Unsolicited Notoriety: Establishing a Framework in the Application of the Public Figure Doctrine to Private Individuals Whose Lives Intersect with Public Interest

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I. INTRODUCTION

> *The legitimate state interest underlying the law of libel is the compensation of the individuals for the harm inflicted upon them by defamatory falsehood. After all, the individual's right to protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.*
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> — Justice Minita V. Chico-Nazario[1]

Privacy has been described as "the most comprehensive of rights and the right most valued by civilized men."[2] This fact remains notwithstanding the premium given by democratic countries like the Philippines to freedom of expression and the public's right to know. Sanctioned by the Constitution, other domestic laws, and even international law, the right to privacy is one of the most widely recognized human rights.[3] The boundaries of this right have historically been one of the most debated issues in the world, including the Philippines. Controversy arises from the potential conflict between the right to privacy on one hand, and right to freedom of expression and information on matters of public concern on the other.

With the advent of the internet, and the growing number of social media networks, the right to privacy has become even more controversial. In a modern era of mass society, the right to privacy continues to be one of the most threatened rights of man.[4] It is quite disturbing, however, that to date,

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1. Philippine Journalists, Inc. (People's Journal) v. Thoenen, 477 SCRA 482, 499 (2005) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974)).
2. Olmstead v. United States, 277 U.S. 438, 478 (1928) (J. Brandeis, dissenting opinion).
3. *See, e.g.*, PHIL. CONST. art. III, §§ 1, 2, & 3(1); & An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 26 (1950).
4. Ople v. Torres, 293 SCRA 141, 170 (1998). "The right to privacy is one of the most threatened rights of man living in a mass society. The threats emanate

the right to privacy of private individuals has been incessantly violated in the name of freedom of expression and the public's right to know. This is particularly true in the case of public figures ex-post,[5] or those private individuals who became instant celebrities as a result of the defamatory imputations in both traditional and non-traditional media.

In the controversy concerning businesswoman Janet Lim-Napoles, four ₱10-million libel complaints were filed against a blogger, two reporters, two editors, and a publisher.[6] The counsels of Mrs. Napoles argued that the latter had not yet been charged, much less convicted, of any crime in any court of law, yet she was portrayed as the mastermind of the ₱10-billion pork barrel scandal.[7] It was argued that while the law allows the public to pry into the privacy of public figures, Mrs. Napoles and her family members are not public figures considering that they have maintained private lives and have never been involved in politics.[8] Oppositors contend that a private individual's mere involvement in a newsworthy event imbued with public interest is enough to make him or her a public figure.[9]

Some of the other recent victims whose reputations were destroyed, and whose rights to privacy were allegedly violated, are Christopher John P. Lao, who caused the expression "I was not informed" to trend;[10] Paula Jamie

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from various sources — governments, journalists, employers, social scientists, etc." *Id.*

5. Karen Jimeno, *Are Trending Victims Less Protected?*, PHIL. DAILY INQ., Mar. 9, 2014, *available at* http://opinion.inquirer.net/72388/are-trending-victims-less-protected (last accessed Oct. 31, 2017).

6. ABS-CBN News, Napoles sues journalists, blogger for P40M, *available at* http://news.abs-cbn.com/nation/08/27/13/napoles-sues-journalists-blogger-p40m (last accessed Oct. 31, 2017).

7. *Id. See generally* Belgica v. Ochoa, Jr., 710 SCRA 1 (2013).

8. Rappler, Napoles lawyer threatens, Rappler replies, *available at* https://www.rappler.com/newsbreak/35781-napoles-lawyer-threatens-rappler-replies (last accessed Oct. 31, 2017) [hereinafter Napoles lawyer threatens, Rappler replies].

9. Rappler, Rappler reporter on Napoles piece: 'No malice', *available at* https://www.rappler.com/nation/40226-natashya-gutierrez-libel-napoles-counteraffidavit (last accessed Oct. 31, 2017) [hereinafter Rappler reporter on Napoles piece: 'No malice'].

10. Paterno Esmaquel II, You've been informed: He's now Atty Chris Lao, *available at* https://www.rappler.com/nation/1932-you-ve-been-informed-he-s-now-atty-chris-lao (last accessed Oct. 31, 2017).

Salvosa, from whom "*Amalayer*" was coined;[11] Robert Blair Carabuena, who became notorious for slapping a Metropolitan Manila Development Authority (MMDA) aide;[12] and Jeane Catherine L. Napoles, who was relentlessly bashed for enjoying a lavish lifestyle, *allegedly* at the expense of the taxpayer's money.[13] Although what these people have done might not exactly be agreeable, they are still entitled to the right of privacy. Before their videos were uploaded, and before the defamatory imputations were posted on the internet, published in the newspapers, and shown on national television, these people were anonymous private individuals who lived lives away from the public eye.

Privacy has been recognized as a universal right enjoyed by every individual, regardless of time and space.[14] An individual's right to privacy has been characterized to include the right to the protection of his or her good name, as constitutive of a person's dignity.[15] However, the right to privacy is not absolute, and must be balanced with other rights. The public figure doctrine is an attempt to strike that balance.

While, as a general rule, every defamatory imputation is presumed to be malicious,[16] jurisprudence has made the public figure doctrine an exception. Under this doctrine, a more stringent rule to prove libel is imposed upon public figures.[17] As a result, when the plaintiff in a libel suit is a public figure,

11. Audrey Domasian & Joshua Mark Dalupang, Girl in viral #Amalayer video speaks up, *available at* www.gmanetwork.com/news/hashtag/content/282308/girl-in-viral-amalayer-video-speaks-up/story (last accessed Oct. 31, 2017).

12. Niña Calleja, *Philip Morris exec beats red light, then traffic enforcer*, PHIL. DAILY INQ., Aug. 15, 2012, *available at* http://newsinfo.inquirer.net/250579/philip-morris-exec-beats-red-light-then-traffic-enforcer (last accessed at Oct. 31, 2017).

13. Vida Cruz, Is Jeane Napoles a new Imelda, or just a victim of social media?, *available at* http://www.gmanetwork.com/news/lifestyle/content/320046/is-jeane-napoles-a-new-imelda-or-just-a-victim-of-social-media/story (last accessed Oct. 31, 2017).

14. Samantha Barbas, *Saving Privacy from History*, 61 DEPAUL L. REV. 973, 978 (2012).

15. Eileen Carroll Prager, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 167 (1977) (citing *Gertz*, 418 U.S. at 341).

16. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 354 (1932).

17. Borjal v. Court of Appeals, 301 SCRA 1, 30-31 (1999). (citing New York Times Co. v. Sullivan, 376 U.S. 254, 281-82 (1965)).

the presumption of malice in law is deemed waived, and clear and convincing proof of actual malice is necessary for the case to prosper.[18] The Supreme Court recognizes "a stricter standard of 'malice' to convict the author of a defamatory statement where the offended party is a public figure."[19] Indeed, as the outcome of a defamation suit is essentially determined by whether the plaintiff is a public figure, the importance of characterization becomes apparent.

A public figure has been defined as 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.'"[20] Public figures have a lesser claim to privacy, since matters that are ordinarily private could, by reason of their status or position, become a subject of legitimate interest to the public in general.

The public figure doctrine was originally applied to public officers.[21] Any issue pertaining to a public official in relation to his or her functions is presumed to be of legitimate public interest.[22] This doctrine was further expanded to apply to public figures, and eventually to private individuals involved in controversies imbued with public interest.[23]

In the landmark case of *Borjal v. Court of Appeals*,[24] the Supreme Court applied the public interest test for the first time. It held that

> even assuming *ex-gratia argumenti* that private respondent, despite the position he occupied in the [First National Conference on Land Transportation (FNCLT)], would not qualify as a public figure, it does not necessarily follow that he could not validly be the subject of a public comment even if he was not a public official or at least a public

18. *Id.*

19. Disini, Jr. v. Secretary of Justice, 716 SCRA 237, 318 (2014).

20. Ayer Productions Pty. Ltd. v. Capulong, 160 SCRA 861, 874-75 (1988) (citing WILLIAM LLOYD PROSSER & WERDNER PAGE KEETON, PROSSER AND KEETON ON TORTS 859-61 (William Lloyd Prosser, et al. eds., 5th ed. 1984)) (emphasis omitted).

21. *See Disini, Jr.*, 716 SCRA at 430 (J. Carpio, concurring and dissenting opinion) (citing *New York Times Co.*, 376 U.S. at 279-80).

22. *See Disini, Jr.*, 716 SCRA at 430 (J. Carpio, concurring and dissenting opinion).

23. *Id.*

24. Borjal v. Court of Appeals, 301 SCRA 1 (1999).

> figure, for he could be, as long as he was involved in a public issue. *If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not voluntarily choose to become involved. 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 anonymity or notoriety.*[25]

However, even with the existing jurisprudence on the public figure doctrine, there is still an issue regarding the doctrine's application to private individuals who become public figures because of their involvement in an issue imbued with public interest. The main question that spawned this confusion is whether a private individual necessarily waives the right to privacy once he or she becomes embroiled, *voluntary or not*, in an issue imbued with public interest. This issue has generated conflicting decisions in the United States (U.S.) as regards the characterization of plaintiffs as public figures, with some decisions focusing on the content of the allegedly defamatory imputation, while others involving similar circumstances being decided solely based on the private or public figure status of the plaintiff.[26]

Although not as apparent, the same problem is currently faced in the Philippines. For instance, although the Supreme Court has held that a private person's mere involvement in a matter of public concern transforms him or her into a public figure, regardless of the participant's prior anonymity or notoriety,[27] the Supreme Court has likewise held that the public figure doctrine cannot be applied to a private individual even if the controversy in question deals with matters of public concern.[28]

The fine line between legitimate and illegitimate intrusion to an individual's right to privacy is further blurred by the increasing tendency for almost anything to be labeled as a "matter of public concern." The necessity of setting boundaries on what constitutes newsworthy events that may

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25. *Id.* at 26-27 (citing Rosenbloom v. Metromedia, 403 U.S. 29, 43 (1971)) (emphasis supplied).

26. *See generally* Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*, 16 N. ILL. U.L. REV. 141 (1995).

27. Villanueva v. Philippine Daily Inquirer, Inc., 588 SCRA 1, 13 (2009) (citing *Borjal*, 301 SCRA at 26).

28. Yuchengco v. The Manila Chronicle Publishing Corporation, 605 SCRA 684, 717-18 (2009) (citing *Philippine Journalists, Inc. (People's Journal)*, 477 SCRA at 497).

render supposedly libelous imputations unsanctionable arises. The existence of rules and guidelines will help recalibrate the balance between the freedom of speech and the right to privacy.

The public figure doctrine adopted by Philippine jurisprudence is an attempt to restore the constitutional equilibrium between the freedom of expression and the right to privacy. Requiring different standards of proof for private and public figures is a legal mechanism intended to protect the interests of private individuals who deserve to recover damages from libel suits, while simultaneously limiting censorship and the chilling effect to freedom of expression exercised against public officials and public figures.[29]

The challenge, therefore, is to adopt a legal framework that effectively protects the right to privacy especially that of private individuals in a manner that still adequately protects freedom of expression at the same time. By identifying the factors that transform a private individual into a public figure, this Note seeks to address the problem on unlawful intrusions upon the right to privacy of private individuals who unfortunately find themselves entangled in an issue infused with public interest, through no purposeful action of their own.

The Note is divided into six chapters. Chapter I is this Introduction. Chapter II will discuss the right to privacy, particularly focusing on reputational interest. It will discuss the constitutional provisions, laws, and international law instruments that protect the right to privacy. The same chapter will discuss the libel laws embedded in Philippine law and jurisprudence as a means to protect the privacy interests of every individual, as well as the possible defenses and exceptions that may be raised to bar or limit recovery. Chapter III will examine the evolution of the public figure doctrine, tracing its roots to U.S. Supreme Court cases from *New York Times Co. v. Sullivan*[30] where the doctrine was first applied, up until the cases of *Rosenbloom v. Metromedia*[31] and *Gertz v. Robert Welch, Inc.*[32] that extended the doctrine's application to private individuals involved in controversies imbued with public interest. An examination of the public figure doctrine's development in Philippine jurisprudence will also be undertaken. Chapter IV will provide a more focused discussion and examination of involuntary

29. *See* Prager, *supra* note 15, at 157.

30. New York Times Co. v. Sullivan, 376 U.S. 254 (1965).

31. Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

32. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

public figures and identify the existing challenges in characterization and in the application of the public figure doctrine to private individuals. Chapter V will discuss the factors to be considered in the determination of private individuals who are deemed to have waived their right to privacy. It will likewise integrate these factors into a proposed legal framework that will guide the courts in the application of the public figure doctrine to private individuals involved in an issue infused with public interest. The chapter will analyze the degree of participation necessary to transform a private individual into a public figure by examining the typical situations in which private individuals-turned-involuntary public figures find themselves in: (1) Involvement in a crime; (2) Involvement in a litigation proceeding; (3) Being associated with a public figure; and (4) Being in the wrong place at the wrong time. Chapter VI concludes this Note.

II. THE RIGHT TO PRIVACY AND THE LAW ON DEFAMATION

A. The Right to Privacy

The importance of the right to privacy is underscored by the statement, "[t]he 'right to be let alone' is the underlying theme of the whole Bill of Rights."[33] Considered as constitutive of a person's dignity,[34] the right to

33. Erwin. N. Griswold, *The Right to be Let Alone*, 55 NW. U.L. REV. 216, 217 (1960). *See also* Jamie E. Nordhaus, *Celebrities' Rights to Privacy: How Far Should the Paparazzi Be Allowed to Go?*, 18 REV. LITIG. 285, 287 (1999) (citing THOMAS M. COOLEY, THE LAW OF TORTS 29 (2d ed. 1888)). With regard to privacy, U.S. courts have held that "the right of personal privacy is one aspect of the 'liberty' protected by the Due Process Clause[.]" 16B AM. JUR. 2D *Constitutional Law* § 650 (2015). Moreover, Philippine jurisprudence discussed the concept of civil liberty in relation to being free from restraint —

> Civil liberty ... includes the right to exist and the right to be free from arbitrary personal restraint or servitude. The term cannot be dwarfed into mere freedom from physical restraint of the person of the citizen, but is deemed to embrace the right of man to enjoy the faculties to which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.

JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 106 (2009 ed.) (citing Rubi v. Provincial Board of Mindoro, 39 Phil. 660, 705 (1919)).

34. *See* Prager, *supra* note 15, at 167 (citing *Gertz*, 418 U.S. at 341).

privacy has been described as the beginning of all freedom.[35] Although not expressly provided, the right to privacy is protected by no less than the 1987 Constitution, and regulated by the other laws, as comprehensively set out in *Ople v. Torres*[36] —

> It is expressly recognized in Section 3 (1) of the Bill of Rights [—]
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> '[Section] 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.'
>
> Other facets of the right to privacy are protected in various provisions of the Bill of Rights[.]
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> ...
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> Zones of privacy are likewise recognized and protected in our laws. The Civil Code provides that '[e]very person shall respect the dignity, personality, privacy[,] and peace of mind of his neighbors and other persons' and punishes as actionable torts several acts by a person of meddling and prying into the privacy of another. It also holds a public officer or employee or any private individual liable for damages for any violation of the rights and liberties of another person, and recognizes the privacy of letters and other private communications. The Revised Penal Code makes a crime the violation of secrets by an officer, the revelation of trade and industrial secrets, and trespass to dwelling. Invasion of privacy is an offense in special laws like the Anti-Wiretapping Law, the Secrecy of Bank Deposits Act[,] and the Intellectual Property Code. The Rules of Court on privileged communication likewise recognize the privacy of certain information.[37]

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35. Morfe v. Mutuc, 22 SCRA 424, 442 (1968) (citing Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (J. Douglas, dissenting opinion). The Court in that case held that, "Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom." *Id.*

36. Ople v. Torres, 293 SCRA 141 (1998).

37. *Id.* at 156-58 (1998) (citing PHIL. CONST. art. III, §§ 1, 2, 3 (1), 6, 8, & 17; CIVIL CODE, arts. 26, 32, & 723 (1950); REVISED PENAL CODE, arts. 229, 280, & 290-292; An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of the Privacy of Communication, and for Other Purpose, Republic Act No. 4200 (1965); An Act Prohibiting Disclosure of or Inquiry into, Deposits with any Banking Institution and Providing Penalty Therefor, Republic Act No. 1405 (1955); An Act Prescribing the Intellectual Property

In addition to the foregoing, the Revised Penal Code also protects the reputational aspect of a person's right to privacy by penalizing libel.[38] The Civil Code also allows a plaintiff to file an independent civil action for defamation, entirely separate and distinct from the criminal action.[39]

The right to privacy is recognized under international law. It bears stressing that, the right to privacy finds refuge under all major international human rights instruments, with the exception of the African Charter on Human and Peoples' Rights.[40] The Universal Declaration of Human Rights (UDHR) [41] provides that, "[n]o one shall be subjected to arbitrary interference with his privacy, family, home[,] or correspondence, nor to attacks upon his [honor] and reputation. Everyone has the right to the protection of the law against such interference or attacks." [42] The International Covenant on Civil and Political Rights (ICCPR), [43] the European Convention on Human Rights (ECHR), [44] and the American Convention on Human Rights (ACHR)[45] contain a similar provision. The ECHR further mandates that,

> [t]here shall be no interference by a public authority with the exercise of [the right to respect for his or her private and family life, his home, and his correspondence] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public

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Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes [INTELL. PROP. CODE], Republic Act No. 8293 (1997); & 1989 RULES ON EVIDENCE, rule 130, § 24) (emphases omitted).

38. REVISED PENAL CODE, arts. 355-360.

39. CIVIL CODE, art. 33.

40. *See* African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, 1520 U.N.T.S. 217.

41. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

42. *Id.* art. 12.

43. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

44. Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, *opened for signature* Nov. 4, 1950, E.T.S. 5 [hereinafter ECHR].

45. American Convention on Human Rights art. 11, ¶ 2, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter ACHR].

> safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[46]

Moreover, it has been said that "[i]nternational bodies, including the European Court of Human Rights and the United Nations (UN) Human Rights Committee, [have also] ruled on the right to privacy."[47]

From the different protected "zones of privacy"[48] discussed above, the following facets of privacy in the Constitutional sphere may be identified: (1) physical privacy which "denotes seclusion, solitude, security, or bodily integrity";[49] (2) informational privacy which "denotes confidentiality, secrecy[,] or anonymity, especially with respect to correspondence, conversation[,] and records";[50] (3) proprietary privacy which "limits the use of a person's name, likeness, identity, or other attributes of identity and exclusive possession;"[51] and (4) decisional privacy which "denotes liberty,

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46. ECHR, *supra* note 44, art. 8, ¶ 2.

47. David Banisar, The Right to Information and Privacy: Balancing Rights and Managing Conflicts (A Working Paper Commissioned by the Access to Information Program at the World Bank Institute) at 6, *available at* http://foiadvocates.net/wp-content/uploads/Publication_WBI_RighttoInfoand Privacy.pdf (last accessed Oct. 31, 2017).

48. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

Id.

49. TIMOTEO B. AQUINO, TORTS AND DAMAGES 462-63 (3d ed. 2013) (citing Anita L. Allen, *Privacy*, *in* OXFORD HANDBOOK OF PRACTICAL ETHICS 485 (2005 ed.)).

50. *Id.*

51. *Id.*

freedom, choice, or autonomy in decision making about sex, reproduction, marriage, family, and health care."[52]

Notably, however, the right to privacy found in the Constitutional sphere,[53] may only be invoked against the government.[54] Against private defendants, violations of the right to privacy may be raised under the Philippine Law on Torts. In the article of William Lloyd Prosser,[55] a leading authority on Torts, the following types of invasion to privacy were identified: (1) intrusion upon plaintiff's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in false light in the public eye; and (4) appropriation for the defendant's advantage, of plaintiff's likeness, or name.[56]

Integrating the different aspects of privacy, the various interests or values in the right to privacy protected by the Constitution, other domestic laws, and international law, may be summarized as follows:

(1) Seclusive interest;

(2) Reputational interest;

(3) Informational interest;

(4) Decisional interest; and

(5) Proprietary interest.

Although the right to privacy has been embedded in Philippine law for more than four decades, it has yet to be examined in depth.[57] With the

52. *Id.*

53. *Id.*

54. *Id.*

55. "William Lloyd Prosser was the Dean of the College of Law at [University of California] Berkeley from 1948 to 1961. Prosser authored several editions of Prosser on Torts, universally recognized as the leading work on the subject of tort law for a generation. It is still widely used today, now known as Prosser and Keeton on Torts, [fifth] edition." HeinOnline, Prosser, William L., *available at* heinonline.org/HOL/AuthorProfile?search_name=Prosser%2C+William+L.&collection=journals&base=js (last accessed Oct. 31, 2017) (click "Biography" to view the quoted passage).

56. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

57. *See* Oscar Franklin B. Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*

advent of social, political, and technological developments,[58] the right to privacy has become a very contentious issue. The imperative to develop a legal framework that can keep up with the changing times while providing sufficient protection to the right to privacy at the same time has arisen.

1. The Right to a Good Reputation

In the Philippines, the most controversial privacy value protected is reputational interest, as evident in the various defamation suits filed by both public and private individuals against both media and non-media defendants. To be sure, jurisprudence recognizes that, "the enjoyment of a private reputation is as much a constitutional right as the possession of life, liberty[,] or property."[59] The law recognizes the societal interest in protecting individual reputation, and therefore penalizes those who destroy a person's name and reputation for no justifiable reason.[60] This is to be expected, as a person's good name and reputation has been seen as a reflection of a person's dignity and worth as a human being —

> *A man's good name and reputation are worth more to him than all the wealth which he can accumulate during a lifetime of industrious labor. To have that destroyed may be eminently of more damage to him personally than the destruction of his physical wealth or health.* He may prize his good name more than even his physical wealth or his health. The loss is immeasurable. No amount of money can compensate him for his loss. *The 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 and underlies the whole scheme of civilization and stable government. The respect and esteem of a man's neighbors are among the highest rewards of a well spent life vouchsafed to man in this existence.* The hope of the good esteem of one's neighbors and associates is the inspiration of youth and its possession is a solace in later years. A man of affairs who has been seen and known by his fellow men in the active pursuits of life for many years and who has developed a great character and an unblemished reputation, has acquired a possession more useful and more valuable to most men than the possession of lands or houses or silver or gold. *The law recognizes the value of such a reputation and imposes upon him who attacks it by*

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82 PHIL. L.J. 78, 86-87 (2008) (citing *Morfe*, 22 SCRA). Oscar Franklin B. Tan was the Chair of the Philippine Law Journal in 2005 and was chosen to be the Commencement Speaker of the Harvard Law School LL.M. Batch of 2007. Tan, *supra* note 57, at 78.

58. *See Ople*, 293 SCRA at 169-70.

59. Worcester v. Ocampo, 22 Phil. 42, 73 (1912).

60. *Id.*

> *slanderous words or libelous publication, the liability to make full compensation for the damage done.*[61]

Reputation refers to the "estimate in which an individual is held by public fame in the place he is known."[62] It is seen as a "personal asset achieved or accrued over time, 'slowly built up by integrity, honorable conduct, and right living.'"[63]

A person's reputation does not speak so much about a person's character, and vice versa. These are two different things. "Character" refers to those qualities that an individual actually is and does, while "reputation" is what people think an individual is[64] —

> [T]he right to reputation ... has regard ... to that repute which is slowly built up by integrity, honorable conduct, and right living. ... [I]t is reputation, not character, which the law aims to protect. Character is what a person really is; reputation is what he seems to be. One is composed of the sum of the principles and motives — be they known or unknown — which govern his conduct. The other is the result of observation of his conduct — the character imputed to him by others. It is, therefore, reputation alone that is vulnerable[.][65]

Several international law instruments likewise protect the right to a good reputation. In particular, the UDHR,[66] ICCPR,[67] the ECHR,[68] and ACHR,[69] all prohibit any attack upon a person's honor and reputation.

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61. Perfecto v. Contreras, 28 Phil. 538, 545-46 (1914) (citing *Worcester*, 22 Phil. at 97-98) (emphases supplied).

62. Samantha Barbas, *The Laws of Image*, 47 NEW ENG. L. REV. 23, 29 (2012) (citing Cooper v. Greeley & McElrath, 1 Denio 347, 365 (1845) (U.S.)).

63. *Id.* (citing Van Vechten Veeder, *The History and Theory of the Law of Defamation II*, 4 COLUM. L. REV. 33, 33 (1904)).

