Drug Testing and Corporate Responsibility: The "Ought Implies Can" Argument

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ABSTRACT. Most of the debate about drug testing in the workplace has focused on the right to privacy. Proponents of testing have had to tackle difficult questions concerning the nature, extent, and weight of the privacy rights of employees. This paper examines a different kind of argument – the claim that because corporations are "responsible" for harms committed by employees while under the influence of drugs, they are entitled to test for drug use. This argument has considerable intuitive appeal, because it seems, at least at first glance, to bypass the issue of privacy rights altogether. The argument turns, not on rights, but on the nature and conditions of responsibility. We may therefore call it an "ought implies can" argument.

In spite of its initial appeal, however, the argument does not succeed in circumventing the claims of privacy rights. Even responsibility for the actions of others does not entitle us to do anything at all to control their behavior; we must look to rights, among other things, to determine what sorts of controls are morally permissible. In addition, the argument rests on unjustified assumptions about the connection between drug testing and the prevention of drug-related harm.

In the past few years, testing for drug use in the workplace has become an important and controversial trend. Approximately 30% of Fortune 500 companies now engage in some sort of drug testing or screening, as do many smaller firms. The Reagan administration has called for mandatory testing of all federal employees. Several states have already passed drug testing laws; others will probably consider them in the future. While the Supreme Court has announced its intention to rule on the testing of federal employees within the next few months, its decision will not settle the permissibility of testing private employees. Discussion of the issue is likely to remain lively and heated for some time.

Most of the debate about drug testing in the workplace has focused on the issue of privacy rights. Three key questions have been: Do employees have privacy rights? If so, how far do these extend? What kinds of considerations outweigh these rights? I believe there are good reasons for supposing that employees do have moral privacy rights,[1] and that drug testing usually (though not always) violates these, but privacy is not my main concern in this paper. I wish to examine a different kind of argument, the claim that because corporations are responsible for harms committed by employees while under the influence of drugs, they are entitled to test for drug use.

This argument is rarely stated formally in the literature, but it can be found informally quite often.[2] One of its chief advantages is that it seems, at least at first glance, to bypass the issue of privacy rights altogether. There seems to be no need to determine the extent or weight of employees' privacy rights to make the argument work. It turns on a different set of principles altogether, that is, on the meaning and conditions of responsibility. This is an important asset, since arguments about rights are notoriously difficult to settle. Rights claims frequently function in ethical discourse as conversation-stoppers or non-negotiable demands.[3] Although it is widely recognized that rights are not absolute, there is little consensus on how far they extend, what kinds of considerations should be allowed to override them, or even how to go about settling these questions. But it is precisely these thorny problems that proponents of drug testing must tackle if they

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wish to address the issue on privacy grounds. Faced with the claim that drug testing violates the moral right to privacy of employees, proponents of testing must either (1) argue that drug testing does not really violate the privacy rights of employees;[4] (2) acknowledge that drug testing violates privacy rights, but argue that there are considerations that override those rights, such as public safety; or (3) argue that employees have no moral right to privacy at all.[5] It is not surprising that an argument that seems to move the debate out of the arena of privacy rights entirely appears attractive.

In spite of its initial appeal, however, I will maintain that the argument does not succeed in circumventing the claims of privacy rights. Even responsibility for the actions of others, I will argue, does not entitle us to do absolutely anything to control their behavior. We must look to rights, among other things, to determine what sorts of controls are morally permissible. Once this is acknowledged, the argument loses much of its force. In addition, it requires unjustified assumptions about the connection between drug testing and the prevention of drug-related harm.

An "Ought Implies Can" argument

Before we can assess the argument, it must be set out more fully. It seems to turn on the deep-rooted philosophical connection between responsibility and control. Generally, we believe that agents are not responsible[6] for acts or events that they could not have prevented. People are responsible for their actions only if, it is often said, they "could have done otherwise". Responsibility implies some measure of control, freedom, or autonomy. It is for this reason that we do not hold the insane responsible for their actions. Showing that a person lacked the capacity to do otherwise blocks the normal moves of praise or blame and absolves the agent of responsibility for a given act.

