IS MAMA A CRIMINAL?—AN ANALYSIS OF POTENTIAL CRIMINAL LIABILITY OF HIV-INFECTED PREGNANT WOMEN IN THE CONTEXT OF MANDATED DRUG THERAPY

"As arrows *are* in the hand of a mighty man; so *are* children of the youth."[1]

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I. INTRODUCTION

At birth, all children receive a gift—life. Some children also receive the human immunodeficiency virus (HIV); however, the virus is not a gift. Pediatric HIV is a global issue of mammoth concern.[2] Since recognition of the virus in

1. *Psalms* 127:4 (King James) (emphasis added).

1981,[3] more than 15,000 children have been infected in the United States alone,[4] and more than 3000 children have died.[5] Acquired immunodeficiency syndrome (AIDS) is the final progressive stage of HIV.[6]

Pediatric HIV results from three primary methods of transmission: the virus passes perinatally[7] from an HIV-infected mother to her child via breast-feeding, in utero, and most commonly, during delivery.[8] From 1988 to 1993, perinatal transmission of HIV accounted for 1000 to 2000 pediatric HIV infections,[9] and accounts for almost all new infections.[10]

This Note addresses mandatory testing, the Protocol 076 study, and mandatory drug therapy for HIV-infected pregnant women. This Note examines whether HIV-infected pregnant women could be criminally liable for noncompliance with an available mandated drug therapy regimen and the extent to which hospital personnel could test for compliance in the absence of consent.

II. BACKGROUND

The Pediatric AIDS Clinical Trials Group (PACTG) performed the Protocol 076 clinical drug study in 1994[11] in response to AIDS-related infant deaths resulting from perinatal transmission of HIV.[12] The PACTG administered

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2. *See AIDS Among Children—United States, 1996*, 46 MORBIDITY & MORTALITY WKLY. REP. 1005, 1005-08 (1996), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00044515.htm (stating the World Health Organization determined that 800,000 children had HIV/AIDS worldwide as of 1996).

3. Helena Brett-Smith & Gerald H. Friedland, *Transmission and Treatment*, *in* AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC 18, 18 (Scott Burris et al. eds., 1993).

4. R.J. Simonds & Martha Rogers, *Preventing Perinatal HIV Infection: How Far Have We Come?*, 275 JAMA 1514, 1514 (1996).

5. *Id.*

6. Brett-Smith & Friedland, *supra* note 3, at 35.

7. Perinatal refers to events occurring during or pertaining to the phase surrounding the time of birth, from the twentieth week of gestation to the twenty-eighth day of newborn life. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1440 (2d ed. 1987).

8. Michael A. Grizzi, *Compelled Antiviral Treatment of HIV Positive Pregnant Women*, 5 UCLA WOMEN'S L.J. 473, 479-80 (1995). Vertical transmission refers to the passage of the disease from mother to child. *Id.* at 479.

9. *AIDS Among Children—United States, 1996*, *supra* note 2, at 1003.

10. *Update: Perinatally Acquired HIV/AIDS—United States, 1997*, 134 ARCHIVES OF DERMATOLOGY 257, 257 (1998).

11. Protocol 076 was a multicenter clinical trial conducted in the United States and France testing the safety and efficacy of AZT for the prevention of maternal-infant HIV transmission.

12. *See generally* Edward M. Connor et al., *Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment*, 331 NEW ENG. J. MED. 1173, 1174 (1994) (detailing the Protocol 076 study).

zidovudine (AZT),[13] the first documented anti-HIV drug,[14] to some randomly selected HIV-infected pregnant women during pregnancy, labor, and delivery and to the infant for six weeks after birth.[15] Each woman was randomly assigned to either an AZT treatment group or a placebo group.[16] Forty infants in the placebo group became HIV-infected compared to only thirteen infants in the AZT group.[17] This two-thirds reduction in perinatal transmission of HIV marked the first breakthrough in combating this fatal epidemic among children.[18] The National Institute of Health (NIH) and Center for Disease Control (CDC) responded by publishing guidelines regarding voluntary testing and counseling of pregnant women[19] and recommendations for AZT in the prevention of perinatal transmission of HIV.[20]

Perinatal transmission rates of HIV have decreased in the United States as a result of AZT drug therapy.[21] Yet, several aspects regarding HIV-infected children remain problematic: (1) As of June 1998, 3425 children were reported as living with AIDS and 1649 with HIV;[22] (2) Roughly 6000 infants per year are born to HIV-infected women;[23] (3) HIV disproportionately impacts women in their childbearing years[24] and women and children of color;[25] (4) Treatment for

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13. Zidovudine, known as ZDV, is also referred to as AZT. *U.S. Public Health Service Recommendations for Human Immunodeficiency Virus Counseling and Voluntary Testing for Pregnant Women*, 44 MORBIDITY & MORTALITY WKLY. REP. 1, 1 (1995), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00038277.htm [hereinafter *Counseling and Voluntary Testing*].

14. Brett-Smith & Friedland, *supra* note 3, at 38.

15. Connor et al., *supra* note 12, at 1178.

16. *Id.* at 1173.

17. *Id.* at 1176.

18. Simonds & Rogers, *supra* note 4, at 1514.

19. *See Counseling and Voluntary Testing*, *supra* note 13, at 4-11 (suggesting guidelines for voluntary testing procedures and counseling of HIV-infected pregnant women).

20. *See Recommendations of the U.S. Public Health Service Task Force on the Use of Zidovudine to Reduce Perinatal Transmission of Human Immunodeficiency Virus*, 43 MORBIDITY & MORTALITY WKLY. REP. 1, 1 (1994), *available at* http://www.cdc.gov/mmwrhtml/00032271.htm (suggesting usage of AZT to prevent perinatal transmission of HIV).

21. San Francisco AIDS Foundation, *Children and HIV*, *at* http://www.sfaf.org/treatment/positivenews/ped.html (May 1997).

22. The François-Xavier Bagnoud Center, *HIV and AIDS in Children: Questions & Answers*, *at* http://www.fxbcenter.org/hivbasics/hiv_aids_qa.html#1-2 (accessed Oct. 20, 2001).

23. *Id.*

24. *See* Laura Hoyt, *HIV Infection in Women and Children: Special Concerns in Prevention and Care*, 102 POSTGRADUATE MED. 165, 165 (1997) (identifying AIDS as the number three cause of death in women aged twenty-five to forty-four).

