

1989

Privatizing Discipline - The Case of Mandatory Drug Testing

Harry J. Glasbeek

Osgoode Hall Law School of York University

D. McRobert

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Glasbeek, Harry J., and D. McRobert. "Privatizing Discipline - The Case of Mandatory Drug Testing." *Windsor Yearbook of Access to Justice* 9 (1989): 30-62.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

PRIVATIZING DISCIPLINE — THE CASE OF MANDATORY DRUG TESTING

H.J. Glasbeek & D. McRobert

The authors discuss mandatory drug testing as an example of an employer's exercise of control over employees and one which should be questioned because of the level of intrusiveness on the individual. For the authors arguments based on concerns with violation of civil liberties and the unreliability of the testing procedures mask the real issue involved with mandatory drug testing. That issue is the use by employers and, as a class, private property owners of private power to discipline and punish in a way that Foucault has argued the state does on behalf of the rulers of society.

La privatisation de la discipline: le cas des tests obligatoires pour le dépistage de drogues

L'article discute les tests obligatoires pour le dépistage de drogues; il y voit un nouvel exemple du pouvoir que l'employeur exerce sur les employés. Mais si cet exercice de pouvoir a été critiqué comme excessif parce que constituant une ingérence dans la vie personnelle, les présents auteurs trouvent que tout argument basé sur la violation des libertés civiles ou sur le manque de fiabilité des tests ne sert qu'à masquer la question véritable: à savoir, l'usage par l'employeur, et par toute la classe des propriétaires, d'un pouvoir privé de discipline et de punition, pouvoir pareil à celui exercé par l'État, selon Foucault, au profit des dirigeants du pays.

1. INTRODUCTION

In August 1986, Nancy and Ronald Reagan created something of a furor when they declared they were going to start a "war on drugs".¹ The abuse of drugs by famous baseball players and other sports stars, accompanied by some highly publicized dramatic deaths,² heightened anxieties and concerns about the use and/or abuse of drugs in America. President Reagan suggested that all employees or, at the very least, all public sector ones, be subjected

* H.J. Glasbeek, Professor of Law, Osgoode Hall Law School, York University.
D. McRobert, LL.M. Candidate, Osgoode Hall Law School, York University.

¹ Abbie Hoffman (with Jonathan Silvers) — *Steal This Urine Test; Fighting Drug Hysteria in America* — (New York: Penguin, 1987) rather cattily remarked that Nancy Reagan, lambasted for her personal extravagances, "was anxious to shed her Marie-Antoinette image" and came up with her campaign to "just say no"; 14-15; see also *Globe and Mail*, Aug. 8, 1986, A1, A2.

² Among the more prominent cases was that of Leonard Bias, a U.S. college basketball star drafted by the Boston Celtics in 1986; *Time*, July 7, 1986, 75.

to urinalyses.³ Other members of his cabinet were encouraged to follow the President's example and also give a sample of their urine. As Stroud noted, there was a veritable outbreak of "patriotic unzippings".⁴ Time and Newsweek both felt compelled to run cover stories about the use and abuse of drugs in the United States.⁵ The National Institute on Drug Abuse released figures which purported to show that 23 million Americans regularly use some kinds of proscribed drugs and that 3 million of them could be described as having developed dependency on such drugs.⁶ This gave the Administration's claims credibility. Government's spending to fight the "war on drugs" was increased sharply, while its calls for cutting the deficit remained shrill and loud.⁷

Much in the same way as Toronto publicizes its (low) murder rate to compete with the cities of Detroit and Buffalo for the cachet of being a truly big, bad, sophisticated urban centre, Canadians seem to feel the need to believe that they face as much of a drug problem as Americans do. In September 1986 Prime Minister Mulroney asserted that there was a true epidemic of drug taking in Canada and declared his own "war on drugs".⁸ Sport Canada announced that athletes should undergo more stringent drug testing.⁹ Very soon Canadians were as mesmerized as were their counterparts in the United States and, by November 1986, a Gallup Poll showed that 75% of Canadians thought that there was a drug epidemic in this country and that two out of three Canadians favoured mandatory drug testing for important people such as teachers and politicians.¹⁰

The fever in the United States had its predictable (and, we guess, its intended) effect. The trend towards even more employer mandated drug testing was given a boost. Between 1982 and 1985 the percentage of employers listed on Fortune's leading 500 companies requiring employees to undergo drug testing had already increased from 3 to 30.¹¹ It now has been estimated that up to 50% of U.S. employers will be imposing drug tests on their employees in the near future.¹² In Canada, employers have evinced less interest

³ Dougherty, "Drug Testing: America's New Work Ethic" (1986), 15 *Stetson L.R.*, 883.

⁴ Carsten Stroud, "Do What's Fair," *Canadian Business*, Apr. 1987, 69-70, 101-103.

⁵ *Time*, Sept. 15, 1986; *Newsweek*, Aug. 11, 1986.

⁶ Bureau of National Affairs, *Alcohol and Drugs in the Workplace: Costs, Controls and Controversies*. (Washington: BNA, 1986).

⁷ S. Wisotsky, "Crackdown: The Emerging 'Drug Exception' to the Bill of Rights" (1987), 38 *Hastings L.J.* 889.

⁸ *Globe and Mail*, Sept. 18, 1986, A5.

⁹ Sport Canada, *Fitness and Amateur Sport Policy on Drug Use and Doping Control in Sport*. (Ottawa, 1986).

¹⁰ *Toronto Star*, Nov. 3, 1986, A7.

¹¹ Noel Dunivant and Associates, *Drug Testing in Major Corporations: A Survey of the Fortune 500* (1986). Cited in *U.S. News and World Report*, July 28, 1986, 51.

¹² *The Toronto Star*, Dec. 14, 1987, A.16.

in subjecting their employees to mandatory drug testing. The indications are that only about 30 employers, including such important ones as Air Canada and Canadian National, have such programmes.¹³ And, while the pressure to promote the testing of employees continues¹⁴, there are indications that even some of the employers now testing are losing their zeal for the enterprise. Fairly recently, American Motors discontinued its practice of testing would-be employees¹⁵ and limitations have been imposed at Air Canada in respect of the kind of employees who are to be subjected to drug testing.¹⁶ In a similar vein, the federal Minister for Health and Welfare, Mr. Epp, has suggested that there really is no evidence that Canada is blighted by an epidemic of drug abuse,¹⁷ contradicting his Prime Minister's earlier assertion. Yet, despite the general muting of the clamour for drug control by employers, the issue remains a high profile one, one which has given rise to very serious public debate.

In the last two years, the Canadian Centre of Occupational Health and Safety has had both a workshop and a conference on the issue¹⁸; the Canadian Bar Association, Ontario Branch, has deliberated and issued a very widely circulated report¹⁹; the Addiction Research Foundation has produced a report and a set of recommendations,²⁰ as has the Health and Welfare Committee of the House of Commons²¹, and the Ontario Human Rights Commission has made a policy statement,²² as has the former federal Human Rights Commissioner, Mr. Gordon Fairweather.²³ More recently, Transport Canada released a report containing recommendations in respect

¹³ *Toronto Star*, Aug. 1, 1987, A2; *The Toronto Star* Nov. 5, 1986, A2.

¹⁴ *Toronto Star*, Aug. 1, 1987, A2.

¹⁵ *Toronto Star*, Dec. 5, 1987, A3.

¹⁶ But, at the same time, there are some indications to the contrary; see Task Force on the Control of Drug and Alcohol Abuse in Railway Operations, *Alcohol and Drugs in the Railway Industry* (Ottawa: Transport Canada, Surface Group, 1988).

¹⁷ *Globe and Mail*, Nov. 25, 1987, A13. At the time of writing, however, following the drama of a drug-related death of a teenager in Toronto, there is renewed alarm about the size of Canada's drug problem. And the even more recent Olympic drug controversies, while not directly related to the drugs-in-the-street scene, has added much fuel to the burning fires.

¹⁸ *Workshop on Drug Testing in the Workplace*, Hamilton, Ontario, June 9 and 10, 1987 (Hamilton: CCOHS, 1987); *Drug Testing in the Workplace: A Conference*, Hamilton, Ontario, Dec. 3, 1987 (Hamilton: CCHOS, 1987).

¹⁹ *Report on Mandatory Drug Testing*, (Toronto: July 1987).

²⁰ *Employee Related Drug Screening: A Public Health and Safety Perspective*, (Toronto 1987). The recommendations are found in a section of the report entitled "Best Advice".

²¹ House of Commons Standing Committee on National Health and Welfare, *Booze, Pills and Dope: Reducing Substance Abuse in Canada*, (Ottawa: Supply and Services, 1987).

²² *Policy on Drug and Alcohol Testing*, Oct. 23, 1987.

²³ *Globe and Mail*, May 28, 1987, A18.

of drug testing in the transportation industry.²⁴ Given the relative rarity of employer-mandated drug testing in Canada, the question is raised: why has the issue attracted so much attention and why does it continue to do so? This article addresses that question.

In part, the answer may lie in Canada's proximity to the United States where the drive toward mandatory drug testing of employees remains in high gear and the wider issue of control of drug abuse in society continues to attract attention. In part, of course, the issue is a sexy one because of the nature of drug testing. Standard drug testing techniques necessitate physical intrusion. This triggers an instinctive reaction that there is something inherently wrong with, something fundamentally unacceptable about, this kind of imposed testing. In this article we will argue that, in addition to these important factors, the issue is a controversial one because the idea that employees might be subjected to drug tests which are mandated by employers brings into sharp focus the hollowness of some of the conventional assumptions made about the nature of our political economy. Specifically, inasmuch as it is widely assumed that the real threat to freedom is the inability to control an omnipotent state and that all our efforts to protect and to further our liberties ought to be directed at holding this leviathan in check, employer-mandated drug testing draws attention to the fact that the private power of property owners may well be a more significant fetter on freedom and democracy. And, once attention is drawn to this possibility, it becomes manifest that the distinction between the private and the public, between the economic and the political, is not as stark in advanced capitalist economies as liberal pluralist theorists — especially lawyers — would have us believe.

Indeed, it may become apparent that the maintenance of the distinction obscures real power relations. We feel, thus, that the drug testing issue has led to a dim perception of alternative and frightening visions of our polity. We want to argue that it is this which has led (often unconsciously) to attempts to present the issue as one which does not threaten the assumptions of a consensual society and that these attempts are not convincing, not even to those who make them, resulting in observable unease and anxiety. Rather, an employer's insistence that he is entitled to subject employees or would-be employees to compulsory drug testing is no more than a manifestation, though a vivid one, of the power possessed by employers — by those who constitute the ruling class — over the subordinate classes, that is, over labour.

