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# Drug-Testing: Some Fundamental Conceptual and Juristic Problems

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# DRUG-TESTING: SOME FUNDAMENTAL CONCEPTUAL AND JURISTIC PROBLEMS

by

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## INTRODUCTION

The subject of this article is both highly sensitive and acutely controversial. It is so because it touches and concerns the equally sensitive and complex subject of our rights, liberties, and privileges as human beings. Historically speaking, it is a fair and accurate judgment that man's relationship to drugs is a long one, antedating recorded history. They have been used for religious, medicinal, hedonistic, and social purposes. It is likewise true that over the long span of world history cultural and legal attitudes towards drugs have varied considerably![1]

Discussions about the use or abuse of drugs or of drug-testing are usually charged with a high degree of emotiveness and subjectivity. By the same token, additionally, writings on the subject of drug testing often pose peculiar problems of analysis and objectivity. The purpose of this article is to explore and analyze some fundamental conceptual legal problems germane to a consideration of the legality of drug-testing in a democratic society which practices the rule of law and which places a high premium, in its normative scheme, on the principle of individual or personal liberty. The justification for this exercise lies primarily in the fact that in contemporary American society drug-testing is not only a reality, but raises issues both of immense legal complexity and practical significance.

This article approaches the subject from five perspectives. The first is that of constructing a factual substratum for the conceptual legal issues to be addressed. The second is that of identifying and isolating the critical issues for determination raised by the facts. The third is an analytical examination of those issues by reference to certain conceptual or juristic criteria. The fourth is to predict, by way of rationalization of existing legal principles, the probable judicial approach of the courts in resolving the issue of the legality of drug-testing if confronted with the task of pronouncing upon it. The fifth is to inquire whether judges can validly and legitimately apply juristic principles postulated by legal scientists to complex moral and social issues of the day.

## FACTUAL PERSPECTIVES

It may be recalled that on September 14, 1986, President Reagan launched

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[1]D. GLASER, HANDBOOK OF CRIMINOLOGY 209 (1974).

a nationwide campaign against the use of drugs under the slogan "War on Drugs," and urged the American public, in dramatic language, to "Just say no to drug and alcohol abuse."[2]

The first major governmental measure emanating from that presidential initiative was an executive order providing for the establishment of a random drug-testing program for federal employees.[3] Its principal objective was declared to be to ensure "the creation of drug-free atmosphere or environment at the workplace."[4] This measure provoked widespread criticism from certain quarters of American society, particularly the lay public, professional groups, and certain members of both the legislative and judicial branches of government.[5]

One such criticism came from the President of the American Federation of Government Employees, who observed that the random drug-test plan "will do nothing more than add humiliation and indignity to a process that we believe is already unconstitutional."[6] Representative Steny Hoyer of Maryland described it as "an Orwellian plan to have drug-test monitors in bathrooms, blue toilet-water and instant temperature taking."[7] Representative Gary Ackerman of New York introduced legislation to prohibit any testing for drugs without a reasonable belief that an employee's drug use has impaired his or her job performance.[8]

Additionally, the National Treasury Employees Union filed a lawsuit in the federal district court seeking the grant of an injunction against the implementation of the executive order in respect of federal workers in "sensitive" jobs.[9] In that action, the Union contended that the drug-testing plan was an infringement of the fourth amendment, which prohibits unreasonable searches and seizures.[10] The reason adduced in support of the union's contention was that there was no documentary evidence of any drug-abuse problem among federal employees.[11]

Two key features of the drug-testing program for federal employees are worth noting. The first is that the use of drugs by such employees on or off duty was an additional ground for dismissal.[12] The second is that it was no longer necessary, as a basis for testing an employee for drugs, to prove a causal connection or relationship between his alleged use of drugs on and off duty and his alleged impaired

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[2]President Ronald Reagan, Remarks on Signing an Executive Order and Messages to the Congress Transmitting Proposal Legislation, September 15, 1986.

[3]Exec. Order No. 12564 (1986), reprinted in 5 U.S.C.A. § 4301 at 175 (1987).

[4]*Id.*

[5]Laurent, *Drug Guidelines Complete*, Federal Times, March 2, 1987 at 18; *see also* Laurent, *Judge Refuses to Dismiss Unions Suit Against Testing*, Federal Times, January 26, 1987, at 7.

[6]*Id.*

[7]*Id.*

[8]Laurent, *Drug-Testing Plans Challenged*, Federal Times, September 29, 1986, at 1.

