FOURTH AMENDMENT BALANCING ACT: SPECIAL NEEDS OF RAPE VICTIMS JUSTIFY COURT-ORDERED HIV TESTING OF THE ACCUSED

The Fourth Amendment to the United States Constitution provides all people with protection from unreasonable searches and seizures conducted by the government.[1] The precise meaning of the Fourth Amendment is elusive, though, given that the exact relationship between the unreasonable Search and Seizures clause and the Warrant Clause[2] is unknown.[3] Through all of the uncertainty surrounding Fourth Amendment protection, however, one thing is definite: The Fourth Amendment is limited to protecting against those searches and seizures deemed to be unreasonable.[4]

In 1987, the Supreme Court held that a search and seizure is proper under the Fourth Amendment if either the Warrant Clause requirements are met or the search and seizure passes the reason-

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[1] *See* U.S. CONST. amend. IV. The Fourth Amendment provides:

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

Id.

[2] *See id.* The Warrant Clause states, "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.* At the time the Constitution was drafted, Americans had not forgotten the general warrants issued by the Crown and exercised by British officers on the colonists. *See* Payton v. New York, 445 U.S. 573, 584 n.21 (1980). These warrants, known as writs of assistance, allowed unfettered searches intended to uncover goods imported in contravention of English tax law. *See id.* The Warrant Clause was inserted into the Constitution as part of the Fourth Amendment to protect Americans from the issuance of similar general warrants by the United States government. *See id.* at 583.

[3] *See* William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633, 634 (1983). The Fourth Amendment itself does not indicate how the two clauses should interact. *See id.* at 634-35. In turn, this has led to an ever-changing understanding of the application of the Fourth Amendment. *See id.* at 635.

[4] *See* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 308 (1998). Clancy writes that it is essential that one have the ability to exclude the government from unreasonable intrusions in order to have the right to be secure. *See id.*

ableness balancing test.[5] By adopting the reasonableness standard as a substitute for the Warrant Clause's probable cause requirements, the Court introduced even more uncertainty into Fourth Amendment jurisprudence.[6] Given that balancing tests are influenced by the subjective beliefs of the person administering them, any application of the reasonableness test is thus swayed by the individual ideals and beliefs of the judge who applies it in the absence of objective judicial directives.[7]

The protections provided by the Fourth Amendment center around the preservation of one's privacy.[8] In determining Fourth

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[5] *See* O'Connor v. Ortega, 480 U.S. 709, 720 (1987). In the plurality opinion, Justice O'Connor reiterated that, except in some well-defined instances, the requirements of the Warrant Clause must be satisfied. *See id.* The Court in *Ortega* stated that the Warrant Clause was inappropriate "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.* at 720 (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (alteration in original)).

The Court has stated that in applying the reasonableness standard courts must balance the government's interests involved, the degree of intrusion involved in the challenged search, and the amount of privacy expectation that inheres in the thing being searched. *See* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 429 (1988).

[6] *See* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 511 (1991). Under the reasonableness test, the Fourth Amendment provides amorphous protection given that what may be deemed reasonable in the mind of one judge is not necessarily reasonable in the mind of another judge. *See id.* The subjective nature of the reasonableness test leads Bookspan to call it a "standardless standard." *See id.* at 510.

[7] *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting). Justice Scalia stated that the question of reasonableness will depend largely on the social need prompting the search when a balancing test is applied. *See id.* Scholars have written that the outcome of a case involving the Fourth Amendment depends largely on how a specific judge decides to weigh the evidence because there is no specific balancing method. *See* Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 120 (1992). There is frequent criticism that the Court has failed to outline any objective guidelines for application of balancing tests. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972 (1987). In the absence of any clear directives, courts are able to turn to a number of sources during the application of a balancing test including social trends, history, and the value of the questioned action in accomplishing constitutional goals. *See id.* at 974; *see also* Sundby, *supra* note 5, at 429-30 (noting that the Court should set forth specific standards to help guide the application of the Fourth Amendment).

[8] *See* James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 670 (1985). In *Katz v. United* States, 389 U.S. 347 (1967), the Court set aside the view that the Fourth Amendment protected locations and held that the Fourth Amendment protects one's reasonable expectations that something is private. *See* Tomkovicz, *supra* at 650. The *Katz* Court stated that it is misdirected to characterize Fourth Amend-

Amendment challenges, courts have recognized the intimate nature of information contained in a personal medical file and have provided such information with privacy protections.[9] However, this privacy protection, similar to the Fourth Amendment's protection from searches and seizures, is not absolute.[10] Disclosure of one's medical information has been allowed when societal interests in disclosure outweigh the privacy interests in maintaining confidentiality.[11] This very same balancing test applies to issues surrounding the disclosure of one's Human Immunodeficiency Virus (HIV)-status in a criminal trial.[12] In fact, given the magnitude of the HIV epidemic, courts tend to give substantial weight to the governmental interest whenever the government invokes public health concerns as a reason for disclosing one's HIV status.[13]

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ment protection in terms of the location sought to be protected. *See Katz*, 389 U.S. at 351. The Court noted, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.*

[9] *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980). The Third Circuit noted that in various contexts special protection has been given to medical records. *See id.* The court explained that the Federal Rules of Civil Procedure place a higher burden on discovering medical records than they do on discovering other information. *See id. Compare* FED. R. CIV. P. 35 *with* FED. R. CIV. P. 26(b). The court stated that the Freedom of Information Act has a special exception for medical files. *See id.* (citing 5 U.S.C. § 552(b)(6) (1976)). The court took the special treatment given to medical records to reflect the private nature of medical records. *See id.*

[10] *See Westinghouse*, 638 F.2d at 577-78. The Third Circuit noted that personal control of one's medical files is not absolute. *See id.* The court stated that legislatures and other courts have determined that public health concerns may allow disclosure of portions of one's medical history. *See id.* The court noted that the Supreme Court has provided examples of those intrusions into one's medical records that have been accepted, including the practices of disclosing personal medical information to doctors, hospitals, insurance companies, and public health agencies. *See id.* (citing Whalen v. Roe, 429 U.S. 589, 602 (1977)). The court stated that reporting statutes pertaining to sexually transmitted diseases, child abuse, and fetal death certifications are all integral parts of modern medical practice. *See id.* (citing *Whalen*, 429 U.S. at 602 n.29).

[11] *See* Detroit Edison Co. v. NLRB, 440 U.S. 301, 315-17 (1979). Courts have denied intrusion into one's medical records if the societal interest in disclosure outweighs the interest in preserving one's privacy. *See id.* In *Detroit Edison*, the Court determined that the union's interest in obtaining employees' scores on psychological aptitude tests to assist in handling grievances was outweighed by the interest of both the employees and Detroit Edison in keeping those medical records private. *See id.*

[12] *See* Roger Doughty, Comment, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the AIDS Epidemic*, 82 CALIF. L. REV. 111, 151 (1994).

[13] *See id.*

Court-ordered HIV testing on convicted or accused sexual offenders raises two significant constitutional issues: the violation of the right to privacy[14] and the violation of the Fourth Amendment[15] right against unreasonable governmental searches and seizures.[16] In examining the constitutionality of HIV-testing statutes, courts apply the "special needs" analysis.[17] This "special needs" analysis requires a court to balance the rights of the individual against the interests of the government to determine if a search is reasonable.[18] When a special need is found to exist, the "special needs" test dispenses with the requirement of securing a warrant prior to conducting a search and the necessity of showing individualized suspicion[19] to make that search reasonable.[20]

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[14] *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (recognizing that there exists an unwritten right to privacy in the shadows of certain enumerated constitutional rights).

[15] *See* U.S. CONST. amend. IV; *see also supra*, note 1 (setting forth the text of the Fourth Amendment).

[16] *See* Schmerber v. California, 384 U.S. 757, 767 (1966). The Supreme Court held that involuntary blood testing did constitute a Fourth Amendment search and seizure. *See id.* In *Schmerber*, while a drunk driver was in the hospital being treated for his injuries, a blood sample was taken to test his intoxication level. *See id.* at 758-59. Schmerber challenged the admissibility of that blood test because the blood was taken without a warrant. *See id.* at 759.

[17] *See* Bernadette Pratt Sadler, Comment, *When Rape Victims' Rights Meet Privacy Rights: Mandatory HIV Testing, Striking the Fourth Amendment Balance*, 67 WASH. L. REV. 195, 200-01 (1992). The "special needs" doctrine first appeared in the concurring opinion written by Justice Blackmun in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and the Supreme Court explicitly adopted the "special needs" analysis in *O'Connor v. Ortega*, 480 U.S. 709 (1987). *See* Sean Anderson, *Individual Privacy Interests and the "Special Needs" Analysis for Involuntary Drug and HIV Tests*, 86 CAL. L. REV. 119, 129 (1998). In *T.L.O.*, Justice Blackmun wrote, "I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we are confronted with 'a special law enforcement need for greater flexibility.'" *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (quoting Florida v. Royer, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting)).

[18] *See* Sadler, *supra* note 17, at 201.

[19] *See* Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond*, 25 URB. LAW. 117, 129 (1993). Individualized suspicion refers to the belief that a specific person committed a crime or may be in the possession of evidence of a crime. *See id.*

[20] *See* Lisa Simotas, Note, *In Search of a Balance: AIDS, Rape, and the Special Needs Doctrine*, 66 N.Y.U. L. REV. 1881, 1894 (1991). Originally, the "special needs" test required that the search be reasonable at its inception premised on a reasonable suspicion of wrongdoing, as well as a reasonable relationship between the scope of the search and the need that was advanced by that search. *See id.* at 1893-94. In 1989, the Supreme Court eliminated the need of individualized suspicion. *See id.* at 1894.

