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Testing Our Teachers

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TESTING OUR TEACHERS

ABSTRACT

In recent years, a number of school districts have begun drug testing their teachers, only to find that the Supreme Court's special needs exception is failing. As it has in other corners of its Fourth Amendment jurisprudence, the Court has erected an exception predicated on a vague "reasonableness" standard, the application of which often varies with the ad hoc interpretations of individual courts. Courts assessing the applicability of the special needs exception to the drug testing of public school teachers have, in the absence of clear analytical guideposts, found a patchwork of inconsistent judicial opinions. As a result, school boards wishing to implement drug testing policies find themselves in a difficult situation, uncertain where their obligation to protect their students must give way to their teachers' reasonable expectations of privacy. The example of teacher drug testing is but one example of where the special needs exception has left government employers uncertain as to their ability to act.

This Comment represents an effort to infuse a degree of certainty into the Court's drug testing cases specifically and the special needs doctrine generally. In so doing, it identifies two areas in which the Court's current special needs analysis lacks sufficiently robust standards to provide meaningful guidance to lower courts: the front-end "special need" designation and the evaluation of the particular drug testing policy's efficacy. Looking to the Court's drug testing cases, this Comment identifies three analytical standards that must be present for a court to find a special need. Utilizing social-control theory and utilitarian theories of punishment, it then fleshes out the efficacy prong into a comprehensive framework for assessing the particular circumstances in which a particular drug testing policy actually advances the purported need. Finally, the Comment takes these new analytical tools and applies them to the case of teacher drug testing. This discussion illustrates the potential for a principled, consistent framework for protecting individual privacy without unduly limiting the government's ability to act.

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INTRODUCTION

Today's special needs exception, like so many other aspects of the Supreme Court's Fourth Amendment jurisprudence,¹ is a disaster. Evolving from an understanding that the Framers, through the Reasonableness Clause,² granted the Fourth Amendment the flexibility to adapt to new technologies and contexts,³ this exception allows the government to conduct warrantless searches when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."⁴ In such cases, a court assesses the reasonableness of a given search by balancing the intrusion on an individual's privacy interests against the promotion of government interests.⁵ As the special needs exception has allowed for government searches to spill outside of the traditional law enforcement context, a far greater number of citizens, ranging from potential terrorists⁶ to high school choir members,⁷ have found themselves subject to warrantless intrusions on their privacy whenever an individual court is willing to acknowledge a sufficient need.

In attempting to set meaningful limits on the exception, courts have found themselves tasked with parsing a doctrine "with all of the character and

¹ See Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1149 (1998) ("The Supreme Court cases construing the Fourth Amendment are a mess that lacks coherence and predictability, and fails to communicate the contours of the field."); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 352 (1974) ("Even for a lone theoretician—for a monarchal, everlasting fourth amendment enforcer—the complications would render a coherent construction of the fourth amendment exceedingly difficult.").

² See 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 . . .").

³ See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 818 (1994) ("Reasonableness' is not some set of specific rules, frozen in 1791 or 1868 amber . . ."); Amsterdam, *supra* note 1, at 399 ("What we do know, because the language of the fourth amendment says so, is that the framers were disposed to generalize to some extent beyond the evils of the immediate past."); Carol S. Steiker, Response, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994) ("[T]he Fourth Amendment, more than many other parts of the Constitution, appears to require a fairly high level of abstraction of purpose; its use of the term 'reasonable' (actually, 'unreasonable') positively invites constructions that change with changing circumstances.").

⁴ *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)) (internal quotation marks omitted).

⁵ *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989).

⁶ See *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006).

⁷ See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

consistency of a Rorschach blot.”⁸ For these courts, the confusion is definitional: At what point or in which circumstances does a purported governmental need become “special”? Courts are at least in agreement that a special need exists when public safety is genuinely at issue.⁹ Whether a court finds that safety interests are actually implicated, though, often turns more on judicial policy preferences than on the consistent application of articulable standards to this critical front-end question.¹⁰ The result is a patchwork of opinions that often leaves the government uncertain where its ability to act begins and the individual’s reasonable expectation of privacy must give way.

Perhaps nowhere is the ambiguity of the special needs exception more apparent than in the context of governmental drug testing. Take, for example, school boards today, which find themselves navigating the narrow strait between Scylla and Charybdis in deciding whether to implement suspicionless drug testing policies for their teachers. Veer too close to the rocks by implementing a drug testing policy, and risk the possibility of costly litigation for infringing on the reasonable privacy expectations of those teachers. But run up against the whirlpool, and risk that the whole ship might be lost—that the failure to exercise all available means of protecting students from the dangers inherent in the school setting might jeopardize the ability of each school to operate effectively.

Teachers’ unions claim that the implementation of these suspicionless drug testing policies amounts to little more than a quixotic endeavor—teacher drug use, they assert, is simply not a prevalent societal problem.¹¹ And indeed, a

⁸ Amsterdam, *supra* note 1, at 375. Professor Akhil Reed Amar has criticized the arbitrary character that the Supreme Court has given the Fourth Amendment:

The Fourth Amendment today is an embarrassment. . . . As a matter of text, history, and plain old common sense, the[] three pillars of modern Fourth Amendment case law are hard to support; in fact, today’s Supreme Court does not really support them. Except when it does. Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so.

Amar, *supra* note 3, at 757–58 (footnote omitted).

⁹ See 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.2(g), at 85 (4th ed. 2004).

¹⁰ See THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 11.3.4.4.2.2, at 501 (2008) (“[T]he conclusion that a special need is present appears to be little more than a facade for policy results . . .”).

¹¹ See Vaishali Honawar, *Random Drug Tests Test Teacher Privacy Rights*, WASH. TIMES, Mar. 12, 2009, at A1 (“Folks who go into teaching are not the kind who use drugs . . .” (quoting Michael Simpson, assistant general counsel for the National Education Association) (internal quotation marks omitted)).

2007 study found, when asking teachers whether they had used illicit drugs in the prior month, that only 4.1% reported drug use—one of the lowest rates among the occupational categories surveyed.¹² But, for school districts, this study reveals a more significant truth: while drug use among teachers may not be pervasive, it does occur.¹³ Were this statistic to bear out in equal measure across all school districts, one would expect the average public school student to have two or three teachers over the course of her primary education who are admitted drug users.¹⁴ To many school districts, the relevant consideration is not the proportion of teachers using drugs but the belief that a given district cannot accept the risk of one rotten apple spoiling the bushel.¹⁵ As a result, school boards and legislatures in a number of states—including Hawaii,¹⁶ Illinois,¹⁷ Kentucky,¹⁸ Louisiana,¹⁹ North Carolina,²⁰ Tennessee,²¹ and West Virginia²²—have enacted or attempted to enact suspicionless urinalysis testing schemes for their teachers and other personnel who interact daily with students. When these policies have faced Fourth Amendment challenges, courts have been forced to wrestle with the question of whether teachers present safety risks that create a special need and, if so, whether drug testing would actually address that need.²³

¹² SHARON L. LARSON ET AL., DEP'T OF HEALTH & HUMAN SERVS., WORKER SUBSTANCE ABUSE AND WORKPLACE POLICIES AND PROGRAMS 23 fig.3.1 (2007), available at http://www.amfetaminadronet.org/comunicazioni/news/samhsa_work.pdf.

¹³ *Id.*

¹⁴ This calculation operates on the assumption that a student will have five teachers per year—or sixty-five total—between kindergarten and her final year of high school. The estimate does not include substitute teachers, coaches, and teachers performing only supervisory functions over the student (e.g., hall monitors), which would lead to a much higher statistic.

¹⁵ LARSON ET AL., *supra* note 12, at 23 fig.3.1.

¹⁶ See Honawar, *supra* note 11 (random drug testing policy).

¹⁷ See Greg Stewart, *Random Drug Testing of Teachers a First in Peoria Area*, PJSTAR.COM (Aug. 18, 2011, 12:14 PM), <http://www.pjstar.com/news/x1510867577/Testing-teachers-a-first-in-area> (discussing a proposed random drug testing policy that resulted in a teachers' strike).

¹⁸ See Crager v. Bd. of Educ., 313 F. Supp. 2d 690, 692 (E.D. Ky. 2004) (random drug testing policy).

¹⁹ See, e.g., United Teachers of New Orleans v. Orleans Parish Sch. Bd., 142 F.3d 853, 855 (5th Cir. 1998) (post-accident and pre-employment drug testing policies); Reno v. E. Baton Rouge Parish Sch. Bd., 697 F. Supp. 2d 659, 660 (M.D. La. 2010) (post-injury drug testing policy).

²⁰ See Jones v. Graham Cnty. Bd. of Educ., 677 S.E.2d 171, 173 (N.C. Ct. App. 2009) (random drug testing policy).

²¹ See Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 366–67 (6th Cir. 1998) (drug testing upon hire or transfer); Smith Cnty. Educ. Ass'n v. Smith Cnty. Bd. of Educ., 781 F. Supp. 2d 604, 607 (M.D. Tenn. 2011) (pre-employment, random, and post-injury drug testing).

²² See Am. Fed'n of Teachers—W. Va. v. Kanawha Cnty. Bd. of Educ., 592 F. Supp. 2d 883, 886 (S.D. W. Va. 2009) (random drug testing policy).

²³ This Comment addresses only the permissibility of suspicionless drug testing of teachers under the special needs exception of the Fourth Amendment. For an account of how courts have addressed challenges to

The Sixth Circuit, in *Knox County Education Ass'n v. Knox County Board of Education*, offered the earliest federal attempt to address whether teachers' drug use created a special need.²⁴ The Knox County Board of Education had passed a "Drug-Free Workplace Substance Abuse Policy," which called for suspicionless drug testing of all individuals who applied for, transferred to, or received a promotion to a teaching position.²⁵ The Knox County Education Association challenged the policy as violative of the Fourth Amendment's prohibition against unreasonable searches and seizures.²⁶ After acknowledging that the Knox County School System had no documented history of drug abuse, the court determined that the school board had prophylactic power under the special needs exception as long as teachers occupied positions that were "safety sensitive."²⁷ In finding that a special need existed, the court observed that teachers are the school's front line for safety and that any momentary lapse of attention could have far-reaching consequences for student well-being.²⁸ This need for constant supervision was not limited to young children horsing around; even at the high-school level, teachers were responsible for identifying and preventing drug use, as well as reporting violent acts, such as assaults.²⁹ After accepting the special need for drug testing and weighing that safety interest against the invasiveness of urinalysis testing, the *Knox* court upheld the suspicionless drug testing scheme.³⁰

In *American Federation of Teachers—West Virginia v. Kanawha County Board of Education*, a West Virginia district court took a different tack.³¹ The Kanawha County Board of Education had revised its "Employee Drug Use Prevention Policy" to implement a new random drug testing scheme that applied to all who occupied "safety-sensitive positions," defined to include

suspicionless drug testing policies under state constitutions, see Amanda Harmon Cooley et al., *The Constitutional and Contractual Controversy of Suspicionless Drug Testing of Public School Teachers*, 63 OKLA. L. REV. 421, 449–57 (2011).

²⁴ *Knox*, 158 F.3d 361.

²⁵ *Id.* at 363.

²⁶ *Id.* at 364.

²⁷ *Id.* at 373–76.

²⁸ *Id.* at 378; accord *Donegan v. Livingston*, No. 3:11-cv-812, 2012 WL 2586862, at *6 (M.D. Pa. July 3, 2012) (noting that "teachers' privacy to ingest substances at work is 'diminished by reasons of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees'" and that "teachers inhabit a highly regulated environment which is particularly sensitive to alcohol and drug abuse" (quoting *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 627 (1989))).

²⁹ *Knox*, 158 F.3d at 378.

³⁰ *Id.* at 384.

³¹ 592 F. Supp. 2d 883 (S.D. W. Va. 2009).

teachers.³² A teachers' union filed suit, claiming, among other things, that the random drug testing violated the Fourth Amendment.³³ After establishing that the existence of a special need depended on the magnitude of the purported safety concern,³⁴ the court concluded that “[b]umps and bruises of students tussling in the hallways or on the playground are not special needs.”³⁵ In so doing, the court required a safety risk comparable to those found compelling in other drug testing cases, such as those involving airline personnel and nuclear-power-plant engineers.³⁶ Finding the absence of such a need, the district court granted a preliminary injunction against enforcement of the board's suspicionless testing scheme.³⁷

A third case shifted the focus, clarifying that, when assessing the special need, the question is not merely whether the need exists but whether the search at issue actually serves the need. In *United Teachers of New Orleans v. Orleans Parish School Board*, a local school district required that a teacher submit to urinalysis testing upon the occurrence of an injury, even if that injury had no relationship to drug activity.³⁸ Avoiding an inquiry into the safety issue entirely, the court focused on the school board's inaccurate invocation of the special needs exception. The court viewed the policy—which in operation only served to facilitate the denial of workers' compensation benefits, rather than address a safety interest in any meaningful way—as little more than an “immolation of privacy and human dignity in symbolic opposition to drug use.”³⁹ Accordingly, the court enjoined the school board from enforcing the testing scheme.⁴⁰

These three cases highlight two undertheorized areas within not only the teacher drug testing debate but also the special needs analysis generally. First, the absence of clear guideposts for identifying the existence of a special need allows judicial policy preferences too much play in the joints. Where one court sees teachers as the front line in the battle against drug use and violence in schools, another sees mere “[b]umps and bruises.” Second, even when a

³² *Id.* at 886–87.

