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# The Economics of Workplace Drug Testing

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*Workplace drug testing is routinely criticized as irrational, unproductive, and even motivated by nefarious intent. This Article analyzes the costs and benefits of workplace drug testing within the context of a complex business environment. Even in a drug-policy vacuum, workplace drug testing is shown to be rational under certain circumstances. The rationality of a drug-testing regime strengthens during a societal War on Drugs and weakens slightly as society transitions into a drug-enforcement regime that experiences legalization at the state level and enforcement at the national level. Throughout, however, the optimum level of workplace drug testing is likely never zero.*

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## INTRODUCTION

Why do so many employers require their workers to pee in a cup? Perhaps it is a dark plot against worker dignity: “I suspect that the real appeal of the urine test lies in its control over a workforce that had become dangerously suspicious and potentially powerful. Pulling workers’ pants down lets ‘em know who’s boss. It threatens their jobs and dignity.”<sup>1</sup> Even those not as inclined to dark cynicism suspect that there is something amiss in employers’ policing their employees’ drug use habits.<sup>2</sup> Exactly how common workplace drug testing is in today’s workplace is unclear,<sup>3</sup> but the consensus among public commentators — mostly outside academia but some within — is that it is a mistake.<sup>4</sup> According to that mode of thinking, workplace drug testing offers no benefit to employers, so employers are either evil, negligent, or at least custom-bound.

This Article challenges that consensus by addressing the incentives faced by employers in a competitive marketplace. In doing so, it follows a tradition established by Henry Manne of presuming a

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<sup>1</sup> ABBIE HOFFMAN WITH JONATHAN SILVERS, *STEAL THIS URINE TEST: FIGHTING DRUG HYSTERIA IN AMERICA* 159 (1987).

<sup>2</sup> Daniel Engber, *Why Do Employers Still Routinely Drug-Test Workers?*, SLATE (Dec. 27, 2015, 8:00 PM), [http://www.slate.com/articles/health\\_and\\_science/cover\\_story/2015/12/workplace\\_drug\\_testing\\_is\\_widespread\\_but\\_ineffective.html](http://www.slate.com/articles/health_and_science/cover_story/2015/12/workplace_drug_testing_is_widespread_but_ineffective.html) (“[D]rug testing of employees isn’t so much a thoughtful labor policy as a compulsive habit.”); Joe Pinsker, *The Pointlessness of the Workplace Drug Test*, ATLANTIC (June 4, 2015), <http://www.theatlantic.com/business/archive/2015/06/drug-testing-effectiveness/394850/> (arguing that workplace drug testing is a holdover from the Reagan Presidency and serves largely to enrich the companies that perform the analysis); see, e.g., Jacob Sullum, *The Puzzling Persistence of Pee Tests*, REASON (Dec. 29, 2015, 10:52 AM), <http://reason.com/blog/2015/12/29/the-puzzling-persistence-of-pee-tests> (arguing that drug testing serves little rational purpose).

<sup>3</sup> The data on workplace drug testing is largely derived from survey responses that have changed over time, making precise numbers and comparisons unavailable, but some estimates approach 50% of all employers choosing to test their employees. Sullum, *supra* note 2.

<sup>4</sup> *Supra* notes 1–2; see Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L.J. 273, 299 (2012); Adam D. Moore, *Drug Testing and Privacy in the Workplace*, 29 J. MARSHALL J. COMPUTER & INFO. L. 463, 476–88 (2012); see also Carmel Lobello, *The Many Problems with Employee Drug-Testing*, WEEK (Nov. 20, 2013), <http://theweek.com/articles/455924/many-problems-employee-drugtesting>; Gina Tron, *Pot Is Increasingly Legal. Employers Need to Stop Screening for It.*, WASH. POST (Feb. 26, 2015), <http://www.washingtonpost.com/posteverything/wp/2015/02/26/pot-is-increasingly-legal-employers-need-to-stop-screening-for-it/>; *Drug Testing in the Workplace*, NAT’L WORKRIGHTS INST., <http://workrights.us/?products=drug-testing-in-the-workplace> (last visited Oct. 27, 2016); *Privacy in America: Workplace Drug Testing*, ACLU, <https://www.aclu.org/workplace-drug-testing> (last visited Sept. 5, 2016).

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complexity not readily apparent to the casual observer.<sup>5</sup> Employers face competition on multiple fronts, and those competitive forces mandate responses that might seem irrational if the employer's task is oversimplified. By approaching the workplace drug testing question as a multifaceted one, this Article provides justification for the rationality and reasonableness of an employer's choice to drug test. This does not discount the possibility that an individual employer may manifest the type of nefarious motivations that some commentators fear. Instead, it provides an alternative explanation for the drug-testing choice, one motivated by legitimate business concerns. There are other relevant concerns in the employee drug-testing debate, such as whether testing violates employees' privacy rights, but those concerns — while important — are beyond the scope of this research.

The most common and easily defended assumption regarding business managers is that they are seeking to maximize the present value of future profits generated by the business over time.<sup>6</sup> Expanding on that assumption, it is possible to conduct a general cost-benefit analysis of workplace drug testing, considering the time and social context in which the business operates. In order to explain historical trends, Part I will begin with a theoretical drug-policy vacuum, addressing how a rational business manager would view

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<sup>5</sup> See Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965). Manne pointed out that the market for corporate control imposed discipline on corporate managers, providing shareholders with protection against managers who might be expected to enrich themselves at the expense of shareholders. *Id.*

<sup>6</sup> In corporate law, this assumption often takes the form of shareholder wealth maximization, with shareholders being the residual claimants to value created by those profits. See George A. Mocsary, *Freedom of Corporate Purpose*, 2016 BYU L. REV. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2761292](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2761292) (proposing shareholder wealth maximization as but one of many possible goals for a corporation); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine), at 32; see also Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1427-28, 1432-34 (1993) (rejecting the stockholder-as-owner model of corporations but asserting that shareholders have a contractual claim to value created by increased profits). One obstacle to shareholder wealth maximization is the fact that managers face their own incentives, specifically to enrich themselves at the expense of the owners of the business. See Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U. L. REV. 99, 101 (1989) (summarizing the Berle and Means concerns regarding the misalignment of manager and shareholder interests). Note also that maximizing the present value of profits does not require a particular preference for long-term profits; small future profits discounted to present time might be worth less than large short-term profits, given the nature of discounting.

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implementation of a drug-testing regime for employees in the absence of strong cultural beliefs or political choices regarding drug use.

Of course, modern employers do not operate in that sort of vacuum, and haven't for decades. Part II will therefore address how a business manager's decisions change in a War-on-Drugs environment, when social, political, and cultural forces all array against drug use. Employers in that environment — every U.S. employer since the 1970s<sup>7</sup> — who choose to test their employees can avoid legal and economic complications while signaling the businesses' virtue to potential customers.

If and when society shifts away from a War on Drugs, the signaling benefits may decrease and the legal consequences of drug use will change, although exactly how much depends on what regime is adopted. A society may pass through a hybrid system, in which drug use is partially decriminalized but not fully legalized.<sup>8</sup> In many ways, the choice by employers is at its most complex in this regime, as Part III will show. A society may ultimately choose full legalization and abandon the negative legal consequences from employee drug use. Importantly, however, there are likely to be significant differences between the drug-policy vacuum discussed in Part I and the post-War-on-Drugs legalization regime introduced in Part IV. After tracing the arc of employer decisions regarding drug testing, I offer some concluding thoughts about the nature of the issue and what the future holds for workplace drug testing.

#### I. DRUG TESTING IN A VACUUM

This section imagines a world without any preconceived notions about drugs. Drug users are not “bad” people, they merely choose to consume substances that alter their mental state to varying degrees. Doing so is not intended as advocacy for such a world; instead, that world provides a useful experiment for analyzing an employer's drug-testing choice set without the baggage of government policies and

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<sup>7</sup> See *infra* Part II.

<sup>8</sup> In its most minor forms, decriminalization reduces the punishment for personal possession of drugs, possibly eliminating penalties for first-time offenders. As the movement progresses, drugs may be legalized for certain medical treatments and eventually for recreational use. However, because that process is slow, some legal penalties may be retained even as others are dropped, leaving a more complex regime than either full prohibition or full legalization. When sovereign power is divided and shared between national and regional authorities — as it is in the United States — the regime is even more complex, as legalization may occur at the state level but not at the national level or, as is the case today, legalization only in certain states.

social norms regarding drug use. An employer is therefore free to make the decision based solely on the costs and benefits derived from each alternative. As a preliminary matter, it is important to be precise, since benefits to employers are often in the form of avoided costs.

#### A. *Costs of Drug Testing*

At a very general level, the costs of drug testing are diminished employee satisfaction, either because the employee enjoys using drugs or because the employee values privacy. When an employee enjoys using drugs, workplace drug testing requires either that the employee cease using or that he engage in extraordinary efforts to defeat the drug test. Both result in a reduction in employee satisfaction. All employees, even those who do not use drugs, will be deprived of some privacy by the intrusive nature of workplace drug testing — often requiring production of a urine sample while being physically observed — and that deprivation will lower employee satisfaction.<sup>9</sup>

Lower employee satisfaction will result in a higher cost to the employer because employees seek to maximize their well-being, considering both the costs and the benefits of each potential job. An employee currently employed in a job that requires the surrender of either a preferred consumable substance or a measure of privacy will realize a lower net return from employment. Any job that provides similar benefits without requiring surrender of those valued things will be preferable, and employees will leave their current employment to obtain the new employment.<sup>10</sup> An employer who inflicts those costs on employees through workplace drug testing will have to offer greater wages, higher fringe benefits, or other amenities that improve the quality of the employee's work-life.

