

# What is Wrong with Testing Welfare Recipients for Drug Use?

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## Abstract

Is mandatory drug testing for welfare recipients morally justifiable? This article argues that none of the three justifications typically offered in support of drug testing - i.e., paternalist, contractualist and harm-based justifications -- are normatively persuasive. On the one hand, I claim that these normative justifications do not warrant the violation of welfare recipients' privacy; that is, I argue that they fail to make the case that the benefits of drug testing outweigh its costs in terms of welfare recipients' privacy. On the other hand, I argue that even if we accept any of these normative justifications for drug testing, current background conditions in the US make the implementation of this policy unfair in practice. First, the enforcement of drug testing can strengthen existing injustices. Second, under current circumstances, drug testing policies are likely to engender moral obligations which cannot be fulfilled.

## **Introduction**

In recent years, drug testing for welfare recipients has received much attention in the United Kingdom, the United States and New Zealand (Wincup 2014). In the United States, for example, the large number of state legislatures considering the adoption of this policy has recently pushed the subject to the forefront of public debate. To put this in perspective, by March 2016, at least 15 states passed legislation on drug testing for welfare applicants and recipients (NCSL 2016).

However, most of the existing research on drug tests for welfare recipients is confined to legal scholarship assessing the constitutional nature of this policy. That debate is not framed around the specifically ethical issues surrounding drug testing, but rather around the question of whether this behavioral instrument impinges upon welfare recipients' Fourth Amendment rights. Unfortunately, the normative literature -- in contrast to legal debates-- is still very limited.

This article aims to fill this gap by providing a normative evaluation of drug testing. Given its particularly salient role in U.S welfare politics, my analysis focuses on recent adoptions of -- and debates surrounding -- drug testing policies in the American welfare system. I contend that none of the three justifications typically offered in support of drug testing -- i.e., paternalist, contractualist and harm-based justifications -- are normatively persuasive in this particular case. On the one hand, I claim that these normative justifications fail to make the case that the benefits of drug testing outweigh its costs in terms of welfare recipients' privacy. On the other hand, I argue that even if we accept any of the three normative justifications for drug testing, current background conditions in the US make the implementation of this policy unfair in practice. This happens for two reasons. First, the enforcement of drug testing can strengthen existing injustices. Second, under current

circumstances, drug testing policies are likely to engender moral obligations which cannot be fulfilled. This notably holds for the many cases in which drug users may have neither the ability nor the opportunity to change their behavior.<sup>1</sup>

This article is organized into two sections. The first section explains the three main justifications for drug testing typically utilized by scholars, politicians, and policy analysts. Section two presents objections to these normative justifications. The main policy implication of this manuscript is that drug testing should not be used to determine who might or might not benefit from welfare policies. Although some of the goals behind the use of this instrument are normatively valuable, academics, politicians and practitioners should also begin to investigate alternative policy instruments that minimize the normative problems associated with current drug testing programs.

### **Three justifications for drug testing**

In the U.S, the enactment of the Personal Responsibility and Work Opportunity Act (PRWORA) in 1996 facilitated the practice of testing welfare recipients for drug use. The goal behind PRWORA was to promote self-sufficiency and minimize welfare dependency by moving families from welfare to employment. In this context, drug use was thought of as a crucial factor that negatively affected the poor's self-sufficiency and increased their dependence on public assistance. PRWORA's justificatory discourse echoed the normative guidelines legitimizing the "War on Drugs" (Amundson, Zajicek and Hunt 2014). For instance, PRWORA (Section 902) encouraged states to ban welfare applicants with drug felony convictions from receiving welfare aid (Gustafson

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<sup>1</sup> In this paper, I adopt the distinction between substance use, abuse and dependence developed by Macdonald et al (2001): "Substance use refers to use of either alcohol or drugs that does not pose serious physical, psychological or social problems. Substance abuse refers to drug use that leads to adverse physical, psychological or social consequences. Substance dependence or addiction refers to prolonged high levels of drug use, resulting in loss of control over one's use, impaired functioning and significant adverse physical and psychological consequences" (p.251).

2011, p.55).

In recent years, several states passed laws to mandate drug testing for welfare recipients. Two paradigmatic cases are the drug testing programs established by Michigan and Florida. In a nutshell, the state of Michigan planned to test all applicants for Temporary Assistance for Needy Families (TANF)<sup>2</sup> and randomly test 20% of TANF recipients every six months (NCSL 2016). The program stipulated that those applicants who tested positive or who refused to be tested would be banned from welfare assistance for a one-year period. The period of ineligibility increased for those who repeatedly tested positive. That law, however, was finally overruled in 2003 by the decision of a Federal District court (NCSL 2016).

Similarly, in 2011, Florida passed House Bill 353 which enacted drug testing for all TANF applicants (Barile 2013, p.794). This suspicionless drug testing program asked welfare applicants to pay for the cost of their own urinalysis test. While there was a stipulated reimbursement for those who tested negative, public assistance was denied to those who tested positive. Moreover, rehabilitation treatments were an exclusive responsibility of the individuals and not of the government. On December 2013, a federal judge permanently stopped the enforcement of this Florida's law initiative. One year later, the 11th U.S. Circuit Court of Appeals ratified this verdict (NCSL 2016). Although these initiatives have been constitutionally challenged as violating welfare recipients' Fourth Amendment rights, new similar legislative initiatives are proposed every year. According to a report from the National Conference of State Legislatures, by 2016, 15 states passed legislation to establish drug testing or screening for welfare recipients: Alabama, Arkansas, Arizona, Florida, Georgia, Kansas, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Utah, West Virginia and Wisconsin. As of March 2016, 17 states introduced legislative

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<sup>2</sup> The TANF is a federal conditional cash transfer program for low-income and needy families.

proposals to enact some form of drug testing for welfare recipients (NCSL 2016).<sup>3</sup>

### *Normative justifications*

There are some similarities between the justifications for drug testing and the arguments typically used to justify other forms of welfare conditionality such as workfare and conditional cash transfers. Like those programs, drug testing constitutes a form of conditional welfare policy. These are redistributive policies that make the payment of welfare benefits “subject to the condition that those who receive them behave in particular ways or participate in specified activities” (Deacon 1994, p. 53). There are three main normative justifications for drug testing for welfare recipients: contractualist, paternalist and harm-based justification.

