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## Mandatory Drug Testing

*Hugh LaFollette*

By some estimates one-third of American corporations now require their employees to be tested for drug use. These requirements are compatible with general employment law while promoting the public's interest in fighting drug use. Moreover, the United States Supreme Court has ruled that drug testing programs are constitutionally permissible within both the public and the private sectors. It appears mandatory drug testing is a permanent fixture of American corporate life. (Bakaly, C. G., Grossman, J. M. 1989)

The legal roots of mandatory drug testing are found in the common law doctrine of "employment at will." That doctrine states that either party to an employment contract can terminate the contract for any reason, at any time, unless the contract specifies otherwise. As the Court held in *Adair v. United States* (208 U.S. 161, 175-6, 1908), the employer "was at liberty, in his discretion, to discharge [the employee] from service without giving any reason for so doing."

In unqualified form, this doctrine would give employers effective control over employees. Employers could establish any requirements they wished for prospective and current employees. Not only could they decline to hire employees who will refuse drug tests, they could likewise decline to hire people with characteristics, beliefs, or behavior they dislike. Employees must endure these requirements or seek employment elsewhere. However, since most people have limited job opportunities, they will be forced to "accept" these requirements, no matter how objectionable. Courts and legislatures have since recognized the abuses this

principle could engender. During the last thirty years they have placed numerous constraints on the right of employers.<sup>1</sup> The Civil Rights Act of 1964 states that it is illegal to refuse someone employment because of "race, color, or national origin" (42 U.S.C. at 2000). Later court decisions held that discrimination based on sex and religion were likewise prohibited.

Nonetheless, elements of the "employment at will" principle are alive and well. Consider a recent Texas Court of Appeals ruling rejecting an employee's challenge to her employer's drug testing program. In siding with the employer the court said: "Generally, when the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit. If the employee continues working with the knowledge of the changes, he has accepted the changes as a matter of law." (*Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497, 1989) Although not in the same unqualified form, the doctrine is likewise evident in several U.S. Supreme Court cases discussed later. Given the staying-power of this doctrine -- albeit in attenuated form -- it is easy to see why mandatory drug testing does not run afoul of the Constitution as interpreted by the Reagan/Bush court. Employers can make extensive demands on employees, simply because it is their pleasure.

Mandatory drug testing is also underwritten by potent political considerations. The public is concerned about the growing use of illegal drugs. The Supreme Court specifically noted this concern in upholding the mandatory testing of Customs Service employees. The use of illegal narcotics, they said, is "one of the greatest problems affecting the health and welfare of our population." (*National Treasury Employees Union v. von Rabb* 109 S.Ct. 1384, 1989). The public wants drug use stopped; and they are willing to use virtually any means to achieve that result.

### Concerns about testing

Even those who endorse widespread use of drug testing do -- or should -- fear an employer's unbridled intrusion into the private lives of its employees. Accordingly, in upholding testing programs, the Supreme Court recognized that mandatory testing

involve invasions of privacy which cannot be constitutionally ignored.

"Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable ... these intrusions must be deemed searches under the Fourth Amendment." (*Skinner*, at 1413). [The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."] In effect, the Court ruled that unless a testing program is reasonable under the constraints of this Amendment, then it would be unconstitutional.

It is not evident, however, that the Fourth Amendment is directly relevant to this issue. In fact, by focusing exclusively on this amendment, the courts have made the case for mandatory drug testing too easy. The primary functions of the Fourth are to insure that governmental agents cannot criminally prosecute someone using evidence obtained "unreasonably," and that neither people nor their property can be examined without warning, unless an independent magistrate determines an unannounced search is warranted. (Israel, J., LaFave, W. 1975: 86)

Drug testing does not run afoul of any of these functions.<sup>2</sup> First, testing programs are not governmental actions in the sense required by this Amendment. Even when the federal government is the employer (as in *National Treasury*, discussed later), it demands qua employer -- not qua government agent -- that employees be tested. Second, test results are not made available to law enforcement officials, and, hence, cannot be grounds for criminal prosecution. Third, since employees know when they accept certain jobs that they will be tested, then they will be searched only after appropriate warning. In short, such tests are not unconstitutional searches under the meaning of the Fourth Amendment. At least that is what the Court ruled. I am inclined to agree.