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<sup>9</sup> See, e.g., *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 680-81 (1989) (Scalia, J., dissenting) (“[T]he Customs Service rules [requiring drug testing] are a kind of immolation of privacy and human dignity . . .”). Many commentators have argued that this kind of invasion of privacy is constitutionally suspect. See, e.g., Stephen M. Fogel, Gerri L. Kornblut & Newton P. Porter, *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 567-609 (1988). But the Supreme Court has upheld drug testing in a variety of circumstances. E.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (upholding drug testing as a condition of participating in interscholastic athletics); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. at 676-77 (upholding drug testing of Customs agents who were required to carry a firearm as a condition of employment).

<sup>10</sup> An employee in this situation might even accept a lower-paying job if the cost of workplace drug testing is high enough. As long as the alternative employer offers compensation at a lower differential than the negative value of the drug test, the employee will change jobs.

At a deeper level, drug testing can eliminate an employer's ability to compete in the market for high-quality employees. In a competitive marketplace, employees will be paid proportional to the value they add to their employer's bottom line.<sup>11</sup> An employer who offers compensation lower than that amount will find it difficult to hire or retain the best employees. A drug-testing regime for employees reduces total effective compensation and that will lead to employees heading for the door.

The employer may attempt to increase compensation in order to forestall the mass exodus of valued workers but will find it difficult-to-impossible to do so. Raising wages will require raising the prices charged for the company's products, which will make them less competitive and reduce total revenues. More to the point, the company's profits will already be lower because drug testing has a non-negligible cost,<sup>12</sup> so there will be less funds available for employee compensation. A drug-testing employer would be expected to regularly lose competitive battles for high-value employees if, as implied by many opponents of drug testing, there are no real benefits to drug testing.<sup>13</sup>

### *B. Benefits of Drug Testing*

The primary costs of drug testing are simple to identify, in economic terms. The benefits, on the other hand, are more complicated, uncertain, and highly context-specific. If employees use drugs, an employer might experience a reduction in productivity,<sup>14</sup> cutting into

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<sup>11</sup> Standard economic theory shows that an employee in a competitive labor market will be paid the value of their marginal product, which is calculated by multiplying the marginal increase in output by the monetary value of that output.

<sup>12</sup> If drug testing is done by an outside entity, it must charge sufficiently high rates to make a profit. If done internally, drug testing still requires diversion of resources from other productive uses, which will reduce profits.

<sup>13</sup> This should be true, given the assumption that all other things are held constant. That assumption rarely holds, and an employee might prefer one employer over another for a whole host of reasons, including fear of unemployment, on-the-job friendships, and so on. At the margin, however, this conclusion must be true. Moreover, in a competitive marketplace, any employer who drug tested employees for normative reasons (e.g. personal morality) would make itself less competitive. This result would not necessarily hold true for an employer who drug tested employees for consequentialist reasons, such as those discussed herein.

<sup>14</sup> Patricia A. Montgomery, *Workplace Drug Testing: Are There Limits?*, 32 TENN. B.J., Mar.–Apr. 1996, at 20, 20 (“The widespread use of drugs in the workplace costs companies billions of dollars in lost productivity.”). Potential sources of decreased productivity include worker recklessness or negligence, inability to concentrate, or even high levels of anxiety caused by drugs' effects on an employee's mental state.

the profits needed to pay those employees. Employees who use drugs might also experience higher rates of absenteeism,<sup>15</sup> which could reduce team efficiency and lead to similar reductions in profit.<sup>16</sup> Employee drug use might also lead to greater legal liability if employees engage in illegal behavior or unsafe behavior while on the job or engaged in job-related activities.<sup>17</sup>

Estimates from three decades ago placed the cost of employee drug use at a society-wide level of \$25 billion annually,<sup>18</sup> or \$500–1,000 per-drugged-worker.<sup>19</sup> Those estimates were offered in the middle of the War on Drugs, so some of those costs are likely War-related costs — the cost of legal action against employees, for example — as will be discussed in the next section. However, it is likely that a significant portion of those costs are the type of productivity losses that would exist in a drug-policy vacuum. Moreover, these estimates did not include the tort-related costs of employee drug use. Tort liability has long been understood to be a strong motivator of business decisions

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<sup>15</sup> Andrew J. Field, *Jar Wars in the Green Mountain State: Vermont's Drug Use Testing Act Has the Potential to Be the Best in the Nation*, 13 VT. L. REV. 593, 595 (1989); Anne M. Rector, Comment, *Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 EMORY L.J. 1011, 1011 (1986). Employees might miss work more when using drugs because of excessive drug use the previous night, making it difficult to make it to work, or possibly because the drug use led the employee to engage in behavior that resulted in legal detention.

<sup>16</sup> Increased absenteeism could also result in an employer being forced to maintain an inefficiently large workforce to compensate for the risk of vital personnel being absent on any given day.

<sup>17</sup> Even those who support legalization efforts are likely to discourage consumption that results in injuries to third parties. If an employee is high when he commits a tort, therefore, a claim against the employer is likely to succeed, even in the absence of a strong showing of independent negligence by the employee. See, e.g., *Chesterman v. Barmon*, 753 P.2d 404, 406-07 (Or. 1988) (denying summary judgment for employer who denied liability when an employee consumed drugs and sexually assaulted a stranger). Of course, an employee would need to be within the scope of employment in order for respondeat superior to apply. RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW. INST. 2006). And yet, courts have historically been quite creative in what constitutes “scope of employment.” For example, in *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991), the Utah Supreme Court held that an off-duty cook at a ski resort was within the scope of employment while skiing because it was his last run of the day and he would then proceed to work.

<sup>18</sup> Peter A. Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42, 42 (1985).

<sup>19</sup> Michael J. Hudock, III, *Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool for Helping Resolve the Nation's Drug Problem if Competing Interests of Employer and Employee Are Equitably Balanced*, 25 DUQ. L. REV. 597, 610 (1987).

on the production side,<sup>20</sup> so it should come as no surprise to discover that it is also a strong motivator of employment decisions, as well. Combining all the risks of employee drug use, it is clear that the risks are substantial enough to warrant employer consideration of a workplace drug-testing regime.

However, all drugs do not yield the same effect and not every job requires the same set of basic skills. Different industries require different factors in order to obtain increases in productivity, and employers are likely to consider the specific requirements of their business and the impact of various forms of drug use when determining whether employee drug use is desirable or undesirable.

Consider, for example, four different industries: (1) manufacturing assembly line; (2) computer programming; (3) long-haul trucking; and (4) air traffic control. Each one can be viewed as requiring a different type of ideal employee. A line worker in a manufacturing plant needs to be able to complete the same task numerous times every day, and possibly for weeks, months, or years in a row. A computer programmer will face numerous obstacles to achieving a desired end and will have to be creative in working around those obstacles. A long-haul trucker will need to be able to endure long periods of solitude while remaining alert. An air traffic controller will face intense pressure every day with thousands of lives depending on her ability to remain calm.

These job descriptions indicate that their respective employers will have very different business views regarding employee drug use.<sup>21</sup> For example, any drug that removes inhibitions could help a computer programmer increase productivity but would likely harm the productivity of an assembly line worker. Drugs that increase alertness could help long-haul truckers remain awake until the next convenient truck stop but could cause a stressed air traffic controller to snap. In contrast, a drug that “takes the edge off” could allow an air traffic controller to remain in control but would make a long-haul trucker sleepy.

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<sup>20</sup> See Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 2-8 (1995) (tracing the history of conflict over products liability and showing that critics and proponents, alike, believe that businesses make decisions based expressly on the threat of legal liability). *But see* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1443-50 (2010) (arguing that safety improvements resulting from products liability are often smaller than anticipated because market forces incentivize those improvements without liability).

<sup>21</sup> As opposed to their *personal moral* views.

### C. *Crafting a Drug-Testing Policy*

Clearly, some drugs would be detrimental to each of these employees' performance. Hallucinogenic drugs, for example, are unlikely to be beneficial to any employee's productivity,<sup>22</sup> but other drugs could have neutral effects on productivity or even improve it. Identifiable benefits will not be uniform, given the law of decreasing marginal returns, so there is some optimal level of drug use even when there are benefits, and drug use above that level would reduce or eliminate the benefits. The negative effects of drug use are likewise subject to the intensity of use; depending on the drug and the user, the negative effects could increase in a non-linear fashion, with the rate of change either increasing or decreasing with the amount of drug used.

As a result, an individual employer will be faced with a circumstance where only certain types of drugs will be beneficial and only in certain quantities. Exactly how much is likely due to even more specific circumstances, including the characteristics of the individual worker. If all of those circumstances were known, an employer could craft a perfect drug-testing regime that maximized profits.<sup>23</sup> Since those circumstances are not easily identified and/or measured, an employer must adopt a policy that takes into account the uncertainty of the policy's effects.

Further complicating the issue is the fact that the costs of drug testing — either increased compensation or the challenge of finding new employees as old ones leave — are variable, as well. The primary factor will be the opportunity costs faced by the employee, specifically the range of alternative employment opportunities. If employees have higher levels of human capital — skills and education — they will be better positioned to leave and workplace drug testing will be less likely.<sup>24</sup> Similarly, the geographic location of the firm may play an

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<sup>22</sup> *But see* Larry Getlen, *How Dock Ellis Dropped Acid and Threw a No-Hitter*, N.Y. POST (Aug. 31, 2014, 5:41 AM), <http://nypost.com/2014/08/31/pitcher-dock-ellis-dropped-acid-then-threw-a-no-hitter/>. Apart from the apocryphal nature of the story, it is unlikely that most employees, regardless of the nature of their employment, would see their productivity increase, with the possible exception of certain artistic endeavors where outlandish behavior might be rewarded. In any case, those endeavors are certain to be rare enough that an employer would be unwilling to risk the heightened legal liability associated with allowing employees to partake of hallucinogenic drugs.

