TOUCH ME NOT: EXPANDING CONSTITUTIONAL FRAMEWORKS TO CHALLENGE LTO-REQUIRED AND OTHER MANDATORY DRUG TESTING

Oscar Tan

TABLE OF CONTENTS

INTRODUCTION 620

SYNOPSIS 624

I. IS IT WRONG FOR A PERSON TO REFUSE TO SUBMIT TO DRUG TESTING? 625

A. How can drug testing unduly intrude into an individual's life? 626

B. The "false positive": A clear danger in any drug testing policy 628

1. False positive results in general 628

2. Anti-cough medicine: A concrete Philippine "false positive" scenario 629

3. The simplest "false positive" scenario of them all 630

C. Crafting drug test policies with users—but not everyone else—in mind 630

1. An example from the United States 630

2. An example from the Philippines 633

(a) Dissecting Administrative Order BGC-AO-001 633

(b) Addressing the concerns regarding false positives and contamination 636

(c) Failing to address modesty and privacy 637

(d) Failing to specify how test results will be secured 638

D. A concrete example of how a testing policy can be taken to an extreme 641

1. Lockney Junior High: A 12-year old and family ostracized over drug testing 641

2. Windsor Forest High: Teacher loses career over drug testing 642

3. More testing policies—and, policies struck down 643

II. THE SEARCH FOR THE PROPER CONSTITUTIONAL ARMOR 644

A. Due process as a clearly insufficient ground 644

B. Privacy as an established but possibly insufficient ground 646

1. The right to privacy is firmly established in Philippine jurisprudence 647

2. However, the scope of the right to privacy has not been fully defined 649

C. May the right against self-incrimination be validly invoked? 652
1. Jurisprudence has excluded physical evidence from the right's protection 652
2. There are grounds in American jurisprudence, but these are extremely weak 654
D. May the right against unreasonable search be validly invoked? 655
1. Reemphasizing dignity in the right 655
2. Schmerber: *Body fluids under the right* 657
3. Expanding the right against unreasonable search 658
III. EXPANDING A RIGHT TO RAISE THE CONSTITUTION'S SHIELD 660
A. How has the United States Supreme Court reviewed drug testing? 660
1. Skinner and Von Raab: Establishing judicial review of drug testing policy 660
2. Vernonia: "Special needs" justify drug testing for schoolchildren 663
3. Chandler: "Special needs" doctrine reviewed and restricted 664
B. Crafting A Clear Constitutional Framework Based on Schmerber 665
1. Establish the Schmerber *connection to unreasonable search* 666
2. Vividly establish the reasons why a person might refuse a drug test 668
3. Relate drug testing to warrantless and administrative searches 669
IV. THE FRAMEWORK FOR A CONSTITUTIONAL COUNTERATTACK 669
A. Raising the constitutional level of scrutiny for drug testing 669
B. From the government side: Scrutinizing the existence of a "special need" 670
1. The LTO policy affects a class that is practically the general public 670
2. Additional concern: Lack of legal basis for the LTO policy 671
3. The LTO policy has many loopholes and is ineffective, following Chandler 672
4. Any benefits in identifying addicts are far outweighed by the great cost 674
C. From the individual's side: Tipping the scale by citing actual invasiveness 676
1. The LTO policy does not sufficiently address modesty 677
2. The LTO policy has no clear guidelines on revelation and confidentiality 679
3. Random test concerns do not apply to the LTO policy 680
4. The LTO policy may not have enough safeguards against false positives 681
CONCLUSION 681
AFTERWORD 684

TOUCH ME NOT: EXPANDING CONSTITUTIONAL FRAMEWORKS TO CHALLENGE LTO-REQUIRED AND OTHER MANDATORY DRUG TESTING*

*Oscar Tan***

But the stand for privacy need not be taken as hostility against other individuals, against government, or against society. It is but an assertion by the individual of his inviolate personality.

- *Justice Irene Cortes*
"The Constitutional Foundations of Privacy"[1]

So many excesses are attempted in the name of the police power that it is time, we feel, for a brief admonition.

- Justice Isagani Cruz
Villacorta v. Bernardo[2]

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

- Justice Louis Brandeis
Olmstead v. US[3]

History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.

- *Justice Thurgood Marshall*
Skinner v. Railway Labor Executives' Ass'n.[4]

INTRODUCTION

From a speech delivered by no less than President Gloria Macapagal-Arroyo: "[Drug cartels] corrupted our police, our criminal justice system and even the higher levels of government. With the amount of money in their control, it is

---

* Winner, Justice Irene R. Cortes Best Paper in Constitutional law (2002).

** Second Year, LL.B., University of the Philippines College of Law. The author is deeply grateful for the invaluable guidance of Dean Raul C. Pangalanan, Prof. Marvic M.V.F. Leonen, Prof. Dante B. Gatmaytan, and most especially Dean Pacifico A. Agabin, impromptu thesis advisers who were kind enough to lavish this author with their time.

[1] IRENE CORTES, THE CONSTITUTIONAL FOUNDATIONS OF PRIVACY, UP Law Center (1970). Adapted from the second Albino Z. SyCip Lecture Series delivered at the UP College of Law, February 21 and 28, 1970.

[2] G.R. No. 31249, 143 SCRA 480 (1986).

[3] Olmstead v. US, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

[4] Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

conceivable that they can even dictate the results of the elections."[5]

The specter of the drug menace looms over the country and spreads its cold talons even over society's most vulnerable members. In a study, commissioned by the International Labor Organization, of 360 minors in Cebu City, 41% admitted to working as couriers, shabu repackers, lookouts or middlemen for pushers.[6] From a global perspective, the United Nations International Drug Control Program estimates the annual global drug trade at $400 billion, comparable to the annual value of the textile trade.[7]

With the problem only worsening each year, drug testing has become a familiar solution, and is slowly becoming accepted by Filipino society as a necessary evil. Consider:

> *Requirements for renewal*
> 1. LTO Form 21
> 2. Tax Identification Number
> 3. Medical Certificate
> 4. Drug Test[8]
>
> x x x
>
> Republic of the Philippines
> Department of Transportation and Communications
> Land Transportation Office
> East Avenue, Quezon City
>
> PAGSANG-AYON SA PAGSUSURI SA IPINAGBABAWAL NA GAMOT
>
> x x x
>
> DAHILAN SA PAGKUHA NG DRUG TEST
> _____ New Professional Driver's License
> _____ Renewal of Professional Driver's License
> _____ New Non Professional Driver's License
> _____ Renewal of Non Professional Driver's License

---

[5] Dennis Arroyo, *Drug money leads to narco-politics*, http://www.inq7.net/bus/2001/sep/03/ text/bus_21-1-p.htm (Sept. 2, 2001).

[6] Anna Bojos, *Children in illegal drug trade*, http://www.inq7.net/reg/2001/oct/06/text/reg_9-1-p.htm (Oct. 5, 2001).

[7] Arroyo, *supra* note 5.

[8] Typewritten note posted on Licensing Section window, Land Transportation Office Santolan Branch.

ALITUNTUNIN: Sagutin and [sic] mga katanungan sa ibaba sa pamamagitan ng pag-tsek sa espasyo na katabi ng inyong sagot. Pagkatapos ay basahin ang mga nakasulat sa ibaba bago pirmahan ang dalawang espasyo para sa iyong lagda.

1. Mayroon ka bang iniinom na gamot sa nakalipas na 30 araw? _____ MERON _____ WALA
2. Umiinom ka ba ng alak sa nakalipas na 24 oras? _____ OO _____ HINDI
3. Humihithit ka ba ng Marijuana sa nakalipas na 30 araw?[9] _____ OO _____ HINDI
4. Kung mayroon kang iniinom na gamot, ilista ang mga ito sa ibaba.

Ako'y pumapayag at sumasang-ayon na magbigay ng aking ihi, dugo o kaya laway para sa pagsusuri ng anumang ipinagbabawal na gamut alinsunod sa RA No. 4136 Section 22 at inamiyendahan ng B.P. Blg. 398.

Ang resulta ng kahit na anong pagsusuri ay ibibigay sa Land Transportation Office. Ang aking lagda sa ibaba ay nagpapatunay na nabasa ko at naiintindihan and [sic] nilalaman nito at ang aking sagot sa mga tanong ay pawing katotohanan.

Petsa _____ Lagda _____

Pinatutunayan ko na ang aking ihing ito ay akin at ito ay sinelyado sa harapan ko. Ang aking ibinigay na ihi, dugo at/o laway ay sasailalim sa pagsusuri para sa droga at/o alcohol.

Petsa _____ Lagda _____ [10]

---

[9] This is the actual question on the form. Considering that sec. 16 in relation to sec. 2 (e) (1) and (i) of Rep. Act 6425 or the Dangerous Drugs Act of 1972, as amended, imposes a penalty of *reclusion perpetua* to death for the use of marijuana, one wonders if the question must be answered in the presence of counsel.

[10] Reproduction of actual form obtained from the Medical Section of the Land Transportation Office's main branch. The English translation, which can also be found in the actual form, is reproduced below.

REASON FOR TAKING A DRUG TEST

_____ New Professional Driver's License
_____ Renewal of Professional Driver's License
_____ New Non Professional Driver's License
_____ Renewal of Non Professional Driver's License

INSTRUCTIONS: Answer the questions below by placing a check in the blank beside your answer. Read what is written below before signing in the two blanks provided for your signature.

1. Have you taken any medication in the past 30 days? ___ HAVE _____ HAVE NOT

The Land Transportation Office (LTO) now requires *all* drivers' license applicants to undergo drug testing to the tune of P300.00 for every application or renewal. Is Juan dela Cruz entitled to ask, "How much is too much?" at some point?

Michael Tan wrote in the *Inquirer:*

> "What's this I hear about the Land Transportation Office requiring drug testing for those applying for a professional driver's license? I agree, totally, that we need to do something about drivers who use drugs, but drug testing is not the solution. Not only that, this new policy will create new problems.[11]

Another columnist, Conrado de Quiros, wrote:

> I read last Monday about how 2,000 applicants for driver's licenses flunked the drug tests last October... The DDB seems very pleased with itself with this, and seems to think this justifies the fees for drug testing that the LTO is now charging from applicants. It doesn't.[12]

And perhaps most surprising of all, Dr. Higimio Mappala, National Program Director for Toxicology Services and head of the only government-operated detoxification unit at the Jose R. Reyes Memorial Medical Center, stated that *the Department of Health actually issued a stand against drug testing for license applicants.* Instead, the DOH believed that spot tests immediately after traffic violations or accidents would be more effective.[13]

---

2. Have you taken any alcoholic beverage in the past 24 hours? ____ YES ____ NO
3. Have you smoked Marijuana in the past 30 days? ____ YES ____ NO
4. If you are taking any medication, kindly list these below.

I consent and agree to contribute urine, blood or saliva for drug testing pursuant to RA No. 4136 Section 22 as amended by B.P. Blg. 398.

The results of whatever test shall be forwarded to the Land Transportation Office. My signature below signifies that I have read and understood the contents of this form and that my answers are all true.

Date _____ Signature _____

I verify that the urine sample is mine and sealed in my presence. The urine, blood and/or saliva sample I have contributed will be tested for drugs and/or alcohol.

Date _____ Signature _____

[11] Michael Tan, *The folly of drug testing*, http://www.inq7.net/opi/2001/oct/11/text/opi_mltan-1-p.htm (Oct. 10, 2001).

[12] Conrado de Quiros, *Wrong Turn*, PHIL. DAILY INQUIRER, March 14, 2002, at 6, *available at* http://www.inq7.net/opi/2002/mar/14/opi_csdequiros-1.htm.

[13] Interview with Dr. Higimio Tiu Mappala, National Program Director for Toxicology Services, Chair of Jose R. Reyes Memorial Medical Center (JRRMMC) Detoxification Unit, and Vice-Chair of the JRRMMC Out

SYNOPSIS

This paper seeks to empower ordinary Filipinos like Michael Tan and Conrado de Quiros to ask, "How much is too much?" in legal terms. It seeks to outline a constitutional framework for challenging a mandatory drug testing policy, and demonstrate it by showing why the LTO policy should be declared unconstitutional.

Drug testing on the scale contemplated by the LTO is little more than a massive erosion of the privacy of the individual Filipino, and it must be stressed that privacy has long been established in the Philippines as a clear constitutional right. The ruling in *Morfe v. Mutuc*[14] was unmistakable, and Justice Irene Cortes outlined the right as early as 1970 in a comprehensive essay that influenced landmark privacy decisions as late as 1998.[15]

The scope of the right, however, has yet to be firmly delineated, and this paper will take a more circuitous, more methodical route towards successfully pitting it against the State's police power. First, this paper will establish that drug testing, when employed excessively by government, has clear negative effects on the people it is supposed to protect. It will discuss a number of privacy concerns, the particulars of the LTO policy and a foreign policy for comparison, and anecdotal data on how drug testing can be taken to an extreme.

Next, it will explore the relief afforded by existing rights frameworks, and show why existing jurisprudence on self-incrimination—under which body fluids have been held to fall under for decades—lends insufficient relief. It will then explore other constitutional grounds, particularly the grounds used by the United States to scrutinize drug testing policies in respect of the right against unreasonable search. Establishing the potential violation of the right to privacy in the context of an explicit constitutional right allows the citizen to push the level of judicial scrutiny from a mere "rational relationship test" to the stricter "balancing of interests test".

The paper will then show that, given the circumstances and specific details of the LTO policy, the balance must lean in favor of the Constitution and the drug test requirement must be struck down.

In justifying such a framework, one recalls the spirit in which the Court

---

Patient Department (March 19, 2002). Dr. Mappala was involved in consultations regarding the LTO policy as well as amendments to the Dangerous Drugs Act.

[14] G.R. No. L-20387, 22 SCRA 424 (1968).

[15] I. CORTES, *supra* note 1, *cited in* Ayer Productions v. Capulong, G.R. Nos. 82380 and 82398, 160 SCRA 861 (1988) and Ople v. Torres, G.R. No. 127685, 293 SCRA 143 (1998).

envisioned the Constitution's service to the nation:

> [T]he purpose of the Bill of Rights is to withdraw "certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts... " Laski proclaimed that "the happiness of the individual, not the well-being of the State, was the criterion by which its behavior was to be judged. His interests, not its power, set the limits to the authority it was entitled to exercise" (citations omitted).[16]

Now consider: The "right to be let alone" is the underlying theme of the whole Bill of Rights.[17]

I. IS IT WRONG FOR A PERSON TO REFUSE TO SUBMIT TO DRUG TESTING?

It is undeniable that drug testing is a valid and useful part of enforcing drug regulations. Annual drug tests for policemen[18] and other civil service[19] members have long since been established. As for the new LTO policy, according to the Dangerous Drugs Board, over 2,000 applicants flunked the tests in Metro Manila in October 2001 alone.[20]

What is unnerving, however, is the broadening scope of drug testing, and the thought that it may eventually expand and reach into school life, one's career, and the other areas of life one removes from public scrutiny.

It must be emphasized that there is *nothing* wrong with refusing or even being hesitant to submit to drug testing. It is hardly an admission of guilt, and a person may have valid personal reasons. When one thinks about it, would not many Filipinos prefer to avoid a blood test if given a choice? Do many not prefer to see a doctor or dentist as infrequently as possible, again for valid personal reasons?

As Justice Romero put so eloquently:

> What marks off a man from a beast?
>
> ... Because of his sensibilities, emotions and feelings, he likewise possesses *a sense of shame*. In varying degrees as dictated by diverse cultures, he erects a wall between himself and the outside world wherein he can retreat in solitude,

---

[16] Philippine Blooming Mills Employment Organization v. Philippine Blooming Mills Co., G.R. No. 31195, 51 SCRA 189, 201 (1973).

[17] Dean Griswold, *The Right to be Let Alone*, 55 N.W.U.L. REV. 217 (1960), *quoted in* I. CORTES, *supra* note 1.

[18] Department of Interior and Local Government (DILG) Circ. No. 31-99 (1999).

[19] Civil Service Commission (CSC) Circ. No. 34-97 (1997).

[20] PHIL. DAILY INQUIRER, March 11, 2002, at 1 col. 5.

> protecting himself from prying eyes and ears and their extensions, whether from individuals, or much later, from authoritarian institutions.[21] (Italics supplied.)

A. HOW CAN DRUG TESTING UNDULY INTRUDE INTO AN INDIVIDUAL'S LIFE?

When the average Filipino weighs the pernicious effects of rampant drug use against the seemingly minimal inconvenience on an individual, he may have the impression that a person who refuses to submit to a drug test is too selfish to sacrifice a few minutes of discomfort for the greater good of the country.

More than a few minutes of discomfort may be involved, however.

Urine analysis, for example, is the method used by the LTO,[22] and urinating appears to be less intrusive than drawing blood. No needles are involved, no skin is pierced, and there cannot possibly be pain involved.

