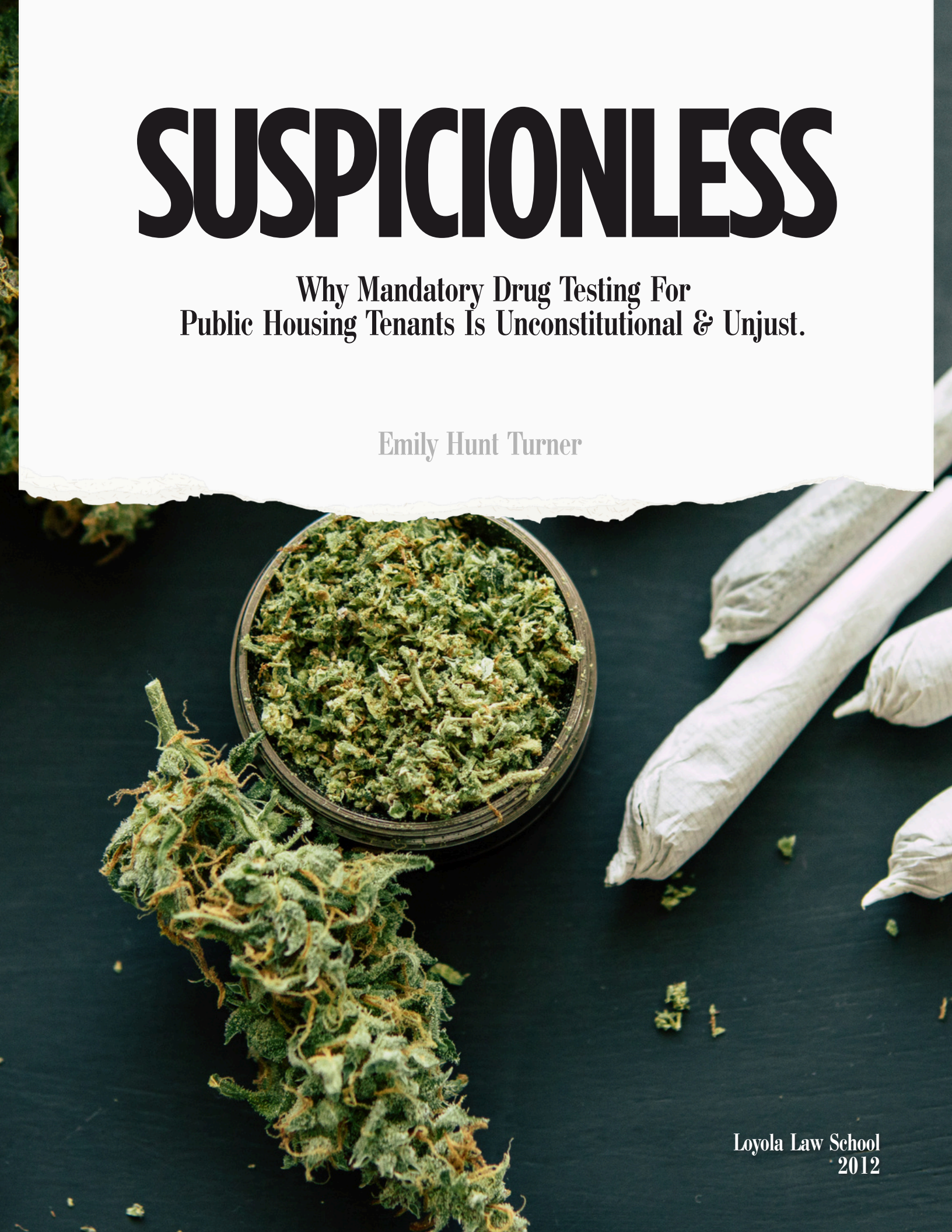
SUSPICIONLESS

Why Mandatory Drug Testing For Public Housing Tenants Is Unconstitutional & Unjust.

Emily Hunt Turner



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Introduction

Mandatory drug testing for those receiving certain types of public assistance is becoming a popular undertaking across the country. The rationale? Moving closer to a drug-free America while ensuring federal dollars are well spent.

Welfare has been the predominant type of public assistance targeted thus far, as talk of subjecting welfare applicants and recipients to testing has not only become common ground, it was attempted by Michigan's Family Independence (FIP) program in 1999.[1] Though Michigan's statute authorizing suspicionless drug testing was deemed unconstitutional in 2003, the idea of testing those receiving public assistance is still percolating in more than half the states across the country.[2]

Public subsidized housing tenants could soon be included amongst the class of public assistance recipients subjected to suspicionless drug testing. States have yet to formally enact any statutory measures targeting public housing assistance, but numerous discussions have developed amongst legislators and housing commissions nationwide.

Proponents of this type of statutory enactment argue the government and its taxpayers have a legitimate interest in ensuring that public dollars are being spent wisely and not being put to enable or further tenant's drug use.[3] They argue for accountability amongst recipients of public assistance and also insist testing would be a fiscally sound endeavor for the state to adopt.[4] Opponents, on the other hand, argue that suspicionless drug testing is not only unconstitutional, but also destructive in its tendency to render a

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[1] *See generally* Marchwinski v. Howard, 113 F. Supp. 2d 1134 (2001).
[2] Teri Weaver, *New York legislators: Make people on public assistance undergo drug testing,* The Post-Standard, February 27, 2011, available at http://www.syracuse.com/news/index/ssf/2011/new_york?legislators_make_peop.html
[3] *Id.*
[4] *Id.*

class of public assistance recipients inferior.[5] They feel adequate remedies already exist and insist courts have been clear that individuals do not lose their constitutional rights just because they are poor.[6]

Given the use of public dollars, I agree that tenants of public housing, and public assistance recipients altogether, need to be held to a heightened standard of accountability. I cannot agree, however, that adopting suspicionless drug testing is the most appropriate, responsible, or effective way of achieving this standard. I do not support public housing tenants who buy and/or sell illegal contraband out of their units. However, there are more reasoned approaches to ensuring a better handle on how our public dollars are being distributed.

Further, drug testing is more a band-aid solution than an effective remedy. Drug use and its associated lifestyle have roots that extend much beyond the drugs themselves; roots that, more broadly, are tied to one's environment and, in some instances, culture. Drug testing tenants targets individuals as a way to indirectly address the public housing environment. But why not address the environment directly? I propose that requiring tenants to maintain the condition of the property is an effective way to weed out those who don't want to comply while achieving a more productive, stable environment in which to house a community. I believe it is also an effective way to directly address the public housing environment without subjecting tenants to a notable invasion of privacy.

A long-term strategy, such as imposing a maintenance condition, takes into account the bigger picture associated with one's environment rather than one factor that contributes to its composition.

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[5] Wyman v. James, 400 U.S. 309, 331 (1971).
[6] Alan Greenblatt, *Should Welfare Recipients Get Drug Testing?* NPR, March 31, 2010, available at http://www.npr.org/templates/story/story.php?storyId=125387528.

