LIFTING THE JUDICIAL CURTAIN: A CASE FOR ELECTRONIC MEDIA ACCESS TO THE PHILIPPINE CRIMINAL COURTROOM*

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ABSTRACT

This paper argues that the presumptive ban on electronic media coverage of criminal court proceedings should be lifted and a regime of presumptive openness adopted, consistent with the constitutional guarantees of free speech and freedom of the press. The first part of the paper clarifies the basis of the media's right of access to criminal trials and discusses its structural necessity to the proper functioning of the courts under a democratic framework. The second part of the paper discusses the tension between the courts and the broadcast media by citing key Philippine cases that show the Supreme Court's attitude towards the television medium. The third part of the paper lays down the basis of the legal regime of presumptive openness by challenging the presumptive ban on electronic media access to the criminal courtroom. The fifth part of the paper surveys the changing attitude of different jurisdictions regarding the televising of trials and other court proceedings and discusses the guidelines that various courts have set to protect other compelling state interests under a regime of presumptive openness.

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* *Cite as* Frank Tiongson, *Lifting the Judicial Curtain: A Case for Electronic Media Access to the Philippine Criminal Courtroom*, 89 PHIL. L.J. 145, (page cited) (2015).

This paper won the Froilan Bacungan Prize for Best Paper on Freedom of Expression (2014), University of the Philippines College of law.

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The author would like to acknowledge Professor Rommel Casis, his Supervised Legal Research (SLR) Paper adviser, for his guidance and patience.

I. INTRODUCTION

That freedom of the press is a cornerstone of democracy is a truism that has bordered on the trite, especially for a citizenry whose institutional memory includes a decades-long struggle against a dictatorship.

This constitutional principle, alongside the rights to free speech and free expression into which it is inextricably woven, has been accorded the status of a preferred freedom.[2] As such, it is with a dogged fervor that the Supreme Court has struck down laws and issuances meant to curtail such right, mindful that restricting its exercise is "patently anathematic to a democratic framework where a free, alert and even militant press is essential for the political enlightenment and growth of the citizenry."[3]

Consistent with the touted democratic framework is the right of the public to scrutinize and comment on the workings of the judiciary. Such entitlement comes with the recognition that "the judiciary and media are both essential foundations of a democratic polity."[4] Indeed, a cursory look at the relationship between the judiciary and the media does not seem to reveal a tension, particularly in the matter of media access to the courtroom. For one, as columnist-lawyer Jose Sison noted, "[i]t cannot be denied that attendance is open to all especially the media practitioners who can *watch and take down notes* on the blow by blow account of the proceedings."[5] The courts, as will be discussed later, have traditionally been open to the public and the press. Court records have also been considered public records available for the perusal of members of the media.

However, when advanced technology and new modes of media consumption came into the picture, the militancy by which the Court has upheld the rights to free speech and press easily deflated and turned into cynical diatribes about the banality of mass media and avowals on the sacredness of judicial space. The Court has been adamant in asserting that television cameras have no place in the courtroom, raising concerns that the

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[2] Chavez v. Gonzales, G.R. No. 168338, 545 SCRA 441, 473, Feb. 15, 2008; Adiong v. COMELEC, G.R. No. 103956, 207 SCRA 712, Mar. 31, 1992.

[3] Burgos v. Chief of Staff, G.R. No. 64261, 133 SCRA 800, 816, Dec. 26, 1984.

[4] PHILIPPINE JUDICIAL ACADEMY, MANUAL GUIDE FOR THE JUDICIARY IN DEALING WITH MEDIA (2011).

[5] Jose Sison, *Is live media coverage necessary for press freedom?*, PHIL. STAR, Nov. 22, 2010, *available at* http://www.philstar.com/opinion/631989/live-media-coverage-necessary-press-freedom.

intervention of the broadcast media in the representation of court proceedings will infringe on the constitutionally guaranteed right to due process and trample on the dignity of the court.[6] Paraphrasing a 2001 Resolution of the Integrated Bar of the Philippines, the Court pronounced that:

> [A]t stake in the criminal trial is not only the life and liberty of the accused but the very credibility of the Philippine criminal justice system, and live television and radio coverage of the trial could allow the "hooting throng" to arrogate unto themselves the task of judging the guilt of the accused, such that the verdict of the court will be acceptable only if popular[.][7]

The Court, still in the cited case, even went further and came up with the dictum: When the fundamental rights of the accused and the constitutional guarantees of freedom of the press and the right to public information clash, the rights of the accused must be preferred.[8] As can be seen, the questions surrounding the access of electronic media to the courtroom has thrown a wrench into the unanimity in according preferential status to the free press and free expression guarantees in the ecology of the Bill of Rights and the traditional scrutiny structures set for regulations limiting the cited rights.

In the jurisprudence addressing the matter of live television and radio coverage of criminal trials, the Court has come up with what appears to be a presumption against the broadcast media's right of access to the courtroom. The criminal courtroom, as such, remains to be one of the final frontiers for electronic media even in a time when the semiotic currency of the televisual image is pervasively used in constructing meaning out of the tumult of everyday life, made possible by rapid advances in communications technology.

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[6] *In re* Request for Radio-TV Coverage of the Trial in the Sandiganbayan of the Plunder Cases against Former President Joseph E. Estrada, A.M. No. 01-4-03-SC, 360 SCRA 248, June 29, 2001 [hereinafter "*Estrada*"].

[7] *Id.* at 263.

[8] *Id.*

II. THE PUBLIC'S RIGHT OF ACCESS TO THE CRIMINAL COURTROOM

In its Manual Guide for the Judiciary in Dealing with Media,[9] the Philippine Judicial Academy (PJA), listed five interacting constitutional principles involved in judiciary-media relations, namely independence of the judiciary, right to due process of the litigants, freedom of expression, right to information on matters of public concern, and the vital role of communication and information in nation-building.[10]

Conspicuously absent in the enumeration is the right to a public trial under the 1987 Constitution,[11] which has been invoked by media organizations in petitioning the Court to allow live radio and television coverage of court proceedings.[12] The reliance on the said right, however, is misplaced because case law has consistently underlined that it is not the public that is entitled to invoke it. Rather, the right has been found to belong to the accused as a mantle of protection against possible abuses in the prosecution of criminal cases.

A. Misplaced Reliance on the Right to a Public Trial

The Court explained that the right to a public trial simply means that "[t]he trial must be public."[13] Originating from English common law, the guarantee was articulated in the Sixth Amendment of the United States Constitution and subsequently incorporated in the Philippine Bill of 1902, the Philippine Autonomy Act of 1916, and the succeeding Philippine Constitutions.[14] The Court, in *Garcia v. Domingo*,[15] explained as follows:

> It possesses that character when anyone interested in observing the manner a judge conducts the proceedings in his courtroom may do so. There is to be no ban on such attendance. His being a stranger to the litigants is of no moment. No relationship to the parties need be shown. **The thought that lies behind this safeguard is the belief that thereby the accused is afforded**

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[9] PHILIPPINE JUDICIAL ACADEMY, *supra* note 4.

[10] *Id.*

[11] CONST. art. III, § 14, ¶ 2.

[12] *In re* Petition for Radio and Television Coverage of the Multiple Murder Cases Against Maguindanao Governor Zaldy Ampatuan et al., A.M. No. 10-11-5-SC, 652 SCRA 1, June 14, 2011 [hereinafter, "*Ampatuan*"].

[13] Garcia v. Domingo, G.R. No. L-30104, 52 SCRA 143, 150, July 25, 1973.

[14] *Id.*

[15] *Id.*

> **further protection, that his trial is likely to be conducted with regularity and not tainted with any impropriety**.[16]

One is easily lulled into framing an argument for broadened media access to court proceedings owing to the mandatory language of the cited pronouncement. Courts are construed as duty-bound to allow greater public access to trials as a form of check against the possible abuse of judicial power.[17] Hence, insofar as media represents itself as one of the primary modes by which the cited policy can be actualized, the principle has accorded some degree of convenience in pressing for live television and radio coverage of criminal trials.

However, a scrutiny of the principle would yield a conclusion that the invocation of the right to a public trial is misplaced. In *Gannett Co., Inc. v. DePasquale*,[18] the US Supreme Court maintained that the right to a public trial belongs to the accused and is not enforceable by interested members of the public. Moreover, the Court, in *Garcia*, underlined that the guarantee is deemed embraced in the procedural due process right of the accused.[19]

The US Supreme Court, instead, found that the public's right of access to court proceedings, exercised primarily by the media which reports the proceedings to the public, is contained in the First Amendment of the US Constitution[20] and finds expression in Section 4, Article III of the 1987 Constitution. In *Richmond Newspapers, Inc. v. Virginia*,[21] where an order of a Virginia court which granted the defendant's plea to exclude the media and the public from his trial was struck down, the US Supreme Court posited that "[t]he right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated."

