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## Drug Testing and Privacy in the Workplace, 29 J. Marshall J. Computer & Info. L. 463 (2012)

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# DRUG TESTING AND PRIVACY IN THE WORKPLACE

ADAM D. MOORE\*

Consider the following thought experiment. Upon moving to a new country and starting a job you are informed that there are mandatory random testing laws in place – these laws are a bit odd because they are designed to test if working adults have a high body mass index – they determine if someone is overweight. Your new employers defend these tests by citing numerous studies indicating that overweight individuals have more accidents at work, use more health care resources and are less productive than their peers who are fit.<sup>1</sup> One of your new colleagues argues “why should I have to pay for some overweight person’s bad choices – why should my profit sharing check or raise be less, why should I have to pay the same in terms of health premiums, and why should I be paid the same when I produce more value? Why should other workers and stockholders be ‘on the hook’ so-to-speak?” Suppose the tests included taking random blood and urine samples along with nude ‘weigh-ins’ under direct observation. While there are numerous dissimilarities between workplace drug testing and testing for obesity there are striking similarities – or so I will argue. In fact, I will argue that in large part, these views stand or fall together.

Being required as a condition for continued employment, to submit a urine sample might strike many as a mild privacy intrusion – a necessary evil to be endured as part of one’s work life.<sup>2</sup> Being watched while providing such a sample may seem overly intrusive – but again, neces-

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1. This case is not as outlandish as one might suspect. *See, e.g.*, David Cutler & Zirui Song, *Workplace Wellness Programs Can Generate Savings*, HEALTH AFFAIRS 1-2, 4-7 (Feb. 2010); Obesity Prevention and Control, CENTERS FOR DISEASE CONTROL AND PREVENTION (Aug. 30, 2012), <http://www.cdc.gov/workplacehealthpromotion/evaluation/topics/obesity.html>.

2. *See, e.g.*, Arthur Delaney, *Obama Administration Pushes Drug Testing in Workplace, But Not For Everybody*, THE HUFFINGTON POST, (April 4, 2012), [http://www.huffingtonpost.com/2012/04/18/obama-administrationdrugtesting\\_n\\_1434624.html](http://www.huffingtonpost.com/2012/04/18/obama-administrationdrugtesting_n_1434624.html) (Data from 2006 suggests “a whopping eighty-four percent of employers typically required drug tests from new hires. According to the most recent information from the Society for Human Re-

sary because of the numerous ways to defeat such a test. Consent to such surveillance is a prominent justification.

At a more general level, there is a lot of ground between our current national policy, aptly called the “war on drugs,” and total unrestricted legalization – although few advocate this latter view. Criminalization of drug use, “three strike” rules, incarceration of those found with forbidden substances, asset seizures and demonizing those who use and distribute drugs are features of current U.S. national drug policy. Aside from throwing more money at the problem, incarcerating an even higher percentage of the population, and upping the ante in terms of punishment, it seems that we are at the extreme.<sup>3</sup> Moreover, the war on drugs’ invasion into the workplace has given license to a wide range of intrusive practices.

To be blunt, I think these policies are nonsense and amount to little more than the sentiment that “what you are doing makes me uncomfortable so we are going to put you in jail or fire you – for your own good.” It is as if those folks who use drugs might tempt us and lead everyone down the road to abuse, dependency, and idleness. Few want to ask the question, “Given current drug policy and the associated costs, how many users are also dependent and substantially impaired?” Alas the central issue is not use. There are many individuals who use drugs who do not also become chemically dependent. Let’s pick a high number such as twenty percent.<sup>4</sup> Suppose twenty percent of users of any drug are also dependent on that drug and that we as a nation (state, local, and federal)

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source Management, 57 percent of businesses required all job candidates to pass drug tests in 2011. Another 10 percent tested only certain candidates”).

3. “Nearly 1.9 million people were arrested in America for drug offences in 2006—over three times the number detained in 1980.” *Possession*, THE ECONOMIST (Oct. 7, 2007), [http://www.economist.com/research/articlesBySubject/displaystory.cfm?subjectid=34895&story\\_id=9933162](http://www.economist.com/research/articlesBySubject/displaystory.cfm?subjectid=34895&story_id=9933162). The United States incarcerates a higher percentage of its population compared to other countries due to invasive anti-drug laws. “More than 5.6 million Americans are in prison or have served time there, according to a new report by the Justice Department released Sunday. That’s 1 in 37 adults living in the United States, the highest incarceration level in the world. . . . The prison population has quadrupled since 1980. Much of that surge is the result of public policy, such as the war on drugs and mandatory minimum sentencing. Nearly 1 in 4 of the inmates in federal and state prisons are there because of drug-related offenses, most of them nonviolent.” See Gail Russell Chaddock, *US Notches World’s Highest Incarceration Rate*, THE CHRISTIAN SCIENCE MONITOR (Aug. 18, 2003); see also Marc Mauer & Ryan S. King, *A 25-Year Quagmire: the War on Drugs and Its Impact on American Society*, THE SENTENCING PROJECT, [http://www.sentencingproject.org/doc/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf) (Sept. 2007).

4. Reports indicate that globally between 3.4 and 6.6 percent of the population between ages 15-65 use illegal drugs each year. This would mean between 153 million and 300 million individuals use illegal drugs annually. Of this population 10-13 percent (15-38 million) are identified as drug dependent or “problem drug users.” *2012 World Drug Report*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (last visited Aug. 8, 2012) [http://www.unodc.org/documents/data-andanalysis/WDR2012/WDR\\_2012\\_web\\_small.pdf](http://www.unodc.org/documents/data-andanalysis/WDR2012/WDR_2012_web_small.pdf).

are spending 50 billion dollars per year to fight this war.<sup>5</sup> Now, we weren't fighting the war on drugs and spending 50 billion dollars per year (even adjusted for inflation) in 1950. My guess is that use and dependency rates in 1950 were much lower – and even if they were not lower, suppose the dependency rates were the same or slightly higher, the costs are not comparable. All other things being equal, would a defender of the current war on drugs maintain that it is worth 50 billion dollars a year to save a small fraction of the population from becoming addicted – the difference between the number of addicts with or without the current war?

Note that it is not even addiction that we should be worried about – alas as I will argue below, there are substantial numbers of addicts who are competent, functioning, and productive adults. Moreover, compared to a model of harm reduction or treatment, the economics of U.S. drug policy do not make much sense, which is why most Western governments have not adopted, or moved away from, the kind of religious war the U.S. is fighting.<sup>6</sup>

The cost to individual liberty is also staggering. From military raids in foreign lands to knocking down doors in suburban America there has been an unrelenting assault on privacy and liberty in the name of this war on drugs. Aside from the overt loss of privacy involved in interdiction and the like, the price tag itself hides a loss of liberty. We are spending 30–50 billion dollars a year to prosecute a war on forbidden chemicals. This is not free money – it represents, in large part, the time and effort of hardworking Americans and creates huge downstream burdens on developing countries. Additionally, as already noted, there are opportunity costs involved. We could be doing something else with this money.

An important component of the national “war on drugs” is found in the more mundane practice of employee drug testing. The Drug Free Workplace Act of 1988 and Executive Order 12564 requires that all federal agencies and federal government contractors maintain a drug-free

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5. “Jeffrey Miron, an economist at Harvard who studies drug policy closely, has suggested that legalizing all illicit drugs would produce net benefits to the United States of some \$65 billion a year, mostly by cutting public spending on enforcement as well as through reduced crime and corruption.” Eduardo Porter, *Numbers Tell of Failure in Drug War*, NY TIMES (July 3, 2012); see Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. OF ECON. PERSP. 175-92 n.4 (1995).

6. For a detailed analysis of the economic argument against current U.S. policy on drug use see Miron, *supra* note 5; see also Mauer, *supra* note 3 (citing Bruce L. Benson & David W. Rasmussen, *Deterrence and Public Policy: Trade-Offs in the Allocation of Police Resources*, 18 INT'L REV. L. & ECON. 77, 100 (1998)) (“A Florida study revealed that every additional arrest for a drug crime resulted in an increase of 0.7 Index (serious) crimes, and a one percent increase in drug arrests resulted in a .18% increase in Index crimes”).

work place.<sup>7</sup> Moreover, the Supreme Court ruled in favor of suspicionless drug testing of government employees in *Skinner v. Railway Labor Executives Association* and *National Treasury Employee Union v. Von Raab*.<sup>8</sup> In these cases the justification of random testing was based on a special need such as safety. In *Vernonia School District v. Acton* the court seemingly abandoned the “special needs” test for overriding individual privacy by allowing compulsory random testing of high school student athletes.<sup>9</sup>

Few would deny that monitoring employees is a necessary part of doing business. The very act of paying someone for services would necessitate, in a competitive environment, that the product produced or time spent working be observed. Continued employment, raises, and profit sharing rewards require employers to monitor their employees. Surveillance may be necessary to diminish corporate liability for sexual harassment claims, absenteeism, safety concerns, employee theft and other illegal activities that take place at work. Nevertheless, we may wonder at the efficacy and moral legitimacy of employee drug testing. In this article, after a presumption in favor of individual privacy has been established, several of the most prominent arguments in support of employee drug testing will be considered. As we shall see, none of the arguments typically offered in favor of workplace drug testing are particularly compelling.