³³ *Id.* at 888–89.

³⁴ *Id.* at 903.

³⁵ *Id.*

³⁶ *Id.* at 904.

³⁷ *Id.* at 904–06.

³⁸ 142 F.3d 853, 856 (5th Cir. 1998).

³⁹ *Id.* at 857 (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting)) (internal quotation mark omitted).

⁴⁰ *Id.*

special need exists, there may be instances where a court should be skeptical of a drug testing scheme because the need that justifies the search may not always be a need the search actually serves. A full exposition of this efficacy prong of the special needs analysis has yet to be offered.

This Comment, using the teacher drug testing debate as a case study, suggests orienting these two areas of ambiguity within the special needs doctrine on a new analytical framework. Part I traces the development of the special needs exception to the Fourth Amendment from general warrants to public school urinalysis. Building off this background, Part II then evaluates where the Supreme Court's case law has left the special needs exception and suggests two standards that will provide greater consistency within courts' special needs analyses while remaining faithful to the Fourth Amendment's underlying purposes. First, the Part proposes a three-step inquiry that aligns the special needs designation along considerations of context—considerations that have always been central to the Fourth Amendment inquiry. Second, the Part, discussing the role of formal and informal sanctioning mechanisms within institutions, identifies when a drug test will actually advance the special need, providing a fuller understanding of the Court's cursory nods to efficacy.

Part III returns to the debate that began this Comment. This Part begins by outlining the safety risks that teacher drug testing policies aim to address. With those risks identified, it proceeds to apply the analytical standards proposed in Part II to assess the constitutionality of suspicionless drug testing policies of public school teachers. In so doing, this Comment illustrates the potential of the proposed analytical tools to better align future special needs analyses with the purposes that led to the doctrine's inception—that, when encroaching on individual privacy, the government retains the power to act as a shield, without wielding the sword.

I. FROM GENERAL WARRANTS TO SUSPICIONLESS DRUG TESTS

Against the backdrop of general warrants and the unfettered discretion they granted government officials to intrude upon the everyman, the Fourth Amendment found life.⁴¹ Beginning in the 1750s, British customs officials relied on legislation passed by Parliament to issue writs of assistance to combat

⁴¹ CLANCY, *supra* note 10, § 2.3, at 40; Scott E. Sundby, *Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 Miss. L.J. 501, 506 (2004).

the pervasive problem of smuggling in the colonies.⁴² These writs granted government officials the authority to search for untaxed imported goods without any individualized suspicion or judicially imposed limits as to the search's scope.⁴³ Almost immediately, the general searches created deep resentment among the colonists, with James Otis's failed attack on behalf of Boston merchants in the Superior Court of Massachusetts serving as a powerful unifying symbol.⁴⁴

At the same time that discontent with the writs of assistance began to foment, stories of similar abuses of the general warrant in England spread among the colonists. In *Wilkes v. Wood*, the Court of Common Pleas assessed the ability of Lord Halifax to authorize the arrest of an individual and the search of his papers.⁴⁵ The warrant in that case, specifying neither the place to be searched nor the people to be seized, resulted in the arrest of more than twenty-four people.⁴⁶ In *Entick v. Carrington*, the King's Bench assessed the validity of a search of an individual's papers under a warrant lacking a summons, examination, hearing, or any proof that the individual had actually disseminated libelous papers.⁴⁷ The juries in both cases returned verdicts for the plaintiffs,⁴⁸ and the colonists had reason to believe that the general warrants would be similarly objectionable as applied to them. This expectation was shattered with the passage of the Townshend Act in 1767.⁴⁹ Eventually, Massachusetts, the colony against which the writs were primarily targeted, included within its Declaration of Rights a provision prohibiting "unreasonable searches and seizures"—language the Framers eventually adopted in the Fourth Amendment's Reasonableness Clause.⁵⁰

Beginning in 1967, the Warren Court drastically expanded the reach of the Fourth Amendment. In announcing that "the Fourth Amendment protects

⁴² CLANCY, *supra* note 10, § 2.2.3.1, at 32. In 1696, Parliament passed legislation that appeared to permit the use of writs of assistance. *Id.* When writs issued pursuant to that act were found to be without legal basis in the 1760s, the Townshend Act emerged to fill the gap. *Id.* § 2.2.3.1, at 32 n.47.

⁴³ See Sundby, *supra* note 41, at 506–07.

⁴⁴ CLANCY, *supra* note 10, § 2.2.3.1, at 32–34.

⁴⁵ (1763) 98 Eng. Rep. 489 (C.P.); see also Sundby, *supra* note 41, at 506.

⁴⁶ Sundby, *supra* note 41, at 506.

⁴⁷ (1765) 98 Eng. Rep. 807 (C.B.) 817; 2 Wils. K.B. 275, 291.

⁴⁸ *Id.* at 818; *Wilkes*, (1763) 98 Eng. Rep. at 499.

⁴⁹ See CLANCY, *supra* note 10, § 2.2.3.1, at 34–35 (noting that the Townshend Act was the catalyst for the American Revolution and discussing the refusal of many lower courts to issue general writs of assistance following the Act's passage).

⁵⁰ WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791*, at 606 (quoting MASS. CONST. pt. I, art. XIV) (internal quotation marks omitted).

people, not places,” the Court in *Katz v. United States*⁵¹ granted the Fourth Amendment force beyond its explicitly enumerated categories, reflecting the recognition that there was no “reason to conclude that the framers intended the fourth amendment . . . to state a principle like the dwarf in Gunter Grass’ *Tin Drum*, who suddenly and perversely decided to stop growing because growth was what grownups expected of him.”⁵² That same Term, the Court proceeded to diminish the role of probable cause in *Terry v. Ohio*⁵³ and identified “reasonableness,” not a warrant based upon individualized suspicion, as the touchstone of the Fourth Amendment analysis in *Camara v. Municipal Court*.⁵⁴ The Court’s application of a reasonableness balancing test to the administrative search in *Camara* presented a new Orwellian nightmare—no longer did the Fourth Amendment’s applicability depend on an individual’s actions but on a judicial evaluation of a government’s stated objectives.⁵⁵

Eighteen years later, in his concurrence in *New Jersey v. T.L.O.*, Justice Blackmun expounded on this balancing test and gave the special needs exception its first articulation: “Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”⁵⁶ Blackmun’s approach received quick acceptance, and the Court subsequently determined

⁵¹ 389 U.S. 347, 351 (1967).

⁵² Amsterdam, *supra* note 1, at 399.

⁵³ 392 U.S. 1 (1968).

⁵⁴ 387 U.S. 523 (1967). Scott Sundby has written of these watershed decisions, “*Camara* twisted the Warrant Clause into a pretzel and *Terry* unwittingly cracked the door for a decline in the role of traditional probable cause.” Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133, 1134 (1998) (footnote omitted).

⁵⁵ See Sundby, *supra* note 54, at 1136.

⁵⁶ 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment). Writing for the majority, Justice White instead adopted a two-pronged test for evaluating suspicionless searches of a student’s belongings, asking (1) whether the search was “justified at its inception” and (2) whether the search “was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* (majority opinion) (quoting *Terry*, 392 U.S. at 20) (internal quotation marks omitted). Though the Court subsequently adopted the special needs approach employed in Justice Blackmun’s concurrence, Justice White’s two-pronged analysis still has continuing viability. See *Safford Unified Sch. Dist. # 1 v. Redding*, 129 S. Ct. 2633, 2642–43 (2009); see also A. James Spung, Comment, *From Backpacks to Blackberries: (Re)Examining New Jersey v. T.L.O. in the Age of the Cell Phone*, 61 EMORY L.J. 111 (2011) (discussing Justice White’s majority opinion and its application in light of modern technological developments). To the extent that a difference between the two standards exists, it appears that the *T.L.O.* majority approach applies when the search is occasioned by the discretionary act of an individual government official, while the special needs approach adheres when the search is performed mechanically according to an established program or policy. Perhaps based on that distinction, the Court’s drug testing cases have subsequently been evaluated under the special needs approach. See *infra* text accompanying notes 59–113.

that suspicionless searches may be reasonable outside of *Camara's* administrative setting.⁵⁷

Around the same time *T.L.O.* was decided, workplace drug testing had begun its move into the government sphere, based primarily on the ability of such testing to identify users more effectively than an office supervisor could.⁵⁸ The Court first addressed the constitutionality of workplace drug testing in a pair of cases decided the same day. In *Skinner v. Railway Labor Executives' Ass'n*, the Court was faced with a Federal Railroad Administration (FRA) regulation that mandated post-accident blood and urinalysis testing of railroad employees.⁵⁹ Responding to a high number of accidents that resulted from on-the-job substance and alcohol abuse, the FRA regulation required that all crew members and covered employees involved in an accident be sent to an independent medical facility where their urine samples would be collected.⁶⁰ The facility then sent the samples to an FRA laboratory for analysis.⁶¹ Typically, a failed drug test resulted in dismissal of the employee.⁶²

After initially noting that a private entity compelled to perform a search under a federal regulation is subject to the Fourth Amendment,⁶³ Justice Kennedy, writing for the majority, determined that the testing at issue, which had the potential to reveal sensitive medical information and subjected an individual to visual or aural monitoring, intruded on an individual's reasonable expectation of privacy and was therefore a search.⁶⁴ The Court commented that

⁵⁷ See Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 109 (discussing the Court's increased willingness to allow suspicionless searches, as reflected by its decisions in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and *O'Connor v. Ortega*, 480 U.S. 709 (1987)).

⁵⁸ See Sundby, *supra* note 41, at 510; Karin Schmidt, Note, *Suspicionless Drug Urinalysis of Public School Teachers: The Concern for Student Safety Cannot Outweigh Teachers' Legitimate Privacy Interests*, 34 COLUM. J.L. & SOC. PROBS. 253, 255 (2001) ("This country has been engaged in a war on drugs since the 1980s . . .").

⁵⁹ 489 U.S. 602, 606 (1989).

⁶⁰ *Id.* at 607–10.

⁶¹ *Id.* at 609–10.

⁶² *Id.* at 629–30.

⁶³ *Id.* at 614.

⁶⁴ *Id.* at 617. Justice Kennedy endorsed the Fifth Circuit's characterization in *Von Raab* of the privacy interest at stake:

There 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. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Id. (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part, vacated in part*, 489 U.S. 656 (1989)) (internal quotation marks omitted). In light of this strong language,

the Fourth Amendment does not prohibit all searches but instead only those that are unreasonable.⁶⁵ The reasonableness of a given search required a balancing of the intrusion on an individual's privacy interests against the promotion of legitimate government interests.⁶⁶ Justice Kennedy acknowledged that, although a search is typically unreasonable unless accompanied by a warrant based upon probable cause, the Court had previously recognized exceptions where the government had a special need for the search.⁶⁷ He found that the government's interest in regulating the conduct of railroad employees for safety created one such special need⁶⁸ and that the imposition of a warrant requirement would impede the government's ability to achieve its purpose.⁶⁹

Given the controlled, detached setting in which samples were collected and the diminished expectation of privacy held by an employee in an industry regulated for safety, the Court saw an intrusion on privacy that was "limited" and "minimal."⁷⁰ Against this minimal privacy intrusion, the government possessed an interest in drug testing that was compelling.⁷¹ Employees "discharge[d] duties fraught with such risks of injury to others that even a momentary lapse of attention [could] have disastrous consequences," and those employees could "cause great human loss before any signs of impairment become noticeable."⁷² Before upholding the search, the Court added that the unpredictable nature of the policy's triggering event and the customary dismissal sanction offered an appropriate means of deterring drug use.⁷³

National Treasury Employees Union v. Von Raab,⁷⁴ decided that same day, presented a very different drug testing scheme. Despite acknowledging that its employees were largely drug free and failing to offer any evidence that even a single employee had actually used drugs, the U.S. Customs Service made drug testing a precondition to employment for all individuals who would (1) be

perhaps it is surprising that the Court subsequently found that the balance tipped against the privacy interest. See Schulhofer, *supra* note 57, at 136 ("At bottom, the Court may not truly believe that urinalysis is so terribly intrusive.").

⁶⁵ *Skinner*, 489 U.S. at 619.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 620.

⁶⁹ *Id.* at 623.

⁷⁰ *Id.* at 626–28.

⁷¹ *Id.* at 628.