The media's right of access to the criminal courtroom is, thus, founded on the free speech and press guarantees of the Constitution. Moreover, the media's presence in the courtroom must be protected not only because it is a part of the public, but also because of the practical consideration that people are not expected to interrupt their daily routines to

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[16] *Id.* at 150-151. (Emphasis supplied.)
[17] *Id.*
[18] 443 U.S. 368 (1979).
[19] Garcia v. Domingo, G.R. No. 30104, 52 SCRA 143, July 25, 1973.
[20] Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979).
[21] 448 U.S. 555, 556-557 (1980).

attend criminal trials.[22] Consequently, the right is one that is constantly exercised by the press on behalf of the public.

B. Open Trial as a Structural Necessity

Freedman, meanwhile, explained that that the free speech and press guarantees "[promote] an informed discussion of governmental affairs, including those conducted in courts."[23] The author's commentary, however, hardly provides a compelling argument for public access to criminal trials, limited as it is to merely underlining the desirability of open trials toward the enhancement of public discourse. For a potent justification for media's presence in the criminal courtroom, the structural necessity for public access to criminal trials must be stressed.

Bunker listed various theoretical explanations for the high value given to the free speech and press guarantees in all spheres of democratic society including criminal trials, namely, individual autonomy, diversity, self-government, and checking abuses of official power.[24] For one, the said guarantees are deemed to promote individual autonomy under the premise that the heterogeneity of speech and expression in society is a desirable end in itself, functioning as a safeguard against a hegemonic orthodoxy that citizens are compelled to subscribe to.[25] The cited guarantees are also seen as ensuring that diverse viewpoints are freely communicated, serving a "safety valve function by allowing those disaffected with the society to express their dissatisfaction through speech, rather than more violent means."[26] Thus, Bunker noted, "[f]ree speech [...] contributes to social stability by allowing an outlet for dissent."[27] The author, moreover, explained that the said guarantees contribute to effective self governance.[28] Citing Meiklejohn, Bunker related that the speech protected by the guarantees is "speech aimed at enhancing citizen participation in political decisions."[29] Lastly, the author cited the "checking value" of the free speech and press guarantees,

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[22] WARREN FREEDMAN, PRESS AND MEDIA ACCESS TO THE CRIMINAL COURTROOM 12 (1988).

[23] *Id.* at 11.

[24] MATTHEW BUNKER, JUSTICE AND THE MEDIA: RECONCILING FAIR TRIALS AND A FREE PRESS 5 (1997).

[25] *Id.*

[26] *Id.* at 6.

[27] *Id.*

[28] BUNKER, *supra* note 24, at 7.

[29] *Id.*

underlining the role that free expression plays in keeping official power in check.[30]

The checking value of the free speech and press guarantees figure prominently in the discussion of the media's right of access to the criminal courtroom inasmuch as the exercise of the cited constitutional guarantees is primarily performed by the media. Bunker posited that "government officials will carry out their duties more fairly and effectively if their activities are closely watched and reported upon."[31] He explained further that:

> Blasi's theory takes a basically pessimistic view of how human beings react when given the reins of governmental power. The corrupting effect of power is assumed to be a constant. The criminal justice system is one exercise of official power that historically has been open to public scrutiny for exactly such reasons.[32]

The structural necessity for free public discourse on the conduct of criminal proceedings accorded by open trials is further emphasized by the idea that they serve a prophylactic purpose. The notion stemmed from the observation that "[w]hen a shocking crime occurs, a community reaction of outrage and public protest often follows[.]"[33] Lassiter, thus, noted that the open processes of justice provide an "outlet for community concern, hostility and emotion."[34] As the said author further explained:

> Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help", as indeed they did regularly in the activities of vigilante "committees" on our frontiers [...] It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.[35]

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[30] *Id.*

[31] *Id.* at 8.

[32] *Id.*

[33] Christo Lassiter, *'TV or Not TV' - That is the Question,* 86 J. CRIM. L. & CRIMINOLOGY 928, 960 (1996).

[34] *Id.*

[35] *Id.*

Meanwhile, the US Supreme Court in *Press-Enterprise v. Superior Court*[36] assigned a "community therapeutic value" to open criminal trials. As the cited case said, "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known."[37] The dynamics of this structure relies on the presumption that the public is not only rational, but also that its members know the law under the legal maxim, *ignorantia legis neminem excusat*; its members are expected only to rely on their barest understanding of equity when scrutinizing the mechanisms of the criminal courtroom sometimes with the aid of legal analysts invited to explain the nuances of various legal processes. Verily, the end envisioned here is not necessarily the actual intervention of the public when it feels that the court has acted unfairly, but the promotion of the confidence necessary to make the apparatuses of the state function.

The above discussions portend that an open trial is not only desirable in keeping with the democratic framework of the Constitution, but also necessary for the proper functioning of the court. The US Supreme Court, in *Richmond Newspapers*,[38] quoted Bentham: "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." The same pronouncement has also been recognized in this jurisdiction. To cite, in *Webb v. De Leon*,[39] the Court noted: "A trial courtroom is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place."[40]

As such, the media and the courts are involved in what Pogorzelski and Brewer called an "interdependent relationship."[41] As the said authors posited, "[t]he process of administering justice is also the process of establishing and enforcing norms and is fundamental to an orderly society.

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[36] 464 U.S. 501, 508 (1984).

[37] *Id.*

[38] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

[39] G.R. No. 121234, 247 SCRA 652, 691, Aug. 23, 1995.

[40] *Id.*

[41] Wendy Pogorzelski & Thomas Brewer, *Cameras in Court: How Television News Media Use Courtroom Footage,* 91 JUDICATURE 124 (2007).

Therefore, the work of the justice system cannot happen in a vacuum and the courts rely on the media as one mechanism to publicize its responses to the social problem of crime and the pursuit of justice."[42]

C. Preliminary Notes on Open Trials and the Right to Privacy

Establishing the structural necessity for open trials would then serve to provisionally dispense with the propensity of the right to privacy of trial participants to figure in the avowed framework of this paper.

Tan, to cite, declared that privacy itself is a fundamental right recognized in this jurisdiction arising as an "amalgam" found in the "penumbra" of affirmative constitutional rights.[43] The author, moreover, identified two distinct categories of the said right, namely, (1) decisional privacy, which is the "interest in independence in making certain kinds of important decisions"; and (2) informational privacy, which is "individual interest in avoiding disclosure of personal matters."[44] Arguably, the specific privacy right relevant to the subject of broadcast media's access to criminal trials is subsumed under the second category—informational privacy—which then Associate Justice Reynato Puno, in *Ople v. Torres*,[45] maintained as "one of the most threatened rights of man living in a mass society." The former magistrate professed, "The threats emanate from various sources—governments, journalists, employers, social scientists, etc."[46]

By contrast, Tan identified "consent to publicity or waiver of privacy," articulated in the public figure doctrine, as one of the exceptions to invocation of the mantle of informational privacy.[47] The cited doctrine, in *Borjal v. Court of Appeals*,[48] was extended to apply to a "private figure who has become involved in an issue of public interest."[49] To quote *Borjal*:

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[42] *Id.* at 125.

[43] 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 PHIL. L. J. 78 (2008).

[44] *Id.* at 89, *citing* Whalen v. Roe, 429 U.S. 589 (1977).

[45] G.R. No. 127685, 293 SCRA 141, 170, July 23, 1998.

[46] *Id.*

[47] Tan, *supra* note 43, at 129-30.

[48] G.R. No. 126466, 301 SCRA 1, Jan. 14, 1999.

[49] Tan, *supra* note 43, at 131.

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not voluntarily choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect and significance of the conduct, not the participant's prior anonymity or notoriety.[50]

Participants in a criminal trial, as such, may be construed to have waived their right to informational privacy inasmuch as a strong public interest consideration is accorded to such legal process which is, after all, prosecuted in the name of the public. As has been already argued, the structural necessity of open trials render public interest as an attribute inherent in criminal trials.