For similar reasons, we believe that persons cannot be obligated to do things that they are incapable of doing, and that if they fail to do such things, no blame attaches to them. Obligation is empty, even senseless, without capability. If a person is obligated to perform an action, it must be within his or her power. This principle is sometimes summed up by the phrase "ought implies can". Kant used it as part of a metaphysical argument for free will, claiming that if persons are to have obligations at all, they must be autonomous, or capable of acting freely.[7] The argument we examine here is narrower in scope, but similar in principle. If corporations are responsible for harms caused by employees under the influence of drugs, they must have the ability to prevent these harms. They must, therefore, have the freedom to test for drug use.

But the argument is still quite vague. What exactly does it mean to say that corporations are "responsible" for harms caused by employees? There are several possible meanings of "responsible". Not all of these are attributable to corporations, and not all of them exemplify the principle that "ought implies can". The question of how or whether corporations are "responsible" is highly complex, and we cannot begin to answer it in this paper.[8] There are, however, four distinct senses of "responsible" that appear with some regularity in the argument. They can be characterized, roughly, as follows: (a) legally liable; (b) culpable or guilty; (c) answerable or accountable; (d) bound by an obligation. The first is purely legal; the last three have a moral dimension.

Legal liability

We do hold corporations legally liable for the negligent acts of employees under the doctrine of *respondeat superior* ("let the master respond"). If an employee harms a third party in the course of performing his or her duties for the firm, it is the corporation which must compensate the third party. *Respondeat superior* is an example of what is frequently called "vicarious liability". Since the employee was acting on behalf of the firm, and the firm was acting through the employee when the harmful act was committed, liability is said to "transfer" from the employee to the firm. But it is not clear that such liability on the part of the employer implies a capacity to have prevented the harm. Corporations are held liable for accidents caused by an employee's negligent driving, for example, even if they could not have foreseen or prevented the injury. While some employee accidents can be traced to corporate negligence,[9] there need be no fault on the part of the corporation for the doctrine of *respondeat superior* to

apply. The doctrine of *respondeat superior* is grounded not in fault, but in concerns of public policy and utility. It is one of several applications of the notion of liability without fault in legal use today.

Because it does not imply fault, and its attendant ability to have done otherwise, legal liability or responsibility **a** cannot be used successfully as part of an "ought implies can" argument. Holding corporations legally liable for harms committed by intoxicated employees while at the same time forbidding drug-testing is not inconsistent. It could simply be viewed as yet another instance of liability without fault. Of course, one could argue that the notion of liability without fault is itself morally unacceptable, and that liability ought not to be detached from moral notions of punishment and blame. This is surely an extremely important claim, but it is beyond the scope of this paper. The main point to be made here is that we must be able to attribute more than legal liability to corporations if we are to invoke the principle of "ought implies can". Corporations must be responsible in sense **b**, **c**, or **d** – that is, *morally* responsible – if the argument is to work.

Moral responsibility

Are corporations morally responsible for harms committed by intoxicated employees? Perhaps the most frequently used notion of moral responsibility is sense **b**, what I have called "guilt" or "culpability".[10] I have in mind here the strongest notion of moral responsibility, the sense that is prevalent in criminal law. An agent is responsible for an act in this sense if the act can be imputed to him or her. An essential condition of imputability is the presence in the agent of an intention to commit the act, or *mens rea*.[11] But does an employer whose workers use drugs satisfy the *mens rea* requirement? The requirement probably would be satisfied if it could be shown that the firm intended the resulting harms, ordered its employees to work under the influence of drugs, or even, perhaps (though this is less clear) turned a blind eye to blatant drug abuse in the workplace.[12] But these are all quite farfetched possibilities. It is reasonable to assume that most corporations do not intend the harms caused by their employees, and that they do not order employees to use drugs on the job. Drug use is quite likely to be prohibited by company policy. If corporations are morally responsible for drug-related harms committed employees, then, it is not in sense **b**.

