

COMMENTS

GOVERNMENT MANDATED DRUG TESTING FOR WELFARE RECIPIENTS: SPECIAL NEED OR UNCONSTITUTIONAL CONDITION?

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INTRODUCTION

In 1996, Congress passed major welfare reform legislation. It signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), which replaced the Aid to Families with Dependent Children (“AFDC”) program and created Temporary Assistance for Needy Families (“TANF”).¹ TANF emphasizes moving recipients from “welfare to work”² and specifically authorizes states to drug test welfare recipients and to sanction those who test positive.³ In 1999, Michigan was the first state to implement a suspicionless drug testing policy as a condition for receiving welfare benefits.⁴ A district court struck down the policy on Fourth Amendment grounds, and the Sixth Circuit court ultimately divided, upholding the district court’s injunction and putting a temporary stop to the policy.⁵ However, the constitutional issues remain undecided.⁶

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1 See *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1135 (E.D. Mich. 2000), *rev’d*, 309 F.3d 330 (6th Cir. 2002), *reh’g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003), *aff’d by an equally divided court*, 60 F. App’x 601 (6th Cir. 2003) (en banc).

2 *About TANF*, OFFICE OF FAMILY ASSISTANCE, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/ofa/programs/tanf/about> (last visited Mar. 20, 2013).

3 21 U.S.C. § 862b (2006) (“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.”); *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1276 (M.D. Fla. 2011) (Scriven, J.) (“Congress authorizes states to test welfare recipients for controlled substances and to sanction those who test positive.”).

4 Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 754 (2009).

5 *Id.* at 754–55 (citing *Marchwinski*, 113 F. Supp. 2d at 1134). However, Michigan again proposed similar legislation, relatively recently. See Crystal Garcia, *State Could Require Drug Test to Receive Welfare*, TIMES HERALD (Port Huron, Mich.), Dec. 30, 2011, at A1.

Since 2007, members of Congress,⁷ well over half of the states, and some U.S. territories⁸ have proposed similar legislation requiring drug testing for welfare recipients as a condition of receiving public assistance.⁹ Recently, Florida enacted such a statute.¹⁰ Soon thereafter, the American Civil Liberties Union (“ACLU”) brought a case challenging the law’s constitutionality under the Fourth Amendment.¹¹ A federal district court judge ordered the preliminary injunction necessary to suspend the policy, and the Eleventh Circuit af-

⁶ Budd, *supra* note 4, at 754–55.

⁷ In 2009, Congress introduced federal legislation requiring drug testing for all recipients of federally funded public assistance. Budd, *supra* note 4, at 775. Federal legislation is still on the table. See Adam Cohen, *Drug Testing the Poor: Bad Policy, Even Worse Law*, TIME (Aug. 29, 2011), <http://ideas.time.com/2011/08/29/drug-testing-the-poor-bad-policy-even-worse-law/> (“Senator David Vitter, a Louisiana Republican, has introduced the Drug Free Families Act of 2011, which would require all 50 states to drug-test [sic] welfare applicants.”).

⁸ See Drug Tester, *Guam Senator Pushes for Drug Testing of Welfare Recipients*, CONFIRMBIOSCIENCES (Oct. 7, 2011), <http://www.confirmbiosciences.com/blog/welfare-recipients-drug-testing/guam-senator-pushes-for-drug-testing-of-welfare-recipients.html> (discussing proposed legislation in Guam).

⁹ See Budd, *supra* note 4, at 774 (“[D]rug testing legislation appeared in over half of the states by 2009.”); Associated Press, *Growing Support for Drug Testing of Welfare*, N.Y. TIMES, Feb. 26, 2012, at A18 (“Nearly two dozen states are considering measures that would make drug testing mandatory for welfare recipients, according to the National Conference of State Legislatures.”); Jim Lynch & Karen Bouffard, *Welfare Recipients May Face Drug Tests*, DETROIT NEWS, Dec. 29, 2011, at A1 (“Thirty-six states are considering testing laws that would require urine sample testing for public assistance.”); A.G. Sulzberger, *States Adding Drug Test as Hurdle for Welfare*, N.Y. TIMES, Oct. 11, 2011, at A1 (“This year, 36 states considered drug testing for recipients of case assistance from the major welfare program, Temporary Assistance for Needy Families . . .”).

¹⁰ See FLA. STAT. § 414.0652 (2011); see also Michael C. Bender, *Scott Signs Bill Forcing Drug Testing on Welfare Recipients*, MIAMI HERALD (May 31, 2011), <http://miamiherald.typepad.com/nakedpolitics/2011/05/scott-signs-bill-forcing-drug-tests-on-welfare-recipients.html> (“Floridians will have to submit urine, blood or hair samples for drug testing before receiving cash benefits from the state under a bill Gov. Rick Scott signed into law . . .”); Cohen, *supra* note 7 (“Under a new Florida law, people applying for welfare have to take a drug test at their own expense.”).

¹¹ Sulzberger, *supra* note 9, at A1 (“The law . . . provoked a lawsuit . . . from the American Civil Liberties Union, arguing that the requirement represents an unreasonable search and seizure.”).

firmed the decision.¹² But, the push for welfare recipient drug testing legislation continues, in Florida and elsewhere.¹³

Such policies stereotype, stigmatize, and criminalize the poor without cause.¹⁴ Studies have shown that welfare recipients are no more likely than the general population to abuse drugs,¹⁵ and drug testing programs cost taxpayers significantly more than they save.¹⁶ But, aside from bad policy, does drug testing in this context constitute an unlawful search under current constitutional doctrine?

Courts and commentators are applying a standard Fourth Amendment analysis to the emerging laws. The Fourth Amendment generally prohibits unreasonable searches and seizures without particularized suspicion or warrants.¹⁷ Under some circumstances, however, the “special needs” doctrine gives the government greater latitude. Even without individualized suspicion of wrongdoing, a search may still be reasonable if the government can show that it is warrant-

¹² See *Lebron v. Wilkins*, 829 F. Supp. 2d 1273, 1281 (M.D. Fla. 2011) (“[T]here is a substantial likelihood that [plaintiff’s] challenge to the constitutionality of [the Florida statute] under the Fourth Amendment will succeed.”), *aff’d*, *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, No. 11-15258, 2013 U.S. App. LEXIS 3998, at *44 (11th Cir. Feb. 26, 2013); Michael Mayo, *Judge Makes Right Call in Halting Florida Welfare Drug Testing*, SUN-SENTINEL (Fort Lauderdale, Fla.), Oct. 27, 2011, at 1B (discussing Florida district court ruling).

