SISYPHUS' LAMENT, PART VII: THE DEATH OF THE PHILIPPINE LAW JOURNAL*

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ABSTRACT

This paper highlights how the PHILIPPINE LAW JOURNAL, the country's leading academic legal journal, is cited only once a year by the Philippine Supreme Court in 2004-2013. This is half the frequency reported in the original landmark study by the same author, which was about twice a year in 1991-2003. The author attributes this to a preference of law clerks for researching foreign journals using more easily searched electronic databases over the individual websites and print copies of Philippine journals. What the author calls the "damning statistic" reveals a detachment of Philippine legal academia from the judiciary, and leads one to question whether there is any effective evaluation of Supreme Court doctrine. For example, Philippine public figure doctrine has been established to be much broader than US doctrine, but no commentator (other than the author) pointed out how recent decisions mistakenly cited the US doctrine instead of the Philippine doctrine. The author then discusses other ideas for ensuring

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First Violeta Calvo-Drilon-ACCRALAW Scholar for Legal Writing (2004). First Freshman and First Two-Time Awardee, Justice Irene R. Cortes Prize for Best Paper in Constitutional Law (2002, 2005). Professor Myres S. McDougal Prize for Best Paper in Public International Law and Jurisprudence (2005). First Awardee, Justice Vicente V. Mendoza Prize for Best Critical Analysis of a Supreme Court Decision (2005). First Awardee, Professor Gonzalo T. Santos, Jr. Prize for Best Paper in Securities Law (2005). First awardee, Professor Bienvenido C. Ambion Prize for Best Paper in Private International Law (2004). Professor Esteban B. Bautista Prize for Best Paper in Intellectual Property Law (2005). Awardee, Professor Araceli T. Baviera Prize for Best Paper in Civil Law (2003).

that the JOURNAL serves as the "handmaiden of jurisprudence" in the age of social media, and raises why the JOURNAL editorial exam was scaled down to an on-the-spot essay writing competition that lacks credibility. This essay is the seventh in a series of forewords on law review management begun by the author and continued by succeeding JOURNAL student chairs.

"There are two things wrong with almost all legal writing. One is its style. The other is its content."

—Fred Rodell, *Goodbye to Law Reviews* (1936)[1]

"Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."

—Chief Justice John Roberts (2011)[2]

"I take it as a challenge when I read a landmark case such as Francisco v. House of Representatives and see a Justice cite the Philippine Law Journal in support of a point regarding medieval England, and then see [then] Justice [Reynato] Puno ground a convincing separate opinion on an array of foreign law reviews."

— Sisyphus' Lament, Part I (2004)[3]

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[1] 23 VA. L. REV. 38, 38 (1936).

[2] Speech at 2011 Fourth Circuit Judicial Conference, *quoted in Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship,* American Constitution Society, July 5, 2011, *at* http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99-take-on-academic-scholarship.

[3] Oscar Franklin Tan, Foreword, *Sisyphus' Lament, Part I: The Next Ninety Years and the Transcendence of Legal Writing,* 79 PHIL. L.J. 7, 12 (2004).

The PHILIPPINE LAW JOURNAL celebrates its 100th anniversary this year. This essay wonders if this is a beautiful epitaph.

I began *Sisyphus' Lament,* a series of essays on law review management, when I became JOURNAL chair during the 90th anniversary year in 2004. At my board's induction, after releasing our first issue and being sworn in by former Senate President Jovito Salonga, I outlined the three purposes of the JOURNAL'S existence:

1) "[T]he JOURNAL must serve as a handmaiden of jurisprudence. It must be the academe's monitor and critic regarding the evolution of the Supreme Court's doctrine";

2) "[T]he JOURNAL must also serve as a vehicle for education, one that stimulates both the academe and the profession"; and

3) "advancing student editors' careers."[4]

I concluded then that, based on empirical evidence, the JOURNAL was failing in all but the third.[5]

I. CITATION BY THE SUPREME COURT OF PHILIPPINE LAW JOURNALS

The damning statistic was how the Supreme Court of the Philippines cited only 23 JOURNAL articles from 1991–2003, or less than two per year.[6] Analyzing the citations qualitatively makes the statistic look even worse. Sixteen out of 23 were citations to support mere background information used in a decision, and 13 out of 23 were citations by then Justice Reynato Puno. The most cited articles were the series by visiting Yale professor Owen Lynch, Jr., who is not a Filipino author. Only one cited article was published in the ten years prior to my research, and merely for a definition of the Internet. Finally,

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[4] *Id.* at 7, 12. *See also* Dexter Samida, Comment, *The Value of Law Review Membership*, 71 U. CHI. L. REV. 1721 (2004).

[5] Reviewing these three goals, Chair Juan Paolo Fajardo evaluated them in the context of the JOURNAL acting as a catalyst for social responsibility in the legal profession, nurturing a pool of future legal writers and student editors, and bringing the JOURNAL into the Internet age. Juan Paolo Fajardo, Foreword, *Sisyphus' Lament, Part V: Reinvigorating the Philippine Law Journal as the Crucible of Legal Writing,* 83 PHIL. L.J. 5, 6 (2008).

[6] Tan, *Sisyphus' Lament, Part I, supra* note 3, at 7-10, tab. 1.

"only one [article] formed the doctrinal bedrock of a Justice's opinion, but this was Justice Antonio Carpio citing his own JOURNAL article to anchor his dissent."[7]

The damning statistic from the JOURNAL'S 90th anniversary remains as damning in its 100th.

The following table continues the one I presented ten years ago as a student chair, this time covering 2004 to 2013:

TABLE 1: PHILIPPINE LAW JOURNAL articles cited by the Philippine Supreme Court (2004-2013)

Decision	Author and Article	Justice	In Support Of
Herrera v. Alba (2005)[8]	Patricia-Ann Prodigalidad, *Assimilating DNA Testing into the Philippine Criminal Justice System: Exorcising the Ghost of the Innocent Convict*, 79 PHIL. L.J. 930 (2005)	Carpio, J.	Cited in decision on DNA as further reading on whether key US DNA testing frameworks are applicable in the Philippines[9]
Pollo v. Constantino-David (2011)[10]	Oscar Franklin Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82(4) PHIL. L.J. 78, 228-29 (2008)[11]	Bersamin, J., *concurring and dissenting*	Cited in decision on employee privacy to support specific reasons why employees have decreased expectations of privacy with respect to work e-mail accounts and used as general reference regarding right to informational privacy[12]

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[7] *Id.* at 10. This cite is *MVRS Publications, Inc. v. Islamic Da'wah Council of the Philippines, Inc.*, G.R. No. 135306, 396 SCRA 210, 261 n.36, Jan. 28, 2003 (Carpio, J., *dissenting), citing* Antonio Carpio, *Intentional Torts in Philippine Law,* 47 PHIL. L.J. 649, 671-72 (1972).

[8] G.R. No. 148220, 460 SCRA 197, 216 n.47, June 15, 2005.

[9] "We now determine the applicability in this jurisdiction of these American cases. Obviously, neither the *Frye-Schwartz* standard nor the *Daubert-Kumho* standard is controlling in the Philippines."

[10] G.R. No. 181881, 659 SCRA 189, 245 n.39, Oct. 18, 2011 (Bersamin, J., *concurring and dissenting*).

[11] The pagination of Volume 82 was incorrect and specific issue numbers must be referred to because of this error.

People v. Siton (2009)[13]	Victor Eleazar, *Victimless Crimes*, 57 PHIL. L.J. 421 (1982)	Ynares-Santiago, J.	Cited for history of vagrancy laws[14]
In re Computation of Properties (2012)[15]	Gerard Chan, *Lobbying the Judiciary: Public Opinion and Judicial Independence*, 77 PHIL. L.J. 73, 76 (2002)[16]	*Per Curiam*	Cited for definition of "institutional independence" in the context of judicial independence[17]
La Bugal B'laan Tribal Ass'n, Inc. v. Ramos (2004)[18]	V. M. A. Dimagiba, *Service Contract Concepts in Energy*, 57 PHIL. L.J. 307, 313 (1982)	Carpio-Morales, J.	Cited for commonly used references to concession systems[19]

[12] "For sure, there are specific reasons why employees in general have a decreased expectation of privacy with respect to work-email accounts, including the following:

> (a) Employers have legitimate interests in monitoring the workplace;
> (b) Employers own the facilities;
> (c) Monitoring computer or internet use is 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;
> (d) An employer also has an interest in detecting legally incriminating material that may later be subject to electronic discovery;
> (e) An employer simply needs to monitor the use of computer resources, from viruses to clogging due to large image or pornography files."

[13] G.R. No. 169364, 600 SCRA 476, 486 n.19, Sept. 18, 2009.

[14] "The first statute punishing vagrancy – Act No. 519 – was modeled after American vagrancy statutes and passed by the Philippine Commission in 1902. The Penal Code of Spain of 1870 which was in force in this country up to December 31, 1931 did not contain a provision on vagrancy."

[15] A.M. No. 11-7-10-SC, 678 SCRA 1, 11 n.16, July 31, 2012 (journal cited incorrectly).

[16] Gerard Chan was the Vice-Chairman of Volume 77's student editorial board, and later became my Vice-Chairman in Volume 79.

[17] "[I]nstitutional independence refers to the 'collective independence of the judiciary as a body.'"

[18] G.R. No. 127882, 421 SCRA 148, 181 n.92, Jan. 27, 2004.

[19] "...the concession (frequently styled 'permit', 'license' or 'lease') system."

Commissioner of Internal Revenue v. San Roque Power Corp. (2013)[20]	Cesar Villanueva, *A Comparative Study of the Juridical Role and its Effect on the Theory on Juridical Precedents in the Philippine Hybrid Legal System*, 42 PHIL. L.J. 63 (1990)	Sereno, C.J., *dissenting*	Background statement regarding the persuasive nature of Court of Appeals decisions[21]
Arroyo v. Department of Justice (2012)[22]	Bartolome Fernandez, *On the Power of the Commission on Elections to Annul Illegal Registration of Voters*, 26 PHIL. L.J. 928 (1951)	Brion, J., *concurring and dissenting*	Background statement about the history of the Commission on Elections[23]
Central Bank Employees Ass'n, Inc. v. Bangko Sentral ng Pilipinas (2004)[24]	Miriam Defensor-Santiago, *The "New" Equal Protection*, 58 PHIL. L.J. 1, 3 (1983)	Panganiban, J., *dissenting*	Background statement regarding the origin of equal protection in US law[25]
Fetalino v. Comm'n on Elections (2012)[26]	Theodore Te, *Stare In (Decisis): Reflections on Judicial Flip-flopping in League of Cities v. Comelec and Navarro v. Ermita*, 85 PHIL. L.J. 784, 787 (2011)	Brion, J.	Quote from a Philippine Supreme Court decision[27]

[20] G.R. No. 187485, 690 SCRA 336, 419 n.3, Feb. 12, 2013 (Sereno, J., *dissenting*) (journal cited incorrectly).

