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## Drug Hysteria Causing Use Of Useless Urine Tests

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## **Abstract**

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**KEYWORDS:** urine, test, drug

# Drug Hysteria Causing Use Of Useless Urine Tests

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In the last few years urine testing has hit America like a hurricane. In the end it will probably do more damage than any hurricane that has hit our country.

As drug use has increased and the failure of our nation's drug policy has become more evident, government and employers have groped for an easy solution. The advent of urine tests, marketed as a high-tech, near infallible answer to the problem, is a symptom of our failed drug policy. The American public has been sold a bill of goods by profit-minded test manufacturers and testing labs. In the end we will deeply regret our quick jump to urine tests, as they will cause more problems than they solve.

Other writers in this symposium have examined the serious constitutional and other legal issues raised by urine testing, as well as the technical limitations of urine tests. While I will touch on these issues, this article focuses more on whether there really is a serious drug problem in the workplace, whether urine tests can accomplish what they promise, and what options are available to society as alternatives to urine testing.

## I. Drug Use in America

Drug use in the United States is widespread. Indeed, one could fairly say that drugs are an American way of life. Virtually every household contains the once prohibited alcohol, almost every American needs caffeine to start or get through the day, and every candy store sells tobacco. There are some 150,000 legal drugs in the United States, and many are sold over-the-counter.<sup>1</sup> Americans use drugs to go to

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1. Sandee Burbank, Director, Mothers Against Misuse and Abuse, Mosier, Oregon.



sleep, wake up, lose weight and relieve stress. One over-the-counter drug even promises to "Correctall."

But these are not the drugs which are tied into the national drug hysteria. The drugs our government is at "war" with are the illegal drugs — mainly marijuana, cocaine and heroin. This "war" has made 30 million marijuana consumers, 5 million cocaine users, and 500,000 heroin addicts the "enemy" in a nation at war against itself.<sup>2</sup>

While the national drug mania has been focused on illegal drugs, it is clear that the real problem drugs are the legal ones: alcohol, prescribed medicines, and over-the-counter drugs. The National Institute on Drug Abuse estimates that prescription drugs cause 60% of hospital emergency room admissions for drug overdoses and 70% of all drug-related deaths. Each year 350,000 people die from tobacco, 100,000 die from alcohol (not including automobile accidents), 1,000 die from aspirin, and 15,000 die from prescription drugs. But there has *never* been a death caused by marijuana or long-term chronic marijuana use. It is perhaps the least toxic drug known to man. In the worst year for cocaine deaths there will not even be 1,000 deaths (.0002% of regular users).<sup>3</sup>

In addition, every study on the effects of drugs on the workplace has shown alcohol to be the largest problem. A report by the Bureau of National Affairs found that alcohol accounted for \$30.8 billion in lost productivity.<sup>4</sup> A study by the Research Triangle Institute found that alcohol accounted for \$89.5 billion in lost productivity and that all illicit drugs accounted for \$46.9 billion.<sup>5</sup>

The report of the Bureau of National Affairs made the following findings: absenteeism among problem drinkers is 2.8 to 8.3 times greater than normal; alcoholics have a two to three times greater risk of being involved in an industrial accident; and up to 40% of industrial fatalities and 47% of industrial injuries can be linked to alcohol abuse.<sup>6</sup>

Despite these facts, employers have not even proposed testing their employees for alcohol. They are not requiring their employees to ab-

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2. NATIONAL INSTITUTE ON DRUG ABUSE, HOUSEHOLD SURVEY, DRUG USE IN THE UNITED STATES (1985).

3. NATIONAL INSTITUTE ON DRUG ABUSE, ANNUAL REPORT, DRUG ABUSE WARNING NETWORK (1985).

4. BUREAU OF NATIONAL AFFAIRS, ALCOHOL AND DRUGS IN THE WORKPLACE: COST, CONTROLS, AND CONTROVERSIES (1986).

5. Harwood, *Economic Costs To Society of Alcohol and Drug Abuse and Mental Illness: 1980* (Research Triangle Institute) (June 1984).

6. ALCOHOL AND DRUGS IN THE WORKPLACE, *supra* note 4.



stain from alcohol and become teetotalers. When President Reagan announced the goal of a drug-free workplace he did not remove alcohol from the White House or announce that he would stop serving alcohol at state dinners. This hypocrisy is what makes the war on drugs unrealistic, unbelievable, and unwinnable.

