

**ARTICULATING THE COMPLETE PHILIPPINE  
RIGHT TO PRIVACY IN CONSTITUTIONAL AND CIVIL LAW:  
A TRIBUTE TO CHIEF JUSTICE FERNANDO AND  
JUSTICE CARPIO\***

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

—Dean and Justice Irene Cortes<sup>1</sup>

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<sup>1</sup> IRENE CORTES, THE CONSTITUTIONAL FOUNDATIONS OF PRIVACY 1 (UP Law Center, 1970). Adapted from the second of the Albino Z. SyCip Lecture Series delivered at the University of the Philippines College of Law, Feb. 21 and 28, 1970.

*“Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”*

—Samuel Warren and Louis Brandeis<sup>2</sup>

*“Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than... exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half of their value.”*

—Justice Stephen Johnson Field<sup>3</sup>

*“If you have nothing to hide, you have nothing to fear.”*

—DILG Secretary Angelo Reyes<sup>4</sup>

## I. INTRODUCTION

### A. REFLECTIONS

Justice Vicente V. Mendoza enjoys repeating that “law has two elements: logic and rhetoric. ... [L]ogic forms the bedrock of our jurisprudence, but it is rhetoric that makes Constitutional Law so potent and so seductive. That is, he cautioned, one must read cases with great care, lest one be ensorcelled by the rhetoric and miss the actual logic.”<sup>5</sup>

No Philippine law student hurdles freshman year without reading landmark privacy decisions and some of the most passionate prose in our jurisprudence, a short but eloquent line of cases from *Morfe v. Mutuc*<sup>6</sup> to *Ople v. Torres*<sup>7</sup> that clothe this upstart right with its ancient peers’ majesty. However, despite tracing its pedigree through judicial deities from Justice and Dean Irene Cortes to Chief Justice Reynato Puno, the Philippine right to privacy taken as a whole is marred by

<sup>2</sup> *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>3</sup> *In Re Pacific Ry. Comm’n*, 32 F. 241, 250 (Cir.Ct. N.D.Cal. 1887), quoted in Robert Palsley, *Privacy Rights v. Anti-Money Laundering Enforcement*, 6 N.C. BANKING INST. 147, 149 (2002). Justice Field was appointed to the United States Supreme Court in 1863 by President Abraham Lincoln, where he served for thirty-four years and six months, the longest in that Court’s history.

<sup>4</sup> Sec. of Dep’t of Interior and Local Gov’t Angelo Reyes, quoted in Gil Cabacungan, Jr. & Christine Avendano, *Palace sees no stumbling block to nat’l ID system*, PHIL. DAILY INQUIRER, Feb. 19, 2005, at A21.

<sup>5</sup> Oscar Franklin Tan, Foreword, *Sisyphus’ Lament, Part IV: Style and the Seduction of the Supreme Court*, 79 PHIL. L.J. 876, 876 (2004).

<sup>6</sup> G.R. No. 20387, 22 SCRA 424, Jan. 31, 1968.

<sup>7</sup> G.R. No. 127685, 293 SCRA 141, Jul. 23, 1998.

inconsistencies, gaps and self-contradictions.

The right to privacy's significance has been underscored in countless seemingly unrelated issues in the past years, and most recently by the Human Security Act of 2007.<sup>8</sup> Given the stakes, libertarians should fear not merely being ensorcelled by rhetoric, but being left to stave off the barbarians at the gates with but a confused constitutional right that currently has a loud bark but a feeble bite.

This excerpt from the 2006 ruling *In re Habeas Corpus of Camilo L. Sabio*<sup>9</sup> may be an example of self-contradiction in an immediate sense:

This goes to show that the right to privacy is not absolute where there is an overriding **compelling state interest**. In *Morfe v. Mutuc*, the Court, in line with *Whalen v. Roe*, employed the rational basis relationship test when it held that there was no infringement of the individual's right to privacy as the requirement to disclosure information is for a valid purpose.... (emphasis in the original and internal citations omitted)<sup>10</sup>

Note that "compelling state interest" and "rational basis" pertain to two different and mutually exclusive levels of scrutiny.

Another 2006 ruling, *Ejercito v. Sandiganbayan*,<sup>11</sup> featured a dissent that discussed *Katz v. United States*<sup>12</sup> and the right to privacy arising from the right against unreasonable search. The same dissent went on to invoke the right to privacy arising from substantive due process, citing the *Roe v. Wade*<sup>13</sup> line. The latter are rulings on what is called decisional privacy, which deals with personal autonomy and is irrelevant to the disclosure of financial information addressed by *Ejercito*.

There are more fundamental inconsistencies. Returning to the very beginning, consider that *Morfe* cites *Griswold v. Connecticut*,<sup>14</sup> a case that decided whether a married couple could be prohibited from using contraceptives. *Morfe*, however, decided whether a public officer may be required to disclose his assets and liabilities under oath. *Griswold* did not deal with information's disclosure, and it is a mere shift in rhetoric but not logic to highlight the choice quote: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"<sup>15</sup> Turning this inconsistency on its head, however, the right to privacy appeared in the 2003 decision *Estrada v. Escritor*,<sup>16</sup> which dealt with choosing to cohabit with someone other than one's spouse under a religious sect's

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<sup>8</sup> Rep. Act No. 9372 (2007).

<sup>9</sup> G.R. No. 174340, 504 SCRA 704, Oct. 17, 2006.

<sup>10</sup> *Id.* at 738.

<sup>11</sup> G.R. No. 157294, 509 SCRA 191, Nov. 30, 2006.

<sup>12</sup> 389 U.S. 347 (1967).

<sup>13</sup> 410 U.S. 113 (1973).

<sup>14</sup> 381 U.S. 479 (1965).

<sup>15</sup> *Id.* at 485.

<sup>16</sup> A.M. No. P-02-1651, 408 SCRA 1, Aug. 4, 2003.

sanction, and the 2000 decision *Ilusorio v. Bildner*,<sup>17</sup> which dealt with an old man's right to choose not to be visited by certain relatives. Neither case involved disclosure of information.

Other inconsistencies are observed in the foundational texts. In the Bill of Rights, the word "privacy" appears only in the narrow right to privacy of communication and Justice Cortes's own landmark essay *The Constitutional Foundations of Privacy*<sup>18</sup> used this provision as a starting point. However, it is clearly not the textual anchor to Philippine privacy jurisprudence that has developed furthest under the right against unreasonable search.

The right to privacy is the only Constitutional right with a birthday, the 1890 publication of Samuel Warren and Louis Brandeis's *The Right to Privacy* in the *Harvard Law Review*.<sup>19</sup> This initial article, however, dealt with torts, and was in fact inspired not by an Orwellian state but by irritation with paparazzi at the debut of Samuel Warren's daughter and their increasingly portable cameras. If one searches for a parallel, the Philippine foundational text would be Justice Antonio Carpio's 1972 student article as *Philippine Law Journal* chair, *International Torts in Philippine Law*.<sup>20</sup> Indeed, then Dean Cortes, writing only two years before the young Carpio, specifically highlighted the word "Constitutional" in her treatise's title, in contrast to Dean William Prosser, whose landmark 1960 privacy torts article was simply entitled *Privacy*.<sup>21</sup> Dean Cortes discussed torts far less than she did sociology, anthropology, psychology, and a datu bathing in a river.<sup>22</sup>

A unified privacy framework is imperative. At present, our jurisprudence is grounded in *Morfe*, *Ople* and the right against unreasonable search. Combined with the Philippine hypertextualist mindset,<sup>23</sup> the constitutional framework stands to be reduced to a chore of itemizing zones of privacy and textual hooks to whatever constitutional or statutory provision presents a plausible fit. We must move towards consciousness that the right to privacy protects a multiplicity of values, and that these converge to ultimately preserve a sphere of personal integrity and dignity in which an individual is free to function within society. This realizes Justice Cortes's prophetic words:

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<sup>17</sup> G.R. No. 139789, 332 SCRA 169, May 12, 2000.

<sup>18</sup> CORTES, *supra* note 1.

<sup>19</sup> 4 HARV. L. REV. 193 (1890).

<sup>20</sup> 47 PHIL. L.J. 649 (1972).

<sup>21</sup> 48 CAL. L. REV. 383 (1960). One notes that *Griswold* was decided in 1965.

<sup>22</sup> CORTES, *supra* note 1, at 2-10.

<sup>23</sup> See BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 72 (1998). "I will be trying to exclude hypertextualism from the starting gate—for the simple reason that it fails to do justice to the complexities of the original understanding. From the very first, our Constitution was based on the pluralist claim that both text and practice deserve weight in the evolving law of higher lawmaking."

The “right to be let alone” is the underlying theme of the whole Bill of Rights.<sup>24</sup>

This readily parallels Professor Laurence Tribe’s memorable lectures, where, after *Lawrence v. Texas*,<sup>25</sup> he criticized Justice Antonin Scalia’s dissenting proposition that the United States Supreme Court must identify specific acts and decide whether the right to privacy protects each. Professor Tribe countered that human beings must always be examined in their broad ability to interact and their inherent dignity,<sup>26</sup> and that the issue could not be uncritically framed as a right to sodomy.

All this is crucial because a different right or less relevant definition of privacy may craftily or unwittingly be invoked against a claim grounded in a less developed privacy segment, and then stifle this with stare decisis. *Tecson v. Glaxo Wellcome-Philippines, Inc.*<sup>27</sup> exemplifies this. The Court upheld a corporation’s right to restrict an employee’s right to marry a competitor’s employee, but curiously focused on “the [constitutional] right of enterprises to reasonable returns to investments.”<sup>28</sup> This stands in striking contrast to landmark American privacy decisions, such as *Loving v. Virginia*<sup>29</sup> on interracial marriage and *Lawrence* on homosexual relationships. *Tecson* failed to discuss privacy in the context of one’s autonomy to form personal relationships, whether or not this would have changed the result.

This was also exemplified in the 2007 decision *Silverio v. People*,<sup>30</sup> which denied a transsexual’s petition to have her sex legally changed after he underwent sex reassignment surgery. The Court treated this as a matter of statutes, and concluded that no law changing one’s recorded sex except to correct clerical errors. The decision was arguably a proxy battle for the issue of post-surgery transsexuals’ right to marry, and the decision’s opening paragraph seemed to have been taken practically verbatim from a Texas decision that ruled against a transsexual. Foreign jurisprudence, however, has treated these issues under the right to privacy, in relation to the fundamental decision to marry and formalize a life partnership. *Silverio* failed to even mention privacy, even though one of the Justices who concurred was none other than Chief Justice Puno.

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<sup>24</sup> CORTES, *supra* note 1, at 38, quoting Erwin Griswold, *The Right to be Let Alone*, 55 N.W.U.L. REV. 217 (1960).

<sup>25</sup> 539 U.S. 558 (2003).

<sup>26</sup> “It’s not the sodomy. It’s the relationship!” Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1904 (2004). In addition to three dozen Supreme Court oral arguments, my professor filed the *Lawrence* amicus brief for the American Civil Liberties Union.

<sup>27</sup> Duncan Ass’n of Detailman-PTGW and *Tecson v. Glaxo Wellcome-Philippines, Inc.*, G.R. No. 162994, 438 SCRA 343, Sep. 17, 2004.

<sup>28</sup> CONST. art. XIII, § 3.

<sup>29</sup> 388 U.S. 1 (1967).

<sup>30</sup> G.R. No. 174689, Oct. 22, 2007. I refer to post-surgery transsexuals by their post-surgery sex, as many foreign decisions have. In contrast, *Silverio* and the original trial court decision used sex prior to surgery.

To cite further scenarios, in *Ty v. Court of Appeals*,<sup>31</sup> a father attached his son's income tax returns to a pleading, and the son was not able to have this financial information withheld as it was deemed permissible under evidentiary rules. In *Krohn v. Court of Appeals*,<sup>32</sup> a husband was permitted to testify on his wife's confidential psychiatric examination after having obtained a copy. Although the Court recognized the wife's right to privacy, she had raised an improper objection, invoking the physician-patient privilege against her husband, who was not even a physician. In *Babst v. National Intelligence Board*,<sup>33</sup> a journalist was invited to Fort Bonifacio and asked by high ranking military officers whether she was formerly a nun and whether she practiced Zen. The majority opinion discussed only a journalist's freedom of speech and custodial rights. Finally, *Roe v. Wade*,<sup>34</sup> is one of the most important American privacy decisions, yet is ignored by Philippine scholars simply because of the constitution's prohibition of abortion. However, *Roe's* logic has broad applications far beyond abortion.

To cite a final, personal example, during my freshman year, Professor Myrna Feliciano asked the future Class of 2005 to write memoranda of law discussing whether drug testing violates constitutional rights. The class wrote that this violated neither the rights against unreasonable search nor self-incrimination, the same position taken by the Commission on Human Rights.<sup>35</sup> I argued that it violated the right to privacy in certain contexts, particularly the inutile Philippine scenario where one has three years to schedule a drug test for a driver's license renewal, and cited a short but well-established line of American cases anchored on precedents well-established in the Philippines. Deans Raul Pangalangan and Pacifico Agabin were kind enough to help me develop the piece into a full *Philippine Law Journal* article.<sup>36</sup> However, the summer after my freshman year, the Dangerous Drugs Act was amended to expand the use of drug testing and I left the article to rot in the law library as though it contained hieroglyphics waiting to be discovered by a future generation.<sup>37</sup>

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<sup>31</sup> G.R. No. 122656, 278 SCRA 836, Sep. 5, 1997.

<sup>32</sup> G.R. No. 108854, 233 SCRA 146, Jun. 14, 1994.

<sup>33</sup> G.R. No. 62992, 132 SCRA 316, Sep. 28, 1984.

<sup>34</sup> 410 U.S. 113 (1973).

<sup>35</sup> CHR-AO6-2001, Sep. 5, 2001, at 1-2.

<sup>36</sup> *Touch Me Not: Expanding Constitutional Frameworks to Challenge LTO-Required and Other Mandatory Drug Testing*, 76 PHIL. L.J. 620 (2002). This author remains grateful to Professor Feliciano for submitting the expanded draft to the *Philippine Law Journal* at the year's end, and to Dean Agabin, who reviewed drafts handed to him at the end of his classes by the author, who absented himself from them to research the article.

<sup>37</sup> JOSE RIZAL, *NOLI ME TANGERE*, chap. 26 ("The Philosopher's Home"), at 165 (Ma. Soledad Lacson-Loacin trans. 1996).

### B. A BRIEF SURVEY OF RECENT HEADLINES

The current privacy debate takes place under the Human Security Act of 2007's specter. It provides for surveillance and wiretapping of suspected terrorists,<sup>38</sup> for having a group "declared as a terrorist and outlawed organization,"<sup>39</sup> for restrictions on suspected terrorists' right to travel,<sup>40</sup> and for examination, sequestration and seizure of suspected terrorists' bank deposits and financial records.<sup>41</sup> These unprecedented powers may possibly be abused under the possibly hazy qualifying definition, "sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand."<sup>42</sup> Finally, there have been moves to augment terrorism legislation with a national identification card system and resurrection of the Anti-Subversion Law.<sup>43</sup>

We must be conscious, however, of a much broader context than the Human Security Act, especially since the latter is already addressed by the best (but not completely) evolved segments of the Philippine right to privacy, grounded on the explicit right to privacy of communication and the right against unreasonable search.

Anti-terrorism legislation was spurred by startling attacks, particularly the coordinated bombings on February 14, 2005 in Makati, General Santos, and Davao that killed seven and injured over one hundred. The Abu Sayyaf claimed it was their Valentine's Day present for President Gloria Macapagal-Arroyo.<sup>44</sup> However, that same month, the New People's Army made waves by officiating what was termed the country's first same sex marriage. A *Philippine Daily Inquirer* headline story opened:

DARE to struggle, dare to win ... as married gays. After raiding a few Army camps, two communist guerrillas hid in a forest gorge and fell in love.<sup>45</sup>

The Communist Party deemed it a progressive move, "a manifestation of the communist movement's recognition of the right to engage in gay relations and

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<sup>38</sup> Rep. Act No. 9372, § 7 (2007).

<sup>39</sup> § 17.

<sup>40</sup> § 26.

<sup>41</sup> §§ 27, 39.

<sup>42</sup> § 3.

<sup>43</sup> Gil Cabacungan, Jr. & Jolene Bulambot, *GMA backs Lacson antiterror bill*, PHIL. DAILY INQUIRER, Feb. 18, 2005, at A1; Cabacungan & Avendano, *supra* note 4, at A21; Veronica Uy et al, *GMA seeks return of anti-subversion law*, PHIL. DAILY INQUIRER, Dec. 14, 2007, available at A1; Editorial, *Guilt by Association*, PHIL. DAILY INQUIRER, Dec. 16, 2007, available at [http://opinion.inquirer.net/inquireropinion/editorial/view\\_article.php?article\\_id=107125](http://opinion.inquirer.net/inquireropinion/editorial/view_article.php?article_id=107125).

<sup>44</sup> 7 *Killed in Abu bombings*, PHIL. DAILY INQUIRER, Feb. 15, 2005, at A1, A6.

<sup>45</sup> Rolando Pinsoy, *Reds Officiate First Gay Marriage in NPA*, PHIL. DAILY INQUIRER, Feb. 7, 2005, at A1.

to marry.”<sup>46</sup> In 1998, the Party had amended an official policy entitled “On the Proletarian Relationship of Sexes” to include homosexual relations and same-sex marriage. Recognizing the landmark development, the couple “Ka Jose” and “Ka Andres” admitted to initial difficulty in changing the “traditional mindset” of their own comrades, biases they attributed to the “prevailing ‘patriarchal’ culture of Philippine society.”<sup>47</sup>

A Letter to the Editor perhaps showed these biases readily, the agitated reader criticizing the Party for fostering Western decadence and questionable ethical standards, “enjoyment of homosexual perversion,” being “living witnesses” to the “gay virus,” and the “eventual ascension of homosexuals and other sex perverts.”<sup>48</sup> The letter criticized leftist leader Satur Ocampo:

Kung noong araw binabanatan ng Partido ang kabulukang ito ng Kanluraning kultura, ngayon lantaran na ang pagtanggap ng mga Marxistang tulad ni Satur Ocampo na bigo sila sa ... ng kabaklaang ito na talamak na sa loob ng kilusang “rebolusyonaryo.”<sup>49</sup>

In another aspect of this issue discussed earlier, in 2007, the Supreme Court declined the petition of a transsexual who had undergone sex reassignment surgery to legally change her sex from male to female.<sup>50</sup> Past legislative bills already proposed excluding post-surgery transsexuals from marriage, in addition to bills dealing with homosexuals.<sup>51</sup>

Months later, the country’s greatest electoral scandal broke out when an alleged wiretap that caught President Arroyo calling Commission on Elections Commissioner Virgilio Garcilano regarding cheating in the 2004 presidential elections was released. Arroyo’s Justice Secretary publicly contemplated arresting the countless teenagers who played the recording’s first few seconds as “Hello Garci” cell phone ring tones, while political opponents argued that no one had admitted to being either person caught in the recording and no wiretapping prosecution could be brought on anyone’s behalf. Congressional investigations were launched and the recording was played in public on the House of Representatives’ floor, clothing it with parliamentary immunity. The president issued a vague apology, but half her cabinet or the “Hyatt 10” resigned in spectacular fashion.

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Elias Ramiro Diaz, Letter to the Editor, *Homosexuality in the Communist Party*, PHIL. DAILY INQUIRER, Mar. 8, 2005, at A14.

<sup>49</sup> *Id.* “[I]f in the past the (Communist) Party condemned this rot in the Western culture, today there is an open admission among Marxists, like Satur Ocampo, that it has failed to stop the homosexuality that has become widespread within the “revolutionary” movement.]” *Id.*

<sup>50</sup> Tetch Torres, *SC rules that he can’t be she*, PHIL. DAILY INQUIRER, Oct. 23, 2007, at A15.

<sup>51</sup> S. No. 1282, 14th Cong., 1st Sess. (2007); S. No. 1276, 13th Cong., 1st Sess. (2004);

Several coup attempts were made in the succeeding months as the president's credibility plummeted.<sup>52</sup>

In the United States, a drama misperceived as one regarding “the right to die” struck a chord in the Philippine psyche, as it evoked old fears regarding euthanasia's legalization. The feeding tube of Theresa “Terri” Schiavo, a forty-one year old woman left in a vegetative state by a stroke in 1990, was removed pursuant to her husband's decision on March 18, 2005 in an emotionally-charged, widely-publicized moment.<sup>53</sup> On Good Friday, the Eleventh Circuit denied petitions to have the tube restored, and Schiavo's parents appealed to the United States Supreme Court,<sup>54</sup> which had just rejected their petition the previous week,<sup>55</sup> and to Governor Jeb Bush to take action.<sup>56</sup> The tube had previously been removed in 2003, but restored by Governor Bush after a Florida law was quickly passed to grant him authority to do so despite a court order. That law was itself declared unconstitutional by the Florida Supreme Court.<sup>57</sup>

The right to privacy's very existence was for a day disbelieved in headlines in 2003, after the president's brother-in-law Ignacio Arroyo invoked his right to privacy before the Senate Blue Ribbon Committee investigation of the “Jose Pidal” accounts. These were allegedly owned by the president's husband, but later publicly claimed by Ignacio.<sup>58</sup> (This debacle inspired a landmark law lecture in February 2005 by then Senior Associate Justice Puno.)<sup>59</sup> Also in 2003, leakage in the national bar examinations' Commercial Law portion were traced to surreptitious access of a bar examiner's computer,<sup>60</sup> and foreshadowed complex computer litigation already a fact of practice in the United States.

Penning *Morfe* four decades ago, Chief Justice Fernando could not have foreseen the right's potential breadth today. The challenge remains to develop a

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<sup>52</sup> Christine O. Avendaño & TJ Burgonio, *Palace on De Castro's call: It's time to move on*, PHIL. DAILY INQUIRER, Mar. 13, 2006, at A2.

<sup>53</sup> CNN.com, *Schiavo's feeding tube removed*, Mar. 18, 2005, ¶ 1, at [http://www.cnn.com/2005/LAW/03/18/schiavo.brain-damaged/?section=cnn\\_topstories](http://www.cnn.com/2005/LAW/03/18/schiavo.brain-damaged/?section=cnn_topstories).

<sup>54</sup> CNN.com, *Schiavo parents appeal to U.S. Supreme Court*, Mar. 24, 2005, ¶ 1, at <http://www.cnn.com/2005/LAW/03/23/schiavo>.

<sup>55</sup> CNN.com, *Supreme Court rejects Schiavo appeal*, Mar. 17, 2005, ¶ 1, at <http://www.cnn.com/2005/LAW/03/17/schiavo.brain-damaged>.

<sup>56</sup> CNN.com, *Judges deny Schiavo parents again*, Mar. 25, 2005, ¶¶ 4-7, at <http://www.cnn.com/2005/LAW/03/25/schiavo/index.html>.

<sup>57</sup> CNN.com, *Schiavo parents*, *supra* note 54, ¶¶ 10-11. For a summary of the protracted legal battle between Schiavo's husband and parents, see O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context*, 57 FLA. L. REV. 53 (2005).

<sup>58</sup> Christine Avendano, *Draft ruling recognizes Iggy's right to privacy*, PHIL. DAILY INQUIRER, Oct. 13, 2003, at A1.

<sup>59</sup> LEGISLATIVE INVESTIGATIONS AND THE RIGHT TO PRIVACY (2005). Pamphlet form of the second Davide lecture, delivered Feb. 28, 2005, Malcolm Theater, University of the Philippines College of Law.

<sup>60</sup> In Re 2003 Bar Examinations, B.M. No. 1222, 421 SCRA 703, Feb. 4, 2004.

jurisprudence capable of keeping pace with social and technological developments and protecting the right in its entirety.

### C. PRIVACY AS CONVERGENT CONSTITUTIONAL AND CIVIL RIGHT

Decades after the Warren debut, Dean Prosser described the debutante as “the face that launched a thousand lawsuits.”<sup>61</sup> One argues that Warren and Brandeis managed to launch a thousand lawsuits grounded on a thousand different rights. In this paper, I thus identify several distinct values subsumed under the right to privacy, and the corresponding Constitutional and Civil Law protections:

Privacy Value	Constitution	Civil Code and Others
<i>Privacy as autonomy</i>	<i>Substantive due process</i>	<i>Infliction of distress</i>
<i>Privacy as seclusion</i>	<i>Unreasonable search</i> <i>Privacy of correspondence</i> <i>Self-incrimination</i> <i>Anonymous speech</i> <i>Anonymous association</i> <i>Restraints on speech</i>	<i>Intrusion into seclusion</i> <i>Infliction of distress</i>
<i>Privacy as reputation</i>	<i>Unreasonable search</i> <i>Privacy of correspondence</i> <i>Self-incrimination</i> <i>Restraints on speech</i>	<i>Disclosure of private facts</i> <i>False light</i> <i>Infliction of distress</i>
<i>Privacy as identity</i>	<i>Substantive due process</i>	<i>Appropriation</i> <i>Infliction of distress</i>
<i>Evidentiary privileges</i>	<i>Unreasonable search</i> <i>Privacy of correspondence</i> <i>Self-incrimination</i>	<i>Remedial law privileges</i>

The Bill of Rights is kept eternally young as broad rights branch off into specialized doctrines with the evolution of jurisprudence. The freedom of speech, for example, has developed subgenres such as libel,<sup>62</sup> sedition,<sup>63</sup> obscenity,<sup>64</sup>

<sup>61</sup> Prosser, *supra* note 21, at 423.

<sup>62</sup> *Generally*, United States v. Bustos, 13 Phil. 690 (1909); Worcester v. Ocampo, 22 Phil. 42 (1912).

<sup>63</sup> *Generally*, People v. Kottinger, 45 Phil. 352 (1923); People v. Go Pin, 97 Phil. 418 (1955); People v. Padan, 98 Phil. 749 (1957); Roth v. United States, 354 U.S. 476 (1957). Professor

commercial speech,<sup>65</sup> “fighting words,”<sup>66</sup> and anonymous speech;<sup>67</sup> all of which protect the same Constitutional value in a particularized factual milieu. Privacy, however, is a welcome constitutional anomaly in that it was instead culled from a *convergence* of existing rights. *Grissold v. Connecticut*<sup>68</sup> itself admitted to discussing a penumbra “formed by emanations from those guarantees that help give them (explicit Constitutional rights) life and substance.”<sup>69</sup> The table outlines how privacy is arguably an amalgamated right, and this paper expands this listing into a single, integrated framework.

This paper proceeds in three parts. First, it will discuss the current privacy doctrines, strand by strand, and review their implicit application in recent Philippine jurisprudence and their evolution from *Morfe*. Second, it will unite these disparate strands of legal doctrine, and explicitly identify the values sought to be protected: privacy as autonomy, privacy as seclusion, privacy as reputation, and privacy as identity. It is submitted that this framework follows directly from the foundations described by Chief Justice Fernando in *Morfe*. Finally, it will identify contemporary problem areas for privacy, and apply the framework to each.

Although Philippine privacy doctrine grounds itself in Justice Cortes’s essay and Chief Justice Puno’s *Ople* ponencia, I intend this article as a tribute to two jurists whose work must equally be highlighted. I honor Chief Justice Enrique Fernando, the father of my professor Emmanuel, who began it all with a broad and visionary opinion in *Morfe* but has a number of related opinions that must be highlighted. I honor Justice Antonio Carpio, who highlighted how civil law and private causes of action also protect privacy in his *Philippine Law Journal* chairman’s article, *International Torts in Philippine Law*.<sup>70</sup>

This article sums up and closes my intellectual evolution as University of the Philippines law student and *Philippine Law Journal* chair. After that first attempt at legal writing informally supervised by Deans Pangalangan and Agabin, I enjoyed

Catharine MacKinnon, however, proposes that pornography demeans women and should be treated under Equal Protection doctrine. ONLY WORDS 25 (1993).

<sup>64</sup> *Generally*, *People v. Perez*, 45 Phil. 599 (1923); *Espuelas v. People*, 90 Phil. 524 (1951); *Dennis v. United States*, 341 U.S. 494 (1951); *Umil v. Ramos*, G.R. No. 81567, 202 SCRA 252, Oct. 3, 1991.

<sup>65</sup> *Generally*, *Ohralik v. Ohio St. B. Assoc.*, 436 U.S. 447, 457-58 (1978); *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 51-54 (2003); *Iglesia ni Cristo v. Ct. of Appeals*, G.R. No. 119673, 259 SCRA 529, Jul. 26, 1996.

<sup>66</sup> *Generally*, *Chaplinsky v. New Hampshire*, 315 US 568, 574 (1942), *cited in* *In re Emil P. Jurado*, A.M. No. 93-2-037, 243 SCRA 299, Apr. 6, 1995.

<sup>67</sup> *Generally*, *Talley v. California*, 362 U.S. 60 (1960); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995), *citing* *John Stuart Mill, On Liberty in ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 1, 3-4 (R. McCallum ed., 1947).

<sup>68</sup> 381 U.S. 479 (1965).

<sup>69</sup> *Id.* at 485, *citing* *Poe v. Ullman*, 367 U.S. 497, 516-22 (1961) (Douglas, J., *dissenting*).

<sup>70</sup> 47 PHIL. L.J. 649 (1972).

numerous enlightening debates with the professors enumerated in this article's second footnote. I recall a heated half-hour argument in Florin Hilbay's office over Jeb Rubinfeld's scholarship, after which I set out to highlight how Philippine privacy jurisprudence's emphases are quite different from those of the United States', and how personal conversations with Justice Mendoza gave me a direct window into the Court's thinking. Serving as Dean Pangalangan's student researcher framed my thinking in the context of actual constitutional litigation, and I was privileged to stand behind him when he appeared in the Supreme Court hearings regarding the impeachment of former Chief Justice Hilario Davide, Jr. and President Arroyo's virtual declaration of martial law.<sup>71</sup> All this was rounded out by the international exposure of studying under the legendary Professors Tribe and Frank Michelman, and Justice Richard Goldstone of the South African Constitutional Court.

Writing from cold, bleak London and committed to developing Securities Law skills for cross-border investment in emerging markets such as the Philippines, I fear that I will never again be able to write a legal article such as this. I hope it may be of some benefit to the next student standing behind Dean Pangalangan or another young University of the Philippines law professor called before our Supreme Court on our civil liberties' behalf.

## II. LEGAL ETYMOLOGIES AND THE FRAMEWORK OF *MORFE V. MUTUC*

The landmark American decision *Whalen v. Roe*<sup>72</sup> bifurcated the right to privacy into:

1. Decisional privacy: "the interest in independence in making certain kinds of important decisions"
2. Informational privacy: "the individual interest in avoiding disclosure of personal matters"<sup>73</sup>

The constitutional right to privacy was first explicitly recognized in the Philippines by *Morfe*. This was decided nine years before *Whalen* but arguably used

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<sup>71</sup> *Francisco v. House of Representatives*, G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003; *David v. Macapagal-Arroyo*, G.R. No. 171396, 489 SCRA 160, May 3, 2006. I fondly recall our last telephone debate before Dean Pangalangan sent his petition. Choosing to discard the convention of suing the Executive Secretary, we discussed whether one can sue the president directly when merely resisting her official actions and not asserting a positive claim against which presidential immunity may properly be raised. The Court let our preferred case name stand for the benefit of Dean Pangalangan's future Constitutional Law lectures.

<sup>72</sup> 429 U.S. 589 (1977) (*cited by* *Ople v. Torres*, G.R. No. 127685, 293 SCRA 143, Jul. 23, 1998).

<sup>73</sup> *Id.* at 599-600 (*citing* *Roe v. Wade*, 410 U.S. 113, (1973); *Doe v. Bolton*, 410 U.S. 179; *Loving v. Virginia*, 388 U.S. 1; *Griswold v. Connecticut*, 381 U.S. 479; *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390; *Allgeyer v. Louisiana*, 165 U.S. 578).

the same framework, although Chief Justice Fernando termed decisional privacy as part of “liberty” and informational privacy as merely “privacy.” By today’s standards, it is curious how the same case could put both decisional and informational privacy in issue, but *Morfe* dealt with a requirement that public officers disclose their assets and liabilities each month and challenged this as both “violative of due process as an oppressive exercise of police power and as an unlawful invasion of the constitutional right to privacy, implicit in the ban against unreasonable search and seizure construed together with the prohibition against self-incrimination.”<sup>74</sup>

These two broad categories capture the emphases in the American and Philippine academe touched on in the introductory discussion, and will be used to frame this section’s analysis. A third section will be added to tackle the civil law privacy doctrines.

Preliminarily, even before discussing *Morfe*’s actual language, one points out that Chief Justice Fernando’s decisions seem to paint a broad picture of the right to privacy. For example, *Ermita-Malate Hotel and Motel Operators Association, Inc. v. Mayor of Manila*,<sup>75</sup> penned before *Morfe*, hints that the right could have been invoked against an ordinance that required all motel occupants to register themselves and their companions, although the motel operators were not allowed to assert their customers’ right in the case and the Court upheld the use of police power against “an evil of rather serious proportion.” In *Evangelista v. Jarencio*,<sup>76</sup> he hinted that the right to privacy is applicable even in administrative regulation. While none of the other rough dozen decisions that explicitly mention privacy tackle the right as squarely as *Morfe*, the broad philosophy that characterized *Morfe* is evident in each.

## A. DECISIONAL PRIVACY: LIBERTY AND THE DUE PROCESS CLAUSE

### 1. Decisional privacy in American jurisprudence

Later, after his appointment to the United States Supreme Court, Louis Brandeis’s pen produced “the right to be let alone,” that “most comprehensive of rights and the right most valued by civilized men.”<sup>77</sup> The *Olmstead* dissent embraced by Philippine jurists, however, does not frame the highest-profile line of American cases on privacy. Rather, these cases have carved an additional restraint on government authority into the Bill of Rights, one that arises from the Due Process Clause and specifically secures an individual’s liberty to make personal decisions without undue State interference.<sup>78</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> G.R. No. 24693, 20 SCRA 849, Jul. 31, 1967.

<sup>76</sup> G.R. No. 29274, 68 SCRA 99, Nov. 27, 1975 (Fernando, J., *concurring*).

<sup>77</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., *dissenting*).

<sup>78</sup> *Whalen v. Roe*, 429 U.S. 589, 599 (1977)

“Decisional privacy” arguably arose from a formidable line of decisions on sex,<sup>79</sup> a sphere of conduct hardly as explicitly protected as speech and religion.<sup>80</sup> The unwritten protection’s first ramparts were raised in the 1920s, a period when the United States Supreme Court began reading substantive content into the Due Process Clause. *Meyer v. Nebraska*<sup>81</sup> mapped out:

“No state ... shall deprive any person of life, liberty or property without due process of law.”

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>82</sup>

Applying this more holistic definition of liberty, *Meyer* struck down a law that forbade the use of non-English languages in schools. The Court held that this infringed on parents’ liberty to direct their children’s education, and alluded to Spartan children’s confinement in barracks.<sup>83</sup> That same decade, *Pierce v. Society of Sisters*<sup>84</sup> upheld the same Due Process right in striking down a requirement that children attend only public schools.<sup>85</sup>

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<sup>79</sup> “[A] right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, and most prominently vindicated in recent years in the contexts of contraception, and abortion.” *Carey v. Population Serv. Int’l*, 431 U.S. 678, 685 (1977).

<sup>80</sup> Note, however, that while various constitutional protections parallel each other, the precise mechanisms of one may have no equivalent in another. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 590 (1992). “Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse.”

<sup>81</sup> 262 U.S. 390, 399 (1923).

<sup>82</sup> *Id.* at 399.

<sup>83</sup> *Id.* at 400-03. “In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.” *Id.* at 403.

<sup>84</sup> *Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary*, 264 U.S. 510 (1925).

<sup>85</sup> *Id.* at 534-35.

The word “privacy” was first explicitly used in *Griswold v. Connecticut*, which described “a privacy older than the Bill of Rights.”<sup>86</sup>

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. (internal citation omitted)<sup>87</sup>

The Court, backpedaling from *Lochner v. New York*'s<sup>88</sup> stigma and substantive due process' “treacherous field,”<sup>89</sup> declined to apply the Due Process Clause,<sup>90</sup> and instead found penumbras of privacy in the freedom of speech, freedom of association, right against unreasonable search, right against self-incrimination, and the Ninth Amendment that reserved certain unenumerated rights to the people.<sup>91</sup> Thus, *Griswold* struck down a statute that forbade the use of contraceptives by married couples:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.<sup>92</sup>

Nevertheless, two years later, *Loving v. Virginia*<sup>93</sup> struck down a statute that forbade interracial marriage on Due Process grounds:

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

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<sup>86</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>87</sup> *Id.* at 484.

<sup>88</sup> 198 U.S. 45 (1905).

<sup>89</sup> *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977). “Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment...”

<sup>90</sup> *Griswold*, 381 U.S. at 481-82. “Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *Olsen v. Nebraska*, 313 U.S. 236; *Lincoln Union v. Northwestern Co.*, 335 U.S. 525; *Williamson v. Lee Optical Co.*, 348 U.S. 483; *Giboney v. Empire Storage Co.*, 336 U.S. 490. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.”

<sup>91</sup> *Id.* at 484.

<sup>92</sup> *Id.* at 485-86.

<sup>93</sup> 388 U.S. 1 (1967).

...To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes... is surely to deprive all the State's citizens of liberty without due process of law.<sup>94</sup>

Six years after *Griswold, Boddie v. Connecticut*<sup>95</sup> ruled that Due Process prohibited a State from denying divorce proceedings to poor people, as fees in this context amounted to an “exclusive precondition to the adjustment of a fundamental human relationship.”<sup>96</sup> Twelve years after *Griswold, Moore v. East Cleveland*<sup>97</sup> struck down a statute that limited occupation of houses to single “families” as it defined families, holding that Due Process protected “a private realm of family life which the State cannot enter.”<sup>98</sup> Finally, *Zablocki v. Redhail*<sup>99</sup> cited *Griswold* as establishing that “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”<sup>100</sup>

In the rough decade after *Griswold*, only *Eisenstadt v. Baird*<sup>101</sup> and its extension of *Griswold* to unmarried couples was explicitly founded on privacy and penumbras. Nevertheless, *Eisenstadt*’s language was precisely that of the decisional privacy later described in *Whalen v. Roe*.<sup>102</sup>

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity... If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person....<sup>103</sup>

Moreover, the dissent precisely decried how the majority “hark back to the heyday of substantive due process.”<sup>104</sup>

A year after *Eisenstadt*, however, the right to privacy and the spurned substantive due process were reconciled in *Roe v. Wade*, which ruled:

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<sup>94</sup> *Id.* at 12.

<sup>95</sup> 401 U.S. 371 (1971).

<sup>96</sup> *Id.* at 382-83.

<sup>97</sup> 431 U.S. 494 (1977).

<sup>98</sup> *Id.* at 499.

<sup>99</sup> 434 U.S. 374 (1978).

<sup>100</sup> *Id.* at 384.

<sup>101</sup> 405 U.S. 438 (1972).

<sup>102</sup> 429 U.S. 589, 599 (1977).

<sup>103</sup> *Eisenstadt*, 405 U.S. at 453. *See* *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833, 897 (1992). “There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State*, 16 Wall. 130 (1873), three Members of this Court reaffirmed the common law principle that a woman had no legal existence separate from her husband....”

<sup>104</sup> *Eisenstadt*, 405 U.S. at 467 (Burger, C.J., *dissenting*). “[I]hese opinions seriously invade the constitutional prerogatives of the States and regrettably hark back to the heyday of substantive due process.”

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>105</sup>

Citing *Whalen, Carey v. Population Services*<sup>106</sup> upheld *Roe's* rationale:

The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy.... (internal citations omitted)<sup>107</sup>

*Roe* was upheld all the way into the last decade, and was most emphatically reiterated in *Planned Parenthood v. Casey*<sup>108</sup> with only modification to its original trimester framework, which the Court deemed nonessential to *Roe's* central holding. *Casey* underscored:

The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.<sup>109</sup>

The Court's balancing of this fundamental autonomy and various state interests, however, appears to have recently shifted when it dealt with what is popularly termed partial birth abortion. This refers to a method where second trimester fetuses are removed largely intact from the uterus before they are destroyed, one seen as particularly gruesome and assailed as a perversion of the natural birth process. The Court quoted a nurse's account:

“Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms-everything but the head. The doctor kept the head right inside the uterus ....

“The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head,

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<sup>105</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>106</sup> 431 U.S. 678 (1977).

<sup>107</sup> *Id.* at 685.

<sup>108</sup> 505 U.S. 833 (1992).

<sup>109</sup> *Id.* at 871. “The Court's duty in the present case is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe's* essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.” *Id.* at 868-69.

and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

“The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp ....”<sup>110</sup>

Some physicians asserted that this posed less risk to at least some women in at least some circumstances, as it required less time, less insertions of instruments into the uterus, and posed less risk from fecal matter left inside the uterus.<sup>111</sup> Thus, the 2000 decision *Stenberg v. Carhart*<sup>112</sup> struck down a Nebraska statute prohibiting partial birth abortions because it did not contain an exception allowing it when other methods might endanger the mother's health, and because it might be interpreted to prohibit other methods. These would amount to an undue burden to women's right to have abortions, in *Casey*'s language.

However, the 2007 decision *Gonzales v. Carhart*<sup>113</sup> upheld the federal statute prohibiting partial birth abortions that was passed after *Stenberg*, despite its lack of a health exception. It emphasized how preceding cases emphasized the state's interests in regulating abortion and medical procedures in general, and held that some disagreement among physicians regarding partial birth abortion's alleged safety advantages did not preclude Congress from addressing it. As the Court deemed the federal statute's wording more specific than the Nebraska statute in *Stenberg*, it upheld the former.

Although abortion is unconstitutional in the Philippines, one must pay attention not superficially to the result, but to the underlying reasons given in this key line of American cases and to how they are weighed against each other. For example, *Gonzales v. Carhart* preliminarily cited *Washington v. Glucksburg*,<sup>114</sup> a decisional privacy ruling on the right to refuse medical treatment when terminally ill, to support its discussion of the state's interest in promoting respect for life and regulating physicians' ethics. On the other hand, Justice Ruth Bader Ginsberg's dissent emphasized past cases' recognition of the link between women's control over their reproductive lives and their greater roles in society:

“There was a time, not so long ago,” when women were “regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution.” ...

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<sup>110</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610, 1622-23 (2007).

<sup>111</sup> *Id.* at 1645 (Ginsberg, J., *dissenting*).

<sup>112</sup> 530 U.S. 914 (2000).

<sup>113</sup> *Gonzales v. Carhart*'s tone was markedly different even in its preliminary discussion of *Casey*. 127 S. Ct. at 1625. “Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.” *Compare Stenberg*, 530 U.S. at 920-21.

<sup>114</sup> *Washington v. Glucksburg*, 521 U.S. 702, 731 (1997).

Women, it is now acknowledged, have the talent, capacity, and right “to participate equally in the economic and social life of the Nation.” Their ability to realize their full potential, the Court recognized, is intimately connected to “their ability to control their reproductive lives.” (internal citations omitted)<sup>115</sup>

This year’s *Harvard Law Review* Foreword similarly but more forcefully criticized the new weight given to the State’s interests:

[W]e find vague references to “[r]espect for human life,” without any attempt to show that a single life would be saved by forcing women into an alternative abortion procedure; suggestions of an open possibility for individuals to challenge the law in a specific case, without any attempt to show that a woman awaiting an abortion would ever be able to avail herself of such a remedy; and, above all, pious and condescending remarks about women that are classic examples of the sort of attitude that has impeded women’s equality in the past.<sup>116</sup>

Returning to intimacy, finally, in 2003, *Lawrence* reiterated *Eisenstadt*’s emphasis on how privacy inheres in an individual, and extended the decisional privacy’s aegis from childbirth, heterosexual intimacy, contraception and abortion to homosexual relationships:

The case does involve two adults.... The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.<sup>117</sup>

Professor Tribe referred to this far-reaching decision as “the *Brown v. Board* of gay and lesbian America.”<sup>118</sup> He wrote:

The *Lawrence* opinion not only denies that the Court’s decision was just about sex, it also goes out of its way to equate the insult of reducing a same-sex intimate relationship to the sex acts.... [T]he evil targeted by the Court in *Lawrence* wasn’t criminal prosecution and punishment of same-sex sodomy,

<sup>115</sup> *Gonzales v. Carhart*, 127 S. Ct. at 1641 (Ginsberg, J., *dissenting*), quoting *Casey*, 505 U.S. at 897.

<sup>116</sup> Martha Nussbaum, Foreword, *Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 85-86 (2007).

<sup>117</sup> *Lawrence*, 539 U.S. at 578. See Amicus Curiae Brief of Rights International in *X, Y and Z v. United Kingdom*, NAT’L J. SEXUAL ORIENTATION L., at <http://www.ibiblio.org/gaylaw/issue5/transbre.html> (last visited Dec. 30, 2007). “[T]he right to privacy under Article 8 of the European Convention has been interpreted repeatedly by the European Court of Human Rights to extend to an adult’s right to participate in private, consensual homosexual activity. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981) (protection extended to mutual masturbation, oral-genital contact, and anal intercourse between adult men); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988) (protection extended to anal intercourse between adult men); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993) (protection extended to carnal knowledge ‘against the order of nature’).”

<sup>118</sup> Tribe, *supra* note 26, at 1895.

but the disrespect for those the Court identified as “homosexuals” that labeling such conduct as criminal helped to excuse. (internal citations omitted)<sup>119</sup>

Taking all these issues, Professor Jeb Rubenfeld quipped that decisional privacy “has little to do with privacy and nothing to do with the Constitution.”<sup>120</sup> He continued:

The right to privacy has everything to do with delineating the legitimate limits of governmental power. The right to privacy, like the natural law and substantive due process doctrines for which it is a late-blooming substitute, supposes that the very order of things in a free society may on certain occasions render intolerable a law that violates no express constitutional guarantee.<sup>121</sup>

Thus, decisional privacy is a necessary or even implied Due Process outgrowth that restrains government from intruding into certain personal decisions deemed fundamental in human experience, and not just those pertaining to narrow aspects of sexuality and family life. More than mere restraint, however, European human rights jurisprudence has taken the concept further towards a respect for individual dignity, much as Professor Tribe discussed. Finally, this emphasis on dignity is most poignant in post-apartheid South African jurisprudence, where the present constitution has dignity as a core principle and explicitly prohibits discrimination due to sexual orientation. This point will be discussed further in this article’s section on same-sex marriage.<sup>122</sup>

## 2. Decisional privacy’s foundations in Philippine jurisprudence

Again, one may doubt whether decisional privacy actually exists in Philippine jurisprudence because the term has never been used in it, and *Morfe* subsumed it into the general liberty protected by substantive due process. Indeed, a dramatic arrest of state action came in *Ople*, but this struck down a National ID system, which did not restrict any actual decisionmaking. This absence is perhaps because *Roe*, the line’s most prominent case, is a jurisprudential taboo because it justified abortion. Although its actual doctrine regarding privacy is not contrary to Philippine thinking and one can distinguish the result because the Philippines places

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<sup>119</sup> *Id.* at 1948-49. See also Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 HOW. L.J. 75 (2007). Another article from the same symposium, however, argued that it is incorrect to cite *Loving* in support of same-sex marriage arguments in the United States because the Supreme Court rejected a 1971 appeal that already invoked *Loving* with respect to same-sex marriage. Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the “Loving Analogy” for Same-Sex Marriage*, 51 HOW. L.J. 117, 137-43 (2007), citing *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (dismissed for want of a substantial federal question, 409 U.S. 810 (1972)).

