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“An Anesthesiologist, a Brain Surgeon and a Nurse Walk into a Bar . . .”: A Call for Change in How America Handles Health Care Worker Substance Abuse

Angelica Halat*

I. Introduction

President Richard Nixon waged the War on Drugs in 1971.¹ Forty years later, the war continues, but the arena has evolved—the battlefield, once confined to streets, jails, and disreputable nightclubs, now includes the workplace. Since the introduction of President Reagan’s Drug-Free Workplace Act of 1988,² public and private employers have been subjecting seasonal clerical assistants, commercial aircraft pilots, and workers in between to drug and alcohol testing as a condition of employment. In fact, Americans have become so accustomed to the practice that it is now as commonplace as filling out the job application itself.³ It is surprising, then, that a country so quick to administer drug tests leaves out the one group of professionals that we, quite literally, entrust with our lives: health care workers.

For years, voices from all sectors of society, including the medical field itself,⁴ have pushed for the testing of health care workers. These calls for help have even motivated legislative attempts to mandate testing. In 2013, a group of New Hampshire State Representatives introduced HB-597

* J.D. Candidate, 2016, Seton Hall University School of Law; B.A., 2013, Lehigh University. Thank you to Professor Charles Sullivan and my fellow Law Review editors for their help and guidance throughout the writing of this Comment. I also extend my thanks to my friends and family for their continued love and support.

¹ Ed Vulliamy, *Nixon’s “War on Drugs” Began 40 Years Ago, and the Battle is Still Raging*, THE GUARDIAN (July 23, 2011) <http://www.theguardian.com/society/2011/jul/24/war-on-drugs-40-years>.

² Exec. Order No. 12564, 51 Fed. Reg. 32889 (Sept. 15, 1986). The Act required federal employees to refrain from using illegal drugs, and directed executive agencies to create and implement a plan to ensure a drug-free workplace. It also authorized each agency to create a drug testing program for “employees in sensitive positions” based on a reasonable suspicion, following an accident, and as part of, or following, rehabilitative treatment. *Id.* § 3(a).

³ M. R. Levine & W. P. Rennie, *Pre-Employment Urine Drug Testing of Hospital Employees: Future Questions and Review of Current Literature*, 61 OCCUP. ENVIRON. MED 318, 318 (2004), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1740763/pdf/v061p00318.pdf> (discussing how common workplace drug testing has become in America, and noting that “more than 90% of US companies with over 500 employees have some sort of drug screening programme in place.”).

⁴ See, e.g., Arthur L. Caplan, PhD, *Doctors and Nurses Should Be Drug-Tested – Get Used to It*, MEDSCAPE (Aug. 1, 2013), <http://www.medscape.com/viewarticle/808385>.

to require health care facilities to establish a program to randomly test all health care employees at least four times per year.⁵ The story of David Kwiatkowski, a hospital technician, represents the most drastic flaws in how our current health care system handles drug and alcohol abuse by physicians, and spurred lawmakers to propose the bill.⁶ After Kwiatkowski infected 32 people in New Hampshire with Hepatitis-C in the course of feeding his addiction,⁷ the New Hampshire Legislature attempted to nudge the medical field in the right direction by introducing a bill that would have required hospitals to enact and implement drug testing policies.⁸

On the other side of the country, California's Proposition 46 made headlines as potentially the first law to mandate statewide drug and alcohol testing for state-licensed physicians.⁹ The testing provision, part of a broader effort to raise the state's malpractice liability cap, proposed to test professionals according to a drug testing program used by employers regulated by the U.S. Department of Transportation (DOT).¹⁰ While the proposition failed, Californians supported the drug testing portion of Proposition 46 both before¹¹ and after the November elections,¹² although many fiercely debated its constitutionality. For example, Natasha Minsker of the American Civil

⁵ H.B. 597, 2013 Leg., Reg. Sess. (N.H. 2013).

⁶ Aaron Sanborn, *Random Drug Testing Taken Out of Hepatitis C Bill*, SEACOASTONLINE.COM (Nov. 5, 2013), <http://www.seacoastonline.com/article/20131105/News/311050336>.

⁷ Mark A. Abramson, et. al, *Exposing The "Dirty Little Secret": Random Drug Testing of Health Care Workers in the Wake of the Hepatitis C Outbreak*, 54 N.H. BAR J. 10, 10 (2014) (explaining that Kwiatkowski, fueled by his fentanyl addiction, would inject himself with the fentanyl meant for patients, refill the used syringes with saline, and then leave the syringes to be used on patients later).

⁸ H.B. 597, 2013 Leg., Reg. Sess. (N.H. 2013). *But see* H.B. 597, 2014 Legis., Reg. Sess. (N.H. 2014) (amending the bill's mandatory random testing scheme to simply require licensed facilities to adopt a drug-free workplace policy).

⁹ 2014 Bill Text CA V. 7.

¹⁰ 49 C.F.R. § 40 (2012).

¹¹ Press Release, University of Southern California, USC Dornsife/L.A. Times Poll: Support for Prop. 46 Drops Steeply as Voters Hear Initiative Details (Sept. 15, 2014), *available at* <https://pressroom.usc.edu/usc-dornsifela-times-poll-support-for-prop-46-drops-steeply-as-voters-hear-initiative-details/> (explaining that a September 2014 poll conducted by USC Dornsife and the Los Angeles Times revealed that the PPSA's testing mandate was the most popular of the suggested measures, with 70% of those polled in support of the idea).

¹² Chris Kardish, *California Won't Drug Test Doctors*, GOVERNING (Nov. 5, 2014), <http://www.governing.com/topics/elections/gov-california-medical-malpractice-doctors-drug-testing-ballot.html> (reporting that while they disagreed with the proposition as written, "the ACLU and California's biggest doctor lobby didn't completely dismiss the idea of drug testing doctors . . .").

Liberties Union of North California argued that the testing program was unconstitutional and went “too far” by threatening to take away a doctor’s medical license for failing a test.¹³ On the other hand, Jamie Court of Consumer Watchdog argued that doctors are within the classes of employees that may constitutionally be tested,¹⁴ and that Proposition 46 is a constitutional method of doing so.¹⁵

After its turn at the polls in November 2014, Proposition 46 failed to become law, with 67% of voters opposing it.¹⁶ Still, many believe the testing policy itself was not to blame: the chief executive of the California Medical Association, Dustin Corcoran, who also served as the chairman of the campaign against the initiative, stated of the initiative’s failure, “[i]n this health care environment, undermining California’s long-standing malpractice cap is a political poison pill.”¹⁷ Further, because the testing mandate was included in the initiative as a “‘sweetener’ designed to get voters to approve raising MICRA caps, which would be less likely to win on its own,”¹⁸ it is difficult to ascertain how many voters actually supported the testing provision itself.

On the other hand, it is quite clear that drug testing was the problem in New Hampshire’s HB-597, which originally called for the random testing of every health care worker in the state at least

¹³ Christopher Cadelago, *Doctor Drug Testing Latest Front in Medical Malpractice Measure*, SACRAMENTO BEE (Aug. 21, 2014), <http://www.sacbee.com/news/politics-government/election/article2607425.html>.

¹⁴ Press Release, Consumer Watchdog, Consumer Watchdog Campaign: Prop. 46 Author Calls on ACLU to Explain Why It Says Doctors Are Not in Safety Sensitive Positions & Should Not Be Tested (Aug. 26, 2014) *available at* <http://www.consumerwatchdog.org/newsrelease/consumer-watchdog-campaign-prop-46-author-calls-aclu-explain-why-it-says-doctors-are-not>.

¹⁵ Cadelago, *supra* note 13.

¹⁶ Michael F. Haverluck, *Did CA Keep Costs Low by Voting Down Raising Malpractice Cap?*, ONE NEWS NOW (Nov. 15, 2014), <http://www.onenewsnow.com/legal-courts/2014/11/15/did-ca-keep-costs-low-by-voting-down-raising-malpractice-cap#.VKAm8DDDs>.

¹⁷ Michael R. Blood, *Attempt to Raise Medical Malpractice Cap Defeated*, WASH. TIMES (Nov. 5, 2014), <http://www.washingtontimes.com/news/2014/nov/5/initiative-would-raise-medical-malpractice-cap/?page=all>.

¹⁸ Yul D. Ejnes, MD, *California’s Proposition 46 and Mandatory Physician Drug Testing: A Cause for Concern*, VOL. 161 ANNALS OF INTERNAL MED., 911, 911 (2014).

four times a year.¹⁹ The state legislators ultimately decided to replace the random test provision with a more politically pleasing substitute: testing based on the nebulous “reasonable suspicion.”²⁰ Thus, based on these legislative calls for change, as well as the support from various sectors, it seems as though the idea of drug testing physicians in fact carries much weight. The question, then, is why have we not yet implemented a program to drug test medical employees? Opponents claim that drug testing is ineffective and invades personal privacy,²¹ but those arguments would also seem to apply to pilots, teachers, and clerical assistants, all of whom are subject to testing.

Opposition to drug testing largely relies on constitutional, ethical, and financial arguments. The constitutionality of drug testing physicians, however, is no different than the constitutionality of drug testing other employees carrying out safety-sensitive tasks, and the ethics of testing physicians is even clearer: if it is ethically acceptable to test bus drivers²² despite the supposed flaws in drug testing,²³ it is undoubtedly just as acceptable to test health care workers for drug and/or alcohol impairment. Additionally, while drug testing may increase operating expenses for medical professionals, testing is worth the added cost for two reasons: not only is testing estimated

¹⁹ H.B. 597, 2013 Leg., Reg. Sess. (N.H. 2013). *See also* Sanborn, *supra* note 6 (explaining that since its introduction, organizations such as the New Hampshire Association of Counties opposed the bill because “mandatory drug testing would have a significant cost to the state’s 11 nursing homes and three assisted-living facilities”).

²⁰ Abramson, *supra* note 7 at 14. Based on the switch in testing policies, it seems that HB-597 was also a victim of politics.

²¹ Brandon Cohen, *Drug-Test Physicians? Docs Say ‘No Way’*, MEDSCAPE (Aug. 26, 2014), <http://www.medscape.com/viewarticle/830211>.

²² 49 .C.F.R. § 382.103(a) (explaining that all “persons who operate a commercial motor vehicle in commerce in any State” are subject to drug testing).

²³ Kristina Fiore, *APA: Drug Test Results Often Flawed*, MEDPAGE TODAY (May 23, 2010), <http://www.medpagetoday.com/MeetingCoverage/APA/20253> (noting that one in 20 patients will receive an inaccurate drug test result, which is more likely to be a false positive than a false negative).

to eventually decrease health care spending,²⁴ but it also helps to ensure the safety of the doctor-visiting public.²⁵

Despite the logic behind drug testing medical professionals, calls to implement such testing, especially on a random basis, repeatedly fail in the political arena.²⁶ Accordingly, to finally pass into law state-mandated testing for chemical impairment, a testing policy that is appropriately tailored to the medical field is necessary. This Comment will discuss the guideposts that belong in a model state statute to provide for the testing of health care workers.

Part II of this Comment will explain the origins and proposed measures of California's Proposition 46 and New Hampshire's HB-597, as well as the reasons why they were rejected and limited, respectively. Part III expounds on the need to test health care workers ("HCW")²⁷ based on recent data brought to light by the debates surrounding Proposition 46. Part IV will demonstrate that, based on the constitutional framework for drug testing set forth in United States Supreme Court precedent, HCW are an appropriate class of employees to test for impairment such that testing would be a reasonable search within the meaning of the Fourth Amendment.

²⁴ CALIFORNIA ATTORNEY GENERAL, PROPOSITION 46, ANALYSIS BY THE LEGISLATIVE ANALYST, at 31, *available at* <http://vig.cdn.sos.ca.gov/2014/general/pdf/proposition-46-title-summary-analysis.pdf> (reporting the findings of an analyst retained by the state of California to assess the effects of Proposition 46, which revealed that random testing would deter physicians from substance use while on duty, leading to fewer medical errors, and therefore a decrease in overall health care spending). *See also* Michael R. Oreskovich et al., *Prevalence of Alcohol Use Disorders Among American Surgeons*, 147 ARCH SURG. 168, 170–71 (2012) (explaining that a study published in the Journal of the American Medical Association suggested that testing might reduce malpractice litigation because "surgeons with alcohol abuse or dependence constituted 77.7% of surgeons reporting a medical error in the previous 3 months" which "suggests a potential relationship with quality of care.").

²⁵ It follows that if testing decreases the amount of medical errors, hospitals and/or doctors would be sued less frequently, avoiding litigation costs and providing patients a safer and healthier supply of medical professionals.

²⁶ See discussion *infra* Parts IIB and IID.

²⁷ This Comment proposes guideposts for drug testing all "health care workers" ("HCW"), a group which includes any professional who treats, or assists in the treatment of, a patient in any way, and any professional with access to drugs in a medical setting. *See Occupational Outlook Handbook: Healthcare Occupations*, BUREAU OF LABOR STATISTICS, UNITED STATES DEPARTMENT OF LABOR (Jan. 8, 2014), <http://www.bls.gov/ooh/healthcare/home.htm>. For example, a phlebotomist and a pharmacist would be within the "HCW" category for purposes of this Comment, while a dietician would not be. *Id.*

Part V will set forth guideposts to include in drug testing legislation that is appropriately tailored to the medical field, taking into account the shortcomings of Proposition 46 and the original HB-597, the profession's self-regulation, and the consequences of relying on a drug test alone to ensure patient safety. Part VI examines the unintended consequences of drug testing HCWs, and rebuts the common oppositions to testing. Finally, Part VII will conclude the Comment, demonstrating that the need for drug testing in the medical field far outweighs the negative consequences and costs.

II. The Troy and Alana Pack Patient Safety Act and New Hampshire HB-597

The Pack Patient Safety Act and HB-597 were two attempts to effect change in the regulation of the medical field by calling for the random drug and alcohol testing of physicians. Although the bills differed in their details, they are similar in that they were reactions to tragic incidents by impaired doctors, and they ultimately could not amass the support to become law.

A. The Troy and Alana Pack Patient Safety Act: Origins and Proposed Measures

Proposition 46, entitled the Troy and Alana Pack Patient Safety Act (PPSA), was introduced by California resident Bob Pack, who began his fight against medical negligence when his two children were struck and killed by a driver who was under the influence of alcohol and drugs—drugs that had been prescribed to her by six different doctors working within the same hospital.²⁸ The physicians failed to check the state's prescription drug monitoring system, called Controlled Substance Utilization Review and Evaluation System (CURES), prior to prescribing the driver, Jimena Barreto, the painkillers.²⁹

²⁸ *New Measure Would Require Drug Testing for Doctors*, ABC 7 NEWS (May 17, 2014), <http://abc7news.com/news/new-measure-would-require-drug-testing-for-doctors/64182/>.

²⁹ Lisa Girion, Scott Glover, *Reckless Doctors Go Unchecked*, L.A. TIMES (Dec. 30, 2012), <http://articles.latimes.com/2012/dec/30/local/la-me-prescription-cures-20121230>.

What looked like a clear case of medical malpractice was not as helpful as might appear—under California’s Medical Injury Compensation Reform Act (MICRA), the Packs would be limited to an award of \$250,000 for the loss of their children after a successful suit against the doctors for their negligence.³⁰ Dissatisfied with the remedies available to those suffering such losses, Mr. Pack introduced the PPSA in 2013 in an effort to require doctors to use CURES to prevent patients from “doctor shopping” as Barretto had, and to raise the cap on medical malpractice damages in the event that the system once again fails to prevent such catastrophes.³¹

For purposes of this Comment, the most important provision in the PPSA is the statewide drug and alcohol testing of physicians with admitting privileges,³² a group with a recognized substance abuse problem.³³ In fact, in a March 2000 report, the Medical Board of California announced that eighteen percent of Californian physicians “may abuse alcohol or drugs during their lifetime,” and that at any given time, one to two percent of doctors are abusing these substances.³⁴ Since 2003, the Board has disciplined 326 physicians for drug or alcohol abuse,³⁵ handling 46 of these cases

³⁰ Nanette Miranda, *Father Working to Change Law on Medical Malpractice Lawsuits*, ABC 7 NEWS (Aug. 16, 2013), <http://abclocal.go.com/story?section=news/politics&id=9209527> (explaining that MICRA has never been adjusted for inflation since its passage in 1975, which would today amount to \$1.1 million).