⁷² *Id.*

⁷³ *Id.* at 629–30.

⁷⁴ 489 U.S. 656 (1989).

involved in drug interdiction, (2) carry a firearm, or (3) handle classified materials.⁷⁵ Applying the same balancing test as in *Skinner*, Justice Kennedy noted that, in certain contexts, “the Government’s need to discover . . . latent or hidden conditions, or to prevent their development,” alone, justifies the application of the special needs doctrine.⁷⁶ The government’s interest in ensuring the fitness, integrity, and judgment of the individuals on the front line of drug interdiction justified the search of those individuals, even absent individualized suspicion.⁷⁷ The Court also found that the public should not be forced to bear the risk of a drug-impaired agent gaining entry to a position where he would carry a firearm.⁷⁸

Against the weighty government interest in drug testing these two classes of employees, the court weighed the employees’ diminished expectation of privacy.⁷⁹ When successful performance of an employee’s duties depends on judgment and dexterity, that employee could not reasonably expect information bearing on those qualities to remain completely protected.⁸⁰ As to these employees, the Court found that the Customs Service’s drug testing policy was reasonable, even absent a history of wrongdoing by employees.⁸¹

The *Von Raab* Court did, however, express doubts as to the third category of employees. Though it had an interest that justified the testing of those who handled classified information, the Customs Service had cast its net too broadly.⁸² The case was remanded for development of the record to determine whether all covered employees—including animal caretakers and accountants—would actually come into contact with classified information and, accordingly, whether drug testing those individuals could ever serve the need to protect classified information.⁸³

The Court faced its most recent workplace drug testing case eight years later in *Chandler v. Miller* and appeared, at least on the surface, to finally rein in the special needs exception.⁸⁴ A Georgia statute conditioned candidacy for

⁷⁵ *Id.* at 660–61; *id.* at 683 (Scalia, J., dissenting).

⁷⁶ *Id.* at 668 (majority opinion).

⁷⁷ *Id.* at 668–70, 677.

⁷⁸ *Id.* at 670–72.

⁷⁹ *Id.* at 672.

⁸⁰ *Id.*

⁸¹ *Id.* at 674, 677.

⁸² *Id.* at 677–78; see also LAFAYE, *supra* note 9, § 10.3(e), at 147.

⁸³ *Von Raab*, 489 U.S. at 678.

⁸⁴ 520 U.S. 305 (1997).

state office on a laboratory's certification that the candidate passed a drug test.⁸⁵ Libertarian Party nominees, upset with the mandate, filed suit.⁸⁶ After acknowledging that the method of testing was not overly intrusive, the Court concentrated on what it considered the core issue: Was there a special need for the testing?⁸⁷ In declaring the statute unconstitutional, Justice Ginsburg determined that nothing in the record identified either a demonstrated problem of drug abuse among officials or a safety risk that was "real and not simply hypothetical."⁸⁸ The Court also criticized the statute as ineffective at deterring drug use—the candidates knew when they would be tested and could simply abstain from drug use to avoid detection.⁸⁹

The *Chandler* Court further distinguished its earlier drug testing cases by noting that public officials "are subject to relentless scrutiny—by their peers, the public, and the press."⁹⁰ This attention offered a far greater protection against potential safety risks than was present in typical work environments.⁹¹ Emphasizing the fundamental nature of safety risks to the Customs positions in *Von Raab*, the Court determined that the Georgia legislature sought to promote an image, not a compelling safety interest—that the asserted need was "symbolic, not 'special.'"⁹² The pursuit of such a need through drug testing violated the Fourth Amendment.⁹³

On two occasions, the Court has addressed whether the government could, based on a safety interest, drug test not only its employees but also participants in uniquely governmental settings.⁹⁴ Two years prior to *Chandler*, the Court

⁸⁵ *Id.* at 309.

⁸⁶ *Id.* at 310.

⁸⁷ *Id.* at 318.

⁸⁸ *Id.* at 319.

⁸⁹ *Id.* at 320.

⁹⁰ *Id.* at 321.

⁹¹ *Id.*

⁹² *Id.* at 321–22. In their brief and at oral argument, attorneys identified the purpose of the statute as ensuring that officials "have what it takes to exercise their best judgment," without pointing to specific risks posed by a public official's drug use. Appellees' Brief at 15, *Chandler v. Miller*, 73 F.3d 1543 (11th Cir. 1996) (No. 95-8230); *Chandler v. Miller*, OYEZ PROJECT, http://www.oyez.org/cases/1990-1999/1996/1996_96_126 (last visited Aug. 22, 2012) (follow "Chandler v. Miller—Oral Argument" hyperlink).

⁹³ See *Chandler*, 520 U.S. at 322 ("However well meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action.").

⁹⁴ See *LAFAVE*, *supra* note 9, § 10.3(e), at 158 n.300. The Supreme Court also evaluated a state hospital's policy of drug testing its pregnant patients in *Ferguson v. City of Charleston*, 532 U.S. 67 (2002). The Court found that policy unconstitutional because the immediate objective of the search was to generate evidence for law enforcement purposes, which situated the hospital's policy outside of the closely guarded

looked at a challenge to an Oregon school district's student drug testing policy in *Vernonia School District 47J v. Acton*.⁹⁵ Though *Skinner* and *Von Raab* had earlier permitted suspicionless testing in the post-accident and pre-employment contexts, *Acton* presented the Court with its first truly random drug testing scheme.⁹⁶ The policy required that all athletes be tested at the beginning of the season and that 10% of the athletes be tested at random each week of the season.⁹⁷ Failed tests resulted in a choice between an assistance program and suspension from athletics.⁹⁸

The *Acton* Court began by noting that special needs inhered in the school context⁹⁹ and then added that the students subjected to testing had a diminished expectation of privacy because of the custodial and tutelary duties of the school, the voluntary choice to try out for a team, and the communal nature of locker rooms.¹⁰⁰ Critical to the decision to uphold the policy was the significant interest in deterring drug use among children during their formative years—an interest the Court viewed as more powerful than that present in any of its prior drug testing cases.¹⁰¹ The Court concluded by noting that the role-model effect of athletes' drug use was effectively curbed by the random drug testing policy.¹⁰² Considering each of these factors, the Court found that the random drug testing policy was reasonable.¹⁰³

In the 2002 decision of *Board of Education v. Earls*, the Court returned to the issue of student drug testing to address “nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas.”¹⁰⁴ An Oklahoma school district had implemented a policy requiring the drug testing of all students participating in extracurricular activities, including the Future Homemakers of America, the Future Farmers of America, the choir, and the cheerleading squad.¹⁰⁵ Applying the special needs balancing test, Justice

category of special needs cases. *Id.* at 83–84. Given that *Ferguson* did not turn on the sufficiency of the purported safety interests but on the policy's law enforcement purpose, its implications largely fall outside of this Comment's scope.

⁹⁵ 515 U.S. 646 (1995).

⁹⁶ LAFAVE, *supra* note 9, § 10.3(e), at 158.

⁹⁷ *Acton*, 515 U.S. at 650.

⁹⁸ *Id.* at 651.

⁹⁹ *Id.* at 653 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985)).

¹⁰⁰ *Id.* at 655–57.

¹⁰¹ *Id.* at 661–62.

¹⁰² *Id.* at 663.

¹⁰³ *Id.* at 664–65.

¹⁰⁴ 536 U.S. 822, 852 (2002) (Ginsburg, J., dissenting).

¹⁰⁵ *Id.* at 826 (majority opinion).

Thomas emphasized that the Court's decision in *Acton* did not turn on the diminished expectation of privacy athletes had in their lockers; rather, the Court "considered the school context '[c]entral' and '[t]he most significant element.'"¹⁰⁶ Within this context, the state's unique responsibility for maintaining discipline, health, and safety limited the privacy interests of students.¹⁰⁷ The Court noted that the urine-collecting process was "minimally intrusive" and that the results were kept confidential.¹⁰⁸

Against this minimal privacy intrusion, the Court weighed the government's important and immediate interest in preventing and deterring childhood drug use.¹⁰⁹ The safety interest furthered by the scheme was substantial, given the health risks that drug use presents for all children.¹¹⁰ Finally, random drug testing was a reasonably effective means of deterring and detecting drug use.¹¹¹ Accordingly, the Court held that the special need to prevent drug use among students justified the particular testing scheme¹¹²—and arguably one that would reach all students.¹¹³

The Supreme Court's drug testing cases have provided lower courts with a couple of guidelines. First, a special need for drug testing likely does not exist unless there is a government-enabled safety risk that the testing would address. Second, absent abuses in the collection or information-retention processes, the existence of a special need will inevitably tilt the reasonableness balance in favor of the government as long as the drug testing policy actually serves the

¹⁰⁶ *Id.* at 831 n.3 (alterations in original) (quoting *Acton*, 515 U.S. at 654, 665).

¹⁰⁷ *Id.* at 830.

¹⁰⁸ *Id.* at 833–34.

¹⁰⁹ *Id.* at 834–36.

¹¹⁰ *Id.* at 836–37.

¹¹¹ *Id.* at 837.

¹¹² *Id.* at 830.

¹¹³ Professor LaFave has explained why the *Earls* decision could eventually lead to the drug testing of all public school students, not just those involved in extracurricular activities:

[I]t could . . . be that those who believe that *Earls* opens the door to testing all students will turn out to be correct. There will be great pressure not to continue the constitutional limits on student drug testing as stated in *Earls*, for the result is a testing policy that is nothing short of absurd. Testing would be limited to those least likely to be using drugs, and the impact of testing only that group would be to discourage those actually using drugs from instead spending their time with a worthwhile extracurricular activity.

LAFAVE, *supra* note 9, § 10.11(c), at 529 (footnote omitted). In some respects, the expansion of drug testing to all students has already begun. *See* *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624 (N.J. 2003) (finding constitutional, under the special needs exception, the random drug testing of all students who held parking passes).

need.¹¹⁴ Yet, between the poles set by *Chandler* and the other drug testing cases, a vast expanse of ambiguity remains, leaving lower courts to argue over what constitutes a sufficiently “special” safety interest and when that interest is actually furthered. The following Part enters the debate, suggesting an analytical framework to provide greater consistency within special needs jurisprudence.

II. FILLING THE SPECIAL NEEDS GAPS

The Court’s special needs jurisprudence leaves two lingering questions: First, at what point is safety sufficiently at stake to create a special need? Second, what role does the efficacy inquiry—functionally part of the reasonableness balance,¹¹⁵ but typically only mentioned in the Court’s opinions in passing—play in the analysis? Indeed, the answer to the first question is outcome determinative: if a special need exists, the balance will almost always tilt in favor of the government interest;¹¹⁶ if not, the search violates the Fourth Amendment. Accordingly, resolving these two questions is critical to a more principled special needs analysis. Section A begins by identifying three factors—three indicia of “specialness”—that establish the existence of a special need to act in the interest of public safety, focusing on the nature of the particular context at issue and the unique risks that the context presents. Section B fixes the efficacy analysis on means of social control in organizational settings, discussing how and in what circumstances sanctioning mechanisms, both formal and informal, help purge the threat posed by employee drug use.

¹¹⁴ See, e.g., William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (“The Supreme Court’s generalized ‘reasonableness’ standard resembles not negligence, but rational-basis constitutional review: when the standard applies, the government wins, save perhaps for a few egregious cases.”).

¹¹⁵ See, e.g., *Earls*, 536 U.S. at 834.

¹¹⁶ See Irene Merker Rosenberg, *The Public Schools Have a “Special Need” for Their Students’ Urine*, 31 HOFSTRA L. REV. 303, 307 (2002) (“[O]ne of the difficulties of the special needs cases is that the result seems to depend on the answer to the front-end question—is there a special need? If the need is viewed as special, which it usually is, the balancing always tilts toward the government.”). Of course, the balance could still tilt in favor of the government if the search occasions an exceptional intrusion on privacy beyond the norm for drug testing schemes (e.g., through dissemination of information to third parties uninvolved in the collection process). This Comment’s analysis assumes that a drug testing policy contains no such exceptional characteristics and serves no law enforcement purpose.

A. *Identifying a Special Need*

The greatest difficulty lower courts face in applying the special needs analysis rests in the front-end assessment of whether a special need for the particular search even exists. When the special need is public safety, courts addressing drug testing policies in new settings must attempt to delineate between a symbolic and special need. Though the initial instinct may be to search for an objective minimum magnitude of harm—a categorical rule that extends special needs protection to the government only once a set level of risk is identified—such an approach is inconsistent with the purposes that the Fourth Amendment is meant to serve. As Justice Scalia wrote of the special needs balancing test in *Acton*:

It is a mistake . . . to think that the phrase “compelling state interest,” in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.¹¹⁷

Justice Scalia’s language clarifies that the special needs analysis involves a profoundly contextual inquiry. Without probing into the nature of the setting in which the harm arises, a court lacks an understanding of the very factors that make the competing interests meaningful. So, too, in the front-end “special need” designation,¹¹⁸ a court should not with myopic focus search simply for a particular severity of harm but instead ask whether the characteristics of the setting in which the harm arises create a need.