The contractualist justification states that welfare benefits are part of a contract between the government and claimants (Deacon 2004, p.915; White 2003, p.13). Since welfare recipients are members of a wider system of social cooperation, they should be tested for drug use as a condition of receiving welfare assistance from the state. The argument in favor of this perspective is that drug use contravenes the behavioral expectations established in some underlying, implicit, and commonly-held understanding of social cooperation. For example, drug testing might be thought of as an instrument to further cooperation between taxpayers and welfare recipients. By claiming public assistance, welfare recipients should moderate their behavior in responsible and cooperative capacities. Consequently, “taxpayers should provide support to those in need; recipients, in return, should engage in responsible and constructive behavior as a condition of receiving aid” (Rector 2011, p.1). This is analogous to programs that wed welfare benefits to work requirements. For example, some scholars believe that tying welfare benefits to work requirements enhances reciprocity and social cooperation (Gutmann and Thompson 1996, White 2003). In that case,

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<sup>3</sup> The 17 states are: Hawaii, Illinois, Iowa, Kentucky, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, South Dakota, Vermont, Virginia and West Virginia. See (NCSL 2016)

conditionality is an instrument to limit free riders (White 2003, p. 175). Contractualist arguments are typically used to justify other forms of conditional redistributive programs such as workfare or conditional cash transfers. But they are also utilized as justifications for the use of drug testing.

Starting from the assumption that drug use is bad for people's lives, the paternalist argument suggests that drug testing is both good for recipients and society at large. Paternalism asks questions about people's lifestyle. It relies on the idea that welfare recipients need to be closely supervised. As Lawrence Mead defines it, "paternalism is an effort to control the lifestyle of the poor" (Mead 1997, p.6). While traditional welfare policy "leaves people free to choose their own course of life", paternalism defends society's rightful claim to "tell its dependents how to live, at least in some respects" (Mead 1997, pp. 3-4). In this way, welfare providers must check up on welfare recipients' behavior in order to make sure that they are meeting their obligations, especially with regard to their obligation to work. Gainful employment, Mead says (2007, p.57), "generates favorable spillover effects for poor families and communities, aside from the income it provides". A successful welfare policy puts welfare recipients to work.

Paternalism is proactive in terms of supervising welfare recipients "largely outside institutional walls" (Mead 1997, p.21). It is through employment that people should obtain the resources to support themselves and their families. The government's supervision of poor citizen – particularly nonworking welfare recipients-- is necessary to "address today's poverty, which is aggravated by the lifestyle of many of the poor themselves" (Mead 1998, p.100). According to this view, at least in some respects, the society has a right to tell its dependents how to live. It assumes that the government "can know and serve its clients' own interests better than they would themselves" (Mead 1998, p.100).<sup>4</sup> In the words of David Vitter, Louisiana U.S. Senator, "requiring

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<sup>4</sup> Notice, however, that Lawrence Mead (2011, p.1) does not fully support a universal drug testing program for welfare recipients. According to him, "To demand that applicants be clean of drugs would keep some people off welfare who could not work because of their drug habit. But it would also exclude some users who might quit drugs as part of a plan to become employable. The result could well be more drug addiction—and less work—than otherwise." Thus, he

screenings would give addicts a key incentive to seek help so that they can once again be healthy, support their own families, and make positive contributions to our society”.<sup>5</sup>

A major point of consideration is that the paternalist perspective treats welfare recipients not as holders of rights but mainly as holders of obligations who need to honor their responsibilities. By the simple act of accepting society’s assistance, welfare recipients lose a rightful claim to liberal values such as privacy and autonomy. Accordingly, there are some important liberal values that ought to be set aside in the context of welfare assistance. As Mead suggests, “government’s priority should not be to keep its hand clean but to do what is necessary to integrate the seriously poor into the larger” (Mead 1997, p. 26). Therefore, from a paternalist perspective, drug testing policies are a necessary instrument to regulate the lives of those who depend on welfare assistance.

A third justification for drug testing begins with the assumption that drug abusers can harm others. In particular, some drug testing advocates believe that welfare programs should protect children in homes from drug addicted parents (McLaughlin 2013). For instance, Florida Governor Rick Scott argues that “any illegal drug use in a family is harmful and even abusive to a child.” Hence, “we should have a zero-tolerance policy for illegal drug use in families — especially those families who struggle to make ends meet and need welfare assistance to provide for their children.”<sup>6</sup> Similarly, Michigan State Senator Rick Jones believes that “there are children who are hungry because their parents are addicted to substances such as meth, heroin and alcohol. Helping a parent seek help and still providing services is in the best interest of children.”<sup>7</sup> By following

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recommends drug testing “only of welfare applicants with a history of substance abuse, not all of them”.

5 David Vitter U.S. Senator, Louisiana in his Government Programs Should Not Encourage Lifelong Dependency, December 15, 2011. Debate Club, USNews. Available in: <http://www.usnews.com/debate-club/should-welfare-recipients-be-tested-for-drugs/government-programs-should-not-encourage-lifelong-dependency> (accessed in February 12, 2015).