³¹ Press Release, Consumer Watchdog, *Consumer Watchdog Campaign: Prop 46 Requiring Physicians to Check Statewide Prescription Drug Database Can Save Up To \$406 Million Annually* (Aug. 11, 2014), *available at* <http://www.consumerwatchdog.org/newsrelease/consumer-watchdog-campaign-prop-46-requiring-physicians-check-statewide-prescription-dru>. *See also* Miranda, *supra* note 30 (explaining that the proposed increase to the medical malpractice cap was simply a proposition to adjust the cap for inflation).

³² 2014 Bill Text CA V. 7. *See also Id.* at § 2350.25(A), (A)(1) (providing that “hospitals shall conduct testing...on physicians who are employers or contractors or have the privilege to admit patients,” covering nearly the whole spectrum of physicians practicing within a hospital).

³³ 2014 Bill Text CA V. 7 § 2 (citing an article from the *Annals of Internal Medicine* which reveals that at least one in ten physicians suffers from drug and alcohol abuse during his career, and that one third of physicians will experience a condition, such as substance abuse, that will affect the safety of their practice).

³⁴ MEDICAL BOARD OF CALIFORNIA, *PHYSICIAN DIVERSION PROGRAM (2000)*, *available at* <http://www.yeson46.org/wp-content/uploads/2014/05/18-percent-of-california-physicians-will-abuse-drugs-or-alcohol-during-their-careers.pdf>.

³⁵ Press Release, Consumer Watchdog, *Dr. Stephen Loyd, Who Survived Substance Abuse, Warns of Undetected Physician Impairment* (Oct. 6, 2014), *available at* <http://www.consumerwatchdog.org/newsrelease/consumer-watchdog-campaign-dr-stephen-loyd-who-survived-substance-abuse-warns-undetected>.

between 2012-2013 alone.³⁶ In addition, unlike most states, California does not offer its physicians a “bypass rehabilitation program,” through which doctors can avoid disciplinary action if they comply with treatment.³⁷ California shut down its program in 2008 after finding that it allowed “impaired physicians to continue to practice,” and was not “effective in adequately protecting patients from substandard care.”³⁸

To implement the testing program, the PPSA would have adopted the guidelines used by the Federal Aviation Administration (FAA),³⁹ which govern the drug and alcohol workplace policies for pilots, air traffic controllers and other employees working on or near aircraft.⁴⁰

While the PPSA cross-referenced the FAA program,⁴¹ it specifically enumerated key features of its proposed policy in the text of the initiative itself, the most controversial of which targeted testing.⁴² Under the PPSA, the California Medical Board would have required doctors to be tested after an “adverse event,” such as performing an incorrect procedure on a patient, prescribing the wrong medication, or other similar events as listed in § 1279.1 of the California Health and Safety Code.⁴³ The Act required that within twelve hours of the event, the physician that treated the patient, or prescribed him medication in the twenty-four hours preceding the incident, report to a

³⁶ MEDICAL BOARD OF CALIFORNIA, 2012–2013 ANNUAL REPORT (2013), available at http://www.mbc.ca.gov/Publications/Annual_Reports/annual_report_2012-2013.pdf.

³⁷ Keith H. Berge, M.D., et. al, *Chemical Dependency and the Physician*, 84 MAYO CLINIC PROCEEDINGS, 625, 625 (July 2009).

³⁸ Sigrid Bathen, *Doctors’ Drug Tests: A Divisive Issue*, CAPITOL WEEKLY (Oct. 19, 2014), <http://capitolweekly.net/drug-testing-doctors-prop-46-california7636/>.

³⁹ 49 C.F.R. § 40 (2012). The Federal Aviation Administration (FAA) is regulated by the Department of Transportation (DOT), so its policy largely mirrors the DOT guidelines, but includes provisions tailored for aviation employees. 14 C.F.R. § 120 (2009). See also Press Release, Consumer Watchdog, No on Prop 46 Doctor: Wine at Dinner More Important than Following Up on Patient Deaths and Injuries (Sept. 22, 2014), available at <https://www.yeson46.org/no-on-prop-46-doctor-wine-at-dinner-more-important-than-following-up-on-patient-deaths-and-injuries/> (explaining that the PPSA planned to implement FAA drug testing procedures).

⁴⁰ 49 C.F.R. § 40 (2012).

⁴¹ 2014 Bill Text CA v. 7 § 4 (proposing that physicians be tested according to 49 C.F.R. § 40, the testing procedure utilized by the DOT).

⁴² *Id.*

⁴³ CAL. HSC. CODE § 1279.1(b)(1)(C), (b)(4)(A) (2007).

hospital for testing, for which he must pay out of his own pocket. Upon a failure to appear for testing, or a refusal to provide a sample, the Attorney General's Health Quality Enforcement Section would have immediately suspended him pending an investigation, and his employers would have been notified of both the suspension and investigation.⁴⁴

Finally, the PPSA would have tested doctors on the basis of referrals by colleagues and supervisors upon a reasonable suspicion of drug or alcohol use or impairment.⁴⁵ This objective was problematic due to the medical profession's notorious culture of silence,⁴⁶ but the PPSA aimed to break down such barriers by mandating that physicians come forward when they believe a colleague may be, or may have been, impaired by drugs or alcohol while working.⁴⁷

The DOT testing guidelines underlie the FAA regulations, and call for the testing, and confirmatory testing, of the employee's breath and urine samples.⁴⁸ Should the second test return a negative result, the laboratory considers both results negative, and the matter is concluded.⁴⁹ If

⁴⁴ 2014 Bill Text CA V. 7 § 2350.30 (mandating the immediate suspension of a doctor upon a refusal or failure to provide a sample, and notifying his employer and patients). *See also* Peter Eisler, *Doctors, Medical Staff on Drugs Put Patients at Risk*, USA TODAY (Apr. 17, 2014), <http://www.usatoday.com/story/news/nation/2014/04/15/doctors-addicted-drugs-health-care-diversion/7588401/> (highlighting the difficulty in identifying substance abuse within the medical field, and noting that disciplinary action, "such as suspension of a license to practice, is rare and often doesn't occur until a practitioner has committed multiple transgressions.").

⁴⁵ 2014 Bill Text CA V. 7 § 2350.25(A)(3).

⁴⁶ Many sources have discussed the unwillingness of HCWs to report an intoxicated colleague. *See* Eisler, *supra* note 44 (stating that despite the numerous times that David Kwiatkowski had been caught unconscious at work near an empty syringe, or running to the bathroom in the middle of a procedure to tend to his addiction, his colleagues never took any action). *See also* Carla K. Johnson, *Many Docs Don't Blow Whistle on Colleagues*, HUFFINGTON POST (July 14, 2010) http://www.huffingtonpost.com/2010/07/14/many-docs-dont-blow-whist_n_645703.html (reporting that 17% of doctors surveyed by the Harvard Medical School had "direct, personal knowledge" of a doctor who had been working while impaired or incompetent, yet one-third had not reported their colleague).

⁴⁷ 2014 Bill Text CA V. 7 § 2350.20. The PPSA did not specify the consequences for a failure to report a colleague. *Id.* However, it would have imposed upon physicians a statutory duty to report an impaired colleague. *See* *FAQ - Complaint Review Process, MEDICAL BOARD OF CALIFORNIA*, http://www.mbc.ca.gov/Consumers/Complaints/Complaints_FAQ/Complaint_Process_FAQ.aspx (last visited Feb. 11, 2015) (explaining that physicians are not statutorily obligated to report an impaired colleague pursuant to the Medical Practice Act, but are encouraged by the Medical Board to do so). *See also* CAL. BUS. & PROF. CODE § 805(b) (mandating only that the chief of staff of a peer review body or the chief executive officer of a medical facility file a report with the Medical Board of California upon a final decision on disciplinary action as to an employee).

⁴⁸ 49 C.F.R. §§ 40.251 (for alcohol), 40.87 (for drugs). *See also* 2014 Bill Text CA V. 7 § 2350.15(G) (providing for confirmatory testing of samples).

⁴⁹ 49 C.F.R. §§ 40.255 (for alcohol), 40.87 (for drugs).

the test result is positive, the HCW may provide a legal explanation for the presence of the drug.⁵⁰ If he is unable to do so, his results are forwarded to the Medical Board of California, triggering the same disciplinary procedures that follow a failure or refusal to test.⁵¹ Like the FAA guidelines,⁵² the PPSA suggested testing for the presence of marijuana metabolites, cocaine metabolites, amphetamines, opiate metabolites, and phencyclidine.⁵³

B. The Pack Patient Safety Act: What Went Wrong?

USC Dornsife and the Los Angeles Times, in a September 2014 poll, revealed that 70% of people supported the PPSA's testing mandate.⁵⁴ By Election Day, Proposition 46 proponents, comprised mostly of lawyers' and consumers' groups,⁵⁵ amassed \$12.4 million in support of the PPSA.⁵⁶ Other proponents included various Democratic organizations and party leaders, the Consumer Federation of California, and a myriad of Patient Safety Advocates.⁵⁷

Conversely, PPSA opponents raised \$57.8 million⁵⁸ to combat the initiative, with the majority of the funds coming "from three medical malpractice insurers—the Cooperative of American Physicians, the Doctors Company and NORCAL Mutual Insurance Company," each contributing

⁵⁰ 49 C.F.R. § 40.141. *See also* 2014 Bill Text CA V. 7 § 2350.15(G) (providing doctors a chance to explain a positive test result).

⁵¹ 2014 Bill Text CA V. 7 § 2350.30(A) (requiring doctors to report any verified positive results, willful failures or refusals to test to the Medical Board, and enumerating the consequences of a positive result, or a failure or refusal to test).

⁵² DEPARTMENT OF TRANSPORTATION, DOT DRUG TESTING: ON AND AFTER OCTOBER 1, 2010 – STILL A 5-PANEL, available at http://www.dot.gov/sites/dot.gov/files/docs/Part%2040DOT5-PanelNotice_0.pdf (last updated Oct. 16, 2012).

⁵³ 2014 Bill Text CA V. 7 § 2350.15(D). *But see Medical Professional Panels*, QUEST DIAGNOSTICS, <http://blog.employersolutions.com/wp-content/uploads/2014/04/MedPro-Final.pdf> (last visited Feb. 12, 2015) (offering a customizable 10-panel drug test for HCWs based on the drugs available in the employer's workplace); *see also* *Medical Professional*, LABCORP, http://www.labcorp.com/wps/portal/!ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os_hACzO_QCM_IwN3dyNXAyNjQ2MvHxcXYwNjM6B8JJK8hVGoBVDeNcjZ0MTXwMDdmIBuP4_83FT9gtyIcgBVIMyI/dl2/d1/L2dJQSEvUUt3QS9ZQnB3LzZfUTg2TIEyTjIwR0cyRTAyMzEzSkxERDMwVDM!/ (last visited Feb. 12, 2015) (same).

⁵⁴ UNIVERSITY OF SOUTHERN CALIFORNIA, *supra* note 11.

⁵⁵ *Endorsers, YES ON 46 – PACK PATIENT SAFETY ACT*, <https://www.yeson46.org/endorsers/> (last visited Oct. 25, 2014).

⁵⁶ Haverluck, *supra* note 16.

⁵⁷ YES ON 46, *supra* note 55.

⁵⁸ Haverluck, *supra* note 16.

at least \$10 million.⁵⁹ Other opponents included medical groups, labor unions and civil liberties groups.⁶⁰ With over four times as much money as the proponents, the anti-PPSA campaign succeeded in reaching voters via “a cascade of negative advertising” to drive home the message that the PPSA “would send medical costs soaring and drive doctors from the state.”⁶¹

Although the post-election analyses are not clear on exactly what influenced voters, the late addition of the testing mandate to the initiative and the heavy campaigning by medical insurance groups suggest that most opponents were moved more by a desire to prevent the increase of the medical malpractice cap than the testing mandate.⁶² In fact, a few doctors and insurance group representatives have candidly said just that.⁶³ Accordingly, it appears that Californians are largely receptive to the idea of state-mandated drug and alcohol testing of physicians.⁶⁴

C. New Hampshire’s HB-597: Origins and Measures

In 2012, 32 patients of the cardiac catheterization lab at New Hampshire’s Exeter Hospital were diagnosed with Hepatitis C.⁶⁵ The diagnoses surfaced after the hospital caught onto the antics of medical technician David Kwiatkowski, a fentanyl addict who bounced from hospital to hospital for nearly a decade, diverting drugs from each facility until his superiors discovered his addiction

⁵⁹ Melanie Mason, *Poll: Weak Support for Prop. 46 Targeting Medical Malpractice*, L.A. TIMES (Sept. 13, 2014), <http://www.latimes.com/local/politics/la-me-pol-poll-malpractice-20140913-story.html#page=1>.

⁶⁰ *Our Coalition*, NO ON 46 (Oct. 17, 2014), <http://www.noon46.com/our-coalition/>.

⁶¹ *Voters Turn Down Proposition 46 To Lift Medical Malpractice Cap, Require Drug Tests For Doctors*, CBS SF BAY AREA (Nov. 4, 2014, 11:20 PM), <http://sanfrancisco.cbslocal.com/2014/11/04/proposition-46-doctors-drug-tests-results/>.

⁶² Adam Nagourney, *California Asks: Should Doctors Face Drug Tests?*, N.Y. TIMES (Aug. 1, 2014), http://www.nytimes.com/2014/08/02/us/california-asks-should-doctors-face-drug-tests.html?_r=0 (explaining that the testing provision was added to the initiative to gain support for the PPSA’s main goal of raising the medical malpractice cap).

⁶³ Bob Egelko, *High-Impact Details in Initiative Aimed at Doctors*, SFGATE, Oct. 30, 2013, <http://www.sfgate.com/health/article/High-impact-details-in-initiative-aimed-at-doctors-4940955.php> (quoting Molly Weedn, spokeswoman for the California Medical Association, as saying that the PPSA’s CURES and testing provisions were “nothing more than window dressing.”).

⁶⁴ UNIVERSITY OF SOUTHERN CALIFORNIA, *supra* note 11 (indicating that 70% of respondents favored the testing mandate, and 46% of voters opposed increasing the medical malpractice cap).

⁶⁵ Abramson, *supra* note 7, at 10.

and asked him to leave.⁶⁶ Kwiatkowski worked in numerous hospitals across eight states, sometimes being fired less than two weeks into an assignment.⁶⁷ Although his employers had their suspicions, only one filed a complaint with the American Registry of Radiologic Technicians (ARRT), the national organization responsible for credentialing technicians and ensuring their adherence to industry ethical standards.⁶⁸ Ultimately, even that investigation met a dead-end, and Kwiatkowski found himself in New Hampshire's Exeter Hospital on a temporary assignment, thanks to his staffing agency.⁶⁹ Despite the misgivings and resistance from staff, Exeter hired Kwiatkowski as a full-time employee.⁷⁰ One year later, an investigation into the Hepatitis C outbreak among the hospital's patients revealed that 32 patients had contracted the disease as a result of contaminated syringes: Kwiatkowski had been injecting himself with the patients' fentanyl and replacing the used syringes with saline, knowing that they would soon be used on the patients.⁷¹

Consequently, in 2013, New Hampshire State Representatives introduced HB-597 to require state-licensed facilities to create a testing program to randomly test each HCW at least four times a year; if a facility failed to test, its license with the state would be suspended.⁷²

D. HB-597: What Went Wrong?

HB-597, entitled "An Act Relative to a Drug-Free Workplace for Licensed Health Care Facilities and Providers," had some support, thanks to the success of drug testing programs in the anesthesiology departments of two out-of-state hospitals.⁷³ Unfortunately, the New Hampshire

⁶⁶ *Id.* at 11.

⁶⁷ *Id.* at 11 (explaining that Kwiatkowski was found unresponsive in a bathroom at work after overdosing on fentanyl just two weeks into his assignment at Arizona Heart Hospital).

⁶⁸ *Id.* at 12.

⁶⁹ *Id.*

⁷⁰ Abramson, *supra* note 7, at 13.

⁷¹ *Id.* at 10.

⁷² *Id.* at 13.

⁷³ *Id.* at 13.