III. THE BROADCAST MEDIA IN THE PHILIPPINE COURTROOM: ENGENDERING THE DEBATE

The preceding discussions showed how broadening media's access to the criminal courtroom is not only desirable, but also necessary in ensuring the proper functioning of the courts. The literature on the matter, however, also seems to reveal a bias against broadcast media even in an age of rapidly advancing communications technology and emerging modes of media consumption. Authors and jurists alike confront the question of electronic media access to the criminal courtroom as if a virtual Pandora's Box had been opened, unleashing unto legal discourse musings about competing rights and the perceived evils of television.

The answer of Philippine jurisprudence to the cited issue of whether live radio or television coverage of a criminal trial should be allowed is a resounding negative. In point are the Court's 1991 pronouncement in *Re: Live TV and Radio Coverage of the Hearing of President Corazon C. Aquino's Libel Case*,[51] its 2001 ruling in *Re: Request Radio-TV Coverage of the Trial in the Sandiganbayan of the Plunder Cases Against the Former President Joseph E. Estrada*[52] (hereinafter "Estrada"), and its 2012 edict in *Re: Petition for Radio and Television Coverage of the Multiple Murder Cases Against Maguindanao Governor Zaldy Ampatuan, et al.*[53] (hereinafter "Ampatuan").

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[50] Ople v. Torres, G.R. No. 126466, 301 SCRA 1, 26-27, Jan. 14, 1999.

[51] Supreme Court En Banc Resolution, Oct. 22, 1991 [hereinafter "*Aquino*"].

[52] *Estrada*, A.M. No. 01-4-03-SC, 360 SCRA 248, June 29, 2001.

[53] *Ampatuan,* A.M. No. 10-11-5-SC, Oct. 23, 2012.

A. The Aquino Libel Case

Aquino stemmed from the libel case filed by former President Corazon Aquino against *Philippine Star* columnist Luis Beltran and his editor, Max Soliven. Aquino accused Beltran of damaging her reputation by claiming in one of his columns that she "hid under her bed" when rebel soldiers attacked Malacañang in a *coup* attempt in August 1987.[54] During the February 11, 1991 hearing of the case, then Presiding Judge Ramon Makasiar permitted the proceedings to be held at the session hall of Manila to accommodate a larger audience.[55] The proceedings were telecast live in light of Makasiar granting the request of a member of the Presidential Broadcast Staff to televise the hearing.[56] Lamenting the live telecast of the proceedings, Sectoral Representative Arturo Borjal raised in a letter to then Associate Justice Marcelo Fernan his concerns regarding the propriety of allowing the live telecast of the proceedings.[57]

The court responded to Borjal by resolving to prohibit the live television and radio coverage of the proceedings.[58] Relying on the US Supreme Court's ruling in *Estes v. Texas*,[59] the Court in *Aquino* held that "television coverage of judicial proceedings involves an inherent denial of the due process rights of a criminal defendant."[60] The Court quoted pertinent portions of the *Estes* decision:

> Experience likewise has established the prejudicial effect of telecasting on witnesses. Witnesses might be frightened, play to the camera, or become nervous. They are subject to extraordinary out-of-court influences which might affect their testimony. Also, telecasting not only increases the trial judge's responsibility to avoid actual prejudice to the defendant, it may as well affect his own performance. Judges are human beings also and are subject to the same psychological reactions as laymen. For the defendant, telecasting is a form of mental harassment and subjects him to excessive public exposure and distracts him from the effective presentation of his defense.

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[54] Reuter, *Lawyer grills Aquino at libel case hearing*, NEW STRAITS TIMES, June 16, 1992, *available at* http://news.google.com/newspapers?nid=1309&dat=19920616&id=51lPAAAAIBAJ&sjid=JZADAAAAIBAJ&pg=6922,2342924.

[55] *Aquino*, supra note 51.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] 381 U.S. 532 (1965).

[60] *Aquino*, *supra* note 51.

> The television camera is a powerful weapon which intentionally or inadvertently can destroy an accused and his case in the eyes of the public.[61]

B. Estrada's Plunder Case Before the Sandiganbayan

Estrada, meanwhile, sprung from the plunder charge against former President Joseph Estrada, who was accused of amassing billions of pesos in public funds and receiving kickbacks from illegal gambling.[62] On March 13, 2001, the *Kapisanan ng mga Brodkaster ng Pilipinas* (KBP) sent a letter requesting the Supreme Court to allow live media coverage of the trial before the Sandiganbayan in order "to assure the public of full transparency in the proceedings of an unprecedented case in our history."[63] KBP's letter was followed by a petition by then Justice Secretary Hernando Perez who asserted, among others, that the prosecution of the cited case "definitely involves a matter of public concern and interest, or a matter over which the entire citizenry has the right to know, be informed and made aware of."[64]

The Court in *Estrada*, however, affirmed its ruling in *Aquino* and denied the request of the KBP as well as the petition of the former Justice Secretary. After enumerating the conflicting rights involved in the deliberation on the matter of broadcast media's access to the courtroom, the Court posited that jurisprudence accords a presumption in favor of the rights of the accused.[65] Thus, it stated:

> Due process guarantees the accused a presumption of innocence until the contrary is proved in a trial that is not lifted above its individual settings nor made an object of public's attention and where the conclusions reached are induced not by any outside force or influence but only by evidence and argument given in open court, where fitting dignity and calm ambiance is demanded.[66]

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[61] *Id.*, *citing* Estes v. Texas, 381 U.S. 532 (1965).
[62] Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, Nov. 19, 2001.
[63] *Estrada*, 360 SCRA at 256.
[64] *Id.*
[65] *Id.*
[66] *Estrada*, 360 SCRA at 259-60.

C. The Maguindanao Massacre Trial

Ampatuan, on the other hand, originated from the multiple murder case filed against former Maguindanao Governor Zaldy Ampatuan and others for the November 23, 2009 massacre of 57 people, including 37 journalists, which was touted as "the worst election-related violence and the most brutal killing of journalists in recent history."[67] On November 19, 2010, the National Union of Journalists of the Philippines, ABS-CBN Broadcasting Corporation, GMA Network, Inc., relatives of the victims, individual journalists from various media entities, and members of the academe filed a petition before the Court, praying that live television and radio coverage of the said criminal trial be allowed.[68]

On June 14, 2011, the Court allowed *pro hac vice* the live radio and television coverage of the cited trial subject to several guidelines, the import of which will be discussed later. The camp of the former governor subsequently filed a motion for reconsideration alleging that the 2011 Resolution of the Court "deprives him of his rights to due process, equal protection, presumption of innocence, and to be shielded from degrading psychological punishment."[69] Meanwhile, counsels for individual journalists assailed in a partial motion for consideration some of the guidelines issued by the Court in the 2011 Resolution. The Court then issued a Notice of Resolution dated October 23, 2012 which overturned its 2011 ruling.[70]

In *Ampatuan*, the Court once again disallowed live media coverage of the proceedings in the abovementioned multiple murder case. It reasoned that the rights of the accused under Section 14, Article III of the 1987 Constitution "provide more than ample justification to take a second look at the view that a camera that broadcasts the proceedings live on television has no place in a criminal trial because of its prejudicial effects on the rights of accused individuals."[71] The Court also stated that:

> In this case that has achieved notoriety and sensational status, a greater degree of care is required to safeguard the constitutional rights of the accused. To be in the best position to weigh the conflicting testimonies of the witnesses, the judge must not be affected by any outside force or influence. Like any human being,

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[67] *Ampatuan*, 652 SCRA at 4.
[68] *Id.*
[69] *Ampatuan,* A.M. No. 10-11-5-SC, Oct. 23, 2012, at 2.
[70] *Id.*
[71] *Id.*

> however, a judge is not immune from the pervasive effects of media.
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> So must the witnesses be shielded from the pressure of being aware that their testimony is broadcasted live over television and radio, to be scrutinized and judged by the court of public opinion. A witness' behavior and self-consciousness before the camera in a high-profile case such as this case might compromise the reliability of the fact-finding process, which in turn could skew the judge's assessment of his or her credibility, necessarily affecting the resolution of the case.[72]

All of the cited rulings subscribe to the assumption that cameras and other electronic recording devices used by the media have pernicious effects on the conduct of criminal trials, which can supposedly "alter or destroy the constitutionally necessary judicial atmosphere and decorum."[73] However, as will be argued later in this paper, introducing carefully crafted guidelines to regulate the presence and operation of cameras in the courtroom also serves to preserve the integrity of criminal trials as well as operationalize the guarantees to free speech and press – a scenario that cannot be realized under the current presumptive ban regime.

