may serve as an effective deterrence for the abuses. Issuance of protection orders by the Court, such as a demand for the partner to vacate the conjugal home during the pendency of the case, will momentarily prevent further abuses on the woman.

5. Others. The complexity and magnitude of the problem demand a more comprehensive and integrated approach, not just the institution of legal remedies. Government should provide temporary refuge or crisis centers for victims of domestic violence. These shelters, equipped with professional or peer counselors, will provide built-in community and institutional support to the women and help them overcome their helplessness and dependency on their partners. On the other hand, rehabilitation programs similar to those provided for youthful offenders may be developed for the batterers. Training and orientation programs for police may also be conducted to sensitize them to the issue and enable them to properly value the significance of reports of battering. Women's desks may be set up in police stations to facilitate immediate and appropriate response to women's cases. Finally, only a transformative education campaign which impugns the ingrained sex role biases that prop up female subordination will advent a social change for the more humane and dignified treatment of women.

FREEDOM OF SPEECH: CRITICISM OF PUBLIC OFFICIALS, PUBLIC FIGURES AND JUDGES

CAROLINE V. HENSON*

Freedom of speech occupies an exalted position in the hierarchy of constitutional rights. However, like all rights, it is not absolute. The acts of public officials and public figures, both official and unofficial, are often the subject of comment and criticism, particulary by members of the media. Balancing the public figure's right to privacy, the people's right to information, and the commentator's right to free expression has been a difficult task for both the legislature and the judiciary.

In an attempt to draw the line between protected speech and those which are not, different tests have been formulated by the Supreme Court over the years. The theory that only a clear and present danger of a substantive evil justifies proscription of speech has evolved from American case law. In libel suits brought by public officers against private individuals, American courts have applied the "actual malice" standard. This test requires the presentation of evidence showing that the defendant published the defamatory statement with knowledge of its falsity or with reckless disregard for the truth. Several reasons support such strict standards for liability, the most important of which is the preferred status of free speech in a democracy.

While the term "public officials" ordinarily includes judges, the latter may exercise contempt powers against those critics whom they perceive as being obstructive to the administration of justice. In this regard, Philippine jurisprudence principally cites the "dangerous tendency" and "balancing of interests" tests. An analysis of the classification of judges apart from other public officials shows that the distinction is unwarranted. Hence, the "clear and present danger" rule and the "actual malice" standard applied by American courts should be adopted as the proper test in determining whether or not a particular comment or criticism pertaining to a judge is protected by the Constitution.

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INTRODUCTION

A. Background of the Study

The Philippine Daily Inquirer recently published a series of articles exposing the alleged affair between President Ramos and Rosemarie Arenas. As expected, the articles created a furor. Consequently, several members of the Manila Overseas Press Club grilled the President on the same subject in a public gathering attended by many local and foreign dignitaries. It was after the President's appearance before the Press Club that different sectors of society, including members of the media, started reproaching those who were responsible for the *expose*. They felt that the President was unreasonably subjected to shame and embarrassment for matters which did not concern his office. They averred that certain aspects of a public person's life should remain private, and are not proper subjects of public discussion.

On the other hand, other quarters maintained that the position occupied by President Ramos makes even his private life a matter of public concern. His constituents have the right to expect that their highest public official conforms with the standards of morality set by an orderly and civilized society. The President's critics likewise refer to the constitutional guarantees of free speech and free press which protect discussion of public matters as further bases for the articles.

The President is only one of the many public figures in the world who have been the object of extensive public scrutiny. Members of the Philippine judiciary have also complained of the barrage of attacks against them, eroding public confidence in the judicial system. In the United States, President Clinton has faced accusations of marital infidelity. New charges of improper financial transactions while he was a state governor have also been played up by the media.

The fixation of the public on the lives of men in power has also extended to those who, while not being public officials, nevertheless wield considerable influence. For example, the activities of entertainment and sports celebrities such as Michael Jackson and Michael Jordan have been closely monitored. Their alleged shortcomings constitute headline news. The semi-retirement of Princess Diana from public life has been attributed largely to a press that would not cease hounding her. The nervous breakdown of Empress Michiko was also blamed on unreasonable media attacks against her character. These public figures have repeatedly pleaded that they be spared from inaccurate and sensational reporting. Nevertheless, the present manner of media coverage of their lives does not appear to have changed.

Perhaps it is the fame, wealth, prestige, and power that surrounds the life of both public officials and public figures which make people hungry for news about their lives and the press eager to satisfy these wants. These public men have powers that may spell the difference between life and death, abundance and destitution, justice or oppression, victory or defeat. Consequently, their decisions are painstakingly scrutinized, their conduct regularly monitored, their achievements lauded, and their failures exposed and condemned. They have been criticized for such important acts as declaring war or breaking long-standing trade barriers as well as for such minor oversights as misspelling a word or donning an unbecoming outfit. These criticisms, which have become part of public men's lives, shall be the subject of this paper.

B. Objectives of the Study

This paper aims to delineate the proper boundaries between allowable criticisms of public men and those which are punishable under the law. The conflicting rights of freedom of speech and the rights to privacy, accurate information, and the orderly administration of justice shall be analyzed to arrive at such delineation.

This paper also aims to study the standards for liability which govern criticisms of public officials, public figures and judges.

C. Scope and Methodology

This paper begins with a discussion of the concept of the freedom of expression, as it is the right against which criticism of public men is juxtaposed. The recognized limitations to the exercise of said freedom will be studied in order to determine the scope of allowable expression in general. American cases on freedom of expression are analyzed together with Philippine cases, as Philippine Constitutional Law is largely patterned after that of the United States.

The subsequent discussion on public officials and public figures is based mainly on case law. Landmark American cases from which evolved present American law and their applicability in the present Philippine setting are evaluated.

An analysis of the judiciary's contempt powers follows to determine whether the exercise of said powers over criticisms hurled against members thereof is justified. In the instance that they may be justified, the requirements for their valid exercise are also discussed. This paper concludes with recommendations for a more responsible exercise of the freedom of expression.

I. FREEDOM OF SPEECH: A CORE VALUE

A. Historical Background

Freedom of speech is recognized as one of the fundamental rights in democratic societies. The concept was unknown to the Philippines before 1900 as the Spanish colonizers effectively stifled criticisms against their reign. During this period, Filipino patriots, both here and abroad, demanded that reforms be instituted in the Philippines, one of the most important of which was the declaration of the freedom of the press. The Malolos Constitution, drafted by the Revolutionary Congress, provided for freedom of speech and of the press in its Bill of Rights. On April 7, 1900, President McKinley, in his Instructions to the Second Philippine Commission, laid down the rule that was lifted from the First Amendment to the United States Constitution:[1] "That no law shall be passed abridging the freedom of speech or of the press..." The Philippine Bill of 1902 and the Jones Law of 1916 re-affirmed these guarantees.[2] The 1935[3] and 1973[4] Constitutions likewise retained the exact command of President McKinley's Instructions. Attempts to amend the provision during the drafting of the 1987 Constitution failed on the ground that "absolutely nothing that is sought to be protected by the amendment is not already protected by the present provision."[5] Hence, almost a century after this freedom was introduced in Philippine soil, it stands unchanged.[6]

B. Jurisprudence

The history of the First Amendment to the United States Constitution is replete with statements by jurists, statesmen and scholars about the fundamental role free speech and free press play

[1] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

[2] *U.S. v. Bustos*, 37 Phil 731, 739-40 (1918).

[3] PHILIPPINE CONST. art. III, sec. 1, clause 8 (1935).

[4] PHILIPPINE CONST. art. III, sec. 9 (1973).

[5] 1 RECORD 758-760. The proposed amendment read: "The right of the people to enjoy freedom of speech and press and to peaceably assemble and petition the government for redress of grievances shall not be abridged."

[6] PHILIPPINE CONST., art. III, sec. 4.

in a democracy.[7] Since our constitutional provision on free expression was taken therefrom, an examination of pertinent American and Philippine cases would help shed light on the definition, scope and rationale of this freedom.

1. DEFINITION AND SCOPE OF FREEDOM OF SPEECH

The Philippine Supreme Court has defined freedom of speech as the right to express one's thought upon any matter, which includes the right to do so with impunity.[8] The freedom has also been referred to as the right to "a full discussion of public affairs"[9] and "the liberty to know, to utter, and to argue freely according to conscience".[10]

In *Thornhill v. Alabama*[11], the United States Supreme Court held that "freedom of expression embraces at the very least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint and without fear of subsequent punishment."[12] The law therefore proscribes two things in the protection of this freedom. The first is prior restraint, which means "official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination".[13] The second is subsequent punishment without restraint. It accordingly requires that there be reasonable limits to the power of the government to enact laws which curtail such freedom, for if it were otherwise, the fear of punishment would effectively hinder the free flow of ideas protected by the guarantee.[14]

2. RATIONALE OF FREEDOM OF SPEECH

Two main theories have been given as bases of this freedom: the marketplace of ideas theory and the encouragement of the citizen-critic of the government.[15] Justice Holmes eloquently explained the first

[7] C. Beckton, *Freedom of Expression–Access to the Courts*, 61 CAN. BAR. REV. 101, 102 (1983).

[8] *People v. Dava*, 40 O.G. 5th Sup. 79, 80 (1941).

[9] *U.S. v. Bustos*, 37 Phil 731, 740 (1918).

[10] *Planas v. Gil*, 67 Phil 62, 81 (1969).

[11] 310 U.S. 88 (1939).

[12] *Id.* at 101-102.

[13] 1 JOAQUIN G. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 139 (1987).

[14] *Id* at 147.

[15] JEROME A. BARRON & C. THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 16 (1979) [hereinafter BARRON].

theory in his dissenting opinion in *Abrams v. U.S.*[16]: "[T]hat the ultimate good desired is better reached by a free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market..."[17] He added that history has shown that man possesses imperfect knowledge, hence, attempts to curtail expressions which are loathed by many should not be allowed unless the very survival of the government be at stake.[18] This is because it is not uncommon for unpopular ideas which have stirred the majority of the people into disbelief, anger or even unrest to be recognized several years later as steps towards the truth by a more enlightened generation.

The second basis of this freedom stresses that in a democracy, it is not only the right of the citizens to criticize their government, but it is their political duty as well. An effective government requires that the public be given the opportunity to discuss freely their alleged grievances and their proposed remedies.[19] It is only through free discussion that government remains responsive to the will of the people whom they serve and peaceful change is made possible.[20] Public opinion and criticism, like purifying lights, often mirror the state of affairs in a country and expose the ills of society, hence, paving the way for meaningful and lawful changes.

Justice Malcolm has summarized the second theory succinctly when he said, "[c]omplete liberty to comment on the conduct of public men is a scalpel in the case of free speech."[21] To deny the public their right to air their views as regards the operations of government and force them to submit to the desires of the men in power would most likely result in resentment, if not defiance, of duly constituted authority. It would also deprive government officials and employees of the opportunity to amend their ways as their mistakes and omissions are made known to them and the community at large.

[16] 250 U.S. 616 (1919).

[17] *Id.* at 630.

[18] *Id.*

[19] *Whitney v. California*, 274 U.S. 357, 377 (1927).

[20] *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

[21] *U.S. v. Bustos*, 37 Phil 731, 740-41 (1918).

C. *Limitations on the Freedom of Speech*

Although the constitutional command in Section 4 of the Bill of Rights appears to be without limitations, this is not the case. Aside from United States Supreme Court Justice Hugo Black[22] and distinguished educator and philosopher Alexander Meiklejohn,[23] who have persistently held on to their view that the First Amendment is absolute and allows for no exception whatsoever, most authorities on the subject agree that the right of free expression is not absolute. The following reasons support the non-absolutist view of this freedom.

1. STATE CONSTITUTIONS

Several State Constitutions in the United States specifically provide that "any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."[24] Such Constitutions therefore recognize that there are certain expressions that do not fall under the protective mantle of the guarantee of free expression, the utterance or publication of which shall constitute an abuse of such guarantee. Examples thereof are the publication of materials where corresponding penalties are attached.

2. RECORD OF THE 1986 CONSTITUTIONAL COMMISSION

The deliberations by the 1986 Philippine Constitutional Commission show that the framers of the present Constitution did not intend the exercise of said freedom to be unlimited. Commissioner Foz sought to introduce some amendments to the 1973 provision, explaining that these were directed towards a responsible exercise of the freedom of expression. He emphasized that this freedom is "not a value or an end by itself, but more importantly, [this freedom] has a social dimension."[25] Commissioner Bernas replied that the provision, as it stood in the 1935 and 1973 Constitutions has been the subject of extensive

[22] Edmond Cahn, *Justice Black and First Amendment Absolutes: A Public Interview*, N.Y.U.L. REV. 549, 552 (1962).

[23] ROCCO J. TRESOLINI, AMERICAN CONSTITUTIONAL LAW 412 (1959).

[24] To name a few: the Alabama, Arkansas, Kansas and New Jersey State Constitutions have provisions of identical or similar import.

[25] 1 RECORD 758.

jurisprudence as to its meaning and limitations. It certainly did not suggest that free speech was absolute. The amendment was then struck down as unnecessary since the reasons given by Commissioner Foz were already implicit in the existing provision.[26] Hence, the freedom of expression clause should be construed as the framers intended it to be so construed – as a freedom subject to limitations.

3. JURISPRUDENCE

a. United States Cases

Jurisprudence likewise strengthens the non-absolutist view of freedom of expression. In *Schenck v. U.S.*,[27] Justice Holmes stated what was to become a classic in First Amendment cases, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic."[28] The clear and present danger rule was thus born, prohibiting the utterance or publication of words of a certain nature which, when used under certain circumstances, create a clear and present danger that they will bring about the substantive evil that Congress has the right to prevent.[29]

Chaplinsky v. New Hampshire[30] was more specific insofar as it did not only provide a test to determine whether the expression was permissible, but it enumerated certain classes of speech which are not protected by the constitutional guarantee, to wit: the lewd and obscene, the profane, the libelous and the insulting. Whatever slight social value such forms of speech may have is far outweighed by considerations of public order and morality.[31] In the totality of ideas that compete in the market, these classes of speech are deemed to contribute practically nothing to the attainment of truth through public discussion.

Justice Frankfurter, in his concurrence in *Pennekamp v. Florida*, [32] emphasized that no institution in a democracy can have absolute power.

[26] *Id.*

[27] 249 U.S. 47 (1919).

[28] *Id.* at 52.

[29] *Id.*

[30] 86 L. Ed. 1031 (1842).