¹³ Florida announced its intent to appeal the decision to the Supreme Court. See Arthur Delaney, *Florida Welfare Drug Testing Law Gets No Reprieve From Appeals Court*, HUFFINGTON POST (Feb. 26, 2013, 2:38PM, updated 3:06PM), http://www.huffingtonpost.com/2013/02/26/florida-welfare-drug-testing_n_2766479.html. Georgia passed its own legislation on April 16, 2012. See 2012 Georgia Laws Act 583 (H.B. 861); Evan Beauchamp & Andrew Hazen, *Social Services*, 29 GA. ST. U. L. REV. 224, 232 (2012) (legislative review); Kristin Torres, *Deal OKs Welfare Drug Tests; Lawsuit Likely*, ATLANTA J.-CONST. (Apr. 16, 2012), <http://www.ajc.com/news/news/state-regional-govt-politics/deal-oks-welfare-drug-tests-lawsuit-likely/nQS5c>.

¹⁴ See generally Kaaryn Gustafson, *Criminal Law: The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009); see also Budd, *supra* note 4, at 754; Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1416, 1445 (2012) (noting that “[t]he stigma of drug testing is a way to discourage the needy from seeking assistance” and that this kind of data collection “stigmatize[s] and humiliate[s], . . . compounding the harmful effects of living in poverty”).

¹⁵ See Budd, *supra* note 4, at 776–77 (noting “the correlation between poverty and drug addiction is quite weak” and citing various studies finding drug abuse among welfare recipients to be at or below the national level).

¹⁶ See Walker Newell, *Tax Dollars Earmarked for Drugs? The Policy And Constitutionality of Drug Testing Welfare Recipients*, 43 COLUM. HUM. RTS. L. REV. 215, 250–51 (2011); Rachel Bloom, *Drug-Testing Welfare Recipients: A Trend With No Traction*, HUFFINGTON POST (Mar. 8, 2012, 2:37 PM), http://www.huffingtonpost.com/rachel-bloom/drug-testing-welfare_b_1317162.html (explaining Virginia’s decision not to pass legislation because it would cost \$1.3 million and save only \$229,165 in the first year).

¹⁷ *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (“To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.”).

ed by a “special need[], beyond the normal need for law enforcement.”¹⁸ The special needs analysis consists of a balancing test weighing individual privacy interests against government interests.¹⁹ Most analyses of welfare recipient drug testing employ the special needs doctrine and conclude that individual interests outweigh those of the government, making the search unconstitutional.²⁰

However, reliance on the special needs doctrine alone overlooks the element of consent in these cases. Laws mandating drug testing for welfare recipients do not involve government searches of unwilling individuals, the standard Fourth Amendment situation. They instead force individuals to consent to invasive drug tests and thereby relinquish Fourth Amendment rights. Technically, an individual does not have to consent, and if she does not consent, no search takes place.²¹ Thus, the drug tests are, at least in a formal sense, consensual searches. And, consent generally eliminates any potential Fourth Amendment problem with a search.²²

The Court has dealt with the problem of consent as a waiver of constitutional rights with an “unconstitutional conditions” analysis. The unconstitutional conditions doctrine, which originated in the context of First Amendment government employee speech rights, purports to “prevent[] the government from penalizing those who exercise their constitutional rights by withholding a benefit that otherwise would be available.”²³ This would seem to apply to an individual deprived of welfare benefits for asserting a Fourth Amendment right. So, under current doctrine, mandated drug testing for welfare recipients should be analyzed as an unconstitutional condition, not as an ordinary Fourth Amendment search. Unfortunately, the unconstitutional conditions doctrine is incoherent, and examining it is “disorienting.”²⁴ Though it generally announces that the government cannot condition a benefit on the waiver of a constitutionally pro-

18 *Id.* (quoting *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 619 (1989)).

19 *Skinner*, 489 U.S. at 619 (“When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”).

20 *See infra* notes 25 and 26 and accompanying text.

21 *See Lebron v. Sec’y, Fla. Dep’t of Children & Families*, No. 11-15259, 2013 U.S. App. LEXIS 3998, at *32 (11th Cir. Feb. 26, 2013) (“[U]nder Florida’s program, an applicant is required to sign an acknowledgement that he or she consents to drug testing. Accordingly . . . the drug test is administered only to those persons who have consented to the test . . .”).

22 *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1972).

23 ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 980 (3d ed. 2006).

24 Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1298 (1984).

tected right, cases do not identify or distinguish prohibited from acceptable conditions. Thus, the unconstitutional conditions doctrine ultimately fails to provide a solution.

This Comment argues for a new constitutional analysis to address emerging welfare recipient drug testing cases under the Fourth Amendment. Part I explains why a standard Fourth Amendment special needs analysis does not directly apply. Part II considers the unconstitutional conditions doctrine and explains why its use is ultimately futile. Part III discusses First Amendment government employee speech cases as an example of a context in which the Court has developed a new doctrine to address similar issues. It argues that the Court should similarly develop a test for Fourth Amendment violations in the context of conditioned welfare benefits. The test should consider (1) whether the policy constitutes a search within the meaning of the Fourth Amendment, (2) how easy it is for individuals to withhold consent, and (3) whether the search is substantially related to the effective administration of the government services, or whether the government is merely leveraging power. This Comment concludes that, under this substance-oriented analysis, legislation mandating drug testing for welfare recipients violates the Fourth Amendment.