This assumes that capital and labour are engaged in a continuing class struggle which can take some very ugly forms. This proposition is not normally acceded to by politicians, scholars, or by the public at large. Our institutional arrangements hide the class-based nature of employment relations' struggles. We have created elaborate mechanisms which give the appearance that conflicts between employers and employees are merely disputes between parties who share an ideology. That is, our institutions and conventional

²⁴ *Supra* note 16.

standard-bearers define, characterize and seek to resolve such disputes as if they were momentary tensions which arise between parties who accept a framework within which their differences are reconcilable.²⁵

In the drug testing arena this papering-over of the essential nature of capital-labour conflict, that is, of the real nature of the relations of production, is taking place almost automatically, reflexively. Employers do not claim that their right to test their employees for the presence of drugs in their bodies is merely an exercise of the power which inheres in their control over property. They do not seek to justify their claim as being one of right, one which is naturally and properly bestowed on the superior party in a superior-subordinate relationship.²⁶ Rather, they justify their claim to be permitted to test their employees on the basis that they are striving to achieve accepted (read shared) goals and/or on the basis of promoting the welfare of the general public. As a consequence, the drug testing debate is reduced to questions such as whether or not the available drug testing techniques can lead to the realization of these "shared" goals and values, and whether or not the means to be employed (subjugation of human beings to testing, the use of intrusive methodologies such as urinalysis, the conduct of unwonted inquiries into private lifestyles of employees) are justified by the achievement of shared social goals.

The debate becomes concerned primarily with (i), the scientific validity of the tests and with (ii), their effect on the civil rights of employees. Discussions of these issues have come to be dominated by technocrats, whether they be occupational health and safety experts or professional civil libertarians, such as lawyers. We will argue that the reason for the public anxiety over drug testing is to be found in the fact that the working of the mediating mechanisms, such as occupational health and safety regimes and civil rights' schemes, as well as the arguments of technocrats and scholars who are the traditional intellectual gate keepers for the ruling classes, lack persuasive power and conviction. Inasmuch as the object of such mediation and of the intellectual and technocratic advocacy is to neutralize the potential of the struggle over employer-mandated drug testing to reveal the true ambit of the power of private employers

²⁵ See P. Weiler — *Reconcilable Differences* (Toronto: Carswell, 1980). Weiler is the modern standard bearer of this school. He is the successor to B. Laskin and H.W. Arthurs in Canada who, in turn, were the heirs of the movement in the U.S. headed by Dunlop, Landis, Frankfurter, Aaron, Cox, Chamberlain and Kuhn, et al. For a more detailed discussion, see Glasbeek, "Voluntarism, Liberalism, and Grievance Arbitration; Holy Grail, Romance and Life," in G. England (ed.) *Essays in Labour Law* (C.C.H.: Don Mills, 1986), 219.

²⁶ As with the phrase "reconcilable differences", the language of "superior-subordinate" is taken from the lexicon of Canadian liberal pluralist scholarship; see, Privy Council Office, *The Report of the Task Force on Labour Relations* (The Woods' Commission)(Ottawa: Queen's Printer, 1968), which referred to the natural "superior-subordinate nexus inherent in the employer-employee relationships" and supported the means in use which helped maintain this hierarchical relationship; see paras. 291 *et seq.*

over their employees, it is not achieved. If we are right, a question arises as to why it is that employer-mandated drug testing is being promoted at all, given its potential for creating disharmony while promising very little by way of substantial gains. We will offer a speculative response. It is that drug testing is but a manifestation of the increasing general tendency to privatize the disciplining of the workforce.

2. Some Established Employers' Rights

We begin by putting the employers' claim to be able to impose drug testing on their employees into a context of analogous existing legal rights of employers. What follows is a sketch of apposite employer power in circumstances where workers have been able to withstand employer strength best, that is, where they have had the benefit of collective bargaining. Among numerous employer rights, consider the following:

- (i) Unless there is something explicitly to the contrary in a collective agreement, an employer may insist that an employee work overtime.²⁷ Arbitral jurisprudence has been developed which holds that an employer can only make reasonable demands of overtime. It turns out that the requirement to act reasonably is not one which fetters the employer unduly. For instance, in one case an employee was asked to work overtime on the week-end on which his long awaited wedding celebration was to be held. As many visitors were to come, some from overseas, the event had been planned for many months. In the circumstances, it was held that the employer's insistence on overtime was unreasonable. In the same hearing, the arbitration board had to deal with a situation in which an employee, asked to work overtime, was disciplined for refusing to do so because he had long-standing plans to attend a much anticipated motorcycle race. He had made a deposit to reserve his seat. It was held that the employer's request was reasonable and that it had been appropriate to discipline the refusing employee.²⁸ In short, the employer's right to interfere with the employee's non-working life is curtailed, but far from abrogated.
- (ii) Employers may discipline their employees for misconduct away from work. Thus, while drunkenness away from the work place will not automatically be a ground for discipline,

²⁷ *Algoma Steel Corp. Ltd.* (1960), 11 L.A.C. 118 (Anderson); *Massey-Harris Co. Ltd. (Toronto)* (1952), 4 L.A.C. 1227 (Cowan); *Northern Electric Co. Ltd.* (1965), 16 L.A.C. 22 (Little); *Kimberley-Clark of Canada* (1973), 3 L.A.C. (2d) 278 (H.D. Brown). The employer's right is limited by statute, eg., *The Employment Standards Act*, R.S.O. 1980, c. 137, Part IV. The need for such legislation indicates the inherent power accorded the employer by contract and collective bargaining jurisprudence in respect of determining the length of the working day.

²⁸ *Cryovac Division, Grace Chemicals Ltd.* (1972), 24 L.A.C. 127 (Weiler).

it may be where the employer's reputation is adversely affected by it.²⁹ Again, where an employee uses proscribed drugs in a recreational way this may not be an adequate ground for discipline³⁰ but, where an employee is found to be in possession of a relatively large amount of such proscribed drugs in non-working time and/or is suspected of trafficking in drugs, an employer is entitled to discipline such an employee.³¹

- (iii) An employer may discipline an employee if she drinks on the job.³²
- (iv) An employee who engages in business activities which are somewhat similar to that of his employer but does so on his own time, may be subjected to the employer's discipline, and this may be true even if it turns out that he is not in direct competition with his employer.³³ In such cases, an employee, once again, is being controlled in respect of her/his conduct away from work.
- (v) An employer may be able to discipline an employee if the employee failed to disclose pertinent misconduct of fellow employees.³⁴
- (vi) An employer may be able to discipline an employee who, upon application for the job, failed to disclose prior pertinent misconduct.³⁵
- (vii) An employer may discipline a worker who is suspected of, or charged with, an unlawful act on or off the employer's premises.³⁶ As in all the immediately preceding cases, there are limits on the employer's right, but what we are describing here is the inherent right of the employer to discipline in such cases.
- (viii) An employer may discipline employees for fighting with supervisory personnel, even if such fighting takes place during off-duty hours.³⁷

²⁹ *Windsor Utilities Commission* (1958), 8 L.A.C. 328 (Hanrahan).

³⁰ *Air Canada* (1975), 10 L.A.C. (2d) 346 (Morin).

³¹ *Air Canada* (1973), 5 L.A.C. (2d) (Andrews). The employee was an aircraft maintenance mechanic. The closer the relationship between drug use/abuse and the welfare of others, the easier it is to accept the employer's exercise of power. But note that the logic is the same when the links are not so obvious. In any event, the employer's enterprise and property is also entitled to be protected and always is when the welfare of others is being invoked as a justification for the exercise of employer power.

³² See, generally, Brown and Beatty — *Canadian Labour Arbitration* (2ed.), (Agincourt: Canada Law Book, 1984), para. 7:3560.

³³ *Gray's Department Stores Ltd* (1973), 4 L.A.C. (2d) 111 (Palmer).

³⁴ *Moffats Ltd.* (1966), 17 L.A.C. 72 (Arnell); *Sooke Forest Products Ltd.* (1968), 68 D.L.R. (2d) 432.

³⁵ For a discussion of the authorities, see *Gould Manufacturing of Canada Ltd.* (1972), 1 L.A.C. (2d) 314 (Shime).

³⁶ *Phillips Cables Ltd* (1974), 5 L.A.C. (2d) 274 (Adams).

³⁷ *Firestone Tire and Rubber Co. of Canada Ltd.* (1975), 9 L.A.C. (2d) 345 (Mason).

- (ix) An employer can always discipline an employee for insolent and insubordinate behaviour.³⁸
- (x) An employer may be able to use electronic surveillance techniques to observe workers at their work station, and when going in and out of the premises.³⁹
- (xi) An employer can regulate the amount of conversation during work hours, or draft rules which prevent employees leaving their work station until a replacement worker has been found.⁴⁰
- (xii) An employer may be entitled to open lockers to check them and the belongings of the employees which are found therein.⁴¹

While none of the above disciplinary powers which employers are able to claim are absolute, they are considered to be inherent in employment relationships. We will now look at the way that employers make the claim that they have a right to impose mandatory drug testing on their employees and compare these arguments to those on which they rest their acknowledged disciplinary powers.

Employers will claim the right to test their employees for drug use on the basis that this:

- (i) will prevent the danger of harm to other workers in the work place;
- (ii) will prevent major accidents or the creation of risk to the public;
- (iii) will help the employer protect his property;
- (iv) will diminish interference with productivity;
- (v) will protect workers from their own follies, that is, from drug-use which will affect their immediate safety and long-range health;
- (vi) will lessen the cost of compensation premiums which may have to be paid as a result of accidents and ill-health caused by the use of drugs; and
- (vii) will act as an indicator of whether the incidence of drug use is caused by unacceptable conditions in the workplace.

These justifications for the imposition of drug testing on employees are of the same nature as those which sanction the employer's acknowledged rights to discipline employees in the ways set out above. In particular, note that an employer is entitled to discipline employees who present a potential of harm to fellow employees

³⁸ See, generally, Brown and Beatty, *supra* note 32, paras. 7:3660, 7:3610, 7:3612.