[31] *Id.* at 1035.

[32] 328 U.S. 33 (1946).

Freedom of the press should not be viewed as an end in itself but as a free society's means to an end.[33] *In Dennis v. U.S.*,[34] Justice Douglas, one of the foremost advocates of the First Amendment, stated in his dissent that although free speech occupies an exalted position in the hierarchy of rights, "there comes a time when even speech loses its constitutional immunity... Otherwise, free speech which is the strength of the Nation will be the cause of its destruction."[35] He therefore recognized that certain exceptions to the guarantee should be allowed under certain circumstances. However, he also stressed that free speech must always be the rule, and never the exception.

Bridges v. California,[36] a landmark decision on criticism of judicial conduct, also recognized that a privilege is not without conditions or exceptions; that the social policy that will prevail in many situations may run counter in others of a different social policy, as different interests compete for supremacy in different settings.

b. Philippine Cases

The Philippine Supreme Court has categorically stated that freedom of speech is not absolute and must be adjusted to and accommodated with the requirements of other equally important interests.[37] The balancing of interests test has been often used by the courts, where interests of varying nature and importance are weighed against each other; balance which is most appropriate under the circumstances is sought to be achieved. This test was formulated in recognition of the existence of the different social values necessary for the maintenance of an orderly society.

In *Gonzalez v. Commission on Elections*,[38] the Court similarly held that the realities of life in a complex society preclude an overly literal interpretation of the Constitutional provision prohibiting the passage of any law abridging the freedom of speech and of the press. The

[33] *Id.* at 354.

[34] 341 U.S. 494 (1950).

[35] *Id.*

[36] 314 U.S. 252 (1941).

[37] *Zaldivar v. Gonzalez*, 166 SCRA 316, 354 (1988).

[38] 27 SCRA 835 (1969).

freedom to express one's thought is limited by other interests in society which also demand recognition and protection.

4. STATUTORY LIMITATIONS

Philippine statutory law has provided for expressions excluded from the constitutional protection of freedom of speech. These exceptions are obscene, seditious and libelous expressions. This paper shall not discuss obscene materials, as they are not within the purview of the subject under study. A brief discussion of the elements of sedition and libel shall be made, as a working knowledge thereof is necessary to determine when criticism of public officials, public figures and judges fall beyond the realm of allowable expression.

a. Seditious Speech

Article 142 of the Revised Penal Code punishes:

> [A]ny person who, without taking any direct part in the crime of sedition, should incite others to the accomplishment of any of the acts which constitute sedition, by means of speeches, proclamations, writings, emblems, cartoons, banners, or other representations tending to the same end, or upon any person or persons who shall utter seditious words or speeches, write, publish, or circulate scurrilous libels against the Government of the Philippines, or any of the duly constituted authorities thereof, which tend to disturb or obstruct any lawful officer in executing the functions of his office, or which tend to instigate others to cabal and meet together for unlawful purposes, or which suggest or incite rebellious conspiracies or riots, or which lead or tend to stir up the people against the lawful authorities or to disturb the peace of the community, the safety and order of the Government, or who shall knowingly conceal such evil practices.

From Article 142, it may be gleaned that the elements of seditious speech are:[39]

1.) That the offender does not take direct part in the crime of sedition, that is, he does not participate in the public and tumultuous uprising against the government;

[39] 2 LUIS B. REYES, THE REVISED PENAL CODE 98 (1981).

2.) That he incites others to the accomplishment of any of the acts which constitute sedition;[40] and

3.) That the inciting is done by means of speeches, proclamations, writings, emblems, cartoons, banners, or other representations tending to the same end.

The State is not compelled to wait until the apprehended danger becomes certain, for then its right to protect itself would be simultaneous with the overthrow of the Government and there would be no prosecutors nor courts to enforce the law and punish the malefactors.[41] The State is thus given the power to avert a danger that threatens its very existence by the use of preventive measures.

The 1923 case of *Peo. v. Perez*[42] illustrated the application of the doctrines used during the American regime as regards seditious speech. Perez, a Filipino, uttered the following words against Governor-General Wood during a political discussion: "And the Filipinos, like myself, must use bolos for cutting off Wood's head for having recommended a bad thing for the Philippines." The Court convicted Perez for seditious speech as:

> The attack on the President passed the farthest bound of free speech and common decency... There is a seditious tendency in the words used, which could easily produce disaffection among the people and a state of feeling incompatible with a disposition to remain loyal to the Government and obedient to the laws.[43]

[40] The objects of sedition are:

1.) To prevent the promulgation or execution of any law or the holding of any popular election;

2.) To prevent the National Government, or any provincial or municipal government, or any public officer thereof from freely exercising its or his functions, or prevent the execution of any administrative order;

3.) To inflict any act of hate or revenge upon the person or property of any public officer or employee;

4.) To commit, for any political or social end, any act of hate or revenge against any private persons or any social class; and

5.) To despoil, for any political or social end, any person, municipality or provice, or the National Government of all its property or any part thereof.

[41] *Gitlow v. New York* 268 U.S. 652, 669-70 (1926).

[42] 45 Phil. 599 (1923).

[43] *Id.*

Justice Malcolm further stated that "the courts should be the first to stamp out the embers of insurrection. The fugitive flame of disloyalty, lighted by an irresponsible individual, must be dealt with firmly before it endangers the general peace."[44] The Court must have felt that a strict enforcement of the law on seditious speech was necessitated by the circumstances in view of the intense clamor for independence at that time. It considered the possibility that fiery statements such as those made by Perez might be acted upon by some over-zealous and misguided patriots.[45] The dangerous tendency rule, which requires only that the danger apprehended be envisioned, even if its occurrence is remote,[46] was used in the determination of liability. Subsequent cases[47] re-affirmed the application of the dangerous tendency test.

Peo. v. Espuelas[48] demonstrated the Court's intolerance of speech which tends to foment dissatisfaction and disloyalty towards the Government. Espuelas had his picture taken making it appear as if he were hanging lifeless at the end of a piece of rope suspended from a branch of a tree when he was, in fact, merely standing on a barrel. He sent copies of the pictures to several newspapers throughout the Philippines and even abroad and had them published together with an alleged suicide note. In said note, he attributed his suicide to the "dirty government of Roxas," now "infested with many Hitlers and Mussolinis."[49]

The Supreme Court considered the letter a "scurrilous libel against the Government which tends to produce dissatisfaction or a feeling incompatible with the disposition to remain loyal to the government."[50] Justice Tuason, however, dissented as he viewed the letter as harmless insofar as the safety of the Government and its officers is concerned and that it should have been ignored as a "grotesque stunt" of a man of an imbalanced mind.[51] He did not believe that the Filipinos could be deluded so easily by the fake suicide letter and photograph into rising up in arms. Justice Tuason appears to have been the lone believer

[44] *Id.* at 607.

[45] LORENZO TAÑADA & ENRIQUE FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 331 (1947).

[46] *Id.*

[47] 58 Phil. 573 (1933).

[48] 90 Phil. 524 (1951).

[49] *Id.* at 526.

[50] *Id.* at 527.

[51] *Id.* at 533.

among the members of the Court in the intelligence and discerning capacity of the Filipinos.

b. Libel

The second class of statutory exceptions to the freedom of speech clause pertains to libelous utterances and publications. Historically, libel law predated the concept of speech as a primary right. Mosaic Law, in the Eighth Commandment, provides: "Thou shalt not bear false witness against thy neighbor." The Law of Twelve Tables, enacted three hundred years after the founding of ancient Rome, mandated that any person who slanders another and injures the latter's reputation, shall be punished by beating with a club. An English book on libel was written and published more than three hundred years ago. In contrast, freedom of speech as a concept came about only during the eighteenth century.[52] This may be due to the fact that great importance has always been placed on a person's reputation and the power to injure said reputation has always existed even with ancient communities, while an independent judiciary strong enough to guard freedom of expression against adverse forces is comparatively recent.[53]

Reputation has been said to be at the heart of one's dignity, free expression, at the heart of a true democracy.[54] When these two interests clash, as they inevitably do, the State aims to strike a delicate balance such that the free flow of information is impeded as little as possible and the reputation of an individual is not unnecessarily exposed to unreasonable attacks. The law on libel seeks to achieve such a difficult balance.

The Revised Penal Code defines libel as "a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstances tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead."[55] The case of *Worcester v. Ocampo*,[56] one of the earliest cases on libel, demonstrated how certain expressions are removed from the constitutional protection of free

[52] Arthur B. Hanson, *The Right to Know: Fair Comment–Twentieth Century*, 12 VILL. L. REV. 751, 751 (1967).

[53] *Id.*

[54] 379 U.S. 64, 74-75 (1964).

[55] Revised Penal Code, Act. No. 3815, art. 353 (1932) [hereinafter Revised Penal Code].

[56] 22 Phil 42 (1912).

speech and free press.

Worcester, an American member of the Civil Commission of the Philippines and Secretary of the Interior, filed a complaint for libel based on several newspaper articles which attacked his honesty and integrity both as an official of the Government and as a private individual. He was referred to as a bird of prey, an owl, a vulture and a vampire that sucks the blood of hapless victims. One particularly insulting article attributed corrupt practices to him. Said article conducted with the statement that he had been found wanting as a high Government functionary, and was not fit to remain in office.[57]

The Court found the article libelous, as the statements therein were baseless, motivated by ill will and not supported by an iota of evidence. Special mention was made of the "peculiar circumstances obtaining in the Philippine Islands" where the minds, thoughts and opinions of the people are easily molded and the public is only too ready to believe derogatory statements against American officials, especially when made by a respected newspaper as that of the defendants'.[58] Whether such a rigid application of libel law in cases concerning criticism of public officials should still be made to apply in contemporary Philippine setting is, however, doubtful, as the public can no longer be termed "credulous" and there are no more foreign colonizers to bear the brunt of the attacks of a discontented people.

The Supreme Court also quoted with favor the decision of the lower court which stated that, "[t]he enjoyment of a private reputation is as much a constitutional right as the possession of life, liberty or property. It is one of those rights necessary to human society that underlie the whole scheme of human civilization."[59] Thus, the law recognizes the importance of this value and protects the person from unfounded imputations of fault. The learned trial judge even waxed poetic as he underscored the value of a good name over great riches.[60]

The recent case of *Daez v. Court of Appeals*[61] has set forth the elements of libel, which are: (1) imputation of a discreditable act or

[57] *Id.* at 69.

[58] *Id.* at 79.

[59] *Id.* at 73

[60] *Id.* To quote: "Who steals my purse steals trash; but he that filches from me my good name, robs me of that which not enriches him and makes me poor indeed."

[61] 191 SCRA 61 (1990).

condition to another; (2) publication of the imputation; (3) identity of the person defamed; and (4) existence of malice.[62] Said malice is known as "malice in law" which is presumed from every defamatory imputation. Article 354 of the Revised Penal Code states: "Every defamation is presumed to be malicious, even if it be true, if no good intention and justifiable motive for making it is shown, except in the following cases:

1. A private communication made by any person to another in the performance of any legal, moral, or social duty; and

2. A fair and true report, made in good faith, without any comments or remarks, of any judicial, legislative, or other official proceedings which are not of confidential nature, or of any statement, report, or speech delivered in said proceedings, or of any other act performed by public officers in the exercise of their functions."

In the two above-mentioned instances, malice is not presumed and the prosecution must prove malice in fact to convict an accused on a charge of libel involving a privileged communication. The determination of whether certain criticisms are qualifiedly privileged under Article 354 is very important as it determines which party has the burden of proof. Such burden of proof is crucial in libel actions as libel is a crime which is difficult to prove as well as to disprove. Hence, he who has the presumption of law in his favor has a considerable advantage over his opponent.

Certain communications, however, are absolutely privileged and are not actionable even if made with bad faith. This class of absolutely privileged communications is practically limited to legislative and judicial proceedings and other acts of the state[63]. This paper shall not dwell on such topic.

The exalted position of freedom of speech, despite the existence of libel laws, should always be remembered. This was emphasized by Justice Brennan when he said, "[W]hatever is added to the law of libel is taken from the field of free debate."[64]

[62] *Id.* at 67.

[63] REYES, *supra* note 39.

[64] *New York Times Co. v. Sullivan*, 376 U.S. 254, 272, (1964).

II. DEFAMATION OF PUBLIC OFFICIALS AND PUBLIC FIGURES

A. Public Officials

1. DEFINITION

Jurisprudence has established that ordinary rules on libel do not apply to public officials. Before a discussion of what rules do apply, it is first necessary to understand to which persons the term "public official" pertains. Article 203 of the Revised Penal Code provides the definition of a public officer. It states:

> Any person who, by direct provision of the law, popular election or appointment by competent authority, shall take part in the performance of public functions in the Government or shall perform in any of its branches public duties as an employee, agent, or subordinate official, of any rank or class, shall be deemed to be a public officer.

Although the definition is preceded by the phrase "[f]or the purpose of applying the provisions of this[65] and the preceding titles of this book" and defamation appears in a subsequent title,[66] the application of said definition in defamation cases is justified by jurisprudence which employed substantially similar definitions.

Rosenblatt v. Baer[67] stated that "the public official designation applies at the very least among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[68] The position must have such importance that the public is independently interested in the qualifications and actuations of the particular employee beyond the general public interest in the qualifications and actuations of all government employees.[69]

The plaintiff in this case, an appointed, county-employed supervisor of a recreation area, was held to fall within the definition of

[65] Revised Penal Code, Tittle VII.

[66] Revised Penal Code, Tittle XIII.

[67] 383 U.S. 75 (1966).

[68] *Id.* at 85.

[69] *Id.* at 86.

a public official. Justice Douglas concurred in the result despite his opinion that the definition was unnecessarily extended to persons who had no substantial participation in the formulation and execution of governmental policy. He suggested that, "[m]aybe the key man in a hierarchy is the night watchman responsible for thefts of secrets of states."[70]

Other examples of government employees adjudged to be public officials in the United States are law enforcement officials at almost every level, legislators, executive and judicial officers,[71] tax assessors and high school principals.[72] Some government employees who have very little responsibility in the implementation of governmental policy, such as a police informant and an appointed criminal defense lawyer, have been considered to be outside the definition.[73] Most lower courts have, however, extended the classification to include any government employee.[74] Public school teachers are considered as public officials in some states, and as public figures in others. Still other states consider them to be private individuals.[75] In *New York Times Co. v. Sullivan*,[76] the Court, in Footnote #23, stated that it did not see the need to determine how far down into the lower ranks of government employees the public official designation rule should extend. Neither did the Court specify categories of persons who would not be included within the designation.