D. The Judicial Slant Against the Television Medium

The aspersions thrown against the broadcast media in the context of the discourse on media access to the criminal courtroom stem from a deep-seated distrust on the television medium itself. Craig, for one, commented that "television is a swirling mix of fictional and factual genres."[74] In the semiotic environment[75] of televisual images, meanings are extracted from a cauldron where both information and entertainment percolate. As such, the Court in *Aquino* raised concerns over live radio and television coverage of criminal trials: "A trial of any kind or in any court is a matter of serious importance to all concerned and should not be treated as a means of entertainment."[76]

In the commercial context of television, moreover, strong images are considered prime commodities while context and critique are devalued as

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[72] *Ampatuan,* A.M. No. 10-11-5-SC, Oct. 23, 2012, at 4-5.

[73] *Aquino*, *supra* note 51.

[74] GEOFFREY CRAIG, THE MEDIA, POLITICS AND PUBLIC LIFE 94 (2004).

[75] *Id.*

[76] *Aquino*, *supra* note 51.

unmarketable airtime contenders. Indeed, much of the criticism against television has been directed toward the cited aspect of television news production. Craig noted that "[t]elevision news has been criticised because the newsworthiness of stories is unduly affected by the presence of strong images, also because of its trend toward shorter stories and soundbites."[77] A conflict then arises between how the media and the court construct reality. In the courtroom, "versions of reality are recreated based on evidence, interpretation, persuasion, and the rule of law."[78] Television, on the other hand, relies on "impressions, shallow imprints that lack contextual truth."[79] The proceedings would then operate "like a boxing match, the television public emotes politically at what it sees in a free consciousness form round-by-round."[80]

The same attribute can be said of Philippine mass media. According to the Center for Media Freedom and Responsibility (CMFR), mass media in the country is dominated by political and economic interests.[81] "As commercial enterprises, they are focused on profitability, or at least the minimizing of financial losses," the CMFR maintained.[82] It further stated that:

> [The commercial nature of mass media] obviously creates a conflict between the private interests of the mass media and their public service function. The commercial imperative has driven the mass media into: sensationalism, choosing news that will sell newspapers or boost ratings, suppressing meaningful but less popular stories, slanting of news and commentary favorable to the interests that control the media, occasional reporting on the most important issues, among other consequences.[83]

As has been seen, the aspersions cast on the media are directed toward its nature as a primarily commercial enterprise. However, the problems cited can be considered, according to Mendoza, "not as an inherent defect of the system, but only an imperfection, that can be

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[77] CRAIG, *supra* note 74.

[78] Pogorzelski & Brewer, *supra* note 40.

[79] PAUL THALER, THE WATCHFUL EYE: AMERICAN JUSTICE IN THE AGE OF THE TELEVISION TRIAL 4 (1994).

[80] Lassiter, *supra* note 33.

[81] Center for Media Freedom and Responsibility, *Press Freedom Report 2008*, *available at* http://www.cmfr-phil.org/wp-content/uploads/2009/03/press-freedom-report-2008.pdf (last visited Mar. 3, 2015).

[82] *Id.* at 57.

[83] *Id.*

corrected."[84] Indeed, unyielding are the efforts to reform the media from various fronts, including media organizations themselves in the exercise of self-regulation. The CMFR, for instance, continues to publish the Philippine Journalism Review Reports, a media-monitoring publication that serves as a regular forum for the discussion of issues confronting the Philippine media.[85] This kind of constant critical engagement is crucial in molding a fair, objective, and balanced media that is well-equipped to respond to the intricacies of reporting criminal trials. As it stands, however, there is a sheer lack of critical engagement between the courts and the broadcast media because of the former's obstinate refusal to allow the telecast of court proceedings and commercial media's perceived propensity to misrepresent judicial processes in the name of commercially-viable images.

The touted interdependent relationship of the media and the courts then is put to the test when their seemingly divergent interests collide which is the case when broadcast media's drive for commercially-viable images goes against the criminal court's strict adherence to procedure and sober adjudication. Thus, authors have remarked that the "symbiotic relationship" between the media and the justice system is also "characterized by a tension that often surfaces around the issue of competing rights."[86] The competing rights at play, particularly in Philippine jurisdiction, are the rights to free speech and press as provided in Section 4, Article III of the Constitution and the right of the accused to a fair, speedy, and impartial trial in Section 14, Article III of the Constitution.

However, *Aquino*, *Estrada*, and *Ampatuan* so far show that in the scuffle between the cited rights, the rights of the accused have emerged as the clear victor.

IV. TOWARDS A REGIME FOR ELECTRONIC MEDIA ACCESS TO THE CRIMINAL COURTROOM

In a sense, the conflict has been rigged against the free speech and free press guarantees, under which broadcast media's right of access to the criminal courtroom may be subsumed. *Aquino*, *Estrada*, and *Ampatuan* introduced to this jurisdiction the notion of a presumptive prejudicial

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[84] Vicente V. Mendoza, *Courts and the Press as Partners for Good Government*, 85 PHIL. L. J. 985, 990 (2011).

[85] Center for Media Freedom and Responsibility, *PJR Reports*, *available at* http://www.cmfr-phil.org/flagship-programs/media-monitoring-and-review/pjr-reports (last visited Mar. 3, 2015).

[86] Pogorzelski & Brewer, *supra* note 41.

publicity ascribed to the presence of television cameras in the courtroom. This was brought about by the Court's insistent reliance on *Estes*, which it used to support a presumptive ban on live media coverage of criminal trials.

However, the absolute ban imposed on live coverage of criminal trials on the ground of presumptive prejudicial publicity can be challenged by an examination of both US and Philippine case law following *Estes*. A legal framework making live television coverage of criminal trials can, thus, be extricated from the restrictive discourse of *Aquino*, *Estrada*, and *Ampatuan*.

The route toward the proposed regime can be traced thus: (1) subsequent jurisprudence has departed from the presumptive prejudicial publicity assigned by *Estes* to cameras in the criminal courtroom; (2) the ban on live media coverage should be subjected to strict scrutiny; (3) the said prohibition was contemplated under a jury system; and (4) a technological and procedural reservation can be read into the rulings of the Court on the matter.

A. Dispelling the Prejudice on Publicity

The petitioner in *Estes*, who was convicted for swindling in a Texas court, claimed that he was deprived of his rights under the Fourteenth Amendment of the US Constitution[87] by the televising and broadcasting of his trial.[88] The US Supreme Court in the cited case pronounced that the electronic media coverage of the trial constituted an inherent prejudice to the due process rights of the accused.[89]

A number of subsequent jurisprudence cited by Puno in his dissenting opinion in *Estrada*, shows that American case law had long departed from the inherent prejudice doctrine in *Estes*.[90] Subsequently, in the overturned 2011 ruling of the Court in *Ampatuan* penned by former Associate Justice Conchita Carpio-Morales, the Court adopted the

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[87] U.S. CONST. amend. XIV, § 1. ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[88] Estes v. Texas, 381 U.S. 532 (1965).

[89] *Id.*

[90] *Estrada*, A.M. No. 01-4-03-SC, 360 SCRA 248, June 29, 2001 (Puno, *J.*, *dissenting*).

observation of the petitioners that *Estes* "does not represent the most contemporary position of the United States in the wake of latest jurisprudence."[91] The former magistrate saw it fit to depart from the position of the *Estes* court, in light of advances in communication technology and changing attitudes toward live media coverage of trials as will be discussed later.

In the 1981 case of *Chandler v. Florida*,[92] the police officers who were convicted of burglary argued that live television coverage of their trial infringed on their right to fair trial. The US Supreme Court, however, upheld their conviction and cited that the appellants did not "present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on that process[.]"[93] Hence, it held that televising a criminal trial does not automatically make the trial unfair to the defendant.[94]

Chandler, while reversing the earlier decision in *Estes*, also disavowed that the latter provided for a presumptive constitutional ban on live telecasting of trials.[95] Delivering the opinion of the US Supreme Court, then Chief Justice Burger refused to read into *Estes* a constitutional rule that broadcasting coverage is prohibited "in all cases and under all circumstances."[96] Lassiter also noted that:

> There were six opinions in Estes. Three opinions argued for reversal on grounds of prejudice due to television coverage, and three justices dissented in separate opinions. Justice Clark wrote the opinion of the Court, which sought a per se rule opposing cameras in the courtroom. Chief justice Warren wrote a concurring opinion, joined by justices Douglas and Goldberg, which agreed with justice Clark's desire to impose a per se ban, but relied on actual examples of prejudice by stressing the chaotic nature of the trial. Justice Harlan, explicitly opposing a per se ban, concurred with justice Clark subject to restricting the holding to sensationalized and chaotic trials such as the one presented on the facts before the court. **Thus, the intersection of common ground between the three concurring opinions makes the holding of Estes a fact specific due process rejection of**

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[91] *Ampatuan*, A.M. No. 10-11-5-SC, 652 SCRA 1, June 14, 2011.
[92] 449 U.S. 560 (1981).
[93] *Id.* at 578.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 573.

