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Poverty Seminar Paper

Drug Testing for Welfare Recipients- An Examination of Policies and their Implications

Welfare reform has become a major topic of conversation in the United States. Currently those who are running for the Republican nomination for the presidency have made many statements regarding welfare reform. Also states have passed, or are in the process of passing, legislation that makes it more difficult to qualify for the different entitlement programs such as TANF (Temporary Assistance for Needy Families) and unemployment insurance. This is partially due to budget shortfalls in many if not all of the states, due to the decline in tax dollars collected, and the increase in entitlement benefits received because of the unprecedented loss of jobs.

Currently, there is a popular sentiment that many people are gaming the welfare system. States are attempting to find out which people who receive welfare are “abusing the system” and remove them from the programs. A popular way of attempting to achieve this goal has been to write legislation in both the state and federal legislatures that make it more difficult to receive funding from TANF by requiring a drug test from applicants.

This paper will examine the current status of and the legal history behind these laws including the cases of *Marchwinski v. Howard* and *Chandler v. Miller*. The paper will also discuss what the goals of the drug testing programs are and whether or not these laws accomplish their goals. It will discuss the constitutionality and the issues of dignity associated with these programs. It will finally offer a solution for addressing these programs using the judicial system.

What is TANF?

TANF is a federal program started in 1996 during a period of welfare reform. The goal of the program, according to the Department of Health and Human Services, is to provide assistance to people and families during a limited amount of time so that they can “get back on their feet,” get jobs, and become productive members of society. According to the Department of Health and Human Services, “The assistance is time-limited and promotes work, responsibility and self-sufficiency.”¹

Each state receives a block grant from the Department of Health and Human Services to use for TANF, so each state runs its own program that has a unique name. The federal government monitors each state’s program.

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The Status of these Laws

Currently two states have implemented mandatory drug testing programs for TANF recipients, and 36 states are considering legislation that puts this policy in place.² A member of the U.S. Senate proposed a bill in 2011 attempting to require all states to test TANF recipients for drugs.³ There are several stated rationales for this United States Senate bill, along with the multitude of state bills. This reasoning includes that it would add accountability to state welfare programs, the states will save money because of the new laws, and people who need TANF money will stop abusing drugs, which would lead

¹ *About TANF*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, (April 23, 2012, 6:54 P.M.), <http://www.acf.hhs.gov/programs/ofa/tanf/about.html#>.

² Roger Alfred, *Drug Testing Flap Holds Up Vote on State Smoking Ban*, The A.P., Mar. 9, 2012.

³ S. 83, 112th Cong. (2011).

to “drug free families.”⁴ The United States Senate bill sponsored by Senator David Vitter never made it out of the 2011 committee process, but is an example of the types of bills that are being passed in multiple states.

Legislation that Has Been Passed Into Law- Michigan

In 1999, the state of Michigan passed a law that would mandate all recipients of TANF be tested for drugs via a urine test.⁵ If an applicant tested positive for drugs, the applicant was required to complete a drug assessment and complete a treatment program if it was suggested after the assessment. Those who did not complete the substance abuse program and could not show good cause were denied TANF funds.⁶ The program was opposed by civil rights groups, including the ACLU, and was challenged in court in *Marchwinski v. Howard*.⁷ The program was found to be unconstitutional by a district court. When the case was appealed to the Sixth Circuit Court of Appeals, the district court’s ruling was upheld as a result of an evenly divided *en blanc* panel.⁸ Therefore the drug-testing program in Michigan was disbanded.

Drug Testing for Other Government Services

⁴ Adam Strunk, *Bill Requiring Random Drug Testing for Kansas Welfare Recipients to go Before House Panel*, The Wichita Eagle, Mar. 7, 2012, <http://www.kansas.com/2012/03/07/v-print/2245818/bill-requiring-random-drug-testing.html>.

⁵ Robyn Meredith, *Testing Welfare Applicants for Drugs*, May 30, 1999, <http://www.nytimes.com/1999/05/30/us/testing-welfare-applicants-for-drugs.html?pagewanted=print&src=pm>.

⁶ CONGRESSIONAL RESEARCH SERVICE, CONSTITUTIONAL ANALYSIS OF SUSPICIONLESS DRUG TESTING REQUIREMENTS FOR THE RECEIPT OF GOVERNMENTAL BENEFITS, *available at* <http://www.fas.org/sgp/crs/misc/R42326.pdf>.

