Drug Testing and the Right to Privacy: Arguing the Ethics of Workplace Drug Testing

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ABSTRACT. As drug testing has become increasingly used to maximize corporate profits by minimizing the economic impact of employee substance abuse, numerous arguments have been advanced which draw the ethical justification for such testing into question, including the position that testing amounts to a violation of employee privacy by attempting to regulate an employee's behavior in her own home, outside the employer's legitimate sphere of control. This article first proposes that an employee's right to privacy is violated when personal information is collected or used by the employer in a way which is irrelevant to the terms of employment. This article then argues that drug testing is relevant and therefore ethically justified within the terms of the employment agreement, and therefore does not amount to a violation of an employee's right to privacy. Arguments to the contrary, including the aforementioned appeal to the employer's limited sphere of control, do not account for reasonable constraints on employee privacy which are intrinsic to the demands of the workplace and implicit in the terms of the employment contract.

Drug testing is becoming an increasingly accepted method for controlling the effects of substance abuse in the workplace. Since drug abuse has been correlated with a decline in corporate profitability and an increase in the occurrence of work-related accidents, employers are justifying drug testing on both legal and ethical grounds. Recent estimates indicate that the costs to employers of employee drug abuse can run as high as $60 billion per year.[1] Motorola, before implementing its drug testing program in 1991, determined that the cost of drug abuse to the company – in lost time, impaired productivity, and health-care and workers compensation claims – amounted to $190 million in 1988, or approximately 40% of the company's net profit for that year.[2] As these effects on the workplace are viewed in light of a much larger social problem – one which impacts health care and the criminal justice system, and incites drug-related acts of violence – advocates of drug testing argue that the workplace is an effective arena for engaging these broader concerns. The drug-free workplace is viewed as causally antecedent and even sufficient to the development of drug-free communities.

The possibility of using workplace drug interventions to effect social change may obscure the more fundamental question of whether or not drug testing is an ethical means of determining employee drug abuse. While admitting that drug testing could mitigate potential harms, some CEOs have elected not to follow the trend set by Motorola and an estimated 67% of large companies,[3] and instead argue that drug testing surpasses the employer's legitimate sphere of control by dictating the behavior of employees on their own time and in the privacy of their own homes.[4] Recent arguments in favor of a more psychologically-sensitive definition of employee privacy place employer intrusions into this intimate sphere of self-disclosure on even less certain ethical grounds.[5] The ethical status of workplace drug testing can be expressed as a question of competing interests, between the

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employer's right to use testing to reduce drug-related harms and maximize profits, over against the employee's right to privacy, particularly with regard to drug use which occurs outside the workplace.

In this paper I will attempt to bring clarity to this debate and set the practice of workplace drug testing on more certain ethical grounds by advancing an argument which justifies workplace drug testing. I will begin by showing that an employee's right to privacy is violated when personal information is collected or used by the employer in away which is irrelevant to the contractual relationship which exists between employer and employee. I will then demonstrate that drug testing is justified within the terms of the employment contract, and therefore does not amount to a violation of an employee's right to privacy. After responding to a battery of arguments to the contrary, I will propose that while drug testing can be ethically justified under the terms of an employment contract, it still amounts to treating employees as a means to an economic end, and is therefore fundamentally inconsistent with a substantive valuation of human worth and dignity.

Privacy and performance of contract

Legal definitions of privacy inevitably rely on the 1890 *Harvard Law Review* article "The Right to Privacy" by Samuel Warren and Louis Brandeis. This article offered an understanding of privacy for which a constitutional basis was not recognized until the 1965 case *Griswold v. Connecticut* (381 U.S. 479). In both instances, privacy was understood as an individual's right "to be let alone," with the Griswold decision according citizens a "zone of privacy" around their persons which cannot be violated by governmental intrusion. This definition, utilized by the Court in numerous decisions since the 1965 ruling, will not be adequate for describing the employee's claim to privacy in an essentially social and cooperative setting like the workplace. In such a condition an absolute right "to be let alone" cannot be sustained, and it may well prove impossible for an employee to maintain a "zone of privacy" when the terms of employment entail certain physical demands. This is not to argue that a right to privacy does not exist in this setting; rather, we must conclude that the aforementioned conditions are not necessary components in such a right.[6]

