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## Governmental Drug-Testing and the Sense of Community

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## **Abstract**

Liberal education is education in culture or toward culture

**KEYWORDS:** agriculture, soil, drug

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Liberal education is education in culture or toward culture. The finished product of a liberal education is a cultured human being. "Culture" (*cultura*) means primarily agriculture; the cultivation of the soil and its products, taking care of the soil, improving the soil in accordance with its nature. "Culture" means derivatively and today chiefly the cultivation of the mind, the taking care and improving of the native faculties of the mind in accordance with the nature of the mind. Just as the soil needs cultivators of the soil, the mind needs teachers. But teachers are not as easy to come by as farmers. The teachers themselves are pupils and must be pupils. But there cannot be an infinite regress: ultimately there must be teachers who are not in turn pupils. Those teachers who are not in turn pupils are the great minds or, in order to avoid any ambiguity in a matter of such importance, the greatest of minds. Such men are extremely rare.

—Leo Strauss, *Liberalism Ancient and Modern* (1968).

### I.

A wise teacher of mine once had occasion to make these classroom observations about the then-pressing problem of "juvenile delinquency":

People think about it and try to do something about it, but it could very well be that all their thinking and all their devices are absolutely useless. It could be that juvenile delinquency is connected with the deep crisis of our society as a whole. It could be true that this phenomenon is due to a loss of hope in the younger generation, or to the absence of great public tasks which arouse public spirit. Now, if this is so, it is obvious that juvenile delinquency cannot be

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treated in isolation and a regeneration of society as a whole would be necessary. Whether the palliatives are gentle or tough is a secondary question compared to the question of society as a whole.

That was Leo Strauss speaking at the University of Chicago in 1959. Similar observations can, perhaps should, be made about a problem of considerable concern today, that widespread use of drugs which has led to the current "crusade" to secure a "drug-free workplace."

Our responses to recent developments can take two principal forms. The first addresses that "deep crisis of our society as a whole" which the widespread recourse to and dependence upon drugs may represent. The second addresses the practical (including the constitutional and political) issues raised by the measures resorted to in 1986 by the United States Government to deal with the immediate problems of drug abuse. I will say something, if only in outline, both about the practical issues and about the "deep crisis of our society."

## II.

The more one studies recent governmental initiatives with respect to routine drug-testing in the workplace, the more dubious they can seem. (I do not attempt to assess the drug-testing program initiated for the military several years ago. Nor do I attempt to assess what should be done about such particularly sensitive positions as those of Intelligence Officers and airline pilots.)

The constitutional issues here are easier to discuss in public than they might have been a few months ago. The recent invocations (before Congressional committees) of the fifth amendment plea against self-incrimination by patriotic Americans (including a Marine Corps officer praised by the President himself as a "hero") have been much publicized. One of the salutary consequences of the current Iranian-arms and contra-aid revelations is that they have obliged "conservatives" to recognize the propriety of recourses to the fifth amendment.

Constitutional privileges with respect to fourth amendment search-and-seizure problems, with respect to fifth amendment due-process problems, and with respect to sixth amendment jury-trial problems have been made much of by those challenging governmental drug-testing in the workplace. We can see here, as well, something resembling the demand that people subscribe to loyalty oaths. The interests of government-as-employer are invoked in defense of such mandatory drug-testing programs, as is the damage inflicted upon the country by drug abuse.

Of course, there are ways of getting around the fifth amendment self-incrimination barrier confronting Congressional committees. Similarly, there are ways of satisfying due-process, search-and-seizure, and jury-trial standards invoked by those challenging drug-testing proposals today. The means for satisfying such constitutional standards require, however, much more restraint than tends to be called for by the popular demand for information (whether the information be about the drugs one has improperly consumed or about the arms and funds one has improperly dispersed).

### III.

The restraint upon government which the fourth, fifth and sixth amendments promote is something we have traditionally associated with constitutionalism and the rule of law. The privileges invoked here have a long and, by and large, honorable history; they have not been invented for this occasion or to satisfy modern tastes.

