

1997

## Mandatory Testing of Pregnant Women and Newborns: HIV, Drug Use, and Welfare Policy

Elizabeth B. Cooper

*Associate Professor of Law, Fordham University School of Law. B.A. 1983, University of Pennsylvania; J.D. 1988, New York University.*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Health Law and Policy Commons](#)

---

### Recommended Citation

Elizabeth B. Cooper, *Mandatory Testing of Pregnant Women and Newborns: HIV, Drug Use, and Welfare Policy*, 24 Fordham Urb. L.J. 719 (1997).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol24/iss4/7>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## INTRODUCTION

### MANDATORY TESTING OF PREGNANT WOMEN AND NEWBORNS: HIV, DRUG USE, AND WELFARE POLICY

*Elizabeth B. Cooper\**

The issues presented by the Symposium's second panel are among the most difficult facing ethicists, policy-makers, health-care providers and healthcare consumers. In the historical context of HIV testing, individual autonomy and consent have been highly respected values. Many states, including New York,<sup>1</sup> have codified a thoughtful counseling and consent process in their public health statutes.<sup>2</sup> Recent developments in medical treatment and prevention, however, have caused some attitudes toward HIV counseling and testing to shift.

The pressure to change these procedures is felt most significantly in the realm of HIV testing of pregnant women and newborns. As our panelists' contributions represent, there is a diverse set of approaches to this subject matter. Some believe strongly that mandated testing is the most effective way to ensure that a newborn receives HIV-related health care. Others counter that, especially for people living in poverty, the lack of meaningful access to care and services, and the risk of HIV-related discrimination, are too great to permit mandated testing.

Thus far, mandated testing largely has been rejected by state and administrative bodies. However, effective February 1, 1997, New York State was the first to order that every newborn in the state will be mandatorily tested for HIV-antibodies.<sup>3</sup> The results of the test will be disclosed to the delivering woman, her physician, and her child's physician. The test will reveal whether the child's mother is HIV-infected. If she is, it also will reveal that the child has an eight to twenty-five percent chance of being infected.

---

\* Associate Professor of Law, Fordham University School of Law. B.A., University of Pennsylvania, 1983; J.D., New York University School of Law, 1988.

1. N.Y. PUB. HEALTH LAW § 2781 (McKinney 1993 & Supp. 1997-98).

2. See, e.g., FLA. STAT. ANN. § 384.31 (West 1993 & Supp. 1998); N.J. STAT. ANN. § 26:5C-16 (West 1996); TEX. HEALTH & SAFETY CODE ANN. § 81.090 (West 1992 & Supp. 1998).

3. NEW YORK COMP. CODES R. & REGS. tit. 10, § 69 (1997).

Is this good public health practice? Some assert that the controversy surrounding mandated testing, is, at its heart, an issue of maternal privacy versus child health rights, and the latter must prevail. They argue that only by knowing that a newborn is HIV-infected will the child be able to get necessary care and services. Others reject that paradigm, asserting that it is a false construct. Rather, they argue that the best way to ensure necessary health care for the child—and the mother—is to work with the mother, providing her with counseling and the option to test. They contend that working with the mother through counseling is the best way to ensure that both mother and child get necessary care and services.

Analogous structures of analysis frequently appear when considering the increasingly intermingled questions of drug toxicology testing of newborns and the impact of “welfare reform” on the lives of those subject to these policy debates. This discussion, in particular, occurs within an encroaching aura of criminalization of public healthcare policy concerning women and their children.

The following collection of essays provides a concise and insightful treatment of the bioethical, legal, and public health conflicts present in the difficult terrain our panelists were asked to address. The richness of our panelists’ diverse backgrounds is well-reflected in their contributions. They grapple head-on with the place of race, class, and gender in the evolution of public health policies affecting the lives of women and their children. Just as important, they address the inherent stretches that traditional principles of law and ethics must make to accommodate technologies and medical realities unimaginable just fifteen years ago. I hope you will find them as enriching as I have found them to be.