⁷ The ACLU, *Drug Testing of Public Assistance Recipients as a Condition of Eligibility*, (April 23, 2012, 4:24 P.M.), <http://www.aclu.org/drug-law-reform/drug-testing-public-assistance-recipients-condition-eligibility>.

⁸ CONGRESSIONAL RESEARCH SERVICE, CONSTITUTIONAL ANALYSIS OF SUSPICIONLESS DRUG TESTING REQUIREMENTS FOR THE RECEIPT OF GOVERNMENTAL BENEFITS, *available at* <http://www.fas.org/sgp/crs/misc/R42326.pdf>.

The testing of TANF applicants in Michigan was not the first case to address drug testing for government benefits. An earlier case resolved in the Supreme Court was *Chandler v. Miller*. This case dealt with drug testing of candidates for “major” office in the State of Georgia including governor, lieutenant governor, and other designated offices. A statute was passed by the state legislature that made it a requirement for candidates for these offices to certify 30 days before they qualified for the state election that they had passed a urinalysis for drugs.⁹

Libertarian candidates for office objected to the law and filed a motion in district court to have the law struck down. They argued that it violated their First, Fourth, and Fourteenth Amendment rights granted to them by the United States Constitution. The lower court upheld the law citing cases where school athletes had been required to submit to drug testing and the laws had been upheld by the Supreme Court.¹⁰

In *Chandler v. Miller*, the Supreme Court of the United States held that “Georgia’s requirement that candidates for state office pass a drug test does not fit within the closely guarded category of constitutionally permissible suspicionless searches.”¹¹

The court focused on whether or not the searches were reasonable.¹² The court has upheld certain searches of high-risk populations such as Customs Service Officers seeking a promotion.¹³ According to the opinion in *Chandler*, for a search to be reasonable under the Fourth Amendment to the United States Constitution when conducted on a non-high risk population, the search must be based on an individualized

⁹ *Chandler v. Miller*, 520 U.S. 305, 308, 117 S. Ct. 1295, 1298, 137 L. Ed. 2d 513 (1997).

¹⁰ *Id.* at 309.

¹¹ *Id.* at 309.

¹² *Id.* at 313.

¹³ *Id.* at 315.

suspicion of wrongdoing.¹⁴

In Ginsburg's opinion, "Drug testing was an act of unreasonable search and seizure and violated Fourth Amendment protections."¹⁵ She further stated, "The state can only impose drug tests in cases where public safety is at risk."¹⁶ According to the opinion:

Respondents contend that unlawful drug use is incompatible with holding high state office because such drug use draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials. Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule. The statute was not enacted, as respondents concede, in response to any fear or suspicion of drug use by state officials. A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime.¹⁷

Here, Ginsberg states that while the respondents (the state, who wanted to drug test

people running for public office) realize that those who hold state office should not use drugs, the respondents lack any explanation for why they are departing from the Fourth

Amendment and that the population running for elected office would be more likely to abuse drugs.

In this case, the persons who were seeking higher office could obtain lab tests from their own physician, and if they were positive, did not have to report them to the state. The Court, while acknowledging that Georgia needed state leaders who were responsible and respectable, did not feel that the urinalysis that Georgia was requiring met the "special needs" requirement set by the court in order to allow a search of someone.

¹⁴ *Id.* at 320.

¹⁵ *Id.* at 323

¹⁶ *Id.* at 323.

¹⁷ *Id.* at 306.

This reasoning was applied in *Marchwinski v. Howard*. The Family Independence Agency of Michigan was requiring those who were applying for welfare to submit to drug screenings in order to receive their benefits.¹⁸ The Sixth Circuit Court of Appeals found that Michigan was not within its constitutional right to search its welfare recipients for drugs. According to the Sargent Shriver National Center on Poverty Law, “The proper standard was whether Michigan had shown a special need—public safety being but one consideration in assessing need; Michigan had a strong interest in ensuring that public assistance monies were used for the welfare of recipients’ children; welfare recipients had a diminished expectation of privacy; and plaintiffs had not shown that drug testing was an unreasonable search.”¹⁹ The plaintiffs then sought an *en blanc* review, where six judges agreed that it was an unreasonable search, while six did not. Because of Sixth Circuit precedent, the district court’s decision to find the law unconstitutional was upheld.²⁰

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Legislation Regarding Welfare and Drug Testing After Michigan- Florida

Over ten years since the Michigan law was found to be unconstitutional by the Sixth Circuit Court of Appeals, other states have decided to implement their own versions of the bill, addressing the same area of government aid- TANF. The Florida legislature was the first state since Michigan to pass a law that required individuals that were receiving TANF (Temporary Assistance to Needy Families) money to be tested for

¹⁸ Shriver Center, *Marchwinski v. Howard* (April 23, 2012, 4:56 P.M.)
<http://www.povertylaw.org/poverty-law-library/case/52600/52642>.