This article will address the reasons why mandatory suspicionless drug testing as a condition for public housing tenants to obtain and maintain assistance is unconstitutional and unjust, despite its seemingly advantageous objectives.

Part I will discuss the connection between low-income housing and drug activity. Part II will first define and present various forms of conditions placed on public assistance programs and subsequently address the ideas behind and proposals for drug testing both welfare and public housing recipients. The various types of constitutional challenges that can be put forth in response to the suspicionless drug testing of public housing tenant is addressed in Part III. Finally, and most importantly, Part VI proposes three alternative solutions to drug testing tenants. The first solution is presented solely as a means to illustrate an approach that has been discussed amongst critics of testing tenants. The second illustrates an expansion of an already-existing approach to alleviating drug activity within public housing. But the most emphasis is put on the third solution, which as presented as my primary suggestion for a comparable approach to drug testing tenants.

I. Drug Activity and Low-Income Housing

Before addressing the topic of drug testing public housing tenants as a condition to receive public housing benefits, it is important to first establish a connection between public housing and drug activity.

Drug activity plagues both public and private housing developments and continues to pose significant problems in each. However, public low-income housing has been *specifically* cited as harboring excessive drug activity and excessive crime. Innocent tenants have been victimized by violent crimes stemming from both drug users

and drug dealers.[7] It would be a stretch to suggest that private housing complexes do not face parallel issues, even if to a lesser degree. But given public housing's use of public funds, lawmakers and the public at large not only target but highly scrutinize these particular areas.

The Clinton administration targeted drug activity in public housing as an urgent dilemma and enacted legislation with a "zero tolerance" undertone. In 1988, Congress declared drug use in public housing a national epidemic and established the Public Housing Drug Elimination Act.[8] This act mandated Public Housing Authorities (PHAs) to include a clause in their leases requiring the eviction of "any member of the tenant's household, or any guest or other person under the tenant's control who engaged in any drug-related criminal activities including selling, buying, or using drugs on or near the premises."[9] These evictions, grounded in criminal activity, are widely known today as "no-fault evictions." They have also been coined "one-strike evictions" given one finding of activity triggers eviction. These evictions will be addressed more specifically in Part III's discussion of constitutional challenges.

Further verification of congressional concern is emphasized in the Anti-Drug Abuse Act of 1988, which states, "It is the declared policy of the United States Government to create a Drug-Free American by 1995."[10] Though drug-related crimes were not limited to a particular type of neighborhood or particular type of housing

[7] Robert J. Aalberts, *Look Who's Getting Drug Tested Now: Tenants Must be Clean or They're Out*, 30 Real Est. L.J. I (2001).
[8] *Id.*
[9] *Id.*
[10] David Lang, *Get Clean or Get Out: Landlords Drug-Testing Tenants,* 2 Wash. U. J.L. & Pol'y 459, 459 (2000).

development, congressional findings have revealed that drug-related crimes pervade low-income housing.[11]

The concern established by Congress and the Clinton administration continues today, though one can certainly argue that progress has been made. Predominately facilitating progress in public housing has been the shift from traditional, concentrated public housing structures to the mixed-income development and section 8 voucher approaches. With these integrated and innovative approaches that began in the 1990's, the overall environment and access to schools, transportation, and amenities for public housing tenants has improved substantially.

Yet despite progress, drug activity amongst public housing tenants, whether they be tenants of the nearly extinct traditional public housing or tenants of mixed-income developments, still poses a significant threat. One of the solutions put forth to address this threat is to adopt suspicionless drug testing for tenants to obtain and maintain their assistance. The pros, cons, and constitutional barriers to this type of testing constitute the essence of this article.

I agree with the stringent approach to drug activity in low-income housing and cannot deny that particular tenants engaged in drug activity have been rightfully evicted. Though many feel stringent laws -such as no-fault evictions - too often punish innocent tenants, the constructive piece that has surfaced is tenants' awareness of the "no tolerance" approach that has been taken towards drug activity. Awareness is both important and necessary, as drugs and drug activity should not be tolerated.

But the problem surfaces when some of these drug-targeted laws are put into application. And no-fault evictions, in particular, operate unfairly and are more

[11] *Id.*

convenient and punitive than they are effective. Convenient and punitive are two qualities that do not often render sound policy or law.

II. Drug Testing of Public Assistance Recipients

Across the country, many states are considering or have already established policies that require certain classifications of public assistance recipients to submit to drug testing to receive benefits. There are various arguments advanced by those in support of such testing, but the predominant argument with respect to public housing is that the government has a substantial interest in ensuring that tax dollars are not put towards funding drugs and drug habits.[12] Those who foster this argument suggest that this is not a matter of evidence to establish the heightened likelihood that certain classes of recipients use drugs, but rather a matter of setting standards and articulating "a clear message…that if you wish to engage in this activity, don't expect to have the taxpayers subsidize that behavior."[13]

Welfare has been the most common class of public assistance targeted for suspicionless testing and public housing will likely be next. Both have been considered for essentially the same reason mentioned above: the government's interest in ensuring efficient use of its funding and a refusal to publicly fund drugs or drug activity. Though suspicionless testing of welfare or public housing recipients *does not* currently exist, the idea is present and the argument compelling.

But before addressing the proposed testing, it is important to first understand what conditions are in addition to when they are (or are not) constitutionally justified.

[12] Greenblatt, *supra.*
[13] Weaver, *supra.*

A. Conditions Placed on Assistance

In assessing the constitutionality of suspicionless drug testing conditions for public housing tenants, it is important to discuss the types of conditions that the United States Supreme Court has addressed, and in some cases upheld, in programs that depend on public assistance. It is common to see these types of conditions challenged on a number of grounds, including due process, equal protection, and fourth amendment challenges. The standards for each of these challenges vary, but most commonly addressed in each claim is the strength and reasonableness of the government's interest in imposing such conditions and the strength of the individual's interest. The court often engages in a balancing of these interests – which will be more thoroughly explained in Part III.