## I. ESTABLISHING A PRESUMPTION IN FAVOR OF PRIVACY<sup>10</sup>

I favor what has been called a “control” based definition of privacy.<sup>11</sup>

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7. 41 U.S.C. § 701 (drug-free workplace requirements for federal contractors); Exec. Order No. 12564, 3 C.F.R. 224 (1986), *reprinted as amended* in 49 U.S.C. §§ 5301-40 (2006) (Omnibus Transportation Employee Testing Act of 1991). For an overview of various public and private sector laws regarding suspicionless drug testing see Lesley Benware, *But See Guiney: Revisiting Mandatory Random Suspicionless Drug Testing of Massachusetts Public-Sector Safety-Sensitive Employees in Light of House Bill 2210*, 44 SUFFOLK U. L. R. 477 (2011).

8. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Emps. v. Von Raab*, 489 U.S. 656 (1989).

9. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *see also* *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997) (finding that emergency room physician could be tested); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (allowing for random testing of police and fire fighters); *AFGE v. Roberts*, 9 F.3d 1464 (9th Cir. 1993) (random testing of prison guards).

10. This section draws from material originally published in Adam D. Moore, *Intangible Property: Privacy, Power, and Information Control*, 35 AM. PHIL. Q. 365-78 (1998); Adam D. Moore, *Privacy: Its Meaning and Value*, 40 AM. PHIL. Q. 215-27 (2003); ADAM D. MOORE, *PRIVACY RIGHTS: MORAL AND LEGAL FOUNDATIONS* 3-8 (Penn State Univ. Pr. 2010).

11. *See* ANITA L. ALLEN, *WHY PRIVACY ISN'T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY* (Rowman & Littlefield Pub. 2003); Ruth Gavison, *Information Control: Availability and Control*, PUBLIC AND PRIVATE IN SOCIAL LIFE 113-34 (Benn, Stan-

A right to privacy is a right to control access to, and uses of, places, bodies, and personal information. For example, suppose that I wear a glove because I am ashamed of a scar on my hand. If you were to snatch the glove away, you would not only be violating my right to property, since the glove is mine to control, but you would also be violating my right to privacy – a right to restrict access to information about the scar on my hand. Similarly, if you were to focus your x-ray camera on my hand, take a picture of the scar through the glove and then publish the photograph widely, you would violate a right to privacy. While your X-ray camera may diminish my ability to control the information in question, it does not undermine my right to control access.

Privacy also includes a right over the use of bodies, locations, and personal information. If access is granted accidentally or otherwise, it does not follow that any subsequent use, manipulation, or sale of the good in question is justified. In this way privacy is both a shield that affords control over access or inaccessibility, and a kind of use and control-based right that yields justified authority over specific items – like a room or personal information.<sup>12</sup>

To get a sense of the importance of privacy and separation, it is helpful to consider similar interests shared by many non-human animals. While privacy rights may entail obligations and claims against others – obligations and claims that are beyond the capacities of most non-human animals – a case can still be offered in support of the claim that separation is valuable for animals. Alan Westin in *Privacy and Freedom* notes:

One basic finding of animal studies is that virtually all animals seek periods of individual seclusion or small-group intimacy. This is usually described as the tendency toward territoriality, in which an organism lays private claim to an area of land, water, or air and defends it against intrusion by members of its own species.<sup>13</sup>

More important for our purposes are the ecological studies demonstrating that a lack of private space, due to overpopulation and the like, will threaten survival. In such conditions animals may kill each other or engage in suicidal reductions of the population.

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ley and G. Gaus eds. 1983); CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE, 9 (Harvard Univ. Press 1970); Richard Wasserstrom, *Privacy: Some Assumptions and Arguments*, PHILOSOPHICAL LAW 148 (R. Bronaugh ed. 1979); Hyman Gross, *Privacy and Autonomy*, PRIVACY: NOMOS XIII 170 (J. Roland Pennock & John W. Chapman eds., 1971); Ernest Van Den Haag, *On Privacy*, PRIVACY: NOMOS XIII 147 (Roland Pennock & John W. Chapman eds., 1971); Richard Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 280 (1974).

12. This way of defining privacy is not without difficulties. For a defense of this account see Moore, *supra* note 10, at 215-27; see also Adam D. Moore, *Defining Privacy*, 39 J. OF SOC. PHIL. 411-28 (2008).

13. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 8 (The Bodley Head Ltd. 1970).

Given that humans evolved from non-human animals, it is plausible to think that we retain many of the same traits. For example, Lewis Mumford notes similarities between rat overcrowding and human overcrowding:

No small part of this ugly urban barbarization has been due to sheer physical congestion: a diagnosis now partly confirmed by scientific experiments with rats – for when they are placed in equally congested quarters, they exhibit the same symptoms of stress, alienation, hostility, sexual perversion, parental incompetence, and rabid violence that we now find in [large cities].<sup>14</sup>

These results are supported by numerous recent studies.<sup>15</sup> Household overcrowding and overcrowding in prisons have been linked to violence,<sup>16</sup> depression,<sup>17</sup> suicide,<sup>18</sup> psychological disorders,<sup>19</sup> and recidivism.<sup>20</sup>

Cultural universals have been found in every society that has been systematically studied.<sup>21</sup> Based on the Human Relations Area Files at Yale University, Alan Westin has argued that there are aspects of pri-

14. LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 210 (Mariner Books 1968), cited in Theodore D. Fuller, et al., *Chronic Stress and Psychological Well-being: Evidence from Thailand on Household Crowding*, 42 *SOC. SCI. MED.* 265, 267 (1996).

15. See, e.g., Andrew Baum & Stuart Koman, *Differential Response to Anticipated Crowding: Psychological Effects of Social and Spatial Density*, 34 *J. OF PERSONALITY & SOC. PSYCHOL.* 526-36 (1976); Jes Clauson-Kaas, et al, *Urban Health: Human Settlement Indicators of Crowding*, 18 *THIRD WORLD PLANNING REV.* 349-63 (1996); John N. Edwards & Alan Both, *Crowding and Human Sexual Behavior*, 55 *SOC. FORCES* 791-808 (1977); see Fuller, *supra* note 14, at 265-80; Morgan Griscom, *Mental and Social Health and Population Density*, 20 *J. HUM. REL.* 196-204 (1972); David P. Farrington & Christopher P. Nuttal, *Prison Size, Overcrowding, Prison Violence and Recidivism*, 8 *J. CRIM. JUST.* 221-31 (1980); Paul B. Paulus, Verne C. Cox & Garvin McCain, *Death Rates, Psychiatric Commitments, Blood Pressure and Perceived Crowding as a Function of Institutional Crowding*, 3 *ENVTL. PSYCHOL. & NONVERBAL BEHAV.* 107-16 (1978); R.B. Ruback & T.S. Carr, *Crowding in a Women's Prison*, 14 *J. APPLIED SOC. PSYCHOL.* 57-68 (1984).

16. See Edwin I. Megargee, *The Association of Population Density Reduced Space and Uncomfortable Temperatures with Misconduct in a Prison Community*, 5 *AM. J. COMMUNITY PSYCHOL.* 289-98 (1977); F. Porporino & K. Dudley, *An Analysis of the Effects of Overcrowding in Canadian Penitentiaries* (1984) Ottawa, Ontario: Research Division, Programs Branch, Solicitor General of Canada.

17. Verne C. Cox, Paul B. Paulus & Garvin McCain, *Prison Crowding Research: The Relevance of Prison Housing Standards and a General Approach Regarding Crowding Phenomena*, 39 *AM. PSYCHOLOGIST* 1148-60 (1984).

18. GARVIN MCCAIN, VERNE C. COX & PAUL B. PAULUS, *THE EFFECT OF PRISON CROWDING ON INMATE BEHAVIOR*, (Univ. of California Libraries 1980).

19. Paulus, *supra* note 15.

20. See Farrington, *supra* note 15, at 221-31.

21. Cultural universals have been found in every society that has been systematically studied. See, e.g., George Murdock, *The Universals of Culture*, READINGS IN WORLD ANTHROPOLOGY (E. A. Hoebel, J. D. Jennings, and E. R. Smith eds., 1955).

vacy found in every society - privacy *is* a cultural universal.<sup>22</sup> Barry Schwartz, in an important article dealing with the social psychology of privacy, provides interesting clues as to why privacy is universal.<sup>23</sup> According to Schwartz, privacy preserves groups, maintains status divisions, allows for deviation, and sustains social establishments. As such, privacy may be woven into the fabric of human evolution.