The HIV epidemic introduced itself to the United States on June 5, 1981.[21] Initially, the disease manifested itself exclusively in homosexual men,[22] but by January of 1983, Acquired Immune Deficiency Syndrome (AIDS)[23] found its way into the heterosexual community and mainstream America.[24] This discovery set off a medical and emotional crisis throughout the country and around the world.[25]

By September of 1993, the Centers for Disease Control (CDC), which tracks the spread of HIV and AIDS, had received 328,392 reports of AIDS.[26] By 1994, the cumulative AIDS statistics from the

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[21] *See* GERALD J. STINE, ACQUIRED IMMUNE DEFICIENCY SYNDROME: BIOLOGICAL, SOCIAL, MEDICAL AND LEGAL ISSUES 6 (2d ed. 1996). On June 5, 1981 the first cases of AIDS-related illness were documented in five homosexual men in Los Angeles, California. *See id.*

[22] *See id.*

[23] *See* Simotas, *supra* note 20, at 1885. AIDS is caused by the Human Immunodeficiency Virus (HIV) that attacks critical types of white blood cells that are crucial to the way the immune system responds. *See id.* AIDS progresses through a series of three stages. *See id.* In the first stage, the person infected exhibits no symptoms. *See id.* The second stage is known as AIDS-related complex and is defined by the manifestation of minor symptoms including fatigue, weight loss, and fever. *See id.* at 1886. The final stage is known as full-blown AIDS. *See id.* AIDS is terminal due to an extensive reduction in white blood cells that leaves the victim helpless to fight diseases. *See id.*

[24] *See* STINE, *supra* note 21, at 6-7. In January of 1983, two American females, both of whom were the sex partners of intravenous drug users, were diagnosed with AIDS. *See id.* From that point on, the spread of AIDS has gained momentum. *See id.* at 7. For comparison, statistically, the first 50,000 cases of AIDS took seven years to be reported to the Centers for Disease Control (CDC). *See id.* The seventh and eighth 50,000 cases of AIDS, however, each took only six months to be reported. *See id.* The spread has only been slowed minimally, as the ninth and tenth 50,000 cases of AIDS reported took an estimated ten months in 1995 and 1996. *See id. But see Update: Trends in AIDS Incidence — United States, 1996*, 278 JAMA 1485 (1997). During 1996, the incidence of AIDS reported to the CDC declined almost universally in all populations and in all locations. *See id.* The report credits recent improvements in HIV care in preventing HIV from progressing into AIDS. *See id.* Despite this decline, the data indicated that incidence of AIDS in 1996 remained high and AIDS-related complications remained one of the leading causes of death among people 25 to 44 years of age. *See id.* at 1486.

[25] *See* STINE, *supra* note 21, at 2, 4. The onset of AIDS has made such a definite impression on the minds of the general public that almost a third of the population defines AIDS or a similar plague as the "greatest threat to human life." *Id.* at 2 (quoting a 1994 Louis Harris poll). As the count of people afflicted by this deadly disease continues to rise, the fear surrounding HIV and AIDS continues to grow. *See* Sadler, *supra* note 17 at 195.

[26] *See HIV/AIDS*, SURVEILLANCE REPORT (CDC, Atlanta, Ga.), Oct. 1993 at 3 [hereinafter SURVEILLANCE REPORT]. This number includes the 50 states and does not account for territories of the United States. *See id.* If the statistics included U.S. territories, the CDC received 339,250 reports of AIDS through September of 1993. *See id.* Between 1981 and 1983, the CDC had separated HIV and AIDS cases according to certain social behaviors and medical needs. *See* STINE, *supra* note 21, at 270. The groupings included "(1) homosexual and bisexual men; (2) injection drug us-

CDC showed that 7% of AIDS cases occurred in the heterosexual community; 31% occurred among intravenous drug users and their heterosexual or homosexual partners; and 53% occurred in the homosexual and bisexual male community.[27]

New Jersey amassed the fifth highest total of AIDS cases reported to the CDC by any state in the union, behind New York, California, Florida, and Texas.[28] Since the inception of the AIDS epidemic, New Jersey has notified the CDC of 36,641 cases of AIDS.[29] As of March 31, 1998, more than 25,000 citizens of New Jersey were living with AIDS or HIV.[30] In 1996 alone, more than 2000 AIDS-related deaths occurred in New Jersey.[31] Given the importance of controlling the spread of AIDS, New Jersey labeled prevention and control of the virus a priority issue on its health agenda.[32]

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ers; (3) hemophiliacs; (4) blood transfusion recipients; (5) heterosexuals; and (6) children whose parents are at risk." *Id.* However, members of high-risk groups can and do spread HIV infection through their relationships with lower risk groups. *See id.*

[27] *See* STINE, *supra* note 21, at 272.

[28] *See Table 2: AIDS Cases by State of Residence Reported to CDC as of June 30, 1998,* NEW JERSEY HIV/AIDS QUARTERLY NEWSLETTER (Div. of AIDS Prevention and Control) (June 30, 1998) <http://www.state.nj.us/health/aids/qtr/9806.htm>. New Jersey has reported 36,638 adult and adolescent cases of AIDS to the CDC, or 6% of the national cases reported since June of 1981, and 704 cases of children with AIDS to the CDC, or 9% of the national cases reported. *See id.*

[29] *See Table 1: New Jersey AIDS Cases Reported July 1997-June 1998 and Cumulative Totals as of June 30, 1998/Age at diagnosis, by Sex,* NEW JERSEY HIV/AIDS QUARTERLY NEWSLETTER (Div. of AIDS Prevention and Control) (June 30, 1998) <http://www.state.nj.us/health/aids/qtr/9806.htm>. The CDC broke down the reported incidents of AIDS in metropolitan areas consisting of more than a population of 500,000. *See* SURVEILLANCE REPORT, *supra* note 26, at 4-5. The CDC reported in 1993 that Bergen and Passaic counties, N.J. recorded 2,476 incidents of AIDS; Jersey City, N.J. reported 3,001 incidents of AIDS through 1993; Middlesex County, N.J. reported 1,548 cases of AIDS through 1993; and Newark, N.J. reported 7,413 incidents of AIDS through 1993. *See id.* at 4.

[30] *See Table 10: Persons Living with HIV Infection (not AIDS) and with AIDS, by New Jersey County/Cumulative Data as of June 30, 1998,* NEW JERSEY HIV/AIDS QUARTERLY NEWSLETTER (Div. of AIDS Prevention and Control) (June 30, 1998) <http://www.state.nj.us/health/aids/qtr/9806.htm>. The Division of AIDS Prevention and Control broke down the cumulative number of people diagnosed with HIV in New Jersey by county. *See id.* Approximately 12,600 people live with HIV in New Jersey and 13,200 live with AIDS. *See id.* By far, Essex County has the highest concentration of people living with HIV and AIDS in New Jersey (30%). *See id.*

[31] *See Figure 2: New Jersey AIDS Cases as of June 30, 1998/Number of Deaths by Year of Death,* NEW JERSEY HIV/AIDS QUARTERLY NEWSLETTER (Div. of AIDS Prevention and Control) (June 30, 1998) <http:www.state.nj.us/health/aids/qtr/9806.htm>. The number of AIDS-related deaths appears to have decreased in recent years. *See id.*

[32] *See* N.J. DEP'T OF HEALTH AND SENIOR SERVICES, 1995 NEW JERSEY HEALTH STATISTICS 155 (Feb. 1998). New Jersey set a goal of limiting the HIV infection death rate in 25- to 44-year-olds to approximately 30 per 100,000 by the year 2000. *See id.* However, the report noted that it is difficult to set goals that may be realized within a

The AIDS epidemic has increased the trauma involved with sexual victimization by compounding physical violation with the threat of acquiring HIV.[33] These fears are well-founded because physical trauma increases the likelihood that an HIV-infected attacker will transmit the virus to a victim.[34] The risk of HIV transmission during rape may also be increased by some sexual offenders' high-risk behavior, such as intravenous drug use and homosexual activity in the prison environment.[35]

In an effort to compel the states to enact some form of court-ordered HIV testing for accused or convicted sex offenders, Congress passed section 1804 of the Crime Control Act of 1990.[36] This legislation allows the federal government to withhold federal funds from states that fail to enact laws requiring convicted sex offenders to be tested for HIV at the request of their victims.[37] The law further man-

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decade because AIDS-related deaths in the present decade occur in individuals infected with HIV in a previous decade. *See id.* This latency period allows individuals infected with HIV during the past decades to die in the current and coming decades. *See id.*

[33] *See* CENTER FOR WOMEN POLICY STUDIES, MORE HARM THAN HELP: THE RAMIFICATIONS FOR RAPE SURVIVORS OF MANDATORY HIV TESTING OF RAPISTS 3 (1981) (citing Baker et al., *Rape Victims' Concerns About Possible Exposure to HIV Infection*, 5 J. INTERPERSONAL VIOLENCE 49 (1990)). Incidents of rape have increased more than any other violent crime since 1980. *See id.* In 1996, the Uniform Crime Reports for the United States reported the occurrence of 95,769 rapes. *See* FBI, 1996 UNIFORM CRIME REPORTS FOR THE UNITED STATES 23 (1997). In 1997, the State of New Jersey alone reported 1730 rapes. *See* Robert Schwaneberg, *Violence Down Across State: Credit Goes to Additional Cops*, STAR-LEDGER, Aug. 12, 1998, at 1.

