

# MANDATORY HIV TESTING OF PREGNANT WOMEN: PUBLIC HEALTH OR PRIVACY VIOLATION?

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## INTRODUCTION

According to the Centers for Disease Control and Prevention ("CDC"), approximately 1.1 million people in the United States are living with Human Immunodeficiency Virus ("HIV"),<sup>1</sup> and more than 15% of those people are unaware of their infection.<sup>2</sup> In the year 2011 alone, an estimated 49,273 people in the U.S. were diagnosed with HIV infection and 32,052 were diagnosed with Acquired Immunodeficiency Syndrome ("AIDS").<sup>3</sup> In 2010, more than 15,500 people with an AIDS diagnosis died.<sup>4</sup> Overall in the U.S., about 1.2 million people have been diagnosed with AIDS and approximately 636,000 people with an AIDS diagnosis have died.<sup>5</sup>

HIV compromises a person's immune system and reduces the infected person's ability to combat disease and infection.<sup>6</sup> No diagnosis of HIV can be made without testing.<sup>7</sup> Therefore, HIV testing is the only method to initiate the appropriate medical treatment, such as antiretroviral therapy, for individuals infected with HIV/AIDS. Because medical treatments that lower the HIV viral load might also reduce the risk of transmission to others,<sup>8</sup> early detection can improve

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1 See *About HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/whatishiv.html> (last visited Jan. 14, 2015) (explaining that HIV is spread through body fluids that affect specific cells of the immune system, called CD4 cells or T cells, and, over time, HIV can destroy so many of these cells that the body can no longer fight off infections and disease, resulting in AIDS).

2 CTRS. FOR DISEASE CONTROL & PREVENTION, *HIV IN THE UNITED STATES: AT A GLANCE 1* (Nov. 2013) [hereinafter *HIV IN U.S. FACT SHEET*], [http://www.cdc.gov/hiv/pdf/statistics\\_basics\\_factsheet.pdf](http://www.cdc.gov/hiv/pdf/statistics_basics_factsheet.pdf).

3 *Id.*; see also *About HIV*, *supra* note 1 (explaining that AIDS is a disease that is acquired through contact with a disease causing agent, in this case HIV, which weakens the immune system and has a group of symptoms that indicate or characterize a disease).

4 *HIV IN U.S. FACT SHEET*, *supra* note 2, at 1.

5 *Id.*

6 *HIV Basics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/index.html> (last updated Feb. 1, 2016).

7 U.S. Dep't of Health & Human Servs., *What Does "HIV-Positive" Mean?*, AIDS.GOV, <https://aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/overview/newly-diagnosed/index.html#manageable> (last updated Apr. 10, 2015).

8 Thomas C. Quinn et al., *Viral Load and Heterosexual Transmission of Human Immunodeficiency Virus Type 1*, 342 *NEW ENG. J. MED.* 921, 921-29 (2000) (detailing the results of a study that indicated that the viral load is the chief predictor of heterosexual transmission of HIV-1).

health, prolong life, and greatly lower HIV transmission.<sup>9</sup> In particular, HIV testing during pregnancy is important because antiretroviral therapy can improve a mother's health and greatly reduce the chance that an HIV-infected pregnant woman will pass HIV to her infant before, during, or after birth.<sup>10</sup>

HIV was first identified in 1981, and the HIV antibodies<sup>11</sup> test became available a few years later.<sup>12</sup> By 2002, an estimated 38–44% of all adults had been tested for HIV.<sup>13</sup> However, approximately one in five individuals (or 240,000 people) living with HIV did not know they were infected.<sup>14</sup> Early testing is critical not only for treatment purposes, but to stop individuals from unwittingly passing the virus to others.<sup>15</sup> And since HIV is a deadly disease that has no cure—only on-going treatment can be provided—prevention is crucial.<sup>16</sup>

As an article from Bernard Branson and his colleagues, in the *Morbidity and Mortality Weekly Report*,<sup>17</sup> explains: “The number of children reported with AIDS attributed to perinatal HIV transmission peaked at 945 in 1992 and declined 95% to 48 in 2004, primarily because of the identification of HIV-infected pregnant women and the effectiveness of antiretroviral prophylaxis in reducing mother-to-child

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<sup>9</sup> See *Testing*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/testing.html> (last updated June 30, 2015).

<sup>10</sup> *Id.*; see also Bernard M. Branson et al., *Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings*, 55 *MORBIDITY & MORTALITY WKLY. REP.* 1, 9 (2006) (“To promote informed and timely therapeutic decisions, health care providers should test women for HIV as early as possible during each pregnancy.”).

<sup>11</sup> “An antibody is a protein produced by the body's immune system when it detects harmful substances, called antigens.” *Antibody*, A.D.A.M. MED. ENCYCLOPEDIA, <http://www.nlm.nih.gov/medlineplus/ency/article/002223.htm> (last visited Jan. 14, 2015).

<sup>12</sup> U.S. Dep't of Health & Human Servs., *A Timeline of AIDS*, AIDS.GOV, <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline/> (last visited Jan. 14, 2015).

<sup>13</sup> Branson et al., *supra* note 10, at 4.

<sup>14</sup> *New Hope for Stopping HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vitalsigns/HIV/testing/index.html> (last updated Nov. 29, 2011).

<sup>15</sup> See Charles Ornestein, *California Officials Track New HIV Cases*, L.A. TIMES, July 1, 2002, at A3.

<sup>16</sup> See U.S. Dep't of Health & Human Servs., *What is HIV/AIDS?*, AIDS.GOV, <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/what-is-hiv-aids/> (last updated Apr. 29, 2015).

<sup>17</sup> See *About the Morbidity and Mortality Weekly Report (MMWR) Series*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/mmwr/about.html> (last updated July 18, 2016) (describing the *Morbidity and Mortality Weekly Report* as the “voice of the CDC”).

transmission of HIV.”<sup>18</sup> Transmission of HIV from mother-to-child occurs during pregnancy, labor, delivery, or breastfeeding.<sup>19</sup> Perinatal transmission rates can be reduced to less than 2% with universal screening of pregnant women in combination with prophylactic administration of antiretroviral drugs,<sup>20</sup> scheduled cesarean delivery when indicated,<sup>21</sup> and avoidance of breast feeding.<sup>22</sup>

HIV testing emerged in 1985, during immense apprehension and great ambiguity regarding the infection among health care professionals.<sup>23</sup> At the time, professional opinion was divided regarding the value of HIV testing and whether HIV testing should even be encouraged, since no consensus existed regarding whether a positive test predicted transmission to sex partners or from mother to infant.<sup>24</sup> Between 1992 and 1993, the proportion of people who first tested positive for HIV less than a year before receiving a diagnosis of AIDS was 51%.<sup>25</sup> Between 1993 and 2004, this proportion declined only modestly to 39%.<sup>26</sup> Persons tested late in the course of their infection were more likely to be Black or Hispanic and to have been exposed

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<sup>18</sup> Branson et al., *supra* note 10, at 2, 4.

<sup>19</sup> *Prevention of Mother-to-Child Transmission (PMTCT) of HIV*, AVERT, <http://www.avert.org/prevention-mother-child-transmission-pmtct-hiv.htm> (last visited June 1, 2015).

<sup>20</sup> PANEL ON TREATMENT OF HIV-INFECTED PREGNANT WOMEN AND PREVENTION OF PERINATAL TRANSMISSION, RECOMMENDATIONS FOR USE OF ANTIRETROVIRAL DRUGS IN PREGNANT HIV-1-INFECTED WOMEN FOR MATERNAL HEALTH AND INTERVENTIONS TO REDUCE PERINATAL HIV TRANSMISSION IN THE UNITED STATES (2015), at A-1, <http://aidsinfo.nih.gov/ContentFiles/PerinatalGL.pdf>; see also Ellen R. Cooper et al., *Combination Antiretroviral Strategies for the Treatment of Pregnant HIV-1 – Infected Women & Prevention of Perinatal HIV-1 Transmission*, 29 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 484, 487–89 (2000).

<sup>21</sup> Int'l Perinatal HIV Group, *The Mode of Delivery and the Risk of Vertical Transmission of Human Immunodeficiency Virus Type 1: A Meta-Analysis of 15 Prospective Cohort Studies*, 340 NEW ENG. J. MED. 977, 977–87 (1999); Am. Coll. of Obstetricians & Gynecologists, *Scheduled Cesarean Delivery & the Prevention of Vertical Transmission of HIV Infection*, 73 INT'L J. GYNECOLOGY & OBSTETRICS 279, 280 (2000).

<sup>22</sup> *Guidelines on HIV & Breastfeeding 2010*, WORLD HEALTH ORG. 1 (2010), [http://apps.who.int/iris/bitstream/10665/44345/1/9789241599535\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/44345/1/9789241599535_eng.pdf).

<sup>23</sup> See U.S. Dep't of Health & Human Servs., *supra* note 12, at year 1985.