I. THE STANDARD FOURTH AMENDMENT “SPECIAL NEEDS” ANALYSIS: NOT DIRECTLY APPLICABLE

Courts and commentators have been directly applying standard Fourth Amendment doctrine to welfare recipient drug testing cases.²⁵ They argue that mandated drug testing for welfare recipients constitutes an unreasonable search because the government cannot

²⁵ See, e.g., *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011), *aff'd*, *Lebron v. Sec'y, Dep't of Children & Families*, No. 11-15258, 2013 U.S. App. LEXIS 3998, at *44 (11th Cir. Feb. 26, 2013); *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1135 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc); Michael D. Socha, *An Analysis of Michigan's Plan for Suspicionless Drug Testing of Welfare Recipients Under the Fourth Amendment "Special Needs" Exception*, 47 WAYNE L. REV. 1099 (2001); Lindsey Lyle, 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, 7984 (2012) (analyzing the constitutionality of Florida's legislation with Fourth Amendment special needs case law); Abby E. Schaberg, Law Summary, *State Drug Testing Requirements for Welfare Recipients: Are Missouri and Florida's New Laws Constitutional?*, 77 MO. L. REV. 567, 56971 (2012) (discussing application of Fourth Amendment special needs analysis to state drug testing requirements for welfare recipients).

demonstrate a special need that justifies the privacy intrusion.²⁶ For example, in *Marchwinski v. Howard*, the district court applied the Fourth Amendment special needs doctrine to find Michigan's suspicionless drug testing law unconstitutional.²⁷ In so doing, however, it ignored the issue of consent, disregarding the State's argument about "the voluntary nature of applying for welfare benefits."²⁸

Yet many commend this court's approach. Professor Jordan C. Budd explains, "the district court in *Marchwinski* took the Constitution at its word and applied the Fourth Amendment on its conventional terms to uphold the poor's basic right to bodily autonomy."²⁹ Budd argues that upcoming drug testing proposals offer a chance for federal courts to follow in the footsteps of the *Marchwinski* district court and redeem corrupted Fourth Amendment doctrine that has "denied indigent litigants the full force of otherwise applicable constitutional guarantees."³⁰ While this is a laudable idea, it disregards the significance of consent and other distinguishing features in these cases that make it difficult, if not impossible, to view mandated drug tests for welfare recipients as standard Fourth Amendment searches.

A. *Consent Is a Key Fourth Amendment Issue*

Though the Fourth Amendment generally prohibits government officials from performing searches without individualized suspicion,³¹ an individual can waive this right.³² For example, if the police ask to

²⁶ See *Lebron*, 820 F. Supp. 2d at 1286 ("[T]he State has not demonstrated a substantial special need to justify the wholesale, suspicionless drug testing of all applicants for TANF benefits."); *Marchwinski*, 113 F. Supp. 2d at 1142 ("[T]he State's financial assistance to parents for the care for their minor children . . . cannot be used to regulate the parents in a manner that erodes their privacy rights in order to further goals that are unrelated to the [welfare benefits]."); see generally Budd, *supra* note 4. But cf. Jeffrey Widelitz, *Florida's Suspicionless Drug Testing of Welfare Applicants*, 36 NOVA. L. REV. 253, 293-307 (2011) (finding Florida law constitutional under a Fourth Amendment "special needs" analysis).

²⁷ *Marchwinski*, 113 F. Supp. 2d at 1135.

²⁸ *Id.* at 1143. The court compared the case to *Chandler*, arguing that the drug testing in *Chandler* "involved an even more voluntary activity" because "[n]o one is compelled to run for public office." *Id.* The court misread *Chandler* because an individual has a constitutional right to run for public office. See discussion *infra* Part I.B.2.

²⁹ Budd, *supra* note 4, at 804.

³⁰ *Id.* at 803.

³¹ *Chandler v. Miller*, 520 U.S. 305, 308 (1997) ("[T]his restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion.").

³² See, e.g., *Lebron v. Sec'y, Fla. Dep't of Children & Families*, 2013 U.S. App. LEXIS 3998, at *32 (11th Cir. Feb. 26, 2013) ("[A] search conducted pursuant to a valid consent is constitutionally permissible.") (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)).

look inside a random motorist's trunk, and he says "yes," there is no Fourth Amendment problem with the search.³³ An individual's consent to a search removes the standard Fourth Amendment problem and eliminates the need for any further analysis.³⁴ This principle is well established in the criminal context, and the Supreme Court has endorsed it in other situations as well.

For example, in *Wyman v. James*,³⁵ the Court assessed the constitutionality of a New York policy requiring home visits by caseworkers as a condition of receiving public assistance.³⁶ The Court held that the recipient's ability to decline the visit (along with the aid) cured any Fourth Amendment problem, noting "the visitation in itself is not forced or compelled, and . . . the beneficiary's denial of permission is not a criminal act."³⁷ It reasoned that "[i]f consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases There is no entry of the home and there is no search."³⁸ The Court concluded that "[t]he choice is entirely [the individual's], and nothing of constitutional magnitude is involved."³⁹

In *Ferguson v. City of Charleston*,⁴⁰ the Court similarly addressed consent in the context of government benefits.⁴¹ In this case, the Court assessed the constitutionality of a South Carolina policy endorsing the drug testing of hospitalized women receiving obstetrical care.⁴² The hospital and law enforcement officials were collaborating to drug test women and using the results to prosecute them for child abuse.⁴³ The State argued that the women had consented to the drug tests.⁴⁴ However, the Fourth Circuit had not ruled on that issue.⁴⁵ To apply the standard Fourth Amendment analysis, the Court expressly assumed that the searches were conducted without informed consent.⁴⁶ But ultimately, the Court remanded the case for a decision on the

³³ These are the facts of *Schneekloth*, 412 U.S. at 220.

³⁴ Michelle Yoder, *Drug Tests for Welfare: Saving Taxpayer Money or Flushing it Down the Drain?*, 17 PUB. INT. L. REP. 56, 59 (2011) ("It is well established that a search, otherwise invalid, will be constitutional with the appropriate consent or waiver.").

³⁵ 400 U.S. 309 (1971).

³⁶ *Id.* at 309.

³⁷ *Id.* at 317.

³⁸ *Id.* at 317–18.

³⁹ *Id.* at 324.

⁴⁰ 532 U.S. 67 (2001).

⁴¹ *Id.* at 73–76.

⁴² *Id.* at 71–73.

⁴³ *Id.*

⁴⁴ *Id.* at 73.

⁴⁵ *Id.* at 74.

⁴⁶ *Id.* at 76.

consent issue.⁴⁷ It reasoned that “when [hospitals] 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, as standards of knowing waiver require.”⁴⁸ Consent was the decisive factor. The holding implied that, with informed consent, there would not have been a Fourth Amendment problem, and the drug tests would have been constitutional.⁴⁹

Wyman and *Ferguson* indicate that mandated drug testing policies for welfare recipients can avoid or survive direct Fourth Amendment scrutiny because of the recipients’ consent. Like in *Wyman*, an individual may choose not to consent to the drug test, and then, no drug test would take place. As in *Ferguson*, an individual’s informed consent would suggest that waiver is possible. Thus, the consent involved removes any direct Fourth Amendment problem with welfare drug testing policies.

