

NOTE

THE CASE AGAINST MANDATORY HIV TESTING OF PREGNANT WOMEN: THE LEGAL AND PUBLIC POLICY IMPLICATIONS

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I. INTRODUCTION

Few images arouse as much emotion as that of a sick child. The desire to do anything to help that child can be powerful and can cause people to take extreme measures to make the child well, especially when the illness is a fatal one, like AIDS. Recent scientific studies have shown that treating HIV-positive mothers during pregnancy can decrease the likelihood of transmission to the infant. These findings, however, do not justify a policy that overrides the fundamental legal rights and health care needs of women with HIV. This Note examines the public policy and legal ramifications of just such an extreme measure—the mandatory HIV testing of pregnant women.

The following analytical framework is used to examine this problem. First, a short medical/statistical background provides a context for this discussion. Second, the political, ethical, legal, and financial considerations unique to this issue are examined. Finally, the overall effectiveness of a mandatory testing program for pregnant women is detailed.

II. MEDICAL/STATISTICAL BACKGROUND: THE FACE OF PREGNANT WOMEN WITH HIV

By contemporary estimates, about four million women give birth each year in the United States.¹ Approximately 7000 of those mothers are HIV-positive, the majority of whom are women of color.² Without intervention, approximately

1. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 74 tbl.89 (117th ed. 1997).

2. Approximately 76% of the women who have been diagnosed with AIDS are non-white. See CENTERS FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., NO. 1, HIV/AIDS SURVEILLANCE REPORT 1996 10 tbl.5 (1996); Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Update: AIDS Among Women—United States, 1994*, 44 MORBIDITY & MORTALITY WKLY. REP. 81, 82 (1995) [hereinafter Centers for Disease Control & Prevention, *Update*]; Jennifer Cooper, *The Politics of Pediatric AIDS*, 3 CARDOZO WOMEN'S L.J. 53, 53 n.6 (1996) [hereinafter Cooper, *Pediatric AIDS*].

twenty-six percent of these infants will become infected.³ By eighteen months of age, however, most of these infants will have replaced their mother's antibodies with their own and the majority will then test HIV-negative without having received treatment.⁴ The well-known 1994 study entitled the AIDS Clinical Trial Group (ACTG) Protocol 076 ("076 Study") showed that treating HIV-infected pregnant women and their newborn infants with AZT reduced the perinatal transmission rate of AIDS from around twenty-five percent to eight percent.⁵

These recent findings have caused an outpouring of support for mandatory testing programs for all pregnant women and/or newborns⁶ from Congress, in various state legislatures, and by the American Medical Association. Anything that decreases the incidence of transmission from mother to child appears, at first glance, to be worth the risk of impinging upon the individual rights of pregnant women. When examined more closely, however, a mandatory testing program is legally indefensible, financially undesirable, and ultimately ineffective in preventing the spread of HIV.

III. POLITICAL CONSIDERATIONS

Legislation that would mandate HIV testing for all pregnant women was introduced recently in the New York State legislature⁷ and in Congress.⁸ Opponents of the proposals argue that mandatory testing is unconstitutional. They contend that regardless of whether the mother or the child is tested, the mother is being informed of her HIV status without her consent, thus violating her pri-

3. See Centers for Disease Control & Prevention, *Update, supra* note 2, at 82-83; see also Lynne Langley, "Innocent Victims" *Focus of AIDS Day*, POST & COURIER (Charleston, S.C.), Nov. 30, 1997, at B1 (comparing vertical transmission rates in newborns who received AZT in utero to those who did not).

4. See Anna Quindlen, *The Baby Bill*, N.Y. TIMES, June 8, 1994, at A25 (showing that up to 80% of these children will test negative); see also Nina Lowenstein, *Mandatory Screening of Newborns For HIV: An Idea Whose Time Has Not Yet Come*, 3 CARDOZO WOMEN'S L.J. 43, 44 (1996).

5. See Elizabeth B. Cooper, *Why Mandatory HIV Testing of Pregnant Women and Newborns Must Fail: A Legal, Historical, and Public Policy Analysis*, 3 CARDOZO WOMEN'S L.J. 13, 19 n.32 (1996) [hereinafter Cooper, *Why Mandatory HIV Testing*] (detailing the protocols of the 076 Study); see also Laura Beil, *AMA Backs HIV Test for Pregnant Women: Research Shows AZT Reduces the Risk of Fetuses Contracting AIDS Virus*, DALLAS MORNING NEWS, June 28, 1996, at 1A; Robin D. Gorsky et al., *Preventing Perinatal Transmission of HIV: Costs and Effectiveness of a Recommended Intervention*, 3 PUB. HEALTH REPS. 335, 336 (1996); *infra* notes 37-40 and accompanying text.

6. Some constituencies have advocated testing newborns and not the mother. Testing a newborn, however, only reliably reveals the HIV status of the mother. Most infants born to HIV-positive mothers initially test positive for HIV because of the in-utero exchange of antibodies. Over time, however, more than three out of four infants shed these maternal antibodies and replace them with their own virus-free antibodies. See Quindlen, *supra* note 4, at A25.

7. See Cooper, *Pediatric AIDS, supra* note 2, at 59 n.49 (discussing New York Assembly Bill No. 6747-B, which, if passed, would have required disclosure to the mother of a newborn confidential HIV-related information that was discussed as a result of testing done on the child for any purpose).

8. The Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990, 42 U.S.C. § 300ff (1994), was amended recently to include a provision that eventually will require states to begin a mandatory testing program for all newborns; non-compliant states will risk losing their general funding under the Act, which is the bill that appropriates hundreds of millions of dollars each year for AIDS programs. See 42 U.S.C.A. § 300ff-34 (West Supp. 1997).

