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### Public Assistance, Drug Testing, and the Law: The Limits of Population-Based Legal Analysis

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# Public Assistance, Drug Testing, and the Law: The Limits of Population-Based Legal Analysis

Candice T. Player<sup>†</sup>

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*In Populations, Public Health and the Law, legal scholar Wendy Parmet urges courts to embrace population-based legal analysis, a public health inspired approach to legal reasoning. Parmet contends that population-based legal analysis offers a way to analyze legal issues—not unlike law and economics—as well as a set of values from which to critique contemporary legal discourse. Population-based analysis has been warmly embraced by the health law community as a bold new way of analyzing legal issues. Still, population-based analysis is not without its problems. At times, Parmet claims too much territory for the population perspective. Moreover, Parmet urges courts to recognize population health as an important norm in legal reasoning. What should we do when the insights of public health and conventional legal reasoning conflict? Still in its infancy, population-based analysis offers little in the way of answers to these questions. This Article applies population-based legal analysis to the constitutional problems that arise when states condition public assistance benefits on passing a drug test, thereby highlighting the strengths of the population perspective and exposing its weaknesses.*

## I. INTRODUCTION

In 2011, three dozen states considered bills that require applicants to pass a drug test before they qualify for income assistance through the Temporary Assistance to Needy Families Program (TANF).<sup>1</sup> Several state legislatures have also proposed bills that would require applicants to pass a drug test in order to qualify for food stamps, public housing, home-heating assistance, and unemployment benefits.<sup>2</sup> To date, eight states have passed laws conditioning public assistance benefits on passing a drug test: Arizona, Florida, Georgia, Michigan, Missouri, Oklahoma, Tennessee, and Utah.<sup>3</sup> Proposals to condition public assistance on passing a drug test have also

<sup>1</sup> A.G. Sulzberger, *States Adding Drug Test as Hurdle for Welfare*, N.Y. TIMES (Oct. 11, 2011), [http://www.nytimes.com/2011/10/11/us/states-adding-drug-test-as-hurdle-for-welfare.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/10/11/us/states-adding-drug-test-as-hurdle-for-welfare.html?pagewanted=all&_r=0); see also *Drug Testing and Public Assistance*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/drug-testing-and-public-assistance.aspx> (last updated Apr. 17, 2013) (providing a comprehensive survey of enacted or proposed drug testing legislation in the states).

<sup>2</sup> See, e.g., H.B. 208, 2011 Gen. Assemb., Reg. Sess. (Ky. 2011) (establishing a substance screening program for adults who receive monetary public assistance, food stamps, or state medical assistance); S. 69, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (establishing a drug-testing requirement for adults who apply for need-based programs that provide cash assistance, medical assistance, housing assistance, food assistance, or energy assistance); H.R. 1174, 2012 Leg. Assemb., 87th Sess. (S.D. 2012) (directing the South Dakota Department of Social Services to screen and test any adult recipient who is otherwise eligible for TANF or food stamps).

<sup>3</sup> ARIZ. REV. STAT. ANN. § 46-294 (Supp. 2013) (West); FLA. STAT. ANN. § 414.0652 (West 2013); GA. CODE ANN. § 49-4-193 (West 2012); MICH. COMP. LAWS ANN. § 400.57e (West 2008);

appeared in the United States Congress. At the federal level, the Middle Class Tax Relief and Job Creation Act of 2012 authorizes states to condition unemployment benefits on passing a drug test and to deny unemployment benefits to anyone who fails a drug test.<sup>4</sup> The Drug Free Families Act of 2011, presently stalled in the House and Senate, would require all fifty states to deny TANF assistance to anyone who tests positive for illegal drugs and to anyone convicted of a drug-related crime.<sup>5</sup>

Although most states require a reasonable suspicion of illegal drug use before conducting a drug test, Florida and Georgia do not. Both states require a drug test for all TANF applicants irrespective of drug history or current suspicion of illegal drug use.<sup>6</sup> In Florida, Governor Rick Scott has emphasized the unfairness of asking taxpayers to subsidize illegal drug use. In a statement to the press, Scott put it this way: “While there are certainly legitimate needs for public assistance, it is unfair for Florida taxpayers to subsidize drug addiction . . . . This new law will encourage personal accountability and will help to prevent the misuse of tax dollars.”<sup>7</sup> In Missouri, Representative Ellen Brandom echoed Scott’s concerns: “We should discourage drug use and not reward it.”<sup>8</sup> In another interview, she added: “Working people today work very hard to make ends meet, and it just doesn’t seem fair to them that their tax dollars go to support illegal things.”<sup>9</sup>

While support for drug testing has largely focused on the unfairness of asking taxpayers to subsidize illegal drug use, supporters have also invoked other government interests in drug testing, including a state interest in providing an incentive for people to stop using drugs. In Georgia, the General Assembly has said that an important purpose of the drug testing law is to reduce the danger that children will be exposed to drugs in the home.<sup>10</sup> Other states—including Alabama, Michigan and Oklahoma—have asserted a state interest in preventing drug-related child abuse, as well as a state interest in identifying TANF recipients for whom substance abuse might present a barrier to employment.<sup>11</sup> In addition, both Florida and Georgia have asserted a state interest in not funding the public health and crime risks associated with drug use.<sup>12</sup> In response, critics maintain that drug tests are needlessly intrusive and unfairly single out the poor for a drug test.<sup>13</sup>

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MO. ANN. STAT. § 208.027 (West Supp. 2013); H.R. 2388, 53rd Leg., 2d Reg. Sess. (Okla. 2012) (to be codified at OKLA. STAT. tit. 230, § 52); S. 2580, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012) (to be codified at TENN. CODE ANN. § 71-5-2); H.R. 155, 59th Leg., Gen. Sess. (Utah 2012) (to be codified at UTAH CODE ANN. § 35A-3-304.5).

<sup>4</sup> Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 2105, 2012 U.S.C.A.N. (126 Stat.) 156, 162-63 (to be codified at 42 U.S.C. § 305).

<sup>5</sup> Drug Free Families Act of 2011, S. 83, 112th Cong. § 2.

<sup>6</sup> FLA. STAT. ANN. § 414.0652 (West 2013); GA. CODE ANN. § 49-4-193 (West 2012).

<sup>7</sup> Press Release, Rick Scott, Governor of Fla., Governor Scott Fulfills Campaign Promise to Require Drug Screening for Welfare Recipients (May 31, 2011), *available at* <http://www.flgov.com/2011/06/03/governor-scott-fulfills-campaign-promise-to-require-drug-screening-for-welfare-recipients/>.

<sup>8</sup> Martin Karamra, *Drug Testing Welfare Recipients*, CBS (Apr. 13, 2011), <http://stlouis.cbslocal.com/2011/04/13/drug-testing-welfare-recipients/>.

<sup>9</sup> Sulzberger, *supra* note 1.

<sup>10</sup> GA. CODE ANN. § 49-4-193 (West 2012).

<sup>11</sup> *Marchwinski v. Howard (Marchwinski II)*, 309 F.3d 330, 333 (6th Cir. 2002); Brief of the States of Alabama, Kansas, Michigan & Oklahoma as Amicus Curiae in Support of Appellant & Reversal at 18, *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, 710 F.3d 1202 (11th Cir. 2013) (No. 11-15258).

<sup>12</sup> FLA. STAT. ANN. § 414.0652 (West 2013); S.B. 292, 158th Gen. Assemb., 2011-2012 Reg. Sess. (Ga. 2012).

<sup>13</sup> *See, e.g.*, Press Release, Alcee L. Hastings, Fla. Representative, Gov. Scott’s Targeting of Welfare Recipients for Drug Screening Misguided (May 31, 2011), *available at*

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures, and the United States Supreme Court has long held that a drug test constitutes a search within the meaning of the Fourth Amendment.<sup>14</sup> In the legal debate surrounding drug testing and public assistance, the central question is whether drug tests are unreasonable as a matter of constitutional law.<sup>15</sup> Under the special needs doctrine, the Supreme Court has said that a drug test may be reasonable without an individualized suspicion of drug use when governments confront “special needs beyond the normal need for law enforcement.”<sup>16</sup> In *Chandler v. Miller*, the Supreme Court articulated a strong public safety rationale for the special needs doctrine. In an opinion by Justice Ginsburg, the Supreme Court held that “where the risk to public safety is substantial and real,” suspicionless searches may be reasonable; however, where “public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search no matter how conveniently arranged.”<sup>17</sup> Yet, subsequent Supreme Court decisions have strained to place the government interest in a suspicionless search within the scope of the public safety exception, while also suggesting that the special needs doctrine might encompass government interests beyond a government interest in public safety.<sup>18</sup>

How should we think about this? In *Populations, Public Health and the Law*, legal scholar Wendy Parmet urges courts to embrace population-based legal analysis, a public health inspired approach to legal reasoning.<sup>19</sup> Parmet contends that population-based legal analysis offers a way to analyze legal issues—not unlike law and economics—as well as a set of values from which to critique contemporary legal discourse.<sup>20</sup> Population-based analysis has been warmly (and rightly) embraced by the health law community as a bold new way of analyzing legal issues.<sup>21</sup> Still, population-based analysis is not without its problems. At times, Parmet claims too much territory for the population perspective. Moreover, Parmet urges courts to

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<http://alceehastings.house.gov/news/documentsingle.aspx?DocumentID=327803> (quoting Congresswoman Corrine Brown who argues that drug tests for welfare recipients amount to “strip searching our state’s most vulnerable residents merely because they rely on the government for financial support during these difficult economic times”).

<sup>14</sup> U.S. CONST. amend. IV; *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616-17 (1989) (“We have long recognized that a compelled intrusio[n] into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search.” (internal quotation marks omitted)); *Mapp v. Ohio*, 367 U.S. 643, 646-47 (1961) (applying the prohibition against unreasonable searches and seizures to the states).

<sup>15</sup> Suspicionless drug tests implicate other constitutional rights, aside from the Fourth Amendment, including the right to privacy. However, courts have largely addressed suspicionless drug testing as a Fourth Amendment problem, and at times, an unconstitutional conditions doctrine problem. Therefore this Article will focus on the Fourth Amendment problems and unconstitutional conditions problems that arise when governments attempt to condition public assistance benefits on passing a drug test.

<sup>16</sup> *Skinner*, 489 U.S. at 620 (citing *Griffin v. Wisconsin*, 483 U.S. 385, 390 (1978)).

<sup>17</sup> *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

<sup>18</sup> See discussion *infra* Part IV.

<sup>19</sup> WENDY E. PARMET, *POPULATIONS, PUBLIC HEALTH, AND THE LAW* 6 (2009).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., RECONSIDERING LAW AND POLICY DEBATES: A PUBLIC HEALTH PERSPECTIVE (John G. Culhane ed., 2011); Wendy E. Parmet & Anthony Robbins, *A Rightful Place for Public Health in American Law*, 30 J.L. MED. & ETHICS 302 (2002); Anthony Robbins, *Public Health Literacy for Lawyers: Teaching Population-Based Legal Analysis*, 111 ENVTL. HEALTH PERSP. 744 (2003); Jonathan E. Selkowitz, Comment, *Guns, Public Nuisance, and the PLCAA: A Public Health-Inspired Legal Analysis of the Predicate Exception*, 83 TEMP. L. REV. 793 (2011).

recognize population health as an important norm in legal reasoning. What should we do when the insights of public health and conventional legal reasoning conflict?

Part II of this Article provides a brief overview of state efforts to condition TANF and public assistance on passing a drug test. Part III outlines the fundamental elements of population-based legal analysis. Part IV discusses the evolution of the special needs doctrine, while also critiquing much of the doctrine from a public health perspective. Part V applies population-based legal analysis to the constitutional problems that arise when states condition public assistance benefits on passing a drug test, thereby highlighting the strengths and weaknesses of a population-based perspective. Part VI applies the unconstitutional conditions doctrine to drug testing of TANF and public assistance recipients, with special attention to how public health can add to our understanding of the unconstitutional conditions problem.

## II. TANF: TEMPORARY ASSISTANCE TO NEEDY FAMILIES

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) ended the Aid to Families with Dependent Children Program (AFDC) and replaced it with Temporary Assistance to Needy Families (TANF).<sup>22</sup> The overarching purpose of TANF is to move recipients of public assistance from welfare to work. With few exceptions, PRWORA requires TANF recipients to find at least part-time work within two years.<sup>23</sup> PRWORA mandates at least twenty hours of work per week for parents with children over age six, and it also imposes a lifetime limit of no more than sixty months on the receipt of federal aid, with a state option for a shorter lifetime limit.<sup>24</sup> States receive TANF block grants and are required to use those funds in a manner reasonably calculated to accomplish any one or more of the four TANF program goals: (i) assisting needy families so that children can be cared for in their homes; (ii) reducing the dependency of needy parents by promoting job preparation, work, and marriage; (iii) preventing out-of-wedlock pregnancies; and (iv) encouraging the maintenance and formation of two-parent families.<sup>25</sup>

Federal and state laws limit TANF to low-income families in which the household includes a minor child or a pregnant woman.<sup>26</sup> With few exceptions, qualified households must demonstrate that their total income is no more than 200% of the federal poverty level (\$37,060 for a family of three in 2011, and \$44,700 for a family of four).<sup>27</sup> Although income assistance is one of the primary benefits of participation in TANF, the average monthly cash benefit varies widely from state to state. In 2011, this figure ranged from \$753 for a single-parent family of three living in New York City to \$170 in Mississippi.<sup>28</sup> The average benefit for a single-parent family of three in 2011 was \$303 in Florida and \$280 in Georgia.<sup>29</sup>

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<sup>22</sup> 42 U.S.C. §§ 601-619 (2006).

<sup>23</sup> *Id.* § 602(a)(1)(ii).

<sup>24</sup> *Id.* §§ 607(c)(2)(B), 608(a)(7).

<sup>25</sup> *Id.* § 601(a).

<sup>26</sup> *Id.* § 608(a)(1).

<sup>27</sup> *Id.* § 604(3); 76 Fed. Reg. 3637, 3638 (Jan. 20, 2011).

<sup>28</sup> IFE FINCH & LIZ SCHOTT, CTR. ON BUDGET & POLICY PRIORITIES, TANF BENEFITS FELL FURTHER IN 2011 AND ARE WORTH MUCH LESS THAN IN 1996 IN MOST STATES 10 (2011), available at <http://www.cbpp.org/cms/?fa=view&id=3625>.

<sup>29</sup> *Id.*

## A. DRUG TESTING AND THE STATES

## 1. Reasonable Suspicion

PRWORA authorizes, but does not require, drug testing as a condition of assistance through TANF.<sup>30</sup> In the handful of states that have enacted a drug testing requirement, most require “reasonable cause” or “reasonable suspicion” of drug use before conducting a drug test.<sup>31</sup> In Arizona, TANF applicants are asked to complete a recent drug use questionnaire.<sup>32</sup> Applicants who admit that they have used drugs are required to pass a urine test before receiving benefits.<sup>33</sup> Those who fail the urine test are TANF-ineligible for one year.<sup>34</sup> Not surprisingly, few applicants tend to disclose drug use. Since 2009, when drug testing began in Arizona, only 16 out of 64,000 applicants have admitted drug use, and 931 applicants failed to submit the form.<sup>35</sup>

Given the obvious limitations of screening by self-reporting, most states rely on case managers and substance abuse counselors to recognize the signs of drug use. In Missouri, the Department of Social Services screens TANF applicants and recipients for drug use and conducts a test when it has reasonable cause to suspect drug use.<sup>36</sup> Applicants or recipients who test positive for drugs are TANF-ineligible for a period of three years, unless they successfully complete a treatment program.<sup>37</sup> In Missouri, TANF recipients who test positive for drugs have the option to retain their benefits on the condition that they enroll in a substance abuse treatment program for six months and do not test positive for drugs while participating in the program.<sup>38</sup> During that time, the Department of Social Services retains the right to conduct drug tests at random or for cause. If a person tests positive for drugs a second time, she is TANF-ineligible for three years.<sup>39</sup>

## 2. Suspicionless Drug Testing

In May 2011, the Florida State Legislature passed H.B. 353, a law that requires all new TANF applicants to pass a drug test before they qualify for benefits.<sup>40</sup> Under H.B. 353, applicants who test positive for drugs are ineligible for TANF-funded cash assistance for one year following the date of a positive drug test.<sup>41</sup> Applicants who test positive for drugs remain eligible for other TANF programs, including food stamps and child care.<sup>42</sup> In Florida, TANF applicants bear the initial costs of their drug tests, which usually range from \$25 to \$45.<sup>43</sup> Applicants who test negative for

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<sup>30</sup> 21 U.S.C. § 862b (2012) (“Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.”).

<sup>31</sup> See, e.g., MO. ANN. STAT. § 208.027 (West Supp. 2013).

<sup>32</sup> Sulzberger, *supra* note 1.

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

<sup>34</sup> *Id.*

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

<sup>36</sup> MO. ANN. STAT. § 208.027.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

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

<sup>40</sup> FLA. STAT. ANN. § 414.0652 (West 2013).

<sup>41</sup> *Id.* § 414.0652(1)(b).

<sup>42</sup> *Id.* § 414.0652(3)(a).

<sup>43</sup> Plaintiff-Appellee Luis W. Lebron’s Answer Brief at 11, Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (No. 6:11-cv-01473-Orl-35DAB).

drugs receive a reimbursement through their initial TANF benefit.<sup>44</sup> An applicant who tests positive for drugs can reapply for TANF benefits upon successful completion of a treatment program offered by a qualified provider.<sup>45</sup> Persons who test positive for drugs a second time are TANF-ineligible for three years after the date of the second positive drug test.<sup>46</sup> If TANF-eligible parents test positive for drugs, they can appoint a payee to receive benefits on behalf of their child.<sup>47</sup>

Since Florida enacted H.B. 353, several other states have passed suspicionless drug testing requirements. In April 2012, the Georgia State Legislature adopted the Social Responsibility and Accountability Act.<sup>48</sup> According to the Legislature, the purpose of the statute is to ensure that TANF funds are used for their intended purposes—to protect children from drug use in the home, and to assist adults who are addicted to drugs.<sup>49</sup> Like H.B. 353, the Social Responsibility and Accountability Act directs Georgia’s Department of Human Services to administer a drug test to all TANF applicants, and to deem applicants who test positive for drugs ineligible for benefits.<sup>50</sup> If applicants test positive, they are initially TANF-ineligible for one month, with increasing intervals of ineligibility following every subsequent positive drug test. Similarly, Tennessee and Oklahoma require a drug test when anyone applies for TANF.<sup>51</sup>

### III. POPULATION-BASED LEGAL ANALYSIS

In a widely cited and influential report, the Institute of Medicine defined public health this way: “Public health is what we, as a society, do collectively to assure the conditions for people to be healthy.”<sup>52</sup> In contrast to general medicine, public health concerns the health of populations rather than individuals. While traditional legal reasoning relies on non-empirical methods, such as analogical reasoning and statutory interpretation, public health values empirical analysis, often based on epidemiological data. From a public health perspective, the key questions in the debate surrounding drug testing and public assistance are these: What do we know about addiction? What do we know about the prevalence of illegal drug use in the target population? How will drug testing requirements impact the health of substance abusers and the people around them?

Population-based legal analysis seeks to incorporate the principal concerns and methodologies of public health into legal reasoning.<sup>53</sup> As advanced by Wendy Parmet, population-based legal analysis consists of three essential elements: (1) a population perspective derived from public health; (2) a normative valuation of population health; and (3) a combination of empirical and traditional legal reasoning.<sup>54</sup> Fundamentally, population-based analysis concerns populations. Parmet writes: “From the population perspective, what matters most is the impact of a particular factor or agent (be it salmonella, a toxin, or even a legal policy) on a

<sup>44</sup> FLA. STAT. ANN. § 414.0652(2)(a) (West 2013).

<sup>45</sup> *Id.* § 414.0652(2)(b).

<sup>46</sup> *Id.* § 414.0652(2)(h).

<sup>47</sup> *Id.* § 414.0652(3)(b).

<sup>48</sup> GA. CODE ANN. § 49-4-193 (West 2012).

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

<sup>50</sup> *Id.* § 49-4-3.1(b).

<sup>51</sup> *Id.* § 49-4-3.1(f).

<sup>52</sup> INST. OF MED., THE FUTURE OF PUBLIC HEALTH 1 (1988), available at [http://www.nap.edu/openbook.php?record\\_id=1091](http://www.nap.edu/openbook.php?record_id=1091).

<sup>53</sup> PARMET, *supra* note 19, at 6.

<sup>54</sup> *Id.* at 51-53.



definable group.”<sup>55</sup> In a population-based analysis, a population consists of any number of individuals or groups of individuals who share a common trait, such as age, gender, or health status.<sup>56</sup> Population-based analysis recognizes that populations are contingent and constructed; in doing so, Parmet challenges courts to grapple with the multiplicity of populations.<sup>57</sup>

Second, as Parmet describes, population-based analysis understands the promotion of public health as an important legal norm:

Borrowing from the population perspective, population-based legal analysis treats the promotion of public health as an important norm, but goes further and asserts that this good is both a rationale for law and a chief value of law. Hence it is a value that judges and lawyers should apply when they interpret legal texts and authority. Or, all other things being equal, legal decision makers should consider the promotion of population health as a relevant factor in their analysis.<sup>58</sup>

As Parmet argues, societies establish laws in part to promote and preserve public health. Moreover, courts have long understood population health to be an important goal of law.<sup>59</sup> For all of those reasons, Parmet contends that courts should view promoting public health as akin to other established norms of legal reasoning (such as the significance of judicial precedent and the neutrality of decision-makers).<sup>60</sup> Still, Parmet cautions that embracing population-based analysis does not mean that public health is the only or most important legal norm.<sup>61</sup> Nor does it mean that courts should blindly defer to regulatory agencies who claim to act in the name of public health.<sup>62</sup>

Third, population-based analysis incorporates empirical and probabilistic reasoning into legal analysis; however, doing so would require courts to do more than merely consider empirical evidence. In Parmet’s words, fusing the methodologies of law and public health would mean that “empirical and probabilistic reasoning joins analogical and deductive reasoning and other standard methods of legal interpretation . . . as among the ways that lawyers and the law come to know what is.”<sup>63</sup> Parmet uses *Supreme Beef Processors, Inc. v. USDA*—a case in which the Fifth Circuit struck down salmonella regulations—to illustrate probabilistic reasoning.<sup>64</sup> The question before the court was whether meat containing salmonella should be considered “adulterated” within the meaning of the Federal Meat Inspection Act.<sup>65</sup> As one might expect, the court conceptualized the issue before it in simple binary terms: either meat containing salmonella was adulterated within the meaning of the statute or it was not.<sup>66</sup> Either the USDA had authority to regulate in this area or it did not. However, in doing so, Parmet argues that the Fifth

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<sup>55</sup> *Id.* at 53.

