New York Public Health Law § 2500-F: The Hand That Robbed the Cradle of Privacy

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NEW YORK PUBLIC HEALTH LAW § 2500-F: THE HAND THAT ROBBED THE CRADLE OF PRIVACY

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INTRODUCTION

AIDS. The acronym alone needs no explanation, but it strikes fear in people from the moment it is spoken. It has become an epidemic in this and in other parts of the world, such as Africa, where it has almost risen to the level of a plague.1 In the United

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States alone, the cumulative number of AIDS cases has reached 816,149 with the total number of deaths from AIDS reaching 467,910, since its detection in 1981 until December of 2001. Since its detection in 1981 until December of 2001.2 AIDS continues to spread and be transmitted from person to person, only heightening the problem and stirring up more fear in its victims and bystanders. Since the beginning of its onslaught, the number of AIDS cases reported among adult and adolescent women has tripled, hitting the hardest among minority women.3 In 1999, HIV/AIDS was the fifth leading cause of death among women between the ages of 25-44 and the third leading cause of death among African American women in the same age group.4 All of these statistics prompted the New York Legislature to propose and enact the “AIDS Baby Bill,” which requires all newborns born within the state to be tested for HIV in order to treat the virus early.5 Although this statute has its

African countries has reached about thirty percent).


heart in the right place, it fails to take into effect the consequences of such mandatory testing. The controversy surrounding this law dates well before its enactment and has continued since it became effective on June 26, 1996.⁶ The major legal concern regarding this bill is the invasion of the mother's individual rights, especially her right to privacy.⁷ This new statute tears away at the heart of a woman's privacy, including her right to confidentiality and autonomy.⁸ Also, such legislation contradicts a woman's Fourth Amendment protections against unlawful search and seizures through mandatory HIV testing, because it is performed through a blood test.⁹ Although AIDS is a fearful disease, legislation surrounding it should not truncate on a woman's individual rights, a price society should not want to bear when alternative policies are available to educate women and help them make the right choice about prenatal health care.

Nettie Meyersohn's push for the "AIDS Baby Bill" early on).

⁶ See Dena Bunis, Baby AIDS Test Notification Bill Dies in Albany, N.Y. NEWSDAY, June 30, 1995, at 49 (clarifying that the proposed AIDS Baby Bill did not pass in the Assembly, after it was passed in the Senate); Curtis L. Taylor, Brooklyn in Albany; Lawmakers Race to the Finish, N.Y. NEWSDAY, June 28, 1994, at B07 (noting the disapproval of the Assembly after not passing the AIDS Baby Bill); see also Monte R. Young, Moms To Get Results of Baby AIDS Tests, N.Y. NEWSDAY, June 27, 1996, at A40 (announcing the passage of the bill in the N.Y. Assembly).


⁸ See Curnin, supra note 7, at 872-74 (stating that both a pregnant woman's right to confidentiality and autonomy, both which are within the right to privacy, will be violated by the proposed AIDS Baby Bill); see also Eileen M. McKenna, The Mandatory Testing of Newborns For HIV: Too Much, Too Little Too Late, 13 N.Y.L. SCH. J. HUM. RTS. 307, 335-45 (1997) (discussing that privacy issues including search and seizure implications of the AIDS Baby bill and concluding no compelling interest could justify these constitutional violations). But see Hogan & Wertz, supra note 7, at 841 (concluding there was a compelling interest that overrides those privacy concerns).

⁹ See Linda Farber Post, Note, Unblinded Mandatory HIV Screening for Newborns: Care or Coercion?, 16 CARDOZO L. REV. 169, 206-09 (1994) (discussing the Fourth Amendment protections against unreasonable intrusion by the government, and their violation under a mandatory HIV screening program); see also McKenna, supra note 8, at 338-40 (explaining how the involuntary blood tests implicate search and seizure issues). See generally U.S. CONST. amend. IV (proscribing unreasonable search and seizures by the government).
I. NEW YORK AND FEDERAL INITIATIVES

New York's controversial newborn HIV screening law mandates the Commissioner of Health to establish a program for testing newborns for HIV.\(^{10}\) Under the regulations established by the Commissioner, "an immediate screening test of the mother with her consent or of her newborn for HIV antibody with results available as soon as practicable, but in no event longer than 48 hours"\(^{11}\) must be administered, along with numerous other procedural requirements including reporting the baby's name, weight, sex, ethnicity, and the mother's name, address, telephone number, social security number, and age.\(^{12}\) This extensive procedure is necessary to "improve the health outcomes of newborns, and to improve access to care and treatment of newborns."\(^{13}\) Although the regulations require an abundant amount of personal information about both mother and child, there is only one requirement referring to counseling or after-care once the mother or child have tested positive for HIV.\(^{14}\) Since more HIV infected people have been able to live longer due to advances in medical science, after-care and counseling are essential in order to help them cope with daily living, and access to medical care gives them a chance to live more fulfilling lives. However, the New York Department of Health is considering

\(^{10}\) N.Y. PUB. HEALTH § 2500-f (2002) (effective June 26, 1996) (stating that "the commissioner 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"); see Press Release, Governor Pataki Signs "Baby AIDS" Legislation into Law, available at http://www.state.ny.us/governor/press/june26.html (June 26, 1996) (explaining the law "directs the Health Commissioner to develop regulations to implement a comprehensive program of newborn HIV testing, including counseling for mothers, disclosure of test results to mothers and physicians, follow-up reviews and educational activities."); see also Michele M. Contreras, New York's Mandatory HIV Testing of Newborns: A Positive Step Which Results in Negative Consequences for Women and Their Children, 20 WOMEN'S RIGHTS L. REP. 21, 28-29 (1998) (setting out 2500-f and discussing its unconstitutional implementation).


\(^{12}\) N.Y. COMP. CODES R. & REGS. tit. 10, § 69-1.3 (b)(1), (b)(3) (2002).


\(^{14}\) N.Y. COMP. CODES R. & REGS. tit. 10, § 69-1.3 (l)(6) (2002) (stating that one of numerous specific procedures that should be followed after testing is to "make referrals as necessary for follow-up of HIV-positive newborns who cannot be located"); see also Contreras, supra note 10, at 29-30 (explaining follow up and treatment are often inadequate or absent undermining any possible justification for the law). But see New York State Department of Health, AIDS - HIV Counseling and Testing - AIDS Institute, New York State Department of Health, available at http://www.health.state.ny.us/nysdoh/ aids/hivtesti.htm (last visited July 23, 2003) (listing numerous counseling resources for those with AIDS throughout New York).
amendments to these regulations, in order to ensure that counseling, immediate care, and treatments are also included within these mandated regulations.\textsuperscript{15}

Through these proposed amendments, the New York Legislature has reiterated its intent with regard to the comprehensive newborn HIV screening program.\textsuperscript{16} The purpose of such a comprehensive screening program is to “ensure that newborns who are born exposed to HIV receive prompt and immediate care and treatment that can enhance, prolong, and possibly save their lives.”\textsuperscript{17} The state legislature asserts that such a program helps mothers make informed decisions about their newborns’ health and welfare\textsuperscript{18} but, since there is no choice with regard to testing, it seems to be a limited decision which is already partially made by the government that mandates it. In fact, the state legislature announced that this screening program is “a model for the nation,”\textsuperscript{19} which should raise the question of

\textsuperscript{15} See Comprehensive HIV Newborn Screening Program, 2002-1 N.Y. ST. REG. 67 (proposed Jan. 2002) (to be codified at N.Y. COMP. CODES R. & REGS. tit. 10, § 69-1, § 69-6) (noting that part of this amendment is to include HIV as part of the list of conditions which tested for in New York’s comprehensive newborn screening program, therefore making it part of a very successful public health initiative); see also Contreras, supra note 10, at 26-27 (describing the potential benefits of early treatment); Katherine Piccola, HIV Related Testing, 64 N.Y. JUR. 2D Health and Sanitation § 84 (2002) (stating that counseling or referrals for counseling must be provided when tests are done “pursuant to Public Health Law regarding the testing of newborns”).


\textsuperscript{18} Id. (proposing that the HIV screening program become a “safety net” for HIV positive mothers and their newborns); see Press Release, Governor Pataki Signs “Baby AIDS” Legislation into Law, available at http://www.state.ny.us/governor/press/june26.html (June 26, 1996) (quoting Senator Guy Velella the sponsor of bill saying “[e]nactment of this new law is a victory for common sense in the testing of infants for HIV. Babies exposed to HIV infection will now be identified earlier and receive appropriate medical care sooner. It’s a law that will unquestionably save lives”); see also N.Y. COMP. CODES R. & REGS. tit. 10, § 69-1 available at http://www.health.state.ny.us/nysdoh/phforum/agenda.htm (last visited July 23, 2003) (considering an expedited HIV test to “maximize the efficacy of treatment”).

\textsuperscript{19} Comprehensive HIV Newborn Screening Program, 2002-1 N.Y. ST. REG. 67 (proposed Jan. 2002) (to be codified at N.Y. COMP. CODES R. & REGS. tit. 10, § 69-1, § 69-6). New York State lawmakers would like this mandatory HIV screening program to become a “longstanding and successful public health initiative” and consequently a “model for the nation.” Id. The Sponsor of the bill called it “a victory for commonsense.” See Press Release, Governor Pataki Signs “Baby AIDS” Legislation into Law, available at
whether the state's motive is recognition or concern for its constituents?

In addition to New York's newborn HIV screening program, the federal government has also enacted guidelines for states with regard to the same matter, known as the "Ryan White Comprehensive AIDS Resources Emergency Act of 1990" (Ryan White Act). Its purpose is to provide emergency assistance and funding to areas that are disproportionately affected by HIV, in order to provide "more effective and cost efficient systems for the delivery of essential services to individuals and families with HIV disease." This Act requires states to adopt the Centers for Disease Control (CDC) guidelines for counseling and voluntary testing for pregnant women in order to receive funding from the federal government. Although the CDC guidelines in 1994, as well as the revised guidelines of 1999, still maintain a voluntary approach to the testing of pregnant women, the Ryan White Act purports to give more funding to states that have required testing for newborns and disclosure of their results to a legal guardian. A statute similar to New York's would fit the bill. Therefore the New York Legislature, in enacting this


21 Id. (describing the statutory purpose).
22 42 U.S.C. § 300ff-33(a)(b) (2002) (stating non compliance with CDC regulations would make a state ineligible for federal funding available for counseling and testing); see 42 U.S.C. § 300ff-21 (a) (b) (2003) (codifying a duty to make grants to states to enable them to deal better with health care costs in connection with HIV, more specifically mothers and infants infected with HIV); see also 42 U.S.C. § 300ff-11 (establishing a general plan for federal grants to assist in providing services for HIV).
24 See 42 U.S.C. § 300ff-33 (c)(2)(B)(i)-(ii) (2003) (explaining the grant of $10,000,000 for states with laws requiring HIV testing for newborns); Kellie E. Lagitch, Note, Mandatory HIV Testing: An Orwellian Proposition, 72 ST. JOHNS L. REV. 103, 127 (1998) (noting "the Ryan White Care Amendments ... call for a program which will encourage pregnant women to submit voluntarily to HIV treatment"); see also Michael A. Grizzi, Recent Developments: Compelled Antiviral Treatment of HIV Positive Pregnant Women, 5 UCLA WOMEN'S L.J. 473, 485 n. 60 (1995) (recognizing "[a]t the time of this writing, there was some concern among AIDS activists that the United States Congress might require mandatory testing of all pregnant women getting care at facilities funded under the Ryan White Act").
comprehensive newborn HIV screening program, is only following the directive of the federal government in order to receive considerable financial assistance to help educate and counsel its citizens on HIV/AIDS prevention and transmission.\textsuperscript{25}

Opponents of this statute argue that mandatory testing creates distrust and embarrassment, especially between patients and their medical providers.\textsuperscript{26} The relationship between doctors and patients will become coercive and harsh, instead of cooperative and nurturing.\textsuperscript{27} There is also a great concern that disclosure of these results will encourage and increase discrimination against

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\item \textsuperscript{25} See 42 U.S.C. § 300ff-33(c)(2)(B)(ii)(I),(II) (2003) (explaining if a state requires newborn infants born in the State be tested for HIV and that the biological mother and legal guardian of the infant be informed of the results of the testing than the state will receive funding from the federal government under this Act); Jennifer Brown, \textit{A Troublesome Maternal-Fetal Conflict: Legal, Ethical, and Social Issues Surrounding Mandatory AZT Treatment of HIV Positive Women}, 18 BUFF. PUB. INTEREST L.J. 67, 74 (1999/2000) (suggesting "if the Health and Human Services Secretary determines that mandatory testing has not become routine practice, each state will have eighteen months to demonstrate one of the following or lose its Ryan White Care Act funds: (1) a 50% reduction in the rate of new AIDS cases resulting from prenatal transmission; (2) HIV testing of at least 95% of the women who have received at least two prenatal visits prior to thirty-four weeks gestation; (3) a program of mandatory testing of all newborns whose mothers have not undergone prenatal HIV testing"); see generally Jennifer Cooper, Note, \textit{The Politics of Pediatric AIDS}, 3 CARDozo WOMEN’S L.J. 53, 64-68 (1996) (discussing the ethical and Constitutional concerns of prenatal HIV testing).
\item \textsuperscript{26} See Erin Nicholson, Note, \textit{Mandatory HIV Testing of Pregnant Women: Public Health Policy Considerations and Alternatives}, 9 DUKE J. GENDER L. & POLY 175, 184 (2002) (arguing "[a] woman who may already feel the most vulnerable in the medical care environment, may feel even less respect for and trust in a system that refuses to let her be in charge of the decision of whether or not to have an HIV test"); see also Andrea Marsh, \textit{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, 260 (2001) (suggesting "[u]nder mandatory prenatal HIV-testing policies, HIV-infected women are treated more like pregnant drug users than like potential carriers of other hereditary physical conditions, who generally are allowed to make their own decisions about whether to be tested for heritable conditions and how to respond to the results"); Evans McMillion, Note, \textit{The Case Against Mandatory HIV Testing of Pregnant Women: The Legal and Public Policy Implications}, 5 DUKE J. GENDER L. & POLY 227, 231 (1998) (recognizing "[a] healthy patient-provider relationship is predicated on trust, and many providers see the punitive nature of mandatory testing as counterproductive when dealing with high-risk populations").
\item \textsuperscript{27} See Brown, \textit{supra} note 25, at 75-77 (discussing the ramifications associated with mandatory HIV testing including discouraging women from seeing medical personnel especially those who lack access to medical facilities because they usually have higher rates of infection of HIV); Dorian L. Eden, \textit{Note, Is It Constitutional and Will It Be Effective? An Analysis of Mandatory HIV Testing of Pregnant Women}, 11 HEALTH MATRIX 659, 692 (2001) (suggesting "[t]he doctor-patient relationship is based on trust and absent that, many women may not seek prenatal counseling and HIV testing"); see also Elizabeth B. Cooper, \textit{Mandatory Testing of Pregnant Women and Newborns: HIV, Drug Use, and Welfare Policy: Introduction}, 24 FORDHAM URB. L.J. 719, 719 (1997) (noting one opponent’s view is that with an increase of HIV/AIDS in minority women and their lack of access to health care, combined with the risk of HIV discrimination, mandatory HIV testing incorporates too many risks to be useful or efficient).  
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people infected with HIV or AIDS. However, proponents of the bill, especially Assemblywoman Nettie Mayersohn, feels that it prevents "premature and agonizing death of preventable pneomocystic pneumonia, [a common AIDS related disease]."