[34] *See* Paul H. MacDonald, Note, *AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders*, 43 VAND. L. REV. 1607, 1630 (1990).

[35] *See id.* at 1630-31. Prison inmates are almost two times as likely to have used and abused intravenous drugs than are people in the general population. *See id.* at 1631. Almost 30% of the national prison population engages in homosexual acts and somewhere between 9% and 20% of inmates are victims of prison rape. *See id.*

[36] *See* Allison N. Blender, Note, *Testing the Fourth Amendment for Infection: Mandatory AIDS and HIV Testing of Criminal Defendants at the Request of a Victim of Sexual Assault*, 21 SETON HALL LEGIS. J. 467, 477 (1997). At the time this federal legislation was passed, approximately one-third of the states had already enacted HIV-testing statutes. *See id.* at 477-78. However, Congress desired that all states have such protections. *See id.*

[37] *See* 42 U.S.C. § 3756(f) (1994). Subsection (f) provides:

> (1) For any fiscal year beginning more than 2 years after November 29, 1990 —
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> (A) 90 percent of the funds allocated under subsection (a) of this section without regard to this subsection to a State described in paragraph (2) shall be distributed by the Director to such State; and
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> (B) 10 percent of such funds shall be allocated equally among States that are not affected by the operation of subparagraph (A).
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> (2) Paragraph (1)(A) refers to a State that does not have in effect, and

dates that the state disclose the test results to the victim[38] and provide proper counseling.[39]

Prompted by this federal legislation, the New Jersey State Legislature enacted its court-ordered HIV-testing provisions in 1993.[40] These statutes provide that all persons, regardless of age, charged

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does not enforce, in such fiscal year, a law that requires the State at the request of the victim of a sexual act —

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

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

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

(3) For purposes of this subsection —

(A) the term "convicted" includes adjudicated under juvenile proceedings; and

(B) the term "sexual act" has the meaning given such term in subparagraph (A) or (B) of section 2245(1) of Title 18.

Id.

[38] *See* STINE, *supra* note 21, at 467. The increased popularity of court-ordered HIV and AIDS testing and disclosure of those test results to sexual-assault victims places doctors in legal and ethical limbo between their obligation to preserve a patient's privacy and their duty to protect society as a whole. *See id.* Historically, the relationship between a patient and healthcare provider has existed within a scope of privacy bolstered by the Hippocratic Oath taken by doctors. *See* JO ANNE CZECOWSKI BRUCE, PRIVACY AND CONFIDENTIALITY OF HEALTH CARE INFORMATION 1-3 (2d ed. 1988). The Hippocratic Oath states in part, "'Whatsoever I shall see or hear in the course of my profession, in my intercourse with men, if it is that which should not be broadcast about, I will never divulge it but consider it a holy secret.'" STINE, *supra* note 21, at 469 (quoting the Hippocratic Oath).

[39] *See* 42 U.S.C. § 3756(f).

[40] *See* Senate Judiciary Committee, *Statement to Assembly Committee Substitute for Assembly, Nos. 897 and 220,* June 14, 1993. The New Jersey Senate Judiciary Committee specifically stated in its report to the assembly that the passage of bills 897 and 220 would bring New Jersey into compliance with the federal funding conditions set forth in the Crime Control Act of 1990. *See id.*

Assembly Bill 897 included the provision that requires juveniles convicted of actions which, but for the age of the perpetrator, constitute sexual assault or aggravated sexual assault, to submit to testing for sexually transmitted diseases, including HIV. *See* A. 897, 205th Legis., 2d Sess. (N.J. 1993). The provisions of Bill 897 eventually were modified and codified into the New Jersey Statutes. *See* N.J. STAT. ANN. § 2C:43-2.2 (West Supp. 1998); N.J. STAT. ANN. § 2A:4A-43.1 (West 1995). Assembly Bill 220, in its original form, allowed a person arrested for various types of sexual and drug offenses voluntarily to submit to HIV testing. *See* A. 220, 205th Legis., 2d Sess. (N.J. 1993). The bill also incorporated mandatory HIV testing for any person convicted of the above-stated offenses. *See id.* Assembly Bill 220 was also modified and incorporated into the New Jersey Statutes. *See* N.J. STAT. ANN. § 2C:43-2.2; N.J. STAT. ANN. § 2A:4A-43.1.

with a crime for actions covered by the definition of sexual assault or aggravated sexual assault are subject to the same HIV-testing laws.[41]

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[41] *See* N.J. STAT. ANN. § 2C:43-2.2(a). The statute provides in relevant part:

> a. In addition to any other disposition made pursuant to law, a court shall order a person convicted of, indicted for or formally charged with, or a juvenile charged with delinquency or adjudicated delinquent for an act which if committed by an adult would constitute aggravated sexual assault or sexual assault as defined in subsection a. or c. of N.J.S. 2C:14-2 to submit to an approved serological test for acquired immune deficiency syndrome (AIDS) or infection with the human immunodeficiency virus (HIV) or any other related virus identified as a probable causative agent of AIDS. The court shall issue such an order only upon the request of the victim and upon application of the prosecutor made at the time of indictment, charge, conviction or adjudication of delinquency. The person or juvenile shall be ordered by the court to submit to such repeat or confirmatory tests as may be medically necessary.
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> As used in this section, "formal charge" includes a proceeding by accusation in the event that the defendant has waived the right to an indictment.
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> b. A court order issued pursuant to subsection a. of this section shall require testing to be performed as soon as practicable by the Commissioner of the Department of Corrections pursuant to authority granted to the commissioner by sections 6 and 10 of P.L.1976, c.98 (C.30:1B-6 and 30:1B-10), by a provider of health care, at a health facility licensed pursuant to section 12 of P.L.1971, c.136 (C.26:2H-12) or the Juvenile Justice Commission established pursuant to section 2 of P.L.1995, c.284 (C.52:17B-170). The order shall also require that the results of the test be reported to the offender and to the appropriate Office of Victim-Witness Advocacy . . . .
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> e. Upon receipt of the result of a test ordered pursuant to subsection a. of this section, the Office of Victim-Witness Advocacy shall provide the victim with appropriate counseling, referral for counseling and if appropriate, referral for health care. The office shall notify the victim or make appropriate arrangements for the victim to be notified of the test result.
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> f. The result of a test ordered pursuant to subsection a. of this section shall be confidential and employees of the Department of Corrections, the Juvenile Justice Commission, the Office of Victim-Witness Advocacy, a health care provider, health care facility or counseling service shall not disclose the result of a test performed pursuant to this section except as authorized herein or as otherwise authorized by law or court order. The provisions of this section shall not be deemed to prohibit disclosure of a test result to the person tested.

Id.

N.J. Stat. Ann § 2A:4A-43.1 specifically provides that:

> In accordance with section 4 of P.L.1993, c. 364 (C.2C:43-2.2) and in addition to any other disposition authorized pursuant to N.J.S. 2A:4A-43, a court shall order a juvenile charged with delinquency or adjudicated delinquent for an act which if committed by an adult would constitute aggravated sexual assault or sexual assault as defined in subsection a. or c. of N.J.S. 2C:14-2 to submit to an approved serological test for acquired immune deficiency syndrome (AIDS) or infec-

It is important to understand the nature of HIV tests in order fully to understand the backdrop against which legal issues arising under statutory testing schemes must be analyzed.[42] HIV tests do not actually test for the virus itself, but rather for the antibodies associated with the presence of HIV in the body.[43] The enzyme-linked immunosorbent assay (ELISA) test is the first test performed on a blood sample undergoing HIV evaluation.[44] Using modern technology, the ELISA test has a specificity rate[45] of nearly 99.8%.[46] The ELISA test is typically performed twice on a blood sample in an effort to ensure the test's accuracy.[47] If both ELISA tests return a negative reading, the HIV test is reported as negative.[48] If either administration of the ELISA test returns a positive result, then the more accurate and more costly Western Blot test is performed for confirmation purposes.[49]

Recently, *State ex rel. J.G., N.S. and J.T.*[50] afforded the New Jersey Supreme Court the opportunity to review the New Jersey statutes that permit court-ordered HIV testing for accused or convicted sex of-

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tion with the human immunodeficiency virus (HIV) or any other related virus identified as a probable causative agent of AIDS.

Id.

[42] *See* Simotas, *supra* note 20, at 1884.

[43] *See* STINE, *supra* note 21, at 328.