Corporations might, however, be morally responsible for harms committed by employees in another sense. An organization acts through its employees. It empowers its employees to act in ways in which they otherwise would not act by providing them with money, power, equipment, and authority. Through a series of agreements, the corporation delegates its employees to act on its behalf. For these reasons, one could argue that corporations are responsible, in the sense of "answerable" or "accountable" (responsibility **c**), for the harmful acts of their employees. Indeed, it could be argued that if corporations are not morally responsible for these acts, they are not morally responsible for any acts at all, since corporations can only act through their employees.[13] To say that corporations are responsible for the harms of their employees in sense **c** is to say more than just that a corporation must "pay up" if an employee causes harm. It is to assign fault to the corporation by virtue of the ways in which organizational policies and structures facilitate and direct employees' actions.[14]

Moreover, corporations presumably have the same obligations as other agents to avoid harm in the conduct of their business. Since they conduct their business through their employees, it could plausibly be argued that corporations have an obligation to anticipate and prevent harms that employees might cause in the course of their employment. If this reasoning is correct, corporations are morally responsible for the drug-related harms of employees in sense **d** – that is, they are under an obligation to prevent those harms. The "ought implies can" argument, then, may be formulated as follows:

1. If corporations have obligations, they must be capable of carrying them out, on the principle of "ought implies can".
2. Corporations have an obligation to prevent harm from occurring in the course of conducting their business.
3. Drug use by employees is likely to lead to harm.
4. Corporations must be able to take steps to eliminate (or at least reduce) drug use by employees.

5. Drug testing is an effective way to eliminate/reduce employee drug use.
6. Therefore corporations must be permitted to test for drugs.[15]

The limits of corporate autonomy

This is surely an important argument, one that deserves to be taken seriously. The premise that corporations have an obligation to prevent harm from occurring in the conduct of their business seems unexceptionable and consistent with the actual moral beliefs of society. There is not much question that drug use by employees, especially regular drug use or drug use on the job, leads to harms of various kinds. Some of these are less serious than others, but some are very serious indeed: physical injury to consumers, the public, and fellow employees – and sometimes even death.[16]

Moreover, our convictions about the connections between responsibility or obligation and capability seem unassailable. Like other agents, if corporations are to have obligations, they must have the ability to carry them out. The argument seems to tell us that corporations are only able to carry out their obligation to prevent harm if they can free themselves of drugs. To prevent corporations from drug testing, it implies, is to prevent them from discharging their obligations. It is to cripple corporate autonomy just as we would cripple the autonomy of an individual worker if we refused to allow him to "kick the habit" that prevented him from giving satisfactory job performance.

But this analogy between corporate and individual autonomy reveals the initial defect in the argument. Unlike human beings, corporations are never fully autonomous selves. On the contrary, their actions are always dependent upon individual selves who are autonomous. Human autonomy means self-determination, self-governance, self-control. Corporate autonomy, at least as it is understood here, means control over others. Corporate autonomy is essentially derivative. But this means that corporate acts are not the simple sorts of acts generated by individual persons. They are complex. Most importantly, the members of a corporation are frequently not the agents, but the objects, of "corporate" action. A good deal of corporate action, that is, necessitates doing something not only *through* corporate employees, but *to* those employees.[17] The act of eliminating drugs from the workplace is an act of this sort. A corporation's ridding itself of drugs is not like an individual person's "kicking the habit". Rather, it is one group of persons making another group of persons give up drug use.

This fact has important implications for the "ought implies can" argument. The argument is persuasive in situations in which carrying out one's obligations requires only *self*-control, and does not involve controlling the behavior of others. Presumably there are no restrictions on what one may do to oneself in order to carry out an obligation.[18] But a corporation is not a genuine "self", and there *are* moral limits on what one person may do to another. Because this is so, we cannot automatically assume that the obligation to prevent harm justifies employee drug testing. Of course this does not necessarily mean that drug testing is *unjustified*. But it does mean that before we can determine whether it is justified, we must ask what is permissible for one person or group of persons to do to another to prevent a harm for which they are responsible.

Are there any analogies available that might help to resolve this question? It is becoming increasingly common to hold a hostess responsible (both legally and morally) for harm caused by a drunken guest on the way home from her party. In part, this is because she contributes to the harm by serving her guest alcohol. It is also because she knows that drunk driving is risky, and has a general obligation to prevent harm. What must she be allowed to do to prevent harms of this kind? Persuade the guest to spend the night on the couch? Surely. Take her car keys away from her? Perhaps. Knock her out and lock her in the bathroom until morning? Surely not.