6 [http://www.nytimes.com/2014/01/01/us/florida-law-on-drug-testing-for-welfare-is-struck-down.html?\\_r=0](http://www.nytimes.com/2014/01/01/us/florida-law-on-drug-testing-for-welfare-is-struck-down.html?_r=0) (Accessed in February 17, 2015)

7 See, Why welfare drug testing is in the best interest of Michigan families, (April 21, 2014) Available in: <http://www.freep.com/article/20140421/OPINION04/304210008/drug-testing-welfare-recipients-Michigan-legislation> (Accessed in February 2015).

Schuck and Zeckhauser's (2006) terminology, we could argue that the third justification conceives of drug abusers as "bad apples". That is, "individuals whose irresponsible, immoral, or illegal behavior in the past—and predictably, in the future as well—marks them as unsuitable to receive the benefits of social programs" (Schuck and Zeckhauser (2006, p.2). Similar to other negative behavior profiles such as chronically disruptive public school students or public housing residents, substance abusers can inflict a variety of harmful effects both on them and others. In line with this interpretation, drug testing for welfare recipients is simply a harm reduction strategy. Since the participation of drug abusers in welfare programs imposes significant costs on third parties, drug testing can become an instrument of fairness and protect these third parties' rights.<sup>8</sup>

Before proceeding, it is important to note that these justifications are not mutually exclusive. In fact, standard defenses of drug testing typically combine arguments from these three justifications. For example, we can advance the synthesized argument that drug testing is required *not only* to guide welfare recipients to lead better lives, *but also* to honor a contract between welfare recipients and taxpayers, *and* to protect third parties from potential harm. We could argue, for instance, that since drug use is an illegal (and undesirable) activity that has devastating consequences at both individual and societal levels, taxpayers have a strong interest both in preventing their taxes, via welfare, from being spent on the support of drug users and in getting recipients off the welfare roll and oriented toward becoming functional members of society. As a consequence, we should test potential welfare recipients for drug use either in order to disqualify them from welfare programs or put them into rehabilitation programs. This argument combines various elements from the three different justifications for drug testing.

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<sup>8</sup> We could argue that the harm argument is not distinct from contractualism since both justifications pretend to enforce good behavior in order to avoid public harm. Notice, however, that although the contract can be justified as a strategy to avoid direct public harm, it can also be based on other grounds such as the furtherance of social cooperation or the promotion of certain values (e.g. reciprocity). Naturally, we could adopt a broader definition of harm that includes the lack of social cooperation and reciprocity as modalities of harm. However, in this context, drug-testing advocates are mainly thinking of forms of direct harm that drug users might inflict upon third parties (e.g. on their children).

## **Normative challenges to drug testing**

This section presents various normative challenges to the use of drug testing for welfare recipients. First, it raises a set of specific objections against each of the three justifications described above. Second, it develops the argument that mandatory drug testing can violate welfare recipients' privacy in a morally impermissible fashion. Finally, it explains why the current background conditions in most liberal societies make the implementation of drug testing unfair. Let's consider these objections in turn.

### *Specific objections against the three main justifications of drug testing*

There are specific objections that can be raised against each of the three justifications for drug testing. Consider first the contractualist justification. It states that welfare benefits are part of an agreement among citizens mediated through the state.<sup>9</sup> There are two objections to the contractualist justification for drug testing. First, there is an important distinction to be drawn between the notion of contract and consent. I may submit to a drug test although I may not explicitly consent to do so (Grant 2011). If I have the opportunity to choose I would rather prefer not to be tested. But most welfare recipients do not have a real choice for deciding whether or not to voluntarily submit to a drug test (Cappeli 2011). Therefore, it is incorrect to conclude that welfare

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<sup>9</sup> For a discussion on the contractualist justification of drug testing in the workplace, see: Cranford (1998) and Rowan (2000).

recipients are free to accept or refuse the conditions attached to welfare provisions. The second objection is that drug testing suffers from a problem of selectivity. Put simply, it is unfair to target behavioral conditionalities at welfare claimants and not simultaneously at the rest of the people who benefit from state funds in the form of tax credits and exemptions, mortgage interest deduction and so on (Deacon 2004, Zelleke 2005, p.641). If justice requires preventing drug users from receiving public money, then the state should not be reluctant to implement drug-testing programs for applicants and recipients of all public benefits (Moses 2011). Drug testing advocates need to explain why some members of society can receive public benefits without being tested for drug use while others need to meet that behavioral conditionality.<sup>10</sup>

The paternalist justification for drug testing says that drug use negatively affects people's chances at becoming self-sufficient and autonomous. Drug tests are needed because drug users would not perform or participate as expected in society. Against this justification, we can argue that it is not true that drug use always affects welfare recipients' self-sufficiency and autonomy. In fact, drug use may have no consistent effect on whether they meet other behavioral conditionalities. For instance, welfare recipients who use drugs can regardless sometimes satisfy their employment and training obligations.

Some empirical studies have shown that substance abuse and dependence “are less widespread among welfare recipients than was originally thought and are less common than other serious barriers to self-sufficiency” (Jayakody et al 2000, p. 644; Metsch and Pollack 2005, p.65)<sup>11</sup>.

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<sup>10</sup> We could argue that the government should test welfare recipients for drug use and not other recipients of public benefits because the incidence of drug use in the former group is higher than in the latter. This is an empirical assumption that is usually made by advocates of drug testing. However, as I mentioned before, there is no evidence that this is the case (Jayakody et al 2000 and Metsch and Pollack 2005). I thank an anonymous referee for pointing this out to me.