<sup>24</sup> See generally ASS'N OF ST. & TERRITORIAL HEALTH OFFICIALS FOUND., *GUIDE TO PUBLIC HEALTH PRACTICE: HTLV-III SCREENING IN THE COMMUNITY* (ASTHO Foundation 1985).

<sup>25</sup> Pascale M. Wortley et al., *HIV Testing Patterns: Where, Why, and When Were Persons with AIDS Tested for HIV?*, 9 AIDS 487, 487–88 (1995).

<sup>26</sup> Ornstein, *supra* note 15.

through heterosexual contact.<sup>27</sup> Also, 87% received their first positive HIV test result at an acute or referral medical care setting and 65% were tested for HIV antibodies because of illness.<sup>28</sup>

Early detection and treatment of HIV in pregnant women is essential to reduce perinatal transmission of HIV.<sup>29</sup> Mandatory HIV testing of pregnant women is beneficial not only to children of the women tested, but to society as whole, both economically and socially.<sup>30</sup> This Article will examine the historical development of HIV testing policies and recommendations, particularly those pertaining to pregnant women. Additionally, case law and legal doctrines that support mandatory HIV testing of pregnant women will be examined, and, in particular, California's adoption of the CDC's 2006 recommendations for HIV testing will be reviewed. Lastly, current developments in antiretroviral research will be discussed.

## I. NATIONAL GUIDELINES

In 1987, the United States Public Health Service ("USPHS") issued guidelines making HIV counseling and testing priorities in the preventive strategy for persons most likely to be infected with HIV or who practiced high-risk behaviors.<sup>31</sup> The guidelines recommended "routine" testing of all persons seeking treatment for STDs, regardless of health care setting.<sup>32</sup> Routine was defined as adhering to a policy to consistently provide these services to all applicable patients, after informing them that HIV counseling and testing would be conducted.<sup>33</sup> In 1993, the CDC extended its recommendations for

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<sup>27</sup> Ctrs. for Disease Control & Prevention, *Late Versus Early Testing of HIV – 16 Sites, United States, 2000–2003*, 52 MORBIDITY & MORTALITY WKLY. REP. 581, 583 (2003).

<sup>28</sup> *Id.*

<sup>29</sup> See Bernard Lo et al., *Ethical Issues in Early Detection of HIV Infection to Reduce Vertical Transmission*, 25 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES S136, S136 (2000).

<sup>30</sup> *Id.* at S140.

<sup>31</sup> Ctrs. for Disease Control & Prevention, *Perspectives in Disease Prevention and Health Promotion Public Health Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MORBIDITY & MORTALITY WKLY. REP. 509, 509–15 (1987).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

voluntary HIV counseling and testing “to include hospitalized patients and persons obtaining health care as outpatients in acute-care hospital settings, including emergency departments.”<sup>34</sup> By 1995, “after perinatal transmission of HIV was demonstrated to be substantially reduced by administration of Zidovudine [an antiretroviral] to HIV-infected pregnant women and their newborns, USPHS recommended that all pregnant women be counseled and encouraged to undergo voluntary testing for HIV.”<sup>35</sup> In 2001, the CDC revised the recommendations for pregnant women in order to emphasize HIV screening as a “routine part of prenatal care,” preventing pretest counseling from acting as a barrier to HIV testing, and to add flexibility to the consent process, allowing multiple types of informed consent.<sup>36</sup>

Screening is defined as “the application of a test to all individuals in a defined population.”<sup>37</sup> Risk-based testing or targeted testing is defined as “[p]erforming an HIV test for subpopulations of persons at higher risk, typically defined on the basis of behavior, clinical, or demographic characteristics.”<sup>38</sup> “Among pregnant women, screening has proven substantially more effective than risk-based testing for detecting unsuspected maternal HIV infection and preventing perinatal transmission.”<sup>39</sup> Screening alleviates physicians of the burden of obtaining informed consent and delving into patients’ sexual and lifestyle practices.<sup>40</sup> Screening also serves as a nondiscriminatory method of testing for HIV because women fall

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<sup>34</sup> Branson et al., *supra* note 10, at 3; *see also* Ctrs. for Disease Control & Prevention, *Recommendations for HIV Testing Services for Inpatients and Outpatients in Acute-care Hospital Settings*, 42 MORBIDITY & MORTALITY WKLY. REP. 1, 1 (1993).

<sup>35</sup> Branson et al., *supra* note 10, at 3; *see also* Edward M. Connor et al., *Reduction of Maternal Infant Transmission of Human Immunodeficiency Virus Type 1 With Zidovudine Treatment*, 221 NEW ENG. J. MED. 1173, 1173–74 (1994); Task Force on Pediatric AIDS, *Perinatal Human Immunodeficiency Virus (HIV) Testing*, 89 Pediatrics 791, 794 (1992).

<sup>36</sup> Branson et al., *supra* note 10, at 3.

<sup>37</sup> COMM. ON PERINATAL TRANSMISSION OF HIV, INST. OF MED., REDUCING THE ODDS: PREVENTING PERINATAL TRANSMISSION OF HIV IN THE U.S. 22 (Michael A. Stoto et al. eds., 1999) [hereinafter REDUCING THE ODDS], <http://www.nap.edu/read/6307/chapter/1>.

<sup>38</sup> Branson et al., *supra* note 10, at 2.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *See id.* at 3.

within the defined population simply due to pregnancy, without having to look to other factors such as class, race, or age.<sup>41</sup>

In 2003, the CDC in partnership with the Department of Health and Human Services, introduced the initiative *Advancing HIV Prevention: New Strategies for a Changing Epidemic*.<sup>42</sup> Two key strategies of this initiative were: (1) to “make HIV testing a routine part of medical care on the same voluntary basis as other diagnostic and screening tests[;]” and (2) to reduce perinatal transmission of HIV further by universal testing of all pregnant women by “using rapid tests during labor and delivery, or postpartum, if the mother was not screened prenatally[.]”<sup>43</sup> In its technical guidance, the CDC acknowledges that prevention counseling is desirable for all persons at risk for HIV, but also recognizes that such counseling might not be appropriate or feasible in all settings.<sup>44</sup>

Guideline utilization has been unsuccessful and unreasonably burdensome because:

- 1) the cost of HIV screening often is not reimbursed, 2) providers in busy health-care settings often lack the time necessary to conduct risk assessments and might perceive counseling requirements as a barrier to testing, and 3) explicit information regarding HIV prevalence typically is not available to guide selection of specific settings for screening.<sup>45</sup>

The uneasiness of the subject and demanding time requirements lead many health care providers to view counseling and obtaining informed consent as an impediment.<sup>46</sup> Thus, approaches have been

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<sup>41</sup> See generally Swati Jha et al., *Women’s Attitudes to HIV Screening in Pregnancy in an Area of Low Prevalence*, 110 BRIT. J. OBSTETRICS & GYNAECOLOGY 145 (2003) (studying the influences on and attitudes of pregnant women in regard to HIV testing).

<sup>42</sup> Ctrs. for Disease Control & Prevention, *Advancing HIV Prevention: New Strategies For A Changing Epidemic – United States 2003*, 52 MORBIDITY & MORTALITY WKLY. REP. 329, 329 (2003).

<sup>43</sup> *Id.* at 331–32.

<sup>44</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *ADVANCING HIV PREVENTION: INTERIM TECHNICAL GUIDANCE FOR SELECTED INTERVENTIONS* 9 (Apr. 2003), <https://stacks.cdc.gov/view/cdc/26031>.

<sup>45</sup> Branson et al., *supra* note 10, at 4.

<sup>46</sup> REDUCING THE ODDS, *supra* note 37.

consolidated, and “HIV prevention counseling”<sup>47</sup> requires a strategy that will facilitate the assessment of the potential behaviors that lead to HIV acquisition or transmission.

According to the Committee on Perinatal Transmission of HIV, a group formed by the Institute of Medicine, “[p]erinatal HIV transmission continues to occur, primarily among women who lack prenatal care or who were not offered voluntary HIV counseling and testing during pregnancy.”<sup>48</sup> Furthermore, “[a] substantial proportion of the estimated 144–236 perinatal HIV infections in the United States each year can be attributed to the lack of timely HIV testing and treatment of pregnant women.”<sup>49</sup> In 2006, the CDC revised their HIV testing recommendations.<sup>50</sup> Among the many groups specifically mentioned were pregnant women.<sup>51</sup> The revised CDC recommendations broadened HIV screening from specific high risk groups to “all patients aged 13–64.”<sup>52</sup> The earlier a woman is tested during pregnancy for HIV, the greater the success of preventing perinatal HIV transmission.<sup>53</sup> Even if initial attempts to perform HIV testing are declined, healthcare providers should continue to attempt HIV testing during the course of the entire pregnancy.<sup>54</sup> Subsequent testing can even be performed in late gestation, if performed before thirty-six weeks of gestation.<sup>55</sup>

## II. A WOMAN’S AUTONOMY AND RIGHT TO PRIVACY

Great debate over whether a state can mandate HIV testing for pregnant women has risen since the CDC’s 2006 recommendations. The following cases outline court decisions regarding a woman’s

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<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.* at 6.