[21] "[D]ecisions of the CA have a persuasive juridical effect."

[22] G.R. No. 199082, 681 SCRA 181, 260 n.7, Sept. 18, 2012 (Brion, J., *concurring and dissenting*) (citation format incorrect).

[23] "The establishment of the COMELEC traces its roots to an amendment of the 1935 Constitution in 1940, prompted by dissatisfaction with the manner elections were conducted then in the country."

[24] G.R. No. 148208, 446 SCRA 299, 428 n.162, 164 Dec. 15, 2004 (Panganiban, J., *dissenting*).

[25] "Its original understanding was the proscription only of certain discriminatory acts based on *race*. ...

"Today, this clause is '*the single most important concept x x x for the protection of individual rights*.'" (Emphasis in the original.)

[26] G.R. No. 191890, 686 SCRA 813, 849 n.50, Dec. 4, 2012.

Bureau of Customs Employees Ass'n v. Teves (2011)[28]	Florentino Feliciano, *Deconstruction of Constitutional Limitations and the Tariff Regime of the Philippines: The Strange Persistence of a Martial Law Syndrome*, 84 PHIL. L.J. 311 (2009)	Sereno, J., *concurring*	Further reference[29]
In re Charges of Plagiarism Against Justice Mariano del Castillo (2011)[30]	Ma. Lourdes Sereno, *Lawyer's Behavior and Judicial Decision-Making*, 70 PHIL. L.J. 472, 492 (1996)	Abad, J., *concurring*	Justice Roberto Abad accused then Justice Ma. Lourdes Sereno of plagiarizing Judge Richard Posner's classic law and economics book[31]

The damning statistic in this second, more recent survey is worse at 11 cited articles in 10 years, or roughly once a year. Chief Justice Puno's retirement arguably halved the statistic.

Qualitatively, the statistic becomes even more discouraging. The first two cites, though not quite providing "doctrinal bedrock of a Justice's opinion," were to articles by University of the Philippines and Harvard Law School alumni that were used in discussing jurisprudential or doctrinal frameworks central to the decision. Three support more minor points. Five support minor background points, such as a statement that Court of Appeals decisions are of a persuasive nature. The 11th citation is to Chief Justice Ma. Lourdes Sereno's law and economics article, arising when Justice Roberto Abad claimed it plagiarized no

[27] "In the oft-cited case of *Tanada v. Yulo*, Justice George A. Malcolm cautioned against judicial legislation and warned against liberal construction being used as a license to legislate and not to simply interpret...."

[28] G.R. No. 181704, 661 SCRA 589, 620 n.3, Dec. 6, 2011 (Sereno, J., *concurring*).

[29] "Congress must revisit this constitutional provision and weigh the question of whether it has wrongly and excessively defaulted on the exercise of this constitutional duty to set tariffs in favor of the President." The footnote reads: "A profound discourse on the subject matter can be seen in the article of Former Senior Associate Justice Florentino P. Feliciano, 'Deconstruction of Constitutional Limitations and the Tariff Regime of the Philippines: The Strange Persistence of a Martial Law Syndrome,' 84 PHIL. L.J. 311 (2009)."

[30] A.M. No. 10-7-17-SC, 642 SCRA 11, 90 n.11, Feb. 8, 2011 (Abad, J., *concurring*).

[31] "Justice Sereno copied the above verbatim in her article entitled *Lawyers' Behavior and Judicial Decision-Making* published in the Philippine Law Journal, without quotation marks or attribution to Judge Posner...."

less than the classic work in the field by Judge Richard Posner. Five out of 11 were citations to fairly recent articles, published after 2000, including two student articles by my two-time Vice-Chair Gerard Chan and by a JOURNAL Chair.

As a point of comparison, the *Ateneo Law Journal* was cited in five decisions in the same ten-year period, or about once every two years, as reflected in the following table:

TABLE 2: Ateneo Law Journal articles cited by the Philippine Supreme Court (2004-2013)[32]

Decision	Author and Article	Justice	In Support Of
Razon v. Tagitis (2009)[33]	Felipe Enrique Gozon, Jr. & Theoben Jerdan Orosa, *Watching the Watchers: A Look into Drafting of the Writ of Amparo*, 52 ATENEO L.J. 665, 675 (2007) (also published 82 PHIL. L.J. 8 (2008))	Brion, J.	A definition of "enforced disappearance" was initially considered in draft Supreme Court rules on the writ of amparo[34]

[32] This table omits one citation where an *Ateneo Law Journal* article was cited for citing the definition of international custom from the hornbook *North Sea* case. It is inexplicable why a law journal article would have to be cited as citing the most basic definition in that field of law. Bayan Muna v. Romulo, G.R. No. 159618, 641 SCRA 244, 293 n.101, Feb. 1, 2011, *citing* North Sea Continental Shelf, 1969 I.C.J. ¶ 77, *in turn cited in* Patrick Simon Perillo, *Transporting the Concept of Creeping Expropriation from De Lege Ferenda to De Lege Lata: Concretizing the Nebulous Under International Law*, 53 ATENEO L.J. 434, 509-10 (2008).

[33] G.R. No. 182498, 606 SCRA 598, 664 n.94, Dec. 3, 2009.

[34] "We note that although the writ specifically covers 'enforced disappearances,' this concept is neither defined nor penalized in this jurisdiction. The records of the Supreme Court Committee on the Revision of Rules (Committee) reveal that the drafters of the Amparo Rule initially considered providing an elemental definition of the concept of enforced disappearance:

> "JUSTICE MARTINEZ: I believe that first and foremost we should come up or formulate a specific definition [for] extrajudicial killings and enforced disappearances. From that definition, then we can proceed to formulate the rules, definite rules concerning the same.
>
> "CHIEF JUSTICE PUNO: ... As things stand, there is no law penalizing extrajudicial killings and enforced disappearances... so initially also we have to [come up with] the nature of these extrajudicial killings and enforced disappearances [to be covered by the Rule] because our concept of killings and

Razon v. Tagitis (2009)[35]	Aloysius Llamzon, *The Generally Accepted Principles of International Law as Philippine Law: Towards a Structurally Consistent Use of Customary International Law in Philippine Courts,* 47 ATENEO L.J. 243, 370 (2002)	Brion, J.	Unnecessary citation for the extremely basic doctrine of state practice and *opinio juris* as requirements[36]
Leca Realty Corp. v. Manuela Corp. (2007)[37]	Cesar Villanueva, *Revisiting the Philippine Laws on Corporate Rehabilitation,* 43 ATENEO L.J. 183 (1999)	Sandoval-Gutierrez, J.	Quoted by petitioner (and by the Court in restating the petitioner's argument) and UP Law Dean Danilo Concepcion to argue that a court cannot impair contractual arrangements absent clear legal authority in rehabilitation proceedings[38]

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disappearances will define the jurisdiction of the courts. So we'll have to agree among ourselves about the nature of killings and disappearances for instance, in other jurisdictions, the rules only cover state actors. That is an element incorporated in their concept of extrajudicial killings and enforced disappearances. In other jurisdictions, the concept includes acts and omissions not only of state actors but also of non state actors. Well, more specifically in the case of the Philippines for instance, should these rules include the killings, the disappearances which may be authored by let us say, the NPAs or the leftist organizations and others. So, again we need to define the nature of the extrajudicial killings and enforced disappearances that will be covered by these rules."

35 G.R. No. 182498, 606 SCRA 598, 674 n.121, Dec. 3, 2009.

36 "[T]hese sources identify the substance and content of the obligations of States and are indicative of the 'State practice' and 'opinio juris' requirements of international law."

37 G.R. No. 166800, 534 SCRA 97, 109 n.8, Sept. 25, 2007. The journal article was cited incorrectly. One suspects that the *ponente* never read the journal article itself because the decision failed to mention the article's title or the specific page being quoted, and uncharacteristically cited the journal volume number in Roman numerals.

38 "Petitioner, in support of its contention, cites in its Memorandum the treatises of Ateneo Law Dean Cesar L. Villanueva and former SEC Commissioner Danilo L. Concepcion, both known authorities on Corporation Law. In his Article which appeared in the Ateneo Law Journal, Dean Villanueva said:

Republic v. Eugenio (2008)[39]	Gabriel Singson, *Law and Jurisprudence on Secrecy of Bank Deposits*, 46 ATENEO L.J. 670, 682 (2001)	Tinga, J.	Cited by a book cited by the decision for the basic proposition that the secrecy of bank deposits is a basic state policy
Dicman v. Cariño (2006)[40]	Sedfrey Candelaria, *Introducing the Indigenous Peoples Rights Act,* 47 ATENEO L.J. 571 (2002) Werner Blenk, *ILO Partnership with Indigenous Peoples,* 47 ATENEO L.J. 556 (2002) Terence Jones, *The United Nations Development Programme and the Indigenous Peoples,* 47 ATENEO L.J 562 (2002)	Austria-Martinez, J.	Volume on indigenous peoples issues cited as background reference regarding the Indigenous People Rights Act of 1997, which was mentioned in passing at the decision's end

> The nature and extent of the power of the SEC to approve and enforce a rehabilitation plan is certainly an important issue. Often, a rehabilitation plan would require a diminution, if not destruction, of contractual and property rights of some, if not most of the various stakeholders in the petitioning corporation. In the absence of clear coercive legal provisions, the courts of justice and much less the SEC would have no power to amend or destroy the property and contractual rights of private parties, much less relieve a petitioning corporation from its contractual commitments.

On the other hand, Professor Concepcion stated that what is allowed in rehabilitation proceedings is only *the suspension of payments, or the stay of all actions for claims of distressed corporations, and upon its successful rehabilitation, the claims must be settled in full.*" (Emphasis in the original.)

[39] G.R. No. 174629, 545 SCRA 384, 414 n.87, Feb. 14, 2008 (journal cited incorrectly).

[40] G.R. No. 146459, 490 SCRA 240, 271 n.56, June 8, 2006.

Garcia v. Drilon (2013)[41]	SALIGAN Women's Unit, *Strengthening Responses to Violence against Women: Overcoming Legal Challenges in the Anti-Violence Against Women and their Children Act*, 52 ATENEO L.J. 804 (2008)	Abad, J., *concurring*	Cited as background in introduction for idea that law enforcers are now intended to intervene more strongly in domestic violence cases

Qualitatively, the statistic likewise looks even worse as arguably none of the citations relate to doctrinal frameworks. One article was cited in discussing the history of the writ of amparo rules and what ideas were considered during their drafting, but the same decision cited another article unnecessarily for one of the most basic rules of international law. Another article was cited to support a key proposition because it was cited by the petitioner and the Court only used the citation to restate the petitioner's position. Other articles were cited to support background points or as additional reference for introductory or tangential points.