<sup>56</sup> *Id.* at 18.

<sup>57</sup> *Id.* at 19.

<sup>58</sup> *Id.* at 56.

<sup>59</sup> *Id.* at 57.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 64.

<sup>63</sup> *Id.* at 53.

<sup>64</sup> *Id.* at 60-72 (discussing *Supreme Beef Processors, Inc. v. U.S. Dep’t. of Agric.*, 275 F.3d 432 (5th Cir. 2001), *aff’g* *Supreme Beef Processors, Inc. v. U.S. Dep’t. of Agric.*, 113 F. Supp. 2d 1048 (N.D. Tex. 2000)).

<sup>65</sup> PARMET, *supra* note 19, at 60-61.

<sup>66</sup> *See id.* at 60-62.

Circuit failed to recognize that risks are relative.<sup>67</sup> The important issue was not merely a jurisdictional one that the court could address through textual interpretation and deductive reasoning. Rather, from a population perspective, the critical issues were how food borne illness might affect different populations and whether the risk of foodborne illness should be considered legally sufficient to justify USDA regulation.

At times, however, Parmet claims too much territory for the population perspective. Consider *Supreme Beef*. Parmet asserts that had the Fifth Circuit applied a population perspective and appreciated public health as an appropriate legal norm, it would have read any ambiguity in the Federal Meat Inspection Act in light of its purpose, namely protecting consumer health and welfare.<sup>68</sup> But why should we consider interpreting a statute in light of its purpose to be part of a population perspective? Parmet contends that insofar as public health is a goal of law, it is also a value that judges should apply when they interpret the law.<sup>69</sup> Nonetheless, something can be a goal of law without also being a norm that should guide legal reasoning. Consider a law designed to promote diversity in higher education. Most of us would probably say that the government interest in diversity is relevant to disputes arising under that statute because the purpose of the statute is to promote diversity, not because diversity itself has role to play in legal reasoning. Diversity is only relevant insofar as it is the purpose of the statute. The same is true of public health.

On the other hand, Parmet is quite right: too often, courts and legislatures invoke “public health talk” to justify policies post hoc, without carefully considering the actual health effects of those policies across populations.<sup>70</sup> The special needs cases are replete with instances in which courts have invoked the rhetoric of public health or public safety without analyzing health risks. In that spirit, Part IV provides an overview of the special needs doctrine while also critiquing it from a public health perspective.

#### IV. THE FOURTH AMENDMENT

The Supreme Court has long held that a drug test constitutes a search within the meaning of the Fourth Amendment.<sup>71</sup> But when does a search become unreasonable? The Fourth Amendment provides:

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.<sup>72</sup>

One school of thought maintains that searches and seizures are *per se* unreasonable unless supported by a warrant and probable cause, or one of a few

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<sup>67</sup> See *id.* at 71-72.

<sup>68</sup> See *id.* at 63.

<sup>69</sup> See *id.* at 63-65.

<sup>70</sup> See Wendy E. Parmet, *Beyond Privacy: A Population Approach to Reproductive Rights*, in RECONSIDERING LAW AND POLICY DEBATES, *supra* note 21, at 34.

<sup>71</sup> *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989).

<sup>72</sup> U.S. CONST. amend. IV.

limited exceptions to the warrant requirement.<sup>73</sup> For adherents to the warrant preference rule, individualized suspicion is a bedrock requirement of reasonableness.<sup>74</sup> An alternative view maintains that the Warrant Clause and Reasonableness Clause are independent, and the Fourth Amendment contains “no irreducible requirement” of individualized suspicion.<sup>75</sup> For proponents of the latter view, the ultimate measure of constitutionality under the Fourth Amendment is reasonableness, and the reasonableness of a government search depends on the totality of the circumstances.<sup>76</sup>

For many years, a long line of Fourth Amendment cases held that a reasonable government search requires a warrant, probable cause or an exception to the warrant requirement.<sup>77</sup> And yet, as Justice Scalia has observed, the Court’s Fourth Amendment jurisprudence has “lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.”<sup>78</sup> To the regret of many Fourth Amendment scholars, the Court has begun to jettison the categorical protection of the warrant requirement in favor of a general reasonableness requirement.<sup>79</sup> For now, however, the rule continues to be that a reasonable government search requires a warrant or an exception to the warrant requirement.<sup>80</sup> Since the late 1980s, the Supreme Court has addressed government drug testing policies under the special needs exception to the warrant requirement. Part IV.A discusses the evolution of this doctrine.

#### A. THE SPECIAL NEEDS DOCTRINE

The Supreme Court began to lay the groundwork for the special needs doctrine in *Camara v. Municipal Court of San Francisco*.<sup>81</sup> *Camara* began when housing inspectors entered Roland Camara’s apartment building to conduct a routine inspection of the building for violations of the city housing code. When inspectors asked Camara for permission to enter his apartment, Camara refused on the ground that the inspectors lacked a search warrant, and without probable cause to believe that a violation of the housing code existed, Camara insisted that the inspection would violate his rights under the Fourth Amendment.<sup>82</sup>

The Supreme Court held that housing safety inspections required a warrant; nonetheless, such inspections were not unreasonable for want of probable cause to believe that a particular dwelling contained violations of the housing code.<sup>83</sup> To Justice White and members of the majority, the existence of probable cause depended on the reasonableness of the search. “In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in

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<sup>73</sup> See Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 523 (1995).

<sup>74</sup> See *id.* at 488.

<sup>75</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

<sup>76</sup> See, e.g., *Vernonia*, 515 U.S. at 652; *N.J. v. T.L.O.*, 469 U.S. 325, 337 (1985).

<sup>77</sup> THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT* 124 (2009).

<sup>78</sup> *California v. Acevedo*, 500 U.S. 565, 582 (1991).

<sup>79</sup> See, e.g., Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 198-200 (1993).

<sup>80</sup> See *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989).

<sup>81</sup> 387 U.S. 523 (1967).

<sup>82</sup> *Id.* at 527.

<sup>83</sup> *Id.* at 534.

terms of the reasonable goals of code enforcement.”<sup>84</sup> On one side of the balance were the interests of the government in identifying hazardous conditions that might present a danger to the public. On the other side of the balance were the individual interests in privacy. To the majority, suspicionless housing inspections involved a “relatively limited invasion of the urban citizen’s privacy.”<sup>85</sup> Housing inspections were not searches of the person, nor were they geared toward the discovery of criminal evidence.<sup>86</sup>

Moreover, the government interest in public health and public safety justified a departure from probable cause based on individualized suspicion of wrongdoing:

Time and experience have forcefully taught that the power to inspect dwelling places . . . is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials . . . .<sup>87</sup>

*Camara* typifies the power of “public health talk,” employed by courts and appropriately denounced by Parmenter. In *Camara*, the Court identified a government interest in preventing “even the unintentional development of conditions which are hazardous to public safety,” including faulty wiring and the risk of fire.<sup>88</sup> Elsewhere Justice White alluded to the possibility that “fires and epidemics may ravage urban areas” as a justification for warrantless housing inspections.<sup>89</sup> Yet, as health law scholar Lawrence Gostin writes, “if there is one article of faith in public health,” it is that public health regulation should be based on “risks that are significant, not speculative, theoretical or remote.”<sup>90</sup> In *Camara*, the City failed to provide any evidence that faulty wiring presented a genuine public threat that would require warrantless housing inspections. Nor did the City demonstrate that its objectives could not be accomplished through less intrusive alternatives, for instance calling the fire department in response to an electrical fire. As such, *Camara* illustrates the tremendous deference that legislatures are sometimes granted when they claim to act in the name of public health, even without empirical evidence and even when doing so burdens fundamental rights, for example, the right to privacy in one’s home.

The Supreme Court returned to the special needs doctrine several years later in *New Jersey v. T.L.O.*<sup>91</sup> *T.L.O.* began when a high school teacher discovered two girls smoking in a lavatory.<sup>92</sup> When T.L.O. denied she had been smoking and claimed that she did not smoke at all, the vice principal demanded to search her purse.<sup>93</sup> Upon opening T.L.O.’s purse, he observed further evidence of drug use: a small amount of marijuana, empty plastic bags, several one-dollar bills, and an index card listing the names of students who owed T.L.O. money.<sup>94</sup> The vice principal turned the evidence

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<sup>84</sup> *Id.* at 535.

<sup>85</sup> *Id.* at 537.

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

<sup>87</sup> *Id.* (citing *Frank v. Maryland*, 359 U.S. 360, 372 (1959)).

<sup>88</sup> *Skinner*, 489 U.S. at 536.

<sup>89</sup> *Id.*

<sup>90</sup> LAWRENCE GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 16 (2008).

<sup>91</sup> *N.J. v. T.L.O.*, 469 U.S. 325 (1985).

<sup>92</sup> *See id.* at 328.

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

over to the police, and T.L.O. confessed that she had been selling drugs at school.<sup>95</sup> T.L.O. moved to suppress the evidence on the ground that the vice principal proceeded without probable cause, and the warrantless search of her purse violated the Fourth Amendment.<sup>96</sup>

In an opinion by Justice White, the Supreme Court held that the search of T.L.O.'s purse was not unreasonable. Once again Justice White explained that the touchstone of the Fourth Amendment is reasonableness, and whether a search is reasonable depends on both the context in which it takes place and balancing interests at stake.<sup>97</sup> Striking the balance in favor of schools, the Court concluded that a warrant requirement would "frustrate" the school's interest in maintaining swift discipline.<sup>98</sup> Nor would a valid Fourth Amendment search require probable cause.<sup>99</sup> The report that T.L.O. had been smoking in the restroom was enough to provide the vice principal with a "reasonable suspicion" that her purse contained cigarettes, and thereby render the search of T.L.O.'s purse consistent with the Fourth Amendment.<sup>100</sup> Citing *Terry v. Ohio*, Justice White suggested that a "reasonable suspicion" of wrongdoing is a lower standard than probable cause but more than an inchoate suspicion or "hunch."<sup>101</sup> Instead, a reasonable suspicion of wrongdoing requires "specific and articulable facts."<sup>102</sup>

Justice Blackmun wrote a separate concurrence to underscore that while the Court had recognized limited exceptions to the probable cause requirement, it had done so only when confronted with a "special need" for greater governmental flexibility: "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 judgment for that of the Framers."<sup>103</sup> According to Justice Blackmun, the Framers had already balanced the interests at stake and decided that a search is unreasonable unless supported by a warrant and probable cause.<sup>104</sup> Only when the warrant and probable cause requirements are impractical are courts permitted to substitute their judgment for that of the Framers.<sup>105</sup> To Justice Blackmun, elementary and secondary schools presented a quintessential need for greater governmental flexibility—teachers cannot maintain discipline if they are required to obtain a warrant before searching a student, nor can teachers be expected to make on-the-spot decisions about probable cause.<sup>106</sup>

Following *T.L.O.*, the Court invoked the special needs doctrine in *O'Connor v. Ortega*<sup>107</sup> and *Griffin v. Wisconsin*.<sup>108</sup> In *Ortega*, a plurality of Justices held that it was not unreasonable for a hospital investigative team to enter the office of a public employee and seize several items from his desk without a warrant and without probable cause. The plurality reasoned that "special needs, beyond the normal need

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<sup>95</sup> *See id.* at 328-29.

<sup>96</sup> *Id.* at 329.

<sup>97</sup> *See id.* at 337.

<sup>98</sup> *See id.* at 340.

<sup>99</sup> *See id.* at 339.

<sup>100</sup> *Id.* at 345-47.

<sup>101</sup> *Id.* at 346-47.

<sup>102</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1985).

<sup>103</sup> *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *Id.* at 352-53.

<sup>107</sup> *O'Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>108</sup> *Griffin v. Wisconsin*, 483 U.S. 866 (1987).

for law enforcement” would make the warrant and probable cause requirements impracticable when government employers investigate office misconduct.<sup>109</sup> Although public employees do not lose their Fourth Amendment rights merely because they work for the government instead of a private employer, “the operational realities of the workplace” can make some expectations of privacy unreasonable.<sup>110</sup> Requiring employers to secure a warrant in order to search an employee’s office for evidence of workplace misconduct would be unduly burdensome.<sup>111</sup> Moreover, if employers were required to establish probable cause before conducting an investigation, the delays could result in “irreparable damage” to the public interest.<sup>112</sup>

In *Griffin v. Wisconsin*, the Supreme Court upheld a state statute that permitted probation officers to search the home of a probationer without a warrant, as long as the officers had “reasonable grounds” to believe that the search would reveal contraband.<sup>113</sup> In an opinion by Justice Scalia, the Supreme Court held that states have a “special need” to supervise probationers, and that the officers’ tip provided reasonable grounds for the search. Importantly, the Supreme Court invoked the rhetoric of public health in *Griffin*, just as it invoked public health twenty years earlier in *Camara*. According to the Court, the purpose of the statute at issue in *Griffin* was to ensure that “probation serves as a period of genuine rehabilitation.”<sup>114</sup> Moreover, probation officers were employees of the Wisconsin Department of Health and Social Services who were required to provide counseling with the wellbeing of their “client” in mind.<sup>115</sup> Thus, the Court suggested that the clinical goals of probation provided further justification for a warrantless search.

In *T.L.O., Ortega*, and *Griffin*, the Supreme Court upheld searches of property based on a reasonable suspicion of wrongdoing. In *Skinner v. Railway Labor Executives’ Association* and its companion case *National Treasury Employees Union v. Von Raab*, the Supreme Court turned its attention to drug tests conducted without a suspicion of drug use. In *Skinner*, the Court upheld regulations promulgated by the Federal Railroad Administration (FRA) that required drug and alcohol testing for railroad employees who were involved in a major train accident without a warrant and without suspicion that a particular employee might have been intoxicated.<sup>116</sup> The Court reasoned that, not unlike the government interest in maintaining discipline in schools or supervising probationers, the government interest in regulating the conduct of railroad employees constitutes a special need beyond the normal need for law enforcement.<sup>117</sup> The FRA was able to provide extensive evidence that workplace intoxication was a serious problem in the railroad industry.<sup>118</sup> The FRA was also able to provide evidence that railroads were only able to detect a small number of violations when they relied on supervisors to observe employees in the past.<sup>119</sup>

Nor did the Court find the federal regulations unreasonable for lack of individualized suspicion. Writing for the Court, Justice Kennedy underscored that

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<sup>109</sup> *Ortega*, 480 U.S. at 725.

<sup>110</sup> *Id.* at 717.

<sup>111</sup> *Id.* at 722.

<sup>112</sup> *Id.* at 742.

<sup>113</sup> *Griffin*, 483 U.S. 866.

<sup>114</sup> *Id.* at 875.

<sup>115</sup> *Id.* at 876.

<sup>116</sup> *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602 (1989).

<sup>117</sup> *Id.* at 620.

<sup>118</sup> *Id.* at 607.

<sup>119</sup> *Id.* at 608.

while the Supreme Court usually required some measure of individualized suspicion before conducting a search, “a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.”<sup>120</sup> Federal regulations did not require employees to furnish samples under direct observation, and railroad employees have a diminished expectation of privacy by virtue of their participation in an industry that is heavily regulated to ensure safety.<sup>121</sup>

In *Von Raab*, the Supreme Court upheld federal regulations that required a drug test for all employees in the United States Customs Service who applied for a position that involved the interdiction of illegal drugs or that required employees to carry a firearm or handle classified materials.<sup>122</sup> In contrast to the Federal Railroad Administration, however, the Customs Service was unable to provide any evidence that illegal drug use was a serious problem among its employees. Yet to describe the drug testing program as unreasonable given the lack of evidence regarding a drug problem was, for Justice Kennedy, “an unduly narrow view of the context in which the Service’s testing program took place.”<sup>123</sup> Instead the Court alluded to the national war on drugs: “The Customs Service is our Nation’s first line of defense against one of the greatest problems affecting the health and welfare of our population. We have adverted before to the veritable national crisis in law enforcement caused by smuggling of illicit narcotics.”<sup>124</sup> To that end, the Court characterized the government interest as “compelling.”<sup>125</sup> The Court also held that customs agents on the frontlines of drug interdiction have a diminished expectation of privacy.<sup>126</sup> Given the “extraordinary safety and national security hazards” that would arise if the Customs Service were to promote illegal drug users to positions that required them to carry a firearm or interdict controlled substances, the drug testing policy was not unreasonable.<sup>127</sup>

What should we say about *Von Raab* from a public health or population perspective? On one hand, the reasoning in *Von Raab* is clearly inconsistent with population-based analysis and its demand for empirical evidence. Notwithstanding the fears expressed by Justice Kennedy and members of the majority, the probability of illicit drug use among customs agents was exceptionally low. Of the 3,600 customs employees who were tested for drugs, only 5 employees—less than 1/10 of 1%—tested positive.<sup>128</sup> Given the extraordinarily low prevalence of illegal drug use among customs agents, fears that the country might face “extraordinary safety and national security hazards” without suspicionless drug tests were vastly overblown.<sup>129</sup> On the other hand, to characterize the demand for empirical evidence as “taking a population perspective,” as Parmet often does,<sup>130</sup> is to claim too much territory for population-based analysis. We could just as easily imagine the Court concluding that the Customs Service failed to establish a genuine national security hazard within the

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<sup>120</sup> *Id.* at 624.

<sup>121</sup> *Id.* at 626; see also generally *Control of Alcohol and Drug Use in Railroad Operations*, 50 Fed. Reg. 31,508, 31,555 (Aug. 2, 1985) (codified as amended in scattered sections of 49 C.F.R.).

<sup>122</sup> See *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 679 (1989).

<sup>123</sup> *Id.* at 673-74.

<sup>124</sup> *Id.* at 668.

<sup>125</sup> *Id.* at 670.

<sup>126</sup> *Id.* at 672.

<sup>127</sup> See *id.* at 674.

<sup>128</sup> *Id.* at 673.

<sup>129</sup> See *id.* at 674.

<sup>130</sup> See PARMET, *supra* note 19, at 130-31.

parameters of conventional legal reasoning. A defender of Parmet and population-based analysis might respond that Parmet does not characterize the demand for empirical evidence as sui generis of the population perspective. Indeed, she writes: “Population-based legal analysis adopts the methodologies of public health. This does not simply mean that consideration is given to empirical evidence; courts have been doing that for a long, long time.”<sup>131</sup> Notwithstanding these disclaimers, however, Parmet often faults the Supreme Court for failing to “truly embrace a population perspective”<sup>132</sup> and accepting public health arguments without any empirical support. In doing so, she implies that a rigorous examination of empirical evidence is in fact a central element of population-based analysis.

The Supreme Court revisited suspicionless drug testing several years later in the context of public schools. In *Vernonia School District 47J v. Acton*, the Supreme Court upheld a policy that required student athletes to submit to random drug testing as a condition of participation in interscholastic athletics.<sup>133</sup> The school district implemented the policy in response to a noticeable increase in drug use and disciplinary problems among students, particularly student athletes.<sup>134</sup> Based on testimony from teachers and school administrators, the district court found, and Supreme Court accepted, that “‘a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion,’ [and] that ‘[d]isciplinary actions had reached epidemic proportions’ . . . .”<sup>135</sup> Not only would drug use increase the risk of sports-related injury, but school administrators feared that in their small community on the edge of town, drug use by student athletes could also create a “role model effect,” thereby fueling drug use among other students.<sup>136</sup>

Subsequently, the Court held that drug testing was not unreasonable under the circumstances, even without individualized suspicion of illegal drug use. The Court, per Justice Scalia, asserted that the Fourth Amendment does not impose an “irreducible requirement” of individualized suspicion.<sup>137</sup> Instead, the ultimate measure of constitutionality under the Fourth Amendment is reasonableness.<sup>138</sup> Justice Scalia noted that in contrast to members of the general public, schoolchildren are required to submit to routine screenings, vaccinations, and physical exams; therefore, children have a diminished expectation of privacy within the school environment.<sup>139</sup> Moreover, “[b]y choosing to go out for the team,” student athletes “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.”<sup>140</sup>

In 1997, after an uninterrupted line of cases upholding searches under the special needs doctrine, the Supreme Court struck down a Georgia law that required candidates for public office to pass a drug test as a condition of placement on the state ballot in *Chandler v. Miller*.<sup>141</sup> In support of the certification requirement,

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<sup>131</sup> *Id.* at 52-53.

<sup>132</sup> Parmet, *supra* note 70, at 15, 28.

<sup>133</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995).

<sup>134</sup> *Id.* at 648-50.

<sup>135</sup> *Id.* at 662-63 (quoting *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1357 (D. Or. 1992) (internal quotation marks omitted) (citation omitted)).

<sup>136</sup> *Id.* at 663.

<sup>137</sup> *Id.* at 653.

<sup>138</sup> *Id.* at 652.

<sup>139</sup> *Id.* at 656-57.

<sup>140</sup> *Id.* at 657.

<sup>141</sup> *Chandler v. Miller*, 520 U.S. 305 (1997).



