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**TO2P31 Drug Policy Analysis: Definition, Concepts and
Methodology**

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Fixing the drug problem, ignoring the workplace.

***A comparison (France – United States) of the regulation of
the “career” of drug testing in the workplace***

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Summary:

This paper concerns the social movements allowing the dissemination of technical instruments against drug addictions. Based on our compared case studies on the regulation and appropriation of drug testing instruments in the workplace in France and the United States, we demonstrate that these tests develop a “social career”, in the course of which their usage becomes normalized. Without foretelling a convergence between testing policies implemented either side of the Atlantic, our comparison shows that test careers in the US and French workplaces are distinct because each is inseparable from the forms through which (in these historically-constituted spaces) the twin dynamic of dissemination and regulation of instruments are bound together.

Key-words:

Policy instruments, drug-testing, work regulation, expertise, comparison, France, Ignorance.

To engage in a dialogue with the work of those social scientists taking an interest in drug policy, this paper concerns the technical instruments at our disposal against drug addictions and the social movements allowing their dissemination to be taken account of. This dynamic may be illustrated by the widespread use of preventive instruments (Steribox, and the pharmacy syringe exchange program) or treatments (Methadone, Subutex), but here, we will be addressing drug tests. Though many North American works focus on the spread of these instruments across a range of activity areas including the workplace¹, analysis of their dissemination in Europe - and in France in particular - remains embryonic.

In recent years, the public policy analysis field has developed critical thinking on tools and instruments of government, renewing the debate on how public action is structured. Based on a non-restrictive definition of the concept of instruments (or tools) these works suggest that questions of policy change should be considered through an analysis of the instrumentation processes. One benefit of this approach is that it breaks with functionalist design, which tends to regard instruments as neutral data in the development of public decision making. We assume that public action instruments would carry an implicit political theorization - for example, condensed forms of knowledge of social power and ways of exerting it. Based on our compared case studies on the regulation and appropriation of drug testing instruments in the workplace in France and the United States, we will show that within these instruments, no such implicit theorization has been settled once and for all. Such theorization can be redefined to suit specific social and political configurations. Our question thus tends to shift away from approaches that prefer to consider the instrumental variable as an independent one (even if they do take its

¹ R.H Coombs, L.J West (dir.), *Drug testing: Issues and Options*, Oxford University Press, 1991. F. A. Hanson, *Testing Testing : Social Consequences of the Examined Life*, University of California Press, 1993. K.T Tunnell, *Pissing on Demand: Workplace Drug Testing and the Rise of the Detox Industry*, New York University Press, 2005. R. Crespin, "Quand l'instrument définit les problèmes. Le cas du dépistage des drogues aux Etats-Unis" in C. Gilbert C. et E. Henry (dirs.), *Comment se construisent les problèmes de santé publique ?*, Paris, La Découverte, November 2009, p. 215-236

weight into consideration) in order to locate or evaluate the scope of public action change. It is our intention to move away from ‘traditional’ questioning: *Does public action change?* and towards *Through what does change occur?*². To this end, we will demonstrate that, because testing has been introduced at the workplace, it develops a social career, in the course of which its usage becomes both regulated and normalized. Herein lies an ordinary sociological phenomenon that ties into mobilization activities generated by sociotechnical objects, their ability to both give rise to, and channel into, new networks. This career is however not restricted to the national arena, since the tests also circulate between national spaces. This transnational dimension serves as a reminder that the introduction of tests to the French workplace as a tool for the prevention of risks linked to the use of illegal drugs is not unconnected to the way in which these instruments have been regulated in the US workplace. Even so, our analysis does not, in principle, foretell a convergence between the policies implemented either side of the Atlantic. Indeed, test careers in the US and French workplaces are distinct because each is inseparable from the forms through which (in these historically-constituted spaces) the twin dynamic of dissemination and regulation of instruments are bound together.

It can be productive to analyze public change through its instruments, on condition that we take account of the conditions under and through which the meaning conferred upon public use of instruments evolves. Understanding of change regarding public action instrumentation must include analysis of both the mobilizations of various actors (employee, labor union, experts, agencies, politics), knowledge and expertise (quantification and figures needed for evaluation of the drug problem at work, the kind of knowledge that sustains the testing solution) and of the norms, standards and legal conflicts involved in defining how instruments are used. Comparing the social career of drug testing in French and American workplaces is therefore an attempt to understand how these biological tools can help us characterize the permanence of

² P. Lascoumes et P. Le Galès (dir.), *Gouverner par les instruments*, Paris, Presses de Sciences-Po., 2004.

repressive approaches to the prevention of drug use - in particular by using health knowledge to redefine the risks associated with this practice. It is also an attempt to describe certain effects that drug testing solutions have on definition of the problem of employee drug use at work. From among these effects, we focus on the reduction of the problem to an individual issue that tends to ignore (or hide) the diversity and variety of drug use by the employee as well as more collective, practical work-based explanations.

Our comparison of the drug test regulation career in the French and American workplace guided us back to the conditions in which a need for testing emerged in the US and then in France (I), then to a characterization of the first frameworks for the use of these instruments on both sides of the Atlantic (II), ultimately to ask how these initial normative frameworks came to be outflanked by actors in favor of the spread of testing (III).

I - Between conservative revolution and the healthisation of public action: the emergence of the need for drug testing

The first drug tests were developed in the U.S in the early 1960s. Though still rudimentary, they were used to screen and monitor patients following maintenance treatment. During the 1970s, progress in both the immunology and the toxicology fields led to significant improvements to their performance. The US Federal government supported such technological advances, funding the development of analytical methods for measuring and quantifying small amounts of drugs in blood. At the same time, pharmaceutical companies began industrial production of immunological screening tests. The Syva company was highly innovative in 1972 with its EMIT technology, which helped detect evidence of marijuana use in urine. As of then, easy-to-use and affordable drug testing kits were available on the market. During the 1970s, these kits

made large-scale drug testing programs possible for around a dozen drugs. Over the next decade, the American market grew rapidly, and the drug testing offer became very competitive by combining immunological tests with confirmatory analytical methods (chromatography and spectrometry), ensuring a supply of reliable drug testing procedures at steadily falling prices (A). In France, because of the social and political context, and because of the type of drugs used, the drug issue has been differently problematized. At the turn of the 1990s, political and cognitive changes combined with lobbying of the drug testing industry helped transform the French policy approach to drug use (B).

