

## TOWARD A NATIONAL POLICY ON DRUG AND AIDS TESTING

Edited by Mathea Falco and Warren I. Cikins.

Washington, D.C.: The Brookings Institution. 1989. Pp. 77.  
\$10.95.

AIDS and drug abuse have become two of the most important issues in politics and public health policy today. One million Americans are estimated to be infected with the AIDS virus, and the U.S. Centers for Disease Control ("CDC") estimate that, by 1993, as many as 98,000 active AIDS cases will be diagnosed per year.<sup>1</sup> Over fourteen million Americans use illicit drugs regularly,<sup>2</sup> and ten to twenty percent of these are believed to be compulsive users (p. 1).

There has been much debate about mandatory testing for AIDS and drug use. AIDS testing involves testing an individual's blood for the presence of AIDS ("HIV") antibodies. Mandatory AIDS testing has been implemented or suggested for prison inmates, insurance applicants, employment applicants, marriage license applicants, and medical patients. Drug testing usually involves testing an individual's urine for the presence of drug metabolites, which are products of the breakdown of the drug in the body. Mandatory drug testing has been implemented or suggested for employees and employment applicants, especially those involved with public safety, law enforcement, and public responsibility.

*Toward a National Policy on Drug and AIDS Testing* grows out of two conferences sponsored by the Brookings Institution that dealt with drug and AIDS testing.<sup>3</sup> This brief volume contains four articles that explain the major legal and political issues, medical and public health issues, private sector viewpoints, and public policy implications of mandatory AIDS and drug testing. The first article, by Mathea Falco,<sup>4</sup> attempts to synthesize the discussions at both conferences. Articles by June E. Osborn, Russel Iuculano, and Norman Zinberg summarize the concerns of participants in specific panel presentations that were made at the first conference.

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1. *From the Centers for Disease Control*, 263 JAMA 1477 (Mar. 16, 1990).

2. According to James O. Mason, Assistant Secretary for Health, in *From the Assistant Secretary for Health*, 263 JAMA 494 (Jan. 26, 1990).

3. Washington, D.C., Oct. 20-21, 1987; Racine, Wis., Mar. 8-10, 1988.

4. Formerly Assistant Secretary of State for International Narcotics Matters, 1979-1981.

June Osborn<sup>5</sup> summarizes the panel discussion on the medical considerations of AIDS testing, and briefly reviews the medical and public health facts about AIDS. The medical panel concluded that widespread testing for either AIDS or drug use would be exorbitantly expensive, unproductive, and possibly damaging, if not pursued with clear goals in mind. Possible goals included modifying the behavior of individuals infected with AIDS or at risk for AIDS, providing treatment for drug abusers, and limited epidemiologic analysis of test results (p. 26).

Osborn notes that mandatory testing programs for AIDS and drug use are quite different, even though they raise similar issues of privacy, cost, and effectiveness. A single positive AIDS test has lifelong implications, while a positive drug test only reveals a transient condition that does not necessarily indicate chronic drug abuse (p. 28).

The life expectancy after symptoms and diagnosis of AIDS rarely exceeds two years (pp. 34-35). Although life-prolonging treatments such as AZT (azidothymidine) are available, no "cure" for AIDS is currently foreseeable. AIDS can only be transmitted by sexual contact or contact with infected blood, and not through casual contact, intimate nonsexual contact,<sup>6</sup> or insect bites (pp. 33-34). Thus, its spread can be controlled by changing the behavior of infected individuals, and through public education about preventing infection.

The medical panel agreed that a mandatory AIDS testing program would probably be counterproductive. Mandatory testing and public anxiety deter high risk individuals from seeking testing or counseling (pp. 26-27).<sup>7</sup> The panel also agreed that voluntary AIDS testing must be accompanied by counseling. Counseling and behavior changes are imperative not only for those testing positive, but also for those testing negative who are still at risk for AIDS. The biggest obstacle to voluntary testing is an irrational fear of contagion, which can lead to discrimination against and harassment of AIDS victims in health insurance, employment, housing, school, health care, and dental care. Public education is necessary to counter these unreasonable fears (pp. 36-37).

Osborn highlights several key elements of a successful voluntary AIDS testing program: (1) informed consent of the subject; (2) counseling before and after the test by trained professionals; (3) ready availability of the test, including convenient locations, reasonable cost, and

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5. Dean of the School of Public Health, University of Michigan.