³⁹ *Puretex Knitting Co. Ltd.* (1979), 23 L.A.C. (2d) 14 (Ellis).

⁴⁰ This was the situation for automobile workers depicted in the film "Final Offer", shown on CBC; see also D. Wells, "Autoworkers on the Firing Line" in C. Heron & R. Storey (eds.), *On the Job; Confronting the Labour Process in Canada* (Kingston, Montreal: McGill-Queen's U.P., 1986), 327.

⁴¹ *Canadian Union of Postal Workers, Calgary Local 710 v. Canada Post Corporation*, [1987] 5 W.W.R. 262 (Alta. Q.B.).

or to the property of the employer. This is reflected in the rules concerned with the right to discipline for misconduct away from work; for failure to disclose the misconduct of fellow employees; for failure to disclose their own prior misconduct; for being under suspicion of, or for being charged with, unlawful acts; for fighting; for insolence and for insubordination; for stealing, and so forth. Inasmuch as the claim to test for the presence of drugs in an employee's system is premised on the idea that fellow workers, property and production must be protected, there is an obvious symmetry between the reasoning justifying that claim and that which justifies already universally accepted employer rights to discipline. In addition, note that employers already have been given the power to make sure that the performance of workers will be acceptable and safe. To this end they have been allowed to require employees to submit to medical examinations.⁴²

The parallel, then, is easily discernible: the claim that an employer should be able to impose drug tests on his workforce is grounded in the same way as is his right to protect his productive activities by insisting on obedience and on conforming behaviour. The essence of this employer right is traceable to the fact that it is understood that the employer should be able to manage *his* business in the way that *he* sees fit, precisely because it is *his* business. Any curtailment of this accepted employer power is seen as an incursion on a natural right and, therefore, as a constraint which ought to be limited. This explains the existing arbitral jurisprudence which, as we have seen, fetters employers a little, but leaves their ultimate control largely undisturbed.⁴³ We can expect this also to be the approach when the issue is the new one of drug testing. But, because drug testing is justified largely on the basis that it has to do with the health and safety of workers and of the public, this will be somewhat obscured.

It has become the dominant wisdom that occupational health and safety matters should be analyzed and discussed on the basis that they constitute shared problems of employers and employees. While our legislative schemes impose a set of positive duties on employers and employees, provide for the proscription and regulation of toxic substances by outside bodies, all of which is to be bolstered by a government-run inspectorate and enforcement system, these regimes also insist on collaboration between employers and employees to make sure that the health and safety conditions which are acceptable to them and to society are maintained. Joint

⁴² *Monarch Fine Foods Co. Ltd.* (1978) 20 L.A.C. (2d) 419 (M. Picher); *B.P. Oil Ltd* (1972), 24 L.A.C. 122 (Palmer); *Lake Ontario Steel Co. Ltd.* (1970), 22 L.A.C. 206 (Hanrahan).

⁴³ For more detailed discussions of how unions can be given more of a role in the running of the business without decreasing the employer's control over the business, see H.J. Glasbeek, "Voluntarism, Liberalism and Grievance Arbitration: Holy Grail, Romance and Real Life," *supra* note 25; see also — H.J. Glasbeek, "The Utility of Model Building — Collins' Capitalist Discipline and Corporatist Law" (1984), 13 *Ind. LJ.* 133.

health and safety committees become the linchpin of these schemes, rather than standard-setting and direct enforcement. That this is meant to be so can be gleaned from the political history of the occupational health and safety systems. Both the creators of the schemes and their assessors go to remarkable length to establish the fact that health and safety issues are not questions of conflict, are not questions which are to be resolved by confrontation. Rather, the emphasis is that they are problems which arise out of production and that both employers and employees have an interest in reducing such risks. Thus, the Robens Report, an English evaluation which has proved to be very influential in this part of the world, argued that

... there is a greater identity of interest between "the two sides" in relation to safety and health problems than in most other matters. There is no legitimate scope for "bargaining" on safety and health issues, but much scope for constructive discussion, joint inspection, and participation in working out solutions.⁴⁴

Professor Ham, in compiling the report which provided the blueprint for Ontario's occupational health and safety legislative regime, wrote that the "adamantly confrontational character of Canadian labour-management relations had deterred the creation of sensible arrangements for worker participation. Questions of health and safety are not suitable issues for collective bargaining".⁴⁵ A subsequent inquiry into mining safety evinced a similar attitude,⁴⁶ as did a labour relations board.⁴⁷ In fact, the mere suggestion that the issue of occupational health and safety is one which requires machinery aimed at controlling inherent conflict between the employers and

⁴⁴ *Report of the Committee on Safety and Health at Work 1970-72* (London: H.M.S.O., 1972)(Robens Report), para. 66.

⁴⁵ *Report of the Royal Commission on the Health and Safety of Workers in Mines* (Ministry of Attorney-General, Ontario, 1976) (Ham Commission).

⁴⁶ *Report of the Joint Federal-Provincial Inquiry Commission into Safety in Mines and Mining Plants in Ontario*, "Towards Safe Production", (Burkett Report, 1981). At page 86, Burkett noted that these issues should be settled in a co-operative and consultative manner and that a joint health and safety committee system will function optimally if it "allows the parties to insulate the health and safety effort from the more adversarial aspects of the relationship". Some collective agreements emphasise the need to co-operate rather than to fight about these matters, eg, the agreement between American Motors (Canada) Inc. and U.A.W. Local No. 1285 (Sept. 1980) (as reproduced in Tucker — *Materials on Occupational Health and Safety* — Toronto, Osgoode Hall Law School, 1986, unpublished teaching materials, available on request), provided that the parties agreed "to use their best efforts jointly to achieve these objectives", the objectives being to bring about a safe work environment by co-operation.

⁴⁷ "Safety is not intended to be an adversarial issue. Life and limbs are not intended to be negotiable items"; see *United Steelworkers of America v. Cominco Ltd* (1980), 80 C.L.L.C., 16,045 (C.L.R.B.).

the employees is rejected with vigour. Thus, when the Ontario occupational health and safety scheme came under attack by workers who believed that the emphasis on the internal responsibility system (as the collaborative mechanism is called) meant that government did not set tough enough standards and did not regulate and control the workplace adequately, the response was that people should work together to create a better environment, rather than ask for a system of more aggressive external regulation and punitive enforcement:

At least some [workers and union activists] are ideologically opposed to cooperative solutions and believe that the system must be changed. They call for an expanded inspectorate, acting not as monitors, mediators and problem solvers, but as policemen using prosecutions as the major tool. Unfortunately, there is evidence that members of this group have another agenda and are using occupational health and safety to achieve other objectives. This is particularly destructive, because finding acceptable solutions to workplace hazards depends upon cooperation between labour, management and the regulatory authorities.⁴⁸

The message was clear: health and safety in the workplace should not be regulated by devices which presumed that an irreconcilable conflict between employers and employees had to be resolved. Similarly, it has been asserted that, while the creation of joint health and safety committees was designed to help the parties work together to improve conditions, it was not meant to give workers more decision-making power. Collaboration was the idea, but one which envisaged that cooperative efforts were to take place in an unchanged power setting, one in which health and safety came within the prerogative of management unless management had bargained it away.⁴⁹

It follows that, if the drug testing controversy is viewed as an aspect of occupational health and safety regulation, the issue of whether employees should be subjected to drug testing also will be seen as falling within the employer's prerogative unless there is a positive indication to the contrary in a contract or in a statutory provision. Such contrary contractual or legislative modifications may evolve. As has been noted, not everything which falls within the prerogative of management is automatically left as an unrestrained employer power. Employees have been able to make gains at the bargaining table and, sometimes, legislation or adjudicative type decision-making has cut down the rawness of the property owners' rights; for instance, as has been seen, the employer power to discipline employees has been limited by the arbitral jurisprudence's requirement that the employer's demands and responses be somewhat reasonable. Unsurprisingly, the argument about drug testing quickly

⁴⁸ *Report on the Administration of the Occupational Health and Safety Act*, (McKenzie-Laskin Report), (Toronto, Ministry of Labour, Ontario, January, 1987) Vol. 1, iii.

⁴⁹ K. Swinton "Enforcement of Occupational Health and Safety Legislation: The Role of the Internal Responsibility System" in K. Swan & K. Swinton (eds.) — *Studies in Labour Law*. (Toronto: Butt., 1983), 143, 153.

devolves into the following kind of debate: (i) drug testing involves intrusive practices; (ii), should the employer be entitled to rely on an unfettered right to so test, given that the results may not be all that useful to him? That is, conceding the claim that drug testing will lead to *some* improvement in respect of health and safety for the employer's workers, as well as to *some* increase in productivity and to *some* enhancement in the protection of the employer's property, the employer still may have to show that drug testing is a reasonable means to achieve these limited objectives, just as he has to show that any disciplinary response he makes is reasonable in view of his productive needs.

3. The Arguments About the Scientific Validity of Drug Tests

The drug testing which employers want to do requires the taking of urine samples from employees or would-be employees. These are to be subjected to tests to determine whether certain proscribed substances are present in the tested person's system. There are a whole series of techniques for urinalyses available to employers: thin-layer chromatography (TLC); immunoassays (radio immunoassays - RIA -, enzyme multiplied immunoassay - EMIT -); gas chromatography; gas chromatography/mass spectrometry (GCMS); high performance liquid chromatography (HPLC). We have listed these in ascending order of accuracy. The first two named tests are quick to do and cheap, but they are not very sensitive. While they can identify the presence of some substances in the system, they are not specific, that is, they are unable to differentiate between a number of substances. Moreover, samples can be easily adulterated and this can lead to mistaken results. RIA and EMIT are more reliable tests. Even better is gas chromatography, especially when combined with mass spectrometry. While these latter tests provide much more reliable results, they require more skill to apply and are far more costly. HPLC is a test which can ensure reliability of results when other tests have been used. The more reliable techniques are not only very costly, but they only permit testing for one substance in the system at a time. This is a real drawback for employers who do not know what they are looking for when they set up their drug testing programme. As a result, some employers now rely on a combination of tests to determine whether their employees are using drugs.