64. Veeder, *supra* note 63.

65. *Id.*

66. UDHR, *supra* note 41, art. 12.

67. ICCPR, *supra* note 43, art. 17.

68. ECHR, *supra* note 44, art. 8, ¶ 1.

69. ACHR, *supra* note 45, art. 11, ¶ 2.

2. Balancing the Right to Privacy with Other Rights

a. Right to Information

Like any other right, the right to privacy is not absolute and must be balanced with other rights and values. One of these rights is the individual's right to information or right to know,[70] provided for under Section 7, Article III of the Philippine Constitution or the Bill of Rights —

> Section 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.[71]

The right to information or the right to know basically provides that, "individuals have a basic human right to demand information held by government bodies."[72] Like the right to privacy, the right to information is a recognized human right, and is a derivative of the right to freedom of expression.[73] This can be seen in Article 19 of the UDHR, which states that "this right to freedom of expression includes freedom ... to seek, receive[,] and impart information and ideas through any media and regardless of frontiers."[74] Such constitutional right however, is "subject to such limitations as may be provided by law,"[75] and may therefore be regulated.

Based on this provision, the following parameters or limitations on such right may be gathered:[76]

(1) The right to information is limited to matters of public concern;

(2) Access is granted to official, not unofficial, records, and to documents and papers that pertain to official acts, transactions or decisions;

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70. CENTER FOR MEDIA FREEDOM AND RESPONSIBILITY, PHILIPPINE PRESS FREEDOM REPORT 2008 15 (2009).

71. PHIL. CONST. art. III, § 7.

72. Banisar, *supra* note 47, at 5.

73. *Id.*

74. UDHR, *supra* note 41, art. 19

75. CENTER FOR MEDIA FREEDOM AND RESPONSIBILITY, *supra* note 70, at 15.

76. *Id.*

(3) Government research data accessed must be those used as basis for policy development;

(4) Such access is afforded the citizen, not the alien; and

(5) All of the above is subject to limitations as provided by law.[77]

Fr. Joaquin G. Bernas, S.J., opines that the regulation can come from either statutory law or the "inherent power [of an officer] to control his office and records under his custody and ... to exercise [some discretion] as to the manner in which persons desiring to inspect, examine, or copy the record may exercise their rights."[78] In expounding on the allowable scope on access to official records, he explained that

> [I]t is important to keep in mind that the two sentences of Section 7 guarantee only one general right, that is, the right to information on matters of public concern. The right of access to official records is given as an implementation of the right to information. Thus, too, regulatory discretion must include both authority to determine what matters are of public concern and authority to determine the manner of access to them.[79]

The conflict that exists between the right to privacy and the public's right to know is present "when there is a demand for access to personal information held by government bodies,"[80] especially in this age where privacy is continuously being confronted by the new technological developments and practices.[81]

Evidently, although the right to information is an essential human right that must be balanced against the right to privacy, the former primarily clashes with informational privacy and not reputational privacy, which is the main concern of libel laws, and of this Note. It is posited that the only instance when right to information may clash with the right to privacy as regards a person's reputation, is when an individual publishes information of public record that tends "to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead[,]" for the right to freedom of expression includes freedom to impart and

77. *Id.*

78. BERNAS, *supra* note 33, at 381 (citing Subido v. Ozaeta, 80 Phil. 383, 386-87).

79. BERNAS, *supra* note 33, at 381 (citing 1 RECORD OF THE CONSTITUTIONAL CONVENTION: PROCEEDINGS AND DEBATES, NO. 32, at 677 (1986)).

80. Banisar, *supra* note 47, at 1.

81. *Id.*

receive information.[82] Strictly speaking however, the right to information is a right enforced against the government as may be gleaned from the text of the provision,[83] as well as the various Supreme Court decisions on the matter.[84] Significantly, in the context of an individual's reputational interest, the right that almost always clashes with the right to privacy is freedom of expression. In fact, according to William Lloyd Prosser in his landmark article on privacy, "[a]t an early stage of its existence, the right of privacy came into head-on collision with the constitutional guaranty of freedom of the press."[85]

b. Right to Freedom of Expression

The freedom of speech and of the press, otherwise known as "freedom of expression,"[86] is also protected by the Philippine Constitution. According to Section 4, Article III, "[n]o law shall be passed abridging the freedom of speech, of expression, and of the press, or the right of the people to peaceably assemble and petition the government for redress of grievances."[87]

The provision above preserved the 1935 and 1973 texts, save for "of expression" added in the 1987 Constitution.[88] Notably, the added phrase was a mere minor amendment which "by itself does not add anything to existing

82. REVISED PENAL CODE, art. 353.

83. "Access [is granted] to [ ] records, and to documents and papers [that pertain] to official acts, transactions, or decisions [of the government.]" PHIL. CONST. art. III, § 7. *See* BERNAS, *supra* note 33, at 380-86.

84. The cases where Article III, Section 7 of the Constitution was invoked include information on any proposed settlement with possessors of ill-gotten wealth, bank accounts of suspects in Anti-Graft cases, access to names of officials who received luxury vehicles seized by the Bureau of Customs, access to land records, and access to decisions and opinions of a court, among others. *See generally Subido*, 80 Phil.; Chavez v. President Commission on Good Government, 299 SCRA 744 (1998); Gonzales v. Narvasa, 337 SCRA 733 (2000); & Marquez v. Desierto, 359 SCRA 772 (2001).

85. Prosser, *supra* note 59, at 410.

86. LEONARDO P. REYES, FUNDAMENTALS OF LIBEL LAW 69 (2007 ed.) [hereinafter REYES, FUNDAMENTALS OF LIBEL LAW].

87. PHIL. CONST. art. III, § 4.

88. BERNAS, *supra* note 33, at 231.

jurisprudence, [and] should itself be inclusive of various forms of expression which jurisprudence has placed under the speech and press clause."[89]

Like the right to privacy, freedom of expression can also be found in several human rights instruments. Under the UDHR, "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive[,] and impart information and ideas through any media and regardless of frontiers."[90] The ICCPR provides that "[e]veryone shall have the right to hold opinions without interference"[91] as well as "the right to freedom of expression."[92] The ECHR also has similar provision that mandates that, "[e]veryone has the right to freedom of expression ... [that] shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[93]

Often identified with liberty, freedom of expression pertains to "the liberty to freely utter, print, and publish any statement whatsoever without subjection to previous censorship of the government."[94] It pertains to the right of every person "to freely utter and publish whatever [he or she] may please, and to be protected against any responsibility [or liability for such]," except to the extent that such speech is injurious to another and to public interest.[95]

Fr. Bernas provided several reasons why freedom of expression is guaranteed by the Constitution, to wit —

> For some, freedom of expression is essential for the *search of truth*. This is the marketplace of ideas which posits that the power of thought can be tested by its acceptability in the competition of the market. Another reason offered is that free expression is *needed for democracy to work properly*. The

89. *Id.* (citing 1 RECORD, 1987 PHIL. CONST., NO. 33, at 770-71).

90. UDHR, *supra* note 41, art. 19.

91. ICCPR, *supra* note 43, art. 19 (1).

92. *Id.* art. 19 (2).

93. ECHR, *supra* note 44, art. 10 (1).

94. REYES, FUNDAMENTALS OF LIBEL LAW, *supra* note 86, at 69 (citing Gonzales v. Commission on Elections, 27 SCRA 835 (1969) & Thornhill v. Alabama, 310 U.S. 88 (1940)).

95. REYES, FUNDAMENTALS OF LIBEL LAW, *supra* note 86, at 69 (citing 2 THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927)).

> citizen-critic has to be given the information and freedom required for him to be able to perform his civic duty. Still another reason is a very personal one. Freedom of expression *promotes individual self-realization and self-determination.*[96]

Although the scope of freedom of expression is indeed broad, extending to all subjects that affect all aspects of life, whether political, sociological, religious, or economic, such freedom is not without limitations.[97] Freedom of expression does not mean absolute freedom to say and publish anything, regardless of the consequences that they bring. The protection accorded to freedom of speech is only to the extent that no injury is caused, and no right of another is impinged upon —

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution *does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or unrestricted or unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.*[98]

Not all kinds of speech are protected speech.[99] Some types of speech are subject to the regulation of the state in order to ensure that the rights of others in the community are similarly safeguarded.[100] For instance, law and jurisprudence have established that libel is not entitled to constitutional protection and may therefore be penalized.[101]

B. The Law on Defamation

1. Definition and Elements of Libel

Defamation, defined as "[a]n intentional false communication, either published or publicly spoken, that injures another's reputation or good name,"[102] includes both libel and slander. The only difference between the

96. BERNAS, *supra* note 33, at 231 (emphases supplied).

97. *See generally* REYES, FUNDAMENTALS OF LIBEL LAW, *supra* note 86, at 73–78.

98. *Gonzales*, 27 SCRA at 895 (J. Castro, separate opinion) (citing People v. Nabong, 57 Phil. 455, 460–61 (1935)) (emphasis supplied).

99. Chavez v. Gonzales, 545 SCRA 441, 486 (2008) (citing *Gonzales*, 27 SCRA at 858).

100. *Chavez*, 545 SCRA at 486 (citing 1 HECTOR S. DE LEON, PHILIPPINE CONSTITUTIONAL LAW: PRINCIPLES AND CASES 485 (2003)).

101. *Chavez*, 545 SCRA at 533 (J. Carpio, separate concurring opinion).

102. BLACK'S LAW DICTIONARY 417 (6th ed. 1990).

two is that, libel is written, while slander is verbal.[103] The more common type is that of libel, as seen in Philippine case law replete with libel cases. A case for slander is rarely filed, perhaps because of the difficulty in procuring evidence to support a case for slander, as opposed to libel. The penalty for libel is also more severe than that for slander.[104]

The only definition of libel is found in the Revised Penal Code.[105] Included under the title on Crimes Against Honor, libel is defined in this wise —

> [Article] 353. Definition of libel. — A libel is a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.[106]

Based on the definition above, the Court has held that for liability to attach, the following four elements of libel must be present:

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103. LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW BOOK TWO 986 (17th ed. 2008) [hereinafter REYES, THE REVISED PENAL CODE].

104. *See* REVISED PENAL CODE, arts. 355 & 358.

> [Article] 355. Libel means by writings or similar means. — A libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means, shall be punished by *prisión correccional* in its minimum and medium periods or a fine ranging from [f]orty thousand pesos ([₱ 40,000]) to [o]ne million two hundred thousand pesos ([₱1,200,000]), or both, in addition to the civil action which may be brought by the offended party.
>
> ...
>
> [Article] 358. Slander. — Oral defamation shall be punished by arresto mayor in its maximum period to prision correccional in its minimum period if it is of a serious and insulting nature; otherwise the penalty shall be arresto menor or a fine not exceeding [t]wenty thousand pesos (₱20,000).

Id.

105. While only the Revised Penal Code defines libel, the Civil Code also gives a certain degree of protection against defamation. *See* CIVIL CODE, arts. 26, 33, & 2219.

106. REVISED PENAL CODE, art. 353.

(1) That there must be an imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance[;]

(2) That the imputation must be made publicly[;]

(3) That it must be malicious[;]

(4) That the imputation must be directed at a natural or juridical person, or one who is dead[; and,]

(5) That the imputation must tend to cause the dishonor, discredit or contempt of the person defamed.[107]

In *Yuchengco v. Manila Chronicle Publishing Corporation*,[108] it was held that libel can also be instituted as an independent civil action under Article 33 of the Civil Code, and shall require only a preponderance of evidence.[109] Notably, jurisprudence has adopted the above-mentioned elements in a purely civil action for damages, considering that "an award of damages under the premises presupposes the commission of an act amounting to defamatory imputation or libel, which, in turn, presupposes malice."[110]

a. Defamatory Imputation

In the determination of what qualifies as a defamatory imputation, the words used are to be construed as a whole, and understood "in their plain, natural[,] and ordinary meaning," unless it appears otherwise.[111]

Libel may either be (1) libelous *per se*, where the publication is "defamatory of the plaintiff upon its face";[112] or (2) libelous *per quod*, where it is "necessary for the party libeled to plead extrinsic facts to show the

107. MVRS Publications, Inc. v. Islamic Da'wah Council of the Philippines, Inc. 396 SCRA 210, 263-64 (2003) (J. Austria-Martinez, dissenting opinion) (citing LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW BOOK TWO 921 (14th ed. 1998) (emphases omitted).

108. Yuchengco v. Manila Chronicle Publishing Corporation, 605 SCRA 684 (2009).

109. *Id.* at 697-98.

110. *Id.* at 698 (citing GMA Network, Inc. v. Bustos, 504 SCRA 638, 650-51 (2006)).

111. *Yuchengco*, 605 SCRA at 699.

112. *New York, Libel Per Quod, and Special Damages: An Unresolved Dilemma*, 27 FORDHAM L. REV. 405, 405 (1958).

defamation[.]"[113] As a general rule, words are libelous *per se* "if these tend to expose a person to public hatred, contempt, ridicule, aversion, or disgrace, induce an evil opinion of him in the minds of right thinking persons, and deprive him of their friendly intercourse in society,"[114] regardless of the actual consequences of such imputations.[115] They must "reflect on his integrity, his character, and his good name and standing in the community, and tend to expose him to public hatred, contempt, or disgrace."[116]

b. Publication

Publication, in its ordinary usage, means "[t]o make public; to make known to people in general; to bring before the public."[117] In defamation law, publication pertains to "the making known of the defamatory matter, after it has been written, to some person other than the person of whom it is written."[118] In relation to the right to privacy, the law on libel protects a person's reputational interest —

> If the statement is sent straight to a person whom it is written there is no publication of it. The reason for this is that [a] communication of the defamatory matter to the person defamed cannot injure his reputation though it may wound his self-esteem. *A man's reputation is not the good opinion he has of himself, but the estimation in which others hold him.*[119]

c. Identification

In order for one to maintain an action for an alleged defamatory imputation, the statement "must refer to an ascertained or ascertainable person, and that person must be the plaintiff."[120] The name of the plaintiff need not be mentioned, and the requirement is satisfied as long as the plaintiff is identifiable or when it is shown that the plaintiff is the person referred to.[121]

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113. *Id.*

114. *MVRS Publications, Inc.*, 396 SCRA at 264 (J. Austria-Martinez, dissenting opinion) (citing 53 C.J.S. *Libel and Slander* § 13) (emphasis omitted).

115. *Id.*

116. *Id.*

117. BLACK'S LAW DICTIONARY 1227.

118. Alonzo v. Court of Appeals, 241 SCRA 51, 60 (1995).

119. *Id.* at 60-61 (emphasis supplied).

120. *Yuchengco*, 605 SCRA at 707.

121. *See, e.g.*, *Yuchengco*, 605 SCRA at 708.

The case of *MVRS Publications, Inc. v. Islamic Da'wah Council of the Philippines, Inc.*[122] explains why it is necessary for the offended party to be identifiable —

> The rule in libel is that the action must be brought by the person against whom the defamatory charge has been made. In the American jurisdiction, no action lies by a third person for damages suffered by reason of defamation of another person, even though the plaintiff suffers some injury therefrom. For recovery in defamation cases, it is necessary that the publication be 'of and concerning the plaintiff.' *Even when a publication may be clearly defamatory as to somebody, if the words have no personal application to the plaintiff, they are not actionable by him. If no one is identified, there can be no libel because no one's reputation has been injured*[.][123]

In sum, for a libel case to prosper, it must appear that the plaintiff is the person alluded to in the defamatory statement.

d. Malice

Jurisprudence describes malice as a state of mind that "connotes ill will or spite and speaks not in response to duty but merely to injure the reputation of the person defamed, and implies an intention to do ulterior and unjustifiable harm."[124] Within the context of defamation, malice is said to exist when it is shown that the defamatory remarks were made "with knowledge that it was false or with reckless disregard as to the truth or falsity thereof."[125]

Essentially, there are two types of malice: (1) malice in law; and (2) malice in fact. The former is a presumption of law that dispenses with proof of malice, while the latter, as the name implies, pertains to actual malice —

> Malice in law is a presumption of law. It dispenses with the proof of malice when words that raise the presumption are shown to have been uttered. It is also known as constructive malice, legal malice, or implied malice. On the other hand, malice in fact is a positive desire and intention to annoy and injure. It may denote that the defendant was actuated by ill will or

122. MVRS Publications, Inc. v. Islamic Da'wah Council of the Philippines, Inc., 396 SCRA 210 (2003).

123. *Id.* at 224 (emphasis supplied).

124. *Borjal*, 301 SCRA at 28 (citing United States v. Cañete, 38 Phil. 253, 264 (1918)). *See also* Orfanel v. People, 30 SCRA 819, 823 (1969).

125. *Yuchengco*, 605 SCRA at 709 (citing Vasquez v. Court of Appeals, 314 SCRA 460, 477 (1999)).

> personal spite. It is also called express malice, actual malice, real malice, true malice, or particular malice.[126]

2. Presumption of Malice and the Exceptions Thereto

The Revised Penal Code explicitly provides the basis for the presumption of malice in defamation. This is what is referred to as malice in law provided in Article 354 of the Revised Penal Code.[127] In particular, the law mandates that, "every defamatory imputation is presumed to be malicious, even if it be true, if no good intention and justifiable motive for making it is shown,"[128] save for a few exceptions.[129]

The exceptions to the presumption of malice, called privileged communications, [130] are bifurcated into two categories: (1) absolutely privileged communications; or (2) qualifiedly or conditionally privileged communications.[131]

An absolutely privileged communication is "one for which, by reason of the occasion on which it is made, no remedy is provided for the damages in a civil action for slander or libel."[132] A privileged communication of this type cannot be negated by proof of express malice, and both criminal and civil action for libel concerning such statements are absolutely barred.[133] The coverage of absolutely privileged communications is narrow[134] and includes

> [s]tatements made by members of Congress in the discharge of their functions as such, official communications made by public officers in the performance of their duties, and allegations or statements made by the parties or their counsel in their pleadings or motions or during the hearing of judicial proceedings, as well as the answers given by witnesses in reply to

126. *Yuchengco*, 605 SCRA at 709 (citing REYES, FUNDAMENTALS OF LIBEL LAW, *supra* note 86, at 15) (emphases omitted).

127. *Yuchengco*, 605 SCRA at 709.

128. *Id.* (citing REVISED PENAL CODE, art. 354).

129. *See Yuchengco*, 605 SCRA at 709 (citing REVISED PENAL CODE, art. 354).

130. Florimond C. Rous, Annotation, *The Concept of Privileged Communications*, 111 SCRA 667, 668-69 (1982).

131. *Id.*

132. Severiano S. Tabios, Annotation, *The Doctrine of Privileged Communication*, 57 SCRA 82, 83 (1974).

133. *Id.* (citing Sison v. David, 1 SCRA 60, 68 (1961)).

134. Tabios, *supra* note 132, at 83.

> questions propounded to them in the course of said proceedings, provided that said allegations or statements are relevant to the issues, and the answers are responsive or pertinent to the questions propounded to said witnesses.[135]

Absolutely privileged communications also covers pleadings, petitions, motions, or other utterances made in "legislative, and judicial proceedings and other acts of state, including, it is said, communications made in the discharge of a duty under express authority of law, by or to heads of executive departments of the state, and matters involving military affairs."[136]

On the other hand, qualifiedly privileged communications pertain to statements

> made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral[,] or social, made to a person having a corresponding interest or duty.[137]

These communications are conditionally privileged, as defamatory statements made that fall under this category may still be actionable, once actual malice is proven — in stark contrast with absolutely privileged communications, where the proof of malice cannot negate the privilege.[138] In other words, these communications are mere exceptions to the general rule where a presumption of malice exists.[139] Article 354 provides the instances when the presumption of malice does not attach, in which case, malice in fact or actual malice must be proven:

> (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

135. REYES, THE REVISED PENAL CODE, *supra* note 103, at 994 (citing *Orfanel*, 30 SCRA at 819-20).

136. Tabios, *supra* note 132, at 83-84.

137. *Id.* at 84.

138. *Yuchengco*, 605 SCRA at 710-11.

139. *Id.* at 710.

> speech delivered in said proceedings, or of any other act performed by public officers in the exercise of their functions.[140]

Notably, jurisprudence has established that the enumeration provided in Article 354 of the Revised Penal Code is not exhaustive.[141] An addition to the list of qualifiedly privileged communications are fair commentaries on matters of public interest, which basically state that a defamatory imputation against a public figure in his public capacity is not necessarily actionable,[142] unless it is shown that the discreditable imputation is a "false allegation of fact or a comment based on a false supposition."[143] The case of *Borjal* explains that

> [i]ndisputably, petitioner Borjal's questioned writings are not within the exceptions of [Article] 354 of The Revised Penal Code for, as correctly observed by the appellate court, they are neither private communications nor fair and true report without any comments or remarks. However this does not necessarily mean that they are not privileged. *To be sure, the enumeration under [Article] 354 is not an exclusive list of qualifiedly privileged communications since fair commentaries on matters of public interest are likewise privileged.* The rule on privileged communications had its genesis not in the nation's penal code but in the Bill of Rights of the Constitution guaranteeing freedom of speech and of the press. As early as 1918, in [*United States v. Cañete*], this Court ruled that publications which are privileged for reasons of public policy are protected by the constitutional guaranty of freedom of speech. This constitutional right cannot be abolished by the mere failure of the legislature to give it express recognition in the statute punishing libels.
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> ...
>
> To reiterate, fair commentaries on matters of public interest are privileged and constitute a valid defense in an action for libel or slander. The doctrine of fair comment means that while in general every discreditable imputation publicly made is deemed false, because every man is presumed innocent until his guilt is judicially proved, and every false imputation is deemed malicious, nevertheless, when the discreditable imputation is directed

140. REVISED PENAL CODE, art. 354.

141. *Yuchengco*, 605 SCRA at 710.

142. *Borjal*, 301 SCRA at 23.

143. *Id.*

> against a public person in his public capacity, it is not necessarily actionable.[144]

In brief, the fact that the communication is qualifiedly privileged merely destroys the presumption of malice, and shifts the burden of negating the presumption of malice from the defendant, in which case, the burden of proving malice now devolves upon the plaintiff.[145]

3. Degree of Protection Against Libel: Civil and Criminal Liability in the Philippines

Citing William G. Hale in his *Law of the Press*, the Supreme Court in *Lopez v. Court of Appeals*,[146] explained why libel law has a criminal and a civil aspect, to wit —

> On the one hand, libeling a person results in depriving him of his good reputation. *Since reputation is a thing of value, truly rather to be chosen than great riches, an impairment of it is a personal wrong.* To redress this personal wrong[,] money damages are awarded to the injured person. *On the other hand, the publication of defamatory statements tends strongly to induce breach of the peace by the person defamed, and hence is of peculiar moment to the state as the guardian of the public peace.* Viewed from this angle, libel is a crime, and as such subjects the offender to a fine or imprisonment.[147]

a. Criminal Liability

The protection against libelous imputations finds basis in both Philippine criminal and civil law.[148] In addition to any civil liability that may be imposed, any person guilty of the crime of libel may suffer the penalty of imprisonment for a minimum period of 6 months and 1 day up to a

144. *Id.* at 21-23 (citing PHIL. CONST. art. III, § 4 & *Cañete*, 38 Phil. at 265) (emphases supplied & omitted).

145. Tabios, *supra* note 132, at 85 (citing Lu Chu Sing and Lu Tian Chiong v. Lu Tiong Gui, 76 Phil. 669; United States v. Bustos, 37 Phil. 731; & *Cañete*, 38 Phil.).

146. Lopez v. Court of Appeals, 34 SCRA 116 (1970).

147. *Id.* at 122 (citing WILLIAM G. HALE, THE LAW OF THE PRESS 6 (3d ed. 1948)) (emphases supplied).

148. REVISED PENAL CODE, arts. 353-359 & CIVIL CODE, arts. 26, 33, & 2219.

maximum period of 4 years and 2 months, or a fine ranging from ₱40,000 to ₱1,200,000.[149] Specifically, Article 355 of the Revised Penal Code states that

> [Article] 355. Libel means by writings or similar means. — A libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means, shall be punished by *prisión correccional* in its minimum and medium periods or a fine ranging from [f]orty thousand pesos ([₱40,000]) to [o]ne million two hundred thousand pesos ([₱1,200,000]), or both, in addition to the civil action which may be brought by the offended party.[150]

The Cybercrime Law[151] further strengthens the protection against defamatory imputations by making online libel a criminal offense.[152] According to *Disini, Jr.*, which upheld the constitutionality of the Cybercrime Law, the latter does not create a new crime, but rather, "merely affirms that online defamation constitutes 'similar means' for committing libel."[153]

b. Civil Liability

Article 33 of the Civil Code, on the other hand, allows the aggrieved party in a defamation case to bring a civil action, entirely separate and distinct from the criminal action for libel.[154] This enables the offended party to recover in a civil suit, based only on a preponderance of evidence, even if his or her criminal action for libel — for which a higher burden of proof, i.e., proof beyond reasonable doubt, is required — fails. Moreover, Article 2219 of the Civil Code explicitly lists "[l]ibel, slander, or any other form of

149. *Id.* art. 355. The values were updated in 2016. An Act Adjusting the Amount or the Value of Property and Damage on Which a Penalty is Based, and the Fines Imposed Under the Revised Penal Code, Amending for the Purpose Act No. 3815, Otherwise Known As "The Revised Penal Code", As Amended, Republic Act No. 10951 (2016).