The evidence of an effect on the workplace is very weak for some illegal drugs. For example, at a recent conference on drugs in the workplace sponsored by the National Institute on Drug Abuse (NIDA), government experts were asked if there was any evidence that marijuana adversely effected work performance. With surprising candor the experts replied that there was no evidence.<sup>7</sup> In an article, Dr. Arthur McBay concurred, saying that "little if any scientific evidence links the use of marijuana with significant behavioral impairment."<sup>8</sup>

A study by NIDA of one group of companies went even further. A study in 1979 by Myrick and Basen, entitled "Drug Use in Industry," found that supervisors and other middle-management staff estimated that 15 to 20 percent of their employees were regular drug users, primarily of marijuana. Yet those surveyed, when asked about the impact of drug use on job performance, responded that "drug use either had a positive or neutral effect."<sup>9</sup> Indeed, the report stated that the only way to tell marijuana users from nonusers is by examining their urine.

If we can step away from the hysteria created by the government's drug war, these findings should not be surprising. After all, stress is a leading killer in the U.S. and has a major impact on job performance, and marijuana is a relatively safe way to relieve stress. Moderate marijuana use can thus have some positive effects on work performance.

## II. Urine Testing in the U.S.

Despite these facts, urine testing has taken off in American society. The beginnings on mass urine-testing came when an accident occurred on the aircraft carrier Nimitz in 1981. THC metabolites were found in the blood of some of the servicemen. This received a great deal of publicity. What was not given much attention was that over-

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7. Conference sponsored by the National Institute on Drug Abuse, Bethesda, Maryland, March 6-7, 1986.

8. McBay, *Cannabinoid Testing: Forensic and Analytical Aspects*, LABORATORY MANAGEMENT (June 1985).

9. NATIONAL INSTITUTE ON DRUG ABUSE, PREVENTING DRUG ABUSE IN THE WORKPLACE 5 (1982).



the-counter drugs were found in the servicemen directly involved in the accident. These drugs were the more likely cause of the crash. Nevertheless, urine testing for marijuana has become widespread, while testing for over-the-counter drugs has not occurred.

Indeed, millions of American servicemen, sworn to defend and protect the Constitution against internal and external threats, have had to put aside their constitutional rights to be free from random searches and to not be forced to testify against themselves by providing a urine sample for drug testing. The inconsistency of the defenders of our Constitution giving up their constitutional rights has escaped the attention of most commentators on urine testing.

Urine testing has spread to prisoners,<sup>10</sup> government workers,<sup>11</sup> private employees,<sup>12</sup> and even school children.<sup>13</sup> Various surveys of Fortune 500 companies indicate that about one-third engage in some type of testing, primarily of job applicants.<sup>14</sup>

Testing has become widespread, but can it really accomplish what it promises? Does a positive urine test indicate poor job performance? Or have urine test salesmen pulled a hoax on the American public?

After five years of mass urine testing it has become evident that both false positives and false negatives occur with urine tests. In other words, people who use illicit drugs will not get caught and people who do not use illicit drugs will be falsely accused.

A study by the Centers for Disease Control<sup>15</sup> found that thirteen

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10. *Cook v. Perry*, Civ. Act. No. 82 CV 5133 (Cir. Ct., Dane County, Wis. 1982); *Kane v. Fair*, Civ. Act. No. 136229 (Norfolk, Mass. Aug. 5, 1983); *Jensen v. Lick*, Civ. No. A1-83-113 (D.N.D. Jan. 9, 1984); *Storms v. Coughlin*, 600 F. Supp. 1214 (S.D.N.Y. 1984); *Johnson v. Walton*, Dkt. No. 961-84 RM (Superior Ct., Rutland, Va., Feb. 14, 1985); *Higgs v. Wilson*, No. C83-0256-P(J) (W.D. Ky. Feb. 22, 1985).

11. *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. App. 1985); *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. 5th Dist. Ct. App. 1985); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987).

12. *I.B.E.W. v. PEPCO*, Civ. Act. No. 86-0717 (D.D.C. March 25, 1986); *Railway Labor Exec. Ass'n v. Dole*, No. 0-85-7958 (N.D. Cal. Nov. 1, 1985); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

13. *Anable v. Ford*, Civ. No. 84-6033 (W.D. Ark. July 15, 1985); *Odenheim v. Carlstadt-E. Rutherford Regional School Dist.*, 211 N.J. Super. 54, 510 A.2d 709 (1985).

14. Gampel, *Drug Testing in the U.S.*, in COUNCIL ON MARIJUANA AND HEALTH, *SOCIAL DRUG USE IN SOCIETY* (1985).

15. Hansen, Caudill and Boone, *Crisis in Drug Testing*, 253 J. A.M.A. 2382



labs surveyed produced false negatives 31% of the time. Indeed, all of the tests have cut-off points where a certain percentage of the THC metabolites or other drugs can be in the urine and the test will be a negative one.