Legislature diluted the bill before its passage, with the final version only requiring “health facilities to adopt policies permitting suspicion-based testing.”⁷⁴ The main reason for HB-597’s change in testing policy is cost: John Poirier, the president of New Hampshire’s Health Care Association, claimed it would cost \$2.6 million a year to test all 15,000 of the state’s health care workers.⁷⁵ Proponents of the original measure argued, however, that the change has essentially gutted the bill, especially since most hospitals, like Exeter Hospital, already had suspicion-based testing policies in place before HB-597 was passed.⁷⁶

III. The Need to Run Tests on Our Doctors

Despite its political unpopularity, the data largely supports the idea of drug testing HCWs. According to a 2010 study, “the rate of addiction among practicing physicians is estimated to be between 10% and 12%, the same as or slightly higher than the rate in the general population,” with alcohol being the drug of choice in almost half of all substance abuse cases.⁷⁷ Another study, published in the *American Journal of Medical Sciences*, found that “approximately 15% of physicians . . . will be impaired at some point in their careers.”⁷⁸ Furthermore, studies have shown that “chemical dependence is considered the most common disabling illness” among physicians,⁷⁹ and that physicians’ use of opioids (17.6% of physicians) and of benzodiazepine (11.4%) is roughly five times higher than that of the general population.⁸⁰

⁷⁴ *Id.* at 14.

⁷⁵ *Id.*

⁷⁶ Abramson, *supra* note 7, at 14.

⁷⁷ Marvin D. Seppala, M.D. & Keith H. Berge, M.D., *The Addicted Physician, A Rational Response to an Irrational Disease*, MINN. MED. (Feb. 2010), available at <http://www.minnesotamedicine.com/Past-Issues/Past-Issues-2010/February-2010/Clinical-Seppala-Feb-2010>. See also Oreskovich et al., *supra* note 24, at 171 (explaining a survey of 7,000 members of the American College of Surgeons, which revealed that 15.4% of the respondents had “answers consistent with alcohol abuse or dependence”).

⁷⁸ EV Boisaubin & RE Levine, *Identifying and Assisting the Impaired Physician*, 322 AM. J. MED. SCI. 31 (2001).

⁷⁹ Abramson, *supra* note 7, at 10.

⁸⁰ *Id.*

Impaired HCWs can harm patients in a myriad of ways. To begin with the obvious, a chemically impaired doctor operating on a patient can seriously injure, or even kill, a patient—such is the case with Dr. Duntsch, a neurosurgeon from Texas with a drinking problem, whose performance was so horrific that a doctor who was called in to repair the damage caused by Duntsch contacted Duntsch’s school to see if he had actually graduated from medical school.⁸¹ Although a former colleague at another hospital had already filed a complaint with the Texas Medical Board by this time, the bureaucratic entity moved so slowly that Dr. Duntsch operated on three more patients at his new hospital, killing one of them.⁸²

Additionally, as was the case in New Hampshire, HCWs can harm patients through drug diversion, “the illegal removal of drugs from a healthcare facility.”⁸³ In a similar vein to Kwiatkowski, Kristen Parker infected over a dozen patients with Hepatitis C via her contaminated syringes filled with saline, while Steven Beumel infected at least five people with the disease—both were sentenced to thirty years in prison for their crimes.⁸⁴

Further compounding the trouble with drug testing HCWs is the culture of silence that permeates the medical field. In 2010, a study published in the *Journal of the American Medical Association* revealed that of the 2,000 physicians surveyed, 17% said that they had personally known an impaired or incompetent physician in the past three years and did not report that colleague’s problems to the relevant authority.⁸⁵ Likewise, in a 2012 study, 33% of physicians revealed that they *chose* not to report a colleague that they knew was impaired.⁸⁶

⁸¹ Saul Elbein, *Anatomy of a Tragedy*, TEXAS OBSERVER (Aug. 28, 2013), <http://www.texasobserver.org/anatomy-tragedy/>.

⁸² *Id.*

⁸³ Abramson, *supra* note 7, at 10.

⁸⁴ Daniel R. Levinson & Erika T. Broadhurst, *Why Aren’t Doctors Drug Tested*, N.Y. TIMES, Mar. 12, 2014, at A27.

⁸⁵ *Pee in This Cup, Doc: Random Drug Tests Should Be Standard for Physicians*, SCIENTIFIC AMERICAN (Oct. 14, 2014), <http://www.scientificamerican.com/article/pee-in-this-cup-doc-random-drug-tests-should-be-standard-for-physicians/>.

⁸⁶ Abramson, *supra* note 7, at 12.

Once again, Mr. Kwiatkowski is a perfect example of this unfortunate phenomenon: although various health care facilities in Michigan fired him for “test[ing] positive for controlled substances” and for “gross misconduct,” his employers did not even inform his staffing agency, let alone the organization that certified him, which allowed Kwiatkowski to continue to infect patients in hospitals across the country.⁸⁷ Even when the University of Pittsburgh Medical Center finally alerted Kwiatkowski’s staffing agency that the facility fired him after finding three empty syringes on his person, a needle and an empty syringe in his locker, and fentanyl and opiates in his urine, his staffing agency still did not report his conduct to the ARRT, but instead provided him with another assignment.⁸⁸ The Arizona Heart Hospital of Phoenix, Arizona finally broke the pattern—when Kwiatkowski’s colleagues found him in the hospital bathroom after he overdosed on fentanyl just two weeks into his assignment, Arizona Heart notified the AART. Unfortunately, the AART dropped its investigation into the matter when it learned that the Phoenix Police Department chose not to press charges against Kwiatkowski.⁸⁹

Another example comes from the case of Dr. Duntsch, the Texas neurosurgeon. During the lawsuits filed by his injured patients, the plaintiffs alleged that the first hospital at which Dr. Duntsch practiced, Baylor Health Care System, failed to report him to the authorities because it had advanced him \$600,000 to join the facility after finishing his residency at the University of Tennessee.⁹⁰ Thus, the plaintiffs argued, the hospital failed to reveal the doctor’s ineptitude because “Baylor had spent a lot of money on Duntsch” and “if he didn’t work, they didn’t get paid.”⁹¹ The patients also alleged that the hospital failed to act after Duntsch “skipped out on five

⁸⁷ *Id.* at 11 (internal quotation marks omitted).

⁸⁸ *Id.*

⁸⁹ *Id.* at 12.

⁹⁰ Saul Elbein, *Licensed to Kill: Lawsuit Seeks to Overturn Texas Hospital Shield Law*, THE GUARDIAN (May 2, 2014), <http://www.theguardian.com/world/2014/may/02/texas-legal-doctor-lawsuit-christopher-duntsch>.

⁹¹ *Id.*

drug tests that Baylor Plano asked him to take,” and instead continued to advertise his services to the public.⁹²

Based on the studies revealing substance abuse by physicians, and the vivid examples of how the culture of silence enabled the deadly practices of Mr. Kwiatkowski and Dr. Duntsch, there is a strong need to test health care workers for drugs and alcohol.

IV. Testing HCWs Constitutes a Reasonable Search Under the Fourth Amendment

Based on the constitutional framework for drug and alcohol testing set forth in United States Supreme Court precedent, HCWs are in fact an appropriate class of employees to test for impairment. Although the problem of workplace intoxication by drugs or alcohol has been acknowledged in some industries for over a century,⁹³ it was not until the 1980s that a wide cross-section of employers began utilizing tests to ensure that employees were not impaired on the job.⁹⁴ After the Supreme Court decided the landmark cases of *Skinner v. Railway Labor Executives' Association*⁹⁵ and *National Treasury Employees Union v. Von Raab*,⁹⁶ a framework for analyzing the constitutionality of workplace drug testing began to take shape. The Supreme Court refined the test in the late 1990s after handing down *Veronia School District 47J v. Acton*,⁹⁷ and *Chandler v. Miller*.⁹⁸ These cases counseled employers that they could lawfully test their employees when a governmental interest in testing, beyond the ordinary law enforcement need to collect criminal

⁹² *Id.*

⁹³ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 606 (1989) (“The problem of alcohol use on American railroads is as old as the industry itself, and efforts to deter it by carrier rules began at least a century ago.”).

⁹⁴ *Id.* at 607–609 (explaining that in 1983, the Federal Railroad Administration (FRA) promulgated regulations requiring railroads to test pockets of employees after finding that the industry prohibitions on alcohol were insufficient to address the widespread drug and alcohol abuse).

⁹⁵ *Id.* at 602.

⁹⁶ *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

⁹⁷ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

⁹⁸ *Chandler v. Miller*, 520 U.S. 305 (1997).

evidence, is both present and sufficiently strong as to outweigh the employee's interest in privacy.⁹⁹

Using this framework, employers have implemented, and courts have upheld as constitutional, testing for those in “safety-sensitive” occupations,¹⁰⁰ those who enjoy a diminished expectation of privacy by virtue of working in a highly regulated field,¹⁰¹ and those whose individual interest in privacy is outweighed by a governmental interest in ensuring that they are not impaired while working.¹⁰² Classes of employees that fall within this framework include teachers,¹⁰³ trucking company drivers¹⁰⁴ and flight attendants.¹⁰⁵

A. Constitutional Rules as Set Forth by the Supreme Court

1. *Skinner v. Railway Labor Executives' Association*

Skinner is the first workplace drug testing case that the Supreme Court heard and upheld. After a private railroad implemented a testing policy to comply with the regulations enacted by the Federal Railroad Administration (FRA) to test employees, a labor union filed suit to enjoin it.¹⁰⁶ The FRA's regulations aimed to address the industry-old problem of alcohol abuse on the railroad, which had resulted in accidents, fatalities and millions of dollars in property damage.¹⁰⁷

⁹⁹ *Id.* at 313–314.

¹⁰⁰ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989).

¹⁰¹ *Id.* at 627.

¹⁰² *Id.* at 633.

¹⁰³ *Knox County Educ. Ass'n v. Knox Count Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998) (finding that teachers occupy safety-sensitive positions because they monitor the children entrusted to their care and have immediate impact upon a child's life).

¹⁰⁴ *Overview of Drug and Alcohol Rules*, Federal Motor Carrier Safety Administration, <http://www.fmcsa.dot.gov/overview-drug-and-alcohol-rules> (last updated Mar. 21, 2014).

¹⁰⁵ *Bluestein v. DOT*, 908 F.2d 451, 457 n.10 (9th Cir. 1990) (opining that “the administrative record adequately supports the FAA determination that [flight attendant] positions are, in fact, safety-sensitive.”).

¹⁰⁶ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 606 (1989)

¹⁰⁷ *Id.* at 606–607 (discussing the FRA's evidence that between 1972 and 1983, more than 20 accidents involved “alcohol or drug use as a probable cause or contributing factor,” “result[ing] in 25 fatalities, 61 non-fatal injuries, and property damage estimated at \$19 million (approximately \$27 million in 1982 dollars).”) (internal quotation marks omitted) (internal citations omitted).

In the event of an “impact” accident, the FRA mandated that employers collect and test blood and urine samples from the employees that were “directly involved” in the incident.¹⁰⁸ The regulations afforded employees an opportunity to explain a positive test before the FRA prepared an investigative report, but policy also required a nine-month suspension of those who refused to provide a sample.¹⁰⁹ Lastly, the regulations permitted employers to test employees’ breath or urine after an accident or safety violation, or based upon a reasonable suspicion garnered from “specific and personal observations” that the employee was impaired on the job.¹¹⁰

The Supreme Court upheld the testing, establishing first that the Fourth Amendment,¹¹¹ which protects individuals from unreasonable searches and seizures, applies to “arbitrary and invasive acts by officers of the Government” and those “act[ing] as an instrument or agent” thereof.¹¹² Accordingly, the private railroad’s search implicated the Fourth Amendment because of the degree of governmental involvement: the FRA regulations mandated the search, proving the government’s “encouragement, endorsement, and participation” of the testing.¹¹³

Next, the Court recognized the blood, breath and urine testing as Fourth Amendment searches because the tests infringe upon “an expectation of privacy society is prepared to recognize as reasonable.”¹¹⁴ Blood and breath tests physically intrude upon the body to obtain a sample of blood or ““deep lung”” breaths for analysis.¹¹⁵ While urinalysis is not physically intrusive in the same way, the process by which the sample is obtained is irrefutably private, as well as the

¹⁰⁸ *Id.* at 609–610.

¹⁰⁹ *Id.* at 610–611.

¹¹⁰ *Id.* at 611.

¹¹¹ U.S. CONST. amend. IV (stating that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

¹¹² *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 613–614 (1989).

¹¹³ *Id.* at 615–616.

¹¹⁴ *Id.* at 617.

¹¹⁵ *Id.* (internal quotations marks omitted) (internal citations omitted).

information to be revealed, which ranges from drug use to medical conditions, such as pregnancy and diabetes.¹¹⁶

After establishing that such testing falls within the ambit of the Constitution, the Court paved the way to warrantlessly collecting specimens for testing. The Fourth Amendment requires a warrant to conduct a search, but that necessity is dispensed with when an exception applies.¹¹⁷ Luckily for employers, one such exception occurs when “special needs beyond the normal need for law enforcement” motivate the search.¹¹⁸ In such a case, rather than requiring a warrant or even a showing of probable cause to assess the reasonableness of the search, a court must balance the government’s interests in conducting the search on the one hand, and the intrusion of an individual’s Fourth Amendment rights on the other.¹¹⁹

The Court recognized the government’s interest as ensuring the safety of railroad employees and the train-commuting public, deterring employee use of drugs and alcohol, and ascertaining and eliminating the causes of accidents.¹²⁰ In fact, the “safety-sensitive tasks” that the covered employees performed, such as operating the trains and maintaining the signal systems, made the government interest in *Skinner* even stronger, since these were “duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.”¹²¹

Against the government’s strong interest in safety, the Court balanced the employees’ interest in privacy and bodily integrity, and found that, while not insignificant, it was minimally implicated

¹¹⁶ *Id.* (quoting *Nat’l Treasury Emps. Union v. Von Raab*, 816 F.2d 170, 175 (1987) (“[T]here are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all.”)).

¹¹⁷ *Skinner*, 489 U.S. at 619.

¹¹⁸ *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

¹¹⁹ *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

¹²⁰ *Id.* at 621, 633.

¹²¹ *Id.* at 620, 628.

by the testing program.¹²² To begin with, blood tests are routinely and safely performed during annual physicals, such that they do not hurt or traumatize employees.¹²³ Breath tests are even less intrusive and can be done “with minimal inconvenience or embarrassment.”¹²⁴ Likewise, while urinalysis implicates privacy concerns, the FRA regulations ensure a minimal intrusion by not requiring direct observation and by having non-railroad personnel obtain the samples in a medical environment.¹²⁵ Under such circumstances, the urinalysis is similar to providing a urine sample during an annual physical.¹²⁶ Furthermore, because the railroad industry is heavily regulated, employees have a “diminished expectation of privacy” as to “information relating to the[ir] physical condition,” such that their career choice decreases their privacy interest.¹²⁷ The Court also noted that the regulations themselves provided those administering the tests with minimal discretion.¹²⁸

Finally, the Court emphasized that the FRA created a program with an effective means of deterring employees from using drugs and alcohol in the first instance.¹²⁹ Based on all of the circumstances, *Skinner* held that the test minimally intruded on privacy interests.¹³⁰ As such, it was reasonable for the government to test safety-sensitive employees for impairment with neither a warrant nor probable cause because these employees can “cause great human loss before any signs of impairment become noticeable to supervisors or others.”¹³¹

¹²² *Id.* at 624.

¹²³ *Id.* at 625 (citing *Schmerber v. California*, 384 U.S. 757, 771 (1996) (holding that blood tests generally extract minimal amounts of blood and “that for most people the procedure involves virtually no risk, trauma, or pain.”)).

¹²⁴ *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 625 (1989).

¹²⁵ *Id.* at 626.

¹²⁶ *Id.* at 626–627.

¹²⁷ *Id.* at 627–628.

¹²⁸ *Id.* at 622.

¹²⁹ *Id.* at 629–630 (noting that the program informed employees that they were subject to testing without disclosing the specific date, “significantly increas[ing] the deterrent effect” of the policy and adding to its legitimacy).

¹³⁰ *Skinner*, 489 U.S. at 628.