Other proponents feel that the general welfare of society and newborns, especially, should be the overriding concern of lawmakers and they argue protecting them is paramount to a woman's privacy rights. Furthermore, they claim that a woman has a right to know her HIV status and make decisions regarding her health. However, opponents counter this argument by

28 See Brown, supra note 25, at 77 (stating that improper disclosure of HIV results could cause "family violence . . . discrimination in healthcare, insurance, employment, and housing"); Juliet J. McKenna, Where Ignorance Is Not Bliss: A Proposal For Mandatory HIV Testing Of Pregnant Women, 7 STAN. L. & POL'Y REV. 133, 146 (1996) (stating "society frequently does penalize people for being HIV positive, female, of color, or poor. The penalty falls very heavily on those who, given all this, dare to become pregnant"); see also Nicholson, supra note 26, at 183 (addressing the argument that universal testing would address stereotyping of women in high risk groups).

29 See Monte R. Young, Moms To Get Results of Baby AIDS Tests, N.Y. NEWSDAY, June 27, 1996, at A40 (noting that Nettie Mayersohn, a D-Queens, sponsored the bill in the Assembly and that Guy Velella, R-Bronx, sponsored the bill in the Senate); see also McKenna, supra note 28, at 139 (arguing "mandatory testing addresses the immediate and concrete needs of HIV-positive pregnant women better than either a newborn or a voluntary testing program can"); Cooper, supra note 25, at 65 (arguing economic costs involved with HIV infected infants constitutes a compelling government interest in mandatory testing).

30 Young, supra note 29, at A40 (inferring that early detection of the virus will prevent later development of the disease and therefore a less painful death, all which is unsubstantiated); see Nettie Mayersohn, Mandatory Testing of Pregnant Women and Newborns: HIV, Drug Use, and Welfare Policy: The Baby AIDS Bill, 24 FORDHAM URB. L.J. 721, 727 (1997) (stating "statistics received from the Health Department on the number of HIV infants identified and linked to treatment indicate an astounding success rate of 98.8 percent"). But see Joanne P. Howlett, Women And HIV: The Barriers to Protection, 5 CIRCLES BUFF. WOMEN'S J. L. & SOC. POL'Y. 20, 24 (1997) (positing "[n]either routine screening nor mandatory testing guarantees either the identification or treatment of infants with HIV").

31 E.g., Brown, supra note 25, at 75-77 (stating that proponents accuse civil libertarians of ignoring the public health consequences of voluntary testing); see also McKenna, supra note 28, at 134 (suggesting mandatory testing is the best way to accomplish the goal of having HIV positive women make informed choices about their pregnancy); Cooper, supra note 25, at 68-69 (arguing "[t]he incorporation of routine HIV testing into every woman's prenatal care would allow for early HIV detection and comprehensive care, thus providing a better and longer life for children born to mothers with HIV").

32 See Brown, supra note 25, at 75-77 (asserting that the right not to know is injurious to both women and the newborn's health); Sheree Gootzeit, Note, Expedited HIV Testing: An Unnecessary Test That is Allowing the State to Trample on a Woman's Constitutional Rights, 7 CARDozo WOMEN'S L.J. 187, 188 (2001) (noting "the right of an expectant mother to make an informed decision prior to consenting to any medical procedure"); Nicholson, supra note 26, at 178 (recognizing "[t]he primary argument offered by most advocates of mandatory testing is that the detection of HIV in a pregnant woman is a first step in getting both her and her fetus on the treatment protocol so as to protect the mother's health and hopefully prevent the transmission of HIV").
asserting that a woman also has the right not to know her HIV status.\textsuperscript{33}

II. HIV TRANSMISSION AND TESTING

HIV is the virus which causes AIDS, and since there is no cure for either,\textsuperscript{34} the only protection available is education concerning the disease and its transmission.\textsuperscript{35} HIV is transmitted through an exchange of bodily fluids,\textsuperscript{36} mostly through either sexual conduct or sharing needles/syringes, primarily for drug use, with an infected person, and of course from mother to child, during pregnancy.\textsuperscript{37} HIV kills a person from within, by destroying the body's own immune system.\textsuperscript{38} HIV attacks a person's immune system through their white blood cells, known as CD4 positive T cells (CD4 cells).\textsuperscript{39} These blood cells fight disease within the body, and without them there is no natural defense system against disease, leaving the body susceptible to other infections and diseases.\textsuperscript{40} However, HIV works slowly to breakdown a person's immune system, and when the immune system is weak enough to allow the person to acquire certain diseases or the CD4 cells have reached a minimal level, the person is said to have AIDS.\textsuperscript{41} It is usually these "opportunistic infections", which an infected person will acquire once his immune system is weak enough, which will eventually cause their demise, not the HIV itself.\textsuperscript{42}

\textsuperscript{33} See McKenna, supra note 8, at 344 (concluding that through mandatory testing a woman's right to make her own medical decisions is absorbed into the statute and becomes submissive to state making medical decisions for her); see also Grizzi, supra note 24, at 487-88 (discussing a woman's right to refuse medical treatment and state interests in mandating medical treatment); McMillion, supra note 26, at 244 (acknowledging "[s]upporters of mandatory HIV testing of pregnant women argue that the need to identify and bring into treatment as many HIV-positive newborns and mothers as possible is worth infringing upon the constitutionally protected rights of the mother").

\textsuperscript{34} See Larry Gostin, A Decade of a Maturing Epidemic: An Assessment and Directions for Future Public Policy, 16 AM. J. L. AND MED. 1, 10 (1990) (noting "there is currently no cure or vaccine for the prevention of HIV infection"); David Pratt, What Lessons Have We Learned From the AIDS Pandemic? Opening Remarks, 61 ALB. L. REV. 671, 676 (1998) (recognizing that unless a cure is found, an HIV positive patient will inevitably die from the infection); Fact Sheet, National Institutes of Health, National Institute of Allergy and Infectious Diseases, HIV Infections and AIDS: An Overview, at http://www.niaid.nih.gov/factsheets/hivinf.htm (June 2003) (noting that researchers have developed certain drug treatments and therapies to combat both HIV and its associated infections, but most have severe side effects and HIV usually becomes resistant to such medications, leaving HIV infected persons without a cure to this virus).

\textsuperscript{35} See Mary E. Clark, AIDS Prevention: Legislative Options, 16 AM. J. L. AND MED. 107, 109 (1990) (positing "HIV infection is preventable if individuals understand and
apply risk reduction measures that can minimize their chance of infection"); Fact Sheet, National Institutes of Health, National Institute of Allergy and Infectious Diseases, HIV Infections and AIDS: An Overview, at http://www.niaid.nih.gov/ factsheets/hivinf.htm (last visited July 23, 2003) (stating the only way to prevent infection by the HIV virus is to avoid any behaviors that put a person at risk, and that educating people on safe sex and other methods of protection is a means of prevention); see also Terry Nicole Steinberg, Feminist Sex Education: To Reduce the Spread of AIDS, 17 WOMEN'S RIGHTS L. REP. 63, 70 (1995) (discussing the role of state AIDS education statutes).

36 See Alix R. Rubin, Comment, HIV Positive, Employment Negative? HIV Discrimination Among Health Care Workers in the United States and France, 17 COMP. LAB. L. 398, 404 (1996) (noting “[HIV] is transmitted from one person to another only through the exchange of blood, semen, vaginal fluids, and breast milk”); Elizabeth Meryment, Quick Fix to Stop HIV Spread, COURIER MAIL, Dec. 2, 2002, at 11 (stating the methods of transmission and new drugs that may help stop the spread of AIDS); see also Josephine Gittler & Sharon Rennert, HIV Infection Among Women and Children and Antidiscrimination Laws: An Overview 77 IOWA L. REV. 1313, 1317-18 (1992) (recognizing “while HIV has been isolated in body fluids other than blood, such as saliva, tears, urine, and bronchial secretions, infection after direct exposure to such fluids has not been documented”).

37 See Rubin, supra note 36 (noting “[HIV] is transmitted from one person to another only through the exchange of blood, semen, vaginal fluids, and breast milk”); see also Lawrence K. Altman, M.D., The Doctor’s World; The AIDS Questions That Linger, N.Y. TIMES, Jan. 20, 2001, at 1 (remarking on the methods of transmission); Marilyn Marchione, Does Having a Fatal Disease Rule Out Parenthood?, MILWAUKEE J. SENTINEL, Mar. 11, 2002, at 1G (arguing transmission rates during pregnancy have fallen with drug treatment).


40 See Hermann, supra note 38, at 849 (noting “HIV infection produces a significant decline in white blood cells or CD4+ cells”); Leonardo Renna, Note, New York State’s Proposal to Unblind HIV Testing for Newborns: A Necessary Step in Addressing a Critical Problem, 60 BROOK. L. REV. 407, 410 (1994) (stating “the virus attacks and destroys a person’s CD4 cells—cells that play an essential role in the proper functioning of a person’s immune system”); Fact Sheet, National Institutes of Health, National Institute of Allergy and Infectious Diseases, HIV Infections and AIDS: An Overview, available at http://www.niaid.nih.gov/ factsheets/hivinf.htm (August 2002) (explaining that HIV attacks by multiplying, infecting, and killing CD4 positive T cells, which are the immune system’s ‘key infection fighters’).
Perinatal HIV is the transmission of HIV from an infected mother to her child through "vertical transmission".\(^4\) Vertical transmission can occur in three different instances: (1) during gestation, while the fetus is in utero, through intrauterine infection, (2) during birth by exposure to the infected blood through delivery, and (3) postpartum or after birth through breastfeeding.\(^4\) A fetus can become infected with HIV as early as the eighth week of pregnancy,\(^4\) but almost half of all babies who


\(^4\) See Malloy, supra note 7, at 1188-89 (explaining that due to HIV the person infected does not have a working, capable immune system to fight against other diseases and infections, therefore succumbing to "opportunistic infections"); see also Renna, supra note 39, at 411 (noting that these opportunistic infections are usually present in the body already, but are only harmful to a person with AIDS because of the failing immune system); National Institutes of Health, National Institute of Allergy and Infectious Diseases, HIV Infections and AIDS: An Overview, Fact Sheet, available at http://www.niaid.nih.gov/factsheets/hivinf.htm (June 2003) (listing some 'opportunistic infections' as various cancers, such as Kaposi's Srecoma, cervical cancer, and lymphomas (cancer of the immune system), coughing and shortness of breath, seizures, difficult or painful swallowing, severe and persistent diarrhea, vision loss, weight loss, fever, severe headaches, and comas).

\(^4\) See Curnin, supra note 7, at 864 (defining 'vertical transmission' simply as the passing of HIV from mother to child); see also Cooper, supra note 25, at 56 (noting a wide variety of vertical transmission rates, the lowest being in Europe); Gootzeit, supra note 32, at 198 (explaining "[t]he 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").

\(^4\) See Curnin, supra note 7, at 864 (stating that in 1990, 87% of children who had AIDS, contracted it through in utero transmission); McKenna, supra note 28, at 135 (noting "[v]ertical transmission can occur during gestation via the pregnant woman's blood system, during delivery through contact with maternal blood or genital tract secretions, or after birth via breast feeding"); Jennifer Sinton, Note, Rights Discourse and Mandatory HIV Testing of Pregnant Women an Newborns, 6 J.L. & POL'Y 187, 194 (1997) (explaining "women can transmit HIV to fetuses in utero and to infants during and after birth").

\(^4\) See William Jefferson Clinton, AIDS Is Not a Death Sentence, N.Y. TIMES, Dec. 1, 2001, at 9 (noting that transmission of HIV can begin in utero); see also Jeffrey W. Cavendar, Note, AIDS in the Health Care Setting: The Congressional Response to the Kimberly Bergalis Case, 26 GA. L. REV. 539, 544 (1992) (explaining HIV can be transmitted to a fetus across the placenta); Amy M. Decker, Comment, Criminalizing the Intentional or Reckless Exposure to HIV: A Wake-Up Call to Kansas, 46 KAN. L. REV. 333, 337 (1998) (recognizing passage from mother to fetus or newborn as one of the four primary ways HIV is transmitted).
contract HIV will do so during labor and delivery.\textsuperscript{46} Although it seems that a newborn has little chance in escaping contamination from their infected mother, in fact newborns have only 25% to 30% chance of contracting HIV when born to HIV positive mothers.\textsuperscript{47} The reason for the low transmission rates is dependent upon the body’s response to HIV and the mechanics of its transmission.\textsuperscript{48} When HIV enters a person’s bloodstream and starts to breakdown one’s CD4 cell, the person’s immune system responds by producing antibodies to fight against the virus.\textsuperscript{49} It is these antibodies, along with the virus, which are passed to the newborn during gestation, delivery, or breastfeeding.\textsuperscript{50} However, since newborns are developing their own immune system, they keep their mother’s antibodies until they are able to produce

\textsuperscript{46} Although early transmission is prevalent, many babies also obtain HIV after birth, through breastfeeding. See Fathia A-Mahmoud, \textit{In Africa, Taking Action Against AIDS}, WASH. POST, Aug. 25, 1987, at Z7. However, there is a 50% reduction in transmission of HIV to the newborn, if the baby is delivered by cesarean section compared to vaginal delivery. Centers for Disease Control and Prevention, \textit{Revised Guidelines for HIV Counseling, Testing, and Referral and Revised Recommendations for HIV Screening of Pregnant Women}, 50 MMWR No. RR-19, 3 available at http://www.cdc.gov/mmwr/pdf/rr/rr5019.pdf (Nov. 9, 2001).

\textsuperscript{47} See Family Doctor, \textit{HIV, Pregnancy, and AZT}, at http://familydoctor.org/handouts/093.html (last visited July 24, 2003) [hereinafter \textit{HIV Pregnancy and AZT}] (providing various studies have concluded that prenatal transmission occurs between 12.9% to 39% of the time, but that 79% of HIV positive children are born to mothers who use intravenous drugs or who have unprotected sex with intravenous drug users); see also Malloy, \textit{supra} note 7, at 1189–90 (indicating that mother-to-child HIV transmission has been indicated to occur in anywhere from 12.9% to 39% of the time depending upon circumstances). See generally Michael L. Closen, \textit{The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and its Adverse Effects on Human Rights}, 61 ALB. L. REV. 897, 942 (1998) (discussing transmission of AIDS from mother to child and potential remedies).