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

<sup>50</sup> *Id.* at 1.

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.* at 4, 7.

<sup>53</sup> *Id.* at 9.

<sup>54</sup> *Id.*

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



bodily integrity, autonomy, and right to privacy. In particular, the opinions of the Supreme Court of the United States support the CDC's recommendations to test pregnant women for HIV, as it is in the interest of the fetuses and general welfare of citizens in the states wherein they reside.

### A. Privacy

The Constitution does not explicitly enumerate a right to privacy.<sup>56</sup> Nonetheless, in 1891, the Supreme Court of the United States, in *Union Pacific Railway Company v. Botsford*, noted that "no right is held more sacred than or is more carefully guarded, by common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of the law."<sup>57</sup> Since the inception of American jurisprudence, bodily integrity and autonomy have been recognized and preserved as fundamental rights.<sup>58</sup>

### B. Right to Refuse Medical Treatment

Justice Cardozo defined bodily integrity and consent for medical procedures as:

[E]very human being of adult years and sound mind has [the] right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages . . . , except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained.<sup>59</sup>

Even though that particular case involved a lack of consent issue, Cardozo's statement has resonated in other areas of law involving bodily integrity and autonomy.

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<sup>56</sup> U.S. CONST.; *see also* *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965) (noting that the Bill of Rights has penumbras which guarantee that rights specifically enumerated in the U.S. Constitution are protected); U.S. CONST. amend. IX (clarifying that rights not enumerated in the Constitution shall not be denied).

<sup>57</sup> *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

<sup>58</sup> *See supra* note 56 and accompanying text.

<sup>59</sup> *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).

In *Jacobson v. Massachusetts*, the Supreme Court of the United States upheld a compulsory vaccine law during a small pox outbreak.<sup>60</sup> The Court acknowledged the constitutional protections of life, liberty, health, and property; however, “the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”<sup>61</sup> The Court upheld the Massachusetts law because states are entrusted with police power to provide public health and public safety.<sup>62</sup> Consequently, the Court deferred to the states in matters that concern public health.

Perhaps the most persuasive factor for the Court in *Jacobson* was the recent small pox outbreak that Massachusetts was battling. If the lower court in Massachusetts recognized small pox as an epidemic, and the Supreme Court had previously upheld a vaccine mandate to battle against a small pox outbreak in 1905,<sup>63</sup> then states should not just acknowledge, but must also accept HIV, which has infected millions of Americans,<sup>64</sup> as an epidemic too. And, as a result, courts must uphold state statutes mandating HIV testing of pregnant women.

The Supreme Court, in *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, determined that “a competent person has a ... liberty interest under the Due Process Clause in refusing unwanted medical treatment.”<sup>65</sup> Despite having this right, public health, and public safety must be weighed against individual constitutional rights.<sup>66</sup> A pregnant woman’s fears regarding discrimination, privacy, and health of the fetus are factors that a court should consider when determining if mandated HIV testing should be upheld.

Life expectancy for those entering HIV care is 24.2 years, and the total lifetime cost, per person, ranges from \$385,200 to \$618,900,

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<sup>60</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 12, 39 (1905).

<sup>61</sup> *Id.* at 26, 28.

<sup>62</sup> *Id.* at 35.

<sup>63</sup> *Id.* at 27.

<sup>64</sup> See text at notes 1–5.

<sup>65</sup> *Cruzan ex rel. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

<sup>66</sup> *Id.* at 279.

averaging to about \$2,100 monthly.<sup>67</sup> “The largest component of the federal [AIDS] budget is health care for people living with HIV[/AIDS] in the U.S., which totals \$17.5 billion in the FY 2015 request (57% of the total and 72% of the domestic share). This represents an increase of 5.3% over FY 2014.”<sup>68</sup> Most care funding is for Medicaid and Medicare, and these mandatory programs account for almost all of the increase in the care budget.<sup>69</sup> Also of note is The Ryan White Program, which is “the largest HIV-specific discretionary grant program in the U.S. and third largest source of funding for HIV care, [and] is level funded in the request at \$2.3 billion.”<sup>70</sup>

Cash and housing assistance total “\$3.1 billion[, or 10%,] of the FY 2015 budget request.”<sup>71</sup> That increase is due to increases in mandatory spending estimates for cash assistance through the Supplemental Security Income (“SSI”) and Social Security Disability Insurance (“SSDI”) programs, which provide support to people with HIV who are disabled.<sup>72</sup> “Housing assistance, through the Housing Opportunities for Persons with AIDS Program (“HOPWA”), is discretionary and receives \$332 million in the request, \$2 million more than the FY 2014 level.”<sup>73</sup> Lastly,

The smallest category of the HIV[/AIDS] budget is domestic HIV prevention (3%[]). . . . Most prevention funding is provided to the CDC’s National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (“NCHHSTP”), which receives \$796.2 million . . . [and t]he National Institutes of Health (“NIH”), which receives \$2.6 billion for domestic HIV research activities.<sup>74</sup>

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<sup>67</sup> Bruce R. Schackman et. al., *The Lifetime Cost of Current Human Immunodeficiency Virus Care in the United States*, 44 MED. CARE 990, 995 (2006).

<sup>68</sup> HENRY J. KAISER FOUND., U.S. FEDERAL FUNDING FOR HIV/AIDS: THE PRESIDENT’S FY 2015 BUDGET REQUEST 2 (June 2014), [https://kaiserfamilyfoundation.files.wordpress.com/2014/06/7029-10-us-federal-funding-for-hiv-aids\\_the-presidents-fy-2015-budget-request.pdf](https://kaiserfamilyfoundation.files.wordpress.com/2014/06/7029-10-us-federal-funding-for-hiv-aids_the-presidents-fy-2015-budget-request.pdf).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

According to a study conducted by the CDC and Johns Hopkins University, an investment in HIV prevention of \$4.5 billion over ten years would save \$104 billion in medical costs.<sup>75</sup> Expressed in different terms: “For every HIV infection that is prevented, an estimated \$355,000 is saved in the cost of providing lifetime HIV treatment.”<sup>76</sup> Additionally, “[t]he current economic crisis has severely impacted state and local governments and community-based organizations, with \$170 million in cuts to state HIV/AIDS prevention and care programs in fiscal year 2009 alone.”<sup>77</sup> As a result, both the federal government and states have an interest in ensuring that citizens are healthy not only for public safety reasons, but also for financial reasons.

### C. The Rights of the Unborn

There is no constitutional definition of “person.”<sup>78</sup> The Supreme Court of the United States determined that a “person,” as used in the Fourteenth Amendment, does not include the unborn.<sup>79</sup> Therefore, the Court cannot guarantee the rights of a fetus. However, the Court found that “it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly.”<sup>80</sup>

The Court, in *Roe v. Wade*,<sup>81</sup> held that when dealing with abortions, a trimester framework should apply, because “states have a significant interest in protecting the potential of human life represented by an

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<sup>75</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, PROJECTING POSSIBLE FUTURE COURSES OF THE HIV EPIDEMIC IN THE UNITED STATES 3 (Aug. 2010) [hereinafter PROJECTING FUTURE COURSES OF HIV EPIDEMIC], <https://www.cdc.gov/hiv/pdf/library/factsheets/possible-future-courses-hiv-epidemic-in-us.pdf>.

<sup>76</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, HIV PREVENTING: PROGRESS TO DATE 3 (Aug. 2013), <https://www.cdc.gov/nchhstp/newsroom/docs/factsheets/progress-508.pdf>.

<sup>77</sup> PROJECTING FUTURE COURSES OF HIV EPIDEMIC, *supra* note 75, at 1.

<sup>78</sup> *Roe v. Wade*, 410 U.S. 113, 158 (1973).

<sup>79</sup> *Id.* at 158.

<sup>80</sup> *Id.* at 159.

<sup>81</sup> *Id.* at 113.

unborn fetus, which increases throughout the course of pregnancy, becoming 'compelling' when the fetus reaches viability."<sup>82</sup> Viability is defined as the point at which the fetus becomes capable of independent life, outside of the womb.<sup>83</sup> The *Roe* Court accepted that viability occurs at twenty-eight weeks and in some instances at twenty-four weeks.<sup>84</sup>

The trimester framework was displaced by the undue burden test in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>85</sup> The Court reasoned that "[t]he trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*."<sup>86</sup> Additionally, the Court wrote:

[A] logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life.<sup>87</sup>

Although a fetus is not granted Constitutional protections, states can convey protection via HIV testing of pregnant women.<sup>88</sup> Mandated HIV testing of pregnant women can facilitate the promotion of antiretroviral treatment to reduce the transmission of HIV from the mother to the fetus.<sup>89</sup>

In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court deliberated over a Pennsylvania Abortion Control Act provision that required abortion techniques employed post-viability to provide the best opportunity for the unborn child to be born alive,

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<sup>82</sup> *Id.* at 162.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 160.

