EXPEDITED HIV TESTING: AN UNNECESSARY TEST THAT IS ALLOWING THE STATE TO TRAMPLE ON A WOMAN'S CONSTITUTIONAL RIGHTS

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INTRODUCTION

A woman's bond with her child begins when the woman is a baby herself and continues throughout her life, increasing in intensity as a young girl's fantasy becomes reality. When little girls play house, there is always a fight over who is going to be the mother; "who is the most caring and nurturing child to act in this very important role?" When a schoolgirl transforms into a young adult, this idea of playing house does not dissipate. Instead, the focus turns to choosing her future spouse; even more importantly, choosing the father of her children. Finally, the time arrives and this little girl transforms into a woman. She becomes pregnant, and is still dreaming the same dreams, still deciding if the names she picked out that day on the playground were names she could live with for the rest of her life. Most of all, she is thinking about how she is going to be the best mother ever. Now, the big day arrives and she is in labor. She does not know her HIV status, either because she did not feel it was necessary or she does not want to undergo such a life altering measure. The doctor comes in and tells her about this new killer virus that can harm her baby, the precious innocent life that she has been carrying for nine months, and has been dressing for twenty-five years. The doctor explains that she needs to take an HIV test at that moment. He gives her a form and she signs on the dotted line. She believes him, after all, a doctor knows best.

Bringing a baby into the world is supposed to be an exhilarating experience for a woman. However, in an age of new technology and dangerous and uncontrollable diseases, bringing a child into the world can be terrifying. Does that mean that the state should expect doctors to persuade a woman to make uninformed decisions during a period so intense and so mind-boggling, under the guise of the best interest of the child? Does the state have the right to override the mother's wishes and aid her by giving her life changing information that she is HIV positive and that even if her

child is born healthy, she may not live to see that child have his or her own child?

This Note will explore a recent New York State Health Department regulation that became effective on August 1, 1999.[1] This provision "requires that hospitals and birthing centers ask mothers who have not been tested for HIV to consent to a rapid test during labor."[2] Part I of this Note explores the various measures the state has employed to protect children from injury, and how each of these measures fails in the context of expectant mothers. Part II states the vast, current statistical analysis of HIV, exemplifying that the fear shaking the nation is justified, but that expedited HIV testing is not the solution. Part III investigates the means that courts have taken to protect a woman's privacy interests, and Part IV examines the right of an expectant mother to make an informed decision prior to consenting to any medical procedure, including a woman's right to bodily integrity. Part V questions whether compelling a woman to undergo this procedure violates her Fourth Amendment protection against unreasonable searches. Part VI investigates the recent trends following this legislation, with a particular emphasis on whether the remedy the state is trying to instill actually helps to solve the AIDS epidemic or whether it just disguises the problem. Finally, Part VII concludes that, though expedited HIV testing for pregnant women is acceptable and practical in theory, the provision is mystifyingly incomprehensible and that the state lacks a legitimate interest to take away a woman's right to privacy. Additionally, this provision encroaches upon a woman's right of bodily integrity, allows for intrusive actions constituting a search, and violates the elements of informed consent.

In the past, counting ten little fingers, ten little toes, and listening for the baby's first wail meant that the child had been born healthy. Today that first cry means life, but for how long?

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[1] *See* Erin Cowan, *New Rule on HIV Test under Fire: Women are asked to take it during labor*, NEWSDAY, Sept. 6, 1999, A7. *See also* N.Y.S. DEPT. OF HEALTH: MATERNAL - PEDIATRIC HIV PREVENTION AND CARE PROGRAM, PROTOCOL FOR EXPEDITED HIV TESTING FOR USE BY LABOR, DELIVERY, AND NURSERY UNITS (1999). Hereinafter referred to as "N.Y.S. DEPT. OF HEALTH."

[2] N.Y.S. DEPT. OF HEALTH. This program strongly urges women to be tested for HIV, begin treatments, and bring awareness during this crucial time. This provision speaks of counseling both prior to testing and after the test has in fact been administered. The fear of testing without counseling has been the subject of many scholarly essays, and this issue will be addressed once again in Part IV, when investigating whether a woman actually is giving informed consent.

PART I: STATE MEASURES EMPLOYED TO PROTECT CHILDREN FROM INJURY

A woman in the midst of newfound happiness should not have to contemplate the idea that the state, disguised as hospital personnel, may shortly hand her a life sentence. Unfortunately, in certain limited instances, the state has the authority to do just that.[3] The state has taken many actions while acting in the best interest of the newborn child. New York has recently responded to the problematic spread of the deadly HIV virus by amending Article 27-F of the New York Public Health Statute ("AIDS Baby Bill"), effective as of February 1, 1997.[4] Under the AIDS Baby Bill, New York State is permitted to test each newborn to determine his or her HIV status without worrying about securing informed consent from the parents.[5] Prior to the enactment of the AIDS Baby Bill, the state had been testing newborns to ascertain the spread of the AIDS epidemic through statistical analysis.[6] The AIDS Baby Bill already permits New York State to continue its detailed study while providing disclosure of a child's HIV status to the parents, granting parents the opportunity to get tested themselves and to provide the child with the necessary medical care.[7] The provision in question today, expedited HIV testing of pregnant women,[8] is merely an unneces-

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[3] *See, e.g.*, Karen L. Goldstein, *Balancing Risks and Rights: HIV Testing Regimes for Pregnant Women*, 4 CORNELL J.L. & PUB. POL'Y 609, 625 (1995); Linda Farber Post, *Unblinded Mandatory HIV Screening of Newborns: Care of Coercion?*, 16 CARDOZO L. REV. 169, 199-202 (1994) (stating that the state traditionally had an easier time exerting its police powers over the realm of health care). Whereas the test used to be that of minimal scrutiny, today a stricter test is applied. There is "a heightened burden on the state to show that a public health regulation targets an identified need as closely as possible so it infringes on individual liberties as little as possible." *Id.* at 200-201

[4] N.Y. PUB. HEALTH LAW § 27-F (McKinney 1999) (provides all HIV and AIDS related information for New York; states that "[no] HIV testing could be performed without the written, informed consent of the subject who has the capacity to consent"). *See also* Michele M. Conteras, *New York's Mandatory HIV Testing of Newborns: A Positive Step Which Results in Negative Costs for Women and their Children*, 20 WOMEN'S RTS. L. REP. 21, 27 (1998).

[5] *See* Conteras, *supra* note 4, at 27.

[6] *See id.* at 28 (citing AIDS' Baby Bill). The AIDS Baby Bill provides the following:

> In order to improve the health of newborns, and to improve access to care and treatment of newborns infected with or exposed to human immunodeficiency virus (HIV) and their mothers, the commissioner [of the Department of Health] shall establish a comprehensive program for the testing of newborns for the presence of human immunodeficiency virus and/or the presence of antibodies to such virus.
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> The commissioner shall promulgate regulations governing the implementation of the program required pursuant to subdivision one of this section, including the administration of testing, counseling, tracking, disclosure of test results pursuant to section twenty-seven hundred eighty-two of this chapter, follow-upreviews, and education activities relating to such testing.

[7] *See id.* at 27.

[8] N.Y.S. DEPT. OF HEALTH.

sary and unconstitutional attempt to expand the already accepted AIDS Baby Bill legislation.

Parens Patriae Doctrine:

Parents have certain duties to their children that arise simply because they have opted to take on the responsibility of creating another life.[9] Children are defenseless against harm and therefore must be protected. One can cause harm to a child either affirmatively, by actively injuring the child, or negatively, by failing to come to the child's aid.[10] So what happens when parents are not fulfilling their obligations to the innocent life they have conceived? In instances where the parental responsibility towards a child fails, a transfer of guardianship occurs.[11] In cases where the child's life may be in danger due to a lack of medical attention, the guardianship falls to the state. The state then usurps the parent's decision-making ability and vests itself with the power to act on the child's behalf. [12] According to the doctrine of *parens patriae,*[13] the state may override a parent's wishes in order to promote and protect the health, the safety, or the welfare of a child.[14] The rationale behind the state sanctioned interference in the family realm is that "[p]arents may be free to become martyrs themselves," but they are not free to make martyrs of their children.[15]

Expedited HIV testing does not fall within the state's authority under the doctrine of *parens patriae.* It is true that AIDS is a serious problem, and it is also true that HIV testing concerns a matter of life and death. However, a simple refusal of an unconstitutional test by a mother should not grant the state permission to override a substantially difficult decision made by the mother. The state already maintains the right to test newborns and to treat them immediately upon learning of their HIV status. Furthermore, a fetus has

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9 Jeffrey Blustein, *Child Rearing and Family Interests, in* HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 115, 116 (Onora O'Neill and William Ruddick eds. 1979).

10 *Id.* at 116.

11 *Id.* at 127.