A more useful definition begins with the idea of a person's right to control information about herself and the situations over which such a right may be legitimately extended. For example, information to the effect that an individual possesses a rare and debilitating disease is generally considered private, but a physician's coming to know that a patient has such a disease is not an invasion of privacy. One might also note that while eavesdropping on a conversation would normally constitute an invasion of privacy, coming to know the same information because the individual inadvertently let it slip in a casual conversation would not. These and other examples demonstrate that the right to privacy is not violated by the mere act of coming to know something private, but is instead contingent on the relationship between the knower and the person about whom the information is known.

George Brenkert formulates this understanding as follows: Privacy involves a relationship between a person A, some information X, and another individual Z. A's right of privacy is violated only when Z comes to possess information X and no relationship exists between A and Z that would justify Z's coming to know X.[7] Brenkert notes that what would justify Z coming to know X is a condition in which knowing X and having a certain access to A will enable Z to execute its role in the particular relationship with A. In such a case, Z is entitled to information X, and A's privacy is in no way violated by the fact that Z knows. Thus, a physician is justified in coming to know of a patient's disease (say, by running certain diagnostic tests), since knowing of the disease will enable her to give the patient medical treatment. One cannot be a physician to another unless one is entitled to certain information and access to that person. Conversely, one can yield one's right to privacy by disclosing information to another that the relationship would not normally mandate. To

maintain a right to privacy in a situation where another would normally be entitled to the information to enable them to fulfill the terms of the relationship is, quite simply, to violate the terms of the relationship and make fulfillment of such terms impossible. In the case of our earlier example, to refuse a physician access to the relevant points of one's health status is to make a physician-patient relationship impossible. Similarly, to refuse an employer access to information regarding one's capability of fulfilling the terms of an employment contract is to violate an employer-employee relationship.

The argument advanced at this point is that drug testing involves access to and information about an employee that are justified under the terms of the implicit contractual agreement between employer and employee. An employer is therefore entitled to test employees for drug use. This statement relies on at least two important assumptions. First, a contractual model of employer-employee relations is assumed over against a common law, agent-principal model. It is not the case that employees relinquish all privacy rights in return for employment, as the common law relationship may imply, but rather that the terms of the contract, if it is valid, set reasonable boundaries for employee privacy rights consistent with the terms and expectations of employment. The argument offered here is that drug testing does not violate those boundaries. I am also assuming that drug abuse has a measurable and significant impact on an employee's ability to honor the terms of the employment contract. Employers are entitled to know about employee drug abuse on the grounds that such knowledge is relevant to assessing an employee's capability to perform according to the terms of the agreement. Without arguing for the connection between drug abuse and employee performance at length, the reader's attention is directed to studies which, if not absolutely incontestable in their methodology, are nonetheless reasonably set forth.[8]

In support of this argument, I would first direct attention to other types of information about an employee that an employer is entitled to know, and in coming to know such information does not violate the employee's privacy. Employers are entitled to information about a current or prospective employee's work experience, education, and job skills – in short, information relevant for determining whether or not the employee is capable of fulfilling her part of the contract. More critically, the employer is not only entitled to such information, but is entitled to obtain such information through an investigatory process, both to confirm information the employee has voluntarily yielded about her qualifications, as well as to obtain such relevant information as may be lacking (i.e., inadvertently omitted or, perhaps, intentionally withheld).

Brenkert further adds that an employer is entitled to information which relates to elements of one's social and moral character:

> A person must be able not simply to perform a certain activity, or provide a service, but he must also be able to do it in an acceptable manner – i.e., in a manner which is approximately as efficient as others, in an honest manner, and in a manner compatible with others who seek to provide the services for which they were hired.[9]

Again, the employer is entitled to know, in the case of potential employees, if they are capable of fulfilling their part of the contract, and, in the case of existing employees, if they are adhering to the terms and expectations implicit in the contract. While this latter case can often be confirmed by direct observation of the employee's actions at the work site, on occasion the employer is entitled to information regarding behavior which can be observed at the workplace but originates from outside of it (such as arriving at work late, or consuming large quantities of alcohol prior to arriving). As all of these actions may be in violation of the term of employment, the employer is entitled to know of them, and in coming to know of them does not violate the employee's privacy.