While privacy may be a cultural universal necessary for the proper functioning of human beings, its form - the actual rules of association and disengagement - are culturally dependent.<sup>24</sup> The kinds of privacy rules found in different cultures will be dependent on a host of variables including climate, religion, technological advancement, and political arrangements. Nevertheless, I think it is important to note that relativism about the forms of privacy - the rules of coming together and leave taking - does not undermine my claim regarding the objective need for these rules. We have strong evidence that the ability to regulate access to our bodies, capacities, and powers and to sensitive personal information is an essential part of human flourishing or well-being.

This view concerning the value of privacy also applies to digital natives, who appear comfortable sharing unprecedented amounts of information about their private lives with the public. First, assuming that these individuals value privacy less than the rest of us, this fact does not make privacy less valuable. The account of value I have sketched is objective, not subjective. To drive this point home, it would be odd to claim that choosing to eat fewer calories than is necessary for survival would be valuable simply because it is chosen. In my view, there are certain facts about human nature that connect to value independent of our desires or wishes, including our need for so many calories per day, or the ability to regulate access to our bodies and personal information. Indeed, digital natives who offer up too much for public consumption may not be aiming at the good life. Second, the evidence collected so far does not indicate that digital natives desire less privacy than the rest of us. These youths are employing different forms of control that protect privacy in

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22. Based on the Human Relations Area Files at Yale University, Westin argues that there are aspects of privacy found in every society - privacy *is* a cultural universal. This view is supported by John Roberts and Thomas Gregor, “. . . privacy as a set of rules against intrusion and surveillance focused on the household occupied by a nuclear family is a conception which is not to be found universally in all societies. *Societies stemming from quite different cultural traditions such as the Mehinacu and the Zuni do not lack rules and barriers restricting the flow of information within the community, but the management and the functions of privacy may be quite different*” (emphasis added). John Roberts & Thomas Gregor, *Privacy: A Cultural View*, PRIVACY NOMOS XIII 225 (Roland Pennock & John W. Chapman eds., 1971).

23. Barry Schwartz, *The Social Psychology of Privacy*, 73 AM. J. SOC. 741-52 (1968).

24. See Herbert Spiro, *Privacy in Comparative Perspective*, PRIVACY NOMOS XIII 121-48 (Roland Pennock & John W. Chapman eds., 1971).



different ways.<sup>25</sup> Likewise the Java of Indonesia may use different norms of coming together and leave taking when compared to those of us living in the United States. If so, this would support my contention that the forms of privacy may be relative to culture and time, but the need is not.

Having said something about what a right to privacy is and why it is valuable we may ask how privacy rights are justified.<sup>26</sup> A promising line of argument combines notions of autonomy and respect for persons. A central and guiding principle of western liberal democracies is that individuals, within certain limits, may set and pursue their own life goals and projects. Rights to privacy erect a moral boundary that allows individuals the moral space to order their lives as they see fit. Clinton Rossiter puts the point succinctly:

Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of the modern society. . . . It seeks to erect an unbreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself, who feels no over-riding compulsion to share everything of value with others, not even those he loves and trusts.<sup>27</sup>

Privacy protects us from the prying eyes and ears of governments, corporations, and neighbors. Within the walls of privacy we may experiment with new ways of living that may not be accepted by the majority. Privacy, autonomy, and sovereignty, it would seem, come bundled together.

A second but related line of argument rests on the claim that privacy rights stand as a bulwark against governmental oppression and totalitarian regimes. If individuals have rights to control personal information and to limit access to themselves within certain constraints, then the kinds of oppression that we have witnessed in the twentieth century would be near impossible. Put another way, if oppressive regimes are to consolidate and maintain power, then privacy rights, broadly defined, must be eliminated or severely restricted.<sup>28</sup>

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25. See, e.g., Alexei Czeskisy et al., *Parenting from the Pocket: Value Tensions and Technical Directions for Secure and Private Parent-Teen Mobile Safety*, Symposium on Usable Privacy and Security (SOUPS) (July 14-16, 2010).

26. This section is embarrassingly incomplete, due in part, to space and time limitations. For a more complete defense of privacy rights please see Moore, *supra* note 10, at ch. 4-5; see also Adam D. Moore, *Toward Informational Privacy Rights*, 44 SAN DIEGO L. REV. 809-45 (2007).

27. CLINTON ROSSITER, *ASPECTS OF LIBERTY* (Ithica, NY: Cornell University Press, 1958) quoted in Alan Westin, *Privacy in the Modern Democratic State*, ETHICAL ISSUES IN THE USE OF COMPUTERS 188 (D. Johnson and J. Snapper eds., 1985).

28. For more about privacy rights see Charles Fried, *Privacy*, 77 YALE L.J. 477 (1968); James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323-33 (1975); THE RIGHT TO

Arguably, any plausible account of human well-being or flourishing will have as a component a strong right to privacy. Controlling who has access to ourselves is an essential part of being a happy and free person. This may be why “peeping Toms” and rapists are held up as moral monsters – they cross a boundary that should never be crossed without consent.

Surely each of us has the right to control our own thoughts, hopes, feelings, and plans, as well as a right to restrict access to information about our lives, family, and friends. I would argue that what grounds these sentiments is a right to informational privacy – a right to maintain a certain level of control over personal information. While complete control of all our personal information is a pipe dream for many of us, simply because the information is already out there and most likely cannot or will not be destroyed, this does not detract from the view of personal information ownership. Through our daily activities we each create and leave digital footprints that others may follow and exploit – and that we do these things does not obviously sanction the gathering and subsequent disclosure of such information by others.

Whatever kind of information we are considering, there is a gathering point that individuals have control over. For example, in purchasing a new car and filling out the car loan application, no one would deny we each have the right to demand that such information not be sold to other companies. I would argue that this is true for any disclosed personal information whether it be patient questionnaire information, video rental records, voting information, or credit applications. In agreeing with this view, one first has to agree that individuals have the right to control their own personal information (i.e., binding agreements about controlling information presuppose that one of the parties has the right to control this information).

If all of this is correct, then we have a fairly compelling case in support of the view that individuals have moral claims to control access to specific places and things and also to certain kinds of information –we have established a presumption in favor of privacy.

## II. ARGUMENTS IN FAVOR OF DRUG TESTING<sup>29</sup>

A right to privacy can be understood as a right to limit public access to the “core self,” personal information that one never discloses, and to

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PRIVACY (Ellen Frankel Paul, Fred Miller Jr. & Jeffrey Paul eds., Cambridge Univ. Pr. 2000); FERDINAND SCHOEMAN, *PRIVACY AND SOCIAL FREEDOM* (Cambridge Univ. Pr. 1992); JUDITH WAGNER DEC EW, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* (Cornell Univ. Press 1997).

29. I am indebted to Judith Wagner DeCew’s analysis and presentation of these issues, *See DeCew, supra* note 28, at 125-144. For a nice overview of these arguments see Debra

information that one discloses only to family and friends. Privacy also extends to use claims over bodies and locations.<sup>30</sup> There are seven major strands of argument in support of employee drug testing – arguments that provide justification for overriding employee privacy rights.<sup>31</sup> First is what I call the “the just trust us” argument. On this view we should simply trust that owners and managers have the best interests of their employees at heart. Second, is the “nothing to hide” view which maintains that only those with something to hide complain about drug testing. Third, employee drug use is said to cause accidents, both to other employees and to customers. Fourth, drug users may have increased medical problems that cause undue strain on the ability to provide high-level health coverage for each employee. Fifth, there are productivity issues, in that drug users may not be as productive on the job when compared to non-users. Sixth, society by engaging in a broad-based effort against drug use, sends the much-needed message to our children that such behavior is undesirable – using drugs and leading a drug lifestyle is immoral. Finally, employees typically waive their privacy rights in return for a job – this is known as the consent argument.

#### THE “JUST TRUST US” ARGUMENT

Those who favor this argument for unannounced employee drug testing typically maintain that owners and managers are well meaning and good people who are looking out for their business and employees. These folks have the same values as the rest of us and will do a competent job in determining the correct balance between employee privacy and workplace safety or productivity. This view has been prominent in other arenas as well – for example, many hackers have argued that we should just trust them when considering Internet security flaws. Google’s Eric Schmidt has given this argument as well in reference to collecting and storing user information.<sup>32</sup> The owner, CEO, or manager wants to generate profits, provide goods and services, and maintain a safe working environment for employees and customers. We should just

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Comer, *A Case Against Workplace Drug Testing*, 5 n.2 ORGANIZATION SCIENCE 259-67 (1994); see also Lennart Henriksson, *The Unconvincing Case for Drug Testing*, 17 n.2 CANADIAN PUBLIC POLICY 183-196 (1991).

30. See Moore, *supra* note 10, at ch. 2.

31. For defenders of these arguments see Robert H. Elliott, *Drug Testing and Public Personnel Administration*, REVIEW OF PUBLIC PERSONNEL ADMINISTRATION 9, 3, 15-31 (1989); H. S. Harwood, et al., *Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness: 1980*, (Research Triangle Institute) (1984); Michael A. McDaniel, *Does Pre-Employment Drug Use Predict On-the-Job Suitability?*, 41 PERSONNEL PSYCHOL. 717-29 (1988).

