

**“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**

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I. INTRODUCTION

President Richard Nixon waged the War on Drugs in 1971.<sup>1</sup> 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 Federal Workplace Act of 1986,<sup>2</sup> public and private employers have been subjecting seasonal clerical assistants, commercial aircraft pilots, and countless workers in between to drug and alcohol testing as a condition of employment. In fact, American employees have become so accustomed to the practice that it is now as commonplace as filling out the job application itself.<sup>3</sup> 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

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<sup>1</sup> Ed Vulliamy, *Nixon’s ‘War on Drugs’ Began 40 Years Ago, and the Battle is Still Raging*, THE GUARDIAN (July 23, 2011, 7:07 PM), <http://www.theguardian.com/society/2011/jul/24/war-on-drugs-40-years>.

<sup>2</sup> Exec. Order No. 12,564, 51 Fed. Reg. 32889 (Sept. 15, 1986), <http://www.archives.gov/federal-register/codification/executive-order/12564.html>. 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).

<sup>3</sup> M. R. Levine & W. P. Rennie, *Pre-Employment Urine Drug Testing of Hospital Employees: Future Questions and Review of Current Literature*, OCCUP. ENVIRON. MED., Apr. 2004, at 318, 318, <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”).

lives: health care workers.

For years, voices from all sectors of society, including the medical field itself,<sup>4</sup> 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 to require health care facilities to randomly test all health care employees at least four times per year.<sup>5</sup> 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,<sup>6</sup> and spurred lawmakers to propose the bill.<sup>7</sup> After Kwiatkowski infected thirty-two people in New Hampshire with Hepatitis-C in the course of feeding his addiction,<sup>8</sup> 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 random drug testing policies.<sup>9</sup>

On the other side of the country, California's Proposition 46 made headlines as potentially the first law to mandate random drug and alcohol testing for state-licensed physicians.<sup>10</sup> The testing provision, part of a broader effort to raise the state's medical 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).<sup>11</sup> While the proposition failed, Californians supported the drug testing portion of Proposition 46 both

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

<sup>5</sup> H.B. 597, 2013 Leg., Reg. Sess. (N.H. 2013) [hereinafter HB-597].

<sup>6</sup> 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*, NEW HAMPSHIRE BAR J., Spring/Summer 2014, at 10.

<sup>7</sup> Aaron Sanborn, *Random Drug Testing Taken Out of Hepatitis C Bill*, SEACOASTONLINE.COM (Nov. 5, 2013, 2:00 AM), <http://www.seacoastonline.com/article/20131105/News/311050336>.

<sup>8</sup> Abramson et al., *supra* note 6 (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).

<sup>9</sup> HB-597, *supra* note 5. Although New Hampshire successfully enacted legislation mandating that hospitals create drug testing policies, the statute does not require random drug testing, as HB-597 did. See N.H. REV. STAT. ANN. § 151:41 (LexisNexis 2015).

<sup>10</sup> SEC'Y OF STATE OF CAL., TEXT OF PROPOSED LAWS 46 (2014), <http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf#prop46> [hereinafter Proposition 46]; *California Proposition 46, Medical Malpractice Lawsuits Cap and Drug Testing of Doctors (2014)*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_46\\_Medical\\_Malpractice\\_Lawsuits\\_Cap\\_and\\_Drug\\_Testing\\_of\\_Doctors\\_\(2014\)](https://ballotpedia.org/California_Proposition_46_Medical_Malpractice_Lawsuits_Cap_and_Drug_Testing_of_Doctors_(2014)) (last visited Feb. 1, 2016).

<sup>11</sup> Proposition 46, *supra* note 10, at sec. 4 § 2350.10; see 49 C.F.R. § 40 (2016).

before<sup>12</sup> and after the November elections,<sup>13</sup> although many fiercely debated its constitutionality. For example, Natasha Minsker, the Associate Director of the American Civil Liberties Union of Northern 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.<sup>14</sup> On the other hand, advocacy group Consumer Watchdog argued that doctors are within the class of employees that may constitutionally be tested,<sup>15</sup> and that Proposition 46 is a constitutional method of doing so.<sup>16</sup>

After its turn at the polls in November 2014, Proposition 46 failed to become law, with sixty-seven percent of voters opposing it.<sup>17</sup> 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 its failure: “in this health care environment, undermining California’s long-standing malpractice cap is a political poison pill.”<sup>18</sup> Further, because the testing mandate was allegedly included in the

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<sup>12</sup> 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), <https://pressroom.usc.edu/usc-dornsifela-times-poll-support-for-prop-46-drops-steeply-as-voters-hear-initiative-details/> [hereinafter USC Press Release] (explaining that a September 2014 poll conducted by USC Dornsife and the *Los Angeles Times* revealed that Proposition 46’s testing mandate was the most popular of the suggested measures, with seventy percent of those polled in support of the idea).

<sup>13</sup> 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, “[t]he American Civil Liberties Union and California’s biggest doctor lobby didn’t completely dismiss the idea of drug testing doctors”).

<sup>14</sup> Christopher Cadelago, *Doctor Drug Testing Latest Front in Medical Malpractice Measure*, SACRAMENTO BEE (Aug. 21, 2014, 9:16 PM), <http://www.sacbee.com/news/politics-government/election/article2607425.html>; 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>.

<sup>15</sup> 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), <http://www.consumerwatchdog.org/newsrelease/consumer-watchdog-campaign-prop-46-author-calls-aclu-explain-why-it-says-doctors-are-not>.

<sup>16</sup> Cadelago, *supra* note 14.

<sup>17</sup> Michael F. Haverluck, *Did CA Keep Costs Low by Voting Down Raising Malpractice Cap?*, ONENEWSNOW (Nov. 15, 2014), <http://www.onenewsnow.com/legal-courts/2014/11/15/did-ca-keep-costs-low-by-voting-down-raising-malpractice-cap#.VKAm8DDD>.

<sup>18</sup> 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>.

initiative as a “sweetener” designed to get voters to approve raising [Medical Injury Compensation Reform Act] caps, which would be less likely to win on its own,”<sup>19</sup> 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 four times per year.<sup>20</sup> The state legislators ultimately decided to replace the random test provision with a more politically pleasing substitute: testing based on the nebulous “reasonable suspicion.”<sup>21</sup> 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 health care workers? Opponents claim that drug testing is ineffective and invades personal privacy,<sup>22</sup> but those arguments would also seem to apply to pilots, teachers, and clerical assistants, all of whom are subject to testing.<sup>23</sup>

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. If it is ethically acceptable to test bus drivers<sup>24</sup> despite the supposed flaws in drug testing,<sup>25</sup> 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

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<sup>19</sup> Yul D. Ejnes, *California’s Proposition 46 and Mandatory Physician Drug Testing: A Cause for Concern*, ANNALS INTERNAL MED., Dec. 16, 2014, at 911, 911.

<sup>20</sup> HB-597, *supra* note 5; *see also* Sanborn, *supra* note 7 (explaining that since its introduction, organizations such as the New Hampshire Association of Counties opposed HB-597 because “mandatory random drug testing would have a significant cost to the state’s [eleven] nursing homes and three assisted-living facilities”).

<sup>21</sup> Abramson et al., *supra* note 6, at 14; *see also* N.H. REV. STAT. ANN. § 151:41 (LexisNexis 2015). Based on the elimination of the random testing provision, it seems that HB-597 was also a victim of politics.

<sup>22</sup> *See* Brandon Cohen, *Drug-Test Physicians? Docs Say ‘No Way’*, MEDSCAPE (Aug. 26, 2014), <http://www.medscape.com/viewarticle/830211>.

<sup>23</sup> *See infra* Part IV.

<sup>24</sup> 49 C.F.R. § 382.103(a) (2016) (explaining that all “persons who operate a commercial motor vehicle in commerce in any State” are subject to drug testing).

<sup>25</sup> Kristina Fiore, *APA: Drug Test Results Often Flawed*, MEDPAGE TODAY (May 23, 2010), <http://www.medpagetoday.com/MeetingCoverage/APA/20253> (noting that one in twenty patients will receive an inaccurate drug test result, which is more likely to be a false positive than a false negative).

estimated to eventually decrease health care spending,<sup>26</sup> but it also helps to ensure the safety of the doctor-visiting public.<sup>27</sup>

Despite the logic behind drug testing medical professionals, calls to implement such testing, especially on a random basis, repeatedly fail in the political arena.<sup>28</sup> Accordingly, to finally pass state-mandated testing for chemical impairment into law, 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 (HCWs)<sup>29</sup> based on recent data brought to light by the debates surrounding Proposition 46. Part IV will explain the constitutional framework for drug testing set forth in United States Supreme Court precedent, and Part V will employ that framework to demonstrate that HCWs 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.

Part VI 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

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<sup>26</sup> CAL. ATTORNEY GEN., PROPOSITION 46, ANALYSIS BY THE LEG. ANALYST 31, <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, thus, a decrease in overall health care spending); *see also* Michael R. Oreskovich et al., *Prevalence of Alcohol Use Disorders Among American Surgeons*, ARCH. SURG., Feb. 2012, at 168, 170–71 (explaining that, according to a study, testing might reduce malpractice litigation because “[s]urgeons with alcohol abuse or dependence constituted 77.7% of surgeons reporting a medical error in the previous 3 months,” which “suggest[s] a potential relationship [between alcohol abuse or dependence and] quality of care”).

<sup>27</sup> 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 with a safer and healthier supply of medical professionals.

<sup>28</sup> *See* discussion *infra* Parts II.B & II.D.

<sup>29</sup> This Comment proposes guideposts for drug testing all “health care workers,” a group that 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, U.S. DEP’T OF LABOR (Dec. 17, 2015), <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 dietitian would not. *Id.*

on a drug test alone to ensure patient safety. Part VII examines the unintended consequences of drug testing HCWs and rebuts the common oppositions to testing. Finally, Part VIII 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

Proposition 46, entitled the Pack Patient Safety Act (PPSA), 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*

The 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.<sup>30</sup> The physicians failed to check the state's prescription drug monitoring system, called the Controlled Substance Utilization Review and Evaluation System (CURES), prior to prescribing painkillers to the driver, Jimena Barreto.<sup>31</sup>

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.<sup>32</sup> Dissatisfied with the remedies available to those suffering such losses, Mr. Pack introduced

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<sup>30</sup> *New Measure Would Require Drug Testing for Doctors*, ABC 7 NEWS (May 16, 2014), <http://abc7news.com/news/new-measure-would-require-drug-testing-for-doctors/64182/>.

<sup>31</sup> 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>.

<sup>32</sup> 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 not been adjusted for inflation since its passage in 1975, which would today amount to \$1.1 million); *see also* Proposition 46, *supra* note 10, at sec. 2.