25. The François-Xavier Bagnoud Center, *supra* note 22.

children with HIV is less advanced than treatment for adults with HIV;[26] and (5) HIV progresses more rapidly in children than adults.[27]

III. HIV IN CHILDREN

All children born to HIV positive mothers will test positive for exposure to the virus at birth.[28] Once the mother's antibodies disappear, some infants will no longer test positive.[29] However, for those ill-fated infants who are infected, the effects of HIV are harsh and destructive.[30] There are generally two patterns of infection: (1) twenty percent develop severe symptoms early in life and die by age four; and (2) the other eighty percent develop severe symptoms as they near school age and have longer life expectancies.[31] HIV-infected children have difficulty gaining weight as well as developing motor skills such as speaking, crawling, and walking.[32] As HIV progresses and affects a child's neurologic system, other difficulties may arise, including seizures, poor school performance, cerebral palsy, and mental retardation.[33] Many HIV-infected children suffer from chronic diarrhea.[34] In addition, life-threatening opportunistic infections may develop, such as toxoplasmosis.[35] Pneumocystis carinii pneumonia (PCP)[36] is the primary cause of death among HIV-infected children with AIDS.[37]

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26. San Francisco AIDS Foundation, *supra* note 21.

27. Hoyt, *supra* note 24, at 171.

28. Jennifer Brown, *A Troublesome Maternal-Fetal Conflict: Legal, Ethical, and Social Issues Surrounding Mandatory AZT Treatment of HIV Positive Pregnant Women*, 18 BUFF. PUB. INT. L.J. 67, 69 (2000).

29. *See* Hoyt, *supra* note 24, at 171 (noting maternal antibodies can persist in the infant for as long as eighteen months).

30. *See* HIVPositive.com, *Women and Children: Pediatric AIDS*, *at* http://www.hivpositive.com/f-Women/9-Kids/9-pediatric.html#Progression (updated Aug. 27, 1999).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* Toxoplasmosis is an "infection with the parasite *toxoplasma gondii*, transmitted to humans by consumption of insufficiently cooked meat containing the parasite or by contact with contaminated cats or their feces: the illness produced is usually mild, but in pregnant women may damage the fetus." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2003 (2d ed. 1987).

36. Pneumocystis carinii pneumonia is a lung infection caused by the microorganism pneumocystis carinii. This microorganism is generally not pathogenic in healthy humans, but occurs with frequency among those with weakened immune systems. MSN Health, WebMD, *at* http://content.health.msn.com/content/asset/adam_disease_pneumocystosis (accessed Jan 9, 2002).

37. HIVPositive.com, *supra* note 30.

IV. MANDATORY HIV TESTING

Some medical personnel have advocated mandatory testing for HIV in pregnant women.[38] One of the primary arguments in support of mandatory testing is that many women who are HIV positive are unaware of their status.[39] Not only is it possible for the woman to be infected, but also for the fetus to become infected.[40] In 1996, the federal government amended the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act[41] to make federal funding available for states that adopt the CDC guidelines regarding HIV counseling and voluntary testing for pregnant women.[42]

New York has passed the only mandatory testing law regarding either newborns or pregnant women.[43] Under New York's law, physicians must inform parents of the purpose for performing HIV screening of newborns, provide post-test counseling for mothers, and arrange health care and social services if infants test positive.[44] The New York statute has the same effect as a mandatory HIV test on the mother because her status is automatically revealed if the infant's HIV test is positive.[45]

In Illinois, legislation that attempted to mandate HIV testing of pregnant women failed.[46] The proposed bill required all pregnant women to be tested for the virus but contained an opt-out provision that permitted women to refuse testing in writing.[47] Although Iowa does not mandate testing, its public health statute is compelling.[48] Iowa's statute requires pregnant women be advised regarding prevention of mother-fetal HIV transmission and strongly encourages pregnant women to undergo testing if even one HIV risk factor is reported.[49]

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38. David Lowe, Note, *HIV Study Raises Ethical Concerns for the Treatment of Pregnant Women*, 10 BERKELEY WOMEN'S L.J. 176, 177 (1995).
39. Brown, *supra* note 28, at 73.
40. *Id.*
41. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, 42 U.S.C. § 300FF (1994 & Supp. 1999).
42. Catherine H. McCabe, *Ryan White CARE Amendments: Mandatory HIV Testing of Newborns and a Woman's Right to Privacy*, 1 DEPAUL J. HEALTH CARE L. 373, 380 (1996).
43. *See id.* at 373 (noting New York requires all newborns to be tested for HIV).
44. N.Y. PUB. HEALTH LAW § 2500-f (McKinney 2001); N.Y. COMP. CODES R. & REGS. tit. 10, §§ 63.3, 69-1.5 (2001).
45. Jennifer Sinton, Note, *Rights Discourse and Mandatory HIV Testing of Pregnant Women and Newborns*, 6 J.L. & POL'Y, 187, 208 (1997).
46. Kevin McDermott, *Bill on AIDS Tests for Pregnant Women is Killed*, ST. J.-REG. (Springfield, Ill.), Mar. 17, 1995, at 6.
47. *Id.*
48. *See* IOWA CODE § 141A.4 (2001) (detailing HIV testing and counseling procedures).
49. *Id.*

Mandatory HIV testing of pregnant women has been advocated.[50] Mandatory testing absent medical intervention would be inadequate to produce the optimal results of a drug therapy regimen. Could a mandatory drug regimen be the ensuing step?[51]

V. PROTOCOL 076 TREATMENT AND EFFECTS

Some women in the Protocol 076 study exhibited minimal short-term toxicity.[52] The only harmful effect directly attributable to AZT noted in infants was mild and reversible anemia.[53] Although the long-term effects are unknown,[54] the PACTG is continuing to evaluate some of the infants involved in the Protocol 076 study.[55]

Protocol 219, released in 1997, was a follow-up study to Protocol 076.[56] Protocol 219 examined Protocol 076 infants who were exposed to AZT but did not become HIV-infected.[57] At the time Protocol 219 was conducted, the average age of these children was 4.2 years.[58] There were no adverse outcomes regarding cognitive function, growth, cancer, immune function, or death.[59] Although continued follow-up is deemed to be difficult due to socioeconomic factors,[60] the Protocol 219 study confirmed the optimistic impact of AZT with regard to perinatal transmission of HIV.[61]

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50. Lowe, *supra* note 38, at 177. In response to Protocol 076, Dr. Philip Pizzo determined "mandatory testing is necessary to identify every pregnant woman with HIV." *Id.* Responding to the ethical concerns of mandatory testing, Dr. Arthur Caplan, Director for the Center for Bioethics, stated that "this isn't such a complicated moral call. If you can prevent a young child from being infected, it would seem to me that you are under an obligation to take the steps necessary to prevent that harm." *Id.*

51. *Id.* Dr. Arthur Caplan suggests that necessary steps should be taken to prevent HIV infection of infants through mandatory treatment. *Id.*

52. Connor et al., *supra* note 12, at 1178.

53. *Id.*

54. Mary Culnane et al., *Lack of Long-Term Effects of in Utero Exposure to Zidovudine Among Uninfected Children Born to HIV-Infected Women*, 281 JAMA 151, 152 (1999).