32. See Shane Richmond, *Google’s Eric Schmidt: You can trust us with your data*, THE TELEGRAPH (July 1, 2010), <http://www.telegraph.co.uk/technology/google/7864223/Googles-Eric-Schmidt-You-can-trust-us-with-your-data.html>.

trust these individuals to determine the correct balance between privacy and security or productivity.

#### THE “NOTHING TO HIDE” ARGUMENT

Only those who have something to hide would complain about employee drug testing. On this view, those who voice concern about the harvesting of blood and urine samples should be viewed with some suspicion. Alas, what have they to hide and why shouldn't our lives be an “open book?” Daniel Solove notes, “In Britain, for example, the government has installed millions of public-surveillance cameras in cities and towns, which are watched by officials via closed-circuit television. In a campaign slogan for the program, the government declares: ‘If you’ve got nothing to hide, you’ve got nothing to fear.’”<sup>33</sup> While this view is typically given in reference to airport security screening or the PATRIOT Act, it is often used in support of employee drug testing.

#### SAFETY CONCERNS

Those in favor of employee drug testing often mention safety as a primary justification. Employees who are using drugs while at work are more likely to hurt themselves, their co-workers, and customers. Employees who use drugs during non-working hours are more likely to come to work “hung over” and tired and thereby present safety risks. An often-cited statistic is that drug users are 3.6 times more likely to be involved in a workplace accident.<sup>34</sup> Furthermore, in certain work environments drug use is especially risky – for example, bus drivers, airline pilots, and nuclear power plant technicians. Given that drug use causes these increased risks, businesses, companies, and employers, the ones who will bear the costs of these risks, are justified in administering drug tests.

#### HEALTH CARE ISSUES

On-the-job or after-hours drug use may cause an increase in medical problems for users. Drug use can suppress the immune system, lead to

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33. Daniel Solove, *Why Privacy Matters Even if You Have ‘Nothing to Hide,’* THE CHRONICLE OF HIGHER EDUCATION (May 15, 2011), <http://chronicle.com/article/Why-Privacy-Matters-Even-if/127461/>; see also, Daniel Solove, *I’ve Got Nothing to Hide and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745-72 (2007).

34. This statistic comes from what has become known as the “Firestone Study.” As noted below, this study does not exist and the claim has not been verified. For more about the “Firestone Study” see LEWIS MALTBY, ACLU REPORT, DRUG TESTING: A BAD INVESTMENT, 5-7 (1999); see also Jacob Sullum, *Urine — or You’re Out: Drug testing is Invasive, Insulting, and Generally Irrelevant to Job Performance. Why do so many companies insist on it?*, REASON MAGAZINE, Nov. 2002, <http://reason.com/archives/2002/11/01/urine-or-youre-out/singlepage>.

mental or physical addiction, and cause the employee to take more sick days than his or her peers. In each of these cases, there will likely be a corresponding increase in medical costs subsidized by the employer and other employees in the form of higher premiums. Drug users are five times more likely to file workers' compensation claims and use three times more health care benefits.<sup>35</sup> Since these increased medical costs will be distributed across non-users and owners, drug testing is justified.

#### PRODUCTIVITY ISSUES

Independent of safety concerns and health care costs or sick days, drug use, it is claimed, causes a decrease in on-the-job productivity.<sup>36</sup> The resulting loss in profits affects other employees and stockholders, ultimately undermining the value of the company and decreasing profit sharing pools. Alcoholics and heroin addicts tend to produce less than their unimpaired counterparts. In addition, losses in short-term memory, muscle control, concentration abilities, and the like will result in a decrease in quality. For example, not only will phone calls not be returned, but when they are, important content will be forgotten. Poor decisions can cost lots of money. As with increased health care expenses and safety concerns, the costs of decreased productivity will impact numerous individuals in negative ways. As a result it has been argued that drug use leads to lower wages for individuals who engage in such behavior.<sup>37</sup>

#### FIGHTING THE WAR ON DRUGS – THE MORAL ARGUMENT

Some advocates of workplace drug testing adopt a moral stance based on the illegal status of drug use and its moral reprehensiveness. For example Bishop Brent, the Anglican bishop of the Philippines (1901), wrote:

The question is first and foremost a moral one. The use of the drug otherwise than medicinally is a vice. . . . The opium traffic stands in the category of crime except so far as it is imported for purely medicinal purposes. It cannot be ranked with the liquor trade, for, as every temperate man acknowledges, in this latter there is a legitimate consumption as a beverage, however much the liberty may be abused, whereas there is no unvicious use of opium or its immediate products as a food-stuff or beverage. The consumption of opium is not merely a personal

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35. "Firestone Study." For more about the "Firestone Study" see Maltby, *supra* note 34.

36. See Elliott, *supra* note 31; Harwood, *supra* note 31; *Worker Drug Use and Workplace Policies and Programs: Results from the 1994 and 1997 National Household Survey on Drug Abuse*, <http://oas.samhsa.gov/NHSDA/A-11/TOC.htm> (last visited on Oct. 15, 2012).

37. See, e.g., Harwood, *supra* note 31.

weakness; it is a social vice, i.e. a crime.<sup>38</sup>

Moreover, we must fight this war on drugs, which includes workplace drug testing, to send the right message to our children. A “drug” lifestyle does not lead to a good life, but rather to dependence, depravity, and stagnation. As a society we have a moral obligation to deter individuals from using drugs and becoming addicted.

Michael Cavanaugh and Pushkala Prasad note while “drug testing may not be a desirable practice . . . [and] there is little evidence of any clear ‘utilitarian’ benefit to the organization” they nonetheless argue that such testing is warranted because drug use is irrational and immoral.<sup>39</sup> Taking drugs is a sign of immaturity and irrationality. “Drug use also represents immorality. By virtue of its associations with high levels of personal hedonism and social deviance drug use also symbolizes self-absorption and consequently is defined as immoral. . . . More seriously, at the level of meaning, drug use threatens the moral order of organizations.”<sup>40</sup> Overall, this justifies the war on drugs in general and workplace drug testing in particular.

#### THE CONSENT ARGUMENT

One of the most common arguments used to justify employee drug testing is based on the notion of a contract or agreement. When a prospective employee agrees to sell her productive efforts for a wage she may also consent to drug testing. An example of the consent argument comes from *Jennings v. Minco Technology Labs, Inc.*, where a Texas court found that an individual’s “consent amounts to an absolute defense in any tort action based upon the invasion . . .”<sup>41</sup> In these cases, the employee freely trades privacy for other benefits like a wage, profit sharing, or a vacation package. Given that the employee did not have to agree to relinquish privacy, no one was physically forcing the employee to con-

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38. ALEXANDER ZABRISKIE, BISHOP BRENT: CRUSADER FOR CHRISTIAN UNITY (Philadelphia: Westminster Press, 1948) quoted in DAVID RICHARDS, SEX DRUGS DEATH AND THE LAW: AN ESSAY ON HUMAN RIGHTS & OVERCRIMINALIZATION, ch.4 (Rowman & Littlefield Publishers 1986); see also James Q. Wilson, *Against the Legalization of Drugs*, 89 COMMENTARY 21-28 (1990) (arguing that using drugs destroys the user’s humanity and it is thus immoral on Kantian grounds).

39. Michael J. Cavanaugh & Pushkala Prasad, *Drug-Testing as Symbolic Managerial Action - In Response to a Case Against Workplace Drug-Testing*, 5.2 ORG. SCI. 268, 267-271 (1994).

40. *Id.* at 269.

41. See *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 500 (1989); see also *Farrington v. Sysco Food Serv., Inc.*, 865 S.W.2d 247 (1993); *Powers v. Pinkerton, Inc.*, 2001 WL 60035 (Ohio App. 8 Dist.); *Jevic v. Coca Cola Bottling Co.*, 1990 WL 109851 (D.N.J. 1990); *Middlebrooks v. Wayne Cnty.* 521 N.W.2d 774, 776, 777 n.11 (Mich. 1994); *Stewart v. Pantry Inc.*, 715 F. Supp. 1361 (W.D. Ky. 1988).

sent, it follows that drug testing is justified.<sup>42</sup>

### III. A CRITIQUE OF THE PRO-DRUG TESTING ARGUMENTS

Putting aside the moral argument and the consent argument for now, let us assume that individuals have privacy rights and that employers, employees, and society have a legitimate interest in employee drug use based on safety, health care, and productivity worries – that is, we have two competing legitimate interests. Suppose that there was some way to obtain the information necessary to alleviate safety, health care, and productivity concerns while at the same time limiting incursions into private domains. There are different ways of gathering information about employees. Given the nature of drug testing and how the tests are administered, it is arguably the case that this way of gathering information is fairly intrusive.<sup>43</sup> A report provided by Substance Abuse and Mental Health Services Administration noted:

Analysis of the 1994 and 1997 NHSDA (National Household Survey on Drug Abuse) provides continued evidence that workplace policies about drug and alcohol use are associated with lower prevalence rates of current illicit drug use and heavy alcohol use among workers.<sup>44</sup>

But the question is not “does drug testing lower workforce use rates?” I suppose that we could lower drug use even further if employees were monitored around the clock via universal video surveillance coupled with automatic shock therapy. The question should be, “are there any less invasive methods that are cost effective and yield the same sorts of information?”