Georgia asserted a state interest in ensuring fitness for public office.<sup>142</sup> The government also argued that illegal drug use would undermine public confidence in elected officials and compromise the ability of elected officials to discharge their public functions, particularly their ability to enforce anti-drug laws.<sup>143</sup>

In an 8-1 opinion, however, Justice Ginsburg held that Georgia's certification requirement did not fit within the "closely guarded category" of permissible suspicionless searches.<sup>144</sup> Notably, the government's case lacked "any indication of a concrete danger demanding departure from the Fourth Amendment's main rule."<sup>145</sup> While evidence of a concrete danger was not indispensable given *Von Raab*, evidence of a genuine problem would at least "shore up" the assertion of a special need.<sup>146</sup> "What is left," Justice Ginsburg wrote, "is the image the State seeks to project. By requiring candidates for public office to submit to a drug test, Georgia displays its commitment to the struggle against drug abuse."<sup>147</sup> However, the state's interest in setting an example is more "symbolic" than substantial within the meaning of the special needs doctrine.<sup>148</sup> In *Chandler*, the Court defined the term "substantial" as a government interest that is both "important enough to override the individual interest in privacy" and "sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."<sup>149</sup> The Court also indicated that in order to be reasonable, a suspicionless search requires evidence of a genuine threat to public safety:

We reiterate too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable"—for example, searches now routine at airports . . . . But where, as in this case, *public safety is not genuinely in jeopardy*, the Fourth Amendment precludes suspicionless searches no matter how conveniently arranged.<sup>150</sup>

Five years later, in *Ferguson v. City of Charleston*, the Supreme Court struck down a state statute that authorized drug tests for maternity patients suspected of cocaine use without the patient's consent and without a warrant.<sup>151</sup> Hospital administrators, police officers, and local officials crafted the policy in response to a noticeable increase in cocaine use among patients who were receiving prenatal treatment.<sup>152</sup> Patients who tested positive for cocaine were referred to a substance abuse clinic for treatment.<sup>153</sup> If patients tested positive a second time, or if they missed an appointment with a substance abuse counselor, the police were notified immediately and the patients were arrested.<sup>154</sup> The government conceded that the threat of law enforcement allowed the hospital to leverage patients into treatment; however, the government defended the policy on special needs grounds.<sup>155</sup> Even if

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<sup>142</sup> *Id.* at 312.

<sup>143</sup> *Id.* at 318.

<sup>144</sup> *Id.* at 309.

<sup>145</sup> *Id.* at 318-19.

<sup>146</sup> *Id.* at 306.

<sup>147</sup> *Id.* at 321.

<sup>148</sup> *Id.* at 322.

<sup>149</sup> *Id.* at 318.

<sup>150</sup> *Id.* at 323 (emphasis added).

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

<sup>152</sup> *Id.* at 70.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 72.

<sup>155</sup> *Id.* at 73-74.

the policy incorporated the threat of law enforcement, the policy was ultimately designed to serve non-law enforcement ends, namely protecting pregnant women and their children.<sup>156</sup> In an opinion by Justice Stevens, the Court held that the searches were unreasonable because they were “ultimately indistinguishable from the general interest in crime control.”<sup>157</sup> Even if the ultimate goal had been to get women into substance abuse treatment, the extensive involvement of law enforcement in the development of the program, and its day-to-day administration, suggested that “the immediate objective” of the program was to secure evidence for a criminal proceeding.<sup>158</sup>

Since *Chandler*, it now appears that at least a handful of Justices have retreated from a strong public safety rationale for the special needs doctrine. In *Board of Education v. Earls*, the most recent special needs case, a four-justice plurality described public safety as only a “factor” in a special needs analysis.<sup>159</sup> In *Earls*, the plurality upheld a policy that required all middle and high school students to consent to an initial drug test, as well as random drug testing and testing on reasonable suspicion, as a condition of participation in any extracurricular activity.<sup>160</sup> While the policy upheld in *Vernonia* only applied to student athletes, the policy at issue in *Earls* required drug testing for students who participated in any extracurricular activity, including nonathletic activities such as Future Farmers of America, the Academic Team, the show choir or the marching band.<sup>161</sup> In an opinion by Justice Thomas, the plurality held that the school policy was not unreasonable, even without evidence that illegal drug use was a serious problem in Pottawatomie schools.<sup>162</sup> Justice Thomas reiterated that public schoolchildren have only a diminished expectation of privacy, and the government had a strong interest in eliminating drug use, particularly among schoolchildren.<sup>163</sup>

#### 1. Public Assistance and the Fourth Amendment

The Supreme Court has yet to address the constitutional questions that arise when states condition public assistance benefits on passing a drug test. In *Wyman v. James*, however, the Supreme Court upheld a similar provision that required Aid to Families with Dependent Children (AFDC) recipients to accept scheduled home visits by a caseworker as a condition of receiving benefits.<sup>164</sup> In *Wyman*, the Court held that home visits by an AFDC caseworker were not searches within the meaning of the Fourth Amendment, and even if they were, home visits were not unreasonable.<sup>165</sup> Writing for the Court, Justice Blackmun reasoned that when states distribute federal and state tax dollars through their social welfare programs, they are “fulfilling a public trust,” and as such, states have an “appropriate and paramount interest” in ensuring that public dollars reach their intended beneficiaries.<sup>166</sup> Moreover, the reasonableness of the government’s interests, as well as the voluntary

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<sup>156</sup> *Id.* at 81.

<sup>157</sup> *Id.* (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)).

<sup>158</sup> *Ferguson*, at 82-83.

<sup>159</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002).

<sup>160</sup> *Id.* at 838.

<sup>161</sup> *Id.* at 826.

<sup>162</sup> *Id.* at 835.

<sup>163</sup> *Id.* at 835.

<sup>164</sup> *See Wyman v. James*, 400 U.S. 309, 326 (1971).

<sup>165</sup> *Id.* at 317-18.

<sup>166</sup> *Id.* at 318-19.

nature of applying for AFDC, worked together to diminish the privacy rights of Mrs. James.<sup>167</sup>

*a. Lower Court Decisions*

Despite *Wyman*, lower courts have consistently invalidated efforts to condition public assistance on passing a drug test. In *Marchwinski v. Howard*, a federal district court struck down a pilot program that authorized random suspicionless drug testing for all TANF recipients in Michigan.<sup>168</sup> Under the pilot program, TANF recipients who tested positive for a controlled substance in selected counties were required to participate in a substance abuse treatment program or risk losing their benefits.<sup>169</sup> In support of the program, Michigan asserted a state interest in moving TANF recipients from welfare to work, as well as a state interest in protecting children from abuse and neglect in the homes of TANF recipients.<sup>170</sup> Relying heavily on *Chandler*, the district court held that the state interest in identifying potential barriers to employment does not constitute a special need.<sup>171</sup> The district court heard arguments for *Marchwinski* before *Earls*. Without *Earls*, the district court read *Chandler* to limit the special needs doctrine to circumstances in which states are faced with a genuine threat to public safety.<sup>172</sup> In addition, the district court was not persuaded that a state interest in preventing child abuse and neglect constituted a special need. Instead, the court reasoned that insofar as the TANF program was not designed to address child abuse and neglect, the state could not advance these interests as a special need.<sup>173</sup>

On appeal, a three-judge panel of the Sixth Circuit reversed, finding that the district court erred in holding that only a public safety interest can qualify as a special need.<sup>174</sup> Instead, the proper standard should have been whether the State of Michigan demonstrated a special need “of which public safety is but one consideration.”<sup>175</sup> Given *Earls*, the court readily concluded that suspicionless drug testing would advance a host of state interests, both related and unrelated to public safety:

We think it is beyond cavil that the state has a special need to insure that public moneys expended in the [TANF program] are used by recipients for their intended purposes and not for procuring controlled substances—a criminal activity that not only undermines the objectives of the program but directly endangers both the public and the children the program is designed to assist.<sup>176</sup>

The court noted additional public safety interests, including a state interest in protecting children in the TANF program from child abuse as well as a state interest in protecting the public from crime associated with drug trafficking.<sup>177</sup> A year later,

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<sup>167</sup> *Id.* at 324.

<sup>168</sup> *Marchwinski v. Howard (Marchwinski I)*, 113 F. Supp. 2d 1134, 1136 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *judgment of district court aff'd by an equally divided court on reh'g en banc*, 60 F. App'x 601 (6th Cir. 2003).

<sup>169</sup> *Marchwinski I*, 113 F. Supp. at 1136.

<sup>170</sup> *Id.* at 1140-41.

<sup>171</sup> *Id.* at 1140.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Marchwinski II*, 309 F.3d 330 (6th Cir. 2002).

<sup>175</sup> *Id.* at 335.

<sup>176</sup> *Id.* at 336.

<sup>177</sup> *Id.*

however, the Sixth Circuit agreed to rehear *Marchwinski* en banc.<sup>178</sup> On appeal, the full 12-judge panel of the Sixth Circuit deadlocked on the Fourth Amendment issue, 6-6.<sup>179</sup> As a result, the appellate court affirmed the initial district court opinion, thereby striking down drug testing for TANF applicants in Michigan.<sup>180</sup>

In *Lebron v. Wilkins*, a Florida district court issued a preliminary injunction against the Florida Department of Children and Families (DCF), temporarily halting the Department's ability to condition TANF benefits on a suspicionless drug test.<sup>181</sup> In its defense, the State argued that drug testing TANF applicants furthered a number of state interests, foremost among them a state interest in ensuring that public funds reach their intended beneficiaries.<sup>182</sup> Second, by providing low-income children with cash assistance, the State stepped into the role of economic provider, thereby acquiring a duty to protect minor children from drug abuse in the home.<sup>183</sup> Third, a drug testing requirement would allow DCF to identify drug-related barriers to employment, thereby furthering the overarching mission of TANF—economic self-sufficiency.<sup>184</sup> Fourth, due to the “public health” and “crime risks” associated with illegal drug use, the State asserted a paramount interest in not funding the drug epidemic and its associated “public ills.”<sup>185</sup>

The district court rejected each of those claims, primarily on the ground that the State failed to provide concrete evidence of rampant illegal drug use among TANF recipients in Florida.<sup>186</sup> Well before enacting H.B. 353, the Florida Legislature directed the Florida Department of Children and Families (DCF) to conduct a pilot study to determine whether TANF applicants were more likely to abuse drugs, and whether that abuse impacted employment and their use of social services.<sup>187</sup> The pilot study found that roughly 5% of TANF applicants tested positive for drugs, a rate far less than the prevalence of statewide drug use in Florida, estimated at 8.13%.<sup>188</sup> Moreover, those who tested positive for drugs during the pilot study were just as likely to work and just as likely to use social services as those who tested negative for drugs.<sup>189</sup> Second, between July 2011 and November 2011, when drug testing began, only 2% of TANF applicants tested positive for drugs.<sup>190</sup> Nor was the court persuaded that refusal to take a drug test after being deemed otherwise eligible should be considered a “drug related denial,” since there were any number of reasons that a person might refuse a drug test—inability to pay for testing or lack of transportation—and the State was unable to provide any evidence about why applicants failed to take a drug test.<sup>191</sup> Finally, the district court rejected the State's contention that data on the nationwide prevalence of drug use might have any

<sup>178</sup> *Marchwinski v. Howard (Marchwinski III)*, 60 F. App'x 601, 601 (6th Cir. 2003).

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

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

<sup>181</sup> *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011), *aff'd* 710 F.3d 1202 (11th Cir. 2013).

<sup>182</sup> Defendant's Response to Plaintiff's Motion for Preliminary Injunction at 18, *Lebron*, 820 F. Supp. 2d 1273 (No. 6:11-CV-01473-ORL-35DAB).

<sup>183</sup> *Id.* at 19.

<sup>184</sup> *Id.* at 21.

<sup>185</sup> *Id.*

<sup>186</sup> *Lebron*, 820 F. Supp. 2d at 1286.

<sup>187</sup> *Id.* at 1276.

<sup>188</sup> *Id.* at 1277; Robert E. Crew, Jr. & Belinda Creel Davis, *Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits*, 17 J. HEALTH & SOC. POL'Y 39, 41-42, 44 (2003) [hereinafter Crew & Davis, *Assessing the Effects*].

<sup>189</sup> *Lebron*, 820 F. Supp. 2d at 1277.

<sup>190</sup> *Id.* at 1280.

<sup>191</sup> *Id.* at 1281.

probative value on the question before the court—namely the prevalence of illegal drug use among TANF applicants in Florida.<sup>192</sup> Applying the *Chandler* “concrete danger” rule, the court concluded that Florida failed to provide evidence of a “concrete danger” among the class of citizens it sought to test.<sup>193</sup> On appeal, the Eleventh Circuit held that the district court did not abuse its discretion in granting a preliminary injunction.<sup>194</sup> On remand from the Eleventh Circuit, the district court declared H.B. 353 unconstitutional and permanently enjoined Florida from reinstating the drug testing requirement.<sup>195</sup> In Florida, Governor Rick Scott has vowed to appeal the Eleventh Circuit decision to the Supreme Court.<sup>196</sup>

*Lebron* aptly illustrates Wendy Parmet’s contention that even when courts consider empirical evidence, they often fail to reason empirically and probabilistically. The district court faulted Florida for relying on national estimates of illegal drug use and failing to provide robust Florida-specific evidence about the prevalence of drug use among TANF applicants.<sup>197</sup> However, from a public health perspective, what we want to know is whether findings based on national household surveys of illegal drug use are generalizable to Florida. Part V.A below demonstrates that basic principles of risk assessment and epidemiology can help courts determine whether states have met their burden to establish a genuine threat to public safety.

## V. THE LIMITS OF POPULATION-BASED LEGAL ANALYSIS

Part V applies population-based analysis to the constitutional problems that arise when states condition public assistance benefits on passing a drug test. Part V also contrasts population-based analysis with a conventional application of Fourth Amendment doctrine, highlighting the strengths and weaknesses of the population perspective. To that end, Part V.A presents a simple public-health inspired framework for risk analysis, while also criticizing the reasoning in *Lebron* from a public health perspective. Part V.B. turns to the nature and intrusiveness of a special needs search. From a conventional Fourth Amendment perspective, questions about the intrusiveness of a search concern who will receive test results, whether positive tests will be turned over to law enforcement, and ultimately, whether the search falls within the scope of the special needs doctrine. From a public health perspective, however, we can understand sharing positive drug test results with law enforcement as a risk-risk tradeoff. Drug testing requirements and information sharing between state agencies would probably deter people who use illegal drugs from seeking public assistance. On the other hand, states could also increase the risk that children who are in abusive homes will go undetected. Still, the unanswered question for population-based analysis is this—what legal significance, if any, should courts attach to these insights?

Since *Vernonia*, the Supreme Court has explicitly addressed effectiveness as an element of a reasonable special needs search.<sup>198</sup> Yet courts tend to assume that drug

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<sup>192</sup> *Id.* at 1286-87.

<sup>193</sup> *Id.* at 1287.

<sup>194</sup> *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, 710 F.3d 1202, 1211 (11th Cir. 2013).

<sup>195</sup> *Lebron v. Wilkins*, No. 6:11-cv-01473-MSS-DAB, 2013 WL 6875563, at \*17 (M.D. Fla. Dec. 31, 2013).

<sup>196</sup> Press Release, Gov. Rick Scott, Governor Scott: We Will Appeal Welfare Drug Testing to Supreme Court (Feb. 26, 2013), available at <http://www.flgov.com/governor-scott-we-will-appeal-welfare-drug-testing-to-supreme-court/>.

<sup>197</sup> *Lebron*, 820 F. Supp. 2d at 1278.

<sup>198</sup> See GOSTIN, *supra* note 90, at 63.

tests are reasonably likely to accomplish their objectives.<sup>199</sup> Instead, Part V.C will argue that courts should assume a more aggressive posture when evaluating the effectiveness of a search under the special needs doctrine.

Once again the problem for population-based analysis is plain—what should we do when the insights of public health and conventional legal reasoning conflict? Requiring public assistance recipients to pass a drug test might be eminently reasonable within the meaning of the Fourth Amendment yet a horrible idea from a public health perspective. Setting these concerns aside, Part V.C argues that the current approach to the special needs doctrine is faulty in one further respect: the failure to incorporate the least intrusive alternative requirement into the special needs doctrine. Although the Supreme Court has consistently said that the Fourth Amendment does not require governments to adopt the least intrusive means to accomplish their objectives, without incorporating the least intrusive alternative requirement into the special needs doctrine, special needs searches are needlessly over-inclusive.

Part V.D considers the individual interest in privacy. Courts may well conclude that the privacy interests implicated by suspicionless drug tests are negligible. However, Part V.D will show that suspicionless drug tests implicate more than the individual interest in privacy. A large body of social epidemiology literature has shown that encounters with the law can be a powerful marker of social status with implications for our health.

#### A. THE GOVERNMENT INTEREST

In *Chandler*, the Supreme Court held that a lawful suspicionless search requires a genuine threat to public safety: “We reiterate, too, that where the risk to the public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’ . . . . But where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”<sup>200</sup> Yet how can we know whether threats to public safety are substantial or real? From a public health perspective, we can understand risk as a composite of two factors—the probability of the harm and the magnitude of the harm if it were to occur. By probability of the harm, I mean the probability that an adverse event such as illegal drug use will occur. By magnitude of the harm, I mean the nature and severity of the harm if it were to occur. In the latter category, I will include harms associated with illegal drug use such as the misuse of taxpayer dollars to purchase illegal drugs, harms to drug users themselves, and harms to others such as child abuse and neglect.

##### 1. The Probability of the Harm

###### a. National Estimates

Most nationally representative estimates of illegal drug use in the United States have found that roughly one in five TANF recipients reported illegal drug use at

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<sup>199</sup> See, e.g., *id.* In upholding the constitutionality of FRA regulations requiring drug and alcohol testing of railway employees, the Supreme Court in *Skinner* noted that the regulations furthered a significant government interest in ensuring railway safety by providing an “effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place.” *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 629 (1989).

<sup>200</sup> *Chandler v. Miller*, 520 U.S. 305, 323 (1997)

some point during the past year.<sup>201</sup> These findings also appear to be consistent over time. Using 1994-1995 data from the National Household Survey of Drug Abuse (NHSDA), Jayakody and colleagues found that 21% of welfare recipients who received cash assistance reported use of an illegal drug during the past year, compared to 13% of non-recipients.<sup>202</sup> Excluding marijuana, about 10% of welfare recipients reported use of some other illegal drug during the past year, compared to 7% of non-recipients, however, as the researchers caution these differences were not statistically significant.<sup>203</sup> Similarly, using 2002 data from the National Survey of Drug Use and Health—the successor to the NHSDA—Pollack and colleagues found that 22.3% of women TANF recipients aged 18-49 reported using illegal drug use during the previous year compared to 12.8% of women who did not receive TANF benefits.<sup>204</sup>

Still, as opponents of drug testing will argue, not all studies based on nationally representative data suggest that one in five recipients of public assistance uses illegal drugs. In 2002, the Substance Abuse and Mental Health Services Administration (SAMHSA) reported that the prevalence of past-month illicit drug use among people in households receiving cash assistance through TANF was somewhat higher than the prevalence of drug use among non-recipients: 11.5% compared to 6.8%.<sup>205</sup> Nor did the study find twofold gaps in the prevalence of illegal drug use among recipients of public assistance. The prevalence of past-month illicit drug use among recipients of public assistance—not limited to TANF—was somewhat higher, though not by much: 9.6% compared to 6.8%.<sup>206</sup>

#### *b. State Estimates*

For opponents of drug testing, findings from state experiments with drug testing also cast doubt on claims that roughly one in five TANF recipients use illegal drugs. In October 1999, Michigan implemented mandatory drug testing for TANF recipients.<sup>207</sup> Under the statute, all TANF recipients were required to pass a urine test as a condition of assistance.<sup>208</sup> Between October and November, when drug testing ended under an injunction, 258 TANF recipients were tested for drugs.<sup>209</sup> Of those 258 recipients, 21 (8.1%) tested positive.<sup>210</sup> Of those who tested positive, 18 (7.0%) tested positive for marijuana alone, and 3 (1.2%) tested positive for “hard drugs,” including cocaine and amphetamine.<sup>211</sup> The rate of illegal drug use detected among TANF recipients in Michigan was also comparable to the 1999 prevalence of

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<sup>201</sup> Lisa A. Metsch & Harold A. Pollack, *Welfare Reform and Substance Abuse*, 83 MILBANK Q. 65, 68 (2005).

<sup>202</sup> Rukmalie Jayakody et al., *Welfare Reform, Substance Use, and Mental Health*, 25 J. HEALTH POL. POL’Y & L. 623, 636-38 (2000).

<sup>203</sup> *Id.* at 637-38.

<sup>204</sup> Harold A. Pollack et al., *Drug Testing Welfare Recipients—False Positives, False Negatives, Unanticipated Opportunities*, 12 WOMEN’S HEALTH ISSUES 23 (2002).

<sup>205</sup> OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., SUBSTANCE USE AMONG PERSONS IN FAMILIES RECEIVING GOVERNMENT ASSISTANCE 2 tbl.1 (2002), <http://www.samhsa.gov/data/2k2/GovAid/GovAid.htm>.

<sup>206</sup> *Id.*

<sup>207</sup> Metsch & Pollack, *supra* note 201, at 76.

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

<sup>209</sup> *Id.*

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

<sup>211</sup> *Id.*

drug use within the state population as a whole (7.1%), leading opponents to argue that states like Michigan are wrongly singling TANF recipients out for drug tests.<sup>212</sup>

What should we make of these claims? First, we might worry that findings from states like Michigan fail to provide a valid estimate of drug use among TANF recipients. Since drug testing proposals are well advertised, opponents of drug testing cannot rule out the possibility that although most TANF recipients do not use drugs, those who do use illegal drugs either refrained from doing so prior to taking the test, or simply elected not to apply for benefits. In Florida, the H.B. 353 pilot study found that 5% of TANF applicants tested positive for drugs; however, as the researchers readily concede, the study suffered from a number of methodological problems.<sup>213</sup> In addition to a possible deterrent effect from advertising, only those applicants who were predicted to have a substance abuse problem using the Substance Abuse Subtle Screening Inventory (SASSI) were asked to take a drug test during the pilot study.<sup>214</sup> A false negative rate of 7% would mean that the SASSI failed to identify 335 individuals as potential candidates for a drug test; however, since the SASSI screens for both alcohol and drug abuse, we cannot know how many of those 335 individuals might have tested positive for drugs.<sup>215</sup>

In *Lebron*, the district court concluded that Florida could only provide evidence that somewhere between 2% and 5% of TANF applicants have used illegal drugs, and therefore the government failed to demonstrate a “concrete danger” of illegal drug use among TANF recipients.<sup>216</sup> Due to enrollment bias and deterrent effects, however, findings from pilot studies and early testing probably underestimate the actual prevalence of illegal drug use among TANF applicants in Florida. Even if the prevalence of illegal drug use among TANF applicants in Florida is not as high as 11% or 20%, it seems unlikely that only 2% or 5% of TANF recipients have used illegal drugs, a rate far below the state average of roughly 8%.<sup>217</sup>

In *Lebron* the district court also faulted Florida for relying on national estimates of illegal drug use and failing to provide evidence about the prevalence of drug use among TANF applicants in Florida.<sup>218</sup> However, from a public health perspective, what we want to know is whether findings based on national household surveys of illegal drug use are generalizable to Florida. John Monahan and Laurens Walker have shown that questions about generalizability in social science bear a close resemblance to reasoning by analogy in the law.<sup>219</sup> Just as courts will view precedents as “on point” to the extent that they involve similar facts, questions about external validity or generalizability concern the degree of similarity between the

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<sup>212</sup> See, e.g., CTR. FOR LAW & SOC. POLICY, RANDOM DRUG TESTING OF TANF RECIPIENTS IS COSTLY, INEFFECTIVE AND HURTS FAMILIES 7 (2013), available at <http://www.clasp.org/admin/site/publications/files/520.pdf> (arguing that mandatory drug testing of TANF applicants or recipients is a poor use of resources); *Percentages Reporting Past Month Use of Any Illicit Drug, by Age Group and State: 1999*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. tbl.2B, available at [http://www.samhsa.gov/data/nhsda/99statetabs/tables2.htm#link\\_group\\_1](http://www.samhsa.gov/data/nhsda/99statetabs/tables2.htm#link_group_1) (last visited Feb. 1, 2014) (table listing the percentage of TANF recipients who reported using an illicit drug in the past month in 1999).

