

Nova Law Review

Volume 11, Issue 2

1987

Article 17

The Ideology of Drug Testing

Steven Wisotsky*

*

Copyright ©1987 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

The Ideology of Drug Testing

Steven Wisotsky

Abstract

Drug testing in the workplace seems to be an idea whose time has come.

KEYWORDS: drug, testing, use

The Ideology of Drug Testing

Steven Wisotsky*

The mood towards drugs is changing in this country and the momentum is with us. We're making no excuses for drugs, hard, soft or otherwise. Drugs are bad and we're going after them.¹

President Ronald Reagan

I. Introduction

Drug testing in the workplace seems to be an idea whose time has come. In the private sector, drug testing — usually by urinalysis — has become widespread, especially among large corporations. By 1986, an estimated one fourth of Fortune 500 companies were testing both employees and job applicants for illegal drugs.² The movement towards employment drug testing gained additional momentum in September, 1986, when President Reagan issued an Executive Order mandating drug testing of federal workers. The Order required the head of each Executive Agency to establish a program to test any job applicant for illegal drugs; to test for the use of illegal drugs by “employees in sensitive positions”; to provide for “voluntary” drug testing; and to test for drugs in other specified circumstances, including reasonable suspicion, investigation of an accident, or as part of an employee assistance program course of rehabilitation for illegal drug use.³ The Order followed on the heels of the Report of the President’s Commission on Organized Crime, which had recommended adoption of a more sweeping drug testing program for all federal, state, and local government employees and employees of federal contractors.⁴

* Professor of Law, Nova Law Center; LL.M., Yale Law School, 1971; J.D., University of Miami, 1970; B.A., University of Pennsylvania.

1. President’s Radio Address to the Nation on Federal Drug Policy, II PUB. PAPERS 1252, 1253 (Oct. 2, 1982).

2. Freedberg, *Clean Urine Clouds Drug Testing*, Miami Herald, Oct. 29, 1986, at 1A. See also Kaufman, *The Battle Over Drug Testing*, N.Y. Times, Oct. 19, 1986, § 6 (Magazine), at 52.

3. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

4. PRESIDENT’S COMMISSION ON ORGANIZED CRIME, AMERICA’S HABIT: DRUG

The widespread and rapidly growing acceptance of drug testing programs reflects a two-fold consensus: that drug abuse in the workplace is a major source of inefficiency and dangerous conditions, and that drug testing is a reasonable, effective solution to these problems. This article challenges both propositions. It will show first that the dimensions of illegal drug abuse in the workplace are small in comparison to those of alcohol abuse, so that universal drug testing is radically disproportionate to the scope of the problem. Second, it will show that drug testing has little functional value in screening out impaired workers or job applicants, i.e., those who fail to meet objective standards of productivity and safety. Nor is it intended to do so. Rather, drug testing is an exercise in symbolism, an expression of the hostile attitude of the War on Drugs. Drug testing may succeed in punishing illegal drug use through fear of dismissal or other job sanctions. But, drug testing as an indicator of impairment is so tenuous that it must be understood as an ideological initiative intended to stigmatize non-conformity and coerce conformity with the law. Whether or not that type of deterrence is a legitimate policy is, of course, subject to debate. The point here is simply that drug testing should be seen for what it is rather than what public rhetoric portrays it to be. Drug testing has little to do with performance. It is driven instead by the categorical imperative that drugs are bad and we are going after them.

II. Sweeping Away the Intellectual Underbrush

To sharpen this point, it is useful to begin by sweeping away the intellectual underbrush of the drug testing controversy. Prevailing criticisms of drug testing mostly miss the mark, failing to confront the legitimacy of drug testing *per se*. Typical objections focus on technical issues such as the potential for innocent, unknowing ingestion of a controlled substance (ambient marijuana smoke, for example); the problem of false positives, such as the claim that EMIT [Enzyme Multiplied Immunoassay Test], the most commonly used method of urinalysis, gives a false positive in at least 5% of the samples;⁵ or the potential for mishandling or tampering with a urine sample.⁶ But these objections can be put to rest by better technology, reliance on confirming tests of preliminary positive results, and adherence to strict chain-of

ABUSE, DRUG TRAFFICKING AND ORGANIZED CRIME 10 (1986).