Nevertheless, it can be uncomfortable, embarrassing or even traumatic when compelled.[23] An American court even stated: "Being forced under threat of punishment to urinate into a bottle being held by another is purely and simply degrading."[24]

It is very difficult to communicate the discomfort, but one simply has to imagine oneself watching another person urinate. Then, imagine the feeling of being watched, even from behind. Imagine raising an eyebrow while reading the testing procedure written in big letters on the wall of the LTO testing center: "Step 5. Umihi sa CR."[25] A man who made the mistake of relieving himself immediately before a urine test would know exactly how awkward the test can be.[26]

Tests may unduly sacrifice modesty to ensure reliability, and a subject's active participation is required in the urine collection. What happens, for example, when a tester wishes to make sure that a subject actually submitted a sample of his

---

[21] Ople v. Torres, G.R. No. 127685, 293 SCRA 143, 171 (1998) (Romero, J., concurring opinion)

[22] Department of Transportation and Communication (DOTC) Adm. Order No. BGC-AO-001, sec. III (Feb. 23, 1999) (hereinafter Feb. 23, 1999 Adm. Order)

[23] Ross Epstein, *Urinalysis testing in correctional facilities*, 67 B. U. L. REV. 475 (1987).

[24] Storms v. Coughlin, 600 F. Supp. 1214, 1217 and n.2 (S.D.N.Y. 1984), *cited in* Epstein, *id.*

[25] "Step 5. Urinate in the comfort room." Ocular inspection of the actual testing center of the LTO main branch along East Avenue.

[26] An interesting experiment is to search for the topic "drug test" using any popular Internet search engine, then count the number of sites that carry or even sell advice on how to pass drug tests. These appeal to the potential customer's peace of mind.

own urine? The actual LTO test, according to professional driving instructors[27] and LTO main branch Medical Section personnel, makes the subject urinate in a small comfort room of about 9-12 square feet.[28] The door is left open, and a medical technician watches him from behind. Dr. Mappala's center uses a similar process, but observation is done using a mirror in the comfort room ceiling.[29]

To cite one concrete example of the modesty issues involved, the majority of applicants are male, but the personnel at the LTO main branch testing center are mostly female.[30] In addition, Dr. Mappala clarifies that his center's procedure specifically requires a female observer for female test subjects.[31] One can imagine how awkward the collection of the sample and the required observation are for women. The general LTO procedures make no gender distinctions.[32]

Second, test subjects cannot control what is revealed by their urine. Although the reagents used in tests for shabu, the cheapest and most common drug used in the Philippines, are very specific and reveal little else from a sample,[33] a person would understandably hesitate to submit to some other drug test that would reveal a medical condition or special medication intake completely unrelated to drug use.

Speaking generally, what if the additional medical information revealed might somehow discriminate against the person, or at least place him in a compromising position? In case of an on-site drug test, the person may even be forced to reveal personal medical information to someone in the same agency or company if this may somehow affect the test results. One concrete example is the AIDS treatment DHEA, which triggers a test for anabolic steroids.[34] Finally, the subject may be unsure of how the medical information will be treated and who will have access to it.[35]

To cite a concrete example along these lines, note that the LTO drug test consent form reproduced earlier asks a person to list medication he is taking without

---

[27] Interview with Rene Escullar, Registrar, Philippine Motor Association (March 19, 2002). Mr. Escullar facilitates the application for driver's licenses of PMA clients-members, and was interviewed with fellow professional driving instructors.

[28] Ocular inspection of and interviews at the actual testing center of the LTO main branch along East Avenue.

[29] Interview with Mappala, *supra* note 13.

[30] Inspection of LTO main branch testing center.

[31] Interview with Mappala, *supra* note 13.

[32] *See* DOTC, LTO Mem. Circ. No. EMA-MC-01338-A (Aug. 30, 2001) (hereinafter Aug. 30, 2001 circular) and DOTC, LTO Mem. Circ. No. BGC-MC-00317 (Nov. 28, 2000) (hereinafter Nov. 28, 2000 circular) (Implementing Guidelines of Adm. Order No. BGC-AO-001 Re: Rules and Regulations in the Implementation of Drug Testing of Professional Driver's License Holders/Applicants).

[33] Interview with Mappala, *supra* note 13.

[34] *Substances causing false positives*, *at* http://www.ultimatedetox.co.uk/false.htm (hereinafter False Positives).

[35] Mechelle Zarou, *The good, the bad, and the ugly: Drug testing in Alaska*, 16 ALASKA L. REV. 297 (1999).

giving him any idea of what sensitive medication he need not reveal. He may inadvertently reveal a condition he has not even revealed to his family, for example.

Third, both the test and the results may be used to unduly harass specific people or groups of people. Selection of subjects for random testing, for example, is open to abuse. How does a person ensure that random testing is truly random? If abused, leakage of results from a required drug test could have negative implications on a person involved in a child custody case or on an employee looking for another job.[36]

B. THE "FALSE POSITIVE": A CLEAR DANGER IN ANY DRUG TESTING POLICY

1. False positive results in general

Aside from the enumerated privacy concerns, there is simply the possibility that a positive drug test result may be wrong, something called a "false positive." Substances in prohibited drugs may have "relatives" in common medication. Anti-cold and cough medicines, for example, contain amphetamine-like substances. Local anesthetics such as lidocaine may show up in cocaine tests.[37] The painkiller ibuprofen may be mistaken for marijuana metabolites.[38] Certain antibiotics[39] or even poppy seeds[40] used to flavor bakery products may trigger a heroin test. Imagine testing positive because one had a cold, took a painkiller, saw a dentist before the test, or ate a few bagels!

To cite a concrete example, enzyme multiplied immunoassay technique (EMIT), one of three basic methods to test for marijuana, is considered limited because it is indirect. EMIT tests for residual substances and not for THC, the psychoactive substance. It has been proven that other substances can cause a positive result, such as aspirin. Nevertheless, it is a cheap and extensively used test in the United States.[41]

Hair testing is another method used in the United States, and on its face, seems even less invasive than urine and blood analysis. Drug residues, in fact, stay longer in hair. There has been concern regarding the accuracy of hair testing,

---

[36] *Id.*

[37] Tan, *supra* note 11.

[38] False Positives, *supra* note 34.

[39] Emma Hitt, *Antibiotics cause False Positives on Heroin Test*, 286 J. AM. MED. ASS'N. 3115, http://www.passyourdrugtest.com/12-25-2001-news.htm; Jayant Patel, *Unexpected Immunoassay Results*, http://www.pathology.med.umich.edu/mlabs/chemistry_current.htm (April 1997).

[40] Mary Ellen Nunes, *Drug Testing: The "Study-Free" Test*, http://www.jobweb.com/Resources/Library/Real_Life/Drug_Testing_The_147_01.htm.

[41] Epstein, *supra* note 23.

however. It has been shown, for example, that some children tested positive only because they lived with people who smoked crack. Another concern is that hair color may affect test results.[42]

One writer advises: "Because there are varying levels of sensitivity to certain chemicals, prescription medication, and over-the-counter medications, a little research may be necessary to find out why your test reacted positively."[43]

2. Anti-cough medicine: A concrete Philippine "false positive" scenario

As mentioned, shabu tests are the most common in the Philippines, and it is no joke that anti-cough medicine like Vicks inhaler[44] can trigger them.

Dr. Mappala explains that these medicines contain phenylephrine, phenylpropanolamine, and ephedrine derivatives, commonly known as amphetamine-like substances. These are actually isomers – understood as molecular mirror images[45] – of the amphetamines in shabu. These similar substances can trigger a positive result even in the second confirmatory test required by the LTO policy.[46]

These substances can stay in the bloodstream in the same way that actual amphetamines do. Dr. Mappala's unit's records show that this is from two weeks to as long as seven months,[47] depending on factors such as the acidity of a person's urine. Thus, a person with a specific body chemistry, who had a cold half a year before the exam, could actually test positive.

Again, note the actual instructions taken from the LTO testing center:

> 4. Kung mayroon kang iniinom na gamot, ilista ang mga ito sa ibaba. (Have you taken any medication in the past 30 days?)

It is not unlikely for an average person to forget to list anti-cough medicine, or think it is too trivial to put down.

---

[42] Theresa Casserly, *Evidentiary and constitutional implications of employee drug testing through hair analysis*, 45 CLEV. ST. L. REV. 469-470 (1997), *cited in* Zarou, *supra* note 35.

[43] Nunes, *supra* note 40.

[44] Patel, *supra* note 39.

[45] Molecules that have the same molecular formula, but different structures. RAYMOND CHANG, CHEMISTRY 941(4th ed 1994).

[46] *See* Aug. 30, 2001 circular, *supra* note 32, sec. VIII., par. 1. "1. Drivers applying for professional driver's license and tested positive for abuse of drugs shall automatically be subjected to Confirmatory Testing using the same urine specimen."

[47] Interview with Mappala, *supra* note 13.

Amphetamine-like substances are found in other medicines as well, such as certain anti-obesity drugs. According to Dr. Mappala, these are the ones that work by suppressing appetite, and are differentiated from others such as the more familiar Xenical, which block fat absorption. Some users, aside from using these for weight reduction, use them to stay awake in the same way that some use shabu.

Dr. Mappala notes that the DOH has already moved for stricter regulation of medicines with amphetamine-like substances.[48]

3. The simplest "false positive" scenario of them all

Of course, aside from all these technical concerns, there is the simple possibility of contamination or substitution if chain of custody procedures are unclear or are not strictly followed. Michael Tan opined, bluntly:

> Samples can get mixed up, reading of results can be sloppy and, worse of all, there can be all kinds of strange things that happen to the samples being tested. The LTO has been notorious for its network of fixers and given that these tests will be contracted to outside laboratories, you can imagine all the innovative irregularities that can be concocted.[49]

The fear of irregularities, incidentally, is not unfounded:

> It has been reported to the undersigned that some LTO field personnel, either acting on their own or in collusion with fixers, have influenced applicants for new driver's license [sic] or renewal thereof to go to a favored drug testing laboratory to the detriment and disadvantage of other laboratories.[50]

C. CRAFTING DRUG TEST POLICIES WITH USERS – BUT NOT EVERYONE ELSE – IN MIND

1. An example from the United States

The concerns described in the preceding sections are compounded by the possibility that laws on drug testing may not even take privacy into account. Before moving to the LTO policy, however, another policy will first be presented, to give the reader a point of comparison.

In critiquing Alaska's drug testing law, Mechelle Zarou first outlined the

---

[48] *Id.*

[49] Tan, *supra* note 11.

[50] Memorandum of LTO Asst. Sec. Edgardo Abenina on "Undue interference in the business activities of Drug Testing Laboratories", Nov. 20, 2001.

main points that protect employees in work places:

- Mandatory written notice at least 30 days before the drug testing program is implemented;
- Written policy distributed to employees or included in employee manual that specifies the employer's policy on drug testing and confidentiality, testing methods, circumstances when drug testing may be required, consequences of refusing drug testing, and how a dialogue concerning a positive result may be set up, among others;
- Testing must be scheduled during work or immediately before or after;
- Testing time is considered work time for purposes of benefits;
- Employers must shoulder all costs of testing, including transport to a testing site if done outside the workplace;
- Samples from employees must be collected in such a way that guarantees privacy and ensures against contamination;
- Testing must be done by a laboratory accredited by the Substance Abuse and Mental Health Services Administration, the College of American Pathologists, or the American Association of Clinical Chemists;
- Stricter requirements for tests done outside the workplace, including the use of Food and Drug Administration approved testing devices and required training for test administrators;
- Test results must be reviewed by a licensed physician or doctor of osteopathy;
- Results will be determined positive following cutoff levels prescribed by the United States Department of Health and Human Services (HHS), or by the employer's written policy in case of drugs where the HHS has not established a cutoff level;
- A positive result must be confirmed by a second test using a different process;
- Employer bears the burden of keeping results confidential;
- Actions by employers based on drug tests not grounds for suit except if done in bad faith, including actions based on "false positive" results;
- Employees barred from filing complaints of slander, libel, defamation of character or damage to reputation against employer in relation to drug testing;

- Employers protected against actions involving "false negative" drug results;
- Employers allowed to test for drugs for a number of reasons including impairment, accidents, and maintenance of security and safety;
- Employers may take action against an employee who refuses to submit to a drug test, and may require employees to participate in drug counseling programs.[51]

Based on the above highlights, the law seems reasonable enough and seems to afford reasonable protections to the employees. Zarou, however, opined that this perception is misleading. She noted that Alaska's state constitution explicitly lists privacy as a right and emphasized that:

- The language of the privacy guarantee does not even specify that an employer may not require witnesses when urine samples are collected, and does not make provisions for violation of the guarantee;
- The law does not prohibit employers from testing for substances other than drugs and from collecting other information on the employee's medical condition, and does not make any provisions in case employers do;
- The law does not have any practical provisions that guard against breaches of confidentiality by the employer; for example, there is no provision against using test information in litigation against former employees;
- Management is not required to submit to testing;
- The law imposes sanctions for refusing to submit to testing rather than incentives to comply;
- The law does not even mandate the creation of internal grievance systems to address improprieties related to a drug testing program;
- Finally, as mentioned, the employee's options to respond to a "false positive" test result and to programs are curtailed.[52]

In summary, Zarou criticized the law for forcing employees to rely too much on employers' good faith—even when they might not fully comply with the law due to the costs involved and the lack of disincentives for violating the

[51] Zarou, *supra* note 35.
[52] *Id.*

employees' confidence. One sees how test subjects may still feel the privacy concerns under the Alaska law despite its seemingly reasonable provisions.

2. An example from the Philippines

a. Dissecting Administrative Order No. BGC-AO-001

The LTO drug testing policy is founded on sec. 22 of the Land Transportation and Traffic Code:

> Every person who desires to operate any motor vehicle shall file an application to the Director or his deputies for a license to drive motor vehicles; provided however, that *no person shall be issued a professional driver's license* who is suffering from contagious diseases such as tuberculosis, sexually transmitted disease and epilepsy or who is an alcohol or *drug addict or dependent*.[53] (Italics supplied.)

The drug testing policy is specifically mandated by Administrative Order No. BGC-AO-001. It was issued during the term of Pres. Estrada, and the actual provisions on drug testing are very simple:

> Section II— APPLICATION AND SCOPE
> ... any person who applies for a new professional driver's license or for a renewal thereof[54] must show proof that he/she has been subjected to and has passed a drug test conducted by any of the following:
>
> x x x
>
> Section III— PROCEDURE
> An applicant shall be subjected to an initial urine test checking for metaphetamine, marijuana and other prohibited drugs in his urine.
> An applicant shall submit at least 60 ml. of urine contained in a collection container.
> The collection site person shall measure the temperature of the urine immediately from the time of its collection.
>
> If the initial drug test is positive, the applicant will be subjected to a secondary confirmatory test at the Dangerous Drugs Board or PNP Crime Laboratory or NBI Laboratory.
>
> If the second test or confirmatory test is still positive, the application for license or renewal thereof shall be denied by the LTO. The MRO shall recommend for the rehabilitation of the applicant.

---

[53] Rep. Act 4136 (TRANSP. & TRAFFIC CODE), as amended by B.P. Blg. 398, sec. 22. Note that the provision that refers to drug testing refers only to professional license holders. This will be discussed later.

[54] Again, note that the provision only mentions professional license holders.

> x x x
>
> Section IV— PENALTIES
> The license of a driver found positive of prohibited drugs/s after the confirmatory test shall be revoked. A license applicant found positive of prohibited drug/s after the confirmatory test shall not be issued a driver's license. He can only renew/re-apply after rehabilitation and after the Drug Rehabilitation Board has cleared him.
>
> x x x
>
> Section V— LABORATORY REPORTS
> As required by the Dangerous Drug Board, all laboratory reports shall be made in printed forms especially prepared for the purpose. These reports shall be valid for fifteen (15) days from the date of issuance thereof.[55]

The LTO implementing rules focus mainly on the accreditation of private laboratories. The actual guidelines are contained in scattered memorandum circulars dated Nov. 28, 2000,[56] July 19, 2001[57] and Aug. 30, 2001,[58] plus a last set dated Sept. 19, 2001 that introduced minor amendments.[59]

At this point, it must be clarified that the law, the implementing Administrative Order, and the first implementing LTO circular refer only to professional license holders, but the July 19 and August 30 circulars refer to both professional and non-professional license holders.

The introduction of the July 19 circular, which was published in newspapers on July 29, 2001 reads:

> Consistent with the primary intention of the cited amendment [to the Transportation and Traffic Code], of screening out unfit applicants from securing any license to drive in order to minimize if not totally prevent untoward vehicular accidents that often result in serious injuries/damages to lives and properties, *all applicants for driver's license* [sic] will comply with the following rules and regulations:... [60] (Italics supplied.)

---

[55] Feb. 23, 1999 Adm. Order, *supra* note 22.

[56] Nov. 28, 2000 circular, *supra* note 32.

[57] DOTC, LTO Mem. Circ. No. EMA-MC-01338 (July 19, 2001) (hereinafter July 19, 2001 circular).

[58] Aug. 30, 2001 circular, *supra* note 32.

[59] Enumerated in a memorandum from Legal Service OIC Geronimo Quintos to LTO Asst. Secretary for Administrative and Legal Affairs Alan Tan (Sept. 4, 2001). Mr. Mario San Pedro, an LTO data encoder assigned to the Medical Unit at the main branch and a staff member of the Central Office Committee on Accreditation of Drug Testing's secretariat, appears to have the only complete copy of the implementing rules, but some documents are missing from it. He explained that a UP student doing research asked to borrow some documents for photocopying, but did not return them.

[60] July 19, 2001 circular, *supra* note 57, sec. I, par. 2.