However, even if the prohibition against unreasonable searches is not violated by drug testing, that does not establish that testing is morally or legally permissible. There are moral limits on an employ-

er's discretion: no employer should be able to control the private lives of her employees.

These moral limits are also Constitutional limits -- albeit not ones the Court majority recognized in any of the cases cited. (They do, however, feature prominently in the dissenting opinion by Scalia, discussed later in the paper.) In particular, the Constitution's protection of privacy, recognized in the Court's landmark ruling in *Griswold v. Connecticut* (381 U.S. 476, 479) is sufficient to throw the use of mandatory testing in doubt. There the Court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." For instance, "the First Amendment has a penumbra where privacy is protected from governmental intrusion." This right "conferred as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."

In light of the constitutionally recognized right to privacy, more is at issue than whether mandatory drug tests are illegal searches under the meaning of the Fourth Amendment. Even if drug tests are not impermissible "searches," they are, at least at first glance, invasions of privacy which merit protection. Thus, we must still determine whether employers can require employees to take drug tests which intrude into employees' private lives. This way of putting the matter, however, assumes that the use of drugs is indeed private -- beyond the scope of legitimate inquiry by potential employers. Yet that we have not shown. Our search to determine if mandatory drug testing is permissible requires us to make a general inquiry about the demands which employers can legitimately make of employees.

#### Employers demands on employees

In deciding what employers can legitimately demand of employees, we must consider the interests of employers as well as those of employees. In our efforts to protect workers, we should not decree whom employers must hire nor mandate what they may expect of workers. To do so would be to intrude inappropriately into their lives. For the purposes of our present

inquiry, however, we need not prescribe whom employers must hire nor dictate employment practices. Rather, we need only establish limits to employer discretion. That is, we must find ways to protect employers' prerogatives without intruding unduly into employees' private lives.

Here's my suggestion. If a belief or activity is irrelevant to job performance, it is none of the employer's business. She cannot rightly prescribe or proscribe it, nor can she even inquire about it. If privacy is to mean anything it must mean at least that. The following example, I think, illustrates this principle. Suppose an employer wants to examine an employee's blood, not to detect illegal drugs, but to determine if she has elevated serum cholesterol. Anyone with elevated levels is given three months to lower her cholesterol to appropriate levels. If she fails, she is dismissed. Moreover, let us stipulate, what is likely true, that elevated cholesterol does not directly affect an employee's job performance. The employer recognizes that. She just refuses to retain people who are unhealthy. Under these circumstances such tests would be unreasonable and their unreasonableness would not be exhausted by the Fourth Amendment's prohibitions on unreasonable searches. In fact, as I argued earlier, it is doubtful whether the Fourth Amendment is directly relevant to the present inquiry.

Likewise, employers should not be able to control employees' behavior which, although marginally related to job performance, is primarily private. For instance, elevated serum cholesterol may be remotely relevant to job performance: People with elevated cholesterol are more likely to suffer heart attacks and die; the employer must subsequently train a replacement. That is expensive. Under such circumstances, permitting employers to specify an employee's serum cholesterol fails to draw an appropriate distinction between the public and the private. If testing were permissible under these circumstances, employers could also forbid their employees to smoke, drink, climb mountains, drive race cars and eat fried chicken -- or any other activity which might shorten their lives. That, however, would give employers extensive control over employees' private lives. And most assuredly that limits employees' privacy in ways which should horrify us.

We return to the original question: what may employers legitimately demand of employees? Can they legitimately force employees to hold particular religious beliefs? Can they require employees to have a particular diet or exercise regimen? Can they enforce dress codes? These questions cannot be answered in the abstract. Such matters are not invariably subject to employer control, nor are they always beyond its legitimate reach. Whether these are reasonable demands depends on the nature of the job. If what is being required is obviously and directly related to job performance, then the requirement is arguably permissible.

For instance, it is generally impermissible to require employees to have specific religious beliefs. In most circumstances such beliefs are unrelated to job performance. Nonetheless, having specified religious beliefs is an eminently plausible requirement for parish priests -- and arguably relevant for teachers in parochial schools. And, although diet is typically irrelevant to job performance, perhaps it is reasonable to expect employees in a vegetarian grocery store to be vegetarians.