<sup>11</sup> Some states such as Arizona, Tennessee, North Carolina and Utah have released information about their drug testing programs. The results support the previous evidence that the prevalence of drug users among welfare recipients and applicants is not bigger than in the general population. See for instance: [http://www.huffingtonpost.com/2013/08/27/welfare-drug-testing\\_n\\_3822750.html](http://www.huffingtonpost.com/2013/08/27/welfare-drug-testing_n_3822750.html) (Accessed: July 25); <http://usatoday30.usatoday.com/news/opinion/editorials/story/2012-03-18/drug-testing-welfare-applicants/53620604/1> (Accessed: July 25); <http://www.tennessean.com/story/news/politics/2016/02/07/drug-testing-benefits-tennessee-yields->

As Pollack et al (2002, p.270) suggest, “poor education, lack of transportation, physical and mental problems” are barriers to self-sufficiency more common among welfare recipients than substance abuse and dependence. Likewise, Schmidt et al (2007) found that while education, work history and family size are good predictors of people’s transitions from welfare to work back and again, substance use does not.

Finally, the harm-based justification says that drug testing is morally permissible as long as this instrument aids in the avoidance of significant harm. One objection to this argument is that it is not an easy task to determine how and to what extent welfare recipients who use drugs may harm third parties.<sup>12</sup> We may believe that drug users can -- probabilistically speaking -- harm good or innocent third parties in various ways. First, drug users might affect the lives of their family. For instance, infants with parents who use drugs are exposed to multiple risk factors. Second, drug users can drain scarce resources away from more “deserving” participants.<sup>13</sup> For example, they can “interfere with the ability of deserving participants to benefit from a program” (Schuck and Zeckhauser 2006, p.2). Third, drug abusers can reduce the political support for social programs. Taxpayers might view drug abusers as individuals engaging in self-destructive conduct and wasting scarce resources that might be better spent on other populations of people. This erodes important public support for these programs (Schuck and Zeckhauser 2006, p.79).

It is worth noting that the political support argument is affected by the validity of the other

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[only-65-positives/79776756/](#) (Accessed: July 25, 2016), See <http://www.vox.com/2016/2/16/11021826/north-carolina-drugs-welfare> (Accessed: July 25, 2016).

<sup>12</sup> For a similar objection in the debate on drug testing in the workplace, see: DesJardins and Duska (1987), DeCew (1994), Birsch (1995) and Rowan (2000).

<sup>13</sup> The concepts of deserving and underserving are highly contested ones. For a discussion of the social construction of deservedness and its implications for public policy see, for example, Schneider and Ingram (2005) and Soss, Fording and Schram (2011).

two harm-based reasons. That is, by the validity of the assumptions that drug users can cause direct harm to others and that their presence in the welfare system reduces the resources available for other welfare applicants. When these two premises are true, taxpayers may have additional reasons to reject funding welfare programs that do not exclude drug users. But these arguments are not as strong as they may seem initially. For example, drug testing advocates should recognize that the exclusion of drug users from the welfare system will also indirectly harm third parties by, say, cutting the flow of social benefits to children and other dependents. It is not a reasonable solution to exclude all drug users (and with them, their families) from the safety net. That will likely produce more harm than good in an otherwise “deserving” population. Thus, the harm-based argument needs to show how the exclusion of drug users from the welfare system will be of more benefit to the children and other dependents of these individuals than their inclusion in the system.

The recent literature on the effects of welfare sanctions on wellbeing is pessimistic about the value of that instrument. Although sanctions under TANF contributed to the decline of welfare rolls, the evidence does not show that this has benefited the population that previously benefited from welfare. For instance, some scholars have recently shown that sanctions have a substantively significant negative effect on the earnings of TANF clients (Fording, Schram and Soss 2013, pp. 669). This is expected to produce more harm than benefit.

### *The value of privacy*

The American legal debate on drug testing is centered on determining the extent to which this policy may undermine the Fourth Amendment. The goal of that constitutional amendment is to protect individuals’ privacy against government’s arbitrary intrusion as derived from its prohibition of “unreasonable searches and seizures”. Accordingly, some authors (i.e. Arcila 2004, 2011; Barile 2012; Carpenter 2014, Guthrie 1991, Jolley 2014) have examined the legal implications that suspicionless drug testing may have on the Fourth Amendment’s “special needs” principle as an

“exception to individualized suspicion and warrant requirements” (Arcila 2004, p.1224). Reasonable searches must be based on individualized suspicion. If that is not the case, the government is required to show that there is a “special need” that justifies an exception to the norm (Carpenter 2014, p. 12). For example, the government has to prove the existence of a public safety risk that justifies a special need exception (Socha 2001).

By examining some specific cases like Michigan (Socha 2001, Newell 2011, Carpenter 2014) and Florida (Barile 2012, Carpenter 2014), some authors argue that suspicionless drug testing for welfare claimants is unconstitutional under the Fourth Amendment. That is because this policy becomes a form of unreasonable search. The government should have probable cause before mandating welfare recipients to be tested for drug use. The debate is then framed in terms of how the Supreme Court should handle special needs cases – where drug testing is warranted on the basis on a special need-- and whether or not this particular principle may constitute a threat to Fourth Amendment protections (Arcila 2004, p.1224). While important, this debate has missed the normative question of what makes drug testing unethical. That is, we need to know not only whether drug testing violates welfare recipients’ privacy but also why that matters in a normative sense.<sup>14</sup>