<sup>23</sup> One such regime might establish a baseline for each employee and measure changes in productivity given the relative levels of drugs present in the employee's system, developing a unique drug/productivity profile for each employee. Divergence from that profile would result in disciplinary action by the employer.

<sup>24</sup> The exception would be a firm where human capital is firm-specific, in that it

important role, given the disparities in economic development between geographic regions; a more isolated business may be able to treat employees as partially captured, allowing for greater flexibility in imposing workplace drug testing.<sup>25</sup> Finally, in an extreme recessionary economy — where jobs are scarce — some individuals may simply not have alternate employment opportunities and an employer could impose an employee drug-testing regime with relative impunity.<sup>26</sup> Each of these factors will be partially knowable to the employer, but only with substantial levels of uncertainty.

Though the employer is not likely to recognize the term, it is operating in a second-best<sup>27</sup> world, which means adopting rules instead of more efficient standards.<sup>28</sup> Standards would allow a precise and thorough case-by-case determination, but it is simply too costly to establish and enforce a perfect standard — especially when doing so requires a case-by-case analysis — so the employer will settle for the best-available generally applicable rule, instead.<sup>29</sup> Make the rule too strict and employees will leave; make it too lenient and productivity will decline and legal liability will increase.

If an employer eschews drug testing entirely, the benefits are forfeited as some productivity will be sacrificed.<sup>30</sup> An employer might still rationally choose this outcome either because the known costs are too high or because the benefits are too uncertain.<sup>31</sup> Costs will be higher if

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will not transfer well to new employment. That would lower the cost of workplace drug testing.

<sup>25</sup> Employees without significant family and friend ties to the community will be more mobile and, therefore, better able to avoid drug testing.

<sup>26</sup> It is worth pointing out that such a severe scarcity of jobs often results because wages are made sticky by long-term contracts and government regulation. See Anthony de Jasay, *Collective Choice at Work*, LIBR. ECON. & LIBERTY (Dec. 3, 2012), <http://www.econlib.org/library/Columns/y2012/Jasaycollectivechoice.html>; Anthony de Jasay, *Paved with Good Intentions Part I. The Curse of Job Protection*, LIBR. ECON. & LIBERTY (Nov. 3, 2014), <http://www.econlib.org/library/Columns/y2014/Jasayjobprotection.html>; Lawrence H. Summers, *Unemployment*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2007), <http://www.econlib.org/library/Enc/Unemployment.html>.

<sup>27</sup> See generally R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956) (articulating and discussing the “general theory of second best” by examining a wide-range of economic academic work).

<sup>28</sup> E.g., Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL’Y 613, 616 (2012).

<sup>29</sup> See *id.*

<sup>30</sup> An employer might also lose public goodwill, in the event that an employee commits a crime or a tort while under the influence of drugs.

<sup>31</sup> For example, a small employer might be able to observe employees and effectively measure individual productivity. In that case, the employer could simply fire those employees whose productivity falls below some acceptable level; the

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employees are more mobile or if they are more likely to value their privacy. Benefits will be more uncertain if there is any significant potential for reasonable employee drug use to have a positive effect on productivity. An employer that chooses drug testing will still have to determine the types of drugs and the level of drug use that will trigger adverse employment decisions. Once again, if employees are more mobile or drug use has some potential benefits, the employer will choose a more lenient rule; if employees have few options or drug use has little or no potential benefits, the employer will choose a stricter rule.

#### D. Why Managers Care

These considerations are not just theoretical for the business manager. As Henry Manne suggested in his early work, market forces are constantly at work, behind the scenes, motivating managers in ways that are not always obvious to the casual observer.<sup>32</sup> At its core, Manne's argument rests on the simple assumption that managers maximize their well-being, in many ways, through the success of their businesses. Whether it is the market for control of the business, the market for employees, product market competition, manager compensation, or the market for managers, there are numerous incentives for managers to care about the drug testing regime that is implemented.<sup>33</sup>

First of all, a manager who wants to remain in control of the business must not allow the business to underperform too dramatically. If the company is underperforming, the expected future stream of income associated with the business will be lower, due largely to mismanagement. That lower future stream of income means that the business will be undervalued, as compared to its potential under efficient management. An individual who knows how to fix the mismanagement can profit by buying the under-valued company,

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employer need not concern herself with employee drug use. As the scale of production and number of employees increase, that option will become less feasible, requiring broader rules, including those regarding employee drug use.

<sup>32</sup> See Manne, *supra* note 5, at 112-13; see also Butler, *supra* note 6, at 111-12 (summarizing Manne's contribution in context of the larger contractual theory of the corporation).

<sup>33</sup> Of course, workplace drug testing is one of many factors — and may very well be only a minor factor — that contributes to the efficiency of the firm. A manager that focuses *exclusively* on workplace drug testing will likely neglect other important aspects of the firm's productivity. Instead, the manager must consider whether and how to implement workplace drug testing as but one of many areas for marginal improvement.

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making the necessary changes, and watching the expected future stream of income rise.<sup>34</sup> A bad drug-testing policy is one form of mismanagement, and a manager who wants to remain in control will strive to establish the efficient scope and scale of drug testing. A manager who is seen as mismanaging the company will also find it difficult to demand high compensation for managerial services and will not easily find alternative managerial employment.

An employer who adopts the wrong regime will also be disadvantaged in the market for employees. Employees are unlikely to appreciate violations of their privacy, especially when their common sense tells them that it is not related to their work performance. The employees most likely to abandon an employer with an over-aggressive drug testing policy are those with the greatest range of alternative employment opportunities. While these will not always be the most valuable employees,<sup>35</sup> that correlation will often hold true. A manager who does not wish to lose valuable employees will therefore have an incentive to develop an efficient drug testing regime.

Finally, a manager who chooses an inefficient drug testing regime will face higher costs than his competitors, either because productivity has suffered or because employees demand higher wages as compensation for the loss of privacy. In order to cover those costs, the manager will have to set the price higher than those competitors who have established a better drug testing policy. Assuming reasonably robust competition in the market, higher prices for the same product will hinder competitiveness, sales and profit will decline, and the manager who chose the inefficient drug-testing regime will lose market share and money.

#### *E. The Role of Fiduciary Duties*

All of these pressures weigh on a manager to get this decision — and so many other decisions — right. To this list must be added the pressure of fiduciary duties, specifically the duty of care.<sup>36</sup> It is true

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<sup>34</sup> Importantly, the new owner need not maintain ownership of the company in order to enjoy this increased profit, since the present value of the company will rise, allowing for a profitable sale in the wake of the useful changes to management.

<sup>35</sup> It is possible, for example, to imagine a company with firm-specific training that creates non-transferrable human capital, making the employees valuable to their current employer, but leaves them without extensive alternative employment opportunities.

<sup>36</sup> See Henry Ridgely Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 DEL. J. CORP. L. 971, 974 (1994); see also *Briggs v. Spaulding*, 141 U.S. 132, 152 (1891) (holding that directors are held to the standard of “ordinarily

that the business judgment rule will insulate the manager from most legal challenges based on alleged violations of the duty of care,<sup>37</sup> but the potential legal consequences of a duty of care claim are not the only constraint on manager behavior.

If we presume that managers are driven in any way by a desire to do their jobs well — either to avoid getting fired or for other internal reasons<sup>38</sup> — they will act to maximize the benefits to the company in this sphere. Doing so requires managers to maximize worker productivity, subject to, among other things, the constraints of worker health and privacy. As this exercise has shown,<sup>39</sup> the choice is not simple and the choice to drug-test employees cannot be dismissed as per-se irrational, even in a drug-policy vacuum. Real people are impacted by the decision, so there are real costs and benefits that the manager must consider. More importantly, the manager operates under significant uncertainty, so the manager must engage in educated guesswork. The business judgment rule must be applied to protect the manager in that good faith effort.<sup>40</sup>

The complexity of the question will lead many employers to forgo drug testing, but others will choose a different path. Some may be tempted to choose a regime that reflects personal preferences or even nefarious motives, but doing so will exact a cost to the business and to the manager, personally.<sup>41</sup> In a drug-policy vacuum, therefore, there is every reason to suspect that some employers will choose to test their employees for drug use and that the choice will be based on purely business motives.

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prudent and diligent men”).

<sup>37</sup> Horsey, *supra* note 36, at 977 (“The duty of care was, in effect, subsumed within the business judgment presumption accorded to director action carried out in good faith, absent evidence of disloyalty.”).

<sup>38</sup> See, e.g., ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 1 (London, A. Millar, A. Kincaid & J. Bell 1759) (“How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.”).

<sup>39</sup> See *supra* Part I.C.

<sup>40</sup> Horsey, *supra* note 36, at 977; see also *id.* at 980 (citing WILLIAM M. FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1039 (perm. ed., rev. vol. 1975)).

<sup>41</sup> That is, unless the manager’s personal motives also happen to coincide with any peculiar factors facing the firm or the particular dynamics of the industry in which the firm operates.