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vacy rights and subjecting her to potential discrimination.⁹ Supporters of the policy argue that if the 076 Study results are accurate, early identification of HIV-positive mothers can reduce the likelihood of perinatal transmission and save lives.¹⁰

Organizations such as the National Organization for Women (NOW) oppose mandatory testing,¹¹ arguing that statutes requiring the testing of newborns will force infants to be tested at the expense of the mother's privacy rights and lay the groundwork for recognition of fetal rights in opposition to the Supreme Court's holding in *Roe v. Wade*.¹² Gay Men's Health Crisis and the New York Civil Liberties Union oppose mandatory testing because each fears that it will set a precedent that erodes the statutory basis of confidentiality in one's HIV status.¹³ They are joined in their opposition by the Centers for Disease Control and Prevention (CDC), the U.S. Department of Public Health, and several doctors' organizations whose members work directly with pregnant women and newborns.¹⁴

On the other side of the debate, the American Medical Association (AMA) surprised the medical community and many of its members by reversing its previous position when it announced its support of mandatory testing of all pregnant women.¹⁵ The AMA represents about half of the nation's doctors and is the largest professional association in the medical profession and therefore can wield tremendous influence on lawmakers and their public policy decisions.¹⁶ In addition to the AMA, the majority of the physicians on the Committee for the Care of Children and Adolescents with HIV Infection support mandatory testing of pregnant women.¹⁷ Finally, the Association to Benefit Children (ABC), a Manhattan-based advocacy group, actively supports mandatory testing.¹⁸ In April 1995, ABC filed suit against Governor George Pataki of New York to compel the

9. See Cooper, *Pediatric AIDS*, *supra* note 2, at 59.

10. See Beil, *supra* note 5, at 1A.

11. See John Leo, *Babies Have Rights, Too*, U.S. NEWS & WORLD REP., May 1, 1995, at 23 (contrasting the author's support of a mandatory testing program with the views of organizations like the National Organization for Women (NOW)).

12. 410 U.S. 113 (1973) (refusing to recognize fundamental rights on the part of a pre-viable fetus); see also Leo, *supra* note 11, at 23.

13. See Leo, *supra* note 11, at 23; see also James Dao, *Mothers to Get AIDS Data Under Accord*, N.Y. TIMES, Oct. 10, 1995, at A1.

14. See Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *U.S. Public Health Service Recommendations for Human Immunodeficiency Virus Counseling and Voluntary Testing for Pregnant Women*, MORBIDITY & MORTALITY WKLY. REP.: RECOMMENDATIONS AND REPORTS, July 7, 1995, at 1, 1-15. The American College of Obstetricians and Gynecologists, the American Medical Association's Council on Scientific Affairs, and the American Academy of Pediatrics oppose mandatory testing. See Beil, *supra* note 5, at 1A.

15. See Beil, *supra* note 5, at 1A (noting that the resolution passed the AMA's board by only four votes).

16. See *id.* (stating that although actions taken by the AMA are not legally binding, their recommendations can be a powerful influence on the lawmaking process).

17. See Cooper, *Pediatric AIDS*, *supra* note 2, at 60. This organization also represents a large number of pediatricians who work with AIDS patients. See *id.*

18. See *id.*

state to release the results of anonymous HIV tests that routinely are given to all newborns by the CDC.¹⁹

At present, the tide among legislators is toward mandatory testing, and given the explosive environment surrounding questions of reproductive rights, it is likely that opposition arguments predicated on women's autonomy in their health care decisions will be hotly contested. There are, however, exponential external costs associated with mandating testing.²⁰ It is likely that only when these costs are felt in an already-overburdened public health system will budget-minded lawmakers take notice.

IV. ETHICAL CONSIDERATIONS

The ethical issues presented by the mandatory testing of pregnant women are troubling. Pediatric AIDS is a particularly compelling target for government intervention, primarily because children are perceived to be the most innocent AIDS population given their political silence and vulnerability.²¹ Implementation of a mandatory testing program for pregnant women, however, results in making the receipt of prenatal care contingent upon forced consent to an HIV test.²²

This raises some important ethical issues in the context of women's health. First, although testing pregnant women might prevent some transmissions,²³ most doctors and public health officials who work directly with pregnant women and newborns believe that mandatory testing would discourage the women who need it most from seeking prenatal care.²⁴ Given the demographics of women with HIV that indicate that it is predominantly poor women of color who traditionally have experienced coercion in reproductive decisions and difficulty in gaining access to medical care, this concern might have important and

19. See Lowenstein, *supra* note 4, at 44.

20. See discussion *infra* Part VI.

21. See Kevin J. Curnin, Note, *Newborn HIV Screening and New York Assembly Bill No. 6747-B: Privacy and Equal Protection of Pregnant Women*, 21 FORDHAM URB. L.J. 857, 858 (1994) (arguing that although well-intentioned, the New York bill requiring mandatory testing of newborns violates the mother's privacy and equal protection rights).

22. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 26 (arguing that this type of program establishes "a barrier requiring a pregnant woman to be tested as a pre-requisite for getting health care, including prenatal care").

23. See *id.* at 18-19 (stating that the 076 Study indicates that treating HIV-positive pregnant women with AZT has the potential to reduce the vertical transmission rate by as much as 67%).

24. See Quindlen, *supra* note 4, at A25 (arguing that there is demonstrable proof that mandatory counseling and voluntary testing programs generate a nearly 90% consent-to-test ratio without alienating high-risk women from the health-care system); see also Lowenstein, *supra* note 4, at 50 (citing Dr. Helen Gayle, testifying for the Centers for Disease Control and Prevention before the Congressional Subcommittee on Health and Environment that "mandatory testing . . . may actually reduce the chance that a woman and her baby will receive needed therapies if they are alienated from the health care system" (citation omitted)).

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far-reaching implications.²⁵ This is relevant particularly to undocumented immigrant women for whom a positive HIV test might be cause for deportation.²⁶

Second, mandatory testing threatens to change the nature of the patient-provider relationship by placing the provider in an enforcing, rather than facilitating, role. A healthy patient-provider relationship is predicated on trust, and many providers see the punitive nature of mandatory testing as counterproductive when dealing with high-risk populations who are already on the periphery of the health care system.²⁷ Similarly, in the reproductive context, an effective health care provider must be able to furnish unbiased information and counseling to pregnant women about their options. It is difficult, therefore, to establish a patient-provider relationship predicated on trustworthiness and honesty when the provider must force women to submit to a mandatory, government-imposed HIV test.²⁸

Third, a mandatory testing program results in the state placing itself between mother and child, implying that the state is a better caretaker than the mother.²⁹ This level of state intervention, and the message it sends, sets a dangerous precedent for future government intrusions into the lives of women and their children.³⁰ Concerns over such intrusions, such as the fear of losing a child to foster care or being prosecuted for transmitting HIV to a child, historically have discouraged women from seeking care and services that otherwise would be beneficial to them and their families.³¹

Fourth, a mandatory testing program raises the issue of violence against women. Although more attenuated from the immediate policy discussion, the impact that women's fear of violence has on their decision to be tested has been noted repeatedly.³² Since a large portion of HIV-positive women were infected either from using intravenous (IV) drugs or by having sexual relations with someone who does,³³ decisions about disclosing their status to, or insisting on risk-reduction behavior with, their drug-using partners are influenced by women's fear of a violent reaction.³⁴ Similarly, if a woman was found to be HIV-

25. See Lowenstein, *supra* note 4, at 50.

26. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 26 (analogizing that since testing positive for HIV is grounds for barring non-citizen aliens from entering the United States, a positive test result similarity may provide grounds for deportation).