B. Consent is Immaterial in Many Special Needs Cases for Other Reasons

Though consent generally eliminates the Fourth Amendment problem, the Court has applied a standard Fourth Amendment analysis in some cases that do arguably feature consent. However, these cases are all distinguishable from welfare drug testing cases on grounds that make consent immaterial.

1. Cases Involving Government Employees or Public Schoolchildren

With government employees (who can choose not to work for the government) and schoolchildren (who can choose not to participate in extracurricular activities), the Court has not considered consent an important factor. However, the Court did not focus on consent in these cases because the government won even under the nonconsensual Fourth Amendment standard, making the question of consent irrelevant.⁵⁰

47 *Id.* On remand, the Fourth Circuit found the government had not obtained constitutionally valid consent. *Ferguson v. City of Charleston*, 308 F.3d 380, 404 (4th Cir. 2002).

48 *Ferguson*, 532 U.S. at 85 (emphasis omitted).

49 The problem is that a woman has little choice but to consent to such a search when threatened with the denial of medical care. This is the same problem that affects welfare recipients when policies place drug testing conditions on the receipt of public assistance.

50 *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59–60 (2006) (finding it unnecessary to consider the unconstitutional conditions doctrine because the government could simply impose the condition at issue without consent).

Both *Skinner v. Railway Labor Executives' Association*⁵¹ and *National Treasury Employees Union v. Von Raab*⁵² involved government-mandated drug testing for government employees. In *Skinner*, the Court held that federal regulations mandating drug tests for railroad employees were reasonable under the Fourth Amendment.⁵³ It reasoned that “[e]mployees subject to the tests discharge duties fraught with . . . risks of injury to others that . . . can have disastrous consequences.”⁵⁴ Likewise, in *Von Raab*, the Court held that a program requiring suspicionless drug testing for certain United States Customs Service employees was constitutional.⁵⁵ It reasoned that these employees were the “first line of defense against [drug smuggling that affects] the health and welfare” of the country.⁵⁶ It also reasoned that “successful performance of their duties depends uniquely on their judgment and dexterity.”⁵⁷ Thus, in both *Skinner* and *Von Raab*, the Court emphasized the importance of public safety.⁵⁸ Because the government employees had duties related to public safety, their consent, or lack thereof, did not matter.

Similarly, in *Vernonia School District 47J v. Acton*,⁵⁹ the Court upheld a school district’s policy to drug test student athletes without individualized suspicion.⁶⁰ It explained that “Fourth Amendment rights . . . are different in public schools than elsewhere.”⁶¹ The Court stressed schools’ “special responsibility of care and direction” for children, and reasoned that “the Policy was undertaken in furtherance of the government’s responsibilities . . . as guardian and tutor of children entrusted to its care.”⁶² The Court went even further in *Board of Education v. Earls*,⁶³ upholding a school district’s policy of drug testing *all* students who participated in *any* extracurricular activity.⁶⁴ Relying on *Vernonia*, it “considered the constitutionality of the program in the context of the public school’s custodial responsibili-

51 489 U.S. 602 (1989).

52 489 U.S. 656 (1989).

53 *Skinner*, 489 U.S. at 634.

54 *Id.* at 628.

55 *Von Raab*, 489 U.S. at 677.

56 *Id.* at 668.

57 *Id.* at 672.

58 *Id.* at 677; *Skinner*, 489 U.S. at 628.

59 515 U.S. 646 (1995).

60 *Id.* at 650, 665.

61 *Id.* at 656.

62 *Id.* at 662, 665.

63 536 U.S. 822 (2002).

64 *Id.* at 826, 838.

ties.”⁶⁵ Because of a public school’s role “in loco parentis,” a student’s consent or lack thereof was inconsequential.⁶⁶

Cases involving government mandated drug testing for welfare recipients are different because, as most courts and commentators agree, in this context, a nonconsensual search without individualized suspicion is likely unconstitutional.⁶⁷ And, welfare recipients should not be compared to government employees or schoolchildren. Unlike government employees, welfare recipients have no duty to the public, and the act of receiving public assistance does not make recipients responsible for public safety in any way. Relegating welfare recipients to the same status as schoolchildren is oppressive and demeaning. The government has no more responsibility to care for welfare recipients than it does to care for the general public. Yet, it is beyond question that the government cannot randomly drug test the general public to patrol drug use. Because drug testing welfare recipients has nothing to do with ensuring public safety or parenting schoolchildren, the policy cannot survive a standard Fourth Amendment special needs analysis regardless of any element of consent.

2. Policies Forcing Choice Between Constitutional Rights

In the one civil search case that the government has lost,⁶⁸ the Court also applied the Fourth Amendment special needs analysis directly, without considering consent. In *Chandler v. Miller*, the Court struck down a Georgia statute requiring drug testing for candidates running for state offices.⁶⁹ However, this case is distinguishable from other Fourth Amendment special needs cases because there is a constitutional right to run for public office.⁷⁰ Thus, with its drug testing policy, the state effectively asked citizens to choose between two constitutional rights. This invalidated any consent.⁷¹

⁶⁵ *Id.* at 838.

⁶⁶ *See* *Vernonia School District 47J v. Acton*, 515 U.S. 646, 655 (1995).

⁶⁷ *See supra* note 26.

⁶⁸ *See* Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1229 (2004) (describing the Court’s recent suspicionless civil search cases).

⁶⁹ *Chandler v. Miller*, 520 U.S. 305, 309 (1997).

⁷⁰ *See generally* *Anderson v. Calabrezze*, 460 U.S. 780, 783, 806 (1983) (holding a state restriction on running for public office unduly burdened voters’ freedoms of choice and association under the First Amendment).

⁷¹ The government cannot require citizens to surrender a constitutional right simply by offering them the alternative of surrendering a different one. *Cf.* *New York v. United States*, 505 U.S. 144, 176 (1992) (finding that Congress cannot offer states a choice of two alternatives, neither of which it could impose as a freestanding requirement).

Here again, mandated drug testing for welfare recipients is different, for there is no constitutional right to welfare.⁷² Asking citizens to take a drug test or give up welfare does not require them to compromise one constitutional right at the expense of another. The Court's use of a standard Fourth Amendment special needs analysis in *Chandler* does not indicate that such analysis is appropriate for welfare drug testing cases.

II. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE: NOT A VIABLE SOLUTION

The Supreme Court has dealt with the problem of conditional infringements on constitutional rights before, using what is known as the unconstitutional conditions doctrine. The unconstitutional conditions doctrine stands for the proposition that “the government [cannot] condition a benefit on the requirement that a person forego a constitutional right.”⁷³ The Court has used this doctrine in several different contexts, mostly involving First Amendment rights. For example, the Court has held that the government cannot condition a tax exemption on the requirement that a person disavow his belief in overthrowing the federal government.⁷⁴ It has also held that the government cannot condition unemployment benefits on a person's willingness to violate her religious principles.⁷⁵ Thus, under current law, one would most naturally challenge a government policy conditioning the receipt of welfare benefits on a clean drug test under the unconstitutional conditions doctrine.⁷⁶

⁷² See *Dandridge v. Williams*, 397 U.S. 471, 484, 486–87 (1970) (noting that welfare is not a “freedom[] guaranteed by the Bill of Rights” in upholding a state policy limiting amounts of public assistance).

⁷³ CHEMERINSKY, *supra* note 23, at 570. There is a vast amount of scholarship on the unconstitutional conditions doctrine. For the leading work on the unconstitutional conditions doctrine, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

⁷⁴ *Speiser v. Randall*, 357 U.S. 513, 518–19, 528–29 (1958).

⁷⁵ *Sherbert v. Verner*, 374 U.S. 398, 404–06 (1963).

⁷⁶ Cf. Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 934–35 (1995) (“It is clear at the outset that contraceptive welfare laws present an unconstitutional conditions problem. They raise the classic unconstitutional conditions question whether the government may condition the conferral of welfare benefits on the beneficiary's surrender of her constitutional right to reproductive autonomy and bodily integrity, although the government might choose not to provide welfare benefits altogether. The government is plainly doing indirectly what it could not do directly.”)

Many scholars discussed conditions on welfare in the context of unconstitutional conditions pre-*Marchwinski*. See, e.g., Lynn A. Baker, *Bargaining for Public Assistance*, 72 DENV. U. L. REV. 949, 950–51 (1995) (discussing author's theory that the Court uses a

Accordingly, the district court in *Lebron*, the Florida case, looked to this doctrine to dispose of the issue of consent.⁷⁷ The court offered a blanket assertion that “the State’s exaction of consent to an otherwise unconstitutional search in exchange for [welfare] benefits would violate the doctrine of unconstitutional conditions.”⁷⁸ The Eleventh Circuit court majority agreed.⁷⁹ But, as Judge Jordan’s concurrence hinted, this claim is much too broad.⁸⁰ Unfortunately, case law does not consistently distinguish between those conditions that are prohibited and those that are reasonable.

In theory, the unconstitutional conditions doctrine should provide a test to determine when the government can place conditions on the benefits it grants and require people to agree to something it could not otherwise require. However, the doctrine is a conceptual failure, so it is not actually helpful. Commentators have been unable to reconcile the many cases that invoke the doctrine or to develop a cohesive framework for understanding it.⁸¹

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court itself suggested that the doctrine is invoked or ig-

two-pronged test to decide unconstitutional conditions cases involving welfare benefits); Philippa M. Guthrie, *Drug Testing and Welfare: Taking the Drug War to Unconstitutional Limits?*, 66 IND. L.J. 579, 592, 598–602 (1991) (discussing three types of claims available to welfare recipients challenging a drug testing program, including an unconstitutional conditions claim).

77 *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1284 (M.D. Fla. 2011).

78 *Id.*

79 *Lebron v. Sec’y, Fla. Dep’t of Children & Families*, 2013 U.S. App. LEXIS 3998 at *40–43 (11th Cir. Feb. 26, 2013).

80 *Id.* at *49–51 (Jordan, J., concurring).

81 *See id.* at *49 (Jordan, J., concurring) (“In my view the doctrine of unconstitutional conditions is somewhat incoherent, and some of the cases decided under it are difficult to reconcile.”); Chemerinsky, *supra* note 23, at 1013 (“[T]he cases cannot be reconciled If the Court wishes to strike down a condition, it declares it to be an unconstitutional condition; if the Court wishes to uphold a condition, it declares that the government is making a permissible choice to subsidize some activities and not others.”); *see also* RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 17–24 (1993) (discussing the lack of desirable large patterns in the unconstitutional conditions cases); Baker, *supra* note 72, at 968–69 (concluding that it is “hard to know” which of two theories addressing the unconstitutional conditions “paradox” is “right”); Julie A. Nice, *Making Conditions Constitutional by Attaching Them to Welfare: The Dangers of Selective Contextual Ignorance of the Unconstitutional Conditions Doctrine*, 72 DENV. U. L. REV. 971, 971 (1995) (discussing frustration with the “lack of a consensus identifying a coherent theoretical framework underlying the [unconstitutional conditions] doctrine”); Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L. J. 1051, 1053 (1995) (“The Court . . . has made no serious attempt to clarify its divergent approach to unconstitutional conditions cases. Numerous commentators have attempted to do so, but no consensus has emerged.”).

nored on an unpredictable and seemingly arbitrary basis.⁸² It identified two conflicting rules: (1) the government “is free to attach reasonable and unambiguous conditions to . . . financial assistance that [recipients] are not obligated to accept,” and (2) “the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . [right] even if he has no entitlement to that benefit.”⁸³ Either of these principles would decide a case if it were the only principle that applied. The problem is that both principles apply—or, both might. The Court has not provided a consistent way to determine which principle applies in any given case.⁸⁴

Ultimately, Professors William Marshall and Cass Sunstein may be right to suggest that there is not, and should not be, a theory of unconstitutional conditions.⁸⁵ Marshall writes that “the search for a comprehensive theory of unconstitutional conditions is ultimately futile.”⁸⁶ He concludes that “whether a governmentally imposed condition upon the receipt of a benefit is unconstitutional depends upon the definition of the particular constitutional protection involved.”⁸⁷ Similarly, Sunstein argues that the unconstitutional conditions doctrine is an “anachronism” that “should be abandoned.”⁸⁸ Instead, he contends, “what is necessary is a highly particular, constitutionally-centered model of reasons: an approach that asks whether, under the provision at issue, the government has constitutionally sufficient justifications for affecting constitutionally protected interests.”⁸⁹ Thus, for cases that invoke the unconstitutional conditions doctrine, an analysis should consider the substance of the right at issue and the context of the potential violation.

III. AN ALTERNATIVE FOURTH AMENDMENT APPROACH

Because the unconstitutional conditions doctrine has failed to address effectively the surrender of constitutional rights across varying substantive areas of the law, the Court needs to develop an alternative

82 547 U.S. 47, 59 (2006).