150. *Id.*

151. An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes [Cybercrime Prevention Act of 2012], Republic Act No. 10175 (2012).

152. Cybercrime Prevention Act of 2012, § 4 (c) (4).

153. *Disini, Jr.*, 716 SCRA at 320.

154. CIVIL CODE, art. 33.

defamation"[155] as one of the cases for which moral damages may be recovered.[156]

c. Burden of Proof

As in any act that imposes both criminal and civil liability, the respective quantums of proof apply. As such, for civil cases, the quantum of proof is preponderance of evidence,[157] or "that evidence that is of greater weight or is more convincing than that which is in opposition to it. It does not mean absolute truth; rather, it means that the testimony of one side is more believable than that of the other side, and that the probability of truth is on one side than on the other."[158] For criminal cases, proof beyond reasonable doubt[159] — which does not mean absolute certainty, but rather moral certainty that the accused is guilty[160] — shall be necessary.

1. Policy behind the Law on Libel

According to *Guingguing v. Court of Appeals*,[161] the law of defamatory libel was established under the common law for two purposes: (1) "to help the government protect itself from criticism"; and (2) "to provide an outlet for individuals to defend their honor and reputation so they would not resort to taking the law into their own hands."[162]

Philippine case law also provides that "[t]he legitimate state interest underlying the law of libel is the compensation of the individuals for the harm inflicted upon them by defamatory falsehood,"[163] for "[an] individual's right to protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being[.]'"[164] Citing *Gertz*, this excerpt from the case of *Philippine Journalists, Inc. (People's*

155. *Id.* art. 2219.

156. *Id.*

157. REVISED RULES ON EVIDENCE, rule 133, § 1.

158. Reyes v. Century Canning Corporation, 612 SCRA 562, 570 (2010).

159. REVISED RULES ON EVIDENCE, rule 133, § 2.

160. *Id.*

161. Guingguing v. Court of Appeals, 471 SCRA 196 (2005).

162. *Id.* at 206.

163. *Philippine Journalists, Inc. (People's Journal)*, 477 SCRA at 499.

164. *Id.* (citing *Gertz*, 418 U.S. at 341).

Journal) v. Thoenen[165] best encapsulates the value upheld by Philippine libel laws. Jurisprudence demonstrates the societal value accorded by law to the right to privacy and reputation of every citizen, and the existing state interest in the protection of such right.

2. Defenses against Libel

Several equitable and legal defenses may be raised by the defendant in defamations suits, as an absolute defense to bar recovery, or at least mitigate liability. Among the traditional defenses are the following:[166]

(1) Fair comment;[167]

(2) Apology or retraction;[168]

(3) Rectification;[169]

(4) Truth;[170]

(5) Self-defense;[171]

(6) Privilege; and,[172]

(7) Anger.[173]

The defense most pertinent for purposes of this Note is that of *fair comment*. The *doctrine of fair comment* basically states that

> while in general every discreditable imputation publicly made is deemed false, because every man is presumed innocent until his guilt is judicially proved, and every false imputation is deemed malicious[;] nevertheless, when the discreditable imputation is directed against a public person in his

165. Philippine Journalists, Inc. (People's Journal) v. Thoenen, 477 SCRA 482 (2005).

166. *See generally* REYES, FUNDAMENTALS OF LIBEL LAW, *supra* note 86, at 34-43.

167. *See generally Borjal*, 301 SCRA at 23.

168. *See generally Lopez*, 34 SCRA at 131 (citing Sotelo Matti v. Bulletin Publishing Co., 37 Phil. 562, 565 (1918)).

169. *See generally* Policarpio v. Manila Times Pub. Co., Inc., 5 SCRA 148, 156 (1962).

170. *See generally Guingguing*, 471 SCRA at 212.

171. *See generally* People v. Chua Hiong, 51 O.G. 1932, 1936-38 (1954).

172. *See generally* Rous, *supra* note 130, at 668.

173. *See generally* Armovit v. Purisima, 118 SCRA 247 (1982).

> public capacity, it is not necessarily actionable. In order that such discreditable imputation to a public official may be actionable, it must either be a false allegation of fact or a comment based on a false supposition. If the comment is an expression of opinion, based on established facts, then it is immaterial that the opinion happens to be mistaken, as long as it might reasonably be inferred from the facts.[174]

In other words, this doctrine may be used as a defense when the allegedly defamatory imputations are fair comments on matters of public concern, as for instance, comments on the conduct of a public official. To use this defense, however, the comment must be (1) true; or, (2) if false, expresses an opinion based on established facts, and formed with a reasonable degree of diligence.[175] It may be supposed that the public figure doctrine is a species of the common law principle of fair comment. Like the doctrine of fair comment, the public figure doctrine as a defense against libel is based on the premise that public men who assume such status are deemed to have given their consent to publicity or have waived, to a certain degree, their right to privacy.[176]

III. THE PUBLIC FIGURE DOCTRINE

A. The Public Figure Doctrine and its Subjects

The public figure doctrine basically states that

> [a] limited intrusion into a person's privacy [is] ... permissible where that person is a public figure and the information sought to be elicited from him or to be published about him constitute matters of a public character ... [as] [t]he interest sought to be protected by the right of privacy is the right to be free 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.'[177]

As such, before a public figure can recover in a civil or criminal case for libel, actual malice, or "knowledge of their falsity or with reckless disregard

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174. *Borjal*, 301 SCRA at 23 (citing People v. Velasco, 40 O.G., No. 18, p. 3694).

175. *See generally* United States v. Sedano, 14 Phil. 338, 342 (1909).

176. *Ayer Productions Pty. Ltd.*, 160 SCRA at 874-75 (citing PROSSER & KEETON, *supra* note 19, at 859-61).

177. *Ayer Productions Pty. Ltd.*, 160 SCRA at 870 (citing PROSSER & KEETON, *supra* note 19, at 854-63 & Smith v. National Broadcasting Co., 138 Cal.App.2d 807, 811 (1956) (U.S.)) (emphases omitted).

of whether they were false or not" must first be proven by the plaintiff.[178] This is known as the "actual malice standard."[179]

The Philippine Supreme Court adopted William Lloyd Prosser and Werdner Page Keeton's definition and defined a "public figure" as

> 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.' He is, in other words, 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, and no less a personage than the Grand Exalted Ruler of a lodge. *It includes, in short, anyone who has arrived at a position where public attention is focused upon him as a person.*[180]

The scope of the doctrine, as culled from Philippine jurisprudence, covers the following individuals:[181]

(1) A public official;[182]

(2) A public figure for all purposes, who enjoys pervasive fame or notoriety in the community;[183]

(3) A public figure for a limited purpose, who has thrust himself into some particular controversy in order to influence its resolution;[184]

(4) An involuntary public figure involved in an issue imbued with public interest;[185] and,

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178. *Vasquez*, 314 SCRA at 476-77.

179. *Id. See also New York Times Co.*, 376 U.S. at 279-80.

180. *Ayer Productions Pty. Ltd.*, 160 SCRA at 874-75 (citing PROSSER & KEETON, *supra* note 23, at 859-61) (emphases omitted & supplied).

181. *See* Mark P. Strasser, *A Family Affair? Domestic Relations and Involuntary Public Figure Status*, 17 LEWIS & CLARK L. REV. 69, 93 (2013) & Tan, *supra* note 57, at 130-31.

182. *Guingguing*, 471 SCRA at 214 (citing CASS ROBERT SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 9-10 (1995 ed.)).

183. *Id.*

184. *Id.*

(5) A private individual.[186]

Philippine case law applies the actual malice standard to all of the foregoing classifications, except to the fifth.[187] The trend observed in Philippine jurisprudence in respect of private individuals involved in an issue imbued with public interest bears a striking difference when compared to its U.S counterpart. While the Supreme Court generally applies the public interest test, the U.S. Supreme Court on the other hand, rejected this approach as early as 1967.[188]

The link between the right to privacy and the Philippine's libel laws cannot be denied. As the right to a good reputation "is as much a constitutional right as the possession of life, liberty[,] or property,"[189] libel laws were placed to temper the use of freedom of expression — another constitutionally-protected right. In balancing these values, much consideration is placed on the individual subject of the defamatory imputation, as the degree of entitlement to the right of privacy may vary depending on an individual's public or private status.[190] Law and jurisprudence demonstrate that a positive correlation exists between the interest of an individual in the right to privacy and the degree of protection given by libel laws. Simply put, an individual who has a greater stake in the right to privacy is accorded greater protection by Philippine's libel laws. Such correlation can be seen in the public figure doctrine.

B. Development of the Public Figure Doctrine in American Jurisprudence

1. Actual Malice Standard Applied to Public Officials: *New York Times Co. v. Sullivan*

The public figure doctrine was formally established by the U.S. Supreme Court.[191] The doctrine was first enunciated in the 1964 landmark case of

185. *Borjal*, 301 SCRA at 26-27 (citing *Rosenbloom*, 403 U.S. at 43).

186. *See Ayer Productions Pty. Ltd.*, 160 SCRA at 874.

187. *See generally Guingguing*, 471 SCRA; *Borjal*, 301 SCRA; & *Ayer Productions Pty. Ltd.*, 160 SCRA.

188. *Lopez*, 34 SCRA at 126-27 (citing *Curtis Publishing Co.*, 388 U.S. at 146).

189. *Worcester*, 22 Phil. at 73.

190. *See Ayer Productions Pty. Ltd.*, 160 SCRA at 876.

191. *See Guingguing*, 471 SCRA at 210 (citing *New York Times Co.*, 376 U.S. at 279-80).

New York Times Co. v. Sullivan.[192] This case involves a Montgomery Commissioner of Public Affairs who filed a suit for libel against New York Times and four other individuals, for an allegedly defamatory advertisement that inaccurately reported the harassment done by the police against Martin Luther King, Jr. and other civil rights demonstrators, to stifle efforts that promote the civil and political rights of African Americans.[193] While it was undisputed that some of the statements made were inaccurate,[194] the U.S. Supreme Court ruled unanimously in favor of the defendant.[195] It is in this case where the U.S. Supreme Court established the "actual malice standard," that requires the plaintiff must establish actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not,[196] before public officials can recover from libel suits, in order to encourage "uninhibited, robust, and wide-open"[197] debate on public issues, even when it may include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." It also explained that "erroneous statement is inevitable in free debate ... if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive[.]'"[198] Particularly, it was held that

> Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error ... This is true even though the utterance contains 'half-truths' and 'misinformation.' Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' surely the same must be true of other government officials, such as elected city commissioners. *Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism, and hence diminishes their official reputations.*
>
> ...

192. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

193. *Id.* at 256-57.

194. *Id.* at 258.

195. *Id.* at 292.

196. *Id.* at 286-88.

197. *Id.* at 270-71 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949) & De Jonge v. Oregon, 299 U. S. 353, 365 (1937)).

198. *New York Times Co.*, 376 U.S. at 271-72. (citing N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable 'self-censorship.' ... *The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*
>
> ...
>
> [T]hreat of damage suits would otherwise 'inhibit the fearless, vigorous, and effective administration of policies of government' and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer ... It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."[199]

The actual malice standard was established to prevent the chilling effect that would result if critics of the government and public officials would be required to adduce legal proofs of the allegedly defamatory imputation to rid themselves of libel suits.[200] Would-be critics of official conduct will be dissuaded from making comments or voicing out their opinions, because of fear of prosecution, should their statements turn out to be false, despite their good faith belief in its truth.[201] Such chilling effect will undoubtedly impede free speech and public debate on clearly matters of public concern.[202]

2. Public Figure Doctrine Extended to Public Figures: *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*

Three years after the *New York Times Co.* decision, the application of the actual malice standard was extended to public figures in the case of *Curtis*

199. *New York Times Co.*, 376 U.S. at 272-83 (citing Bridges v. California, 314 U.S. 252, 289 (1941); Pennekamp v. Florida, 328 U.S. 331, 342-45 (1946); Craig v. Harney, 331 U.S. 367, 376 (1947); Barr v. Matteo, 360 U.S. 564, 571; & Whitney v. California, 274 U.S. 357, 375 (J. Brandeis, concurring opinion)) (emphases supplied).

200. *New York Times Co.*, 376 U.S. at 279-80.

201. *Id.*

202. *Id.*

Publishing Co. v. Butts.[203] The case concerned an article that accused the plaintiff, who was a well-known football coach and athletic director of the University of Georgia, of conspiring with the opposition to fix a game.[204] On appeal, the case was consolidated with *Associated Press v. Walker*[205] that basically dealt with the same issue. The latter case involves a news dispatch that inaccurately reported that the plaintiff — a prominent former military officer — who was reported to have led a charge against U.S. marshals[206] during a riot, in an attempt to prevent the "admission of ... the first negro student of the University of Mississippi[.]"[207] In applying the actual malice standard to both cases, the U.S. Supreme Court ruled in favor of the plaintiff in *Curtis Publishing Co.* and against the plaintiff in *Associated Press* finding actual malice in the former, but not in the latter.[208] The U.S. Supreme Court held that, "a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[209]

3. Public Figure Doctrine Extended to Private Individuals

a. Public interest test or content-based approach: Rosenbloom v. Metromedia

Rosenbloom v. Metromedia[210] further expanded the public figure doctrine to cover private individuals.[211] The case involves a distributor of nudist magazines who filed a defamation case against Metromedia radio station for broadcasting stories regarding the plaintiff's arrest for possession of obscene literature.[212] Even though plaintiff was eventually acquitted, the U.S.

203. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

204. *Id.* at 135.

205. Associated Press v. Walker, 389 U.S. 28 (1967).

206. *Curtis Publishing Co.*, 388 U.S. at 140.

207. Walker v. Associated Press, 191 So.2d 727, 730 (La. Ct. App. 1966) (U.S.).

208. *See Curtis Publishing Co.*, 388 U.S. at 156-61.

209. *Id.* at 155.

210. Rosenbloom v. Metromedia, 403 U.S. 29, 44-45 (1971).

211. *Id.* at 44-45.

212. *Id.* at 32-34.

Supreme Court ruled against plaintiff, holding that, "a libel action ... by a private individual ... for a defamatory falsehood ... relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not."[213]

The decision in *Rosenbloom* penned by Justice William J. Brennan, Jr., Jr., discussed the following points:

i. Necessity of freedom of speech and discussion[214]

The argument on the need for an "uninhibited, robust, and wide-open" discussion on public issues has been invoked since *New York Times Co.*[215] Pursuant to this, freedom of discussion, according to the U.S. Supreme Court in *Rosenbloom*, must cover all issues that would "enable the members of society to cope with the exigencies of their period."[216]

ii. Illusory distinction between public and private individuals[217]

The U.S. Supreme Court likewise explained that, the distinction between public and private figures finds no basis in reason and logic, as there are individuals who are not public officials but are nonetheless involved in the resolution of public questions.[218] Moreover, the actual malice standard in *New York Times Co.* was established not because a public official has a lesser interest in protecting his reputation, as opposed to a private individual, but "to encourage ventilation of public issues[.]"[219]

The actual malice standard was initially applied to public officials and public figures because (1) they need less protection since they have greater access to media to counter criticisms against them; and (2) they are considered to have assumed the risk of defamation "by voluntarily thrusting

213. *Id.* at 52.

214. *See Rosenbloom*, 403 U.S. at 41.

215. *New York Times Co.*, 376 U.S. at 270-71 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949) & De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

216. *Rosenbloom*, 403 U.S. at 41 (citing Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

217. *See Rosenbloom*, 403 U.S. at 41-45.

218. *Id.* at 42.

219. *Id.* at 46.

[themselves] into the public eye[.]"[220] However, the U.S. Supreme Court in *Rosenbloom* counters that, as to the first reason, notoriety does not necessarily entail greater access to media, since "newsworthiness" of the issue determines degree of command to media attention; and as to the second reason, the degree of assumption of risk undertaken bears little significance to the value accorded to freedom of speech protected by the actual malice standard.[221] In claiming that everyone is a public person to a certain extent, the U.S. Supreme Court explained that

> [w]e have recognized that '[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.' *Voluntarily or not, we are all 'public' men to some degree.* Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. *Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction.* In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern.[222]

iii. Legitimate and substantial interest in the event[223]

The main thrust of the *Rosenbloom* decision focused on the legitimate interest of the public in the event imbued with public interest.[224] The legitimate interest identified by the U.S. Supreme Court in this case concerns the proper enforcement of criminal laws in society.[225] In disregarding the private or public character of the individual involved, the U.S. Supreme Court ratiocinated that

> [*i*]*f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because, in some sense, the individual did not 'voluntarily' choose to become involved.* The public's *primary*

220. *New York Times Co.*, 376 U.S. at 304–05 & *Rosenbloom*, 403 U.S. at 47.

221. *Rosenbloom*, 403 U.S. at 45–47.

222. *Id.* at 48 (citing Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) & *Griswold*, 381 U.S.) (emphases supplied).

223. *See Rosenbloom*, 403 U.S. at 41–42.

224. *Id.* at 42 (citing *Curtis Publishing Co.*, 388 U.S. at 164 (C.J. Warren, concurring opinion)).

225. *Rosenbloom*, 403 U.S. at 43.

> *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 anonymity or notoriety.[226]

Regardless of the notoriety or anonymity of the individual involved, the U.S. Supreme Court, citing *Curtis Publishing Co.*, held that the public has a "legitimate and substantial interest in the conduct of such persons,"[227] and freedom of expression as regards these matters are "as crucial as it is in the case of 'public officials.'"[228]

b. Status-based approach: Gertz v. Robert Welch, Inc.

Three years later, the U.S. Supreme Court in *Gertz v. Robert Welch, Inc.*[229] rejected the public interest test enunciated in *Rosenbloom*, finding the determination of the existence of an issue imbued with public interest too burdensome and elusive to be entrusted with a court.[230] It is worthy to note, according to William M. Krogh, that in American jurisprudence, "*Gertz* remains the principal authority on the public figure doctrine."[231]

In this case, the plaintiff was an attorney who represented the family of a man who was shot by a police officer.[232] Following the conviction of the police officer for murder, Robert Welch, Inc. published an article that labeled the plaintiff as a "Leninist" and a "Communist-fronter."[233] In refusing to apply the actual malice standard to the plaintiff, the U.S. Supreme Court held that, "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life."[234] The

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226. *Id.* (emphases supplied).

227. *Id.* at 42 (citing *Curtis Publishing Co.*, 388 U.S. at 164 (C.J. Warren, concurring opinion)).

228. *Id.*

229. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

230. *Id.* at 346.

231. William M. Krogh, *The Anonymous Public Figure: Influence Without Notoriety and the Defamation Plaintiff*, 15 GEO. MASON L. REV. 839, 846 (2008).

232. *Gertz*, 418 U.S. at 326.

233. *Id.*

234. *Id.* at 352.

decision in *Gertz* gave birth to the "status-based approach"[235] that focuses on "the nature and extent of an individual's participation in the [ ] controversy[.]"[236] The U.S. Supreme Court ruled that being the counsel in a highly publicized case did not transform him into a public figure.[237] Writing for the majority, Justice Powell discussed the following three key points:

i. Greater Interest in Protecting the Reputation of Private Individuals[238]

The U.S. Supreme Court in *Gertz* pointed out that freedom of speech is not the only value protected by the actual malice standard, but also includes the State's interest in protecting reputational privacy in defamation suits.[239] This legitimate state interest referred to is "the compensation of individuals for the harm inflicted on them by defamatory falsehood."[240] The U.S. Supreme Court in *Gertz* however qualified that, in defamatory imputations, private individuals are more deserving of protection, and consequently more deserving of recovery. [241] The dissimilar treatment is based on two grounds:[242] (1) the concept of self-help; and, (2) normative considerations.[243]

As to the first, the U.S. Supreme Court reasoned that compared to private individuals, public figures have "greater access to the channels of effective communication," [244] and may therefore easily counter the

235. David A. Elder, *"Hostile Environment" Charges and the ABA/AALS Accrediation/Membership Imbroglio, Post-Modernism's "No Country For Old Men", Why Defamed Law Professors Should "Not Go Gentle Into That Good Night"*, 6 RUTGERS J.L. & PUB. POL'Y 434, 550 (2009) (citing *Gertz*, 418 U.S. at 338-39 & 342-50).

236. *Gertz*, 418 U.S. at 352.

237. *Id.*

238. *See Gertz*, 418 U.S. at 343-44.

239. *Id.* at 341. "The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Id.*

240. *Id.*

241. *Id.* at 345.

242. *See generally* Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 TEMP. L. REV. 231 (2002).

243. *Gertz*, 418 U.S. at 344.

244. *Id.* at 344-45.

defamatory imputations against them. This makes private individuals more vulnerable to injury, thereby making the state interest in protecting them greater.[245] As to the second, the U.S. Supreme Court reasoned that public officials and public figures must "accept certain necessary consequences"[246] of their involvement in public affairs, and must accept "the risk[s] of closer public scrutiny,"[247] as they are deemed to have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood[.]"[248] In contrast, private individuals are not deemed to have assumed such risk, and have not waived any aspect of their right to privacy and protection of their reputation.[249] As such, the State has a more compelling interest in the protection of the privacy and reputational interest of private individuals.[250]

ii. Types of Public Figures and the Calibrated Protection against Defamation[251]

The level of protection against defamation accorded to public figures also varies depending on the kind of public figure the individual is. Under *Gertz*, public figures may be (1) all-purpose public figures, who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes"[252]; and, (2) limited-purpose public figures, who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"[253]. The U.S. Supreme Court observed that, "[i]n either event, they invite attention and comment."[254] Significantly, the U.S. Supreme Court in *Gertz* also stated that

245. *Id.* at 344.

246. *Id.*

247. *Id.*

248. *Id.* at 345.

249. *Gertz*, 418 U.S. at 345.

250. *Id.* at 343-46. *See also* Susan M. Gilles, *Public Plaintiffs and Private Facts: Should the "Public Figure" Doctrine be Transplanted into Privacy Law?*, 83 NEB. L. REV. 1204, 1207 (2005).

251. *See Gertz*, 418 U.S. at 345.

252. *Id.*

253. *Gertz*, 418 U.S. at 345.

254. *Id.*

in theory, "it may be possible for someone to become a public figure through no purposeful action of his own[.]"[255]

iii. Case-to-Case Basis Not Feasible

In rejecting the public interest test in *Rosenbloom*, the Court explained that such approach leads to decisions resolved on an *ad hoc* basis where the courts will be required to determine whether or not the defamatory imputation concerns matters of general or public interest.[256] This may not only put an unnecessary burden on the courts, but may also eventually result in an unwarranted violation of the reputational interest of private individuals.[257]

In ruling that the application of the actual malice standard must depend on the nature and extent of the individual's participation in the issue that gave rise to the defamation, the U.S. Supreme Court found that the plaintiff had achieved no general fame or notoriety in the community although he was well known in some circles.[258] In finding that the plaintiff's participation was limited to his representation of a private client,[259] the U.S. Supreme Court said that his "participation in community and professional affairs [did not render] him a public figure for all purposes[,] [for] clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society [was necessary.]"[260]

c. Post-Gertz application of the actual malice standard to private individuals

After *Gertz*, the U.S. Supreme Court, as well as the U.S. lower courts, used different standards in the application of the public figure doctrine and in the characterization of the individual as a private individual or a public figure.[261]

255. *Id.*

256. *Id.* at 346.

257. *Id.* & Carl Willner, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931, 942 (1983). According to Carl Willner, "[b]ecause considerable judicial discretion remains, the plaintiff's status can be altered by manipulating the boundaries of the public controversy to include or exclude facts tending to establish voluntary involvement." Willner, *supra* note 257, at 942.

258. *Gertz*, 418 U.S. at 351-52.

259. *Id.* at 351.

260. *Id.* at 352.

261. *See* Willner, *supra* note 257, 939-42.

