

The Venereal Doctrine: Compulsory Examinations, Sexually Transmitted Infections, and the Rape/Prostitution Divide

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ABSTRACT

This Article uncovers a blatantly sexist dynamic that has persisted, largely unnoticed, in American common law for more than a century: courts are far more willing to accept invasive examinations for sexually transmitted infections in women than in men. Remarkably, this disparity has been justified by the same assumption throughout the twentieth century: women with STIs are viewed as a threat to the health of the general public, while men with STIs are viewed as a threat only to individuals, not the public at large.

By examining cases involving men accused of rape and women accused of prostitution, this Article documents starkly disparate treatment. For decades, judges across the country have consistently relied on the stereotype that prostitutes with STIs represent such an alarming threat to public health that few measures go too far to stop them from promiscuously spreading these infections. On the other hand, rapists with STIs are a threat only to individual victims, not to the broader public, and thus health measures to hinder their transmission of infection must be far more limited. Together, these opinions comprise a cognizable legal doctrine—the “venereal doctrine.”

This doctrine emerged in the early 1900s, as scientific advancements made relatively reliable STI testing a reality, and it evolved throughout the twentieth century. Even following the rights revolution of the Warren Court, this doctrine

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persisted; remarkably, in the late 1980s and early 1990s, the assumptions underlying the doctrine were actually written into law for the first time. These years marked the heyday of hysteria surrounding the HIV/AIDS epidemic, and authorities across the country called for compulsory HIV testing statutes for both men accused of rape and women accused of prostitution. After considerable struggle, legislatures enacted these laws in dozens of states—and they remain on the books today. Yet these laws were firmly grounded in the gendered assumptions of decades past: male rapists were a threat only to their victims, while prostitutes were a threat to the public at large. These laws openly reflect their underlying assumptions—some testing statutes for accused rapists explicitly declare that their purpose is to provide peace of mind to individual victims, and many of these statutes allow testing only at the request of the alleged victim. Compulsory testing statutes for prostitutes, on the other hand, largely remain grounded in general public health powers. When these laws were challenged, courts across the country unanimously upheld them, and once again they openly relied upon gendered assumptions.

Significantly, the venereal doctrine flies in the face of scientific data. Modern studies show that female prostitutes very rarely transmit STIs to their customers, while male rapists are relatively likely to transmit STIs to their victims. Therefore, this Article concludes that compulsory pre-conviction STI examinations of accused prostitutes are unconstitutional. The same may be (but is not necessarily) true for examinations of accused rapists.

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INTRODUCTION

On August 30, 2017, the United States Court of Appeals for the Second Circuit issued a decision in the controversial case of *Doe v. Hagenbeck*.¹ Jane Doe, a former cadet at the United States Military Academy (also known as West Point) had claimed that two superior officers “perpetrated a sexually aggressive culture at West Point that discriminated against female cadets, put female cadets at risk of violent harm, and resulted, *inter alia*, in her sexual assault,”² and in doing so, had violated the Fifth Amendment.³ The Second Circuit ruled against Doe on technical grounds, without reaching the merits of her claim.⁴ Yet in a dissent in *Hagenbeck*, Judge Denny Chin discussed in some detail the pervasively sexist environment at West Point. In addition to mentioning administrators failing to adequately punish sexual offenders and permitting “sexually explicit, violent, and degrading group chants during team building exercises,”⁵ Chin cited Doe’s amended complaint, in which she had written, “West Point officials also required mandatory annual sexually transmitted disease (STD) testing for female cadets, but not for male cadets.”⁶ During Doe’s second year, school officials briefed the female cadets on this policy. “There, they admitted that the policy was unfair, but expressed that it was the Army’s opinion that STDs were more harmful to women than men and that it was the responsibility of women to prevent their spread.”⁷

This West Point policy—apparently an ongoing initiative implemented by an arm of the United States military—reflects deeply ingrained and sexist stereotypes about gender and infection. Specifically, it reflects and perpetuates the notion that sexually transmitted infections (STIs) are somehow different in men and women in a way that demands greater scrutiny of women’s bodies. It also implicitly endorses the age-old idea that women bear a greater responsibility than men for the spread of STIs. These stereotypes have dominated the jurisprudence over STI examinations for more than a century. They are entrenched in common law, and, in recent decades, they have been explicitly codified in statutes.

This Article argues that the way authorities have examined individuals for STIs, and the way courts have decided cases brought by individuals objecting to such examinations, is fundamentally sexist. In particular, this Article examines cases involving men accused of rape and women accused of prostitution. When government officials attempted to examine these individuals for STIs before they were convicted, many sued, objecting to such compulsory examinations on a variety of legal grounds. Courts decided these cases differently depending on whether the complainants were men or women. Together, these opinions comprise

1. 870 F.3d 36 (2d Cir. 2017).

2. *Id.* at 38 (internal quotations omitted).

3. U.S. Constitution amendment V.

4. *Hagenbeck*, 870 F.3d at 49.

5. *Id.* at 50 (Judge Chin, dissenting).

6. *Id.* at 52 (Judge Chin, dissenting) (quoting Amended Complaint at ¶ 44, *Doe v. Hagenbeck*, 98 F. Supp. 3d 672 (S.D. New York 2013) (No. 13 CIV.2802), 2013 WL 10480143).

7. Amended Complaint, note 6 at ¶ 44.

a cognizable legal doctrine—what this Article terms the “venereal doctrine.” Black’s Legal Dictionary defines “doctrine” as “[a] principle, esp[ecially] a legal principle, that is widely adhered to.”⁸ Over the years, courts across the United States have closely adhered to the tenets of the venereal doctrine. This Article is the first to identify (and to name) the venereal doctrine, which has persisted throughout history, but gone unrecognized in scholarly literature.

Under the venereal doctrine, women with STIs are viewed as a threat to the health of the general public, while men with STIs are viewed as a threat only to individual members of the public.⁹ Prostitutes with STIs represent such an alarming threat to public health that few measures go too far to stop them from promiscuously spreading these infections. Rapists with STIs, on the other hand, pose a threat only to individual victims, not to the wider public, and thus health measures to hinder their transmission of infection must be far more limited. The civil liberties of white male rapists in particular must be protected assiduously, while the civil liberties of accused men of color can be infringed to a greater extent. From the earliest days of physicians being able to reliably diagnose syphilis and gonorrhea to the heyday of the HIV/AIDS epidemic, courts and government officials have been remarkably consistent in treating accused women and accused men differently, according to these principles.

This Article is the first to trace the cases of pre-conviction STI examinations in any context. Thus, it is also the first to compare the treatment of compulsorily examined women accused of prostitution and compulsorily examined men accused of rape, and to recount how courts have decided their cases over the past century. Even though the rationale underlying these decisions has changed, the principles and assumptions undergirding this rationale have remained the same: women are a threat to public health, whereas men are a threat only to individuals. By examining the case law, as well as local laws and practices, scholarly literature, and archival documents, this Article demonstrates that suspected female prostitutes and suspected male rapists were consistently treated in this disparate manner—even though both were accused of sex crimes, and regardless of the dearth of evidence that female prostitutes were more likely than male rapists to carry STIs, and, indeed, regardless of the bounty of evidence that female prostitutes are far less likely than male rapists to transmit STIs.¹⁰

8. “Doctrine,” *Black’s Law Dictionary*, 496 (West Group, 7th ed. 1999).

9. As Part IV explains, gay men are something of an exception to this doctrine, at least in the last quarter-century. In the age of AIDS, they have (like women) been perceived as disease spreaders.

10. I have chosen to focus on rape and prostitution for two principal reasons. First, cases involving these two crimes were and are by far the most likely to involve compulsory STI testing, compared with other criminal cases. Second, these crimes have largely been understood along gendered lines throughout history (though it is important to note that this understanding reflects stereotypes and does not always reflect reality), so rape cases can exemplify the way courts treat men, while prostitution cases can exemplify the way courts treat women.

In drawing this distinction, I am in no way affirming a gender binary. Gender is experienced and expressed in a plethora of ways, and many people identify as neither male nor female. That said, this doctrine emerged and was refined at a time when courts did not acknowledge

No scholar until the 1980s devoted more than cursory attention to what this Article deems the venereal doctrine. Indeed, several jurists noted that such cases seemed to stand out from other cases involving pre-conviction physical examinations without noting what it was about these cases that set them apart.¹¹ The difference is that these cases involved prostitution or rape, and were thus informed by all of the assumptions and stereotypes that surround those who sell, buy, or forcibly take sex. In the late 1980s and early 1990s, however, the country was suddenly awash in conversations about STIs—specifically, HIV/AIDS. This led to an explosion of scholarly literature considering proposed or enacted policies to compulsorily examine accused rapists and accused prostitutes for HIV. Some scholars determined that such policies might be unconstitutional,¹² while others came to the opposite conclusion,¹³ yet no scholar compared such policies (and thus revealed the gendered assumptions that underlay them). More importantly, none of the scholars studying HIV testing looked back to the history of such compulsory pre-conviction STI examinations. Only by thoroughly investigating this history can we truly understand these policies in the present.

In the present, court-sanctioned stereotypes about men, women, sex, and infection justify the greater policing of female prostitutes. Because, according to the venereal doctrine, women represent a greater threat to the public health than men, women's bodies and sex lives are more scrupulously policed than those of men. This assumption was made apparent by Jane Doe's experience at West Point, and it is apparent in the country at large. In 2010, across the United States, 19,860 men were arrested for "forcible rape," compared with 43,190 women arrested for prostitution-related offenses.¹⁴ It is impossible to state what percentage of those who rape and those who sell sex these figures represent, considering how few

the existence of gender beyond the binary. Thus, unfortunately, my analysis of this doctrine necessarily draws a hard line between "men" and "women," in an attempt to point out the doctrine's sexist implications. I do not know, nor do I assume, how any of the individuals discussed below would have identified in terms of gender; I know only how the courts or other authorities identified them.

11. See e.g. *Rochin v. California*, 342 U.S. 165, 177 footnote 2 (1952) (Justice Douglas, concurring); *People v. One 1941 Mercury Sedan*, 168 P.2d 443, 449 (1st D. Ct. of Appeal California 1946).
12. See e.g. James Grant Snell, "Mandatory HIV Testing and Prostitution: The World's Oldest Profession and the World's Newest Deadly Disease," 34 *Hastings Law Journal* 1565 (1994); Bernadette Pratt Sadler, "When Rape Victims' Rights Meet Privacy Rights: Mandatory HIV Testing, Striking the Fourth Amendment Balance," 67 *Washington Law Review* 195 (1992); Karin Zink, "*Love v. Superior Court*: Mandatory AIDS Testing and Prostitution," 22 *Golden Gate University Law Review* 795 (1992); Paul H. MacDonald, "AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders," 43 *Vanderbilt Law Review* 1607 (1990).
13. See e.g. Stacey B. Fishbein, "Pre-Conviction Mandatory HIV Testing: Rape, AIDS and the Fourth Amendment," 28 *Hofstra Law Review* 835 (2000); Royce Richard Bedward, "AIDS Testing of Rape Suspects: Have the Rights of the Accused Met Their Match?," 1990 *University of Illinois Law Review* 347; Kelly A. Bennett, "Mandatory AIDS Testing: The Slow Death of Fourth Amendment Protection," 20 *Pacific Law Journal* 1413 (1989).
14. Howard N. Snyder, *Arrests in the United States, 1990-2010*, 2 (2012), <https://perma.cc/3JUV-PB8F>.

survivors report sexual assaults,¹⁵ how few of those assaults are prosecuted, how hidden prostitution is, and how variable the definitions of prostitution are, but, in any case, women are arrested for selling sex more than four times as often as are men for rape. This almost certainly exposes more women to compulsory STI examinations—which can result in harsh consequences. As Anna Forbes has noted, at least thirty-two states (and two territories) have laws that criminalize the transmission of HIV. In fifteen states, if there is a positive diagnosis, “the standard penalty is enhanced if the accused was arrested on a prostitution-related charge. These enhanced penalties can be applied in some states even if no sexual contact has occurred—simply on the basis of allegations that the defendant offered to have sex with another person.”¹⁶

Far more research remains to be done on how often pre-conviction STI testing is performed on accused rapists and prostitutes today, and how often positive diagnoses actually result in enhanced charges,¹⁷ yet the logic of the venereal doctrine—that women are a greater public health threat than men—undoubtedly serves to justify any greater policing or charging that does result. As this Article shows, the venereal doctrine flies in the face of scientific data. Modern studies show that female prostitutes very rarely transmit STIs to their customers,¹⁸ while male rapists are likely to transmit STIs to their victims.¹⁹ In other words, the central assumption of the venereal doctrine is wrong. The doctrine rests on gendered and inaccurate stereotypes.

This Article is not meant to be merely a work of history. Rather, it is intended to render the doctrine legible so that it might be changed. This Article contends that compulsory pre-conviction STI examinations of accused prostitutes are unconstitutional, because such examinations are not an effective means of achieving the government’s compelling interest in protecting public health. On the other hand, compulsory pre-conviction STI examinations of accused rapists may be constitutional, as studies suggest that rapists are comparatively more likely to transmit STIs in a manner that threatens public health. In other words, based on currently available research, we must turn the venereal doctrine on its head, so that the assumptions that inform compulsory STI testing are justified by actual scientific studies. In any event, more studies are necessary to more unambiguously document how likely female prostitutes and male rapists are to transmit STIs.

In Part I, this Article shows that during the first half of the twentieth century,

15. See “Get Statistics: Sexual Assault in the United States,” *National Sexual Violence Resource Center* (2018), <https://perma.cc/UVW6-L3VZ> (“Rape is the most under-reported crime . . .”).

16. Anna Forbes, “Speaking of Sex Workers: How Suppression of Research Has Distorted the United States’ Domestic HIV Response,” 23 *Reproductive Health Matters* 21, 24 (2015).

17. Center for HIV Law & Policy, *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice*, 2 (3d. ed. 2017) (“It . . . is difficult to know the extent to which crimes are charged or prosecutions are actually brought in any jurisdiction, since there is no centralized database for such information.”).

18. See notes 471-486.

19. See notes 487-493.

most American courts held that men accused of rape could not be compelled to undergo STI examinations. These decisions rested on the privilege against self-incrimination.²⁰ Yet there were two exceptions to this trend: when the accused rapist consented or was a man of color, courts were less inclined to rule in his favor. In all of these cases the prosecution sought the results of an STI examination not because the government considered rapists a threat to public health, but in order to use a defendant's STI diagnosis (which could be then be matched to a victim's STI diagnosis) as evidence at trial. By protecting accused (white) rapists from compelled STI examinations, courts were solidifying the central assumption of the venereal doctrine—that men who rape do not threaten public health in the same way that women who sell sex threaten it. In addition, all of these rulings relied on highly gendered assumptions about rape, infection, and extramarital sex.

Part II of this Article turns to the cases of women accused of prostitution. During the first half of the twentieth century, most American courts held that women accused of prostitution could be compelled to undergo STI examinations. Courts ruled this way—the opposite of how they ruled in the cases of men accused of rape—in large part because of the assumption that female prostitutes (unlike male rapists) pose an immense threat to public health. Based on this assumption, American officials launched a campaign called the “American Plan” under which they compulsorily examined and incarcerated tens, probably hundreds, of thousands of infected women without due process during these years—ostensibly to protect soldiers and sailors from contracting debilitating STIs. Women of color were disproportionately likely to be examined and detained.

It is worth noting that the cases in Parts I and II are not directly comparable. In the rape cases from Part I, authorities examined men for STIs in order to use the results of the examination as evidence of guilt in a criminal trial; in the prostitution cases from Part II, authorities examined women for STIs in order to detain those infected without trials. These cases reflect the deliberate choices of authorities: government officials believed that male rapists were not a public health threat of the same magnitude as female prostitutes, and thus men did not need to be locked up by the thousands without due process in the same manner that women were. However, this decision was based on flawed studies and assumptions about who spreads infection. Men (including but not exclusively male prostitutes) could and did infect soldiers and sailors, and countless others, yet because of gendered assumptions, men were not subject to mass testing and

20. U.S. Constitution amendment V (“No person shall . . . be compelled in any criminal case to be a witness against himself”). Note that the Fifth Amendment had not yet been incorporated against the states in the early twentieth century, and it would not be until 1964. *Malloy v. Hogan*, 378 U.S. 1489 (1964). However, all the cases discussed in Part I continued to refer to the privilege against self-incrimination. Some mentioned the Fifth Amendment and/or a corresponding state constitutional amendment, see e.g. *State v. Newcomb*, 119 S.W. 405, 409 (Supreme Ct. Missouri 1909), while some called the privilege a “common law” right, see e.g. *State v. Height*, 91 N.W. 935, 937 (Supreme Ct. Iowa 1902), and some simply invoked the privilege without any citation, see e.g. *People v. Akin*, 143 P. 795, 795 (3d D. Ct. of Appeals California 1914).

quarantine in the same manner as were women. Thus, the difference between the cases in Part I and the cases in Part II is itself reflective of the stereotypes underlying the venereal doctrine.

In Part III, this Article tracks the compulsory pre-conviction STI examinations of both men and women from the middle of the twentieth century to the early 1980s. During these decades, courts began to turn against men accused of rape, and remained dead-set against women accused of prostitution. In 1966, the landscape for both men and women changed when the Supreme Court issued its decision in *Schmerber v. California*.²¹ *Schmerber* closed the door on Fifth Amendment challenges to STI examinations, but still allowed individuals to challenge such examinations as unreasonable searches or seizures under the Fourth Amendment.²² In subsequent cases, courts remained more sympathetic to men than to women, yet by and large they ruled that pre-conviction STI examinations of both were acceptable. Nonetheless, these decisions remained grounded in the same gendered assumptions as the earlier cases: that prostitutes are a threat to public health, while rapists are a threat only to their victims.

Part IV traces the venereal doctrine from the 1980s to the modern day, revealing a political and public health landscape radically altered by HIV/AIDS. In the late 1980s and early 1990s, authorities around the country called for compulsory HIV testing statutes for both men accused of rape and women accused of prostitution. After considerable struggle, legislatures enacted these laws in dozens of states—and they remain on the books today. Yet these laws remained firmly grounded in the gendered assumptions of decades past: male rapists were a threat only to their victims, while prostitutes were a threat to the public at large. For the first time, these laws began to openly reflect this—some testing statutes for accused rapists explicitly declared that their purpose was to provide peace of mind to victims, and many of these statutes allowed testing only at the request of the alleged victim. Compulsory testing statutes for prostitutes, on the other hand, largely remained grounded in general public health powers. When these laws were challenged, courts across the country unanimously upheld them, but once again they openly relied upon gendered assumptions.

Finally, the Article concludes by arguing that, according to the case law that arose in the decades following *Schmerber*, compulsory pre-conviction STI examinations of accused prostitutes are unconstitutional. The same is not necessarily true for examinations of accused rapists. This conclusion is grounded in the history revealed by this Article, which shows that, for more than a century, the venereal doctrine has rested on sexist assumptions and stereotypes. This conclusion is further grounded in scientific studies, which suggest that such

21. 384 U.S. 757 (1966) (holding that forced extraction and analysis of a blood sample is not compelled testimony and therefore a violation of the Fifth Amendment's privilege against self-incrimination).

22. *Id.* at 761; see U.S. Constitution amendment IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

assumptions and stereotypes are inaccurate. Prostitutes are unlikely to transmit STIs (especially HIV) to men through vaginal intercourse, whereas rapists are likely to transmit STIs to their victims. It is thus male rapists, and not female prostitutes, who appear to pose the true threat to the public health at large. However, considerably more research must be done before we should feel comfortable endorsing compulsory pre-conviction STI examinations of accused rapists. In general, the constitutionality of all such examinations, regardless of context, is in serious doubt.

I. COMPULSORY EXAMINATIONS FOR MEN

During the first half of the twentieth century, most courts found that men accused of rape could not be compelled to undergo examinations for STIs. With two notable exceptions, courts broadly ruled that such examinations impermissibly compelled such men to incriminate themselves, in violation of the Fifth Amendment. These rulings rested on clearly gendered principles and sexist assumptions—including the notion that women are predisposed to falsely accuse innocent men of rape, and the idea that even guilty rapists are a threat only to their victims, and not to the public health at large. As discussed in Part II, the ways courts treated men accused of rape was sharply at odds with the way that courts over this same time period treated women accused of prostitution.

In the late nineteenth century, three simultaneous developments in American law and medicine fundamentally reshaped rape prosecutions: first, spurred by popular movements to protect women and children and to raise the age of consent, the number of rape prosecutions (and percentage of convictions) increased dramatically;²³ second, doctors became more professionalized and more widely respected, cementing their places as experts in rape trials;²⁴ and third, researchers identified the bacteria that cause gonorrhea and syphilis and developed somewhat more effective techniques for diagnosing these conditions.²⁵ Following these three developments, a number of cases arose in which physicians examined alleged rapists for STIs; the men objected and, when convicted, appealed.

A. The Birth of the Doctrine: *State v. Height*

In 1901, *State v. Height* became the first appeal by a rape defendant forced

23. Estelle Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation*, 148-51 (Harvard University Press, 2013); Brian Donovan, *Respectability on Trial: Sex Crimes in New York City, 1900-1918*, 72-73 (State University of New York Press, 2016).

24. Paul Starr, *The Social Transformation of American Medicine*, 79-145 (Basic Books, 1982); Stephen Robertson, "Signs, Marks, and Private Parts: Doctors, Legal Discourses, and Evidence of Rape in the United States, 1823-1930," 8 *Journal of the History of Sexuality* 345, 376 (1998).

25. Albert Neisser discovered the bacterium that causes gonorrhea in 1879; Paul Ehrlich discovered the syphilis spirochete in 1909; the first blood test for syphilis was developed by August von Wassermann in 1906. Scott W. Stern, *The Trials of Nina McCall: Sex, Surveillance, and the Decades-Long Government Plan to Imprison "Promiscuous" Women*, 25 (Beacon Press, 2018).

to undergo an STI exam to reach a higher court. In that case, a man named Fred Height was arrested for raping a ten-year-old girl.²⁶ Shortly thereafter, authorities forced Height to undergo an STI examination because his alleged victim had contracted an STI. The prosecution wanted to see if Height had the same infection; if he did, they could use that as evidence of his guilt. Three physicians visited Height in his jail cell and, in spite of his protests, examined his “private parts,” and pronounced Height infected with “venereal disease.”²⁷ In his opening statement, the prosecutor cited this as evidence that Height was guilty; a jury in the Linn County courthouse agreed, and Height was convicted.²⁸ Height appealed, and his case reached the Iowa Supreme Court. There, as one Des Moines newspaper put it, “[t]he supreme court decided a new and interesting point of law. . . . In setting aside the action of the trial court [, the court] launch[ed] into a twenty-page essay on personal rights from the days of Caesar down to the present time, and show[ed] that the majority of states prevent such an examination as was permitted in this instance.”²⁹

The court held that, even though involuntarily obtained confessions may be admissible, a defendant cannot be compelled to provide evidence against himself. “The rule against requiring a witness to give self-criminating evidence in any judicial proceeding is much older than our constitution,” it declared. “It is one of the fundamentals of the common law.”³⁰ Based upon this principle, “[t]he search was for the mere purpose of securing evidence by an invasion of the private person of the defendant, and we think there is no consideration whatever which will justify it. . . . [T]he officers acted unlawfully in compelling defendant to submit to this examination, and all evidence with reference to information secured thereby should have been excluded on defendant’s objection.”³¹

The court’s opinion appears to have been influenced at least in part by disdain for sexually active women—including ten-year-old girls—in addition to the court’s stated reverence for constitutional rights. The court held the defense should have been allowed to admit evidence of the ten-year-old victim’s “unchaste character or acts of intercourse with other men” to rebut the assertion or implication that the defendant was the only man who could have infected her.³² In determining this, the court relied on a case from 1850, in which the Alabama Supreme Court had ruled that a rape defendant should have been permitted to introduce evidence as to the sexual history of the victim (who was under the age of ten) for the purpose of casting doubt on the “presumption” that the defendant was the man who infected her with an STI.³³

26. *State v. Height*, 91 N.W. 935, 935 (Supreme Ct. Iowa 1902).