As John Gilliom (2001) suggests, in the context of welfare administration, privacy should be thought of as an issue that concerns more than just a legal set of rights and entitlements. In particular, it should be scrutinized in relation to broader notions of power and domination. In this case, drug testing for welfare recipients is an instrument of surveillance with important political implications. It allows welfare bureaucracies the possibility to gather, store, share and use personal

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<sup>14</sup> In addition to the concerns about privacy, a different argument appeared in the debate about drug testing in New Zealand (Wincop 2014, p.1035). In that particular case, part of the normative discussion was focused on the right that drug users may have to refuse treatment. For a more detailed discussion about the particularities of drug testing for welfare recipients in New Zealand, see for instance: NZ Drug Foundation. (2011), the Office of the Minister of Social Development. (2012), and Wincop (2014).

information about welfare recipients (Gilliom 2001, p.2). For example, in his qualitative study of welfare surveillance of low-income mothers from Appalachian Ohio, Gilliom (2001, p.5) found that the concerns of privacy by these welfare recipients has very little to do with “the ongoing mainstream legal and policy debates about rights to privacy and due process”. Instead, they chiefly complained about “the hassle and degradation caused by surveillance and the ways that it hindered their ability to meet the needs of their family”. That is, privacy, in this context, is fundamentally an issue related to “daily need and about power of surveillance that both make their needs greater and limit their capacity to meet them” (Gilliom 2001, p.5). From a normative point of view, it is crucial to evaluate how the potential intrusion into welfare recipients' privacy can affect important moral values and whether it is itself a morally justifiable action.

An appropriate place to look for answers is the normative debate on the value of privacy triggered after the implementation of employee drug-testing programs. Drug testing programs have been implemented in the workplace over the last three decades. Among other things, opponents of this policy argue that the potential benefits of this instrument rarely outweigh its negative impacts on employees' privacy (DesJardins and Duska 1987, Moore 1988, DeCew 1994, Comer 1994, Gilliom 1994, Birsch 1995, Rowan 2000).

In the context of that debate, a right to privacy has been defined as a three-part relation involving an Agent *A*, an Agent *Z* and some information *X*.<sup>15</sup> According to George Brenkert (1981, p.23), “to say that something is rightfully private is to say that *A* may withhold from or not share something, *X*, with *Z*. Thus to know whether some information, *X*, about a person or institution, *A*, is, or ought to be, treated as rightfully private, we must ask about the relationship in which *A* stands to *Z*, another person or institution.” Therefore, there is a violation to the right of privacy when *Z* deliberately acquires information *X* about *A* without being entitled to it given the nature of the

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<sup>15</sup> It is important to note that privacy is a disputed idea with a number of divergent definitions. Since Brenkert's notion of privacy is commonly used in the debate about drug testing in the workplace I adopt his definition here. For a good overview of the concept of privacy see: Judith DeCew (2013), available in: <http://plato.stanford.edu/entries/privacy/>

relationship between these two agents. For example, if I consult a physician for abdominal pain, it is reasonable that she asks me about my bowel movements during the past few days. In this case, the relationship between patient and physician justifies the latter coming to know information about my bowel movements. However, the relationship that I may have with the waitress of the coffee shop where I am typing these words does not justify -all things being equal- she getting access to that information. Thus, paraphrasing DesJardins and Duska (1987, p.4), *A*'s right to privacy is violated "whenever personal information is requested, collected and/or used by" an agent *Z* (a person or institution) "in a way or for any purpose that is irrelevant" to the relationship that exist between *A* and *Z*.

A key issue is whether the state is entitled to take stock of individual welfare recipients' potential drug habits. The three justifications previously discussed present various arguments in support of the idea that the relationship between welfare recipients and the state results in the state's power to collect appropriately relevant information. That is, to justify why the state is entitled to know whether welfare recipients use drugs. For example, paternalist advocates could argue that privacy is an irrelevant value at the time of evaluating welfare policies. Privacy should not be among the ethical standards for evaluating the efficacy of drug testing programs. If a violation of privacy allows the government to shape welfare dependents into higher functioning members of society, then this violation should be undertaken.

Similarly, we could argue that, in so far as drug use is an illegal activity, it is additionally justifiable when the state overrides welfare recipients' privacy. It is worth noticing, however, that our collective entitlement to knowing some particular piece of information does not also entitle us to collect that information at any cost. Even if *Z* is entitled to some information from *A* given the nature of the relationship between them, we should not assume that *Z* is justified in using any means to acquire that information. The state is not allowed to use any available method to detect illegal behavior. The costs associated with the use of some instruments can significantly outweigh

its benefits. This is particularly important for the case of suspicionless mandatory drug testing for all welfare recipients and applicants. In this specific case, the costs in terms of forfeited privacy that are associated with the use of drug testing can outweigh the benefits of obtaining that information.

The obvious dual question is both why privacy matters and also when its claims may be justly overruled. More concretely, we need to understand why privacy is a value that can outweigh the potential benefits of drug testing. There are several arguments that might be leveraged to that effect. For instance, a range of scholars have persuasively argued that privacy is crucial for individuals' intimacy (Gernstein 1978), the full functioning of social relationships (Rachels 1975), the possibility of human well-being or flourishing (Moore 2003, p.220) and even the promotion of individual autonomy (Rowan 2000). Without entering into details, it seems reasonable to think that the absence of privacy produces vulnerability within people's lives (Gillom 2001). As Rowan (2000, p.71) points out, any evaluation of the moral value of privacy should take into account the fact that there is a potential vulnerability that accompanies the process of "being forced to relinquish certain information about oneself".