12 Samantha Catherine Halem, *At What Cost? An Argument Against Mandatory AZT Treatment of HIV-Positive Pregnant Women,* 32 HARV. C.R.-C.L. L. REV. 491, 513 (1997).

13 *See* Goldstein, *supra* note 3, at 625. The doctrine of *parens patriae* is derived from an early common law rule which stated that the state retains the right to act on behalf of minors in property and marital disputes. The common law regarding the state's right to act on behalf of minors has been expanded throughout the years to include areas of general welfare such as education and health.

14 Halem, *supra* note 12, at 513.

15 *Id.* (citing Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (allowing the state to mandate the necessary medical treatment over the parents' religious objections to such treatment)).

no rights under our current legal system until after it is born. Thus, it is unnecessary and unacceptable to transfer guardianship of an unborn child away from its parents. To do so would constitute an unconstitutional coercive legislative action and it is unlikely that such coercive legislative action could withstand judicial scrutiny under a *parens patriae* claim.[16]

Best Interests of the Child:

Determining whether the state may act as a child's guardian or "in the child's best interest" requires a two-part balancing test.[17] The first component of this balancing test is whether there is an identifiable state interest that makes it acceptable for the state to intervene on the child's behalf.[18] If the state does have an identifiable interest, then the next question is whether the state's asserted interest sufficiently outweighs the parents' interest.[19] In instances regarding life-threatening illnesses, courts may impart guardianship upon the state over parental objection to assure that the child receives the necessary medical treatment.[20] However, this is not always the case. The court also considers various factors and is reluctant to authorize treatment with parental disapproval when (1) the treatment is overly invasive or potentially dangerous in itself and (2) when the child suffers from an incurable disease and medical treatment would simply be prolonging the inevitable.[21] The court's analysis in *Prince v. Massachusetts* as applied to expedited HIV testing shows that in the case of expedited HIV testing, the state lacks the ability to over-ride parental objections using a claim that expedited HIV testing is in the best interest of the child.

Although all children born to HIV positive mothers *appear* to have the HIV virus, in actuality, these children are only testing positive for their mother's antibodies.[22] Eighty percent of children born to HIV positive mothers who test positive have not actually contracted the deadly virus.[23] Rather, a seven to eight month time

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16 *See* Halem, *supra* note 12, at 515.

17 Goldstein, *supra* note 3, at 628.

18 *Id.*

19 *Id.* The court considers several factors when determining the state's right to assert guardianship. They are: the seriousness of the harm the child is suffering, the potential effectiveness of treatment, the effects of such treatment on the child, and finally the child's chance of surviving with or without medical treatment.

20 *Id.* The court allowed medical treatment over the parents' religious objections in order to save the life of a child. Prince v. Massachusetts, 321 U.S. 158 (1944).

21 *See Prince*, 321 U.S. at 158.

22 Kevin J. Curnin, *Newborn HIV Screening and New York Assembly Bill No. 6747-B: Privacy and Equal Protection of Pregnant Women*, 21 FORDHAM URB. L.J. 857, 865 (1994).

23 Evans McMillion, *The Case Against Mandatory HIV Testing of Pregnant Women: The Legal and Public Policy Implications*, 5 DUKE J. GENDER L. & POL'Y 227, 231 (1998).

period exists before one would be certain if a child actually is HIV positive or was just antibody positive, a harmless diagnosis for healthy infants.[24] The testing of the newborn child, therefore, often yields inaccurate results. Furthermore, the effects of drugs designed to combat the HIV virus remain new and unfamiliar, and may only hide or slow the effects of the AIDS virus.

In addition to the fact that the effects of the drugs maintain unknown dangers, there is no known cure for AIDS.[25] Therefore, when a court grants guardianship to the state and allows the state to make the ultimate decision about testing, the court is only extending the unavoidable, i.e. the death of a child rather than the death of an infant. Instead of allowing an infant eight or nine months to live, the child may live to see his or her first birthday.[26] Even the lucky children will not live longer than the age of thirteen.[27] An early detection, therefore, does not help to halt a raging epidemic.

Also, to assert that expedited HIV testing falls under the state's right to act in the best interest of the child would be a farce. Even if the state weighed the above factors and determined that the state should act as guardian and mandate treatment, testing women at the final phase of the pregnancy would be unjustified. The state would not actually be helping the child any more than the mandatory testing of newborns already does.

One of the benefits of testing women early is the availability of counseling which provides parents, more importantly the mother, with information about the nature of the AIDS virus and HIV related illnesses, transmission of the disease to others,[28] and the possible discrimination and stigmatism that may occur as a result of a positive diagnosis.[29] Those considering HIV testing should be informed of the medical benefits of the process as well as the social risks that may be incurred.[30] Without furnishing the appropriate counseling, the state would not be acting in the best interest of

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[24] Conteras, *supra* note 4, at 25. *See also* Suzanne Sangree, *Control of Childbearing by HIV-Positive Women: Some Responses to Emerging Legal Policies,* 41 BUFF. L. REV. 309, 357 (1993).

[25] Halem, *supra* note 12, at 512. *See also* Informed Consent to Perform an Expedited HIV Test in the Delivery Setting, N.Y.S. DEPT. OF HEALTH (Attachment 11) (consent form that a woman signs while in delivery *consenting* to an HIV test and acknowledging that she gives permission for treatment that may reduce her child's chance of acquiring HIV).

[26] *See* Curnin, *supra* note 22, at 864.

[27] *There's 'No Excuse' for Babies to be Born Today Infected with HIV,* 14 AIDS ALERT 121 (Nov. 1, 1999). Hereinafter referred to as "*There's No Excuse.*"

[28] Elizabeth Cooper, *Testing for Genetic Traits: The Need for a New Legal Doctrine of Informed Consent,* 58 MD. L. REV. 346, 370-377 (1999).

[29] *Id.*

[30] *See id.* at 401.

expectant mothers or their children. The state would be acting in its *own* self-interest because it would be denying necessary prenatal care. The state could better tailor its interest of protecting newborns by mandating an HIV test for all women seeking medical care in their first or second trimester. This way drug therapy can begin immediately following a positive result, and more importantly, expectant mothers could be truly informed of their rights and responsibilities so that they may act in the best interest of their children.

State Claims to be Protecting Fetal Rights:

Medical technology continues to make significant advances and perhaps has even contrived "the perception of a fetus as a separate entity with rights distinct from the mother."[31] The U.S. Supreme Court first recognized and sought to protect potential human life in the landmark case of *Roe v. Wade*.[32] This momentous decision determined that a fetus is not considered a person under the Fourteenth Amendment.[33] Furthermore, the court has also acknowledged that a person already born has rights that supersede those of the unborn, and though the state may have compelling reasons to aid the unborn, the rights of the unborn are secondary to the rights of the mother.[34]

When the state claims that it knows what is best for the fetus, the state professes to have greater power over the unborn child than the expectant mother herself.[35] Allowing the state to make this claim would mean permitting the state to deny pregnant women the same constitutional rights entitled to every other competent adult or "person."[36] A woman's entire lifestyle impacts the development of the fetus she is carrying,[37] but this does not mean

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31 Rebekah R. Arch, RN, *The Maternal-Fetal Rights Dilemma: Honoring A Woman's Choice of Medical Care During Pregnancy*, 12 J. CONTEMP. HEALTH L. & POL'Y 637, 640 (1996).

32 410 U.S. 113, 95 S. Ct. 705 (1973) (recognizing fetal interests, establishing a trimester structure in order to determine if the woman or the state maintains control in abortion questions, and deciding that a fetus is a person as soon as it is viable and can live on its own).

33 *Id.* at 158, 95 S.Ct at 729.

34 *See* Halem, *supra* note 12, at 507 (citing In re A.C, 573 A.D.1235 (D.C. 1990) (en banc) (deciding the legality of performing a Caesarean section on a patient who could not clearly communicate her wishes)).

35 *See id.* at 516.

36 *See id.*

37 *See* Arch, *supra* note 31, at 648. *See also* In re Baby Boy Doe, 632 N.E.2d 326, 332 (1994) (holding that a competent woman's refusal to undergo a Caesarian section must be upheld, even if the circumstances pose a detriment to the fetus).

that the state should provide extraordinary rights for the unborn - an entity not recognized as having any rights.[38]

Though a fetus is viable when the expedited HIV testing occurs, the state should not be able to usurp the rights of the expectant mother. A possibility always exists that something may go wrong during the delivery. Therefore, it is implausible for the state to transgress a woman's rights for what is still a *potential* life. Finally, though a woman is responsible for the protection of her child, this obligation does not include the unborn. "A woman is under no duty to guarantee the mental and physical health of her child at birth, and cannot be compelled to do or not to do anything merely for the benefit of the unborn."[39]

PART II: HISTORY OF HIV & THE MEASURES THE STATE HAS UTILIZED TO CONTROL THE SPREAD OF THE INFECTIOUS DISEASE

> The picture of the AIDS victim is a shell of a man wasted by the opportunistic infections, his deeply recessed eyes staring out from a death's head skull in hopeless, disoriented pain [. . .] This disease causes its victims to experience hell on earth; people are terrified out of their rational minds.[40]

The HIV virus infects 16,000 people per day and this number is "going to get a lot worse before it gets better."[41] The Centers for Disease Control ("CDC") have estimated that at least 43,000 people per year will be infected with the HIV virus, and 2,000 of the infected population will be newborns.[42] It has also been calculated that by the year 2000, there will be ten million children worldwide that are infected with this deadly virus.[43] This exorbitant number includes approximately six to seven thousand infants born to HIV positive mothers, many of whom will not live to see their second birthday.[44] Despite the large increase of women infected with the HIV virus, the rate of perinatal transmission has decreased by 74% since 1993.[45]

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38 Halem, *supra* note 12, at 515.