6. Intimate nonsexual contact includes contact between AIDS patients and their family members, who share toilets, cups, utensils, and kisses (p. 33).

7. Note that mandatory testing actually may not reach those at highest risk for AIDS. For example, pre-marital testing will reach neither unmarried intravenous ("IV") drug users nor homosexuals. Pre-insurance testing will not reach poor, unemployed IV drug users.

shortened waiting periods for results; and (4) reliability—the HIV screening test is fairly accurate, but some false positives are inherent in any diagnostic test (pp. 37–38).<sup>8</sup>

Osborn notes that in a few exceptional circumstances, such as homosexual rape in prison, a clear “need to know” may warrant involuntary testing. Osborn also notes that some elective surgery might be included in this testing category, but that “universal precautions” against contact with blood should protect workers in hospitals and medical offices (p. 39).

Finally, Osborn states that drug use and AIDS have become closely linked; over eighty percent of women and over ninety percent of children with AIDS in the United States became infected with the HIV virus through intravenous (“IV”) drug use (p. 32). In New York and New Jersey, sixty to eighty percent of drug addicts test HIV positive. IV drug use is the key pathway for broadening the AIDS epidemic (p. 41). Despite this correlation, very little has been done to prevent the transmission of AIDS through drug use. Efforts to provide clean needles have been blocked by protests against “condoning” IV drug use. Funding for drug treatment programs has not increased in the last decade (p. 42). Even drug addicts who desire treatment must wait six months to over a year before being admitted to a program (p. 67). Clearly, public policy in this area needs effective, pragmatic change (p. 42).

Russel Iuculano<sup>9</sup> outlines the panel discussion on private sector concerns about drug and AIDS testing, which included the viewpoints of insurance companies, corporate employers, and labor unions.

Insurance companies want to use mandatory AIDS testing to evaluate applicants' risk of AIDS, just as they evaluate the risk of other diseases through physical examinations and testing. They feel that an HIV positive applicant presents an unacceptably high insurance risk.<sup>10</sup> Insurers argue that prohibiting pre-insurance AIDS testing is unfair to low-risk policy holders who must subsidize coverage for AIDS patients, and also unfair to applicants with other diseases who are denied coverage

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8. False positives are inherent in diagnostic tests, regardless of how well they are performed. Note that, statistically, the number of false positives is greater when a lower risk population is tested, and false positives may far outnumber the true positives. A positive AIDS screening test is confirmed with a repeat screening test and a Western blot test. The accuracy of the Western blot is also dependent on the testing laboratory. Naturally, if an individual is notified of a false positive result before confirmation, there will be severe emotional and psychological consequences, especially if the test result is revealed to employers or associates (pp. 38–39).

9. Senior Counsel, American Council of Life Insurance.

10. One analysis finds that an HIV positive person is 26 times more likely to die within seven years than a non-infected person, all other factors being equal (p. 48).

(pp. 47-48).

Opponents of mandatory testing are concerned that irrelevant information about lifestyle and sexual orientation may become a basis for discriminatory denial of health insurance. They are also anxious about the insurance industry's ability to protect the secrecy of AIDS test results (pp. 45-46). Jeffrey Levi<sup>11</sup> states that economic arguments for testing are more convincing for life insurance than for health insurance. Positive HIV tests are often used as the basis for denying health coverage entirely, thus denying AIDS victims access to quality health care. Levi advocates the establishment of health insurance risk sharing pools for all uninsurable persons. He points out that private health insurance is not only a business; it also has a social responsibility to provide access to adequate health care (p. 48).

The insurance industry counters such concerns by noting that health insurance is not an entitlement. They agree that states should establish risk sharing pools for all uninsurable persons, but would prefer that the funding come from state sources, or at least from tax-deductible assessments on insurance companies (pp. 49-51).

Iuculano briefly touches on AIDS testing in the workplace. Most employers allow HIV positive individuals to continue to work as long as they can (p. 14). Some states prohibit pre-employment AIDS screening. Federal and state statutes prohibiting discrimination against handicapped persons have also been interpreted to protect HIV positive persons (pp. 57-59).<sup>12</sup>

Many private companies require pre-employment and on-the-job drug testing. Peggy Taylor of the AFL-CIO<sup>13</sup> is not opposed to pre-employment drug screening, provided that companies use reliable tests and qualified laboratories (p. 52). Taylor feels that most employee groups would not object to drug testing after a "reasonable suspicion" of drug use based on an unexplained, measurable work impairment. She feels that random or regular testing without reasonable suspicion is inappropriate (p. 53).