5. Tampering with samples is a two-way street; black market samples of clean urine are sold to those who want to beat the system. See Freedberg, *supra* note 2.

custody standards for maintaining the integrity of physical evidence that now apply in criminal cases.⁶ Other critics fret about resources wasted in testing,⁷ as sophisticated test procedures can cost up to \$100 per sample. Better technology will also undermine this objection. Some commentators base their objections on legal grounds. They argue that fourth amendment privacy rights of public employees are violated by mandatory urinalysis tests.⁸ But the constitutional prohibition against unreasonable searches and seizures does not apply where authorities have probable cause, and investigative intrusions short of a full-scale search are legitimated by "reasonable suspicion" of wrong doing.⁹ Thus, the constitutional objection has bite only against random or universal testing without cause but concedes the legitimacy of testing under "proper" circumstances. The ACLU, for example, takes this position;¹⁰ and most lower courts have agreed that some factual predicate is required to justify administering the test to an individual.¹¹

6. See Rep. Patricia Schroeder, Chairperson, Subcomm. on Civil Service, Comm. on Post Office & Civil Service, Staff Report, at 17 (June 20, 1986).

7. *Id.*

8. There is a constitutionally protected liberty or property interest in public employment under the due process clause, *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

9. See *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny, e.g., *United States v. Place*, 462 U.S. 696 (1983).

10. See Siegel, *Toward the New Federal Right to Privacy*, 11 NOVA L. REV. 703 (1987).

11. All the cases decided thus far have agreed that drug testing implicates the right of privacy, although at least one appellate judge has questioned whether a person can maintain an expectation of privacy in bodily waste products. *National Treasury Employees Union v. Von Raab*, 808 F.2d 1057 (5th Cir. 1987) (Judge Higginbotham concurring in denial of Government's application for stay). On February 3, the court heard oral argument in the Government's appeal of the district court's order enjoining the Custom Service's plan to test those who apply for positions directly involved in drug interdiction, who carry firearms, or who have access to classified information.

Most of the cases agree that urinalysis of a public employee constitutes a warrantless search of the person and that the fourth amendment requires "reasonable suspicion" or "particularized suspicion." Applying this standard, courts upheld the drug tests in *Allen v. Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985); *Everett v. Napper*, 632 F. Supp. 1481 (N.D. Ga. 1986). Applying the same standard, drug tests were struck down as unconstitutional in *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); and *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 119 A.D.2d 35, 508 N.Y.S.2d 888 (1986). The major exception is *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), upholding drug testing of jockeys without

Yet another set of concerns focuses on procedural matters, such as whether a monitor will watch a worker urinate into a bottle or whether there will be an opportunity for a hearing to challenge the accuracy of test results. In short, the main currents of debate swirling around the drug testing issue deal only with the time, place and manner of administering the tests. These "challenges" to drug testing have little power because they implicitly concede the fundamental question whether drug testing can claim any legitimacy at all. For the truth of the matter is that the instrumental and practical — as distinguished from ideological and symbolic — basis for drug testing is very feeble and cannot survive critical scrutiny intact.

The main justification for drug testing of employees or applicants is efficiency: to promote the productivity of workers and their safety in the workplace. A worker who tests positive for drugs is assumed to be impaired and therefore to produce less (quantitatively or qualitatively) and to make errors that endanger himself, co-workers or the public. The President's Executive Order states a typical rationale: "Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism. . . ." Drug use "impairs the efficiency of Federal departments and agencies. . . [and] can pose a serious health and safety threat to members of the public and to other Federal employees."¹²

These claims are at best unproven. Certainly the President's Order did not respond to any comprehensive empirical study of the federal workforce regarding safety, unreliability, absenteeism, and the like. Indeed, after the Presidential Order was issued, press accounts of interviews with officials in various government departments described drug use as minimal. Many said alcohol was a far greater menace to alertness and productivity. Furthermore, the President rejected the recommendation of the Labor Department that a study be made to determine the extent of illegal drug use among federal workers. Of course, ideological presupposition requires no proof; faith does not depend on facts. And the operative belief was expressed by President Reagan in his 1982 declaration of war: "Drugs are bad and we're going after

cause under the "administrative search exception" to the fourth amendment. Language in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), points in a similar direction, allowing testing of prison guards by "systematic random selection," but the case is narrower on its facts because plaintiff was arguably under suspicion. See generally, Stille, *Some Judges Say 'No' to Drug Tests*, Nat'l L. J., Oct. 6, 1986, at 1.