My point in offering these examples is to suggest that drug testing is a method of coming to know about an employee's ability to fulfill the terms of contract which is analogous to those listed. An exploratory process, in seeking to verify an employee's ability to do a certain job in connection with reasonable expectations for

what that job entails, may also validly discover characteristics or tendencies that would keep the employee from performing to reasonable expectations. Drug testing is precisely this sort of process. As a part of the process of reviewing employee performance to determine whether or not they are fulfilling the terms and expectations of employment satisfactorily, drug testing may be validly included among other types of investigatory methods, including interviews with coworkers, skills and proficiency testing, and (in some professions) medical examinations. The fact that an employee may not want to submit to a drug test is entirely beside the point; the employee may just as likely prefer not to include a complete list of personal references, or prefer that the employer not review her relations with other employees. In all these cases, the employer is entitled to know the relevant information, and in coming to know these things does not violate the employee's privacy. The employee may withhold this information from the employer, but this action is tantamount to ending the employer-employee relationship. Such a relationship, under the terms of employment, includes not only each party's commitment to benefit the other in the specific way indicated, but also entitles each to determine if the other is capable of performance according to the terms of contract. In this way, each retains the free ability to terminate the relationship on the grounds of the other's nonperformance.

Of course, not just any purpose of obtaining information relevant to evaluating performance under the terms of contract can automatically be considered reasonable. For instance, an employer cannot spy on a prospective employee in her own home to determine if she will be a capable employee. I offer the following criteria as setting reasonable and ethical limits on obtaining relevant information (though note that the requirement of relevancy is in each case already assumed).

1. *The process whereby an employer comes to know something about an employee (existing or prospective) must not be unnecessarily harmful or intrusive*

The information may not result from investigatory processes which are themselves degrading or humiliating by virtue of their intrusiveness (e.g., strip searches, spying on an employee while they use the bathroom, interviewing a divorced spouse, or searching an employee's locker) or which may prove unhealthy (e.g., excessive use of x-rays, or torture). (Note: Degrading processes of securing information must be distinguished from processes of securing information which is itself degrading. The latter is not necessarily in violation of this or successive criteria.)

2. *The process whereby an employer comes to know something about an employee must be efficient and specific*

The information must result from an efficient and specific process – i.e., a process which is the most direct of competing methods (though without compromising point 1 above), and should result in information which corresponds to questions of performance under the terms of the employment contract, and should not result in information that does not so correspond. For example, detailed credit checks may help a bank decide whether a prospective employee is a capable manager of finances, but not directly (only inferentially), and it would also provide a great deal of information that the employer is not entitled to see. Consulting the employee's previous employer, on the other hand, may provide the relevant information directly and specifically.

3. *The process whereby an employer comes to know something about an employee must be accurate, or if not itself precise, then capable of confirmation through further investigation*

The information must result from a dependable source; if a source is not dependable and is

incapable of being verified for accuracy, the employer is not justified in pursuing this avenue of discovery. Thus, the polygraph must be excluded, since it is occasionally inaccurate and may in such cases result in information that cannot be verified. In addition, disreputable sources of information, or sources that may have an interest in misrepresenting the information being sought, should not be used.

Having outlined these, I offer my argument in full: Drug testing is not only a method of coming to know about an employee's ability to fulfill the terms of contract which is analogous to those listed earlier, but which also is reasonable under the criteria listed above.

1. *Drug testing is not harmful or intrusive*

In the Supreme Court case *Samuel K. Skinner v. Railway Labor Executives' Association* (489 U.S. 602), the Court determined that both blood and urine tests were minimally intrusive.[10] While the Court acknowledged that the act of passing urine was itself intensely personal (ibid., p. 617), obtaining a urine sample in a medical environment and without the use of direct observation amounted to no more than a minimal intrusion (ibid., p. 626). The Court justified not only testing of urine but also testing of blood by focusing on the procedure of testing (i.e., "experience . . . teaches that the quantity of blood extracted is minimal," ibid., p. 625) and pointing out that since such tests are "commonplace and routine in everyday life," the tests posed "virtually no risk, trauma, or pain" (ibid., p. 625). The Court's findings on this case are compelling, and are consistent with my contention that drug testing is not unnecessarily harmful or intrusive. While such testing does amount to an imposition upon an employee (i.e., by requiring her to report to a physician and provide a urine sample) in a way that may not be commonplace for many employees, the Court ruled that since this takes place within an employment context (where limitations of movement are assumed), this interference is justifiable and does not unnecessarily infringe on privacy interests (ibid., pp. 624–625).