27. See Beil, *supra* note 5, at 1A (referring to remarks of Victoria Thomas of the Pediatric AIDS Foundation, Santa Monica, California).

28. See Lowenstein, *supra* note 4, at 50-51.

29. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 26.

30. See *id.*

31. See *id.* at 26-27 (noting the concern that HIV-positive pregnant women might be prosecuted for transmitting the disease in the same way that women have been charged with violating drug statutes when their infants test positive for drug metabolites).

32. See Sharon Rae Jenkins & Helen L. Coons, *Psychosocial Stress and Adaptation Processes for Women Coping with HIV/AIDS*, in *WOMEN AND AIDS: COPING AND CARE* 33, 54-55 (Ann O'Leary & Loretta Sweet Jemmott eds., 1996); Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 18.

33. See Dawn K. Smith & Janet S. Moore, *Epidemiology, Manifestations, and Treatment of HIV Infection in Women*, in *WOMEN AND AIDS*, *supra* note 32, at 1, 4-5.

34. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 18.

positive and her partner was not, "it's a kind of forced revelation of infidelity, or perceived infidelity,"³⁵ and infidelity is the leading cause of domestic violence.³⁶

Finally, the risks of treating a fetus with AZT are unknown.³⁷ AZT "can produce severe side effects, and [its] long term effects are still unknown."³⁸ The question, thus, becomes one of "risk-benefit analysis." This analysis has both a scientific component and a personal element: risks and benefits can be analyzed based on observations, previous studies, and clinical experience. A mother's values, however, also will affect how she weighs the various risks and benefits.³⁹ If eighty percent of HIV-positive newborns are likely to test negative for the virus without any treatment, is subjecting the unborn-children of every mother who tests HIV-positive to the unknown complications of AZT worth the risk?⁴⁰ The issue, therefore, is whether the benefit accrued from testing mothers—increasing non-infection rates through treatment—justifies overriding and infringing the mother's autonomy and family privacy.

V. LEGAL CHALLENGES

The legal issues presented by a mandatory HIV testing program are particularly troubling,⁴¹ and most legal experts believe that such programs violate women's constitutional and statutory rights.⁴² Nonetheless, at least one legal challenge already has been brought to compel states to institute mandatory testing of pregnant women.⁴³ This case was settled, but it set the stage for legislative responses in Congress and the New York State legislature.⁴⁴ Although several legal arguments can be raised to challenge mandatory testing of pregnant

35. See Beil, *supra* note 5, at 1A (quoting Alta Charo, an associate professor of law and medical ethics at the University of Wisconsin-Madison).

36. See *id.*

37. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 19.

38. See Lowenstein, *supra* note 4, at 48-49.

39. See COMMITTEE ON THE ETHICAL AND LEGAL ISSUES RELATING TO THE INCLUSION OF WOMEN IN CLINICAL STUDIES, INSTITUTE OF MEDICINE, 1 WOMEN AND HEALTH RESEARCH: ETHICAL AND LEGAL ISSUES OF INCLUDING WOMEN IN CLINICAL STUDIES 191 (Anna C. Mastroianni et al. eds., 1994).

40. See Lowenstein, *supra* note 4, at 49 (stating that if "therapies are administered to all newborns testing positive for HIV from their mother's antibodies, at least 75% of those infants will have been exposed to the medications unnecessarily").

41. Since any HIV test given to a newborn is essentially a non-consensual HIV test of the mother, this Note addresses the legal aspects of mandatory testing programs of both groups together as mandatory HIV testing for pregnant women.

42. See generally Scott Burris, *Testing, Disclosure, and the Right to Privacy*, in AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC 115, 115-49 (Scott Burris et al. eds., 1993); Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 22-25; Lowenstein, *supra* note 4, at 44-47.

43. See Julie D. Levinson, Note, *While Ignorance May Not Be Bliss, It Is A Mother's Right: Constitutional Implications of Testing Newborn Babies For HIV*, 3 CARDOZO WOMEN'S L.J. 71, 74-75 n.23 (1996) (citing *Baby Girl Doe v. Pataki*, No. 106661-95 (N.Y. Sup. Ct. filed Apr. 25, 1995) (settled Oct. 12, 1995), where the Association to Benefit Children sued New York Governor George Pataki on behalf of several infant plaintiffs to compel the state to disclose the results of otherwise anonymous HIV tests routinely given to all newborns and to mandate HIV testing for all children born in New York within 30 days of their birth); see also Dao, *supra* note 13, at A1.

44. See *supra* notes 7-8 and accompanying text.

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women,⁴⁵ this discussion will examine in depth only those brought under the Fourth and Fourteenth Amendments to the United States Constitution.

A. The Fourth Amendment Right to Bodily Integrity

The Fourth Amendment protects individual privacy and the right to be free from bodily intrusion by guaranteeing citizens the “right . . . to be secure in their persons . . . against unreasonable searches and seizures by government or its agents.”⁴⁶ In order for a government action to qualify as a search under the Fourth Amendment, the person involved in the search must have an expectation of privacy that society regards as reasonable.⁴⁷ The Supreme Court has held that a blood test is a search for the purposes of Fourth Amendment analysis.⁴⁸ Since HIV tests are administered by drawing blood, HIV screenings constitute searches under the Fourth Amendment.⁴⁹

In examining the reasonableness of a search, the Supreme Court has ruled that courts must balance the government’s need to conduct the search against the level of intrusion into the individual’s rights occasioned by the search.⁵⁰ The standard of reasonableness depends on the type of search, and government searches fall within two distinct rubrics—criminal and administrative. Criminal searches occur when the government, acting in a law enforcement capacity, obtains evidence to be used in a criminal proceeding.⁵¹ Such criminal searches are deemed reasonable only when conducted pursuant to a warrant obtained through a showing of probable cause.⁵² Administrative searches, however, involve government activity to obtain evidence necessary to protect the public

45. See Burris, *supra* note 42, at 121-24 (examining state legislation regarding confidentiality, disclosure, and consent); see generally Arthur S. Leonard, *Discrimination, in AIDS LAW TODAY*, *supra* note 42, at 297, 297-318 (illustrating that federal issues, such as the right to be free from discrimination on the basis of a disability under the Americans with Disabilities Act, may be used as a challenge to mandatory AIDS testing).

46. U.S. CONST. amend. IV.

47. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (holding that a person who goes into a telephone booth, closes the door, and deposits money to make a call maintains a reasonable expectation of privacy).

48. See, e.g., *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“Such [blood] testing procedures plainly constitute searches . . . within the meaning of . . . [the Fourth] Amendment.”).