The introduction of the August 30 circular reads: "These guidelines are issued to govern the application for *professional and non-professional driver's licenses* so as to promote safe and efficient transportation and to curb alcohol or drug-related vehicular accidents."[61] (Italics supplied.)

What is confusing is that these two paragraphs are the only ones in the entire series of documents that refer to the authority for imposing the drug test requirement on non-professional license applicants. This curious detail will be discussed later on, but the author confirmed with a number of LTO personnel and even professional driving instructors[62] that the test is required for all license applicants, not just professional license applicants.[63] LTO Santolan District Head Juanito Tejano even promised the author that his office had authority to conduct the drug testing on non-professional license applicants, and that it was in a telegrammed addendum to an earlier circular, though the telegram could not be located.[64] In addition, a change in the restriction code of a driver's license is considered a new application for which a drug test is required.[65]

In any case, specific details in the implementing rules will be critiqued below one by one. A general provision of note added in the implementing rules, however, reads:

> A driver who gets involved in a serious traffic accident shall be immediately subjected to drug test. If such driver is a holder of Professional driver's license, and he is found positive for use of prohibited drugs, his driver's license will be immediately suspended for a period of five (5) years. For a Non-Professional driver's license holder who gets involved in a similar serious accident and who is found positive for use of prohibited drugs by an

---

[61] Aug. 30, 2001 circular, *supra* note 32, sec. I, par. 1.

[62] Interview with Escullar, *supra* note 27.

[63] There appears to be no LTO circular that specifically requires drug testing for non-professional license applicants. If it exists, it must have been issued after September 2001. The National Administrative Register Office in the UP Law Center does not have a copy. The Philippine Motor Association Academy likewise has no copy, though its instructors were informed of the policy because they facilitate license applications at the LTO every Monday. Juanito Tejano, LTO Santolan District Head, could not locate his branch's copy of the authorization. The LTO General Services section of its main branch does not have a copy on file, and the clerk assumed it was sent directly to the Medical Unit. Finally, Mario San Pedro of the Medical Unit showed the author what San Pedro's officemate described as the only available compilation of implementing circulars in the entire LTO, and still no specific provision for non-professional license applicants was found.

However, PMA, LTO licensing sections and even the actual drug test consent form all confirm that drug testing is *not* limited to professional license applicants. Fortunately or unfortunately, all this confusion is now moot given amendments to the Dangerous Drugs Act made after this paper was submitted, which will be noted later.

[64] Interview with Juanito Tejano, LTO Santolan District Head (March 19, 2001).

[65] Memorandum of LTO Asst. Secretary Edgardo Abenina, "Guidelines in the Implementation of the Drug Testing Program", Nov. 14, 2001. (A one-page, three-item memo, not a circular of implementing rules.)

> accredited drug testing center, his license will be immediately suspended for three (3) years.[66]

Note that another series of memoranda details and authorizes the formation of a drug results database by three Internet providers: Prism, Drugnet, and No Limit. Concerns such as the use of security codes in result forms and the technical details, however, are outside the scope of this paper.[67]

b. Addressing the concerns regarding false positives and contamination

Reviewing the LTO implementing rules, one observes that the safeguards in the policy mainly address false positives:

> b. Drug Test— any chemical, biological or physical instrument analysis administered by a laboratory for the purpose of determining the presence or absence of a drug principally methamphetamine and cannabinoids[68] or its metabolite.
>
> b1. Screening Test— refers to immunoassay test to eliminate "negative" specimen, i.e., one without the presence of drugs, from further consideration and to identify the presumptively "positive" specimen that requires confirmation or further testing.
>
> b2. Confirmatory Test— refers to the second or further analytical procedure to identify the presence of drugs in specimen.
>
> b3. Quantitative Test— refers to an examination to determine the level or concentration of drugs in the body.
>
> ...
>
> Section VII. INTERPRETATION OF RESULTS
> Test results shall be printed individually in an official form, sealed and signed by the laboratory manager.
>
> All positive results shall be submitted to LTO and shall contain final findings done by a confirmatory laboratory. An applicant confirmed to be positive for drugs may request that the same urine sample be sent to DDB (Dangerous Drugs Board) or a Class A private laboratory for further validation testing— the result thereof shall be submitted to LTO within fifteen (15) days after collection of sample.

---

[66] Aug. 30, 2001 circular, *supra* note 32, sec. VIII, par. 2.

[67] The memoranda were written by LTO Asst. Secretary Roberto Lastimoso on Jan. 17, 25 and 30, 2002.s

[68] Commonly known as shabu and marijuana, respectively.

> As confirmed by the Class A Confirmatory Laboratory or the DDB, the concerned DDB-accredited physician may subject an individual found positive for drugs to a clinical evaluation as basis for appropriate disposition.[69]

Assuming that "further analytical procedure" means a second test of a different nature to validate the first, the procedure thus provides for false positives. Further:

> Chain of Custody—refers to the procedure established by the testing laboratory for the handling of specimens to ensures [sic] that the integrity of the sample identification is maintained. It accounts for the integrity of each specimen by tracking its handling and storage, from specimen collection to its final disposition.[70]

Sample chain of custody forms are among the requirements for the accreditation of a drug testing laboratory for LTO purposes,[71] and the LTO Central Office Committee on Accreditation of Drug Testing is empowered to conduct inspections[72] that presumably check how custody procedures are being observed. Thus, contamination of samples is also addressed.

Finally, drug testing laboratories are penalized with fines of at least P100,000.00 for non-compliance with mandated requirements or submission of anomalous test reports.[73]

c. Failing to address modesty and privacy

The only concession to the test subject's convenience, however, is:

> The screening testing (Class "C") Center should be located within the 100-200 meter radius from the LTO Licensing Office, for the convenience of the driver applying/renewing for [sic] a professional license.[74]

There is absolutely nothing in the implementing rules that even hint at addressing potential awkwardness or even embarrassment of the subject, not even a general provision such as the one in the Alaska law critiqued earlier. Further, the procedure quoted from the Administrative Order itself discusses only the volume and temperature of the subject's urine.[75] There is, in fact, no prescribed procedure at all. There are no instructions on how to check the integrity of the sample, not even a

---

[69] Aug. 30, 2001 circular, *supra* note 32.
[70] *Id.*
[71] *Id.*, sec. IV.A.5.; Nov. 28, 2000 circular, *supra* note 32, sec. IV.I.f.
[72] Aug. 30, 2001 circular, *supra* note 32, sec. III.B.2.4.
[73] *Id.*, sec. XI.A.1-2.
[74] Nov. 28, 2000 circular, *supra* note 32, sec. III.B.1.
[75] Feb. 23, 1999 Adm. Order, *supra* note 22.

simple sentence on the prescribed position and distance of an observer. And, again, there is nothing to address the concerns of female drivers.

On another aspect, the overly general nature of the request to list medication being taken was already criticized. However, the excerpt in the preceding section also details a clinical evaluation for applicants who test positive. Even if shabu tests are specific and reveal little else, what may be revealed in this clinical evaluation? What will the exact nature of the physician-patient relationship be? Can the subject refuse? In any case, how will he be advised of the nature of the evaluation?

d. Failing to specify how test results will be secured

Perhaps most appalling of all, nothing in the law describes who has access to the test results except:

> SECTION VI. REPORTING SYSTEM:
> All accredited laboratory managers shall make a periodic report on the results of the drug tests that was [sic] conducted to the Central Office or LTO Regional Offices, as the case may be. For drug test [sic], it shall be identified on [sic] the report, the drug that was tested for [sic], Methamphetamine or Cannabinoids and whether positive or negative. *The test results shall be treated as confidential.*[76] (Italics supplied. This is the entire section VI of the circular.)

> SECTION VI. REPORTING SYSTEM
> All accredited laboratory owners/managers shall submit a Monthly Report to the LTO Central Office Accreditation Committee and Regional Offices concerned on the results of all drug tests conducted by them in a prescribed form.
>
> All accredited drug testing laboratories shall be connected on-line with the LTO Information Technology System. (This is the entire section VI of the circular.)[77]

What exactly does confidential mean and what concrete safeguards are there to prevent disclosure by LTO employees? Are employees of the laboratories likewise bound? It is impossible to interpret. While there is a chain of custody for the samples tested, there is none for the results. How many people will have access to them? How will access be controlled? How will the results be stored? Can an LTO employee peek at the results of a particular person for whatever reason? Note that information technology included in the drug test program will make drug test

---

[76] *Id.*, sec. VI.

[77] Aug. 30, 2001 circular, *supra* note 32, Sec. VI.

results available to district offices, making access an even more sensitive issue.[78]

These questions may not have occurred to policymakers in the LTO, and might not occur to test subjects as well. However, the Court had a lot to say about such questions when the issue of a national ID system was brought before them. Justice Puno wrote in the landmark case of *Ople v. Torres*:

> ... [S]aid order does not tell us in clear and categorical terms how these information gathered shall be handled. It does not provide who shall control and access the data, under what circumstances and for what purpose. These factors are essential to safeguard the privacy and guaranty the integrity of the information... [T]here are no controls to guard against leakage of information. When the access code of the control programs of the particular computer system is broken, an intruder, without fear of sanction or penalty, can make use of the data for whatever purpose, or worse, manipulate the data stored within the system.[79]

Justice Vitug added:

> Administrative Order No. 308 appears to be so extensively drawn that (it) could, indeed, allow unbridled options to become available to its implementers beyond the reasonable comfort of the citizens and of residents alike.
>
> ...
>
> ... [T]he questioned administrative order can have far-reaching consequences that can tell on all individuals, their liberty and privacy... [80]

And Justice Romero was the most adamant:

> So terrifying are the possibilities of a law such as Administrative Order No. 308 in making inroads into the private lives of the citizens, a virtual Big Brother looking over our shoulders, that it must without delay, be "slain upon sight" before our society turns totalitarian with each of us, a mindless robot.[81]

Further, in the same case, Justice Kapunan explicitly pooh-poohed the majority's concerns on the assailed order's lack of controls for access to and leakage of information:

> ... [T]he right to privacy is well-ensconced in and directly protected by various provisions of the Bill of Rights, the Civil Code, the Revised Penal Code, and certain special laws, all so painstakingly and resourcefully catalogued in the majority opinion. Many of these laws provide penalties for their violation in

---

[78] Letter from Ramon Reyes, Chief Operating Officer, Stradcom Information Technology Company to LTO Asst. Secretary Roberto Lastimoso (Feb. 5, 2002).

[79] Ople v. Torres, G.R. No. 127685, 293 SCRA 143, 161-162 (1998).

[80] *Id.* at 174 (Vitug, J., concurring opinion)

[81] *Id.* at 173 (Romero, J., concurring opinion)

> the form of imprisonment, fines, or damages. These laws will serve as powerful deterrents not only in the establishment of any administrative rule that will violate the constitutionally protected right to privacy, but also to would-be transgressors of such right.[82]

Note that his was the minority opinion. In fact, fears of intrusion into privacy through information databases were already outlined by Justice Cortes 30 years ago.[83]

One might argue, further, that *Ople* discussed a national ID system that would collect a wide range of information, while shabu test results contain only very specific information. However, it must be emphasized that this information is very sensitive, and one cannot simply assume that existing internal LTO regulations are sufficient.

Perhaps the most unnerving aspect of the issue is how test results might be used against the subject. Although the rules prescribe denial of the license application or suspension of driving privileges as penalties,[84] LTO chief Roberto Lastimoso has announced that he would "push for stricter penalties for license applicants found positive."[85]

Can this possibly mean that a positive result can be used as probable cause for further investigation, perhaps treating the test as though obtained in the course of a lawful search? Will the applicant be treated as though caught in flagrante delicto?[86] Even if the test will not be used for prosecution, may it be used to automatically deny other privileges or impose further penalties—failing to "hear before it condemns?"[87]

The concern is not purely speculative because use of the results of routine testing has occurred to policymakers before. For example:

> [I]t should be stressed that the objective of regular drug testing for NBI Agents and Special Investigators is to ensure that the NBI has a competent and efficient force of law enforcers who, by the nature of their functions, must

---

[82] *Id.* at 186 (Kapunan, J., dissenting opinion)

[83] I. CORTES, *supra* note 1, at 12.

[84] Aug. 30, 2001 circular, *supra* note 32. In addition to provisions for the denial of the application, the rules also provide, "2. A driver who gets involved in serious traffic accident shall be immediately subjected to drug test [sic]. If such driver is a holder of Professional driver's license, his driver's license will be immediately suspended for a period of five (5) years. For a non-professional driver's license holder who gets involved in a similar serious accident and who is found positive for use of prohibited drugs by an accredited drug testing center, his license will be immediately suspended for three (3) years."

[85] PHIL. DAILY INQUIRER (March 11, 2002), at 18 col.1 (story continued from p.1 col.5).

[86] *See* People v. Johnson, G.R. No. 13881, Dec. 18, 2000.

[87] Dartmouth College v. Woodward, 4 Wheaton 518. (The classic words of Daniel Webster.)

> be exemplars of good physical and mental health, unsullied by immoral and vicious habits. It cannot be a basis for summary removal of employees who enjoy security of tenure and are protected by the due process guaranty of the Constitution.[88]

Given that what is at stake is "essential in the pursuit of a livelihood,"[89] the potential deprivations may go beyond those emphatically decried in *Ople*. Although prosecution following a positive result appears remote because the Administrative Order discusses rehabilitation,[90] the penalties a test subject faces should be more clearly outlined.

A cursory review of the various circulars that compose the LTO policy thus reveals several shortcomings. Can good faith and common decency thus be presumed in the implementation of the LTO drug testing policy, or that, at least, existing laws and regulations are enough to safeguard the confidentiality of the results? It would be fair to say that Michael Tan and Conrado de Quiros do not think so, that the Supreme Court justices would not think so, and that many Filipinos would not think so.

The details and criticisms described in this section shall be revisited later, in the context of the legal framework to be outlined.

D. A CONCRETE EXAMPLE OF HOW A TESTING POLICY CAN BE TAKEN TO AN EXTREME

Before moving to the constitutional discussion, the presentation of one concrete example helps visualize the potential dangers of an overly broad drug testing policy. One of the most striking is the American experience with drug testing in high schools.

1. Lockney Junior High: A 12-year old and family ostracized over drug testing

Texan Farmer Larry Tannahill refused to allow his 12-year old son Brady to be tested under Lockney Junior High's new drug test program, and faced severe criticism from his neighbors for doing so— including getting fired from his job and the spray-painting of his dog as a threat. The school board had implemented the program in response to pleas from parents, especially after 12 of the town's 2,300 residents were indicted on drug charges and some of their children were suspected of drug use as well. Tannahill, however, felt violated when he was told that his son

---

[88] Sec. of Justice Op. No. 007, s. 1999, *but see* People v. Johnson, G.R. No. 13881, Dec. 18, 2000.
[89] Bell v. Burson, 402 U.S. 535 (1971).
[90] Feb. 23, 1999 Adm. Order, *supra* note 22, sec. III, par. 3.

would be suspended as though he had tested positive if he refused to sign the consent form for the program.[91]

Conflicting emotions characterized the issue. Sixteen-year old Junior Class Vice-President Bobby Hunter opined: "There is a drug problem and our school's trying to fix it and they're doing a good job."[92] Student Ashley Brock was quoted: "He's going against the whole town, and people don't have any respect for him. We just want to be proud that our school is drug-free."[93] Tannahill rebutted: "My son is an A and B student. He's never been in trouble and right now they are saying he's guilty." "[I]f you do it across the board it's fair for everybody," explained Laurie Pachiano, while her Adam son shared, "A lot of parents didn't want it to happen, but they didn't want to fight it. They just did it to keep us out of trouble."[94]

Tannahill's lawyer and American Civil Liberties Union member Graham Boyd stated: "This is literally the first school I have ever heard of doing this and I really wonder why they think this is OK,"[95] and added, "This isn't about race or religion... This is about drug testing a 12-year-old boy."[96]

2. Windsor Forest High: Teacher loses career over drug testing

In another set of news stories, half a hand rolled marijuana cigarette was found in an ashtray in the car of high school social studies and constitutional law teacher Sherry Hearn. An anonymous caller on a radio program that night said that the cigarette was planted, and it was never produced as evidence by the policemen who conducted the search without consent because they claimed it had crumbled. Hearn was also informed that she had to take a drug test in two hours even though she had never even exhibited anonymous behavior and had been voted Teacher of the Year in 1994.

Hearn's Windsor Forest High School was one of many schools that were subject to drug raids by police. During the raid before the one where the cigarette was found in Hearn's car, she had made a comment about the constitution, and a policeman who overheard it promptly reported her to the principal. During that next raid, the teachers' cars were searched without their consent.

---

[91] CHRISTIAN SCIENCE MONITOR 1 (April 18, 2001).

[92] Linda Kane and John Wise, *ACLU sets deadline for Lockeney schools*, *at* http://www.lubbockonline.com/stories/021300/loc_021300114.shtml (last modified Feb. 13, 2000).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Jim Yardley, *Family in Texas challenges mandatory school drug test*, *at* http://www.mapinc.org/drugnews/v00/n507/a01.html (April 17, 2000).