¹⁹ *Id.*

²⁰ *Id.*

drugs.²¹ The differences between the Michigan law and the Florida law will be discussed below.

The bill signed into law by Republican Governor Rick Scott on May 31, 2011 was passed to “[To] encourage personal accountability and ...to prevent the misuse of tax dollars.”²² House Bill 353 was passed in the 2011 legislative session and took effect on July 1, 2011. According to the bill, the program required applicants for the Federal Temporary Assistance to Needy Families program to submit to a test for several illegal drugs.²³ All applicants for TANF, including mothers who currently have children that exempt them from the work requirements of the federal assistance, were required to be tested. This test included submitting a urine sample that was then analyzed by a lab.²⁴

Applicants who were tested also had to provide a list of the medications they were taking, both prescription and over the counter, in order to avoid a false positive. This was not required in the Michigan law. Children, who were under the age of eighteen and were dependent, did not have to be screened for drugs. Teenagers who were legally emancipated from their parents, and teen mothers did have to participate in the drug-testing program.²⁵

Previously the Florida Department of Children and Families had conducted a study to see if certain populations were more likely to use drugs. They were responsible for implementing a program that identified possible users of drugs, and then testing them.

²¹ Catherine Whittenburg, *Welfare Drug-Testing Yields 2% Positive Results*, Tampa Bay Trib., August 25, 2011, <http://www2.tbo.com/news/politics/2011/aug/24/3/welfare-drug-testing-yields-2-percent-positive-res-ar-252458/?referer=None&shorturl=http://tbo.ly/pGP0Yv>.

²² Michael Peltier, *Florida to Begin Testing Welfare Recipients for Drugs*, The News Service of Florida (April 23, 2012, 5:38 P.M.), <http://www.northescambia.com/2011/06/florida-to-begin-testing-welfare-recipients-for-drugs>.

²³ H.B. 353, (Fl. 2011).

²⁴ Drug Screening for Applicants for Temporary Assistance for Needy Families, Fl. Stat. 414.0652, 2011).

²⁵ *Id.*

According to the order by the Federal Judge in Orlando who reviewed the program in *Lebron v. Wilkens*, a study had been conducted in the early 2000s called the Demonstration Project that was “designed... to test empirically (1) whether ‘individuals who apply for temporary cash assistance or services under the state’s welfare program are likely to abuse drugs,’ and (2) whether such abuse affects employment and earnings and use of social service benefits.”²⁶ The program yielded interesting results. It showed that people working used the same amount of drugs as people who were on assistance programs like welfare.²⁷ The Federal Judge in *Lebron v. Wilkens* goes on to state that Florida ignored these results from their own study and implemented the program to test TANF recipients for drugs.²⁸

If the recipient or applicant tested positive for illegal drugs, they were not eligible for Federal TANF money for one year. After this year, they could be retested. If they failed the test a second time, they were banned from TANF funding for three more years. This is also different from the Michigan law, which was much less harsh on applicants who tested positive for drugs and required an assessment and drug counseling but did not immediately disqualify a person from TANF.

Once a person had tested positive and his TANF benefits had been revoked, the person was given a list of treatment centers and options, but was not required to go into a treatment program. If the applicant who failed the drug test had children, the dependent child’s ability to apply for and receive money from TANF was not affected by his parent’s failing of the drug screening. At this point, an alternative adult payee could be designated for the child, so the child could receive the benefits while the parent could

²⁶ *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1275 (M.D. Fla. 2011).

²⁷ *Id.* at 1275.

