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## Letters to the Task Force

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Richard A. Epstein  
*James Parker Hall Distinguished  
Service Professor of Law*

August 2, 1991

Professor Rodney Smolla  
Institute of Bill of Rights Law  
Marshall-Wythe School of Law  
The College of William and Mary  
South Henry Street  
Williamsburg, Virginia 23185

Re: Drug testing

Dear Rod:

I just received a copy of the proposal on drug testing and have some comments to make on it and a small favor to ask.

Turning first to the Report, I think that it spends too much time of the details of legislation without explaining why we need any legislation at all, especially for private employers. I agree that drug testing is a hot and sensitive issues. People do not like to be tested even if they are innocent, and firms are uneasy about having workers who use drugs (or alcohol) on their workforce, both for the safety and business risks that they could cause, and the more diffuse reputational risks that go with trying to maintain a client base. So clearly some balance has to be drawn.

The difficulty with your report is that it asks only one question, not two. The question asked is the second in the sequence: what should be the nature of the balance between firm and individual? The prior question is who should make the balance? I find it a little ironic that a Bill of Rights Institute, which should be dedicated to keeping government at bay instinctively leaps to a legislative solution. Why not the contractual solution? There are of course some problems with disclosure and variations in terms, but skilled drafting can deal with those problems especially on an institutional issue of such moment and import.

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One advantage of the contract solution is it does not require once-and-for-all balancing. Stated otherwise, there is an implicit assumption in your report that all firms have roughly the same interest, and all workers have roughly the same interests. But why should this be so, even within certain categories of workers (e.g. high or low risk jobs). The best way in which to find out the relative intensity of preferences (even legitimate preferences) is to have them in bidding tension with each other. If an employer says that we regard this as very important, then it has to be prepared to pay the price. It will lose some workers who do not want to go through the testing, or it will make accommodations on wages or other terms of employment. Some employees will find the deal not to their liking, but they can seek out another firm whose policies they find more congenial. There is a sorting equilibrium, so that firms which want extensive testing get workers who are relatively indifferent to the indignities involved. There is no reason to ask whether the concern with drugs is "justified" with reference to the workplace. The standards of relevance are defined internal to the workplace, and do not have to be validated in any public forum. Likewise there is no need to figure out what kinds of jobs call for random testing and which only allow it to be for cause. There are private solutions that courts can enforce. There is no need to convert intelligent hunches into binding law.

This position should help with drug enforcement. I suspect that the balance on this issue in the marketplace is more toward testing than you would like, but I don't think it is a bad thing. The standard enforcement of drug policies is coercive. The state takes after those who seek to mind their own business. Here the employer in effect waits until private individuals come to it. Keeping off drugs now gets you something you want, and as the incidence of drug use is reduced, the external benefits to the rest of us should increase. Drug testing by employers can operate as a (relatively) efficient substitute for public enforcement. Why then treat it with such deep suspicion and concern?

There is a second element that needs a brief mention as well: government employees. Does the fourth amendment have anything to do with the types of drug tests that should be imposed. I think not. Here is a case where consent by individual workers should be sufficient to validate the consent. While I am a great fan of the unconstitutional conditions doctrine, I don't think that it has any application where the government functions in some sort of a competitive system, but should be reserved to those cases where its monopoly position (with regulation or taxation) carries with it the prospect of abuse. So in this regard I don't think that the public/private distinction is of much moment, although it surely is in other areas.

Which gets me to my brief favor: You mention in your report that there are lots of statutes that now work on the area. Is there any memo or collection of materials that you have that I could see. I might want to include

something on this question in a book on which I am working --"Bargaining with the State" which is an expansion and revision of my Harvard Foreword on Unconstitutional Conditions.

I am glad to see that you and your Institute are so active. Keep in touch. And feel free to circulate this letter to your group if you think it is of any interest or help.

Best regards,



Richard A. Epstein

**EISohly Laboratories, Incorporated**

1215½ Jackson Avenue  
Oxford, Mississippi 39655  
(601) 236-2609



September 5, 1990

Dr. Paul Marcus  
Professor of Law  
College of Law  
The University of Arizona  
Tucson, AZ 85721

Dear Dr. Marcus:

This is in reference to your letter of August 16, 1990, in which you requested that I provide you with a position paper regarding some of the issues under consideration by the Task Force for the Drug Testing Project of the Institute of Bill of Rights, College of William and Mary. It will indeed be my pleasure and honor to provide you with the material you requested.