A - From the US army to the US workforce: expanding the scope of drug testing

The availability of new, low cost and proven (performant) technologies should not exhaust the understanding of their diffusion in the workplace. Getting rid of a deceptively simple technological approach implies shifting the questioning on testing from “what are the tests?” to “what do they do?” or “what do we make them to do?”. The aim is thus to characterize the different types of use by which drug tests spread throughout the social world. Thus, as we noted earlier, one primary purpose assigned to drug tests is restorative (curing) and medical: they serve to identify the drugs used by patients and to prevent drug users from doing so during a maintenance treatment program in which only methadone use is, normally, permitted. At the end of the 1960s, it is through this curing (restorative) and medical purpose that drug tests paved their way into the world of work. As early as 1972, US military teams of medics used drug tests in the *Drug and Alcohol Abuse Prevention and Control Program* in order to identify the soldiers returning from Vietnam War who were drug addicted and thus provided them with appropriate care.

In the early 1980s, the embedment of drug tests into preventive actions was increasing. Several elements may explain it. First, in 1980 an epidemiological study showing that 48% of worldwide US military personnel had used marijuana during the last 30 days and 20% during the course of their duty became public³. These outcomes lead to a shift away from solely health care programs to a more disciplinary oriented use of drug testing. This reorientation strengthened after the American aircraft carrier USS Nimitz crash in May 1981. During a night operation, a military aircraft crashed on the landing deck. The toll was heavy: 14 dead, 48 injured and 300 million of dollars in damage. Post-mortem examinations, including drug tests, requested by insurance companies revealed that 9 of the crew members were tested positive for marijuana⁴. Mandatory and random drug testing programs were then launched in almost all US Army corps. Clearly, the aim was exploratory and preventive since units with no history of particular dysfunction were tested in order to detect possible weaknesses which could cause problems in the future. If military personnel tested positive for drugs, severe disciplinary action up to and including dismissal was planned. In 1986 nearly two million of these tests were performed for preventive reasons⁵.

If during the 1980s the curing (restorative) and medical purpose was maintained, we must admit that it is the second type of use, namely the exploratory and preventive one, which made the rapid spread of drug testing in the civilian workplace possible. Thus, between 1987 and 1992, drug testing in the workplace increased by 250 %. In 1988, American employers tested 8 million workers, 13 million in 1990 and 22 in 1992⁶. To understand this widespread diffusion several elements of the political and economic context of the time must be taken into account. The

³ M. R. Burt, M. M. Biegel, Y. Carnes, E. C. Farley, *Worldwide Highlights from the Worldwide Survey of Non-Medical Drug Use and Alcohol Use Among Military Personnel*, Burt Associated, Bethesda 1980.

⁴ P. J. Mulloy, « Winning the War on Drugs in the Military », in R. H. Coombs, L. J. West (eds.), *Drug testing: Issues and Options*, Oxford, Oxford University Press, 1991, pp. 93-112.

⁵ S.G. Olmstead, « Drug Testing in the Military », in National Association of State Personnel Executives (ed.), *Drug Testing: Protection for Society or a Violation of Civil Rights*, Lexington, NASPE, 1987, pp. 19-20.

⁶ AMA, *Survey on Workplace Drug Testing and Drug Abuse Policies*, New York, American Management Association, 1992.

1980s were notable particularly for the escalation of the war on drugs by the US government. In order to ensure complementarity with the actions conducted beyond the frontiers of the USA, especially in South America, to reducing the supply of illicit drugs, new measures were taken to target the demand for drugs on American soil. These programs were implemented at a time when the drug problem was receiving intensive coverage in the American media⁷. Being framed as a threatening epidemic the drug problem dramatized other public issues with which it was associated such as AIDS epidemic, crime in urban ghettos or the crisis in the American economy⁸. Furthermore, the epidemic rhetoric helped to frame the drug problem in such a way that the solution was obvious: a domestic battle against the drug epidemic in which drug testing is used as a prophylactic tool.

This domestic battle against drug use does not only meet cognitive requirements it must be seen in a broader political context. The early 1980s were marked by a return to conservative values in U.S policies. A key principle of the new government's agenda is that social problems arise from individual moral choice⁹. Applied to drug related problems, this denial of the structural dimension of the social world leads to consider that individuals do not use drugs because they are unemployed, poor or alienated but that they are unemployed, alienated or poor because they use drugs, which is a sign of moral weakness. Thus, in a time of economic recession, the figure of the drug user is a perfect scapegoat to publicly explain the difficulties encountered by U.S companies. No need to blame short-term financial investment or the internationalization of industrial competition, the problem was that employees were using drugs, bad habits that were considered as very costly for companies and thus responsible for the declining productivity of the American workforce. We then better understand why the US

⁷ J. Gilliom, *Surveillance, Privacy and the Law: Employee Drug Testing and the Politics of Social Control*, Ann Arbor, The University of Michigan Press, 1994.

⁸ R. Crespin, « Quand l'instrument définit les problèmes. Le cas du dépistage des drogues aux États-Unis », in C. Gilbert et E. Henry (dir.), *Comment se construisent les problèmes de santé publique ?* Paris, La Découverte, novembre 2009, pp. 215-236.

⁹ W. Ryan, *Blaming the Victim*, New York, Vintage Book, 1976.

federal government has been active in promoting drug testing programs: these policy instruments help to implement in the workplace the aims and values of a conservative political agenda.