In the Philippines, the term has been interpreted to include the members of the three branches of government--the executive, the legislative and the judiciary. Teachers are considered persons in authority for purposes of some provisions of the Revised Penal Code (e.g. in direct assault). However, the extension of this rule to defamation actions has not yet been tested.

[70] *Id.* at 88.

[71] Judy D. Lynch, *Public Officials, the Press, and the Libel Remedy: Toward a Theory of Absolute Immunity*, 67 OR. L. REV. 612, 615 (1988).

[72] BARRON, *supra* note 15, at 274.

[73] LYNCH, *supra* note 71, 615.

[74] BARRON, *supra* note 15, at 274.

[75] Peter S. Cane, *Defamation of Teachers: Behind the Times?*, 56 FORDHAM L. REV. 1191, 1192 (1988).

[76] 376 U.S. 254 (1964).

2. SCOPE OF ALLOWABLE CRITICISM

After discussing who may be the object of criticism, an examination of what may be the subject thereof should follow. Both Philippine and American cases have addressed the protection of criticism directed at the official conduct of public officers. The case of *U.S. v. Bustos*[77] stated that:

> Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom... A public officer must not be too thin-skinned with reference to comments upon his official acts. Only thus can the intelligence and dignity of the individual be exalted.[78]

Mr. Webster, quoting Justice Johnson in *United States v. Perfecto and Mendoza,*[79] stated, "[I]t is the ancient and constitutional right of our people to judge public matters and public men. It is such a self-evident right as the right to breathe the air and to walk on the surface of the earth... "[80] The development of an informed public opinion so essential to a democracy requires that citizens who have the courage to denounce the maladministration of public affairs be not prosecuted.

The Court even stressed that a high official position, instead of giving protection against libelous charges, may be regarded as making the [official's] character "free plunder for any one who desires to create a sensation by attacking it." A democratic system of government does not afford public officials any official halo which insulates them from criticisms and punishes those who dare make such criticisms. If the criticisms annoy the officials, they must objectively examine the propriety of the act complained of and determine whether there is legitimate cause for the grievance, instead of penalizing the critic for voicing his thoughts.

In *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc.,*[81] the Supreme Court stated that "freedom of

[77] 37 Phil. 731 (1918).

[78] *Id.* at 740-41.

[79] 43 Phil. 58 (1922).

[80] *Id.* at 63.

[81] 51 SCRA 189 (1973).

speech is absolute when directed against public officials."[82] This is because comments on their conduct make possible the discipline of abusive public officials. Without the "illuminating light" of the citizens' criticisms and comments, it is highly probable that the excesses of official action will continue and remain unpunished.

a. New York Times: *The Actual Malice Standard*

Present American law on criticism of public officials was radically influenced by the landmark decision of *New York Times Co. v. Sullivan.*[83] Prior to such case, the "fair comment" privilege generally protected comments on matters of public concern, including the conduct and qualifications of public officials. However, said privilege was limited to opinions, criticisms and comments and was ordinarily held not to include false statements of facts made in good faith.

There existed, however, a minority view that asserted protection even for false statements of facts if made for the public benefit and with honest belief in their truthfulness.[84] This minority view was adopted by the United States Supreme Court in *New York Times.* A discussion of the facts and the rulings of the case illustrate the extent of the protection given to criticisms of public officials which are later proven to be false.

A full page advertisement entitled "Heed Their Rising Voices" was published in the New York Times at the instance of four black Alabama clergymen. It alleged that Southern Negro students engaged in non-violent demonstrations were being met by an unprecedented wave of terror by persons who did not believe in the guarantees set forth in the Constitution. Certain parts of the text imputed illegal acts to the Montgomery, Alabama police force over which respondent Sullivan exercised supervision as an elected Commissioner. The advertisement stated that after the students sang a patriotic hymn on the State Capitol steps in protest against said terrorism, their leaders were expelled from school and truckloads of policemen equipped with shot-guns and tear gas surrounded the Alabama State College campus. As a protest against such abuses, the entire student body refused to re-register. The school's

[82] *Id.* at 203.

[83] 376 U.S. 254 (1964).

[84] Todd S. Swatsler, *The Evolution of the Public Figure Doctrine in Defamation Actions,* 41 OHIO ST. L. J. 1009, 1013 (1980).

dining hall was thereafter padlocked by authorities to starve the students into submission.

The advertisement likewise claimed that Dr. Martin Luther King has been the subject of various acts of intimidation and violence. His home was bombed, almost killing his wife and his child. He was assaulted and arrested seven times for minor offenses and charged for perjury. Sullivan claimed that the ringing of the campus, the padlocking of the dining hall, the arrest of King and the other acts of harassment were blamed on the police and hence, on him as the Supervisor of the Police Department.

It has been unquestionably proven that several of the statements complained of contained glaringly inaccurate representations of what really transpired. A number of students were indeed expelled from school not because of the demonstration, but for a different reason. Not the entire studentry refused to re-register, although the majority decided to boycott classes for one day. The dining hall was not padlocked as claimed. The police never ringed the campus and at no time were they called because of the demonstration on the State Capitol steps. Dr. King had been arrested four times only and not seven, as claimed. The alleged assault against him was not proven. Sullivan thus brought a civil action for libel and was awarded damages by the Circuit Court of Montgomery County. The Alabama Supreme Court affirmed the decision while the United States Supreme Court reversed.

Justice Brennan began his *ponencia* by stating the reasons that underlie freedom of expression. These reasons have been referred to earlier in this paper as the marketplace of ideas theory and the encouragement of the citizen-critic of the government.[85] He said that "debate on public issues should be uninhibited, robust and wide open and... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[86] He correctly identified the issue in the case as whether the constitutional protection extends to false statements of facts regarding the conduct or qualifications of public men.

Several justifications for the extension of the protection to false factual statements followed, to wit: that exaggerations, villifications,

[85] *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

[86] *Id.* at 270.

and even false statements are sometimes inevitable to persuade others to one's own point of view;[87] that erroneous statements must be protected if the freedoms of expression are to have the "breathing space" for their survival;[88] that public officials must be men of strength and character, "able to thrive in a hardy climate"[89] and should not immediately run to the courts at the first sign of criticism; that public interest demands a full discussion of the conduct of public officials and candidates for political office to enable the voters to cast their ballots more intelligently;[90] and that citizen-critics should be given the fair equivalent of the immunity enjoyed by public servants as to utterances made by the latter within the outer perimeter of their duties.[91] Justice Brennan also asserted that to require the critic of official conduct to guarantee the truth of all his factual statements would amount to self censorship, such that the prospective critic would often choose not to say anything at all for fear of the enormous expense and inconvenience that accompany a defamation suit. Public debate is therefore dampened and speech, including those which are not false, deterred.[92]

He enunciated the famous *New York Times* rule that for a public official to recover damages for a defamatory falsehood concerning his official conduct, he must prove "actual malice", meaning, the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.[93] Said proof is very difficult to establish, as it involves the state of the mind of the defendant. The presumption of malice in law is defeated and the burden of proof, which is so crucial in libel actions, shifts to the public person-plaintiff who is required to demonstrate with "convincing clarity" the "knowing falsehood" or "reckless disregard for truth or falsity".[94] The fact that the Times had information in its own files which negated several of the claims of the advertisement was held to be insufficient proof of "reckless disregard".

[87] *Id.*

[88] *Id.* at 272.

[89] *Id.* at 273.

[90] *Id.* at 281.

[91] *Id.* at 282.

[92] *Id.* at 279.

[93] *Id.* at 279-80.

[94] DONALD M. GILLMOR, POWER, PUBLICITY AND THE ABUSE OF LIBEL LAW 13 (1992).

In the later case of *St. Amant v. Thomson*,[95] the Court further elucidated on the meaning of reckless disregard. It stated:

> There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice.[96]

Publications based wholly on an unverified anonymous telephone call, or on information given by a source whose credibility is to be seriously doubted, or those which are so obviously improbable, are examples of instances when the actual malice standard is satisfied.[97]

b. The Actual Malice Standard in Philippine Jurisprudence

As early as 1969, the Philippine Supreme Court has referred to the case of *New York Times* in its own decisions.[98] However, the applicability of the standard for actual malice in this jurisdiction remains unsettled, as no definite adoption of said standard has been made despite references thereto.

Lopez v. CA[99] contained a discussion of the *New York Times* actual malice standard and the reasons which support it. The case involved the publication in the weekly magazine of the Manila Chronicle of the pictures of Fidel G. Cruz, who was labelled as being responsible for the hoax of the year. It turned out that a different Fidel Cruz was being referred to. The pictures of both men, on file in the publisher's library, were mistakenly switched during the publication process. As soon as the error became known, the corresponding correction and apology were promptly made. Fidel G. Cruz brought an action to recover damages based on the defamatory character of the picture. Both the trial court and the Court of Appeals awarded actual and moral damages.

The Supreme Court, on review, discussed both Philippine and American cases to "underscore the primacy that freedom of the press enjoys".[100] *New York Times* was extensively quoted, making it appear

[95] 390 U.S. 727 (1968)

[96] *Id.* at 731.

[97] *Id.* at 732.

[98] *Gonzalez v. COMELEC*, 27 SCRA 835 (1969).

[99] 34 SCRA 116 (1970).

[100] *Id.* at 127.

that the doctrine stated therein applied with equal force in this jurisdiction. However, an examination of the result of the case negates the adoption of said doctrine. The publisher was held liable for damages when only "excusable negligence," which eliminates any actual malice to cause injury, was established. Justice Dizon proposed in his dissenting opinion that the case be resolved in the light of *New York Times* and the actual malice standard as defined therein be applied.[101]

The decision likewise emphasized that "there was no pressure of a daily deadline to meet, no occasion to act with haste as the picture of respondent was published in a weekly magazine".[102] *Quisumbing v. Lopez*[103] was thus not applicable, as it involved a daily newspaper. The Supreme Court stated in this case:

> The newspapers should be given such leeway and tolerance as to enable them to courageously and effectively perform their important role in our democracy. In the preparation of stories, press reporters and editors usually have to race with their deadlines, and consistently with good faith and reasonable care, they should not be held to account, to a point of suppression, for honest mistakes or imperfections in the choice of words.[104]

It is submitted that the Court's justification for the award of damages, which is the difference in terms of pressure and reasonableness in the verification of reports between a daily newspaper and a daily publication, hardly satisfies the actual malice standard. In *New York Times*, the fact that The Times had information in its own files which effectively disproved the contents of the publication was held insufficient to constitute actual malice. Hence, the *Lopez* decision, while expounding on the *New York Times* rule, creates more questions than answers as to its applicability in Philippine case law.

The case of *Beltran v. Makasiar*, now pending before the appellate court, would probably resolve once and for all the issue of whether or not the *New York Times* rule may be considered doctrinal in the Philippines. Columnist Beltran and his publisher Soliven were convicted of libel by Judge Makasiar for a statement in the former's column that "during the August 28 coup attempt, the President hid

[101] *Id.* at 129.

[102] *Id.* at 128.

[103] 96 Phil. 510 (1955).

[104] *Id.* at 514-15.

under her bed while the firing was going on – perhaps the first Commander-in-chief of the Armed Forces to have to do so."[105]

The Supreme Court has denied the motion to quash filed separately by Beltran and Soliven. It squarely rejected the Beltran's claim that the provisions of the Revised Penal Code penalizing libel are unconstitutional for being violative of the guarantee of the freedom of the press and of the right of the people to information on matters of public interest. It held that "freedom of speech and of the press is not absolute and may be subject to limitation."[106]

c. Official Conduct

1.) PHILIPPINE INTERPRETATION OF OFFICIAL CONDUCT

The definition of "official conduct" as provided in *New York Times* is, however, not clear. In *U.S. v. Sedano*[107] the Philippine Supreme Court called for a broad license to criticize and comment on the mental, moral and physical fitness of a candidate for office to enable voters to make an informed judgment. However, the Court was quick to point out that such criticisms should be limited to fair comment.[108] In the same vein, *U.S. v. Contreras*[109] stated that:

> The law does not permit men falsely to impeach the motives, attack the honesty, blacken the virtue, or injure the reputation of a public official. They may destroy, by fair means or foul, the whole fabric of his statesmanship, but the law does not permit them to attack the man himself. They may falsely charge that his policies are bad, but they may not falsely charge that he is bad.[110]

Fr. Joaquin Bernas has made an insightful analysis of the Court's decision in the preceeding two cases.[111] He observed that the Court divided the area of a public official's life into three compartments: (1) his official acts; (2) his mental, moral and physical fitness for office;

[105] Resolution of the Supreme Court *En Banc* dated September 28, 1989, at 1.

[106] *Id.* at 3.

[107] 14 Phil. 338 (1909).

[108] *Id.* at 341.

[109] 23 Phil. 513 (1912).

[110] *Id.* at 516.

[111] BERNAS, *supra* note 13 at 180.

and (3) his strictly private life. His official acts maybe criticized "through fair means or foul."[112] Criticism of his mental, moral and physical fitness for office is protected only when it constitutes fair comment, or that "which is true or, if false, expresses the true opinion of the author, such opinion having been formed with a reasonable degree of care and on reasonable grounds."[113] Good faith is therefore a defense in such an instance. Lastly, when the criticism refers to the official's strictly private life, the defamation is not protected and the ordinary rules on libel apply.[114]

2.) AMERICAN EXTENSION OF CRITICISM OF OFFFICIAL CONDUCT

American courts have had more opportunity to discuss the extent of allowable criticism. In *Coleman v. MacLennan*,[115] the Court held that:

> [A public official or] a candidate for public office must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office... it should be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles.[116]

Hence, a person who leads an honorable private life would in all probability, better serve the community than someone who could not even manage to keep his personal affairs in order.

In *Monitor Patriot Co. et. al. v. Roy*[117] and *Ocala Star-Banner et. al. v. Damron*,[118] the United States Supreme Court extended the application of the *New York Times* rule to criticisms of acts that do not strictly pertain to "official conduct." The *Monitor Patriot* case involved an alleged defamatory statement against a candidate for the United States Senate in a primary election. Three days before the election, the defendant published an article which described the plaintiff as a "former small-time bootlegger," as a result of which the latter instituted an action for libel.

[112] *U.S. v. Contreras*, 23 Phil. 513, 516 (1912).

[113] *U.S. v. Sedano*, 14 Phil. 338, 342 (1909).

[114] BERNAS, *supra* note 13 at 180.

