Journal of Civil Rights and Economic Development

Volume 26
Issue 3 *Volume 26, Spring 2012, Issue 3*

Article 10

March 2012

Learning from Lebron: The Suspicionless Drug Testing of TANF Applicants

Frank G. Barile

NOTES AND COMMENTS

LEARNING FROM *LEBRON*: THE SUSPICIONLESS DRUG TESTING OF TANF APPLICANTS

FRANK G. BARILE[1]

INTRODUCTION

Luis Lebron, a single father and thirty-five year old honorably discharged veteran of the United States Navy, resides with and cares for his four year old son and disabled mother in Orlando, Florida. Luis and his son, who receive food stamps and Medicaid benefits, have lived on his veterans' benefits for several years. In May 2011, those veterans' benefits ran out. Luis, at the time pursuing a bachelor's degree in accounting at the University of Central Florida, had to figure out a way to support his family on an income derived exclusively from his student loans and grants. Finding himself and his family in dire financial need, Luis applied for temporary cash assistance benefits under Florida's Temporary Assistance for Needy Families ("TANF") program. Shockingly, the State denied the Lebrons the cash necessary for their day-to-day subsistence—not because Luis or his family were financially ineligible—but merely on account of Luis's refusal to waive his constitutional right to be secure from unreasonable searches.

The situation currently facing the Lebrons and other Floridian families is the result of legislation designed to "increase personal accountability"[2] throughout the state of Florida. On May 31, 2011, while Florida's

[1] J.D. Candidate, 2013, St. John's University School of Law; M.S., Childhood Education, St. John's University School of Education, May 2007; B.A., *cum laude*, English, Philosophy, Binghamton University, May 2004. I would like to thank Professor Ettie Ward and Notes and Comments Editor Melanie Lazarus for their time and thoughtful feedback in developing this Note, the 2012-2013 JCRED Board and staff for all the hard work they put in to make this article the best it can be, and my wife Caley for her endless support.

[2] *Governor defends welfare drug tests*, CNN, June 5, 2011 http://www.cnn.com/video/?/video/bestoftv/2011/06/05/exp.nr.fl.gov.welfare.drug.tests.cnn. (last visited Oct. 3, 2011).

unemployment rate soared above the ten-percent mark,[3] Governor Rick Scott signed into law Florida House Bill 353 ("HB 353"),[4] effectively making Florida the only state to require all applicants for Temporary Cash Assistance ("TCA") to undergo a urinalysis drug test as a condition to receiving necessary aid, irrespective of any lack of reasonable suspicion of drug use or abuse. As a result, Florida families like the Lebrons are now faced with a stark choice: give up your constitutional right to be secure from suspicionless searches or give up "the means to obtain essential food, clothing, housing, and medical care."[5]

On September 6, 2011, the ACLU challenged the law in federal court.[6] The class action complaint, naming Luis Lebron as the lead plaintiff, alleged that the drug-testing regime mandated by HB 353 is an unreasonable search that violates the Fourth Amendment.[7] On October 24, 2011, the district court granted plaintiff's motion for a preliminary injunction[8]—a decision that has been appealed by the State and whose fate now rests in the hands of the Eleventh Circuit.[9]

Though Florida is currently at the forefront of the welfare-drug testing debate, the problem is one of national importance. Suspicionless drug testing programs are being considered in a growing number of states in 2012, including Colorado,[10] Wyoming,[11] Kansas,[12] Indiana,[13] and

[3] *See* United States Department of Labor, Bureau of Labor Statistics Data, http://data.bls.gov/timeseries/LASST12000003 (last visited Oct. 3, 2011); *Florida Unemployment Rate*, YCHART, http://ycharts.com/indicators/florida_unemployment_rate (last visited Oct. 9, 2012).

[4] Codified as FLA. STAT. § 414.0652 (2011).

[5] Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

[6] Complaint, Lebron v. Wilkins, 820 F.Supp.2d 1273 (M.D. Fla. 2011), 2011 WL 3909757.

[7] *Id.* at 10.

[8] Lebron v. Wilkins, 820 F.Supp.2d 1273, 1275 (M.D. Fla. 2011); *see* Mike Schneider and Kelli Kennedy, *Florida Welfare Drug Testing Law Blocked By Federal Judge*, HUFFINGTONPOST.COM (Oct. 24, 2011, 11:21 PM), http://www.huffingtonpost.com/2011/10/24/rick-scott-drug-testing-welfare-florida_n_1029332.html.

[9] Initial Brief for Appellant, Lebron v. Wilkins, 820 F.Supp.2d 1273 (M.D. Fla. 2011) (No. 11-15258). The State's initial brief was ultimately stricken, with orders to file a corrected initial brief, for failing to confine itself to the district court record in making assertions of fact. Order Striking Appellant's Brief, Lebron v. Wilkins, 820 F.Supp.2d 1273 (11th Cir. Mar. 9, 2012) (No. 11-15258-DD).

[10] H.B. 1046, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012).

[11] H.B. 82, 61st Leg., Budget Sess. (Wyo. 2012).

[12] H.B. 2686, 84th Leg., Reg. Sess. (Kan. 2012); *see* Adam Strunk, *Bill Requiring Random Drug Testing for Kansas Welfare Recipients to go Before House Panel*, KANSASCITY.COM (Mar. 7, 2012, 7:31 PM), http://www.kansas.com/2012/03/07/2245818/bill-requiring-random-drug-testing.html#storylink=cpy.

[13] H.B. 1007, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012). Indiana's bill, which would have created a pilot program for drug testing welfare recipients, was temporarily withdrawn by its creator, Rep. Jud McMillin, after a colleague amended the bill to require drug testing for legislators as well. *See* Arthur Delaney, *Welfare Drug Testing Bill Withdrawn After Amended to Include Testing Lawmakers*, HUFFINGTONPOST.COM (Jan. 27, 2012, 5:36 PM), http://www.huffingtonpost.com/2012/01/27/welfare-

Washington.[14] Recently, Georgia Governor Nathan Deal signed off on a bill similar to HB 353, but the State is holding off on enforcing it until the Eleventh Circuit rules on Florida's law.[15] Thus, the growing national trend is one that is increasingly combative towards the poor—the socio-economic group most in need of help. This shift in legislative hostility comes at a time of record poverty in the United States: more Americans were living in poverty in 2010 than at any time since at least the 1950s.[16] So, while 46.2 million Americans (including more than 10 million children) continue to struggle beneath the poverty line, a growing number of state legislatures have begun to respond to the crisis—not by increasing aid to these Americans, but by contributing to the stereotype of TANF recipients as drug users and abusers.

Part I of this Note will discuss the history of TANF and the role that drug testing has played in relation to the program, including an analysis of HB 353. It will also discuss why any government action that conditions the conferral of welfare benefits on the results of a drug test administered in the absence of actual, individualized suspicion is unconstitutional under the Fourth Amendment. Part II will articulate the policy arguments against the suspicionless drug testing of TANF applicants, describing the social and economic consequences of a drug testing regime that targets the poor as a class. Part III of this note will address and debunk the arguments commonly made in support of suspicionless drug testing of TANF

drug-testing-bill_n_1237333.html; David Ferguson, *Indiana welfare drug testing bill withdrawn after lawmakers included*, RAWSTORY.COM (Jan. 28, 2012, 7:53 PM), http://www.rawstory.com/rs/2012/01/28/indiana-welfare-drug-testing-bill-withdrawn-after-lawmakers-included/.

14 H.B. 2424, 62nd Leg. (Wa. 2012). A number of other states, including Alabama and Virginia, have proposed mandatory drug tests for applicants who arouse a reasonable suspicion following an initial screen. *See* H.B. 197, 2012 Reg. Sess. (Ala.); H.B. 73, 2012 Sess. (Va.). While the measures proposed in Alabama and Virginia differ slightly from that enacted in Florida, they are symbolic of an increased willingness of states to resort to mandatory drug testing as a condition precedent to providing cash assistance. Alabama's bill requires a drug test based upon mere "observable phenomena, such as...physical symptoms or manifestation of illegal use of an illegal controlled substance by the applicant." H.B. 197 § 1(b)(i)(b). Thus, despite the presence of what the bill calls a "reasonable suspicion," the threshold for submitting an applicant to a drug test in Alabama would be a low one, indeed.

15 Errin Haines, *Ga. to Hold Off on Welfare Drug Testing Law*, SFGATE.COM (July 3, 2012, 2:48 PM), http://www.sfgate.com/news/article/Ga-to-hold-off-on-welfare-drug-testing-law-3681968.php; Philip Smith, *Georgia Governor Puts Welfare Drug Testing on Hold*, STOPTHEDRUGWAR.COM (July 5, 2012 4:34 PM), http://stopthedrugwar.org/chronicle/2012/jul/05/georgia_governor_puts_welfare_dr.

16 *Record Number of Americans Living in Poverty, Census Reports,* FOXNEWS.COM (Sept. 13, 2011), http://www.foxnews.com/politics/2011/09/13/census-us-poverty-rate-swells-to-27-year-high-151-percent/ (noting that nearly 1-in-6 people were in poverty in 2010); Sabrina Tavernise, *Soaring Poverty Casts Spotlight on 'Lost Decade,'* NYTIMES.COM, September 13, 2011, http://www.nytimes.com/2011/09/14/us/14census.html?pagewanted=all&_r=0.. This historic poverty rate includes a large number of working Americans—seven percent of American workers were living in poverty in 2010.

applicants, examining in particular the key justifications advanced by the state of Florida in the *Lebron* litigation. Finally, Part IV will argue that there are several tried-and-true alternatives to suspicionless testing that should be adopted by states interested in identifying individuals with actual drug problems—solutions that avoid both the stigmatic effects and unconstitutional implications of suspicionless testing.

