

minutes to use the toilet! The arbitrator was, I think, as dumbfounded as I was and did not credit that preposterous, obviously fabricated story. My point is that no arbitrator should credit ridiculous testimony, testimony that would never otherwise be credited, just because it arises within the context of a highly emotional drug case.

Finally, I would urge that you keep reminding yourselves of what we all know is at issue in most drug-testing cases: the very narrow question of whether or not there is just cause to discipline or discharge an employee. Your obligation as arbitrators is to tell the parties that the contract does or does not permit the action in question, and then to explain why.

Ultimately, companies and unions are going to have to solve the drug-testing problem, as they see fit, at the bargaining table. What may be agreed upon in negotiations may not have all the components of a perfect drug-testing program. It may not meet my standards; it may not meet yours. But with all due respect, giving the parties your personal views on what they should have done or might have done to better address the problem is likely to complicate further an already complex area.

After much thought, I decided that my final words to you should be no different from my final words to the employer groups I often speak to on this subject: Common sense goes a long way in this area. In most cases, doing the fair thing, doing the reasonable thing, taking into account all the relevant circumstances will probably serve all concerned quite well.

### III. DRUG ABUSE IN THE WORKPLACE: ARBITRATION IN THE CONTEXT OF A NATIONAL SOLUTION OF DECRIMINALIZATION

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Most of the current literature on drug abuse explicitly works from the premise that we are experiencing a new and explosive drug "epidemic" (as it is frequently described), which will corrode the American work force and seriously undercut its productive capacities. Articles on drug abuse in the workplace quote estimates that industry is sustaining annual productivity losses

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and increased health costs that range from \$25 billion to \$70 billion.<sup>1</sup> Predictions are that if present trends continue, drug users will be an ever-increasing portion of the total population.<sup>2</sup> This is especially startling because at least one report says that 60–80 percent of Americans are using a psychoactive substance at home or at work.<sup>3</sup>

It may be important to step back from these common assumptions of an impending doom and “crisis” in order to view the problem from a larger perspective. The thesis of this paper is that such a perspective will reveal that there are deep strains of ambivalence and confusion that plague the nation’s approach to drug abuse (and thus arbitration), and prevent a de-emotionalized approach toward a fresh program.

First, the very breadth in the range of estimates about the impact of drug use in the workplace suggests the high degree of guesswork underlying the reports. Some of the differences between the reports result from researchers’ use of different measures and criteria. The most probable explanation, however, is that the bulk of the drug-using population is “underground” and not available to researchers, and thus the characteristics of this population, especially its employment status, are derived through much speculation. Further, the recent reports that drug use is on the increase do not convey information as meaningful as one might think; studies with a longer time frame generally report that the use of some drugs waxes and wanes over time, particularly as word spreads among users about its hitherto unknown dangerous side effects. Young people, for example, appear to be using marijuana less but drinking alcohol and smoking cigarettes more. Moreover, throughout our history, periodic panics about drug use have, to some extent, been driven by the association of certain drugs with aliens and ethnic minorities.<sup>4</sup>

This paper concentrates primarily on drugs which have the capacity to alter consciousness, perception, or emotions and which are obtained illegally, without medical authorization (e.g.,

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<sup>1</sup>Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 *Lab. L.J.* 42, 47 (1985) (\$25 billion); *Time* (Jan. 27, 1987) (\$33 billion); *Wall Street J.* (Feb. 27, 1986) (\$70 billion).

<sup>2</sup>*Alcohol and Drugs in the Workplace: Costs, Controls, and Controversies*. A BNA Special Report (Washington: BNA, 1986), 10–12.

<sup>3</sup>Hartsfield, *Medical Examinations as a Method of Investigating Employee Wrongdoing*, 37 *Lab. L.J.* 692 (1986).

<sup>4</sup>Musto, *The American Disease: Origins of Narcotics Control* (New Haven: Yale Univ. Press, 1973).

cocaine, heroin, marijuana, LSD, amphetamines, and depressants). Although such drugs have been the focus of recent public clamor, in objective terms they may pale in comparison with the widespread and deleterious impact of the legal drugs, alcohol and nicotine, in terms of the proportion of the working population affected, loss in productivity, accelerated mortality, and attendant health costs.