<sup>120</sup> Jeb Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 737 (1989).

<sup>121</sup> *Id.*

<sup>122</sup> See *infra* text accompanying note 695.

a much higher premium on state interest with respect to the unborn,<sup>123</sup> a jurist might prefer not to cite it in order to avoid misimpressions.

Substantive due process concepts, however, are firmly established in Philippine jurisprudence. Their importation from the United States has been comprehensively chronicled by Dean Agabin, though he cautions that its development was not identical to the American doctrine's. He concluded:

[T]he area protected by the substantive aspect of due process began to shrink. What had been immutable rights of property became relative concepts, and they were placed on the balance with more important values.<sup>124</sup>

Dean Agabin wrote this in 1969, and his *Philippine Law Journal* article provides a perfect backdrop for *Morfe's* discussion. In the latter, then Justice Fernando wrote that due process is the proper challenge to a state-imposed infringement of one's liberty. He quoted Dean and Justice George Malcolm:

[Liberty] 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 facilities with which he has been endowed by his Creator, subject only to such restraint as are necessary for the common welfare.<sup>125</sup>

Strikingly, Chief Justice Fernando explicitly linked what he called privacy to due process, even though the two had been bifurcated in the case:

There is much to be said for this view of Justice Douglas: "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." As a matter of fact, this right to be let alone is, to quote from Mr. Justice Brandeis "the most comprehensive of rights and the right most valued by civilized men." (internal citations omitted)

The concept of liberty would be emasculated if it does not likewise compel respect for his personality as a unique individual whose claim to privacy and interference demands respect. As Laski so very aptly stated: "Man is one among many, obstinately refusing reduction to unity. His separateness, his isolation, are indefeasible; indeed, they are so fundamental that they are the basis on which his civic obligations are built. He cannot abandon the consequences of his isolation, which are, broadly speaking, that his experience is private, and the will built out of that experience personal to himself. If he surrenders his will to others, he surrenders his personality. If

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<sup>123</sup> See also *infra* text accompanying note 672 (quoting Professor Cass Sunstein).

<sup>124</sup> Pacifico Agabin, *Laissez Faire and the Due Process Clause: How Economic Ideology Affects Constitutional Development*, 44 PHIL. L.J. 709, 726 (1969).

<sup>125</sup> *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660 (1919), quoted in *Morfe v. Mutuc, G.R. No. 20387, 22 SCRA 424, Jan. 31, 1968*.

his will is set by the will of others, he ceases to be master of himself. I cannot believe that a man no longer master of himself is in any real sense free.”<sup>126</sup>

Nevertheless, it would seem that Chief Justice Fernando did not consider decisional privacy part of his conception of privacy, or rather considered it part of substantive due process’ liberty. In a footnote, he quoted an author who spoke of “privacy, as thus refined and separated from a generalized concept of freedom.”<sup>127</sup> However, in a later ponencia, *UEUGIP v. Noriel*,<sup>128</sup> Chief Justice Fernando spoke in passing of “the privacy of religious freedom, to which contractual rights, even on labor matters, must yield.”<sup>129</sup> He spoke of the freedom to practice one’s religion in the context of choosing not to join a labor union, which was a clear issue of autonomy and not of information. Note how his prose dovetails with Professor Tribe’s articulation emphasizing inherent dignity in human relationships. Parenthetically, Justice Cortes also referred to the Due Process clause in a footnote, but one enumerating the provisions that implicitly protect privacy.<sup>130</sup>

Whether one calls it liberty or privacy, it is nevertheless clear that the foundations for decisional privacy exist in Philippine jurisprudence. One additional note is that *Griswold* is seen in American jurisprudence as a crossroad between the *Katz* and *Roe* lines, and this remains the primarily cited decision along with *Morfe* and *Ople*. Further, aside from substantive due process, finally, one may also draw parallels to the attorney-client privilege. The later’s rationale is:

In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure from the legal advisors must be removed.<sup>131</sup>

Similarly, *Hickman v. Taylor*<sup>132</sup> explained the allied work product privilege:

In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case

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<sup>126</sup> *Morfe*, 22 SCRA 424, 443 (quoting *Public Utilities Commission v. Pollak* 343 U. S. 451, 467 (1952) (Douglas, J., *dissenting*); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., *dissenting*); HAROLD LASKI, *LIBERTY IN THE MODERN STATE* 44 (1944)).

<sup>127</sup> *Id.* at 443 n.59 (quoting Dixon, *The Griswold Penumbra*, 64 MICH. L. REV. 197, 205 (1955)).

<sup>128</sup> *United Employees Union of Gelmart Indus. Phils. v. Noriel*, G.R. No. 40810, 67 SCRA 267, Oct. 3, 1975.

<sup>129</sup> *Id.* at 275.

<sup>130</sup> CORTES, *supra* note 1, at 18 n.56. *See id.* at 22.

<sup>131</sup> 8 JOHN WIGMORE, *EVIDENCE* § 2291, 545 (1961), *quoted in* *Regala v. Sandiganbayan*, G.R. No. 105938, 262 SCRA 122, 143, Sep. 20, 1996.

<sup>132</sup> 329 U.S. 495 (1947).

demands that he assemble information ... and plan his strategy without undue and needless interference.<sup>133</sup>

This is precisely the language of decisional privacy, removed from its familiar context of sex and marriage.

### 3. Decisional privacy's reemergence in recent jurisprudence

The 2003 decision *Escritor*<sup>134</sup> hints that decisional privacy is in fact integrated into the Philippine definition of privacy, and recall *UEUGIP*. *Escritor* dealt with a charge of immorality against court stenographer Soledad Escritor, who had cohabited for twenty years and had a child with someone other than her husband. The case was novel, however, because Escritor and her partner were Jehovah's Witnesses who had signed a "Declaration of Pledging Faithfulness" following their sect's practice. The Court remanded the case to the Office of the Court Administrator and instructed the Solicitor General to intervene in order to prove a state interest so compelling that Escritor's claim to religious freedom would have to be set aside in order to uphold the charge of immorality.

The majority opinion did not mention privacy, which would arguably have been superfluous given the claim of religious freedom, an explicit constitutional right. However, Justice Josue Bellosillo asserted in his concurrence:

More than religious freedom, I look with partiality *to the rights of due process and privacy*. Law in general reflects a particular morality or ideology, and so I would rather not foist upon the populace such criteria as "compelling state interest," but more, the reasonably foreseeable specific connection between an employee's potentially embarrassing conduct and the efficiency of the service. This is a fairly objective standard than the compelling interest standard involved in religious freedom.

Verily, if we are to remand the instant case to the Office of the Court Administrator, we must also configure the rights of due process and privacy into the equation. By doing so, we can make a difference not only for those who object out of religious scruples but also for those who choose to live a meaningful life even if it means sometimes breaking "oppressive" and "antiquated" application of laws but are otherwise efficient and effective workers. As is often said, when we have learned to reverence *each individual's liberty* as we do our tangible wealth, we then shall have our renaissance. (emphasis added)<sup>135</sup>

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<sup>133</sup> *Id.* at 510-11, cited in *Rep. v. Sandiganbayan*, G.R. No. 90478, Nov. 21, 1991; ANTONIO BAUTISTA, *BASIC CIVIL PROCEDURE* 127-28 (2003).

<sup>134</sup> *Estrada v. Escritor*, A.M. No. P-02-1651, 408 SCRA 1, Aug. 4, 2003.

<sup>135</sup> *Id.* at 207-08 (Bellosillo, J., *concurring*). I wonder, however, whether the good Justice's "reasonably foreseeable specific connection" sets a lower bar than "compelling state interest." His choice of words is better understood when one examines the *Mindel* decision he cited. *See infra* text accompanying note 138.

The separate opinion lacked both the specific term decisional privacy and any reference to *Whalen* or a related precedent. However, Justice Bellosillo clearly did not frame the issue along *Morfe's* lines of liberty and privacy. The nexus or “specific connection” he discussed is not the language of liberty as a deeper personal autonomy. He referred to privacy in the sense of decisional privacy.

This is supported by a number of points. First, *Escritor* involved a possible dismissal from government service due to her romantic relationship. The issue had nothing to do with any undue disclosure of the relationship, and the cohabitation was even sanctioned “with the proper inspiration and guidance of their spiritual leaders.”<sup>136</sup> Neither did it involve a compulsion to disclose the relationship, as in *Morfe*.

Second, the opinion cited an American district court case *Mindel v. Civil Service Comm'n*,<sup>137</sup> which invoked privacy in the context of decisional privacy under similar facts, minus the claim of religious freedom. *Mindel's* Due Process leg merely characterized the plaintiff's dismissal as arbitrary and capricious:

Even if Mindel's conduct can be characterized as 'immoral', he cannot constitutionally be terminated from government service on this ground absent a rational nexus between this conduct and his duties as a postal clerk. 'A reviewing court must at least be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service.'<sup>138</sup>

It was *Mindel's* privacy leg that spoke more explicitly of a curtailment of autonomy, and included a citation to *Griswold*:

The government cannot condition employment on the waiver of a constitutional right; even in cases where it has a legitimate interest, it may not invade 'the sanctity of a man's home and the privacies of life.' Here, of course, the Post Office has not even shown a rational reason, much less the 'compelling reason' required by *Griswold*, to require Mindel to live according to its special moral code.<sup>139</sup>

Finally, the opinion closed by proposing individual liberty as the value it defended, beyond religious freedom. Such liberty is the personal autonomy specifically protected by decisional privacy and note, again, that Chief Justice Fernando similarly pointed to an “identification with liberty”<sup>140</sup> in *Morfe* and implied in *UEUGIP* that religious freedom itself gives rise to a zone of privacy.

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<sup>136</sup> *Id.* (Bellosillo, J., *concurring*).

<sup>137</sup> 312 F. Supp. 485 (N.D.Cal. 1970).

<sup>138</sup> *Id.* at 487.

<sup>139</sup> *Id.* at 488.

<sup>140</sup> *Morfe v. Mutuc*, G.R. No. 20387, 22 SCRA 424, 444, Jan. 31, 1968.

The Court likely recognized decisional privacy's logic as proposed by Justice Bellosillo, but felt it was superfluous to the majority opinion, leaving it to be emphasized in the separate and broader concurrence. Note that Justice Jose Vitug's separate opinion also used the term privacy, including a citation of *Griswold*, in his more tangential discussion of morality.

In addition to *Escritor*, decisional privacy was arguably applied in the 2000 decision *Ilusorio*. Here, the Court declined a petition for *habeas corpus* by an estranged wife for custody of her 86-year old husband, and refused to compel visitation rights. Having found that the husband was "of sound and alert mind,"<sup>141</sup> the Court held:

[T]he crucial choices revolve on his residence and the people he opts to see or live with. The choices he made may not appeal to some of his family members but these are choices which exclusively belong to Potenciano. He made it clear before the Court of Appeals that he was not prevented from leaving his house or seeing people. With that declaration, and absent any true restraint on his liberty, we have no reason to reverse the findings of the Court of Appeals.

With his full mental capacity coupled with the right of choice, Potenciano Ilusorio may not be the subject of visitation rights against his free choice. Otherwise, we will deprive him of his right to privacy. Needless to say, this will run against his fundamental constitutional right.<sup>142</sup>

*Ilusorio* clearly involved no issue of disclosure. Privacy here could refer to a preference for seclusion, but the emphasis on the word "choice" refers to decisional privacy. While the opinion was very brief, its preliminary discussion of liberty could very well be along the lines of Chief Justice Fernando's more extensive discussion in *Morfe*.

Decisional privacy's stumbling block is that the Court has failed to even mention it in the most recent landmark case that dealt with personal autonomy in sex, marriage, and romantic relationships. *Tecson* dealt with a contract provision on marrying a competitor's employee:

You agree to disclose to management any existing or future relationship you may have, either by consanguinity or affinity with co-employees or employees of competing drug companies. Should it pose a possible conflict of interest in management discretion, *you agree to resign voluntarily* from the Company as a matter of Company policy. (emphasis added)<sup>143</sup>

An employee of the pharmaceutical company Glaxo challenged this provision on equal protection grounds after he married an employee of competitor

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<sup>141</sup> *Ilusorio v. Bildner*, G.R. No. 139789, 332 SCRA 169, 176, May 12, 2000.

<sup>142</sup> *Id.* at 176.

<sup>143</sup> *Duncan Ass'n of Detailman-PTGWO and Tecson v. Glaxo Wellcome-Phils., Inc.*, G.R. No. 162994, 438 SCRA 343, 351, Sep. 17, 2004.

Astra and Glaxo transferred him to another area. He then sued Glaxo for constructive dismissal. The equal protection issue was brusquely brushed aside because Glaxo was not a government entity, but the Court did not discuss decisional privacy or substantive due process despite *Loving* and *Zablocki*.

An invocation of decisional privacy would not necessarily have altered the result. Dean Agabin read the case as a balancing of interests between the individual's right to marry and the corporation's management prerogative,<sup>144</sup> explicitly framed by the Court in the context of "the right of enterprises to reasonable returns to investments."<sup>145</sup> Even if, as Dean Agabin proposed, the Court should have applied the Bill of Rights in order to uphold the Constitutional policy on marriage as an "inviolable social institution,"<sup>146</sup> a further invocation of decisional privacy might not have been the straw that broke the camel's back, and equal protection is itself no lightweight right. Further, Dean Froilan Bacungan noted that a right, no matter how fundamental, may generally be waived, and Tecson did so in this case in order to contract for a high-paying job.<sup>147</sup> Finally, one does sympathize with the lack of high-handedness depicted by the Court:

[T]he record shows that Glaxo gave Tecson several chances to eliminate the conflict of interest brought about by his relationship with Bettsy. When their relationship was still in its initial stage, Tecson's supervisors at Glaxo constantly reminded him about its effects on his employment with the company and on the company's interests. After Tecson married Bettsy, Glaxo gave him time to resolve the conflict by either resigning from the company or asking his wife to resign from Astra. Glaxo even expressed its desire to retain Tecson in its employ because of his satisfactory performance and suggested that he ask Bettsy to resign from her company instead. Glaxo likewise acceded to his repeated requests for more time to resolve the conflict of interest. When the problem could not be resolved after several years of waiting, Glaxo was constrained to reassign Tecson to a sales area different from that handled by his wife for Astra. Notably, the Court did not terminate Tecson from employment but only reassigned him to another area where his home province, Agusan del Sur, was included. In effecting Tecson's transfer, Glaxo even considered the welfare of Tecson's family. Clearly, the foregoing dispels any suspicion of unfairness and bad faith on the part of Glaxo.<sup>148</sup>

Decisional privacy's invocation, however, would have more intimately captured the personal anguish professed by Tecson as a curtailment of personal

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<sup>144</sup> Inaugural lecture on Constitutional Law (Bill of Rights), PHILIPPINE LAW JOURNAL 2004 Supreme Ct. Term Review Lectures, delivered Jan. 24, 2005, Malcolm Theater, University of the Philippines College of Law (videotape and paper on file with the student editorial board).

<sup>145</sup> CONST. art. XIII, § 3.

<sup>146</sup> Art. XV, § 2.

<sup>147</sup> Inaugural lecture on Labor Law, PHILIPPINE LAW JOURNAL 2004 Supreme Ct. Term Review Lectures, delivered Jan. 25, 2005, Malcolm Theater, University of the Philippines College of Law (videotape and paper on file with the student editorial board).

<sup>148</sup> Tecson, 358.

autonomy beyond a claim of discrimination. It would have also forced the application of a different Constitutional framework in the balancing against management prerogative, since the issue would no longer revolve around valid distinctions but a more personal restriction of autonomy. Possibly, given the more intimate value placed before it, the Court might at least have been harder pressed to explain the Constitutional issue instead of merely stating there was no state action. Nevertheless, the Court did not mention privacy. Neither did legal commentators such as Dean Pangalangan, a progressive-minded Bill of Rights professor who criticized the decision solely on the equal protection trajectory invoked by Tecson.<sup>149</sup>

In conclusion, one argues that the particular invocation of privacy by Justice Bellosillo in *Escritor* amounts to a recognition of decisional privacy as part of privacy, in addition to its clear recognition as part of liberty in substantive due process. Its possible omission from cases such as *Tecson*, which was not even treated as a constitutional case, should not affect this recognition. Further, Rubenfeld's discussion of the necessary outgrowth of decisional privacy as part of substantive due process guarantees readily applies to the Philippine Due Process clause, and interlocks seamlessly with Dean Agabin's classic discussion. Nevertheless, it must be conceded that Philippine privacy doctrine has thus far not emphasized decisional privacy, or at least has had far less opportunity to do so than the United States'. Justice Fernando's *Morfe* is a scintillating exception in this regard.

Finally, note the invocation of decisional privacy in the 2006 decision *Ejercito v. Sandiganbayan's*<sup>150</sup> dissent, complete with citations to *Roe v. Wade*, *Glucksberg*, and *Carey*:

First in the Bill of Rights is the mandate that no person shall be deprived of his life, liberty or property without due process of law. **Courts have held that the right of personal privacy is one aspect of the "liberty" protected by the Due Process Clause.** (emphasis in the original)<sup>151</sup>

Although this is clearly dicta gone far astray, as the full paragraph clearly discusses procedural due process, it does show that a Philippine Justice may not be as averse to citing even *Roe v. Wade* as previously thought.

#### B. INFORMATIONAL PRIVACY: PENUMBRAS AND THE RIGHT TO BE LET ALONE

The right to privacy was indubitably recognized in Philippine jurisprudence in *Morfe*:

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<sup>149</sup> Raul Pangalangan, *Passion for Reason: High court frowns on Romeo and Juliet Romances*, PHIL. DAILY INQUIRER, Sep. 24, 2004, at A14

<sup>150</sup> G.R. No. 157294, 509 SCRA 190, Nov. 30, 2006.

<sup>151</sup> *Id.* at 260 (Sandoval-Gutierrez, J., *dissenting*).

The constitutional right to privacy has come into its own.

So it is likewise in our jurisdiction. The right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection.<sup>152</sup>

Chief Justice Fernando deemed privacy so important that, “The right to be let alone is indeed the beginning of all freedom.”<sup>153</sup> Further, although leading Philippine cases such as *Morfe* and *Ople* quote *Griswold’s* discussion on how privacy arises as an independent right from certain fundamental rights, *Ople* attempted to go a step further and declared in its dicta that privacy itself is a fundamental right:

[W]e prescind from the premise that the right to privacy is a *fundamental right* guaranteed by the Constitution, hence, it is the burden of government to show that A.O. No. 308 is justified by some compelling state interest and that it is narrowly drawn. (emphasis added)<sup>154</sup>

Philippine cases after *Morfe*, however, took only the discussion of what Chief Justice Fernando explicitly termed privacy and neglected the preceding discussion on liberty and substantive due process. *Ople* dealt with the formation of a national identification card system and an accompanying information database. Recall that *Morfe* framed a similar issue of information as one of both disclosure and of control or compulsion. The latter aspect was in fact quoted in *Ople*:

“The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen.” This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state.<sup>155</sup>

This, however, was quickly set aside to focus on the depiction of what Justice Fernando explicitly termed privacy:

In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization, urbanization, and organization — operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of

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<sup>152</sup> *Morfe v. Mutuc*, G.R. No. 20387, 22 SCRA 424, 444, Jan. 31, 1968.

<sup>153</sup> *Id.*, quoting *Public Utilities Comm’n v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

<sup>154</sup> *Ople v. Torres*, G.R. No. 127685, 293 SCRA 143, 158, Jul. 23, 1998. Chief Justice Puno himself admitted that this section of his ponencia failed to obtain the necessary votes. REYNATO PUNO, LEGISLATIVE INVESTIGATIONS AND THE RIGHT TO PRIVACY 62 (2005).

<sup>155</sup> *Morfe v. Mutuc*, G.R. No. 20387, 22 SCRA 424, 445, Jan. 31, 1968 (quoted in *Ople v. Torres*, G.R. No. 127685, 293 SCRA 143, 169, Jul. 23, 1998).

private life marks the difference between a democratic and a totalitarian society.<sup>156</sup>

Recalling Justice Mendoza, note that even the rhetoric of privacy after *Morfe* focused solely on this personal zone of seclusion. This was most emphatically reiterated by Justice Flerida Ruth Romero in *Ople*:

What marks off man from a beast?

...Because of his sensibilities, emotions and feelings, he likewise possesses a sense of shame. In varying degrees as dictated by diverse cultures, he erects a wall between himself and the outside world wherein he can retreat in solitude, protecting himself from prying eyes and ears and their extensions, whether from individuals, or much later, from authoritarian intrusions.<sup>157</sup>

The closest discussion of decisional privacy in *Ople* was perhaps in Justice Mendoza's dissent, which opined that the issue was not privacy, but freedom of thought and of conscience protected by the freedom of speech and religious freedom (a framework that contrasts with Chief Justice Fernando's phrasing in *UEUGIP*).<sup>158</sup>

Again, *Whalen v. Roe* recognized two aspects of privacy:

The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.<sup>159</sup>

The first, informational privacy, is the concept that has been emphasized in Philippine jurisprudence after *Morfe*. As Chief Justice Puno ended *Ople*:

The right to privacy is one of the most threatened rights of man living in a mass society.... In the case at bar, the threat comes from the executive branch of government which by issuing A.O. No. 308 pressures the people to surrender their privacy by giving information about themselves on the pretext that it will facilitate delivery of basic services.<sup>160</sup>

The right to informational privacy arises from the penumbras, and itself has two aspects: 1) the right of an individual not to have private information about

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<sup>156</sup> *Id.* at 444 (quoted in *Ople*, 293 SCRA 141, 155).

<sup>157</sup> *Ople*, 293 SCRA 141, 171 (Romero, J., concurring). See *Fisher v. United States*, 425 U.S. 391, 416 (1976) (Brennan, J., concurring in the result), quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). "The privilege reflects 'our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.'"

<sup>158</sup> *Ople*, 293 SCRA 141, 193 (Mendoza, J., dissenting).

<sup>159</sup> *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977).

<sup>160</sup> *Ople*, 293 SCRA 141, 170.

himself disclosed; and 2) the right of an individual to live freely without surveillance and intrusion.<sup>161</sup> It must be emphasized that the latter protects against the very act of piercing Justice Romero's "retreat in solitude" regardless of whether any information is actually disclosed.

Thus, and this distinction will become important later, actual disclosure is not necessarily the operative violation against privacy. In this sense, the right becomes not one against disclosure, but a right to peace of mind analogous to that in the Civil Code's article 26.<sup>162</sup> This, finally, also follows from Justice Irene Cortes's concept of privacy:

Though a component part of the greater society in which he lives, the individual must of necessity reserve certain areas of his life to himself. To preserve his own identity, he has to maintain an inner self, safeguard his beliefs, and keep hidden certain thoughts, judgments and desires.<sup>163</sup>

Further, Justice Cortes also wrote that man's moral nature is linked with a sense of privacy.<sup>164</sup>

### 1. Justice Cortes, *Ople v. Torres*, and privacy in the penumbras

*Griswold* was the first case to explicitly recognize the right to privacy, and it was the seeming crossroads of privacy doctrines before *Whalen* and *Roe v. Wade*, where Due Process discussion met a summary of the penumbras privacy emerged from.<sup>165</sup> *Morfe* first outlined the right to privacy by quoting *Griswold*:

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."<sup>166</sup>

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<sup>161</sup> *Whalen*, 429 U.S. at 599 n.24.

<sup>162</sup> Carpio, *supra* note 20, at 687-90; *Tenchavez v. Escano*, G.R. No. 19671, 17 SCRA 684, Jul. 26, 1966; CIVIL CODE, art. 26.

<sup>163</sup> CORTES, *supra* note 1, at 1

<sup>164</sup> *Id.* at 3.

<sup>165</sup> Professor Tribe places *Griswold* similarly in his lectures. He illustrates this by drawing two intersecting lines, one for the *Roe* line and another for the *Katz* line, with *Griswold* forming the intersection.

<sup>166</sup> *Morfe v. Mutuc*, G.R. No. 20387, 22 SCRA 424, Jan. 31, 1968.

*Lagunzad v. Vda. de Gonzales*<sup>167</sup> discussed a “right to privacy” without citing *Morfe*, and balanced it against the freedom of speech. Continuing the *Morfe* line, *Ayer Productions, Ltd. v. Capulong*<sup>168</sup> took *Morfe*’s explicit recognition of privacy, but cautioned:

It was demonstrated sometime ago by the then Dean Irene R. Cortes that our law, constitutional and statutory, does include a right of privacy. It is left to case law, however, to mark out the precise scope and content of this right in differing types of particular situations.<sup>169</sup>

Later, *Ople* made its own constitutional accounting:

Sec. 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.

Sec. 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

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

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Sec. 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health as may be provided by law.

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Sec. 8. The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.

Sec. 17. No person shall be compelled to be a witness against himself.<sup>170</sup>

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<sup>167</sup> G.R. No. 32066, 92 SCRA 476, 488-89, Aug. 6, 1979.

<sup>168</sup> G.R. No. 82380, 160 SCRA 861, Apr. 29, 1988.

<sup>169</sup> *Id.* at 870. *Lagunzad* and *Ayer* both discussed the balance between privacy and freedom of speech in the context of movies depicting public figures.

<sup>170</sup> *Ople v. Torres*, G.R. No. 127685, 293 SCRA 143, 157, Jul. 23, 1998 (*quoting* CONST. art. III).

*Ople* further examined Philippine law from a broader perspective:

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.<sup>171</sup>

## 2. Informational privacy and the right against unreasonable search

At its very inception, the right to privacy was already criticized as a “broad, abstract and ambiguous concept ... easily be interpreted as a constitutional ban against many things.”<sup>172</sup> The Philippine conception of privacy is concretized by backtracking through *Ople’s* parallel penumbras. One begins with the right to privacy’s immortal articulation by Justice Brandeis himself in *Olmstead*. This depicted privacy even more intimately than personal decisionmaking did, and would later lead to its portrayal as a personal zone of seclusion, the right to have one’s own separate corner of the sky. He wrote:

The makers of our Constitution... recognized the significance of man’s spiritual nature, of his feelings and of his intellect... They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual... must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.<sup>173</sup>

...Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent.... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. (internal citations omitted)<sup>174</sup>

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<sup>171</sup> *Id.* at 157-58.

<sup>172</sup> *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

<sup>173</sup> The Fourth Amendment to the American Constitution corresponds to section 2 of the present Bill of Rights, or the right against unreasonable search and seizure. The Fifth Amendment corresponds to section 17, or the right against self-incrimination.

<sup>174</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *quoted in* *Morfe v. Mutuc*, G.R. No. 20387, 22 SCRA 424, 442, Jan. 31, 1968; *Ople*, 293 SCRA 141, 144.

Gauging from *Griswold's* discussion,<sup>175</sup> *Olmstead's* eloquent prose, and the nature of informational privacy itself, the right's first set of roots are embedded in the bedrock of the right against unreasonable search and seizure.

*a. A history of protecting security and dignity*

The right arose from English law, as eloquently described by Lord Camden:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him.<sup>176</sup>

The constitutional right thus arose from property rights, but even the earliest property-centered image from Philippine jurisprudence in *People v. Arceo*<sup>177</sup> reflected how the right against unreasonable search intertwines with the right to privacy:

[T]he humblest citizen or subject might shut the door of his humble cottage in the face of the monarch and defend his intrusion into that privacy which was regarded as sacred as any of the kingly prerogatives. The poorest and most humble citizen may bid defiance to all the powers of the state; the wind, the storm and the sunshine alike may enter through its weather-beaten parts, but the king may not enter against the owner's will.<sup>178</sup>

The link between privacy and the right against unreasonable search was always explicit in Chief Justice Fernando's language, as seen, for example, in *Lopez v. Commissioner of Customs*.<sup>179</sup> Here, dealing with consent to enter and search a room, he wrote:

It cannot be contended that such premises would be outside the constitutional protection of a guarantee intended to protect one's privacy. It

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<sup>175</sup> "The Fourth and Fifth Amendments were described in *Boyd v. United States* as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp v. Ohio*, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'" *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

<sup>176</sup> *Entick v Carrington & Three Other King's Messengers*, 19 How. St. Tr. 1029, quoted in *Boyd v. United States*, 116 U.S. 616, 627 (1886). This case was quoted by then Justice Puno as a "a landmark of the law of search and seizure and called a familiar 'monument of English freedom.'" *Republic v. Sandiganbayan*, G.R. No. 104768, 407 SCRA 105-106, Jul. 21, 2003 (Puno, J., concurring).

<sup>177</sup> 3 Phil. 381 (1904).

<sup>178</sup> *Id.* at 384 (attributed to William Pitt).

<sup>179</sup> G.R. No. 27968, 68 SCRA 320, Dec. 3, 1975.

stands to reason that in such a place, the insistence on being free from any unwelcome intrusion is likely to be more marked.<sup>180</sup>

The link, however, is clearer when one notes decisions that depict the right against unreasonable search in a different light. Searching for the Constitutional foundations of privacy, Justice Cortes points to the defining case *Boyd v. United States*.<sup>181</sup> Quoting Lord Camden, Justice Joseph Bradley wrote:

The principles laid down in this opinion affect the very essence of constitutional liberty and security.... It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.... Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment.<sup>182</sup>

An examination of jurisprudence reveals that Philippine search and seizure cases have always echoed this recognition of personal dignity and Justice Romero's "sensibilities, emotions and feelings" and "sense of shame."<sup>183</sup> Chief Justice Fernando's own decisions after *Morfe* readily echoed this, and *Boyd* featured prominently in *Pacis v. Pamaran*.<sup>184</sup> Later decisions read:

It is not only respect for personality, privacy and property, but to the very dignity of the human being that lies at the heart of the provision.<sup>185</sup>

[T]he unreasonable search on the plaintiff's person and bag caused (sic) done recklessly and oppressively by the defendant, violated, impaired and undermined the plaintiff's liberty guaranteed by the Constitution, entitling her to moral and exemplary damages against the defendant. The search has unduly subjected the plaintiff to intense humiliation and indignities and had consequently ridiculed and embarrassed publicly said plaintiff so gravely and immeasurably.<sup>186</sup>

The constitutional protection of our people against unreasonable search and seizure is not merely a pleasing platitude. It vouchsafes our right to privacy and dignity against undesirable intrusions committed by any public officer or private individual.<sup>187</sup>

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<sup>180</sup> *Id.* at 326, *citing for comparison* *Schmerber v. California*, 384 U.S. 75 (1966).

<sup>181</sup> CORTES, *supra* note 1, at 33, *citing* *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>182</sup> *Boyd*, 116 U.S. at 630.

<sup>183</sup> Ople, 293 SCRA 141, 171 (Romero, J., *concurring*).

<sup>184</sup> G.R. No. 23996, 56 SCRA 16, Mar. 15, 1974.

<sup>185</sup> *Rep. v. Sandiganbayan*, G.R. No. 104768, 407 SCRA 10, 63, Jul. 21, 2003 (Puno, J., *concurring*).

<sup>186</sup> *United States v. Reyes*, G.R. No. 79253, 219 SCRA 192, 201-02, Mar. 1, 1993.

<sup>187</sup> *MHP Garments v. Ct. of Appeals*, G.R. No. 86720, 236 SCRA 227, 229, Sep. 2, 1994.

Landynski in his authoritative work (Search and Seizure and the Supreme Court, 1966) could fitly characterize this constitutional right as the embodiment of a 'spiritual concept: the belief that to value the privacy of home and person and to afford its constitutional protection against the long reach of government is no less than to value human dignity.... (internal citations omitted)<sup>188</sup>

This last is still another nugget from Chief Justice Fernando in *Villanueva v. Querubin*, and this particular excerpt has been quoted in several unreasonable search decisions, including *People v. Burgos*.<sup>189</sup> Judging from the most recent decisions, the term privacy in the above sense has arguably become intertwined with the rhetoric of unreasonable search. Maintaining the distinction from substantive due process, for example, *People v. Tudtud*<sup>190</sup> recently stated that:

[T]he right to personal security which, *along with the right to privacy*, is the foundation of the right against unreasonable search and seizure "includes the right to exist, and the right to enjoyment of life while existing." (emphasis added)<sup>191</sup>

*People v. Molina*<sup>192</sup> made a similar pronouncement, one traceable to many older Philippine cases.<sup>193</sup> Finally, then Justice Puno integrated the right to privacy in his discussion of the right against unreasonable search's history in *Republic v. Sandiganbayan*,<sup>194</sup> emphasizing the same value. However, he also emphasized that

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<sup>188</sup> *Villanueva v. Querubin*, G.R. No. 26177, 48 SCRA 345, 350, Dec. 27, 1972.

<sup>189</sup> G.R. No. 68955, 144 SCRA 1, Sep. 4, 1986. *See* 20th Century Fox Film Corp. v. Ct. of Appeals, G.R. No. 76649, 164 SCRA 655, Aug. 19, 1988; *People v. Compacion*, G.R. No. 124442, 361 SCRA 540, Jul. 20, 2001.

<sup>190</sup> G.R. No. 144037, 412 SCRA 142, Sep. 26, 2003.

<sup>191</sup> *Id.* at 168, *citing* D. SANDIFER & L. SCHEMAN, *THE FOUNDATION OF FREEDOM* 44-45 (1966).

<sup>192</sup> G.R. No. 133917, 352 SCRA 174, Feb. 19, 2001, *citing* *Mapp v. Ohio*, 367 U.S. 643 (1961). "Without this rule (unreasonable search), the right to privacy would be a form of words, valueless and undeserving of mention in a perpetual charter of inestimable human liberties; so too, without this rule, the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom implicit in the concept of ordered liberty."

<sup>193</sup> *See, e.g.,* *Aniag v. Ct. of Appeals*, 237 SCRA 424, G.R. No. 104961, Oct. 7, 1994. "[T]he search could not be valid. The action then of the policemen unreasonably intruded into petitioner's privacy and the security of his property...." *Id.* at 441 (Vitug, J., *concurring*), *quoting* *Bagalihog v. Fernandez*, G.R. No. 96356, 198 SCRA 614, 618. "This guaranty is one of the greatest of individual liberties and was already recognized even during the days of the absolute monarchies, when the king could do no wrong. On this right, Cooley wrote: 'Awe surrounded and majesty clothed the King, but the humblest subject might shut the door of his cottage against him and defend from intrusion that privacy which was as sacred as the kingly prerogatives.'"

<sup>194</sup> *See supra* text accompanying note 176.

Philippine doctrine has always maintained the right to be secure in one's property as well.<sup>195</sup>

*b. Katz and Silverman: Emphasizing people and zones of privacy*

This long-standing emphasis on personal privacy was further highlighted when technology forced jurists to look beyond property and physical intrusion. Years after *Boyd*, the United States Supreme Court ruled in *Olmstead* that wiretapping by government agents did not violate the right against unreasonable search, because intercepting electronic telephone impulses involved no "seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure;"<sup>196</sup> in short, no physical trespass beyond the constitutionally delineated boundaries. Justice Brandeis vehemently dissented:

Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. Moreover, "in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be." The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping.<sup>197</sup>

His views proved too advanced for his day, but were eventually upheld in *Katz v. United States*.<sup>198</sup> Brushing aside the argument that the booth was made of transparent glass and thus not private, the Court noted "what he sought to exclude when he entered the booth was not the intruding eye – it was the uninvited ear."<sup>199</sup> It held:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>200</sup>

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.<sup>201</sup>

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<sup>195</sup> Rep. v. Sandiganbayan, 407 SCRA at 116 (Puno, J., *concurring*), quoting People v. Court of First Instance of Rizal, Branch IX, Quezon City, G.R. No. 41686, 101 SCRA 86, Nov. 17, 1980.

<sup>196</sup> *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

<sup>197</sup> *Id.* at 473-74 (Brandeis, J., *dissenting*).

<sup>198</sup> 389 U.S. 347 (1967).

<sup>199</sup> *Id.* at 352, quoted in CORTES, *supra* note 1, at 43.

<sup>200</sup> *Katz*, 389 U.S. at 351.

<sup>201</sup> *Id.* at 359.

Justice John Marshall Harlan emphasized how the majority decision held that “electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment.”<sup>202</sup> Bringing the right to privacy to the fore, he articulated “people, not places” as:

1. “first that a person has exhibited an actual (subjective) expectation of privacy and,”
2. “second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>203</sup>

The *Katz* test and its articulation of expectations of privacy was incorporated into *Ople*.<sup>204</sup> Thus, “what a person knowingly exposes to the public, even in his own house or office, is not a subject [of]... protection, but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>205</sup> Applying this to the facts in *Katz*, Justice Harlan argued that a man in a telephone booth does not ordinarily assume his call will be intercepted. *Ople* generalized this:

The factual circumstances of the case determines the reasonableness of the expectation. However, other factors, such as customs, physical surroundings and practices of a particular activity, may serve to create or diminish this expectation.<sup>206</sup>

Thus, it struck down the proposed national ID system, stating:

The measure of protection granted by the reasonable expectation diminishes as relevant technology becomes more widely accepted... A.O. No. 308 is so widely drawn that a minimum standard for a reasonable expectation of privacy, regardless of technology used, cannot be inferred from its provisions.<sup>207</sup>

The *Katz* test in *Ople* was later applied to an airport frisk in *People v. Johnson*<sup>208</sup> that revealed packs of hidden drugs:

Persons may lose the protection of the search and seizure clause by exposure of their persons or property to the public in a manner reflecting a lack of subjective expectation of privacy, which expectation society is prepared to recognize as reasonable. Such recognition is implicit in airport security procedures.... Should these procedures suggest the presence of suspicious objects, physical searches are conducted to determine what the objects are. There is little question that such searches are reasonable, given their minimal

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<sup>202</sup> *Id.* at 360 (Harlan, J., *concurring*).

<sup>203</sup> *Id.*

<sup>204</sup> *Ople v. Torres*, G.R. No. 127685, 293 SCRA 143, Jul. 23, 1998.

<sup>205</sup> *People v. Canton*, G.R. No. 148825, 394 SCRA 478, 489, Dec. 27, 2002.

<sup>206</sup> *Id.* at 164.

<sup>207</sup> *Id.* at 164-165.

<sup>208</sup> G.R. No. 13881, 348 SCRA 526, Dec. 18, 2000.

intrusiveness, the gravity of the safety interests involved, and the reduced privacy expectations associated with airline travel.<sup>209</sup>

*Katz* and *Johnson* were again explicitly upheld in the 2002 case *People v. Canton*,<sup>210</sup> which involved a similar airport drug search. In addition to *Katz*, Justice Puno also pointed to *Silverman v. United States*,<sup>211</sup> whose test searches whether a place is a “constitutionally protected area.”<sup>212</sup> Here, the Court held that it was unconstitutional for government agents to use a microphone to convert a house’s heating system into a listening device, and emphasized the physical intrusion into a home. It stated:

The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. ...

...It is based upon the reality of an actual intrusion into a constitutionally protected area.<sup>213</sup>

In contrast, Justice Carpio held in the 2005 decision *Alejano v. Cabuay*<sup>214</sup> that military officers in detention had a traditionally diminished expectation of privacy. Thus, they could not protest that their letters could not be read by military intelligence officers in the absence of a law authorizing them to do so. (The junior officers in question had taken control of the Oakwood luxury apartments in the Makati financial district and planted explosives in these, and later surrendered. Their leader, Lieutenant Antonio Trillanes IV, was later elected senator while in detention due to public sympathy for his message against perceived corruption in the Arroyo regime, although this sympathy was lost after he attempted a similar revolt in the Manila Peninsula hotel.)<sup>215</sup>

In the Philippines, the “sanctity of privacy the law accords to the human abode”<sup>216</sup> remains paramount in this doctrine, as bolstered by the many reiterations of *People v. Arceo*. For example, Justice Isagani Cruz wrote shortly after the EDSA Revolution:

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<sup>209</sup> *Id.* at 534.

<sup>210</sup> *Canton*, 394 SCRA 478.

<sup>211</sup> 365 U.S. 505 (1961) (*cited in* Republic v. Sandiganbayan, G.R. No. 104768, Jul. 21, 2003 (Puno, J., *concurring*)).

<sup>212</sup> *Id.* at 510.

<sup>213</sup> *Id.* at 511-12.

<sup>214</sup> G.R. No. 160792, 468 SCRA 188, Aug. 25, 2005.

<sup>215</sup> Julie Aurelio et al, *Trillanes revolt crushed*, PHIL. DAILY INQUIRER, Nov. 30, 2007, at A1.

<sup>216</sup> *People v. Agoncillo*, G.R. No. 138983, 358 SCRA 178, 196, May 23, 2001. “[T]he inviolable right to privacy of home and person.” *People v. Chua Hosan*, G.R. No. 128222, 308 SCRA 432, 443, Jun. 17, 1999. *See* *People v. Fabon*, G.R. No. 133226, 328 SCRA 302, Mar. 16, 2000; *People v. Sapinosa*, G.R. No. 122540, 328 SCRA 649, Mar. 22, 2000; *People vs. Paraiso*, G.R. No. 127840, 319 SCRA 422, Nov. 29, 1999; *Payton v. New York*, 445 U.S. 573, 601 (1980).

One of the most precious rights of the citizen in a free society is the right to be left alone in the privacy of his own house. That right has ancient roots, dating back through the mists of history to the mighty English kings in their fortresses of power. Even then, the lowly subject had his own castle where he was monarch of all he surveyed. This was his humble cottage from which he could bar his sovereign lord and all the forces of the Crown.<sup>217</sup>

Highlighting this, Justice Cortes's essay included a specific section on picketing in front of residences and proposed that even public officials deserved relief from this.<sup>218</sup> Finally, in criminal law, this aspect of privacy has long been reiterated in the aggravating circumstance of dwelling:

Dwelling is considered an aggravating circumstance because primarily of the sanctity of privacy the law accords to human abode. ... "[O]ne does not lose his right of privacy where he is offended in the house of another... the stranger, is sheltered by the same roof and protected by the same intimacy of life it affords. It may not be his house, but it is, even for a brief moment, 'home' to him. He is entitled to respect even for that short moment."<sup>219</sup>

It is argued, however, that the human body itself should enjoy the greatest expectation of privacy of all.<sup>220</sup> This is supported by the 1891 case *Union Pacific Railway Co. v. Botsford*,<sup>221</sup> which held that forcing a female party in a civil action to submit to a surgical examination was an "indignity, an assault, and a trespass,"<sup>222</sup> and the 1881 case *De May v. Roberts*,<sup>223</sup> which considered it "shocking to our sense of right, justice and propriety"<sup>224</sup> for a physician to allow a young man to witness his patient giving birth. Most compellingly, Justice Cortes wrote:

Surely the Constitution does not protect the individuals possessions – one's houses, papers and effects – more than the integrity of the human person.<sup>225</sup>

This point in her essay is supported by Chief Justice Fernando's characterization of rape in *People v. Reyes*<sup>226</sup> and *People v. Nazareno*:<sup>227</sup>

The state policy on the heinous offense of rape is clear and unmistakable. ... [T]here is sound reason for such severity. It is an intrusion into the right of privacy, an assault on human dignity. No legal system worthy of the name

<sup>217</sup> *Roan v. Gonzales*, G.R. No. 71410, 145 SCRA 687, 690-691, Nov. 25, 1986.

<sup>218</sup> CORTES, *supra* note 1, at 36-37.

<sup>219</sup> *People v. Alfeche*, G.R. No. 124213, 294 SCRA 352, Aug. 17, 1998, *quoting* *People v. Balansi*, G.R. No. 77284, 187 SCRA 566, 575, Jul. 19, 1990.

<sup>220</sup> *Schmerber v. California*, 384 U.S. 757 (1967); *Guanzon v. de Villa*, G.R. No. 80508, 181 SCRA 623, Jan. 30, 1990. *See, however*, *Villafior v. Summers*, 41 Phil 62 (1920).

<sup>221</sup> 141 U.S. 250, 252 (1891).

<sup>222</sup> *Id.*

<sup>223</sup> 9 N.W. 146 (1881).

<sup>224</sup> *Id.* at 149.

<sup>225</sup> CORTES, *supra* note 1, at 65.

<sup>226</sup> G.R. No. 36874, 60 SCRA 126, Sep. 30, 1974.

<sup>227</sup> G.R. No. 45533, 80 SCRA 484, Nov. 29, 1977.

can afford to ignore the traumatic consequences for the unfortunate victim and grievous injury to the peace and good order of the community.<sup>228</sup>

Taken together, *Katz*, *Silverman*, *Ople*, *Johnson*, and *Canton* answer the question, “When does a search occur?” Even if a place is explicitly named in the Constitution such as a “house,”<sup>229</sup> it only occurs when “the individual manifested a subjective expectation of privacy in the searched object, and society is willing to recognize that expectation as reasonable.”<sup>230</sup> The intrusion or search, as Dean Agabin phrased, delves into one’s “capacity to maintain aspects of one’s life apart from public awareness” and “the control we have over information about ourselves,”<sup>231</sup> which form the very core of informational privacy.

*c. Technology and modern applications of unreasonable search*

Various decisions have thus explored the levels of expectation in various “zones of privacy.” For example, there is clearly a much decreased expectation in a general physical exam, while such is greatly increased inside a toilet.<sup>232</sup> Moving vehicles are subject to a decreased expectation of privacy due to government regulation.<sup>233</sup> The United States observed a “retreat from Boyd” since the 1980s and a restrictive interpretation. The school and the workplace, for example, were deemed to carry lesser expectations.<sup>234</sup> *Florida v. Riley*<sup>235</sup> ruled that there was no expectation of privacy violated when government authorities searching for marijuana plants flew over a greenhouse using a helicopter:

[H]elicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft. Any member of the public could legally have been flying over Riley’s property in a helicopter at the altitude of 400 feet and could have observed Riley’s greenhouse. The police officer did no more.<sup>236</sup>

Most recently, the *Katz* test has been applied to evolving technological capabilities, to determine when a search is indeed a search. The 2001 decision *Kyllo v. United States*<sup>237</sup> began by establishing that a visual inspection of a house’s exterior cannot possibly be a search, even though *Katz* unbundled the definition from mindsets tied to property. However, it conceded that this is “not so simple” today:

<sup>228</sup> Reyes, 60 SCRA 126, 127.