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 failed to prevent such a catastrophe.<sup>33</sup>

For purposes of this Comment, the most important provision in the PPSA is the statewide drug and alcohol testing of physicians with admitting privileges,<sup>34</sup> a group with a recognized substance abuse problem.<sup>35</sup> In fact, in a March 2000 report, the Medical Board of California (the “California Board”) announced that eighteen percent of Californian physicians “may abuse alcohol or drugs during their lifetime.”<sup>36</sup> Since 2003, the California Board has disciplined 326 physicians for drug or alcohol abuse,<sup>37</sup> imposing sanctions in forty-six such cases between 2012 and 2013 alone.<sup>38</sup> 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 and practice restrictions.<sup>39</sup> California shut down its program in 2008 after finding that it “permitt[ed] impaired physicians to continue to practice” and was not “effective in adequately protecting patients from substandard care.”<sup>40</sup>

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<sup>33</sup> See 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), <http://www.consumerwatchdog.org/newsrelease/consumer-watchdog-campaign-prop-46-requiring-physicians-check-statewide-prescription-dru>; see also Miranda, *supra* note 32.

<sup>34</sup> Proposition 46, *supra* note 10, at sec. 4 § 2350.25(a), (a)(1) (providing that “hospitals shall conduct testing . . . on physicians who are employees or contractors or who have the privilege to admit patients,” covering nearly the whole spectrum of physicians practicing within a hospital).

<sup>35</sup> Proposition 46, *supra* note 10, at sec. 2 (citing studies from the *Annals of Internal Medicine*, which reveal that “at least one in ten physicians suffers from drug or alcohol abuse during his or her career” and that one-third of physicians will experience a condition, such as substance abuse, that will affect the safety of their practice).

<sup>36</sup> MED. BD. OF CAL., PHYSICIAN DIVERSION PROGRAM 6 (2000), <http://www.protectconsumerjustice.org/wp-content/uploads/2014/07/MBC.pdf>.

<sup>37</sup> Press Release, Consumer Watchdog, Consumer Watchdog Campaign: Dr. Stephen Loyd, Who Survived Substance Abuse, Warns of Undetected Physician Impairment and Says New Ad Against Prop. 46 Will “Cost People Their Lives” (Oct. 6, 2014), <http://www.consumerwatchdog.org/newsrelease/consumer-watchdog-campaign-dr-stephen-loyd-who-survived-substance-abuse-warns-undetected>.

<sup>38</sup> MED. BD. OF CAL., 2012–2013 ANNUAL REPORT, at vii (2013), [http://www.mbc.ca.gov/Publications/Annual\\_Reports/annual\\_report\\_2012-2013.pdf](http://www.mbc.ca.gov/Publications/Annual_Reports/annual_report_2012-2013.pdf).

<sup>39</sup> Keith H. Berge et al., *Chemical Dependency and the Physician*, MAYO CLINIC PROCEEDINGS, July 2009, at 625, 630, <http://www.mayoclinicproceedings.org/article/S0025-6196%2811%2960751-9/pdf>.

<sup>40</sup> *Id.*; see also Peter Eisler, *Doctors, Medical Staff on Drugs Put Patients at Risk*, USA TODAY (Apr. 17, 2014, 5:08 PM), <http://www.usatoday.com/story/news/nation/>

To implement the testing program, the PPSA would have adopted the guidelines used by the Federal Aviation Administration (FAA),<sup>41</sup> which govern the drug and alcohol workplace policies for pilots, air traffic controllers, and other employees working on or near aircrafts.<sup>42</sup>

While the PPSA cross-referenced the FAA policy,<sup>43</sup> it specifically enumerated key features of its proposed program in the text of the initiative itself, the most controversial of which targeted testing.<sup>44</sup> Under the PPSA, the California 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 engaging in other similar events as listed in Section 1279.1 of the California Health and Safety Code.<sup>45</sup> The Act required that within twelve hours of learning of the event, the physician that treated the patient or prescribed him medication during the twenty-four hours preceding the incident, report to a hospital for testing, for which he must pay out of his own pocket.<sup>46</sup> Upon a physician’s failure to appear for testing or refusal to provide a sample, the Attorney General’s Health Quality Enforcement Section would have immediately suspended him pending an investigation and notified his employer of both the suspension and investigation.<sup>47</sup>

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.<sup>48</sup> This objective was problematic due to the medical profession’s notorious culture of silence,<sup>49</sup> but the

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2014/04/15/doctors-addicted-drugs-health-care-diversion/7588401/.

<sup>41</sup> Proposition 46, *supra* note 10, at sec. 4 § 2350.10 (proposing that physicians be tested according to 49 C.F.R. § 40, the testing procedure utilized by the Department of Transportation (DOT)); *see also* 49 C.F.R. § 40 (2016). The FAA is regulated by the DOT, so its policy largely mirrors the DOT guidelines but includes provisions tailored for aviation employees. 14 C.F.R. § 120 (2016).

<sup>42</sup> 49 C.F.R. § 40; 14 C.F.R. § 120.

<sup>43</sup> Proposition 46, *supra* note 10, at sec. 4 § 2350.10.

<sup>44</sup> *Id.* at sec. 4.

<sup>45</sup> CAL. HEALTH & SAFETY CODE § 1279.1(b)(1)(C), (b)(4)(A) (Deering 2016).

<sup>46</sup> Proposition 46, *supra* note 10, at sec. 4 § 2350.25(a)(2), (b).

<sup>47</sup> *Id.* at sec. 4 § 2350.30; *see also* Eisler, *supra* note 40 (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”).

<sup>48</sup> Proposition 46, *supra* note 10, at sec. 4 § 2350.25(a)(3).

<sup>49</sup> Many sources have discussed the unwillingness of HCWs to report an intoxicated colleague. *See* Eisler, *supra* note 40 (stating that despite the numerous times David Kwiatkowski was 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); Carla K. Johnson, *Many Docs Don’t Blow Whistle on*

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.<sup>50</sup>

The DOT testing guidelines underlie the FAA regulations and call for the testing, and confirmatory testing, of an employee's breath and urine samples.<sup>51</sup> If the second test reveals a negative result, the laboratory considers both results as negative, and the matter is concluded.<sup>52</sup> If the test result is positive, the HCW may provide a legal explanation for the presence of the drug.<sup>53</sup> If he is unable to do so, his results are forwarded to the California Board, triggering the same disciplinary procedures that follow a failure or refusal to test.<sup>54</sup> Like the FAA guidelines,<sup>55</sup> the PPSA suggested testing for the presence of "marijuana metabolites, cocaine metabolites, amphetamines, opiate metabolites, and phencyclidine."<sup>56</sup>

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*Colleagues*, HUFFINGTON POST (July 14, 2010, 11:05 AM), [http://www.huffingtonpost.com/2010/07/14/many-docs-dont-blow-whist\\_n\\_645703.html](http://www.huffingtonpost.com/2010/07/14/many-docs-dont-blow-whist_n_645703.html) (reporting that seventeen percent 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).

<sup>50</sup> Proposition 46, *supra* note 10, at sec. 4 § 2350.20. The PPSA did not specify the consequences for a failure to report a colleague. *Id.* It would, however, have imposed a statutory duty upon Californian doctors to report an impaired colleague, which they are not otherwise required to do. See *Frequently Asked Questions—Complaint Review Process*, MED. BD. OF CAL., [http://www.mbc.ca.gov/Consumers/Complaints/Complaints\\_FAQ/Complaint\\_Process\\_FAQ.aspx](http://www.mbc.ca.gov/Consumers/Complaints/Complaints_FAQ/Complaint_Process_FAQ.aspx) (last visited Feb. 14, 2016) (explaining that physicians are not statutorily obligated to report an impaired colleague pursuant to the Medical Practice Act, but are encouraged by the California Board to do so); see also CAL. BUS. & PROF. CODE § 805(b) (Deering 2016) (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).

<sup>51</sup> See 49 C.F.R. §§ 40.251 (for alcohol), 40.87 (for drugs) (2016); see also Proposition 46, *supra* note 10, at sec. 4 § 2350.15(g) (providing for confirmatory testing of samples).

<sup>52</sup> See 49 C.F.R. §§ 40.255 (for alcohol), 40.87 (for drugs).

<sup>53</sup> 49 C.F.R. § 40.141; see also Proposition 46, *supra* note 10, at sec. 4 § 2350.15(g) (providing doctors a chance to explain a positive test result).

<sup>54</sup> Proposition 46, *supra* note 10, at sec. 4 § 2350.30 (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).

<sup>55</sup> U.S. DEP'T OF TRANSP., DOT DRUG TESTING: ON AND AFTER OCTOBER 1, 2010—STILL A 5-PANEL, [http://www.dot.gov/sites/dot.gov/files/docs/Part%2040DOT5-PanelNotice\\_0.pdf](http://www.dot.gov/sites/dot.gov/files/docs/Part%2040DOT5-PanelNotice_0.pdf) (last visited Feb. 14, 2016).

<sup>56</sup> Proposition 46, *supra* note 10, at sec. 4 § 2350.15(d); but see *Medical Professional*, LABCORP, [https://www.labcorp.com/wps/portal/!ut/p/c1/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os\\_hACzO\\_QCM\\_IwN3dyNXAyNjQ2MvHxcXYwNjM6B8JJK8hVGoBVDeNcjZ0MTXwMDdmIBuP4\\_83FT9gtyIcgBVIMyI/dl2/d1/L2dJQSEvUUt3QS9ZQnB3LzZfUTg2TlEyTjIwR0cyRTAyMzEzSkxERDMwVDM!/](https://www.labcorp.com/wps/portal/!ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os_hACzO_QCM_IwN3dyNXAyNjQ2MvHxcXYwNjM6B8JJK8hVGoBVDeNcjZ0MTXwMDdmIBuP4_83FT9gtyIcgBVIMyI/dl2/d1/L2dJQSEvUUt3QS9ZQnB3LzZfUTg2TlEyTjIwR0cyRTAyMzEzSkxERDMwVDM!/) (last visited Feb. 14, 2016)

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

The University of Southern California Dornsife and the *Los Angeles Times*, in a September 2014 poll, revealed that seventy percent of people supported the PPSA's testing mandate.<sup>57</sup> By Election Day, Proposition 46 proponents, comprised mostly of lawyers' and consumers' groups,<sup>58</sup> amassed \$12.4 million in support of the PPSA.<sup>59</sup> Other supporters included Democratic Party leaders and public safety and consumer advocates, such as Erin Brockovich and the founder of Mothers Against Drunk Driving, Candace Lightner.<sup>60</sup>

Conversely, PPSA opponents raised \$57.8 million to combat the initiative,<sup>61</sup> 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 at least \$10 million.<sup>62</sup> Other opponents included medical groups, labor unions, and civil liberties groups.<sup>63</sup> 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."<sup>64</sup>

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.<sup>65</sup>

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(offering a customizable drug test for HCWs based on the drugs available in the employer's workplace); *Medical Professional Panels*, QUEST DIAGNOSTICS, <http://blog.employersolutions.com/wp-content/uploads/2014/04/MedPro-Final.pdf> (last visited Feb. 14, 2016) (same).

<sup>57</sup> USC Press Release, *supra* note 12.

<sup>58</sup> BALLOTPEDIA, *supra* note 10.

<sup>59</sup> Haverluck, *supra* note 17.

<sup>60</sup> BALLOTPEDIA, *supra* note 10.

<sup>61</sup> Haverluck, *supra* note 17.

<sup>62</sup> Melanie Mason, *Poll: Weak Support for Prop. 46 Targeting Medical Malpractice*, L.A. TIMES (Sept. 13, 2014, 6:00 AM), <http://www.latimes.com/local/politics/la-me-pol-poll-malpractice-20140913-story.html#page=1>.