One guesses that analysis of how other Philippine law journals are cited would reveal even more superficial usage.

Sadly, the JOURNAL's present use is a far cry from the *Harvard Law Review's* inception where, for example, Samuel Warren and Louis Brandeis wrote their classic article *The Right to Privacy*[42] in response to a New York Superior Court tort case and was consciously aimed at judges dealing with privacy doctrine evolving in the face of technological advance. As we now know, they were quite successful in influencing doctrine, even though the New York Court of Appeals explicitly rejected their theory in 1902.[43] In comparison, a 2007 survey by *Cardozo Law Review* editors did conclude that citations by US federal courts to the most cited American law reviews halved from the 1970s to the 1990s.[44] A 2013 study in the United States also found that judges and practicing

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[41] G.R. No. 179267, 699 SCRA 352, 481 n.1, June 25, 2013 (Abad, J., *concurring*) (journal cited incorrectly).

[42] 4 HARV. L. REV. 193 (1890).

[43] Shane Tintle, Note, *Citing the Elite: The Burden of Authorial Anxiety,* 57 DUKE L.J. 487, 493-94 (2004), *citing, e.g.,* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 74, 78-79 (Ga. 1905).

[44] Carissa Alden et al., *Trends in Federal Judicial Citations and Law Review Articles*, at 2 (Mar. 8, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf.

lawyers now read law journals infrequently.[45] However, the absolute numbers presented above are so low that they cannot be anything but alarming.

II. CITATION BY SUPREME COURT OF FOREIGN LAW JOURNALS

In contrast, 22 *Harvard Law Review* articles were cited a total of 25 times in 17 decisions in the same 10-year period, or about twice a year (see Table 3).

TABLE 3: Harvard Law Review articles cited by the Philippine Supreme Court (2004 – 2013)[46]

Decision	Author and Article	Justice	In Support Of
Central Bank Employees Ass'n v. Bangko Sentral ng Pilipinas (2004)[47]	*Developments in the Law – Equal Protection*, 82 HARV. L. REV. 1065, 1107-08 (1969)	Carpio-Morales, J., *dissenting*	History of racial classifications as suspect classifications in United States history[48]
	Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1065. 1, 8, 21 (1972)		In strict scrutiny, "the legislature must adopt the least burdensome or least drastic means available for achieving the governmental objective." Criticism of how rational basis and strict scrutiny dichotomy is applied[49]

[45] Richard Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 70-71 (2004).

[46] The 1974 Note *The Rights of the Public and the Press to Gather Information* was cited in two decisions. The *Akbayan* decision cites the *Harvard Law Review* a second time because the citation was copied from an excerpt of another decision. The article's title was not even cited. This second citation is omitted from the table.

[47] G.R. No. 148208, 446 SCRA 299, 490 n.75, 500 n.99, 501 n.101, 502 n.103, Dec. 15, 2004 (Carpio-Morales, J., *dissenting*).

[48] "Racial classifications are generally thought to be 'suspect' because throughout the United States' history these have generally been used to discriminate officially against groups which are politically subordinate and subject to private prejudice and discrimination."

[49] "The Rational Basis Test and Strict Scrutiny form what Gerald Gunther termed as the two-tier approach to equal protection analysis - the first tier consisting of the Rational Basis Test (also called by Gunther as the old equal protection) while the second tier consisting of Strict Scrutiny (also called by Gunther as the new equal protection)."

Central Bank Employees Ass'n v. Bangko Sentral ng Pilipinas *(continued)*	*Should The Supreme Court Presume that Congress Acts Constitutionally?: The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 HARV. L. REV. 1798 (2003)	Panganiban, J., *dissenting*	Court should not preempt Congress on an issue subject to an amendment it is deliberating on at the time[50]
Estrada v. Escritor (2003)[51]	Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1416-17 (1990)	Puno, J.	"'Only beliefs rooted in religion are protected by the Free Exercise Clause'; secular beliefs, however sincere and conscientious, do not suffice."
	Stephen Carter, *The Resurrection of Religious Freedom*, 107 HARV. L. REV. 118, 128-29 (1993)	Puno, J.	Cited by first *Escritor* case, which was cited twice for the proposition that (1) courts protect religion when legislatures fail to and (2) historical criticism of the US free exercise decision *Employment Division, Oregon Department of Human Resources v. Smith*[52]

[50] "Racial classifications are generally thought to be 'suspect' because throughout the United States' history these have generally been used to discriminate officially against groups which are politically subordinate and subject to private prejudice and discrimination."

[51] A.M. No. P-02-1651, 492 SCRA 1, 42 n.52, 57 n.101, 60 n.111, Jun. 22, 2006 (journal cited incorrectly).

[52] 494 U.S. 872 (1990).

<table>
<tr><td rowspan="3">Presidential Comm'n on Good Gov't v. Sandiganbayan (2005)[53]</td><td rowspan="2">Irving Kaufman, The Former Government Attorney and Canons of Professional Ethics, 70 HARV. L. REV. 657 (1957)</td><td>Puno, J.</td><td>"Judge Kaufman warned that the sacrifice of entering government service would be too great for most men to endure should ethical rules prevent them from engaging in the practice of a technical specialty which they devoted years in acquiring and cause the firm with which they become associated to be disqualified."

"No less than Judge Kaufman doubts that the lessening of restrictions as to former government attorneys will have any detrimental effect on that free flow of information between the government-client and its attorneys which the canons seek to protect."</td></tr>
<tr><td>Callejo, Sr., J., dissenting</td><td>"...policy consideration that an attorney must seek to avoid even the appearance of evil."</td></tr>
<tr><td>Developments in the Law: Conflicts of Interest, 94 HARV. L. Rev. 1244, 1428-30 (1981)</td><td>Panganiban, J., separate opinion</td><td>One cannot add measures to eliminate ethical improprieties at the price of creating a static bureaucracy</td></tr>
</table>

[53] G.R. No. 151809, 455 SCRA 526, 582 n.46, 584 n.58, Apr. 12, 2005; *id.* at 671 n.47 (Callejo, Jr., J., *dissenting*); *id.* at 607 n.41 (Panganiban, J., *separate opinion*).

Romualdez v. Commission on Elections (2008)[54]	Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77, 79 (1948)	Tinga, J., *dissenting*	Definite meaning and applicability are due process requirements for a penal law
Akbayan Citizens Action Party v. Aquino (2008)[55]	Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1512-13 (1974)	Carpio-Morales, J.	No right to information is recognized in the US Constitution[56]
Office of the Court Administrator v. Kasilag (2012)[57]	Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983)	*Per Curiam*	Cited as further reference for discussion on envisioned legal norms and translating these to reality[58]
Abakada Guro Party List v. Purisima (2008)[59]	H. Bruff & E. Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1372-73 (1977)	Tinga, J., *concurring*	Cited as further reference for history of legislative veto in the United States[60]

[54] G.R. No. 167011, 553 SCRA 370, 466 n.29, Apr. 30, 2008 (Tinga, J., *dissenting*).

[55] G.R. No. 170516, 558 SCRA 468, 648 n.239, July 16, 2008 (journal cited incorrectly).

[56] "Neither the U.S. courts nor the U.S. Congress recognizes an affirmative constitutional obligation to disclose information concerning governmental affairs; such a duty cannot be inferred from the language of the U.S. Constitution itself."

[57] A.M. No. P-08-2573, 673 SCRA 583, 589 n.26, June 19, 2012.

[58] "Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative ... A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as towards our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision"

[59] G.R. No. 166715, 562 SCRA 251, 323 n.3, Aug. 14, 2008 (Tinga, J., *concurring*).

[60] "The emergence of the legislative veto in the United States coincided with the decline of the non-delegation doctrine, which barred Congress from delegating its law-making powers elsewhere."

<table>
<tr><td rowspan="3">Perez-Rosario v. Court of Appeals (2006)[61]

Sialana v. Avila (2006)[62]</td><td>Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897)</td><td rowspan="3">Austria-Martinez, J.</td><td>General reference for proposition that courts must weigh all considerations of social advantage</td></tr>
<tr><td>Roscoe Pound, A Survey of Social Interests, 57 HARV. L. REV. 1 (1943)</td><td rowspan="2">General reference for proposition that courts must inquire into the overlapping social interests in the adjustment of conflicting demands and expectations of the people</td></tr>
<tr><td>Eugene Ehrlich, Montesquieu and Sociological Jurisprudence, 29 HARV. L. REV. (1916)</td></tr>
<tr><td>Pollo v. Constantino-David (2011)[63]</td><td>Samuel Warren & Louis Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890)</td><td>Bersamin, J., concurring and dissenting</td><td>Citing classic Warren and Brandeis article in introductory discussion on the right to privacy's origin</td></tr>
<tr><td>Almario v. Executive Secretary (2013)[64]</td><td>Eugene Rostow, The Democratic Character of Judicial Review, 66 HARV. L. REV. 193 (1952)</td><td>Leonardo-De Castro, J.</td><td>For Rostow's classic phrase "vital national seminar"</td></tr>
<tr><td>Arroyo v. Department of Justice (2013)[65]</td><td>Euegene Volokh, The Mechanisms of the Slippery Slope, 116 HARV. L. REV. 1026 (2003)</td><td>Brion, J., dissenting</td><td>For Volokh's boiled frog metaphor[66]</td></tr>
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[61] G.R. No. 140796, 494 SCRA 66, 93 n.46-47, June 30, 2006.

[62] G.R. No. 143598, 495 SCRA 501, 503 n.1-2, July 20, 2006.

[63] G.R. No. 181881, 659 SCRA 189, 232 n.1, Oct. 18, 2011 (Bersamin, J., *concurring and dissenting*) (journal and article cited incorrectly).

[64] G.R. No. 189028, 701 SCRA 169, 307 n.70, July 16, 2013.

[65] G.R. No. 199082, 701 SCRA 753, 780 n.10, July 23, 2013 (Brion, J., *dissenting*). The journal is cited incorrectly and appears to have been found through the SSRN network instead of the actual journal.

Commissioner of Internal Revenue v. Central Luzon Drug Corp. (2005)[67]	Erwin Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 3, 398, 406 (1941)	Panganiban, J.	Cited by previous decision cited to support that predictability and certainty are key in judicial tax administration[68]
Hilado v. Reyes (2005)[69]	Note, *The Rights of the Public and the Press to Gather Information,* 87 HARV. L. REV. 1505, 1518-19 (1974)	Callejo, Sr., J.	Cited by previous decision cited to support that information may be restricted when faced with immediate danger[70]
In re Complaint of Arrienda Against Justices (2005)[71]	Erwin Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960)	Corona, J.	Cited by previous source cited to support statement that "any criticism of the Court must possess the quality of judiciousness and must be informed by perspective and infused by philosophy"
Teves v. Commission on Elections (2009)[72]	Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 121 (1930)	Ynares-Santiago, J.	Cited by journal article cited by decision for proposition that "[i]t is hardly to be expected that a word which baffle judges will be more easily interpreted by laymen."