A series of examples clarifies the important role context plays in the recognition of a special need. Take, first, the government’s interest in effective drug interdiction. The potential risks created by impaired judgment of Customs officers on the front lines are fundamentally different and weightier than those

¹¹⁷ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995).

¹¹⁸ Professor Irene Merker Rosenberg has pointed out that the “special need” designation is little more than the recognition of the compelling government interest that is subsequently balanced. *See* Rosenberg, *supra* note 116, at 307 (“Conceptually, it appears in these cases that the governmental interest is counted twice—once to determine if the need is special, and then again in the balancing of governmental and private interests. The double dipping must result in a governmental win unless the search is extremely intrusive.”).

created by a politician drafting legislation.¹¹⁹ Or consider the government's interest in preventing adolescent drug use. This interest may justify special intrusions in the school setting,¹²⁰ but the government's interest may be muted outside the schoolhouse gates, where it does not maintain the same supervisory and custodial duties.¹²¹ Context creates a given risk, defines its scope, and determines the frequency with which it is faced. And so, context serves as the backdrop of the special needs inquiry. As the safety inquiry orients itself around considerations of context, three factors should guide a court in the finding of a special need: (1) the risk addressed must be uniquely enabled by the particular government institution or instrumentality occasioning the search, (2) the safety risk must touch an essential aspect of the context in which the need arises, and (3) the context must be such that current controls are insufficient to identify and correct risk-creating activity before any harm occurs. This section addresses each of these factors in turn.

First, for a special need to exist, the safety risk at issue must be uniquely enabled by the particular institution or instrumentality that creates the purported need.¹²² In short, a court must ask whether the ordinary public would face the same risk had the particular institution or instrumentality occasioning the search never come into being. The operation of motor vehicles on state roads illustrates the implications of this limit. In funding and constructing its roads, a state constructs an instrument through which the public faces harms that would not otherwise exist. As a result, a state's interest in curbing drunk driving would justify the state's implementation of sobriety checkpoints on those roads.¹²³ However, an employee driving his car from office to office does not create a risk that rises above this baseline. Accordingly, the possibility that an employee might cause harm does not create a safety interest that is in any way "special"—all drivers pose the same risk, regardless of their

¹¹⁹ Compare *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668–70 (1989) (finding a special need for testing Customs officers involved in drug interdiction), with *Chandler v. Miller*, 520 U.S. 305, 318 (1997) (finding that the possible jeopardizing of antidrug law enforcement efforts by public official drug use was not a special need).

¹²⁰ See, e.g., *Earls*, 536 U.S. 822; *Acton*, 515 U.S. 646.

¹²¹ See, e.g., *Lanier v. City of Woodburn*, 518 F.3d 1147, 1150–52 (9th Cir. 2008) (finding unconstitutional the drug testing of part-time library pages, who exercised no *in loco parentis* responsibilities, when the purported need was protecting children from drug use).

¹²² See Robert S. Logan, Note, *The Reverse Equal Protection Analysis: A New Methodology for "Special Needs" Cases*, 68 GEO. WASH. L. REV. 447, 476 (2000).

¹²³ See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding the constitutionality of random sobriety checkpoints under the special needs exception).

employment.¹²⁴ But the situation would change if, by virtue of his employment, an individual was required to operate a school bus or other heavy machinery.¹²⁵ The average citizen does not have the ability to operate such vehicles, and those vehicles present a substantial risk to life far greater than that posed by everyday passenger vehicles.¹²⁶

This initial limit prevents the special needs exception from swallowing the Fourth Amendment whole; if the exception were to reach universal risks, the general citizenry would face the possibility of suspicionless drug testing for their daily activities, and the special needs exception would become little more than a modern-day general warrant. For a safety risk to form the basis for a special need, it must present a unique, institutionally enabled risk, one created by context and specific to the individuals who are part of it—the railway operation in *Skinner*, the drug-interdiction responsibilities and mandated firearm possession in *Von Raab*, or the school setting in *Vernonia* and *Earls*.

Second, a court should assess whether the safety interest goes to the essence of the position and setting at issue.¹²⁷ So long as the safety interest does so, acting as an almost definitional aspect of the day-to-day functions, the risk is real. If the risk of harm is merely peripheral, that risk is insufficient to present a special need. The question that must be answered, then, is whether the safety risk is necessarily present whenever an employee performs his everyday tasks and obligations. *Skinner* presented a real safety risk insofar as railway employment is predicated upon the performance of functions that affect safe operation of rail lines.¹²⁸ Similarly, one could not conceive of the Customs officials tested in *Von Raab* performing their jobs without engaging

¹²⁴ See *id.* at 475.

¹²⁵ See, e.g., *Amalgamated Transit Union, Div. 1279 v. Cambria Cnty. Transit Auth.*, 691 F. Supp. 898, 904 (W.D. Pa. 1988) (upholding the routine drug testing of a municipal transportation authority's bus drivers because they "bear direct and daily responsibilities for more lives than any other type of public employee" and because, given that each bus carried up to seventy passengers, "[a]n impaired driver . . . could injure or kill scores of people").

¹²⁶ See *id.*

¹²⁷ The second threshold inquiry may fairly be viewed as a neo-Aristotelian extension of the essence–accidents distinction. See generally ARISTOTLE, *METAPHYSICS* 60–63, 100–01 (Hippocrates G. Apostle trans., Peripatetic Press 1979) (c. 350 BCE) (distinguishing between a person's essence and accidents). In his classical account, Aristotle set forth the following inquiry: Would a man who is white cease being a man if he were no longer white? *Id.* at 63. No, he reasoned, because whiteness was a property accidental to being a man, not one of the higher order qualities that made up man's essence. *Id.*

¹²⁸ See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 628 (1989) ("Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.").

in interdiction efforts that posed far-reaching safety consequences.¹²⁹ And the Court permitted student drug testing after acknowledging that schools would cease to operate effectively if they failed to exercise their custodial duties over children.¹³⁰ In contrast, Georgia's purported interest in *Chandler* merely fell into the "'set a good example' genre,"¹³¹ given that the defendant did not pinpoint any unique, concrete risk presented by the drug use of candidates for public office.¹³² Identifying an individual as portraying some undesirable personal example ultimately says little of his ability to perform the functions of public office effectively and so represents a characteristic outside the scope of the office's essential functions.¹³³ When the identified need is predicated on the occurrence of an act that an employee is under no obligation to perform or on a character trait that an employee can effectively function without, it is sufficiently remote that a special need should not be found.

Finally, the context within which the risk arises must be such that it is incapable of identifying and correcting the harm-creating activity before the effects are felt by the public. This final factor assures that there is actually a need for the particular search. The *Chandler* Court identified a "telling difference" between Georgia's mandate for drug testing public officials and the earlier schemes that the Court had upheld: public officials are subject to far more extensive scrutiny than are employees in ordinary work environments.¹³⁴ As the ACLU pointed out in its role as amicus curiae:

[B]ecause of numerous checks and balances on their acts, elected officials cannot "cause great human loss before any signs of impairment become noticeable to . . . others." For example, members of the Georgia General Assembly cannot act alone. Elected officials within the executive branch must answer to the Governor. Actions of the executive branch (including those of the Governor) are carefully scrutinized by the press and the General Assembly. Judges are

¹²⁹ See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 669 (1989) ("Many of the Service's employees are often exposed to this criminal element and to the controlled substances it seeks to smuggle into the country.").

¹³⁰ See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 830–31 (2002) (noting the significance of the school's obligation to protect children).

¹³¹ See *Chandler v. Miller*, 520 U.S. 305, 322 (1997).

¹³² See *id.* at 321–22 ("[Public] officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort.").

¹³³ See Nik Antovich, *Politicians' Private Lives Indicative of Character*, CBS NEWS (Feb. 11, 2009, 2:53 PM), <http://www.cbsnews.com/stories/2008/05/27/politics/ewire/main4130497.shtml> (indicating that many individuals are unconcerned with a politician's private life, so long as she does not cause a direct negative effect on their lives).

¹³⁴ *Chandler*, 520 U.S. at 321.

subject to discipline, impeachment and, in many cases, reversal on appeal.¹³⁵

Ordinary work environments typically lack similar protective checks for the actions of employees;¹³⁶ the relative independence of employees and the immediacy with which harmful effects are felt within the ordinary workplace distinguish the run-of-the-mill case from *Chandler*. A special need to address safety risks should only exist when there are no unique contextual factors, such as those present in *Chandler*, that provide the opportunity for the government body to identify and correct the harm-creating activity before its effects are felt.

When it comes to special needs, context matters.¹³⁷ Indeed, for drug testing, context is often determinative.¹³⁸ The following section explores when the finding of a special need may not be determinative for upholding a drug testing scheme.

B. *Evaluating Efficacy*

For the special needs balance to tilt in favor of a government intrusion, not only must the implementing body base its search on a special need, it must also show that the particular search is actually designed to serve that need.¹³⁹ When it has addressed the issue, the Supreme Court has only done so in cursory fashion,¹⁴⁰ leaving few standards to which lower courts can look for guidance. In large part, the underdevelopment of the efficacy prong is a result of the Court having not yet encountered a suspicionless-search program where the record placed efficacy squarely in question—that is, where a program was not clearly oriented toward the advancement of the purported need.¹⁴¹

¹³⁵ Brief for Amici Curiae American Civil Liberties Union et al. at 9–10, *Chandler*, 520 U.S. 305 (No. 96-126) (second alteration in original) (citation omitted) (quoting *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 628 (1989)).

¹³⁶ See, e.g., *Harmon v. Thornburgh*, 878 F.2d 484, 491 (D.C. Cir. 1989).

¹³⁷ *Nat'l Fed'n of Fed. Emps.—IAM v. Vilsack*, 681 F.3d 483, 492 (D.C. Cir. 2012).

¹³⁸ See *supra* note 116 and accompanying text.

¹³⁹ See *LAFAVE*, *supra* note 9, § 10.3(e), at 159 (“[A] drug testing scheme . . . may be found wanting as a Fourth Amendment matter because that scheme does not effectively serve the legitimate goals of detection and deterrence.”).

¹⁴⁰ See, e.g., *Skinner*, 489 U.S. at 629. Although *Skinner* did present a case with at least a low level of deterrence, the scheme in question had a clearer benefit in its ability to incapacitate violators.

¹⁴¹ Though the *Von Raab* Court expressed concern about the Custom Service’s seemingly overbroad drug testing of individuals who handled classified information, it remanded the case for further development of the record. 489 U.S. 656, 678 (1989).

This section fleshes out the Court's brief nods to efficacy into a complete analytical framework applicable to all forms of suspicionless drug testing. Following the Court's lead, this framework maps the traditional utilitarian theories of criminal punishment—deterrence, incapacitation, and rehabilitation¹⁴²—onto the efficacy prong of the special needs analysis. This orientation places the focus squarely on the necessity of implementing a meaningful sanctioning mechanism if a special need is to be served. In the process, this section identifies the particular social controls, whether formal or informal, that one should expect to see at work in permissible drug testing regimes.¹⁴³ This section now discusses each theory of punishment in turn.

1. *Deterrence*

Deterrence theory posits that an individual evaluates the net value of deviant behavior by weighing the potential gain against the perceived certainty, severity, and swiftness of repercussions.¹⁴⁴ The theory proposes two arguments about human action: (1) man accurately perceives the costs and benefits of his actions, and (2) man acts rationally, through conformity or deviance, according to that perception.¹⁴⁵ For an individual to choose to forego deviant behavior, he must actually perceive a threat of punishment.¹⁴⁶

To understand the role of deterrence in organizational settings, one must first acknowledge the baseline by which society, as a whole, acts. And that baseline is set through the broad-reaching, established rules that apply to all society—the criminal law. Behavioral theorists have long studied how the certainty and severity of sanctions enforced through the law impact an

¹⁴² See, e.g., Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1154 (2003) (discussing the prevailing theories of punishment).

¹⁴³ For purposes of exposition, this Part discusses the operation of theories of social control and utilitarian theories of punishment primarily within workplace drug testing schemes. The general principles underlying these theories may, to varying degrees, be applied to special needs searches in other contexts, depending on the unique contextual factors implicated.

¹⁴⁴ Monica J. Barratt et al., *Cannabis Law Reform in Western Australia: An Opportunity to Test Theories of Marginal Deterrence and Legitimacy*, 24 DRUG & ALCOHOL REV. 321, 322 (2005); Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 2 (2000).

¹⁴⁵ Michael Geerken & Walter R. Gove, *Deterrence, Overload, and Incapacitation: An Empirical Evaluation*, 56 SOC. FORCES 424, 425 (1977).