<sup>63</sup> BALLOTPEDIA, *supra* note 10.

<sup>64</sup> *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/>.

<sup>65</sup> 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](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

In fact, a few doctors and insurance group representatives have candidly said just that.<sup>66</sup> Accordingly, it appears that Californians are largely receptive to the idea of state-mandated drug and alcohol testing of physicians.<sup>67</sup>

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

In 2012, thirty-two patients of the cardiac catheterization lab at New Hampshire's Exeter Hospital were diagnosed with Hepatitis C.<sup>68</sup> 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 and asked him to leave.<sup>69</sup> Kwiatkowski worked in numerous hospitals across eight states, sometimes being fired less than two weeks into an assignment.<sup>70</sup> 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.<sup>71</sup> Ultimately, even the AART's investigation met a dead-end, and Kwiatkowski eventually found himself in New Hampshire's Exeter Hospital on a temporary assignment, thanks to his staffing agency.<sup>72</sup> Despite staff misgivings and resistance, Exeter hired Kwiatkowski as a full-time employee.<sup>73</sup>

One year later, an investigation into the Hepatitis C outbreak among the hospital's patients revealed that thirty-two patients had contracted the disease as a result of contaminated syringes: Kwiatkowski had been injecting himself with the patients' fentanyl and

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malpractice cap).

<sup>66</sup> Bob Egelko, *High-Impact Details in Initiative Aimed at Doctors*, SFGATE (Oct. 30, 2013, 7:47 PM), <http://www.sfgate.com/health/article/High-impact-details-in-initiative-aimed-at-doctors-4940955.php> (quoting Molly Weedn, California Medical Association spokeswoman, as saying that PPSA's CURES and testing provisions were "nothing more than window dressing").

<sup>67</sup> USC Press Release, *supra* note 12 (indicating that seventy percent of respondents favored the testing mandate, and forty-six percent of voters opposed increasing the medical malpractice cap).

<sup>68</sup> Abramson et al., *supra* note 6.

<sup>69</sup> *Id.* at 10, 11–12.

<sup>70</sup> *Id.* at 11–12 (explaining that Kwiatkowski was found unresponsive in a bathroom at work after overdosing on fentanyl merely two weeks into his assignment at Arizona Heart Hospital).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 12.

<sup>73</sup> *Id.*

replacing the used syringes with saline, knowing that they would soon be used on the patients.<sup>74</sup> 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 per year; if a facility failed to test, its license with the state would be suspended.<sup>75</sup>

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 due to the success of drug testing programs in the anesthesiology departments of two out-of-state hospitals.<sup>76</sup> Unfortunately, the New Hampshire Legislature diluted the bill before its passage, with the final version only requiring “health facilities to adopt policies permitting suspicion-based drug testing.”<sup>77</sup> The main reason for HB-597’s change in testing policy was cost: John Poirier, the president of New Hampshire’s Health Care Association, claimed it would cost \$2.6 million per year to test all 15,000 of the state’s HCWs.<sup>78</sup> Proponents of the original measure argued, however, that the change essentially gutted the bill, especially since most hospitals, like Exeter Hospital, already had suspicion-based testing policies in place before HB-597 was passed.<sup>79</sup>

### III. THE NEED TO RUN TESTS ON OUR DOCTORS

Despite its political unpopularity, data largely supports the idea of drug testing HCWs. According to a 2010 study, “[t]he 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 HCW substance abuse cases.<sup>80</sup> Another study, published in the *American*

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<sup>74</sup> Abramson et al., *supra* note 6.

<sup>75</sup> *Id.* at 13.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 14.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Marvin D. Seppala & Keith H. Berge, *The Addicted Physician: A Rational Response to an Irrational Disease*, MINN. MED., Feb. 2010, at 1, <https://www.mnhospitals.org/Portals/0/Documents/ptsafety/diversion/the-addicted-physician-a-rational-response-to-an-irrational-disease.pdf>; *see also* Oreskovich et al., *supra* note 26, at 170 (discussing a survey of 7000 members of the American College of Surgeons, which revealed that 15.4% of the respondents had responses “consistent with alcohol abuse or dependence”).

*Journal of Medical Sciences*, found that “approximately 15% of physicians will be impaired at some point in their careers.”<sup>81</sup> Furthermore, studies have shown that “chemical dependence is considered the most common disabling illness” among physicians,<sup>82</sup> 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.<sup>83</sup>

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. Christopher Duntsch, an alcoholic neurosurgeon from Texas whose performance was so horrific that the doctor called in to repair the damage caused by Duntsch contacted Duntsch’s medical school to see if he had actually graduated.<sup>84</sup> 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.<sup>85</sup>

Additionally, as was the case in New Hampshire, HCWs can harm patients through drug diversion, “the illegal removal of drugs from a healthcare facility.”<sup>86</sup> Like 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.<sup>87</sup>

Further compounding the difficulty in effectively 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 2000 physicians surveyed, seventeen percent said that they had personally known an impaired or incompetent physician in the past three years; two-thirds of them did not report their colleague to the relevant authority.<sup>88</sup>

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<sup>81</sup> Eugene V. Boisaubin & Ruth E. Levine, *Identifying and Assisting the Impaired Physician*, AM. J. MED. SCI., July 2001, at 31, 31, <http://www.ophed.net/system/files/2009/07/impaired-physician-1966-1966.pdf>.

<sup>82</sup> Abramson et al., *supra* note 6.

<sup>83</sup> *Id.*

<sup>84</sup> Saul Elbein, *Anatomy of a Tragedy*, TEXAS OBSERVER (Aug. 28, 2013, 2:01 PM), <http://www.texasobserver.org/anatomy-tragedy/>.

<sup>85</sup> *Id.*

<sup>86</sup> Abramson et al., *supra* note 6.

<sup>87</sup> Daniel R. Levinson & Erika T. Broadhurst, Opinion, *Why Aren't Doctors Drug Tested*, N.Y. TIMES, Mar. 12, 2014, at A27.

<sup>88</sup> *Pee in This Cup, Doc: Random Drug Tests Should Be Standard for Physicians*,

Once again, Mr. Kwiatkowski is a perfect example of this unfortunate phenomenon. Although various health care facilities in Michigan fired him for “gross misconduct” and “test[ing] positive for controlled substances,” 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.<sup>89</sup> Even when the University of Pittsburgh Medical Center finally alerted Kwiatkowski’s staffing agency that it had fired Kwiatkowski 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; the agency instead provided him with another assignment.<sup>90</sup> The incident at 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 informed Kwiatkowski’s staffing agency, which notified the AART.<sup>91</sup> Unfortunately, the AART dropped its investigation into the matter when it learned that the Phoenix Police Department chose not to press charges against Kwiatkowski.<sup>92</sup>

Another example comes from the case of Dr. Duntsch, the Texas neurosurgeon.<sup>93</sup> As part of the lawsuits filed by his injured patients, the plaintiffs alleged that Baylor Regional Medical Center of Plano—the hospital at which Dr. Duntsch practiced—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.<sup>94</sup> 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, [it] didn’t get paid.”<sup>95</sup> The patients also alleged that the hospital failed to act after Duntsch “skipped out on five drug tests that [it] asked him to take” and instead continued to advertise his services to the public.<sup>96</sup>

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SCIENTIFIC AM. (Nov. 1, 2014), <http://www.scientificamerican.com/article/pee-in-this-cup-doc-random-drug-tests-should-be-standard-for-physicians/>.

<sup>89</sup> Abramson et al., *supra* note 6, at 11 (internal quotation marks omitted).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 12.

<sup>92</sup> *Id.* at 12.

<sup>93</sup> See *infra* text accompanying footnote 84.

<sup>94</sup> Saul Elbein, *Licensed to Kill: Lawsuit Seeks to Overturn Texas Hospital Shield Law*, THE GUARDIAN (May 2, 2014, 10:04 AM), <http://www.theguardian.com/world/2014/may/02/texas-legal-doctor-lawsuit-christopher-duntsch>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

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,<sup>97</sup> 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,<sup>98</sup> 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.<sup>99</sup> After the Supreme Court decided the landmark cases of *Skinner v. Railway Labor Executives' Association*<sup>100</sup> and *National Treasury Employees Union v. Von Raab*,<sup>101</sup> 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 *Vernonia School District 47J v. Acton*<sup>102</sup> and *Chandler v. Miller*.<sup>103</sup> As a result of these four cases, employers ascertained that they could lawfully test their employees when a governmental interest in testing, beyond the ordinary law enforcement need to collect criminal evidence, is both present and sufficiently strong as to outweigh the employee's interest in privacy.<sup>104</sup>

Using this framework, employers have implemented, and courts have upheld as constitutional, the testing of employees: in "safety-sensitive" occupations;<sup>105</sup> who enjoy a diminished expectation of

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<sup>97</sup> See *infra* Part IV.B.

<sup>98</sup> *Skinner v. Ry. Labor Execs.' 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.").

<sup>99</sup> *Id.* at 607–08 (explaining that in 1983, the Federal Railroad Administration (FRA) promulgated regulations requiring railroads to test pockets of employees after finding that industry prohibitions on alcohol were insufficient to address widespread drug and alcohol abuse); see also Exec. Order No. 12,564, 51 Fed. Reg. 32889 (Sept. 15, 1986), <http://www.archives.gov/federal-register/codification/executive-order/12564.html> (establishing a testing policy for all federal employees).

<sup>100</sup> 489 U.S. 602 (1989).

<sup>101</sup> 489 U.S. 656 (1989).

<sup>102</sup> 515 U.S. 646 (1995).

<sup>103</sup> 520 U.S. 305 (1997).

<sup>104</sup> *Id.* at 313–14.

<sup>105</sup> *Skinner*, 489 U.S. at 633.

privacy by virtue of working in a highly regulated field;<sup>106</sup> and whose individual interest in privacy is outweighed by a governmental interest in ensuring that they are not impaired while working.<sup>107</sup> Classes of employees that fall within this framework include teachers,<sup>108</sup> trucking company drivers,<sup>109</sup> and flight attendants.<sup>110</sup>

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), a labor union filed suit to enjoin the testing.<sup>111</sup> 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.<sup>112</sup>

In the event of an "impact accident," the FRA mandated that employers collect and test blood and urine samples from the employees "directly involved" in the incident.<sup>113</sup> The regulations allowed employees an opportunity to explain a positive test before the FRA prepared an investigative report and required a nine-month suspension of those who refused to provide a sample.<sup>114</sup> 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, personal observations" that the

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<sup>106</sup> *Id.* at 627.

<sup>107</sup> *Id.* at 633.

<sup>108</sup> *Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir. 1998) (finding that teachers occupy safety-sensitive positions because they monitor children entrusted to their care and have immediate impact upon a child's life).

<sup>109</sup> *Overview of Drug and Alcohol Rules*, FED. MOTOR CARRIER SAFETY ADMIN., <http://www.fmcsa.dot.gov/overview-drug-and-alcohol-rules> (last updated Apr. 8, 2015).

<sup>110</sup> *Bluestein v. Skinner*, 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").

<sup>111</sup> *Skinner*, 489 U.S. at 612.