2. *Drug testing is both efficient and specific*

In fact, drug testing is the most efficient means of discovering employee drug abuse. In addition to providing direct access to the information in question, the results of drug testing do not include information that is irrelevant. The test targets a specific set of illegal substances. It can be argued (and has been) that drug testing is not efficient because it does not test for impairment – only for drug use. But this point ignores the fact that the test is justified on a correlation between drug abuse and employee productivity more generally; impairment is itself difficult or impossible to measure, since the effects of a given quantity of substance vary from individual to individual and from one incidence of use to another. The fact that impairment is an elusive quantity cannot diminish the validity of testing for drug abuse. This criticism also ignores the fact that the test is an effective means of deterring impairment, providing habitual users a certain expectation that their drug use will be discovered if it is not controlled.

3. *Drug testing can be conducted in a way which guarantees a high degree of precision*

It is well known that the standard (and relatively inexpensive) EMIT test has a measurable chance of falsely indicating drug use, and is also susceptible to cross-reactivity with other legal substances. But confirmatory testing, such as that performed using gas chromatography/mass spectrometry, can provide results at a high level of accuracy. This confirmatory testing, as well as a host of other stringent safeguards, is required of all laboratories certified by the National Institute on Drug Abuse.[11]

In summary, my contention is that an employer is entitled to drug test on the grounds that the information derived is relevant to confirm the employee's capacity to perform according to the terms of employment, and that such testing is a reasonable means of coming to know such information. Other points in favor of drug testing, which are not essential to my preceding argument but congruent with it, include the following two items.

First, drug testing is an opportunity for employer beneficence. Testing permits the employer to diagnose poor employee performance and require such individuals to participate in employer-sponsored counseling and rehabilitative measures. Employers are permitted to recognize that drug abuse is a disease with a broad social impact that is not addressed if employees who perform poorly as a result of drug abuse are merely terminated.[12] Second, a specific diagnosis of drug abuse in the case of poor employee performance might protect the employer from wrongful termination litigation, in the event that an employee refuses to seek help regarding their abuse. The results of drug testing might confirm to the court that the termination was effected on substantive and not arbitrary grounds.

Drug testing and questions of justification

A number of arguments have been offered which suggest that drug testing is not justified under terms of contract, or is not a reasonable method by which an employer may come to know of employee drug abuse, and therefore amounts to a violation of employee privacy. These arguments include a rejection of productivity as a justification for testing, charges that testing is coercive, and that it amounts to an abuse of employee privacy by controlling behavior conducted outside the workplace. I will respond to each of these in turn.

First, some have charged that arguing from an employer's right to maximize productivity to a justification for drug testing is problematic. DesJardins and Duska point out that employers have a valid claim on some level of employee performance, such that a failure to perform to this level would give the employer a justification for firing or finding fault with the employee. But it is not clear that an employer has a valid claim on an optimal level of employee performance, and that is what drug testing is directed at achieving. As long as drug abuse does not reduce an employee's performance beyond a reasonable level, an employer cannot claim a right to the highest level of performance of which an employee is capable.[13]

DesJardins and Duska further point out the elusiveness of an optimal level of performance. Some employees perform below the norm in an unimpaired state, and other employees might conceivably perform above the norm in an impaired state. "If the relevant consideration is whether the employee is producing as expected (according to the normal demands of the position and contract) not whether he/she is producing as much as possible, then knowledge of drug use is irrelevant or unnecessary."[14] This is because the issue in question is not drug use *per se*, but employee productivity. Since drug use need not correlate to expectations for a given employee's productivity, testing for drug use is irrelevant. And since it is irrelevant to fulfillment of the employment contract, testing for drugs is unjustified and therefore stands in violation of an employee's privacy.