Not only can lab inaccuracy cause false negatives, but illicit drug users can mask positive urine samples. The three most common and effective ways of masking a positive urine test are: 1) not giving the first urine of the day; 2) diluting the urine by filling the bladder with a large amount of fluids; and 3) changing the pH of the urine by adding salt or other substances to it. Individuals have placed in their bladder balloons filled with another person's urine. There have even been reports of addicts in treatment centers inserting someone else's urine with a catheter. I have heard several reports from servicemen that a new industry has developed in the military: for \$50 you can purchase a guaranteed clean urine sample.

As a result of some of these techniques, employers are beginning to more closely monitor urine tests. Some companies are now hiring people to "monitor the void." One consultant recommends blocking all the sinks and turning off the water in rooms where testing occurs and having two people watch each person giving a sample. This close monitoring increases the invasion of privacy, which already is pretty dramatic with the testing of bodily fluids.

Another problem is false positives — false accusations of drug use. False positives can be caused by improper lab techniques, mixing up of samples, inhalation of someone else's smoke, tampering with samples, inadequate confirmation testing, and cross-reactions of various non-drugs which test positive as illegal drugs.

Studies show very high levels of false results. The Center for Human Toxicology found a false positive rate of 38%, the New Jersey Department of Corrections found 25%, a 1983 Air Force study found 11.1%, the Armed Forces Institute of Pathology found 49.1%, and the Coast Guard found 58.1% in 1984; the Navy could confirm positives at only a 65% rate in a 1984 study and the CDC study referred to earlier found a 66% inaccuracy.<sup>16</sup>

One problem is a cross-reaction. For example, anti-inflammatory drugs will test positive as marijuana. These drugs include some of

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(1985).

16. See filings by the Syva Company in Government Accounting Office # 2755028.



America's favorites: Advil, Motrin, and Nuprin.<sup>17</sup> The prescription drug fenoprofen (Nalfon) will test positive for amphetamines, barbiturates, benzodiazepines, and menthaqualone. Codeine can test positive for opiates, as can poppy seeds.<sup>18</sup> It is a statement of the inconsistency of our drug policy that there are so many drugs used by Americans that urine tests cannot tell the legal drugs from the illegal ones.

Drug tests are not only highly inaccurate, but also have nothing to do with whether people are capable of doing their jobs. There is no dispute that urine tests are incapable of either determining whether an individual is under the influence of marijuana or other drugs, or differentiating between users and abusers. Since the tests have nothing to do with impairment, they are useless even in jobs that are safety-sensitive, such as bus drivers and airline pilots.

Mass urine testing can have a significant impact on our society. It leads to dramatic erosion of our constitutional protections and makes us more of a totalitarian society than a tolerant society. It is a method of blacklisting which will prove to be as embarrassing as that of the McCarthy era. Millions of people may lose their jobs due to urine tests, adding greatly to our welfare burden.

Urine testing will also worsen the drug problem in the United States. Some people who use the less dangerous marijuana will switch to other drugs, as urine will test positive for marijuana longer (sometimes for over a month). For example, cocaine use can be detected for only two days. Some will switch to alcohol, adding to the largest drug problem in the workplace.

In addition, relations between employers and employees will worsen. There will be suspicion on both sides and employees will file lawsuits challenging the program. Employee assistance programs (EASP's) will be weakened, as they rely on employees to come forward and seek help when they recognize their drug problem. Instead, employees will take precautions to hide their private drug use from employers.

Urine testing can be expensive. Testing one individual can cost over \$150. Toby Cohen estimates that testing each worker in the U.S. only once would cost up to \$27 billion.<sup>19</sup> No one has estimated the cost

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17. Letters from Syva to Clients (January-March 1986) (copies available from author).

18. See *supra* note 17.

19. Cohen, *Drug Use Testing: Costly and Corruptible*, New York Times, Aug. 20, 1986, at 23, col. 2.



of litigation, unemployment, and welfare payments that would also result.

Even if positive test results were used only to force someone into treatment, the testing makes little sense. Most marijuana (and other illicit drug) users are not abusers.<sup>20</sup> They use marijuana occasionally and it does not adversely effect their lives or work. Since people who need treatment are sometimes unable to get it due to the lack of facilities, it makes no sense to force people into treatment for drug problems they do not have.

### III. Other Options

I do not mean to imply that on-the-job impairment is not something to be concerned about, or that it is an unsolvable problem. However, there are many sensible alternatives to urine testing.