<sup>112</sup> *Id.* at 606–07 (discussing the FRA's evidence that between 1972 and 1983, more than twenty accidents involving "alcohol or drug use as a probable cause or contributing factor" and "result[ing] in 25 fatalities, 61 non-fatal injuries, and property damage estimated at \$19 million (approximately \$27 million in 1982 dollars)" had occurred on railroads) (citation and internal quotation marks omitted).

<sup>113</sup> *Id.* at 609.

<sup>114</sup> *Id.* at 610–11.

employee was impaired on the job.<sup>115</sup>

The Supreme Court upheld the testing, establishing first that the Fourth Amendment,<sup>116</sup> which protects individuals from unreasonable searches and seizures, applies to “certain arbitrary and invasive acts by officers of the Government” and those “act[ing] as an instrument or agent” thereof.<sup>117</sup> 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.<sup>118</sup>

Next, the Court recognized the blood, breath, and urine testing as Fourth Amendment searches because the tests infringe upon “expectation[s] of privacy that society is prepared to recognize as reasonable.”<sup>119</sup> Blood and breath tests physically intrude upon the body to obtain a sample of blood or “deep lung” breaths for analysis.<sup>120</sup> While urinalysis is not physically intrusive in the same way, the process by which the sample is obtained is irrefutably private.<sup>121</sup> Likewise, the information revealed by urinalysis is personal, ranging from drug use to medical conditions, such as epilepsy and diabetes.<sup>122</sup>

After establishing that such testing falls within the ambit of the Constitution, the Court paved the way to warrantlessly collecting specimens for testing.<sup>123</sup> The Fourth Amendment requires a warrant to conduct a search, but that necessity is dispensed with when an exception applies.<sup>124</sup> Luckily for employers, one such exception applies when “special needs [] beyond the normal need for law enforcement” motivate the search.<sup>125</sup> 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 merely balances the government’s interest in conducting the search on the one hand and

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<sup>115</sup> *Id.* at 611.

<sup>116</sup> U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

<sup>117</sup> *Skinner*, 489 U.S. at 613–14.

<sup>118</sup> *Id.* at 615–16.

<sup>119</sup> *Id.* at 617.

<sup>120</sup> *Id.* (citation and internal quotations marks omitted).

<sup>121</sup> *Id.* (“[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.” (quoting Nat’l Treasury Emps. Union v. Von Raab, 816 F.2d 170, 175 (1987))).

<sup>122</sup> *Id.*

<sup>123</sup> *Skinner*, 489 U.S. at 624.

<sup>124</sup> *Id.* at 619.

<sup>125</sup> *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

the intrusion of an individual's Fourth Amendment rights on the other.<sup>126</sup>

The *Skinner* Court identified 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.<sup>127</sup> 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."<sup>128</sup>

The Court then balanced the employees' interest in privacy and bodily integrity against the government's strong interest in safety and found that, while not insignificant, the employees' privacy interests were minimally implicated by the testing program.<sup>129</sup> To begin with, blood tests are routinely and safely performed during annual physicals, such that they do not hurt or traumatize employees.<sup>130</sup> Breath tests are even less intrusive and can be done "with a minimum of inconvenience or embarrassment."<sup>131</sup> 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.<sup>132</sup> Under such circumstances, the urinalysis is similar to providing a urine sample during an annual physical.<sup>133</sup> 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.<sup>134</sup> The Court also noted that the regulations themselves provided those administering the tests with minimal discretion.<sup>135</sup>

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<sup>126</sup> *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

<sup>127</sup> *Id.* at 621, 632.

<sup>128</sup> *Id.* at 620, 628.

<sup>129</sup> *Skinner*, 489 U.S. at 624–25.

<sup>130</sup> *Id.* at 625 (explaining that blood tests generally extract minimal amounts of blood and "that for most people the procedure involves virtually no risk, trauma, or pain" (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966))) (internal quotation marks omitted).

<sup>131</sup> *Id.* at 625.

<sup>132</sup> *Id.* at 626–27.

<sup>133</sup> *Id.* at 627.

<sup>134</sup> *Id.* at 627–28.

<sup>135</sup> *Skinner*, 489 U.S. at 634.

Finally, the Court emphasized that the FRA created a program with “an effective means of deterring employees . . . from using controlled substances or alcohol in the first place.”<sup>136</sup> Based on all of the circumstances, *Skinner* held that the test minimally intruded on privacy interests.<sup>137</sup> 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.”<sup>138</sup>

## 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.”<sup>139</sup> 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.”<sup>140</sup> 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.<sup>141</sup> If the physician concluded that there was no legal explanation for the positive result, the employee would be dismissed.<sup>142</sup>

To decide the case, the Supreme Court applied the reasonableness test just announced in *Skinner*.<sup>143</sup> The government interests identified in *Von Raab* included deterring employees from using drugs and alcohol and “prevent[ing] the promotion of drug users to [the specified] positions.”<sup>144</sup> The Court found that, as “our Nation’s first line of defense” against drug importation and its

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<sup>136</sup> *Id.* at 629–30 (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).

<sup>137</sup> *Id.* at 628.

<sup>138</sup> *Id.*

<sup>139</sup> Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 660–61 (1989).

<sup>140</sup> *Id.* at 661–62.

<sup>141</sup> *Id.* at 662.

<sup>142</sup> *Id.* at 663.

<sup>143</sup> *Id.* at 665–66 (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).

<sup>144</sup> *Id.* at 666.

accompanying crime, Customs officials hold “safety-sensitive” occupations—if the agents are not alert as a result of their drug use, “[t]his national interest in self-protection could be irreparably damaged.”<sup>145</sup> Moreover, it is uncontroverted that handling weapons is a safety-sensitive task fraught with risks of catastrophic injury.<sup>146</sup> The Court concluded that the public “should not bear the risk” of such employees working while impaired and that the burden should instead fall on the U.S. Customs Service and its employees.<sup>147</sup>

While Customs agents undoubtedly have an interest in their bodily integrity and informational privacy, the majority held that the agents’ interests are “diminished” with respect to “the intrusions occasioned by a urine test.”<sup>148</sup> 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.”<sup>149</sup> 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.<sup>150</sup>

*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.<sup>151</sup> 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.”<sup>152</sup> Finally, the access that agents have to the “vast sources of [confiscated] valuable contraband” provides another reason to test, due to the inevitable temptation presented to drug-using employees.<sup>153</sup>

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<sup>145</sup> *Von Raab*, 489 U.S. at 668, 670.

<sup>146</sup> *Id.* at 670.

<sup>147</sup> *Id.* at 670–71.

<sup>148</sup> *Id.* at 672.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 672 n.2.

<sup>151</sup> *Von Raab*, 489 U.S. at 674.

<sup>152</sup> *Id.* at 660 (citation and internal quotation marks omitted), 674–75.

<sup>153</sup> *Id.* at 669.

### 3. *Vernonia 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 Vernonia, Oregon, was testing its students.<sup>154</sup> After noticing an increase in drug use in the 1980s, the Vernonia School District implemented a testing program to eradicate school drug use by testing “the leaders of the drug culture,” the school athletes.<sup>155</sup> In Vernonia, 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 at the beginning of the season and then randomly throughout.<sup>156</sup> The students provided the urine sample in an “empty locker room accompanied by an adult monitor of the same sex.”<sup>157</sup> The samples were tested for amphetamines, cocaine, and marijuana, but administrators could request testing for other drugs.<sup>158</sup> An outside laboratory tested the samples and sent the reports to the school superintendent, but the vice-principals and athletic directors also had access to the results.<sup>159</sup> 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.<sup>160</sup>

The plaintiff, a seventh-grade boy not admitted to the football team for failure to sign the consent form, filed suit against the school for violating his Fourth and Fourteenth Amendment rights.<sup>161</sup> In assessing the reasonableness of the program, the Court first noted the key player in *Acton*: the administration of a public school district, an entity with “a degree of supervision and control” over the minors within its care.<sup>162</sup> Because of the school’s caretaking role and the students’ status as minors, Acton and his classmates necessarily enjoyed a lesser expectation of privacy.<sup>163</sup> Additionally, the student-athlete subset reasonably held an even lower expectation of privacy because of the regulations accompanying participation in school sports (such as

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<sup>154</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995).

<sup>155</sup> *Id.* at 648–50.

<sup>156</sup> *Id.* at 650.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 650–51.

<sup>159</sup> *Id.* at 651.

<sup>160</sup> *Acton*, 515 U.S. at 651.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 655.

<sup>163</sup> *Id.* at 654.

preseason physicals and 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.).<sup>164</sup>

Further, the Court found the invasiveness of the sample-collecting method “negligible.”<sup>165</sup> Because the students provided the specimens either from a urinal or bathroom stall, the “conditions [we]re nearly identical to those typically encountered in public restrooms.”<sup>166</sup> Although the majority expressed concern that the school required the disclosure of medication information prior to testing, the Justices noted that such disclosures 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.”<sup>167</sup>

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.<sup>168</sup> The majority reasoned that middle- and high-school aged 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.<sup>169</sup> 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 general student body.<sup>170</sup> Based on the students’ low expectation of privacy, the program’s narrow tailoring and minimal level of intrusion, and the strong government interest at hand, the Vernonia School District’s drug screening policy was upheld as reasonable under the Fourth Amendment.<sup>171</sup>

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<sup>164</sup> *Id.* at 657.

<sup>165</sup> *Id.* at 658.

<sup>166</sup> *Acton*, 515 U.S. at 658.

<sup>167</sup> *Id.* at 659.

<sup>168</sup> *Id.* at 661.

<sup>169</sup> *Id.* at 661–62.

<sup>170</sup> *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).

<sup>171</sup> *Id.* at 664–65.

#### 4. *Chandler v. Miller*

In 1997, the Supreme Court rounded out its approach to employee drug testing when it handed down *Chandler v. Miller*.<sup>172</sup> In *Chandler*, the Georgia Legislature enacted a statute that required candidates running for state office to test negatively for drugs “within thirty days prior to qualifying for nomination or election.”<sup>173</sup> The plaintiffs, Libertarian Party nominees, filed suit to enjoin the program for violating their First, Fourth, and Fourteenth Amendment rights.<sup>174</sup> Following the decisions in *Skinner*, *Von Raab*, and *Acton*, 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.”<sup>175</sup>

For the first time in the Court’s drug testing case history, it held that the statute violated the candidates’ Fourth Amendment rights.<sup>176</sup> 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 each candidate’s choosing.<sup>177</sup> 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.<sup>178</sup>

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,”<sup>179</sup> the inability to monitor the employees daily to garner an individualized suspicion,<sup>180</sup> and the existence of “high-risk, safety-sensitive tasks.”<sup>181</sup> As such, the Court concluded that Georgia’s need was not special, but rather

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<sup>172</sup> *Chandler v. Miller*, 520 U.S. 305 (1997).

<sup>173</sup> *Id.* at 309–10 (some of the offices for which Georgia required testing include: governor or lieutenant governor; state Attorney General; state court judge; district attorney; or Public Service Commission member).

<sup>174</sup> *Id.* at 310.

<sup>175</sup> *Id.* at 311.

<sup>176</sup> *Id.* at 323.