One method that would not require accompanied trips to the bathroom, the drawing of blood, or the harvesting of hair or tissue, would be agility or capacity testing administered by a licensed technician. Perhaps randomly, as many drug tests are now administered, the technician would test an employee before the beginning of a shift. In addition, an agility test could be tailored to the employee position. Tests for pilots, bus drivers, and life guards would be more involved and have higher standards for passing than tests for gardeners, cooks, and grocery

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42. This argument has recently been given to justify drug testing of welfare recipients. See *Requires Drug Testing for Certain Welfare Recipients*, H. B. 380 (La. 2012).

43. In *Skinner v. Railway Labor*, the court determined that blood and urine tests were minimally intrusive and did not constitute a serious harm. But harm in this case seems irrelevant. If individuals have privacy rights, then they have justified control over access to themselves independent of harm – the peeping Tom may not harm and yet still violate a right. *Skinner*, 489 U.S. 602 (1989).

44. *Policy Implications and Recommendations for Future Research*, <http://www.samhsa.gov/data/nhsda/a-11/WrkplcPly2-54.htm> (last visited Mar. 4, 2013).

clerks.<sup>45</sup>

Another benefit of capacity testing is that it will catch other employee impairments that drug testing does not. For example, lack of sleep, independent of drug use, decreases employee productivity and increases safety concerns. An airline pilot who is plagued by insomnia is as much, or more of, a safety risk as the pilot who is high on marijuana. The severe alcoholic may easily pass drug tests – all he has to do is come to work sober. Physical and mental impairments caused by severe alcoholism, however, would be easily determined by agility testing, especially if employee specific baselines were first determined.

Thus, if we assume that the arguments from safety, health care, and productivity are compelling and that individuals have privacy rights, then we should abandon drug testing in favor of agility testing or some other process. Agility or capacity testing would be less invasive, immediately relevant to “same day” employee performance, and sensitive to a wide variety of impairments related to safety, health care, and productivity issues.

Before moving on to consider the merits of the moral argument and the consent argument, I would like to more forcefully critique the arguments from safety, health care, and productivity – they are not as compelling as one might think. These arguments are both too strong and too weak. They sanction unnecessary incursions into private domains; they are not job specific and simply miss employee impairments that are as serious as on-the-job drug use.

First, the arguments from safety, health care, and productivity are too strong. While they may justify drug testing they would also justify a host of policies and procedures that most would find objectionable. For example, having kids, along with the associated loss of sleep, increased sickness, and numerous parental obligations, causes these employees to produce less and cost more. Moreover, other employees, stockholders, and owners will share such costs. None of this would justify mandatory employee attendance at company-sponsored “anti-kid” seminars. Or more minimally, these considerations do not appear to generate a legitimate corporate or public interest in monitoring employees.

Obese employees may also produce less and cost more than their thinner counterparts. Similarly with smokers, the elderly, the young, and even left-handers. Smokers as a group will likely cost more in terms of health care.<sup>46</sup> The elderly may not likely produce as much when working at jobs that require robust physical activity. The young may not have

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45. Other, less invasive, alternatives to employee drug testing are reference checking, supervisor training, and employee drug assistance programs.

46. This claim has been recently disputed – smokers are more likely to die younger and quicker than their non-smoking counterparts.



the experience or mental capacity to make correct decisions. Left-handers may be more accident-prone.<sup>47</sup> Judith Wagner DeCew continues:

[B]esides confirming or disconfirming the presence of drugs in the body, analysis of blood and urine samples may reveal numerous physiological facts about the party being tested that he or she may not want shared with others. Tests can reveal such conditions as the use of contraceptives, pregnancy, epilepsy, manic depression, diabetes, schizophrenia, and heart trouble, for example.<sup>48</sup>

As DeCew notes, these arguments are too strong in a second sense as well – they permit the gathering and use of sensitive personal information that is independent of drug use.<sup>49</sup> Nicholas Caste puts the point in a more general way, “the intrusion into the private lives of the employee that is occasioned by drug testing wrongly appropriates time which . . . was not purchased.” Furthermore, a positive drug test does not reveal patterns of addiction, impairment, dependency, or even voluntary use. For example, inhaling second-hand smoke from a marijuana cigarette can trigger a positive drug test.

The arguments from safety, health care, and productivity are also too weak. Drug testing does not affect “same day” performance given that there is typically a time lag between the test and employee performance. Thus, a bus driver may be severely inebriated, receive a drug test, and still take a seat behind the wheel. Lewis Maltby of the ACLU writes:

[D]rug tests mainly identify drug users who may have used a drug on the weekend, as they might use alcohol, and who are not under the influence of a drug while at work or when tested. Moreover, because it takes several hours for drug metabolites to appear in urine, drug tests may miss drug users who are under the influence of drugs at the time the test is given.<sup>50</sup>

As already noted, drug tests do not even test for a wide variety of employee impairments that are as serious as drug use.

Drug testing is also inefficient in other ways. Barnum and Gleason claim that even when drug tests are accurate they may yield a high “false accusation rate” nonetheless:

The proportion of positive drug tests that are false, that is, the false accusation rate, can be high even when the tests themselves are judged to be extremely accurate by contemporary laboratory measures. In such cases, positive drug tests do not provide credible evidence of drug use.

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47. Charles J. Graham et al., *Left-handedness as a Risk Factor for Unintentional Injury in Children*, 92 *PEDIATRICS* 823-26 (1993).

48. Judith Wagner DeCew, *Drug Testing: Balancing Privacy and Public Safety*, *THE HASTING CENTER REPORT* 24 (1994).

49. See Nicholas J. Caste, *Drug Testing and Productivity*, 11 *J. BUS. ETHICS* 305, 301-06 n.4 (1992).

50. See Maltby, *supra* note 34, at 9.

Our estimates of drug use, false positive rates, and true positive rates, all of which are based on recently published empirical evidence, indicate that under common circumstances, drug test results have high false accusation rates and hence low credibility.

[I]f a drug-testing process that produces only one false positive per 2000 drug-free specimens, and no false negatives, is administered to a population in which 0.1% of the people use the targeted drugs, one-third of those identified as drug users will be falsely accused.<sup>51</sup>

These results alone, if accurate, cast doubt on the entire practice of employee drug testing.

Additionally, drug tests are easily avoided or defeated. “Those who practice timed abstinence or who ingest large amounts of fluid can dilute the concentration of a drug in urine to below the cutoff amount. Adding salt, vinegar, bleach, liquid soap, blood, or another interfering substance can adulterate samples and produce false negative results that do not rule out abuse.”<sup>52</sup> Users can also switch to drugs that are difficult to detect or are not tested for at all.

Drug testing is not cost-effective as well.<sup>53</sup> One government study indicated that it cost \$77,000 to find one drug user.<sup>54</sup> If one out of ten users were also drug abusers, then the cost would be \$770,000. The aviation industry reported spending \$14 million per year on drug testing.<sup>55</sup> Texas Instruments reported spending \$1 million per 10,000 workers on drug tests.<sup>56</sup> In the United States there are approximately two million hard-core drug abusers distributed primarily across entry-level and blue-collar jobs.<sup>57</sup> In addition, a substantial number of these abusers are chronically unemployed or underemployed. The proponent of drug tests would be quick to counter – we are not only after the drug abusers – mere use impacts safety, health care, and productivity. Or does it?

Two studies show that drug users were no more likely to be involved

51. Donald Barnum & John Gleason, *The Credibility of Drug Tests: A Multi-Stage Bayesian Analysis*, 47 *INDUS. & LAB. REL. REV.* (1994); see also, DeCRESCE, R., ET AL., *DRUG TESTING IN THE WORKPLACE* (American Society of Clinical Pathologists Press 1989).

52. See DeCew, *supra* note 48.

53. A. Marlatt & K. Witkiewitz, *Update on Harm-Reduction and Policy Intervention Research*, 6 *ANNU. REV. CLIN. PSYCHOL.* 591–606 (2010) (arguing that “every dollar invested in drug treatment saves taxpayers more than seven dollars in societal costs. In contrast, taxpayers lose 85 cents for every dollar spent on source-country control and 68 cents for every dollar spent on interdiction”) (citing C. PETER RYDELL & SUSAN S. EVERINGHAM, *DRUG POLICY RESEARCH CENTER, CONTROLLING COCAINE: SUPPLY VERSUS DEMAND PROGRAMS* (2006)).

54. Maltby, *supra* note 34, at 14.

55. *Id.* at 4.

56. Mark Rothstein, *Workplace Drug Testing: A Case Study in the Misapplication of Technology*, 5 *HARV. J.L. & TECH.* 65-93 (1991) (cited in Maltby, *supra* note 4).