¹³¹ *Id.*

2. National Treasury Employees Union v. Von Raab

In this *Skinner* companion case, the U.S. Customs Service, which processes people and items entering the country, implemented a testing policy for employees directly involved in drug interdiction, carrying firearms, or having access to “classified material.”¹³² The Service tested employees for marijuana, cocaine, opiates, amphetamines, and phencyclidine, and required them to provide a sample while a monitor listened “for the normal sounds of urination.”¹³³ Following a confirmatory test, the Service sent the positive results to a licensed physician, who evaluated them along with the employee’s medical and prescription information to verify the presence of illegal substances.¹³⁴ If the physician concluded that there was no legal explanation for the positive result, the employee would be dismissed.¹³⁵

To decide the case, the Supreme Court applied the reasonableness test just announced in *Skinner*.¹³⁶ The government interests identified in *Von Raab* included deterring employees from using drugs and alcohol, and preventing the promotion of drug users to the specified positions.¹³⁷ As “our Nation’s first line of defense” against drug importation and its accompanying crime, the Court found that Customs officials hold “safety-sensitive” occupations—if the agents are not aware of the seriousness of their duties because of their own drug use, “this national interest in self-protection could be irreparably damaged.”¹³⁸ Moreover, it is uncontroverted that handling weapons is a safety-sensitive task fraught with risks of catastrophic injury. The Court concluded

¹³² Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 660–661 (1989).

¹³³ *Id.* at 661–662.

¹³⁴ *Id.* at 662–663.

¹³⁵ *Id.* at 663.

¹³⁶ *Id.* at 665 (summarizing the rule as holding that when a Fourth Amendment search is conducted to advance a “special governmental need,” the reasonableness of the search is determined by balancing the interests of the individual and of the government).

¹³⁷ *Id.* at 666.

¹³⁸ *Von Raab*, 489 U.S. at 670.

that the public should not have to bear the risk of either type of employee operating while impaired, and the burden should fall on the U.S. Customs Service and its employees.¹³⁹

While Customs agents undoubtedly have an interest in their bodily integrity and informational privacy, the majority held that their interest is “diminished” with respect to “the intrusions occasioned by a urine test.”¹⁴⁰ As in *Skinner*, the Court emphasized the effect of the nature of the employees’ occupation on their reasonable expectation of privacy, and noted that employees working with drugs and/or guns must expect inquiries as to “their fitness and probity.”¹⁴¹ Further, the procedures outlined in the policy minimized the invasiveness of the program by avoiding direct observation, testing solely for the presence of drugs, and not requiring the employee to disclose his medical information unless he tested positive for drugs.¹⁴²

Von Raab shed light on three additional considerations in assessing the reasonableness of workplace testing. First, the Court opined that requiring individualized suspicion in such a non-traditional work environment would be impracticable since Customs agents are not amenable to “the kind of day-to-day scrutiny that is the norm” in an office environment.¹⁴³ Secondly, the lack of a known drug problem pervading the Customs Service was not dispositive of the program’s legality because “no segment of society is immune from the threat of illegal drug use,” and in any event, the agency is entitled to enact a program that seeks to both detect drug use *and* prevent the promotion of drug users.¹⁴⁴ Finally, the access that agents have to “vast sources of valuable

¹³⁹ *Id.* at 668, 670.

¹⁴⁰ *Id.* at 670–671.

¹⁴¹ *Id.* at 672.

¹⁴² *Id.* at 672, n.2.

¹⁴³ *Id.* at 674.

¹⁴⁴ *Von Raab*, 489 at 660 (quoting the Joint Appendix at 10, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (No. 86-1879)), 674–675.

contraband” that has been confiscated provides another reason to test, due to the inevitable temptation presented to drug-using employees.¹⁴⁵

3. Veronia School District 47J v. Acton

The third drug testing case to reach the Supreme Court featured a new kind of authority imposing the drug test: rather than an employer testing its employees in *Acton*, a school district, comprised of a high school and three grade schools in Veronia, Oregon, was testing its students.¹⁴⁶ After noticing an increase in drug use in the 1980s, the Veronia School District implemented a testing program to eradicate school drug use by testing “the leaders of the drug culture,” the school athletes.¹⁴⁷ To join a school sports team, a student had to submit a consent form, signed by himself and his parents, agreeing to be drug tested prior to joining the team, and randomly during the season if selected.¹⁴⁸ The students provided the urine sample in an empty locker room accompanied by a monitor of the same sex.¹⁴⁹ The samples tested for amphetamines, cocaine, and marijuana, but administrators could request testing for other drugs, such as LSD. Upon a confirmatory positive test result, the school sent the report to the superintendent, but the vice-principals and athletic directors also had access to the results.¹⁵⁰ A positive drug test resulted in either a six-week assistance program with weekly urinalysis, or suspension from the team for the rest of the current season and the following season.¹⁵¹

The plaintiff, a seventh-grade boy precluded from trying out for the football team for failure to sign the consent form, filed suit against the school for violating his Fourth and Fourteenth

¹⁴⁵ *Id.* at 669.

¹⁴⁶ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995).

¹⁴⁷ *Id.* at 650.

¹⁴⁸ *Id.* at 650–651.

¹⁴⁹ *Id.* at 650.

¹⁵⁰ *Id.* at 651.

¹⁵¹ *Id.*

Amendment rights.¹⁵² In assessing the reasonableness of the program, the Court first noted the key players in *Acton*: the administration of a public school district, an entity with “a degree of supervision and control” over the minors within its care, was testing public school students.¹⁵³ Because of the school’s caretaking role and the students’ status as minors, Acton and his classmates necessarily enjoyed a lesser expectation of privacy.¹⁵⁴ Additionally, the student-athlete subset *reasonably* held an even lower expectation of privacy because of the regulations accompanying participation in school sports (preseason physicals, minimum grade point averages), as well as the public exposure inherent in being a part of a team (changing in the locker rooms, communal showering, etc.).¹⁵⁵

Further, the Court found the invasiveness of the sample-collecting method “negligible.”¹⁵⁶ Because the students provided the specimens either from a urinal or a bathroom stall, the “conditions are nearly identical to those typically encountered in public restrooms.”¹⁵⁷ Although the majority expressed concern that the school required the disclosure of medication information prior to testing, the Justices noted that such concerns did not present a significant infringement: while precedent holds that it is favorable to not disclose prescription data until after a positive test result, the Court never held that “requiring advance disclosure of medications is *per se* unreasonable.”¹⁵⁸

Ultimately, the Court found that the government’s interest in deterring drug use among students is as weighty as deterring the same among Customs officials involved in drug interdiction, and engineers operating locomotives. The majority reasoned that middle- and high-school aged

¹⁵² *Acton*, 515 U.S. at 651.

¹⁵³ *Id.* at 655.

¹⁵⁴ *Id.* at 654.

¹⁵⁵ *Id.* at 657.

¹⁵⁶ *Id.* at 658.

¹⁵⁷ *Id.*

¹⁵⁸ *Acton*, 515 U.S. at 659.

children are already especially susceptible to the psychological and physiological effects of drugs, and the added concern of impaired students physically injuring one another while partaking in a school sporting event further solidified the school district's grave interest.¹⁵⁹ Moreover, the Court found the program to be effective because it merely tested the school's student athletes, who heavily influenced drug and alcohol use among the student body generally.¹⁶⁰ Based on the students' decreased expectation of privacy, the program's narrow tailoring and minimal level of intrusion, and the strong government interest at hand, the Veronia School District's drug screening policy was upheld as reasonable under the Fourth Amendment.¹⁶¹

4. Chandler v. Miller

In 1997, the Supreme Court rounded out its approach to employee drug testing when it handed down *Chandler v. Miller*.¹⁶² In *Chandler*, the Georgia Legislature enacted a statute that required candidates running for state office to test negatively for drugs within thirty days of qualifying for nomination or election.¹⁶³ The plaintiffs, Libertarian party nominees, filed suit to enjoin the program for violating their First, Fourth, and Fourteenth Amendment rights.¹⁶⁴ Following the decisions in *Skinner*, *Von Raab* and *Veronia*, the Eleventh Circuit upheld the district court's denial of the injunction, finding that political officials were "vested with the highest executive authority to make public policy," and as such, required "the highest levels of honesty, clear-sightedness, and clear-thinking."¹⁶⁵

¹⁵⁹ *Id.* at 661–662.

¹⁶⁰ *Id.* at 663 (opining that the school district may have been even more justified in implementing this program than the government in *Skinner* because of how tailored the school district's solution was as compared to *Skinner*, which applied to all railroads across the country).

¹⁶¹ *Id.* at 664–665.

¹⁶² *Chandler v. Miller*, 520 U.S. 305 (1997).

¹⁶³ *Id.* at 309–310 (noting that Georgia subjected a candidate to testing if he were running for one of the following offices: governor or lieutenant governor, state Attorney General, state court judge, district attorney, and Public Service Commission member).

¹⁶⁴ *Id.* at 310.

¹⁶⁵ *Id.* at 311.

For the first time in the Court’s drug testing case history, it held that the statute violated the candidates’ Fourth Amendment rights. The Supreme Court acknowledged that the test was minimally invasive: the government tested only for the presence of drugs, the candidates controlled the release of their results, and testing took place in a doctor’s office of their choosing.¹⁶⁶ Nevertheless, Georgia had not set forth a “sufficiently vital” special need to test: although abusing drugs and/or alcohol is incompatible with the proper discharge of public functions, the Court held that incompatibility alone is not a special governmental need.¹⁶⁷

The majority also noted that the conditions that weighed toward a finding of reasonableness in prior cases were not present in *Chandler*, such as “a demonstrated problem of drug abuse,”¹⁶⁸ the inability to monitor the employees daily to garner an individualized suspicion,¹⁶⁹ and the existence of “high-risk, safety-sensitive tasks.”¹⁷⁰ As such, the Court concluded that Georgia’s need was not special, but rather “symbolic,” and opined that diminishing individual privacy for the sake of a symbol is precisely what the Fourth Amendment was created to prevent.¹⁷¹

B. Framework

The guidance provided by *Skinner*, *Von Raab*, *Acton*, and *Chandler* demonstrates that when a search is conducted for reasons besides ordinary law enforcement needs, it is a “special need.”¹⁷² Such a need dispenses with the traditional requirements of a warrant and probable cause to search an individual. Accordingly, to determine the reasonableness of the search, the court must balance the government’s interest in testing against the employee’s privacy interests. Some of the factors

¹⁶⁶ *Id.* at 309, 310, 312.

¹⁶⁷ *Id.* at 318.

¹⁶⁸ *Chandler*, 520 U.S. at 319.

¹⁶⁹ *Id.* at 316.

¹⁷⁰ *Id.* at 321–322. The Court distinguished this case from *Skinner* and *Von Raab* by emphasizing that politicians do not genuinely endanger public safety through their actions. *Id.* at 323.

¹⁷¹ *Id.* at 322.

¹⁷² *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 610 (1989) (internal citations omitted).

that the Court has considered in this determination include: whether the employee performs safety-sensitive duties; whether the employee works in a highly regulated field; whether the industry currently faces a drug and/or alcohol use problem; how much the test intrudes upon privacy interests; and whether the government interest is in the health and safety of employees and/or third parties, or a symbolic interest in a drug free appearance.

V. Drug Testing HCWs Would Not Violate the Fourth Amendment of the U.S. Constitution

The Fourth Amendment protects the right of citizens “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹⁷³ The Supreme Court has held that the Fourth Amendment “guarantees the privacy, dignity, and security of persons against . . . invasive acts by officers of the Government or those acting at their direction.”¹⁷⁴ In *Acton*, the Supreme Court clarified that testing administered or mandated by states triggers the protections of the Fourth Amendment because the Bill of Rights is incorporated through the Fourteenth Amendment to apply to state and local governments.¹⁷⁵ Accordingly, should a state adopt a statute mandating the drug testing of HCWs, as Proposition 46 and the original HB-597 proposed to do, the statute would be subject to the Fourth Amendment because employers would be acting at the direction of the state government.¹⁷⁶ Further, the tests qualify as searches because the *Skinner* Court held that subjecting individuals to breathalyzer tests and urinalysis is an intrusion on a reasonable expectation of privacy that implicates the Fourth Amendment.¹⁷⁷

As seen in the *Skinner-Von Raab* line of cases, workplace drug and alcohol testing is motivated by a “special need,” such that neither a warrant nor probable cause is required to lawfully test.¹⁷⁸

¹⁷³ U.S. CONST. amend. IV.

¹⁷⁴ *Skinner*, 489 U.S. at 614.

¹⁷⁵ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (“We have held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers.”).

¹⁷⁶ *Skinner*, 489 U.S. at 614.

¹⁷⁷ *Id.* at 616.

¹⁷⁸ *Id.* at 620.

Because the model testing statute would not aim primarily to release test results to law enforcement, but instead to ascertain and deter impairment among physicians, such a statute would be motivated by a “special need.”¹⁷⁹ Thus, the reasonableness of the statute would be determined by balancing the competing interests of the government and the individual.

A. The State Interest Inquiry

Assessing the government’s interest in drug testing entails considering both the nature and the immediacy of the state’s need to test, and the efficacy of the means by which the government achieves that goal.¹⁸⁰

1. The Nature and Immediacy of the State’s Need to Test

The nature of the government concern at issue is the undeniably important interest in protecting the public, and the concern is immediate because of the safety-sensitive tasks performed by HCWs, as well as the hard-to-monitor drug-filled environment in which they work. To begin with, there is one common thread uniting HCWs, U.S. Customs officers, and railroad employees that weighs heavily in favor of the permissibility of testing HCWs: the safety-sensitive nature of the professionals’ duties. The *Skinner* Court acknowledged the danger accompanying drug or alcohol use by the general population, but went on to state, “it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influence of these substances.”¹⁸¹ An inebriated train operator can derail a train and cause multiple fatalities. An impaired and armed U.S. Customs official in an airport can fire at a civilian, or an addicted officer can fall prey to bribery by a drug

¹⁷⁹ 2014 Bill Text CA V. 7 § 2350.10 (referring to 49 C.F.R. § 40 as governing the privacy and confidentiality of the proposed testing). 49 C.F.R. § 40.321 prohibits employers from releasing an employee’s test results without his written consent—adopting this aspect of the DOT regulations demonstrates that California’s primary motivation in implementing the PPSA is a special need, not regular criminal evidence gathering). 49 C.F.R. § 40.321.

¹⁸⁰ *See Acton*, 515 U.S. at 654, 659, 660 (in assessing the reasonableness of the school’s drug testing policy, the Supreme Court weighed, against the student’s privacy interest, the character of the intrusion, the nature and the immediacy of the government concern at issue, and the efficacy of the policy in meeting the school’s end).

¹⁸¹ *Skinner*, 489 U.S. at 633.

smuggler and endanger our safety by introducing more contraband into our country. The threat posed by a drugged HCW, while dangerous on a smaller scale, is more immediate and arguably more likely than the threats posed by the aforementioned professionals, since the health and safety of the patient is more proximately linked to the actions of the HCW—and some courts have held just that.

In *Kemp v. Claiborne County Hospital*, the Southern District of Mississippi found the drug testing of a scrub nurse reasonable because of the direct risks she posed to her patients.¹⁸² The *Kemp* court focused on the safety-sensitive nature of the nurse’s job, and found “the ‘immediacy’ of the threat posed to the public” by the impaired employee to be “the most salient factor.”¹⁸³ Thus, although it would be rare for a drunk HCW to endanger the lives of multiple people,¹⁸⁴ it is undeniable that a HCW poses a more immediate and likely threat to his patient when operating under the influence than the threat posed by a train conductor.

In a case out of the Northern District of California, *American Federation of Government Employees L-2110 v. Derwinski*, the district court upheld the random testing policy implemented by the Veteran’s Association Hospital due to “the possibility of catastrophic accident” that accompanies direct patient contact.¹⁸⁵ The plaintiff HCWs who sued to enjoin the testing program included a Clinical Specialist Pharmacist, a licensed graduate nurse, a Medical Technologist, a physician-pathologist, and a Dialysis Unit supervisor.¹⁸⁶ It is key that, like the plaintiff nurse in *Kemp*, some of these employees had very little opportunity to erroneously operate on a patient or prescribe a fatal dosage of a drug. Nonetheless, the *Derwinski* court found that all of the plaintiffs

¹⁸² *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362 (SD Miss. 1991).

¹⁸³ *Id.* at 1367 (citing *American Federation of Government Employees v. Sullivan*, 744 F. Supp 294, 300 (D. D.C. 1990)).

¹⁸⁴ Although rare for a doctor to harm more than one person at once, it is certainly possible—should an impaired doctor fail to vaccinate a child or expose a patient to a contagious disease, he may very well cause an epidemic.

¹⁸⁵ *Am. Fed’n of Gov’t. Emps. L-2110 v. Derwinski*, 777 F. Supp. 1493, 1498 (N.D. Cal. 1991).