[9]*Id.*

[10]*Id.*

[11]*See* Laurent, *supra* note 8.

[12]Exec. Order No. 12564 (1986), reprinted in 5 U.S.C.A. § 7301 at 175 (1987).

job performance.[13] Another factual dimension of the problem relates to the alleged incidence of drug abuse in some segments of the police forces in the United States of America.[14] A survey conducted by Research Management Associates, Inc. of Alexandria, Virginia, revealed that of thirty-three police departments surveyed, twenty-four had drug-testing programs.[15] The key findings of that survey were as follows:

(1) seventy-three percent of the departments surveyed were conducting drug-screening tests of applicants;
(2) virtually all departments had written policies and procedures for conducting tests when there was reason to suspect that officers were using illegal drugs;
(3) twenty-one percent said that they were considering mandatory testing of all officers;
(4) twenty-four percent indicated that treatment (rather than dismissal) would be appropriate for officers under some circumstances, generally depending on the type of drug and the severity of the problem.[16]

Drug-testing is also now a feature of the official lives of some employees in private industry in the country.[17] It is likewise a reality in the world of sports, both at the university and college levels.[18] For example, in 1987, Kent State University authorities issued a proposed drug-testing plan incorporating these elements:

(1) Random testing once a week of all athletes in the twenty intercollegiate varsity teams and cheerleading squad;
(2) One out of every fifteen team members will be selected by lottery for urine test;
(3) Where an athlete is tested positive for the third time, he or she may be suspended;
(4) For the first and second positive tests, the athlete will be required to meet a University physician for appropriate counseling in respect of the athlete's problem;
(5) Confidentiality is guaranteed in that only physicians in DeWeese Health Center will know which athletes have tested positive;
(6) Confidentiality will be lifted where an athlete tests positive repeatedly, in which case the physician will notify the Athletics Department.[19]

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[13] *Id.*

[14] J. McEwen, B. Manil, E. Connors, *Employee Drug Testing Policies in Police Departments*, National Institute of Justice, Research in Brief, U.S. Department of Justice, 1 (October 1986).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Louie, *Drug Testing Could Start in Spring*, Daily Kent Stater, Sept. 5, 1986 at 1; *See also* William Shelton, Vice President's statement: "The intent of this kind of policy is to protect the athlete, the student. This is not meant to be a punishment, but a strong deferrence (to abuse drugs)." *Id.*

[19] *Id.*

Drugs which are tested include amphetamines, cocaine, heroin, marijuana, diuretics, and anabolic steroids.[20] From these factual perspectives, it is evident that drug-testing is now a reality in the United States.

## CRITICAL ISSUES RAISED BY DRUG-TESTING IN A DEMOCRATIC STATE

Some of the critical issues raised by drug-testing in a democratic state include the following: (a) whether the government has the authority to legislate drug-testing of its citizens while having regard for the normative primary accorded to the rule of law and the principle of personal liberty in modern democratic systems;[21] (b) whether drug-testing amounts to a violation of some constitutional provision, in the case of the United States of America, of the Fourth amendment, under which provision individuals have a reasonable expectation to be free from "bodily intrusions" by the government or employer;[22] (c) whether drug testing, mandatory or optional, infringes an employee's contractual rights;[23] (d) whether student athletes should be tested for drugs;[24] (e) whether drugs should be banned from sports;[25] (f) whether an exception for the use of anabolic steroids should be allowed in sports,[26] and (g) whether drug-testing, especially in the case of sensitive drugs, is reliable.[27]

## CONSIDERATION OF TWO KEY ISSUES BY REFERENCE TO CERTAIN CONCEPTUAL AND JURISTIC CRITERIA

My researches disclose that there is, as it is technically put in law, a hiatus or lacuna in the law as regards the question of the constitutionality of drug-testing in the United States.[28] There is as yet no authoritative judicial determination or pronouncement on this issue by the United States Supreme Court, in its final appellate capacity.[29] Because of this, it seems to me a sound analytical approach in resolving key issues (a) and (b) above would be to test the legal validity of drug-testing against the theoretical postulations of two celebrated political thinkers and jurists of the seventeenth century, namely, John Stuart Mill and Jeremy Bentham on the subject of personal liberty and the scope of governmental authority. Mill formulated a principle of liberty as a juristic yardstick of when it would be appropriate, legitimate or illegitimate, for the government of a democratic state, prac-

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[20] *Id.*

[21] This would be implicit in cases of states with written constitution embodying a Bill of Rights guaranteeing Fundamental rights and freedoms, for example, the U.S. Constitution.