49. See *Virgin Islands v. Roberts*, 756 F. Supp. 898, 901-04 (D.V.I. 1991) (holding that a nonconsensual intrusion into the body for blood is a search within the meaning of the Fourth Amendment); *Glover v. Eastern Neb. Community Office of Retardation*, 686 F. Supp. 243, 250 (D. Neb. 1988) (“Compulsory administration of a blood test ‘plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment.’” (citation omitted)), *aff’d*, 867 F.2d 461 (8th Cir. 1989).

50. See, e.g., *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 633 (1989) (holding that the government interest in having drug testing for railroad employees outweighed individual privacy concerns); see also Linda Farber Post, Note, *Unblinded Mandatory HIV Screening of Newborns: Care or Coercion?*, 16 *CARDOZO L. REV.* 169, 206-13 (1994) (arguing that the mandatory HIV testing of newborns infringes the Fourth Amendment rights of HIV-infected or at-risk individuals).

51. See Post, *supra* note 50, at 208.

52. See *Katz*, 389 U.S. at 356-57 (holding that even though law enforcement officers might maintain reasonable suspicion, they are not authorized to search an individual without submitting evidence of probable cause to a judicial officer and securing a search warrant).

health and welfare as part of its larger regulatory function.⁵³ These searches are justifiable “whenever a reasonable government interest is justified by the ‘legislative or administrative standards’ governing the search.”⁵⁴ Determining the HIV status of pregnant women is not proposed as a means by which to obtain evidence for criminal proceedings, but rather as a way to protect the public health and welfare by preventing the spread of HIV to newborns and therefore falls into the administrative search category.

In evaluating the legality of administrative searches, the Supreme Court has recognized that these searches arise, almost by definition, in cases where the traditional warrant and probable cause requirements are impractical.⁵⁵ This has led to the development of the “special needs” exception to the Fourth Amendment prohibition on unreasonable searches.⁵⁶ The special needs exception is applied narrowly “[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion”⁵⁷

The Supreme Court has not ruled on the privacy issues raised by HIV testing, but has applied the special needs analysis in cases involving blood and urine tests. In 1989, twice in the same day, the Supreme Court held that in certain circumstances a showing of a compelling government interest in protecting the public welfare could justify the application of the special needs exception to the Fourth Amendment protections. In *Skinner v. Railway Labor Executives’ Association*,⁵⁸ the Court found that passenger safety on trains was a sufficiently compel-

53. See Post, *supra* note 50, at 208.

54. Barbara Danko, Comment, *The Fourth Amendment’s Challenge to Mandatory AIDS Testing of Convicted Sexual Offenders—Has the AIDS Virus Attacked Our Constitutional Right to Privacy?*, 4 SETON HALL CONST. L.J. 279, 294 (1993) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)).

55. See *Railway Labor Executives’ Ass’n*, 489 U.S. at 619 (allowing exceptions to Fourth Amendment requirements when “special needs . . . make the warrant and probable-cause requirement impracticable” (citations omitted)); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (same). Initially recognized in *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967), the Supreme Court has established that, counter to *Frank v. Maryland*, 359 U.S. 360, 373 (1959), administrative searches such as criminal searches require judicial warrants, but has announced that exceptions would be made in cases where the governmental interest outweighs an individual’s privacy intrusion, even if there is no individualized suspicion. See *Camara*, 387 U.S. at 538-40; see also Danko, *supra* note 54, at 298-300. The application of this balancing test was broadened further in *New York v. Burger*, 482 U.S. 691 (1987), where the Court addressed the reasonableness of the search of an automobile junkyard without a warrant or probable cause. See *id.* at 693. In addressing this issue, the Court set out a three-part test that, if satisfied, would justify a suspicionless, warrantless administrative search. See *id.* at 702-03. To be found reasonable (1) the government must have a “substantial” interest in the regulatory scheme under which the search is conducted; (2) such suspicionless searches must be necessary to promote the regulatory scheme; and (3) the regulatory structure must serve as a “constitutionally adequate substitute for a warrant.” *Burger*, 482 U.S. at 703 (internal quotations omitted); see also Danko, *supra* note 54, at 303-05.

56. See *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (permitting exceptions to the Fourth Amendment requirements when special needs make showing probable cause and obtaining a warrant impracticable (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring))). Once a court determines that a special need is present, it then applies the balancing test enunciated in *Camara*. See Danko, *supra* note 54, at 300.

57. *Railway Labor Executives’ Ass’n*, 489 U.S. at 624.

58. 489 U.S. 602 (1989).

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ling need to permit the compulsory testing of employees' blood and urine for traces of drugs following accidents and violations.⁵⁹ In *National Treasury Employees Union v. Von Raab*,⁶⁰ the Supreme Court found that the United States Customs Services' interest in ensuring that all employees applying for promotions to positions involving interdiction of illegal drugs or requiring the carrying of firearms were fit and of high moral character outweighed the individual privacy rights of the employees to work free of suspicionless drug testing.⁶¹ The Court in these cases firmly established the precedent that in certain circumstances where the court determines that the privacy interests invaded are minimal and that the government's compelling interest in promoting public welfare are beyond those of normal law enforcement, the special needs exception will be applied.⁶²

Once a court applies the special needs analysis, it proceeds with the aforementioned balancing test, weighing the interest of the government in conducting the search against the level of intrusion it occasions to determine whether the government action violates the Fourth Amendment.⁶³ It is likely that if a case involving the mandatory HIV testing of pregnant women is brought, courts would apply the special needs analysis, balancing the public health need to curb the spread of AIDS and to obtain medical care for HIV-positive newborns against the intrusion into the woman's privacy. The need to prevent the spread of HIV is indeed important, but given the social stigma associated with being HIV-positive, mandatory HIV testing represents an unnecessarily burdensome intrusion into the private lives of pregnant women.

The stigma associated with being HIV-positive has been well-documented; testing positive has resulted in the loss of employment, insurance, housing, and benefits.⁶⁴ Similarly, only two groups of individuals must submit to mandatory HIV-testing in the United States—prisoners and those charged with sex crimes.⁶⁵ By forcing a woman to submit to a mandatory HIV-test simply because she has chosen to exercise her constitutionally-protected fundamental right to become pregnant⁶⁶ is to suggest that the decision to have children results in such a diminished expectation of privacy as to compare only with the reduced rights of prisoners and alleged sex offenders.