\textsuperscript{48} See Alejandro Dorenbaum, \textit{Two-Dose Intrapartum/Newborn Nevirapine and Standard Antiretroviral Therapy Reduce Perinatal HIV Transmission}, 288 JAMA 137, 189 (2002) (indicating that most transmission occurs late in pregnancy or at the time of delivery); Krieb, \textit{supra} note 47, at 2–3 (indicating that mother’s viral load, method of birth, and breast feeding all influence transmission rate); Melissa Miller, \textit{Breastmilk Erythropoietin and Mother-to-Child HIV Transmission Through Breastmilk}, 360 LANCET 1246, 1246 (2002) (providing that 15% of newborn infections are caused solely by breastfeeding).

\textsuperscript{49} See Herman, \textit{supra} note 38, at 849–50 (2000) (indicating this as the typical progression of the HIV infection); Richard A. Maniskas, Bragdon v. Abbott: The Case in Which Reproduction Was Ruled to Be a Major Life Activity within the Americans with Disabilities Act of 1990, 10 WIDENER J. PUB. L. 187, 200 n.116 (2001) (elucidating the bodies reaction to HIV infection); \textit{HIV, Pregnancy and AZT}, (explaining that HIV testing is based on the body’s production of antibodies in response to HIV).

\textsuperscript{50} See Brown, \textit{supra} note 25, at 69 (indicating these as the primary means through which HIV antibodies are transmitted between mother and child); Lisa R. Filler, \textit{Ethics of AIDS Clinical Trials in Developing Countries: A Review} 87 FOOD DRUG L.J. 133, 136–37 (2002) (providing these as the means of mother-to-child HIV transmission); \textit{HIV, Pregnancy and AZT}, (noting that all of the mother’s antibodies are passed to her baby during her pregnancy).
their own, which usually occurs between the ages of 6 to 18 months old. Therefore, a baby born to an HIV positive mother will always test positive for HIV at first. However, if the virus did not infect the baby, it will eventually lose its mother’s antibodies and will test negative for HIV. In the one out of four newborns that do contract HIV they will also lose their mother’s antibodies, but instead will then begin to produce their own and will test positive for HIV. Conclusively, the only HIV status that will be determined after any HIV testing of the baby is the mother’s because if the baby tests positive for HIV, than the mother must have HIV antibodies, making her HIV status positive.

Testing for HIV is already complicated, but combined with the varying accuracy rates depending on which test is administered; testing becomes even more complex. The most common HIV tests used are the ELISA and Western Blot tests. These tests,
when administered properly, are usually accurate because they test for antibodies, which the body produces in response to HIV entering one’s system. However, when a newborn is tested, using these same tests, the presence of the mother’s antibodies renders the test positive but all it truly determines is that the baby was exposed to the virus, not that the baby is necessarily infected. These tests are easily administered by taking a small sample of blood from a heel stick or the umbilical cord, applying it to filter paper, and sending it off for analysis. The Western Blot test is routinely given after the ELISA test results, as a confirmatory test, because of the high number of false positives which arise from the ELISA test. However, the Western Blot test gives no such confirmation of a newborn’s status because it also tests for HIV antibodies and therefore, will detect the mother’s HIV antibodies, producing a HIV positive result.

of testing for HIV); Smith, supra note 55, at 72 (indicating these as two commonly utilized tests for HIV); Gootzeit, supra note 32, at 195 (noting that all newborns born to HIV infected mothers will be seropositive upon birth, even though most of them will never become HIV positive themselves).

See Stacey B. Fishbein, Note, Pre-Conviction Mandatory HIV Testing: Rape, AIDS and the Fourth Amendment, 28 HOFSTRA L. REV. 835, 840 n.49 (2000) (indicating that ELISA is 99.8% accurate); Gootzeit, supra note 32, at 195 (distinguishing the accuracy of the ELISA and Western Blot tests in adults compared with the results from infants administered with these HIV diagnostic tests); Renna, supra note 39, at 413 (indicating that the combination of ELISA and Western Blot is approximately 99% accurate).

See Fishbein, supra note 57, at 840 n.49 (indicating that ELISA is 99.8% accurate); Gootzeit, supra note 32, at 195 (distinguishing the accuracy of the ELISA and Western Blot tests in adults compared with the results from infants administered with these HIV diagnostic tests); Renna, supra note 39, at 413 (indicating that the combination of ELISA and Western Blot is approximately 99% accurate).

See Hearing of the Subcommittee on Newborn Screening of the New York State AIDS Advisory Council app. at 2 (Sept. 15, 1993) (statement of Dr. David Rogers, Chairman, New York State AIDS Advisory Council) (providing description of the normal testing process); Martha A. Field, Testing for AIDS: Uses and Abuses, 16 AM. J.L. & MED. 34, 38 (1990) (indicating that the filter paper will produce bands indicating the presence of HIV antibodies); Post, supra note 9, at 179 (explaining the testing procedure involved when taking blood from a newborn for an HIV test).

See Eugene M. Harrington & Paige Horelica, HIV Misdiagnosis: Possible Liabilities, 25 T. MARSHALL L. REV. 1, 5 (2000) (providing that tests like Western Blot are used in conjunction with ELISA to lessen the risk of false positives); McKenna, supra note 31, at 323 (emphasizing that opponents of mandatory testing attack the accuracy of these two common tests in producing false positives and only definitively determine the mother’s HIV status); Shriver, supra note 56, at 325 n.51 (indicating that Western Blot is often used in conjunction with ELISA to prevent the occurrence of false positives).

See Marsh, supra note 26, at 204 (describing the inaccuracy of these two tests when utilized to test newborns); Gootzeit, supra note 32, at 195 (elucidating the inability of these tests to accurately test for HIV infection in newborns); Renna, supra note 39, at 413–14 (noting that because all newborns receive their mothers’ antibodies; all infants born to HIV infected mothers will test positive under the ELISA and Western Blot tests until the babies lose their mothers’ antibodies).
Therefore, until the infants reach 6 to 18 months old when they lose their mothers' antibodies and the tests can effectively detect their own antibodies, these two tests are, without a doubt, useless to determine their HIV status.\textsuperscript{62}

There have been many new developments in testing in order to provide earlier detection of HIV. The HIV-IgA assay test can give a positive or negative result for 66\% of newborns being tested before they reach three months old,\textsuperscript{63} by identifying the antibodies to HIV that do not cross over the placenta of the mother.\textsuperscript{64} The accuracy of this test also increases with the age of the infant, to render 99.4\% positive prediction and a 98.7\% negative prediction with an infant over three months old.\textsuperscript{65} There is another test, the polymerase chain reaction (PCR) test, which produces no false positives, is incredibly accurate, extremely sensitive, and provides results in only a few days.\textsuperscript{66} It can determine 90\% of all infected babies between the ages of one to three months and this probability increases to 93\% by fourteen days old.\textsuperscript{67} The PCR test can even identify 38\% of HIV positive

\textsuperscript{62} See Gootzeit, supra note 32, at 195 (indicating that these tests are inaccurate predictors of possibility of a newborn contracting HIV for up to 16 months); Renna, supra note 39, at 413-14 (explaining that it normally takes 7 to 10 months for babies to lose their mother's antibodies, but it could take as long as 15 or 16 months); Maia E. Scott, Note, Tests for Pediatric AIDS: Are We Failing Our Children?, 3 VA. J. SOC. POLY & L. 217, 233 (1995) (indicating that these tests may be inaccurate predictors of newborn infection for up to 18 months).

\textsuperscript{63} See Contreras, supra note 10, at 25 (providing that HIV-IgA can accurately identify a 3 month old child's HIV infection 66\% of the time); Sheldon Landesman et al., Clinical Utility of HIV-IgA Immunoblot Assay in the Early Diagnosis of Perinatal HIV Infection, 266 JAMA 3397, 3443 (1991) (indicating that the test was 62\% effective at 3 months of age); Gootzeit, supra note 32, at 196 (describing the new developments of HIV testing, including HIV-IgA test and PCR tests).

\textsuperscript{64} See Contreras, supra note 10, at 25 (indicating that the HIV-IgA tests for antibodies that do not pass through the placenta); Post, supra note 9, at 180 n.74 (indicating that the test detects antibodies that do not pass through the placenta); Renna, supra note 39, at 415 (noticing the similarity between the HIV-IgA test and the Western Blot and ELISA test is that all three test for HIV antibodies, but HIV-IgA test focuses on the HIV antibodies that do not cross the placenta).

\textsuperscript{65} See Contreras, supra note 10, at 25 (providing that the test is 99.4\% positive predictive value and 98.7\% negative predictive value); Landesman, supra note 63, at 3443 (indicating that initial study produced no false positive results); Gootzeit, supra note 32, at 196 (discussing the accuracy rating of the HIV-IgA assay test and there improvement as the baby becomes older).

\textsuperscript{66} See Colin Crawford, Mandatory Testing of Pregnant Women and Newborns: HIV, Drug Use, and Welfare Policy, 24 FORDHAM URB. L.J. 729, 738 n.22 (1997) (indicating that the false positive rate is approximately 0.2\%); Gootzeit, supra note 32, at 196 (indicating that PCR is 90\% accurate for newborns 1 to 3 months old); Renna, supra note 39, at 414 (noting the sensitivity of this test that it can detect one HIV DNA molecule in 10 microliters of blood).

\textsuperscript{67} See Gootzeit, supra note 32, at 196 (explaining the initial and increased accuracy
babies on the day or the day after they were born. 68 Another new test focuses on detecting a protein, known as p24, which is at the heart of HIV. 69 This p24 antigen test can identify the status of newborns, three weeks old with 100% accuracy. 70 Hence, this test promises to become an inexpensive, rapid, and accurate technique in determining the HIV status of newborns. 71 However, the PCR and other tests mentioned above are not available at most clinics, but rather through a personal physician, 72 making their effectiveness limited to those who can afford it. Finally, the most recent and controversial new development in testing is the Single-Use Diagnostic System (SUDS), which can provide a result in thirty minutes. 73 The rating of this test while the baby increases in age); Renna, supra note 39, at 414 n.34 (indicating that the test is 100% effective after 6 months); Scott, supra note 62, at 234 (providing that the test is nearly 100% effective from 1 to 3 months).

68 See Contreras, supra note 10, at 25 (providing that PCR is 38% effective at birth); Gootzeit, supra note 32, at 196 (noting the high accuracy of this test when it is administered to newborns on the day of their birth and the following 2 weeks after birth); Scott, supra note 62, at 234 (indicating that PCR is 38% effective on the day of birth).

69 See Contreras, supra note 10, at 25 (providing that p24 tests for the presence of proteins “in the core of the HIV virus”); Gootzeit, supra note 32, at 196 (indicating it tests for core proteins of HIV); Renna, supra note 39, at 414 (specifying that the p24 antigen test detects p24, “a protein found in the core of HIV”).

70 See Renna, supra note 39, at 414 (noting that the original p24 antigen test was not compatible with infants, but a small modification of the test produces 100% accuracy ratings when administered to infants by three weeks old). See generally Sandra G. Boodman, New Test Identifies HIV Infected Newborns, WASH. POST, Feb. 9, 1993, at Z5 (noting the effectiveness of the p24 antigen test on children); HIV Monitoring, VIRUS WKLY., Nov. 12, 2002, at 10 (stating that “p24 antigen is a protein in HIV” which is measured by the p24 antigen test to determine the amount of antigen present in a sample).

71 See Contreras, supra note 10, at 25 (highlighting that the antigen test will be accurate, inexpensive, and a rapid form of testing); Gootzeit, supra note 32, at 196 (predicting that due to its high accuracy, early detection capabilities, and its inexpensiveness, p24 antigen test will become the customary HIV diagnostic test for newborns); Renna, supra note 39, at 414-15 (noting that the new antigen test will be accurate, inexpensive, and a rapid form of testing).

72 See HIV, Pregnancy, and AZT, (noting that these tests are not available at all clinics and should be discussed with a personal physician). See, e.g., West Alliance Biotechnologies, at http://www.wabtusa.com/viral%20load%20test.htm (last visited July 24, 2003) (indicating that the current cost is about $150 out-of-pocket for the test). See generally Symposium on Health Care Policy, 61 ALB. L. REV. 679, 715 (recognizing that there are other significant barriers to some of the populous in obtaining this testing such as cost, geographic accessibility, and culture).

73 See Gootzeit, supra note 32, at 196 (noting that due to the quick results from the SUDS test, it is usually administered to the mother while in labor, if there is no report of the mother’s HIV status), see also Jin Hee Lee, Excerpts from a Jailhouse Lawyer’s Manual, Fifth Edition, 31 COLUM. HUMAN RIGHTS L. REV. 355, 365 (stating that the p24 antigen test gets results in 15 to 30 minutes); Jamie Talan, Newborns and AIDS: To Test, or Not to Test / Doctors Say Quick Screening now Used is Too Often Wrong, May do More Harm Than Good, NEWSDAY, Feb. 13, 2000, at A07 (discussing the potential of receiving erroneous test results).
problem with this test is its unbelievable inaccuracy. In fact, the SUDS test was wrong two out of three times when the women who were tested were those who fell outside of the high-risk group. The SUDS test is a blood screening test that deciphers how well your body responds to HIV and the results are based on a mathematical equation, therefore leaving the accuracy of the test dependent upon the make-up of the group tested (i.e. Whether the group of women tested have high or low risk of HIV?) The SUDS test is authorized for use during labor, in order to provide an HIV status if none is known, and to determine if treatment is needed immediately. Nevertheless, despite the wide array of testing possibilities available, none are completely effective or available to the entire population, in order to consider any of them as sufficient testing diagnostic methods.

74 See Gootzeit, supra note 32, at 196 (concluding that the SUDS is faulty and produces an “overwhelming number of wrong results due to its temperamental accuracy”). See generally Richard L. Brown, et al., A Two-Item Screening Test for Alcohol and Other Drug Problems, APPLETON & LANGE J. OF FAM. PRAC., Feb. 1997, No. 2, Vol. 44, at 151 (stating that self-report measures are susceptible to some inaccuracy in detecting SUDS); Lee, supra note 73, at 365 (positing that generally, the accuracy of an HIV test is determined by the proximity of the test to the actual time of infection).

75 E.g., Gootzeit, supra note 32, at 197 (iterating the proposition that SUDS yielded a result incorrect two of three times when testing women outside of the high risk group); Talan, supra note 73 (stating that people who are part of a non-risk population and are tested with the SUDS test, have lower amount of true positives within the group and hence, result in a much higher percentage of false positives). See generally Brown, supra note 74, at 151 (specifying that accuracy remained constant whether a high risk group was included or removed from the test group).