<sup>229</sup> CONST. art. III, § 2.

<sup>230</sup> *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

<sup>231</sup> Pacifico Agabin, *Integrating DNA Technology In The Judicial System*, 1 CONT. LEGAL EDUC. L.J. 27, 47-8 (2001).

<sup>232</sup> Oscar Franklin Tan, *Touch Me Not: Expanding Constitutional Frameworks to Challenge LTO-Required and Other Mandatory Drug Testing*, 76 PHIL. L.J. 620, 626, 681 (2002).

<sup>233</sup> *People v. Baula*, G.R. No. 132671, 344 SCRA 663, 674 n.28, Nov. 15, 2000; *People v. Padilla*, G.R. No. 121917, 269 SCRA 402, Mar. 12, 1997.

<sup>234</sup> Daniel Solove, *The Origins and Growth of Information Privacy Law*, 748 PLI/PAT 29, 69 (2003), citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1984); *O’Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>235</sup> *Florida v. Riley*, 488 U.S. 451 (1989).

<sup>236</sup> *Id.* at 452.

<sup>237</sup> 533 U.S. 27, 33 (2001).

[J]ust as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*. . . . Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home.<sup>238</sup>

A four-point expanded *Katz* test is gleaned from *Kyllo*. This new test declares that a search takes place when:

1. Information is obtained through sense-enhancing technology.
2. The information could not have been otherwise obtained without physical intrusion.
3. The intrusion is into a constitutionally protected area, following the *Katz* test.
4. The technology used is not in general public use.<sup>239</sup>

Arguing against its breadth, one author discussed *Kyllo*'s broad application:

Through enhanced technology such as electronic wiretaps and bugs, law enforcement agencies can listen to those with suspected terrorist ties. Rather than narcotics, dogs can be trained to locate bomb material. Trap and trace devices and pen registers can be used to capture source and addressee information for computer (e.g., e-mail) and telephone conversations. Other sense-enhancing devices “might detect the odor of deadly bacteria or chemicals for making a[n] . . . explosive.”<sup>240</sup>

Reconciling *Kyllo* with precedents, another author concluded that *United States v. Knotts*<sup>241</sup> arguably involved no violation when authorities placed a homing device on a defendant's car, because it remained in public roads and could have been observed without the device.<sup>242</sup> *Dow Chemical v. United States*<sup>243</sup> likewise involved no violation because authorities took aerial photographs with an expensive but commercially available mapmaking camera.<sup>244</sup>

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<sup>238</sup> *Id.* at 28.

<sup>239</sup> *Id.* at 47.

<sup>240</sup> Nicholas Heydt, Note, *The Fourth Amendment Heats Up: The Constitutionality of Thermal Imaging and Sense-Enhancing Technology—Kyllo v. United States*, 29 WM. MITCHELL L. REV. 981, 1009-10 (2003).

<sup>241</sup> 460 U.S. 276 (1983).

<sup>242</sup> *Id.* at 282, cited in Amanda Froh, Note, *Rethinking Canine Sniffs: The Impact of Kyllo v. United States*, 26 SEATTLE U. L. REV. 337, 343-344 (2002).

<sup>243</sup> 476 U.S. 227 (1986).

<sup>244</sup> *Id.* at 238, cited in Froh, *supra* note 243, at 345.

Looking over the requisites, however, one argues that many informational privacy violations are now possible with the Internet, arguably a sense-enhancing technology, featuring powerful programs and techniques the ordinary user is unaware of. The Internet demands that *Katz* be taken to its final logical point, to a disassociation of expectations of privacy from place and zone altogether, and onto information itself.<sup>245</sup>

Certainly, this was echoed in *Ople*:

[T]he threat comes from the executive branch of government which by issuing A.O. No. 308 pressures the people to surrender their privacy by giving information about themselves on the pretext that it will facilitate delivery of basic services. Given the record-keeping power of the computer, only the indifferent fail to perceive the danger that A.O. No. 308 gives the government the power to compile a devastating dossier against unsuspecting citizens. It is timely to take note of the well-worded warning of Kalvin, Jr., “the disturbing result could be that everyone will live burdened by an unerasable record of his past and his limitations. In a way, the threat is that because of its record-keeping, the society will have lost its benign capacity to forget.”<sup>246</sup>

The same sentiments were voiced in the original case, *Whalen*, which *Ople* cited:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.... The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy.<sup>247</sup>

*Ople* distinguished its facts from *Whalen*:

[T]he statute was narrowly drawn and contained numerous safeguards against indiscriminate disclosure. The statute laid down the procedure and requirements for the gathering, storage and retrieval of the information. It enumerated who were authorized to access the data. It also prohibited public disclosure of the data by imposing penalties for its violation. In view of these

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<sup>245</sup> David Philips, *Beyond Privacy: Confronting Locational Surveillance in Wireless Communication*, 8 COMM. L. & POL'Y 1, 21-22 (2003); William deVries, *Protecting Privacy in the Digital Age*, 18 BERKELEY TECH. L.J. 283, 306-07 (2003). *See, e.g.*, United States v. Hambrick, 55 F.Supp.2d 504, 508 (E.D. Va. 1999). “Cyberspace is a nonphysical ‘place’ and its very structure, a computer and telephone network that connects millions of users, defies traditional Fourth Amendment analysis.”

<sup>246</sup> *Ople v. Torres*, G.R. No. 127685, 293 SCRA 143, 170, Jul. 23, 1998.

<sup>247</sup> *Whalen v. Roe*, 429 U.S. 589, 606 (1977).

safeguards, the infringement of the patients' right to privacy was justified by a valid exercise of police power. As we discussed above, A.O. No. 308 lacks these vital safeguards.<sup>248</sup>

*d. Recent privacy applications with respect to unreasonable search*

The concept of privacy was so closely connected with the right of unreasonable search from English jurisprudence to *Morfe*, *Griswold*, and *Olmstead* that there is little doctrinal debate regarding this aspect of privacy. As seen from American jurisprudence, the main challenge is to continually apply this right to fast-changing technology. The original Warren and Brandeis article was in fact a response to the increasing use of cameras, and Dean Cortes's own essay dealt with devices from polygraphs to computers.<sup>249</sup> The Philippine Court has not had opportunities to make new privacy rulings in this field, however. The closest was *In Re 2003 Bar Examinations*,<sup>250</sup> which dealt with a lawyer copying bar questions from a bar examiner's computer through their law firm's office network. It quoted a report by a committee of retired Justices (perhaps one with a relaxed concept of state action):

“Besides theft, De Guzman also committed an unlawful infraction of Attorney Balgos' right to privacy of communication, and to security of his papers and effects against unauthorized search and seizure – rights zealously protected by the Bill of Rights of our Constitution.”<sup>251</sup>

Developments have mainly been in less technologically-driven areas. *Marquez v. Desierto*,<sup>252</sup> for example, affirmed *Ople's* discussion of specific statutory zones of privacy, and enjoined the Ombudsman from compelling a bank manager to furnish information, invoking the Law on Secrecy of Bank Deposits.<sup>253</sup> Similarly, *Ramirez v. Court of Appeals*<sup>254</sup> upheld privacy as the rationale behind the Anti-Wiretapping Act. It quoted Senator Lorenzo Tañada's Explanatory Note:

“The right to the privacy of communication, among others, has expressly been assured by our Constitution. Needless to state here, the framers of our Constitution must have recognized the nature of conversations between individuals and the significance of man's spiritual nature, of his feelings and of his intellect. They must have known that part of the pleasures and satisfactions of life are to be found in the unaudited, and free exchange of communication between individuals – free from every unjustifiable intrusion by whatever means.”<sup>255</sup>

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<sup>248</sup> Ople, 293 SCRA 141, 168.

<sup>249</sup> CORTES, *supra* note 1, at 7-13.

<sup>250</sup> B.M. No. 1222, 421 SCRA 703, Feb. 4, 2004.

<sup>251</sup> *Id.* at 716.

<sup>252</sup> *Marquez v. Desierto*, G.R. No. 135882, 359 SCRA 772, Jun. 27, 2001.

<sup>253</sup> Rep. Act No. 1405 (1955), *amended by* Rep. Act No. 6770 (1989).

<sup>254</sup> G.R. No. 93833, 248 SCRA 590, Sep. 28, 1995.

<sup>255</sup> *Id.* at 599, *quoting* III CONGRESSIONAL RECORD, No. 31, at 573 (Mar. 10, 1964).

Finally, remedial law privileges have also been held to reflect zones of privacy. Shortly before *Ople, Krohn* held so with respect to the physician-patient privilege.<sup>256</sup> As discussed with respect to decisional privacy, the attorney-client and work product privileges are treated in the same way.

### 3. Informational privacy and the privacy of correspondence

In addition to the right against unreasonable search, another Constitutional provision explicitly protects the “privacy of communication and correspondence.”<sup>257</sup> This was an area of particular concern throughout history. The postal system’s integrity was a nagging concern in the 18th century United States, for example, to the point that the likes of Thomas Jefferson, Alexander Hamilton and George Washington sometimes wrote letters in code.<sup>258</sup>

In her essay, Justice Cortes cited the provision on privacy of correspondence as the first demonstration of a constitutional basis for privacy, but did not discuss it further.<sup>259</sup> She nevertheless commented that an explicit provision regarding communication and correspondence “forestalled the problems caused by its omission in the United States Constitution and the tortuous path the court decisions had to take for almost three decades.”<sup>260</sup> Chief Justice Fernando, in *Secretary v. Marcos*,<sup>261</sup> clearly associated the two rights which are explicit in the Philippines, and placed the privacy of communication on the same level as the quintessential privacy of the domicile.

The provision is important as the word privacy’s only instance in the Constitution, and may be invoked as a specific textual hook in the narrower range where it applies. Its discussion may be subsumed in the broader discussion regarding unreasonable search,<sup>262</sup> but with the key practical difference that one need not determine whether a search has taken place when dealing with this narrow range, or even whether information has been unduly disclosed.

In *Faeldonea v. Civil Service Comm’n*,<sup>263</sup> a postal employee opened an envelope containing a deceased man’s death benefits, deposited the check in a bank in order to settle the deceased’s obligations, and then informed the widow. The Court exonerated him of gross misconduct and dishonesty, but ordered him suspended for six months because he had violated “the duty of preserving the privacy of communication and correspondence, particularly the integrity of the

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<sup>256</sup> *Krohn v. Ct. of Appeals*, G.R. No. 108854, 233 SCRA 146, 153, Jun. 14, 1994.

<sup>257</sup> CONST. art. III, § 3.

<sup>258</sup> Solove, *The Origins and Growth of Information Privacy Law*, *supra* note 235, at 37.

<sup>259</sup> CORTES, *supra* note 1, at 38.

<sup>260</sup> *Id.* at 43.

<sup>261</sup> A.M. No. 207-J, 76 SCRA 301, Apr. 22, 1977.

<sup>262</sup> *See, e.g.*, JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 209-22 (2003).

<sup>263</sup> G.R. No. 143474, 386 SCRA 344, Aug. 6, 2002.

postal system.”<sup>264</sup> The broader application outside unreasonable search doctrine becomes increasingly important, as communications technology increases the volume and speed of written electronic communications. Again, however, the Philippine Court has not had many opportunities to review such cases.

Perhaps the most interesting privacy of correspondence case in the last decade is *Ty*. Here, Alejandro Ty attached the income tax returns of his son Alexander to a pleading in order to show that the latter did not have the financial capacity to acquire certain properties. The Court of Appeals allowed this because the documents did not appear to be obtained illegally; they were allegedly duplicates in Alejandro’s possession because he had paid the taxes, and were not copies from the Bureau of Internal Revenue. The Supreme Court affirmed simply because the returns had not yet been formally offered as evidence, making the objection premature.<sup>265</sup>

This illustrates how important it is to identify all the values protected by the right to privacy. From a pure procedural standpoint, *Ty* is correct. However, the decision amounted to the court-sanctioned disclosure of the opponent’s confidential financial documents in a public trial. In invoking the privacy of correspondence, Alexander Ty was arguably invoking not the evidentiary rules, but constitutional protection of the more intimate values discussed in cases such as *Boyd*.

The same criticism may be leveled against *Krohn*, coincidentally also penned by the same ponente, Justice Bellosillo. In *Krohn*, a husband had obtained a copy of his wife’s confidential psychiatric examination and moved to testify on this examination in proceedings for annulment. The Court explicitly held that:

The physician-patient privilege creates a zone of privacy, intended to preclude the humiliation of the patient that may follow the disclosure of his ailments. Indeed, certain types of information communicated in the context of the physician-patient relationship fall within the constitutionally protected zone of privacy, including a patient’s interest in keeping his mental health records confidential.<sup>266</sup>

Nevertheless, *Krohn* allowed the admission of the testimony on the report because the wife had erroneously invoked the physician-patient privilege against someone who was not a physician, and failed to properly invoke the hearsay objection. Again, this was procedurally correct, but failed to address the constitutional issue that was squarely raised and that the Court in fact recognized.

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<sup>264</sup> *Id.* At 390.

<sup>265</sup> *Ty v. Ct. of Appeals*, G.R. No. 122656, 278 SCRA 836, 840, Sep. 5, 1997.

<sup>266</sup> G.R. No. 108854, 233 SCRA 146, 153, Jun. 14, 1994, *quoting* III CONGRESSIONAL RECORD, No. 31, at 573 (Mar. 10, 1964).

This is not to say that the invocation of privacy with respect to clearly confidential documents should have changed the above decisions. Depending on how the documents were obtained, the Court could have easily found a waiver of privacy. Alternatively, in the context of *Katz* and *Ople*, it could have found a decreased expectation of privacy with respect to issues litigated in an adversarial trial. Nevertheless, the purely procedural rulings fell far short of such clearer resolution of the actual privacy issues.

#### 4. Informational privacy and the right against self-incrimination

The right against self-incrimination is not discussed in depth in an informational privacy context because it is much narrower than the right against unreasonable search, although the two were discussed together in *Boyd*, *Griswold*, and the *Olmstead* dissent. It comes into play mainly when prosecution is involved, and has a concrete doctrinal framework to afford protection in this narrow sphere. The right, however, is important in that it also reiterates the sacrosanct zone surrounding a person and his inherent dignity. As Justice William Brennan wrote:

I do not join the Court's opinion... [because it is] but another step in the denigration of privacy principles settled nearly 100 years ago in *Boyd v. United States*

Expressions are legion in opinions of this Court that the protection of personal privacy is a central purpose of the privilege against compelled self-incrimination. "[I]t is the invasion of [a person's] infeasible right of personal security, personal liberty and private property" that "constitutes the essence of the offence" that violates the privilege. The privilege reflects "our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life." "It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." "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." (internal citations omitted)<sup>267</sup>

This is borne out by the right's history:

The doctrine that one accused of crime cannot be compelled to testify against himself is predicated upon principles of humanity and civil liberty. The maxim *Nemo tenetur seipsum accusare* had its origin in the protests against the abuses and manifestly unjust methods of interrogating accused persons in the inquisitorial Court of the Star Chamber. It was erected as an additional barrier for the protection of the people against the exercise of arbitrary power....<sup>268</sup>

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<sup>267</sup> *Fisher v. United States*, 425 U.S. 391, 414, 416 (1976) (Brennan, J., *dissenting*), *citing* *Boyd v. United States*, 116 U.S. 616 (1886); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Katz v. United States*, 389 U.S. 347, 350 n. 5 (1967).

<sup>268</sup> *People v. Buscato*, G.R. No. 40639, 74 SCRA 30, Nov. 23, 1976.

So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law....<sup>269</sup>

Similarly, in Philippine jurisprudence, *People v. Alegre*<sup>270</sup> quoted Chief Justice Fernando's landmark ponencia on the right against self-incrimination in *Pascual v. Board of Examiners*<sup>271</sup> and concluded:

Identifying the right of an accused to remain silent with right to privacy, this Court, in *Pascual* explained that the privilege against self-incrimination "enables the citizen to create a zone of privacy which government may not force to surrender to its detriment."<sup>272</sup>

However, the crux of the right goes against coercion by the government against an accused to confess against his free will,<sup>273</sup> not to the "wall between himself and the outside world wherein he can retreat in solitude."<sup>274</sup> This was seen in *Villaflores v. Summers*,<sup>275</sup> which held that forcing a woman to submit to a pregnancy test did not violate the right, since there was no "physical or moral compulsion to extort communications from him."<sup>276</sup> Nevertheless, Justice Malcolm wrote:

Fully conscious that we are resolving a most extreme case in a sense, which on first impression is a shock to one's sensibilities, we must nevertheless enforce the constitutional provision...

It is a reasonable presumption that in an examination by reputable and disinterested physicians due care will be taken not to use violence and not to embarrass the patient any more than is absolutely necessary. Indeed, no objection to the physical examination being made by the family doctor of the accused or by doctor of the same sex can be seen.<sup>277</sup>

It must be noted, however, that the right to privacy has been discussed in what was termed interrogation but outside prosecution. *Babst* dealt with newsmen who were summoned and questioned before a committee of high ranking military officers under the Marcos administration. Then Justice Claudio Teehankee wrote in dissent:

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<sup>269</sup> *Id.* at 48, quoting *Bram v. United States*, 168 U.S. 42.

<sup>270</sup> G.R. No. 30423, 94 SCRA 109, Nov. 7, 1979.

<sup>271</sup> G.R. No. 25018, 28 SCRA 344, May 26, 1969.

<sup>272</sup> *Alegre*, 94 SCRA 109, 121, quoting *Pascual*, 28 SCRA 344, 349-50.

<sup>273</sup> *People v. Bagasala*, G.R. No. 26182, 39 SCRA 326, May 31, 1971; *United States v. Holt*, 218 U.S. 245 (1910).

<sup>274</sup> *Ople v. Torres*, G.R. No. 127685, 293 SCRA 141, 171, Jul. 23, 1998 (Romero, J., concurring).

<sup>275</sup> 41 Phil 62 (1920).

<sup>276</sup> *Id.* at 67 (quoting *Holt*, 218 U.S. 245).

<sup>277</sup> *Id.* at 70.

The interrogations were not only offensive to the guarantees of free speech and free press, they also violated the right to privacy – the right to withhold information which are nobody’s business. Note, for example, that Ms. Babst was asked if she was really a nun, if she practised Zen, why she left the Catholic religion, etc.

In the case of Ms. Babst it could be asked why she honored the “request” and discussed even impertinent and personally intrusive questions when she had the legal services of Atty. Joker Arroyo. It should be recalled that the interrogation took place on December 22, 1982, and on that date the WE FORUM case was just a few days old and it should be noted that not only were the staffers of that publication arrested on Presidential Commitment Orders but the equipment and other properties of the paper were also sequestered. Fear indeed can have a paralyzing effect.<sup>278</sup>

Chief Justice Fernando, incidentally, penned a lengthy separate opinion, but this focused on free speech and libel doctrines such as the public figure doctrine very much relevant to privacy.

Further, factual milieus traditionally associated with the right against self-incrimination’s narrow parameters must be appreciated more broadly given the sophistication of today’s medical science. One curious landmark case was *Davis v. Mississippi*,<sup>279</sup> where police investigated the rape of a woman in her home by someone she could identify only as “a Negro youth.” During the investigation, police detained at least two dozen such youths without probable cause, and fingerprints which were collected during their detention. One set was eventually matched with prints collected from the rape victim’s window sill, leading to a conviction.

Although use of physical evidence does not violate the right against self-incrimination, the manner of its collection is nevertheless governed by the right against unreasonable search, and the Court refused to exempt fingerprints because of their peculiar “trustworthiness.”<sup>280</sup> It reversed the conviction because:

[T]he detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer; petitioner was unnecessarily required to undergo two fingerprinting sessions; and petitioner was not merely fingerprinted during the December 3 detention but also subjected to interrogation.<sup>281</sup>

*Davis*, however, contained dicta which implied that an individual might be validly fingerprinted without need for a warrant:

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<sup>278</sup> Babst v. Nat’l Intelligence Board, G.R. No. 62992, 132 SCRA 316, 356, Sep. 28, 1984.

<sup>279</sup> 394 U.S. 721 (1969).

<sup>280</sup> *Id.* at 723.

<sup>281</sup> *Id.* at 728.

It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment *even though there is no probable cause in the traditional sense*. Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the 'third degree.' Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context. (emphasis in the original)<sup>282</sup>

This focus on what it perceived was a decreased physical intrusion was decried by a separate opinion.<sup>283</sup> The *Davis* dicta was in fact used by various states to enact laws that allowed collection of physical evidence without warrants, based on suspicion and not probable cause.

The problem is that the broad dicta possibly applies to other physical evidence such as blood or urine samples, or even DNA evidence. Quite unlike fingerprints, these disclose a wealth of information about an individual, and this would imply that these other categories of samples should be protected more closely. The other factors in *Davis*, however, apply.<sup>284</sup> This trail of thought has great impact in modern contexts such as drug testing and DNA research.

### 5. Informational privacy and freedom of speech and association

At first blush, the rights to freedom of speech and association appear to have nothing to do with privacy. Examining liberty's underpinnings, however, it becomes clear that they have everything to do with it. John Stuart Mill wrote that the pursuit of happiness necessarily involves the freedom of thought; "Over himself, over his own body and mind, the individual is supreme."<sup>285</sup> His was a vision of the progressive enlightened development of a society,<sup>286</sup> driven by the

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<sup>282</sup> *Id.* at 727-28.

<sup>283</sup> *Id.* at 728-29 (Harlan, J., *concurring*). Justice Harlan referred to the dicta as "so sweeping a proposition" against the right against unreasonable search.

<sup>284</sup> Edward Imwinkelried & D.H. Kaye, *DNA Typing: Emerging or Neglected Issues*, 76 WASH. L. REV. 413, 421-24 (2001).

<sup>285</sup> John Stuart Mill, *On Liberty*, in *ESSENTIAL WORKS OF JOHN STUART MILL* 263 (Max Lerner, ed., 1961).

<sup>286</sup> George Wright, *Speech in Constitutional Sense*, in *THE FUTURE OF FREE SPEECH LAW* 8 (Quorum Books, 1990).

communication of thoughts of a social nature.<sup>287</sup> According to Alexander Meiklejohn, this encompasses all elements of the arts, sciences and humanities that allow man to improve himself and his ability to govern himself.<sup>288</sup> Mill's development is achieved when these ideas compete in the community:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>289</sup>

*a. Privacy and anonymous speech and association*

*Griswold* outlined freedom of speech facets of privacy categorized under decisional privacy, and cited *Pierce* and *Meyer*. Justice Cortes likewise explored this line, citing *West Virginia Board of Education v. Barnette*,<sup>290</sup> which enjoined a requirement for public school children to salute the flag.

In the context of this market of ideas, the fullness of the “right to be let alone” is the right to be anonymous. As the American Court held:

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.<sup>291</sup>

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all....<sup>292</sup>

This has a parallel in the right to association, as most famously held in *NAACP v. Alabama*.<sup>293</sup> Here, an association of African-Americans resisted the

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<sup>287</sup> *Id.* at 6.

<sup>288</sup> EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 26 (Oxford University Press, 1989), citing Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUPREME CT. REV. 245, 256-57.

<sup>289</sup> *Abrams v. United States*, 250 U.S. 616, 631 (1919) (Holmes, J. & Brandeis, J., *dissenting*), quoted in *Babst v. Nat'l Intelligence Board*, G.R. No. 62992, 132 SCRA 316, 332, Sep. 28, 1984 (Fernando, C.J., *concurring*).

<sup>290</sup> 319 U.S. 625 (1943), cited in CORTES, *supra* note 1, at 35.

<sup>291</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), citing Mill, *On Liberty*, *supra* note 67, at 1, 3-4.

<sup>292</sup> *Talley v. California*, 362 US 60, 66 (1960).

<sup>293</sup> *Nat'l Ass'n for the Advancement of Colored Peoples v. Alabama Ex Rel. Patterson*, 357 U.S. 449 (1958) (cited in *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); CORTES, *supra* note 1, at 39).

compelled production of its membership list on substantive due process grounds because:

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association.... This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. ... Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. (internal citations omitted)<sup>294</sup>

*Griswold* considered this to mean that, “the First Amendment has a penumbra where privacy is protected from governmental intrusion.”<sup>295</sup> Simply, anonymity allows an individual to exchange thoughts in certain ways or regarding certain subjects that he would otherwise be unable to. Professor Michael Froomkin wrote, “The ability to protect a secret, to preserve one’s privacy, is a form of power.”<sup>296</sup>

Modern life has led to other nuances in this zone of privacy surrounding associations. Today, the right to associate with a group is emasculated if stripped of the concurrent right to support it financially.<sup>297</sup> Thus, the American Court ruled:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.<sup>298</sup>

This, too, must be allowed with relative anonymity and without fear of undue publicity. Finally, the Constitution also shelters a right of expression through association. *Roberts v. U.S. Jaycees*<sup>299</sup> held:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.... [T]he constitutional

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<sup>294</sup> *Id.* at 462.

<sup>295</sup> *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

<sup>296</sup> Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1475 (2000).

<sup>297</sup> Emmanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C. J. INT’L L. & COM. REG. 1, 7 (2002), citing David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 248 (1999).

<sup>298</sup> *Buckley v. Valeo*, 424 US 1, 20 (1976).

<sup>299</sup> 468 U.S. 609 (1984).

shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others.<sup>300</sup>

*Roberts* is the leading case on “expressive association,” and this doctrine was expounded on in *Boy Scouts of America v. Dale*.<sup>301</sup> The latter ruled that the Boy Scouts of America could not be forced by the State to reinstate an assistant scoutmaster who was removed after he was discovered to be a homosexual and gay rights activist. That would amount to undue interference into an association’s internal affairs by forcing it to accept a member whose presence would restrict the group’s ability to advocate certain public or private views.

Simply, men need to “retreat in solitude” to think, to speak, and to associate; they need that “private space in which a man may become and remain himself.”<sup>302</sup> Undue disclosures and intrusions into these likewise pierce the “wall between himself and the outside world” and deny “full protection in person and in property.”<sup>303</sup>

To end this section, note the Human Security Act’s impact on the freedom of association. It allows the declaration of a group as a terrorist and outlawed organization, after which the Act’s most powerful provisions may be brought to bear on any of that organization’s members. Specifically, the Act allows wiretapping and surveillance of such organizations’ members, and examination and seizure of individual bank accounts and other financial assets.<sup>304</sup> In addition to the scenario in *NAACP*, one wonders if such power in a certain context may one day prove so coercive that a court might strike down government action to protect members’ autonomy under decisional privacy.<sup>305</sup>

#### *b. Privacy and the public figure doctrine*

With respect to privacy, freedom of speech is important in that it sets out many defenses against the former’s invocation. Dean Prosser wrote that, “At an early stage of its existence, the right of privacy came into head-on collision with the constitutional guaranty of freedom of the press. The result was the slow evolution of a compromise between the two.”<sup>306</sup> He further wrote that, restating Warren and Brandeis, defenses for invasions of privacy included those that would justify alleged libel or slander.<sup>307</sup> The first and most obvious such defense, for example, is consent

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<sup>300</sup> *Id.* at 619.

<sup>301</sup> 530 U.S. 640 (2000).

<sup>302</sup> *CORTES*, *supra* note 1, at 4.

<sup>303</sup> Warren & Brandeis, *supra* note 2, at 193.

<sup>304</sup> Rep. Act No. 9372, §§ 7, 17, 27 (2007).

<sup>305</sup> *See Nader v. General Motors Corp.*, 255 N.E.2d 765, 772 (N.Y. 1970) (Breitel, J., *concurring in result*). The separate opinion in this decision gave credence to the plaintiff’s allegations that a “giant corporation” had embarked on a systematic campaign to harass him and invade his privacy in the hopes of intimidating him and silencing him as a critic.

<sup>306</sup> Prosser, *supra* note 21, at 410.

<sup>307</sup> *Id.* at 421, *citing* Warren & Brandeis, *supra* note 2, at 216.

to publicity or waiver of privacy.<sup>308</sup>

The most important such defense is the public figure doctrine. This holds that public figures, those who by their accomplishments, fame, mode of living, or particular profession have given the public a legitimate interest in their affairs,<sup>309</sup> have a generally decreased expectation of privacy and they will naturally be the subject of discussion, especially in the media. The public figure doctrine is one area where Philippine jurisprudence was arguably ahead of its American counterpart, as pointed out by Chief Justice Fernando.<sup>310</sup> In 1918 – or almost a century before the landmark ruling *New York Times v. Sullivan*<sup>311</sup> – Justice Malcolm wrote:

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.<sup>312</sup>

The public figure doctrine arose from defamation cases, and a public figure, thus, may not sue due to comments regarding his official, public acts absent actual malice. The link connecting defamation to privacy is readily seen, however. For example:

[T]he Court has miscalculated and denigrates that interest at a time when escalating assaults on individuality and personal dignity counsel otherwise.... The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity.<sup>313</sup>

Philippine public figure doctrine, further, is extremely liberal and broader than its American counterpart. It covers four relevant categories:

1. The public official<sup>314</sup>

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<sup>308</sup> Prosser, *supra* note 21, at 419.

<sup>309</sup> *Ayer Prod'ns v. Capulong*, G.R. No. 82380, 160 SCRA 861, Apr. 29, 1988, *citing* PROSSER AND KEETON ON TORTS 854-63 (5th Ed., 1984).

<sup>310</sup> *Phil. Comm'l and Indus. Bank v. Philnabank Employees' Ass'n*, G.R. No. 29630, Jul. 2, 1981. This decision considers Justice Malcolm's famous *ponencia* as analogous to the later *New York Times* rule.

<sup>311</sup> 376 U.S. 254 (1964).

<sup>312</sup> *United States v. Bustos*, 37 Phil. 731 (1918).

<sup>313</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 400, 400 n.42 (1974) (White, J., *dissenting*), *quoting* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1003 (1964).

<sup>314</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *cited in* *In re Jurado*, A.M. No. 93-2-037, 243 SCRA 299, Apr. 6, 1995; *Adiong v. Comm'n on Elections*, G.R. No. 103956, 207

2. The public figure, who enjoys great fame or notoriety or has thrust himself into public view<sup>315</sup>
3. The private figure who has become involved in an issue of public interest<sup>316</sup>
4. The private figure

Unlike in American jurisprudence, the first *three* are subject to the burden of *New York Times* and *Bustos*. This deviation arises in the third category, because Philippine cases have adopted the reasoning of *Rosenbloom v. Metromedia*.<sup>317</sup>

“Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”<sup>318</sup>

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.<sup>319</sup>

In the United States, however, the issue-based determination of public figure status was later rejected in *Gertz v. Richard Welch, Inc.*,<sup>320</sup> which held American jurisprudence firmly to the personality-based determination:

Hypothetically, 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.<sup>321</sup>

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SCRA 712, Mar. 31, 1992; Manila Public School Teachers Ass’n v. Laguio, G.R. No. 95445, Aug. 6, 1991; Salonga v. Pano, G.R. No. 59524, 134 SCRA 438, Feb. 18, 1985.

<sup>315</sup> *Gertz*, 418 U.S. at 336-37, *citing* *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J. *concurring in result*). The Philippine equivalent is found in *Ayer Prod’ns v. Capulong*, G.R. No. 82380, 160 SCRA 861, Apr. 29, 1988, *citing* PROSSER AND KEETON ON TORTS 854-63 (5th Ed., 1984). *Curtis Publishing* was cited in *Lopez v. Ct. of Appeals*, G.R. No. 26549, 34 SCRA 116, Jul. 31, 1970; *Babst v. Nat’l Intelligence Board*, G.R. No. 62992, 138 SCRA 316, Sep. 28, 1984.

However, *Borjal v. Ct. of Appeals*, G.R. No. 126466, 301 SCRA 1, Jan. 14, 1999 points to *Ayer*. *See, however*, *Lagunzad v. Soto Vda. de Gonzales*, G.R. No 32055, 92 SCRA 476, Aug. 6, 1979.

<sup>316</sup> *Borjal*, 301 SCRA 1, 27, *citing* *Rosenbloom v. Metromedia*, 403 U.S. 29, 44-45 (1971).

<sup>317</sup> 403 U.S. 29 (1971).

<sup>318</sup> *Id.* at 41, *quoting* *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

<sup>319</sup> *Rosenbloom*, 403 U.S. at 43.

<sup>320</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Nevertheless, Philippine press freedom cases have just as firmly upheld *Rosenbloom's* treatment of issues of public interest. *Ayer Productions v. Capulong* held:

[T]he right of privacy cannot be invoked to resist publication and dissemination of matters of public interest. The 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.<sup>322</sup>

Finally, in 1999, *Borjal v. Court of Appeals*<sup>323</sup> explicitly cited *Rosenbloom*,<sup>324</sup> strongly expanding Philippine public figure doctrine into something more liberal than the original.

In any case, the first category is well-established in both Philippine and American jurisprudence from *Bustos* to *New York Times*, and the second leaves room for colorful discussion. *Gertz* unified the long line of cases after *New York Times*, and gives two reasons for subjecting a plaintiff to the actual malice requirement:

1. Public figures “may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes 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.”<sup>325</sup>
2. Public figures “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”<sup>326</sup>

The public figure exception to privacy, however, is not an absolute one, and even the most famous celebrities retain privacy over the clearly private facets of their lives. In *Ayer*, now Senator Juan Ponce Enrile was not allowed to prohibit the use of his name in a movie that depicted the EDSA Revolution. Given his highly publicized role in that historic event, his right to privacy could not overcome the filmmakers’ freedom of expression. On the other hand, *Lagunzad* ruled in favor of privacy when it addressed another movie about Negros mayoralty candidate Moises Padilla. This second movie depicted Padilla’s private and family life, and even included a certain Auring as his girlfriend.

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<sup>321</sup> *Id.* at 345. See II JOAQUIN BERNAS, S.J., CONSTITUTIONAL RIGHTS AND SOCIAL DEMANDS: NOTES AND CASES 361 (1996 ed.); JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 259 (1996). “*Rosenbloom*, however, was rejected by *Gertz*...”

<sup>322</sup> *Ayer Prod'ns v. Capulong*, G.R. No 82380, 160 SCRA 861, Apr. 29, 1988.

<sup>323</sup> G.R. No. 126466, 301 SCRA 1, Jan. 14, 1999.

<sup>324</sup> *Id.* at 27 n.30.

<sup>325</sup> *Gertz*, 418 U.S. at 352.

<sup>326</sup> *Id.* at 345.

*Lagunzad* emphasized: “Being a public figure ipso facto does not automatically destroy in toto a person’s right to privacy.”<sup>327</sup> As Warren and Brandeis put it, “Some things all men alike are entitled to keep from popular curiosity, whether in public life or not.”<sup>328</sup>

To end, one must highlight that the foundations of the public figure doctrine in Philippine jurisprudence were also laid by Chief Justice Fernando. He penned *Lopez v. Court of Appeals* and there articulated the *New York Times* doctrine. The original citations to *Curtis Butts Publishing* are in *Lopez* and his *Babst* concurrence. Finally, he articulated the link between the *New York Times* doctrine and the much earlier *Bustos* decision.

### C. THE RIGHT TO PRIVACY IN INTERNATIONAL LAW

The 2006 decision *In re Sabio* outlined:

The meticulous regard we accord to these zones [of privacy] arises not only from our conviction that the right to privacy is a “constitutional right” and “the right most valued by civilized men,” but also from our adherence to the Universal Declaration of Human Rights which mandates that, “no one shall be subjected to arbitrary interference with his privacy” and “everyone has the right to the protection of the law against such interference or attacks.”<sup>329</sup>

Without redirecting the discussion into a tangent that deserves its own article, Philippine decisions also cite international law as giving rise to the right to privacy. While welcome, I infer this is in part forced by a textualist mindset inherently incapable of perceiving the right to privacy in its full breadth, absent textual hooks.<sup>330</sup>

International law features the International Covenant on Civil and Political Rights, or ICCPR,<sup>331</sup> which the Philippines ratified in 1986. Section 17 provides:

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<sup>327</sup> *Lagunzad v. Vda. de Gonzales*, G.R. No. 32066, 92 SCRA 476, 487, Aug. 6, 1979.

<sup>328</sup> Warren & Brandeis, *supra* note 2, at 216.

<sup>329</sup> *In re Habeas Corpus of Camilo L. Sabio*, G.R. No. 174340, 504 SCRA 704, 736, Oct. 17, 2006.

<sup>330</sup> Note *Sabio's* examination of the Constitution: “Our Bill of Rights, enshrined in Article III of the Constitution, provides at least two guarantees that explicitly create zones of privacy. It highlights a person’s ‘right to be let alone’ or the ‘right to determine what, how much, to whom and when information about himself shall be disclosed.’ Section 2 guarantees ‘the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose.’ Section 3 renders inviolable the ‘privacy of communication and correspondence’ and further cautions that ‘any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.’”

<sup>331</sup> G.A. Res. 2200A (XXI), art. 19(2), U.N. GAOR, 21st Sess., 1496th plen. Mtg., U.N. Doc. A/6316 (Dec. 16, 1966).

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Further, article 12 of the Universal Declaration of Human Rights, or UDHR, provides:

No 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.<sup>332</sup>

A number of other international instruments cite the right to privacy, including the Convention on the Rights of the Child, the Convention on Migrant Workers, the European Convention for the Protection of Human Rights, the American Convention on Human Rights, and the American Declaration on the Rights and Duties of Mankind.<sup>333</sup>

It is not yet settled whether the right to privacy expressed in the provision has attained the status of international customary law. Without belaboring the point, though, if it has, then the incorporation clause applies to it. If it has not, judges may still use it to help interpret other provisions, or treat it as soft law.<sup>334</sup> Further, the country's treaty obligations, such as the ICCPR, are a wholly different source of authority.

Finally, note the exact wording of article 8 of the European Convention of Human Rights:

Everyone has the right to respect for his private and family life, his home and his correspondence.

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<sup>332</sup> G.A. Res. 217 (III), U.N. GAOR, 3rd Sess., Supp. No. 13, U.N. Doc. A/810 71 (Dec. 12, 1948).

<sup>333</sup> Note, however, that the African Charter on Human and People's Rights does not contain a similar provision on privacy.

<sup>334</sup> See, e.g., Restatement (Third) of Foreign Relations Law § 702, comment m (1987). "All the rights proclaimed in the Universal Declaration and protected by the principal International Covenants are internationally recognized human rights, but some rights are fundamental and intrinsic to human dignity. . . . These include, for example, systematic harassment, invasions of the privacy of the home . . . denial of basic privacy such as the right to marry and raise a family. . . .; and invidious racial or religious discrimination. A state party to the Covenant on Civil and Political Rights is responsible even for a single, isolated violation of any of these rights; any state is liable under customary law for a consistent pattern of violations of any such right as state policy."

As will be discussed in the section on transsexuals, this provision has been interpreted to protect an individual's right to personal autonomy. This draws textual support for decisional privacy from a provision similar in wording to the right against unreasonable search.

One would do well to keep all this in the background of one's mind.

#### D. THE RIGHT TO PRIVACY IN THE CIVIL CODE AND OTHER STATUTES

One recalls that the influential articles by Warren and Brandeis and by Prosser were actually tort law articles. No study of privacy is complete without an integration of its root tort doctrines. First, the Constitutional right to privacy is deemed derived from explicit rights in the Bill of Rights, but the latter is a restraint directed solely against the government. Many analogous applications of privacy doctrine against private actors are easily grounded in Civil Law, however, excepting mainly decisional privacy, since only the State wields police power.

Second, the border between public and private act in privacy is porous. The interplay is readily seen in cases such as *Ayer* and *Lagunzad*, where private parties' claims had to be set against constitutional values. One case even featured academic freedom as a defense against a privacy tort claim.<sup>335</sup>

Finally, some aspects of privacy doctrine are more developed in tort law than in Constitutional law, yet are readily applicable the moment one replaces the private actor with a State agent. It must further be argued that tort law sheds further light on values protected by privacy but hardly highlighted in Constitutional Law.

Again, *Ople* detailed specific statutory zones of privacy:

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.<sup>336</sup>

With respect to the Civil Code, as highlighted by Justices Cortes and

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<sup>335</sup> *Univ. of the Phils. v. Ct. of Appeals*, G.R. No. 97827, 218 SCRA 728, Feb. 9, 1993.

<sup>336</sup> *Ople v. Torres*, G.R. No. 127685, 293 SCRA 141, 157, Jul. 23, 1998.

Carpio, privacy is primarily protected by the untapped potential that is article 26:

Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:

- (1) Prying into the privacy of another's residence;
- (2) Meddling with or disturbing the private life or family relations of another;
- (3) Intriguing to cause another to be alienated from his friends;
- (4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.

One must not discount the Code's other provisions, however. Article 32 penalizes private violations of the constitutional rights from which privacy arises, most importantly the rights against unreasonable search and to the privacy of correspondence. The Revised Penal Code also provides for the civil aspects of privacy violations penalized as felonies, such as the revelation of secrets by a public officer, trespass to dwelling, and discovery and revelation of secrets.<sup>337</sup>

### 1. Privacy and state action

Before discussing privacy in Civil Law, one must clarify the state action threshold applicable to privacy cases. Again, observing cases such as *Ayer*, one sees private claims decided as Constitutional cases influenced by tort law. Even Dean Cortes wrote of a number of situations that do not on surface involve the State, such as picketing in front of residences. With respect to privacy, she emphasized:

[T]he enumeration of the rights of the in the constitution should not solely be a limitation upon government, but that "the government must take positive steps to implement them."<sup>338</sup>

In general, private parties are deemed to carry the burden of upholding certain fundamental rights. With respect to freedom of speech, for example, *Prune Yard Shopping Center v. Robins*<sup>339</sup> required a mall owner to reasonably allow the distribution of handbills on its premises:

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<sup>337</sup> REV. PEN. CODE, arts. 229-30, 280-81, 290-92.

<sup>338</sup> CORTES, *supra* note 1, at 69. Dean Cortes specifically referred to violations of the right against unreasonable search by nonstate parties. "For 'judicial acceptance of privately seized evidence may be sufficient governmental involvement for a finding of unconstitutional state action.' For this reason, it is contended that whether the search is done by a private party or by public authority, the search violates individual privacy...." *Id.*

<sup>339</sup> 447 U.S. 74 (1980).

[A] State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.

Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights.<sup>340</sup>

On the other hand, the 2004 decision *Agabon v. National Labor Relations Comm'n*<sup>341</sup> reiterated that dismissals of employees without due process do not violate the Constitution because no state action is involved, although it forms a basis for nominal damages for the breach of statutory due process under labor regulations.

As Dean Cortes pointed out, the state action requirement is of particular importance in the context of unreasonable search, since traditional thinking might allow a claim for damages against a private party, but nevertheless allow the admission of evidence collected by that private party in violation of the right. The last decade's worth of cases are inconsistent.

On one hand, the 1999 decision *People v. Mendoza*,<sup>342</sup> based on the rule in *People v. Marti*,<sup>343</sup> allowed the admission of documents discovered by the accused's father-in-law, a private citizen. *Marti* was similarly applied in *Waterous Drug Corp. v. National Labor Relations Comm'n*,<sup>344</sup> which held that a check in an envelope opened by another employee was admissible as evidence, and that the proper remedy was to pursue criminal and civil liabilities. *Marti's* reasoning was simple:

To agree with appellant that an act of a private individual in violation of the Bill of Rights should also be construed as an act of the State would result in serious legal complications and an absurd interpretation of the constitution.<sup>345</sup>

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<sup>340</sup> *Id.* at 81, 83. The California Supreme Court decision appealed from noted: "It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center there]." Note, however, that the *Prune Yard* Court found that the California Court had granted the handbillers in that case broader rights under the State constitution than those found under the United States Constitution.

<sup>341</sup> G.R. No. 158693, 442 SCRA 573, Nov. 17, 2004, *modifying* *Serrano v. Nat'l Lab. Rel. Comm'n*, G.R. No. 117040, 323 SCRA 445, Jan. 27, 2000.

<sup>342</sup> G.R. No. 109279, 301 SCRA 66, Jan. 18, 1999.

<sup>343</sup> G.R. No. 81561, 193 SCRA 57, Jan. 18, 1991.

<sup>344</sup> G.R. No. 113271, 280 SCRA 735, Oct. 16, 1997.

<sup>345</sup> *Marti*, 193 SCRA 57, 68. *Agabon* features the same reasoning.

On the other hand, the 1996 decision *Zulueta v. Court of Appeals*<sup>346</sup> declared inadmissible documents obtained by a wife by forcibly opening cabinets and drawers in her husband's office:

Indeed the documents and papers in question are inadmissible in evidence. The constitutional injunction declaring "the privacy of communication and correspondence [to be] inviolable" is no less applicable simply because it is the wife (who thinks herself aggrieved by her husband's infidelity) who is the party against whom the constitutional provision is to be enforced. The only exception to the prohibition in the Constitution is if there is a "lawful order [from a] court or when public safety or order requires otherwise, as prescribed by law." *Any violation of this provision renders the evidence obtained inadmissible "for any purpose in any proceeding."*

The intimacies between husband and wife do not justify any one of them in breaking the drawers and cabinets of the other and in ransacking them for any telltale evidence of marital infidelity. A person, by contracting marriage, does not shed his/her integrity or his right to privacy as an individual and the constitutional protection is ever available to him or to her. (emphasis added)<sup>347</sup>

Finally and parenthetically, *Suarez v. National Labor Relations Comm'n*<sup>348</sup> involved dismissed employees who complained of a search of their tables, drawers, and persons by the company's security guards. The question was not taken up by the Court, however, because it was not raised before the arbiter.

All these cases squarely invoked privacy, and the state action is clear because a court would have admitted the documents these cases revolved around as evidence. Although *Mendoza* and *Waterous Drug* were promulgated later, it is difficult to discount *Zulueta* because it was penned by no less a constitutional heavyweight than Justice Mendoza. At the very least, one concludes that when a court recognizes the intentional, forcible seizure of documents even by a private person, it would be abhorrent for the same court to nevertheless allow their use in a judicial proceeding.<sup>349</sup>

Such conclusions are important when identifying state action and the precise privacy value sought to be protected. Again, *Ty* and *Krohn* may be criticized as sanctioning the disclosure of confidential information in a public trial. Warren and Brandeis were concerned with the increasing use of portable cameras, while Dean Cortes was concerned with computer databases. With such advances in technology, it must be emphasized that civil claims may be too cumbersome or even ineffective in protecting privacy, especially given minor but pervasive violations, hence Justice Cortes's note not to apply the state action threshold so

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<sup>346</sup> G.R. No. 107383, 253 SCRA 699, Feb. 20, 1996.

<sup>347</sup> *Id.* at 704.

<sup>348</sup> G.R. No. 124723, 293 SCRA 496, Jul. 31, 1998.

<sup>349</sup> Drawn in part from the author's conversations with Justice Mendoza in 2005.

rigidly.