> **televised coverage and not a general ban based upon presumptive prejudice.**[97]

Moreover, in the 1982 case of *Globe Newspaper Co. v. Superior Court*[98] which involved a challenge to a Massachusetts state law that made it mandatory for state courts to exclude the press during the testimony of minors alleging sexual abuse, the US Supreme Court expressly placed the burden of proof on the defendant to demonstrate prejudice supposedly caused by a televised criminal trial.

The Court's reliance on *Estes* in *Aquino*, *Estrada*, and *Ampatuan* is also inconsistent with Philippine case law on the doctrine of prejudicial publicity. In the 1995 case of *People v. Teehankee*,[99] the Court explicitly stated that "[p]ervasive publicity is not *per se* prejudicial to the right of an accused to fair trial." The said case also stated, "The mere fact that the trial of appellant was given a day-to-day, gavel-to-gavel coverage does not *by itself* prove that the publicity so permeated the mind of the trial judge and impaired his impartiality."[100] Justice Puno, delivering the majority opinion in the case, further explained:

> For one, it is impossible to seal the minds of members of the bench from pre-trial and other off-court publicity of sensational criminal cases. The state of the art of our communication system brings news as they happen straight to our breakfast tables and right to our bedrooms. These news form part of our everyday menu of the facts and fictions of life. For another, our idea of a fair and impartial judge is not that of a hermit who is out of touch with the world.[101]

In *Webb*, as such, the Court stressed that "to warrant a finding of prejudicial publicity there must be allegation and proof that the judges have been unduly influenced, not simply that they might be, by the barrage of publicity."[102] As it stands then, alleging prejudicial publicity in this jurisdiction requires the presentation of proof on the part of the accused. As seen, the rulings in *Aquino*, *Estrada*, and *Ampatuan* are departures from the prevailing jurisprudence on prejudicial publicity insofar as they contemplate

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[97] Lassiter, *supra* note 33. (Emphasis supplied.)
[98] 457 U.S. 596 (1982).
[99] G.R. Nos. 111206-08, 249 SCRA 54, 105, Oct. 6, 1995.
[100] *Id.*
[101] *Id.*
[102] Webb v. De Leon, G.R. No. 121234, 247 SCRA 652, 692, Aug. 23, 1995.

a regime where prejudice can be presumed from the mere presence of television cameras in the criminal courtroom.

B. Judicial Ban as Policy Pronouncement

When the Court pitted the free speech and free press guarantees against the right of the accused in a criminal trial, its discourse departed from the policy context of the cited constitutional principles. In other words, it tended to draw attention away from its intervention in the conflict. This resulted in a decontextualized balancing of interests test that created a presumption against the free speech and free press guarantees, under which the right of public access to criminal trials is subsumed. Justice Puno, in his dissenting opinion in *Estrada*, lamented that "the majority has struck the balance between free press and fair trial much too much to the prejudice of the press and public right to information."[103]

For one, the positioning of the Court in the conflict is inconsistent with a well-settled rule in constitutional construction – *utmagis valeat quam pereat* – which demands that the Constitution be interpreted as a whole. The principle was articulated in *Civil Liberties Union v. Executive Secretary*[104], thus:

> It is a well-established rule in constitutional construction that no one provision of the Constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. Sections bearing on a particular subject should be considered and interpreted together as to effectuate the whole purpose of the Constitution and one section is not to be allowed to defeat another, if by any reasonable construction, the two can be made to stand together.[105]

Apparently, the Court in *Aquino*, *Estrada*, and *Ampatuan* had established a false dichotomy between the free speech and press guarantees and the constitutional rights of the accused. The maxim dissuades courts from resorting to an interpretation that would insist on the irreconcilability of the cited guarantees when confronted by an issue that cursorily pits them against each other. As such, reframing the debate on the matter of broadcast

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[103] *Estrada*, A.M. No. 01-4-03-SC, 360 SCRA 248, 297, June 29, 2001 (Puno, *J., dissenting*).

[104] G.R. No. 83896, 194 SCRA 317, Feb. 22, 1991.

[105] *Id.* at 330-331.

media's access to the criminal courtroom is appropriate since the key conflict is not between the free speech and press guarantees and the constitutional rights of the accused in a criminal trial.[106]

Bunker, to cite, underlined that the duty to provide a fair trial falls on the state and if it cannot do so, "the defendant is entitled by the sixth amendment to a dismissal of the charges against him."[107] In providing mechanisms to ensure a fair trial, however, the government is proscribed from curtailing other constitutionally protected rights such as the free speech and press guarantees.[108]

The cited author's observation ascribes to the courts a central function in the apparent conflict. He explained that "judges are regularly called on to make broad policy decisions based only on the narrow interests of the litigants."[109] As has been seen, the ban unilaterally imposed by the Court on the live coverage of trials amounted to a legislative judgment[110] curtailing the public's free speech and free press guarantees.

Hence, the Court in *Aquino*, *Estrada*, and *Ampatuan* bypassed the scrutiny structures set for policies tending to curtail the exercise of free speech and free press. It resorted to a balancing of interests that was eventually tilted against the free speech and press guarantees which were, in the first place, hurled into the fray without the benefit of strict scrutiny. The result of skirting the said scrutiny structure is the sweeping policy pronouncement in *Estrada*: When the fundamental rights of the accused and the constitutional guarantees of freedom of the press and the right to public information clash, the rights of the accused must be preferred to win.[111]

White Light Corp. v. City of Manila[112] defined strict scrutiny as "the standard for determining the quality and the amount of governmental interest brought to justify the regulation of fundamental freedoms." The said case also noted that the US Supreme Court has expanded the scope of strict scrutiny "to protect fundamental rights such as suffrage, **judicial access** and interstate travel."[113] The import of this judicial review template is that

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[106] BUNKER, *supra* note 24 at 10, *citing* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 624-626 (1978).

[107] *Id.*

[108] *Id.*

[109] *Id.* at 9.

[110] *Id.*

[111] *Estrada*, A.M. No. 01-4-03-SC, 360 SCRA 248, June 29, 2001.

[112] G.R. No. 122846, 576 SCRA 416, 421, Jan. 20, 2009.

[113] *Id.* at 438. (Emphasis supplied.)

the Court's ban on the telecast of criminal trials, insofar as it curtails the exercise of the free speech and free press, should come with a showing of a "compelling, rather than substantial governmental interest and on the absence of less restrictive means for achieving that interest."[114]

In *Globe Newspaper*, for instance, the US Supreme Court held that the "state must show a compelling government interest to successfully exclude the public and press from a trial."[115] The case also cited that the order preventing media access to the court must be "narrowly drawn" to serve a compelling government interest.[116] The US Supreme Court, thus, struck down the subject Massachusetts state law, finding that while the state's interest in protecting minors alleging sexual abuse was compelling, the mandatory closure rule was not narrowly molded to serve such government interest.[117]

Thus, the Court's ban on live electronic media coverage of criminal trials, which amounted to a policy pronouncement, should be dissected using the cited strict scrutiny structure. In doing so, the Court will have to abandon its prohibitive framework and, instead, endeavor to adopt a carefully designed regulatory regime for the live coverage of criminal proceedings. Only under such framework can the free speech and free press guarantees and the rights of the accused in a criminal trial be harmonized.

C. Absence of Juror Prejudice

Justice Puno in his dissenting opinion in *Estrada* and Justice Carpio-Morales in the overturned 2011 ruling in *Ampatuan* cautioned that the absolute ban on live electronic media coverage of criminal trials emerged from a regime under the jury system.[118] In *Ampatuan*, an argument was raised by petitioners that "[*Estes*] was borne out of the dynamics of a jury system, where the considerations for the possible infringement of the impartiality of a jury, whose members are not necessarily schooled in the law, are different from that of a judge who is versed with the rules of evidence."[119] The absence of jurors whose impartiality may be put to question, thus, militates against the adherence to the presumptive ban on televising criminal trials.

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[114] *Id.* at 421.
[115] Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).
[116] *Id.*
[117] *Id.*
[118] *Ampatuan*, A.M. No. 10-11-5-SC, 652 SCRA 1, June 14, 2011.
[119] *Id.* at 11.