Drug testing is a valuable and effective tool in combatting drug abuse. The ultimate goal of drug testing is to serve as a deterrent to individuals who start out using drugs in a "recreational" fashion but who might end up using them more and more to the point of addiction. Drug testing also helps those individuals who are already having difficulty abstaining on their own to come forward and seek professional help. When carried out properly, drug testing is a valid means by which to identify individuals who have used illicit drugs in the near past. Depending on the drug to be identified, the individual's personal use habits, rate of metabolism, and the test cutoff level, one could detect previous drug use for periods of days or even weeks. What a single drug test will not do, however, is identify whether the drug was used knowingly or unknowingly, the method, or the exact time of use. This is particularly true when urine is used as the biological specimen for analysis.

Laboratories involved in drug testing must operate in a strict forensic manner, since in most cases the only evidence is the specimen submitted for analysis. Maintaining proper chain of custody throughout the testing process and proper documentation of the testing results are essential for the validity of the test. Today, most drug testing laboratories, especially those certified under the Department of Health and Human Services (DHHS) guidelines, abide by these requirements and provide test results which are both scientifically and legally defensible. Under the guidelines, the testing process is delineated in such a way that specimens must be tested at least two times using two independent aliquots from the original bottle using two techniques operating by totally different principles. One of these techniques (the confirmatory test) is mandated to be gas chromatography/mass spectrometry (GC/MS) which is a very

accurate "state of the art" test. Quality control procedures, both open and blind, mandated within the laboratory, coupled with external quality control carried out by the testing agency (also mandated under the guidelines), provide necessary assurances to the accuracy of the testing process. The continuous monitoring and evaluation of the laboratories' performance through proficiency testing (six cycles per year) and on-site inspections (twice a year by DHHS) provide added assurances to the accuracy and reliability of the testing process. Testing for drugs of abuse under DHHS guidelines is perhaps the most accurate and reliable laboratory test one can get today.

I hope the information provided above gives you my position on the issue of drug testing. In the meantime, should you need additional information, need me to elaborate on any particular point, or discuss another area of interest to the Task force, please let me know. I will be glad to get it done immediately to meet your schedule.

With best regards, and good luck with your assignment.

Sincerely,



Mahmoud A. ElSohly, Ph.D.  
President  
Laboratory Director

Attachment: CV



OFFICE OF NATIONAL DRUG CONTROL POLICY  
EXECUTIVE OFFICE OF THE PRESIDENT  
Washington, D.C. 20500

JUN 7 1990

Mr. Rodney A. Smolla  
James Gould Cutler Professor  
of Constitutional Law and  
Director, Institute of Bill  
of Rights Law  
Marshall-Wythe School of Law  
Williamsburg, Virginia 23185

Dear Mr. Smolla:

Drug testing performed with a high level of confidentiality and accuracy, in conjunction with a drug-free workplace program, has proven to be a deterrent to drug use by the casual user and an impetus to seek help for the addict. Many companies use drug testing to improve safety, to deter use, to improve productivity, and to reduce health benefit costs.

The drug testing methodology certified by the National Institute on Drug Abuse utilizes a urine specimen which measures the existence of a drug, or its metabolized form. Although a urine test does not indicate impairment level, a confirmed positive test does indicate usage within days or weeks. This test uses an immunoassay for the initial screen, and, if the results are positive, a confirmation procedure is performed using GC/MS. The level of accuracy for this technology and process is very high; however a strong quality control process must be in place to eliminate human errors.

If you would like additional information on the toxicological methods or quality control procedures, please call the National Institute on Drug Abuse workplace hotline at 1-800-845-4971.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'H. Kleber'.