76 See Gootzeit, supra note 32, at 196-97 (commenting that SUDS is based on such a mathematical equation); Talan, supra note 73, at A07 (finding that the mathematical equation, which the test is based upon, detects a certain percentage of true positives and a certain percentage of false positives within the group of women tested. Since the test is looking for a certain percentage of false positives and true positives a high-risk group would produce an inaccuracy rate of 1%). See generally Lulu Weinzimer, US, Foreign Firms Spar for Dominance in AIDS-Test Market, J. OF COMM., Sept. 24, 1992, at 4A (describing the test).

77 See Gootzeit, supra note 32, at 196 (commenting that SUDS tests are being performed during labor); Talan, supra note 73, at A07 (explaining that this rapid testing is used during labor in order to allow AZT treatment during and/or birth, in order to hopefully reduce the risk of transmission). See generally Weinzimer, supra note 76 (outlining that such testing is used during labor).

78 See HIV, Pregnancy, and AZT (noting that these tests are not available at all clinics and should be discussed with a personal physician). See, e.g., West Alliance Biotechnologies, at http://www.wabusa.com/viral%20load%20test.htm (last visited July 24, 2003) (indicating that the current cost is about $150 out-of-pocket for the test). But see FDCH Federal Department and Agency Documents Regulatory Intelligence Data, HHS Extends Use of Rapid HIV Test to New Sites Nationwide, Jan. 31, 2003 (suggesting that widespread availability of rapid testing has been approved and will improve the number of people who are unaware of their infections).
There is limited treatment available for anyone who is HIV positive, but especially for pregnant women who have HIV. The current medication used to help prevent the transmission of HIV from mother to child is zidovudine, also known as AZT, ZDV or Retrovir. The administration of zidovudine during pregnancy can reduce the transmission rate by two-thirds, leaving only a 9% chance of transmission. This antiretroviral medicine works by slowing the growth of the virus. Optimally, the antiretroviral therapy begins with administering the zidovudine orally to the mother during her second and third trimesters, then intravenously during labor and delivery, and finally oral administration of zidovudine to the newborn for its first six weeks of life. However, the effects of this antiretroviral

79 See HIV Pregnancy and AZT (last visited July 24, 2003) (noting that there is no medication available that will prevent a baby from becoming infected with HIV); Symposium on Health Care Policy, supra note 72, at 698 (noting that AIDS is not curable at present). See generally Abraham Lama, Health-Peru: AIDS Activism - For Women, By Women, INTER PRESS SERVICE, Oct. 3, 2002 (positing that treatment to pregnant mothers with HIV ends shortly after childbirth, essentially leaving the mothers to die).

80 See Gen Kenslea, AZT Scientists Join GSK Patent Challenge, PR Newswire, Dec. 5, 2002, Domestic News (announcing that AZT is otherwise known as Retrovir® or zidovudine); Thomas H. Maugh, Strides Made in Fighting HIV in Newborns, L.A. TIMES, July 10, 2002, at A3 (noting the increasing use of zidovudine in expectant mothers); HIV Pregnancy and AZT (last visited July 24, 2003) (listing the most common names for zidovudine).

81 See Jonathan D. Moreno, "Of Certain Viability": The New Federal Rules for Fetal and Neonatal Research; Perspective, HASTINGS CENTER REP. Sept. 1, 2002, at 47 (concluding that research in the 1980's produced the data that indicates a two-thirds decline in perinatally transmitted HIV when AZT was utilized during pregnancy); David Orentlicher, Universality and its Limits: When Research Ethics Can Reflect Local Circumstances, 30 J.L. MED. & ETHICS, 403, 403 (2002) (asserting that AZT treatments up to 25 weeks during pregnancy could reduce HIV transmission to a baby at childbirth down to two-thirds); Michael Specter, The Vaccine: Has the Race to Save Africa from AIDS put Western Science at Odds with Western Ethics?, NEW YORKER, Feb. 3, 2002, at 54 (recognizing the two-thirds reduction in HIV transmission from pregnant mother to child at childbirth, but also noting that the expensive nature of the treatment would preclude some parties from receiving the treatment).

82 See Talan, supra note 72, at A07 (noting that the odds of HIV transmission from mother to child reduces from 25% to 9% with the administration of AZT to the mother during pregnancy and to the infant after birth).

83 See Lee, supra note 73, at 368 (discussing how AZT and other drugs can block certain proteins made by HIV that causes the virus to spread); HIV Pregnancy and AZT, (explaining that zidovudine slows the growth of HIV thereby allowing the baby's immune system to become stronger in order to fight other illnesses); see also Renna, supra note 39, at 418 (stating ZDV has been shown to "delay the progression of HIV infection, decrease the frequency of opportunistic infections, and improve cognitive and neurological functions in adults.").

84 Centers for Disease Control and Prevention, Revised Guidelines for HIV Counseling, Testing, and Referral and Revised Recommendations for HIV Screening of Pregnant Women, 50 MMWR No. RR-19, 3 available at http://www.cdc.gov/mmwr/pdf/rr/rr5019.pdf (Nov. 9, 2001) (describing the recommended protocol for administration of antiretroviral therapy to a pregnant women). See Brown, supra note 25, at 71 (noting how
medicine on newborns are unknown. One known major side effect of this treatment is anemia, which could become a much larger problem in developing babies. Also, there is a concern of zidovudine causing possible long-term damage to the mitochondria, which are the powerhouses of each and every cell. More importantly, most of the babies who will be given zidovudine will not be HIV positive, but rather only be exposed to the virus. Thereby leaving healthy babies drugged with antiretroviral medication, and the possibility of unknown long term side effects.

Since there are nearly 40,000 people newly infected with HIV every year and at least 30% of them are women, there is cause for concern among the nation. However, the real area of
concern is increase in HIV infection among minorities, with 82% of new HIV infections arising from Hispanic and African American women. These women are contracting the virus mostly through heterosexual intercourse, leaving many of them pregnant along the way. In fact, by 2001, there have been 9,074 AIDS cases reported among children under 13 years old and 5,257 AIDS deaths in children under 15 years old. Nevertheless, perinatal transmission rates have decreased. According to the CDC "[b]etween 1992 and 1997, perinatally acquired AIDS cases declined 66% in the United States" without mandatory newborn screening, but rather through the CDC guidelines of voluntary testing and counseling for pregnant women. In effect, the number of pregnant women who voluntarily chose to be tested for HIV increased from 68% in 1993 to 79% in 1996, with antiretroviral treatment also on the increase. Between 1991 and 2000, there was an 80% decrease


91 See Rich, supra note 90, at 11 (noting increase of HIV in minorities and women); David Brown, Poverty Entangles Promise of Powerful Treatment, WASH. POST, Sept. 1, 1997, at A01 (discussing increase in minorities with HIV); Centers for Disease Control, supra note 90 (noting each year, more than half new HIV infections occur among African Americans, while they only represent 13% of the population and similar disproportionate percentages occur among Hispanics, who only represent 12% of the American population).

92 See Centers for Disease Control, supra note 90 (noting that 75% of women contracted the virus through heterosexual contact and 25% through IDU, intravenous drug use); see also Janice Alfred, The 45th Session Of The Commission On The Status Of Women: Gender Discrimination And The AIDS Pandemic, 18 N.Y.L. SCH. J. HUM. RTS. 439, 440 (2002) (discussing women in other countries who acquire HIV through sexual intercourse); Jody B. Gabel, Liability For "Knowing" Transmission of HIV: The Evolution Of A Duty To Disclose, 21 FLA. ST. U.L. REV. 981, 986 (1994) (noting increase of HIV in women due to heterosexual contact).


95 See id. (discussing increases in testing). According to the CDC's Perinatal AIDS Collaborative Transmission Study (PACTS), AZT uses increased and perinatal transmission decreased from 21% to 11% in New York City, Baltimore, MD, Newark, NJ and Atlanta, GA. Id; see also Anna-Marie Tabor, AIDS Crisis, 38 HARV. J. ON LEGIS. 515 n.3 (discussing decline in deaths when antiretroviral treatments became available in 1996).
in the number of babies born with HIV in the United States. In reality, in 2000, only 280 to 370 children were born with HIV out of approximately 6,075 to 6,422 infants born to HIV infected mothers in the entire country. This decline is due to CDC 1995 recommendations of routine counseling and voluntary testing for pregnant women, along with offering zidovudine to HIV positive women during pregnancy, birth and for the infant after birth, not a mandatory newborn screening program in New York State.

III. CONSTITUTIONALITY OF MANDATORY NEWBORN HIV SCREENING PROGRAM

New York's Public Health Law, which mandates that all newborns' HIV status must be deciphered within several days of birth, either through testing the mother with her consent or testing the baby upon birth without consent, is unconstitutional. This law and its regulations trample upon the privacy rights of women by having their HIV status deciphered

96 See Press Release, Centers for Disease Control and Prevention, HIV Infections in U.S. Newborns Decline 80 Percent Since 1991, available at http://www.cdc.gov/od/oc/media/pressrelr020707b.htm (July 9, 2002). Although, the decrease in perinatal transmission is dramatic, it will prove to be harder to keep such a decline consistent, because of the increase in women who are of child-birthing age becoming infected with HIV. Id. See generally McKenna, supra note 8, at 344 (noting decline in perinatal transmission due to AZT); Fewer Infants Acquire AIDS From Mothers, N.Y. TIMES, Nov. 22, 1996, at A20 (noting decrease in infants).


without their permission or knowledge. Such a law commits a breach against a woman's right to confidentiality, along with her right to autonomy or self-determination. New York's law must also fail as it is a violation of a woman's Fourth Amendment rights, which protects against "unreasonable searches and seizures" without probable cause, because it has already been held that blood testing is considered a search within the meaning of the Fourth Amendment. Although there is a possible argument that this law is also invalid on equal protection grounds because it targets and discriminates against pregnant women, it is frail in comparison, due to certain case law that has ruled otherwise. Nevertheless, this law should be found unconstitutional as a violation of both privacy rights, as well as, Fourth Amendment rights.

A. The Right to Privacy: The Right to Confidentiality

The importance of the right to privacy was first recognized by Justice Brandeis in Olmstead v. United States, during his

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100 See Curnin, supra note 7, at 860 (concluding that mandatory HIV testing of newborns infringes on a mother's constitutional right of privacy); Eden, supra note 27, at 675 n. 82 (discussing problems with New York's law). But see Mayersohn, supra note 30, at 727 (defending mandatory testing as beneficial to both the mothers and children).

101 See Curnin, supra note 7, at 871 (proposing that the pending N.Y. legislation would violate both strands of right to privacy; right to confidentiality and the right to autonomy). See generally Whalen v. Roe, 429 U.S. 589, 599 (1977) (discussing both strands of privacy interests); Steven Eisenstat, An Analysis Of The Rationality of Mandatory Testing For The HIV Antibody: Balancing The Governmental Public Health Interests With The Individual's Privacy Interest, 52 U. PIT. L. REV. 327, 328 (1991) (opining that only justification for government mandated screening is in a rape situation).


103 See Ferguson, 532 U.S. at 84 (holding that blood test is a search); Schmerber v. California, 384 U.S. 757, 767 (1966) (explaining that blood testing procedures constitute a search of "persons", within the meaning of the Fourth Amendment); see also Chandler v. Miller, 520 U.S. 305, 323 (1997) (holding blood test as an unreasonable search of officials running for public office).

104 See Curnin, supra note 7, at 909-10 (explaining the holding and reaction to the Supreme Court's decision in Geduldig v. Aiello, 417 U.S. 484 (1974), which truncated the argument that pregnancy discrimination is equal to gender discrimination); Eden, supra note 27, at 673-74 (opining that an equal protection argument would fail); see also Geduldig v. Aiello, 417 U.S. 484, 497 (1974) (dismissing claim of equal protection based on pregnancy).

dissent, when he categorized it as the “right to be let alone”. Justice Brandeis further expanded on its significance when he described it as “the most comprehensive of rights and the right most valued by civilized men.” He emphasized that each infringement on this right was a violation, to its fullest extent and that it is a necessity for the Government to be justified when interfering with such a right. In *Katz v. United States*, the plaintiff was convicted of transmitting wagering information because of evidence supplied from wiretapping of the public phone, the Supreme Court recognized the Fourth Amendment’s right to privacy, but expanded its protections to include oral transmissions without trespass of property, which falls outside of the traditional search and seizure area. The Supreme Court emphasized that the Fourth Amendment protections of privacy do not depend on the “presence or absence of a physical intrusion into any given enclosure.” The Court further recognized the right to privacy in *Whalen v. Roe*, when it expounded on the doctrine by differentiating it into two separate protected interests: the “interest in avoiding disclosure

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106 Olmstead v. United States, 277 U.S. at 478.
107 Id. at 478 (expanding the significance of the “right to be left alone”).
110 *Katz*, 389 U.S. at 348 (noting that evidence was introduced by the prosecution of telephone conversations the plaintiff had from a public telephone, which was obtained by the FBI through an electronic listening device). See also Mary I. Combs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Calif. L. Rev. 1593, 1594 (October, 1987) (noting the facts of the *Katz* case); Dhillon, supra note 108, at 148 (discussing the facts of *Katz*).
111 See *Katz*, 389 U.S. at 353 (holding that the Fourth Amendment protections are not limited to the seizure of tangible items, but include recordings of oral transmissions); see also Dhillon, *supra* note 108, 148 (stating that *Katz* effectively changed the Fourth Amendment inquiry necessary to determine whether violation has occurred); Jennette C. James, Comment, *The Constitutionality of Federal Drug Testing: National Treasury Employees Union v. Von Raab*, 38 AM. U.L. REV. 109, 115 (1988) (outlining the two prong test set forth by Justice Holmes in *Katz*).
112 *Katz*, 389 U.S. at 353 (discussing when the privacy interest applies).
of personal matters,"114 more commonly known as "the right to confidentiality",115 and the "interest in independence in making certain kinds of important decisions,"116 also known as "the right to autonomy or personal decision-making".117 Although the Court rejected a right to privacy argument in this particular case, it reaffirmed its existence within the bounds of the Fourteenth Amendment118 and recognized it as being within the scope of medical decision-making.119 However, the Court's decision in Whalen left both of the defined privacy interests broad and illusive with respect to their applicability on other personal matters and decisions.120

During the same year as Whalen, the Court established a balancing test in Nixon v. Administrator of General Services,121 in order to determine whether there was a violation of the right