²⁸ *Id.* at 1279.

not.²⁹ If a person took on the responsibility of being the designated payee for a child, she was required to be tested for drugs as well.³⁰

When a person tested positive for drugs during a TANF screening, the bill did not mandate that the test results be shared with any other state agency. In reality, positive test results were shared with the Florida Abuse Hotline, who shares that information with a program called the Florida Safe Families Network Database. Various law enforcement agencies in Florida have access to the information in the database.³¹ The fact that law enforcement agencies had access to the data collected by the state's TANF drug screening program provided its own legal issues that will be discussed further in this paper. This sharing of information was also not a part of the Michigan program.

The program, which Governor Rick Scott had campaigned on, was not very cost effective. According to an article from the Tampa Bay Tribune, "Cost of the tests averages about \$30. Assuming that 1,000 to 1,500 applicants take the test every month, the state will owe about \$28,800-\$43,200 monthly in reimbursements to those who test drug-free. That compares with roughly \$32,200-\$48,200 the state may save on one month's worth of rejected applicants. Net savings to the state: \$3,400 to \$5,000 on one month's worth of rejected applicants. Over 12 months, the money saved on all rejected applicants would add up to \$40,800 to \$60,000 for a program that state analysts have

²⁹ Drug Screening for Applicants for Temporary Assistance for Needy Families, Fl. Stat. 414.0652, 2011).

³⁰ *Id.*

³¹ CONGRESSIONAL RESEARCH SERVICE, CONSTITUTIONAL ANALYSIS OF SUSPICIONLESS DRUG TESTING REQUIREMENTS FOR THE RECEIPT OF GOVERNMENTAL BENEFITS, *available at* <http://www.fas.org/sgp/crs/misc/R42326.pdf>.

predicted will cost \$178 million this fiscal year.”³² This does not seem to be much of a savings for taxpayers in Florida.

Another issue with the Florida program is the way the state paid for reimbursements for tests that were negative. According to the Federal Judge that found the law to be unconstitutional, the state of Florida used federal TANF money to reimburse people for the price of their tests.³³ This is money that could have and should have been spent on providing assistance to the needy families instead of reimbursing them for unnecessary negative tests.

Current Legal Action Regarding the Florida Law

The constitutionality of the Florida program is being challenged in *Lebron v.*

Wilkins which was filed by an applicant for TANF who had completed all of the required steps for the aid except for the drug test. The applicant who is working with the ACLU then filed a motion with a federal district court, claiming that the state law violates the United States Constitution’s Fourth Amendment right against unreasonable searches and seizures. A federal court judge in Orlando halted the drug-testing program until the court case is decided.³⁴

The Federal Court Judge, Mary Scriven, an appointee to the bench by President George W. Bush also declared the test unconstitutional and said, “The right to be free from unreasonable searches and seizures under the Fourth Amendment is a fundamental

³² Catherine Whittenburg, Welfare Drug-Testing Yields 2% Positive Results, Tampa Bay Trib., August 25, 2011, <http://www2.tbo.com/news/politics/2011/aug/24/3/welfare-drug-testing-yields-2-percent-positive-res-ar-252458/?referer=None&shorturl=http://tbo.ly/pGP0Yv>.

³³ *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1279 (M.D. Fla. 2011).

³⁴ 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?story_link=email_msg.

Constitutional right” and that the screening of the applicants for TANF funds could “cause irreparable harm.”³⁵ The court stated that “The drug test represents a Fourth Amendment search due to the ‘intrusion into a highly personal and private bodily function’ necessary for urinalysis, the fact that private information such as prescription drug use could be divulged as part of the test, and that the test results could be made available to law enforcement and other non-medical third parties.”³⁶

Legislation Currently Being Considered

On a national level, Senator David Vitter of Louisiana introduced Senate Bill S83 in January of 2011. The bill, entitled “The Drug Free Families Act” would require all states to test TANF recipients for drugs as a part of their application. The bill would require all states to submit certification to the Federal Government that all recipients of TANF had been screened for drugs.³⁷ So far the bill has not made it out of committee.

Currently 36 states have bills that are being considered in their state legislatures. States considering these laws include Georgia, Kansas, Oklahoma, Alabama, and Ohio.³⁸ There had been a bill considering implementing the process in Colorado, but the bill was killed in committee.

Georgia has made headway on passing a state law similar to the one in Florida. The bill was passed by the Georgia House and then approved by the Senate of Georgia. In the law, there would be an exemption for those who are significantly impaired by

³⁵ *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1292 (M.D. Fla. 2011).