<sup>213</sup> Crew & Davis, *Assessing the Effects*, *supra* note 188, at 45-46.

<sup>214</sup> *Id.* at 42.

<sup>215</sup> *Id.* at 46.

<sup>216</sup> *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1287 (M.D. Fla. 2011), *aff'd* 710 F.3d 1202 (11th Cir. 2013).

<sup>217</sup> See *id.* at 1277, 1281.

<sup>218</sup> *Id.* at 1278.

<sup>219</sup> John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 506 (1986).



people under study and the people to whom courts wish to generalize.<sup>220</sup> Moreover, just as courts should not rely on decisions that are poorly reasoned, or decisions that have fallen into disfavor, courts should only rely on a particular piece of scientific evidence to the extent that it has survived the process of peer review, it has employed valid research methods, and it is supported by further research.<sup>221</sup>

Despite being a coastal state and an entry point for drug smuggling into the United States, illicit drug use in Florida closely resembles the national average. According to the 2002 National Survey on Drug Use and Health, 8.84% of Floridians age twelve or older reported use of an illicit drug during the past month, compared to a national average of 8.3%.<sup>222</sup> Using data from the same survey, Pollack and colleagues found that roughly 20% of TANF recipients reported illicit drug use during the past year.<sup>223</sup> Based on this evidence we can infer that the prevalence of past year illegal drug use among TANF recipients in Florida is probably somewhere around 20%. However, even if the prevalence of illegal drug use among TANF recipients is roughly 20%, that would mean that 80% of TANF recipients have *not* reported illegal drug use; yet, as the district court pointed out in *Lebron*, all are required to submit to a drug test.<sup>224</sup>

### c. A Precautionary Principle?

In *Lebron*, Florida argued that it could establish a special governmental need for drug testing without evidence of an “overwhelming drug problem.”<sup>225</sup> In support of its contention, the government relied heavily on *Von Raab*, where the Supreme Court upheld suspicionless drug testing for customs agents involved in drug interdiction without any evidence that illegal drug use was a serious problem among customs agents.<sup>226</sup> The government also alluded to *Earls*, where a plurality of the Court upheld suspicionless drug testing for high school students involved in nonathletic extracurricular activities, again with very little evidence of illegal drug use among these students, but instead on the ground that illegal drug use presents a safety risk for all children, “athletes and nonathletes alike.”<sup>227</sup> Writing for the plurality in *Earls*, Justice Thomas reasoned, “it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.”<sup>228</sup>

What should we make of these claims? As Lawrence Gostin writes, “if there is one article of faith in public health,” it is that public health regulation should be based on “risks that are significant, not speculative, theoretical, or remote.”<sup>229</sup> Without a clear understanding of a public health hazard, interventions are unlikely to be effective and run a risk of imposing needless economic costs and personal

<sup>220</sup> *Id.* at 505-06.

<sup>221</sup> *Id.* at 499.

<sup>222</sup> DOUGLAS WRIGHT, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN, STATE ESTIMATES OF SUBSTANCE USE FROM THE 2002 NATIONAL SURVEY ON DRUG USE AND HEALTH 81 app. tbl.A.1 (2004), available at <http://www.samhsa.gov/data/2k2State/PDFW/2k2SAEW.pdf>.

<sup>223</sup> Metsch & Pollack, *supra* note 201, at 68-70.

<sup>224</sup> *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1281 (M.D. Fla. 2011), *aff'd* 710 F.3d 1202 (11th Cir. 2013).

<sup>225</sup> *Id.* at 1287.

<sup>226</sup> *Id.* at 1287-88.

<sup>227</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002).

<sup>228</sup> *Id.*

<sup>229</sup> GOSTIN, *supra* note 90, at 57, 73.

burdens.<sup>230</sup> At the same time, communities will sometimes face hazards that are not fully understood but nonetheless require immediate intervention.<sup>231</sup> In public health, the precautionary principle provides a framework for preventive measures designed to protect the public's health under conditions of uncertainty.<sup>232</sup> It permits policymakers to implement regulation when there are early warning signs that a harm is occurring or is likely to occur, even though the precise causal mechanisms of that harm are not yet fully understood.<sup>233</sup> In environmental health, the precautionary principle shifts the burden of proof onto proponents of an activity to demonstrate that the proposed activity would not result in a serious or potentially irreversible harm.<sup>234</sup> Absent such evidence, the precautionary principle permits preventive regulation geared toward protecting public health. In support of greater precautionary measures, proponents of the precautionary principle often cite examples of risks that were underestimated but later turned out to be highly damaging to human health, including asbestos, leaded gasoline, and chlorofluorocarbons.<sup>235</sup>

What would the precautionary principle imply for the special needs doctrine? Ordinarily, a reasonable government search requires a warrant; without one, a search requires probable cause or a reasonable suspicion of wrongdoing. Nevertheless, as Justice Kennedy observed in *Von Raab*, the traditional probable cause standard may be unhelpful when “the Government seeks to *prevent* the development of hazardous conditions” or to detect violations that rarely generate articulable grounds for a search.<sup>236</sup> We can understand the special needs doctrine as an attempt to organize the murky territory between searches falling short of probable cause and reasonable suspicion but above the Fourth Amendment threshold of unreasonableness.

Although the Supreme Court has been criticized for failing to recognize the many ways in which the law can be used as a tool to protect population health, in its special needs cases, the Supreme Court appears to have the opposite problem—a tendency to be overly solicitous when governments assert an interest in public health or public safety. A tendency to overemphasize small risks to public health led the Court to uphold suspicionless fire safety inspections for householders in *Camara*, and suspicionless drug tests for customs agents in *Von Raab*.<sup>237</sup> Before pressing on to consider what the precautionary principle might imply for drug testing and public assistance, it may be helpful to pause and reconsider the drug testing cases from a public health perspective.

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<sup>230</sup> *See id.*

<sup>231</sup> *Id.*

<sup>232</sup> The precautionary principle has its origins in environmental health. A widely cited formulation of the precautionary principle can be found in the 1992 United Nations Rio Declaration on Environment and Development. *Id.* at 72. As formulated in the Declaration and adopted by member states, including the United States, the precautionary principle provides, “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” United Nations Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. 1), Annex I (Aug. 12, 1992).

<sup>233</sup> Joel A. Tickner et al., *A Compass for Health: Rethinking Precaution and Its Role in Science and Public Health*, 32 INT’L J. EPIDEMIOLOGY 489, 489 (2003).

<sup>234</sup> Noah M. Sachs, *Rescuing the Strong Precautionary Principle From Its Critics*, 2011 U. ILL. L. REV. 1285, 1288 (2011).

<sup>235</sup> Gary E. Marchant, *From General Policy to Legal Rule: Aspirations and Limitations of the Precautionary Principle*, 111 ENVTL. HEALTH PERSPS. 1799, 1799 (2003).

<sup>236</sup> Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989) (emphasis in original).

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

In *Von Raab*, the Supreme Court emphasized the “extraordinary safety and national security hazards” associated with the promotion of illegal drug users to positions involving drug interdiction or to positions that would require them to carry firearms.<sup>238</sup> However, the case for precautionary measures fails in *Von Raab*, owing to the low risk harm. Above, I said that we can understand risk as a combination of two factors—the probability of a harm and the magnitude of the harm if it were to occur.<sup>239</sup> Notwithstanding routine exposure to criminal elements and access to valuable sources of contraband, only slightly more than one-tenth of one percent of customs employees tested positive for illegal drugs.<sup>240</sup>

By itself, a low probability of harm should not lead courts to conclude that the government has failed to establish a genuine public health threat. Courts must also consider the severity of the harm if it were to occur. Although the number of airline passengers and pieces of luggage screened by the Federal Aviation Administration reaches into the billions, only a few thousand firearms have been detected and only a few planes have been successfully hijacked.<sup>241</sup> Even though the probability of an undetected firearm or a successful hijacking is extraordinarily low, the consequences of a false negative (a missed firearm or a successful hijacking) would be very severe—hundreds of human lives lost, countless injuries, and millions of dollars in property damage. In cases like this one, where the severity of harm is great because of long-lasting and potentially devastating consequences across populations, governments can establish genuine threats to public safety notwithstanding a low probability of wrongdoing. By contrast, the harm associated with failure to interdict a drug shipment is fairly low—primarily drug-related morbidity and some mortality. The combination of a near zero probability of harm and the small magnitude of harm greatly undermines the case for precautionary drug testing.

The case for precautionary measures becomes stronger in *Vernonia* where the government was able to provide a wealth of evidence to support its claims regarding the extent of illegal drug use in Vernonia schools. Students began to boast about drug use and the inability of school administrators to stop them; teachers reported direct observation of student drug use and confiscated drug paraphernalia on school grounds.<sup>242</sup> Coaches also reported an increase in the number and severity of injuries.<sup>243</sup> In contrast to *Von Raab*, where the connection between drug use and population health was highly attenuated and speculative at best, in *Vernonia* the government was able to advance a plausible hypothesis that in a small community where interscholastic activities provided the primary source of entertainment, drug use among student athletes could fuel a “role model” effect, encouraging other students to use drugs.<sup>244</sup> School administrators were able to provide credible evidence that the combination of illegal drug use and exercise could result in serious, potentially deadly harms.<sup>245</sup>

In contrast to *Vernonia*, the case for precaution fails entirely in *Earls*. School administrators were only able to provide minimal evidence of illegal drug use, primarily: (1) testimony from teachers who had observed students who appeared to be under the influence of drugs; (2) marijuana cigarettes in the school parking lot;

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<sup>238</sup> *Id.* at 674.

<sup>239</sup> *See supra* Part V.A.

<sup>240</sup> *Von Raab*, 489 U.S. at 673.

<sup>241</sup> *Id.* at 675 n.3.

<sup>242</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648-49 (1995).

<sup>243</sup> *Id.* at 649.

<sup>244</sup> *Id.* at 663.

<sup>245</sup> *Id.* at 662.

and (3) drug paraphernalia found in a car driven by a student member of the Future Farmers of America.<sup>246</sup> Nor was the government able to provide much in the way of a causal connection between illegal drug use and harm.<sup>247</sup> Quite unlike the student activities at issue in *Vernonia*, in which the combination of illegal drug use and physical exertion could create substantial health risks, the *Earls* plurality upheld suspicionless drug testing for students involved in nonathletic extracurricular activities like show choir and the debate team,<sup>248</sup> where the magnitude of potential harm would be comparatively low.

## 2. The Nature and Severity of the Harm

### *a. Taxpayer Subsidy of Illegal Drug Use*

There are circumstances in which we might be prepared to tolerate a blanket suspicionless search—e.g., a suspicionless search of all airline passengers and their carry-on luggage—because even if the probability of the harm is very low, the potential harm is very great. In contrast to the airplane case, however, the harm associated with a taxpayer subsidy of illegal drug use is small—primarily a few thousand in lost taxpayer dollars. In Florida, it appears that H.B. 353 has actually cost taxpayers more money than it has saved. Florida law requires the state to reimburse applicants who test negative for drugs. According to the Florida DCF, at an average cost of \$30 per test, the total reimbursement cost to the state was \$118,140.<sup>249</sup> DCF estimates that H.B. 353 has cost the state an additional \$45,780, since the reimbursement costs were far more than the state would have spent on income assistance had it provided benefits to the 108 people who failed the test.<sup>250</sup>

Those who continue to support a drug testing requirement nonetheless offer two replies to these findings. First, the real reason to require TANF applicants to pass a drug test is to ensure that taxpayer dollars are spent on “diapers and Wheaties” rather than illegal drugs.<sup>251</sup> Without a drug test, states cannot be sure that taxpayer dollars will reach their intended beneficiaries. Second, states have a basic interest in ensuring that taxpayer dollars are not used to fund an illegal activity. In support of a drug testing law in Oklahoma, Representative Liebmann put it this way: “Even if it didn’t save a dime, this legislation would be worth enacting based on principle . . . . Law-abiding citizens should not have their tax payments used to fund illegal activity that puts us all in danger.”<sup>252</sup>

To the extent that states rest the case for drug testing on principle, arguments of this kind come dangerously close to resting the case for suspicionless drug testing on a symbolic interest—an interest forcefully rejected by eight Justices in *Chandler*. In response, those who support a drug testing requirement might argue, as some have, that “[t]he drug testing law was really meant to make sure that kids were

<sup>246</sup> Bd. of Educ. v. Earls, 536 U.S. 822, 834-36 (2002).

<sup>247</sup> *Id.* at 851-52.

<sup>248</sup> *Id.* at 841, 847.

<sup>249</sup> Lizette Alvarez, *No Savings Are Found from Welfare Drug Tests*, N.Y. TIMES (Apr. 17, 2012), [http://www.nytimes.com/2012/04/18/us/no-savings-found-in-florida-welfare-drug-tests.html?\\_r=0](http://www.nytimes.com/2012/04/18/us/no-savings-found-in-florida-welfare-drug-tests.html?_r=0).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Jennifer Cope, *Proposed House Bill Would Drug Test Recipients of Government Assistance*, KTUL (Mar. 12, 2012), <http://www.ktul.com/story/17139440/proposed-house-bill-would-drug-test-recipients-of-government-assistance>.

protected,”<sup>253</sup> or to make sure that taxpayer dollars reach their intended beneficiaries, the latter being a government interest endorsed by the Court in *Wyman*.<sup>254</sup> In *Chandler*, however, the Supreme Court held that “the proffered special need” for a drug test must be “substantial.”<sup>255</sup> The Court defined the term substantial as a government interest that is both “important enough to override the individual’s acknowledged privacy interest” and “sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”<sup>256</sup> Even if the Supreme Court were to hold that the special needs doctrine encompasses government interests beyond an interest in public safety, the government interest in ensuring that taxpayer dollars are used as intended falls far short of “substantial” within the meaning of *Chandler*. Nor are courts likely to find that the government interest in ensuring that taxpayer dollars are used as intended is “sufficiently vital” to suppress the individualized suspicion requirement. As Justices O’Connor, Souter, and Stevens remarked in their *Vernonia* dissent, “[f]or most of our constitutional history, mass, suspicionless searches have generally been considered *per se* unreasonable within the meaning of the Fourth Amendment.”<sup>257</sup> Indeed, the abuses associated with “general searches” were foremost on the minds of the Framers.<sup>258</sup> If the Supreme Court were to hold that the government interest in ensuring that taxpayer dollars are used as intended is sufficient to suppress the Fourth Amendment’s ordinary requirement of individualized suspicion, doing so would amount to a vast expansion of government power with no foreseeable stopping point.

*b. Child Abuse and Neglect*

Supporters of drug testing have also argued that a state interest in preventing child abuse and neglect in the homes of TANF recipients constitutes a special need. In *Lebron*, Florida connected substance abuse among TANF recipients to adverse consequences for their children:

A parent using drugs is less able to care for [their] children properly (neglect), is more likely to actively harm a child (abuse), is less able to procure and maintain employment, is more likely to come in contact with the criminal justice system and thus be removed from the home, and is more likely to set an inappropriate example for children and also provide those children with easier access to drugs (who, thus, might more readily abuse illegal drugs).<sup>259</sup>

Many studies have shown that parental substance abuse can have a negative impact on children. According to the U.S. Department of Health and Human Services, between one and two-thirds of children who have been reported to child protective services come from families coping with substance abuse.<sup>260</sup> Children whose parents abuse drugs often experience a home that is chaotic and

<sup>253</sup> Alvarez, *supra* note 249.

<sup>254</sup> The latter being a government interest endorsed by the Court in *Wyman*. See *Wyman v. James*, 400 U.S. 309, 318-19 (1971).

<sup>255</sup> *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

<sup>256</sup> *Id.*

<sup>257</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 667 (1995) (O’Connor, J., dissenting).

<sup>258</sup> *Id.* at 669.

<sup>259</sup> Defendant’s Response, *supra* note 182, at 20.

<sup>260</sup> OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVAL., U.S. DEP’T OF HEALTH & HUMAN SERVS., BLENDING PERSPECTIVES AND BUILDING COMMON GROUND: A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION 40 (1999), available at <http://www.ncsacw.samhsa.gov/files/BlendingPerspectives.pdf>.

unpredictable.<sup>261</sup> Children whose parents abuse drugs are also more likely to experience physical violence and sexual abuse.<sup>262</sup> Still, the case for suspicionless drug testing is not without its problems. The special needs doctrine applies when governments face special needs *beyond* the normal need for law enforcement.<sup>263</sup> To the extent that states rest the case for suspicionless drug testing on a state interest in protecting children from acts of drug-related violence in the home—battery and sexual assault—they have asserted an interest in law enforcement.

In *Lebron*, Florida went on to argue that by providing income assistance to low-income families, the state “steps into the role of parent” or “economic provider,” and therefore, the state takes on a special responsibility to ensure that TANF funds are not used to subsidize drug use in the home.<sup>264</sup> To that end, Florida relied on *Vernonia*, in which the Supreme Court held that suspicionless drug testing policies were not unreasonable given the custodial responsibilities of public schools for minor children in their care.<sup>265</sup> Florida’s reliance on *Vernonia*, however, is misplaced. In both *Vernonia* and *Earls*, the Court described the custodial responsibilities of schools with respect to extracurricular activities on school grounds or school-sponsored field trips.<sup>266</sup> In neither case did the Court suggest that the custodial responsibilities of schools extend into the home. Even if states did assume some special responsibility for the children of TANF recipients, neither *Vernonia* nor *Earls* suggest that a concern for the wellbeing of children would support a state interest in requiring their parents to pass a drug test.

### *c. Drug Use, Employment, and Public Health*

In their defense, several states—including Alabama, Kansas, Michigan, Oklahoma, and Florida—have argued that the federal government conditions TANF funding on a state’s ability to move TANF recipients from welfare to work.<sup>267</sup> Since employers who participate in TANF programs are likely to require a drug test, and since illegal drug use undermines employability, states have a “special need” to exclude illegal drug users from the program.<sup>268</sup> Yet, the Supreme Court has never suggested that a state interest in securing a steady funding stream constitutes a special governmental need. Nor are courts likely to see government interests of this kind as “substantial” within the meaning of *Chandler*. Nor is there much evidence to support state claims that the handful of TANF recipients who do use illegal drugs are likely to loll on welfare rolls for extended periods of time. According to the SAMHSA, roughly two-thirds of illegal drug users are employed either full time or part time.<sup>269</sup> Florida’s H.B. 353 pilot study found that drug users were employed at

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<sup>261</sup> ICF INT’L, ADMIN. FOR CHILDREN & FAMILIES, PROTECTING CHILDREN IN FAMILIES AFFECTED BY SUBSTANCE USE DISORDERS 21 (2009), available at <https://www.childwelfare.gov/pubs/usermanuals/substanceuse/substanceuse.pdf>.

<sup>262</sup> See *id.* at 7.

<sup>263</sup> *Chandler v. Miller*, 520 U.S. 305, 311 (1997).

<sup>264</sup> Defendant’s Response, *supra* note 182, at 20-21.

<sup>265</sup> *Id.*

<sup>266</sup> See *Bd. of Educ. v. Earls*, 536 U.S. 822, 840 (2002) (citing *Vernonia v. Acton*, 515 U.S. 646, 654-55 (1995)).

<sup>267</sup> Brief of the States, *supra* note 11, at 4.

<sup>268</sup> *Id.* at 10.

<sup>269</sup> See CTR. FOR BEHAVIOR HEALTH STATISTICS & QUALITY, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2011 NATIONAL SURVEY ON DRUG USE AND HEALTH 25 (2012), <http://www.samhsa.gov/data/nsduh/2k11results/nsduhresults2011.pdf>.

the same rate as non-users.<sup>270</sup> Drug users earned approximately the same amount of money as non-users and they did not require more government assistance than non-users.<sup>271</sup>

In *Marchwinski v. Howard*, a three-judge panel of the Sixth Circuit indicated that the public safety risks stemming from crime associated with illegal drug use and drug trafficking are either themselves a special need or at least a relevant consideration when determining whether states have met their burden to establish a special need.<sup>272</sup> Picking up this thread in *Lebron*, Florida counted among its special needs the “public health” and “crime risks” associated with the drug epidemic.<sup>273</sup> To that end, Florida asserted an interest in not funding that epidemic and its associated “public ills.”<sup>274</sup> Although the public health and crime risks associated with illegal drug use are well known, there is little or no evidence that welfare recipients are important contributors to the drug problem. Without a genuine threat to public health or public safety, states cannot meet their burden to establish a special need.

