

**JUSTICE IS BLIND BUT SHE LISTENS TO THE RADIO:
PROCEDURAL REMEDIES TO SAFEGUARD THE RIGHTS OF THE
ACCUSED FROM PREJUDICIAL MEDIA PUBLICITY***

*Oscar Franklin B. Tan***

“The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”

—Justice Oliver Wendell Holmes, *Patterson v. Colorado*,¹ cited in *Re: Coverage Estrada*²

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** Chair, PHILIPPINE LAW JOURNAL (2005). LL.M., Harvard Law School (International Finance Concentration), Class Commencement Speaker (2007). LL.B., University of the Philippines; First Violeta Calvo-Drilon-ACCRALAW Scholar for Legal Writing (2005). First Freshman and First Two-Time Awardee, Justice Irene R. Cortes Prize for Best Paper in Constitutional Law (2002, 2005). First Awardee and Runner-Up, Justice Vicente V. Mendoza Prize for Best Critical Analysis of a Supreme Court Decision (2005). Professor Myres S. McDougal Prize for Best Paper in Public International Law and Jurisprudence (2005). Awardee, Professor Araceli T. Baviera Prize for Best Paper in Civil Law (2003). 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). First Awardee, Professor Gonzalo T. Santos, Jr. Prize for Best Paper in Securities Law (2005).

B.S. Management Engineering / A.B. Economics Honors, *cum laude*, Ateneo de Manila University (2001). Associate, Angara Abello Cruz Concepcion & Regala Law Offices (ACCRALAW). Member, Sigma Rho Fraternity.

¹ 205 U.S. 454, 462 (1907).

² Re: Request Radio-TV Coverage of the Trial in the Sandiganbayan of the Plunder Cases Against the Former President Joseph E. Estrada, A.M. No. 01-4-03-SC, 360 SCRA 248, 260, Jun. 29, 2001 [hereafter, Re: Coverage (Estrada)].

"Our judges are high-minded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion."

—Justice Tom Clark, *Estes v. Texas*, quoted in *Re: Coverage Estrada and Aquino*³

"The notion that 'justice must satisfy the appearance of justice' is an imposition by the citizenry... upon the courts of a high and uncompromising standard in the proper dispensation of justice."

—Justice Florida Ruth Romero, *Go v. Court of Appeals*⁴

"A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field ... [It] guards against the miscarriage of justice by subjecting in the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

—Justice Tom Clark, *Sheppard v. Maxwell*,⁵ quoted in *People v. Teehankee*⁶

"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."

—Justice Reynato Puno, *People v. Teehankee*⁷

³ 381 U.S. 532, 549 (1965), cited in *Re: Coverage (Estrada)*, A.M. No. 01-4-03-SC, 360 SCRA 248, 273, Jun. 29, 2001; Court En Banc Resolution October 22, 1991 *Re: Live TV and Radio Coverage of the Hearing of President Corazon C. Aquino's Libel Case*, [hereafter, *Re: Coverage (Aquino)*].

⁴ G.R. No. 106087, 221 SCRA 397, 409, Apr. 7, 1993, quoting *Offut v. United States*, 99 L Ed 11, 16 (1954).

⁵ 384 U.S. 333 (1966).

⁶ G.R. No. 112206, 249 SCRA 54, 104, Oct. 6, 1995.

⁷ *Id.* at 105.

"Petitioner needs to offer more than hostile headlines to discharge his burden of proof."

—Justice Reynato Puno, *Estrada v. Desierto*⁸

Due process must "hear before it condemns"⁹ but even the stoutest voice can be drowned by the "hooting throng."¹⁰

When former President Joseph "Erap" Estrada walked into the courtroom on the first day of his plunder trial, a phalanx of photographers was waiting, jampacked into a two-meter wall barely two feet in front of his front row bench. He sat down without a word, trying to ignore the series of flashes mere inches from his nose.

In the back of the room, Plunder Watch representatives took their places, ready to start a wave of murmurs or groans with each perceived delay. Outside, rallyists began their vigils for justice—both for the version that demanded Estrada's immediate conviction and the other that denounced "demo-crazy" and "Badoy justice."¹¹

Justice Anacleto Badoy walked in almost two hours late, then spent another half hour explaining why. He eased into an exaggerated performance, strutting behind the bench as though a circus ringmaster, interrupting testimony to ask the sheriff to fetch electric fans, and making a big show of suspending the trial to have counsel write down their weekly schedules. He even stopped the clock *sine die*—drawing a mischievous stage whisper from defense counsel Rene Saguisag that such only applied to the legislature and certainly not on the first day.

When the day finally ended—without even seeing the end of the first witness's testimony—Estrada ran the gauntlet of news crews and TV cameramen waiting outside.

This author entered that courtroom just a few steps behind Estrada, and could not help visualizing it from his perspective—never mind

⁸ G.R. No. 146710, 353 SCRA 452, 528, Mar. 2, 2001.

⁹ *Dartmouth College v. Woodward*, 17 U.S. (4 Wheaton) 518, 581 (1819). The classic words of Daniel Webster.

¹⁰ *Estrada*, 353 SCRA at 530. The specific term used by Justice Reynato Puno.

¹¹ Seen in rallyists' placards during this author's drive to the Sandiganbayan.

that he was one of the many young students who took to the streets in protest during EDSA II.

The Court had earlier ruled on Estrada's Motion for Reconsideration:

The investigation of the petitioner is a natural media event... But what is important for the petitioner is that his constitutional rights are not violated... For this reason, we have warned the respondent Ombudsman in our Decision to conduct petitioner's preliminary investigation in a circus-free atmosphere. Petitioner is represented by brilliant legal minds who can protect his right as an accused.¹²

How can this cavalier ruling be reconciled with the sanctity accorded to the rights of the accused by no less than the Constitution and the spectacle that was the opening of Estrada's trial?¹³

SYNOPSIS

"Accusation is not, according to the fundamental law, synonymous with guilt."¹⁴ With those words, Justice Enrique Fernando demanded no less than moral certainty to sustain a criminal conviction in this country. Indeed, more than half of the Bill of Rights protects a person facing criminal investigation or prosecution,¹⁵ warding against evils from coercion by the State to simple delay.

The right to trial before a cold, impartial judge¹⁶ is perhaps the most fundamental of these sacred rights, one that springs from the very essence of the judicial process. The constitutional aegis raises itself over even the most despicable vermin, staying the government's sword until the villain speaks and is heard. Today, however, the venerable protector is beset not by the overzealous swordsman, but by the television camera's all-seeing eye and the newspaper headline's one-phrase omniscience. The modern age's threats slip through the mighty constitutional shield, intangibly,

¹² *Estrada v. Desierto*, G.R. No. 146710, 356 SCRA 108, 154, Apr. 3, 2001 (Motion for Reconsideration) (hereinafter "Estrada Motion for Recon").

¹³ CONST. art. III, § 14(2). "[T]he accused shall... have a speedy, impartial and public trial."

¹⁴ *People v. Dramayo*, G.R. No. 32806, 42 SCRA 59, 64, Oct. 29, 1971.

¹⁵ ISAGANI CRUZ, CONSTITUTIONAL LAW 295 (2000 ed).

¹⁶ *Luque v. Kayanan*, G.R. No. 26826, 29 SCRA 165, 178, Aug. 29, 1969

unconsciously, and subtly. "That these influences are done indirectly by technology does not lessen their prejudicial impact on the justice system."¹⁷

Unfortunately, nothing in the Constitution or Rules of Court even mentions these new perils. And while wealthy, influential defendants in high-profile cases with "brilliant legal minds" may appear to have no need of the judge's assistance to protect them from undue publicity, the reality is that for every Estrada, there are countless other accused of far humbler means. There are four main cases of extreme media publicity, and only in one can the accused be presumed to be rich and powerful:

1. The crime is so heinous and shocking
2. The victim is a celebrity
3. The accused is a celebrity
4. The crime involves such sordid details that has a voyeuristic attraction¹⁸

This paper seeks to highlight the need for formal, explicit procedural remedies to address prejudicial publicity in a criminal proceeding. The first part shall trace the key Philippine decisions on the subject. The second shall explore related doctrines, and contrast the reasoning applied in these and to prejudicial publicity. The third shall explore philosophical, psychological and even anecdotal grounds for recognizing prejudicial publicity, as well as persuasive American jurisprudence. Finally, the last part shall discuss possible remedies to better secure the rights of the accused against prejudicial public opinion as amplified by mass media in today's electronic society.

The saying goes, "Sticks and stones may break my bones, but words may never hurt me." In summary, this paper seeks to prove that words may be the twenty-first century's most dangerous threat of all.

I. COURT'S HISTORICAL TREATMENT OF THE "HOOTING THRONG."

Estrada confidently justified:

¹⁷ Christo Lassiter, *The Appearance of Justice: TV or No TV—That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 991 (1996).

¹⁸ Robert Hardaway & Douglas Tumminello, *Pretrial Publicity in Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U.L. REV. 39, 89 (1996).

The cases are not wanting where an accused has been acquitted despite pervasive publicity.¹⁹

The original opinion pointed out that many public figures from O.J. Simpson to Imelda Marcos were acquitted despite tremendous publicity,²⁰ but the above quote after the motion for reconsideration actually cited only one case. In *People v. Ritter*, the Court reversed the conviction of an Austrian who left a vibrator inside a young girl's vagina while fondling her (and while masturbating a young boy), leading to her death by peritonitis:

We are aware of the wide publicity given to the plight of Rosario Baluyot and how her death exemplified starkly the daily terrors that most street children encounter as they sell their bodies in order to survive.... It is with distressing reluctance that we have to seemingly set back the efforts of Government to dramatize the death of Rosario Baluyot as a means of galvanizing the nation to care for its street children. It would have meant a lot to social workers and prosecutors alike if one pedophile-killer could be brought to justice so that his example would arouse public concern, sufficient for the formulation and implementation of meaningful remedies....

...We have to acquit the appellant because the Bill of Rights commands us to do so. We, however, express the Court's concern about the problem of street children....²¹

The Court nevertheless handed down PHP30,000 in civil damages, and had the "thrill seeking alien" deported. However, it must be emphasized that *Ritter* mentions publicity only in the above *dictum*—and only once. Publicity was *not* a big issue in that case.

A more diligent backtracking along the jurisprudential trail reveals that the first case to directly involve prejudicial publicity came in 1959. *Cruz v. Salva*²² upheld the City Fiscal of Pasay's right to conduct a reinvestigation, but spared no words publicly reprimanding him for turning it into a circus. Fiscal Francisco Salva held this reinvestigation in the Municipal Court's

¹⁹ Estrada Motion for Recon, G.R. No. 146710, 356 SCRA 108, Apr. 3, 2001, citing *People v. Ritter*, G.R. No. 88582, 194 SCRA 690, Mar. 5, 1991.

²⁰ G.R. No. 146710, 353 SCRA 452, 528 n.131, Mar. 2, 2001.

²¹ *Ritter*, 194 SCRA at 723.

²² 105 Phil 1151 (1959).

session hall, then invited reporters to participate in the questioning. The Court stated in disbelief:

It seemed as though the criminal responsibility for the killing of Manuel Monroy which had already been tried and finally determined by the lower court and which was under appeal and advisement by this Tribunal, was being retried and redetermined in the press, and all with the apparent place and complaisance of respondent [fiscal].²³

Incidentally, no less than President Ramon Magsaysay ordered the reinvestigation.

The first case to squarely rule on prejudicial publicity came in 1970, after the "Jabidah massacre." *Martelino v. Alejandro*²⁴ acknowledged that a court-martial's president had read newspaper reports regarding the alleged shooting of Muslim recruits undergoing training in Corregidor. The Court discussed landmark American cases involving reversals of convictions due to prejudicial publicity,²⁵ but held them "disparate" from the case. Had there been a "trial by newspaper," the Court reasoned, it focused on the government's responsibility for the "massacre" and not on the defendants' guilt. The Court added that the court martial's suspension had addressed any undue influence, and that the trial could resume since the publicity had abated.