³⁶ CONGRESSIONAL RESEARCH SERVICE, CONSTITUTIONAL ANALYSIS OF SUSPICIONLESS DRUG TESTING REQUIREMENTS FOR THE RECEIPT OF GOVERNMENTAL BENEFITS, available at <http://www.fas.org/sgp/crs/misc/R42326.pdf>.

³⁷ S. 83, 112th Cong. (2011).

³⁸ Roger Alfred, Drug Testing Flap Holds Up Vote on State Smoking Ban, *The A.P.*, Mar. 9, 2012.

physical, mental, or developmental disabilities. The bill has been passed and there is expected to be a legal challenge to it as well.³⁹

Issues of Dignity Surrounding Drug Testing for Welfare Recipients

In the United States, some people look down on those who collect certain types of government assistance. Currently in the 2012 presidential campaign, candidates who are vying to be the Republican nominee for president spend a lot of time on the campaign trail discussing welfare recipients. Candidate Rick Santorum made several negative remarks about welfare recipients, saying at a campaign event in reference to black Americans who receive welfare benefits, “I don’t want to make black people’s lives better by giving them someone else’s money.”⁴⁰

For a segment of society already stigmatized, testing them for drugs in order to receive much needed support can be a demeaning experience. The tests are typically urine tests, which require the recipient to submit a sample of a very private bodily fluid to the state to be tested for drugs. That coupled with the assumption that these people are at a greater risk for drug abuse and use than other segments of the population and therefore they should be tested for drugs is a demeaning assumption.

There is also the assumption that use equals addiction. While drugs are addictive by nature, the assumption that someone who tests positive for drugs is an addict discounts

³⁹ *Georgia Approves Welfare Drug Tests*, UPI.COM, (April 23, 2012, 7:02 P.M.) http://www.upi.com/Top_News/US/2012/04/17/Georgia-approves-welfare-drug-tests/UPI-28361334695390/.

⁴⁰ Ted Robbins, *Santorum Support Builds Ahead of Iowa Caucuses*, NATIONAL PUBLIC RADIO, Jan. 2, 2012, available at <http://www.npr.org/2012/01/02/144569143/rick-santorum-may-be-peaking-at-the-right-time>.

a one-time user who made a mistake. While many people break traffic laws from time to time, a person caught speeding, is not assumed to be a habitual bad driver.

Persons who apply for other forms of government aid are not subject to the stereotyping that comes along with applying for TANF. No one who applies for student loans is required to submit a urine test even though popular culture is dominated with movies and television shows about “experimentation with drugs in college.” The fact is that the poor are stigmatized in American society, and when a state adds a requirement of submitting bodily fluids in order to receive certain types of funding, this adds to the burden of being part of that segment of society.

The Issue with the Fourth Amendment and Drug Testing for TANF

When Michigan passed a law in 1999 forcing people who wanted public assistance to submit to drug screens, the law was declared unconstitutional by the Sixth

Circuit Court of Appeals because it was deemed to violate the Fourth Amendment’s right to not be subjected to unreasonable search and seizure. The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴¹

The Fourth Amendment protects a person from a search by the United States government without a proper justification in order to protect citizens from an overreaching government. Drug testing has historically been treated as a search by the Supreme Court in cases such as *Board of Education v. Earls*. In *Earls*, the United States Supreme Court

⁴¹ U.S. CONST. amend. IV.

determined that a drug test was a search for the purposes of the Fourth Amendment but that in that particular circumstance the search was proper because it dealt with drug testing in schools, an environment that the Justices said had a lower expectation of privacy.⁴² In cases like *Chandler v. Miller*, the court has made it clear that the state must have a special need that is substantially greater than the need for privacy by the individual.⁴³

The Federal Judge in *Lebron v. Wilkins* discussed United States Supreme Court precedent that holds that drug testing, specifically testing of urine, is a search. Judge Scriven quoted from the United States Supreme Court case *Skinner v. Railway Labor Executives Association* that “These intrusions [urine tests] must be deemed searches under the Fourth Amendment.”⁴⁴ Judge Scriven continues of *Skinner* in her opinion when

discussing the dignity of a person who is forced to submit to a urinalysis. She quotes-

There are few activities in our society more personal or private than the passage of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed its performance in public is generally prohibited by law as well as social custom.⁴⁵

This underscores the dignity that the state takes away from those who are trying to collect TANF funds. In order for a person to apply to receive federal aid, and for no other reason, the state of Florida passed a law that required them to submit a sample of urine to be tested for drugs. The Court continues their discussion of the drug search as a qualification for TANF, quoting *Perry v. Sindermann*, where it was held that “even though a person has no ‘right’ to a valuable government benefit... [the government] may not deny a

⁴² *Board of Education v. Earls*, 536 U.S. at 837 (2002).