Hearn was later fired after refusing to take a urine test required by the school and had great difficulty obtaining a job. She lost in the lower federal courts and her case is now in the Supreme Court.[97]

The searches Hearn protested against at the cost of her 27-year teaching career were graphically described by reports:

> The police who swooped down on Windsor Forest High School one day last spring stirred little panic. In the 15 middle and high schools in Savannah, Georgia, drug and weapon sweeps are about as routine as field trips. At Windsor, it's the same drill every time. First the intercom squawks with the announcement of a "code 22," a signal to teachers that police are on the way. Next comes what is known as "lockdown." To make sure no one dodges the search, all 1,350 students are held in their classes for two or three hours as teams of county and campus police, each with a drug-sniffing German shepherd, comb the school room by room.
>
> ...
>
> ... She watched closely as an officer ran a hand-held metal detector up and down each student. Occasionally the device buzzed, and, amid nervous giggles, students emptied the keys from their pockets or pulled up their shirts to uncover metal belt buckles. Inside the classroom, meanwhile, an officer with the Chatham County police led a drug dog up and down the rows of desks.[98]

3. More testing policies— and, policies struck down

Each month brings more of these reports. Earlier last year, in Grand Blanc High School in Michigan, Micah White— a member of the National Honor Society, a National Merit Commended Student, a National Achievement Finalist, and a student with a clean disciplinary record— was denied the opportunity to join the varsity wrestling team after his parents refused to sign a consent form for drug testing.[99] In Park Hill High School in Kansas City, students asked for a guarantee from the school administration that random searches would stop.[100] And so on.

Back in Lockney, the drug testing policy that cost Larry Tannahill his job

---

[97] Nat Hentoff, *Teacher brings Constitution to life*, *at* http://www.mapinc.org/drugnews/v00/ n508/a05.html (April 17, 2000); Drew Lindsay, *Up in smoke*, 2 TEACHER MAGAZINE (2000), *available at* http://www.edweek.org/tm/vol-08/04drug.h08 (Jan./Feb. 1997).

[98] Drew Lindsay, *Up in smoke*, 2 TEACHER MAGAZINE (2000), *available at* http://www.edweek.org/tm/vol-08/04drug.h08 (Jan./Feb. 1997).

[99] ACLU, *Michigan Court asked to strike down high school's urine testing policy*, *at* http://www.aclu.org/news/2001/n060501b.html (June 5, 2001).

[100] ACLU, *Students protest drug search*, *at* http://www.aclu.org/DrugPolicy/ DrugPolicy.cfm?ID=7001&c=231 (April 2, 2001).

and his peace of mind was declared unconstitutional by the district court last June. His lawyer called the ruling a signal that US courts were growing reluctant to continue to permit invasive drug tests and searches.

The previous month, a Denver Appeals court struck down a drug policy similar to the one in Lockney, this time in an Oklahoma school. And, months before that, a school district in Maryland also discontinued its drug testing policy and paid damages to students.[101]

The above anecdotes taken together beg the question: What could stop such insanity from being implemented in the Philippines? Note that the Secretary of Justice already advised the Dangerous Drugs Board against requiring routine drug testing for elementary and high school students because no law clearly provided for such testing, but added that there would be no conflict with the Constitution if testing is "voluntary and not attended by compulsion or deceit."[102]

II. THE SEARCH FOR THE PROPER CONSTITUTIONAL ARMOR

A. Due process as a clearly insufficient ground

If mandatory drug testing unduly intrudes into the daily lives of Filipinos, then the great aegis of the Constitution must afford them protection. The question, however, is which piece of armor guards against this particular blow?

Due process is the most fundamental restriction to the exercise of police power, but it is woefully inadequate here.[103] Taking the LTO policy as a specific example, a license applicant can validly assert that it presents a potential deprivation, and the idea was already explored by the American court:

> Once *licenses* are issued, as in petitioner's case, their continued possession may become *essential in the pursuit of a livelihood*... [L]icenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.[104] (Citations omitted and italics supplied.)

However, the drug test requirement cannot be assailed as unduly oppressive for the obvious reason that it does not prohibit applicants from driving. Curbing the

---

[101] ACLU, *After bitter battle, Texas school agrees to drop mandatory student drug testing policy, at* http://www.aclu.org/news/2001/n043001b.html (April 30, 2001).

[102] Sec. of Justice Op. No. 029, s. 1996. *But see* Senate Bill No. 1858 or the proposed Comprehensive Dangerous Drugs Act of 2002, which submits college and even high school students to drug testing.

[103] The discrepancy in the treatment of non-professional license applicants by the Transportation and Traffic Code and the actual implementation will be discussed later in the paper.

[104] Bell v. Burson, *supra* note 89.

drug menace cannot possibly be assailed as a state interest not compelling enough, and a regulation— again, not a prohibition— clearly in pursuit of this goal is likewise difficult to attack.[105]

In fact, the Commission on Human Rights advised the LTO:

> Inquiries have been made... whether the mandatory requirement of drug test [sic] violates the *human rights of liberty* of applicants...
>
> ...
>
> The issuance of [sic] driver's license is not a right but only a privilege. It is a privilege granted only to qualified persons...
>
> ...
>
> Police power is that right of the State... to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community which *do not violate any of the provisions of the organic law.*[106] (Italics supplied.)

To illustrate the futility of this line of attack, there is no clearer proof of the legislature's view of illegal drug use than:

> SEC. 8. *Possession or Use of Prohibited Drugs.*— The penalty of *reclusion perpetua* to death and a fine ranging from five hundred thousand pesos to ten million pesos shall be imposed upon any person who, unless authorized by law, shall possess or use any prohibited drug subject to the provisions of Section 20 hereof.[107]

The Court has never hesitated to apply this severe penalty, and emphatically held: "The proliferation of drug addiction and trafficking has already reached an alarming level and has spawned a network of incorrigible, cunning and dangerous operations."[108]

Thus, how can one think of challenging the regulation of driver's licenses to address the drug problem when the Court has long upheld execution in line with the same goal? This particular piece of armor fails to deflect even a sling stone, and employing it will only allow the State's David to make short work of the giant of constitutional liberties.

---

[105] *See* Ermita-Malate Hotel and Motel Operators v. City of Manila, G.R. No. L-24693, 20 SCRA 849 (1967); *see also* Schneider v. New Jersey, 308 U.S. 147 (1939).

[106] CHR-AO6-2001, p. 1-2 (Sept. 5, 2001).

[107] Rep. Act. No. 6425, sec. 8 (The Dangerous Drugs Act of 1972).

[108] People v. De La Cruz, G.R. No. 83260, 184 SCRA 416 (1990).

Fortunately, due process is but the first layer of defense. To quote a military aphorism: "That the impact of your army may be like a grindstone dashed against an egg, use the science of weak points and strong... You may advance and be absolutely irresistible if you make for the enemy's weak points."[109]

The issue must be carefully probed, and a more imaginative avenue of attack must be found. As hinted by the Commission on Human Rights advisory, the problem with the frontal attack is that the default rational relationship test puts the State at the precipitous heights[110] of presumption of validity.[111] Note: "While in the attainment of such public good, no infringement of constitutional rights is permissible, there must be a showing, clear, categorical, and undeniable, that what the Constitution condemns, the statute allows."[112]

Thus, the alternate avenue is to find a concrete constitutional right to pit against police power, and force more options by increasing the level of scrutiny to the balancing of interests test. To quote another Chinese military aphorism: "The natural formation of the country is the soldier's best ally; but a power of estimating the adversary, of controlling the forces of victory, and of shrewdly calculating difficulties, dangers, and distances, constitutes the test of a great general."[113]

B. PRIVACY AS AN ESTABLISHED BUT POSSIBLY INSUFFICIENT GROUND

In the trek towards a balancing of interests battlefield, recall the now immortal words of Justice Brandeis:

> ... The makers of our Constitution... recognized the significance of man's spiritual nature, of his feelings and of his intellect... They conferred, as against the government, *the right to be let alone*— the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual... must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[114]

---

[109] Sun Tzu, *Ping Fa* or *The Art of War* 25-26 (James Clavell ed., 1983).

[110] One of the six types of terrain described by Sun Tzu. He advised: "If the enemy has occupied precipitous heights before you, do not follow him, but retreat and try to entice him away."

[111] *See* Ermita-Malate Hotel and Motel Operators v. City of Manila, G.R. No. L-24693, 20 SCRA 849 (1967)

[112] Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424 (1968).

[113] Sun Tzu, *supra* note 109, at 53

[114] The Fourth Amendment to the American Constitution corresponds to sec. 2 of the Bill of Rights of the 1987 Constitution, or the right against unreasonable search and seizure. The Fifth Amendment corresponds to sec. 17, or the right against self-incrimination.

> ... Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent... *The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.*[115] (Citations omitted and italics supplied.)

This classic text thus sets Michael Tan, Conrado de Quiros and every other Filipino who might feel affronted by an overdose of drug testing in society on their path. The echo of Justice Brandeis's words maps out the first crossroads: 1) the right to privacy, 2) the right against self-incrimination, and 3) the right against unreasonable search and seizure.

1. The right to privacy is firmly established in Philippine jurisprudence

To be sure, there is no explicit right to privacy in the Bill of Rights. Justice Cortes discussed it as "a legal concept first in tort law and then as a constitutionally protected right."[116] The latter came into being when *Morfe v. Mutuc* held:

> ... "The right to be let alone is indeed the beginning of all freedom... "[117]
>
> The concept of liberty would be emasculated if it does not likewise compel respect for his personality as a unique individual whose claim to privacy and interference demands respect... [118]

Justice Fernando then affirmed the existence of such a right:

> Nonetheless, in view of the fact that there is an express recognition of privacy, specifically that of communication and correspondence which "shall be inviolable except upon lawful order of Court or when public safety and order" may otherwise require, and implicitly in the search and seizure clause, and the liberty of abode, the alleged repugnancy of such statutory requirement of further periodical submission of a sworn statement of assets and liabilities deserves to be further looked into.
>
> The Griswold case... stressed "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[119] It has wider implications though. *The constitutional right to privacy has come into its own.*

---

[115] Olmstead v. US, 277 U.S. 438 (1928) (Brandeis, J., dissenting), *quoted in* Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424 (1968) and in Ople v. Torres, G.R. No. 127685, 293 SCRA 143 (1998). *See also* C. Warren and L. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 123, *cited in* Katz v. US, 389 U.S. 347 (1967).

[116] I. CORTES, *supra* note 1, at 14, *citing* COOLEY ON TORTS (2nd ed., 1888).

[117] Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424 (1968), *quoting* Public Utilities Commission v. Pollack, 343 U.S. 451 (1952) (Douglas, J., dissenting)

[118] *Id.* Contrast this with the Commission on Human Rights advisory, *supra* note 106.

[119] *Id.*, *quoting* Griswold v. Connecticut, 381 U.S. 485 (1965).

> So it is likewise in our jurisdiction. The right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection...[120] (Citations omitted and italics supplied.)

Today, as Justice Irene Cortes emphatically stated: "There can be no doubt that right to privacy is constitutionally protected."[121]

The *Morfe* adoption of the *Griswold* ruling has been reaffirmed most recently in *Ople v. Torres*.[122] Furthermore, the famous *Olmstead* dissent, aside from being quoted in *Morfe* in the Philippines, became the controlling American doctrine after *Katz v. US* declared the majority *Olmstead* opinion eroded.[123] *Katz* was cited by the Philippine Court when it recently held:

> Persons may lose the protection of the search and seizure clause by exposure of their persons or property to the public in a manner reflecting *a lack of subjective expectation of privacy*, which expectation society is prepared to recognize as reasonable.[124] (Italics supplied.)

Because this is an exception, the obvious implication is that the general rule upholds an expectation of privacy.

Ople reiterated the *Morfe* emphasis of the explicitly worded right to privacy of communication[125] and the other constitutional provisions that imply privacy.[126] It also expressly stated:

> *Zones of privacy are likewise recognized and protected in our laws.* The Civil Code provides that "[e]very person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons" and punishes as actionable torts several acts by a person of meddling and prying into the privacy of another. It also holds a public officer or employee or any private individual liable for damages for any violation of the rights and liberties of another person, and recognizes the privacy of letters and other private communications. The *Revised Penal Code* makes a crime the violation of secrets by an officer, the revelation of trade and industrial secrets, and trespass to dwelling. Invasion of privacy is an offense in *special laws* like the Anti-

---

[120] *Id.*

[121] Valmonte v. Belmonte, Jr., G.R. No. 74930, 170 SCRA 256 (1989), *citing* Morfe v. Mutuc, *id.*; *see also* I. CORTES, *supra* note 1, *cited in* Ayer Productions v. Capulong, G.R. Nos. 82380 and 82398, 160 SCRA 861 (1988) and Ople v. Torres, G.R. No. 127685, 293 SCRA 143, n.34 (1998).

[122] Ople v. Torres, G.R. No. 127685, 293 SCRA 143 (1998).

[123] 389 U.S. 347 (1967).

[124] People v. Johnson, G.R. No. 13881, Dec. 18, 2000, *citing* Katz v. US, 389 U.S. 347 (1967).

[125] CONST. Art. III, sec. 3(1).

[126] CONST. Art. III, sec. 1 (due process clause), sec. 2 (right against unreasonable search and seizure), sec. 6 (liberty of abode and travel), sec. 8 (right of association), and sec. 17 (right against self-incrimination).

> Wiretapping Law, the Secrecy of Bank Deposits Act and the Intellectual Property Code. The *Rules of Court* on privileged communication likewise recognize the privacy of certain information.[127] (Citations omitted and italics supplied.)

Some "zones" are natural penumbras of specific constitutional rights. The right against unreasonable search and seizure, for example, implies inherent privacy in one's home,[128] car[129] and workplace.[130] The Court has described other zones, explicitly or implicitly, such as the physician-patient relationship, including a patient's medical records,[131] a woman's chastity,[132] private conversations,[133] personal reputation,[134] nighttime,[135] which relatives may visit a hospital room,[136] the population density of a neighborhood,[137] and even illicit romances[138] and one's living room television viewing area.[139]

2. However, the scope of the right to privacy has not been fully defined

One may think he has found a clear path to the balancing of interests battleground where he can knock the State out of its precipitous heights. There are potholes in this particular road, however, because the delineation of the scope and content of the right to privacy is still ongoing in case law.[140]

---

[127] Ople v. Torres, G.R. No. 127685, 293 SCRA 143, 157 (1998).

[128] People v. Burgos, G.R. No. 68955, 144 SCRA 1 (1986), *quoting* Villanueva v. Querubin, G.R. No. L-26177, 48 SCRA 345 (1972); People v. Bumindang, G.R. No. 130630, December 4, 2000, *citing* People v. Fabon, G.R. No. 133226, March 16, 2000 and People v. Sapinoso and Recreo, G.R. No. 122540, March 22, 2000; People v. Riglos, G.R. No. 134763, September 4, 2000, *citing* People v. Paraiso, G.R. No. 127840, November 29, 1999; Bagalihog v. Fernandez, G.R. No. 96356, 198 SCRA 614 (1991), *quoting* COOLEY, CONSTITUTIONAL LIMITATIONS; People v. Lapan, G.R. No. 88300, 211 SCRA 337 (1992), *citing* People v. Roncal, G.R. Nos. 26857-58, 79 SCRA 509 (1977); People v. Codilla, G.R. Nos. 100720-23, 224 SCRA 104 (1993); St. Louis Realty Corp. v. CA, G.R. No. L-46061, November 14, 1984; CIVIL CODE, art. 26.

[129] Aniag, Jr. v. COMELEC, G.R. No. 104961, October 7, 1994.

[130] MHP Garments v. CA, G.R. No. 86720, 236 SCRA 227 (1994).

[131] Krohn v. CA, G.R. No. 108854, June 14, 1994; Worcester v. Ocampo, 22 Phil. 42 (1912), *cited* in L. REYES, THE REVISED PENAL CODE BOOK TWO 932 (15th ed. 2001).

[132] People v. Guibao, G.R. No. 93517, 217 SCRA 64 (1993); People v. Casinillo, G.R. No. 97441, 213 SCRA 777 (1992); Espiritu v. CA, G.R. No. 115640, March 15, 1995; People v. Grefiel, G.R. No. 77228, 215 SCRA 596 (1992); People v. Matrimonio, G.R. Nos. 82223-24, 215 SCRA 613 (1992).

[133] Ramirez v. CA, G.R. No. 93833, September 28, 1995; Almonte v. Vasquez, G.R. No. 95367, May 23, 1995, *quoting* US v. Nixon, 418 U.S. 683 (1973).

[134] In Re: Emil P. Jurado, A.M. No. 93-2-037, April 6, 1995.

[135] People v. CA, G.R. No. 117412, December 8, 2000.

[136] Ilusorio v. Bildner, G.R. Nos. 139789 and 139808, May 12, 2000.

[137] Fajardo, Jr. v. Freedom to Build, G.R. No. 134692, August 1, 2000.

[138] Pilapil v. Ibay-Somera, G.R. No. 80116, 174 SCRA 661 (1989); Ninal v. Bayadog, G.R. No. 13378, March 14, 2000 (The publicity attending the marriage license may discourage such persons from legitimizing their status).

[139] Eastern Broadcasting Corp. v. Dans, G.R. No. L-59329, July 19, 1985; NPC v. CA, G.R. No. 102653, March 5, 1991 ("[R]epetitive political commercials when fed into the electronic media themselves constitute invasions of the privacy of the general electorate.").

[140] Ayer Productions v. Capulong, G.R. Nos. 82380 and 82398, 160 SCRA 861 (1988).

