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The Discrimination of Hair-Based Drug Testing

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Business ethicists usually debate workplace drug testing by appealing to safety (consequences of drug use for the public) and employees' contracts with the company. However, the means of catching these unsafe workers are rarely analyzed. I discuss the means of hair-based drug testing through the lens of discrimination. Drawing on Richard Lippke's criticism of drug testing, my paper demonstrates that there is an unequal hindrance of autonomy of long-haired women, the unsheltered homeless, and darker haired individuals over others and, as a result, that hair-based drug testing is morally wrong.

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Keywords

Autonomy, Discrimination, Drug History, Hair-based Drug Tests, Richard Lippke, Business Ethics

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INTRODUCTION

In the current drug testing debate being waged in school districts, workplaces, professional sports leagues, and society in general, there is an overemphasis on the consequences of drug use for the public, the workplace, and the other workers. For example, many make the argument that a person who uses illegal drugs deserves to get caught by any means necessary. While the consequences are relevant, we must also evaluate the means through which we discover potentially dangerous employee drug use. Without this analysis of means, society cannot make an informed, ethical judgment as to whether workplace drug testing is morally acceptable. This paper challenges the current moral trust in hair-based drug tests, which is quickly becoming more popular than urine testing and is a main means for catching employee drug use.¹ Within the U.S., hair-based drug testing is discriminatory against darker skinned races, the unsheltered homeless, and women with long hair by unequally invading their privacy and causing more harm to autonomy than it does to other groups.

SECTION ONE: INEQUALITIES

To assess the effectiveness of these tests, we should begin looking at common variables that must be accounted for if these tests are going to be accurate for everyone. This section addresses three variables: color, length, and grooming practices of hair. As this paper will show, certain constraints—long-haired women, darker haired individuals, or the unsheltered homeless—change the results of hair-based drug tests when these constraints interact with a specific set of drugs. We can only then conclude that an inequality of privacy exists

until further research is done to expand what other constants might cause inequalities. If darker haired individuals use codeine, amphetamine, and cocaine and are given a hair-based drug test, then their results can be skewed against them. Similarly, if the unsheltered homeless take or are near cocaine, PCP, methamphetamines, morphine, 6-MAM—an ingredient in heroin—and are given a hair-based drug test, then their results could also be distorted. Unlike these two groups, women with longer hair are susceptible to discriminatory hair-based drug tests from any drug that can be tested. Because each of these traits is only discriminatory against specific drugs, one cannot confuse the drugs for a single group for another group, unless a test subject is a member of multiple groups or if a drug distorts two or more hair trait's results. To illustrate this, an unsheltered-homeless woman with dark hair would have three different factors skewing her test results, and cocaine is unequally detected for all three groups.

To analyze the first variable, hair colors, or, more accurately, pigmentation from different kinds of melanin fluctuates on a spectrum from dark (more pigmentation) to light (less pigmentation). At the end of their study, Robert Kronstrand and his co-author demonstrated that the melanin content accounted for roughly eighty percent of the variation in detectable codeine concentrations in hair samples.² In a similar study focusing on codeine, after all forty-two human subjects were given the same dosing protocol, every participant with black hair tested positive, yet only half of the brown-haired individuals were positive and

¹Kathy Koch, "Drug Testing," *CQ Researcher*. 8 (1998): 1009.

²Robert Kronstrand, et al., "Codeine Concentrations in Hair after Oral Administration is Dependent on Melanin Content," *Clinical Chemistry*. Vol. 45 (1999): 1493.

none of the red-haired or blond-haired participants tested positive.³ Chad R. Borges' work with pigmented and non-pigmented rat hair came to a similar conclusion: individuals with eumelanin, a pigment that determines the blackness of hair, retain thirty-five percent more amphetamine in their hair than test subjects with non-pigmented hair.⁴ Dark-haired individuals also retain higher cocaine levels than lighter haired individuals: Martha R. Harkey's research shows "the non-Caucasians in this study had between 2 and 12 times as much [cocaine] in their hair as did Caucasians," even though both groups had the same dose of cocaine.⁵ From these studies, there is a consensus that hair-based drug tests show more drug history of darker haired individuals because of their melanin than of lighter haired individuals.⁶

³D. E. Rollins, et al., "The Effect of Hair Color on the Incorporation of Codeine into Human Hair," *Journal of Analytic Toxicology*. Vol. 27 (2003): 545-551.