A trial by jury guarantees to the accused in criminal trials in the US that his guilt can only be determined by a fair and impartial jury of his peers under the Sixth Amendment of the US Constitution.[120] In order to ensure the impartiality of members of the jury, courts in the US adopt certain institutionalized mechanisms. One such measure is the selection of jurors via *voire dire* which is defined as the "preliminary examination of prospective jurors to determine their qualifications and suitability to serve on a jury, in order to ensure the selection of fair and impartial jury."[121] The process involves asking potential jurors specific questions in order for the parties to the case to select an impartial panel.[122] US courts may also resort to the sequestration of the jury, especially in high profile and highly publicized cases. Sequestration involves the imposition of strict rules imposed to prevent jurors from being influenced by extraneous evidence or opinions.[123] In most cases, jurors are instructed to "decide the case based only on the information they learned during the trial."[124] Meanwhile, jurors who are found to have based their decision on an outside source or information may be accused of committing juror misconduct which may lead to a new trial.[125] As seen, the jury system engenders a compulsion on the part of US courts to institute mechanisms to control the information space of trial participants, particularly the jurors, in order to operationalize the Sixth Amendment guarantee of the accused in a US criminal trial.

The said compulsion exhibited by the Court in *Aquino*, *Estrada*, and *Ampatuan* may be considered out of context. A criminal case in this jurisdiction is necessarily presumed to be decided based solely on the judge's appreciation of the law and the facts of the case. It is then crucial to the proper functioning of the Philippine criminal justice system that a presumption lie in favor of the mental fortitude of a judge against extraneous influences that can seriously put his impartiality into question. As a particular application of the doctrine of presumption of regularity in the

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[120] U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.").

[121] The Free Dictionary, *Voire Dire*, *available at* http://legaldictionary.thefreedictionary. com/voir+dire (last visited Oct. 15, 2013).

[122] *Id.*

[123] Rottenstein Law Group LLP, *What does it mean when a jury is "sequestered"?*, *available at* http://www.rotlaw.com/legal-library/what-does-it-mean-when-a-jury-is-sequestered/ (last visited Oct. 15, 2013).

[124] *Id.*

[125] *Id.*

performance of official duties, the presumption of impartiality can only be impeached upon the submission of satisfactory proof of partiality by the party disputing it.[126] In *Teehankee*, Justice Puno reiterated, "Our judges are learned in the law and trained to disregard off-court evidence and on-camera performances of parties to a litigation. Their mere exposure to publications and publicity stunts does not *per se* fatally infect their impartiality."[127] The PJA, for instance, has released a Manual Guide for the Judiciary in Dealing with Media precisely to apprise judges of their duties in light of possible extensive media coverage of the cases docketed in their courts.[128] This is not to say, however, that judges are not actually influenced by the pervasive publicity attending their cases. The presumption of impartiality merely places the burden of alleging and proving that a trial judge in a criminal proceeding was unduly swayed by the media on the party decrying prejudicial publicity.

Insisting on a presumptive ban on cameras in the criminal courtroom, the Court in *Aquino*, *Estrada*, and *Ampatuan* has nurtured an anomaly since the prohibition relies on a presumption of partiality on the part of judges exposed to the influence of electronic media. In *Estrada*, the Court said, "Witnesses and judges may very well be men and women of fortitude, able to thrive in hardy climate, with every reason to presume firmness of mind and resolute endurance, but it must also be conceded that 'television can work profound changes in the behavior of the people it focuses on.'"[129] The Court in the cited ruling added: "The conscious or unconscious effect that such coverage may have on the testimony of witnesses and the decision of judges cannot be evaluated but, it can likewise be said, it is not at all unlikely for a vote of guilt or innocence to yield to it."[130]

As such, the prohibitive regime on broadcast media access to the criminal courtroom must yield to a framework in tune with the context of the Philippine criminal justice system which is largely dependent on the presumptions in favor of the fairness and impartiality of the trial judge. To insist on the current regime is to overturn the said presumption and destabilize the confidence necessary for the proper functioning of the criminal courts.

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[126] People v. Teehankee, G.R. Nos. 111206-08, 249 SCRA 54, 105, Oct. 6, 1995.
[127] *Id.* at 105.
[128] PHILIPPINE JUDICIAL ACADEMY, *supra* note 4.
[129] *Estrada*, A.M. No. 01-4-03-SC, 360 SCRA 248, 260, June 29, 2001.
[130] *Id.*

D. Reservations for Technology

Among the concerns raised in *Aquino*, *Estrada*, and *Ampatuan* were the tendency of broadcast media, which requires the use of oftentimes bulky and distracting recording equipment, to shatter the decorum necessary in conducting a criminal trial.[131] In *Estes*, the US Supreme Court highlighted that during the preliminary hearing, "cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel's table."[132] The observation of the US Supreme Court would then serve as artillery for the argument that allowing electronic media access to the criminal courtroom, aside from prejudicing the rights of the accused, will seriously impair the orderly administration of justice.

The Court in *Aquino*, however, denied that it is discriminating against broadcast media by imposing a ban on cameras and other recording devices inside the courtroom.[133] It said in the cited Resolution, "Courts do not discriminate against radio and television media by forbidding the broadcasting or televising of a trial while permitting the newspaper reporter access to the courtroom, since a television or news reporter has the same privilege, as the news reporter is not permitted to bring his typewriter or printing press into the courtroom."[134] In *Ampatuan*, the Court pronounced that the relevant guarantees supporting unhampered access to the courtroom is satisfied by allowing members of the press to attend the trial and reporting what they have observed afterwards.[135] *Estrada* also had a definitive declaration on the matter:

> A public trial is not synonymous with publicized trial; it only implies that the court doors must be open to those who wish to come, sit in the available seats, conduct themselves with decorum and observe the trial process. In the constitutional sense, a courtroom should have enough facilities for a reasonable number of the public to observe the proceedings, not too small as to render the openness negligible and not too large as to distract the trial participants from their proper functions, who shall then be totally free to report what they have observed during the proceedings.[136]

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[131] *See Aquino*, *supra* note 51.
[132] Estes v. Texas, 381 U.S. 532 (1965).
[133] BUNKER, *supra* note 24.
[134] *Id.*
[135] *Ampatuan,* A.M. No. 10-11-5-SC, Oct. 23, 2012.
[136] *Estrada*, A.M. No. 01-4-03-SC, 360 SCRA 248, 261, June 29, 2001.

The above pronouncements underline the pervading influence of the horror story of the US Supreme Court's experience in *Estes* on the Court's attitude toward the presence of cameras inside the courtroom. However, a closer inspection of the decision in the said case would reveal that the ban on broadcast media access to the courtroom was not meant to be *ad infinitum*.[137] Justice John Marshall Harlan II's concurring opinion in *Estes* is telling:

> [T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.[138]

Almost half a century has passed since *Estes* was promulgated by the US Supreme Court in 1965 as of this writing. Recording technology has advanced in such a rapid pace that the camera of an ordinary "smart phone" nowadays captures a higher resolution than the bulky television camera used during that period.[139] In 2001, Justice Puno in his dissenting opinion in *Estrada* already noted that "[w]ith the quantum leap in communications technology in the last twenty (20) years, TV cameras are now less intrusive and disruptive."[140] Moreover, surveillance technology, while managing to drastically reduce the size of a camera, is also responsible for the emergence of unobtrusive recording equipment.[141] This is accompanied by advances in wireless technology which has consigned to obsolescence the "snaking cables" that the *Estes* court complained about.

Clearly, the assault to judicial decorum assumed to be posed by the intrusive equipment used by broadcast media is unavailing as a justification for the continued prohibition against electronic media access to the courtroom in light of rapid advancements in recording technology.

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[137] Kyu Ho Youm, *Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning from Abroad?*, 2012 BRIGHAM YOUNG U. L. REV. 1989 (2012).

[138] *Id*, *citing* Estes v. Texas, 381 U.S. 532 (1965) (Harlan, *J.*, *concurring*).

[139] Mustafa Ziraba, *The Ever Evolving Smartphone Camera,* Sunday Monitor, July 23, 2013, *available at* http://www.monitor.co.ug/artsculture/Reviews/The-ever-evolving-smartphone-camera/-/691232/1923672/-/u8rv2rz/-/index.html.

[140] *Estrada*, A.M. No. 01-4-03-SC, 360 SCRA 248, 290, June 29, 2001 (Puno, *J.*, *dissenting*).