¹⁸⁶ *Derwinski*, 777 F. Supp. at 1495-1497.

had “active patient care responsibilities, either directly or in the providing of necessary diagnostic or therapeutic care to patients,” and such care, even if it amounted to only five percent of an employee’s time, justified testing for impairment.¹⁸⁷

Thus, the safety-sensitive nature of HCWs’ duties plainly points to a serious government interest in testing: while the threatened danger to a patient depends on the type of medicine involved and the level of direct patient contact, HCWs can endanger a life by providing any kind of care to patients. Moreover, while U.S. Customs officials and railroad employees may often work in small groups, a doctor, for example, usually tends to a patient on a one-on-one basis save for a nurse, decreasing the chance of a third party’s stepping in to prevent or correct his erratic behavior or poor judgment. Consequently, based on case law pertaining to drug testing HCWs, as well as a comparison of the threats HCWs and the tested employees in the *Skinner-Von Raab* line of cases pose, it is irrefutable that medical professionals occupy a safety-sensitive occupation.

A second factor that weighs in favor of the government interest in drug testing HCWs is the importance of the interest itself: ensuring patient safety by deterring the use of drugs and/or alcohol at work, and ascertaining and eliminating the causes of medical error.¹⁸⁸ Because the aim of a HCW’s occupation is to affect the condition of a patient’s body, it is not difficult to imagine that an inebriated HCW could harm a patient due to a lapse in judgment—for example, a drunken doctor could leave in the middle of an open heart surgery to go out to lunch, or could so badly

¹⁸⁷ *Id.* at 1498 (holding that a licensed graduate nurse was lawfully subject to testing even though she had no access to narcotic drugs, did not handle surgical instruments, and only “devote[d] five percent or less of her time to patient care,” because that fraction of time was “significant . . . considering the importance of the care then rendered.”). Hence, the Court seemed to adopt the majority’s position in *Skinner* that certain duties are so dangerous “that even a momentary lapse of attention can have disastrous consequences.” *Skinner*, 489 U.S. at 628.

¹⁸⁸ Press Release, Consumer Watchdog, Consumer Watchdog Campaign: Landmark Patient Safety Act Qualifies for November California Ballot (May 15, 2014), *available at* <http://www.consumerwatchdog.org/newsrelease/consumer-watchdog-campaign-landmark-patient-safety-act-qualifies-november-california-bal>. These motivations, then, are very similar to the government interests advanced in *Skinner*. See discussion *supra* Part IIIA.

handle a delivery that a woman is left a quadriplegic.¹⁸⁹ The data and reports of impaired HCWs¹⁹⁰ demonstrate that the interest in testing is not merely “symbolic,” like Georgia’s interest in *Chandler*, but rather is a concrete problem that needs a solution.¹⁹¹

The *Acton* Court upheld the testing of student athletes because athletes who are impaired while playing a sport may harm a teammate or opponent—certainly the concern that a HCW, wielding surgical tools or a prescription pad, will harm a patient under his care is just as strong as the fear that a high soccer player will run into a teammate on the field. Further, the *Derwinski* court recognized the interests in testing hospital employees as ensuring the integrity of the workers, and enhancing public safety.¹⁹² The district court held that maintaining the integrity of the medical profession is “of paramount concern” because hospitals “exist precisely for [the] purpose” of ensuring the safety of the members of the public who seek medical attention.¹⁹³ The Supreme Court reached a similar conclusion in *Von Raab* in finding the testing of U.S. Customs officials necessary to ensure the officers’ commitment to the mission at hand.¹⁹⁴ Thus, while this interest may seem to mirror *Chandler*’s symbolic interest, the gravity of the duties performed distinguishes

¹⁸⁹ Press Release, Consumer Watchdog, California Ballot Initiative Will Enact Nation’s First Law Requiring Random Drug Testing of Physicians, says Consumer Watchdog Campaign (Apr. 16, 2014), *available at* <http://www.consumerwatchdog.org/newsrelease/consumer-watchdog-campaign-california-ballot-initiative-will-enact-nation’s-first-law-re>. The patient who was left on the operating table while his drunken doctor stepped out for lunch is in a permanent vegetative state as a result of his physician’s negligence. *Id.* The patient whose intoxicated doctor used forceps in her delivery is paralyzed from the neck down because her doctor stretched her neck and spinal cord “like taffy.” *Id.* See also Edward J. Boyer, *Girls Wins \$21 Million in Malpractice Suit*, L.A. TIMES (July 2, 1991), http://articles.latimes.com/1991-07-02/local/me-1814_1_spinal-cord-injury (explaining that in the doctor’s malpractice suit, the patient’s attorney alleged that the two doctors who cared for the patient after her delivery “entered a conspiracy of silence” in protecting the defendant despite the clear evidence of his medical negligence and instead told her family that she “had a hereditary disease and would die in a few months.”) (internal quotation marks omitted).

¹⁹⁰ See discussion *supra* Part III.

¹⁹¹ *Chandler v. Miller*, 520 U.S. 305, 319 (1997) (stating that while there need not be a documented problem of substance abuse among the profession, such a finding helps “shore up” the need for government involvement).

¹⁹² *Am. Fed’n of Gov’t. Emps. L-2110 v. Derwinski*, 777 F. Supp. 1493, 1498 (N.D. Cal. 1991).

¹⁹³ *Id.*

¹⁹⁴ *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660 (1989).

the interest in upholding a doctor's ethical obligation to remain sober while treating a patient from a mere desire to show a commitment to a drug-free workplace.

Finally, the government interest in testing HCWs is particularly strong because of the nature of their work environment. The *Von Raab* Court noted that Customs officials are on the front lines of drug interdiction, so an impaired or addicted employee may be seduced by the sizeable stash of drugs under their control.¹⁹⁵ This concern also applies to HCWs, who have access to an abundance of addictive drugs. The proximity to drugs is certainly a temptation to overwhelmed HCWs, and only seems to enable addictions and provide breeding grounds for medical negligence.¹⁹⁶ In fact, the *Derwinski* court took note of the fact that, like U.S. Customs agents, medical employees work in a unique environment with its own temptations, and held that “the propinquity to drugs is therefore a factor to be weighed in the balance.”¹⁹⁷ Consequently, based on the demonstrated problem of drug- and alcohol-impaired HCWs causing harm to patients, the special responsibilities these professionals carry out, and the unique environment in which they work, states have a significant interest in testing HCWs.

2. The Efficacy of the Testing Program, and the Character of the Intrusion

Two other factors that a state must prove before it can drug test HCWs are how effective a testing program will be in uncovering and deterring drug and alcohol use among medical employees, and how much the program infringes upon the privacy of medical professionals.

Based on the evidence speaking to the high rate of drug and alcohol abuse among HCWs and the “culture of silence” permeating the medical field,¹⁹⁸ to *effectively* address a state's interest in

¹⁹⁵ *Id.* at 669.

¹⁹⁶ Berge, *supra* note 37, at 625 (describing a 2009 article published by the Mayo Clinic recounting the findings of a five-year study of doctors in physician health programs, and its conclusion that one of the contributing factors to the use of drugs is the “ready access to narcotics and other psychotropic drugs in the workplace.”).

¹⁹⁷ *Derwinski*, 777 F. Supp at 1499.

¹⁹⁸ *See* discussion *supra* Part III.

protecting patients, a drug testing program is clearly necessary. First, there is a documented problem of substance abuse among HCWs nationwide.¹⁹⁹ In upholding the railroad’s testing program, the *Skinner* Court noted the problem of drug and alcohol use by railroad employees.²⁰⁰ Likewise, the *Acton* Court opined that the school’s program was appropriately tailored to address its drug problem because the individuals to be tested were the “leaders of the drug culture.”²⁰¹ Thus, although proof of a demonstrated substance abuse problem is not a necessary predicate for testing,²⁰² the presence of such a problem among HCWs reveals the need for some sort of government involvement to protect third parties.

Both the PPSA and the original HB-597 pushed for random drug testing to deter drug and alcohol use among HCWs, and to ascertain the source of medical error due to such impairment.²⁰³ But the two acts differed in their breadth. For example, the PPSA aimed to randomly drug test all “physicians” with admitting privileges at a hospital, whether that physician is an employee or an independent contractor, and regardless of his specific area of medicine.²⁰⁴ On the other hand, the original New Hampshire Bill was even broader than the PPSA because it aimed to tie the state licensure of health care facilities to their creation of a mandatory random drug testing program: if the facility did not test each worker at least four times a year, its license would be suspended.²⁰⁵ Because HB-597 was enacted in response to the drug diversion of a medical technician as opposed to a physician, the act would have tested all workers, and not just certain physicians.²⁰⁶ Although

¹⁹⁹ Eisler, *supra* note 44 (citing a 2007 report by the U.S. Substance Abuse and Mental Health Services Administration which stated that “an average of 103,000 doctors, nurses, medical technicians and health care aides a year were abusing or dependent on illicit drugs”).

²⁰⁰ *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 607–608 (1989).

²⁰¹ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995).

²⁰² *Chandler v. Miller*, 520 U.S. 305, 319 (1989).

²⁰³ 2014 Bill Text CA V. 7; H.B. 597, 2014 Legis., Reg. Sess. (N.H. 2014).

²⁰⁴ 2014 Bill Text CA V. 7 § 2350.15(e) (defining a “physician” as “a holder of a physician and surgeon’s certificate” under California law).

²⁰⁵ Abramson, *supra* note 7, at 13.

²⁰⁶ *Id.*

the empirical data cited above²⁰⁷ seems to apply more to doctors, the model testing policy cannot be so limited because patients can be harmed by the Mr. Kwiatkowskis of the world just as much as by the Dr. Duntschs.

Secondly, in upholding the U.S. Customs Service’s policy, the *Von Raab* Court emphasized that Customs officials were our nation’s “first line of defense” against the introduction of contraband into the country.²⁰⁸ To some degree, then, the Court found it important that the public relied on Customs officials to protect our borders, which made it reasonable to ensure (by testing) that the employees possessed their full faculties while carrying out their duties.²⁰⁹ In the same sense, HCWs owe their patients those same fiduciary duties—members of the public rely on medical professionals to take care of their mental and physical well being, such that it *is* reasonable to randomly test HCWs to ensure their sobriety.

Further, the seriousness of the work HCWs perform warrants departure from the requirement of individualized suspicion to test. The *Skinner* Court held that as to railroad employees, requiring an employer to prove an individualized suspicion following an adverse event would impede his ability to ascertain the cause of the accident and quickly remove the impaired employees responsible.²¹⁰ Moreover, the Court held that it would be reasonable to randomly test because it provides a more effective deterrent among the employees.²¹¹ For the same reasons, testing HCWs randomly is an effective way to deter drug and alcohol use, and to protect patients by ascertaining and removing impaired medical employees.²¹²

²⁰⁷ See discussion *supra* Part III.

²⁰⁸ Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989).

²⁰⁹ *Id.* at 670.

²¹⁰ *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 631 (1989).

²¹¹ *Id.* at 630–631.

²¹² *Von Raab*, 489 U.S. at 667–668 (rejecting the requirement of an individualized suspicion because probable cause, unique to criminal investigations, is “unhelpful” in the “routine administrative” context, such as when the government aims to “prevent the development of hazardous conditions . . .”) (internal citations omitted).

Allowing suspicionless drug testing in the medical profession is not only wise in theory, it is also warranted based on the culture of the field today. Many advocates in the medical field have spoken out about the need for suspicionless testing in the profession based on their personal experience with substance abuse or with addicted colleagues.²¹³ For example, Dr. Stephen Loyd, a doctor of internal medicine practicing in Tennessee, has revealed that although he was heavily addicted to narcotics while practicing, taking up to 100 pills a day, none of his colleagues ever reported him or intervened despite his erratic behavior and decreased worked quality.²¹⁴ Similarly, an article published by the Mayo Foundation acknowledges the difficulty in getting help for doctors, even though their rate of abusing drugs and/or alcohol is equal to, if not greater than, the rate of abuse among the general population, because “a physician’s family members and coworkers will often participate in a ‘conspiracy of silence’ in an effort to protect the family or practice workers from economic ruin by the loss of the physician’s job and income.”²¹⁵ It is quite plain, then, that the unwillingness to report a HCW is not limited to Dr. Loyd and his colleagues, but medical employees across the country.²¹⁶

Moreover, a doctor’s office or hospital surely fits within the non-traditional office environment discussed in *Von Raab*. For instance, doctors mostly work alone or with just one other medical professional when treating a patient.²¹⁷ Further, HCWs as a class frequently work for lengthy

²¹³ See Consumer Watchdog, *supra* note 35; Levinson, *supra* note 84; Ken Murray, *How to Deal with Doctors Who Get Drunk and High on the Job*, TIME (June 19, 2014), <http://time.com/2901422/doctors-drunk-high/> (calling for a legislative attempt at mandating testing because “patient safety concerns justify such testing for physicians”); Julius Cuong Pham, MD, PhD, et al., *Identification of Physician Impairment*, 309 JAMA 2101, 2101 (2013) (suggesting the use of random testing in a model regulation for physician impairment); Julius Cuong Pham, MD, PhD & Peter J. Provonost, MD, PhD, *California’s Proposition 46: A Wolf in Sheep’s Wool*, ANNALS OF INTERNAL MED., 913, 913 (2014) (explaining that a key principle of a program for physician drug testing includes random testing).

²¹⁴ Eisler, *supra* note 44.

²¹⁵ Berge, *supra* note 37, at 625.

²¹⁶ See discussion *supra* Part III.

²¹⁷ Elbein, *supra* note 81 (explaining that Baylor Regional Medical Center suspended Dr. Duntsch’s privileges after another surgeon witnessed his mishaps in the operating room, and although the terms of his suspension required him to be monitored during the surgeries he performed, Dr. Duntsch operated on Kellie Martin alone because the operation “was supposed to be a simple procedure” that a doctor would ordinarily perform alone).

periods of time, so their colleagues might misinterpret signs of impairment as signs of fatigue associated with working such long hours. The ambiguity of the indicators of substance use, the infrequent contact with other colleagues, and the culture of silence within the medical profession all point to the impracticability of relying on this atypical work environment to garner an individualized suspicion of impairment on the job. As such, a testing policy that aims to eradicate and deter drug use among HCWs must feature random testing.

Finally, the state must prove that the invasiveness of the suggested testing procedure is justified given its interest in testing, as well as the efficacy of the chosen methods. The *Skinner* Court noted that while blood, breath and urine tests are all physical intrusions of the body, they are negligible because they mirror the testing done during a visit to the doctor's office, reveal nothing more than the presence of drugs and/or alcohol (urine and blood), and can be done with minimal embarrassment or inconvenience (breath).²¹⁸ Further, the American Society of Addiction Medicine reports that urine testing is the most common form of drug testing because it is most familiar, is the least expensive to analyze, and can include a range of drugs on a test panel, while breath testing is the standard means for testing a person for alcohol impairment.²¹⁹

Moreover, the program set forth in the PPSA followed the FAA drug testing guidelines, which courts have upheld as posing a minimal threat of intrusiveness.²²⁰ The guidelines do not require direct observation of the employee providing the sample—typically, the testing atmosphere mirrors the public bathroom experience, or an annual physical examination.²²¹ Such an environment presents a “negligible” invasion of privacy according to the *Acton* court.²²² Further,

²¹⁸ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625–627 (1989).

²¹⁹ WRITING COMMITTEE, AMERICAN SOCIETY OF ADDICTION MEDICINE, DRUG TESTING: A WHITE PAPER OF THE AMERICAN SOCIETY OF ADDICTION MEDICINE (ASAM), 23, 26 (2013), available at <http://www.asam.org/docs/default-source/publicity-policy-statements/drug-testing-a-white-paper-by-asam.pdf>.

²²⁰ *National Air Traffic Controllers Asso., MEBA/MNU v. Burnley*, 700 F. Supp. 1043, 1045 (N.D. Cal. 1988).

²²¹ 49 C.F.R. § 40.41(e), (f) (2012).