## 2. The privacy torts

Although privacy violations may be pleaded as many different torts depending on the actual circumstances, the main tort remedies are the privacy torts proposed by Dean Prosser and recognized by both Justices Cortes and Carpio as readily encompassed by article 26. There are four main privacy torts:

1. Intrusion upon the 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 a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.<sup>350</sup>

Some readily conform to facets of the constitutional privacy doctrines, but not all do. It is proposed that Dean Prosser's privacy tort categorization is an easier framework for discussion than article 26, because it is easier to segregate the specific privacy values protected in the former organization. In addition, however, one must discuss a broader tort singled out by Justice Carpio as *Philippine Law Journal* Chair and discussed by him in jurisprudence decades later:

5. Infliction of mental distress.

### *a. Intrusion into seclusion*

Warren and Brandeis were primarily motivated by an emerging media paparazzi core, and did not appear to envision intrusions in themselves as their primary privacy violations.<sup>351</sup> Nevertheless, such intrusions dovetail perfectly with informational privacy in Constitutional Law. Again, *Whalen* pointed to two aspects of informational privacy: 1) the right of an individual not to have private information about himself disclosed; and 2) the right of an individual to live freely without surveillance and intrusion.<sup>352</sup> The first privacy tort of intrusion into seclusion is the latter's Civil Law counterpart.

Intrusion into seclusion is wholly independent from any disclosure or publication of information obtained through the intrusion. The crux is not even aggravated mental distress. Its essence is the trespass into a zone of privacy, or the

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<sup>350</sup> Carpio, *supra* note 20, at 687-90.

<sup>351</sup> Prosser, *supra* note 21, at 389.

<sup>352</sup> *Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977).

“interruption of ‘mental peace.’”<sup>353</sup> The Restatement of Torts articulates this as:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.<sup>354</sup>

Dean Prosser, finally, explained that:

[T]he interest protected by this branch of the tort is primarily a mental one. It has been useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights.<sup>355</sup>

Dean Prosser and Justice Carpio cited as examples tortuous intrusions into a home,<sup>356</sup> a hotel room,<sup>357</sup> a stateroom aboard a ship,<sup>358</sup> and a search of a shopping bag inside a store.<sup>359</sup> There is, however, scant Philippine jurisprudence on such intrusions analogous to article 26(1). The closest is *United States v. Reyes*,<sup>360</sup> where the bags and car of a United States Navy Exchange Filipina employee was “recklessly and oppressively” searched outside the establishment, attracting the attention of curious onlookers. This was done pursuant to an American supervisor’s instructions, who was sued in her private capacity. While the Court upheld the suit and award of PHP450,000, it merely stated that the defendant had “violated, impaired and undermined the plaintiff’s liberty guaranteed by the Constitution.” This was likely a reference to article 32(9), or the Civil Code equivalent of the right against unreasonable search, though it must be emphasized that article 26(1) is arguably broader and goes beyond the concept of a search.

*Zulueta* might have been another fertile factual milieu.<sup>361</sup> However, the issues there were solely the return of the documents and their disallowance as evidence.

In article 26’s broader context, the most common Philippine application to date is perhaps harassment. Justice Carpio noted the Court of Appeals decision *Equitable Banking Corp. v. Rizal Insurance & Surety Co., Inc.*,<sup>362</sup> where a music teacher

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<sup>353</sup> Bernard Jacques, *Common Law Right to Privacy in an Employment Context*, 748 PLI/PAT 583, 589 (2003).

<sup>354</sup> Restatement (Second) of Torts, § 652B (1977).

<sup>355</sup> Prosser, *supra* note 21, at 392.

<sup>356</sup> *Young v. Western & A.R. Co.*, 148 S.E. 414 (1929); *Walker v. Whittle*, 64 S.E.2d 87 (1951); *Welsh v. Pritchard*, 241 P.2d 816 (1952).

<sup>357</sup> *Newcomb Hotel Co. v. Corbett*, 108 S.E. 309 (1921).

<sup>358</sup> *Byfield v. Candler*, 125 S.E. 905 (1924).

<sup>359</sup> *Sutherland v. Kroger Co.*, 110 S.E.2d 716 (W.Va. 1959).

<sup>360</sup> G.R. No. 79253, 219 SCRA 192, Mar. 1, 1993.

<sup>361</sup> *See supra* text accompanying note 348.

<sup>362</sup> 11 CAR 774, *cited in* Carpio, *supra* note 20, at 689.

was sent several demand letters by a bank even after she had informed it that she had not executed the promissory note referred to in the letters. Worse, she was later included as a co-defendant in a suit filed by the bank. The decision held such harassment analogous to article 26(2), or “Meddling with or disturbing the private life or family relations of another.” Of course, the intrusion must be reasonably offensive, and “there is no tort when the landlord stops by on Sunday morning to ask for the rent.”<sup>363</sup>

Another possible factual milieu for article 26(2) might have been *Tenchavez v. Escano*,<sup>364</sup> where a couple became estranged almost as soon as they were clandestinely wed, and the wife eventually obtained a divorce in the United States and married an American. The husband filed a million-peso suit, in 1965, against the wife’s parents for alienation of affection and against the Roman Catholic Church for annulling their marriage. There was no explicit reference to article 26, however, and the Court pronounced a twist in the plot:

Plaintiff Tenchavez, in falsely charging Vicenta’s aged parents with racial or social discrimination and with having exerted efforts and pressured her to seek annulment and divorce, unquestionably caused them unrest and anxiety, entitling them to recover damages. While this suit may not have been impelled by actual malice, the charges were certainly reckless in the face of the proven facts and circumstances. Court actions are not established for parties to give vent to their prejudices or spleen.<sup>365</sup>

Note that an invasion of privacy claim may be distinct from a claim of alienation of affections.<sup>366</sup>

Many American applications of the tort deal with surveillance, and note *Ramirez v. Court of Appeals*<sup>367</sup> upheld a suit arising from a conversation’s surreptitious taping. The tort formulation is simpler than the unreasonable search framework in that, again, one need not quibble over whether or not there is in fact a search.<sup>368</sup> One need only establish intrusion into a private zone, and doctrines such as the *Katz* and *Silverman* tests and the public figure doctrine help establish the latter.

The general rule is simply that there can be no intrusion in what the reasonable man considers a public place, particularly parks and streets. One may readily take photographs of people in such places, for example, because “this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to

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<sup>363</sup> Prosser, *supra* note 21, at 391, *citing* Horstman v. Newman, 291 S.W.2d 567 (Ky. 1956).

<sup>364</sup> G.R. No. 19671, 15 SCRA 355, Nov. 29, 1965.

<sup>365</sup> *Id.* at 366.

<sup>366</sup> *See, e.g.*, O’Neil v. Schuckardt, 733 P.2d 693 (Idaho 1986).

<sup>367</sup> G.R. No. 93833, 248 SCRA 590, Sep. 28, 1995.

<sup>368</sup> *See supra* text accompanying note 263.

see.”<sup>369</sup> This is not, however, absolute.

One important exception is that persons retain a limited right to privacy even in public, such that undue focus on a person even in a public place may amount to harassment, and there is a distinction between casual observation and surveillance or stalking. The latter was recognized in *Nader v. General Motors Corp.*<sup>370</sup> The plaintiff not only alleged that the corporation’s agents had been attempting to uncover embarrassing information about him, but that there had been an intent to give him an unnerving and even destabilizing feeling of being watched.<sup>371</sup> The Court stated:

[S]urveillance may be so ‘overzealous’ as to render it actionable. ... A person does not automatically make public everything he does merely by being in a public place.... On the other hand, if the plaintiff acted in such a way as to reveal that fact to any casual observer, then, it may not be said that the appellant intruded into his private sphere.<sup>372</sup>

In a manner of speaking, thus, a person retains a sense of anonymity and privacy as one man in a crowd. Note that the concurrence in *Nader* added that minor acts directed at someone in a public place might readily become objectionable when committed repeatedly or, worse, systematically.<sup>373</sup>

As Justice Cortes hinted by opening her landmark essay with notes from sociology and anthropology, it must be noted that privacy standards differ across cultures. Some European privacy tort benchmarks may be more aptly calibrated for East Asian cultures such as the Philippines’. European law, for example, affords more protection to people even in public places, and with respect to photographs, has long held that photographs that focus on persons in public places may not be published without their consent.<sup>374</sup> American doctrine is not as protective.<sup>375</sup>

Another important exception is that some acts are simply deemed private even if performed in public. Breastfeeding and inadvertent breast exposure while doing so are deemed private no matter where performed, especially when performed publicly by necessity.<sup>376</sup> Urination is another such activity.<sup>377</sup> In Germany, further, “it is a matter of ordinary politeness that nude people have a

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<sup>369</sup> Prosser, *supra* note 21, at 392.

<sup>370</sup> 255 N.E.2d 765 (N.Y. 1970).

<sup>371</sup> *Id.* at 772 (Breitel, J., *concurring in result*).

<sup>372</sup> *Id.* at 771.

<sup>373</sup> *Id.* at 772 (Breitel, J., *concurring in result*).

<sup>374</sup> James Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1179 (2004).

<sup>375</sup> Prosser, *supra* note 21, at 395.

<sup>376</sup> Alice Clapman, Note, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 YALE L.J. 1545, 1555-56 (2003), *citing* Restatement (Second) of Torts, § 652B illus.10 (1977).

<sup>377</sup> *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 635 (1989).

right not to be stared at.”<sup>378</sup> There, a Munich man sued a newspaper over the publication of a photo showing him naked, but failed to collect damages because his genitals had not been shown. The German court emphasized, however, a principle that people naked in public have a right to control such publication as much as clothed people.<sup>379</sup> Again, American doctrine is more liberal towards the press and, for example, one case provided no relief against a man photographed in a marketplace while embracing his wife.<sup>380</sup> However, another case did uphold a claim by a woman who was photographed just as wind blew her skirt upwards and revealed her body from the waist down, stating that:

To hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust.<sup>381</sup>

Finally, it is argued a relaxation of privacy before a restricted audience should not amount to a decreased expectation of privacy with respect to the general public. For example, actor Kirk Douglas successfully sued regarding the public exhibition of antics captured in a home movie made for the benefit of friends.<sup>382</sup>

*b. Public disclosure of private facts*

This brand of disclosure, the kind done by overzealous press photographers and primarily bewailed by Warren and Brandeis, forms the Civil Code counterpart of *Whalen's* other informational privacy prong. As with intrusion into seclusion, the facts disclosed must from a private zone. Additionally, however, there must be an element of communication to the public, beyond an individual or small group.<sup>383</sup> The Restatement articulates:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.<sup>384</sup>

Disclosure is distinct from, but can be complementary to, intrusion, and the former primarily protects reputation. Dean Prosser considers it an “extension of defamation” and a remedy of “the deficiencies of defamation actions, hampered as they are by technical rules inherited from ancient and long forgotten jurisdictional

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<sup>378</sup> Whitman, *supra* note 376, at 1201.

<sup>379</sup> Bildveröffentlichung eines nackten Sonnenbaders, 1986 Archiv für Presserecht 69. These kinds of suits, however, have failed in France. ANDRE BERTRAND, DROIT A LA VIE PRIVEE ET DROIT A L'IMAGE 160-61 (1999), *cited in* Whitman, *supra* note 376, at 1201.

<sup>380</sup> Gill v. Hearst Publishing Co., 253 P.2d 441 (1953)

<sup>381</sup> Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 1964).

<sup>382</sup> Douglas v. Disney Prod'ns, *cited in* Prosser, *supra* note 21, at 417. *See* Whitman, *supra* note 376, at 1179.

<sup>383</sup> Prosser, *supra* note 21, at 393.

<sup>384</sup> Restatement (Second) of Torts, § 652D (1977).

conflicts.”<sup>385</sup> Unlike in defamation, thus, malice and truthfulness are not as relevant.

The relevant doctrines may be culled from intrusion into seclusion and broader free speech rules. Note, however, that the matter has to be private, but not necessarily secret. *Brents v. Morgan*<sup>386</sup> recognized a violation when a man put up a five by eight foot placard on his window announcing that his neighbor owed him money and “if promises would pay an account, this account would have been settled long ago.”<sup>387</sup> Neither did the matter have to be private at all times in the sense that a sensitive matter made public once remains public for all time. *Mehin v. Reid*<sup>388</sup> found a violation when a movie *The Red Kimono* revealed the past life of a prostitute who had given up the trade after being acquitted of murder. The movie had even used her actual name. It would seem, however, that the particular matter in relation to societal mores is important. *Sidis v. F.R. Publishing Corp.*<sup>389</sup> found no violation when a magazine featured a former child prodigy who had disappeared into obscurity. William James Sidis had lectured eminent mathematicians at eleven and graduated from Harvard at sixteen, but later shunned publicity and became a bookkeeper. Although the anguish caused by the renewed publicity contributed to his early death, the matter of his former potential was deemed of public interest.

*c. False light in the public eye*

The false light tort has the distinction of being the only one explicitly upheld on the basis of article 26 by the Philippine Supreme Court. False light is similar to disclosure except that the former involves a false or made-up matter, while the latter involves truth. Both seek to protect reputation.<sup>390</sup> The Restatement articulates:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.<sup>391</sup>

Dean Prosser traces the tort to a successful suit by George Gordon, Lord Byron enjoining “the circulation of a spurious and inferior poem attributed to his pen”<sup>392</sup> in 1816. It enjoys a significant overlap with defamation, and often but not always, both causes of action should lie. Perhaps because of this, false light torts are the most explicitly observed in Philippine jurisprudence, although they may not

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<sup>385</sup> Prosser, *supra* note 21, at 398.

<sup>386</sup> 299 S.W. 967 (1927).

<sup>387</sup> *Id.* at 968.

<sup>388</sup> 297 P. 91 (1931).

<sup>389</sup> 113 F.2d 806 (2nd Cir. 1940).

<sup>390</sup> Prosser, *supra* note 21, at 400.

<sup>391</sup> Restatement (Second) of Torts, § 652E (1977).

<sup>392</sup> Prosser, *supra* note 21, at 398, *citing* Lord Byron v. Johnston, 35 Eng. Rep. 851 (1816).

necessarily be denominated as privacy claims.

One need look no further than Chief Justice Fernando's classic *Lopez v. Court of Appeals*,<sup>393</sup> although this was framed purely as a defamation suit. Here, *This Week Magazine* featured a story about one Fidel Cruz who was responsible for the "hoax of the year" when he sent a distress signal from the Babuyan Islands to a passing United States Army plane, and then sent urgent messages to Manila regarding killings that had been taking place. When Army rangers arrived, however, they found that Cruz was a sanitary inspector who merely wanted transport to Manila. In reporting this sensational story, however, the magazine inadvertently used the picture of another Fidel Cruz, a businessman whose photograph was also on file. Although *Lopez* upheld the *New York Times* doctrine and found no actual malice on the magazine's part, it awarded a reduced sum of PHP1,000 considering it was a weekly publication and did not face the pressure of daily deadlines. Taking Dean Prosser's comment regarding the sometimes irrelevant technicalities embedded in the defamation framework, perhaps false light, which does not demand actual malice, would have yielded the same result.

The distinction between the defamation and the false light torts are readily seen, however, in *St. Louis Realty Corp. v. Court of Appeals*, which was decided purely as a privacy tort and explicitly under article 26.<sup>394</sup> Here, St. Louis Realty published an advertisement for their subdivision project Brookside Hills, and obtained the permission of the Arcadio couple to use photographs of their house and family. Similar to *Lopez*, the advertisement featured photos of the Arcadios mistakenly coupled with a photograph of the house of Dr. Conrado Aramil. The latter wrote the corporation:

I have had (sic) invited in several occasions numerous medical colleagues, medical students and friends to my house and after reading your December 15 advertisement some of them have uttered some remarks purporting doubts as to my professional and personal integrity. Such sly remarks although in light vein as "it looks like your house," "how much are you renting from the Arcadios?," "like your wife portrayed in the papers as belonging to another husband," etc., have resulted in no little mental anguish on my part.<sup>395</sup>

Especially because, unlike in *Lopez*, the advertiser did not make an immediate apology and correction, the Court affirmed the award of damages due to invasion of privacy, stating:

Persons, who know the residence of Doctor Aramil, were confused by the distorted, lingering impression that he was renting his residence from Arcadio or that Arcadio had leased it from him. Either way, his private life

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<sup>393</sup> G.R. No. 26549, 34 SCRA 116, Jul. 31, 1970.

<sup>394</sup> G.R. No. 46061, 133 SCRA 179, Nov. 14, 1984.

<sup>395</sup> *Id.* at 180.

was mistakenly and unnecessarily exposed. He suffered diminution of income and mental anguish.<sup>396</sup>

The distinction of false light from libel was again explicitly upheld in *Concepcion v. Court of Appeals*.<sup>397</sup> Here, Rodrigo Concepcion had made constant accusations against Nestor Nicolas of having an affair with his business partner, to the point that the latter could no longer face his neighbors due to shame, his partner stopped contributing capital to the business, and his wife quarreled with him over his alleged infidelity. Petitioner Concepcion assailed the legal basis for the award, explicitly claiming he had committed neither defamation nor privacy violations under article 26. The Court rejected this and focused on article 26, discussing the Civil Code's intent to exalt the "sacredness of human personality."<sup>398</sup> In *Concepcion*, in fact, one sees how the award is readily grounded in article 26 even if the elements of defamation or even the precise elements of the American false light tort are absent.

Finally, *University of the Philippines v. Court of Appeals*<sup>399</sup> featured another case grounded purely on article 26 and not on defamation. It dealt with claims by Manuel Elizalde against two UP professors for allegedly depriving him of peace of mind and defiling the Tasadays' dignity and personality. The latter were alleged cave dwellers in Mindanao, but the professors stated in conferences and documentaries that they were actually Manobo and T'boli tribesmen asked by Elizalde to pose as primitives. Although the 1993 decision dealt only with a procedural issue and remanded the case, the Court did not find the invocation of article 26 by Elizalde baseless or improper.

Considering the false light tort's unassailable basis in Philippine jurisprudence, one repeats Dean Prosser's original comment that it "go[es] considerably beyond the narrow limits of defamation, and no doubt [has] succeeded in affording a needed remedy in a good many instances not covered by the other tort."<sup>400</sup>

#### *d. Appropriation*

Appropriation is perhaps the easiest privacy tort to visualize, but has spawned complex doctrines that touch on the freedom of speech and intellectual property law. At heart, it is a right of exclusivity that allows an individual to control the use of his name and likeness as symbols of his identity.<sup>401</sup> The Restatement's articulation is quite simple:

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<sup>396</sup> *Id.* at 183.

<sup>397</sup> G.R. No. 120706, 324 SCRA 85, Jan. 31, 2000. Unfortunately, the brief decision did not cite earlier article 26 cases as precedents.

<sup>398</sup> *Id.* at 94

<sup>399</sup> G.R. No. 97827, 218 SCRA 728, Feb. 9, 1993.

<sup>400</sup> Prosser, *supra* note 21, at 400-01.

<sup>401</sup> *Id.* at 406.

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.<sup>402</sup>

Analyzing the underlying value, this tort goes deeper to the crux of privacy, and seeks to protect the kernel of uniqueness that is an individual's personality. A name may not sound pleasant and a likeness may not be beautiful, but a person embraces his identity as his own and feels violated at an intimate level when such is appropriated by another.

The tort of appropriation became the famous early test case for Warren and Brandeis in *Roberson v. Rochester Folding Box Co.*,<sup>403</sup> where the defendant used a beautiful young lady's picture on his product, along with the legend, "The Flour of the Family." The New York Court of Appeals narrowly rejected the suit 4-3, arguing it would encourage absurd litigation regarding, for example, comments regarding another's looks. It conceded, however, that privacy might be a proper matter for legislation, which did not yet exist. The decision triggered widespread public disapproval and New York did in fact enact a law against using another's name or portrait as advertisements or in trade.

The dissent argued that it was inconceivable for the woman to suffer the "mortifying notoriety"<sup>404</sup> of such publicity without recourse to the judiciary. Three years later, however, the dissent inspired the unanimous Georgia decision *Pavesich v. New England Life Insurance Co.*<sup>405</sup> This upheld a claim against the use of the plaintiff's picture in a newspaper advertisement for life insurance, and went so far as to proclaim that later lawyers would be shocked at judges' denials of privacy's existence in the same way that generation stood shocked by the burning of women at the stake for witchcraft.

The tort of appropriation, however, is complicated by the offshoot right of publicity, which mandates a similar exclusivity over one's likeness, but for commercial purposes. "The right of publicity concerns itself with injuries to the pocketbook while the right of privacy concerns itself with injuries to the psyche."<sup>406</sup> The right of publicity thus has a property basis that finds wider application today than the property basis,<sup>407</sup> and treats one's identity as a valuable asset, as seen in countless celebrity endorsements. Following this economic rationale, individuals are encouraged to invest in a famous and desirable identity. People are disallowed from

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<sup>402</sup> *Id.*

<sup>403</sup> 64 N.E. 442 (N.Y. 1902).

<sup>404</sup> *Id.* at 450 (Gray, J., *dissenting*).

<sup>405</sup> 50 S.E. 68 (Ga. 1905).

<sup>406</sup> Sarah Kinsky, *Publicity Dilution: A Proposal for Protecting Publicity Rights*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 347, 364 (2005) (citing I J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 5:61 (2nd ed. 2000)). This article, incidentally, proposes to apply trademark doctrine to the right of publicity, in a sense going back to Warren and Brandeis, who incorporated an intellectual property discussion in the original article.

<sup>407</sup> *Id.* at 349.

using others' identities without consent, reaping the benefits without reward to the owner's investment and diluting the identity's value by increasing its availability.

This commercial right, independent of the right to privacy, was recognized by the United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>408</sup> This affirmed a human cannonball's suit against a television station that aired his fifteen-second performance, from the time he exited the cannon to the time he landed in a net two hundred feet away, because it threatened the economic value of his act beyond merely reporting on it. Today, roughly twenty-eight American states recognize a right of publicity, though some recognize it as part of common law,<sup>409</sup> and the right is now part of the Restatement of Unfair Competition:

One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for relief.<sup>410</sup>

The distinction between the original privacy right and the right of publicity was emphasized when the Second Circuit first articulated the latter in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>411</sup> Here, a major league baseball player had granted exclusive rights over his photograph to a gum company. A competing gum company, however, used the same photograph then argued the original company could not bring a privacy claim against it, privacy being a personal right. *Haelan* thus recognized an economic value in the exclusive right to use the photograph distinct from the player's privacy right. This distinction is easy to visualize when one notes that celebrities should not be expected to lose peace of mind because their names and likenesses are widely known, but they are precisely the individuals protected by the right of publicity. "*Haelan* thus was the start of a judicial and legislative movement delineating an economic right in one's persona distinct from the right of privacy or any of the other cognates and analogues in tort law."<sup>412</sup>

In the United States, the rights to privacy and of publicity have been confused and intermingled,<sup>413</sup> but the distinct bases of the two have been crucial in lawsuits. *PETA v. Bobby Berosini Ltd.*,<sup>414</sup> for example, involved a suit by an animal trainer for defamation and invasion of privacy against animal rights activists who

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<sup>408</sup> 433 U.S. 532 (1977).

<sup>409</sup> Claire Gorman, Notes and Comments, *Publicity and Privacy Rights: Evening Out the Playing Field For Celebrities and Private Citizens in the Modern Game of Mass Media*, 53 DEPAUL L. REV. 1247, 1259 (2004).

<sup>410</sup> Restatement (Third) of Unfair Competition, § 46 (1995).

<sup>411</sup> 202 F.2d 866 (2nd Cir. 1953).

<sup>412</sup> Sheldon Halpern, Book Review, *The Commercial Appropriation of Personality*, 13 DUKE J. COMP. & INT'L L. 381, 382 (2003).

<sup>413</sup> Gorman, *supra* note 411, at 1251.

<sup>414</sup> *People for the Ethical Treatment of Animals v. Bobby Berosini Ltd.*, 895 P.2d 1269 (1995).

secretly taped him mistreating animals and used the tape in their activities. The suit was dismissed, however, because it was framed as a claim to recover whatever was earned in fundraising activities through the use of the tape instead of as a claim to soothe his peace of mind because of the intrusion.

Without discussing the complex discussion and criticism of the right of publicity, it must be emphasized that it and the tort of appropriation collide head-on with the freedom of expression. For example, the Sixth Circuit recently held that a song named after civil rights figure Rosa Parks was not protected by the latter.<sup>415</sup>

Free speech doctrines such as the public figure doctrine work to avoid a chilling effect caused by the two rights against appropriation, and this was already seen in Philippine constitutional cases such as *Ayer* and *Lagunzad*. In fact, I assert *Lagunzad* as laying a basis to invoke appropriation in the Philippines. *Lagunzad*, again, is cited for its holding that public figures retain a right to privacy over their lives' purely private aspects, but note that the case involved no disclosure of private information. Rather, it dealt with a certain control over information disclosed, and the actual holding reads:

As held in *Schuyler v. Curtis*, "a privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased."

...Being a public figure *ipso facto* does not automatically destroy in toto a person's right to privacy. The right to invade a person's privacy to disseminate public information does not extend to a fictional or novelized representation of a person, no matter how public a figure he or she may be. In the case at bar, while it is true that petitioner exerted efforts to present a true-to-life story of Moises Padilla, petitioner admits that he included a little romance in the film because without it, it would be a drab story of torture and brutality.<sup>416</sup>

Finally, it must be recalled that Warren and Brandeis discussed a "common-law right to intellectual and artistic property"<sup>417</sup> that allowed an individual the exclusive right to publicize his thoughts as found in his papers and compositions. This, however, is now protected by the Intellectual Property Code's zone of privacy as recognized in *Ople*, and the right against unreasonable search and privacy of correspondence and their Civil Law analogs.

*e. Infliction of mental distress*

Finally, I note that with respect to article 26, Justice Carpio outlined a right

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<sup>415</sup> Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003).

<sup>416</sup> Lagunzad v. Soto Vda. de Gonzales, G.R. No 32055, 92 SCRA 476, 487, Aug. 6, 1979, quoting Schuyler v. Curtis, 147 N.Y. 434 (1895).

<sup>417</sup> Warren & Brandeis, *supra* note 2, at 198.

to peace of mind and a consequent tort of infliction of mental distress that can be used with the articulated privacy torts and is in fact broader than privacy. This is useful when one recalls that article 26 is itself very broad and imposes no rigid framework or precise elements, and its enumeration is hardly even exclusive. One recalls the Code Commission's commentary:

The privacy of one's home is an inviolable right. Yet the laws in force do not squarely and effectively protect this right.

The acts referred to in No. 2 are multifarious, and yet many of them are not within the purview of the law in force. Alienation of the affection of another's wife or husband, unless it constituted adultery or concubinage, is not condemned by the law, much as it may shock society. There are numerous acts, short of criminal unfaithfulness, whereby the husband or the wife breaks the marital vows, thus causing untold moral suffering to the other spouse. Why should not these acts be the subject matter of a civil action for damages? In American law, they are.

Again, there is meddling of so-called friends who poison the mind of one or more members of the family against the other members. In this manner many a happy family is broken up or estranged. Why should not the law try to stop this by creating a civil action for damages?

Of the same nature is that class of acts specified in No. 3: intriguing to cause another to be alienated from his friends.

No less serious are the acts mentioned in No. 4: vexing, or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect or other personal condition. The penal laws against defamation and unjust vexation are glaringly inadequate.

Religious freedom does not authorize anyone to heap obloquy and disrepute upon another by reason of the latter's religion.

Not a few of the rich people treat the poor with contempt because of the latter's lowly station in life. To a certain extent this is inevitable, from the nature of the social make-up, but there ought to be a limit somewhere, even when the penal laws against defamation and unjust vexation are not transgressed. In a democracy, such a limit must be established. The courts will recognize it in each case. Social equality is not sought by the legal provision under consideration, but due regard for decency and propriety.

Place of birth, of physical defect and other personal conditions are too often the pretext of humiliation cast upon other persons. Such tampering with human personality, even though the penal laws are not violated, should be the cause of civil action.

The article under study denounces “similar acts” which could readily be named, for they occur with unpleasant frequency.<sup>418</sup>

The infliction of mental distress is not a new concept in Civil Law since mental anguish is precisely one ground for awarding moral damages. Justice Carpio originally highlighted it in cases dealing with common carriers’ extraordinary responsibilities to passengers, which includes courtesy.<sup>419</sup> He highlighted the generic tort, however, in *MVRS Publications, Inc. v. Islamic Da’Wah Council of the Philippines, Inc.*<sup>420</sup> This was a defamation claim by Islamic organizations caused by the following statement in the newspaper *Bulgar*:

ALAM BA NINYO?

Na ang mga baboy at kahit anong uri ng hayop sa Mindanao ay hindi kinakain ng mga Muslim? Para sa kanila ang mga ito ay isang sagradong bagay. Hindi nila ito kailangang kainin kahit na sila pa ay magutom at mawalan ng ulam sa tuwing sila kakain. Ginagawa nila itong Diyos at sinasamba pa nila ito sa tuwing araw ng kanilang pangangilin lalung-lalo na sa araw na tinatawag nilang “Ramadan”.<sup>421</sup>

The Islamic organizations had appealed from the trial court ruling on the ground that it had decided their claim as a libel suit instead of an article 26 suit, and the Court of Appeals instead ruled that the statement was in fact libelous. The majority reversed, finding no libel, noting the persons alluded to could not be identified, and applying the *New York Times* actual malice rule for public figures.

Justice Carpio, however, took a broader view and asserted that the case was not one of libel, but the infliction of emotional distress, which was clearly independent of libel and its more stringent elements. “In intentional infliction of mental distress, the gravamen of the tort is not the injury to plaintiff’s reputation, but the harm to plaintiff’s mental and emotional state.”<sup>422</sup> With respect to the actual victims’ identification, he proposed a class suit as the procedural remedy. In disgust, he described the piece as “dripping with extreme profanity, grossly offensive and manifestly outrageous, and devoid of any social value.”<sup>423</sup>

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<sup>418</sup> REPORT OF THE CIVIL CODE COMMISSION 32–33, *quoted in* *MVRS Publications, Inc. v. Islamic Da’Wah Council of the Philippines, Inc.*, G.R. No. 135306, 396 SCRA 210, Jan. 28, 2003 (Carpio, J., *dissenting*).

<sup>419</sup> *See, e.g.*, *Air France v. Carrascoso*, G.R. No. L-2138, 18 SCRA 155, 168, Sept. 28, 1966; *Trans-Asia Shipping Lines, Inc. v. Ct. of Appeals*, G.R. No. 118126, 254 SCRA 60, Mar. 4, 1996.

<sup>420</sup> G.R. No. 135306, 396 SCRA 210, Jan. 28, 2003 (Carpio, J., *dissenting*).

<sup>421</sup> *Id.* at 217. “DO YOU KNOW? That Muslims do not eat pigs and other animals in Mindanao? These animals are sacred to them. They do not need to eat these even if they go hungry or lose viands for meals. They make these animals gods and worship them on their days of worship, particularly during Ramadan.”

<sup>422</sup> *Id.* at 247.

<sup>423</sup> *Id.* at 254.

Finally, he recalled his own *Philippine Law Journal* article:

At the time Article 26 was lifted by the Code Commission from American jurisprudence, many of the rights embodied therein were not yet widely accepted by American courts, and in fact even now at least one, the right to privacy, is still struggling to gain recognition in some states. While we have been quick to leapfrog American state decisions in recognizing such rights, we have, however, been painfully slow in galvanizing the same in actual cases. To date Article 26 stands almost as a mere decorative provision in our statutes; but it may be harnessed fruitfully anytime.<sup>424</sup>

This was in the context of the Court's duty to promulgate rules to protect constitutional rights and in a sensitivity towards Filipino Muslims and the secessionist problem.

Having read Dean Prosser and his reasons for articulating the privacy torts independently of libel, and the Code Commission's reasons for writing article 26 into law as a parallel, it is quite difficult to disagree with Justice Carpio's dissent. In fact, one might point to *MVRS Publications'* facts as precisely the sort of tangle that article 26 should address, given the clearly abominable published statement.

In any case, article 26 has supported claims for the infliction of emotional distress without further articulation. *Grand Union Supermarket, Inc. v. Espino*<sup>425</sup> cited it in awarding damages to a supermarket customer who was accused of shoplifting in front of a crowd when he forgot to pay for a small file of negligible value. *Peregrina v. Panis*<sup>426</sup> involved a suit that coupled article 26 with a defamation claim. *Globe Mackay and Radio Corp. v. Court of Appeals*,<sup>427</sup> penned by Justice Cortes, applied article 26 to a "scornful remark about Filipinos" and statements about being a "crook" and a "swindler," even though the Court explicitly noted these statements were not made before other people. Finally, *Ponce v. Legaspi*<sup>428</sup> used article 26 in conjunction with a suit for malicious prosecution.

Again, the sheer flexibility article 26 was designed for reinforces Justice Carpio's decades-old call to finally utilize it. The more formally articulated Prosser privacy torts and their attendant jurisprudence may be used to bolster such applications as appropriate.

### III. RECONCILING THE VALUES PROTECTED BY THE RIGHT TO PRIVACY

The right to privacy initially outlined in *Morfe* and a handful of Chief Justice

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<sup>424</sup> *Id.* at 261, citing Carpio, *supra* note 20, at 671.

<sup>425</sup> G.R. No. 48250, 94 SCRA 996, Dec. 28, 1979.

<sup>426</sup> G.R. No. 56011, 133 SCRA 75, Oct. 31, 1984.

<sup>427</sup> G.R. No. 81262, 176 SCRA 778, Aug. 25, 1989.

<sup>428</sup> G.R. No. 79184, 208 SCRA 377, May 6, 1992.

Fernando's succeeding ponencias is a very broad one, encompassing many other explicit rights. In exploring this, the preceding section has comprehensively illustrated that the right to privacy is not a single concept at all, and has countless facets in its complexity.

Justice Cortes taught that the right to privacy is the Bill of Rights' underlying theme.<sup>429</sup> This breadth finds expression in rhetoric as liberty, as in *Morfe*, and as dignity, as in Professor Tribe's lectures. These concepts are themselves so broad that they must be compartmentalized to facilitate their study. Distinct privacy values may thus be identified from the emphases of each right, constitutional and civil alike.

Autonomy is obviously the first value. This is protected by decisional privacy, which is directed primarily against the State and its monopoly of the police power. Its rhetoric was captured by the due process discourse of Chief Justice Fernando in *Morfe*:

"The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen." This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state.<sup>430</sup>

Seclusion is the second and most familiar. This is protected by just about every manifestation of "the right to be let alone," particularly the rights against unreasonable search and to privacy of correspondence, and the intrusion into seclusion tort. It is also protected by the public figure doctrine from the freedom of speech, the rights to anonymous speech and association, and to some extent, doctrine from the right against self-incrimination. The key is that an intrusion into a private zone of seclusion is a violation in itself, independent of any resulting disclosure of information.

Seclusion's rhetoric is most beautifully captured by Justice Romero in *Ople*:

What marks off man from a beast?

Aside from the distinguishing physical characteristics, man is a rational being, one who is endowed with intellect which allows him to apply reasoned judgment to problems at hand; he has the innate spiritual faculty which can tell, not only what is right but, as well, what is moral and ethical. Because of his sensibilities, emotions and feelings, he likewise possesses a sense of shame. In varying degrees as dictated by diverse cultures, he erects a wall between himself and the outside world wherein he can retreat in solitude,

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<sup>429</sup> See *infra* text accompanying note 24.

<sup>430</sup> *Morfe v. Mutuc*, G.R. No. 20387, 22 SCRA 424, 445, Jan. 31, 1968, *quoted in* *Ople v. Torres*, G.R. No. 127685, 239 SCRA 141, 155, Jul. 23, 1998.

protecting himself from prying eyes and ears and their extensions, whether from individuals, or much later, from authoritarian intrusions.<sup>431</sup>

Reputation is the third value, as referred to by the related disclosure of private facts and false light torts. The value would be elaborated as the exclusive right to control the personal information one discloses to the world and the persona by which one is known to it. In this sense, the embarrassing and sensitive and the seemingly trivial detail are imbued with a privacy value for the individual. Aside from the two torts on disclosure, constitutional protections would arise from the rights against unreasonable search and self-incrimination, the privacy of correspondence, and restraints against the freedom of speech and of the press.

The rhetoric of controlling such disclosure is best captured by Justice Puno's closing paragraph in *Ople*:

The right to privacy is one of the most threatened rights of man living in a mass society. The threats emanate from various sources — governments, journalists, employers, social scientists, etc. In the case at bar, the threat comes from the executive branch of government which by issuing A.O. No. 308 pressures the people to surrender their privacy by giving information about themselves on the pretext that it will facilitate delivery of basic services. Given the record-keeping power of the computer, only the indifferent fail to perceive the danger that A.O. No. 308 gives the government the power to compile a devastating dossier against unsuspecting citizens. It is timely to take note of the well-worded warning of Kalvin, Jr., “the disturbing result could be that everyone will live burdened by an unerasable record of his past and his limitations. In a way, the threat is that because of its record-keeping, the society will have lost its benign capacity to forget.” Oblivious to this counsel, the dissents still say we should not be too quick in labelling the right to privacy as a fundamental right. We close with the statement that the right to privacy was not engraved in our Constitution for flattery.<sup>432</sup>

Identity is the final value, as protected in Civil Law by the appropriation tort and related doctrines such as the right of publicity. Given these doctrines' roots, the constitutional counterpart, assuming hypothetical facts involving state action, would be the guarantees to liberty and property in substantive due process.

The infliction of emotional distress tort must be taken to protect every privacy value since it is a broad cause of action that allows protection of peace of mind in whatever imaginable circumstance. Lastly, one must also consider evidentiary privileges related to privacy in the narrow context of judicial proceedings.

Tabulating these values against existing rights, one summarizes:

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<sup>431</sup> *Ople*, 293 SCRA 141, 171 (Romero, J., *concurring*).

<sup>432</sup> *Id.* at 170.

<b>Privacy Value</b>	<b>Constitution</b>	<b>Civil Code and Others</b>
<i>Privacy as autonomy</i>	<i>Substantive due process</i>	<i>Infliction of distress</i>
<i>Privacy as seclusion</i>	<i>Unreasonable search Privacy of correspondence Self-incrimination Anonymous speech Anonymous association Restraints on speech</i>	<i>Intrusion into seclusion Infliction of distress</i>
<i>Privacy as reputation</i>	<i>Unreasonable search Privacy of correspondence Self-incrimination Restraints on speech</i>	<i>Disclosure of private facts False light Infliction of distress</i>
<i>Privacy as identity</i>	<i>Substantive due process</i>	<i>Appropriation Infliction of distress</i>
<i>Evidentiary privileges</i>	<i>Unreasonable search Privacy of correspondence Self-incrimination</i>	<i>Remedial law privileges</i>

Examining the table, it becomes easier to articulate criticism regarding the application of privacy doctrine. As discussed earlier, for example, *Ty* and *Krohn* are readily criticized for focusing on the evidentiary privileges, but failing to address the possible fear of disclosure of private facts. The *Babst* majority may be criticized for focusing on the disclosure obtained through interrogations, yet failing to grasp the subtler intrusion into seclusion, or even an indirect stifling of mediemen's autonomy. It becomes easier to appreciate *Ople* when one notes that it did not protect solely against undue disclosures of information, and statements such as "If you have nothing to hide, you have nothing to fear" by former Defense Secretary Angelo Reyes regarding the ID system sorely miss the point.

In an attempt to demonstrate the above values' application and stimulate discussion, the next section examines a number of contemporary privacy problems. (Given the author's desire to raise consciousness of a broader context in this article, commentary specifically on the Human Security Act of 2007 is left to other articles.)

#### IV. RIGHT TO PRIVACY'S MODERN APPLICATIONS

##### A. THE NATIONAL ID SYSTEM, COMPUTER DATABASES, AND "PRACTICAL OBSCURITY"

In the 2005 Valentine's Day bombings' wake, President Arroyo stated that new laws were needed because "terrorists take advantage of the loopholes in the legal system that allow them anonymity and mobility,"<sup>433</sup> referring to proposals for a national ID system. Plans were disclosed to pilot test such a system in Metro Manila against "a faceless enemy."<sup>434</sup> Opposition legislators protested "a prelude to a veiled martial law regime."<sup>435</sup> In order to understand the debate, one must focus not on the ID cards themselves, but on the government computer database the information reflected in them would necessarily be stored in.

Justice Cortes wrote about the problem of computer databases as early as the 1970s. However, the loss of the "benign ability to forget" is not solely because electronic records are easier to store, resulting in an increased amount of records stored in writing. More importantly, electronic records are easier to search through, and may easily be reorganized according to whatever parameters one wishes. The proverbial needle in an electronic haystack is actually easy to find.

Without the proper safeguards, as *Ople* discussed, there is potentially unbounded violation of peace of mind and of reputation well outside the context of unreasonable search. Simply, after the information is collected and removed from the individual's private zone, there is arguably no more search to speak of, yet the individual has eternally lost control or even knowledge of where the information is disseminated. In discussing the ID system, Press Secretary Ignacio Bunye mainly argued that creating the system through legislation would squarely address *Ople*. Although he recognized that *Ople* also found that the system proposed in 1998 had insufficient safeguards to protect privacy, he failed to even mention what safeguards the government proposal had. In fact, Interior Secretary Angelo Reyes merely quipped, "What are you hiding? Your age, your height, or your weight?"<sup>436</sup>

The sheer scale of the computer's impact underscores the pressing need for safeguards with respect to such an undertaking today. Consider that the 1880 United States census took seven years to complete, even with 1,500 clerks. The 1890 census, however, was finished in less than three years, thanks to Herman Hollerith and a tabulating machine that read holes punched in cards, incidentally the forerunner of the device that propelled the company that became IBM into business legend. Half a century later, with advances in data storage technology, the

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<sup>433</sup> Cabacungan & Bulambot, *supra* note 43, at A20.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> Gil Cabacungan, Jr. & Christine Avendano, *Palace sees no stumbling block to nat'l ID system*, PHIL. DAILY INQUIRER, Feb. 19, 2005, at A21.

government easily collected and stored information on millions.<sup>437</sup>

One must further consider that computer records are very difficult to actually erase, considering they are easily replicated and transmitted, and are far more easily stored for decades without the need for disposal. Coupled with the accessibility facilitated by the Internet and similar advances in communication technology, all this taken together means that a single violation of informational privacy can be repeated many times over simply by storing a piece of information in an electronic database, and even years later, there is no such thing as an obscure record to an electronic search.

This is again all the more true with respect to the Internet. One easily searches through years' worth of newsgroup and e-mail group messages, and retrieves a forgotten year-old note with ease. In an even more formidable flex of electronic muscle, a website called "The Wayback Machine" even archives for free websites that have been removed or discontinued.<sup>438</sup>

This was precisely what Justice Cortes feared in 1970:

It could not have entered his mind that the information given in separate instances could one day be put together and made available to more people than he had in mind when he furnished the information. The computer is capable of producing a comprehensive dossier on individuals out of information given at different times and for varied purposes. ... When information of a privileged character finds its way into a computer, it can be extracted together with other data about the subject.<sup>439</sup>

Thirty-five years later, perhaps one must even consider the interesting proposition that in the context of electronic records, even technically public information easily becomes "too public," and this is in an entirely different context from the broadened Internet public figure doctrine, since the latter largely deals with aspects of a person communicating in a roughly public manner. The proposition is exemplified by Cincinnati's Hamilton County, where the local clerk converted records into electronic form and later made them available through the Internet in 1999. One author described:

With perfect anonymity, I paged through the most intimate details of other people's lives. One woman had left her husband and had requested a restraining order against him because he was always calling her a "nigger." Another couple's divorce records revealed that the husband had fathered a child with another woman 22 years into his 38-year marriage.<sup>440</sup>

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<sup>437</sup> Daniel Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1401-02 (2001).

<sup>438</sup> <http://www.archive.org> (last visited Dec. 30, 2007).

<sup>439</sup> CORTES, *supra* note 1, at 11-12.

<sup>440</sup> Amy Benfer, *Http in Cincinnati*, 2003-APR LEGAL AFF. 57, 57 (2003).

Merely by typing a person's name, one could obtain everything disclosed in recent cases from Social Security numbers to, in some cases, psychiatric testimony. By 2003, the website enjoyed thirty million inquiries a month. Residents deemed the innovation a double-edged sword. On one hand:

Many Cincinnati citizens, as well as legal scholars, praise the site's transparency and consider it a hallmark of an increasingly open age. Small-business owners have reported that they use the site to run checks on prospective employees to make sure they don't have criminal records. Parents check up on schoolteachers, baby-sitters, even gardeners. Homeowners compare their property taxes to those of the people next door to see if their neighbors are being treated better or worse. One woman discovered that the "single" guy she was dating was married.<sup>441</sup>

On the other, it is a ready source of abuse from idle gossip to aids to stalking. One observes that such automation removes the human barrier in accessing the information inevitably collected by the State, and when the cost of information is radically reduced, the idle mind is placed on the same footing as a journalist, historian, or lawyer poring through old records<sup>442</sup> – one no longer even incurs photocopying costs.

The privacy concerns from State-collected data's increased organization were squarely addressed by *Whalen* itself:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.... The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.<sup>443</sup>

Further, the American Court recognized a distinction between the public nature of disparate bits of information existing in "practical obscurity"<sup>444</sup> and the nature of organized, summarized compilations derived from them. *Dep't of Justice v. Reporters Committee* ruled on such compilations of criminal records by the Federal

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<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 58. "A single mother who couldn't afford a lawyer might skip a day of work to go down to the court before a custody hearing and look for the criminal record of a violent ex-husband. But she was less likely to miss work to look through her neighbors' divorce records." *Id.* at 59.

<sup>443</sup> *Whalen v. Roe*, 429 U.S. 589, 599 (1977), *quoted in* *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 770 (1989).

<sup>444</sup> *Reporters Committee*, 489 U.S. at 778. "The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir."

The term "practical obscurity" was cited in a later case. *Dep't of Defense v. Fed. Lab. Rel. Auth.*, 510 U.S. 487, 496 (1994).

Bureau of Investigation, or FBI, called “rap sheets:”

[T]he issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.<sup>445</sup>

The Court noted that “States nonconviction data from criminal-history summaries are not available at all, and even conviction data are ‘generally unavailable to the public.’”<sup>446</sup> Thus, it explicitly stated the distinction in this way:

[W]e hold as a categorical matter that a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy, and that when the request seeks no “official information” about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is “unwarranted.”<sup>447</sup>

Recognizing the “benign capacity to forget,”<sup>448</sup> *Reporters* further held that even information that was at one time public could be protected by the right to privacy:

Because events summarized in a rap sheet have been previously disclosed to the public, respondents contend that Medico’s privacy interest in avoiding disclosure of a federal compilation of these events approaches zero. We reject respondents’ cramped notion of personal privacy.<sup>449</sup>

Further, *Air Force v. Rose*<sup>450</sup> blocked New York University law students’ research of Air Force Academy discipline summaries, even though these had all been posted on forty Academy bulletin boards at one time or another. It held:

Despite the summaries’ distribution within the Academy, many of this group with earlier access to summaries may never have identified a particular cadet, or may have wholly forgotten his encounter with Academy discipline. And

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<sup>445</sup> *Reporters Committee*, 489 U.S. at 764.