12. *Supra* note 3.

them.”¹³

But what about the “drug crisis”? Isn’t that a valid and concrete predicate for drug testing in the workplace? Everyone “knows”, after all, that drug abuse costs employers billions of dollars in lost productivity, insurance claims and the like. In 1983, for example, *Newsweek* magazine ran a cover story on the issue.¹⁴ It presented the results of a 1977 Study by the Research Triangle Institute showing the cost of drug abuse to the economy at \$25.8 billion (in 1983 dollars). In 1986, *Time* followed with its own cover story on the subject. This time the Research Triangle Institute study of the cost of drug abuse in 1983 was estimated as \$60 billion.¹⁵ *Time* also asserted that “[f]ederal experts estimate that between 10% and 23% of all United States workers use dangerous drugs on the job.”¹⁶ Closer to home, the City of Miami rejected 25 of 272 job applicants (9%), most of whom tested positive for marijuana or cocaine or both.¹⁷

Carlton Turner, President Reagan’s adviser on drug abuse, asserts that employees who use drugs perform at only 67% of their normal ability. Where does one begin to analyze a statement like that? Which drug? What job? What measurement of performance? Other drug warriors, such as former DEA Director Peter Bensinger, blame drug abuse for poor industrial performance in the late 1970’s but nonfarm productivity rose at an annual rate of 4.3% when *Newsweek* published its story — during the greatest cocaine boom in history. Cause and effect are quite elusive.

Mandatory drug testing programs have a lot more to do with defending anti-drug cultural norms by espousing homilies than with serious analysis of employee productivity. This is not to deny the obvious anecdotal evidence of employee failure, theft or accidents apparently caused by drug abuse. This is not the issue. The question is whether there is a substantial fit or match between the perceived problem and the proposed solution. The argument here quite simply is that for most employees in most jobs drug testing does not substantially promote the goals of efficiency and safety.

13. *Supra* note 1, at 1253.

14. *Drugs are Rife in the Workplace and the Human and Economic Costs are Enormous*, NEWSWEEK, Aug. 22, 1983, at 52.

15. TIME, Mar. 17, 1986, at 52-3.

16. *Id.*

17. Livingston, *Dade Formulating New Employee Drug-Testing Policy*, Miami Herald, Jan. 8, 1987, at 1D.

There are three principal points. First, the President's drug testing program, like many in the private sector, applies only to illegal drugs. A drug program that disregards alcohol, the major source of worker impairment, cannot be taken seriously as a program focused upon performance. Second, illegal drug traces in the urine of a worker or applicant show only past use of that drug and very little, if anything, about the present physical and mental condition of the person tested. Third, even if drug testing could be technologically refined to pinpoint the recency of use, i.e., to show that the person tested was then under the pharmacological influence of the drug, that would not itself prove his intoxication or impairment.

III. The Exclusion of Alcohol From Testing

The first point requires little elaboration. The exclusion of alcohol from the scope of any drug testing program strips it of rationality. Even the most hysterical purveyors of a "drug crisis" concede that the scale of alcohol abuse far exceeds that of drug abuse (although the purity of the two categories is muddled by the phenomenon of polydrug abuse and cross addiction). For example, *Time*, which ran four cover stories on drugs in the 1981-86 period, concedes that the cost of alcohol abuse runs double that of drug abuse. Its data came from the Research Triangle Institute, which also provided the information for a report by *The Conference Board* on controlling substance abuse in the corporate sector.¹⁸

The data show that of \$16.9 billion in treatment and support costs, \$14.9 billion goes for alcohol abuse, only \$2 billion for drug abuse. The loss in production due to premature mortality is computed at \$20.6 billion, with \$18.2 billion attributed to alcohol, \$2.4 billion to drugs. Of \$98.9 billion in reduced productivity, roughly $\frac{2}{3}$ results from alcohol abuse, $\frac{1}{3}$ from drug abuse. Of \$5.7 billion in lost employment, \$5.3 billion arises from alcohol abuse. Of \$52 billion in social welfare costs, only \$3 billion comes from drug abuse and \$49 billion comes from alcohol abuse. Only in the area of criminality does alcohol impose less social cost; and that for the stunningly obvious reason that alcohol is legal while the predominant black market drugs (marijuana, cocaine, and heroin) are steeped in lawlessness and generate secondary crimes to facilitate illicit transactions and to pay the exorbitant crime tariffs of

the black market.^{18a}

Given these facts of contemporary life, it would take transcendental creativity to conclude that programs of testing for illegal drug use that exclude alcohol are really directed toward policing the productivity

