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# Drug Tests for Welfare: Saving Taxpayer Money or Flushing It Down the Drain?

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Loyola Public Interest Law Reporter

*FEATURE ARTICLE*

**DRUG TESTS FOR WELFARE:  
SAVING TAXPAYER MONEY OR  
FLUSHING IT DOWN  
THE DRAIN?**

*by* MICHELLE YODER

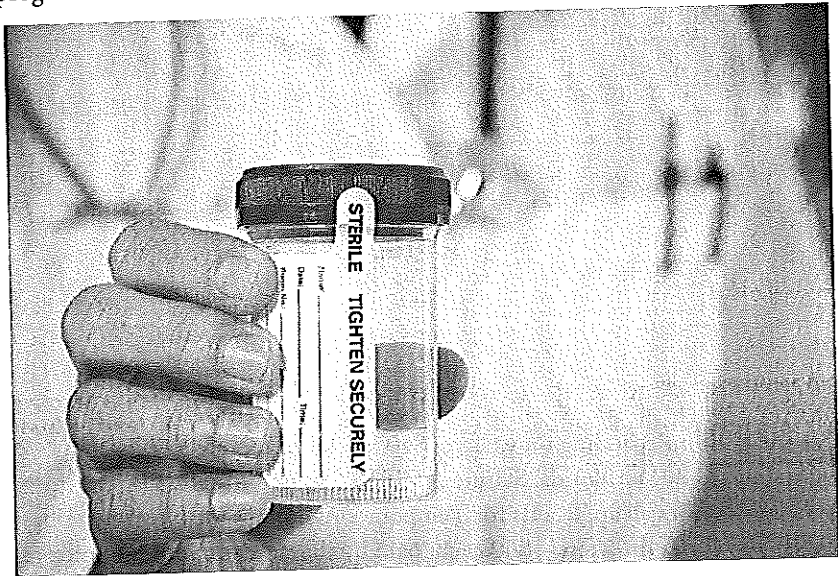
**F**or the person depending on welfare, \$40 is a lot of money to “piss away.”<sup>1</sup> On July 1, 2011, Florida Statute 414.0652 went into effect.<sup>2</sup> The new Florida law requires all applicants for Temporary Assistance for Needy Families (“TANF”) to pass a drug test – \$40 each, paid by the state – in order to receive benefits.<sup>3</sup>

Fewer than nine weeks after its passage, the American Civil Liberties Union (“ACLU”) of Florida filed a class action lawsuit challenging the law, claiming it violated applicants’ Fourth Amendment rights.<sup>4</sup>

Less than two months later, District Court Judge Mary Scriven issued an injunction against the state that temporarily blocked the law.<sup>5</sup> “The constitutional rights of a class of citizens are at stake,” wrote Scriven in her 37-page order.<sup>6</sup> The judge based her decision on the real possibility that the law violates the Fourth Amendment to the Constitution prohibiting illegal searches.<sup>7</sup>

Legal standards governing searches and seizures have a history of arousing public concern. Attempts by governments to mandate drug testing as a prerequisite for welfare benefits are nothing new.<sup>8</sup> In 2003, the Sixth Circuit Court of Appeals invalidated such a law in Michigan.<sup>9</sup>

As of October 2011, 36 states have considered enacting laws requiring drug testing for recipients of cash assistance programs like TANF, 12 states have considered it for unemployment insurance, and still more have considered it as a requirement for food stamps, home heating assistance, and other benefit programs.<sup>10</sup>



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Republican Sen. David Vitter of Louisiana has now introduced the Drug Free Families Act of 2011, which, if passed, would mandate drug testing for welfare recipients in all 50 states.<sup>11</sup> While there are valid, passionate arguments both for and against such a law, without a thoughtful discussion of its likely consequences, public aid recipients and taxpayers alike will feel the pain.

“Tight budgets force tough choices,” says North Carolina House Speaker Thom Tillis, an advocate for a similar law in his state.<sup>12</sup> Tillis’s concerns have echoed throughout the country, as in the past few years the United States has seen difficult financial times. By the end of 2009, the unemployment rate in America had risen to more than 10 percent.<sup>13</sup>

In light of the economic downturn, it is necessary to find a long-term solution.<sup>14</sup> But this solution must be one that accounts for the unique needs of economically vulnerable groups.<sup>15</sup>

## POLICY IMPLICATIONS

As with any hot-button issue, public policy will be a driving force as both legislation and litigation unfold. The U.S. Supreme Court has consistently held that a drug test requiring a urine sample is a “search” warranting a constitutional analysis.<sup>16</sup> Further, while the Supreme Court has outlined several exceptions that allow for suspicionless, non-consensual searches, the trouble comes in trying to place laws like Florida’s into the proper legal context.<sup>17</sup>

“I don’t think the taxpayers should have to help fund somebody’s drug habit,” Alabama State Rep. Kerry Rich commented.<sup>18</sup> At the core of Rich’s argument is the assumption that drug users on welfare are using Americans’ hard-earned money to support illegal activity. Essentially, there are two inherently conflicting views.<sup>19</sup> Is drug use a disease or an illegal habit?<sup>20</sup> On the one hand, there is the desire to eliminate illegal misuse of tax dollars, while on the other hand there is the risk of “discriminating based on whether people are good.”<sup>21</sup>