Some illegal drugs may be implicated in industrial accidents that imperil workers, but we now know that the passive inhalation of nicotine imperils the health of even nonsmoking workers. Indeed, by a number of measures, one could label alcohol as the most dangerous drug in terms of threats to the workplace. There are, however, no current calls for regular testing for alcohol consumption, despite the fact that tests for alcohol impairment exist, while there is strong doubt of such tests for illicit drug use.<sup>5</sup> When one adds alcohol to the financial estimates of the loss in productivity, the figure rises from \$70 billion for illicit drugs to \$140 billion.<sup>6</sup> While illegal drug use is estimated to affect 2–5 percent of the work force, serious alcohol consumption is thought to affect at least double that number of persons, namely, 10 percent.<sup>7</sup> Alcohol is the drug most present in negligent drivers in auto accidents, and one would therefore suppose in industrial accidents, where a similar control over mechanical operations may be needed. Indeed, heroin is one drug unlikely to be involved in industrial accidents because at the peak “high” the user (if he has not progressed to a state of tolerance) is in a deep stupor and totally immobilized. By contrast, alcohol and nicotine consumed intensively enough and over a sufficient period of time can be fatal.

While research on marijuana has produced some evidence of negative side effects, no one has claimed that the drug is lethal. Newspapers continue to write stories about persons dying from a heroin “overdose.” One report, however, cites a number of studies done on monkeys which show that the quantum of heroin typically used by street addicts in New York City (which has a high proportion of addict deaths) would have to be increased 40–50 times to effect death. Addicts in England, where the drug

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<sup>5</sup>Denenberg and Denenberg, *Employee Drug Testing and the Arbitrator: What Are the Issues?* 42 Arb. J. 19, 27–28 (1987).

<sup>6</sup>Nation's Business (Oct. 1986).

<sup>7</sup>Drug Abuse—The Workplace Issues (Chicago: AMA Membership Publications Division, 1987), 6.

is administered medically in clinics, do not expire on doses far stronger than those used by the typical New York City addict. What then is hypothesized as the cause of the New York deaths? The answer is the use of heroin along with some other depressant, especially alcohol.<sup>8</sup>

None of these points is raised to suggest that illegal drugs with the potential for addiction are not dangerous or do not have profound destabilizing effects on the health and social adjustment of the addict. They suggest only that our current drug "panic" may be too heavily generated by the high visibility of persons discovered to be drug users (e.g., football and baseball stars), or by politicians who recruit public support by honestly, but naively, calling for simplistic "crackdowns" and "wars" on drugs. The sequence of responses by the Reagan administration deserves attention. Nancy Reagan took up the "drug problem" only after the media jibed at her for being overly concerned with the White House decor and her personal wardrobe. The President has since issued an executive order requiring widespread drug testing of federal employees without any prior study showing that drug use was especially rampant in that sector of the work force.

The drug phenomenon frightens most of the public, because of its association with a total loss of control and corruption of the nation's youth. Those fears prevent development of rational and clear-headed policies to cope effectively with many of the manifestations of the problem.<sup>9</sup> Thus, extreme polarities in thinking range from those who see the drug user as a "sick" person in need of a cure to those who appeal for quarantine of all addicts and for an increase in the criminal penalties for drug traffickers to life imprisonment or death.

This confusion and the absence of any consistent national policy are reflected in the way in which we approach drug use in the workplace. While illegal drug use by employees has been uncovered by hundreds of employers, they rarely, if ever, turn such evidence over to the police for further investigation or prosecution. National legislation now requires employers not to hire aliens who are in the country illegally and thus to assist in the enforcement of immigration laws, but no law requires employers to report violations by employees of laws against drug use.

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<sup>8</sup>Brecher, ed., *Licit and Illicit Drugs*, (Boston: Little Brown & Co., 1972), 101-115.