27. *Id.*

28. *Id.*

29. “New Point of Law,” *The Bystander*, 2 (24 Oct. 1902).

30. *Height*, 91 N.W. at 937.

31. *Id.* at 940.

32. *Id.*

33. *Id.*; see *Nugent v. State*, 18 Ala. 521, 525-26 (Supreme Ct. Alabama 1850).

Height became the first and most important precedent in the line of cases that followed, all protecting accused rapists from STI examinations. In the years to come, *Height* would be cited in numerous cases upholding its central principle.³⁴ For instance, in 1909, the Missouri Supreme Court cited *Height* when deciding a similar case, *State v. Newcomb*. Richard Newcomb was convicted of raping a girl under the age of fourteen.³⁵ While in custody after arrest, he had been taken into a room of the courthouse and, with the sheriff standing nearby, had been examined for STIs by a physician.³⁶ His lawyer insisted on appeal that this had been a “flagrant error and was a conspicuous violation of the constitutional right of the defendant to be exempt from testifying against himself,” enshrined in both the Missouri constitution and the Fifth Amendment of the U.S. Constitution.³⁷ Looking to *Height*, the court agreed that “this testimony was incompetent and inadmissible and violative of defendant’s constitutional right not to be compelled to testify against himself.”³⁸

Height would continue to be the leading case on the question of compelling accused rapists to undergo STI examinations for at least a quarter-century. In Arkansas and Michigan in 1928, and in Kentucky in 1936, courts held that men accused of rape could not be examined for STIs without their consent—explicitly relying on *Height*.³⁹ *Height*’s influence went beyond rape cases, as seen in a New Jersey case from 1940, *Bednarik v. Bednarik*, regarding whether a husband divorcing his wife on the grounds of adultery could compel her to take a blood test to determine paternity of their child.⁴⁰ In a telling passage, the New Jersey chancery court judge explored “[w]hether a compulsory order for the taking of blood grouping tests is in violation of the privilege against self-incrimination”⁴¹ “Perhaps the leading case is *State v. Height*,” the judge wrote, before discussing *Height* and the many cases that relied upon the decision to hold that forcing “a defendant to submit to a physical examination and requiring him to furnish evidence against himself was a denial of the privilege against self-incrimination.”⁴² “The *Height* case has exercised a strong influence on subsequent decisions,” the judge concluded, before deciding the case on the grounds of an implied “constitutional right of privacy.”⁴³

Several other courts reaffirmed the holding in *Height* without relying on it

34. See e.g. *McManus v. Commonwealth*, 94 S.W.2d 609 (Kentucky Ct. of Appeals 1936); *Bethel v. State*, 10 S.W.2d 370 (Supreme Ct. Arkansas 1928); *People v. Corder*, 221 N.W. 309 (Supreme Ct. Michigan 1928); *Newcomb*, 119 S.W. 405, 405.

35. *Newcomb*, 119 S.W. at 406.

36. *Id.* at 409.

37. *Id.*

38. *Id.*

39. *Bethel*, 10 S.W.2d at 372; *Corder*, 221 N.W. at 313; *McManus*, 94 S.W.2d at 611.

40. *Bednarik v. Bednarik*, 16 A.2d 80, 82 (New Jersey Chancery Ct. 1940).

41. *Id.* at 86.

42. *Id.* at 86-87.

43. *Id.* at 87-91.

explicitly.⁴⁴ The “most extreme” articulation of this principle, according to a dissenting Michigan Supreme Court Justice in 1928, was made by the Missouri Supreme Court in 1913.⁴⁵ In that case, *State v. Horton*, a schoolteacher in Kansas City was convicted of “ravishing” an eleven-year-old pupil during the lunch hour.⁴⁶ Because the pupil was eventually diagnosed with gonorrhea, two physicians examined the teacher upon arrest, at the police captain’s request, and found the teacher had the same infection.⁴⁷ The court reversed his conviction, holding, “[w]hen a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman’s club, it requires something much more substantial than silence to justify an invasion of his constitutional right not to be compelled to furnish evidence against himself.”⁴⁸

It is worth noting that virtually all of the alleged rape victims in the cases mentioned above were quite young—usually around ten or eleven years old. This pattern is striking; yet, in the context of the history of the time, it is unsurprising. Historian Estelle Freedman has shown that New York courts were especially focused on rape prosecutions when the alleged victims were minors;⁴⁹ of thirty rape cases decided by the New York Supreme Court between 1890 and 1910, only a third had complainants over the age of eighteen.⁵⁰ This was largely the result of a national movement to prosecute more statutory rape cases, and because convictions were much harder to attain when the complainant was an adult (as many statutes demanded victims prove their chastity or that they exhibited “extreme resistance”).⁵¹ Yet there is another reason that the aforementioned cases disproportionately had young complainants. From his study of 610 Manhattan rape cases tried between 1886 and 1921, historian Stephen Robertson concluded that young rape victims were most likely to seek out doctors and be examined for STIs.⁵² “Almost all the cases that featured testimony about venereal disease involved prepubescent girls.”⁵³ With the victim’s STI diagnosis in hand, authorities would then try to examine the alleged assailant; thus, leading to cases like *Height* in which men objected to such examinations. Note, also, the complete absence of the idea that rapists with STIs were a threat to the public health in general, as opposed to individual victims in particular.

There were two exceptions to *Height* and its progeny. Broadly speaking, the first was when a court could plausibly conclude that the accused rapist consented

44. See e.g. *State v. Horton*, 153 S.W. 1051 (Supreme Ct. Missouri 1913); *Akin*, 143 P. 795; *State v. Matsinger*, 180 S.W. 856 (Supreme Ct. Missouri 1915); *Garcia v. State*, 274 P. 166 (Supreme Ct. Arizona 1929).

45. *Corder*, 221 N.W. at 310 (Justice Fead, dissenting).

46. *Horton*, 153 S.W. at 1052.

47. *Id.*

48. *Id.* at 1053.

49. Freedman, note 23, at 145-51.

50. Donovan, note 23, at 72.

51. *Id.*; see also Freedman, note 23, at 127-28, 148-51.

52. Robertson, note 24, at 376-78.

53. *Id.* at 382.

to the examination, and the second was when the accused rapist was not white. These two exceptions are briefly discussed below.⁵⁴

B. Exception 1: Consent

During the same years that courts from California to Kentucky were striking down STI examinations of accused rapists, other courts were upholding these examinations when the accused rapist consented to the examination. In *Angeloff v. State*, a man accused of raping a ten-year-old girl was examined for STIs, apparently without objection.⁵⁵ When the man later objected to the evidence admitted as a result of this examination, the Supreme Court of Ohio in a per curiam decision dismissed his complaint: “Where a defendant while confined in jail submits without objection to a physical examination of his person, with knowledge that such examination is for the purpose of proving or disproving his guilt of the crime charged, evidence of the result of such examination may be admitted in evidence upon the trial.”⁵⁶ Subsequent cases reaffirmed this principle. “Evidence of the result of a physical examination of an accused person, may not be excluded in a criminal action on the ground that it compels him to become a witness against himself, where the examination is conducted with the consent of the accused.”⁵⁷ However, courts also took care to affirm *Height* where the defendant did not consent.⁵⁸

The consent exception was never well-defined. Even so, two courts held that the accused rapist must “expressly voice his approval” in order to be protected—“mere silence and the absence of overt objection being insufficient.”⁵⁹ Meanwhile, in the widely cited case of *People v. Glover*, the Michigan Supreme Court held that an accused rapist who consented to an STI examination could not later claim that the results of that examination were inadmissible on the grounds of “confidential relations” between doctor and patient.⁶⁰

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54. It is worth noting at this moment a pair of rulings that appear to be contrary, but that are subtly different from those in the *Height* line. In *State v. Marcks*, the Missouri Supreme Court dismissed the complaint of an accused rapist who objected on appeal to his STI examination, but the court did so on procedural grounds (the man had failed to object at the proper time). 41 S.W. 973, 976 (Supreme Ct. Missouri 1897). The Missouri Supreme Court also decided *State v. Sanford* on the same procedural basis. 124 Mo. 484, 487 (Supreme Ct. Missouri 1894).
55. *Angeloff v. State*, 110 N.E. 936, 936-37 (Supreme Ct. Ohio 1914).
56. *Id.* at 937 (citing to *Lindsay v. State*, 14 Ohio C.D. 1 (Circuit Ct. Ohio 1902) (affirmed by *Lindsey [sic] v. State*, 69 N.E. 126 (Supreme Ct. Ohio 1903))).
57. *People v. Gutierrez*, 14 P.2d 838, 840 (California Ct. of Appeals 1932).
58. *Garcia*, 274 P. at 167.
59. Fred E. Inbau, “Self-Incrimination—What Can an Accused Person be Compelled to Do,” 28 *Journal of Criminal Law & Criminology* 261, 269 (1937) (citing *Corder*, 244 Mich. 309, and *Bethel*, 178 Ark. 277).
60. *People v. Glover*, 38 N.W. 874, 874-75 (Supreme Ct. Michigan 1888). But see *State v. Moore*, 204 N.W. 341 (Supreme Ct. North Dakota 1924).

C. Exception 2: Race

During these same years, several appeals courts issued rulings that at first appear to be at odds with the *Height* line of cases. There is, however, a probable explanation for the decision in each of these cases: the alleged rapists were men of color. In contrast, in *Height* and its progeny, census and newspaper records indicate that all but one of the alleged rapists was white.⁶¹ This pattern is likely explained in part by racist stereotypes, which held that men of color were more likely to contract and transmit STIs, and also that men of color were more likely to be sexual threats (especially to white women).⁶²

The first race-exception cases were decided in 1912. That year, two appeals courts in U.S. territories—one in the Philippines and the other in Hawaii—ruled that compelled STI examinations did not impermissibly force the defendants to provide evidence against themselves.⁶³ In *United States v. Tan Teng*, the Supreme Court of the Philippines made clear that the defendant was of Chinese descent: after a seven-year-old girl tested positive for gonorrhea, she told her sister that she had been raped by a “Chinaman.”⁶⁴ The authorities “collected together” a “number of Chinamen” and had the girl identify her assailant.⁶⁵ The girl identified one of the men, who was promptly arrested, stripped, and examined.⁶⁶ “The policeman took a portion of the substance emitting from the body of the defendant” and had it tested; he was positive for gonorrhea.⁶⁷ The court held that the defendant had

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61. For *Height*, see 1910 United States Census, Muscatine City, Muscatine County, Iowa, sheet 3A, family 82, lines 21-23 (18 Apr. 1910) (listing Height as white); 1930 United States Census, Muscatine City, Muscatine County, Iowa, sheet 1B, family 36, lines 97-100 (2 Apr. 1930) (listing Height as white); 1940 United States Census, Muscatine City, Muscatine County, Iowa, sheet 10A, family 210, lines 25-28 (1940) (listing Height as white). For *Newcomb*, see Richard Monroe Newcomb, *United States World War II Draft Registration Cards, 1942*, Dunklin, MO, RG 147, Roll 1023 (listing Newcomb as white); “Certificate of Marriage, Richard M. Newcomb and Etta A. Horris, Caruthersville, Pemiscot, MO,” *Missouri, Marriage Records, 1805-2002* (15 June 1914). For *Akin*, see “1920 United States Census, Chico, Butte County, California, sheet 8A, family 167,” lines 23-24 (2 Jan. 1920) (listing Akin as white); *R.L. Polk & Company’s Chico Directory, 1916*, 7 (Detroit: R.L. Polk & Co., 1917). (Note, as support, that Akin’s hometown is the same as that of his alleged victim, Norah Heckart. See “1910 United States Census, Chico, Butte County, California, sheet 4A, family 78,” lines 1-4 (12 May 1910).) For *Matsinger*, see “1920 United States Census, St. Joseph City, Buchanan County, Missouri, sheet 6A, family 150,” lines 30-37 (9 Jan. 1920) (listing Matsinger as white). For *Bethel*, see Transcript of Record. For *Corder*, see “1930 United States Census, Jackson City, Jackson County, Michigan, sheet 10B,” line 60 (5 Apr. 1930) (listing Corder as white). For *McManus*, see “1930 United States Census, Somerset City, Pulaski County, Kentucky, sheet 3B, family 66,” lines 62-67 (4 Apr. 1930) (listing McManus as white); Interior Journal, 1 (18 Oct. 18) (noting McManus’s crime and confirming his age). *Horton* is the exception. The decision clarifies that the defendant was “colored.” *Horton*, 153 S.W. at 1052.
62. Jennifer Wheeler, “Race and Sexual Offending,” in *Race, Culture, Psychology, and Law*, 391 (eds. Kimberly Barrett & William H. George, Sage Publications, 2005).
63. *United States v. Tan Teng*, 23 Phil. Rep. 145 (Supreme Ct. Philippine Islands 1912); *Territory v. Chung Nung*, 21 Haw. 214 (Supreme Ct. Territory Hawai’i 1912).
64. *Tan Teng*, 23 Phil. Rep. at 146-47.
65. *Id.* at 147.
66. *Id.* at 147-48.
67. *Id.* at 148.

not, in fact, been compelled to provide evidence against himself, noting that the examination had taken place “without his objection.”⁶⁸ The court went further, approvingly quoting the lower court judge: “The accused was not compelled to make any admissions or answer any questions, and the mere fact that an object found on his person was examined; seems no more to infringe the rule invoked [*sic*], than would the introduction in evidence of stolen property taken from the person of a thief.”⁶⁹

In *Territory v. Chung Nung*, the Supreme Court of the Territory of Hawaii did not specify the defendant’s race, but local newspaper records identify him as a “Chinaman.”⁷⁰ As in *Height*, the defendant was charged with carnal abuse of a female child under the age of twelve, who had contracted an STI.⁷¹ Upon arrest, the police “directed [the defendant] to remove his trousers, which he did without objection,” to examine him for STIs, and determined that he had “chronic gonorrhoea.”⁷² The defendant was convicted on this evidence.⁷³ On appeal, the defendant argued that this examination required him to testify against himself.⁷⁴ The court succinctly rejected this argument with similar reasoning to that in *Tan Teng*: “There is no evidence tending to show the use of any force, or threats, or the holding out of any inducement. . . . The purpose of the examination was to obtain proof of a physical fact, and not to compel the defendant ‘to be a witness against himself.’”⁷⁵

Sometimes, when the defendant was a person of color, the court didn’t even bother to offer a legal rationale justifying its decision to bless the examination. For example, in the Texas case *Martinez v. State*, where a “young Mexican” was accused of raping an eight-year-old girl and then examined for STIs,⁷⁶ the court of criminal appeals simply wrote that when “[t]hat a physician examines a person under arrest and thereafter testifies to his discovery of a venereal disease, is not violative of the rules against compelling one to give testimony against himself.”⁷⁷ The court cited nothing to support this statement.⁷⁸

There also is a notable overlap between cases where the court ruled that a man objecting to an STI examination had consented to the examination and cases where the defendant was a man of color. This may reflect the bigoted view that Asian and Latino men are more “docile” than white men,⁷⁹ and it may reflect

68. Id. at 149, 152-53.

69. Id. at 149.

70. “Odds and Ends in the Courts: Sentence of Fiend,” *Hawaiian Star*, 8 (15 May 1912).

71. *Chung Nung*, 21 Haw. at 215-16.

72. Id. at 219.

73. Id. at 215.

74. Id. at 219.

75. Id.

76. *Martinez v. State*, 256 S.W. 289, 289 (Ct. of Criminal Appeals Texas 1923).

77. Id. at 291.

78. Id.

79. “Racial Violence Against Asian Americans,” 106 *Harvard Law Review* 1926, 1931 (1993); Mark Reisler, “Always the Laborer, Never the Citizen: Anglo Perceptions of the Mexican

judges searching for an acceptable rationale to justify compelling these men to incriminate themselves. Consider the opinion in *Tan Teng*, wherein the court stated that the defendant—who was picked out of a lineup, stripped, and then examined—had not objected (shortly after rhetorically comparing him to a thief).⁸⁰ A generation later, the Arizona Supreme Court in *Garcia v. State* ruled that while *Height's* holding was valid, it did not apply to the case at hand because the Latino defendant had “willingly acquiesced in the examination by the doctor.”⁸¹ Three years later, a California Court of Appeal concluded, “[f]rom a careful reading of the record it satisfactorily appears that the defendant”—a Latino man named Frank Gutierrez—“voluntarily submitted to a physical examination by the doctor.”⁸² The court additionally noted that Gutierrez subsequently admitted he was afflicted with gonorrhea and concluded that this made the examination “merely cumulative.”⁸³ This last conclusion, however, conflates Gutierrez’s objection to the prosecution’s introduction of the examination results into evidence, and his constitutional objection to the examination itself.

While none of these courts directly cited the defendant’s race (or its perception of the defendant’s race) to justify its conclusion that he had consented to STI examination, it is certainly possible that implicit or explicit bias shaped the judges’ views of how individuals of color interacted with the authorities, of what consent was for these men, and of whether these examinations would have been justified in the first place. In any event, the pattern is striking.⁸⁴

The cases discussed in this Section fit neatly within a history of racist stereotypes about who is most likely to have and transmit STIs. During the early twentieth century, many in power believed that people of color were hereditarily more likely to be promiscuous or deviant, and thus contract STIs.⁸⁵ For example,

Immigrant During the 1920s,” in David G. Gutierrez, *Between Two Worlds: Mexican Immigrants in the United States*, 23, 25-26 (Scholarly Resources Inc. 1996).

80. *Tan Teng*, 23 Phil. Rep. at 145-46.

81. *Garcia*, 274 P. at 167.

82. *Gutierrez*, 14 P.2d at 840. On Gutierrez’s ethnicity, see Frank Gutierrez, “Records of California State Prison at San Quentin, record 52407” (21 June 1932) (listing Gutierrez as “Mex”).

83. *Id.*

84. In the realm of public health policy, there is a long history of authorities treating populations of color as health threats to white populations. See e.g. Warwick Anderson, *Colonial Pathologies: American Tropical Medicine, Race, and Hygiene in the Philippines* (Duke University Press, 2006).

85. The disproportionate application of the venereal doctrine to people of color is inescapably part of the longer, broader American tradition of casting people of color as disease carriers and biological threats. Immigration provides salient examples of how forced medical testing has been wielded as a racist tool. The predominantly European immigrants arriving at Ellis Island, for instance, faced only cursory physical exams; the mostly Asian immigrants arriving at Angel Island faced invasive, humiliating examinations for “Oriental” diseases and were often denied entry on the basis of treatable, non-contagious diseases. See generally Erika Lee & Judy Yung, *Angel Island: Immigrant Gateway to America* (Oxford University Press, 2010). Even if they were admitted to the United States, Asian immigrants were often targeted by health inspectors with rigid systems of surveillance and quarantine. Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco’s Chinatown*, 146-52 (University of California Press, 2001); Marilyn Chase, *The Barbary Plague: The Black Death in Victorian San Francisco*, 91-141 (2003). Mexican immigrants too faced intense scrutiny at the border; many laborers who

the United States Surgeon General, Thomas Parran, wrote in his 1937 book, *Shadow on the Land: Syphilis*:

The Negro is not to blame because his syphilis rate is six times that of the white. . . . It is not his fault that the disease is biologically different in him than in the white; that his blood vessels are particularly susceptible so that late syphilis brings with it crippling circulatory diseases, cuts his working usefulness in half, and makes him [an] unemployable burden upon the community in the last years of his shortened life.⁸⁶

Parran's analysis applied not just to men of color, but also to women. "It is through no fault of hers that the colored woman remains infectious two and one-half times as long as the white woman."⁸⁷ This, in turn, justified incarcerating people of color, in particular black men,⁸⁸ for sex crimes at a disproportionate rate.⁸⁹ These racist stereotypes underlay, and partially explain, the disparate decisions that courts reached in cases involving white men and men of color accused of rape.

D. "A Minority Doctrine": When Venereal Disease in Men Was Exceptional

In the thirty years after *Height* was decided, it slowly became clear that the decision and its progeny were outliers among cases wherein individuals were

crossed in El Paso, for example, were ordered to strip and then bathed with kerosene and vinegar. John McKiernan-González, *Fevered Measures: Public Health and Race at the Texas-Mexico Border, 1848-1942*, 174-75 (Duke University Press, 2012); see also Alexandra Minna Stern, "Buildings, Boundaries, and Blood: Medicalization and Nation-Building on the U.S.-Mexico Border, 1910-1930," 79 *Hispanic American History Review* 41 (1999). All of these practices concretized stereotypes about people of color. Howard Markel & Alexandra Minna Stern, "The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society," 80 *Milbank Quarterly* 757, 761-64 (2002).

86. Thomas Parran, *Shadow on the Land: Syphilis*, 175 (Waverly Press, 1937).

87. Id.; see also Alankaar Sharma, "Diseased Race, Racialized Disease: The Story of the Negro Project of American Social Hygiene Association Against the Backdrop of the Tuskegee Syphilis Experiment," 14 *Journal of African American Studies* 247, 250 (2010).

88. Black men continue to be incarcerated for sex crimes at a much higher rate than white men. Judith Levine & Erica Meiners, "Are Sex Offenders White?," *CounterPunch* (11 Apr. 2016), <https://perma.cc/GQ9N-AV62>. Indeed, studies suggest that Black prisoners serving time for sexual assault are three-and-a-half times more likely to be innocent than a white person convicted of sexual assault. National Registry of Exonerations, *Race and Wrongful Convictions*, 11 (7 Mar. 2017), <https://perma.cc/CL86-YKMC>.