Among the most substantial conditions imposed and upheld in public assistance programs are warrantless home visits as a condition of eligibility for welfare assistance. In *Wyman v. James,* a case grounded in the fourth amendment, the Court upheld mandatory home visits as a condition of receiving Aid to Families with Dependent Children (AFDC) benefits.[14] The Court held the home visit did not constitute a search under the fourth amendment because it was primarily rehabilitative in nature, lacking the traditional "criminal investigative" characteristics.[15] The fact that the visit was not conducted by the police but rather by trained caseworkers weighed heavily in the Court's decision to sanction the condition and it was further stated that even if they accepted the

[14] Wyman, 400 U.S. at 309.
[15] *Id.* at 317.

home visit to be a search, it was a *reasonable* search and therefore received fourth amendment protection.[16]

Wyman was reaffirmed and extended in 2006 with the holding in *Sanchez v. County of San Diego.* In *Sanchez,* the Court again upheld warrantless, mandatory home visits. Under San Diego's "Project 100%," all applicants received a home visit from an investigator employed by the District Attorney's office.[17] This came as a surprise to many, as the rehabilitative as opposed to investigative nature of the visit in *Wyman* was a strong factor in determining the visit was not a search under the fourth amendment. Yet in *Sanchez,* the Court held a search had yet to be established, even though a trained investigator from the District Attorney's Public Assistance Fraud Division (which is the County's Special Investigative Unit) conducted the visit.[18]

Beyond the investigative component, there are two other important differences in *Wyman* and *Sanchez* that are important to note. First, the visit in *Sanchez* included a walk through the entire house[19] – as opposed to *Wyman's* less intrusive discussion that took place in the house. Second, the notice requirement differed substantially in *Sanchez* because there was no requirement to provide the applicant with a specific time or date of the visit.[20] So long as the visit was "within business hours" the investigator could show up completely unannounced.[21] In *Wyman,* notice was not an issue because the applicant had received and the policy required a letter from her case worker informing her of the date she would be conducting the visit.[22]

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[16] *Id.* at 323 (the Court stated "[t]he visit is not one by police or uniformed authority. It is made by a caseworker of some training whose primary objective is, or should be, the welfare, not the prosecution.")
[17] Sanchez v. County of San Diego, 464 F. 3d 916, 918 (2006).
[18] *Id.* at 934.
[19] Lang, *supra,* at 473
[20] Sanchez, 464 F. 3d. at 919.
[21] *Id.*
[22] Wyman, 400 U.S. at 313.

Whether one agrees with it or not, the message conveyed in the decisions handed down in *Wyman* and especially *Sanchez* suggests participants in social programs, such as welfare, are subject to diminished expectations of privacy. The undertone in these two cases suggests those who receive money or benefits in response to financial constraints or shortcomings inevitably swallow a reality that their expectations of privacy are diminished in comparison to those who do not.

In a similar yet different vein, a controversial condition to food stamps is being considered in New York City. Mayor Michael R. Bloomberg is seeking federal permission to bar food stamp recipients from using them to buy soda or other sugared drinks.[23] Bloomberg has delineated the city's interest in this particular conditioned food-stamp program as part of an aggressive anti-obesity movement in New York City. He claims, "In spite of the great gains we've made over the past eight years in making our communities healthier, there are still two areas where we are losing ground – obesity and diabetes."[24] According to Bloomberg, food and drinks that provide nourishment are what New York families need to focus on.[25]

This food stamp proposal was made to the United States Department of Agriculture in October of 2010.[26] Though many applaud the idea and give it merit, there exists great skepticism about this particular approach. It is argued that despite the proposal's praiseworthy objectives, "[t]here are a great many ethical reasons to consider why one would not want to stigmatize people on food stamps."[27]

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[23] Anemona Hartocollis, *New York Asks to Bar Use of Food Stamps to Buy Sodas,* N.Y. Times, October 6, 2010, available at http://www.nytimes.com/2010/10/07/nyregion/07stamps.html.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

In 2004, Minnesota's attempt to adopt a "junk food" condition was denied by the Agriculture Department.[28] Minnesota's plan was to prevent food-stamp recipients from buying junk food, particularly candy and soda. But the Agriculture Department would not validate the merits of such a proposal, stating it would only "perpetuate the myth that food-stamp users make poor shopping decisions."[29] Similar to Minnesota's reasoning for denying the food stamp condition, those that oppose suspicionless drug testing of public housing tenants reason that testing has the propensity to stigmatize the impoverished realm of public assistance recipients. As one can see, the arguments are alike as far as disenfranchisement is concerned.

Lastly, as a way to illustrate a condition that the Supreme Court has flatly rejected, it is useful to look at *Graham v. Richardson.* The issue in *Graham* was whether Arizona's welfare condition based on one's alienage violated the Equal Protection Clause of the Fourteenth Amendment. The condition required a person be either a citizen of the United States or a resident of the United States for a total of fifteen years to receive the state's welfare benefits.[30] The Court struck down the condition and held that a "person" for the purposes of the Fourteenth Amendment encompassed both resident aliens and citizens, thereby affording legal aliens equal protection of the laws.[31]

The Court declared conditions based on alienage were akin to classifications based on race or nationality and therefore subject to strict scrutiny due to their status as a protected class.[32] It is this rigorous strict scrutiny standard that so seamlessly allowed the citizenship condition to be defeated under an Equal Protection challenge. As addressed

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[28] *Id.*
[29] *Id.*
[30] Graham v. Richardson, 403 U.S. 365, 367 (1971).
[31] *Id.* at 375.
[32] *Id.* at 377.

in Part III, this rigorous standard is *not* applied when it comes to public housing assistance – as wealth has not been established as a protected class.

In other words, conditions based on one's income or financial status are subjected to a much lower standard and the government need only establish a rational basis for imposing them. This rational basis standard is considerably lax in comparison to that of strict scrutiny. Again, as will be discussed in Part III, it is the Court's refusal to define wealth as a protected class that would make an equal protection argument difficult to sustain when addressing challenges to conditioned drug testing of public housing tenants.

B. Suspicionless Drug Testing: Welfare Recipients

Requiring those on welfare or other public assistance programs to submit to mandatory drug testing to receive benefits is an argument that is taking place in half of the states across America.[33] As far as welfare is concerned, no states currently subject recipients to random drug testing as a condition of eligibility.[34] However, there are states that feel it is a viable option and are giving it serious consideration.

This interest in fiscal responsibility, they argue, generates a right of the government to know when taxpayer's dollars are allocated towards recipients who use drugs. Upstate New York legislator, John DeFrancisco, says this type of testing is about stewardship of the state's money and making sure every dollar is well spent.[35] He said, "If someone has a drug habit, if someone is getting public benefits in order to feed that drug benefit, we have to do something about that."[36]

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[33] Weaver, *supra.*
[34] Ron Fonger, *ACLU warns Flint Housing Commission: Drug testing tenants is unconstitutional,* Flint Journal, August 15, 2010, available at http://www.mlive.com/news/flint/index.ssf/2010/08/aclu_to_flint_housing_commissi.html.
[35] Greenblatt, *supra.*
[36] *Id.*

Proponents of testing welfare recipients also feel that testing people on public assistance would not only be fiscally advantageous, but would also help those on assistance establish a firmer footing in preparation for the "working world."[37]

Opponents, however, insist that that testing those on public assistance is not only unconstitutional, but also indirectly creates an inferior class of public assistance recipients. They feel that lawmakers are targeting the programs that assist the poor while ignoring other recipients of government subsidies, such as business owners who receive millions in tax credits.[38] In addition, opponents argue there is "little evidence people getting government help with social programs are more likely to use drugs."[39]

Finally, those against testing insist adequate remedies for identifying and penalizing those using or buying drugs already exist. It has been established that "if a recipient is suspected of using drugs – because of current behavior or past history of abuse – he or she will be referred for treatment or screening."[40] In other words, the current laws allow for testing upon reasonable suspicion of a particular recipient rather than subjecting all to a blanket testing regulation accordingly. Opponents feel that tighter regulations should be created for those assessing and monitoring recipients rather than on the recipients themselves, given the legal remedy of testing upon suspicion that currently exists.[41]

C. Suspicionless Testing: Public Housing Recipients

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[37] *Id.* (the term "working world" in this context assumes that those on welfare do not work. According to John Iceland, a common misperception is that the poor do not work – when in fact, "nearly half of the poor of working age work at least part-time." *See* John Iceland, *Poverty in America,* University of California Press, 3 (2d ed. 2006).
[38] Weaver, *supra.*
[39] *Id.*
[40] Greenblatt, *supra.*
[41] *See* Greenblatt, *supra* (an new approach has been adopted in Arizona, where welfare recipients are now asked three questions about drug use. If they answer "yes" to any of the questions, they are sent to drug testing. If they test positive, they lose their benefits for one year).