I. TANF, SUSPICIONLESS DRUG TESTING, AND THE FOURTH AMENDMENT: AN OVERVIEW

Before one can fully grasp the issue at hand, some background on TANF is in order. The Temporary Assistance for Needy Families (TANF) program had its genesis as part of the federal welfare reform of the mid-1990s. The federal legislation, signed into law by President Clinton on August 22, 1996, was part of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[17] Shortly after the Act's passage, the TANF program was implemented in Florida.[18] Through TANF, federal funds were provided to states in the form of a block grant to support needy families with children.[19] The federal initiative, designed to give significant flexibility to each state in designing and implementing its own program, has the overarching goals of ensuring that the children of needy parents are supported while encouraging parents to find gainful employment.[20]

The TANF program has several built-in mechanisms that allow states to tailor the program's requirements to suit their needs, distinguishing TANF from the welfare programs that preceded it. First, the federal law caps the total number of months that a recipient can remain eligible for benefits at 60. Florida caps aid at 48 months with exemptions made for showings of hardship.[21] Also, only families with at least one child are eligible.[22]

17 Pub. L. No. 104-193, 110 Stat. 2105 (PRWORA) (1996).

18 The Florida legislature passed the Work and Gain Economic Self-Sufficiency Act in anticipation of federal welfare reform and began implementing the TANF program on October 1, 1996. Florida Department of Children and Families, ACCESS FLORIDA 3, http://www.dcf.state.fl.us/programs/access/docs/TANF%20101%20final.pdf.

19 *Id.*

20 Section 601(a) of the Social Security Act, 42 U.S.C. § 601 (1996), states that the purpose of TANF "is to increase the flexibility of States in operating a program designed to—(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on governmental benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual goals of preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families."

21 Florida Department of Children and Families, ACCESS FLORIDA 3, http://www.dcf.state.fl.us/programs/access/docs/TANF%20101%20final.pdf. Examples of hardship

Additionally, PRWORA requires that adults in families receiving cash assistance must work or participate in work related activities for a specified number of hours per week, which in Florida includes education and job training.[23] Many of these requirements, among others,[24] were perceived as critical in breaking "the cycle of dependency that has existed for millions and millions of [. . .] citizens"[25] by "moving [them] from welfare to work."[26]

Among the many requirements of PRWORA was a provision that invited individual states to test welfare recipients for use of controlled substances and penalize those who test positive.[27] Under the federal provision, states took a variety of approaches to drug testing: some states did nothing;[28] a handful of states adopted noninvasive screening measures to identify applicants for whom there might be reasonable suspicion to support actual drug testing;[29] others targeted convicted felons or other individuals for whom the state found some individualized reason to suspect substance abuse.[30] Only one state—Michigan—attempted any form of suspicionless testing, but it was ultimately struck down by a federal court in 2003.[31] It is under this provision that Florida passed HB 353, effectively making Florida the only state that currently subjects all applicants of TANF to

include individuals receiving Social Security disability benefits or individuals caring for a disabled family member when the disability and the need for care have been medically verified.

22 *Id* at 8. This includes pregnant women.

23 *Id.*

24 *See id.*

25 *Text of President Clinton's Announcement on Welfare Legislation* (Aug. 1, 1996), *available at* http://www.nytimes.com/1996/08/01/us/text-of-president-clinton-s-announcement-on-welfare-legislation.html?pagewanted=all&src=pm. ("This legislation [...] gives us a chance we haven't had before to break the cycle of dependency that has existed for millions and millions of our fellow citizens, exiling them from the world of work. It gives structure, meaning, and dignity to most of our lives.").

26 *Id.* "[Real welfare reform] should be about moving people from welfare to work. It should give people the child care and the health care they need to move from welfare to work without hurting their children. It should crack down on child-support enforcement, and it should protect our children." *Id.*

27 21 U.S.C § 862b (1996) ("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.").

28 The following states have neither considered nor enacted any drug-testing legislation: Alaska, Arkansas, Delaware, Montana, Nevada, New Hampshire, Ohio, and South Dakota. *See Issue Brief: Drug Testing of TANF Recipients*, AM. CIV. LIBERTIES UNION OF UTAH, http://www.acluutah.org/TANFDrugTesting.pdf; *see also ASPE Issue Brief: Drug Testing Welfare Recipients: Recent Proposals and Continuing Controversies*, U.S. DEP'T OF HEALTH & HUM. SERVICES, App. A. (Oct. 2011), http://aspe.hhs.gov/hsp/11/DrugTesting/ib.shtml.

29 *See e.g.*, IDAHO CODE ANN. § 56-209j (2009); LA. ADMIN. CODE TIT. 67, § 1249(B) (2009); *see also* Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL OF RTS. J. 751, 781 (2011); *infra* Part IV.

30 *See e.g.*, LA. REV. STAT. ANN. § 46:460.10 (2009); MINN. STAT. § 609B.435 (2009); N.C. GEN. STAT. § 108A-29.1 (2009); VA. CODE ANN. § 63.2-605 (West 2009); WIS. STAT. §§ 49.79(5), 49.148(4) (2009); *see also* 2009 Ariz. Sess. Laws 3rd S.S., ch. 10, § 27; Budd, *supra* note 29, at 781.

31 *See infra* Part I-B.

suspicionless drug tests.[32]

HB 353, which went into effect on July 1, 2011, requires DCF to administer a drug test to screen each parent or caretaker-relative who applies for TANF.[33] The applicant is responsible for the cost of the drug test.[34] Applicants who test negative for controlled substances would be reimbursed by the state for the cost of the drug test,[35] which ranges from $24 to $45.[36] If an applicant tests positive for controlled substances, that individual is ineligible to receive TANF benefits for a full year after the date of the positive drug test.[37] If denied, the applicant may reapply for benefits after six months "if the individual can document the successful completion of a substance abuse treatment program," the cost of which is the responsibility of the individual receiving treatment.[38] Those who test positive a second time will be barred from TANF eligibility for three additional years.[39] So as not to obstruct TANF funds from reaching the children of denied applicants, the law allows such applicants the opportunity to designate an "appropriate protective payee" who would be responsible for receiving benefits on behalf of the applicant's child.[40] The designated payee must also undergo drug testing before being approved to receive benefits on behalf of the child.[41]

There are several structural flaws inherent in HB 353. First, requiring needy applicants who have applied for TANF for the sole reason that they are financially unable to support their families to pay for their own drug test is highly illogical. It is foreseeable, if not inevitable, that this requirement could prevent a substantial amount of eligible applicants from attempting to get benefits, even though they might otherwise have applied,

32 In 1999, Michigan implemented a pilot program to carry out suspicionless drug testing in several counties around the state but the program was shut down after the Sixth Circuit struck it down in 2003. *See infra* Part I-B for a more detailed history of the Michigan program and the subsequent litigation.

33 FLA. STAT. § 414.0652(1).

34 *Id.*

35 FLA. STAT. § 414.0652(2)(a).

36 Defendant's Response to Plaintiff's Motion for Preliminary Injunction at 6, Lebron v. Wilkins, 820 F.Supp.2d 1273 (M.D. Fla. 2011) (No. 6:11-cv-01473-Orl-35DAB), 2011 WL 4947381.

37 *See* FLA. STAT. § 414.0652(1)(b). The law does not specify under which circumstances an individual who fails a drug test would be entitled to take one or more additional tests, but allows the department to specify the circumstances under which additional test(s) may be administered. *See* FLA. STAT. § 414.0652(2)(g). The law also provides that the department shall "advise each individual to be tested, before the test is conducted, that he or she may, but is not required to, advise the agent administering the test of any prescription or over-the-counter medication he or she is taking." FLA. STAT. § 414.0652(2)(d).

38 FLA. STAT. § 414.0652(2)(j).

39 FLA. STAT. § 414.0652(2)(h).

40 *See* FLA. STAT. § 414.0652(3)(a)-(c).

41 *Id.*

solely on account of their inability to afford the drug test. Furthermore, for those applicants who test negative and qualify for reimbursement from the state, there still figures to be a significant delay between the time the applicant pays for the drug test and receives reimbursement from the state. For most welfare recipients, this delay is crucial, since TANF applicants are already in dire financial need when they apply for assistance. HB 353 also fails to ensure that children who are the intended beneficiaries of the majority of TANF payments are adequately supported throughout the drug-testing process. While the law states that a positive test will result in a parent or guardian's ineligibility to receive benefits on behalf of the child,[42] it does not go on to specify what the next step would be to ensure that the child receives the necessary benefits, should the designated payee test positive for drug use as well. Omissions such as these could have devastating consequences for children and families.

Even despite these obvious flaws in the organization of HB 353, in order to decide whether to uphold or strike down any law requiring blanket drug tests of a class of people, the courts will first need to consider whether the law's requirement of a suspicionless drug test constitutes an unreasonable search under the Fourth Amendment of the U.S. Constitution.[43]

A. The Supreme Court And Suspicionless Drug Testing: The "Special Needs" Requirement

The Fourth Amendment states that "[t]he 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."[44] The Fourth Amendment essentially guarantees privacy and security against any search or seizure conducted by the government without grounds for individualized suspicion.[45] However, searches undertaken in the absence of such suspicion have been upheld in "certain limited circumstances."[46]

[42] *Id.*

[43] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 618–19 (1989); Complaint at 1, Lebron v. Wilkins, 820 F.Supp.2d 1273, (M.D. Fla. 2011) (No. 6:11-cv-01473-Orl-35DAB), 2011 WL 3909757.

[44] U.S. CONST. amend. IV.