39 *In re Baby Boy Doe,* 632 N.E.2d at 332.

40 Peter H. Berge, *Setting Limits on Involuntary HIV Antibody Testing Under Rules 35 and State Independent Medical Examination Statute,* 44 FLA. L. REV. 767, 779 (1992).

41 Erina Kinetz, *AIDS: Still Searching,* N.Y. TIMES, Feb. 7, 2000, at 38.

42 Conteras, *supra* note 4, at 21.

43 Kellie E. Lagitch, *Mandatory HIV Testing: An Orwellian Proposition,* 72 ST. JOHN'S L. REV. 103, 105 (1998).

44 *Id.* at 106.

45 *HHS to Let States Chart Own Policies on Perinatal Transmission,* 15 AIDS POL. & L. (Feb. 4, 2000).

Today, AIDS is the fifth leading cause of death in children under fifteen years of age,[46] and the seventh leading cause of death for children ages one to four.[47] The HIV virus in newborns often results from a transmission of the virus from the mother to the child.[48] The final outcome of this transmission is an unyielding infection called AIDS. AIDS destroys the immune system so that the body cannot fight disease, and eventually forces the body to succumb to other illnesses.[49] HIV can be transmitted from mother to child in three different modes: (1) prior to birth through the placenta; (2) during birth through vaginal secretions; and (3) after birth through breastfeeding.[50] Studies indicate that one out of four, or 15-25% of babies born to HIV positive mothers will be infected with the virus.[51] Women that use AZT during pregnancy can drop this number to one out of twelve.[52]

The ELISA and the Western blot tests are two of the original tests used to determine whether a person is HIV positive.[53] Properly utilized, these tests are highly accurate, but only in adults.[54] A newborn is born with his or her mother's antibodies.[55] This means, that all newborns born to HIV positive mothers will be seropositive, or show HIV positive antibodies, even if the infant will never actually acquire the HIV virus itself.[56] A child will not shed these antibodies for seven to ten months and, possibly, as long as fifteen to sixteen months.[57] Thus, the ELISA test or the Western blot tests would only reveal that a child *might* be infected, and not whether the child actually is in danger of this disease.[58] The actual status of infants may be obtained through the HIV-IgA assay test.[59] Utilizing this measure, a positive or negative status for 66% of in-

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46 Melinda Madison, *Tragic Life or Tragic death, Mandatory Testing of Newborns for HIV – Mothers' Rights Versus Children's Health*, 18 J. LEGAL MED. 361, 362 (1997).

47 Paul Frisman, *Mandatory HIV Testing of Newborns Challenged*, CONN. L. TRIBUNE, Oct. 18, 1999, at news.

48 Madison, *supra* note 46, at 362.

49 HIV/AIDS HOTLINES PASS THE FACTS — NOT HIV! (1999).

50 Madison, *supra* note 46, at 362.

51 100 QUESTIONS AND ANSWERS ABOUT HIV/AIDS (1998).

52 *Id.* AZT is also known as "zidovudine" and was the first drug approved for treating HIV. AZT is an anti-HIV treatment that assists in preventing HIV from infecting uninfected cells in the body. AZT does not help cells that have already been infected with the virus. AZT is best used in combination with other anti-HIV drugs. *See* http://www.aidsinfonyc.org/network/simple/zido.html (last visited May 2000).

53 Leonardo Renna, *New York State's Proposal to Unblind HIV Testing for Newborns: A Necessary Step in Addressing a Critical Problem*, 60 BROOK. L. REV. 407, 413 (1994).

54 *Id.*

55 Conteras, *supra* note 4, at 24.

56 Renna, *supra* note 53, at 413.

57 *Id.*

58 *Id.* at 414.

59 Conteras, *supra* note 4, at 25.

fants can be determined prior to the child reaching three months of age. [60] HIV-IgA can show a positive predicting value of 99.4% and a negative prediction of 98.7% for children over three months of age.[61] Another test, the polymerase chain reaction ("PCR") test, takes a short time to perform, produces no false positive results, and can identify greater than 90% of infected infants,[62] one to three months of age.[63] The PCR test can detect 38% of HIV infected infants on the day of or the day after birth.[64] The PCR test can determine the HIV status for 93% of infants by fourteen days of age.[65]

A test that can identify the status of 100% of infants within a three-week period is the p24 antigen test.[66] This test identifies p24, a protein in the core of the HIV virus.[67] The p24 antigen test promises to be an inexpensive, rapid, and accurate technique for targeting the HIV virus in newborns.[68] A final test is a quick last minute test called the Single-Use Diagnostic System ("SUDS") Test which provides an overwhelming number of wrong results.[69] Unfortunately, SUDS is the test being performed during labor.[70]

Single Use Diagnostic Systems ("SUDS") as a screening process for HIV:

Six to seven thousand women with HIV give birth each year in the United States.[71] The majority of pregnant women get tested for HIV early in their pregnancy, but for those who never undergo this process, there is a new quick test, sure to yield a result in just thirty minutes.[72] The real question is how often is this result inaccurate? Single-Use Diagnostic Systems (SUDS) is the screening process that hospitals are currently using to determine whether a woman whose HIV status is unknown, is infected with the HIV virus.[73] The problem is that SUDS is faulty. SUDS results are based on a mathematical equation that identifies a certain number of

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60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *See generally* Jamie Talan, *Newborns and AIDS: To Test, or Not to Test*, NEWSDAY, Feb. 13, 2000, at A7.
70 *Id.* at A7.
71 Laura E. Riley, M.D. & Michael F. Greene M.D., *Elective Cesarean Delivery to Reduce the Transmission of HIV*, 340 THE NEW ENG. J. MED. 977, 1032 (Apr. 1, 1999).
72 Jamie Talan, *supra* note 69, at A40.
73 *Id.* at A7.

both true and false positives.[74] SUDS yields more accurate results when dealing with a population at a high risk of being HIV positive,[75] whereas here, most of the women are at no risk.[76] Thus, if the percentage of the true positives decreases, then the percentage of false positives must increase.[77] In other words, testing under SUDS leads to a wrong result two out of three times for women not within the high risk group.[78]

Using SUDS as the test for determining the HIV status of pregnant women leads to errors.[79] The SUDS result is determined by reading a small color changing tab, similar to a home pregnancy test that indicates pregnancy.[80] Because the test is performed manually, the reading of the test is subjective.[81] Furthermore, the test result may be skewed by room temperature.[82] Finally, timing is essential in determining the correct SUDS test result.[83] Even more problematic then the inaccuracy of the SUDS test is the fact that four different tests must actually be taken prior to confirming whether a woman is actually HIV positive.[84] First, a SUDS test is taken.[85] If the first SUDS test shows a positive result, then another SUDS test is taken.[86] If the second SUDS test also yields a positive response, then a third test is taken because the two prior SUDS tests may both be inaccurate. The third test, the ELISA test, screens anti-bodies and may take up to four hours to show the results.[87] Finally, if the ELISA test shows a positive confirmatory result, then the Western Blot test is conducted.[88] The result for the Western Blot test takes approximately forty-eight hours, and if positive, usually means that the person has the HIV virus.[89]

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74 *Id.*

75 The high-risk groups are homosexuals and IV drug users and their partners.

76 Talan, *supra* note 69, at A7.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

Preventative measures during delivery:

Various strategies have been employed to reduce maternal-infant transmission of the HIV virus.[90] In examining the medical angle of preventative HIV transmission, it is apparent that expedited HIV testing is a last minute measure that will not really bring about the results that it seeks. Some of the tactics utilized to prevent conveyance of the HIV virus from mother to child include: reducing the maternal plasma levels by using antiretroviral drugs; delivering the baby by cesarean section in order to decrease the newborn's exposure to the mother's blood and secretions; using local agents to reduce the viral level in genital secretions; and treating the infant with an HIV vaccination or drugs upon birth.[91] Optimally, physicians would like to prevent premature birth, a rupturing of the membranes more than four hours prior to delivery, and any unnecessary use of instruments during the birth in an effort to decrease the possibility of conveying the mother's virus to the newborn.[92] Though these procedures are meant to eradicate perinatal transmission, numerous questions still remain unanswerable. A few of these inquiries are: (1) how effective is prophylactic treatment for infants that do not receive follow up antenatal treatment; (2) how long is the optimal duration of treatment; (3) how close to the birth must the preventative treatments begin; and (4) what is the most effective drug in the fight against perinatal HIV transmission?[93]

Cesarean sections are considered a precautionary act to maternal-infant HIV transmission, but this is only true if the mother's HIV status is known prior to her being in labor. The mother's blood may reach the infant during labor contractions after the membranes are ruptured, or through direct contact between the fetus and the mother's blood and/or genital secretions. [94] Thus, an elective cesarean section performed prior to the onset of labor would be more beneficial to the infant[95] than performing a cesarean section following discovery of the expectant mother's HIV status through expedited HIV testing. Clinical studies have shown that the rupturing of the membranes or the initiation of labor in-

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90 *See* Martha F. Rogers M.D. & Nathan Shaffer, M.D., *Reducing the Risk of Maternal-Infant Transmission of HIV by Attacking the Virus,* 341 NEW ENG. J. MED. 441 (Aug. 5, 1999).