⁴Chad R. Borges, et al., "Influx and Efflux of Amphetamine and N- Acetylamphetamine in Keratinocytes, Pigmented Melanocytes, and Nonpigmented Melanocytes," *Journal of Pharmaceutical Sciences*. Vol., 91. 6 (2002): 1523-1524, 1527-1533.

⁵Martha R. Harkey, "Technical Issues Concerning Hair Analysis for Drugs of Abuse," *Membranes and Barriers: Targeted Drug Delivery*. (1995): 227, <http://www.drugabuse.gov/pdf/monographs/download154.html>.

⁶Interestingly, this debate is not only emerging in the academic sphere. The Boston Police Department has been receiving criticism, most notably Fancie Latour's article in the *Boston Globe*, for adopting hair-based drug tests and punishing forty-five officers who were mainly not Caucasian (sixty-five percent were Hispanic or Black). Unfortunately, there are too many variables in this situation to make any legitimate conclusions about hair-based drug testing being the culprit, but we should keep this in mind as a very real possibility.

Admittedly, this drug history only includes codeine, amphetamines, and cocaine until more research is done with other drugs' relationships to pigmentation.

Just as individuals with more pigmentation, the drug history of the unsheltered homeless can also be more available to employers than more economically privileged individuals. According to the January 2009 *Homelessness Pulse Project* that surveyed nine major cities, there were 6,872 unsheltered homeless people within a total population of 67,243 homeless persons.⁷ This works out to a little over 10.2% of the homeless are living on streets, abandoned buildings, vehicles, parks, etc.⁸ Because of their lack of shelter, most of these unsheltered individuals are less likely to shower and groom themselves regularly, except in rare situations where public hygiene centers are easily accessible. To my knowledge, there have not been any recent comparative analyses of the hygiene differences between the sheltered and the unsheltered homeless; however, Lillian Gelberg's and Lawrence Linn's methodical study of 529 homeless individuals helps to indicate what current hygiene differences might exist.⁹ During the research, when the

Latour, Fancie, "Drug Test For HUB Officers Stirs Bias Fear," *Boston Globe*, June 22, 2002, A1, <http://proquest.umi.com.ezp.lib.cwu.edu/pqdweb?index=0&did=127867761&SrchMode=2&sid=1&Fmt=3&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1258958904&clientId=16941>.

⁷U.S. Department of Housing and Urban Development, *The Homelessness Pulse Project*, (2009), 3. <http://www.hudhre.info/documents/HomelessnessPulseProjectJul09.pdf>.

⁸Ibid, 1.

⁹Lillian Gelberg and Lawrence S. Linn, "Assessing the Physical Health of Homeless Adults," *Journal of the American Medical Association*. Vol. 262 (1989): 1974.

homeless were asked about the last time they washed themselves, fifty percent of sheltered individuals responded that they washed within the last day, yet only eighteen percent of unsheltered homeless individuals claimed to have washed within the last day.¹⁰ Supporting these individuals' accounts, the objective researchers evaluated the personal hygiene of these participants: fifty-five percent of sheltered homeless and eighteen percent of the unsheltered individuals had good personal hygiene.¹¹ In addition to this study, there are other indicators of poor hygiene; for example, the homeless are two to three times more likely to have skin diseases than an equivalent domiciled group.¹²

Not only is this lack of grooming already disadvantageous for homeless individuals who are getting or maintaining a steady job because of societal conceptions about proper grooming, but this lack of hygiene also means that they have a larger segment of their drug history scrutinized by possible or current employers who conduct hair-based drug tests. Thomas Cairns created a test where ten test subjects with different hair types would dunk their hair into water with cocaine, PCP, methamphetamines, morphine, or 6-MAM to simulate an external exposure. Then these subjects followed hair washing procedures and went through a hair-based drug test. Even though the simulated exposure was concentrated enough for all the individuals to test positive, they all tested negative after

washing their hair.¹³ In support of these findings, Harkey establishes how sweat with small secreted amounts of cocaine from eccrine sweat ducts next to hair follicles affects hair-based drug tests. She finds that cocaine users secrete at least 200 to around 400 nano-grams of cocaine from these ducts for one to seventy two hours after drug use.¹⁴ Considering that normal hair growth does not incorporate drug residues for a couple days after usage, sweat can introduce drug residue into hair faster than regular hair growth. As a result, on average, many unsheltered homeless individuals' recent drug histories are receiving more exposure than more economically privileged persons' drug histories. To increase this inequality even more, the unclean individuals' drug histories can extend out further into the past than clean individuals' histories since there is less of a chance for the residue to be removed from hair. Hence unsheltered homeless who are unable to maintain their hygiene have a more evident amount of their drug history (restricted to cocaine, PCP, methamphetamines, morphine, 6-MAM) measured before and after drug use and from external exposure.

