

The Case Against Drug Testing

WHY THIS IS NOT THE TIME TO BEGIN USING A TECHNOLOGY THAT INVADES OUR PRIVACY AND JUST PLAIN DOESN'T WORK.

ESSAY

BY ANNE MARIE O'KEEFE

During 1986, the nation's concern over illegal drug use reached almost hysterical proportions. The U.S. House of Representatives passed legislation that, had the Senate agreed, would have suspended certain Constitutional protections and required the death penalty for some drug offenses. The President issued an executive order calling for the mass drug testing of federal employees in "sensitive" positions. Federal courts have deemed such testing to be illegal for some classes of federal workers; however, these decisions are still being appealed, and the administration is determined to forge ahead with its drug-testing program. And private employers have turned increasingly to chemical laboratories to determine who is fit for hiring, promotion and continuing employment. Between 1962 and 1985, the estimated proportion of Fortune-500 companies conducting routine urinalysis rose from 3 to nearly 80 percent—a figure expected to reach 50 percent by this year or next year.

While there are issues of legitimate concern about drug use and public safety, the speed and enthusiasm with which many of our elected representatives and business leaders have embraced drug testing as a panacea has left many questions unanswered. Why did our national drug problem so rapidly become the focus of political and business decisions? Did this change reflect a sudden, serious worsening of the problem? Why did mass drug testing suddenly gain favor? Was it shown to

be particularly effective in detecting and deterring illegal drug use? And finally, what are the costs of making employees and job applicants take urine tests?

Our country has a serious drug problem. The National Institute on Drug Abuse (NIDA) estimates that nearly two-thirds of those now entering the work force have used illegal drugs—44 percent within the past year. But ironically, the drug-testing craze has come just when most types of drug use are beginning to wane. NIDA reports that for all drugs except cocaine, current rates are below those of 1979, our peak year of drug use.

Why the furor now? The drug-testing fad might be viewed as the product of both election-year posturing and well-timed and well-financed marketing efforts by test manufacturers. During the 1970s, the relatively low-cost chemical assay (called EMIT) that promised to detect drugs in urine was first manufactured. In the beginning, these tests were used only by crime laboratories, drug-treatment programs and the military. By the early 1980s, a handful of private employers were also using them. But more recently, sales of drug tests have gotten a big boost from the attitudes and edicts of the Reagan administration. On March 2, 1986, the President's Commission on Organized Crime recommended that all employees of private companies contracting with the federal government be regularly subjected to urine testing for drugs as a condition of employment. Then came the President's executive order on September 15, requiring the head of each executive agency to "establish a program to test for the use of illegal drugs by employees in sensitive positions." It remains unclear how

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many millions of federal workers will be subject to such testing if the President gets his way.

Strangely, drug testing is becoming widespread despite general agreement that the results of mass tests are often highly inaccurate. Error rates reflect both inherent deficiencies in the technology and mistakes in handling and interpreting test results. In a series of studies conducted by the federal Centers for Disease Control (CDC) and NIDA, urine samples spiked with drugs were sent periodically to laboratories across the country serving methadone treatment centers. Tests on these samples, which the labs knew had come from CDC, revealed drug-detection error rates averaging below 10 percent. However, when identical samples subsequently were sent to the same laboratories, but not identified as coming from CDC, error rates increased to an average of 81 percent, with a high of 100 percent. These errors were "false negatives," cases in which "dirty" urine samples were identified as "clean."

Independent studies of laboratory accuracy have also confirmed high error rates. One group of researchers reported a 66.5 percent rate of "false positives" among 160 urine samples from participants in a methadone treatment center. False-positive mistakes, identifying a "clean" urine sample as containing an illegal drug, are far more serious in the context of worker screening than are false-negative mistakes. This is because false positives can result in innocent people losing their jobs. Ironically, since the error rates inherent in the drug tests are higher than the actual rate of illegal drug use in the general working population, as reported by NIDA, the tests are more likely to label innocent people as illegal drug users than to identify real users.

Many of the false-positive results stem from a phenomenon known as "cross-reactivity." This refers to the fact that both over-the-counter and prescription drugs, and even some foods, can produce false-positive results on the tests. For example, Contac, Sudafed, certain diet pills, decongestants and heart and asthma medications can register as amphetamines on the tests. Cough syrups containing dextromethorphan can cross-react as opiates, and some antibiotics show up as cocaine. Anti-in-

flammatory drugs and common painkillers, including Datril, Advil and Nuprin, mimic marijuana. Even poppy seeds, which actually contain traces of morphine, and some herbal teas containing traces of cocaine can cause positive test results for these drugs.