[45] Soldal v. Cook Cnty., 506 U.S. 56, 62, (1992); Camara v. Mun. Ct. of S.F., 387 U.S. 523, 528 (1967).

[46] Chandler v. Miller, 520 U.S. 305, 308 (1997); *see* Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 668 (1989).

The exceptional circumstances under which a suspicionless search may be constitutionally permissible arise only when a "special need" is involved.[47] This exception is very narrow one[48] and is only implicated in exigent circumstances when obtaining a warrant is impractical.[49] Such circumstances have only been found to exist when "public safety is genuinely in jeopardy."[50] If a court determines that a special need exists, it must then determine whether the importance of the special need outweighs the individual's privacy interest.[51] Only if the special need is substantial will a court find that it is sufficient to override an individual's privacy interest.[52] Thus, the question that federal courts will inevitably have to answer with regard to HB 353 is whether TANF applicants, like Luis Lebron, pose such a threat to the public safety as to justify Florida's coercion of those applicants to surrender to a Fourth Amendment search.

The Supreme Court first applied the Fourth Amendment to mandatory drug testing in 1989 in *Skinner v. Railway Labor Execs. Ass'n.*[53] In *Skinner*, the Federal Railroad Administration (FRA) promulgated certain regulations that required blood and urine tests of rail employees involved in train accidents,[54] as well as of those in violation of certain safety rules.[55] The Court, recognizing the privacy implications inherent in the collection and testing of urine, held that such intrusions were conclusively searches under the Fourth Amendment.[56] The Court went on to apply the "special needs" test. In doing so, the Court found that the FRA's interest in maintaining safe railroads outweighed the privacy interests of the railroad workers, a targeted class of employees for whom on-the-job intoxication was a serious problem.[57] As a result, the Court held that the railroad

47 Skinner v. Ry. Labor Execs. Ass'n., 489 U.S. 602, 619 (1989).

48 Amer. Fed. of Teachers v. Kanawha Cty. Bd. of Educ., 592 F. Supp. 2d 883, 897 (W.Va. 2009) (explaining that "the special needs exception to a suspicion-based search was intended to be a very narrow one and to apply only when the government is faced with a safety concern of sufficiently great magnitude to outweigh the privacy interests of the group to be searched."); Am. Fed. of State County and Mun. Emps. (AFSCME) Council 79, 857 F.Supp.2d 1322, 1340 (S.D. Fla. 2012) (finding it clear that "an interest sufficient to justify a drug testing regime in the context of public employment must be more narrowly defined than the public concern behind" the drug testing regime).

49 John A. Bourdeau, *Supreme Court's Views on Mandatory Testing for Drugs or Alcohol*, 145 A.L.R. FED. 335, at 2 (2008); Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 665–66 (1989).

50 *Chandler*, 520 U.S. at 323.

51 *Id.* at 318; *Kanawha Cty. Bd. of Educ.*, 592 F.Supp.2d at 896.

52 *Chandler*, 520 U.S. at 318; *AMFSCME*, 857 F.Supp.2d 1322 at 1332.

53 489 U.S. 602.

54 *Id.* at 606.

55 *Id.*

56 *Id.* at 617.

57 *Id.* at 607. The problem of on-the-job intoxication of railroad employees was well documented. The FRA found, that from 1972 to 1983 "the nation's railroads experienced at least 21 significant train

workers, whose duties were of such a nature that "even a momentary lapse of attention [could] have disastrous consequences,"[58] had diminished expectations of privacy.[59] The FRA's testing program was indeed warranted by "surpassing safety interests."[60]

The Court applied a similar analysis in *National Treasury Employees Union v. Von Raab*.[61] *Von Raab* involved a United States Customs Service program that mandated drug tests as a condition of promotion or transfer to positions that would either directly involve drug interdiction or require the employee to brandish a firearm.[62] The Court upheld the drug tests,[63] but as Justice Scalia noted in a dissenting opinion,[64] the Court's opinion lacked any "real evidence of a real problem that [would] be solved by urine testing of Customs Service employees."[65] Justice Scalia's dissent is strong in its conviction that the "special needs" exception to the Fourth Amendment should remain protected from mere speculative risks to public safety.[66]

Other than the employer-employee context of *Skinner* and *Von Raab*, the only other context in which the Court has found a special need sufficient to warrant suspicionless drug testing is in regard to student drug testing in public schools.[67] In the seminal case, *Vernonia School District 47J v. Acton*, the Court upheld an Oregon high school's policy of conducting random and suspicionless drug tests of student athletes.[68] In *Board of Education v. Earls*, the Court relied on the principles articulated in *Vernonia* to uphold an Oklahoma school district's policy of subjecting all students participating in competitive extracurricular activities to urinalysis drug testing.[69] In doing so, the Court pitted the privacy interests of the

accidents involving alcohol or drug use as a probable cause or contributing factor [. . .]."

58 *Id.* at 628.

59 *Id.* at 627.

60 *Id.* at 634.

61 489 U.S. 656 (1989).

62 *Id.* at 660–61.

63 *Id.* at 679. The Court determined that the record was inadequate for it to make a determination of whether drug testing was appropriate for promotions to positions involving access to classified material.

64 Justice Scalia joined the majority in *Skinner*.

65 489 U.S. at 681.

66 The need for more than mere speculation of drug use among TANF applicants will likely be crucial to Florida's defense of HB 353. *See* Corinne A. Carey, *Crafting a Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State Response as the Most Recent Chapter in the War on Drugs*, 46 BUFF. L. REV. 281, 322–23 (1998), for a more detailed discussion of Justice Scalia's dissent in *Von Raab* in the context of welfare drug-testing.

67 *See* Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

68 515 U.S. 646 (1995).

69 536 U.S. 822 (2002).

student against the promotion of the government's interests, and determined the school context to be the "'[c]entral' and '[t]he most significant element'" of its analysis.[70] In the public school context, the State carries the hefty responsibilities of "maintaining discipline, health, and safety" of all students. As a result, a student's expectation of privacy is unavoidably diminished.[71] The Court factored in the government's compelling interest in "prevent[ing] and deter[ring] the substantial harm of childhood drug use,"[72] and concluded that a "special need" existed.

The great amount of deference afforded to the state in identifying a "special need" in *Earls* is alarming. Even though both *Vernonia* and *Earls* purport to affect only drug testing within the public school context, *Earls* goes much further in its expansion of the "special needs" doctrine.[73] In *Vernonia*, the Court upheld a school district's decision to drug test its student athletes in the face of "a disruptive and explosive drug abuse problem sparked by members of its athletic teams."[74] In *Earls*, the school district mandated drug testing of all students engaged in certain nonathletic and academic extracurricular activities despite a drug problem described by the superintendent as "not. . .major."[75] The circumstances giving rise to the two cases were so distinct that Justice Ginsberg, who concurred in *Vernonia*, wrote a troubled dissent in *Earls*.[76] Despite the extraordinary amount of deference given to school administrators in deciding whether to conduct student drug testing,[77] it would take an outright defacement of the "special needs" doctrine were a court to afford a State the same degree of deference regarding its decision to conduct suspicionless drug testing of TANF applicants, as is afforded school administrators in drug testing schoolchildren under *Vernonia* and *Earls*.[78] Such a distorted interpretation

70 *Id.* at 831 n.3.

71 *Id.* at 830; *see also Vernonia*, 515 U.S. at 656 ("Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.").

72 *Earls*, 536 U.S. at 836.

73 *See id.* at 844 (Ginsburg, J., dissenting) ("This case presents circumstances dispositively different from those of *Vernonia*.").

74 *Id.* at 843–44 (discussing the drug problems addressed by testing in *Vernonia*, 515 U.S. at 648–49).

75 *Id.*

76 *Id.* at 842.

77 Writing for the majority in *Earls*, Justice Thomas declared that "this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing" and that "it would make little sense to require a school district to wait for a substantial portion of its students to being using drugs before it was allowed to institute a drug testing program designed to deter drug use." 536 U.S. at 835–36.

78 *Cf. id.* (Ginsberg, J. dissenting) (arguing that *Vernonia* cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs

of the "special needs" doctrine would not only fly in the face of Justice Scalia's *Von Raab* dissent, but would turn a great deal of Fourth Amendment jurisprudence on its head.

B. We've Been Down This Road Before: Michigan's Failed Attempt To Submit Welfare Applicants To Suspicionless Drug Testing

Florida is not the first state to authorize the mandatory testing of TANF applicants.[79] In 1999, Michigan's Family Independence Program ("FIP") implemented a pilot program[80] in which TANF applicants (through the FIP) were tested for substance abuse in three counties in the state.[81] Applicants who tested positive were required to cooperate with a substance abuse assessment and, if referred for treatment, required to comply with the treatment plan.[82] The pilot program was challenged in the United States District Court for the Eastern District of Michigan, where the statute was subsequently struck down and a preliminary injunction was granted in *Marchwinski v. Howard*.[83] That decision was reversed by a three-judge panel of the Sixth Circuit.[84] However, the full circuit subsequently reheard the matter en banc, vacated its previous decision, and reinstated the district court's injunction.[85] Although the constitutional question was not sufficiently decided, no other state fully tested the issue for nearly a decade following Michigan's rejection of suspicionless testing of TANF applicants;[86] that is, until 2011, when Florida enacted HB 353.

jeopardize the life and health of those who use them); *see generally* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 at 682 (Scalia, J., dissenting) (arguing that indiscriminate drug testing, regardless of intent, was a violation of the Fourth Amendment on its face).

79 *See Chain E-Mail Claims Florida is the First State to Require Drug Testing For Welfare*, POLITIFACT FLORIDA (Sept. 30, 2011, 3:36 p.m.), http://www.politifact.com/florida/statements/2011/sep/30/chain-email/chain-e-mail-claims-florida-first-state-require-d/.