While I agree that it is problematic to state that an employer has a right to expect an optimal level of performance from an employee, I would argue that the employer does have a right to a workplace free from the deleterious effects of employee drug abuse.[15] Drug testing, properly understood, is not directed at effecting optimal performance, but rather performance which is free from the effects of drug abuse. Since the assessment which justifies drug testing is not based on the impact of drug abuse on a given employee's performance, but is correlated on the effects of drug abuse on workplace productivity more generally, drug testing does measure a relevant quantity.

It is also overly simplistic to state that employers need not test for drugs when they can terminate employees on the mere basis of a failure to perform. Employers are willing to tolerate temporary factors which may detract from employee performance; e.g., a death in the family, sickness, or occasional loss of sleep. But employers have a right to distinguish these self-correcting factors from factors which may be habitual, ongoing, and increasingly detrimental to productivity, such as drug abuse. Such insight might dramatically impact their course of action with regard to how they address the employee's failure to perform. It is therefore not the case, as DesJardins and Duska suggest, that "knowl-

edge of the cause of the failure to perform is irrelevant."[16]

A more critical series of arguments against basing drug testing on an employer's right to maximize productivity has been leveled by Nicholas Caste. First, Caste attacks what he identifies as "the productivity argument":

> The productivity argument essentially states that since the employer has purchased the employee's time, the employer has a proprietary right to ensure that the time purchased is used as efficiently as possible. . . . the employer must be concerned with "contract enforcement" and must attempt somehow to motivate the employee to attain maximal production capacity. In the case of drug testing, the abuse of drugs by employees is seen as diminishing their productive capacity and is thus subject to the control of the employer.[17]

From this argument, Caste states, one can infer that any manipulation is acceptable as long as it is maximizing productivity, and he defines manipulation as an attempt to produce a response without regard for that individual's good, as he or she perceives it.[18] Caste goes on to give two examples of hypothetical drugs which, assuming the productivity argument, an employer would be justified in requiring employees to take. The first drug increases employee productivity while also increasing pleasure and job satisfaction. The second drug increases productivity while inflicting painful side-effects on the employee. The fact that the productivity argument appears to sanction the use of both drugs, and in fact cannot morally distinguish between them, seems to argue for its invalidity. Since the productivity argument cannot distinguish between causing an employee pleasure or pain, by adopting its logic one would be forced to the morally unacceptable conclusion that an employee's best interests are irrelevant.

Caste points out that what is wrong with the second drug is not that it causes pain "but that it is manipulatively intrusive. It establishes areas of control to which the employer has no right."[19] He concludes that what is wrong with the productivity argument is that it is manipulative. And what is wrong with manipulation is not the effects it produces (which may, coincidentally, be in the subject's best interests) but rather that it undermines the subject's autonomy by not allowing their desires to be factored into the decision making process.[20] Since drug testing is justified by appeal to productivity arguments, it also is fundamentally manipulative and results in a morally unacceptable degree of employee control. Drug testing is therefore unethical, and should be rejected.

One could point out that our system of modern law regulates behavior in a way that would also have to be considered manipulative, according to Caste's definition, but he avoids this counterexample by stating that in a democratic system, citizens have a chance to participate in the legislative process. Since their desires participate through the election of representatives who make the laws, Caste argues that our legal system does not destroy autonomy the way mandatory drug testing does, by dictating behavior without any room for autonomy.[21] Before I address the critical oversight here, I should point out that one might rescue drug testing from the charge of being manipulative by using the same argument that Caste did to rescue our legal system. One can exercise the same degree of autonomy with respect to drug testing legislation as one currently does with legislation generally by participating in our electoral system. Since employees have an ability to elect representatives who can limit the use of drug testing, one could argue that drug testing also "does not destroy the individual's autonomy in that he or she retains the capability of input into the governing process."[22] In point of fact, individual autonomy is limited in both cases, as it must necessarily be in any contractual obligation, making any expressed distinction here trivial.