<sup>177</sup> *Id.* at 312, 318.

<sup>178</sup> *Chandler*, 520 U.S. at 318, 321–22.

<sup>179</sup> *Id.* at 319.

<sup>180</sup> *Id.* at 321.

<sup>181</sup> *Id.* at 321–22. 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.

“symbolic,” and opined that infringing personal privacy for the sake of a symbol is precisely what the Fourth Amendment was intended to prevent.<sup>182</sup>

#### 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 constitutes a “special need.”<sup>183</sup> Such a need dispenses with the traditional requirements of a warrant and probable cause to search an individual.<sup>184</sup> Accordingly, to determine the reasonableness of the search, the court must balance the government’s interest in testing against the employee’s privacy interests.<sup>185</sup> Some of the factors that the Court has considered in this determination include: whether the employee performs safety-sensitive duties;<sup>186</sup> whether the employee works in a highly regulated field;<sup>187</sup> whether the industry currently faces a drug and/or alcohol use problem;<sup>188</sup> how much the test intrudes upon privacy interests;<sup>189</sup> 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.<sup>190</sup>

### 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.”<sup>191</sup> 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.”<sup>192</sup> In *Acton*, the

<sup>182</sup> *Id.* at 322.

<sup>183</sup> *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Chandler*, 520 U.S. at 321–22; *Skinner*, 489 U.S. at 620; *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 669–70 (1989).

<sup>187</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995); *Skinner*, 489 U.S. at 627; *Von Raab*, 489 U.S. at 671–72.

<sup>188</sup> *Chandler*, 520 U.S. at 321; *Acton*, 515 U.S. at 648–49; *Skinner*, 489 U.S. at 606–07.

<sup>189</sup> *Chandler*, 520 U.S. at 318; *Acton*, 515 U.S. at 658; *Skinner*, 489 U.S. at 624–25; *Von Raab*, 489 U.S. at 672.

<sup>190</sup> *Chandler*, 520 U.S. at 321–22; *Skinner*, 489 U.S. at 630.

<sup>191</sup> U.S. CONST. amend. IV.

<sup>192</sup> *Skinner*, 489 U.S. at 613–14.

Supreme Court clarified that state-administered or -mandated testing 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.<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup>

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.<sup>196</sup> Because a 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.”<sup>197</sup> 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 immediacy of the state’s need to test and the efficacy of the means by which the government achieves that goal.<sup>198</sup>

##### 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

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<sup>193</sup> *Acton*, 515 U.S. at 652 (“We have held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers . . .”).

<sup>194</sup> *Skinner*, 489 U.S. at 614.

<sup>195</sup> *Id.* at 616–17.

<sup>196</sup> *Id.* at 620.

<sup>197</sup> Proposition 46, *supra* note 10, at sec. 4 § 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 (2016).

<sup>198</sup> *See Acton*, 515 U.S. at 660.

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 and/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 those substances."<sup>199</sup> 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 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.<sup>200</sup> 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 "[t]he most salient factor."<sup>201</sup> Thus, although it would be rare for a drunk HCW to endanger the lives of multiple people,<sup>202</sup> it is undeniable that a HCW poses a more immediate and more 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.<sup>203</sup> The plaintiff HCWs who sued to enjoin the testing program included a Clinical Specialist

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<sup>199</sup> *Skinner*, 489 U.S. at 633.

<sup>200</sup> *Kemp v. Claiborne Cty. Hosp.*, 763 F. Supp. 1362, 1367, 1369 (S.D. Miss. 1991).

<sup>201</sup> *Id.* at 1367 (citing *Am. Fed'n of Gov't Emps. v. Sullivan*, 744 F. Supp. 294, 300 (D.D.C. 1990)).

<sup>202</sup> Although it is rare that a doctor might 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.

<sup>203</sup> *Am. Fed'n of Gov't Emps. L-2110 v. Derwinski*, 777 F. Supp. 1493, 1498 (N.D. Cal. 1991).

Pharmacist, a licensed graduate nurse, a Medical Technologist, a physician-pathologist, and a Dialysis Unit supervisor.<sup>204</sup> It is key that, like the plaintiff in *Kemp*, some of these employees had very little opportunity to erroneously operate on a patient or prescribe a fatal dosage of a drug.<sup>205</sup> Nonetheless, the *Derwinski* court found that all of the plaintiffs 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.<sup>206</sup>

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 usually tends to a patient on a one-on-one basis, save for a nurse, decreasing the chance of a third party 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.<sup>207</sup> Because an HCW’s professional objective is to affect the condition of a patient’s body, it is not difficult to imagine how an inebriated HCW could harm a patient due to a lapse in judgment. For example, a

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<sup>204</sup> *Id.* at 1495–97.

<sup>205</sup> *Id.* at 1496–97 (noting that a nurse, Medical Technologist, and Dialysis Unit supervisor infrequently have contact with patients).

<sup>206</sup> *Id.* at 1496, 1498 (holding that a nurse was lawfully subject to testing even though she had no access to narcotic drugs, did not handle surgical instruments, and “devote[d] only 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 v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 628 (1989).

<sup>207</sup> *Prop. 46: Drug and Alcohol Testing of Doctors; Medical Negligence Lawsuits; Initiative Statute*, SEC’Y OF STATE OF CAL., <http://vigarchive.sos.ca.gov/2014/general/en/propositions/46/arguments-rebuttals.htm> (last visited Feb. 14, 2016). These motivations, then, are very similar to the government interests advanced in *Skinner*. See discussion *supra* Part IV.A.1.

drunken doctor could leave in the middle of an open-heart surgery to go out to lunch, or could badly err in delivering a baby, rendering the birthing mother a quadriplegic.<sup>208</sup> The data and reports of impaired HCWs<sup>209</sup> 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.<sup>210</sup>

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.<sup>211</sup> Further, the *Derwinski* court recognized the interest in testing hospital employees as ensuring the integrity of the workers and enhancing public safety.<sup>212</sup> The district court held that maintaining the integrity of the medical profession is “of compelling concern” because hospitals “exist for precisely [the] purpose” of ensuring the safety of those who seek medical attention.<sup>213</sup> 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.<sup>214</sup> Thus, while this interest may seem to mirror *Chandler*’s symbolic interest, the gravity of the duties performed distinguishes the interest in upholding a doctor’s ethical obligation to remain sober

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<sup>208</sup> Press Release, Consumer Watchdog, Consumer Watchdog Campaign: California Ballot Initiative Will Enact Nation’s First Law Requiring Random Drug Testing of Physicians (Apr. 16, 2014), <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 “stretch[ed] her neck and spinal cord like taffy.” *Id.*; see also Edward J. Boyer, *Girl 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](http://articles.latimes.com/1991-07-02/local/me-1814_1_spinal-cord-injury) (explaining the patient’s allegation that, after her delivery, two other doctors “entered a conspiracy of silence” to protect the delivering doctor despite the clear evidence of his negligence and instead told her family that she “had a hereditary disease and would die in a few months”) (internal quotation marks omitted).

<sup>209</sup> See discussion *supra* Part III.

<sup>210</sup> *Chandler v. Miller*, 520 U.S. 305, 319 (1997) (stating that while there need not be a documented problem of substance abuse among the employees at issue, such a finding helps “shore up” the need for government involvement).

<sup>211</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995).

<sup>212</sup> *Am. Fed’n of Gov’t. Emps. L-2110 v. Derwinski*, 777 F. Supp. 1493, 1498 (N.D. Cal. 1991).

<sup>213</sup> *Id.*

<sup>214</sup> *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 670 (1989).

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 the HCWs' 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 his control.<sup>215</sup> 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.<sup>216</sup> 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 "[t]he propinquity to drugs is therefore a factor to be weighed in the balance."<sup>217</sup> 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 minimally the program will infringe upon the privacy of medical professionals.

Based on the evidence noting the high rate of drug and alcohol abuse among HCWs and the "culture of silence" permeating the medical field,<sup>218</sup> to *effectively* address a state's interest in protecting patients, a drug testing program is clearly necessary. First, there is a documented problem of substance abuse among HCWs nationwide.<sup>219</sup>

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<sup>215</sup> *Id.* at 668–69.

<sup>216</sup> Berge et al., *supra* note 39, at 625 (describing a five-year study of doctors in physician health programs, which revealed that one of the contributing factors to physician drug use is the "ready access to narcotics and other psychotropic drugs in the workplace").

<sup>217</sup> *Derwinski*, 777 F. Supp. at 1499.

<sup>218</sup> See discussion *supra* Part III.

<sup>219</sup> Eisler, *supra* note 40 (citing a 2007 report by 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").

In upholding the railroad's testing program, the *Skinner* Court noted the problem of drug and alcohol use by railroad employees.<sup>220</sup> 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."<sup>221</sup> Thus, although proof of a demonstrated substance abuse problem is not a necessary predicate for testing,<sup>222</sup> 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.<sup>223</sup> 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 was an employee or independent contractor and regardless of his specific area of medicine.<sup>224</sup> 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 per year, its license would be suspended.<sup>225</sup> 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.<sup>226</sup> Hence, although the empirical data cited above<sup>227</sup> seems to apply more to doctors, the model testing policy cannot be so limited because the Mr. Kwiatkowskis of the world can harm patients just as much as 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.<sup>228</sup> To some degree, then, the Court found it important that the public relied on Customs officials to protect the country's borders, which made it reasonable to ensure (by testing) that the employees

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<sup>220</sup> *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 607–08 (1989).

<sup>221</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995).

<sup>222</sup> *Chandler v. Miller*, 520 U.S. 305, 319 (1997).

<sup>223</sup> Proposition 46, *supra* note 10; HB-597, *supra* note 5.

<sup>224</sup> Proposition 46, *supra* note 10, at sec. 4 §§ 2350.15(e), 2350.25(a)(1).

<sup>225</sup> *Abramson et al.*, *supra* note 6, at 13.

<sup>226</sup> *Id.*

<sup>227</sup> See discussion *supra* Part III.

<sup>228</sup> *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668 (1989).

possessed their full faculties while carrying out their duties.<sup>229</sup> 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 them. 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.<sup>230</sup> Moreover, the Court held that it would be reasonable to randomly test because it provides a more effective deterrent among the employees.<sup>231</sup> For the same reasons, randomly testing HCWs is an effective way to deter drug and alcohol use, and to protect patients by discovering and removing impaired medical employees.

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 based on their personal experiences with substance abuse or with addicted colleagues.<sup>232</sup> 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 work quality.<sup>233</sup> Similarly, an article published by the Mayo Foundation acknowledges the difficulty in getting help for doctors, even though their rate of substance abuse 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

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<sup>229</sup> *Id.* at 670.

<sup>230</sup> *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 630–31 (1989).

<sup>231</sup> *Id.* at 630.

<sup>232</sup> See Consumer Watchdog, *supra* note 37; see also Levinson & Broadhust, *supra* note 87; Julius Cuong Pham et al., *Identification of Physician Impairment*, JAMA, May 2013, at 2101, 2101 (suggesting the use of random testing in a model regulation for physician impairment); Julius Cuong Pham & Peter J. Provonost, *California’s Proposition 46: A Wolf in Sheep’s Wool*, ANNALS INTERNAL MED., Sept. 30, 2014, at 913, 913 (explaining that a key principle of a program for physician drug testing includes random testing); Ken Murray, Opinion, *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 mandatory testing because “patient safety concerns justify such testing for physicians”).