<sup>85</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>86</sup> *Id.* at 873.

<sup>87</sup> *Id.*

<sup>88</sup> Andrea Marsh, *Testing Pregnant Women and Newborns for HIV: Legal and Ethical Responses to Public Health Efforts to Prevent Pediatric AIDS*, 13 *YALE J.L. & FEMINISM* 195, 210 (2001) (discussing a possible protection option for non-constitutionally protected fetuses).

<sup>89</sup> Samantha C. Halem, Note, *At what Cost?: An Argument Against Mandatory AZT Treatment of HIV-Positive Pregnant Women*, 32 *HARV. C.R.-C.L.L. REV.* 491, 491 (1997).

unless, in the physician's good faith judgment, the technique "would present a significant greater medical risk to the life or health of the pregnant woman."<sup>90</sup> The Court held that the provision was facially invalid, because the construction of the abortion statute would burden the mother with an increased medical risk to save a viable fetus.<sup>91</sup> In other words, the statute was a means of coercion to prevent women from terminating pregnancies.<sup>92</sup> The Court noted "[t]he States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."<sup>93</sup>

*Thornburgh* serves as a lesson to the states, as it proves that ulterior motives can and will be detected not only by citizens, but also by the courts.<sup>94</sup> State statutes, such as Pennsylvania's, that focus on preserving life and not on the quality or welfare of the fetus are invalid; conversely, mandatory HIV testing of pregnant women would target both the welfare of the mother and the fetus.<sup>95</sup> State statutes that mandate HIV testing of pregnant women would provide a woman with the knowledge of her HIV status and the opportunity to determine what alternatives, if any, are best for her and the fetus.<sup>96</sup> The welfare of the fetus is directly affected by the mother's HIV status because, as a threshold matter, the pregnant woman must know her HIV status before she can seek treatment for HIV.<sup>97</sup> If the pregnant woman undergoes HIV testing and the test results are positive, she can potentially prevent the fetus from living with HIV.<sup>98</sup> Again, however, this benefit to the fetus requires a pregnant woman to undergo HIV testing.<sup>99</sup>

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<sup>90</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 768 (1986).

<sup>91</sup> *Id.* at 769.

<sup>92</sup> *Id.* at 759, 767-68.

<sup>93</sup> *Id.* at 759.

<sup>94</sup> *Id.*

<sup>95</sup> Michelle Yeun, Note, *HIV Testing of Pregnant Women: Why Present Approaches Fail to Reach the Desired Objective & the Unconsidered Option*, 14 *CARDOZO J.L. & GENDER* 185, 202 (2007).

<sup>96</sup> *Id.* at 210.

<sup>97</sup> Marsh, *supra* note 88, at 231.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

In *Jefferson v. Griffin Spalding County Hospital Authority*, the Georgia Supreme Court reversed the Superior Court's decision, by denying a motion for stay order to submit the mother to a caesarean section and a blood transfusion.<sup>100</sup> The mother was in her thirty-ninth week of pregnancy, when it was discovered that:

[S]he ha[d] a complete placenta previa; that the afterbirth is between the baby and the birth canal; and that it is virtually impossible that this condition will correct itself prior to delivery; and that it is a 99% certainty that the child cannot survive natural childbirth (vaginal delivery). The chances of [the mother] surviving vaginal delivery are no better than 50%.<sup>101</sup>

On religious grounds, the mother refused the caesarean section and a blood transfusion.<sup>102</sup>

The Georgia Supreme Court found that "as a matter of fact, the child is a human being fully capable of sustaining life independent of the mother."<sup>103</sup> The Court also found:

[T]hat the State has an interest in the life of this unborn, living human being. The Court finds that the intrusion involved into the life of [the parents] is outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live.<sup>104</sup>

As a result, the Court denied the parent's request for a stay.<sup>105</sup> The Court's decision to grant an order for a caesarean section and blood transfusion was for the benefit of the fetus, whose life was at stake.<sup>106</sup> By contrast, mandated HIV testing of pregnant women will not rise to the level of a surgical procedure, since HIV testing can be achieved with a simple blood draw, which causes virtually no pain and requires minimal recovery time.

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<sup>100</sup> *Jefferson v. Griffin Spalding Cty. Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 459.

<sup>104</sup> *Id.* at 460.

<sup>105</sup> *Id.*

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

### D. A Pregnant Woman's Right to Refuse Medical Treatment

The states and the United States Supreme Court's command over pregnant women is not absolute. The majority of courts endorse a competent adult's right to refuse medical treatment<sup>107</sup> and their right to bodily integrity.<sup>108</sup> Notwithstanding *Jefferson v. Griffin Spalding County Hospital Authority*, which is inapposite with this principle, courts have upheld a pregnant woman's right to govern decisions pertaining to medical treatment in conjunction with their pregnancy.<sup>109</sup>

In *In re A.C.*, the Court of Appeals for the District of Columbia was confronted by "two profoundly difficult and complex issues" on appeal:<sup>110</sup>

First, . . . who has the right to decide the course of medical treatment for a patient who, although near death, is pregnant with a viable fetus? Second, . . . how should that decision be made if the patient cannot make it for herself – more specifically, how should a court proceed when faced with a pregnant patient *in extremis* who is apparently incapable of making an informed decision regarding medical care for herself and her fetus?<sup>111</sup>

The DC Court determined that:

[I]n virtually all cases the question of what is to be done is to be decided by the patient – the pregnant woman – on behalf of herself and the fetus. If the patient is incompetent or otherwise unable to give an informed consent to a proposed course of medical treatment, then her decision must be ascertained through the procedure known as substituted judgment.<sup>112</sup>

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<sup>107</sup> See, e.g., *In re Bryant*, 542 A.2d 1216, 1218 (D.C. 1988); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 426 (Mass. 1977); *In re Conroy*, 486 A.2d 1209, 1222–23 (N.J. 1985).

<sup>108</sup> *Canterbury v. Spence*, 464 F.2d 772, 783, *cert. denied*, 409 U.S. 1064 (1972); *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914); *Crain v. Allison*, 443 A.2d 558, 561–62 (D.C. 1982).

<sup>109</sup> *In re Jamaica Hosp.*, 491 N.Y.S.2d 898 (Sup. Ct. 1985); *In re Klein*, 538 N.Y.2d 274, 275 (App. Div. 1989).

<sup>110</sup> *In re A.C.*, 573 A.2d 1235, 1237 (D.C. 1990), *rev'g en banc*, 533 A.2d 611 (D.C. 1987).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*



George Washington University Hospital sought declaratory judgment to perform a caesarean section on A.C., a patient who was close to death from cancer and was twenty-six and one-half weeks pregnant with a viable fetus.<sup>113</sup> A trial court “hearing lasting approximately three hours . . . was held at the hospital.”<sup>114</sup> Pursuant to the hearing, the Court ordered:

[T]hat a caesarean section be performed on A.C. to deliver the fetus. [A.C.’s attorneys] immediately sought a stay, . . . which was unanimously denied. . . . The caesarean was performed, and a baby girl, L.M.C., was delivered. . . . [T]he child died within two and one-half hours, and A.C. died two days later.<sup>115</sup>

The District of Columbia Court of Appeals ultimately set aside the trial court’s order and its treatment of *In re A.C.*<sup>116</sup> As a result, this case now serves as a guide on how to approach similar cases.<sup>117</sup> However, the Court did not decide in what circumstances a state’s interest would override the interests of a pregnant woman.<sup>118</sup> In A.C.’s situation:

[She] suffer[ed] from cancer [since] the [tender] age of thirteen. . . . [S]he underwent major surgery several times, together with multiple radiation treatments and chemotherapy. A.C. married when she was twenty-seven . . . and . . . became pregnant. She was excited about her pregnancy and very much wanted the child.<sup>119</sup>

The situation became complicated because A.C. initially “consented to the cesarean [section] . . . [then] withdrew her consent.”<sup>120</sup> A.C. was heavily sedated because of an inoperable tumor located in her right

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<sup>113</sup> *Id.* at 1238.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1251-53.

<sup>117</sup> *Id.* at 1252-53.

<sup>118</sup> *Id.* at 1247.

<sup>119</sup> *Id.* at 1238.

<sup>120</sup> *Id.* at 1252.

lung,<sup>121</sup> making it difficult to determine if A.C. was competent under sedation.<sup>122</sup>

The cumulative effects of these factors were weighed against A.C.'s terminally ill state and the trial court's interest in the life of the unborn.<sup>123</sup> Mandated HIV testing of pregnant women, however, will not encroach upon a woman's body as the decision in *In re A.C.* did, since HIV testing is not an invasive, surgical procedure. In fact, prenatal care and medical treatment already require routine blood work. Thus, the addition of an HIV test to the routine blood analysis would not be overly burdensome.