[115] 98 Pac. 281 (1908).

[116] *Id.* at 291.

[117] 401 U.S. 265 (1971).

[118] 401 U.S. 295 (1971).

The trial judge instructed the jury that the plaintiff was a public official by virtue of his candidacy. However, the application of the stringent *New York Times* actual malice standard would depend on whether the publication may be characterized as referring to "official conduct" and relating to the plaintiff's fitness for office. If the publication was not relevant to his fitness for office and was a mere exposure of his long forgotten misconduct, then the ordinary libel rules shall apply. The jury considered the publication as referring to a matter of private concern and awarded a verdict for the plaintiff. This was affirmed by the New Hampshire Supreme Court.

The United States Supreme Court reversed and held that "a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the knowing falsehood or reckless disregard rule of *New York Times Co. v. Sullivan.*"[119] The Court observed that few personal characteristics are more germane to fitness for office than dishonesty, malfeasance or improper motivation. Hence, a candidate who lays before the voters every aspect of his public and private life which he thinks may help persuade voters to his cause may not complain when an attempt is made to demonstrate that his record is not as unblemished as he set it out to be.[120] This case sent a warning signal to persons aspiring for political office that everything but the most minor of their past misdeeds may be the subject of investigation and discussion by the public and the press.

Ocala Star-Banner Co. et. al. v. Damron,[121] decided on the same day as *Monitor Patriot,* involved a city mayor who was a candidate for the position of tax assessor when the alleged defamatory story was published. The article claimed that the plaintiff had been charged with perjury in a pending civil rights case. It was proven that no such charge existed, although the allegation was substantially true as to his brother James.

The trial judge instructed the jury that the statement was libelous *per se* and that the only task left for them was the determination of the amount of damages. He also said that the actual malice standard for public officials in *New York Times* did not apply as the article did

[119] 401 U.S. 265, 277 (1971).

[120] *Id.* at 274.

[121] 401 U.S. 295 (1971).

not relate to the public offices held or sought by the plaintiff. Damages were accordingly awarded. The Florida District Court of Appeal affirmed on the ground that the plaintiff's official conduct was not the basis of the inaccurate imputations.

The United States Supreme Court reversed and referred to its ruling in *Monitor Patriot.* It stated that public discussion about the character and qualifications of a candidate for public office should be considered as relating to official conduct, as public interest would be promoted thereby. The argument that a perjury charge did not concern the public offices occupied or sought by the plaintiff was thus rejected by the Court.

It is evident that in American cases involving situations where it is unclear whether the imputed acts refer to a public officer's private life, the Court often includes criticisms of such acts within the actual malice standard. A 1949 law review article[122] that has been often quoted by authorities and even by the United States Supreme Court states that: "[A] man's private character often will be of public significance, as indicating characteristics incompatible with the proper discharge of his public duties."

The author of the aforementioned article submits that the fact that a man has been dishonest in handling other people's money would surely bear upon his fitness for an office involving the custody of public funds. Illicit sex affairs may distract a public officer from the unhampered discharge of his functions and make him vulnerable to corruption as he would need resources to maintain such affairs.[123] The author therefore proposed that considerable latitude be allowed in criticism relating to the "private character" of the public official. The proposition is logical, as the citizenry usually prefers and actually expects its leaders to lead honest and decent lives and serve as examples to the community at large.

[122] Dix W. Noel, *Defamation of Public Officers and Candidates,* 49 COLUM L. REV. 876 (1949).

[123] *Id.* at 887 - 88.

3. RATIONALE FOR THE CLASSIFICATION OF PUBLIC OFFICIALS

The following reasons have been given for the classification of public officials:

a. Republican and Democratic State

Article II, Section 1 of the 1987 Constitution provides that "sovereignty resides in the people and all government authority emanates from them." Hence, the people are expected to share their opinions regarding how government is being run or how it should be run. Moreover, the government is not the master of the people, but their servant, and public officers may well listen and learn from those whom they serve. The right to demand exemplary conduct and efficiency from public officials is thus a necessary consequence of a republican and democratic state.

b. Reciprocal Immunity

Another reason for the classification given in American jurisprudence is the doctrine of reciprocal immunity. It provides that public servants would have an unjustified preference over the public if the latter did not have an immunity parallel to that granted to the former in libel actions for utterances made "within the outer perimeter of [the public officials'] duties."[124]

Barr v. Mateo [125] laid down the rule that most high- ranking officials are immune to libel claims stemming from statements made by them in their official capacity, as they should be free to perform their duties unhampered by damage suits.[126] In *New York Times*, the Court recognized certain distinctions laid down by states as to the quality of the immunity. Top ranking officers are accorded absolute immunity for statements made in connection with the performance of official duty, while lesser officials enjoy qualified immunity for statements made without actual malice. In the same case, however, no distinction was made as to libel suits filed by high-ranking officials and those in the lower ranks. In setting forth the rule on immunity of public officials in general, reliance was made on the fact that judges enjoy

[124] *Id.* at 283.

[125] 360 U.S. 564 (1959).

[126] *Id.* at 571.

immunity for statements made during judicial proceedings and an analogous application thereof to other public officials did not appear unjustified.[127]

c. Access to the Media

Still another reason given for the classification is that public officials enjoy substantial access to media and have ample opportunity to disprove false claims against them. The United States Supreme Court said that the greater risk of defamation attendant upon their office is balanced by the increased access to media which they have.[128] The case of *Gertz v. Welch*,[129] although relating to a public figure, squarely referred to this justification when the Court declared that:

> The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.[130]

However, not all public officials equally enjoy substantial access to media. The rebuttal of some minor officials who are embraced by the public official designation would certainly not be given the same importance as that of a public official having national prominence. Moreover, responses made by public officials may not be considered "hot news" anymore and may be relegated to the inside or back pages of publications as obscure articles, particularly considering the propensity of media to stand behind its original commentary.[131] Even assuming that considerable media attention is given to the rebuttal, it may not be able to completely salve the injury caused, its effect being limited in all likelihood to lessening the harm done. It has never been held by any court that mere access to the means of counter-argument bars the injured party from instituting a libel suit.[132]

[127] John F. Handler & William A. Klein. *The Defense of Privilege in Defamation Suits Against Government Executive Officials.* 74 HARV. L. REV. 44, 47 (1960).

[128] *Curtis Publishing v. Butts*, 388 U.S. 130, 155 (1967).

[129] 418 U.S. 323 (1974).

[130] *Id.* at 344.

[131] LYNCH, *supra* note 71, 641.

[132] *Id.*

d. Assumption of Risk

A fourth reason for the classification is the argument that public officials voluntarily assume the risks of defamation upon their assumption of office.[133] Public men must be "of sufficiently strong moral fiber to be able to take it and to dish it out in reply, instead of running to the courts for protection."[134] They are aware that because of the responsibilities and privileges of their office, their activities are often subject to the scrutiny of the public.

Despite some flaws in the arguments justifying the classification, such reasons, when considered with each other, particularly the guarantee of free speech and the need for a full discussion of public affairs, give solid support for the classification.

B. Public Figures

1. DEFINITION AND RATIONALE

The United States Supreme Court has extended the application of the actual malice standard rule to persons who have been designated as "public figures." *Walker v. Courier-Journal and Louisville Times Co.*[135] justified said extension by referring to the landmark case of *New York Times* which quoted with approval the ruling in *Coleman v. MacLennan*:[136] "This privilege extends to a great variety of subjects and includes matters of public concern, *public men* and candidates for office."

Footnote # 23 of *New York Times* likewise stated that the Court did not find it necessary to specify categories of persons who would or would not be included within the public official designation.[137] The Judge thus contended that said footnote would have been superfluous if the Court intended all along to limit the application of the actual malice standard to public officials only. However, the Judge may have overlooked another possible interpretation. The footnote may also be interpreted as limited only to the different levels of public employees, and not to public figures at all.

[133] *Gertz v. Welch* 418 U.S. 323, 345 (1974).

[134] Noel, *supra* note 122, 878.

[135] 246 F. Supp. 231 (1965).

[136] 98 Pac. 281 (1908).

[137] 376 U.S. 254, 282 (1964).

The Judge also looked into the rationale behind the classification of public officials and concluded that public debate cannot be "uninhibited, robust, and wide-open"[138] if the media were to be too careful in reporting about the conduct of persons of prominence and influence who have involved themselves in matters of public concern. Since the spirit behind the classification of public officials applies equally to "public figures", said classification should likewise be extended to the latter. He thus argued that the *New York Times* decision impliedly recognized that the actual malice standard must be extended to other categories of persons involved in public debate or matters of public concern.

The plaintiff was declared to be a public figure as the latter was, by his own admission, a man of political prominence. Walker was a former Army General and candidate for governor. He made vigorous public statements in the past and was involved in controversies regarding the problems of racial segregation. A person like him who attempts to use his position to convince other people to believe in his cause must be ready to accept the errors in reporting that would probably result.

The difficulty in defining what a public figure is has led one court to state: "Defining public figures is much like trying to nail a jellyfish to the wall."[139] However, this difficulty has not deterred the courts from attempting to arrive at a satisfactory definition and explanation of the term.

The twin cases of *Curtis Publishing Co. v. Butts and Associated Press v. Walker*[140] provided guides by which a person could become a public figure, namely, either by a position or status alone or by thrusting one's personality into the vortex of an important public controversy.[141] On the other hand, the case of *Pauling v. National Review, Inc.*[142] stated that a person becomes a public figure when, by his own conduct, he is involved in matters of the greatest and most widespread importance.[143]

[138] *Id.* at 270.

[139] *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (1976).

[140] 388 U.S. 130 (1967).

[141] *Id.* at 155.

[142] 269 NYS 2d 11 (1966).

[143] *Id.* at 18.

The Philippine Supreme Court defined a public figure in the case of *Ayer Production Pty., Ltd. v. Capulong*.[144] It stated:

> A public figure... [is] a person who, by his accomplishments, fame, or mode of living or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a public personage... It includes... anyone who has arrived at a position where public attention is focused upon him as a person.[145]

The Court also quoted with favor the three reasons given by Professors Prosser and Keeton as to why public figures are deemed to have lost, to some extent, their right to privacy. These are: (1) the public figure had sought publicity and had consented to it, and had therefore assumed the risks of defamation; (2) the public figure and his activities had already become public; and (3) discussion of legitimate matters of public interest should be promoted.[146]

2. THE EVOLUTION OF THE PUBLIC FIGURE DOCTRINE IN AMERICAN JURISPRUDENCE

The first major case involving a public figure after the promulgation of *New York Times Co. v. Sullivan*[147] was *Time, Inc. v. Hill*.[148] The plaintiff Hill alleged that an article falsely reported that a new play portrayed the experience suffered by him and his family while being held hostage by three escaped convicts years ago. The publisher raised the defense that the article was "a subject of legitimate news interest of value and concern to the public" and that it was published in good faith. The hostage incident had involuntarily thrust Hill and his family into the spotlight and they had already been the subjects of several front-page articles prior to the publication in question. The jury returned a verdict for Hill. The New York Court of Appeals affirmed.

The United States Supreme Court reversed the decision on the ground that the jury should have been instructed that an award of damages could be predicated only on a finding of knowing or reckless

[144] 160 SCRA 861 (1988).

[145] *Id.* at 874.

[146] James B. Naughton, *Gertz and the Public Figure Doctrine Revisited*, 54 TUL L. REV. 1053, 1076-1077 (1980).

[147] 376 U.S. 254 (1961).

[148] 385 U.S. 379 (1967).

falsity in the publication of the article.[149] The Court, in effect, extended the actual malice standard to Hill, who had become a public figure through circumstances not of his own choice. It is noted, however, that the Court did not at any time call Hill a public figure nor did it make a categorical statement extending the New York Times rule to persons who are not public officials. It merely stated that its decision was reached "upon consideration of the factors which arise in the particular context of the New York statute involving private individuals."[150] It is unfortunate that the exact meaning of this statement insofar as the public figure doctrine is concerned was not further clarified.

In support of the decision, the Court stated that the constitutional guarantees of free speech and free press are not limited alone to political expressions or comments about public affairs but must instead embrace "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

The opening of a new play linked to an actual incident such as the one at bar was considered a matter of "public interest" within the scope of the *New York Times* standard.[151] The Court also added that the fact that books, newspapers and magazines are published for profit does not exclude them from the protection of the First Amendment.[152]

a. BUTTS *and* WALKER: *Plaintiff's Status as Basis*

After the promulgation of *Hill*, the Supreme Court squarely confronted the issue of whether the actual malice standard should be extended to public figures in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.[153] Justice Harlan began the decision by recognizing that the sweep of the *New York Times* rule was a question that was expressly reserved in that case.[154] Because of the absence of a definite rule on the coverage of the *New York Times* standard, state and lower federal courts have been promulgating inconsistent

[149] *Id.* at 397.

[150] *Id.* at 390-91.

[151] *Id.* at 388.

[152] *Id.* at 397.

[153] 388 U.S. 130 (1967).

[154] 76 U.S. 254, 283, n. 23 (1964).

decisions.[155] The Court thus saw the need to resolve the ambiguity once and for all.

The first case arose from an article entitled "The Story of a College Football Fix" which accused Butts, the athletic director of the University of Georgia, of disclosing Georgia's plays and defensive patterns to the rival coach in a telephone conversation one week prior to the game. Butts was employed not by the University of Georgia, a state university, but by the Georgia Athletic Association, a private corporation. Hence, he may not be considered a public official. The source of the article was Burnett, who had accidentally overheard the conversation through an electronic error.

The evidence presented supported Butts' claim that the conversation had been "general football talk" and an examination of Burnett's notes showed that nothing of particular value was divulged to the opponent's coach. The jury held for Butts. Soon thereafter, the *New York Times* decision was promulgated, prompting the publisher to move for a new trial. The judge denied the motion on the ground that Butts was not a public official and even assuming that he were, there was sufficient evidence to support a finding of "reckless disregard" of the truth or falsity of the article. His decision was affirmed on appeal.

The second case involved the distribution of a news dispatch of an eyewitness account of a riot in the University of Mississippi. The riot was the result of federal intervention in the enforcement of a court decree mandating the enrollment of a Negro as a student in said University. The dispatch stated that Walker, a retired United States Army officer who was extensively involved in political activity regarding racial integration, had encouraged the rioters to employ violence and had personally led a charge against federal officers.