Fortunately, for our present purposes we need not determine exactly what are reasonable requirements for every job. Nor do we need a comprehensive theory of employment -- although for other purposes such a theory would be highly desirable. The only answer we need for the present inquiry is suggested by the previous examples. If normally private information is irrelevant to a job's performance, then the employer cannot legitimately expect it or even inquire about it. Thus, in circumstances where drug use is irrelevant, or only marginally relevant, to the performance of a job, then the employer could not ask applicants or employees about their drug use. That seems only too obvious if an employer wanted to ask applicants and employees whether they use Tylenol.

On the other hand, if drug use (or any other trait or behavior, for that matter) were demonstrably relevant to the performance of an employee's assigned duties, an employer may reasonably inquire about such use.

Someone might object that no one should have to disclose details of her private life, even if those details were relevant to job performance. To ask that they do is to violate the Fifth Amendment's protection against self-incrimination. Not so. For the Fifth

Amendment -- like the Fourth -- primarily functions to protect people (potentially) engaged in criminal proceedings. As previously argued, employee drug tests are not criminal proceedings. No one is in danger of being imprisoned. The Fifth Amendment is inapplicable.

Rather, the issue is whether (prospective) employees should have to disclose information which enables employers to make a rational assessment of the employees' suitability for the job. The answer, I would have thought, is yes. Were that not so, employers could not require applicants to submit school and employment records or letters of recommendation -- since these are, for most purposes, properly considered private. Consequently it is appropriate for employers to ask applicants to divulge any information, including information about drug use, if it is relevant to job performance.

Given these principles, employers may reasonably want to know whether their employees use drugs, if that use would affect employee performance. But this does not yet establish that employers may use mandatory drug tests as a way of discerning use. For the issue is not merely what information an employer may reasonably desire, but the means she may use to obtain it. To consider an earlier example, the local parish may ask prospective priests about their religious views. After all, such beliefs are relevant to job performance. But the parish cannot demand that applicants submit to lie detector tests; nor may it tap their phones or eavesdrop on them or to determine if, in fact, their views are as they say.

Likewise, employers may ask an employee about drug use if that employee's work could be adversely affected by use. Perhaps, too, they might legitimately dismiss any employees they discover using drugs. However, employers should not automatically conclude that mandatory drug testing is an appropriate means of discerning use. We must still be concerned about employees' privacy. Testing is not a justified means of identifying drug use unless, in addition to being relevant to job performance, a) use is of substantial and direct risk to others and b) testing is a reliable and relatively unintrusive way of limiting use. Or so I shall argue in the next section.

## The Rationale for Mandatory Testing

### *The theory*

The principles discussed in the previous section appear to provide the rationale for a mandatory drug testing program established under a 1988 ruling by the Department of Transportation. That ruling specified that nearly four million private sector employees with safety or security related responsibilities (e.g., airlines personnel, truck drivers, certain railroad and mass transit employees, and employees who handle pipelines carrying natural gas or hazardous substances) will be subject to mandatory random drug and alcohol tests. These regulations require not only tests for job applicants, but also random tests of current employees and specific tests of any employee involved in an accident.

The ruling further specified that "testing of employees is conducted in a manner that protects the privacy and dignity of individuals, while at the same time insuring the integrity of the sample." People who test positive must be removed, although they can be reinstated if a medical officer certifies they have been rehabilitated. (Bakaly, C. G., Grossman, J. M. 1989: 344)

The stated purpose of these tests is to protect the safety of innocent people whose lives may be endangered by the inappropriate behavior of transportation workers. That purpose is most noble. However, before we endorse testing, we must determine if testing is the most reasonable and relatively unintrusive way of achieving that purpose.

To bring the previous discussion together, I propose that testing is permissible if and only if all of the following conditions are satisfied:

- 1) The job is such that its improper performance can have immediate, serious and irreversible consequences for others (which others I shall discuss later).
  
- 2) Use of certain drugs is relevant to job performance in the following way: drug use demonstrably increases the chance that an employee will perform in ways which harm others.

- 3) It is unlikely that the harm can be prevented without random testing.
- 4) Testing is a reliable way of discerning the presence of drugs,
- 5) Without being unduly intrusive.

If each of these conditions is satisfied, then testing is the only plausible way to protect people from harm, and is, therefore, justified. Moreover, I think that if such criteria are demonstrably satisfied, then well-intentioned members of the profession in question would agree to drug testing programs. They would recognize that testing would increase the likelihood that their fellow professionals acted responsibly and in the best interest of the public they serve. Surely that is a goal of all responsible professionals.