Such privileges may seem to stand in the way of governmental efficiency and hence of public safety and the common good. But the law-abidingness which officials are obliged to exhibit may itself be critical to the law-abidingness which the community at large needs to practice. After all, it is salutary for us to believe that it is usually a sufficient reason for doing something one way rather than another that the law prescribes one action or forbids another.

The significance of law-abidingness among us may be seen in the "no previous restraint" standard which is so critical a part of the first amendment protection of freedom of the press. Although we need not go as far as those who insist that to reaffirm this standard was the principal purpose of the latter half of the first amendment, we should certainly recognize that this standard is vital both to the development and to the perpetuation of a free press. This standard has meant, in effect, that printing should be subject only to the rule of law, that no system of licensing or censorship (an early form of "testing in the workplace"?) can be permitted.

Our entire constitutional system rests upon a general respect for the rule of law. The fourth, fifth, and sixth amendments dramatize that general respect when suspected drug users come to view.

But, one might ask, what of governmental efficiency? Is not the public safety jeopardized, or at least the gross national product markedly reduced, by extending fourth, fifth, and sixth amendment privileges to those who resist drug-testing in the workplace?

Such privileges, it should at once be noticed, are not concerned "only" for the rights of citizens. Rather, such privileges reflect considerable experience (at least among the English-speaking peoples) with what truly works.

An obvious discipline is imposed upon officials. They cannot do what first comes to mind; they have to think things through; they have to restrain themselves. That is likely to be good, not least because it can help sensible people stand firm against surges of questionable enthusiasm.

Thus, for example, if "probable cause" must be shown, it is more likely that a hard look will be taken at the problem being confronted and at the evidence available. Among the useful lessons taught here is that the end does not justify every means —or, perhaps a better way of putting this, that there are ends beyond the immediate end which often seems so demanding.

Impulsiveness in these matters must be resisted. Impulsiveness is the mode of the immature and the self-centered, to say nothing of the criminal. The current "crusade against drugs" has itself exhibited a considerable impulsiveness in both the Executive and the Legislative branches of the United States Government. In such circumstances, constitutional privileges can be cavalierly brushed aside, natural sensibilities can be wantonly offended, and vast sums of money can be simply wasted. This is what enthusiasm can lead to.

#### IV.

Some of these objections may be moderated by technological developments. Concern about constitutional privileges may itself encourage innovations which could save money as well as reduce offensiveness.

Consider, for example, how a reliable breath or saliva test would be received. Expensive laboratory tests might thereby be dispensed with as well as troublesome delays and opportunities for mistaken identifications.

The current tests are evidently unreliable enough to make many people uncomfortable — and the more complicated the testing program, the more chance for error. There can (and should) be re-testing of those initially identified as offenders — but the more efficient tests are considerably more expensive, and budget-conscious supervisors may be reluctant to order them.

Technological developments could also serve to assure employees

that the condition being tested for is rigorously specific, that nothing else will be revealed about other conditions or activities of the subject tested. One can be reminded here of the emphasis upon specificity in the fourth amendment. Certainly, we do not want someone's entire way of life exposed in a test tube to anyone who might happen to have access to the sample.

Furthermore, technological developments could (and should) shift our collective attention away from one kind of sample to others. I suspect that the routine urinalysis approach in these situations will eventually be repudiated as people generally come to appreciate what precisely must be done by officials in order to make certain that the sample provided is in fact produced by the person to be tested.

But technology can take us only so far. No matter how sophisticated our technology becomes, the question remains whether we really want to penalize the *use* of drugs, which is what we seem to be moving toward.

The recent emphasis upon elimination of drugs from the workplace can mean two things: that the use of drugs on the job should be curtailed; that the effects on job performance of one's use of drugs anywhere should be curtailed.

The use of drugs on the job does not seem to be the critical concern. Presumably, such an activity in the workplace can be supervised, just as might be eating on the job or doing on the job other things not in themselves improper. So it must be the effects on job performance of drug use elsewhere with which large-scale testing must be primarily concerned.