Walker claimed that, on the contrary, he advocated peaceful protest and did not control the crowd which later engaged in violence. He also denied attacking federal officers. The jury awarded compensatory and punitive damages. The trial judge deleted the award for punitive damages as he found no actual malice accompanied the publication. He added that were the *New York Times* rule applicable, Associated Press would have won the suit. However, he said the rule was not applicable, as "there were no compelling reasons of public policy requiring

[155] *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 134 (1967).

additional defenses to suits for libel."[156] The appellate court affirmed the decision and stated without elaboration that the doctrine in *New York Times* was inapplicable.

The United States Supreme Court held that the public interest in the circulation of the articles in these two cases was not less than that involved in *New York Times*. Both complainants commanded a considerable amount of public interest at the time the articles were published and had sufficient access to channels for counter arguments.[157] Butts became a public figure by reason of his position alone while Walker became one by his high-profile activities which thrust him into the vortex of an important public controversy, that is, racial integration through federal intervention.[158] Justice Harlan then stated the doctrine that was to govern a public figure's recovery of damages for defamatory false statements. To recover, the public figure-plaintiff must show on the media-defendant's part such "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[159] Libel actions instituted by public figures cannot be left entirely to state laws, unrestricted by constitutional safeguards.

On the other hand, the stringent federal standards set forth in *New York Times* are not the only proper accommodation of the conflicting interests of the right to the free flow of information and the right to privacy. The "unreasonable conduct test" thus fashioned out may be considered as a middle ground between the presumed malice standard for private individual-plaintiffs and the actual malice standard for public officials.

Justice Warren, in his concurrence, opined that no distinction should be made between public officials and public figures, considering the blurred distinctions between the functions of governmental and private sectors at present. He therefore called for the total extension of the *New York Times* rule to public figures. Justices Black and Douglas dissented and recommended the abandonment of the *New York Times*

[156] *Id.* at 142.

[157] *Id.* at 154.

[158] *Id.* at 155.

[159] *Id.*

doctrine altogether on the ground that the First Amendment intended to leave the press free from the harassment of libel suits.[160]

After applying the "unreasonable conduct test" to the cases at bar, the plurality of the Court found that the said test was satisfied in the case of Butts but not in the case of Walker. The following reasons supported a judgment against Curtis Publishing. First, the story was in no case "hot news", in the sense that if it was not published immediately it would not have been "stale". Second, the Post knew that the source of their information was on probation for charges of issuing bad checks, yet they did not bother to verify his version of the story despite a strong indication of his unreliability. Third, Burnett's notes, which any person well-versed in football would understand as "general football talk," was not examined by the Post at all. The writer assigned to the story was not knowledgeable in the sport and yet no efforts were made to consult an expert on the subject. These circumstances, together with the Post's recent avowed promise to change its image by instituting a policy of "sophisticated muckracking", led the Court to declare that the "unreasonable conduct standard" had been met.

Justice Warren considered the conduct of the Post as amounting to a reckless disregard for the truth, and hence, upheld the award of damages using the actual malice standard set forth in *New York Times*.

A different conclusion was reached in *Associated Press v. Walker*,[161] since the dispatch involved news which required immediate dissemination.[162] Considering that time was of the essence, no unreasonable departure from the usual standards of investigation may be imputed to the appellant.

An examination of the "unreasonable conduct rule" and the "reckless disregard for the truth rule" reveals that both standards require the same amount of gross negligence to support a conviction for libel. Hence, despite Justice Harlan's different nomenclatures for the two tests and his distinction between a public official and a public figure, the same conclusion would nonetheless result in the application of both rules.

[160] *Id.* at 170-71.

[161] 388 U.S. 130 (1967).

[162] *Id.* at 158.

b. Rosenbloom: *The Public Interest*

In *Rosenbloom v. Metromedia, Inc.*,[163] the Supreme Court employed yet another test in determining the applicability of the *New York Times* rule. The plaintiff herein was described in a news broadcast as a "girlie book peddler" engaged in the "smut literature racket". He was neither a public official nor a public figure, as per definition in the *Butts-Walker* cases. However, the Court shifted its attention from his private status and concentrated instead on the nature of the alleged defamatory statment. Justice Brennan commented:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved.... The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonimity or notoriety.[164]

The "public interest" doctrine was thus born, extending the constitutional protection afforded by the *New York Times* actual malice standard to all discussions involving matters of public or general concern, regardless of whether the participants in the controversy were famous or anonymous. In practice, however, public interest soon became synonymous to "newsworthy", which the press readily defined as anything it published. Hence, the *Rosenbloom* doctrine appeared to be a step towards an absolute defense of the media in libel actions, as public interest was somewhat all-encompassing. This has unwittingly allowed the press, instead of the judiciary, to determine the nature of the defamatory statement.[165]

c. GERTZ: *A Return to Plaintiff's Status*

The mandatory public interest doctrine was rejected by the Court three years later in *Gertz v. Welch*.[166] The plaintiff Gertz was a lawyer in a celebrated civil action for the murder of a young boy. A magazine labelled him as a "Leninist" and a "communist fronter" and claimed that he used to occupy a high position in the "Marxist League for Industrial Democracy". In the libel suit filed by him, the trial court

[163] 403 U.S. 29 (1971).

[164] *Id.* at 43-44.

[165] Naughton, *supra* note 146, 1066.

[166] 418 U.S. 323 (1974).

ruled that the actual malice standard should apply as this involved the discussion of a public issue, pursuant to the doctrine laid down in *Rosenbloom*.

The Supreme Court rejected the command of the *Rosenbloom* decision, and returned to a standard based on the plaintiff's status. Hence, public figures are still subject to the *New York Times* rule, but private individuals may now recover damages without proving actual malice, although the defamation may refer to a matter of public interest. The states were thus given the discretion to formulate their own standard of liability when the private person-plaintiff sues on a publication concerning matters of public interest.

The Court also distinguished between a "general" and "limited" public figure. The general public figure is one who is a virtual household name in the community and is extensively involved in the affairs of society. These are usually media personalities who are constantly exposed to media attention.[167] On the other hand, the limited public figure is a person who has attempted to shape public opinion in a particular controversy.[168] The former shall be considered a public figure for all purposes, while the latter shall be a public figure for a limited range of issues only and shall remain a private person as to other matters.

The Court thereafter proceeded to declare Gertz a private individual not subject to the *New York Times* rule, as he was not a household name in the community and neither had he attempted to influence public opinion as he had consistently avoided publicity during the trial.

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d. Firestone, Hutchinson and Wolston: *Voluntary Participation in a Significant Public Controversy*

Times, Inc. v. Firestone[169] sought to further clarify the definition of a public figure. The plaintiff, who was married to a member of one of the country's prominent industrial families, was in the midst of a contested divorce when Time mistakenly reported that the court found her guilty of adultery. Time argued that since she was a

[167] BARRON, *supra* note 15 at 279.

[168] *Id.* at 345, 351.

[169] 424 U.S. 448 (1976).

well-known member of society who had even called several press conferences during the trial and the divorce had attracted nationwide media coverage, she was a public figure subject to the actual malice standard.

The Court rejected this contention and held that she was not a general public figure as she was not especially prominent in society. Neither was she a limited public figure as she did not voluntarily thrust herself into a public controversy with the view of influencing public opinion.[170] She was a litigant in a divorce suit, hence, she attempted to resolve her problems through the courts[171] and not through public opinion. The Court considered the press conferences arranged by her as mere attempts to satisfy inquiring reporters which could have had no bearing on the resolution of the case.[172]

Moreover, to become a limited public figure, one must knowingly thrust himself into a controversy which is not only of interest to the public but is also significant. Hence, divorce actions involving wealthy people may not be properly categorized as "public controversies."[173]

The subsequent cases of *Hutchinson v. Proxmire*[174] and *Woltson v. Reader's Digest*[175] reiterated the rule that a private individual cannot be transformed into a public figure just because he attracted media attention or is forced to take part in public events. He must have deliberately engaged public attention with the purpose of influencing public opinion.[176]

e. Philadelphia: *Private Individual Plaintiff has Burden of Proof in Defamation Actions Regarding Matters of Public Concern*

Philadelphia Newspapers, Inc. et. al., v. Hepps[177] declared that the private individual-plaintiff has the burden of proving that the alleged defamatory statements are false when said statements pertain to matters of public concern. In such instances, the common-law presumption

[170] *Id.* at 456.

[171] *Id.* at 454, n. 3.

[172] *Id.* at 454.

[173] *Id.*

[174] 443 U.S. 111 (1979)

[175] 443 U.S. 157 (1979).

[176] Swatsler, *supra* note 84, 1029.

[177] 475 U.S. 767 (1986).

of falsity of defamatory statements give way to the First Amendment requirement protecting the freedom of expression.[178] The standard of liability applicable, however, shall not be the actual malice standard.

The Court thus summarized the rules to be applied in defamation cases as follows: When the statement is of public concern and the plaintiff is a public official or public figure, the strict actual malice standard in *New York Times* shall apply. When the statement is of public concern but the plaintiff is a private person, the Constitution supplants the common-law presumption of malice and requires the plaintiff to prove the falsity of the statement. Several states have adopted the "negligence standard," where publications made with negligence are penalized, as the basis of liability. Lastly, when the speech is of exclusively private concern and the plaintiff is a private individual, the common law presumption of malice applies, hence, the defendant bears the burden of proving the truth of the publication.[179]

f. ANDERSON: *Summary Judgment Proper Where Absence of Actual Malice Uncontroverted by Evidence*

Anderson v. Liberty Lobby, Inc.[180] dealt with procedural law when it laid down the rule that where the plaintiff is a public figure, and the defendant moves for a summary judgment on the ground that actual malice was absent since an affidavit by the author clearly chronicled his investigation and research, said motion may be granted if the plaintiff does not support his opposition to the motion by concrete evidence from which a reasonable jury may return a verdict in his favor.[181]

3. APPLICATION OF THE PUBLIC FIGURE DOCTRINE IN PHILIPPINE JURISPRUDENCE

Unlike its American counterpart, there has been a dearth of Philippine Supreme Court decisions dealing with defamation of public figures. Only two Philippine cases have dealt squarely with this issue. The

[178] *Id.* at 775.

[179] *Id.*

[180] 477 U.S. 242 (1986).

[181] *Id.* at 255.

first is *Lagunzad v. Soto Vda. de Gonzalez*,[182] where the Supreme Court discussed the right to privacy of a public figure.

The case involved the enforcement of the terms of a Licensing Agreement between the petitioner, producer of a movie entitled "The Moises Padilla Story," and the respondent, mother and legal heir of Moises Padilla. Padilla was a mayoralty candidate who was murdered by his political opponents. The producer argued that the episodes in the life of Padilla portrayed in the movie were matters of public knowledge and occurred at a time when he may properly be considered a public figure. The Court rejected the allegation that private respondent did not possess any property right over the life of her son as the latter was a public figure. It stated:

> Being a public figure *ipso facto* does not automatically destroy *in toto* a person's right to privacy. The right to invade a person's privacy to disseminate public information does not extend to a fictional or novelized representation of a person, no matter how public a figure he or she may be.[183]

In this case, even the petitioner admitted that he inserted some romance into the story. The Court upheld the validity of the Licensing Agreement "particularly because the limits of freedom of expression are reached when expression touches upon matters of essentially private concern." Hence, the Court drew a line between the private and public lives of a public figure. His public life may be the subject of discussion, but such discussion should have some bases in fact, and may not be fictionalized or romanticized.

The actual malice standard in *New York Times* was not referred to at all by the Court in this case. The decision did not protect false expressions, nor did it distinguish between mere negligence or actual malice. Hence, the public figure doctrine that has evolved in American jurisprudence was not applied in *Lagunzad*. Although the Court recognized that public figures lose their privacy to some extent, it did not go so far as to categorically state that as regards false comments relating to them, they shall be treated like public officials whose protection against defamation has been considerably decreased.

[182] 92 SCRA 476 (1979).

[183] *Id.* at 487.

The later case of *Ayer Productions Pty., Ltd. v. Capulong*[184] referred to some of the cases involving comments regarding public officials and public figures decided by the United States Supreme Court.[185] The case involved a motion picture made for television about the four-day EDSA Revolution. Enrile, one of the principal participants in the historic event, obtained a writ of Preliminary Injunction against Ayer Productions which prohibited the latter from making any reference to him or his family, or from creating a fictitious character identifiable with him.

Justice Feliciano began his discussion of the legal issues by stating that freedom of expression includes the right to film motion pictures and to exhibit them. He then considered Enrile's claim that the film invaded his right to privacy. The right to privacy, he stressed, is not an absolute right. A limited intrusion thereto is permissible when the person involved is a public figure and the information concerns matters of a public character.[186] The right to privacy protects a public figure from "unwarranted publicity, from the wrongful publicizing of the private affairs and activities of an individual which are outside the realm of legitimate public concern."[187] Since the motion picture related to the EDSA Revolution, which is a matter of public interest, and did not concern the private life of Enrile, no unreasonable intrusion into his privacy was made. The Court added, however, that the motion picture must render a fairly truthful and historical presentation of the events. There should be no reckless or knowing disregard of the truth and no disclosure of intimate or embarrassing personal facts. Matters of purely private concern shall not be inquired into.[188]

The Supreme Court cited the examples of public figures given by Professors Prosser and Keeton. It stated:

> [A public figure] is... a celebrity. Obviously to be included in this category are those who have achieved some degree of reputation by appearing before the public, as in the case of an actor, a professional baseball player, a pugilist, or any other entertainer. The list is, however, broader than this. It includes public officers, famous inventors and explorers, war heroes and even ordinary soldiers, an infant prodigy... It includes... anyone who has arrived at a position where public attention is focused upon him as a person.[189]

[184] 160 SCRA 861 (1988).

[185] *Id.* at 876, n. 16.

[186] *Id.* at 870.

[187] *Id.*

[188] *Id.* at 876.

Hence, applying said criteria to the persons who have been involved in the EDSA Revolution, it is submitted that the following persons should be considered public figures aside from Ponce-Enrile: Fidel Ramos, Jaime Cardinal Sin, Agapito Aquino, Corazon Aquino, Lorenzo Tañada and Gringo Honasan.

Ayer Productions, therefore, makes applicable to Philippine libel suits the extensive American jurisprudence on public figures. The actual malice standard in *New York Times* was expressly adverted to in *Ayer Productions*. However, the decision made it clear that the protection does not extend to the private lives of public figures, hence, it appears that only "limited" public figures were recognized in the decision. Whether the rule for "general" public figures in the United States extending the protection for virtually all purposes will apply to "household names" is doubted as the Court definitely limited the freedom to discuss the public figure's life to that which concerns public matters only.