<sup>446</sup> *Id.* at 767.

<sup>447</sup> *Id.* at 780.

<sup>448</sup> *Ople v. Torres*, G.R. No. 127685, 293 SCRA 141, 170, Jul. 23, 1998.

<sup>449</sup> *Reporters Committee*, 489 U.S. at 762-63. *Reporters* explicitly referred to the informational privacy in *Whalen*. “The preliminary question is whether Medico’s interest in the nondisclosure of any rap sheet the FBI might have on him is the sort of “personal privacy” interest that Congress intended Exemption 7(C) to protect. As we have pointed out before, [t]he cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977).” *Id.* at 762.

<sup>450</sup> 425 U.S. 352 (1976).

the risk to the privacy interests of a former cadet, particularly one who has remained in the military, posed by his identification by otherwise unknowing former colleagues or instructors cannot be rejected as trivial.<sup>451</sup>

Finally, *Rose* recognized that not even removal of names from the discipline summaries in question would protect privacy rights, since identities could be deduced by piecing together the other information. Confidentiality, it ruled, “must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar, as fellow cadets or Academy staff...”<sup>452</sup>

To further broaden the discussion, *Reporters* and *Rose* dealt with still another balancing of interests between the right to privacy and the right to information explicit in the Philippine Constitution:

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.<sup>453</sup>

The American reasoning is readily applicable to the Philippines. The right to information is not absolute, and the first sentence grants a general but self-executory right<sup>454</sup> with respect to “matters of public concern.” The second sentence implements this, though the right of access is controlled and limited by the State, which is necessarily authorized to decide precisely what information is of public concern.<sup>455</sup> So far, Philippine jurisprudence has focused on official information pertaining to public officials themselves, such as voting in the Movie & Television Review and Classification Board,<sup>456</sup> inquiries by an individual regarding official action with a direct bearing on him,<sup>457</sup> ongoing negotiations prior to finalization of a government contract,<sup>458</sup> political advertisements and election-related speech,<sup>459</sup> a

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<sup>451</sup> *Dep’t of Air Force v. Rose*, 425 U.S. 352, 380-81 (1976) (*quoted in* *Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 768-69 (1989)).

<sup>452</sup> *Id.* at 380-81, *quoted in* *Reporters Committee*, 489 U.S. at 768.

<sup>453</sup> CONST. art. III, § 7.

<sup>454</sup> *Aquino-Sarmiento v. Morato*, G.R. No. 92541, 203 SCRA 515, Nov. 13, 1991; *Legaspi v. Civil Service Comm’n*, G.R. No. 72119, 150 SCRA 530, May 29, 1987.

<sup>455</sup> *BERNAS*, *supra* note 261, at 335. *Secretary of Justice v. Lantion*, G.R. No. 139465, 343 SCRA 377, Oct. 17, 2000, *citing* *BERNAS*, *supra* note 261, at 337.

<sup>456</sup> *Aquino-Sarmiento*, 203 SCRA 515.

<sup>457</sup> *Lantion*, 343 SCRA 377, 384.

<sup>458</sup> *Chavez v. Public Estates Auth.*, G.R. No. 133250, 384 SCRA 152, Jul. 9, 2002; *Chavez v. Presidential Comm’n on Good Gov’t*, G.R. No. 130716, 299 SCRA 744, Dec. 9, 1998.

<sup>459</sup> *Nat’l Press Club v. Comm’n on Elections*, G.R. No. 102653, 207 SCRA 1, Mar. 5, 1992; *Osmena v. Comm’n on Elections*, G.R. No. 132231, 288 SCRA 447, Mar. 31, 1998; *Telecomm. and Broadcast Attorneys of the Phils., Inc. v. Comm’n on Elections*, G.R. No. 132922, 289 SCRA 337, Apr. 21, 1998.

party seeking to obtain a court dismissal order against her case,<sup>460</sup> and media coverage of court proceedings.<sup>461</sup>

A searchable, State-maintained database was precisely what impelled the *Ople* majority to assert privacy as a fundamental right. Privacy should be upheld over the *Rosenbloom* issue-based public figure determination integrated into jurisprudence, something borne out by the right to information's phrasing:

"Public concern" like "public interest" is a term that eludes exact definition. Both terms embrace a 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.<sup>462</sup>

One concludes that the right to privacy cannot absolutely bar the implementation of a national ID system, as no Constitutional right is absolute. However, the discussion by both Justice Cortes and in *Ople* mandate strict restrictions on the use of the information, including the concerns raised in *Reporters* and *Rose* regarding third party access to information disclosed to the State. Thus far, these concerns have been lamentably absent from the public debate.

## B. PRIVATE COMMERCIAL DATABASES AND INTERNET DATA COLLECTION

For all the talk of State information databases and peace of mind's protection, it must be emphasized that due to information collection's radically decreased costs and modern computers' power, the State no longer has a monopoly on data, not even on its collection. Today, private entities are the largest holders of information for commercial or "data mining" purposes – the largest collection of American *public* records amounting to over sixteen billion is actually held by an Atlanta-based company called ChoicePoint, which sells criminal and employment background checks even to the FBI and the Internal Revenue Service.<sup>463</sup> Even businesses face strong pressures to collect information from and profile their customers. In the Philippines, for example, 20 percent of an enterprise's customers are usually responsible for 80 percent of revenues, making it crucial to react to the needs and tastes of these regular customers. Thus, a loyalty program such as a customer card that allows discounts or free items is seen not as an incentive to the

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<sup>460</sup> *Perez v. Alpuerto*, A.M. No. MTJ-88-173, 200 SCRA 591, Aug. 16, 1991.

<sup>461</sup> *Webb v. De Leon*, G.R. No. 121234, 247 SCRA 652, Aug. 23, 1995. *See Cruz v. Salva*, 106 Phil. 1151 (1959); *Martelino v. Alejandro*, G.R. No. 30894, 32 SCRA 306, Mar. 25, 1970; *People v. Ritter*, G.R. No. 88582, 194 SCRA 690, Mar. 5, 1991; *Go v. Ct. of Appeals*, G.R. No. 106087, 221 SCRA 397, Apr. 7, 1993; *People v. Teehankee*, G.R. No. 112206, 249 SCRA 54, Oct. 6, 1995; *Estrada v. Desierto*, G.R. No. 146710, Mar. 2, 2001; *Estrada v. Desierto*, G.R. No. 146710, Apr. 3, 2001 (Motion for Reconsideration).

<sup>462</sup> *Legaspi v. Civil Service Comm'n*, G.R. No. 72119, 150 SCRA 530, 541, May 29, 1987, *quoted in* Sec. of Justice v. Lantion, G.R. No. 139465, 322 SCRA 160, 195, Jan. 18, 2000.

<sup>463</sup> *Benfer*, *supra* note 447, at 59.

customer to purchase more, but a means for the business to collect data about him.<sup>464</sup>

Over the Internet, data can be collected by tracking websites visited by a particular computer or Internet account, compiling customer purchase records, or offering free services such as birthday reminders among friends, which require the users to enter personal information. Such information can be sold, matched, and compiled, and taken advantage of by marketers and advertisers. Today, even collections of e-mail addresses have commercial value, especially if their owners share a common interest or demographic, given the low cost of sending solicitations and ads *en masse*.

Although these are actions by private parties, their regulation is a weighty government concern. The individual's protection here is not remedied by addressing any particular intrusion, given the great number an Internet user might face. Instead, Professor Daniel Solove argues:

The problem with databases does not stem from any specific act, but is a systemic issue of power caused by the aggregation of relatively small actions, each of which when viewed in isolation would appear quite innocuous. I refer to this as the "aggregation problem" – the fact that the whole is greater than the parts. In other words, the problem emerges when individual information transactions, combinations, lapses in security, disclosures, or abusive uses are viewed collectively. The problem is compounded by the fact that much of this activity occurs in secret outside the knowledge of the individual whose personal information is involved.<sup>465</sup>

Simply distinguishing between government and private actors, thus, overlooks the systemic nature of the harms involved. Professor Solove likens the intrusion into "the right to be let alone" to Kafka's trial where the defendant is eternally anguished by waiting for a verdict that does not come, since the individual loses control over his personal information to the point that he has no inkling when and where it may end up being disclosed.<sup>466</sup>

Finally, Professor Solove argues that the right to informational privacy articulated by *Whalen* fails to embrace this kind of injury. He cites *Doe v. SEPTA*,<sup>467</sup> where the plaintiff had subscribed to a drug used exclusively to treat HIV through his employer's drug supplier. The purchase was sent with his name to the employer, and resulted in a superficial inquiry, although his HIV-positive status and other confidential information were never disclosed. In fact, the plaintiff was never discriminated against, and was even promoted. However, Professor Solove explains:

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<sup>464</sup> Tina Arceo-Dumlao, *The prize of loyalty*, PHIL. DAILY INQUIRER, Feb. 25, 2005, at B2-1, B2-3.

<sup>465</sup> Solove, *The Origins and Growth of Information Privacy Law*, *supra* note 235, at 1434.

<sup>466</sup> *Id.* at 1436-37.

<sup>467</sup> *Doe v. Southeastern Penn. Transp. Auth.*, 72 F.3d 1133 (3rd Cir. 1995).

His real injury was the powerlessness of having no idea who else knew he had HIV, what his employer thought of him, or how the information could be used against him. This feeling of unease changed the way he perceived everything at his place of employment. The privacy problem was... that the information appeared to be entirely out of anyone's control.... He was informed that information about him had been collected; he knew that his employer had been investigating; but the process seemed to be taking place out of his sight.<sup>468</sup>

This is a clear example where the very piercing of that zone delimited by “the right to be let alone” is an intrusion that destroys peace of mind, independent of any disclosure of confidential information.

The systemic harms involved and the proposed fundamental nature of the privacy violated as per *Ople*, it may be argued, call for protection of the right even by private actors, through legislation if not by Constitutional imperative or privacy torts.<sup>469</sup> An American case, for example, held that messages sent by users through America Online's network enjoy an “objective expectation of privacy.”<sup>470</sup>

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<sup>468</sup> Solove, *The Origins and Growth of Information Privacy Law*, *supra* note 235, at 1438-39.

<sup>469</sup> Without attempting to summarize complex state action doctrines in a footnote, this “horizontal” application (from citizens, as opposed to the conventional “vertical” scenario against the government) is admittedly a weighty and uncommon thing in Constitutional Law. It is powerful in the rare cases when it is explicit, such as the United States Constitution's provision against slavery, and the South African Constitution's provision against discrimination. However, note that it has been applied when the right in question is deemed sufficiently fundamental, as in *Prune Yard*.

U.S. CONST. amend. 13. “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

S. Afr. CONST. art. 9(4). “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds [including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth]. National legislation must be enacted to prevent or prohibit unfair discrimination.”

*Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980). *See, e.g.*, Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387 (2003); Delisa Futch, Note, *Du Plessis v. De Klerk, South Africa's Bill of Rights and the Issue of Horizontal Application*, 22 N.C. J. INT'L L. & COM. REG. 1009 (1997). *See, however, e.g.*, *Agabon v. Nat'l Lab. Rel. Comm'n*, G.R. No. 158693, 442 SCRA 573, Nov. 17, 2004; *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989),

<sup>470</sup> *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F.), *quoted in* Ben Delsa, *E-mail and the Attorney-Client Privilege: Simple E-mail in Confidence*, 59 LA. L. REV. 935, 945 (1999). One might compare this to the policy impositions on common carriers, for example. *See Fisher v. Yangco Steamship Co.*, 31 Phil. 1, 18-19 (1915). “Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. Their business is, therefore, affected with a public interest, and is subject of public regulation.”

*See Kilusang Mayo Uno Lab. Center v. Garcia*, G.R. No. 115381, 289 SCRA 286, Dec. 23, 1994, *citing* *Pantranco v. Public Serv. Comm'n*, 70 Phil. 221 (1940). “[P]ublic utility services are impressed with public interest and concern... they cease to be *juris privati* only. When, therefore,

Finally, although the appropriation privacy tort appears difficult to apply to these situations, the ability of private entities to reconstruct a person's purchases and commercial preferences seems to implicate a different kind of violation of identity.

### C. WIRETAPPING AND E-MAIL SURVEILLANCE

One of the Human Security Act of 2007's most ominous provisions, section 7, provides for wiretapping in the broadest of language: "any mode, form, kind or type of electronic or other surveillance equipment or intercepting and tracking devices, or with the use of any other suitable ways and means..."<sup>471</sup>

In American jurisprudence, *Bartnicki v. Vopper*<sup>472</sup> definitively warned of wiretapping's "chilling effect on private speech."<sup>473</sup>

In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.<sup>474</sup>

*Katz* was cited prominently in *Bartnicki*, and this line of cases has already provided a wealth of unreasonable search jurisprudence on this revitalized privacy intrusion. What must be emphasized is that the exclusionary rule in unreasonable search provides little actual protection to the innocent individual. In fact, should no charges be filed against him and if the evidence collected is never presented, he may never even know of the surveillance. Again, this nagging uncertainty is no trifle, and if legal requirements are not complied with, focused surveillance of an individual even in public should also lay a basis for a privacy tort.

If American experience is a gauge, not even the need for a judicial order is comforting. The American court handling warrants related to the Foreign Intelligence Surveillance Act has only denied *one* out of thousands of applications in

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one devotes his property to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to the control by the public for the common good, to the extent of the interest he has thus created."

*See* *Munn v. Illinois*, 94 U. S., 113 (1876); *North Negros Sugar Co. v. Hidalgo*, 63 Phil. 664 (1936); *Luque v. Villegas*, G.R. No. 22545, 30 SCRA 408, Nov. 28, 1969.

<sup>471</sup> *See also* Michael Lim Ubac et al., *Antiterror bill: 'Taxes today, liberties tomorrow'*, PHIL. DAILY INQUIRER, Feb. 19, 2005, at A1.

<sup>472</sup> 532 U.S. 514 (2001).

<sup>473</sup> *Id.* at 533.

<sup>474</sup> *Id.*, quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 202 (1967). Chief Justice William Rehnquist's dissent emphasizes the same idea.

2001,<sup>475</sup> and their judges tend to overestimate the government interest in criminal prosecution.<sup>476</sup> Further, in the 1960s and 1970s, it was discovered that the American Federal Bureau of Investigation conducted widespread illegal wiretapping against politicians and dissidents.<sup>477</sup> As for the Philippines, it was alleged that senators were under wiretap surveillance during former president Joseph Estrada's Impeachment Trial,<sup>478</sup> and that Estrada himself was a victim during his term.<sup>479</sup> This year, phone repairmen found an alleged wiretapping device on the phone of former President Corazon Aquino, who had suspected her phone of being bugged since the 1970s.<sup>480</sup>

Admittedly, as with all technology, the Internet's communicative power is easily misused, and easily facilitates the commission of crime both in and out of it. For example, the New Jersey Supreme Court's *State v. Evers*<sup>481</sup> described the electronic trail that led to William Evers' conviction for possession and transmission of child pornography over the Internet. The married, middle-class man with no criminal record opened a second Internet account for browsing child pornography websites. In 1999, in the chat room "NOxHAIRxYET," he transmitted images of a naked female child to 51 other users, one of whom was a California sheriff. Police obtained the account's billing information and traced it to Evers' wife. They seized the family computer's hard drive and arrested Evers, who confessed on the spot.<sup>482</sup> The Court commented:

[D]efendant readily admitted that he distributed the offending photographs for the express purpose of encouraging the recipients to reciprocate by sending him more child pornography in return. That is exactly the type of trafficking the Legislature meant to shut down in order to stop the demand for and perpetuation of the sexual exploitation of children. Defendant's so-called "bit player" role in the child pornography industry nevertheless brought him within the sweep of the second-degree crime of distribution and does not dispel the notion that his imprisonment would deter others from, in

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<sup>475</sup> David Markus, *Do Recent Antiterrorism Proposals Violate Our Constitution?*, 25-DEC CHAMPION 36, 38 (2001).

<sup>476</sup> Mark Young, *What Big Eyes and Ears You Have!: A New Regime for Covert Government Surveillance*, 70 FORDHAM L. REV. 1017, 1081 (2001) (citing JEFFREY ROSEN, *THE UNWANTED GAZE* 65, 243 n.21 (2001)).

<sup>477</sup> *Id.* at 1077-78.

<sup>478</sup> BusinessWorld Internet Edition, *Unofficial transcript of the Impeachment Trial*, Dec. 19, 2000 at [http://www.bworld.com.ph/Impeachment/documents/d9\\_am\\_transcript1.html](http://www.bworld.com.ph/Impeachment/documents/d9_am_transcript1.html).

<sup>479</sup> Maila Ager, *Wiretapping unspoken language in military – solon*, PHIL. DAILY INQUIRER, Aug. 22, 2007, at <http://www.inquirer.net/specialreports/hellogarci/view.php?db=1&article=20070822-84052>.

<sup>480</sup> Maila Ager, *Drilon, Binay assail alleged wiretapping of Aquino's phone*, PHIL. DAILY INQUIRER, May 3, 2007, at <http://www.inquirer.net/specialreports/hellogarci/view.php?db=1&article=20070503-63946>.

<sup>481</sup> 815 A.2d 432 (N.J. 2003).

<sup>482</sup> *Id.* at 437-38.

the trial judge's words, "perpetuat[ing] the growing market for... cyber-porn" by soliciting and disseminating child pornography."<sup>483</sup>

Recently, American law enforcement agencies unveiled Carnivore, a tool they say will allow them to "conduct the type of investigation required to make the Internet safe."<sup>484</sup> Carnivore is software created by the Federal Bureau of Investigation ("FBI") that functions as a "cyberwiretap."<sup>485</sup> It has an ingenious "ability to filter a single suspect's Internet traffic from among that of all users on a portion of the ISP's network, and then capture (by making a copy of the data packets) only those types of data authorized by court order."<sup>486</sup> This allows the "tracking" of an online criminal by tracing the "electronic trail" from the victim back to the perpetrator, as though rendering visible the twenty-first century's electronic "fingerprint."<sup>487</sup>

Advocates now fear Carnivore as an "excessive intrusion on individual privacy"<sup>488</sup> because "it creates the potential for widespread monitoring of Internet traffic."<sup>489</sup> One thus applies past rulings on *Katz* expectations to the electronic impulses generated by one's Internet use. Authors have drawn parallels to the "pen register" that records the numbers dialed on a telephone, which *Smith v. Maryland*<sup>490</sup> ruled did not constitute a search. The Court explained that the defendant there "voluntarily conveyed numerical information to the telephone company,"<sup>491</sup> and therefore he can have no legitimate expectation of privacy with respect to the phone number dialed.

One logically examines such powerful new technology under *Kyllo*:

1. Information is obtained through sense-enhancing technology.
2. The information could not have been otherwise obtained without physical intrusion.
3. The intrusion is into a constitutionally protected area, following the *Katz* test.

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<sup>483</sup> *Id.* at 458.

<sup>484</sup> Thomas McCarthy, *Don't Fear Carnivore: It Won't Devour Individual Privacy*, 66 MO. L. REV. 827, 829 (2001).

<sup>485</sup> *Id.* at 828.

<sup>486</sup> Anthony Orr, *Marking Carnivores Territory: Rethinking Pen Registers on the Internet*, 8 MICH. TELECOMM. & TECH. L. REV. 219, 223 (2001-2002).

<sup>487</sup> Kevin Di Gregory, "Carnivore" and the Fourth Amendment, *Statement Before the Subcommittee on the Constitution of the House Committee on the Judiciary* (Jul. 24, 2000) at <http://www.usdoj.gov/criminal/cybercrime/carnivore.htm> (last visited Dec. 30, 2007).

<sup>488</sup> McCarthy, *supra* at 492, at 829.

<sup>489</sup> Orr, *supra* at 494 at 220.

<sup>490</sup> 442 U.S. 737 (1979).

<sup>491</sup> *Id.* at 744.

4. The technology used is not in general public use.<sup>492</sup>

First, a device such as Carnivore is arguably sense-enhancing technology since the ordinary human being cannot make sense of electronic impulses sent through phone wires. Second, it is obviously not in public use because it is in the FBI's exclusive possession. Third, the pen register analogy fails because Carnivore does not reconstruct limited information such as a phone number or the destination of a message. Rather, by capturing a user's transmitted data itself, it is closer to an actual wiretap, which is indubitably a search, and goes beyond such in the sense that it not only eavesdrops, but produces a duplicate of the conversation. The telephone company analogy also fails in that one uses the Internet without direct human intervention from a service provider's employees. The sheer volume of transmissions such companies handle, moreover, cloak a particular person's usage in practical obscurity.

Evidently, one has an expectation of privacy in one's Internet messages, more than simply traces of one's interactions with third party web sites that are fed into cookies, in the same way one expects privacy in personal mail. Thus, one understands why FBI spokesmen have nevertheless specified Carnivore's carefully regulated use in line with court warrants.

Legal surveillance's bounds and existing doctrine's application to electronic media remains unresolved even in foreign jurisdictions. The United States Department of Justice made the point that "the public rightfully expects that law enforcement will continue to be effective as criminal activity migrates to the Internet."<sup>493</sup> However, it must be emphasized that there is no perfect analogy to older technologies, and Internet media can transmit far more information than, say, telephones, making privacy violations more intrusive.

Further, however, it must be noted that regulation short of surveillance faces lesser objection. The proposal that prepaid cellular phone accounts be registered instead of allowing these to be purchased anonymously, for example, merely puts such prepaid users on the same footing as landline and postpaid cell phone subscribers.

Finally, this discussion would not be complete without noting *Bartnicki's* applicability to the "Hello Garci" scandal, where alleged wiretaps of President Arroyo calling an election commissioner regarding cheating in the 2004 presidential elections were made publicly available.<sup>494</sup> Arroyo's Secretary of Justice promptly floated the idea of prosecuting parties who broadcast or reproduced the alleged wiretap, down to teen-agers using its first few seconds as a cell phone ring tone.

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<sup>492</sup> *Id.* at 47.

<sup>493</sup> DiGregory, *supra* note 495.

<sup>494</sup> *See supra* text accompanying note 52.

While *Bartnicki* is persuasive that this was yet another empty threat, it is crucial to specify exactly what this decision held. First, *Bartnicki* involved radio commentator Vopper and other media defendants who, the Court emphasized, clearly had no participation in recording the conversation involved, and who received the recording in a lawful manner. This was true in *Hello Garci*, as the alleged wiretaps were played in the media and in a session of Congress, and the government released its own version of the recordings.

Second, *Bartnicki* recognized the privacy of communication's gravity, but quoting Warren and Brandeis themselves, held that the communication in that particular case was of sufficient public interest to uphold its reproduction by mediamen:

In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: "The right of privacy does not prohibit any publication of matter which is of public or general interest." One of the costs associated with participation in public affairs is an attendant loss of privacy.<sup>495</sup>

The cell phone recording in *Bartnicki* involved a teachers' union president proposing to his chief negotiator, Bartnicki, that if the school board would not give in to their demands, they would have to "go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys."<sup>496</sup> The Court emphasized:

If the statements about the labor negotiations had been made in a public arena – during a bargaining session, for example – they would have been newsworthy. This would also be true if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone.<sup>497</sup>

This was also obviously true in *Hello Garci*, where the recorded conversation concerned fraud in no less than the presidential elections.

What is important is what *Bartnicki* did not hold. It would not be authority to justify replaying or reproducing a wiretapped or otherwise intercepted conversation absent the above two circumstances, and the decision explicitly stated that it would not apply to trade secrets, gossip and purely private matters. I propose, however, that *Bartnicki's* specific holding should not preclude broader protection of privacy as autonomy in this context. By its own language, it should also support protection against a broad fear of indiscriminate wiretapping

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<sup>495</sup> *Bartnicki*, 522 US at 538 (quoting Warren & Brandeis, *supra* note 2, at 214).

<sup>496</sup> *Id.* at 539.

<sup>497</sup> *Id.* at 525.

independent of any specific conversation, and, as it explicitly noted, even when no actual wiretapping has taken place.

Finally, note that during the Hello Garci scandal, the legal knee-jerk argument was that no case could be made unless a party to the alleged wiretapping identified his or her voice and authenticated the recording. This line of thinking, however, unfairly creates a Catch 22 assuming not all the voices on a recording have been identified. Indeed, Arroyo later practically admitted the Hello Garci recording's authenticity in a televised public apology, and the next section discusses that it is proper for a lawyer to make a court appearance to protect an anonymous client's interests.

#### D. INTERNET ANONYMITY

Privacy, more than any other Constitutional right, has been kept scrambling to keep pace by the inexorable march of science's frenetic cadence.<sup>498</sup> At present, the Internet sets the drumbeat, and anonymity, a key privacy outgrowth from the freedom of speech,<sup>499</sup> defines this new electronic medium.<sup>500</sup>

In many cases, authorship of individual messages cannot be traced. Free e-mail accounts can be obtained quickly and anonymously. Internet forums offer similar anonymity, there being no way to pierce a pseudonym unless an account can be traced using billing or other real world information.

Internet anonymity is a great equalizer, drawing attention away from the speaker's characteristics such as age, gender, race, social status and profession, and forces listeners to focus on the message.<sup>501</sup> Near-absolute anonymity allows the discussion of sensitive topics such as political beliefs, sexuality, religion and finances, even with complete strangers. Finally, anonymity also encourages a speaker to propose even the most radical of ideas, without fear of reprisal or ostracization,<sup>502</sup> or simply of losing one's privacy.<sup>503</sup>

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<sup>498</sup> In 1949, *Popular Mechanics* stated: "Computers in the future may weigh no more than 1.5 tons." "Humorous quotations", ¶ 1, at <http://ei.cs.vt.edu/~history/humor.html> (last visited Dec. 30, 2007).

<sup>499</sup> *Buckley v. Am. Const. L. Found.*, 525 U.S. 182, 197 (1999).

<sup>500</sup> *Am. Civil Liberties Union v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997).

<sup>501</sup> *Dendrite Int'l v. Doe No. 3*, 342 N.J. Super. 134 (App. Div. 2001). "This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate."

<sup>502</sup> MADELEINE SCHACHTER, *LAW OF INTERNET SPEECH* 236-37 (2001), cited in Jennifer O'Brien, *Putting a face to a (screen) name: The First Amendment implications of compelling ISPs to reveal the identities of anonymous online speakers in online defamation cases*, 70 *FORDHAM L. REV.* 2745, 2759 (2002); Julie Hilden, *The death of anonymous speech on the Internet?*, FindLaw.com Legal Commentary, Nov. 29, 2001, ¶ 4, at <http://writ.news.findlaw.com/hilden/20020416.html>,

<sup>503</sup> Richard Ravin & Van Mejia, *Anonymous online speech*, 213 *FEB N.J. LAW.* 9, 11 (2002).

Indeed, the United States Supreme Court noted:

Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.<sup>504</sup>

To cite modern day example, when a Georgia law prohibiting Internet communication through pseudonyms was successfully challenged, advocates announced:

The Court recognized that anonymity is the passport for entry into cyberspace for many persons.... Without anonymity, victims of domestic violence, persons in Alcoholics Anonymous, people with AIDS and so many others would fear using the Internet to seek information and support.<sup>505</sup>

In short, it is precisely anonymity that makes the beauty recognized in *Reno v. ACLU*<sup>506</sup> possible:

[A]t any given time “tens of thousands of users are engaging in conversations on a huge range of subjects.” It is “no exaggeration to conclude that the content on the Internet is as diverse as human thought.”<sup>507</sup>

Combined with the speed and low cost of Internet communication, it thus becomes a medium where Justice Oliver Wendell Holmes’ grand marketplace of ideas<sup>508</sup> very well blurs with John Stuart Mill’s idealized freedom of thought itself:<sup>509</sup>

Cyber-reach makes the Internet unique, accounts for much of its explosive growth and popularity, and perhaps holds the promise of a true and

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<sup>504</sup> Talley v. California, 362 US 60, 66 (1960). See, however, Hilden, *supra* note 510, ¶¶ 2, 19-23. She asks if the Court’s treatment should now be seen as naïve, after reports that terrorists used Internet cafes to anonymously plan the September 11 attack. She argues, for example, that many Americans no longer mind showing identification at checkpoints after September 11.

<sup>505</sup> Laurie Ellison & Yaman Akdeniz, *Cyber-stalking: the Regulation of Harassment on the Internet*, CRIM L. REV., Dec. 1998 Special Edition, at 38, quoting American Civil Liberties Union, *ACLU Wins First-Ever Challenge to a State Internet Censorship Law in Georgia*, Jun. 20, 1997, ¶ 7, at <http://archive.aclu.org/news/n062097b.html> (last visited Dec. 30, 2007).

<sup>506</sup> 521 U.S. 844 (1997).

<sup>507</sup> *Id.* at 844.

<sup>508</sup> “[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.” *Abrams v. United States*, 250 U.S. 616, 631 (1919) (Holmes, J. & Brandeis, J., *dissenting*), quoted in *Babst v. Nat’l Intelligence Board*, G.R. No. 62992, Sep. 28, 1984 (Fernando, C.J., *concurring*).

<sup>509</sup> “Over himself, over his own body and mind, the individual is supreme.” Mill, *supra* note 286, at 263.

meaningful “free trade in ideas” that Justice Holmes imagined eighty years ago.<sup>510</sup>

Thus, attempts to regulate online privacy transgress one of the gravest Constitutional taboos: the dreaded “chilling effect.”<sup>511</sup> One notes not only Internet speech’s unequaled speed, but the absence of factors that justified past regulation of other media, such as radio frequencies’ scarcity.<sup>512</sup>

Thus, in the United States, judicial bars against unmasking defendants in Internet cases have been raised, and Internet privacy in this context has been accorded a status increasingly closer to the sanctity of free speech itself.<sup>513</sup>

These cases, as might be expected, deal mainly with online defamation and may be more serious than one initially thinks. For example, in a “cybersmear,” Internet pranksters may post rumors or claim to be employees, and affect small companies’ stock prices. *Columbia Insurance Co. v. Seescandy.com*<sup>514</sup> exemplifies the rational in handling these cases:

People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court’s order to discover their identity.<sup>515</sup>

This has been concretized into several similar tests applied to discovery orders. In 2000, Judge Joan Melvin sued an anonymous website owner who accused her of lobbying the governor to appoint an unnamed lawyer to a vacancy in the judiciary. Through counsel, the anonymous defendant attempted to protect his identity during discovery. *Melvin v. Doe*<sup>516</sup> denied this, recognizing a state interest in discouraging the defamation of public officers, and applied a threefold test that the defendant’s identity must be:

1. material, relevant and necessary;
2. unobtainable by other means; and

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<sup>510</sup> Note, *The Long Arm of Cyber-reach*, 112 HARV. L. REV. 1610, 1610 (1999).

<sup>511</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 301-02 (1964), *quoted in* *Bulletin Publishing Corp. v. Noel*, G.R. No. 76565, 167 SCRA 255, Nov. 9, 1988.

<sup>512</sup> *Reno*, 521 U.S. at 870, *citing* *Turner Broadcasting System, Inc. v. Fed. Comm. Comm’n*, 512 U.S. 622, 637-38 (1994); *Sable Comm. of California, Inc. v. Fed. Comm. Comm’n*, 492 U.S. 115, 128 (1989).

<sup>513</sup> This is implied by *Reno*. *The Long Arm of Cyber-reach*, *supra* note 518, at 1631 n.128.

<sup>514</sup> 185 F.R.D. 573 (N.D. Cal. 1999).

<sup>515</sup> *Id.* at 578.

<sup>516</sup> 49 Pa. D. & C. 4th 449 (2000).

3. crucial to the plaintiff's case<sup>517</sup>

The following year, 2TheMart.com tried to obtain the identities of twenty three anonymous users of a forum called "Silicon Investor." They had posted several unflattering comments; one "Truthseeker" called the company "a Ponzi scam that Charles Ponzi would be proud of," and accused the CEO of defrauding employees in the past. 2TheMart claimed that these messages had resulted in part of damage it was in turn being sued for by its shareholders. *John Doe v. 2TheMart.com*<sup>518</sup> considered a four-prong test:

1. the subpoena seeking the information was issued in good faith and not for any improper purpose;
2. the information sought relates to a core claim or defense;
3. the identifying information is directly and materially relevant to that claim or defense; and
4. information sufficient to establish or to disprove that claim or defense is unavailable from any other source.<sup>519</sup>

The court concluded that the company's motion sought to obtain material such as personal e-mails that had little relevance to the shareholder suit, and related to only one generalized claim out of twenty-seven affirmative defenses. Moreover, although the company alleged that the forum messages affected its stock prices, these were read by the public without knowing the authors' identities. The company alleged that it needed to compare the authors' names with those of others who may have engaged in stock manipulation, but the allegation alone could not balance against the freedom of speech. The subpoena in the case was thus quashed.<sup>520</sup>

Less than three months later, a New Jersey Court ruled that Dendrite International could not obtain the identity of an anonymous Yahoo forum user. "John Doe No. 3" had accused its president of accounting misconduct and of trying to sell the uncompetitive company, but the court ruled that Dendrite had failed to prove a connection between the statements made and harm to the company. It noted, for example, that its stock price had actually increased on five

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<sup>517</sup> *Id.* at 477.

<sup>518</sup> 140 F.Supp.2d 1088 (W.D. Wash. 2001).

<sup>519</sup> *Id.*, citing *Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 578 (N.D.Cal. 1999); *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372, (Va. Cir. Ct. 2000).

<sup>520</sup> See Richard Raysman & Peter Brown, *Discovering the Identity of Anonymous Internet Posters* (Sep. 11, 2001), available at <http://econ.law.harvard.edu/stjohns/anon-net.html>. This brief article from the *New York Law Journal* summarizes the various frameworks found in State cases from 2000 to 2001.

out of eight days when Doe posted messages. *Dendrite International v. Doe No. 3*<sup>521</sup> used a different test:

1. The court should require notice to the defendant and an opportunity to be heard;
2. The court should require the plaintiff to set forth the exact statements that are the basis of its claim;
3. The court should receive evidence and determine not only whether the complaint would survive a motion to dismiss but whether plaintiff has submitted sufficient prima facie evidence to support its claim; and
4. Assuming plaintiff has presented a prima facie claim, “the court must balance the defendant’s First Amendment right of anonymous speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.”<sup>522</sup>

Another New Jersey case, however, applied the *Dendrite* framework, but denied the anonymous defendant’s motion to quash a similar subpoena. “Jean Doe aka moonshine\_fr” posted messages on a Yahoo forum that identified her as “a worried employee” and described the alleged sales situation of the Immunomedics. The company showed a confidentiality agreement in its employment contracts and attempted to obtain moonshine’s identity. *Immunomedics v. Jean Doe*<sup>523</sup> ruled that Immunomedics had shown a prima facie cause of action for a breach of the agreement and stated:

Although anonymous speech on the Internet is protected, there must be an avenue for redress for those who are wronged. Individuals choosing to harm another or violate an agreement through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment.<sup>524</sup>

A last case is slightly more complicated. In *La Societe Metro Cash & Carry France v. Time Warner Cable*,<sup>525</sup> the plaintiff company that operated facilities in France traced a malicious e-mail to Time Warner’s network and obtained a discovery order from a French court. The user was informed, and demanded no disclosure be made without an order from an American court. The plaintiff brought another action in Connecticut and the subscriber was permitted to litigate the privacy objection as Jane Doe, and even claimed self-incrimination and anonymous

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<sup>521</sup> 342 N.J. Super. 134 (App. Div. 2001).

<sup>522</sup> *Id.* at 142; see Michael Vogel, *Unmasking “John Doe” Defendants: The Case for Caution in the Creation of New Legal Standards*, at 2, at <http://www.cfp2002.org/proceedings/proceedings/vogel.pdf> (last visited Dec. 30, 2007).

<sup>523</sup> 342 N.J. Super. 160 (App. Div. 2001).

<sup>524</sup> *Id.* at 165.

<sup>525</sup> 2003 WL 22962857 (Conn.Super. 2003).

speech rights under the United States Constitution. However, after considering the privacy claim at length, the court applied *Doe v. 2theMart.com* and other cases, and granted discovery because the plaintiff had established probable cause and there was no other means of determining the defendant's identity.<sup>526</sup>

The precise test that should be used is a matter of remedial law, although it clearly involves a constitutional issue and may lay a basis for a civil claim, whether due to a privacy tort or a breach of contract. The important point, however, is that this narrow aspect of discovery should be treated as a foothold for privacy doctrine in procedural law. These Internet cases recognized freedom of speech values in the facts presented, and similar recognition of the related privacy values is straightforward.

#### E. INTERNET PUBLIC FIGURE DOCTRINE

*Gertz* unified the long line of cases after *New York Times*, and gave two reasons for subjecting a plaintiff to the actual malice requirement:

1) Public figures "may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes 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."<sup>527</sup>

2) Public figures "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater."<sup>528</sup>

*Gertz's* discussion takes on great significance in the Internet's context, where everyone is imbued with cyber-reach.<sup>529</sup> In an issue distinct from anonymity, one asks to what degree reputation should be protected by state-sanctioned action, such as defamation suits.

With regard to the first, Internet explorers are inevitably drawn to fora populated by fellow electronic travelers of similar interests. The moment one speaks on the Internet, whether using one's real name or an alias, one thrusts one's thoughts in front of that particular audience, for them and any newcomer to read and react to. One's message, further, is easily reproduced and transmitted.

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<sup>526</sup> See also Elizabeth Ritvo et al, *Online Forums and Chat Rooms in Defamation Actions*, 24-SUM COMM. LAW. 1 (2006).

<sup>527</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974).

<sup>528</sup> *Id.* at 345.

<sup>529</sup> See *supra* text accompanying note 518.

With regard to the second, an interesting role reversal is now seen in defamation suits, with large companies now suing anonymous individuals, thanks to cyber-reach. *Reno* readily recognized this:

Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.<sup>530</sup>

Again, public figure doctrine arose from defamation doctrine, and libel law's primary concern is to level the playing field and aid targets of defamation who are unable to protect their reputations with their own resources.<sup>531</sup> Cyber-reach, however, is the Internet's great equalizer, making *Gertz's* second concern less relevant in the virtual world. Moreover, not only is answering speech with more speech a more constitutionally satisfying solution, it can also allow triumph in a matter of minutes after the slighted individual marshals his electronic hosts – without the time and cost of a lawsuit.<sup>532</sup>

Thus, a participant in an open Internet discussion is arguably a public figure for that “limited range of issues,”<sup>533</sup> though it must be emphasized that one does not attain “such pervasive fame or notoriety” in every end of the Internet merely by entering but one of its electronic corridors. Further, applying the Philippines' expanded doctrine, while “simply taking private speech and posting it on the Internet does not magically transform it into speech of public concern,” the incredible scope of the Internet paints seemingly private issues discussed there with a public color.<sup>534</sup>

Justice George Malcolm's admonition not to be too “thin-skinned” thus takes on new significance a century later.<sup>535</sup>

#### F. SPAM AND E-MAIL ABUSE

In the past, unsolicited door-to-door advertisements raised privacy issues when households were continually disturbed by unwelcome salesmen. Today,

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<sup>530</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>531</sup> MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 81-82 (1998) (cited in O'Brien, *supra* note 510, at 2771).

<sup>532</sup> *Id.* at 100.

<sup>533</sup> See also John Kahn, *Defamation Liability of Computerized Bulletin Board Operators and Problems of Proof*, Feb. 1989, ¶¶ 31-32, at [http://www.eff.org/Legal/bbs\\_defamation\\_liability.paper](http://www.eff.org/Legal/bbs_defamation_liability.paper).

<sup>534</sup> *The Long Arm of Cyber-reach*, *supra* note 518, at 1621.

<sup>535</sup> Parenthetically, defamation doctrine is hardly uniform throughout the world. English doctrine, for example, treats public and private plaintiffs alike and does not consider the public or private nature of the issue involved, and leaves it to the defendant to prove fair comment. Harvey Zuckman, *The Global Implications of Defamation Suits and the Internet: The U.S. View*, 12(2) ENT. L.R. 53, 58 (2001).

automated e-mail mass advertising is another factor that makes privacy a key Internet issue,<sup>536</sup> and is increasingly relevant in SMS or text messaging.<sup>537</sup>

“Spam” is unsolicited commercial e-mail sent through “open-relays” to millions of internet users around the world. It has been described as “cost-shifted advertising” because computers send advertisements *en masse* at little cost to the senders, while consuming users’ time,<sup>538</sup> and it is an increasingly common experience to spend several minutes clearing one’s inbox of “junk email.” The hidden economic burden is massive; a study published by the European Commission in January 2001 estimated private consumer losses at EUR 10B per year.<sup>539</sup>

Spammers obtain e-mail addresses in three ways: by scavenging or harvesting, or automatically collecting addresses from web pages; by guessing, using dictionary terms or randomly-generated strings to develop addresses; and by outright purchase from list brokers.<sup>540</sup>

Spam clearly requires a broader understanding of privacy violations since there is no disclosure of one’s personal information (except one’s e-mail address in some cases); the reverse takes place as one faces intrusion via an avalanche of unwanted information in small doses. Unlike human marketers in jurisprudence or even mailed catalogs, spam is more intrusive in that one can receive it at any time and place, even the supposedly most sacred zones of privacy such as the bedroom. *Katz* divorced expectations of privacy from place and attached them to the person, and an intellectual framework to deal with spam extends this logic in even greater abstraction. Again, disclosure is not the constitutive element of violations of that “wall between himself and the outside world.”

This framework readily applies in Philippine thinking, and note how *National Press Club v. Court of Appeals*<sup>541</sup> stated:

Repetitive political commercials when fed into the electronic media themselves constitute invasions of the privacy of the general electorate.<sup>542</sup>

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<sup>536</sup> Robert Litan, *Law and Policy In the Age of the Internet*, 50 DUKE L.J. 1045, 1057-60 (2001). Ironically, spam also includes advertisements for anti-spam software.

<sup>537</sup> Electronic Privacy Information Center, *SPAM - Unsolicited Commercial E-Mail*, at [http://www.epic.org/privacy/junk\\_mail/spam](http://www.epic.org/privacy/junk_mail/spam) (last updated Nov. 30, 2005).

<sup>538</sup> *Id.*

<sup>539</sup> Unsolicited Commercial Electronic Email, Trans Atlantic Consumer Dialogue, DOC NO: Ecom-19-00 (2001), at [www.tacd.org](http://www.tacd.org) (last visited Dec. 30, 2007).

<sup>540</sup> Electronic Privacy Information Center, *SPAM - Unsolicited Commercial E-Mail*, at [http://www.epic.org/privacy/junk\\_mail/spam](http://www.epic.org/privacy/junk_mail/spam) (last updated Nov. 30, 2005).

<sup>541</sup> G.R. No. 102653, 207 SCRA 1, Mar. 5, 1991.

<sup>542</sup> *Id.* at 15.

Analyzing traditional media, *Eastern Broadcasting v. Dans*<sup>543</sup> noted that the “radio audience has lesser opportunity to cogitate, analyze and reject the utterance.”<sup>544</sup> This is because the impact of such speech is “forceful” and “immediate.” However, spam, although not forceful or immediate and easily deleted, has a similar effect in that one has no control over the daily torrent of junk e-mails.

The United States has already regulated intrusive advertising via familiar media such as mail, telephone,<sup>545</sup> and door-to-door advertising.<sup>546</sup> The state’s interest in protecting an individual’s right of privacy was extended as a power to control and limit unsolicited advertisements sent to his home. Note commercial speech enjoys much less protection in the spectrum of speech and is more justifiably regulated,<sup>547</sup> provided that the government has a legitimate interest in seeking such regulation,<sup>548</sup> which is straightforward because no individual has an incentive to police the miniscule but infinite intrusions. Using intermediate scrutiny, the government must only establish: first, the substantial interest; second, how the regulation advances the particular interest; and three, that the regulation is narrowly drawn.<sup>549</sup>

Philippine jurisprudence thus has a ready ground to justify spam’s regulation. In addition, note that tort law offers a theoretical but impractical remedy, since identifying the spammers is extremely difficult -- unless a captive cell phone user sets his sights on his telecommunications provider.

### G. COOKIES AND ONLINE PROFILING

Marketers around the world have capitalized on personal information harvested from the Internet. As technology increases convenience, it facilitates information’s collection, and its sale as the new online commodity.

Such digital thievery is done through “cookies,” or, “The pages you read tell marketers what junk to push on you.”<sup>550</sup> Cookies work through unique

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<sup>543</sup> G.R. No. 59329, 137 SCRA 628, 633, Jul. 19, 1985.

<sup>544</sup> *Id.* at 636.

<sup>545</sup> Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(c) (1988).

<sup>546</sup> *Martin v. City of Struthers*, 319 U.S. 141, 145-46 (1943)

<sup>547</sup> *Florida Bar v. Went for It*, 515 U.S. 618 (1995); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564-65 (1980).

<sup>548</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997).

<sup>549</sup> Michael W. Carroll, *Garbage In: Emerging Media and Regulation of Unsolicited Commercial Solicitations*, 1996 BERKELEY TECH. L.J., at <http://www.law.berkeley.edu/journals/btlj/articles/vol11/Carroll/html/reader.html>.

<sup>550</sup> *How Web Servers’ Cookies Threaten Your Privacy* at <http://www.junkbusters.com/ht/en/cookies.html> (last visited Dec. 30, 2007).

identifiers a web server places onto one's computer,<sup>551</sup> and commonly store usernames, passwords, display preferences and other settings, and financial information to facilitate sales.<sup>552</sup> Primarily and ostensibly, cookies are for Internet users' own conveniences, and spare one from reentering personal information for each transaction. However, these also help advertisers, from noting the banner advertisements that have already been flashed to the user to recording the products one has browsed. The latter allows a website that one never entered data into to sell a marketer the fact that one clicked on information on, for example, personal digital assistants. As more data is correlated with a computer's unique identifier, its user's digital portrait takes shape in what is called "online profiling."<sup>553</sup>

Advertisers track this profiling information and use cookies in determining "what your interests might be as you move from site to site,"<sup>554</sup> and display banner ads related to that user's interests. All this is currently unregulated, and no one is required to notify the user of such profiling. Compiled personal information's use or sale is similarly unregulated, which is causing increasing concern in the United States.<sup>555</sup>

Technically, users can regulate cookies. These are saved as miniscule, simple text files that can be deleted, and browsers can be set to reject cookies. Further, a cookie poses no immediate danger to one's computer; it cannot contain a virus and cannot manipulate the hard drive.<sup>556</sup> However, consider the following complaint:

While reading my E-mail the other day, I found a disturbing item. The anonymous sender offered to sell me child pornography because my E-mail address had "appeared on a list that fit this category."<sup>557</sup>

Online profiling likewise requires an expansion of current thinking as some may argue that there is no undue disclosure of information. Well before the Internet, people were already divulging personal information for the processing of countless needs such as driver's licenses, medical records, credit card applications and bank accounts. What has changed is that all this information was "not as easily

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<sup>551</sup> Jason Kotzker, *The Great Cookie Caper: Internet Privacy and Target Marketing at Home and Abroad*, 15 ST. THOMAS L. REV. 727, 734 (2003).