91 *Id.*

92 *Id.*

93 *Id.* at 442.

94 The International Perinatal HIV Group, *The Mode of Delivery and the Risk of Vertical Transmission of Human Immunodeficiency Virus Type I,* 340 NEW ENG. J. MED. 977 (Apr. 1, 1999).

95 *Id. See also* Riley & Greene, *supra* note 71, at 1032.

creases the chance that the HIV virus will be transmitted from the mother to her newborn.[96] Therefore, knowledge of the mother's HIV status before the onset of labor may allow the option of performing an *elective* cesarean operation. By scheduling the cesarean operation two weeks prior to the anticipated date of birth, the infant would be subject to substantially less risk of exposure to the mother's HIV virus.[97]

The benefits of a cesarean delivery must be weighed against the many risks within the process.[98] Delivery by cesarean is associated with greater blood loss, higher rates of maternal death, endometritis, postoperative wound infections, and other infections that may not result from vaginal delivery.[99] Thus, ironically, women with advanced HIV, whose babies are most likely to benefit from a cesarean delivery, are the ones that would most likely suffer more complications as a result of the operation.[100] Hence, asking a woman to choose a cesarean delivery method, and thereby risk serious complications to her own health in the final minutes of her pregnancy is asking the woman to put her life in danger for the life she is carrying, without knowing if the life inside her will be born healthy regardless of all of her precautionary extremes. Therefore, the best preventative method would be to detect the virus early in the pregnancy, to begin and continue the antiviral therapy throughout the pregnancy, and to choose the elective cesarean delivery.[101] The infant should be placed on drug therapy for six weeks after birth, and the mother should not breastfeed the infant.[102] Anything less than this regimen would not be as efficacious.[103] Therefore, expedited HIV testing could be considered as cheating women and the potential child of all the benefits of advanced medical care.

Conclusion:

An HIV positive mother has a 75% chance of having a healthy baby.[104] When a mother is treated with AZT, the chance of perinatal transmission of the HIV virus to her child can be reduced by

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96 Riley & Greene, *supra* note 71, at 1032.
97 *If you Don't Ask Moms About HIV, They Won't be Tested,* 14 AIDS ALERT 124 (Nov. 1, 1999).
98 *See* Riley & Greene, *supra* note 71, at 1032.
99 *Id.*
100 *Id.*
101 *Id.* at 1032-1033.
102 *Id.*
103 *Id.* at 1032.
104 Halem, *supra* note 12, at 501.

two-thirds or 67.5%.[105] Transmission to infants may be significantly reduced or further delayed if the newborn and the mother are treated as well.[106] The United States' growing anxiety over the HIV virus is justified by the fact that more than 15,000 children are infected with the HIV virus by their mother.[107] However, expedited HIV testing is unnecessary to solve this problem. HIV research shows that the mother-to-child transmission of the HIV virus can be eliminated by providing antiviral medication to the expectant mothers in the last two trimesters of pregnancy, and to the babies for the six weeks following birth.[108] The only limitations are that HIV positive mothers cannot breastfeed their infants,[109] and that this course of treatment must be planned out several months before the actual birth. A mother and her child cannot derive the same benefits by consenting to a HIV test in the final moments of the pregnancy. Women that do consent to expedited HIV testing cannot possibly be properly counseled. Even if a woman is tested during labor and found to be HIV positive, other confirmatory tests must be undertaken to determine if the original test was accurate.[110] Therefore, it is easy to see that expedited HIV testing does not offer much more than mandatory newborn testing does. Results of both the mother and the infant's HIV status are obtained shortly after the baby is born.

Expedited HIV testing does not prevent or lower the risk of mother-to-child transmission of the HIV virus. The most beneficial way to decrease the risk of transmission is to engage in procedures such as elective cesarean deliveries where the baby can be removed before labor contractions and a rupturing of membranes occur. Technology is always changing. It is also possible that in the future, new tests will enable quicker and better determinations of an infant's HIV status. It is possible that the invention of new drugs will enable doctors to prevent HIV transmission from mother to child without any side effects. However, no such solutions are yet available. Sadly, the future holds only a distant promise.

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105 Lagitch, *supra* note 43, at 107. *See also* Goldstein *supra* note 3, at 613.
106 Goldstein, *supra* note 3, at 613.
107 *There's 'No Excuse,' supra* note 27, at 121.
108 *Id.*
109 *Id.*
110 N.Y.S. DEPT. OF HEALTH, *supra* note 2.

PART III: ANALYSIS OF EXPEDITED HIV TESTING & AN EXPECTANT MOTHER'S RIGHT TO PRIVACY UNDER THE STRICT SCRUTINY TEST

Two competing tests exist in the realm of privacy: the Undue Burden test and the Strict Scrutiny test. Each of these tests arose in the context of a pregnant woman attempting to retain the rights that she had been born with, and those which should not vanish merely because she is pregnant. "[W]hen dealing with sensitive areas of liberty, such as childbearing, a woman should not be compelled to give up the freedom to make decisions merely because the majority does not agree with her values."[111]

A woman's right to privacy may be exhumed, not from words written in the text of the Constitution, but rather from penumbras that emanate a zone of privacy from the specific provisions found in the Bill of Rights.[112] Though a specific boundary to this right of privacy has never been established, the parameters have been expanded to include the right to make personal decisions regarding medical treatment - more specifically the right to refuse medical care completely.[113] When one compares the application of the Undue Burden test to the Strict Scrutiny test, one can easily ascertain that the Strict Scrutiny test predominates, and that the expedited HIV testing measure fails miserably under such a stringent examination.

Undue Burden:

The Undue Burden test arose in the monumental decision of *Planned Parenthood of Southern Pennsylvania v. Casey*,[114] a recent Supreme Court decision that established a less stringent standard than the Strict Scrutiny test of *Roe v. Wade*.[115] To utilize the Undue Burden test, one must balance the important interests of the state against the personal liberty interests of the woman and ask whether the governmental action places a "substantial obstacle in the path of a woman."[116] Though the Undue Burden test is more flexible

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111 Madison, *supra* note 46, at 366

112 Kellie E. Lagitch, *supra* note 43, at 108.

113 *Id.*

114 505 U.S. 833 (1992) (questioning whether parental notification, spousal notification, and a twenty four-hour waiting period prior to getting an abortion is constitutional or places an unconstitutional undue burden on a woman's privacy interests).

115 410 U.S. 113 (1973). The court in *Roe*, determined not whether the abortion process itself was right or wrong, but rather that it was one that should be left to the individual rather than to the public. *See* Stanley Ingbar, *Rethinking Intangible Injuries: A Focus on Remedy*, *in* THE FIRST AMENDMENT 333, 335 (1996).

116 McMillion, *supra* note 23, at 238.

than the Strict Scrutiny test, it is uncertain whether the Undue Burden test is only applicable to the restriction of abortions.[117] Thus, until a broader analysis of the Undue Burden test can be applied to other privacy interests, it should not be used in the context of expedited HIV testing. However, even if the Undue Burden test could be applied here, the state could not succeed. Expedited HIV testing would be considered a substantial obstacle in a woman's autonomy rights, since "[e]very human being of adult years and sound mind has a right to determine what shall be done with his [or her] body."[118]

Strict Scrutiny:

A Strict Scrutiny analysis has been the prevalent analysis used in determining whether and when a state may intrude on a woman's privacy rights. As such, the Strict Scrutiny test may be utilized in determining whether expedited HIV testing is not essential and unconstitutional. The Strict Scrutiny test mandates that the state must possess a compelling interest and that this interest must be achieved through narrowly tailored means.[119] In other words, the test is whether the state has a genuine and obligatory purpose to interfere in the family realm, and whether these are the only means the state can employ to achieve its goal.