<sup>9</sup>See Zinberg and Robertson, *Drugs and the Public* (New York: Simon & Schuster, 1972).

Such inconsistency and ambivalence are reflected in arbitral decisions. Despite the fact that drug use has become a matter of active public concern, at least in terms of attention from politicians and the media, arbitrators in reported decisions set aside employment discharges in two-thirds of cases from 1973 to 1982 and in slightly more than half the cases (25 of 46) from 1980 to 1985.<sup>10</sup>

A major source of the divergence in these arbitral decisions stems from one facet of our public policy, namely, the decision to criminalize some forms of drug use. The typical standard an employer must meet in sustaining a discharge is to prove the facts supporting the action by a "preponderance of the evidence." In cases where an employer charges the employee with conduct that would constitute a crime, some, but not all, arbitrators escalate the level of proof to that which is "clear and convincing" or "beyond a reasonable doubt."<sup>11</sup> Such an increase in proof is justified on the ground that charges of a criminal nature create a greater stain on an employee's work record and future employment prospects. However, the result in drug cases is that the employer will often be unable to sustain the higher burden of proof, given the difficulty of securing evidence of typically secretive drug activity. Thus, we may have the anomaly that the employee who is insubordinate to a supervisor or frequently late can be more easily dismissed than the employee operating heavy equipment and using drugs covertly.

Drug testing is another case in point. A urinalysis test can discover traces of drugs like marijuana, cocaine, and heroin in an employee's system. The test has been criticized on a number of grounds, including an alleged error rate of 5-10 percent. In gross statistics this rate would appear to establish a fairly reliable measure, but it gives little solace to the employees in that 5-10 percent who are incorrectly labeled drug users. The error rate can be higher if the test is administered and analyzed by companies that lack tight procedures for reducing it. Few states license drug-testing companies and thus no standards are imposed on their procedures. The error rate can be reduced by a confirmatory test, but this has the drawback of being much more costly. Moreover, the claim has been made (and sustained by

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<sup>10</sup>Geidt, *Drug and Alcohol Abuse in the Workplace: Balancing Employer and Employee Rights*, 11 *Employee Rel. L.J.* 181, 193 (1985).

<sup>11</sup>Hill and Sinicropi, *Evidence in Arbitration*, 1st ed. (Washington: BNA Books, 1980) 10-13.

arbitrators) that, since the test shows the use of drugs in the past, sometimes extending over four to five weeks, the employer has no evidence that the employee used drugs on the job or, more specifically, that there was any impairment in the performance of duties.<sup>12</sup> This claim has been sustained even when testing of an employee immediately followed an accident.<sup>13</sup> Moreover, test results can be subverted by an employee handing in "clean" urine from another person, but the antidote to this deception, namely, random, unannounced testing or watching an employee urinate, may invite objections of undue invasions of privacy.

Other means of detecting drug users have certain limitations. Polygraph tests have been used to identify drug users.<sup>14</sup> Such testing is, however, subject to similar claims of unreliability that are made against urinalysis, and approximately 27 states have passed laws which restrict or prohibit employer reliance on them.<sup>15</sup> The deployment of undercover agents is expensive, and their use as witnesses in arbitration ends any further usefulness as informers. Moreover, arbitrators disagree over the weight they assign to an undercover agent's testimony.<sup>16</sup>

Some drug use will evidence itself in bizarre behavior. Similarly, the use of excessive amounts of alcohol is often very visible and impairment can be measured in a simple breathalyzer test. However, other drug use (e.g., marijuana) may have a subtle and important impact on motor control, but may not be evidenced by grossly irrational conduct or very visible loss of control.

Compounding the difficulty for employers in getting adequate evidence of drug impairment from observation by supervisors has been the wide divergence between arbitrators in the weight given to such reports. Two arbitrators rejected the observations of slurred speech, unsteady walk, or glassy eyes by lay supervisors as too equivocal to qualify as definitive evidence of drug or alcohol intoxication.<sup>17</sup> They required blood, breath, or urine tests. However, another arbitrator rejected a test showing a blood alcohol level of 0.44 percent because the supervisor and

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<sup>12</sup>*Boone Energy*, 85 LA 233 (O'Connell, 1985).