Martelino laid down the present rule that the fear of prejudicial publicity is insufficient; "there must be allegation and proof that the judge has been unduly influenced, not simply that he might be, by the 'barrage' of publicity."²⁶

However, carefully note the Court's own description of the media "barrage:"

The petitioner's counsel referred to... the July 29, 1969 issue of the Daily Mirror and cited other news reports to the effect that "coffins are being prepared for the President in Jolo," that

²³ *Id.* at 1159.

²⁴ G.R. No. 30894, 32 SCRA 306, Mar. 25, 1970, *citing* Cruz v. Salva, 105 Phil 1151.

²⁵ *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The last two were also cited by *Re: Coverage Estrada*, A.M. No. 01-4-03-SC, 360 SCRA 248, 259, Jun. 29, 2001.

²⁶ *Go v. Court of Appeals*, G.R. No. 106087, 221 SCRA 397, Apr. 7, 1993, *citing* *Martelino v. Alejandro*, G.R. No. 30894, 32 SCRA 106, Mar. 25, 1970.

according to Senator Aquino "massacre victims were given sea burial," and that Senator Magsaysay, opposition Vice President candidate, had gone to Corregidor and "found bullet shells." In addition the petitioners cite in this Court a Manila Times editorial of August 26, 1969 which states that "The Jabidah issue was bound to come up in the course of the election campaign..." The petitioners argue that under the circumstances they could not expect a just and fair trial.²⁷

The short, rough jurisprudential trail has few other stops before *Estrada. Go v. Court of Appeals* involved Eldon Maguan's shooting inside his car in traffic. It reiterated the *Martelino* test, made it more explicit, and put it in the context of previous rulings that held that prejudice is not to be presumed.²⁸ The case also featured a motion to transfer the venue outside Metro Manila, a remedy described in *Martelino*, which was denied by the lower courts because only the Supreme Court had the authority to grant it.²⁹ The Court, in turn, noted that Rolito Go's Motion for Reconsideration no longer requested the transfer of venue. It also frowned on his lawyers' dilatory tactics, and observed how the case records had ballooned to 1,523 pages in six months.³⁰

The Maguan shooting did not have the Jabidah massacre's political overtones, but it was no less publicized because it took place in the middle of busy Wilson Street in San Juan. It even became a *Pugad Baboy* comic strip's subject,³¹ where a driver refused to be intimidated by another sporting a "Progun" sticker, but immediately turned when he saw a sticker that read, "*Utol ko si Rolito Go.*"³²

*Webb v. De Leon*³³ involved Carmela Vizconde's brutal rape-slay and her mother and younger sister's killing, and alleged prejudicial publicity during the preliminary investigation. The Court simply said that these and other allegations were never raised during the investigation itself, and

²⁷ *Id.* at 111.

²⁸ *Go*, 221 SCRA 397 at 410, quoting *Aparicio v. Andal*, G.R. No. 86587, 175 SCRA 569, Jul. 25, 1989, in turn citing *Pimentel v. Salanga*, G.R. No. 27934, 21 SCRA 160, Sep. 18, 1967.

²⁹ CONST. art. VIII, § 5(4).

³⁰ Go's lawyers were later fined PHP500 each after their motion for reconsideration. G.R. No. 106087, 221 SCRA 397, Apr. 7, 1993.

³¹ Literally translated as "Nest of Pigs," *Pugad Baboy* is a popular series by cartoonist Pol Medina, set in a neighborhood populated only by overweight people.

³² My brother is Rolito Go.

³³ G.R. No. 121234, 247 SCRA 652, Aug. 23, 1995, citing *Martelino v. Alcjandro*, G.R. No. 30894, 32 SCRA 106, Mar. 25, 1970.

Hubert Webb had been given a month to do so. It reiterated the *Martelino* test, and found no proof of bias in the investigation's resolution or manner. It noted the assigned investigators' experience and seniority, and that the accused's motions were generously accommodated. It further quoted another "seminal" American case,³⁴ which upheld trials' historic openness and the rights to free speech, press, and assembly.

The Court specifically referred to the case as the "Vizconde case" and the same was labeled the "Vizconde massacre" in the media. It received as much publicity as the previous cases, this time because the accused was Senator Freddie Webb's son. For a time, "Vizconde" even became a college basketball cheer against the accused's brother Jason Webb and his team, the De La Salle University Green Archers.

With the case going to trial, then Justice Reynato Puno closed:

[W]hile the light of publicity may be a good disinfectant of unfairness, too much of its heat can bring to flame an accused's right to fair trial. Without imposing on the trial judge the difficult task of supervising every specie of speech relating to the case at bar, it behooves her to be reminded of the duty of a trial judge in high profile criminal cases to control publicity prejudicial to the fair administration of justice.³⁵

*People v. Teehankee*³⁶ involved Roland Chapman and Maureen Hultman's shooting, and is the only case to date where the accused appealed his conviction to the Supreme Court on the ground of prejudicial publicity:

[A]ppellant blames the press for his conviction as he contends that the publicity given to his case impaired his right to an impartial trial. He postulates there was pressure on the trial judge for high-ranking government officials avidly followed the developments in the case (as no less than Vice-President Joseph Estrada and then Department of Justice Secretary Franklin Drilon attended some of the hearings and, President Corazon Aquino even visited victim Maureen Hultman while she was still

³⁴ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), citing *Offut v. United States*, 99 L. Ed. 11 (1954).

³⁵ *Webb v. De Leon*, G.R. No. 121234, 247 SCRA 652, 692-693, Aug. 23, 1995, citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

³⁶ G.R. No. 112206, 249 SCRA 54, Oct. 6, 1995, citing *Martelino*, 32 SCRA 106.

confined at the hospital). He submits that the trial judge failed to protect him from prejudicial publicity and disruptive influences which attended the prosecution of the cases. He claims there were placards displayed during the hearing of the cases, spectators inside the courtroom clapped their hands and converted the proceedings into a carnival. In another instance, he was allegedly given the "finger sign" by several young people while he was leaving the courtroom on his way back to his cell.³⁷

The Court again reiterated *Martelino*, found no actual prejudice, and enumerated how the judge had ordered placards put away, media photographers excluded after they took photos, cameramen to desist from live coverage, and admonished the crowd for reacting during the proceedings. The judge even "declared that he could not be dissuaded by public sentiments," and the Court itself denied the judge's voluntary inhibition. The Court added an interesting statement as well:

Parenthetically, appellant should be the last person to complain against the press for prejudicial coverage of his trial. The records reveal he presented in court no less than seven (7) newspaper reporters and relied heavily on selected portions of their reports for his defense. The defense's documentary evidence consists mostly of newspaper clippings relative to the investigation of the case at bar and which appeared to cast doubt on his guilt. The press cannot be fair and unfair to appellant at the same time.³⁸

The Chapman-Hultman shooting was likewise highly publicized because it took place within the posh Dasmariñas Village in Makati, the accused was a former Chief Justice's son, and the victim was an American diplomat's son. *Teehankee* admitted that judges cannot be shielded from "day-to-day, gavel-to-gavel"³⁹ media publicity, not even while watching television in their own bedrooms. Nevertheless, Justice Puno emphatically stated:

Our judges are learned in the law and trained to disregard off-court evidence and on-camera performances of parties to a

³⁷ *Id.* at 104.

³⁸ *Id.* at 108.

³⁹ See text *infra* accompanying note 7.

litigation. Their mere exposure to publications and publicity stunts does not per se fatally infect their impartiality.⁴⁰

Finally, the jurisprudential excursion ends with *Estrada v. Desierto*,⁴¹ which ruled on President Joseph Estrada's resignation following the EDSA II rallies. The Court answered the complaint of bias against the investigating Ombudsman by reiterating the *Martelino* test as expounded in *Webb* and *Teehankee*. Then Justice Puno wrote:

Petitioner needs to offer more than hostile headlines to discharge his burden of proof. He needs to show more weighty social science evidence to successfully prove the impaired capacity of a judge to render a bias-free decision.⁴²

The ruling was reiterated after a motion for reconsideration, and the Court emphasized that it had instructed the Ombudsman to maintain a "circus-free atmosphere" and that Estrada was represented by "brilliant legal minds"⁴³ more than capable of protecting his rights.

Far less dramatic than Teehankee, Estrada asked for a "cooling off" period but:

There is no assurance that the so called 2-month cooling off period will achieve its purpose. The investigation of the petitioner is a natural media event....⁴⁴

This refusal seems to narrow *Martelino* even further, which stated:

[S]ince the petitioners here do not contend that the respondents have been unduly influenced but simply that they might be by the "barrage" of publicity, *we think that the suspension of the court-martial proceedings has accomplished the purpose sought...* The atmosphere has since been cleared and the publicity surrounding

⁴⁰ Teehankee, 249 SCRA at 105.

⁴¹ G.R. No. 112206, 356 SCRA 108, Oct. 6, 1995, *citing* People v. Teehankee, 249 SCRA 54; Webb v. De Leon, G.R. No. 121234, 247 SCRA 652, Aug. 23, 1995; Martelino v. Alejandro, G.R. No. 30894, 32 SCRA 106, Mar. 25, 1970.

⁴² Estrada v. Desierto, 356 SCRA at 528.

⁴³ Estrada Motion for Recon, G.R. No. 146710, 356 SCRA 108, Apr. 3, 2001.

⁴⁴ *Id.* at 154.

the Corregidor incident has so far abated that we believe the trial may now be resumed in tranquility. (emphasis added)⁴⁵

The media publicity surrounding *Estrada* needs no further discussion, from the impeachment trial's daily telecast to EDSA II's live coverage. Estrada's lawyers even pointed out that the Court's ruling itself adverted to newspaper accounts,⁴⁶ down to published excerpts of Edgardo Angara's diary that were instrumental in determining that Estrada had resigned. Some justices had their roles in EDSA II's events,⁴⁷ and others were undernably caught in history's emotional wave, pushed along by the media, as seen from the tone of their opinions:

A reminder of an elder to the youth. After two non-violent civilian uprisings within just a short span of years between them, it might be said that popular mass action is fast becoming an institutionalized enterprise. Should the streets now be the venue for the exercise of popular democracy? Where does one draw the line between the rule of law and the rule of the mob, or between "People Power" and "Anarchy?"⁴⁸

It cannot be overlooked that this Court's legitimation through sufferance of the change of administration may have the effect of encouraging People Power Three, People Power Four, and People Power ad infinitum. It will promote the use of force and mob coercion by activist groups expert in propaganda warfare to intimidate government officials to resolve national problems only in the way the group wants them to be settled.⁴⁹

Three decades' worth of decisions all lead back to *Martelino*: Prejudicial media publicity may violate the rights of an accused to an impartial trial and due process, but he must allege and *prove actual prejudice*.

Understandably, not a single lawyer has hurdled this high bar and presented solid evidence, not in thirty years. Obviously, Philippine judges

⁴⁵ *Martelino*, 32 SCRA at 117.

⁴⁶ *Estrada Motion for Recon*, 356 SCRA at 137.

⁴⁷ Note that Chief Justice Hilario Davide and Justice Artemio Panganiban inhibited themselves in *Estrada*.

⁴⁸ *Estrada v. Desierto*, 353 SCRA at 540 (Vitug, J., concurring), quoted by Raul Pangalangan, *The Impact of People Power on our Legal System*, 6 CT. SYSTEMS J. 121 (2001).

⁴⁹ *Estrada v. Desierto*, 353 SCRA at 570 (Ynares-Santiago, J., separate opinion), quoted by Pangalangan, *supra* note 48, and Randy David, *People Power and the Legal System: A Sociological Note*, 6 CT. SYSTEMS J. 127 (2001).

must be paragons of integrity, with ice water running in their veins and unshakeable in their resolve. Not even the powerhouse Estrada defense team's "brilliant legal minds," not even with a former chief justice, a former UP College of Law dean, a former senator, and months of TV, radio and print coverage to present to the Court—in seeming frustration, they ended up throwing *res ipsa loquitur* at the justice system.⁵⁰

Thus a frustrated defense counsel may well read every reiteration of *Martelino* to mean: Storm the gates of hell with a glass of water.