[66] "Libertarians often tell of the parable of the frog. If a frog is dropped into hot water, it supposedly jumps out. If a frog is put into cold water that is then heated, the frog doesn't notice the gradual temperature; change, and dies. Likewise, the theory goes, with liberty: People resists to take rights away outright, but if the rights are eroded slowly."

[67] G.R. No. 159647, 456 SCRA 414, 441 n.64, Apr. 15, 2005.

[68] Lim Hoa Ting v. Central Bank of the Philippines, 104 Phil. 573, 580 (1958).

[69] A.M. No. RTJ-05-1910, 456 SCRA 146, 161 n.21, Apr. 15, 2005.

[70] Baldoza v. Dimaano, A.M. No. 1120-MJ, 71 SCRA 14, May 5, 1976.

[71] A.M. No. 03-11-30-SC, 460 SCRA 1, 16 n.37, June 9, 2005.

[72] G.R. No. 180363, 587 SCRA 1, 24 n.33, Apr. 28, 2009.

De Castro v. Judicial and Bar Council (2010)[73]	Barton Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797 (1967)	Bersamin, J.	Cited by book cited by decision for history of the *stare decisis* doctrine

Qualitatively, these citations seem more significant compared to citations of the JOURNAL as 14 out of 25 are to support or further reference significant points in decisions. One might argue, however, that the figure appears inflated by citations that are not directly relevant to the decision. Nine tangentially cite classic articles, such as Warren and Brandeis' *Right to Privacy* from Volume 4 of the *Harvard Law Review,* or hornbook quotes such as Rostow's "vital national seminar." Five are citations to sources that in turn cited the *Harvard Law Review.* And Justice Puno, now retired, accounted for eight citations.

Skimming recent key decisions is even more alarming. The 2014 decisions on the Cybercrime Act[74] and the Reproductive Health Act,[75] for example, did not cite a single Philippine law journal article. This is despite both decisions covering a wide range of topics, from religious freedom to the application of traditional free speech and criminal law doctrines to the Internet, which requires broader academic discussion. Indeed, cyberlaw topics were a popular choice for authors as the Internet came into mainstream use in the Philippines in the early 2000s but none of the scholarship generated during this period was cited in evaluating the Cybercrime Act. On the other hand, both decisions cited several foreign law journals and a large number of websites. This pattern is consistent throughout the separate opinions.

These patterns are summarized in Tables 4 and 5, which reflect the citation counts in *Disini* and *Inbomg.*

[73] G.R. No. 191002, 618 SCRA 639, 659 n.6, Apr. 20, 2010 (journal cited incorrectly).

[74] Disini v. Sec. of Justice, G.R. No. 203335, Feb. 11, 2014, *upholding* Rep. Act No. 10175 (2013).

[75] Imbong v. Ochoa, G.R. No. 204819, Apr. 8, 2014, *upholding* Rep. Act No. 10354 (2013).

TABLE 4: Breakdown of citations in Disini v. Secretary of Justice

Decision	Phil. laws/cases[76]	Phil. books	Phil. law journals	Phil. websites	Foreign laws/cases	Foreign books	Foreign law journals	Foreign websites[77]	Other[78]
Main opinion (Abad, J.)	62	3	0	0	14	0	1	15	14
Sereno, C.J., *concurring and dissenting*	102	25	0	0	39	7	3	0	21
Carpio, J., *concurring and dissenting*	50	1	0	0	30	1	5	14	13
Brion, J., *concurring*	45	1	0	1	7	1	7	6	3
Leonen, J., *concurring and dissenting*	144	5	0	1	84	34	16	91	3
TOTAL	**403**	**35**	**0**	**2**	**174**	**43**	**32**	**126**	**54**
%	**46.4**	**4.0**	–	**0.2**	**20.0**	**4.9**	**3.7**	**14.5**	**6.2**

[76] Includes constitutional commission and legislative deliberations, explanatory notes and bills.

[77] Includes newspapers and academic databases such as SSRN and Hein Online.

[78] Includes petitions and documents presented as part of proceedings, and references to the *Disini* decision in the separate opinions.

TABLE 5: Breakdown of citations in Imbong v. Ochoa

Decision	Phil. laws/cases	Phil. books	Phil. law journals	Phil. websites	Foreign laws/cases	Foreign books	Foreign law journals	Foreign websites	Other
Main opinion (Mendoza, J.)	111	11	0	11	10	4	1	9	210
Sereno, C.J., *dissenting*	52	0	0	0	8	0	0	0	14
Carpio, J., *concurring*	1	0	0	0	0	0	0	0	0
Leonardo-De Castro, J., *concurring*	54	9	0	1	16	3	6	12	16
Brion, J., *concurring*	63	0	0	1	29	2	1	7	5
Del Castillo, J., *concurring and dissenting*	58	6	0	0	1	0	0	1	8
Abad, J., *concurring*	12	0	0	1	2	4	0	15	6
Reyes, J., *concurring and dissenting*	46	7	0	0	25	1	0	7	4
Bernabe, J., *concurring and dissenting*	23	0	0	0	4	2	0	0	11

Leonen, J., *dissenting*	154	6	0	2	14	74	21	67	85
TOTAL	**574**	**39**	**0**	**16**	**109**	**90**	**29**	**118**	**359**
%	**43.0**	**0.3**	**-**	**1.2**	**8.2**	**6.7**	**2.2**	**8.8**	**26.9**

III. THE IMPACT OF NONEXISTENT ACADEMIC CRITICISM

The damning statistic must shock judges, lawyers and ordinary citizens. First and most obvious, one must worry whether the Philippines is unwittingly outsourcing its deeper legal reflection to foreign judges and legal authors. Law journals are supposedly the venue for broader legal discussion that transcends the bounds of individual cases. The lack of citation to Philippine law journals leads one to worry that this broader discussion is either not taking place or being outright ignored in favor of reference to foreign journals.

Problems caused by seeming reliance on foreign doctrines can be seen if one looks carefully. The simplest and most obvious problem is inconsistency in Supreme Court decisions where Philippine doctrine diverges from American doctrine.

The public figure doctrine, for example, is one of the most important free speech doctrines in an Internet age because a broader public figure doctrine necessarily restricts Internet libel. Public figures are persons who will naturally be talked about in society, such as celebrities of various stripes, and libel suits over speech regarding public figures must hurdle the *New York Times* "actual malice" standard, so as to protect erroneous but non-malicious speech that inevitably arises.[79] Public figures are often integral to public debate (and "limited" public figures are integral to debate within limited segments of the public) and their celebrity status (or limited celebrity status within the relevant audience) presumably gives them greater access to media to correct any untruths or counter any views regarding them.[80]

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[79] Oscar Franklin Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio,* 82(4) PHIL. L.J. 78, 132 (2008), *citing* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); United States v. Bustos, 37 Phil. 731 (1918); Phil. Comm'l and Indus. Bank v. Philnabank Employees' Ass'n, G.R. No. 29630, 105 SCRA 314, July 2, 1981).

[80] *Id.* (*citing* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 352 (1974)).

There are four relevant categories in analyzing this doctrine:

1. The public official[81]
2. The public figure, who enjoys great fame or notoriety or has thrust himself into public view (a public figure based on his own circumstances)[82]
3. The private figure who has become involved in an issue of public interest;[83] and
4. The private figure.

The United States applies the actual malice standard to the first two categories only and considers the second and third category mutually exclusive following *Gertz v. Robert Welch.*[84] Philippine doctrine, however, is more liberal and applies the actual malice standard to the first *three* categories because it combines the doctrines of *Gertz* and *Rosenbloom v. Metromedia.*[85] This doctrinal divergence arose well before the Internet, in the 1988 Philippine decision *Ayer Productions v. Capulong,*[86] which dealt with a portrayal of now Senator Juan Ponce Enrile in a movie about the Edsa Revolution.

Modern doctrine has upheld *Ayer* and the broader Philippine public figure doctrine. Just in 2013, for example, Senior Associate Justice Antonio Carpio thumbed down libel charges by Atty. Sigfrid Fortun against mediamen who reported that a disbarment case was filed against him. Carpio used the typical reasoning that he is a public figure by virtue of being the defense lawyer prominently handling the Ampatuan massacre case. Additionally, however, he explicitly used the further *Ayer/Rosenbloom* reasoning that, even assuming he is not a public figure by virtue of his own circumstances, he has necessarily

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[81] *Id.* (*citing* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), *which was 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 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).

[82] *Id.* (*citing* Gertz, 418 U.S. at 336-37, *in turn 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, July 31, 1970; Babst v. Nat'l Intelligence Board, G.R. No. 62992, 138 SCRA 316, Sept. 28, 1984. However, *Borjal v. Ct. of Appeals*, G.R. No. 126466, 301 SCRA 1, Jan. 14, 1999 points to *Ayer*).

[83] *Id.* (*citing* Borjal, 301 SCRA 1, 27, *in turn citing* Rosenbloom v. Metromedia, 403 U.S. 29, 44-45 (1971)).

[84] 418 U.S. 323 (1974).

[85] 403 U.S. 29 (1971).

[86] G.R. No. 82380, 160 SCRA 861, Apr. 29, 1988.

become a public figure as someone intertwined with the nationally followed Ampatuan trial.[87]

There has been increasing discussion of the public figure doctrine in the last ten years. The 2009 *Villanueva v. Philippine Daily Inquirer, Inc.*[88] decision explicitly discusses the *Ayer/Rosenbloom* reasoning that diverges from US doctrine. The *Ayer/Rosenbloom* reasoning is not explicit but is arguably implied in or at least not inconsistent with the 2013 *Co v. Muñoz*[89] and the 2004 *Brillante v. Court of Appeals*[90] decisions.