While there is much contention in the literature about the accuracy of each and every one of these tests⁵⁰, it is plausible to argue that, if one of the better methodologies is used, drug testing for a particular

⁵⁰ G. Atherley and S. Lampert, "Mandatory Drug Testing in the Workplace" in *Human Resources Management in Canada* (Toronto: Prentice-Hall Canada, 1986); H.J. Hansen, S. Candill and J. Boone, "Crisis in Drug Testing" (1985), Vol. 253, No. 16, *Jour. Amer. Med. Assoc.*, 2382; S. Schnell and D. Lewis, "Drug Screening in the Workplace: Pros and Cons" *Seminars in Occupational Medicine*, Vol. 1., No. 4, Dec. 1986, 243.

drug can lead to accurate results in the sense that it will reveal whether or not a particular substance was in the tested subject's system. Rigorous safeguards have to be instituted to ensure that this much can be said. It must be made certain that the sample which is tested is the sample which is actually being given in an unadulterated form. That is, monitoring of the giving of the sample may well have to be undertaken.⁵¹ Similarly, the chain of custody of the sample, from the moment of its taking through to its testing and the reporting back to the employer, must be safeguarded so that no mistakes or adulterations can take place at any stage. And, of course, the testing must be done scrupulously by people with the expertise necessary to do the more complicated testing. But, even if all these prerequisites are met, several problems will still remain unresolved. The urinalysis

- (i) may show that a particular drug was present in a person's system;
- (ii) will not show, with any degree of precision, when or how a particular drug came to be in that person's system, that is, whether by inhalation, injection or ingestion;
- (iii) will not show whether the presence of the drugs in the person's body means that the person was ever impaired (in terms of work performance) and was, or is, a potential danger to other people;
- (iv) will not show whether the impairment, if any, was there at any particular time or that there will be a similar impairment at any future time;
- (v) will not show how much of that drug needs to be present in a particular individual to impair that person, as opposed to any other person who might use the particular drug; and
- (vi) will not eliminate the possibility that the positive test was the result of the intake of substances which give a similar reading, but which are not proscribed.

Given (a), that there is no guarantee that the employers will use the best and most expensive drug testing technique, (b), that the testing may not be done as expertly as it ought to be, and (c), that there is no direct connection between finding the presence of a particular drug and its impact on health and safety and on production, there is a very good argument that mandated drug testing by employers is not a reasonable exercise of employer prerogative. Those who make this argument rely heavily on the fact that the scientific studies which are produced by employers who think that such drug testing is worthwhile are not all that reliable.

There are many studies which purport to show that drug testing is very useful. For instance, there is a study which claims that employees who have five drinks are likely to have twice as many accidents as non-drinkers and that marijuana and cocaine users

⁵¹ For a vivid description of the embarrassment and humiliation this may cause, see Susan Ager, "Ready, Set . . . Will You Go?" *Detroit Free Press*, Nov. 30, 1986.

have a 70% greater risk of falling prone to injury.⁵² In a self-reporting study, 28% of drug dependent workers said that their injuries were drug related, while of the 4% of the sample who took responsibility for injuring another employee, one in four said the accident was due to their usage of drugs.⁵³ But, such findings are controversial. In a review of the scientific studies summarized by the Addiction Research Foundation, Ellis is very scathing of the claims made on the basis of the scientific tests which have been conducted. He points out that where studies show that alcohol use is common among workers, its relationship to occupational health and safety injuries is not made out, but merely suggested. He notes that in studies where death and injuries at work are said to be related to drug usage, no control groups were employed to calculate rates of death and injuries on the job among comparable non-drug users. He bluntly calls this work unconvincing.⁵⁴

Nonetheless, employers who have used drug testing argue that, when they instituted such programmes, accidents were reduced dramatically. It is these claims which led *Time* magazine to report that drug abusers had three times the injury rate of other workers.⁵⁵ The Addiction Research Foundation has argued that alcohol and drugs may play a role in up to 15% of accidents in the workplace in Ontario.⁵⁶ A large employer, the International Mineral and Chemical Corporation, claimed that its introduction of a drug testing programme at their Carlsbad operation in New Mexico had led to a sharp reduction in accident claims. Further, after the institution of the programme, the percentage of its workforce which tested positive for drugs was reduced from 30% to 5%.⁵⁷ In one of the most discussed employer studies, that of the Georgia Power Company, the claim was that extensive drug testing led to a dramatic reduction in the accident rate, from 5.4 per 2000 hours' work to .48 per 2000 hours' work.⁵⁸

⁵² R.W. Hingson, R.J. Lederman and S.C. Walsh, "Employee Drinking Patterns and Accidental Injury: A Study of Four New England States" (1985), 46 *J. Stud. Alcohol*, 298-303.

⁵³ D. Caplovitz, *The Working Addict* (New York: City University of New York, 1976).

⁵⁴ "To Pee or Not to Pee?: A Critical Review of the Addiction Research Foundation's Best Advice on Employee Related Drug Screening", paper presented to Ontario Federation of Labour Conference on Drug Testing, August 17, 1987, York University, Downsview, Ontario; see now, Ellis "Urine Testing — A Critical Appraisal", *Canadian J. of Criminology*, July 1988, 261, 263-264.

⁵⁵ "Battling the Enemy Within", *Time* March 17, 1986, 52.

⁵⁶ See Bruce Cunningham, Addiction Research Foundation's Presentation to "Drug Testing in the Workplace", A Conference Sponsored by the Canadian Centre for Occupational Health and Safety, Hamilton, Ont., Dec. 3, 1987, proceedings cited *supra* note 18.

⁵⁷ "Lowest accident rate at potash operation recorded after five months of drug testing" *Mine Safety and Health Reporter*, Oct. 17, 1987, 197-198.

⁵⁸ See "Nuclear Industry is Latest Focus of Drug Testing Debate", *Workplace Health and Job Safety Report*, v. 17(7) Mar. 30, 1987, 53.

All of these arguments are self-serving, of course, but, from time to time, they are given an air of additional plausibility by spectacular incidents which usually lead to speculation by the media and public officials that drug use and health and safety are linked. Thus, in the Amtrak-Conrail accident, which involved a train wreck near Baltimore in which 16 people were killed, the employees working the trains were said to have consumed marijuana.⁵⁹ Such revelations heighten public prejudices. In this context, a finding by CN rail that one out of every six railway employees whose job affects safe train operations is using proscribed drugs,⁶⁰ takes on ominous significance and gives support to the proponents of employee drug testing. But, while distortions of evidence heighten the public's anxiety, they throw doubt on those who claim science to be on their side. Thus, much was made of the fact that the engine drivers had been found to have had traces of drugs in their system after the tragic railway car crash in Hinton, Alberta which led to the death of 23 persons. Yet, the formal investigation which followed the Hinton rail accident identified the stressful conditions of work of the employees as the most likely culprit.⁶¹

Opponents of drug testing indicate that this not only underscores the scientific frailty of the arguments made by proponents of drug testing but also the fact that, inasmuch as workers become impaired by the use of drugs, they are not to be blamed. Very often, they rightly assert, employees use drugs because of the system of work imposed on them and that a scheme designed to identify the workers who use drugs will not get to the root of the problems which are sought to be solved. But, this argument cuts both ways. While it is very appealing to us, it must be conceded that it also enables employers to say that drug testing should be undertaken to help them identify deficiencies in their work processes, something which they might tell us they are more than eager to resolve. In any event, this kind of debate, we believe, is besides the point. Both the politics of drug testing and some bottom-line logic underlying employer/employee relations make employer-imposed drug testing an almost irresistible movement. The only issue is the scope of such monitoring. Let us tease out some of the reasoning which we believe gives pro-drug testing advocates a real advantage in the debate.

While the scientific testing available will not directly realize the goals which employers claim to be pursuing, it is clear that the better testing methodologies are good enough to enable employers to claim that they will indicate the use of proscribed drugs by employees or would-be employees. Thus, if employers can demonstrate that there is a link between the use of such drugs and

⁵⁹ The forensic toxicologist who reported this presence of drug, giving a boost to drug-testing proponents, later pleaded guilty to falsifying blood-analysis reports from 1986 train wrecks. See Abbie Hoffman, *supra* note 1, 123.

⁶⁰ See, *Globe & Mail*, 28 Feb., 1988.

⁶¹ *Report of the Commission of Inquiry — Hinton Train Collision*. (Ottawa: Supply and Services, December 1986)(R. Foisy, Commissioner); see 81-105.

matters of legitimate concern to them, they will have laid a sound basis for mandatory drug testing. Now, it is counter-intuitive to say that the use of drugs (such as alcohol or mind-altering substances) by employees is not likely to affect the health and safety of those workers, other workers and the productivity of the enterprise. Beaumier has pointed out that most people would probably not want to work in a place where the person entrusted with moving a heavy load above one's head may be 'high' as the result of the use of some drug.⁶² That this argument has merit is already acknowledged by us in many ways. As seen, arbitral jurisprudence permits employers to test their employees for their fitness to perform.⁶³ Moreover, it is not uncommon for government regulations to provide that workers should be fit for their tasks. Thus, the Ontario *Occupational Health and Safety Act's* Mining Regulations provide that no person under the influence of, or carrying, intoxicating liquor, shall enter a mine or mining plant. They also specifically forbid anyone to be under the influence of a drug or of a narcotic substance, unless it is medically prescribed. Further, no person is to operate a hoist unless s/he is appropriately licensed and physically and mentally fit to discharge the duties of a hoist operator. In order to qualify, a hoist operator is to undergo a medical examination every 12 months to ensure that s/he is physically and mentally fit.⁶⁴ In a similar vein, doctors are to notify the Minister of Transport of any condition or the impairment, of a patient which could contribute to the imperilling of safety standards.⁶⁵ Many workers themselves appear to be in favour of drug testing where the use of drugs by fellow employees is perceived as a threat to their safety. Thus, 47% of surveyed railway employees thought that mandatory drug testing was desirable and that figure rose to 77% when the question was asked how they would feel if it had been proved that alcohol and drug use was a problem for the railways.⁶⁶

Thus, while both the imperfection of scientific tests and the limited information such tests can produce provide good bases for making the argument that drug testing imposed by employers should be carefully curtailed and watched — especially because they intrude

⁶² As quoted by Jim Middlemiss, "Examining Mandatory Drug Testing", *The Lawyer's Weekly*, October 2, 1987, 10, 23. Note that Mr. Beaumier is a respected scientist who works for laboratory services which do urinalyses. Such enterprises have a lot to gain from the trend towards employee testing. Nonetheless, the point made is a well-taken one.