<sup>13</sup>*Georgia-Pacific Corp.*, 86-1 ARB ¶8155 (Clarke, 1985).

<sup>14</sup>*Drayton v. City of St. Petersburg*, 477 F. Supp. 846 (M.D. Fla., 1979).

<sup>15</sup>Lehr and Middlebrooks, *Work-Place Privacy Issues and Employer Screening Policies*, 11 *Employee Rel. L. J.* 407, 413 (1985).

<sup>16</sup>Denenberg, *The Arbitration of Alcohol and Drug Abuse Cases*, 35 *Arb. J.* 16 (1980).

<sup>17</sup>*Park Haven Care Center*, 79-2 ARB ¶8328 (1979).

the attending physician did not report any visible external signs of inebriation.<sup>18</sup> Even the courts have been split on the function of observation in deciding whether drug testing of public employees can ensue at all. Some courts require some external observation of disrupted job performance that satisfies at least the "reasonable suspicion" threshold in Fourth Amendment terms before allowing a drug test, and others allow uniform testing of employees without prior subjective evidence of impairment.<sup>19</sup>

Arbitrators have also differed in the remedies which they think are appropriate once drug use on the job is proven. Some permit discharge, but others think some form of trial rehabilitation is necessary.<sup>20</sup> Indeed, arbitrators have been chided that it is inappropriate for them to step from their role of interpreting the contract into that of "therapist" at the remedial stage in chemical abuse cases.<sup>21</sup>

Another major impediment to arbitration as a vehicle for dealing with drugs in the workplace is just on the horizon. Commentators are pointing to a host of issues involving statutory rights that drug testing or the reliance on its results may entail.<sup>22</sup> The Rehabilitation Act of 1973 applies to private employers who receive federal government contracts or federal financial assistance. Drug users are protected under the Act from discharge unless the employer can prove that the drug use prevents the person from performing the duties of the job or constitutes a direct threat to property or safety.

It has been speculated that Title VII of the 1964 Civil Rights Act, which prohibits employment discrimination on the basis of race or national origin, may be implicated. That statute prevents an employer from penalizing an employee from a protected group that is adversely impacted by a screening measure, unless the employer can show a business necessity for the use of the measure. Minority persons in some communities seem to con-

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<sup>18</sup>*Northrop Worldwide Servs.*, 64 LA 742 (Goldstein, 1975).

<sup>19</sup>*Security & Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984) (reasonable suspicion required); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (uniform testing allowed without reasonable suspicion).

<sup>20</sup>Denenberg, *supra* note 16.

<sup>21</sup>Bornstein, *Drug and Alcohol Issues in the Workplace: An Arbitrator's Perspective*, 39 Arb. J. 19 (1984).

<sup>22</sup>Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 Employee Rel. L.J. 422 (1985).

stitute a disproportionate segment of the persons dying from AIDS, a disproportion apparently resulting from intravenous drug use.<sup>23</sup>

As stated earlier, drug testing in the context of public employment has met a number of challenges that it violates rights to privacy guaranteed by the Fourth Amendment to the U.S. Constitution, and the picture is further complicated by the fact that 15 states have constitutional provisions guaranteeing a right to privacy, which may also constrict drug testing by private employers.<sup>24</sup>

The point is not that any or all of these challenges will ultimately be sustained by the courts, but it raises the age-old question of whether an arbitrator, who is generally limited to effecting the intent of the parties to the contract, has the authority or competency to make interpretations of law in the context of arbitration. Indeed, employers have recently challenged arbitration awards involving the use of drugs and alcohol in court on the ground that they violate "public policy."<sup>25</sup> The U.S. Supreme Court, in defining the limits of judicial review of arbitral awards against a backdrop of statutory law, may indirectly make policy pronouncements on drugs in the workplace.