²²² *Acton*, 515 U.S. at 658.

the FAA program does not test the urine sample for anything but the presence of specifically enumerated drugs: opiates, marijuana, cocaine, amphetamines and phencyclidine.²²³ In the event that a urine or breath sample indicates the presence of drugs and/or alcohol, a second test is done to confirm the positive finding.²²⁴ Even upon confirmation, the results are not reported to the employer until a licensed physician analyzes the results in conjunction with medical information provided by the employee to find a legal explanation for the positive result.²²⁵ Finally, the results of the test are sent to the employer alone, and may not be disseminated without the employee's consent.²²⁶

B. The Individual Interest in Privacy

The final step in assessing the reasonableness of a testing program is weighing the individual privacy interest that is threatened. As mentioned in the *Skinner-Von Raab* line of cases, urinalysis and breath samples are Fourth Amendment searches that invade one's bodily and informational privacy.²²⁷ As the Fifth Circuit noted in *Von Raab*, urinating is an activity that society recognizes as private,²²⁸ and while obtaining breath samples does not require an invasion of privacy in the same way, it could embarrass the employee and be inconvenient.²²⁹ Further, employees have an interest in shielding their biological, physiological and medical information from others—a urine

²²³ 49 C.F.R. § 40.85 (explaining that the DOT regulations only test for the presence of drugs, respecting the employee's privacy interest in his own biological and medical information).

²²⁴ 14 C.F.R. § 120.5 (explaining that testing programs must conform to the procedures set forth in 49 C.F.R. § 40). See 49 C.F.R. §§ 40.251 (for alcohol), 40.87 (for drugs) (providing for confirmatory testing of samples).

²²⁵ Should the second test return a negative result, the employee's result is recorded as a negative, completely disregarding the first "positive" reading.

²²⁶ 49 C.F.R. § 40.321. This aspect also justifies the use of the special needs doctrine in drug testing: had the results been sent to law enforcement upon a finding of drug use, the program would not be motivated by a purpose other than ordinary law enforcement, and the search would be unconstitutional.

²²⁷ *Skinner v. Ry. Labor Executives' Association*, 489 U.S. 602, 616–617 (1989).

²²⁸ *National Treasury Employees Union v. Von Raab*, 816 F. 2d 170, 175 (1987) ("There are few activities in our society more personal or private than the passing of urine.").

²²⁹ *Skinner*, 489 U.S. at 625.

test could reveal information beyond just the presence of drugs, such as whether the employee is diabetic or pregnant.²³⁰

Accordingly, while the privacy interest threatened in providing breath and/or urine samples is not insignificant, the individuals subject to testing, HCWs, have a diminished reasonable expectation of privacy because their profession is heavily regulated and/or is inherently dangerous.²³¹ Like the railroad industry, the medical profession is heavily regulated, although mostly at the state level.²³² Doctors, for example, cannot practice until completing years of schooling and internships, and acquiring a state license to work within its borders.²³³ Once a physician obtains his license, he is subject to regulation by the state medical board, which derives its power to supervise licensing, examinations and disciplinary procedures from the state legislature.²³⁴ For example, the Medical Board of California's website provides visitors a 104-page PDF document that describes the laws governing the practice of medicine within the state, from general licensing to ordering controlled substances.²³⁵ It appears, then, that the medical field is as highly regulated as the railroad industry, leaving physicians with a decreased expectation of privacy.

Further, in upholding the Veteran Hospital's testing program, the *Derwinski* court took a page out of *Von Raab* and remarked that "those held out as medical professionals" have an "aura of

²³⁰ *Id.* at 617.

²³¹ *Id.* at 627 (explaining that railroad employees hold a low reasonable expectation of privacy because they are subject to a litany of rules at the federal level). See also *Von Raab*, 489 U.S. at 671–672 (opining that those working with guns and drugs should expect to be subject to testing because of the danger inherent in their work); *id.* at 671 (asserting that certain public positions, like employees of the U.S. Mint or members of the military, should expect searches at the end of the workday and inquiries into physical fitness, respectively, because of their required duties).

²³² Deborah Haas-Wilson, *Regulation of Health Care Professionals Other than Physicians*, CATO INST., <http://www.cato.org/sites/cato.org/files/serials/files/regulation/1992/10/reg15n4d.html> (last visited Nov. 2, 2014).

²³³ American Medical Association, *Requirements for Becoming a Physician*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/education-careers/becoming-physician.page?> (last visited Feb. 10, 2015).

²³⁴ Haas-Wilson, *supra* note 232.

²³⁵ MEDICAL BOARD OF CALIFORNIA, *GUIDE TO THE LAWS GOVERNING THE PRACTICE OF MEDICINE BY PHYSICIANS AND SURGEONS* (7th ed. 2013), available at http://www.mbc.ca.gov/About_Us/Laws/laws_guide.pdf.

professional competence,” such that it is unlikely for such an employee to “reasonably hold the same expectation of privacy as that entertained by a clerical worker or other non-professional employee in federal service.”²³⁶ Because providing medical care is as regulated as operating a train, and as dangerous as handling a firearm to protect our borders, albeit dangerous on a smaller scale in terms of potential casualties, individuals who voluntarily choose to occupy these positions must make do with their diminished expectation of privacy.²³⁷

This analysis balancing the employee-HCW’s privacy interest against the state’s interest in testing the HCW for impairment demonstrates that it would not violate the Fourth Amendment for a state to adopt a statute mandating testing for HCWs. Specifically, the nature and immediacy of the government’s interest, the efficacy of testing, and the character of the intrusion all buttress the state’s interest in testing HCWs for drugs and/or alcohol to protect the public.

VI. Model Statute: The Guideposts to Include Within a Statute Mandating HCW Drug Testing

Taking into consideration drug testing precedent, as well as California and New Hampshire’s attempts to mandate such testing, this Comment proposes some guideposts that a model statute would include to ensure a constitutional, effective, and fair testing program.²³⁸ Such a statute would: specifically enumerate the chosen procedure; include pre-employment, random, suspicion-based, adverse event, return-to-duty and follow-up testing; test all HCWs; provide swift consequences that are tailored to the infraction; and would provide for a comprehensive approach

²³⁶ *Am. Fed’n of Gov’t. Emps. L-2110 v. Derwinski*, 777 F. Supp. 1493, 1499 (N.D. Cal. 1991). The court also remarked that the grave “life and death” atmosphere in which a physician carries out his duties necessarily means he holds “a lesser expectation of privacy in [his] ability to provide the services necessary to perform [his] duties.” *Id.*

²³⁷ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (“Somewhat like adults who choose to participate in a closely regulated industry, students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.”) (internal quotation marks omitted).

²³⁸ *See also* Pham & Provonost, *supra* note 213 (setting forth “the key principles of a program for physician drug testing,” which include: 1) a focus on identification and rehabilitation rather than punishment; 2) confidentiality; 3) mandatory pre-employment, pre-appointment or pre-licensure testing; 4) random testing; 5) for-cause testing, such as adverse event testing; and 6) initially limiting testing programs to a hospital setting, “where the bylaws and infrastructure can support the program.”).

to a drug-free work environment, by supporting state physician health programs, require medical schools to test students and educate them on the danger of impairment, and enact a whistleblower law to encourage professionals in the medical field to refer colleagues for help.

A. The Statute Must Delineate the Specifics

In its attempt to mandate physician drug testing, the PPSA provided hospitals with a ready-made policy to implement.²³⁹ The advantage of taking the initiative in this manner is the confidence that comes with creating a constitutional testing program.²⁴⁰ The FAA regulations pose a minimal threat of invading an employee's privacy; not only do they ensure bodily (by not requiring direct observation) and informational (by limiting the use of the test results) privacy, but also they provide the test administrators with little, if any, discretion in carrying out their duties to ensure that the employee's privacy is respected.²⁴¹ In adopting the FAA guidelines, the PPSA likewise promised physicians minimal invasiveness in implementing the procedure.

On the other hand, HB-597 did not specifically provide a testing program for employer-health care facilities, but merely mandated that the employers establish and implement "a mandatory random drug testing program," leaving the specifics up to the facility itself.²⁴² Thus, the original HB-597 left the method of collecting the samples to the facility's discretion—it could adopt a urinalysis testing program if it felt that urinalysis would be more cost-effective, or a blood or hair sample program if it felt that such a program would be more accurate.

While it might be helpful to have a universal method of testing among the state's health care facilities, there are benefits to allowing each facility to adopt its own procedure: the facilities can

²³⁹ 2014 Bill Text CA V. 7 § 4.

²⁴⁰ *Bluestein v. DOT*, 908 F.2d 451, 457 (9th Cir. 1990). (rejecting the constitutional challenge to the FAA testing program for lack of a meaningful distinction between the Fourth Amendment issues in this case and in *Von Raab*). *See also* discussion *infra* Part IVB.

²⁴¹ *Id.* at 457. *See also* discussion *infra* Part IVB.

²⁴² H.B. 597, 2013 Leg., Reg. Sess. (N.H. 2013).

do their own cost-benefit analyses and find economically feasible, yet effective, plans. It is key to note, though, that if a statute is to mandate that facilities adopt their own policies (HB-597) as opposed to provide a universal program (PPSA), it is important to define the terms that apply to all facilities (i.e., the tests must still be “random” and must be done “X” number of times per year, etc.).

B. Forms of Suggested Testing

1. HCWs Should Be Tested Pre-Employment, Randomly, After an Adverse Event, Upon a Reasonable Suspicion, and After Returning to Duty from Treatment

Based on the incidence of drug and alcohol use among medical professionals and the failure of the system’s current policy of self-regulation, drug testing is necessary to ascertain and deter drug use in the field. Of the two proposed pieces of legislation discussed in this Comment, only Proposition 46 set forth a testing procedure to apply to all hospitals throughout the state. Specifically, the PPSA suggested that physicians be drug tested according to the FAA testing regulations, which cross-referenced the DOT procedures for testing employees in the transportation sectors that are subject to federal regulation.²⁴³ For our purposes, the HCWs because the regulations aim to test employees pre-employment, randomly, following an adverse event, upon a reasonable suspicion of impairment, when an employee returns to duty, and to follow-up with the employee’s progress once he rejoins the workforce.²⁴⁴

²⁴³ *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, DEPARTMENT OF TRANSPORTATION, <http://www.dot.gov/odapc/part40> (last visited Nov. 2, 2014). While the FAA specifies its own rules for aviation employees under 14 C.F.R. § 120, it belongs to a group of federal agencies that are governed by the DOT, and thus largely refers to the DOT’s own provisions. *DOT Agency Information*, DEPARTMENT OF TRANSPORTATION, <http://www.dot.gov/odapc/agencies> (last visited Nov. 5, 2014).

²⁴⁴ 49 C.F.R. § 40.14(h) (2012). *See also An Employer’s Guide to Drug Testing in Montana*, MONT. DEP’T OF LABOR AND INDUS, <http://wsd.dli.mt.gov/service/drugmanuala.asp> (last visited Jan. 16, 2015) (explaining that a return-to-duty test is administered when an employee violates the applicable drug and alcohol regulations, including failing to submit a sample, while a follow-up test is administered when an employee has previously tested positive for a controlled substance).

The DOT testing program is very careful about respecting employee privacy: for example, the regulations require that the collector of the sample not be able to link the employee with his sample, result, or report.²⁴⁵ Also, under § 40.61, test administrators are prohibited from asking the employee to list the medications he is currently taking.²⁴⁶ Section 40.41 states that the preferred type of testing facility is a single-toilet room with a full-length privacy door, or a multi-stall restroom with a door providing “substantial visual privacy.”²⁴⁷ Likewise, the policy requires that breathalyzer tests be administered in a way that provides the employee “visual and aural privacy” from others besides the test administrator and a DOT agency representative.²⁴⁸ Further, both the urinalysis and breathalyzer tests require a confirmatory test upon a positive result for either substance.²⁴⁹ Finally, the DOT procedures prohibit an employer from releasing an employee’s results or medical information without the latter’s specific written consent.²⁵⁰

The regulations, then, set out a minimally intrusive method of testing by not requiring direct observation or disclosure of medical information until a positive result is confirmed, two factors that weighed toward a finding of constitutionality in *Von Raab*,²⁵¹ and by providing testing facilities similar to public restrooms, which the *Acton* Court looked upon favorably.²⁵²

²⁴⁵ 49 C.F.R. § 40.31.

²⁴⁶ *Id.* § 40.61.

²⁴⁷ *Id.* § 40.41.

²⁴⁸ *Id.* § 40.221.

²⁴⁹ *Id.* § 40.221 for alcohol testing; *id.* § 40.87 for urine.

²⁵⁰ 49 C.F.R. § 40.321.

²⁵¹ *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 660 n.2 (1989). *See also* 49 C.F. R. § 40.67 (specifying that a direct observation may be done only if an employee shows an intent to, or does, tamper with the sample, or is subject to return-to-duty or follow-up testing. Such an observation is done without advance notice to the employee, ensuring the effectiveness of the testing, unlike in *Chandler*, and gives collectors little discretion to require such testing on their own).

²⁵² *Veronia Sch. Dist. 47 J v. Acton*, 515 U.S. 646, 658 (1995).

The FAA regulations,²⁵³ which served as the model for the PPSA program, require a full range of testing of all employees in safety-sensitive positions:²⁵⁴ pre-employment, random, post-accident, reasonable cause, return to duty, and follow-up testing.²⁵⁵ Likewise, the FAA regulations have a more detailed scheme for alcohol testing. While all safety-sensitive employees are tested for alcohol,²⁵⁶ certain employees are prohibited from working with a BAC over 0.04, and from drinking within eight hours of performing their duties.²⁵⁷

As for consequences, § 40.191 of the DOT regulations provides that a failure to “cooperate with any part of the testing process,” even failing to empty one’s pockets, constitutes a refusal to take a test and triggers consequences such as suspension from work.²⁵⁸ Specifically, §§ 120.11, 120.13, and 120.15 of the FAA program state that pilots, flight crewmembers, and other airmen are subject to drug testing, and their refusal to test results in a one-year suspension or revocation of their licenses.²⁵⁹

Further, the FAA provides for strict consequences for positive test results. Under § 120.11, an employee with two positive drug test results is permanently disqualified from performing his safety-sensitive duties “prior to the second drug test.”²⁶⁰ If a test result demonstrates that an employee performed that duty while impaired, his employer will also permanently disqualify him

²⁵³ 14 C.F.R. § 120 (2009).

²⁵⁴ *Industry Drug and Alcohol Testing Program*, FEDERAL AVIATION ADMINISTRATION, https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/drug_alcohol/ (last visited Jan. 16, 2015).

²⁵⁵ 14 CFR §§ 120.109, 120.217. *See also* 2014 Bill Text CA V. 7 § 2350.35 (requiring random, referral and post-adverse event testing, but stating that a physician who has been put on probation for impairment cannot have his license reinstated until he “demonstrates to the Board’s satisfaction that he or she is fit to return to duty,” suggesting the requirement of return-to-duty and follow-up testing to demonstrate such “fitness”).

²⁵⁶ 14 CFR §§ 120.105, 120.215. *See also* 14 CFR § 120.19 (prohibiting employees from drinking within eight hours after an accident in which they performed a safety-sensitive function).

²⁵⁷ 14 C.F.R. §§ 120.19(d), 120.37(d).

²⁵⁸ 49 C.F.R. § 40.191 (2012).

²⁵⁹ 14 C.F.R. §§ 120.11, 120.13, 120.15.

²⁶⁰ 14 C.F.R. § 120.11.

from that position.²⁶¹ When an employee engages in alcohol-related misconduct, he is immediately removed from his safety-sensitive position, and permanently disqualified following his first incident of on-duty alcohol use, or his second violation of any alcohol-related rule under §§ 120.19 or 120.37.²⁶²

Based on this analysis, it seems that the PPSA provided a constitutionally reasonable test to apply to HCWs, as well as an adequate starting point for drafting a model testing statute. The DOT policy implements safeguards for employee privacy pursuant to the *Skinner-Von Raab* line of cases, such as preferring a public restroom atmosphere rather than direct observation, ensuring that the collector does not know the employee,²⁶³ and testing solely for the presence of drugs and alcohol.²⁶⁴ Further, the FAA guidelines would adequately protect third parties from the risks posed by impaired physicians: the strict consequences triggered when an employee is found to be under the influence at work supply a promising deterrent for HCWs, and the immediate removal of such an employee satisfactorily ensures patient safety. Accordingly, although the PPSA failed to become law, its proposed adoption of the FAA regulations for testing physicians seems to be an appropriate fit, and the model testing program would do well to adopt the FAA, or any other DOT-based, drug testing regulations.

2. Random Testing is a Necessary Component of any Model Testing Statute

²⁶¹ 14 CFR § 120.111.

²⁶² 14 CFR § 120.221.