B - France: The new public policy frame of reference and business opportunities

In France, the December 1970 law sought to articulate prevention and repression, in a bid to regulate drug trafficking and use. In the post-May '68 political context, many public officials felt that 'youth' had become lost in 'leftist' movements and needed to be taken in hand. The 1970 law was thus part of a set of laws that, passed in the same period, sought to criminalize social protest, in which "consumers of drugs were supposed to be found"¹⁰. Although (as in the US) the media referred to it as an epidemic, the data available does not show an upsurge in use¹¹. Yet the link between drug addiction and delinquency does indeed underlie the compromise of the 1970 law. The reasoning follows a logical sequence: as delinquents, drug addicts must be apprehended because they are powerless: their compelling need for drugs necessarily leads them to commit crimes. As people who are unwell, these same drug addicts are also a danger to themselves, and should therefore be helped and cared for. Yet, in the 1970s and 1980s, when 'psychologizing' approaches were dominant, healthcare systems essentially served consumers of opiates¹². Specific policies concerning the use of alcohol have been in place for several decades now, as a result of a concerted reflection on its links with work, yet

¹⁰ P. Pinell, M. Zafiropoulos, "Drogues, déclassé et stratégies de disqualification", *Actes de la recherche en sciences sociales*, 1982, vol. 42, pp. 61-75.

¹¹ J. Bernat de Célis, "Fallait-il créer un délit d'usage illicite de stupéfiants ? Une étude de sociologie législative", *Déviance et contrôle social*, CESDIP, Paris 1992.

¹² H. Bergeron, *Soigner la toxicomanie. Les dispositifs de soins, entre idéologie et action*, Paris, Coll. Dossiers sciences humaines et sociales, L'Harmattan, 1996.

this French specificity has meant that no such reflection has emerged on the links between drug use and work¹³.

Since the 1980s, the situation has gradually evolved; this can be put down to several factors. First, psychologizing approaches have increasingly been rivalled by other etiological models raising the profile of the psychosocial, familial and metabolic origins of drug addiction. Then, in the 1990s, the (delayed) taking into account of the incidence of AIDS-related contaminations and deaths among drug addicts left public authorities having to rethink health service strategies around the 'risk-reduction' principle. The goal thus became prevention of the health and social consequences of drug use¹⁴. This 'sanitization' of the problem¹⁵ was accompanied by a gradual replacement of the French term *toxicomanie* by that of 'addiction' in thinking about and treating drug users¹⁶. Yet these political and cognitive changes encouraged the import of new tools in the fight against drugs – especially from the US, where the notion of addiction had held sway since the 1970s.

This was the context in which the problem of drug use at work emerged in the French public arena. One of the first events to demonstrate this was organized in Paris, in January 1989, by the pharmaceutical laboratory Syva-bioMérieux - at that time world leader on the drug detection market. The conference was entitled "The detection of drug addictions" (translated as "*Le dépistage des toxicomanies*"). In a bid to encourage the use of urine tests within the French professional arena, several communications addressed different aspects of the problem: effects

¹³ L. Berlivet, Les démographes et l'alcoolisme : Du "Fléau social" au "Risque de santé", *Vingtième Siècle. Revue d'histoire*, 2007, no. 95, pp. 93-113 ; H. Bergeron, "Qualifier en politique : l'exemple du problème alcool.", *Santé Publique*, 2008, vol. 20, no. 4, pp. 341-352 ; T. Fillaut, "Du fléau au risque : l'alcool au travail dans la France du second XXème siècle (1950-2000)", in N. Dedessus-Le Moustier, F. Douguet (coord.), *La santé au travail à l'épreuve des nouveaux risques*, Paris, Éditions Tec&Doc – Lavoisier, 2010, pp. 15-25.

¹⁴ A. Coppel, "De la clinique à la santé publique : traitement et réduction des risques" in A. Ogien, P. Mignon, (dir.), *La demande sociale de drogues*, DGLDT, La documentation Française, Paris 1994. Bergeron H., *L'Etat et la toxicomanie. Histoire d'une singularité française*, Paris, PUF, 1999.

¹⁵ H. Bergeron, *Sociologie de la drogue*, Paris, Editions La Découverte - Collection Repères, 2009

¹⁶ N. Fortané, "La carrière des "addictions". D'un concept médical à une catégorie d'action publique", *Genèses*, no. 78, mars 2010, pp. 5-25.

on behavior were dealt with by a psychiatrist; the technical aspects of detection by a pharmacist and toxicologist and the legal dimension was entrusted to a legal counsel. The role of the occupational physician is addressed by a labor inspector. These expert reports are completed by reports from two aeronautics companies (SNECMA and Air-Inter), recounting their experiences in managing drug addiction and detection. The conference ended with a presentation by the CEO of Syva-bioMérieux, arguing in favor of a charter for the commercialization of tests and implementation of testing for illegal drugs within French companies. Directed at the public authorities, this document was sent to the MILDT (Interministerial Mission for the Fight against Drugs and Drug Addiction)¹⁷.

II - First framings of drug test use in the workplace: American incentive policies and French containment

At the start of the 1980s, there were no US statistics on the number or social composition of the drug-consuming population¹⁸, though this didn't prevent the American media publishing multiple articles on the problem of "drugs at work" and reporting on implementation of the first testing programs as conducted by such major companies as General Motors, IBM, Mobil and Exxon. These programs relied on a set of promotional expertise aimed at legitimizing the idea that drug users were responsible for the American economy's "productivity crisis". Testing was thus presented as being capable of combating a whole range of risks: absenteeism, lateness and abusive take-up of social benefits, as well as accidents and theft in the workplace¹⁹. Moreover,

¹⁷ In 2014, the MIDLT became the MILDECA: Interministerial Mission for Combating Drugs and Addictive Behaviours.

¹⁸ SAMHSA, *National Household Survey on Drug Abuse: Main Findings 1991*, Rockville, Substance Abuse Mental Health Service Administration, 1993.

¹⁹ R. Crespin, "Quand l'instrument définit les problèmes.", *op. cit.*

these risks were also used to justify the regulations issued by either Federal or state government aimed at making drug testing more widespread in both public and private sector workplaces. In the absence of any specific law, three regulation models encouraged recourse to these instruments.

