

of privacy in regard to having a blood test for HIV, the results of which are disclosed only to the victim and to public health authorities."<sup>294</sup>

If the defendant does have a reasonable expectation of privacy, the state must show that a compelling interest justifies the intrusion, and that the interest will be met through the least intrusive means.<sup>295</sup> The *Fosman* court held that "[e]ven if the petitioner had a reasonable expectation of privacy, society's interest in preventing members of the public from being exposed to HIV would be a sufficient compelling state interest to justify the infringement of that right."<sup>296</sup> The "special needs" of the public far outweigh the need to establish probable cause. The court found the law to be "the least intrusive means" to deal with transmission because the testing is routine and disclosure of the results is limited to the defendant, the victim and public health officials. The law was upheld.

### 3. Should Usefulness Be a Factor?: *State of New Jersey in the Interest of J.G., N.S., and J.T.*<sup>297</sup>

In 1996, the American Civil Liberties Union filed an amicus curiae brief outlining its objections to the statutes requiring mandatory HIV testing of those charged, indicted, convicted, or adjudicated of either sexual assault or aggravated assault.<sup>298</sup> Not only did the ACLU believe that such testing is a violation of the Fourth Amendment, but they also believed that the test offered no useful information to the victim.<sup>299</sup> The ACLU argued that if the information provided through the test is of little benefit to the victim, then the search is unnecessary to achieve the state's interest. The defense presented expert testimony from physicians who stated that a negative test would not necessarily mean that an attacker was uninfected.<sup>300</sup>

Conversely, a defendant who tests positive may not necessarily have transmitted the disease to the victim.<sup>301</sup> The only way in which the victim will truly know their HIV status is by undergoing tests for a year.<sup>302</sup> Although the trial court found this reasoning persuasive, the Court of Appeals overturned the decision stating that the issue was "not whether the State has chosen what all or even most experts would consider to be the best or most effective means of determining whether a victim has been

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<sup>294</sup> 664 So. 2d at 1166.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> 674 A.2d 625 (App. Ct. 1996).

<sup>298</sup> *Id.* at 627.

<sup>299</sup> See *Supreme Court Debates Tests on Demand in Sex Assault Cases*, AIDS WEEKLY PLUS, Jan. 20, 1997, at 23.

<sup>300</sup> See *In the Interest of J.G., N.S., and J.T.*, 674 A.2d at 627.

<sup>301</sup> *Id.*

<sup>302</sup> See *Court Upholds Law Allowing Testing of Rape Defendants*, AIDS POLICY & LAW, May 17, 1996, at 4.

infected by her assailant; rather, the inquiry is whether the means chosen can withstand constitutional scrutiny."<sup>303</sup>

Applying the "special needs" doctrine, the Court found that the defendant's interest against a bodily intrusion had less weight than the state's interest in the health and welfare of both the victim and the public.<sup>304</sup> The Court stated that "rightly or wrongly, the information may ease a victim's anxiety."<sup>305</sup> The state law was declared constitutional, but the New Jersey Supreme Court plans to hear the case.<sup>306</sup>

## V. LEGAL-ETHICAL COMPARISONS AND CONCLUSIONS

With the exception of autonomy, the state courts reached the same outcome as the principles of utilitarianism, beneficence and justice. Further, the courts' analyses incorporated these principles, although they were not mentioned by name.

The "special needs" doctrine requires that the government have a compelling interest that outweighs the accused's right to privacy.<sup>307</sup> This is similar to the utilitarian principle of achieving the best overall result by weighing the interests of the affected parties.<sup>308</sup> The courts weighed the states' interests in curbing the transmission of HIV and protecting victims of sexual assault against the accused's interest and found that the mandatory test was reasonable and constitutional.<sup>309</sup>

Part of the states' interests in the mandatory testing were compelled by beneficence. The intent of the Florida legislature was to provide both parties with crucial information: "[E]arly diagnosis is a critical factor in the treatment of HIV infection, both the victim and the person charged with . . . the offense *benefit* from prompt disclosure of the HIV test results."<sup>310</sup> The state courts found that this information would allow both parties to take immediate medical steps to treat the infection and take precautionary measures to prevent the spread of the disease.<sup>311</sup> The possibility of the results alleviating the victim's anxiety was also

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<sup>303</sup> See *In the Interest of J.G., N.S., and J.T.*, 674 A.2d at 633.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> See *Supreme Court Debates Tests on Demand in Sex Assault Cases*, AIDS WEEKLY PLUS, Jan. 20, 1997, at 23.

<sup>307</sup> See *Skinner v. Railway Labor Executive Ass'n*, 489 U.S. 602, 616 (1989).

<sup>308</sup> See *BEAUCHAMP & CHILDRESS*, *supra* note 62, at 47.

<sup>309</sup> See, e.g., *Virgin Islands v. Roberts*, 756 F. Supp. 898, 904 (D. Virgin Islands 1991); *Fosman v. Florida*, 664 So. 2d 1163, 1166 (Fla. Dist. Ct. App. 1995); *In the Interest of J.G., N.S., and J.T.*, 674 A.2d at 633.

<sup>310</sup> FLA. STAT. ANN. § 960.003(1) (West Supp. 1994) (emphasis added).

<sup>311</sup> See *Roberts*, 756 F. Supp. at 904.

considered by both the courts and the state legislatures.<sup>312</sup> Some of the state laws require counseling for the victim and the accused after each is tested.<sup>313</sup> The courts and the state legislatures were acting for the benefit of both parties. That is the theory of beneficence in a nutshell.

he states' interest in the just enforcement of its criminal law was held to be a compelling interest, supporting the constitutionality of the law.<sup>314</sup> These are examples of the principle of justice. In addition, to override the accused's right to privacy and autonomy, the state must be able to *justify* the intrusion by showing a compelling interest that may be met through the least intrusive means.<sup>315</sup> Autonomy of the accused is respected unless the state can show a sufficiently compelling reason to outweigh that right.

In the opinions and statutes discussed throughout this paper, one can see influences of these principles. The principles may not be named, but they are present nonetheless.

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<sup>312</sup> See *In the Interest of J.G., N.S., and J.T.*, 674 A.2d at 633; see also Statutes, *supra* note 73.

<sup>313</sup> See ALASKA STAT. § 18.15.310(h) (1996); NEV. REV. STAT. § 441A.320(3) (1993).

<sup>314</sup> See *Roberts*, 756 F. Supp. at 903.

<sup>315</sup> See *Fosman*, 664 So. 2d at 1166.