The Association to Benefit Children argues that prolonging an infant's life is a compelling interest and as such expedited HIV testing is able to withstand the Strict Scrutiny analysis. This group "continues to conclude that the possibility of giving an HIV-positive newborn the chance of a childhood, and perhaps of an adolescence as well [. . .] present[s] a compelling argument."[120] Though the arguments may be strong and persuasive, expedited HIV testing fails the Strict Scrutiny test.

The state has a compelling state interest in promoting the health and in securing the HIV status of newborns,[121] as early detection will help the state provide early treatment.[122] The state also has a compelling interest in preventing the transmissions of perinatal AIDS through mothers breastfeeding their newborns.[123] Expedited HIV testing during labor achieves this goal. However, the

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117 *Id.*
118 *In re Baby Boy Doe*, 632 N.E.2d at 330.
119 McMillion, *supra* note 23, at 238.
120 Contreras, *supra* note 4, at 27.
121 *See* Michael Close, et al., *Mandatory Premarital HIV Testing: Political Exploitation of the AIDS Epidemic*, 69 TUL. L. REV. 71, 105 (1994).
122 *See* McMillion, *supra* note 23, at 239.
123 Curnin, *supra* note 22, at 868.

means of testing during labor are not narrowly tailored to achieve this goal. First, the already recognized and accepted AIDS Baby Bill legislation yields the same result that expedited HIV testing is trying to accomplish. Under the AIDS Baby Bill legislation, every child is tested for the HIV virus immediately upon birth and every mother is made aware of her HIV status regardless of whether she wishes to know. Therefore, the AIDS Baby Bill already provides the necessary means to obtain the HIV status of every newborn and his or her mother, and to begin treatment as quickly as possible. Secondly, even if the mother's HIV status has been determined to be positive, there is no guarantee that the child has contracted the virus, and is not simply antibody positive. Third, if the mother's test yields a positive result, confirmatory tests must be ordered to determine whether there was a false positive.[124] Finally, even if a mother knows that she is HIV positive, there is still no foolproof method to prevent her from breastfeeding her child.[125]

Consequently, even though the state maintains a compelling interest in promoting the health and safety of the people, the state can accomplish its goals through other means. The state does not meet the second prong of the two-part Strict Scrutiny analysis for numerous reasons, and therefore, lacks the justification to supersede a woman's constitutional rights.

Conclusion:

Since the Undue Burden test has not been applied outside of the abortion realm, it cannot be utilized to justify expedited HIV testing. Thus, when looking into privacy interests, the only test to use is the Strict Scrutiny test. The state must have a compelling state interest and it must also employ narrowly tailored means to accomplish this goal. As explained above, expedited HIV testing fails to meet the second prong of the Strict Scrutiny test since it merely tests a mother's HIV status rather than an infant's.[126] Since a mother's and an infant's HIV status can already be determined through the previously established mandatory HIV testing of newborns, the expedited HIV testing of mothers in labor is unnecessary.

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124 N.Y.S. DEPT. OF HEALTH, *supra* note 2.

125 Even after counseling, prevention may only occur in the hospital. There is no method to determine what a mother does once she takes her child home.

126 Paul Frisman, *supra* note 47, at news.

PART IV: A WOMAN'S RIGHTS TO BODILY INTEGRITY & INFORMED CONSENT

> [Courts] have consistently refused to force one person to undergo medical procedures for the purpose of benefiting another person, even where the two persons share a blood relationship, and even where the risk to the first person is perceived as minimal and the benefit to the second person may be great.[127]

The right to informed consent can be broken down into three subcategories: (1) the right to informational privacy; (2) the right to bodily integrity; and (3) the right to informed decision making.[128]

Traditionally:

The question of who should have the final say over a patient's health was historically left to doctors, whom most presumed possessed the necessary medical knowledge that was essential to heal.[129] One of a doctor's primary goals was to instill in his patients an unquestionable faith in his omnipotent medical abilities so that patients would completely trust his ability to help and heal.[130] Presently, an uneasy tension exists between a physician's godlike role and a patient's interest in controlling the choices she makes regarding medical treatments and her body.[131] "It is one thing to trust physicians' ability to diagnose, to treat, and not to make matters worse unnecessarily. It is quite another to trust them to know what is for the patient's benefit [. . .] when choices are available which make matters both better and worse."[132]

Informed Consent and Bodily Integrity:

Critics believe that informed consent has become a ritual of signing papers.[133] They also assert that obtaining consent after informing the patient of his or her options is contradictory to medical education where a physician is trained to recommend what he or she believes to be the best option and to convince the patient to

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127 Madison, *supra* note 46, at 370.
128 Cooper, *supra* note 28, at 370. The latter two categories are discussed infra.
129 Michelle Wilcox DeBarge, *The Performance of Invasive Procedures by HIV-Infected Doctors: The Duty of Disclosure Under the Informed Consent Doctrine*, 25 CONN. L. REV. 991, 993 (1993) (addressing total faith in the physician as a prerequisite for healing).
130 *Id.*
131 *Id.*
132 *Id.* at 995.
133 *See id.* at 1002.

trust his recommendation.[134] Though the critics may be correct, these observations are insufficient to justify violating the legal rules that govern the doctrine of informed consent.

The elements of the doctrine of informed consent include a disclosure of information to a person who is competent to make a decision, who understands the information and the nature of the decision he or she would be making, and who voluntarily makes such a decision.[135] Informed consent also includes the right of bodily integrity.[136] Bodily integrity includes a "sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of the human government [. . .] to interfere with the exercise of that will."[137] Therefore, under the informed consent doctrine, a person has the right to refuse any and all medical treatment, and no medical care may be provided to a patient unless he or she knowingly, voluntarily and competently consents.[138]

Women who consent to an HIV test in the midst of labor are doing so neither knowingly nor voluntarily. Expedited HIV testing is only for those women who do not know if they are infected with the HIV virus, have not undergone HIV testing during the pregnancy, and are presently in labor.[139] The new regulation requires that women be counseled[140] about AIDS and the HIV virus, perinatal HIV transmission, antiretroviral therapy, mandatory new-

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134 *Id.*

135 Bruce J. Winnick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 15 (1991).

136 Goldstein, *supra* note 3, at 634.

137 Cooper, *supra* note 28, at 370.

138 Goldstein, *supra* note 3, at 634.

139 *See* N.Y.S. DEPT. OF HEALTH, *supra* note 2.

140 *Id.* (Attachment 10) Pre-test counseling for HIV should include:

- A brief explanation of the nature of AIDS and HIV related illness.
- A discussion of perinatal HIV transmission.
- A discussion of the effectiveness of antiretroviral therapy in reducing HIV transmission, including the likely effectiveness of abbreviated antiretroviral regimens.
- A discussion of newborn HIV testing, including:
  - All newborns in New York State are tested for HIV with the results reported to their mothers.
  - Mothers not HIV-tested during the current pregnancy must be offered the opportunity to consent to expedited HIV testing in the labor and delivery setting.
  - If the mother does not consent to expedited testing in labor, her newborn will be tested for HIV immediately after birth without consent.
- An explanation of the meaning of a positive maternal or newborn test result.
- An explanation of the meaning of the expedited test result, the chance of a false positive result (based on the specific algorithm used by the facility), and the necessity and importance of confirmatory testing.

born testing, and an explanation of the test results.[141] This counseling is supposed to result in women voluntarily and knowingly signing the informed consent form.[142] However, when a woman signs the consent form for expedited HIV testing while she is in labor, it is unlikely that she is making a voluntarily and knowing decision. It is more likely that she is signing the consent form because others have persuaded her to believe in the rightness of such a choice. The decision cannot be considered *knowing* because the information that a woman is given in a limited time is not adequate to ensure that she understands the full extent of her actions. There is also limited time in between labor pains for a woman to digest the plethora of information or its importance. Furthermore, a wide variety of economic, personal, and social factors may influence the nature of and the amount of information necessary to make sure that a woman is fully cognizant of her actions prior to consenting to the medical procedure.[143] Though urging a woman to undergo expedited HIV testing seems to be a beneficial task, it really places a vulnerable woman in a compromising position that she should not be faced with at a time when she is already fraught with fear and anxiety. If a woman has not consented to the test prior to the final moments of her pregnancy, then the purpose that the test is meant to serve is lost and there is no rational reason to perform the test. A woman will not receive the same counseling and monitoring that the test was meant to ensure, but instead will succumb to what the state believes is best for her rather than her own personal feelings on the issue.

Though the test is not required, it is far from voluntary. Many women still maintain the preconceived notion that doctors know all. A woman about to give birth is in fact being told that regardless of her well thought out and researched choices, she is going to be made aware of her HIV status immediately upon the birth and testing of her newborn, and therefore she should just accept the test at that precise moment. The decision will not be voluntary because of societal pressures and the need to fit in. If an expectant mother previously withheld her consent, she may be faced with the belief that society disapproves of her decision and may eventually surrender to societal pressure and a test that she is against. Finally, "[labor] is a psychologically vulnerable moment for the mother."[144]

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141 *See* N.Y.S. DEPT. OF HEALTH, *supra* note 2.