¹⁴⁶ See, e.g., Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 18 (1998) (“[A]bsent some linkage between policy and perceptions[,]behavior is immune to policy manipulation.” (citation omitted)).

individual's decision to engage in or forego a criminal act.¹⁴⁷ A collection of cognitive biases, they have found, leads the criminal to the conclusion that he is unlikely to be caught and that, if caught, he would only receive the minimum punishment.¹⁴⁸ Because of this perceived low risk of detection, criminal sanctions often create a low deterrent effect for the general populace,¹⁴⁹ particularly when those sanctions target illicit drug use.¹⁵⁰ Given the expected immediate rewards of drug use and its addictive qualities, the uncertain and remote nature of legal sanctions provide little incentive for a criminal to halt his drug use.¹⁵¹ But, as a general matter, one should expect that the formal legal system deters at least *some* portion of society from ever using drugs.

The Court's drug testing cases implicitly adopt this understanding of the criminal law's normative effects as a jumping-off point when approaching the question of deterrence. When searching for a deterrent effect, then, what a court is looking for is *marginal* deterrence. That is, the program implemented must contain sufficient enforcement mechanisms to deter individuals who would not be deterred by the criminal law alone. Accordingly, institutions must create external incentives that define the acceptable boundaries of individual behavior. As Andrew Oldenquist has observed, "[H]umans evolved to be innately social animals, to be tribal creatures and group egoists who are emotionally dependent on group membership."¹⁵² Individual mental models are not universally shared, varying instead according to the unique environments

¹⁴⁷ See, e.g., Geerken & Gove, *supra* note 145, at 425 ("[P]resent evidence indicates that certainty is more important than severity of punishment in deterring crime." (citation omitted)).

¹⁴⁸ See Matthew Haist, Comment, *Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?*, 99 J. CRIM. L. & CRIMINOLOGY 789, 809–14 (2009) (listing cognitive biases and ultimately concluding that "the criminal probably does not believe that he or she will be caught in the first place" and that, "if he or she is caught, he or she will believe that he will receive a sentence or punishment on the lower end of the range of permissible punishments").

¹⁴⁹ Geerken & Gove, *supra* note 145, at 428; see also Irving Piliavin et al., *Crime, Deterrence, and Rational Choice*, 51 AM. SOC. REV. 101, 114 (1986).

¹⁵⁰ See Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497, 502 (1993) ("It is doubtful . . . that the criminal justice system could ever mete out punishment for drug offenses rapidly enough to counteract impulsivity effects without greatly curtailing civil liberties.").

¹⁵¹ *Id.* at 501–02.

¹⁵² Andrew Oldenquist, *Community and De-Alienation*, in ALIENATION, COMMUNITY, AND WORK 91, 92 (Andrew Oldenquist & Menachem Rosner eds., 1991); accord *id.* at 96 ("Human beings are not bugs who mechanically catch the[ir] prey and spin their cocoons as their DNA directs them; we are more complex creatures whose innate behavior works through wants, fears, and external sources of satisfaction and anxiety.").

and institutions of which each individual is a part.¹⁵³ Building on these background principles, a number of scholars have acknowledged the controlling effect of norms within relatively small, well-defined social constructs, such as the family, peer group, or workplace.¹⁵⁴ These constructs present unique informal and formal influences on member behavior.¹⁵⁵ Informally, these settings engender feelings of social connectedness, raising the social costs of transgression.¹⁵⁶ Individuals value the opinions of those with whom they share social bonds and, accordingly, orient their actions to avoid stigma and embarrassment.¹⁵⁷ Formally, these institutions encourage the development of clearly promulgated behavioral rules with well-known sanctions.¹⁵⁸

Perhaps the greatest advantage of the institutional setting in controlling individual behavior is its ability to deliver a clear message to members.¹⁵⁹ Closed systems enable more informed assessment of social-control mechanisms, benefitting from the unique advantages of known members, distinct spatial boundaries, formal rules, well-known sanctions, and efficient informational avenues.¹⁶⁰ As the reach of the sanctioning scheme narrows,

¹⁵³ See, e.g., Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 487 (1985) (“Actors do not behave or decide as atoms outside a social context . . .”); Douglass C. North, *The New Institutional Economics and Third World Development*, in THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT 17, 18 (John Harris et al. eds., 1995) (“[Mental models] are acquired through experience which is ‘local’ to the particular environment and therefore also varies widely with different environments.”).

¹⁵⁴ See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Robert Apel et al., *The Sanctions–Perceptions Link in a Model of School-Based Deterrence*, 25 J. QUANTITATIVE CRIMINOLOGY 201, 205 (2009); Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in THE NEW INSTITUTIONALISM IN SOCIOLOGY 19 (Mary C. Brinton & Victor Nee eds., 1998).

¹⁵⁵ See Apel et al., *supra* note 154, at 206, 220 (identifying stigma and well-known sanctions as factors influencing individual behavior within institutions).

¹⁵⁶ See, e.g., *id.* at 206; Granovetter, *supra* note 153, at 490 (“The embeddedness argument stresses . . . the role of concrete personal relations and structures (or ‘networks’) of such relations in generating trust and discouraging malfeasance.”).

¹⁵⁷ Apel et al., *supra* note 154, at 206; see also ROBERT S. BARON & NORBERT L. KERR, *GROUP PROCESS, GROUP DECISION, GROUP ACTION* 64–66 (2d ed. 2003) (discussing conformity pressure as a control on individual action, particularly where an individual values the group); Nee & Ingram, *supra* note 154, at 28–29 (noting that, through the “publish-or-perish” norm in the research-university setting, colleagues confer social approval and informally rank faculty members according to their perception of the members’ academic productivity and that, as a result, the motivation for research productivity is based not merely on monetary concerns but also on a desire for social approval and status).

¹⁵⁸ Apel et al., *supra* note 154, at 220.

¹⁵⁹ *Id.* at 207.

¹⁶⁰ *Id.* at 220.

thereby making the possibility of punishment more palpable to the individual, the effectiveness of the sanctioning climate strengthens.¹⁶¹ Where broad-reaching criminal laws have failed to produce a deterrent result,¹⁶² similar efforts in smaller pockets of social control may prove beneficial.

As noted above, one institution in which we should expect social-control mechanisms to exert a unique influence on individual behavior is the workplace. Apart from the need for a steady income, many people look forward to going to work each day because, given the substantial amount of time spent in the workplace, that is where many of their closest friends are.¹⁶³ For most adults, relationships at work are the most meaningful ones outside of the family unit, and many workers view good relationships with coworkers as a working condition of great import.¹⁶⁴ So, it is not surprising that social scientists find that interactions with coworkers create a strong feeling of community for many individuals¹⁶⁵—a feeling, we would expect, that not many would easily give up.

A series of studies evaluating drug testing schemes in the workplace have confirmed the belief that the workplace creates unique normative effects on individual behavior.¹⁶⁶ Individuals whose employers perform drug testing are substantially less likely to use drugs than those individuals whose employers do not.¹⁶⁷ The mere presence of these testing policies increases the necessity of abstaining completely from drug use, given the extensive length of time that

¹⁶¹ See, e.g., *id.* at 221 (“[T]he association between changes in sanctioning climate and perceived risk was strongest among youth in the smallest and least disordered schools.”).

¹⁶² See, e.g., *id.* (“[T]he county may be too large and diffuse a geographic unit of aggregation to find evidence for a sanctions–perceptions correlation.”).

¹⁶³ JAMES O’TOOLE & EDWARD E. LAWLER III, *THE NEW AMERICAN WORKPLACE* 134 (2006).

¹⁶⁴ *Id.* at 133.

¹⁶⁵ *Id.* at 134.

¹⁶⁶ See, e.g., Christopher S. Carpenter, *Workplace Drug Testing and Worker Drug Use*, 42 *HEALTH SERVICES RES.* 795, 805 & tbl.4 (2007) (finding, in the employment setting, a high correlation between penalty severity and deterrent effect); John P. Hoffmann & Cindy L. Larison, *Worker Drug Use and Workplace Drug-Testing Programs: Results from the 1994 National Household Survey on Drug Abuse*, 26 *CONTEMP. DRUG PROBS.* 331, 347 (1999) (“The[] results suggest that workplace drug-testing programs attenuate frequent use of these drugs.” (citation omitted)); see also *Worker Drug Use and Workplace Policies and Programs: Results from the 1994 and 1997 National Household Survey on Drug Abuse*, U.S. DEPARTMENT HEALTH & HUM. SERVICES, http://oas.samhsa.gov/nhsda/A-11/WrkplcPly2-34.htm#P4114_76969 (last updated Dec. 30, 2008) (“[W]orkers who were not current illicit drug users were significantly more likely to report that their employers had drug use testing programs . . . than workers who were current illicit drug users.”).

¹⁶⁷ See Carpenter, *supra* note 166, at 805 tbl.4 (finding that individuals tested pre-hire were .715 times as likely to report past-month marijuana use as those whose employers did not perform testing, individuals tested at random were .721 times as likely, and individuals tested both pre-hire and at random were .444 times as likely).

trace amounts of drugs may remain in an individual's urine.¹⁶⁸ Studies have found that, as the severity of punishment increases, the likelihood of an employee using drugs decreases.¹⁶⁹ For example, one study found that individuals were .56 times as likely to report that they had used drugs when the penalty for a failed test was termination, .71 times as likely when the penalty was compulsory entry into a rehabilitation program, and .88 times as likely when the penalty was of lesser magnitude.¹⁷⁰ Consistent with this finding, a study of the Navy's "Zero Tolerance" drug testing policy revealed that the policy deterred 56.5% of drug use among Navy personnel.¹⁷¹

These findings reflect the interplay of the two forms of social control described above—formal and informal—in creating the deterrent effect of a particular drug testing scheme. At bottom, for a drug testing scheme to be an effective deterrent, it must employ formal sanctioning mechanisms—that is, there must be an articulated policy with certain punishments. Where the risk is greatest, as when the sanction is termination, the formal sanction does much of the work; for many, the economic risk of unemployment will deter drug use. Informal controls exert influence when termination is a possibility as well, given that a failed drug test results in total exclusion from a significant social group. But as the studies above show, even as the severity of the formal sanction—and the potential economic loss—to the individual decreases, a deterrent effect may remain.¹⁷² For these lesser sanctions, such as forced entry into a rehabilitation program, informal sanctions come to the fore. Absent a meaningful economic impact, an individual's decision to cease or refrain from drug use is best conceptualized as a desire to avoid a sanction that clearly labels the individual as a "drug user" to his coworkers, creating a risk of stigma and outsider status.¹⁷³

¹⁶⁸ See Scott Macdonald et al., *Testing for Cannabis in the Work-Place: A Review of the Evidence*, 105 ADDICTION 408, 409 (2010) ("The detection periods (i.e. the time between the ingestion of a drug and a positive test) vary considerably for different drugs: 2 days for morphine, 3–5 days for cocaine and up to several weeks for cannabis.").

¹⁶⁹ See, e.g., Carpenter, *supra* note 166, at 805.

¹⁷⁰ *Id.* at 805 tbl.4.

¹⁷¹ Jules I. Borack, *An Estimate of the Impact of Drug Testing on the Deterrence of Drug Use*, 10 MILITARY PSYCHOL. 17, 24 (1998). The Navy instituted a random drug testing scheme that drew samples from 10% to 30% of all personnel annually. *Id.* at 17.

¹⁷² See Carpenter, *supra* note 166, at 805 tbl.4.

¹⁷³ See BARON & KERR, *supra* note 157, at 66 ("People conform more when . . . [t]heir conformity or deviation will be easily identifiable (and therefore subject to social rewards and punishments)" (citation omitted)).

Whether a given drug testing scheme has a deterrent effect thus depends on the scheme's triggering event and the particular punishments that result from a failed test. The first—and least problematic—form of suspicionless drug testing is the pre-employment scheme.¹⁷⁴ Employers typically implement these schemes to ferret out employees entering safety-sensitive positions before they ever have the opportunity to cause harm.¹⁷⁵ Such tests are used as part of the hiring process and apply to all individuals seeking to occupy safety-sensitive positions.¹⁷⁶ These schemes serve a clear deterrent purpose. The inclusion of a tangible formal sanction—the denial of employment—and the uncertainty with which an employer will act on an application prevents many drug users from ever applying to the position.¹⁷⁷ The exceedingly high likelihood of a failed drug test is sufficient to deter applicants, even though informal social controls are muted by the individual's lack of connectedness within the work environment.