⁴³ *Chandler v. Miller*, 520 U.S. 305 (1997).

⁴⁴ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989).

⁴⁵ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989).

benefit to a person on a basis that infringes his constitutionally protected interests.”⁴⁶

These Supreme Court cases and *Lebrong v. Wilkens* seem to point out that even if a government service is wanted, the government has no right to make a applicant submit to what amounts to an unreasonable search and seizure by the Fourth Amendment to the United States Constitution. This is especially true in cases where bodily fluids are required for the testing procedure.

Policy Arguments for the Implementation of Programs for Drug Testing

While there are several sound constitutional arguments that were discussed above in the Michigan case and preceding cases against drug testing for government benefits, there are several policy arguments that are being made for the implementation of these programs.

Some argue that “As welfare spending approaches \$1 trillion a year, taxpayers have a right to insist that their financial help not only goes to those who truly need it but that it's not wasted on frivolous or self-destructive activities such as drug use.”⁴⁷ Drug use damages a person and her family. Drug addicts, especially those who use crystal meth, expose themselves to toxic chemicals such as battery acid and Drano, which are dangerous and can be explosive or produce toxic gasses.

Children of drug addicts face negative consequences as well. Some of the consequences are small- the teasing and bullying the child might experience at school if their classmates knew his parent was a drug user. Others are quite large. According to the

⁴⁶ *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L. Ed. 2d 570 (1972).

⁴⁷ Robert Reichter, *Welfare Programs Should Promote Self Sufficiency*, U.S. NEWS AND WORLD REPORT (April 23, 2012, 7:33 P.M.) <http://www.usnews.com/debate-club/should-welfare-recipients-be-tested-for-drugs/welfare-programs-should-promote-self-sufficiency>.

Center on Addiction and the Family, children parented by drug addicts are more likely to be abused or neglected, and the children unfortunately are also exposed to the drugs themselves.⁴⁸ Especially dangerous situations can occur when the parents use drugs such as crystal meth, which must be “cooked.” This creates a safety hazard because the ingredients used to create the drug are extremely flammable, toxic, and can cause explosions.

Many children born to mothers who are addicted to drugs are addicted to the drugs themselves when they are born. There are also physical consequences for the babies of mothers who abuse illegal substances. According to the March of Dimes, four percent of children are born to mothers who use drugs. Children who are born to mothers who use drugs are also more likely to have birth defects. A study conducted of ecstasy and other amphetamine users who gave birth found a risk of congenital heart defects in the children, and the birth weight of the babies was often much lower than that of mothers who did not use these drugs.⁴⁹ Proponents of the drug testing programs argue that mothers who want to receive TANF will have to quit their drug use in order to receive the benefits, which will benefit the addict’s child. It is hard to argue that a child is in better hands when she is being taken care of by a sober parent than a parent addicted to drugs.

Another argument that proponents of drug testing for welfare recipients use is that the programs like TANF are supposed to promote self sufficiency, and eventually the recipient will be off of welfare and making a living on his own. If the goal of TANF is to

⁴⁸ *Effects of Parental Substance Abuse on Children and Families*, The Center on Addiction and the Family (April 23, 2012, 7:38 P.M.), <http://www.coaf.org/professionals/effects%20.htm>.

⁴⁹ *Alcohol and Drugs*, The March of Dimes (April 23, 2012, 7:44 P.M.), http://www.marchofdimes.com/pregnancy/alcohol_illicitdrug.html.

support self-sufficiency, that would mean for most people, at least a reduced, if not complete ceased usage of drugs. Many employers use drug testing on their employees, and the effects of drugs can make a person unsuitable for a job environment. For example, according to The Mayo Clinic, an addict could display the following symptoms—loss of control, hallucinations, not caring about one’s grooming, lethargy, excess anxiety, and other symptoms that would make them less than desirable employees.⁵⁰ If the purpose of TANF were to promote a self-sufficient member of society, encouraging sobriety by making it a requirement to receive the government benefit would go along with the goal of the program. This would mean that drug testing would be an appropriate step for a state agency to take. In order for addicts to get help, the state of Florida runs a substance abuse program through its department of Children and Families. The program provides funding for individuals to go to detoxification and treatment centers, and provides recovery and support through a variety of outsourced programs.⁵¹