55. *See id.*

56. *See id.*

57. *Id.*

58. *Id.* at 155.

59. *Id.*

60. *Id.* at 156 (estimating loss of contact with participants at about ten percent annually because some children may be placed in foster care or adopted).

61. *See id.*

VI. WHY MANDATED AZT?

Results of the Protocol 076 study exhibit the most compelling evidence to combat perinatal transmission of HIV.[62] Three arguments support implementation of mandatory drug therapy for women who choose to carry fetuses to term after learning of their HIV positive status.[63] First, a mandatory policy would require medical personnel to focus on women and HIV and its effects on the fetus.[64] In an effort to learn more about AZT and its potential effects on the woman and infant, additional studies by pharmaceutical companies and researchers could have a significant impact on AIDS research.[65] Second, mandatory treatment would impose a burden upon the state to subsidize the treatment.[66] Not only the affluent but also the indigent would have the same opportunity to make an informed decision with regard to carrying the fetus to term.[67] Third, mandatory treatment would alleviate the discriminatory effect of voluntary testing and treatment as evidenced during the syphilis outbreak in the 1900s.[68] Patients who attended private physicians' offices were uninformed regarding testing and treatment because the stigma associated with syphilis deterred private physicians from advocating medical intervention.[69] Clinics, whose patients were mostly indigent, were primary advocates of testing and treatment.[70] This effect is significant because indigent minorities comprise a large percentage of HIV-infected individuals,[71] but the lack of a mandatory policy may not impact some white female individuals who account for twenty-five percent of HIV-infected women.[72]

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62. Lowe, *supra* note 38, at 177 (noting the Food and Drug Administration's chairperson refers to the results as compelling).

63. Juliet J. McKenna, *Where Ignorance Is Not Bliss: A Proposal for Mandatory HIV Testing of Pregnant Women*, 7 STAN. L. & POL'Y REV. 133, 142 (1996).

64. *See id.* (stating that a mandatory testing policy would require medical personnel and the medical community to focus on women affected by HIV).

65. *Id.*

66. *Id.*

67. *See id.* (suggesting that mandatory testing would require the state to pay for medication of individuals who may be economically distressed).

68. *See id.* at 136-37 (suggesting that during the syphilis outbreak, testing and treatment were not effective until government involvement).

69. *Id.* at 136.

70. *Id.*

71. *See* Brett-Smith & Friedland, *supra* note 3, at 20 (indicating the disproportionate socioeconomic status representative in minorities mirrors the disproportionate impact of AIDS).

72. McKenna, *supra* note 63, at 138.

VII. THE RIGHT TO REFUSE MEDICAL CARE

A. Jacobson v. Massachusetts

Inherent in the concept of mandatory treatment is the liberty interest embodied in a person's right to refuse medical care.[73] In *Jacobson v. Massachusetts*,[74] the Supreme Court upheld a state's right to enact a mandatory vaccination law in an effort to halt the spread of smallpox.[75] The regulation stated, "'Whereas, smallpox has been prevalent to some extent . . . and still continues to increase . . . it is necessary for the speedy extermination of the disease, that all persons not protected by vaccination should be vaccinated . . . or revaccinat[ed].'"[76]

The defendant claimed that mandatory vaccination was an infringement of his liberty interest protected by the Fourteenth Amendment.[77] The Court stated that the liberty interest secured by the Constitution is not an absolute right "to be, at all times and in all circumstances, wholly freed from restraint."[78] The statute only required vaccination when it was essential for the public's health and safety.[79] When the statute was enacted, smallpox existed within the city and was increasing.[80] Having noted these facts, the Court stated that true liberty for all persons could not exist under a principle that recognized each person's right regardless of any injury it may cause to others.[81] The Court noted the interest of liberty, the greatest right of all, is not an unrestricted license to act according to one's own wishes.[82]

B. Singleton v. Norris

More recently in *Singleton v. Norris*,[83] the Arkansas Supreme Court upheld the State's decision to force a death row inmate to take antipsychotic medication

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73. *See* Cruzan v. Dir. of Mo. Dep't of Health, 497 U.S. 261, 262 (1990) (holding a competent individual has a constitutional right to refuse unwanted medical care).

74. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

75. *Id.* at 39.

76. *Id.* at 12 (quoting a regulation adopted by the City of Cambridge, Massachusetts Board of Health on February 27, 1902).

77. *Id.* at 14.

78. *Id.* at 26.

79. *Id.* at 27.

80. *Id.* at 12.

81. *Id.* at 26. "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be free from restraint. There are manifold restraints to which every person is necessarily subject for the common good." *Id.*

82. *Id.* at 26-27.

83. Singleton v. Norris, 992 S.W.2d 768 (Ark. 1999).

because "[t]he State has a due process obligation to provide appropriate medical care to persons in its custody."[84] The State contended the medication was necessary to keep the inmate from causing harm to himself as well as others.[85] The defendant argued that forcing him to take medication violated his liberty interest and rendered him sane, precluding his insanity defense against execution.[86] The court rejected the inmate's claim and noted that forcing an inmate to take medication did not violate his liberty interest,[87] nor was it the State's intent to make the defendant competent so he could be executed.[88]

In the context of a mandated drug therapy regimen, *Singleton* is notable because an anti-HIV drug therapy regimen would save some infants from certain death while invading a pregnant woman's liberty interest.[89] As in *Singleton*, HIV might be examined by weighing the consequences of an individual decision against the health and welfare of other individuals the decision affects.[90] It is possible that a state's interest in saving lives and combating the spread of HIV might supersede the interests of the individual.