To illustrate the point that the scope of the right to privacy is, at present, indeterminate, Justice Mendoza would cite Justice Fernando's own footnote from Morfe to restrict his recognition of the right to privacy:

> ... In *Morfe v. Mutuc*, this Court dealt the *coup de grace* to claims of latitudinarian scope for the right of privacy by quoting the pungent remark of an acute observer of the social scene, Carmen Guerrero-Nakpil:
>
> > "Privacy? What's that? There is no precise word for it in Filipino, and as far as I know any Filipino dialect and there is none because there is no need for it. The concept and practice of privacy are missing from conventional Filipino life. The Filipino believes that privacy is an unnecessary imposition, an eccentricity that is barely pardonable or, at best, an esoteric Western afterthought smacking of legal trickery."
>
> Justice Romero herself says in her separate opinion that the word privacy is not even in the lexicon of Filipinos.[141]

It must be noted, as a counterargument, that Justice Cortes already refuted that very argument 30 years ago. Guerrero-Nakpil was actually discussing Marcos's revelation that he taped conversations with opposition politicians,[142] and opined that while the reaction in the provinces would be different from that of Manila writers and jurists, "the case for privacy is starting to get around."[143] While Justice Cortes conceded that the Filipino lived under constant observation by neighbors and relatives, he "still maintains a degree of reticence."[144] She added that the early Filipinos punished those who passed by the Chief while he was bathing in the river and who entered a house of the principalia without permission.[145]

Nevertheless, it cannot be said that the right to privacy's long established foundation has settled and dried if an eminent constitutionalist can cite *a footnote in turn citing a 30-year old magazine article* against the right. Recall that at its very inception, the right to privacy was already criticized as a "broad, abstract and ambiguous concept... [can] easily be interpreted as a constitutional ban against many things."[146]

Returning to the LTO policy, one of the established delineations of the

---

[141] Ople v. Torres, G.R. No. 127685, 293 SCRA 143, 192 (1998) (Mendoza, J., dissenting), *quoting* Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424 (1968), *in turn quoting* Carmen Guerrero-Nakpil, *Consensus of One*, SUNDAY TIMES MAGAZINE, Sept. 24, 1967, at 18.

[142] Cortes, *supra* note 1, at 6.

[143] *Id.*

[144] *Id.* at 7.

[145] *Id.* at 6.

[146] Griswold v. Connecticut, 381 U.S. 479 (1965) (Black, J., dissenting), *majority opinion cited in* Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424 (1968) and Ople v. Torres, G.R. No. 127685, 293 SCRA 143 (1998).

right to privacy is a much reduced expectation of privacy for issues or figures of public interest[147] compared to "matters of essentially private concern."[148] Note that American jurisprudence adds a logical qualification: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." [149]

The LTO policy falls right in the gray area. While an average driver is in no way a public figure, having drivers whose senses are impaired by drugs on public roads is a clear, compelling public issue. Given this, do they thus have a lesser expectation of privacy[150] when they subject themselves to LTO policy? If so, how much less? Where exactly is the boundary of the right to privacy drawn?

Although the "right to be let alone" exists and is well-supported, it may be difficult to use as a ground to contest government policy, or at least on its own. One, for example, needs further grounds to show that the LTO test is not in a zone of reduced privacy expections. A further problem is that the above collection of rights and zones may be ill-equipped to challenge an intrusion that may result in penalties, unlike those in *Ople* and *Ayer*. In fact, remember that *Morfe*, the landmark case on privacy, ruled:

> Even with due recognition of such a view, it cannot be said that the challenged statutory provision calls for disclosure of information which infringes on the right of a person to privacy. It cannot be denied that the rational relationship such a requirement possesses with the objective of a valid statute goes very far in precluding assent to an objection of such character... [I]n subjecting him to such a further compulsory revelation of his assets... there is no unconstitutional intrusion into what otherwise would be a private sphere.[151]

One can attempt to argue that a higher level of scrutiny should have been appreciated in *Morfe*, or try to distinguish the issues and emphasize that drug testing deals with the person's very body. The issue, however, becomes subjective, and the scales may yet tip in favor of the compelling state interest in addressing the drug problem.

---

[147] Ayer Productions v. Capulong, G.R. Nos. 82380 and 82398, 160 SCRA 861 (1988). *See also* Cortes, *supra* note 1, at 28.

[148] Lagunzad v. Gonzales, G.R. No. 32866, 92 SCRA 486 (1979), *quoted in* Ayer Productions v. Capulong, G.R. Nos. 82380 and 82398, 160 SCRA 861 (1988).

[149] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), *citing* Curtis Publishing Co. v. Butts, 388 U.S. 163-164 (Warren, C.J., concurring).

[150] *See* People v. Johnson, G.R. No. 13881, Dec. 18, 2000, *citing* Katz v. US, Katz v. US, 389 U.S. 347 (1967).

[151] Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424 (1968).

Thus, a piece of constitutional armor has been found, but it would be prudent to reinforce it and survey the two explicit rights detailed by Brandeis.

C. MAY THE RIGHT AGAINST SELF-INCRIMINATION BE VALIDLY INVOKED?

1. Jurisprudence has excluded physical evidence from the right's protection

No additional protection, however, will be found in the right to self-incrimination. The Bill of Rights provides: "Sec. 17. No person shall be compelled to be a witness against himself."[152]

This does not mean that someone should be allowed not to take a drug test because he fears that he may test positive.

The right against self-incrimination is best articulated by the landmark case, *Miranda v. Arizona*: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[153] Justice Fernando elaborated: "What is essential for its (confession) validity is that it proceeds from the free will of the person confessing."[154] He added that testimony becomes inadmissible the moment it is tainted by coercion, whether physical, mental or emotional.[155]

What is prohibited is involuntary testimony by the accused against himself,[156] which includes any other communication by the accused unfavorable to his case[157] such as participation in the reenactment of the crime he is accused of.[158] The Court explained: "The right is meant to 'avoid and prohibit positively the repetition and recurrence of the certainly inhuman procedure of competing a person, in a criminal or any other case, to furnish the missing evidence necessary for his conviction.'"[159]

The emphasis is on the involuntariness and consequent indignity of self-incrimination. This is borne out by the history of the right:

---

[152] CONST. art. III, sec. 17.

[153] 384 U.S. 444 (1966), *cited in* Magtoto v. Manguera, G.R. No. 82585, 43 SCRA 4 (1988) ("[T]he Miranda-Escobedo rule was expressly included as a new right... [in the 1973] Constitution.")

[154] People v. Bagasala, G.R. No. 26182, 39 SCRA 236 (1971).

[155] People v. Jimenez, G.R. No. 40677, 71 SCRA 186 (1976) (Fernando, J., concurring).

[156] Villaflor v. Summers, 41 Phil. 62 (1920).

[157] Schmerber v. California, 384 U.S. 757 (1967).

[158] People v. Olvis, G.R. No. 71092, 154 SCRA 513 (1987).

[159] *Id.*, *quoting* Bermudez v. Castillo, 64 Phil. 483 (1937).

> The doctrine that one accused of crime cannot be compelled to testify against himself is predicated upon principles of humanity and civil liberty. The maxim *Nemo tenetur seipsum accusare* had its origin in the protests against the abuses and manifestly unjust methods of interrogating accused persons in the inquisitorial Court of the Star Chamber. It was erected as an additional barrier for the protection of the people against the exercise of arbitrary power...[160]

> So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law... [161]

Because of the nature of the right, Justice Holmes distinguished:

> The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, *not an exclusion of his body as evidence* when it may be material.[162] (Italics supplied.)

Because physical evidence is neutral and does not speak for the accused, there is no involuntariness and consequent indignity in gathering such or ascertaining physical attributes through simple observation.[163] Thus, in the case cited, Holmes wrote that an objection to having the accused put on a blouse to see if it fit and belonged to him was "based upon an extravagant extension of the 5th Amendment."[164] Philippine jurisprudence has accordingly delimited the right against self-incrimination and upheld the validity of a pregnancy test for a woman accused of adultery,[165] an order to put on a pair of pants to see if it fit,[166] ultraviolet examination,[167] a test to extract a virus from a man's body,[168] compelling the accused to expectorate morphine from his mouth,[169] footprinting tests,[170] participation in a police lineup,[171] paraffin tests for murder suspects,[172] and having a suspect initial

---

[160] People v. Buscato, G.R. No. 40639, 74 SCRA 30 (1976).

[161] Bram v. United States, 168 U.S. 42, *quoted in* People v. Buscato, *id.*

[162] Holt v. US, 218 U.S. 245 (1910).

[163] People v. Olvis, G.R. No. 71092, 154 SCRA 513 (1987); People v. Gamboa, G.R. No. 91374, 194 SCRA 372 (1991).

[164] Holt v. US, 218 U.S. 245 (1910).

[165] Villaflor v. Summers, 41 Phil. 62 (1920).

[166] People v. Otadora, 86 Phil. 244 (1950).

[167] People v. Arellano, G.R. No. 110357, 235 SCRA 455 (1994).

[168] US v. Tan Teng, 23 Phil. 145 (1912).

[169] US v. Ong Siu Hong, 36 Phil. 735 (1917).

[170] US v. Salas, 25 Phil. 337 (1913); US v. Zara, 42 Phil. 308 (1921).

[171] People v. Olvis, G.R. No. 71092, 154 SCRA 513 (1987).

[172] People v. Canceran, G.R. No. 104866, 229 SCRA 581 (1994); People v. Gamboa, G.R. No. 91374, 194 SCRA 372 (1991).

marked bills solely for the reason of proving they were found in his possession.[173]

A drug test clearly falls within the category implied by the above enumeration. To invoke the right against self-incrimination would thus be grasping at straws in an attempt to swat at decades of jurisprudence.

2. There are grounds in American jurisprudence, but these are extremely weak

There are, of course, a few straws that one may try to grasp. *Rochin v. California* featured a man whose house was being searched for drugs. He swallowed two capsules into his mouth before policemen could examine them, and the policemen then had them expelled from his stomach in a hospital, Justice Douglas wrote:

> ... Of course an accused can be compelled to be present at the trial, to stand, to sit, to turn this way or that, and to try on a cap or a coat. But I think that words taken from his lips, *capsules taken from his stomach, blood taken from his veins are all inadmissible* provided they are taken from him without his consent. They are inadmissible *because of the command of the Fifth Amendment.*[174] (Citations omitted and italics supplied.)

Over a decade later, when a driver in an automobile accident was compelled to submit to a blood test, the right against self-incrimination was explicitly made the issue. Justice Douglas joined with Justice Black, who wrote:

> I disagree with the Court's holding that California did not violate petitioner's constitutional right against self-incrimination *when it compelled him, against his will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content*, and then used that analysis as evidence to convict petitioner of a crime... It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content but proscribes compelled production of his lifeless papers. Certainly there could be few papers that would have any more "testimonial" value to convict a man of drunken driving than would an analysis of the alcoholic content of a human being's blood introduced in evidence at a trial for driving while under the influence of alcohol. In such a situation blood, of course, is not oral testimony given by an accused but it can certainly "communicate" to a court and jury the fact of guilt.[175] (Citations omitted and italics supplied.)

However, as the preceding cases have shown, this straw, while eloquent, has

---

[173] People v. Linsangan, G.R. No. 88589, 195 SCRA 784 (1991).

[174] Rochin v. California, 342 U.S. 165 (1952) (Douglas, J., dissenting), *majority opinion cited in* Guazon v. de Villa, G.R. No. 80508, January 30, 1990.

[175] Schmerber v. California, 384 U.S. 757 (1967) (Black, J., dissenting).

long since been buried under haystacks of *stare decisis*. Michael Tan and Conrado de Quiros may try that specific straw because Justices Black and Douglas would certainly be fine intellectual company, but they are strongly advised to cling to sturdier material than these dissents.

D. MAY THE RIGHT AGAINST UNREASONABLE SEARCHES BE VALIDLY INVOKED?

One may note that the earlier quote from Brandeis first pointed to the American Fourth Amendment, not the Fifth. The search began at the right against self-incrimination, however, because Philippine jurisprudence treats body fluids in the context of the right against self-incrimination.

Though the first path is a dead end, nothing is lost by backtracking to the second. Surprisingly, although nothing in Philippine jurisprudence hints at the possibility, two decades of persuasive American jurisprudence point exactly to the right against unreasonable search and seizure:

> SEC. 2. The right of the people *to be secure in their persons*, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose *shall be inviolable*... [176] (Italics supplied.)

The strength of the Constitutional Commission's choice of words ("inviolable") and the order of this provision in the Bill of Rights (second only to the provision on due process and equal protection) leave no doubt whatsoever of the importance of this provision. Its application to mandatory drug testing, however, is not readily apparent, though this right is intimately connected with the right against self incrimination.[177]

1. Reemphasizing dignity in the right against unreasonable search

One of the earliest yet most eloquent descriptions of the right against unreasonable searches was written by Lord Camden:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the

---

[176] CONST. art. III, sec. 2.
[177] US v. Boyd, 116 U.S. 616 (1886).

> fact, he is bound to show, by way of justification, that some positive law has justified or excused him.[178]

This association with property was phrased as eloquently by the Court:

> [T]he humblest citizen or subject might shut the door of his humble cottage in the face of the monarch and defend his intrusion into that *privacy* which was regarded as *sacred as any of the kingly prerogatives*. The poorest and most humble citizen may bid defiance to all the powers of the state; the wind, the storm and the sunshine alike may enter through its weather-beaten parts, but the king may not enter against the owner's will.[179] (Italics supplied.)

However, the focus is less on property today than it is on the importance the right accords to personal dignity and privacy. Take *US v. Reyes* as an example. Nelia Montoya worked as an identification checker in the US Navy Exchange (NEX) in Quezon City. On January 22, 1987, while she was on her way to her car, she was stopped by another ID checker on the orders of a manager, and informed that her bags had to be searched. Not just her bags but her car and person were also searched, and in the presence of many curious onlookers.

When she later checked with the NEX security manager, she was informed that a search outside the store was quite irregular and contrary to policy. Brushing aside a question of state immunity, the Court upheld an award of P450,000.00.

Then Justice Hilario Davide, Jr. quoted the decision of Judge Reyes:

> It is hereby determined that the unreasonable search on the plaintiff's person and bag caused [sic] done recklessly and oppressively by the defendant, violated, impaired and undermined the plaintiff's liberty guaranteed by the Constitution, entitling her to moral and exemplary damages against the defendant. *The search has unduly subjected the plaintiff to intense humiliation and indignities and had consequently ridiculed and embarrassed publicly said plaintiff so gravely and irremeasurably.*[180] (Italics supplied.)

Montoya, incidentally, alleged that the American manager had been motivated by racial discrimination against a Filipina employee.

The ruling is not an exception. As Justice Puno wrote:

---

[178] Entick v Carrington and Three Other King's Messengers, 19 How. St. Tr. 1029, *cited in* U.S. v Boyd, 116 US 616 (1886).

[179] US v. Arceo, 3 Phil. 381 (1904) (attributed to William Pitt).

[180] U.S. v Reyes, G.R. No. 79253, March 1, 1993.

> The constitutional protection of our people against unreasonable search and seizure is not merely a pleasing platitude. It vouchsafes our *right to privacy and dignity* against undesirable intrusions committed by any public officer or private individual.[181]

And, *Villanueva v. Querubin*, quoted by later search and seizure decisions, held:

> Landynski in his authoritative work (Search and Seizure and the Supreme Court, 1966) could fitly characterize this constitutional right as the embodiment of "a spiritual concept: the belief that to value the privacy of home and person and to afford its constitutional protection against the long reach of government is *no less than to value human dignity*..."[182] (Citations omitted and italics supplied.)

Commentators have also discussed this aspect of the right.[183]

At this point, we return to the central question: Can body fluids be brought under the zone of privacy protected by the Constitution?

2. Schmerber: Body fluids under the right against unreasonable search

Justice Cortes was no less emphatic when she discussed the privacy aspect of the right against unreasonable search and seizure: "[T]he United States Supreme Court said in *Schmerber v. California* that its (right against unreasonable search) overriding function 'is to protect personal privacy and dignity against unwarranted intrusion by the state.'"[184]

Schmerber is the American case quoted by Philippine unreasonable search cases that emphasize the dignity aspect,[185] but the reason it emphasizes dignity can only be appreciated if one pays close attention to the holding. *Schmerber* emphasizes dignity because the key holding was that the right protects an individual against unreasonable intrusions by the State into his very body, more than a search of the objects on his person. It stated:

---

[181] MHP Garments, Inc. v. CA, G.R. No. 86720, 236 SCRA 227 (1994).

[182] Villanueva v. Querubin, G.R. No. L-26177, 48 SCRA 345 (1972), *quoted in* People v. Burgos, G.R. No. 68955, 144 SCRA 1 (1986).

[183] JOAQUIN BERNAS, SJ, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 147-148 (1st ed. 1996), *cited in* People v. Aruta, G.R. No. 120915, April 3, 1998, and People v. Bolasa, G.R. No. 125754, December 22, 1999.

[184] Cortes, *supra* note 1, at 48, *quoting* Schmerber v. California, Schmerber v. California, 384 U.S. 757 (1967).

[185] For example, Schmerber was cited by Villanueva v. Querubin, which was in turn cited by the prominent case on unreasonable search, People v. Burgos, G.R. No. 68955, 144 SCRA 1 (1986).