We would have quite different problems from those now facing us if observed effects on job performance were depended upon to justify the recourse to drug-testing (or to any other testing) in specific instances. "Observed effects" sounds something like "probable cause." Drug-related effects on job performance may indeed be observable — if one takes the work force as a whole or the economy as a whole. But whether this person or that is observed to be affected by drugs on a particular occasion, and how, is quite a different issue.

It may be true that if off-job drug use is controlled, then on-job costs and consequences are apt to be favorably affected. But do we want our lives thus subjected to comprehensive governmental supervision? The current Administration in Washington came to power with the supposed mandate to moderate the intrusion of "big government" into our lives. Has this mandate gone the way of another supposed mandate, to balance the budget?

We are obliged to wonder, in any event, how much interference by government we should permit in our everyday affairs and to what ends.

## V.

The President of the United States has insisted that the current crusade mounted against drugs in the workplace is not rhetoric.

But is not rhetoric, in the old-fashioned sense, very much needed here? For it is a certain kind of rhetoric that can contribute to that "regeneration of society" upon which an effective campaign against drugs, juvenile delinquency and other desperate manifestations of a general demoralization depends. The teacher from whom I have quoted spoke of "a loss of hope" and "the absence of great public tasks which arouse public spirit." An elevated public teaching — a noble rhetoric — can help restore the required sense of community.

The widespread recourse to drugs is itself in large part a pervasive abandonment of the community. Is this a perverse form of that self-reliance which we have heard so much made of in recent years? Just as the poor can more easily be regarded as not the community's proper concern these days, so can individual efforts to please oneself be celebrated in the name of liberty. An indulgence in drugs may be, then, but another form of the selfishness which has become all too fashionable.

How lives are to be made more meaningful is a vital question for us today. Appearance cannot be safely divorced from reality here: lives are not apt to be meaningful if they do not seem to be. A sense of dignity is critical to such appearances: our leaders must speak and act with a becoming gravity; the measures we resort to in governing each other must not be intrinsically demeaning. At the heart of any regenerating rhetoric is a common awareness of the best way of life.

The opinions of the community have to be addressed even more than its conduct. Unfortunately, television, the principal means these days of addressing the country at large, is itself intrinsically incapable of sustained elevation. It tends to bring out the worst in us and in our leaders, inducing a breakdown of the sense of community as we retreat (as spectators) into the pursuit of private "fulfillment." The very depreciation of the term "rhetoric" recognizes that much of our public discourse now consists of one form or another of "selling."<sup>1</sup>

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1. What the best way of life truly is, and how to secure it, can be no more than touched upon here. I have developed heretofore many of the points alluded to in this article. Consider, e.g., these publications by me: (1) *THE CONSTITUTIONALIST: NOTES*



## VI.

We have seen in the current "crusade against drugs" a lower form

ON THE FIRST AMENDMENT (1971) (this book includes, in Appendix C, *Due Process and the World of Commerce*, a response to a proposal that lie detectors be used in the marketplace); (2) *HUMAN BEING AND CITIZEN: ESSAY ON VIRTUE, FREEDOM, & THE COMMON GOOD* (1970) (this book includes essays on natural right, on obscenity, and on death and dying); (3) *Self-Government and the Mass Media: A Practical Man's Guide*, in *THE MASS MEDIA AND MODERN DEMOCRACY*, 161 (H. Clor ed. 1974) (this article includes an extended argument for the abolition of broadcast television in the United States; at page 232, line 7, "audiences" should read, "spectators"); (4) *The Public Interest in Privacy: On Becoming and Being Human*, 26 *DEPAUL L. REV.* 767 (1977); (5) *Human Nature and the First Amendment*, 40 *U. PITT. L. REV.* 661 (1979) (this article includes a discussion of human nature and the criminal law); (6) *The Religion Clauses of the First Amendment*, 11 *MEM. ST. L. REV.* 151 (1981) (at page 225, note 154, "a sin of community" should read, "a sense of community"); (7) "Notes toward an 'Apologia pro vita sua,'" 10 *INTERPRETATION* 319 (1983); (8) *Psychiatry and the Law: An Old-Fashioned Approach*, in *BY REASON OF INSANITY: ESSAYS ON PSYCHIATRY AND THE LAW* 167 (L. Freedman 1983); (9) *Aristotle on Law and Morality*, 3 *WINDSOR YEARBOOK OF ACCESS TO JUSTICE* 458 (1983); (10) *Freedom of Speech and the Silence of the Law*, 64 *TEX. L. REV.* 443 (1985); (11) *How to Read the Constitution of the United States*, 17 *LOY. U. CHI. L. J.* 1 (1985) (this article includes a discussion of "commercial free speech"); (12) *Law, Lawyers, and Property: The Open Society and Its Limitations*, in *ORDER, FREEDOM AND THE POLITY: CRITICAL ESSAYS ON THE OPEN SOCIETY* (G. Carey ed. 1986) (an unedited version of this article, with extensive notes, may be found in 20 *WILLIAMETTE L. REV.* 615 (1984); in the law review version, at page 631, line 20, "reluctance" should be "inclination", and at page 641, line 7, "common" should be "common good"); (13) *Political Philosophy of the Constitution*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* (L. Levy, K. Karst & D. Mahoney ed. 1986).