Just like more pigmented individuals and the unsheltered homeless, women with longer hair also have a larger amount of their drug history available in hair-based drug tests than men or women with short hair. Though there has not been a comparative analysis of women's and men's hair length in the United States, American social norms can help to understand the trends. According to Anthony Synnott, current Western norms of beauty enforce "a theory of opposites,"

¹⁰Ibid., 1976.

¹¹Ibid., 1976.

¹²Brian C. Scanlan and Philip W. Brickner, "Clinical Concerns in the Care of Homeless Persons," In *Under the Safety Net: The Health and Social Welfare of the Homeless in the United States*, edited by Philip W. Brickner, et al. (New York: W. W. Norton Company, 1990): 73.

¹³Thomas Cairns, Virginia Hill, Michael Schaffer, William Thistle, "Removing and Identifying Drug Contamination in the Analysis of Human Hair," *Forensic Science International*. Vol. 145 (2004): 97-108.

¹⁴Hartkey, 229-30.

where the traditional genders—men and women—are made to be distinguishable from each other.¹⁵ Consequently, women are trained to identify with long hair, and men are taught to identify with short hair.¹⁶ Synnott correctly provides a caveat about these idealized images of gender: “[t]his does not mean that *all* men have shorter hair than *all* women, still less that they always have, but that is the norm.”¹⁷ From this theoretical understanding of gender norms as dissimilar, this paper will assume that more women than men have hair longer than an inch and a half.

According to the Office of National Drug Control Policy, hair grows at an average rate of a half an inch per month, and hair-based tests normally only use an inch and a half of hair from the scalp—so only three months of a person’s history is available to testers and employers.¹⁸ However, while this three month window does decrease the invasion, women’s drug history is still more available than men’s history in many cases. As

¹⁵Anthony Synnott, “Shame and Glory: A Sociology of Hair,” *The British Journal of Sociology*. Vol. 38 (1987): 382-6.

¹⁶*Ibid.*, 382-6.

¹⁷*Ibid.*, 384.

It is important to recognize the versatility of Synnott’s argument. Acknowledging that there are males, females, and transsexuals, these individuals are encouraged (or coerced) to follow one of these two gender norms. Also, according to Synnott, when individuals do choose to deviate from their sex’s gender norms, they “tend” to conform to the opposing gender norm, which reinforces the dichotomous gender structure (384). This flexibility could allow this paper’s argument to be expanded from long-haired women to deviating men or to transsexuals who identify as feminine.

¹⁸U.S. Office of National Drug Control Policy, *What You Need to Know about Drug Testing in Schools*. (2002), 6. http://www.ncjrs.gov/ondcppubs/publications/pdf/dru_g_testing.pdf.

assumed earlier, women’s hair is normally quite long and often longer than an inch and a half; whereas, men’s hair length is not always long and ranges from less than an inch (shaved heads only have a follicle’s worth of hair) to the occasional man with hair as long or longer than an inch and a half. Women’s three month drug history will often be available while only one or two months of men’s drug history will frequently be available, except in anomalous cases when men or women defy gender norms. Therefore, long-haired women’s drug history is observed more than short-haired men’s history at companies that use hair-based drug tests.

SECTION TWO: INEQUALITIES OF HARM

Since these three inequalities have been firmly established, this paper will now explore the repercussions of these imbalances, which, as this paper argues, are discriminatory. To understand how these inequalities are harmful, I will frame the discussion in terms of personal privacy. Richard L. Lippke sufficiently defines privacy as “(1) control over some information about ourselves; and (2) some control over who can experience or observe us.”¹⁹ In the case of drug testing, there is a clear issue of privacy. Fulfilling Lippke’s first criterion of privacy, a person’s drug history is personal information about his or her past conduct and, by being tested, this information becomes less private, less controlled. Secondly, hair-based testing reveals this personal drug history to others, including an employer and laboratory staff. Yet, as the last section argued, this private information is unequally available to employers when employees are members of

¹⁹Richard L. Lippke, “Work, Privacy, and Autonomy,” In *Issues in Business*, ed. by Shaw H. William and Vincent Barry (Belmont: Wadsworth, 2010), 514.

these three groups—darker haired individuals, long-haired women, and the unsheltered homeless—and are competing against other employees who are non-members. Hence the inequalities in the observable history of an applicant or employee are unequal intrusions of privacy because these three groups have a larger amount of their information—their privacy—intruded upon by the test.