II. IS THERE A DOUBLE STANDARD USED AGAINST THE ACCUSED?

Martelino is entrenched in Philippine jurisprudence, yet discussed landmark American cases involving even convictions' reversals due to prejudicial publicity. The key difference is that the Philippines has no juries, and as Justice Puno wrote, the judge is presumed to know better than to fall for "publicity stunts." Jurisprudence explains:

It ill behooves this Court to tar and feather a judge as biased or prejudiced, simply because counsel for a party litigant happens to complain against him. As applied here, respondent judge has not as yet crossed the line that divides partiality and impartiality.... Prejudice is not to be presumed. Especially if weighed against a judge's legal obligation under his oath to administer justice without respect to person and do equal right to the poor and the rich.⁵¹

However, the reasoning behind *Martelino* seems to blur when one takes a broader jurisprudential perspective on tense circumstances preceding a trial. Curiously enough, when one searches for beaten side trails off the *Martelino* road, one again finds Joseph Estrada by the wayside.

A. WILL THE REAL *ESTRADA* RULING PLEASE STAND UP?

In *Perez v. Estrada*, the Court prohibited live media coverage of the "deposed President's" plunder trial.⁵² Adding to the collection that began in

⁵⁰ Estrada Motion for Recon, 356 SCRA at 151. "The thing speaks for itself."

⁵¹ Aparicio v. Andal, G.R. No. 86587, 175 SCRA 569, July 25, 1989, cited by Go v. Court of Appeals, G.R. No. 106087, 221 SCRA 397, Apr. 7, 1993.

⁵² Re: Coverage (Estrada), A.M. No. 01-4-03-SC, 360 SCRA 248, Jun. 29, 2001.

Martelino, the Court borrowed *Estes v. Texas* and cautioned against possible influences on the judge and the witnesses, as well as "mental harassment"⁵³ of the defendant. *Perez* recognized "conscious or unconscious"⁵⁴ influences, and that the right to a public trial "belongs to [the accused] more than anyone else."⁵⁵

The ruling is confusing, however, when compared to *Martelino*. Compare:

With the possibility of losing not only the precious liberty but also the very life of an accused, it behooves all to make absolutely certain that an accused receives a verdict solely on the basis of a just and dispassionate judgment...

...

To say that actual prejudice should first be present would leave to near nirvana the subtle threats to justice that a disturbance of the mind so indispensable to the calm and deliberate dispensation of justice can create. *The effect of television may escape the ordinary means of proof...* (emphasis added)⁵⁶

to *Martelino*:

[T]here must be allegation and proof that the judge has been unduly influenced, not simply that he might be, by the "barrage" of publicity...

...

...We have had occasion to rule in a criminal case that a charge made before trial that a party "will not be given a fair, impartial and just hearing" is "premature." *Prejudice is not to be presumed.* (emphasis added)⁵⁷

Of course, one may distinguish the issues involved. *Martelino* ruled on a tribunal's impartiality while *Perez* disallowed live media coverage. Nevertheless, both obviously involved media influence on the trial. The self-contradiction might be explained by the broader view of *Perez*, since the ruling would affect an entire national audience:

⁵³ *Id.*

⁵⁴ *Id.* at 260.

⁵⁵ *Id.*

⁵⁶ *Id.* at 259, 260, citing *Freedom of the Press vs. Impartial Justice*, 6 M.L.Q.U. L.Q. 100.

⁵⁷ *Go v. Court of Appeals*, G.R. No. 106087, Apr. 7, 1993, citing *Martelino v. Alejandro*, G.R. No. 30894, 32 SCRA 106, Mar. 25, 1970.

The Court, just recently, has taken judicial notice of the enormous effect of media in stirring public sentiment during the impeachment trial... indeed the most-watched program in the boob-tubes during those times, that would soon culminate in EDSA II.⁵⁸

However, such an explanation would defy logic. The Court would put the burden of proof on a defendant when he asserts a violation of his right to an impartial trial, but takes on the *same* burden when the *same* right is balanced against freedom of speech and of the press, and the right of the public to information. Yet such illogic, it would seem, remains good law, never mind that the accused might be facing the death penalty.

To present another explanation, perhaps the Court was shocked into the *Perez* ruling by EDSA III's violent images telecast mere weeks before the decision. This might explain the divergence with the *Estrada v. Desierto* rulings before EDSA III. However, *Perez* merely reiterated an earlier 1991 resolution on former President Aquino's libel case,⁵⁹ which it quoted verbatim. The *Perez* majority focused on *Estes*'s unconscious media influences, the Aquino ruling's core, while the dissenters gave greater weight to the unobtrusiveness of modern broadcast equipment.⁶⁰

B. IS THE PROSECUTION FAVORED OVER THE DEFENSE?

When Rolito Go asked to transfer his trial outside Metro Manila, it was dismissed as another of countless dilatory tactics. However, the Court has always upheld requests to transfer venues *from the prosecution* as necessary to avoid "a mockery of the judicial process."⁶¹

In granting transfers of venue, the Court primarily addresses the potential intimidation of witnesses. *People v. Gutierrez* granted a transfer because witnesses feared testifying against Vicente Crisologo, son of an Ilocos congressman and the judge's seeming protégé. The Court noted that there had been 78 local murders in five months that year, and not even armed escorts could reassure the witnesses. *Sanchez v. Demetrio*⁶² involved

⁵⁸ Re: Coverage (*Estrada*), 360 SCRA at 259.

⁵⁹ Re: Coverage (*Aquino*), Oct. 22, 1991.

⁶⁰ Re: Coverage (*Estrada*), 360 SCRA 248 (Puno, J., *dissenting*); *id.* (Panganiban, J., *dissenting*).

⁶¹ *People v. Gutierrez*, G.R. No. 32282, 36 SCRA 172, 180, Nov. 26, 1970.

⁶² G.R. No. 111171, 227 SCRA 627, Nov. 9, 1993.

the Eileen Sarmienta's rape-slay, and cited the "tense and partisan atmosphere"⁶³ in Calauan, Laguna where accused Antonio Sanchez was the mayor. *People v. Sola*⁶⁴ involved accused in Kabankalan who were people in power and out on bail or at large. Death threats had been made against witness's families, and they feared they would be ambushed on their way to court.

The last case goes so far as to say:

[T]here may be cases where the fear, objectively viewed, may, to some individuals, be less than terrifying, but the question must always be the effect it has on the witnesses who will testify... In case of doubt, *it should be resolved in favor of a change of venue.* (emphasis added)⁶⁵

In fairness, the defense is also entitled to ask for similar transfers. *Mondiguing v. Francisco*⁶⁶ granted the request of two accused who feared reprisals against their witnesses by the victim, Ifugao's governor. However, the same case could only list *one* case where the ground involved the accused's own fears. *People v. Pilotin*⁶⁷ involved the same Vincent Crisologo, who feared assassination if he were confined in the local jail. The Court granted a transfer to Baguio, noting that many of Crisologo's relatives had been murdered, including his father Congressman Floro Crisologo, who was shot while hearing mass at the Vigan cathedral.

Again, transfer of venue was one of the remedies listed in *Martelino*, but it is usually requested by the prosecution. *People v. Sola* states a policy in favor of accommodating prosecution witnesses, but no similar rule exists for the defendant. If a transfer is requested by the defense and not for the usual purpose of protecting its witnesses, it may well be reviewed in the context of *Martelino's* actual prejudice requirement.

⁶³ *Id.* at 633.

⁶⁴ G.R. No. 56158, 103 SCRA 393, Mar. 17, 1981.

⁶⁵ *Id.* at 399.

⁶⁶ G.R. No. 41313, 68 SCRA 14, Nov. 6, 1975, *citing* *People v. Gutierrez*, 36 SCRA 172.

⁶⁷ G.R. No. 35377, Jul. 31, 1975.

Obviously, it is much easier to prove the danger of being shot while hearing Mass than damage arising from having your name on the front pages of local papers for several days.⁶⁸

All the cases discussed recognize that the rights of the accused are paramount. However, the extremely high standard in *Martelino* appears misplaced because the Court seems more accommodating to the prosecution, the judge and even the press.

III. GETTING BEHIND THE BENCH AND INTO A JUDGE'S MIND

To reiterate Justice Puno's words in *Perez*:

To say that actual prejudice should first be present would leave to near nirvana the subtle threats to justice that a disturbance of the mind so indispensable to the calm and deliberate dispensation of justice can create. The effect of television may escape the ordinary means of proof....⁶⁹

This seeming concession against the *Martelino* standard must be qualified. While it is impossible to prove publicity's influence in a specific trial or decision-maker, there is overwhelming evidence of the existence of such effects *in general*.

Justice Puno would be pleased to know that these are more accessible than nirvana.

A. LEGAL PHILOSOPHY AND ITS FOCUS ON HUMAN ACTORS

Describing the judge's lofty perch on the bench, Justice Oliver Wendell Holmes once wrote: "We are very quiet there, but it is the quiet of a storm centre, as we all know."⁷⁰

That deceptively quiet center's demystification begins with philosophy. Legal philosophers have abandoned the romantic notion that law is etched in the stars and falls gently to the Earth with the starlight to be

⁶⁸ And even the Court seems to have admitted as much. See *infra* text accompanying note 56.

⁶⁹ Re: Coverage (Estrada), A.M. No. 01-4-03-SC, 360 SCRA 248, 260, Jun. 29, 2001.

⁷⁰ *Law and the Court*, in COLLECTED LEGAL PAPERS 291 (1920), quoted by Joseph Bellacosa, *Remarks: Judging cases v. courting public opinion*, 65 FORDHAM L. REV. 2381, 2403 n.93 (1997).

revealed by the judge. Recent years' more earthy thinkers argue that Emperor Justinian could not possibly have read today's Internet doctrines in the stars, and thus recognize "judge-made law."⁷¹

Legal realists reexamine legal philosophy "in terms of 'the law in action' and 'the law in the making.'"⁷² In the words of Justice Holmes:

If you want to know the law and nothing else, you must look at it as a bad man... he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact... The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.⁷³

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intentions of public policy avowed or unconscious *even the prejudices which judges share with their fellow men*, have had a good deal to do than the syllogism in determining the rules by which men should be governed. (emphasis added)⁷⁴

Much has been devoted to exploring exactly how Holmes' prophesying is done and what the experience consists of: "[T]he judge often arrives at his decision before he explains it;"⁷⁵ "[T]he judge really decides by feeling, and not by judgment; by 'hunching' and not by ratiocination;"⁷⁶ "[A]n individual's views in political and legal matters are likely to be... determined by his interests, training, environment and long-continued associations...."⁷⁷

Professor Crisolito Pascual enumerates the following sources of metalegal stimuli that influence a decision:

⁷¹ Benjamin Nathan Cardozo, *The Nature of the Judicial Process*, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 457 (1951) [hereafter, LEGAL PHILOSOPHY].

⁷² CRISOLITO PASCUAL, INTRODUCTION TO LEGAL PHILOSOPHY 266 (4th ed., 1970).

⁷³ *The Path of the Law*, in LAW: A TREASURY OF ART AND LITERATURE 276-277 (1990).

⁷⁴ *The Common Law*, in LEGAL PHILOSOPHY, *supra* note 71, at 530.

⁷⁵ Jerome Frank, *What Courts Do in Fact* in *id.* at 474.

⁷⁶ Joseph Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. REV. 274, 285 (1929).

⁷⁷ Charles Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges* in LEGAL PHILOSOPHY, *supra* note 71, at 467.

- a) witnesses;
- b) lawyers;
- c) personal legal attitudes;
- d) personal predilections and preconceptions;
- e) historical events and precedents; and
- f) current economic or social conditions.⁷⁸

These stimuli correspond to specific schools of thought: legal realism uses political ideology,⁷⁹ critical legal studies use existing power structures,⁸⁰ critical race and feminist thinkers use race and gender,⁸¹ and law-and-economics thinkers use advancement in a judge's political fortunes.⁸² A *Philippine Law Journal* quantitative study even proposes an economic model to gauge judicial behavior using such variables as expected earnings and the costs of law school,⁸³ while a more extensive American study uses factors such as their Court's allowable range of lower court opinions, and the other branches' influence through statutes and judicial appointments.⁸⁴

With respect to publicity, the idea of metalegal stimuli can be summarized:

[The judge] must be assumed to have a fund of general information, consisting of both generalized knowledge and knowledge of specific facts, and the capacity to relate it to what he has perceived during the proceeding.... That fund of general

⁷⁸ PASCUAL, *supra* note 72, at 295.