18. THE CONFERENCE BOARD, CORPORATE STRATEGIES FOR CONTROLLING SUBSTANCE ABUSE 13 (Axel ed. 1986).

An Update on Costs

ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE, 1983

Millions of Dollars

| | Total | Alcohol Abuse | Drug Abuse |
|---|------------------|------------------|-----------------|
| CORE COSTS¹ | | | |
| <u>Direct:</u> | | | |
| Treatment and Support | \$16,914 | \$14,865 | \$2,049 |
| <u>Indirect:</u> | | | |
| Mortality ² | 20,637 | 18,151 | 2,486 |
| Reduced Productivity | 98,928 | 65,582 | 33,346 |
| Lost Employment | 5,728 | 5,323 | 405 |
| OTHER RELATED COSTS | | | |
| <u>Direct:</u> | | | |
| Motor Vehicle Crashes | 2,667 | 2,667 | ^a |
| Crime | 9,172 | 2,607 | 6,565 |
| Social Welfare Programs | 52 | 49 | 3 |
| Other | 4,350 | 3,673 | 677 |
| <u>Indirect:</u> | | | |
| Victims of Crime | 1,137 | 192 | 945 |
| Crime Careers | 10,846 | 0 | 10,846 |
| Incarceration | 5,404 | 2,979 | 2,425 |
| Motor Vehicle Crashes (time loss) | 583 | 583 | ^a |
| TOTAL³ | \$176,421 | \$116,674 | \$59,747 |

¹"Core" costs are costs that occur in the health sector. "Direct" costs are those in which resources are consumed and formal payment in cash or in kind is made. "Indirect" costs involve no formal payment for resources used and may be incurred over a period of time.

²Production lost due to premature death calculated at 6 percent discount rate.

³Totals may not add due to rounding. Data for alcohol and drug abuse are not strictly comparable. Most significant differences occur in the completeness of data relating substance abuse and reduced productivity. Figures are more complete for alcohol abuse.

^aInsufficient data to provide reliable estimate.

Source: Harwood, 1984, at G-16.

18a. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

and safety of workers. Even if a positive urinalysis is assumed to be a meaningful index of worker impairment, the exclusion of alcohol makes it radically and irrationally under-inclusive. As a constitutional matter, of course, under-inclusiveness does not invalidate a legislative classification. The one-step-at-a-time rationale permits the legislature to address itself "to the phase of the problem which seems most acute to the legislative mind."¹⁹ But this deferential legal rule mocks rationality. Indeed, the point of the rule is to defer to the irrational or unprincipled nature of the political process.

The likelihood that far more workers come to the office or plant hung over on alcohol (or return tipsy from lunch) than high on marijuana or stimulated by cocaine, is simply irrelevant to the political counterattack on illegal drug use. A bona fide testing program — one truly focused on preventing or minimizing worker impairment — could not exclude alcohol, the single greatest source of impairment, on the ground that it is a legal drug. Legality is an artifact of culture, while impairment belongs to the domains of science and medicine. For this reason, a few government agencies, such as the Tennessee Valley Authority in "the nuclear work environment," do test for alcohol.²⁰ Most agencies do not test for alcohol abuse, however. This merely confirms that testing for illegal drugs is generally intended to promote cultural values other than efficiency or safety.²¹

IV. The Past/Present Dichotomy In Drug Testing

Even if one assumes that the tests are accurate,²² traces of cocaine or marijuana in the urine provide only historical evidence that the test subject has ingested those drugs. But there is no basis to infer from a positive test result that the subject is under the *influence* of the drug at the time of testing. In the language of economists, urinalysis is a "lagging indicator." Unlike a breathalyzer test for alcohol, a positive urine test does not prove a contemporary altered physical or psychic condition.²³ If a person snorts a few lines of cocaine, for example, the drug

19. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

20. Schroeder Comm. Report, *supra* note 6, at 30.

21. *See infra* note 36.

22. *See* Dubowski, *Drug-Use Testing: Scientific Perspectives* 11 NOVA L. REV. 415 (1987); *See generally*, Stille, *Drug Testing: The Scene is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat'l L.J., Apr. 7, 1986, at 22-23.