Additional references to my work on these topics may be found in the Bibliography appended to my booklength commentary on the United States Constitution of 1781 published in 18 *LOY. U. CHI. L.J.* 15 (1986). I provide, in my book, *G. ANASTAPLO, THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE* (1983), introductions to a dozen artists who offer us guidance as to the best way of life. The epilogue of the book is devoted to Leo Strauss.

Consider, also, on the best way of life, the epigraph to this article. Consider, as well, the series of long introductions to ancient non-Western texts I have been preparing in recent years for the annual volumes of *THE GREAT IDEAS TODAY* (an *ENCYCLOPEDIA BRITANNICA* publication). These introductions are to the *Analects* of Confucius (1984), to the *Bhagavad Gita* (1985), and to the *Gilgamesh* (1986). It can be of help, in considering what is truly the best way of life, to see what other great peoples have tried to do.

In any event, vital to our virtue as a self-governing people is the need to combine classical thought with the principles of the American polity. See L. Berns, *Aristotle and the Moderns on Freedom and Equity*, in *THE CRISIS OF DEMOCRACY: A STRAUS-*

of rhetoric, beginning perhaps with the very use of the term "crusade." Slogans abound; posturing by both legislators and administrators is all too evident. Even the recently-promulgated executive order and the recently-enacted statute are very much sloganeering.

The intimate relation between these developments and the 1986 Congressional elections has been noticed. It is widely accepted by sophisticated observers that the drug issue was deliberately seized upon as something that could be safely used for political advantage by incumbents in the 1986 campaign, so much so that brave talk was heard of a willingness to "break the budget" in order to achieve the much-heralded goal.

But what precisely the goal is (aside from consequences at the polls) has yet to be made clear. Much is made of a "drug-free America" — but how seriously is this to be taken, especially when the vending of potions remains a big business? The challenges in the courts, on the basis of the fourth, fifth, and sixth amendments, may at least have the merit of forcing government to be far more clear about what it is doing, and what it is after, than it had been able to be during the rush to launch the current attack upon drugs in the workplace.

It seems to be generally recognized among those who have studied these matters that the known effects of illegal drugs in the workplace (and on the highways and elsewhere) are still far less destructive than the known effects of alcohol and tobacco. And yet no politician is advocating — or would dare advocate — that there be routine on-the-job testing of government employees for alcohol and tobacco abuse.

On the contrary, the President could even remind a Georgia audience during the 1986 campaign that he had successfully opposed Japanese tariffs on American tobacco imports. The subsidies for tobacco production in this country remain notorious, even though the Surgeon-General of the United States continues to denounce the effects of smoking upon both non-smokers and smokers. The President *has* cautioned young drivers against drinking as well as against drugs, but his administration does not seem to be supporting efforts to curtail the advertising of alcohol.