89. See Freedman, note 23, at 5, 89-103; 1 Melissa Hope Ditmore, ed., *Encyclopedia of Prostitution and Sex Work* 97 (2006); Estelle Freedman, "'Crimes Which Startle and Horrify': Gender, Age, and the Racialization of Sexual Violence in White American Newspapers, 1870-1900," 20 *Journal of Historical Sexuality* 465 (2011); Irma Victoria Montelongo, *Illicit Inhabitants: Empire, Immigration, Race and Sexuality on the U.S.-Mexico Border, 1891-1924*, 77-84 (2014) (unpublished Ph.D. dissertation, University of Texas, El Paso); Bascom Johnson, *Law and Order and Related Problems of Navajo Indians at Gallup, New Mexico* (1935) (on file in Folder 9, Box 100, Series 7, American Social Hygiene Association Records, University of Minnesota); Isadore Dyer, *State Committee of National Defense Medical Section* (11 Feb. 1918) (on file in doc. 26748, Box 55, Entry 393, Record Group 165, National Archives).

allegedly compelled to provide evidence against themselves; courts were far less likely to agree with a defendant's constitutional arguments against compelled physical evidence when that evidence was obtained in contexts other than STI examinations in rape cases. In 1917, the New Mexico Supreme Court in *State v. Barela* reflected the opinion of many jurists across the country. In determining whether a man could be forced to provide a footprint as evidence, the court surveyed three of the cases that followed *Height* (in which courts ruled that accused rapists could not be forced to undergo STI examinations) and concluded that these cases were part of "a minority doctrine."⁹⁰

By the 1930s, the majority doctrine, in contrast, held that the right against compulsory self-incrimination applied only to "testimonial compulsion"—that is, literally being forced to testify (or otherwise communicate damning testimony) against oneself. Compulsory medical examinations (of a person's body or blood,⁹¹ of a person's skin for scars,⁹² of a person for signs of intoxication⁹³); forcing defendants to give fingerprints or footprints;⁹⁴ shaving a defendant's head;⁹⁵ forcing a defendant to grow a beard;⁹⁶ compelling defendants to perform physical acts, speak, or display themselves⁹⁷—all were generally constitutional and admissible as evidence in court.⁹⁸ As the Supreme Court of the Philippines wrote in an opinion denying a woman's petition for the writ of habeas corpus, forcing a

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90. *State v. Barela*, 168 P. 545, 547-48 (Supreme Ct. New Mexico 1917).
 91. See e.g. *State v. McLaughlin*, 70 So. 925 (Supreme Ct. Louisiana 1916); *Villafior v. Summers*, 41 Phil. Rep. 62 (Supreme Ct. Philippine Islands 1920).
 92. See e.g. *State v. Garrett*, 71 N.C. 85 (Supreme Ct. North Carolina 1874); *O'Brien v. State*, 25 N.E. 137 (Supreme Ct. Indiana 1890); *State v. Miller*, 60 A. 202 (Ct. of Errors and Appeals New Jersey 1905).
 93. See e.g. *Noe v. Monmouth*, 143 A. 750, 752 (Supreme Ct. New Jersey 1928).
 94. See e.g. *People v. Van Wormer*, 67 N.E. 299 (Ct. of Appeals New York 1903); *Magee v. State*, 46 So. 529 (Supreme Ct. Mississippi 1908); *People v. Swallow*, 165 N.Y.S. 915 (Ct. of General Sessions of Peace of New York County 1917); *Ricketts v. State*, 215 P. 212 (Criminal Ct. of Appeals Oklahoma 1923); *State v. Griffin*, 124 S.E. 81 (Supreme Ct. South Carolina 1924); *Biggs v. State*, 167 N.E. 129 (Supreme Ct. Indiana 1929); *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932); *People v. Jones*, 296 P. 317 (4th D. Ct. of Appeals California 1931).
 95. See e.g. *State v. Tettaton*, 60 S.W. 743, 749 (Supreme Ct. Missouri 1900).
 96. See e.g. *Ross v. State*, 182 N.E. 865 (Supreme Ct. Indiana 1932).
 97. See e.g. *State v. Ah Chuey*, 14 Nev. 79 (Supreme Ct. Nevada 1879); *Sprouse v. Commonwealth*, 81 Va. 374 (Supreme Ct. of Appeals Virginia 1886); *Johnson v. Commonwealth*, 9 A. 78 (Supreme Ct. Pennsylvania 1887); *Bruce v. State*, 21 S.W. 681 (Ct. of Criminal Appeals Texas 1893); *People v. Gardner*, 38 N.E. 1003 (Ct. of Appeals New York 1894); *State v. Reasby*, 69 N.W. 451 (Supreme Ct. Iowa 1896); *People v. Oliveria*, 59 P. 772 (Supreme Ct. California 1899); *State v. Ruck*, 92 S.W. 706 (Supreme Ct. Missouri 1906); *Holt v. United States*, 218 U.S. 245 (1910); *United States v. Ong Siu Hong*, 36 Phil. Rep. 735 (Supreme Ct. Philippine Islands 1917); *People v. Curran*, 121 N.E. 637 (Supreme Ct. Illinois 1919); *State v. Oschoa*, 242 P. 582 (Supreme Ct. Nevada 1926); *State v. Bazemore*, 137 S.E. 172 (Supreme Ct. North Carolina 1927); *State v. Clark*, 287 P. 18 (Supreme Ct. Washington 1930); *State v. Fulks*, 173 S.E. 888 (Supreme Ct. of Appeals West Virginia. 1934); *Commonwealth v. Safis*, 186 A. 177 (Superior Ct. Pennsylvania 1936).
 98. See Akhil Reed Amar & Renee Lettow Lerner, "Fifth Amendment First Principles: The Self-Incrimination Clause," 93 *Michigan Law Review* 857, 884-85, 909 (1995); Inbau, note 59; Charles Gardner Geyh, "The Testimonial Component of the Right Against Self-Incrimination," 36 *Catholic University Law Review* 611, 621 (1987).

defendant's testimony is impermissible because it could induce them to give a false confession; however, the court reasoned that this rationale was inapplicable to the case before it, where a woman accused of adultery was imprisoned for contempt when she refused to submit to a pregnancy test, because "no evidence of *physical* fact can . . . be held to be detrimental to the accused except in so far as the truth is to be avoided in order to acquit a guilty person."⁹⁹

In the decades following *Height*, in the cases of accused male rapists, courts did narrow the doctrine to some extent in two ways. The first exception, consent, has already been discussed. Second, courts consistently ruled against male rapists who did not object to an examination on constitutional grounds, but merely sought to exclude introduction of their STI diagnosis as trial evidence. The courts held that the evidence was relevant and admissible.¹⁰⁰ One court held the same in a case in which the sexual assailant was a woman.¹⁰¹ Nonetheless, by 1937, Fred E. Inbau, a prominent criminal law scholar, could confidently write:

In the course of criminal investigations of rape cases where the victims have contracted venereal diseases as the result of such attacks, it becomes important, as part of a thorough investigation, to ascertain whether or not the accused persons are similarly afflicted. To determine this satisfactorily, of course, necessitates a medical examination of the sexual organs of the accused. Hence the possible objection that the examination constitutes a violation of the privilege against self-incrimination. Courts generally have held that examinations of this nature are violative of the privilege, unless submission is voluntary.¹⁰²

In all of the cases discussed in this Section, the prosecution sought to have the alleged rapist examined for STIs in order to use the results of the examination as evidence in a criminal trial. In none of these cases did the prosecution seek such examinations because of the potential threat to public health posed by rapists. In none of these cases did a judge invoke the potential public health risk that an infected rapist might represent. As we shall see, the justification for STI tests in rape cases was strikingly different than that cited by the state in prostitution cases.

II. COMPULSORY EXAMINATIONS FOR WOMEN

While Part I focused on compulsory pre-conviction STI examinations of

99. Inbau, note 59, at 268 (quoting *Villaflor v. Summers*, 41 Phil. Rep. 62 (Supreme Ct. Philippine Islands 1920)) (emphasis added).

100. See e.g. *State v. Mason*, 189 N.W. 452, 453 (Supreme Ct. Minnesota 1922); *State v. Priest*, 232 P. 353, 355 (Supreme Ct. Washington 1925).

101. *Swango v. Commonwealth*, 183 S.W.2d 523 (Ct. of Appeals Kentucky 1944). Evidence produced from STI examinations was also admissible to impugn the credibility of an alleged victim when the accused rapist tested negative. *United States v. Allen*, 8 C.M.R. 66, 68-69 (Ct. of Military Appeals 1953); *State v. Mills*, 189 N.W. 941, 941 (Supreme Ct. South Dakota 1922).

102. Inbau, note 59, at 269.

men, this Part turns to examinations that were far more common: compulsory pre-conviction STI examination of women. During the first half of the twentieth century, tens of thousands of women were detained, forcibly examined for STIs, and imprisoned for treatment as a result of those examinations. A small number of these women objected to this treatment and sued in court; an even smaller number objected to the examinations in particular. Courts issued a series of rulings in these cases, never adopting a uniform rationale but unanimously upholding both the incarcerations and examinations. No court ruled that a compulsory pre-conviction STI examination impermissibly forced a woman to incriminate herself, as courts repeatedly did for men. Sexism underlays these decisions, as well as an assumption that, unlike male rapists, female prostitutes were a grave threat to the health of the public at large. And prostitutes of color were seen as especially dangerous.

The cases discussed in this Part are different from those discussed in Part I: officials were conducting STI examinations to justify incarcerating women without trials, rather than to find evidence to be used at trial. This distinction is significant, for reasons discussed below.¹⁰³ But the cases in Part II nonetheless exhibit gendered stereotypes that were absent in the cases from Part I, and contrasting these cases helps to clarify that. In addition, the very difference between the way STI examinations were used in cases of accused women and the way STI examinations were used in cases of accused men is itself reflective of the gendered assumptions that underlie the venereal doctrine. And, in spite of the differences, both the cases in Part I and the cases in this Part II feature individuals objecting to compulsory pre-conviction STI examinations; the responses of courts to these objections lay bare a sexist divide.

A. The American Plan

Authorities across the globe have been forcibly examining women for STIs for centuries.¹⁰⁴ Such examinations were justified as part of public health campaigns to prevent suspected prostitutes from spreading the infections they were thought to traffic in.¹⁰⁵ In the United Kingdom in the 1860s, a series of Parliamentary Acts empowered officials to detain any woman whom they suspected of being a prostitute and have her examined for STIs. The women found to be infected would be imprisoned in “lock hospitals,” where they would undergo the painful (and ineffective) “treatment” of repeated injections of mercury.¹⁰⁶ Authorities examined thousands of women, to the outrage of a number of elite

103. In short, women (unlike men) were usually undergoing examinations that were allowed by statute, and women (unlike men) were rarely being examined so authorities could find evidence to be used at trial, but rather so that authorities could incarcerate them without trials.

104. Stern, *Trials of Nina McCall*, note 25, at 12-13.

105. *Id.*

106. Paul McHugh, *Prostitution and Victorian Social Reform*, 39-52 (Croom Helm Ltd, 1980); Judith Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State*, 74-77, 159, 178, 201-02, 214 (Cambridge University Press, 1980).

female reformers who objected to the examinations as humiliating, unsanitary, and a form of “rape” by “steel penis” (that is, the speculum).¹⁰⁷ These painful examinations usually consisted of a physician inserting his fingers or a cold metal instrument into a woman’s vagina to secure smears, which could then be examined under a microscope for signs of syphilis or gonorrhea.¹⁰⁸

The United Kingdom discontinued this practice in 1886, but American officials implemented similar systems of arrests and examinations late in the nineteenth century.¹⁰⁹ In 1911, San Francisco opened a “Municipal Clinic,” to which female prostitutes had to report twice a week for STI examinations; those who tested positive had to “go into retirement” for treatment, while those who refused to go could be prosecuted or physically forced to undergo examinations.¹¹⁰ Soon after it opened, “[p]olice court judges began sending women merely arrested—not convicted—for vagrancy, disorderly conduct, or other similarly vague charges to the Clinic for compulsory examinations, and, if necessary, forced treatments.”¹¹¹ Just like in the United Kingdom, women in San Francisco fiercely objected, and the Clinic closed in 1913.¹¹²

Yet the idea of examinations as a means of controlling infection refused to die. When the United States entered World War I in 1917, authorities relied on prior experience to craft a national policy intended to protect soldiers and sailors from the women who they thought would spread STIs.¹¹³ From 1917 to 1919, at the urging of the military and the federal government, states across the country adopted laws enabling authorities to detain anyone “reasonably suspected” of carrying STIs, examine her before she was convicted of any crime, and then imprison her for several months for “treatment” (often injections of mercury or

107. Walkowitz, note 106, at 201-02; Marion Horan, *Trafficking in Danger: Working-Class Women and Narratives of Sexual Danger in English and United States Anti-Prostitution Campaigns, 1875-1914*, 32 (2006) (unpublished Ph.D. dissertation, SUNY Binghamton); Barbara Meil Hobson, *Uneasy Virtue: The Politics of Prostitution and the American Reform, 168-69* (Basic Books, Inc., 1987); Judith R. Walkowitz, “Male Vice and Female Virtue: Feminism and the Politics of Prostitution in Nineteenth-Century Britain,” in *Powers of Desire: The Politics of Sexuality*, 421 (eds. Rosalyn Baxandall et al., Monthly Review Press, 1983).

108. Hobson, note 107, at 168-69.

109. See e.g. the four-year experiment in registering and examining alleged prostitutes in St. Louis, Missouri, from 1870 to 1874. John C. Burnham, “The Social Evil Ordinance—A Social Experiment in Nineteenth Century St. Louis,” 27 *The Bulletin of the Missouri Historical Society* 203, 204-07 (1971). On the United Kingdom’s discontinuation of this, see Shani D’Cruze & Louise A. Jackson, *Women, Crime and Justice in England Since 1660*, 73-74 (Palgrave Macmillan, 2009); Walkowitz, *Prostitution and Victorian Society*, note 106, at 99.

110. Hiroyuki Matsubara, *Unsettled Controversies: The Anti-Prostitution Movement and the Transformation of American Political Culture, 1910-1919*, at 129-30 (2005) (unpublished Ph.D. dissertation, University of California, Santa Cruz); Julius Rosenstim, *Our Nation’s Health Endangered by Poisonous Infection Through the Social Malady: The Protective Work of the Municipal Clinic of San Francisco and its Fight for Existence*, 19-22 (Town Talk Press, 1913); Brenda Elaine Pillors, *The Criminalization of Prostitution in the United States: The Case of San Francisco, 1854-1919*, 149 (1982) (unpublished Ph.D. dissertation, University of California, Berkeley).

111. Stern, *Trials of Nina McCall*, note 25, at 27.

112. Id.

113. Id. at 42-55.

arsenic-based drugs) if she proved to be infected.¹¹⁴ Contemporary observers estimated that during World War I, on the basis of these laws, authorities quarantined some 30,000 women (and virtually no men) without due process.¹¹⁵ Nearly all of these women were examined for STIs without having first been convicted of a crime.¹¹⁶

Men were rarely incarcerated under these facially gender-neutral laws.¹¹⁷ Between 1918 and 1919, for instance 1,072 women in Michigan were incarcerated for STI treatment, compared with just forty-nine men.¹¹⁸ This gendered disparity reflected sexist stereotypes about who spread STIs. “I would like to state that while the above figures show we have hospitalized more females than males,” one state agent wrote to a federal official in 1919, “we have been able to care for males thru’ clinics and other organizations throughout the state”—that is to say, through voluntary outpatient treatment.¹¹⁹ The agent went on to state the government’s view that “a female can spread Venereal Disease a great deal more rapidly and, usually, it is easier to hospitalize a female than a male owing to the fact that the latter is a wage earner.”¹²⁰

The enforcers of these laws often embraced racist stereotypes, including the perception that women of color were especially likely to spread STIs.¹²¹ “Mexican women,” wrote one War Department official, occupy “dark alleys” that “are a fertile source of infection;”¹²² a second War Department official, corresponding with the first, asserted that “the[se] Mexican prostitutes” are “mostly all . . . diseased.”¹²³ This same official worried about the “lax sexual morals of the Negro race.”¹²⁴ “Negro women,” wrote another federal official, “exercise little or no care in protecting themselves or in caring for themselves in the matter of gonorrhoea.”¹²⁵ Because of these stereotypes, officials policed, examined, and incarcerated women

114. *Id.* at 53-76.

115. See Allan M. Brandt, *No Magic Bullet: A Social History of Venereal Disease in the United States Since 1880*, 234 footnote 118 (Oxford University Press, 1985).

116. See *id.*

117. This appears to have been the case even for male prostitutes. Though they certainly existed and sold sex throughout the twentieth century, and though they were subject to police harassment and frequent arrests, they were not policed under these specific laws.

118. Richard M. Olin, *Forty-Seventh Annual Report of the Secretary of the State Board of Health of the State of Michigan for the Fiscal Year Ending June 30, 1919*, 29 (1920).

119. Letter from G. M. Byington to C. C. Pierce (29 Nov. 1919) (on file in Woman Question Folder, Box 331, Entry 42, Record Group 90, National Archives).

120. *Id.*

121. These were the same stereotypes that led courts to create the second exception to the *Height* line of cases, discussed in Part I.C.

122. Paul Popenoe, *Report on El Paso, Tex: Prostitution and the Sale of Alcohol as Affecting the Army* (10 Nov. 1917) (on file in Folder 6, Box 46, Paul Bowman Popenoe Papers, University of Wyoming).

123. Letter from William H. Zinsser to Paul Popenoe (26 Feb. 1918) (on file in Folder 2, Box 47, Paul Bowman Popenoe Papers, University of Wyoming).

124. Memorandum from Paul Popenoe to Law Enforcement Division, Columbus, New Mexico (1 Apr. 1918) (on file in Folder 4, Box 47, Paul Bowman Popenoe Papers, University of Wyoming).

125. Dyer, note 89.

of color disproportionately.¹²⁶ In Kansas, for instance, “blacks were 3 percent of the population but made up nearly a third of women locked up.”¹²⁷ In one town in Virginia, of the 208 women quarantined for having STIs over the course of a year, 160 were “colored” and just forty-eight were white.¹²⁸

This carceral campaign became known as the “American Plan,” and—because of the laws eventually passed by every state—it continued on the local level for decades.¹²⁹ And so these women started suing. Of all the women who were imprisoned, only a fraction challenged their treatment with lawsuits.¹³⁰ Yet several dozen cases from women incarcerated under the Plan reached appellate courts. Nearly all of these women challenged their incarcerations—but not the examinations that led to them. Without exception, appellate courts across the country held that, where the proper authorities “reasonably suspected” that a woman had an STI, they could examine her and imprison her for treatment if she proved to be infected.¹³¹ This method was, a California Court of Appeal wrote in 1919, “reasonable and proper, indeed, the usual measure taken to prevent the increase and spread” of these infections.¹³²

Courts also widely affirmed that evidence of prostitution was sufficiently reasonable suspicion on which to detain, examine, and incarcerate women.¹³³ Evidence that a woman was present in a “house of ill fame” was enough to justify examination and subsequent incarceration: “It is not essential that the particular acts indulged in such houses be expressly shown.”¹³⁴ Simply being found at night “where women not engaged in prostitution would not under any circumstances be found” likewise constituted reasonable suspicion.¹³⁵ It was even reasonable for a state to assume a madam was infected and to thus compel her to submit to an examination.¹³⁶

126. Nancy K. Bristow, *Making Men Moral: Social Engineering During the Great War*, 162 (New York University Press, 1996).

127. Stern, *Trials of Nina McCall*, note 25, at 98.

128. W.F. Draper, “The Detention and Treatment of Infected Women as a Measure of Control of Venereal Diseases in Extra-Cantonment Zones,” *American Journal of Obstetrics & Diseases of Women & Children* 642, 643 (1919).

129. See Stern, *Trials of Nina McCall*, note 25. For more on the American Plan, see generally id.; Scott W. Stern, “The Long American Plan: The U.S. Government’s Campaign Against Venereal Disease and Its Carriers,” 38 *Harvard Journal of Law & Gender* 373 (2015). To see a list of the American Plan laws, and way that they’ve remained in some form in every state to this day, see id. at appendices A & B.

130. See Stern, *Trials of Nina McCall*, note 25, at 238.

131. Id. Most of these women were white, in large part because access to legal representation was divided along racial lines, but it is notable that some black women too challenged their incarceration under the American Plan in court. See id. at 232-35.

132. *Ex parte Johnston*, 180 P. 644, 645 (California Ct. of Appeals 1919).

133. See e.g. *Ex parte Arata*, 198 P. 814, 816 (California Ct. of Appeals 1921); *Ex parte Brooks*, 212 S.W. 956, 957 (Texas Ct. of Criminal Appeals 1919); *People ex. rel. Baker v. Strautz*, 54 N.E.2d 441, 444 (Supreme Ct. Illinois 1944); *Reynolds v. McNichols*, 488 F.2d 1378, 1382 (10th Cir. 1973).

134. *In re Dayton*, 199 P. 635, 636 (California Ct. of Appeals 1921).

135. *In re Caselli*, 204 P. 364, 365 (Supreme Ct. Montana 1922).

136. *Ex parte Clemente*, 215 P. 666 (California Ct. of Appeals 1923).

Public health experts provided the basis for this belief that prostitutes were definitionally likely to be infected. One study from a female reformatory claimed that 90 percent of prostitutes had STIs; a poster produced by the New York Board of Health asserted that 95 percent of prostitutes and “easy women” were infected.¹³⁷ Not a single study appears to have been conducted in the first half of the twentieth century to determine the prevalence of STIs among rapists.

The authority of public health experts was pivotal to these rulings. In one case, the Supreme Court of Kansas upheld the state’s American Plan statute in part because the STI examination involved “practically infallible scientific methods,”¹³⁸ and in another, an Oregon judge did the same because the results of a syphilis test were “unquestionable.”¹³⁹ Yet experts now understand that the blood test for syphilis could have a false positive rate of up to 25 percent,¹⁴⁰ while the visual examination for gonorrhea was unreliable and presupposed that physicians took time to carefully examine microscopic slides.¹⁴¹

B. Height for Women?

Cases in which women challenged the examination itself were far less common, yet a handful did arise. Appellate courts decided these cases based on a variety of different rationales, yet in every single one, they ruled that the examinations of female appellants were acceptable. Permitting examinations of women was justified because of the assumption that prostitutes posed a grave risk not just to their clients, but to public health in general.

Remarkably, in *City of Jackson v. Mitchell*, the clearest parallel to the male rape cases, the Mississippi Supreme Court refused to rule on the appellant’s constitutional challenge to the examination; instead, it ruled on other grounds to uphold the broader American Plan.¹⁴² In 1924, a health officer in Jackson, Mississippi, detained Pearl Mitchell, a woman he suspected of having an STI, and demanded she disrobe and undergo an examination.¹⁴³ When Mitchell refused, authorities quarantined her.¹⁴⁴ Mitchell sued, claiming Mississippi’s law “attempts to compel an examination of the person accused, thus forcing him or her against their will to give mute but unmistakable and possibly damning evidence against

137. Stern, *Trials of Nina McCall*, note 25, at 55. The 90 percent number was echoed in *Arata*, 198 P. at 815.

138. *Ex parte McGee*, 185 P. 14, 17 (Supreme Ct. Kansas 1919).

139. *In the Matter of the Petition of Mary Main, for a Writ of Habeas Corpus* (18 Nov. 1918) (on file in Dance Halls folder, Box 328, Entry 42, Record Group 90, National Archives).

140. Abigail Claire Barnes, *Pure Spaces and Impure Bodies: The Detention of Prostitutes in the U.S. During World War I*, 90-93 (2010) (unpublished Ph.D. dissertation, University of California, Los Angeles).

141. Nancy Moore Rockafellar, *Making the World Safe for Soldiers of Democracy: Patriotism, Public Health and Venereal Disease Control on the West Coast, 1910-1919*, 432 (1990) (unpublished Ph.D. dissertation, University of Washington).

142. *City of Jackson v. Mitchell*, 100 So. 513, 513-14 (Supreme Ct. Mississippi 1924).

143. *Id.* at 513.

144. *Id.*

themselves. This is in derogation of the common law as well as violative of the constitution.”¹⁴⁵ Mitchell’s attorney cited *Height* in support.¹⁴⁶ The court ruled that Jackson’s health officer had acted improperly.¹⁴⁷ But its conclusion rested on the officer’s failure to comply with procedural requirements rather than any substantive objection to the coercive examination authorized by the statute.¹⁴⁸ “Certainly the statute cannot be construed to mean that mere suspicion founded on gossip or rumor would be sufficient.”¹⁴⁹ Furthermore, suspected individuals were entitled to a hearing before “submitting to the examination requested.”¹⁵⁰ Yet the court, having determined that “[t]he power of the state to protect the public health is very great,” made clear that if the health officer had reasonable suspicion, given Mitchell a hearing, and otherwise followed the statute, his actions would have been acceptable.¹⁵¹ The court did not directly pass judgment on Mitchell’s claim that, as in *Height*, she was being forced to provide evidence against herself.

Five years later, the New York Court of Appeals, the state’s equivalent of a supreme court, heard a similar appeal and this time ruled against the woman.¹⁵² In this case, two New York police officers had barged into Ida Johnson’s hotel room at 9:15 pm and interrupted her engaged in sex.¹⁵³ Johnson maintained she was being raped when the officers entered; the police claimed she was having consensual sex in exchange for money.¹⁵⁴ The police arrested Johnson, and she was charged with committing prostitution and promptly found guilty.¹⁵⁵ Johnson appealed, claiming that, while under arrest, she’d been forcibly examined for STIs, and that the judge had “used” her positive diagnosis “in determining [her] guilt.”¹⁵⁶ Johnson objected to the examination and its admission as evidence, as it denied her due process of law and the ability to confront and impeach testimony against her.¹⁵⁷ As support, she also cited *Height*.¹⁵⁸ Unlike the Mississippi Supreme Court, New York’s highest court outright rejected Johnson’s arguments (though without specifically addressing *Height*).¹⁵⁹ The court characterized the compulsory medical report as “merely a method of enlightening the court as to the physical condition of an accused person so that the community may be to some extent

145. Statement of Counsel for Appellee, *Jackson v. Mitchell*, 100 So. 513 (Supreme Ct. Mississippi 1924).

146. *Id.*

147. *Jackson*, 100 So. at 514.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *People v. Johnson*, 169 N.E. 619 (Ct. of Appeals New York 1930).