In approaching the problem of on-the-job impairment, it must be recognized that the issue is broader than drug use. There are a number of factors other than drug abuse that can effect someone's performance: a poor night's sleep, a hangover, marital problems, stress, and physical or psychological problems.

The most important factor in solving this problem is trained supervisors who are very conscious about how people do their jobs. It is important for supervisors and managers to develop a close and trusting relationship with their employees so that they know their normal behavior. Indeed, a close relationship can result in employees confiding in their manager when a problem develops.

This type of relationship needs to be tied into a non-threatening treatment program. This should be an employee assistance program for drug and alcohol abuse, as well as some type of counseling or psychological program. Employees should know that involvement in this program will not result in loss of employment, but instead will result in support from the employer. This approach is less expensive than mass urine testing and will result in the rehabilitation of highly trained employees, rather than their dismissal.

It is difficult to create this non-threatening situation with our government engaged in a "war on drugs." Obviously it would be easier if drugs, especially marijuana, were not illegal. It is important for an employer to promise confidentiality and, especially, to assure the employee that the police will not be notified.

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20. See DRUG USE IN THE UNITED STATES, *supra* note 2.



In safety sensitive positions where it is imperative that employees not be impaired, it could be worthwhile to employ some type of impairment test. One example is a simulator test. Airline pilots could be required to perform on a flight simulator before they are allowed to fly. Not only would this prevent drug-impaired pilots from flying, it would also prevent pilots with any other type of impairment from flying. Another alternative is a motor coordination test to determine whether an individual's motor coordination is impaired.

Another option is to test for drug impairment instead of drug use. There are two possible impairment tests for marijuana. A saliva test can result in a positive reading for five hours after use and a blood test for THC (as opposed to THC metabolites) will result in a positive reading for about six hours after use.<sup>21</sup>

#### IV. Conclusion

Mass urine testing is a symptom of our failed drug policy. Urinalysis is the same sort of mistake that has been made in drug policy for the last few decades — over-reliance on coercion and under-reliance on reason and fact. In the last twenty years the only two drugs to show consistent declines have been alcohol and tobacco.<sup>22</sup> Tobacco is especially interesting as it is legal, glamorized in advertising, sold over-the-counter and at vending machines, more addictive than heroin, and subsidized by the government. However, since 1965 overall tobacco use has dropped by 25%.<sup>23</sup> The government has engaged in an effective discouragement and education program even though tobacco is legal. If such a program can work with tobacco it can surely work with the currently illicit drugs.

Over the same period of time that tobacco use has been dropping, marijuana use has tripled.<sup>24</sup> The government has attempted to educate the public about marijuana's dangers and discourage its use. But that program has not worked as well because education is inconsistent with a "war" policy. When our government is at war it engages in propaganda more than honest education, and does more harm than good be-

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21. MetPath Labs, Teterboro, New Jersey, Oral THC Test.

22. NIAA, *Epidemiological Bulletin No. 4, Apparent Consumption of Alcoholic Beverages in the U.S.*, ALCOHOL RESEARCH WORLD MAGAZINE, Summer 1984.

23. NATIONAL CENTER FOR HEALTH SCIENCES, NAT'L HEALTH INTERVIEW SURVEY (1986).

24. See DRUG USE IN THE UNITED STATES, *supra* note 2.



cause it loses credibility.

Urine testing is an extension of the "war on drugs" approach. This article has tried to demonstrate that there is no basis for mass urine testing, that urine tests are highly inaccurate and do not show impairment, that urine testing is costly and may make the drug problem worse, and that there are more sensible alternatives to mass urine testing. In this symposium other articles examine the legal issues which make it difficult to institute a urine testing program consistent with the Constitution, laws, and philosophy of our free society.

Whether these facts will result in employers being more sensible and not rushing to institute a urine testing program is doubtful. Our society is currently going through a drug mania which seems to have blinded us from reason and common sense. In the short-term it is difficult to combat this hysteria; in the long-term the mania will subside and employers will be embarrassed that they joined the blind hysteria.

The war on drugs will go down in history as an American folly. The government continues to pursue a policy that cannot work and is willing to waste tremendous resources, undercut our civil liberties, and ruin the lives of millions in the name of the drug war. We will be as embarrassed about this episode as we are about imprisoning Japanese-Americans during World War II and the treatment of black Americans as second-class citizens. Urine testing will be seen as the height of drug war absurdity.

Until that time I favor the type of urine testing that President Reagan submitted to: a program done for public relations purposes only, completely voluntary, with no action taken as a result of a positive test and with no one being told the outcome of the test. If it is good enough for the President, it is good enough for me.