59. See *id.* (holding that the employees' individual privacy rights were outweighed by the compelling government interest in determining the cause of, and preventing, future train accidents, thereby making warrantless and suspicionless drug and alcohol testing reasonable under the Fourth Amendment); see also *Schmerber v. California*, 384 U.S. 757, 766-72 (1966) (applying the special needs analysis in the criminal context for the first time when an individual hospitalized after an arrest was compelled to undergo a blood test and finding that this search did not violate the individual's Fourth Amendment rights).

60. 489 U.S. 656 (1989).

61. See *id.* (applying the special needs analysis to urinalysis drug testing).

62. See Post, *supra* note 50, at 210.

63. See *Railway Labor Executives' Ass'n*, 489 U.S. at 634.

64. See John Douard & Jerry D. Durham, *HIV-Infected Women and Children: Social and Ethical Perspectives*, in *WOMEN, CHILDREN, AND HIV/AIDS* 228, 229-30 (Felissa L. Cohen & Jerry D. Durham eds., 1993).

65. See Post, *supra* note 50, at 212 (citations omitted).

66. See *Skinner v. Oklahoma*, 316 U.S. 535, 541-43 (1942) (holding that the familial right to procreate is fundamental and therefore is protected by the Constitution).

Given that the privacy interests implicated by a mandatory testing program for pregnant women are far from "minimal,"⁶⁷ the outcome of a case challenging the mandatory HIV testing of pregnant women would depend on balancing these interests against the government interest in preventing the spread of AIDS. Preventing the spread of the HIV virus is indisputably important to public health and welfare, but this goal likely can be accomplished without diminishing pregnant women's privacy rights to the level of prisoners and alleged sex offenders. Statistics have shown that when pregnant women are offered counseling about the risks of transmitting AIDS to their children and the test results are guaranteed to be confidential and linked to available health care, ninety percent of women will assent voluntarily to being tested for the virus.⁶⁸ Preventing the spread of AIDS is an important state interest, but the level of intrusion into pregnant women's lives occasioned by mandating an HIV test is overwhelming. Given that the same goal can be achieved through a program of counseling and voluntary testing without the intrusion of forced testing indicates that the balance should tilt toward protecting the individual liberties guaranteed by the Fourth Amendment.

B. The Fourteenth Amendment Right to Privacy

Regardless of how the Court might articulate it, however, there is also a constitutional right to privacy⁶⁹ that is rooted in the doctrine of substantive due process,⁷⁰ a constitutional safeguard against state infringement of certain fundamental rights.⁷¹ The right to privacy under the Fourteenth Amendment has two strands. The first relates to confidentiality, or informational privacy implicated in an "individual[s] interest in avoiding disclosure of personal matters"⁷²

67. See *Railway Labor Executives' Ass'n*, 489 U.S. at 624 (noting that for suspicionless searches to pass constitutional muster, "the privacy interests implicated by the search [need to be] minimal").

68. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 22 (contrasting the discouraging effects of mandatory testing with the success of voluntary testing and counseling).

69. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (holding that specific guarantees in the Bill of Rights create the penumbral right of privacy); see also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (arguing that there is a certain private realm that the state is forbidden to enter); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (recognizing "that a right of personal privacy, or a guarantee of certain areas or zones of privacy" exists under the Constitution); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the right to privacy is equivalent to the right of individuals to be free from unsolicited government intrusion into fundamentally personal matters such as whether to bear children); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding that there is a fundamental right to be free "from unwarranted governmental intrusions into one's privacy"). Although the Supreme Court consistently has articulated the existence of a constitutional right to privacy, the rulings supporting this proposition have made defining this right difficult. See, e.g., *Roe*, 410 U.S. at 152 (writing for the Court, Justice Blackmun acknowledged the difficult line-drawing resulting from this precedent, noting that "[t]he Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps [to 1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

70. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-1, at 1302-04 (2d ed. 1988) (discussing the Court's development of the substantive due process doctrine as encompassing the right of privacy as a protected liberty interest).

71. See *id.*

72. *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

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The second, more controversial strand is the right to decisional privacy, or autonomy and “independence in making certain kinds of important decisions.”⁷³ A mandatory testing program of pregnant women would invoke not only confidentiality issues, but also autonomy issues by affecting a woman’s decision-making ability regarding her reproductive options. Most analysis of mandatory HIV testing has focused on confidentiality; consequently, the following analysis focuses on the autonomy strand, illustrating that a testing scheme based on a woman’s decision to give birth implicitly burdens her autonomous decision-making right.⁷⁴

Only those rights that are considered fundamental are guaranteed by the constitutional substantive due process right of individual privacy.⁷⁵ These fundamental rights are separated into isolated “zones of privacy”⁷⁶ that include, among others, marriage,⁷⁷ procreation,⁷⁸ contraception,⁷⁹ and family life.⁸⁰ Gov-

73. *Id.* at 599-600.

74. For an analysis of the confidentiality strand of the right to privacy in this area, see Roger Doughty, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the AIDS Epidemic*, 82 CAL. L. REV. 113, 148-54 (1994) (arguing that the legal protections against disclosure of confidential HIV-related information are inadequate and do not strike the appropriate balance between protecting individual rights and promoting public health); Gretta J. Heaney, *The Constitutional Right of Informational Privacy: Does It Protect Children Suffering from AIDS?*, 14 FORDHAM URB. L.J. 927, 929-46, 965-66 (1986) (arguing that HIV-infected children have a constitutional right of informational privacy that would make disclosure of their serostatus to any school official, other than those who provide health care, constitutionally impermissible).

75. See *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (holding that the Connecticut statute in question infringes the Due Process Clause because it “violates basic values ‘implicit in the concept of ordered liberty’” (citation omitted)).

76. *Roe v. Wade*, 410 U.S. 113, 152 (1973); see also *Currin*, *supra* note 21, at 896-97 (listing the recognized “zones of privacy”).

77. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967). *But see Bowers v. Hardwick*, 478 U.S. 186, 194-96 (1986) (holding that the Constitution does not confer upon homosexuals the fundamental right to engage in private sexual acts).

78. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Mandatory testing unlawfully discriminates on the basis of gender because of the unique biological reality of pregnancy, and could give rise to a cause of action under the Equal Protection Clause of the Fourteenth Amendment. Statutory classifications based on gender typically are evaluated by courts under intermediate scrutiny, which requires that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Craig v. Boren*, 429 U.S. 190, 197 (1976). Even though only women can become pregnant, the Supreme Court has refused to hold that pregnancy-based statutes are gender-based classifications. See *Geduldig v. Aiello*, 417 U.S. 484, 494-97 (1974) (holding that a California disability insurance program that excludes from coverage a disability resulting from normal pregnancy does not discriminate against any definable group or class in violation of the Equal Protection Clause). Despite the Court’s rulings that attempt to disassociate gender from pregnancy for the purpose of determining the constitutionality of statutes, mandatory HIV testing of pregnant women might still be unconstitutional if the discriminatory nature of testing can be characterized as a gender-based deprivation of women’s liberty interest as distinct from the issue of pregnancy. See *City of Los Angeles v. Manhart*, 435 U.S. 702, 711 (1978) (holding that a pension plan requiring women to make larger contributions than men because of their longer life expectancy discriminates against women by treating them “in a manner which but for [her] sex would [have been] different” (citation omitted)).