[22] *See* Schmerber v. California, 384 U.S. 757 (1966).

[23] *See* Maurice Turner v. Fraternal Order of Police, No. 83-1213 (D.C. Ct. App. Nov. 13, 1985).

[24] Daily Kent Stater, Sept. 10, 1986.

[25] *Id.*

[26] *Id.*

[27] *See* Allen v. City of Marietta, 601 F.Supp. 1122 (S.D. Iowa 1985).

[28] *See supra* note 14.

[29] *Id.*

ticing the rule of law, to limit or restrict personal liberty.[30] Because issue (a) may be considered a species of the general conceptual problem: Should the enforcement of morals be the concern of the law?" it is instructive to investigate the approaches of Mill and Bentham to the problem of state restraint of personal liberty.

*Mill's Postulations on Liberty*

In 1859, in his famous essay on Liberty,[31] Mill expounded the principle of individual liberty in his intellectual investigation of a much wider conceptual question, namely, the nature and limits of the power which can be legitimately exercised by society over the individual.[32] In response, he postulated that one very simple principle governs the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force, in the form of legal sanctions or penalties, or whether they be the moral coercion of public opinion.[33] Mill expounds this principle as follows:

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right . . .[34]

Reinforcing his general principle, Mill reasons:

> [N]either one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it. He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect: while, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else.[35]

Notwithstanding his firm belief in individual autonomy, Mill concedes that

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[30] J. MILL, MORALITY AND LAW 10-23 (ed. 1971). *See also* JOHN STUART MILL ON LIBERTY 10-11 (D. Spitz ed. 1975).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] J. MILL, *supra* note 30, at 1, 2.

[35] *Id.* at 11.

"human beings do owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter,"[36] an explicit acknowledgment of some moral obligation of benevolence.

*Application of Mill's Principle to Drug-Testing*

On the issue of applying Mill's principle of liberty to drug-testing, and, for an avoidance of doubt, I do here enter a caveat; namely that his principle did not address directly the problem at hand. The justification for its application is a matter of logical deduction, because the issues for determination rest on the tacit assumption that drug-testing, whether mandatory or optional, is an unjustifiable and unwarranted restraint on personal liberty. It is clear that Mill's principle of liberty, as formulated and correctly interpreted, makes room, conceptually, for the idea of individual autonomy in the sense of investing every rational and mature human being with responsibility for his action.[37]

An important logical dimension of such a general principle is that the government or the state cannot legitimately interfere with a fully voluntary choice of a mature rational human being concerning matters affecting his own interests, except in clearly-defined circumstances. Exceptionally, Mill stipulates two limitations on autonomous individual behavior. The first is where the action of the individual can be harmful to others.[38] The second is where the individual is acting in a manner that will result in an irreversible loss of his potential liberty owing to his present or immediate choices.[39] Admittedly, this is a problematic issue for the reason that it may well involve making extremely complex and subtle cognitive distinctions between rational and irrational individual choices, on one level of reasoning, and, on a second level of reasoning, determining the boundary between choices which will result in an irreversible loss of potential liberty and those that will not. Mill posits: "The reason for not interfering, unless, for the sake of others, with a person's voluntary acts, is consideration for his liberty . . . The principle of freedom cannot require that they should be free not to be free. It is not freedom to be allowed to alienate his freedom."[40]

Two inferences can be drawn from Mill's rationalization. The first is that the government or state can properly legislate certain restrictions on personal liberty. The second is that restrictions on personal liberty, to be legitimate and acceptable, must come within the ambit of the exceptions postulated to the general principle. The permissibility of these derogations from individual liberty apart, Mill's general principle remains analytically cogent as is deducible from his succinct observation: "Over himself, over his own body and mind, the individual is

[36] *Id.*

[37] *Id.*

[38] *Id.* at 11; Spitz, *supra* note 30, at 10-11.

[39] D. Spitz, *supra* note 30, at 95.

[40] *Id.*

sovereign."[41]

From the foregoing analysis, it can readily be perceived that though Mill's principle of liberty, by his own admission, is "very simple,"[42] it is, nonetheless, extremely difficult to apply. In purely conceptual terms, one reasonable inference is that, if on Mill's theory, drug-testing constitutes a limitation on personal liberty, then, where the stipulated conditions are satisfied, exceptional legislation in relation to drug-testing may well be reasonably justifiable in a democratic society.