A. USA: Federal regulations and standards as promotional tools

First, an axiological model advocating a "Drug-free Federal workplace". These are the words of *Executive Order 12564*, signed by President Reagan in September 1986, and aimed at generalizing testing of Federal employees. To achieve this, the order required Federal agencies to test (on either a voluntary or systematic basis) all employees occupying 'sensitive' positions. The definition of such positions was a matter for agency heads, but the posts involving "*law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence*" had to be included. Moreover, Federal employees suspected of having used drugs, especially following an accident, had to be tested - as did those returning to posts following rehabilitation treatment. Lastly, the order authorized testing of applicants for Federal posts. For applicants, a positive result meant employment would be refused, and for existing employees, it meant disciplinary measures: suspension, reclassification, compulsory treatment, removal from service.

In November 1988, an incentive contractual model boosted the spread of testing. The *Drug-Free Workplace Act* thus required employers seeking to contract with the Federal state (for an amount in excess of £25,000) to certify that their companies were "drug-free". In the event of an infraction, these employers could be excluded from Federal markets for up to five years, even though the sanction for clauses not concerning drugs was just two years. Several surveys have shown that these contractual requirements did indeed accelerate the spread of

testing within companies. In 1990, a study conducted at 130 companies by the *Manufacturers' Alliance for Productivity and Innovation* showed that 64% had adopted testing programs following this law. In addition, this law had led 34% of companies already running testing programs to strengthen them by targeting not only applicants for employment but also existing employees. In 1996, this trend was confirmed by the *American Management Association*²⁰. Yet these surveys were only conducted after testing had been adopted. Responses in terms of contractual requirements must, therefore, be understood first and foremost as justifications that allowed retrospective rationalization of the pro-testing choices made by companies. Indeed, at that time alternative solutions did exist that would also allow Federal standards to be met. One such alternative was *Employee Assistant Programs* (EAP), which were preventive mechanisms based on an educational approach that privileged dialogue with drug-using employees. These systems were however both more costly and more difficult to implement than testing. In addition, in a context of heavy stigmatization of drug users, EAPs were seen as potentially damaging to company image, because culturally, the punitive response prevailed²¹.

A model that forces certain sectors of activity to test their employees can be characterized as binding. This is the case of the *Omnibus Transportation Employee Testing Act* signed in October 1991 by the first President Bush, obliging transport companies to include drug and alcohol testing in their fitness screening for both existing employees and job applicants. Today, testing extends to all transport sectors (rail, school transport, airlines, etc.). In the 2000s, for the road carrier industry alone, testing affected six million employees - at an estimated annual cost of almost \$250 million²².

²⁰ American Management Association (AMA), "Most Employers Who Test Do So by Mandate", in AMA (ed.), *Drugs in the Workplace*, Surveys no. 10, 1996, New York, pp. 3-4.

²¹ W. Sonnenstul, "Symbolic Crusades and Organizational Adoption of Substance Abuse Prevention Programs", in J. B. Bennett, W. E. K. Lehman (eds), *Preventing Workplace Substance Abuse: Beyond Drug Testing to Wellness*, Washington, American Psychological Association 2003, pp. 227-238.

²² M. Jacobson, "Drug Testing in the Trucking Industry: The Effect on Highway Safety", *Journal of Law and Economics*, 2003, vol. 46, no. 1, pp. 131-156

B. France: Upstream regulation revealed competing methods of defining drug problems at work

In France (under commercial pressure from Syva-bioMérieux) two administrative bodies were to express an opinion on the conditions of use for tests in the workplace. The first (October 1989) was the CCNE (*National Consultative Committee on Ethics*), which issued an opinion on "drug testing at work"²³. This opinion took the form of two reports: scientific, and ethical. The scientific report was entrusted to a toxicologist whose laboratory already practiced confirmatory examinations for tests conducted within the French aeronautics industry. This report was openly pro-testing, employing melodramatic rhetoric alongside approximative data on the extent, cost and effects of drugs in the workplace. The ethical report, however, was far more nuanced. Drawing inspiration from earlier work by the Labor Ministry on HIV infection issues in the workplace, it considered all discrimination in employment practice unacceptable. The ban on testing job applicants was also based on already-proven commonlaw norms. First, those relating to *criteria for judging a person's ability to perform a workplace role*, indicating that an applicant's state of health at the time of hiring can only be assessed as part of a "fitness assessment" that can only be conducted by an occupational physician. Second, privacy protection comes into play. As a result, according to the CCNE, it is inappropriate at the time of hiring to seek to find out whether an employee is a drug addict and, in any case, any testing carried out must be subject to the principle of respect for the will of persons.

²³ Comité Consultatif National d'Éthique, *Avis sur le dépistage des toxicomanies dans l'entreprise*, 1989, Rapport no. 15-16, 6 p.

Following this, the Ministry of Labor stated its position, by means of the July 1990 circular from the CSPRP (Higher Council for Prevention of Occupational Risks)²⁴. This circular confirmed the logic of ‘despecification’ of the problem of drug addiction in the workplace announced by the CCNE, while also acknowledging security requirements relating to certain ‘sensitive’ positions. The CSPRP thus refuted the idea that drug addiction can be reduced to either the simple use of drugs or a physical and/or psychological dependency on a product that is toxic to the central nervous system. The emphasis is on the complexity of the "drug-addicted experience" of subjects as well as on the contradictions of the notion of dependency. This approach leads to relativization of the scale of the problem within the workplace context, since anyone not only dependent on a product but also having "allowed all other emotional and social investment to take a back seat" is considered a "drug addict". Yet, according to the Ministry, in France this definition matches around 150,000 people, just a quarter of whom are currently economically active. As a result, though testing can be justified as part of a therapeutic approach, the CSPRP concludes that it is not of use either as a diagnostic tool or as an instrument for the assessment of a person’s ability to perform certain tasks.

At the start of the 1990s, then, public regulations limited the tests to tools designed to assess fitness for work conditions, excluding their systematic use in companies, other than for security-related posts. These initial public regulations revealed a split between two types of expertise as to what drug addiction is. The first is based on toxico-pharmacological knowledge, and envisages drug addiction as an intoxication brought about by the use of illegal drugs – which, by dramatizing the drugs problem,²⁵ justifies the workplace testing solution. The second is both clinically and legally inspired, and supported by the Ministry of Labor. It tends to relativize the extent of the problem, considering drug addiction as a complex illness in the

²⁴ Ministère du travail de l’emploi et de la formation professionnelle (CSPRP), *Circulaire no. 90/13 relative au dépistage de la toxicomanie en entreprise* (B.O. du 9 juillet 1990).