Taylor states that clear legislative guidelines on the circumstances for drug testing are necessary.<sup>14</sup> She criticizes random drug testing as the most "egregious" kind of testing, because of its damaging effect on

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11. National Gay and Lesbian Task Force.

12. *Shuttleworth v. Broward County*, 41 Fair Empl. Prac. Cas. (BNA) 406 (S.D. Fla. 1986); *Cronin v. New England Tel. Co.*, 41 Fair Empl. Prac. Cas. (BNA) 1273 (Mass. 1986).

13. Deputy Director of the Legislative Department of the AFL-CIO.

14. For example, "reasonable suspicion" must be defined. Also, on-the-job accidents that require post-accident testing should be clearly defined in advance (pp. 53-54).

morale and its potential for harassment of selected employees (p. 54). In contrast, Philip Shellhaas<sup>15</sup> feels that people in certain occupations should not expect privacy, and should simply expect random drug testing to be a part of their job (p. 55).

Taylor emphasizes that key procedural protections are necessary in any drug testing program, namely, strict confidentiality and full disclosure of all testing procedures and employees' rights, including the right to contest the result. Most importantly, any employee testing positive for drug use should be given treatment and rehabilitation (p. 55).

Norman Zinberg<sup>16</sup> reviews the public policy implications of mandatory testing.<sup>17</sup> He outlines conflicting approaches to preventing AIDS and drug use. One approach encourages individuals at high risk for AIDS to adopt safer behavior. This nonjudgmental approach also recognizes the varying addiction potentials of different drugs, and advocates using drugs and intoxicants responsibly. The second approach emphasizes total abstinence from non-marital sex and drugs through pro-family and "Just Say No" messages.<sup>18</sup> Proponents of this moralistic approach frequently oppose educational efforts that promote use of condoms or clean needles (pp. 60-61). Ironically, advocates of the "Just Say No" approach often condone alcohol and tobacco, the most common physically addictive substances in use.<sup>19</sup>

Zinberg, like Osborn, emphasizes the need for public education about the means of transmitting AIDS. Zinberg also feels that the public should be informed that different drugs cause different levels of addiction,<sup>20</sup> and that even in the highest risk category, a fair percentage of

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15. Program Director, IBM Corporation.

16. Harvard University, Department of Psychiatry.

17. Unlike the other articles in the book, Zinberg's article reflects his own point of view (p. 60).

18. This approach is based on the old stepping stone theory of drug use—that even mild marijuana users are destined to become heroin users—which remains current despite being disproved many times (p. 63).

19. The 1988 national U.S. household survey showed that 14.5 million people were "current users" of illicit drugs, while 106 million people were "current drinkers." *From the Assistant Secretary for Health*, 263 JAMA 494 (Jan. 26, 1990). Using data from the 1988 Behavioral Risk Factor Surveillance System, the proportion of persons who "currently smoked" was estimated to range from 18.1% in Utah to 37.9% in Kentucky, with a median of 26.2%. These figures correspond to a total of 65 million "current smokers" in the United States. *From the Centers for Disease Control*, 263 JAMA 207 (Jan. 12, 1990). See *infra* note 20 for comparison of addictiveness.

20. Over 90% of individuals who smoke tobacco for more than a month will become addicted. Five to 9% of alcohol drinkers become addicted. In comparison, less than 1% of regular marijuana users become addicted. Figures for cocaine and opiates are difficult to assess; some experts estimate that 10 to 20% of occasional cocaine users become addicted, and the percentage is probably less for opiate users. Another interesting statistic is that in 1986 there were 600 cocaine-related deaths, but more than 300,000 tobacco-related deaths (p. 66).

drug users recover. For example, middle-class cocaine addicts respond well to treatment programs, when they can afford them. Unfortunately, poorer addicts cannot afford treatment programs and are less motivated to seek help (pp. 66-67). Zinberg notes that mandatory drug testing is aimed mostly at employees, and thus does not reach those at highest risk, the poor and unemployed. Like Osborn, he advocates a more pragmatic public policy. One change that could successfully break the link between IV drug use and the spread of AIDS is a program to distribute sterile needles or needle cleaning kits (p. 69). While this program would not affect drug use, it would decrease AIDS transmission by decreasing the exchange of infected blood among IV drug users.