Someone might object that such testing, even for this noble purpose, is not permissible because it inappropriately intrudes into an employees' private lives. Most assuredly we must be concerned about individuals' privacy. It is very easy for policy makers and executives to lose sight of these concerns in their quest to protect the public -- or to enhance the company's public image. If, however, these conditions are satisfied, drug use would not be private for employees in these jobs.

Rather it would be public. It would be public even by the guidelines set down by the staunch defender of individual liberty, J.S. Mill. "[T]he only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others." However, if an activity is likely to harm another person, then for those actions each of us "is amenable to society." (Mill, J. S. 1978: 9) The distinction between the public and the private cannot be drawn in the abstract. We can only determine if an action is public in the relevant sense, if the action potentially harms others. Thus, an action which is generally considered private, would, under certain conditions, be public because of its potential affects on others. In summary, employees' private lives should be free from intrusion, including any intrusion from employers. However, for people in jobs which satisfy the stated criteria, drug use is not, properly speaking, private.

*The practice*

I have argued that testing is theoretically justified: that testing is permissible if certain conditions are satisfied. Whether testing is actually permissible, however, depends in substantial degree on whether these five criteria are satisfied. We cannot merely assume they are satisfied. We must demonstrate that they are, else testing will be unacceptably intrusive. How likely is it that a professional who uses drugs will perform her tasks in ways which harm others? Perhaps the chances are extremely remote. If so, testing would not prevent harm to others and would be unnecessary. Perhaps there are more effective or less intrusive ways of achieving these same results. If so, testing would be unacceptably invasive. If on the other hand these criteria are clearly satisfied, then testing is not only permissible but mandatory -- after all, we have a duty to protect innocent people from harm.

However, philosophers are not especially equipped to determine when the criteria are satisfied, although they may be adept at specifying what would count as evidence. Thus, I cannot state unequivocally that the criteria are satisfied. Nonetheless, it is plausible to believe they are satisfied in at least some instances. Both anecdotal and scientific evidence suggests that use of certain drugs will seriously hamper performance of some tasks in ways which would be extremely dangerous to others. Consider, for example, a pilot for a commercial airline. Pilot error could have immediate, disastrous, and irreversible consequences for all passengers (criterion 1). Second it appears that the presence of certain drugs in the blood stream (including alcohol) will substantially increase the possibility of an accident. Perhaps, too, previous experimentation with certain drugs (like LSD), even if not currently in the blood stream, might increase the likelihood of such accidents (criterion 2).

Moreover, by all accounts, there is no feasible way of detecting use of some drugs except by testing (criterion 3) and testing appears to be a reliable means of identifying drug use (criterion 4).<sup>3</sup> Finally, it appears standard procedures for administering tests -- procedures like those established by the DOT -- are not unduly intrusive (criterion 5).

If these suppositions are plausible, and if there is reason to believe people in said profession are susceptible to drug use,<sup>4</sup> then testing is a reasonable way to prevent harm and is therefore permissible.

It is important to note that this argument for drug testing does not imply that drugs ought to be illegal. Although I have not settled this issue to my own satisfaction, I am sympathetic with the claim that people should have a right to take any drug they want, particularly if by so doing they harm no one except themselves. (Szasz, T. 1972) But these arguments for legalizing drugs are irrelevant for those who have voluntarily undertaken careers where their actions could have dramatic and irreversible consequences for people under their care. *Ex hypothesi*, this behavior no longer concerns just themselves; on good Millian grounds we should support limited testing.

#### Limits on Testing

But limited testing it must be. I do not endorse extensive testing programs. However, I fear, on historical grounds, that testing will be used far more widely than is necessary. There are any number of ways in which the rationale could be mistakenly applied or inappropriately interpreted. Unless carefully monitored, executives could blithely assume that all of the criteria have been satisfied when, in fact, they had not. This would lead to far more extensive testing than is justified. Were this to happen, some of us might come to oppose all drug testing even when the five criteria are satisfied.