[141] William Deutsch, *Covert Security Cameras*, *available at* http://bizsecurity.about.com/od/physicalsecurity/a/Covert-Surveillance-Cameras.htm (last visited Oct. 15, 2013).

V. CAMERAS IN THE COURTROOM: A SURVEY

As seen, departing from the current prohibitive regime on electronic media coverage of criminal trials mainly involves abandoning presumptive ban on televised trials. Corollary to this is the recognition of an affirmative right of access of the electronic media to the criminal courtroom. Once the legal framework is realigned toward such end, critical engagement between the media and the courts can take place.

In the overturned 2011 ruling in *Ampatuan*, petitioners in that case underscored that *Estes* had long been abandoned by US courts, citing statistics "revealing that as of 2007 all 50 states, except the District of Columbia, allow television coverage with varying degrees of openness."[142] In Justice Puno's dissenting opinion in *Estrada*, meanwhile, the former magistrate cited that the findings of the 1990 experiment of the Judicial Conference of the US on using cameras in court showed that there was "no negative impact" on the conduct of trials.[143] Justice Puno, in this case, underlined the findings to support his argument that there is now a more liberal attitude toward telecasting trials in the US, which should serve as a cue for the Philippine Supreme Court to initiate its own survey among members of the Philippine judiciary. Specifically, the Federal Evaluation of the three-year program cited:

> - overall, attitudes of judges toward electronic media were neutral and became more favorable after experience under the experimental program;
> - generally, judges and attorneys who had experience with electronic media coverage reported observing small or no effects on camera presence on proceedings participants, courtroom decorum, or the administration of justice; and
> - overall, judges and court personnel reported that the media were very cooperative and complied with program guidelines and other restrictions that were imposed.[144]

Authors, moreover, observed that there is a trend among courts around the world towards allowing cameras in the courtroom in varying degrees. Youm, for one, noted that "the general trend among foreign and international courts examined is that they recognize the positive role of

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[142] *Ampatuan*, A.M. No. 10-11-5-SC, 652 SCRA 1, 11, June 14, 2011.

[143] *Estrada*, A.M. No. 01-4-03-SC, 360 SCRA 248, 295, June 29, 2001 (Puno, *J.*, *dissenting*).

[144] *Id.*

cameras to expand the public access to court proceedings."[145] To cite, Charles Schumer, author of the pending Sunshine in the Courtroom Act of 2013[146] in the US Senate, stressed that allowing cameras in the courtroom could help "demystify" court processes and contribute to the efficiency of the justice system.[147]

Meanwhile, a study on the "open justice principle" in England revealed that "technological advances have reduced the courtroom broadcasting's 'disruptive and distracting effect' to such an extent that it is not a valid ground for prohibiting filming of court proceedings."[148]

A. Protective Measures

Enabling broadcast media to access criminal trials have accorded courts of various jurisdictions a certain sophistication in handling the press, as opposed to the brusque approach of the presumptive ban regime currently in place in the Philippines. In a regime of presumptive openness, courts are compelled to constantly fine-tune policy judgments narrowly tailored to protect the rights of the accused and other compelling governmental interest. A survey of different guidelines of several courts shows that protective measures generally fall under the following categories: technological, procedural, and evidential.

1. Technological Measures

Technological measures involve the use of recording equipment inside the courtroom as well as the eventual broadcast of the audio-visual recordings. Such measures are intended to preserve judicial decorum and mitigate broadcast media's perceived propensity to sidestep ethics and fair play to accommodate drama and spectacle.

The courtroom of the Canadian Supreme Court, for instance, do not permit the use of outside cameras.[149] At present, its courtroom is equipped with four stationary cameras that are voice-activated and pre-fixed to focus on the person speaking.[150] An agreement between the Canadian Public Affairs Channel and the Canadian Supreme Court, meanwhile,

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[145] Youm, *supra* note 137, at 2019.
[146] S. 405, 113th Cong. (2013). Sunshine in the Courtroom Act of 2013.
[147] Pogorzelski & Brewer, *supra* note 41.
[148] Youm, *supra* note 137, at 2023.
[149] *Id.*
[150] *Id.*

provides that the broadcast feed should be available to other television networks that are mandated to respect all non-broadcast orders.[151]

Recordings of the proceedings of the Supreme Court of the United Kingdom, on the other hand, are mandated to be used only in news and current affairs programs and cannot be used for entertainment, satires, party political broadcasts, and advertising or promotion.[152] Also, a Scottish court which permitted the filming of a sentencing in 2012 struck an agreement with broadcasters to give a short delay in the broadcasting of the recordings of the event "to allow for editing in the event of any outburst from the dock or the public gallery."[153] The Superior Court of Connecticut, furthermore, prohibits media entities to broadcast a criminal defendant who has not been made subject to an order for electronic coverage and close-ups of documents of counsel, the clerk, or judge.[154]

The Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey, moreover, provides that only recording devices that do not produce a distracting sound, either from the equipment or its operation, are allowed inside the courtrooms.[155] In addition, the said Guidelines allow only two portable electronic television cameras and one audio recording device in any proceeding in any court in New Jersey.[156] Courts, in the said state, may also require proof that the video recording equipment to be used meets the standards set by the Code.[157]

By contrast, the Ohio Franklin County Rules of Practice of the Court of Common Pleas provide that artificial lighting devices other than those normally used in the courtroom are not allowed.[158] The cited rules also prohibit the use of visible audio recording devices except upon the prior permission of the trial judge.[159]

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[151] *Id.*

[152] UK MINISTRY OF JUSTICE, PROPOSALS TO ALLOW THE BROADCASTING, FILMING, AND RECORDING OF SELECTED COURT PROCEEDINGS 9-10 (2012).

[153] *Id.*

[154] CONN. PRACTICE BOOK, §1-11A(c)(1) & (3).

[155] New Jersey Courts, *Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey ,available at* http://www.judiciary.state.nj.us/ rules/appcamera.htm (last visited Oct. 15, 2013).

[156] *Id.*

[157] *Id.*

[158] OHIO FRANKLIN COUNTY RULES OF PRACTICE OF THE COURT OF COMMON PLEAS, Rule 101.04 (B).

[159] *Id.*

2. Procedural Measures

Procedural measures entail identifying specific proceedings that the broadcast media can and cannot cover as well as preserving certain prerogatives to judges aimed primarily at protecting due process rights. Such measures also involve processes set to exclude the media from certain proceedings upon showing that live telecasts would cause specific prejudice to parties seeking closure.

In New Zealand, for one, broadcasting most parts of court proceedings is allowed. Media networks are required to submit an application in advance, indicating what part of the proceedings they are planning to cover and the program where the recordings will be shown.[160] The 2013 California Rules of Court, meanwhile, provides that television coverage may be permitted only upon a written order of the judge.[161] To request for a written order, media entities are required to submit a request at least five days before the proceeding that they intend to cover.[162] In the Superior Court of Connecticut, in addition, the court administrator maintains the flexibility to approve or disapprove a media organization and may require entities requesting permission to cover its proceedings to show, among others, that it regularly disseminates news by providing broadcasts and that it adheres to the Society of Professional Journalists Code of Ethics.[163]

Procedural protective measures involve limiting media coverage to specific proceedings. In some states in the US, for instance, live media coverage is only permitted in the appeals courts.[164] In the Canadian Supreme Court, on the other hand, the Chief Justice is empowered to select the case that can be televised.[165] The Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings, meanwhile, expressly prohibit the electronic coverage of several matters such as child custody, support, motions to suppress evidence, and proceedings involving trade secrets, among others.[166]

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[160] UK MINISTRY OF JUSTICE, *supra* note 152.

[161] CAL. RULES OF COURT, Rule 1.150(e).

[162] CAL. RULES OF COURT, Rule 1.150(e)(1).

[163] UK MINISTRY OF JUSTICE, *supra* note 152.

[164] New Jersey Courts, *supra* note 155.

[165] Youm, *supra* note 137.

[166] MISS. RULES FOR ELECTRONIC AND PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS (2003), Rule 3(c).

Nearly all the guidelines examined also reserve to the judge the discretion to terminate or limit the live coverage of their proceedings if the court finds it necessary to protect the interests of the litigants and witnesses or to ensure the orderly conduct of the proceedings. Ordinarily, however, seeking the cessation of the electronic coverage of the proceedings is the burden of the party decrying perceived prejudice who may raise the same in a closure or exclusion proceeding. In the Mississippi rules, to cite, any party may object to electronic coverage via written motion at least 15 days prior to the proceeding that will be subject to coverage.[167]

3. Evidential Measures

Evidential measures, lastly, involve restricting media access in light of the nature of the evidence being presented in court. These may involve prohibiting the media from broadcasting the testimonies of certain types of witnesses and inadmissible evidence. Evidential protective measures are set mainly to prevent harm that may be inflicted on a trial participant and impair judicial fact-finding.