142 *See id.*

143 Cooper, *supra* note 28, at 383.

144 Talan, *supra* note 69, at A7 (citing Mayris Webber, epidemiologist at Montefiore Medical Center).

These factors, taken together with the emotionally charged atmosphere and the fact that sometimes "a voluntary program can itself exert a great deal of pressure," will render a woman's consent to just about anything.[145] It would not be unusual for health care personnel to procure written consent from a patient who is not in a physical or emotional condition to weigh the proposal rationally.[146] Therefore, it is necessary to inquire into the nature and the quality of the consent granted.[147]

The court has allowed the state to intercede and to waive the informed consent requirements in cases "where there is a proven compelling need to protect the public health."[148] The state also has a legitimate interest in protecting and preserving human life, which in certain instances may permit the state's intervention in unwanted medical care.[149] If a woman was not pregnant and refused medical treatment, then there would be nothing that the state could do to interfere.[150] In cases of pregnant women, the state asserts that it should have the power to override a woman's decision because there is a potential life at stake. This is not so. No person, however, should be compelled to undergo an intrusion on his or her bodily integrity for the benefit of another person.[151] A woman's rights do not vanish simply because she is carrying another life.[152] "Surely [. . .] a fetus cannot have rights [. . .] superior to those of a person who has already been born."[153]

Implied Consent:

> [Any] person who induces any other person to [. . .] consent [. . .] by false or fraudulent representation or pretense that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person's free will [. . .] is [subject to] punish[ment].[154]

Though, this Note is not concerned with punishing physicians or hospital personnel that urge women to test for HIV, the method

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145 *Id.*
146 Cooper, *supra* note 28, at 385
147 *Id.*
148 N.Y.S. DEPT. OF HEALTH, *supra* note 2.
149 Halem, *supra* note 12, at 505.
150 *Id.* at 506.
151 Sangree, *supra* note 24, at 365.
152 *Id.*
153 *Id.*
154 Patricia Falk, *Rape by Fraud and Rape by Coercion,* 64 BROOK. L. REV. 39 (1998). *Rape by Fraud* deals with concepts underlying rape laws, but the same principles of coercion may apply to expedited HIV testing in respect to the doctrine of implied consent.

of achieving consent is important. A woman in labor is likely in fear of the process of giving birth. She has heard the stories of possible mishaps and hopes that every precaution is taken to make sure that her baby is born safe and healthy. However, telling a woman in labor about HIV statistics, claiming an extreme need for her to take an HIV test, and urging her to sign on the dotted line, is not aiding her in her decision. Rather, to do so would be to play on her fears to the point that she is *induced* to act, where she loses her free will and her thinking is no longer her own. This type of consent is not implied consent. It is an unfair pressure that hospital personnel use to influence women in vulnerable positions.

Some may argue that since the baby is going to be tested immediately after birth, the woman should just succumb to the testing while she is in labor. Others may claim that the decision to bring an innocent life into the world equals implied consent to permit all necessary procedures to give this child the best chance he or she has in succeeding on his or her own. Expedited HIV testing cannot fall into this category because of the potentially grave psychological and social significance an HIV positive result may yield.[155] Implied consent allows the state to engage in mandatory HIV testing of newborns. The doctrine may be adopted in certain emergency situations.[156] Expedited HIV testing is not an emergency measure. The state has the opportunity to get the same data and to take action against the communicable disease by utilizing other means and exercising just a little patience.

Coercion:

"'Without consent' includes instances in which the victim was compelled to submit because of [. . .] coercion."[157] Coercion may occur when a person feels a loss of control over his or her decision-making ability through the use of threats, pressure, deception or persuasion on the part of another person.[158] Coercion is a subjective idea and what may be perceived as coercion by one may not be a problem for another.[159] When people believe they have made a voluntary determination, the idea of coercion does not enter one's thoughts.[160] Nonetheless, what an outsider may think to be an or-

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155 *Id.* at 367.

156 *See id.* at 363. Mandatory HIV testing of newborns can also be used in cases where the mother is incompetent and cannot make an informed decision.

157 Falk, *supra* note 158.

158 Bruce J. Winik, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1145 (1997).

159 *Id.* at 1146.

160 *Id.* at 1147.

dinary procedural occurrence, the patient may view as coercion.[161] Thus, a doctor or a counselor seeking to obtain informed consent from a patient in a highly excitable state must impart knowledge without attempting to impart his or her own opinion.[162]

Therefore, informed consent and the right to bodily integrity are two important aspects of a medical procedure. A woman has the right to know that she is the one who will ultimately determine what will happen to her body and that doctors do not have an omnipotent power over her judgment. A woman does not have to undergo any life-altering test simply because the physician and the state believe it to be in her and the child's best interest. A woman is entitled to all information, up-front and truthfully. Even more pointedly, she should be able to refuse any test she does not desire.

Conclusion:

The New York State Health Department "requires" that all pregnant women and any women whose HIV status is not known "be tested at the time of their delivery."[163] Thus, physicians in New York "no longer have a choice" in whether to convince women to submit to an HIV test,[164] and women are the ones feeling the brunt of their persuasion. Women are not allowed to make a voluntary, knowing or competent decision. They are in fact subject to the pressure of physicians who are mandated by the state to coerce them into taking a test that they may have previously refused. A woman has the right to bodily integrity and a trusted physician should not attempt to persuade her that taking an unnecessary test would be in her best interest.

PART V: EXPEDITED HIV TESTING AS A VIOLATION OF A WOMAN'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES

The purpose of the Fourth Amendment is to "guarantee the privacy, dignity, and security of persons against certain arbitrary and invasive acts of officers of the Government or those acting at their direction."[165] Thus, hospital personnel, at the direction of the New York State Department of Health, questioning and urging women in the throes of labor to submit to expedited HIV testing would be at risk of violating the Fourth Amendment since this com-

161 *Id.* at 1146.
162 Sangree, *supra* note 24, at 369.
163 *"There's No Excuse," supra* note 27, at 121.
164 *Id.*
165 Renna, *supra* note 53, at 443.

pulsion may lead to unconstitutional invasions and searches of pregnant women's blood. Traditionally, a search required probable cause so as to protect a person and to make sure that if his or her papers, house, effects, or person was to be searched, it was because there was probable cause to do so.[166] However, the traditional notion of probable cause was shortly replaced by the reasonable suspicion standard, and today, in certain instances, the Special Needs Doctrine prevails.[167] In the present scenario, hospital personnel, acting on behalf of the state that they were licensed to practice in, would claim the intrusion upon the mother was justified as a special need, to fight the spread of the disease. However, this argument is lacking and would not withstand a Fourth Amendment challenge.

Intrusion on the person:

Subjecting a woman to an unwanted blood test may constitute a substantial intrusion on her person since a syringe must break the skin and is inserted deep into her vein in order to withdraw her blood.[168] There is always a risk of human error.[169] For example, the syringe could strike a nerve, paralyzing her forever, or the syringe may be contaminated, thereby causing an infection.[170] Finally, there is the possibility that the syringe may be reused rather than discarded and that the first patient for whom the syringe was used may have had a deadly disease, such as HIV, thus exposing the second patient to the the same illness.[171] Many may remember that during a publicized demonstration of a flu shot administration, the physician reused the syringe he had previously used on one of the show's hosts to inject the other host, causing an upheaval for the potential risk of HIV infection for the second host.[172] There remains a likely possibility of a similar result occurring in instances where hospital personnel rushing to learn of a person's HIV status at a time of turmoil and prior to a woman giving birth, do not properly discard of infected needles.

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166 *See* Sean Anderson, *Individual Privacy Interests and The "Special Needs" Analysis For Involuntary Drug and HIV Tests*, 86 CALIF. L. REV. 119, 156 (1998).

167 *See id. Individual Privacy* discusses the transition from the need for probable cause in order to conduct a search to reasonable suspicion, i.e. the belief that criminal activity is afoot

168 Close, et al., *supra* note 124, at 78.

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

Though some may argue that a blood test does not constitute a true search in the sense of the Fourth Amendment, this argument is unsubstantiated. The "United States Supreme Court previously ruled that '[t]he requested blood test requiring physical penetration for the removal of bodily fluid and subsequent chemical testing leading to the revelation of private medical information is [. . .] a search.'"[173]

Proponents for expedited HIV testing will argue that during labor, blood is often drawn for various other testing purposes and that a woman is consenting to these tests with the same state of mind with which she consents to the HIV test. The proponents therefore argue that the result is a minimal invasion to the patient's body. However, the difference between the standard blood tests and an HIV test is that while the former is necessary, the latter is completely unnecessary. A woman's HIV status will be known shortly after the baby is born according to Article 27-F of the public health law which mandates HIV testing of all newborns,[174] so that no other HIV testing is necessary.