For instance, likely some employers establish testing programs merely to insure that employees adhere to the company's views of appropriate behavior. That is morally abhorrent and politically frightening. I am in strong sympathy with Justice Scalia's biting dissent to the majority's holding in *National Treasury Employees Union*. Scalia had approved the Court's ruling in *Skinner* since a) it involved testing a few people (railroad employees involved in train accidents) and b) there was evidence of substance abuse in the targeted class. He claimed, however, that the circumstances in *National Treasury*

were relevantly different. "I decline to join the Court's opinion in the present case because neither the frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."(1398)

Or, as he stated later in the opinion, "The Court's opinion in the present case, however, will be searched in vain for real evidence of a real problem that will be solved by the urine testing of Customs Service employees."(1399) In such cases, testing programs are clearly inappropriate and indefensible. Testing under these conditions would be nothing more than an inappropriate intrusion by employers into the private lives of their employees. An intrusion which will be perpetrated by employers and upheld by the courts.

Scalia is concerned about testing programs which are clearly motivated by something other than the desire to protect public safety. I share his concern. But I am also concerned about testing programs which, although appropriately motivated, are unwarranted nonetheless. Consider, for a moment, auto makers, bridge builders, construction workers, etc. -- workers with jobs whose ill-performance could lead to substantial and irreversible harm to others. Despite the potentially disastrous effects of employee malfeasance, I would be loathe to endorse a full scale mandatory drug program for people in these professions.

What distinguishes these cases from the previous ones? Several of the proffered criteria are not satisfied. For instance, any harm which might occur, although serious, is not immediate in the sense required. Worker error may be detected either by the worker herself or by a supervisor or company inspector. Thus testing is not the only way -- and probably not the best way -- of protecting innocent people from harm.

It is not merely that such errors might be detected. We expect them to be detected. We would expect construction companies to carefully scrutinize employees' work even if none of their employees used drugs. Companies should scrutinize their work to identify flaws resulting from poor materials or from employee inattention, mistake or ignorance. In the process, the company should identify any flaws attributable to employee drug use. Hence, drug testing is unnecessary since any harm which might eventuate from employees' drug use should

be prevented by normal supervisory monitoring of work. Since intrusive drug tests are unnecessary, they are unjustified.

This discussion helps us focus on an ambiguity I have heretofore glossed over. The first criterion states that testing is permissible if employee behavior is likely to harm others. Until now I have not specified who counts as "others." My comments implied that "others" referred to individuals outside the company who could be harmed by the employees' actions: passengers on a train or plane, people who live along a gas line, etc.

Should employers likewise be counted as "others"? Can a company legitimately test employees to prevent harm to it? I argued that a bridge company cannot legitimately test its employees as a means of preventing harm to those who may use the bridge, since drug-induced errors should be detected by normal company inspections. However, can those employers force employees to undergo drug tests to prevent harm to themselves?

The answer, at least in most cases, is "No." Supervisors should inspect work at each level of construction: e.g., when footings are poured, when major beams are erected, etc. Thus, even if drugs use does lead to mistakes, those mistakes could be discovered quickly and the cost of correcting them would be relatively minimal. Perhaps in rare cases the financial damage to the company could be substantial. If so, then assuming all five criteria were satisfied, testing would be justifiable. I suspect, however, that such cases are rare indeed.

### Fairness in testing

Although my proposal seems theoretically defensible, it is vulnerable to the charge that it is politically naive. For the powers that be will use this argument to require large numbers of workers, especially manual workers, to submit to drug tests. Once again executives will foist an intrusive procedure on the "little people" while they, the rich and powerful, escape unscathed.

This criticism bothers me considerably, for there is more than a mite of truth in it. Most of the substantial, long-term ills in this world are wrought by high paid executives sitting in plush offices. These executives -- like old politicians who will not have to die in the wars they declare -- are never subject to the indignities they cavalierly impose on their workers. Since they do not have to suffer these indignities, they will likely ignore the need for evidence and merely assume the five conditions are satisfied. They will subsequently establish far more extensive testing programs than are justified as a means of preventing harm.

In the name of fairness should we thus require these executives to be subject to tests they inflict on their employees? Although I find that appealing, such a requirement cannot be justified on the grounds mentioned earlier. There are three reasons why. First, executives' and politicians' work is scrutinized by others, and thus, any harm they could cause is preventable by the actions of others. CEOs can be fired by stock holders; politicians can be voted out of office during the next election. Second, there are genuine disagreements about how politicians or executives should behave; there are no similar disagreements about how airplane pilots should behave. Consequently, we have no test which can straightforwardly identify executive or political behavior likely to cause harm. Any test we could construct must ignore continuing debates about important political questions. Finally, and most importantly, evils wrought by politicians or executives are rarely if ever the results of drug use -- but of greed, insensitivity, ignorance or short-sightedness. Such evil is indeed evil. However, it is not evil preventable by mandatory drug tests. In summary, it is not obvious that the criteria which justify forcing some workers to have mandatory drug tests are applicable to executives.