By enacting Florida’s controversial law, Gov. Rick Scott and the Florida Legislature sought to “increase personal accountability and prevent Florida’s tax dollars from subsidizing drug addiction, while still providing for needy children.”<sup>22</sup> Scott touts the law as helping “to prevent the misuse of tax dollars.”<sup>23</sup>

The effect on the children of welfare recipients is one focus of the Florida law.<sup>24</sup> Gov. Scott, who made a campaign promise to pass such a law, clarified one important point: "To me it's real simple. Money is going to the benefit of children, not to a parent who is using drugs."<sup>25</sup> Under the law, if a parent were to fail a drug test, an immediate family member or other approved individual can still collect the child's benefits on the child's behalf.<sup>26</sup>

From a legal perspective, supporters view such a law as "nothing more than an additional eligibility criteria" for the receipt of public benefits.<sup>27</sup> Advocates are quick to point out that participating in public assistance programs is voluntary.<sup>28</sup> This is critical to their position because, viewed in this light, the legal rules concerning suspicionless testing differ.<sup>29</sup>

The legal effect of the argument is that, if participation is voluntary, participants effectively consent to the search of their bodies.<sup>30</sup> It is well established that a search, otherwise invalid, will be constitutional with the appropriate consent or waiver.<sup>31</sup> For example, in *Skinner v. Ry. Labor Exec. Ass'n*, the Supreme Court held that because employees' participation in an inherently dangerous line of work was voluntary in nature, mandatory drug testing was not unconstitutional.<sup>32</sup>

The Supreme Court has held that a suspicionless search in the form of a drug test will be constitutional so long as it is warranted by substantial public safety concerns, such as those cases involving student athletes and railroad workers.<sup>33</sup> Opponents of the law have suggested that allowing suspicionless testing for welfare benefits would create a "poverty exception" in the application of the Fourth Amendment.<sup>34</sup>

Some of those opposed to a drug testing requirement, like Ohio State Sen. Nina Turner, have called such laws "a witch hunt against poor people."<sup>35</sup> This is a direct reproach to proponents of laws that link poverty with drug use. Advocates for welfare recipients claim that such policies "vilify victims of the recession."<sup>36</sup> They argue that such laws perpetuate "the stereotype that low-income people are lazy, shiftless drug addicts and if all they did was pick themselves up by the bootstraps then the country wouldn't be in the mess it's in."<sup>37</sup>

In addition, those opposed to such laws hold that, from a financial standpoint, mandatory drug tests may do more harm than good.<sup>38</sup> If such a law does have its intended effect, it may very well deny benefits to substance abusers that

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need assistance the most.<sup>39</sup> Unfortunately, restricting access to basic assistance may aggravate substance abuse and lead to a higher demand for treatment.<sup>40</sup>

#### FACING THE REALITY OF THE SITUATION

The situation “really speaks to how the politics of the moment are dominating the policy conversation in the virtual absences of any evidence,” one University of Chicago researcher noted.<sup>41</sup> While public policy is a powerful weapon in the law, especially when human rights are at stake, policy without thoughtful consideration of its likely consequences has the real likelihood of doing more harm than good.

Since the Florida law took effect in July, enrollment in the TANF program has declined.<sup>42</sup> Almost 1,600 applicants have refused to submit to the drug testing requirement, while only 7,028 applicants have taken it and passed.<sup>43</sup> After a few months, the number of Florida residents receiving aid was lower than it was before the start of the recession.<sup>44</sup> Preliminary data showed that, as of October 2011, fewer than one percent had tested positive, with the majority of those failures attributed to marijuana use.<sup>45</sup>

The danger lies in the interpretation of the resulting data. Parties on each side of this issue consider the data supportive of their position.<sup>46</sup> Those opposed to the law argue that the law will cost more in the long run because the number of welfare recipients using illegal drugs is in reality quite low.<sup>47</sup> Supporters of the law are quick to respond that the low numbers of applicants that tested positive is simply evidence of a “weeding out” effect.<sup>48</sup> A more scientific study of the results will best shed light on the true reasons for the reaction.<sup>49</sup>

Nevertheless, serious and financially draining unintended consequences may result from mandatory drug testing.<sup>50</sup> Stacey Dembo, a Social Security disability attorney in Chicago, is skeptical that drug testing will actually save the government money. She notes that the law is “not going to stop them from using drugs, it’s just going to stop [people] from getting welfare. That’s going to cause a huge new societal issue.”<sup>51</sup>

She predicts such laws will simply shift expenses from one budget area to another.<sup>52</sup> “If you are going to cut off someone’s food stamps because they tested positive for drugs, they are going to end up stealing or doing something else to

eat, and they are going to end up in jail instead of the welfare rolls. It's a lot more expensive to incarcerate someone than it is to give them a Link card for \$200."<sup>53</sup>

#### WHAT SHOULD BE DONE?

Viewing the issue on a holistic level, the law may fall short of reaching its intended effect.<sup>54</sup> There are legitimate arguments that the new law could potentially waste more taxpayer dollars than if the law did not go into effect. Florida should conduct a cost-benefit analysis comparing the total money spent on the negative drug tests – at \$40 each – with the money it is saving by not providing benefits to those applicants that test negative. Attacking the financial soundness of the law could undermine its basic intent: saving taxpayer money.

Lawmakers and advocates must confront their own biases and preconceptions in order to better understand the implications of their proposals long-term and wide-scale.<sup>55</sup> America can ill afford policy “test-runs” that both waste taxpayer resources and potentially violate the Constitution.

#### NOTES

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