153. Testimony of John Barton, in *People v. Johnson* case file, New York State Archive.

154. Testimony of Ida Barrett Johnson, in *People v. Johnson* case file, New York State Archive.

155. *Johnson*, 169 N.E. at 619.

156. Henry Hirschberg’s statement upon appeal, in *People v. Johnson* case file, New York State Archive.

157. Appellant’s brief, in *People v. Johnson* case file, New York State Archive.

158. *Id.*

159. *Johnson*, 169 N.E. at 621.

protected from the menace of infectious venereal disease, the consequences of which sometimes fall upon innocent men, women and children.”¹⁶⁰ “Mistakes may be made but if the medical examination and subsequent treatment are properly safeguarded, the regulation is one for the protection of the public health and the public safety”¹⁶¹ This decision rested on the assumption that a prostitute posed a serious threat to “the public health and the public safety.” This decision too in effect upheld enforcement of the American Plan.

The public health justification New York’s highest court offered for upholding the examination—“so that the community may be to some extent protected from the menace of infectious venereal disease”—is strikingly at odds with the justifications articulated in the *Height* line of cases. In those cases, courts were concerned with personal liberty and privacy; the public health threat posed by rapists was not an issue. Yet in *Ida Johnson’s* case, the pivotal consideration was Johnson’s potential threat to the public health at large. As detailed below, this sexist logic would frequently reappear in American Plan cases.

A number of courts ruled that this examination of suspected women did not violate due process.¹⁶² In one such case, *Ex parte Company*, the Supreme Court of Ohio huffily observed:

There is perhaps no provision of the federal constitution that is more overworked than the Fourteenth amendment. Counsel generally are apparently unanimous in thinking that any judgment or finding as against the client denies such client the equal protection of the laws, or is without due process of law. It has been so many times decided that the Fourteenth amendment does not limit the states in the proper exercise of police power, that citation of authority seems needless.¹⁶³

As the court ruled, compulsory pre-conviction STI examinations were acceptable, even when authorities arrested and examined a woman without a warrant, largely because of the government’s powerful interest in “secur[ing] the general comfort, health and prosperity of the state.”¹⁶⁴ A decade later, an Ohio lower court cited *Company* as support for the statement: “regulations providing for the examination of prostitutes for venereal disease was held to be constitutional.”¹⁶⁵ Note that the Ohio statute at issue in *Company* did not provide just for the examination of prostitutes, but for the examination of all “persons reasonably suspected of having a venereal disease.”¹⁶⁶ The conflation of such people and prostitutes is revealing.

Some women also objected to STI examinations after being convicted of (or

160. *Id.*

161. *Id.*

162. See e.g. *Strautz*, 54 N.E.2d at 445; *Ex parte Lewis*, 42 S.W.2d 21, 21 (Supreme Ct. Missouri 1931); *Johnson*, 169 N.E. 619 at 620; *Ex parte Company*, 139 N.E. 204 (Supreme Ct. Ohio 1922) at 204.

163. *Company*, 139 N.E. at 205.

164. *Id.* at 206.

165. *Booker v. Cincinnati*, 1936 Ohio Misc. LEXIS 1166, at *7 (Ohio Common Pleas 1936).

166. *Company*, 139 N.E. at 205.

pleading guilty to) prostitution or vagrancy; in these cases, courts again justified examinations on the basis that such exams were a necessary tool to protect the public health (because, based on the women's convictions, officials suspected they had STIs), and were not used to provide evidence for trial.¹⁶⁷ In Oklahoma City in 1947, for example, a woman pleaded guilty to vagrancy and was then taken to a quarantine ward in the jail for a compulsory STI examination.¹⁶⁸ She objected to this examination and sued, claiming that the statute on which it was based was "unconstitutional for the reason that it amounts to forcing a person to give testimony against one's self."¹⁶⁹ The court ruled that, considering the "emergency occasioned by danger to the public health" from STIs, the statute was not unconstitutional.¹⁷⁰ Once again, the court did not directly discuss the self-incrimination objection. Once again, the court assumed that an infected woman was not merely a threat to the man with whom she was having sex, but to "the public health" at large.

It must again be noted that the cases brought by these women were different from the cases brought by men, which were discussed in Part I. Unlike in the rape cases, the examinations these women were forced to undergo were usually justified by statute.¹⁷¹ Further, while the evidence of STIs was being used in the rape cases to prove the men's guilt, the evidence of STIs in these cases was rarely used at trial; rather, it was used as justification for incarcerating these women without trial. In addition, historical context goes a long way toward explaining why these cases would inevitably be different. The vast majority of people detained under the American Plan were women;¹⁷² in large part, this was because of the sexism of authorities,¹⁷³ but it was also because most state Plan statutes specifically singled out prostitutes as being inherently "reasonably suspected."¹⁷⁴

Nonetheless, it is striking that most courts in the first half of the twentieth century rejected compulsory pre-conviction STI examinations of suspected male rapists but accepted them for suspected female prostitutes and vagrants. In many of the latter cases the particular "menace of infectious venereal disease" was cited as justification,¹⁷⁵ yet surely such diseases were just as menacing in men. Courts justified the difference by invoking national security: prostitutes and other promiscuous women might infect troops vital to the nation's security in World

167. See e.g. *People ex rel. Barone v. Fox*, 127 N.Y.S. 484 (1911).

168. *Ex parte Fowler*, 184 P.2d 814, 817 (Criminal Ct. of Appeals Oklahoma 1947).

169. *Id.*

170. *Id.* at 820.

171. See the statutes listed in Stern, *The Long American Plan*, note 129, at appendix A. That said, the cases in this Part were not examples of courts merely deferring to the judgment of legislatures; rather, the gendered language and overblown public health rhetoric reveal that judges fully embraced the sexist logic of the venereal doctrine.

172. See Stern, *The Trials of Nina McCall*, note 25, at 5.

173. See *id.* at 78-79.

174. See Bascom Johnson, "The Functions of Law and Law Enforcement in Combating Venereal Diseases," 8 *Journal of Social Hygiene* 163, 166 (1922).

175. *Johnson*, 169 N.E. at 621; see also *Little Rock v. Smith*, 163 S.W.2d 705, 707 (Supreme Ct. Arkansas 1942).

Wars I or II, while men—even rapists—likely would not. “The venereal diseases with which appellee is afflicted have become so widespread and so devastating in their effects upon communities where prevalent as to become a public menace,” wrote the Arkansas Supreme Court in 1942, just months after Pearl Harbor.

Camp Joseph T. Robinson, with its 25,000 young men soldiers; Maumelle Ordinance Works and Arkansas Ordinance Plant, each with thousands of workers, men and women, are near the city of Little Rock, and these men and women, as well as our own citizens in the city, are entitled to protection against these dreadful and loathsome diseases. Here the necessity exists which justifies the exercise of the power, and the private rights of appellee, if any, must yield in the interest of the public security.¹⁷⁶

Once again, there is a gendered assumption inherent in such a statement. Men could also infect troops. As the historian George Chauncey noted during World War I, “[s]ome gay men interested in sex with ‘straight’ men also portrayed themselves as less dangerous than women by arguing that there was no chance they would infect the men with the venereal diseases women were thought to carry.”¹⁷⁷

The assumption underlying these cases was the same: prostitutes (or promiscuous women) were not merely a threat to the men to whom they might transmit STIs; they were a threat to the public at large. This assumption was strikingly different from the one underlying the cases of compulsorily examined rapists: men were a threat only to individual women, not to the health of the public at large. This critical difference justified strikingly different treatment—that is, a nationwide system of examinations and incarcerations for women likely to spread STIs, and no such system for men likely to spread STIs. This critical difference also goes a long way toward explaining courts’ divergent approaches and rationales in *Height* and its progeny, as compared with the American Plan cases.

III. SCHMERBER AND ITS PROGENY

In the decades following World War II, authorities continued to conduct compulsory pre-conviction STI examinations of suspected male rapists and female prostitutes. During the 1940s and 1950s, courts consistently ruled against women who objected to such examinations; at the same time, courts began ruling contrary to the *Height* line of cases, against men who claimed that such examinations violated their Fifth Amendment privilege against self-incrimination. Yet some men continued to prevail, and these cases continued to assume women were a threat to public health, while men were a threat only to the specific women they victimized.

176. *Smith*, 163 S.W.2d at 707; see also *Baker*, 54 N.E.2d at 444.

177. George Chauncey, *Gay New York: Gender, Urban Culture, and the Makings of the Gay Male World, 1880-1940*, 85 (Basic Books, Inc., 1994).

In 1964, the landscape for both men and women changed irrevocably when the Supreme Court issued its decision in *Schmerber v. California*,¹⁷⁸ holding that a compulsory physical exam (in that case an involuntary blood test) did not violate the Fifth Amendment privilege against self-incrimination and firmly closing the door on Fifth Amendment challenges to STI examination. However, *Schmerber* left the door on Fourth Amendment challenges ajar, and in the decades that followed, men and women continued to object to pre-conviction STI examinations on the grounds that such examinations constitute unreasonable searches. The logic judges used in deciding Fourth Amendment challenges reveals starkly sexist assumptions, even if the results of these cases began to look similar. It would be this logic, and not the precise results of the cases, that would ultimately survive into the 1980s and beyond, shaping how men and women would be examined during the HIV/AIDS epidemic to come.

A. The Remnants of *Height* in the 1940s, 50s, and 60s

As mentioned above, in 1937, scholar Fred Inbau wrote of STI examinations of accused rapists, “[c]ourts generally have held that examinations of this nature are violative of the privilege [against self-incrimination], unless submission is voluntary.”¹⁷⁹ Yet in the years after Inbau made this statement, courts across the country began to whittle away at the rights of men—accused rapists and others—objecting to compulsory STI examinations. First, in 1939, the Nevada Supreme Court ruled in *Skidmore v. State* against a man convicted of sexually assaulting a girl under the age of five.¹⁸⁰ The man objected to his STI examination, which had revealed that he was infected with gonorrhea.¹⁸¹ The court ruled that this examination was not unconstitutional, based on precedent “which establish[ed] the rule that the privilege afforded by the constitution is not merely immunity from compulsion, but testimonial compulsion.”¹⁸² This ruling was also based on the court’s distaste for the defendant for “placing himself” in a “degrading condition and situation.”¹⁸³ Any public health risk he might pose was not mentioned.

Then, in *State v. Alexander*, decided a decade later, the New Jersey Supreme Court also ruled that compulsory STI examinations of men were acceptable, though notably this case did not involve rape.¹⁸⁴ In that case, a man named McKinley Alexander, convicted of the second-degree murder of his long-term partner, had been examined for STIs for unclear reasons (possibly as a subterfuge to be able to test his blood against blood found on the murder weapon).¹⁸⁵ Alexander objected to this examination, claiming it was a violation of his right

178. 384 U.S. 757, 762 (1964).

179. Inbau, note 59, at 269.

180. *Skidmore v. State*, 92 P.2d 979, 980 (Supreme Ct. Nevada 1939).

181. *Id.* at 981.

182. *Id.* at 982.

183. *Id.* at 983.

184. *State v. Alexander*, 83 A.2d 441 (Supreme Ct. New Jersey 1951).

185. *Id.* at 442.

against self-incrimination, an unreasonable search and seizure, and a denial of due process.¹⁸⁶ Alexander relied upon five of *Height*'s progeny, "all of which involved examinations of the defendant against his will, while in jail, for the purpose of determining if he had a venereal disease, and where the evidence so procured was subsequently used in proof of a rape charge against him."¹⁸⁷ The court "[a]dmitted these cases sustain the defendant's view but they are offset by a wealth of authority to the contrary,"¹⁸⁸ citing a host of cases involving defendants objecting to compulsory physical examinations (though not compulsory STI examinations) in which courts had ruled against the defendant.¹⁸⁹ "Taking into consideration the origin and history of the rule of privilege against self-incrimination, its scope and purpose and the protection to be afforded thereby, [the court had] no hesitancy in subscribing to the doctrine as enunciated by these cases last cited . . ."¹⁹⁰ The court likewise relied on non-venereal precedents to dismiss the defendant's other complaints.¹⁹¹

The New Jersey Supreme Court recognized the distinctiveness of the *Height* line of cases, even as it ruled to the contrary. The Missouri Supreme Court did likewise in 1947, in a case involving a man convicted of rape and murder who objected to a psychiatric examination.¹⁹² The man cited three cases in the *Height* line,¹⁹³ but the court distinguished the cases as "not [on] point here. They were all rape cases in which the defendant was examined without his consent to determine whether he had a venereal disease, which fact tended to connect him with the crime."¹⁹⁴ It is notable that the Missouri Supreme Court recognized that, in cases involving a male rapist (as opposed to a female prostitute) the purpose of the STI examination was "to connect him with the crime," not to determine if he was a threat to the health of the general public. It is, perhaps, even more notable that the court here acknowledged the existence of a health justification for STI testing but explicitly rejected it; previously, such rejections in rape cases had been implicit.

In spite of the trend away from the *Height* line, as late as 1957, a federal district court in Washington, D.C., issued a ruling that, while not about an STI examination per se, was very much in accord with the implicit reasoning in *Height*.¹⁹⁵ In *United States v. Townsend*, a man named James M. Townsend was

186. *Id.* at 443.

187. *Id.* (citing *McManus v. Commonwealth*, 94 S.W.2d 609 (Ct. of Appeals Kentucky 1936); *People v. Corder*, 221 N.W. 309, 313 (Supreme Ct. Michigan 1928); *State v. Matsinger*, 180 S.W. 836 (Supreme Ct. Missouri 1915); *State v. Horton*, 153 S.W. 1051 (Supreme Ct. Missouri 1913); and *State v. Newcomb*, 119 S.W. 405, 409 (Supreme Ct. Missouri 1909)).

188. *Id.*

189. *Id.* at 445.

190. *Id.*

191. *Id.* at 445-48.

192. *State v. Cochran*, 203 S.W.2d 707, 708, 710-11 (Supreme Ct. Missouri 1947).

193. *Id.* at 711 (citing *Matsinger*, 180 S.W. 856; *Horton*, 153 S.W. 1051; *Newcomb*, 119 S.W. 405.)

194. *Id.*

195. *United States v. Townsend*, 151 F. Supp. 378 (D. District of Columbia 1957).

charged with sexually assaulting a girl under the age of sixteen.¹⁹⁶ After arresting Townsend, the police took him to a laboratory, where they informed him “that chemical tests would be run on his penis to determine the presence of blood.”¹⁹⁷ Townsend objected “vigorously” and “resisted physically, but the detective overcame this resistance by twisting the defendant’s arm or arms behind his back. While the defendant was thus held and unable to resist further, the sergeant pulled his trousers down and swabbed his penis with four different patches of cotton, all chemically treated.”¹⁹⁸ The court ruled that this evidence should have been excluded and overturned Townsend’s conviction.¹⁹⁹ The forced examination of Townsend’s penis was an unreasonable search and seizure, a denial of due process, a violation of the right against “self-crimination.”²⁰⁰ The court seemed genuinely troubled by Townsend’s treatment, calling it “offensive to our sense of justice,”²⁰¹ and concluding, “[t]o uphold the challenged evidence . . . would be to say that citizens suspected of future crimes may properly be subjected to the same treatment. . . . To strike down the evidence is to say that citizens suspected of crimes in the future may not be dealt with in so offensive a manner.”²⁰² The court did not mention or appear to consider that, if he were infected, Townsend could pose a threat to the health of the public.

However, courts’ construal of compulsory genital examinations as offensive remained limited to cases involving white alleged rapists. In *Brent v. White*, decided a decade later in 1968, the Fifth Circuit rejected a similar appeal from Leon Brent of Louisiana, who had been convicted of aggravated rape (and sentenced to death).²⁰³ Brent claimed “that a penis scraping which revealed menstrual blood of the victim’s type violated his Fourth Amendment rights,” but the court curtly dismissed this as “devoid of merit.”²⁰⁴ One wonders if the court’s decision was motivated by racial animus, for, unlike Townsend (who was white), Brent was black.²⁰⁵ Indeed, Brent, represented by the National Association for the Advancement of Colored People, argued that there was no evidence that the alleged sexual intercourse (with a white woman) was forced, and decried the all-white jury that convicted Brent.²⁰⁶ And Brent had objected not only to the

196. Id. at 380.

197. Id. at 381.

198. Id.

199. Id. at 380.

200. Id. at 384.

201. Id.

202. Id. at 388.

203. *Brent v. White*, 398 F.2d 503 (5th Cir. 1968).

204. Id. at 505.

205. Whiteness is presumed in legal documents so the court’s failure to apply a racial descriptor to Townsend reveals his racial identity was likely white. Amanda Carlin, “The Courtroom as White Space: Racial Performance as Noncredibility,” 63 *UCLA Law Review* 450, 463-64 (2016).

206. Julia O’Donoghue, “John Bel Edwards Reduces 22 Prisoners’ Terms – and Gets Angola Inmates’ Attention,” *New Orleans Times-Picayune* (9 Mar. 2017), <https://perma.cc/6XLN-2TVM>; “Appeals Court Mulls Death Term Attacks,” *The Shreveport Times* (4 Apr. 1968).

compulsory penile examination, but also to the prosecution's mention of his "previous conviction for disorderly conduct for insulting a 'white girl,'" as well as to the prosecutor's "racially directed references to the conviction."²⁰⁷ The Fifth Circuit dismissed such arguments: "The prosecutor's description of the victims as 'white girls' revealed nothing that the jury could not itself observe when both testified as witnesses, nor were the prosecutor's comments so inflammatory as to infringe any federally protected rights."²⁰⁸ As of 2017, Brent remained behind bars in Louisiana.²⁰⁹

B. The American Plan Continues

In the years following World War II, women with STIs continued to be imprisoned without due process, and many continued to challenge such treatment in court. As they had in years past, courts consistently ruled against these women, employing logic that was sharply at odds with that used by judges in cases such as *Townsend*, in which the person examined was a man. These women were consistently construed as threats to the public at large, which invariably justified their examinations and quarantine.

In 1945 in Ohio, and then in 1948 in Kansas, women objected to their incarcerations under the American Plan; in so doing, they challenged the constitutionality of American Plan statutes that enabled authorities to forcibly examine anyone "reasonably suspected" of carrying an STI.²¹⁰ First, in *Ex parte Kilbane*, an Ohio trial court rejected Edwyna Kilbane's claim "that she [was] illegally restrained and deprived of her liberty without any legal authority whatever."²¹¹ The legality of Kilbane's detention rested "upon the validity and interpretation of regulations adopted by the public health council of the department of health," which "authorize[d] the health commissioner of a city to make or cause to be made an examination of a person reasonably suspected of having a venereal disease"²¹² The court tersely ruled against Kilbane. The Ohio court's ruling was particularly dismissive, and its logic notably circular:

The fact that the criminal charge which led to the arrest of Edwyna Kilbane was dropped in court in no wise affects the right and duty of the health commissioner to act in the matter. He is "empowered" and "directed" under the above regulations "to make, or cause to be made, an examination of persons reasonably suspected of a venereal disease." Under Regulation 23 "all known prostitutes and persons associating with them shall be considered as reasonably suspected of having a venereal disease." As to other persons the surrounding circumstances

207. *Brent*, 398 F.2d at 505.

208. *Id.*

209. O'Donoghue, note 206.

210. *Welch v. Shepherd*, 196 P.2d 235, 237, 241 (Supreme Ct. Kansas 1948); *Ex parte Kilbane*, 67 N.E.2d 22, 22-23 (Ct. of Common Pleas Ohio 1945).

211. *Kilbane*, 67 N.E.2d at 23.

212. *Id.*

determine who are reasonably suspected of having a venereal disease. The fact that Edwyna Kilbane was found to be so infected was proof of the correctness of such determination.²¹³

In the Kansas case, *Welch v. Shepard*, two sisters were detained and held behind bars indefinitely until they acquiesced to venereal examinations. One of them sued, alleging “that she had been cajoled, promised and threatened to obtain from her unlawful examinations of her person in violation of her privacy, all without any legal justification, provocation or excuse.”²¹⁴ Further, “she believed she would be further restrained and deprived of her freedom and not admitted to bail or have a lawful hearing for an indefinite and extended period for the purpose of compelling her to submit to this examination.”²¹⁵ The Kansas Supreme Court held that this was not “the proper way to cause the patient to submit to the examination,” resulting in “an invasion of the rights of the two petitioners in this case.”²¹⁶ However, the court continued, this was simply because there was a far quicker way the health officer could have obtained the STI test results: “Where there are reasonable grounds for the city health officer to believe that a patient is afflicted with a venereal disease he has the power under the ordinance to restrain the suspected person and to forcibly cause him or her to submit to an examination.”²¹⁷ This is yet another example of a court resting its decision on a technicality and not really challenging the substance of the official action or the underlying rationale of the American Plan.

The Kansas Supreme Court noted that the city and state ordinances that enabled the examination had been repeatedly upheld.²¹⁸ Yet the court went further—it justified such examinations on prudential grounds as well:

This court, as well as the officers charged with the duty of stamping out venereal disease, is bound to consider the expediency of action taken by those officers, as well as questions involving the invasion of human rights with reference to the particular kind of an examination which is necessary to be made in order to detect the infection. If it were a disease such as smallpox or scarlet fever, where some outward manifestation is usually visible, or where, as in the case of diphtheria, its existence can be detected easily by clinical examination not involving any marked invasion of privacy, the question would be easier. However, an examination for the discovery of gonorrhea requires the taking of a smear from the private parts. Proper examination to ascertain whether or not a patient is afflicted with syphilis requires the securing of a sample of the patient’s blood. The fact is, one who is under any likelihood of being infected with

213. Id.

214. *Welch*, 196 P.2d at 237.

215. Id.

216. Id. at 243.

217. Id.

218. Id.

syphilis or gonorrhea should welcome an examination which would disclose that. It is well known that where one is afflicted the more quickly medical treatment is administered the more certain and satisfactory a result would be obtained.²¹⁹

In the eyes of these judges, this case was about “stamping out” a potential epidemic, such as smallpox or scarlet fever or diphtheria.²²⁰ Further, the court had clearly not taken seriously the petitioner’s objection that this examination was a “violation of her privacy.”²²¹

Not a single court in the decades after World War II struck down an American Plan law or ruled that a statute enabling pre-conviction STI examinations of suspected women was unconstitutional. This was in large part because of decades of precedent, but also because of common, remarkably sexist assumptions about sexually active women. In 1947, for instance, after two women were dragged from their beds to the police station to be questioned about a robbery, and were then examined for STIs when one officer decided that the rooming house in which they lived was actually a brothel, they sued. The case, *Ex parte Martin*, landed before Annette Abbott Adams, one of California’s first female judges.²²² Her questions to the assistant district attorney during oral argument were remarkably revealing:

“If the place is known to be a house of prostitution, as you say this was shown to have been, the health officer could have gone in any time, could have issued an order for quarantine of everybody found in it and put them all in jail?”²²³

The district attorney replied that he could.²²⁴

But what happened to suspected men, Adams asked—“were they quarantined in jail?”²²⁵

The assistant district attorney replied that they were not.²²⁶

“They weren’t as dangerous as carriers as these women?” Adams asked.²²⁷

“I believe the cases hold . . . that prostitutes are the most dangerous source,” said

219. *Id.*

220. *Id.*

221. *Id.* at 237.