⁷⁹ Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779 (2001) (citing JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949); Felix Cohen, *Transcendental Nonsense and the Functionalist Approach*, 35 COLUM. L. REV. 809 (1935); Edward Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996)).

⁸⁰ *Id.* (citing MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987)).

⁸¹ *Id.* (citing Martha Chamallas & Linda Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990); Gregory Sisk, et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998); Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 LAW & SOC'Y REV. 1197 (1990)).

⁸² *Id.* at 780 (citing Jonathan Macey, *Judicial Performers, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994); Richard Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997)).

⁸³ Ma. Lourdes Sereno, *Lawyers' Behavior and Judicial Decision-Making*, 70 PHIL. L.J. 476, 478 (1996), citing RICHARD POSNER, *AN ECONOMIC ANALYSIS OF LAW* (1977).

⁸⁴ Matthew McCubbins et al., *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S.C.L. REV. 1631 (1995). See Linda Cohen, *Politics and the Courts: A Comment on McNollGast*, 68 S.C.L. REV. 1685 (1995).

information must be at least as great as that of all reasonably well-informed persons in the community.⁸⁵

This "fund" simply refers to the concept of judicial notice, a term encountered in *Estrada v. Desierto*.⁸⁶

Simply, decades of legal philosophy theorize that the judicial process' elements are never in plain black and white, and that many factors from a judge's life from his elementary education to the day's headline may influence his decision. "Facts... do not just walk into the courtroom,"⁸⁷ but they may surreptitiously take the back door through the judge's television set.

No less than Justice Gregorio Perfecto wrote that none of this can be avoided:

[N]ot all bias is harmful. No judge is required to be free from all kinds of prejudice. To make that requirement is to attempt an impossibility... Each and everyone of the Supreme Court entertains some kind of prejudice, whether political, moral, religious, artistic, economic, legal, or otherwise. Each one of us is the child of our past personal experiences, surroundings, education, training, associations, and each one of these tends to create some kind of prejudice. It is hard to set a dividing line between harmless and harmful prejudices.⁸⁸

B. THE SOCIAL SCIENCES AND PSYCHOLOGICAL DATA

Psychological research on prejudicial publicity buttresses the legal realists, and explains why the renowned Clarence Darrow complained:

Trial by jury is rapidly being destroyed in America.... As the law stands today there is no criminal case where the newspapers are not guilty of contempt of court day after day...⁸⁹

⁸⁵ Edmund Morgan, *Judicial Notice*, 57 HARV. L. REV. 267, 272 (1944).

⁸⁶ See *infra* text accompanying note 58.

⁸⁷ PASCUAL, *supra* note 72, at 286 (citing *In Re Fried*, 161 F.2d 453, 462 (1947) (referring to formalist treatment of facts)).

⁸⁸ *People v. Lopez*, 78 Phil. 286 (1947), *quoted id.*

⁸⁹ Stephen Krause, *Punishing the Press: Using Contempt of Court to Secure a Free Trial*, 76 B.U.L. REV. 537, 561 (1997), *quoting* Stewart Perry, *Trial by Newspapers*, 30 MICH. L. REV. 228, 238 (1931).

If, in Professor Emmanuel Fernando's words, philosophy is a "second-order discipline"⁹⁰ that takes the empirical sciences' data and proceeds to a deeper understanding of the world beyond these sciences, there is more than enough data to give Justice Puno his fill.⁹¹

Existing local research is usually directed towards less abstract concerns such as court administration and corruption. Investigative journalist Sheila Coronel explains that the Philippine judiciary is "one of the most difficult subjects" because many critical interactions (and "transactions") are kept out of the public eye and out of the public record.⁹² Foreign studies are more revealing, though psychologists have focused mainly on juries.⁹³ For example, they have revealed that jurors' "commonsense notions" influence perceptions on key legal concepts such as self-defense, premeditation and insanity,⁹⁴ and that the verdicts in juries' first votes match over 90% of final verdicts.⁹⁵ Judges, despite their training and experience, can themselves be vulnerable to "cognitive illusions," such as falling into the mental trap of "anchoring" onto a fact or figure presented earlier, or internalizing misleading heuristics.⁹⁶ Some studies have even mathematically modeled the United States Supreme Court's historical tendencies.⁹⁷

The field survey is one widely used methodology. To cite a few examples that dealt with prejudicial publicity and juries:

1. Simon and Eimermann conducted a survey a week before a highly publicized murder trial, and 59% of the 130 subjects had heard or read about the crime. Those

⁹⁰ *The Relevance of Philosophy to Law*, 73 PHIL. L.J. 1, 15 (1998).

⁹¹ The good justice wrote in *Estrada v. Desierto*: "Petitioner needs to offer more than hostile headlines to discharge his burden of proof. He needs to show more weighty social science evidence to successfully prove the impaired capacity of a judge to render a bias-free decision." G.R. No. 146710, 353 SCRA 452, 528-529, Mar. 2, 2001.

⁹² BETRAYALS OF THE PUBLIC TRUST 196 (Sheila Coronel ed., 2000).

⁹³ Guthrie, *supra* note 79, at 781.

⁹⁴ Christina Studebaker & Steven Penrod, *The Media, the Law and Common Sense*, 3 PSYCH. PUB. POL. AND L. 428, 432 (1997).

⁹⁵ Dennis Devine et al, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH. PUB. POL. & L. 622, 624 (2001), citing H. KALVEN AND H. ZEISEL, *THE AMERICAN JURY* (1966).

⁹⁶ Guthrie, *supra* note 79, at 782.

⁹⁷ Glendon Schubert, *A Psychological Analysis of the Warren Court*; Herman Pritchett, *Voting Behavior on the United States Supreme Court*; David Danelski, *Values as Variables in Judicial Decision-Making, both in AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR* (W.H. Freeman ed., 1978).

who did were 24% more likely to describe themselves as "pro-prosecution."⁹⁸

2. Constantini and King correlated preconceptions about guilt with many variables such as gender, education, and general attitudes. Prior knowledge of the crime emerged as the strongest indicator. In fact, preconceptions were generally stronger in people who monitored more media sources.⁹⁹
3. Davis found that negative pretrial publicity increased the chance for conviction, while delaying the start of the trial for a week reduced it.¹⁰⁰
4. Moran and Cutler surveyed 704 subjects, and showed that potential jurors tended to perceive that there was "a lot of evidence" against the defendant as they received more information.¹⁰¹
5. Chesterman's survey of actual Australian jurors showed that 78% of juries had at least one member who recalled news reports about the crime,¹⁰² and 25% of verdicts were possibly influenced by publicity.¹⁰³
6. Kerr, Niedermeier and Kaplan found that negative pretrial publicity biased juries. This was eased by their deliberations if a prosecution's case was weak, but increased if the prosecution's case was strong.¹⁰⁴

⁹⁸ Studebaker, *supra* note 94, at 434; Joel Lieberman, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH. PUB. POL. & L. 677, 679 (2000), citing R. J. Simon & T. Eimermann, *The jury finds not guilty: Another look at media influence on the jury*, 48 JOURNALISM Q. 343, 343-344 (1971).

⁹⁹ Studebaker, *supra* note 94, at 434; Lieberman, *supra* note 98, at 679, citing E. Constantini & J. King, *The partial juror: Correlates and causes of prejudgment*, 15 LAW & SOC'Y REV. 9, 9-40 (1980-1981).

¹⁰⁰ Devine, *supra* note 95, at 688, citing R.W. Davis, *Pretrial publicity, the timing of the trial, and mock jurors' decision processes*, 16 J. APPLIED SOCIAL PSYCH., 590, 590-607 (1986).

¹⁰¹ Studebaker, *supra* note 94, at 434; Lieberman, *supra* note 98, at 679, citing G. Moran & B. L. Cutler, *The prejudicial impact of pretrial publicity*, 21 J. APPLIED SOCIAL PSYCH. 345, 345-67 (1991).

¹⁰² Michael Chesterman, *Contemporary Issues on the Law of Contempt*, at 4, available at <http://www.aija.org.au/ac01/Chesterm.pdf>.

¹⁰³ *Id.* at 10.

¹⁰⁴ Devine, *supra* note 95, at 689, citing N.L. Kerr, et al, *Bias in jurors vs. bias in juries: New evidence from the SDS perspective*, 80 ORG. BEHAV. & HUM. DECISION PROCESSES 70, 70-86 (1999).

7. Finally, Steblay, Besirevic, Fulero and Jimenez-Lorente conducted a meta-analysis of 44 previous studies, and showed a modest correlation of exposure to negative pretrial publicity and convictions.¹⁰⁵

Nevertheless, large numbers of subjects in these studies answered that they could be impartial jurors.

To further concretize *Estes'* fourfold concern, surveys show that even lawyers are affected. The New York Office of Court Administration found that roughly a third of lawyers felt that live coverage created a tense atmosphere, affected the security of witnesses, made witnesses more reluctant, and basically distracted everyone.¹⁰⁶ American trials offer many concrete examples. For example, in William Kennedy Smith's rape trial, his lawyer had to change his cross-examination tactics:

"I could not do anything but handle her with kid gloves. On national television—with my mother watching—I had to get her to explain the mechanics of sexual intercourse on the Kennedy lawn at three o'clock in the morning."

If the jury had found William Kennedy Smith guilty, obviously he would have appealed on the ground *inter alia* that his lawyer sacrificed effectiveness of a crucial cross-examination so as to not appear insensitive on national television.¹⁰⁷

Another set of psychological data comes from controlled experiments and simulations:

1. Tans and Chaffee fed different sets of news stories to subjects, and discovered that subjects who received all the unfavorable details were more likely to consider the suspect guilty. The study showed that negative publicity has a cumulative effect.¹⁰⁸

¹⁰⁵ Devine, *supra* note 95, at 688, citing N.M. Steblay et al, *The effects of pretrial publicity on juror verdicts: A meta-analytic review*, 23 L. & Hum. Behav. 219, 219-35 (1999).

¹⁰⁶ Lassiter, *supra* note 17, at 968-69.

¹⁰⁷ *Id.* at 994 (quoting defense lawyer Roy Black).

¹⁰⁸ Studebaker, *supra* note 94, at 435; Lieberman, *supra* note 98, at 679, citing M. Tans & S. Chaffee, *Pretrial publicity and juror prejudice*, 43 Journalism Q. 647, 647-54 (1966).

2. A similar study by Wilcox and McCombs linked a reported confession with preconceptions of guilt.¹⁰⁹
3. Padawer-Singer and Barton showed that subjects exposed to inadmissible evidence via media such as retracted confessions were 28% more likely to convict after listening to an actual murder trial.¹¹⁰
4. DeLuca showed that a story that noting a criminal record, a positive lie detector test result or a confession increased the perception of guilt. In the study, a story with all three produced the strongest perception.¹¹¹
5. Media reports may disclose a suspect's prior felony convictions before his trial, and several studies showed that defendants with such priors were more likely to be found guilty¹¹² or even sentenced to death.¹¹³
6. Otto exposed subjects to different sets of negative stories, and showed that they retained negative preconceptions even after watching an edited trial videotape. Knowledge of negative character had the greatest impact on preconceptions both before and after the tape was shown.¹¹⁴

¹⁰⁹ Studebaker, *supra* note 94, at 436, *citing* W. Wilcox & M. McCombs, Crime story elements and fair trial/free press (1967) (unpublished manuscript with the University of California).

¹¹⁰ Studebaker, *supra* note 94, at 436, Lieberman, *supra* note 98, at 679; Devine, *supra* note 95, at 639 T.3, *citing* A. PADAWER-SINGER & A. H. BARTON, THE IMPACT OF PRETRIAL PUBLICITY ON JURORS' VERDICTS IN THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 123-39 (1975).

¹¹¹ Studebaker, *supra* note 94, at 436, *citing* A. J. DeLuca, Tipping the scales of justice: The effects of pretrial publicity (1979) (Unpublished master's thesis with the Iowa State University).