VIII. FETAL RIGHTS IN A CRIMINAL CONTEXT

Mothers have traditionally been protected from imposition of criminal liability for causing serious injury or death to a child through drug use.[91] Courts primarily determined legislatures did not intend this result in criminal child abuse statutes.[92] Hence, prosecutors have struggled when trying to impose criminal charges against mothers.[93]

To bring criminal charges against a third party under common law, the fetus had to be born alive and subsequently die as a result of the prenatal injury.[94]

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84. *Id.* at 769-70 (citations omitted).
85. *Id.*
86. *Id.*
87. *Id.* (citing Washington v. Harper, 494 U.S. 210 (1990)).
88. *Id.* at 770.
89. *See id.* at 769 (citing Washington v. Harper, 494 U.S. at 210).
90. *See id.* (finding that involuntary administration of medication is appropriate as long as potential danger to others exists).
91. Nova D. Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741, 744 (2000).
92. *See, e.g.*, Reinesto v. Super. Ct., 894 P.2d 733, 735 (Ariz. Ct. App. 1995) ("[W]hen the legislature has intended to refer to an unborn child or fetus, it has done so specifically."); Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993) (finding that if state legislature "intended to include a pregnant woman's self-abuse which also abuses her unborn child within the conduct criminally prohibited, it would have done so expressly").
93. *See* Janssen, *supra* note 91, at 755.
94. Michael J. Davidson, *Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law*, ARMY LAW., July 1998, at 23, 23.

Until 1984, most states adopted some variation of this born-alive approach.[95] In *Commonwealth v. Cass*,[96] the Supreme Court of Massachusetts rejected this approach and extended Massachusetts' vehicular homicide statute to include the death of a viable fetus.[97]

The defendant in *Cass* hit a woman who was eight and a half months pregnant and killed her fetus.[98] Under the Massachusetts statute, defendants were liable if, while operating a motor vehicle recklessly or negligently, they caused the death of a person.[99] .The *Cass* court determined the word "person" included a viable fetus by examining the legislative intent and concluding that person included all human beings.[100] The court stated a fetus of human parents is also a human being, and a person, first, while still in the womb, and, later, outside the womb.[101]

Almost an equal number of states presently adhere to the born-alive rule and the approach that criminalizes killing a fetus by statute.[102] States that adopt feticide statutes inconsistently impose criminal liability depending on the varying stages of fetal development.[103] Imposition of criminal liability ranges from viability of a "quick child"[104] in some states to the very early developmental stage in a few other states.[105]

IX. *WHITNER v. STATE*

In 1997, South Carolina became the first state to uphold criminal conviction against a mother for causing injury to a fetus as a consequence of substance abuse in *Whitner v. State*.[106] The South Carolina Supreme Court applied a child endangerment statute to convict a mother for causing the infant to be born cocaine positive via the mother's ingestion of cocaine in the third trimester of pregnancy.[107] The statute stated, "Any person . . . who shall . . . refuse or neglect to provide . . . the proper care and attention for such child . . . so

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95. *Id.* at 24.
96. Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984).
97. *Id.* at 1325.
98. *Id.*
99. *Id.* (citing MASS. GEN. LAWS ANN. ch. 90, § 24G (West 1984)).
100. *Id.* at 1325-26.
101. *Id.*
102. Davidson, *supra* note 94, at 25 (citing Tony Mauro, *Abortion Battle, Medical Gains Cloud Legal Landscape*, USA TODAY, Dec. 12, 1996, at 1A-2A).
103. *Id.*
104. A quick child is "[o]ne that has developed so that it moves within the mother's womb." BLACK'S LAW DICTIONARY 1415 (4th ed. 1968).
105. Davidson, *supra*, note 94, at 25-26.
106. Whitner v. State, 492 S.E.2d 777, 782-83 (S.C. 1997).
107. *Id.* at 778-79, 786.

that the life, health or comfort of such child . . . is endangered or is likely to be endangered, shall be guilty of a misdemeanor."[108] South Carolina's children's code defined the term "child" as a person less than eighteen years of age.[109] The critical question for the South Carolina Supreme Court in *Whitner* was whether the term "person" included a viable fetus.[110]

The court had already established viable fetuses were persons having specified legal rights and privileges.[111] The South Carolina Supreme Court in *Hall v. Murphy*[112] unanimously held "a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person."[113] The court affirmed this concept in *Fowler v. Woodward*[114] by concluding it was not necessary for a viable fetus that sustained injury while in the womb to be born alive in order for another to bring a wrongful death suit on behalf of the fetus.[115] Because a viable fetus is a person, a cause of action in tort arose immediately upon sustaining the injury.[116] The *Whitner* court stated it would be grossly inconsistent to declare a viable fetus a person in a civil context but not in a criminal context.[117] The court found no rational basis for excluding a viable fetus as a person in the present context.[118]

Ms. Whitner, the defendant, contended the statute was not intended to include abuse or neglect of viable fetuses.[119] She argued that previous failed attempts at legislation in this area provided evidence that the legislature did not intend this inclusion.[120] The court rejected this argument based on prior case law and a clear reading of the statutory language.[121] Ms. Whitner also argued if a viable fetus was a person, any conduct by a pregnant woman, regardless of whether it was legal or illegal, would be punishable under the statute.[122] The court rejected Ms. Whitner's second argument and stated the same contention could be advanced regardless of whether the child is born or not born.[123] If a

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108. S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985).
109. *Id.* § 20-7-30(1).
110. *Id.* at 779.
111. *Id.* (citing Hall v. Murphy, 113 S.E.2d 790, 793 (S.C. 1960)).
112. Hall v. Murphy, 113 S.E.2d 790 (S.C. 1960).
113. *Id.* at 793.
114. Fowler v. Woodward, 138 S.E.2d 42 (S.C. 1964).
115. *Id.* at 44.
116. *Id.*
117. Whitner v. State, 492 S.E.2d at 780 (citing State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984)).
118. *Id.* at 781.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

parent drinks excessively after a fetus is born, the parent could be punished if the conduct endangered the child even though the act of consuming alcohol is legal.[124] The legislature did not believe it would be absurd to prosecute a parent for legal conduct when the conduct potentially endangered the life or health of the child.[125] The result should not be absurd because the child was a viable fetus.[126]

X. *WHITNER* IN THE CONTEXT OF MANDATED DRUG THERAPY

In the context of mandated drug therapy, the applicable statute in *Whitner* has been amended[127] and states:

> (A) It is unlawful for . . . the parent . . . who is responsible for the welfare of a child . . . to: (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety . . . . (B) A person who violates subsection (A) is guilty of a felony . . . .[128]

At the time *Whitner* was decided, violation of the statute was a misdemeanor.[129] The amended statute makes violation a felony punishable by a fine within the court's discretion, imprisonment of up to ten years, or both.[130]

At the outset, it is worth noting that some mothers may be uninformed regarding potential criminal charges in the context of HIV and mandated drug therapy. Child abuse and neglect in this regard are novel issues.[131] Additionally, some women may not make the connection that *Whitner* is applicable to fetuses because the law uses the term "child."[132]

