Wishful Thinking and Public Policy

Dean Roger I. Abrams*
Wishful Thinking and Public Policy

Dean Roger I. Abrams

Abstract

Wouldn’t it be nice if we could eliminate illegal drug use by American workers?

KEYWORDS: illegal, drug, public
Wishful Thinking and Public Policy

Roger I. Abrams, Dean, Nova Law Center

Wouldn’t it be nice if we could eliminate illegal drug use by American workers? American industry suffers from the same chemical plague that has corroded other institutions in our society. Freeing employees from the debilitating effects of drugs would enhance the productivity of American industry and return our economy to its preeminent place in world markets. It is a very attractive goal. Regretfully, it may all be wishful thinking. There is nothing wrong with wishful thinking, of course. Without it very little good would get done. Goals always start with aspirations. A productive economy, staffed by dedicated men and women physically and psychologically ready to perform their assigned functions, seems a worthy goal by any measure. At some point, however, the focus must turn from the ends to be achieved to how they are to be accomplished. How do we achieve a drug-free workplace? Some have suggested we should conduct mandatory drug tests.

A perfect public policy has yet to be devised, and universal employee drug testing is no exception. Mandatory drug testing does have superficial appeal, much like passing a constitutional amendment prohibiting the sale of intoxicating liquor.¹ Who could be opposed other than a scoundrel or a dope fiend? Some say that such a policy invades our civil liberties,² but is mandatory drug testing any more intrusive than other societal obligations, such as mandatory inoculation of school children³ or selective service induction for young adult males?⁴ The concern

1. U.S. CONST. amend. XVIII.
expressed for privacy is legitimate, but like all civil liberties, this freedom is not without limits.

There is a serious question whether a mandatory and universal drug-testing policy is advisable. The success of the strategy turns on two assumptions: the risk of discovery will deter drug use and use of the tests will rid the workplace only of dangerous or non-productive workers. Both assumptions are questionable. Some non-users may be deterred from experimenting, but if they have not tried the stuff yet it is because of the strength of existing deterrents, such as the criminal law or the fear of self-destruction. Those truly addicted really have little choice but to risk the odds of detection. They may be caught, but non-users may be ensnared as well.

Those who propose mandatory drug testing assume that drug tests will tell us who are drug users with a precision rivaling that of the ancient sages. The problem is that the technology has not progressed that far. Anyone who has been falsely accused by a computer of not paying a bill should appreciate the dangers of misidentification. To lose a job as a falsely accused drug user may stigmatize an unfortunate worker for life. Without confidence in the drug tests, the strategy becomes one of roulette, where the innocent have as much to fear from the process as the guilty.

What then do we do about this societal scourge of drugs? In particular, how can we salvage the productivity of American industry if drug-crazed employees report to work? Perhaps traditional time-tested strategies are best. Employers have always addressed the problem of non-productive employees by exercising their managerial right to discharge. A worker may be separated from her job if she is unable to perform it. That inability may be the result of a variety of causes, including chemical intoxication. Employers need not wait to catch someone under the influence. Employees can be discharged for possession of illegal drugs, whether used or not.

This approach, of course, might not be sufficient when it comes to those few employment situations where a single mistake might prove tragic. We would all want to know that certain employees — those who monitor nuclear reactors and airport landings, for example — are free from even the potential of mistakes. In those areas we might be willing to accept the risk of false positive identifications to insure the true positives are removed from the scene. The drug testing strategy, however, is woefully underinclusive. Drug habits are only one of many personal characteristics that might impact on the job performance of these persons. In most other areas of employment, the drug testing strategy risks being overinclusive. To lump all employees in a single undifferentiated mass in a crusade for productivity ill-serves our national interest. Universal drug testing is not the panacea that some suggest.

We need to address the important issue of worker productivity in a more comprehensive manner. Piecemeal approaches focusing alone on drugs, or decaying technology or union work rules, at best solve only a part of the problem and at worst distract our attention from its full dimension. American ingenuity must be put to work to develop better methods of motivating our workers. In the process of moving towards a more productive employment environment, we will find a better answer than the urinalysis kit.

5. Cf. Wisconsin v. Yoder, 406 U.S. 205, 213-16 (1972) (["T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.").


from her job if she is unable to perform it. That inability may be the result of a variety of causes, including chemical intoxication. Employers need not wait to catch someone under the influence. Employees can be discharged for possession of illegal drugs, whether used or not.

This approach, of course, might not be sufficient when it comes to those few employment situations where a single mistake might prove tragic. We would all want to know that certain employees — those who monitor nuclear reactors and airport landings, for example — are free from even the potential of mistakes. In those areas we might be willing to accept the risk of false positive identifications to insure the true positives are removed from the scene. The drug testing strategy, however, is woefully underinclusive. Drug habits are only one of many personal characteristics that might impact on the job performance of these persons. In most other areas of employment, the drug testing strategy risks being overinclusive. To lump all employees in a single undifferentiated mass in a crusade for productivity ill-serves our national interest. Universal drug testing is not the panacea that some suggest.

We need to address the important issue of worker productivity in a more comprehensive manner. Piecemeal approaches focusing alone on drugs, or decaying technology or union work rules, at best solve only a part of the problem and at worst distract our attention from its full dimension. American ingenuity must be put to work to develop better methods of motivating our workers. In the process of moving towards a more productive employment environment, we will find a better answer than the urinalysis kit.


This important Symposium addresses in more detail the difficult issue of drug testing in the workplace from a variety of perspectives. It demonstrates that reaching a policy on drug testing involves a balancing of conflicting rights, and there is no agreement yet on how the balance should be struck. Although we should certainly try to work towards consensus on what to do about this important problem, that too may be wishful thinking.

Governmental Drug-Testing and the Sense of Community

George Kostopulos

Liberal education is education in culture or toward culture. The linked product of a liberal education is a cultured human being. "Culture" (cultural) means primarily agriculture; the cultivation of the soil and its products, taking care of the soil, improving the soil in accordance with nature. "Culture" means derivative and not chiefly the cultivation of the mind, the taking care and improving of the native faculties of the mind in accordance with the nature of the mind. Just as the soil needs cultivators of the soil, the mind needs teachers. But teachers are not as easy to come by as farmers. The teachers themselves are pupils and must be pupils. But there cannot be an infinite regress: ultimately there must be teachers who are not in turn pupils. Those teachers who are not in turn pupils are the great minds or, in order to avoid any ambiguity it is a matter of such importance, the greatest of minds. Such men are extremely rare.


I.

A wise teacher of mine once had occasion to make these classroom observations about the then-pressing problem of "juvenile delinquency":

People think about it and try to do something about it, but it could very well be that all their thinking and all their devices are absolutely useless. It could be that juvenile delinquency is connected with the deep crisis of our society as a whole. It could be true that this phenomenon is due to a loss of hope in the younger generation, or to the absence of great public tasks which arouse public spirit. Now, if this is so, it is obvious that juvenile delinquency cannot be