> If compulsory administration of a blood test does not implicate the Fifth Amendment (right against self-incrimination), it *plainly involves the broadly conceived reach of a search and seizure* under the Fourth Amendment (right against unreasonable searches and seizures)... *The integrity of an individual's person is a cherished value of our society.* That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body *under stringently limited conditions* in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.[186] (Italics and parenthetical remarks supplied.)

In the above case, the defendant, who was tested for alcohol after a car accident, was unable to successfully invoke his right against unreasonable search, but the American Court stressed that this was strictly because of the facts of the case. Justice Brennan wrote that there was a pressing need for the test, that blood tests were common in physical exams, and that it was carefully administered in a hospital, all of which made the intrusion quite reasonable. Nevertheless, Justice Douglas wrote in his dissent: "No clearer invasion of this right of privacy can be imagined than forcible bloodletting of the kind involved here."

The question from the preceding section stands, however: Can these fluids be brought under the privacy protected by the right against unreasonable search in the Philippines?

3. Expanding the right against unreasonable search to cover the human body

Although the Philippine Court has not yet had the opportunity to squarely rule on the issue in *Schmerber*, the logic seems readily applicable given the similar emphasis on dignity in Philippine jurisprudence. Again, *Schmerber* is cited by Philippine cases precisely because of this emphasis, and Justice Cortes's essay on privacy cited the case as well.

Had the issue been presented before the Philippine Court outside the established self-incrimination framework, the same conclusion could have been reached likewise because of the inherent dignity and privacy of the body itself. Given the long list of zones of privacy established in Philippine jurisprudence, it is inconceivable that the human body itself is not one of them.

Philippine rulings have at least implicitly recognized this idea. For example, *Guazon v. de Villa*, which also cited *Schmerber*, discussed "saturation drives" by the military in Tondo, which included rough body searches for tattoos and other marks. It worded its ruling in this way: "*The individual's right to immunity from such intrusion of his body* was considered as 'far outweighed by the value of its deterrent effect' on the evil

[186] Schmerber v. California, 384 U.S. 757 (1967).

sought to be avoided by the police action."[187] (Italics supplied)

To illustrate the various protected zones of privacy more vividly, ask if any agent of the Philippine government can search one's home or car for drugs. One knows he would not be allowed to even search one's pockets. It is thus only logical that he should likewise not be allowed to search one's bloodstream.

In any case, in addition to the Philippine citations of *Schmerber*, American jurisprudence is persuasive in the Philippines,[188] especially when constitutional concepts are involved. As Justice Bidin wrote:

> Our present constitutional provision on the guarantee against unreasonable search and seizure had its origin in the 1935 Charter... which was in turn derived almost verbatim from the Fourth Amendment to the United States Constitution. As such, the Court may turn to the pronouncements of the United States Federal Supreme Court and State Appellate Courts which are considered doctrinal in this jurisdiction.[189]

Given all these, the expansion of the right against unreasonable search contemplated thus seems neither a large, radical leap nor incompatible with Filipino values or culture. In fact, it is a logical expansion of the right in the face of even more advanced medical developments such as DNA testing and cloning.

A viable constitutional ground to challenge drug testing has thus been established, and *Schmerber* was precisely the ruling used to ground American drug test rulings in the right against unreasonable search. However, one is not yet at the home stretch of the jurisprudential trail.

From the very start, the American Court applied the balancing of interests test and not the rational relationship test to testing policies. However, the balance between the police power of the State and the right of the individual to be let alone and to be secure in his person has swung back and forth, and one cannot say that the scales have fully settled.

At this point, however, it must be reiterated that the American Court precisely discarded the idea that an extraction of body fluids ordered by the State is a mere "minor intrusion" that a person's dignity easily withstands, which is exactly

---

[187] Guazon v. de Villa, G.R. No. 80508, January 30, 1990. To be sure, however, *Guazon* does not torpedo the idea of challenging drug testing. The Court upheld warrantless searches in specific neighborhoods in connection with *coup d'etats*, while drug testing covers more general groups and concerns.

[188] RUBEN AGPALO, STATUTORY CONSTRUCTION 102-103 (4th ed. 1998).

[189] People v. Marti, G.R. No. 81561, 193 SCRA 57 (1991). Note that *Schmerber* was cited by Villanueva v. Querubin, G.R. No. L-26177, 48 SCRA 345 (1972), which was in turn cited by the prominent case on unreasonable search, People v. Burgos, G.R. No. 68955, 144 SCRA 1 (1986).

why *Schmerber* forces the balancing of interests test.[190]

III. EXPANDING A RIGHT TO RAISE THE CONSTITUTION'S SHIELD

A. How has the United States Supreme Court reviewed Drug Testing?

Schmerber illustrates a logical expansion for Philippine jurisprudence, and an equally logical next step is to see where that ruling took the American Court. And so the trail that began with Justice Brandeis and through *Schmerber* takes the legal trailblazer into the American jurisprudence of the 1980s, when heightened drug-related concerns reached the Court.

Up to the late 1960s, the Court was strict in applying the right against unreasonable searches in criminal prosecutions, but relaxed its standards in other cases. In some administrative searches, warrants were not required.[191] After *Schmerber*, the American rulings that deal directly with drug testing are easy to trace, and doctrine has been defined by four main cases.

1. Skinner and Von Raab: Establishing judicial review of drug testing policy

The first came in 1989, *Skinner v. Railway Labor Executives Ass'n*.[192] Unions challenged Federal Railroad Administration (FRA) safety regulations that included required blood and urine tests for employees following any major accident, and authorization for railroads to conduct breath or urine tests on employees who violated certain safety rules. The Court of Appeals for the Ninth Circuit declared that the policy was unconstitutional because it required drug tests without probable cause,[193] but the Supreme Court reversed this ruling.

First, the Court found that the regulations fell under the right against unreasonable searches, citing *Schmerber*, and added that urine and breath tests were similar intrusions into the human body even though there was no penetration of the skin.[194] However, it ruled that no warrants were needed for searches pursuant to "special needs," and stated that in these cases, the question was one between an individual's privacy against government interests.

---

[190] *See for e.g.,* Breithaupt v. Abram, 352 U.S. 432 (1957), *quoted in* Guazon v. de Villa, G.R. No. 80508, January 30, 1990.

[191] Joy Ames, *Chandler v. Miller: Redefining "special needs" for suspicionless drug testing under the Fourth Amendment*, 31 AKRON L. REV. 273 (1997). *See also* Frank v. Maryland, 359 U.S. 360 (1959), *overruled by* Camara v. San Francisco Mun. Ct., 387 U.S. 523 (1967).

[192] 489 U.S. 602, 635 (1989).

[193] Railway Labor Executives' Ass'n. v. Burnley, 839 F. 2d 575 (1988).

[194] Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602 (1989).

The Court emphasized:

> The problem of alcohol use on American railroads is as old as the industry itself, and efforts to deter it by carrier rules began at least a century ago... More recently, these proscriptions have been expanded to forbid possession or use of certain drugs...
>
> ... The FRA pointed to evidence indicating that on-the-job intoxication was a significant problem in the railroad industry. The FRA also found, after a review of accident investigation reports, that from 1972 to 1983 "the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor," and that these accidents "resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million (approximately $27 million in 1982 dollars)."[195] (Citations omitted.)

And then ruled:

> Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. *We have recognized exceptions to this rule, however, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"* When faced with such special needs, we have not hesitated *to balance the governmental and privacy interests* to assess the practicality of the warrant and probable-cause requirements in the particular context.
>
> The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, "likewise presents *'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.*"[196] (Citations omitted and italics supplied.)

Note, at this point, that the Court treated the drug test as a warrantless search and applied the balancing of interests test to determine if it was justified. They paid close attention to the nature of the state interest that justified the tests, and, as will be discussed later, to the specific test procedures and the degree of intrusiveness.[197]

A second drug testing decision was decided on the same day, *National Treasury Employees Union v. Von Raab*.[198] In May 1986, Commissioner of Customs

---

[195] *Id.*

[196] *Id.*

[197] The importance of factual circumstances to the balancing of interests test used by the American Court is the reason the excerpts in this section of the paper are very detailed.

[198] 489 U.S. 656 (1989).

Von Raab made drug testing a requirement for promotion or transfer to positions in three categories: 1) those directly involved in drug interdiction or enforcement of related laws; 2) those which required the employee to carry firearms; and 3) those which handled "classified" material. Although he publicly stated a belief that his agency was drug-free, he implemented the stricter regulations for reasons such as security and potential corruption or blackmail.

Just like the railroad unions, the federal employee union invoked the right against unreasonable searches and filed suit. The Court of Appeals of the Fifth Circuit ruled that the tests were reasonable because they tried to minimize intrusiveness by requiring a witness to merely listen to the subject urinating instead of directly observing and by giving notice to the employee, and because discretion as to who would be tested was minimized by requiring the tests for all employees in specific categories.

Using the same reasoning in *Skinner*, the Court affirmed:

> [T]he traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person...
>
> ... Many of the Service's employees are often exposed to this criminal element and to the controlled substances it seeks to smuggle into the country. The physical safety of these employees may be threatened, and many may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service. The Commissioner indicated below that "Customs officers have been shot, stabbed, run over, dragged by automobiles, and assaulted with blunt objects while performing their duties." At least nine officers have died in the line of duty since 1974. He also noted that Customs officers have been the targets of bribery by drug smugglers on numerous occasions, and several have been removed from the Service for accepting bribes and for other integrity violations.
>
> It is readily apparent that *the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit*, and have unimpeachable integrity and judgment..."[199] (Citations omitted and italics supplied.)

The two decisions paralleled each other, and provided a framework for evaluating drug testing that would be tested in the cases that followed.

---

[199] *Id.*

2. Vernonia: "Special needs" justify drug testing for schoolchildren

Mandatory drug tests were thus distinguished from tests in relation to law enforcement, and became subject to a standard of "special needs." The third case came six years later, *Vernonia School District 47J v. Acton*,[200] when seventh-grader James Acton was not allowed to play football because his parents refused to sign a consent form for drug testing.

The judges were convinced of the pressing drug problem in the district and that vulnerable youngsters had to be protected:

> Along with more drugs came more disciplinary problems. Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.
>
> Not only were student athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture. This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury. Expert testimony at the trial confirmed the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance. The high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use.
> Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted. According to the District Court:
>
> > "[T]he administration was at its wits end and....a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary problems had reached 'epidemic proportions.' The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture."[201] (Citations omitted.)

Based on the above and citing *Skinner*, the Court thus ruled that "special needs" existed in public schools:

---

[200] 515 U.S. 663 (1995).
[201] *Id.*

> Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs... [I]t must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high... [T]he particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes.[202]

While a seventh grader's athletic activities was being considered as equivalent to train collisions and smuggling, the broadening "special needs" doctrine was being severely criticized by libertarians.[203] Soon after it was decided, *Vernonia* was used as the justification for mandatory drug testing programs in middle and high schools, including the one in Lockney that Larry Tannahill successfully protested against.[204] The *Vernonia* ruling itself was qualified:

> *We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts...* [W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Given the findings of need made by the District Court, we conclude that *in the present case* it is.[205] (Italics supplied.)

3. Chandler: "Special needs" doctrine reviewed and restricted

The first three cases, taken together, provide a picture of what the American Court considered "special needs." Pay attention, however, to why the trend was reversed in the most recent case. *Chandler v. Miller*[206] struck down Georgia's innovative new policy of requiring candidates to take a drug test before running for office.

The District Court affirmed and based its ruling on *Von Raab*, citing the impracticality of requiring probable cause and citing the same concerns of clear thinking and potential for blackmail in the governor tasked with enforcing the laws of the state. It also observed several provisions to safeguard privacy. The candidate could, for example, have the test conducted in the office of his own doctor, and the results would not even be released to law enforcement officials if the candidate forfeited his candidacy.[207]

The Supreme Court applied "special needs" and reversed:

---

[202] *Id.*

[203] 31 AKRON L. REV. 273 n.62 (1997).

[204] Joanna Raby, *Reclaiming Our Public Schools: A Proposal for School-Wide Drug Testing*, 21 CARDOZO L. REV. 999 (1999); *See* sec. I.D.

[205] Vernonia School District 47J v. Acton, 515 U.S. 663 (1995).

[206] 520 U.S. 305 (1997).

[207] 73 F.3d 1543 (1996).

> [W]e note, first, that the testing method the Georgia statute describes is relatively noninvasive; therefore, if the "special need" showing had been made, the State could not be faulted for excessive intrusion...
>
> Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion...
>
> ... Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule...
>
> ....
>
> "[QUESTION]: Is there any indication anywhere in this record that Georgia has a particular problem here with State officeholders being drug abusers?
>
> "[COUNSEL FOR RESPONDENTS]: No, there is no such evidence. and to be frank, there is no such problem as we sit here today."[208]

Going to the specific testing methods used, the Court also distinguished the case from *Skinner*, *Von Raab*, and *Vernonia* because it believed that the testing in Chandler was ineffective. For example, the candidate himself chose the date of the testing, and could simply abstain from drug use for a short time to avoid a positive result. It added that there was no reason ordinary law enforcement methods were insufficient to address the concern raised by the policy as public officers were under constant scrutiny, unlike the customs employees in *Von Raab*.

Chandler thus showed how a drug testing policy could fail the balancing test. In this case, the need for the test in relation to the subjects was not compelling enough, and the tests imposed intrusions that were undue because they were ineffective.

B. CRAFTING A CLEAR CONSTITUTIONAL FRAMEWORK BASED ON *SCHMERBER*

Chandler, as exhaustively discussed, is the end of a development of legal ideas that have at their core the right to privacy expressed in the right against unreasonable search. Because all of the rights and component ideas involved are well accepted or have strong grounds for application in Philippine jurisprudence, *Chandler* also presents a legal framework for a Filipino who wishes to contest mandatory drug testing. It is time to assemble the pieces of a new suit of armor.

Remember that in interpreting Constitutional rights, the Court left these

---

[208] Chandler v. Miller, 520 U.S. 305 (1997).

instructions, crystal clear in their eloquence:

> [A] constitution, to quote from Justice Cardozo, "state or ought to state not rules for the passing hour, but principles for an expanding future."
>
> To that primordial intent, all else is subordinated. Our Constitution, any constitution, is not to be construed narrowly or pedantically, for the prescriptions therein contained, to paraphrase Justice Holmes, are not mathematical formulas having their essence in their form, but are organic living institutions, the significance of which is vital nor formal. There must be an awareness, as with Justice Brandeis, not only of what has been, but of what may be...
>
> The moving discourse on the interpretation of the Constitution ended:
>
> (The Constitution) is not, in brief, a printed finality but a dynamic process.

Clearly, medical advances have given rise to new possibilities that Lord Camden, the framers of the American Constitution, and our own Constitutional Convention delegates never imagined. In this day and age, the ageless Constitutional guardian may not inwardly boast of his prowess while remaining oblivious to the changing world around him, lest he go the way of the Japanese samurai who, for all his nobility and dueling grace, fell obsolete in the face of Kublai Khan's Mongol horde and untrained peasants armed with crude muskets.[209] A Constitution, more than a medieval warrior, cannot remain static when the people it serves move with the tides of time.

1. Establish the Schmerber connection to unreasonable search

To create the framework, one must, like a toddler playing with building blocks, first construct a solid foundation with an eye to laying the *Chandler* logic as the final block on top of the tower.

The base of this hypothetical tower is *Schmerber*. One must first establish the crucial link between the collection of body fluids and the right against unreasonable searches.

This is not a difficult feat of statutory construction.

---

[209] Readers with a passing curiosity in Oriental medieval warfare may refer to Jeff Vitous, *Warfare in Feudal Japan*, *at* http://www.wargamer.com/shogun/dw-2.asp and http://www.samurai-archives.com. The metaphor refers to the first Mongol invasion of Japan in 1274 where Mongol archers simply fired *en masse* on samurai accustomed to single combat, and to the Battle of Nagashino Castle in 1575 where Oda-Tokugawa infantry armed with 3,000 arquebuses crushed the creme of the Takeda clan cavalry, 30 years before the introduction of firearms in European land warfare.

First, one must go back to the history of the right as discussed, and emphasize that it has already been interpreted to protect dignity more than security (Sec. II.D). One then cites the various zones of privacy established by Philippine jurisprudence (Sec. II.B.1).

Second, one must note that the Philippines adopted the right from the United States and thus accords great respect to the interpretation of that country's Court. *Schmerber* is cited by a number of cases, and the logic is not incompatible with Philippine culture. The Court has also mentioned the inherent dignity surrounding the human body on some occasions. The argument is that if the constitution protects one's pockets, it must certainly protect one's blood vessels. (Sec. III.B)

Third, one must emphasize that the Constitution is to be interpreted broadly, with a view of covering all contingencies and addressing new needs.[210]

Finally, one must emphasize the intimacy of the right against unreasonable searches with the right against self incrimination[211] then distinguish that the former would not apply in the past cases where accused were unable to invoke the latter. The woman accused of adultery who was ordered tested for pregnancy,[212] for example, would also be unable to invoke the right against unreasonable searches because probable cause existed, assuming that the proper steps to minimize the intrusion were taken.[213] Again, what is being discussed here is mandatory drug testing, not testing related to arrests or actual investigations.