There are several reasonable responses to these problems. First, we need federal legislation to cope with what is claimed to be a problem of national scope. Such policy should not be set indirectly by arbitrators or the courts under the guise of defining "public policy." In our present fragmented approach we find ourselves with a private sector more easily able to discharge employees for drug use because they are generally not governed by federal constitutional controls on searches, while the public sector which is so governed may be disabled from doing so, despite the fact that the government may perform more safety-related work that vitally affects the public interest. Second, even private sector employers who could achieve a plan for dealing

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<sup>23</sup>In *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979), the Court appeared to find that a blanket exclusion of methadone users from employment was a valid business necessity that served the safety and efficiency of the transportation system. However, the import of this ruling is in doubt because the Court need not have reached the issue, since they found the plaintiff's data did not sufficiently establish that minority persons were disproportionately represented among methadone users or applicants for employment. See also *Drayton v. City of St. Petersburg*, *supra* note 14 (prohibiting the hiring of applicants who had used marijuana did not violate Title VII).

<sup>24</sup>Hartsfield, *supra* note 3, at 727.

<sup>25</sup>*Misco v. Paperworkers*, 768 F.2d 739, 120 LRRM 2119 (5th Cir. 1985), *cert. granted*, 107 S.Ct. 871 (1986).



with drug use in negotiation with a union, will still face a great deal of uncertainty about their freedom of action if they are covered by statutes like the Rehabilitation Act and Title VII, or are sued for "wrongful discharge" or violations of the right of privacy under state constitutions. Even greater fragmentation and conflict will develop for private employers who operate nationally if more municipalities go the route of San Francisco and begin to enact ordinances which restrict or prohibit drug testing.

Two proposals are being made here to achieve more order, consistency, and rationality in dealing with substance abuse. One is procedural and the other, more controversial, is substantive. The first procedural proposal is for federal legislation setting standards for all forms of employer investigations, searches, tests (urine, blood, and hair analysis) and interrogations (including polygraph) of employees to uncover drug use or abuse. The goal would be to reach as many employees as possible and to facilitate and encourage employer intervention, while setting appropriate limits in terms of the employee's interest in privacy and accuracy of results. A brief outline of such an investigatory program might entail drug tests: (1) of all applicants for jobs; (2) of all current employees, preannounced and annually; (3) of persons occupying jobs which are safety-sensitive on a random, unannounced basis; and (4) of any person whose lowered job performance is reasonably suspected of being drug-related (e.g., after an accident).

This suggested program responds to the need for uniformity, so that all applicants, employees, and employers know what can be done. Items (1) and (2) accommodate the privacy of the employees who believe off-the-job use of drugs should not be disrupted by the employer, since they can continue such use as long as they have sufficient control to cease during the period within which they know they will be tested. Any employee who cannot exercise such control is probably an abuser and not merely a weekend, recreational user. An employer may reasonably treat such an applicant or employee as a potential on-the-job user and thus a candidate for a rehabilitation program, spelled out later in this paper. Items (3) and (4) respond to the greater need for the employer to have information about drug use by an employee because of impaired performance or performance in a critical job.

The Centers for Disease Control report a very high error rate by private companies which have sprung up to service employers who decide to test employees for drug use.<sup>26</sup> Such federal legislation could require licensing of companies doing drug analysis and impose standards to reduce the error rate, thus alleviating the problem presented in arbitration when grievants make claims that the results of drug tests are unreliable.

The second proposal is substantive in nature and will be quite controversial, but it accommodates some impediments to arbitration and addresses the drug problem in its larger terms. We should, perhaps for some period of experimentation, decriminalize drug use while retaining criminal penalties for participation in drug trafficking. While this initially may seem a radical proposal, a careful examination of the de facto, if not the de jure, situation will reveal that we may be fairly close to that practice now.<sup>27</sup> Our current prison population is approximately 500 thousand, and a number of states have struggled with the problem of overcrowded jails. In this context there is no possibility that any sizable portion of the estimated 20 million marijuana users or the 4 million cocaine users could be incarcerated.<sup>28</sup> Prosecutors, in fact, concentrate their efforts almost exclusively on drug traffickers, and persons are prosecuted for possession of small amounts of a drug discovered collaterally with other law enforcement activity, such as airport searches or arrests of persons in connection with other suspected criminal activity (e.g., traffic violations). Formal recognition of the actual practice introduces clarity and no harm.