<sup>233</sup> Eisler, *supra* note 40.

silence' in an effort to protect the family or practice workers from economic ruin by the loss of the physician's job and income."<sup>234</sup> 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.<sup>235</sup>

Moreover, a doctor's office or hospital surely fits within the non-traditional office environment discussed in *Von Raab*.<sup>236</sup> For instance, doctors mostly work alone or with only one other medical professional when treating a patient.<sup>237</sup> Further, HCWs as a class frequently work for lengthy periods of time, so their colleagues might misinterpret signs of impairment as signs of fatigue. 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 the efficacy of the chosen testing procedure and demonstrate that its invasiveness is justified given the state's interest in testing. 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; and can be done with minimal embarrassment or inconvenience.<sup>238</sup> Further, the American Society of Addiction Medicine reports that urine testing is the most common form of drug testing because it is the most familiar, 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.<sup>239</sup>

Moreover, the program set forth in the PPSA followed the FAA drug testing guidelines, which courts have upheld as posing a minimal

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<sup>234</sup> Berge et al., *supra* note 39, at 625.

<sup>235</sup> See discussion *supra* Part III.

<sup>236</sup> Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 674 (1989).

<sup>237</sup> Elbein, *supra* note 84 (explaining that, even though Baylor Regional Medical Center of Plano suspended Dr. Duntsch after another surgeon witnessed his mishaps in the operating room, requiring him to be monitored when performing surgeries, Dr. Duntsch operated on Kellie Martin alone because the operation "was supposed to be a simple procedure" that a doctor would ordinarily perform alone).

<sup>238</sup> *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 625-27 (1989).

<sup>239</sup> See WRITING COMM., AM. SOC'Y ADDICTION MED., DRUG TESTING: A WHITE PAPER OF THE AMERICAN SOCIETY OF ADDICTION MEDICINE (ASAM) 23, 26 (2013), <http://www.asam.org/docs/default-source/public-policy-statements/drug-testing-a-white-paper-by-asam.pdf>.

threat of intrusiveness.<sup>240</sup> 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.<sup>241</sup> Such an environment presents a “negligible” invasion of privacy according to the *Acton* Court.<sup>242</sup> Further, the FAA program does not test the urine sample for anything but the presence of specifically enumerated drugs: opiates, marijuana, cocaine, amphetamines, and phencyclidine.<sup>243</sup> 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.<sup>244</sup> Even upon confirmation, the results are not reported to the employer until a licensed physician has analyzed them in conjunction with medical information provided by the employee to find a legal explanation for any positive match.<sup>245</sup> Finally, the results of the test are sent to the employer alone and may not be disseminated without the employee’s consent.<sup>246</sup>

#### B. *The Individual Interest in Privacy*

The final step in assessing the reasonableness of a testing program is weighing the individual’s privacy interest that is threatened. As mentioned in the *Skinner-Von Raab* line of cases, urinalysis and breathalyzer tests constitute Fourth Amendment searches that invade one’s bodily and informational privacy.<sup>247</sup> As the Fifth Circuit noted in *Von Raab*, urinating is an activity that society recognizes as private,<sup>248</sup> and while obtaining breath samples does not require an invasion of privacy in the same way, it could embarrass the employee and be inconvenient.<sup>249</sup> Further, employees have an interest in shielding their

<sup>240</sup> Nat’l Air Traffic Controllers Ass’n v. Burnley, 700 F. Supp. 1043, 1045 (N.D. Cal. 1988).

<sup>241</sup> 49 C.F.R. § 40.41(e), (f) (2016).

<sup>242</sup> Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995).

<sup>243</sup> 49 C.F.R. § 40.85.

<sup>244</sup> 14 C.F.R. § 120.5 (2016) (explaining that testing programs must conform to procedures set forth in 49 C.F.R. § 40); *see also* 49 C.F.R. §§ 40.251 (for alcohol), 40.87 (for drugs).

<sup>245</sup> 49 C.F.R. §§ 40.97, 40.123.

<sup>246</sup> 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.

<sup>247</sup> *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616–17 (1989).

<sup>248</sup> *Nat’l Treasury Emps. Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987) (“There are few activities in our society more personal or private than the passing of urine.”).

<sup>249</sup> *Skinner*, 489 U.S. at 625.

biological, physiological, and medical information from others—a urine test could reveal information beyond just the presence of drugs, such as whether the employee is diabetic or pregnant.<sup>250</sup>

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 expectation of privacy because their profession is heavily regulated and/or is inherently dangerous.<sup>251</sup> Like the railroad industry, the medical profession is heavily regulated, although mostly at the state level.<sup>252</sup> Doctors, for example, cannot practice until they have completed years of schooling and training and have acquired a state license to practice.<sup>253</sup> Once a physician obtains his license, he is subject to regulation by the state medical board, which supervises licensing and disciplinary procedures.<sup>254</sup> For example, the California Board's website provides visitors with a 104-page document that describes the laws governing the practice of medicine within the state, from general licensing to ordering controlled substances.<sup>255</sup> 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's Association Hospital's testing program, the *Derwinski* court took a page out of *Von Raab* and remarked that "[t]hose held out as medical professionals" have an "aura of professional competence," such that it is unlikely for such employees to "reasonably hold the same expectation of privacy as that entertained by a clerical worker or other nonprofessional employee in federal service."<sup>256</sup> Because providing medical care is as regulated as

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<sup>250</sup> *Id.* at 617.

<sup>251</sup> *Id.* at 627 (explaining that railroad employees hold a low reasonable expectation of privacy because they are subject to a litany of governmental rules at the federal level); *see also* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 672 (1989) (opining that those working with guns and drugs should expect to be subject to testing because of the danger inherent in their work).

<sup>252</sup> Deborah Haas-Wilson, *The 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 Feb. 14, 2016).

<sup>253</sup> *Requirements for Becoming a Physician*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/education-careers/becoming-physician.page?> (last visited Feb. 14, 2016).

<sup>254</sup> MED. BD. OF CAL., *GUIDE TO THE LAWS GOVERNING THE PRACTICE OF MEDICINE BY PHYSICIANS AND SURGEONS* 7 (7th ed. 2013), [http://www.mbc.ca.gov/About\\_Us/Laws/laws\\_guide.pdf](http://www.mbc.ca.gov/About_Us/Laws/laws_guide.pdf).

<sup>255</sup> *See id.*

<sup>256</sup> *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

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 accept their diminished expectation of privacy.<sup>257</sup>

This analysis balancing the employee-HCW's privacy interest against the state's interest in testing him 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 should include to ensure a constitutional, effective, and fair testing program.<sup>258</sup> 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 provide for a comprehensive approach to a drug-free work environment by supporting state physician health programs, requiring medical schools to test students and educate them on the danger of impairment, and enacting a whistleblower law to encourage medical professionals to refer colleagues for help.

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expectation of privacy in [his] ability to provide the services necessary to perform [his] duties." *Id.* (citation omitted).

<sup>257</sup> *Vernonia 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.") (citation and internal quotation marks omitted).

<sup>258</sup> *See also* Pham & Provonost, *supra* note 232 (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 hospitals, "where the bylaws and infrastructure can support the program").

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.<sup>259</sup> The advantage of taking the initiative in this manner is the confidence that comes with creating a constitutional testing program.<sup>260</sup> 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 they also provide the test administrators with little, if any, discretion in carrying out their duties.<sup>261</sup> In adopting the FAA guidelines, the PPSA likewise promised physicians minimal invasiveness in implementing the program.

On the other hand, HB-597 did not specifically provide a testing program for employer-health care facilities, but merely mandated that the state Commissioner of Health and Human Services establish and implement "a mandatory random drug testing program," leaving the specifics up to the Commissioner himself.<sup>262</sup>

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 do their own cost-benefit analyses and find economically feasible, yet effective, plans. It is key to note, though, that if a statute mandates that facilities adopt their own policies as opposed to providing a universal program, it is important to define the terms that apply to all facilities (i.e., tests must 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

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<sup>259</sup> Proposition 46, *supra* note 10, at sec. 4.

<sup>260</sup> *Bluestein v. Skinner*, 908 F.2d 451, 457 (9th Cir. 1990) (rejecting the constitutional challenge to the FAA testing program); *see also* discussion *infra* Part IV.B.

<sup>261</sup> *Bluestein*, 908 F.2d at 457; *see also* discussion *infra* Part IV.

<sup>262</sup> HB-597, *supra* note 5.

to all hospitals throughout the state.<sup>263</sup> Specifically, the PPSA suggested that physicians be drug tested according to the FAA testing regulations and cross-referenced the DOT procedures for testing employees in the transportation sectors that are subject to federal regulation.<sup>264</sup> The FAA program aims 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.<sup>265</sup>

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.<sup>266</sup> Also, under 49 C.F.R. § 40.61, test administrators are prohibited from asking the employee to list the medications he is currently taking.<sup>267</sup> Section 40.41 states that the preferred type of testing facility is a single-toilet room with a full-length door or a multi-stall restroom that provides "substantial visual privacy."<sup>268</sup> 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.<sup>269</sup> Further, both the urinalysis and breathalyzer tests require a confirmatory test upon a positive result for either substance.<sup>270</sup> Finally, the DOT procedures prohibit an employer from releasing an employee's results or medical information without the latter's "specific written consent."<sup>271</sup>

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*,<sup>272</sup> and by

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<sup>263</sup> Proposition 46, *supra* note 10, at sec. 4.

<sup>264</sup> 49 C.F.R. § 40 (2016). 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*, U.S. DEP'T OF TRANSP., <http://www.dot.gov/odapc/agencies> (last visited Feb. 15, 2016).

<sup>265</sup> 49 C.F.R. § 40.14(h).

<sup>266</sup> *Id.* § 40.31(d).

<sup>267</sup> *Id.* § 40.61(g).

<sup>268</sup> *Id.* § 40.41(e), (f).

<sup>269</sup> *Id.* § 40.221.

<sup>270</sup> *See id.* § 40.253 for alcohol testing and *id.* § 40.87 for drug testing.

<sup>271</sup> 49 C.F.R. § 40.321.

<sup>272</sup> *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 660 n.2 (1989). Moreover, the DOT regulations only permit a direct observation in select instances, such as when an employee shows intent to, or does, tamper with the sample, or is

providing testing facilities similar to public restrooms, which the *Acton* Court looked upon favorably.<sup>273</sup>

Similarly, the FAA regulations,<sup>274</sup> which served as the model for the PPSA program, require a full range of testing of all employees in safety-sensitive positions:<sup>275</sup> pre-employment, random, post-accident, reasonable cause, return to duty, and follow-up testing.<sup>276</sup> The FAA regulations, however, have a more detailed scheme for alcohol testing than the DOT regulations. While all safety-sensitive employees are tested for alcohol,<sup>277</sup> certain employees are prohibited from working with a BAC over 0.04 and from drinking within eight hours of performing their duties.<sup>278</sup>

In terms of sanctions, 49 C.F.R. § 40.191 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.<sup>279</sup> Specifically, 14 C.F.R. §§ 120.11, 120.13, and 120.15 state that pilots, flight crewmembers, and other airmen are subject to drug testing, and their refusal to test results in a denied certificate or rating application, or license suspension or revocation.<sup>280</sup>

Further, the FAA provides strict consequences for positive test results. Under 14 C.F.R. § 120.111, an employee with two positive drug test results is permanently disqualified from performing “the safety-sensitive duties [he] performed prior to the second drug test.”<sup>281</sup> If a test result demonstrates that an employee performed such a duty while impaired, his employer will also permanently disqualify him from that

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subject to return-to-duty or follow-up testing. 49 C.F.R. § 40.67. 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. *Id.*; *Chandler v. Miller*, 520 U.S. 305, 326 (1997).