Some decisions even subconsciously reverted to *Rosenbloom*'s public interest test that was rejected in *Gertz*.[262] In the case of *Time, Inc. v. Firestone*,[263] the plaintiff filed a libel suit against a publisher who published an article that erroneously reported that she was divorced by her husband on grounds of adultery and extreme cruelty.[264] Although the divorce was a very controversial proceeding, and although the plaintiff was known in the community, the U.S. Supreme Court did not consider her a public figure who thrust herself to the forefront of the controversy as she had no choice but to participate in the proceeding to get the divorce.[265] The Court added that a divorce proceeding is not the sort of public controversy referred to in *Gertz*, "even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."[266]

In the U.S. case of *Wolston v. Reader's Digest Assn., Inc.*,[267] the plaintiff in this case failed to appear before the grand jury that was investigating the espionage charges against him.[268] Several years later, plaintiff filed a case for defamation against Reader's Digest which referred to him as a Soviet agent who "[was] convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution."[269] Dispensing with the actual malice test, the U.S. Supreme Court held that plaintiff is not a limited-purpose public figure.[270] The U.S. Supreme Court focused on the fact that plaintiff did not voluntarily thrust himself to the forefront of a public controversy, nor did the plaintiff assume any special prominence in the resolution of public questions, to justify conferring upon him the status of a public figure.[271]

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262. *Id.*

263. Time, Inc. v. Firestone, 424 U.S. 448 (1976).

264. *Id.* at 451-52.

265. *Id.* at 453-55.

266. *Id.* at 454.

267. Wolston v. Reader's Digest Assn., Inc., 443 U.S. 157 (1979).

268. *Id.* at 161-62.

269. *Id.* at 159.

270. *Id.* at 161 & 165-69.

271. *Id.* at 165-68.

Hutchinson v. Proxmire,[272] on the other hand, is a case where the plaintiff, Ronald Hutchinson, was a research scientist who applied for and received a federal grant to investigate emotional behavior for a federal agency.[273] The plaintiff filed a libel suit against Senator William Proxmire for giving him the "Golden Fleece Award" for what he "perceived to be the most egregious examples of wasteful governmental spending,"[274] as the plaintiff's research focused on behavioral patterns of certain animals.[275] The lower court concluded that Hutchinson was a public figure, essentially because of "the public interest in the expenditure of public funds on the precise activities in which he voluntarily participated[.]"[276] In ruling that the plaintiff was not a public figure, the U.S. Supreme Court reasoned that the plaintiff did not "thrust himself or his views into public controversy to influence others," and that to the extent that the plaintiff's research became imbued with public interest, "it was a consequence of the Golden Fleece Award."[277]

In the case of *Waldbaum v. Fairchild Publications, Inc.*,[278] the plaintiff filed a libel suit because of a defamatory article that falsely reported his termination as being for poor performance.[279] After defining public controversy as "a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way,"[280] the U.S. Supreme Court held that the plaintiff was a public figure.[281] In this case, the U.S. Supreme Court considered the reports on his termination as president and chief executive officer of Greenbelt as within the purview of reports protected under the *New York Times Co.* standard, considering that the company involved was the second largest cooperative that affected market policies in the supermarket industry, thereby attracting public and media

272. Hutchinson v. Proxmire, 443 U.S. 111 (1979).

273. *Id.* at 114–15.

274. *Id.* at 114.

275. *Id.* at 115.

276. *Id.* at 119.

277. *Id.* at 135.

278. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1987) (U.S.).

279. *Id.* at 1290.

280. *Id.* at 1296.

281. *Id.* at 1300.

attention.[282] In determining whether or not the plaintiff was a public figure, three questions were asked:

(1) Is there a public controversy?[283]

(2) Did the plaintiff play a sufficiently central role in that controversy?;[284] and,

(3) Is the alleged defamation germane to the plaintiff's involvement in the controversy?[285]

Based on the three-part test, the U.S. Supreme Court held that the plaintiff was a limited-purpose public figure as he had thrust himself into the public controversies concerning issues that affected the supermarket industry, in an attempt to influence the policies of firms in such industry.[286]

While the U.S. is replete with jurisprudence about the public figure doctrine, to date, no guidelines have been set in stone in the application of the actual malice standard to involuntary public figures and in the characterization of the public controversy that they may find themselves in.[287]

C. Development of the Public Figure Doctrine in the Philippines

1. Pre-dating *New York Times Co. v. Sullivan*

Although the U.S. Supreme Court formally established the public figure doctrine,[288] the doctrine's application to cases in the Philippines arguably pre-dated *New York Times Co.*[289] While the name of the doctrine was not

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282. *Id.* at 1298-1300.

283. Clyburn v. News World Communications, Inc., 903 F.2d 29, 31 (D.C. Cir. 1990) (U.S.) (citing *Waldbaum*, 627 F.2d at 1296-98).

284. *Id.*

285. *Id.*

286. *Waldbaum*, 627 F.2d at 1296-1300.

287. *See* Adam Chrzan, *No-fault Publicity: Trying to Slam the Door Shut on Privacy - The Battle Between the Media and the Nonpublic Persons It Thrusts into the Public Eye*, 27 NOVA L. REV. 341, 354-61 (2002).

288. *See Guingguing*, 471 SCRA at 210 (citing *New York Times Co.*, 376 U.S. at 279-80).

289. Tan, *supra* note 57, at 130 (citing Philippine Commercial & Industrial Bank v. Philnabank Employees' Association, 105 SCRA 314, 319 (1981)).

explicitly used, the idea espoused by such doctrine was applied in the majority opinion written by Justice George A. Malcolm as early as 1918 in the case of *United States v. Bustos*.[290] In this case, a justice of the peace sued certain individuals for libel because of allegedly defamatory imputations contained in their affidavits that accused the plaintiff of bribery.[291] In acquitting the defendants from the crime of libel, the Court considered the public character of the justice of the peace,[292] and the need to prove malice.[293] Similar to the decision in *New York Times Co.*, public officials like the justice of the peace were considered to have assumed the risk of public scrutiny, to wit —

> The interest of society and the maintenance of good government demand a full discussion of public affairs. *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. Men in public life may suffer under a hostile and an unjust accusation; the wound can be assuaged with the balm of a clear conscience. *A public officer must not be too thin-skinned with reference to comment upon his official acts.* Only thus can the intelligence and dignity of the individual be exalted. Of course, criticism does not authorize defamation. Nevertheless, as the individual is less than the State, so must expected criticism be born for the common good. Rising superior to any official or set of officials, to the Chief Executive, to the Legislature, to the Judiciary — to any or all the agencies of Government — public opinion should be the constant source of liberty and democracy.

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290. United States v. Bustos, 37 Phil. 731. *See also* Tan, *supra* note 57, at 130 (citing *Bustos*, 37 Phil. at 741-42). In *United States v. Bustos*, the Court applied the doctrine of privileged communication — "Public policy, the welfare of society, and the orderly administration of government have demanded protection for public opinion. The inevitable and incontestable result has been the development and adoption of the doctrine of privilege." *Bustos*, 37 Phil. at 742.

291. *Id.* at 733-35.

292. *Id.* at 744-46.

293. *Id.* at 744. In *Bustos*, the Court explained that

> [e]xpress malice has not been proved by the prosecution. Further, although the charges are probably not true as to the justice of the peace, they were believed to be true by the petitioners. Good faith surrounded their action. Probable cause for them to think that malfeasance or misfeasance in office existed is apparent. The ends and the motives of these citizens — to secure the removal from office of a person thought to be venal — were justifiable.

Id.

> The guaranties of a free speech and a free press include the right to criticize judicial conduct. The administration of the law is a matter of vital public concern. Whether the law is wisely or badly enforced is, therefore, a fit subject for proper comment. *If the people cannot criticize a justice of the peace or a judge the same as any other public officer, public opinion will be effectively muzzled.*[294]

2. First Application of the Public Figure Doctrine to Private Individuals: Anticipating *Borjal v. Court of Appeals*

It was in 1970, or six years after *New York Times Co.*, when the public figure doctrine was first expressly applied in a Philippine case, even making references to both *New York Times Co.* and *Curtis Publishing Co.* — two of the most prominent cases on the public figure doctrine.[295] The case of *Lopez* concerns the allegedly defamatory publication of the plaintiff's picture in two issues of the Manila Chronicle's This Week Magazine.[296] These particular articles referred to a certain Fidel Cruz, a health inspector who cooked up a story about a murderer who ran loose on the Calayan Islands "so that he could be ferried back to civilization."[297] Because of this, he was given the appellation of "Hoax of the Year."[298] Unfortunately, the pictures published were those of a different Fidel G. Cruz, a businessman-contractor from Bulacan.[299]

Although it cited *New York Times Co.* and *Curtis Publishing Co.*, the Court did not provide any discussion on whether or not the plaintiff was a private individual or a public figure, and what accounted for such characterization.[300] It would seem however that the "actual malice" standard was applied because the plaintiff became involved in a matter of public

294. *Id.* at 740-41 (emphases supplied).

295. *New York Times Co.* established the "actual malice" standard, while *Curtis Publishing Co.* extended this to all public figures. *Lopez*, 34 SCRA at 125-27. (citing *New York Times Co.*, 376 U.S. at 279-80 & *Curtis Publishing Co.*, 388 U.S. at 155).

296. *Lopez*, 34 SCRA at 118-19.

297. *Id.* at 118.

298. *Id.*

299. *Id.*

300. *Id.* at 125-29 (citing *New York Times Co.*, 376 U.S. at 256, 269, 270-71, & 279-80 & *Curtis Publishing Co.*, 388 U.S. at 155).

concern.[301] In giving primacy to freedom of speech,[302] the Court, citing the 1955 case of *Quisumbing v. Lopez, et al.*,[303] explained why due consideration must be given to the press —

> 'Every citizen of course has the right to enjoy a good name and reputation, but we do not consider that the respondents, under the circumstances of this case, had violated said right or abused the freedom of the press. *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 imperfection in the choice of words.*'[304]

Although the Court did not seem to find actual malice, the Court nevertheless allowed the plaintiff to recover damages and considered the defendant's immediate clarification and rectification of the error as a ground to mitigate liability and reduce the award for damages.[305]

Notably, the plaintiff here was not a public official nor a private figure, but a private citizen who was erroneously defamed due to a case of mistaken identity.[306] Although it was in the 1999 case of *Borjal* where the Court discussed extensively the Public Figure doctrine's application to private individuals, citing *Rosenbloom*'s public interest test in particular,[307] the doctrine was already applied to private individuals as early as 1970 as shown by the case of *Lopez*.[308]

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301. *See Lopez*, 34 SCRA at 120. The Court in *Lopez* observed that, "Included [in the scope of freedom of the press] is the widest latitude of choice as to what items should see the light of day so long as they are relevant to a matter of public interest[.]" *Id.*

302. *Id.* at 124. In *Lopez*, the Court said that, "[a] criminal suit for libel should not be utilized as a means for stifling press freedom. ... 'Public policy, the welfare of society, and the orderly administration of government have demanded protection for public opinion.'" *Id.* (citing *Bustos*, 37 Phil. at 742).

303. Quisumbing v. Lopez, et al., 96 Phil. 510, 515 (1955).

304. *Lopez*, 34 SCRA at 125 (citing *Quisumbing*, 96 Phil. at 515) (emphases supplied).

305. *Lopez*, 34 SCRA at 128-29.

306. *Id.* at 118-19.

307. *See Borjal*, 301 SCRA at 24-28 (citing *Rosenbloom*, 403 U.S. at 43).

308. *See Lopez*, 34 SCRA at 125-29.

3. Application of the Public Figure Doctrine to Public Officials

Philippine case law demonstrates that the public figure doctrine is more commonly applied to public officials,[309] perhaps because of the facility in determining whether or not the actual malice standard must apply, considering the apparent interest the public has in the conduct of persons occupying positions in the government.[310] Additionally, for the standard to apply, the plaintiff only had to be an "elective [or an] appointive official[ ] or employee[ ], permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the government,"[311] thereby expediting the process of status determination.

The case of *Vasquez v. Court of Appeals*[312] involves the publication of defamatory imputations against the Tondo Foreshore Area barangay chairman Jaime Olmedo, accusing the latter of engaging in various illegal activities such as conspiring to illegally acquire certain lands.[313] In applying

309. *See generally Ayer Productions Pty. Ltd.*, 160 SCRA; Lagunzad v. Soto Vda. De Gonzales, 92 SCRA 476 (1979); Brillante v. Court of Appeals, 440 SCRA 541 (2004); Jalandoni v. Drilon, 327 SCRA 107 (2000); *Vasquez*, 314 SCRA; & Tulfo v. People, 565 SCRA 283 (2008).

310. *See generally Tulfo*, 565 SCRA at 321-22. *See also Chavez*, 545 SCRA at 528 (J. Sandoval-Gutierrez, concurring opinion) & *Brillante*, 440 SCRA at 541. In *Tulfo*, the Court held that "[a] robust and independently free press is doubtless one of the most effective checks on government power and abuses. Hence, it behooves government functionaries to respect the value of openness and refrain from concealing from media corruption and other anomalous practices occurring within their backyard." *Tulfo*, 565 SCRA at 321-22. Meanwhile, Justice Angelina Sandoval-Gutierrez explained in her concurring opinion in *Chavez*, "Freedom of expression allows citizens to expose and check abuses of public officials. Freedom of expression allows citizens to make informed choices of candidates for office. Freedom of expression crystallizes important policy issues, and allows citizens to participate in the discussion and resolution of such issues." *Chavez*, 545 SCRA at 528 (J. Sandoval-Gutierrez, concurring opinion). Likewise, in Justice Dante O. Tinga's separate opinion in *Chavez*, he explains that, "[b]ecause government retaliation tends to chill an individual's exercise of his right to free expression, public officials may not, as a general rule, respond to an individual's protected activity with conduct or speech even though that conduct or speech would otherwise be a lawful exercise of public authority." *Id.* at 555 (J. Tinga, concurring and dissenting opinion).

311. Anti-Graft and Corrupt Practices Act, Republic Act No. 3019, § 2 (b) (1960).

312. Vasquez v. Court of Appeals, 314 SCRA 460 (1999).

313. *Id.* at 464-67.

the actual malice standard enunciated in *New York Times Co.*,[314] the Court acquitted the accused, as "the prosecution failed to prove not only that the charges made by petitioner were false but also that petitioner made them with knowledge of their falsity or with reckless disregard of whether they were false or not."[315] The Court added that requiring the accused to prove the truth of either his allegations or that it was done for good motives and justifiable ends, or both, would not only go against Article 361 of the Revised Penal Code,[316] but such requirement will also infringe on freedom of expression guaranteed by the Constitution.[317]

In *Jalandoni v. Drilon*,[318] the plaintiff who was then a Presidential Commission on Good Government Commissioner filed a libel suit concerning advertisements that contained defamatory imputations alleging that the plaintiff committed illegal and unauthorized acts constituting graft and corruption relative to a certain financing arrangement.[319] In dismissing the criminal complaint, the Court once again applied the actual malice standard enunciated in *New York Times Co.* without referring to the libel laws contained in the Revised Penal Code.[320]

In the case of *Brillante v. Court of Appeals*,[321] the plaintiff was Atty. Jejomar C. Binay, Sr. (Binay), then the "[officer-in-charge] mayor" of the Municipality (now City) of Makati, who filed a defamation suit over imputations made by Roberto Brillante, accusing Binay of plotting the assassination of another candidate, among other allegations.[322] Brillante also circulated a published open letter addressed to President Corazon C. Aquino

314. *Id.* at 476-77.

315. *Id.* at 477.

316. The second paragraph of Article 361 of the Revised Penal Code provides: "Proof of the truth of an imputation of an act or omission not constituting a crime shall not be admitted, unless the imputation shall have been made against Government employees with respect to facts related to the discharge of their official duties." REVISED PENAL CODE, art. 361, para. 2.

317. *Vasquez*, 314 SCRA at 477.

318. Jalandoni v. Drilon, 327 SCRA 107 (2000).

319. *Id.* at 111-12.

320. *Id.* at 120-22.

321. Brillante v. Court of Appeals, 440 SCRA 541 (2004).

322. *Id.* at 547-49.

that contained his accusations.[323] In finding Brillante guilty of the crime of libel, the Court applied the doctrine of privileged communication,[324] and held that the open letter and statements uttered by Brillante do not qualify as conditionally privileged communication for failure to satisfy the requisites under Article 354 of the Revised Penal Code.[325] Since the open letter and the defamatory statements uttered by Brillante were not privileged, "malice is presumed and need not be proven separately from the existence of the defamatory statement."[326] Although the Court did not apply the public figure doctrine, the effect would have been the same. If the public figure doctrine were applied, the plaintiff would have had to prove actual malice to recover.[327] In this case, the Court found actual malice when Brillante resorted to a "shotgun approach to disseminate the information [to] essentially destroy[ ] the [plaintiffs' reputations]."[328] The Court held that, "[h]is lack of selectivity is indicative of malice and is anathema to his claim of privileged communication."[329] Even if the actual malice standard in *New York Times Co.* was applied, the result would have been the same — the plaintiff would be able to recover. After all, jurisprudence has already recognized the public figure doctrine to be within the purview of qualifiedly

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323. *Id.* at 547-48.

324. *See* REVISED PENAL CODE, art. 354.

325. *See Brillante*, 440 SCRA at 567-71. The Court in *Brillante* emphasized that

> [i]n order to prove that a statement falls within the purview of a qualifiedly privileged communication under Article 354, No. 1 [of the Revised Penal Code], the following requisites must concur: (1) the person who made the communication had a legal, moral, or social duty to make the communication, or at least, had an interest to protect, which interest may either be his own or of the one to whom it is made; (2) the communication is addressed to an officer or a board, or superior, having some interest or duty in the matter, and who has the power to furnish the protection sought; and[,] (3) the statements in the communication are made in good faith and without malice.

Id. at 569 (citing REVISED PENAL CODE, art. 354 (1)).

326. *Brillante*, 440 SCRA at 573.

327. *See New York Times Co.*, 376 U.S. at 279-80.

328. *Brillante*, 440 SCRA at 571.

329. *Id.*

privileged communications, although not explicitly included under Article 354 of the Revised Penal Code.[330]

In the case of *Flor v. People*,[331] an information for libel was filed for allegedly destroying the good name and reputation of then Minister of the Presidential Commission on Government Reorganization and concurrent Camarines Sur governor, Luis R. Villafuerte.[332] The defamatory imputations concern accusations that the governor spent government money for unofficial trips to Japan and Israel.[333] Applying the *New York Times Co.* standard, the Court, quoting Martin L. Newell, did not find actual malice, reasoning that "[s]light unintentional errors, [ ] will be excused ... [as] '[i]t is not to be expected that a public journalist will always be infallible.'"[334]

Significantly, the Supreme Court has applied the actual malice standard to candidates for public office who are deemed to have assumed the role of a public official.[335] This is because the public has as much legitimate interest in the qualifications of a candidate for public office.[336]

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330. *See Borjal*, 301 SCRA at 21-22 & Flor v. People, 454 SCRA 440, 455 (2005). In *Borjal*, the Court said that "the enumeration under [Article] 354 is not an exclusive list of qualifiedly privileged communications since fair commentaries on matters of public interest are likewise privileged." *Borjal*, 301 SCRA at 22 (emphasis omitted).

331. Flor v. People, 454 SCRA 440 (2005).

332. *Id.* at 447-48.

333. *Id.* at 447.

334. *Id.* at 456-58 (citing MARTIN L. NEWELL, THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES 523 (4th ed. 1924)).

335. *See Villanueva*, 588 SCRA at 13 (citing *Ayer Productions Pty. Ltd.*, 160 SCRA at 874-75). In *Ayer Productions Pty. Ltd.*, the Court explained —

> The [list of public figures] is, however, broader than this. *It includes public officers*, famous inventors and explorers, war heroes and even ordinary soldiers, an infant prodigy, and no less a personage than the Grand Exalted Ruler of a lodge. It includes, in short, anyone who has arrived at a position where public attention is focused upon him as a person.

Ayer Productions Pty. Ltd., 160 SCRA at 874-75 (citing PROSSER & KEETON, *supra* note 19, at 859-61) (emphases omitted & emphasis supplied). *See also Lagunzad*, 92 SCRA at 486-87.

336. *Villanueva*, 588 SCRA at 13 & Binay v. Secretary of Justice, 501 SCRA 312, 321-23 (2006).

In *Binay v. Secretary of Justice*[337] an article was published about the allegedly extravagant lifestyle of the Binay family in relation to the assets that they acquired while in public office.[338] Paragraph 25 of the article was written about the adopted daughter of then-mayoralty candidate Binay and his wife, Elenita S. Binay, that read — "*Si* Joanna Marie Bianca, 13[,] *ang sinasabing ampong anak ng mga Binay, ay bumibili ng panty na nagkakahalaga ng ₱1,000 ang isa, ayon sa isang writer ni Binay. Magarbo ang pamumuhay ng batang ito dahil naspoiled umano ng kanyang ama.*"[339] A complaint for libel on behalf of the minor Joanna was thereafter filed against the article's publisher and writer.[340] The Court did not find merit in the defendants' contention that the published article that showed that "petitioner and his family lived a lavish lifestyle" was "within the realm of public interest" as the petitioner is a candidate for public office, while his wife is an incumbent public official.[341] Instead, the Court ruled that paragraph 25 is "opprobrious, ill-natured, and vexatious as it has absolutely nothing to do with [the] petitioner's qualification as a mayoralty candidate or as a public figure," and is therefore defamatory.[342] The Court concluded that paragraph 25 was only meant to embarrass Joanna before the reading public, because: (1) there is no "legal, moral, or social duty in publishing [the minor's] status as an adopted daughter"; and, (2) there is no public interest may be extrapolated from the minor's purchases of undergarments worth P1,000.[343] Characterizing Joanna as a private individual, the Court upheld the presumption of malice.[344]

In the case of *Villanueva v. Philippine Daily Inquirer, Inc.*,[345] the petitioner Hector G. Villanueva was a mayoralty candidate when the Philippine Daily Inquirer published an article stating that the Commission on Elections disqualified the said petitioner as a candidate for mayor for having been

337. Binay v. Secretary of Justice, 501 SCRA 312 (2006).

338. *Id.* at 316.

339. *Id.* "According to a writer for the Binay family, Joanna Marie Bianca, the alleged adopted daughter of the Binays buys panties worth ₱1,000 each. This young woman lives an extravagant lifestyle because it is suspected her father spoils her."

340. *Id.*

341. *Id.* at 322-23.

342. *Id.* at 321.

343. *Binay*, 501 SCRA at 323.

344. *Id.* at 322-23.

345. Villanueva v. Philippine Daily Inquirer, Inc., 588 SCRA 1 (2009).

convicted in three administrative cases on grave abuse of authority and harassment, when in truth, the petition for disqualification was denied.[346] Allegedly because of these false and malicious reports, the plaintiff lost the elections, thereby causing him to file a case for libel against the publishers.[347] The Supreme Court held that petitioner became a public figure because the controversy involved matters of which the public has the right to be informed considering the "very public character of the election itself."[348] Although Villanueva eventually lost the elections, and was strictly speaking, not a public official, the Court still applied the actual malice standard and held that, "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not voluntarily choose to become involved."[349]

4. Public Figure Doctrine Applied to Public Figures

Fermin v. People[350] is a case where the actual malice standard was applied to a public figure who was not a public official.[351] This case concerns allegedly defamatory imputations published against spouses Annabelle Rama Gutierrez and Eduardo Gutierrez (Eddit Gutierrez), known actors in the Philippines, accusing them of swindling their fellow Filipinos in America in their business of distributing high-end cookware, and thereafter fleeing the U.S. to escape liabilities.[352] In finding that there was motive to talk ill against complainants for a campaign propaganda against Eddie Gutierrez's opponent for the congressional seat, the Supreme Court ruled that actual malice was present.[353] The Court further held that the public figure doctrine does not give critics unbridled license to destroy their reputation, to wit —

> If the utterances are false, malicious[,] or unrelated to a public officer's performance of his duties or irrelevant to matters of public interest involving public figures, the same may give rise to criminal and civil liability. *While complainants are considered public figures for being personalities in*

346. *Id.* at 6-7.

347. *Id.* at 7.

348. *Id.* at 13.

349. *Id.* at 12 (citing *Borjal*, 301 SCRA at 26-27).

350. Fermin v. People, 550 SCRA 132 (2008).

351. *Id.* at 155-56.

352. *Id.* at 152-53.

353. *Id.* at 155-56.

> *the entertainment business, media people, including gossip and intrigue writers and commentators such as petitioner, do not have the unbridled license to malign their honor and dignity by indiscriminately airing fabricated and malicious comments, whether in broadcast media or in print, about their personal lives.*[354]

In *Guingguing*, the plaintiff was a broadcaster who filed a libel suit against the defendant, for publishing the former's criminal records, together with photos on his arrest.[355] Such course of action was allegedly done by the defendant, in retaliation for the plaintiff's scurrilous attacks against him as well as his family over the airwaves.[356] Since the plaintiff had no access to radio time, he resorted to paid newspaper advertisements to answer the scurrilous attacks, as a means of self-defense.[357] Contending that he had been acquitted, the complainant filed a libel suit.[358] Citing *Curtis Publishing Co.* in applying the actual malice standard,[359] the Supreme Court held that being a broadcast journalist who hosts two radio programs aired over a large portion of Visayas and Mindanao, complainant's notoriety is unquestionable; he is a public figure.[360] Moreover, by undertaking such job, he gave the public a legitimate interest in his life.[361] In finding no actual malice, the Court reasoned that not only were the publications true, but that they were done with good motives and for justifiable ends.[362]

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354. *Id.* (citing *Brillante*, 440 SCRA at 574 & Soriano v. Intermediate Appellate Court, 167 SCRA 222, 231 (1988)).