Since privacy is determined by a person's control or decisions about the distribution of information, these decisions must be made by autonomous persons, who think rationally and without bias or coercion. For example, if an employee was having a seizure on the floor, bribed, or threatened with violence to consent to a drug test, then the employer could not ask for consent because these conditions do not allow for full consideration of the effect on a displayed identity. That is, as autonomous agents, we constantly make choices about how we want to represent ourselves to the end of limiting others' misinterpretations about our public identity. For example, most people perform their chosen gender with symbols and archetypical actions, and others display their piousness with other symbols and archetypical actions. Without their autonomy to shape their identities, employees' consideration might become about fear for personal safety or the need for extra money and would not evaluate the possible issues of being near drug use instead of a person's intentionally displayed identity.

With an understanding of the connection between privacy and autonomy, Lippke describes a consequence to autonomy from a lack of privacy: intrusive supervision and constant correction (or the threat of it) are inimical to individuals developing and maintaining a sense of themselves as worthy

of autonomy. In contrast, social practices that respect privacy give the individual a chance to make mistakes or do wrong, and thus convey the message that the individual is worthy of acting autonomously. The sense that they are worthy of acting autonomously may, as Kupfer notes, increase the confidence of individuals in themselves, and so they may exercise their autonomy to an even greater extent.²⁰

Employees need to recognize the worth of their autonomy to increase their own confidence and promote decision making, yet this sense of worth can be reduced by constant supervision which emphasizes employees' inability to choose and be autonomous. Not only is the amount of supervision important, but the amount of corrective action²¹ also devalues an employee's autonomy, because being disciplined for choosing—being around drug users, using drugs, consenting to a hair-based drug test, or any other choice—reinforces not choosing these or other actions. That is, if an employee's autonomous choice about drugs failed, then this creates a fear of failure for another autonomous choice in the future about any life decision. Because the fear hinders the decision making process, individuals in these groups are being harmed by having their autonomy limited.

²⁰ Lippke, 514-15; Kupfer, 139-43.

²¹ While corrective action can harm a person's willingness to use his or her autonomy, this action is simultaneously important to the individual for recognizing the resulting inequality of privacy from hair-based drug testing. As discussed in an earlier foot note about the unequal punishment of more pigmented police officers on the Boston police force, these individuals might have not know about this inequality unless these punishments were unequally enforced.

To put the importance of maintaining workers' confidence in their autonomy in the context of hair-based drug testing, there is a huge inequality in the amount of surveillance, depending on one's hair length, color, or cleanliness. As a result, according to Lippke and Kupfer, these three groups begin to feel less valuable and less willing to act autonomously than other groups. Plus there is an inequality in the amount of correction. Because these three groups have a larger window of time observed, they have a higher chance of being caught and punished. This inequality of punishment is going to devalue these employees' feeling of worth for their own autonomy. As a result of these three groups having a larger loss in their value of their autonomy, they have less confidence in themselves. This lack of confidence can manifest itself in multiple ways, for example, reducing their ability to commit to a decision, mechanizing their work into a thoughtless daily routine, or reducing their willingness to report unethical actions around them. From these two connections between autonomy and privacy, we can understand that these three groups are suffering a disproportionate amount of harm to their autonomy.

SECTION THREE: DISCRIMINATION

I have shown how hair-based drug testing causes unequal amounts of harm for more pigmented individuals, longer-haired women, and the unsheltered homeless. This inequality introduces a discriminatory element into hair-based drug testing. To define discrimination, the United Nations "International Convention on the Elimination of All Forms of Racial Discrimination" says:

[T]he term "racial discrimination" shall mean any distinction, exclusion, restriction or preference

based on race, colour, descent, or national or ethnic origin which has the purpose or effects of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²²

This definition only applies to racial discriminations, yet there is room to broaden this definition. Instead of saying "race, colour or national or ethnic origin," William Shaw and Vincent Barry's catch-all language could be used to be more inclusive: "the person's membership in a certain group."²³ Or we could replace the racially focused language with the generic "legally protected groups;" for example, in Washington State, the law protects "race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability" against discrimination.²⁴ Either option will make sure that at least more pigmented individuals and women with longer hair are protected,

²²United Nations, "International Convention on the Elimination of All Forms of Racial Discrimination," (1965),

<http://www2.ohchr.org/english/law/pdf/cerd.pdf>.