## II. DRUG TESTING DURING THE WAR ON DRUGS

If the choice to drug test employees can be rational in a drug-policy vacuum, how might that choice be affected by a sea change in societal forces towards drug prohibition? The mood-altering nature of drugs has always been anathema to some in society, and that belief began to gather strength in the mid-Nineteenth Century, with prohibition campaigns in most states between 1851 and 1869, and again from 1880 to 1890.<sup>42</sup> Eventually, the temperance movement garnered supermajority support in the enactment of Prohibition with the Eighteenth Amendment.<sup>43</sup> After prohibition was repealed with the Twenty-First Amendment in 1933,<sup>44</sup> those opinions did not disappear,<sup>45</sup> and, in 1971, President Richard Nixon adopted that public opinion by declaring an international War on Drugs.<sup>46</sup>

In 1982, Ronald Reagan repeated the call for a War on Drugs<sup>47</sup> and the government responded in a variety of ways. Comprehensive

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<sup>42</sup> Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 237 (2000) [hereinafter *Freeing Ourselves*].

<sup>43</sup> U.S. CONST. amend. XVIII (repealed 1933). Some commentators have argued that Prohibition was not a sign that the majority rejected alcohol consumption entirely, but that it reflected “hostility toward excessive consumption, political corruption, and licensed saloons.” Charles H. Whitebread, “*Us*” and “*Them*” and the Nature of Moral Regulation, 74 S. CAL. L. REV. 361, 363-64 (2000) [hereinafter *Us and Them*]. Regardless, it is undoubtedly true that political enactments are rarely — if ever — truly reflective of societal norms.

<sup>44</sup> U.S. CONST. amend. XXI.

<sup>45</sup> In fact, the Pure Food and Drug Act of 1906, Pub. L. No 59-384, 34 Stat. 768, was one of the first federal actions to control certain substances viewed as harmful for public consumption, including cocaine, morphine, heroin, alcohol, and cannabis. The Harrison Narcotics Act of 1914, Pub. L. No. 63-223, ch. 1, 38 Stat. 785, followed, regulating and taxing the production, importation, manufacture, etc. of coca leaves and derivatives. A lighter form of prohibition had therefore begun prior to the passage of the Eighteenth Amendment and remained even after Prohibition had ended.

<sup>46</sup> See Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control (June 17, 1971), <http://www.presidency.ucsb.edu/ws/?pid=3048>. At a June 1971 press conference, President Nixon stated that drug abuse was “America’s Public Enemy No. 1.” *The Nation: The New Public Enemy No. 1*, TIME (June 28, 1971), <http://www.time.com/time/magazine/article/0,9171,905238-1,00.html>. As early as 1969, President Nixon had identified the problem of narcotics as one he perceived as particularly important. See Special Message to the Congress on Control of Narcotics and Dangerous Drugs, 266 PUB. PAPERS 513-15 (July 14, 1969).

<sup>47</sup> See Leslie Maitland, *President Gives Plan to Combat Drug Networks*, N.Y. TIMES, Oct. 15, 1982, at A1; see also Peter G. Bourne, “*Just Say No*”: *Drug Abuse Policy in the Reagan Administration*, in RONALD REAGAN AND THE 1980S: PERCEPTIONS, POLICIES, LEGACIES 41, 50 (Cheryl Hudson & Gareth Davies eds., 2008) (declaring that he was “taking down the surrender flag . . . [and] running up the battle flag”).

federal drug control legislation was enacted.<sup>48</sup> Federal drug interdiction and enforcement efforts increased and sentences for offenders became more severe.<sup>49</sup> The Supreme Court upheld a forty-year prison sentence imposed on a Virginia man convicted of possessing only nine ounces of marijuana, finding that the sentence did not violate the Eighth Amendment's ban on cruel and unusual punishment.<sup>50</sup> Arizona courts sentenced a twenty-one year old man to a two-year sentence just for sniffing paint, concluding that "intoxicating sniffers can grow violent."<sup>51</sup> First Lady Nancy Reagan made clear, in 1988, that the government was fully committed to the War on Drugs. The New York Times reported that First Lady Reagan identified any user of illicit drugs as an "accomplice to murder."<sup>52</sup> She further stated that "[t]here is no middle ground. We must be as adamant about the casual user as we are about the addict."<sup>53</sup>

The War on Drugs has seen various strategies employed, depending on who has occupied the White House.<sup>54</sup> In general, however, the War on Drugs has been the subject of intense criticism from many scholars, politicians, and activists. To be certain, the costs of the War are high, in terms of government expenditures<sup>55</sup> and its impact on the lives of individual citizens,<sup>56</sup> even those not involved with drugs in any way.<sup>57</sup>

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<sup>48</sup> Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

<sup>49</sup> See Peter J. Boettke, Christopher J. Coyne & Abigail R. Hall, *Keep off the Grass: The Economics of Prohibition and U.S. Drug Policy*, 91 OR. L. REV. 1069, 1076-77 (2013).

<sup>50</sup> *Hutto v. Davis*, 454 U.S. 370, 371, 374-75 (1982).

<sup>51</sup> Boettke et al., *supra* note 49, at 1076.

<sup>52</sup> Steven V. Roberts, *Mrs. Reagan Assails Drug Users*, N.Y. TIMES, Mar. 1, 1988, at A16, <http://www.nytimes.com/1988/03/01/us/mrs-reagan-assails-drug-users.html>.

<sup>53</sup> *Id.*

<sup>54</sup> See Kasey C. Phillips, *Drug War Madness: A Call for Consistency Amidst the Conflict*, 13 CHAP. L. REV. 645, 659-73 (2010) (contrasting the approaches to drug crime taken by every president from Richard Nixon to Barack Obama).

<sup>55</sup> One advocacy group estimates the total expenditure on the War on Drugs to be more than fifty-one billion dollars, annually. *Drug War Statistics*, DRUG POL'Y ALL., <http://www.drugpolicy.org/drug-war-statistics> (last visited June 21, 2016). In 1995, it was estimated that the War on Drugs, among other things, occupied half of the trial time of the U.S. judiciary. William F. Buckley, Address to the New York Bar Association (Summer 1995), in *The War on Drugs Is Lost*, NAT'L REV. (Feb. 12, 1996), <http://www.nationalreview.com/article/383913/war-drugs-lost-nro-staff>. Incarcerating drug manufacturers, dealers, and users can also be quite costly, estimated at over thirty-two thousand dollars per prisoner in 2000. Whitebread, *Freeing Ourselves*, *supra* note 42, at 246-47.

<sup>56</sup> See Whitebread, *Us and Them*, *supra* note 43, at 368 ("The war on drugs has magnified a sense of alienation and economic despair among our inner-city communities, particularly minority communities . . ."); *id.* at 369 ("A final

And, as is the case any time governments attempt to restrict access to popular products, the emergence of a black market in drugs has led to a host of unintended consequences, including increased criminal and violent activity surrounding that black market.<sup>58</sup> Whether those costs are higher than we should accept as a society is a valid concern for policy-makers and the electorate, but not for business managers. Their concern is not for the overall social costs, or even whether the War on Drugs has been an abject failure<sup>59</sup> or a success.<sup>60</sup> They are concerned with maximizing the profits from their business, and that requires them to react to this concerted effort to combat drug use — by governments at all levels — in deciding whether to drug-test employees.

#### A. Signaling Benefits

One of the ways in which the War on Drugs — or any comparable social movement — would impact an employer's drug-testing decision is the way in which consumers view individuals and businesses who are not on the “right side” of this important social struggle.<sup>61</sup> During

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consequence of the drug prohibition has been the permanent disenfranchisement of 1.4 million black men . . .”). Individuals found using drugs — even if they avoid incarceration — face loss of occupational and professional licenses, loss of child custody, loss of subsidized housing and other government benefits, not to mention legal fees and lost wages. Whitebread, *Freeing Ourselves*, *supra* note 42, at 251. In 2014, there were over 1.5 million arrests in the U.S. for drug law violations, over 700,000 for marijuana alone, and over 80% were for possession alone. *See Drug War Statistics*, *supra* note 55. Under the Higher Education Act of 1965, as amended in 1998, those convicted of a drug-related offense were denied federal financial aid, including grants, loans, and work study opportunities. *See Higher Education Act of 1965*, 20 U.S.C. § 1091(r) (2012) (amended 1998). Those restrictions are still in place, but rehabilitated offenders face more relaxed provisions. *See id.*

<sup>57</sup> *See, e.g.,* Boettke et al., *supra* note 49, at 1070 (profiling two innocent individuals — one badly injured and the other killed — during police drug raids in which no drugs were discovered).

<sup>58</sup> *See id.* at 1077-84; Daniel D. Polsby, *Ending the War on Drugs and Children*, 31 VAL. U. L. REV. 537, 540 (1997) (“The violent crime wave of the late 1980s and early 1990s has almost certainly been the unintended consequence of prohibitionist drug laws . . .”).

<sup>59</sup> Phillips, *supra* note 54, at 673-75 (collecting citations in opposition to the war on drugs).

<sup>60</sup> *See* Stephen D. Easton, *Everybody Knows It, but Is It True?: A Challenge to the Conventional Wisdom that the War on Drugs Is Ineffective*, 14 FED. SENT'G REP. 132, 138 (2002).

<sup>61</sup> *See* William H. Ryan, Jr., *Fighting the War on Drugs in the Twenty-First Century: A Prosecutor's Perspective*, 47 VILL. L. REV. 809, 811 (2002) (“The main weapon in the war has been, and will continue to be, the public relations effort that all levels of

the 1980s, when the fight against drug use was a priority of the Reagan Administration, there were numerous efforts to enlist the public in the struggle. These included Nancy Reagan's "Just Say No" campaign and a series of public service announcements, such as the "This is your brain on drugs" commercials, which depicted eggs frying in a very hot pan.<sup>62</sup> The strategy was successful, and public opinion swung heavily against drug use and in favor of the War on Drugs.<sup>63</sup>

Once individual members of society have joined the struggle, they will have some willingness to pay for furtherance of those policies seen as necessary to the accomplishment of the stated goals. Increased taxes are one way citizens pay for a government policy, but there are other ways — official and unofficial — that citizens can support preferred policy choices. One is to buy from businesses who act in furtherance of the approved public policy. Goods or services from those businesses embody not only the normal utility derived from goods or services from that type, but also a policy-preference utility.<sup>64</sup>

In most communities, there will be some value to being anti-drug-use, in that some segments of the market will view an opposition to

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American society must be involved in.").