Herbert D. Kleber, M.D.  
Deputy Director for  
Demand Reduction

THE CITY UNIVERSITY OF NEW YORK MEDICAL SCHOOL  
THE SOPHIE DAVIS SCHOOL OF BIOMEDICAL EDUCATION

THE CITY COLLEGE OF NEW YORK  
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September 11, 1990

Paul Marcus  
Professor of Law  
The University of Arizona  
Tuscon, Arizona 85721

Dear Professor Marcus:

There is exactly one properly done study to ascertain whether pre-employment testing to detect drug users sanitizes the workplace. Dr. David Parish when asked to implement a testing program for pre-employment applicants at an Atlanta Hospital suggested a study of pre-employment testing instead. For six months all applicants for work at the hospital were tested. All qualified were hired whether they tested positive or negative. The information about the test results were kept confidential. Most of the positive group were positive for marijuana metabolite. All employees were carefully evaluated one year after hiring as to their suitability and work performance. There was no evaluation differences between those testing positive and those testing negative. More of the study group who tested negative had been fired than those testing positive. I recently spoke with Dr. Parish who told me that a year after his study, despite his protests, pre-employment testing was instituted at the hospital because management thought it best. This is, of course, a decision to conduct a crusade rather than an evaluation of policy.

Urine testing of unimpaired workers for evidence of illicit drug use has become widely accepted. When I entered the arguments and controversies in 1983-1984, I would have characterized this governmental and management-executed action as a data-free policy. I would now in 1990 characterize testing as a data-proof policy. Workplace-based drug testing has become less of a policy to be evaluated than a crusade. Policies can be evaluated for what they accomplish; crusades are evaluated by the degree of righteousness we feel in conducting them. Those conducting the crusade produce little or no credible evidence that the goals of drug testing are being achieved. In fact, the statements indicating that drug testing works as a policy were generated in 1984, and they are simply repeated over and over in various forms today.



Dr. Kleber's Letter

The accomplishments cited in this letter to Professor RA Smolla in June of 1990 have a familiar ring:

"Drug testing...has proven to be a deterrent to drug use by the casual user and an impetus to seek help for the addict. Many companies use drug testing to improve safety, to deter use, to improve productivity and to reduce health benefit costs."

There are two things to say about the above quotes. How could anyone oppose a policy which accomplished such things, and where is the documentation proving that workplace testing would accomplish them? The answer to the latter question is: nowhere. I'll discuss briefly the technological dilemmas which remain but more importantly, nowhere is there any proof at any acceptable level that urine testing of apparently impaired workers:

- 1) has proven to be a deterrent to casual use,
- 2) forces addicted users to seek help,
- 3) improved productivity,
- 4) reduced health benefit costs,
- 5) augmented safety.

An Overview of Testing in 1990

What the testing does is fairly simple conceptually. If an individual chosen for testing provides an authentic specimen, a screening immunoassay followed by a confirmatory GC-MS may identify the reaction product (a metabolite) of an illegal drug. Recent refinement of testing (and the narrowing of the searching) means that it is rare for a false-positive test to occur. Most workplace positives are secondary to the identification of delta-9-THC-carboxy acid, a marijuana metabolite. In truth, the development of the ability to detect extremely small amounts of marijuana metabolite is the essence of the entire drug-testing enterprise. The percent positive for illegal drugs in the Federal Workplace tested heretofore is less than 1%. Most of these are secondary to marijuana metabolite. The reported range of all positives due to marijuana metabolite is 60-90%. Of the remaining drugs tested for in the Federal programs (opiate, cocaine, amphetamine, and PCP) opiate positives have essentially been withdrawn from consideration. The end result of heroin metabolism in the urine is morphine glucuronide. This is the same resultant if the testee has consumed legal codeine or morphine or ingested poppy seeds or poppy seed products. Although there is a test to assess a specific heroin metabolite, this is not routinely done. Within the Federal Program, if an individual tests positive for morphine metabolite, he or she is simply exonerated by a Medical Review Officer if the test is not confirmed by clinical evidence of opiate dependence.

A positive test for PCP or amphetamine is rare. Although there is some non-dependent or recreational use of cocaine by Americans in the workplace, little is detected because the metabolite persists for such a brief period of time and most users consume off worktime and off premises.

The focus on marijuana should help us think about the other claims of the benefits of testing. There is little evidence of dysfunctional work caused by the occasional use of marijuana and despite hyperbolic claims, there is little evidence that most users of marijuana go on to particular trouble or heavy use. For example, the most recent data of the High School Senior Survey, confirms that use is conservative. Less than half of high school seniors have ever tried marijuana. Of these who have ever tried, only 38% have used in the last month, and 30% of those who have ever tried have not used in the past year. Of those who have ever tried, approximately six percent have smoked 20 of the last 30 days and constitute regular users. Now if this is true, the rate of dysfunctional drug use (mostly potential high dosage use of marijuana) is very low in the workplace. Therefore, the current testing simply detects at a high cost the use of marijuana and not those in need of help and treatment.