Universities are occasionally held legally and morally responsible for harms committed by members of fraternities – destruction of property, gang rapes, and injuries or death caused by hazing. What may they do to prevent such harms? They may certainly withdraw institutional recognition and support from the fraternity, refusing to let it operate on the campus. But may they expel students who live together off-campus in fraternity-like arrangements? Have university security guards police these houses, covertly or by force? These questions are more difficult to answer.

We sometimes hold landlords morally (though not legally) responsible for tenants who are slovenly, play loud music, or otherwise make nuisances of themselves. Landlords are surely permitted to cancel the leases of such tenants, and they are justified in asking for references from previous landlords to prevent future problems of this kind. But it is not clear that a landlord may delve into a tenant's private life, search his room, or tap his telephone in order to anticipate trouble before it begins.

Each of these situations is one in which one person or group of persons is responsible, to a greater or a lesser degree, for the prevention of harm by others, and needs some measure of control in order to carry out this responsibility.[19] In each case, there is a fairly wide range of actions which we would be willing to allow the first party, but there are some actions which we would rule out. Having an obligation to prevent the harms of others seems to permit us some forms of control, but not all. At least one important consideration in deciding what kinds of actions are permissible is the *rights* of the controlled parties.[20] If these claims are correct, we must examine the rights of employees in order to determine whether drug testing is justified. The relevant right in the case of drug testing is the right to privacy. The "ought implies can" argument, then, does not circumvent the claims of privacy rights as it originally seemed to do.

The agency argument

A proponent of drug testing might argue, however, that the relation between employers and employees is significantly different from the relation between hosts and guests, universities and members of fraternities, or landlords and tenants. Employees have a special relation with the firm that employs them. They are *agents*, hired and empowered to act on behalf of the employer. While they act on the business of the firm, it might be argued, they "are" the corporation. The restrictions that apply to what one independent agent may do to another thus do not apply here.

But surely this argument is incorrect, for a number of reasons. First, if it were correct, it would justify anything a corporation might do to control the behavior of an employee – not merely drug testing, but polygraph testing, tapping of telephones, deception, psychological manipulation, whips and chains, etc.[21] There are undoubtedly some people who would argue that some of these procedures are permissible, but few would argue that all of them are. The fact that even some of them appear not to be suggests that we believe there are limits to what corporations may do to control employees, and that one consideration in determining these limits is the employees' rights.

Secondly, the argument implies that employees give up their own autonomy completely when they sign on as agents, and become an organ or piece of the corporation. But this cannot be true. Agency is a moral and contractual relationship of the kind that can only obtain between two independent, autonomous parties. This relationship could not be sustained if the employee ceased to be autonomous upon signing the contract. Employees are not slaves, but autonomous agents capable of upholding a contract. Moreover, we expect a certain amount of discretion in employees in the course of their agency. Employees are not expected to follow illegal or immoral commands of their employers, and we find them morally and legally blameworthy when they do so. That we expect such independent judgment of them suggests that they do not lose their autonomy entirely.[22]

Finally, if the employment contract were one in which employees gave up all right to be treated as autonomous human beings, then it would not be a legitimate or morally valid contract. Some rights are considered "inalienable" – people are forbidden from negotiating them away even if it seems advantageous to them to do so. The law grants recognition to this fact through anti-discrimination statutes, minimum wage legislation, workplace health and safety standards, etc. Even if I would like to, I may not trade away, for example, my right not to be sexually harassed or my right to know about workplace hazards.

Again, these arguments do not show that drug testing is unjustified. They do show, however, that *if* drug testing is justified, it is not because the "ought implies can" argument bypasses the issue of employee rights, but because drug testing does not impermissibly violate those rights.[23] To think that obligation, or responsibility for the acts of others, can circumvent rights claims is to misunderstand the

import of the "ought implies can" principle. The principle tells us that there is a close connection between obligation or responsibility and capability. But it does not license us to disregard the rights of others any more than it guarantees us the physical conditions that make carrying out our obligations possible. It may well prove that employees' right to privacy, assuming they have such a right, is secondary to some more weighty consideration. I take up this question briefly below. What has been shown here is that the issue of the permissibility of drug testing will not and cannot be settled *without* a close scrutiny of privacy rights. If we are to decide the issue, we must eventually determine whether employees have privacy rights, how far they extend, and what considerations outweigh them — precisely the difficult questions the "ought implies can" argument sought to avoid.