<sup>62</sup> Easton, *supra* note 60, at 134.

<sup>63</sup> See Ryan, *supra* note 61, at 810 ("Finally, in the early 1980s . . . [s]ociety's attitude about drug abuse changed about 180 degrees."). In August of 1986, 86% of Americans said that fighting the drug problem was the highest priority for the country. See *Opinion Roundup*, PUB. OPINION, Nov.–Dec. 1986, at 21, 31 (citing a survey conducted by the Roper Organization for U.S. News & World Report and Cable News Network). In January of 1987, 43% of Americans said drug abuse concerned them more than any other problem facing the country. See *Opinion Roundup*, PUB. OPINION, Nov.–Dec. 1987, at 21, 27 (citing a survey conducted by the Roper Organization). A 1989 Washington Post-ABC News Poll found that over 60% of Americans were willing to surrender some of their freedoms in order to fight the War on Drugs. Richard Morin, *Many in Poll Say Bush Plan Is Not Stringent Enough*, WASH. POST, Sept. 8, 1989, at A1, <https://www.washingtonpost.com/archive/politics/1989/09/08/many-in-poll-say-bush-plan-is-not-stringent-enough/afe5eaa0-06f1-4c1b-af65-ab6c95695fff/> (reporting poll results); see also Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 839 (2002) ("People throughout the country accept the idea that incarcerating fellow citizens in service of a higher goal is justified, and even patriotic."). In fact, some commentators at the time worried that anti-drug sentiment in the U.S. had made it impossible for anyone accused of a drug crime to face a truly impartial jury. See Jack C. Doppelt, *Generic Prejudice: How Drug War Fervor Threatens the Right to a Fair Trial*, 40 AM. U. L. REV. 821, 830-34 (1991).

<sup>64</sup> Consumers may also be signaling their willingness to support the cause as they try to avoid a curtailment of their own liberties, given what they have observed in the War on Drugs. See, e.g., Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1396 (1993) ("The assault on the Bill of Rights during the war on drugs has been strikingly broad-based, undermining many fundamental rights and liberties.").

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drugs as providing a valuable moral, ethical, or health-related benefit to the community. As a result, they will be willing to pay a higher price for products that offer those additional benefits. In communities dominated by religious or civic groups that preach abstinence, for example, a business that chooses some anti-drug stance will gain a marginal advantage over their competitors who do not. The size of that advantage will vary by community, and businesses might not choose to avail themselves of it for a variety of reasons. The advent of a War on Drugs will increase the number of market participants who view anti-drug policies as a benefit, increasing the benefits to businesses who choose to signal their cooperation. Importantly, however, this simply changes the calculations; it does not guarantee that any individual business will make a discrete change in policy.

For example, the owner of a business that holds a significant market advantage over its competitors might not see any need to engage in any explicit anti-drug efforts — including workplace drug testing — because there is little to gain from the increased good will. That might be true even in a community with a strong anti-drug public sentiment, at least in the short run. That determination is contingent, of course, on the nature of the anti-drug sentiment. If it is a reflection of widespread public abstinence, the benefits of workplace drug testing might be minimal because the likelihood of hiring a drug-using employee out of the general population is quite low. If the strong anti-drug public sentiment is a measure of the intensity of preference of a bare majority of the public, however, the likelihood of hiring a drug user might be high and workplace drug testing would have greater benefits.

Productivity considerations are also just one factor that employers must consider; they must consider legal liability and public relations questions, as well. Every market player must concern itself with how it is viewed relative to its competitors. Even a dominant player in the market might be forced to consider implementing a workplace drug-testing regime if all of its competitors did so and it became public knowledge, particularly in a community with a strong anti-drug sentiment. Doing so would be a defensive measure, designed to protect its market share. A War on Drugs, to the extent it is successful in motivating society to oppose drugs, will increase the incentives for all businesses in a competitive market to increase their anti-drug bona fides. Some will begin drug testing their employees as a way of improving market share, others as a way of defending it.

Another group that may reward the proper signals is other employees. Those who join the War on Drugs will likely prefer to work only with those who have also joined the struggle. Even those

who are indifferent to the War on Drugs may find working with high co-workers to be less safe and/or more frustrating. For many employees, the costs remain the same, but for those who prefer a sober workplace — either because they believe in the righteousness of the War on Drugs or for more consequentialist reasons — testing in the workplace is a feature, rather than a flaw. At the very least, the loss of privacy will be offset by the benefits of working in an ostensibly drug-free workplace and for an employer who takes the evils of drug use seriously.<sup>65</sup>

One final group of individuals for whom an anti-drug signal is important is the collection of government officials who are responsible for awarding government contracts or grants. For many businesses, this signal will be the most important. If the War on Drugs is a government-wide phenomenon, then all corners of the bureaucracy will be enlisted and a wide range of bureaucrats will be attentive to whether or not potential awardees have shown themselves to be team players. In some cases, such as with the Drug Free Workplace Act of 1988,<sup>66</sup> receipt of government funds is expressly conditioned on maintaining a drug-free workplace.<sup>67</sup> While the law does not require that employers drug-test their employees,<sup>68</sup> the nature of the law and the requirement that employers engage in an “ongoing, good faith effort to maintain a drug-free workplace”<sup>69</sup> strongly incentivizes that choice.

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<sup>65</sup> A less laudatory reason for drug testing might also be in play. Where certain demographic groups are viewed as being more prone to drug use, employers might employ workplace drug testing as a way of signaling to employees that members of those disfavored communities are less likely to be employed.

<sup>66</sup> 41 U.S.C. §§ 8101–8106 (2012).

<sup>67</sup> The Drug Free Workplace Act requires some federal contractors and all federal grantees to agree to provide a drug-free workplace. *Drug-Free Workplace Act of 1988 Requirements*, U.S. DEP'T LAB., <http://webapps.dol.gov/elaws/asp/drugfree/screenr.htm> (last visited Sept. 23, 2016).

<sup>68</sup> Individual grantees must agree to refrain from engaging in the unlawful drug trade, see *Drug-Free Workplace Act of 1988 Requirements for Individuals*, U.S. DEP'T LAB., [http://webapps.dol.gov/elaws/asp/drugfree/req\\_ind.htm](http://webapps.dol.gov/elaws/asp/drugfree/req_ind.htm) (last visited Sept. 23, 2016), while organizations receiving grants must agree to: (1) publish an anti-drug policy statement to all employees; (2) establish a drug-free awareness program; (3) notify all employees that employment is conditioned on abiding by the policy statement and notifying the employer within five days of a drug conviction; (4) notify the granting entity within ten days of any violation; (5) impose penalties on, or require rehabilitation for, any employee who violates the policy; and (6) make ongoing efforts to maintain a drug-free workplace, *Drug-Free Workplace Act of 1988 Requirements for Organizations*, U.S. DEP'T LAB., <http://webapps.dol.gov/elaws/asp/drugfree/require.htm> (last visited Sept. 23, 2016).

<sup>69</sup> *Drug-Free Workplace Act of 1988 Requirements for Organizations*, *supra* note 68.

Even if drug testing is not made mandatory, a business that wishes to receive federal tax dollars will have a strong incentive to demonstrate a willingness to comply with such a high-priority government policy. For example, the drug policy of President Reagan has been described as one of zero tolerance,<sup>70</sup> a position that eventually led to a 1986 executive order mandating drug testing for all federal agencies.<sup>71</sup> A business operating under those circumstances would be foolish not to consider ways to signal compliance with strong government preferences. Even those businesses that do not rely on government funds may wish to signal their virtue in order to minimize the possibility of adverse regulatory decisions. As the size of government and scope of government intervention in markets increases, the more powerful these incentives become.

Whether the intended audience is consumers, other employees, or government bureaucrats, businesses who signal their willingness to join the fight against drug use will realize returns to their investment. As with any investment, the existence of positive returns does not guarantee a particular choice, but these signaling benefits make workplace drug testing far more likely.

#### *B. Avoidance of Legal Complications*

Another way in which the War on Drugs would impact an employer's decision to drug test is the increased costs associated with employee drug use. Some of those costs could be direct, as when an employee engages in drug use or drug trafficking on company property, subjecting the business to civil or criminal penalties. Even if direct penalties are not assessed by the government, any arrest on company property will be a disruption to normal business operations, reducing normal efficiency and increasing production costs.<sup>72</sup>

Other costs to the business will be indirect, as drug-using employees are arrested for their drug-related activities and are unable to show up

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<sup>70</sup> Ricardo Cortes, *Sketches of the Drug Czars*, VANITY FAIR (July 29, 2009), <http://www.vanityfair.com/news/photos/2009/07/drug-czars-slideshow200907#5>. As one example, President Reagan encouraged every Cabinet member to establish a drug program in that department. Phillips, *supra* note 54, at 663.