355. *Guingguing*, 471 SCRA at 200-03.

356. *Id.* at 203.

357. *Id.*

358. *Id.*

359. *Id.* at 213 (citing *Curtis Publishing Co.*, 388 U.S. at 155).

360. *Guingguing*, 471 SCRA at 218-19.

361. *Id.* at 223. The Court in *Guingguing* observed that, "Complainant hosts a public affairs program that he claims to be imbued with public character since it deals with 'corruptions in government, corruptions by public officials, [and] irregularities in government in comrades.'" *Id.*

362. *Id.* at 223. As the Court analyzed the facts attendant in the case, it said that

> [t]he information, moreover, went into the very character and integrity of complainant to which his listening public has a very legitimate interest. ... By entering into this line of work, complainant in effect gave the public a legitimate interest in his life. He likewise gave them a stake in finding out if he himself had the integrity and character to have the right to criticize others for their conduct.

5. Limitations to Utterances

While wide latitude is given to utterances made against public officials or public figures on matters of public interest, such privilege is not without limit.[363] Consistent with the principles of due process and justice, the public figure doctrine does not give journalists and commentators *carte blanche* as regards their publications —

> If the utterances are false, malicious, or unrelated to a public officer's performance of his duties or irrelevant to matters of public interest involving public figures, the same may give rise to criminal and civil liability. [Although] personalities in the entertainment business, media people, including gossip and intrigue writers and commentators, do not have the unbridled license to malign their honor and dignity by indiscriminately airing fabricated and malicious comments.[364]

a. Reckless Disregard for the Truth

In *Tulfo v. People*,[365] a criminal complaint for libel was filed against Erwin Tulfo who wrote defamatory articles alleging that the plaintiff was involved in criminal activities, and that he was using his public position in the Bureau of Customs for personal gain.[366] In this case, the Court found that Tulfo merely relied on his "unnamed source" without doing any research or verification of his own.[367] In fact, in the articles in question, Tulfo merely made an uncorroborated criminal imputation, without providing particular details or acts committed by the plaintiff to show that he was a corrupt public official.[368] In ruling for the complainant, the Court held that while the falsity of a report does not necessarily prove actual malice, the exercise of press freedom must still be done "[*c*]*onsistent with good faith and reasonable care*[.]"[369] In writing for the majority, Justice Presbitero Jose Velasco, Jr. opined that the mere fact that the plaintiff is a public official or a public

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Id.

363. BERNAS, *supra* note 33, at 295 (citing *Fermin*, 550 SCRA at 155).

364. *Id.*

365. Tulfo v. People, 565 SCRA 283 (2008).

366. *Id.* at 306.

367. *Id.* at 310.

368. *Id.* at 309.

369. *Id.* at 307 (citing *Borjal*, 301 SCRA at 30) (emphasis supplied).

figure does not *ipso facto* exclude the author of the libelous material from liability —

> Although wider latitude is given to defamatory utterances against public officials in connection with or relevant to their performance of official duties, or against public officials in relation to matters of public interest involving them, such defamatory utterances do not automatically fall within the ambit of constitutionally protected speech. Journalists still bear the burden of writing responsibly when practicing their profession, even when writing about public figures or matters of public interest.[370]

Allowing journalists to influence public opinion by publishing offensive charges destructive of a person's honor and reputation, and then subsequently hide behind the convenient assertion that "to do so would compromise his sources and demanding acceptance of his word for the reliability of those sources" will undeniably violate all notions of justice and fair play.[371]

b. Public-Private Dichotomy

In at least two cases, the Court has recognized that public officials retain their right to privacy over private aspects of their life. The cases of *Lagunzad v. Soto Vda. De Gonzales*[372] and *Ayer Productions Pty. Ltd. v. Capulong*[373] are illustrative of such, although neither involved the reputational interest in the right to privacy, but, rather, seclusive privacy.[374]

The case of *Lagunzad* concerns a soon-to-be-aired movie about the murder of Moises Padilla who was then a mayoralty candidate for the

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370. *Tulfo*, 565 SCRA at 307. In *Tulfo*, the Court, quoting from the earlier case of *In Re: Emil P. Jurado*, explained —

> Surely it cannot be postulated that the law protects a journalist who deliberately prints lies or distorts the truth; or that a newsman may e[s]cape liability who publishes derogatory or defamatory allegations against a person or entity, but recognizes no obligation [bona fide] to establish beforehand the factual basis of such imputations and refuses to submit proof thereof when challenged to do so.

Id. at 309 (citing In Re: Emil P. Jurado, 243 SCRA 299, 332 (1995)).

371. *Id.*

372. Lagunzad v. Soto Vda. De Gonzales, 92 SCRA 476 (1979).

373. Ayer Productions Pty. Ltd. v. Capulong, 160 SCRA 861 (1988).

374. Neither case involved any defamation suit.

Municipality of Magallon in Negros Occidental.[375] Finding that some scenes dealt with Moises Padilla's private and family life, the Court ruled in favor of the party who opposed the movie's screening.[376] It was held that, "the limits of freedom of expression are reached when expression touches upon matters of essentially private concern."[377] The Court was emphatic when it stated that

> [b]eing 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.[378]

The case of *Ayer Productions Pty. Ltd.* similarly involved the release of a movie that included portions about the life of Senator Juan Ponce Enrile, because of his role in the EDSA Revolution of 1986.[379] In acknowledging the distinction between the public and private aspect of a public official's personality, The Supreme Court held in *Ayer Productions Pty. Ltd.*, as they did in *Lagunzad*, that, "[t]here must [ ] be no presentation of the private life of the unwilling [plaintiff] and certainly no revelation of intimate or embarrassing personal facts. The proposed motion picture should not enter into what Mme. Justice Melencio-Herrera in *Lagunzad* referred to as 'matters of essentially private concern.'" [380] Nevertheless, the Court in *Ayer Productions Pty. Ltd.* allowed the screening of the movie, as well as the use of the plaintiff's name therein, and explained that what accounted for the difference in treatment was because while the movie in *Lagunzad* covered the fictionalized private life of the plaintiff, the film in *Ayer Productions Pty. Ltd.* concerned an event of legitimate public interest in the history of the Philippines —

> The subject matter of 'The Four Day Revolution' relates to the non-bloody change of government that took place at Epifanio de los Santos

375. *Lagunzad*, 92 SCRA at 479.

376. *Id.* 478-79 & 489. The movie showed portions about the mother and romantic interest of Moises Padilla for otherwise, the movie will be a "drab story of torture and brutality." *Id.* at 487.

377. *Id.* at 489.

378. *Id.* 487 (citing Garner v. Triangle Publications, 97 F. Supp. 546, (S.D.N.Y. 1951) (U.S.)).

379. *Ayer Productions Pty. Ltd*, 160 SCRA at 865.

380. *Id.* at 876 (citing *Lagunzad*, 160 SCRA at 489).

> Avenue in February 1986, and the train of events which led up to that [dénouement]. Clearly, such subject matter is one of public interest and concern. Indeed, it is, petitioners' argue, of international interest. *The subject thus relates to a highly critical state in the history of this country and as such, must be regarded as having passed into the public domain and as an appropriate subject for speech and expression and coverage by any form of mass media. The subject matter, as set out in the synopsis provided by the petitioners and quoted above, does not relate to the individual life and certainly not to the private life of private respondent Ponce Enrile.* Unlike in *Lagunzad*, which concerned the life story of Moises Padilla necessarily including at least his immediate family, what we have here is *not* a film biography, more or less fictionalized, of private respondent Ponce Enrile. 'The Four Day Revolution' is not principally about, nor is it focused upon, the man Juan Ponce Enrile; but it is compelled, if it is to be historical, to refer to the role played by Juan Ponce Enrile in the precipitating and the constituent events of the change of government in February 1986.[381]

Notably, in the case of *Fermin*, the Court did not seem to prohibit the media from publishing newsworthy stories about the lives of celebrities or public personalities, but merely enjoined them from "indiscriminately airing fabricated and malicious comments ... about [the celebrities'] personal lives."[382] After all, it cannot be denied that news about the lives of celebrities generate a higher level of interest on the part of the public.[383] By entering an occupation that is inherently public, the entertainment business, actors, actresses, and other celebrities in the "showbiz" industry sought and consented to publicity, and gave the public a legitimate interest in their lives.[384] As a result, information about celebrities, even those that are ordinarily private, are transferred into the realm of public interest, beyond the protective shield of privacy.[385]

6. Rationale Behind the Public Figure Doctrine

The Court in *Ayer Productions Pty. Ltd.* also took the chance to lay down the rationale behind the public figure doctrine, explaining that a limited intrusion into public figures' privacy becomes permissible because these

381. *Id.* SCRA at 873-74 (emphasis supplied).

382. *Fermin*, 550 SCRA at 155-56 (citing *Soriano*, 167 SCRA at 231).

383. Nordhaus, *supra* note 33, at 289.

384. *Id.* at 289-90.

385. *Id.* at 289.

public men are deemed to have relinquished their right to privacy to a certain degree.[386] The Court basically gave three reasons for such loss:

> (1) [T]hat they had sought publicity and consented to it, and so could not complain when they received it;
>
> (2) [T]hat their personalities and their affairs had already become public, and could no longer be regarded as their own private business; and[,]
>
> (3) [T]hat the press had a privilege, under the Constitution, to inform the public about those who have become legitimate matters of public interest.[387]

In ruling that the plaintiff in *Ayer Productions Pty. Ltd.* was a public figure, the Court reasoned that aside from his significant role in the EDSA Revolution, his position in the Senate of the Philippines undeniably made him a public figure.

> [Plaintiff] is a 'public figure' precisely because, *inter alia*, of his participation as a principal actor in the culminating events of the change of government in February 1986. *Because his participation therein was major in character, a film reenactment of the peaceful revolution that fails to make reference to the role played by [plaintiff] would be grossly unhistorical.* The right of privacy of a 'public figure' is necessarily narrower than that of an ordinary citizen. [Plaintiff] has not retired into the seclusion of simple private citizenship. *He continues to be a 'public figure.' After a successful political campaign during which his participation in the EDSA Revolution was directly or indirectly referred to in the press, radio*[,] *and television, he sits in a very public place, the Senate of the Philippines.*[388]

A study of these cases shows that in the public figure doctrine's application to public officials or public icons, the parameters in the determination of whether or not the actual malice standard should apply has been laid down, utterances that are maliciously false and unrelated to their public figure status aside. For instance, there is no question that an allegedly defamatory imputation about a public official's performance of his duties, even if false, will be covered by the mantle of protection accorded to press freedom and freedom of speech, so long as these were published for good motives and justifiable ends, and not merely to malign another person's reputation. In the case of public icons or celebrities in the entertainment

386. *Ayer Productions Pty. Ltd.*, 160 SCRA at 870 (citing PROSSER & KEETON, *supra* note 19, at 854-63).

387. *Ayer Productions Pty. Ltd.*, 160 SCRA at 875 (citing PROSSER & KEETON, *supra* note 19, at 859-61) (emphasis omitted).

388. *Ayer Productions Pty. Ltd.*, 160 SCRA at 875-76 (emphases supplied).

industry, while there seems to be no restriction in the publication of celebrities' private lives, clearly false and malicious comments that are without basis cannot be sanctioned by freedom of expression. The catch-all defense of done for "good motives and justifiable ends" may not be taken as *carte blanche* to make any libelous statement against public officials or public figures, hoping to pass them off as protected speech. A journalist who abdicates his responsibility to verify his sources and observe reasonable care in his or her publications may not hide behind the guarantee of a free press.

As opposed to public officials and celebrities, however, where the lines between utterances covered by the mantle of freedom of expression and those that are not are more or less discernible, the same cannot be said of private individuals involved in matters imbued with public interest. Also, while public officials and public icons voluntarily sought publicity by engaging in their respective undertakings, thereby justifying public criticisms thrown their way, again, the same cannot be said of private individuals unwittingly drawn to an issue imbued with public interest. As the Supreme Court generally follows *Rosenbloom*'s content-based approach,[389] the absence of guidelines in its application will potentially transform all private individuals whose lives traverse the lane of public interest into public figures. Because the lines are not clearly drawn in the determination of which utterances against private individuals are not protected, inconsistencies in its application will be inevitable.

7. *Rosenbloom*'s Public Interest Test Generally Followed in Philippine Jurisdiction: Inconsistent Application of the Public Figure Doctrine to Private Individuals

The public interest test enunciated in *Rosenbloom* was applied by the Philippine Supreme Court for the first time in the case of *Borjal*.[390] The case concerns an allegedly defamatory article about a certain organizer's involvement with FNCLT that aims to solve the transportation crisis in the country.[391] Although no name was mentioned, the articles that accused the "organizer of a conference" of extortion, among other things, allegedly alluded to the plaintiff, Francisco Wenceslao — a civil engineer, businessman, business consultant, and journalist by profession.[392] The Court

389. *See e.g.*, *Borjal*, 301 SCRA at 26-27 (citing *Rosenbloom*, 403 U.S. at 43).

390. *Id.*

391. *Borjal*, 301 SCRA at 11-12.

392. *Id.* at 11-15.

held that the libel suit could not prosper, as the subject of the defamatory imputation was not properly identifiable.[393] Further, even if it was proven that the defamatory statements indeed referred to the plaintiff, actual malice was not proven.[394] In holding that the plaintiff was a public figure within the purview of *Ayer Productions Pty. Ltd.*,[395] the majority thus held —

> The FNCLT was an undertaking infused with public interest. It was promoted as a joint project of the government and the private sector, and organized by top government officials and prominent businessmen. For this reason, it attracted media mileage and drew public attention not only to the conference itself but to the personalities behind it as well. As its Executive Director and spokesman, private respondent consequently assumed the status of a public figure.[396]

The Court went further and reasoned that, even if the plaintiff was not a public official nor a public figure, the actual malice standard may still apply, following the public interest test in *Rosenbloom*, to wit —

> [E]ven assuming *ex-gratia argumenti* that private respondent, despite the position he occupied in the FNCLT, would not qualify as a public figure, it does not necessarily follow that he could not validly be the subject of a public comment even if he was not a public official or at least a public figure, for he could be, as long as he was involved in a public issue. If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not voluntarily choose to become involved. 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 anonymity or notoriety.[397]

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393. *Id.* at 18.

394. *Id.* at 28-30.

395. In *Borjal*, the Court quoted the meanng of a "public figure" as previously stated in the case of *Ayer Productions Pty. Ltd.* —

> [a] person who, by his accomplishments, fame, 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.' He is, in other words, a celebrity. ... It includes, in short, anyone who has arrived at a position where the public attention is focused upon him as a person.

Id. at 26 (citing *Ayer Productions Pty. Ltd.*, 160 SCRA at 874-75).

396. *Borjal*, 301 SCRA at 26.

397. *Id.* at 26-27 (citing *Rosenbloom*, 403 U.S. at 43).

In this case, the Court found that the articles involved matters of public interest, as it pertained to the plaintiff's fitness as the Executive Director of the FNLCT, a position that handled matters of which "the public has the right to be informed, taking into account the very public character of the conference itself."[398]

In a 2003 journal article published by the Philippine Law Journal, Oscar Franklin B. Tan remarked that, the "Philippine public figure doctrine [ ] is extremely liberal and broader than its American counterpart."[399] As opposed to the U.S. where the focus is on the person, regardless of the public interest involved, the Supreme Court in *Borjal* reverted to *Rosenbloom*'s content-based approach that the U.S. Supreme Court rejected, and adopted a more inclusive test.[400] Consequently, most of the cases that followed *Borjal*, where the status of the plaintiff was at issue, applied *Rosenbloom*'s public interest test that uses the actual malice standard to private individuals involved in an issue imbued with public interest.[401] This notwithstanding, the Supreme Court would still occasionally adopt the status-based approach in *Gertz*,[402] thereby resulting in inconsistent decisions, as will be demonstrated in the following discussion.

It took six long years for another Philippine case to invoke the public interest test enunciated in *Borjal*. The case of *Filipinas Broadcasting Network, Inc. v. Ago Medical and Educational Center-Bicol Christian College of Medicine (AMEC-BCCM)*,[403] concerns Ago Medical and Educational Center-Bicol Christian College of Medicine, a private learning institution whose reputation was maligned over the radio waves by referring to the school as a dumping ground for misfits and immoral teachers, among other imputations.[404] Although the Court held that the defendant misapplied *Borjal*, since unlike the latter case, the broadcasts in the present case "are [not] based on [established facts],"[405] one can infer that had the broadcasts

398. *Borjal*, 301 SCRA at 27.

399. Tan, *supra* note 57, at 130.

400. *See* Tan, *supra* note 57, at 130-33.

401. *Borjal*, 301 SCRA at 26-27 (citing *Rosenbloom*, 403 U.S. at 43).

402. *Gertz*, 418 U.S. at 345-46 & 351-52.

403. Filipinas Broadcasting Network, Inc. v. Ago Medical and Educational Center-Bicol Christian College of Medicine (AMEC-BCCM), 448 SCRA 413 (2005).

404. *Id.* at 420-22.

405. *Id.* at 432 (emphases omitted).

been based on established facts, the public interest test would have been properly applicable, considering that "AMEC is a private learning institution whose business of educating students is '*genuinely imbued with public interest.*'"[406]

Several months after *Filipinas Broadcasting Network, Inc.*, the Court in *Philippine Journalists, Inc. (People's Journal) v. Thoenen*[407] deviated from the content-based approach in *Rosenbloom* and followed the status-based approach in *Gertz*. In *Philippine Journalists, Inc. (People's Journal)*, a news article was written about how residents of a certain subdivision through their lawyer, have asked the Bureau of Immigration to deport a Swiss citizen Francis Thoenen, who "allegedly shoots wayward neighbors' pets" that end up in his territory.[408] Thoenen, who was a retired engineer permanently living in the country with his Filipina wife and children, claims that the report was false and defamatory as the letter to the Bureau was a mere request to verify his status as a foreign resident.[409] A defamation suit was filed against Philippine Journalists for the latter's failure to verify the truth prior to the article's publication.[410] The Court upheld the presumption of malice and refused to apply the doctrine in *Borjal* because Thoenen is a private individual, and not a public official nor a public figure.[411] Following *Gertz*, the Court focused on the status of the plaintiff as a private individual, and disregarded the fact that the alleged defamatory imputation concerned a matter of public interest, to wit —

> We are persuaded by the reasoning of the [U.S.] Supreme Court in [*Gertz*], that a newspaper or broadcaster publishing defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim a constitutional privilege against liability, for injury inflicted, even if the falsehood arose in a discussion of public interest.[412]

406. *Id.* (emphasis supplied).

407. Philippine Journalists, Inc. (People's Journal) v. Thoenen, 477 SCRA 482 (2005).

408. *Id.* at 486-89.

409. *Id.* at 486 & 498.

410. *Id.* at 486.

411. *Id.* at 496-98.

412. *Id.* at 496-97 (citing *Gertz*, 418 U.S. at 344-50) (emphases omitted).

Four years later, the Supreme Court in *Villanueva* went back to *Rosenbloom*'s content-based approach.[413] In this case, the plaintiff was a mayoralty candidate who filed a libel suit for false and defamatory reports about the plaintiff's disqualification in the mayoralty elections.[414] Applying the public interest test, the Court held that petitioner became a public figure because the controversy involved matters of which the public has the right to be informed, considering the "very public character of the election itself."[415] Quoting the *Rosenbloom* decision previously mentioned in *Borjal*, the Court went further and added that "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not voluntarily choose to become involved."[416]

Six months later, the Court, in *Yuchengco*, deviated once again from *Rosenbloom* public interest test, and went back to the status-based approach in *Gertz*.[417] In this case, the Manila Chronicle published an article portraying Alfonso T. Yuchengco as a "Marcos crony" who has engaged in illegal conduct.[418] The Court ruled against the characterization of Yuchengco as a public figure since the latter has not "voluntarily thrust himself to the forefront of particular public controversies in order to influence the resolution of the issues involved."[419] In writing for the majority, Justice Minita V. Chico-Nazario cited the case of *Philippine Journalists, Inc. (People's Journal)* that previously quoted *Gertz* as regards the definition of a public figure, and, borrowing words from *Gertz*, the esteemed justice concluded that the plaintiff "has relinquished no part of his interest in the protection of his own good name"[420] as a private individual, and is consequently deserving of recovery.[421] Moreover, the Court, still quoting from *Gertz*, stressed that "private individuals are not only more vulnerable to injury than public

413. *See Villanueva*, 588 SCRA at 13 (citing *Borjal*, 301 SCRA at 26-27).

414. *Villanueva*, 588 SCRA at 13 6-7 & 11.

415. *Id.* at 13.

416. *Id.* (citing *Borjal*, 301 SCRA at 26-27).

417. *See Yuchengco*, 605 SCRA at 717-18 (citing *Philippine Journalists, Inc. (People's Journal)*, 477 SCRA at 497).

418. *Yuchengco*, 605 SCRA at 688-90.

419. *Id.* at 718.

420. *Id.* (citing *Philippine Journalists, Inc. (People's Journal)*, 477 SCRA at 497).

421. *Yuchengco*, 605 SCRA at 718-19.

officials and public figures; they are also more deserving of recovery."[422] The Court held that, since Yuchengco was a private individual, "[the] said articles cannot be considered as qualifiedly privileged communications even if they deal with matters of public concern."[423]

In the 2013 case of *Fortun v. Quinsayas*[424] the Supreme Court once more applied the public interest test.[425] This case concerns Atty. Philip Sigfrid A. Fortun, the counsel representing the principal accused in the highly publicized Ampatuan Massacre.[426] About a year after the massacre, Atty. Prima Jesusa B. Quinsayas, among others, filed a disbarment complaint against the petitioner.[427] Although the disbarment case was still pending, the GMA Network, Inc., the Philippine Daily Inquirer, and the Philippine Star published articles regarding the disbarment case against the petitioner, stating that the latter has been obstructing the administration of justice through delaying tactics and countless causes of action meant to bury his client's guilt in the massacre.[428] Channel 23 also aired on national television, through Atty. Quinsayas, details of the disbarment complaint, which, according to the petitioner, allegedly violated the Rules of Court on the confidential nature of disbarment proceedings.[429]

While the case is not a libel complaint but a petition for indirect contempt, the Supreme Court, taking cue from the earlier case of *People v. Castelo*, ruled that "contempt is akin to libel" and, as such, the principle of privileged communication may be invoked.[430] The Court applied the public figure doctrine in ruling on the petitioner's allegation that the articles in question "opened his professional and personal reputation to attack[,]" thereby "[exposing the] Court and its investigators to outside influence and public interference."[431] Although Atty. Quinsayas was found guilty of

422. *Id.* (citing *Philippine Journalists, Inc. (People's Journal)*, 477 SCRA at 497).

423. *Yuchengco*, 605 SCRA at 718.

424. Fortun v. Quinsayas, 690 SCRA 623 (2013).

425. *See Fortun*, 690 SCRA at 641-43.

426. *Id.* at 628-29.

427. *Id.* at 629.

428. *Id.* at 629-30.

429. *Id.* at 631.

430. *Id.* at 641 (citing People v. Castelo, 4 SCRA 947, 956 (1962)).

431. *Fortun*, 690 SCRA at 631.

indirect contempt for distributing copies of the disbarment complaint,[432] the media groups who published the said articles were acquitted because the articles were about matters imbued with public interest.[433] In considering Atty. Fortun as a public figure, the Court cited the *Rosenbloom* public interest test reiterated in *Villanueva* and *Borjal*.[434] Associate Justice T. Carpio, speaking for the majority, thus held —

> As a general rule, disbarment proceedings are confidential in nature until their final resolution and the final decision of this Court. *In this case, however, the filing of a disbarment complaint against petitioner is itself a matter of public concern considering that it arose from the Maguindanao Massacre case.*
>
> ...
>
> The Maguindanao Massacre is a very high-profile case. Of the 57 victims of the massacre, 30 were journalists. It is understandable that any matter related to the Maguindanao Massacre is considered a matter of public interest and that the personalities involved, including petitioner, are considered as public figure[s].[435]

This decision is in stark contrast with the case of *Gertz*, where the counsel of one of the parties was characterized as a private individual regardless of the public interest involved.[436] Delivering the opinion of the U.S. Supreme Court in *Gertz*, Justice Lewis F. Powell, Jr. rejected the idea that mere public interest outweighs any consideration of Gertz's status as a private or public figure, and put much premium on the nature and extent of the plaintiff's participation in the particular controversy giving rise to the defamation.[437]

Indeed, while the Philippines generally follows the public interest test, the Supreme Court has not established its policy in the application of the public figure doctrine to private individuals. Oscillating between *Rosenbloom*'s content-based approach and *Gertz*'s status-based approach has inevitably spawned inconsistent decisions in the application of the public figure doctrine to private individuals embroiled in an issue imbued with public interest. The unfortunate result of the lack of guidelines in the

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432. *Id.* at 645-46.