²⁶³ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626–27 (1989) (explaining that the railroad's test is minimally intrusive because the sample was collected "by personnel unrelated to the railroad employer," making it "not unlike similar procedures encountered" when getting an annual physical). *See also* 14 C.F.R. § 40.31 (providing that the collector cannot be the immediate supervisor, unless nobody else is available, and the collector must not be able to link the employee with his test result, sample, or report).

²⁶⁴ *Skinner*, 489 U.S. at 626.

Although this form of testing has proved most controversial, random testing is indispensable to an effective testing program.²⁶⁵ The medical field is, and has been, self-regulating,²⁶⁶ and a desire to remain so is understandable because only HCWs can understand “the complexity of medical tasks,” the nature of their work, and the standards to which such professionals should be held.²⁶⁷ On the other hand, because HCWs understand so well the stress and the years of hard work, they also may be more forgiving of their colleagues who fall prey to addiction, or even those who sometimes come to work intoxicated.²⁶⁸ Consequently, 33% of physicians fail to report their colleagues²⁶⁹ which is “something of an embarrassment” to the profession, and entirely unacceptable to the public.²⁷⁰ Further, where physician health programs do exist, they may be less proactive than they should be in detecting impaired physicians, which means, “by default, that patient harm has to occur before a review process occurs,” and often, “an overwhelming amount of data (i.e., harmed patients) must be available before a hospital or state initiates an investigation.”²⁷¹

Perhaps, then, it is time to break from the status quo and adopt another method of regulation. While testing in other forms (based on a random suspicion, following an adverse event, etc.) is necessary, it would not be sufficient to ensure patient safety. For example, relying on referrals

²⁶⁵ Ejnes, *supra* note 18 at 912 (“Despite our professional obligation to report impaired colleagues, we have been reluctant to do so. Thus, as advocated by others, effective programs to detect and prevent physician impairment may require a limited amount of mandatory drug and alcohol testing.”).

²⁶⁶ Pham & Provonost, *supra* note 213 at 913 (“Traditionally, impaired physicians are identified through self-policing of professional norms, with impaired physicians identifying themselves or being identified by their colleagues.”).

²⁶⁷ Matthew K. Wynia, MD, MPH, *The Role of Professionalism and Self-Regulation in Detecting Impaired or Incompetent Physicians*, 304 J. AM. MED. ASS’N 210, 210 (2010).

²⁶⁸ Pham & Provonost, *supra* note 213 at 913–14 (“Physicians are often reticent to identify their colleagues, even in the face of clear evidence of impairment or abuse.”).

²⁶⁹ Cynthia A. Lien, *A Need to Establish Programs to Detect and Prevent Drug Diversion*, 87 MAYO CLIN. PROC. 607, 607 (2012).

²⁷⁰ Abramson, *supra* note 7, at 12.

²⁷¹ Pham et. al., *supra* note 213, at 2101.

from colleagues to test an employee is simply ineffective due to the culture of silence in the medical field, which prevents physicians from reporting an impaired doctor.²⁷²

Relying on a reasonable suspicion alone to test employees for drugs and/or alcohol would be ineffective because of the discretion inherent in such a judgment. The DOT regulations allow employers to test upon a reasonable suspicion, which is defined as a supervisor's "determination based upon specific, contemporaneous, articulable observations concerning the employee's appearance, behavior, speech or body odors" that lead him to believe the employee is under the influence of drugs or alcohol.²⁷³ Because this type of testing depends on the determination of the supervisor, influenced by his meager two hours of training (sixty minutes of training each for the indicators of alcohol use and drug use),²⁷⁴ it is largely discretionary. If the supervisor chooses to turn a blind eye, or misses a sign of impairment, the employee simply will not be tested under this program.²⁷⁵

For example, most of the facilities that employed Kwiatkowski had suspicion-based testing policies: at least one of them, the University of Pittsburgh Medical Center, actually tested Kwiatkowski, but still did not inform the ultimate authority responsible for his licensure, the ARRT.²⁷⁶ On the other hand, New Hampshire's Exeter Hospital never tested Kwiatkowski, even

²⁷² Pham & Provonost, *supra* note 213, 913–914.

²⁷³ The agencies covered by the DOT regulations differ slightly in how many supervisors need to witness the suspicious behavior before requiring a test, etc. See *DOT Agency/USCG Drug and Alcohol Program Facts*, U.S. DEPARTMENT OF TRANSPORTATION, http://www.dot.gov/sites/dot.dev/files/docs/ODAPC_Program%20Facts.pdf (last visited Jan. 16, 2015).

²⁷⁴ REASONABLE SUSPICION REFERRAL FOR DRUG AND ALCOHOL TESTING, A TRAINING PROGRAM FOR TRANSIT SUPERVISORS (1997) available at <http://transit-safety.volpe.dot.gov/publications/safety/ReasonableSuspicion/PDF/rf-leader.pdf>.

²⁷⁵ Abramson, *supra* note 7, at 14. See also Roger S. Cicala, MD, *Substance Abuse Among Physicians: What You Need to Know*, 39 HOSPITAL PHYSICIAN, 39, 42–43 (2003) (explaining that the indicators of substance abuse among HCWs varies based on the substance being abused: if the HCW has access to the drug through work, he maintains his work performance at a high level so as to stay near the drug, but works alone, takes frequent bathroom breaks, and often closes doors to the rooms he occupies; on the other hand, a HCW who abuses drugs obtained through other avenues will make work his last priority, leaving early, coming in late, and taking extended lunch hours, etc.).

²⁷⁶ Abramson, *supra* note 7, at 11.

though his colleagues repeatedly told supervisors that he seemed “overly medicated” and was seen with white foam around his mouth. Instead, the extent of the hospital’s disciplinary action was sending him home for the day and recording these behaviors in his personnel file.²⁷⁷

Pre-employment testing alone will not suffice to deter medical professionals from substance abuse because they will anticipate the test. Such tests condition a HCW’s employment on a negative drug test, giving the prospective employees notice and an opportunity to find a way to avoid detection. Employees could abstain from their substance abuse for the necessary period of time to allow the drug to leave their system,²⁷⁸ dilute their urine and/or use the urine of another individual, or use a product available on the market to assure a negative result.²⁷⁹ While such testing at least weeds out the employees who are so addicted that they cannot even abstain for a test they know is coming, the data regarding currently practicing impaired medical workers²⁸⁰ suggests that pre-employment testing does not capture enough of the harm-doers.

Testing following an adverse event by definition means waiting until a patient is injured before stepping in to protect patients more generally. For example, the California Health and Safety Code includes within its definition of “adverse event”: performing surgery on the wrong patient; death or disability associated with giving a patient the wrong dosage of a drug; and death or disability associated with using a device in patient care in a way it is not intended to be used.²⁸¹ Further, testing a HCW after an adverse event risks the danger of a false positive: a doctor may have

²⁷⁷ *Id.* at 12.

²⁷⁸ Approximate Detection Times Table, MAYO CLINIC, MAYO MEDICAL LABORATORIES, <http://www.mayomedicallaboratories.com/articles/drug-book/viewall.html> (last updated January 2011). Based on this chart, it is possible for an employee to avoid detection by merely abstaining from drug use for one day before the urinalysis. *Id.*

²⁷⁹ *Medical school drug testing is a moral and scientific failure*, KEVINMD (May 11, 2014), <http://www.kevinmd.com/blog/2014/05/medical-school-drug-testing-moral-scientific-failure.html>.

²⁸⁰ See discussion *supra* Part III.

²⁸¹ CAL. HSC. CODE §§ 1279.1(b)(1)(B), 1279.1(b)(4)(A), 1279.1(b)(2)(B). See also 2014 Bill Text CA V. 7 § 2350.10(b) (adopting the definition of “adverse event” set out in the California Health and Safety Code).

attended a social function after his services have been rendered, or a nurse may have left for vacation, and is thus unable to be tested. Will either of these professionals be penalized for their post-work activities, the doctor for his positive breathalyzer test, and the nurse for her “refusal” to provide a test sample? If so, would medical professionals be forced to schedule work around their social plans to avoid being caught in such a predicament?²⁸²

Finally, return-to-duty and follow-up testing are necessary because they take place after an employee has already failed or refused to take a prior test.²⁸³ Unfortunately, because these tests are not administered until after an employee has already violated the testing regulations (either by failing a test or by being noncompliant), they do not have as much of a deterrent or preventative-measure value as random testing.

Based on an analysis of the range of testing available, random testing provides a different kind of benefit, and as such, needs to be included in any health care testing program. Because medical professionals have no way of knowing, down to the day, when their test will be, they are not as prepared to avoid the test or alter their results, offering employees an incentive to avoid using drugs or alcohol, and offering employers a more effective way to pick out the employees who may be harming patients. Further, because there is no discretion involved with random testing, this form of testing will presumably yield a more accurate reading of the medical workforce because supervisors will not be able to turn a blind eye to a positive result, and there is no need to rely on the referrals of colleagues who prefer to not get involved. Lastly, some have argued that random

²⁸² 2014 Bill Text CA V. 7 § 2350.24(A)(2) (requiring a doctor to be tested within 12 hours of an adverse event if he treated the patient 24 hours *before* the event, necessarily limiting the operative time period to 36 hours). *But see* Sam Levin, *The Poison Pill of Proposition 46?*, EAST BAY EXPRESS (Sept. 24, 2014), <http://www.eastbayexpress.com/oakland/the-poison-pill-of-proposition-46/Content?oid=4079871> (quoting Richard Thorp, president of the California Medical Association, as saying “an adverse event may not come to light for days or even weeks after a patient received care. That means that a drug test would not reveal anything about whether the doctor in question was under the influence while on duty. It could also be difficult for doctors to provide immediate urine samples if they are traveling or on vacation.”).

²⁸³ MONTANA DEPARTMENT OF LABOR AND INDUSTRY, *supra* note 244.

testing is an ethical necessity, as it fills in the gaps, left by other forms of testing, in a health care institution's ethical obligation to detect substance abusers while avoiding the "double standards and stigmata" of suspicion-based and pre-employment testing.²⁸⁴

C. All Health Care Workers Must be Tested

Had the PPSA been enacted, it would have subjected all holders of a physician and surgeon's certificate to testing.²⁸⁵ According to the California Business and Professions Code, a "holder of a physician and surgeon's certificate" may prescribe medication, use devices in or upon a person, and/or perform surgery that would sever or penetrate human tissue.²⁸⁶ Thus, even specialist doctors in fields that generally do not require particularly risky procedures, such as dermatologists and podiatrists, would have been subject to testing.

Podiatrists treat a variety of foot-related problems by prescribing drugs, setting fractures and performing surgery.²⁸⁷ Some states even license podiatrists to prescribe narcotics to treat foot conditions, to be administered "by any route, including intravenously," even though "any medications prescribed may also have other systemic effects on the patient."²⁸⁸ The fact that a podiatrist is able to operate on a patient and prescribe him medication alone creates the risk that an impaired podiatrist can seriously harm a patient. What is more, an unlicensed assistant at the podiatrist's side "cannot provide any service which constitutes the practice of podiatry," and in fact is monitored by the podiatrist while in the office.²⁸⁹ Thus, if the podiatrist himself is under the influence of drugs or alcohol, it seems as if the assistant will be of little help to the patient.

²⁸⁴ Levine, *supra* note 3, at 323.

²⁸⁵ 2014 Bill Text CA V. 7 § 2350.15(E).

²⁸⁶ CAL. BUS. & PROF. CODE § 2051.

²⁸⁷ Tara Parks, DPM, *The Profession of Podiatry*, DEPARTMENT OF PODIATRY, BOULDER MEDICAL CENTER, <https://www.bouldermedicalcenter.com/depts/podiatry.php>.

²⁸⁸ *Frequently Asked Questions*, NEW YORK STATE EDUCATION DEPARTMENT, OFFICE OF THE PROFESSIONS (May 29, 2014), <http://www.op.nysed.gov/prof/pod/podfaq.htm>.

²⁸⁹ *Id.* (internal citations omitted).

Likewise, dermatologists treat skin-related problems by prescribing medication, diagnosing certain ailments, and performing minor surgery. For instance, when a dermatologist diagnoses skin cancer, he may excise the “cancer and a small amount of normal-looking skin” surrounding it, and typically performs the procedure right in his office,²⁹⁰ putting the patient in harm’s way if the dermatologist is impaired. Furthermore, dermatologists as a group have generated about 86 to 123 claims of malpractice per year, ranging from medication errors to failure to recognize a complication of treatment.²⁹¹

Therefore, though there is less of a chance of danger to life when doctors who don’t typically perform invasive procedures, like dermatologists and podiatrists, err because the nature of their practice is less surgically demanding, the need to test these kinds of doctors is still strong. Specialized physicians could still prescribe patients the wrong kind of medication, or misdiagnose or fail to diagnose a serious condition. Further, while these doctors devote a minimal percentage of their time to procedures that can immediately impact a patient, that small amount of time, as the *Derwinski* court recognized,²⁹² is not insignificant. Thus, a model testing policy for HCWs would include *all* types of doctors.

Moreover, the ideal testing program would *not* be limited to doctors because such a program would exclude nurses, medical technicians and other HCWs who can harm patients. Courts have recognized this risk. In *Kemp*, the Southern District of Mississippi upheld the testing of a scrub nurse because she held a safety-sensitive position by providing “direct, hands-on patient care, including bringing the patient from the hospital room to the operating room for surgery and being

²⁹⁰ *Skin Cancer: Diagnosis, Treatment, and Outcome*, AMERICAN ACADEMY OF DERMATOLOGY, <http://www.aad.org/dermatology-a-to-z/diseases-and-treatments/q---t/skin-cancer/diagnosis-treatment>.

²⁹¹ *Patient Safety*, AMERICAN ACADEMY OF DERMATOLOGY, <http://www.aad.org/education/patient-safety>.

²⁹² *Am. Fed’n of Gov’t. Emps. L-2110 v. Derwinski*, 777 F. Supp. 1493, 1498 (N.D. Cal. 1991).

present and assisting during surgery.”²⁹³ The district court found that despite her not wielding a surgical instrument, a scrub tech could cause the patient “irremediable harm” by allowing the patient to fall from a gurney, by bumping the surgeon “at a critical moment during the surgery,” or by failing to properly count surgical sponges.²⁹⁴ Similarly, the *Derwinski* court found the drug testing constitutional as applied to medical professionals across the board—physicians, pharmacists, nurses and medical technicians—even if they spent “five percent or less of [their] time” directly interacting with patients.²⁹⁵

Finally, the cases of Mr. Kwiatkowski, Ms. Parker, and Mr. Beumel²⁹⁶ make clear that nearly any employee in an operating room or doctor’s office could harm a patient. As such, the New Hampshire legislature was justified in proposing to test “all health care workers employed” in state-licensed facilities.²⁹⁷

D. Consequences Should be Swift, Yet Appropriate

Thanks to the public debate occasioned by Proposition 46, it has become clear that the medical field needs to change its approach to regulating its professionals.²⁹⁸ While most of the necessary reform is beyond the scope of this Comment, it is beneficial to note some of the suggestions made by others in the face of the failed PPSA and HB-597.

One of the biggest critiques of Proposition 46 is that it was just too strict: many people believed that the purpose of the act was to punish, rather than identify and rehabilitate, the impaired

²⁹³ *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362, 1367 (S.D. Miss. 1991).

²⁹⁴ *Id.* at 1367–68.

²⁹⁵ *Derwinski*, 777 F. Supp. 1493, 1498.

²⁹⁶ Levinson, *supra* note 84.

²⁹⁷ H.B. 597, 2013 Leg., Reg. Sess. (N.H. 2013).