2. Vividly establish the reasons why a person might refuse a drug test

Once the crucial *Schmeber* foundation is successfully set, it must then be broadened by a second layer of blocks emphasizing the possible reasons of an innocent and upright citizen for refusing to be tested for drugs, as discussed (I.A-C). The potential invasions into privacy and consequently dignity already discussed must be clearly and graphically illustrated, as in the example of American high schools (I.D).

This contention, especially if couched in a liberal interpretation of the Bill of Rights, can be partially supported by certain Opinions of the Secretary of Justice. Inquiries on constitutional rights related to drug testing have already been made, such as those involved in spot tests on motorists[214] and in the NBI.[215] One Opinion

---

[210] R. AGPALO, *supra* note 188, at 440-443.
[211] US v. Boyd, 116 U.S. 616 (1886).
[212] Villaflor v. Summers, 41 Phil. 62 (1920).
[213] Note the tone of Justice George Malcolm's decision.
[214] Sec. of Justice Op. No. 079, s. 1999.
[215] Sec. of Justice Op. No. 007, s. 1999.

advised the Dangerous Drugs Board against requiring routine drug testing for elementary and high school students in the absence of a law clearly providing for such testing, but added that there would be no conflict with the Constitution if testing is "voluntary and not attended by compulsion or deceit."[216] Officers of line agencies, thus— and perhaps judges as well— see the an intuitive relation of the Bill of Rights to drug testing and it is a matter of articulating which particular right must be protected.

3. Relate drug testing to warrantless and administrative searches

The next layer involves clarifying *Schmerber's* framework in the context of the 1987 Constitution. The Bill of Rights provides:

> SEC. 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable... and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.[217]

This provision must be read as having two parts, the first dealing with unreasonable searches and seizures, and the second dealing with requirements for a valid warrant.[218] Drug testing without probable cause is covered by the first but not the second.

It must again be emphasized that drug testing itself is not unconstitutional. To hold otherwise is to go against accepted norms of Philippine society and the clear expression of legislative will in the Dangerous Drugs Act and other laws, not to mention various treaties and rulings. The American cases cited decided the validity of specific drug testing policies, never the absolute question of whether drug testing itself was unconstitutional.

It must be emphasized that the right against unreasonable searches protects only against unreasonable searches. Jurisprudence recognizes searches without probable cause in five generally accepted exceptions to the general rule: 1) searches incidental to arrest, 2) searches of moving vehicles, 3) seizures of evidence in plain view, 4) customs searches, and 5) when the right is waived.[219] Certainly, metal

---

[216] Sec. of Justice Op. No. 029, s. 1996.
[217] CONST. art. III, sec. 2.
[218] J. BERNAS, *supra* note 183, at 159.
[219] *Id.*

detector and x-ray operators in airports do not secure warrants for passengers.[220]

The key in the first part is the word "unreasonable." Drug testing itself cannot be attacked as unconstitutional, but specific policies can be attacked as "unreasonable" under the above provision and with respect to the right to privacy because there is no compelling reason to consider them as exceptions to it.

It must further be noted that administrative searches have been held to be warrantless searches that are also protected by the right against unreasonable search.[221] When one reaches this point, one has already successfully presented the issue in the context of a balancing of interests test.

IV. THE FRAMEWORK FOR A CONSTITUTIONAL COUNTERATTACK

A. Raising the constitutional level of scrutiny for drug testing

The top of the tower, again, involves raising the constitutional level of scrutiny resulting from establishing a clear constitutional right—the right against unreasonable searches, coupled with the right to privacy—against the government's police power. An example of the test was quoted by Justice Castro:

> [T]he duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented...
>
> ... In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct... We must, therefore, undertake the "delicate and difficult task... to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."[222]

With new armor firmly in place, the Constitutional guardian can then eye the nexus. While the government interest is unassailable, the narrowness of the means used may be scrutinized, and this is the point of the Constitution's parry and counterthrust.

---

[220] *See* People v. Johnson, G.R. No. 13881, Dec. 18, 2000.

[221] Camara v. San Francisco Mun. Ct., 387 U.S. 523 (1967), *overruling* Frank v. Maryland, 359 U.S. 360 (1959), *discussed in* I.CORTES, *supra* note 1.

[222] Communications Ass'n v. Douds, 339 U.S. 382 (1950), *quoted in* Gonzales v. Comelec, G.R. No. L-27833, 27 SCRA 835 (1969) (Castro, J., concurring and dissenting); *see also* Schneider v. New Jersey, 308 U.S. 147 (1939).

B. From the government side: Scrutinizing the existence of a "special need"

Challenges to a specific policy can approach from either side of the balance. The first approach is from the government perspective: whether a "special need" clearly exists. Three different challenges can be made based on: 1) the scope of the policy; 2) the effectiveness of the policy; and 3) the social cost of the policy. The LTO policy specifically can be attacked for lack of legal basis.

1. The LTO policy affects a class that is practically the general public

The first angle is that the test affects far too many people. In *Vernonia*, for example, the Court recognized that only the Actons out of all the parents in the school district contested mandatory drug testing.[223] The same was true in the case of Lockney and Larry Tannahill.[224] The same may not be true in the Philippines.[225]

Vernonia also mentioned that public school children have lesser expectations of privacy, being under the guardianship of the State and subject to health checks and immunization requirements, for example. Certain classes such as law enforcers are certainly asked to sacrifice some privacy as well, and the extreme conditions faced by customs officers in *Von Raab* illustrates why. A test being scrutinized, however, may be shown to affect even classes of people where the interest is lesser or nonexistent.

The most shocking thing about the LTO-required drug testing is that it is practically a mandatory test policy aimed at the general public because it also includes non-professional drivers. One may argue that no distinction needs to be made because these drivers also use public roads even if they do not operate passenger vehicles or large trucks, and because there is a compelling interest to spot even occasional users who may turn into drug addicts.[226] However, to give one a concrete idea of just how many people are affected, the LTO issued 586,710 non-professional licenses in the year 2000, 254,968 in Manila alone. Just in January 2002, it issued 56,300 non-professional licenses, 24,955 in Metro Manila alone. When one begins to talk about hundreds of thousands of citizens, clearly, much closer scrutiny is

---

[223] 515 U.S. 663 (1995).

[224] CHRISTIAN SCIENCE MONITOR 1 (April 18, 2001); Linda Kane and John Wise, *ACLU sets deadline for Lockney schools, at* www.lubbockonline.com/stories/021300/loc_021300114.shtml (Feb. 13, 2000); Pam Easton, *In Texas, a flashpoint in fight over mandatory drug tests, at* www.onlineathens.com/stories/020400/new%5Ftest.shtml (Feb. 4, 2000); Jim Yardley, *Family in Texas challenges mandatory school drug test, at* www.mapinc.org/drugnews/v00/n507/a01.html (April 17, 2000).

[225] *See* Sec. of Justice Op. No. 029, s. 1996.

[226] Letter from Dr. Nestor Laceda, Sr. to Senator Aquilino Pimentel, Jr. (Nov. 8, 2001) (on file with the LTO).

warranted.

As Dr. Mappala emphatically phrased the issue: "Three hundred pesos is P300 for the lower income classes."[227]

A narrower measure that focused on drivers of passenger and cargo vehicles—and lets the 17-year olds driving to school alone—might be more effective, for example. Some kind of random policy with no notice to the subjects, or the spot testing on traffic violators or those involved in accidents, as preferred by the DOH, sound even narrower yet more effective.

2. Additional concern: Lack of legal basis for the LTO testing policy

It was pointed out earlier in the paper that there is a discrepancy between the wording of the Transportation and Traffic Code, the administrative order, and the actual implementation of the policy. Further, nothing in the implementing rules concretely states that the drug tests are required for non-professional license applicants.

This is the relevant provision of the Code:

> Every person who desires to operate any motor vehicle shall file an application to the Director or his deputies for a license to drive motor vehicles; provided however, that *no person shall be issued a professional driver's license* who is suffering from contagious diseases such as tuberculosis, sexually transmitted disease and epilepsy or who is an alcohol or *drug addict or dependent.*[228] (Italics supplied.)

This is the relevant provision of the administrative order:

> Section II— APPLICATION AND SCOPE
> ... any person who applies for a new professional driver's license or for a renewal thereof must show proof that he/she has been subjected to and has passed a drug test conducted by any of the following:[229]

These are the relevant provisions of the implementing circulars:

> Consistent with the primary intention of the cited amendment [to the Transportation and Traffic Code], of screening out unfit applicants from securing any license to drive in order to minimize if not totally prevent untoward vehicular accidents that often result in serious injuries/damages [sic]

---

[227] Interview with Mappala, *supra* note 13.

[228] TRANSP. & TRAFFIC CODE, *supra* note 53. Note that the provision that refers to drug testing refers only to professional license holders.

[229] Feb. 23, 1999 Adm. Order, *supra* note 22.

> to lives and properties, *all applicants for driver's license* [sic] will comply with the following rules and regulations:[230] (Italics supplied.)
>
> These guidelines are issued to govern the application for *professional and non-professional driver's licenses* so as to promote safe and efficient transportation and to curb alcohol or drug-related vehicular accidents.[231] (Italics supplied.)

Not only are non-professional drivers suddenly mentioned in the later implementing circulars, but also these do not even have any specific provisions that instruct these drivers to obtain drug tests.

The only legal basis for applying the requirement to non-professionals is the sentence in the Code requiring every driver to apply for a license, and this is tenuous because it is a very general provision. The law specifically states that drug users are not to be issued professional licenses, and had the legislature not intended to make a distinction, they would not have written one into the law. Assuming that such sentence even allows the LTO to conduct drug tests, the second, more specific sentence should prevail, applying the construction that minimizes the intrusion into the right to privacy and in keeping with the rules of statutory construction.

Should a challenge to the policy actually be mounted, this glaring arrogation of legislative power[232] should be the very first mentioned to attack the incredible scope of the policy. Because of the nature of this paper, however, it has assumed that Congress has provided the proper legal bases for all policies to be challenged, lest the discussion stray to the separation of powers. Further, the point will soon be moot with the passage of the Comprehensive Dangerous Drugs Act of 2002.

3. The LTO policy has many loopholes and is ineffective, following Chandler

A parallel approach is to contest concrete circumstances, such as the veracity of complaints and the effectiveness of the mandatory drug testing program, taking a cue from the US Court's line of reasoning in *Vernonia* and other cases.[233] As in *Chandler*,[234] one can argue that, based on the circumstances, large deviations from existing law enforcement procedures is unnecessary. An articulation of this line of

---

[230] July 19, 2001 circular, *supra* note 57, Sec. I, par. 2.

[231] Aug. 30, 2001 circular, *supra* note 32, sec. I, par. 1.

[232] The police power is wielded by the legislature, as stated in R. AGPALO, *supra* note 188, at 23 and VICENTE SINCO, PHILIPPINE POLITICAL LAW PRINCIPLES AND CONCEPTS 579 (11th ed. 1962). *See* Ople v. Torres, G.R. No. 127685, 293 SCRA 143 (1998), for a comprehensive discussion on implementing a policy *without* legislative authority that has very broad effects on the privacy of an entire society. The point will soon be moot, however. *See* S. No. 1858 and H. No. 4433 (The Comprehensive Dangerous Drugs Act of 2002), sec. 35, 12th Cong., 2nd Sess. (2002).

[233] Vernonia School District 47J v. Acton, 515 U.S. 663 (1995).

[234] *Id.*

counterattack is the dissent of Justice Scalia in *Von Raab*, which was cited in *Chandler*:

> What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of even a single instance in which any of the speculated horribles actually occurred... Although the Court points out that several employees have in the past been removed from the Service for accepting bribes and other integrity violations, and that at least nine officers have died in the line of duty since 1974, there is no indication whatever that these incidents were related to drug use by Service employees... According to the Service's counsel, out of 3,600 employees tested, no more than 5 tested positive for drugs.[235] (Citations omitted.)

Returning to the LTO example, Michael Tan's Inquirer column provided a more humorous yet equally graphic account:

> ... The website manager claims he had a friend who was able to substitute his dog's urine several times and came clean. The website manager himself writes that he couldn't use his own dog's urine because this loyal companion was constantly raiding his marijuana supplies!
>
> ...
>
> The new drug-testing requirement only tells you the applicant probably did not use shabu the last three days. In exchange he or she gets a three-year license. Drug testing does nothing for the safety of the public...[236]

Dr. Mappala was far from joking when he emphasized that the DOH was against the LTO policy because there are so many ways for actual drug users to evade detection. There does not appear to be any standard procedure aside from having the test subject watched from behind, or even a guarantee of the strictness of the observer, especially in more remote testing centers. Dr. Mappala shares that he has personally caught a number of subjects trying to substitute urine samples. It is difficult to detect a container of about 100cc of precollected urine in a man's belt area or underwear. Pouring the contents even simulates the sound of actual urination, and an observer will not see this with the subject's back blocking his view.

He goes on that substitution is not even necessary to evade a positive result. Increasing the acidity in a person's bloodstream also increases the excretion of shabu from his body, and he estimates that an average person can remove all traces by consuming citrus fruits and vitamin C for just two weeks before the test. He has, in fact, treated patients who did just that. One can even purchase a simple testing kit

---

[235] Chandler v. Miller, 520 U.S. 305 (1997).

[236] Tan, *supra* note 11.

from a drugstore[237] before the LTO test to see if one has to start loading up on fruit.

To show just how fast shabu can be excreted from the human body, Dr. Mappala cites that an occasional user can be detoxified in just 48 hours by withholding food, dosing him with ascorbic acid, and using charcoal. This holds for someone who sniffs adulterated or about 20-30% "piso-piso" shabu thrice a week. A heavier user can be detoxified in just 96 hours.

To reiterate Tan's point, the tests are imposed every three years so an actual drug user has all the time in the world to prepare for it.

Dr. Mappala further criticizes that the LTO outsources the actual testing to private laboratories, but does not prescribe a uniform set of tests. Thus, the nature and sensitivities of tests can actually differ. Further, he has his doubts about the actual qualifications of testing personnel, considering that tests themselves are very easy to administer and a test center might try to cut costs. This is despite the LTO's requirement that the technical qualifications of testing personnel must be presented.[238] All these may result in "false negatives" in some tests.[239]

Note that this set of essential circumstances involved in the LTO policy closely parallels those criticized in Chandler.

4. Any benefits in identifying addicts are far outweighed by the great cost

A more practical twist to the preceding approach has been used by the American Civil Liberties Union. It computed that drug testing in American workplaces costs $77,000 per positive result. They add, however, that given statistics that only one in ten people who test positive are regular drug users, it actually costs $770,000 per drug abuser. They use this to reason that the intrusion caused by drug testing actually impairs productivity instead of addressing the productivity decrease drug use by employees supposedly causes.[240]

Dr. Mappala criticizes the LTO policy along these lines. He believes that an effective policy should distinguish between an occasional user and a drug addict. Actual addicts, he explains, are psychically dependent on drugs to the point that they

---

[237] In fact, he may not even need to, with the detailed advice available on the Internet. For example, try http://www.ultimatedetox.co.uk/vtt.htm. A sample result reads: "The information you have provided suggests that you'll most likely fail your drugs test. If at all possible, try to delay your test a few days and stop using until after your test. This will allow your body a little longer to breakdown and excrete any drug metabolites still remaining. For greater peace of mind, we suggest using our Cleansing Drink."

[238] Aug. 30, 2001 circular, *supra* note 32; Nov. 28, 2000 circular, *supra* note 32.

[239] Interview with Mappala, *supra* note 13.

[240] ACLU, DRUG TESTING: A BAD INVESTMENT (1999).

cannot function normally without them. There are users, however, who are only physically dependent, and take drugs for specific reasons other than to get high. For example, some truck drivers with long nighttime shifts take shabu to keep from falling asleep. Rehabilitation is conducted mainly by psychiatrists, and Dr. Mappala had patients who were judged to be fine after detoxification and did not require rehabilitation, precisely because they had no psychic dependence.[241]

Although the Dangerous Drugs Act does not distinguish between the two,[242] remember that prosecution is not the primary goal of the LTO policy. What the policy may end up achieving is to bar more occasional users from driving than actual heavy users, and not achieve much in terms of rehabilitation.

Even with the very rough data available, one can make convincing estimates like the ACLU. LTO data reveal, for example, that there were 255 positive results in Metro Manila in January 2002 alone, and 1,678 such results from January to March.[243] Just for rough estimation, we can take the monthly average of the second, larger figure and assume that there are about 560 positive results in Metro Manila each month.

To form a ratio, one needs a numerator, in this case the number of licenses issued each month by the LTO:[244]

	Professional	Non-Professional	Total
Metro Manila January 2002	32,556	24,955	57,511
Philippines January 2002	135,053	56,300	191,353
Metro Manila Total figure for 2001	348,115	254,968	603,083
Philippines Total figure for 2001	1,386,407	586,710	1,973,117

Taking the January figure and dividing 191,353 by 560, one sees that the LTO has to conduct roughly 342 tests to detect one user – and again, the user may not even be an actual addict.

---

[241] Interview with Mappala, *supra* note 13.

[242] Rep. Act. No. 6425 (1972), sec. 2 (g). "Drug dependence"— means a state of psychic or physical dependence, or both, on a dangerous drug, arising in a person following administration or use of that drug on a periodic or continuous basis.

[243] Obtained from the database of Mario San Pedro, LTO main branch Medical Unit.

[244] Obtained from the LTO main branch MID Statistics and Library Unit.