Public housing in America has travelled through drastic changes; changes that some may coin innovations. The departure from traditional concentrated public housing to the mixed-income and section 8 voucher approach has improved the quality of living and access to better schools, neighborhoods, and amenities for the low-income population. However, despite the progress made, public housing still faces serious shortcomings that undercut its overall effectiveness.[42] Drug use, drug-related crimes, and their pervasion of low-income communities are included amongst the aforementioned shortcomings and are the impetus for this article.

Suspicionless drug testing of public housing tenants has yet to be formally proposed as a means to address drug use and drug-related crimes, but is most certainly the topic of discussion amongst housing commissions and lawmakers throughout the country. The crux of the justification put forth by those in support of testing in this particular niche runs parallel to the justification posed for testing recipients of welfare and public assistance at large: taxpayer dollars should not be put towards providing housing for drug users.[43] The crux of those who oppose testing is that those who seek assistance for public housing should not be subjected to testing and a substantial invasion of privacy if all public assistant recipients are not subjected as well.[44]

The most notable attempt to test public housing tenants as a condition to obtain and maintain assistance took place in Michigan in 1999. The executive director and chief executive officer of the Flint Housing Commission told The Flint Journal "he was interested in establishing a drug-free property in which residents are routinely tested for

[42] Lang, *supra,* at 459.
[43] Weaver, *supra.*
[44] Fonger, *supra.*

substance abuse as a lease condition."[45] The idea has yet to be considered by the Flint Housing Commission board of directors due to the commission's preoccupation with a multi-million-dollar energy efficient project,[46] but the discussions lodged make clear that testing will likely be considered in the future.

This idea was coined "zero-tolerance properties" and rigorously condemned by the American Civil Liberties Union (ACLU).[47] In a letter to Rod Slaughter, CEO of the Flint Housing Commission, the ACLU warned, "[W]e strongly urge you to reconsider this idea because it is unconstitutional, singles out poor people for privacy violations, and there are more effective means to address drug abuse."[48] The ACLU has made it clear that mandatory suspicionless drug testing will not exist without a fight.

III. Constitutional Challenges to Drug Testing Public Housing Tenants

Three different types of challenges could be raised in the face of laws or policies that required drug testing of public housing tenants as a condition to obtain and maintain benefits: due process challenges, equal protection challenges, and fourth amendment challenges.

As things stand today, due process challenges provide the strongest argument against the constitutionality of suspicionless drug testing of tenants and equal protection challenges provide the weakest – with fourth amendment challenges falling somewhere in between. Yet all three types of challenges present valuable insight into the court's views on economic inequalities at large and are useful to discuss.

A. Due Process Challenges

[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*

The Due Process Clause would likely pose the most substantial hurdle to constitutionally implementing suspcionless drug testing of public housing tenants. The concept that drives the Due Process Clause is fairness, and challenges under this clause examine the relationship between the government's interest and one's private interest. Due process challenges fall under two different types of claims: procedural and substantive. Substantive due process deals with specific rights that are being threatened where procedural due process promises that before depriving a citizen of life, liberty or property, the government must follow fair procedures.[49]

Due to precedence and the Supreme Court's decisions in cases such as *Lindsey v. Normet,* substantive due process claims regarding tenant testing would pale in comparison to claims based strictly on procedure. In *Lindsey,* the Supreme Court held that there is no fundamental right to adequate housing. Justice White stated, "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill."[50] Given the Court's holding that rejects a fundamental right to adequate housing, a substantive due process claim would not currently be very lucrative because a right to housing needs to be established before this type of claim can prevail.

A procedural due process claim, on the other hand, would present greater (and perhaps the greatest) challenges for proponents of suspicionless testing. Procedural due process "imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the

[49] Legal Information Institute, *Due Process,* Cornell University Law School, available at http://topics.law.cornell.edu/wex/due_process.
[50] Lindsey v. Normet, 405 U.S. 56, 74 (1972).

Fifth or Fourteenth Amendment."[51] It requires both adequate notice and the opportunity to be heard. This is because "[t]he fundamental requisite of due process of law is the opportunity to be heard."[52] And in nearly every situation, due process requires an opportunity to confront and cross-examine adverse witnesses.[53]

Court's examine procedural due process claims through the consideration of three distinct factors: the private interest that will be affected by the action, the risk of erroneous deprivation of such interest through the procedures adopted and the probable value of additional or substitute procedural safeguards, and the government's interest in the action.[54]

A useful (and pertinent) case to illustrate the court's consideration and balancing of these factors is *Goldberg v. Kelly.* At issue in *Goldberg* was the opportunity to be heard. Here, New York had implemented a program that terminated welfare recipients' assistance without affording them the opportunity for an evidentiary hearing prior to termination.[55] The government asserted that its interest in conserving fiscal and administrative resources justified the delay of all evidentiary hearings until after the assistance had been terminated.[56] But the Court found that the individual's private interest in an evidentiary hearing and notice of that hearing with regard to something as critical as welfare, which "provides the means to obtain essential food, clothing, and medical care," clearly outweighed the state's fiscal concerns.[57]

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[51] Matthew v. Eldridge, 424 U.S. 319, 326 (1976).
[52] Grannis v. Ordean, 234 U.S. 385, 394 (1914).
[53] Goldberg v. Kelly, 397 U.S. 254, 269 (1970).
[54] *Id.* at 335.
[55] *Id.* at 255.
[56] *Id.* at 265.
[57] *Id.* at 264-267.