The International Criminal Court (ICC), for instance, may find special circumstances that require that certain proceedings be closed for the protection of victims and witnesses and their participation in the proceedings.[168] The ICC Trial Chamber, similarly, may order such closure "to protect confidential or sensitive information to be given in evidence."[169]

The Ohio Franklin County Rules of Practice in the Court of Common Pleas, meanwhile, prohibit the televising of victims of sexual assault and undercover police officers.[170] The trial judge in the cited court also has the discretion to limit or prohibit photographing or televising any victim, witness, and counsel or his work, upon objection.[171] The New Jersey Code likewise empowers trial judges to prohibit media coverage upon a finding that it would lead to a "substantial increase in the threat of or the potential for harm to a participant in the case."[172]

Several courts also prohibit the presentation of the audio-visual recordings of the media as evidence. The New Jersey Code, for instance,

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[167] *Id.*

[168] Youm, *supra* note 137.

[169] *Id.*

[170] OHIO FRANKLIN COUNTY RULES OF PRACTICE OF THE COURT OF COMMON PLEAS, Rule 101.07 (B).

[171] *Id.*

[172] New Jersey Courts, *supra* note 155.

allows members of the print media to record the proceedings but provides that such audio recording cannot be used to contest the accuracy of the official court record nor can it be presented as an official transcript of the proceedings.[173]

B. Close Up: The Aborted Philippine Guidelines

As already discussed, the Supreme Court in 2012 overturned what could have been a radical paradigm shift premised on the 2011 ruling in *Ampatuan*. The cited ruling set guidelines for live media coverage of a criminal trial which apparently drew from the rules adopted by foreign courts operating under a regime of presumptive openness. Far from perfect because of the lack of experimentation and experience on the part of the courts, the guidelines could have spurred a much needed critical engagement between the broadcast media and the courts.

The abandoned Philippine guidelines, as seen, were more or less consistent with the rules adopted by foreign courts allowing televised trials. The cited guidelines similarly institute protective measures that can be categorized in the same manner.

1. Technological Measures

The technological protective measures set by the guidelines mandated:

> A single fixed compact camera shall be installed inconspicuously inside the courtroom to provide a single wide-angle full-view of the sala of the trial court. No panning and zooming shall be allowed to avoid unduly highlighting or downplaying incidents in the proceedings. The camera and the necessary equipment shall be operated and controlled only by a duly designated official or employee of the Supreme Court. The camera equipment should not produce or beam any distracting sound or light rays. Signal lights or signs showing the equipment is operating should not be visible. A limited number of microphones and the least installation of wiring, if not wireless technology, must be unobtrusively located in places indicated by the trial court.[174]

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[173] *Id.*

[174] *Ampatuan*, A.M. No. 10-11-5-SC, 652 SCRA 1, 14-15, June 14, 2011.

Moreover, the guidelines sought to ensure that the trial would be unencumbered by possible distractions that may be caused by the operation of the media's recording equipment. As such, the guidelines mandated:

> The hardware for establishing an interconnection or link with the camera equipment monitoring the proceedings shall be for the account of the media entities, which should employ technology that can (i) avoid the cumbersome snaking cables inside the courtroom, (ii) minimize the unnecessary ingress or egress of technicians, and (iii) preclude undue commotion in case of technical glitches.[175]

To ensure compliance, the guidelines provided that the court shall require media entities to manifest that "they have the necessary technological equipment and technical plan"[176] to carry out the guidelines.

2. Procedural Measures

The guidelines also required media entities to file a letter of application before the court with an undertaking that "they will faithfully comply with the guidelines and regulations and cover the entire proceedings until promulgation of judgment."[177]

It also provided that the proceedings should be broadcasted in its entirety, except portions covered by Section 21, Rule 119 of the Rules of Court where the judge may, *motu proprio*, exclude the public from the trial if the evidence to be produced is offensive to decency or public morals.

3. Evidential Measures

The guidelines, meanwhile, enabled the trial court to exclude, upon motion, prospective witnesses from being televised. It cited three instances when exclusion may be ordered: (1) when there are unresolved identification issues; (2) when there are issues which involve the security of witnesses; and (3) when there issues which involve the integrity witnesses' testimony.[178] The guidelines cited as examples of such instances the dovetailing of corroborative testimonies and the minority of a witness.[179]

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[175] *Id.* at 15.
[176] *Id* at 14.
[177] *Id.*
[178] *Ampatuan*, A.M. No. 10-11-5-SC, 652 SCRA 1, 14, June 14, 2011.
[179] *Id.*

In special circumstances, the court can order the media to pixelize the image of the witness or mute the audio output with the consent of the parties.[180]

C. Caveat on Restricting the Contents of Broadcasts

Notable in the abandoned Philippine guidelines are reservations made on the power of the court to control the manner by which the audio-visual recordings of the trial should be broadcast. To wit:

> (f) To provide a faithful and complete broadcast of the proceedings, no commercial break or any other gap shall be allowed until the day's proceedings are adjourned, except during the period of recess called by the trial court and during portions of the proceedings wherein the public is ordered excluded.
>
> (g) To avoid overriding or superimposing the audio output from the on-going proceedings, the proceedings shall be broadcast without any voice-overs, except brief annotations of scenes depicted therein as may be necessary to explain them at the start or at the end of the scene. Any commentary shall observe the *sub judice* rule and be subject to the contempt power of the court;
>
> (h) No repeat airing of the audio-visual recording shall be allowed until after the finality of judgment, except brief footages and still images derived from or cartographic sketches of scenes based on the recording, only for news purposes, which shall likewise observe the *sub judice* rule and be subject to the contempt power of the court[.][181]

The survey of guidelines adopted by foreign courts show that there has been hesitation to regulate the conduct of the media once the audio-visual recordings have left the court, so to speak. Some foreign courts impose sanctions in the form of fines while some are totally silent on the penalties to be imposed in case of breach by the media of the regulations imposed by the said courts.

Hence, the guidelines treaded disputed grounds and could have entered another phase of the perceived conflict between free press and fair trial – this time involving regulation of out-of-court speech. However, this discussion is better threshed out in a different paper. What is significant, for

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[180] *Id.*

[181] *Id.* at 16.

the purpose of this paper, is recognition that the aborted guidelines and their unrealized application could have further pushed the boundaries within which Philippine courts and the media have traditionally confined their engagement.

VI. CONCLUSION

A regime of presumptive openness could take the symbiotic relationship between the media and the courts to bold new directions – a media savvy judiciary which is sensitive to the demand for public involvement in the criminal justice system and a media keen to the intricate contours of the law.

What is sure is that such scenario is impossible without the courage to take the first steps toward the fog of uncertainty. While, indeed, the broadcast media is beset by various problems that have engendered distrust toward the institution, it is in a continuous struggle toward reform. Opening the courts to the gaze of the media can, thus, be seen not as a rude intrusion into the sanctum of criminal litigation, but as one of the means by which media reform could be achieved – the courts being a partner in the endeavor.

The Court, thus, must be daring enough to experiment to come up with rules that can truly harmonize the free speech and free press guarantees and the rights of the accused. It will not be alone in this endeavor since various courts around the world have already opened their doors to the broadcast media. In this context, the Court's experiences under a regime of presumptive openness would further enrich the discourse.

Ultimately, this paper calls for the critical engagement between the courts and the media, both of which are institutions involved in giving flesh and blood to the democratic framework of Philippine society.

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PHILIPPINE LAW JOURNAL

VOLUME 89 APRIL 2015 NO. 2

ISSN 0031-7721

PHILIPPINE LAW JOURNAL
Published by the College of Law, University of the Philippines,
Diliman, Quezon City, Philippines

VOLUME 89 APRIL 2015 NO.2

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ACKNOWLEDGMENTS

The Editorial Board of the PHILIPPINE LAW JOURNAL Volume 89 would like to acknowledge the editorial assistants for this volume. Participants in the PLJ Editorial Assistants Program help out the members of the Editorial Board in their regular editorial and administrative tasks. Because membership in the JOURNAL is purely on the basis of academic qualifications and the annual competitive examinations, participants in the Editorial Assistants Program are not members of the publication. However, participation in said program is especially encouraged for students interested in membership in the Board, as it exposes them to the work of student editors.

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