433. *Id.* at 638-44.

434. *Id.* at 642 (citing *Villanueva*, 588 SCRA at 13).

435. *Fortun*, 690 SCRA at 641-42 (emphasis supplied).

436. *Gertz*, 418 U.S. at 351-52.

437. *Id.* at 352.

doctrine's application is either an unlawful intrusion upon a private individual's right to privacy or an unlawful restraint upon an individual's freedom of expression.

IV. INVOLUNTARY PUBLIC FIGURES

A. Private Individuals as Accidental Public Figures: Broad Scope of the Public Figure Doctrine in the Philippines

As discussed in the previous chapters, the public figure doctrine has been embedded in Philippine jurisprudence since 1979.[438] An examination of pertinent jurisprudence on the doctrine shows that most cases that applied the public figure rule dealt with plaintiffs who were clearly public figures, as in the case of public officials or celebrities in the entertainment industry.[439] During the early stages of the public figure doctrine's development, only those who voluntarily sought publicity were considered public figures. A person was considered a public figure:

> (1) if he is a 'public official' in the sense that he works for the government[;] (2) if, while not employed by government, he otherwise has pervasive fame or notoriety in the community[;] or[,] (3) if he has thrust himself into some particular controversy in order to influence its resolution.[440]

The public figure doctrine was then formally extended to cover private individuals involved in an issue infused with public interest, as seen in *Borjal*.[441] These private individuals became so-called "public figures" by virtue of their being drawn into the public controversy "through no purposeful action of their own[.]"[442] However, the standards in determining when an issue is one imbued with public interest sufficient enough to transform the private individual into a public figure remains nebulous at best. The degree of participation in the public controversy necessary to make one a public figure has likewise not been laid out methodically.

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438. *See generally Lopez*, 34 SCRA. *But see GMA Network, Inc.*, 504 SCRA.

439. *See generally Ayer Productions Pty. Ltd.*, 160 SCRA; *Lagunzad*, 92 SCRA; *Brillante*, 440 SCRA; *Jalandoni*, 327 SCRA; & *Vasquez*, 314 SCRA.

440. *Guingguing*, 471 SCRA at 214 (citing SUNSTEIN, *supra* note 182, at 9-10).

441. *Borjal*, 301 SCRA at 26-27.

442. *Gertz*, 418 U.S. at 345.

The problem becomes more complex in the case of public figures ex-post, who become public figures because of the defamatory imputations themselves, coupled with public contempt and ridicule, ultimately thrusting them into fame or notoriety. Such is the case of trending victims like Christopher John P. Lao, [443] Paula Jamie Salvosa, [444] Robert Blair Carabuena,[445] and Jeane Catherine L. Napoles.[446] Should these individuals decide to sue for libel, their characterization as public figures or private individuals will play an important role in the defamation suit, for if they are to be considered public figures, albeit involuntary, they would have to meet the actual malice threshold before they can recover for the damages they suffered.

An examination of existing jurisprudence shows that the Philippine Supreme Court generally follows the public interest test.[447] This increases the probability for such trending victims to be characterized as public figures, as the only criterion that needs to be complied with is that the issue be one imbued with public interest. With the broad coverage of "public interest," any controversy that might pique the curiosity of an ordinary citizen can be easily classified as one imbued with public interest. In fact, in the oral arguments before the Supreme Court regarding the Cybercrime Law, Justice Marvic Mario Victor F. Leonen described Christopher Lao as a private figure transformed into a public figure.[448] Considering the foregoing, the necessity of establishing standards to guide the courts in determining whether or not a private individual has been transformed into a public figure becomes necessary, in order to safeguard the right to privacy of those deserving of such protection.

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443. Esmaquel II, *supra* note 10.

444. Domasian & Dalupang, *supra* note 11.

445. Calleja, *supra* note 12.

446. Cruz, *supra* note 13.

447. *Borjal*, 301 SCRA at 26-27 (citing *Rosenbloom*, 403 U.S. at 43).

448. *See* Supreme Court, Setting of Oral Arguments for Cybercrime Prevention Act of 2012, *available at* http://sc.judiciary.gov.ph/microsite/cybercrime (last accessed Oct. 31, 2017) (download the audio recording of the oral arguments held on Jan. 15, 2013 found below the "Links" section) & Rey E. Requejo, Justices find infirmities in cybercrime law, *available at* globalbalita.com/2013/01/17/justices-find-infirmities-in-cybercrime-law (last accessed Oct. 31, 2017).

B. Philippine Jurisprudence vis-à-vis U.S. Jurisprudence on Involuntary Public Figures: Revisiting Gertz v. Welch, Inc.

1. Existence of a Third Category

It was in *Gertz* where the three kinds of public figures were first distinguished.[449] In characterizing the status of the plaintiff, the Court described two classes of public figures, which commentators eventually labeled as "all-purpose public figures" and "limited-purpose public figures."[450]

An all-purpose public figure is one who has such "pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts,"[451] as in the case of famous actors, actresses, and singers, among others, in the entertainment industry. A limited-purpose public figure on the other hand is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues,"[452] as in the case of political activists who voluntarily and actively participate and advocate a stand in a certain public controversy. In such a case, his or her status as a public figure is only with regard to the particular public controversy involved.

Notably, the way the U.S. Supreme Court in *Gertz* discussed the ways by which one can become a public figure seems to suggest not two, but three, categories of public figures[453] —

> [*H*]*ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.*
>
> ...
>
> That designation [of petitioner as a public figure] may rest on either of two alternative bases. In some instances[,] an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes

449. *See Gertz*, 418 U.S. at 345.

450. W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1, 10 (2003).

451. *Id.* at 8 (citing *Gertz*, 418 U.S. at 351).

452. *Id.*

453. Aureliano Sanchez-Arango, *The Elusive Involuntary Limited Purpose Public Figure: Why the Fourth Circuit Got It Wrong in Wells v. Liddy*, 9 GEO. MASON L. REV. 211, 220-21 (2000) (citing *Gertz*, 418 U.S. at 345).

> and in all contexts. *More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case*[,] *such persons assume special prominence in the resolution of public questions.*[454]

A third kind of public figure may be deduced from the two statements above.[455] The first states that, "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."[456] The second states that, "[m]ore commonly, an individual voluntarily injects himself *or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues*. In either case[,] such persons assume special prominence in the resolution of public questions."[457]

Essentially, the third category of public figures, later referred to as involuntary public figures, refers to persons who are drawn into a particular public controversy through no purposeful action of their own.[458] Some commentators interpret the *Gertz* decision to have only described two types of public figures — the all-purpose public figures and the limited-purpose public figures — with the involuntary public figures under the second category.[459] Unfortunately, the Court in *Gertz* never offered a definition of involuntary public figures, but merely stated that such cases would be "exceedingly rare."[460]

2. The Policy Behind the Public Figure Doctrine

In the U.S., the determination of the plaintiff's status — as a private individual or a public figure — is indeed important in defamation suits, for as opposed to public figures upon whom the law imposes the burden of proving actual malice, proof of negligence is usually sufficient in the case of private individuals.[461] A similar policy is also followed in Philippine libel

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454. *Gertz*, 418 U.S. at 345 & 351 (emphases supplied).

455. *See* Hopkins, *supra* note 450, at 10 & 15.

456. *Gertz*, 418 U.S. at 345 & 351.

457. Hopkins, *supra* note 450, at 44-45.

458. *Id.* at 45.

459. *Id.* at 10.

460. *Gertz*, 418 U.S. at 345.

461. NEIL J. ROSINI, THE PRACTICAL GUIDE TO LIBEL LAW 42 (1991 ed.).

suits. While public figures have to prove actual malice, the general rule upholding the presumption of malice applies to private individuals.[462]

An analysis of the policy behind the public figure doctrine shows that the doctrine as a defense against libel suits finds basis in the very status of public figures who voluntarily thrust themselves into the vortex of public issues and who are capable of protecting themselves against libelous attacks because of their access to the media. The doctrine was never meant to serve as a license to violate an individual's right to privacy in the name of freedom of expression and the public's right to know. As such, in the application of the public figure doctrine to private individuals, due consideration must still be given to the privacy of the plaintiff involved in the public controversy. To sanction a contrary rule will cause unscrupulous individuals to hide behind the guarantee of freedom of speech and of the press to protect themselves against libel suits.

Evidently, *Gertz* focused on the nature and extent of the individual's participation in a public controversy in the characterization of the plaintiff as a private individual or a public figure, determining, *first*, the existence of a public controversy; *second*, the plaintiff's voluntary participation in the public controversy; and, *third*, the plaintiff's attempt to affect the outcome of the public controversy.[463] Arguably broader than its American counterpart, Philippine case law adopted the public interest test in *Rosenbloom*, which characterizes the plaintiff as a public figure — *regardless of the nature and extent of his involvement* — so long as he is involved, *voluntary or not*, in an issue infused with public interest.[464]

Critics of *Gertz* assert that the status-based approach inadequately protects the competing interests of freedom of expression and the right to privacy, for under such a paradigm, utterances about the private affairs of public figures are entitled to protection, while utterances made about public issues when private individuals are involved are not. While *Gertz* hinted at the existence of a third category, it nevertheless failed to provide a set of criteria to determine whether a plaintiff qualifies as an involuntary public figure. The three-pronged approach under the *Gertz* formulation does not seem to cover involuntary public figures who do not deliberately participate in the public controversy, nor attempt to affect the resolution of the same.

462. REVISED PENAL CODE, art. 354.

463. *See Gertz*, 418 U.S. at 351.

464. *Rosenbloom*, 403 U.S. at 43. *See also* Tan, *supra* note 57, at 131.

No standards with regard to the public controversy requirement have likewise been established.

The Author respectfully submits that while the Philippines has adopted most of its principles on privacy and the public figure doctrine from the U.S., the Supreme Court must nevertheless take it upon itself to establish its own legal framework which is more fitting given the Philippine context and the problem of characterization with regard to involuntary public figures. A blind replication of either *Gertz* or *Rosenbloom*, without any standards in place, will inevitably lead to unwarranted violations of the constitutional rights that it seeks to protect.

3. Involuntary Public Figures Should be Exceedingly Rare

Because of the U.S. Supreme Court's silence on involuntary public figures since *Gertz*, it was supposed that the concept was practically non-existent.[465] The concept of involuntary public figures was resurrected in *Dameron v. Washington Magazine, Inc.*[466] This case involved an air traffic controller, Merle Dameron, who was incidentally the only one on duty when a TWA 727 crashed.[467] The Washington Magazine, Inc., in its magazine, The Washingtonian, mentioned that air traffic controllers were partly to blame for the disaster; hence, Dameron filed suit.[468] Ruling that Dameron was a public figure, the D.C. Circuit Court cited the *Gertz* decision providing for the third class of public figures who through no action of their own become drawn to a public controversy.[469]

It was held that Mr. Dameron was an involuntary limited-purpose public figure who, "[b]y sheer bad luck, ... became embroiled, through no desire of his own, in the ensuing controversy over the causes of the accident [and] thereby became well known to the public in this one very limited connection."[470] The court made use of the test in *Waldbaum v. Fairchild Publications, Inc.*[471] in determining whether the plaintiff has become a

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465. *See* Hopkins, *supra* note 450, at 10.

466. Dameron v. Washington Magazine, Inc., 779 F.2d 736 (D.C. Cir. 1985) (U.S.).

467. *Id.* at 738.

468. *Id.*

469. *Id.* at 740-41.

470. *Id.* at 742.

471. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1987) (U.S.). The *Waldbaum* test asks the following questions: "(1) [Is] there ... a

limited-purpose public figure.[472] Realizing that the second component of voluntariness is absent, it modified the second criteria, to fit the profile of an involuntary public figure described in *Gertz*.[473]

Although the *Dameron* case mentioned that the decision in *Gertz* added a caveat, that "the instances of [truly] involuntary public figures must be exceedingly rare[,]"[474] its characterization of an involuntary public figure is ironically too over-inclusive, so much so that it inevitably covers any private individual who, unfortunately, "[b]y sheer bad luck," becomes involved in a controversy that is of public interest.[475] This seems to be the principle followed in the Philippines.[476]

The first Philippine case that applied the *New York Times Co.* actual malice standard was very much akin to *Dameron*. In *Lopez*, the plaintiff was also a private individual who, by a stroke of bad luck, became a victim of mistaken identity and unfortunately became the subject of the article's defamatory imputations.[477] The case clearly involved a private individual who was unwittingly drawn to an issue imbued with public interest. Although no actual malice was found, the Court allowed the plaintiff to recover damages and merely considered the defendant's rectification as a ground to mitigate liability and reduce the award for damages.[478] Despite this unconventional treatment, what is of significant note is that the Court nevertheless applied the actual malice standard to the plaintiff, even when his involvement in the issue was merely involuntary.[479]

An analysis of pertinent Supreme Court decisions shows that most libel suits where the public figure doctrine was invoked involved plaintiffs who

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public controversy; (2) [Did] the plaintiff [play] a sufficiently central role in [that] controversy; and[,] (3) [Is] the alleged [defamation] ... germane to the plaintiff's [involvement] in the controversy." *Clyburn*, 903 F.2d at 31 (citing *Waldbaum*, 627 F.2d at 1296-98).

472. *Dameron*, 779 F.2d at 740-43.

473. *Id.* at 741-42.

474. *Id.* at 742 (citing *Gertz*, 418 U.S. at 345) (emphasis omitted).

475. *Dameron*, 779 F.2d at 742.

476. *See generally Borjal*, 301 SCRA; *Villanueva*, 588 SCRA; *Filipinas Broadcasting Network, Inc.*, 448 SCRA; & *Fortun*, 690 SCRA.

477. *Lopez*, 34 SCRA at 118-19.

478. *Id.* at 128-29.

479. *See Lopez*, 34 SCRA at 126-29.

are public officials.[480] The determination of one's public figure status becomes an easy task, with only the issue on actual malice left unsettled. However, the application of the doctrine becomes tricky when the plaintiff is a private individual who inadvertently becomes entangled in an issue imbued with public interest.

The problem with adopting a set of over-inclusive criteria for an involuntary public figure is that even the right to privacy of the most private persons becomes vulnerable to violation in the name of public interest, despite the absence of any purposeful action on their part. "By sheer bad luck," as the court in *Dameron* described it,[481] previously private persons can become public figures, even if the status was effectively caused by the very defamatory imputation complained of. As opposed to a status-based approach that considers the role and the extent of participation of the plaintiff involved, a content-based approach will be entirely dependent on the Court's characterization of an issue as one imbued with public interest — a concept whose scope is too all-encompassing, to say the least. The absence of any legal framework to guide the Court in the public figure doctrine's application to involuntary public figures will inevitably lead to more confusion and obfuscation.

The Author submits that, in determining when a private individual can be deemed to have assumed the status of a public figure, both values at stake — the *right to privacy*[482] and *freedom of expression*[483] — must be taken into consideration. While recognizing the importance of having a robust discussion on private affairs, one must not lose sight of the other competing value involved in libel — the right to privacy of the defamed individual. Consequently, the importance of determining when a private individual may be deemed to have waived his or her right to privacy arises.

C. Waiver of the Right to Privacy

Indeed, just like other rights, the right to privacy may be waived, lost, or relinquished. According to Jeffrey F. Ghent, the following are different ways by which this may happen:

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480. *See generally Ayer Productions Pty. Ltd.*, 160 SCRA; *Lagunzad*, 92 SCRA; *Brillante*, 440 SCRA; *Jalandoni*, 327 SCRA; *Vasquez*, 314 SCRA; & *Tulfo*, 565 SCRA.

481. *Dameron*, 779 F.2d at 742.

482. *See* PHIL. CONST. art. III, §§ 1-3.

483. *See* PHIL. CONST. art. III, § 4.

(1) By express or implied waiver or consent, or by estoppel;

(2) By becoming a public figure;

(3) By becoming involved, intentionally, or unintentionally, in a matter of public interest;

(4) By doing something which is a matter of public record; or

(5) By merely being in a public place.[484]

In such cases, invasion of privacy is not actionable. All the items enumerated above are arguably within the purview of the concept of waiver. In fact, U.S. courts that dealt with privacy cases would often use the above-mentioned terms interchangeably, without regard to the technical nuances and distinctions among them.[485]

A waiver is the "renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or of the opportunity to take advantage of some select, irregularity, or wrong."[486] It is "[t]he passing by of an occasion to enforce a legal right, whereby the right to enforce the same is lost[.]"[487] Applied to an individual's right to privacy, the waiver may be done expressly or impliedly, or even through conduct that precludes the assertion of such right.[488] The public figure doctrine is on all fours with the concept of waiver.

According to Philippine case law, public figures are deemed "to have lost, to some extent at least, their right of privacy."[489] One of the reasons for such loss of privacy is because "they had sought publicity and consented to it, and so could not complain when they received it[.]"[490] In other words, by seeking publicity, these individuals were deemed to have waived their right to privacy, thereby allowing a limited intrusion into their private lives.

484. Jeffrey F. Ghent, 57 A.L.R.3D *Waiver or Loss of Right of Privacy* § 2 (a) (1974).

485. *Id.*

486. BLACK'S LAW DICTIONARY 1231 (11th ed. 2004).

487. *Id.*

488. 62A AM. JUR. 2D *Privacy* § 181.

489. *Ayer Productions Pty. Ltd.*, 160 SCRA at 875 (citing PROSSER & KEETON, *supra* note 23, at 859-61) (emphasis omitted).

490. *Id.* (emphasis omitted).

Indeed, "one of the costs associated with participation in public affairs is an attendant loss of privacy."[491]

Based on the disquisitions above and considering the definition of a waiver, the Author submits that a positive act, or at least some fault, is necessary for a person to "waive" his or her claim, right, or privilege. Before a person's right is considered lost, a certain degree of culpability must be attributable to the person whose right to privacy has been intruded upon. After all, while it is true that a waiver of an individual's right to privacy may justify a limited intrusion, such may only be allowed only "to the extent warranted by the circumstances which brought about the waiver."[492]

In the case of trending personalities or involuntary public figures, the use of the nebulous public interest test as the sole basis to validate an illegal intrusion into a legitimate one will inevitably violate the right to privacy of these private individuals. The lack of working parameters in determining whether or not a private individual has been transformed into a public figure because of his or her involvement in a public controversy will open the floodgates to abuse of the right to privacy.

While the Author recognizes the interest protected by *Rosenbloom*'s content-based approach, it cannot be denied that *Gertz*'s status-based approach also deserves much consideration, for the latter takes into account the reputational interest and the right to privacy of the private individuals who were merely drawn into an issue imbued with public interest through no purposeful action of their own. Although making the plaintiff's role and participation in the public controversy a factor in status-determination will arguably restrict freedom of expression, it must be realized that freedom of expression is not the only societal value at issue in this controversy.[493]

It is noteworthy that in libel cases where the plaintiff is a public official or a public figure, freedom of expression takes precedence over the privacy right of the plaintiff, in order to encourage an unimpeded discussion on public issues. In the case of private individuals involved in public issues however, greater vigilance is required in characterizing them as public figures. In such cases, the legitimate interest of the State to safeguard their

491. Bartnicki v. Vopper, 532 U.S. 514, 534 (2001).

492. Pohle v. Cheatham, 724 N.E.2d 655, 659 (Ind. Ct. App. 2000) (U.S.) (citing Continental Optical Co. v. Reed, 119 Ind. App. 643, 650 (Ind. Ct. App. 1949) (U.S.)).

493. *See* Strasser, *supra* note 181, at 75.

right to privacy must be given more consideration. Only then can the inherent clash between the reputational interest of private individuals and the right to freedom of expression be reconciled. In determining when a private individual is deemed to have waived his or her right to privacy and has consequently assumed the status of a public figure, the Author submits that considerations of public interest must be tempered with the plaintiff's role and degree of participation in the public issue in question.

V. CONSTRUCTING A STRUCTURAL FRAMEWORK IN THE APPLICATION OF THE PUBLIC FIGURE DOCTRINE TO PRIVATE INDIVIDUALS

It is undisputable that the right to privacy of every person is considered sacrosanct, and finds refuge in no less than the Philippine Constitution,[494] law,[495] and jurisprudence,[496] as well as international law.[497] Apart from being recognized as part of the substantive right to due process, jurisprudence has also recognized the right to privacy as independent of the right to liberty.[498]

Yet, various Supreme Court decisions hold that the right to privacy must, at times, give way to considerations of public interest arising from a public controversy in which the individual finds himself or herself embroiled.[499] In a democratic country like the Philippines, free speech is accorded much premium to encourage unimpeded discussion on public issues.[500] Interests protected by freedom of speech are easily discernible in cases where the individual involved is a public official or a voluntary public figure.[501] However, public interest considerations attributed to controversies involving private individuals are often illusory, to the detriment of the right to privacy. Therefore, using a content-based approach without any set of

494. PHIL. CONST. art. III, §§ 1-3.

495. *See, e.g.*, An Act Protecting Individual Personal Information in Information and Communications Systems in the Government and the Private Sector, Creating for this Purpose a National Privacy Commission, and for Other Purposes [Data Privacy Act of 2012], Republic Act No. 10173, § 2 (2012).

496. *See Morfe*, 22 SCRA at 443-46.

497. *See, e.g.*, UDHR, *supra* note 44, art. 12.

498. *Morfe*, 22 SCRA at 444.

499. *See, e.g.*, *Borjal*, 301 SCRA & *Lopez*, 34 SCRA.

500. *Flor*, 454 SCRA at 455-56 (citing *Bustos*, 37 Phil. at 740-41).

501. *See generally Ayer Productions Pty. Ltd.*, 160 SCRA; *Lagunzad*, 92 SCRA; *Brillante*, 440 SCRA; *Jalandoni*, 327 SCRA; *Vasquez*, 314 SCRA; & *Tulfo*, 565 SCRA.

guidelines in the application of the public figure doctrine will unduly threaten the right to privacy of private individuals who are inadvertently drawn into an event that the Court characterizes as one imbued with public interest.

Based on the foregoing discussions, the Author submits that in order to protect the privacy and reputation of a private individual involved in an issue imbued with public interest, four issues must first be settled: (1) the kind of public controversy that must be present; (2) the point in time when the public controversy must exist; (3) the relationship between the defamatory imputation and the plaintiff's role in the public controversy; and (4) the degree of participation necessary to transform a private individual into an involuntary public figure.

A. First Factor: Public Controversy Requirement

Although *Gertz* established the status-based approach as regards public figures, it also held that the doctrine's application presupposes the existence of a public controversy.[502] The elusive definition of public interest or public controversy confers upon courts unbridled discretion to expand or contract the scope of the public controversy.[503] This opens the floodgates to abuse, enabling the courts to surreptitiously manipulate the plaintiff's public figure status, causing either undue restraint to freedom of expression or undue intrusion to the right of privacy.

Setting parameters as to what kind of public controversy legitimizes the intrusion to the right to privacy pursuant to public interest considerations is important in order to prevent any unwarranted intrusion to the right of privacy, considering that a private individual must not *ipso facto* become a public figure, simply because he or she is involved in an issue that draws public attention.[504]

The Philippine Supreme Court attempted to define what public interest is, stating that

> [i]n determining whether or not a particular information is of public concern there is no rigid test which can be applied. 'Public concern' like 'public interest' is a term that eludes exact definition. *Both terms embrace a*

502. *See generally* Jacquelyn S. Shaia, *The Controversy Requirement in Defamation Cases and its Misapplication*, 28 AM. J. TRIAL ADVOC. 387, 393-97 (2004).

503. *See generally* Willner, *supra* note 256.

504. *See Wolston*, 443 U.S. at 166-67.