83 *Id.* (internal quotation marks omitted).

84 See Sullivan, *supra* note 73, at 1416–17 (providing numerous examples of how “the doctrine of unconstitutional conditions is riven with inconsistencies”).

85 William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243, 244 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594–95 (1990).

86 Marshall, *supra* note 85, at 244.

87 *Id.*

88 Sunstein, *supra* note 85, at 594.

89 *Id.* at 595.

approach to decide Fourth Amendment violations in the context of conditioned welfare benefits. In comparable situations, the Court has moved away from the idea of a generic unconstitutional conditions doctrine toward a more substantive analysis. For example, in First Amendment government employee speech rights cases, the Court formally developed a context-specific doctrine, known as the *Connick-Pickering* test.⁹⁰ First Amendment government employee speech cases and Fourth Amendment welfare recipient drug testing cases share similar features: both involve an element of consent and government non-sovereign (civil), as opposed to sovereign (criminal), action. Using the First Amendment cases as an example, the Court should develop a special test for Fourth Amendment issues pertaining to welfare benefits that considers both the purposes of the Fourth Amendment and the government's needs as a benefit provider.

A. *A Valuable Example: The Approach to First Amendment Violations in the Context of Government Employee Speech*

Cases addressing government employee speech rights under the First Amendment once presented a problem very similar to that of welfare drug testing cases. Under standard First Amendment doctrine, the government cannot penalize individuals for the content of their speech without meeting strict scrutiny.⁹¹ However, speech in the context of government employment presents a unique situation. Individuals are not entitled to government employment, and ordinary First Amendment analysis would prevent the government from managing the workplace and disciplining disruptive workers. Also, the government imposes sanctions as an employer in a non-sovereign capacity (i.e., it fires employees as opposed to arresting them).

Recognizing these aspects of government employee speech rights cases, the Court started using a waiver theory⁹² and unconstitutional conditions analysis.⁹³ Then, it realized that adopting a waiver theory

⁹⁰ The test comes from *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) and *Connick v. Myers*, 461 U.S. 138, 142 (1983). For a more detailed discussion, see *infra* note 95 and accompanying text.

⁹¹ See *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling governmental interest.").

⁹² See *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) ("[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

⁹³ See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny

would allow the government to silence public employees seeking to speak as citizens.⁹⁴ And, the unconstitutional conditions doctrine, offering an unpredictable choice between that and the alternative, restricting the government's supervision of its employees, was not a good solution. Hence, the Court abandoned that approach and crafted a special First Amendment analysis tailored to address the specific features of government employee speech.

The *Connick-Pickering* test, derived from two Supreme Court cases,⁹⁵ considers (1) whether the adverse employment action was motivated by the employee's speech, (2) whether the speech was about a matter of public concern, and (3) a balancing of the employee's speech rights against the employer's interest in the efficient functioning of the office.⁹⁶ These considerations help ensure that government employees have adequate speech protection even though employment is technically voluntary.⁹⁷ In other words, the test prevents the government from leveraging the employer-employee relationship to infringe inappropriately on employees' rights to free speech.⁹⁸ It provides a context-sensitive analysis taking into account the purposes of the First Amendment and the special needs of the government as an employer.

Like public employee speech cases, welfare recipient drug testing cases feature consent and non-sovereign government action. The Court has already recognized the significance of these features in the Fourth Amendment context. In addition to identifying consent as an important consideration,⁹⁹ the Court examines the form of govern-

him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .").

94 See generally Kermit Roosevelt III, *The Costs of Agencies: Waters v. Churchill and the First Amendment in the Administrative State*, 106 YALE L.J. 1233 (1997) (discussing public employee speech rights).

95 See *supra* note 90.

96 See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2008).

97 *Id.* at 418–19.

98 *Id.* at 419. By leveraging, the Court seems to mean the government's exploitation of a pre-existing relationship to acquire power over individuals in an unrelated context. See *id.* ("The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."); Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 643 (2012) (providing examples of what may constitute leveraging). The anti-leveraging principle is presumably what the unconstitutional conditions doctrine tries to enforce; it just has not found a coherent way to do so.

99 See discussion *supra* Part I.A.

ment action in the special needs analysis.¹⁰⁰ Just as it did in the First Amendment context, the Court should formalize an approach to Fourth Amendment cases with these characteristics. For cases challenging conditions on welfare under the Fourth Amendment, the Court needs a test that considers both the purposes of the Fourth Amendment and the Government's needs as a benefit provider, yet prevents the government from leveraging the government-beneficiary relationship.

B. Proposed Analysis for Fourth Amendment Violations in the Context of Conditioned Welfare Benefits

For cases challenging conditions on welfare benefits under the Fourth Amendment, the Court should use a three-prong test that considers the search, the consent (or lack thereof), and the government's needs concerning the administration of public assistance. The Court should first consider whether the condition constitutes a search within the meaning of the Fourth Amendment. If the condition does not qualify as a search, the analysis would stop, as there would be no Fourth Amendment violation. If it is a search, the Court should consider how harmful it is in terms of the values and purposes of the Fourth Amendment.

Second, the Court should consider how easy it is for the individual to withhold consent. If the government benefit is trivial or nonessential, then less judicial protection is needed. However, if the benefit is critical to the life and wellbeing of the individual, more judicial protection is needed.

Finally, the Court should consider whether the search is substantially related to the effective administration of the government ser-

¹⁰⁰ See *supra* note 18 and accompanying text. Individuals generally receive greater Fourth Amendment protection against the government in its non-sovereign capacity. Compare, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 80, 83–84 (2001) (emphasizing the government's sovereign action, referring to it as a critical distinction, and striking down the government policy to give the women full Fourth Amendment protection), with *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 664, 666 (1989) (noting that the "drug-testing program is not designed to serve the ordinary needs of law enforcement" in upholding the government's policy), and *Wyman v. James*, 400 U.S. 309, 318, 322–23, 326 (1971) (upholding the government's home visit policy, reasoning that the "[t]he visit is not one by police or uniformed authority," that prosecution is not the primary objective of the visit, and that "[i]t does not deal with crime or with the actual or suspected perpetrators of crime"). Since providing public assistance is a non-sovereign government action, welfare recipients risk receiving inadequate Fourth Amendment protection. They need substantial protection because of both the nature of the violated right and the type of benefit at issue. See discussion *infra* Part III.C.1–2.

vices, or whether the government is, instead, just leveraging power. This prong of the test takes into account the government's need to ensure that benefits are properly distributed but also protects individuals from the inappropriate use of government power. The government is "leveraging" if it is opportunistically using an individual's dependence on government benefits to obtain power over an unrelated area of that individual's life. Lack of a clear connection between the condition imposed and the requirements of program administration suggests leveraging because it indicates that the government is taking advantage of individuals' needs to achieve some unrelated objective. Governmental use of sovereign power also suggests that the government is leveraging, because there is no need to use law enforcement to implement welfare programs. If the Court determines that the condition is just a means for the government to leverage power, it should find a violation of the individual's Fourth Amendment protection.