Culpability under the statute requires some type of harm to occur.[133] In the context of mandated anti-HIV drug therapy, harm would occur when a parent fails to provide adequate medical care and physical injury results.[134] Some

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124. *Id.* at 781-82.
125. *Id.* at 782.
126. *Id.*
127. *See* S.C. CODE ANN. § 20-7-50 (West Supp. 2000). Various amendments have been made to this section and became effective in 1994, 1997, and 1999. *Id.*
128. *Id.*
129. *See* S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985).
130. S.C. CODE ANN. § 20-7-50(B) (West Supp. 2000).
131. *Cf.* Janssen, *supra* note 91, at 744 ("[V]irtually no jurisdiction will allow a mother to go to jail for killing or seriously injuring her child by way of her own illegal drug use.").
132. S.C. CODE ANN. §§ 20-7-50(A), -490(1).
133. *Id.* §§ 20-7-50(A), -490(3).
134. *See id.* § 20-7-490(3)(c). "Harm" includes failure to supply "adequate health care," which includes "any medical or nonmedical remedial health care permitted or authorized under state law." *Id.* "'Physical injury' means death, disfigurement or impairment of any bodily organ." *Id.* § 20-7-490(6).

women may choose not to adhere to a drug therapy regimen as evidenced by the Protocol 076 study.[135] An HIV-infected mother's failure to comply with a regimen of available preventive medication to maximize the fetus' chance to avoid contracting the virus might be construed as harm.[136] This is especially true for a state that considers a child a person[137] and a viable fetus a person.[138] The child's contraction of HIV would be more likely to constitute harm. The harm requirement would be satisfied if death results from complications of the virus.[139] Liability against a mother for failure to take an available mandatory drug therapy regimen during the third trimester of pregnancy could potentially be imposed, and failure to comply would result in criminal conviction under a statute like the South Carolina statute as applied in *Whitner*.[140]

The objective behind imposing criminal sanctions against a mother for failure to take a drug therapy regimen is tantamount to the objective behind imposing criminal sanctions for maternal cocaine usage—to ensure that an infant receives the best chance at life.[141] There is no known cure for HIV or AIDS[142] and death is an inevitable result.[143] A mandatory drug therapy regimen could make the outcome of a child's quality of life dependent upon a mother's compliance.[144]

XI. *FERGUSON v. CITY OF CHARLESTON*

South Carolina again addressed the issue of substance abuse among pregnant women in *Ferguson v. City of Charleston*.[145] In response to a perceived national epidemic of crack babies,[146] Medical University of South Carolina (MUSC) personnel, the county's Substance Abuse Commission, the police, the

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135. Connor et al., *supra* note 12, at 1175 tbl. 1.

136. *See* S.C. CODE ANN. § 20-7-490(3)(c).

137. *Id.* § 20-7-490(1).

138. *See* Whitner v. State, 492 S.E.2d 777, 780 (S.C. 1997) (holding viable fetuses are persons in the context of criminal charges applicable to a mother for causing cocaine to be present in her infant's system at birth).

139. S.C. CODE ANN. § 20-7-490(3)(c), -490(6).

140. *See* Whitner v. State, 492 S.E.2d at 778-79.

141. *See id.* at 781-82.

142. Melinda Madison, *Tragic Life or Tragic Death: Mandatory Testing of Newborns for HIV—Mothers' Rights Versus Children's Health*, 18 J. LEGAL MED. 361, 361 (1997).

143. Grizzi, *supra* note 8, at 477.

144. *See id.* at 483.

145. Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281 (2001). [Editor's Note: *United States Reports* pagination was unavailable at time of publication. Further citation will be to the *Supreme Court Reporter*.]

146. *Id.* at 1285 n.1. A crack baby is defined as an "infant born to a mother who uses crack cocaine during pregnancy." THE AMERICAN HERITAGE DICTIONARY (4th ed. 2000), *available at* http://www.bartleby.com/61/71/CO717150.html (accessed Jan. 24, 2002).

Social Services Department, and the Solicitor's Office instituted Policy M-7 (the Policy).[147] The Policy outlined procedures for identification and testing of patients who exhibited any one of at least nine indicia of substance abuse.[148] The Policy established a chain of custody for urine samples to be obtained and tested, made substance abuse treatment available for identified patients, and used law enforcement to effectuate the Policy.[149]

The defendants in *Ferguson* challenged the Policy on the theory that the drug tests were administered for the purposes of criminal investigation and constituted warrantless and nonconsensual searches in violation of the Fourth Amendment.[150] The district court determined the patients consented to the searches.[151] On appeal, the Fourth Circuit did not decide the consent issue, but affirmed the decision and determined the searches were reasonable as "special needs" searches.[152]

The Supreme Court granted certiorari to review the Fourth Circuit's holding that the interest in employing a threat of criminal charges as a deterrent for pregnant women to abstain from cocaine usage justified departure from the Fourth Amendment.[153] In reversing and remanding *Ferguson* for a determination on the consent issue, the Supreme Court held urine screens were searches within the Fourth Amendment, testing and reporting positive test results to law enforcement officials absent the patients' consent constituted an unreasonable search, and *Ferguson* did not fit in the closely protected category of special needs.[154]

The special needs doctrine is implicated in exceptional situations in which a search may be reasonable absent a warrant or probable cause if the search

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147. Ferguson v. City of Charleston, 121 S. Ct. at 1285.

148. *Id.* The nine indicia were: (1) the absence of prenatal care; (2) not obtaining prenatal care until after twenty-four weeks of gestation; (3) incomplete prenatal care; (4) abruptio placentae; (5) fetal death while in utero; (6) preterm labor; (7) no obvious reason for intrauterine growth retardation; (8) previous history of drug or alcohol abuse; and (9) unexplainable congenital abnormalities. *Id.* at 1285 n.4.

149. *Id.* at 1285.

150. *Id.* at 1286.

151. *Id.* The district court submitted the issue to the jury with the requirement that it find for the defendants unless it determined that defendants affirmatively consented to the search, using three criteria: (1) whether the defendant consented to the taking of the samples; (2) whether the defendant consented to the testing of those samples for cocaine; (3) whether the defendant consented to the possible disclosure of the test results to the police. *Id.* at 1286 n.6.

152. *Id.* at 1287. The Court explained that special needs searches—searches unsupported by warrant or probable cause—may be constitutional in limited circumstances as determined by "'a careful balancing of governmental and private interests.'" *Id.* at 1287 n.7 (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)).