¹¹² Devine, *supra* note 95, at 700, *citing* V.P. Hans & A.N. Doob, Section 12 of the Canada Evidence Act and the deliberation of simulated juries, 18 CRIM. L.Q. 235, at 235-253 (1976); P.D. Blanck, The appearance of justice: Judges' verbal and nonverbal behavior in criminal jury trials, 38 STAN. L. REV. 89, 89-164 (1985); E. Borgida & R. Park, The entrapment defense: Juror comprehension and decision making, 12 L. & HUM. BEHAV. 19, 19-31 (1988).

¹¹³ Devine, *supra* note 95, at 700, *citing* A. Barnett, Some distribution patterns for the Georgia death sentence, 18 U.C.D.L. REV. 1327, 1327-74 (1985); D.C. Baldus et al, Racial discrimination and the death penalty in the post-Furman era: An empirical and legal overview, with recent findings from Philadelphia, 83 CORNELL L. REV. 1638, 1638-61 (1998).

¹¹⁴ Devine, *supra* note 95, at 700; John Walton, From O.J. to Tim McVeigh and Beyond: The Supreme Court's Totality of Circumstances Test as Ringmaster in the Expanding Media Circus, 75 DENV. U.L. REV. 549, 574 n.192, *citing* Amy Otto et al., The biasing impact of pretrial publicity on juror judgments, 18 L. & HUM. BEHAV. 453, 453-70 (1994).

7. Kramer and Kerr showed that emotional pretrial stories were 20% more likely to strengthen preconceptions than factual stories, and that publicity made subjects more persuasive in arguing for conviction.¹¹⁵
8. Kline and Jess showed that one out of four subjects disregarded instructions and, during mock deliberations, referred to an inadmissible detail from a news item such as an accident or drunk driving record.¹¹⁶
9. Otto showed that negative hearsay statements in media accounts influenced judgments on as well as impressions of the parties.¹¹⁷
10. Finally, Lieberman notes that bias from pretrial publicity is difficult to eliminate. One possible explanation was subjects' tendency to fit details onto schemas or preexisting mental representations used by the mind.¹¹⁸

The most interesting discovery from simulations concerns admonitions to disregard details aired on the news but never admitted as evidence. Not only are such instructions ineffective, they sometimes cause jurors to become more conscious of them.¹¹⁹ In one study, an admonition to disregard knowledge that the defendant had insurance *increased* awards by a third.¹²⁰ Another reflected jurors' preconceived notions of admissibility, and showed that instructions from the judge were effective in suppressing hearsay evidence, but backfired on criminal records.¹²¹

One explanation for these backfiring instructions is that a belief is difficult to undo once formed. Another theory explains that an individual tends to overestimate something's likelihood once he knows the actual

¹¹⁵ Studebaker, *supra* note 94, at 436; Lieberman, *supra* note 98, at 679; Devine, *supra* note 95, at 649 T.5, *citing* G. P. Kramer & N. L. Kerr, *Pretrial publicity, judicial remedies, and jury bias*, 14 L. & HUM. BEHAV. 409, 409-38 (1990).

¹¹⁶ Studebaker, *supra* note 94, at 438; Devine, *supra* note 95, at 649 T.5, *citing* F. G. Kline & P. H. Jess, *Prejudicial publicity: Its effects on law school mock juries*, 43 JOURNALISM Q. 113, 113-16 (1966).

¹¹⁷ Devine, *supra* note 95, at 700, *citing* A. Otto et al., *The influence of pretrial publicity on juror judgments in a civil case* (1990) (manuscript in preparation).

¹¹⁸ Lieberman, *supra* note 98, at 681.

¹¹⁹ *Id.* at 690.

¹²⁰ *Id.* (*citing* D.W. Broeder, *The University of Chicago jury project*, 88 NEB. L. REV. 744-60 (1959)).

¹²¹ *Id.* (*citing* K. L. Pickel, *Inducing jurors to disregard inadmissible evidence: A legal explanation does not help*, 19 L. & HUM. BEHAV. 407, 407-424 (1995)).

result, a tendency called hindsight bias. Still another theory explains that an instruction limiting freedom psychologically arouses the subject, a tendency called reactance. Simply but ironically, trying not to think a particular thought simply causes a person to think about it. Moreover, subjects may react differently to different types of inadmissible evidence.¹²²

It is thus quite surprising that judge's instructions to juries are still "the primary corrective measure"¹²³ in the United States. Indeed, summing up decades' worth of psychological studies, one set of authors wrote:

The model of decision making endorsed (at least implicitly) by most courts is one in which jurors are assumed to pay complete attention, withhold judgment until all of the facts are in, discard any information that the judge so instructs, and carefully weigh a host of intangible factors. Several decades of research on human cognition suggest that this model rarely, if ever, holds in the real world.¹²⁴

Judge Jerome Frank wrote that if decisions are "based on judge's hunches... then whatever produces the judge's hunches makes the law."¹²⁵ If the above psychological studies apply to judges as well as to jurors—even to lesser degrees—then they certainly bring a fresh twist to the adage, "General propositions do not decide specific cases."¹²⁶

C. RES IPSA LOQUITUR?

The preceding sections present convincing grounds for fearing prejudicial publicity, but a reader may remain unable to readily visualize them. The *Estrada v. Desierto* defense ended up proposing *res ipsa loquitur*, perhaps the simplest yet most concrete angle of all. Prejudicial publicity ceases to be an abstraction after one experiences a scene such as the one described in the introduction. For someone who has yet to have the pleasure, perhaps a collection of random vignettes from the last five years will come close enough.

¹²² *Id.* at 691-701.

¹²³ Devine, *supra* note 95, at 701 (citing J.D. Lieberman & J. Arndt, *Understanding the limits of limiting instructions: Social psychological explanations for the failures of instructions to disregard pretrial publicity and other inadmissible evidence*, 6 PSYCH., PUB. POL. & L. 677, 677-711 (2000)).

¹²⁴ *Id.* at 700.

¹²⁵ JEROME FRANK, *LAW AND THE MODERN MIND* 104 (1930).

¹²⁶ *Lochner v. New York*, 198 U.S. 45, 77 (1905) (Holmes, J., *dissenting*).

Are judges such "men and women of fortitude"¹²⁷ unaffected by publicity? The Philippine Judges' Association and the Regional Trial Court Judges Association of Quezon City once issued a resolution asking the media to encourage wide-eyed respect instead of blind disobedience to their decisions, and especially to the Supreme Court. They added that courts had always treated press freedom with the utmost liberality, and encouraged mass media as a means of exchange instead of an "alarmist podium for nihilistic rabble rousers."¹²⁸ The statement mentioned media coverage of Judge Jaime Salazar, who was involved in a "snopake scandal" and accused of "gross ignorance" of the law after meting out sentences for drug traffickers that were too light. It also mentioned coverage of Judge Tirso Velasco and Mayor Galvez's acquittal.

The media regularly features denunciations of the judiciary. Cardinal Sin was once quoted on the front pages, describing "rogues in robes" as "often on the take" and "buyable."¹²⁹ Two days later, the late Senator Raul Roco, who chaired the Senate Committee on Justice, was quoted urging Sin to substantiate his allegations.¹³⁰ Despite such stories, a University of the Philippines law professor proudly pointed out a 1995 Social Weather Stations survey where 84% of respondents disagreed with the statement, "Corruption is a fact of life which judges have to live with," and only 7% agreed.¹³¹ However, the figure fell to 60% in 1999, and 62% of respondents to the same survey perceived large-scale corruption in the judiciary.¹³²

Human interest stories paint vivid pictures of the pressures on judges. When action star "Bad Boy" Robin Padilla posted bail, he was cheered by over a *thousand* mostly female employees of the Quezon City RTC and local government.¹³³ The scene seemingly downplayed Judge Maximiano Asuncion's reprimand regarding his absence in the previous hearing. The preceding events were immortalized by the Office of the Solicitor General:

¹²⁷ Re: Coverage (Estrada), A.M. No. 01-4-03-SC, 360 SCRA 248, 260, Jun. 29, 2001.

¹²⁸ Martin Marfil, *Judges demand respect from media*, PHIL. DAILY INQUIRER, Nov. 7, 1996, at A1.

¹²⁹ *Sin takes a swipe at 'rogues in robes'*, PHIL. DAILY INQUIRER, Feb. 20, 1996, at A1.

¹³⁰ *Help us unmask rogues in robes, Roco asks Sin*, PHIL. DAILY INQUIRER, Feb. 22, 1996.

¹³¹ Sereno, *supra* note 83, at 490.

¹³² Mahar Mangahas, *Update concerning surveys on corruption*, available at <http://www.sws.org.ph/op042001.htm> (last visited May 21, 2007).

¹³³ "Badboy" posts bail, PHIL. DAILY INQUIRER, Nov. 11, 1992, at A1.

Appellant was wearing a short leather jacket such that when he alighted with both his hands raised, a gun tucked on the left side of his waist was revealed...

...

...Appellant, however, arrogantly denied his misdeed and, instead, played with the crowd by holding their hands with one hand and pointing to SPO3 Borja with his right hand saying '*yan, kinuha ang baril ko.*'¹³⁴ Because appellant's jacket was short, his gesture exposed a long magazine of an armalite rifle tucked in appellant's back right pocket...SPO2 Mercado prevented appellant from going back to his vehicle by opening himself the door of appellant's vehicle. He saw a baby armalite rifle lying horizontally at the front seat... SPO Mercado modified the arrest of appellant by including as its ground illegal possession of firearms...

...[A]ppellant voluntarily surrendered a third firearm, a Pietro Beretta pistol...¹³⁵

Again, all of the above took place in front of crowds, before the trial even started.

The Villa case's media coverage concretely demonstrates influences and interactions noted in daily news reports. Lenny Villa died during initiation rites of the Ateneo Law School's Aquila Legis fraternity. Columnists were soon holding the fraternity responsible for delaying the investigation,¹³⁶ and one publicly asked the judge how he would react if his own son had been murdered by the Aquila Legis.¹³⁷ The arraignment alone took eight months. Caloocan judge Bayani Isidro inhibited himself after no less than then Vice-President Joseph Estrada publicly accused him of dragging his heels.¹³⁸ Judge Adoracion Angeles was then ordered by the Court of Appeals to inhibit herself after she was accused of railroading the case. Then Court of Appeals Justice Alfredo Benipayo stated that his "mind is unencumbered by any preconceptions and impressions about the case."¹³⁹

¹³⁴ "He took my gun."

¹³⁵ Padilla v. Court of Appeals, G.R. No. 121917, 269 SCRA 402, 412-13, Mar. 12, 1997.

¹³⁶ Teodoro Benigno, *Here's the Score: The Long Hand of Aquila Legis*, PHIL. STAR, May 17, 1991, at

11.

¹³⁷ Teodoro Benigno, *Here's the Score: The judge & Aquila Legis*, PHIL. STAR, May 27, 1991, at 9.

¹³⁸ Editorial: *Aquila Legis & Power Tripping*, MANILA CHRONICLE, Nov. 26, 1993, at 4.

¹³⁹ Lay off 'Lenny Villa' case, CA tells Lady Judge, PHIL. DAILY INQUIRER, Jun. 16, 1994, at A12.

An editorial publicized that the Villa family had to change counsel many times because lawyers were afraid to handle the prosecution. They settled on Atty. Artemio Tadiar, who publicly denounced an "old boy's network."¹⁴⁰

Finally, this section would not be complete without mentioning the most high-profile judge of 2001. Sandiganbayan Third Division Chair Anacleto Badoy stole the limelight perhaps even from Estrada spokesman Raymond Fortun, who once had to apologize to the Sandiganbayan for saying, "May those justices be struck by lightning"¹⁴¹ on radio.

Justice Badoy made a surprise appearance on GMA 7's *Saksi* to accuse one of his own staff members of stealing a draft resolution for the Estrada plunder trial. He "had himself brought to the TV station by ambulance and all but volunteered to be interviewed by the news anchor,"¹⁴² and defense lawyer Rene Saguisag described him as "AIM" or "*ayaw ibigay ang mike*."¹⁴³

Mediamen, particularly those who chased Badoy's ambulance, branded the incident a "stage comedy" and "television tryst." The Integrated Bar of the Philippines president filed a motion asking the Supreme Court to examine Badoy's behavior, and Saguisag filed a separate motion pointing out that his brother had received an appointment from President Arroyo.