Is drug testing necessary?

The "ought implies can" argument also has another serious flaw. The argument turns on the claim that forbidding drug testing prevents corporations from carrying out their obligation to prevent harm. But this is only true if drug testing is *necessary* for preventing drug-related harm. If it is merely one option among many, then forbidding drug testing still leaves a corporation free to prevent harm in other ways. For the argument to be sound, in other words, premise 5 would have to be altered to read, "drug testing is a necessary element in any plan to rid the workplace of drugs."

But it is not at all clear that drug testing *is* necessary to reduce drug use in the workplace. Its necessity has been challenged repeatedly. In a recent article in the *Harvard Business Review*, for example, James Wrich draws on his experience in dealing with alcoholism in the workplace and suggests the use of broadbrush educational and rehabilitative programs as alternatives to testing. Corporations using such programs to combat alcohol problems, Wrich reports, have achieved tremendous reductions in absenteeism, sick leave, and on-the-job accidents.[24] Others have argued that impaired performance likely to result in harm could be easily detected by various sorts of performance-oriented tests — mental and physical dexterity tests, alertness tests, flight simulation tests, and so on. These sorts of procedures have the advantage of not being controversial from a rights perspective.[25]

Indeed, many thinkers have argued that drug testing is not only unnecessary, but is not even an effective way to attack drug use in the workplace. The commonly used and affordable urinalysis tests are notoriously unreliable. They have a very high rate both of false negatives and of false positives. At best the tests reveal, not impaired performance or even the presence of a particular drug, but the presence of metabolites of various drugs that can remain in the system long after any effects of the drug have worn off.[26] Because they do not measure impairment, such tests do not seem well-tailored to the purpose of preventing harm — which, after all, is the ultimate goal. As Lewis Maltby, vice president of a small instrumentation company and an opponent of drug testing, puts it,

> . . . [T]he fundamental flaw with drug testing is that it tests for the wrong thing. A realistic program to detect workers whose condition put the company or other people at risk would test for the condition that actually creates the danger.[27]

If these claims are true, there is no real connection between the obligation to prevent harm and the practice of drug testing, and the "ought implies can" argument provides no justification for drug testing at all.[28]

Conclusion

I have made no attempt here to determine whether drug testing does indeed violate employees' privacy rights. The analysis on p. 283 above suggests that we have reason to believe that employees have some rights. Once we accept the notion of employee rights in general, it seems likely that a right to privacy would be among them, since it is an important civil right and central for the protection of individual autonomy. There are also reasons, I believe, to think that most drug testing violates the right to privacy. These claims need much more defense than they can be given here, and even if they are true, this does not necessarily mean that drug testing is unjustified. It does, however, create a *prima facie* case against drug testing. If drug testing violates the privacy rights of

employees, it will be justified only under very strict conditions, if it is justifed at all. It is worth taking a moment to see why this is so.

It is generally accepted in both the ethical and legal spheres that rights are not absolute. But we allow basic rights to be overridden only in special cases in which some urgent and fundamental good is at stake. In legal discourse, such goods are called "compelling interests".[29] While there is room for some debate about what counts as a "compelling interest", it is almost always understood to be more than a merely private interest, however weighty. Public safety might well fall into this category, but private monetary loss probably would not. While more needs to be done to determine what kinds of interests justify drug testing, it seems clear that if testing does violate the basic rights of employees, it is only justifed in extreme cases — far less often that it is presently used. Moreover, we believe that overriding a right is to be avoided wherever possible, and is only justified when doing so is *necessary* to serve the "compelling interest" in question. If it violates rights, then drug testing is only permissible if it is necessary for the protection of an interest such as public safety and if there is no other, morally preferable, way of accomplishing the same goal. As we have seen above, however, it is by no means clear that drug testing meets these conditions. There may be better, less controversial ways to prevent the harm caused by drug use; if so, these must be used in preference to drug testing, and testing is unjustified. And if the attacks on the effectiveness of drug testing are correct, testing is not only unnecessary for the protection of public safety, but does not serve any "compelling interest" at all.