The second (and most controversial) form of suspicionless drug testing is the random scheme.¹⁷⁸ Random drug testing schemes select employees for testing “by a method employing objective, neutral criteria which ensure that every covered employee has a substantially equal statistical chance of being selected within a specified time frame.”¹⁷⁹ Employers spread testing and selection procedures over the course of the calendar year to maximize the deterrent effect of the testing.¹⁸⁰ The number of employees selected for testing each year is determined according to a minimum percentage of the workforce set by the policy.¹⁸¹

¹⁷⁴ Jill Dorancy-Williams, Comment, *The Difference Between Mine and Thine: The Constitutionality of Public Employee Drug Testing*, 28 N.M. L. REV. 451, 469 (1998); cf. *MacWade v. Kelly*, 460 F.3d 260, 275 (2d Cir. 2006) (“[W]e always have viewed notice and the opportunity to decline as beneficial aspects of a suspicionless search regime because those features minimize intrusiveness.”).

¹⁷⁵ See, e.g., 49 C.F.R. § 219.502(a)(1)–(2) (2011) (noting that the FRA's pre-employment testing applies to those who engage in safety-sensitive functions).

¹⁷⁶ See, e.g., *id.* § 219.502(a)(2)–(3).

¹⁷⁷ See LARSON ET AL., *supra* note 12, at 4 (noting that 5.6 million workers reported that they would be less likely to work for an employer conducting pre-employment drug testing).

¹⁷⁸ Dorancy-Williams, *supra* note 174, at 477.

¹⁷⁹ See, e.g., 49 C.F.R. § 219.601(b)(1) (FRA policy). Subjective factors should play no role in selection. See *id.*

¹⁸⁰ See, e.g., *id.* § 219.601(b)(2)(i)(A) (“The random testing program is spread reasonably through the 12-month period.”).

¹⁸¹ See, e.g., *id.* § 219.602(a) (“[T]he minimum annual percentage rate for random drug testing must be 50 percent of covered employees.”); Borack, *supra* note 171, at 17 (requiring random urinalysis of 10% to 30% of all Navy personnel without permission from higher headquarters).

Within this category of testing, again, a deterrent effect should be expected. Such programs assure that a substantial portion of employees will be tested as set by the policy and that the random manner in which employees are chosen prevents individuals from altering their behavior only temporarily to pass a test. Because an employer would only have the incentive to expend the resources necessary to support a random drug testing policy if a meaningful employment sanction resulted—whether termination, suspension, or compelled entry into a rehabilitation program—we should expect to see the interplay between formal and informal sanctions discussed above.¹⁸² When the sanction imposed threatens either to permanently remove the individual from the work community or to result in a punishment that is sufficiently visible to risk the stigma of the peer group, those risks alone will deter a number of individuals from continuing or ever beginning to use drugs.¹⁸³

The final suspicionless drug testing tool is the post-incident scheme. Post-incident testing occurs following a distinct triggering event, even though the employer may have no reasonable suspicion that the employee committed a wrongful act.¹⁸⁴ An example is a policy that calls for drug testing of employees after an accident or other harm has already occurred.¹⁸⁵ The scheme's reliance on a remote triggering event lowers the certainty of punishment to the point where an individual is unlikely to alter his behavior in response to the existence of the policy. An individual's optimism bias will lead him to believe, in most instances, that such events are unlikely to occur and, even if they do occur, are unlikely to involve him.¹⁸⁶ For post-incident schemes, the deterrent effect, as a general rule, will likely be nonexistent or at least exceedingly low, regardless of the formal and informal sanctions that might result.

2. *Incapacitation*

Although deterrence is the broadest reaching form of punishment, it is not all-encompassing.¹⁸⁷ Deterrence aims to discourage future acts, but its value is

¹⁸² See *supra* text accompanying notes 172–73.

¹⁸³ See Carpenter, *supra* note 166, at 805 tbl.4.

¹⁸⁴ See, e.g., 49 C.F.R. § 219.201(a) (listing train accidents, impact accidents, fatal incidents, and passenger accidents as triggering events for toxicological testing).

¹⁸⁵ See, e.g., *id.*

¹⁸⁶ See generally Haist, *supra* note 148, at 812–13 (discussing how an individual develops optimism bias toward crime detection).

¹⁸⁷ See Eric Sandberg-Zakian, *Counterterrorism, the Constitution, and the Civil-Criminal Divide: Evaluating the Designation of U.S. Persons Under the International Emergency Economic Powers Act*, 48

solely as a coercive measure to prevent future violations.¹⁸⁸ Separate from this coercion, utilitarian goals are served through measures that respond to risks in a corrective manner.¹⁸⁹ The drug testing scheme in *Skinner* illustrates this distinction. The Court's conclusion that the FRA's suspicionless post-accident drug testing policy served a preventative purpose¹⁹⁰ is consistent with the earlier discussion of deterrence. The employment setting created a sense of social connectedness among the railway employees, and the scheme set a severe sanction of dismissal.¹⁹¹ However, the scheme provided a greater benefit to society than deterrence alone—a failed drug test actually resulted in the removal of violators from the setting, foreclosing the possibility that those identified as drug users might cause future harm. Though the threat of termination promoted the public good through deterrence, the imposition of that sanction independently served the aim of incapacitation.¹⁹²

Incapacitation involves a clearer evaluation of actors than deterrence—it requires no inquiry into the individual's state of mind or into his subjective valuations of risk and reward.¹⁹³ Instead, incapacitation rests on the government's independent determination that the removal of a particular individual from a particular societal construct will improve the public good.¹⁹⁴ Through this removal, society renders the individual incapable of inflicting the harm again.¹⁹⁵ Within the employment context, incapacitation often takes the form of termination. By removing the individual from the very positions which present opportunities for harm, an employer ensures that the risks of harm created by drug use are eradicated.

For pre-employment drug testing policies, the goal of incapacitation is advanced insofar as all individuals who fail a drug test will invariably be

HARV. J. ON LEGIS. 95, 118 (2011) (“[P]unishment has a great many purposes, including not just deterrence and retribution but also rehabilitation and prevention through incapacitation.”).

¹⁸⁸ See Sigler, *supra* note 142, at 1155.

¹⁸⁹ See, e.g., Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000) (“Incapacitation uses imprisonment to remove the offender from society to protect it from the danger he poses.”).

¹⁹⁰ *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 629–30 (1989).

¹⁹¹ See *id.*

¹⁹² See Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 468 (1961) (“[Deterrence, incapacitation, and correction] all are means to crime prevention and as such are entitled to be weighed.”).

¹⁹³ See Stephen O’Hanlon, *Toward a More Reasonable Approach to Free Will in Criminal Law*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 395, 420 (2009).

¹⁹⁴ *Id.*

¹⁹⁵ See Sigler, *supra* note 142, at 1155.

denied employment and, as a result, deprived of the opportunity to occupy a position where they might cause harm. With random and post-incident testing, the potential for the incapacitation of drug users rests entirely on the given policy's mechanical imposition of a sanction that actually removes violators from the workplace setting, such as termination. So long as such a meaningful removal is effected through the policy, a special need will be advanced directly through the jettisoning of risk-creating persons and behaviors.

3. *Rehabilitation*

The final form of government action that may yield an efficacious result is rehabilitation. Rehabilitation involves a direct attempt to reform the wrongdoer, transforming his character so that his behavior squares with accepted norms.¹⁹⁶ Like incapacitation, rehabilitation is a reactive tool, having effect only after a transgressor has already been caught.¹⁹⁷ Rehabilitation, then, serves a two-fold societal good: (1) it protects society from the offender, and (2) it enhances the offender's own well-being.¹⁹⁸ Although rehabilitation programs do not in all instances reform the wrongdoer,¹⁹⁹ they will reform some, leading to a socially desirable result.²⁰⁰

With straightforward denial of entrance as its purpose, a pre-employment drug test could not attempt to further the purpose of rehabilitation. There can be no attempt to reform an individual when a scheme is oriented solely toward the exclusion of all drug users. As with incapacitation, the presence of a satisfactory rehabilitative purpose in random and post-incident schemes hinges on the inclusion of appropriate sanctioning measures. For example, a drug testing policy might condition continued employment following a failed drug test on participation in a drug-abuse program.²⁰¹ Even if the individuals are not permanently removed from the particular setting, the government furthers a

¹⁹⁶ *Id.* at 1155–56.

¹⁹⁷ *See id.*

¹⁹⁸ Martha Grace Duncan, “Cradled on the Sea”: *Positive Images of Prison and Theories of Punishment*, 76 CALIF. L. REV. 1201, 1243 (1988).

¹⁹⁹ *See* O’Hanlon, *supra* note 193, at 419 (“[R]eliance on rehabilitation is problematic, especially if there are strong deterministic characteristics that exist within certain offenders.”).

²⁰⁰ *See, e.g.*, Jane McCusker et al., *Outcomes of a 21-Day Drug Detoxification Program: Retention, Transfer to Further Treatment, and HIV Risk Reduction*, 21 AM. J. DRUG & ALCOHOL ABUSE 1, 12 tbl.3 (1995) (finding that no drug use was reported among 28% of individuals entering drug-detoxification programs only, 37% of those entering detoxification programs and outpatient facilities, and 49% of those entering detoxification and residential facilities).

²⁰¹ *Cf.* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995) (providing athletes who failed a drug test with a six-week drug-assistance program).

safety interest through efforts to reform identified offenders to prevent future wrongs.

* * *

The preceding discussion has aimed to provide a measure of clarity within two underdeveloped areas of the special needs inquiry. First, the Part identified three contextual considerations that should guide a court in making the front-end special needs determination. Given the typically outcome-determinative nature of this inquiry,²⁰² these considerations offer great potential to combat the criticism that special needs decisions too often take on an ad hoc appearance. Second, this Part proposed an analytical framework for understanding the efficacy prong. In evaluating the effect of formal and informal controls on the advancement of various goals of punishment within different drug testing schemes, the discussion has attempted to prepare courts for the day when they must seriously question a search despite the presence of a valid need.

III. AN APPLICATION: TEACHER DRUG TESTING

Part II advocated the implementation of a contextual inquiry to assess both the existence of a special need and the efficacy of the particular drug testing policy. Part III now applies these principles to the debate that opened this Comment: the suspicionless drug testing of public school teachers. This Part proceeds in three steps. First, this Part discusses the unique dangers targeted by teacher drug use. Second, this Part takes those unique dangers and examines whether they create a special need for drug testing public school teachers. Finally, it assesses whether the interest will be served in three forms of suspicionless drug testing schemes: (1) random testing, (2) pre-employment testing, and (3) post-incident testing.²⁰³

A. *Harms Targeted by Teacher Drug Testing*

For a school board to have a special need to drug test its teachers, that board must first identify the safety risks that might form the basis for the need. This section identifies the three most salient dangers that teachers create

²⁰² See *supra* notes 114, 116.

²⁰³ See generally John B. Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799 (2000) (identifying instances in which an employer may choose to implement a drug testing scheme).

through their drug use: (1) decreased awareness and judgment while under the influence; (2) enablement, directly and indirectly, of student drug use; and (3) the molding of attitudes toward drug use through role modeling.

1. *Decreased Awareness and Judgment*

The first potential risk that teacher drug use presents is decreased awareness and judgment within the school setting. By tapping into the brain's neural network, many drugs interfere with the way nerve cells send, receive, and process information.²⁰⁴ Most illicit drugs target the brain's reward system with a surge of dopamine—a neurotransmitter regulating movement, emotion, cognition, motivation, and pleasure.²⁰⁵ Following this initial surge, the brain responds by producing less dopamine to reach equilibrium.²⁰⁶ For example, among cannabis users, this drop in dopamine levels has led to drowsiness, distorted vision and hearing, loss of concentration, and dream-like states.²⁰⁷ Studies have also found that cannabis has effects on memory, learning, and other cognitive processes.²⁰⁸

A teacher suffering from these incapacities threatens the maintenance of order in schools. Although idealized as educational safe havens, public schools face prevalent drug and violence problems. A 2010 Department of Health and Human Services study found that, in the year leading up to the survey, 22.7% had been offered, sold, or given drugs at school, and that, in just the prior month, 4.6% had smoked marijuana at school.²⁰⁹ The same study found that, in the prior year, another 11.1% of students had been in a fight on school grounds and that 7.7% had been either threatened with or injured by a weapon at school.²¹⁰ Were students measured over the entirety of their educational experiences, these numbers would only continue to rise. Reflecting an extreme

²⁰⁴ NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., NIH PUB. NO. 10-5605, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION 17 (2010), available at <https://www.drugabuse.gov/sites/default/files/sciofaddiction.pdf>.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 19.

²⁰⁷ See, e.g., Leo E. Hollister, *Health Aspects of Cannabis*, 38 PHARMACOLOGICAL REVIEWS 1, 2 (1986); see also Macdonald et al., *supra* note 168, at 410 ("Reduced perceptual and motor skills, attention, decision-making, learning and short-term memory are noted frequently as impairments. Mood changes (i.e. euphoria or anxiety), perception and difficulty in concentration are also reported frequently." (endnotes omitted)).

²⁰⁸ See, e.g., Irma B. Adams & Billy R. Martin, *Cannabis: Pharmacology and Toxicology in Animals and Humans*, 91 ADDICTION 1585, 1601–02 (1996).