153. Ferguson v. City of Charleston, 186 F.3d 469 (4th Cir. 1999).

154. Ferguson v. City of Charleston, 121 S. Ct. at 1292-93.

serves non-law enforcement needs.[155] When the doctrine is implicated, a balancing test must be employed to weigh the special needs against the individual's interest in privacy.[156] The Court distinguished *Ferguson* from previous special needs cases based on the fact that MUSC personnel gave positive test results to law enforcement officials without the patients' knowledge or consent whereas in the previous special needs cases the justification for these searches was not general law enforcement.[157] This intrusion of privacy was more significant than in previous special needs drug cases.[158] The Court stated patients enjoy a reasonable expectation of privacy that diagnostic test results will not be released to nonmedical personnel absent consent.[159] None of the previous drug special needs cases intruded on this expectation.[160]

The critical difference between previous special needs drug cases and *Ferguson* was in the nature of the special need advanced as justification for the warrantless search.[161] In the previous cases, the special need asserted as justifying the absence of a warrant was separate from the state's interest in law enforcement.[162] In *Ferguson*, the "central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."[163]

While the ultimate goal of the searches may have been to provide substance abuse treatment for identified patients, the immediate purpose was to generate evidence for law enforcement.[164] The Court noted several reasons for drawing this conclusion including: (1) Other than substance abuse treatment of the mother, the Policy did not discuss subsequent medical treatment for the

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155. *See* New Jersey v. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable–cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

156. Ferguson v. City of Charleston, 121 S. Ct. at 1288.

157. *Compare id.*, *with* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995) (upholding warrantless and involuntary drug testing of high school athletes participating in interscholastic sports); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 633 (1989) (upholding warrantless and involuntary drug testing of railway employees involved in train accidents); *and* Treasury Employees v. Von Raab, 489 U.S. 656, 672 (1989) (upholding warrantless and involuntary drug testing of United States Customs Service employees seeking promotion-sensitive positions). *But see* Chandler v. Miller, 520 U.S. 305, 309 (1997) (striking down warrantless drug testing of candidates for state offices as unreasonable even though the tests were for other than law enforcement purposes).

158. Ferguson v. City of Charleston, 121 S. Ct. at 1288.

159. *Id.*

160. *Id.* at 1289; *see supra* note 157.

161. Ferguson v. City of Charleston, 121 S. Ct. at 1289.

162. *Id.*; *see supra* note 157.

163. Ferguson v. City of Charleston, 121 S. Ct. at 1290.

164. *Id.* at 1291.

mother or the newborn; (2) Police were significantly involved in daily administration; (3) Police were involved in deciding who received reports of positive tests and the information included in the reports; (4) Law enforcement personnel helped determine procedures to follow when performing urine screens; and (5) Law enforcement personnel had access to identified patients' files, attended regular team meetings, and received copies of documents assessing patients' progress.[165] The Court stated any search that was nonconsensual or suspicionless could be hidden in the category of special needs if the search was defined solely by its ultimate instead of immediate purpose.[166] The Court determined it was especially difficult to contend that the Policy was designed solely to save lives.[167] Considering the primary purpose of MUSC's program—using the threat of arrest and prosecution to force patients into substance abuse treatment—and the significant involvement of law enforcement, the Court held *Ferguson* did not fit in the closely protected category of special needs.[168]

The dissent concluded that, because the urine sample was voluntarily provided, it did not constitute a search implicated by the Fourth Amendment.[169] The dissent noted three possible justifications for the proposition that the urine samples were taken without consent: (1) The consent was coerced as a result of the patients' need for medical care; (2) The consent was uninformed because the patients were not told that the test results would be given to police; and (3) The consent was uninformed because medical personnel did not reveal the urine samples would be tested for evidence of drug use.[170] The dissent found that, based on the Court's prior holding in *Hoffa v. United States*,[171] the last two contentions would not suffice.[172] In *Hoffa*, the Court held that lawfully obtaining material and giving it to police is not unconstitutional even if the information is obtained deceivingly and for means other than those advanced.[173] In addressing the remaining justification—that the consent was coerced as a result of the

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165. *Id.* at 1290-91.
166. *Id.* at 1291-92.
167. *Id.* at 1292 n.23.
168. *Id.* at 1292.
169. *Id.* at 1297 n.1 (Scalia, J., dissenting). The dissent contended that in previous special needs cases the screens were taken involuntarily and thus constituted Fourth Amendment searches. *Id.* (Scalia, J., dissenting); *see supra* note 157. Subsequent testing and reporting of unconsented test results to law enforcement are part of that search. Ferguson v. City of Charleston, 121 S. Ct. at 1297 n.1 (Scalia, J., dissenting). In *Ferguson*, however, the taking was voluntary and therefore was not a Fourth Amendment search. *Id.* (Scalia, J., dissenting). Thus, in conducting a Fourth Amendment analysis, the testing and reporting should be viewed separately. *Id.* (Scalia, J., dissenting).
170. *Id.* at 1296 (Scalia, J., dissenting).
171. Hoffa v. United States, 385 U.S. 293 (1966).
172. Ferguson v. City of Charleston, 121 S. Ct. at 1297 (Scalia, J., dissenting).
173. Hoffa v. United States, 385 U.S. at 302.

patients' need for prenatal medical care—the dissent opined that even if this was coercion, it was "not coercion applied by the government."[174] In the dissent's opinion, the special need doctrine was inapplicable because the search was not unconstitutional on its own terms.[175]

Nevertheless, the dissent examined the facts presented in *Ferguson* and contended they would have justified a special need.[176] The dissent argued that the majority viewed the alleged medical rationale in *Ferguson* as a pretext and no special need existed.[177] The dissent stated that the district court's finding was binding absent being clearly erroneous.[178]

The testing at issue in *Ferguson* began in 1989 prior to police involvement.[179] Pregnant mothers who tested positive for cocaine were referred to substance abuse treatment.[180] The dissent stated substance abuse treatment was beneficial to both the mother and the child.[181] An expectant mother's cocaine usage can result in infants having intrauterine growth retardation, smaller head circumference, and neurological irregularities.[182] At two years of age, motor skill development may become impaired.[183] Cocaine-exposed children four to six years of age show increased signs of depression, anxiety, attention problems, and aggressive behaviors.[184] Hence, prior to police involvement, the tests served the immediate purpose of improving the health of both mother and infant.[185] Once the police became involved, police and hospital personnel used the testing program to secure what the *Ferguson* majority called the ultimate purpose—to coerce patients into drug treatment.[186] The dissent contended it was

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174. Ferguson v. City of Charleston, 121 S. Ct. at 1299 (Scalia, J., dissenting).