⁶³ *Supra* note 42. As was well said by M. Picher in another case: "It is well established that an employer does have the right to require an employee to submit to a medical examination where the purpose of such an examination is to confirm that he or she is physically fit to perform assigned work in a safe manner"; see *CP Ltd*, Canadian Railway Office of Arbitration, Case No. 1703.

⁶⁴ R.R.O. 1980, Reg. 694, s.14 and s. 230. This is also true of airline pilots, see Desmond Ellis, *supra* note 54, 267.

⁶⁵ S. 5.5, *Aeronautics Act*, S.C. 1985 c.28.

⁶⁶ "Task Force on the Control of Drug and Alcohol Abuse, . . ." *supra* note 16.

so offensively into people's private lives — they do not support the case that testing for the presence of debilitating drugs makes no sense at all. Consequently, given the kinds of "positive" results claimed by employers who already test their employees and the political climate which has been created in respect of the use and abuse of drugs in our society, it is not politically realistic to think that there will be a total prohibition on employer-mandated drug testing.⁶⁷

4. Drug Testing and the State

One of the notable features of employer-mandated drug testing is that the drugs to be looked for are substances which have been proscribed by the state. The fact that the state does not want people to use and/or sell such drugs is the result of a serious public policy commitment. Large investigatory and enforcement organizations have been established to prevent the use and possession and sale of these drugs. Just as the Reagan administration began to spend more money after its declaration of its war on drugs, so did the Mulroney government after its declaration of an epidemic. A \$210 million five-year plan was unveiled in May 1987. Most of the money was to be spent on education in respect of drugs and the prevention of their use, but 20% of this new money is to be directed towards enforcement and control of use and sale.⁶⁸

The state's commitment to the control of the use of proscribed drugs is graphically illustrated by its triumphant celebration of drug busts. Hardly a week goes by without headline news announcing that the largest cocaine, marijuana, or heroin bust of the year, of the decade, of the century, has been successfully completed. The figures concerning the kilos of materials seized, the number of wrong-doers arrested, the amount of money the drugs would have brought on the street, are all revealed with an air of righteousness and satisfaction.⁶⁹ There is to be no doubt left in the mind of the public that the state wants to inhibit the use of drugs. It would make sense, therefore, for it to try to emulate employers who impose mandatory drug testing on their employees. The government could send out its police forces to test people, based on its belief that they may be in possession of drugs or be using them because the

⁶⁷ The Premier of Ontario, Mr. Peterson, has been quoted as saying that he might be willing to consider the prohibition of drug testing (*Toronto Star*, Aug. 1, 1987, A2) but, frankly, this looks like political rhetoric. Occasionally, however, it is true that an analogous employer power will be abrogated completely. In Ontario this happened when, without much fanfare or debate, employers were denied the right to use polygraph testing; *Employment Standards Act* R.S.O. 1980, c. 137, Part XI-A, as am. 1983, c. 55 s. 2.

⁶⁸ *Globe and Mail*, May 26, 1987, A1.

⁶⁹ Hoffman, *supra* note 1, 37, shows how the media accept the street value of drugs as the real value of the drugs but do not allow for the fact that the price is an inflated one as a result of much dilution and cutting. This creates an aura of excitement about the size of the problem, one which Hoffman labels "hysteria".

practice is known to be pervasive in a particular area. People could be stopped in the street or, even more dramatically, the police could be given permission to enter people's private houses to undertake searches and/or tests.

While the state might very well want to do these kinds of things, there is no question that even the mere announcement of a plan of this kind would give rise to a great outcry. The public is not likely to accept such behaviour by the state unless it has been convinced that there is a pressing need for it. This can be illustrated easily.

The R.I.D.E. programme was initiated to curb drinking and driving in the Christmas season and is now well established in Ontario. It permits police officers to stop drivers and to subject them to tests to see whether they have been using alcohol. This programme has all the difficulties which are attributed to mandatory drug testing. It involves intrusive practices; there are some scientific validity problems with the accuracy of the instruments used, and with the purity of the sample, as well as difficulties in respect of the expertise of the testing officers and with the chain of custody once a sample is taken; moreover, as with employer drug testing, it is done on a random basis, the police officers not having to show any kind of reasonable cause before they stop and check drivers. A good deal of public education was required before R.I.D.E. was accepted as a utilitarian programme, one which was justifiable because the overall benefits are likely to outweigh the harm done to the rights of individuals.⁷⁰

The reason as to why it is extremely difficult for the state to undertake mandatory random drug testing of the public is now manifest. It requires the use of coercive powers by the state. This threatens the liberty of the individual and thus presents a challenge to the classical liberalism on which our political understandings are based. Liberalism puts individuals on a pedestal vis-à-vis the state. To give the state power which would permit the coercion of individuals by it would challenge the core of our political assumptions and theories, unless it could be demonstrated that such state action was truly necessary. If this cannot be done the exercise of this kind of state power over individuals is associated with power wielded during the odious, unfree, days of the High Commission and of the Star Chamber, reigns of repression not to be tolerated by a liberal democratic society. The modern state is not to be empowered to go on fishing expeditions to preserve itself from what it decrees to be subversion. Any such trend raises the fear that

⁷⁰ The validity of the R.I.D.E. programme was upheld in *R. v. Dedman* (1981), 23 C.R. (3d) 228 (Ont. C.A.). Since then, spot checks have been challenged under the *Charter of Rights and Freedoms*. The Supreme Court of Canada has held that the random stopping of drivers for conducting roadside breathalyzer tests does violate the safeguards of the Charter, but is saved by s.1 of that document; see *Hufsky v. R.*, S.C.C., April 28, 1988. The very fact that such programmes are characterized as prima facie violations of citizen rights underscores the point being made in the text.

we soon would be on a slippery slope on which political freedoms would be imperilled.

These beliefs and anxieties are reflected in our criminal law procedural rules. Intrusions into the private lives of individuals are seen as a thin edge of the wedge: a state which can force individuals to produce evidence against themselves, even for supposedly good reasons, is well on the way to becoming a totalitarian one. This line of argument suggests, strongly, that the argument of those who oppose mandatory drug testing, especially by the state, does not rest on a general sense of squeamishness and tenderness for the privacy of individuals; rather it is their wish to reinforce the dominant view of the political entente which underpins their opposition.

That it is this which underlies the debate on drug testing was revealed nicely by the decision of Judge Sarokin in *Ben Capua v. City of Plainfield*. In that case a city had decided to test, randomly, a number of its firemen for the presence of drugs in their urine. There had been no notice given to the firemen and some of them resisted. This led to the dismissal of sixteen people and to the ensuing litigation. The court ruled for the discharged firefighters and had them permanently reinstated with back pay. The court was not so much revolted by the idea that the employer wanted to test its employees for the presence of drug in their system, as it was by the manner in which it was done: mandatorily, randomly, without warning.

“The sweeping manner which the [officials] set about to accomplish their goals violated a firefighter’s individual liberties . . . the search was unreasonable because defendants [the city] lacked any suspicion as to that [individual] fire fighter . . .

The individuou effects of such mass, round-up urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual’s Fourth Amendment right in the name of some larger public interest. The City of Plainfield essentially presumed the guilt of each person tested . . .

We do not permit a search of every house on a block merely because there is reason to believe that one contains evidence of criminal activity. No prohibition more significantly distinguishes our democracy from a totalitarian government than that which bars warrantless searches and seizures.⁷¹

It is this unease which has led most courts in the United States which have had to deal with the issue to hold that publicly employed persons may refuse such employer-initiated tests. In thirteen out of seventeen cases in which the employer was the state, courts have found in favour of restricting the employer’s right. In one

⁷¹ (1986), 643 F. Supp. 1507, (D.N.J.) The quoted passages appear on pp. 1516, 1517, 1511 respectively. Recently, a district court judge in Brampton, Ont., ruled that random searches of airport luggage for narcotics violated the *Charter of Rights and Freedoms*. He was quoted as saying that he could not think of a more fundamental breach of justice; *Globe & Mail*, 21 Jan., 1988, A8. That employers might be able to engage in such searches legally is potentially embarrassing.

important federal appellate decision, the court decided, by a majority of 2 to 1, that a programme, which required employees seeking promotions to positions in the customs' bureau service, many of which were sensitive because they involved drug interdiction, to urinate into a cup while a government agent waited and listened outside the stall, was a valid programme.⁷² The Supreme Court of the United States announced that it will hear an appeal from this decision.⁷³

What has become clear from this discussion is that it is very difficult for the state to impose its power on individual citizens in the way that employers do when they seek to initiate mandatory drug testing in their workplace. Liberal scholars and political activists cannot countenance the idea that a private sector employer may be able to test for drugs,⁷⁴ without restraint, when the state certainly cannot be permitted to do so. This explains, in part, some of the rather odd arguments which swirl around the debates about mandatory drug testing.

Opponents of drug testing frequently talk about the issue in human rights' terms. It is clear that they do not use the term "human rights" in the sense that is commonly referred to when the concerns are those raised under the aegis of human rights' legislation. That kind of legislation deals with the prohibition of discrimination which denies equality of access and opportunity. In the employment setting, human rights' legislation fetters the employer's right to act capriciously and whimsically. An employer must treat people alike, regardless of gender, age, creed, nationality, place of origin, marital status, and so forth, provided that they can do the job which he has designed. It is always an answer for an employer to say that the people whom he refuses to hire or to retain in employment are not capable of doing the job as well as others; his productive goals are to hold sway, provided they are not found to be tainted by discriminatory inklings. This is clearly reflected by the fairly recent innovations in protecting differently abled people. Human rights' agencies are now requiring that the employer make some accommodation so that people who are physically handicapped in some way or another will still be able to do the task for which

⁷² *National Treasury Employees Union, Chapter 168 v. Von Raab, Commissioner United States Customs Service* 808 F. 2d 1057 (5th Circ.) 1987.

⁷³ *New York Times*, March 1, 1988. Since this was written, the War on Drugs in the U.S.A. has been given more prominence by the Bush Administration. This will put pressure on the judiciary to support employer-mandated drug testing, even when initiated by the state as employer.