[44] *See id.* at 333. There are some significant problems with the enzyme-linked-immunosorbent assay (ELISA) test and its use in detecting the presence of HIV in the general population. *See id.* The primary assumption of the ELISA test is that every person infected with HIV will produce HIV antibodies. *See id.* However, HIV antibodies do not generally appear in a person infected with HIV for approximately six weeks to one year, although the antibodies are usually present within a period of six to 18 weeks. *See id.* This will lead to a false negative test result in those individuals still in that broad latency phase. *See id.* It is also scientifically possible that the ELISA test will produce a false positive result, showing the presence of HIV antibodies where there are none. *See id.* A false positive can show up in people with liver disease, people who have given birth to several children, people who have recently had flu or hepatitis B vaccinations, and people who have a history of intravenous drug use. *See id.*

[45] *See id.* at 491. The specificity of a test refers to the probability of a negative reading when there is no HIV present in the body. *See id.*

[46] *See id.* at 333. The Red Cross in its use of the ELISA test achieved the 99.8% specificity rate in the capacity for which it was originally intended: to screen the nation's blood supply for HIV. *See id.*

[47] *See id.*

[48] *See id.*

[49] *See* STINE, *supra* note 21, at 333. The Western Blot test does not have an accuracy rate of 100%, but if administered properly, it can come extremely close to having an accuracy of perfection. *See id.* at 335. The Western Blot test takes more time to complete, requires more labor, and costs significantly more. *See id.* The estimates show that the cost of administering the ELISA test is less than $50, while the cost of administering the Western Blot test is more than $120. *See id.* at 339.

[50] 151 N.J. 565, 701 A.2d 1260 (1997).

fenders.[51] The court held that judicially mandated HIV testing of all individuals accused or convicted of actions fulfilling the definition of sexual assault does not violate the Fourth Amendment of the United States Constitution or Article I, Paragraphs 1[52] and 7[53] of the New Jersey Constitution.[54] The court stipulated, however, that there must be probable cause to conclude that accused or convicted sex offenders exposed their victims to circumstances under which HIV might be transmitted.[55]

In 1994, the State of New Jersey filed complaints in the Superior Court of New Jersey, Chancery Division, against three juveniles, ages fourteen to fifteen.[56] The State alleged that on May 7, 1994 the juveniles, identified in court documents as J.G., N.S., and J.T., committed aggravated sexual assault[57] when they forced a ten-year-old, mentally retarded girl to engage in anal and oral acts of sexual conduct.[58] The victim requested that the court compel her assailants to submit to tests for HIV and any other related condition identified as a causal agent of AIDS.[59]

The defendants opposed the State's motion for court-ordered HIV testing.[60] They alleged that such testing violated the Fourth and

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[51] *See id.* at 575, 701 A.2d at 1265.

[52] *See* N.J. CONST. art. I, ¶ 1. Article 1, paragraph 1, provides, "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." *Id.*

[53] *See* N.J. CONST. art. I, ¶ 7. Article I, paragraph 7, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

Id.

[54] *See J.G.*, 151 N.J. at 570, 701 A.2d at 1262.

[55] *See id.*

[56] *See* State *ex rel.* J.G., N.S. and J.T., 283 N.J. Super. 32, 35-36, 660 A.2d 1274, 1276 (Ch. Div. 1995).

[57] *See* N.J. STAT. ANN. § 2C:14-2a(1) (West 1995). This provision provides, "An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any of the following circumstances: (1) The victim is less than 13 years old . . . ." *Id.*

[58] *See J.G.*, 283 N.J. Super. at 35-36, 660 A.2d at 1276 (Ch. Div. 1995). Prosecutors filed the complaint against J.G. on July 13, 1994, against N.S. on July 20, 1994, and against J.T. on October 18, 1994. *See id.* at 36 n.1.

[59] *See id.* at 36, 660 A.2d at 1276.

[60] *See id.* at 37, 660 A.2d at 1276.

Fourteenth Amendments[61] to the United States Constitution and Article I, Paragraphs 1 and 7 of the New Jersey Constitution.[62]

The chancery division held an evidentiary hearing on this matter.[63] The defendants presented three expert witnesses to address the methods currently available for HIV testing and medical treatment and psychological counseling presently used for possible exposure to HIV.[64] First, Dr. Oleske[65] testified that an HIV test is not beneficial given that it does not indicate the HIV status of the attacker at the time of the attack or whether HIV was transmitted to the victim.[66]

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[61] *See* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction the equal protection of the laws.

Id.

The Supreme Court determined, beginning as early as 1897 and gathering momentum considerably in the 1960s, that the Fourteenth Amendment incorporates the protections of the Bill of Rights to the states. *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 86-87 (1990). Specifically, this concept of incorporation makes the Fourth Amendment applicable to the states. *See id.* at 87.

[62] *See J.G.*, 283 N.J. Super. at 37, 660 A.2d at 1276. The New Jersey Supreme Court has found that Article I, Paragraphs 1 and 7 of the New Jersey Constitution afford greater protection to New Jersey citizens than does the Fourth Amendment to the United States Constitution. *See* State v. Pierce, 136 N.J. 184, 209, 642 A.2d 947, 960 (1994). In *Pierce*, the court explained:

> "The United States Supreme Court, charged as it is with establishing a basic level of protection for the entire nation, often is obliged to establish a lowest common denominator of such protection. The federalist system contemplates that state courts may grant greater protection to fundamental rights than is accorded under the federal constitution. When a state supreme court grants such protection, it does no more than fulfill its obligation to uphold is own constitution."

Id. (quoting State v. Lund, 119 N.J. 35, 52-53, 573 A.2d 1376, 1386 (1990) (Pollock, J., concurring).

[63] *See J.G.*, 283 N.J. Super. at 37, 660 A.2d at 1277.

[64] *See id.*

[65] *See id.* Dr. James Oleske is the director of the Division of Allergy, Immunology and Infectious Disease at the University of Medicine and Dentistry, New Jersey Medical School. *See id.*

[66] *See id.* at 42, 660 A.2d at 1279-80. Oleske stated that a negative test, due to the latency period of HIV, would not prove that the offender was not HIV positive at the time of the attack. *See id.* at 40, 660 A.2d at 1278. The doctor further recounted that regardless of the offender's HIV status, because not every sexual encounter with a person infected with HIV results in the infection of the sex partner, knowing the offender's HIV status does not tell anything about the HIV status of the victim. *See* State *ex rel.* J.G., N.S. and J.T., 289 N.J. Super. 575, 579-80, 674 A.2d 625, 627 (App. Div. 1996).

Next, the defendants presented Patricia Kloser[67] who testified that the HIV status of an attacker does not change the prescribed treatment for a victim of sexual assault.[68] Finally, Dr. Greenbaum[69] testified that knowing the HIV status of an attacker is not beneficial to the emotional healing of a sexual-assault victim.[70] The State offered no witnesses on its behalf, nor did it submit any evidence for consideration.[71]

The court determined that the "special needs" doctrine[72] provided the most appropriate analysis of whether the governmental interest in HIV testing of accused sex offenders outweighed the individual's privacy interests.[73] Applying this balancing test, the chancery division determined that New Jersey's court-ordered HIV-testing statutes failed sufficiently to advance the compelling state interest for which they were enacted and thus violated the Fourth and Fourteenth Amendments to the United States Constitution.[74] In view of this, the court did not extend its inquiry into any possible violation of the New Jersey Constitution.[75]

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[67] *See J.G.*, 283 N.J. Super. at 38, 660 A.2d at 1277. Dr. Kloser is the medical director of AIDS services and associate professor of both Clinical and Preventative Medicine at New Jersey Medical School. *See id.*

[68] *See id.* at 46, 660 A.2d at 1281.

[69] *See id.* at 38-39, 660 A.2d at 1277-78. Dr. Greenbaum, executive director of the New Jersey Coalition Against Sexual Assault, has extensive experience in helping rape victims cope with their post-attack trauma. *See id.*

[70] *See id.* at 48, 660 A.2d at 1283. According to Greenbaum, in order for sexual-assault victims to recover, they must separate themselves from their attackers. *See id.* at 47, 660 A.2d at 1283. Greenbaum agreed with Oleske that the HIV status of the attacker is not indicative of the HIV status of the victim and thus is not informative for the victim in any way. *See id.* at 48, 660 A.2d at 1283.

[71] *See id.* at 39, 660 A.2d at 1278.

[72] *See supra* notes 5 & 20 (discussing the "special needs" analysis).

[73] *See J.G.*, 283 N.J. Super. at 50, 660 A.2d at 1284. In applying the "special needs" test, the court determined that this particular practice of drawing a person's blood and testing it for HIV was a search and seizure of the most intrusive kind. *See id.* at 52, 660 A.2d at 1285. The court next determined that protecting and advancing the interests of victims having been violated by sexual assault was a legitimate and compelling state interest. *See id.* at 53, 660 A.2d at 1285. Finally, the court looked to whether the interference with the fundamental rights of the accused sex offender was narrowly tailored to advance the compelling state interest. *See id.*

[74] *See id.* at 54-55, 660 A.2d at 1286. Using the testimony of the three experts, the court determined that if a defendant tests negative it does not mean that the defendant does not have HIV. *See id.* at 53-54, 660 A.2d at 1286. Thus, the court concluded, the result of an HIV test should have no bearing on a victim's mental state or medical treatment. *See id.* at 54, 660 A.2d at 1286. The court, therefore, determined that the testing scheme is not narrowly tailored to serve the intent for which it was enacted. *See id.*

[75] *See id.*

The State appealed, and the appellate division held that the HIV-testing scheme was constitutional.[76] In making this determination, the court noted that the testing provided a sexual-assault victim with relevant information that might serve to mitigate his or her fears over the possible exposure to HIV.[77] The court concluded that the testing serves the public interest by protecting the health and safety of both the offender and the victim.[78] The court determined that this public interest outweighed the privacy interests of the offender.[79] The court remanded the case to the chancery division to order the defendants to submit to blood testing.[80]

The Supreme Court of New Jersey granted certification[81] to determine the constitutionality of New Jersey's court-ordered HIV-testing statutes.[82] After balancing the accused sexual offender's interest in non-disclosure of his or her HIV status against the potential emotional and medical benefits of disclosure to a victim, the court held that the victim's interests outweighed those of the accused and that the statutes were constitutional.[83] The court affirmed the appellate court's holding, modifying it only to add that there must be probable cause to conclude that the victim was exposed to the risk of HIV transmission for the court to compel HIV testing.[84] The supreme court also addressed the constitutionality of testing a person indicted, but not yet convicted, of sexual assault.[85] Because the indictment necessitates a finding of probable cause that the suspect committed sexual assault, the court found no due process violation.[86]

The Fourth Amendment stands as a guarantor of privacy, dignity, and protection from arbitrary and intrusive actions that might be taken by the government by requiring government actors to se-

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[76] *See* State *ex rel.* J.G., N.S. and J.T., 289 N.J. Super. 575, 592, 674 A.2d 625, 633-34 (App. Div. 1996).