> *broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen.* In the final analysis, *it is for the courts to determine on a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public.*[505]

Such definition of what constitutes matters of public interest is problematic not only because it gives the courts unbridled discretion to determine the presence of public interest on a case-to-case basis, but also because such definition broadly covers matters that "the public may want to know,"[506] regardless of the social value it imparts and regardless of how it affects them, as, in fact, an issue may become one of public interest simply because it "arouse[s] the interest of an ordinary citizen."[507]

U.S. jurisprudence provides a more well-defined set of parameters in determining the existence of a public controversy or an issue imbued with public interest —

> The controversy at issue must be a genuine public controversy; that is, it must involve an issue of *significant importance to society*, rather than an issue that is simply interesting. ... 'A public controversy is not simply a matter of interest to the public; it must be a real dispute, *the outcome of which affects the general public or some segment of it in an appreciable way*. ... [E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention ... Rather, a public controversy is a dispute that in fact has received public attention because its *ramifications will be felt by persons who are not direct participants.*[508]

Based on the definition above, a public controversy discussed in *Gertz* must be qualified to include not only one that is newsworthy enough to be the subject of public discussion. Such controversy must also be one that (1) is of significant importance to the public; and (2) has received public attention because its ramifications will be felt by persons who are not direct participants — *either the general public or some segment of it* — in an appreciable way.

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505. Valmonte v. Belmonte, Jr., 170 SCRA 256, 267 (1989) (citing Legazpi v. Civil Service Commission, 150 SCRA 530, 541 (1987)) (emphases supplied).

506. *Id.*

507. *Id.*

508. Hopkins, *supra* note 450, at 30-31 (citing *Waldbaum*, 627 F.2d 1287 at 1296) (emphases supplied).

The U.S. case of *Time, Inc.*, decided years before *Waldbaum*, seems to have been the basis of such definition.[509] In that case, the U.S. Supreme Court ruled that the wife of the heir to the Firestone tire dynasty was a private person because her divorce, even if highly publicized and sensationalized, is not the sort of "public controversy" referred to in *Gertz*, because "[d]issolution of a marriage through judicial proceedings is not the sort of [controversy] ... [which] may be of interest to some portion of the reading public."[510] While the Court in *Time, Inc.* did not lay down a set of guidelines in the determination of what public controversy qualifies in the application of the actual malice standard, it nevertheless determined what does not.[511]

The Author submits that a more objective set of standards to be used in defining what a public controversy is, such as the one laid down in *Waldbaum*, should be adopted in order to prevent any issue that may potentially arouse an ordinary citizen's interest from being indiscriminately labeled as a genuine public controversy or an issue imbued with public interest.

B. Second Factor: Pre-existence of the Public Controversy

The public controversy must precede the defamatory imputation,[512] for the "defendant [in a defamation suit] could not launch a false accusation and then argue that the ensuing controversy made the plaintiff a public figure."[513] In *Hutchinson,* involving the "Golden Fleece Award,"[514] the U.S. Supreme Court ruled that Hutchinson was not a public figure as "those charged with defamation cannot, by their own conduct, create their own defense[.]"[515]

509. *Time, Inc.*, 424 U.S. at 454-56.

510. Hopkins, *supra* note 450, at 11 (citing *Time, Inc.*, 424 U.S. at 454).

511. *See* Shaia, *supra* note 508, at 393. "Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Time, Inc.*, 424 U.S. at 454.

512. *See* Shaia, *supra* note 502, at 396-97.

513. Gilles, *supra* note 241, at 257 (citing *Hutchinson*, 443 U.S. at 135).

514. *See generally, Hutchinson*, 443 U.S.

515. *Hutchinson*, 443 U.S. at 135.

This criterion is particularly important in light of the high prevalence of cases involving public figures ex-post whose fame or notoriety was principally triggered by the defamatory imputations themselves, or the public reaction occasioned by the libelous imputations. To adequately protect the right to privacy and reputational interests of private individuals who are most deserving of protection, the defamatory imputation "must arise from the public controversy,"[516] and not the other way around.

While the Supreme Court has yet to resolve a case where the plaintiff's notoriety arose as a consequence of the defamatory imputation complained of, the rise to fame of private individuals due to libelous articles published against them or due to cyber-bullying seems rampant.[517] Applying this criterion to the case of such trending public figures, it is apparent that they shot to fame precisely because of the defamatory imputations against them. If these libelous posts or articles had not been published, they would not have been exalted to a position of fame or notoriety. The Author posits that the defamatory imputation must arise from a pre-existing public controversy, for otherwise the media, or even mere *netizens*,[518] will have the power to transform private individuals into public figures by tarnishing their reputation, and then thereafter use the public figure status they themselves created to shield themselves from liability. The absence of this criterion will not only result in an unjust situation, but such will also result in unwarranted violations of private individuals' right to privacy.

C. Third Factor: Relationship between the Defamatory Imputation and the Plaintiff's Role in the Public Controversy

After the explicit use of the concept of an "involuntary public figure" by the D.C. Circuit court in *Dameron*, subsequent lower court decisions attempted to follow suit.[519] However, because of the absence of a clear set of criteria by

516. Shaia, *supra* note 502, at 410.

517. *See, e.g.*, Esmaquel II, *supra* note 11; Domasian & Dalupang, *supra* note 12; Calleja, *supra* note 13; & Cruz, *supra* note 14.

518. It is a term used to refer to Internet users. The Merriam-Webster dictionary defines the term as "an active participant in the online community of the Internet." Merriam-Webster Dictionary, Definition of Netizen, *available at* https://www.merriam-webster.com/dictionary/netizen (last accessed Oct. 31, 2017).

519. *See* Matthew Lafferman, *Do Facebook and Twitter Make You a Public Figure?: How to Apply the Gertz Public Figure Doctrine to Social Media*, 29 SANTA CLARA COMPUTER & HIGH TECH L.J. 199, 221–22 (2012).

the U.S. Supreme Court, the lower courts in the U.S. have resorted to an *ad hoc* approach in the determination of conditions or standards under which an individual may be deemed an involuntary public figure.[520] The inconsistent results primarily arose because of the tendency of most courts to consider a public controversy unrelated to the defamatory imputation in the determination of the plaintiff's status.[521]

As enunciated in *Gertz*, the defamatory imputation must be germane to the plaintiff's role in the public controversy.[522] There are instances where, although a public controversy involving the plaintiff preceded the defamatory imputation, the topic of the defamatory imputation essentially pertained to another public controversy that arose subsequently and as a result of the defamation. In most cases, the alleged defamation was independent of the public controversy. The identification of a controversy unrelated to the defamatory imputation as the public controversy at issue is erroneous.

In *Clyburn v. News World Communications Inc.*,[523] John Clyburn filed a libel suit for a news article stating that "Clyburn, waited 'several critical hours' after [Joann] Medina's collapse before calling an ambulance so that those present could clear out before the police arrived[,]" thereby implying that his inaction hastened his girlfriend's death.[524] However, since the plaintiff was a political ally of the local mayor under investigation for drug dealing, the court considered "[p]ossible drug dealing and drug use by public officials and their friends" as the public controversy in the case.[525] The court found that the plaintiff was a limited-purpose public figure, and ruled that his conduct before the controversy arose put him at its center, considering his

520. *See* LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 80-81 (2004).

521. *See* LIDSKY & WRIGHT, *supra* note 527, at 81.

522. *See generally Gertz*, 418 U.S.

523. Clyburn v. News World Communications Inc., 903 F.2d 29 (D.C. Cir. 1990) (U.S.).

524. *Id.* at 31 & 34.

525. *Id.* at 32.

ties with various public officials, and his false statements regarding the circumstances surrounding his girlfriend's collapse.[526]

In *Little v. Breland*,[527] K. Carl Little was hired as president by the Mobile Convention Visitors Corporation, "a non-profit corporation created to provide sales and marketing services and to attract conventions to Mobile[.]"[528] Little filed a defamation suit because of articles stating that Little was fired for alleged sexual misconduct.[529] The court ruled that Little was a limited-purpose public figure.[530] The court considered the issue as one "of legitimate public concern" considering that the leadership of the corporation and the success of the U.S. $60 million convention center had foreseeable and substantial impact on the City of Mobile's tax base.[531] The court also found that even assuming that the plaintiff did not voluntarily thrust himself to the forefront of the controversy to influence its outcome, he nevertheless assumed a "prominent position in its outcome[,]" and had even sought out media attention before the defamatory imputation.[532] Finally, the court noted that by accepting a taxpayer-supported job, he assumed the risk of public scrutiny.[533]

An examination of these two cases show how much of the inconsistency in the determination of a plaintiff's public figure status may be attributed to the manner courts identify the relevant controversy in a given case. In *Clyburn*, the public controversy invoked and identified by the court to justify the finding of public figure status is the "[possible] connection between her ([the girlfriend's)] drug abuse and the Barry administration[,]"[534] when the defamatory imputation clearly arose from the death of his girlfriend, and his

526. *Id.* at 31-34. During two interviews with a reporter, "Clyburn said that he had called 911[,] and that he was alone with Ms. Medina at the time. He admitted later that he was not alone and that a woman called the paramedics." *Id.* at 31.

527. Little v. Breland, 93 F.3d 755, 756 (11th Cir. 1996) (U.S.).

528. *Id.* at 756.

529. *Id.*

530. *Id.* at 758.

531. *Id.* at 757. (citing Silvester v. American Broadcasting Companies, 839 F.2d 1491, 1493 (11th Cir. 1988) (U.S.)).

532. *Little*, 93 F.3d at 758 (citing *Silvester*, 839 F.2d at 1496).

533. *Little*, 93 F.3d at 758.

534. *Clyburn*, 903 F.2d at 32.

failure to promptly call for help.[535] In *Little*, the court seemed to consider public accountability as the public controversy because the plaintiff's job was supported by taxpayers.[536] A closer scrutiny of the case, however, would show that the controversy from which the alleged defamatory imputation arose was the plaintiff's termination, which, while newsworthy, is not necessarily a genuine public controversy.

The requirement that the defamatory imputation be germane to the plaintiff's role in the pre-existing public controversy is important so as to avoid the tendency of courts to affirm the existence of a genuine public controversy, when, in truth, the real controversy from which the defamatory imputation arose does not satisfy the requirement of a genuine public controversy. Otherwise, courts will be allowed to justify conferral of public figure status by identifying an independent public controversy to covertly manipulate the plaintiff's public figure status.

D. Fourth Factor: Degree of Participation

1. Assumption of Risk and Reasonable Expectation of Privacy

As stated in the *Gertz* decision, the instances of involuntary public figures are exceedingly rare.[537] As such, mere involvement without so much as a trace of participation of the private individual in the public controversy should not automatically transform him into an involuntary public figure, for a different interpretation would result to an over-inclusive criterion which is contrary to the "exceedingly rare" qualification. While involuntary public figures are described as individuals who were drawn to a public controversy "through no purposeful action of [their] own," such persons must have at least done something to trigger the series of events that led to his or her involvement in the public controversy.[538] The Author submits that the plaintiff's conduct and participation in the public controversy must be considered.

In the case of *Dameron*, the mere fact that plaintiff went to work, as he would ordinarily do,[539] should not have been sufficient to transform him into a public figure. At the very least, there must have been an assumption of

535. *See* Shaia, *supra* note 502, at 402.

536. *Little*, 93 F.3d at 758.

537. *Gertz*, 418 U.S. at 345.

538. *Id.*

539. *See Dameron*, 779 F.2d at 738.

risk undertaken by the plaintiff before he or she can be considered a public figure, albeit an involuntary one.

One of the defenses against civil liability under Philippine Tort Law is proof that the plaintiff knowingly and voluntarily assumed the risks inherent in a particular undertaking, thereby effectively barring or reducing his right to recovery.[540] Before one can use assumption of risk as a defense, the following requisites must be satisfied: (1) knowledge of the existence of the risk; (2) understanding of the nature of the risk; and (3) freely and voluntarily chose to pursue the undertaking.[541]

Under U.S. Torts Law, assumption of risk as a defense may be either express or implied.[542] Implied assumption of risk is further classified into primary assumption of risk and secondary assumption of risk.[543] Primary assumption of risk is an objective criterion that focuses on the defendant's general duty of care, considering the well-known and inherent risks in the activity or undertaking which the plaintiff is engaged in.[544] This kind aptly applies to public officials,[545] who, by seeking or accepting public office with known and inherent risks, "must accept certain necessary consequences of involvement in public affairs, including greater public scrutiny[,]" without need of assessing whether or not the public official subjectively knew the risks involved.[546] On the other hand, secondary assumption of risk is more subjective, and focuses on the plaintiff's knowledge of the existence of the risk, understanding of its nature, and free and voluntary choice to incur it.[547] Philippine Tort Law clearly adopts the secondary assumption of risk. It is this kind of assumption of risk that is applied to limited-purpose public figures to determine whether or not an individual has voluntarily thrust himself to the forefront of a public controversy enough to transform him into a public figure for that limited purpose.[548]

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540. TIMOTEO B. AQUINO, TORTS AND DAMAGES 238-39 (2d ed. 2005) (citing Rodrigueza v. Manila Railroad Co., 42 Phil. 351 (1921)).

541. 1 J. CEZAR S. SANGCO, PHILIPPINE LAW ON TORTS AND DAMAGES 84 (1993).

542. *See generally* Gilles, *supra* note 241, at 234-37.

543. *Id.* at 234.

544. *Id.* at 235-36.

545. *Id.* at 242.

546. *Id.* (citing *Gertz*, 418 U.S. at 344).

547. Gilles, *supra* note 241, at 234-35.

548. *Id.* at 260.

The concept of "reasonable expectation of privacy" is a Constitutional Law concept that is akin to the Civil Law concept of "assumption of risk." Under the first principle, before the right to privacy may be invoked, a reasonable expectation of privacy must exist.[549] According to Justice John Marshall Harlan II, the reasonableness of an individual's expectation of privacy depends on a two-part test consisting of both subjective and objective components: (1) "that a person [has] exhibited an actual (subjective) expectation of privacy;"[550] and (2) "the expectation be one that society is prepared to recognize as reasonable (objective)."[551]

It is worthy to note that the Supreme Court has applied the reasonable expectation test in the context of public figures. In one case, the Court held that the plaintiffs "have no reasonable expectation of privacy over matters involving their offices in a corporation where the government has [an] interest [in,] [considering that] such are matters of public concern [ ] over which the people have the right to information."[552] Furthermore, the Court held that an individual's reasonable expectation of privacy is tempered by an overriding compelling state interest.[553] For instance, in *Valmonte v. Belmonte, Jr.*,[554] Justice Irene R. Cortes remarked that, "because of the interest they generate and their newsworthiness, public figures, most especially those holding responsible positions in government, enjoy a more limited right to privacy as compared to ordinary individuals, their actions being subject to closer public scrutiny."[555]

Applying the reasonable expectation test to involuntary public figures, the Author submits that while the determination of what society considers as reasonable is arguably based on the legitimate public interest at stake,[556] the conduct of the plaintiff in determining whether he or she exhibited an actual expectation of privacy must also be considered. Viewed in this light, identifying an issue imbued with public interest, or one where a compelling

549. *See geneerally* Pollo v. Constantino-David, 659 SCRA 189, 206 (2011).

550. *Id.* at 206 (citing Katz v. United States, 389 U.S. 347, 361 (1967) (J. Harlan, concurring opinion)).

551. *Id.*

552. Sabio v. Gordon, 504 SCRA 705, 737 (2006) (emphasis omitted).

553. *Id.* at 738.

554. Valmonte v. Belmonte, Jr., 170 SCRA 256 (1989).

555. *Id.* at 270.

556. *See Sabio*, 504 SCRA at 737.

state interest exists, is not enough to override a private individual's right to privacy. The conduct of such individual, or his or her participation in the public controversy in question, must be examined as well.

It is thus submitted that, before a private individual involved in an issue imbued with public interest can be deemed an involuntary public figure, his or her participation in the public controversy in question, in light of the related concepts of assumption of risk and reasonable expectation of privacy, must be taken into consideration. Only then can the competing values of public interest, freedom of expression, and the right to privacy be balanced.

2. Individuals Whose Lives Intersect with Public Persons and Public Interest

As a defense against the libel suits filed by Janet Lim-Napoles for the allegedly defamatory articles written about her daughter's lavish lifestyle, Rappler reporter, Natashya Gutierrez, argued that Mrs. Lim-Napoles was already a public figure when the articles in question were published, explaining that "Janet [Lim-]Napoles became a public figure the moment she was tagged as the mastermind of the pork barrel scam[.]"[557] On this basis, it was argued that the articles published about Mrs. Lim-Napoles' daughter were justified, as "[p]rivate persons whose lives intersect with public persons and issues of public interest are certainly not exempt from the 'prying eyes.'"[558]

The concept of involuntary public figures arose primarily because of individuals who unwittingly find themselves entangled in a public issue or with public men, thereby transforming them into public figures. As Judge Karen J. Williams said in the case of *Wells v. Liddy*, "there is a great temptation when evaluating a controversy ... to allow the controversy itself to take precedence in the analysis and let it convert all individuals in its path into public figures."[559] This is the soul of *Rosenbloom*'s public interest test, and what this Note aims to prevent, or at least contain.

To facilitate the examination of the extent of participation necessary to transform one into a public figure, it is best to examine the role of the plaintiff in the following situations from which the issue on involuntary public figures typically arises: (1) Involvement in crimes; (2) Involvement in

557. Rappler reporter on Napoles piece: 'No malice', *supra* note 6.

558. *Id.*

559. Wells v. Liddy, 186 F.3d 505, 541 (4th Cir. 1999) (U.S.).

a litigation proceeding; (3) Association with public figures; and, (4) Accidental public figures in the wrong place and at the wrong time.

a. Individuals Engaged in Criminal Activities

An issue typically deemed to be one of public concern is with regard to criminal activities, for crimes are considered committed against the State and the citizens that compose it.[560] Hence, the public has the right to know. On the other hand, under Revised Penal Code, libel also includes a "public and malicious imputation of a crime"[561] or a "public and malicious imputation of ... any act ... tending to cause the dishonor, discredit, or contempt" of a person[562]. Therefore, if an article was published linking an individual to the commission of a crime, the imputation may be considered libelous. In such cases, the distinction between private individuals and public figures once again becomes relevant. In the case of the former, malice is presumed, while the burden of proving actual malice befalls the latter.

Some U.S. courts and commentators see the possibility of considering the commission of a crime or engaging in a criminal activity enough to transform a private individual into a public figure.[563] In the case of *Wolston*, however, the U.S. Supreme Court was very explicit when it held that, a person who engages in criminal conduct does not *ipso facto* become a public figure even "for purposes of comment on a limited range of issues relating to his conviction."[564]

In *Wolston*, the U.S. Supreme Court focused on the fact that the plaintiff did not voluntarily thrust himself to the forefront of a public controversy, nor did he assume any special prominence in the resolution of public questions, to justify conferring upon him the status of a public figure.[565] Though the plaintiff's failure to appear was due to health concerns, the U.S. Supreme Court went on to say that even assuming that failure to appear was his own choice, the plaintiff still cannot be considered a public figure merely because he voluntarily chose not to appear before the grand jury, even when

560. *See* Barredo v. Garcia and Almario, 73 Phil. 607, 611 (1942).

561. REVISED PENAL CODE, art. 353.

562. *Id.*

563. *See generally Gilles*, *supra* note 241, at 268.

564. *Id.* (citing *Wolston*, 443 U.S. at 168).

565. *Wolston*, 443 U.S. at 165-69.

he knew that his action might attract the media.[566] The U.S. Supreme Court rejected the argument that "any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction[,]" for a contrary decision will "create an 'open season' for all who [seek] to defame persons convicted of a crime."[567]

It seems that the Supreme Court considers involvement in a crime as a genuine public controversy enough to accord the media the constitutional protection of freedom of the press when they report about a private individual's involvement in a criminal activity. In fact, under the 2007 Broadcast Code of the Philippines, the press is allowed, subject to certain limitations, to reveal the identities of criminals, suspects, or alleged perpetrators of crimes, even with the absence of an indictment.[568]

In *Guingguing*, the plaintiff was a broadcaster who sued the defendant for libel, for having caused the publication of plaintiff's criminal records, together with photos of his arrest.[569] Against this allegation, the Court ruled that, although the publication and revelation of such information may have caused a great deal of inconvenience to plaintiff, "such information hardly falls within any realm of privacy complainant could invoke, since the pendency of these criminal charges are actually matters of public record."[570]

The Author posits that while public access to criminal records pursuant to the public's right to know finds basis in law,[571] and that a person's

566. *Id.* at 166-68.

567. *Id.* at 168-69.

568. Kapisanan ng mga Brodkaster ng Pilipinas, 2007 Broadcast Code of the Philippines at 11-12, *available at* http://www.kbp.org.ph/wp-content/uploads/2008/04/Broadcast-Code-of-2007.pdf (last accessed Oct. 31, 2017).

569. *Guingguing*, 471 SCRA at 200.

570. *Id.* at 223.

571. PHIL. CONST. art. III, § 7. The Philippine Constitution provides,

> The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

Id.

involvement in a criminal activity is one of legitimate public interest,[572] considering its implications to public safety, a line must still be drawn between the publication of the criminal imputation as *news* to serve public interest, and as *entertainment to the point of defamation* to satisfy the curiosity of the public audience. After all, to adequately protect the right to privacy of private individuals, the allegedly defamatory imputation must be germane to the plaintiff's participation in the public controversy. Any other malicious comment that is merely intended to malign the reputation of the individual concerned cannot be protected by freedom of speech and of the press.

It is submitted that a private individual involved in a criminal activity becomes a public figure for purposes of *fair* and *unbiased* news reporting, notwithstanding the fact that the reports subsequently turn out to be a false accusation. This is because "[e]ven assuming that the contents of the articles are false, mere error, inaccuracy[,] or even falsity alone does not prove actual malice[,]"[573] so long as the statements were made "with good motives and for justifiable ends[.]"[574] Otherwise, the press will be impeded to the point of suppression to effectively function as a critical agency of democracy.[575]

In the recent high-profile case in which businesswoman Janet Lim-Napoles was involved, Mrs. Lim-Napoles had not yet been charged, much less convicted, of any crime in any court of law, and yet she was portrayed as the mastermind of the ₱10 billion pork barrel scandal.[576] While the law allows the public to pry into the privacy of public figures, Mrs. Lim-Napoles and her family members are not public figures considering that they have maintained private lives and have never been involved in politics.[577]

Oppositors contend that a private individual's mere involvement in a newsworthy event imbued with public interest is enough to make him or her a public figure.[578] Notably, in Republic Act No. 6770, Section 22 provides that

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572. *See Barredo*, 73 Phil. at 611.

573. *Guingguing*, 471 SCRA at 225 (citing *Borjal*, 301 SCRA at 30).

574. *Guingguing*, 471 SCRA at 212.

575. *Id.* at 225 (citing *Borjal*, 301 SCRA at 30).

576. *Id. See generally Belgica*, 710 SCRA.

577. Napoles lawyer threatens, Rappler replies, *supra* note 4.

578. Rappler reporter on Napoles piece: 'No malice', *supra* note 6. *See generally Borjal*, 301 SCRA.

> [i]n all cases of conspiracy between an officer or employee of the government and a private person, *the Ombudsman and his Deputies shall have jurisdiction to include such private person in the investigation and proceed against such private person as the evidence may warrant*. The officer or employee and the private person shall be tried jointly and shall be subject to the same penalties and liabilities.[579]

When a public official commits a crime of corruption, in conspiracy with a private individual, the latter cannot escape liability.[580] Just as a private individual cannot use his private status as a defense against the Ombudsman's jurisdiction over his person, a private individual cannot also hide behind his or her allegedly private status as a defense against the libelous criminal imputations. To require either indictment or conviction to justify such imputations will cause a chilling effect upon freedom of speech and freedom of the press, to the detriment of public interest.

Examining the case of Mrs. Lim-Napoles, it can be surmised that the requirement on assumption of risk has been satisfied. As discussed, public officials are deemed to have assumed the risk of public scrutiny and potentially defamatory imputations by seeking public office. A private person may be deemed to have assumed the risk of public scrutiny by engaging in a criminal act, in conspiracy with public officials, or by acting in such a way that would give the public such impression. It would be at the height of injustice if public officials were subjected to public scrutiny and contempt, while private individuals who are involved in the same crime may go off unscathed. By engaging in criminal activity in conspiracy with public officials, Mrs. Lim-Napoles may be deemed to have waived her right to privacy to a certain extent. The issue of corruption, and the potential involvement of various public officials occupying high positions in government, is without a doubt an issue imbued with legitimate public interest. As such, a person may be deemed to be an involuntary public figure "when his or her conduct is related in an integral and meaningful way to the conduct of a public official."[581] After all, public officials are held to be

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579. An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for Other Purposes [The Ombudsman Act of 1989], Republic Act No. 6770, § 22 (1989) (emphasis supplied).

580. *Id.*

581. Lewis v. NewsChannel 5 Network L.P., 238 S.W.3d 270, 298 (Tenn. Ct. App. 2007) (U.S.). In this case, the plaintiff, although a private person, was considered an involuntary public figure because of his brother-in-law's intervention as a major in the police force, and the court held that, "officials using or attempting

accountable to the public.[582] If the publication of potentially libelous criminal imputations may shed light to the possible involvement of public officials who conspired with such private individual, the latter's right to privacy may be limited to give way to a higher state interest.