<sup>71</sup> Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986). The Order prohibited drug use by federal employees and required drug testing for all employees in sensitive positions, although which employees met that testing criteria was left to the Department heads. *Id.*

<sup>72</sup> And, of course, a company that is publicly revealed as a facilitator — unwitting or not — of drug activity will be seen as an enemy in the War on Drugs, complete with negative signaling effects.

for work. If those employees are non-essential, the cost may be minimal, but the arrest and detention of a key employee could reduce the productivity of the entire business and inflict large losses. Prosecution of the drug-related offense would extend the time horizon of those losses and incarceration even further. Under a strict enforcement regime, the likelihood of any drug use resulting in criminal sanction would increase but, even under a more relaxed enforcement regime, the potential severity of the loss and the uncertainty associated with employee drug use should be sufficient, at the margin, to change some employer decisions regarding the relative benefits and costs of workplace drug testing.

Drug testing can mitigate these potential losses in two ways. First, implementing an employee-drug-testing regime can weed out those who are likely to use drugs and inflict these costs on the company.<sup>73</sup> Second, some employees who might otherwise be inclined to use drugs might refrain if their employment were at stake. Just as employers make their drug-testing decisions after balancing the costs and benefits of their various options, so do individuals before choosing to use drugs. One of the costs of drug use can be the probability of an adverse employment decision. By raising the cost of drug use through drug testing, the employer reduces the likelihood of drug use by all employees and reduces the potential legal costs to the business.

These incentives to engage in drug testing are in addition to those faced by the employer in a drug-policy vacuum. An employer who chooses to drug-test employees in a vacuum will not change that regime as a War on Drugs progresses except, perhaps, to increase the strictness of the policy. An employer who refrains from testing in a vacuum, on the other hand, may be motivated to begin testing by the legal and societal forces unleashed by the War on Drugs.<sup>74</sup>

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<sup>73</sup> Importantly, employers have historically been quite bad at predicting which potential employees are likely to use drugs, as evidenced by the fact that workplace drug testing has increased black employment by disabusing employers of the preconception that black workers are more likely to use drugs. See Abigail Wozniak, *Discrimination and the Effects of Drug Testing on Black Employment* 10-11 (W.E. Upjohn Inst. for Emp't Research, Working Paper No. 13-195, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2264334](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264334).

<sup>74</sup> This is a theoretical conclusion, but it would appear to be supported by empirical evidence, in that drug testing by employers increased during the 1980s and 1990s. See Sullum, *supra* note 2 (“[Workplace drug testing rose] from 21 percent in 1987 to 81 percent in 1996 . . .”).

## III. DRUG TESTING UNDER A HYBRID REGIME

During the last decade, there have been signs that the War on Drugs may be waning as public sentiment shifts away from drug prohibition. Support for marijuana legalization has been rising, with a slim majority in support.<sup>75</sup> That support differs greatly across age groups, with younger groups being far more supportive of legalization efforts.<sup>76</sup> That might portend an inevitable trend towards cessation of hostilities in the War on Drugs. Perhaps reflecting that trend, prior to the November 2016 election, four states and the District of Columbia had legalized marijuana for recreational use,<sup>77</sup> another twenty-three states and the District of Columbia had legalized marijuana for medicinal use,<sup>78</sup> and an additional four states had decriminalized marijuana.<sup>79</sup>

Two factors, however, urge caution in presuming too much about shifts in public opinion. The first is that, despite positive poll numbers and success at the state level, there is no meaningful effort to end the

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<sup>75</sup> Seth Motel, *6 Facts About Marijuana*, PEW RES. CTR. (Apr. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/04/14/6-facts-about-marijuana/>.

<sup>76</sup> Only 29% of those age 70–87 support legalization, rising to 50% among Baby Boomers, 52% among Gen X, and 68% among millennials. *See id.*

<sup>77</sup> D.C. CODE ANN. § 48-904.01 (2016); COLO. CONST. art. XVIII, § 16; ALASKA STAT. ANN. § 17.38.020 (2016); OR. REV. STAT. ANN. § 475B.005 (2016); WASH. REV. CODE ANN. § 69.50.4013 (2016).

<sup>78</sup> D.C. CODE ANN. § 7-1671.02 (2016); ARIZ. REV. STAT. ANN. § 36-2801 (2016); CAL. HEALTH & SAFETY CODE § 11362.5 (2016); CONN. GEN. STAT. ANN. § 21a-408a (2016); DEL. CODE ANN. tit. 16, § 4903A (2016); HAW. REV. STAT. ANN. § 329-122 (2016); 410 ILL. COMP. STAT. ANN. 130/25 (2016); ME. REV. STAT. ANN. tit. 22, § 2423-A (2016); MD. CODE ANN., HEALTH–GEN. § 13-3313 (2016); MASS. GEN. LAWS ANN. ch. 94C App., § 1-4 (2016); MICH. COMP. LAWS ANN. § 333.26424 (2016); MINN. STAT. ANN. § 152.21 (2016); MONT. CODE ANN. § 50-46-307 (2015); NEV. REV. STAT. ANN. § 453A.200 (2015); N.H. REV. STAT. ANN. § 126-X:2 (2016); N.J. STAT. ANN. § 24:6I-6 (2016); N.M. STAT. ANN. § 26-2B-4 (2016); N.Y. PUB. HEALTH LAW § 3362 (2016); OHIO REV. CODE ANN. § 3796.22 (2016); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.303 (2016); 21 R.I. GEN. LAWS ANN. § 21-28.6-4 (2016); TEX. OCC. CODE ANN. § 169.003 (2015); VT. STAT. ANN. tit. 18, § 4474b (2016); 2016 La. Sess. Law Serv. 96 (to be codified at LA. REV. STAT. ANN. § 40:1046).

<sup>79</sup> *See* MISS. CODE ANN. § 41-29-139(b)(1) (2016) (excepting possession of 30 grams of marijuana or less from standard penalties for drug offenses); NEB. REV. STAT. ANN. § 28-416(13) (2016) (establishing possession of 1 ounce or less as an infraction only, with a \$300 fine); N.C. GEN. STAT. ANN. § 90-95(d)(4) (2016) (requiring suspension of any imprisonment imposed for possession of 0.5 ounces or less of marijuana); 2014 Mo. Legis. Serv. S.B. 491 (to be codified at MO. REV. STAT. § 579.015) (reclassifying certain drug crimes as offense and lessening penalties for possession up to 10 grams). Decriminalization typically refers to the removal of arrest, prison time, or criminal record for at least a first-time possession of small amounts of marijuana for personal use.

War on Drugs at the federal level.<sup>80</sup> The second is that all efforts at legalization or decriminalization center on marijuana, alone, rather than on drug use, generally. Similarly, the source of the shift in public opinion is unclear; the public may simply be weary of the battle or it may actually be adopting a neutral stance towards drug use, or towards marijuana use, at least.

It is possible for public sentiment to continue current trends in linear fashion, leading to a conclusion to the War on Drugs. For the time being, however, most employers remain in the midst of the War. An employer who operates solely in a state that maintains prohibition faces all the incentives described in the previous section. An employer who operates in a legalization or decriminalization state will still face certain aspects of the War, especially if they also do business in at least one prohibition state. At best, therefore, employers face a drug-policy regime that is a hybrid of legalization and prohibition. This regime retains some of the same incentives as the War on Drugs, but introduces new complications that an employer must consider, particularly with regard to signaling benefits and the potential for legal complications.<sup>81</sup>

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<sup>80</sup> There is some pressure at the federal level to shift tactics in at least one field of battle in the War on Drugs — sentencing reform. At least one Republican and one Democratic candidate for president in 2016 voiced support for elimination of sentencing disparities between powder cocaine and crack cocaine. See *Bernie Sanders on Drug Policy*, FEELTHEBERN.ORG, <http://feelthebern.org/bernie-sanders-on-drug-policy/> (last visited June 28, 2016); Jason Russell, *Rand Paul Calls for Repeal of Drug Laws; Reaches out to Minority Voters*, WASH. EXAMINER (Apr. 7, 2015, 5:59 PM), <http://www.washingtonexaminer.com/rand-paul-calls-for-repeal-of-drug-laws-reaches-out-to-minority-voters/article/2562674>. However, there is no proposed legislation to legalize even marijuana at the federal level that stands any chance of passage. Of course, it is possible that the lack of federal legislation speaks only to the difficulty of achieving national legislative results in the absence of a crisis, rather than a lack of favorable national sentiment. See, e.g., Todd Zywicki & Jeremy Kidd, *Meaningful Tort Reform: A Public Choice Analysis* 55-56 (Feb. 11, 2010) (unpublished manuscript), <http://ssrn.com/abstract=2273943> (applying public choice analysis to describe the difficulties of achieving federal-level reforms).

<sup>81</sup> This analysis assumes clarity in the law regarding the interplay between federal and state treatment of drug use. Unfortunately, in practice this will not always be the case, as exemplified by the confusion arising as states began legalizing marijuana for recreational use. See Alexis Gabrielson, *The “Right to Use” Takes Its First Hit: Marijuana Legalization and the Future of Employee Drug Testing*, 18 EMP. RTS. & EMP. POL’Y J. 241, 242-43 (2014) (“Employers do not have stable guidance on how these new laws affect their hiring practices, liability, and accommodation decisions.”).

### A. Signaling Effects

At the margin, a shift in public opinion regarding drug use must change the signaling benefits of workplace drug testing. As tolerance for drug use rises, fellow employees are less likely to view working with drug users as a cost of employment. Similarly, increased public tolerance for drug use translates into increased consumer tolerance for purchasing goods made by companies not fully invested in the War on Drugs. As a result, employers should feel more freedom to forgo workplace drug testing as public opinion shifts.