80 Pursuant to 21 U.S.C. § 862b (1996).

81 Codified at M.C.L. § 400.57, which provides in relevant part: "(2) The family independence agency shall implement a pilot program of substance abuse testing as a condition for family independence assistance eligibility in at least 3 counties, including random substance abuse testing. It is the intent of the legislature that a statewide program of substance abuse testing of family independent assistance recipients, including random substance abuse testing, be implemented before April 1, 2003."

82 *See* Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1136–37 (E.D. Mich. 2000) (stating that stipulations were also made for the random testing of twenty-percent of recipients with active cases up for redetermination to be made after six months); *see also* Robyn Meredith, *Testing Welfare Applicants for Drugs*, N.Y. TIMES, May 30, 1999, http://www.nytimes.com/1999/05/30/us/testing-welfare-applicants-for-drugs.html?pagewanted=all.

83 Marchwinski v. Howard, 113 F.Supp. 2d 1134, 1137 (E.D. Mich, 2000).

84 309 F.3d 330 (2002).

85 319 F.3d 258 (2003). The Sixth circuit's judgment to reinstate the district court's decision was far from resounding however, with an equal number of justices voting for and against the reinstatement. *See* Budd *supra* note 29, at 782–83.

86 Budd *supra* note 29, at 782–83.

Marchwinski is particularly instructive, especially considering that the Supreme Court's stance on the unconstitutionality of suspicionless drug testing has not wavered in the time since Michigan's program was halted.[87] In the district court's opinion (the one that was eventually reinstated, granting the injunction), the court relied primarily on *Chandler v. Miller*,[88] a 1997 Supreme Court decision that held that the drug testing of candidates for public office was an impermissible search because the law's justification—to address "the incompatibility of unlawful drug use with holding high state office"—did not rise to the level of a special need.[89] Citing *Chandler*, the Sixth Circuit in *Marchwinski* concluded that in order to determine that a drug test is warranted in the absence of individualized suspicion, "not only must there be a special need but if there is one, 'it must be substantial—important enough to override the individual's acknowledged privacy interest [. . .].'"[90] *Chandler* remains controlling law and as such, it should naturally dictate the same result as *Marchwinski*.[91]

87 The most recent of the Supreme Court's Fourth Amendment drug testing cases was Bd. of Educ. v. Earls, 536 U.S. 822 (2002), which had been decided just months before the Sixth Circuit's reinstatement of the district court's injunction of Michigan's program to drug test TANF applicants. *See infra* note 91.

88 Chandler v. Miller, 520 U.S. 305 (1997).

89 *Id.* at 318.

90 Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1138 (6th Cir. 2000) (quoting *Chandler*, 520 U.S. at 318).

91 The ACLU made this argument before the district court on behalf of Luis Lebron. *See* Plaintiff's Motion for Preliminary Injunction at 7, Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011). It remains to be seen, however, if and how the Supreme Court's decision in Bd. of Educ. v. Earls, 536 U.S. 822 (2002) might complicate this analysis, since *Earls* had not yet been decided by the Court at the time the district court decided *Marchwinski*. *Earls* was decided by the Supreme Court on June 27, 2002, nearly two years after the Eastern District of Michigan decided *Marchwinski*. The district court's decision in *Marchwinski* was reversed by a three-judge panel of the Sixth Circuit, 309 F.3d 330, on October 18, 2002—less than four months after the Supreme Court handed down its decision in *Earls*, but more than five months after the Sixth Circuit heard oral arguments for *Marchwinski*. The result was that the *Marchwinski* plaintiffs were precluded from incorporating *Earls* into their appellate brief and oral argument, while the court had the luxury of incorporating *Earls* into its final decision, which it did, 309 F.3d at 334. In its ultimately-vacated decision, the *Marchwinski* panel used the strong language of *Earls* to distort the special needs doctrine, destroying the "surpassing safety interests" standard (critical to a finding of a "special need"), *see, e.g.*, Chandler v. Miller, 520 U.S. 305 (1997), Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), Skinner v. Railway Labor Execs. Ass'n., 489 U.S. 602, 619 (1989), and instead requiring "safety interests" to be but one "component of a state's special need," 309 F.3d at 335. Although the decision was subsequently vacated by the full circuit, the Sixth Circuit panel's interpretation of *Earls* is an alarming glimpse into where the "special needs" doctrine could potentially be headed and the frightening effects it could have in the welfare context. *See* Budd, *supra* note 29 at 790–804, for a thorough discussion and critique of the two *Marchwinski* opinions and their roles as two conflicting visions of a constitutional response to the issue of drug testing welfare applicants.

II. INDIFFERENCE TOWARDS THE INDIGENT: HOW SUSPICIONLESS TESTING IS CREATING A SOCIOECONOMIC "SUBCLASS"

HB 353 sparked a great deal of discussion in the local and national news media and attracted the attention of many bloggers and columnists who both defended and criticized the law. In the face of overwhelming public support for HB 353,[92] its critics have raised several strong concerns. Apart from the State's deliberate imposition of yet another hurdle over which needy families must rise in order to escape the evils of poverty, these critics' concerns are rooted in the law's underlying presumption that the poor have fewer constitutional rights than the rest of the population, as well as the law's perpetuation of the hurtful stereotype that most recipients of TCA are using government money to subsidize their own drug habits. Parts A and B of this section will address these concerns in turn.

A. Suspicionless Drug Testing Forces Needy TANF Applicants To Choose Between Relinquishing Constitutional Rights And Being Denied The Means To Obtain Essential Benefits Necessary For Supporting Their Children And Families

Ever since the landmark Supreme Court decision of *Goldberg v. Kelly*,[93] the importance of welfare benefits to those who qualify has been well-established.[94] Welfare provides the qualified recipient with "the means to obtain essential food, clothing, housing, and medical care."[95] Thus, it is more than "mere charity;" it is "a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'"[96]

Given the importance of welfare benefits to the families who receive

92 A Quinnipiac poll reveals that over 70% of Floridians support the drug testing of TANF applicants. Quinnipiac University, *September 21, 2011 – Voters Back Drug Tests For Welfare Recipients 2-1*, http://www.quinnipiac.edu/institutes-centers/polling-institute/florida/release-detail?ReleaseID=1649 (last visited Oct. 21, 2011); John Kennedy, *Judge Blocks Florida Governor's Drug-Testing for Welfare Applicants as Unconstitutional,* THE PALM BEACH POST, Oct. 24, 2011, *available at* http://www.palmbeachpost.com/news/news/judge-blocks-florida-governors-drug-testing-for-we/nLy8F/.

93 397 U.S. 254 (1970).

94 *See e.g.*, Ortiz v. Eichler, 794 F.2d 889, 894 (3d Cir. 1986) ("The importance of an applicant's interest in welfare benefits is well established."); Frost v. Weinberger, 515 F.2d 57, 65 (2d Cir. 1975) (recognizing that a stricter standard is required to determine whether a pre-termination hearing is necessary before terminating welfare benefits than that required before terminating other government benefits); Vargas v. Trainor, 508 F.2d 485, 490 (7th Cir. 1974) (acknowledging that an erroneous deprivation of welfare benefits deprives the recipient "of the means to obtain the necessities of life."); Lessard v. Atkins, 1985 U.S. Dist. LEXIS 20478, at *18, (D. Mass. Apr. 23, 1985) (noting that "the interest of a welfare recipient not to be deprived of his benefits is an important one.").

95 Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

96 *Id.* at 265.

them, it seems counterintuitive that welfare applicants and recipients "have [long] been subjected to all kinds of dehumanizing experiences in the government's effort to police its welfare payments."[97] From infringing upon citizens' constitutional right to travel by conditioning eligibility for welfare assistance on a full year's residence in the State[98] to mandating the sterilization of women on welfare as a means to prevent poor women from having babies who would also require public assistance,[99] states have, time after time, implemented policies that have coerced the indigent into forgoing constitutional rights in exchange for "the very means to live."[100] Historically, such coercive actions on the part of States have been rejected by courts,[101] in some cases ultimately coming to be seen as politically unacceptable.[102]

Because HB 353 involves a similar coercion of the indigent into forgoing constitutional rights—in this case, the right of privacy—it too should be rejected.[103] The Supreme Court has recognized that urinalysis examinations are procedures that require individuals to "perform an

97 Wyman v. James, 400 U.S. 309, 331 (Douglas, J., dissenting) (quoting Skelly Wright, *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425, 437–38); *see* Carey *supra* note 66, at 295.

98 Shapiro v. Thompson, 394 U.S. 618 (1969). In *Shapiro*, the Court struck down a durational residency requirement denying assistance to welfare applicants who resided in Connecticut for less than one year prior to filing their application for assistance on the ground that the purpose of inhibiting the migration of needy people was a constitutionally impermissible objective.

99 *See* Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 934 (listing mandatory sterilization as a strategy used in many states during the first half of the twentieth century to reduce the number of children born to women on welfare).

100 *Goldberg*, 397 U.S. at 264.

101 One of the primary tools used by courts to strike down such coercive legislation has been the doctrine of unconstitutional conditions. *See* Bourgeois v. Peters, 387 F.3d 1303, 1324–25 (11th Cir. 2004) (striking down a policy instituted by the City of Columbus, Georgia that required everyone wishing to participate in a protest against SOA (the School of the Americas), to submit to a metal detector search at a checkpoint. In *Bourgeois*, the Eleventh Circuit "roundly condemned" the use of unconstitutional conditions because "the very purpose of the unconstitutional conditions doctrine is to prevent the government from subtly pressuring citizens, whether purposely or inadvertently, into surrendering their rights." The unconstitutional conditions doctrine prohibits the State from placing "a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *See* Plaintiff's Reply in Support of Motion for Preliminary Injunction at 4, Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (6:11-cv-01473-MSS-DAB), *available at* http://norml.org/legal/drug-testing-briefs (quoting Alliance for Open Soc'y Int'l., Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 231 (2d Cir. 2011)).