²⁵ Coomber R. (2011). "Social Fear, Drug-Related Beliefs, and Drug Policy", in G. Hunt, M. Milhet, H. Bergeron, *Drugs and Culture. Knowledge, Consumption and Policy*, Ashgate Publishing, p. 15-33.

‘subject’ - a definition that proved compliant with the then-dominant frame of reference in the field of treatment and care for drug addicts²⁶. During the 1990s, the problem of consumption of psychoactive products at work gained in profile, becoming increasingly linked to the testing solution. This dynamic (which was to call into question the initial public framing of the use of tests) was supported by two types of mobilization, both founded on the specific knowledge and expertise that enabled the translation of drug consumption into risks (and organizational risks in particular) for businesses.

III – Legal protection challenged by judges and experts

During the 1980s, several civil liberties organizations, as well as numerous American intellectuals, denounced the policy of drug testing employees. Within the context of these mobilizations, human rights violations were the most-often used critique, particularly alongside denunciation of "biological McCarthyism"²⁷. Without commenting on the merits of these arguments, it is important to bear in mind that they were made in social spaces that often had no direct influence over actual working relations. This is why we are most interested in the legal norms mobilized by employees and labor unions in the multitude of legal proceedings initiated in the US against testing programs (A). Meanwhile, the French situation began evolving in the 1990s, and was characterized by the development of ‘adjusted’ expert opinions and vague norms (B).

²⁶ Bergeron H., *L'Etat et la toxicomanie. Histoire d'une singularité française*, Paris, PUF, 1999.

²⁷ G. D. Lundberg, "Mandatory Unindicted Urine Drug Screening: Still Chemical McCarthyism", *JAMA*, 1986, vol. 256, no. 21, p. 3003-3005.

A - USA: the adverse effects of legal action

Two main types of norm were mentioned: first, those relating to protection of the integrity and dignity of persons who (traditionally) protect privacy, followed by those who have to ensure a form of equity in the face of testing procedures (due process). Although the notion of 'privacy' is used extensively in the US, no definition appears in any legal text. Indeed, the 4th Amendment to the Constitution (which is the reference on the subject) states only that protection of privacy concerns the right of every American citizen to be defended against "unreasonable search and seizure". Before the courts, three modalities for the protection of privacy are based on complaints against drug testing. The first of these was to find out whether testing constituted a violation of human dignity. The situation concerned certain procedures that forced employees to "urinate in front of a third party to provide a sample", a practice justified by employers to prevent any substitution of, or alteration to, the sample at the time of sampling. The second question concerned information considered relevant to privacy because it is protected by medical confidentiality. This question was brought before the judges because certain forms of testing forced employees to tell their employers about medical treatment, in order to limit cross reactions with legal products and thus the possibility of false positives. The third question on the protection of privacy concerned employee autonomy. Here, it was a matter of knowing whether an employer has a right to know about what an employee does outside of their working hours. This is a crucial issue, because a urine test does not allow us to state with certainty whether an employee is under the influence of drugs at the time of sampling. This is because the biological techniques used do not directly detect the presence of a drug, but only the body's reaction to it following consumption (metabolite). In fact, for the most-consumed illegal drug in the US (and in France) - marijuana and its derivatives - a test can prove positive even several weeks after consumption, even though the psychotropic effects rarely persist

beyond a few hours. As a result, the information produced by this type of test makes no distinction between an employee who occasionally smokes in their free time and an employee under the influence of marijuana when at the workplace.

On the whole, these complaints have been upheld by the courts, which have recognized that drug testing raises many issues relating to the protection of privacy. But in the first instance, faced with the diversity of situations, no jurisprudence became established. The diversity of (often contradictory) judgements even tended to restrict protection. In 1989, two Supreme Court decisions confirmed this restrictive aspect by judging the testing programs conducted by the Federal state to be compliant with the Constitution if justified by reasons of security (*Skinner v. Railway Labor Executives Association*, 1989) or in order to guarantee the integrity of Federal employees (*National Treasury Employees Union v. Von Raab*, 1989)²⁸. These same decisions also recognized the legality of random testing programs, without motive or prior suspicion, if motivated by public health or national security imperatives (*National Federation of Federal Employees v. Cheney*, 1990). In this way, the proceedings initiated by employees and labor unions ended up, paradoxically, encouraging the spread of testing by specifying the conditions for fair implementation. On this point, one of the questions raised was that of the ‘reliability’ of the testing techniques and procedures used by employers. The processes also thus led to the standardization of these procedures and, ultimately, only those testing programs combining urine tests with confirmation tests were recognized as being compliant with legal standards.

Labor union action against testing has, also paradoxically, contributed to its generalization²⁹. Indeed, in the 1980s, confronted with abusive employer practices, the main American labor unions considered that drug testing, because it affected working conditions,

²⁸ In the *Skinner* case, the Supreme Court adjudicated on the constitutionality of a testing policy adopted by the Federal administration for the railways, which required that all employees involved in a railway accident or incident be tested. The *Von Raab* case posed the question of knowing whether testing all Federal employees assigned to posts involving the handling of weapons or access to confidential documents was constitutional.

²⁹ N. M. Riccucci, E. Knowles, "Drug Testing in the Public Sector", *International Journal of Public Administration*, 1993, vol. 16, no. 6, pp. 891-919.

should be subject to negotiation between social partners. In 1987, the National Labor Relations Board supported this union demand and included drug testing on its list of compulsory subjects for drawing up collective agreements. Gradually, agreements authorizing workplace testing became widespread, except in those activities in which being unionized is a prerequisite for recruitment, such as, for example, the building trade³⁰. However, a high level of labor union protest was maintained against random testing and the use of tests in the course of routine medical examinations³¹. For the unions, what was at stake was a refusal to endorse forms of testing that allowed a suspicion of consumption to hang over all employees. In the end, compromises were found, branch by branch. These ratified the most individual form of testing, namely that based on prior suspicion of consumption. Once again, the employee health and safety argument proved decisive in justifying this.