23. Schroeder Comm. Report, *supra* note 6, at 11.

has a short half-life and is rapidly metabolized in the body.²⁴ Most of the subjective experience of say 50 milligrams of the drug will dissipate within 20 to 30 minutes. In short, the subject will rapidly return to physical and psychological equilibrium. He will not in other words be "under the influence" of the drug. Yet 2-3 days later, urinalysis may well reveal traces of the cocaine. An employee would then face disciplinary action for prior conduct despite the fact that he would be fully functional on the job.

The discrepancy between then and now approaches the extreme with marijuana. Depending upon the amount (and potency) of the intake, the effect of the drug will wear off within a few hours or more. Certainly, the intoxication of a joint smoked on Saturday night ordinarily dissipates by Sunday or Monday. But urinalysis will catch traces of THC in the urine for up to 30 days after ingestion.²⁵ Again, there is hardly any congruence between a positive drug test for THC and the (altered) condition of the subject at the time of testing.

This argument, however, is vulnerable to advancing technology. Technically, it may become possible to refine the tests (or administer them more frequently) to establish the amount taken and the recency of ingestion. In other words, it may become possible to establish that a drug was taken so close to the time of the test that the subject is likely to be under its influence when tested. If that technology should evolve, drug testing could claim better justification: the ability to pinpoint those who are under the influence while on the job would arguably identify impaired workers.

Here we get closer to the goal. Yet this argument uncritically and inaccurately equates the mere fact of chemical influence or drug action in the body with impaired performance. In fact, drug consumption will often have no measurable impact on job performance, and some drugs may actually improve performance. Everything turns on the nature of the task, the drug, the dose, and the subjective or experiential response of the individual. Therefore, drug testing becomes a very poor means of promoting high performance. Even common sense suggests that direct measures of worker efficiency are better than oblique, ambiguous and irrationally selective evaluations of an employee's pharmacological condition. Why make speculative inferences when direct measures are available? The answer, once again, is ideological.

24. Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1410.

25. Schroeder Comm. Report, *supra* note 6, at 12.

The drive to install universal drug testing programs rests on the operative Presidential assumption of the war on drugs that drugs are "bad." It is therefore believed that a person "on drugs" is, at the very least, disabled from normal functioning and, at the worst, a menace to himself or to those around him. This is not generally true, and certainly not any more true of marijuana or cocaine than it is for alcohol. Here is where cultural truth clashes with science, where fact (or at least reasoned inquiry) falls beneath the crushing weight of what J.S. Mill called the tyranny of majority opinion.

Contrary to the conventional wisdom, there are two inescapable truths about the connection between drug intake and human behavior, including job performance. First, the most common "recreational drugs" — alcohol, marijuana and cocaine — do not cause or determine any particular course of human behavior or misbehavior. People under the influence can behave as "normal" people do, from the sublime to the psychotic. Second, to the extent that certain physical or mental abilities are affected by the use or abuse of drugs, alcohol is by far the greatest danger to accuracy, control, good judgment and other qualities that constitute safety and productivity of workers. Let's take these one at a time.

First, a lot of what we commonly regard as inappropriate mixing of drugs and work represents no more than convention (and its flip side, taboo) rather than empirically based judgments. In fact, prodigious feats of human performance have been accomplished by people under the influence of alcohol, opium, cocaine and other drugs. One of the greatest hypocrisies of the war on drugs is the dishonest, undimensionally negative portrayal of illicit drugs as *always* bad for health or performance. This is as false as the equivalent condemnation of a glass of wine or a prescribed valium tablet. The only meaningful distinction is between use and abuse, moderation and excess, responsibility and irresponsibility. If businessmen can take wine or vodka with lunch or dinner and consummate multi-million dollar transactions, it is no less true of other drugs. Only the legal stigma differentiates the two.