The Court had him "considered on leave."¹⁴⁴ Over a year later, the newspapers reported:

The Supreme Court has slapped a P13,000 fine on retired Sandiganbayan Associate Justice Badoy for making a bizarre trip in an ambulance to the GMA studios, where he said on live television that a draft ruling on the Estrada plunder case got lost or was stolen.

¹⁴⁰ MANILA CHRONICLE, *supra* note 132, at 4.

¹⁴¹ PHIL. DAILY INQUIRER, Mar. 6, 2002, available at <http://www.philsol.nl/news/02/Erap02-mar02.htm> [hereafter, Fortun quote].

¹⁴² Volt Contreras, *Analyze Badoy, Estrada lawyer asks high court*, PHIL. DAILY INQUIRER, Nov. 30, 2001, available at http://www.inq7.net/nat/2001/dec 01/nat_9-1.htm.

¹⁴³ "Refuses to surrender the microphone." Popular expression referring to a videoc bar patron who relishes being the center of attention.

¹⁴⁴ Ma. Theresa Torres, *Supreme Court orders forced leave for Badoy*, MANILA TIMES, Dec. 12, 2001, available at http://www.manilatimes.net/national/2001/dec 12 top_stories/20011212top4.html.

...
The SC decided to investigate Badoy for the incident after it was "sarcastically" depicted in the press.

Finding no reason why Badoy had to "rush" to the TV station, the high court chided Badoy for "reporting to the whole nation" what should have remained an "internal office incident."¹⁴⁵

Even before the "bizarre trip," Badoy had already landed in national headlines. A word war broke out between then Presiding Justice Francis Garchitorena and Badoy on the day after the plunder trial opened. Badoy called a press conference and claimed he was only retaliating against Garchitorena, who had publicly accused him of not doing his work as division chair and cited frequent absences and tardiness.¹⁴⁶

Again, are judges truly invulnerable to external factors and pressures? It is difficult to believe that each and every one of them are "men and women of fortitude" as Justice Puno described. Perhaps not even the Court itself is completely immune.

D. THE AMERICAN EXPERIENCE

After considering philosophical, psychological and even anecdotal evidence of prejudicial publicity, a brief stroll in the American Court's backyard rounds out one's bases.¹⁴⁷ The United States came to grips with the problem far earlier, and nineteenth century American writer Mark Twain commented:

"We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of

¹⁴⁵ Volt Contreras, *Badoy fined for ambulance ride*, PHIL. DAILY INQUIRER, Jan. 17, 2003, at A7.

¹⁴⁶ First witness, PHIL. NEWS, Nov. 7-13, 2001, at <http://www.philippinews.com/issues/nov01/nov7-13/headlines.asp>.

¹⁴⁷ Several authors have already traced the American line of cases more comprehensively than this paper requires. Hardaway & Tumminello, *supra* note 18; Walton, *supra* note 114; Tijani Cole, *The Courts & the Media Bench Book*, 35 NEW ENG. L. REV. 853 (2001); Leslie Berger, *Can the First and Sixth Amendments Co-exist in a Media Saturated Society?*, 15 N.Y.L. SCH. J. HUM. RTS. 141 (1998); Brian Coffey, *Mu'min v. Virginia: Reexamining the Need for Content Questioning During Voir Dire in High Profile Criminal Cases*, 13 PACE L. REV. 605 (1993); Janet Branigan, *Case note: People v. Tyburski*, 518 N.W.2d 441 (Mich. 1994), 72 U. DET. MERCY L. REV. 701 (1995); Studebaker, *supra* note 94. See also Ashley Newsom, *Casenote, Pretrial Publicity and Individual Voir Dire: What has the Florida Supreme Court done to the Jury Selection Process?*, 52 FLA. L. REV. 1039 (2000).

finding twelve men every day who don't know anything and can't read."¹⁴⁸

Some lessons or solutions are inapplicable to the Philippines because the United States uses a jury system, has separate state and federal courts, and has some elected judges. Nevertheless, the key Philippine decisions from *Martelino* to *Perez v. Estrada* also mark out the waypoints on the parallel American jurisprudential trail of prejudicial publicity. Theirs is probably a longer, wider highway, and American rulings help shed light on rights in the Philippine Constitution.¹⁴⁹ However, beginning with *Martelino* itself, the Philippine and American roads never intersected, and it helps to understand why, or why they should.

The criminal trial was historically public since its beginnings in present-day England, from the Ordeal to the eventual trial by jury. The main exception lay with the Star Chamber, which was eventually abolished in 1641 after the numerous abuses perpetrated behind its closed doors.¹⁵⁰

The idea of pretrial publicity appeared in the United States as early as 1807, in the treason trial of Vice-President Aaron Burr,¹⁵¹ who planned to seize New Orleans and conquer Mexico. The newspapers were saturated with trial news and Chief Justice John Marshall, sitting circuit, ruled that a juror could only be disqualified if he had a strong opinion about the defendant that could not be set aside.¹⁵² The standard was later made explicit in 1878,¹⁵³ and is a rough analog of the Philippine *Martelino* standard requiring evidence of actual prejudice.

¹⁴⁸ Harris Feldman, Note, *Free press vs. fair trial in New Jersey: Capital appeals based on prejudicial media publicity*, 31 RUTGERS L.J. 209, 209 (1999).

¹⁴⁹ RUBEN AGPALO, STATUTORY CONSTRUCTION 102-03 (1998).

¹⁵⁰ Hardaway & Tumminello, *supra* note 18, at 46-47. See *In re Oliver*, 333 U.S. 257, 266 (1948), quoted in Jonathan Remshak, Comment, *Truth, Justice and the Media: An Analysis of the Public Criminal Trial*, 6 SETON HALL CONST. L.J. 1083, 1086 n.14 (1996). "This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage."

¹⁵¹ *US v. Burr*, 25 F. Cas. 2 (1807).

¹⁵² Mercy Hermida, *Trial by tabloid*, 7 ST. THOMAS L. REV. 197, 201 (1994), citing Newton Minow & Fred Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 639 (1991); Hardaway & Tumminello, *supra* note 18, at 47.

¹⁵³ *Reynolds v. United States*, 98 U.S. 145 (1878). Two authors note that the framers of the American Constitution, being from small towns, could not possibly have envisioned completely uninformed jurors. Given how quickly news would circulate in such communities, they must have had only fair and impartial ones in mind. Brian Breheny & Elizabeth Kelly, Note, *Maintaining impartiality: Does media coverage of trials need to be curtailed?*, 10 ST. JOHN'S J.L. COMM. 371, 398 (1995).

The first taste of mass media-induced pretrial publicity came with the kidnapping and murder of Charles Lindbergh's baby.¹⁵⁴ About 700 reporters covered the 1934 trial of Bruno Hauptmann, far greater than the number sent to cover World War I.¹⁵⁵ The large amount of publicity, including a news reel from a hidden camera placed in the courtroom against the judge's instructions,¹⁵⁶ led the American Bar Association to enact Canon 35 of the Code of Judicial Conduct, which specifically dealt with press coverage of criminal trials.¹⁵⁷

From here, one picks up the parallel trail that began in *Martelino v. Irvin v. Dowd*¹⁵⁸ in 1961 marked the first time a conviction was struck down solely on the ground of prejudicial publicity. The county prosecutor released a statement that the accused had confessed, which was carried by the press to the jury. The media barrage from headlines to cartoons had made an impartial trial impossible.

Irvin articulated the test: "Whether the nature and strength of the opinion formed are such as in law necessarily... raise the presumption of partiality,"¹⁵⁹ relying on "the totality of the surrounding facts."¹⁶⁰ Note that this totality standard fell short of requiring proof of actual prejudice. In any

¹⁵⁴ *State v. Hauptmann*, 180 A. 809, 813 (N.J. 1935). Charles Lindbergh was the first aviator to fly nonstop across the Atlantic Ocean.

¹⁵⁵ David Anderson, *Democracy and the Demystification of Courts*, 14 REV. LITIG. 627 (1995), citing REPORT OF SPECIAL COMMITTEE ON PUBLICITY IN CRIMINAL TRIALS (1936), reprinted in Oscar Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 484 (1940). See Remshak, *supra* note 150, at 1084 n.8. "The members of the press in the courtroom included 141 newspaper reporters and photographers, 125 telegraph operators, and 40 messengers who ran about during the course of the proceedings. Albert H. Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure*, 21 A.B.A. J. 301, 304 (1935) (citing an unnamed New York newspaper (Jan. 9, 1935))."

¹⁵⁶ Kelly Cripe, Comment, *Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System*, 6 UCLA ENT. L. REV. 235, 260 (1999); Remshak, *supra* note 150, 1084 n.8. "[N]ewsreel footage of the proceedings, taken contrary to the judge's order which limited filming to trial recesses, appeared in newsreel theaters throughout the country. J. EDWARD GERALD, *NEWS OF CRIME: COURTS AND PRESS IN CONFLICT* 152 (1983)."

¹⁵⁷ Cripe, *supra* note 156, at 260; Remshak, *supra* note 150, at 1084 n.8. "A special American Bar Association committee set up after the trial noted that it was 'the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial.' Report of the Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings, 62 A.B.A. REP. 851, 861 (1937)"; Hardaway & Tumminello, *supra* note 18, at 49.

¹⁵⁸ 366 U.S. 717 (1961) (cited by *Martelino v. Alejandro*, G.R. No. 30894, 32 SCRA 106, Mar. 25, 1970).

¹⁵⁹ *Id.* at 724, citing *Reynolds*, 98 U.S. 145, 155 (1878). Specifically, the Court examined two factors: 1) the extent and content of pretrial media coverage, and 2) the trial court's jury interviews. Branigan, *supra* at 147, at 709-10.

¹⁶⁰ *Irvin*, 366 U.S. at 722, citing *Gannon v. Porter Circuit Court*, 239 Ind. 637, 159 N.E. 2d 713.

case, the bias was manifest: 90% of potential jurors felt the accused was guilty, and eight of those finally selected maintained these preconceptions.

*Rideau v. Louisiana*¹⁶¹ in 1963 featured a man who robbed a bank, kidnapped three of the employees, and later killed one of them. His confession before the sheriff was recorded and later televised many times. Not only did tens of thousands of potential jurors see the broadcasts, but the coverage was done with the police's active participation. Two actual jurors were even deputy sheriffs from the parish where Rideau was being held.

The entire community could not possibly have been impartial after the accused made what was practically a public plea of guilt. Accordingly, *Rideau* did not even bother to ask for any proof of prejudice; it simply stated:

The kangaroo court proceedings in this case involved a more subtle but no less real deprivation of due process of law.¹⁶²

*Estes v. Texas*¹⁶³ voided a televised trial for being inherently violative of due process even though no evidence of actual prejudice was shown. It was deemed sufficient if the *probability* of prejudice could be inferred from the procedures employed by the State, and live coverage potentially influenced the behavior of the judge, jury and witnesses, or harassed the defendant himself. With respect to Philippine jurisprudence, *Estes* presents a seeming moebius strip, because it was rejected as "disparate" in *Martelino* yet formed the core of *Perez*, creating two different standards.

Sheppard v. Maxwell's¹⁶⁴ circumstances parallel the Philippine's *Cruz v. Salva*. Dr. Sheppard was accused of brutally bludgeoning his pregnant wife to death, and the judge who was up for reelection turned his courtroom into a media circus. Reporters drowned out testimony, handled exhibits during recesses, interviewed witnesses and published their testimony in advance, and even published conversations between Sheppard and his lawyer such that jurors were able to read them. Even before the

¹⁶¹ 373 U.S. 723 (1963) (cited by Martelino, 32 SCRA 106).

¹⁶² *Id.* at 727.

¹⁶³ 381 U.S. 532 (1965) (cited by Martelino, 32 SCRA 106; Re: Coverage Estrada, A.M. No. 01-4-03-SC, 360 SCRA 248, Jun. 29, 2001; Re: Coverage (Aquino), Oct. 22, 1991).