C. Government Mandated Drug Testing for Welfare Recipients Violates the Fourth Amendment

Under the above test, laws mandating drug testing for welfare recipients violate individuals' Fourth Amendment rights. Drug tests are clearly searches within the meaning of the Fourth Amendment, consent is extremely difficult for welfare recipients to withhold, and the tests are not substantially related to the effective administration of the benefits. The government is leveraging power over the poor and should not be permitted to do so.

1. Drug Tests Are Searches

The Court has held repeatedly that drug tests constitute searches within the meaning of the Fourth Amendment.¹⁰¹ Drug tests are extremely invasive, much more so than home visits by social workers.¹⁰² They involve collecting bodily fluids, requiring that a sample of blood or urine be extracted or excreted from the body. These fluids contain the most personal of information, DNA. Thus, these tests not only infringe upon a person's bodily dignity, but also deprive people of control over personal, highly sensitive information. This is exactly

¹⁰¹ See *Ferguson*, 532 U.S. at 76 (2001) (holding that urinalysis drug testing constitutes a Fourth Amendment "search") (citing *Skinner v. Ry. Labor Execs. Ass'n.*, 489 U.S. 602, 617 (1989)).

¹⁰² Cf. *Wyman*, 400 U.S. at 317–18, 326 (1971) (stressing the "rehabilitative," "investigative," and "interview nature" of home visits in concluding that such visits were not invasive).

the kind of harmful intrusion the Fourth Amendment intends to prohibit.

2. *Consent Is Hard to Withhold*

The stakes of withholding consent are particularly high in the welfare context, signaling the need for more judicial protection. While people subject to drug testing conditions may technically choose not to consent, they do so at the expense of meeting their basic daily needs, as welfare benefits provide subsistence. Thus, the costs of withholding consent in this situation and losing welfare benefits are much higher than the costs of withholding consent in other contexts. If a government employee does not consent, she may lose her job and have to work elsewhere. If a student does not consent, she may not be able to play on the school soccer team. But, if a welfare recipient does not consent, she may not be able to eat, clothe, or shelter herself or her dependents. Forcing surrender of Fourth Amendment rights as a condition of welfare is also particularly troubling since welfare is supposed to promote independence, not reduce dignity.¹⁰³

Since welfare is intended to benefit the entire family unit, children are unduly affected. Dependent children are powerless with regard to a parent's decision to withhold consent. If a parent, for whatever reason, cannot or will not consent to the drug test, innocent children do not receive benefits intended to provide for their basic needs.¹⁰⁴ This potential harm to children also makes withholding consent more difficult: parents willing to go without benefits rather than submit to drug tests might reconsider if their children will suffer as well.

¹⁰³ See Gilman, *supra* note 14, at 1405 (“[A]ccepting welfare can subject one to humiliation, but refusing it can result in hunger. This ‘choice’ hardly promotes autonomy or dignity.”). As Professor Sullivan points out, this type of condition “discriminates de facto between those who do and do not depend on a government benefit, [and] it can create an undesirable caste hierarchy in the enjoyment of constitutional rights.” Sullivan, *supra* note 66, at 1490. She explains, “background inequalities of wealth and resources necessarily determine one’s bargaining position in relation to government, and . . . the poor may have nothing to trade but their liberties.” *Id.* at 1497–98; see also Roberts, *supra* note 76, at 941–43 (arguing that “[a]n individual’s acceptance of government benefits is [wrongfully] deemed to constitute a waiver of privacy,” whereas “[w]ealth can help to buy the presumption of privacy”).

¹⁰⁴ It should be clear that the state has no interest in punishing children for their parents’ misdeeds, much less their parents’ decision to waive a constitutional right. *Cf.* Plyler v. Doe, 457 U.S. 202 (1982) (holding that children cannot be disfavored based on their parents’ immigration status).

Moreover, the consent involved in welfare drug testing cases is not necessarily informed consent, as required under *Ferguson*.¹⁰⁵ It is often unclear under state legislation what the government can or will do with the information from the drug tests.¹⁰⁶ Under TANF, federal law authorizes states to sanction individuals who test positive.¹⁰⁷ This potential exercise of sovereign government power further demonstrates the need for increased judicial protection from the drug testing policies.¹⁰⁸

3. *The Search Is Not Related to Administering Benefits; Government Is Leveraging Power*

The drug tests are not substantially related to the effective administration of welfare benefits. Nothing is required of welfare recipients. Unlike government employees, welfare recipients are not performing government job functions, nor are they responsible for public safety. The government's primary concern in distributing welfare benefits is ensuring that the money goes to the correct qualified individuals.¹⁰⁹ Drug tests do not help it further this purpose.¹¹⁰

105 *Ferguson v. City of Charleston*, 532 U.S. 67, 84–85 (2001) (“While state hospital employees . . . 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 . . .”(emphasis omitted)). Informed consent in the welfare context could be achieved through a policy providing an additional monetary incentive for welfare recipients who agree to be tested and test negative.

106 Many of the laws leave open the possibility of criminal sanctions. *See Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1280 (M.D. Fla. 2011) (explaining that the welfare agency shares all positive drug tests with a hotline that is authorized to share its records with criminal justice agencies and state attorneys).

107 *See supra* note 3 and accompanying text.

108 *See supra* note 100.

109 *Wyman* shows that the Government can ensure that welfare funds are going to the proper recipients. *Wyman v. James*, 400 U.S. 309, 322 (1971). Home visits are related to the provision of services that affect dependent children, who are objects of public concern. *See id.* However, unlike a social worker's observation of a home, drug tests reveal little about whether funds have gone to dependent children. *Marchwinski v. Howard* warns of the danger of accepting this argument:

If the State is allowed to drug test [welfare] recipients in order to ameliorate child abuse and neglect by virtue of its financial assistance on behalf of minor children, that excuse could be used for testing the parents of all children who receive Medicaid, State Emergency Relief, educational grants or loans, public education or any other benefit from the State. In all cases in which the State offers a benefit on behalf of minor children, the State could claim that it has a broad interest in the care of those children which overcomes the privacy rights of the parents.