Special Needs doctrine:

One approach to getting around the Fourth Amendment is through the Special Needs doctrine. The Special Needs standard is a balancing test where the government's interest behind the questionable testing is weighed against the individual's expectation of privacy.[175] This type of analysis is said to afford the courts too much discretion in determining which interest should prevail.[176] Originally, the principle behind the Special Needs Doctrine was used to approve warrantless searches of property where there was a certain level of suspicion of drug or alcohol activity.[177] The courts have thus expanded this rationale to other areas such as government imposed blood and urine tests.[178] These tests target groups such as accused and convicted sex offenders, public employees, private employees in regulated industries, persons involved in traffic accidents, convicted prostitutes, and those involved in physical struggles with police officers.[179] The rationale behind the warrantless search is that where the evidence is easily removed or where

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173 Susan Hatcher, et al., 25 AM. J. CRIM. L. 169, 172 (1997).
174 Lagitch, *supra* note 43, at 107.
175 *See* Sylvia Mayer Baker, *HIV: Reasons to Apply Traditional Methods of Disease Control to the Spread of HIV*, 29 HOUS. L. REV. 891, 905 (1992).
176 Anderson, *supra* note 170, at 119.
177 *Id.* at 120.
178 *Id.* at 121.
179 *Id.*

there is not enough time to obtain a warrant prior to a search, the state has the right to conduct a search without a warrant.[180]

Expedited HIV testing should not fall within the Special Needs Doctrine. Though the government has a compelling interest to prevent the spread of a communicable disease, this interest should not predominate over a woman's right to privacy. Birth is not a situation where the lives of hundreds will be saved by determining one woman's HIV status. Determining an expectant mother's HIV status during labor only concerns the life/lives of the unborn child/children whose status will still remain unknown. Drawing a person's blood is an intrusionary measure whereby the skin is penetrated in an effort to find a vein.[181] Urging women to submit to an unwanted test at a time when they may not be in full control of their decision making power due to the excruciating pain of labor and the fear of childbirth itself is similar to taking away their right to make an informed choice, and thus constitutes a search without consent. Rather then characterizing them as innocent individuals seeking medical care, this lack of choice analogizes pregnant women to those arrested for sex crimes or prostitution, where there is no need for a search warrant or probable cause to seize their blood.

Urine analysis: an alternative to intrusive HIV testing:

According to researchers at the John Hopkins School of Public Health, testing by urine samples is "an accurate, safe, and more acceptable way to screen" for HIV.[182] A recent study was conducted in Uganda where 222 adults between the ages of fifteen and fifty-nine submitted both blood and urine samples during the same visit.[183] The urine samples were divided and half were tested while fresh, and the other half were refrigerated and sent to John Hopkins for testing.[184] The results of the study showed overwhelming accuracy. Out of the ninety-six positive results obtained through the testing of the blood, ninety-two results or 95.8% of the refrigerated urine samples tested positive.[185] All of the HIV negative re-

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180 *See* Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989). *See also* Camera v. Municipal Court of the City and county of San Francisco, 387 U.S. 523, 533 (1967) (stating warrantless search is permitted where the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search).

181 Baker, *supra* note 179, at 905.

182 Charles W. Henderson, *Urine Testing Accurate and More Acceptable Way to Screen for HIV: Statistical Data Included,* AIDS WEEKLY, Nov. 15, 1999, at NA.

183 *Id.*

184 *Id.*

185 *Id.*

sults obtained through the blood testing also came up negative in the refrigerated urine samples, meaning that the urine samples yielded 100% accuracy for the negative HIV status.[186] In the analysis of the fresh urine samples, there was 100% exactness with the HIV positive blood samples and 97.7% accuracy with the blood specimens found to be HIV negative.[187] The difference between the results of the fresh versus the refrigerated urine experiments could merely be due to chance.[188]

Urine analysis is a beneficial approach that should be further explored. First, it is more advantageous over blood screening since it does not involve the use of needles.[189] As explained earlier, drawing blood can constitute an unconstitutional search in violation of the Fourth Amendment, whereas giving a urine specimen must be voluntary and knowing and thus cannot be considered intrusive. Second, testing a person's urine is a safer alternative to testing someone's blood.[190] Urine does not actually contain the HIV virus that may be transmitted to health care workers that handle the samples.[191] Third, it is cheaper and easier to dispose of urine than it is to dispose of potentially infectious blood samples.[192] Finally, when given a choice of whether to give blood samples or urine samples for a follow-up collection, 14.3% more of the study members opted to provide urine samples.[193] In a survey at a New York Family Planning Clinic, 21% of 180 women refused HIV testing because they did not wish to have their blood drawn.[194]

The results of the urine study exemplify the notion that means less intrusive than drawing blood exist to determine an expectant mother's HIV status. Women should not be subjected to an intrusive and unconstitutional search when a simple urine specimen will yield the same and possibly more accurate results more quickly.

Conclusion:

When analyzing the Fourth Amendment, three inquiries must be made.[195] The first inquiry should be whether or not the action is attributable to the state.[196] The second inquiry is whether the

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186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.*
194 *Id.*
195 Close, Gamrath, Hopkins, *supra* note 124, at 107
196 *Id.*

action is one that may be considered a search or seizure.[197] Finally, the last inquiry is whether the action is one that is reasonable.[198] The action in question, expedited HIV testing, is attributable to the state. The state has mandated hospital personnel to ask, and impress upon the patients, the need for the woman's consent to HIV testing. The penetration of one's body in order to yield bodily fluid may be considered a search under the Fourth Amendment.[199] However, this search and seizure is far from reasonable. New York State already has a mandatory HIV testing procedure for newborns[200] and this testing yields the same response as does testing the mother. Both expedited HIV testing and the mandatory testing of newborns indicate a mother's HIV status, but expedited HIV testing does not offer any further insight on the newborn's condition. Expedited HIV testing only allows the medical personnel to learn whether or not the mother is HIV positive. Expedited HIV testing does not indicate whether the baby is HIV positive. At best, expedited HIV testing shows that the baby *may* have seropositive antibodies even though the child may not actually be infected with the HIV virus.[201] Also, testing for the mother's HIV status is only beneficial if this test is confirmed either by further testing of the mother or by awaiting the result of the mandatory testing of the newborn.[202] Finally, less intrusive means than drawing blood, like a urine analysis, exist. Thus, coercing a woman to yield to an expedited HIV test would be considered a violation of her Fourth Amendment rights.

PART VI: RECENT TRENDS FOLLOWING THE ENACTMENT OF EXPEDITED HIV TESTING

Since expedited HIV testing of pregnant women became effective in New York State on August 1, 1999, a few issues have arisen. First, a similar HIV testing provision went into effect in Connecticut as of October 1, 1999.[203] Connecticut's law calls for HIV testing of the mother, and if the mother refuses to undergo this test, than

197 *Id.*
198 *Id.*
199 Renna, *supra* note 53, at 443.
200 100 QUESTIONS AND ANSWERS ABOUT AIDS/HIV (1998) (giving basic information about AIDS and HIV). *See also* Frisman, *supra* note 47, at news (stating that HIV testing of newborns is troublesome, since the test really determines the mother's HIV status rather than the infants).
201 Renna, *supra* note 53, at 413.
202 *See* N.Y.S. DEPT. OF HEALTH, *supra* note 2 (attachment 10).
203 *H.I.V. Tests for Mothers of Newborns Challenged,* N.Y. TIMES, Oct. 20, 1999, at B10. The Connecticut law is a combination of the AIDS Baby Bill Legislation and the expedited HIV testing.

the law requires that the infant be tested for the virus.[204] Second, following the enactment of the Connecticut law, the Connecticut Hospital Association filed a lawsuit in Federal District Court[205] claiming that forceful mandatory HIV testing is a violation of a woman's and an infant's Fourth Amendment rights to be free from unreasonable searches.[206] The Connecticut Hospital Association also asserts that the law damages the doctor-patient relationship and that it may cause women to stop seeking necessary medical care.[207] The overwhelming concern is that the provision created a "coercive environment."[208] Finally, the most prevalent problem is that the HIV cocktail, i.e. the combination of drugs given as a chemical treatment for the HIV virus, does not seem to be as effective as the medical society had anticipated.[209]

Scientists have recently discovered that "HIV not only remains hidden and latent in the body, it continues to reproduce and spread within seemingly successfully treated patients."[210] Highly Active Antiretroviral Therapy ("HAART") is the drug cocktail that has become standard anti-HIV therapy.[211] HAART consists of two or more potent anti-HIV drugs like protease inhibitors.[212] Although HAART was once believed to be a possible cure for AIDS, scientists now believe that HAART does not cure AIDS.[213] In actuality, HAART merely hides the HIV virus while the virus continues to multiply and spread.[214] HAART masks the disease in such a manner that HIV levels are undetectable in the bloodstream,[215] making an incurable disease seemingly more manageable.[216] HAART cannot eradicate the HIV virus completely out of a person's system and once a person begins the intensive drug therapy cocktail he or she will have to continue to take these drugs every day for the rest of his or her life.[217] However, once drug intake stops, the viral levels quickly rebound since the virus has been alive