Commercial testing companies almost always claim very high accuracy and reliability. But because these laboratories are not uniformly regulated, employers who buy their services may find it hard to confirm these claims or even to conduct informed comparative shopping. Companies that mass-market field-testing kits such as EMITs (which cost an estimated \$15 to \$25 per test) usually recommend that positive test results be confirmed with other laboratory procedures, which can run from \$100 to \$200 per test. But relatively few employers seem to be using the expensive back-up procedures before firing employees who test positive. Even when employers do verify positive results, employees who turn out to be drug-free upon retesting will already be stigmatized.

The tests have other critical failings, particularly their limited sensitivity to certain drugs, a shortcoming the drug-test manufacturers readily admit. Consider cocaine, for example. Despite great concern in the 1980s over the use of cocaine, the only illicit drug whose use is on the rise, this is the drug to which the tests are least sensitive since its chemical traces dissipate in a few days. Alcohol, which is legal but potentially detrimental to job performance, is also hard to detect, since traces disappear from within 12 to 24 hours. By contrast, urine testing is, if anything, overly sensitive to marijuana; it can detect the drug's chemical byproducts (not its active ingredient) for weeks after its use and can even pick up the residue of passive inhalation. Drug testing does not indicate the recency of use, nor does it distinguish between chronic and one-time use. Most important, though urinalysis can reveal a lot about off-the-job activities, it tells nothing about job performance.

Mass drug testing is expensive, but its greatest costs are not financial and cannot be neatly quantified. The greatest costs involve violations of workers' rights and the poor employee morale and fractured trust that re-

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sult when workers must prove their innocence against the presumption of guilt.

The most important cost of drug testing, however, may be the invasion of workers' privacy. Urinalysis may be highly inaccurate in detecting the use of illegal drugs, but it can reveal who is pregnant, who has asthma and who is being treated for heart disease, manic-depression, epilepsy, diabetes and a host of other physical and mental conditions.

In colonial times, King George III justified having his soldiers break into homes and search many innocent people indiscriminately on the grounds that the procedure might reveal the few who were guilty of crimes against the Crown. But the founders of our nation chose to balance things quite differently. An important purpose and accomplishment of the Constitution is to protect us from government intrusion. The Fourth Amendment is clear that "the right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ." Searches are permitted only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The U.S. Supreme Court has ruled that extracting bodily fluids constitutes a search within the meaning of this Amendment. Therefore, except under extraordinary circumstances, when the government seeks to test an employee's urine, it must comply with due process and must first provide plausible evidence of illegal activity. People accused of heinous crimes are assured of this minimum protection from government intrusion. Because employees in our government work force deserve no less, most courts reviewing proposals to conduct mass tests on such employees have found these programs to be illegal.

Unfortunately, workers in the private sector are not as well protected. The Constitution protects citizens only from intrusions by government (county, state and federal); it does not restrict nongovernmental employers from invading workers' privacy, although employers in the private sector are subject to some limitations. The constitutions of nine states have provisions specifically pro-

tecting citizens' rights to privacy and prohibiting unreasonable searches and seizures. Several private lawsuits against employers are now testing the applicability of these shields. Local governments, can, if they wish, pass legislation to protect private employees from unwarranted drug tests; in fact, San Francisco has done so. In addition, union contracts and grievance procedures may give some workers protection from mass drug testing, and civil-rights laws could block the disproportionate testing of minorities. Nonetheless, private employees have relatively little legal protection against mandatory drug testing and arbitrary dismissal.

Civil libertarians claim that as long as employees do their work well, inquiries into their off-duty drug use are no more legitimate than inquiries into their sex lives. Then why has drug testing become so popular? Perhaps because it is simple and "objective"—a litmus test. It is not easily challenged because, like the use of lie detectors, it relies on technology that few understand. It is quicker and cheaper than serious and sustained efforts to reduce illegal drug use, such as the mass educational efforts that have successfully reduced cigarette smoking. And finally, while drug testing may do little to address the real problem of drug use in our society, it reinforces the employer's illusion of doing something.

Apparently some employers would rather test their employees for drugs than build a relationship with them based on confidence and loyalty. Fortunately, there are employers, such as the Drexelbrook Engineering Company in Pennsylvania, who have decided against drug testing because of its human costs. As Drexelbrook's vice president put it, a relationship "doesn't just come from a paycheck. When you say to an employee, 'you're doing a great job; just the same, I want you to pee in this jar and I'm sending someone to watch you,' you've undermined that trust." □

Anne Marie O'Keefe, Ph.D., J.D., is a psychologist and lawyer who specializes in health issues.

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