B – France: Drug testing regulation under expert pressure, and legal disputes

In France, the 1990s were marked by growing coverage of the problem of drugs in the workplace. This dynamic was driven by three mobilizations: First, that of AFEDCAP (an association of French occupational physicians), which in 1994 organized a symposium on the theme of "Drug Addiction and Work"³². In 1998, this work resulted in a landmark publication - one of the first attempts to place testing at the heart of a process of identification and prevention of drug abuse in French businesses³³. This document regrets the absence of a list of

³⁰ R. L. Seeber, M. Lehman, "The Union Response to Employer-Initiated Drug Testing Programs", *Employee Responsibilities and Rights Journal*, 1989, vol. 2, no. 1, pp. 39-48.

³¹ M. H. Leroy, "The Presence of Drug Testing in the Workplace and Union Member Attitudes", *Labour Studies Journal*, 1991, vol. 16, no. 3, pp. 32-42.

³² Association française d'études des déviations et de leurs conséquences sur l'aptitude physique (AFEDCAP) Informations, "Toxicomanie et travail", 1994, no. 3, 145 p.

³³ J-L. Maxence, R. Trarieux, "Toxicomanies et milieu du travail : la prévention des drogues en entreprise", *Toxibase*, 1998, no. 3, pp.1-11.

workstations for which testing would be justified in order to protect against the risks considered inherent to drug abuse.

1. *The international forensic toxicologist network and the promotion of drug testing in the workplace*

In the mid-1990s, both the definition of risks and the promotion of testing took shape, driven by a second mobilization - this time bringing experts in toxicology and pharmacology together with the drug testing industry. This mobilization can be partially explained by the fact that Europe was lagging behind the US. Whereas across the Atlantic it had become standard practice to combine a screening test with confirmation procedures, in Europe and in France, this process - though required by international regulations,³⁴ *remained a rarity in practice for reasons of technical availability, cost and the absence of a standardized protocol*³⁵. *During the second half of the 1990s, there was a gradual catch-up following several international toxicology congresses aimed not only at achieving technical objectives but also at convincing the European public authorities "of the benefits of drug testing"*³⁶. In 1998, the founding of the *European Workplace Drug Testing Society (EWDT)* enabled a standard of quality to be formalized, so that the results of drug tests would stand up in court. Borrowing heavily from North American procedures, the standard ultimately formulated allowed for a positive screening test to be confirmed using confirmation methods (that is, liquid or gaseous phase chromatography, coupled with mass spectrometry).

³⁴ Bureau international du Travail, *Prise en charge des questions d'alcoolisme et de toxicomanie sur le lieu de travail*, Recueil de directives pratiques, BIT, Genève, 1996.

³⁵ Just 10% of European laboratories were capable of providing both testing and confirmation with product quantification by positivity threshold (Cf. A. Verstraete, M. Deveaux, "Historique du dépistage des conduites addictives en milieu professionnel en Europe et aux États-Unis", *Annales de toxicologie analytique*, 2002, no. 1, vol. 14).

³⁶ *Ibidem*.

2. *Hybridization of science and the promotion of drug testing services: defining drug-related risk in the workplace by ignoring working conditions and environment*

In France, the promotion of these confirmation methods is achieved by way of the SFTA (Société Française de Toxicologie Analytique) which, in the 2000s, conducted a twofold process: internal reflection coupled with external communication in favor of drug testing. In 2002, the SFTA, following several publications promoting drug testing as a way of improving road safety, devoted an entire issue of the *Annales de Toxicologie Analytique* to the workplace. Dramatically highlighting many attributes in a bid to influence public decision-making,³⁷ this special edition was positioned squarely within the context of the uncertainties arising out of the first public regulations on drug testing. Figures on the problem were thus put forward for the first time (without being backed up), stating that "15 to 20% of fatal accidents at work are linked to the use of alcohol, psychotropic drugs or narcotics". Testing, meantime, was described as an "indispensable tool for the prevention" of "addictive behaviors". This last formulation is strategic because it allows alignment of both the expertise and the services on offer within the 'addiction' category - which was at the time in the process of replacing the 'toxicomanie' category within public action³⁸. Drawing on the EWDT work in which they had been involved, the authors of the editorial also pointed out the uncertainty regarding the reliability and availability of drug testing instruments, along with a reminder that procedures were now able to guarantee the confidentiality and traceability of their results. Moreover, because the regulations restrict the use of these tests to occupational physicians alone, special attention was paid to them. Since these doctors "take responsibility in the decision regarding

³⁷ S. Hilgartner, *Science on Stage. Expert Advice as Public Drama*, Stanford, Stanford University Press 2000.

³⁸ N. Fortané, "La carrière des "addictions". D'un concept médical à une catégorie d'action publique", *Genèses*, 2010, no. 78, pp. 5-25.

fitness for a position", the testing had to allow them to *"refine their diagnosis"* using the *"biological and toxicological"* data that the SFTA- affiliated laboratories said they were ready to provide. The editorial oriented the offer of services by targeting the needs emanating from the first public regulations, and this work of adjustment is refined in the following articles. Several other types of expertise were thus mobilized in support of the warning about the risks related to the use of drugs in the workplace, justifying testing in companies. As the sociology of sciences has shown, the import of external expertise to a disciplinary field is intended to persuade the audience being addressed of the objectivity of the analysis put forward. Recourse to scientific allies thus has a strategic impact: it is a matter of coming up with a scientific consensus as to the definition of a problem and its solution, while side-lining other approaches³⁹. Several fields of knowledge are therefore called upon. Neurobiological works focusing on the effects of drugs on the central nervous system offer proof of the harmfulness of drugs through the constant shifting between neurological and cognitive behavioral registers. The inventory of general symptoms (performance loss, delirium syndrome, slowed thinking, amotivational syndrome, etc.) allows affirmation of the incompatibility of any drug use with any professional activity demanding "self-control". Considered dangerous for the employee, the use of drugs is also dangerous for the business that has to take its consequences on board. Testing is thus presented as the solution capable of preventing a further inventory of non-quantified risks: behavioral troubles, absenteeism, accidents, and reduced vigilance⁴⁰. Lastly, several articles also use legal knowledge to justify the use of tests as protection against the financial and legal risks to which businesses are exposed. Indeed, by providing proof of drug consumption by an employee involved in an accident, testing could absolve the employer of

³⁹ S.S. Jasanoff, "Contested boundaries in policy-relevant science", *Social studies of science*, 1987, vol. 17, no. 2, p. 195-230.