Do we not see in all this, too, a considerable deference to private life and self-gratification, with government (or the informed will of the community) to be kept to a minimum? This bears upon how seriously the current crusade for a drug-free workplace is to be taken.

## VII.

What, then, is apt to happen now? The current enthusiasm to curtail drug use, at least by means of routine measures in the workplace, is apt to die out. Both the immediate impetus for making much of this (that is, an impending election) will be absent and the recognition that this approach does not work will become widespread.

This recognition will be encouraged by a growing awareness of what the various costs truly are of the testing programs which have been ordered — and of how uncertain the results are bound to be. Adverse effects upon morale will become evident — as well as the fact that government employees are citizens who are capable of organizing themselves effectively to protect their interests. It is even possible that bad experience with governmental drug-testing programs can help advance efforts to place legislative restrictions upon the programs already established by non-governmental employers.

It will be said, as one poorly-conceived governmental plan after another is junked, that liberal judges have once again thwarted the public purpose. But that is silly talk. The judges are merely facing up to the assumptions and consequences that I have sketched out on this occasion. The invocations of constitutional privileges help make us all face up to what we are doing and why.

Few things are so good for public servants as the obligation to explain and to justify what they believe they are up to. We, as their masters, can listen and learn (as can they) from what they can, and cannot, say.

## VIII.

Perhaps the primary lesson to be learned from all this now is that there should be a reconsideration of our overall approach to drugs.

I have already suggested that basic to any enduring curtailment of recourse to drugs in this country is a revival of the public spirit, a “regeneration of society.” Short of that, however, there should be at least a thoroughgoing assessment of the effects of our having made the production, sale and possession of various popular drugs illegal.

“Decriminalization” might make sense *not* because the community cannot distinguish right from wrong, *not* because the community has no right to deal with moral evils, *not* because the community does not have a legitimate interest in the harmful effects of drugs, and certainly *not* because drug offenses are victimless crimes. Rather, “decriminalization” might make sense because the present approaches are becom-

ing more and more expensive, do not seem to do much good, and may even make matters much worse than they would otherwise be.

The present general approach seems to add appreciably to the number of victims, since large-scale criminality is promoted by the fortunes to be made in drug-dealing, leading to corruption of officials, flouting of the law, and a wide-spread deterioration in law-abidingness. It is said that more than one-fourth of our people has used illegal drugs at one time or another. This suggests that the problem we face is primarily educational and hence political.

What we seem to have here is a serious public health problem, not a problem that the criminal law is apt to be able to address effectively, however despicable (and even worthy of summary execution) the professional dealer in drugs may be as matters now stand. Since drug abuse looks very much like alcohol abuse and tobacco abuse in its overall bad effects, it has long been wondered why drugs, alcohol and tobacco should not be treated substantially alike. Government-sponsored educational programs seem called for in all three cases, supported by such measures as strict prohibitions upon advertising and perhaps upon unlicensed distribution. The mandatory warnings on cigarette packages are only a beginning in what may properly be done to discourage consumption.

In addition, taxes and damage suits should permit victims, (including the community) to recover, from producers and distributors (and hence from all users), the catastrophic costs that can be incurred by routine use of drugs, alcohol and tobacco.

## IX.

I began with the observations of an old teacher of mine. I conclude with the observations of an even older teacher of us all, a great teacher of all our teachers today. The lesson which very much needs to be taught a consumption-minded society, in which self-indulgence is not only permitted but encouraged, is a lesson offered by Homer in his *Odyssey*.

The longstanding warning in the West against self-indulgence (and hence against something such as drug abuse) may well be summed up in the opening lines of the epic:

Tell me, O Muse, of that ingenious hero who traveled far and wide,  
after he had sacked the famous town of Troy. Many cities did he  
visit, and many were the nations with whose manners and customs  
he was acquainted; moreover he suffered much by sea while trying

to save his own life and bring his men safely home; but do what he might he could not save his men, for they perished through their own sheer folly in eating the cattle of the Sun-god Hyperion; so the god prevented them from ever reaching home.

Critical to Odysseus' ingenuity, and hence to his ability to prevail, was that sense of community reflected in his determination to get safely home.