[77] *See id.*, 674 A.2d at 633.

[78] *See id.*

[79] *See id.*

[80] *See id.*, 674 A.2d at 633-34.

[81] *See* State *ex rel.* J.G., N.S. and J.T., 146 N.J. 70, 679 A.2d 656 (1996).

[82] *See* State *ex rel.* J.G., N.S., and J.T., 151 N.J. 565, 575, 701 A.2d 1260, 1265 (1997).

[83] *See id.* at 588, 701 A.2d at 1271.

[84] *See id.* at 594, 701 A.2d at 1274-75.

[85] *See id.* at 593, 701 A.2d at 1274.

[86] *See id.* A prosecutor must submit evidence to a grand jury that makes out a prima facie case that the defendant committed the alleged sexual assault before the grand jury will hand down an indictment. *See id.* at 594, 701 A.2d at 1274 (citing Trap Rock Indus. v. Kohl, 59 N.J. 471, 487-88, 284 A.2d 161, 169 (1971)). By this procedure, the due process rights of the defendant who is ordered to be tested for HIV are protected. *See id.*

cure a search warrant before they may search an individual's person, property, or personal effects.[87] The United States Supreme Court addressed the issue of privacy and the application of the Fourth Amendment in *Boyd v. United States*,[88] decided in 1886.[89] The *Boyd* Court extended Fourth Amendment protection to cover not only personal property, but also personal privacy.[90] Although much of the *Boyd* decision focused on the Fourth Amendment's applicability to criminal cases, the Court recognized that the government is prohibited from depriving a citizen of his or her rights against unreasonable searches and seizures pertinent to a civil investigation.[91]

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[87] *See* Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967) (holding that searches by municipal safety and health inspectors conducted without the warrant procedure violate the Fourth Amendment); *see also supra* note 1 (quoting the Fourth Amendment).

[88] 116 U.S. 616 (1886).

[89] The *Boyd* Court scrutinized an act to amend the customs revenue laws. *See id.* at 617. The act allowed the seizure of any goods imported with the intent of defrauding the government of proper duties and taxes owed. *See id.* The claimants were ordered to produce evidence in the form of a previous invoice. *See id.* at 618. The claimants objected to this procedure on the grounds that no defendant can be compelled to produce evidence against himself and that the statute in question was void and unconstitutional as far as it compelled such productions. *See id.*

[90] *See id.* at 630. The Court, in *Boyd*, related the meaning of the Fourth Amendment to the country's ties with Great Britain by focusing on a seminal British case written by Lord Camden pertaining to the protection of personal property. *See id.* at 624-26. The *Boyd* Court noted:

> The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole . . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil.

Id. at 627 (citation omitted).

In finding that the Fourth Amendment extends to personal privacy, Justice Bradley wrote:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

Id. at 630.

[91] *See id.* at 634. Justice Bradley wrote, "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Id.* at 635.

The Court, in *Camara v. Municipal Court of San Francisco*,[92] affirmed the proposition that the Fourth Amendment secures privacy and protection against arbitrary government intrusions.[93] The *Camara* Court addressed a specific portion of the San Francisco Housing Code that authorized warrantless inspections of apartments in order to uncover possible housing code violations.[94] The Court held that a person has a constitutional right to refuse the inspection of his or her premises without the issuance of a valid search warrant.[95] The Court observed that a warrantless search of private property was unreasonable.[96] The Court explained that the determination of when a person's reasonable expectations of privacy give way to the government's right to search is a decision best left to the judiciary and not to law enforcement officials.[97] The controlling standard for the issuance of a search warrant, according to *Camara*, is reasonableness.[98] This standard, the Court explained, necessitates balancing the need for the search against the personal invasion caused by the search.[99]

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[92] 387 U.S. 523 (1967).

[93] *See id.* at 528.

[94] *See id.* at 525. A building manager informed the inspector of possible code violations by the lessee of the ground floor of the building. *See id.* at 526. The inspector attempted to gain access to the area where the alleged code violations existed. *See id.* The lessee denied the inspector access because the inspector lacked a search warrant. *See id.*

[95] *See id.* at 540. The Court found that there was no urgency in inspecting the premises at a certain time. *See id.* The Court further observed that most citizens voluntarily allow inspections and, thus, it seems proper that when a certain person denies an inspector access, the warrant process should be adhered to unless there is a citizen complaint or another valid reason that requires immediate entry. *See id.* at 639-40.

The *Camara* Court unequivocally dispelled the belief that the Fourth Amendment protected an individual only from criminal searches and seizures. *See id.* at 530. The Court noted:

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.

Id. at 530-31.

[96] *See id.* at 528-29.

[97] *See id.* at 529 (citing Johnson v. United States, 333 U.S. 10, 14 (1948)). The Court noted that the ability to have a law enforcement officer enter one's private domain is a legitimate concern not only to the individual being searched, but to an ordered society grounded in the belief that there is a reasonable expectation of freedom from being watched. *See id.* (citing *Johnson*, 333 U.S. at 14).

[98] *See Camara*, 387 U.S. at 535.

[99] *See id.* at 536-37. The Court recognized several factors that point to the rea-

Eighteen years later, in *New Jersey v. T.L.O.*,[100] signs of erosion of the strict warrant requirement crept into Fourth Amendment jurisprudence.[101] T.L.O., a student who was caught smoking in her school's bathroom, was taken to the principal's office, where she denied the incident.[102] The principal searched her purse and found cigarettes and evidence of drug use and drug-dealing activity.[103] The principal subsequently turned the drug-dealing evidence over to the police.[104] T.L.O. challenged the legality of the principal's search and the admissibility of the evidence obtained by that search on Fourth Amendment grounds.[105]

The Court dismissed the Fourth Amendment challenge, focusing on the need to balance the privacy interests of school children against the need of school officials to maintain discipline in the school.[106] The Court concluded that the constitutionality of a student search should be premised upon that search's reasonableness, assessed under all surrounding circumstances.[107] Using this test, the

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sonableness of code inspections. *See id.* at 537. The Court first considered the long history of acceptance of code inspections by both the public and the judiciary. *See id.* (citing Frank v. Maryland, 359 U.S. 360, 371 (1959)). Second, the Court considered the unlikelihood that any other search technique would be as effective as this type of search. *See id.* Finally, the Court noted that the impersonal nature of the searches mandated by municipal codes means that there is a relatively limited invasion of personal rights. *See id.*

[100] 469 U.S. 325 (1985).

[101] *See id.* at 358 (Brennan, J., concurring in part and dissenting in part) (arguing that applying a balancing test, rather than the constitutional probable cause standard, dangerously weakens the Fourth Amendment).

[102] *See id.* at 328.

[103] *See id.* The search produced rolling papers, small amounts of marijuana, plastic bags, a pipe, a large number of one-dollar bills, and letters that implicated T.L.O. in drug-dealing rings. *See id.*

[104] *See id.*

[105] *See id.* at 329. T.L.O. also challenged the confession she made to police regarding her involvement in drug dealing on the grounds that the unlawful search committed by the principal marred such a confession. *See id.*

A study of post-*T.L.O.* cases indicates that in 1994, 31 of the 36 Fourth Amendment challenges to searches conducted in schools were deemed reasonable by courts. *See* Joseph R. McKinney, *The Fourth Amendment and the Public Schools: Reasonable Suspicion in the 1990s*, 91 EDUC. L. REP. 455, 457. Two circuit courts have upheld the use of strip searches where there is a suspicion of drug possession on school property. *See id.* at 462. Students subjected to searches in school have now begun to look increasingly towards state constitutions for protection as opposed to the Fourth Amendment of the United States Constitution. *See id.* at 458.

[106] *See T.L.O.*, 469 U.S. at 339, 340. The Court noted that the warrant requirement could not be applied to reasonable searches performed within the confines of a school because it would interfere with the disciplinary procedures of such institutions in an adverse manner. *See id.* at 340.