114 Whalen, 429 U.S. at 599 (expanding the right of privacy).
115 Id. See Beaty v. Stewart, 303 F.3d 975, 989 (9th Cir. 2002) (implying that the due process right is known as the right to confidentiality); see also Dhillon, supra note 108, 148 (implying that there is a right of confidentiality); Curnin, supra note 7, at 871 (announcing the alternate name for the right to confidentiality).
116 Whalen, 429 U.S. at 599-00 (discussing the different types of privacy rights).
117 See Curnin, supra note 7, at 871 (clarifying that the "interest in independence in making certain kinds of important decisions", is also known as the right to autonomy or the right to personal decision-making). See also Doe v. Delie, 257 F.3d 309, 317 (3d Cir. 2001) (referring to the right of personal decision making).
118 See Whalen, 429 U.S. at 600 n.23. (noting that the Court's decision in Roe v. Wade, 410 U.S. 113, 154 (1973), announced that right to privacy can be found within the confines of the Fourteenth Amendment). See also United States v. Brandon, 158 F.3d 947 (1998) (recognizing a right to autonomy in medical decision making); Timothy O. Lenz, "Rights Talk" About Privacy in State Courts, 60 ALB. L. REV. 1613, 1613 n. 2 (1997) (noting that Whalen court identified two dimensions of privacy right).
119 See Whalen, 429 U.S. at 600 (stating that the right to privacy is applicable to the right to make medical decisions). See also Doe, 257 F.3d at 317 (intimating that there is a right to personal decision making for medical decisions); Jennifer S. Geetter, Coding for Change: The Power of the Human Genome to Transform the American Health Insurance System, 28 AM. J.L. AND MED. 1, 64 n. 446 (2002) (noting that the Supreme Court affirmed privacy right in Whalen).
to confidentiality while providing a concrete basis for the privacy doctrine.122 The test consists of balancing the public interest in violating the person's privacy against the invasion of that person's right to confidentiality, by evaluating the claim in light of the specific law.123 The specific holding in Nixon explained that the President Nixon had right to privacy with respect to his documents, but the intrusion into his privacy by the Presidential Recordings and Materials Preservation Act in obtaining these documents for review and public access was an overriding governmental interest and thus a valid intrusion the President's privacy.124 Although the Supreme Court has not given any specifics with regards to this test outlined in Nixon, the Third Circuit in its opinion in United States v. Westinghouse Electric Corp.125 outlined numerous factors to consider while administering the balancing test, including, but not limited to, the information requested and its potential to cause harm, the adequacy of safeguards against disclosure, and the need for access to such information.126

122 Nixon, 433 U.S. at 425 (bringing to certainty the area of privacy rights). See Glitzenstein, supra note 121, at 371 (outlining the holding of Nixon); Popson, supra note 121, at 163 (laying out the two part test of Nixon which added a degree of certainty to the debate on privacy).

123 See Nixon, 433 U.S. at 458. The Court clarified that after the application of the balancing test the plaintiff in the present case has a weaker privacy interest than the plaintiff in Whalen. The Supreme Court in Whalen rejected a privacy argument which asserted that the retention of private medical information retained in computers by New York State was a violation of his privacy, but the plaintiff in Nixon contends that his privacy was also violated although there would be no long term retention of his private documents because they would be returned to him. Id. Hence, the plaintiff in Nixon has a weaker privacy argument than did the plaintiff in Whalen, therefore his privacy argument was also rejected. Id.

124 See id. at 456-58. The Court held that the Act was the least intrusive method of promulgating the government interests and was not an unconstitutional violation of President Nixon's privacy. The Presidential Recordings and Materials Preservation Act required the Administrator of General Services to review President Nixon's documents and decipher which were public and private, returning the private documents to President Nixon, and then produce regulations to give public access to the public documents. Id. at 429. The Westinghouse court confirmed that a compelling public interest may override a right of confidentiality. Todd Robert Coles, Does The Privacy Act of 1974 Protect Your Right To Privacy? An Examination of the Routine Use Exemption, 40 AM. U.L. REV. 957, 964 (1991).

125 638 F.2d 570 (3d Cir. 1980).

126 See id. at 578. The Third Circuit recognized that:
The factors which should be considered in whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy,
was assessing the privacy rights of employees who were mandated by the government to release their medical records to the National Institute for Occupational Safety and Health, in order for them to conduct research regarding the health and safety of a workplace. However, the Third Circuit recognized, while listing factors for consideration, that informational privacy or the right to confidentiality is limited and not absolute, therefore allowing certain public policy concerns to override this right. Despite, the Third Circuit's discussion about privacy and its importance, it held that the employee's right to privacy regarding their medical records was outweighed by the government's interest in providing a safe and healthy work environment. These factors have acted as a guide for the lower courts. The right to confidentiality of a person's HIV status came under review in the Second Circuit, in Doe v. City of New York. This case concerned a violation of the plaintiff's privacy due to a press release by the City regarding a Conciliation Agreement between the plaintiff and his former employer, in which it disclosed his HIV positive status to the public. The Second

or other recognizable public interest militating toward access.

Id.

127 See Westinghouse, 638 F.2d at 572 (discussing the necessity of providing a safe and secure work place and the value of personal privacy which is intermingled with medical records). See also Coles, supra note 124, at 964 (noting that Westinghouse court determined that a compelling public interest may override a right of confidentiality).

128 See Westinghouse, 638 F.2d at 578 (announcing that in past decisions societal interests have outweighed privacy interests); Nicolas P. Terry, An eHealth Diptych: The Impact of Privacy Regulation on Medical Error and Malpractice Litigation, 27 AM. J. L. & MED. 361, 363 n. 50 (2001) (stating that Westinghouse court found medical records in the zone of the right of privacy).

129 See Westinghouse, 638 F.2d at 580 (holding that after considering all the factors and balancing the privacy interests of the employees against the government's interest, the government must prevail due to the strong public interest and the minimal intrusion into privacy); see also Blayer, supra note 120, at 1193 (noting Third Circuit held government's interest in public safety and health was sufficient justification for invading individual's right to privacy). See generally Chlapowski, supra note 120, at 147-48 (noting Westinghouse balancing test used when evaluating individual's right to privacy and government interest).

130 15 F.3d 264 (2d Cir. 1994) (finding right to confidentiality of a person's HIV status). See generally Jeffrey Donohue, Developing Issues Under the Massachusetts Physician Profile Act, 23 AM. J. L. & MED. 115, 156 n.309 (1997) (citing Doe v. City of New York as recognizing person's right to confidentiality concerning his or her HIV status); Blayer, supra note 120, at 1194 (noting Doe v. City of New York held individuals have a right of privacy in their HIV status).

131 See Doe, 15 F.3d at 265-66 (noting that within the Conciliation Agreement there was a confidentiality clause requiring individual's name not be released, which it was not in press release, but enough facts were given to uncover his identity); see also Lauren Shapiro, An HIV Advocate’s View of Family Court: Lessons from a Broken System, 5 DUKE J. GENDER L. & POLY 133, 165 n. 144 (1998) (noting press statement offered enough
Circuit announced that “[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition.” While applying all of the guidelines set forth in Whalen, Nixon, and Westinghouse the court held that Doe had a “constitutional right to confidentiality... in his HIV status” because “it is a matter that he is normally entitled to keep private” and that he did not waive this right for the information to become public upon entering into the Conciliation Agreement. Furthermore, the court emphasized that matters concerning health are of the utmost privacy, especially when dealing with HIV and AIDS and the possibility of ostracism and discrimination from society; the right to inform others of a person’s HIV status is that own individual’s decision.

If New York State’s mandatory newborn HIV screening program is going to pass constitutional muster, it must not offend the mother’s right to confidentiality of her own HIV status. Since Olmstead, the right to privacy has arisen time and time again in various areas of law, but the basic principle asserted by Justice Brandeis still holds true that the right to privacy is the “right to be let alone,” and New York’s law truncates that right information to identify plaintiff). See generally Blayer, supra note 120, at 1194 (noting press release given by city of New York which mentioned plaintiff’s HIV status).

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132 See Doe, 15 F. 3d at 267 (emphasis added); see also, Blayer, supra note 120, at 1194 (noting Doe v. City of New York’s holding “a constitutional right to privacy exists in one’s HIV status”). See generally Jamie Fleckner, A Case Study: of New Textualism in State Courts: Doe v. Marselle and the Confidentiality of HIV-Related Information, 30 CONN. L. REV. 295, 324 n.148 (1997) (citing to Doe v. City of New York’s holding that right of confidentiality exists to protect individual’s HIV status).

133 Doe, 15 F.3d at 267.

134 Id. at 269.

135 See id. at 267 (explaining that disclosure of HIV positive status can result in intolerance and discrimination, not compassion and understanding, therefore necessitating the expansion of the privacy rights cover this information); see also Blayer, supra note 120, at 1194 (discussing Second Circuit’s explanation in Doe v. City of New York for recognizing one’s right to confidentiality about his HIV status). See generally Fleckner, supra note 132, at 324 (quoting Second Circuit’s justification of one’s right to confidentiality of HIV status as based on possible discrimination person faces from disclosure).

136 See Post, supra note 9, at 205-20 (explaining what constitutional issues arise with mandatory newborn HIV screening); see also Marsh, supra note 26, at 245-46 (arguing mandatory newborn HIV screening would infringe individual’s right to confidentiality). See generally Julie D. Levinson, Note, While Ignorance May Not Be Bliss, It is a Mother’s Right: Constitutional Implications For Testing Newborn Babies for HIV, 3 CARDOZO WOMEN’S L.J. 71, 71-75 (1997) (arguing mandatory newborn HIV screening would violate constitutional right to privacy).

137 Olmstead v. United States, 277 U.S. 438, 478 (1928) (noting right of privacy involves "right to be let alone"). See Coles, supra note 124, at 960 (noting right of privacy according to Brandeis); Patti Stanley, Does the Right to Free Speech Trump the Right to
for pregnant women. Accordingly, in Whalen, the Court held that matters relating to medical decision-making were embedded in the right of confidentiality, therefore linking mandatory HIV testing to this right and allowing it to be applied to the states through the Fourteenth Amendment. However, the balancing test established under Nixon must be applied by weighing New York's interest in violating a woman's right to confidentiality against the invasion of this same right. New York's policy interest in this law is to "improve the health outcomes of newborns, and to improve access to care and treatment for newborns infected with or exposed to human immunodeficiency virus (HIV) and their mothers." Although this is a valid and noble interest, it does not outweigh the invasion of a mother's right to confidentiality regarding her HIV status because testing her newborn will reveal and record her status, leaving her subject to discrimination and fear from society. Furthermore, if the Nixon balancing test is assessed according to the factors established in Westinghouse, then the New York law will probably be invalidated because the court


See Gootzeit, supra note 32, at 200 (arguing that a mother's privacy right does not bend or vanish simply because she becomes pregnant). See generally Curnin, supra note 7, at 926 (stating mandatory testing has "inherent invasions of the mother's right to confidentiality"); Post, supra note 9, at 226 (concluding mandatory HIV testing on newborns would infringe upon pregnant women's right to privacy).

See Whalen v. Roe, 429 U.S. 589, 599-00 (1977) (finding no unlawful violation of right of privacy where state has adequate standards and procedures to protect privacy of information); see also Powell v. Shriver, 175 F.3d 107, 111 (2d Cir. 1999) (noting Whalen concluded right of confidentiality included protecting matters related to one's health). See generally Geeter, supra note 119, at 76 n.446 (noting Supreme Court's finding in Whalen "that state record keeping of all the names and addresses of people obtaining prescription drugs did fall within the constitutional privacy ambit").

See Nixon v. Administrator of General Services, 433 U.S. 425, 458 (1977) (establishing balancing test requiring courts to weigh government's purpose behind legislation and public interest served against invading individual's interest); see also Elinor Shroeder & Sidney A. Shapiro, Responses to Occupational Disease: The Role of Markets, Regulation, and Information, 72 GEO. L.J. 1231, 1275 (1984) (explaining balancing test under established in Nixon); Curnin, supra note 7, at 872-73 (discussing balancing test annunciated in Nixon of weighing intrusion into privacy against legislation's purpose).


See Malloy, supra note 7, at 1211-12 (explaining the prejudice and discrimination that plagues HIV positive individuals and their families). See generally Contreras, supra note 10, at 29-30 (discussing possible discrimination that may arise from disclosure of HIV status to people other than individual); Nina Loewenstein, Mandatory Screening of Newborns For HIV: An Idea Whose Time Has Not Yet Come, 3 CARDozo WOMEN'S L.J. 43, 46-7 (1996) (noting problems women with HIV face in society).
considers the potential of harm from nonconsensual disclosure and the injury from disclosure along with the public policy for disclosure. Since AIDS has a stigmatizing effect, the harm from nonconsensual disclosure can ostracize a person from their family, friends, job, and the general society. Also, the CDC recommended voluntary testing has produced favorable results thereby leaving no necessity for a mandatory program. In addition, any court reviewing New York's law should consider the Second Circuit's reasoning in Doe v. City of New York, which held that there is a constitutional right to confidentiality in one's HIV status. This holding places New York's law in direct contradiction to the right to confidentiality, placing an additional barrier in the path of the state in proving its interest in this law, and tipping the balancing test in favor of a mother's right to confidentiality and against New York's mandatory HIV testing program.

143 See United States v. Westinghouse Electric Corp., 638 F.2d 570, 578 (3d Cir. 1980) (announcing factors courts should consider when balancing the state interest against an individual's privacy interest); see also Blayer, supra note 120 at 1202-03 (stating that "[t]he Westinghouse balancing test is the most appropriate test for determining whether an invasion into an individual's records is justified because the factors enumerated in Westinghouse are comprehensive and concretely encompass the reasoning of Whalen"); 1995-96 Annual Survey of Labor and Employment Law: Employment Discrimination, 38 B.C. L. REV. 347, 435 (1997) (discussing balancing test set forth in Westinghouse).

144 See Malloy, supra note 7, at 1211-12 (listing events which occur to HIV positive individuals at a higher probability ratings as job loss, sever social and economic repercussions, eviction from homes, physical abuse, and public shunning). See generally A Matter of Life and Death, TIME, Dec. 6, 1999, at 16 (quoting Peter Piot, executive director of UNAIDS, discussing effect AIDS has on families).


146 See Doe v. City of New York, 15 F.3d 264, 267-69 (2d Cir. 1994) (finding right of confidentiality in HIV status); see also Donohue, supra note 130, (citing to Doe as example of case where court has held individual has right to privacy of HIV status); William O. Fabbri, Home HIV Testing and Conflicts with State HIV Testing Regulations, 21 AM. J. L. & MED. 419, 442 (1995) (noting Doe as finding right of privacy in individual's HIV status).