III. CONTEMPT POWERS OF THE COURTS: THE JUDICIARY AS A CLASS SEPARATE FROM PUBLIC OFFICIALS

A. Judicial Power and Contempt Powers

Although public officials include members of the judiciary, the latter enjoys a potent power not possessed by other public officials insofar as retaliation for unfair criticism is concerned. Judges may cite for contempt. An examination of the nature of judicial power and the concomitant contempt powers follows in an attempt to analyze the propriety of the classification of judges apart from other public officials.

Article VIII of the 1987 Constitution vests judicial power in the Supreme Court and in such lower courts as the law may establish.[190] Judicial power is "the authority to settle justiciable controversies or

[189] *Id.* at 874-75.

[190] PHILIPPINE CONST., art.VIII, sec.1.

disputes involving rights that are enforceable and demandable before the courts of justice or the redress of wrongs for violation of such rights."[191] For a proper exercise of such power, judges are given other incidental powers analogous to the legislature's power to conduct investigations in aid of legislation or the president's immunity from suit. One such example is the power to cite for contempt given them under Rule 71 of the Rules of Court. It is considered inherent in all courts and is believed to be essential to their right of self- preservation.[192] It also aims to ensure respect for the judiciary.[193]

1. KINDS OF CONTEMPT

The Rules of Court recognizes two kinds of contempt: direct and indirect. Section 1 of Rule 71 provides for the summary punishment of direct contempt. It states:

> A person guilty of misbehavior in the presence of or so near a court or judge as to obstruct or interrupt the proceedings before the same, including disrespect toward the court or judge, offensive personalities toward others, or refusal to be sworn to answer as a witness, or to subscribe to an affidavit or deposition when lawfully required to do so, may be summarily adjudged in contempt by such court or judge...

Hence, the essential characteristic of direct contempt is that it is "committed in the presence of or so near a court or judge." Indirect contempt, on the other hand, refers to contumacious acts perpetrated outside of the presence of the court. It requires that there be a charge in writing and an opportunity to be heard on the part of the accused. For purposes of this paper, the following acts constituting indirect contempt are material: (1) Any abuse of or any unlawful interference with the process or proceedings of a court not constituting direct contempt; and (2) Any improper conduct tending, directly or indirectly, to impede, obstruct, or degrade the administration of justice.[194]

Nye v. United States[195] gave another classification of contempt. The Court discussed the procedural differences between civil and criminal

[191] *Lopez v. Roxas*, 17 SCRA 756, 761 (1966)

[192] *Patricio v. Sulpicio*, 196 SCRA 140, 147 (1991).

[193] *Cornejo v. Tan*, 85 Phil. 771 (1950).

[194] Rules of Court, R. 71, sec. 3 (c) and (d).

[195] 313 U.S. 33 (1940).

contempt. It defined civil contempt as "when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public."[196] Such kind of contempt has also been referred to as "the disobedience of a party to a case of an express order of the court entered in that particular case". On the other hand, criminal contempt is "an act which strikes at the discipline and efficiency of judicial authority."[197]

2. PROCEDURE FOR PUNISHMENT

As has been stated, direct contempt is punishable summarily. In the United States, several cases until the early part of the century have assumed the existence of summary contempt powers since time immemorial. Such summary powers covered certain cases of indirect contempt, such as contempt by publication. However, a 1927 book by Sir John Fox entitled "The History of Contempt of Court" revealed that the English cases upon which the Americans relied to support summary contempt powers had never been promulgated, and therefore, the source of such powers was a "poisoned spring."[198]

The case was *The King v. Almon*. It involved the publication of a pamphlet imputing the introduction of certain unreasonable methods to the Chief Justice. Justice Wilmot, before whom the trial was to be held, wrote a pre-prepared opinion in advance of actual trial. The gist thereof was that the court was a representative of the King and any attack upon it was an attack upon the sovereign. His exercise of contempt powers was aimed to "keep a blaze of glory" around the court so that the people may be deterred from casting aspersions against the "fountain of justice." The case was, however, dismissed and hence, the decision was never promulgated. Thirty seven years later, Wilmot's son found the decision and published it in a book entitled "Notes and Opinions of Judgments", after which it mistakenly became the authority for judges to put newspapermen in jail for unsavory comments.[199]

[196] *Id.* at 42.

[197] John W. Oliver, *Contempt By Publication and the First Amendment*. 27 MO. L. REV. 171, 173-74 (1962).

[198] Walter Nelles & Carol Wiess King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 101, 401 (1928).

[199] *Id.* at 181.

In the United States, the Act of 1789 gave judges broad discretion to punish all contempts of authority in any case before them. However, this power led to abuses which prompted Congress to enact a law limiting the court's summary powers to acts constituting direct contempt. Indictment for prosecution of indirect contempt was thereafter required.[200] The Philippines follows the same procedure under Rule 71, and requires written notice and hearing in cases of indirect contempt.

3. CRITICISMS AGAINST CONTEMPT POWERS

Several criticisms have been made against the exercise of contempt powers. First, it goes against the constitutional guarantees of free speech and free press and impedes the free flow of ideas.[201] Contempt powers isolate judges from the rest of other public officials whom the law allows to be severely criticized, and accord special treatment to judges. Courts have readily extended the privilege to defame other public officials while they retained the power to cite for contempt.

The second is the issue of impartiality, as the judge is the accuser, prosecutor and arbiter at the same time. It is argued that it is not consistent with human nature to expect a judge who has been angered by a statement to decide with objectivity and fairness in the same case.

The third criticism is the vagueness of the law, as it is not clear when a statement or publication has obstructed the administration of justice. It is therefore often left to the discretion of the judge to determine which statements are beyond reason. Since judges have varying temperaments, the media is left to rely on guesswork and may even be forced to resort to self-censorship in certain cases. This attitude obviously goes against the ideal situation in a democracy where debate on public issues should be "uninhibited, robust and wide open."[202]

Some quarters maintain that there exist other remedies for judges who are unjustly criticized, such as an action for libel,[203] or a

[200] *Nye v. United States* 313 U.S. 33, 45-46 (1940).

[201] Oliver, *supra* note 197, 171.

[202] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[203] *Nazareno v. Barnes*, 136 Phil. 57, 69 (1985).

judicious response.[204] *Craig vs. Harney*[205] recommended that the judge take the criticism in silence, as he would most likely command respect for such dignified conduct.[206]

B. The Exercise of Contempt Powers in the Philippines

The 1916 case of *In re Kelly*[207] involved the publication in a newspaper of a letter which severely attacked a Supreme Court decision and accused said Court of intimidating the press and misusing imaginary contempt powers. The unanimous Court laid down the rule that: "[a]ny publication pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, the counsel, etc., with reference to the suit, or tending to influence the decision of the controversy, is contempt of court and is punishable."

U.S. v. Bustos,[208] on the other hand, showed a Court highly tolerant of the criticisms lodged against a justice of the peace by several concerned citizens through a letter addressed to the Executive Secretary. The letter charged the justice of the peace with immoral and corrupt practices that made him "dangerous to the community" and "unworthy of the office." The citizens therefore asked that he be removed. A charge for libel was subsequently filed by the justice of the peace after his acquittal in the administrative case. Judgment was rendered in his favor.

The Supreme Court reversed the decision. Justice Malcolm first made a discourse on the history of freedom of speech in this country and the importance of said freedom in a democratic society. He categorically stated that the guarantees of free expression include the right to criticize judicial conduct, as the administration of justice is a matter of public concern fit for discussion and comment. To hold that judges are not subject to the same level of criticism allowed for other public officials would effectively repress public opinion and would amount to nothing less than tyranny. In fact, the citizens are even obliged to report to the proper authorities any malfeasance of

[204] Jack Watson, *Badmouthing the Bench: Is There A Clear and Present Danger? To What?*, 56 SASK. L. REV. 113, 165 (1992).

[205] 331 U.S. 367, 383 (1946).

[206] *Id.* at 383.

[207] 35 Phil. 944 (1916).

[208] 37 Phil. 731 (1918).

a judge or of any public officer. Said reports should therefore not be met with prosecutions but should instead be encouraged.

While *Bustos* considered judges to be in the same class as other public officials, *People v. Perfecto*[209] expressly recognized that judges formed a distinct class from other public officers. The case involved a publication which imputed electoral frauds to several members of the Senate. The Court held that the provision in the Spanish Penal Code punishing any person who, by writing, shall defame, abuse, or insult any Minister of the Crown or other person in authority, has no place in a territory under American sovereignty since the United States Constitution declares the equality of every man before the law. There is also no longer a "Minister of the Crown or a person in authority of such exalted position that the citizen must speak of him only with bated breath."[210] The defendant was accordingly acquitted.

Near the end of the decision, Justice Malcolm stated: "[p]unishment for contempt of non-judicial officers has no place in a government based upon American principles."[211] Hence, the Court recognized that insofar as punishment for contempt was concerned, judges formed a class separate from the executive or legislative officers.

The decision, in effect, stated that, were the imputations directed against judicial officers, a conviction may have resulted. Unfortunately, the statement was not explained further, hence, the rationale for the classification was not made clear. It is, however, surmised that the different treatment was brought about by the nature of the judicial functions which requires the respect and confidence of the public in the orderly administration of justice. It is doubted, though, that the other branches of government require less respect and credibility, as the enactment and execution of the laws are likewise noble endeavors, without which the entire system of democratic government shall fail.

El Hogar Filipino v. Prautch and Poblete[212] enunciated a doctrine that tolerated a conscientious press even as regards legal issues then pending in court. Justice Johns stated: "[s]o long as it acts in good faith, a

[209] 43 Phil. 887 (1922).

[210] *Id.* at 900.

[211] *Id.* at 902.

[212] 49 Phil. 171 (1926).

newspaper has the legal right to have and express its own opinions on legal questions in cases pending in court. The denial of such right would infringe upon the freedom of the press."[213] The Court, allowed comments on pending issues made in good faith. The article in question was published pending appeal of the decision of the lower court. It followed the reasons given by the trial judge to support his decision and those contained in the appellees' brief filed in court. The determination of the case was considered to be of public interest since it involved a novel question on the law on mortgage. Justice Johns commented that the article was limited to a discussion on the provisions of the mortgage law, which is a public record, and aimed only to show that the lower court's decision annulling the mortgage was correct. Said decision was later reversed by the Court, although a strong dissent thereto was made. The article was not perceived as an attempt to influence the decision of the Court in a pending controversy and was instead looked upon as a bona fide expression of an opinion.

However, one wonders whether the Court would have been as tolerant of an article which, after analyzing a decision, characterizes the same as wrong. Convictions for contempt usually concern derogatory articles and not publications such as the one in this case where the writer fully supports the decision of the lower court. It is submitted, however, that if an article criticizing a lower court's decision be considered an attempt to influence the decision of the appellate court and hence, contemptuous, the same treatment should also hold true for publications which fully support the judgment of the court a quo, since it is as much an attempt to obtain an affirmation of the decision as the criticism is an attempt to obtain a reversal.

When either kind of article is juxtaposed against the freedom of expression, it becomes evident that to punish for contempt in either case would infringe upon said freedom. Hence, it is best to remember the *ratio decidendi* of *El Hogar*,: that a publication expressing opinions on legal matters before the court falls within the ambit of the freedom of speech clause if made in good faith. It might be argued that an article attacking a decision of any court would undermine the people's confidence in the judiciary. However, blind loyalty to judicial institutions has never been one of the foundations of democratic societies.

[213] *Id.* at 176.

The case of *In re Lozano and Quevedo*[214] followed in the line of cases decided by the Court during the early part of the century. It involved an article in a newspaper which disclosed the proceedings in an investigation of a judge which had been conducted behind closed doors. This was pursuant to a resolution of the Supreme Court requiring that said investigations be kept confidential. The defendants were declared in contempt, and the resolution was declared valid as a protection against the practice of party-litigants and other third persons of hurling malicious charges against lawyers and judges whose reputations are unjustly ruined. The decision, however, contained statements which actually support a more lenient treatment of the press. Justice Malcolm stated: "[h]ere, in contrast to other jurisdictions, we need not be overly sensitive because of the sting of newspaper articles, for there are no juries to be kept free from outside influence."[215] Hence, implicit in said statement was a recognition that the Philippine judicial system allows the existence of a judiciary more tolerant of the criticisms of the press than its English or some of its American counterparts whose stringent contempt rules are required by their jury system. Fr. Bernas considered the prohibition in this case as "prior restraint", and observed that what the Court really stated was: although there are no juries to be kept free from outside influence, there are lawyers to be shielded and judges to be respected.[216]

The Court limited the prohibition to criticize and comment on legal issues to only those still pending in the court in *People v. Alarcon*[217] and rejected some American authorities holding the contrary view. What is sought to be protected from the influence of comments of the media is the duty of the courts to administer justice in a pending case. In this instance, the article imputing grave misconduct on the part of judges was published after the Court of First Instance had already rendered judgment. The CFI no longer had any jurisdiction over the case, as an appeal therefrom had already been perfected.

In his dissent, Justice Moran contended that the Constitution has provided an adequate remedy against corrupt judges in the form of impeachment; hence, excessive criticism of judges is already unnecessary. He also stated that the fact that many perverse

[214] 54 Phil. 801 (1930).

[215] *Id.* at 807.

[216] BERNAS, *supra* note 13 at 159.

[217] 69 Phil. 265 (1939).

publications about courts in the United States are considered within the protection of the free speech guarantee may be justified in said jurisdiction in view of the American temper and psychology and their stable political institutions. He doubted whether an adoption of such a liberal attitude in the Philippines would "result in no untoward consequences to our structure of democracy yet in the process of healthful development and growth."[218] He also expressed his admiration for the vigilant judiciary of England which zealously guards the stability of its judicial institutions and quoted with favor Justice Wilmot in *King v. Almon*. It is unfortunate that the English case relied upon is now discredited for never having been promulgated. As to the inappropriate application of certain American principles to a "budding democracy" such as the Philippines, it is doubtful that fifty-four years after the promulgation of the decision, the same argument may still hold true. It is unlikely that repression of the press will at present contribute to the strengthening of democratic institutions as it is in fact inconsistent with the basic principles of a democracy. On the contrary, democracy would be better served by a robust and unhampered press.