⁷⁴ There is some movement in the U.S. courts to prevent private sector employers from imposing drug tests on their employees. In California, a preliminary injunction was granted on the basis that that State's privacy law was violated by such practices; see *New York Times*, June 11, 1988, 6. More recently, the U.S. Supreme Court has stated that it will hear a case questioning the constitutional right of private employers to implement mandatory drug testing. Unsurprisingly, the case involves the Consolidated Rail Corporation, known as Conrail, which, after its disaster in 1987 (text, *supra* note 59), imposed drug testing on its employees; *New York Times*, Oct. 4., 1988.

they want to be employed. But, so far, the employer has not been asked to do more than to provide "reasonable" accommodation. The idea is that his productive needs are to be respected if his motives are not suspect. On this basis drug impairment might very well be a justifiable reason for discriminating against an employee, or would-be employee. Appeals to "human rights" arguments by opponents of drug testing then, will not be obviously persuasive. It can be surmised that when opponents of mandatory drug testing discuss the matter as if it raised a human rights' issue, it is likely that they are not using the language in the context of the anti-discrimination laws summarized above. Rather, they are invoking the expression "human rights" in the sense of rights which individual citizens, as sovereign political entities, are to have vis-à-vis the state. This is an implicit acknowledgment that private sector employers possess state-like powers.⁷⁵ The question that is raised, therefore, by the employment of this "human rights-type" language is, once again, how it is that private sector employers can overcome individual liberties by mechanisms which, if employed by the state, would give rise to revulsion and to claims that the state would be overriding the *political* rights of citizens. The answer to this vexing question is to be found in the essence of employer/employee relationships.

5. The Source of the Power of Private Sector Employers and the Need to Hide It

The conventional assumption is that employees voluntarily enter into an agreement with an employer and that the nature of the terms and conditions to which they agree is, therefore, voluntary. While it is understood that the lack of property ownership robs employees of bargaining power, it is felt that, in contemporary capitalism, this imbalance has been mediated a great deal. The state stipulates minimum conditions which employers must meet and encourages collective bargaining which offsets the employers' strength. But, this commonly held view of the employment relationship falsifies concrete conditions. The difference between an employer and an employee was, *and still is*, that an employer really has a choice whether or not to invest his property. By definition, the ownership of property means that he does not need to use it to reproduce himself and his necessities. By definition, a worker is a propertyless person and must work for someone in order to reproduce herself and her necessities. Thus, while a worker may sometimes have a choice as to whom she shall sell her services and, if she is lucky enough to be part of a bargaining trade union,

⁷⁵ In part, the expression "human rights" may be used by mandatory drug test opponents because it is also felt to be appropriate in that that expression is often used in respect of torture used by state agencies in various parts of the world. The invasion of the human body and the accompanying indignity associated with drug testing throw up images which suggest analogies with the abuse of people's bodies by repressive regimes. But this is an emotive approach.

may have some leverage in the ensuing bargaining, the fact is that she must work for an employer.⁷⁶ This lack of equivalence between the starting positions of the employer and the employee has not been redressed in any serious way. Moreover, our law always has upheld and fortified the employer's needs. This is a necessity for the employer because what the employee sells is her labour power. This is an unquantifiable, unusable thing until it is translated into labour which produces a value. It is only at that point that the employer is in a position to make profit. Therefore, there must be a mechanism to translate raw labour power into concrete labour or value.⁷⁷

The inequality in bargaining power takes on concrete form when the employer makes a series of decisions about work conditions when setting up an enterprise.⁷⁸ This gives the employer the initial control over technology, processes, hours of work, intensity of work, levels of skill, etc. For workers to change any of that, they must win concessions at the bargaining table or in the legislative process. But this has been made difficult.

In the first place, the judiciary, as the institution which is to protect private property rights, assisted employers by developing a doctrine that every contract of employment had implied terms unless they were specifically altered. These implied terms included the doctrines that employees had a duty to obey their employers, a duty to exercise skill, a duty to be of good faith and fidelity to their employers. These doctrines enabled employers to command employees. In turn, this permitted them to translate labour power into productive labour. With the advent of collective bargaining and the acceptance of the legitimacy of the collective use of economic power by workers, it might have been expected that the underlying assumptions which permitted the common law to imply the terms it did would be forgotten. But, grievance arbitrators, that is, those functionaries who spell out the parameters of employer/employee relationships arising out of collective bargaining, have made the same assumptions common law judges did. There is still a duty imposed on employees to obey, to exercise a reasonable level of skill, to be of good faith and fidelity. The credo of arbitrators is that

“an industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued,

⁷⁶ C.B. MacPherson, “Elegant Tombstones: A Note on Friedman’s Freedom” in MacPherson — *Democratic Theory: Essays in Retrieval* (New York: O.U.P., 1973), 143; Robert Heilbroner, *The Nature and Logic of Capitalism* (New York: Norton, 1985).

⁷⁷ For a more detailed consideration of this argument, see H.J. Glasbeek, “The Contract of Employment at Common Law” in J. Anderson & M. Gunderson — *Union — Management Relations in Canada* (Don Mills, Ont.: Addison-Wesley, 1982) ch. 3.

⁷⁸ H.J. Glasbeek, “A Role for Criminal Sanctions in Occupational Health and Safety” in *New Developments in Employment Law*, Meredith Memorial Lectures 1988 (Cowansville, Que.: Les Editions Yvon Blais Inc., 1989).

production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision".⁷⁹

This rule, known by labour relations' cognoscenti as the "obey now, grieve later" rule, enables employers to conduct the enterprise that they own in the way that they desire, at least to the extent that workers have not fettered their right to do so. It is this which explains the employer's power to discipline employees in the way that was set out in section 2 of this paper. As was seen, the employer's power to discipline is not the same as the employer's power to discharge. The employer's power to discharge has been modified by the arbitral right to tailor remedies which the arbitrators see as better suited to the maintenance of stable production and good industrial practices than is the unfettered right of employers to do as they wish with errant employees.

As a result, the employer now has to show that he has reasonable cause to punish an employee, that he has not made demands which are not acceptable given the industrial norms. This limiting of overall employer power is seen as one of the great advances of legitimated collective bargaining. In large measure it is this which permits the argument to be made that the relationship between employers and employees is a truly voluntary one, not one which is the result of coercion by one party of the other. By softening the more brutal impacts inherent in the fundamental inequality of bargaining power — as perpetuated and consolidated by the common law regime — it has become possible to assert that the relationship between employers and employees is one of free agreement, one in which a consensus exists. The idea that the interests of employers and employees are in fundamental conflict has been pushed into the background. This is why unilaterally imposed employer drug testing presents a problem.

If employers were to be permitted to subject their employees to the indignity and oppression of urinalysis it would draw attention to the fact that the prerogative of management has been far less limited than conventional wisdom always assures society it has been. Employers exercising this right would be making naked what has been relatively successfully hidden since the advent of collective

⁷⁹ *Ford Motor Company* (1944), 3 L.A. 779 (Shulman). For remarkably similar language used by a common law court, see *Ex parte Fry* [1954], W.L.R. 730. There a court was asked to interfere (by way of certiorari) with the discipline imposed by a Fire Brigade on a disobedient employee. The court refused because the employer was not acting judicially or quasi-judicially. Lord Goddard, C.J. said, 733: "It seems to me impossible to say that a chief officer of a force which is governed by discipline in exercising disciplinary authority over [an employee] is acting . . . judicially . . . any more than a schoolmaster is when he is exercising disciplinary powers over his pupils." (Emphasis added).

bargaining with its attendant grievance arbitration jurisprudence and mediation practices. It is in this sense that we can understand the almost instinctive opposition of liberal scholars and policy-makers to private sector mandatory drug testing. It would be preferable not to have to bring the remaining huge inequality in bargaining power and control to the forefront. For this reason, if employer-mandated drug testing cannot be stopped, we should expect that there will be attempts to confine managerial power to impose drug tests, in much the same way that arbitrators have limited the employers' powers to fire and discipline workers. The likelihood is that grievance arbitrators will require an employer who wants to test his employees to show he has reasonable grounds to believe that an employee's faculties are impaired while working and that this impairment presents a danger to the physical safety of that employee, to that of other employees, to that of the public, or to the welfare of the ongoing enterprise. In addition, it may well come to be that the employer might be forced to use specific kinds of testing to ensure scientific validity.

But, there will still be many problems: will the employer be able to argue that there is an objective reason for instituting mandatory and even random drug testing when drug use is pervasive in a geographic area or amongst a group of people?⁸⁰ Will an employer be able to demand that employees tell him of drug taking by fellow employees? Will employers be persuaded not to take disciplinary action against drug-using employees but, rather, to set up assistance plans (as has been done in respect of people who have been found to abuse alcohol) and, if this is done, will this mean that employees in any such programme will be on some kind of probation, requiring them to be monitored?⁸¹ If these kinds of limitations on employers develop as a result of union struggles and arbitral decision-making, as we think will happen, it is quite possible that similar legislative limitations will be imposed in due course. There are some indications that these kinds of developments will occur. As has been noted, Transport Canada has issued a report saying that it considers drug use a very serious problem and that, because it is entrusted with the public's welfare, it is willing to impose drug testing on both would-be employees and on its employees, with appropriate safeguards.⁸² Similarly, the *Canada Labour Code* was recently amended to permit searches of mine employees and to force such employees to undergo testing in some circumstances. This legislation has not yet been proclaimed.⁸³

⁸⁰ It is on this basis that the U.S. military is able to impose mandatory drug testing.

⁸¹ For an example of this kind of limitation on employer power, see the 1985 *San Francisco Ordinance* which amended the *Municipal Code* to this effect, as reproduced in Hoffman — *supra* note 1, 126-27.

⁸² "Task Force on the Control of Alcohol and Drug Abuse . . .," *supra* note 16.

⁸³ S. 1 of *Bill C-124, An Act to Amend the Canada Labour Code*, c.33. This Bill received Royal Assent on 21 July, 1988, but s. 1 was to be proclaimed on a date to be fixed.

Thus, there will be attempts to fetter what is the real power of private sector employers, a power that is, in political terms, not readily exercisable by the state. The limitations which we see likely as being imposed on this employer power will be of a kind which will limit private employers no more than the state would be if it chose to exercise its awesome power and seek to compel people to submit themselves to drug searches and tests. This in itself tells us a lot about the real power of private wealth owners in our society.

6. Drug Testing as Part of a Larger Phenomenon

The final question to be addressed is why it is that employers are motivated to impose this kind of intrusive testing on their employees. After all, it is calculated to raise hackles and to lead to conflict and, as we have argued, it presents a problem for the dominant ideology: it may reveal the real shape of the emperor.