This is a very unpopular thing to say — heresy always is — but it is nonetheless true. There is abundant empirical evidence accumulated over several centuries that the frequent consumption of large quantities of drugs of many kinds is perfectly consistent with a raging work ethic. The Chinese Coolies smoked opium and built the U.S. railroads quite efficiently in the 19th century. In fact, they worked so hard and so productively that they earned the enmity of white coworkers who then barred them (literally) from the country with the Chinese Exclusion

laws.²⁶ A generous daily ration of whiskey was standard issue for sailors, soldiers, miners and plantation workers at many times in the past. Today athletes take steroids to improve their physical development and amphetamines to enhance their competitive edge. Long distance truckers also favor amphetamines to maintain alertness during long hours on the road. (Cocaine has a similar effect but suffers the disadvantage of having a short span of action.) Throughout his outstanding dancing career, Mikhail Baryshnikov smoked cigarettes and drank freely. So did Mickey Mantle. Babe Ruth was known as a glutton and heavy drinker. Gelsey Kirkland, a principal dancer for the New York City Ballet Company, danced under the influence of cocaine for a period of years. Perhaps it would be better to hide the "warts" of these culture heroes from impressionistic youngsters. But there is no basis for the universal assumption that drug use necessarily impairs professional performance. Certainly, it has that potential; and often that potential is realized. But proponents of drug testing have not weighed the evidence to come up with a reasoned assessment of the relationship of particular drugs to particular jobs.

At the same time, it is indisputable that drug intake, legal or not, sometimes results in absenteeism, diminished productivity, industrial accidents and the like. On this score, the damaging evidence weighs most heavily against alcohol, because of its high toxicity and impairment of motor skills. Cocaine is rather more dualistic in character.

A review of the psychopharmacology of cocaine is beyond the scope of this article. While it clearly has a dark side, the reputation of cocaine as an addictive and dangerous drug far exceeds the evidence. Media hype and government propaganda bear the primary responsibility for irrational fears about the drug. The sensationalistic reports of notorious tragedies such as those with John Belushi, Richard Pryor, David Kennedy, and Len Bias have tended to portray these aberrations as the norm. In fact, just about 600 official cocaine overdose deaths occurred in 1985, as compared to one third of a million from cigarette-caused diseases or one quarter million from long-term alcoholism or acute intoxication leading to traumatic death.²⁷ Of course, addiction to cocaine is a justifiable concern in light of its rapid growth, but the question here is not prevention of addiction but the pharmacological effect of the drug on human performance in the workplace by the ma-

26. Act of May 6, 1882, ch. 126, 22 Stat. 58, amended by Act of July 5, 1884, ch. 220, 23 Stat. 115.

27. Wisotsky, *supra* note 24, at 1406-08.

jority of persons who are not addicted.²⁸ That side of the coin has been suppressed because it subverts orthodoxy. The truth is that cocaine, like amphetamines, can facilitate many kinds of work.

Let us take a hypothetical scenario in which a 9-to-5 worker tests positive for cocaine at 11:30 a.m. Suppose further that sophisticated tests of the future are able to pinpoint the time of ingestion to 8:30 that morning. Given the short half-life of cocaine, we can infer that the worker was to some degree stimulated by cocaine while in the office. The common place assumption would be to view the worker as impaired. But the taint of illegal drugs such as cocaine is rather more metaphysical than pharmacological. Moderate levels of central nervous system stimulation generally promote efficient performance. The twice-daily coffee break reflects that reality. Overstimulation, of course, is counter-productive, and cocaine may well be a difficult drug to use in moderation, but that is quite a different argument from the *per se* equation of cocaine ingestion and impaired performance.

Among the most important data neglected by the negative political consensus on cocaine are Freud's own studies suggesting that as a stimulant of the central nervous system (CNS), cocaine in moderate doses can improve physical and mental performance. For example, Freud's self-experiments with cocaine showed some improvement in eye, ear, and hand coordination in his tests with a neuroamoebimeter, a device that emits a tone and measures the time it takes for a subject to react to stop the tone. After taking a tenth of a gram of cocaine, Freud's reaction times were usually shorter and more uniform than before taking the drug.²⁹

In addition to improved reaction times, Freud found that taking cocaine generally caused his physical strength, as measured with a hand dynamometer, to increase. Freud's findings apparently have been

28. In a 1984 paper for NIDA (*Research Monograph 50*), Dr. Ronald Siegel concluded that the "hypothesis that long term use of cocaine is inevitably associated with an escalating dependency marked by more frequent patterns of use is not supported by these findings." Instead, he found that "social recreational users maintained relatively stable patterns of use" in the face of ready supplies and increased income as they aged. This undermines the view that cocaine is inherently addictive. Indeed, the probability is that cocaine addiction occurs in 10-20% of the population at risk, resembling the rate of alcoholism. Consider that in excess of 21 million people have tried cocaine at least once, according to the NIDA 1985 National Household Survey. See Wisotsky, *supra* note 24, at 1411.