In re Parazo[219] stemmed from a newspaper article which claimed that there had been leakages in the last Bar examinations. The Supreme Court, which was in charge of conducting the Bar examinations, ordered an investigation. Parazo refused to disclose the source or his information, hence, he was cited for contempt. The Court reiterated that it inherently possesses contempt powers which may be exercised to preserve the integrity of the courts and to enable them to effectively perform their functions.[220]

From the *Parazo* case arose another contempt action which drew the Court's ire even more. Atty. Sotto, a Senator of the Republic, issued a statement which was published in several newspapers attacking the Supreme Court's conviction of Parazo. He labelled the majority of the members of the Court as "incompetent" or "narrowminded" and accused them of having deliberately committed blunders and injustices over the years. He also stated that the only remedy was a change of membership of the Court. Thus, he would introduce a bill in Congress

[218] *Id.* at 279.

[219] 82 Phil. 230 (1948).

[220] *Id.* at 244-45.

calling for the complete reorganization of the Supreme Court. Justice Feria, who wrote for the majority, first stated that:

> Mere criticism or comment on the correctness or wrongness, soundness or unsoundness of the decision of the court in a pending case made in good faith may be tolerated; because if well founded it may enlighten the court and contribute to the correction of an error if committed; but if it is not well taken and obviously erroneous, it should, in no way, influence the court in reversing or modifying its decision.[221]

However, Sotto did not just intend to bring into the court's attention any error it may have committed in the construction of the law. He even went so far as to intimidate the Court with a bill reorganizing its composition. He attacked the Court's honesty and integrity for the purpose of degrading the administration of justice. Justice Feria stated that if the people were to lose confidence in the Supreme Court, which is considered the last bulwark of justice, they might be driven to take the law into their own hands and the whole structure of government would then collapse resulting in chaos. Justice Holmes was quoted with approval:

> The administration of justice and the freedom of the press, though separate and distinct, are equally sacred, and neither should be violated by the other. The press and the courts have correlative rights and duties and should cooperate to uphold the principles of the constitution and laws, from which the former receives its prerogative and the latter its jurisdiction.[222]

The dangerous tendency test was thus applied. In a concurring opinion, Justice Perfecto responded to Sotto's allegations and lambasted him by citing his past criminal convictions, to wit: abduction, blackmail and libel. Justice Perfecto must have been so enraged to say that a person with such criminal records would dare cast aspersions on the highest tribunal of the land and label it a "constant peril to liberty and democracy". Some quarters argue that judges should answer irresponsible criticism and rebut it since the best response to inaccurate expression is more persuasive expression.[223]

[221] *In re* Sotto, 82 Phil 595, 600 (1949).

[222] *Id.* at 603.

[223] WATSON, *supra* note 204, 165.

Cabansag v. Hernandez[224] introduced the clear and present danger rule and the dangerous tendency test in the determination of liability in contempt actions. The case arose from a letter addressed by Cabansag, a plaintiff in an ejectment case, to the Presidential Complaints and Action Commission (PCAC), requesting the latter's help in the termination of the ejectment case that has been pending in the Court of First Instance for more than eight years. The letter imputed the delay to the "careful maneuvers of a tactical lawyer." It also stated that the new judges could not proceed with the trial of the case as the transcript of records had not yet been prepared because the stenographers who took the notes were presently assigned to other courts.

The judge of the Court of First Instance declared Cabansag and his counsels in contempt of court for having sent the letter to the PCAC. Said letter, the judge said, tended to degrade the court in the eyes of the President and of the public. An appeal was subsequently brought to the Supreme Court.

The Court recognized that it was confronted with a clash of two fundamental rights – the independence of the judiciary and the freedom of expression. Its task was to balance and reconcile the exercise of said rights.[225] Two theoretical formulae have been given in the attempt to balance said conflicting interests. Both tests, the clear and present danger rule and the dangerous tendency rule, have already been discussed in the earlier part of this paper relating to freedom of speech and seditious libel. When applied to the case at bar, the first rule requires that:

> The advocacy of ideas cannot constitutionally be abridged unless there is a clear and present danger that such advocacy will harm the administration of justice. There must be a serious and imminent threat to the administration of justice and... the possibility of engendering disrespect for the judiciary is not such a substantive evil as will justify impairment of the constitutional right of freedom of speech and press.[226]

The dangerous tendency rule, on the other hand, requires only that there be a dangerous tendency that the fair administration of justice be obstructed.

[224] 102 Phil. 152 (1957).

[225] *Id.* at 160.

[226] *Id.* at 161-62.

Under either rule, the letter constituted no attempt to belittle the court or undermine the fair administration of justice. Neither may it be considered as having created a serious imminent threat thereto. The criticisms were not even directed against the court, but against the opposing counsel, and the grievance was addressed to the court stenographers. The good faith of Cabansag was readily apparent from the letter which contained no derogatory remarks against the court.

However, the lawyers of Cabansag were admonished since being learned in the technicalities of the law, they should have known better than to advise their client to seek the help of the PCAC when recourse to the Department of Justice was available. A different standard is therefore used by the Court when dealing with lawyers as their expertise in the law carries with it greater responsibilities.

In the more recent case of *Nazareno v. Barnes*,[227] the Court reminded judges of the purpose of contempt powers. Justice Abad Santos, in his concurrence, emphasized that the power to cite for contempt must be used sparingly. He also stated that although he regarded his office with respect, he had not lost his ability to laugh at himself as a human being susceptible to error. He therefore admitted that judges do err, and it was not shameful to recognize one's mistake and attempt to rectify the error. Criticisms and comments may help the judge in discovering said errors. Contempt powers must be used only to uphold the dignity of the office, not the person of the judge, and to prevent the obstruction of justice.[228]

The case concerned a letter-complaint addressed to President Marcos regarding certain corrupt and improper acts of Court of First Instance Judge Barnes. Nazareno charged Judge Barnes with ignorance of the law in relation to some pending cases, acts of harassment, refusal to settle monetary obligations, use of undue influence, and habitual absenteeism. A charge of indirect contempt was lodged against Nazareno and after a short proceeding wherein Judge Barnes emphasized that the letter undermined the faith and confidence of the people in the courts, Nazareno was declared guilty of indirect contempt. The conviction was reversed by the Supreme Court. Justice Cuevas stated that:

> A judge as a public servant, should not be so thin-skinned or sensitive as to feel hurt or offended if a citizen expresses an honest opinion about him... A judge should never allow himself to be moved by pride, prejudice, passion, or pettiness in the performance of his duties ... [The power of contempt] is intended as safeguard not for the judges as persons but for the functions that they exercise.[229]

[227] 136 SCRA 57 (1985).

[228] *Id.* at 73.

This doctrine was repeated in *Sesbreno v. Garcia*[230] when the Court reminded judges that the power to cite for contempt is not a "bludgeon" to be used to exact silent submission to their orders, however questionable or unjust said orders may be.

Hence, the last two cases asked that judges attempt to overcome the human instinct of retaliating against those who make unfavorable comments. Instead, they should continue persevering with their work and learn from such comments if possible. Justice Cuevas also lumped judges with other public servants who must accept that their office brings with it criticisms and comments. It was stressed that contempt powers exist to protect the administration of justice, and not to isolate improper acts of judges from criticism.

A recent administrative case showed that judges have had difficulty in ignoring unfavorable comments. On July 26, 1993, Professor Mangahas, president of the Ateneo Social Weather Station (SWS), addressed a letter- complaint to the Chief Justice against Judge Maximiano Asuncion of the Regional Trial Court of Quezon City for grave abuse of authority and gross ignorance of the law. The complaint arose from the order of Judge Asuncion directing Professor Mangahas to explain why he should not be held in contempt for distributing to the general public, without prior permission from any court, the results of the opinion polls conducted by the SWS, which showed the judiciary as having a lower satisfaction rating than the much-maligned Philippine National Police. Judge Asuncion considered said findings as tending directly or indirectly to degrade the administration of justice and hence, punishable as contempt.

Professor Mangahas filed his Comment where he stressed the following points, among others: (1) "public criticisms of government officials and institutions are an important part of the process of enhancing public administration in all branches of government, not of degrading it" and (2) "SWS needed no prior permission from any court to publish

[229] *Id.* at 69-70.

[230] 181 SCRA 879 (1990).

its findings in any of its publications."[231] Judge Asuncion was satisfied with the explanation of Professor Mangahas and accordingly dismissed the contempt charge. Professor Mangahas thereafter filed the letter-complaint.

The Supreme Court dismissed the charges against Judge Asuncion. The Court noted that the report came out at a time when there was already widespread publicity adverse to the judiciary and it clearly tended to degrade the administration of justice. What Judge Asuncion did was merely to initiate an inquiry into the source and bases of the derogatory report.[232] It is submitted that the contempt charge initiated by the Judge was unwarranted. Prudence dictates that judges do not demand explanations for survey results such as the one at bar. The publication of said poll results falls under the free expression clause and absent a clear and present danger to the administration of justice, cannot be proscribed. The fact that the findings of SWS were disclosed at a time when adverse comments against the judiciary were already rampant and said results would probably cause further decrease in public confidence does not constitute such clear and present danger to justify suppression thereof. In this case, silence and an unrelenting devotion to duty may be considered as the best response under the circumstances.[233]

C. The American, English and Canadian Jurisprudence on the Exercise of Contempt Powers

A discussion of leading American cases on the exercise of contempt powers by the courts together with a couple of important English and Canadian decisions on the subject will be made since the Philippine judiciary is an inheritor of the Anglo-American tradition,[234] and a clear understanding of the developments that shaped their jurisprudence may aid in the analysis of Philippine cases.

The early American cases on contempt stressed the need to prevent the obstruction of the orderly administration of justice through articles

[231] Resolution of the Supreme Court *En Banc* dates November 18, 1993, A. M. No. RTJ-93-1049 (*Social Weather Stations, Inc. v. Judge Maximiano Asuncion*, Regional Trial Court, Branch 104, Quezon City), at 1.

[232] *Id.* at 6.

[233] *Craig v. Harney*, 331 U.S. 367, 376 (1946).

[234] *Philippine Air Lines* v. CA, 181 SCRA 573 (1990).

or comments which relate to the resolution of pending cases.[235] Once the case is fully determined in the court criticized, comment is unrestricted pursuant to the constitutional guarantees of free speech and free press. Several cases likewise tackled the issue of when punishment may be summary. The American rule, like Rule 71 of the Rules of Court, authorizes summary punishments when the misbehavior which is the subject of the contempt action was committed in the presence of the court or so near thereto as to obstruct the administration of justice. The phrase "so near thereto" has been construed in its geographical sense, hence, the misbehavior must be within the vicinity of the court.[236]

Bridges v. California and Times-Mirror Co. and *Hotchkiss v. Superior Court of the State of California*[237] are twin cases which revolutionized the Court's treatment of criticisms of judges in pending cases. The first case arose from a telegram sent by Bridges to the Secretary of Labor which was published in the newspapers pending a motion for new trial of an inter-union dispute. Bridges, a union officer, characterized the decision as "outrageous" and stated that an enforcement thereof would result in a strike that would paralyze the operations of the port of Los Angeles and adversely affect the entire Pacific Coast. Bridges was declared in contempt for attempting to intimidate the judge into changing his decision by threatening a massive strike.

The United States Supreme Court reversed the conviction on several grounds. First, the strike was not an illegal course of action as it was allowed under California law. Second, the Secretary of Labor was the proper official charged with the prevention of strikes, hence, he was entitled to receive as much information as possible. Bridges had only exercised his constitutional right of petition to an authorized representative of government. Thirdly, it may not be assumed that the judge was intimidated by the telegram, as a man of reasonable fortitude would not have been sidetracked in the proper course of justice solely by such statements. Moreover, the judge could not have been unaware of the possibility of a strike and any tension in the atmosphere was generated by the surrounding facts, and not by the Bridges telegram.

The second case involved the punishment for contempt of those responsible for the publication of three editorials, the most serious of

[235] *Toledo Newspaper C. v. U.S.*, 247 U.S. 402 (1918), *Patterson v. Colorado* 205 U.S. 454 (1907).

[236] *Nye v. U.S.*, 313 U.S. 33, 48 (1940).

[237] 314 U.S. 252 (1941).

which pertained to an article entitled "Probation for Gorillas?" Pending the application of two union leaders for probation after their conviction for the assault of non-union members, the newspaper published an editorial which stated that the judge would make a serious mistake if he granted the application. It contended that the community needed the example of their assignment to the "jute mill." The trial court cited the article's "inherent tendency" and the Superior Court alluded to its "reasonable tendency" to interfere with the fair administration of justice in a case pending consideration.

The United States Supreme Court reversed the decision. Justice Black stated that the minimum requirement of the First Amendment is that any suppression of speech must be justified by a reasonable ground to fear that serious and imminent danger shall result if the speech were allowed. Hence, the dangerous tendency rule used by the trial and superior courts was not the proper test in the determination of the scope of allowable expression.

Even assuming that said test could be properly used, a conviction still cannot be supported. The editorial did nothing more than threaten future adverse criticism in case of the grant of the probation. Such criticism could reasonably be expected in view of the position taken by the newspaper in labor controversies similar to the one at bar. To consider the editorial as a substantial influence on the decision-making process of the judge would be to ascribe to him a "lack of firmness, wisdom or honor," characteristics which should be expected of judges.

Moreover, to prohibit the discussion of pending cases at a time when the audience would be most receptive to the public discussion would amount to censorship. This would constitute an abridgement of the freedom of expression, since speech concerning public affairs, of which the administration of justice is undoubtedly a part, is the essence of self-government.[238]

Garrison v. Louisiana[239] concerned a district attorney who held a press conference where he attributed the enormous backlog of pending criminal cases before eight judges to their inefficiency, laziness and excessive vacations. He also accused the judges of unreasonably

[238] *Garrison v. Louisina*, 379 U.S. 64, 74-75 (1964).

[239] *Id.*

hampering his efforts to enforce the vice laws by refusing to authorize disbursements for the investigations of vice within the district. He then alluded to possible racketeer influences. He was tried without a jury by a judge from another area and was convicted of defamation.

On appeal, the United States Supreme Court held that the *New York Times* actual malice standard must apply in this case, as it was brought by a public official for criticism of his official conduct. Hence, there must be proof of knowledge of the falsity of the charges or at least a reckless disregard for the truth or falsity thereof. Since no proof of actual malice was adduced, the conviction was reversed.

What is interesting about this case is that instead of punishing the defendant for his utterances through a proceeding for indirect contempt, an action for defamation was commenced. Hence, the main criticism against the exercise of contempt powers which is the judge's impartiality, may no longer be raised. Judges were already grouped together with the other public officials and the New York Times standard was made equally applicable to them. In actions for defamation, therefore, judges are to be treated like other public officials, whose official conduct shall be subject to criticisms, no matter how severe, as long as the same are made without actual malice.