However, it will be difficult for employers to know precisely how much public opinion has shifted. Survey results showing shifts in public opinion are subject to certain limitations, as are all survey results.<sup>82</sup> Even electoral results may not be an accurate representation, since the entire population will not vote. Some members of society will be ineligible to vote — due to age, citizenship, past crimes, and so on — even though they still remain a part of the workforce and the consumer market.<sup>83</sup> Many others will be eligible to vote but will refrain from doing so for any number of personal reasons. In the end, a public vote in favor of legalization or decriminalization may not represent the opinion of the majority of workers or consumers.<sup>84</sup>

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<sup>82</sup> Surveys will always experience some margin of error; the smaller the sample size, the greater the margin of error and the less confidence employers can have in the survey results. Similarly, the methodology for selecting the survey sample can bias the results if the sample does not accurately reflect the characteristics of the population as a whole. These are commonly understood shortcomings of surveys, but good policy choices are still possible if one views survey results with the appropriate level of skepticism and caution. More important to this discussion, however, is a limitation of survey methodologies that is not often discussed. Specifically, that they are typically not designed to measure intensity of preference. For example, a survey might show a population evenly split on the issue of drug use but fail to indicate that the anti-drug half is vehemently against drugs while the pro-drug half is only marginally in favor.

<sup>83</sup> Some who lose their right to vote do so precisely because they are convicted drug users; if the drug offenses are felonies, then those convicted could lose their right to vote permanently in ten states and temporarily in twenty-four more. *State Felon Voting Laws*, PROCON.ORG (Aug. 4, 2016, 8:20:15 AM), <http://felonvoting.procon.org/view.resource.php?resourceID=000286>. These voters who have been disenfranchised may be more willing to support legalization but can only do so through informal means, since they cannot vote. It may also be the case that those favoring legalization do so because of the harm they believe has been inflicted on their communities by the War on Drugs. Those individuals will likely be from poor and marginalized communities and may be less likely to vote, as a result.

<sup>84</sup> For example, in the referendum legalizing drugs in Colorado, only 1,383,140 out of the 2,584,719 ballots cast —out of 3,648,008 total registered voters — were cast in favor of the measure. See *Amendments and Propositions*, COLO. SEC'Y ST., <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/amendProp.html>

Even more difficult is interpreting societal views in the wake of a legislative decision. One important purpose of a republican form of government, guaranteed to each state by the Constitution,<sup>85</sup> is to place a buffer between the public will and the legislature.<sup>86</sup> It is true that legislatures often follow the perceived will of the public but, given the alternative pressures on legislators, it will not always be the case that legislation will intentionally reflect the public will, even when that will can be accurately determined.

For an employer wishing to choose the proper employee-drug testing regime, these concerns are not trivial. The continuation of the War on Drugs, at least in part, might actually make apparent surrender — in the eyes of those favoring continuation of the fight — even more reprehensible than one who never joined the fight in the first place. The uncertainty regarding just how big the pro-legalization faction is makes an employer's decision even more risky. Likewise, a backlash by those opposed to legalization or buyers' remorse could complicate life for an employer who moves too quickly. For example, municipalities in states that have legalized marijuana have begun to pass local ordinances banning its use.<sup>87</sup>

Some employers, of course, will know that their workers or customers are more likely to see abandonment of drug-war efforts as treasonous surrender. Those employers will not move away from workplace drug testing; if anything, they may have incentives to increase their drug testing as a way of signaling that they are still supportive of the War on Drugs' moral struggle. This dynamic is indicative of the nature of signaling benefits in a hybrid system: high uncertainty regarding actual public opinion and potential backlash if an employer chooses incorrectly. As a result, it is far from clear that a shift away from the War on Drugs will necessarily bring about a reduction in workplace drug testing.

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(last visited Sept. 26, 2016). The “yea” vote, in other words, represented only 53.51% of ballots cast and only 37.91% of all those eligible to vote. Moreover, in 2012, there were 5,187,582 estimated residents of Colorado, so the “yea” vote represented only 26.66% of the total population of the state. *2012 State Population Census Estimates*, GOVERNING, <http://www.governing.com/gov-data/state-census-population-migration-births-deaths-estimates.html> (last visited Sept. 26, 2016). Some voters clearly choose not to vote even when they are legally entitled to do so. That fact may be an indication that they do not have strong preferences on the subject of the vote.

<sup>85</sup> U.S. CONST. art. IV, § 4.

<sup>86</sup> See Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 301 (“[The Framers] saw direct democracy as the antithesis of a republican form of government.”).

<sup>87</sup> Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719, 720 (2015).

One final word on signaling benefits under a hybrid regime: when the regime is a hybrid because the federal government continues to wage a War on Drugs, one of the most important signals remain. Federal agencies will still have billions of dollars to distribute in the form of grants and contracts. Regardless of how voters, workers, and consumers in the various legalization or decriminalization states feel regarding drug use, federal bureaucrats have expansive bank accounts and that financial incentive may be enough to discourage employers from abandoning the War on Drugs, at least in ways that will be obvious to those writing federal checks.

### B. *Legal Consequences*

Legal consequences under a hybrid regime are similarly uncertain. State law penalties for drug use post-legalization or decriminalization will be lower or nonexistent. Even if employees use drugs, they will not face legal consequences from state law enforcement, reducing one of the productivity costs to employers during a War on Drugs.<sup>88</sup> However, federal criminal penalties remain, so the relevant question becomes the federal government's willingness and ability to enforce its criminal statutes in a state that has legalized or decriminalized drug use.

Federal law enforcement might choose — as the Obama Administration has, in limited fashion<sup>89</sup> — to decline to prosecute individuals for violation of federal drug laws. Unless those laws are repealed, however, a subsequent president might change course and renew enforcement. An employer who abandoned workplace drug testing under a permissive federal regime might find itself with an inefficient policy should federal enforcement revert to a War on Drugs footing. After giving employees an increase in privacy, an employer might find it more difficult to return to strict drug testing<sup>90</sup> and be stuck with a policy that places the company at a competitive

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<sup>88</sup> Importantly, the lack of state criminal penalties does not mean that all legal consequences are eliminated under a hybrid regime. Just as with a substance that is currently legal to buy and consume such as alcohol, an employer might still be liable if employees negligently injure a third party while under the influence of drugs and within the scope of employment. See RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW. INST. 2006).

<sup>89</sup> See Press Release, U.S. Dep't of Justice, Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013), <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>.

<sup>90</sup> See, e.g., Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw. U. L. REV. 1227, 1228 (2003) (“[P]eople tend to value goods more when they own them than when they do not.”).

disadvantage. Given the uncertainty, an employer might err on the side of caution and move slowly to abandon drug testing.

Then again, perhaps the future isn't so uncertain. Some scholars have suggested that the reason the Obama Administration chose to defer to states' drug policies was not because it agreed with the policy choice, but rather because drug enforcement is an area of law enforcement where the federal government's policy goals have long outstripped its enforcement resources.<sup>91</sup> In brief, the federal government relies heavily on state law enforcement cooperation in order to effectuate federal policy goals. When state and federal policies align, both governments can achieve their goals; when the policies do not align, only state goals can succeed.<sup>92</sup> If that is, indeed, the reason why the federal government has chosen not to enforce drug laws in legalization and decriminalization states, then it is unlikely that any future president could reverse course and an employer could make a permanent change to her drug-testing regime.

Even if that hypothesis is presently correct, one recent development casts doubt on its continued validity into the future. It is that federal agencies have begun to innovate in their enforcement techniques, utilizing tools unique to the federal government. For example, many targeted individuals or entities threatened with loss of access to the banking industry might comply "voluntarily" with federal enforcement requests.<sup>93</sup> Federal enforcement priorities can then be

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<sup>91</sup> See Press Release, U.S. Dep't of Justice, *supra* note 89 ("[T]he federal government has traditionally relied on state and local authorities to address marijuana activity through enforcement of their own narcotics laws.").

<sup>92</sup> See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1463-69 (2009) (describing how states' de facto right to legalize marijuana use arises from a combination of anti-commandeering doctrines and limited enforcement resources).

<sup>93</sup> See Michael J. Bresnickat, Exec. Dir., Fin. Fraud Enft Task Force, Speech at the Exchequer Club of Washington, D.C. (Mar. 20, 2013), <https://www.justice.gov/opa/speech/financial-fraud-enforcement-task-force-executive-director-michael-j-bresnick-exchequer> (describing new efforts by the government to foreclose certain targets' access to financial institutions and payment processors "because they are the so-called bottlenecks, or choke-points, in the fraud committed by so many merchants"). Operation Choke Point, established by a joint task force including the Department of Justice and the Federal Deposit Insurance Corporation, was originally defended as a way to cut off access to the financial industry for those engaged in consumer fraud. Jeri Leigh McDowell, Comment, *Insidious Design or Instrument of Progress: The Multi-Agency Initiative to Choke off Undesirable Businesses' Access to the Financial World*, 47 TEX. TECH L. REV. 803, 807, 811-12 (2015) ("Operation Choke Point has led to an alarming number of account terminations 'based solely on politicized regulatory pressure and informal intimidation related to the products and services being offered by legal, licensed and regulated businesses.'"); see also STAFF OF H. COMM. ON OVERSIGHT &

achieved indirectly without any cooperation from state enforcement. This enforcement innovation has already affected certain disfavored industries, such as gun manufacturers<sup>94</sup> and payday lenders,<sup>95</sup> and could be used against drug producers or distributors if the political gains are sufficiently high. Furthermore, success with this innovation will encourage additional innovations that will allow federal enforcement agencies to bypass reluctant state actors.