A distinguishing case is *In re Baby Boy Doe*,<sup>124</sup> in which a Chicago hospital sought an order to perform a cesarean section on a married woman in her thirty-fifth week of pregnancy due to insufficient oxygen flow to the fetus.<sup>125</sup> The pregnant woman, informed of the potential harm to the fetus, continued to refuse the procedure "because of her personal religious beliefs . . . [S]he would not consent to either procedure. Instead, given her abiding faith in God's healing powers, she chose to await natural childbirth. Her husband agreed with her decision."<sup>126</sup> All parties agreed, *inter alia*, both that:

[T]he fetus [was] . . . viable [and that,] because of medical complications, the chances of the unborn child surviving natural childbirth (the process of labor) are close to zero. [Furthermore, even] if the child were to somehow survive natural childbirth he would be retarded. [By contrast,] the chance of the child surviving a C-section is close to 100%[,] unless the child is already compromised or damaged.<sup>127</sup>

The Appellate Court of Illinois, however, ultimately, held "that a woman's competent choice to refuse medical treatment as invasive as

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<sup>121</sup> *Id.* at 1238.

<sup>122</sup> *Id.* at 1253.

<sup>123</sup> *Id.* at 1264.

<sup>124</sup> *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994).

<sup>125</sup> *Id.* at 327.

<sup>126</sup> *Id.* at 328.

<sup>127</sup> *Id.*

a cesarean section during pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus.”<sup>128</sup>

The *In re Baby Boy Doe* Court had to balance the mother’s First Amendment rights with the life of the fetus. The pregnant woman’s right to religious expression is a constitutional guarantee, while, conversely, the unborn have no constitutional protection.<sup>129</sup> Following this Court’s analysis, the pregnant woman will always prevail, even if stipulated that the fetus will be harmed by the pregnant woman’s decision. Again, mandated HIV testing of pregnant women, however, is not as invasive as a cesarean section, and a mere blood draw for HIV testing will not usurp the constitutional rights of a pregnant woman.

In yet another decision, this time from the Superior Court of New Jersey, Chancery Division:

The [New Jersey] Division of Youth and Family Services (“DYFS”) filed an action against the defendant, L.V. (. . . “the mother”), alleging abuse and neglect of her baby. . . . [DYFS’s] allegation related solely to the mother’s refusal to take certain medications during her pregnancy to reduce the risk that the baby would be born HIV positive. . . . The mother admitted that while she was pregnant with her child she learned, for the first time, that she was HIV positive. Further, the mother admitted that despite advice she received from the nurse who treated her, she refused to regularly take medication that was intended to reduce the chance that her baby would be HIV positive. She refused to take the medication on a regular basis because she simply could not accept the fact that she contracted the disease.<sup>130</sup>

The nurse practitioner, who provided prenatal treatment for the mother, testified:

[A]s to [the] treatment and conversations with the mother, and as to her expert opinion regarding current treatment methods available to HIV-positive pregnant women. Those treatments include antiretroviral (drug) therapy, which is designed to reduce the risk of the virus being passed to a newborn baby.<sup>131</sup>

The nurse practitioner further reported:

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<sup>128</sup> *Id.* at 326.

<sup>129</sup> *Roe v. Wade*, 410 U.S. 113, 158 (1973).

<sup>130</sup> *N.J. Div. of Youth & Family Servs. v. L.V.*, 889 A.2d 1153, 1154–55 (N.J. Super. Ch. 2005).

<sup>131</sup> *Id.* at 1155.

[A]ll babies born to mothers who are HIV positive carry their mother's antibody to HIV in their blood, even if the medication is taken during the pregnancy. Therefore, initial tests on all children of HIV-positive mothers can [test] positive for HIV. However, as the mother's antibodies die off and the baby's immune system matures and produces antibodies to environmental antigens, the child can ultimately test negative for the virus. . . . [T]he parties therefore agreed that, even where the virus initially appears in a child, the virus can disappear from the child within its first eighteen months of development. They also agreed that an initial negative result can change to a positive result during that time.<sup>132</sup>

Lastly, the nurse practitioner confirmed:

[S]he prescribed the therapeutic medications to the mother in this case. In addition, she informed the mother of the therapy's benefits and counseled her to take the drugs as prescribed on a regular basis. However, during her pregnancy, the mother failed to take the medications with any regularity, if at all.<sup>133</sup>

A case of first impression, DYFS argued that the situation was "analogous to a pregnant mother's use of illegal drugs during pregnancy."<sup>134</sup> The New Jersey Court acknowledged that it was:

[W]ell settled that where a mother abuses narcotics or alcohol during her pregnancy, and her abuse results in her child being born addicted to drugs and forced to suffer the consequences of that addiction, the mother can be shown to have abused or neglected her child . . . . However, it is the attendant suffering to the child, after birth, that a court must rely on in making a finding of abuse or neglect under those circumstances. The mother's decision to use narcotics or alcohol during her pregnancy alone is an insufficient basis for a finding of abuse or neglect. To otherwise hold a mother culpable for her incorrect decision would be an unauthorized punishment for her "past transgressions against the child in utero or in esse."<sup>135</sup>

The Court dismissed the case, based on a woman's right to privacy and to refuse medical treatment:

The decisions she makes as to what medications she will take during her pregnancy, (as compared to controlled dangerous substances), are left

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1156.

<sup>134</sup> *Id.* at 1157.

<sup>135</sup> *Id.* at 1157-58.

solely to her discretion after consultation with her treating physicians. The right to make that decision is part of her constitutional right to privacy, which includes her right to control her own body and destiny. Those rights include the ability to refuse medical treatment, even at the risk of her death or the termination of her pregnancy.<sup>136</sup>

In *New Jersey Division of Youth & Family Services v. L.V.*, the Superior Court of New Jersey balanced the mother's right to privacy and bodily integrity against those of the fetus.<sup>137</sup> In the final analysis, the Court bolstered a woman's right to decide what medical treatment to receive during pregnancy.<sup>138</sup> Moreover, the Court conceded that the mother has a right to refuse medical treatment during pregnancy, even if the refusal may lead to death.<sup>139</sup> Once again, however, confirmation of a women's HIV status requires a mere blood draw, which does not subject a pregnant woman to oppressive medical treatment or compromise her bodily integrity.

#### **E. Damages for Injuries in Utero**

In *Stallman v. Youngquist*, a father brought suit on behalf of an infant against her mother for injuries allegedly sustained prenatally during an automobile accident.<sup>140</sup> "[The d]efendant was approximately five months pregnant with the plaintiff and was on her way to a restaurant when the collision occurred."<sup>141</sup> The Supreme Court of Illinois held that it "does not recognize a cause of action brought by or on behalf of a fetus, subsequently born alive, against its mother for the unintentional infliction of prenatal injuries."<sup>142</sup> The Court reasoned that "[h]olding a mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions

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<sup>136</sup> *Id.* at 1158.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Ex. rel. Stallman v. Youngquist*, 531 N.E.2d 355, 355 (Ill. 1988).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and bodily autonomy."<sup>143</sup>

The *Stallman* Court also reviewed the history of prenatal injuries.<sup>144</sup> The first suit alleging prenatal injuries was a Massachusetts case, *Dietrich v. Northampton*.<sup>145</sup> The *Dietrich* Court held that common law did not recognize a cause of action in tort for prenatal injuries to a fetus.<sup>146</sup> Judge Holmes reasoned that because the fetus "was a part of the mother at the time of the injury, any damage to it[,] which was not too remote to be recovered for at all[,] was recoverable by her."<sup>147</sup>

The ruling in *Stallman* and similar rulings from other jurisdictions foreclosed the possibility of recovery for prenatal injuries.<sup>148</sup> Denying recovery for injuries allegedly sustained by an individual as a fetus while in the womb is a sound practice because, as previously discussed, a fetus is not a person under the Constitution.<sup>149</sup> However, if an individual has no right to recover outside the womb for prenatal injuries, and protections while inside the womb are weighed against the rights of the mother, a child who contracts HIV from its mother during pregnancy has no legal recourse. For this very reason, mandated HIV testing of pregnant women should be implemented and practiced.

### III. LEGAL DOCTRINES

The Fourth Amendment protects against "unreasonable searches and seizures" by the government.<sup>150</sup> It is one of the most potent protections that Americans possess against intrusive invasions by the government and entities pursuant to government authority. However,

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<sup>143</sup> *Id.* at 360.

<sup>144</sup> *Id.* at 357-61.

<sup>145</sup> *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884).

<sup>146</sup> *Id.* at 17.

<sup>147</sup> *Id.*

<sup>148</sup> *Ex. rel. Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988).

<sup>149</sup> U.S. CONST.