<sup>273</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995).

<sup>274</sup> 14 C.F.R. § 120 (2016).

<sup>275</sup> *Industry Drug and Alcohol Testing Program*, FED. AVIATION ADMIN., [https://www.faa.gov/about/office\\_org/headquarters\\_offices/avs/offices/aam/drug\\_alcohol/](https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/drug_alcohol/) (last visited Feb. 15, 2016).

<sup>276</sup> 14 C.F.R. §§ 120.109, 120.217; *see also* Proposition 46, *supra* note 10, at sec. 4 § 2350.35 (requiring random, referral, and post-adverse event testing, but stating that a physician 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”).

<sup>277</sup> 14 C.F.R. §§ 120.105, 120.215.

<sup>278</sup> *Id.* §§ 120.19(d), 120.37(d).

<sup>279</sup> 49 C.F.R. § 40.191 (2016).

<sup>280</sup> 14 C.F.R. §§ 120.11, 120.13, 120.15.

<sup>281</sup> *Id.* § 120.111.

position.<sup>282</sup> 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 14 C.F.R. §§ 120.19 or 120.37.<sup>283</sup>

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,<sup>284</sup> ensuring that the collector does not know the employee,<sup>285</sup> and testing solely for the presence of drugs and alcohol.<sup>286</sup> 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

Although this form of testing has proved most controversial, random testing is indispensable to an effective testing program.<sup>287</sup> The medical field is, and has been, self-regulating,<sup>288</sup> and a desire to remain self-regulating is understandable because only HCWs can understand

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<sup>282</sup> *Id.*

<sup>283</sup> *Id.* § 120.221.

<sup>284</sup> Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 660 n.2 (1989).

<sup>285</sup> *Skinner v. Ry. Labor Execs.' 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).

<sup>286</sup> *Skinner*, 489 U.S. at 626.

<sup>287</sup> Ejnes, *supra* note 19, 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.")

<sup>288</sup> Pham & Provonost, *supra* note 232 ("Traditionally, impaired physicians are identified through self-policing of professional norms, with impaired physicians identifying themselves or being identified by their colleagues.")

“the complexity of medical tasks,” the nature of their work, and the standards to which such professionals should be held.<sup>289</sup> On the other hand, because HCWs understand so well the stress and the years of hard work, they may be more forgiving of their colleagues who fall prey to addiction or even those who sometimes come to work intoxicated.<sup>290</sup> Consequently, thirty-three percent of physicians fail to report their colleagues,<sup>291</sup> which is “something of an embarrassment” to the profession and entirely unacceptable to the public.<sup>292</sup> 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.”<sup>293</sup>

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 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.<sup>294</sup>

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.<sup>295</sup> Because this type of testing depends on the supervisor’s determination, influenced by his meager two hours of training (sixty minutes of training each for the indicators

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<sup>289</sup> Matthew K. Wynia, *The Role of Professionalism and Self-Regulation in Detecting Impaired or Incompetent Physicians*, JAMA, July 14, 2010, at 210, 210.

<sup>290</sup> Pham & Provonost, *supra* note 232, at 913–14 (“Physicians are often reticent to identify their colleagues, even in the face of clear evidence of impairment or abuse.”).

<sup>291</sup> Cynthia A. Lien, *A Need to Establish Programs to Detect and Prevent Drug Diversion*, MAYO CLINIC PROCEEDINGS, July 2012, at 607, 607.

<sup>292</sup> Abramson et al., *supra* note 6, at 12 (citation and internal quotation marks omitted).

<sup>293</sup> Pham et al., *supra* note 232, at 2101.

<sup>294</sup> Pham & Provonost, *supra* note 232, 913–14.

<sup>295</sup> OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE, U.S. DEP’T OF TRANSP., DOT AGENCY/USCG DRUG AND ALCOHOL PROGRAM FACTS 5, [http://www.dot.gov/sites/dot.dev/files/docs/ODAPC\\_Program%20Facts.pdf](http://www.dot.gov/sites/dot.dev/files/docs/ODAPC_Program%20Facts.pdf) (last visited Feb. 15, 2016).

of alcohol use and drug use),<sup>296</sup> 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.<sup>297</sup>

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.<sup>298</sup> On the other hand, New Hampshire's Exeter Hospital never tested Kwiatkowski, even though his colleagues repeatedly told supervisors that he seemed "overly medicated" and was seen with white foam around his mouth.<sup>299</sup> Instead, the extent of the hospital's disciplinary action was sending him home for the day and recording these behaviors in his personnel file.<sup>300</sup>

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 drug or alcohol use for the necessary period of time to allow the substance to leave their system,<sup>301</sup> dilute their urine and/or use the urine of another individual, or use a product available on the market to assure a negative result.<sup>302</sup> While such testing at least weeds out the employees

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<sup>296</sup> KUO & ASSOCS., U.S. DEP'T OF TRANSP., REASONABLE SUSPICION REFERRAL FOR DRUG AND ALCOHOL TESTING: A TRAINING PROGRAM FOR TRANSIT SUPERVISORS 3 (1997), <http://transit-safety.volpe.dot.gov/publications/safety/ReasonableSuspicion/PDF/rf-leader.pdf>.

<sup>297</sup> Abramson et al., *supra* note 6, at 14; *see also* Roger S. Cicala, *Substance Abuse Among Physicians: What You Need to Know*, HOSP. PHYSICIAN, July 2003, at 39, 42-43, [http://www.turner-white.com/pdf/hp\\_jul03\\_know.pdf](http://www.turner-white.com/pdf/hp_jul03_know.pdf) (explaining that the indicators of substance abuse among HCWs vary based on the substance 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, taking frequent bathroom breaks and often closing doors to the rooms he occupies; conversely, the HCW who abuses drugs obtained through other avenues will make work his last priority, leaving early, coming in late, and taking extended lunch hours).

<sup>298</sup> Abramson et al., *supra* note 6, at 11.

<sup>299</sup> *Id.* at 12 (quotation marks omitted).

<sup>300</sup> *Id.*

<sup>301</sup> *Approximate Detection Times*, MAYO CLINIC, <http://www.mayomedicallaboratories.com/articles/drug-book/viewall.html> (last updated Nov. 2015). Based on this chart, it is possible for an employee to avoid detection by abstaining from drug use for a short time before the urinalysis: for example, cocaine and LSD leave the system in less than one day. *Id.*

<sup>302</sup> *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>.

who are so addicted that they cannot even abstain for a test that they know is coming, the data regarding currently practicing impaired medical workers<sup>303</sup> 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 using a device in patient care in a way it is not intended to be used; and death or disability associated with giving a patient the wrong dosage of a drug.<sup>304</sup> Another disadvantage of relying solely on adverse event testing is the danger of a false positive—a doctor may have had a drink at a social function after rendering his services, or a nurse may be unable to provide a sample because he has left for vacation. Will either of these professionals be penalized for their post-work activities, the doctor for his positive breathalyzer test or the nurse for his “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?<sup>305</sup>

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.<sup>306</sup> 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

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<sup>303</sup> See discussion *supra* Part III.

<sup>304</sup> CAL. HEALTH & SAFETY CODE § 1279.1(b)(1)(B), (2)(B), (4)(A) (Deering 2016); see also Proposition 46, *supra* note 10, at sec. 4 § 2350.15(b) (adopting the definition of “adverse event” set out in the California Health and Safety Code).

<sup>305</sup> Proposition 46, *supra* note 10, at sec. 4 § 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 period to 36 hours); see also Levin, *supra* note 14 (stating that Richard Thorp, president of the California Medical Association, explained:

“[A]n 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 . . .”).

<sup>306</sup> *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 Feb. 15, 2016).

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 testing is an ethical necessity because 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.<sup>307</sup>

### 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.<sup>308</sup> 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.<sup>309</sup> Thus, even specialists 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.<sup>310</sup> 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."<sup>311</sup> 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

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<sup>307</sup> Levine & Rennie, *supra* note 3, at 323.

<sup>308</sup> Proposition 46, *supra* note 10, at sec. 4 § 2350.15(E).

<sup>309</sup> CAL. BUS. & PROF. CODE § 2051 (Deering 2016).

<sup>310</sup> *Podiatry Department: The Profession of Podiatry*, BOULDER MED. CENTER, <https://www.bouldermedicalcenter.com/depts/podiatry.php> (last visited Feb. 15, 2016).

<sup>311</sup> *Frequently Asked Questions*, N.Y. STATE EDUC. DEP'T, OFFICE OF THE PROFS., <http://www.op.nysed.gov/prof/pod/podfaq.htm> (last updated May 12, 2015).

podiatrist while in the office.<sup>312</sup> 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.

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,<sup>313</sup> 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.”<sup>314</sup>

Therefore, though there is less danger to life when doctors who do not typically perform invasive procedures—such as 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,<sup>315</sup> 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 present and assisting during surgery.”<sup>316</sup> The district court found that despite her not wielding a surgical instrument, a scrub tech could cause the patient “irremediable harm” by allowing

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<sup>312</sup> *Id.* (internal citations omitted).

<sup>313</sup> *Columbus Skin Cancer Treatment*, UNIVERSAL DERMATOLOGY AND VEIN CARE, <https://universaldermatology.com/medical-services/skin-cancer/> (last visited Feb. 15, 2016).

<sup>314</sup> *Patient Safety*, AM. ACAD. OF DERMATOLOGY, <http://www.aad.org/education/patient-safety> (last visited Feb. 15, 2016).

<sup>315</sup> *Am. Fed’n of Gov’t. Emps. L-2110 v. Derwinski*, 777 F. Supp. 1493, 1498 (N.D. Cal. 1991).

<sup>316</sup> *Kemp v. Claiborne Cty. Hosp.*, 763 F. Supp. 1362, 1367 (S.D. Miss. 1991).

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.<sup>317</sup> 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.<sup>318</sup>

Finally, the cases of Mr. Kwiatkowski, Ms. Parker, and Mr. Beumel<sup>319</sup> 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.<sup>320</sup>

#### 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.<sup>321</sup> 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 doctors.<sup>322</sup> 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

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<sup>317</sup> *Id.* at 1367–68.

<sup>318</sup> *Derwinski*, 777 F. Supp. at 1498.

<sup>319</sup> Levinson & Broadhust, *supra* note 87.

<sup>320</sup> HB-597, *supra* note 5.

<sup>321</sup> 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 REPORT (Oct. 16, 2014), <http://leiferreport.com/protecting-bad-doctors/> (stating that, “according to [Inspector General] Alan Levine, who provides oversight of the medical boards on behalf of the United States,” 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).