A. Mandatory Drug Testing and Foucault's Carceral Society.

One of the more intriguing aspects of the mandatory drug testing controversy is that the drugs which are being tested for are all drugs which have been proscribed by the state. That is, the drugs involved are not necessarily the only drugs which might impair people nor those which are the most dangerous. The state has not chosen to proscribe those which are the most harmful.⁸⁴ All sorts of reasons have been advanced as to why drugs have been proscribed from time to time. For example, Comack,⁸⁵ argues that the first Canadian drug legislation can be best explained as an outcome of class conflict which was resolved by turning the white working class against Chinese workers in British Columbia. Whereas Cook,⁸⁶ another conflict analyst, sees the origin of drug legislation as part of a labelling exercise undertaken by the state. Whatever the

⁸⁴ It is obvious that alcohol and tobacco are just as dangerous to human beings, cause just as much economic havoc and are likely to debilitate people far more than most of the proscribed drugs. Hoffman, *supra* note 1, 53, provides the following table:

ANNUAL SUBSTANCE-RELATED FATALITIES
(Source: U.S. Bureau of Mortality Statistics and the
National Institute of Drug Abuse, 1979 estimates.)

Substance	Estimated Deaths
Tobacco	200,000 — 300,000
Alcohol	30,000 — 130,000
Licit Drug Overdose	8,000 — 10,000
Illicit Drug Overdose	1,000 — 3,600

⁸⁵ E. Comack, "The Origins of Canadian Drug Legislation: Labelling versus Class Analysis", in T. Fleming (ed.) — *The New Criminologies in Canada: Crime, State and Control* (Toronto: O.U.P., 1985) 65.

⁸⁶ S. Cook, "Canadian Narcotics Legislation, 1908-1923: A Conflict Model Interpretation", (1969), *Can. Rev. of Soc. and Anthro.* 6(1):36.

explanation, it seems clear that the purposes underlying the creation of drug-use crimes involve more than attempts at reflecting a consensually agreed-upon morality.⁸⁷ This raises the question of the contemporary state's objectives, both in this sphere of proscription and when it criminalizes conduct generally. Once the state's role and objectives are identified, it will become possible to ask more meaningful questions about the role played by private employers when they engage in parallel activity, that is, when they seek to proscribe the use of drugs by their employees and attempt to police these rules. For the remainder of this discussion we rely a great deal on the analysis provided by Foucault of the uses made by the state of criminal law and associated regulatory mechanisms.⁸⁸

According to Foucault, it is the state's function to help the powerful retain power by disciplining those in society whose cooperation and labour is needed by the rulers. He demonstrates how there has been an evolution from a crudely repressive society which used direct demonstration, by, say, the public ritual killing of non-conformists by the rulers' champions, to one which makes it clear to citizens that, should they deviate in any way whatsoever from the accepted norms, they will be disciplined by the state. As the norms being so enforced are those which suit the people in power, the purpose of such discipline is to encourage the citizens to accept lines of established authority without question. This eliminates the need for the powerful to fight the powerless on an on-going, continuous, basis. This conceptualization of the state role makes the jailhouse an important tool. It shows people what will happen to them unless they accept the norms which the state wishes them to follow. In addition, as only the undeserving will be so treated, it is made clear to people that they all will be watched.⁸⁹ Foucault understood that, if people knew that they were being watched by those with power to punish them, there would be less and less need to resort to jailing. He argued, therefore, that continuous surveillance by the authorities was an effective disciplinary method. The creation of the notion of delinquency had permitted such on-going monitoring

⁸⁷ Other explanations include competitive wars between the patent medicine industry and pharmacists and physicians; see G. Murray, "Cocaine Use in the Era of Social Reform: The Natural History of a Social Problem in Canada, 1880-1911" (1987), 2 *Can. J. Law & Soc.*, 29. For more conventional analyses of the origins of drug legislation, see Solomon & Radison "The Evolution of Non-Medical Opiate Use in Canada, Part I, 1870-1929", (1976-77), *Drug Forum* 5; 237; M. Green, "The History of Canadian Narcotics Control" (1979), 37 *U. of T. Fac.L.Rev.* 42; G. Trosov, "History of Opium and Narcotic Drug Legislation in Canada" (1962), 4 *Crim. L.Q.* 274.

⁸⁸ The principal text referred to is *Discipline and Punish: The Birth of the Prison* (Trans. A. Sheridan). (New York: Pantheon, 1977).

⁸⁹ In a complementary work, Melossi and Pavarini argue that jail was an extension of the factory. Their idea of the jail is that it was not there so much to punish wrong-doers as it was to help the reproduction of acceptable workers on behalf of property owners; see D. Melossi and M. Pavarini, *The Prison and the Factory: Origins of the Penitentiary System* (Trans. Glynis Cousin), (London: Macmillan Press Ltd., 1981).

which, he noted, would lead to “generalized policing . . . [which] constitutes a means of perpetual surveillance of the population: an apparatus that makes it possible to supervise, through the delinquents themselves, the whole social field”.⁹⁰ He envisaged that while, initially, this kind of surveillance and monitoring worked best in conjunction with a prison, soon a carceral archipelago would develop. Foucault pointed to the increasing use of institutions such as poor houses, orphanages, workers’ estates, and the like, and predicted that more and more of the monitoring and surveillance would take place within the community itself rather than in state institutions. This is certainly happening in Canada.

To show that this is the case, Michael Mandel has developed some remarkable data. He points to the fact that the last decade or so has been hailed as a period of state-promoted decarceration, but notes that Canada has incarcerated as many people as it ever has.⁹¹ At the same time, however, Mandel shows that Canada has more people under formal surveillance now than at any other time in its history. There are three times as many people under such surveillance as there are people in custody. This astounding extension of control over people’s lives has been achieved by an intricate system of orders devised by courts and state authorities while giving effect to the so-called decarceration policies. There are probation orders which may require people to attend hostels — where they are supervised; roughly 45 percent of people on probation are released on condition that they carry out community services — where they are also supervised. A parole system exists which requires supervision and monitoring of the jail population and of the released parolees. A system of halfway houses has been established; day parole has been invented, as well as other mechanisms which subject parolees to continuous surveillance. In addition, conditional discharges are given; by definition, they require supervision of the dischargees. Pardons, when given, provide another excuse for supervision because they may be revoked. More recently, the Canadian Bar Association has recommended that people who are released from jails should be equipped with an ankle or a wrist strap which will tell a surveillance agent if the ex-prisoner has strayed beyond the limits of his “freedom” zone. A similar scheme has been experimented with and may be implemented in British Columbia and is well established in Florida.⁹²

⁹⁰ *Supra* note 88, 281.

⁹¹ M. Mandel, “Decarceration: The Rise and Fall of Prison Populations” in M. Mandel, *Readings in Criminology 1987*, (Toronto: Osgoode Hall Law School), (unpublished teaching materials available on request). The comparison he makes is between the number of prisoners per 100,000 of population in given periods. The figures of the contemporary level of incarceration are all the more remarkable because the previous equivalent high was recorded during the Great Depression and contemporary Canadian penologists espouse their preference for a decarceration policy. The argumentation in this part of the paper relies heavily on the reasoning, as well as the data, offered by M. Mandel in the *Readings* cited above.

⁹² *Toronto Star*, Aug. 20, 1988, A1, D2.

As a consequence, many people are subject to direct surveillance. Often the state is able to enlist community leaders to participate in its surveillance of the people who have been labelled delinquents. Santos⁹³ has argued that the state, by reducing itself — in this case through decarceration — has in fact increased its reach by putting some of its control functions into the hands of private supervisors and monitors. The carceral archipelago is growing.

There is a close parallel between the reasons for the monitoring and surveillance of employees by employers and that of the citizenry at large by the state. This can be seen from the congruence in language used by penologists and arbitrators. When Fauteux recommended decarceration in 1956, he justified the making of probationary orders in the following terms:

“It [a probationary order] is a form of correctional treatment deliberately chosen by the Court because there is reason to believe that this method will protect the interests of society while meeting, at the same time, the needs of the offender. Probation permits the offender to lead a normal life in the community and enables him to avoid the inevitably disturbing effects of imprisonment. It makes it possible for him to continue his normal associations and activities while he receives the constructive assistance of supervision and guidance by a trained probation officer.”⁹⁴

There can be no doubt about the nature of the argument made by Fauteux: people were to be put on probation to teach them how to behave and to conform.

Labour relations' arbitrators have developed an analogous approach and use similar language. They have crafted and finely calibrated a series of sanctions in respect of wrongful behaviour by employees. Both the terminology and the precepts are eye-catchingly similar to those of the penologists. Thus, the well-known labour arbitrator/theoretician Adams has written that corrective type discipline:

“[S]hould be tailored to allow the offender to learn from his mistake. . . . It . . . identifies those employees who are unlikely to profit from another opportunity. . . . It . . . ensures that those who abide by the rules will not be disadvantaged. It preserves the morale of the law abiding citizen. A final purpose . . . is to achieve conformity to workplace norms by permanently removing the offender from his job and replacing him with someone who will conform.”⁹⁵

While it is something of a digression, it is nonetheless pertinent to note here that the language and ideas used in the two spheres — prisons and factories — are similar in other respects as well.

⁹³ “Law & Community: The Changing Nature of State Power in Late Capitalism” (1985), *Int. J. of Soc. of Law*, 8:379.

⁹⁴ *Report of a Committee on the Remission Service* (Department of Justice of Canada, 1956 (*Fauteux Report*), 13.

⁹⁵ G. Adams, *Grievance Arbitration of Discharge Cases: A Study of the Concepts of Industrial Discipline and Their Results*. (Kingston: Industrial Relations Centre, Queen's University 1979), 27-28.