Next came *Pennekamp v. Florida*[240] which stated that freedom of the press includes not just the right to approve judicial conduct and processes, but also the right to criticize and disparage the same even in terms that are "scurrilous, vitriolic or erroneous." The clear and present danger rule allows punishment of the criticism only when it makes it impossible for the court to discharge its functions of administering justice in an orderly manner.[241] In borderline cases, freedom of public comment should always be preferred over a possible tendency to impede the administration of justice.

Craig v. Harney[242] laid down a rule that strong and intemperate language as well as unfair and vehement criticism do not constitute contempt if they are not imminent perils to the administration of justice. The law of contempt was not fashioned for the protection of overly-sensitive judges. Judges are supposed to be "men of fortitude, able to thrive in a hardy climate."

[240] 328 U.S. 331 (1946).

[241] *Id.* at 369-70.

[242] 331 U.S. 367 (1946).

It is therefore apparent from the above American decisions that the Court guards freedom of expression with zeal. It only recognizes possible exceptions if the clear and present danger rule be satisfied. In contrast, Philippine decisions have used varying tests in the determination of liability. At present, the balancing-of-interests test is most commonly used.

English courts, from whom the Americans derived their judicial system, have been more vigilant than their American counterparts in the exercise of their contempt powers. Comments which "scandalize a court or judge" such as the imputations of corruption, bias and improper motives are likely to be regarded as contempt.[243] However, several statements may still be taken from their decisions which call for a more lenient attitude towards criticisms of judicial conduct.

Lord Atkins stated in *Ambard v. Attorney-General for Trinidad and Tobago*[244] that: "[j]ustice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary men." The decision stressed that the right to criticize must be exercised in good faith and must be limited to the public acts of the judge. A recent decision of the Court of Appeal has also emphasized the value of preserving the freedom to express opinions upon matters of public interest. The judge said:

> We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man... to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken and our decisions erroneous ... All we would ask is that those who criticise us will remember from the nature of our office, we cannot reply to their criticisms... we must rely on our conduct itself to be its own vindication.[245]

Despite the tolerant attitude of the Court to criticism in this case, it still stressed that comments must always be fair. Hence, the *New York Times* rule which extends protection even to false statements made without actual malice shall not apply.

[243] CHRISTOPHER J. MILLER, CONTEMPT OF COURT, 370 (2nd ed., 1989).

[244] AC 322 (1936).

[245] *Metropolitan Police Commissioner, ex p. Blackburn* (No. 2), 2 QB 150 (1968).

In Canada, the current state of the law still has freedom of expression at a legal disadvantage vis-a-vis the contempt powers of courts.[246] There is, however, one remarkable case where a powerful court has surrendered a substantial portion of its contempt powers. In *R. v. Kopyto*[247] the Court held that comments, such as the judge was "unreasonable, unprofessional, unworthy and disgraceful," are still entitled to protection under the freedom of speech guarantee. It held that:

> As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will be sweetly reasoned... But the courts are not fragile flowers that will wither in the hot seat of controversy... They need not fear criticism, nor need they seek to sustain unnecessary barriers to complaints about their operations and decisions.[248]

Hence, the courts were again referred to as institutions which could withstand criticisms, even if unfounded. This line of reasoning, which attributes qualities such as fortitude and strength of character to judges, is often found in American decisions which have held that the criticisms in issue are not sufficient to influence a judge of strong moral fiber. *Kopyto* likewise referred to the American doctrine of "clear and present danger" as the only possible exception to the abridgement of freedom of expression. Only when the expression constitutes such a substantial and imminent danger that the courts could not function should criminal sanctions be imposed. The Court, however, conceded that it is difficult to imagine any statement that would produce such dire consequences.[249]

In the United States, the Supreme Court has not upheld any conviction for contempt by publication subsequent to the *Bridges* case decided in 1941. Although it technically relies upon the clear and present danger rule, it has not found sufficient factual bases to justify a conviction based upon such test.[250]

[246] WATSON, *supra* note 204, 114.

[247] 47 D.L.R. (4th) 213 (1987).

[248] *Id.* at 226-27.

[249] *Id.* at 241.

[250] BARRON, *supra* note 15 at 516-17.

D. Is the classification of Judges Apart from Public Officials Valid?

The case of *People v. Cayat*[251] enumerated the requirements which justify a classification that is not violative of the constitutional provision on equal protection of the laws. For the classification to be reasonable and, hence, allowable: (1) it must rest on substantial distinctions; (2) it must be germane to the purpose of the law; (3) it must not be limited to existing conditions only; and (4) it must apply equally to all members of the same class.[252] A discussion of each of the requirements shall follow to show that the classification of judges apart from other public officials is not warranted.

1. SUBSTANTIAL DISTINCTIONS

The first requisite is that the classification be based on substantial distinctions. The distinction between public officials in general and judges in particular lies in the nature of the work of the judges. They are called upon to determine conflicting rights. It is alleged that criticisms which strip the courts of the public's confidence might drive the people into taking the law into their own hands as justice would then be an illusion.[253] The argument assumes that the administration of justice may be set apart from the other functions of government. This is not necessarily true as severe criticisms of the other branches of government during troubled times may also lead into a similar crisis. As stated earlier, the enactment and execution of the laws are as much a part of a democratic government as the adjudication of rights. Hence, the rules applicable to public officials in the other branches of government should also be applicable to the judiciary.

Justice Frankfurter recognized substantial distinctions between elective lower court judges and justices of superior courts which prompted him to call for a more liberal construction of contempt laws insofar as the former are concerned.[254] He stated that a Supreme Court Justice whose sheltered position is fortified by life tenure and other defenses to judicial independence, may easily dismiss criticisms hurled by media and not allow them to affect his decision in any way. However, for a local judge who held an elective office good only for a short term,

[251] 68 Phil. 12 (1939).

[252] *Id.* at 18.

[253] *In re Sotto*, 82 Phil. 595, 602 (1942).

[254] 361 U.S. 363 (1946).

rendering an unpopular decision in the face of growing media opposition would be very difficult. This is not to say that the local judge is a man of less fortitude than others, but human considerations dictate that he would prefer to remain in office. Since his career might be jeopardized if he ruled in a certain manner, he might be tempted to rule the other way.[255] He therefore raised the issue of susceptibility to pressure because of the elective posts of several judges.

This argument by Justice Frankfurter does not apply at all in the Philippine setting since judges enjoy security of tenure[256] and are less likely to be affected by external influences, in the same manner that he argued that the members of the United States Supreme Court were not likely to be intimidated by a negative press. Pushing this idea further, it may even be said that some public officials who are subject to the *New York Times* rule do not enjoy security of tenure. They are probably more susceptible to outside pressures, yet the law allows them to be the subject of false accusations made without actual malice. Hence, insofar as vulnerability to possible outside influence is concerned, there is no substantial distinction between judges and other public officers.

The overriding consideration of a free press dictates the application of the actual malice standard even to judges whose functions are to settle disputes since matters of public concern should be fully discussed. The judges, whose functions are definitely matters of public concern, should therefore not be isolated by their contempt powers in some ivory tower, to be shielded from unfavorable attacks.

2. GERMANE TO THE PURPOSE OF THE LAW

The second requisite is that the classification be germane to the purpose of the law. *Bridges v. California*[257] enumerated the purposes of the court's contempt powers as regards criticisms directed against it. These are: (1) to avert disrespect for the judiciary and (2) to prevent the disorderly and unfair administration of justice.

[255] *Id.* at 396-97.

[256] PHILIPPINE CONST., art. VIII, sec. 11 states: "[t]he members of the Supreme Court and judges of the lower courts shall hold office during good behavior until they reach the age of seventy years or become incapacitated to discharge the duties of their office..."

[257] 314 U.S. 252 (1941).

Justice Black countered the first purpose by stating that "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[258] Moreover, respect is earned and not imposed. The public would not be impressed with a judiciary that is not criticized on the main ground that criticism is prohibited.

The second purpose of contempt powers, which is the prevention of the disorderly and unfair administration of justice, is justified insofar as there is a real and imminent threat that the criticism will prevent the courts from discharging their functions. Criticisms that tend to put the court in an unfavorable light hardly satisfy the clear and present danger test. Save in exceptional circumstances such as in times of crisis, criticisms of judicial conduct will not constitute a clear and present danger to the orderly administration of justice.

3. NOT LIMITED TO EXISTING CONDITIONS

The third requirement is that the classification must not be limited to existing conditions only. Justice Moran, in his dissent in *Peo. v. Alarcon*,[259] stated that an accommodation of scandalous attacks against the judiciary would produce untoward consequences to "our structure of democracy yet in the process of healthful development and growth". This statement limits the classification of judges into a distinct group to existing conditions only, as it would no longer hold true after the structures of democracy have already been firmly established. In fact, as early as 1964, Fr. Bernas stated in a law review article:

> [I]t is submitted that Philippine democracy is robust enough and the Philippine Supreme Court is solidly established enough to survive in good health the kinds of attacks which the American Supreme Court, severely uncomplaining, has constantly borne.[260]

Hence, what Justice Moran stated may have been true in 1939, but it was limited to the conditions then prevailing.

[258] *Id.* at 270-71.

[259] 69 Phil. 265 (1939).

[260] Joaquin G. Bernas, S.J., *Contempt of Court By Publication: A Look at Philippine, English and American Practice*, 13 ATENEO L.J. 251, 275 (1964).

4. APPLIES EQUALLY TO MEMBERS OF CLASS

The fourth requisite demands that the classification must apply equally to all members of the same class. After an examination of Philippine contempt cases, Fr. Bernas observed that in all cases brought to the Supreme Court where criticism alleged to be contemptuous was directed against the Supreme Court or its members, the same was declared contemptuous. On the other hand, in all cases where the object of criticism was an inferior court or a judge thereof, the critic was acquitted.[261] Hence, a sub-classification has been made within the class of judges. Ordinarily, this would violate the fourth requisite, as the members of the class may not be treated differently. However, a sub-classification may be allowed if the three prior requirements for a reasonable classification are likewise complied with.

It is submitted that the sub-classification may be valid insofar as a criticism against the highest tribunal would more likely result in an obstruction of the fair administration of justice than an attack on a judge of an inferior court. However, the sub-classification, although not without basis, should not be the general rule in the absence of serious and imminent threat to the administration of justice. The Supreme Court should, at present, consider applying to itself the rules it has consistently applied to lower courts since there is no clear and present danger that justifies otherwise.

CONCLUSION AND RECOMMENDATIONS

The conflicting interests studied in this paper, namely, freedom of expression on one hand, and the right to privacy and the independence and integrity of the judiciary on the other, are all values of paramount importance. However, they do clash, and the law seeks the optimum balance where public discussion is not unnecessarily hampered, private rights are respected to the fullest extent possible, and the judiciary is allowed to proceed with its functions with the minimum of interference.

It is submitted that the classification of judges separate from public officials, insofar as criticisms are concerned, is not warranted. This

[261] BERNAS, *supra* note 13 at 167.

is not to say, however, that judges should be stripped altogether of their contempt powers directed against criticisms of their conduct. The exercise of contempt powers may be justified in cases where the statement or publication criticizing judicial conduct constitutes a clear and present danger to the administration of justice. The equivalent of this limitation on the freedom of expression in the case of other public officials is the statutory provision on inciting to sedition. Where the speech, utterance, emblem or other form of expression aimed at preventing an officer of the government from performing his functions creates a clear and present danger that the functions of said officer will not be discharged effectively, the same may be classified as seditious speech which is beyond the protection of freedom of speech. Although both the clear and present danger and the dangerous tendency tests have been used in the determination of liability in seditious speeches, it is submitted that the importance of freedom of expression in a democratic society, as supported by the cases analyzed in this paper, directs the application of the strict clear and present danger rule.

Hence, in cases of both public officials in general and judges in particular, when the criticism is directed at the public official or judge for the purpose of obstructing the administration of government, the clear and present danger test should be used and liability should attach only if the criticism creates said clear and present danger. Focus is, therefore, given to the consequence of the utterance or publication and not to the state of the mind of the critic.

On the other hand, if the criticism was directed against the person of the public official or judge and does not impede the operations of the government but attacks the integrity of the individual, an action for libel may be commenced. In such cases, the *New York Times* rule should apply, requiring the critic to possess actual knowledge of the falsity of the imputation or there is reckless disregard of the truth or falsity thereof. In cases where judges are subject to attacks which do not undermine the administration of justice, they should follow the procedure laid down by law for libel where the critic, pursuant to the requirements of due process, is given the opportunity to defend himself before an impartial tribunal.

Libel actions may possibly distract judges from concentrating on their functions, but the interests of justice require that they be accorded a remedy like other public servants and that the accused be given the chance to defend himself as well. The libel action is a middle ground between the exercise of contempt powers which may unreasonably

prejudice the accused and unwittingly stifle free discussion on matters of public interest and the complete absence of any remedy which puts judges at the mercy of an irresponsible press.

Other remedies have been recommended by writers, scholars and even members of the press to further protect these conflicting rights. It is submitted that the following remedies may be considered in arriving at the desired balance referred to earlier.

1.) RIGHT OF REPLY.

Several countries have adopted the "right of reply" as a possible alternative to libel actions, the most notable of which is found in the French Civil Code. Said Code grants any person named in the press the right to submit his reply within a prescribed period. The publisher is bound to publish the same promptly. The rationale therefor has been given in a law review article:

> [T]o strike out after falsehood in hot pursuit with truth is far better that to rattle the chain on the courthouse door. The publication of the reply, moreover, by adding to the store of public information, would seem to serve affirmatively the public interest. A reply will not guarantee that the public will get the truth. It will dramatize the fact that there are two sides to the controversy... [262]

This ensures that access to the channels for counterarguments, which is one of the reasons given for the different treatment of public officials and public figures in defamation cases, is readily available. Said right of reply, however, is not intended as a remedy *in lieu* of a defamation action. It shall exist side by side with the right to institute a libel action since rebuttals seldom provide complete relief. Provisions for retractions, corrections and the publication of judgments in favor of libel plaintiffs should also be made as possible deterrents against an irresponsible press. This remedy is in line with the Philippine Journalist's Code of Ethics, which provides: " I recognize the duty to air the other side and the duty to correct substantive errors promptly."

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[262] William H. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581, 605-06 (1964).