175. *See id.* (Scalia, J., dissenting) (noting the special needs doctrine "operates only to validate searches and seizures that are otherwise unlawful").

176. *Id.* (Scalia, J., dissenting).

177. *Id.* (Scalia, J., dissenting).

178. *Id.* (Scalia, J., dissenting); *see* FED. R. CIV. P. 52(a) (noting conclusions based on facts tried by an advisory jury should not be overturned unless they are clearly erroneous). The district court found that MUSC's policy was directed, not at arrest, but at treatment for the mother and her unborn child. Ferguson v. City of Charleston, 121 S. Ct. at 1299.

179. Ferguson v. City of Charleston, 121 S. Ct. at 1300 (Scalia, J., dissenting).

180. *Id.* (Scalia, J., dissenting).

181. *Id.* at 1300 (Scalia, J., dissenting).

182. *See id.* at 1294 (Kennedy, J., concurring); *see also* Claudia A. Chiriboga et al., *Dose-Response Effect of Fetal Cocaine Exposure on Newborn Neurologic Function*, 103 PEDIATRICS 79, 79 (1999).

183. Robert Arendt et al., *Motor Development of Cocaine-Exposed Children at Age Two Years*, 103 PEDIATRICS 86, 86 (1999).

184. Ira J. Chasnoff et al., *Prenatal Exposure to Cocaine and Other Drugs: Outcome at Four to Six Years*, *in* 846 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES: COCAINE: EFFECTS ON THE DEVELOPING BRAIN 314, 320 tbl. 3 (John A. Harvey & Barry E. Kosofsky eds., 1998).

185. Ferguson v. City of Charleston, 121 S. Ct. at 1300 (Scalia, J.; dissenting).

186. *Id.* (Scalia, J., dissenting).

incredible to believe that once the Policy was adopted, its immediate purpose disappeared—the testing here served as a pretext.[187]

XII. THE FOURTH AMENDMENT AND THE SPECIAL NEEDS DOCTRINE

The Fourth Amendment serves to protect citizens against unreasonable government searches and seizures.[188] The Fourth Amendment guarantees the following:

> 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.[189]

The Reasonableness Clause of the Fourth Amendment mandates that searches and seizures be reasonable.[190] The Warrant Clause mandates all warrants must be based on probable cause.[191] Yet, the Constitution is silent on the interplay between the two clauses.[192] If the Warrant Clause is read to amend the Reasonableness Clause, the Fourth Amendment mandates government officials to show probable cause and obtain a warrant prior to conducting a search or seizure.[193] This interpretation prohibits warrantless searches and seizures.[194] However, if the two clauses are read independently, the Fourth Amendment mandates that searches and seizures must be reasonable and that warrants may only be issued with probable cause.[195] Thus, warrantless searches are permitted if they are reasonable.[196]

Until the 1960s the Supreme Court interpreted the Reasonableness Clause and the Warrant Clause in conjunction and mandated warrants based on probable cause before the search or seizure was deemed reasonable.[197] Since then, the Court has stated the special needs doctrine is an exception to the reasonableness

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187. *Id.* (Scalia, J., dissenting).
188. *See* U.S. CONST. amend. IV.
189. *Id.*
190. *See* Jennifer E. Smiley, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protection*, 95 NW. U. L. REV. 811, 812 (2001).
191. *Id.*
192. *Id.*
193. *Id.* at 813.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*; *see* Katz v. United States, 389 U.S. 347 (1967).

of a search absent probable cause or a warrant.[198] Under the special needs doctrine, a search performed without a warrant or probable cause can be reasonable if the government's special need outweighs the individual privacy interest invaded.[199] The special need cannot be related to law enforcement.[200]

XIII. *FERGUSON* AND THE SPECIAL NEEDS DOCTRINE IN THE CONTEXT OF MANDATED DRUG THERAPY

Although a mandated drug therapy regimen is dissimilar to cocaine use, both require compliance with the law. In the case of cocaine use, abstinence is compliance. In the case of a mandated drug therapy regimen, adherence would be compliance. Urine samples may be collected to determine individual compliance in either case.[201]

Identified patients would know the purpose of a mandated drug therapy regimen.[202] However, mandating that patients take medication does not mandate compliance.[203] Patients in compliance would likely consent to having their urine tested. Those patients not adhering to a drug therapy regimen would be less likely to consent to urine testing in light of *Whitner*.[204]

Protocol 076 is compelling evidence to combat perinatal HIV transmission.[205] In an effort to prevent a child from contracting HIV and enhance the optimum length and quality of life for a child, *Ferguson* presents a dilemma to medical personnel who would specifically need to test urine for compliance.[206] Testing an HIV-infected pregnant woman's urine for compliance with an anti-HIV drug regimen absent her consent, probable cause of noncompliance, or a warrant might constitute an exceptional circumstance and qualify as a

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198. Smiley, *supra* note 190, at 813-14; *see, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (concluding special needs exist, making the probable cause requirement impracticable for legitimate work-related investigations for work-related misconduct (citing New Jersey v. T.L.O., 469 U.S. 325, 353 (1985) (Blackmun, J., concurring))); Griffin v. Wisconsin, 489 U.S. 868, 875 (1987) (holding the special needs of Wisconsin's probation system made the warrant requirement impracticable).

199. Smiley, *supra* note 190, at 813-14.

200. *Id.*

201. Letter from Adrian C. Sewell, Dep't of Pediatrics, Univ. Children's Hosp. Frankfurt am Main, to 352 THE LANCET 1227, 1227 (1998).

202. *See* Ferguson v. City of Charleston, 121 S. Ct. 1281, 1288 (2001).

203. *See* Jacobson v. Massachusetts, 197 U.S. 11, 13 (1905) (determining the criminality of a defendant's refusal to be vaccinated under mandatory vaccination statute).

204. *See* Whitner v. State, 492 S.E.2d 777, 786 (S.C. 1997) (upholding criminal conviction of expectant mother under child endangerment statute).

205. *See generally* Connor et al., *supra* note 12, at 309-10.