79. See *Griswold*, 381 U.S. at 485 (holding that the right to use contraceptives falls “within the zone of privacy created by several fundamental constitutional guarantees”).

ernment action that impinges autonomy within any of these zones triggers the most rigorous judicial review, strict scrutiny.⁸¹ Strict scrutiny requires that any governmental act treading upon a fundamental right must serve a compelling interest and must be narrowly tailored to achieve that interest.⁸²

Application of the traditional strict scrutiny analysis in this setting, however, would depend on a court's interpretation of the recent Supreme Court case *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁸³ which altered the landscape in this area. Like *Roe v. Wade*,⁸⁴ the seminal abortion rights case, *Casey* implicated the reproductive rights zone of privacy.⁸⁵ The Court in *Casey*, however, did not apply strict scrutiny as it had in *Roe*, but instead applied the "undue burden" test⁸⁶ formulated in earlier decisions.⁸⁷ The undue burden analysis is a balancing test that weighs personal liberty against an important state interest and asks whether the government action places a "substantial obstacle in the path of a woman seeking an abortion"⁸⁸ of a pre-viable fetus. The application and scope of this new analysis has yet to be determined. The undue burden test might apply only to legislation restricting abortion.⁸⁹ It is possible, however, that the undue burden analysis may become a "new, more flexible standard by which any interference with individual autonomy is measured."⁹⁰ Under either analysis, however, a mandatory HIV testing program for pregnant women likely would be found unconstitutional.

Under the strict scrutiny test, which mandates that a compelling state interest be achieved through narrowly tailored means,⁹¹ at least two protected zones of privacy would be infringed upon by legislation mandating the testing of

80. See *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (holding that the sanctity of family life is a fundamental right).

81. See, e.g., *Roe*, 410 U.S. at 155. Although the term "strict scrutiny" most commonly is associated with equal protection jurisprudence, the same language is used in cases addressing substantive due process protections when the right infringed is determined to be a fundamental substantive due process right. See *Griswold*, 381 U.S. at 503-04 (White, J., concurring).

82. See, e.g., *Roe*, 410 U.S. at 154-55 (holding that the right to personal privacy, which includes a limited right to obtain an abortion, is a fundamental right and can only be impinged in the face of a narrowly tailored statute that protects a compelling state interest); *Griswold*, 381 U.S. at 485.

83. 505 U.S. 833 (1992).

84. 410 U.S. 113 (1973).

85. See *Casey*, 505 U.S. at 852-53.

86. See *id.* at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

87. See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) (discussing the "unduly burdensome" standard); *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) (same).

88. *Casey*, 505 U.S. at 877.

89. See, e.g., David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 687 (1994) (noting that the lower courts will apply the undue burden test to abortion regulations); Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1155 (1993) (noting that "the burden of proof now faced by challengers of abortion restrictions is weightier" than it was under *Roe* (emphasis added)).

90. Curnin, *supra* note 21, at 898, 898 n.235.

91. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

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pregnant women—procreation⁹² and family life.⁹³ Such a government program likely would fail strict scrutiny analysis because, even assuming a compelling government interest in early detection and treatment of newborns who are at high risk for being HIV-positive, there is an alternative means that is tailored more narrowly to achieve the state's purpose. Mandatory counseling, coupled with voluntary testing, avoids the privacy invasion associated with mandatory testing and many of the other built-in obstacles—discouraging women from seeking prenatal care and failure to guarantee follow up care—and directly effectuates the state's interest in testing large numbers of women and entering infected newborns into treatment.⁹⁴

It also is difficult to argue that a mandatory screening program is narrowly tailored when in practice it is overinclusive. The Court has stated that statistical analysis can provide an illustrative tool for analysis,⁹⁵ and the numbers do not justify universal testing of pregnant women. There are less than 2000 children born HIV-positive in the United States annually,⁹⁶ and yet a mandatory testing program would result in the testing of all of the nearly four million women who give birth across the nation each year.⁹⁷ This reality presents a stark statistical imbalance: all of the women who give birth in hospitals and medical care facilities in the United States would be subjected to the substantial intrusion into their constitutionally protected autonomy to guard against a risk found in less than one percent of the population. This disproportionate statistical reality, especially when contrasted with the efficacy of a counseling and voluntary testing program,⁹⁸ illustrates that a mandatory testing program for all pregnant women may be overinclusive and may not be narrowly tailored to fit the state's interest, thereby failing strict scrutiny.

A mandatory HIV testing program for pregnant women also likely fails the undue burden test. Under a broad reading of *Casey*, the undue burden test will be applied to any government regulation that imposes an undue burden on a constitutionally protected zone of privacy.⁹⁹ A statute affecting one of these zones would be unconstitutional only if it created an undue burden or a "substantial obstacle" between an individual and the protected zone of privacy in which she chooses to exercise her autonomy.¹⁰⁰ Since *Casey* provides the most contemporary analysis of the undue burden test, the outcome of a challenge to a

92. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the right to procreate is a fundamental right).

93. See *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (holding that "the Constitution protects the sanctity of the family"); see also *Curnin*, *supra* note 21, at 899.

94. See *Cooper*, *Why Mandatory HIV Testing*, *supra* note 5, at 22.

95. See *Craig v. Boren*, 429 U.S. 190, 200-04 (1976) (holding that statistical analysis can help to prove the unconstitutionality of a gender classification).

96. See *supra* notes 2-3 and accompanying text.

97. See *supra* note 1 and accompanying text.

98. See *Curnin*, *supra* note 21, at 921 (arguing that the results of the New York State HIV Seroprevalence Project show that after six years of demographic testing the state knows exactly where the HIV infection rates are the highest and who is most at risk for transmission).

99. See *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992).

100. See *id.* at 877.

mandatory testing program will depend on the way in which the Court applies this fact-intensive test.