With regard to the risk of erroneous deprivation in *Goldberg*, the Court cited the District Court's conclusion that "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed…so that he may contest its basis and produce evidence in rebuttal."[58]

In contrast to *Goldberg* is a case that deals with the termination of Social Security disability benefits without affording the recipient an evidentiary hearing. In *Matthews v. Eldridge,* the private interest and risk of erroneous deprivation were much weaker than in *Goldberg* and the Court held that the government's interest in its efficient allocation of resources was enough to outweigh the two. Though *Goldberg* established welfare as "a place of last resort," the majority in *Eldridge* felt eligibility for disability benefits were not based on financial need and were wholly unrelated to the recipient's income or support from other sources.[59] The Court stated, "The potential deprivation here is generally likely to be less than in Goldberg."[60]

One can start to see how a procedural due process claim may (or may not) be effective in arguing against suspicionless drug testing of public housing tenants. In order to succeed on this type of claim, the private interest in procedural fairness would need to outweigh the government's interest in mitigating drug activity and fiscal responsibility. However, the risk of erroneous deprivation factor could operate as the 'swing vote' and potentially be very strong in this situation, as a tenant's home is of critical importance when it comes to the basic necessities of life. One would hope the court would account for the degree of deprivation one would suffer in the face of losing their dwelling if

[58] *Id.* at 266.
[59] Matthews v. Eldridge, 424 U.S. at 340-341.
[60] *Id.* at 341.

testing positive or refusing to test, especially given today's housing and economic playing field.

Finally, in the context of procedural due process, public housing, and drug activity, one must acknowledge a recent Supreme Court decision that upheld "no-fault" evictions. In *Department of Housing and Urban Development v. Rucker,* four public housing tenants challenged the constitutionality of 42 U.S.C. §1437d(l)(6) that allows a public housing authority to evict a tenant when a member of the tenant's household or any guest or other person under the tenant's control engages in criminal activity, *regardless* of whether the tenant "knew, or had reason to know, of that activity."[61]

"No-fault" evictions have been defined as evictions that authorize the eviction of innocent tenants who may have had no knowledge that a household member, guest, or "other person under their control" was engaging in criminal activity.[62] These have also been coined "one-strike" evictions and have generated a great deal of controversy and criticism since their adoption in 2002, as many feel HUD's strict liability approach casts unduly harsh punishments for innocent tenants who have nowhere else to turn for shelter.

Strange, however, was the court's complete disregard of the tenant's procedural due process challenge in *Rucker*. Rather than directly address this challenge, the court turned to congressional intent behind no-fault evictions, asserting that Congress was reasonable in adopting such evictions to provide safe low-income housing free from drugs.[63] One can hardly challenge Congress's belief that drugs lead to murders,

[61] Department of Housing and Urban Development v. Rucker*,* 535 U.S. 125, 127-128 (2002).
[62] *Id.* at 129.
[63] *Id.* at 134.

muggings, violence, and deterioration of the physical environment.[64] But this belief certainly does not justify a departure from due process and overall fairness in the law.

As mentioned above, the declaration of no fundamental right to housing makes substantive due process challenges difficult in this area. But a salient substantive challenges that is grounded in a *related* right has surfaced in the wake of *Rucker.* It is argued that "Section 1437d puts individuals in the untenable position of choosing between risking their homes by helping a family member fight addiction, or abandoning that family member to comply with a government regulation."[65] Since an individual's right to determine family living arrangements is a fundamental right, a viable substantive due process challenge can be made and Section 1437d's no-fault evictions would be subject to strict scrutiny.[66]

Undoubtedly, no-fault evictions are not the exclusive or the most reasonable means to tackling drug activity in public housing and would therefore fail under a strict scrutiny standard.[67] This is a lucrative 'back door' approach to overturning *Rucker* and an interesting way of introducing a substantive due process argument where a procedural due process challenge was completely ignored.

B. Equal Protection Challenges

Initial instincts might prompt one to craft an equal protection argument in response to suspicionless drug testing of public housing tenants. By adopting testing only

[64] *Id.*
[65] Evi Schueller, *HUD v. Rucker, Unconscionable Due Process for Public Housing Tenants,* 37 U.C. Davis L. Rev. 1175, 1176 (2004).
[66] *Id.*
[67] *Id.*

for certain classes of public assistance recipients who are enrolled in programs based on income inadequacies while refraining from testing other classes of assistance recipients - such as farmers or businesses - states unequally apply the law and create an inferior class of recipients. Equal protection challenges examine the relationship between these types of classifications and the government's interest in establishing them.

The dissent in *Wyman,* which has received a great deal of attention and merit amongst the legal community, addresses the 'inferior class' undertone in adopting suspicionless testing of welfare recipients as a condition of receiving benefits.[68] An excerpt on this issue is cited:

> 'Welfare has long been considered the equivalent of charity and its recipients have been subjected to all kinds of dehumanizing experiences in the government's effort to police its welfare payments….The truth is that in this subsidy area society has simply adopted a *double standard*, one for aid to business and the farmer and a different one for welfare.'[69]

Undoubtedly, the prong of the double standard adopted for welfare recipients would include public housing tenants, as this area of subsidy is also defined by poverty. It is hard to escape the assertion that lawmakers are targeting programs for the poor - like welfare and public housing - while ignoring other recipients of government subsidies.

However, one critical barrier renders an equal protection argument in this particular scenario fragile and likely ineffective: wealth has not been established as a protected class. As we saw above in *Graham,* one's national origin has been established as a protected class and is therefore subject to strict scrutiny – a rigorous standard that presents a tremendous hurdle for the government to overcome in adopting measures that classify based on protected classes.

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[68] Wyman, 400 U.S. at 331.
[69] J. Skelly Wright, *Poverty, Minorities, and Respect for Law,* Duke L.J. 425, 438 (1970).

Under strict scrutiny, a law or policy must be justified by a compelling governmental interest, must be narrowly tailored to achieve that interest, and also must be the least restrictive means for achieving that interest.[70] "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."[71]

In contrast, wealth has not been established as a protected class and classifications made according to one's financial status are subject to a much less rigorous "rational basis" standard. Under the rational basis standard of review, the general rule is that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[72] So as long as states can establish that their suspicionless drug testing statute is rationally related to a legitimate interest, such as addressing efficient fiscal management, the testing will not violate the Equal Protection Clause.

Lawyers continue to argue that wealth should be regarded as a suspect classification because there are certain life necessities that are paramount to all and should be provided regardless of ability to pay.[73] But the Court has refused to accept economic inequality as a constitutional issue for a number of reasons. The general reasoning is founded in the notion that inequalities in the distribution of wealth are to be expected in a capitalist society that hinges on a free market.[74] In addition, many argue

[70] City of Boerne v. Flores, 521 U.S. 507, 534 (1997).
[71] *Id.*
[72] Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985).
[73] James A. Curry et al., *Constitutional Government: the American Experience,* 303-304 (West Publishing Company ed., Kendall Hunt 5th ed. 2003) (1989).
[74] *Id.* at 303

that poverty, as opposed to traits like race or gender, is not inalterable and therefore does not receive synonymous protection under the Equal Protection Clause.[75]

However, it is critical to acknowledge that "[o]ne's poverty can hamper access to the legal and political processes of American society."[76] It is the access component that is so critical and it is this component that fuels so many to argue for heightened scrutiny. Furthermore, I would be willing to guess that upon inquiry, those that are poverty-stricken would maintain that poverty *is* an 'inalterable trait' given the economic structure of the twenty-first century.