¹⁶⁴ 384 U.S. 333 (1966) (cited by Martelino, 32 SCRA 106, Re: Coverage (Estrada), 360 SCRA 248; Re: Coverage (Aquino), Oct. 22, 1991).

trial, prejudicial stories filled the news, and the county coroner was quoted, "[T]he doctor did this, so let's go get the confession out of him."¹⁶⁵

Despite the lack of identifiable prejudice, the *totality of the circumstances*¹⁶⁶ warranted the conclusion that the jury was hardly free from outside influences. The Court held that there was a blatant violation of due process, and further held the trial court responsible for failing to minimize the taint of prejudicial publicity.

Martelino stops at *Sheppard*, and one must note the sharper turns and forks in the road that followed. *Murphy v. Florida*¹⁶⁷ involved jurors learning about an accused's prior felony convictions from widespread media coverage, to the point that one juror remarked, "How can you not know [that he is a convicted murderer]?"¹⁶⁸ The Court discussed the previous cases and distinguished them from *Murphy* one by one. It ruled that there was no clear actual prejudice, unlike in *Irvin*. Circumstances did not raise strong presumptions, unlike the televised confession in *Rideau* or the circus atmospheres in *Estes* and *Sheppard*. The totality of the circumstances did not imply a loss of impartiality, either, because most of the jurors were shown to feel that the prior convictions were irrelevant, or even that the accused would tend to be singled out because of them. Thus, the Court ruled that an impartial jury did not mean a completely ignorant one, and affirmed the conviction.

Murphy created a new, two-prong test:

1. Whether prejudice can be inferred from the procedures to control external influences; and
2. Whether the totality of the circumstances imply prejudice.

However, Justice Brennan, the lone dissenter, held that the verdict should have been reversed because the case was analogous to *Irvin*. Apparently, the Court grew more reserved, and became less willing to reverse convictions, unlike the Warren Court in *Estes* and *Sheppard*.

¹⁶⁵ *Id.* at 335.

¹⁶⁶ Although the citation was not made in *Sheppard*, this phrase was a clear nod to *Irvin*. See *infra* text accompanying note 160 ("the totality of the surrounding facts"). The phrase "totality of the circumstances" is reiterated in later cases.

¹⁶⁷ 421 U.S. 794 (1975).

¹⁶⁸ *Id.* at 804 (Brennan, J., dissenting).

*Richmond Newspapers, Inc. v. Virginia*¹⁶⁹ ruled on the *second* retrial of a hotel manager's murder. The defense lawyer requested:

I would like to ask that everybody be excluded from the Courtroom because I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what.¹⁷⁰

The lawyer's paranoia is understood when one notes how the first retrial ended in mistrial because a juror had read prejudicial newspaper reports and shared them with the rest of the jury. The Court ruled that such a broad exclusion order was unconstitutional because of the traditional openness of the criminal trial, and given the rights to free speech, free press and assembly, as well as the unwritten right of the public to information.

*Patton v. Yount*¹⁷¹ featured a high school mathematics teacher who strangled an 18-year old female student and left the body in a wooded area near her home in Pennsylvania. He confessed, but his conviction was set aside after it was shown that police had not sufficiently advised him of his right to counsel.

Yount moved for a change of venue in the retrial, citing earlier prejudicial publicity and the number of newspaper articles about the case. The judge denied the motion, but conducted extensive jury interviews and screening, and suppressed the confessions. The Court noted:

The trial court noted that the articles merely reported events without editorial comment...that "almost all, if not all," the jurors seated had "no prior or present fixed opinion"; and that there had been "little, if any, talk in public" between the two trials. The court also observed that the voir dire of the second trial had been sparsely attended.¹⁷²

Again convicted for murder, Yount's conviction was eventually reversed by the federal Court of Appeals, citing *Irvin*. The Court, reversed, however, distinguishing that *Irvin* called for overturning a trial court only

¹⁶⁹ 448 U.S. 555 (1980) (cited by Go v. Court of Appeals, G.R. No. 106087, 221 SCRA 397, Apr. 7, 1993).

¹⁷⁰ *Id.* at 560-61.

¹⁷¹ 467 U.S. 1025 (1984).

¹⁷² *Id.* at 1028-29.

when error was manifest.¹⁷³ Carefully scrutinizing the facts on record, particularly the jury screening process, the Court did not find *Murphy's* "barrage of inflammatory publicity immediately prior to trial"¹⁷⁴ or *Irvin's* "huge . . . wave of public passion."¹⁷⁵ Moreover, a year-and-a-half gap before the second set of proceedings belied the presence of prejudicial publicity.

The most recent case, *Mu'min v. Virginia*,¹⁷⁶ involved a convict who left his work detail, robbed and killed a woman, then returned. Months later, several newspaper articles were circulated about the killing, the murder Mu'min was convicted for, and his criminal record and prison infractions. Other articles criticized the work detail system's laxity. During jury selection, the judge asked superficial questions about exposure to pretrial publicity, but denied the accused's motion to excuse everyone who admitted to reading the articles, and further denied a transfer of venue. The Court upheld the death penalty imposed on Mu'min, holding that the judge's refusal to ask more specific questions about what the jurors had read did not violate the Due Process Clause. The Court, in effect, placed the burden of proving bias on Mu'min, but held that he could not question the jurors about bias unless the judge let him—a seemingly impossible standard.¹⁷⁷

Finally, *Gentile v. State Bar*¹⁷⁸ reversed a lawyer's conviction for holding a press conference about an upcoming trial, and discussed the balance between a lawyer's personal freedom of speech and his duty to the Court and the state interest in impartial trials. The extent of lawyers' First Amendment is the point of a lengthy and yet unresolved debate, which is beyond the scope of this paper.

While the last two cases show the horizons American jurisprudence is exploring, perhaps the most important question for the Filipino lawyer is how to reconcile *Murphy* with the older cases discussed in *Martelino*. They all seem to stand together because *Irvin* was still invoked in later cases, and a

¹⁷³ *Id.* at 1032 (citing *Irvin v. Dowd*, 366 U.S. 717, 724 (1961), quoting *Reynolds v. United States*, 98 U.S. 145 (1878)). "[T]he finding of the trial court upon that issue [the force of a prospective juror's opinion] ought not be set aside by a reviewing court, unless the error is manifest."

¹⁷⁴ *Id.* at 1034 (quoting *Murphy v. Florida*, 421 U.S. 794, 798 (1975)).

¹⁷⁵ *Id.* at 1034 (quoting *Irvin*, 366 U.S. at 728).

¹⁷⁶ 500 U.S. 415 (1991).

¹⁷⁷ Coffey, *supra* note 147, at 605.

¹⁷⁸ 501 U.S. 1030 (1991).

case with the extent of *Irvin's* prejudicial publicity would likely be reversed in the United States. However, *Murphy* seems to erode the past rulings by making *Irvin*, *Estes* and *Sheppard* applicable mainly to the extreme circumstances in those cases.

Since American decisions are persuasive but not binding in the Philippines, perhaps it is best to leave this American diversion with two broad conclusions:

1. The present *Murphy* standard presents a high bar for the accused, but still one that is short of proving actual prejudice;¹⁷⁹ and
2. *Murphy* takes *Sheppard's* admonitions, and its first prong presumes that the trial court will proactively assert control over undue publicity.

IV. PROPOSED REMEDIES FOR THE PHILIPPINES

So far, this paper has reviewed jurisprudence on prejudicial publicity, and contrasted *Martelino's* underlying reasoning with other cases related to the rights of the accused. It has then explored philosophical, psychological and anecdotal bases for recognizing prejudicial publicity, as well as the American treatment. Nevertheless, the Court has yet to reverse a conviction on the ground of prejudicial publicity, and would not even grant Estrada a "cooling off" period. *Martelino's* high standard remains in place, and probably will continue to barring a case with circumstances as extreme as *Irvin*, *Estes* or *Sheppard*.

It is obvious from *Perez*, however, that the Court recognizes the dangerous new dynamics mass media brings into the courtroom. *Sheppard* held that reversing a conviction is merely a palliative,¹⁸⁰ so perhaps the beleaguered defense counsel can explore possible remedies that can be

¹⁷⁹ Note that proof of actual prejudice is required in some jurisdictions in the United States. However, this pertains not to the right of the accused to safeguards against prejudicial publicity prior to the trial, but to the burden he has to discharge before having the media excluded from the actual trial. Audrey Winograde, *Cameras in the courtroom: Whose right is it anyway?*, 4 SW. J.L. & TRADE AM. 23, 42 (1997), citing *Lassiter*, *supra* note 17, at 979.

¹⁸⁰ *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

employed even before the trial begins. In other words, if jousting with *Martelino* appears quixotic, then perhaps one can simply avoid the windmill altogether.¹⁸¹

American remedies focused on juries are, of course, of little value to Philippine policymakers.¹⁸² Instructions, as discussed, may even backfire, and in any case, it would be absurd for a judge to instruct himself to disregard undue publicity. The most extreme measure of jury sequestration is too cumbersome—to cite a concrete example, sequestering the jury that decided the O.J. Simpson case cost \$2,985,052 for 266 days¹⁸³—and judge sequestration would be absurd. Thus the legal knight must examine the broader remedies available, that he may better distinguish between giants and windmills.

A. EXCLUSION AND CLOSED DOOR TRIALS

An American case goes so far as to say:

A trial is a public event. What transpires in the court room is public property.¹⁸⁴

Nevertheless, the precise middle ground between the right to an impartial trial and the freedom of speech and of the press remains a

¹⁸¹ MIGUEL DE CERVANTES, *DON QUIXOTE* (Ormsby trans., 1895). "[H]e gave the spur to his steed Rocinante, heedless of the cries his squire Sancho sent after him, warning him that most certainly they were windmills and not giants he was going to attack. He, however, was so positive they were giants that he neither heard the cries of Sancho, nor perceived, near as he was, what they were."

¹⁸² Further note that a jury system itself adds many layers of complexity. The O.J. Simpson trial lasted fourteen months, and foreign journalists noted that the jury selection process alone lasted four months, or much longer than the average homicide trial in their home countries. Though the average non-capital trial takes three to eight weeks, one author even opines that the American jury system is so unworkable that the justice system is forced to rely heavily on plea bargaining. Peter Arancella, *People v. Simpson: Perspectives on the implications for the criminal justice system: Foreword: O. J. Lessons*, 69 S. CAL. L. REV. 1233, 1239-40 (1996).

¹⁸³ Charles Whitebread, *Selecting Juries in High Profile Criminal Cases*, 2 GREEN BAG 2d 191, 196 (1999), citing *Simpson Trial Record*, USA TODAY, Oct. 4, 1995, at 1A. Orenthal James Simpson was a former football hero who was charged with the murder of his ex-wife and a male friend. The trial degenerated into a media circus. Laurie Robinson, Comment, *Professional Athletes-Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1325-26 (1998).

¹⁸⁴ *Craig v. Harney*, 331 U.S. 367, 374 (1947), quoted in Michael Grygiel, *Perspective: Memorandum of Law of Regional News Network in support of its motion for limited intervention and application to provide audio-visual coverage of trial proceedings*, 63 ALB. L. REV. 1003, 1008 (2000).

complex debate in the United States.¹⁸⁵ For this paper's purposes, it suffices to explain that neither extreme is feasible nor wise. Absolutely favoring the freedom of the press would turn every trial into a potential *Cruz v. Salva* or *Sheppard*. Absolutely favoring the right to an impartial trial would recreate the Star Chamber, and is nevertheless forbidden because *Webb* cited *Richmond* and the historic openness of trials. The Constitution mandates an impartial and public trial.¹⁸⁶ Exclusion orders have not prospered in the United States, either.¹⁸⁷

Richmond taken with *Perez* define the allowable range of action regarding prejudicial publicity. Reading *Richmond*, one must further note that while the right of the public to information is merely a recent First Amendment offshoot in the United States,¹⁸⁸ the same right is constitutionalized in the Philippines,¹⁸⁹ and has been supported by statutes.¹⁹⁰ Although the balancing of interests test weighs less on that right when information does not affect a citizen's ability to make informed

¹⁸⁵ See, e.g., Lassiter, *supra* note 17; Eugene Cerruti, "Dancing in the courthouse:" *The First Amendment Right of Access opens a new round*, 29 U. RICH. L. REV. 237, 239 (1995); Kathleen Krygier, *The thirteenth juror: Electronic media's struggle to enter state and federal courtrooms*, 3 COMM. LAW CONSP. 71 (1994); Eric Schweiker, *United States v. Noriega: Conflicts between the First Amendment and the Rights to a Fair Trial and Privacy*, 1993 U. CHI. LEGAL F. 369 (1993); Megan Conboy & Alice Scott, Note, *Tipping the scales of justice: An attempt to balance the right to a fair trial with the right to free speech*, 11 ST. JOHN'S J.L. COMM. 775, 785-90 (1996); Taffiny Smith, Student article, *The distortion of criminal trials through televised proceedings*, 21 L. & PSYCH. REV. 257 (1997); Jimmy Moye, Comment, *The Confluence of Sensationalism and News: Media Access to Criminal Investigations and the Public's Right to 'Know'*, 6 COMM. LAW CONSP. 89 (1998); Joshua Sarner, Comment, *Justice, take two: The continuing debate over cameras in the courtroom*, 10 SETON HALL CONST. L.J. 1053 (2000); Grygiel, *supra* note 178, at 1008.