*An Antithetical Conceptual Approach: Bentham's Views*

Perhaps, it is instructive to examine a different conceptual approach to this problem. Bentham, another English social reformer, also articulated the boundaries of liberty and authority in political society.[43] His conceptual analyses of liberty anticipate much of Mill's theoretical postulations on the subject. According to Bentham, the utilitarian system of morals and legislation founded, not on liberty, but on the universal and inescapable subjection to mankind's 'sovereign masters,' namely, pain and pleasure.[44] They govern both the *is* and the *ought* of every aspect of life.[45] He postulated that "a general unrestricted liberty is by definition a state of anarchy."[46] In syllogistic terms, this was the major premise of his utilitarian model of liberty, which is clearly antithetical to Mill's own major premise, namely, "over himself, over his own body and mind, the individual is sovereign."[47] The logical extreme of this last position is, as Price argued, "that in every free state every man is his own legislator."[48] How, then, did Bentham conceive of liberty? He reasoned thus:

> Liberty then is neither more or less than the absence of coercion. This is the genuine, original and proper sense of the word liberty. The idea of it is an idea purely negative. It is not anything that is produced by law. It exists without law and not by means of law. It is not productible at all by law, but in the case where its opposite *coercion* has been produced (by law) before. That which under the name of liberty is so much magnified, as the individual, the unrivaled work of law, is not *liberty*, but *security*.[49] (emphasis added.)

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[41] *Id.* at 11.

[42] *Id.*

[43] D. LONG, BENTHAM ON LIBERTY: JEREMY BENTHAM'S IDEA OF LIBERTY IN RELATION TO HIS UTILITARIANISM 100-101 (1977).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] D. Spitz, *supra* note 30, at 11.

[48] D. Long, *supra* note 43, at 56.

[49] *Id.* at 74. Long notes that the marginal heading beside the last sentence is "Liberty used improperly for security."

Though Bentham, like Mill, did not directly address the problem of drug-abuse and the issue of drug-testing as a manifestation of the intrusion of the law into the domain of private morality, his theoretical discussions of the provinces of liberty and authority in a democratic state are wide enough to encompass these conceptual problems. Therefore, it is possible to deduce his attitude toward legislation restricting personal liberty, from his thoughts on the concept of liberty embodied in the passages already cited here,[50] and from the following extract from his writings under the rubric, "Offense against morality:"

> The State takes upon it to control those acts of a man the consequences of which are in the first instance interesting only to himself, and that for two reasons. First, that his happiness is the happiness of the community: secondly, that his strength is the strength of the community. If there be any difference, it is the latter consideration that gives the state the best and most incontestible title it has thus to interfere. It may be a matter of doubt/question/whether there is reason to expect that the state will do/in general be apt to manage/better for a man than he will manage/do/for himself: but it is a matter that does not admit of being questioned that the state will be apt to manage better for others than he will be apt to do/manage/for those others.[51]

Two important notions emerge from the above passage. The first is justification of state interference with "those acts of a man the consequences of which are in the first instance interesting only to himself," in respect of which control is imposed primarily through the instrument of the moral sanction. The second is that the justification for control is more expansive in the sense that society can regulate individual acts of private consequence on utilitarian grounds. It is a fair and reasonable inference that Bentham's conceptual approach would allow the government or state the authority to legislate laws restrictive of individual liberty on purely utilitarian grounds, even though his conceptual approach to the principle of personal liberty is antithetical to that of Mill.

## PROBABLE JUDICIAL APPROACH TO THE ISSUE OF THE LEGALITY OF DRUG-TESTING

An earlier observation at the beginning of this article was that the justification for the exercise lay primarily in the fact that in contemporary American society drug-testing was not only a reality but raised issues both of immense legal complexity and practical significance. It was also observed later that there existed a gap in the law in this country as to the constitutionality of drug-testing. These observations warrant a predictive analysis as to the probable judicial approach if the United States Supreme Court were to be confronted squarely with the issue of the constitutionality of drug-testing. Therefore, the question becomes as follows: What legal standards are applicable in determining the question of the legality or otherwise of drug-testing?

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[50] D. Long, *supra* note 48, at 49.

[51] *Id.* at 72.