The failure of Caste's argument becomes clear when we realize that, if he is correct, virtually every action required of an employee at a work site would qualify as manipulative – whether the action in question was in her best interests or not, and whether or not she desired to comply, since Caste defines manipulation as a function of restricting autonomy. Dress codes, starting times, and basic performance expectations all may be similarly justified by appeal to the productivity argument – but most of us are not prepared to

count these things as manipulative or unjustified. Requirements of this sort are not instances of manipulation, but are justified expectations which honor a contractual agreement. Similarly, an employee who demands a paycheck of her employer is engaging in manipulation, according to Caste's definition – but this cannot be correct. In the contract, each party is apprised that the other has a right to benefit from the arrangement, and each has a commensurate responsibility to uphold their part. Accountability to the terms of the contract does not amount to manipulation when the accountability in question is reasonable. In agreement with Caste's original criticism, it is not true that an employer has a right to ensure maximal productivity. But an employer does have the right to hold an employee accountable to the terms of the contract, which express reasonable expectations of productivity. From this it cannot be inferred, however, that just any activity to maximize (or even minimally ensure) productivity is justifiable, since the contractual model expressly allows that the employee has certain morally justified claims that cannot be bargained away in return for employment. Since the productivity argument, as Caste depicts it, is in fact not a justification for drug testing under a contractual model, it is not the case that drug testing must be rejected.

In a similar vein, some argue that any testing which involves coercion is inherently an invasion of employee privacy. Placing employees in a position where they must choose between maintaining their privacy or losing their jobs is fundamentally coercive. "For most employees, being given the choice between submitting to a drug test and risking one's job by refusing an employer's request is not much of a decision at all."[23] While Brenkert's arguments against the use of the polygraph are directed at that device's inability to distinguish the reason behind a positive reading (which may not, in many instances, indicate an intentional lie), his argument that the polygraph is coercive is pertinent to the question of drug testing as well.

Brenkert notes that if an employee

> . . . did not take the test and cooperate during the test, his application for employment would either not be considered at all or would be considered to have a significant negative aspect to it. This is surely a more subtle form of coercion. And if this be the case, then one cannot say that the person has willingly allowed his reactions to the questions to be monitored. He has consented to do so, but he has consented under coercion. Had he a truly free choice, he would not have done so.[24]

Brenkert's point is surprising, in that his own understanding is that A's privacy is limited by what Z is entitled to know in order to executive its role with respect to A. If Z (here, the corporation) is entitled to know X (whether or not the employee abuses drugs) in order to determine if A (the employee) is capable of performing according to the terms of employment, then the employee has no right to privacy with respect to the information in question. While this does not authorize the corporation to obtain the information in just any manner, the mere fact that the employee would *prefer* that the employer not know cannot be sufficient to constitute a right to privacy in the face of the employer's legitimate entitlement. The employee can freely choose to withhold the information, but this is not so much invoking a right to privacy as it is rejecting the terms of contract.

If Brenkert's criticism of employer testing were valid, then potentially all demands made by the employer on the employee – from providing background information to arriving at work on time – would count as coercive, since in every case where the employee consents to the demand there is a strong possibility that she would not have consented if she was offered a truly free choice. But these demands are reasonable, and the employer is entitled to demand them under the terms of employment, just as the employee is entitled to profit by acceding to such demands.

The final argument considered here is the charge that drug testing is an attempt to "control the employee's actions in a time that has not actually been purchased."[25] Even if we assume that an employer has the right to maximize profitability by controlling the employee's behavior during normal work hours, the employer has no right to control what an employee does in her free time. To attempt to do so is a violation of

employee rights. This argument also falls flat, however, when we realize that the demands of a standard employment contract inherently place limitations on an employee's free time. In a sense, the employment contract demands priority, requiring the employee to organize her free time around her employment schedule in a way that permits her to honor the contractual obligation. For instance, time traveling to and from work occurs during an employee's "free time," and is dependent on the employee's own personal resources, but is rightfully assumed within the terms of the contract. Time and money spent shopping for work attire also falls outside the normal time of employment, but is essential for honoring a mandatory dress code. These are not normally considered violations of an employee's private life, or unethical "controls" placed on an employee by an employer, but are justified, again, under the terms of contract. Drug testing is justified similarly.