Judicial support for heightened scrutiny has been extended time and again, as pointed out by legal scholars. The Warren Court in the 1950's generated the strongest support and Chief Justice Warren believed, and specifically stated, that lines drawn on the basis of wealth create a suspect classification and should be subject to a more exacting judicial scrutiny.[77] And in *Griffin v. Illinois,* the court held that indigent defendants cannot be denied a free copy of transcripts necessary to file for appeal.[78] The majority asserted, "[T]here can be no equal justice where the kind of appeal a man enjoys depends on the amount of money he has."[79]

Unfortunately, the 1970's and the Burger Court narrowed thoughts on economic inequalities and equal justice with regard to the impoverished.[80] *James v. Valtierra* struck down an equal protection challenge to a California Constitution amendment that denied poverty-stricken people access to low-income housing. According to the court, a "procedure that 'disadvantages' a particular group does not always deny equal

[75] *Id.* at 304
[76] *Id.*
[77] *Id.*
[78] Griffin v. Illinois, 351 U.S. 12, 12-13 (1956).
[79] *Id.* at 19.
[80] Curry, *supra,* at 305.

protection."[81] Marshall's dissent strongly echoed the Warren Court's sentiments, rebutting "[i]t is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect."[82]

In 1972, ideals established in *James* were further emphasized in *Lindsey v. Normet.* Here, as mentioned earlier in this section, the court denied the existence of a fundamental right to housing. Within a year of *James,* the Supreme Court handed down a decision that represents a bold illustration of their reluctance to condemn classifications based on wealth. In *San Antonio Independent School District v. Rodriguez,* the Supreme Court upheld a school financing system that was based on local property taxes, declaring that despite the importance of education, it was not a fundamental constitutional right.[83]

The Court's refusal to adopt a heightened level of scrutiny for classifications based on wealth is inexcusable and implausible in light of both the status of today's impoverished in a devastated economy and the blatant discrimination based on income inadequacies that exists nationwide. "Today, the ranks of the poor include over forty million Americans and their numbers are expected to grow at an accelerated pace during the worst economic conditions since the Great Depression."[84] Economic growth played the largest role in explaining absolute poverty rates through the latter half of the twentieth century and changes in income inequality played a prominent role in the relative poverty levels.[85]

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[81] James v. Valtierra*,* 402 U.S. 137, 142 (1971).
[82] *Id.* at 145.
[83] San Antonio Independent School District v. Rodriguez*,* 411 U.S. 1, 37 (1973).
[84]Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services,* 59 Cath. U. L. Rev. 1057, 1067 (2010).
[85] John Iceland, *Poverty in America,* University of California Press, 145 (2d ed. 2006).

It is clear the situation for the indigent in this country is more desperate than any other class in the United States (other than perhaps undocumented citizens), yet this perpetually marginalized class continues to receive only minimal scrutiny from the Court.

Unfortunately, until the Court's views on the importance of economic inequalities evolve, challenges under the Equal Protection Clause with regard to implicit fundamental rights (such as welfare, housing, medical care, and education) will be subject to a lenient rational basis standard and will likely fail. Equal protection challenges, as they are currently applied, would likely stand only to support the constitutionality of suspicionless drug testing of public housing tenants as a condition to receive benefits.

C. Fourth Amendment Challenges

Discussions of implementing mandatory suspicionless drug tests for public housing tenants are most frequently met with discussions of the fourth amendment. The ACLU's rejection of zero-tolerance properties mentioned in Part II was based on their belief that such testing was a violation of the fourth amendment.[86] This is predominately because drug testing is seen and has been established as extremely invasive and many feel that subjecting all tenants to testing rather than those they reasonably suspect is a violation of constitutional rights.

The fourth amendment guarantees the right to be secure against unreasonable searches and seizures.[87] A search is "unreasonable" if it is conducted without a warrant that is based on probable cause.[88] In recent years, however, courts have carved out a

[86] Fonger, *supra.*
[87] U.S. CONST. amend. IV: 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. *See* Katz v. United States, 389 U.S. 347, 357 (1967).
[88] Katz v. United States, 389 U.S. 347, 357 (1967).

number of exceptions to the warrant requirement,[89] including what are coined "special needs" exceptions.[90] Special needs exceptions do not have a precise definition, but address unique circumstances that law enforcement may encounter in which their interest is so critical that searches may constitutionally be conducted absent a warrant, probable cause, or even individualized suspicion.[91]

A substantive body of case law has developed over the last few decades regarding special needs exceptions. This article will address six of those cases. The first four will illustrate not only how special needs exceptions justify particular suspicionless searches (which includes suspicionless drug testing) but also how the Supreme Court's standard for these exceptions has fluctuated over time. The fifth case is the most factually parallel to and helpful for the discussion of suspicionless testing of public housing tenants. And finally, the sixth case illustrates a recent attempt to establish suspicionless drug testing of welfare recipients as a special needs exception.

1. Special Needs and Suspicionless Searches: *Skinner, Von Raab, Vernonia,* and *Chandler*

In the first case, *Skinner v. Railway Labor Executives' Association,* the Supreme Court upheld Federal Railroad Administration (FRA) regulations requiring drug testing of railroad workers involved in accidents.[92] In conducting its analysis, the court balanced the government's interest in conducting the search against the fourth amendment privacy rights of the railroad employees and specified the "special need" established in this case

[89] *See* Nathan A. Brown, *Recent Development: Reining in the National Drug Testing Epidemic Chandler v. Miller,* 33 Harv. C.R. – C.L. L. Rev. 253, 255 n. 14 (1998) ("Exceptions have been made for investigatory detention, warrantless arrests, seizure of items in plain view, consent searches, exigent circumstances, searches of containers, inventory searches, border searches, administrative searches, searches at sea, and special needs").
[90] *See generally* Skinner v. Railway Labor Executives' Association, 489 U.S. 602, (1989).
[91] *Id.* at 604-605.
[92] *Id.* at -617.

was the need to ensure the safety of the traveling public.[93] Justice Kennedy asserted, "[T]he expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."[94]

Also contributing to the conclusion to uphold the testing was the fact that the railroad employees worked in a highly regulated industry and the procedures regarding urine collection were nonintrusive.[95]

Often discussions about *Skinner* are coupled with discussion of *National Treasury Employees Union v Von Raab,* where the Court upheld random drug testing of federal customs officers who carry firearms or who are involved in drug interdiction.[96] The Court looked at the role of the Customs Service in fighting national dilemmas associated with drug activity and concluded that the government had a compelling interest in these employees' physical fitness and judgment.[97]

Important to note is the statistical findings in both *Skinner* and *Von Raab.* In *Skinner,* the FRA produced data linking drug and alcohol use to serious train accidents.[98] At the core of the government's justification for the testing was public safety, and this argument was furthered by statistical data. In *Von Raab,* however, very little evidence or statistical support was offered to justify the testing. The court "seemed only to require a showing that the drug testing program was instituted not to cure a pre-existing harm but to avoid potential, serious, drug-related harms."[99]

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[93] *Id.* at 621.
[94] *Id.* at 627.
[95] *Id.* at 626-628.
[96] National Treasury Employees Union v. Von Raab*,* 489 U.S. 656 (1989).
[97] *Id.* at 670.
[98] Lang, *supra,* at 474.
[99] *Id.* at 475.