29. S. Freud, *Contribution to the Knowledge of the Effect of Cocaine*, COCAINE PAPERS 98, 103 (R. Byck ed. 1974).

rediscovered by contemporary athletes. According to media reports, many professional athletes, especially football and baseball players, have used cocaine during the playing season, and sometimes amphetamines during the games themselves. Some of these players turned in brilliant performances, suggesting that the consumption of cocaine, like amphetamines, may be beneficial for speed and strength, at least in the short run. In a sports "scandal," the Commissioner of the National Football League suspended four players for four games of the 1983 season "because of their involvement with cocaine."³⁰ One of the four, defensive end Ross Browner, had set a Super Bowl record of 10 unassisted tackles. Another, running back Pete Johnson, was the all-time leading rusher for the Cincinnati Bengals. A third, a rookie, finished third in team tackles. It seems doubtful that cocaine hurt their playing.

Unlike the paucity of controlled studies of cocaine, marijuana has been prominent in American culture long enough to produce a vast body of literature on its behavioral effects. Nevertheless, as a result of uncontrollable variables of dose, tolerance, set and setting,³¹ it too is awash in ambiguity. Let's take as an example the operation of machinery. The intuitive assumption would regard marijuana as similar to alcohol in dulling cognitive acuity and degrading motor coordination so that driving a car would be irresponsible. The staff of *Car and Driver Magazine* put that hypothesis to the test, with results that powerfully undermine what everyone "knows." Initially, testers drove against the clock on a challenging slalom course to establish a base time. The testers then smoked marijuana and repeated the experiment with successive runs as they progressively got more stoned. Their accuracy and times held close to the same as their base levels.³² Two drivers actually improved. By contrast, the magazine's similar test of the effects of drinking on driving performance confirmed the commonplace dangers, demonstrating gross deterioration of motor skills.³³ Once again, *bona fide* concern for industrial safety and productivity could not possibly

30. *NFL Benches Four Players for Drug Use*, Miami Herald, July 26, 1983, at 1C.

31. See N. ZINBERG, *DRUG SET AND SETTING: THE BASIS FOR CONTROLLED INTOXICANT USE* (1984).

32. Knepper, *Puff, the Dangerous Drug*, *CAR AND DRIVER*, June, 1980, at 43. Compare a study performed at Stanford University Medical School. In that study, pilots voluntarily smoked marijuana and then tested their flying skills on a flight simulator. The results of the test were negative. Apparently, driving entails a low level exercise of motor coordination.

33. Thompson, *High Driving*, *CAR AND DRIVER*, Mar., 1978, at 30.

exclude alcohol from the scope of testing where hand-eye coordination is important.

This, of course, raises as many questions as it answers. The alcohol/marijuana comparison may cut the other way for different jobs. Marijuana use may impair the performance of more complex tasks like flying an airplane. Some jobs place a premium on brute strength, agility (sports, dance), on alertness (air traffic control), on repetitive physical motion (assembly line), on complex judgment and evaluation (securities trader) and so on. Job performance is thus not a unitary phenomenon. This is precisely the reason why urinalysis is such a crude and barely relevant measure of ability, even if the test could verify that the employee was then "under the influence."

When all is said and done, the question remains: Isn't drug testing a reasonable response to the fear of worker impairment resulting from drug abuse in the workplace? The answer is no. If society is really interested in safety and efficiency, it should devise standards of safety and efficiency. The way to measure performance is to measure performance. Rather than testing the typist's urine for drug traces, why not test the typing? If a "pop quiz" produces acceptable speed and accuracy scores, what then is the relevance of cocaine in the urine? Conversely, if the typing is not acceptable, of what importance is the absence of drugs in the urine?

Other procedures would have to be devised. Perhaps pilots could be tested at computer consoles that simulate flight. Assembly line workers could be tested in time and motion studies. Sales personnel could be tested by volume of sales. Other jobs, especially those where qualitative judgments must be made, may be more difficult to assess. But that is the duty of supervisory personnel.

A lot of what is now blamed on drugs is simply poor supervision. In June, 1985, a Miami Metrorail train crashed; twelve people were injured and several million dollars in property damage resulted. The driver had received eight reprimands and four suspensions for violating county rules as a bus driver. The driver was compelled to undergo urinalysis 16 hours after the accident. The test was positive for cocaine, marijuana and Valium, but it was unclear whether he was intoxicated at the time of the accident. He was fired for negligent operation of the train, in violation of procedures.³⁴ In short, the drug issue only raised a cloud of suspicion and did not resolve the question of impairment.