<sup>150</sup> U.S. CONST. amend. IV.

there are legal doctrines that allow the circumventing of the constitutional shield against searches and seizures.

### A. Special Needs

A search unsupported by probable cause can be constitutional when special needs, other than the normal need for law enforcement, provide sufficient justification.<sup>151</sup> Under this doctrine, the government is not required to show probable cause, much less reasonable suspicion, to support a search.<sup>152</sup> Under the exception, a warrantless, suspicion-less search may still be valid, “where the private interest[s] implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individual suspicion.”<sup>153</sup> A court reviewing an alleged special needs exception must utilize a context-specific inquiry of the competing private and public interests.<sup>154</sup>

The special needs doctrine was originally utilized to gain approval of warrantless searches of property that were based on a “reasonable” suspicion.<sup>155</sup> The application of the doctrine evolved after two decisions in 1989. The Court in *Skinner v. Railway Labor Executives’ Association*<sup>156</sup> and *National Treasury Employees Union v. Von Raab*<sup>157</sup> held that the federal government could require suspicion-less drug and alcohol tests of certain employees in the railroad industry and the United States Customs Service. These decisions expanded the special needs doctrine exception to “intrusions into the human body” and “searches of entire categories of persons in the absence of any

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<sup>151</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 74 (2001).

<sup>152</sup> *Neumeyer v. Beard*, 421 F.3d 210, 213–14 (3d Cir. 2005).

<sup>153</sup> *Adams v. State*, 762 N.E.2d 737, 741 n.10 (Ind. 2002) (quoting *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 624 (1989)).

<sup>154</sup> *Chandler v. Miller*, 520 U.S. 305, 306 (1997) (citing *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989)).

<sup>155</sup> See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (upholding search of probationer’s apartment for weapons); *O’Connor v. Ortega*, 480 U.S. 709 (1987) (upholding search of government employee’s office for papers); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (upholding search of student’s property).

<sup>156</sup> 489 U.S. 602, 624–25 (1989).

<sup>157</sup> 489 U.S. 656, 668 (1989).

suspicion that particular individuals were in fact using drugs or alcohol.”<sup>158</sup>

Since the *Skinner* and *Van Raab* decisions, courts have upheld various tests that detect drug use or the presence of HIV. These tests are aimed at specific groups such as: convicted sex offenders;<sup>159</sup> public employees;<sup>160</sup> private employees in regulated industries;<sup>161</sup> persons involved in traffic accidents;<sup>162</sup> convicted prostitutes;<sup>163</sup> and individuals involved in physical struggles with police officers.<sup>164</sup>

There is no case law to date that has dealt with the issue of mandated HIV testing of pregnant women under the special needs exception. Justification and application of the special needs exception to pregnant women for HIV testing would not require further expansion of this doctrine. As noted above, courts, in narrow contexts, have upheld warrantless searches where private interests were nullified by the public interests, as applied to particular groups. Pregnant women are a group of individuals from which the government or an authorized agency can justifiably draw blood for HIV testing, because the prevention of transmission of HIV from the mother to the fetus outweighs the private interests of the mother. States arguably can employ the special needs exception when statutes mandating HIV testing of pregnant women are challenged. However, states must show that “‘special needs[,]’ other than the normal need for law enforcement[,] provide sufficient justification” for the

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<sup>158</sup> Sean Anderson, *Individual Privacy Interests and the “Special Needs” Analysis for Involuntary Drug and HIV Tests*, 86 CAL. L. REV. 119, 120 (1998).

<sup>159</sup> See, e.g., *Rise v. Oregon*, 59 F.3d 1556, 1559–60 (9th Cir. 1989); *Fosman v. State*, 664 So. 2d 1163, 1165–66 (Fla. Dist. Ct. App. 1995); *In re Juveniles A, B, C, D, E*, 847 P.2d 455, 458 (Wash. 1993) (en banc).

<sup>160</sup> See, e.g., *Taylor v. O’Grady*, 888 F.2d 1189, 1194–95 (7th Cir. 1989); *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402, 414–15 (N.D. Ohio 1991).

<sup>161</sup> See, e.g., *Dimeo v. Griffin*, 943 F.2d 679, 685 (7th Cir. 1991); *Bluestein v. Skinner*, 908 F.2d 451, 455 (9th Cir. 1990).

<sup>162</sup> See, e.g., *Fink v. Ryan*, 673 N.E.2d 281, 286 (Ill. 1996); *State v. Roche*, 681 A.2d 472, 474–75 (Me. 1996).

<sup>163</sup> See, e.g., *Love v. Superior Court*, 276 Cal. Rptr. 660, 664 (Ct. App. 1990); *People v. Adams*, 597 N.E.2d 574, 582–83 (Ill. 1992).

<sup>164</sup> See, e.g., *Johnetta J. v. San Francisco Mun. Court*, 267 Cal. Rptr. 666, 681 (Ct. App. 1990).



exception under this doctrine to apply.<sup>165</sup> Although a possible legal tool, the special needs doctrine is perhaps the least persuasive mechanism to enforce mandated HIV testing of pregnant women.

### B. *Parens Patriae*

Another method that states can employ to advance mandatory HIV testing of pregnant women is *parens patriae*. The theory of *parens patriae* is the presumption that the government, or a government agency, may represent the interests of all the citizens in cases raising matters of sovereign interest.<sup>166</sup> *Parens patriae* means “parent of his or her country” and “refers to the state regarded as a sovereign.”<sup>167</sup> The common-law prerogative of a state to sue in *parens patriae* in the interests of its citizens, and for the prevention of injury to those who cannot protect themselves, is inherent in the supreme power of every state.<sup>168</sup> However, the doctrine of *parens patriae* is merely a species of prudential standing, and does not create a boundless opportunity for governments to seek recovery for alleged wrongs against it or its residents.<sup>169</sup> In order to maintain a *parens patriae* action, the state must articulate an interest apart from the interests of the particular private parties, and the state must be more than a nominal party.<sup>170</sup>

If the state has no quasi-sovereign interest apart from the interests of the private individuals, who can obtain complete relief through their own litigation, then no *parens patriae* standing exists.<sup>171</sup> In order to express such an interest, the state must articulate an interest that affects a sufficiently substantial segment of its residents.<sup>172</sup> Although the articulation of such interest is a matter determined on a case-by-

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<sup>165</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 75 n.6 (2001).

<sup>166</sup> *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003) (citing *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996)).

<sup>167</sup> *Steele v. Hamilton Cty. Cmty. Mental Health Bd.*, 736 N.E.2d 10, 19 n.5 (citing *Parens patriae*, BLACK’S LAW DICTIONARY (7th ed. 1999)).

<sup>168</sup> *New York ex rel. Vacco v. Mid Hudson Med. Grp., P.C.*, 877 F. Supp. 143, 146 (S.D.N.Y. 1995).

<sup>169</sup> *Serv. Emps. Int’l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073 (D.C. Cir. 2001) (citing *Pfizer, Inc. v. Lord*, 522 F.2d 612, 616 (8th Cir. 1975)).

<sup>170</sup> *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

<sup>171</sup> *People v. Peter & John’s Pump House, Inc.*, 914 F. Supp. 809, 811 (N.D.N.Y. 1996).

<sup>172</sup> *Broselow v. Fisher*, 319 F.3d 605, 609 (3d Cir. 2003).

case basis, certain characteristics of interests fall into two categories:<sup>173</sup> (1) a state has a quasi-sovereign interest in the health and well-being, both physical and economic, of its residents in general,<sup>174</sup> and (2) a state has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.<sup>175</sup> The fact that private litigants might not have the tenacity or fortitude to sue is relevant in determining whether they can obtain complete relief through private litigation for purposes of *parens patriae* standing.<sup>176</sup>

The doctrine was applied in the case of *In re Matter of Jamaica Hospital*.<sup>177</sup> A hospital sought an order granting permission to transfuse blood to a patient, who was eighteen weeks pregnant and in critical condition because the patient had refused the transfusion on religious grounds, even though the blood was necessary to stabilize her condition and save the life of the unborn child.<sup>178</sup> The Court acknowledged that in most circumstances:

[T]he patient, of course, has an important and protected interest in the exercise of her religious beliefs. If her life were the only one involved here, the court would not interfere. Her life, however, is not the only one at stake. The court must consider the life of the unborn fetus.<sup>179</sup>

The presiding judge visited the pregnant Jehovah's Witness in the Intensive Care Unit at Jamaica Hospital and spoke with the woman regarding the severity of the situation.<sup>180</sup> Despite the judge's efforts to persuade her to consent to the blood transfusion, she refused.<sup>181</sup> The judge stated, "she told me, in effect, that because of her religion she would not."<sup>182</sup> The Court ultimately held that the "patient's interest in exercising her religious beliefs" was not sufficient to override the

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<sup>173</sup> *Alfred L. Snapp & Son*, 458 U.S. at 607.