222. *Ex parte Martin*, 188 P.2d 287 (California Ct. of Appeal 1948); *Annette Abbott Adams*, California Courts: The Judicial Branch of California (2019), <https://perma.cc/A4JK-JJVK>.

223. Oral Argument of John A. Wilson 13 (2 Oct. 1947) (on file in case file, *In re Martin*, California State Archives).

224. *Id.*

225. *Id.* at 10.

226. *Id.*

227. *Id.*

the assistant district attorney.²²⁸

“Where do they get it?” Adams asked.²²⁹

“I suppose from someone else.”²³⁰

Adams replied that she had recently spoken to the county’s chief health officer about this. “He says it is only transmitted if there are acts of prostitution.”²³¹

In the end, Adams’s concerns came to naught. A three-judge panel held, two-to-one, that the city had followed proper procedures in its examination and incarceration of the two women.²³² Adams was the lone dissenter.²³³ In this case, as in others, women (and specifically prostitutes) were understood to be a threat to public health; men, in the eyes of the two male judges, were apparently incapable of being dangerous in the same way. Their gendered assumption persisted in spite of the complete lack of evidence that prostitutes, or women in general, were the main vectors of STI transmission; it persisted even when someone like Adams pointed this out.

Racism too continued to infect the enforcement of such examinations. In 1949, for example, four police officers in Berkeley stopped a black woman trying to catch a taxi and asked her, “What have you been doing with your big black belly?”²³⁴ Then they detained her and held her in jail, where she was forcibly examined; she was released three days later, after the test results came back negative.²³⁵ At roughly the same time, two women were forcibly examined and then quarantined in San Francisco “because they had been seen frequently in a restaurant that caters to Filipinos. The officer had no evidence of promiscuity, and took the position simply that these women had no business hanging around a place in which there were Filipinos.”²³⁶ It is worth noting that this over-policing of women of color, and of women who spent time with men of color, reflected the same suspicion of non-white bodies and non-white behavior that was seen in Part I.C.

As the 1940s became the 1950s and 1960s, however, the advent of penicillin and other new “miracle drugs”—which could quickly and easily cure gonorrhea or syphilis—began to accomplish what generations of women suing could not: the gradual decline of the American Plan.²³⁷ Slowly, some cities and states stopped

228. Id.

229. Id.

230. Id.

231. Id. at 10-11.

232. *Martin*, 188 P.2d at 291.

233. Id. at 287.

234. Letter from Bertram Edises to Ora E. Rhodes (9 May 1949) (on file in Folder 776, Carton 36, ACLU of Northern California Records, California Historical Society).

235. Id.

236. Letter from Ernest Besig to J.C. Geiger, (16 Jan. 1954) (on file in Folder 776, Carton 36, ACLU of Northern California Records, California Historical Society).

237. John Parascandola, *Sex, Sin, and Science: A History of Syphilis in America*, 133 (Praeger

rounding up women to examine for STIs.²³⁸ At the same time, a case appeared before the Supreme Court that would fundamentally reshape the venereal doctrine.

C. The Death of *Height*: *Schmerber v. California*

The *Height* line of cases came to an abrupt and irrevocable end on June 20, 1966. That day, the U.S. Supreme Court announced its decision *Schmerber v. California*, which clarified that the Fifth Amendment privilege against self-incrimination only protects a defendant from being forced to provide “evidence of a testimonial or communicative nature” against himself, not from being forced to provide physical or medical evidence.²³⁹ Further, the Fourth Amendment protection against unreasonable searches and seizures did not prevent the state from performing physically intrusive medical examinations to obtain evidence, so long as the state had obtained a warrant.²⁴⁰ As we shall see, this holding would have a profound effect on future cases in which both men and women challenged compulsory pre-conviction STI examinations. It would not, however, change the gendered assumptions on which these cases relied.

Armando Schmerber whose blood-alcohol content had been tested without his consent, appealed his conviction for driving under the influence.²⁴¹ Schmerber claimed that the withdrawal of his blood and its admission into evidence: (1) denied him due process; (2) forced him to testify against himself; and (3) was an unreasonable search and seizure.²⁴² In the years before Schmerber’s case reached the Court, the Justices had issued a number of somewhat contradictory rulings as to whether compelling a defendant to provide physical evidence against himself was unconstitutional for any of the reasons raised by Schmerber²⁴³—even as the broad trend in lower courts had been moving away from the libertarian logic of *Height*.²⁴⁴ Now, the Justices could resolve this once and for all. Justice Brennan, writing for the majority, concluded that: (1) the extraction of Schmerber’s blood did not deny him due process; (2) forcible blood tests (and, by extension, forcible medical examinations) were not violative of the Fifth Amendment privilege against self-incrimination; and (3) “intrusions into the body” were not violative of the Fourth Amendment right against unreasonable searches and seizures, so long as the intrusions were “justified in the circumstances” and conducted after the authorities obtained a warrant.²⁴⁵

Publishers, 2008).

238. Stern, *Trials of Nina McCall*, note 25, at 238-40.

239. 384 U.S. 757, 761.

240. *Id.* at 766-67.

241. *Id.* at 758-59.

242. *Id.* at 759.

243. See *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Rochin v. California*, 342 U.S. 165 (1952); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Weeks v. United States*, 232 U.S. 383 (1914); *Holt v. United States*, 218 U.S. 245 (1910).

244. See cases cited in notes 251-272 and accompanying text.

245. *Schmerber*, 384 U.S. at 759-72.

In the years following *Schmerber*, the Court made clear that defendants could be compelled to surrender their voices,²⁴⁶ take sobriety tests,²⁴⁷ stand in a lineup,²⁴⁸ and submit samples of handwriting without running afoul of the Fifth Amendment privilege against self-incrimination.²⁴⁹ As prosecutor Anne Marie Schubert put it a quarter century later:

Relying on the landmark case of *Schmerber v. California*, the Supreme Court has consistently found that there is no Fifth Amendment violation where the witness is the source of ‘real or physical’ evidence. If the government is merely seeking an identifying physical characteristic and not the contents of the physical evidence, an individual has no protection because the evidence is neither the accused’s testimony nor evidence relating to some communicative act by the accused.²⁵⁰

Meanwhile, if an exception under the Fourth Amendment, such as an exigency, is present then no warrant supported by probable cause is needed and the permissibility of searching someone’s body is determined by “balancing [the examination’s] intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”²⁵¹ In the years following *Schmerber* the Court held that police could extract tissue from under a suspect’s fingernails²⁵² but that compelling a defendant to undergo surgery so that officials could remove a bullet that might be evidence of a crime constituted an unconstitutional search under the Fourth Amendment.²⁵³

D. The Aftermath

In the two decades after the Court handed down its decision in *Schmerber*, authorities across the country continued to sometimes examine suspected rapists and suspected prostitutes for STIs. When individuals objected and sued, they now invoked the Fourth Amendment, not the Fifth; *Schmerber* had effectively closed that latter door. Courts consistently ruled against both men and women objecting to pre-conviction STI examinations, but the courts’ logic continued to reveal gendered assumptions about who had and spread STIs. As in the previous seven decades, men were understood as a threat to individuals, while women were

246. *United States v. Dionisio*, 410 U.S. 1 (1973).

247. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

248. *United States v. Wade*, 388 U.S. 218 (1967).

249. *Gilbert v. California*, 388 U.S. 263 (1967).

250. Anne Marie Schubert, “Compelled Consent to Release of Foreign Records—Taking the Fifth: *Doe v. United States*,” 23 *University of Southern Florida Law Review* 291, 297 (1989) (emphasis omitted).

251. *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 618 (1989) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

252. *Cupp v. Murphy*, 412 U.S. 291 (1973).

253. *Winston v. Lee*, 470 U.S. 753 (1985). But see Blake A. Bailey, et al., “Criminal Law—*Lee v. Winston*: Court-Ordered Surgery & the Fourth Amendment—A New Analysis of Reasonableness?,” 60 *Notre Dame Law Review* 149, 152 (1984).

understood as a threat to communities at large.

On July 7, 1977, police in Fort Wayne, Indiana, arrested Joseph Howard McClain for allegedly raping an eleven-year-old girl.²⁵⁴ On the same day, the police received a warrant to examine McClain for gonorrhea.²⁵⁵ “He was taken to the Board of Health where during the course of a procedure the examiner squeezed his penis and obtained a swab of secretion. The presence of gonorrhea was established.”²⁵⁶ After he was convicted, based on the STI test results, McClain appealed, claiming his examination was an unreasonable search and seizure, in violation of the Fourth Amendment.²⁵⁷

In deciding *McClain v. State*, the Indiana Supreme Court discussed a number of cases that had been decided based on *Schmerber*, which determined the limits of the Fourth Amendment’s protection.²⁵⁸ Although there were “fundamental human interests at stake” in the case, the court ruled that the examination did not violate McClain’s Fourth Amendment rights, since the city had obtained a warrant first and had sufficient “probable cause” to believe he had committed rape.²⁵⁹ The court did not discuss any threat an infected rapist could possibly pose to the public at large.

In the five years after *McClain*, two other courts—one in Alabama and one in Georgia—affirmed this ruling, declaring that, so long as the authorities had probable cause and had obtained a proper warrant, pre-conviction STI examinations of suspected rapists were not unreasonable under the Fourth Amendment.²⁶⁰ Another case, from the Louisiana Supreme Court, affirmed the decades-old holding that consent rendered an STI examination of an accused rapist permissible, even in the absence of a warrant.²⁶¹ The men in all three cases had been accused of raping girls under the age of ten, and all were convicted.²⁶² Each court cited *Schmerber* to justify its decision.²⁶³ No court mentioned public health concerns beyond those faced by an individual victim.

However, the Iowa Supreme Court in *State v. Peterson* did make clear (albeit in a case not involving an STI examination) that there were limits to when authorities could examine the bodies and blood of accused rapists.²⁶⁴ In 1971,

254. *McClain v. State*, 410 N.E.2d 1297, 1299 (Supreme Ct. Indiana 1980).

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* (citing *United States v. Dionisio*, 410 U.S. 1 (1973) and *Cupp v. Murphy*, 412 U.S. 291 (1973)).

259. *Id.* at 1302.

260. *State v. Morrow*, 334 S.E.2d 344 (Ct. of Appeals Georgia 1985); *McIntosh v. State*, 443 So.2d 1275 (Ct. of Criminal Appeals Alabama 1983). See also *Williams v. State*, 448 So.2d 964, 967 (Ct. of Criminal Appeals Alabama 1984) (citing *Schmerber* to hold that a blood test for gonorrhea was constitutionally permissible and that test results could be used at trial).

261. *State v. Carthan*, 377 So. 2d 308, 311-12 (Supreme Ct. Louisiana 1979).

262. *Morrow*, 334 S.E.2d at 346; *McIntosh*, 443 So.2d at 1276; *Carthan*, 377 So. 2d at 310, 314.

263. *Morrow*, 334 S.E.2d at 346; *McIntosh*, 443 So.2d at 1281; *Carthan*, 377 So. 2d at 311.

264. *State v. Peterson*, 219 N.W.2d 665, 669 (Supreme Ct. Iowa 1974).

Michael Dean Peterson was arrested for rape and murder of his fiancée.²⁶⁵ When an Iowa investigator asked Peterson for a sample of his blood, to compare his blood type to semen found at the scene of the murder, Peterson was “reluctant” to comply.²⁶⁶ The government investigator “assured [Peterson] the procedure was perfectly legal, or if not, his lawyer could keep it out of evidence in any later trial. Only after this assurance did defendant submit the sample. No warrant for the search of defendant’s person was sought or obtained.”²⁶⁷ In spite of the investigator’s assurances, the results of Peterson’s blood-type test were introduced into evidence over his lawyer’s objections, and Peterson was convicted of manslaughter.²⁶⁸ He appealed, claiming his Fourth Amendment rights had been violated, and the Iowa Supreme Court overturned his conviction.²⁶⁹

Interestingly, Peterson cited *Height*, and the Iowa Supreme Court was confronted with its own influential decision from 1902.²⁷⁰ In its *Peterson* decision, the court noted that both cases involved men who were arrested for rape and then examined by government officials who failed to obtain search warrants.²⁷¹ In *Height*’s case, too, the accused rapist “consented to [the physical examination] only after being assured by the arresting officer that the State had a right to require the examination.”²⁷² The court then cited *Schmerber* as further attesting that “intrusions into body cavities are subject to Fourth Amendment restrictions,” and that these intrusions demand search warrants in the absence of “exigent circumstances” (such as the certainty that blood-alcohol content would dissipate over time in *Schmerber*).²⁷³ In the absence of a warrant or exigent circumstances, and especially considering the state investigator’s possibly misleading statements, the court ruled that “the taking of the blood sample was a violation of defendant’s rights under the Fourth Amendment of the United States Constitution and Article I, § 8, of the Iowa Constitution.”²⁷⁴ Interestingly, in spite of the sea change in Fourth Amendment doctrine and the unavailability of the Fifth Amendment argument, the court still relied on state law to reach much the same result as it did in *Height*.

Predictably, women “reasonably suspected” of carrying STIs—often women accused of selling sex—were rarely afforded such protections, even in the years following the sexually revolutionary 1960s. During the 1950s, 1960s, and 1970s, cities and states across the country did begin winding down their enforcement of the American Plan, but often only after concerted protests from the examined women themselves. For instance, in New York in 1965 police arrested 18-year-

265. Id. at 667.

266. Id. at 669.

267. Id.

268. Id. at 667.

269. Id.

270. Id. at 670.

271. Id.

272. Id.

273. Id.

274. Id.

old Vietnam protester (and future feminist scholar) Andrea Dworkin.²⁷⁵ “While in jail,” Dworkin would later write:

In addition to the many strip searches by hand that police and nurses made into my vagina and anus, I was brutalized by two male doctors who gave me an internal examination, the first one I ever had. They pretty much tore me up inside with a steel speculum and had themselves a fine old time verbally tormenting me as well. I saw them enjoy it.²⁷⁶

This examination was enabled by New York’s American Plan law.²⁷⁷ Dworkin launched a press campaign against the enforcement of this law, and finally, in 1967, the city stopped using it.²⁷⁸

In at least one instance, such battles against the American Plan reached an appellate court; the Tenth Circuit’s reasoning in *Reynolds v. McNichols* continues to reveal the sexist assumptions surrounding the venereal doctrine.²⁷⁹ In 1972, Roxanne Reynolds sued the city of Denver, claiming that its American Plan law, Ordinance 735, violated her Fourth and Fourteenth Amendment rights.²⁸⁰ For decades, authorities in Denver had been detaining women “reasonably suspected” of prostitution, taking them to the city jail, and then only allowing them to leave after either taking a blood test and a shot of penicillin, or waiting forty-eight hours behind bars.²⁸¹ Reynolds, who sold sex to support herself, decided to sue after she was repeatedly ordered to report to the jail.²⁸² As her lawyer later recalled, Reynolds looked beyond her “immediate problem” and “wanted to take steps to stop the degrading procedure.”²⁸³

During the lawsuit’s depositions, the city’s attorney repeatedly referred to Reynolds as a “whore.”²⁸⁴ Eventually, Reynolds’s case reached the Tenth Circuit—the highest court ever to hear a case from a woman affected by the American Plan. The Tenth Circuit decisively ruled against her. “The principal thrust of the ordinance [was] aimed at bringing under control the *source* of communicable venereal disease.”²⁸⁵

To that end, the city authorities are empowered to examine and treat those reasonably suspected of having an infectious venereal disease. It is not illogical

275. See generally Johanna Fateman & Amy Scholder, eds., *Last Days at Hot Slit: The Radical Feminism of Andrea Dworkin* (Semiotext(e), 2019).

276. Quoted in Stern, *Trials of Nina McCall*, note 25, at 251.

277. *Id.*

278. *Id.* at 251-52.

279. *Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir. 1973).

280. *Id.* at 1379-80.

281. Peter Ney, *Getting Here: From a Seat on a Train to a Seat on the Bench 173-75* (iUniverse, 2009).

282. *Reynolds*, 488 F.2d at 1380-81.

283. Ney, note 281, at 173-74; *Reynolds*, 488 F.2d at 1379-81.

284. Ney, note 281, at 174.

285. *Reynolds*, 488 F.2d at 1382 (emphasis in original).

or unreasonable, and on the contrary it is reasonable, to suspect that known prostitutes are a prime source of infectious venereal disease. Prostitution and venereal disease are no strangers.²⁸⁶

The Tenth Circuit cited numerous American Plan cases to support its conclusion that public health concerns justify compulsory STI examinations,²⁸⁷ including *Ex parte Fowler*, a 1947 Oklahoma case in which a woman objected to an STI examination as “unconstitutional for the reason that it amounts to forcing a person to give testimony against one’s self.”²⁸⁸ The court of criminal appeals in that case ruled against her, considering the “emergency occasioned by danger to the public health” from STIs.²⁸⁹

The Tenth Circuit also dismissed Reynolds’s Fourteenth Amendment equal protection argument, writing, “the ordinance is aimed at the primary source of venereal disease and the plaintiff, being the prostitute, was the potential source, not her would-be customer.”²⁹⁰ Thus, the Tenth Circuit concluded, the statute’s unequal application was justified and it was no denial of equal protection for the law to, in effect, target only the women selling sex but not the men purchasing those services. As in years past, women—and especially prostitutes—were construed as a threat to “the public health”; the Tenth Circuit was explicit in declaring that male consumers of sex did not present the same level of threat.²⁹¹

Nonetheless, as Reynolds’s lawyer later noted, her lawsuit caused Denver to cease detaining and examining women under the city’s ordinance.²⁹² However, this still wasn’t the end of compulsory pre-conviction STI examinations for women in Colorado. Colorado Springs, located near the Fort Carson military installation, continued to detain suspected women and hold them in jail indefinitely until they succumbed to STI examinations until at least the end of 1977.²⁹³ Just as they had for sixty years, authorities justified this by claiming that it protected the nearby soldiers from STIs. According to the director of the El Paso County Venereal Disease Control Program, prostitutes “[were] responsible for one-fourth to one-third of the VD cases in the county,” justifying the city’s District Attorney’s purpose of employing this old statute “to get prostitutes off the streets and jail them temporarily.”²⁹⁴ Similarly, as late as 1982, the mayor of Atlantic

286. *Id.*

287. *Id.* (citing *Welch v. Shepherd*, 196 P.2d 235 (Supreme Ct. Kansas 1948); *Ex parte Fowler*, 184 P.2d 814 (Criminal Ct. of Appeals Oklahoma 1947); *People ex. rel. Baker v. Strautz*, 54 N.E.2d 441, 444 (Supreme Ct. Illinois 1944); *Varholý v. Sweat*, 15 So.2d 267 (Supreme Ct. Florida 1943); *City of Little Rock v. Smith*, 163 S.W.2d 705 (Supreme Ct. Arkansas 1942); *Ex parte Arata*, 198 P. 814 (California Ct. of Appeal 1921)).

288. *Fowler*, 184 P.2d at 817.

289. *Id.* at 820.

290. *Reynolds*, 488 F.2d at 1383.

291. *Id.*

292. Ney, note 281, at 175.

293. Stern, *Trials of Nina McCall*, note 25, at 258.

294. Marianne Salcetti, “Prostitution, Military Linked to High Rate of Gonorrhea,” *Colorado Springs Gazette-Telegraph*, 1, 4 (18 Dec. 1977); Doug Hardie, “D.A., Health Officials to

City, New Jersey, spoke about asking the state legislature to enact “tougher laws and a ‘quarantine’ of prostitutes found spreading venereal disease.”²⁹⁵

Thus, as America entered the 1980s, gendered assumptions remained surrounding who had STIs—common wisdom held that prostitutes, not rapists, were the true spreaders of these infections. Rapists were a threat to vulnerable women; prostitutes were a threat to all.

IV. AIDS AND THE WORLD IT MADE

As America entered the 1980s, the landscape of public health and public policy was about to be radically reshaped by the HIV/AIDS epidemic. When it became clear that the epidemic affected heterosexuals and not just homosexuals, calls for punitive measures—including compulsory pre-conviction HIV testing—quickly arose and became law around the country. Though compulsory testing schemes would affect both accused prostitutes and accused rapists, gendered assumptions remained: prostitutes were a threat to public health as a whole, whereas rapists were a threat only to their victims. However, as more and more people realized during the 1980s and 1990s, such assumptions (at least with respect to prostitutes) do not reflect science or statistics. Further, in cases challenging the enforcement of these pre-conviction HIV testing laws, courts sometimes upheld the statutes by citing to decades-old precedents from the venereal doctrine, continuing a decades-long pattern of relying on gender stereotypes. The power of that tradition is exemplified by its longevity even in the face of statistics challenging the stereotypes that justify it.

A. Hysteria and the Rise of Punitive Measures

On July 3, 1981, *The New York Times* carried its first story on the HIV/AIDS epidemic: “Rare Cancer Seen in 41 Homosexuals.”²⁹⁶ The story reported that gay men in San Francisco and New York, many characterized as promiscuous and recreational drug-users, had come down with a cancer, which often manifested as purplish spots all over the body.²⁹⁷ Alarmed by reports of this mysterious condition, the Centers for Disease Control and Prevention (CDC) formed a task force to study the emerging epidemic.²⁹⁸ CDC officials initially believed that transmission of AIDS was largely confined to those within the so-called “4-H risk group”—Haitians, hemophiliacs, heroin users, and homosexuals.²⁹⁹ Journalists

Crackdown on Prostitution,” *Colorado Springs Gazette-Telegraph*, 1B (3 Jul. 1970).

295. “‘All-Out War’ on Prostitution Brings About Stiffer Sentences,” *Hartford Courant* (5 Jan. 1982).

296. Lawrence K. Altman, “Rare Cancer Seen in 41 Homosexuals,” *The New York Times* (3 Jul. 1981).

297. *Id.*

298. Randy Shilts, *And the Band Played On: Politics, People, and the AIDS Epidemic*, xvii (St. Martin’s Press, 2007); Stern, *The Long American Plan*, note 129, at 424.

299. Mary Irvine, “From ‘Social Evil’ to Public Health Menace: The Justifications and Implications of Strict Approaches to Prostitutes in the HIV Epidemic,” 43 *Berkeley Journal of*

and physicians routinely referred to the condition as GRID—gay-related immune deficiency.³⁰⁰ In large part because of this stigmatization, heterosexuals in America generally believed that AIDS could not affect them.³⁰¹ Few knew about a federal study from the summer of 1981 that confirmed that men could transmit the condition to women through vaginal intercourse.³⁰² Thus, in spite of the fears of gay activists, calls for mandatory testing or quarantine in the early 1980s were relatively rare.³⁰³

Yet by the autumn of 1985, everything had changed; hysteria had gripped the nation. Politicians and legislators across the country were calling for compulsory examinations; one poll found that a majority of Americans favored quarantine for those with AIDS.³⁰⁴ What had changed?

A series of events—most involving prostitutes accused of indiscriminately spreading HIV—had enflamed the public and played a large role in sparking the outcry. First, in New Haven, Connecticut, a rumor circulated that a female prostitute named Carlotta Locklear had AIDS but was still soliciting clients and having sex with them.³⁰⁵ The story broke in a Yale student publication but was quickly picked up by the Associated Press.³⁰⁶ It became a national story, especially after *60 Minutes* aired a story about the woman.³⁰⁷ The woman was arrested (allegedly for soliciting) and briefly quarantined in an institution created seven decades earlier to hold women under the American Plan,³⁰⁸ and a state legislator introduced a bill that many feared would enable the broader quarantine of those with AIDS.³⁰⁹ The law eventually passed, though it has never been invoked.³¹⁰ Just months later, a similar story broke in San Francisco.³¹¹ Television cameras rolled into the city's Tenderloin neighborhood, and the story hit the front page of the *San Francisco Chronicle*.³¹²

Sociology 63, 64 (1998-99).