Nonetheless, it does seem unfair to allow executives to exempt themselves from drug testing, particularly given a propensity to exaggerate testing's benefits and to downplay its inconveniences. Consequently, I propose we seriously consider adopting the following adjunctive principle: an executive cannot mandate that her employees be tested unless she undergoes testing herself. Under these circumstances, we could reasonably assume executives would be unlikely to endorse such a plan unless they were convinced each of the criteria were satisfied. Put differently, we would have less reason to fear that employees would suffer the indignities of testing unless such tests really were essential to protect public safety.

The rationale for this principle is a variation on (although certainly not identical with) the five criteria stated earlier. Such testing is justified as a means of protecting employees from intrusive tests. Unjustified testing programs would harm innocent people (the

workers); we should prevent harm. The most effective and least intrusive way of preventing that harm is to demand that those who institute testing programs subject themselves to the same tests, and in the same manner.

Likewise for legislators who pass laws mandating testing. They should be subject to the tests they mandate for others. By so doing they would fully appreciate the imposition testing involves. Therefore they would be less likely to institute testing unless they were convinced the criteria were satisfied. That would fulfill the goals of testing without unduly interfering with workers.

There is an obvious objection to this suggestion. Given this adjunctive principle, only executives who themselves do not use drugs will require their employees to undergo drug tests. That would be bad for two reasons: 1) some innocent people who would have been protected by drugs tests on airplane pilots, etc., will no longer be protected, and 2) executives' and legislators' drug use will still escape detection. Hence, the purpose for making this requirement would have been thwarted and the benefits of the initial program curtailed.

This objection isolates a significant flaw in my proposal, albeit a different flaw that the objector supposes. Moreover, once this defect has been corrected we will be able to plausibly retain the current proposal to tests executives and legislators. Here's how. My account implied that employers will decide when and if mandatory drug testing is instituted. But that makes these programs, along with their potential benefits, entirely dependent on the conscientiousness of employers. That is unacceptable -- whether the executives themselves use drugs or not.

As I argued earlier, if all five conditions are satisfied, then testing is not only permissible, but mandatory since it is the only feasible way of protecting innocent people. Hence, to insure that the original purpose of testing is achieved legislatures must mandate testing for any job which satisfies the five criteria. Executives, as well as workers, in such professions would be tested. Requiring executives to be subject to these tests would insure that they

were vividly aware of the indignities accompanying such testing. They would thus be more likely to conduct testing in a manner sensitive to the interests of workers.

Of course, legislators who use drugs might refuse to mandate testing as a way of hiding their use. If they do, however, voters desirous of protecting themselves from drug-induced employee error could toss legislators out of office during the next election.

Hence, we find a way of providing all the positive benefits of mandatory drug testing while doing our best to insure that workers are not forced to undergo intrusive procedures merely to satisfy the whims of their employers. The public and workers are protected.

## Notes

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1. There have been points in history when, because of unusual conditions, employers were at a decided competitive disadvantage compared to employees -- and the powers that be stepped in to stop workers from exploiting the situation. For example, following the Black Plague, when the workforce in Europe was severely limited, King Edward passed the Statute of Laborers which capped worker's salaries. (Bakaly, C. G., Grossman, J. M. 1989: 3)

2. The Court recently extended the application of the Fourth Amendment so that it is relevant, at least in principle, to mandatory drug testing. However, this is not the Amendment's primary focus. Moreover, the extent to which it is now applicable to drug testing is derivative from the more general Constitutional concern with privacy. That is, it was only after *Griswold*, which first identified the right to privacy, that the courts began to extend the application of the Fourth Amendment. These more general privacy rights I shall discuss shortly.

3. Some of the available tests are extremely accurate. Other versions are notoriously unreliable. Obviously this criterion will be satisfied only if the more reliable forms are used.

4. If there is no reason to believe members of said profession have or will use these drugs, then testing would not only be silly but also a violation of employees' privacy. For, as I have argued, employers cannot intrude into the private lives of employees unless the matter is directly relevant to job performance.

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