What do these conclusions tell us about the responsibility of employers for preventing harms caused by employees? If it is decided that drug testing is morally impermissible, then there can be no duty to use it to anticipate and prevent harms. Corporations who fail to use it cannot be blamed for doing so. They cannot have a moral obligation to do something morally impermissible. Moreover, if it turns out that there is no other effective way to prevent the harms caused by drug use, then it seems to me we may not hold employers morally responsible for those harms. This seems to me unlikely to be the case — there probably are other effective measures to control drug abuse in the workplace. But corporations can be held responsible only to the extent that they are permitted to act. It would not be inconsistent, however, to hold corporations legally liable for the harms caused by intoxicated employees under the doctrine of *respondeat supèrior*, even if drug testing is forbidden, for this kind of liability does not imply an ability to have done otherwise.

Notes

[1] Employees do not, of course, have legal privacy rights, although the courts seem to be moving slowly in this direction. Opponents of testing usually claim that employees have *moral* rights to privacy, even if these have not been given legal recognition. See, for example, Joseph Des Jardins and Ronald Duska, "Drug Testing in Employment", in *Business Ethics: Readings and Cases in Corporate Morality*, 2nd Ed, *ed.* W. M. Hoffman and J. M. Moore (McGraw-Hill, forthcoming).

[2] See, for example, "Work-Place Privacy Issues and Employer Screening Policies," Richard Lehr and David Middlebrooks, *Employee Relations Law Journal* **11**, 407. Lehr and Middlebrooks cite the argument as one of the chief justifications for drug testing used by employers. I have also encountered the argument frequently in discussion with students, colleagues, and managers.

[3] Ronald Dworkin has referred to rights as moral "trumps". This kind of language tends to suggest that rights overwhelm all other considerations, so that when they are flourished, all that opponents can do is subside in silence. Rights are frequently asserted this way in everyday discourse, and in this sense rights claims tend to close, rather than open, the door to fruitful ethical dialogue.

[4] In his article "Privacy, Polygraphs, and Work," *Business and Professional Ethics Journal* **1**, Fall, 1981, 19, George Brenkert has developed the idea that my privacy is violated when some one acquires information about me that they are not entitled, by virtue of their relationship to me, to have. My mortgage company, for example, is entitled to know my credit history; a prospective sexual partner is entitled to know if I have any sexually transmitted diseases. Thus their knowledge of this information does not violate my privacy. One could argue that employers are similarly entitled to the information obtained by drug tests, and that drug testing does not violate privacy for this reason. A somewhat different move would be to argue that testing does not violate privacy because employees give their "consent" to it drug testing as part of the employment contract. For a sustained attack on these and other Type 1 arguments, see Joseph Des Jardins and Ronald Duska, "Drug Testing in Employment".

[5] One might defend this position on the ground that the

employer "owns" the job and is therefore entitled to place any conditions he wishes on obtaining or keeping it. The problem with this argument is that it seems to rule out *all* employee rights, including such basic ones as the right to organize and bargain collectively, or the right not to be discriminated against, which have solid legal as well as ethical grounding. It also implies that ownership overrides all other considerations, and it is not at all clear that this is true. One might take the position that by accepting a job, an employee has agreed to give up all his rights save those actually specified in the employment contract. But this makes the employment contract look like an agreement in which employees sell themselves and accept the status of things without rights. And it overlooks the fact that we believe there are some things ("inalienable" rights) that persons ought not to be permitted to bargain away. Alex Michalos has discussed some of the limitations of the employment contract in "The Loyal Agent's Argument", in *Ethical Theory and Business*, 2nd edition, ed. Tom L. Beauchamp and Norman E. Bowie (Englewood Cliffs, NJ: Prentice-Hall, 1983), p. 247.

[6] The term "responsibility" is deliberately left ambiguous here. Several different meanings of it are examined below.

[7] See Immanuel Kant, *Critique of Practical Reason*, trans. Lewis White Beck (Indianapolis: Bobbs-Merril, 1956), p. 30.

[8] In this paper I have tried to avoid getting embroiled in the question of whether or not corporations are themselves "moral agents", which has been the question to dominate the corporate responsibility debate. The argument I offer here does, I believe, have important implications for the problem of corporate agency, but does not require me to take a stand on it here. I am content to have those who reject the notion of corporations as moral agents read my references to corporate responsibility as shorthand for some complex form of individual or group responsibility.