²⁰⁹ Danice K. Eaton et al., *Youth Risk Behavior Surveillance—United States, 2009*, MORBIDITY & MORTALITY WKLY. REP., June 4, 2010, at 1, 19, available at <http://www.cdc.gov/mmwr/pdf/ss/ss5905.pdf>.

²¹⁰ *Id.* at 7.

case, a Pennsylvania school district recently reported a rate of 47.23 violent incidents per 100 students during the 2011–2012 school year.²¹¹ Indeed, one does not need to look long to find stories of school violence in the news, often with disastrous consequences for the students involved.²¹²

This high incidence of illicit activity has led some states to create mandates for safe schools.²¹³ California, for example, amended its state constitution to provide all students with “the inalienable right to attend campuses which are safe, secure and peaceful.”²¹⁴ As the frontline of school security, teachers have the unique ability—and, indeed, responsibility—to curb the substantial risks presented within the schoolhouse gates.²¹⁵

A teacher’s drug use greatly jeopardizes his ability to ensure that these duties are fulfilled. Violent encounters erupt suddenly, resulting from little more than petty insults or wayward looks.²¹⁶ Drug use and sales occur surreptitiously. Distorted vision and hearing, drowsiness, and loss of

²¹¹ Adam Wagner, *Wilksburg Is Pa.’s Most Violent School District*, TRIBLIVE (June 27, 2012, 12:01 AM), <http://triblive.com/news/2100160-74/district-schools-incidents-students-violence-violent-wilksburg-100-per-state>.

²¹² See, e.g., Chris Bury & Kristina Wong, *After Chicago Teen’s Violent Death, White House Tries to Mitigate School Violence*, ABC NEWS (Oct. 7, 2009), http://abcnews.go.com/Politics/derrion-alberts-death-obamas-education-secretary-arne-duncan/story?id=8777211#.T_Kl6lvNqSo (reciting the story of a sixteen-year-old student bludgeoned to death in a Chicago high school by four teenagers); *Columbine Students Attacked with Hammer at School*, CBS NEWS (Feb. 13, 2012, 3:21 PM), http://www.cbsnews.com/8301-201_162-57376813/columbine-students-attacked-with-hammer-at-school/ (describing a fifteen-year-old female student’s attack on two female classmates with a hammer at Columbine High School); Erin McLaughlin, *School District Pays Out \$4.2 Million to Student Paralyzed by Bully Attack*, ABC NEWS (Apr. 19, 2012, 8:03 PM), <http://abcnews.go.com/blogs/headlines/2012/04/school-district-pays-out-4-2-million-to-student-paralyzed-by-bully-attack/> (recounting how a twelve-year-old New Jersey student was paralyzed after a bully punched him in the abdomen, sending a blood clot to his spine); Curtis M. Wong, *Kardin Ulysse, New York Teen, Left Blind in One Eye After Alleged Anti-Gay Attack by Bullies*, HUFFINGTON POST (June 19, 2012, 12:38 PM), http://www.huffingtonpost.com/2012/06/19/kardin-ulysse-new-york-teen-blinded-gay-bullies_n_1609103.html (summarizing an attack on a fourteen-year-old junior high student on school grounds based on his perceived sexual orientation, which left the student blind in one eye); Emmeline Zhao, *Warren Lewis, Teen in Texas School Shooting, Says He Was Bullied*, HUFFINGTON POST (Jan. 11, 2012, 5:30 PM), http://www.huffingtonpost.com/2012/01/11/teen-in-texas-school-shoo_0_n_1200385.html?ref=school-bullying (discussing a Houston teenager who shot a classmate in the leg at school).

²¹³ Gale M. Morrison et al., *School Violence to School Safety: Reframing the Issue for School Psychologists*, 23 SCH. PSYCHOL. REV. 236, 239 (1994).

²¹⁴ CAL. CONST. art. I, § 28(f)(1).

²¹⁵ Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 375 (6th Cir. 1998); see also Ronald D. Stephens, *Planning for Safer and Better Schools: School Violence Prevention and Intervention Strategies*, 23 SCH. PSYCHOL. REV. 204, 210 (1994) (“Crime and violence is often promoted by the quality and preparation of staff responsible for daily supervision.”).

²¹⁶ Gloria E. Miller, *School Violence Miniseries: Impressions and Implications*, 23 SCH. PSYCHOL. REV. 257, 257–58 (1994).

concentration present serious impediments to a teacher's ability to prevent harm from actually occurring in school, and to identify and react to harms once they are present.²¹⁷

2. *Enablement of Student Drug Use*

Teachers present a second risk that is unique among forms of public employment—the enablement of adolescent drug use. Such drug use is a major public health concern. Studies have shown that, although brain size stabilizes by age five, myelination and synaptic pruning—processes critical to cognitive development—occur well into a child's teenage years.²¹⁸ Both the basal ganglia and frontal cortex develop relatively late, showing the continuing maturation of cognitive processes over the course of adolescence.²¹⁹ Accordingly, the typical school-aged child is going through a critical stage of development where environment and activities may shape his brain development²²⁰—a development upon which drug use will have a direct, negative impact.²²¹

School districts, then, should desire to close all possible avenues for children to obtain drugs, not the least of which is the drug-using teacher. Stories of teachers placing drugs directly into the hands of students arise far too frequently. In a Pennsylvania school district, one employee who served as a coach and teacher's aide was accused of calling a student out of class to smoke marijuana, giving prescription pills to athletes before competitions, and allowing students to use drugs in his home.²²² A high school debate teacher in a west Texas school district pled guilty to distributing narcotics to her

²¹⁷ See *Knox*, 158 F.3d at 379 (“Clearly, if school personnel are themselves under the influence of, or involved in, drugs, their ability to perform this critical function [of monitoring students and preventing harm from occurring] is not only reduced, but they themselves are open to being compromised and undermined.”).

²¹⁸ Lisa C. Caldwell et al., *Gender and Adolescent Alcohol Use Disorders on BOLD (Blood Oxygen Level Dependent) Response to Spatial Working Memory*, 40 ALCOHOL & ALCOHOLISM 194, 194 (2005).

²¹⁹ Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012, 1016 (2001).

²²⁰ See Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 863 (1999).

²²¹ See Ignacio Mata et al., *Gyrification Brain Abnormalities Associated with Adolescence and Early-Adulthood Cannabis Use*, 1317 BRAIN RES. 297, 301 (2010) (“Our findings support recent reports of neuroanatomical changes associated with [cannabis] use and, for the first time, reveal that cannabis use may induce cortical gyrification abnormalities.”).

²²² Douglas B. Brill, *Ex-Bangor Teacher's Aide Charged with Dealing Drugs to Students*, POCONO REC. (Sept. 23, 2010), <http://www.pocconorecord.com/apps/pbcs.dll/article?AID=/20100923/NEWS/9230325/-1/rss01>.

students.²²³ And a North Carolina English teacher was recently arrested for selling prescription drugs to students and employing them to sell those same drugs in a local high school.²²⁴ These examples are not meant to imply that such behavior is typical of public school teachers—it assuredly is not. Rather, they serve to show the unique opportunities that teachers have—and sometimes take—to imperil adolescent well-being by providing direct access to drugs that would otherwise be unavailable.

A teacher may also enable student drug use indirectly merely by bringing drugs onto school grounds. For example, a teacher in a New Jersey school district was charged after an investigation revealed that he received the highly addictive drug OxyContin on school grounds as part of a one-thousand-pill-a-week prescription drug ring that involved a group of other teachers in the district.²²⁵ The risk teachers like this pose is not that they voluntarily place the drugs in a student's hands; rather, the mere presence of drugs on school grounds increases the risk to students. In such cases, the unzipping of a bag, opening of a desk, or unlocking of a car may stand as the sole obstacle to student drug possession.

Given that drug use will often correlate with drug possession, the implementation of a drug testing scheme addresses the risks created by teachers through direct and indirect enablement. School boards should be able to act when the very individuals they employ have the power to dramatically impact childhood development.

3. *Forming Attitudes Through Role Modeling*

Unlike the previous two types of harms, the final safety risk from teacher drug use—negative role modeling—does not result in a tangible detriment but rather in one that is attitudinal. Social-learning theorists posit that an individual will identify with and emulate his role models and that the individual will

²²³ James Cannon, *MISD Teacher Sentenced to 37 Months for Drug Dealing*, MYWESTTEXAS.COM (Mar. 31, 2011, 10:19 PM), http://www.mywesttexas.com/top_stories/article_0858181a-ae30-5198-a6ab-41af9d994ae0.html.

²²⁴ Laura Hibbard, *Meredith Burris Pruitt, North Carolina Teacher, Allegedly Used Students to Sell Drugs*, HUFFINGTON POST (Apr. 3, 2012, 8:11 PM), http://www.huffingtonpost.com/2012/04/03/meredith-burris-pruitt-teacher-arrested-for-using-students-to-sell-drugs_n_1400135.html.

²²⁵ Michael Rispoli, *Warren County Teacher, Coach Charged in Drug Ring Received Pills at School, Authorities Say*, NJ.COM (Aug. 4, 2009, 7:33 PM), http://www.nj.com/news/index.ssf/2009/08/warren_county_teacher_coach_ch.html.

adopt and internalize the values of that role model.²²⁶ Accordingly, studies have found that actual and perceived drug use among influential adult figures is positively correlated with adolescent drug use.²²⁷

Adolescents spend 6.5 to 8 hours per day, 32.5 to 40 hours per week, and over 8000 hours total within the school environment.²²⁸ Given this high level of daily interaction between teacher and student, teachers inevitably assume the mantle of role model.²²⁹ Describing the unique role of teacher as role model, Justice Powell wrote:

[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.²³⁰

Because of the profoundly influential role teachers play in the lives of their students, then, it is unsurprising that a number of states have made immorality a ground for termination in their teacher-tenure statutes²³¹ and that at least one state has used this ground to terminate teachers for their drug-related behaviors.²³²

This role-model function provides an additional incentive to curb teacher drug use.²³³ So long as teachers appear, through their words and actions, to oppose drug use, they will encourage healthy behaviors among children or, at

²²⁶ See William J. Brown & Marcela Alejandra Chaván de Matviuk, *Sports Celebrities and Public Health: Diego Maradona's Influence on Drug Use Prevention*, 15 J. HEALTH COMM. 358, 362–63 (2010).

²²⁷ See, e.g., George J. Huba et al., *Longitudinal Analysis of the Role of Peer Support, Adult Models, and Peer Subcultures in Beginning Adolescent Substance Use: An Application of Setwise Canonical Correlation Methods*, 15 MULTIVARIATE BEHAV. RES. 259, 259 (1980); G.J. Huba & P.M. Bentler, *The Role of Peer and Adult Models for Drug Taking at Different Stages in Adolescence*, 9 J. YOUTH & ADOLESCENCE 449 (1980).

²²⁸ Rachel A. Grana et al., *School Disrepair and Substance Use Among Regular and Alternative High School Students*, 80 J. SCH. HEALTH 387, 388 (2010); cf. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (noting that youth “is a time and condition of life when a person may be most susceptible to influence”).

²²⁹ See John Trebilcock, Comment, *Off Campus: School Board Control over Teacher Conduct*, 35 TULSA L.J. 445, 446–47 (2000).

²³⁰ *Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979) (footnote omitted).

²³¹ E.g., ALA. CODE § 16-24C-6(a) (Supp. 2011); CAL. EDUC. CODE § 44,932(a)(1) (West 2006); GA. CODE ANN. § 20-2-940(a)(4) (West Supp. 2011); N.Y. EDUC. LAW § 3012(2) (McKinney 2009).

²³² See, e.g., *Dominy v. Mays*, 257 S.E.2d 317 (Ga. Ct. App. 1979) (drug possession); *Sherling v. Colquitt Cnty. Bd. of Educ.*, No. 1989-21 (Ga. State Bd. of Educ. Nov. 9, 1989) (drug use).

²³³ Cf. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) (expressing concern as to the role-model effect of athletes on other students in public schools).

the very least, maintain the status quo; however, once they give the impression of being afflicted by drug use, the example set for children becomes decidedly negative. As the Court noted in discussing the athletes in *Vernonia*, the role-model effect has the potential to “fuel[]” the drug problem in schools.²³⁴ So, too, school boards have an interest in controlling the role-model effect of their teachers, curbing the influence of any individual who may contribute to a drug culture.

B. The Special Need for Teacher Drug Testing

The preceding section discussed the unique risks that a teacher presents by virtue of his close custodial relationship with children. This section now takes those safety interests and, applying the analysis suggested in Part II.A, concludes that a special need for teacher drug testing exists. This conclusion rests upon three important observations. First, the safety risks faced in the school setting are uniquely experienced by teachers. Second, the safety risks touch on definitional aspects of the profession of public school teachers. Third, the nature of the school environment is such that it is currently unable to identify and correct teachers’ risk-creating activities before the harm has an opportunity to manifest.