#### B. THE NATURE AND INTRUSIVENESS OF THE SEARCH

Courts will also consider the nature and intrusiveness of the search. Most states have proposed to test welfare recipients for drugs using a urine test. In each of the special needs cases where the Court has upheld drug testing policies, urine samples were monitored by “listening for normal sounds of urination,” either behind a closed stall or by standing directly behind the person producing a urine sample, but not under direct observation.<sup>275</sup> Consistent with *Skinner* and *Von Raab*, Florida law would not require laboratories to monitor TANF applicants as they produce urine samples under direct observation. Instead Florida law simply instructs the Florida DCF to provide each person with a “reasonable degree of dignity” consistent with the state’s interest in obtaining a reliable sample.<sup>276</sup>

More difficult questions arise with respect to the intrusiveness of a drug test. Before a federal district court issued a preliminary injunction against H.B. 353 in November 2011, temporarily halting Florida’s drug testing program, H.B. 353 allowed DCF to enter drug test results into a database accessible by law enforcement agencies.<sup>277</sup> Florida also indicated its intention to report test results to the Florida Child Abuse Hotline.<sup>278</sup> In February 2012, however, the Florida DCF retreated from its earlier position. Instead, DCF has published a new rule, indicating that the Department will not report test results to the Child Abuse Hotline, nor will DCF share test results with law enforcement.<sup>279</sup>

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<sup>270</sup> See Crew & Davis, *Assessing the Effects*, *supra* note 188, at 51-52; Robert E. Crew & Belinda Creel Davis, *Substance Abuse as a Barrier to the Employment of Welfare Recipients*, 5 J. POL’Y PRAC. 69, 79-80 (2006) [hereinafter Crew & Davis, *Substance Abuse as a Barrier*].

<sup>271</sup> Crew & Davis, *Assessing the Effects*, *supra* note 188, at 51-52.

<sup>272</sup> *Marchwinski II*, 309 F.3d 330, 336 (6th Cir. 2002).

<sup>273</sup> Defendant’s Response, *supra* note 182, at 21.

<sup>274</sup> *Id.*

<sup>275</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650 (1995).

<sup>276</sup> FLA. STAT. § 414.0652 (2)(f) (2012).

<sup>277</sup> *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1283 (M.D. Fla. 2011).

<sup>278</sup> *Id.*

<sup>279</sup> FLA. ADMIN. CODE ANN. r. 65A-4.221 (2012).

### 1. A Fourth Amendment Perspective

The Supreme Court has provided uncertain and conflicting guidance as to whether drug test results obtained through the special needs doctrine can be shared with law enforcement agencies or child protective services. In its classic formulation, the special needs doctrine permits suspicionless searches when governments confront special needs “beyond the normal need for law enforcement.”<sup>280</sup> In its early special needs cases, however, the Supreme Court appeared untroubled when the fruits of a special needs search were used in subsequent criminal proceedings. In *T.L.O.*, Justice Blackmun did not object when prosecutors charged T.L.O. with juvenile delinquency based on evidence of drug dealing seized from her purse.<sup>281</sup> Nor did Justice Scalia object in *Griffin* when police officers searched Griffin’s home and prosecutors used a gun seized in that search to charge Griffin with a weapons offense.<sup>282</sup>

In its more recent special needs cases, the Supreme Court has suggested that handing test results over to law enforcement officials would impugn an otherwise valid administrative scheme. In *Ferguson v. City of Charleston*, the Supreme Court struck down state regulations that permitted drug tests for obstetrics patients without their consent and without a reasonable suspicion of drug use, owing to the excessive entanglement of law enforcement in the creation and execution of the policy.<sup>283</sup> Justice Stevens indicated that the “critical difference” between the hospital drug testing policy on the one hand and previous special needs cases on the other, was that in each of the previous cases, the special need for drug testing was “divorced from the State’s general interest in law enforcement.”<sup>284</sup> In *Vernonia*, for example, the Court held that the School District instituted a drug testing policy for “distinctly nonpunitive purposes,” namely protecting student athletes from drug-related injury and deterring illegal drug use among students.<sup>285</sup> In *Skinner*, the Court indicated that the Federal Railroad Administration required drug tests to prevent train accidents and fatalities, “not to assist in the prosecution of employees.”<sup>286</sup>

At times, proponents of drug testing have alluded to state interests that appear to be distinguishable from a general state interest in law enforcement; for example, a state interest in ensuring that taxpayer dollars reach their intended beneficiaries, or eliminating drug-related barriers to employment.<sup>287</sup> Nonetheless, throughout the debate surrounding drug testing and public assistance, states have largely rested the case for drug testing on a state interest in ensuring that taxpayer dollars are not used to subsidize illegal drug use. In *Lebron*, Florida averred: “[T]he government has spent untold resources over the last thirty years fighting the “war on drugs.” Surely, then, the government has a paramount interest in *not* funding the drug epidemic and its associated public ills.”<sup>288</sup>

<sup>280</sup> See *supra* Part IV.A.

<sup>281</sup> Tracey Maclin, *Is Obtaining an Arrestee’s DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 J.L. MED. & ETHICS 102, 109 (2006); see also *New Jersey v. T.L.O.*, 469 U.S. 325, 351-53 (1985).

<sup>282</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987).

<sup>283</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 82-86 (2001).

<sup>284</sup> *Id.* at 68.

<sup>285</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 n.2 (1995) (emphasis in original).

<sup>286</sup> *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 620 (1989).

<sup>287</sup> See *Sanchez v. Cnty. of San Diego*, 464 F.3d 916, 923 (2006) (citing *Wyman v. James*, 400 U.S. 309, 318 (1971) (“[T]he public has a strong interest in ensuring that aid provided from tax dollars reaches its proper and intended recipients.”)); Defendant’s Response, *supra* note 182, at 21.

<sup>288</sup> Defendant’s Response, *supra* note 182, at 20-21 (emphasis in original).



To that end, opponents of drug testing might argue that states have failed to demonstrate that the primary purpose of drug testing is to further a valid non-law enforcement interest. However, notwithstanding *Ferguson*, the Supreme Court has also said that a lawful suspicionless search may serve multiple purposes, including a state interest in law enforcement. In *New York v. Burger*, the Court confronted the mirror image of *Ferguson*—the primary purpose of the search was administrative, but authorities also discovered evidence of criminal conduct in the process.<sup>289</sup> Ironically, in an opinion by Justice Blackmun, the Supreme Court upheld a New York statute designed to prevent auto theft by authorizing the police to conduct suspicionless searches of automobile junkyards.<sup>290</sup> According to Justice Blackmun, what lower courts failed to realize was that “a State can address a major social problem *both* by way of an administrative scheme . . . *and* through penal sanctions.”<sup>291</sup> Penal laws and administrative regulations may aim toward the same “ultimate purpose” even if the regulatory goals of an administrative search are narrower.<sup>292</sup> The Court added that auto theft was a “significant social problem” and New York had a “substantial interest in regulating the vehicle-dismantling industry because of this problem.”<sup>293</sup>

Appealing to *Burger*, supporters of drug testing might argue that a valid administrative search may have the same ultimate purpose as the penal law—namely, combating illegal drug use—even if its regulatory goals are narrower, like weeding illegal drug users out of public assistance programs. Moreover, the fruits of that search can also be used in a criminal prosecution. As Justice Blackmun argued in *Burger*, a valid administrative scheme does not become unconstitutional merely because an officer discovers evidence of a crime in addition to a violation of the administrative statute itself.<sup>294</sup> Nor is evidence garnered from that search inadmissible.

In *Ferguson*, Justice Stevens attempted to reconcile the tension between the hospital drug testing policy and *Burger* by proposing that where the individual interest in privacy is “particularly attenuated” or where the discovery of criminal evidence is “merely incidental to the purpose of the administrative search,” the search may fall within the scope of the special needs doctrine.<sup>295</sup> Although the Supreme Court has long held that a lesser expectation of privacy attaches to commercial property and other “closely regulated industries,” in what sense was the discovery of stolen auto parts “merely incidental”? The statute authorized police officers to search junkyards for *stolen* vehicles, in an effort to combat what the *Burger* Court itself described as a “serious social problem in automobile theft.”<sup>296</sup> The Court’s attempt to explain away the discovery of stolen auto parts as “merely incidental,” and thereby salvage the holding in *Burger*, speaks to a longstanding dilemma in the special needs doctrine: In what sense must a special need lie “beyond the normal need for law enforcement?”<sup>297</sup> *Ferguson* attempted to answer that question by emphasizing that the immediate objective of the hospital drug testing policy was to generate evidence that would be admissible in a subsequent criminal

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<sup>289</sup> See *New York v. Burger*, 482 U.S. 691, 693-96 (1987).

<sup>290</sup> *Id.* at 716-18.

<sup>291</sup> *Id.* at 712 (both emphases in original).

<sup>292</sup> *Id.* at 713.

<sup>293</sup> *Id.* at 708.

<sup>294</sup> *Id.* at 716.

<sup>295</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001).

<sup>296</sup> *Burger*, 482 U.S. at 713.

<sup>297</sup> *N.J. v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

prosecution.<sup>298</sup> The Court also highlighted the excessive involvement of law enforcement officers in both the creation and day-to-day administration of the policy.<sup>299</sup>

Unlike in *Ferguson*, there is little evidence that the “immediate objective” or “primary purpose” of imposing a drug testing requirement on public assistance is to generate evidence for a criminal proceeding. Nor is there evidence of an excessive entanglement between public assistance programs and law enforcement. To that end, courts might well conclude that the primary purpose of requiring TANF recipients to pass a drug test is administrative; therefore, evidence of illegal drug use is admissible in a criminal prosecution under *Burger*.

## 2. A Public Health Perspective

What can public health and the population perspective add to this disarray? The differences between a population-based legal analysis, on the one hand, and a conventional Fourth Amendment analysis on the other are markedly evident with respect to the nature and intrusiveness of a special needs search. From a conventional Fourth Amendment perspective, the central questions with respect to the nature and intrusiveness of a search are whether drug testing furthers a valid non-law enforcement interest, and whether sharing test results with third parties would violate a reasonable expectation of privacy held by public assistance recipients. However, from a public health perspective, the important issues have little to do with the *Ferguson* problems that arise when the fruits of a special needs search are turned over to law enforcement. Instead, the important questions concern the impact of drug testing requirements on the health of illegal drug users and the people around them.

A proponent of population-based legal analysis would keep two considerations in mind. First, regulations to protect the public’s health often involve risk-risk tradeoffs. Such tradeoffs occur when interventions designed to decrease one risk simultaneously increase another.<sup>300</sup> Second, a public health perspective, particularly a population-level perspective, would consider the likely health impacts of drug testing requirements on people who use illegal drugs, as well as likely “spillover effects” on their minor children and the communities around them. Requiring public assistance recipients to pass a drug test would decrease the risk that taxpayer dollars are used to fund illegal drug use. On the other hand, if parents are concerned that they might test positive for drugs, then sharing positive test results with child protective services or law enforcement could deter parents from applying for public assistance for fear that they might lose custody of their children or face incarceration. Paradoxically, by driving at-risk parents away from social services, policies designed to protect children could actually increase the risk that children who are in abusive homes will go undetected.

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<sup>298</sup> *Ferguson*, 532 U.S. at 83-86. Justice Stevens noted:

While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights . . . .

*Id.* at 84-85 (emphasis added).

<sup>299</sup> *See id.* at 84.

<sup>300</sup> GOSTIN, *supra* note 90, at 62.

Qualitative studies on pregnant women who use illegal drugs have shown that sharing test results with law enforcement tends to discourage women from seeking necessary assistance.<sup>301</sup> A study by the U.S. General Accounting Office (the precursor to the U.S. Government Accountability Office) found that for drug-dependent women, the fear of legal repercussions appeared to be a potent barrier to health care:

Drug treatment and prenatal care providers told us that the increasing fear of incarceration and losing children to foster care is discouraging pregnant women from seeking care. Women are reluctant to seek treatment if there is a possibility of punishment. They also fear that if their children are placed in foster care, they will never get their children back.<sup>302</sup>

Anticipating such problems, most states allow parents who test positive for drugs to appoint a third-party beneficiary to receive benefits on behalf of a minor child.<sup>303</sup> However, parents may be reluctant to disclose their need for a third-party beneficiary to a friend or family member. According to the Florida DCF, the number of TANF applications has declined since drug testing began in July 2011, suggesting both that H.B. 353 has had its intended deterrent effect, but also that TANF applicants who use drugs have not enrolled their children in TANF through third-party beneficiaries.<sup>304</sup>

From a public health perspective, sharing positive test results with law enforcement officers is clearly a bad idea—doing so would drive an already marginalized group of women further underground. The problem for population-based analysis is this: What legal significance, if any, should courts attach to these insights? Should we say that these policies are unreasonable and unconstitutional insofar as they conflict with the insights of public health? Probably not. Doing so would invite courts to outstrip their competence and open population-based analysis to charges of *Lochner*-ing in the name the public health.

Nonetheless, Parmet presents the population perspective not merely as a set of public health inspired values from which to critique legal discourse, but also as a tool of legal reasoning.<sup>305</sup> She urges courts to embrace population health as “a chief value of law,” one that “judges and lawyers should apply when they interpret legal

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<sup>301</sup> See Sarah C. M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 *MATERNAL & CHILD HEALTH J.* 333, 338 (2011); see generally Martha A. Jessup et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 *J. DRUG ISSUES* 285 (2003); Marilyn Poland, *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 *DRUG & ALCOHOL DEPENDENCE* 199 (1993).

<sup>302</sup> See U.S. GEN. ACCOUNTING OFFICE, *GAO/HRD-90-138, DRUG EXPOSED INFANTS: A GENERATION AT RISK* 9 (1990), available at <http://archive.gao.gov/d24t8/141697.pdf>.

<sup>303</sup> See, e.g., OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., *DRUG TESTING WELFARE RECIPIENTS: RECENT PROPOSALS AND CONTINUING CONTROVERSIES* 3-4 (2011) [hereinafter OAS, *DRUG TESTING WELFARE RECIPIENTS*], available at <http://aspe.hhs.gov/hsp/11/DrugTesting/ib.pdf> (noting that Maryland, South Carolina, and Rhode Island require that a third-party beneficiary be appointed to ensure that benefits are used to meet the needs of minor children).

<sup>304</sup> Since information sharing may be associated with public health gains, states should consider a middle ground that would allow TANF programs to share test results with child welfare agencies, but prohibit those agencies from using test results in a custody hearing or a criminal prosecution. For more on the benefits of interagency collaboration, see CYNTHIA ANDREWS ET AL., *URBAN INST., COLLABORATION BETWEEN STATE WELFARE AND CHILD WELFARE AGENCIES* (2002), available at <http://www.urban.org/publications/310563.html>.

<sup>305</sup> See PARMET, *supra* note 19, at 6.

texts and authority.”<sup>306</sup> However, if we think that courts should not allow population health concerns to trump conventional legal reasoning—or that population health should only play a supporting role in our thinking about the nature and intrusiveness of a special needs search—Parmet will find it difficult to make good on her claim that population-based analysis is indeed a tool of legal reasoning, not merely a policy perspective from which to critique legal decisions.

### C. EFFECTIVENESS

Courts will also ask whether laws that condition public assistance benefits on passing a drug test are “reasonably likely” to achieve their objectives. Although several states have passed laws that require TANF applicants to pass a drug test before they qualify for benefits, state laws differ from one another in important ways. In Florida and Georgia, state laws require *all* TANF applicants to pass a drug test before they qualify for assistance.<sup>307</sup> In Arizona, Missouri and Utah, state laws require a reasonable suspicion of illegal drug use before TANF programs can require a drug test.<sup>308</sup> Although a few states, like Missouri, would allow TANF applicants who test positive for drugs to retain their benefits on the condition that they participate in a substance abuse treatment program,<sup>309</sup> Florida and Georgia would not.<sup>310</sup> Eventually, all states with these laws would suspend assistance to someone who continues to test positive for drugs.

Since *Vernonia*, the Supreme Court has explicitly addressed effectiveness as an element of the special needs doctrine. However, courts tend to assume that suspicionless searches are reasonably likely to accomplish their objectives.<sup>311</sup> As Part IV.C argues, courts should assume a more aggressive posture when evaluating the effectiveness of a search under the special needs doctrine. The Supreme Court should also incorporate a least-intrusive alternative requirement into the special needs doctrine. Without a requirement to seek the least-intrusive alternative, special needs searches are needlessly over-inclusive.

#### 1. Taxpayer Subsidy of Illegal Drug Use

The Supreme Court has been of two minds about the role of effectiveness in a special needs analysis. In *Von Raab*, the Court rejected the petitioner’s contention that requiring a drug test as a condition of promotion in the Customs Service was unreasonable since employees could schedule the date of their drug test and arguably abstain from illegal drug use in advance of the test.<sup>312</sup> Justice Kennedy reasoned that drug addicts would be unable to abstain from drugs, even for a limited period of time. He also noted that in any event, the amount of time that it would take for a particular drug to become undetectable in the system varies widely from person to person, and that information would likely remain unknown to the employee.<sup>313</sup> Several years later in *Chandler*, however, the Supreme Court struck down suspicionless drug testing as a condition of placement on the Georgia state ballot,

<sup>306</sup> *See id.* at 56.

<sup>307</sup> *See* OAS, DRUG TESTING WELFARE RECIPIENTS, *supra* note 303, at 10, App. A at 11-12.

<sup>308</sup> *See id.*

<sup>309</sup> *See id.*

<sup>310</sup> *See id.*

<sup>311</sup> *See* Gostin, *supra* note 90, at 63.

<sup>312</sup> Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 676 (1989).

<sup>313</sup> *Id.* (holding that “the program bears a close and substantial relation to the Service’s goal of deterring drug users from seeking promotion to sensitive positions”).

reasoning that “Georgia’s certification requirement [was] not well designed to identify candidates who violate antidrug laws . . . .”<sup>314</sup> As Justice Ginsburg remarked, drug tests scheduled by the candidate were “no secret” and the government failed to explain why ordinary law enforcement mechanisms were insufficient to identify illegal drug users “should they appear in the limelight of the public stage.”<sup>315</sup>

Requiring TANF applicants to pass a drug test on their initial application for benefits would fail to identify the small number of TANF applicants who do in fact use drugs. Not unlike the drug tests at issue in *Von Raab* and *Chandler*, Florida’s H.B. 353 would require a onetime drug test as part of an initial application for TANF benefits, and, as in *Chandler*, the date of a drug test to be scheduled by the TANF applicant is “no secret.”<sup>316</sup> States like Florida have failed to explain why most TANF applicants would be unable to abstain from illegal drug use long enough to avoid detection. Of those public assistance recipients who have reported illegal drug use during the past month or year, most report use of marijuana.<sup>317</sup> Marijuana is not a highly addictive substance, and for most people, the metabolites of marijuana become undetectable through urine analysis after 10 days.<sup>318</sup> A small number of public assistance recipients have reported use of “hard drugs” like cocaine and methamphetamine.<sup>319</sup> Although highly addictive, the metabolites of these drugs are detectable in the system for only a few days.<sup>320</sup> Most TANF applicants, save those who are prohibitively addicted, would probably be able to pass a scheduled drug test.

As in *Chandler*, state statutes that would require new TANF applicants to complete a scheduled drug test are not well designed to identify applicants who have violated antidrug laws, but what about random drug testing? In *Marchwinski v. Howard*, Michigan proposed to combine an initial drug test for TANF applicants with random drug testing for current TANF recipients.<sup>321</sup> Random drug testing would allow states to identify TANF applicants who have used illegal drugs; however, as this Article argues above,<sup>322</sup> courts are unlikely to see a state interest in ensuring that taxpayer dollars reach their intended beneficiaries as “substantial” within the meaning of *Chandler*.

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<sup>314</sup> *Chandler v. Miller*, 520 U.S. 305, 319 (1997).

<sup>315</sup> *Id.* at 320.

<sup>316</sup> *See id.*

<sup>317</sup> *See Jayakody et al.*, *supra* note 202, at 637.

<sup>318</sup> *See Paul L. Cary, Marijuana Detection Window: Determining the Length of Time Cannabinoids Will Remain Detectable in Urine Following Smoking: A Critical Review of Relevant Research and Cannabinoid Detection Guidance for Drug Courts*, 5 DRUG CT. REV. 23, 37 (2005).

<sup>319</sup> *See Metsch & Pollack*, *supra* note 201, at 76 (reporting that, of the 258 TANF recipients who tested positive for drugs in Michigan in October 1999, only 3 (1.2%) tested positive for “hard drugs,” including cocaine and amphetamine); *see also Jayakody et al.*, *supra* note 202, at 638 (finding that only 6% of welfare recipients reported use of crack or cocaine during the past year, using data from 1995 data from the National Household Survey of Drug Abuse).

<sup>320</sup> *See ENNO FREY & JOSEPH V. LEVY, PHARMACOLOGY AND ABUSE OF COCAINE, AMPHETAMINES, ECSTASY, AND RELATED DESIGNER DRUGS: A COMPREHENSIVE REVIEW OF THEIR MODE OF ACTION, TREATMENT OF ABUSE, AND INTOXICATION* 255 tbl.2 (2009).

<sup>321</sup> *Marchwinski I*, 113 F. Supp. 2d 1134, 1136 (E.D. Mich. 2000), *rev’d*, 309 F.3d 330 (6th Cir. 2002), *judgment of district court aff’d by an equally divided court on reh’g en banc*, 60 F. App’x 601 (6th Cir. 2003) (noting that under Michigan’s program, new applicants must be tested before their case opens, and twenty percent of adults and minor parent grantees will be randomly selected to be tested after they have been in the program for six months).

<sup>322</sup> *See supra* Part IV.A.1.

## 2. Drug Use and Employment

Proponents of drug testing have also argued that statutes like H.B. 353 are designed to address government interests beyond merely identifying potential misuse of taxpayer dollars, for example, a state interest in giving people an incentive to get off drugs or encouraging the transition from welfare to work.<sup>323</sup> What should we make of these claims? In 1997 Congress eliminated Supplemental Security Income (SSI) for people with a primary diagnosis of drug addiction.<sup>324</sup> Not unlike H.B. 353, the purpose of eliminating SSI benefits for people with a primary diagnosis of drug addiction was to encourage substance abusers to take responsibility for their illegal drug use.<sup>325</sup> Also not unlike H.B. 353, an important purpose of the federal benefit termination was to address a public perception that providing federal disability benefits to drug addicts only enabled their illegal drug use.<sup>326</sup> Although some former SSI beneficiaries were able to secure stable employment, many others were not.

Without employment, many former SSI beneficiaries turned to TANF and state emergency relief, resulting in cost-shifting onto states and local governments. A longitudinal study of former SSI beneficiaries found that within two years of benefit termination, twenty percent of former beneficiaries reported income assistance from other public programs including TANF, general assistance, and veterans' benefits.<sup>327</sup> Another study found that after four years, nearly forty percent of former SSI beneficiaries in Northern California reported TANF or general state assistance as their primary source of income.<sup>328</sup> The same study found that former SSI beneficiaries who came to rely on TANF or general assistance also reported an increase in their utilization of mental health services.<sup>329</sup> The federal experience suggests that if states were to withhold public assistance benefits from people who fail a drug test, or from those who are unable to complete a substance abuse treatment program, the cost of these policies may be passed onto others, or felt downstream, in other parts of the social safety net.