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

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

<sup>176</sup> *Peter & John's Pump House, Inc.*, 914 F. Supp. at 813.

<sup>177</sup> *In re Jamaica Hospital*, 491 N.Y.S.2d 898, 899 (Supp. 1985).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

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

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

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

State's "significant interest in protecting the life of a midterm fetus," who could be regarded "for purposes of this proceeding as a human being to whom court stood in *parens patriae*."<sup>183</sup> The judge appointed the internal medicine physician overseeing the pregnant Jehovah's Witness care "as special guardian of the unborn child and ordered him to exercise his discretion to do all that in his medical judgment was necessary to save its life, including a blood transfusion."<sup>184</sup>

Similarly, the Superior Court of the District of Columbia ordered a cesarean section, at the request of a hospital, for a woman who refused to undergo the procedure because of her religious belief and desire to give birth by vaginal delivery.<sup>185</sup> Maydun, a pregnant woman, refused the cesarean section even though she was already in labor and sixty hours had lapsed since her membrane had ruptured.<sup>186</sup> Both parents refused the cesarean even after considerable risks of infection and possible death to the fetus were explained.<sup>187</sup> A hearing was held at the hospital in which Maydun testified that "a Muslim woman has the right to decide whether or not to risk her own health to eliminate a possible risk to the life of her undelivered fetus."<sup>188</sup> At the hospital hearing, Maydun's physician testified that there was a 50-75% risk of fetal sepsis. In contrast, the risk of harm to Madyun from undergoing a caesarean section was said to be only 0.25%.<sup>189</sup>

The Court found that "[a]ll that stood between the Madyun fetus and its independent existence, separate from its mother, was, put simply, a doctor's scalpel. In these circumstances, the life of the infant inside its mother's womb was entitled to be protected."<sup>190</sup> The Court also found that "in the case of children, the state acting as *parens patriae* has the ability, in appropriate situations, to 'restrict' a parent's control of a child, even where the parent's claim to control is founded upon

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<sup>183</sup> *Id.* at 899-900.

<sup>184</sup> *Id.* at 900.

<sup>185</sup> *In re Maydun*, Misc. No. 189-86 (D.C. 1986), reprinted in *In re A.C.*, 573 A.2d 1235, 1259 (D.C. 1990).

<sup>186</sup> *Id.* at 1260.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 1261.

<sup>190</sup> *Id.* at 1262.

religious rights or a more generalized 'right of parenthood[.]'"<sup>191</sup> The Superior Court determined that the medical procedure was warranted, and ordered the cesarean section to be performed expediently.<sup>192</sup>

In both of these cases, the courts granted the hospital's request for medical treatment, because the viability of the fetus was in jeopardy. Both courts noted that under normal circumstances, in which a fetus is not involved, the religious beliefs of a woman must be respected, because they are protected by the Constitution.<sup>193</sup> Nevertheless, the preservation and survival of the fetus commenced the legal action, and the analysis of the courts must factor in the potentiality of the fetus's survival.<sup>194</sup> Consequently, the courts in both instances applied the doctrine of *parens patriae* to grant an order for the medical treatment sought.

Under *parens patriae*, states can persuade a court that mandated HIV testing of pregnant women is in the best interest of the fetus and that the state has a physical and economic interest in unveiling the HIV status of all pregnant women within its boundaries. States have a legitimate and compelling interest at stake—not only that of the pregnant women or fetuses, but also that of all the citizens within their states. If statutes mandating HIV testing of pregnant women are upheld, states can offer and provide the proper treatment to reduce the transmission of HIV. When states cannot exercise their police power, then *parens patriae* is the most persuasive device to prevent injury to fetuses that cannot protect themselves.

#### IV. HIV TESTING STATUTES

Since the promulgation of the CDC's 2006 Revised Recommendations for HIV Testing,<sup>195</sup> states have modified their statutes to reflect those recommendations. Every state has codified an "opt-out" method law, in which the physician or health care provider

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

<sup>192</sup> *Id.* at 1263–64.

<sup>193</sup> *Id.* at 1262; *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 899 (Supp. 1985).

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

<sup>195</sup> See *Testing*, *supra* note 9.

informs the pregnant woman that a sample for HIV testing will be drawn and advises them of their option to “opt-out,” or decline to have the test performed.<sup>196</sup> Idaho, Kansas, Missouri, Nevada, New Jersey, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Wyoming are the only states that have not codified an informed consent requirement before HIV testing can be performed.<sup>197</sup>

### A. California’s Statute

California was among the first states to modify its HIV testing statute to emulate the CDC’s 2006 Revised Recommendations for HIV Testing.<sup>198</sup> The enactment of Chapter 550, California Health and Safety Code Section 120990 (“Chapter 550”) eliminated the requirement to obtain informed consent prior to testing for HIV.<sup>199</sup> The CDC defines “informed consent” as:

[A] process of communication between patient and provider through which an informed patient can choose whether to undergo HIV testing or decline to do so. Elements of informed consent typically include providing oral or written information regarding HIV, the risks and benefits of testing, the implications of HIV test results, how test results will be communicated, and the opportunity to ask questions.<sup>200</sup>

Under the new provision, a patient must be “advise[d] that he or she has the right to decline the test.”<sup>201</sup> California also requires health care providers to report cases of HIV infection and AIDS by name.<sup>202</sup> The provision states:

To ensure knowledge of current trends in the HIV epidemic and to ensure that California remains competitive for federal HIV and AIDS

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<sup>196</sup> See *State HIV Testing Laws: Consent and Counseling Requirements*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/policies/law/states/testing.html> (last updated Mar. 18, 2015).

<sup>197</sup> See *State HIV Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/policies/law/states/index.html> (last updated Mar. 18, 2015).

<sup>198</sup> See *Testing*, *supra* note 9.

<sup>199</sup> CAL. HEALTH & SAFETY CODE § 120990 (2006).

<sup>200</sup> See *Testing*, *supra* note 9.

<sup>201</sup> CAL. HEALTH & SAFETY CODE § 120990(a) (West 2015).

<sup>202</sup> *Id.* at § 121022.

funding, health care providers and laboratories shall report cases of HIV infection to the local health officer using patient names on a form developed by the department. . . . Local health officers shall report unduplicated HIV cases by name to the department on a form developed by the department.<sup>203</sup>

Despite California's aggressive campaign of HIV testing, the state chose to alter HIV testing requirements for pregnant women. Chapter 550 requires prenatal care providers to offer pregnant women HIV information and counseling.<sup>204</sup> The provision specifically enumerates, but does not limit, the "information and counseling" required to be given to the patient.<sup>205</sup> While not mandatory,<sup>206</sup> the required information includes:

[A] description of the modes of HIV transmission, [a] discussion of risk reduction behavior modifications including methods to reduce the risk of perinatal transmission, . . . [and i]f appropriate, referral information to other HIV prevention and psychosocial services including anonymous and confidential test sites approved by the Office of AIDS.<sup>207</sup>

Finally, the provision also explicitly reiterates that testing is not mandatory.<sup>208</sup>

California's Chapter 550 was controversial, yet, there was support to streamline the formal informed consent process to the opt-out method. For example, the Journal of the American Medical Association and the San Francisco Department of Public Health detailed a study where clinicians exercised the opt-out model for HIV testing.<sup>209</sup> The study found an increase of 50% in testing and subsequent positive test

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

<sup>204</sup> *Id.* § 125107.

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

<sup>206</sup> *Id.* § 125107(c).

<sup>207</sup> *Id.* § 125107(b).

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

<sup>209</sup> See *JAMA Study Released Today Supports Call for Routine Testing in CA, Says AIDS Healthcare Foundation*, MED. NEWS TODAY (Mar. 15, 2007), <http://www.medicalnewstoday.com/releases/65256.php>.

results with positive diagnoses.<sup>210</sup> A CDC study also found that pregnant women were receptive to the opt-out method.<sup>211</sup>

Despite the scientific data supporting Chapter 550, the American Civil Liberties Union (“ACLU”) and Lambda Legal opposed the CDC’s recommendations and advocated for changes to California’s Chapter 550.<sup>212</sup> The ACLU and Lambda Legal published a summary of the reasons why HIV testing should require “specific, written consent . . . after some counseling.”<sup>213</sup> The reasons included: obtaining informed consent is a physician’s ethical and legal duty;<sup>214</sup> communication and trust between a physician and patient;<sup>215</sup> the emotional and legal dimensions of HIV can be discussed;<sup>216</sup> stigma continues to be attached to HIV;<sup>217</sup> “people are more likely to agree to be tested if they understand more about HIV and its treatment”;<sup>218</sup> information about HIV and the nature of HIV testing is important to all, not just those who test positive;<sup>219</sup> people who test negative need counseling to fully understand they might still be infected and how to avoid transmission;<sup>220</sup> and increased offering of testing provides an excellent opportunity to educate patients about HIV and changing risk behaviors.<sup>221</sup>

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

<sup>211</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, REDUCING HIV TRANSMISSION FROM MOTHER-TO-CHILD: AN OPT-OUT APPROACH TO HIV SCREENING (May 2008), [https://www.cdc.gov/hiv/pdf/risk\\_Pregnant\\_opt-out.pdf](https://www.cdc.gov/hiv/pdf/risk_Pregnant_opt-out.pdf).