102 *See e.g.*, Roberts, *supra* note 99, at 935; *see also* Franklin H. Romeo, *Beyond A Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUMAN RIGHTS L. REV. 713, 751 (2005).

103 *See* Plaintiff's Reply in Support of Motion for Preliminary Injunction at 5, Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011) (6:11-cv-01473-MSS-DAB), *available at* http://norml.org/legal/drug-testing-briefs ("The 'consent' required by DCF is an unconstitutional condition, as that term is defined by the Eleventh Circuit. Although Plaintiff has no statutory entitlement to TANF benefits, he has the right to apply to the government for those benefits without surrendering his Fourth Amendment rights.").

excretory function traditionally shielded by great privacy"[104] and has held that the testing of urine constitutes a search under the Fourth Amendment.[105] Juxtaposing the weight of the privacy interest that an individual has in safeguarding his own urine with the importance of TANF benefits to qualified applicants and their families, it is clear that HB 353 corners TANF applicants into a position in which they must either relinquish a fundamental right or be denied the means to support their families. At the very same time, the notion of a state conditioning the distribution of many other types of government assistance—subsidies, tax exemptions, student scholarships and grants, or social security benefits (some of which are welcomingly received by even the wealthiest Americans)—upon the results of drug test is a ludicrous proposition to most.[106] It is apparent then, that a different standard has been applied in assessing the need to drug-test welfare recipients than has historically been used in assessing the prospect of drug-testing the recipients of just about any other type of government assistance. This inequality underscores the discriminatory presumption that lies at the heart of HB 353: poor Floridians have fewer privacy rights than their wealthier counterparts.[107]

B. Suspicionless Drug Testing Laws Stigmatize Needy TANF Applicants As Drug Users And Abusers

Upon signing the 1996 welfare reform legislation, President Clinton challenged Americans to see to it that the new welfare system was seen "not as a chance to demonize or demean anyone, but instead as an opportunity to bring everyone fully into the mainstream of American life [. . .]."[108] Regretfully, HB 353 achieves precisely what the President warned against. Florida State Senator Arthenia Joyner, who filed a bill to repeal HB 353,[109] called the law "an assault on poor people" which

104 Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 626 (1989).

105 *See supra* Part I-A.

106 *See* Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1142 (E.D.Mich. 2000); *see also* Budd, *supra* note 29, at 770–71 (making a parallel argument that the poor stand beneath the protections of the Fourth Amendment and face home intrusions as a condition of their receipt of public assistance, whereas Americans that receive other public benefits, subsidies, credits, or deductions do not face the possibility of such intrusions).

107 *See* Budd, *supra* note 29, at 753; *see also* Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 HASTINGS CONST. L.Q. 297, 317 (2011).

108 Remarks by President Clinton on Welfare Legislation. The White House – Office of the Press Secretary (July 31, 1996), *available at* http://archives.clintonpresidentialcenter.org/?u=073196-remarks-by-president-on-welfarelegislation.htm.

109 2012 Fl. S.B. 284, 114th Reg. Sess. (Sept. 19, 2011) (filed by Sen. Joyner).

"denigrate[s] them."[110] Howard Simon, Executive Director of the ACLUFL, said that "[the] law [. . .] violates basic American dignity and fairness by assuming that everyone who needs help is a lazy drug abuser."[111] Indeed, the very existence of HB 353 is indicative of the fact that many Americans still spurn the poor, perceiving them as a subclass whose socio-economic position is the result of their own attitudes of dependency and laziness.[112]

Politicians in other states, in the months following the passage of HB 353, have publicly used the premise of the lazy, dependent, drug-addicted welfare recipient to rally support for their own policies which seek to trim the welfare and unemployment rolls in their respective states via the drug test. North Carolina House Speaker Thom Tillis suggested the state "find a way to divide and conquer" people on public assistance, and encouraged "folks to look down at those people who choose to get into a position that makes them dependent on the government [. . .]."[113] South Carolina Governor Nikki Haley, in pushing for suspicionless testing as a prerequisite for unemployment benefits, claimed that half of job applicants at a local government facility failed a drug test, when in actuality, less than one percent failed.[114] Her support for the testing program did not waver, even after her realization and public admission that her claims were bogus.[115]

Frighteningly, statements such as those made by House Speaker Tillis and Governor Haley are signs of what may be on the horizon, should HB 353 be upheld in federal court. In 2011, thirty-six states considered drug testing recipients of TCA or food stamps.[116] Missouri and Pennsylvania

110 *See* David Taintor, *Florida Senator Files Bill To Repeal Welfare Drug Testing Law*, TPMMUCKRAKER (Sept. 23, 2011), http://tpmmuckraker.talkingpointsmemo.com/2011/09/florida_state_sen_files_bill_to_repeal_welfare_dru.php (last seen Oct. 15, 2011).

111 ACLU Files Suit in Federal Court Challenging Mandatory Drug Testing of Temporary Assistance Applicants, ACLU.ORG (Sept. 7, 2011), http://www.aclu.org/criminal-law-reform/aclu-files-suit-federal-court-challenging-mandatory-drug-testing-temporary (last seen Oct. 15, 2011).

112 *See* Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 HARV. L. REV. 2013, 2023 (1994); *see also Report: 27% of Americans think poor are lazy*, CBSNEWS.COM (May 16, 2012), http://www.cbsnews.com/8301-201_162-57435467/report-27-of-americans-think-poor-are-lazy/ (last visited Oct. 15, 2012).

113 Luke Johnson, *Thom Tillis, North Carolina House Speaker, Calls To 'Divide And Conquer,' Drug Test Welfare Recipients*, HUFFINGTONPOST.COM, Oct. 14, 2011, http://www.huffingtonpost.com/2011/10/14/thom-tillis-welfare-drug-testing-north-carolina_n_1010878.html (last seen Oct. 15, 2011).

114 Arthur Delaney, *Nikki Haley: Jobless On Drugs Claim From Bad Information*, HUFFINGTONPOST.COM, Sept. 20, 2011, http://www.huffingtonpost.com/2011/09/20/nikki-haley-drug-test-jobless-unemployment_n_971672.html (last visited Oct. 15, 2011).

115 *Id.*

116 A.G. Sulzberger, *States Adding Drug Test as Hurdle for Welfare*, NYTIMES.COM, Oct. 10, 2011, http://www.nytimes.com/2011/10/11/us/states-adding-drug-test-as-hurdle-for-welfare.html?_r=1

enacted drug-testing laws for welfare recipients, though the laws were not quite as sweeping as Florida's.[117] Alabama actually introduced a bill that mirrored HB 353, but it was introduced too late in the session for it to go anywhere.[118] As of August 2012, at least 28 states have considered drug testing welfare applicants this year;[119] a number have introduced bills which would implement suspicionless testing.[120] Given this widespread and increasing interest in drug testing welfare recipients, many states will be looking to what happens to HB 353 in federal court in deciding whether or not to enact similar legislation of their own. While a judicial rejection of HB 353 would certainly not undo the stigma that has long been associated with welfare, a judicial embrace of such a policy would not only give an "ugly legitimacy to an unfortunate stereotype,"[121] but would likely have the catalytic effect of spawning even more similar legislation across the country.

III. ARGUMENTS IN OPPOSITION OF THE SUSPICIONLESS DRUG-TESTING OF TANF APPLICANTS: ATTACKING THE ASSUMPTIONS

In order to withstand a challenge on Fourth Amendment grounds, a State must show that its policy of suspicionless drug testing is warranted by the existence of a "special need." To fit within this "closely guarded category of constitutionally permissible suspicionless searches,"[122] it must be determined that (1) "the privacy interests implicated by the search are minimal" and that (2) an important governmental interest is at stake (3) that would be placed in jeopardy by a requirement of individualized suspicion.[123] It is with this constitutional framework in mind that we can

(citing to the National Conference of State Legislatures).

117 Missouri's law requires drug screenings for welfare applicants and recipients if there exists reasonable cause to believe they may be using illegal drugs. Pennsylvania enacted drug testing for welfare recipients with previous drug convictions as part of a broader welfare reform package. Pamela M. Prah, *Drug Tests Ordered for Florida Welfare Applicants*, STATELINE.ORG (Aug. 24, 2011), http://www.stateline.org/live/details/story?contentId=595886.

118 *Id.* Alabama filed an amicus brief in support of suspicionless drug testing during the *Lebron* litigation; Philip Smith, *Bills to Drug Test the Poor Face Tough Going*, STOPTHEDRUGWAR.ORG (Apr. 26, 2012), http://stopthedrugwar.org/chronicle/2012/apr/26/bills_drug_test_poor_face_tough (last visited Oct. 15, 2012).

119 Ivan Moreno, *Utah Begins to Drug Test Welfare Applicants*, KSL.COM (Aug. 1, 2012), http://www.ksl.com/?sid=21520244.

120 *See supra* Introduction, at 2.

121 Kenric Ward, *Welfare Drug-Test Challenge a Legal Long Shot*, SUNSHINESTATENEWS.COM (June 8, 2011), http://www.sunshinestatenews.com/story/welfare-drug-test-challenge-legal-long-shot (quoting ACLU-Florida executive director Howard Simon).

122 Chandler v. Miller, 520 U.S. 305, 309 (1997).

123 Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 624 (1989).

attack HB 353, as well any copycat law conditioning an applicant's receipt of public assistance benefits on the results of a negative drug test, for what it really is—a misinformed excuse to denigrate the poor.