It is thus striking that the 2009 decision *Yuchengco v. Manila Chronicle Publishing Corp.*[91] contradicts all of the above decisions from the same time period. Not only does it fail to mention *Ayer* or *Rosenbloom,* but its discussion also quotes *Gertz* in a way that contradicts *Ayer:*

> We are persuaded by the reasoning of the United States Supreme Court in Gertz v. Robert Welch, Inc., [418 U. S. 323 (1974)] that *a newspaper or broadcaster publishing defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim a constitutional privilege against liability, for injury inflicted, even if the falsehood arose in a discussion of public interest.*[92]

This is precisely what *Ayer* rejected; *Yuchengco* thus blindly quoted American jurisprudence, oblivious to the different state of Philippine law since 1988. The error in *Yuchengco* is traced to an earlier decision penned by the same justice with a very similar discussion of *Gertz* and public figures, the 2005 *Philippine Journalists, Inc. v. Thoenen*[93] decision. Finally, the error is also arguably present in the 2005 *Guingging v. Court of Appeals*[94] decision, which contains one of the lengthier discussions of the doctrine before *Fortun* but omits the *Ayer/Rosenbloom* reasoning. Instead, *Guingging* focuses on *Gertz* and definitions under which becoming a public figure is inherently voluntary,[95] which American doctrine considers mutually exclusive with *Rosenbloom.*

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[87] Fortun v. Quinsayas, G.R. No. 194578, Feb. 13, 2013.

[88] G.R. No. 164437, 588 SCRA 1, May 15, 2009.

[89] G.R. No. 181986, Dec. 4, 2013.

[90] G.R. No. 118757, 474 SCRA 480, Oct. 19, 2004.

[91] G.R. No. 184315, 605 SCRA 684, Nov. 25, 2009.

[92] *Id.* at 716 (emphasis in the original).

[93] G.R. No. 143372, 477 SCRA 482, Dec. 13, 2005 (Chico-Nazario, J.).

[94] G.R. No. 128959, 471 SCRA 196, Sept. 30, 2005.

[95] *Id.* at 215, *quoting* CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 9-10 (1995 ed.). "A person counts as a public figure (1) if he is a "public official" in the sense that he works for the government, (2) if, while not employed by government, he otherwise has

One must be alarmed that recent Supreme Court decisions could so unmistakably misstate a key doctrine and that neither subsequent decisions nor academic discussion pointed out the important error. To date, I have not seen the error pointed out in other discussions.[96]

An even deeper problem than inconsistency, however, is a lack of academic criticism of arguably questionable doctrine. The need to discuss such questionable doctrine has become even more imperative after one set of impeachment charges against Chief Justice Renato Corona involved alleged "flip-flopping" decisions[97] and others allegedly characterized by manifest partiality,[98] although the actual impeachment trial was dominated by corruption issues. President Benigno "Noynoy" Aquino III even reiterated his need to check these decisions when he supported Corona's impeachment as recently as his speech at the Philippine Bar Association's 123rd anniversary last June 25, 2014 at the Manila Polo Club.

Beyond the flip-flopping cases, I previously criticized *Imbong* for seeming to anchor itself on new doctrine without explicitly presenting the doctrine as new (and without presenting supporting citations).[99] Worse, such new doctrines

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pervasive fame or notoriety in the community, or (3) if he has thrust himself into some particular controversy in order to influence its resolution. Thus, for example, Jerry Falwell is a public figure and, as a famous case holds, he is barred from recovering against a magazine that portrays him as having had sex with his mother. Movie stars and famous athletes also qualify as public figures."

[96] I first pointed out the crucial error in *Yuchengco* in the *Philippine Daily Inquirer's* series of reactions to the *Disini* Cybercrime Act decision. Oscar Franklin Tan, *Public figure: the unknown libel defense,* PHIL. DAILY INQUIRER, Mar. 2, 2014.

My UP classmate and friend's subsequent article in the series, however, argued that "accidental" or involuntary public figures should be able to sue for libel without hurdling the "actual malice" standard, citing *Guingging's* definitions of public figure. This subsequent article did not discuss the *Ayer/Rosenbloom* reasoning regarding private persons who become involved in an issue of public interest. Karen Jimeno, *Are 'trending' victims less protected?,* PHIL. DAILY INQUIRER, Mar. 9, 2014.

[97] In re Impeachment of Corona, Verified Complaint for Impeachment, arts. 3, 5, Dec. 12, 2011 (*citing* Flight Attendants and Stewards Ass'n of the Phils. (FASAP) v. Philippine Airlines, Inc., G.R. No. 178083, 602 SCRA 473, Oct. 2, 2009; In re Letters of Atty. Estelito Mendoza, A.M. No. 11-10-1-SC, 668 SCRA 11, Mar. 13, 2012; League of Cities of the Phils. v. Comm'n on Elections, G.R. No. 176951, 652 SCRA 798, June 28, 2011; Navarro v. Ermita, G.R. No. 180050, 648 SCRA 400, Apr. 12, 2011 (the Dinagat Islands case)).

[98] *Id.,* art. VII (*citing* Macapagal-Arroyo v. De Lima, G.R. No. 199034, Nov. 18, 2011 (Sereno, J., *dissenting*)). *See also id.* at 15, ¶1.6 (*citing* Biraogo v. Phil. Truth Comm'n of 2010, G.R. No. 192935, 637 SCRA 78, Dec. 7, 2010); *id.* at 12, ¶1.2 (*citing* De Castro v. Judicial and Bar Council, G.R. No. 191002, 615 SCRA 666, Mar. 17, 2010).

[99] Oscar Franklin Tan, *Commentary: RH decision's booby traps and reinvented doctrine,* PHIL. DAILY INQUIRER, at A17, Apr. 21, 2014.

were seemingly enunciated amidst strong objections during the oral arguments and in the dissenting opinions that the "actual case or controversy" requirement was never met and there was no live case to be heard (meaning the exercise of judicial review necessary to create such new doctrine was well out of bounds, making such doctrine arguably *obiter dicta*).

First, in the context of contraceptives' alleged health risks, *Imbong* declared the right to health[100] as self-executory. This was done even though *Imbong* made no resolution regarding such alleged health risks because no factual evidence was presented and *Imbong* stated such claims should have been made to the Food and Drug Administration given the Court's lack of technical competence to review such.[101]

Second, the provisions strengthening the family and upholding spouses' right "to found a family in accordance with their religious convictions"[102] was transformed into a mutant version of the right to decisional privacy that could only be exercised by both spouses jointly. This mutant right was used to strike down a Reproductive Health Act provision allowing a spouse to undergo a RH procedure such as a ligation despite the other spouse's opposition,[103] which would be in line with the right to decisional privacy as familiar to us. That portion of *Imbong* even matter-of-factly cites classic privacy cases *Morfe v. Mutuc*[104] and *Griswold v. Connecticut*[105] without justifying how these cases, which uphold an individual right to privacy, are authority for recognizing a right that can only be jointly exercised.

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[100] CONST. art. II, § 15.

[101] Imbong v. Ochoa, G.R. No. 204819, Apr. 8, 2014, at 59 (slip opinion). "At any rate, it bears pointing out that *not a single contraceptive has yet been submitted to the FDA pursuant to the RH Law.* It behooves the Court to await its determination which drugs or devices are declared by the FDA as safe, it being the agency tasked to ensure that food and medicines available to the public are safe for public consumption. Consequently, the Court finds that, at this point, the attack on the RH Law on this ground is *premature.* Indeed, the various kinds of contraceptives must first be measured up to the constitutional yardstick as expounded herein, to be determined as the case presents itself." (Emphasis in the original.)

[102] CONST. art. XV.

[103] Rep. Act No. 10354, § 23(a)(2)(i) (2013).

[104] G.R. No. 20387, 22 SCRA 424, 444, Jan. 31, 1968. Note that *Morfe* is arguably an informational and not a decisional privacy case, as it dealt with a requirement that public officers disclose their assets and liabilities. Tan, *The Complete Philippine Right to Privacy, supra* note 79, at 90.

[105] 381 U.S. 479 (1965). *Griswold* is a "seeming crossroads of privacy doctrines ... where Due Process discussion met a summary of the penumbras privacy emerged from." Tan, *The Complete Philippine Right to Privacy, supra* note 79, at 107. "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." *Id.* at 107 n.165.

Finally, *Imbong* likewise declared the right to life of the unborn[106] as self-executing even though the decision explicitly declined to rule on whether life in this context begins at conception or fertilization and left individual justices to their opinions on this.[107] In fact, Carpio pointed out during the oral arguments that the Reproductive Health Act prohibited contraceptives that would be deemed abortifacient whether one used the conception or the fertilization definition, making this a non-issue in *Imbong.*[108] The declarations, despite the lack of an actual case context and lack of an actual ruling in the relevant portions of *Imbong*, that the right to health and the right of the unborn to life are self-executing can only restrict future decisions regarding contraception.

I have also criticized *Biraogo v. Philippine Truth Commission of 2010*[109] as "brazen intellectual dishonesty,"[110] another recent and frequently cited decision that contradicts the textbooks. At the beginning of President Aquino's term, this decision struck down the truth commission he created to investigate alleged corruption in his predecessor's administration. *Biraogo* termed this an equal protection violation because it singled out the immediately preceding administration and did not undertake to investigate corruption in all administrations all the way to Emilio Aguinaldo's. Such a rigid equal protection analysis can only be justified under strict scrutiny, meaning *Biraogo* necessarily requires the incredible logical leap that public officers accused of corruption are on the same plane as victims of racial and religious persecution. Otherwise, an ordinary rational basis equal protection analysis would follow the hornbook doctrine that a government may make classifications that have a reasonable basis, that it may start somewhere instead of attempting to tackle all evils in one go and recognize that evidence of corruption is likely more available for the immediately preceding administration than one that held power over a hundred years past. *Biraogo* thus takes equal protection well out of its typical human rights

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[106] CONST. art. II, § 13. "[The State] shall equally protect the life of the mother and the life of the unborn from conception." Although this is commonly understood to prevent abortion in the Philippines, it has not actually been declared self-executory given no case has arisen where its binding effect would have to be declared.

[107] Imbong v. Ochoa, G.R. No. 204819, Apr. 8, 2014, at 39 (slip opinion). "Majority of the Members of the Court are of the position that the question of when life begins is a scientific and medical issue that should not be decided, at this stage, without proper hearing and evidence. During the deliberation, however, it was agreed upon that the individual members of the Court could express their own views on this matter."

[108] Oscar Franklin Tan, *Commentary: RH: No case, Carpio Shows,* PHIL. DAILY INQUIRER, at A13, July 12, 2013.

[109] G.R. No. 192935, 637 SCRA 78, Dec. 7, 2010.

[110] Oscar Franklin Tan, *Commentary: Gloria M. Arroyo as human rights victim,* PHIL. DAILY INQUIRER, at A15, Jan. 16, 2012.

context and necessarily concludes that former President Gloria Macapagal-Arroyo was a human rights victim. Indeed, the conclusion is so inane that ordinary criminals would likewise be human rights victims if they are investigated for crimes and all possible suspects are not simultaneously investigated.[111]

Despite the glaring contradictions with existing doctrine in *Imbong* and *Biraogo,* I have yet to see other authors make similar criticisms regarding these. At best, there has been recent criticism regarding alleged flip-flopping in Supreme Court decisions, but not doctrinal criticism along the lines of the above.