[107] *See id.* at 341. The Court stated that the reasonableness of any search is dependent upon a two-part inquiry. *See id.* The question must be asked "'whether

Court determined that the Fourth Amendment does not require schools to obtain search warrants before searching students over whom they have authority.[108]

Four years later, the Court decided *Skinner v. Railway Labor Executives' Ass'n*[109] and *National Treasury Employees Union v. Von Raab*,[110] both of which expanded the ability of certain entities to perform drug testing upon a well-defined group of individuals without securing a search warrant.[111] The Court premised its rulings on the finding that blood and urine tests are searches within the meaning of the Fourth Amendment.[112]

The *Von Raab* Court held that suspicionless urine testing of employees seeking promotion to jobs that require intervening with illegal drugs and carrying a firearm is reasonable.[113] In making this determination, the Court focused on the fact that the drug-testing scheme, set up to test certain specific customs officers, was not intended for law enforcement purposes.[114] The Court, therefore, applied a balancing test rather than the customary presumption in favor of the probable cause requirement outlined in the Fourth Amendment's Warrant Clause.[115]

The majority afforded substantial weight to the government's assertion that an officer who uses drugs may be more likely to succumb

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the . . . action was justified at its inception' . . . [and] whether [it] 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). The Court explained the application of this test by stating that a search will be deemed reasonable at its inception when there is a belief that the search will provide evidence of previous or ongoing infractions of the law or school policy. *See id.* at 341-42. The scope of the search will be deemed acceptable when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342.

[108] *See id.* at 340. The courts provide pivotal authority upon which school officials rely when conducting searches. *See* McKinney, *supra* note 105, at 463. Presently, school officials must exercise professional judgment in determining when the use of that authority is appropriate. *See id.*

[109] 489 U.S. 602 (1989).

[110] 489 U.S. 656 (1989).

[111] *See Von Raab*, 489 U.S. at 679; *See Skinner*, 489 U.S. at 634.

[112] *See Skinner*, 489 U.S. at 633-34.

[113] *See Von Raab*, 489 U.S. at 679.

[114] *See id.*

[115] *See id.*; *see also supra* note 2 (quoting the text of the Warrant Clause). The Court balanced the government's compelling interest in not allowing drug users to be promoted to positions in which such drug use would compromise the security of America's borders against the expectation of privacy of the customs officers. *See Von Raab*, 489 U.S. at 679. The Court determined that the officers had a decreased expectation of privacy due to the "physical and ethical demands of those positions." *Id.*; *see also supra* note 1 (quoting the text of the Fourth Amendment).

to bribery and other temptations that inhere in the access to large quantities of valuable property seized in the daily operations of Customs Service.[116] Justice Scalia, in dissent, took great offense at what he viewed to be a significant erosion of the Fourth Amendment to the point that mere speculation, unsupported by clear and convincing evidence, allows for a bodily search without a warrant.[117]

The Court in *Skinner* validated a mandatory drug-testing scheme established by the Federal Railroad Administration to test railroad employees involved in specified types of railroad accidents.[118] The Court found that the interests of the government in preventing the occurrence of railroad accidents outweigh the privacy concerns of the railroad workers.[119] The Court concluded that the testing was reasonable given that the scheme advanced the compelling state interest of railway safety.[120] The Court determined this despite the fact that the statute required neither individualized suspicion nor a warrant to perform the testing.[121]

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[116] *See Von Raab*, 489 U.S. at 669.

[117] *See id.* at 684 (Scalia, J., dissenting). Justice Scalia wrote:

> What is absent in the Government's justification — notably absent, revealingly absent, and as far as I am concerned dispositively absent — is the recitation of even a single instance in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use . . . . But if such a generalization suffices to justify demeaning bodily searches . . . then the Fourth Amendment has become frail protection indeed.

Id. at 683-84 (Scalia, J., dissenting).

[118] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633 (1989). The scheme confers upon the railroad the task of collecting both blood and urine samples for testing. *See id.* at 609.

[119] *See id.* at 633. The Court emphasized that there is a decreased expectation of privacy by employees who work in an industry regulated by the government for safety reasons. *See id.* at 627. The Court stated:

> Though some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information.

Id. at 628. The Court recognized that the privacy concerns raised by the statutory drug-testing under scrutiny may be substantial in other situations, but considering the diminished expectation of privacy by railroad employees, the drug testing is a reasonable means of gathering such information. *See id.*

[120] *See id.* at 633-34. The Court also observed that the testing scheme gave limited discretion to railroads in determining which employees should be tested. *See id.*

[121] *See id.* at 634. The Court also noted that imposing a warrant obligation before conducting urine or blood tests on railroad employees would not increase the protections of certainty and regularity already provided by the railroad's testing provi-

In 1997, in *Chandler v. Miller*,[122] the Supreme Court considered a Georgia statute that required candidates running for state office to submit to and pass a drug test prior to being placed on an election ballot.[123] The Court held that the statute was unconstitutional after balancing the state's interest in having drug-free elected officials against the proposed candidates' interests in privacy.[124] The Court noted that there must be an important governmental need that allows compromising the Fourth Amendment's individualized suspicion requirement prior to conducting a warrantless search.[125]

The Court distinguished *Von Raab* by pointing out the inherent difficulties in monitoring the day-to-day work of customs agents.[126]

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sions. *See id.* at 624. Indeed, the Court observed that a warrant requirement would hinder the governmental purpose for such testing regulations. *See id.*

The decisions in *Skinner* and *Von Raab* have been criticized as compromising the Fourth Amendment balance that the framers of the Constitution struck and diluting the Fourth Amendment protections guaranteed. *See* Andrea Lewis, Comment, *Drug Testing: Can Privacy Interests Be Protected Under the "Special Needs" Doctrine?*, 56 BROOK. L. REV. 1013, 1044 (1990). In particular, the Court has been criticized for accepting the "special needs" doctrine and eliminating the need for probable cause in any search operating outside of the criminal context. *See id.* In cases that address civil searches, the "special needs" test only requires a showing that personal privacy interests are outweighed by the interests possessed by the government. *See id.* at 1034. Critics argue that the framers of the Constitution intended the Fourth Amendment balance to favor individual privacy. *See id.* at 1035 (citing United States v. Place, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring)). They further argue that the delicate balance struck by the framers should not be disregarded for the sake of convenience. *See id.*

[122] 117 S. Ct. 1295 (1997).

[123] *See id.* at 1298-99.

[124] *See id.* at 1301, 1305. The state's interest in the testing of candidates for office is premised upon the fact that the use of illegal drugs by state officials undermines that person's credibility and authority, interferes with his or her ability to perform basic job functions, and compromises public respect for and confidence in elected state officials. *See id.* at 1303.

[125] *See id.* at 1303. The Court noted that the counsel for respondents admitted that absent from the record and Georgia's state government is any indication that drug use is a problem among elected officials. *See id.* The Court also noted that Georgia's testing scheme did not effectively deter candidates from using drugs because candidates themselves chose when to submit to the testing, and thus could calculate how long drug use must be suspended prior to their scheduled drug test. *See id.* at 1304.

[126] *See id.* at 1304. The Court indicated that it simply was impossible to scrutinize the work of a customs agent, whose job required him or her to carry a firearm and have ready access to drugs and drug smugglers. *See id.* (citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989)).

In essence, the Court rejected the *Von Raab* characterization that a "special need" could exist without a showing of a recognized evil and a well known consequence of this evil. *See* Nathan A. Brown, *Reigning In the National Drug Testing Epidemic:* Chandler v. Miller, 117 S. Ct. 1295 (1997), 33 HARV. C.R.-C.L. L. REV. 253, 271. *Chandler* signals the return of the requirement that suspicionless searches be

The Court noted that the duties of elected government officials are performed largely in an office setting where it is more feasible to monitor job performance and detect drug use without the personal privacy invasion of mandatory drug testing.[127] In rendering the Georgia statute unconstitutional, the Court asserted that well-intended symbolic gestures, such as making a statement against drug use, are insufficient to overcome Fourth Amendment protections.[128]

Against this background of precedent, the New Jersey Supreme Court, in *State ex rel. J.G., N.S. and J.T.*,[129] held that New Jersey's statutes authorizing mandatory HIV testing for accused or convicted sex offenders are constitutional.[130] Further, the court noted that due process is not violated by requiring an indicted suspect to submit blood samples for testing.[131]

Writing for a unanimous court, Chief Justice Poritz began by stating that the blood test proposed by the testing statutes is a search and that the court's inquiry must be limited to whether that search was reasonable under the Fourth Amendment to the United States Constitution and Article I, Paragraphs 1 and 7 of the New Jersey Constitution.[132] The chief justice noted that the analysis used to determine the constitutionality of the statutes under the Fourth Amend-

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narrowly tailored to serve a legitimate governmental interest. *See id.* at 272.

[127] *See Chandler*, 117 S. Ct. at 1304. In making this comparison, the Court concluded that Georgia wanted to set an example in its testing scheme for its citizens and thus it is a more symbolic gesture rather than a "special need" and does not fall within a compelling interest allowing warrantless and suspicionless searches. *See id.* at 1304-05.

Despite the lack of an explicit rejection of the *Von Raab* holding, *Chandler* effectively limits suspicionless searches on all classes of people because the *Chandler* Court found that politicians, although elite members of society, have no greater privacy protection than the average office worker or unarmed Customs agent. *See* Brown, *supra* note 126, at 272. *See id.*

[128] *See Chandler*, 117 S. Ct. at 1305. The Court stated:

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Id. (quoting Olmstead v. United States, 277 U.S. 438, 479 (Brandeis, J., dissenting) (1928)).

[129] 151 N.J. 565, 701 A.2d 1260 (1997).

[130] *See id.* at 570, 701 A.2d at 1262.