300. Brandt, note 115, at 184.

301. Stern, *Trials of Nina McCall*, note 25, at 259.

302. Shilts, note 298, at 510-11.

303. Stern, *Trials of Nina McCall*, note 25, at 259.

304. Id.; "Poll Indicates Majority Favors Quarantine for AIDS Victims," *The New York Times* (20 Dec. 1985). See also Ronald Bayer, *Private Acts, Social Consequences: AIDS and the Politics of Public Health*, 176 (The Free Press, 1989).

305. W. Hampton Sides, "Lana: A Story of Scarlet Letters, Private Lives and Public Health," 16 *The New Journal* 16 (9 Dec. 1983).

306. Id.; Joan Barbuto, "AIDS RISK: Prostitute Suspected as Carrier," *New Haven Register* (23 Jan. 1984); Associated Press, "Lawmaker Considers Proposal for Quarantine of AIDS Victims," *The Galveston Daily News*, 7C (26 Jan. 1984).

307. "60 Minutes," *The Courier-Journal*, 4A (19 Feb. 1984).

308. "Three Faces of Crime," *The Philadelphia Daily News*, 21 (28 Feb. 1984); "AIDS Hooker is Back in Jail," *New Haven Register* (13 Mar. 1984). For this institution's American Plan history, see Andi Rierden, *The Farm: Life Inside a Women's Prison*, 45-47 (1997).

309. Christine Guilfooy, "Connecticut Quarantine Law Out of Committee," *Gay Community News*, 3 (12 May 1984). See also Bayer, note 304, at 177.

310. Richard L. Melchreit, "HIV Infection in Connecticut, 1980-1990," 38 *Connecticut History* 45, 46 (Fall 1997-Spring 1999).

311. Shilts, note 298, at 508-10.

312. Randy Shilts, "Working Prostitute Waits for Test: A 'Monster' Dilemma on AIDS," *San*

Then, in April 1985, *The Washington Post* informed readers that a team of researchers from Walter Reed Army Medical Center had concluded a study of forty-one military men with AIDS; after multiple interviews with the men, the study's author, Robert Redfield, determined that female prostitutes had likely transmitted the infection to many of the men.³¹³ Female prostitutes, Redfield told the press, might be a vector in the spread of AIDS.³¹⁴ Experts would later dismiss Redfield's study as "based on questionable data and unsound epidemiological reasoning," and pronounce his findings "unconvincing"³¹⁵—in large part because he relied on the men's self-reporting, and closeted gay soldiers were unlikely to admit homosexual interactions. But Redfield's study and other, similar studies that followed in its wake³¹⁶ were hugely influential.³¹⁷ (Decades later, in 2018, President Donald Trump would make Redfield the head of the CDC.)³¹⁸

These events, along with the AIDS-related death of beloved movie star Rock Hudson and the famous *Life* magazine cover that declared in massive red text, "Now No One Is Safe From AIDS,"³¹⁹ led heterosexual Americans to panic. The calls for quarantine and other punitive measures promptly began, motivated by ignorance, bigotry, and, above all, fear. A poll conducted in the fall of 1985 found that 47 percent of Americans thought they could acquire AIDS from a shared drinking glass, while 28 percent thought they could get it from toilet seats.³²⁰ That fall, Texas's health commissioner and the Republican nominee for New York mayor both issued calls for quarantine.³²¹ In Sacramento, the sheriff's office instructed police officers not to give mouth-to-mouth resuscitation to gay men; in Oklahoma, a prison inmate with AIDS was placed in solitary confinement; and in South Carolina, officials began planning a state AIDS registry.³²² As in years past,

San Francisco Chronicle, 1 (5 Jan. 1985).

313. William A. Check, "Heterosexual AIDS Risk Studied," *The Washington Post*, A7 (17 Apr. 1985).
314. *Id.*
315. Stephen Schultz, et al., "Female-to-Male Transmission of HTLV-III," 255 *The Journal of the American Medical Association* 1703, 1703-04 (1986).
316. See "Researcher Testifies Soldiers Getting AIDS from Prostitutes," *Houston Chronicle*, 14 (26 Sept. 1985).
317. Shilts, note 298, at 513.
318. Lena H. Sun, "Longtime AIDS Researcher Robert Redfield Picked to Lead CDC," *The Washington Post* (21 Mar. 2018), <https://perma.cc/4ZR3-YZB5>.
319. "Now No One Is Safe From AIDS," *Life* (July 1985).
320. Brandt, note 115, at 192.
321. Cristine Russell, "Texas Health Chief Seeks Quarantine in AIDS Cases," *The Washington Post*, A2 (23 Oct. 1985) (describing the Texas health commissioner's call for quarantine for "incorrigible" AIDS patients); Saul Friedman, "McGrath: Mandatory AIDS Tests," *Newsday*, 22 (2 Oct. 1985) (recounting New York mayoral candidate Diane McGrath calling for AIDS patients to "be segregated from other patients" and acknowledging that a registry of AIDS patients, and the issuance of identity cards, and the broader use of quarantine, might be necessary); "AIDS and the New Apartheid," *The New York Times*, 30 (7 Oct. 1985) (condemning McGrath's comments as "cruel" and "bigotry").
322. Randy Shilts, "AIDS Test Pits Gays Against Doctors," *San Francisco Chronicle*, 1 (21 Aug. 1985); Adrian Peracchio, "The Age of AIDS," *Newsday* (15 Sept. 1985); see also Dennis Altman, *AIDS in the Mind of America*, chapter 4 (1986).

this punitive turn in public health policy especially threatened female prostitutes—a number were placed under house arrest or forced to undergo testing.³²³ State health officials began examining whether existing quarantine statutes could be applied to AIDS, and the president of the Florida Police Chiefs Association “said he would like to see legislation to assure that prostitutes suspected of the disease are kept off the streets and tested.”³²⁴

“People are talking about coercive methods much more now,” said James Mason, then-director of the CDC. “Six months ago, it was not mentioned by anyone.”³²⁵ Mason condemned large-scale quarantine, but added, “[e]very large community is going to find people so irresponsible that some sort of coercive action will have to be taken.”³²⁶ In reporting Mason’s comments, Cristine Russell of *The Washington Post* noted, “[m]ost states have laws granting health officials sweeping powers to act to protect the public health as they see fit. Some states also have little-used venereal-disease laws that make it a criminal offense, usually a misdemeanor, to infect another person knowingly or negligently through sexual contact.”³²⁷ She neglected to mention that every state also retained its American Plan law.³²⁸

B. Compulsory HIV Testing of Female Prostitutes

It was during that hysterical autumn of 1985 that officials across the country began calling for compulsory HIV testing of marginalized individuals—especially female prostitutes. As in decades past, these calls reflected highly gendered assumptions. Officials believed that female prostitutes, in particular, were a threat not just to men who bought sex, but to the public health at large. Thus, extreme measures were justified, even at the expense of women’s privacy. This remained true in spite of scientific studies that emerged, establishing that women (including women who sold sex) presented only a marginal threat to public health.

That fall, Lyndon LaRouche, the neo-Nazi conspiracy theorist and political figure, began calling for a universal system of quarantine for those with AIDS and compulsory testing for those suspected of having AIDS.³²⁹ LaRouche’s followers in New York, Florida, the District of Columbia, and elsewhere, started lobbying school boards and local government officials, trying to get them to impose a

323. See e.g. “AIDS Victim Under House Arrest Until Trial on Prostitution Charge,” *Pensacola News Journal*, 9A (28 Sept. 1985); “Testing Prostitutes for AIDS Questioned,” *South Florida Sun Sentinel*, 6B (1 Nov. 1985).

324. “Testing Prostitutes for AIDS Questioned,” *South Florida Sun Sentinel*, 6B (1 Nov. 1985); see also Lisa Ocker, “Prostitutes’ AIDS Testing Questioned,” *Palm Beach Post*, B27 (4 Nov. 1985).

325. Cristine Russell, “AIDS: Rights vs. Safety: Plans to Restrict Carriers Gain Momentum,” *The Washington Post*, A1, A26-27 (16 Dec. 1985).

326. *Id.*

327. *Id.*

328. Stern, *The Long American Plan*, note 129, at 435-36, appendix B.

329. Barbara Vobejda, “LaRouche Unit Asks AIDS Quarantine,” *The Washington Post*, C5 (9 Oct. 1985).

quarantine on AIDS patients and compulsory screening of teachers.³³⁰ In Seattle, authorities at the King County Jail announced that, beginning in 1986, they would start routinely testing arrested (but not convicted) prostitutes for AIDS.³³¹ In a prescient passage, journalist Warren King noted, “[h]ealth officials have legal authority to test anyone they ‘reasonably suspect’ of carrying a sexually transmitted disease.”³³² This was the state’s American Plan law, which hadn’t been invoked in decades.³³³ However, King County’s prosecutor told King that he was doubtful this law would actually apply to AIDS, since “[i]t was written at the turn of the century and applies only to the diseases syphilis, gonorrhea and chancroid, a type of venereal ulcer.”³³⁴

In December 1985, LaRouche’s followers in California proposed a ballot initiative that would make AIDS carriers subject to “quarantine and isolation statutes and regulations.”³³⁵ Furthermore, those merely suspected of having HIV would be reported to local health officials; they could then face summary firings or travel restrictions—simply for being suspected.³³⁶ LaRouche and his supporters gathered some 690,000 signatures (more than twice the number needed to place this initiative on the ballot), thus putting HIV/AIDS quarantine before voters for the first time.³³⁷ Prominent gay rights and sex workers’ rights activists lobbied hard against the LaRouche initiative.³³⁸ Eventually, the LaRouche initiative lost by a margin of more than two-to-one, though nearly two million people had voted for it.³³⁹

The idea of quarantine and compulsory testing spread. In Georgia, in 1986, a state task force recommended that all convicted prostitutes be tested for HIV and those arrested again faced harsher penalties.³⁴⁰ When asked about the legality of this proposal, the task force’s chairman replied that their “sense of the matter is to let the lawyers worry about the constitutional questions . . . that are raised by

330. Bayer, note 304, at 147; Vobejda, note 329, at C5; see also Christopher Tournay, *Conjuring Science: Scientific Symbols and Cultural Meanings in American Life*, 87-88 (Rutgers University Press 1996).

331. Warren King, “AIDS Test Set for Prostitutes in County Jail,” *Seattle Times*, A1, A7 (19 Oct. 1985).

332. *Id.*

333. Wash. Rev. Code, § 70.24 (2018).

334. King, note 331.

335. “Proposal for Ballot Would Subject AIDS Carriers to Quarantine,” *Los Angeles Times*, 32 (25 Dec. 1985); Ronald Elseberry, “AIDS Quarantine in England and the United States,” 10 *Hastings International and Comparative Law Review* 113, 144-45 (1986).

336. *Id.*

337. Kevin Roderick, “AIDS Measure Qualifies for Fall Election,” *Los Angeles Times*, 8, 18 (25 Jun. 1986); “LaRouche Backers Submit AIDS Quarantine Petitions,” *San Francisco Chronicle*, 10 (23 May 1986).

338. Marylouise Oates, “Group Rallies Against AIDS Ballot Proposition,” *Los Angeles Times*, D2 (16 Jul. 1986); Telephone interview with Priscilla Alexander (18 Aug. 2015).

339. Kevin Roderick, “Toxics: Anti-Pollution Measure Wins Easily; AIDS Initiative Rejected,” *Los Angeles Times*, 29 (5 Nov. 1986).

340. Bayer, note 304, at 182.

people who don't want to do something."³⁴¹ Similar laws were proposed around the country. By the end of 1987, nine states had amended existing quarantine laws or passed new ones explicitly authorizing quarantine for those carrying AIDS—though usually only as a last resort.³⁴² As Tamar Lewin wrote on the front page of *The New York Times*:

The laws vary widely. Colorado's new statute covers only HIV infection and AIDS itself and provides for up to three months of isolation. Minnesota's law covers all communicable diseases and has a six-month limit. North Carolina's new law, which takes effect in February [1988], empowers health officials to limit indefinitely the 'freedom of movement or action' of people with a communicable disease.³⁴³

Lewin further noted that such laws had precedents: "Quarantine orders were also used in some cases against people, especially prostitutes, thought to carry sexually transmitted diseases."³⁴⁴

Beginning in 1986, and picking up steam in 1987 and 1988, activists began denouncing these laws, and drawing explicit parallels between them and the American Plan of yesteryear.³⁴⁵ "Many of the issues surrounding AIDS—mandatory testing, education about sexually transmitted disease, prevention, confidentiality and even quarantine—were debated with syphilis seven decades ago and led to a number of public health policies," wrote journalist Larry Thompson in 1987.³⁴⁶ Sex workers' rights activists in particular denounced these laws. In late 1987, Priscilla Alexander of Call Off Your Old Tired Ethics (COYOTE) appeared before the California Senate Select Committees on Substance Abuse and AIDS and informed the state legislators that legislation mandating the compulsory testing of prostitutes, which was currently being considered, "would create the illusion that all prostitutes who have been infected have been identified, with the result that customers would be more resistant to using condoms and spermicides."³⁴⁷ She recommended the implementation of

341. Id.

342. Tamar Lewin, "Rights of Citizens and Society Raise Legal Muddle on AIDS," *The New York Times*, A1 (14 Oct. 1987).

343. Id.

344. Id.

345. See Brandt, note 115, at 195, 201-02; Carol Leigh, "NO MANDATORY TESTING! A Feminist Prostitute Speaks Out," *On The Issues* (1988), <https://perma.cc/SZ97-GSYJ>; Beth Bergman, "AIDS, Prostitution, and the Use of Historical Stereotypes to Legislative Sexuality," 21 *John Marshall Law Review* 777, 796-98, 802, 806 (1987-1988); Larry Thompson, "The AIDS-Syphilis Parallel: Similarities and Differences," *The Washington Post*, 13 (31 Mar. 1987); Wendy E. Parmet, "AIDS and Quarantine: The Revival of an Archaic Doctrine," 14 *Hofstra Law Review* 66, 66-69, 75, 90 (1985-1986).

346. Thompson, note 345, at 13.

347. Testimony of Priscilla Alexander before the Senate Select Committee on Substance Abuse and Senate Select Committee on AIDS (20 Oct. 1987) (on file in Folder 1, Carton 1, COYOTE Records, Schlesinger Library, Radcliffe).

syringe exchanges and the distribution of condoms.³⁴⁸ A few months later, in 1988, Alexander appeared before the California Senate Judiciary Committee to again argue against a mandatory testing measure.³⁴⁹ Not only did the proposal constitute an “unreasonable search and seizure,” but “[m]andatory testing, and especially the ancillary felony charge would deter prostitutes from voluntarily being tested.”³⁵⁰

In spite of such opposition, the calls for compulsory testing of suspected prostitutes continued. New York City’s health commissioner, for instance, “signaled a dramatic turnabout in local policy and a departure from the state health regulations, when in late 1987 he called for mandatory testing of prostitutes and a ‘heavy crackdown on all forms of prostitution,’ even after the New York City Department of Health had maintained that there was no connection between prostitution and HIV transmission to men.”³⁵¹ In 1988, the California legislature passed a law enabling authorities to perform AIDS tests on convicted prostitutes.³⁵² The statute was scheduled to take effect in January 1989, but Grace Lidia Suarez, a public defender in San Francisco, filed suit on behalf of COYOTE member Heather Love and ten other prostitutes (eight women, two men).³⁵³ In March, the court granted a stay, preventing state authorities from putting the testing statute into action.³⁵⁴ COYOTE member Carol Leigh, known as the “Scarlet Harlot,” told the press that the law would allow “already existing prejudices inherent in the judicial system to be played out. Since prostitutes are considered a ‘high risk population’ the law will be used to single us out.”³⁵⁵ Leigh claimed that in California, “prostitutes suspected of being HIV antibody positive are often denied bail when arrested, and given longer jail sentences if convicted.”³⁵⁶ Leigh, along with several prostitutes and members of the AIDS Coalition to Unleash Power (ACT UP), protested in front of San Francisco City Hall to stop implementation of the law.³⁵⁷

In the end, Love and her allies lost in the California Court of Appeal. In *Love v. Superior Court*, the court decided that the state’s interest in preventing AIDS outweighed the potential unreasonableness of the search and the invasion of

348. Id.

349. Testimony of Priscilla Alexander before the Senate Judiciary Committee in Opposition to AB 2319 (23 Feb.1988) (on file in Folder 1, Carton 1, COYOTE Records, Schlesinger Library, Radcliffe).

350. Id.

351. Irvine, note 299, at 66; see also Ronald Sullivan, “AIDS Test Is Weighed in Sex Cases,” *The New York Times* (21 Nov. 1987).

352. Cal. Pen. Code, § 1202.6 (1992) (codifying S.B. 1007 and enacting Cal. Pen. Code, §§ 647(f), 1202.1, 1202.6, and 12022.85). See also Zink, note 12, at 796-98; Kelly A. Bennett, “Mandatory AIDS Testing: The Slow Death of Fourth Amendment Protection,” 20 *Pacific Law Journal* 1413, 1413 (1989).

353. Melinda Chateauvert, *Sex Workers Unite: A History of the Movement from Stonewall to SlutWalk*, 107 (2013).

354. Id.

355. Chris Bull, “Woman Challenges Calif. Testing Law,” *Gay Community News*, 1 (26 Mar. - 1 Apr. 1989).

356. Id.

357. Chateauvert, note 353, at 107.

privacy.³⁵⁸ The court “balanced the Fourth Amendment interests of those persons convicted of prostitution against the promotion of the government’s goal of preventing the spread of AIDS.”³⁵⁹ Yet in its decision, the court relied on stereotypes about prostitution, conflating sex workers with spreaders of STIs. “The Legislature, as heretofore discussed, has determined that those who engage in prostitution activities represent a high-risk group in terms of their own health, in contracting AIDS, and in terms of the health of others, in spreading the virus.”³⁶⁰ In ruling against Love’s Fourth Amendment argument, the court cited *In re Johnson*, an American Plan case from 1919 that deemed the “isolation of one afflicted with a contagious or infectious disease” to be “reasonable and proper, indeed the usual, measure taken to prevent the increase and spread thereof.”³⁶¹

Love was the first case to uphold the mandatory HIV-testing of convicted prostitutes, and the year that it was announced, Colorado,³⁶² Florida,³⁶³ Kentucky,³⁶⁴ and Virginia³⁶⁵ also passed or amended laws enabling authorities to compulsorily examine convicted prostitutes for AIDS. In the years that followed, other states passed similar laws,³⁶⁶ while some states already had such laws on the books by the time Love’s case reached the courts.³⁶⁷ Illinois’s law,³⁶⁸ enacted in 1989, was challenged in 1992. Two women, Henrietta Adams and Peggy Madison, were convicted of prostitution in Cook County circuit court; when the court ordered the two women to submit to HIV tests, they challenged the testing statute’s constitutionality, claiming it “violated their rights to privacy, to freedom from unreasonable searches and seizures, and to the equal protection of the laws.”³⁶⁹

In *People v. Adams*, the Illinois Supreme Court ruled against the two women, deciding that the state’s interest in preventing the spread of HIV trumped the women’s privacy and the intrusion on personal freedom.³⁷⁰ In so doing, the court again relied on a belief that prostitutes were disproportionately likely to carry STIs. “The General Assembly has targeted at-risk groups, concentrating on sex offenders and, in companion legislation, illicit users of hypodermic syringes.”³⁷¹ Like the court in *Love*, the Illinois Supreme Court relied on American Plan

358. 226 Cal. App. 3d 736, 746 (California Ct. of Appeal 1990).

359. *Id.* at 746.

360. *Id.*

361. *Id.* at 740 (quoting *In re Johnson*, 40 Cal.App. 242, 244 (California Ct. of Appeal 1919)).

362. Colo. Rev. Stat., § 18-7-201.5 (1993) (enacted L. 90, p. 987, § 13).

363. Fla. Stat., § 796.08 (1994) (enacted s. 2, ch. 86-143, amended s. 44, ch. 88-380; s. 6, ch. 90-292).

364. Ky. Rev. Stat., § 529.090 (1993) (enacted Acts 1990, ch. 443, § 48).

365. Va. Code, § 18.2-346.1 (1991) (enacted 1990, c. 913).

366. See N.D. Code, § 23-07.7-01 (1993); Utah Code, § 76-10-1311 (1993); W. Va. Code, § 16-3c-2(5) (1993).

367. See Ala. Code, § 22-11A-17 (1993); Nev. Rev. Stat., § 201.356 (1992); Mich. Comp. Laws, § 333.5129 (1992); Wash. Rev. Code, § 70.24.340 (1992).

368. Ill. Stat., ch. 730, para. 5/5-5-3(g) (1993).

369. *People v. Adams*, 597 N.E.2d 574, 576-77 (Supreme Ct. Illinois 1992).

370. *Id.* at 581-83.

371. *Id.*

precedent to support its decision, *People ex rel. Baker v. Strautz*, a 1944 case in which the same court noted that, “[c]ertainly one who is charged with soliciting to prostitution and one of lewd and lascivious character is one who may first be suspected of carrying such dreadful affliction.”³⁷² The Illinois court also cited *Love* itself.³⁷³

Somewhat surprisingly, *Love* and *Adams* are the only two cases in which appeals courts considered the constitutionality of laws mandating the post-conviction HIV examinations of female prostitutes. Yet other appellate courts in the late 1980s and early 1990s made clear that prisoners,³⁷⁴ individuals convicted of possessing hypodermic needles,³⁷⁵ and individuals who bit or scratched law enforcement officials could likewise be compelled to undergo such testing.³⁷⁶ Courts ruled this way because the “seriousness and the potential for transmissibility of the disease AIDS” outweighed “the intrusion of a blood test.”³⁷⁷

In the early 1990s, legislators across the country introduced a slew of bills to institute compulsory HIV tests for those merely arrested for prostitution.³⁷⁸ By 2016, some ten states had passed these laws.³⁷⁹ An additional fifteen states had laws that enabled authorities to compulsorily examine those convicted of prostitution.³⁸⁰ As Sienna Baskin, Aziza Ahmed, and Anna Forbes show in their excellent 2016 study, these laws “vary [in terms of] when they are imposed, and in administration and disclosure of results.”³⁸¹ Some states required judges to impose STI tests on accused prostitutes, while other states allowed judges to retain discretion.³⁸² Some states demand that there be “reason to believe the violation

372. *Id.* at 579, 581 (citing 54 N.E.2d 441, 444 (Ill. 1944)).

373. *Id.* at 581.

374. *Harris v. Thigpen*, 727 F. Supp. 1564 (Middle D. Alabama 1990); *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989).

375. *People v. C.S.*, 583 N.E.2d 726 (Appellate Ct., 2d D., Illinois 1991), *petition for leave to appeal denied* 602 N.E.2d 461 (Supreme Ct. Illinois 1992).

376. *Adams v. State*, 498 S.E.2d 268 (Supreme Ct. Georgia 1998); *Doe v. Burgos*, 638 N.E.2d 701 (Illinois Appellate Ct. 1994); *Johanna J. v. Mun. Court*, 218 Cal. App. 3d 1255 (California Ct. of Appeal 1990).

377. *Dunn*, 880 F.2d at 1195.

378. See the multitude of bills listed in Snell, note 12, at 1569 footnote 26 (1994).

379. Ark. Code, § 16-82-101(b)(1); Conn. Gen. Stat., § 54-102a; Idaho Code, § 39-604; Mich. Comp. Laws, 333.5129; Mo. Stat., § 567.120; Nev. Rev. Stat. Ann., § 201.356; N.D. Cent. Code, § 23-07.7-01; Ohio Rev. Code, § 2907.27; Okl. Stat., tit. 63, § 1-524; W. Va. Code, § 16-3C-2 (2016).