Vernonia School District 47J v. Acton established the constitutionality of a school district's policy of randomly subjecting student athletes to drug tests.[100] Here, the court addressed a nationwide epidemic in the context of student athletes, stating that athletes in particular were "the leaders of the drug culture."[101] The safety of the athletes was also a major concern addressed by the court since drug use would substantially increase the risk of sports-related injuries.[102]

According to the majority in *Vernonia,* drug use amongst student athletes was "an immediate crisis of greater proportions than existed in Skinner, where we upheld the Government's drug-testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. And of much greater proportions than existed in Von Raab, where there was no documented history of drug use by any customs officials."[103]

Vernonia was extended in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* when the Court upheld a drug testing policy that required all students who participated in competitive extracurricular activities to submit to drug testing.[104] The responsibility of teachers to be in semi-parental roles during school hours was inferred in Breyer's concurrence and the majority felt strongly that the implemented policy reasonably served the school district's important interest of preventing drug use among its students.

The dissent in *Earls* had a difficult time reconciling *Vernonia* with the majority's rationale, given no drug epidemic was established at the particular school or in the area of

[100] Vernonia School District 47J v. Acton, 515 U.S. 646, 646-647 (1995).
[101] *Id.* at 649.
[102] *Id.*
[103] *Id.* at 663.
[104] Board of Education of Independent School District No. 92 of Pottawatomie County v Earls, 536 U.S. 822 (2002).

the school at large, no individualized suspicion had been produced, and the safety factor that existed with student athletes was also not present.

Finally, *Chandler v. Miller* is a useful case in illustrating the Supreme Court's first decision to oppose suspicionless drug testing under a special needs exception. Here, the court held that a statute requiring candidates to submit to and pass a urinalysis drug test to qualify for state office was unconstitutional.[105] The court found no immediate danger to justify a departure from the fourth amendment warrant requirement and emphasized how critical the "public safety" element is to justify the desired departure.[106]

2. Special Needs and a General Interest in Crime Control: *Ferguson*

There is universal agreement that "the collection and testing of urine is a search within the meaning of the fourth amendment."[107] Over the past few decades, the Supreme Court has established the general rule that a constitutional search requires "some quantum of individualized suspicion."[108] As mentioned above, the proposed blanket testing of all tenants lacks any sort of individualized suspicion required by the fourth amendment, therefore presenting states with a difficult hurdle in justifying such a measure.

However, it is it foreseeable, and arguably likely, that states will attempt to establish drug testing public housing tenants as a special needs exception to refute the fourth amendment privacy argument. Again, special needs are an exception to the general rule requiring individualized suspicion and are recognized by the court when the need is beyond the normal need for law enforcement, making the general rule impracticable.[109]

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[105] Chandler v. Miller, 520 U.S. 305, 309 (1997).
[106] *Id.* at 323.
[107] Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1138 (2001).
[108] *Id.*
[109] Skinner, 489 U.S. at 619.

In 2001, the Supreme Court handed down a decision in *Ferguson v. City of Charleston* that would provide salient support for arguing against the constitutionality of suspicionless drug testing of public housing tenants – at least as far as the fourth amendment is concerned. In *Ferguson,* a state hospital in South Carolina adopted suspicionless drug tests for maternity patients who were suspected of using cocaine.[110] The testing was in response to a local medical university's concern regarding an increase in the use of cocaine by patients who were involved in prenatal treatment.[111] Importantly, the testing implemented in *Ferguson* was nonconsensual and had a criminal investigatory dimension in that the results of the tests were turned over to law enforcement.[112]

The suspicionless testing was deemed unconstitutional due to the majority's view that a policy that permits searches where the purpose served is "ultimately indistinguishable from the general interest in crime control" does not comport with the fourth amendment.[113] Despite the court's recognition of the state's ultimate purpose – protecting the health of mothers and their unborn children – as commendable, it was clearly articulated that the invasion of privacy in this case was far too substantial, especially given the mothers' reasonable expectation of privacy as a patient.

The parallel between the state's interest and factual scenario in *Ferguson* to the potential state interest and factual scenario regarding testing public housing tenants is strong. The court made it clear that a state's interest in crime control was not grounds for departure from fourth amendment warrant requirements. Crime control is undoubtedly a

[110] Ferguson v. City of Charleston*,* 532 U.S. 67, 68 (2001).
[111] *Id.*
[112] *Id.* at 73.
[113] *Id.* at 81.

portion of the justification set forth in all current discussions regarding suspcionless testing and public housing.

Further, the Supreme Court has made it clear on numerous occasions that special needs, especially those associated with suspicionless drug testing, must be founded in a concern for public safety. This was addressed in the four cases mentioned above and also in *Marchwinski* mentioned below. If the testing of public housing tenants were ever to be established as a fourth amendment special needs exception, it is likely that a state would need to make clear that their testing policy was grounded in a concern for public safety.

In addition, if the policy did *not* contain a criminal investigatory component, *Ferguson* would become a great deal less reliable as a precedent against suspicionless drug testing. In order for *Ferguson* to operate most strongly against the constitutionality of testing tenants, the state would have to propose turning over the results of tenants' drug tests to law enforcement as part of the overall procedure.

3. Special Needs and Public Safety: *Marchwinski*

Though we have yet to see states argue for a special needs exception regarding public housing recipients, it has been argued as grounds for drug testing welfare recipients in *Marchwinski v. Howard*. Here, Michigan's Family Independence Agency (FIA) argued that testing would help to move more families from welfare to work and the desire to address substance abuse as a barrier to employment constituted a special need sufficient to warrant departure from the fourth amendment's general rule regarding searches.[114] The FIA's suspicionless testing of welfare recipients was as follows:

[114] Marchwinski, 113 F. Supp. 2d at 1140.

> Where an applicant fails or refuses without good cause to submit a speciment for testing by the end of the first business day following the application interview, the FIP application will be denied. Where an applicant fails to complete the assessment process and/or fails to comply with a treatment plan within the first two months without good cause, his/her case will be closed. Where an active FIP client chosen randomly fails to complete a drug test without good cause, his/her FIP benefit amount will be reduced twenty-five percent for the first month of non-compliance, and twenty-five percent for each subsequent month of non-compliance. If the client remains non-compliant at the end of the fourth month, his/her case will be closed.[115]

A federal appellate court, however, rejected the argument and stated that though the agency's desires to curb substance abuse and address employment barriers were laudable, they failed to establish that this objective was rooted in public safety and therefore could not qualify as a special needs exception.[116] The Court sighted *Skinner* emphasizing only in *limited* cases where the privacy interests implicated by the search are *minimal* in coupled with an important governmental interest that would be *placed in jeopardy* by a requirement of individualized suspicion can departures from fourth amendment norms be justified.[117] The invasive nature of drug testing rendered the privacy interest significant rather than "minimal" and the Court explicitly held, "The State has not shown that public safety is genuinely placed in jeopardy in the absence of drug testing of all FIP applicants and of random, suspicionless testing of FIP recipients."[118]

Marchwinski deemed the suspicionless drug testing of welfare recipients unconstitutional and unequivocally denied a special needs exception for testing under these circumstances. This is a critical precedent for those who oppose suspionless drug

[115] *Id.* at 6.
[116] *Id.* at 9.
[117] *Id.* at 1138.
[118] *Id.* at 1140.

testing of public housing recipients and in many ways should quiet fears that a special needs exception would be established. However, if the FIA's goals and objectives would have been grounded in public safety – the case may have been held differently. *Marchwinski* is a strong precedent, but it does not necessarily close the door to suspicionless drug testing of public assistance recipients.