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204 *Id.*
205 *Id.*
206 *Id.*
207 Frisman, *supra* note 47, at news.
208 *Id.*
209 *See* Laurie Garrett, *HIV Grows Despite Drug Treatment, Study Shows 'Cocktail' Doesn't Work as Hoped*, NEWSDAY, Nov. 3, 1999, at A33.
210 *Id.* at A33.
211 *Id.*
212 *See* Kinetz, *supra* note 41, at 37.
213 *See* Garrett, *supra* note 213, at A33.
214 *Id.*
215 *Id.*
216 Kinetz, *supra* note 41, at 37.
217 Laurie Garnett, *Change in Guidelines for HIV*, NEWSDAY, January 17, 2001, at A22. People must be prepared to live taking these drugs for twenty to thirty years, in some cases even longer. They must also be prepared for the many complications that may also arise.

and growing at all times in the bloodstream.[218] Problems other than the necessity of continuous treatment have arisen. These include the toxicity of the drugs and the body's resistance.[219]

Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, stated: "[i]t's clear we're not going to eradicate the virus with the drugs we have now [. . .] And we're starting to see a greater and greater realization of the accumulation of other side effects."[220] What the drug cocktail does not do is make the disease disappear and though it remains hidden, the HIV virus can still be conveyed to others.[221] However, once the patient discontinues use of the drug, the viral levels quickly rebound, since the virus has been alive and growing at all times in the bloodstream.[222] So instead of being the cure that society has hoped for, HAART causes HIV to linger latent in the blood, resting in T-cells that are untouchable by drugs that are supposed to counteract rather than cause the virus to remain invisible.[223] To exacerbate matters further, HAART carries with it numerous side effects. In the past, these side effects included diabetes, cholesterol-associated heart and liver diseases, and a host of cancers.[224] Today, side effects from the HAART cocktail include death of hip bone tissue, neuropathy or loss of nerve sensations, kidney failure, skin rashes, pancreatic failure, severe anemia, liver dysfunctions that lead to transplants, and near-instantaneous death due to lactic acid build-up.[225] The hope is that in three to four years the analysis of the toxicity of these drugs will be revealed causing there to be a vast improvement in drug therapy to fight HIV.[226] HAART cannot be a life-long treatment because new research demonstrates that it would take seventy years for HAART to be completely effective and to eradicate all the HIV in a person's body.[227] Unfortunately prior to being free from the virus, a person's body will succumb to drug

218 *See id.* It is true that the virus may lurk in a latent state in the bloodstream for more than 60 years, but HAART is working against scientists because it is putting the immune system to sleep.

219 *See id.*

220 *Id.*

221 NEW TREATMENTS FOR HIV: A GUIDE FOR PEOPLE WITH HIV (1998).

222 *Id.*

223 Kinetz, *supra* note 41, at 37.

224 *See* Laurie Garrett, *Sneak Attack on HIV? Starting, Then Stopping Treatment is Seen to Make the Virus Vulnerable*, NEWSDAY, Feb. 15, 2000, at C3. These ailments have been observed in patients who have been taking the HAART drug combination therapy for about five years.

225 *Id.*

226 *See id.*

227 *See id.*

resistant forms of the virus.[228] Thus, HAART is not a drug that can be taken for a lifetime.[229]

Other significant drug related problems are sure to arise before an actual cure is discovered. The future holds the prospect of three new drugs.[230] These drugs are supposed to be more convenient, more potent, and at least at the onset, these drugs are supposed to be less toxic than the choices now available.[231] However, "for 95 percent of HIV-positive people worldwide, these advances are meaningless; only a vaccine will stop the spread of the disease."[232]

Effects since the enactment of expedited HIV testing:

New statistics have arisen since the enactment of expedited HIV testing which show that 84,200 pregnant women have been tested since the law went into effect as of August 1, 1999.[233] Over 13,500 women entered hospitals in the midst of labor to discover that they *need* to be tested.[234] Of that number, 44 positive results were determined, and upon confirmation by the Western Blot test, only 26 of those positives were actually true positives.[235] Seventeen of those positives were true negatives, meaning that the women and their children were treated for HIV although they were not infected.[236]

A baby may spend the first 48 hours of his or her life taking unnecessary AZT treatments.[237] One of the major side effects of such a regimen is anemia. "'Three-quarters of the babies exposed to AZT would not have become infected,' even if their mothers were positive for the virus."[238] Doctors consider anemia in uninfected children to be a small price to pay to benefit those children who would be infected.[239] Although anemia is one of the short-term side effects, and though doctors believe that a few days or even weeks of anti-retroviral treatment for a child who does not need it will not be overly detrimental, doctors do not know the long term consequences of exposing a healthy child to an anti-re-

228 *See id.*
229 *Id.*
230 *Id.*
231 *Id.*
232 *Id.* at C3
233 Talan, *supra* note 69, at A40.
234 *Id.*
235 *Id.*
236 *Id.*
237 *Id.*
238 *Id.* at A7.
239 *Id.*

troviral treatment.[240] AZT may damage the mitochondria, or the energy packets within each cell, that are vital to the health of each cell.[241] It has in fact recently been noted that two babies died as a result of AZT induced destruction of their mitochondria.[242] Mitochondria destruction is a developing problem far more serious than anemia, one that should not be so easily discarded as a minor complication.

Mindful that a cure does not exist, society and legislators should work to perfect individual counseling, societal awareness programs, and raise money for research, rather than enact laws that are unnecessary and do not serve a legitimate state purpose. Once the Federal District Court determines that the legislation violates an individual's constitutional rights, many more lawsuits will follow. Overall, if hospitals continue to use SUDS in the final stages of pregnancy and as more states seek mandatory testing, the future will bring to light many people's fears including an even greater percentage of false positive HIV results.[243]

PART VII: CONCLUSION

"Non-consensual HIV testing violates privacy rights by stripping individuals of the ability to decide what will be done with their bodies."[244] Even with advancements and new technology in the fight against HIV, it all comes down to the overwhelming fact that "new treatments are not a cure, they can extend life and improve health." In the end, the answer is always the same: these infants who contract HIV from their mothers are not going to live a long and normal life. For this reason, it is unfair to coerce a woman to undergo an expedited HIV test that violates her right to privacy, her right to give informed consent, and that constitutes a search in violation of her Fourth Amendment rights.

It is unarguably true that the state has a compelling interest to safeguard health issues, but the means by which the state is attempting to employ (expedited HIV testing) are not narrowly tailored to the issue at hand. The state has already enacted a law stating that all newborns must be tested for the HIV virus and the result of this test must be disclosed to the mother.[245] Thus, the

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240 *Id.* at A40.

241 *Id.*

242 *See* Laurie Garrett, *Brainstorm on HIV in Africa: Use of Drug Treatments at Issue,* NEWSDAY, Feb. 3, 2000, at A30.

243 *See id.*

244 Laura Duncan, *Suit Charges AIDS Test Done Without Consent,* 139 CHI. DAILY L. BULL. 2 (1993).

245 N.Y. PUB. HEALTH L. § 2701 (McKinney 1999).

state has no reason to take away a woman's authority in making the ultimate decision, HIV test or no HIV test, because this law in actuality tests the mother's status and not the child's.

Though the state proclaims expedited HIV testing is a necessary step in fighting this deadly disease, the state is misinformed, or rather it is misinforming those whom it wishes to persuade. This test will not add to the already established mandatory newborn testing. Rather, all it will do is take away a woman's rights to privacy, informed consent, and to be free from bodily intrusion by compelling her to submit to a life sentence when she is not in the frame of mind to understand the ramifications of a decision made during a momentary weakness. The consequences for a woman who consents to an expedited HIV test that for some reason she never consented to before and that she never believed to be a necessary measure, are inconceivable. In a blink of an eye, a woman's whole world can come crumbling down around her all because the state, under the guise of hospital personnel, asserts that it is in her best interest to sign a piece of paper and submit to a physical intrusion of her body without providing the appropriate counseling.

In enacting expedited HIV testing, the state may pretend to be acting in a woman's and her child's best interest. In actuality, no other explanation for expedited HIV testing exists except that the state is acting to protect itself by making a proclamation to society that it is doing every thing possible to battle the spread of the HIV virus. The state is attempting to take action so as not to feel completely helpless against a disease that it is acting to combat, a disease that it does not understand, a disease that no matter what the state tries to accomplish, it cannot control and it cannot cure. Unfortunately, the action it is currently taking is unconstitutional.