380. Cal. Health & Safety Code, §§ 1603.1, 120292, 12022.85; Colo. Rev. Stat., §§ 18-3-415, 18-3-415.5; Del. Code, tit. 11, § 1345; D.C. Code, §§ 22-3901, 22-3902; Fla. Stat., § 796.08(3); Ga. Code, § 16-6-13.1; Ill. Comp. Stat. ch. 720, § 5/11-1.10; Ky. Rev. Stat., § 438.250; N.M. Stat., § 24-2B-5.1 (2016); R.I. Gen. Laws, ch. 42, §§ 23-6.3-7, 42-56-37; S.C. Code, §§ 16-3-740, 44-29-100, 44-29-136; Tenn. Code, § 39-13-521; Utah Code, § 64-13-36; Va. Code, § 18.2-346.1; and Wash. Rev. Code, § 70.24.340. Three additional states (Arkansas, Ohio, and West Virginia) have both pre-conviction and post-conviction testing statutes. See Ark. Code, § 16-82-101(b)(1); Ohio Rev. Code, § 2907.27; W. Va. Code, § 16-3C-2.

381. Sienna Baskin, Aziza Ahmed, & Anna Forbes, “Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences,” 93 *Denver Law Review* 355, 371 (2016).

382. *Id.* at 371.

involved sexual penetration or exposure to a body fluid of the defendant”³⁸³ to justify an HIV test, or that there be “probable cause.”³⁸⁴

No appellate court has ever ruled on the constitutionality of one of these laws as applied to the compulsory pre-conviction HIV testing of a suspected female prostitute. This is somewhat surprising, considering that—for a time, at least—the constitutionality of these laws seemed to be in doubt. Indeed, in 1989, a state official in Idaho (which had one of these laws on the books) told *The Village Voice*:

I keep waiting for our own law to be challenged constitutionally. But there has not yet been a definitive nationwide statement as to whether someone can be tested against their will: It’s a Fourth Amendment privacy right balanced against a public health situation. The states have taken the lead and everyone is doing it differently. Mistakes are going to be made all along the line.³⁸⁵

However, in 2005, the Court of Appeals of Ohio upheld the state’s pre-conviction testing statute in *State v. Wallace*, a case involving the testing of an alleged male prostitute.³⁸⁶ In that case, a man named Tarri Wallace, who had previously tested positive for HIV, was arrested for soliciting.³⁸⁷ Even though there was no evidence that Wallace had been arrested on evidence of sexual intercourse or other activity that might cause the exchange of body fluids, the trial court ordered that he undergo STI testing (including for HIV).³⁸⁸ Wallace appealed, arguing that the statute was unconstitutional because it violated his privacy and due process rights. “Wallace’s argument also implicate[d] the issue of whether the statute violate[d] the prohibition against unreasonable searches and seizures.”³⁸⁹ The court held that Ohio law “permits the warrantless testing of persons.”³⁹⁰ The state presented multiple potential interests in compelling testing: (1) “protecting any victim who may have been exposed to an STD”; (2) “halting the spread of STD’s among the general population”; (3) “protecting the health of its prison population by preventing anyone with an STD from engaging in behavior that could spread the disease in the prison environment”; and (4) “providing appropriate medical care to any prison inmate suffering from an STD.”³⁹¹

In this case, even though there was no “victim” who was exposed to a possible STI, and even though “any interest in protecting the prison population or

383. See Mich. Comp. Laws, §§ 333.5129(1), (3).

384. See S.C. Code Ann. §§ 16-3-740(B)(2).

385. Jan Hoffman, “AIDS & Rape: Should New York Test Sex Offenders?” *Village Voice*, 37-38 (12 Sept. 1989).

386. *State v. Wallace*, 2005-Ohio-1913, Case No. 20030 (Ohio Ct. of Appeals 2005).

387. *Id.* at ¶¶ 1, 3.

388. *Id.*

389. *Id.* at ¶ 6.

390. *Id.* at ¶ 13.

391. *Id.*

providing adequate medical treatment to an inmate is obviated by the fact that the statute does not require conviction and imprisonment prior to testing,” the court upheld the statute because it found “a special governmental need in protecting the public from the spread of STD’s [*sic*].”³⁹² Although the court “[could not] determine from this record how effective the treatment required by the statute would be in preventing the spread of STD’s [*sic*] . . . [t]he burden [was] on Wallace to demonstrate the unconstitutionality of the statute, since legislative enactments enjoy a presumption of constitutionality.”³⁹³ Although Wallace failed to carry this burden, the court appeared to leave the door open to a defendant in his position to demonstrate that the statute is ineffective in preventing the spread of STIs and thus constitutes an unconstitutional search or seizure.³⁹⁴ However, courts’ historic predisposition to conflate prostitution with the spread of STIs suggests this would likely be an exceedingly difficult task. Interestingly, in Wallace’s case a male prostitute was included in this conflation. Perhaps Wallace’s participation in prostitution outweighed his maleness, or perhaps it was his apparent homosexuality (which, especially in the age of AIDS, was seen by many as particularly threatening to health).

In some cases, the laws that enabled the HIV testing of suspected or convicted prostitutes were simply amended versions of American Plan laws passed decades prior.³⁹⁵ In Washington, for instance, Title 70, Chapter 24 of the Revised Code includes a provision allowing local health departments to conduct HIV testing on “all persons . . . [c]onvicted of prostitution or offenses relating to prostitution.”³⁹⁶ This same chapter also includes a provision allowing “state and local public health officers or their authorized representatives” to examine people “reasonably believed to be infected with or to have been exposed to a sexually transmitted disease” and quarantine infected ones, if necessary.³⁹⁷ Chapter 24 is simply an amended version of a law passed in March 1919, during the federal government’s push for American Plan laws.³⁹⁸ The wording of the section enabling the examination of suspected individuals has hardly changed.³⁹⁹

Yet even in states without laws specifically enabling authorities to examine prostitutes for HIV, existing American Plan laws could possibly allow for this. Though no court has ever ruled on this question in the context of prostitution, in 1984, a California Court of Appeal made clear that a decades-old statute using the term “venereal disease” could apply to genital herpes and AIDS, even though the law was enacted “long before herpes [or AIDS] achieved [their] present

392. *Id.* at ¶ 15-16.

393. *Id.* at ¶ 19.

394. *Id.* at ¶ 16.

395. Compare e.g. Idaho Code, §§ 39-601-04 with Idaho Code, §§ 38-501-07 (1932) (enacted 1921).

396. Wash. Rev. Code, § 70.24.340 (2018).

397. Wash. Rev. Code, §§ 70.24.24, 70.24.70 (2018).

398. Act of 14 Mar. 1919, ch. 114, 1919 Wash. Sess. Laws 277.

399. Stern, *The Long American Plan*, note 129, at 420-21.

notoriety,” because they are “disease[s] that can be propagated by sexual contact.”⁴⁰⁰ The following year, the Court of Appeals of Georgia interpreted its American Plan law (enacted in 1918) in the same fashion.⁴⁰¹ Furthermore, in some places, officials even examined convicted prostitutes for HIV without a law explicitly authorizing it.⁴⁰²

Prostitution remains conflated with the promiscuous and dangerous spread of infection, which can have a material impact on sex workers’ lives; one recent study found that sex workers, especially black sex workers, “are being treated much more harshly in the context of HIV criminalization laws in Georgia than injection drug users, sex offenders, or others engaging in activity that could potentially expose an individual to HIV.”⁴⁰³ This conflation is based on assumptions about women who sell sex—assumptions that are strikingly absent in cases involving male rapists, as the next Section explores.

C. Compulsory HIV Testing of Male Rapists

In the late 1980s, as fears surrounding the heterosexual transmission of HIV climbed to new heights, authorities across the country began examining accused rapists, in order to provide rape survivors with peace of mind. Several alleged rapists, in turn, brought claims that such examinations represented a violation of their Fourth Amendment rights. Though, with some notable exceptions, courts have generally upheld statutes implementing compulsory HIV testing of male rapists, their decisions (and the statutes they were ruling on) nonetheless rested on gendered assumptions about the risk posed by male rapists.⁴⁰⁴ Rapists were perceived not as a threat to the public at large; rather, they were only a threat to individual women.

Some states began testing alleged rapists before their legislatures passed laws specifically enabling such testing. In 1988, two state trial courts, one in Pennsylvania and another in New York, heard cases in which accused rapists challenged HIV tests.⁴⁰⁵ That same year, another New York trial court heard an

400. *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 996 footnote 3 (California Ct. of Appeal 1984).

401. *Long v. Adams*, 333 S.E.2d 852, 856 (Georgia Ct. of Appeals 1985). The Georgia court held this in the context of a case involving herpes, but it approvingly quoted the language about AIDS as well.

402. See Snell, note 12, at 1583; “Testing Prostitutes for AIDS Studied,” *The Republic*, Columbus, Indiana, A3 (11 Apr. 1987).

403. Amira Hasenbush, *HIV Criminalization in Georgia*, 20 (Jan. 2018).

404. See *State v. Houey*, 651 S.E.2d 314, 317 (Supreme Ct. South Carolina 2007); *Virgin Islands v. Robert*, 756 F. Supp. 898, 903 (D. Virgin Islands 1991); *People v. Thomas*, 139 Misc. 2d 1072, 1075 (New York Superior Ct. of Schoharie County 1988); *State ex rel. J.G.*, 701 A.2d 1260, 1267 (Supreme Ct. New Jersey 1997). All of these cases, which are discussed in more detail in Part III.D, explicitly justified permitting HIV testing on the grounds that it would provide peace of mind to a single victim, not because rapists were a public health threat in the same way that prostitutes supposedly were.

405. *Commonwealth v. Mason*, 48 Pa. D. & C.3d 633 (Ct. of Common Pleas for Luzerne County, Pennsylvania 1988) (affirmed in part by 405 Pa. Super. 629 (Superior Ct. Pennsylvania 1990));

almost identical case involving a convicted rapist.⁴⁰⁶ In all three cases, the government claimed that the HIV tests were to provide information to the alleged survivors. In the Pennsylvania case, “[t]he commonwealth agree[d] that they [would] not use the test results or the taking of the test against the accused in the future; that the commonwealth [would] not deem the taking of the test as an admission of guilt; [and] that the basic reason for requesting the test [was] to give the victim peace of mind.”⁴⁰⁷ In the New York cases, the government made no such, but likewise stressed that the tests were for the benefit of the survivors.⁴⁰⁸

All three courts ruled that the examinations did not amount to unreasonable searches or seizures. In the New York case involving the convicted rapist, the court relied on a New York statute allowing for a court to order a criminal defendant to surrender a blood sample taken “in a manner not involving an unreasonable intrusion” (though this statute did not mention HIV),⁴⁰⁹ as well as “the victim[’s] right to know whether she may have been exposed to the AIDS virus.”⁴¹⁰ In the New York case involving the accused rapist, the court did not rely on this statute, but rather determined simply that “the minimal intrusion to the defendant by disclosure to a very few persons of some limited health data when balanced against the fears and health concerns of his alleged victims and their families mandates the issuance of the subpoena sought.”⁴¹¹ The Pennsylvania court took yet another approach, relying on a 1956 state law⁴¹² that had been enacted at the behest of a former American Plan administrator⁴¹³ to maintain “adequate legal coverage for all aspects of venereal disease control.”⁴¹⁴ This law allowed authorities to examine any person “charged with any crime involving lewd conduct or a sex offense” for “venereal disease.”⁴¹⁵ The court determined that AIDS fell within the definition of “venereal disease” and thus allowed the HIV test.⁴¹⁶

At the same time, during the late 1980s, states passed laws that made such tortured logic irrelevant; legislatures began specifically enabling HIV testing of

People v. Toure, 137 Misc. 2d 1066 (Supreme Ct. for Richmond County, New York 1988) (affirmed by 180 A.D.2d 1013 (Supreme Ct. Appellate Division, 2d Dept. New York 1992)).

406. *Thomas*, 139 Misc. 2d 1072.

407. *Mason*, 48 Pa. D. & C.3d at 634-35.

408. *Toure*, 137 Misc. 2d at 1067; *Thomas*, 139 Misc. 2d at 1073.

409. N.Y. Crim. Proc., § 240.40(2).

410. *Thomas*, 139 Misc. 2d at 1073-75; see also *People v. Cook*, 143 A.D.2d 486, 487 (Supreme Ct., Appellate Division, 3d Dept., New York 1988) (“find[ing] no violation of any constitutional right of [a convicted rapist compelled to] undergo a test for the presence of acquired immune deficiency syndrome upon the request of the victim, who was concerned for her own health and safety”).

411. *Toure*, 137 Misc. 2d at 1069.

412. Disease Prevention & Control Act, Pa. Cons. Stat., tit. 35, § 521.1 et seq.

413. “House Oks Revision of Disease Laws,” *Pittsburgh Post-Gazette*, 4 (8 Feb. 1956).

414. Department of Health of the Commonwealth of Pennsylvania, *1956 Annual Report*, 17 (1957).

415. Pa. Cons. Stat., tit. 35, § 521.8(a) (quoted in *Mason*, 48 Pa. D. & C.3d at 640).

416. *Mason*, 48 Pa. D. & C.3d at 641-42; see also *People v. Frausto*, 36 Cal. App. 4th 712 (California Ct. of Appeal 1995) (ordering an AIDS test even when the appellant had pled guilty to an offense not listed in the mandatory testing statute).

convicted or accused rapists. By 1990, California,⁴¹⁷ Colorado,⁴¹⁸ and Texas⁴¹⁹ had passed laws enabling the testing of rape suspects.⁴²⁰ The ostensible purpose of these laws was to benefit the survivors by providing them with information and thus peace of mind.⁴²¹ “The court may direct the person to undergo the procedure or test on its own motion,” read the Texas law, “or on the request of the victim of the alleged offense.”⁴²² These laws were justified in part by “frightening statistics suggest[ing] a strong possibility of HIV transmission in a sexual assault.”⁴²³ As Royce Richard Bedward observed in a 1990 note, several courts in the late 1980s declined to compel HIV tests when no specific statute enabled it,⁴²⁴ but “[s]pecified legislation, like that adopted in California, Colorado, and Texas, remove[d] any uncertainties about a court’s power to compel the HIV testing of a rape suspect.”⁴²⁵

Many within the federal government apparently felt that the states were not moving quickly enough. In 1990, Congress passed the Crime Control Act, which issued a mandate declaring that some federal funds would be withheld from states that did not have laws authorizing compulsory HIV testing for *convicted* rapists.⁴²⁶ In response, twenty-two states passed laws enabling post-conviction HIV testing within four years.⁴²⁷ In 1994, the government’s Working Group on HIV Testing, Counseling, and Prophylaxis After Sexual Assault proposed a limited policy to enable compulsory HIV testing for *accused* rapists.⁴²⁸ “In order to protect the accused from inappropriate testing and unauthorized disclosures,” wrote the Working Group, “the procedural protections embodied in this policy, including a probable cause hearing, limited disclosure, and confidentiality protection, are particularly important and merit careful consideration by policymakers and drafters of statutory language.”⁴²⁹ The Working Group noted that legal scholars were, in the early 1990s, divided as to whether merely accused rapists could be compelled to undergo HIV testing.⁴³⁰ This proposal met with some criticism—three public health authorities wrote to the *Journal of the American Medical*

417. Cal. Pen. Code, § 1524.1 (1990).

418. Colo. Rev. Stat., § 18-3-415 (1989).

419. Tex. Code Crim. Proc., art. 21.31 (1989).

420. Bedward, note 13, at 347.

421. *Id.* at 347-48.

422. Tex. Code Crim. Proc., art. 21.31(a).

423. Paul H. MacDonald, “AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders,” 43 *Vanderbilt Law Review* 1607, 1631 (Oct. 1990).

424. See *Anne D. v. Raymond D.*, 139 Misc. 2d 718 (Supreme Ct. of Nassau County, New York 1988); *Doe v. Roe*, 139 Misc. 2d 209 (Supreme Ct. of New York County, New York 1988); *Shelvin v. Lykos*, 741 S.W.2d 178 (Ct. of Appeals Texas 1987).

425. Bedward, note 13, at 354-55.

426. Crime Control Act of 1990, 18 U.S.C. § 1, 104 Stat. 4789 (1990). See also Fishbein, note 13, at 846-47.

427. Lawrence O. Gostin, et al., “HIV Testing, Counseling, and Prophylaxis After Sexual Assault,” 271 *Journal of the American Medical Association* 1436, 1439-40 (11 May 1994).

428. *Id.* at 1441.

429. *Id.*

430. *Id.* at 1443.

Association:

Unfortunately, the policy has a differential impact on communities of color and poor people: it supports problematic assumptions about the victims, it dismisses the public health goals of HIV testing and counseling activities, and it disregards the fact that HIV testing of the accused does not resolve the victim's prophylaxis and treatment dilemmas.⁴³¹

Still, the trend was toward the more liberal use of compulsory examinations. By 2000, more than a dozen other states had passed laws allowing for pre-conviction STI examinations of accused rapists, though these differed in the procedural protections they afforded the accused.⁴³² Some of these laws, for instance, permit an examination only "upon a finding of reasonable cause to believe that the person committed the offense,"⁴³³ or only following a hearing,⁴³⁴ while others have no such requirement.⁴³⁵ Many of the laws declared that accused rapists could only be examined at the request of the alleged victim.⁴³⁶ Several of the laws contained language clearly stating that their intent was to provide information and peace of mind to victims.⁴³⁷ California's statute, for instance, began, "[t]he primary purpose of the testing and disclosure provided in this section is to benefit the victim of a crime by informing the victim whether the defendant is infected with the HIV virus."⁴³⁸

By analyzing the rationales that courts used to rule on the constitutionality of these laws, and by contrasting these decisions with those in the prostitution cases, a gendered distinction becomes quite clear (i.e. men are a threat only to individual women; women are a threat to society at large). Significantly, as displayed in the next Section, this distinction is not supported by science.

431. Barbara Herber et al., "HIV Test, Counseling, and Prophylaxis," 272 *Journal of the American Medical Association* 1577, 1577 (23/30 Nov. 1994).

432. See Ariz. Rev. Stat., § 13-1415 (1999); Ark. Code, § 16-82-101(b)(1) (1993); Cal. Pen. Code, § 1524.1 (2000); Colo. Rev. Stat., § 18-3-415 (1999); Fla. Stat., § 960.003 (2000); Idaho Code, § 39-604(3) (1995); Kan. Stat., § 65-6009 (2000); Nev. Rev. Stat., § 441A.320 (1996); N.C. Gen. Stat., § 15A-615 (1999); Ohio Rev. Code, § 2907.27 (1996); Okla. Stat., tit. 63, § 1-524 (2000); S.D. Codified Laws § 23A-35B-3 (1998); Tenn. Code, § 39-13-521 (1997); Tex. Code Crim. Proc., art. 21.31 (2000); Va. Code, § 18.2-62 (1996); Wis. Stat., § 968.38 (2000).

433. See e.g. Ark. Code, § 16-82-101(b)(1); see also N.C. Gen. Stat., § 15A-615.

434. See e.g. S.D. Codified Laws, § 23A-35B-3; Va. Code, § 18.2-62 (demanding a hearing in the absence of consent).

435. See e.g. Idaho Code § 39-604(3); Tenn. Code § 39-13-521.

436. See e.g. Ariz. Rev. Stat., § 13-1415; Cal. Pen. Code, § 1524.1; Fla. Stat., § 960.003; N.C. Gen. Stat., § 15A-615; S.D. Codified Laws, § 23A-35B-3; see also Kan. Stat., § 65-6009(a) (the accused rapist shall be tested "[i]f the victim of the crime or the county or district attorney requests [this]"); Ohio Rev. Code, § 2907.27 (the accused rapist shall be tested for HIV "upon the request of the prosecutor in the case or upon the request of the victim"); Tex. Code Crim. Proc., art. 21.31 (an indicted rapist "shall, at the direction of the court on the court's own motion or on the request of the victim of the alleged offense, undergo a standard diagnostic [HIV] test").

437. See e.g. Cal. Pen. Code, § 1524.1(1); Fla. Stat., § 960.003(1).

438. Cal. Pen. Code, § 1524.1(1).

D. A “Special Need” for Pre-Conviction HIV Tests

Over the past two decades, multiple courts across the country have upheld compulsory pre-conviction HIV testing of rapists, thereby rejecting Fourth Amendment challenges.⁴³⁹ These decisions relied on the so-called “special needs” doctrine, which creates an exception to the Fourth Amendment and permits officials to conduct warrantless searches in the absence of probable cause.⁴⁴⁰ As in decades past, these decisions continued to rely on stereotypes about the threat rapists pose to society—which was strikingly different from the perceived threat posed by prostitutes. This Section outlines court decisions in this area and the ways in which courts got these decisions wrong—predicated as they were on flawed and gendered assumptions, as well as a misreading of the “special needs” doctrine.

The “special needs” doctrine was established in a 1985 case, *New Jersey v. T.L.O.*,⁴⁴¹ coincidentally just as HIV/AIDS hysteria was mounting across the country. In *T.L.O.*, the U.S. Supreme Court allowed school officials to search students’ bags for cigarettes without a warrant or probable cause, because the search was justified “at its inception” by reasonable suspicion of wrongdoing and because it was “reasonably related” in scope to the need justifying the search.⁴⁴² This balanced the students’ desire for privacy with the school’s legitimate interest in upholding order.⁴⁴³ Initial cases following *T.L.O.* held that under the “special needs” doctrine warrantless searches did not demand probable cause but did need some degree of individualized suspicion.⁴⁴⁴ In 1989, however, the Court decided that the “special needs” doctrine allowed bodily searches in the absence of both a warrant and individualized suspicion when the primary object of the search was not to discover evidence to be used in a criminal trial.⁴⁴⁵ Rather, in two cases decided that year (over invasive tests for evidence of drug or alcohol use), the Court declared that it would measure the reasonableness of a warrantless search by balancing the “legitimate governmental interests” against an individual’s privacy interests.⁴⁴⁶

439. See *State v. Houey*, 651 S.E.2d 314 (Supreme Ct. South Carolina 2007); *Scott v. Commonwealth*, 2006 Ky. Unpub. LEXIS 186 (Supreme Ct. Kentucky 2006); *Isom v. State*, 722 So.2d 237 (Ct. of Appeal Florida 1998); *State v. Superior Court*, 930 P.2d 488 (Arizona Ct. of Appeals 1996); *People v. Frausto*, 36 Cal. App. 4th 712 (California Ct. of Appeal 1995); *Fosman v. State*, 664 So.2d 1163 (Ct. of Appeal Florida 1995); *Virgin Islands v. Robert*, 756 F. Supp. 898 (D. Virgin Islands 1991). See also *People v. White*, 2004 WL 1392302 (Ct. of Appeals Michigan 2004) (involving a pre-conviction test for “venereal disease and hepatitis”).

440. For a clear articulation of the “special needs” doctrine, see Lisa Simotas, “In Search of a Balance: AIDS, Rape, and the Special Needs Doctrine,” 66 *New York University Law Review* 1881, 1893-97 (1991).

441. 469 U.S. 325 (1985).

442. Simotas, note 440, at 1893-94 (quoting *T.L.O.*, 469 U.S. at 341-42).

443. *T.L.O.*, 469 U.S. at 341-42.

444. *O’Connor v. Ortega*, 480 U.S. 709, 722-25 (1987) (plurality); *Griffin v. Wisconsin*, 483 U.S. 868, 872-73, 878-80 (1987).

445. Simotas, note 440, at 1894.

446. *Skinner*, 489 U.S. at 619; *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989).