57. See Maltby, *supra* note 34, at 14.

in workplace accidents than non-users.<sup>58</sup> After reviewing several other studies, the National Academy of Sciences concluded “illicit drugs contribute little to the overall rate of industrial accidents” and “were no more profound than the effects of sleep deprivation in the absence of drug use.”<sup>59</sup> A study by Jacques Normand noted that moderate doses of cocaine as well as other stimulants yielded “slight performance enhancing effects.”<sup>60</sup> Surprisingly, the claim that drug users are 3.6 times more likely to be involved in a workplace accident, a statistic that has been widely cited, cannot be substantiated. This citation traces to what is called the “Firestone Study” which isn’t a study at all but rather a lunchtime address given to Firestone Tire and Rubber executives.<sup>61</sup>

It is also not true that drug use entails a decrease in workplace productivity or an increase in health care claims. As Normand asserts, “It is often assumed rather than proven that those who use alcohol and other drugs away from work will also do so on the job or in close enough proximity to affect workplace performance.”<sup>62</sup> In a study of employees at Utah Power and Light, drug users were actually found to file fewer claims and cost less than their non-using counterparts.<sup>63</sup> Moreover once age and gender are considered, rates of absenteeism between drug users and non-users are negligible.<sup>64</sup> As with the claim about accidents, the assertions that drug users are five times more likely to file worker compensation claims and use three times more health care benefits are unsubstantiated – again, the citation given for these claims is the non-existent “Firestone Study.” Register and Williams found that while marijuana use had a short-term negative effect on wages, “the net productiv-

58. Jacques Normand, et al., *An Evaluation of Preemployment Drug Testing*, 75 J. OF APPLIED PSYCHOL. 926-39 (1990); Craig Zwerling, et al., *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcomes*, 264 J. AM. MED. ASS’N 2639-43 (1990); see also Robert Kaestner & Michael Grossman, *Wages, Workers’ Compensation Benefits, and Drug Use: Indirect Evidence of the Effect of Drugs on Workplace Accidents*, 85 AM. ECON. REV. 55-60 n. 2 (May 1995).

59. See Maltby, *supra* note 34, at 9.

60. JACQUES NORMAND, UNDER THE INFLUENCE? DRUGS AND THE AMERICAN WORKFORCE 107 (National Academic Press 1994); see also Maltby, *supra* note 34, at 9.

61. See Maltby, *supra* note 34, at 6.

62. See Normand, *supra* note 60; see also Charles Winick, *Social Behavior, Public Policy, and Non-harmful Drug Use*, CONFRONTING DRUG POLICY: PART I 69 n.3. MILBANK Q. 437-59 (1991).

63. Denis Crouch et al., *A Critical Evaluation of the Utah Power and Light Company’s Substance Abuse Management Program: Absenteeism, Accidents, and Costs*, DRUGS IN THE WORKPLACE: RESEARCH AND EVALUATION DATA (S. Gust and J. Walsh eds. 1989).

64. “In other words, those workers who are most likely to use drugs (young males) are also more likely to be absent from work, whether they use drugs or not. Thus the statistical difference between drug users and non-users may actually be due to age and sex differences in drug-using and non-using samples rather than to drug use *per se*.” See Maltby, *supra* note 34, at 11.

ity effect for all marijuana users (both those who engaged in long-term or on-the-job use and those who did not) was positive.”<sup>65</sup> Moreover, Gill and Michaels found that drug users as a group earned higher wages than non-users.

Lewis Maltby also notes several negative effects of drug testing. Drug testing deters highly qualified workers from applying, has a negative impact on workplace morale, diverts funds from drug treatment programs, and has been indicated in reduced productivity.<sup>66</sup> This last report deserves mention. “[C]ompanies that relate to employees positively with a high degree of trust are able to obtain more effort and loyalty in return. Drug testing, particularly without probable cause, seems to imply lack [of] trust . . .”<sup>67</sup> Maltby writes:

A recent study applied a standard productivity analysis to 63 “high tech” firms in the computer equipment and data processing industry – some having drug testing programs and some not. Overall, the researchers found that drug testing “reduced rather than enhanced productivity.” Firms with pre-employment testing, compared to firms with no drug testing at all, scored 16 percent lower on productivity measures. For firms with both pre-employment and random testing, productivity was 29 percent lower.<sup>68</sup>

In light of all of this, it would seem that the arguments from safety, health concerns, and productivity are not overly compelling – certainly not compelling enough to override individual rights to privacy. Nevertheless, adherents to workforce drug testing may try to strengthen their case by appealing to the arguments based on morality and consent. Let us now turn to these arguments.

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65. Charles Register & Donald Williams, *Labor Market Effects of Marijuana and Cocaine Use Among Young Men*, INDUS. & LAB. REL. REV. 435-448 (1992); see also Andrew Gill & Robert Michaels, *Does Drug Use Lower Wages?*, 45 n.3 INDUS. & LAB. REL. REV. 419-34 (1992); Robert Kaestner, *The Effect of Illicit Drug Use on the Wages of Young Adults*, 8 J. LAB. ECON. 381-412 n.4 (1991).

66. See Maltby, *supra* note 34, at 16-21. This point seems more generally true as well. As a graduate student I worked at a now defunct catalogue distribution center for a major retail store. When hired I was told to work hard and that if the managers who walked the floor caught us goofing around we would be written up and fired. This system of monitoring was soon replaced with a computer surveillance system and a per hour work quota. Our response to the ever increasing levels of surveillance was to figure out ways to defeat the monitoring and simply appear to be good employees.

67. Edward Shepard & Thomas Clifton, *Drug Testing: Does it Really Improve Labor Productivity?*, WORKING USA 76 (1998), cited in Maltby, *supra* note 34, at 20.

68. See Maltby, *supra* note 34, at 17; see also Crant, J. M. and T. S. Bateman, *A Model of Employee Responses to Drug-testing Programs*, EMP. RESP. & RTS. J., 2, 3, 173-90 (1989).

PROBLEMS FOR THE MORAL ARGUMENT IN FAVOR OF  
EMPLOYEE DRUG TESTING

The moral argument in favor of workforce drug testing holds that businesses have a moral obligation to administer drug tests because drug use is immoral. We must fight the war on drugs in every sector in order to send the right message to our children. A “drug” lifestyle does not lead to a good life, and we, as a society should fight this war.

I have always been somewhat perplexed by this sort of argument for the following reasons. First, what is the argument for the claim that drug use is immoral? As noted earlier, Cavanaugh and Prasad simply claim that drug use is irrational, hedonistic, and is thus immoral. These are not arguments – they are mere assertions. No one would claim that every action that is both irrational and hedonistic is also immoral. Arguably, eating a donut is irrational and hedonistic in most cases. Yet, it is not obvious that eating donuts is immoral. Moreover, it does not follow from the claim that “X is bad” that “we ought not to do X.” Even if it did, it does not follow that society ought to interfere with such activity. For example we cannot jump, without further argument, from the claim that “lying is disvaluable” to the claim that “we ought not to lie.” And even if “we ought not to lie” we cannot jump, without further argument, to “society ought to prohibit lying and take appropriate measures to punish liars.”

Why do we think that drug use necessarily leads to a depraved life? Addiction and abuse *may* lead to a depraved life, but this is true of any activity or behavior performed in excess. Laziness, over-activity, eating too much, eating too little, reading too much, never learning to read, and so on would each lead to a non-flourishing life – and yet I doubt that the defender of the moral argument in favor of workforce drug testing would marshal similar arguments against these other activities. There is no outcry that businesses have a moral obligation to stamp out after-work laziness – after all, such laziness may lead to on-the-job laziness.

Finally, this argument smacks of unjustified moral paternalism and places an undue burden on corporations. While becoming addicted and abusing drugs is irrational, stupid, and perhaps even immoral, these value statements are not in themselves sufficient for requiring businesses to administer drug tests that override the presumption in favor of privacy already established.

AGAINST THE CONSENT ARGUMENT IN FAVOR OF  
EMPLOYEE DRUG TESTING<sup>69</sup>

Workforce drug testing advocates typically offer the consent argument as a discussion stopper. What justifies drug testing is employee consent. Most would agree that absent such consent, drug testing represents a serious violation of privacy. But under what conditions does consent or agreement yield the appropriate sort of permission? The initial bargaining situation must be fair if we are to be morally bound by the outcome.