⁴⁰ J-P Anger, "Principaux effets psychiques des stupéfiants : risque en milieu professionnel", *Annales de toxicologie analytique*, 2002, no. 1, vol. XIV.

responsibility, thus reducing (or even exempting) them from the payments victims are able to claim⁴¹.

These various expert opinions may well serve to stabilize and reinforce the definition of the public problem posed by drugs as a behavioral problem that is a matter of individual responsibility. Yet at the same time, they also serve to reduce the analysis of complex inter-relations between the use of psychoactive products, and work⁴². We are able to distinguish several effects of misunderstanding that jeopardize the development of a more overarching approach to prevention⁴³. First, by focusing on the products consumed and their effects on the ‘brain’, these promotional expert opinions both disregard the social variables involved in drug use and fail to take into account the role played by organizations and working conditions on drug use in the workplace⁴⁴. Next, by essentially envisaging drug use in terms of abuse and risks, these expert opinions obscure the heterogeneity of ways of using both licit and illicit products at work⁴⁵.

3. *When judges are faced with uncertain standards ...*

In 2003, the expert advices of the SFTA were referenced in a senatorial report entitled “Drugs: the other cancer”, which sought to strengthen repression against drugs and encourage workplace testing. During the 2000s, this issue of drugs at work became one of the core themes of the 2004-2008 and 2008-2011 governmental plans for fighting drugs and drug addiction.

⁴¹ P. Mura, "Cannabis sativa var. indica : une menace croissante pour les entreprises", *Annales de toxicologie analytique*, 2002, no. 1, vol. XIV.

⁴² R. Crespin, D. Lhuilier et G. Lutz (dir.), *Se doper pour travailler*, Paris, Érès, 2017.

⁴³ S. Frickel, K. Moore (dir.), *The new Political Sociology of Science : Institutions, Networks and Power*, Madison, University of Wisconsin Press, 2006.

⁴⁴ L. Negura, M.-F Maranda, C. Genest, "La consommation de substances psychoactives en lien avec le travail : l'impératif d'adapter les services aux causes réelles", dans S. Brochu et al. (dir.), *L'intégration des services en toxicomanie*, Québec, Presses de l'Université Laval, 2012, p. 199-225.

⁴⁵R. Crespin, D. Lhuilier et G. Lutz, "Les fonctions ambivalentes de l'alcool en milieu de travail : bon objet et mauvais objet.", *Les Cahiers Internationaux de Psychologie Sociale*, 2015, vol. 3, no. 107, p. 375-401

Even as the addiction-based approach held sway, these plans led to a whole series of expert works⁴⁶, symposia, reports⁴⁷ and best practice guides⁴⁸ aimed at lifting the ‘taboo’ on drug use at work - but also at promoting appropriate solutions. Among these, testing was in prime position in the fight against risks that remain largely unquantified: accidents, absenteeism, bad atmosphere at work, profitability and/or image losses for businesses. Even if the normative context of the use of tests that is being shaped tends to channel them into an overall policy of prevention that deems itself respectful of occupational medicine, the recourse to testing remains controversial. One contentious issue concerns the legal categorization of the saliva tests that are, in France, the preferred testing tool of the public authorities. Are these tests biological examinations in the sense of Article 6211-7 of the French Public Health Code “for the purposes of detection” in the sense of Article L. 6211-3 of the same Code? If the tests belong in the first of these categories, then they can only be conducted by a doctor or biologist. On the other hand, if they are “for the purposes of detection” then a person devoid of biological or medical qualifications could conduct them. This uncertainty resulted in conflicting positions on the part of several public bodies in knowing who is entitled to conduct tests in businesses: some supported the idea that only occupational physicians were authorized to do it, others that employers were also able to. In January 2012, the MILDT and the Ministry of labor attempted to resolve these uncertainties. In a jointly-published practical guide, they specified that “*all biological tests (and the saliva tests for drug consumption fall within this category) can only be conducted by a doctor or medical biologist.*”⁴⁹. Yet the vagueness persisted. In September 2012, the CNOM (French National Medical Council) did not consider that drug testing necessarily

⁴⁶ B. Redonnet, *Consommation de drogues en milieu professionnel, état des lieux des connaissances et des recherches menées en France*, OFDT, 2010, 13 p.

⁴⁷ MILDT, *Conduites addictives et milieu professionnel*, rapport au Premier Ministre, décembre 2006, 32 p. (rendu public en octobre 2009).

⁴⁸ MILDT/DGT, *Guide : Repères pour une politique de prévention des risques liés à la consommation de drogues en milieu professionnel*, la documentation Française, 16 janvier 2012, 72 p.

⁴⁹ MILDT/DGT, *op. cit.*, p.62.

had to be carried out by an occupational physician. That same year, the Court of Cassation - the highest French judicial jurisdiction - did not exclude the possibility that tests could be conducted by an employee's manager, without the presence of a doctor⁵⁰. Still in 2012, debates on legal theory argued that saliva test examinations should be used for diagnostic purposes, like "pregnancy or blood sugar tests"⁵¹. In June 2013, this interpretation was however called into question by the revision of Article L. 6211 of the French Public Health Code. The revision was eagerly awaited, because it was to legally settle the question of whether an employer could carry out a saliva test without having recourse to the occupational physician, yet in the end it maintained the ambiguity. The new article certainly did state that saliva tests were now available on the market, but without making any reference to those testing for illicit drugs. Thus, as in the US, despite governmental orientations strongly in favor of drug detection tests, for a long time France remained without any clear legal position as to the use of these instruments by employers. Yet this did not prevent testing being practiced in businesses. Indeed, service companies were able to take advantage of this normative uncertainty to define and implement, in line with the expectations of their clients, urine and saliva testing for drugs by using breathalyzers as a model, so as to limit the risks of illegality. The first uses of saliva tests were the subject of several legal disputes. In 2015, the Administrative Court of Appeal in Marseille⁵² rejected the option of a business being able to test its own employees. The grounds for rejection were based on two problematic aspects. The first was that the saliva tests were practiced by a hierarchical superior rather than by a doctor. The second was that a positive test result would lead to disciplinary sanctions, up to and including dismissal. To justify the suspension of this test program, the Appeal Court thus considered it a violation of medical confidentiality and,