Privacy violations produce at least two forms of vulnerability. First, we may feel anxiety, embarrassment and shame when someone else knows some information that we would not like to share. Second, the potential misuse and abuse of that information can make us vulnerable. These two points equally apply to the case of drug testing for welfare recipients. On the one hand, drug testing can reveal information that produces shame and embarrassment. Even if the revealed information is not misused or abused, welfare recipients who submit to drug tests can feel shame. Although shame is externally imposed, it is "internalized and experienced as a powerful negative emotion that results in social withdrawal and a sense of powerlessness" (Walker 2014, p.2). Shame, Walker points out, may "well serve to exacerbate the underlying causes of poverty and to lessen the impact of policies designed to tackle the problem" (Walker 2014, p.2).

On the other hand, the misuse -- whether direct or indirect -- of the information obtained

through drug testing can increase the vulnerability of an already disadvantaged population. As DeCew (1994, p.18) argues, “analysis of blood and urine samples may reveal numerous physiological facts about the party being tested that he or she may not want to share with others. Tests can reveal such conditions as the use of contraceptives, pregnancy, epilepsy, manic depression, diabetes, schizophrenia and heart trouble for example”. Thus, how this information is handled is not a minor issue. Moreover, it is unreasonable to assume that there is a causal link between the drug test results and the decisions made based on those results. In her analysis of the everyday decision-making practices of a local juvenile court staff, Paik (2006) found that there is not always a clear pattern between drug test results and court decisions. Court staff, she says, “anticipates, recognizes and treats a certain number of drug tests results as false positive, false negatives, ambiguous or not tests” This shows “how malleable and negotiable drug tests are” (Paik 2006, p.956).

Likewise, while the information obtained via drug tests may be directly used to cut the welfare benefits of a needy population, it can also produce stigmatization. When welfare recipients are required to undergo drug testing, tax-payers in the population at large might interpret this as a signal that most welfare recipients are cheaters and have problems with drug use. Drug testing can indiscriminately stigmatize both offenders and non-offenders alike. This is particularly problematic in those welfare systems that incorporate the logic of a criminal justice system to control welfare recipients’ behavior (Soss, Fording and Schram 2011).

Kaaryn Gustafson (2011) persuasively shows that the current American welfare system is strongly connected with the criminal justice system. Current conditional welfare policies treat welfare recipients “as presumptive liars, cheaters and thieves” (Gustafson 2011, p.2). The implementations of policies mainly intended to deter welfare use and control welfare misuse help to conflate the stigma of poverty with the stigma of criminality. If the violation of privacy is very often experienced as an undesirable intrusion on people’s rights, we need to ask which benefits may

be gained from that action. The relevant question is “whether there are ethical considerations even more pressing than privacy” which may justify the use of drug testing (Rowan 2000, p.73).

Proponents of drug testing may counter that my argument only applies to the most invasive drug testing procedures. Thus, the use of less invasive drug testing would be immune to my criticisms. For example, there are other less intrusive methods than blood and urine tests such as hair, saliva and sweat and dexterity testing which can be used in determining drug use (Macdonald et al 2010, p.409). But notice that the problem transcends the actual drug testing method used: as I argued above, the invasion of privacy comprises not only the test itself but also the collection of data. Regardless of the method employed, the simple process of interpreting results and reporting those results to some authority may affect the tested persons’ privacy. This is because, simply put, those who are tested lose control of the information collected via drug testing. The resulting information -- whatever the method used to obtain it -- can be misused and abused by welfare administrators, caseworkers and other parties involved in the administration and interpretation of drug testing (BeVier 1995). In the typical organizational context surrounding the administration of drug tests, bureaucratic discretion may be exercised within uncertain boundaries (Paik 2006).

One could object to this argument by countering that our personal information is already handled by the state in a number of other contexts. States continuously collect information about their citizens. The question is what makes the case of drug testing particularly problematic. If the main concern is how the state handles this information once it has already been collected, we could address that problem by creating institutional constraints that protect welfare recipients in order to make them less vulnerable. In other words, we could protect that vulnerability through procedural protections.<sup>16</sup>

There are, however, two reasons to be cautious about such a recommendation. First, in this

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<sup>16</sup> Unfortunately, as Radel, Joyce, and Wulff (2011, pp.4-5) suggest, few legislative proposals for drug testing welfare recipients in the U.S include provisions for procedural safeguards.

particular case, at question is a vulnerable population who may not be particularly aware or even capable of using the procedural protections designed to regulate how the information is released, presented, published and used. Second, even if the state can provide various procedural protections to secure the use of the information gathered through drug testing, in the present day no state can guarantee a full protection of that information. As Altman et al (2015, p. 1973) suggest, unauthorized release of information and violations to privacy are difficult to predict since public “data are accumulated, combined, and used in a wide variety of contexts, and data release programs often fail to address the full range of risks identified within the scientific literature on privacy”. Naturally, this applies to all other personal information that is gathered by the state. But what makes drug testing particular in this respect is that it reveals highly sensitive information about some of the most vulnerable members of society.

### *Background conditions*

The presence of unequal background conditions against which individuals make decisions affects the moral case for welfare conditionality. Even if we accept the ideal normative merits of the three justifications for drug testing, the existence of unfair background conditions in non-ideal circumstances represents an additional challenge to these justifications. That is, even if we accept the claim that drug testing is a useful instrument to distinguish between good and bad behaviors, to minimize harm to third parties or to honor a contract between welfare recipients and the state, we should ask to what extent its implementation -- given the current empirical realities -- can attenuate or exacerbate existing injustices.