A. TANF Applicants Do Not Abuse Drugs At A Rate Higher Thanthe Population In General

On June 5, 2011, just days after signing HB 353 into law, Florida Governor Rick Scott appeared on national television to defend it.[124] When pressed by CNN's T.J. Holmes for some "evidence that there are people [in Florida] who are drug users," the Governor acknowledged the existence of studies that show that people on welfare use drugs at a "much higher rate" than those not on welfare.[125] Governor Scott's assertion, if true, would give some weight to the government's interest at stake, since it would have at least some relevance to proving the existence of a concrete problem, akin to the evidence of "alcohol and drug abuse by railroad employees"[126] in *Skinner* or the "sharp increase in drug use" among the student body in *Vernonia*.[127]

Scott's sweeping claim fails to reveal the whole picture,[128] however, and studies relied upon by the State in its defense[129] lack the probative value sufficient to justify Scott's assertion.[130] In enjoining the DCF from requiring suspicionless testing, Judge Mary Scriven of the Middle District

[124] Governor defends welfare drug tests. CNN.COM (June 5, 2011), http://www.cnn.com/video/?/video/bestoftv/2011/06/05/exp.nr.fl.gov.welfare.drug.tests.cnn. (last visited October 23, 2011).

[125] When first asked, "Do you believe that a [. . .] significant number of welfare recipients in your state are drug users?" Scott responded by saying, "You know T.J., I don't know [. . .]."

[126] 489 U.S. at 606.

[127] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648 (1995).

[128] *See* Aaron Sharockman, *Rick Scott Says Welfare Recipients are More Likely to Use Illicit Drugs*, POLITIFACT.COM (June 9, 2011), http://www.politifact.com/florida/statements/2011/jun/09/rick-scott/rick-scott-says-welfare-recipients-are-more-likely/ (rating Governor Scott's claim as only "half-true" after receiving and examining studies presented by both Scott and the ACLUFL); *see also* Catherine Whittenburg, *Welfare drug-testing yields 2% positive results*, TBO.COM (Aug. 24, 2011), http://www2.tbo.com/news/politics/2011/aug/24/3/welfare-drug-testing-yields-2-percent-positive-res-ar-252458/ ("More than once, Scott has said publicly that people on welfare use drugs at a higher rate than the general population. The 2 percent test fail rate seen by DCF, however, does not bear that out.").

[129] *See* Defendant's Response to Plaintiff's Motion For Preliminary Injunction at 18–19 n.12, Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011), 2011 WL 4947381 (citing Jayakody et al., *Substance Abuse and Welfare Reform*, NATIONAL POVERTY CENTER POLICY BRIEF #2 (National Poverty Center) April 2004; Bridget F. Grant and Deborah A. Dawson, *Alcohol and Drug Use, Abuse, and Dependents among Welfare Recipients*, 86 AM. J. PUB. HEALTH 1450 (1996); Harold Pollack et al., *Drug Testing Welfare Recipients – False Positives, False Negatives, Unanticipated Opportunities* (2001).

[130] Lebron v. Wilkins, 820 F. Supp. 2d 1273, 1286 (M.D. Fla. 2011) (finding that one such study "lacks any probative value on the issue presented," while finding another such study "even less probative of the State's position").

of Florida noted that the studies relied upon by the government were either outdated,[131] not specific to Florida,[132] considered evidence of a population broader than either that of TANF applicants or Florida TANF beneficiaries,[133] not considered by the legislature in promulgating the statute,[134] or the product of a multitude of these ills. For example, one such study[135] concluded that "contrary to common characterizations," only "small percentages"—3.8 percent to 9.8 percent—of national recipients of AFDC,[136] WIC,[137] and food stamps use drugs.[138] Reliance upon such findings is problematic since the study was based on a much larger population than just TANF recipients. As a result, this information does not support the conclusion that TANF beneficiaries in Florida, as a class, use drugs at a higher rate than the general population, let alone at a rate great enough to constitute a "concrete danger."[139]

Moreover, much of the data relied upon by proponents of suspicionless testing is plagued by the same inconsistencies and pitfalls that plague the reliability of drug testing generally. Drug testing, without more, identifies more "false positives" than it does "true positives."[140] Thus, generalized claims that are based on such results will inevitably be skewed in this respect.[141] In fact, drug tests have been reported to produce false-positive

131 *Id.* at 1287. Judge Scriven, in her order granting Plaintiff's Motion for Preliminary Injunction, discredited each of the three studies put forth by the State for relying on data from 1994 and 1995, dating back nearly 20 years to 1992, and taken between 1997 and 1999. *See* Jayakody et al., *supra* note 129, Grant, *supra* note 129, and Pollack et al., *supra* note 129.

132 *Id.*

133 *Id.*

134 *Id.*

135 *See* Grant et al., *supra* note 129, at 1453.

136 AFDC (Aid to Families with Dependent Children), which was established by the Social Security Act of 1935 to provide welfare payments for needy children, was replaced by TANF in 1996 under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). *See supra* Part I.

137 WIC (Women, Infants, and Children) provides Federal grants to States for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk. For more information on the WIC program, *see* ABOUT WIC, FOOD & NUTRITION SERVICE, http://www.fns.usda.gov/wic/aboutwic/ (last modified 11/30/2011).

138 *Lebron*, 820 F. Supp. 2d at 1287.

139 *Id.* (quoting Chandler v. Miller, 520 U.S. 305, 319 (1997)).

140 *See* Pollack, *supra* note 129, at 13; *see also* Mark A. Rothstein, *Kenneth M. Piper Lecture: Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 1987 CHI.-KENT L. REV. 683, 696 (1987).

141 For example, in its response, the State relied upon research that concluded that approximately 20 percent of TANF recipients report that they have used an illegal drug at least once in the past year. *See* Jayakody et al., *supra* note 129. To draw from this the conclusion that those on welfare use drugs at a higher rate than the general population requires an inferential leap that is ignorant of the fact that most of the people who have admitted to using an illicit drug in the past year are not dependent, and are not "feeding a habit with welfare dollars." *See also* Sharockman, *supra* note 128 (quoting Professor Harold Pollack, University of Chicago).

results in 5% to 10% of cases and can be triggered, harmlessly enough, by the intake of poppy seeds, cold medications, antidepressants such as Wellbutrin and Zoloft, and even the HIV medication, Sustiva.[142]

The Governor's claim also fails to acknowledge research suggesting that proportions of welfare recipients using or abusing illegal drugs are actually consistent with or lower than those who do not receive welfare, [143] including the findings of a study conducted by the DCF itself.[144] This particular study, conducted pursuant to a mandate by the Florida legislature, found that between 1999 and 2001, only 5.1% of the total population of screened applicants tested positive.[145] These results confounded the expectations of researchers,[146] and showed that Florida's TANF population was actually using drugs at a rate much lower than that of the Florida population at large, which was recently estimated at 8.13 percent.[147]

The results under HB 353 confirm these trends: Since July 1, 2011, only two percent of TANF applicants tested under HB 353 have tested positive for drug use.[148] Given these numbers, it is not surprising that a 2006

[142] Charlene Laino, *Drug Tests Often Trigger False Positives*, WEBMD.COM (May 28, 2010); Karen Manfield, *Imposing Liability on Drug Testing Laboratories for "False Positives": Getting Around Privity*, 1997 U. CHI. L. REV. 287, 291 (1997). It is by no means a stretch to envision the tragic scenario in which a needy TANF applicant who is also battling depression—or worse, HIV—is told that she cannot receive temporary cash assistance to put food on her child's plate unless she undergoes, and pays for, a six-month drug rehabilitation program, despite the fact that she has not used drugs. In cases such as these, a false positive is literally the difference between eating and not eating.

[143] *See e.g.*, Matt Lewis, Elizabeth Kenefick and Elizabeth Lower-Basch, *TANF Policy Brief: Random Drug Testing of TANF Recipients is Costly, Ineffective and Hurts Families*, CLASP.ORG (updated Feb. 3, 2011), http://www.clasp.org/admin/site/publications/files/0520.pdf;
NIAAA Researchers Estimate Alcohol and Drug Use, Abuse, and Dependence Among Welfare Recipients, NAT'L INST. OF HEALTH PRESS RELEASE (1996), http://www.nih.gov/news/pr/oct96/niaaa-23.htm.

[144] Pursuant to legislation passed in 1998, the DCF developed and implemented a "Demonstration Project" for the purposes of studying and evaluating the "impact of the drug-screening and drug-testing program on employability, job placement, job retention, and salary levels of program participants" and to make "recommendations, based in part on a cost benefit analysis, as to the feasibility of expanding the program." FLA. STAT. § 414.70(1)–(5) (1998) (repealed 2004).

[145] Robert E. Crew, Jr. and Belinda Creel Davis, *Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits*, 17(1) J. HEALTH & SOC. POL'Y 39, 45 (2003).

[146] *See* Lebron v. Wilkins, 820 F. Supp. 2d 1273 at 1277 (M.D. Fla. 2011).

[147] *Id.* (citing a 2008 study by the Office of National Drug Control Policy). Upon receipt of the preliminary results of the Demonstration Project, the Legislature did not implement any further testing and the Demonstration Project expired on June 30, 2001, pursuant to a statutory sunset provision. *See* FLA. STAT. § 414.70(1) (1998) (repealed 2004). In 2011, Florida, without conducting new studies and despite the findings of the Demonstration Project, inexplicably resurrected the concept of drug testing TANF applicants and enacted Fla. Stat. § 414.0652 on May 31. *See id.* at 1276–79.