It may be that those who were able to complete the transition from federal disability benefits to work were among the least impaired. A Chicago study found that when compared to former beneficiaries who were able to secure even marginal employment of at least \$500 a month, former disability beneficiaries who remained unemployed or underemployed were five times more likely to be drug dependent and seven times more likely to be psychiatrically impaired.<sup>330</sup> Those who were unable to secure employment were also more likely to be dependent on cocaine or heroin, and far less likely to have any means of social support save for friends or family members, or possibly resorting to illegal activities.<sup>331</sup> Although states vary in the

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<sup>323</sup> See 42 U.S.C. § 601(a)(2) (2006).

<sup>324</sup> See Carole Roan Gresenz et al., *Supplemental Security Income (SSI), Disability Insurance (DI), and Substance Abusers*, 34 CMTY. MENTAL HEALTH J. 337, 337-38 (1998).

<sup>325</sup> See *id.* at 341-42.

<sup>326</sup> See *id.* at 339-42.

<sup>327</sup> See James A. Swartz et al., *Termination of Supplemental Security Income Benefits for Drug Addiction and Alcoholism: Results of a Longitudinal Study of the Effects on Former Beneficiaries*, 78 SOC. SERV. REV. 96, 110 (2004).

<sup>328</sup> Sean R. Hogan et al., *The Effects of Eliminating Supplemental Security Income Drug Addiction and Alcoholism Eligibility on the Mental Health of Low-Income Substance Abusers*, 25 SOC. WORK PUB. HEALTH 438, 448 (2010).

<sup>329</sup> See *id.* at 446.

<sup>330</sup> James A. Swartz et al., *Severe Mental Illness and Substance Use Disorders Among Former Supplemental Security Income Beneficiaries for Drug Addiction and Alcoholism*, 57 ARCHIVES GEN. PSYCHIATRY 701, 704 (2000).

<sup>331</sup> *Id.* at 706.

penalties attached to a positive drug test, studies like this one suggest that for those who are the most vulnerable, the most bereft of resources—and therefore most likely to contribute to the public health and crime risks associated with the drug epidemic—removing public assistance benefits without further social support is more likely to exacerbate the problem than alleviate it.

In Florida, TANF applicants who test positive for drugs are ineligible for income assistance through TANF, with no option to retain their benefits while participating in a treatment program.<sup>332</sup> However, a few states, like Missouri, have proposed a middle ground. In these states, TANF applicants who test positive for drugs have the option to retain their benefits on the condition that they enroll in a substance abuse treatment program for six months and do not test positive for drugs while participating in the program.<sup>333</sup> Anyone who tests positive for drugs a second time would be TANF-ineligible for three years.<sup>334</sup> In Florida, TANF applicants who test positive for drugs would be ineligible for income assistance, but remain eligible for other benefits like food stamps and childcare.<sup>335</sup> In Missouri, however, TANF recipients who test positive a second time would lose access to *all* of their TANF benefits during that three year period—including temporary cash assistance, food stamps, child care, and other state programs, partially funded through TANF.<sup>336</sup>

Sooner or later, many, if not most, people who are required to participate in a substance abuse treatment program will relapse.<sup>337</sup> From a public health perspective, the question is whether the loss of public assistance benefits will provide an effective incentive for beneficiaries to stop using illegal drugs. For some casual drug users, the possibility of losing their TANF benefits might be enough to stop using drugs, but for those who are truly drug-dependent, the answer is probably not. Decades of research on addiction have shown that prolonged drug use can alter the structure and function of the brain.<sup>338</sup> When areas of the brain involved in reward, memory, and inhibition are disrupted, the capacity to stop using drugs is also impaired, even if continued drug use means the person stands to lose everything he once valued.<sup>339</sup> The result is that negative incentives like threatening public assistance recipients with the loss of benefits like income assistance, public housing, or unemployment programs probably will not provide an effective incentive for them to stop using drugs. There is also the further concern alluded to above—namely, that if states push drug addicts out of public assistance programs, the costs of doing so may be felt by others.

### 3. Child Abuse and Neglect

Supporters of drug testing argue that these policies are justified by a state interest in combating drug-related child abuse and neglect. Yet, as this Article

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<sup>332</sup> See *Florida Bill Requires Drug Testing of TANF Applicants: Bill Summary*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/florida-legislation-requires-drug-testing-of-tanf.aspx> (last visited Jan. 11, 2014).

<sup>333</sup> MO. REV. STAT. § 208.027 (West 2012 & Supp. 2013).

<sup>334</sup> See *id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> A. Thomas McLellan et al., *Drug Dependence, A Chronic Medical Illness*, 284 JAMA 1689, 1689 (2000).

<sup>338</sup> See NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION 19 (2010).

<sup>339</sup> See *id.* at 20.

argues,<sup>340</sup> if parents are even remotely concerned that they might test positive for drugs, sharing test results with law enforcement could deter parents from applying for public assistance for fear that they might lose custody of their children or face incarceration. By driving at-risk parents away from social services, states could actually increase the risk that children who are in abusive homes are undetected.

Denying public assistance benefits to parents who use illegal drugs could create additional problems for low-income children, even apart from communication with law enforcement. A study of welfare recipients in Chicago found that substantial declines in welfare income, problems with utility assistance, food shortages, and eviction threats all significantly increased the risk of child welfare involvement.<sup>341</sup> Without income assistance, most parents in the study lacked sufficient resources to secure basic household needs, thereby putting their children at risk. As one woman remarked, welfare income provides her with “stable money,” the money that she and her children rely on when a part-time job does not last for more than a few months, or when an employer cannot provide more than a few hours of work.<sup>342</sup>

Although most state proposals would allow parents who test positive for drugs to continue receiving food stamps or child care services in an effort to insulate children from the impact of welfare sanctions on their parents, these safeguards are likely to be inadequate. A 2002 study on welfare reform found that welfare sanctions resulting in a loss of income significantly increased the risk that children faced food insecurity, even when families continued to receive food stamps.<sup>343</sup> For most people, the average monthly food stamp benefit does not provide enough money to buy healthy food.<sup>344</sup> A large literature on nutrition has shown that micronutrient deficiencies at an early age are associated with a wide variety of adverse outcomes for children, ranging from impaired cognitive development and poor school performance to chronic disease and increased susceptibility to infection.<sup>345</sup> As a result, although states have adopted drug testing requirements to sanction adults who use illegal drugs, withholding public assistance benefits from parents could inadvertently harm their children.

#### 4. Population-Based Analysis

Given everything we know about poverty, addiction, and the federal experience with SSI benefits, courts could easily conclude that withholding public assistance from people who use illegal drugs would be unlikely to achieve many of the states’ objectives, for example, incentivizing the transition from welfare to work, providing an incentive for people to stop using drugs, and combating child neglect. Then again, what about the government interest in “not funding the drug epidemic and its

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<sup>340</sup> See *supra* Part V.B.2.

<sup>341</sup> See Kristen Shook, *Does the Loss of Welfare Income Increase the Risk of Involvement with the Child Welfare System?*, 24 CHILD & YOUTH SERVS. REV. 781, 809-10 (1999).

<sup>342</sup> *Id.* at 803-04.

<sup>343</sup> John T. Cook et al., *Welfare Reform and the Health of Young Children: A Sentinel Survey in 6 U.S. Cities*, 156 ARCHIVES GEN. PSYCHIATRY 678, 682 (2002); see also Earnestine Willis et al., *Welfare Reform and Food Insecurity*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 871, 873-74 (1997).

<sup>344</sup> See Mario Batali *Food Stamp Challenge: Chef Spending \$31 on Food for One Week*, HUFFINGTON POST (May 14, 2012), [http://www.huffingtonpost.com/2012/05/15/mario-batali-food-stamp-challenge\\_n\\_1517572.html](http://www.huffingtonpost.com/2012/05/15/mario-batali-food-stamp-challenge_n_1517572.html); see also BARBARA LEE ET AL., HATCHER GROUP, TAKE THE CHALLENGE: LIVING ON A FOOD STAMP BUDGET (2007).

<sup>345</sup> Katherine Alaimo et al., *Food Insufficiency, Family Income, and Health in U.S. Preschool and School-Aged Children*, 91 AM. J. PUB. HEALTH 781, 784-85 (2001).



associated public ills?”<sup>346</sup> Or the state interest in ensuring that TANF funds reach their intended beneficiaries? Courts may well conclude that these interests are “substantial” and “beyond the normal need for law enforcement” within the parameters of *Chandler, T.L.O.*, and *Earls*. Random drug tests are also reasonably likely to identify TANF recipients who have used illegal drugs, thereby furthering the state interest in ensuring that taxpayer dollars are used as intended. As such, these interests might well pass constitutional muster.

If so, the problems for population-based analysis are plain. What legal significance should courts attach to population health? Insofar as states have asserted an interest in ensuring that TANF funds reach their intended beneficiaries—clearly not a public health goal—Parmet would be hard pressed to explain why courts should consider “the promotion of public health as a relevant factor in their analysis.”<sup>347</sup> Not unlike sharing drug test results with law enforcement agencies, requiring public assistance recipients to pass a drug test might be reasonably likely to accomplish at least some of the states’ interests and be eminently reasonable from a Fourth Amendment perspective, yet a horrible idea from a public health perspective. What should we say when the insights of public health and conventional legal reasoning conflict? Parmet might respond that “the wellbeing of the community is the highest law,” moreover, “law exists, in part, to serve the common good.”<sup>348</sup> Yet not all law has population health as its goal. Indeed, current drug testing requirements are not at all motivated by public health.

##### 5. The Least Intrusive Alternative

Even when policies are well designed and reasonably likely to accomplish their objectives, they still may impose unacceptable burdens on individual rights.<sup>349</sup> In public health, the requirement to seek the least intrusive alternative instructs officials to adopt policies that achieve their objectives as well or better than possible alternatives, while imposing the fewest burdens on individual interests.<sup>350</sup>

Nevertheless, the Supreme Court has consistently held that the Fourth Amendment does not require governments to adopt the least intrusive alternative. In *Earls*, Justice Thomas flatly asserted that a reasonable government search does not require an individualized suspicion of wrongdoing; to that end, the Fourth Amendment does not require governments to seek the least intrusive alternative.<sup>351</sup> The categorical rejection of the least intrusive alternative requirement issued by the plurality in *Earls* reflects a larger and longstanding debate about the relationship between the Reasonableness Clause and the Warrant Clause of the Fourth Amendment. Justice Thomas, an adherent to the Reasonableness school of thought, has long defended the position that the Warrant Clause does not inform the Reasonableness Clause, casting doubt about whether the Fourth Amendment would require a individualized suspicion of wrongdoing.<sup>352</sup>

Whatever one might think about the relationship between the Reasonableness Clause and the Warrant Clause, the requirement that the government adopt the least intrusive means of accomplishing its objectives remains a fundamental element of a

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<sup>346</sup> Defendant’s Response, *supra* note 182, at 21.

<sup>347</sup> PARMET, *supra* note 19, at 53.

<sup>348</sup> PARMET, *supra* note 19, at 1.

<sup>349</sup> GOSTIN, *supra* note 90, at 68.

<sup>350</sup> *Id.* at 142.

<sup>351</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002).

<sup>352</sup> *Id.* at 835.

reasonable government search. If the government can accomplish its objectives as well or better through means that impose fewer burdens on personal rights and freedoms, a more intrusive method would be patently unreasonable.<sup>353</sup> Without incorporating a least intrusive alternative requirement into the special needs doctrine, government searches may be over-inclusive, sweeping far more people than necessary under the ambit of regulation. In this case, since the vast majority of people who receive public assistance from the government do not use illegal drugs, requiring all of them to take a drug test would be vastly overinclusive, with little or no public health gain.

At times, the Supreme Court has suggested that the problem with incorporating a less intrusive alternative requirement into the special needs doctrine is that it would be too difficult for courts to imagine less intrusive alternatives to the proposed government program. In *Earls*, Justice Thomas added that “[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.”<sup>354</sup> Why should that be the case? Even if the Supreme Court were reluctant to incorporate the least intrusive alternative requirement into its general Fourth Amendment jurisprudence, that alone should not discourage the Court from adding a least intrusive alternative requirement to the special needs doctrine. Doing so would not require courts to hypothesize potential less intrusive alternatives. Instead, not unlike other areas of the law in which courts engage in a least intrusive alternative analysis, the government should bear the burden of demonstrating that its objectives could not be achieved as well or better through less intrusive methods.

#### *a. Suspicion-Based Drug Testing*

In *Earls*, a plurality of the Court insisted that the Fourth Amendment does not require consideration of less intrusive alternatives.<sup>355</sup> In *Chandler*, however, Justice Ginsburg strongly suggested that Georgia ought to explain why an appearance in the “limelight of the public stage” would not suffice to apprehend addicted candidates for public office and that the state’s failure to provide such an explanation was a constitutionally relevant consideration.<sup>356</sup> In doing so, the Supreme Court seemed to suggest that a reasonable search under the special needs doctrine might require governments to seek the least intrusive means to accomplish their objectives. In the same way, the *Chandler* majority contrasted the circumstances of candidates for public office—subject to relentless scrutiny by their peers, the public, and the press—to those of the customs agents at issue in *Von Raab*, for whom it would not have been feasible to subject their behavior to the day-to-day scrutiny that is the norm in an ordinary office environment.<sup>357</sup> The very strong suggestion emerging from *Chandler* is that when government actors are able to detect drug related

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<sup>353</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905) (holding that while governments may impose restraints on individual liberty for the common good, the exercise of police powers must be based on the “necessity of the case,” and may not go “beyond what was reasonably required for the safety of the public”); James F. Childress et al., *Public Health Ethics: Mapping the Terrain*, 30 J.L. MED. & ETHICS 169, 172 (2002) (arguing that public health officials should interpret the least intrusive alternative requirement as a corollary of the requirement that governments exercise coercive public health powers in response to a genuine public health necessity).

<sup>354</sup> *Earls*, 536 U.S. at 837.

<sup>355</sup> *Id.* at 835.

<sup>356</sup> *Chandler v. Miller*, 520 U.S. 305, 320 (1997).

<sup>357</sup> *Id.* at 321.

impairment without a drug test, blanket suspicionless drug tests are “not needed” and inappropriate.<sup>358</sup>

In contrast to the customs agents in *Von Raab*, welfare recipients are subject to constant scrutiny. Most states require regularly scheduled home visits as a condition of receiving welfare benefits, and regularly scheduled appointments with case managers to review eligibility for benefits and progress toward employment.<sup>359</sup> Since each of these activities provides an opportunity for welfare programs to identify drug-related impairment, without subjecting all welfare recipients to a drug test, *Chandler* suggests that blanket suspicionless drug tests for all welfare recipients may be unreasonable.

Instead, most states require a reasonable suspicion of drug use before conducting a drug test. A few states require TANF applicants to complete a survey or recent drug use questionnaire.<sup>360</sup> However, since few applicants disclose illegal drug use, most states rely on case managers to recognize the signs of drug use: eyes that appear red, glazed, or unable to focus; slurred speech; and poor coordination. While drug testing based on a reasonable suspicion of drug use rests on surer Fourth Amendment grounds, from a public health perspective, suspicion-based approaches are not without their problems. Although there are some classic signs of drug use, courts have at times looked favorably upon factors with questionable value: being unusually tired or unusually active; excessive meticulousness or an unusually messy appearance; changes in behavior; and even showing up late or unusually early for an activity.<sup>361</sup> If courts permit such a wide range of factors to create a reasonable suspicion of illegal drug use, unscrupulous case managers could easily use the pretense of reasonable suspicion of drug use to harass unpopular clients. Requiring case managers to request a drug test when they have reason to believe that their clients are using drugs could also undermine the trust between caseworker and client.

Yet, however imperfect, policies that require a reasonable suspicion of drug use are preferable to a regime of blanket, suspicionless drug testing for all welfare recipients. By itself, being unusually tired, or even unusually messy or disheveled, does not (or should not) create a reasonable suspicion of drug use. However, when taken together with some of the indicators described above (eyes that appear glazed or unusually fixed, poor coordination, and slurred speech), certain signs such as a particularly disheveled appearance or unusual sluggishness can create a reasonable suspicion of illegal drug use. Under such circumstances, we have less reason to worry about abuse. Policies that offer people who test positive for drugs the opportunity to participate in a substance abuse program can also mitigate some of the harmful effects of suspicion-based testing on the caseworker client relationship.

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<sup>358</sup> *Id.* at 320.

<sup>359</sup> PAMELA HOLCOMB, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE APPLICATION PROCESS FOR FOOD STAMPS, TANF, MEDICAID, AND SCHIP 9 (2003), available at [http://www.acf.hhs.gov/sites/default/files/opre/urban\\_report.pdf](http://www.acf.hhs.gov/sites/default/files/opre/urban_report.pdf).

<sup>360</sup> Sulzberger, *supra* note 1.

<sup>361</sup> Martin H. Belsky, *Random vs. Suspicion-Based Drug Testing in the Public Schools—A Surprising Civil Liberties Dilemma*, 27 OKLA. CITY U. L. REV. 1, 19 (2002).

## D. THE INDIVIDUAL INTEREST IN PRIVACY

## 1. A Fourth Amendment Perspective

Finally, courts must consider the individual interest in privacy. From a conventional Fourth Amendment perspective, the central question with respect to the privacy interests of welfare recipients is whether drug testing intrudes upon a reasonable expectation of privacy. The Supreme Court has appealed to a variety of factors in order to determine whether an expectation of privacy is reasonable. At times, the Supreme Court has suggested that whether a person has a reasonable expectation of privacy depends upon his or her relationship with the state. In *Griffin*, the Supreme Court held that although a probationer's home is protected by the Fourth Amendment, the supervisory relationship between the probationer and the State permits "a degree of impingement upon privacy that would not be constitutional if applied to the public at large."<sup>362</sup> The Supreme Court has also said that voluntary participation in a closely regulated industry can diminish an otherwise reasonable expectation of privacy.<sup>363</sup> Extending that logic to schoolchildren in *Vernonia* and *Earls*, the Court held that, not unlike "adults who choose to participate in a closely regulated industry," children who participate in extracurricular activities voluntarily subject themselves to a greater degree of regulation than others.<sup>364</sup> Moreover, public school children are subject to countless school rules and public health regulations, in addition to the rules governing their extracurricular activities, all of which work to diminish their expectations of privacy.<sup>365</sup> Applying the logic of *Vernonia* and *Earls*, courts might conclude that public assistance recipients voluntarily subject themselves to a higher degree of regulation than others and therefore enjoy a diminished expectation of privacy.

Still, arguments along these lines are vulnerable to a few objections. In both *Vernonia* and *Earls*, the Court based its decision on the custodial responsibilities of public schools when children are entrusted to their care.<sup>366</sup> In a strongly worded conclusion, the Court limited its decision to public schoolchildren and "caution[ed] against the assumption that suspicionless drug testing will readily pass muster in other contexts."<sup>367</sup> Moreover, the Supreme Court's decision in *Chandler v. Miller* casts considerable doubt on the role of voluntariness when determining individual expectations of privacy. In *Chandler*, the Supreme Court held that blanket suspicionless drug testing of all candidates for state office violated the Fourth Amendment, even though candidates seeking public office did so voluntarily.<sup>368</sup> Instead, *Chandler* suggests that whether individuals have a diminished expectation of privacy depends in large part on the strength of the government interest in a search.

The Court took a similar approach in *Skinner* and *Von Raab*. In both cases, the Supreme Court asserted that an otherwise reasonable expectation of privacy can be diminished by a compelling government interest in public safety. In *Skinner*, the Court concluded that the privacy expectations of railroad employees were

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<sup>362</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987).

<sup>363</sup> *New York v. Burger*, 482 U.S. 691, 700 (1987).

<sup>364</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (internal quotation marks omitted); see also *Bd. of Educ. v. Earls*, 536 U.S. 822, 831 (2002).

<sup>365</sup> *Vernonia*, 515 U.S. at 656.

<sup>366</sup> *Earls*, 536 U.S. at 838; *Vernonia*, 515 U.S. at 655-56.

<sup>367</sup> *Vernonia*, 515 U.S. at 665.

<sup>368</sup> *Chandler v. Miller*, 520 U.S. 305, 305 (1997).

diminished by virtue of “their participation in an industry that is heavily regulated to ensure safety,” notably, “a goal, dependent in substantial part, on the health and fitness of covered employees.”<sup>369</sup> Likewise, with respect to the customs agents at issue in *Von Raab*, the Court concluded that, since “successful performance of their duties depends uniquely on their judgment and dexterity,” customs agents “cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.”<sup>370</sup>

Taken together, *Chandler*, *Von Raab*, and *Skinner* suggest that what matters is whether the government has demonstrated an “important” or “substantial” interest in requiring all public assistance recipients to pass a drug test. Even if the government interests at stake are more than symbolic, the government interest in saving a few thousand in taxpayer dollars probably does not rank as substantial or important within the meaning of *Chandler*. To the extent that the government has failed to demonstrate a substantial or important interest in requiring all public assistance recipients to pass a drug test, courts should conclude that the government interest in a suspicionless drug test is not sufficiently vital to outweigh the individual interest in privacy.

## 2. A Public Health Perspective

In *Katz v. United States*, the Supreme Court held that while the Fourth Amendment protects reasonable expectations of privacy, the reasonable expectations of privacy held by citizens are not the only interests the Fourth Amendment protects.<sup>371</sup> To the contrary, “its protections go further, and often have nothing to do with privacy at all.”<sup>372</sup> At times the Court has instead underscored the dignity and liberty interests implicated by a blanket search. Famously remarking upon prohibition era laws aimed at concealed transportation of liquor in *Carroll v. United States*, Chief Justice Taft added: “It would be intolerable and unreasonable” if a prohibition agent were authorized to stop every automobile on the highway “and thus subject all persons to the inconvenience and indignity of a search.”<sup>373</sup>

In the same way, a large body of literature on social epidemiology, law, and social status points toward a broader understanding of Fourth Amendment values. As Scott Burris and Ichiro Kawachi have argued, law may be a powerful social determinant of health.<sup>374</sup> Burris and Kawachi posit two relationships between law and public health. First, the law may play a role in creating and maintaining the social structures that influence population health such as adequate housing, workplace safety, income inequality, and stable employment.<sup>375</sup> The law might also act as a pathway along which social determinants impact population health.<sup>376</sup> Drawing from the literature on procedural justice, Burris and Kawachi argue that encounters with the law can be a “powerful psychosocial experience” through which “low socioeconomic status is reinforced and driven home.”<sup>377</sup>

<sup>369</sup> *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 627 (1989).