If the Court applies the undue burden test to the statute in the same way it applied the test to the twenty-four hour waiting period in *Casey*,¹⁰¹ a mandatory testing program might be found to be constitutional. By stressing the benefits and de-emphasizing the burdens, the Court found that the statute did not constitute a substantial obstacle to obtaining an abortion.¹⁰² The Court acknowledged that such a waiting period would burden most the women with the fewest resources, the farthest to travel, and the most difficulty explaining their absences to spouses and employers.¹⁰³ The Court nonetheless determined that the requirement created an important opportunity to make a more informed and deliberate choice that did not increase a woman's health risk.¹⁰⁴ The Court concluded that the twenty-four hour waiting period did not make the right to choose too difficult, announcing that "[a] particular burden is not of necessity a substantial obstacle."¹⁰⁵

In contrast, if the Court applied a narrow reading of *Casey*, as in its analysis of the spousal notification requirement,¹⁰⁶ an HIV testing program might be seen as overly burdensome and thus unconstitutional.¹⁰⁷ By minimizing the benefits and stressing the burdens of a spousal notification requirement, the Court went to great lengths¹⁰⁸ to point out that since there was no exemption from the requirement for women who experienced domestic abuse, and because of the "millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands,"¹⁰⁹ the provision was "likely to prevent a significant number of women from obtaining an abortion."¹¹⁰ If the Court were to apply this narrower reading of *Casey*, a mandatory testing program likely would be struck down.

Under a program of mandatory testing for pregnant women, every woman giving birth in a hospital or health care facility would be tested for HIV and therefore would be given no choice as to how and when she chooses to confront

101. *See id.* at 885-87 (examining the constitutionality of an element of the Pennsylvania abortion statute that required a physician to inform patients of the health risks of an abortion for both the mother and the fetus 24 hours before the procedure and to provide materials published by the state characterizing the fetus and listing the agencies that assist with adoption and child welfare services).

102. *See id.* at 887.

103. *See id.* at 885-86.

104. *See id.* (holding that in light of the medical emergency exemption, the 24-hour wait did not create a health risk).

105. *Id.* at 887.

106. *See id.* at 887-98 (invalidating an element of a Pennsylvania abortion statute that requires a physician to refrain from performing an abortion on a married woman unless she presents a signed statement certifying that she has informed her husband that she is about to undergo an abortion; if the procedure is performed without such a statement, the doctor will lose her license and be liable to the husband for damages).

107. *See id.*

108. *See id.* at 888-93 (stepping beyond the factual record to introduce studies to support the lower court's findings that fear of domestic abuse would discourage women from notifying their husbands).

109. *Id.* at 893.

110. *Id.*

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her HIV status. Considering the fatal diagnosis that awaits a positive test result and the profound discrimination that confronts those with AIDS, it is not unthinkable that a woman would choose not to know her HIV status. A mandatory testing program denies this choice to pregnant women merely because they have chosen to give birth, creating a substantial obstacle to deciding when and how to bear a child. In addition, for the women most at risk for HIV infection, this type of forced confrontation in a health care setting can cause women to avoid prenatal care rather than risk being exposed,¹¹¹ a result that poses serious health risks for both the mother and the child. Any program that discourages women from seeking prenatal care poses an undue burden on pregnant women's autonomous reproduction decisions because it affects not only their decisions about whether to have children, but when and where to have them. These negative consequences illustrate that legislation that forces pregnant women to confront their HIV status and the possible infection of their newborns constitutes a "substantial obstacle," and therefore an undue burden on the exercise of their autonomy in their constitutionally protected zones of privacy.

VI. FINANCIAL CONSIDERATIONS

Public health reports estimate that the cost savings resulting from the implementation of a comprehensive HIV counseling and *voluntary* testing program of pregnant women would prevent approximately 656 perinatal transmissions, with a resulting cost savings of \$105.6 million.¹¹² If these medical cost savings are subtracted from the costs of implementing the counseling and testing programs, the net savings is \$38.1 million.¹¹³ Similar estimates of the cost savings of a mandatory testing program have not been reported by the U.S. Department of Public Health, but with the consent-to-test rate so high,¹¹⁴ it is realistic to assume that the savings would be of a similar magnitude.

In a mandatory program, however, there are external costs not present in the voluntary counseling context that must be taken into account when comparing the financial efficiency of the two programs. First, significant funds are likely to be wasted on unnecessary tests in a mandatory testing program. Counseling and screening procedures reveal that many women are at such low risk levels that they should be exempt from testing; a mandatory regime would test such women unnecessarily and at great cost to the state. There are over four million live births in the United States annually.¹¹⁵ The cost to administer an HIV test to all of these women, when only 7000 of them are HIV-positive,¹¹⁶ would be astro-

111. See Curnin, *supra* note 21, at 881-82.

112. See Gorsky et al., *supra* note 5, at 338.

113. See *id.* at 339. This is a conservative estimate. Gorsky et al. note that "[f]or the United States, with a maternal HIV seroprevalence of 1.71 per 1000 births, the cost-savings of the intervention [counseling and voluntary testing] ranged from \$24.9 million to \$93.5 million . . ." *Id.*

114. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 22 (showing that when pregnant women are offered counseling about the risks of transmitting AIDS to their children and the test results are guaranteed to remain confidential, nearly 90% of women volunteer for HIV testing); see also discussion *infra* Part VII (describing the effectiveness of mandatory HIV testing programs).

115. See BUREAU OF THE CENSUS, *supra* note 1, at 74 tbl.89.

116. See *supra* note 2 and accompanying text.

nomical. This is highly inefficient when nearly the same effectiveness could be achieved through a voluntary testing program without these excess costs.¹¹⁷

Second, although often forgotten in this debate, the most important factor in a newborn's health care is the mother,¹¹⁸ which is why women's health care providers and public health officials support voluntary testing.¹¹⁹ Health officials believe that mandatory testing will drive women away from the health care system and discourage them from seeking prenatal care.¹²⁰ The external costs to society of these infants born without prenatal care likely will be greater in the long run than the costs of preventative prenatal care.

Finally, testing pregnant women, either through mandatory or voluntary programs, represents only limited costs savings because such a program applies only after the infection and the pregnancy already have occurred. The greatest costs savings would be realized if the initial infection could be prevented by determining the HIV status of the mother before she becomes pregnant. This type of initiative likely would increase the mother's reproductive options and result in fewer children abandoned in hospitals after birth.¹²¹ A better way to realize these goals would be to combine the funds saved through an aggressive counseling and voluntary testing program with those saved from avoiding administering the test on a mandatory basis to very low-risk women and direct this money toward pre-exposure prevention efforts. Education and counseling programs are the most efficient ways to prevent the spread of HIV to women and therefore are the most effective way to prevent pregnant women from infecting their newborns.

