Toward a New Federal Right to Privacy

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Abstract

Drug testing in the American workplace is the new panacea.

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Drug testing in the American workplace is the new panacea. Along with the other would-be accoutrements of the “War on Drugs” — increases in criminal penalties, including the death penalty, deployment of military forces in search and arrest activities, and further erosion of the Exclusionary Rule — drug testing offers false promises while doing great injury to civil liberties. Wars and crusades are never kind to individual rights, and when rhetoric is combined with new technologies which are little understood by the public, the damage is compounded. The pushers of drug tests have attempted to portray them as harmless adjuvants to a routine medical examination. They have been described as no more intrusive than passing through an airport metal detector. Policy makers from the President on down exhort the citizenry to help create a “Drug-Free America” by voluntarily urinating into a bottle. They assure us that if we have nothing to hide, there is nothing to fear.

Such blandishments aside, an anonymous personal testimonial recently received by one of the American Civil Liberties Union’s state offices tells quite a different story:

I am a Baltimore County resident and thought I wanted to serve my country until June 4, 1986. On that day I was given a drug test. A drug test you say. Big deal. Well, it was a big deal! I was not informed of the test until I was walking down a hall towards the bathroom with the attendant. I thought no problem. I have had urine tests before and I do not take any type of drugs besides occasional aspirin. I was led into a very small room with a toilet, sink and a desk. I was given a container in which to urinate by the attendant. I waited for her to turn her back before pulling down my pants, but she told me she had to watch everything I did.

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pulled down my pants, put the container in place — as she bent down to watch — gave her a sample and even then she did not look away. I had to use the toilet paper as she watched and then pulled up my pants. This may sound vulgar — and that is exactly what it is . . . . I am a forty year old mother of three and nothing I have ever done in my life equals or deserves the humiliation, degradation and mortification I felt.

Urinalysis as presently practiced by American industry represents, in its very scope, an unprecedented invasion of privacy. It invades privacy not only because of the manner in which specimens are collected as so eloquently detailed by the forty-year-old mother of three, but also because the specimens are then subjected to scrutiny and analysis for the personal, physiological secrets they hold. Today, hundreds of thousands of Americans are being routinely searched in the absence of even the merest suspicion that they are committing illegal acts. And their livelihoods and reputations are, in many cases, falling victim to an imperfect technology.

Other contributors to this symposium have written of the deficiencies inherent in the technology of drug testing. Without belaboring the point, it bears reminding that even the most sophisticated test (Gas Chromatography/Mass Spectrometry) cannot distinguish between casual use and chronic abuse; cannot discover recency of ingestion and cannot measure impairment or even intoxication. The far more commonly used screening tests, like the EMIT kit, confuses codeine with heroin, Advil with marijuana, and the antibiotic Amoxicillin with cocaine. Medical experts caution that testing large, unsusected groups of people for unusual events produces more false positives than true positives and that drug screening should not be used as a “front-line tool” in combatting drug abuse. But the drug testing epidemic continues to spread, and for the employees of private industry there is no end in sight.

On the other hand, government employees have, with few exceptions, prevailed in a number of challenges against random, indiscriminate testing programs. Virtually every court which has considered the issue, on both the state and federal levels, has found that urinalysis is a search and seizure and that fourth amendment standards apply. Furthermore, in the majority of cases decided thus far, the courts have held that a public employee can be required to submit to urinalysis only on the basis of “reasonable suspicion, based on specific facts and reasonable inferences drawn from those facts in the light of experience” that the employee is under the influence of drugs.

Judges have explicitly rejected a variety of employer justifications for testing which fall short of the “reasonable suspicion” standard. In McDonnell v. Hunter the court enjoined the state of Iowa from testing all prison guards in order to discover the few actual drug users:

No doubt most employers consider it undesirable for employees to use drugs, and would like to be able to identify any who use drugs. Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees . . . .

There is no doubt about it — searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III’s men so frequently searched the colonists.) That potential, however, does not make a governmental employer’s search of an employee a constitutionally reasonable one.

In Caruso v. Ward the New York City Police Department sought to persuade the state trial court that random testing would deter the 1200 members of the Department’s Organized Crime Bureau from using drugs. The court was unpersuaded: “Without any direct or even circumstantial proof that a drug problem exists . . . it is difficult to justify random testing as a deterrent when there is little indication that there is any significant drug use to deter.” Nor have the courts ac-

4. 612 F. Supp. at 1122.
5. Id. at 1130.
7. Id. at 795.
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2. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976); Shoemaker v. Handel, 795 F.2d 1136 (D

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A clear consensus is developing among the courts that random drug testing in the public workplace runs afoul of fourth amendment standards of reasonableness, a judgment perhaps most forcefully stated by Federal Judge H. Lee Sarokin in a recent drug testing decision:

If we choose to violate the rights of the innocent in order to discover and act against the guilty, then we will have transformed our country into a police state and abandoned one of the fundamental tenets of our free society. In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.

Paradoxically, private sector employees (except for those working in the city of San Francisco9) are essentially unprotected from indiscriminate drug testing. Some labor unions are effectively opposing drug testing programs, but their members constitute a small percentage of the American workforce. A few state constitutions, most notably California’s, may confer an enforceable right to privacy upon private employees not found in the United States Constitution. Lastly, lawyers around the country are trying to develop other legal strategies to combat abuses of drug testing. But the fact that so few cases have been brought against private companies is a measure of the dearth of viable legal options for wronged employees.

The right to privacy in America today occupies much the same place as did the right to equality in the days before the passage of the Civil Rights Act of 1964. Before 1964, government employers were prohibited from discriminating against employees or prospective employees on the basis of race, religion or national origin, while private

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The right to privacy in America today occupies much the same place as did the right to equality in the days before the passage of the Civil Rights Act of 1964. Before 1964, government employers were prohibited from discriminating against employees or prospective employees on the basis of race, religion or national origin, while private employers could do so with impunity. Under the mounting pressure of the Civil Rights movement, Congress concluded that the strong public policy against racial discrimination would continue to be frustrated unless legislation were enacted which essentially extended the protections of the 13th, 14th and 15th amendments into the private workplace. The historic Civil Rights Act gave racial, ethnic and religious minorities the legal handle they needed to vindicate their right to equality under the law. Only a federal Privacy Act, which gives private employees the right to be free of unreasonable searches and seizures by their employers, will put a halt to the wholesale tyranny of drug testing. Such testing threatens our "right to be left alone," once described by Justice Louis Brandeis as "the most comprehensive of rights and the right most valued by civilized people."11

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