Zinberg also discusses the constitutional dimension of mandatory testing (pp. 72-74). The most important issue is the right to privacy under the Fourth Amendment. There is also concern that individuals' equal protection guarantees might be violated.<sup>21</sup> Complicated legal issues may arise from mandatory testing. For example, if certain behavior by an HIV positive person is illegal, what is the responsibility of that person to ascertain his or her HIV positivity? Can a positive drug test be used in prosecuting an individual? Other consequences of mandatory drug testing may include the corruption of test overseers and frequent falsification of test results (p. 71).

Zinberg lists three variables in the use of intoxicants: pharmacological properties of the drug; the values, attitudes, and personality of the user; and the influence of the physical and social setting in which use takes place (p. 75). The social setting of drug use is the least understood of these three. Some research has been done linking personality attributes with drug use, but much more is needed. In light of these factors, Zinberg feels that a prohibitionist attitude is not a realistic method of preventing drug abuse and the spread of AIDS. He suggests a more moderate approach based on current concerns. For example, the present social emphasis on health and nutrition might encourage decreased drug use (pp. 75-76). Zinberg emphasizes the need to consider public policies on drugs and AIDS not just in relation to mandatory testing, but more importantly, in relation to the great need for public education along with counseling and treatment of those at risk (p. 77).

The issue of AIDS testing has not yet been addressed by the U.S. Supreme Court. Since this book has been published, the Court has considered the issue of drug testing in relation to Customs officers and

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21. In addition to the usual discrimination and equal treatment issues, one unique inequity of drug testing is that some individuals retain higher concentrations of drug products than others do. Thus, of two individuals ingesting the same amount of drug, one may be caught and punished while the other escapes detection (p. 73).

railroad workers. In *Skinner v. Railway Labor Executives' Association*.<sup>22</sup> the Court considered the constitutionality of a Federal Railroad Administration ("FRA") regulation that required drug and alcohol testing of breath, blood, and urine samples taken from the train crew after specified types of accidents. The challenged regulation also permitted railroads to require alcohol or drug testing after specified rule violations or upon a supervisor's "reasonable suspicion" of impairment. The Court held that a breath or blood test "must be deemed a Fourth Amendment search" because of its intrusion into "bodily integrity."<sup>23</sup> Similarly, it found the collection procedure for a urine sample to be a Fourth Amendment search because it "intrudes upon expectations of privacy that society has long recognized as reasonable."<sup>24</sup>

Despite this reasoning, Justice Kennedy, writing for the Court, held that the FRA-required testing in this case was reasonable because "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety . . . 'presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements.'<sup>25</sup> The Court's conclusion rested on the presumptions that: (1) "covered employees are engaged in safety-sensitive tasks";<sup>26</sup> (2) "the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them";<sup>27</sup> and (3) "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety."<sup>28</sup>

In his dissent, Justice Marshall describes the decision as the "deepest incursion yet into the core protections of the Fourth Amendment" regarding the search of one's person.<sup>29</sup> He objects to applying a "special needs" balancing analysis "to authorize searches of the human body unsupported by any evidence of wrongdoing."<sup>30</sup> He notes the particular invasiveness of the FRA procedure,<sup>31</sup> and warns that the FRA regulations "appear to invite criminal prosecutors" to use the test results for

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22. 109 S. Ct. 1402 (1989).

23. *Id.* at 1412.

24. *Id.* at 1413.

25. *Id.* at 1414 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874-75 (1987)).

26. *Id.*

27. *Id.* at 1415.

28. *Id.* at 1418.

29. *Id.* at 1425.

30. *Id.* (emphasis in original).