113 F. Supp. 2d 1134, 1142 (E.D. Mich. 2000).

The government also has an interest in ensuring that the money it provides is used for its intended purpose and not to purchase drugs. However, the government provides monetary benefits to many citizens without attempting to drug test them.¹¹¹ For example, the government does not drug test citizens receiving tax benefits.¹¹² Also, there is no general principle honored in different contexts that the government needs to ensure that taxpayer dollars are not funding drug use. For example, the government does not drug test legislators, whose salaries are paid by taxpayers.¹¹³ There is no reason that the government's interest in not funding drug use is greater in the welfare context than in any other context. Studies have shown that the rate of drug use among welfare recipients is lower than that of the general population.¹¹⁴ Thus, with policies requiring drug testing for

110 The government cannot argue that drug tests help it ensure funds are distributed to dependent children because tests are conducted before any funds have been distributed. See *Lebron*, 820 F. Supp. 2d. at 1273 (“At the point at which the drug test is demanded, the State has not made a TANF contribution for the benefit of the children.”).

111 See Gilman, *supra* note 14, at 1391 (“[M]ost government benefits do not flow to the poor, yet this is the group we require to sacrifice their dignity and their right to privacy.” (internal quotation omitted)).

112 The government gives out billions of dollars of what some have referred to as “corporate welfare,” yet it does not drug test CEOs on Wall Street. Some bloggers have advanced this idea. See Eric Baerren, *The Latest Dumb Idea: Drug Testing People on Welfare*, MICHIGANLIBERAL.COM (Dec. 30, 2011), <http://www.michiganliberal.com/diary/18702/the-latest-dumb-idea-drug-testing-people-on-welfare> (“Perhaps it is time to subject investment bankers and derivatives traders to routine random drug tests The health of the economy is too important to be left in the hands of potentially drug-addled brains.”).

113 The reaction to such a suggestion is one of incredulity. See *The Daily Show with Jon Stewart: Poor Pee-Ple* (Comedy Central television broadcast Feb. 2, 2012), available at <http://www.thedailyshow.com/watch/thu-february-2-2012/poor-pee-ple>.

114 See Associated Press, *Florida: Few Drug Users Among Welfare Applicants*, N.Y. TIMES, Sept. 28, 2011, at A14 (“Preliminary figures compiled under a new state law requiring drug tests for welfare applicants show that they are less likely than other people to use drugs, not more.”). Compare Maia Szalavitz, *Does Drug Testing the Poor Do Anything to Reduce Addiction?*, TIME HEALTH & FAMILY, Aug. 30, 2011, <http://healthland.time.com/2011/08/30/does-drug-testing-the-poor-do-anything-to-reduce-addiction> (“One study found that just 4% of people receiving welfare were addicted to illegal drugs.”), with Associated Press, *supra* (“The Justice Department estimates that 6 percent of Americans 12 and older use illegal drugs.”). See also Cohen, *supra* note 7 (“Several studies, including a 1996 report from the National Institute on Alcohol Abuse and Alcoholism, have found that there is no significant difference in the rate of illegal-drug use by welfare applicants and other people. Another study found that 70% of illegal-drug users between the age of 18 and 49 are employed full time.”). In *Lebron*, the court explained that “researchers found a lower rate of drug usage among TANF applicants than among current estimates of the population of Florida as a whole. This would suggest that TANF funds are no more likely to be diverted to drug use or used in a manner that would expose children to drugs or fund the ‘drug epidemic’ than funds provided to any other recipient of government benefits.” *Lebron v. Wilkins*, 820 F. Supp. 2d. 1273, 1286 (M.D. Fla. 2011).

welfare recipients, the government is leveraging power over the poor that it cannot wield over other citizen populations.

Furthermore, drug testing does not help the government with its goal of moving recipients from welfare to work.¹¹⁵ There is no data that suggests that drug use among welfare recipients prevents them from getting jobs.¹¹⁶ This means that there is no evidence that drug testing policies help advance the goal of decreasing dependency on public assistance in any way. On the other hand, the current high unemployment rate reflects the struggling economy and the difficulty of finding jobs for all citizens.¹¹⁷ Welfare recipient drug testing policies represent the government's attempt to cut back in times of economic recession by leveraging power over the poor.¹¹⁸ The Fourth Amendment was meant to protect individuals from this kind of unreasonable government intrusion.

CONCLUSION

Emerging legislation mandating drug testing for welfare recipients stereotypes and criminalizes the poor. It strips them of their dignity and control over their most personal information. However, because there is an element of consent involved with the testing, policies cannot be analyzed directly under the standard Fourth Amendment special needs doctrine. Therefore, it is critical for the Court to recognize an alternative Fourth Amendment analysis that accounts for specific issues pertaining to conditions placed on welfare benefits. This can put a stop to unjustifiable coercion that forces individuals to choose between sustenance and privacy.

115 See 820 F. Supp. 2d. at 1286 (noting the government's interest in "ensuring that funds are not used in a manner that detracts from the goal of getting beneficiaries back to employment").

116 See, e.g., *id.* ("The researchers . . . found no evidence that TANF recipients who screened and tested positive for the use of illicit substances were any less likely to find work than those who screened and tested negative."); see also Cohen, *supra* note 7 ("Another study found that 70% of illegal-drug users between ages 18 and 49 are employed full-time.").

117 Unemployment is currently around 8%. See U.S. Bureau of Labor Statistics, *Unemployment Rate—Seasonally Adjusted*, available at http://www.google.com/publicdata/explore?ds=z1ebjpk2654c1_&met_y=unemployment_rate&tdim=true&fdim_y=seasonality:S&dl=en&hl=en&q=current+unemployment+rate (last visited Mar. 6, 2013).

118 See Gilman, *supra* note 14 at 1416–17 ("The stigma of drug testing is a way to discourage the needy from seeking assistance. It diverts the attention away from systemic problems underlying the modern economy and . . . allows the government to wash its hands of need."). Yet, policies have not resulted in any government savings, have "snared few drug users," and have "had no effect on the number of [welfare] applications." Lizette Alvarez, *No Savings Are Found from Welfare Drug Tests*, N.Y. TIMES, April 18, 2012, at A14.