<sup>370</sup> *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989).

<sup>371</sup> *Katz v. United States*, 389 U.S. 347, 347 (1967).

<sup>372</sup> *Id.* at 350.

<sup>373</sup> *Carroll v. United States*, 267 U.S. 132, 153-53 (1925).

<sup>374</sup> Scott Burris et al., *Integrating Law and Social Epidemiology*, 30 J.L. MED. & ETHICS 510, 510 (2002).

<sup>375</sup> *Id.* at 511.

<sup>376</sup> *Id.* at 512.

<sup>377</sup> *Id.* at 513.

Ethnographic studies on welfare point toward similar conclusions. Describing her experience with a local welfare office, one woman in Appalachian Ohio remarked: “Well, I feel cheap when I walk in there. I feel that everybody’s looking at me and like she ain’t got no job, she’s dirty, and I just feel worse when I go in there and come out than I did going in there.”<sup>378</sup> Another added: “They act like they own us. [Researcher:] How does that make you feel? [Response:] It makes me feel real low.”<sup>379</sup>

It may be that encounters like this one have implications for our health. In a well-known study of British civil servants, Michael Marmot found that lower positions in the occupational hierarchy were associated with greater risk for coronary heart disease.<sup>380</sup> Differences in access to health care could not explain the social gradient in health since all of the civil servants who participated in the study had universal access to health care. The study also found that risk factors such as smoking, high blood pressure, and high cholesterol levels accounted for less than one-third of the gradient in mortality due to coronary heart disease.<sup>381</sup> Instead, researchers believe that low social status and low control at work, common among employees who occupy lower rungs of the occupational hierarchy, could explain their greater risk for coronary heart disease.<sup>382</sup>

Further research supports the hypothesis that low social status can affect our health through the impact of stress on the cardiovascular system and the immune system. Repeated exposure to stressful events or failure to shut off the stress response efficiently can create wear and tear on the body, contributing to what social epidemiologists refer to as “allostatic load.”<sup>383</sup> Over time, the cumulative burden of daily stressors can wear down the cardiovascular and immune systems, leading to diabetes, obesity, hypertension and greater susceptibility to infection.<sup>384</sup>

What might these findings imply for the Fourth Amendment? What might they imply for the special needs doctrine? From a public health perspective, the Fourth Amendment protects more than our interests in privacy. By shielding us from the indignities of a government search, the Fourth Amendment protects our health.<sup>385</sup> The literature on social epidemiology suggests that the harms associated with suspicionless drug testing include more than the fleeting embarrassment of providing a urine sample while a lab technician stands outside the door “listening for the sounds of urination” and inspects the sample for tampering.<sup>386</sup> Instead, the problem may be the way in which degrading treatment “gets under the skin.”<sup>387</sup>

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<sup>378</sup> JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 78 (2001).

<sup>379</sup> *Id.* at 77.

<sup>380</sup> Michael G. Marmot, *Status Syndrome: A Challenge to Medicine*, 295 *JAMA* 1304, 1304 (2006); see also Harry Hemingway et al., *Does Autonomic Function Link Social Position to Coronary Risk? The Whitehall II Study*, 111 *CIRCULATION* 3071, 3071 (2005).

<sup>381</sup> Hemingway et al., *supra* note 381, at 3074.

<sup>382</sup> *Id.* at 3074.

<sup>383</sup> Bruce S. McEwen & Teresa Seeman, *Protective and Damaging Effects of Mediators of Stress: Elaborating and Testing the Concepts of Allostasis and Allostatic Load*, 896 *ANNALS N.Y. ACAD. ARTS & SCI.* 30, 30 (1999).

<sup>384</sup> Burris et al., *supra* note 374, at 513.

<sup>385</sup> See Norman Daniels et al., *Why Justice Is Good for Our Health: The Social Determinants of Health Inequalities*, 128 *DAEDALUS* 215 *passim* (1999) (advancing a parallel argument in the literature on public health and ethics).

<sup>386</sup> STUDENTS FOR SENSIBLE DRUG POL’Y, *ELIMINATE THE HARMFUL AND COSTLY STUDENT DRUG TESTING GRANTS 2* (2013), available at <http://ssdp.org/assets/files/campaigns/sdt/drug-testing-backgroundunder.pdf>.

<sup>387</sup> Burris et al., *supra* note 374, at 513.

## VI. DRUG TESTING AND UNCONSTITUTIONAL CONDITIONS

Proposals to condition public assistance benefits on passing a drug test raise a Fourth Amendment question and courts are likely to analyze these statutes under the special needs doctrine. However, as a conditional benefit, these policies also implicate the unconstitutional conditions doctrine, and in doing so they unearth a longstanding puzzle in constitutional law. Although neither the states nor the federal government are under an obligation to provide public assistance benefits, may the government provide public assistance on the condition that the recipient waive or surrender a constitutional right? Notwithstanding the power of government to withhold valuable benefits absolutely, the Supreme Court has limited the power of governments to provide benefits conditionally. To that end, the unconstitutional conditions doctrine limits the power of government to condition benefits on the waiver of a constitutional right. Part VI applies the unconstitutional conditions doctrine to drug testing and public assistance, with special attention to how the Fourth Amendment prohibition against unreasonable searches and seizures might complicate the unconstitutional conditions problem. Part VI concludes by taking a closer look at the unconstitutional conditions doctrine and its critics. Part VI also asks how public health can deepen our understanding of the unconstitutional conditions doctrine.

### A. UNCONSTITUTIONAL CONDITIONS

#### 1. Conditions Overturned

The Supreme Court applied the unconstitutional conditions doctrine to individual rights for the first time in *Speiser v. Randall*.<sup>388</sup> In *Speiser*, the Supreme Court struck down a California statute that required WWII veterans to swear loyalty to the state as a condition of receiving a tax exemption.<sup>389</sup> In an opinion by Justice Brennan, the Court held that denying a tax exemption to veterans who refused to sign a loyalty oath would in effect “penalize” the claimants for engaging in proscribed speech, or “coerce” them into refraining from disloyal speech.<sup>390</sup> To Brennan, the deterrent effect of the denial was no different than if the state were to issue a “fine” against proscribed speech.<sup>391</sup>

In *Sherbert v. Verner*, the Supreme Court held that South Carolina could not deny unemployment benefits to a woman who refused to work on Saturday, the Sabbath Day of her faith, without burdening her interest in free exercise and violating the First Amendment.<sup>392</sup> The Court conceded that the pressure on Mrs. Sherbert was at best indirect.<sup>393</sup> No criminal statute compelled Mrs. Sherbert to work on Saturdays. However, as Justice Brennan wrote: “[I]f the purpose or effect of a law is to impede the observance . . . of religion,” then “that law is constitutionally invalid even though the burden may be characterized as being only indirect.”<sup>394</sup> In doing so, the Court began to answer a question left unanswered in *Speiser*: How can

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<sup>388</sup> *Speiser v. Randall*, 357 U.S. 513 (1958).

<sup>389</sup> *Id.* at 518.

<sup>390</sup> *Id.* at 518-19.

<sup>391</sup> *Id.* at 518.

<sup>392</sup> *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963).

<sup>393</sup> *Id.* at 413.

<sup>394</sup> *Id.* at 404.

a condition that we are free to accept or reject actually “burden” or “impinge upon” protected First Amendment interests?

In *Sherbert*, the Court alluded to three justifications for a more searching review. First, the pressure on Mrs. Sherbert to forgo the practice of her religion was “unmistakable.”<sup>395</sup> By conditioning unemployment benefits on acceptance of Saturday work, South Carolina presented Mrs. Sherbert with an impossible choice: follow the basic precepts of her religion and forego benefits on the one hand, or accept work and violate her religious beliefs on the other.<sup>396</sup> Second, the conditional denial “threatened to produce a result which the State could not command directly.”<sup>397</sup> Third, forcing Mrs. Sherbert to choose between her religion and unemployment benefits “puts the same kind of burden upon the free exercise of her religion as would a fine imposed against appellant for Saturday worship.”<sup>398</sup> Even though the law did not require Mrs. Sherbert to accept Saturday work, the coercive and deterrent effects were such that the Court would require South Carolina to come forward with a compelling state interest to justify the burden on free exercise. In its defense, South Carolina argued that the statute was justified by a state interest in deterring fraudulent religious claims.<sup>399</sup> The Court found no evidence of fraud, and more importantly, even if there had been fraud, South Carolina failed to demonstrate that less restrictive means could not have achieved the government’s objectives.<sup>400</sup>

Several years later the Court turned directly to public assistance benefits in *Shapiro v. Thompson*.<sup>401</sup> In *Shapiro*, the Court struck down state statutes, as well as a statutory provision in the District of Columbia, that denied welfare benefits to residents who had not resided in their state or district for at least one year immediately preceding their application for welfare.<sup>402</sup> The Court, per Justice Brennan, held that the statute created an invidious distinction between residents who had resided within the district for a year or more, and those who had been there for less than a year.<sup>403</sup> He added: “On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of families to obtain the very means to subsist—food, shelter, and other necessities of life.”<sup>404</sup> The District of Columbia asserted a compelling state interest in preserving the fiscal integrity of public assistance programs as well as administrative interests in budget planning and minimizing the risk of fraud.<sup>405</sup> However, the *Shapiro* Court rejected both claims, and paid little if any attention to the alleged administrative interests. Even if the state had acted on a compelling governmental interest in minimizing fraud, the Supreme Court held that there were “less drastic means” available to minimize the risk.<sup>406</sup>

In *Memorial Hospital v. Maricopa County*, the Supreme Court also struck down an Arizona statute that conditioned nonemergency medical assistance at the county expense on residence within the state for at least the preceding twelve months.<sup>407</sup> In

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<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 405.

<sup>398</sup> *Id.* at 404.

<sup>399</sup> *Id.* at 407.

<sup>400</sup> *Id.*

<sup>401</sup> *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>402</sup> *Id.* at 621-22.

<sup>403</sup> *Id.* at 627.

<sup>404</sup> *Id.* at 627.

<sup>405</sup> *Id.* at 633-36.

<sup>406</sup> *Id.* at 637.

<sup>407</sup> *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 250 (1974).



an opinion by Justice Marshall, the Court clarified the deterrence and penalty rationales in *Shapiro*. Although the Court would consider whether a durational residence requirement deterred the right to travel, proof of actual deterrence was unnecessary.<sup>408</sup> Instead, a residence requirement would trigger the *Shapiro* compelling interest test if it includes “any classification which serves to *penalize* the exercise of the right [to travel].”<sup>409</sup> The Court took *Shapiro* to stand for the proposition that a “denial of the ‘basic necessities of life’” constitutes a penalty on the right to travel. To Justice Marshall, medical care was as much a basic necessity of life as welfare.<sup>410</sup>

Like *Speiser* and *Sherbert* before it, in *Memorial Hospital* the Court left the term “penalty” undefined, and instead hinted at when a condition might rise to the level of a penalty. First, Justice Marshall distinguished the “basic necessities of life” at issue in *Shapiro* from other instances in which the Court has upheld a one year in-state residence requirement as condition of receiving lower in-state tuition. In doing so, Marshall suggested that the essential nature of medical care contributed to the willingness of the Court to characterize its denial as a penalty.<sup>411</sup> Importantly, Justice Marshall added: “Whatever the ultimate parameters of the *Shapiro* penalty analysis[,] . . . governmental privileges and benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.”<sup>412</sup> In other words, whether or not a condition that would deny nonemergency medical care constituted a “penalty” within the meaning of *Shapiro*, the fact that medical care is a basic necessity has been reason enough for courts to review a potential denial with heightened scrutiny.

## 2. Conditions Upheld

In *Sherbert* and its progeny, as well as *Shapiro* and *Memorial Hospital*, the Supreme Court struck down the offending statute on the ground that it penalized or deterred the exercise of a fundamental right.<sup>413</sup> In the abortion funding cases *Maher v. Roe*<sup>414</sup> and *Harris v. McRae*,<sup>415</sup> the Court seemed to move away from the penalty rationale. In *Maher*, the Supreme Court held that equal protection does not obligate states to pay for nontherapeutic abortions simply because they elect to pay for the expenses associated with childbirth.<sup>416</sup> In *Harris*, the Court held that the federal government is not required to pay for medically necessary abortions, even though it funds other medically necessary services, including childbirth.<sup>417</sup> In both cases, the Court reasoned that “[a] refusal to fund protected activity without more cannot be equated with the imposition of a ‘penalty’ on that activity.”<sup>418</sup>

Several years later, in *Lyng v. International Union*, the Court upheld an amendment to the Food Stamp Act that prevented households from becoming

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<sup>408</sup> *Id.* at 257-59.

<sup>409</sup> *Id.* at 258 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)).

<sup>410</sup> *Mem’l Hosp.*, 415 U.S. at 259.

<sup>411</sup> *Id.* at 260.

<sup>412</sup> *Id.* at 285.

<sup>413</sup> *See id.* at 250; *Shapiro*, 394 U.S. at 622; *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

<sup>414</sup> *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>415</sup> *Harris v. McRae*, 448 U.S. 297 (1980).

<sup>416</sup> *Maher*, 432 U.S. at 464.

<sup>417</sup> *Harris*, 448 U.S. at 298.

<sup>418</sup> *Id.* at 317 n.19; *see also Maher*, 432 U.S. at 476 n.8 (rejecting the argument that “[Connecticut] ‘penalizes’ the woman’s decision to have an abortion by refusing to pay for it”).

eligible for food stamps if members of the household were on strike.<sup>419</sup> The Court thought it “exceedingly unlikely” that any more than a few workers might leave their families or their unions in order to increase the amount of food going to their households.<sup>420</sup> Even if the amendment had pressured the associational rights of at least some strikers, the Constitution does not provide an entitlement to funds that might be necessary to realize the exercise of those rights.<sup>421</sup>

In *Dandridge v. Williams*, the Supreme Court also upheld a Maryland statute that limited the absolute dollar amount that AFDC families could receive to no more than \$250 per family, per month, regardless of family size or need.<sup>422</sup> Where *Shapiro* and *Memorial Hospital* implicated a fundamental right to travel, the AFDC limitation implicated no such right, and the Court held that the statute was rationally supportable on any number of grounds, including a state interest in promoting gainful employment and family planning, an interest in allocating public funds to as many families as possible, and an interest in maintaining some degree of equity between welfare recipients and wage earners.<sup>423</sup> Through Justice Stewart, the Court acknowledged “the dramatically real factual difference” between the impoverished circumstances of persons seeking public assistance and other instances in which the Court applied rational basis review, but found no reason to apply a more rigorous standard.<sup>424</sup>

Finally, in *Wyman v. James*, the Supreme Court upheld a New York statute that authorized home visits by an AFDC caseworker on the theory that home visits were not searches within the meaning of the Fourth Amendment, and even if they were, home visits were not unreasonable.<sup>425</sup> The Supreme Court also touched upon the unconstitutional conditions problem that arises when governments condition public assistance benefits on the surrender of a Fourth Amendment right. In a sharply worded opinion, Justice Blackmun argued that Mrs. James certainly had a “right” to refuse home visits, but doing so would simply result in a termination of benefits, and “nothing of a constitutional magnitude” was involved.<sup>426</sup> If anything, to the *Wyman* majority, Mrs. James was the one who appeared to be unreasonable:

What Mrs. James appears to want from the agency that provides her and her infant son with the necessities of life is the right to receive those necessities upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms and to avoid questions of any kind.<sup>427</sup>

To Justice Blackmun and members of the majority, the circumstances confronting Mrs. James were analogous to that of a taxpayer who refuses to furnish proof of a deduction. The taxpayer would be fully within his “right” not to produce proof, but doing so would result in “a detriment of the taxpayer’s own making.”<sup>428</sup>

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<sup>419</sup> *Lying v. Int’l Union*, 485 U.S. 360, 360-61 (1988).

<sup>420</sup> *Id.* at 365.

<sup>421</sup> *Id.* at 369.

<sup>422</sup> *Dandridge v. Williams*, 397 U.S. 471, 477-78 (1970).

<sup>423</sup> *Id.* at 483-84.

<sup>424</sup> *Id.* at 485. Nor did the *Dandridge* majority pause to consider *Memorial Hospital*, where the Court indicated that conditions resulting in a denial of the basic necessities of life require strict scrutiny under the Equal Protection Clause. *Id.*

<sup>425</sup> *Wyman v. James*, 400 U.S. 309, 309-10 (1971).

<sup>426</sup> *Id.* at 324.

<sup>427</sup> *Id.* at 321.

<sup>428</sup> *Id.* at 324.

## B. THE FOURTH AMENDMENT

When analyzing unconstitutional conditions claims, courts will usually begin by asking whether the condition “burdens” or “impinges upon” protected interests. If so, courts will require the government to demonstrate that the regulation is narrowly tailored to a compelling governmental interest. If not, courts will sustain the regulation with evidence of a rational relationship between means and ends. Before addressing those questions, however, the Fourth Amendment may present a unique set of concerns. Unconstitutional conditions problems arise when governments attempt to condition benefits on the waiver of a constitutional right. What might that imply for the Fourth Amendment prohibition against unreasonable searches and seizures? Must a plaintiff alleging a violation of the unconstitutional conditions doctrine first establish that her Fourth Amendment rights have been violated before courts will proceed and consider her unconstitutional conditions claim?

In *Sanchez v. San Diego County*, the Ninth Circuit considered and promptly rejected an unconstitutional conditions challenge to a government regulation that required welfare recipients to submit to a home “walk through” as a condition of participation in a county welfare program.<sup>429</sup> Having established that home visits were reasonable, the Ninth Circuit found that the plaintiffs could not prevail on their unconstitutional conditions claim, since the Fourth Amendment only prohibits unreasonable searches and seizures.<sup>430</sup> The difference between the Ninth Circuit approach on the one hand and the plaintiff’s position on the other raises a hard question about how we should view Fourth Amendment rights for the purposes of an unconstitutional conditions analysis. Should we begin with the plaintiff’s Fourth Amendment rights *ex ante*, viewing the government as proposing to trade some part of those rights for valued benefits? Or should we consider the scope of the plaintiff’s rights *ex post*, viewed in relationship to a particular government program?

Consider *Lebron* once more. Like anyone else, Mr. Lebron has a Fourth Amendment right to refuse unreasonable searches and seizures. Before Mr. Lebron walks into a Florida TANF office and signs on the dotted line, his bundle of Fourth Amendment rights includes the right to refuse a suspicionless drug test. In order to determine the reasonableness of a government search, courts will weigh competing governmental and individual interests. Absent an extraordinarily compelling or weighty government interest—for example, an extraordinary public health threat—Florida could not order *all* Floridians to submit to a drug test, including Mr. Lebron. Nor, under garden-variety circumstances, could Florida criminalize the failure to submit to a drug test. The result is that *ex ante* TANF applicants have a Fourth Amendment right to refuse a drug test, and statutes like H.B. 353 in Florida offer them an opportunity to exchange some part of that right for public assistance benefits.

The same was true in *Speiser v. Randall*, where the Supreme Court struck down a California statute that required World War II veterans to swear loyalty to the state as a condition of receiving a tax exemption.<sup>431</sup> The First Amendment prohibits the State of California from abridging freedom of speech.<sup>432</sup> The result is that WWII veterans have a First Amendment right to engage in disloyal speech. Why? With very few exceptions, the government does not have a compelling interest in

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<sup>429</sup> *Sanchez v. San Diego Cnty.*, 464 F.3d 916, 918 (9th Cir. 2007).

<sup>430</sup> *Id.* at 930-31.

<sup>431</sup> *Speiser v. Randall*, 357 U.S. 513, 529 (1958).

<sup>432</sup> U.S. CONST. amend. I.

imposing prior restraints on speech. In *Speiser*, California offered veterans an opportunity to exchange their First Amendment right to engage in disloyal speech for a tax exemption.<sup>433</sup> Had the Supreme Court adopted the Ninth Circuit approach in *Speiser*, Justice Brennan would have required World War II veterans to demonstrate that they have a First Amendment right to engage in disloyal speech *and* receive a tax exemption, before addressing the unconstitutional conditions problem.

Ordinarily, however, the Court considers the scope of the plaintiff's rights *ex ante*, without reference to the particular government program in question. Consider *Sherbert v. Verner*, where the Supreme Court held that South Carolina could not deny unemployment benefits to a woman who refused to work on Saturday, the Sabbath Day of her faith, without burdening her interest in free exercise and violating the First Amendment.<sup>434</sup> Justice Brennan began by describing the scope of Mrs. Sherbert's First Amendment interest in free exercise. He explained that while the Court had rejected challenges to regulation of religious conduct when that conduct posed a substantial threat to public safety, Mrs. Sherbert's First Amendment objection to Saturday work fell beyond the reach of government regulation.<sup>435</sup> Bearing the scope of Mrs. Sherbert's First Amendment interest in mind—truncated only by the prior balance of government and individual interests—the Court then considered whether disqualifying Mrs. Sherbert for unemployment benefits imposed a burden on her interest in free exercise.<sup>436</sup> Concluding that it did, the Court then asked whether the regulation was narrowly tailored to a compelling governmental interest.<sup>437</sup> If courts were to adopt the approach taken by the Ninth Circuit in *Sanchez*, doing so would mean that courts will inevitably prune the scope of Fourth Amendment protection twice: once since the plaintiff's *ex ante* bundle of Fourth Amendment rights is not absolute (like Mrs. Sherbert, Mr. Lebron's *ex ante* bundle of Fourth Amendment rights has already been limited by case law); and a second time, when courts balance the plaintiff's residual Fourth Amendment interests in privacy against the government interest in a suspicionless search, all before reaching the unconstitutional conditions problem, if at all.

Courts should instead ask whether the government program in question burdens or impinges upon the plaintiff's *ex ante* bundle of Fourth Amendment rights. However, even if there is a viable Fourth Amendment right in play, determining the existence of that right only marks the beginning of an inquiry into the unconstitutional conditions problem. The important question is this: Would requiring public assistance recipients to pass a drug test, without individualized suspicion of drug use, unduly "burden" or "impinge upon" their Fourth Amendment interests in privacy? Despite the importance of these questions, the principle tools the Court relies upon to answer them are hopelessly indeterminate.