[9] One example would be negligent hiring, which is an increasingly frequent cause of action against an employer. Employers can also be held negligent if they give orders that lead to harms that they ought to have foreseen. Domino's Pizza is now under suit because it encouraged its drivers to deliver pizzas as fast as possible, a policy that accident victims claim should have been expected to cause accidents.

[10] This understanding of moral responsibility often seems to overshadow other notions. In an article on corporate responsibility, for example, Manuel Velasquez concludes that because corporations are not responsible in this sense, they are "not responsible for anything they do". "Why Corporations Are Not Responsible For Anything They Do", *Business and Professional Ethics Journal* **2**, Spring, 1983, 1.

[11] There is also an *actus reus* requirement for this type of responsibility – that is, the act must be traceable to the voluntary bodily movements of the agent. Obviously, corporations do not have bodies, but the people who work for them do. The question, then, has become when may we call an act by one member of the corporation a "corporate act". If it is possible to do so at all, the decisive feature is probably the presence of some sort of corporate "intention." This is why I focus on intention here, and why intention has been central to the discussion of corporate responsibility.

[12] There are some, like Velasquez, who hold that a corporation can never satisfy the *mens rea* requirement because this would require a collective mind. If this were true, the argument would collapse at the outset. Others believe that a *mens rea* can be attributed to corporations metaphorically, if it can be shown that company policy includes an "intention" to harm, and it is this model I follow here.

[13] There are, of course, those who take precisely this position. See Velasquez, "Why Corporations Are Not Responsible For Anything They Do".

[14] See, for example, Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984).

[15] It is tempting to conclude from this argument that drug testing is not only permissible, but obligatory, but this is not the case. The reason why it is not provides a clue to one of the major weaknesses of the argument. Drug testing would be obligatory only if it were *necessary* for the prevention of harm due to drug use, but it is not clear that this is so. But also means that it is not clear that corporations are deflected from their duty to prevent harm by a prohibition against drug testing. See below for a fuller discussion of this problem.

[16] For example, it has been claimed that employees who use drugs cause four times as many work-related accidents as do other employees. The highly publicized Conrail crash in 1987 was determined to be drug-related. Of course there are harms to the company itself as well, in the form of higher absenteeism, lowered productivity, higher insurance costs, etc. But since these types of harm raise the question of what a company may do to preserve its self-interest, rather than what it may do to prevent harms to others for which they are responsible, I focus here on harm to employees, consumers, and the public.

[17] In our eagerness to assign "corporate responsibility", this fact has frequently been overlooked. This in turn has led, I believe, to an oversimplified view of corporate action. I discuss this problem more fully in a paper in progress entitled "The Paradox of Corporate Autonomy".

[18] It is an interesting question whether there are limitations on what individuals can do to themselves to control their own behavior. What about individuals who undergo hypnosis, or who have their jaws wired shut in order to lose weight? Are they violating their own rights? Undermining their own autonomy? It could be argued plausibly that these kinds of things are not permissible, on the Kantian ground that we have a duty not to treat ourselves as merely as means to an end. Of course, if there are such restrictions, it makes the "ought implies can" argument as applied to corporations even weaker.

[19] None of these analogies is perfect. In the case of the hostess and guest, for example, the guest is clearly intoxicated. This is rarely true of employees who are tested for drugs; if the employee were visibly intoxicated, there would be no need to test. Moreover, in the hostess/guest case the hostess contributes directly to the intoxication. There are important parallels, however. In each case one party is held morally (and in two of the cases, legally) responsible for harms caused by others. Moreover, the first parties are responsible in close to the same way that employers are responsible for the acts of their employees: they in some sense "facilitate" the harmful acts, they have some capacity to prevent those acts, and they are thus viewed as having an obligation to prevent them. One main difference, of course, is that employees are "agents" of their employers. See p. 283.

[20] There are other, utility-related considerations, as well — for example, harm to employees who are unjustly dismissed, a demoralized workforce, the costs of testing, etc. I concentrate here on rights because they have been the primary focal point in the drug testing debate.

[21] The assumption here is that persons are entitled to do whatever they wish to themselves. See Note 18.

[22] See Michalos, "The Loyal Agent's Argument".