34. Fisher & Soto, *Driver in Metrorail Crash has a Spotty Job Record*, Miami Herald, June 28, 1985, at 1A.

Given the driver's long history of violations, he should probably have been dismissed *before* the accident. Since the accident was based on negligence, why even bother with urinalysis? The negligence speaks for itself. Could previous drug testing have weeded out that driver? Of course, but it's a strained and irresponsible system that would fire him for traces in the urine but not for repeated rules violations. A drug test is no substitute for good judgment.

Ultimately the challenge to an employer is to develop and enforce standards of evaluation tied in a meaningful way to the actual purpose of the job in question, as opposed to reliance on a relatively mindless, insensitive drug test. Are there nevertheless some jobs that are so critical, so delicate, so risk-laden that the cloud of suspicion raised by a drug test might justifiably be used for preventive or disciplinary purposes? Perhaps for soldiers, neuro-surgeons, or nuclear weapons personnel a prophylactic case can be made. In some areas of life, it is necessary to adhere to a spartan standard, to devote oneself completely to a task, and to give up the ordinary distinctions between one's personal and professional life. But merely to enumerate these special cases shows how far removed they are from relevance to the mass of employees in either the public or private sector. The irony is that the routine, bureaucratic work performed by the majority of Civil Service workers and other clerical personnel presents the *least* justification for drug testing.

V. Conclusion

In the end, universal drug testing of the work force in routine, nonsensitive jobs cannot plausibly be justified on morally neutral economic and safety grounds. At its core, drug testing is not about safety or productivity in the workplace. Rather, it is a transparent injection of governmental power into the private lives of workers. It is clearly intended to coerce and intimidate them into obeying the drug laws and to punish them for failing to do so. If administered frequently enough, drug testing may have a significant deterrent effect on illegal drug use. From the government's point of view, it is a neat solution, given the impotency of the criminal law to control the drug trade. Cocaine imports have tripled since 1980 and marijuana has become a principal cash crop in the United States. Sanctions for drug use, including dismissal, can be imposed even though the government would not be able to prove a criminal violation beyond a reasonable doubt. The sanction, moreover, has real bite. For most people, loss of employment is far

more severe than the probationary sentences typically meted out to first time drug users (not sellers) upon conviction. The drug testing program thus fulfills the frustrated societal need to strike back at the alien "them" that has so notoriously defied law and convention in taking illegal drugs.

The idea that dismissal from employment is a legitimate law enforcement tool has incredibly far-reaching implications. If drug testing does not measure job performance but nevertheless constitutes legal cause for loss of a constitutionally protected entitlement, then the logic of dismissal might apply with equal force to all other entitlements — Social Security benefits, VA benefits, retirement pensions, food stamps, *ad infinitum* to all species of the "new property".³⁵ Such radical measures may or may not be foreseen by drug testing proponents. But such is its inner logic. And the law, as Justice Oliver Wendell Holmes reminds us, has a tendency to expand a principle to the limits of its logic.

I have written elsewhere³⁶ about the complex of social attitudes that animates the War on Drugs. They are non-empirical, ideological, intolerant and increasingly vindictive.³⁷ Drug testing is merely one expression of that larger social reality. The zeal to condemn and isolate the bad — those who take illegal drugs — should not be mistaken for a rational response to a clearly defined social goal of promoting productivity and safety in the workplace. That would require a reasoned assessment of the subtle interrelationship of a particular job task, a particular drug, and the time and occasion of its use. Most of all, it would focus directly on the work actually being done by workers, rather than indulging speculative inferences about what might happen as a result of drug use in the past.

35. Reich, *The New Property*, 94 Yale L.J. 1617 (1985).

36. S. WISOTSKY, *BREAKING THE IMPASSE IN THE WAR ON DRUGS* (1986) argues that drug laws have only a slight mooring in evidence of physical or psychological harm; that culture and tradition play the dominant role in the legal regulation of drugs; and that the war on drugs can be interpreted as a struggle for cultural hegemony between the drug-naïve generation over age 50 and a younger, more sophisticated generation.

37. See Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights* 38 HASTINGS L.J. (in press).