[148] *See id.* at 1280; *see also* Catherine Whittenburg, *Welfare Drug-Testing Yields 2% Positive Results*, TAMPA BAY ONLINE (Aug. 24, 2011), http://www2.tbo.com/news/politics/2011/aug/24/3/welfare-drug-testing-yields-2-percent-positive-res-ar-252458.

study[149] concluded that "the use of controlled substances among welfare recipients in Florida appears to have no relationship with the ability of these individuals to find employment, to stay employed, to avoid economic hardship, and thereby to avoid reliance on governmental social service programs."[150]

B. Laws That Mandate Suspicionless Drug Testing Of TANF Applicants Do Not Implicate Public Safety And Thus Fail To Support The Finding Of A "Special Need"

Outside the public school context, suspicionless drug testing conducted for reasons other than public safety is precluded by the Fourth Amendment.[151] In its response to the lawsuit, Florida offered several "purposes" of HB 353, which, it argued, satisfy the special needs doctrine.[152] However, these justifications, for a variety of reasons, do not rise to the level of a special need, and proponents of similar legislation in the future will be hard-pressed to find one. A popular justification for the mandatory drug testing of welfare applicants is concern for taxpayers.[153] This justification can be discarded with ease. Aside from its obvious failure to address public safety, this rationale has implications that sweep well beyond the welfare context; "taxpayer

149 Robert E. Crew, Jr. & Belinda Creel Davis, *Substance Abuse as a Barrier to Employment of Welfare Recipients*, 5(4) J. POL'Y PRACTICE 79, (Haworth Press 2006).

150 Crew, *supra* note 149, at 79. The State has posited that all denials of benefits to TANF applicants who refuse to take the drug test after being determined otherwise eligible should be considered "drug related denials." *See Lebron*, 820 F.Supp.2d at 1281 (M.D. Fla. 2011). Relying on data from a pamphlet put forth by the Foundation for Government Accountability, Tarren Bragdon, The Impact of Florida's New Drug Test Requirement for Welfare Cash Assistance, FOUND. FOR GOV'T ACCOUNTABILITY, Sept. 14, 2011, the State conflates the 2 percent of those who tested positive with an additional 7.6 percent who have been denied because they refused to submit to drug testing. In her Order, Judge Scriven dismissed the pamphlet as "not competent expert opinion," *Lebron*, 820 F.Supp.2d at 1290, and stifled the idea that one may "draw any conclusions concerning the extent of drug use or the deterrent effect of the statute from this fact because declining to take the drug test can be attributed to a number of factors in addition to drug use, including an inability to pay for the testing, a lack of laboratories near the residence of an applicant, inability to secure transportation to a laboratory or, as in the case at bar, a refusal to accede to what an applicant considers to be an unreasonable condition for receiving benefits," *Lebron*, 820 F.Supp.2d at 1281.

151 Chandler v. Miller, 520 U.S. 305, 323 (1997).

152 *See* Plaintiff's Motion for Preliminary Injunction at 16, Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011), 2011 WL 4947387.

153 This is not surprising considering that Governor Scott, during the course of a 3-minute interview on CNN, cited taxpayer burden no less than seven times as his primary justification for HB 353. *See* CNN.COM, *supra* note 124; *see also* Rebecca Catalanello, *Florida's Welfare Drug Testing Halted by Federal Judge*, THE MIAMI HERALD (Oct. 25, 2011), http://www.miamiherald.com/2011/10/24/2470519/florida-welfare-drug-testing-halted.html; Mark Christopher, *Weeding Out: Florida Will Now Drug Test Welfare Recipients*, SUNSHINE SLATE (May 31, 2011), http://www.sunshineslate.com/tag/hb-353/.

burden" could very well be used to justify warrantless and suspicionless searches of just about anybody who receives a tax deduction, credit, grant, scholarship, or subsidy, to ensure that such funds are not paying for illegal drug habits.[154] Similarly, the justification that HB 353's purpose is to ensure that government benefits are reaching the children for whom they are intended and are not being spent on illegal drugs[155] does not implicate the "surpassing safety interests" of *Skinner*. Rather, this need is "symbolic, not 'special,'"[156] and the Supreme Court has distinguished mere speculative, symbolic attempts to preserve the state's integrity (fiscal or otherwise) from cases where the public safety is genuinely in jeopardy.[157] That children are the intended beneficiaries of some of the funds does not change this distinction.[158]

The State also argues that one of HB 353's purposes is to protect recipients' children from drug-related child abuse.[159] This rationale, which was rejected in *Marchwinski*,[160] fails to reach the status of a "special need" for a couple of reasons. First is the fact that this justification could be used to impose mandatory drug testing in all cases in which a State confers a benefit upon a parent or guardian on behalf of their children.[161] Such a dangerous precedent would allow the state to "eviscerate the Fourth Amendment's requirement of individualized suspicion across the spectrum of American families."[162] Second, the prevention of child abuse is unrelated to the goals of TANF and TCA, which are to:

> (1) provide assistance to needy families so that children can be cared for in their own homes or in the homes of relatives;

154 *See* Budd, *supra* note 29, at 799.

155 *See Hearing Before the Fla. H.R. Comm. On Judiciary*, 112th Cong. (Mar. 31, 2011) (comments of Rep. Jimmie Smith in support of H.B. 353), *available at* http://myfloridahouse.gov/FileStores/AdHoc/PodCasts/03_31_2011/Judiciary_2011_03_31.mp3; *see also Hearing Before Fla. S. Comm. On Budget, Subcomm. on Health and Human Services Appropriations*, 112th Cong. (Apr. 13, 2011) (comments of Sen. Steve Oelrich in support of S.B. 556, the Senate version of the bill), *available at* http://myfloridahouse.gov/filestores/adhoc/PodCasts/04_13_2011/Health_Human_Services_2011_04_13.mp3.

156 *Chandler*, 520 U.S. at 322 (finding that the incompatibility of drug use with the holding of office is a symbolic need, not a special need).

157 *See id.*; *see also* Baron v. City of Hollywood, 93 F. Supp. 2d 1337, 134 –42 (S.D. Fla. 2000) (ensuring that public funds are in good hands is not a special need).

158 Plaintiff's Motion for Preliminary Injunction at 16, Lebron v. Wilkins, 820 F. Supp. 2d 1273 (M.D. Fla. 2011), 2011 WL 4947387.

159 Initial Brief for Appellant at 37–38, Lebron v. Wilkins, 820 F.Supp.2d 1273 (11th Cir. Jan. 18, 2012) (No. 11-15258).

160 *Id.*; *Marchwinski*, 113 F. Supp. 2d 1134, 1142 (E.D. Mich. 2000).

161 *Id.*

162 Budd, *supra* note 29, at 795.

(2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;

(3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and

(4) encourage the formation and maintenance of two-parent families.[163]

Just as the *Marchwinski* court rejected the state's advancement of child abuse as supporting a special need sufficient to isolate welfare recipients for suspicionless testing,[164] the same approach should be taken with regard to HB 353.

C. Suspicionless Drug Testing Costs States More Money Than It Saves Them

In its defense of plaintiff's motion for preliminary injunction, Florida produced a pamphlet from the Foundation for Government Accountability[165] projecting that millions of dollars would be saved by the State in enforcing HB 353, even after conceding that the cost of administering the program was substantial.[166] In her Order,[167] Judge Mary Scriven ridiculed the pamphlet,[168] stating that the "data contained in the pamphlet is not competent expert opinion, nor is it offered as such, nor could it be construed as such."[169]

As Judge Scriven pointed out, the data presented by the State is marred with assumptions that ultimately undermine its conclusions.[170] For instance, the study's assertion that the State will save millions in the first year alone is achieved only by "extrapolating from the 9.6 percent of TANF applications that are denied [. . .], including those who tested positive[171] and those who declined to be tested."[172] The assumption that the

163 42 U.S.C. § 601.

164 *Marchwinski*, 113 F. Supp. 2d at 1142.

165 *See* Bragdon, *supra* note 150.

166 Lebron v. Wilkins, 820 F. Supp. 2d 1273, 1290 (M.D. Fla. 2011).

167 *Id.*

168 Arthur Delaney, *Rick Scott's Welfare Drug Test Saves No Money: Judge*, HUFFINGTONPOST.COM, Oct. 26, 2011, http://www.huffingtonpost.com/2011/10/25/rick-scott-drug-test-welfare_n_1031024.html; Adam Weinstein, *Rick Scott's Pee Test Fails Court Test*, MOTHERJONES.COM (Oct. 26, 2011), http://www.motherjones.com/mojo/2011/10/judge-rick-scott-piss-welfare-drug-test.

169 *Lebron*, 820 F. Supp. 2d at 1290.

170 *Id.* at 1290–91.

171 2% of the total applicant pool tested positive during the two months that HB 353 was enforced.

savings achieved by the 7.6 percent of "non-testers" (applicants who have declined to be tested) could reasonably count as providing twelve months of savings is ignorant of the fact that these "non-testers" are "otherwise eligible and can begin receiving benefits at any point during the year by submitting a new application."[173] What is more, under "the 'protective payee' provision of the statute,[174] another adult family member who tests negative for substance use may receive the allegedly "saved" funds on behalf of a child whose parent or primary caretaker has tested positive.[175] Thus, it should be no surprise that the district court found that "the State has not demonstrated any financial benefit or net savings will accrue as a result of the passage of [Florida's TANF drug testing statute]."[176]

In fact, the preliminary data easily supports the conclusion that HB 353 actually cost the state significantly more money than it saved. During the first three months of the program's existence, 7,030 applicants passed and only 32 failed.[177] Since the state is required to reimburse the 7,030 people who passed the test,[178] the state has already lost a net of $200,000 as a result of the program.[179] As a measure largely promoted with the goal of saving taxpayer money, this should be alarming to other states considering Florida's approach, especially to those that routinely approve more TANF applications than Florida. For example, if identical legislation was to pass in California, a state which has averaged no fewer than 21,000 TANF approvals per month since 2007—nearly four times the average number of approvals in Florida over the same time period[180]—the potential financial

See supra section III-a.