Following the logic of *Speiser*, *Sherbert*, and *Shapiro* would lead courts to ask whether policies that condition public assistance benefits on passing a drug test are best understood as a "penalty" on claimants for exercising their Fourth Amendment rights, or better understood as a mere "non-subsidy" of Fourth Amendment rights. On one hand, courts could easily conclude that these conditions amount to no more than a mere non-subsidy. Even if claimants have a Fourth Amendment right to

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<sup>433</sup> *Speiser*, 357 U.S. at 516.

<sup>434</sup> *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963).

<sup>435</sup> *Speiser*, 357 U.S. at 403.

<sup>436</sup> *Id.* at 403-04.

<sup>437</sup> *Id.* at 406-07.

refuse a drug test, *Maher* and *Harris* stand for the proposition that “without more,” refusal to fund a protected activity cannot be equated with the imposition of a “penalty” on that activity. Following *Lyng* and *Dandridge*, courts may conclude that while claimants certainly have a Fourth Amendment right to refuse a drug test, the Constitution does not obligate governments to subsidize the exercise of that right, nor does the Constitution shield claimants from the resulting economic hardship. On the other hand, *Lyng* and *Dandridge* rest uncomfortably with *Shapiro* and *Memorial Hospital*, where the Court affirmed that the denial of a “basic necessity of life” can be tantamount to the imposition of a penalty on the exercise of a fundamental right.

### C. RETHINKING THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Given the current state of affairs, legal scholars have offered a variety of approaches to the unconstitutional conditions doctrine, which range from theories based on coercion to the systemic effects of conditional allocations on the distribution of power between government and rightholders. None of these approaches, however, fully capture what might go wrong when governments condition public assistance benefits on the waiver of a constitutional right.

#### 1. Coercion

The Supreme Court has often suggested that the problem with unconstitutional conditions stems from their coercive effect on beneficiaries.<sup>438</sup> The Court took this approach in *Speiser*, where it opined that denying a tax exemption to veterans who refuse to sign a loyalty oath would have the effect of “coercing claimants to refrain from the proscribed speech.”<sup>439</sup> In *Sherbert*, the Court described the pressure on Mrs. Sherbert to forego her Sabbath as “unmistakable,” once again suggesting that the problem with offering unemployment benefits on the condition that beneficiaries accept Saturday work stems from the coercive pressure placed on beneficiaries.<sup>440</sup> Still, why should we regard these conditions as coercive? In *South Dakota v. Dole*, the Supreme Court held that conditions on otherwise discretionary federal spending were permissible insofar as they were not “so coercive as to pass the point at which pressure turns into compulsion.”<sup>441</sup> Yet, the problem with this approach is that it threatens to sweep far too much under the heading of coercion. Where Justice Brennan saw coercion in *Sherbert*, one might argue that South Carolina merely presented Mrs. Sherbert with a hard choice, but such choices are not *prima facie* wrong.<sup>442</sup>

In an early and influential article, Seth Kreimer attempts to respond to complaints of this kind by proposing a series of baselines—history, equality, and prediction—from which to determine whether a conditioned benefit amounts to an offer or a coercive threat.<sup>443</sup> As Kreimer concedes, the obvious problem with a multiple baseline approach is not only that such baselines might well be indeterminate, but how should courts proceed when baselines conflict? Beyond that, however, his analysis suffers from a number of conceptual problems, most of them

<sup>438</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428 (1989).

<sup>439</sup> *Speiser*, 357 U.S. at 519.

<sup>440</sup> *Sherbet v. Verner*, 374 U.S. 398, 404 (1963).

<sup>441</sup> *South Dakota v. Dole*, 483 U.S. 203, 204 (1987).

<sup>442</sup> For an argument along these lines, see ALAN WERTHEIMER, *EXPLOITATION* 123-57 (1999).

<sup>443</sup> Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1351-52 (1984).

stemming from his choice of baselines. Take Kreimer's example: "If for each of the last twenty years the mayor has provided patronage to the advertising department of a newspaper, the threat to stop doing so unless the newspaper changes its editorial policies would legitimately be viewed as coercion."<sup>444</sup> On the other hand, if the mayor announced an intention to provide previously unavailable funds, conditional on a change in policy, that announcement would not seem to penalize the existing policy, "for it does not reduce the range of choices available to the newspaper."<sup>445</sup> Using history as the relevant baseline, Kreimer locates coercion in the mayor's threat to make the newspaper worse off than it was before the change in policy.<sup>446</sup>

But why should that be the case? It might be that Kreimer's example works by taking advantage of our suspicion that the mayor's office has used public funds to her political advantage: "I'll let you keep \$1000 in public funds if you stop criticizing my administration." Under those circumstances, it would probably matter to us that the mayor's announcement threatens to use public dollars to suppress protected First Amendment speech. But suppose the mayor announced that her office would no longer continue to provide public funds to papers with a track record of libel, or a history of reporting baseless (though not libelous) sleaze. In both cases, we might find it more difficult to view her announcement as coercive. What seems to matter here is the legal baseline, rather than the historical baseline.

Suppose instead that in an effort to get kids to read, the mayor issues an announcement that for the coming fiscal year her office will condition 5% of previously available city patronage on the creation of a children's section in the local paper. Since the city will not offer additional funds, the announcement means that newspapers choosing not to comply will lose public dollars on which they have come to rely, and the policy will reduce the range of choices available to newspapers relative to the historical baseline. If we were to use the historical baseline as a guide, Kreimer's approach would lead us to the conclusion that the mayor's efforts are at least *prima facie* coercive, rather than an unobjectionable change in public policy.

Although Kreimer concedes that there a number of problems with the historical baseline, similar problems arise if we substitute equality or prediction as the baseline from which to determine coercion. Returning to the original example, Kreimer claims that even if there were no history of public advertising (and thus we could not use history as a baseline) a mayoral decision to place advertising in one paper but not another "looks significantly different from" a decision not to buy advertising at all.<sup>447</sup> In the same way, to Kreimer, excluding Speiser from benefits because he refused to sign a loyalty oath "looks like a penalty," even if veterans were required to pay property taxes *ex ante*.<sup>448</sup> But why? Kreimer finds coercion in "singling out" individuals for differential treatment merely because they have chosen to exercise their constitutional rights, even though in all other respects they are no different from similarly situated citizens who have received the benefit.<sup>449</sup> While it is true that Speiser was in a sense "singled out" for a penalty, why not say that that veterans who took the oath received a bonus for their loyalty, and Speiser simply did not qualify?<sup>450</sup>

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<sup>444</sup> *Id.* at 1359.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.* at 1359-63.

<sup>447</sup> *Id.* at 1363.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.* at 1368.

<sup>450</sup> *Id.* at 1356. Kreimer concedes that this may be a problem but proceeds without an adequate response.

Others, including Kenneth Simons and Seth Kreimer, have argued for a predictive baseline so that coercion is determined by measuring the condition against what the government would do if it could not impose the condition in question.<sup>451</sup> If the government would provide the benefit in the normal course of events, the condition is a threat; if not, the condition is an offer. However, arguments along these lines are irreducibly speculative and perhaps underestimate the willingness to defund programs that serve vulnerable populations.<sup>452</sup>

## 2. Systemic Effects

A second approach, advanced by Kathleen Sullivan, focuses not on coercion, but rather on the systemic effects of conditional allocations and the distribution of power between government and its citizens.<sup>453</sup> As Sullivan writes, a systemic account takes as its starting point the proposition that “the preferred constitutional liberties at stake in unconstitutional conditions cases do not simply protect individual rightholders piecemeal,” but instead “determine the overall distribution of power between government and rightholders generally.”<sup>454</sup> Sullivan argues that unconstitutional conditions not only skew the distribution of power between government and rightholders, but also among rightholders insofar as the government engages in facial discrimination between those who do and not comply with the condition.<sup>455</sup> A systemic approach would require strict scrutiny whenever the “primary purpose or effect” of the condition is to redistribute power to government or “to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government.”<sup>456</sup>

When governments impose conditions on public assistance benefits, however, their purpose is usually not to pressure the exercise of a constitutional right. In fact, Sullivan argues that when a condition has “so obvious a purpose other than pressuring rights,” the condition is not suspect and strict scrutiny need not apply.<sup>457</sup> Sullivan describes government efforts to conserve public dollars, or prevent the misuse of taxpayer dollars, as prime examples of a non-rights pressuring purpose. Instead, Sullivan rests the case for strict review on her claim that imposing a condition on public assistance could create an unconstitutional “donor caste” if, for example, governments were to condition public assistance on donating an organ to an organ bank, or donating service as a surrogate mother in a public program.<sup>458</sup>

Sullivan’s approach has the virtue of offering a robust response to critics who argue that conditional allocations are unobjectionable to the extent that they are “liberty expanding.” Even when a government condition falls short of coercion, the condition might be objectionable to the extent that it imposes systemic effects on others. With our legacy of slavery and indentured servitude, we might prefer not to

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<sup>451</sup> See Kreimer, *supra* note 443, at 1371; Kenneth Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289, 299 (1989).

<sup>452</sup> See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 219 (1971) (closing public swimming pools rather than operating them on a desegregated basis did not violate Equal Protection); see also Robert L. Green & Louis J. Hofmann, *A Case Study of the Effects of Educational Deprivation on Southern Rural Negro Children*, 34 J. NEGRO EDUC. 327 *passim* (1965) (discussing the decision by Prince Edwards County to close all public schools rather than comply with court ordered desegregation).

<sup>453</sup> Sullivan, *supra* note 438, at 1420.

<sup>454</sup> *Id.* at 1490.

<sup>455</sup> *Id.*

<sup>456</sup> *Id.* at 1499-1500.

<sup>457</sup> *Id.* at 1501.

<sup>458</sup> *Id.* at 1498.

live in society where states condition public assistance benefits on invasive surgery or surrogate motherhood. Yet, for the most part, state efforts to attach conditions to public assistance benefits are not so daring. Nor do they disturb the distribution of power between governments and the rightholders that Sullivan describes. Instead, state efforts in this area are driven by a non-rights pressuring purpose, and therefore fall beyond the systemic approach Sullivan describes.

### 3. A Public Health Perspective

From a public health perspective, the case for strict scrutiny rests on the contribution that public assistance benefits make to population health. In its unconstitutional conditions cases, the Supreme Court has vacillated between affording greater judicial scrutiny to conditions that threaten the subsistence of the poor, while in other moments stubbornly refusing to apply more rigorous standards to public assistance benefits as it did in *Dandridge*.<sup>459</sup> Below, I assert that judicial ambivalence in this area is mistaken. Instead, the limited ability of low-income families to protect their interests in the political process provides ample reason for courts to apply strict review when legislatures attach conditions to benefits like TANF, public housing, or food stamps.

#### a. *The Social Determinants of Health*

A large body of literature on income and health supports an intuition that most of us have developed based on our everyday experience: wealthy people tend to be better off and people with higher incomes tend to be healthier than their counterparts.<sup>460</sup> Within the literature on income and health, several studies suggest that income inequality may be a key determinant of population health. A widely cited study on income inequality and mortality in the United States found that metropolitan areas with high income inequality and low average income had an excess mortality of 139.8 deaths per 100,000 people compared with areas of low inequality and high income.<sup>461</sup> To put these numbers in perspective, the authors note that the number of excess deaths due to income inequality exceeds the number of deaths due to lung cancer, diabetes, motor vehicle crashes, HIV infection, suicide, and homicide combined.<sup>462</sup> A similar study found that income inequality in the United States was strongly associated with mortality, even after controlling for poverty, smoking, median household income, and race.<sup>463</sup>

Several hypotheses have been advanced to explain why income inequality might matter to our health. It may be that income inequality affects health through its

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<sup>459</sup> Compare *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) (holding that a state regulation placing an absolute limit of \$250 per month on AFDC grants regardless of family size did not violate the Equal Protection Clause), with *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) (determining the equal protection clause is violated by discriminatory laws concerning the status of birth when the classification is not justified by a state interest) and *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (finding provisions of state welfare laws conditioning benefits on citizenship and requiring durational residency for aliens violated the Equal Protection Clause).

<sup>460</sup> John W. Lynch et al., *Income Inequality and Mortality in Metropolitan Areas of the United States*, 88 AM. J. PUB. HEALTH 1074, 1074 (1998).

<sup>461</sup> *Id.*

<sup>462</sup> *Id.* at 1079.

<sup>463</sup> Bruce P. Kennedy et al., *Income Distribution and Mortality: Cross Sectional Ecological Study of the Robin Hood Index in the United States*, 312 BRIT. MED. J. 1004, 1004 (1996).



impact on spending.<sup>464</sup> As the rich flee to gated communities, they tend to rely more on privately financed services, leading to underinvestment in public education, transportation, health care, and other publically financed services on which low-income communities rely.<sup>465</sup> A second possible pathway involves the relationship between income inequality, social capital, and social cohesion.<sup>466</sup> A widening income gap between the rich and the poor may result in a general erosion of the social fabric, leading to increased hostility and distrust.<sup>467</sup> Third, income inequality may affect our health through its effect on social status and social participation.<sup>468</sup> As the gap between the haves and have-nots widens, material deprivation may impede our ability to participate fully in society, leading to isolation and depression.<sup>469</sup>

An alternative school of thought rejects the income inequality hypothesis and instead maintains that absolute income levels are the key determinants of population health.<sup>470</sup> On the latter view, what matters is whether the “floor is high enough” and if it is, relative income might be less important.<sup>471</sup> Both hypotheses, however, suggest that income assistance programs like TANF can make an important contribution to population health, either by narrowing the income gap between groups or by elevating the social safety net.

#### *b. Unconstitutional Conditions*

What might these findings imply for a theory of unconstitutional conditions? In his landmark work, *Democracy and Distrust*, John Hart Ely addresses the tensions that arise between safeguarding the interests of minorities from the tyranny of majority rule, while also maintaining faithful adherence to the principles of majoritarianism that are the cornerstone of American government.<sup>472</sup> Rejecting both “clause-bound interpretivism” and the view that courts should be guided by fundamental American values, Ely argues instead that the Court should devote itself to policing the process of democratic representation.<sup>473</sup> Courts are to step in as “referee,” intervening to protect those who are unable to protect themselves in the political process. Indeed, Ely writes, elected representatives are the last people we can trust to identify circumstances in which the political process is unworthy of trust.<sup>474</sup>

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<sup>464</sup> Ichiro Kawachi, *Income Inequality and Health*, in *SOCIAL EPIDEMIOLOGY* 76, 86 (Lisa Berkman & Ichiro Kawachi eds., 2000); see also Kennedy et al., *supra* note 463, at 1006 (finding that states with high levels of income inequality spent a smaller proportion of their budgets on education and had poorer educational outcomes, which ranged from poorer scores in reading and math to lower rates of high school graduation).

<sup>465</sup> Kawachi, *supra* note 464, at 86; see also Kennedy et al., *supra* note 463, at 1006.

<sup>466</sup> Ichiro Kawachi & Bruce Kennedy, *Health and Social Cohesion: Why Care About Income Inequality?*, 314 *BRIT. MED. J.* 1037, 1037 (1997).

<sup>467</sup> *Id.* at 1038.

<sup>468</sup> MICHAEL MARMOT, *STATUS SYNDROME: HOW SOCIAL STANDING AFFECTS OUR HEALTH AND LONGEVITY* 61-81 (2004).

<sup>469</sup> *Id.*

<sup>470</sup> See generally John Lynch et al., *Is Income Inequality a Determinant of Population Health? Part I. A Systematic Review*, 82 *MILBANK Q.* 5 (2004).

<sup>471</sup> *Income Inequality and Health: What's the Relationship?*, ROBERT WOOD JOHNSON FOUND., <http://www.rwjf.org/pr/product.jsp?id=20839> (last visited Dec. 1, 2013).

<sup>472</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 7-8 (1980).

<sup>473</sup> *Id.* at 73-104.

<sup>474</sup> *Id.* at 103.

For if it is not the “many” who are being treated unreasonably but rather only some minority, the situation will not be so comfortably amenable to political correction. Indeed there may be political pressures to *encourage* our representatives to pass laws that treat the majority coalition on whose continued support they rely one way, and one or more minorities whose backing they don’t need less favorably.<sup>475</sup>

In Florida, efforts to condition public assistance benefits like TANF on passing a drug test are exceedingly popular among voters. According to a 2011 Quinnipiac poll, seventy-one percent of Florida voters support the law, including ninety percent of Republicans.<sup>476</sup> For Republican Governor Rick Scott, adding a drug test to Florida’s TANF program offered a bright spot in an otherwise lackluster first term, while also satisfying a campaign promise to clean up welfare policies in Florida by requiring applicants to pass a drug test. Unsurprisingly, the latest crop of drug testing bills popped up in state legislatures during an election year, and at a time when states are wrestling with shrinking budgets following the Great Recession. The current climate, both fiscal and political, enables state legislators to reform welfare programs in ways that are appealing to their coalitions, while also disregarding the interests of low-income communities that will inevitably absorb the costs of those reforms.

In *Dandridge v. Williams*, the Supreme Court acknowledged the “dramatically real factual difference” between the desperate circumstances of persons seeking public assistance and other instances in which the Court applied rational basis review.<sup>477</sup> Yet, the Court refused to apply a more rigorous standard. Instead, Justice Stewart expressed the reluctance of the Court to police the substance of welfare policies, adding: “the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.”<sup>478</sup> However, if Ely is correct, then heightened scrutiny may be required when the political market is malfunctioning—as it might be if the “ins” have restricted the channels of political change, or “representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility” or prejudice.<sup>479</sup>

In its Equal Protection jurisprudence, the Supreme Court has repeatedly stated that the poor are neither a suspect nor a quasi-suspect class, and in much the same way, the Court has hesitated to apply strict review when legislatures condition public assistance on the waiver of a constitutional right.<sup>480</sup> However, not unlike other groups for whom the Supreme Court has applied a more rigorous standard, the poor lack access to the political process in a way that would enable them to safeguard their own rights. An approach to unconstitutional conditions that focuses on the widening gap between the haves and the have-nots would direct courts to apply strict scrutiny whenever legislatures attach conditions to public assistance benefits, due to

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<sup>475</sup> *Id.* at 78.

<sup>476</sup> *States Consider Drug Test Requirement for Benefits*, NAT’L PUB. RADIO (Oct. 11, 2011), <http://www.npr.org/2011/10/11/141240653/states-consider-drug-test-requirement-for-benefits>.

<sup>477</sup> *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

<sup>478</sup> *Id.* at 487.

<sup>479</sup> ELY, *supra* note 472, at 103.

<sup>480</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973); *see also Dandridge*, 397 U.S. at 485.

the limited ability of low-income families to protect their own interests in the political process.

## VII. CONCLUSION

How should population-based legal analysis factor into our thinking about drug testing and public assistance? Wendy Parmet and I are in agreement that too often courts invoke public health to justify regulations without actually considering the health effects of those policies. Further public health methodologies can help courts determine whether states have met their burden to establish a genuine threat to public safety under the special needs doctrine. The insights of social epidemiology can also lead us to embrace a broader understanding of Fourth Amendment values beyond privacy. In the same way, public health can provide a set of reasons to apply strict scrutiny in unconstitutional conditions cases, beyond coercion and systemic effects.

Nonetheless, population-based analysis remains frustratingly indeterminate. Parmet urges courts to embrace population health as “a chief value of law,” one that “judges and lawyers should apply when they interpret legal texts and authority.”<sup>481</sup> Yet, Parmet stops short of assigning real consequence to population health. She never, for example, argues that a particular statute or regulation is unlawful or unconstitutional insofar as it conflicts with insights of public health. As I argued above,<sup>482</sup> if we think that courts should not allow population health to trump conventional legal reasoning—or that population health should only play a supporting role in our thinking—then Parmet cannot make good on her claim that population-based analysis is indeed a tool of legal reasoning, and not merely a policy perspective from which to critique legal decisions.

To say that population-based analysis is often better understood as a policy perspective is not to diminish its importance. From a public health perspective, policies that result in withholding public assistance benefits from illegal drug users are unlikely to accomplish many of the states’ objectives and could make many social problems much worse. We know that public assistance programs like TANF provide a valuable opportunity to identify people with substance abuse problems and get them into treatment. For example, a 2006 study on women and substance abuse found that low-income women who used illegal drugs and continued to receive cash assistance through TANF were more than twice as likely to receive substance abuse treatment when compared to low-income women who also used illegal drugs but did not receive cash assistance.<sup>483</sup> Decades of research on addiction also point toward harm reduction methods as the approach most likely to lead to lasting reductions in drug use.<sup>484</sup> Finally, for most low-income women who receive public assistance, childcare concerns, transportation problems, poor academic skills, and language

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<sup>481</sup> PARMET, *supra* note 19, at 56.

<sup>482</sup> See discussion *supra* Part V.B.2.

<sup>483</sup> Harold A. Pollack & Peter Reuter, *Welfare Receipt and Substance Abuse Treatment Among Low-Income Mothers: The Impact of Welfare Reform*, 96 AM. J. PUB. HEALTH 2024, 2025 (2006). It may be that programs like TANF provide an important source of funding for treatment. See, e.g., CTR. FOR BEHAVIORAL STATS. & QUALITY, U.S. DEP’T OF HUMAN & HEALTH SERVS., RESULTS FROM THE 2010 NAT’L SURVEY ON DRUG USE & HEALTH 80 (2011) (finding that among those who reported substance abuse treatment at a specialized facility during the past year, 29.2% reported using their Medicaid benefits, but 35.6% reported using public assistance other than Medicaid).

<sup>484</sup> Jason Kilmer et al., *Reducing Harm Associated with Illicit Drug Use: Opiates, Amphetamines, Cocaine, Steroids and Other Substances*, in HARM REDUCTION PRAGMATIC STRATEGIES FOR MANAGING HIGH RISK BEHAVIORS 212, 212 (G. Alan Marlatt et al. eds., 2d ed. 2012).

barriers are perhaps more common, and they present more important obstacles to full-time employment than illegal drug use.<sup>485</sup> Despite our current focus on substance abuse and welfare, given the real problems facing low-income families, states must look elsewhere.

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<sup>485</sup> Metsch & Pollack, *supra* note 201, at 71.