²³William H. Shaw and Vincent Barry, ed, *Moral Issues in Business* (Belmont: Wadsworth, 2010), 608.

²⁴U. S. Washington State Legislature. "Freedom from Discrimination—Declaration of Civil Rights," RCW 49.60.030 (2009), <http://apps.leg.wa.gov/RCW/default.aspx?cite=49.60.030>.

Although a legal argument is not being made in this paper, we should notice that these inequalities against African Americans and other "minority" races and women could actually be a violation of law.

while Shaw and Barry's definition will also include the unsheltered homeless. No matter what, just having sexual and racial discrimination is enough to establish the discriminatory practice of hair-based drug testing, but this paper will continue with class discrimination as well because it seems intuitive that this is an important and vulnerable group.

Two crucial aspects of this definition are equal opportunity for the "enjoyment" of and the ability to equally "exercise" our rights. Neither aspect of the definition is fulfilled with hair-based drug testing. First of all, the employees who fit into these three categories and are drug tested do not have an equal opportunity to pursue happiness because, as Lippke has already shown, reducing worth of employees' autonomy causes a reduction of their confidence and positive outlook of themselves—their ability to pursue happiness. As a result, the harm of being unequally treated due to people's membership within these groups has a snowball effect that causes the inequality to grow even larger because they do not get to reap the benefits of achieving goals, including promotions within a company or even getting hired to receive a regular wage. Since this reduction of autonomy does not affect other groups as much, and they do not have these harms and still benefit from the positives—there is an unequal amount of harm to these three groups' abilities to pursue happiness than to everyone else. This inequality indicates one element of discrimination.

While these three groups have a disproportionate amount of harm inflicted on them, they also have a reduced ability to use "human rights and fundamental freedoms." Throughout the United States Constitution, there is the spirit of the right to privacy, confirmed by the Supreme Court in

landmark rulings such as *Roe v. Wade*. From a global perspective, the United Nations *Universal Declaration of Human Rights* has the same spirit: "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."²⁵ In these documents and proceedings, the right to privacy seems very apparent and "fundamental." And considering that this right is being invaded more for some individuals than others, the ability to enjoy one's freedoms is being unequally hindered, which fulfills the second criterion of discrimination. Hence, dark-haired individuals, the unsheltered homeless, and long-haired women are all being discriminated against by hair-based drug tests in the workplace.

After thousands of years of ethical theory converge in condemning discrimination, many people have developed a knee-jerk reaction of legal or moral outrage to discrimination. For the purpose of my argument, I would like to show, in a succinct fashion, why this kind of discrimination inherent in current hair-based drug testing is unethical. Without getting too caught up in the different arguments, a main theme in these arguments is that discrimination does not allow equality of opportunity.

John Rawls' veil of ignorance is a hypothetically thought experiment that will assist in understanding the requirement of a state of fairness: we should imagine that everyone momentarily forgot their identity—social class, race, gender, and so on—and had the opportunity to decide if

²⁵United Nations, *Universal Declaration of Human Rights* (1948), <http://www.un.org/en/documents/udhr/>.

there would be hair-based drug testing.²⁶ If anyone behind the veil chooses to have these discriminatory tests, then they would run the risk of being a member of the subordinate groups once they remembered their identity.²⁷ By realizing this danger, they would choose to not discriminate against any groups. Even though there would be more options to consider in this forgetful state, including different kinds of tests, the decision not to allow a discriminatory practice seems clear because it is ethically wrong to restrict the opportunities of some but not others as long as a better option is possible, including using other kinds of tests or reevaluating if drug tests are even necessary for a given profession.