In an article in US News and World Report, Lawrence M. Mead discussed the possible negative implications of a drug-testing program for welfare recipients and argues for a more moderate approach. Mead argues that while the program might keep some drug addicts off the program who would abuse it, it would also keep addicts away from a program that would provide them with a way to get a job, improve their lives, and ultimately keep clean.⁵² Mead’s moderate approach would be to keep known addicts off

⁵⁰ *Drug Addiction*, The Mayo Clinic, (April 23, 2012, 8:04 P.M.), <http://www.mayoclinic.com/health/drug-addiction/DS00183/DSECTION=symptoms>.

⁵¹ *Substance Abuse Program*, The Florida Department of Children and Families (April 24, 2012, 10:28 P.M.), <http://www.dcf.state.fl.us/programs/samh/SubstanceAbuse/treatment.shtml>.

⁵² Lawrence Mead, *The Result Could Be More Drug Addiction*, U.S. NEWS AND WORLD REPORT (April 23, 2012, 8:14 P.M.) <http://www.usnews.com/debate-club/should-welfare-recipients-be-tested-for-drugs/the-result-could-well-be-more-drug-addiction>.

of TANF, but provide services to them in order to get clean and then qualify for the assistance they need to have better lives.⁵³

One issue with Mead's proposed program is that many who are passing laws and implementing policy do not understand the science behind addiction and psychology. Many states don't have enough funding as is, and many states are using these drug-testing programs as proposed cost cutting measures to get people off of TANF so the money can be used elsewhere. Even if this has not been proven as a productive strategy for cutting costs, becoming sober is a difficult task, and in order to "get clean," an addict often has to enter a recovery center or get medical help, which can be very expensive. If the state is trying to implement these measures as cost cutting programs, I do not see states as willing to provide an extra service when they feel the money they have could go to more "deserving residents."

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Policy Arguments Against Drug Testing for Welfare Recipients

As stated above, constitutional arguments come in to play when dealing with drug testing and the receipt of welfare benefits, specifically TANF. Policy arguments can be made as well. In the Florida law currently being challenged, the state has designated a "payee" that could receive the benefits on behalf of the child, so even if the parent fails the drug test, the child could still receive money for food.⁵⁴ This is troubling in several ways. First, the parent who was found to be positive for drugs might be in a difficult position to argue with a person who has been deemed "more fit" by the state to handle the food intake of his or her child. The payee could abuse the privilege and instead of using

⁵³ *Id.*

⁵⁴ *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1280 (M.D. Fla. 2011).

the TANF funds for the good of the child, the payee could use them for his or her own benefit.

TANF has a stated goal of getting people back to work and off of government assistance as soon as possible. Recipients must move into a work position quickly, no later than two years after they begin to receive the money. TANF is meant to be a short-term solution for families who have fallen onto hard economic times.⁵⁵ TANF recipients are less of an “at risk” group than other people who receive government assistance for longer periods of time, such as those who live in housing facilities. And since TANF recipients are not as much of an at risk group, they would not fall under the group that could be tested constitutionally according to the court in *Chandler*.

Also, the argument has been made that drug testing must be done to protect people, for instance, Customs Agents and train drivers may be tested. It could be argued that taking TANF money away from a child’s parent does not protect the child at all.

Even if a child’s parent is able to find a payee for his child to use, taking away TANF funds from the parent still deprives the family unit as a whole of money. Does the government really think that even if a payee buys food only for the child, that the parent will not eat it? And if she does, will the state finger print all of the wrappers of the food to make sure that the adult is not consuming the food that is purchased for the child? This does not make sense for the child or the family as a whole, especially if the goal of the drug test is to make sure that a population is safer or more secure.