We began the paper by pointing out that the employer's right to control his workforce allows him to discipline and punish his employees. When he does so, he uses those very terms: discipline and punish. Workers' non-conformist behaviour, that is, behaviour which the employer defines as not being consonant with his productive needs, is referred to as an "offence". Moreover, the punishment which is imposed can be very severe. It is punishment of the kind which real criminals might expect to suffer. For instance, if a worker who makes \$20,000 a year, has been discharged from work and is subsequently reinstated by a grievance arbitrator who felt that the employer had a cause for discipline but not one for discharge, the employee may lose pay for a lengthy period during which he was not employed. Thus, not untypically, an employee may lose four to six months' pay, a penalty of \$6,600 to \$10,000. This kind of "fine" at least equals, and likely exceeds, any that could be imposed by the state for an analogous offence.⁹⁶ Inevitably, it is well understood that the employer is really exercising state-like criminal powers when he is disciplining and punishing his workers. This helps explain why some of the opponents of mandatory drug testing make their arguments in the way they do and why the idea of employers imposed drug testing raises their ire. Thus: the imposition of drug tests on employees is often characterized as a potential abuse of the privilege against self-incrimination of individuals. Similarly, it is often said that such drug tests are repugnant because they involve the assumption that people are guilty before they have been proved to be so by an appropriate process and, therefore, the presumption of innocence will be undermined. This argument has its strongest persuasive power vis-à-vis random testing, that is, when there is no objective basis for the belief that something is wrong and needs to be controlled. It has resonance precisely because the result of a finding that an individual has wrongfully used drugs will lead to punishment, in the same way as it would if she had been criminally convicted. Not surprisingly, it has been lawyers who make some of the strongest arguments against mandatory drug testing and do so precisely because the scientific reliability of the processes for evidence-gathering are so suspect. This makes the possibility of punishment offensive, in the same way that to convict someone on the basis of an illegally obtained confession is deemed offensive.⁹⁷

There are other parallels between the use of criminal power by the state and employer-mandated drug testing. In respect of the

⁹⁶ For an elaboration of this argument, see H.J. Glasbeek — The Utility of Model Building . . . *supra* note 43. It suffices to note that an employer may be fined no more — and often less — for a violation of a health and safety standard which leads to the death of a worker.

⁹⁷ See the argument of the Canadian Bar Association — Ontario Branch, *supra* note 19. It should be noted that the recommendation made in that report to ban the use of employer-mandated drug testing was ultimately rejected when it was offered as a resolution at the mid-Winter meeting of the national body of the CBA in February, 1988, see *The National*, March 1988.

proscription of drugs by the state, Ericson⁹⁸ has argued that one of the benefits, from the state's point of view, of making drugs illegal is that it enables the police to stop, seize, survey and monitor individual citizens. The potential of surveillance of the public is enhanced and this enhances the state's control over the citizenry. Similarly, if employers are allowed to check their employees for drug use/abuse, even if this right is restricted by the requirement that there be an objective basis for such testing, they will be entitled to monitor the performance of their workforce even more closely than they do now. The effect which increasingly sophisticated and legitimated surveillance will have on the workforce cannot be underestimated. Surveillance, generally, has a chilling effect on the ability of those under scrutiny to express themselves freely. As the Labour Relations Board of Ontario has noted, "surveillance has become a recognized technique of behaviour modification."⁹⁹ Askin has argued that workers who are conscious of being watched experience heightened fear:

"... apprehension is an act of anxiety that subjects feel when they are being evaluated. It leaves the individuals to behave in a manner that will win a positive evaluation on the person who is judging him. . . .

The psychological consequence of concern over social evaluation (induced through awareness that once behaviour is under surveillance) is the arousal of anxiety. This anxiety raises the threshold for expression of all behaviours which could be judged as non-normative, deviant, atypical, or political dissident."¹⁰⁰

The concrete advantage which employers will derive from monitoring and surveillance carried on under the guise of justified checking for drug impairment is manifest. It is the same kind of benefit which the state seeks to obtain from its surveillance practices. Once again, the parallel between private sector and state objectives becomes apparent. Moreover, if private sector employers can do what the state would find difficult to do and exercise this power for the kind of reasons which, in the first place, led us to fetter the state lest it oppresses us unduly, it is likely to bring out the fact that employment relations are not based on voluntary agreement. The private employer would not be able to do at least as much as the state can do, or even more, if there did not remain an imbalance of power which permits the employer to exploit his workers whenever he wishes to do so.

⁹⁸ Richard V. Ericson — *Reproducing Order: A Study of Police Patrol Work* (Toronto: U. of T. Press, 1982), 164-166.

⁹⁹ *K-Mart Canada Ltd. (Peterborough)* [1981], O.L.R.B. Rep. 60.

¹⁰⁰ Askin, "Surveillance: The Social Science Perspective" (1972), 4 *Columbia Human Rights' Law Rev.* 59, 73. The idea that continuous monitoring and surveillance has a chilling effect on people's behaviour is well understood by labour relations boards which watch out for such employer behaviour when workers seek to form legitimate trade unions.

B. Some Concrete Reasons for the Desire of Some Employers to Impose Drug Testing on their Employees

Given the undesirable revelatory nature of mandatory drug testing, it is not easy to see why employers would embark on such an enterprise, given that it is not likely to lead to much greater improvement in work performance. That is, if the argument made in this paper is right, it might be expected that thoughtful employers would not wish to push for mandatory drug testing. Yet, in the U.S., they are doing so with zeal and, in Canada, there are some stirrings to this effect. In this final section some instrumental reasons are offered as to why this dangerous course might be pursued by individual employers.

- (i) There is the ideological impetus given by neo-conservative governments, particularly in the U.S. and more latterly in Canada. Ellis points out that these kinds of governments routinely co-opt crime and employ it as a political resource. He notes that, in the U.S., the Reagan administration has done so successfully: “[u]nder the guise of dealing with a significant social/medical problem, opposition to homosexuals, Haitians, blacks, street criminals, AIDS, drug use, and employee autonomy can be mounted”.¹⁰¹ Employers who like to exercise power are encouraged when their instinctive desires are legitimated by governmental signals which tell them that they are not just being self-indulgent but, rather, that they are acting in the public interest.
- (ii) It is possible that some employers want to ensure that their employees not use drugs because they really care about the safety of those employees and that of any others whom they might hurt. But, the history of occupational health and safety makes it clear that employers seldom have been at the forefront of the struggles to improve occupational health and safety conditions.¹⁰² This, then, cannot be an important aspect

¹⁰¹ D. Ellis, *supra* note 54, 268. Ellis notes the hypocrisy of these neo-conservative tactics. He argues that it is not the lifestyle to which the rulers object, but it is the people who are identified with it who are the focus of the “War on Drugs”. After all, he comments, many members of the conservative hierarchy use drugs, including corporate executives. In addition, it is fairly well-known that these conservative governments and their secret agencies use drugs and the drug trade as part of their foreign policy stratagems; see Penny Lernoux — *In Banks We Trust* (New York: Anchor Press/Doubleday, 1984); Elaine Sciolino and Stephen Engelberg, “The Traffic in Drugs, America’s Global War”, *New York Times*, Apr. 10, 1988, 1. (The first of three articles).

¹⁰² Although, occasionally, some of them will participate in reform movements; see, generally, V. Navarro, “The Labour Process and Health: A Historical Materialist Interpretation” (1982), 12 *Int’l J. Health Serv.* 5; C. Noble, *Liberalism at Work: The Rise and Fall of the OSHA* (Philadelphia: Temple U, 1986); E. Tucker, “Making the Workplace ‘Safe’ in Capitalism: The Enforcement of Factory Legislation in Nineteenth Century Ontario” (1988), 21 *Labour/Le Travail* 45.

of the drive towards employer-mandated drug testing, although the very fact this argument has any plausibility at all aids the cause of those who support this development.

- (iii) A better argument to help explain the employers' desire to impose drug testing on employees is that it is another version of blaming the victim. By dramatizing that drug abuse exists, indeed, is rampant, and that it may be connected (even if this is not so clearly established) to workplace injuries and diseases, a suggestion is being made that much of occupational health and safety harm is the outcome of imprudent employee behaviour. Both the fact that there is no clear connection between drug use/abuse and occupational health and safety harm and the fact that much drug use and abuse may arise out of the stressful conditions imposed by employers should make this line of argument rebuttable. But, this will require a good deal of education, particularly as one tempting way of making the counter argument, viz., that there is no connection between drug use and safety, is counter-intuitive.
- (iv) Economics may impel employers to subject employees to drug testing. Here there are two sets of arguments. On the one hand, the mandatory drug testing programmes have gained momentum at a time when employers have been faced with a weakened union movement and an increasingly large army of reserve labour. As a result, facing competitive pressures, employers have been less interested in pretending that they care about their workers' plight; increasingly they have engaged in massive layoffs as a means of economic rationalization.¹⁰³ Overall, they feel less of a need to accommodate workers' concerns. In this kind of economic circumstance, the more hardheaded and autocratic employers are not persuaded by arguments that the physical intrusion which mandatory drug testing presents will lead to the kind of worker opposition and militance which they ought to fear.

The second kind of argument based on economics is the fact that, with the development of new technologies, many workers are asked to handle very expensive and delicate equipment. Mistakes by one employee can cause a great deal of damage to production. In these circumstances, it makes sense to ensure that these centrally placed workers are not in any way impaired.

Testing for drugs makes sense to employers who are seeking immediate concrete gains. Moreover, it makes sense in a world where the exercise of discipline and control is vital.

¹⁰³ D. Drache and H. Glasbeek, "The New Fordism in Canada: Capital's Offensive, Labour's Opportunity", (1989), 27 *Osgoode Hall Law Journal* 517.

7. Summation

1. There is a real anxiety about the use/abuse of certain drugs in contemporary North America.
2. In part this anxiety has been fostered by employers; in part employers' awareness of it has been increased by external factors.
3. Some employers encouraged by the general climate and perceiving the potential for some tangible productive advantages seek to impose mandatory drug testing on employees and would-be employees.
4. Employers who choose this route find justification and support in the fact that the exercise of this kind of power over their workers already has been legitimated.
5. The nature of drug testing is such, however, that the exercise of this power by employers makes it clear how real their power is and how contentious the conventional wisdom, which posits the state (rather than private property owners) as the enemy of individuals, is.
6. As a result, opposition to employer-mandated drug testing often comes from those who support the conventional wisdom.
7. One of the arguments of this opposition is that the drug testing technology is not reliable enough to warrant the interference with employees' privacy which drug testing entails.
8. Another such argument is that employer-mandated drug testing would permit employers to treat employees as guilty before there was proof to this effect. This is characterized as offensive to our social norms. The full implications of this argument are not pursued.
9. These implications are that the private sector employers will be exercising, directly, the power to discipline and punish in the way that Foucault has argued the state does on behalf of the rulers of any society.
10. Employer-mandated drug testing is part of the trend towards privatization of discipline of the ruled. Employer-mandated drug testing is, in a sense, a microcosm of the larger terrain of struggle between capital and labour and reveals some of its (usually) carefully hidden features.