SECTION FOUR: OBJECTIONS

Within the drug test debate, a common argument for testing is the fact of voluntary consent by employees. A person may note the fact that workers have consented to the testing in order to excuse the discrimination involved. However, this objection is more complicated than it appears, and it is also irrelevant to the topic. A major complication with this objection is that the employee cannot consent to something unknown (by not being told, being hidden in legal terminology, or being in the fine print), and they are probably unaware of the discrimination. Another complication is that there needs to be more investigation into the employee even having a choice. Lippke argues that employees are incapable of refusing their employers because of an

“imbalance of power” or pressures from society and the marketplace.²⁸ That is, as long as there is a pool of desperate unemployed workers, companies can easily refuse an argumentative or idealistic employee in exchange for another without harming the corporation and punishing the boisterous job candidate with poverty. Since both of these unresolved complications are deeply problematic, the burden of proof for this objection does not rest on my paper but on the person making the objection. As if these problems were not condemning enough, this objection is also irrelevant. This paper is merely arguing that hair-based drug testing is discriminatory and not that the discriminatory nature of drug testing can be overridden by a worker’s choice to use a drug.

Turning to another objection, some might even grant the immorality of violating workers’ privacy and simultaneously trump this wrong with a greater moral duty, protecting the public from harm. For example, in a cost-benefit analysis, they could believe the inherent immorality of discrimination in hair-based drug testing is morally better than letting a drug user into a harmful situation with stakeholders, like an airplane pilot on hallucinogens. Even if this objection were completely correct, it would only justify drug tests that are not based on hair samples in extremely limited situations. Also, when doing a cost-benefit analysis, we must consider all possible resolutions to the equation and cannot simply assume that this is the only possible way to test the pilot. Employers can still use many other kinds of drug tests, which could actually be more beneficial than harmful. For example, hair-based drug tests are good for catching a person with drug use in the near past and can rarely catch a person who just consumed

²⁶ Even though he did not apply this thought experiment to drug testing, Rawls did develop this thought experiment, the veil of ignorance, that I am applying to this situation.

John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard UP, 1999), 118.

²⁷Ibid, 130.

²⁸Lippke, 515.

a substance. Plus it cannot even test for alcohol use, which is something important for a pilot boarding a plane. By contrast, a urine test can test for alcohol and other drugs active in the person at that crucial moment.²⁹ Hence, the argument that the benefits outweigh means is incorrect; the cost-benefit analysis dictates that other possible and more practical means should be used, like urine testing, instead of discriminatory hair-based drug tests.

A final objection to this paper's thesis is that employees feeling of control and autonomy cannot be taken away by drug testing since all employees can choose to do or not drugs. From this ability to choose prior to the test, all employees, regardless what groups they are in, have a constant feeling of choice and autonomy. Hence there is no unequal amount of harm. This objection is assuming that the only people who are harmed by drug testing are those caught with a positive test result for an illegal substance, but the strength of Lippke's argument is that everyone being tested is harmed even if they have not done drugs. This broader sense of harm is from being under constant surveillance and not being able to choose who gets personal information about drug history. So even if a drug user should be caught, which is another question beyond this paper, he or she does not deserve to be caught by unethical means, nor do innocent people deserve to have their privacy unnecessarily invaded. After understanding that all tested employees suffer this harm, I have shown that there is an unequal amount of harm for the three groups.

²⁹U.S. Department of Labor. Office of the Assistant Secretary for Policy, "Workplace Drug Testing," U.S. Department of Labor, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp>.

SECTION FIVE: CONCLUSION

Because these objections do not hold, and the discriminatory nature of hair-based drug tests has been established, companies have a clear obligation to rethink their means of resolving the employee drug problem. Although a lot of discussion within each company must occur about the exact changes needed to avoid discrimination, at minimum, companies ought to change existing policies or create new policies that prohibit hair-based drug tests. While it might seem prudent to give the members of these three groups another kind of drug test and all other employees a hair-based test, this practice would generate unfair conditions. To show this, every drug test surveys a different interval of time: While some tests survey for a single day, such as oral-fluid tests, others—urine-based tests and sweat-patch tests—have a five- to seven-day interval, and hair-based tests have durations of three months.³⁰ If one group was given a hair-based test while others were given a urine test, one group would have a much larger interval of their drug history available to their employers. Hence employers cannot create a new inequality of privacy to avoid a former inequality from hair-based drug testing and instead must prohibit hair-based drug tests for all employees.

An even stronger approach that removes all drug testing to avoid its discriminatory nature might also be necessary, pending further argumentation. While more dialogue must occur over other drug tests, it remains clear that hair-based drug testing is discriminatory against more pigmented individuals, the unsheltered homeless, and long-haired women by unequally invading

³⁰U.S. Office of National Drug Control Policy, 9.

their privacy and causing more harm to their autonomy than it does to other groups.

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