172 *Lebron*, 820 F. Supp. 2d at 1290.

173 *Id.* at 1291.

174 *See* FLA. STAT. § 414.0652(3)(a)-(c); *see also supra* section I.

175 *Lebron*, 820 F. Supp. 2d at 1289.

176 *Id.* at 1291.

177 *See* A.G. Sulzberger, *States Adding Drug Test as Hurdle for Welfare*, N.Y. TIMES, Oct. 10, 2011, http://www.nytimes.com/2011/10/11/us/states-adding-drug-test-as-hurdle-for-welfare.html?_r=1 (citing to the National Conference of State Legislatures); *see also*, Lindsey Lyle, Student Policy Note, *Florida's Legislation Mandating Suspicionless Drug Testing of TANF Beneficiaries: The Constitutionality and Efficacy of Implementing Drug Testing Requirements on the Welfare Population*, 8 TENN. J.L. & POL'Y 68, 70 (2012) ("[A]bout two percent of applicants have tested positive for drug use since Florida implemented the drug testing requirement[.]").

178 *See* FLA. STAT. § 414.0652(2)(a).

179 This net loss includes the amount "saved" by the state in the form of denied benefits due to drug testing, which was estimated at $40,480. This number is based on the estimate that the average temporary assistant applicant receives $253 monthly for less than five months. *See* Sulzberger, *supra* note 116.

180 *See TANF: Average Monthly Number of Applications Approved – Fiscal Years*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Apr. 3, 2012), http://www.acf.hhs.gov/programs/ofa/resource/tanf-fy-avg-apps-apprv (providing statistics on the average monthly number of approved TANF applications for each state, territory, and the District of Columbia since the year 2000).

consequences would be devastating.

D. Solutions: Protecting The Public Fisc Without Depriving The Needy Of Constitutional Rights

This note does not maintain the view that the minority of welfare recipients who use government funds to pay for their illicit drug habits should remain unaccountable. Nor does it subscribe to the view that states should be powerless in their struggle to determine which recipients are spending government money to feed drug habits. To the contrary, it is in society's best interest to identify those individuals whose substance abuse is a barrier to employment and see to it that they receive necessary treatment. As mentioned earlier,[181] TANF has been around since 1996 and throughout the program's first decade and a half of existence only one state has attempted to administer drug tests to TANF applicants without individualized suspicion of drug use.[182] Instead, the vast majority of states have utilized a variety of alternate approaches to identify drug use amongst their TANF population, many of which have achieved considerable success without using any drug testing at all. This section will highlight several of these test-free approaches.

The most important factor in assessing any program that attempts to identify drug abuse amongst TANF applicants is its effectiveness in building bridges, rather than barriers, to employment and self-sufficiency.[183] Mandatory drug testing is unreliable, intrusive, and costly; thus, it is ineffective in achieving many of the purposes of TANF.[184] However, "screen-and-refer" methods of detection and treatment, such as those in place in Idaho, Maryland, New York, and Oklahoma,[185] have proven to be more accurate, less degrading, and less costly than across-the-board drug testing.[186] These screens are typically administered via pencil

181 *See supra* Part I.

182 *See supra* Part I-B.

183 *See Issue Brief: Drug Testing of TANF Recipients*, AMER. CIV. LIBERTIES UNION OF UTAH, http://www.acluutah.org/TANFDrugTesting.pdf (last visited Oct. 15, 2012). Two of the goals of TANF are employment and self-sufficiency; therefore, any program that attempts to identify drug abuse amongst TANF applicants should assist in, not hinder, reaching these TANF goals. *See* Lyle, *supra* note 177, at 72–73 (2012).

184 *See supra* Part III.

185 *See Issue Brief: Drug Testing of TANF Recipients*, AMER. CIV. LIBERTIES UNION OF UTAH, http://www.acluutah.org/TANFDrugTesting.pdf (last visited Oct. 15, 2012); *see e.g.*, Abby E. Schaberg, Note & Law Summary, *State Drug Testing Requirements for Welfare Recipients: Are Missouri and Florida's New Laws Constitutional?*, 77 MO. L. REV. 567, 580 (2012).

186 *See* Lewis, *supra* note 143, at 4; *Drug Testing for TANF Recipients*, DRUG POLICY ALLIANCE (New York, N.Y.), http://www.drugpolicy.org/resource/drug-testing-tanf-recipients.

and paper[187] and also seek to identify alcohol abuse and other mental health problems—barriers which would be completely undetectable through a standard urinalysis exam.[188] One such test, the Substance Abuse Subtle Screening Inventory (SASSI) is "a brief self-report, easily administered psychological screening measure that [. . .] helps identify individuals who have a high probability of having a substance dependence disorder with an overall empirically tested accuracy of 93 percent." [189] While screening procedures in many states stand to be improved through the hiring of more experienced caseworkers as well as additional training for workers tasked with administering the exams,[190] the benefits of the "screen-and-refer" method are evident.

It is not enough for a screening program to simply identify TANF recipients with drug and alcohol problems; an ideal screening program must find a way to treat those individuals who have dependency issues and do so without depriving them of benefits.[191] Loss of benefits will make it even more difficult for TANF recipients with drug or alcohol problems to comply with both work and treatment requirements, and could result in even deeper poverty for them and their families.[192] Some states, such as New Jersey, have implemented an intensive case management (ICM) referral system, [193] in which each substance-dependent client receives an individualized treatment plan according to his or her needs and meets with a case manager weekly.[194] In a recent study, it was found that TANF

187 *Id.*

188 Harold Pollack et al., *Drug Testing Welfare Recipients – False Positives, False Negatives, Unanticipated Opportunities*, 6–7 (Jan. 2001).

189 *National Institute on Alcohol Abuse and Alcoholism, Assessing Alcohol Problems: A Guide for Clinicians and Researchers* 591, *available at* http://pubs.niaaa.nih.gov/publications/assessingalcohol/InstrumentPDFs/66_SASSI.pdf. According to its company website, a package of 100 SASSI paper tests and profiles costs $165, averaging out to slightly more than a mere $1.50 per applicant; *The SASSI Institute*, SASSI.COM, http://www.sassi.com/products/SASSI3/shopS3-pp.shtml (last visited Jan. 17, 2011, 11:48 A.M.). Compare this to the $24-$46 cost to the state to reimburse each individual who applies for TANF under HB 353.

190 *See* Lewis, *supra* note 143, at 4; Amelia M. Arria & Ashley Thoreson, *Integration of Child Welfare and Drug Treatment Services in Baltimore City and Prince George's County: An Evaluation of the Implementation of Maryland's House Bill 7*, http://adaa.dhmh.maryland.gov/Documents/content_documents/JusticeServices/HB7_ADAA_finalreport.pdf (last visited Oct. 15, 2012).

191 Gwen Rubenstein, *The State of State Policy on TANF & Addiction: Findings from the "Survey of State Policies and Practices to Address Alcohol and Drug Problems among TANF Recipients"*, LEGAL ACTION CENTER 6 (June 2002), *available at* http://www.lac.org/doc_library/lac/publications/state_of_state.pdf.

192 *Id.*

193 *See* Lewis, *supra* note 143, at 2; Jon Morgenstern et al., *Intensive Case Management Improves Welfare Clients' Rates of Entry and Retention in Substance Abuse Treatment* (Jan. 2001).

194 Jon Morgenstern et al., *Improving 24-Month Abstinence and Employment Outcomes for*

recipients who were referred to and participated in the ICM system were even more likely to abstain from future drug use and find subsequent employment than those participating in a screen-and-refer plan.[195] It is the ICM program's focus on rehabilitation—that is, its effort to build bridges towards employment and self-sufficiency— that gives it a chance to make a deeper and more lasting impact on the lives of the individuals and their families.

CONCLUSION

Satirist George Carlin once asked, "Why is there so much controversy about drug testing? I know plenty of guys who would be willing to test any drug they could come up with."[196] Carlin's joke is funny because it intentionally "misses the point." However, when a state like Florida mandates the drug testing of all TANF applicants at the risk of degrading and stigmatizing its most needy citizens, it too misses the point—but the results are none too funny. HB 353 treats the indigent class as if it suspects they are drug abusers and puts them in position to be stripped of their constitutional rights, solely on account of their economic status. It makes those who are asking for help even more vulnerable to the effects of poverty. Moreover, in choosing to deprive individuals who test positive of the assistance necessary to maintain an adequate standard of life for their families, it fails to promote employment and independence—the very ideals that TANF was designed to achieve. While HB 353 is yet another frightening example of how far some states will go in their assault on the poor, the public and political support behind such programs is real, strong, and threatening to a constitutional right to privacy once considered sacred.

Substance Dependent Women Receiving Temporary Assistance for Needy Families with Intensive Case management, 99 AM. J. PUB. HEALTH 328, 329 (Feb. 2009).

[195] *Id.* at 330; *see e.g.* Matt Lewis and Elizabeth Kenefick, *TANF Policy Brief: Random Drug Testing of TANF Recipients is Costly, Ineffective and Hurts Families*, CLASP.ORG, http://www.drugpolicy.org/sites/default/files/CLASP%20policy%20brief.pdf (Updated Feb. 3, 2011).

[196] *George Carlin Quotes*, THINKEXIST.COM, http://thinkexist.com/quotation/why_is_there_so_much_controversy_about_drug/182374.html (last visited Oct. 30, 2011, 1:46p.m.).