#### The Firestone Study

Dr. Kleber's statement is very familiar. I have previously written of the repeated use of a cadence of "facts" about the workplace performance of drug users since 1984. These untruths are repeated almost daily by those justifying a policy of testing and they have been accepted as a true reflection of the workplace drug problem. Dr. Sidney Cohen, supposedly quoting a study of the Firestone Tire & Rubber Company generated this list.

The recreational drug user is:

- 4-5 times more likely to be involved in accidents on or off the job,
- will be absent or late to work or leave early more than twice as often as the non-user,
- will apply for sickness benefits 4-5 times more often than the non-user,
- will exhibit a diminished (usually 33%) productivity,
- will be involved in substantially more grievance matters and file many more worker's compensation claims.

Dr. E. Gates Morgan of the Firestone Tire & Rubber Company Medical Department could not understand how the idea emerged that there was such a study and he recently told a newspaper reporter that there was no Firestone Tire & Rubber Company study. However, these facts with little variation have been cited by Michael Walsh who heads the NIDA Office of Workplace Initiatives in a number of declarations in lawsuits filed by Federal Unions trying to stave

off testing. They are cited by Roche Biomedical in its literature promoting urine testing.

The uncritical citing of these documents is surprising. It takes only a second to realize that since most workplace drug use is secret, and we "need" to test millions to learn about it, how could we know these imposing facts about recreational users? Since they are seldom caught, how could we know that they have filed five times the number of compensation cases and are 2.2 times more likely to be absent from work? These numbers are made up and Dr. Kleber's citing of these justifications for testing simply indicate the completeness of his new affiliation to the Czar's office as opposed to his prior affiliation to an academic ideal of skepticism, criticism, and truth.

Proponents of testing who move beyond the repetition of fraudulent Firestone data will often cite the Postal Study. Although this actually exists, it does not make the case for testing at all.

#### U.S. Postal Service

The U.S. Postal Service decided to conduct an evaluation of pre-employment testing. Preliminary reports of the study indicate that a slightly higher percentage of those testing positive had been fired than those testing negative (15.4% versus 10.5%). The study simply has no validity and was improperly designed. Almost all the positives were significantly younger than the negatives. It is well established that for first hires, the retention rate of mature workers exceeds that of youthful workers. In fact, the Post Office Study generated a positive group consisting almost exclusively of youthful Black males while the "control" group contains older, white applicants. The study does not at all indicate that the 4-5% differences in retention in a youthful minority group of workers from a "control" group of older non-minority workers had anything to do with the positive marijuana test rate. The positive marijuana use was associated with this group of hires who were not retained. One could as well postulate that some other factor predominantly associated with the youthful group caused their job loss - how about a preference for Nike footwear or a greater mass of hair?

#### Compiled Testing Results

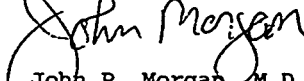
In a recent NIDA monograph, there is a report of data generated under a California law requiring composite evaluation of results from some California laboratories engaging in drug-abuse urine testing. The results are somewhat skewed in the direction of positives because the laboratories were reporting both screening positives and later confirmations as two separate tests. Despite this, the incidence of positives in the workplace was very low. To quote this article:

"The first-year results, however, raise serious questions about the value of drug testing in the workplace. When we consider that only 1 or 2 out of each 100 tests in the employee population are positive and that due to the limitations previously discussed, even those 1 or 2 positives may represent an overstatement of the actual number of positive tests in general, we have to decide whether we really need to test for drugs in employee populations."

Aggressive repeated random testing in the workplace, or at schools, or at the Republican National Convention, may deter some casual users. I accept that, although the proof is still lacking to confirm even this benefit. This result would constitute preventive surveillance - exactly the sort of political solution that has been unacceptable heretofore in a constitutional democracy. Actually, despite the enormous cost of our testing programs, they probably do not go far enough to accomplish even the goal of deterrence.

Drug testing does not sanitize the workplace nor does it enhance productivity or safety or decrease health costs. It stands as an expensive symbolic folly which harms individual workers and fools us. It is drug abuse abuse.

Sincerely,



John P. Morgan, M.D.  
Medical Professor  
CUNY Medical School

JPM/mmp