Further, if one multiplies 342 by P300.00, it costs the public P102,510.00 to detect one user, not counting the taxpayer's money needed for any rehabilitation. It is unlikely that the LTO can prove that each drug user in the country is responsible for over 100,000 in accidents each year.

Even if one argues that life is priceless, surely the money can be channeled into a more efficient program. The policy will affect two million Filipinos each year, and one recalls a persuasive facet of American due process doctrine:

> In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs... The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision...
>
> Financial cost alone is not a controlling weight... But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost... [R]esources available for any particular program of social welfare are not unlimited.[245] (Citations omitted.)

One may in turn cite the doctrine that a government policy does not have to attack a problem completely to be upheld. In addition to the incredible cost to the public, however, this has to be weighed with the fact that real drug addicts have three years to prepare for each test and quite possibly evade it according to an expert, while innocent drivers have to pay more than double the original license fee.

Finally, note that with the balancing of interests test in place, narrower means of achieving the same goal must be explored.[246]

C. From the individual's side: Tipping the scale by citing actual invasiveness

The second direction is from the individual's perspective, and he must show that his right against unreasonable searches should be protected against specific violations of privacy inherent in a policy. Four challenges can be made based on: 1) Basic intrusion into modesty and privacy; 2) Subject's lack of control over confidentiality of results; 3) Potential abuse of random testing; and 4) Lack of safeguards for false positives.

---

[245] Matthews v. Eldridge, 424 U.S. 319 (1976).

[246] *See, for e.g.,* NPC v. COMELEC, G.R. No. 102653, March 5, 1991.

1. The LTO policy does not sufficiently address modesty

The first angle of attack focuses on the basic intrusion into modesty and privacy.

Skinner held:

> Compelling a person to produce a urine sample on demand also intrudes deeply on privacy and bodily integrity. Urination is among the most private of activities. It is generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of personal seclusion.[247]

Note how the American Court noted the testing procedure in *Von Raab*:

> On reporting for the test, the employee must produce photographic identification and remove any outer garments, such as a coat or a jacket, and personal belongings. The employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses. To ensure against adulteration of the specimen, or substitution of a sample from another person, a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination. Dye is added to the toilet water to prevent the employee from using the water to adulterate the sample.
>
> Upon receiving the specimen, the monitor inspects it to ensure its proper temperature and color, places a tamper-proof custody seal over the container, and affixes an identification label indicating the date and the individual's specimen number. The employee signs a chain-of-custody form, which is initialed by the monitor, and the urine sample is placed in a plastic bag, sealed, and submitted to a laboratory.[248] (Citations omitted)

Next, it noted the procedure in *Vernonia*:

> The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.
>
> The student to be tested completes a specimen control form which bears an assigned number. Prescription medications that the student is taking must be

[247] Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 635 (1989).
[248] National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

> identified by providing a copy of the prescription or a doctor's authorization. The student then enters an empty locker room accompanied by an adult monitor of the same sex . Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial.
>
> The samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine, and marijuana. Other drugs, such as LSD, may be screened at the request of the District, but the identity of a particular student does not determine which drugs will be tested. The laboratory's procedures are 99.94% accurate. The District follows strict procedures regarding the chain of custody and access to test results. The laboratory does not know the identity of the students whose samples it tests. It is authorized to mail written test reports only to the superintendent and to provide test results to District personnel by telephone only after the requesting official recites a code confirming his authority. Only the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year.
>
> If a sample tests positive, a second test is administered as soon as possible to confirm the result. If the second test is negative, no further action is taken. If the second test is positive, the athlete's parents are notified, and the school principal convenes a meeting with the student and his parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student is then retested prior to the start of the next athletic season for which he or she is eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense in suspension for the remainder of the current season and the next two athletic seasons.[249] (Citations omitted.)

Finally, note the comment in *Chandler*:

> [T]he Eleventh Circuit emphasized that the tests could be conducted in the office of the candidate's private physician, making the "intrusion here...even less than that approved in *Von Raab*." [250] (Citations omitted.)

The above in general have been considered sufficient to forestall undue indignity, assuming "special needs" exist. Zarou's concern, for example, about direct

---

[249] Vernonia School District 47J v. Acton, 515 U.S. 663 (1995).

[250] Chandler v. Miller, 520 U.S. 305 (1997)..

observation of the subject urinating is explicitly addressed.[251] One may still have misgivings about having a person specifically assigned to listen to one urinating, and a better policy to prevent substitution of urine samples may be to request the subject to remove outer clothing such as jackets, use dye as in *Von Raab*, and search bathrooms to be used beforehand. Another alternative is a private, windowless, empty room that has also been checked beforehand.[252] Nevertheless, the point is that the farther a specific policy goes from the descriptions in the above cases, the more likely it can be challenged on grounds of unreasonableness and dignity. Certainly, raids such as those faced by Hearn and Windsor Forest High School[253] would be unthinkable even in a Philippine police station or military barracks.

As has already been discussed, the LTO policy does not sufficiently address modesty and other procedures where one need not be watched urinating yet still guard against substitution could be explored (Sec. I.C.2b).

Again, it may not seem like much, but simply sit back and take a moment to imagine the discomfort of being watched while urinating. Then, imagine how it would feel if the observer were of the opposite sex. Then, imagine how awkward it is for a female subject. Remember, the policy does not even mention the gender of observers.

2. The LTO policy has no clear guidelines on revelation and confidentiality

The second angle is whether a testing policy gives a person enough control over the confidentiality of his medical information. *Vernonia* as described above made specific provisions for this, and the US Court found Chandler's policy even more acceptable because results were sent to the subject first, and positive results would not even be disclosed if the candidate withdrew from the election.[254] The main problem, as discussed by Zarou,[255] is that extremely private medical information may be revealed by the drug test and that this may be used or released for other purposes. Specific provisions are not enough; they must be clearly enforceable as well through specific grievance procedures or clear sanctions against the superior with access to test results. Again, this issue does not seem to have been mentioned anywhere in Philippine law or jurisprudence, and it may be raised in the context of an enshrined right and an appeal for equity in the face of real injury.

Preceding sections have already discussed that, although the common shabu

---

[251] Zarou, *supra* note 35.
[252] Epstein, *supra* note 23.
[253] *See infra*, I.D.2.
[254] Chandler v. Miller, 520 U.S. 305 (1997).
[255] Zarou, *supra* note 35.

test reveals little additional information, a person may inadvertently reveal medication or conditions that he does not need to, or the clinical evaluation described for those who test positive may be unduly intrusive. However, note that the objection remains for future, broader drug tests.

Further, the policy does not guarantee security of the results aside from a single general sentence (Sec. I.C.2c). The quotes from *Ople* remain incisive, especially given the ongoing computerization of the LTO's system. To go further, a measure protecting the anonymity of the subjects in the laboratories themselves as in Vernonia is missing, despite the explicit chain of custody procedures.

Again, as early as 1970, Justice Cortes cautioned: "... [The computer] poses new threats to privacy because it intereferes with and may ultimately deprive the individual of the right to control the flow of information about himself."[256]

Incidentally, the most curious line in the actual consent form used illustrates this line of criticism very vividly:

3. Humihithit ka ba ng Marijuana sa nakalipas na 30 araw?[257] (Have you smoked Marijuana in the past 30 days?)	_____ OO	_____ HINDI

3. Random test concerns do not apply to the LTO policy

The third angle involves discretion given to the authority administering the tests, and the possibility of abuse. This was considered in *Von Raab*, where the policy was found more acceptable because discretion was limited by specifying the conditions for drug testing.[258] Due to this concern involving discretion, random drug testing seems to be the policy most likely to be invalidated, and the Supreme Court of Appeals of West Virginia already condemned random drug testing in one of its decisions.[259]

One may argue that stricter scrutiny should be given to any policy that prescribes random drug testing on people in lower risk or non-sensitive positions. This is justified by the compounded potential intrusion into privacy due to the discretion involved and the lack of both probable cause and "special needs."

---

[256] I. CORTES, *supra* note 1, at 11, *quoting* Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society*, 67 MICH. L. REV. 1091 (1969).

[257] *See* n.10.

[258] National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)..

[259] Twigg v. Hercules Corp., 406 S.E.2d 52 (W. Va. 1990); John Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799 (2000).

Note that by similar logic, however, this angle is very difficult to apply to drug testing included in an annual physical exam.[260] There is no discretion involved, and the intrusion is minimized because it is performed along with the other physical tests. Challenging drug testing during physical exams is also more difficult because it has already been required for all applicants to government service, and there have not been any publicized complaints so far.[261]

Going back to the LTO example, however, it must be clarified that the separate drug test required is not in the context of a general physical exam and other tests. Thus, it should not be conceded that applying for a driver's license brings one into a zone with reduced expectations of privacy.[262]

4. The LTO policy may not have enough safeguards against false positives

The final angle, the possibility of false results, is more difficult to discuss here due to the medical and technical details involved. Nevertheless, any policy with a clear lack of safeguards, such as the second drug test by another method and review by a physician provided for in the Alaska law critiqued by Zarou, may be challenged.[263]

False positives in the LTO policy have already been extensively discussed (Sec. I.B.2; Sec. I.C.2a). Certain aspects may still be clarified, from the vague note that may not warn subjects of amphetamine-like substances to a lack of clarity on what penalties may actually be applied to them and what remedies are available.

CONCLUSION

A Constitution may be timeless, but constitutional doctrine and jurisprudence may not be. Some of the sacred guarantees have been eroded or fallen into disuse not because they are invalid, but simply because they have been unable to keep pace with changing times. It may be argued, for example, that the non-impairment clause is less relevant because macroeconomic tools after the Great Depression evolved to the point that government no longer intervened in private transactions by dealing directly with contracts. Today, for example, the government uses budget policy and control of the money supply and interest rates. Thus, even "timeless" Constitutional guarantees must constantly adapt. Among these are the Philippine frameworks available to address mandatory drug testing, in the face of

---

[260] John Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799 (2000).

[261] CSC Circ. No. 34-97 (1997).

[262] *See* People v. Johnson, G.R. No. 13881, Dec. 18, 2000.

[263] *See infra*, I.C.1.

medical advances unheard of a century or two ago.

Drug testing is a penetration into the zone of privacy that is the human body itself, and there are few government policies that are therefore more intrusive. Michael Tan and Conrado de Quiros are not actually voicing a new concern. In the face of changing technologies, one recalls the question posed by Justice Cortes over 30 years ago:

> The right of privacy, therefore, finds protection not only in the various provisions of the constitution, but also in special laws. These provisions were adopted before recent developments effected profound changes in human existence. Is the protection adequate?[264]

The right to privacy has been established and affirmed in Philippine jurisprudence. However, its scope is still being defined and restricted in case law, and it is best invoked in the context of one of the explicit constitutional rights it arises from.

The right against self-incrimination has long been held as inapplicable to physical evidence because collecting such evidence does not involve coercion of the subject. He is not compelled to confess against himself because mere physical evidence does not speak for him. Intimately connected to this right, however, is the right against unreasonable searches and seizures, and this has been applied in persuasive American jurisprudence to the collection of body fluids.

Although drug testing itself is impossible to challenge on constitutional grounds, intrusions of dignity and privacy by the exercise of police power may be validly raised by expanding the right against unreasonable search to protect a person's very body. Again, there are a number of reasons why this is perfectly logical in Philippine law. Making that transition, the level of scrutiny can then be raised from a rational relationship test to a balancing of interests test. Exactly how compelling the "special need" is and how intrusive the means used are can then be challenged.

A short list of the challenges that can be made includes:

Government side

1. The policy covers too many classes of individuals relative to the nature of the "special need."

---

[264] I. CORTES, *supra* note 1.

2. The policy is ineffective, making the intrusions undue.

3. The policy results in undue social cost relative to the benefits or the nature of the "special need."

Individual side

1. The policy fails to sufficiently address privacy and modesty.

2. The policy fails to restrict what information may be revealed and secure the confidentiality of the results.

3. The policy does not minimize potential for abuse by testers.

4. The policy fails to protect subjects against false positive results.

Comparing the list against the observations on the LTO policy:

Government side

1. The scope of the LTO policy is practically the general public.

2. There are many ways for drug users to evade detection.

3. The LTO policy imposes great social costs on the public— possibly over P100,000 per positive result— in exchange for limited benefits.

Individual side

1. The policy lacks legal basis, at least with respect to the roughly 600,000 non-professional license applicants each year.

2. The questionnaire given out before the test is administered contains a thinly disguised invitation to self-incrimination.

3. The LTO policy could explicitly adopt less intrusive procedures than having a subject watched while urinating, and could adopt gender-specific measures.

4. The LTO policy fails to restrict what medical information needs to be revealed, though not primarily by the tests themselves.

5. The LTO policy fails to clearly outline how the confidentiality of test results will be protected, including internal measures and measures for laboratory personnel.

6. The LTO policy does not keep test subjects as anonymous as possible.

7. Abuse by testers is less relevant because the LTO policy is not random.

8. The LTO policy is still subject to false positive results. For example, it fails to warn a test subject that anti-cough medicine may trigger a positive result.

To end, it must be noted that the experiences of the United States and the Philippines are quite different. Certainly, for example, "drug raids" in Metro Manila high schools are quite unlikely at present. Nevertheless, it cannot be denied that many other intrusions into privacy, dignity and security take place in this country each day. Small or large, they are intrusions nonetheless, and it is often the poorer members of society who are subject to them.

The Bill of Rights and the constitutionally enshrined principle of social justice must constantly be reinterpreted, expanded and applied to new situations in our ever-changing society. Although the dangers of rampant drug use are very real, the potential intrusions from mandatory drug testing are equally real, even shocking, and the Constitution must expand its embrace in order to grasp such issues. Only with such constant enrichment can the right of every Filipino to live a silent and peaceful life be realized.

To quote Dean Vicente Sinco:

> The liberty to live in the way one chooses, the liberty to think, to work and do things, to believe, to enter into contracts, to use one's property are, after all, the real essentials of life, rather than mere physical existence and mere material goods, that the civilized man yearns and struggles to be protected against the power of government.[265]

The Bill of Rights cannot remain static when the people it serves certainly do not.

AFTERWORD

Former Justice Isagani Cruz wrote:

---

[265] V. SINCO, *supra* note 232.

> I firmly believe that whenever liberty is offended, everyone is a proper party even if he is not directly injured... Where liberty is debased into a cruel illusion, all of us are degraded and diminished. Liberty is indivisible; it belongs to all of us.[266]

This author was interning in the House Committee on Suffrage during the final revision of this paper in the summer of 2002. Only then did he discover the full extent of planned drug testing in Congress. The proposed Comprehensive Dangerous Drugs Act of 2002 authorizes drug testing for:

a) Applicants for driver's licenses
b) Applicants for permits to carry firearms
c) High school and college students
d) Officers and employees of public and private offices
e) Officers and members of the military, police and other law enforcement agencies.
f) All violators of laws
g) All candidates for public office, as well as elected and appointed officials, both national and local[267]

Can any parent imagine being ordered by a teacher to submit his 13-year old child to mandatory drug testing? Did Michael Tan, Conrado de Quiros, or any law abiding Filipino imagine that the ordeal of Larry Tannahill[268] would become possible in the Philippines?

Ironically, this author only found out about the proposed amendments immediately after this paper was written. Emboldened by the recognition, he offered to present the paper to the House Committee. He was politely informed by the secretary that it would probably not even be reviewed because the congressmen had long since made up their minds. This author thus expects the ideas in this paper to comfortably gather dust somewhere in the UP Law Library, while the scope of drug testing widens and measures to curb the drug problem remain unimaginative and uncritical.

Of what use, then, is the study of law when the legislative hand that molds it has no ears for it? Is the Bill of Rights now seen as an extravagance decades after the sacrifices that won it back were made? Given the factors that actually influence Philippine legislation, perhaps all the work of the academe is actually written in hieroglyphics, as a far more eminent writer dramatized:

---

[266] Isagani Cruz, *Separate Opinion: Judicial Evasion*, PHIL. DAILY INQUIRER, May 19, 2002, at 8, cols. 2, 4.

[267] S. No. 1858 and H. No. 4433 (The Comprehensive Dangerous Drugs Act of 2002), sec. 35, 12th Cong., 2nd Sess. (2002).

[268] *See infra*, I.D.1.

> "You write in hieroglyphics! And why?"
>
> "So that they won't be able to read me now." Ibarra was regarding Tasio with attention, debating whether the old man was mad...
>
> ...
>
> "If the present one were able to read me, they would burn my books, the work of a lifetime; on the other hand, the generation that can decipher these characters would be an educated generation; they would understand me and say: 'Not all slept during the night of our ancestors.' The mystery, or these curious characters, will save my work from the ignorance of men, as the mystery and the strange rites have saved many truths from the destructive priestly class."
>
> "And in what language are you writing?" asked Ibarra after a brief pause.
>
> "In our own, in Tagalog."[269]

Perhaps a generation from now, the present students will be able to more effectively question the wisdom of overly broad drug testing policies, that the next generation may live free and proud and understand the essence of the Bill of Rights, written in the blood of so many brave and noble Filipinos before them.

-oOo-

[269] JOSE RIZAL, NOLI ME TANGERE 165 (Ma. Soledad Lacson-Locsin trans., 1996). (Taken from the dialogue of Tasio and Ibarra in Chapter 26, "The Philosopher's Home.")