In *Schmerber v. California*[52] the Supreme Court held that intrusions "beyond the body's surface" are searches within the meaning and contemplation of the fourth amendment.[53] The clear implication of this holding is that under the privacy provisions of the fourth amendment, individuals have a reasonable expectation to be free from "bodily intrusions" by the government or an employer. It follows by logical extension, that such an expectation of privacy does extend to the seizure of one's body fluids which any form of drug-testing will entail. But the law is, (and this point is emphasized for an avoidance of doubt) that the fourth amendment only protects individuals from "unreasonable" searches and seizures.[54]

The distinction here is between "reasonable" and "unreasonable" which is certainly, for the purposes of the law, not a distinction without a difference, importing as it does the notion of the reasonable man, the anthromorphic conception of justice.[55] On the basis of that decision, and having regard for the place of the doctrine of stare decisis in the context of the application of judicial decisions, it seems clear that it is a matter for the courts of this country to pronounce upon the constitutionality of drug-testing or the legality of particular drug-testing programs legislated by the government, either directly, or by means of delegated authority. Such judicial approach would necessarily entail a legal interpretative analysis of the language, meaning, and effect of the fourth amendment in terms of its legislative breadth, of whether the right alleged to be infringed or sought to be protected is covered or secured within the meaning and intendment of that enactment, and whether, granted it is covered, or secured, it is an absolute or qualified right. If the court proceeds along those lines, then such an approach may result in a holding on either side of the borderline of permissibility and impermissibility.

Where the holding falls on the permissible side of the borderline, then the resolution of the problematical question of the legality of drug-testing will assume a different legal dimension, namely, the validity of specific drug-testing packages involving a concretization of the conceptual problem addressed. In working out this new legal equation, the overriding principle may well be that of the reasonableness of specific drug-testing programs. The key factors to be taken into account in making a judicial decision one way of the other may include: (a) balancing of the interest or expectation of privacy on the part of the alleged drug user against the government or employer's policies and interests in testing for drug abuse; (b) the sensitivity; of the particular area of employment involved (for example, testing of airline pilots and policemen for drugs); (c) possibility of psychological, physiological, or physical impairment to the drug user; (d) the

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[52]384 U.S. 757 (1966).

[53]*Id.*

[54]*See supra* note 14.

[55]This is the constitutional provision from which the courts developed the familiar exclusionary evidence rule; *see* Weeks v. United States, 232 U.S. 383 (1916); *see also* Mapp v. Ohio, 367 U.S. 643 (1965) and Ker v. California, 374 U.S. 23 (1963).

justification for the tests; (e) the probability of the employee's impairment while on the job or, for example, in the case of an athlete, his impairment while performing or, the probability of the athlete user of anabolic steroids having an unfair advantage over his fellow competitors; (f) confidentiality as a safeguard; (g) reliability of the test as a safeguard; and (h) any other safeguards provided for in the program. The categories of such key factors are not exhaustive. As regards the judicial approach to the problem of the validity of drug-testing, we await, with eager expectation, the Supreme Court's authoritative determination of this problematical question.

## CONCLUSION

I have demonstrated (1) that, on Mill's theory, a modern democratic state can, subject to certain limitations, legislate to test its citizens for drugs; and (2) that Bentham would allow a democratic state to legislate drug-testing of its citizens on merely utilitarian grounds. Now, it may quite properly be inquired whether courts have a judicial mandate or warrant to apply principles or theories propounded by political thinkers, social reformers or legal scientists in the resolution of disputes relating to complex issues of private morality. This sort of inquiry transports us into the realm of jurisprudential analysis. One dimension of the issue relates to the nature and scope of juristic thought, that is to say, whether it is limited to the view that legal rules can exist only within the framework of an operative legal system. The second is whether there is a valid distinction between the role of a judge and that of a legal scientist. The latter raises the crucial question whether judges can validly and legitimately rely upon or apply theories descriptive of legal science in resolving issues of private morality. My perception of the problem here is that theories such as Mill's principle of liberty and Bentham's utilitarian doctrine are important layers of the conceptual bedrock of Western legal tradition. It may be contended that the view that judges have no judicial warrant to apply doctrinaire juristic theories in settling disputes arising before them in the context of their daily judicial concerns has an engaging elegance. However, on close examination, its seeming plausibility can be challenged on the grounds that such a view imports into the adjudicative process an arbitrary and dangerous limitation on both the function of the law as "an instrument of social engineering," as Roscoe Pound articulated it,[56] and on the nature of the judicial process, as Benjamin Cardozo conceptualized it.[57]

[56]The classic expression of which is found in the law of torts, especially the tort of negligence.

[57]B. CARDOZO, THE GROWTH OF THE LAW (1924).