In cases involving HIV tests of accused rapists, the government's "special need" has been consistently articulated as "protecting the health and safety of victims."⁴⁴⁷ Writing in 1991, a federal district court in the Virgin Islands reasoned that the government had a "compelling need to conduct" the test based on its interest in "protecting victims of sexual assault."⁴⁴⁸ Courts repeated this justification in cases involving convicted rapists.⁴⁴⁹ Compulsory testing laws "further the rights of victims by granting them access to critical medical information about their assailants' HIV or AIDS status," wrote the New Jersey Supreme Court in 1997.⁴⁵⁰

This is a notably different "special need" than that articulated in cases involving HIV tests of female prostitutes. In *People v. Adams*, the Illinois Supreme Court upheld a statute enabling HIV testing of convicted prostitutes under the "special needs" doctrine because of the "compelling" government interest in preventing "at-risk groups" from spreading HIV to the "community at large."⁴⁵¹ In *Love v. Superior Court*, a California Court of Appeal likewise found a compelling government interest in examining convicted prostitutes because "[t]he rapidly spreading AIDS epidemic pos[ed] an unprecedented major public health crisis in California, and threaten[ed], in one way or another, the life and health of every Californian" and prostitutes were "a specific group of concern."⁴⁵² Under this logic, prostitutes present a threat to the public health at large; rapists present a threat merely to their victims.

Some have critiqued the "special needs" analysis used in both the rape and prostitution cases. Several advocates have noted that testing accused or convicted rapists for HIV "does not provide a victim with reliable or timely information about her own risk of infection."⁴⁵³ Compulsory testing does not necessarily give survivors relevant information, but it may mislead survivors, unnecessarily alarm them, or give them a false sense of security.⁴⁵⁴ "[O]pponents maintain that the only way a victim can obtain accurate and reliable information about her HIV status is to be tested herself."⁴⁵⁵ Further, there is a fear that such tests will serve to stigmatize accused rapists (some of whom may not be guilty), such that they "may

447. See e.g. *Houey*, 651 S.E.2d at 317; *Toure*, 137 Misc. 2d at 1069.

448. *Virgin Islands v. Robert*, 756 F. Supp. 898, 903 (D. Ct. Virgin Islands 1991).

449. See e.g. *Thomas*, 139 Misc. 2d at 1075.

450. *State ex rel. J.G.*, 701 A.2d at 1267.

451. *Adams*, 597 N.E. at 580-81.

452. 226 Cal. App. 3d 736, 742 (California Ct. of Appeal 1990) (internal quotations omitted).

453. Allison N. Blender, "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 Legislative Journal* 467, 495 (1997); Justin Amaechi Okezie, "The Presumption of Guilt and Compulsory HIV Testing of Accused Sex Offenders: A Case Study of *State ex rel. J.G., N.S., and J.T.*," 6 *Journal of Gender & the Law* 557, 582 (1998).

454. This is so because one would not test positive for many STIs for some period after the moment of transmission; to confirm, public health experts recommend getting tested multiple times over a period of months following an assault. See Centers for Disease Control and Prevention, *2015 Sexually Transmitted Diseases Treatment Guidelines*, <https://perma.cc/E8XW-W5UT>.

455. Blender, note 453, at 496.

be forever ostracized [from their] community.”⁴⁵⁶ Much the same logic holds for prostitutes, who are already likely to be stigmatized by age-old presumptions that they are diseased.⁴⁵⁷ In addition, Karen Zink has argued persuasively that the court in *Love* erroneously applied the “special needs” doctrine by failing to adequately assess the “privacy intrusion” suffered by the women.⁴⁵⁸ “Furthermore, the court’s inquiry into the government’s interest was cursory.”⁴⁵⁹ A more thorough special needs analysis may well have yielded the opposite result.

However, in spite of commonalities, compulsory HIV testing for prostitutes and rapists are not the same. The language and logic of courts’ decisions in these cases reinforces the stereotype that prostitutes are a threat to the general population, while rapists are only a threat to their victims. This further reinforces a gendered understanding of who spreads infection, and justifies disparate treatment.

Courts are far more likely to express concern for the constitutional rights of accused rapists. While Zink has shown that the “special needs” analysis in *Love* was inadequate,⁴⁶⁰ multiple courts have rejected orders for HIV tests of even convicted rapists when the precise procedures specified in the statutes were not followed exactly.⁴⁶¹ Further, some courts have rejected HIV tests of accused rapists in the absence of specific statutory authority. For instance, an appellate court in New York held in 1992 that a county judge could not grant a government request to perform an HIV test on an accused rapist where the test results would not be used in the trial against him.⁴⁶² The government requested the test solely to help relieve the victim’s “emotional trauma,”⁴⁶³ and the court ruled that in “the absence of specific statutory authority that permit[ted] HIV testing under the circumstances of th[e] case,” this was impermissible.⁴⁶⁴ The next year, a family law court in New York reached the same result, noting the absence of statutory authority allowing a test to benefit the victim but not to be used in the prosecution.⁴⁶⁵ The year after that, an appellate court affirmed a similar family court decision.⁴⁶⁶ Yet another year later, after a highly publicized attack by an escaped psychiatric patient on a six-year-old girl in the subway,⁴⁶⁷ New York

456. *Id.* at 498.

457. See Cecilia Benoit et al., “Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers,” 55 *Journal of Sex Research* 1, 7 (2017).

458. Zink, note 12, at 812.

459. *Id.* at 816.

460. *Id.* at 795-96.

461. See e.g. *People v. Guardado*, 40 Cal. App. 4th 757, 763-65 (California Ct. of Appeal 1995); *State v. Farmer*, 805 P.2d 200, 208-09 (Supreme Ct. Washington 1991).

462. *John Doe v. Connell*, 179 A.D.2d 196 (Supreme Ct., Appellate Division, 4th Dept., New York 1992).

463. *Id.* at 197.

464. *Id.* at 199.

465. *In re Harry G.*, 157 Misc. 2d 959 (Family Ct. of Broome County, New York 1993).

466. *In re Michael WW*, 203 A.D.2d 763 (Supreme Ct., Appellate Division, 3d Dept., New York 1994).

467. Fishbein, note 13, at 849.

passed a law requiring convicted rapists to undergo HIV tests “upon a request of the victim.”⁴⁶⁸ However, to this day, New York lacks a similar statute for accused rapists.

Though no court has ruled on this question in the context of HIV testing of prostitutes, such testing—in the absence of statutory authority—was not uncommon in the hysterical late 1980s.⁴⁶⁹ That such policies went unchallenged in the courts likely reflects a disparity in who has access to courts, as well as a belief that courts would be less inclined to rule in favor of women who sell sex.

Stereotypes conflating prostitution and STIs remain dominant.⁴⁷⁰ Yet, significantly, such stereotypes are not, in fact, accurate. In response to Robert Redfield’s misleading 1984 study linking prostitutes to HIV transmission, several sex-workers-rights advocates launched what historian Melinda Chateauvert called “the first federally funded effort to focus on AIDS among women.”⁴⁷¹ At the International AIDS Conference in Paris in June 1986, public health experts Constance Wofsy and Judith Cohen presented the findings of their rigorous studies.⁴⁷² They discovered that, while HIV could potentially be transmitted from women to men through vaginal intercourse, this would be exceedingly rare, since vaginal excretions contained only tiny amounts of the virus.⁴⁷³ Rather, the primary way women (even sex workers) transmitted STIs to men was by sharing needles.⁴⁷⁴ As Chateauvert noted, this study “so contradicted the thinking of established medical authorities that it would be ignored for at least another decade.”⁴⁷⁵

More recent studies have confirmed these results. Female-to-male HIV transmission is quite rare, and thus women who simply have sex with men (rather than share needles with them) are highly unlikely to transmit HIV (or many STIs) to them.⁴⁷⁶ In addition, as attorney Tracy M. Clements noted, “prostitutes are more likely to use condoms during intercourse than any other group of sexually active

468. N.Y. Crim. Proc., § 390.15 (2018).

469. See note 402.

470. See e.g. *Roundtree v. United States*, 581 A.2d 315, 327 (District of Columbia Ct. of Appeals 1990); Donna King, “Prostitutes as Pariah in the Age of AIDS”: A Content Analysis of Coverage of Women Prostitutes in *The New York Times* and the *Washington Post*, September 1985–April 1988,” 16 *Women & Health* 155 (1990).

471. Chateauvert, note 353, at 83.

472. Melinda Chateauvert, “Resisting the Virus of Prejudice: Sex Workers Fight the AIDS Panic,” *Beacon Broadside* (20 Jul. 2016), <https://perma.cc/4LKF-AX2J>.

473. Constance Wofsy et al., “Isolation of AIDS-Associated Retrovirus from Genital Secretions of Women with Antibodies to the Virus,” 8 *The Lancet* 527 (March 1986); Constance Wofsy, “Human Immunodeficiency Virus Infection in Women,” 257 *Journal of the American Medical Association* 2074 (17 Apr. 1987).

474. *Id.*

475. Chateauvert, “Resisting the Virus of Prejudice,” note 472.

476. Sylvia A. Law, “Commercial Sex: Beyond Decriminalization,” 73 *Southern California Law Review* 523, 546 (2000); Nancy Padian, et al., “Female-to-Male Transmission of Human Immunodeficiency Virus,” 266 *Journal of the American Medical Association* 1664, 1665 (1991).

women.”⁴⁷⁷ These facts are far more important in determining whether prostitutes are a public-health risk than whether prostitutes in general are likely to have HIV (or other STIs).

In addition, even studies of prostitutes’ general likelihood to have HIV are often flawed or misunderstood. Over the past quarter-century, there have been a smattering of scientific studies on HIV prevalence among prostitutes, finding a range from 0.3 percent to 32 percent.⁴⁷⁸ One reason for this disparity is that the statistics elide the distinction between prostitutes who use intravenous drugs and those who do not.⁴⁷⁹ Earlier studies from Italy and Spain, for instance, indicate that prostitutes who do not use intravenous drugs have HIV infection rates of 1.6 percent and 3.4 percent, respectively, while those who do use intravenous drugs have rates of 36 percent and 51.7 percent.⁴⁸⁰ This disparity has been borne out by studies of American prostitutes.⁴⁸¹ Thus, the threat to public health is not women selling sex to men; rather, it is individuals who share needles. Another methodological drawback is that such studies often over-represent prostitutes who get arrested, which is not a representative sampling.⁴⁸²

Some authorities have known about the relative unlikelihood of female prostitutes transmitting HIV or other STIs to male clients for decades. In 1967, as New York City was ceasing to enforce its state’s American Plan law, the chief of the city’s health department put out a statement asserting “that prostitutes were less important in the spreading of venereal disease than was commonly believed”—very few actually had either syphilis or gonorrhea.⁴⁸³ In the fall of 1985, at the peak of the HIV/AIDS hysteria, *The New York Times* noted that “the number of AIDS cases spread by prostitutes in the United States has been miniscule.”⁴⁸⁴ In 1987, in the midst of virulently anti-prostitute efforts to combat AIDS, one study of 146 prostitutes in San Francisco found that just 6 percent of them (nine individuals) had HIV.⁴⁸⁵ All nine were apparently IV drug users.⁴⁸⁶

Studies of the prevalence of STIs among rapists and STI transmission through rape are even less common (itself reflecting assumptions about the connection between rape and STIs).⁴⁸⁷ However, one study of 194 imprisoned

477. Tracy M. Clements, “Prostitution and the American Health Care System: Denying Access to a Group of Women in Need,” 11 *Berkeley Journal of Gender, Law & Justice* 49, 60 (1996).

478. Gabriela Paz-Bailey, et al., “Prevalence of HIV Among U.S. Female Sex Workers: Systematic Review and Meta-Analysis,” 20 *AIDS Behaviour* 2318, 2324 (2016).

479. Clements, note 477, at 61-62.

480. Law, note 476, at 547.

481. Paz-Bailey, note 478, at 2318-20.

482. Law, note 476, at 548. See also Clements, note 477, at 62.

483. J. Anthony Lukas, “Court V.D. Clinic is Closed by City,” *The New York Times*, 20 (1 Jul. 1967).

484. Erik Eckholm, “Prostitutes’ Impact on Spread of AIDS Is Debated,” *The New York Times*, C1 (5 Nov. 1985).

485. Sarah Sward, “How Fear of AIDS Has Changed S.F. Prostitutes,” *San Francisco Chronicle*, 4 (27 Aug. 1987).

486. Id.

487. Carole Jenny et al., “Sexually Transmitted Diseases in Victims of Rape,” 322 *New England*

male rapists from 2003 found that they had STIs at a significantly higher rate than do members of the general population.⁴⁸⁸ A more recent study from France found that, of 138 women and eight men who had been sexually assaulted in the previous days, these survivors had a higher rate of at least some STIs “compared with the general French population.”⁴⁸⁹ Perhaps the preeminent study of STIs in rape survivors, published in *The New England Journal of Medicine* in 1990, found that the pre-rape prevalence of STIs is high in rape survivors, but that there is a substantial additional risk of acquiring STIs as a result of sexual assault.⁴⁹⁰

The higher prevalence of STIs among survivors of sexual assault is likely the result of a number of factors. While condom use can significantly decrease the chance of HIV transmission, one study found that approximately 41 percent of rapists never used a condom.⁴⁹¹ Further, sexual assaults are more likely to be violent (and thus cause cuts and abrasions, increasing the odds of transmission) than consensual sexual intercourse.⁴⁹² In addition, some research suggests that a large proportion of rapes are committed by repeat offenders⁴⁹³—such serial offending increases the risk of contracting and thus transmitting STIs.

In spite of these statistics, the idea that women who sell sex are a threat to public health, while men who buy or take sex are not, remains prevalent. This, in turn, builds on more than a century of sexist anti-STI policies. This history, and the different understandings of rape and prostitution that it enables, justifies maintaining compulsory testing statutes for both accused prostitutes and accused rapists, even though prostitutes are highly unlikely to spread STIs through prostitution, while rapists are likely to spread STIs.

CONCLUSION

In considering the constitutionality of compulsory pre-conviction STI examinations for accused prostitutes, courts must assess these examinations according to the “special needs” doctrine, weighing an individual’s privacy

Journal of Medicine 713, 715 (1990).

488. O. Giotakos et al., “Prevalence and Risk Factors of HIV, Hepatitis B and Hepatitis C in a Forensic Population of Rapists and Child Molesters,” 130 *Epidemiology & Infection* 497 (2003).
489. J. Fougas et al., “Sexually Transmitted Infections Among Victims Attending a French Sexual Offence Centre,” 93 *Sexually Transmitted Infections* 451, 451 (2017).
490. Jenny, note 487, at 713.
491. K.C. Davis et al., “The Use of Alcohol and Condoms During Sexual Assault,” 2 *American Journal of Men’s Health* 281 (2008).
492. See Jessica E. Draughton, “Sexual Assault Injuries and Increased Risk of HIV Transmission,” 34 *Advanced Emergency Nursing Journal* 82 (2012).
493. See Rachel Lovell et al., *Cuyahoga County Sexual Assault Kit Pilot Project (SAK): Report on Serial and One-Time Sexual Offenders*, 1 (Begun Center for Violence Prevention Research and Education, 2016), <https://perma.cc/952U-ZVVX> (“Of the 243 sexual assaults coded to date, 124 (51.0%) sexual assaults were connected to serial offenders.”); David Lisak & Paul M. Miller, “Repeat Rape and Multiple Offending Among Undetected Rapists,” 17 *Violence & Victims* 73 (2002). But see Kevin Swartout et al., “Trajectory Analysis of the Campus Serial Rapist Assumption,” 169 *Journal of the American Medical Association of Pediatrics* 1148 (2015).

interests against “legitimate governmental interests.”⁴⁹⁴ In the cases discussed in Part IV, courts found that, with regard to accused rapists, the government had a sufficiently compelling interest in “protecting the health and safety of victims” to justify the invasion of individuals’ privacy rights.⁴⁹⁵ The government’s compelling interest in the cases of accused prostitutes, meanwhile, was preventing a broader threat to the public health at large.⁴⁹⁶

Yet, at least in cases involving accused prostitutes, these decisions represent a misreading of the “special needs” doctrine. In *Love v. Superior Court* and *People v. Adams*, the only two decisions on point since the development of the “special needs” doctrine, both the Court of Appeal of California and the Supreme Court of Illinois *only* balanced the government’s interest against the individual’s privacy interest.⁴⁹⁷ In going no further, the courts performed an incomplete analysis, and thus reached incorrect conclusions. In addition, neither court based its inquiry into the government’s interest on scientific data, thus compounding the error of their rulings.

The Supreme Court’s “special needs” cases make clear that, in addition to balancing governmental interest against individual privacy, courts must also determine whether the search “bears a close and substantial relation” to the government’s interest.⁴⁹⁸ The search must be “effective” and “well designed” to achieve the government’s goal.⁴⁹⁹ Yet STI tests of suspected prostitutes do not “bear a close and substantial relation” to the government’s interest, nor are they “well designed” to achieve the government’s goal. If, as the courts suggested in *Love* and *Adams*, the government’s interest is in protecting public health at large, examining accused prostitutes is a poor method for achieving that goal, since (as shown above) prostitutes are relatively unlikely to transmit STIs to their male partners through the act of prostitution.

This conclusion is affirmed by comparing compulsory pre-conviction STI examinations of accused prostitutes to the searches at issue in other “special needs” cases. In *Skinner v. Railway Labor Executives’ Association*, the Court assessed federal regulations demanding blood and urine tests for drugs and alcohol of all rail employees involved in train accidents, as well as breath and urine tests of employees who violated certain safety rules.⁵⁰⁰ The Court upheld this testing regime, even in the absence of individualized suspicion, because the government’s interest in preventing “great human loss” through rail accidents outweighed the minimal privacy invasions the tests represented, and *also* because the testing scheme was “an effective means” of preventing rail accidents and thus that loss of

494. *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665-66.

495. See notes 447-450.

496. See notes 451-452.

497. *Adams*, 597 N.E.2d at 580-82; *Love*, 226 Cal.App.3d at 741-46.

498. *Von Raab*, 489 U.S. at 676.

499. *Chandler v. Miller*, 520 U.S. 305, 319 (1997).

500. *Skinner*, 489 U.S. at 606-12.

life.⁵⁰¹ The Court found that the testing scheme itself served as a successful deterrent to prevent rail employees from drinking alcohol or using drugs, since employees were aware of the tests.⁵⁰²

Similarly, in *National Treasury Employees Union v. Von Raab*, the Court likewise held that a federal drug testing scheme of Customs Service employees seeking promotions or transfers was reasonable, because the government's interest was compelling, the tests represented only a negligible invasion of privacy, and *also* because the testing program "bears a close and substantial relation to the Service's goal of deterring drug users from seeking promotion to sensitive positions."⁵⁰³ In *Von Raab*, the petitioners argued that the Service's drug-testing program was unreasonable in part because it was "not a sufficiently productive mechanism to justify its intrusion upon Fourth Amendment interests."⁵⁰⁴ In other words, the drug-testing scheme was unreasonable because the drug tests themselves were unreliable and easy to cheat, and thus failed to advance the government's purpose of preventing drug use. The Court rejected this argument only because it believed the petitioners had "overstate[d] the case"—the testing scheme was not, in fact, that easy to fool.⁵⁰⁵ Rather, it was an effective means to achieve the government's end.

More recently, in *Chandler v. Miller*, the Court assessed Georgia's requirement that political candidates pass a drug test.⁵⁰⁶ Again, the Court considered whether the testing scheme was "well designed to identify candidates who violate antidrug laws" and whether "the scheme [represented] a credible means to deter illicit drug users from seeking election to state office."⁵⁰⁷ The Court concluded that, because the drug test date was well-known, drug-using candidates could simply "abstain for a pretest period sufficient to avoid detection."⁵⁰⁸ Thus, the testing scheme was not an effective means of preventing drug-using candidates, and the testing scheme was unconstitutional.⁵⁰⁹

The pre-conviction HIV testing schemes of accused prostitutes on the books in many states do not bear "a close and substantial relation" to the government's interest in protecting public health. They are closer to the tests at issue in *Chandler* than they are to the tests in *Skinner*. Compulsory STI tests may themselves be effective at diagnosing STIs, but they are not particularly effective at preventing prostitutes from transmitting STIs. This is because prostitutes are comparatively unlikely to transmit STIs to begin with.⁵¹⁰ STI tests may not be easy to cheat (as the petitioners construed the drug tests in *Von Raab*), but they are not "well

501. Id. at 628-29.

502. Id. at 629.

503. *Von Raab*, 489 U.S. at 676.

504. Id. at 673 (citing *Prouse*, 440 U.S. at 648, 658-659 (1979)).

505. Id. at 676.

506. *Chandler*, 520 U.S. at 305.

507. Id. at 319.

508. Id. at 320.

509. Id. at 320, 323.

510. See Part IV.D.

designed” to protect public health. Nor do these tests offer a “credible means” of deterring prostitution. As Carole A. Campbell wrote a quarter-century ago, such testing “may serve to impede an infected prostitute’s chances of leaving prostitution because of the more serious criminal record she has acquired due to her seropositive status.”⁵¹¹ This is because a positive diagnosis can often bump a prostitution charge from a misdemeanor to a felony.⁵¹² “Moreover, there is a woeful lack of support services for occupation change such as vocational training for prostitutes. Mandatory testing of unlicensed prostitutes could also serve to make them more dependent on pimps.”⁵¹³ In addition, by giving clients a false sense of security, “mandatory testing could discourage safer sex practices and could actually be counterproductive.”⁵¹⁴

Such compulsory pre-conviction STI tests may also fail the test articulated in the “special needs” doctrine because the state has not demonstrated a satisfactory compelling interest. In *Chandler*, the Court rejected the drug-testing-of-politicians scheme as unreasonable in part because the state failed to show that this special need was “substantial.”⁵¹⁵ The state had not demonstrated “a concrete danger” justifying departure from the Fourth Amendment’s normal requirements.⁵¹⁶ “Nothing in the record hint[ed] that the hazards respondents broadly describe [were] real and not simply hypothetical for Georgia’s polity.”⁵¹⁷ There was no “indication” that “Georgia has a particular problem with State officeholders being drug abusers.”⁵¹⁸ Likewise, the studies discussed in Part IV demonstrate that prostitutes do not represent a “real” or “concrete danger” to the public health; such a danger is not even “hypothetical”—rather, it is affirmatively disproven by statistics.⁵¹⁹

Ultimately, in assessing the government’s interests, the courts in *Love* and *Adams* relied not on facts but on the assumptions central to the venereal doctrine. Because, somewhat surprisingly, there have not been other cases specifically considering the constitutionality of such examinations for female prostitutes, it would not be difficult for a court to jettison the shoddy logic of *Love* and *Adams* and ground its decision in data and sound public health policy, rather than stereotypes. It would also be helpful for those courts if scholars could determine just how frequently compulsory testing laws are enforced against prostitutes, and

511. Carole A. Campbell, “Prostitution, AIDS, and Preventive Health Behavior,” 32 *Social Science & Medicine* 1367, 1372-73 (1991). See also Tammy L. Tichel & Douglas A. Feldman, “A Preliminary Ethnography of HIV-Positive Women in Dade County Jails,” 15 *Practicing Anthropology* 52, 54 (Fall 1993).

512. Campbell, note 511, at 1372. See also Arianne Stein, “Should HIV Be Jailed? HIV Criminal Exposure Statutes and Their Effects in the United States and South Africa,” 3 *Washington University Global Studies Law Review* 177, 190 footnote 99 (2004).

513. Campbell, note 511, at 1373.

514. *Id.*

515. *Chandler*, 520 U.S. at 318.

516. *Id.* at 318-19.

517. *Id.*

518. *Id.*

519. See notes 471-485.

how those laws interact with criminalization statutes.

As to the constitutionality of such examinations for accused rapists, the reasonableness of the examinations under the “special needs” doctrine depends on the threat rapists do pose to the public health. More studies are needed to determine whether this threat truly is substantial. In addition, more research is needed to determine whether, assuming rapists do pose a substantial threat, a compulsory testing regime would be an “effective” method of preventing that threat. As mentioned above, some advocates have questioned the efficacy of such a testing scheme; they claim that the only way for survivors to get accurate information is to get tested for STIs themselves.⁵²⁰

In any event, quite apart from all of this much-needed research, it is high time that courts and lawmakers abandoned the highly gendered assumptions underlying the venereal doctrine.

520. See notes 453-456.