206. *See* Ferguson v. City of Charleston, 121 S. Ct. at 1281.

governmental special needs search.[207] The crucial question is whether a state's interest in prohibiting the spread of HIV to infants while enhancing both a child's and mother's quality of life would outweigh an intrusion of a woman's privacy interest.[208]

Any policy or procedure instituted and executed by hospital personnel that was attributable to the government would implicate the Fourth Amendment.[209] The immediate purpose of a mandated drug therapy regimen would be to test HIV-infected pregnant women for compliance with anti-HIV drug therapy.[210] The ultimate purpose would be to prevent HIV infection in the infant and improve both the mother's and child's quality of life.[211] The procedure could not be aimed at generating evidence for law enforcement.[212]

Protection against release of test results to third parties would have to be ensured for the procedure to fall within the special needs exception.[213] Absent consent, patients are privy to a reasonable expectation of privacy that test results performed while undergoing medical care will not be released to third parties.[214] No policy could intrude upon this expectation.[215]

Obtaining a warrant or requiring probable cause would be impractical in the context of mandated AZT as in *Skinner v. Railway Labor Executives' Ass'n*.[216] In *Skinner*, the Court upheld the Federal Railroad Administration's (FRA) policy of urine testing of all employees who had been involved in particular train accidents.[217] The Court determined the FRA's need to "regulat[e] the conduct of railroad employees to ensure safety" of the traveling public constituted a governmental special need and stated the warrant requirement would have complicated the FRA's purpose.[218] Obtaining a warrant might have delayed the collection of an individual's bodily fluids until after a time when drugs or alcohol were no longer detectable.[219] The Court determined the

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207. *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).
208. *See* Ferguson v. City of Charleston, 121 S. Ct. at 1288.
209. *See id.* at 1287.
210. *Id.* at 1291-92.
211. *See id.*
212. Smiley, *supra* note 190, at 814.
213. Ferguson v. City of Charleston, 121 S. Ct. at 1288.
214. *Id.*
215. *Id.* at 1289.
216. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 622 (1989).
217. *Id.* at 606, 633-34.
218. *Id.* at 620, 623.
219. *Id.*; *see also* Smiley, *supra* note 190, at 818.

intrusion of privacy was minimal because the samples were taken during work hours and conducted by medical personnel.[220]

In the context of mandated drug therapy, obtaining warrants would complicate the intended purpose of the policy.[221] For example, a patient could be noncompliant with a drug therapy regimen on the exam date, but by the time a warrant was issued, the patient could have resumed taking the medication. Anti-HIV medication should be taken on a consistent basis to enhance the maximum effects.[222] Medical personnel need to assess if an individual is in compliance at the exam date.[223] Additionally, time is of the essence with regard to when transmission of HIV occurs.[224] The elapsed time required to procure a warrant may prove detrimental. If preventing perinatal transmission of HIV qualified as a special need, the privacy interest invaded would likely be considered minimal in light of *Skinner*.[225]

XIV. CONCLUSION

The Protocol 076 and 219 studies suggest optimistic results with regard to preventing perinatal transmission of HIV.[226] Even though the women in the Protocol 076 study were mildly symptomatic,[227] AZT has since been shown to have moderate effects on persons who are HIV-infected in all phases of the disease.[228] Thus, while long-term follow up evaluation is deemed difficult, it is essential in the promotion of AZT.[229]

Current changes in the criminal law are indicative of a change with regard to fetal rights.[230] In 1997, South Carolina became the first state to uphold conviction of a mother for harm or injury caused to a fetus.[231] Holding pregnant

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220. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. at 626-27; *see* Smiley, *supra* note 190, at 819.

221. *Cf.* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. at 623.

222. *See* Mary Lou Lindegren, *Trends in Perinatal Transmission of HIV/AIDS in the United States*, 282 JAMA 531, 535-37 (1999) (suggesting that adherence to an antiretroviral drug therapy among HIV-infected pregnant mothers is important to reduce perinatal transmission).

223. *See* Smiley, *supra* note 190, at 818.

224. *See* Grizzi, *supra* note 8, at 479-80.

225. *See* Smiley, *supra* note 190, at 819.

226. *See* Culnane et al., *supra* note 54, at 155-56 (evidencing the long-term optimistic results of AZT treatment on children previously exposed to the drug).

227. Connor et al., *supra* note 12, at 1173.

228. Culnane et al., *supra* note 54, at 151-52.

229. *Id.* at 156.

230. *See, e.g.*, Whitner v. State, 492 S.E.2d 777, 786 (S.C. 1997) (upholding criminal conviction of mother under child endangerment statute).

231. Whitner v. State, 492 S.E.2d 777, 786 (S.C. 1997) (upholding criminal conviction of mother under child endangerment statute).

women liable for culpable conduct that caused injury to a fetus might promote compliance with anti-HIV drug therapy.

Previously some patients demonstrated noncompliance with a drug therapy regimen.[232] HIV is very destructive and compliance with anti-HIV drug therapy needs to be maintained at an optimal level to improve the chances that an infant will not contract the virus. Absent a patient's consent, probable cause, or a warrant, testing patients for compliance with a drug therapy regimen is problematic in light of *Ferguson*.[233] Nevertheless, combating the spread of a fatal disease in infants while improving the quality of life of both the mother and child may present a special need and outweigh the invasion of an expectant mother's privacy interest.

Although some aspects of a mandated drug therapy regimen are problematic, support does exist for the policy's implementation. History suggests that until the government initiates a policy for treatment of diseases, either no one will take advantage of the treatment or only poor people will benefit.[234] HIV infects people without regard to economic status or race.[235] A mandated drug therapy regimen could alleviate this impartial effect.

Finally, perhaps the issue is not one of invaded rights, constitutional implications, or governmental policies, but one of choices and consequences. More than likely a woman's detrimental life choices resulted in contraction of HIV.[236] A child had no choice, but was born with the virus.[237] A more appropriate question is who should bear the consequences.

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232. Connor et al., *supra* note 12, at 1175 tbl. 1.

233. Ferguson v. City of Charleston, 121 S. Ct. 1281, 1291-92 (2001) (holding the testing of a patient's urine sample for drugs absent consent, probable cause, or a warrant and revealing positive test results to law enforcement violated the Fourth Amendment).

234. *See* McKenna, *supra* note 63, at 136-37.

235. *See* Centers for Disease Control and Prevention, 5 HIV/AIDS SURVEILLANCE SUPPLEMENTAL REP. 1, 10-11 (1999) (demonstrating that adolescent or adult female AIDS cases diagnosed in 1998 consisted of White, Black, Hispanic, Asian or Pacific Islander, and American Indian or Alaska Native individuals from ages thirteen to sixty-five and over).

236. *See id.* (demonstrating the majority of HIV-infected adolescent or adult female exposures in 1998 in White, Black, Hispanic and American Indian or Alaska Native races occurred primarily through injection drug use and heterosexual contact and the sole means of exposure reported in Asian or Pacific Islander adult or adolescent females was heterosexual contact).

237. Madison, *supra* note 142, at 361.