[23] Some violations of right, of course, are permissible. See p. 285.

[24] James T. Wrich, "Beyond Testing: Coping with Drugs at Work", *Harvard Business Review* Jan-Feb 1988, 120.

[25] See Des Jardins and Duska, "Drug Testing in Employment", and Lewis Maltby, "Why Drug Testing is a Bad Idea", *Inc.*, June 1987. While other sorts of tests also have the potential to be abused, they are at least a direct measurement of something that an employer is entitled to know — performance capability. Des Jardins and Duska offer an extended defense of this sort of test.

[26] See Edward J. Imwinkelreid, "False Positive", *The Sciences*, Sept.-Oct. 1987, 22. Also David Bearman, "The Medical Case Against Drug Testing", *Harvard Business Review* Jan-Feb. 1988, 123.

[27] Maltby, "Why Drug Testing is a Bad Idea', pp. 152–153.

[28] It could still be argued that drug testing *deters* drug use, and thus has a connection with preventing harm, even though it doesn't directly provide any information that enables companies to prevent harm. This is an important point, but it is still subject to the restrictions discussed in the previous section. Not everything that has a deterrent value is permissible. It is possible that a penalty of capital punishment would provide a deterrent for rapists, or having one's hand removed deter shoplifting, but there are very few advocates for these penalties. Effectiveness is not the only issue here; rights and justice are also relevant.

[29] The principle that fundamental rights may not be overridden by the state unless doing so is necessary to serve a "compelling state interest" is a principle of constitutional law, but it also reflects our moral intuitions about when it is appropriate to override rights. The legal principle would not apply to all cases of drug testing in the workplace because many of these involve private, rather than state, employees. But the principle does provide us with useful guidelines in the ethical sphere. Interestingly, Federal District Judge George Revercomb recently issued an injunction blocking the random drug testing of Justice Department employees on the ground that it did not serve a compelling state interest. Since there was no evidence of a drug problem among the Department's employees, the Judge concluded, there is no threat that would give rise to a compelling interest. See "Judge Blocks Drug Testing of Justice Department Employees", *New York Times* July 30, 1988, 7.

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phy, management studies and finance-oriented business. It reinforces an approach as old as Aristotle and as recent as Habermas and Gadamer. It demonstrates that a broad socially interpretive and critical philosophy has an empirical and practical potential for both business and ethics.

Secondly, Toffler's work indicates that the bureaucratic organization, by diffusing responsibility and occluding accountability, transforms ethical decisions into tough choices. It produces organization men, not autonomous managers. In them, ethics means whistle-blowing, disloyalty, and exit. The primary difficulty is to gain legitimacy (voice) for ethics.[5] Obversely ethics implies a practical and structural critique of the collectivism and rigidity of the bureaucratic organization. Top-level CEO commitments and formal codes and committees, while steps forward, may only reinforce its hierarchical culture. They are not enough.

Toffler does not, then, just report the need for change from the standpoint of individual managers; she also shows how ethics arises within the firm and how it constitutes a dynamic pressure for organizational transformation. Standing still in pathological bureaucratic rigidity with one's eyes firmly on the past will only mean that change is imposed externally and, usually, via some 'sudden' – but foreseeable and preventable – crisis. An ethically responsive business, *Tough Choices* suggests, would be more open, more human, more flexible and dynamic. All are characteristics of organizations capable of foresight, organizations with a future.

Tough Choices is a work of significance, then; for it shows that the ethical change process in organizations is one of the major implications of business ethics.

References

[1] See H.-G Gadamer, *Truth and Method* (Sheed and Ward: London, 1978), 285ff, and J. Habermas, *Knowledge and Human Interests* (Beacon, Boston: 1971).

[2] In Aristotle's *Nicomachean Ethics*, Hegel's *Philosophy of Right*, and A. MacIntyre's *After Virtue* (University of Notre Dame, 1981).

[3] Respectively, *Moral Mazes: The World of Corporate Managers* (Oxford, New York: 1988), and *Images of the Organization* (Sage, San Francisco: 1986).

[4] See Gadamer's comments on Aristotle in *Truth and Method* (285f).

[5] See Albert O. Hirschmann, *Exit, Voice and Loyalty* (Harvard UP, Cambridge, Mass: 1970).

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