Another policy issue with the Florida law is how the negative drug tests are reimbursed. As stated above, the state of Florida had a 96 percent negative test rate when

⁵⁵ Matthew Bodie, *Welfare Assistance is not a Parental Oversight*, U.S. NEWS AND WORLD REPORT (April 23, 2012, 8:18 P.M.) <http://www.usnews.com/debate-club/should-welfare-recipients-be-tested-for-drugs/welfare-assistance-is-not-parental-oversight>.

the law was in effect. The state of Florida used TANF money to pay for the tests of 96 percent of the Floridians who tested negative instead of using that money to help needy families get back on their feet and start over.⁵⁶

Opponents of these drug testing programs suggest that the money spent testing people should be put into programs to help those most prone to drug addiction stay away from drugs both for themselves and their families. Opponents also argue that poverty itself is stigmatizing enough, having an additional layer of stigmatism through the drug tests hurts the very people that it is supposed to help, those in need of government assistance.

Possible Solutions

Clearly there is a problem with states requiring drug testing in order to receive TANF funds. But what should be done to prevent legislators from writing bills that require drug testing for lower income individuals who are seeking aid such as TANF? Some advocate a legislative approach to the problem—allowing state governments to enact the programs that require TANF recipients (and possibly other recipients of welfare programs) to be tested for drugs and see how well the programs work. If there is a loss of revenue by the state, or if the state does not meet its objective goal of reducing the amount of welfare recipients who are on drugs, then the state legislature can pass a new law that changes the rule and bans drug testing. This would be difficult, as many state legislatures are facing budget shortfalls and other issues that could be viewed as more of a priority. If this approach is used, these programs could be in place for a long period of time, while the state suffers from a loss of revenue due to the amount of money it has to

⁵⁶ *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1279 (M.D. Fla. 2011).

use for TANF drug testing programs, and the ability of a parent to get TANF checks is hindered.

The other option is a judicial one. This option would let the courts decide whether or not it is constitutional for state governments to drug test TANF recipients. This is a preferable route of action for several reasons. First, the Florida case of *Lebron v. Wilkens* is already moving through the court system. While it could take a while for the case to reach the Supreme Court, having the United States Supreme Court rule on the constitutionality of TANF drug testing would have the same effect in every state. Drug testing on non-suspect groups has already been declared unconstitutional, and the Florida study showed that TANF users were not a group that was more likely to use drugs. Therefore, programs that test TANF users for drugs should be found unconstitutional.

If the process is found unconstitutional, it would outlaw drug testing for TANF applicants and recipients in every state at one time. It could also be argued, these types of situations are exactly why the court system was included as the third branch of government. Non-elected officials whose jobs are not determined by public opinion can interpret the law based on its constitutionality and come to a conclusion not based on public opinion, but instead, on legal reasoning.

Aside from legislative and judicial means, there are other ways to stop the wave of drug testing of TANF recipients. Since TANF money is received by states as block grants, the federal government could impose regulations on how the TANF money is used. Federal regulations could be written that forbid the testing of TANF recipients. This could be viewed as a radical step and the possibility of this happening, as opposed to a

ruling by the Supreme Court, which would have fewer legal repercussions, is much slimmer.

Conclusion

Drug testing programs for welfare recipients have grown in popularity in recent years due to a rise in conservative politicians and an economic downturn. Many state legislatures are considering legislation that would allow them to test welfare (specifically TANF) recipients. Florida was the first state in this wave of states rushing to require drug testing, to actually pass a bill through both the house and senate and implement it. A law quite similar to the TANF law was passed in Michigan in 1999 and in 2003 was found unconstitutional.

Drug testing for TANF laws have a profound affect on the people that are seeking government assistance, as well as their families. There is already unfortunately a great deal of stigma in the United States against people who seek certain types of government assistance. A requirement of a urine test would create an even greater stigma for people who are seeking government assistance to go back to work.

Proponents of the laws argue that they help people who are abusing drugs to get clean in order to receive federal assistance. Without help, there is little hope that an addict will be able to get clean, just so they can get TANF funds. In order for these types of programs to truly be effective in their stated goal, they need to offer assistance to the drug abuser to get clean.

Overall these laws are unconstitutional according to the Fourth Amendment of the United States Constitution, and also do not live up to their stated objective of helping

families be drug free. They simply deprive children of needed nutrition while mom and dad are trying to put their lives back together. It is important to make sure that we do not deprive our citizens of basic constitutional rights because the state wants to save money or does not want to serve a segment of the population.

We should use the court system in order to make this type of drug testing unconstitutional. Other methods, such as going through the state legislatures will not be as effective or productive.

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