I argue that the fairness of conditional welfare policies depends highly on context. Stuart White explores this problem for the case of workfare policies. According to him, “the claim is that

because *our* society is unfair in certain other major respects, fairness is best served, in an all-things-considered and second-best sense, by not enforcing work in the welfare system” (White 2004a, p.278).<sup>17</sup> The idea is that even if we have good normative reasons for justifying a particular type of welfare conditionality, its enforcement can, in fact, likely “serve only to consolidate or exacerbate existing injustice”. We have to “tackle basic structural injustices” before we can enforce some forms of welfare conditionality.

Background conditions play a central role in determining the degree to which recipients possess control over behavioral requirements. There are at least three levels in which background conditions become normatively important. First, there are structural factors that make the distinction between “deserving” recipients and “undeserving” recipients extremely difficult to determine. It is unfair, in the abstract, to blame someone who uses drugs without taking into account the circumstances that led that person to behave in this way. Multiple external and internal factors can impact people’s attitudes toward drug use, abuse and dependence. Those factors can explain not only why a person begins to use drugs but also why some people may have more difficulty than others in quitting and successfully abandoning their addiction (Sellman 2009).

In discussing the problem of smoking, Voigt (2010, p. 94) suggests “disadvantaged groups are exposed to a range of factors that make them more prone to become smokers and that make smoking cessation more difficult to them than it is for others”. And she adds: “the unequal outcomes arising from the choices made against such background conditions should concern us as a problem of justice, irrespective of whether or not the inequalities in background conditions undermine the autonomy or voluntariness of the choices individuals make” (Voigt 2010, p. 94). This observation is also pertinent to the case of drug use, abuse and dependence. Although it is difficult to determine what weight should be assigned to background conditions against other determinants, inequalities in

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<sup>17</sup> It is important to note, though, that White supports the use of work conditionality as long as those conditions help to promote fair reciprocity (White 2003, 2004a).

the background should not be easily dismissed.

Second, given individual contexts, some conditionalities may exert different impacts on different people based on morally arbitrary factors, such as race, gender and circumstances of birth. For example, like other sanctions, there are good reasons to believe that drug testing may have a disproportionate impact on women.<sup>18</sup> Some scholars argue that drug testing for all welfare recipients “will detect use among many women who have no accompanying problems with impaired social performance or employment” (Jayakady et al 2000, p.644). Likewise, in reviewing the literature on the impact of sanctions on TANF’s recipients, Fording, Schram and Soss (2013, p.645) found that the probability of being sanctioned is associated with variables such as a client’s race (non-white), age (younger), educational level (low), marital status (single), job experience (less), and family size (larger). When sanctioned clients are more likely to present some similar characteristics, this has a biasing effect on the size and composition of the welfare recipient population. Welfare claimants are by definition socio-economically vulnerable. But many of them are also vulnerable due to gender and racial inequalities within societies. The use of drug testing can exacerbate these vulnerabilities.

Finally, some welfare conditionalities can be objectionable when placed in context because they ask people to fulfill obligations they cannot meet. For example, we would argue that it is unfair to condition welfare benefits on children’s school attendance and routine health exams if there is an insufficient supply of public education and health care provision that allow recipients to meet these conditionalities (Hanlon, Barrientos and Hulme 2010, p.136). Recipients need to have a fair opportunity to fulfill the behavioral requirements imposed by conditional welfare policies.

In the case of drug tests for welfare recipients, it is unfair to impose a behavioral conditionality that beneficiaries can hardly meet. We should inquire about the degree of control that

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<sup>18</sup> I thank an anonymous referee for this suggestion

welfare recipients have over substance use and abuse. The fairness of a drug test policy is questionable, to say the least, if it is implemented without providing recipients a real option to avoid drug consumption. People who are regulated by some behavioral requirement need to have a real opportunity to change and meet the expected behavior. A drug test policy aimed at preventing welfare recipients from using and abusing drugs cannot be predicated on the premise that all substance users are equally capable of voluntarily changing their behavior and meeting the behavioral conditions imposed by that policy (Dennis and Scott 2007). The unfairness of that policy, in this case, is quite obvious: it is enforcing people to do something that may be well beyond their capacity.<sup>19</sup>

If welfare recipients ought to stop using drugs, they must be able to do it.<sup>20</sup> In other words, society can only demand that drug users stop using drugs if these individuals have realistic opportunities for rehabilitation.<sup>21</sup> If they lack such an ability, then they may not be ethically obligated to do it. It can be argued that it is unfair to blame people for failing to do something they cannot do (Howard-Snyder 2013). For example, we could argue that the severity of the demands of conditionality we place on welfare recipients who use drugs should themselves be conditional on the existence of feasible opportunities for rehabilitation (Bauld et al 2012, p. 763). If the state cannot improve their opportunities for rehabilitation and as a consequence they cannot stop using

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<sup>19</sup> It is worth noticing that in the U.S, individuals with a diagnosis of substance abuse do not qualify for disability benefits unless their disability would be present without the use of addictive behaviors (Kim and Kaye 2015, p. 596). For example, the Supplemental Security Income (SSI) --a Federal income supplement program “designed to help aged, blind, and disabled people, who have little or no income” (<https://www.ssa.gov/ssi/>)-- does not grant benefits for disabilities that are caused by some form of substance abuse. Welfare claimants denied welfare benefits due to drug use do not qualify for becoming SSI recipients either unless their primary diagnosis is not that of substance abuse or dependence. Under certain circumstances welfare claimants who are denied regular welfare support because of their drug use could eventually be institutionalized. I thank an anonymous referee for this point.