Please do not take what follows as a general view about coercion, wage offers, and liberty. My goal here is to indicate the force of relinquishing privacy in certain conditions. If consent is offered under certain conditions – assume that there are lots of jobs and few workers or that a specific type of surveillance is necessary for doing business – then privacy claims may be justifiably waived. When conditions do not favor the employee – suppose there are lots of workers and no jobs – and the monitoring is unnecessary, counterproductive, and violates a basic right, then we should proceed with great caution. It is not so clear that in this latter case consent is sufficient for waving privacy rights.<sup>70</sup>

Justifying employee drug testing in light of privacy rights begins with what I call thin consent. A first step in justifying a kind of monitoring is employee notification. The consent takes the following form: “if your employment is to continue then you must agree to such-and-so kinds of surveillance or if you would like to obtain employment then. . . .” This is appropriately called “thin consent” because it assumes that jobs are hard to find and the employee in question needs the job. Nevertheless, quitting remains a viable option. The force of such agreements or contracts is noted by Ronald Dworkin:

If a group contracted in advance that disputes amongst them would be settled in a particular way, the fact of that contract would be a powerful argument that such disputes should be settled in that way when they do arise. The contract would be an argument in itself, independent of the force of the reasons that might have led different people to enter the contract. Ordinarily, for example, each of the parties supposes that a contract he signs is in his own interest; but if someone has made a mis-

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69. Parts of this section draw from material that appeared in Adam D. Moore, *Employee Monitoring and Computer Technology: Evaluative Surveillance v. Privacy*, 10 BUS. ETHICS Q. 697-709 (2000).

70. For more about coercion see, e.g., David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121 (1981); Crawford B. Macpherson, *Elegant Tombstones: A Note on Friedman's Freedom*, DEMOCRATIC THEORY (1973); Robert Nozick, *Coercion*, PHILOSOPHY, SCIENCE AND METHOD 440-72 (Morgenbesser et al., eds. 1969); David Lyons, *Welcome Threats and Coercive Offers*, 50 PHIL. 427 (1975); Frankfurt, *Coercion and Moral Responsibility*, ESSAYS ON FREEDOM OF ACTION 71 (T. Honderich ed., 1973).

take in calculating his self-interest, the fact that he did contract is a strong reason for the fairness of holding him nevertheless to the bargain.<sup>71</sup>

An employee cannot consent, even thinly, to drug testing if it is unknown to her – suppose the employer obtains biological samples from an employee's work area without her consent. Given a fairly strong presumption in favor of privacy, thin consent would seem obligatory. The employee would be notified of the different sorts of drug testing that will be administered. Individual instances of drug testing, however, would not require notification – thus users would not be notified to stop using or to take countermeasures.

It should be clear, however, that thin consent is not enough to justify employee drug testing – not in every case. When jobs are scarce, unemployment high, and government assistance programs swamped, thin consent becomes thin indeed. In these conditions employees will be virtually forced to relinquish privacy because of the severe consequences if they do not. But notice what happens when we slide to the other extreme. Assume a condition of negative unemployment where there are many more jobs than employees and where changing jobs is relatively easy. In circumstances such as these, thin consent has become quite thick. And if employees were to agree to drug testing in these favorable conditions most would think it justified.

As we slide from one extreme to the other, from a pro-business environment with lots of workers and few jobs to a pro-employee environment with lots of jobs and few workers, this method of justification becomes more plausible. What begins looking like a necessary condition ends up looking like a sufficient condition? To determine the exact point where thin consent becomes thick enough to bear the justificatory burden required is a difficult matter. The promise of actual consent depends on the circumstances. Minimally, if the conditions favor the employee, then it becomes plausible to maintain that actual consent would be enough to override a presumption in favor of privacy.

As noted above, thick consent is possible when employment conditions minimize the costs of finding a comparable job for an employee. Put another way, an employee who does not have to work, but agrees to anyway, has given the right kind of consent – assuming of course they have been notified of the different types of drug testing that will occur. What justifies a certain type of surveillance is that it *would be agreeable* to a worker in a pro-employee environment. If thin consent is obtained and the test of hypothetical thick consent is met, then we have reason to think that a strong presumption in favor of privacy has been justifiably surpassed.

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71. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 150-51 (Harvard Univ. Pr. 1977).

We will also have to assume that the hypothetical worker making the choice is modestly interested in maintaining control over private information. If this constructed individual has nothing to hide and a general attitude of openness, then any type of surveillance will pass the test. And if I am correct about the value of privacy, anyone would be interested in retaining such control. If the individual agreeing did not know whether she was a worker, manager, or owner and if we assume that anyone would be interested in retaining control over private domains, then the correct vantage point for determining binding agreements will have been attained.<sup>72</sup>

The force of hypothetical contracts has been called into question by Dworkin and others – “A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.”<sup>73</sup> Here I agree with Dworkin. The moral bindingness of hypothetical contracts has to do with the reasons for why we would choose to do this or that. Viewing it this way, hypothetical contracts are simply devices that enable us to more clearly understand the reasons, moral or otherwise, for adopting a particular institution or process. Dworkin notes:

There must be reasons, of course, why I would have agreed if asked in advance, and these may also be reasons why it is fair to enforce these rules against me even if I have not agreed. But my hypothetical consent does not count as a reason, independent of these other reasons, for enforcing the rules against me, as my actual agreement would have.<sup>74</sup>

Thus the test of hypothetical thick consent can be understood as a way of clarifying, and allowing us to arrive at, a position that is fair and sensible. Hereafter, when I talk of hypothetical consent and the moral force of such agreements, be aware that this is simply a tool or device that is notifying us when privacy rights may be justifiably relaxed.

I take a view of hypothetical thick consent to be that satisfaction is determined by imagining a pro-employee situation and then asking what an employee would do in the face of drug testing. However, some may charge that I am stacking the deck. Why not imagine a pro-business situation and then ask what an employee would do? We would not have to do much imagining though; and employee consent in such conditions would not justify anything. Moreover, if I am correct in positing privacy rights for each of us, then the deck is already stacked. There is a presumption in favor of individuals having control over personal information and rights to control access to their own bodies — we have privacy rights. Since workforce drug testing may cross into private domains, we must consider under what conditions a privacy right may be waived. In rela-

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72. This method for ensuring an unbiased standpoint is similar to Rawls' original position. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-142 (Harvard Univ. Pr. 1971).

73. See Dworkin, *supra* note 70, at 151.

74. *Id.*



tively few cases is thin consent thick enough to handle the justificatory burden; hence, the use of hypothetical thick consent. We are imagining a case where the bargaining situation favors the employee, and if agreement is offered in these conditions, then we may have binding consent.

In general, even in a pro-employee environment there would be certain kinds of employee monitoring that would be necessary for any business. Punching a time clock or measuring time spent working, for example, would occur in almost any business or company. Even in a pro-employee market, theft would have to be minimized. It is not as if McDonalds would become so desperate for workers that they would leave the register drawers open, allow employees to come and go as they please, and continue to pay wages. The market demands that businesses make a profit or at least break even. Given this, there will be certain kinds of employee monitoring that every business will use.

This method of determining employee consent also works well for different types of jobs. For example, airlines will have to monitor, and perhaps drug test, pilots no matter which job a pilot takes. This kind of surveillance may be required by the market – after all, who would want to fly with a carrier who did not monitor its pilots in some fashion? In addition there may be laws that require certain licenses that make businesses liable for noncompliance. The hypothetical or constructed airplane pilot, no matter where he goes, will be subject to certain kinds of monitoring. So, even in a pro-employee environment certain kinds of surveillance will be justified – those kinds that are necessary for doing business.

If I am correct, thin consent will justify certain kinds of monitoring when employment conditions favor the employee. Absent such conditions actually occurring, we can imagine what an employee would choose if she were in a pro-employee environment. If she would agree to a type of monitoring from this vantage point, either because, every business in her field will monitor in the way she is considering, or there are good reasons for trading privacy away, then the monitoring is permitted.

#### TEST CASES AND ILLUSTRATIONS

Let us begin with an easy case. Suppose that one day an employee is approached by his boss and is informed that a new drug testing policy is being initiated. Randomly, but at least once a month, each employee will submit a urine sample obtained under direct observation. The employee complains and asks what conceivable purpose such a policy could have at an insurance company. Management replies that “only someone with something to hide would object.”

By my lights the fact that an employee should have nothing to hide is irrelevant. It is her private life that is being monitored and so it is up

to her to deny access. Whether or not she has something to hide is nobody's business. We all may have perfectly normal at-home lives and have nothing to hide in this area. Nevertheless, mounting company video cameras and wake-up sirens in employee houses cannot in the least bit be supported by such reasons. Also, it is not at all clear that privacy always shields unlawful conduct – perhaps what privacy shields is embarrassing behavior or experiments in living not accepted by the majority.

Assuming that there are lots of jobs and few workers we may ask if this type of drug testing is justified in relation to hypothetical thick consent. I think it is clear that an individual who is modestly interested in protecting privacy and in a pro-employee environment would leave, other things being equal, and find similar employment elsewhere. The “other things being equal” exception is important because if management were to double employee salaries then maybe a deal could be made – no privacy at work for lots of cash.<sup>75</sup> Outside of such offers, however, the presumption in favor of privacy rights would not have been surpassed for this type of drug testing.