There is little reason to suspect that any federal enforcement agency will train its sights on the average employer who chooses to eliminate employee-drug testing. However, it is plausible that the federal government will target businesses directly involved in the marijuana industry,<sup>96</sup> and a particularly zealous drug-war administration in the future could turn that power on businesses not seen as sufficiently dedicated to the cause. Moreover, the ability of the federal government to circumvent state-government refusal to participate in drug enforcement would re-introduce the uncertainty created by the existence and non-enforcement of federal drug laws. Moreover, if innovative federal enforcement allows the federal government to credibly threaten increased federal drug enforcement, the legal costs of employee drug use will remain high, irrespective of state decisions regarding drug enforcement.

During a War on Drugs, the costs of not joining — or abandoning — the fight are likely higher than in a hybrid system that exists in an increasing number of states. As the War winds down, and society

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GOV'T REFORM, 113TH CONG., THE DEPARTMENT OF JUSTICE'S "OPERATION CHOKEPOINT": ILLEGALLY CHOKING OFF LEGITIMATE BUSINESSES? 2 (2014), <http://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf>; Todd Zywicki, *The Dodd-Frank Act Five Years Later: Are We Freer?* 8-9 (George Mason Univ. Law & Econ. Research Paper No. 15-54, 2016), <http://ssrn.com/abstract=2704076>.

<sup>94</sup> Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 121-22 (2015); see also Kelly Riddell, 'High Risk' Label from Feds Puts Gun Sellers in Banks' Crosshairs, *Hurts Business*, WASH. TIMES (May 18, 2014), <http://www.washingtontimes.com/news/2014/may/18/targeted-gun-sellers-say-high-risk-label-from-feds/> (describing impacts on online gun retailers — including gun manufacturers — arising from the implementation of Operation Choke Point and the potential threat to banks and payment processors who facilitate transactions).

<sup>95</sup> McDowell, *supra* note 93, at 805-06; see also Marjorie J. Peerce & Jeremy T. Rosenblum, *DOJ Hits Bank Target in "Operation Choke Point,"* 67 CONSUMER FIN. L.Q. REP. 243 (2013) (describing the first DOJ lawsuit against Four Oaks, a bank that processed transactions for payday lenders); Jessica Silver-Greenberg, *Justice Department Inquiry Takes Aim at Banks' Business with Payday Lenders*, N.Y. TIMES (Jan. 26, 2014, 9:59 PM), [http://dealbook.nytimes.com/2014/01/26/justice-dept-inquiry-takes-aim-at-banks-business-with-payday-lenders/?\\_php=true&\\_type=blogs&\\_r=1](http://dealbook.nytimes.com/2014/01/26/justice-dept-inquiry-takes-aim-at-banks-business-with-payday-lenders/?_php=true&_type=blogs&_r=1).

<sup>96</sup> Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 619-21 (2015).

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enters a hybrid system, those costs begin to decline but uncertainty rises, as more relevant factors are unknown. Foremost among the factors leading to increased uncertainty is the fact that the long-run optimal choice depends on the path that society takes in the future.

Declaring war is a political choice and announcing a full cessation of hostilities is equally political. How fast society abandons the War on Drugs will depend on how public opinion evolves and how politicians and vested interests react to that evolution. The future is always subject to significant uncertainty, especially when society is reacting to entirely new choice sets, making both future incentives and human reaction to those incentives not only unknown but largely unknowable. Increased uncertainty will slow any movement towards employer adoption of less strict or intrusive drug testing regimes.

#### IV. DRUG TESTING UNDER FULL LEGALIZATION

If current trends continue, marijuana legalization or commercialization will be a reality at some point in the future. If those trends then shift to encompass additional drugs, those who prefer an end to the War on Drugs may yet achieve their goals.<sup>97</sup> If the War ends, what would be the effect on workplace drug testing? In many ways, a full legalization regime would look much like the drug-policy vacuum discussed earlier,<sup>98</sup> but with a number of lingering effects of the War on Drugs to the collective psyche of the nation. Reverting to a world without pre-conceived notions regarding drug use would not automatically eliminate workplace drug testing, as many employers would test their employees even in a drug-policy vacuum. Once the War on Drugs has been abandoned by society, however, the signaling and legal benefits will decline and make workplace drug testing far less practical and efficient.

Individuals affected by the War on Drugs could eventually transition to a drug-neutral stance, but there would inevitably be short- to medium-term variations — of uncertain direction — from a drug-policy vacuum. Employees will still generally prefer their own privacy, so the costs of workplace drug testing will remain stable in the long run, subject to various environmental factors which should have only

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<sup>97</sup> It is not clear how far public opinion is from full legalization of all drugs, but two countries — Portugal and the Netherlands — have decriminalized all drug possession, indicating that the political fight to end the War on Drugs is at least theoretically possible.

<sup>98</sup> See *supra* Part I.

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short-run effects.<sup>99</sup> Every employer who chooses to test employees for drug use will have to offer some additional form of consideration to compensate for the lost privacy. In the short run, there may be lingering effects of the War on Drugs that impact individuals and communities. For example, members of prohibitionist groups might be willing to accept lower compensation from an employer who signals a willingness to continue the fight; they might even do so publicly as a way of signaling to others in the same community that they support a return to a war footing.

On the other side, there will be individuals who will cheer the end of the War on Drugs and wish to punish anyone who refuses to acknowledge the War's end. Some examples would be those who were active participants in the insurgency against the War on Drugs and members of any groups who were disadvantaged for the duration of the War. These individuals will demand higher compensation in return for any infringement on their privacy. On average, these two forces should more or less cancel each other out, allowing employers to choose a drug-testing regime that maximizes the company's profits. In the short term and under local customs, however, individual employers may make decisions that look irrational from a national perspective but are actually the profit-maximizing choice, given the intensity of preferences that exist in the communities in which the business operates.

#### CONCLUSION

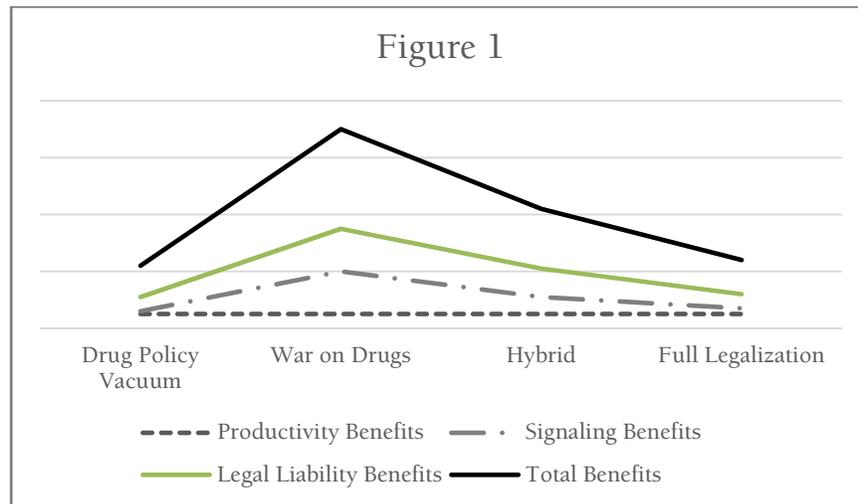
The intrusive nature of workplace drug testing makes it an easy and emotional target as the forces supporting legalization realize incremental gains towards their goals. Unfortunately, their attacks on workplace drug testing — in popular media and academic literature<sup>100</sup> — improperly ignore the complex nature of the markets in which business managers operate. This research makes clear that the optimum level of workplace drug testing is almost certain to be something greater than zero. The reason for this conclusion is simple — there are benefits to workplace drug testing.

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<sup>99</sup> Post 9/11, for example, a greater sense of insecurity may have temporarily diminished the relative value of privacy. Individuals may have been willing to accept greater intrusions into their privacy in order to gain an increase in personal safety. In the long run, however, such decreases in the value of privacy should dissipate. Losses of privacy in the public realm may even leave a lingering aversion to private privacy intrusions. However, unless these impacts are tied to workplace drug use, the effect on employer choices regarding workplace drug-testing regimes should be limited.

<sup>100</sup> See *supra* note 4 and accompanying text.

As described here and illustrated in Figure 1,<sup>101</sup> many of those benefits fluctuate over time, depending on the political regime employed to deal with the use of drugs by members of the public. Productivity gains from reduced drug use will be largely independent of the political atmosphere, but signaling benefits and the benefits of avoiding legal liability will respond directly to the choice of drug-policy regime. Both of these latter benefits will rise significantly during a War on Drugs, begin to decrease during the tapering-off period of a hybrid regime and end in full legalization at a level similar to that of the initial drug-policy vacuum. An employer will choose workplace drug testing whenever the benefits outweigh the costs, so the logical result is that, everything else held constant, workplace drug testing will become less prominent. However, because there are some productivity gains to be had and tort liability to be avoided even in the absence of anti-drug policies, workplace drug testing will remain a viable option for some employers.



Employers who are primarily concerned about maximizing profits for their businesses will balance the cost of infringing the privacy of their employees with the productivity benefits of a more drug-free workplace, the public relations costs of drug-related accidents, and the potential tort liability associated with intoxicated employees. Those consequentialist concerns will combine with any lingering normative

<sup>101</sup> Figure 1 is not intended as a reporting of real-world data. Instead, it is simply a visual representation of the relative benefits discussed *supra*.

preferences that the employer has and yield a business decision regarding workplace drug testing. For those employees who find the process embarrassing and those commentators who find it a gross violation of employee privacy, there is some evidence to support the conclusion that the potential end of the War on Drugs portends a significant reduction in total drug testing in the workplace. The level of confidence that can be placed in that evidence, however, is limited, given the consequentialist benefits of drug testing and the lingering sentiment by some segments of society that drug use is immoral.