<sup>552</sup> *Id.* at 746; David Whalen, <http://www.cookiecentral.com/faq> (last visited Dec. 30, 2007); Stephen Wildstrom, *Privacy and the 'Cookie Monster'* (1996), at <http://www.businessweek.com>.

<sup>553</sup> Valarie Arrington-Steele, *Invasion of Privacy—Has Cyber-Technology Made Privacy a Thing of the Past?*, Yale-New Haven Teachers Institute (2004), at <http://www.yale.edu/ynhti/curriculum/units>.

<sup>554</sup> *Id.*

<sup>555</sup> Wildstrom, *supra* note 561.

<sup>556</sup> Whalen, *supra* note 561.

<sup>557</sup> Wildstrom, *supra* note 561.

accessible as it is now by the click of the mouse,<sup>558</sup> nor was there the technology to so readily compile, sort and transfer this information.

Searchability and automation make the constitutional practical obscurity nonexistent the moment a piece of information enters the Internet stream, often unwittingly. Again, *Katz* “zones of privacy” are supposedly independent of place, but the human mind still perceives them as tied to rough areas such as the sacred home<sup>559</sup> and the more open workplace.<sup>560</sup> It is more difficult to articulate the expectations of privacy breached by cookies, however, because these have been completely divorced from place. One should consider that one’s consumption preferences are intimately intertwined with an individual’s personality and lie so close to the core that one should not need to consider analogies of place.<sup>561</sup> Such expectations have now been articulated as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about themselves is communicated to others.”<sup>562</sup>

Although the violators are almost always private parties seeking commercial gain, the minute but cumulative injuries amount to systemic harms that only government can address. The violations’ nature should at least encourage legislation. The United States has, in fact, passed numerous laws in response to the above fears:

In 1966 Congress passed the Freedom of Information Act which provides a way for citizens to request information about the operation of government and what the government is doing with all the information it collects. The government does maintain the right to refuse to release information related to national security, intelligence activities, criminal cases and other areas.

In 1972 the Advisory Committee on Automated Personal Data Systems to the Secretary of the Department of Health, Education and Welfare stated basic principles for protecting privacy in the Information Age. They include disclosure of information-gathering activities, the right of individuals to correct information about them, and guarantees for accuracy and control of disclosure of information.

The Privacy Act of 1974 was passed to make government agencies disclose their information-gathering and distribution activities and to give citizens the opportunity to learn what information has been collected about them and to correct any errors.

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<sup>558</sup> *Arrington-Steele*, *supra* at 562.

<sup>559</sup> *People v. Burgos*, G.R. No. 68955, 144 SCRA 1, 12, 1986.

<sup>560</sup> *MHP Garments v. Ct. of Appeals*, G.R. No. 86720, 236 SCRA 227, 233, 1994.

<sup>561</sup> If one insists on analogies of place, given current frameworks, consider nevertheless that data may be mined even as one uses a computer from one’s bedroom. Consider, further, that even the real world parallel of a salesman following a customer with a notebook would strike anyone as odd.

<sup>562</sup> FRED CATE, *PRIVACY IN THE INFORMATION AGE* 22 (1999).

The Electronic Communications Privacy Act of 1986 was passed to prohibit the unauthorized interception of all electronic communications stored or in transit to include computer data transmissions and e-mail.

Congress also passed the Children's Online Privacy Protection Act of 1998 which prevents Web sites from gathering personal information about children without parental consent.<sup>563</sup>

Such, however, run into the opposite fear of Internet regulation and curtailments of online freedoms, particularly those related to the freedom of speech. Governments may "not be ready to pass a lot of regulations governing online privacy" since "technology is developing far too rapidly to be enclosed."<sup>564</sup> They may also face pressure from business interests. As a Clinton administration report established:

Commerce on the Internet could total tens of billions of dollars by the turn of the century. For this potential to be realized fully, governments must adopt a non-regulatory, market-oriented approach to electronic commerce....<sup>565</sup>

Cookies, perhaps, present the subtlest form of personal information's unmonitored disclosure through the internet. Coupled with commercial electronic databases' power, even the privacy value of identity is implicated, one's peace of mind disturbed by the thought of a recreated electronic profile directing advertisements to one's web browser or e-mail.

#### H. MONEY LAUNDERING AND FINANCIAL AND COMMERCIAL PRIVACY

One of the broadest Human Security Act provisions allows the examination of financial records. If an organization is declared as terrorist and unlawful under the Act, the government may apply to examine its financial records and, more broadly, those of its members.<sup>566</sup> This brings privacy to the fore, as financial privacy is a fertile field of debate.

Modern technology has expanded not just the ability to express oneself, but to act financially as well. Amidst fears of money laundering and terrorism, the privacy that surrounds such financial cyber-reach and the need to protect peace of mind and reputation must be reiterated because money becomes increasingly indispensable in the exercise of even fundamental rights in today's complex economy. The right to associate today, for example, is emasculated without the

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<sup>563</sup> Arrington-Steele, *supra* note 562.

<sup>564</sup> *Id.*

<sup>565</sup> *A Framework for Global Electronic Commerce*, ¶ 6, at <http://www.technology.gov/digeconomy/framework.htm> (Jul. 1, 1997).

<sup>566</sup> Rep. Act No. 9372, § 27 (2007).

necessary right to fund one's associations.<sup>567</sup> Thus, *Buckley v. Valeo* ruled:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.<sup>568</sup>

Professor Michael Froomkin wrote, "The ability to protect a secret, to preserve one's privacy, is a form of power."<sup>569</sup> Loss of privacy as a loss of power is readily demonstrated when one loses one's financial information to strangers. Access to a person's bank records, for example, allows an intruder to infer many things from that person's lifestyle, to his political beliefs. Credit card records reveal everything from clothing purchases to travels. Other financial records reveal many things from stock investments and loans to child support payments. As one court held:

For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography.<sup>570</sup>

As another put more succinctly:

If it is true that a man is known by the company he keeps, then his soul is almost laid bare to the examiner of his checking account.<sup>571</sup>

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<sup>567</sup> Emmanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C. J. INT'L L. & COM. REG. 1, 7 (2002), citing David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 248 (1999).

<sup>568</sup> *Buckley v. Valeo*, 424 U.S. 1, 20 (1976), cited by *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Turner Broadcasting System, Inc. v. Fed. Comm'n's Comm'n*, 512 U.S. 622 (1994).

<sup>569</sup> Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1475 (2000).

<sup>570</sup> *Burrows v. Sup. Ct. of San Bernardino County*, 529 P.2d 590, 596 (Cal. 1975), quoted in *United States v. Miller*, 425 U.S. 435, 451 (1976) (Brennan, J., *dissenting*).

<sup>571</sup> *Suburban Trust Co. v. Waller*, 408 A.2d 758, 762 (Md. Ct. Spec. App. 1979), discussing *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 85-86 (1974) (Douglas, J., *dissenting*). "Since the banking transactions of an individual give a fairly accurate account of his religion, ideology, opinions, and interests, a regulation impounding them and making them automatically available to all federal investigative agencies is a sledge-hammer approach to a problem that only a delicate scalpel can manage. Where fundamental personal rights are involved - as is true when as here the Government gets large access to one's beliefs, ideas, politics, religion, cultural concerns, and the like - the Act should be 'narrowly drawn' (*Cantwell v. Connecticut*, 310 U.S. 296, 307) to meet the precise evil."

In the same breath it asserted privacy a fundamental right, *Ople* stated that a key zone of privacy surrounds the Secrecy of Bank Deposits Act.<sup>572</sup> Whether or not this portion of *Ople* is dictum, it was quoted in the key banking decision *Marquez v. Desierto*,<sup>573</sup> and another decision emphasized the “absolute confidentiality” mandated by the Act.<sup>574</sup> Moreover, banking cases more generally speak of public faith in the banking system,<sup>575</sup> a statement arguably not limited to its financial stability. This is borne out by the foundational English case *Tournier v. National Provincial and Union Bank of England*,<sup>576</sup> which held that confidentiality of transactions and accounts was implied in all contracts with banks,<sup>577</sup> a contention generally adhered to by American courts.<sup>578</sup> One of the latter, for example, held:

Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors.<sup>579</sup>

However, the American Supreme Court ruling on financial privacy, *United States v. Miller*,<sup>580</sup> reversed a lower court decision that applied the right against unreasonable search to bank records:

[W]e perceive no legitimate ‘expectation of privacy’ in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.

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<sup>572</sup> *Ople v. Torres*, G.R. No. 127685, 293 SCRA 141, 158, Jul. 23, 1998, *citing* Rep. Act. No. 1405 (1955).

<sup>573</sup> G.R. No. 135882, 359 SCRA 772, Jun. 27, 2001, *quoting* *Ople*, 354 Phil. at 948, 973-74, 293 SCRA 141, 158.

<sup>574</sup> *Union Bank of the Phils. v. Ct. of Appeals*, 321 SCRA 563, 564-65 (1999), *quoted in* *Marquez*, 259 SCRA at 781.

<sup>575</sup> *Central Bank v. Ct. of Appeals*, G.R. No. 76118, 220 SCRA 536, 546, Mar. 30, 1993, *quoting* *Phil. Veterans Bank Employees Union-NUBE v. Phil. Veterans Banks*, 189 SCRA 14 (1990). “...the public trust in the banking system.” *Bank of the Phil. Islands v. Ct. of Appeals*, G.R. No. 112392, 326 SCRA 641, Feb. 29, 2000. “...the trust and confidence of the international banking community in the banking system of the country...” *Phil. Nat’l Bank v. Ct. of Appeals*, G.R. No. 108052, 259 SCRA 174, Jul. 24, 1996.

<sup>576</sup> 1 K.B. 461 (1923).

<sup>577</sup> *Id.*, *quoted in* *Palsley*, *supra* note 3, at 173. The ruling provided for four exceptions:

“(1) Where the disclosure is under compulsion by law.

(2) Where there is a duty to the public to disclose.

(3) Where the interests of the bank require disclosure.

(4) Where the disclosure is made by the express or implied consent of the customer.”

<sup>578</sup> *Palsley*, *supra* note 3, at 173-87.

<sup>579</sup> *Suburban Trust Co. v. Waller*, 408 A.2d 758, 763 (Md. Ct. Spec. App. 1979), *citing* *Peterson v. Idaho First Nat’l Bank*, 367 P.2d 284, 290 (1961).

<sup>580</sup> *United States v. Miller*, 425 U.S. 435 (1976).

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.<sup>581</sup>

The Court gave the additional reason that the records in question were the bank's business records, not the defendant's personal papers. Justice William Brennan, however, dissented, citing:

[T]he emerging trend among high state courts of relying upon state constitutional protections of individual liberties – protections pervading counterpart provisions of the United States Constitution, but increasingly being ignored by decisions of this Court.<sup>582</sup>

On the same day, Justice Brennan also wrote in his separate opinion in *Fisher v. United States*:

I do not join the Court's opinion, however, because of the portent of much of what is said of a serious crippling of the protection secured by the privilege against compelled production of one's private books and papers. Like today's decision in *United States v. Miller*, it is but another step in the denigration of privacy principles settled nearly 100 years ago in *Boyd v. United States*....

Nonbusiness economic records in the possession of an individual, such as canceled checks or tax records, would also seem to be protected. They may provide clear insights into a person's total lifestyle. They are, however, like business records and the papers involved in these cases, frequently, though not always, disclosed to other parties....<sup>583</sup>

Nevertheless, *Ople* and *Marquez* have sealed the issue in Philippine law, and both the Anti-Money Laundering Act of 2001 and the Human Security Act require court orders before lifting Secrecy of Bank Deposits Act protections.<sup>584</sup> Moreover, *Miller's* disclosure argument is less applicable today, with the increasing volume of bank transactions matched by an increasingly impersonal automation, and some of the remaining human intervention may be couched in the context of *Reporters Committee's* practical obscurity. Note also that the United States Congress later legislated in response to *Miller*.

I emphasize *Ople* in the face of *Ejercito v. Sandiganbayan*,<sup>585</sup> a 2006 decision that restated the line of cases on the Secrecy of Bank Deposits Act. The decision emphasized that the investigation of former president Estrada's bank accounts was subject to the Act's exceptions, and in any case declined to apply the "fruit of the poisonous tree" principle under the exclusionary rule. What is curious is that Justice Angelina Sandoval-Gutierrez's dissent framed itself under the right to privacy, citing

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<sup>581</sup> *Id.* at 442-43.

<sup>582</sup> *Id.* at 454-55 (Brennan, J., *dissenting*).

<sup>583</sup> *Fisher v. United States*, 425 U.S. 391, 416, 427 (1976) (Brennan, J., *concurring in the result*).

<sup>584</sup> Rep. Act. No. 9160 (2001), § 11; Rep. Act No. 9372, § 27 (2007).

<sup>585</sup> G.R. No. 157294, 509 SCRA 190, Nov. 30, 2006.

*Morfe*, Justice Cortes and the Universal Declaration of Human Rights. She argued that the Ombudsman's inquiries, which allowed the office to establish exceptions to the Act, violated Estrada's expectations of privacy with respect to his bank accounts. She wrote:

Practically speaking, a customer's disclosure of his financial affairs is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. Consequently, the customer's reasonable expectation is that, absent customary legal process, the matter he reveals to the bank will be utilized by the bank only for internal banking purposes.<sup>586</sup>

I readily reconcile the majority opinion with the dissent in that the two did not differ on whether there was in fact an expectation of privacy, and note that Justice Puno himself joined the majority. Rather, the former opinion held that the Ombudsman's inquiries were legal at the time they were made, which was shortly before *Marquez* reconciled the Ombudsman Act and the Secrecy of Bank Deposits Act and held that the Ombudsman could only inspect bank accounts pursuant to a pending case.<sup>587</sup> The majority, however, refused to apply *Marquez* retroactively. This reconciliation is evident when one notes how Justice Romeo Callejo, Sr.'s concurrence quotes *Miller*, but follows up that the United States Congress enacted the Right to Financial Privacy Act of 1978 in response, and continues its discussion under this law's framework.

Nevertheless, *Ejercito* is disappointing in that the majority failed to take up the right to privacy, despite the vocal dissent that focused on this. Justice Sandoval-Gutierrez made a striking point, for example, that Estrada only learned about his financial information's disclosure two years later, through the media.

Note that the dissent focused on *Katz*, not *Marquez* and *Ople*. This opens the door for the Court to find related zones of privacy outside the recognized statutory zone in the Secrecy of Bank Deposits Act, and individuals today are practically compelled to disclose commercial information to many other entities.

Note also that the dissent underscores the need for a comprehensive understanding of the Philippine right to privacy. A later paragraph arguing that Estrada should have been notified of the Ombudsman's subpoena stated that "the right of personal privacy is one aspect of the 'liberty' protected by the Due Process Clause."<sup>588</sup> This is quite curious in context because the doctrine cited pertains to substantive due process, which has nothing to do with proper notice. Further, this sentence from the dissent cited the *Roe* line of cases, including *Carey* and *Glucksburg*, all decisional privacy decisions that had nothing to do with the dissent's *Katz* discussion.

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<sup>586</sup> *Id.* at 244 (Sandoval-Gutierrez, J., *dissenting*), *citing* Burrows, 529 P.2d at 596.

<sup>587</sup> *See* Rep. Act 6770, § 15(8) (1989).

<sup>588</sup> 509 SCRA 190, 260 (Sandoval-Gutierrez, J., *dissenting*).

*I. Government regulation of the Internet in general*

A popular United States opinion poll showed that an overwhelming majority of Americans consistently reported that “they are deterred from using the Internet more than they currently do because of privacy-related fears.”<sup>589</sup> There is great freedom in cyberspace as its inherent decentralization means that no single body can oversee it. Users must either obtain commercial protection software or rely on governments to secure online privacy rights.<sup>590</sup>

The United States Congress made its first attempt at regulation when it enacted the Communications Decency Act or CDA.<sup>591</sup> This made it criminal to transmit “obscene or indecent” material over the internet to a person below eighteen years old. However, *Reno* deemed the Act in conflict with the freedom of speech, as a suppression of the right of adults to send and receive a diversity of information over the Internet.<sup>592</sup> The following year, the Child Online Protection Act was passed, requiring commercial websites distributing “material harmful to minors,” judged by “contemporary community standards,” to restrict their sites’ access by minors. The Supreme Court upheld an injunction against the act’s enforcement, and a federal district court recently found the act unconstitutional, a ruling currently on appeal.<sup>593</sup>

Subsequent major internet laws were content neutral, such as the No Electronic Theft Act, Digital Millennium Copyright Act, Internet Tax Freedom Act, Trademark Cyberpiracy Prevention Act, Uniform Electronic Transactions Act, Uniform Computer Information Transactions Act, and Electronic Signatures in Global and National Commerce Act. Even the CDA’s next evolution was drawn more narrowly. The Children’s Internet Protection Act required schools and libraries to use pornography filters on computers used by minors as a condition to federal funding. Finally, spam was addressed in 2003 by the Controlling the Assault of Non-Solicited Pornography And Marketing Act, or CAN-SPAM. This act allows marketers to send e-mails subject to a number of restrictions, such as a visible unsubscribe mechanism, accurate subject headings, and the marketer’s physical address. Offenses under the act range from use of falsified headings to e-mail address harvesting, and arrests have been made under the act since 2004.

It must be emphasized that the concept of the Internet as its own hermetically sealed dimension where freedom is absolute quickly became obsolete in the late 1990s. Rather, it is seen as an extension of the real world, access to which

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<sup>589</sup> Litan, *supra* note 544, at 1058.

<sup>590</sup> Carroll, *supra* note 558, at 262.

<sup>591</sup> 47 U.S.C.A. § 223 (1996).

<sup>592</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997), *citing* *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1968).

<sup>593</sup> *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004); *Am. Civil Liberties Union v. Gonzales*, 478 F. Supp 2d. 775. (E.D.Pa. 2007).

can be regulated by governments.<sup>594</sup> Surveying the various values protected by privacy and the Bill of Rights, It is readily possible to regulate the manner in which individuals use the Internet without regulating the actual content of expression. Recall that it is extremely difficult for individuals to address Internet violations of privacy, given the infinite but individually near trivial intrusions.

*J. Drug testing*

Drug testing, given the recent concerns regarding terrorism, must be seen as an anomaly in Constitutional law. Where concerns against an anti-terror law have raised howls of protest on privacy grounds, drug testing has been radically expanded by the Dangerous Drugs Act of 2002<sup>595</sup> yet has failed to generate the same attention. The dangers of intrusion and disruption of seclusion, however, are similar, and there are additional dangers to reputation due to disclosure of personal medical information or even erroneous test results. Beyond privacy intrusions, the new law is in fact a penal law which should arguably be examined against the warrant requirements of the right against unreasonable search. The law provides:

Sec. 36. *Authorized Drug Testing.* – Authorized drug testing shall be done by any government forensic laboratories or by any of the drug testing laboratories accredited and monitored by the DOH to safeguard the quality of test results. The DOH shall take steps in setting the price of the drug test with DOH accredited drug testing centers to further reduce the cost of such drug test. The drug testing shall employ, among others, two (2) testing methods, the screening test which will determine the positive result as well as the type of the drug used and the confirmatory test which will confirm a positive screening test. Drug test certificates issued by accredited drug testing centers shall be valid for a one-year period from the date of issue which may be used for other purposes. The following shall be subjected to undergo drug testing:

(a) Applicants for driver's license. – No driver's license shall be issued or renewed to any person unless he/she presents a certification that he/she has undergone a mandatory drug test and indicating thereon that he/she is free from the use of dangerous drugs;

(b) Applicants for firearm's license and for permit to carry firearms outside of residence. – All applicants for firearm's license and permit to carry firearms outside of residence shall undergo a mandatory drug test to ensure that they are free from the use of dangerous drugs: *Provided*, That all persons who by the nature of their profession carry firearms shall undergo drug testing;

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<sup>594</sup> Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1408 (1996); Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119, 1121 (1998).

<sup>595</sup> Rep. Act No. 9165 (2002).

(c) Students of secondary and tertiary schools. – Students of secondary and tertiary schools shall, pursuant to the related rules and regulations as contained in the school's student handbook and with notice to the parents, undergo a random drug testing: *Provided*, That all drug testing expenses whether in public or private schools under this Section will be borne by the government;

(d) Officers and employees of public and private offices. – Officers and employees of public and private offices, whether domestic or overseas, shall be subjected to undergo a random drug test as contained in the company's work rules and regulations, which shall be borne by the employer, for purposes of reducing the risk in the workplace. Any officer or employee found positive for use of dangerous drugs shall be dealt with administratively which shall be a ground for suspension or termination, subject to the provisions of Article 282 of the Labor Code and pertinent provisions of the Civil Service Law;

(e) Officers and members of the military, police and other law enforcement agencies. – Officers and members of the military, police and other law enforcement agencies shall undergo an annual mandatory drug test;

(f) All persons charged before the prosecutor's office with a criminal offense having an imposable penalty of imprisonment of not less than six (6) years and one (1) day shall have to undergo a mandatory drug test; and

(g) All candidates for public office whether appointed or elected both in the national or local government shall undergo a mandatory drug test.

In addition to the above stated penalties in this Section, those found to be positive for dangerous drugs use shall be subject to the provisions of Section 15 of this Act.

Sec. 15. *Use of Dangerous Drugs.* – A person apprehended or arrested, who is found to be positive for use of any dangerous drug, after a confirmatory test, shall be imposed a penalty of a minimum of six (6) months rehabilitation in a government center for the first offense, subject to the provisions of Article VIII of this Act. If apprehended using any dangerous drug for the second time, he/she shall suffer the penalty of imprisonment ranging from six (6) years and one (1) day to twelve (12) years and a fine ranging from Fifty thousand pesos (P50,000.00) to Two hundred thousand pesos (P200,000.00): *Provided*, That this Section shall not be applicable where the person tested is also found to have in his/her possession such quantity of any dangerous drug provided for under Section 11 of this Act, in which case the provisions stated therein shall apply.

Focusing on privacy, one recalls that *Schmerber v. California*,<sup>596</sup> which was taken up by Justice Cortes, held that the human body itself is a zone of privacy and that a blood test must be deemed covered by the right against unreasonable search.

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<sup>596</sup> 384 U.S. 757 (1967).

This laid the foundation for balancing the right against the police power in drug test cases by the United States Court in 1989.

Initially, the balance swung in favor of the police power. *Skinner v. Railway Labor Executives Association*<sup>597</sup> upheld federal regulations that required breath and urine tests on railroad employees who violated certain safety rules. The decision explicitly recognized that *Schmerber* and the right against unreasonable search would be applicable, even though there was no penetration of the skin. However, it ruled that the case presented “‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.”<sup>598</sup> It stated:

The problem of alcohol use on American railroads is as old as the industry itself, and efforts to deter it by carrier rules began at least a century ago.... More recently, these proscriptions have been expanded to forbid possession or use of certain drugs....

...The FRA pointed to evidence indicating that on-the-job intoxication was a significant problem in the railroad industry. The FRA also found, after a review of accident investigation reports, that from 1972 to 1983 “the nation’s railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor,” and that these accidents “resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at \$19 million (approximately \$27 million in 1982 dollars).” (internal citations omitted)<sup>599</sup>

That same day, *National Treasury Employees Union v. Von Raab*<sup>600</sup> similarly upheld drug testing for customs employees who were: 1) directly involved in drug interdiction or enforcement of related laws; 2) required to carry firearms; 3) handling “classified” material. The Court found:

Many of the Service’s employees are often exposed to this criminal element and to the controlled substances it seeks to smuggle into the country. The physical safety of these employees may be threatened, and many may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service. The Commissioner indicated below that “Customs officers have been shot, stabbed, run over, dragged by automobiles, and assaulted with blunt objects while performing their duties.” At least nine officers have died in the line of duty since 1974. He also noted that Customs officers have been the targets of bribery by drug smugglers on numerous occasions, and several have been removed from the Service for accepting bribes and for other integrity violations.

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<sup>597</sup> 489 U.S. 602 (1989).

<sup>598</sup> *Id.* at 603.

<sup>599</sup> *Id.* at 607.

<sup>600</sup> 489 U.S. 656 (1989).

It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment.... (internal citations omitted)<sup>601</sup>

The scope of valid drug testing was arguably expanded six years later by *Vernonia School District 47J v. Acton*,<sup>602</sup> which applied the above cases regarding train collisions and smuggling to grade school athletics. The Court stated:

Along with more drugs came more disciplinary problems. Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.

Not only were student athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture. This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury. Expert testimony at the trial confirmed the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance. The high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use.

...

Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs... [I]t must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.... [T]he particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes.<sup>603</sup>

Although the three cases all posited "special needs," it must be noted that *Vernonia* affected a much broader category of persons, based on a compelling state interest. In fact, the Court stated that public school student athletes had a lesser expectation of privacy compared to the general population because they were under the schools' custody and responsibility.<sup>604</sup> The basis for this finding included the "communal undress inherent in athletic participation,"<sup>605</sup> citing locker rooms as an example, and this is arguably specious.

In 1997, another Supreme Court decision finally struck down a drug test policy because "special needs" did not exist. *Chandler v. Miller*<sup>606</sup> dealt with

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<sup>601</sup> *Id.* at 670.

<sup>602</sup> 515 U.S. 663 (1995).

<sup>603</sup> *Id.* at 661.

<sup>604</sup> *Id.* at 656.

<sup>605</sup> *Id.* at 657.

<sup>606</sup> 520 U.S. 305 (1997).

mandatory testing for Georgia gubernatorial candidates, and stated that “special need for drug testing must be substantial – important enough to override the individual’s acknowledged privacy interest.”<sup>607</sup> Compared to the statistics presented in *Skinner* and *Von Raab*, the state failed to show any particular, concrete danger associated with the public officials concerned, especially a particular danger that could not be addressed by regular law enforcement methods nor by the public scrutiny such officials faced. Further, the testing policy itself was ineffective, even assuming “special needs” existed. The candidate could select the date of the test, and could thus abstain from drug use briefly to avoid a positive result.

Another decision in 2002, however, further broadened *Vernonia* by upholding a testing policy directed at all students who wished to engage in extracurricular activities. *Board of Education v. Earls*<sup>608</sup> effectively set aside much of *Vernonia*’s reasoning specific to athletes and focused on the assertion that students in public schools had lesser expectations of privacy as wards of the State,<sup>609</sup> and further because such activities were subject to school regulations and faculty monitoring.<sup>610</sup> *Earls* no longer required evidence of a particular interest, and merely required evidence of drug use in the school district:

Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car.... And the school board president reported that people in the community were calling the board to discuss the “drug situation.” We decline to second-guess the finding of the District Court that “[v]iewing the evidence as a whole, it cannot be reasonably disputed that the [School District] was faced with a ‘drug problem’ when it adopted the Policy.”<sup>611</sup>

Further, *Earls* stated that *Chandler* had not required a “real and immediate interest,” but only noted that a “demonstrated problem of drug abuse” “shore[d] up”<sup>612</sup> a special need. It added that *Von Raab* had not found any documented history of drug abuse among customs officers. *Earls* thus reemphasized the premise

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<sup>607</sup> *Id.* at 318.

<sup>608</sup> Board of Educ. of Indep. School Dist. No. 92 of Pottawatomie County v. Earls, 436 U.S. 822 (2002).

<sup>609</sup> *Id.* at 830-31. This holding has been criticized by some authors and compared negatively to the classic decision *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Students do not “shed their constitutional rights... at the school house gate.” *Id.* at 506. From another aspect, the United States has been criticized as using this thinking to justify loose treatment of information collected from students, and one author argues that the inability to articulate the right to informational privacy of children stunts the articulation of the general right for adults. Susan Stuart, *Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 863, 866 (2004).

<sup>610</sup> Earls, 436 U.S. at 831-32.

<sup>611</sup> *Id.* at 834-35.

<sup>612</sup> *Id.* at 835.

that public school students had a decreased expectation of privacy, and greatly reduced the “specials needs” threshold with respect to them:

Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug testing policy. We reject the Court of Appeals’ novel test that “any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.”<sup>613</sup>

It must be emphasized, however, that *Earls*’ result is apparently unique to students. For example, an Eighth Circuit decision recently used *Earls* to contrast what was deemed a minimal intrusion with a policy of randomly searching students’ belongings by classroom.<sup>614</sup> In contrast, a 2004 Arizona decision struck down a random testing policy on firemen, finding that no “special needs” were asserted. It found that *Earls* and *Vernonia* had merely limited application because, “Firefighters, of course, have little in common with students entrusted to the government’s care.”<sup>615</sup> Finally, *Earls* itself reiterated that its line of cases applied to warrantless searches that were administrative in nature, and in no way replaced probable cause in a criminal context. This was explicitly emphasized with respect to *Skinner*, *Von Raab*, *Vernonia*, and *Chandler* by another Supreme Court decision, *Ferguson v. City of Charleston*,<sup>616</sup> and has been upheld in lower court decisions that applied *Earls*.<sup>617</sup>

It must be noted, however, that all American precedents have preliminarily required that a drug test be as minimally intrusive as possible to be valid, and held that, “Urination is ‘an excretory function traditionally shielded by great privacy.’”<sup>618</sup>

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<sup>613</sup> *Id.* at 836. It compared itself in this way to *Vernonia*. “*Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school’s custodial responsibilities.” *Id.* at 838. “The *Earls* model of deference effectively limits the judicial function to watching for evidence of anomaly and abuse of authority, yielding to even the imprecise implementation of a good faith attempt to match a policy to a campus problem.” Bernard James & Joanne Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court’s Restatement of Student Rights After Board of Education v. Earls*, 56 S.C. L. REV. 1, 91 (2004).

<sup>614</sup> *Doe v. Little Rock School Dist.*, 380 F.3d 349 (8th Cir. 2004). Further, a recent district court ruling did not uphold an ordinance that allowed law enforcers to administer breath tests on persons suspected of drinking and who were below 21. This was no longer in the context of a public school. *Spencer v. City of Bay City*, 292 F.Supp.2d 932 (E.D.Mich. 2003).

<sup>615</sup> *Petersen v. City of Mesa*, 83 P.3d 35, 41 (S. Ct. Ariz. 2004).

<sup>616</sup> 532 U.S. 67 (2001).

<sup>617</sup> *Earls*, for example, highlighted that test results were not used for any law enforcement purpose, nor were students given any academic penalties for failing a drug test. The contrast with tests relating to criminal penalties was noted in, for example, *Spencer*, 292 F.Supp.2d 932; *Hannoy v. State*, 789 N.E.2d 977 (CA Ind. 2003).

<sup>618</sup> *Earls*, 536 U.S. at 832, quoting *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 636 (1989). “Being forced under threat of punishment to urinate into a bottle being held by another is purely and simply degrading.” *Storms v. Coughlin*, 600 F. Supp. 1214, 1217 n.2

For example, urine samples are usually collected inside bathrooms, and an observer merely listens to the sound of urination instead of outright staring at the subject. The same cases have also mandated strict confidentiality requirements, as well as chain of custody procedures to ensure that the no results are mistakenly attributed to another subject.

A recent comment noted:

Drug testing has become routine for many of America's schools. In fact, the current administration encourages schools to adopt drug testing policies as part of the nation's drug abuse prevention policy. In addition, President George W. Bush addressed the issue in his 2004 State of the Union Address by announcing the availability of funds to assist schools to adopt drug testing policies.<sup>619</sup>

Note an author criticized *Earls* for failing to consider that students might be embarrassed by a drug test to the point that it might serve as a deterrent to extracurricular activities, yet empirical evidence precisely showed a negative correlation between such involvement and drug use.<sup>620</sup> A *Harvard Law Review* note similarly criticized an earlier Seventh Circuit ruling similar to *Earls*.<sup>621</sup>

However, compared against the consistent American doctrine, the Philippine Dangerous Drugs Act is alarmingly broad. It amounts to blanket approval of drug testing for almost every member of society, without any showing of "special needs" or other particular circumstances. Even with respect to public school students, it must be noted that the American cases upheld testing policies on a per school district basis. Further, except for the requirement that positive results be confirmed by a second test, it prescribes no safeguard or instruction that intrusion be minimal. This includes not only the physical intrusions during the testing itself, but the confidentiality of the results, considering that a medical test can reveal a wide range of information about an individual whose disclosure is far more intrusive than the test itself. Neither is there any prescription that tests be effective. Finally, it must be emphasized that the Dangerous Drugs Act is a penal law, and the probable cause requirement must be applied, not the American administrative search jurisprudence discussed.

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(S.D.N.Y. 1984). One author has noted that urination may even be traumatic if compelled. Ross Epstein, *Urinalysis testing in correctional facilities*, 67 B.U. L. REV. 475 (1987).

<sup>619</sup> Gareth Diaz Zehrbach & Julie Mead, Comment, *Urine as "Tuition": Are We There Yet?*, 194 ED. LAW REP. 775, 775 (2005).

<sup>620</sup> M. Casey Kucharson, Note, *Please Report to the Principal's Office, Urine Trouble: The Effect of Board of Education v. Earls on America's Schoolchildren*, 37 AKRON L. REV. 131, 165-69 (2004).

<sup>621</sup> Recent Cases, *Seventh Circuit Holds That Random Suspicionless Drug Testing of Participants in Extracurricular Activities Does Not Violate The Fourth Amendment – Todd v. Rush County Schools*, 133 F.3d 1984 (7th Cir.), 112 HARV. L. REV. 713, 718 (1999).

The testing for driver's licensees was the first to be applied, even before the Dangerous Drugs Act was amended,<sup>622</sup> and is the most visible today. Even without considering the penal sanction, it is highly questionable under the American guidelines. First, it affects a class that is potentially the country's entire adult population, and it is difficult to imagine what "special need" exists. Second, it is woefully ineffective by *Chandler's* standard, since the licensee obtains his own test and has three years before the next renewal to plan when to undergo the test. Third, the current policy has no particular safeguards for concerns such as female subjects' modesty, the intrusion of compelled urination in general, or false positive results.

Outside a strict privacy context, the policy may even be assailed as a grave social burden whose cost is borne by the public, yet is ineffective. For example, in January to March 2002, there were 1,678 positive results in the country,<sup>623</sup> or a rough average of 560 per month. This must be compared against the number of licenses issued:

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

As a rough estimate, dividing 191,353 by 560, one sees that 342 tests must be conducted for one positive result, and this subject will not necessarily even be a drug addict. At PHP300 per test, this amounts to more than *one hundred thousand pesos* per positive result, which restates *Chandler's* standard regarding effectiveness in economic language. One argues that this factor should be considered in weighing the government interest put forth, and approach that parallels *Matthews v. Eldridge*.<sup>624</sup>

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs.... The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision....

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<sup>622</sup> Dep't of Trans. & Comm'n Adm. Order No. BGC-AO-001, Feb. 23, 1999.

<sup>623</sup> All data obtained by the author from the Land Transportation Office main branch in 2002.

<sup>624</sup> 424 U.S. 319 (1976).

Financial cost alone is not a controlling weight.... But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost... [R]esources available for any particular program of social welfare are not unlimited. (internal citations omitted)<sup>625</sup>

Similar concerns are raised against the other broad provisions of the Dangerous Drugs Act, even the one providing for drug testing of students. Further, random testing policies have been frowned upon by some courts because discretion may be abused by those in charge of selecting subjects.<sup>626</sup> It must be noted, perhaps, that the fact that the intrusion caused by drug testing goes beyond mere discomfort must be articulated in the Philippine academe. For example, one American commentator depicted:

You hear your name announced over the intercom and are immediately directed to report to the nurse's office. ... When it's finally your turn, you exchange your form for a transparent cup and a nurse says, "fill it to the line." While the nurse is either listening through a door or standing over your shoulder, you force out what little liquid you can muster and turn it over to the technician, knowing that the result could determine your future participation in sports, extracurricular activities, or any other program your school decided to limit. More likely, however, you see the test as a joke, ineffective, and a serious invasion of your privacy.<sup>627</sup>

Even outside the economic context, this disproportionate burden on the innocent must be taken as a valid Bill of Rights argument.<sup>628</sup>

Finally, again, it cannot be emphasized enough that the Dangerous Drugs Act is a penal law which the right against unreasonable search and its safeguards were precisely designed to apply to.

#### *K. Genetic privacy*

*Schmerber* was revolutionary for its application of the rights against unreasonable search and of privacy to the human body, including body fluids such as blood, urine and even breath. Modern science has advanced so far, however, that

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<sup>625</sup> *Id.* at 348. Drawn in part from the author's conversations with Dean Agabin in 2002.

<sup>626</sup> See, e.g., *Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W. Va. 1990); John Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799 (2000).

<sup>627</sup> Aaron Marcus, Note, *Beyond the Classroom: A Reality Based Approach to Student Drug Testing*, 3 WHITTIER J. CHILD & FAM. ADVOC. 365, 365 (2004).

<sup>628</sup> Arnold Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

the *Schmerber* doctrine has been advanced one step further to apply to DNA itself,<sup>629</sup> to an individual's very genetic makeup. Thus, beyond the privacy values of seclusion and reputation addressed by the drug testing line of *Skinner*, *Von Raab*, *Chandler*, and *Earls*, the involvement of DNA implicates one's very sense of identity. This is especially true when one considers that in 1997, a scientist was already able to clone an adult sheep, a complex organism.<sup>630</sup>

The 2003 Iceland Supreme Court decision *Guomundsdottir v. Iceland*<sup>631</sup> is the broadest genetic privacy ruling to date, and featured a daughter and a deceased father's genetic information:

[I]t held that "for reasons of personal privacy" Guomundsdottir "has a personal interest in preventing the transfer of data from her father's medical records to the Health Sector Database, as it is possible to infer, from the data, information relating to her father's hereditary characteristics which could also apply to herself." The Court concluded that Guomundsdottir's "right to make the claims that she is making in the case is admitted."<sup>632</sup>

Simply, although privacy inheres in the individual, the Iceland Court reasoned that a parent has half of one's DNA.<sup>633</sup>

Rulings such as *Guomundsdottir* and American appellate court rulings regarding genetic databases are spurred by awareness of the extensive information stored inside a genetic sample and the inversely proportional lack of control a person has over this information once such a sample is put in a third party's control. The simple knowledge of a genetic characteristic or defect in an individual or the possibility of such stands the chance of coloring one's relations with people, such that they draw inferences regarding oneself based solely on that piece of genetic information. Such characteristics may even include a genetic disease or propensity towards certain criminal behavior.<sup>634</sup> One may even choose to withhold genetic information from oneself, avoiding a genetic test so as not to live life or perhaps have children having confirmed one has a genetic disease. Beyond personal

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<sup>629</sup> See James Watson & Francis Crick, *Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid*, 171 NATURE 737 (1953).

<sup>630</sup> Note, *Human Cloning and Substantive Due Process*, 111 HARV. L. REV. 2348, 2348 (1998).

<sup>631</sup> No. 151/2003, Nov. 27, 2003 (Ice.).

<sup>632</sup> Recent Cases, *Icelandic Supreme Court Holds That Inclusion of an Individual's Genetic Information in a National Database Infringes on the Privacy Interests of His Child – Guomundsdottir v. Iceland*, No. 151/2003 (Nov. 27, 2003) (Ice.), 118 HARV. L. REV. 810, 811 (2004).

<sup>633</sup> A *Harvard Law Review* Note opined that property rather than privacy doctrine would best resolve such concerns. However, this was partly because of the state of American privacy doctrine. *Id.* at 812. See, e.g., Sonia Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 GEO. WASH. L. REV. 737, 750 (2004); Paul Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055 (2004). See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 159-62 (1999).

<sup>634</sup> Leigh Harlan, Note, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 DUKE L.J. 179, 181-82 (2004).

relationships, however, such genetic information can color commercial relationships such as employment and medical insurance.<sup>635</sup>

A different plane of violations is involved in genetic research. One would feel as though one's soul is laid bare or that one has surrendered an intimate portion of oneself, and is suddenly unsure of what will happen to that part of oneself. Or, one participates because such research is one's hope of finding a cure for an incurable genetic condition, leading to a significant emotional investment. At the very least, one hopes to help others with the condition.<sup>636</sup> George Washington law professor Sonia Suter illustrated a scenario:

Cathy and Curt Donnor had a young child who suffered from Canavan disease ("CD"), an inherited, devastating, and inevitably fatal brain disease. No prenatal test was available. After giving birth to another child with the same disease, the Donnors convinced a group of researchers to try to develop a genetic test for CD. They agreed to donate tissue samples to help researchers identify the gene for CD and even offered to persuade other families affected by CD to do the same. The Donnors were explicit about their reasons for participating in the research: they wanted to facilitate the isolation of the CD gene so that affordable screening programs would be widely available to enable families to find out whether they were carriers of the disease gene or to undergo prenatal testing. Their participation was purely altruistic; because their children were dying, the research could not help them. The knowledge that they were carriers of CD shaped the Donnors' experiences and sense of themselves. They identified with other at-risk families and felt a moral obligation to help them.

Eventually the researchers found the gene for CD. Unbeknownst to the Donnors, they not only patented it, but they also severely restricted its availability. The researchers limited the number of CD tests that any academic laboratory could perform, and allowed a limited number of centers to perform the test – but only if they paid a "hefty royalty" fee. Many academic centers, which had widely offered genetic testing for other similarly devastating genetic diseases at minimal cost, were unwilling to participate in such restrictive licensing agreements and were therefore unable to offer the test. At other academic centers, the cost of the test went up substantially, making access difficult for many families, including some who gave the researchers samples. To the Donnors, this information had personal value; to the researchers, it was simply a commodity.<sup>637</sup>

The difficulty in genetic privacy, as with electronic databases in general, is that one's privacy is compromised by only one extraction of the genetic information. This again emphasizes the traditional unreasonable search framework's inability to protect privacy in this context. For example, one may be asked to submit

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<sup>635</sup> Suter, *supra* note 642, at 779-97. See Sheri Mezoff, Note, *Forcing a Square Peg into a Round Hole: The Negative Ramifications of Misaligned Protection for Predisposed Individuals Under ADA*, 85 B.U. L. REV. 323 (2005).

<sup>636</sup> Suter, *supra* note 642, at 787-88.

<sup>637</sup> *Id.* at 740-41.

a DNA sample by a valid court order, but subsequent uses of the sample are no longer so governed, especially if it is entered into a database. Or, a sample may be obtained without one's consent, such as from an object at a crime scene that had been handled by the subject, something as innocuous as saliva from a cup.<sup>638</sup> One may also consent to participate in a research project, only to have one's genetic material used beyond the purposes specified.<sup>639</sup>

Even a criminal investigation's context where the right against unreasonable search applies, University of California Professor Edward Imwinkelried argues the misleadingly minimal physical intrusion, compared to the potential disclosure of extremely detailed personal information, might lead to a lower bar for collection of DNA samples, citing the dicta in *Davis v. Mississippi*.<sup>640</sup> This appears to have been borne out by the 2004 Ninth Circuit decision *United States v. Kincade*,<sup>641</sup> which upheld legally mandated DNA collection from parolees, but applied a lower-level reasonableness or totality of the circumstances test instead of *Skinner's* "special needs." This leads to a curious result in American jurisprudence that a physical frisk is seen as more intrusive than a blood, urine or breath test, and the latter drug test is seen as more intrusive than a DNA test. Critically assessing the value perceived and protected by jurisprudence, again, there would seem to be an undue focus on the physical circumstances of the actual test and less attention to the potentials for disclosure of detailed, sensitive information. Finally, even from a privacy perspective that departs from the traditional unreasonable search context, it may be claimed that there is a diminished expectation of privacy with respect to DNA samples because all individuals inevitably leave hair, dandruff, saliva, and other cellular material in public places. Professor Imwinkelried emphasizes, however, that this must be distinguished from throwing confidential papers in garbage or leaving them in a public place, because shedding hair is not a conscious act.<sup>642</sup>

At present, all fifty American states have passed laws authorizing DNA databases for the genetic profiles of all convicted criminals, and the DNA Identification Act of 1994<sup>643</sup> created a complementary federal database system.<sup>644</sup> The resulting massive medical database is called the Combined DNA Index System or CODIS, originally a fourteen-state database for samples from crime scenes. The

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<sup>638</sup> Harlan, *supra* note 643, at 191.

<sup>639</sup> See Carolyn Johnston & Jane Kaye, *Does the UK Biobank Have a Legal Obligation to Feedback Individual Findings to Participants?*, 12 MED. L. REV. 239 (2004). The authors argue that research participants have a moral right to feedback regarding the results of studies involving their DNA.

<sup>640</sup> Imwinkelried & Kaye, *supra* note 285, at 423-24, citing *Davis v. Mississippi*, 394 U.S. 721, 726-28 (1969).

<sup>641</sup> 379 F.3d 813 (9th Cir. 2004).

<sup>642</sup> Imwinkelried & Kaye, *supra* note 285, at 437-38.

<sup>643</sup> 42 U.S.C. § 14, 132 (2000).

<sup>644</sup> Harlan, *supra* note 643, at 190. Originally, DNA was collected only from those convicted of sexual offenses. Recent Cases, *Ninth Circuit Upholds Collection of DNA from Parolees*. — *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), 118 HARV. L. REV. 818, 823 (2004)

DNA Analysis Backlog Elimination Act of 2000 authorized the collection of samples from broader categories of convicts and parolees, and as of September 2004, CODIS contained almost two million DNA samples.<sup>645</sup>

The system, however, is no longer limited to the DNA of those convicted. Twenty-nine states, for example, allow or require the retention of DNA samples after DNA profiling, and only five require that the profiles of innocent individuals be purged from databases.<sup>646</sup> In 2003, Louisiana enacted the DNA Detection of Sexual and Violent Offenders Act,<sup>647</sup> and became the first state to require all individuals arrested to provide DNA samples for the state database.<sup>648</sup> Soon afterwards, Texas and Virginia enacted similar laws.<sup>649</sup> Further, the DNA of all armed forces members was also added to CODIS without consent, and the original purpose was merely to identify soldiers' remains.<sup>650</sup>

It must be noted that broad DNA collection in clear law enforcement contexts has been observed in First World countries. One West German investigation of the rape and murder of an eleven year old girl involved the screening of 16,400 volunteers, which led to a conviction. Similar but smaller-scale DNA profiling by geographic area has been seen throughout Europe and the United States.<sup>651</sup> Of course, privacy can be waived and even in the strict unreasonable search context, consent may be given. However, the scope of potential disclosures may mandate stricter safeguards to ensure informed waiver or consent in such cases, or to restrict the use of samples obtained or to ensure their destruction afterwards.<sup>652</sup>

Genetic privacy issues encourage one to specifically protect the privacy value of identity, far beyond the unreasonable search framework from which current Philippine jurisprudence draws its understanding of informational privacy. Note, finally, that genetic privacy concerns should amplify chain of custody concerns arising from an incredibly broad and indiscriminate drug testing policy.