Finally, on a broader note, the simplest conclusion that can be drawn from the damning statistics presented is that, at least not in the decisions themselves, there is no interaction between the Court and the academe, and there is a dangerous appearance of broader legal analysis being outsourced to foreign courts and academia. What little Philippine academic thinking is being developed receives no attention in the anthologies.

IV. THE NEED FOR IMPROVED ACCESS

The quote from US Chief Justice John Roberts at the start of this article comes from a US context where law journals have been criticized for irrelevance because they perpetuate ever longer articles on ever more esoteric articles that give rise to jokes about topics such as the intersection of law, economics and the Starship Enterprise.

In 1936, Yale professor Fred Rodell famously decried the so-called legal style:

> [T]he strait-jacket of law review style has killed what might have been a lively literature. It has maimed even those few pieces of legal writing that actually have something to say. I am the last one to suppose that a piece about the law could be made to read like a juicy sex novel or a detective story, but I can not see why it has to resemble a cross between a nineteenth century sermon and a treatise on higher mathematics.[112]

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[111] *Id.*

[112] Rodell, *supra* note 1, at 41.

He added: "the only consumers of law reviews outside the academic circle are the law offices, which never actually read them but stick them away on a shelf for future reference."

By 1995, Judge Posner implied that these problems had only become worse and were exacerbated by the explosion of esoteric fields and trends towards interdisciplinary writing, plus the inexperience of student editorial boards in filtering the best scholarship amidst this. He proposed:

> Doctrinal scholarship as a fraction of all legal scholarship underwent a dramatic decline to make room for a host of new forms of legal scholarship—interdisciplinary, theoretical, nondoctrinal (the last is the term that I shall use). The principal nondoctrinal subfields of law are economic analysis of law, critical legal studies, law and literature, feminist jurisprudence, law and philosophy, law and society, law and political theory, critical race theory, gay and lesbian legal studies, and postmodernist legal studies. Nonlawyers such as Coase, Cooter, Ferguson, Fish, Landes, Nussbaun, Rawls, Rorty, and Shavell have become real presences in legal scholarship, while many of the most prominent and productive academic lawyers, whether named Ackerman or Michelman, Balkin or Priest, Dworkin or Epstein, Ellickson or Eskridge, Grey or MacKinnon, Kennedy or White, Levinson or Levmore, Radin or West, Sunstein or Unger, are writing articles of a kind (or rather kinds) that would barely have been recognized as legal scholarship in previous generations. The change in the character of legal scholarship has been accompanied by a collapse of political consensus among legal scholars and by a vast expansion in constitutional law....[113]

Indeed, the *Cardozo* study inventoried articles in the five most cited American law reviews (those of Harvard, Yale, Columbia, New York University

[113] Richard Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1133 (1995).

Around this time, Professor Dennis Arrow parodied the more esoteric writing with his faux article *Pomobabble.* "In *Pomobabble*, Professor Arrow parodies the new postmodern constitutional jurisprudence by mocking both the style and substance of such scholarly endeavors. There are fewer than three dozen pages of full text, and virtually all of these consist of dictionary-style definitions. The vast bulk of the article consists of extremely long, seemingly stream-of-consciousness style footnotes, with a great many literary references." Ronald Krotoszynski, Jr., *Legal Scholarship at the Crossroads: On Farce, Tragedy and Redemption,* 77 TEX. L. REV. 321, 323 (1998), *citing* Dennis Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated,* 96 MICH. L. REV. 461 (1997).

and the University of California) and established empirically that there was a marked shift towards theoretical, doctrinal articles in 2000 compared to 1960.[114]

Aside from Judge Posner, Professor James Lindgren became a noted critic of student editorial boards:

> Our scholarly journals are in the hands of incompetents. ... [T]hey often select articles without knowing the subject, without knowing the scholarly literature, without understanding what the manuscript says, without consulting expert referees, and without doing blind reads. Then they try to rewrite every sentence.[115]

This, however, is not today's Philippine context (although we admittedly get incompetent, know-it-all student editors occasionally).

There is, if anything, a dearth of academic writing to publish in the Philippines. Editors over the last ten years have been passed the urban legend of the Bluefin tuna issue, where a fictional student editor behind an article solicitation chanced upon a symposium on Bluefin tuna and requested the papers presented for a special JOURNAL issue.[116] My faculty adviser when I chaired the JOURNAL recalled that gaps in the article lineup are often filled with the student papers awarded legal writing prizes at the academic year's end.[117] I

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[114] Brent Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 119-20 (2010), *citing* Alden, *supra* note 44, at 1.

[115] James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527 (1994). See Articles Editors of the University of Chicago Law Review, A Response, 61 U. CHI. L. REV. 553 (1994); Wendy Gordon, *Counter-Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship*, 61 U. CHI. L. REV. 541 (1994). To complete the set of noted critiques of student edited law journals from the 1990s, see also Bernard Hibbits, *Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267 (1996).

[116] The urban legend is inspired by Volume 75, Issue No. 3, which revolved around the *Southern Bluefin Tuna Case* (Australia and New Zealand v Japan) (Jurisdiction and Admissibility) (Arbitral Tribunal constituted under annex VII of the United Nations Convention on the Law of the Sea) (Award Aug. 4, 2000), 75 PHIL. L.J. 385 (2001).

See Oscar Franklin Tan, Foreword, *Sisyphus' Lament, Part II: Editing, or the Student's Art of Not Being One's Own Worst Enemy,* 79 PHIL. L.J. 233, 246 (2004). "[T]here is an undue focus on producing four issues of whatever quality come March that there is sometimes an impression that the truly important aspects of the process are not under scrutiny. One past JOURNAL issue, in fact, merely took all the papers from a recent conference on tuna and published them as a special issue to help meet the quota."

[117] *Id.* "Student editors' simplest trick is liberally raiding the last batch of graduates for their theses and research papers, particularly those that won legal writing awards. By the second semester of the Board's term, it is a simple matter to cite these authors as fresh junior associates instead of as student authors. There is a world of difference, of course, between a student-edited

aimed to publish not more than one-fourth of the articles from students (and was later reprimanded for releasing the JOURNAL issues ahead of the date printed on the cover). However, barring outliers such as a recent four-page student essay on international human rights whose publication was informally questioned by past JOURNAL chairs,[118] skimming JOURNAL covers over the last ten years shows that articles are largely substantial, relevant and timely and Judge Posner would be relieved were he made its faculty adviser.

The culprit in the JOURNAL's seeming demise is actually the foreign electronic law journal database, the likes of Westlaw and Lexis Nexis. These databases allow a school or court researcher to enter a few search terms and immediately pull up dozens of foreign articles on the topic, which in turn provide relevant citations to select decisions and even more articles. An electronic search takes less time than it does to pick up a Philippine journal or index to one.

In the Philippines, the JOURNAL and the *Ateneo Law Journal* maintain electronic archives. In 2013, Carpio made a generous gift of a JOURNAL website to the Volume 87 editorial board led by Chair Jenny Domino. This finally made real plans laid during my term in 2004-2005 made with then freshman interns Leandro Angelo Aguirre and Juan Paolo Fajardo, who later chaired Volume 81 in 2006-2007 and Volume 83 in 2008-2009.[119] Both, however, offer only downloadable PDF files of the print versions whose full contents are not captured in Google searches.[120] This means that articles may only be downloaded and electronically searched one by one, in great contrast to the extensive, instantaneous electronic searches possible with the foreign electronic databases. Student editors have explored submitting the JOURNAL to Westlaw or Lexis Nexis, but do not have the capacity to meet certain requirements. Converting the JOURNAL to a more typical electronic format would require substantial reformatting, particularly the insertion of star pagination to make citation possible after page formatting is lost.

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publication and a student publication, and the student article ratio may well be the acid test of a Board's dedication." Publishing Jessup competition memorials is a related trick.

[118] *Prosecuting the President: What is, and What can be,* 85 PHIL. L.J. 1000 (2011).

[119] *See* A.M. No. 04-11-09-SC, Supreme Court En Banc Resolution Re: Launching of Supreme Court Judicial E-library and MOA Signing with E-Library Partners, June 28, 2005 (approving Memorandum of Agreement regarding digitization of PHILIPPINE LAW JOURNAL among Justice Antonio Carpio, Chair of Supreme Court Committee on Library, Record Management, Legal Research and Printing; Dean Raul Pangalangan, UP College of Law; and Chair Oscar Franklin Tan, PHILIPPINE LAW JOURNAL); Fajardo, *supra* note 5.

[120] Discussions of law reviews document the limitations of PDF files, particularly their limited searchability. *See, e.g.,* Richard Danner et al, *The Durham Statement Two Years Later: Open Access in the Law Journal Environment,* 103 LAW LIBR. J. 39, 49 (2011).

There is no doubt that Philippine law journals are falling by the wayside primarily because they cannot be electronically searched the way today's law clerks are used to with foreign journal databases. Of the 869 citations in *Disini,* for example, 75.3% are to Philippine and foreign statutes, decisions and books. 18.2% are to foreign journals and websites while 0.2% are to Philippine websites and none are to Philippine journals. Of the 1,334 citations in *Imbong,* 58.2% are to statutes, decisions and books while 11.0% are to foreign journals and websites, 1.2% are to Philippine websites and none are to Philippine journals. Note the high relative percentage of citations to foreign websites, including, as revealed by the citation format, journal articles found via the Internet instead of a database or physical search. This evidences the extensive use of Google searches for material outside the typical statutes, decisions and textbooks.

In the United States, where the journals are all together in electronic databases, this phenomenon expresses itself in the debate over whether to discontinue physical printing of journals altogether, the perceived prestige of having printed journals on bookshelves aside.[121] The 2009 Durham Statement on Open Access to Legal Scholarship,[122] produced after a meeting of the law library directors of Harvard, Yale, Stanford, Columbia, New York University, Georgetown, Duke, Cornell, Northwestern, and the Universities of Chicago, Pennsylvania and Texas, controversially proposed to maintain law journals solely in open access digital form to reduce libraries' storage and other costs and ease pressure on journals whose subscription revenues cannot cover their costs. The Durham Statement argued:

> Researchers—whether students, faculty, or practitioners—now access legal information of all sorts through digital formats much more frequently than in printed formats. Print copies of law journals and other forms of legal scholarship are slower to arrive than the online digital versions and lack the flexibility needed by 21st century scholars.[123]

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[121] This American debate, however, is almost as old as the Internet itself. *See, generally,* Bernard Hibbits, *Last Writes? Reassessing the Law Review in the Age of Cyberspace,* 71 N.Y.U. L. REV. 615 (1996) (*cited in* Conchita Carpio-Morales, Foreword, *The Philippine Law Journal and the Centennial Year of the University of the Philippines,* 83 PHIL. L.J. 1, 2 (2008)); David Rier, *The Future of Legal Scholarship and Scholarly Communication: Publication in the Age of Cyberspace,* 31 AKRON L. REV. 183 (1996).