<sup>322</sup> Pham & Provonost, *supra* note 232. 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 Sigrid Bathen, *Doctors’ Drug Tests: A Divisive Issue*, CAPITOL WEEKLY (Oct. 19, 2014), <http://capitolweekly.net/drug-testing-doctors-prop-46-california7636/> (explaining that California’s PHP was shut down in 2008 when audits revealed “major flaws,” such as allowing participants to provide false urine samples to finish the program and return to practice).

will be *less* likely to make referrals, and impaired physicians themselves will try harder to hide their substance abuse.<sup>323</sup>

A second critique of the PPSA focuses on its lack of specificity. The Act did not explain how 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.<sup>324</sup> 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 in charge of testing.<sup>325</sup> 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,<sup>326</sup> it tested residents twice per year during their first year of employment, and at least once per year for their second and third years at the hospital.<sup>327</sup> The Massachusetts hospital later reported the program’s success in deterring drug use among its 100 employees.<sup>328</sup> Conversely, the original HB-597 proposed to drug test all HCWs four times per year.<sup>329</sup> Perhaps, at least initially, a state might aim to emulate the successful Massachusetts program, especially if employers are concerned about the cost of administering such tests.<sup>330</sup>

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.<sup>331</sup> 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.”<sup>332</sup> Upon a positive test result, the state attorney general

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<sup>323</sup> Pham & Provonost, *supra* note 232.

<sup>324</sup> Ejnes, *supra* note 19, at 912.

<sup>325</sup> *Id.*

<sup>326</sup> See discussion *infra* Part VII.

<sup>327</sup> Abramson et al., *supra* note 6, at 13–14.

<sup>328</sup> *Id.* at 14.

<sup>329</sup> HB-597, *supra* note 5.

<sup>330</sup> See, e.g., *One State May Require Drug Tests for Hospital Workers*, THE ADVISORY BD. CO. (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 thirteen workers would cost him \$5700 per year).

<sup>331</sup> Elbein, *supra* note 84 (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 killed two patients and paralyzed four through his “surgical misadventures”).

<sup>332</sup> Levin, *supra* note 14.

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.<sup>333</sup> Moreover, "the Act d[id] 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.<sup>334</sup> 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."<sup>335</sup>

While these critiques are valid, one aspect of the PPSA with which it is difficult to argue is the swift removal of a doctor from duty upon a confirmed positive drug test. Through its reference to the DOT regulations, the PPSA called for the confirmatory testing of a provided sample *and* analysis 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.<sup>336</sup> 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—a place where he can harm both himself and his patients.<sup>337</sup> Furthermore, if substance abuse is a result of the HCW's

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<sup>333</sup> Ejnes, *supra* note 19, at 911–12.

<sup>334</sup> *Id.*

<sup>335</sup> Levin, *supra* note 14 (internal quotation marks omitted); *but see* Johnson, *supra* note 49 (explaining that for Dr. A. Clark Gaither, who had long struggled with a drinking problem, 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 attempt at mandatory treatment during his residency program).

<sup>336</sup> This sort of procedure is included in 49 C.F.R. § 40.123 (2016).

<sup>337</sup> Lauren Cox, *Urine Drug Tests for Doctors? After Decades of Unchanging Addiction Rates, Some Anesthesiology Departments Are Using Drug Testing*, ABC NEWS MED. 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 percent of anesthesiology residency training programs reported problems with drug-impaired doctors, and an additional 19 percent reported a death

self-medication for his job-induced stress, we owe it to that doctor to provide him treatment to save *his* 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.<sup>338</sup> Most states have PHPs, and studies reporting the effectiveness of such programs boast success rates as high as eighty or ninety percent.<sup>339</sup> PHPs offer a variety of services, such as “disease management, support, long-term monitoring of illness and treatment efforts, advocacy, [and] help with fulfilling reporting requirements.”<sup>340</sup> Further, a 2008 study of 800 physicians who had recently completed such programs found that after five years, sixty-five percent of the subjects remained drug- and/or alcohol-free.<sup>341</sup> 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.<sup>342</sup>

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 “[f]or many physicians, substance abuse begins early during medical school and residency.”<sup>343</sup> Moreover, medical schools should test students to prevent recreational drug use from turning into a crippling addiction. While some schools already feature testing,<sup>344</sup>

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from overdose”); *see also* Seppala & Berge, *supra* note 80, at 4 (explaining the high death rate among anesthesiologists and the recommendations that, when these physicians return to work following treatment, they be kept out of the operating room, where they would “have to handle on a daily basis the very drugs to which they were addicted”).

<sup>338</sup> Seppala & Berge, *supra* note 80, at 3–4.

<sup>339</sup> Bathen, *supra* note 322.

<sup>340</sup> Seppala & Berge, *supra* note 80, at 3.

<sup>341</sup> SCIENTIFIC AM., *supra* note 88. 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.*

<sup>342</sup> Bathen, *supra* note 322 (“All the doctors insist that [the program] must be secret and confidential, otherwise no doctor will go into it . . .”) (internal quotation marks omitted).

<sup>343</sup> Marie R. Baldisseri, *Impaired Healthcare Professional*, 35 CRIT. CARE. MED., no. 2, 2007, at S106, S109 [http://www.csam-asam.org/sites/default/files/pdf/misc/16\\_article\\_Baldisseri\\_Impaired\\_healthcare\\_prof\\_2007.pdf](http://www.csam-asam.org/sites/default/files/pdf/misc/16_article_Baldisseri_Impaired_healthcare_prof_2007.pdf).

<sup>344</sup> *See, e.g., Alcohol and Other Drug Policy*, COLUM. UNIV. COLL. OF PHYSICIANS AND SURGEONS, <http://ps.columbia.edu/education/academics/policies/alcohol-policy> (last visited Feb. 15, 2016) (requiring ten-panel drug test prior to students beginning a clinical program); *Background Check and Drug Testing*, HERBERT WERTHEIM COLL. OF MED., <http://www.medicine.fiu.edu/admissions/md/background-check/index.html> (last visited Feb. 15, 2016) (explaining that all students are subject to a ten-panel drug

more schools should adopt such procedures.<sup>345</sup> Further, HCWs must learn, through school or otherwise, how to identify an impaired individual and the importance of identifying such people.<sup>346</sup> Although HCWs are under an obligation to report impaired colleagues, they often fail to do so.<sup>347</sup>

Finally, the medical field needs a more protective whistleblower law. Despite their moral, legal, and ethical obligations 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.<sup>348</sup> 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.<sup>349</sup>

#### 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 might: 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.

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screen and alcohol test “prior to the beginning of first year classes”); *Background Checks and Drug Testing*, SUNY DOWNSTATE MED. CTR., [http://sls.downstate.edu/student\\_affairs/CBCDT.html](http://sls.downstate.edu/student_affairs/CBCDT.html) (last visited Feb. 15, 2016) (explaining that students must take, and pay for, a ten-panel drug test before being enrolled in certain elective clinics).

<sup>345</sup> 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 49 (explaining that Dr. A. Clark Gaither struggled with addiction throughout medical school and his residency program); see also Elbein, *supra* note 94 (noting that Dr. Duntsch was allegedly treated for drug abuse while a resident at the University of Tennessee).

<sup>346</sup> See Seppala & Berge, *supra* note 80, at 2 (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).

<sup>347</sup> Ejnes, *supra* note 19, 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.”).

<sup>348</sup> Baldisseri, *supra* note 343, at S111.

<sup>349</sup> Bathen, *supra* note 322 (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).

Some opponents claim that drug testing after 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 certain states, like California, when dealing with deaths or injuries not caused directly by the HCW's negligence, limit "adverse events" to the death or injury of otherwise healthy patients.<sup>350</sup> 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.<sup>351</sup> One response to this critique is the approach taken by Proposition 46, which would have required doctors themselves to pay for the tests and would have increased licensing fees to enable the state medical boards to administer the tests and investigate allegations of substance abuse.<sup>352</sup> While this approach seems to put all of the cost on doctors, drug testing may decrease medical errors, and in turn, the cost of medical malpractice litigation,<sup>353</sup> making these tests and fees affordable for doctors.

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.<sup>354</sup> Accordingly, if the invasion of privacy does not render the testing of teachers and pilots unreasonable,<sup>355</sup> 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

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<sup>350</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 1279.1 (Deering 2016) (recognizing deaths and injuries resulting from "[r]etention of a foreign object," "contamination [that] is the result of generally detectable contaminants," and use of a device that is "other than as intended" as adverse events, but excluding deaths or injuries of high-risk patients, such as those: "associated with neurosurgical procedures known to present a high risk of intravascular air embolism;" "from pulmonary or amniotic fluid embolism, acute fatty liver of pregnancy, or cardiomyopathy;" and "resulting from self-inflicted injuries that were the reason for admission to the health facility").

<sup>351</sup> THE ADVISORY BD. CO., *supra* note 330.

<sup>352</sup> Ejnes, *supra* note 19.

<sup>353</sup> CAL. ATTORNEY GEN., *supra* note 26.

<sup>354</sup> See *supra* Part IV.

<sup>355</sup> Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ., 158 F.3d 361, 384 (6th Cir. 1998); Bluestein v. Skinner, 908 F.2d 451, 457-58 (9th Cir. 1990).

medical professionals.<sup>356</sup>

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?<sup>357</sup> Furthermore, some hospitals have instituted random drug testing for their employees in recent years and have reported the success of these programs.<sup>358</sup> For instance, in 2005, Massachusetts General Hospital began randomly testing all 100 employees of its Department of Anesthesia and Critical Care at least twice in their first year of residency, and at least once during their second and third years.<sup>359</sup> The program also randomly tested “[s]taff anesthesiologists and nurse anesthetists . . . within six months of their biannual reappointment.”<sup>360</sup> The Massachusetts hospital found that, “[s]ince the institution of th[e] program, there have been no reported cases of drug abuse” in its anesthesiology residency program.<sup>361</sup>

#### 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 regulated field. Further, the guideposts advanced in this Comment—reflecting aspects of programs upheld by courts, of provisions mentioned in proposed legislation, and of suggested reforms from those within and outside of the medical field—are minimally intrusive and respect HCWs’ privacy by keeping results confidential and reducing the discretion administrators have in

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<sup>356</sup> Pham & Provonost, *supra* note 232, at 914 (“Most other professions that have the potential to harm others already require routine testing. There is no ethical justification for excluding physicians from such testing.”).

<sup>357</sup> KEVINMD, *supra* note 302 (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 94 (explaining that Dr. Dunsch abused drugs throughout medical school and went on to practice as a neurosurgeon); *see also* Baldisseri, *supra* note 343, at S109.

<sup>358</sup> Abramson et al., *supra* note 6, at 13–14.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 14.

<sup>361</sup> *Id.*

carrying out the program. While the suggested program proposes to test all HCWs, such a broad application is warranted based on the dangers 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 PHPs, 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 . . . .”<sup>362</sup> A random drug test a few times per year can be instrumental in saving lives, and it is surely a facet of the “special obligations” those in the health care profession hold to their fellow human beings.

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<sup>362</sup> Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>.