*L. The Right of the Terminally Ill to Refuse Medical Assistance*

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<sup>645</sup> *Ninth Circuit Upholds Collection of DNA*, *supra* note 653, at 818-20.

<sup>646</sup> Harlan, *supra* note 643, at 190-91.

<sup>647</sup> La. Rev. Stat. Ann. § 15:609(A) (West Supp. 2004).

<sup>648</sup> Renee Germaine, Comment, "You Have the Right to Remain Silent... You Have No Right to Your DNA" *Louisiana's DNA Detection of Sexual and Violent Offender's Act: An Impermissible Infringement on Fourth Amendment Search and Seizure*, 22 J. MARSHALL J. COMPUTER & INFO. L. 759, 759-60 (2004).

<sup>649</sup> Tex. Gov't Code Ann. § 411.1471 (Vernon 2003); Va. Code Ann. § 19.2-310.2:1 (Michie 2004).

<sup>650</sup> *Ninth Circuit Upholds Collection of DNA*, *supra* note 653, at 824, 824 n.57.

<sup>651</sup> Imwinkelried & Kaye, *supra* note 285, at 443-45.

<sup>652</sup> See Harlan, *supra* note 643.

The Schiavo case's Easter denouement brought the grossly mislabeled "right to die" – this right has not been primarily debated in a context of euthanasia nor of suicide – to the fore of international debate. If decisional privacy has most famously defended a right to abortion in the United States following *Roe*, then the same autonomy could conceivably protect a right by an adult to refuse medical treatment when terminally ill. Indeed, the 2003 Florida legislative attempt to enact a law that would restore Schiavo's feeding tube was seen as a means for conservatives "to advance their broader political pro-life/anti-abortion agenda."<sup>653</sup>

In *Cruzan v. Missouri Department of Health*,<sup>654</sup> Nancy Beth Cruzan was left in a vegetative state by a car accident, a state where she "exhibits motor reflexes but evinces no indications of significant cognitive function."<sup>655</sup> Assured that she had no chance of regaining higher brain functions, her parents requested that her life support be terminated, but hospital employees refused to do so without a court order. *Cruzan* recognized that an individual clearly had a right to refuse medical treatment, but stated:

[T]he dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.<sup>656</sup>

*Cruzan* recognized that, "The choice between life and death is a deeply personal decision of obvious and overwhelming finality."<sup>657</sup> However, it focused on Missouri's procedural safeguard, and noted that in the case of an incompetent, the right to refuse treatment would have to be exercised by a surrogate, and Missouri's interest in preserving human life allowed it to ensure that a surrogate's decisions would conform to the incompetent's and protect against abuse. It added that all civilized nations have proscribed homicide and a majority of states criminalize assistance of suicide.<sup>658</sup>

The Court later rejected an attempt to use *Cruzan's* discussion to strike down a law that criminalized physician-assisted suicides for competent terminally ill patients, thus refusing to extend *Cruzan's* holding to recognize a true "right to die." *Washington v. Glucksberg*<sup>659</sup> and its companion case *Vacco v. Quill*<sup>660</sup> upheld states'

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<sup>653</sup> Michael Allen, *The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die*, 53 AM. U. L. REV. 971, 978 (2004).

<sup>654</sup> 497 U.S. 261 (1990).

<sup>655</sup> *Id.* at 266.

<sup>656</sup> *Id.* at 279.

<sup>657</sup> *Id.* at 281.

<sup>658</sup> *Id.* at 280-81. See, however, Brett Kingsbury, *A Line Already Drawn: The Case for Voluntary Euthanasia After the Withdrawal of Life-Sustaining Hydration and Nutrition*, 38 COLUM. J.L. & SOC. PROBS. 201 (2004).

<sup>659</sup> 521 U.S. 702 (1997).

<sup>660</sup> 521 U.S. 793 (1997).

interest in preserving life and stated that “for over 700 years, the Anglo-American tradition has punished or otherwise disapproved of both suicide and assisted suicide.”<sup>661</sup>

Suffice it to say that a Philippine Court would not rule differently, with even the sanctity of the unborn child’s life enshrined in the 1987 Constitution. The framework parallels the Philippine framework for abortion, and as Harvard professor Cass Sunstein articulated:

[T]he Court should say that even if it assumes that the right to physician-assisted suicide qualifies as “fundamental” under the Due Process Clause, a legal ban on physician-assisted suicide is constitutionally permissible in light of the state’s legitimate and weighty interests in preventing abuse, protecting patient autonomy, and avoiding involuntary death.<sup>662</sup>

Nevertheless, the right is not so simple. For example, while one readily recognizes a right of autonomy over one’s life, the discussion implies that the privacy value of identity would also be implicated, because a person would have the right to choose how he lives the final moments he would be remembered by, and die in dignity. This aspect of death was highlighted by Justice Stevens in *Cruzan*:

Because death is so profoundly personal, public reflection upon it is unusual. . . . Highly invasive treatment may perpetuate human existence through a merger of body and machine that some might reasonably regard as an insult to life rather than as its continuation. . . . [T]he reorganization of medical care accompanying the new science and technology, have also transformed the political and social conditions of death: People are less likely to die at home, and more likely to die in relatively public places, such as hospitals or nursing homes.

Ultimate questions that might once have been dealt with in intimacy by a family and its physician have now become the concern of institutions.<sup>663</sup>

Thus, Justice Stevens proposed that the right implied no abandonment of the desire to live, but a spiritual coming to terms with one’s own mortality that touched the core of liberty.<sup>664</sup> This context, beyond autonomy, was further highlighted in *Glucksberg* and *Vacco*. Justice Sandra Day O’Connor framed the issue:

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<sup>661</sup> *Glucksberg*, 521 U.S. at 721.

<sup>662</sup> Cass Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1124 (1997). This articulation would conclude that the Philippines can readily accept the reasoning of *Roe v. Wade* while rejecting its result, with no doctrinal inconsistencies. According to Judge Michael McConnell, it is also a less “imperial” assertion of rights, unlike *Roe v. Wade*. *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997), cited in Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 89 (1999); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 124 (2000).

<sup>663</sup> *Cruzan*, 497 U.S. at 340-41 (Stevens, J., *dissenting*).

<sup>664</sup> *Id.* at 343.

Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms.<sup>665</sup>

These cases adamantly distinguished the right to refuse further medical treatment from “mercy killing” and physician-assisted suicide.

The actual description of Terri Schiavo’s condition similarly highlights this aspect, and note that the vegetative state is quite distinct from being comatose:

The vegetative state is a clinical condition of complete unawareness of the self and the environment, accompanied by sleep-wake cycles, with either complete or partial preservation of hypothalamic and brain-stem autonomic functions. In addition, patients in a vegetative state show no evidence of sustained, reproducible, purposeful, or voluntary behavioral responses to visual, auditory, tactile, or noxious stimuli; show no evidence of language comprehension or expression; have bowel and bladder incontinence; and have variably preserved cranial-nerve and spinal reflexes. We define persistent vegetative state as a vegetative state present one month after acute traumatic or nontraumatic brain injury or lasting for at least one month in patients with degenerative or metabolic disorders or developmental malformations.<sup>666</sup>

Thus, one asks if there would be a right to die in dignity or “right of exit”<sup>667</sup> that preserves a value of identity beyond autonomy. If so, however, one would necessarily have to ask if a course of action that would relieve pain yet hasten death would be legal.

I assert that despite the difficult and emotional questions this issue raises, Philippine jurisprudence would readily recognize a terminally ill patient’s right to refuse treatment per *Cruzan*. However, a state interest may be asserted, likely in a clear and compelling manner, to trump parallels of this right in other contexts, particularly euthanasia and suicide.

A Court decision that disallows one to take steps to end his life may thus recognize both this state interest and an individual’s privacy in what is arguably its ultimate form, and I further assert that the intellectual discipline of looking beyond the mere result and taking care to recognize the latter right in such an ultimate context is crucial. Finally, from a cultural standpoint, I assert that our Catholic majority would readily identify with Justices Stevens and O’Connor’s beautiful prose.

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<sup>665</sup> Glucksberg, 521 U.S. at 736 (O’Connor, J., *concurring*).

<sup>666</sup> The Multi-Society Task Force on PVS, *Am. Acad. of Neurology, Medical Aspects of the Persistent Vegetative State-First of Two Parts*, 330 *NEW ENG. J. MED.* 1499, 1499 (1994), *quoted in* Snead, *supra* note 57, at 56-57.

<sup>667</sup> Tribe, *supra* note 26, at 1919 n.96.

My beloved professor Justice Mendoza would disagree, based on our conversations and on his voting pattern since *Ople*, and refuse to recognize any privacy right in the above contexts (and find a discussion of state interest superfluous). He once wrote:

[T]he concept of privacy as a fundamental right has been interpreted in American law to include the right to use contraceptive devices, the right to have an abortion, the right to marry, and the right to die. Other “rights” are being pressed for recognition in the name of privacy, namely, the “right” to engage in homosexual sodomy and the “right” to physician-assisted suicide. It is obvious that such “rights” cannot exist under our laws. It cannot be contended that statutes prohibiting the exercise of such “right” are presumed void because the rights involved are “fundamental.” These were declared “rights” by the U.S. Supreme Court in the course of what has come to be called “fundamental rights” adjudications, determining what interests are implicit in the American “scheme of ordered liberty” for the purpose of extending such “rights” to the several states. It is obvious that such “rights” are not necessarily also part of the liberty guaranteed on the Due Process Clause of our Constitution. (internal citations omitted)<sup>668</sup>

#### *M. Same-sex marriage*

In the United States, *Lawrence v. Texas* now protects homosexual acts from State intrusion, while in the Philippines, the New People’s Army has asserted same-sex marriage’s legitimacy. The two issues are not identical, since there is a public, institutional aspect to marriage absent in an act of sexual intercourse by itself. Nevertheless, *Loving* and *Zablocki* have stated how fundamental the right to marry is, while *Eisenstadt* would imply that this right inheres in the individual. Professor Tribe emphasized:

[I]t is noteworthy that the *Loving* Court treated its holding as if it all but followed automatically from the conclusion in *McLaughlin v. Florida*, in which the Court struck down a state law making open and notorious interracial cohabitation a more serious offense than open and notorious cohabitation between unmarried adults of the same race. (internal citations omitted)<sup>669</sup>

Thus, from a privacy viewpoint, there would have to be evidence of a compelling State interest to justify the denial of marriage to homosexuals but not to heterosexuals. Beyond all these and the value of autonomy, it would further be asserted that there is a value of identity involved, noting *Roberts v. United States Jaycees* and the expressive association one derives from personal relationships.

The Philippine Family Code prescribes that marriage must be celebrated between a man and a woman, but one notes that the Constitution makes no such qualification. It would be argued that physical characteristics are an imprecise

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<sup>668</sup> Estrada v. Sandiganbayan, G.R. No. 148560, Jan. 29, 2002 (Mendoza, J., *concurring*), *citing* Washington v. Glucksberg, 521 U.S. 702 (1997).

<sup>669</sup> Tribe, *supra* note 26, at 1948-49.

classification to prohibit same-sex marriage. Chromosomes are the biological determinant of sex, but the high school science “XX” and “XY” chromosomal definition is not completely precise. Some individuals, for example, have “a variation such as ‘XXX, XXY, XXXY, XYY, XYYY, XYYYY, or XO.’”<sup>670</sup> This was highlighted in the 1967 European Cup, where Polish sprinter Eva Klobukowska was barred from competing as a woman because she possessed XXY chromosomes. She later became pregnant and gave birth. Further, even with respect to chromosomally normal individuals:

[A]n individual with XY chromosomes who has androgen insensitivity syndrome may develop external female genitalia because of an inability to process androgen. Or, individuals with Congenital Adrenal Hyperplasia (CAH) have XX chromosomes but may nonetheless have a masculine external appearance and demeanor.<sup>671</sup>

The ability to engage in male-female copulation likewise cannot be a classification, because it is not a requisite in the Philippine Family Code, and, further, impotence is merely a ground for annulment.<sup>672</sup> For the same reason, the ability to procreate is not a requisite for marriage, and even the aged and infertile are allowed to take vows. This is, in fact, an increasingly diminished concern given advances in reproductive technology<sup>673</sup> and acceptance of adoption. Finally, there is no empirical proof that homosexuality impairs one’s psychological capacity to love one’s partner or raise children.

Instead of the individual’s right to marry, some American courts have used an economic equal protection argument to grant same-sex marriage or some analog of it. To give an overview, several states have already ruled that limiting the right of same-sex couples to marry violated their State constitutions.<sup>674</sup> Hawaii and Alaska subsequently amended their constitutions to make rulings to this effect moot.<sup>675</sup>

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<sup>670</sup> Corbett v. Corbett, [1971] P. 83. “Various errors can occur at this stage which led to the production of individuals with abnormal chromosome constitutions, such as XXY and XO (meaning a single X only). In these two cases, the individuals will show marked abnormalities in the development of their reproductive organs. The XXY patient will become an under-masculinised male with small, under-developed testes and some breast enlargement. The abnormality will become apparent at puberty when the male secondary sex characteristics, such as facial hair and male physique, will not develop in the normal way. The XO individual has the external appearance of a female, a vagina and uterus but no active ovarian tissue. Without treatment the vagina and uterus remain infantile in type and none of the normal changes of puberty occur. Administration of estrogen, however, produces many of these changes. The individual of course remains sterile.”

<sup>671</sup> Mark Strasser, *Harvesting the Fruits of Gardiner: Marriage, Public Policy and Fundamental Interests*, 71 GEO. WASH. L. REV. 179, 182-84, 184 n.23 (2003).

<sup>672</sup> FAMILY CODE, art. 45(5).

<sup>673</sup> It is possible for a same-sex couple to have a child biologically related to at least one partner using artificial insemination or surrogate motherhood.

<sup>674</sup> See *infra* text accompanying note 701.

<sup>675</sup> *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2005 (2003), citing *Brause v. Bureau of Vital Statistics*,

Massachusetts granted full marriage rights in 2004, due to state “constitutional principles of respect for individual autonomy and equality.”<sup>676</sup> Vermont, did not allow same-sex marriage per se, but held that the economic benefits arising from marriage must be extended to same-sex couples:

[M]arriage laws transform a private agreement into a source of significant public benefits and protections ... [T]he benefits and protections incident to a marriage license under Vermont law have never been greater. They include, for example, the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions; preference in being appointed as the personal representative of a spouse who dies intestate; the right to bring a lawsuit for the wrongful death of a spouse; the right to bring an action for loss of consortium; the right to workers' compensation survivor benefits; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance; the opportunity to be covered as a spouse under group life insurance policies issued to an employee; the opportunity to be covered as the insured's spouse under an individual health insurance policy; the right to claim an evidentiary privilege for marital communications; homestead rights and protections; the presumption of joint ownership of property and the concomitant right of survivorship; hospital visitation and other rights incident to the medical treatment of a family member, under; and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce. (internal citations omitted)<sup>677</sup>

The plain economic argument, however, fails to depict the very personal, intimate dimension of marriage, and one notes how Justice Stevens depicted the right to die. Outside the Communist movement, the demand for same-sex marriage has arguably not yet reached its peak, but a countervailing legal argument must be formulated should the State insist on prohibiting it. Unlike the refusal of medication and abortion, it is far more difficult to illustrate a compelling governmental interest against same-sex marriage. One might examine the United States Defense of Marriage Act or DOMA, which provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws

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No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. 1998); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>676</sup> CNN Law Center, *State's constitution was basis for ruling*, Nov. 18, 2003, ¶ 2, at <http://www.cnn.com/2003/LAW/11/18/samesex.ruling>; CNN Law Center, *Massachusetts court rules ban on gay marriage unconstitutional*, Feb. 4, 2004 at <http://www.cnn.com/2003/LAW/11/18/samesex.marriage.ruling>.

<sup>677</sup> *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>678</sup>

The United States Congress presented five rationales:

1. encouraging heterosexuality;
2. preserving government resources;
3. defending traditional notions of morality;
4. defending and nurturing the institution of traditional, heterosexual marriage; and
5. reserving the institution of marriage for procreation<sup>679</sup>

Similarly, the now superseded European decision *Sheffield v. United Kingdom*<sup>680</sup> also interpreted the European Convention on Human Rights' provision on marriage as underpinned by "the traditional concept of marriage." Such sentiment is captured by President George W. Bush's speeches:

The union of a man and a woman is the most enduring human institution, honored and encouraged in all cultures and by every religious faith. Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society.<sup>681</sup>

Nevertheless, the DOMA's relation to the stated goals do not appear to address individual homosexuals' decisional privacy rights. Finally, again, the issue regarding procreation is unconvincing because heterosexual married couples are not required to procreate.<sup>682</sup>

Stepping back from marriage and the complication brought by its public aspects, I must emphasize Professor Tribe's protest: "It's not the sodomy. It's the

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<sup>678</sup> 1 U.S.C. §7 (Supp. II 1996); 28 U.S.C.A. § 1738C (West Supp. 1998).

<sup>679</sup> Karla Robertson, Note, *Penetrating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory*, 75 DENV. U.L. REV. 1375, 1391 (1998), citing H.R. Rep. No. 104-664.

<sup>680</sup> [1999] 27 EHRR 163.

<sup>681</sup> CNN, *Bush calls for ban on same-sex marriages*, CNN.com, Feb. 25, 2004, ¶¶ 1-2, at <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/index.html> (last visited Dec. 30, 2007).

<sup>682</sup> "To hold otherwise would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations or the capacity to conceive. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. It is even demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy." *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524, ¶ 86 (CC) (S. Afr.).

relationship!”<sup>683</sup> That is, whether or not a Court chooses to recognize a homosexuals’ right to marriage in a future decision, jurisprudence cannot reduce homosexual relationships to sodomy while singing paeans to the love in heterosexual relationships. As Professor Elizabeth Pangalangan often emphasizes in her Family Law classes, privacy inheres in the individual, and decisional privacy here demands the recognition of human interaction’s inherent dignity, particularly the deep emotional interaction when individuals choose to love. (Note I took her class in 2001, shortly before *Lawrence* was decided.)

I hope such an articulation finds its way into jurisprudence. I note, for example, that Justice Mendoza adopted the characterization of *Bowers* as an attempt to assert “the ‘right’ to engage in homosexual sodomy,”<sup>684</sup> though I wonder if he would revise this as *Lawrence* overturned *Bowers* shortly after he wrote the opinion I quote.

I emphasize that Professor Tribe’s articulation is taken even further in South Africa jurisprudence, where dignity is a core constitutional principle after apartheid, and where their constitution explicitly prohibits discrimination based on sexual orientation.<sup>685</sup> The landmark *Sodomy Case*<sup>686</sup> thus struck down sodomy’s criminalization due to both the South African rights to dignity and privacy:

Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. The common-law prohibition[s] ... symbolic effect is to state that in the eyes of our legal system all gay men are criminals. ... But the harm imposed by the criminal law is far more than symbolic. ... [G]ay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society.

...  
Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy. Our society has a poor record of seeking to regulate the sexual

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<sup>683</sup> Tribe, *supra* note 26, at 1904.

<sup>684</sup> Estrada v. Sandiganbayan, G.R. No. 148560, Jan. 29, 2002 (Mendoza, J., *concurring*), *citing* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>685</sup> S. Afr. CONST. art. 9(4); *see supra* text accompanying note 477.

<sup>686</sup> Nat’l Coalition for Gay & Lesbian Equality v Minister of Justice, (1999) (1) S.A. 6 (S. Afr.).

expression of South Africans. In some cases, as in this one, the reason for the regulation was discriminatory; our law, for example, outlawed sexual relationships among people of different races. The fact that a law prohibiting forms of sexual conduct is discriminatory, does not, however, prevent it at the same time being an improper invasion of the intimate sphere of human life to which protection is given by the Constitution in section 14. We should not deny the importance of a right to privacy in our new constitutional order, even while we acknowledge the importance of equality. In fact, emphasising the breach of both these rights in the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been. The offence which lies at the heart of the discrimination in this case constitutes at the same time and independently a breach of the rights of privacy and dignity which, without doubt, strengthens the conclusion that the discrimination is unfair.<sup>687</sup>

*The Sodomy Case* underscored a close link among the concepts of dignity, equality and privacy in South African jurisprudence, and that invoking privacy did not amount to a narrower claim that homosexual relationships were protected only when hidden behind private walls.<sup>688</sup> Further, the Constitutional Court explicitly paralleled discrimination against homosexuals and discrimination against black South Africans during apartheid, a doctrine even stronger than Professor Tribe's comparison of *Lawrence* and *Brown*. Finally, the 2006 decision *Minister of Home Affairs v. Fourie*<sup>689</sup> took this foundation and upheld homosexuals' rights to marriage. The esteemed Justice Albie Sachs, one notes, directly and comprehensively addressed objections rooted in tradition and religion.<sup>690</sup> He also continued the use of the right to privacy as linked to equality and dignity.<sup>691</sup>

Returning to the issue of marriage, the following section describes what was unmistakably the Philippine proxy skirmish for this. I hope that when the Supreme Court directly addresses the issue, its reasoning is of a caliber comparable to that of its peers in various other jurisdictions, given the intense global debate this last decade. Note that Andorra, Australia, Austria, Belgium, Brazil, Canada, Croatia, Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Israel,

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<sup>687</sup> *Id.*, ¶¶ 28, 32.

<sup>688</sup> *See id.*, ¶¶ 29. *See, however*, Brenda Hale, C.F.L.Q. 2004, 16(2), 125-34, at 127. Baroness Hale argues that privacy is too narrow to fully protect homosexual rights. However, this may all be a matter of semantics. Note that *Lawrence's* decisional privacy and *Morfe's* liberty likely treat privacy and dignity as practically the same thing.

<sup>689</sup> 2006 (1) SA 524 (CC) (S. Afr.).

<sup>690</sup> "[T]he antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law...." *Id.*, ¶ 74.

"It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others." *Id.*, ¶ 92.

<sup>691</sup> *Id.*, ¶ 48. *See also* Lisa Newstrom, *The Horizon of Rights: Lessons From South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 CORNELL INT'L L.J. 781 (2007).

Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and some states of the United States (California, Connecticut, Hawaii, Maine, Massachusetts, New Hampshire, Oregon, New Jersey, Vermont, and Washington, as well as the District of Columbia) have to varying extents recognized same-sex marriages or analogous partnerships.<sup>692</sup>

*N. Transsexuals and marriage*

Columbia Professor Herbert Wechsler famously wrote on how a judicial decision is properly critiqued:

The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees, or, it is vital that we add, to maintain the rejection of a claim that any given choice should be decreed. The critic's role, as T. R. Powell showed throughout so many fruitful years, is the sustained, disinterested, merciless examination of the reasons that the courts advance....<sup>693</sup>

I thus consider the 2007 decision *Silverio v. People*<sup>694</sup> the year's greatest disappointment from a privacy perspective not because of its result effectively denying legal recognition of a transsexual's chosen sex, but because the right to privacy never set foot on the stage the Court set as a mere statutory drama. So many jurisdictions have addressed this issue with exhaustive decisions that cross-reference each other, yet the Philippine Supreme Court could only produce a curt opinion whose reasoning parallels the oldest and least developed of the decisions unfavorable to transsexuals.

Strictly speaking, *Silverio* decided whether a transsexual may compel the State to recognize a change in his gender after undergoing sex reassignment surgery. Rommel Silverio underwent such surgery in Thailand and entered a petition to change her first name to "Mely" and her sex to female. Judge Felixberto Olalia, Jr. granted this, holding:

Petitioner filed the present petition not to evade any law or judgment or any infraction thereof or for any unlawful motive but solely for the purpose of making his birth records compatible with his present sex.

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<sup>692</sup> See, generally, Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589 (2004); Nicholas Bamforth, *Same-Sex Partnerships: Some Comparative Constitutional Lessons*, E.H.R.L.R. 2007, 1, 47-65. With respect to the United States, note that at the time of this writing, 26 states have amended their constitutions to specifically prohibit same-sex marriages, while 43 have laws preventing same-sex unions from being recognized as marriages.

<sup>693</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19-20 (1959).

<sup>694</sup> G.R. No. 174689, Oct. 22, 2007.

The sole issue here is whether or not petitioner is entitled to the relief asked for.

The [c]ourt rules in the affirmative.

Firstly, the [c]ourt is of the opinion that granting the petition would be more in consonance with the principles of justice and equity. With his sexual [re-assignment], petitioner, who has always felt, thought and acted like a woman, now possesses the physique of a female. Petitioner's misfortune to be trapped in a man's body is not his own doing and should not be in any way taken against him.

Likewise, the [c]ourt believes that no harm, injury [or] prejudice will be caused to anybody or the community in granting the petition. On the contrary, granting the petition would bring the much-awaited happiness on the part of the petitioner and her [fiancé] and the realization of their dreams.<sup>695</sup>

The Office of the Solicitor General belatedly challenged the ruling and the Supreme Court held that because present law allows a change of one's sex to be entered into the civil registry only in cases of clerical error, a person's sex at birth must be deemed immutable until Congress legislates otherwise. The Court reasoned that to rule otherwise would be to engage in judicial legislation, and considered the broad effect a ruling would have in implementing laws concerning family relations and laws applying to women.

One is tempted to infer, however, that the real issue was whether a post-surgery transsexual could legally marry. The Court listed this as the first item in its enumeration of potential problems:

The changes sought by petitioner will have serious and wide-ranging legal and public policy consequences. First, even the trial court itself found that the petition was but petitioner's first step towards his eventual marriage to his male fiancé. However, marriage, one of the most sacred social institutions, is a special contract of permanent union between a man and a woman. One of its essential requisites is the *legal capacity of the contracting parties who must be a male and a female*. To grant the changes sought by petitioner will substantially reconfigure and greatly alter the laws on marriage and family relations. It will allow the union of a man with another man who has undergone sex reassignment (a male-to-female post-operative transsexual). (internal citations omitted and emphasis in the original)<sup>696</sup>

The enumeration, incidentally, only had one other item, miscellaneous issues arising under the penal code, presumption of survivorship in succession, and various laws applying to women. Further, *Silverio's* introductory paragraph was lifted

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<sup>695</sup> *Id.*

<sup>696</sup> *Id.*

almost verbatim from *Littleton v. Prange*,<sup>697</sup> the prominent Texas decision that invalidated a transsexual's marriage with arguably the most flippant conclusion in that line of cases.<sup>698</sup>

It is interesting that the decision's first line was a biblical quote: "When God created man, He made him in the likeness of God; He created them male and female."<sup>699</sup> Of course, the second line quotes the Philippine creation myth of the first man and woman, Malakas (strong) and Maganda (beautiful) and attempts to clothe the introduction in a secular wardrobe.

In any case, privacy was not even mentioned, even though the panel that unanimously decided *Silverio* included Chief Justice Puno himself. As discussed below, jurisprudence has evolved such that the most recent European decisions explicitly turned on the right to privacy.

The privacy values of autonomy and perhaps identity in same-sex marriage's context are more poignant with respect to transsexuals because there has in fact been a long line of cases affirming their right to marry after sex reassignment surgery. In a nutshell, if, like Judge Olalia above, one accepts the premise that a man given a vagina by modern surgery may be female both physically and psychologically, it becomes impossible for one to deny her right to then marry a man, whatever stigma one might attach to marriage between homosexuals.

A transsexual man is defined as male but medically established as psychologically female, someone suffering an "incurable and irremediable"<sup>700</sup> disharmony "between the psychological and the morphological sex."<sup>701</sup> The term was first used by David Caldwell in a paper regarding a girl who wanted to be a boy, noting that her condition was first referred to as "*psychopathia transsexualis*."<sup>702</sup> The Minnesota Supreme Court described in an early case:

He considers himself a normal woman trapped inside a male body. The transsexual male consciously views his male genitals as a symbol of maleness which runs directly contrary to his gender identity as a female. Since his male

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<sup>697</sup> 9 S.W.3d 223 (Tex. Civ. App. 1999).

<sup>698</sup> *Silverio* opened: "When is a man a man and when is a woman a woman? In particular, does the law recognize the changes made by a physician using scalpel, drugs and counseling with regard to a person's sex?"

*Littleton* opened: "When is a man a man, and when is a woman a woman? ... [C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"

See *infra* text accompanying note 718.

<sup>699</sup> *Id.*, quoting Genesis 5:1-2.

<sup>700</sup> *Cossey v. United Kingdom*, 1990 13 EHRR 622 (Martens, J., *dissenting*), quoted in *Bellinger v. Bellinger*, [2001] 1 FLR 389, Nov. 2, 2000.

<sup>701</sup> *Anonymous v. Weiner*, 270 N.Y.S. 2d 319 (Sup. Ct., N.Y. Co., 1966).

<sup>702</sup> Ekins & King, *Pioneers of Transgendering: The Popular Sexology of David O. Cauldwell*, at <http://www.symposium.com> (last visited Dec. 30, 2007).

sex organs are a source of immense psychological distress, the male transsexual seeks their removal and construction of female sex organs in order to make both his sexual identity and his gender identity consistent.<sup>703</sup>

The defining characteristic is psychological identification with the opposite gender,<sup>704</sup> though a pre-surgery transsexual exhibits gender non-conformist behavior many people would interpret as a sign of homosexuality.<sup>705</sup> Moreover, “transsexual” is itself a broad term:

The term may include but is not limited to: transsexuals, intersex people, cross-dressers, and other gender-variant people. Transgender people can be female-to-male (FTM) or male-to-female (MTF)... Transgender people may or may not choose to alter their bodies hormonally and/or surgically.<sup>706</sup>

The English decision *Corbett v. Corbett*<sup>707</sup> effectively barred post-surgery transsexuals from marriage, reasoning:

[T]he biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.<sup>708</sup>

This reasoning is no longer upheld in a number of jurisdictions, including England, but the United States is a striking exception. In Texas, *Littleton* cited *Corbett* and concluded:

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<sup>703</sup> *Doe v. Dep't of Public Welfare*, 257 N.W.2d 816, 818-19 (Minn. 1977).

<sup>704</sup> Early cases also distinguished the transsexual from the transvestite, though the latter term is seen as derogatory by transgender communities. In *Re Anonymous*, 293 N.Y.S.2d 834, 836 (Civ. Ct. N.Y. Co. 1968). “The petitioner is not a transvestite. By definition, the transvestite is content to dress in the clothing of the opposite sex. The transsexual, on the other hand, will be satisfied only if he can become converted into a sexually functioning person of the opposite sex.” (See Wollman, *Surgery for the Transsexual*, *Journal of Sex Research*, vol. 3, No. 2, pp. 145-147.)”

<sup>705</sup> *See, e.g.*, *B v. France*, [1992] 16 EHRR 1. “Miss B., the eldest of five children, adopted female behaviour from a very early age. She was considered as a girl by her brothers and sisters and is said to have had difficulty coping with a wholly segregated scholastic environment. She completed her military service in Algeria, as a man, and her behaviour at the time was noticeably homosexual.” B later underwent sex reassignment surgery.

<sup>706</sup> *Gay and Lesbian Alliance Against Defamation (GLAAD), Transgender Glossary of Terms*, ¶ 4, <http://www.glaad.org/media/guide/transfocus.php?PHPSESSID=c23cd7559fcec04a06d0c99c16fc0749> (last visited Dec. 30, 2007). “Intersex: Describing a person whose sex is ambiguous. There are many genetic, hormonal or anatomical variations which make a person's sex ambiguous (i.e., Klinefelter Syndrome, Adrenal Hyperplasia). Parents and medical professionals usually assign intersex infants a sex and perform surgical operations to conform the infant's body to that assignment. This practice has become increasingly controversial as intersex adults are speaking out against the practice, accusing doctors of genital mutilation.” *Id.*, ¶ 7.

<sup>707</sup> [1971] P. 83.

<sup>708</sup> *Id.* at 47.

At the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court. There are some things we cannot will into being. They just are.<sup>709</sup>

The 2002 Kansas decision *In re Estate of Gardiner*<sup>710</sup> acknowledged medical cases where identification of sex at birth is uncertain, but recognized legislative intent that “the public policy of this state is to recognize only the traditional marriage between ‘two parties who are of the opposite sex.’”<sup>711</sup> It adopted the following construction:

The plain, ordinary meaning of “persons of the opposite sex” contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to “produce ova and bear offspring” does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. As the *Littleton* court noted, the transsexual still “inhabits... a male body in all aspects other than what the physicians have supplied.”<sup>712</sup>

New York and Ohio use *Gardiner’s* logic.<sup>713</sup> Finally, the 2004 Florida decision *Kantaras v. Kantaras*<sup>714</sup> seemed to adopt both approaches: “We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth.”

The other line of decisions sympathetic to transsexuals perhaps began with the 1968 American decision *In re Anonymous*,<sup>715</sup> which ruled:

[S]hould the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions, many so exquisite in nature, including sex orientation? I think not.<sup>716</sup>

However, the case only decided a change of name, not a change of sex in a birth certificate or the issue of a marriage license. In fact, a 1970 *In re Anonymous*<sup>717</sup>

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<sup>709</sup> Littleton, 9 S.W.3d at 231.

<sup>710</sup> 42 P.3d 120 (Kan. 2002).

<sup>711</sup> *Id.* at 215.

<sup>712</sup> *Id.* at 213.

<sup>713</sup> *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. App. Div. 1971); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712 (N.Y. App. Div. 1974); *In re Ladrach*, 513 N.E.2d 828 (Ohio Probate 1987); *In re A Marriage License for Nash*, 2003 Ohio 7221, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003).

<sup>714</sup> 884 So.2d 155 (Fla.App. 2 Dist. 2004).

<sup>715</sup> *In Re Anonymous*, 293 NYS.2d 834 (Civ. Ct. N.Y. Co. 1968).

<sup>716</sup> *Id.* at 838.

<sup>717</sup> *In Re Anonymous*, 314 NYS. 2d 668 (Civ. Ct. N.Y. Co. 1970).

allowed a change of name because a person has the right to use what name he pleases, but gave the condition that the decision would not be evidence of a change of sex.<sup>718</sup>

In 1973, however, *Christian v. Randall*<sup>719</sup> held that the fact that a man's former wife was undergoing sex reassignment was insufficient grounds for stripping her of the children.<sup>720</sup> Finally, in 1975, *Darnell v. Lloyd*<sup>721</sup> refused to dismiss a case for change of sex in a birth certificate outright. It recognized the humiliation, for example, with a passport declaring one's sex to be the opposite of one's apparent sex. More importantly, it held that "at least tangentially one's fundamental interest in marriage is allegedly implicated," and listed a formidable line of Due Process cases upholding the fundamental natures of the rights to marriage and to privacy.<sup>722</sup>

In 1976, the New Jersey decision *M.T. v. J.T.*<sup>723</sup> became the first case to explicitly find a marriage involving a transsexual valid. M.T., a male-to-female transsexual, sought support and maintenance from her former husband of two years. He then assailed their marriage's validity on the ground that his wife was a man. The court rejected this, opining that if a person's psychological choice is medically sound and not a mere whim, and irreversible sex reassignment surgery had already been performed, society has no right to prohibit the transsexual from leading a normal life.<sup>724</sup>

Although it upheld *Corbett* in that sex is biological and unchangeable, the court rejected the notion of sex being determined solely at birth. Other factors, it noted, were of equal importance; factors such as self-image or self-identity, for instance. The court ruled that "true sex" in fact, is a person's "self-identity plus the anatomical changes necessary to harmonize the biological with that identity," and the post-surgery harmony of sex and gender made recognition a "*fait accompli*."<sup>725</sup> It stated:

[F]or marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.<sup>726</sup>

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<sup>718</sup> *Id.* at 670.

<sup>719</sup> 516 P.2d 132 (Colo. App. 1973).

<sup>720</sup> *Id.* at 134.

<sup>721</sup> *Darnell v. Lloyd*, 395 F. Supp. 1210 (D. Conn. 1975).

<sup>722</sup> *Id.* at 1214, citing *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zemel v. Rusk*, 381 U.S. 1, 14 (1965); *Aptheker v. Sec. of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116, 125-27 (1958); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>723</sup> 355 A.2d 204 (N.J. App. 1976).

<sup>724</sup> *Id.* at 207.

<sup>725</sup> *Id.* at 211.

<sup>726</sup> *Id.* at 209.

*M.T.* was a landmark ruling because first, it reformulated *Corbett's* criteria by emphasizing the psychological ingredient. Second, it found that *M.T.* not only acquired and possessed female physical qualities, but did in fact engage in sexual intercourse with her husband.

In *In Re Kevin*,<sup>727</sup> an Australian family court recognized the marriage between a female-to-male transsexual and his wife. Unlike in *Corbett*, the judge in this case based his decision on the following conclusions:

1. For the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is *to be determined as of the date of the marriage*.
2. There is *no rule or presumption* that the question whether a person is a man or a woman for the purpose of marriage law is to be determined by reference to circumstances at the time of birth. Anything to the contrary in *Corbett* does not represent Australian law.
3. In the context of the rule that the parties to a valid marriage must be a man and a woman, the word "man" has its ordinary current meaning according to Australian usage.
4. There may be circumstances in which a person who at birth had female gonads, chromosomes and genitals, may nevertheless be a man at the date of his marriage. Anything to the contrary in *Corbett* does not represent Australian law.
5. In the present case, the husband at birth had female chromosomes, gonads and genitals, but was a man for the purpose of the law of marriage at the time of his marriage, having regard to all the circumstances, and in particular the following:-
  - (a) He had always perceived himself to be a male;
  - (b) He was perceived by those who knew him to have had male characteristics since he was a young child;
  - (c) Prior to the marriage he went through a full process of transsexual re-assignment, involving hormone treatment and irreversible surgery, conducted by appropriately qualified medical practitioners;
  - (d) At the time of the marriage, in appearance, characteristics and behaviour he was perceived as a man, and accepted as a man, by his family, friends and work colleagues;
  - (e) He was accepted as a man for a variety of social and legal purposes, including name, and admission to an artificial insemination program, and in relation to such events occurring after the marriage, there was

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<sup>727</sup> *In Re Kevin* (validity of marriage of transsexual) [2001] Fam CA 1074 (Austl.).

evidence that his characteristics at the relevant times were no different from his characteristics at the time of the marriage;

(f) His marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues.

6. For these reasons, the application succeeds, and there will be a declaration of the validity of the applicants' marriage.<sup>728</sup>

Significantly, *In Re Kevin* went beyond *M.T.* by not stressing the couple's capacity for heterosexual sexual intercourse. Its discussion of transsexual reassignment centered his and his peers' overall perception of his sex. This mirrored an earlier decision in New Zealand. Professor Mark Strasser described:

The New Zealand High Court suggested that it would be cruel and counter-productive not to recognize marriages involving a man and a post-operative male-to-female transsexual. The court reasoned that if "society allows such persons to undergo therapy and surgery in order to fulfill that desire [to be recognized and able to behave as members of their self-identified sex], then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry."<sup>729</sup>

By 1997, it became clear that the European perspective had changed radically. *X, Y and Z v. United Kingdom*<sup>730</sup> found a violation of human rights when a transsexual was disallowed from registering as the father of his wife's son by artificial insemination. The European Court of Human Rights or ECHR frowned on the stigma placed on the family relations involved and held:

The Commission is further of the opinion that there is a clear trend in Contracting States towards the legal acknowledgement of gender re-assignment. It finds that in the case of a transsexual who has undergone irreversible gender re-assignment in a Contracting State and lives there with a partner of his former sex and child in a family relationship, there must be a presumption in favour of legal recognition of that relationship, the denial of which requires specific justification.<sup>731</sup>

In 2002, *Goodwin v. United Kingdom*<sup>732</sup> found:

There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality.<sup>733</sup>

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<sup>728</sup> *Id.* at 476.

<sup>729</sup> Strasser, *Harvesting the Fruits of Gardiner*, *supra* note 680, at 215, quoting Attorney-General v. Otahuhu Fam. Ct., 1 N.Z.L.R. 603, 607 (1995) (N.Z.).

<sup>730</sup> [1997] 24 E.H.R.R. 143.

<sup>731</sup> *Id.* at 156.

<sup>732</sup> [2002] 35 EHRR 18.

<sup>733</sup> *Id.* at 452.

Thus, the ECHR held *Corbett* outmoded, and that denying the right of a post-surgery male-to-female transsexual to marry a man intruded into the very essence of her right to marry.<sup>734</sup> Its companion case *I v. United Kingdom*<sup>735</sup> ruled similarly. Thus, in 2003, England's House of Lords expressed great sympathy for transsexuals, and declared:

[T]he recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender. These areas include education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulations, sport, the needs of decency, and birth certificates.<sup>736</sup>

*Bellinger v. Bellinger* disallowed the marriage in question, but only because it strongly declared an intent to effect *Goodwin* and *I* through legislation, after which the transsexual could legally marry.<sup>737</sup> It again rejected *Corbett* and noted, "the application of the Corbett approach leads to a substantially different outcome in the cases of a post-operative inter-sexual person and a post-operative transsexual person, even though, post-operatively, the bodies of the two individuals may be remarkably similar."

A Philippine practitioner might note the exact text that anchored *Goodwin's* privacy leg, article 8 of the European Convention on Human Rights:

Everyone has the right to respect for his private and family life, his home and his correspondence.

The Court explained its application of article 8:

[S]erious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity. The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.<sup>738</sup>

The Court concluded:

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<sup>734</sup> *Id.* at 453.

<sup>735</sup> [2002] 35 EHRR 447.

<sup>736</sup> *Bellinger v. Bellinger*, [2003] UKHL 21, ¶ 45.

<sup>737</sup> *Id.*, ¶ 55.

<sup>738</sup> *Goodwin*, 35 EHRR at 449.

The very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. [T]he unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.<sup>739</sup>

This discussion is striking to someone schooled primarily in Philippine and American material. Article 8 appears similar to our provisions guaranteeing the rights against unreasonable search and to privacy of correspondence, yet *Goodwin*'s interpretation is clearly along decisional privacy's lines.<sup>740</sup> The European approach may thus support decisional privacy's explicit recognition in our jurisdiction, even though the Philippines has never interpreted its "right of the people to be secure in their persons, houses, papers, and effects" along these lines. The logic is readily appreciated as a broader protection of privacy arising from the right against unreasonable search's penumbras, distinct from the explicit right's rigid framework requiring something that can be deemed a search.

*Goodwin* also demonstrates my framework of privacy values' utility in analyzing privacy issues, as it allows one to focus on underlying values instead of needlessly reconciling persuasive textual authority and semantics. Taking *Lawrence* and *Goodwin*, whether one applies substantive due process or the "right to respect for his private and family life," one ultimately seeks to protect the values of autonomy and identity. Transsexuals, in my opinion, present a compelling case study in the latter, as one has to recognize an identity value in individually asserting a chosen sex and gender distinct from the autonomy to form intimate relationships as one chooses. That is, recognition of post-surgery transsexuals' gender itself involves no relationship except the individual's with greater society as regulated by government. Transsexuals' objections against the "discordan[t]" "conflict between social reality and law"<sup>741</sup> seem closer to a variant of appropriation than to decisional privacy. Further, as Philippine privacy jurisprudence anchors itself on *Griswold* and the concept of penumbras, I imagine it might develop to assert a broader expressive aspect grounded in the *Roberts* expressive right,<sup>742</sup> as the freedom of speech contains a key penumbra. Such a concept might be asserted by a post-surgery transsexual to specifically address the value of identity.

Finally, *Goodwin* noted that "there had been statutory recognition of gender reassignment in Singapore, and a similar pattern of recognition in Canada, South

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<sup>739</sup> *Id.* at 451.

<sup>740</sup> Note, as another example, that the American Law Institute's restatement of customary international law presents the right to privacy as covering the right to marry, in addition to contexts presently established in the Philippines such as the privacy of the home. *See supra* text accompanying note 335.

<sup>741</sup> *Goodwin*, 35 EHRR at 449.

<sup>742</sup> *See supra* text accompanying note 301.

Africa, Israel, Australia, New Zealand and all except two of the States of the United States of America.”<sup>743</sup>

Going further, ruling on a final dimension in the life of a married transsexual, the 2003 American district court decision *Kantaras v. Kantaras*<sup>744</sup> not only recognized the validity of a transsexual’s marriage, but granted a female-to-male transsexual custody of the estranged couple’s children, concluding he was the more fit parent. According to the Court, Michael Kantaras had accomplished all that medical science required to succeed in the transition from female to male. He possessed the capacity to function sexually as any heterosexual male.<sup>745</sup>

The Court described Kantaras physically:

“Michael is visibly male. He has a deep masculine voice, a chin beard and moustache, a thinning hair line and some balding, wide shoulders, muscular arms and the apparent shifting of fat away from the hips toward the stomach. He has a pronounced “maleness” that prompts one to automatically refer to Michael with the pronoun he or him.”<sup>746</sup>

His psychological sexual identity need not be elaborated upon since he had, after all, long believed and considered himself as a man.

With regard to his right to marry, the court stressed that genetically heterosexual women who undergo hysterectomy and oophorectomy, post-menopausal women, men with erectile dysfunction and low sperm counts, and men with prostate problems are eligible to marry and may nevertheless be responsible parents to existing, adopted, or artificially inseminated children. The court found transsexuals in a similar situation:

There is no justification in the law to hold a transsexual to a higher standard than all heterosexuals in approaching marriage. Gender is only relevant, as male or female, at the time of application for a license to marry, not at birth. Age is the only requirement to be under oath. None for gender. The statement in *Corbett* that sex is fixed at birth is not the controlling law of Florida.

All heterosexuals are legally qualified to apply for a marriage license without having to prove they are capable of producing a family. Virility is not a requirement of either gender.<sup>747</sup>

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<sup>743</sup> [2002] 35 EHRR 447, at 56. However, as of the *Kantaras* appellate decision, only Florida, Kansas, Texas, Ohio, New York, and New Jersey decisions have directly addressed the issue, as discussed in this section.

<sup>744</sup> Fla. Cir. Ct., No. 511998 DR005375, Feb. 21, 2003.

<sup>745</sup> *Id.* at 760.

<sup>746</sup> *Id.* at 761.

<sup>747</sup> *Id.* at 766.

*Corbett, Kantaras* pronounced, represented the traditionalist rule that the law and not the facts decided one's sex. It vehemently rejected law's arbitrary disregard of medical science.<sup>748</sup> Although Kantaras's marriage was deemed void when the trial court decision was appealed,<sup>749</sup> note that the ruling on child custody was explicitly not disturbed and the case was remanded to the trial court. Instead of pursuing further litigation, Michael Kantaras and Linda Forsythe compromised and agreed on joint custody. The *Kantaras* trial decision, however, remains a fertile source of discussion among scholars.