[122] Feb. 11, 2009, *at* http://cyber.law.harvard.edu/publications/durhamstatement.

[123] *Id.,* ¶ 2.

Some go so far as to argue that the modern legal scholar has a duty to make his work accessible to the public, particularly those without access to commercial legal databases.[124] Others theorize that legal scholarship is uniquely independent from market factors, given that academics seek to have more people read their journal articles than profit from them and law schools in effect subsidize the cost of producing scholarship.[125]

Given the trend of the American discussion, it is clear that Philippine law journals have no choice but to take whatever steps are required to integrate themselves into the global databases. At the very least, they must convert themselves into formats picked up in Google searches.

V. OTHER ISSUES

In addition to the previously not-quite-evident issue of access, today's JOURNAL faces several secondary issues. The length of the print publication process is an increasingly evident weakness of law journals in an electronic age. Even the very length and format of journal articles is being questioned.[126] No less than the *Harvard Law Review* recently increased online publication frequency to weekly from monthly, increased the number of editors dedicated to website content, and redesigned its website for better browsing with smartphones and tablets.[127]

In the United States, blogs published by law professors (or "blawgs") became a natural vehicle for brief thoughts. As blawgs gained audiences and authoritativeness, and became increasingly cited in court decisions (note that the

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[124] Richard Danner, *Applying the Access Principle in Law: The Responsibilities of the Legal Scholar,* 35 INT'L J. LEGAL INFO. 355, 356 (2007), *quoting* Michael Carroll, *The Movement for Open Access Law,* 10 LEWIS AND CLARK L. REV. 741, 756 (2006). *See* Kevin Brady & Justin Bathon, *Education Law in a Digital Age: The Growing Impact of the Open Access Legal Movement,* 277 ED. LAW REP. 589 (2012).

[125] Christopher Ryan, Jr., *Not-So-Open Access to Scholarship: Balancing Stakeholder Interests with Copyright Principles,* 20 RICH. J.L. & TECH. 1, 14 (2014).

[126] "In 2004, the *Harvard Law Review* surveyed approximately 780 law faculty and determined that more than 85% of them thought that law review articles were too long." Wise, *supra* note 45, at 6.

[127] Tyler Olkowski, *Harvard Law Review Selects 128th President,* HARVARD CRIMSON, Feb. 4, 2014, *available at* http://www.thecrimson.com/article/2014/2/4/128th-law-review-president/?page=1; Upstatement LLC, *Responsive Redesign: Harvard Law Review, at* http://upstatement.com/portfolio/harvard-law-review (last visited June 30, 2014).

Harvard Bluebook introduced a citation format for blawgs in 2005),[128] more readers wondered whether their ability to publish rapidly and ready accessibility would make law journals obsolete. One of the most popular blawgs, *The Volokh Conspiracy,* recently joined *The Washington Post* to become part of mainstream media. It was founded in 2002 by noted professor Eugene Volokh and receives contributions from several leading scholars.[129]

Philippine journals will eventually feel the same pressure and will have to decide how they plan to take advantage of the Internet, and possibly to distribute new content in addition to the articles in a print version of the journal.

Midway between the traditional print format and the blawg, student editors might reconsider the symposium format, which is hardly a new suggestion[130] and which I think has been underutilized by the JOURNAL. During my term in Volume 79, because we finished our four issues in four months, we spent the second semester organizing the inaugural (and only) Supreme Court Term Review Symposium for 2004 decisions in cooperation with the Sigma Rho Fraternity. The speaker lineup was formidable:

- *Constitutional Law:* Deans Pacifico Agabin and Raul Pangalangan
- *Family Law:* Professor Araceli Baviera
- *Labor Law:* Dean Froilan Bacungan
- *Conflicts of Law:* Former Senate President Jovito Salonga
- *Public International Law:* Dean Merlin Magallona
- *Corporate Law:* Professor Arturo Balbastro
- *Taxation:* Court of Tax Appeals Presiding Justice Ernesto Acosta
- *Legal Ethics:* Court of Appeals Justice (ret.) Hilarion Aquino
- *Civil Procedure:* Professor Antonio Bautista
- *Criminal Procedure:* Court of Appeals Justice (ret.) and former Solicitor General Ricardo Galvez
- *Evidence:* ACCRALAW Senior Partner Rogelio Vinluan

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[128] Lee Peoples, *The Citation of Blogs in Judicial Opinions,* 13 TUL. J. TECH. & INTELL. PROP. 39 (2010).

[129] *The Volokh Conspiracy Joins The Washington Post,* Jan. 21, 2014, *at* http://washpostpr.tumblr.com/post/74089780685/the-volokh-conspiracy-joins-the-washington-post.

[130] *E.g.,* James Lindgren, *Reforming the American Law Review,* 47 STAN. L. REV. 1123 (1995); Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews,* 52 N.Y.L. SCH. L. REV. 349 (2008).

Unfortunately, our faculty adviser rejected our proposal to publish the talks as a fifth issue (and they could readily have filled two more issues). There is thus no record of this symposium except for amateur videotapes left with Virgilet Encarnacion, the Law Center staff member assigned to the JOURNAL. Nevertheless, it was priceless to see Dean Agabin and Justice Vicente V. Mendoza debating *Tecson v. Glaxo Wellcome-Philippines, Inc.*[131] and *Agabon v. National Labor Relations Commission*[132] in front of stunned freshmen, with Dean Pangalangan attempting to referee; Professor Baviera walking to the classroom of Professor Eduardo Labitag and telling his freshman Obligations and Contracts class to go to the auditorium and listen to her lecture instead of attending Labitag's class; Dean Bacungan claiming that I required him to write a paper where half the pages must be filled with footnotes; Senate President Salonga praising Carpio decisions of the early 2000s as the best written and friendliest to students and posing for fraternity photos; and being approached by a woman in the audience who introduced herself as a regional trial court judge who snuck into Justice Acosta's lecture to ask a question drawn from a pending case that she had been grappling with for two weeks (and was answered by Justice Acosta in ten seconds). We recruited the first batch of freshman interns in that 2004-2005 term, and the additional manpower made the symposium possible.

Finally, the JOURNAL must critically consider the credibility of its selection process. Until 2010, student editors were chosen primarily on the basis of a one-week legal article writing contest, which required a candidate to research, frame and write what is practically a full-length thesis in one week. The two highest scorers became Chair and Vice-Chair and traditionally published their entries, which allowed immediate scrutiny of the new editors' caliber. Inexplicably, in 2011, the writing exam was downgraded to a one day on-the-spot spontaneous essay contest, allegedly to allow the judges to monitor candidates during the exam and prevent communication with outside parties. I have worked with Nathan Marasigan and Jenny Domino, the Chairs for Volume 86 in 2011-2012 and Volume 87 in 2012-2013, as well as Jenny's Vice-Chair Paolo Celeridad, and they clearly knew what they were doing. However, having hurdled the traditional exam, I imagine the credibility of this new process is silently being questioned by alumni and this must be carefully reconsidered.

More broadly, the student editorial board's discretion must remain a paramount concern. Further, one wonders if the editorial board at some point

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[131] Duncan Ass'n of Detailman-PTGWO and Tecson v. Glaxo Wellcome-Philippines, Inc., G.R. No. 162994, 438 SCRA 343, Sept. 17, 2004.

[132] G.R. No. 158693, 442 SCRA 573, Nov. 17, 2004.

will need to be expanded beyond the longtime eight slots given workload or additional projects, or whether the editors should be allowed to recruit non-editor staff members, which was the point of the internship program launched in 2004 despite its being "restricted by his faculty adviser's refusal to support the first batch of interns, for fear that they would hold themselves out as editors after graduation."[133]

The internship program has since been institutionalized after studying similar programs in foreign law reviews.[134] As hoped for, it has stabilized the JOURNAL's culture by ensuring some continuity from board to board and mitigating abrupt shifts in work style and direction with each new student chair. For example, Johann Carlos Barcena, chair of Volume 84 in 2009-2010, affirmed that his board had several former interns. His Vice-Chair Mary Rhauline Lambino, editor Michelle Sabitsana and himself were all interns under Chair Fajardo, who was in turn an intern under me, and Joseph Gerald Jumamil was an intern under me.[135] The documentation of JOURNAL best practices, traditions, aspirations and urban legends as this *Sisyphus' Lament* series, including a simplified citation manual,[136] has also facilitated continuity.

Finally, I was amused to learn that "the number of those who wish to volunteer [for the JOURNAL] have significantly increased, thus necessitating a screening process to cut them down to a more manageable number."[137] Who would have thought that law students would actually be interested in editing drafts and source checking without the privilege of listing oneself as a student editor in one's resumé? (The more typical problem is having editors who know they are entitled to the resumé entry, regardless of their board's output, and attempt to do as little work as possible, and I actually removed an editor from my board.)

VI. CONCLUSION

As Carpio put it, the JOURNAL "as as an integral part of the academic bar, shares in the informative and transformative roles of the judiciary and the

[133] Fajardo, *supra* note 5, at 8-9, *quoted in* Johann Carlos Barcena, Foreword, *Sisyphus' Lament, Part V.I: Laying Foundations and Reinforcing an Institution through an Effective Internship Program*, 84 PHIL. L.J. i, v (2010).

[134] Barcena, *supra* note 133, at vi.

[135] *Id.*

[136] Oscar Franklin Tan, Foreword, *Sisyphus' Lament, Part III: Citation and the Little Black Book*, 79 PHIL. L.J. 547 (2004).

[137] Barcena, *supra* note 133, at 6 n.18.

legal profession."[138] Nevertheless, Former Senate President Jovito Salonga quipped at my own induction:

> In the United States, articles, editorial comments and notes in the *Harvard Law Review*, the *Yale Law Journal*, the *Columbia Law Review* and journals of similar stature are cited by Supreme Court Justices, whether penning majority or dissenting opinions, partly because of the influence of their law clerks who had been with these law reviews during their law studies. Editorial notes are often cited, mostly through footnote documentation. It seems to me we do not have such a tradition here, although I am willing to be proved wrong.[139]

The JOURNAL's most enduring quality over the last hundred years remains the idealism and dedication of the student editorial boards who take up its sacred charge each year. I have kept in touch with various boards and for every one that solicits an article from me then later claims to lose it rather than review the mathematical discussions contained, there are more who have critically approached me for advice on gauging whether an awarded Intellectual Property paper contains indicia of plagiarism or with fears that their editorial independence is being compromised by an overeager faculty advisor. The JOURNAL's great patrons, such as Justice Carpio and the Class of 1974 led by Solicitor General Francis Jardeleza and his classmates such as SyCip Salazar Managing Partner Rafael Morales and ACCRALAW Senior Partner Luis Vera Cruz, likewise deserve credit for encouraging each new board. The JOURNAL's great passion has been evident in recent years in, for example, the unprecedented foreword criticizing *In re Charges of Plagiarism against Associate Justice Mariano C. del Castillo*[140] as a decision that "muddles the concept of plagiarism. Not only does it set a dangerous judicial precedent, but it likewise imperils prevailing norms of scholarship, particularly, in legal educational institutions."[141]

Passion and idealism can only go so far, however, and there is a critical need to consider the suggestions in this essay, particularly the need to integrate into international journal databases or face nonuse in one's own country. Action must be taken lest the JOURNAL fall well short of a 200th anniversary.