31. Employees must provide the urine samples while under direct observation. *Id.* at

criminal investigations and trials."<sup>32</sup>

In *National Treasury Employees Union v. Von Raab*,<sup>33</sup> the Court considered the constitutionality of a U.S. Customs Service program requiring a urine drug test from employees seeking transfer or promotion to positions involving drug interdiction, carrying firearms, or handling "classified" material. The Court believes that this situation is also a "special need."<sup>34</sup> The Court states that "the Government's need to conduct the suspicionless searches required by the Customs program outweighs the [diminished] privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms."<sup>35</sup> The Court also relies on a "notice" rationale, stating that "every employee who seeks a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must follow in administering the test."<sup>36</sup>

The Supreme Court also reviewed the issue of drug testing by a private company. In *Consolidated Rail Corporation v. Railway Labor Executives Association*,<sup>37</sup> the Court held that Conrail's decision to include drug testing in routine physical examinations, which was made without consulting the labor union, was arguably justified by the implied terms of their collective bargaining agreement. In summary, the Supreme Court has favored mandatory drug testing for persons it considers to be safety-sensitive personnel. In the above cases, however, the circumstances triggering drug testing were clearly defined. The Court has not yet considered the issue of random testing, which is a much more invasive type of drug testing program.<sup>38</sup>

*Toward a National Policy on Drug and AIDS Testing* clarifies several of the issues that are at the heart of the debate on testing policy: first, the information mandatory testing will actually provide; second, the goals for such a testing program; and lastly, whether testing will really aid us in attaining those goals. Tests actually give us quite limited information.

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32. *Id.* at 1431.

33. 109 S. Ct. 1384 (1989).

34. *Id.* at 1390-91.

35. *Id.* at 1392. However, Justice Scalia states in his dissent that "the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use," because neither frequent use nor connection to harm has been demonstrated. *Id.* at 1398. Even the Commissioner of Customs believes the Customs work force is largely drug-free. *Id.* at 1400. Scalia believes the risk of personal injury from carrying a gun while intoxicated is a more effective deterrent of drug use. *Id.* at 1399.

36. *Id.* at 1391.

37. 109 S. Ct. 2477 (1989).

38. The Supreme Court recently denied certiorari to *Guiney v. Roache*, which challenged a Boston police department rule requiring random drug testing of all personnel, including civilians. 873 F.2d 1557 (1st Cir.), *cert. denied*, 110 S. Ct. 404 (1989).

An AIDS test cannot tell us when a person became infected, nor can it predict when this person will develop AIDS symptoms. Drug tests provide information on drugs used up to a week before the test,<sup>39</sup> but they do not reveal whether the person is an occasional user or a chronic abuser, nor do they reveal the degree of current impairment the person suffers from drug use. Test results are not one hundred percent reliable; careless or negligent laboratory work leading to inaccurate results has been a serious problem that would be exacerbated by an increased demand for testing.<sup>40</sup> Even when a test is performed perfectly, false positives will occur.

Diverting resources from voluntary testing programs and drug treatment programs into widespread mandatory testing will be at best ineffective, and at worst, damaging.<sup>41</sup> Mandatory pre-marital AIDS testing will not reach those at highest risk for AIDS. Mandatory drug testing in the workplace will not reach those at highest risk for drug use: the poor and unemployed. Would mandatory testing deter drug use? A massive random testing policy, the most invasive type of testing, might. However, it raises serious constitutional questions and is not likely to have a deterrent effect on chronic, addicted users. Would mandatory testing deter the spread of AIDS? Most emphatically, no. Only voluntary changes in the behavior of high risk individuals and HIV positive individuals can prevent the spread of AIDS. Criminalizing the transmission of AIDS is not a solution—how can we effectively punish a person who is already facing an unpleasant death from AIDS?

Any testing program will be ineffective unless combined with counseling and treatment. From a medical point of view, the most pressing needs are for public education, professional AIDS counseling, and drug treatment programs. The debate about mandatory testing must not obscure these basic issues. This concise volume does a good job of showcasing the primary issues arising from mandatory testing for drug use and AIDS. It should be required reading for anyone who is involved in formulating a policy on drug or AIDS testing, and makes excellent reading for anyone generally interested in public health.

*Li-Hsien Rin-Laures*

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39. Cocaine and amphetamines are difficult to detect after 48 hours; opiates can be detected two to four days after use; marijuana can be detected for a week after use (p. 7).

40. For example, in 1981 the U.S. National Institute of Health had to reverse positive drug test results for a number of its personnel, because of sloppy work in one of its labs (pp. 6-7).

41. When Illinois began mandatory AIDS testing for marriage licenses, the Cook County testing facility shut down because it was overwhelmed by the demand for tests, thereby making voluntary testing unavailable to high risk groups (p. 10).