[131] *See id.*

[132] *See id.* at 576, 701 A.2d at 1265. The court relied upon the Supreme Court's determination in *Skinner*. *See id.* In *Skinner*, the Court maintained that drawing blood for alcohol analysis constitutes a search under the Fourth Amendment. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (citing Schmerber v. California, 384 U.S. 757, 767-68 (1966)).

ment sufficed to determine constitutionality under the New Jersey Constitution.[133] The court reasoned that it had to balance the infringements on the juveniles' rights against the government goals that support those infringements.[134] The court took note of the fact that the State presented no evidence as to the benefits served by court-ordered HIV testing, however, the court assumed that the Legislature had determined that the HIV status of an attacker can be beneficial to both the treating doctors and the victim.[135] The chief justice stated that knowledge of an attacker's HIV status would allow the victim to begin post-exposure HIV treatments early if the results are positive, and it would allow the victim to allay some of the concerns of possible exposure if the results are negative.[136]

In cases in which exceptions to the Fourth Amendment Warrant Clause apply, the court recounted that to make a warrantless search reasonable, there usually must be some evidence raising suspicion about the target of that search.[137] However, if the requirement of individualized suspicion might compromise the governmental interest involved, and there is minimal intrusion on privacy interests, the court indicated that the individualized suspicion requirement may be waived.[138] In making these observations, the court concluded that federal precedent mandated that the court apply the "special needs" analysis to determine whether the testing statutes were constitutional under the Fourth Amendment.[139]

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[133] *See J.G.*, 151 N.J. at 578, 701 A.2d 1266.

[134] *See id.* at 581, 701 A.2d at 1267. The court explained that, in the instance of a criminal investigation, the balance is usually weighed heavily in favor of following the procedures of the Warrant Clause incorporated in the Fourth Amendment. *See id.* at 576-77, 701 A.2d at 1265. However, the court noted that exceptions to the Warrant Clause exist when "'special needs, beyond the normal need for law enforcement, make the warrant and the probable cause requirement impracticable.'" *Id.* at 577, 701 A.2d at 1265 (quoting *Skinner*, 489 U.S. at 619).

[135] *See id.* at 584, 701 A.2d at 1269. The court assumed that the Legislature, in enacting the laws, knew of the medical and scientific information available on HIV and AIDS and took this information under advisement. *See id.*

[136] *See id.* at 584-86, 701 A.2d 1269-71. The majority noted that the price of post-exposure treatment may deter many victims from actually availing themselves of such treatment, but there is medical treatment available. *See id.* at 584, 701 A.2d 1269. The court explained that knowing the HIV status of an attacker can prevent some of the long-term anxiety that can follow a sexual assault while the victim is unsure of his or her HIV status. *See id.* at 586, 701 A.2d 1270. The court, however, stated that a positive HIV test result from the attacker can significantly increase the victim's anxiety before he or she learns of his or her own HIV status. *See id.*

[137] *See id.* at 577, 701 A.2d at 1265-66.

[138] *See id.*, 701 A.2d at 1266 (citing *Skinner*, 489 U.S. at 624).

[139] *See J.G.*, 151 N.J. at 578, 701 A.2d at 1266. The court noted several recent Supreme Court decisions regarding the use of bodily searches for reasons other than

Chief Justice Poritz next turned to whether mandatory HIV testing for accused or convicted sex offenders is one of the instances wherein suspicionless searches are appropriate.[140] The court determined that the requirement of individualized suspicion would compromise the state's purpose behind the testing statute because many of the HIV symptoms are latent.[141] The latent nature of HIV symptoms makes individualized suspicion of one's HIV status impossible in many instances because the test is needed to provide that information.[142]

Continuing, the court undertook an analysis of the privacy interests of the juveniles.[143] Chief Justice Poritz first noted that, because a blood test is a standard medical procedure, the privacy intrusion of such a test is limited.[144] The chief justice opined, however, that the statutory testing is actually more invasive than the intrusion of merely taking the blood sample because of the nature of the information provided by the test.[145]

The court next weighed the governmental interest in testing against the privacy rights of the individuals.[146] The court conveyed that the government's interests in the testing procedure are to facilitate the ability to receive post-exposure treatment and to promote

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to conduct criminal investigations in which the "special needs" balancing test was applied. *See id.* at 577, 701 A.2d at 1266. Specifically, the chief justice alluded to the Court's decisions in such cases as *Chandler v. Miller*, 117 S. Ct. 1295 (1997) (applying the "special needs" test to deem unconstitutional a Georgia statute requiring candidates for elected office to submit to drug testing); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (applying the "special needs" analysis to the drug-testing program enacted by the Customs Service); and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (applying the "special needs" analysis to deem unconstitutional a policy of drug testing railroad employees involved in certain types of accidents).

The "special needs" analysis also serves the interests of the New Jersey State Constitution. *See* New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 151 N.J. 531, 556, 701 A.2d 1243, 1255 (1997). The court in *New Jersey Transit PBA* stated, "We find that the special needs test provides a useful analytical framework for considering the protections afforded by Article I, Paragraph 7 of the New Jersey Constitution and adopt this approach in our review . . . ." *Id.*

[140] *See J.G.*, 151 N.J. at 578, 701 A.2d at 1266 (citing *Chandler*, 117 S. Ct. at 1298).

[141] *See id.* at 579, 701 A.2d at 1267.

[142] *See id.* (citing *Skinner*, 489 U.S. at 623; *In re* Juveniles A, B, C, D, E, 847 P.2d 455, 459 (Wash. 1993)).

[143] *See id.*

[144] *See id.* at 579-80, 701 A.2d at 1267.

[145] *See id.* at 580, 701 A.2d at 1267. The court noted that "'there still exists a risk of much harm from non-consensual dissemination of the information that an individual is inflicted with AIDS.'" *Id.* (quoting Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133, 1140 (3d Cir. 1995)).

[146] *See J.G.*, 151 N.J. at 581, 701 A.2d at 1267.

the mental healing of the victims by providing them access to essential information about the HIV status of their assailants.[147] After concluding that these interests are legitimate state interests, the court determined that the analysis hinged on whether the statutes sufficiently advanced their stated goals.[148] The court noted that, despite the State's failure to provide any expert testimony as to the benefits of court-ordered HIV-testing statutes, some members of the medical community believe that knowing the HIV status of the attacker can be beneficial to the victim.[149]

The court then considered the privacy protections built into the testing statutes.[150] The court noted that only the victim is allowed to request testing[151] and that the test results have an extremely limited

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[147] *See id.*, 701 A.2d at 1267-68. The government claimed that this statute exhibited the Legislature's interest in the physical and emotional well-being of the victim of sexual assault. *See id.*

The court took notice of the recent upsurge in public and political interest in the rights of victims. *See id.* at 581-82, 701 A.2d at 1268. The court recognized that, in New Jersey, three statutes have been enacted since 1985 for the advancement of victim's rights: The Crime Victim's Bill of Rights, codified at N.J. STAT. ANN. § 52:4B-34-8 (West 1995), which assures that a victim is treated with compassion and dignity, is not subject to intimidation, and suffers minimal inconvenience resulting from criminal proceedings; the Victim Counselor Privilege Act, codified at N.J. STAT. ANN. § 2A:84A-22.13 to 22.15 (West 1995), which mandates in part that a counselor assert a testimonial privilege regarding confidential communications he or she had with a crime victim; and the Victim Impact Statute, codified at N.J. STAT. ANN § 2C:11-3c(6) (West Supp. 1998), which allows the State at a sentencing proceeding, if the defendant chooses to present character evidence of his own in hopes of mitigating his sentence, to present evidence of a murder victim's character and the impact that such a murder had on the victim's family. *See J.G.*, 151 N.J. at 582, 701 A.2d at 1268. In addition, the court observed that New Jersey voters approved a Victim's Rights Amendment to the New Jersey Constitution in 1991, included as Article I, Paragraph 22. *See id.* Chief Justice Poritz explained that these New Jersey statutes are in addition to those initiatives taken by the federal government, including the Victims of Crime Act of 1984 codified at 42 U.S.C. §§ 10601 to 10605 (1994) and the Victims' Rights and Restitution Act of 1990 codified at 42 U.S.C. §§ 10606 to 10607 (1994). *See J.G.*, 151 N.J. at 581, 701 A.2d at 1268.

[148] *See J.G.*, 151 N.J. at 583, 701 A.2d at 1269. The juveniles did not challenge the stated purpose of the testing statutes or that the government had a compelling interest in enacting victim's rights legislation. *See id.*; *see also supra* note 65-70 (explaining the defendants' expert witnesses' testimony that argued that court-mandated HIV testing does not provide a victim with reliable evidence of his or her own HIV status).

[149] *See J.G.*, 151 N.J. at 584, 587, 701 A.2d at 1269, 1271. Based upon this diversity of opinion and the constantly evolving nature of the knowledge of HIV and AIDS, the court concluded that it should be extremely reluctant to disregard a victim's desire to know the HIV status of his or her alleged attacker. *See id.* at 587, 701 A.2d at 1271.