Reservations and policy recommendations

At least one troubling aspect of drug testing remains to be considered prior to recommendations on policy, and that is the ethics of profit maximization as a justification for including employee testing under the terms of an employment agreement. As Caste correctly observed, the fact that drug testing may be in the best interests of employees is ancillary to the employer's productivity goals.[26] While drug testing may turn out to further the interests of employees by forcing them to confront self-destructive behavior, this correlation between employee's interests and the financial goals of the corporation is merely fortuitous. If drug testing were not perceived as being in the best interests of the company from a financial point of view, then drug testing would not be the issue it is today.

In counterpoint, one could argue that the financial status of the company is inherently intertwined with the good of employees; as the corporation becomes increasingly profitable, employees are increasingly benefited. One might even argue that, in light of such a framework, profit maximization is central to society and therefore inherently consistent with its values.[27] This model is overly simplified, however; we can easily envision a situation where a corporation, attempting to maximize its profits, does so in a way that is inconsistent with a substantive social ethic but is not otherwise limited by market values. Appealing to profit maximization as a social ethic does not alleviate these tensions.

It is the position adopted in this article that a corporation is entitled to drug test its employees to determine employee capacity to perform according to the terms of the employment contract. That drug testing is not, however, in the large majority of cases, directed at maximizing the employee's best interests, suggests that employers should avail themselves of their right to drug test within reasonable limits. In light of this conclusion, the following policy recommendations are directed at employers, with the goal of balancing the employer's right to drug test with a more substantive regard for the dignity and privacy of employees.

1. *Testing should focus on a specifically targeted group of employees*

In the case of employers who are testing without regard for questions of safety, I would strongly urge that testing only be done when probable cause exists to suspect that an employee is using controlled substances. Probable cause might include uncharacteristic behavior, obvious symptoms of impairment, or a significantly diminished capacity to perform their duties. Utilizing probable cause minimizes the intrusive aspect of testing by yielding a higher percentage of test-positives (i.e., requiring probable cause before testing will inherently screen out the large majority of negatives). Even with this stipulation, a drug program may provide a reasonable deterrence factor at the workplace.

It should be noted that this qualification does not apply in cases of job applicants. Employers who insist on testing potential employees will typically do so under a general suspicion of drug use, and may in that cause assume a condition of probable cause.

2. *When testing is indicated, it should not be announced ahead of time*

Regularly scheduled testing runs the risk of losing its effectiveness by providing an employee sufficient time to contrive a method of falsifying the sample. Drug testing, if it is to be used at all, should be used in a way which maximizes its effectiveness and accuracy.

3. *Employees who test positive for drug abuse should be permitted the opportunity to resolve their abusive tendencies and return to work without penalty or stigma*

Employees should only be terminated for an inability to resolve their abuse, once early detection and substantial warning have been made. Employers can mitigate the dehumanizing aspect of this technology by using it as an opportunity to assist abusive employees with their problems, and permitting them to return to their old positions if they can remedy their habitual tendencies. Toxicological testing should therefore be accompanied by a full range of employee assistance interventions.

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Notes

[1] According to SAMHSA (Substance Abuse and Mental Health Services Administration), cited in Ira A. Lipman, 'Drug Testing is Vital in the Workplace', *U.S.A. Today Magazine* **123** (January 1995), 81.

[2] Dawn Gunsch, 'Training Prepares Workers for Drug Testing', *Personnel Journal* **72** (May 1993), 52.

[3] According to the U.S. Bureau of Labor Statistics, cited in Rob Brookler, 'Industry Standards in Workplace Drug Testing', *Personnel Journal* **71** (April 1992), 128.

[4] See Lewis L. Maltby, 'Why Drug Testing is a Bad Idea', *Inc.*, (June 1987), 152.

[5] On this point see Michele Simms, 'Defining Privacy in Employee Health Screening Cases: Ethical Ramifications Concerning the Employee/Employer Relationship', *Journal of Business Ethics* **13** (1994), 315–325.

[6] DesJardins further argues that these conditions are not sufficient to constitute a right to privacy. In the example of subliminal advertising, if it was effective, one's right "to be let alone" would be violated, but without any clear violation of one's privacy (Joseph R. DesJardins, 'An Employee's Right to Privacy', in J. R. DesJardins and J. J. McCall (eds.), *Contemporary Issues in Business Ethics* [Wadsworth, Belmont, CA, 1985], p. 222).