What might be some of the beneficial effects for arbitration of such a move? The strengths of arbitration are its responsiveness to the particular facts presented in each case, its flexibility in avoiding rigid adherence to precedent, and the fact that the parties have the power to change the agenda that any arbitrator has written for them in the past by writing the contract differently for the future. These are not factors which will aid us in confronting a drug problem of national scope.

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<sup>26</sup>Hansen, Caudill, and Boone, *Crisis in Drug Testing*, 253 J. Am. Medical Ass'n 2382 (1985). Error rates ranged from 11 to 100% in blind tests of 13 laboratories, with the average around 61%.

<sup>27</sup>Indeed, in an opinion which has been variously interpreted, the U.S. Supreme Court has held that it would be unconstitutional to impose any criminal sanction on a person solely because he was "addicted" to a drug. *Robinson v. California*, 370 U.S. 660 (1962).

<sup>28</sup>National Institute on Drug Abuse, *National Survey on Drug Abuse: Main Findings* (1982) (rep. 1984), 7, 17-18.

Variability among arbitrators and among employers is not a strength but a weakness in this context. The proposed legislation, for example, would preclude arbitrators from imposing varying and inappropriately high burdens of proof on employers ("beyond a reasonable doubt") because the infraction of the work rule also entailed proof of a criminal violation. The courts might also sustain more flexibility for searches by employers in the public sector where there was not a prospect of criminal prosecution.

The U.S. Supreme Court has often applied a less stringent standard to permit searches where the primary goal of the government is protection of the safety and health of the public.<sup>29</sup> In the case closest on point, the Court recently established that public employers may search the office and desk areas used by a public employee without a warrant or the establishment of "probable cause," where the investigatory search is solely for "legitimate work-related reasons wholly unrelated to illegal conduct."<sup>30</sup> Likewise, if criminal prosecution was not a possibility, the public employee could not refuse to respond to an employer's inquiry about drug use by invoking the Fifth Amendment privilege against disclosing evidence of one's own criminal conduct, and thus would be available to testify in public sector arbitration without the cumbersome process of securing a grant of immunity. Such a change in the law may encourage employees in the private and public sectors to more readily self-report once the stigma of criminal conduct is removed. This would diminish the burden on employers to function as "private police" investigating criminal conduct, a task which they are ill-equipped, and less than enthusiastic, to perform.

Decriminalization of drug use as herein proposed may solve some problems by making arbitration more efficient and uniform, but it is not alone a sufficient move. If the drug problem is national in scope, streamlining arbitration will assure only that the small group of employees (19 percent) who are governed by collective bargaining agreements is reached. Facilitating the achievement of a safe and productive work force for any given group of employers is a laudable but ultimately short-term goal.

<sup>29</sup>*Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967).

<sup>30</sup>*O'Connor v. Ortega*, \_\_\_ U.S. \_\_\_, 55 USLW 4405, 4409 (1987). It is to be noted, however, that the majority opinion specifically eschewed addressing the question of the "proper Fourth Amendment analysis for drug and alcohol testing of employees." *Id.* at 4411, note. The factual circumstances of the case did not present that question, which would obviously involve more complex questions of privacy intrusions.

Little satisfaction is merited in a process with the net effect of shifting employees from employers who test for drugs to those who don't or, still worse, of creating a pool of employees with stigmatized employment records so that they are added to the too numerous ranks of the unemployed. The loss of trained human resources would also be too costly. It is therefore suggested that we adopt the following additional measures:

1. Expand the provisions of the Rehabilitation Act,<sup>31</sup> which affects drug addiction, to cover all employers, and bar the discharge of any employee whose drug addiction does not impair performance on the job.

2. Prohibit employers from refusing to hire any applicant who tests positive for drug use if that person commits to a rehabilitation program and performs adequately during a probation period (3 months, 6 months) on the job.