[150] *See id.*

[151] *See id.* The court noted that only in the event that victims are minors can parents request testing of the suspected or convicted rapist and have the results dis-

scope of disclosure.[152] In weighing these factors, Chief Justice Poritz deemed court-ordered HIV testing of convicted or suspected sex offenders to be reasonable because the potential benefits of HIV testing to the victims of sexual assault overshadow the offender's privacy interest.[153]

The court, however, placed a limiting factor on the reasonableness of court-ordered HIV testing.[154] The court reasoned that, when there has been no possibility of transmission of HIV, it is unreasonable to compromise the attacker's privacy by administering an HIV test.[155] The court noted that the New Jersey testing laws adopted a broad definition of sexual penetration.[156] The court determined that because bodily fluid transfer does not occur in some acts covered by this definition, HIV transmission is impossible in those instances.[157] Therefore, Chief Justice Poritz held that in order for a court to com-

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closed directly to them. *See id.* In all other cases, only the victim can request and receive the results of the HIV test. *See id.*

[152] *See id.* The court noted that the New Jersey statute allows for disclosure only to the victim, the attacker, and the Office of Victim Witness Advocacy. *See id.* The statute must be read to place reasonable limitations on to whom the victim can disclose the HIV status of the attacker. *See id.*; *see also supra* note 41 (quoting the text of the New Jersey HIV-testing statutes).

Additionally, the court stated that federal law provides some further guidance in interpreting the limited scope of disclosure intended for mandatory HIV tests. *See* 42 U.S.C. § 14011(b)(5) (1994) ("The victim may disclose the test results only to any medical professional, counselor, family member or sexual partner(s) the victim may have had since the attack. Any such individual to whom the test results are disclosed by the victim shall maintain the confidentiality of such information.").

[153] *See J.G.*, 151 N.J. at 588, 701 A.2d at 1271.

[154] *See id.*

[155] *See id.* at 589, 701 A.2d at 1272. The court reiterated the fact that it has been scientifically proven that HIV is transmitted only when certain bodily fluids of one person come in contact with the blood or mucous membranes of another person. *See id.* at 588, 701 A.2d at 1271-72 (citing HELENA BRETT-SMITH & GERALD H. FREILAND, TRANSMISSION AND TREATMENT IN AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC 23 (Scott Burris et al. eds., 2d ed. 1993)). Thus, the court concluded, HIV transfer is impossible where the potential for transfer of bodily fluids from one individual to another is not present. *See id.* at 589, 701 A.2d at 1272.

[156] *See id.*

[157] *See id.* For the purposes of New Jersey's court-ordered HIV-testing statutes, sexual penetration is defined as "vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or the insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor's instruction." N.J. STAT. ANN. § 2C:14-1c. (West 1995). By this definition, the court reasoned that sexual penetration is not limited to activities where there exists the possibility for the exchange of bodily fluids. *See J.G.*, 151 N.J. at 589, 701 A.2d at 1272. Thus, the court determined that the state's HIV-testing statutes could lead to HIV testing where the possibility of HIV transfer is negligible or absent. *See id.*

pel HIV testing, the victim must demonstrate probable cause of HIV transmission due to the probable transfer of bodily fluids.[158]

The chief justice next turned to the juveniles' due process claims.[159] The court addressed the contention that due process requires a hearing to establish probable cause both that the defendant committed sexual assault and that a transfer of bodily fluids occurred.[160] Chief Justice Poritz explained that, because the court's application of the statute requires probable cause to believe that bodily fluids were transferred during a sexual assault, there is no due process violation.[161]

Lastly, the court dismissed the juveniles' contention that their constitutional rights of privacy and liberty were violated because the testing statutes do not include procedural safeguards to protect those who have not yet been convicted of a crime.[162] The court stated that in order to subject a defendant to HIV testing the defendant must be formally charged or convicted.[163] A formal charge, the court explained, requires the State to establish probable cause to believe that the defendant committed a sexual assault or the equivalent.[164] The

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[158] *See J.G.*, 151 N.J. at 590, 701 A.2d at 1272. The court determined that the requirement to show probable cause that a transfer of bodily fluids took place ensures that the interests of both the state and the convicted or accused will be adequately addressed and served. *See id.* at 590-91, 701 A.2d at 1273. The court stated:

> Before a court may order HIV testing of sex offenders pursuant to N.J.S.A. 2C:43-2.2 or N.J.S.A. 2A:4A-43.1, the court must find that probable cause exists to believe that the victim may have been exposed to the bodily fluids of the assailant such that there is a possibility of transmission of the AIDS virus. If the court makes such a finding, the testing authorized by N.J.S.A. 2C:43-2.2 and N.J.S.A. 2A:4A-43.1 will comport with the requirements of both the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution.

Id. at 592, 701 A.2d at 1273. The court articulated the definition of probable cause as "'a well grounded suspicion or belief.'" *Id.* at 591, 701 A.2d at 1273 (quoting State v. DeSimone, 60 N.J. 319, 322, 288 A.2d 849, 850 (1972)). The court elaborated that "probable cause is not a stringent standard, but does require 'something more than a raw, unsupported suspicion.'" *Id.* (quoting State *ex rel.* A.J., 232 N.J. Super. 274, 286, 556 A.2d 1283, 1289-90 (App. Div. 1989)).

[159] *See id.* at 593, 701 A.2d at 1274.

[160] *See id.*

[161] *See id.*

[162] *See id.*

[163] *See id.*

[164] *See J.G.*, 151 N.J. at 594, 701 A.2d at 1274. The court noted that a grand jury indictment requires that the State build a prima facie case that that particular defendant committed the crime of sexual assault. *See id.* The court further stated that a similar prima facie case must be established even in instances in which a defendant waives the right to an indictment. *See id.* Chief Justice Poritz explained that in the instance of juveniles, a summons may not be issued unless there is probable cause to

court found that the probable cause requirement was sufficient to safeguard due process.[165]

Taking into account the public stigma surrounding the AIDS epidemic and the compelling interest of sexual-assault victims to know the HIV status of their attackers, the Supreme Court of New Jersey held that the court-ordered testing schemes are reasonable searches under the Fourth Amendment to the United States Constitution and Article I, Paragraphs 1 and 7 of the New Jersey Constitution as they were applied to J.G., N.S. and J.T.[166] Accordingly, the court upheld the appellate division's ruling, but modified it to require probable cause to believe that the transfer of bodily fluids might have taken place between the accused assailant and the alleged victim.[167] The court emphasized that the state has a compelling interest in providing victims with knowledge of the HIV status of their attackers only when this probable cause showing exists.[168]

Several factors contribute to the recent judicial acceptance of New Jersey's court-ordered HIV-testing statutes. The nation as a whole has embraced a shift toward meeting the needs of victims of violent crimes.[169] A strong foundation for AIDS- and HIV-related legislation is found in the extent to which AIDS and HIV have touched the lives of and embedded a sense of fear in the people of America.[170] It is, therefore, not surprising that court-ordered HIV-testing statutes have become a national phenomenon.[171]

Critics allege that knowing the HIV status of the attacker does not provide a victim with any useful information that will contribute to his or her healing, either physically or emotionally.[172] There is no

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conclude that the juvenile has in fact been delinquent. *See id.* The chief justice reminded that a conviction still requires that the State prove every element of the crime beyond a reasonable doubt. *See id.* at 593-94, 701 A.2d at 1274.

[165] *See id.* at 593, 701 A.2d at 1274.

[166] *See id.* at 594, 701 A.2d at 1274-75.

[167] *See id.*

[168] *See id.* at 594, 701 A.2d at 1275.

[169] *See supra* note 147 and accompanying text (discussing the recent upsurge in public and political interest in victim's rights).

[170] *See supra* notes 21-35 (discussing the extent to which AIDS has affected American society).

[171] *See* Blender, *supra* note 36, at 477-78 (observing that when Congress enacted 42 U.S.C. § 3756(f) in 1990, approximately one third of all states had already signed legislation mandating that some form of HIV and AIDS testing be performed on sex offenders). With the passage of this federal statute, Congress intended to encourage the remainder of the states to sign similar mandatory testing legislation. *See id.* at 478.

[172] *See* Kathy Barrett Carter, *Rape Victims' Rights Reign Over Privacy of Suspects: Ability to Demand HIV Test Upheld*, STAR-LEDGER, Sept. 26, 1997, at 25. The American Civil Liberties Union found a complete lack of any benefit advanced by the New Jersey

better person, however, to decide whether there is any benefit to knowing the HIV status of an attacker than the victim. If a victim desires to know the full extent to which he or she has been placed in harm's way, such information should be provided, even at the expense of the defendant's privacy. Furthermore, if a victim believes that no benefit will be derived from knowing the HIV status of the attacker, the victim will not request that information and the criminal defendant will be spared the obligation to disclose such information.

Undoubtedly, compelling convicted sex offenders to produce blood samples for HIV testing is easier to justify than is compelling a merely suspected sex offender. However, the American legal system incarcerates men and women every day prior to conviction. While incarcerated, there is a diminished expectation of privacy.[173] Court-ordered HIV testing is merely a minimal extension of that decreased expectation of privacy, if indeed it is an extension at all. This is especially true if the information sought will minimize the emotional trauma the victim suffers or will allow post-exposure treatment. The benefits of HIV-testing statutes outweigh the detriments to the privacy interests of accused or convicted sexual offenders.

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court-ordered HIV-testing statutes. *See id.*

[173] *See* Hudson v. Palmer, 468 U.S. 517, 527-28 (1984) (holding that a prisoner has no right to privacy in his or her cell under the Fourth Amendment because such a right is fundamentally at odds with the prison environment requiring continuous observation); Bell v. Wolfish, 441 U.S. 520, 558 (1979) (upholding the practice of conducting visual body cavity searches on any inmate, whether they were convicted or awaiting trial, after that inmate had contact with a visitor from outside of the prison because such searches are reasonable in an effort to maintain discipline and order among inmates).