²⁹⁸ Although medicine is a self-regulating profession, relying on state medical boards to license and discipline physicians, colleagues are mum when it comes to blowing the whistle, and bureaucratic boards are slow to move their feet. See John Leifer, *Who is Protecting Us From Bad Doctors?*, THE LEIFER HEALTH CARE REPORT, (Oct. 16, 2014), <http://leiferreport.com/protecting-bad-doctors/> (quoting Inspector General Alan Levine, who oversees medical boards on behalf of the United States, as saying that many medical boards “serve the vested interest of physicians to a far greater extent than they serve the public good” by under-disciplining physicians, if at all).

doctors.²⁹⁹ While our instinct may be to lock up dangerous doctors, such an approach may actually have the opposite effect on patient safety by feeding into the culture of silence—if doctors face harsh consequences, colleagues will be *less* likely to make referrals, and impaired physicians themselves will try harder to hide their substance abuse.³⁰⁰

A second critique of the PPSA focuses on its lack of specificity. The Act did not enumerate the process by which doctors would be chosen for random testing, “leaving the door open for less-than-random selection” which is “of particular concern given the increasingly competitive business environment” of the medical field.³⁰¹ Similarly, the PPSA stated that doctors would be drug tested at hospitals, but did not specify whether the hospital’s medical staff or its administration would be the entity in charge of testing.³⁰² Accordingly, should a state enact a statute to test HCWs, it should specify these details. For example, when Massachusetts General Hospital began drug testing all members of its anesthesiology department in 2008,³⁰³ it tested residents twice a year during their first year of employment, and at least once a year for their second and third years at the hospital.³⁰⁴ The Massachusetts hospital later reported the program’s success in deterring drug use among its one hundred employees.³⁰⁵ Conversely, the original HB-597 proposed to drug test all HCWs four times a year.³⁰⁶ Perhaps, at least initially, a state might aim to emulate the successful

²⁹⁹ Pham & Provonost, *supra* note 213, at 913. One reason the PPSA seems more punitive than rehabilitative is because California is one of the few states without a Physician Health Program (PHP). *See Id.* at 914. *See also* Bathen, *supra* note 38 (explaining that California’s PHP was shut down in 2008 when audits revealed “major flaws” that helped members provide false urine samples, allowing them to finish the program and return to practice).

³⁰⁰ Pham & Provonost, *supra* note 213, at 913.

³⁰¹ Ejnes, *supra* note 18, at 912.

³⁰² *Id.*

³⁰³ *See* discussion *infra* Part VII.

³⁰⁴ Abramson, *supra* note 7, at 13–14.

³⁰⁵ *Id.* at 14.

³⁰⁶ H.B. 597, 2013 Leg., Reg. Sess. (N.H. 2013).

Massachusetts program, especially if employers are concerned about the cost of administering such tests.³⁰⁷

A final criticism of Proposition 46, and perhaps of drug testing physicians more generally, is the damage caused by false positives and faulty referrals, especially in a state with a slow-moving medical board.³⁰⁸ Natasha Minsker of the American Civil Liberties Union of Northern California stated that the testing “could easily yield positive tests from legitimately prescribed drugs” and “creates a presumption of negligence.”³⁰⁹ Upon a positive test result, the state attorney general would temporarily suspend the doctor’s license pending an investigation, during which time the physician could not practice, and his patients would not be treated.³¹⁰ Moreover, “the Act does not specify a time frame for an investigation and hearing to determine whether the physician was impaired,” potentially holding doctors in limbo for an unreasonable amount of time.³¹¹ Finally, Richard Thorp, president of the California Medical Association, spoke out against the consequences of failing to submit to a test: according to the PPSA, if a doctor does not submit to a test within the required period, he could have his license suspended, which Thorp argues is “overreaching and so draconian.”³¹²

While these critiques are fair, one aspect of the PPSA that is difficult to argue with is the swift removal of a doctor from duty upon a confirmed positive drug test. Through its reference to the

³⁰⁷ See e.g., *One State May Require Drug Tests For Hospital Workers*, THE ADVISORY BOARD COMPANY (Feb. 28, 2013), <http://www.advisory.com/daily-briefing/2013/02/28/one-state-may-require-drug-tests-for-hospital-workers>. (explaining that Cary Cahoon, the vice president of New Hampshire’s Association of Residential Care Homes, opposed the original HB-597 because randomly testing his 13 workers would cost him \$5,700 a year).

³⁰⁸ Elbein, *supra* note 81 (explaining that although six doctors and lawyers complained to the Texas Medical Board about Dr. Duntsch, it took the Board over a year to finally revoke his license—by that time, Duntsch had already killed two patients and paralyzed four through his “surgical misadventures.”).

³⁰⁹ *Id.*

³¹⁰ Ejnes, *supra* note 18, at 911–912.

³¹¹ *Id.*

³¹² Levin, *supra* note 282. *But see* Johnson, *supra* note 46 (explaining that for Dr. Gaither, who struggled with a drinking problem as a resident, the temporary loss of his license was necessary to finally set him on the path to sobriety after a failed intervention in medical school, and an unsuccessful meeting with the head of his residency program, wherein Gaither signing a contract to attend Alcoholics Anonymous meetings and agree to be tested).

DOT regulations, the PPSA called for the confirmatory testing of a provided sample *and* review by a Medical Review Officer of the sample and the employee's medical and prescription information to increase the chance that the result is not a false positive.³¹³ Adding such safeguards would help protect doctors from the damage to their reputation of a false positive while keeping the public safe.

E. Relying on a Drug Test Alone is Not Enough to Ensure Patient Safety

Drug testing HCWs by itself will not keep patients safe. All a drug test can do is identify an impaired HCW and remove him from his duties for a period of time. But what happens when that period expires, and the still-addicted HCW is able to return to work? While such a situation can be dangerous with any HCW, if the employee is one with access to drugs at work, he could be returning to the most dangerous place for him to be, where he can harm both himself and his patients.³¹⁴ Furthermore, if substance abuse is a result of the HCW's self-medication because of his stressful occupation, we owe it to that doctor to provide him treatment to save his own life.

For this reason, opponents emphasize the need for rehabilitation programs, like Physician Health Programs (PHPs), through which HCWs can receive treatment for their addiction, attend group therapy, and be monitored when they return to work.³¹⁵ Most states have PHPs, and studies reporting the effectiveness boast success rates as high as 80 or 90%.³¹⁶ PHPs offer a variety of services, such as "disease management, support, long-term monitoring of illness and treatment

³¹³ This sort of procedure is included in 49 C.F.R. § 40.123.

³¹⁴ Lauren Cox, *Urine Drug Tests for Doctors?*, ABC NEWS MEDICAL UNIT (Nov. 12, 2008), <http://abcnews.go.com/Health/PainManagement/print?id=6232694> (describing a study by the Cleveland Clinic Foundation in Ohio, which revealed that 80% of anesthesiologist residency training programs have experienced problems with impaired doctors, and another 19% of programs experienced the death of an anesthesiologist due to overdose). *See also* Seppala, *supra* note 77 (explaining the high death rate among anesthesiologists, and the studies reporting that when these physicians return to work following treatment, they often may be prevented from working in the operating room, where they would have "have to handle on a daily basis the very drugs to which they were addicted.").

³¹⁵ Seppala, *supra* note 77.

³¹⁶ Bathen, *supra* note 38.

efforts, advocacy, help with fulfilling reporting requirements,” etc.³¹⁷ Further, a 2008 study of 800 physicians who had recently completed such programs found that after five years, 65% of the subjects remained drug- and/or alcohol-free.³¹⁸ For PHPs to be successful, however, they need to be confidential to encourage professionals to both turn themselves in and/or refer their colleagues. Without this promise of privacy, the stigma of substance abuse will keep away HCWs who truly need treatment.³¹⁹

Likewise, these types of program need to begin earlier. Medical schools need to educate their students on the dangers of substance use and abuse, since “for many physicians, substance abuse begins early during medical school and residency.³²⁰ Moreover, medical schools should test students to prevent recreational drug use from turning into a crippling addiction. While some schools already feature testing,³²¹ more schools should adopt such procedures.³²² Further, HCWs must learn, through school or otherwise, how to identify an impaired individual, and the

³¹⁷ Seppala, *supra* note 77.

³¹⁸ SCIENTIFIC AMERICAN, *supra* note 85. Of course, this means that one in three doctors relapse, suggesting that these programs either need to be revamped, and/or that employers need to more diligently monitor employees returning from PHPs. *Id.*

³¹⁹ Bathen, *supra* note 38 (“All the doctors insist that [the program] must be secret and confidential, otherwise no doctor will go into it.”).

³²⁰ Marie R. Baldisseri, MD, FCCM, *Impaired Healthcare Professional*, 35 CRIT. CARE. MED. S106, S109–S110 (2007) (discussing that many physicians, because they are so well-educated, self-diagnose and self-medicate with the belief that they are in control and cannot become addicted to the chemical they are ingesting).

³²¹ See e.g., *Background Check and Drug Testing*, HERBERT WERTHEIM COLL. OF MED., <http://www.medicine.fiu.edu/admissions/md/background-check/index.html> (last visited Feb. 12, 2015) (explaining that all students are subject to a 10-panel drug screen and alcohol test prior to starting first year classes); *Background Checks and Drug Testing*, SUNY DOWNSTATE MED. CTR., http://sls.downstate.edu/student_affairs/CBCDT.html (last visited Feb. 12, 2015) (explaining that students must take, and pay for, a 10-panel drug test before being accepted or enrolled in an elective clinic); *Pre-Clinical Drug Testing Policy and Procedure*, COLUM. UNIV. MED. CTR., <http://www.cumc.columbia.edu/student/health/DrugTesting.htm> (last visited Feb. 12, 2015) (requiring a urine 10-panel drug test prior to beginning a clinical program).

³²² Medical schools should test their students because drug use and addiction can begin in the school and clinical settings. See, e.g., Johnson, *supra* note 46 (explaining that Dr. Gaither struggled with his addiction throughout medical school and his residency program); see also Elbein, *supra* note 90 (noting that Dr. Duntsch was allegedly treated for drug abuse while a resident at the University of Tennessee).

importance of identifying such people.³²³ Although HCWs are under an obligation to report impaired colleagues, they often fail to do so.³²⁴

Finally, the medical field needs a more protective whistleblower law. Despite their moral, legal, and ethical obligation to report colleagues they know to be impaired, HCWs fail to carry out that duty because of the culture of silence and the threat to their careers of turning in a fellow medical professional.³²⁵ If a state enacting a law to drug test HCWs likewise adopts a statute to protect those who report their colleagues, the testing law may be more effective.³²⁶

VII. The Downside of Testing Health Care Workers

While this Comment mainly focuses on the need to test medical professionals for drugs and alcohol, there are some unintended consequences of adopting legislation calling for such testing. Many believe testing will drive HCWs out of the medical field, or at least limit their practice areas, not only because of the fear of getting caught (the intended consequence), but also because testing will: 1) make it more dangerous to perform certain procedures; 2) make it too expensive to practice medicine generally; 3) be degrading to medical employees; and 4) be ineffective.

Some opponents claim that drug testing following an adverse event will force HCWs out of the riskier areas of medicine. For example, will testing lead to a decrease in aides in nursing homes, or prevent a surgeon from operating on particularly vulnerable patients? Perhaps, but it should be noted that in defining “adverse events,” certain states, like California, limit the events

³²³ See Seppala, *supra* note 77 (explaining that HCWs may be hesitant to talk to and/or report a colleague because “medical schools provide little, if any, training in how to recognize and treat addiction,” so “the vast majority of primary care physicians are unable to recognize” the indicators of abuse and/or addiction in a colleague).

³²⁴ Ejnes, *supra* note 18, at 912 (“Our efforts to date to address [impairment] have fallen short and are for the most part reactive. Despite our professional obligation to report impaired colleagues, we have been reluctant to do so.”).

³²⁵ Baldisseri, *supra* note 320, at S111.

³²⁶ Bathen, *supra* note 38 (explaining Dr. Gregory Skipper’s belief that a “snitch law” is necessary to encourage physicians to report their colleagues by providing them protection from liability).

to the death or injury of “normal, healthy patient[s].”³²⁷ Thus, it is possible that the state adopting drug testing for HCWs already has, or will implement, these provisions in its statutes.

Another view shared by opponents is that drug testing will make practicing medicine generally too expensive, forcing HCWs to leave the field due to cost.³²⁸ One response to this critique is the approach taken by Proposition 46, which would have required doctors themselves to pay for the tests, and increased licensing fees to enable the state medical boards to review the results of the tests and initiate investigations of allegations of substance abuse.³²⁹ While this approach seems to put all of the costs on doctors, drug testing itself may decrease the cost of medical malpractice insurance and litigation,³³⁰ enabling doctors to earn more money, and making these tests and fees affordable.

A third argument is that drug testing HCWs would be unethical and degrading because of the cultural status of medical professionals in our country, and the invasion of privacy accompanying such tests. Proponents would respond to this argument by pointing out that drug and/or alcohol testing, whether by breath, urine, or blood tests, have been upheld by courts for safety-sensitive employees, a class to which HCWs belong. Accordingly, if the invasion of privacy does not render the testing of pilots and teachers unreasonable,³³¹ the same would be true for HCWs. Likewise, if testing is not unethical for other safety-sensitive employees, it could not be morally objectionable to test medical professionals.³³²

³²⁷ See e.g., CAL. HSC. CODE, § 1279.1 (excluding “deaths associated with neurological procedures known to present a high risk of intravascular air embolism.”).

³²⁸ THE ADVISORY BOARD COMPANY, *supra* note 307.

³²⁹ Ejnes, *supra* note 18, at 911.

³³⁰ CALIFORNIA ATTORNEY GENERAL, *supra* note 24.

³³¹ Knox County Educ. Ass’n v. Knox Count Bd. of Educ., 158 F.3d 361 (6th Cir. 1998); Bluestein v. DOT, 908 F.2d 451, 457 n.10 (9th Cir. 1990).

³³² Pham & Provonost, *supra* note 213, at 914 (arguing that “[m]ost other professions that have the potential to harm others already require routine testing. There is no ethical justification for excluding physicians from such testing.”).

Finally, opponents argue that drug testing is largely ineffective, so those in the medical field should not be subjected to it. Such an argument is unconvincing because the same rates of effectiveness apply to drug testing no matter the subject of the test: if drug testing is so flawed, why subject only certain subsets of the safety-sensitive class of employees to testing and exempt others, like HCWs?³³³ Furthermore, some hospitals have instituted random drug testing for their employees in recent years and have reported the success of these programs.³³⁴ For instance, in 2005, Massachusetts General Hospital began randomly testing all 100 employees of its Department of Anesthesia and Critical Care.³³⁵ The residents were subject to at least two random tests in their first year of residency, and at least one random test during the second and third years.³³⁶ The program also randomly tested “staff anesthesiologists and nurse anesthetists...within six months of their biannual reappointment.”³³⁷ The Massachusetts hospital found that, “since the institution of th[e] program, there have been no reported cases of drug abuse” in its anesthesiology residency program.³³⁸

VIII. Conclusion

Based on drug testing precedent, HCWs are an appropriate class of employees to constitutionally test for drugs and alcohol. Not only is the government’s interest in testing HCWs significant due to the rate of substance abuse within the profession and its safety-sensitive nature, but these professionals also have a diminished expectation of privacy by virtue of being in a highly

³³³ KEVINMD, *supra* note 279 (arguing that drug testing is not necessary because if the objective is to prevent addicts from becoming doctors, the rigors of medical school already accomplish that aim). *But see* Elbein, *supra* note 90 (explaining that Dr. Duntsch, a graduate of the University of Tennessee Health Science Center’s Department of Neurosurgery, abused drugs throughout medical school and went on to practice as a neurosurgeon). *See also* Baldisseri, *supra* note 320.

³³⁴ Abramson, *supra* note 7, at 13–14.

³³⁵ *Id.* at 13.

³³⁶ *Id.* at 13–14.

³³⁷ *Id.* at 14.

³³⁸ *Id.*

regulated field. Further, the guideposts advanced in this Comment, reflecting aspects of programs upheld by courts, provisions mentioned in proposed legislation, and suggested reforms from those within and without the medical field, are minimally intrusive and respect HCW privacy by keeping results confidential and reducing the discretion administrators have in carrying out the program. While the suggested program proposes to test all HCWs, such a broad application is warranted based on the danger inherent in any sort of patient treatment, no matter the degree of actual physical contact.

Although adopting such legislation may risk some negative consequences, such as scaring medical employees away from certain types of procedures or making it more expensive to practice medicine generally, the advantages of testing HCWs far outweigh the disadvantages. For years, different sectors of society have called for the random drug testing of medical employees, and for years, such provisions have been put off. Despite reliance on self-regulation and Physician Health Programs, the rate of substance abuse among HCWs is not subsiding, and a change is necessary to protect patients. While the medical field may have to pay the price of relinquishing some control and perhaps expending more money to monitor professionals, the result is a healthier and more reliable profession, and as such, greater safety for patients.

Upon graduating medical school, doctors take the Hippocratic Oath, and swear to uphold the following statements: “[m]ost especially must I tread with care in matters of life and death I will remember that I remain a member of society, with special obligations to all my fellow human beings”³³⁹ A random drug test a few times a year can be instrumental in saving lives, and it is surely a facet of the special obligation those in the health care professions hold to their fellow human beings.

³³⁹ Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>