<sup>212</sup> AM. CIVIL LIBERTIES UNION, INCREASING ACCESS TO VOLUNTARY HIV TESTING: A SUMMARY OF EVIDENCE OF THE IMPORTANCE OF SPECIFIC WRITTEN CONSENT AND PRE-TEST COUNSELING IN HIV TESTING 1 (Mar. 2007) [hereinafter INCREASING ACCESS TO VOLUNTARY HIV TESTING], <http://www.aclu.org/increasing-access-voluntary-hiv-testing-summary-evidence-importance-specific-written-consent-and-pre>.

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

<sup>214</sup> *Id.* at 2.

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

<sup>216</sup> *Id.*

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

<sup>218</sup> *Id.* at 3.

<sup>219</sup> *Id.* at 4.

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

<sup>221</sup> *Id.*

California's endorsement of the opt-out method reflects considerations of healthcare providers, their limited time, and a low comfort-level with discussing or counseling a patient regarding HIV. The ACLU and Legal Lambda's primary concerns were the lack of informed consent and missed educational opportunities when utilizing the opt-out method.<sup>222</sup> However, studies have shown that individuals—especially pregnant women—are more receptive to the opt-out method.<sup>223</sup> Informed consent requirements consume a health care provider's time and perhaps deter individuals from testing, since providing information regarding HIV may offend patients. Thus, when balancing a patient's rights and the public health, in the context of pregnant women at least, public health tends to triumph because a fetus is involved.

## V. RECENT SCIENTIFIC DEVELOPMENTS

The realm of HIV/AIDS research is ever changing on account of numerous research initiatives, developments, and funding. At the 2013 Conference on Retroviruses and Opportunistic Infections in Atlanta, a group of investigators announced that a toddler was “functionally cured of HIV.”<sup>224</sup> The unidentified girl was born HIV positive to a mother who received no prenatal care and was not diagnosed as HIV positive herself until just before delivery.<sup>225</sup> As CNN reported:

A “functional cure” is when the presence of the virus is so small, lifelong treatment is not necessary and standard clinical tests cannot detect the virus in the blood.

... “We didn't have the opportunity to treat the mom during the pregnancy as we would like to be able [to] . . . to prevent transmission to the baby,” said Dr. Hannah Gay, a pediatric HIV specialist at the University of Mississippi Medical Center.

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<sup>222</sup> *Id.* at 1.

<sup>223</sup> *Testing, supra* note 9.

<sup>224</sup> Sandra Young, *Researchers: Toddler Cured of HIV*, CNN (Mar. 4, 2013), <http://www.cnn.com/2013/03/03/health/hiv-toddler-cured>.

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



Gay told CNN the timing of intervention—before the baby’s HIV diagnosis—may deserve “more emphasis than the particular drugs or number of drugs used.”

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Once it was determined the Mississippi mother was HIV positive, Gay immediately began giving the infant antiretroviral drugs upon the baby’s delivery in an attempt to control [the] HIV infection.

....

Investigators said the Mississippi case may change the practice because it highlights the potential for cure with early standard antiretroviral therapy, or ART. ART is a combination of at least three drugs used to suppress the virus and stop the progression of the disease. But they do not kill the virus. Tests showed the virus in the Mississippi baby’s blood continued to decrease and reached undetectable levels within 29 days of the initial treatment.<sup>226</sup>

After two years of not receiving antiretroviral treatment, the Mississippi baby, now four years old was declared no longer in remission. She had appeared free of HIV as recently as March, without receiving treatment for nearly two years.<sup>227</sup> Unfortunately, this child was not cured of HIV as previously announced. Until a proven cure for HIV is developed, the most reliable method of lowering instances of HIV is a reduction in transmission. Transmission can only be prevented if there is a diagnosis of HIV, which of course requires HIV testing.

## CONCLUSION

HIV is a worldwide epidemic. The World Health Organization (“WHO”) estimated that 35 million people worldwide were infected with HIV in 2013, an alarming statistic.<sup>228</sup> The WHO has implemented a goal to reduce the mother-to-child transmission rate to less than 5%

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

<sup>227</sup> James Gallagher, *HIV Re-emerges in ‘Cured’ Mississippi Girl*, BBC (July 10, 2014), <http://www.bbc.com/news/health-28257768>.

<sup>228</sup> *Global Summary of the AIDS Epidemic 2013*, WORLD HEALTH ORG. (July 21, 2014), [http://www.who.int/hiv/data/epi\\_core\\_dec2014.png](http://www.who.int/hiv/data/epi_core_dec2014.png).

globally by 2015.<sup>229</sup> “Without any interventions, between 15% and 45% of infants born to these women will acquire HIV: 5–10% during pregnancy, 10–20% during labour and delivery, and 5–20% through breastfeeding.”<sup>230</sup> Antiretroviral therapy is only one of many different options that a pregnant woman can undertake to prevent transmission of HIV. However, if HIV testing is not performed to determine a pregnant woman’s HIV status, the indicated medical treatment will never be recommended.

The ACLU and Lambda Legal raised valid legal and ethical concerns of the opt-out method.<sup>231</sup> Nonetheless, the CDC has conducted research studies that support their 2006 Recommendations for HIV testing and opt-out testing.<sup>232</sup> HIV testing of pregnant women should be mandated to prevent the transmission of HIV from the mother to fetus; without the force of law, HIV will continue to be a menace to American public health.

In the U.S., the Supreme Court of the United States has acknowledged the right to privacy<sup>233</sup> and the right to refuse medical treatment.<sup>234</sup> Even so, the Court has also recognized the police power of the States to provide for public health and public safety.<sup>235</sup> States must carefully weigh the privacy rights of their citizens as individuals against the public health and safety of their citizens as an entire state. Mandated HIV testing of pregnant women is the only method to confirm if a woman has the disease and, subsequently, if medical treatment is available to prevent transmission from the mother to the child. The most pragmatic approach to HIV testing of pregnant women is a statutory mandate. Nevertheless, the CDC has recommended the

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<sup>229</sup> *Mother-to-Child Transmission of HIV*, WORLD HEALTH ORG., <http://www.who.int/hiv/topics/mtct/en/> (last visited Jan. 15, 2015).

<sup>230</sup> UNITED NATION’S CHILDREN’S FUND, TOWARDS AN AIDS-FREE GENERATION, CHILDREN AND AIDS: SIXTH STOCKTAKING REPORT, 2013, at 6 (2013).

<sup>231</sup> INCREASING ACCESS TO VOLUNTARY HIV TESTING, *supra* note 212, at 1.

<sup>232</sup> Branson et al., *supra* note 10, at 6–7.

<sup>233</sup> *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

<sup>234</sup> *Cruzan ex rel. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990).

<sup>235</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

opt-out method, which is an alternative method for states to institutionalize.<sup>236</sup>

Irrespective of a state's methodology to obtain the blood sample for HIV testing from a pregnant woman, the verification of the presence or absence of the disease will benefit all citizens of the state. The states were vested with police powers that should be exercised to decrease perinatal transmission, not only for the fetus directly affected by that particular pregnancy, but for the hundreds of individuals that will come in and out of that child's life once outside of the womb. Every perinatal HIV transmission<sup>237</sup> is a sentinel health event, signaling either a missed opportunity for prevention or, more rarely, a failure of interventions to prevent perinatal transmission.<sup>238</sup>

When these infections occur, they underscore the need for improved strategies to ensure that all pregnant women undergo HIV testing and, if found to be HIV positive, receive proper interventions to reduce transmission risk and safeguard their health and the health of their infants. The onus of public health and public safety is not only left to the states, but to the citizens within its borders. Therefore, pregnant women should be mandated to undergo HIV testing for their own health and the health of their children and communities.

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<sup>236</sup> *Testing*, *supra* note 9, at 5.

<sup>237</sup> *Id.* at 7.

<sup>238</sup> "A sentinel health event is an unexpected occurrence involving death or serious physical or psychological injury, or the risk thereof. Serious injury specifically includes loss of limb or function." JOINT COMM'N, *Sentinel Events*, in COMPREHENSIVE ACCREDITATION MANUAL FOR OFFICE-BASED SURGERY PRACTICES SE-1, SE-1 (Jan. 2011), [http://www.jointcommission.org/assets/1/6/2011\\_CAMOBS\\_SE.pdf](http://www.jointcommission.org/assets/1/6/2011_CAMOBS_SE.pdf); *see also* REDUCING THE ODDS, *supra* note 37.