IV. Comparable Solutions

Now that the types of challenges that could be raised in response to suspicionless drug testing tenants have been addressed, I would like to discuss the merits of the idea itself and present comparable solutions.

Public housing, despite progress made in the past few decades, has substantial room for improvement. And in certain areas, such as drug activity, there is a critical *need* for improvement. However, it is imperative that this need is addressed and improvement achieved in a responsible and efficient manner. The impoverished population in America already feels defeated by 'the system' in a variety of ways and further exacerbating that sentiment will only further divide existing environments. Regardless of what, specifically, one hopes to achieve, reaching a greater product for all is considerably more difficult to achieve with a divided population.

Subjecting tenants to heightened accountability is not only appropriate, but it is also a dependable way to address the shortcomings that continue to plague public housing environments and public housing units. It is reasonable to require certain expectations be met in order to obtain and maintain assistance provided by the country's tax dollars. But heightened accountability can be achieved in a variety of ways that do not include privacy intrusions of one's physical body.

Despite the clear and in many ways laudable objectives that states and housing commissions hope to obtain through suspicionless drug testing of public housing tenants, I believe the cost of achieving that objective outweighs the potential benefits. Especially when the essence of those benefits - eradicating drug use, heightening accountability and ensuring the optimal use of public tax dollars - can be achieved through comparable means.

A. Test Public Assistance Across the Board

First, states could test *all* recipients of public assistance, therefore negating the equal protection argument altogether. I note this argument not because of its viability, but because it is an argument that has been put forth regarding drug tests and public assistance.

It cannot be refuted that certain classes of public assistance recipients are being treated differently depending on their position and reasoning for needing such assistance, regardless of arguments that can be put forth in support of suspicionless drug testing of welfare recipients and/or pubic housing recipients. Testing all rather than particular classes would be a way to defeat any chance of an equal protection argument. However, this option is unworkable and unrealistic, given its seemingly infinite effect on public assistance.

B. Testing Based on Prior Conviction or Suspicion

Second, states could adopt a compromised approach that denies blanket testing of all tenants but tests tenants individually suspected. The core components of this approach are already embraced in the current legal landscape, but it is mentioned for two reasons: one, it is a reminder that current remedies do exist, and two, certain states have expanded

this approach in a way that makes it more meaningful and effective. According to Liz Schott, a senior fellow at the Center on Budget and Policy Priorities in Washington, some states require not only welfare applicants who are suspected of drug use to undergo drug testing as a condition of getting benefits, but also those applicants who have a prior felony drug conviction.[119]

Washington's modified approach regarding welfare recipients is viable for public housing tenants as well. The idea of testing upon suspicion amongst certain public assistance programs is commonly accepted. "It's already a given…that if a recipient is suspected of using drugs – because of current behavior or past history of abuse – he or she will be referred for treatment or screening."[120] But the supplemental dimension of testing upon prior drug-related record in addition to suspicion gives the existing approach more merit in its ability to operate effectively.

The modified approach's respect for suspicion that is *particular to the individual* - whether it their current suspect activity or their past convictions - adheres to the traditional fourth amendment requirements for constitutional searches and diminishes the expectation of privacy for *only* those tenants who are deserving of the diminishment.

C. Conditions on the Property, not the People

Finally, and most notably, states could take an entirely alternate approach to limiting the existence of drugs on government-owned property and ensuring that the public dollar is used optimally. Property-based conditions could be placed on those receiving public housing assistance, requiring tenants to give back to and maintain the property itself. This idea is grounded in the critical importance of one's *environment* in

[119] Greenblatt, *supra.*
[120] *Id.*

its tendency to foster particular lifestyles and is presented as my primary comparable solution.

The tendency of the environment to play a role in the activities that one partakes in is not always an obvious observation. But it is necessary to address the issue of drug activity by implementing a condition that enhances the overall context of one's neighborhood or development rather than implementing a condition that addresses, and arguably attacks, each individual associated with such an environment. Conditions of this sort aimed solely at the individual infer impoverished individuals yield their right to privacy and adequate fourth amendment protection, and are unduly punitive.

As noted above, conditionality is not a new concept when it comes to public assistance programs. Many different variations of conditions have been imposed, though not all conditions have been upheld. However, a condition that focuses on the property and the environment has the potential to be effective while simultaneously alleviating the propensity to render inferior classes of public assistance recipients. This type of condition does not assume a diminished expectation of privacy for low-income people with an invasive technique such as drug testing, but rather assumes and demands heightened accountability for those utilizing government-owned property.

Property-based conditions could entail lawn maintenance, building maintenance, trash maintenance, etc. With this approach, the focus of the requirement is shifted from the people and their privacy to the property and the need to maintain it. The government would have a much easier time establishing its interest in maintaining the property that it provides the funding for than it would in establishing its interest in the private lives and

homes of those it is assisting. Furthermore, this approach allows tenants of public housing to maintain their deserved expectations of privacy from bodily invasions.

VII. Conclusion

Housing commissions and state legislators are justified in their concerns with drug use and drug activity amongst public assistance recipients. I would be hard pressed to believe that *any* tax-paying citizen would champion the idea of public dollars being used to foot the bill for drug use, regardless of the specific type of assistance granted. That said, assistance allocated for public housing is no exception to concerns regarding these issues and the desire to achieve optimal use of state funding.

But the suspicionless drug testing of public housing tenants is the easy and obvious solution to achieving drug eradication and efficient use of public funds. Though easy and obvious solutions often seem best, they overlook overall effectiveness in the long term. And in this case, the suspicionless drug testing solution is not only unconstitutional, but will further polarize an already divided population.

Given the punitive nature of suspicionless drug testing of public housing tenants in addition to the availability of comparable and potentially *more* effective solutions, I cannot support or condone it. I agree with the goal of eradicating drug activity, but I do not agree with this approach. It is not the most appropriate, responsible, or effective way of achieving accountability amongst public housing tenants or optimal use of public dollars. The focus needs to be enhancing the overall environment of public housing and the means for doing so does not need to include the invasion of tenants' ever-so-critical privacy.