⁵⁰ Cass. soc., 8 févr. 2012, no. 11-10.382, Bull. civ.V, no. 70

⁵¹ J. Costentin, J-P Goullé et L. Gamet, "Drogues au travail : Les tests salivaires en débat", *Semaine Sociale Lamy*, 2012, no. 1545, 6p.

⁵² CAA de Marseille, 7ème chambre, 21 août 2015, no. 14MA02413

taking account of the inadequate reliability of saliva tests, that their usage as a disciplinary tool was an infringement of human rights and both individual and collective freedoms.

But in December 2016 the Council of State (France's highest administrative court) annulled this judgement, adopting a more liberal approach to the conditions of use of saliva tests by employers⁵³. First, the Council of State authorized testing by a hierarchical superior, on the grounds that saliva tests do not fall into the category of medical biology tools. Second, in seeming to endorse the testing practices developed by those selling tests using the breathalyzer model, the Council of State made saliva drug testing primarily conditional on the internal regulations of businesses, stating in which type of posts employees could be checked and that employees could, in the event of a dispute, benefit from a second, independent medical opinion. Lastly, by this decision, the Council of State aligned itself with the jurisprudence of both the Court of Cassation and the civilian judges, contradicting the line defended by the Ministry of Labor. In fact, as public regulation stands, the model for the prevention of drug consumption in the workplace hybridizes two schools of thought: on the one side, a health logic, geared towards the identification of consumption thought of exclusively as high-risk behaviors for businesses, and, on the other, a disciplinary logic that places human rights and individual freedoms second to the safety requirements that are incumbent on employers.

Conclusions

In conclusion, we note that although in France, the use of drug tests by employers is less widespread than it is in the US, the recent Council of State decision is likely to lead to a closing of this gap. Questions of social prejudice and the demonization of drugs within a repressive political context - both in France and in the US - are certainly significant in the spread of testing,

⁵³ Conseil d'État No. 394178 - 2016-12-05

but in our opinion, it is important not to neglect the economic reasoning that has led employers (in both public and private sectors) to adopt these practices. For a business, an employee represents an investment in training and know-how. Any disruption to work in terms of absences, internal conflicts or accidents due to the presence of people who use drugs generates costs that must be reduced. Lastly, it is also a matter of avoiding situations in which employees who use drugs are able to undermine a company's image.

In the US, the Federal state's normative activity has provided structure in the deployment and promotion of testing. Faced with the frequency of sanctions and selective employer practices, public regulation modalities have of course varied by state⁵⁴, but in line with the liberal perspective, it is above all individual advocacy that has enabled regulation of drug testing uses that violate basic rights. Yet the proceedings against testing programs have tended to diminish the collective scope of protections. In France, where commercial pressure was being applied by pharmaceutical laboratories, testing within businesses was subject to upstream regulation. Positioned as a mediation and negotiation space, the state found itself standing between industrial and commercial concerns, and those of the public administration. The question of testing has been treated on a sectoral basis (definition of fitness for work criteria) and normative pressure has been applied to the workplace via a concerted process involving the social partners (conditions for use of tests during medical examinations at recruitment, possibility of restriction to security posts only). However, in the absence of a limitative list of security posts, and given the divergent definitions of drug addiction within the administration, no clear ruling has emerged to frame the use of tests within businesses. In this regulatory haze, the question of the definition of risks associated with the use of drugs has thus

⁵⁴ In the US, several states have adopted laws authorizing certain uses of marijuana, opening up fresh regulatory questions as to the modalities of use of tests at work, see: T. Garvey et B. T. YEH, *State legalization of recreational marijuana: selected legal issues*, Congressional Research Service Report for Congress, 2013. K. Harvey, "Protecting Medical Marijuana Users in the Workplace", *Case Western Reserve Law Review*, vol. 66, no. 1, 2015, pp. 209-234.

become central to justifying testing⁵⁵. Expertise in regulatory toxicology has thus proved crucial, since depending on the legally-set thresholds, it employs a causal mode of documenting the relationship between a level of consumption of products and behavioral effects that are considered riskier still where the drugs are illegal. By preferring this pro-testing expertise as the public action solution, the state has turned promoter, resulting in the marginalization of other, more comprehensive expertise that does not separate the measurement of risk from concrete workplace situations. The state's choice of a prevention policy based on individual responsibility and testing has not, however, removed legal uncertainties as to the conditions of use of tests, leaving the test manufacturers or distributors free to sell their services. Public regulation of the use of tests has thus also happened downstream, because it has fallen to judges to specify which testing practices were acceptable. Yet in social spaces already practiced in the selection of risks, judges now seem to favor the spread of testing in French businesses, which raises other problems. Thus, in the US, several studies have stressed the extent to which drug testing reproduces common attitudes of discrimination towards, and stigmatization of, ethnic minorities and those who are more vulnerable in terms of access to many services⁵⁶. In France, where the jobs market is tight, one issue is knowing whether people have the benefit of adequate legal and social resources to prevent the social labelling that results from testing from strengthening other, pre-existing labels, rendering them still more 'discreditable'.

⁵⁵ R. Crespin, "Le sens des mesures. Usages et circulation des chiffres dans la définition du problème public des drogues au travail", *Psychotropes*, 2015, vol. 21, no. 1, pp. 35-54

⁵⁶ D. Pager D et H. Shepherd, «The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets», *Annual Review of Sociology*, 2008, vol. 34, no. 1, p. 181–209.