It is important to note that while absolute certainty or an indictment should not be required before an imputation of corruption can afford the constitutional protection of a free press, an unfounded accusation without any basis whatsoever as to the alleged culpability of the individual cannot be considered protected speech.[583] In fact, in the case of Mrs. Lim-Napoles, investigations had already been undertaken and a sworn affidavit had already been executed by Benhur Luy, before the allegedly defamatory articles were published.[584] While acknowledging that crimes are within the purview of issues imbued with public interest, the Author likewise posits that freedom of expression and the public's right to know matters of public concern must be tempered by reason and prudence. Evidently, an unrestrained freedom to publish anything that theoretically qualifies as a matter of public interest even if the source of the information in question is mere gossip or rumor mongering is not the kind of speech that is constitutionally protected.

b. Individuals Associated with Public Figures

Significantly, some U.S. cases seem to suggest that a private individual could become an involuntary public figure by mere association with public figures.[585] For instance, in *Clyburn*,[586] the plaintiff became a public figure essentially because of his ties with public officials who were allegedly

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to use their position to keep friends from receiving tickets or citations, and certainly from being arrested, constitutes a matter of public concern." *Id.* at 274 & 298.

582. PHIL. CONST. art. XI, § 1.

583. *See Chavez*, 545 SCRA at 486 (citing *Gonzales*, 27 SCRA at 858).

584. ABS-CBN News, *supra* note 2 & Nancy C. Carvajal, *NBI probes P10-B scam*, PHIL. DAILY INQ., Jul. 12, 2013, *available at* newsinfo.inquirer.net/443297/nbi-probes-p10-b-scam (last accessed Oct. 31, 2017).

585. *See* Shaia, *supra* note 502, at 403 (citing *Clyburn*, 903 F.2d at 32). *See generally* Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) (U.S.); Zupnik v. Associated Press Inc., 31 F.Supp.2d 70 (D. Conn. 1998) (U.S.); Brewer v. Memphis Pub. Co., Inc., 626 F.2d 1238 (5th Cir. 1980) (U.S.); *Lewis*, 238 S.W.3d; & Foretich v. Capital Cities/ABC, 37 F.3d 1541 (4th Cir. 1994) (U.S.).

586. *Clyburn*, 903 F.2d at 32-33.

involved in a drug-related issue. The Philippines is also susceptible to making the same characterization. The most obvious example of such individuals would be in the case of spouses married to the president of a State, such as Michelle LaVaughn Robinson Obama, the former First Lady of the U.S., or Jose Miguel "Mike" T. Arroyo, the First Gentleman of former president Gloria Macapagal-Arroyo, who have had their fair share of libelous remarks.[587] In fact, former First Gentleman Mike Arroyo had filed several libel suits against 43 journalists in 2006, claiming that he was a private individual. [588] Human rights lawyer and current Assistant Court Administrator and Chief of the Public Information Office of the Supreme Court, Theodore O. Te, however, citing *Borjal*, argued that a private individual may become a public figure once involved in a matter imbued with public interest, thus reaffirming the general rule followed in the Philippines focusing on the public issue concerned.[589]

Another illustration is *Carson v. Allied News Co.*,[590] where the plaintiff was considered a public figure for being married to an all-purpose public figure, for the reason that "the wife of a public figure ... more or less automatically becomes at least a part-time public figure herself."[591] The problem with *Carson*'s characterization is that it fails to account for the individual's role in his or her alleged notoriety and merely bases the public figure designation on somebody else's fame. Such characterization is patently too over-inclusive — contrary to *Gertz*'s "exceedingly rare" qualification on

587. *See, e.g.*, Breanna Edwards, Michelle Obama Says Racist Attacks She Faced as First Lady 'Cut the Deepest', *available at* www.theroot.com/michelle-obama-says-racist-attacks-that-she-faced-while-1797273029 (last accessed Oct. 31, 2017) & GMA News Online, Journalists fight back, file P12.5M suit vs Mike Arroyo, *available at* http://www.gmanetwork.com/news/news/nation/24801/journalists-fight-back-file-p12-5m-suit-vs-mike-arroyo/story (last accessed Oct. 31, 2017).

588. Nathan Lee & Jose Bimbo F. Santos, A Slew of Libel Suits, *available at* http://cmfr-phil.org/media-ethics-responsibility/ethics/a-slew-of-libel-suits (last accessed Oct. 31, 2017). In 2007, however, First Gentleman Mike Arroyo decided to drop the libel suits against the impleaded journalists. GMANews, Mike Arroyo Drops All Libel Cases vs. Media, *available at* http://www.gmanetwork.com/news/story/40816/news/nation/mike-arroyo-drops-all-libel-cases-vs-media (last accessed Oct. 31, 2017).

589. Lee & Santos, *supra* note 588.

590. Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) (U.S.).

591. *Id.* at 210.

involuntary public figures[592] — as anyone who crosses paths with a public person unqualifiedly becomes a public figure.

The same rule might not be applicable to private individuals associated with public figures who embrace the limelight or exploit the attendant publicity. In *Brewer v. Memphis Pub. Co., Inc.*,[593] for instance, the Fifth Circuit imposed the actual malice standard on the plaintiff, who took advantage of her six-year romantic relationship with Elvis Presley to promote her career in the entertainment industry.[594]

The Author posits that while there are individuals who embrace or even exploit their connection with public figures and the consequent publicity, there are also individuals who would deliberately try to avoid the limelight. The Author submits that private individuals in the latter case who are associated with public figures should not be considered public figures. On the other hand, individuals associated with public figures who assume the risk of publicity themselves, as in the case of those who publicly campaign for their spouses running for public office,[595] should be considered to have assumed the status of a public figure as well. Viewed in this light, mere association or familial relationship with public figures is not enough to automatically transform a private individual into an involuntary public figure. The element of assumption of risk must still be present. The Philippine Supreme Court seems to support this view.

In the case of *Binay*, where an allegedly defamatory article was published regarding the extravagant lifestyle of the Binays and the assets that they acquired while in public office,[596] a portion of the article was about the Binays' adopted daughter and her lavish purchases.[597] The Supreme Court did not find merit in the defendants' claim that the articles were "[meant] to show that petitioner and his family lead lavish and extravagant lives; and that this matter is within the realm of public interest given that petitioner is an aspirant to a public office while his wife is an incumbent public official."[598] The Court instead ruled that the article had nothing to do with petitioner's

592. *Gertz*, 418 U.S. at 345.

593. Brewer v. Memphis Pub. Co., Inc., 626 F.2d 1238 (5th Cir. 1980) (U.S.).

594. Strasser, *supra* note 181, at 104. (citing *Brewer*, 626 F.2d at 1257).

595. *See* Strasser, *supra* note 181, at 101-02.

596. *Binay*, 501 SCRA at 316.

597. *Id.*

598. *Id.* at 319.

qualification as a candidate for public office or as a public figure, and that the defamatory imputations were meant to publicly malign and embarrass the adopted daughter.[599] In upholding the presumption of malice, the Court considered mayoralty candidate Binay's adopted child as a private individual whose privacy was clearly invaded.[600] Therefore, no assumption of risk may be attributable to the adopted child of the Binays. On the other hand, it would seem that the characterization of Jeane Napoles as a public figure is dependent on whether or not posting pictures of one's extravagant lifestyle in cyberspace may properly be construed as assuming the risk of publicity. Significantly, such discussion might be better threshed out in a separate study.

c. Parties to a Litigation Proceeding

Another debatable issue concerning involuntary public figures is whether or not parties to a lawsuit are properly classifiable as public figures considering that court proceedings are essentially imbued with public interest.[601] According to jurisprudence, court records or judicial records[602] may fall

599. *Id.* at 321 & 323.

600. *Id.* at 321.

601. BERNAS, *supra* note 36, at 106 (citing *Rubi*, 39 Phil. at 705).

602. As to what "judicial record" or "court record" covers, the Supreme Court has explained that —

> The term 'judicial record' or 'court record' does not only refer to the orders, judgment[,] or verdict of the courts. It comprises the official collection of all papers, exhibits[,] and pleadings filed by the parties, all processes issued and returns made thereon, appearances, and word-for-word testimony which took place during the trial and which are in the possession, custody, or control of the judiciary or of the courts for purposes of rendering court decisions. It has also been described to include any paper, letter, map, book, other document, tape, photograph, film, audio or video recording, court reporter's notes, transcript, data compilation, or other materials, whether in physical or electronic form, made or received pursuant to law or in connection with the transaction of any official business by the court, and includes all evidence it has received in a case.

Hilado v. Reyes, 496 SCRA 282, 296 (2006) (citing BLACK'S LAW DICTIONARY 1273 & Vermont Judiciary, Rule 3(a), Rules for Public Access to Court Records, *available at* http:// www.vermontjudiciary.org/rules/public access.htm (last accessed Oct. 31, 2017) (accessible through internet archives such as https://web.archive.org)).

within the purview of the constitutional right of the public to information on matters of public concern.[603] There is, however, no blanket authority to demand access to any court record that is arguably one of public concern.[604] The courts are given the discretion to determine whether a particular information or issue is one imbued with public interest, significant enough to affect the public.[605] The public interest as regards court proceedings consists in the "right to transparency in the administration of justice, to the end that it will serve to enhance the basic fairness of the judicial proceedings, safeguard the integrity of the fact-finding process, and foster an informed public discussion of governmental affairs."[606] The constitutional right to be informed of court proceedings is therefore not hinged on the "desire or necessity of people to know about the doing of others," but rather, in "knowing whether its servant, the judge, is properly performing his duty."[607]

Fr. Bernas opined that with regard to court records, one must distinguish between decisions and pleadings, for while decisions and opinions of a court are matters of public concern or interest, pleadings and other documents filed by the parties are not necessarily matters of public concern.[608] On this note, jurisprudence has held that —

> Decisions and opinions of a court are of course matters of public concern or interest for these are the authorized expositions and interpretations of the laws, binding upon all citizens, of which every citizen is charged with knowledge.
>
> ...
>
> Unlike court orders and decisions, however, pleadings and other documents filed by parties to a case need not be matters of public concern or interest. For they are filed for the purpose of establishing the basis upon which the court may issue an order or a judgment affecting their rights and interests.[609]

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603. *See* BERNAS, *supra* note 36, at 386 (citing *Hilado*, 496 SCRA).

604. *Id.*

605. *Hilado*, 496 SCRA at 296 (citing Legaspi v. Civil Service Commission, 150 SCRA 530, 541 (1987)).

606. *Hilado*, 496 SCRA at 296-97.

607. *Id.* at 284 (citing Barretto v. Philippine Publishing Co., 30 Phil. 88, 92 (1915)) (emphases omitted).

608. BERNAS, *supra* note 36, at 386 (citing *Hilado*, 496 SCRA).

609. *Hilado*, 496 SCRA at 298 (citing Ex parte Brown, 78 N.E. 553 (1906) (U.S.)).

As such, the purpose of the request for access, and the probable prejudice to any of the parties are taken into account in the determination of which part of the court records may be accessed,[610] considering that "[g]ranting unrestricted public access and publicity to [court records such as] personal financial information may constitute an unwarranted invasion of privacy to which an individual may have an interest in limiting its disclosure or dissemination."[611] Thus, in determining which part or all of the records of a case may be accessed, the purpose for which the parties filed them is considered.[612] Initiating a court proceeding does not *ipso facto* transform him or her into a public figure who would have to prove actual malice for his libel suit to prosper. Moreover, that the plaintiff is a party to a court proceeding does not give defamers unbridled discretion to malign the former's reputation.

To illustrate, courts and commentators repeatedly use the *Molina* doctrine, involving the annulment case of Spouses Roridel Olaviano Molina and Reynaldo Molina.[613] The case is known to practically every law student in the country. Yet, the Molina spouses did nothing more than file a complaint or an answer. Should defamatory imputations against parties to a litigation be published, considering that allegations in annulment or nullity of

610. BERNAS, *supra* note 36, at 386 (citing *Hilado*, 496 SCRA).

611. *Hilado*, 496 SCRA at 299.

612. In the exercise of such discretion, the following issues may be relevant:

(1) whether parties have interest in privacy[;]

(2) whether information is being sought for legitimate purpose or for improper purpose[;]

(3) whether there is threat of particularly serious embarrassment to party[;]

(4) whether information is important to public health and safety[;]

(5) whether sharing of information among litigants would promote fairness and efficiency[;]

(6) whether party benefiting from confidentiality order is public entity or official[;] and[,]

(7) whether case involves issues important to the public.

Id. at 300-01 (citing Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994) (U.S.)).

613. *See generally* Republic v. Court of Appeals, 268 SCRA 198 (1997). The term "*Molina* doctrine" has been used by the Supreme Court in subsequent cases. *See, e.g.*, Ting v. Velez-Ting, 582 SCRA 694 (2009) & Aurelio v. Aurelio, 650 SCRA 561, 566-67 (2011).

marriage proceedings may necessarily include "imputation[s] of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt"[614] to either of the spouses, as seen in the case of *Time, Inc.*? The Author submits that the actual malice standard should not be imposed unqualifiedly. Although some parties to a litigation proceeding may legitimately be considered public figures, as when the participants are celebrities in the entertainment industry, a greater number of litigants will more likely be ordinary private individuals who were "drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others."[615] Such policy is indeed "consistent with and indeed essential to the [c]ourt's attempt to strike a more adequate accommodation between protection of reputation and the interest of the public and the press in uninhibited reporting."[616]

While it is true that decisions of the Supreme Court and the Court of Appeals are made available to the public through certain authorized publications, [617] such publication and evident accessibility cannot be presumed to have automatically transformed private individuals into public figures. The mere fact that individuals initiate legal proceedings does not necessarily mean that they forfeit the constitutional protection of their privacy and reputation simply because they have become embroiled in legal proceedings.[618] By the mere act of filing a complaint or an answer, parties to a case cannot be reasonably presumed to have waived their right to privacy or acceded to uninhibited publicity and potential defamatory imputations, for the Court could not have wanted a rule with deleterious effects that would, for instance, discourage people from asserting their rights.[619]

The kind of assumption of risk necessary to transform one into a public figure becomes difficult because of the tendency to attribute an alleged public controversy upon which the defamatory imputation was based to an

614. REVISED PENAL CODE, art. 353.

615. Strasser, *supra* note 181, at 84-85 (citing *Time, Inc.*, 424 U.S. at 457).

616. Lackland H. Bloom, Jr., *The Press and the Law: Some Issues in Defamation Litigation Involving Media Coverage of Legal Affairs and Proceedings*, 43 SW. L.J. 1011, 1032-33 (1989).

617. 1997 RULES OF CIVIL PROCEDURE, rule 55, § 1.

618. Bloom, Jr., *supra* note 616, at 1024 (citing *Time, Inc.*, 424 U.S. at 454).

619. Bloom, Jr., *supra* note 616, at 1024.

unrelated although voluntary act previously done by the plaintiff. While the act of filing the complaint sets things into motion, such an indirect causation cannot be invoked to unlawfully deprive the parties of their right to privacy for allegedly having assumed the risk of public scrutiny.

As what Justice Harry Andrew Blackmun had said in his concurring opinion in *Wolston*, a private person embroiled in a litigation does not necessarily forfeit the degree of protection given by defamation laws just because of his or her involvement in a court proceeding.[620] If the Court sanctions a contrary rule, ordinary private citizens will hesitate to seek justice before the courts for fear of publicity and defamation.

d. Accidental Public Figures in the Wrong Place and at the Wrong Time

As posited, mere incidental involvement of a private individual in a public controversy is not sufficient to brand him or her as a public figure, albeit an involuntary one. Allowing the public controversy in which private individuals find themselves in to be the determinative factor in their public figure designation will result in an unwarranted intrusion to their right to privacy. While a societal value exists as regards freedom of speech and of the press, as well as the public's right to information on matters of public concern, one must not lose sight of the right to privacy of private individuals which the State is also duty-bound to protect. As such, that the issue involved is one imbued with public interest alone is not sufficient to transform a private individual into a public figure. The individual's role and degree of participation must likewise be taken into account.

It becomes problematic, however, when a private individual, through no purposeful action, nor any assumption of risk on his or her part, but by sheer bad luck, still becomes entangled in an issue evidently imbued with public interest. The cases of *Dameron* and *The Atlanta Journal-Constitution v. Jewell*[621] are the best illustrations of these accidental public figures who were merely caught in the wrong place and at the wrong time.

Like the plaintiff in *Dameron*, Richard Jewell in *The Atlanta Journal-Constitution* was the security guard on duty when the bomb was discovered during the 1996 Olympics in Atlanta.[622] He was initially dubbed as a hero

620. *Wolston*, 443 U.S. at 169-72 (J. Blackmun, concurring opinion).

621. The Atlanta Journal-Constitution v. Jewell, 251 Ga. App. 808 (Ga. Ct. App. 2001) (U.S.).

622. *Id.* at 814.

because of his role in alerting the authorities and helping evacuate the public from the immediate vicinity.[623] Subsequently, he became a suspect in the police investigation concerning the bomb he found.[624] Four days after the bombing, Atlanta Journal-Constitution published a front-page article headlined "FBI suspects 'hero' guard may have planted bomb."[625] After being cleared, the plaintiff filed a defamation suit because of the allegedly defamatory articles about his "bizarre employment history" and probable involvement in the bombing incident.[626] The lower court considered him a public figure primarily because he granted ten interviews and a photo shoot to the media, in addition to participating in the public discussion on public safety.[627] Like the plaintiff in *Dameron*, Jewell was considered an involuntary public figure because even assuming that he did not voluntarily inject himself into a particular controversy, "[i]t is sufficient ... that [he] voluntarily engaged in a course that was bound to invite attention and comment."[628]

Although the courts in *Dameron* and *The Atlanta Journal-Constitution* considered both plaintiffs as involuntary public figures, a closer scrutiny of the facts involved would show that as opposed to the plaintiff in *Dameron*, the plaintiff in *The Atlanta Journal-Constitution* eventually played a significant role in the public controversy. While it is true that Jewell was initially drawn into the public controversy, through no purposeful action on his part, his voluntary participation in the public controversy, in addition to the media appearances, consequently thrust him to the forefront of the controversy.

Significantly, according to *Gertz*, for a private individual to be transformed into a public figure, such person must "assume special prominence in the resolution of public questions."[629] The Author submits that, while an individual who is of mere tangential importance to the public issue involved should not be considered a public figure, a private individual who assumes special prominence in a particular controversy may be considered an involuntary public figure, although he or she does not voluntarily seek publicity. Again, however, the conduct of the plaintiff as

623. *Id.*

624. *Id.* at 808.

625. *Id.* at 815.

626. *Id.* at 815-16.

627. *The Atlanta Journal-Constitution*, 251 Ga. App. at 818-19.

628. *Id.* at 819 (citing *Silvester*, 839 F.2d at 1496).

629. *Gertz*, 418 U.S. at 351.

regards his or her role in the public controversy must still be taken into account. Otherwise, an unwitting individual drawn in a public controversy may still be subjected to public comment and scrutiny, based merely on the allegedly significant role he or she played in the public controversy.

E. Recapitulation of the Framework

As culled from both U.S. and Philippine jurisprudence, the following steps are suggested in the application of the public figure doctrine to libel suits where the plaintiffs are private individuals embroiled in matters imbued with public interest:

(1) *First, the Court must be able to identify a genuine public controversy.* The requirement of a genuine public controversy is necessary in order to prevent a situation where any kind of issue that merely piques the curiosity of an ordinary citizen — regardless of the social value it imparts — can transform a private individual into a public figure who would consequently be entitled a more limited right to privacy.

(2) *The second step after determining the existence of a genuine public controversy is for the Court to determine whether or not the public controversy preceded the defamatory imputation.* This step is necessary in order to protect the privacy rights of involuntary public figures, especially of public figures ex-post who instantly shot to fame because of the defamatory imputations that propelled them to fame and notoriety.

(3) *The third step after determining that the genuine public controversy preceded the defamatory imputation is for the Court to determine whether or not a connection exists between the defamatory statement and the plaintiff's role in the controversy.* The requirement that the defamatory statement be germane to the plaintiff's role in the controversy is important in order to prevent a situation where a separate and independent public controversy is used to justify a libelous statement arising from a different issue that does not satisfy the genuine public controversy requirement. Again, it is important to be conscious of the fact that what is dealt with here is the right to privacy of private individuals whose lives happen to intersect with public interest. As such, assuming that they qualify as involuntary public figures, they cannot be deemed as all-purpose public figures, but may only be the subject of public comment in relation to the public controversy that the plaintiff is involved in.

(4) *Finally, the Court must examine the plaintiff's participation in the public controversy in question.* An analysis of existing jurisprudence demonstrates that the Philippine Supreme Court has been oscillating between *Rosenbloom*'s content-based approach and *Gertz*'s status-based approach in the application of the public figure doctrine to private individuals involved in an issue infused with public interest. This unguided or blind application of these U.S. doctrines inevitably leads to arbitrary decisions that neither gives adequate protection to the right to privacy nor to freedom of expression. The Author submits that an examination of the plaintiff's conduct, in relation to the concepts of assumption of risk and reasonable expectation of privacy must be taken into account in light of the public controversy in question.

While public discussion on matters of public concern is, without a doubt, a societal interest that must be protected, equally deserving of protection is the right to privacy of private individuals in which the state has a legitimate interest to protect. Otherwise, private individuals whose lives inadvertently intersect with public interest will always be at the mercy of the Court's unbridled discretion in determining whether the issue is a matter of public concern.

VI. CONCLUSION

For more than four decades now, the right to privacy has been recognized as a constitutionally protected right that finds basis in several international human rights instruments. One controversial aspect of this right is the reputational interest zealously guarded by every individual. After all, an individual's reputation is "as much a constitutional right as the possession of life, liberty[,] or property."[630] Like any other right however, it is not absolute.

The public figure doctrine in libel exists to balance the right to privacy against the interests protected by freedom of expression and the public's right to information. During the early stages of its development, the public figure doctrine clearly distinguished private individuals who enjoyed the presumption of malice, from public figures who had the burden of proving actual malice. By seeking public office or publicity, public officials and public figures are deemed to have waived to a certain extent their right to privacy. As opposed to public officials and public figures, private individuals

630. *Worcester*, 22 Phil. at 73.

who have a more restricted access to the media have not voluntarily sought publicity, and have lived their lives away from the public eye. As such, a more compelling state interest exists in the protection of a private individual's good name and reputation.

As it stands today, the legal framework in the Philippines as regards the application of the public figure doctrine to private individuals is unstable, to say the least. A problem exists not so much because *Gertz*'s status-based approach is arguably better than *Rosenbloom*'s content-based approach, or vice versa, but, because there are no working parameters in the doctrine's application to private individuals embroiled in an issue infused with public interest. This deficiency, coupled with the broad scope of "public interest," inevitably led to inconsistent decisions that oscillate between *Gertz* and *Rosenbloom*. Without a consistent structural framework in the doctrine's application to private individuals, the Supreme Court is given much latitude and leeway to determine what issues qualify as matters of public concern, enough to transform a private individual involved into a public figure. While it may be presumed that the Supreme Court in handing down decisions would have public interest in mind, it cannot be gainsaid that any instability, ambiguity, or uncertainty in the law as to the application of the doctrine to private individuals will potentially result in an unlawful intrusion upon the private individuals' right to privacy, or an unlawful restraint upon an individual's freedom of expression. Neither right will be adequately protected.

The importance of a robust and free debate on matters of public concern is undisputed. Because of this, criticisms against public officials and public personalities are given such leeway and tolerance to enable them to courageously and effectively perform their role in promoting the ideals of democracy. Such is the purpose of the public figure doctrine. However, the same treatment cannot be applied to private individuals who inadvertently find themselves involved in an issue imbued with public interest. A greater degree of vigilance and caution is demanded in the application of the actual malice standard to private individuals whose lives intersect with public interest and public men. For while the legitimate public interest served in an unimpeded discussion about a public official's qualifications is easily discernible, the same cannot be said of private individuals who did not voluntarily seek publicity to warrant such intrusion to their right to privacy.

Justice Brennan, Jr. opined that, "voluntarily or not, we are all 'public' men to some degree."[631] Being a suspect in a crime; being a party to a court proceeding; being associated with other public figures; trending in social media; being the subject of a news report; being part of a public catastrophe; handling a job that entails public service — as social beings, treading the realm of the public sphere is inevitable. However, this does not mean that any person whose life intersects with the public sphere becomes *ipso facto* subject to a more limited right to privacy.

631. *Rosenbloom*, 403 U.S. at 48.