<sup>20</sup> This argument describes a situation of ‘ought’ implies ‘can’ (OIC). The intuition here is that for a relevant subset of cases, if agent *A* ought to do *X*, then that agent *A* must be able to do *X*. There is an extensive philosophical literature discussing this type of situation. In a paper of this scope, I cannot seriously engage the extensive literature on OIC so I will merely state the argument in its simplest form. For a general overview of the debate on OIC see Howard-Snyder (2013).

<sup>21</sup> Some studies have shown that more intensive services (i.e. interventions that monitor drug users over time and that consider substance abuse as a chronic illness) have a more positive impact on abstinence from drug use (Morgenstern 2009 et al, p.328). The transition from welfare to employment cannot be predicated only on providing any form of drug rehabilitation.

drugs, then it is not the case that they ought to change their behavior. As I discussed earlier, some drug testing policies (i.e. the one introduced in Florida) exclude all welfare applicants who test positive for drug use without providing any public rehabilitation program.<sup>22</sup>

Advocates of drug testing might object to this argument by pointing out that this allows the welfare recipient to shirk his obligations simply “by making himself unable to do it” (Sinnot-Armstrong 1984, p. 252). To take an example: if I ought to meet a friend at 8 pm in Chicago, but earlier in the day I flew to Montevideo, I will not be able to fulfill the obligation of meeting my friend. It would be impossible for me to do it. By following the logic of my previous argument, we could argue that because I cannot meet my friend at 8 pm, I ought not to be subject to an obligation to do so. This kind of case, Sinnot-Armstrong (1984, p.254) argues, shows that “ought does not universally imply, much less entail, can”. Likewise, my argument might allow welfare recipients to let themselves off the moral hook, so to speak, by rendering their rehabilitation unlikely and, as a consequence, becoming incapable of being rehabilitated. By arguing that welfare recipients ought to not meet their obligations because they cannot fulfill them, we run the risk of justifying irresponsible behaviors.

But notice that this is a case in which an agent *W* (a welfare recipient) has an obligation to an agent *S* (the state) that cannot be fulfilled if *S* does not facilitate some background conditions. It is not the case that welfare recipients do something to avoid blame. Instead, their inability to meet their obligations is mainly explained by the limited opportunities that the state gives them to fulfill their obligations in the first place.

In response, drug testing advocates could argue that drug users should become responsible

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<sup>22</sup> One could argue that from this argument it follows that we should institutionalize all those drug-using recipients who are unable to come clean. However, I do not think this idea logically follows from my position. My point here is simply that some drug users need comprehensive assistance before they can be rehabilitated. The absence of public or affordable public rehabilitation programs may work against demanding that welfare recipients rehabilitate by their own means. It does not imply that they need to be forced to participate in a rehabilitation program. I am not defending that position here.

for their actions and that the state does not have any obligation to help them. The role of drug testing is to prevent drug users from getting state money. However, this response, for those cases of substance abuse and dependence, is only available for advocates of drug testing as an instrument to deter welfare participation and not to promote self-sufficiency and independence for the poor. Drug testing advocates could certainly suggest that there are a good number of drug users who do not need the help of a rehabilitation program to stop using drugs and that this argument only works for the case of substance abusers. In response we could argue that -- as is shown by the available empirical data -- the majority of drug users do not represent a risk for themselves or third parties (Pollack et al 2002).

The background objection does not tell us that drug testing is always unjustifiable. Instead, it says that, given the current circumstances, it would be morally impermissible to enforce that kind of conditionality. The background objection points out that all of the available moral defenses of drug testing are unjustifiable as long as they ask people to do things that they may not have the ability to do. This does not mean that welfare recipients do not have a duty to stop using drugs. They may retain that obligation as long as the necessary conditions for fairly implementing drug testing are feasible in the future.<sup>23</sup>

## **Conclusions**

This paper advances a moral case against the use of mandatory drug testing for welfare recipients. On the one hand, I argued that drug testing impermissibly violates welfare recipients' privacy. On the other hand, I claimed that the enforcement of drug testing -- given the current background conditions -- leads to unfair results in actual practice. Like other forms of welfare conditionality, the

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<sup>23</sup> Wiens (2012, p.327) presents a similar reasoning applied to the debate about global justice.

policy goals behind mandatory drug testing are generally uncontroversial ones. It is difficult to disagree with the goals of promoting self-sufficiency among welfare recipients or protecting children from drug abusing parents. However, the set of policy *goals* is one thing and the set of policy *instruments* used to pursue those goals is quite another. The case of drug testing shows a mismatch between policy goals and policy instruments.

To conclude this discussion, it is worth emphasizing that the ethical study of drug testing – as any normative evaluation of public policy-- depends on sound empirical studies and knowledge. Some of the ethical criticisms advanced in this manuscript are based on empirical knowledge about how drug testing programs work and how they may impact the lives of welfare recipients. New empirical studies, however, can reaffirm or contest some of the normative arguments developed here. For instance, the existing empirical evidence tends to support the view that drug testing produces more harm than it prevents – although, as with all empirical claims, this view should be continually revisited in light of future scholarship.

But until new evidence convincingly indicates as much, we have good reasons to believe that drug testing is not an adequate instrument for promoting welfare recipients' self-sufficiency and responsibility or to avoid harm to third parties. Like other conditional welfare policies, these programs have been used to penalize welfare recipients. As several scholars have argued, welfare recipients with problems of drug abuse and dependence need assistance in order to recover from drug use. Drug testing programs that are not integrated with accessible rehabilitation policy will not be helpful. For those politicians, policy makers and practitioners who are interested in identifying, screening and monitoring substance use and abuse, the conclusions of this argument indicate that drug testing for welfare recipients by itself is an insufficient and morally impermissible instrument for achieving these desired goals.

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