147 See Post, supra note 9, at 187 (arguing if New York would have to show benefits of legislations requiring mandatory testing "outweigh" right to confidentiality in one's HIV status). See generally Dr. Anthony Simones, The Right to Suffer as Individuals or the Necessity to Survive as a Society: HIV Status and the Constitutional Right of Privacy, 68 U.M.K.C. L. REV. 195, 206 (1999) (noting that right of confidentiality would be "undermined" if state laws allowed HIV status to be made public). But see Renna, supra note 39, at 448 (arguing mandatory testing does not violate right of autonomy or
B. The Right to Privacy: The Right to Autonomy

The Supreme Court in Whalen recognized two different aspects of the right to privacy, the former being the right to confidentiality and the later being "the interest in independence in making certain kinds of important decisions," more commonly referred to as the right to autonomy or self-determination. Although the Supreme Court in Whalen named the two competing privacy interests, the Court, in its opinion in Griswold v. Connecticut, had already recognized that the "specific guarantees in the Bill of Rights have penumbras" which establish "zones of privacy." In Griswold, the Court invalidated a Connecticut statute that made it criminal to give information to married couples regarding forms of contraception, therefore holding that marriage is within the zones of privacy. These zones of privacy create a protection against broad and unnecessary governmental regulations and establish the right to make personal decisions within those confidentiality interest).


150 Griswold, 381 U.S. at 484 (finding that these "[v]arious guarantees create zones of privacy"). See generally Adkins, supra note 149 (noting "zones of privacy" found in Griswold); Tracey Haslett, Comment, J.B. v. M.B.: The Enforcement of Disposition Contracts and the Competing Interests of the Right to Procreate and the Right Not to Procreate Where Donors of Genetic Material Dispute the Disposition of Unused Preembryos, 20 TEMP. ENVTL. L. & TECH. J. 195, 215-16 (2002) (discussing "zones of privacy" found in Griswold).

151 See Griswold, 381 U.S. at 480 (explaining the applicable Connecticut statute makes it unlawful to give information, advice, or counseling for the purpose of preventing conception); see also Robert S. Peck, Extending the Constitutional Right to Privacy in the New Technological Age, 12 Hofstra L. Rev. 893, 903 (1984) (noting Justice Harlan's decision in invalidating Connecticut statute for infringing on individual's constitutional right of privacy); Lisa M. Spenny, Comment, Commercialism in New York Public Schools: State Versus Local Control, 5 ALB. L.J. SCI. & TECH. 339, 368 n.31 (1996) (citing Griswold's holding of Connecticut statute as violating marital right of privacy).

152 See Griswold, 381 U.S. at 515 (holding that several fundamental constitutional guarantees extend the zone of privacy to the marriage relationship); see also Singleton v. Wulff, 428 U.S. 106, 115 (1976) (reviewing Griswold's holding of allowing a physician to assert privacy interests of a married couple); Coyote v. Roberts, 502 F. Supp. 1342, 1350 (D. R.I. 1980) (suggesting that State power is suspect in the realm of prohibitions on sexual conduct between married persons).
protected zones. In fact, the Court reaffirmed the sanctity and importance of marriage by announcing that this "right of privacy [is] older than the Bill of Rights" and should be protected from governmental intrusion because falls within "the liberty guaranteed by the Fourteenth Amendment." Other Supreme Court decisions have rendered additional subjects within the zones of privacy, including but not limited to procreation, family life, and child bearing and rearing. The Court in Eisenstadt v. Baird further described the relationship between the zones of privacy and governmental regulation as "the right of the individual, married or single to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." However, in Carey v. Population Services. Int'l, the Supreme Court invalidated a New York Education Law that prohibited the distribution, or advertisement of contraceptives to minors under sixteen years old, except by a licensed pharmacist or physician,

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153 Griswold, 381 U.S. at 485 (noting The Court in "that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieve by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."). See Webster v. Reproductive Health Services, 492 U.S. 430, 556 (1989) (Blackmun, J., dissenting) (remarking that a woman's choices with regard to her body are immune to any governmental interference); Roberts v. U.S. Jaycees, 468 U.S. 609, 631 (1984) (O'Connor, J., concurring) (mentioning that a constitutional zone of privacy will place some decisions out of the reach of governmental interference).

154 Griswold, 381 U.S. at 486.

155 Id. at 495.

156 See Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977) (affirming that the decision to bear or beget children is at the center of constitutionally protected choices within the zone of privacy); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that marriage and procreation are within the zones of privacy because they are fundamental rights); see also United States v. Orito, 413 U.S. 139, 142-43 (1973) (contrasting the constitutional protection afforded to decisions about procreation with decisions involving obscene material).

157 See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that family relationships are within the confines of privacy related to decision making); see also Roe v. Wade, 410 U.S. 113, 168 (1973) (Stewart, J., concurring) (noting that the Due Process Clause of the 14th Amendment protects personal choice in matters of family affairs). But see Webster, 492 U.S. at 546-47 (Blackmun, J., dissenting) (positing that the unenumerated right to privacy may not exist to protect decisions with respect to family life).

158 See Carey, 431 U.S. at 684-85 (explaining that decision to bear and raise a child is at the core of the constitutionally protected rights); see also Paul v. Davis, 424 U.S. 693, 713 (1976) (noting that State power is limited in regulating conduct with respect to child rearing and education); Orito, 413 U.S. at 142 (explaining that the Constitution extends privacy rights to child rearing).

159 405 U.S. 438 (1972).

160 Id. at 453.

as unconstitutional.\textsuperscript{162} In addition, the Court recognized that the right to bear a child is within the zones of privacy, but also limited the protection of these zones, by allowing certain state interests to potentially sustain a state regulation of one of these zones, if the interest was compelling and regulation was narrowly tailored.\textsuperscript{163} This line of cases, which established differing zones of privacy, also acknowledged the respect and privacy that certain family matters should be given, along with the importance of making decisions relating to such matters independently and without government interference.\textsuperscript{164}

Following in the footsteps of \textit{Griswold}, the Court continued its expansion of right to self-determination in \textit{Roe v. Wade},\textsuperscript{165} where it held that a woman’s choice to have an abortion was also protected under this right.\textsuperscript{166} Nevertheless, the Court described this right as not being absolute, but instead that it can be limited by a state regulation, if there is compelling state interest present.\textsuperscript{167} This created a standard of strict scrutiny for such government regulations to overcome in order to validate an

\textsuperscript{162} \textit{See} \textit{Carey}, 431 U.S. at 681 (noting that violation of New York Education Law § 6811(8) was a Class A misdemeanor and Population Services was in violation of this law due to advertisements about contraceptives in local news forums); \textit{see also} \textit{Reno v. ACLU}, 521 U.S. 844, 875 (1997) (recognizing the governmental interest in protecting children from detrimental materials). \textit{But see} \textit{Ashcroft v. Free Speech Coalition}, 535 U.S. 234, 245 (2002) (noting that \textit{Carey} incorporated free speech concerns due to advertisements).

\textsuperscript{163} \textit{See} \textit{Fla. Star v. B.J.F.}, 491 U.S. 524, 551 (1989) (stating, “Of course, the right to privacy is not absolute.”); \textit{Carey}, 431 U.S. at 686 (discussing the right to privacy as not absolute and can be limited by a compelling state interest, if the legislation is narrowly tailored to those interests); \textit{Poe v. Ullman}, 367 U.S. 497, 552-53 (1961) (Harlan, J., dissenting) (maintaining that privacy rights can be subject to governmental regulations).

\textsuperscript{164} \textit{See} \textit{Planned Parenthood of Southeastern Pa. v. Casey}, 505 U.S. 833, 857 (1992) (observing that decisions regarding family matters are harbored within the zone of privacy); \textit{see also} \textit{Hodgson v. Minnesota}, 497 U.S. 417, 471 (Marshall, J., concurring) (1990) (remarking that child rearing decisions are outside the scope of governmental regulation); \textit{Goodwin v. Turner}, 908 F.2d 1395, 1402 (8th Cir. 1990) (McMillian, J., dissenting) (stating that procreational choices are classified as family decisions and are within the zone of privacy).

\textsuperscript{165} 410 U.S. 113 (1973).

\textsuperscript{166} \textit{See} \textit{Roe v. Wade}, 410 U.S. 113, 153-55 (1973) (discussing that the right to privacy, through self-determination, is applied to state regulations through the Fourteenth Amendment and is broad enough to encompass the abortion decision.) \textit{See generally} \textit{Casey}, 505 U.S. at 833 (reaffirming the holding in \textit{Roe}); \textit{Rust v. Sullivan}, 500 U.S. 173 (1991) (discussing abortion and the role it plays in family planning).

\textsuperscript{167} \textit{See} \textit{Roe}, 410 U.S. at 155 (clarifying that limiting legislation must be narrowly tailored to the state interest, which it is trying to protect); \textit{see also} \textit{Casey}, 505 U.S. at 871 (explaining that \textit{Roe} imposed a heavy burden on the State to show a compelling interest); \textit{Ariz. Right to Life Pac. v. Bayless}, 2003 U.S. App. LEXIS 3379, at *34 (9th Cir. 2003) (concluding that a statute which does not serve a compelling governmental interest is unconstitutional).
invasion of these fundamental rights. The strict scrutiny test has not been overruled, but instead it can argued that it has been replaced by the undue burden test established in the recent Supreme Court decision in Planned Parenthood v. Casey.

The decision in Casey is the most recent attempt by the Supreme Court to clarify the privacy doctrine and its relationship to state regulation of abortion. The Court in Casey explored its past decisions relating to privacy and reaffirmed that "there is a realm of personal liberty which the government may not enter." Notwithstanding its confirmation of Roe v. Wade, the Court took a step further by adopting an undue burden analysis of the Pennsylvania statute in question. Basically, the undue burden analysis consists of an inquiry into the statute at issue, in order to see if it places an undue burden on a fundamental right, and if so the statute is invalid. Therefore, if a statute's purpose or effect places a substantial obstacle in the path of an individual exercising a fundamental right then it is an undue burden and is unconstitutional.

Although the Court established and used
this undue burden analysis in *Casey*, it never overruled the strict scrutiny test outlined in *Roe v. Wade*, leaving the question open of which test is applicable to the other fundamental rights.174

A woman’s right to have an abortion is constitutionally protected under these series of cases as discussed above.175 Since the Supreme Court has recognized a woman’s right to choose to bear a child in numerous decisions, then her right to choose to be tested for HIV should also fall within this same fundamental right.176 In *Griswold*, the Supreme Court recognized that there were various zones of privacy that included familial matters, whether it is marriage, procreation, or raising a child.177 Prenatal testing for HIV plainly relates to such matters concerning procreation, child rearing, and other family decisions; therefore it should be included under the same zone of privacy and afforded the same protections.178 Another reason for the inclusion of an individual’s HIV status in a zone of privacy is the impact from society a person faces upon disclosing his or her status.179 The consequences can vary from problems with

174 *See Gootzeit, supra* note 32, at 201 (proposing the idea that the strict scrutiny analysis is more pertinent and applicable to analyze the mandatory newborn HIV screening legislation than the undue burden test); *see also Curnin, supra* note 7, at 868 (arguing that the State does have a compelling interest in preserving life of newborns). *But see Contreras, supra* note 10, at 21 (supporting the testing of newborns as a moral and medicinal necessity).

175 *See Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (declaring invalid a Connecticut statute that made illegal to give contraception information to married couples); *see also Casey*, 505 U.S. at 877-78 (establishing the undue burden test); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (establishing the right to an abortion).

176 *See Gootzeit, supra* note 32 at 203 (stating that the undue burden in the abortion context should be extended to HIV testing); *see also McMillion, supra* note 26, at 239 (stating that mandatory HIV testing programs would fail under undue burden test). *See generally* 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, 523 (1997) (arguing mandatory AZT treatment violates undue burden standard).

177 *See Griswold*, 381 U.S. at 494-95 (stating the Founders granted citizens “the right to be left alone” from the government); *see also Petra Sami, Watered Down Constitutional Rights: A Hospital’s Role in Prosecuting Pregnant Women for Drug Use in Ferguson v. City of Charleston, 16 ST. JOHN’S J. LEGAL COMMENT. 767, 771 n.19 (2002) (stating *Griswold* establishes zones of privacy from the penumbras emanating from Bill of Rights, such as the right to procreate or marry); Shannon O’Malley, *At All Costs: Mandatory Child Abuse Reporting Statutes and the Clergy-Communicant Privilege*, 21 REV. LITIG. 701, 712, n.60 (2002) (recognizing Griswold’s penumbra of constitutional rights).

178 *See Post, supra* note 9, at 214 (explaining mandatory HIV testing of newborns corresponds with the fundamental right of procreation and conception); *see also Marsh, supra* note 26, at 241 (arguing that prenatal HIV screening programs would violate the privacy protections under the Due Process Clause); McMillion, *supra* note 26, at 241 (stating that proposed legislation forcing prenatal HIV testing places a “substantial obstacle” and is thus an undue burden on the exercise of autonomy).

179 *See Scott Burris, Disease Stigma in U.S. Public Health Law*, 30 J.L. MED. &
employer relations to family and everything in between, including issues with securing housing and financial assistance. If an individual's HIV status is considered to be within a zone of privacy, the constitutionality of the statute and corresponding regulations should be determined under the strict scrutiny standard established in *Roe v. Wade*, or under the undue burden analysis provided for in *Casey*. The strict scrutiny test mandates a compelling interest by the state in violating the right to autonomy. The compelling interest asserted by New York is the improvement of the health of newborns born with HIV, but at stake is a women's right to choose to have her HIV status deciphered, along with her babies' status. If HIV testing could be accomplished without discerning the mother's status, then New York's Public Health Law could be sustained under strict scrutiny.

ETHICS 179, 179 (2002) (stating the need to reduce the social stigma of those who are HIV-positive justifies the passage of privacy laws); see also Stacy L. Bogert, *Recent Decisions*, 68 GEO. WASH. L. REV. 643, 653 (2000) (observing the privacy needs of those who are affected by HIV are especially important because of the stigma society attaches to the disease); Note, *Name Brands: The Effects of Intrusive HIV Legislation on High-Risk Demographic Groups*, 113 HARV. L. REV. 2098, 2102 (2000) (stating attempts to reduce privacy of HIV testing will deter many to get testing because of the stigma associated with HIV infection).

180 See Malloy, supra note 7, at 1211-12 (commenting that HIV-positive individuals suffer severe social and economic repercussions from disclosing their HIV status or from being labeled as HIV positive); see also Caroline Palmer & Lynn Mickelson, *Many Rivers To Cross: Evolving And Emerging Legal Issues In The Third Decade Of The HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV. 455, 474 (2001) (noting although there is a potential for abuse of private health information, new protections and the ADA will afford those who with HIV who are injured recourse against their employers); Maia R. Albrecht, Comment, *Defining Qualified Immunity: When is the Law "Clearly Established?"*, 40 WASHBURN L.J. 311, 312 (2001) (noting courts have concluded that even HIV-positive prisoners have constitutionally-protected privacy interests in prevent their HIV status to other inmates).