[7] George G. Brenkert, 'Privacy, Polygraphs, and Work', *Business and Professional Ethics Journal* **1** (1981), 23. In agreement see DesJardins, 'An Employee's Right to Privacy', p. 222; Joseph DesJardins and Ronald Duska, 'Drug Testing in Employment', *Business aand Professional Ethics Journal* **6** (1987), 3–4.

[8] See for example U.S. Department of Health and Human Services, *Drugs in the Workplace: Research and Evaluation Data*, ed. S. W. Gust and J. M. Walsh (National Institute on Drug Abuse Monograph 91, 1989), and National Research Council/Institute of Medicine, *Under the Influence? Drugs and the American Work Force*, ed. J. Normand, R. O. Lempert and C. P. O'Brien (Committee on Drug Use in the Workplace, 1994). For example, a prospective study of preemployment drug testing in the U.S. Postal Service showed after 1.3 years of employment that employees who had tested positive for illicit drug use at the time they were hired were 60% more likely to be absent from work than employees who tested negative (*Drugs in the Workplace*, pp. 128–132; *Under the Influence*, p. 134).

[9] Brenkert, 'Privacy, Polygraphs, and Work', 25.

[10] While the legal opinion itself only summarizes and does not in and of itself justify a moral argument, it does in this case demonstrate a broad consensus and both rational and intuitive appeals to the matter at hand.

[11] See Brookler, "Industry Standards in Workplace Drug Testing," 129.

[12] *Contra* DesJardins and Duska, who state, "Of course, if the employer suspects drug use or abuse as the cause of the unsatisfactory performance, then she might choose to help the person with counseling or rehabilitation. However, this does not seem to be something morally required of the employer. Rather, in the case of unsatisfactory performance, the

employer has a prima facie justification for dismissing or discipling the employee" ('Drug Testing in Employment', 6–7).

[13] DesJardins and Duska, 'Drug Testing in Employment', 5.

[14] Ibid., 6.

[15] Implicit in this statement is the assumption that employees do not have an absolute right to abuse drugs. This is a point I am neither able (for lack of space) nor interested in taking up at this point, but would instead appeal to a broad societal consensus on drug abuse, legislation against the use of illicit substances (and abuse of legal substances), and various negative social correlates to drug use. Thus, I am convinced that drug abuse can be distinguished from other legitimate (but potentially deleterious) behaviors, such as poor dietary habits.

[16] Ibid.

[17] Nicholas J. Caste, 'Drug Testing and Productivity', *Journal of Business Ethics* **11** (1992), 301.

[18] Ibid., 302.

[19] Ibid., 303.

[20] As a side note, I should point out that Caste has gone wrong in assessing his own definition of manipulation (understood as an attempt to produce a response without regard for that individual's good, as they perceived it). What is wrong with manipulation is *not* that it undermines autonomy, since undermining autonomy is neither a necessary nor a sufficient component in manipulation as he defines it (i.e., I can undermine your autonomy in a way which is in complete accord with your good as you perceive it, and this would not qualify as manipulation). If the subject willingly embraces the act in question, and is in complete agreement with a policy mandating the action, it would still be manipulative under Caste's definition, since manipulation turns not on the effect, nor on the victim's will, but on the motivation of the agent behind the act.

[21] Ibid., 302.

[22] Ibid.

[23] DesJardins and Duska, 'Drug Testing in Employment', 16–17. This is also implied in DesJardins, 'An Employee's Right to Privacy', p. 226, but in neither case is the argument fully developed.

[24] Brenkert, 'Privacy, Polygraphs, and Work', 28–29.

[25] Caste, 'Drug Testing and Productivity', 303. See also Maltby, 'Why Drug Testing is a Bad Idea', 152.

[26] Caste, 'Drug Testing and Productivity', 302. Caste goes too far when he attributes to corporations following the productivity argument an 'absence of concern for the individual employee' (p. 303), but I am in agreement that employer beneficence is, in the case of drug testing, at best an afterthought.

[27] See Patrick Primeaux and John Stieber, 'Profit Maximization: The Ethical Mandate of Business', *Journal of Business Ethics* **13** (1994), 287–294.

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