3. Permit impaired performance on the job, coupled with testing positive for drugs, to be grounds for discharge unless the employee commits to a rehabilitation program and the employer, in its sole discretion, determines that there is a prospect for the employee to perform adequately in some position. No employee who tests positive for drugs need be hired or retained in a safety-sensitive position but, unless there is impaired performance, the employee must be considered for other positions with the employer.

4. Require an employer to give priority in rehiring to a person whom he had discharged for drug use but who has successfully completed a rehabilitation program and is now qualified to occupy an available opening.

5. Adopt some variation of the English model and permit rehabilitation centers to retain physicians to administer the now illicit drugs to confirmed addicts while their rehabilitation process is underway. The notion here is that initially attracting a person to a rehabilitation program may entail foregoing the "cold turkey" immediate withdrawal process until the person has appropriate emotional strength and insight to function drug-free.

This last proposal is so deeply at variance with our current policy that it will require some development. It should be fairly clear that relying solely on criminal prosecution to interdict the

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<sup>31</sup>The Rehabilitation Act of 1973 (29 U.S.C. §793) currently covers only employers having government contracts in excess of \$2,500.

supply of illicit drugs to habitual users and especially the addicted population, does not work. When drug importation has been interrupted or curtailed in one foreign country, the illegal traffic merely shifts to another. We simply do not have sufficient police to close off all the borders and maintain surveillance of all the vehicles entering the country. Moreover, while constitutional controls on searches and interrogations by the police under the Fourth and Fifth Amendments are important values to sustain, they import a level of inefficiency into criminal investigation and prosecution which make stopping drug traffic virtually impossible. The inefficacy of the criminal prosecution route is underscored by the fact that as we have increased criminal penalties for drug trafficking, drug use and addiction have concomitantly increased.

We should now take the bold step of sweeping the addicted population out from under the drug traffickers, with the hope that drug profits would be severely undercut, thus making it less likely that drugs will continue to be imported and to reach the new and potential user.<sup>32</sup> If drugs were dispensed on the premises of a rehabilitation center solely to those people identified as lacking the control necessary to avoid use, it should curtail the most prevalent way in which people begin experimentation with drugs, namely, through current users or addicts who share their drugs with the curious initiate. Facilitating detection of drug use in the workplace, as outlined above, may also act as a deterrent to the potential experimenter who still has the capacity to avoid drug use, but it must be a nationwide detection program and not piecemeal, as it is now.

If drug trafficking were substantially reduced by a loss of its most active customers, then the route of criminal prosecution, faced with a more manageable task, might prove more efficacious in reducing the traffic further. Millions of dollars that now go into the clearly unmanageable task of criminal prosecutions could then be spent on researching the precise impact of drug use on employment, and we would have a larger population for study under varied circumstances. Further research could be done on alternatives to drug use that more safely reduce tension or "solve" the problems that users are posing for

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<sup>32</sup>A recent study reports that drug sales are the most lucrative form of criminal activity by organized crime groups. President's Commission on Organized Crime, *America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime* (Washington: GPO, 1986).

themselves, and we could afford a more active search for chemical antidotes to addiction that would permit a person to function adequately in the workplace.

The shift of resources from criminal prosecution would facilitate federal financing of rehabilitation programs, especially for small employers, who provide the bulk of new employment opportunities but who probably could not afford to underwrite the programs themselves. Such a proposal may also collaterally control another galloping health problem (that is associated with intravenous drug use), namely, the spread of AIDS. If we avoid a program of maintenance on drugs in controlled settings, we may indirectly be condemning those drug users to death. Indeed, the user population of all drugs could be kept abreast of the latest scientific information about the short-term and long-term deleterious effects of drugs, and not be at the mercy of the "cutting" of drugs by traffickers with dangerous impurities, or the inaccurate street gossip about drugs.

There may be a host of problems inherent in such a proposal (will more people experiment with drugs if criminal sanctions are removed or maintenance programs instituted?), but an experiment with it for some years is worth a try, given the current chaos and unproductive muddle.