181 See Gootzeit, supra note 32, at 201 (clarifying that there are two separate and distinct tests for legislation that abuts the right to privacy: the strict scrutiny analysis and the undue burden test); see also Shriver, supra note 56, at 349 (stating any laws that interfere with a woman's procreative rights do not satisfy strict scrutiny analysis). See generally McMillion, supra note 26, at 239 (stating statutes mandating HIV testing would fail undue burden framework).


183 See N.Y. PUB. HEALTH § 2500-f (1) (2001) (stating the objective and purpose of the legislation); see also Ayers, supra note 86, at 298 (stating that the New York statute is essentially a mandatory HIV test because the mother's HIV status is revealed if her baby has tested positive). See generally Dennis, supra note 51, at 271 n.10 (2003) (stating New York is only one of two states that requires HIV testing of newborns).
scrutiny because the law would be narrowly tailored to effectuate the compelling state interest. However, there is no such HIV test that does not determine the mother's status; therefore under strict scrutiny, the state's interest is not sufficiently compelling or narrowly tailored to breach a women's right to autonomy. Furthermore, application of the undue burden analysis used in Casey produces an identical result, invalidation of New York screening program. The mandatory screening of newborns for HIV must place an undue burden, or a substantial obstacle, in the path of a woman's fundamental right, the right to choose to be tested and know her status. The purpose of the screening program places no undue burden on a woman, but its effect mandates her knowledge of her HIV status, therefore placing a substantial obstacle in her path of choosing to know her status and to be tested or not. The substantial obstacle is the mandatory testing of her newborn, therefore revealing her own

\[184\] See McKenna, supra note 31, at 337-38 (announcing the application of the strict scrutiny test to mandatory HIV newborn screening programs produces privacy interests which cannot be sustained through such legislation); see also Sonia Bhatnager, HIV Name Reporting And Partner Notification In New York State, 26 FORDHAM URB. L.J. 1457, 1490 (1999) (highlighting the importance of anonymous testing due to the fears associated with HIV). See generally Armen H. Merjian, The Court at The Epicenter of a New Civil Rights Struggle: HIV/Aids in the New York Court of Appeals, 76 ST. JOHN'S L. REV. 115, 163 (2002) (stating New York’s Article 27-F allows for anonymous AIDS/HIV testing and maintains confidentiality).

\[185\] See Curnin, supra note 7, at 898-99 (discussing the ramifications of undue burden test and how it may be interpreted, although the mandatory HIV newborn screening program would be upheld under any reasonable interpretation of the undue burden test); see also Gootzeit, supra note 32, at 201 (stating HIV test fails under the strict scrutiny analysis); Catherine H. McCabe, Note, Ryan White Care Amendments: Mandatory HIV Testing Of Newborns And A Woman's Right To Privacy, 1 DEPAUL J. HEALTH CARE L. 373, 391 (1996) (stating HIV testing serves no compelling state interest).

\[186\] See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877-78 (1992) (announcing the application of the undue burden test to issues surrounding privacy of autonomy); see also McMillion, supra note 26, at 239 (stating HIV testing cannot succeed under an undue burden analysis). But see Gootzeit, supra note 32, at 201-02 (stating undue burden analysis should not be applied to HIV testing until it is decided if that standard is appropriate for other interests besides abortion).

\[187\] See Casey, 505 U.S. at 877-78 (defining an undue burden in terms of applying the aforementioned analysis); see also Taunya Lovell Banks, Women And Aids—Racism, Sexism, And Classism, 17 N.Y.U. REV. L. & SOC. CHANGE 351, 377 (1989-1990) (stating HIV prenatal screening is an undue burden on a women's reproductive liberty). See generally Halem, supra note 176, at 523 (stating forced AZT treatment to HIV positive pregnant women would fail the undue burden test).

\[188\] See Gootzeit, supra note 32, at 202 (stating expedited HIV testing places a substantial obstacle in the way of a woman's right to privacy); see also Curnin, supra note 7, at 902 (arguing states that force a woman to confront her HIV status place a substantial obstacle in their privacy rights); McMillion, supra note 26, at 241 (stating forcing a woman to confront her HIV positive status is a substantial obstacle).
HIV status and having it documented and reported. Consequently, New York’s mandatory screening program should be void due to its unconstitutionality under either the strict scrutiny or undue burden analysis.

C. Fourth Amendment Rights

The Fourth Amendment protects individuals “against unreasonable searches and seizures” by the government, in order for them to be “secure in their persons, houses, papers, and effects”. This protection is considered to be a type of a privacy right and is applicable to the states through the Due Process Clause of the Fourteenth Amendment. The protection afforded by the Fourth Amendment attaches to “people, not places;” therefore, it is not eliminated in public arenas. A governmental action is deemed to qualify as a search, if it meets two criteria; (1) person has an actual expectation of privacy (a subjective requirement) and (2) society recognizes this

189 See McMillion, supra note 26, at 241 (stating it constitutes a substantial obstacle to force a mother to fact that her newborn has HIV); see also Curnin, supra note 7, at 902 (stating facing the possible HIV infection of their newborn is a substantial obstacle). See generally Gootzeit, supra note 32, at 189 (discussing the problems of New York’s law requiring HIV testing of infants).

190 U.S. CONST. amend. IV. The Fourth Amendment states:

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

Id.

191 See Mapp v. Ohio, 367 U.S. 643, 655 (1961) (explaining that the right to privacy under the Fourteenth Amendment has been held to apply to the states through the Due Process Clause of the Fourteenth Amendment); see also Mark D. Fox & Chris E. Forte, Privacy Issues From The Judicial Perspective: Requirements For Protective Orders, 70 DEF. COUNS. J. 89, 95 (2003) (stating federal courts rely on the Fourth and Fourteenth Amendments to limit governmental power and protect privacy interests); Caroline Slater Burnette, Note, Making Specimen Cups As Normal As Prom Night: The Implications Of Board Of Education v. Earls On Public Schools Across The Nation, 25 CAMPBELL L. REV. 71, 73 (2002) (stating the Fourth Amendment is incorporated to the states by the Fourteenth Amendment). See generally U.S. CONST. amend. XIV, § 1.(stating “nor shall any State deprive any person of life, liberty, or property, without due process of law”).

expectation as "reasonable". Therefore, a person's expectation of privacy may be diminished while on a street due to the second reasonableness requirement. The Supreme Court attacked this reasonableness requirement in New Jersey v. T.L.O., where it explained that reasonableness is dependent upon the context of the search. Consequently, reasonableness is determined by "balancing the need to search against the invasion which the search entails." This guaranteed right to privacy under the Fourth Amendment is so important that even an unlawful trivial search has been deemed a substantial invasion of privacy. The most common searches are for the purpose of obtaining evidence for a criminal trial, and require an issuance of a warrant based on probable cause. However, there are administrative searches performed as part of the regulatory functions of the government,


194 See Barry Crago, Fourth Amendment Search and Seizure - Consensual Encounter Or Coerced Questioning? United States v. Drayton, 3 WYO. L. REV. 295, 301 (2003) (stating it is not violative of the Fourth Amendment when law enforcement approaches someone on the street); see also Christopher Slobogin, Public Privacy: Camera Surveillance Of Public Places And The Right To Anonymity, 72 MISS. L.J. 213, 215 (2002) (stating the Fourth Amendment does not apply when a person walking the street is under surveillance); Mary Lehman, Comment, Are Red Light Cameras Snapping Privacy Rights?, 33 U. TOL. L. REV. 815, 817-18 (2002) (stating a person driving an automobile on a public street has no expectation of privacy).


196 T.L.O., 469 U.S. at 337. The Court further explains that one side of the balancing test includes "individual's legitimate expectations of privacy and personal security; and on the other, the government's need for effective methods to deal with breaches of public order." T.L.O., 469 U.S. at 337.


198 See T.L.O., 469 U.S. at 335 (pointing out that Fourth Amendment is not limited to police searches); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (indicating that searches usually require probable cause); see also Post, supra note 9, at 208-09 (specifying the two different types of searches which may be performed, administrative and criminal searches).
usually affecting the public health and welfare, in various industries, including food handling, gun shops, and other regulated industries.\textsuperscript{199} These searches have no probable cause requirement, but are governed under a special needs analysis.\textsuperscript{200}

While evaluating the constitutionality of a compulsory blood test, in \textit{Schmerber v. California},\textsuperscript{201} which was given to the petitioner to decipher if he was driving while under the influence of intoxicating liquor (DWI) when an accident occurred,\textsuperscript{202} the Supreme Court reaffirmed the purpose of the Fourth Amendment as protecting "personal privacy and dignity against unwarranted intrusion by the State."\textsuperscript{203} Although the Court held that the compulsory DWI blood test was not a violation of privacy in this specific case, it did explain that such testing constitutes an invalid search under the Fourth Amendment, if unjustified or administered in an improper manner.\textsuperscript{204} \textit{Schmerber} provided a basis for the Court to decide \textit{Skinner v. Railway Labor Executives Ass'n}.\textsuperscript{205} \textit{Skinner} discussed the constitutionality of mandatory alcohol and drug testing for railway employees involved in accidents and held that such testing did not offend the Fourth

\textsuperscript{199} See Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989) (noting administrative searches may be governed by different standards than criminal searches); see also Heather C. Leslie, Comment, Ferguson v. City of Charleston: A Limitation on the 'Special Needs' Doctrine, 3 LOY. J. PUB. INT. L. 93, 97 (2001) (pointing out that administrative searches include regulatory searches). See generally Post, supra note 9, at 208 (describing the mechanics of searches and how they correlate to administrative and criminal searches).

\textsuperscript{200} See Von Raab, 489 U.S. at 668 (stating that in administrative searches a probable cause requirement is "unhelpful"); \textit{T.L.O.}, 469 U.S. at 337 (explaining that a search is determined reasonable based on its particular circumstances); see also Post, supra note 9, at 208 (developing the special needs analysis in relation to administrative searches).

\textsuperscript{201} 384 U.S. 757 (1966).

\textsuperscript{202} See \textit{Schmerber}, 384 U.S. at 758-59 (explaining that while petitioner was in the hospital for treatment from the accident a law enforcement officer ordered a alcohol test to be administered and the chemical analysis of the petitioner's blood revealed intoxication).

\textsuperscript{203} See \textit{T.L.O.}, 469 U.S. at 335 (describing Court's traditional treatment of Fourth Amendment protections against governmental interference); \textit{Schmerber}, 384 U.S. at 767 (noting that right to privacy under the Fourth Amendment is a fundamental part of our society and tradition); Post, supra note 9, at 207 (stating Fourth Amendment protections).

\textsuperscript{204} See \textit{T.L.O.}, 469 U.S. at 338 (reiterating that Fourth Amendment does not protect if searches are "illegitimate"); \textit{Schmerber}, 384 U.S. at 767-68 (announcing that blood tests are a search within the meaning of the Fourth Amendment; the Court went further to explain that minor intrusions into a person's body under strict and limited conditions are allowable by the State, but anything more substantial is a violation); Post, supra note 9, at 209 (noting that the \textit{Schmerber} Court specifically stated that its holding was limited to the facts).

\textsuperscript{205} 489 U.S. 602 (1989).
Amendment. These searches were deemed to be reasonable without a warrant or probable cause because of widespread alcohol and drug use among employees, safety interests, and diminished privacy expectations. However, the blood tests were confirmed to be searches, within its constitutional meaning. The Supreme Court, in *Skinner*, discussed the difference between criminal and administrative searches and described a "special needs" analysis. The special needs analysis arises when the need for law enforcement, a warrant, or probable cause is impracticable. This impracticability is determined by balancing the government and privacy interests against the practicality of the probable cause and warrant requirements. Special needs analysis is a determination of reasonableness of a search; where under certain, but limited circumstances, there is a minimal intrusion of privacy through a search and an important state interest at hand, which could be jeopardized by necessity of individualized suspicion, then the search may still be considered reasonable without the requirement of individual suspicion. The very same day the

206 *See Skinner*, 489 U.S. 602, 633-34 (1989) (holding that mandatory drug tests for railway employees is not a violation of privacy under the Fourth Amendment); *Post*, supra note 9, at 209-10 (elaborating on the *Skinner* holding). *But see T.L.O.*, 469 U.S. at 337 (noting that the Court has not upheld against the Fourth Amendment searches of personal luggage or closed purses).

207 *See Skinner*, 489 U.S. at 634 (listing all of the compelling reasons why there is no violation of the Fourth Amendment); *see also T.L.O.*, 469 U.S. at 337 (explaining that reasonable searches balance personal expectations against governmental need). *See generally Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967) (setting forth the balancing standard for reasonable searches).

208 *See Skinner*, 489 U.S. at 616 (explaining that blood tests are searches because they puncture the skin and society considers it reasonable to have an expectation of privacy regarding blood tests; *see also Doe v. Roe*, 526 N.Y.S. 2d 718, 722 (1988) (noting well established fact that blood tests are considered under Fourth Amendment (citing Schmerber, 384 U.S. at 757)); *Post*, supra note 9, at 208 (stating that HIV blood screening tests are considered searches under the Fourth Amendment).

209 *See Skinner*, 489 U.S. at 619; *see also Lang*, supra note 197, at 472 (discussing Court’s "special needs" analysis); *Leslie*, supra note 199, at 97-98 (tracing development of "special needs" analysis).

210 *See T.L.O.*, 469 U.S. at 340 (supporting that the warrant requirement may sometimes be waived, as in the school setting the requirement is a hindrance to disciplinary procedures); *see also Leslie*, supra note 199, at 98 (discussing special needs analysis is utilized when other solutions are "unworkable") *Post*, supra note 9, at 209 (describing the process by which the Court proceeds on a finding of special need).

211 *See Skinner*, 489 U.S. at 619-20 (discussing the possible circumstances for special needs analysis); *see also T.L.O.*, 469 U.S. at 341 (explaining that when a balancing finds in favor of public interest the standard is one of reasonableness). *See generally Post*, supra note 9, at 200-01 (noting that balancing extends to public health regulations).

212 *See Skinner*, 489 U.S. at 624 (noting that in limited situations a requirement of individual suspicion is not necessary for a search to be reasonable); *see also T.L.O.*, 469
Supreme Court decided *Skinner*, it elaborated on the special needs analysis in *National Treasury Employees Union v. Von Raab*, where it was deciding if a drug testing program, using urinanalysis, for U.S. Custom Officers who meet certain criteria, was a violation of their Fourth Amendment rights. While explaining the applicable special needs analysis, Justice Kennedy explained that the probable cause requirement, imbedded in criminal searches, is not necessary and even unhelpful for administrative searches. In particular, Justice Kennedy focused on a general governmental interest in preventing the development of hazardous conditions or the detection of violations that usually escape individual suspicion, while rationalizing the use of the special needs analysis and the inapplicability of the probable cause requirement. In conclusion, the Court held that this compulsory drug testing program was a reasonable search and that the government's interests in drug prevention, especially across the nation's borders, outweighs this invasion of privacy. Therefore, the special needs analysis outlined in *Skinner* and developed in *Von Raab* bypasses any requirement of individual suspicion in certain

U.S. at 341 (listing Supreme Court cases holding a search was permissible on a reasonable standard and not necessarily a probable cause standard); Post, *supra* note 9, at 208 (discussing the Court's balancing test).