VII. EFFECTIVENESS OF A MANDATORY HIV TESTING PROGRAM

Mandatory testing programs frighten away the very people most at risk, and thus render these programs ineffective. For example, in Illinois, during the two years in which the state required mandatory HIV testing for all those applying for marriage licenses, approximately 40,000 people left the state to get married elsewhere.¹²² In addition, in New York City there was a dramatic increase in newborns abandoned at the hospital when city officials were given the authority to initiate foster care proceedings against women who tested positive for drug use.¹²³ Finally, disproportionately high rates of anonymous HIV testing

117. Research shows that 90% of women agree to be tested once they have been counseled by their doctor. See Quindlen, *supra* note 4, at A25; see also discussion *infra* Part VII (discussing the effectiveness of mandatory HIV testing).

118. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 27.

119. This approach has been endorsed by the American Nurses Association, American Academy of Pediatrics, American College of Obstetricians and Gynecologists, American Public Health Association, the Institute of Medicine, and the CDC. See Beil, *supra* note 5, at 1A; Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 27 n.78.

120. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 21-22.

121. See *id.* (arguing that a New York law that required newborns to be screened for drug metabolites at birth resulted in a significant increase in the number of babies abandoned at the hospital because when a newborn's test was positive, the state automatically could initiate proceedings against the mother).

122. See *id.* at 21.

123. See *id.* at 21-22.

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are recorded across the borders of states that mandate reporting of all of those who test positive for HIV.¹²⁴

In addition, mandatory testing of pregnant women is unlikely to reduce the spread of HIV because groups at high risk for HIV historically have had very limited access to medical care and treatment.¹²⁵ All AIDS-related programs therefore must be sensitive to issues of socio-economics, class, race, and most importantly, access, in order to be effective.

By contrast, however, when pre-test counseling is offered in the prenatal settings and is linked to voluntary testing and access to care and treatment, approximately ninety percent of pregnant women consent to counseling.¹²⁶ For example, at the Harlem Hospital in New York City, the consent-to-test rate with a voluntary testing program is approximately ninety percent.¹²⁷ Similar statistics are reported at Cook County Hospital (Chicago), Johns Hopkins (Baltimore), Grady Hospital (Atlanta), and other sites in California and Puerto Rico.¹²⁸ The majority of the populations served in these locations are poor women of color who have been perceived traditionally as difficult patients, yet the consent-to-test rates and numbers of women brought into care in those locations are high.¹²⁹ The conclusion is that voluntary programs work among women infected with HIV. Mandatory programs, on the other hand, threaten to create downstream costs and problems by discouraging women from seeking medical care.

Any benefits to be realized from a testing program depend upon the continued cooperation and involvement of the mother. The complexity of the decisionmaking and monitoring of the child require the voluntary participation of a mother who trusts her health care provider and wants to be a part of a system that responds to her needs. HIV testing "is likely to be most successful if it begins with an informed patient and a trusted provider. Voluntary testing accomplishes this; mandatory testing . . . may actually reduce the chance that a woman and her baby will receive needed therapies if they are alienated from the health care system."¹³⁰ It is unlikely, therefore, that mandatory testing will be effective in facilitating the relationship of continued cooperation between the mother and her provider necessary to allow her newborn to benefit from early diagnosis.

Finally, instituting a mandatory HIV testing program does not ensure that those who test positive will have access to treatment and care. Although early identification of HIV infection is important, without providing access to prophylactic treatments to those newborns at risk, mandatory testing is ineffective. For example, a recent study showed that out of twenty-nine infants in New York City identified as at risk for HIV, twenty-two did not receive prophylactic drug treatments.¹³¹ Given the demographics of HIV-positive pregnant women, many

124. See *id.* at 22.

125. See Post, *supra* note 50, at 181.

126. See Quindlen, *supra* note 4, at A25.

127. See *id.*

128. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 22.

129. See *id.*

130. Lowenstein, *supra* note 4, at 50 (quoting Dr. Helen Gayle, testifying for the Centers for Disease Control and Prevention before the congressional Subcommittee on Health and Environment, May 1995 (citation omitted)).

131. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 27 n.79 (quotations omitted).

of those in need will receive assistance through federal and state government programs.¹³² New welfare legislation, however, would cut funding for many women who would have been eligible to receive expensive prophylactic treatments. These women are forced to seek assistance elsewhere from an increasingly overburdened public health system. If the purpose of instituting a mandatory testing program is to diagnose the mother early so that new drug therapies can be employed to decrease the chances of transmission to her child,¹³³ the effectiveness of such a program is questionable when access to these "miracle" drugs may be limited, if not impossible.

VIII. CONCLUSION

Supporters of mandatory HIV testing of pregnant women argue that the need to identify and bring into treatment as many HIV-positive newborns and mothers as possible is worth infringing upon the constitutionally protected rights of the mother. Mandatory testing focuses only on the identification element, however, and is an unsatisfactory and potentially counterproductive substitute for substantive programs. By contrast, programs combining aggressive and comprehensive prenatal counseling lead to high percentages of women who comprehend the importance of learning their HIV status voluntarily submitting to an HIV test.¹³⁴

The most legally defensible policy, the one most respectful of women's autonomy, and the one with the least undesirable consequences is a voluntary testing program that (1) counsels women in high-risk groups to make the appropriate decisions regarding their own health care and that of their fetus; (2) caters the counseling materials to fit the demographics of the population served; (3) mandates pre- and post-test counseling; (4) requires that voluntary prenatal testing occur only after pre-test counseling; and (5) secures funding and access to AZT and other AIDS therapies for pregnant women and their children.

Legislators remain unaware of many of the realities facing HIV-infected pregnant women and their providers. Any legislation in this area must protect the rights of both mothers and children. It is only by winning the trust and cooperation of pregnant women, not coercing them, that real change in perinatal HIV-transmission rates can occur.

132. Cf. Laurence Lavin, *AIDS, Medicaid, and Women*, 5 DUKE J. GENDER L. & POL'Y 193, 198-207 (1998) (discussing the way in which the recent changes in the welfare laws impact women with HIV who receive Medicaid); Katherine Marconi et al., *The Paradigm Shift in Medicaid: Women with HIV Under Managed Care*, 5 DUKE J. GENDER L. & POL'Y 211, 212-21 (1998) (discussing issues facing HIV-positive women who receive Medicaid as health care provision shifts from a fee-for-service system to managed care).

133. It is noteworthy that the dramatically reduced transmission rates shown in the 076 study are not expected to be equaled when women face "tangible concerns not present" in the clinical trial context, such as the challenge of overcoming limited access to health and prenatal care. See Lowenstein, *supra* note 4, at 19.

134. See Cooper, *Why Mandatory HIV Testing*, *supra* note 5, at 22.