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[138] Antonio Carpio, *The Philippine Law Journal and the Development of Law*, 86 PHIL. L.J. i, i (2012).

[139] Jovito Salonga, Foreword, *On the Philippine Law Journal*, 79 PHIL. L.J. 541, 543 (2004).

[140] A.M. No. 10-7-17-SC, 632 SCRA 607, Oct. 12, 2010.

[141] Volume 85 Editorial Board, Foreword, *Defend Legal Scholarship: A Statement by the Philippine Law Journal on the Allegations of Plagiarism in the Supreme Court*, 85 PHIL. L.J. i, i (2012).

The Supreme Court needs a handmaiden of jurisprudence. It cannot stand by itself and comment on itself. It needs the academe to scrutinize the broader angles individual decisions do not examine, make sense of series of decisions as emerging trends and generally place decisions within society's broader contexts.[142] I have also discussed the dangers of an absence of criticism, with unnoticed errors as the most obvious. We must realize, however, that if there is no one saying when the Court is wrong, then it also means that there is no one saying when the Court is right, which is equally important. For example, early into President Benigno Aquino III's term, I criticized the doctrine of the Reproductive Health Act case and other cases. I must, however, commend the Court for resolving the Cybercrime Act case largely untouched by the popular frenzy that focused on cyberlibel. Only months later, when exposés of horrifying cybersex dens in poor neighborhoods in far-flung provinces emerged, was the Court silently validated.

To cite another example, I wrote that it was really the Justices, particularly Chief Justice Ma. Lourdes Sereno and Carpio who fleshed out the arguments against the Priority Development Assistance Fund or so-called legislators' pork barrel, given weak petitions.[143] I also praised the Court during the various pork barrel hearings for framing the issues as unmistakably legal, avoiding political overtones and the appearance of creating a venue to attack the President.[144]

Finally, in some cases, the Court is not so much right or wrong but prone to being misunderstood. In the Reproductive Health Act case, for example, some posited that Leonen wrote the most aggressive dissent as he was the lone Justice who would have upheld every provision of the law. I wrote, however, that this was because he believed the Court should not have taken jurisdiction in the first place.[145] This is actually a conservative, not an aggressive, stance.

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[142] One way of looking at this is that the academic perspective is distinct from the advocate and practitioner's typical adversarial context. Robert Spitzer, *Why History Matters: Saul Cornell's Second Amendment and the Consequence of Law Reviews,* 1 ALB. GOV'T L. REV. 312, 327-35 (2008).

[143] Belgica v. Exec. Sec., G.R. No. 208566, 710 SCRA 1, Nov. 19, 2013; Oscar Franklin Tan, *Commentary: Jardeleza: Let gov't fix pork itself,* PHIL. DAILY INQUIRER, Oct. 14, 2013.

[144] Oscar Franklin Tan, *Commentary: SC: Why pork is unconstitutional,* PHIL. DAILY INQUIRER, at A11, Oct. 10, 2013; Oscar Franklin Tan, *Commentary: Pork barrel as a human rights issue?,* at A17, PHIL. DAILY INQUIRER, Nov. 27, 2013.

[145] Tan, *Commentary: RH decision's booby traps and reinvented doctrine, supra* note 99.

Clearly, we need to better harness the JOURNAL as the best venue for reflecting upon our Supreme Court, our jurisprudence, our legal education, and our society's most dearly held values. Chief Justice Roberts quipped at his Senate confirmation, "Nobody ever went to a ballgame to see the umpire."[146] Nevertheless, a select group of student editors are eager to do just that each year, following the tradition unique to the legal profession where students as eager generalists[147] are tasked with overseeing its most important academic dialogues. It has been a hundred years and the damnable boulder keeps rolling back down the hill no matter what we do,[148] but we hope that the journey is only beginning.[149]

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[146] Confirmation Hearing on the Nomination of John Roberts, Jr. to be Chief Justice of the United States, Hearing Before Comm. on Judiciary, United States Senate, 109th Cong. 55 (2005).

[147] *See, e.g.,* Oscar Franklin Tan, Foreword, *Sisyphus' Lament, Part II: Editing, or the Student's Art of Not Being One's Own Worst Enemy*, 79 PHIL. L.J. 233 (2004); Natalie Cotton, *The Competence of Students as Editors of Law Reviews: A Response to Judge Posner*, 154 U. PA. L. REV. 951 (2006); Harvey Gilmore, *Defending the Law Review—A Response to Judge Posner and Professor Lindgren*, 4 CHARLOTTE L. REV. 323, 325-26 (2013); John Doyle, *The Law Reviews: Do Their Paths of Glory Lead But to the Grave*, 10 J. APP. PRAC. & PROCESS 179 (2009); Jason Nance & Dylan Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565 (2008); James Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261 (1998). One interesting argument is that electronic access levels the playing field among journals of varying perceived quality and reputation and makes student editors' ability or inability to select good articles irrelevant, as electronic searches lead readers direct to articles and they no longer browse individual journal volumes. Dan Hunter, *Open Access to Infinite Content (Or "In Praise of Law Reviews")*, 10 LEWIS & CLARKE L. REV. 761, 767-68 (2006). *See, however,* Jonathan Mermin, *Remaking Law Review*, 56 RUTGERS L. REV. 603 (2004) (comparing student editors to slave labor).

[148] "Surprisingly, of all the Malcolm community's student and faculty members, only Dean Pacifico Agabin gave me a knowing smile regarding the title of this series of forewords: Sisyphus' Lament... Sisyphus is the epitome of hopeless labor, condemned to forever roll a boulder up a slope only to see it rush back down each time. No one else truly understood why I chose this cryptic mythological reference to depict the JOURNAL Chair's lot.

..."Perhaps I feel that the Volume 79 editorial board has done its share in rolling the boulder up the hill, and my deepest fear is that it will roll back down someday. If the written word's power lies in its immortality, then perhaps the writer fears meaningless obscurity. This is likely the lot of our trip up the slope should the stone later slip once again, and perhaps the consignment of our Herculean labors to the forgotten Sisyphean oblivion of a dusty shelf is something to fear indeed. (internal citations omitted)" Oscar Franklin Tan, Foreword, *Sisyphus' Lament, Part IV: Style and the Seduction of the Supreme Court*, 79 PHIL. L.J. 876, 884-86 (2004), *quoted in part in* Volume 83 Issue Editors, Foreword, *Of Marching Forward and Continuing Sisyphus' Lament*, 83 PHIL. L.J. 744, 744 n.* (2009).

[149] One might be interested to read the foreword for the *Virginia Law Review's* 100th anniversary, also celebrated this year and also downplaying Judge Posner's gloomy assessment. Ronald Fisher, Foreword, *One Hundred Years of Law Reviewed,* 100 VA. L. REV. 1 (2014).

SISYPHUS' LAMENT

Oscar Franklin Tan, Foreword, *Sisyphus' Lament, Part I: The Next Ninety Years and the Transcendence of Legal Writing,* 79 PHIL. L.J. 7 (2004)

Oscar Franklin Tan, Foreword, *Sisyphus' Lament, Part II: Editing, or the Student's Art of Not Being One's Own Worst Enemy,* 79 PHIL. L.J. 233 (2004)

Oscar Franklin Tan, Foreword, *Sisyphus' Lament, Part III: Citation and the Little Black Book*, 79 PHIL. L.J. 547 (2004)

Oscar Franklin Tan, Foreword, *Sisyphus' Lament, Part IV: Style and the Seduction of the Supreme Court*, 79 PHIL. L.J. 876 (2004)

Juan Paolo Fajardo, Foreword, *Sisyphus' Lament, Part V: Reinvigorating the Philippine Law Journal as the Crucible of Legal Writing,* 83 PHIL. L.J. 5 (2008)

Johann Carlos Barcena, Foreword, *Sisyphus' Lament, Part V.I: Laying Foundations and Reinforcing an Institution through an Effective Internship Program*, 84 PHIL. L.J. i (2010)

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COMMENTARIES

INTRODUCTION

As a century-old publication, the PHILIPPINE LAW JOURNAL is a privileged repository of the best of Philippine scholarship. The early history of the JOURNAL was characterized by two major interruptions (which explains why the publication celebrates its centennial with Volume 88) and doubts have been raised as to the quality of the issues printed especially in the last decade, but for most of its existence, the JOURNAL has continuously printed well-written, well-researched works on the most pressing legal issues of the time.

To mark its 100th year, the Editorial Board has commissioned this project consisting of commentaries or reviews of five works previously published in the JOURNAL. This project did not endeavor to create a *best of* list, and while it was inspired by similar initiatives of law reviews that celebrated their own centennials,[1] neither is it a selection of the most-cited articles of the JOURNAL. Nevertheless, the works reviewed were selected on the basis of their far-reaching influence, their continued relevance, or their sheer quality.

The writers of these works would later become magistrates of the Supreme Court, eminent jurists and professors, or leaders of the Philippine legal community, but when these works were first written, the authors were simply *scholars*—professors or students of the University of the Philippines College of Law—who challenged the prevailing theories and practices of the day and advocated law reform. Hence, more than influence, relevance, and quality, these works were selected because they represent the pioneering spirit of the JOURNAL, one that is restless to transform Philippine society by reforming law and jurisprudence.

Most of the authors of the commentaries that follow are professors of the College who have become experts in their own fields; to honor the invaluable contribution of student authors through the years and in recognition of the fact that three out of the five papers reviewed were *student* papers, one of the commentaries was written by a law student. While we take pride in the past century of the JOURNAL, this project looks forward to the *next* one hundred years; it is our sincere hope that by letting the authors of the commentaries critique the selected papers, the present generation of legal scholars will be inspired to make their own contribution to the JOURNAL's cause.

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[1] *See, e.g.* Fred R. Shapiro, *The Most-Cited Articles from the* Yale Law Journal, 100 YALE L.J. 1449 (1991).