215 See *Von Raab*, 489 U.S. at 667-68 (summarizing the Court held that the "Government's need to discover such latent or hidden circumstances, or to prevent their development, is sufficiently compelling to justify the intrusion of privacy entailed by conducting such searches without any measure of individualized suspicion."); see also Leslie, *supra* note 199, at 98 (justifying reduced expectations of privacy by compelling governmental interest); Post, *supra* note 9, at 210 (discussing holding that governmental interest presented situations beyond ordinary law enforcement).

216 See *Von Raab*, 489 U.S. at 667-68 (noting that the Court did not decide if drug testing is reasonable for employees not meeting the specified criteria); see also *T.L.O.*, 469 U.S. at 341 (proposing that the reasonable standard for searches is a two-part test of justified action in relation to the circumstances); Post, *supra* note 9, at 210 (noting that governmental interest made search without individual suspicion reasonable).
circumstances, leaving the majority of administrative searches requiring no individualized suspicion for the search to be reasonable, and therefore lawful.\textsuperscript{218}

Through the aforementioned Fourth Amendment analysis, New York's HIV screening program can be scrutinized, in order to determine if there is an unreasonable, hence unlawful, search when conducting the HIV testing. The protections in the Fourth Amendment are guaranteed through the Due Process Clause of the Fourteenth Amendment,\textsuperscript{219} making them applicable to New York. Since this right to privacy adheres to persons and not places,\textsuperscript{220} this right is still viable upon a pregnant woman's admission to a hospital to give birth. Also, the HIV blood test would be considered a search because blood tests are a constitutionally defined as a search under \textit{Schmerber.}\textsuperscript{221} By applying the necessary criteria to qualify a search,\textsuperscript{222} there is (1)
an expectation of privacy by a pregnant woman upon entering a hospital and (2) this expectation of privacy is what society would consider as reasonable, since birth is a private, time consuming and intimate matter. Nevertheless, this screening program is not a criminal search, but rather administrative, leaving it subject to the special needs analysis. Through balancing the state’s interest in improving the health of newborns with HIV against the pregnant woman’s expectation of privacy regarding her own HIV status, it can be asserted that individualized suspicion is required to divulge such personal information as one’s HIV status. The courts have upheld involuntary mandatory testing of HIV for federal prisoners and sex offenders, but first consider if pregnant women are in the same classification as federal prisoners and sex offenders, both of whom have been criminally convicted? There is little rationality in arguing that the special needs analysis of the New York program dispenses with the need for individualized suspicion, leaving the search reasonable without such a requirement, because there are alternative methods available to avoid

223 See McMillion, supra note 26, at 233 (noting that a search has been conducted if there was a reasonable expectation of privacy); see also Rachel Weissmann, Note, Constitutional Law What “Choice” Do They Have?: Protecting Pregnant Minors’ Reproductive Rights Using State Constitutions, 1999 ANN. SURV. AM. L. 129, 152-53 (1999) (indicating that pregnant women have a reasonable expectation of privacy). But see Theresa M. McGovern, Mandatory HIV Testing and Treating of Child-Bearing Women: An Unnatural, Illegal, and Unsound Approach, 28 COLUM. HUM. RTS. L. REV. 469, 485-86 (1997) (explaining that a women’s expectation of privacy diminishes when she becomes pregnant).

224 See Post, supra note 9, at 212-13 (proposing that a court would analyze a mandatory HIV screening program for newborns under the special needs analysis); see also Ames, supra note 214, at 276 (noting that an administrative search may not require a warrant). See generally Stephen L. Washby, Justice Blackmun and Criminal Justice: A Modest Overview, 28 AKRON L. REV. 125, 148 (1995) (explaining that special needs are those beyond normal needs of law enforcement making Fourth Amendment requirements impracticable).

225 See Post, supra note 9, at 212-13 (balancing the state’s interest in mandatory HIV testing of newborns against the mother’s Fourth Amendment protection against unlawful search and seizure); see also Erwin Chemerinsky, The Rehnquist Court and Justice: An Oxymoron?, 1 WASH. U. J.L. & POLY 37, 42 (1999) (explaining that the Framers wanted a search to be based on individualized suspicion). See generally Lang, supra note 197, at 478 (noting opposition to suspicionless drug testing).

226 See Dunn v. White, 880 F.2d 1188, 1196-97 (10th Cir. 1989) (holding that unconsensual testing of prisoners for AIDS is not unconstitutional); see also People v. Durham, 563 N.Y.S.2d 944, 947 (Sup. Ct. 1990) (holding that an indicted suspect for rape may be ordered to have an HIV test without violating his constitutional rights). See generally Post, supra note 9, at 212 (discussing the irrationality of mandatory HIV testing in the context of Fourth Amendment protections).
offending the Fourth Amendment. Voluntary testing is producing the same results that the New York law states as its objective, by greatly reducing the number of babies born with HIV. Therefore, a court would be hard-pressed to justify violating the Fourth Amendment's guarantees, which are at the core of free society, when an alternate less invasive method is available, which has also proved to be quite successful.

D. Equal Protection Analysis

The Equal Protection Clause of the Fourteenth Amendment provides for all citizens to have equal protection of the laws. It arguably allows pregnant women to challenge the New York Public Health Law on equal protection grounds because men and non-pregnant women are not subjected to the same mandatory disclosure of their HIV status. Unfortunately, the Supreme


231 See Halem, supra note 176, at 500 (arguing that singling out pregnant women for forced medical treatment violates the Equal Protection Clause); see also Nancy Kubesek & Melissa Held, The Communitarian Case Against Prosecution of Prenatal Drug Abuse, 22 WOMEN'S RTS. L. REP. 1, 2 (2000) (noting that limiting reproductive freedom may violate
Court in *Geduldig v. Aiello*\(^{232}\) took the position that discrimination based on pregnancy is not equivalent to gender discrimination.\(^{233}\) This equal protection challenge arose from a California disability insurance program which administered benefits to private employees who suffer a disability, but excluded disabilities occurring from pregnancy.\(^{234}\) The Court implied that there needs to be a clear showing that the classification of pregnancy, made by a state enactment, is a false pretext for underlying gender discrimination, otherwise pregnancy will be scrutinized as simply a physical condition.\(^{235}\) Accordingly, pregnancy discrimination is scrutinized on a rational basis test, requiring legislatures to find only a rational basis for the legislation in order for it to be valid under the Equal Protection Clause.\(^{236}\) Therefore, the Court held that California is

the Equal Protection Clause). *But see* Eden, *supra* note 27, at 670 (expressing that mandatory HIV testing of pregnant women probably will not violate the Equal Protection Clause).


\(^{233}\) *See Geduldig*, 417 U.S. at 496-97 (noting the discretion given to legislation in classifying pregnancy discrimination, therefore not affording the same protections as gender discrimination); *see also* Sandy Mastro, *Note, Courtroom Bias: Gender Discrimination Against Pregnant Litigators*, WM. & MARY J. WOMEN & L. 155, 156 (2001) (providing that pregnancy discrimination is not gender-based discrimination). *But see* Petra Foubert, *Does EC Pregnancy and Maternity Legislation Create Equal Opportunities for Women In The EC Labor Market? The European Court of Justice's Interpretation of the EC Pregnancy Directive in Boyle and Lewen*, 8 MICH. J. GENDER & L. 219, 220 (2002) (expressing that women are discriminated against based on the likelihood that they may become pregnant).

\(^{234}\) *See Geduldig*, 417 U.S. at 486-87 (dismissing three appellees' cases who had abnormal pregnancies based on the decision of the California Court of Appeal that allowed payment under the disability program for abnormal pregnancies but the fourth appellee with a normal pregnancy was still barred under that decision); *see also* Elizabeth F. Defeis, *The Treaty of Amsterdam: The Next Step Towards Gender Equality*, 23 B.C. INT'L & COMPL. L. REV. 1, 15 (1999) (noting that excluding disability coverage due to pregnancy is not discrimination). *See generally* Michelle Zaptin, *Note, Erickson v. Bartell Drug Company: Requiring Coverage of Prescription Contraceptives*, 76, ST. JOHN'S L. REV. 423, 428 (2002) (excluding pregnancy from disability coverage is the removal of a physical condition from coverage).

\(^{235}\) *See Geduldig*, 417 U.S. at 497 n.20 (explaining that pregnancy is considered to be a physical attribute and will be treated as such, absent contrary proof); *see also* Hillary Von Rohr, *Access to Justice: The Social Responsibility of Lawyers: Recent Developments: Lactation Litigation and the ADA Solution: A Response to Martinez v. NBC*, 4 WASH. U. J. L. & POLY 341, 351 (2000) (noting that pregnancy is a physical condition). *See generally* Monica J. Stamm, *Note, A Skeleton In the Closet: Single-Sex Schools For Pregnant Girls*, 98 COLUM. L. REV. 1203, 1215 (1998) (providing that courts have equated pregnancy to any other physical condition).

\(^{236}\) *See Geduldig*, 417 U.S. at 497 n.20 (announcing the rational basis standard as the level of scrutiny provided for pregnancy discrimination); *see also* Stamm, *supra* note 235, at 1215 (noting that pregnancy related classification requires rational basis scrutiny). *See generally* Lawrence G. Sager, *Symposium On Constitutional Law: Of Tiers of Scrutiny and Time Travel: A Reply To Dean Sullivan*, 90 CALIF. L. REV. 819, 820 (2002) (providing
allowed to create programs that are not completely comprehensive, in order to avoid compromising its interests, and that risks insured by the program were not based on discriminatory reasons, hence the California disability insurance program was valid legislation. Consequently, the New York HIV screening program will have no problems under the Equal Protection Clause, because the improvement of health for newborns with HIV is a rational reason for mandatory testing. However, if the Court had decided to equate pregnancy discrimination with gender discrimination, the regulation would be scrutinized under a more strict intermediate level of scrutiny. This standard compels the government to prove that the "regulation serves an important government objective and . . . [it] is substantially related to that end," in order for the regulation to be constitutional. Upon application of the intermediate level of scrutiny, the New York regulation would have a more difficult burden in proving the constitutionality of its testing program, although with the application of the rational basis test, there are no serious equal protection concerns at all.

that gender discrimination receives intermediate scrutiny).

237 See Geduldig, 417 U.S. at 496-97 (explaining that within the California disability insurance program "there is no risk from which women are protected and men are not" and vice versa); see also Marjorie Jacobson, Note, Pregnancy and Employment: Three Approaches To Equal Opportunity, 68 B.U. L. REV. 1019, 1022 (1988) (noting the exclusion of pregnancy from an otherwise comprehensive disability plan). See generally 42 U.S.C. § 2000e(k) (1994) (defining the terms "because of sex" to include "pregnancy, childbirth, or related medical conditions").

238 See Renna, supra note 39, at 452 (explaining that newborn testing passes a rational test); see also Michael T. Flannery & Raymond C. O'Brien, Mandatory HIV Testing Of Professional Boxers: An Unconstitutional Effort to Regulate a Sport That Needs to be Regulated, 31 U.C. DAVIS L. REV. 409, 483 (1998) (demonstrating that the rational basis test should be used for mandatory HIV testing). See generally Shannon M. Roesler, Comment, The Kansas Remedy By Due Course of Law Provision: Defining a Right To a Remedy, 47 KAN. L. REV. 655, 678 (1999) (noting improvement of health care as a rational basis).

239 See Craig v. Boren, 429 U.S. 190, 197 (1976) (announcing that classifications based on gender are subject to scrutiny under the Equal Protection Clause); see also Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (finding that sex as in race was based on a physical characteristic which had a long history of discrimination and was rarely related to performance). See generally Brown, supra note 25, at 86 (noting that gender discrimination is scrutinized at the intermediate level).

240 See Craig, 429 U.S. at 197 (outlining the level of scrutiny to be used in conjunction with statutes that discriminate on the basis of gender); see also Brown, supra note 25, at 86 (explaining intermediate level scrutiny in relation to gender discrimination and HIV mandatory testing). See generally Paul E. McGreal, Alaska Equal Protection: Constitutional Law or Common Law?, 15 ALASKA L. REV. 209, 214 (1998) (noting that all gender discrimination cases receive intermediate scrutiny).

241 See Kelly D. Bryce, Note, Mandatory HIV Testing of Newborns: Is There a Better Way To Achieve The State's Goal of Preventing Transmission of HIV To Newborns and
CONCLUSION

New York State's Public Health Law which mandates HIV testing for all newborns does not pass constitutional muster on three grounds: it (1) violates the pregnant mother's right to confidentiality as to her HIV status, (2) violates her right to autonomy to make medical decisions regarding her health and the health of her newborn, and (3) violates her Fourth Amendment right to privacy. HIV and AIDS are genuine public health concerns for the state, but mandating HIV testing, and in effect disclosure of a pregnant woman's HIV status, is unreasonable given the possible side effects. Unauthorized disclosure of a woman's HIV status can cause her irreparable harm and the state does not have any proposed solutions for such injury. It can cause discrimination on many levels, including employment problems, familial problems, and housing and medical coverage problems, all which are fundamental to life and prosperity. Besides causing distrust and fear of medical personnel who perform the testing, this law could cause women to make uninformed decisions regarding the health of the unborn child, including unwarranted abortions. Therefore, this public health initiative by New York and supported by the federal government is rather irresponsible and haphazard because it does not deal with the ramifications of counseling and future health care which will be needed for all newborns and mothers who are in fact infected with HIV. This law only purports to test and record their status, in order to secure funding from the federal government, and leaves both mother and child out in the cold once the AZT treatment is administered six months after the birth of the baby. Furthermore, there are some constitutional rights that are so fundamental to liberty and democracy that invasion of them by the government without a compelling interest, supported by substantial evidence, should be held in disdain by society. The right to privacy is one of them.

Ensuring Them Treatment, 4 QUINNIPAC HEALTH L.J. 69, 87 (2000) (explaining that Equal Protection challenges to mandatory HIV testing will fail under federal law). See generally Brown, supra note 25, at 85-86 (noting that discrimination based on pregnancy is only prohibited in the employment context by the Equal Protection Clause). But see Crawford, supra note 66, at 39 (providing a possible way to object to mandatory HIV testing on Equal Protection grounds).