Returning to *Silverio*, I emphasize that the Court framed the issue solely as a matter of interpreting statutory rights:

In our system of government, it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of the effects of sex reassignment. The need for legislative guidelines becomes particularly important in this case *where the claims asserted are statute-based.* (emphasis added)<sup>750</sup>

The Court's Bickelian dodge means that the constitutional questions remain open, and that the Court may yet be spurred to answer them more exhaustively and more eloquently provided the issues of privacy are squarely raised. *Silverio* did end with an acknowledgement of "Mely's" plight:

Petitioner pleads that "[t]he unfortunates are also entitled to a life of happiness, contentment and [the] realization of their dreams." No argument about that. The Court recognizes that there are people whose preferences and orientation do not fit neatly into the commonly recognized parameters of social convention and that, at least for them, life is indeed an ordeal. However, the remedies petitioner seeks involve questions of public policy to be addressed solely by the legislature, not by the courts.

When a constitutional question is raised, however, I note that while it is true per James Bradley Thayer that legislatures have the first opportunity at constitutional interpretation, the Court has the last, ultimate and definitive chance to answer.<sup>751</sup> This is particularly true where fundamental human rights are involved. Again, I assert that this context implicates two key privacy values: autonomy, arising from decisional privacy (or even privacy from the right against unreasonable search's penumbra, if one applies *Goodwin's* logic), and identity, in an expressive

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<sup>748</sup> *Id.* at 767.

<sup>749</sup> *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla.App. 2 Dist. 2004).

<sup>750</sup> *Silverio v. People*, G.R. No. 174689, Oct. 22, 2007.

<sup>751</sup> James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136-37 (1893). See *Missouri, Kansas and Tennessee Railroad v. May*, 194 U.S. 267 (1904). Justice Oliver Wendell Holmes, Jr. wrote: "Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

context akin to *Roberts*, arising in part perhaps from the freedoms of speech and association.

*O. Legislative investigations*

The meeting of the power of legislative investigation and the right to privacy has already been comprehensively discussed by Justice Puno in his recent lecture.<sup>752</sup> In summary, in the early United States, the right against self-incrimination was the original tool to deflect legislative inquiries. When legislators instead asked questions about the activities of others that the right could not protect against, witnesses next invoked the freedoms of speech and of association, arguing that legislative inquiries were being used as a pretext to stifle these.<sup>753</sup> This was articulated by the Warren Court decision *Watkins v. United States*:<sup>754</sup>

Abuses of the investigative process may imperceptibly lead to abridgment of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. This effect is even more harsh when it is past beliefs, expressions or associations that are disclosed and judged by current standards rather than those contemporary with the matters exposed.<sup>755</sup>

The early decision *Marshall v. Gordon*<sup>756</sup> held that Congress' contempt power was a mere implied power that arose for reasons of efficiency, and could not be used to punish private interests.<sup>757</sup> Further, *McGrain v. Daugherty*<sup>758</sup> established that:

[A] witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.<sup>759</sup>

Later, *Watkins* recognized a shift in doctrinal emphasis:

Prior cases, like *Kilbourn*, *McGrain* and *Sinclair*, had defined the scope of investigative power in terms of the inherent limitations of the sources of that power. In the more recent cases, the emphasis shifted to problems of accommodating the interest of the Government with the rights and privileges

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<sup>752</sup> PUNO, *supra* note 59, at 64-72.

<sup>753</sup> *Id.* at 64.

<sup>754</sup> 354 U.S. 178 (1957).

<sup>755</sup> *Id.* at 197.

<sup>756</sup> 243 U.S. 421 (1916).

<sup>757</sup> *Id.* at 542.

<sup>758</sup> 273 U.S. 135 (1926).

<sup>759</sup> *Id.* at 176, *citing* *Kilbourn v. Thompson*, 103 U.S. 168 (1880) *Marshall*, 273 U.S. 135 (1927) *See* *Sinclair v. United States*, 279 U.S. 263 (1929).

of individuals. The central theme was the application of the Bill of Rights as a restraint upon the assertion of governmental power in this form.<sup>760</sup>

While *Watkins* was decided on the relevance of questions raised at hearings, it also contained broad language regarding the right to privacy, and note it was decided before *Griswold*:

Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court. ... We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances... an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.<sup>761</sup>

At the Communist scare's height, the American Court leaned in favor of legislators investigating Communist activities, considering this a relevant and paramount matter of national security.<sup>762</sup> Eventually, however, the Court demanded a clear relationship between the information sought and the compelling state interest put forward, one commensurate to the resulting intrusions. *Gibson v. Florida Legislative Investigation Committee*<sup>763</sup> drew the line when the same national security rationale with respect to Communists was used against the National Association for the Advancement of Colored Peoples or NAACP. There was no evidence that the NAACP was ever associated with Communists, and it was even shown that they had actively prevented Communists from joining.<sup>764</sup> The Court thus decided in favor of privacy, stating its test requiring a compelling state interest as:

We understand this to mean – regardless of the label applied, be it 'nexus,' 'foundation,' or whatever – that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest. Absent such a relation between the N.A.A.C.P. and conduct in which the State may have a compelling regulatory concern, the Committee has not 'demonstrated so cogent an interest in obtaining and making public' the membership information sought....<sup>765</sup>

Such a ruling springs from the original ruling *NAACP v. Alabama*,<sup>766</sup> which was cited by *Griswold* as recognizing a penumbra of privacy in the freedom of association.

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<sup>760</sup> *Watkins*, 354 U.S. at 195.

<sup>761</sup> *Id.* at 198-99.

<sup>762</sup> *Uphaus v. Wyman*, 360 U.S. 72 (1959); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Braden v. United States*, 365 U.S. 109 (1959); *Wilkinson v. United States*, 365 U.S. 399 (1960).

<sup>763</sup> 372 U.S. 359 (1963).

<sup>764</sup> *Id.* at 547-48.

<sup>765</sup> *Id.* at 546. *See De Gregory v. Attorney General of New Hampshire*, 383 U.S. 825 (1966).

<sup>766</sup> 357 U.S. 449 (1958).

Distilling this discussion into a Constitutional framework, one must first determine whether the legislative inquiry is a valid one, in accordance with proper procedure. If it is, then second, one must determine whether the right to privacy is validly invoked, whether against the entire inquiry or specific questions. This follows from the explicit grant in the Constitution:

Section 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in, or affected by, such inquiries shall be respected.<sup>767</sup>

The Philippines has only two main cases regarding legislative investigation. As distinguished by Justice Puno,<sup>768</sup> the 1950 decision *Arnault v. Nazareno*<sup>769</sup> was more liberal in that it deemed a legislative investigation valid if it was on a subject Congress could validly legislate on. The 1991 decision *Bengzon v. Senate Blue Ribbon Committee*, decided under the above 1987 Constitution provision, deemed an investigation invalid because it was initiated after Senator Juan Ponce Enrile had asked the committee to investigate a transaction for a possible violation of the Anti-Graft and Corrupt Practices Act without hinting at any intended legislation. The Senate Rules at the time allowed Senators to refer their speeches to committees if they felt it required appropriate inquiries in aid of legislation.

With respect to the right to privacy, however, it was raised in *Arnault*, but the witness ultimately relied on his right against self-incrimination, meaning there is no applicable ruling to date. One would have to apply the general doctrines of privacy as discussed.

One must note, however, that Warren and Brandeis described the freedom of speech as generally delimiting the right to privacy, particularly libel doctrines. Thus, a witness would have to contend with the very broad Philippine public figure doctrine, where one is deemed a public figure under *Borjal* if one is either a public figure due to his great fame or notoriety, or a private figure nevertheless intertwined in a matter of public interest. Assuming the procedural validity of a Congressional inquiry, one may argue that Congress wields a broad power because of both this broad public figure doctrine and the inherently broad powers of the legislature.

Applying this to Ignacio Arroyo, or Iggy, and the Jose Pidal accounts, the solution to that controversy would be simpler than national media reports depicted. Although Arroyo claimed he was a private citizen at the time, this in itself is insufficient to invoke the right to privacy, following *Borjal*, because the Blue Ribbon investigation on corruption was clearly a matter of public interest. Arroyo was perhaps exonerated by Senator Joker Arroyo's finding that Senator Panfilo Lacson,

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<sup>767</sup> CONST. art. VI, § 21.

<sup>768</sup> PUNO, *supra* note 59, at 30-34.

<sup>769</sup> 87 Phil. 29 (1950).

who initiated the investigation, had been unable to present independent evidence that the Jose Pidal accounts were in fact a matter of public interest or tainted with any illegality, and that the burden of proving their legality should not fall on Iggy.<sup>770</sup> However, it could also be argued that he could have at least been asked to make some cursory explanation, given the public interest that had surrounded the investigation and the president's husband.

Finally, the right to privacy, like all rights, may be waived. Plausibly, Iggy had at least partially waived such rights when he voluntarily appeared before the Blue Ribbon Committee that was investigating his brother.

I fondly recall being in the University of the Philippines College of Law when the Senate investigation of Iggy abruptly stopped. The doctrine regarding matters of public interest, noting that the Philippines follows a doctrine broader than *Gertz*, was my initial answer to Professor H. Harry Roque as he rushed from class to a television interview. The following morning, Dean Agabin opined to add waiver in a casual corridor conversation. The controversy clearly illustrated that the right to privacy has much room for growth in the Philippines, as the mass media was immediately inundated with commentaries disbelieving that the right to privacy exists, despite the textual hook in the Philippine Constitution. This abruptly ended when Fr. Bernas himself was asked to write a primer illustrating the jurisprudence, and this in a country where *Griswold* is taken up within the first two weeks of law school.

Nevertheless, it also illustrated UP Law students' intellectual panache. When then Justice Puno himself delivered lectured on the right to privacy and legislative investigation in the Malcolm Hall auditorium as part of the series in tribute to Chief Justice Davide, the most difficult questions he fielded were from students asking about public figure jurisprudence less than ten years old at the time. Fittingly, the future Chief Justice Puno opened his talk by saying that he need state no other credential except his graduating from the UP College of Law.

*P. Privacy in court proceedings*

I have criticized *Ty* and *Krohn* for deciding privacy cases using purely procedural rules, and arguably failing to protect the privacy value of seclusion due to the focus on evidentiary rules. These issues are particularly highlighted in modern discovery, where the prevailing mindset is one of openness and breadth.<sup>771</sup> Further,

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<sup>770</sup> Avendano, *supra* note 58.

<sup>771</sup> Security Bank Corp. v. Ct. of Appeals, G.R. No. 135874, 323 SCRA 330, 333, Jan. 25, 2000.

the scope of discovery is expanding with the recognition of voluminous electronic documents and communications as potential treasure troves of evidence.<sup>772</sup>

It is difficult to invoke the right to privacy in the trial context in general and in discovery in particular because there are no rules to facilitate this, except for general ones, such as protections for witnesses against abuse. Privilege enjoys the most specific rules, and the attorney-client and work product privileges are the easiest to apply.<sup>773</sup> The former, especially in the context of casual, rapid electronic exchanges,<sup>774</sup> may be broadened to protect communications of the attorney's and the client's agents and employees.<sup>775</sup> The work product privilege may be broadened by granting it to documents where preparations were assisted by a lawyer, including a computer database for litigation purposes, or otherwise reveals the lawyer's thinking in any way.<sup>776</sup>

Further, because of the potential volume of electronic documents involved in discovery, privilege should not be deemed waived by inadvertent production, absent a showing of actual negligence.<sup>777</sup> In the United States, this has been governed by the Fifth Circuit's *Allread v. City of Grenada*<sup>778</sup> framework:

1. precautions taken to prevent inadvertent disclosure;

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<sup>772</sup> Carol Heckman & Jerold Brydges, *Winning Electronic Discovery Motions*, 4 SEDONA CONF. J. 151, 151 (2003); Lesley Rosenthal, *Electronic Discovery Can Unearth Treasure Trove of Information or Potential Land Mines*, 75-SEP N.Y. ST. B.J. 32, 32 (2003); Edgardo Carlo Vistan, *The Philippine Voyage into Electronic Discovery*, 78 PHIL. L.J. 27, 30 (2003).

<sup>773</sup> Eric Van Buskirk, *Practical Strategies for Digital Discovery*, 32-SPG BRIEF 50, 51 (2003); Carey Sirota Meyer & Kari Wraspir, *E-Discovery: Preparing Clients for (and Protecting Them Against) Discovery in the Electronic Information Age*, 26 WM. MITCHELL L. REV. 939, 953 (2000).

<sup>774</sup> Michael Marron, *Discoverability of "Deleted" E-mail: Time for a Closer Examination*, 25 SEATTLE U.L. REV. 895, 898 (2003); James Lehman, *Litigating in Cyberspace: Discovery of Electronic Information*, 14 S.C. LAW. 15, 17 (1997).

<sup>775</sup> *E.g.*, *Upjohn v. United States*, 449 U.S. 383, 396 (1981); *Kintaro, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 513-14 (S.D.Cal. 2003); *In Re Auclair*, 961 F.2d 65 (5th Cir. 1992); *Long v. Anderson Univ.*, 204 F.R.D. 129, 134 (S.D.Ind. 2001); *AT&T Corp. v. Microsoft Corp.*, 2003 WL 21212614, at \*4 (N.D.Cal. 2003); *IBM Corp. v. Comdisco*, No. 91-C-07-199, 1992 LEXIS 67 (Del. Super. Ct. Mar. 11, 1992); *RLS Associates, LLC v. United Bank of Kuwait, PLC*, 2003 WL 1563330, at \*4 (S.D.N.Y. 2003); *Ross v. Uki Ltd.*, 2004 WL 67221, at \*4-6 (S.D.N.Y. 2004); *Robinson v. Texas Automobile Dealers Ass'n*, 214 F.R.D. 432, 447 (E.D. Tex. 2003); *TVT Records, Inc. v. The Island Def Jam Music Group*, 2003 WL 749801, at \*3 (S.D.N.Y. 2003); *In re Grand Jury Subpoenas dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F.Supp.2d 321, 326 (S.D.N.Y. 2003).

<sup>776</sup> *E.g.*, *Kintera*, 219 F.R.D. at 509; *In re Honeywell Int'l, Inc., Securities Litig.*, 2003 WL 22722961, at \*6 (S.D.N.Y. 2003); *Hoffman v. United Telecomm., Inc.*, 117 F.R.D. 436, 439 (D. Kan. 1987); *Lawyers Title Ins. v. U.S.F.&G.*, 122 F.R.D. 567 (N.D. Cal. 1988); *Santiago v. Miles*, F.R.D. 636, 437-40 (W.D.N.Y. 1988).

<sup>777</sup> *E.g.*, *Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125 (E.D. Tex. 2003); *Fleet Bus. Credit Corp. v. Hill City Oil Co.*, 2002 WL 31741282 (W.D.Tenn. 2002); *United States v. Rigas*, 281 F.Supp.2d 733, 739 (S.D.N.Y. 2003).

<sup>778</sup> 988 F.2d 1425 (5th Cir. 1993).

2. the time taken to rectify the error;
3. the scope of the discovery;
4. the extent of the disclosure; and
5. the overriding issues of fairness<sup>779</sup>

The potential volume is rarely exaggerated. *In re Worldcom, Inc. Securities Litigation*,<sup>780</sup> for example, covered four *terabytes* worth of electronic documents, or 84 million pages worth, including 2.5 million pages of e-mail. *Renda Marine, Inc. v. United States*<sup>781</sup> even featured a plaintiff who resisted not discovery itself, but the government's demand that it organize and label 38,000 pages of disclosed records.<sup>782</sup>

Despite the increasing breadth granted to these privileges, however, they may only be invoked in very specific situations, when specific requisites are established. Barring, for example, a laptop computer containing a doctor's patient records, privilege may generally be invoked only when one's lawyer is involved in the communications. Second, even when they are properly invoked, privileges are seen as exceptions to a general rule. The burden is always on the party claiming it, and their application is always strictly construed against that party.

*Republic v. Sandiganbayan*,<sup>783</sup> quoting the landmark case *American Hickman v. Taylor*,<sup>784</sup> provides that discovery may be validly protested when it:

1. "is being used in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry";
2. "touches upon the irrelevant"; and
3. "encroaches upon the recognized domains of privilege"<sup>785</sup>

Thus, outside the situations where privilege is proper, one is left with the first two, which are matters of a trial judge's discretion. Bad faith, for example, is never presumed and the party alleging it must establish it. One might also argue that discovery is precisely the time to gauge what are relevant and irrelevant, and having material produced does not equate to admissibility as evidence later at trial. In

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<sup>779</sup> *Id.* at 1433, citing *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323 (N.D.Cal.1985).

<sup>780</sup> 2003 WL 22953645 (S.D.N.Y. 2003).

<sup>781</sup> 58 Fed.Cl. 57 (2003).

<sup>782</sup> *Id.* at 63.

<sup>783</sup> G.R. No. 90478, Nov. 21, 1991.

<sup>784</sup> 329 U.S. 495 (1947).

<sup>785</sup> *Id.* at 500.

American jurisprudence, the only concrete ground is the inequity of the costs one would incur due to an opponent's discovery request.<sup>786</sup>

The need to be able to concretely invoke the right to privacy in discovery is best illustrated by the 1997 New York rape case *People v. Jovanovic*.<sup>787</sup> The defendant was indicted for kidnapping, aggravated sexual abuse, and sodomy. He subpoenaed all e-mails sent and received by the victim from her Columbia University account, which amounted to over 2,400 pages.<sup>788</sup> The court conducted an *in camera* examination of the material, and released e-mail between the victim and the defendant, and two others with the name of the third party redacted. It ruled that the other e-mails would have no bearing on the case.<sup>789</sup> The court noted:

The Court can only conclude that the defendant's subpoena of the complainant's third party e-mails from Columbia University constitutes nothing more than a "discovery" subpoena – a fishing expedition to attempt to examine the e-mails in the hope that evidence or information helpful to the defense will be discovered, i.e., presumably information regarding the complainant's sexual history and/or proclivities. This is clearly an improper use of a subpoena duces tecum.<sup>790</sup>

*Jovanovic* is possibly the most atrocious fishing expedition seen in recent jurisprudence. However, first, no privilege could be asserted. The victim's e-mails were not confidential, and did not involve legal advice or mental impressions regarding legal strategies. Second, cost was not an issue. Columbia University readily produced diskettes containing the e-mails and forwarded these to the court. Third, although the court found impropriety and made no attempt to hide its disapproval of the discovery motion, one infers it did not find bad faith since it did not disallow the request altogether. In fact, the decision elaborated further and eventually restricted the production due to relevance, but even then it disclosed two e-mails between the victim and a third party.

*Jovanovic* ended:

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<sup>786</sup> See, generally, *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002). *Rowe* prescribed the following criteria:

- (1) the specificity of the discovery requests;
- (2) the likelihood of discovering critical information;
- (3) the availability of such information from other sources;
- (4) the purposes for which the responding party maintains the requested data;
- (5) the relative benefit to the parties of obtaining the information;
- (6) the total cost associated with production;
- (7) the relative ability of each party to control costs and its incentive to do so; and
- (8) the resources available to each party.

<sup>787</sup> 676 N.Y.S.2d 392 (N.Y. 1997).

<sup>788</sup> *Id.* at 392-93.

<sup>789</sup> *Id.* at 393, 396.

<sup>790</sup> *Id.* at 395.

The Court is also cognizant of the privacy rights of the complainant in the material subpoenaed, in light of the holding by the Court of Appeals in *People v. Williams*... in which the Court of Appeals expressed the legitimate societal interest of affording protection to victims of alleged sexual crimes from unnecessary invasions of privacy and harassment. Communications between the complainant and third parties other than the defendant (which the Court has previously determined through its in camera review are not exculpatory) are not directly relevant to the defendant's case, since such have no bearing on the defendant's state of mind at the time the crime was allegedly committed.<sup>791</sup>

Given facts as atrocious as *Jovanovic's*, one recalls a conclusion of Fr. Bernas with respect to discovery rules:

When it is realized that the power of the Supreme Court to issue rules of procedure is subject to the specific constitutional limitation that they shall not diminish substantive rights, it becomes clear that the application of Rule 27 must follow constitutional principles on search and seizure.<sup>792</sup>

Although he concluded that the present rules nevertheless meet the minimum requirements of some probable cause and designation of the material sought,<sup>793</sup> the right against unreasonable search's application provides a ready link to the right to privacy.

Of course, very few electronic evidence cases have facts similar to *Jovanovic* where abuse is clear; privacy violations are less apparent in corporate litigation, for example.<sup>794</sup> However, it is incorrect to say that the right does not apply in a given context. Rather, the right to privacy may be deemed waived, there is a decreased expectation of privacy, or privacy is balanced against and is outweighed by a more compelling interest. Of course, a trial is a public event and what transpires in the court room is public property,<sup>795</sup> and a litigant expects to have his affairs probed before the judge. Nevertheless, especially given electronic records' pervasiveness, one should be able to argue that one does not enter court expecting every corner of his life to be scrutinized.

Of course, privacy loses the balance in many litigation contexts, and is quickly set aside. However, this is understandable given that most targets of electronic discovery are e-mails and records one makes in the course of business or

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<sup>791</sup> *Jovanovic*, 676 N.Y.S.2d at 395.

<sup>792</sup> BERNAS, THE 1987 CONSTITUTION (1996 ed.), *supra* note 322, at 166.

<sup>793</sup> *Id.* at 167.

<sup>794</sup> See, however, Katie Patton, *Unfolding Discovery Issues That Plague Sexual Harassment Suits*, 57 HASTINGS L.J. 991, 997 (2006), citing Ethan Heinz, Note, *The Conflicting Mandates of FRE 412 and FRCP 26: Should Courts Allow Discovery of a Sexual Harassment Plaintiff's Sexual History?*, 1999 U. CHI. LEGAL F. 519, 530 (1999). "In sexual harassment suits, discovery abuse not only involves an 'increasing the cost' strategy, but additionally can lead to the plaintiff enduring a heightened invasion of privacy in order to see his or her suit through to fruition."

<sup>795</sup> *Craig v. Harney*, 331 U.S. 367, 374 (1947).

made by one's employees. One is deemed to have a lower expectation of privacy in one's workplace,<sup>796</sup> as this is the center of one's public life, on the opposite end of the spectrum from the home.

Further, there are specific reasons why employees have a decreased expectation of privacy with respect to work e-mail accounts. First, employers have legitimate interests in monitoring the workplace.<sup>797</sup> They have a responsibility, for example, to police messages that constitute sexual harassment or pornography.<sup>798</sup> In *Blakey v. Continental Airlines*,<sup>799</sup> for example, the airline was sued by its first female captain for sexually explicit messages on the company's electronic bulletin board. In *Strauss v. Microsoft Corp.*,<sup>800</sup> the corporation was sued by a female employee because the staff circulated sexually charged e-mails, such as a parodied play, "A Girl's Guide to Condoms." In *Coniglio v. City of Bernwyn*,<sup>801</sup> the city was sued by a female employee over a manager who viewed pornography from the Internet and printed it out in full view of female employees.

Monitoring Internet use is simply cheaper than incurring such lawsuits,<sup>802</sup> which goes to the second reason, namely that the employer owns the facilities. Thus, the fact that workers may be given individual accounts and password protection is not deemed to create any expectation of privacy.<sup>803</sup> This is true especially if the employer makes such clear in employee manuals and the like, but even employers with no explicit policies have been upheld in court.<sup>804</sup>

Third, monitoring is also a lesser evil compared to other liabilities, such as having copyright infringing material enter the company computers, or having employees send proprietary material to outside parties.<sup>805</sup> To cite one especially striking example, the CEO of Cerner Corp. once threatened his staff via e-mail with layoffs and benefit freezes if productivity did not improve. Less than ten days later, the message was posted on the Internet and the company's stock price dropped.<sup>806</sup>

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<sup>796</sup> *O'Connor v. Ortega*, 480 U.S. 709, 715-17 (1987). This decision, however, emphasized that a decreased expectation is not the same as a nonexistent expectation.

<sup>797</sup> *Id.* at 717. See Michael Rustad & Thomas Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 95 (2003).

<sup>798</sup> William Porter & Michael Griffaton, *Between the Devil and the Deep Blue Sea: Monitoring the Electronic Workplace*, 70 DEF. COUNS. J. 65, 67 (2003).

<sup>799</sup> 751 A.2d 538 (N.J. 2000).

<sup>800</sup> 814 F.Supp. 1186 (S.D. N.Y. 1993).

<sup>801</sup> 2000 WL 967989 (N.D. Ill. 2000).

<sup>802</sup> Frank Morris, *The Electronic Platform: Email and Other Privacy Issues in the Workplace*, 20 NO. 8 COMPUTER & INTERNET LAW. 1, 1 (2003); Fernando Piera, *International Electronic Commerce: Legal Framework at the Beginning of the XXI Century*, 10-SUM CURRENTS: INT'L TRADE L.J. 8, 18 (2001).

<sup>803</sup> *Id.* at 3.

<sup>804</sup> Mark Schreiber, *Employer E-Mail and Internet Risks, Policy Guidelines and Investigations*, 85 MASS. L. REV. 74, 84 (2000).

<sup>805</sup> Porter & Griffaton, *supra* note 807, at 69.

<sup>806</sup> Morris, *supra* note 811, at 5.

An employer also has an interest in detecting legally incriminating material that may later be subject to electronic discovery.

Finally, an employer simply needs to monitor the use of computer resources, from viruses to clogging due to large image or pornography files.<sup>807</sup> Thus, today, about one-third of American workers with workplace Internet access are subject to monitoring, and employers can block them from certain web sites, read individual messages, and block messages with certain keywords.<sup>808</sup>

Discussing a USD30 million verdict in a discrimination suit after discovery revealed deletion of key e-mail evidence, a 2006 *Yale Law Journal* comment summarized:

[B]y combining a low bar for the discoverability of inaccessible data with the possibility of severe sanctions for negligent destruction, the *Zubulake* framework places a heavy burden on employers with large information systems. Systematic electronic surveillance thus becomes an attractive option, because it enables employers to (1) keep employees from using company networks for personal reasons, thereby reducing the amount of data captured on backup tapes; (2) detect improper employee behavior before a lawsuit is lodged against the company; and (3) prevent key players from erasing evidence from their computers once litigation is anticipated.<sup>809</sup>

The comment adopted a quantitative approach and proposed that employers should not be encouraged to adopt intrusive monitoring policies aimed at reducing their costs in electronic discovery contexts. This would be done by increasing the bar for allowing discovery when electronic material would be disproportionately costly to produce, such as cases where large amounts of data would have to be searched through or reproduced. This would also include cases where discovery would result in disproportional intrusion into an employee's affairs, such as a request for certain e-mails by someone with peripheral involvement, which would require a lawyer to inspect that employee's personal correspondence.<sup>810</sup>

Reviewing electronic discovery management decisions, the landmark ruling in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*<sup>811</sup> stated:

To the degree the defendants seek to assert the privacy concerns of their employees, those interests are severely limited. Although personal

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<sup>807</sup> Matthew Finkin, *Information Technology and Worker's Privacy: The United States Law*, 23 COMP. LAB. L. & POL'Y J. 471, 474 (2002).

<sup>808</sup> Charles Kerr et al., *Privacy – The Proliferating Legal Landscape*, 683 PLI/PAT 561, 752 (2002).

<sup>809</sup> Elaine Ki Jin Kim, Comment, *The New Electronic Discovery Rules: A Place for Employee Privacy?*, 115 YALE L.J. 1481, 1485 (2006) (citing *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003)).

<sup>810</sup> *Id.* at 1487.

<sup>811</sup> 205 F.R.D. 421 (S.D.N.Y. 2002).

communications of employees may be appear in hard copy as well as in electronic documents, the defendants made no effort to exclude personal messages from the search of paper records conducted by plaintiffs' counsel. Moreover, an employee who uses his or her employer's computer for personal communications assumes some risk that they will be accessed by the employer or by others.<sup>812</sup>

This implies that a court might be willing to exclude employees' clearly personal e-mails, though it is unlikely an employer would go to the additional expense of filtering such e-mails along with privileged material.<sup>813</sup> Nevertheless, the general rule remains a lack of reasonable expectations at work. The exceptions cover personal e-mail accounts of employees, though accessed at work. In *Fischer v. Mount Olive Lutheran Church*,<sup>814</sup> a pastor guessed the password to a personal account belonging to an employee he suspected of having multiple homosexual relationships. The court held that an expectation of privacy was possible. However, such personal accounts would likely be outside the scope of discovery, unless they belonged to impleaded employees.

Although privacy finds little application in the general corporate context, there are clearly scenarios where it has been used as the ground to resist discovery. The most common in present American jurisprudence are found in Internet defamation suits,<sup>815</sup> as already discussed in a preceding section, where the Internet provider has to be subpoenaed to obtain the identity of an anonymous user.

*Playboy Enterprises, Inc. v. Welles*,<sup>816</sup> a case often cited in infringement cases and for its detailed discovery order that involved creating a "mirror" copy of the defendant's hard drive, is the most promising decision to base a privacy objection on to date. It is one of few existing electronic discovery decisions where a privacy claim that was taken very seriously by the court.<sup>817</sup>

*Welles* featured 1981 "Playmate of the Year" Teri Welles, who was self-employed and used her personal computer for both business and personal e-mails.<sup>818</sup> She admitted to deleting her e-mails immediately after reading them, despite a discovery order in the pending litigation, leading the plaintiff to ask to be allowed to recover the deleted e-mails. Welles' position was summarized by the court:

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<sup>812</sup> *Id.* at 428.

<sup>813</sup> Marron, *supra* note 783, at 922.

<sup>814</sup> 2002 WL1306900 (W.D. Wis.).

<sup>815</sup> It must be noted that these have become very important in American Internet jurisprudence. Online defamation cases, for example, accounted for 29% of punitive damages in Internet cases from 1992-2002. Michael Rustad, *Punitive Damages in Cyberspace: Where in the World is the Consumer?*, 7 CHAP. L. REV. 39, 47 (2004).

<sup>816</sup> 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999).

<sup>817</sup> Marron, *supra* note 783, at 921. Only one out of more than one hundred journal articles and none of the cases I reviewed discussed this point regarding *Welles*.

<sup>818</sup> *Id.* at 1053.

Defendant contends that her business will suffer financial losses due to the approximate four to eight hour shutdown required to recover information from the hard drive. Defendant also contends that any recovered e-mails between her and her attorneys are protected by attorney-client privilege. Lastly, Defendant contends that the copying of her hard drive would be an invasion of her privacy.<sup>819</sup>

The court's order deviated from the ones usually seen in such discovery cases:

Considering these factors, the Court determines that the need for the requested information outweighs the burden on Defendant. Defendant's privacy and attorney-client privilege will be protected pursuant to the protocol outlined below, and Defendant's counsel will have an opportunity to control and review all of the recovered e-mails, and produce to Plaintiff only those documents that are relevant, responsive, and non-privileged. Any outside expert retained to produce the "mirror image" will sign a protective order and will be acting as an Officer of the Court pursuant to this Order. Thus, this Court finds that Defendant's privacy and attorney-client communications will be sufficiently protected. Further, Plaintiff will pay the costs associated with the information recovery. Lastly, if the work, which will take approximately four to eight hours, is coordinated to accommodate Defendant's schedule as much as possible, the Court finds that the "down time" for Defendant's computer will result in minimal business interruption.<sup>820</sup>

The court clearly recognized the privacy ground, since it ruled that the need for the information outweighed it, instead of dismissing it outright. Moreover, it took measures to safeguard Welles's privacy by allowing her lawyer to remove personal as well as privileged e-mails. It even explicitly ordered the plaintiff to "accommodate Defendant's schedule as much as possible." The key difference was Welles's self-employed status. First, this and her clear use of her computer for personal purposes gave her a clearly more significant expectation of privacy than an ordinary employee. Second, she owned the computer, and employer monitoring justifications did not apply to her. In short, she could not have a decreased expectation of privacy by virtue of being at the workplace, and the court perceived this difference.

Similar details apply to the anonymous defendants in the Internet cases, or at least potentially did, since one would be unsure of their circumstances. Thus, one begins to see that the right to privacy in the context of electronic discovery is actually found in a spectrum. The bulk of present decisions deal with commercial litigation where the business contexts and surrounding facts do not support privacy objections, but they are actually only one end of the scale. In the middle, one finds the anonymous defendant cases and *Playboy*, where a balancing of interests takes place. On the opposite pole, this author thus submits that one finds extreme cases

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<sup>819</sup> *Id.* at 1054.

<sup>820</sup> *Id.* at 1055.

such as *People v. Jovanovic* where the breadth and intrusiveness of discovery requests border on abuse. At this point, at least, such out-of-bounds discovery should no longer be treated liberally, and the burden should no longer be placed on the producing party.

As electronic discovery becomes more common and more closely integrated into the legal process, the other side of the spectrum will inevitably surface. Lawyers and judges alike should thus be ready to recognize more appropriate applications of the right to privacy.

One only has to think of a loved one raped and then subject to the indignity of having her e-mail being browsed by the suspected rapist.

### CONCLUSION

I mulled over this article's final revision while visiting the Anne Frank Huis in Amsterdam, all the while conducting a Blackberry correspondence with editor GJ Jumamil in Manila. After one passes Eleanor Roosevelt and Nelson Mandela's testimonials on how a child's diary inspired them in their quests to advance human rights, the tour ends with an interactive exhibit that covers modern issues from Neo Nazi demonstrations outside synagogues to the Patriot Act. One section is definitively entitled: "Privacy is a fundamental human right." This, I believe, succinctly demonstrates the right's breadth and acceptance in countless other countries, and challenges the Philippines to develop its conception of the right with equal intellectual rigor.

This article described how current Philippine privacy doctrine anchors itself textually on the rights against unreasonable search and to privacy of correspondence, and in various textual penumbras and zones of privacy as described in *Griswold*, *Morfe* and *Ople*. It then outlined the much broader understanding of the right in foreign jurisprudence, using the same rights and concepts already established in Philippine law. The right's constitutional aspect consists of decisional and informational privacy, while its civil aspect consists of the various privacy torts and the broad tort intentional infliction of emotional distress, as well as various statutory zones identified in *Ople*.

In appraising the Philippine right to privacy's development, this article then pointed out examples of inconsistencies meriting serious study. *Morfe* cited *Griswold*, yet the latter involved no undue disclosure of private information. In fact, Philippine jurisprudence has anchored itself onto *Griswold*, but this is actually a seeming anomaly in a crucial line of American substantive due process decisions. *In re Sabio* seemed to discuss both strict scrutiny and rational basis review in the same paragraph. A separate opinion in *Ejercito* cited both *Katz* and *Roe*. *Ty* and *Krohn* seemed to deal with privacy superficially, resolving issues solely through the procedural rules. Certain decisions invoke privacy where there no disclosure of private information is actually at issue, such as *Escritor* and *Ilusorio*. Further, this

article pointed out decisions where the right to privacy should have been discussed, judging from the approaches seen in foreign jurisprudence, but was nowhere to be seen. This was true of *Tacson* and the right to marriage, *Silverio* and a transsexual's decision to undergo sex reassignment surgery, and will likely be true in a future decision regarding drug testing policies.

A integrated framework for the Philippine right to privacy is imperative, and our thinking must ultimately free itself from existing rigid frameworks such as the right against unreasonable search's technicalities, defamation's strict requisites, and procedural rules which offer little explicit protection for privacy. Such frameworks stand in stark contrast to, for example, the Civil Code's potentially expansive article 26. The complete right to privacy in its full breadth protects a set of underlying values, which I organize as follows:

<b>Privacy Value</b>	<b>Constitution</b>	<b>Civil Code and Others</b>
<i>Privacy as autonomy</i>	<i>Substantive due process</i>	<i>Infliction of distress</i>
<i>Privacy as seclusion</i>	<i>Unreasonable search</i> <i>Privacy of correspondence</i> <i>Self-incrimination</i> <i>Anonymous speech</i> <i>Anonymous association</i> <i>Restraints on speech</i>	<i>Intrusion into seclusion</i> <i>Infliction of distress</i>
<i>Privacy as reputation</i>	<i>Unreasonable search</i> <i>Privacy of correspondence</i> <i>Self-incrimination</i> <i>Restraints on speech</i>	<i>Disclosure of private facts</i> <i>False light</i> <i>Infliction of distress</i>
<i>Privacy as identity</i>	<i>Substantive due process</i>	<i>Appropriation</i> <i>Infliction of distress</i>
<i>Evidentiary privileges</i>	<i>Unreasonable search</i> <i>Privacy of correspondence</i> <i>Self-incrimination</i>	<i>Remedial law privileges</i>

Reorganizing the discussion around these values, the challenges posed to current doctrine become more evident. First, the values of seclusion and reputation fall squarely within the currently most developed doctrine arising from the right against unreasonable search. One nevertheless wonders, however, how definitively current doctrine recognizes that violations may take place even if no information is actually disclosed, when nothing analogous to a search takes place, or perhaps even when a mere threat albeit a credible and systematic threat of intrusion is likely.

Finally, one wonders if present understanding will expand to cover modern situations where a single intrusion may give rise to a perpetual threat of intrusion, as in electronic and genetic contexts, drawing in particular from Justice Cortes's and *Ople's* discussions on databases. Recall Justice Cortes's now prophetic words from almost four decades past:

The computer age is upon us. While the use of computers in this country is as yet limited, the need to provide protection to individual privacy against threats arising from computerization will have to be met. A legal framework will have to be established which, while recognizing the various ways in which the computer may be utilized, will also afford protection to privacy.<sup>821</sup>

Second, there is evidence that the value of autonomy and what American jurisprudence terms decisional privacy would be protected by Philippine doctrine, but explicit recognition has not yet been seen. Assuming such recognition comes in the future, one wonders to what extent it may be expanded to, given the multitude of controversial contexts covered in foreign jurisprudence. Third, one wonders whether the value of identity will be independently protected in the various new contexts discussed in this article. Finally, one hopes that privacy issues in contexts relating to evidentiary privileges are resolved to protect the underlying values and not merely in the technically correct procedure under the Rules of Court, and one only need look to *Jovanovic* for an illustration. Recall Professor Tribe's assertion that process and procedural rights are never purely neutral in that there is always some underlying value they protect, such as individual dignity.<sup>822</sup>

All these pose interesting challenges, and not merely in the Human Security Act's context, although this is the most immediate catalyst to consolidating Philippine privacy doctrine. Admittedly, in addition to Human Security Act issues' political considerations and to the Internet and other complex technological challenges, the most difficult privacy issues touch upon deeply held moral, social and religious beliefs. These are precisely the issues, however, that stand to shed the most light on how we understand our concept of liberty. The "right of exit" in refusing medical treatment when terminally ill, for example, seeks to preserve values of autonomy and identity at one's very last moment, and in this sense is the right to privacy's ultimate context. The rights sought by post-surgery transsexuals similarly involve the values of autonomy and identity, the latter in a particularly fundamental context relating to how one views and is viewed by society. Whether our Court recognizes or denies the right to privacy in such contexts, or determines the right is trumped by more powerful state interests, the discussion cannot result in the intellectual frustration that arises from *Silverio*. Again, part of *Silverio's* rationale may well have been couched in the preliminary Bible quote and the implicit quotation of

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<sup>821</sup> CORTES, *supra* note 1, at 12.

<sup>822</sup> LAURENCE TRIBE, CONSTITUTIONAL CHOICES 13 (1985). Particularly with respect to procedural rights arising from the Constitution, the ultimate value is to protect the individual's dignity during the criminal process and ensure that the State apparatus does not treat him as a mere object.

*Littleton*, a decision that denied a post-surgery transsexual's right to marry, something not put in issue but possibly preempted in hidden dicta.

All these privacy values converge in, as Professor Tribe emphasizes, the dignity inherent in human beings, the dignity that underlies our interaction. These concepts of dignity and privacy were most powerfully rearticulated in the South African *Sodomy case*:

[T]he constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.

...

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.<sup>823</sup>

To my mind, it is not as important *how* we as a nation decide future privacy issues from Internet and other technological dilemmas to same-sex and transsexual marriage and the so-called "right to die." Noting Wechsler, it is far more important *why* we strike a balance the way we do, and that we nevertheless acknowledge individual Filipinos' dignity no matter what the outcome. Presented with the varied contexts in which the right to privacy has been discussed in Philippine jurisprudence, it appears straightforward to infer that it is not Justice Black's "broad, abstract and ambiguous concept ... easily [] interpreted as a constitutional ban against many things," but a broad right that protects a broad set of related values. In recognizing this interrelation, however, one must realize that an individual's right to be free from government wiretapping is related to the right to choose to use contraceptives, which is related to the right to retain some control over a fictionalized account of a spouse's life, which is related to the right to engage in intimate relationships, heterosexual and homosexual alike. One recognizes that to devalue one aspect devalues the entire right, just as the true libertarian readily defends a right even while disagreeing in how it is used. As Justice Bellosillo wrote, "[W]hen we have learned to reverence *each individual's liberty* as we do our tangible wealth, we then shall have our renaissance."<sup>824</sup>

This article's most controversial discussions are most likely those devoted to same-sex and transsexual marriage, but perhaps I do not so much as espouse allowing these as I voice extreme intellectual frustration with arguments to the contrary,<sup>825</sup> as recently embodied in *Silverio*. It was an unforgettable moment to be

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<sup>823</sup> Nat'l Coalition for Gay & Lesbian Equality v Minister of Justice, (1999) (1) S.A. 6, ¶¶ 28, 32 (S. Afr.). Taking Professor Michelman's class, I could not help being frustrated at realizing that South African constitutional jurisprudence is being studied by the world's finest scholars, while the post-EDSA Philippine experience has merited little intellectual attention.

<sup>824</sup> Estrada v. Escritor, A.M. No. P-02-1651, 408 SCRA 1, 207-08, Aug. 4, 2003 (Bellosillo, J., *concurring*).

<sup>825</sup> This recalls the challenge posed by Professor Elizabeth Pangalangan in my 2001 Persons class. She first emphasized that under *Eisenstadt*, the right to privacy inheres in the individual and not in a relationship between individuals. If so, she then challenged the class to present legal

introduced to the great one-armed Justice Albie Sachs by Professor Michelman in Boston, and it is impossible for me to forget the man's great inner strength as I recall his words on the subject:

[T]he antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law....

...

It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others.<sup>826</sup>

Thus did he write on South Africa's behalf, a country that now constitutionally parallels discrimination based on sexual orientation to the apartheid that stripped a majority of its citizens of their dignity as surely as Martial Law did to countless Filipinos. Our Court may validly decide against homosexuals and transsexuals when the definitive decision comes, but its grounds must stand up to the powerful reasoning and symbolism above, just as its grounds must in issues from drug testing to the Human Security Act.

In all this, two jurists must be highlighted. In *Morfe*, Chief Justice Enrique Fernando made the right to privacy an explicit right in Philippine jurisprudence. He laid a strong foundation for the right's evolution in a poetic, comprehensive discussion of liberty and privacy that preceded the later American decision *Whalen v. Roe* and what are now the recognized categories decisional privacy and informational privacy.

His handful of later ponencias that explicitly discussed privacy all hinted at *Morfe's* still unrecognized breadth. *Ermita-Malate Hotel and Motel Operators Association* implied that the right to privacy could be invoked against a requirement that motel guests register themselves and their companions, and *Pacis v. Pamaran* hinted the same with respect to customs searches. *Evangelista v. Jarencio* hinted that the right was applicable in administrative regulation, and this is now key in issues such as drug testing. *People v. Reyes* and *People v. Nazareno* characterized an invasion of the body as the most vulgar intrusion of privacy, implying a stronger link to the

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reasons against same-sex marriage, as opposed to moral, traditional or religious reasons. She was met by silence, and I believe no freshman has satisfactorily answered her to this day. This lecture inspired me to use same-sex marriage as a context for exploring constitutional concepts. I wrote an article testing arguments against same-sex marriage on bisexuals and post-surgery transsexuals which was reviewed by Professor Beth and Professor Araceli Baviera prior to its publication in the *Philippine Law Journal*.

<sup>826</sup> Minister of Home Affairs v. Fourie, 2006 (1) SA 524, ¶¶ 74, 92 (CC) (S. Afr.).

American decision *Schmerber v. California* and issues such as drug and genetic testing. *Lopez v. Commissioner* explicitly linked the right against unreasonable search to privacy, and the oft-quoted *Villanueva v. Querubin* emphasized human dignity in this link. *Pascual v. Board of Examiners* characterized the right against self-incrimination as creating a zone of privacy. Finally, *Secretary v. Marcos* characterized the privacy of communication as being on the same level as the privacy of the home. This breadth was tempered perhaps only by Chief Justice Fernando's similarly expansive discussions of the public figure doctrine in *Lopez v. Court of Appeals* and *Babst v. National Intelligence Board*, which necessarily constrict the right to privacy.

Justice Carpio, on the other hand, pioneered recognition of the right to privacy's civil aspect, from his *Philippine Law Journal* article which is now required reading in the University of the Philippines Torts classes, to his Supreme Court decisions. He remains on the bench and has many opportunities to further unlock the wealth in the Civil Code's article 26 that he recognized many years ago as a student.

Professor Alexander Bickel noted that judicial review is a "deviant"<sup>827</sup> institution in a democracy. Nevertheless, this is a role that takes on particular power when the Court articulates minority rights against the majority's representatives in government. The countermajoritarian difficulty in this context is the highest calling in the Court's mystic role, as Professor Bickel articulated, where the Court must educate society as an institutional symbol of the past's principles and at the same time articulate society's aspirations for the future.<sup>828</sup> As one recalls that the "law must remain stable, but it cannot stand still,"<sup>829</sup> that "it is a Constitution we are expounding,"<sup>830</sup> and that the Constitution is an experiment, as all life is an experiment,<sup>831</sup> one also recalls the core of Justice Cortes's teaching: that the right to privacy is the entire Bill of Rights' underlying theme.<sup>832</sup>

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*Afterword:* This article draws from several of the author's previous articles, and he remains grateful to the various *Philippine Law Journal* editors who assisted in their preparation, particularly his own Volume 79 board and student interns. He also remains grateful to his namesake former Senate President Franklin M. Drilon and ACCRALAW for granting him the first Violeta Calvo-Drilon-ACCRALAW Scholarship for Legal Writing.

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<sup>827</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (1962).

<sup>828</sup> *Id.* at 32. See Florentino Feliciano, *On the Functions of Judicial Review and the Doctrine of Political Question*, 39 PHIL. L.J. 444, 446 (1964); Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 195 (1952).

<sup>829</sup> ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923).

<sup>830</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.).

<sup>831</sup> *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., *dissenting*).

<sup>832</sup> See *infra* text accompanying note 24.

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