Consider a slightly modified version of this case differing only in occupation – suppose we are considering college professors. Given that no lives are at stake in the execution of typical academic work, it would seem that our hypothetically constructed individual interested in maintaining private domains would not agree to such testing. It would appear that even random agility testing would not be justified in this case. What kinds of “impairment” testing would be justified – you might ask? I cannot see how someone could reasonably object to agility testing coupled with reasonable suspicion – suppose the teacher was slurring his speech or falling down drunk. Still, little is lost if an impaired teacher slips by the monitoring net for a day or a week. No lives hang in the balance. It is not as if hearing a bad lecture will kill you.

The case in favor of monthly urine testing under direct observation does not get much better if we consider bus drivers, airplane pilots, or food inspectors. While employee impairment in these occupations could have much more serious consequences, less invasive methods exist for gathering the requisite information. Agility testing, direct supervision and redundant systems would likely provide better information in a more timely fashion than monthly urine testing under direct observation or blood tests.

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75. Employment agreements grant rights, powers, liberties, and duties to both parties. Thus an employee may trade privacy for some kind of compensation like time off or the opportunity to learn. When trade offs such as these have occurred we may take the obligations, generated by the agreement, as *prima facie* — alas, the agreement may have been brokered in unfair conditions. If I am correct, fairness of conditions and binding agreements that justifiably relax rights are guaranteed when the tests of thin and hypothetical thick consent are passed.

In addition, an individual who did not know whether she was the pilot, navigation officer, attendant, or airline owner, and who was interested in maintaining private domains, would not agree to drug testing assuming a pro-employee environment. If there were no other options and employee impairment could threaten lives, then perhaps drug testing would be justified. But we simply do not live in that world.

#### THE CANADIAN MODEL

In the area of workplace drug testing it seems that Canada has seized on a more appropriate model. Consider the following strictures on drug testing:

The following types of testing are not acceptable:

- Pre-employment drug testing
- Pre-employment alcohol testing
- Random drug testing
- Random alcohol testing of employees in non-safety sensitive positions

The following types of testing may be included in a workplace drug and alcohol testing program, but only if an employer can demonstrate that they are *bona fide* occupational requirements:

- Random alcohol testing of employees in safety-sensitive positions. Alcohol testing has been found to be a reasonable requirement because alcohol testing can indicate actual impairment of ability to perform or fulfill the essential duties or requirements of the job. Random drug testing is prohibited because, given its technical limitations, drug testing can only detect the presence of drugs and not if or when an employee may have been impaired by drug use.
- A safety-sensitive job is one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment. Whether a job can be categorized as safety-sensitive must be considered within the context of the industry, the particular workplace, and an employee's direct involvement in a high risk operation. Any definition must take into account the role of properly trained supervisors and the checks and balances present in the workplace.
- Drug or alcohol testing for "reasonable cause" or "post-accident," e.g. where there are reasonable grounds to believe there is an underlying problem of substance abuse or where an accident has occurred due to impairment from drugs or alcohol, provided that testing is a part of a broader program of medical assessment, monitoring and support.
- Periodic or random testing following disclosure of a current drug or alcohol dependency or abuse problem may be acceptable if tailored to individual circumstances and as part of a broader program of monitoring and support. Usually, a designated rehabilitation provider will determine whether follow-up testing is necessary for a particular individual.

- Mandatory disclosure of present or past drug or alcohol dependency or abuse may be permissible for employees holding safety-sensitive positions, within certain limits, and in concert with accommodation measures. Generally, employees not in safety-sensitive positions should not be required to disclose past alcohol or drug problems.<sup>76</sup>

In general the Canadian model seems much more sensible than current U.S. legal or corporate policy. When asked why random drug testing is prohibited, champions of the Canadian model say things like random testing is not time sensitive and it gathers personal information that is not the concern of employers. Testing impacts what an employee does one her free time – time that she does not owe her employer. Identifying “safety-sensitive” positions, insisting on “reasonable cause” for testing and restricting required disclosures of past drug dependency problems by employees, each seem defensible from a pro-employee choice situation.

#### IV. CONCLUSION

In summary, it is not so clear that employee consent should be a “discussion stopper” for advocates of employee drug testing. Actual consent will only have normative force in pro-employee conditions. In pro-employer conditions where there are lots of workers and few jobs, actual consent is almost meaningless. If we imagine a pro-employee environment and ask, given the occupation in question what type of “impairment” testing would be agreeable, it is doubtful that many currently used drug testing programs would be justified.

The arguments from safety, health care, and productivity have been undermined as well. Even if we assume that employers have a legitimate interest in gathering information about employee drug use there will be less invasive ways of achieving this goal. Furthermore, it is not so clear that the arguments from safety, health care, and productivity generate a legitimate corporate interest in testing for employee drug use. Employers do sometimes have a legitimate interest in employee impairment – especially when lives are at stake. But once we change the discussion to one of detecting employee impairment, the issue of drug testing begins to weaken. Political ideologies no longer drive the debate – Democrats and Republicans do not typically have ideological axes to grind when it comes to those who suffer from sleep deprivation or back pain.

To conclude consider a positive argument in favor of permitting some regulated drug use. There are a substantial number of automobile drivers who cannot safely operate a motor vehicle. Some of these individuals are “speed nuts” while others may lack, for whatever reason, the

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76. CANADIAN HUMAN RIGHTS COMMISSION, CANADIAN HUMAN RIGHTS COMMISSION POLICY ON ALCOHOL AND DRUG TESTING: EXECUTIVE SUMMARY (June 2002).

requisite eye, hand, foot, coordination. We do not, as a society, take away everyone's liberty to drive because of those who do not or cannot drive responsibly. More controversially, we do not take away everyone's liberty to gamble just because there are those who cannot gamble responsibly. In these types of cases, it is better to restrict the liberties of the offending class of individuals than to insist on blanket prohibitions. Why don't we adopt this sort of policy with drugs? Those who recreationally use drugs and do not break any laws would be left alone – it is my understanding that the vast majority of drug users are of this type. Those who demonstrate that they cannot use drugs responsibly by driving under the influence or committing property crimes to support a habit, for example, would be legally prohibited from using.

A hidden assumption in this argument is that recreational drug use does not necessarily lead to dependency, abuse, and serious impairment. This empirical claim is demonstrably supported by the facts – there are vastly more drug users than abusers, vastly more individuals who use drugs as an infrequent escape than those who are dependent. As the United Nations "World Drug Report notes:

While a large share of the world's population uses illicit drugs each year (about 5 percent of the population between the ages of 15 and 64), only a small share of these can be considered "problem drug users" (0.6%).<sup>77</sup>

Worldwide, approximately 200 million individuals use illegal drugs annually, while only 12 million of these actually have a "drug problem."

Consider the differences between illegal drug possession rules in the United States and Portugal. In the United States the mere possession of small amounts of illegal drugs may lead to arrest and incarceration.<sup>78</sup> In 2001, Portugal decriminalized the possession of up to ten daily doses (determined by weight) of all "illegal" drugs. Thus an individual in Portugal could have ten doses each of cocaine, heroin, marijuana, and ecstasy and not be subject to arrest or incarceration. Probably the most important aspect of Portugal's 2001 drug policy change is the surprising effect on use rates. Overall, there has been an "increased use of cannabis, de-

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77. UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2007 WORLD DRUG REPORT 15 (2008) [http://www.unodc.org/pdf/research/wdr07/WDR\\_2007.pdf](http://www.unodc.org/pdf/research/wdr07/WDR_2007.pdf).

78. All fifty states have laws prohibiting the use of certain types of drugs. Recently voters in the State of Washington approved the legalization of recreational use of marijuana. Medical marijuana has been legal for several years in Washington. One wonders if employers, both public and private, will continue to test for marijuana use when such use is legal at the state level. Another interesting question is what the Federal Government will do in light of this legalization – at the federal level use, possession, and sale are still illegal. An interesting State's rights battle looms. For my part, the sovereign people of the State of Washington have determined what they would like to do regarding marijuana – legalize, tax, and regulate. The Federal Government overturning this decision amounts to little more than unjustified paternalism. . . there, there, little children of Washington. . . we know what is best for you.

creased use of heroin, increased uptake of treatment, and a reduction of drug related deaths.”<sup>79</sup> Cocaine use rates appeared to stay the same between 2001 and 2007 as well.<sup>80</sup> Perhaps the decrease in drug related deaths and the use of heroin in Portugal, were caused by using resources that would have been spent on prosecution and incarceration for treatment and prevention. In any case, if these statistics hold up, we would have a powerful argument for changing drug possession laws in the United States. More minimally – we could at least make a “new mistake.” The balance between corporate drug policy and individual privacy has been ill struck. Even if there are legitimate interests at stake, there are many ways to protect individual privacy rights while testing for workplace impairment that do not include accompanied trips to the bathroom or the harvesting of hair, tissue, and blood.

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79. CAITLIN HUGHES & ALEX STEVENS, BECKLEY FOUNDATION DRUG POLICY PROGRAMME, THE EFFECTS OF DECRIMINALIZATION OF DRUG USE IN PORTUGAL 9 (2007) <http://www.beckleyfoundation.org/pdf/BriefingPaper14.pdf>.

80. *Id.* at 3.