As to the first requirement, the safety risks created by teacher drug use are uniquely experienced in the school setting. Though the harms of impaired judgment, enablement of drug use, and negative role modeling do not occur solely within the school environment, they are specially facilitated by and rendered more substantial because of that setting.²³⁵ Indeed, the Supreme Court, even outside its Fourth Amendment decisions, has not hesitated to emphasize the heightened safety risks inherent in public schools.²³⁶ And the

²³⁴ *Id.*

²³⁵ *See, e.g., Donegan v. Livingston*, No. 3:11-cv-812, 2012 WL 2586862, at *6 (M.D. Pa. July 3, 2012) (“[T]eachers inhabit a highly regulated environment which is particularly sensitive to alcohol and drug abuse.”). The Court’s drug testing cases of *Vernonia* and *Earls* do not intimate that the prevention of adolescent drug use, standing alone, presents a special need. If that were the case, every adolescent in the country—even at home—could be susceptible to a governmental drug testing scheme, and the Court would have wasted a great deal of time and paper discussing the unique attributes of the school setting.

²³⁶ *See, e.g., Morse v. Frederick*, 551 U.S. 393, 425 (2007) (“In most settings, the First Amendment strongly limits the government’s ability to suppress speech on the ground that it presents a threat of violence. But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence.” (citation omitted)); *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (“Students whose presence poses a continuing danger to persons or property . . . may be immediately removed from school [without due process].”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (“[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or

Court's decisions in *T.L.O.*,²³⁷ *Acton*,²³⁸ and *Earls*²³⁹ tell us nothing if not that the school context itself creates unique needs. Public schools, through their teachers, exercise custodial and supervisory powers over schoolchildren that the government could not wield over free adults.²⁴⁰ It would be a perverse result were a court to conclude that these unique responsibilities justified the drug testing of the class meant to be protected,²⁴¹ but not the protectors.

Second, the safety risks necessarily go to the fundamental character of the positions. Indeed, the supervisory duties of teachers are of such central importance that they have received recognition in the common law doctrine of *in loco parentis*. William Blackstone wrote of the teacher's *in loco parentis* obligations:

[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed."²⁴²

This same responsibility was crucial in defining the school context and the roles individuals occupy within it, which were determinative in the Court's justification for the drug testing of public school students.²⁴³ One could not conceive of a school district operating effectively if its teachers abandoned these duties.²⁴⁴ For this very reason, the Court appears to view the preservation of the school setting and its concomitant relationships as special needs.²⁴⁵

type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”).

²³⁷ See 469 U.S. 325, 340 (1985) (“It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search.”).

²³⁸ See 515 U.S. at 653 (“We have found . . . ‘special needs’ to exist in the public school context.”).

²³⁹ See 536 U.S. 822, 829 (2002) (“Significantly, this Court has . . . held that ‘special needs’ inhere in the public school context.”).

²⁴⁰ *Acton*, 515 U.S. at 655.

²⁴¹ See, e.g., *Earls*, 536 U.S. at 831 (“[O]ur decision in *Vernonia* . . . depended primarily upon the school’s custodial responsibility and authority.”).

²⁴² See 1 WILLIAM BLACKSTONE, COMMENTARIES *453; accord 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 170 (O. Halsted 1827) (“The power allowed by law to the parent over the person of the child, may be delegated to a tutor or instructor, the better to accomplish the purposes of education.”).

²⁴³ See *Earls*, 536 U.S. at 831 & n.3.

²⁴⁴ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring) (“Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.”).

²⁴⁵ See *Earls*, 536 U.S. at 829.

Finally, the nature of the school setting and the teaching profession render it impossible to consistently correct the harm-creating behaviors that flow from drug use before they occur. Some commentators have suggested that there is no special need to drug test public school teachers because these employees hold positions for which observation is sufficient to detect impairment.²⁴⁶ Teachers, they argue, encounter administrators and other staff throughout the day.²⁴⁷ Cameras often monitor hallways, and drug dogs may occasionally be called into a school facility.²⁴⁸ This argument, though, misses the point. A special need does not cease to exist simply because some mechanisms may identify users once an individual under the influence is already present in the school setting. If that were the case, one might wonder why a special need was found in *Skinner* and *Von Raab*. Certainly, those employees were also under the scrutiny of supervisors, coworkers, and various other forms of surveillance.

The relevant consideration in denying a special need is not whether the context may allow for the identification of some users who are under the influence but whether that identification allows for a school to actually correct the harmful act before its effects manifest.²⁴⁹ Viewed through this lens, a school has a diminished capacity once a drug-using teacher has already acted in a way that could cause harm and the student body has been exposed to the particular harm-creating behavior. The eruption of violence or spread of drugs cannot easily be undone. We have not yet reached a point where every classroom comes equipped with a security guard, and so, the drug-using teacher still threatens lasting harm in the school setting.

In light of these contextual considerations, there exists a special need for drug testing public school teachers. Absent elements that impose an abnormal intrusion on privacy, this special need will almost always justify a drug testing scheme,²⁵⁰ at least as long as the scheme advances the identified safety interests. The following section discusses the types of drug testing policies that a school district may permissibly employ.

²⁴⁶ See, e.g., *Am. Fed'n of Teachers—W. Va. v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883, 904 (S.D. W. Va. 2009); Schmidt, *supra* note 58, at 269.

²⁴⁷ See *Am. Fed'n of Teachers*, 592 F. Supp. 2d at 904; Schmidt, *supra* note 58, at 269.

²⁴⁸ See *Am. Fed'n of Teachers*, 592 F. Supp. 2d at 904.

²⁴⁹ See *supra* notes 134–36 and accompanying text.

²⁵⁰ See *supra* note 114.

C. *Efficacy and Teacher Drug Testing*

As the earlier discussion made clear, the efficacy of a given drug testing regime depends on whether it serves the goal of deterrence, incapacitation, rehabilitation, or any combination. To varying extents, these goals are advanced through social-control mechanisms, both formal (e.g., alterations in the employment relationship under company policy) and informal (e.g., group norms).²⁵¹ This section situates these purposes and their controls within the three categories of suspicionless drug testing schemes regularly implemented by public school districts: pre-employment testing, random testing, and post-incident testing. In so doing, this section identifies the narrow circumstances in which a court should tilt the special needs balance against the government for a teacher drug testing policy's lack of efficacy.

When a school board decides to implement a pre-employment drug testing policy to screen out teachers before they ever begin working, there should be little doubt that the board's safety interests are furthered. Such pre-employment schemes deliver both a deterrent and incapacitative effect for all individuals who apply for the teaching position. They are deterrent insofar as their mere presence and the uncertain date on which the board may act upon an application discourage a large number of drug users from seeking employment in a school district.²⁵² In dissuading large numbers of individuals from ever applying to a position, these policies use the imposition of a formal organizational sanction—the denial of gainful employment—as a means of controlling the incidence of drug use among public school teachers. The testing also has an incapacitative effect, preventing identified drug users from entering a role where they could exert an influence on students or otherwise allow the potential harms flowing from their drug use to ever enter the schoolhouse gates.

When a school board seeks to impose a completely random drug testing policy on its teachers, each of the three goals of punishment may be served as long as the policy imposes meaningful sanctions.²⁵³ Informally, the public school setting creates for the teacher unique, institutionally enabled bonds with both faculty and students. Because the teacher values the approval of both

²⁵¹ See *supra* Part II.B.

²⁵² LARSON ET AL., *supra* note 12, at 4 (noting that 5.6 million workers reported that they would be less likely to work for an employer conducting pre-employment drug testing).

²⁵³ See Carpenter, *supra* note 166, at 805 & tbl.4 (finding a high correlation between sanctioning severity and deterrent effect).

these groups, he will typically orient his actions in a way that avoids the creation of stigma.²⁵⁴ When the teacher knows that a set percentage of employees will necessarily be tested and that a specific punishment will be meted out for a failed test, the likelihood that an individual will discontinue using drugs increases. Termination, suspension, or compelled entry into a rehabilitation program sends a strong, visible message to the faculty, students, and even surrounding community that the individual is an “other,” incapable of conforming to accepted institutional norms. The avoidance of this stigma renders random drug testing a powerful deterrent tool.

Formally, insofar as a particular policy calls for termination or compelled entry in a drug rehabilitation program following a failed drug test, a school district’s drug testing policy ensures that at least one goal of punishment is furthered. When the risk of beginning or continuing drug use is the loss of employment, that potential cost alone deters a substantial portion of employees.²⁵⁵ Though the mere threat of termination may deter a portion of employees from using drugs, for those who remain unaffected, the ex post enforcement of that sanction independently furthers the goal of incapacitation. By removing known risks currently present in the school setting, even if not permanently, the school board decreases or completely cuts off the possibility of immediate harm. When a failed drug test imposes as its sanction the teacher’s entry in a drug-treatment program, that policy holds further potential as a rehabilitative tool. Such policies take the drug user as they find him and attempt to lessen the incidence of drug use in the workplace by reforming the individual’s conduct to meet the board’s expectation of sobriety. Only in the absence of the sanctions identified above should a random drug testing policy be found wanting for lack of efficacy.

Post-incident testing, typically predicated on the occurrence of a remote triggering event, is often unlikely to serve a true deterrent purpose and so presents the greatest potential for government abuse of the special needs doctrine. Consider the policy at issue in *United Teachers*,²⁵⁶ discussed at the beginning of this Comment. There, a school board claimed a special need for drug testing teachers whenever a teacher was injured in the course of his employment.²⁵⁷ The safety interests there could have served a special need;

²⁵⁴ See *supra* notes 156–57 and accompanying text.

²⁵⁵ See Carpenter, *supra* note 166, at 805 & tbl.4.

²⁵⁶ 142 F.3d 853 (5th Cir. 1998).

²⁵⁷ *Id.* at 856.

indeed they are the same drug-related harms that were identified as creating a special need earlier in this Comment. Where the policy suffered was in its woefully deficient sanctioning structure. A failed drug test imposed no stigmatizing punishment—it did not mandate termination, suspension, or any other change in the employment relationship that would label the individual as an outsider to the rest of the school community.²⁵⁸ Rather, the sole sanction imposed was the denial of worker’s compensation,²⁵⁹ a formal sanction so remote as to have little effect on the individual teacher’s balancing of costs and benefits when choosing whether to forego continued drug use.

In post-incident tests like this, where neither incapacitation nor rehabilitation are furthered, the government subverts the special needs exception. The government converts the special needs exception from a shield for the protection of the public interest into a sword that cuts down individual privacy to advance its own impermissible purposes.²⁶⁰ Accordingly, when post-incident schemes are enforced, the question of efficacy turns entirely on the presence of meaningful sanctions, capable of effectively addressing individual behavior in a reactive manner—that is, termination, compelled rehabilitation, and the like.

* * *

The foregoing discussion, which applied the analytical tools that were developed in Part II and have run through each of the Court’s drug testing cases, showed that the safety risks created by teacher drug use create a special need. This Part has also showed that, even the post-incident scheme, the form of drug testing open to abuse, will survive special needs balancing as long as meaningful sanctions are imposed. Given that the identification of a special need almost invariably leads to the special needs balance tilting in favor of the government, then, school board’s teacher drug testing policies are consistent with the Fourth Amendment, absent exceptional intrusions on privacy.²⁶¹ Certainly, drug testing may not be a desirable option for all school districts. But such decisions fall squarely within the province of legislatures and local school boards, and should not be barred by a court’s misapplication of the

²⁵⁸ *Id.* at 855.

²⁵⁹ *Id.* at 857.

²⁶⁰ *See id.*

²⁶¹ *See supra* notes 114, 116.

special needs exception.²⁶² The standards suggested in this Comment, by clarifying and fleshing out the guideposts set forth in the Supreme Court's drug testing cases, provide a set of tools that courts may use to ensure, in a principled manner, that the special needs exception is properly applied.

CONCLUSION

In his famous dissent in *Olmstead v. United States*, Justice Brandeis wrote that “[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”²⁶³ His words have been prescient, but the corollary is also true: a lack of understanding also threatens the government's power to act when it should have the ability to do so. As long as the contours of the special needs exception remain unclear, both dangers remain. This Comment represents an effort to develop the special need and efficacy prongs of the special needs analysis to counteract the ad hoc approach courts often take in applying the doctrine. Using the teacher drug testing debate as an analytical vehicle, this Comment then illustrated the benefits that these standards offer in close cases of safety. Though the discussion has not advocated for drug testing policies in all instances, it has strived to ensure that each employer, considering its unique needs and resources, shall not by reason of the Fourth Amendment improperly be deprived of the opportunity to make the choice for itself.

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²⁶² Cf. *Bd. of Educ. v. Earls*, 536 U.S. 822, 842 (2002) (Breyer, J., concurring) (“I cannot know whether the school's [student] drug testing program will work. But, in my view, the Constitution does not prohibit the effort.”).

²⁶³ 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

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