¹⁸⁶ Const. art. III, § 14(2).

¹⁸⁷ See, however, Cole, *supra* note 147, at 885-90 for a discussion of valid limited exclusions and supporting jurisprudence.

¹⁸⁸ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582 (1980) (Stevens, J., concurring). "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."

Cerruti, *supra* note 185, at 29. "This claim of First Amendment-based access to government information had been so consistently and emphatically rejected by the Supreme Court that by the late 1970s, it was considered an all but dead letter. Then, in one of the more remarkable and unanticipated turnabouts on the Court, an unconsolidated majority adopted a variation of the so-called structural theory to recognize for the first time a First Amendment-based affirmative right of public access to criminal trial proceedings. And with surprisingly little fanfare, the foundation of the First Amendment was realigned to support the diverse and increasing claims of access to an open government in a post-libertarian era."

"The seminal case was *Richmond Newspapers Inc. v. Virginia*...."

¹⁸⁹ Const. art. III, § 7. ("The right of the people to information on matters of public concern shall be recognized.")

¹⁹⁰ Alberto Muiot, *The Cornerstone of Democracy: Transparency, Accountability and the Constitutional Right to Information*, 73 PHIL. L.J. 202, 247-54 (1998).

political decisions,¹⁹¹ an absolute exclusion such as the one in *Richmond* would be impossible to defend. The right to information may also be argued in other contexts, such as the need for increased transparency in courtrooms and the role of the media in educating the public regarding judicial processes.¹⁹²

Further, the blossoming right to privacy is another ground to restrict coverage, but one must remember that the public has an inherent interest in knowing about crime. A criminal, by his own acts, becomes a public figure and suffers reduced expectations of privacy.¹⁹³ After all, all criminal cases begin, "People of the Philippines v. ..."

The rough middle ground is the status quo after *Perez*, where live coverage may be disallowed but reporters retain the right to sit silently and take notes like any other observer.¹⁹⁴

B. GAG ORDERS AND CONTEMPT

While the American system errs towards a free press and hopes to reverse any undue convictions, the British and Australian systems err towards the right to an impartial trial. The latter make good use of the power of contempt to restrict the press in relation to trials.¹⁹⁵

These two approaches have been discussed at length by other authors,¹⁹⁶ but it is easily said that less high-handed remedies are called for. Allowing courts to prohibit the broadcast or publication of certain information collides head-on with the Bill of Rights,¹⁹⁷ and creates the

¹⁹¹ *Id.* at 224.

¹⁹² Krygier, *supra* note 185, at 83-85; Angelique Paul, Note, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655 (1997).

¹⁹³ *People v. Beriales*, G.R. No. 39962, 76 SCRA 42, Apr. 7, 1976; *Ayer Productions v. Capulong*, G.R. No. 82380, 160 SCRA 861, Apr. 29, 1988; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

¹⁹⁴ This is the same middle ground presently accepted by American federal courts. Krygier, *supra* note 185, at 79.

¹⁹⁵ Joanne Brandwood, *You say "Fair Trial" and I say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U.L. REV. 1412 (2000), cited in *Estrada v. Desierto*, G.R. No. 146710, 353 SCRA 452, Mar. 2, 2001. Michael Chesterman, *OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America*, 45 AM. J. COMP. L. 109 (1997).

¹⁹⁶ Brandwood, *supra* note 195; Chesterman, *OJ and the Dingo*, *supra* note 195; Krause, *supra* note 89.

¹⁹⁷ American jurisprudence explicitly considers this type of prior restraint as the most extraordinary and least tolerable remedy. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 562 (1976). Such gag

"chilling effect"¹⁹⁸ abhorrent to post-martial law Filipino society. The words of Thomas Jefferson capture how repugnant such inroads are to fundamental liberties:

The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.¹⁹⁹

In practical terms, it is dubious that anyone could draft guidelines that would restrict the freedom of speech narrowly enough to be acceptable,²⁰⁰ except in extremely clear-cut cases²⁰¹ such as preserving rape victims' anonymity.²⁰² Moreover, keeping track of various gag orders would be an administrative nightmare, for courts and media companies alike.

A far narrower remedy would be to strictly enforce ethical restrictions on officers of the Court, considering opposing lawyers are likely to fuel media fires in high profile cases. Although the United States sees First Amendment debates regarding such restrictions, Philippine ethical rules currently embrace these:

orders have met with considerable resistance in that jurisdiction. Breheny & Kelly, *supra* note 153, at 388.

¹⁹⁸ Tolentino v. Sec. of Finance, G.R. No. 115455, 235 SCRA 630, Aug. 25, 1994, *quoting* New York Times v. Sullivan, 376 U.S. 254 (1964).

¹⁹⁹ Letter from Thomas Jefferson to Edward Carrington in Freedom of the Press from Zenger to Jefferson, in EARLY AMERICAN LIBERTARIAN THEORIES 333 (Leonard Levy ed., 1966), *quoted in* Michelle Johnson, *Protecting Child Sex-Crime Victims: How Public Opinion and Political Expediency Threaten Civil Liberties*, 20 SEATTLE UNIV. L. REV. 401, 447 (1997).

²⁰⁰ The United States has in fact experienced enforcement problems. Breheny & Kelly, *supra* note 153, at 387 n.94, *citing* Press-Enter. Co. v. Superior Court of California, 464 U.S. 501, 510 (1989); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980); Gannett Co. v. DePasquale, 443 U.S. 368, 378-80 (1979); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976); Arthur R. Miller, *Confidentiality, Protective Orders and Public Access to the Court*, 105 HARV. L. REV. 427, 493 (1991). Further, restricting the press even at the investigation stage has proven impractical, even unenforceable. Moye, *supra* note 185, at 97-98.

²⁰¹ Breheny & Kelly, *supra* note 153, at 388 n.100.

²⁰² Johnson, *supra* note 199, at 411. "Victims always ask about publicity, Shelton police detective Gary Martzell said. 'They're always hoping police or the courts can do something to keep their names out of the paper.'" *See, however*, Karla Sanchez, *Barring the Media From the Courtroom in Child Abuse Cases: Who Should Prevail?*, 46 BUFFALO L. REV. 217, 256 (1998). "[I]n the past, exceptions to the presumption of openness for trials involving sex crimes existed. This fact has been ignored."

Rule 13.02. A lawyer shall not publicly discuss pending cases.²⁰³

In theory, lawyers are ethically barred from making statements that prejudice the impartial administration of justice.²⁰⁴ In practice, however, there are no clear-cut lines, and lawyers do have the right and even the duty to criticize courts.²⁰⁵ Lawyers have been very liberal with the latter, especially when dealing with the media. Former Estrada spokesman Raymond Fortun, for example, said, "May those justices be struck by lightning"²⁰⁶ on radio and Estrada himself predicted his inevitable execution by the Sandiganbayan.²⁰⁷ No one took them seriously. After his dismissal, the Court was even very lenient with former defense counsel Rene Saguisag and his stream of unsolicited memos regarding the plunder trial. Contempt has simply not been exercised with any great frequency in recent years over what have become accepted as ordinary "publicity stunts" dismissed as the less palatable end of Justice George Malcolm's "scalpel [that] relieves the abscesses of officialdom."²⁰⁸

Moreover, in this age of mass media, it simply cannot be denied that lawyers in high profile cases have to stay conscious of the second front. It is quite possible to win the case but leave the client's reputation in shambles, after media induces people in distant provinces to mentally and emotionally own a stake in the case.²⁰⁹ One author even proposes reviewing the ethical treatment of the use of media, because a lawyer condemned as

²⁰³ Such a restriction theoretically promotes the impartiality of trial proceedings. See Conboy & Scott, *supra* at 185, 801 n.164. "See Gentile, 501 U.S. at 1074 (noting that attorney comment is likely to be perceived as more authoritative because of attorney access to information); Roscoe C. Howard, Jr., *The Media, Attorneys, And Fair Criminal Trials*, 4 KAN. J.L. & PUB. POLY 61, 70 (1995) (concluding that criminal attorneys should refrain from commenting to media during on-going trial in order to deter prejudicial trial publicity); see also Philip Hager, *Crackdown on Commentary: Is the Solution to Out-of-Court Comment Worse than the Problem?*, 15 CAL. LAW. 35, 36-37 (1995) (quoting State Senator and attorney Quentin L. Kopp as saying that rule restricting attorney comment will inevitably prevent prejudicial comment by non-lawyers)." See also Gabriel Gregg, Comment, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321, 1353 (1996).

²⁰⁴ RUBEN AGPALO, COMMENTS ON THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE CODE OF JUDICIAL CONDUCT 128 (2001).

²⁰⁵ *Id.* at 129.

²⁰⁶ Fortun quote, *supra* note 141.

²⁰⁷ AFP, *Ex-Philippine leader Estrada predicts own "inevitable" execution*, May 3, 2002 available at <http://www.khaleejtimes.co.ac/ktarchive/050302theworld.htm>.

²⁰⁸ *United States v. Bustos*, 37 Phil 731, 739 (1918).

²⁰⁹ Chesterman, *OJ and the Dingo*, *supra* note 195, at 144.

being media-hungry under present standards may well be defending the interests of his client in the best possible way.²¹⁰

Given prevailing doctrines, attitudes and practices, it is dubious that the potentially sharp increase in administrative cases will be worth the tradeoff. It would be healthy for the judiciary to internalize the English respect for prejudicial publicity, but not their methods of addressing it.²¹¹

C. TRANSFER OF VENUE

Martelino read:

Absent here is a showing of failure of the court-martial to protect the accused from massive publicity encouraged by those connected with the conduct of the trial either by a failure to control the release of information or *to remove the trial to another venue* or to postpone it until the deluge of prejudicial publicity shall have subsided. (internal citations omitted and emphasis added)²¹²

Transfer of venue is thus one of the original decision's remedies, gleaned from its own discussion of foreign jurisprudence. Unlike the first two measures, transfer of venue addresses the judge in addition to the witnesses, lawyers and general public. For example, a captured Abu Sayyaf member may well prefer to be tried in Manila instead of a Christian area of Mindanao. Again, no matter how experienced and well-trained a judge is, he certainly cannot be expected to completely set aside local prejudices, memories and mental saturation by the local headlines.

There is, at present, no hard and fast rule. The only two examples in jurisprudence are Vincent Crisologo, who was in danger of being assassinated on one extreme, and Rolito Go, whose lawyers were reprimanded for dilatory tactics on the other extreme. The Court may treat the unconventional request for transfer of venue with accommodation parallel to *Sola*, or it may apply the *Martelino* bar. At worst, one will be forced to stand one's ground and cite the American cases where convictions

²¹⁰ Jonathan Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811 (1995).

²¹¹ Brandwood, *supra* note 195, at 1415.

²¹² *Martelino v. Alejandro*, G.R. No. 30894, 32 SCRA 106, Mar. 25, 1970.

were overturned because requests for transfer of venue were denied, and ask that the Court act liberally in favor of the rights of the accused.²¹³

Psychological evidence supports transfer of venue as a possible remedy. One survey used five actual murder trials and showed that 40-90% more people in actual venues had been exposed to pretrial publicity, including inadmissible information. Moreover, 16-40% were more likely to form preconceptions that the accused was guilty.²¹⁴ Results in relation to transfer of venue studies are among the strongest, which may help convince the Court to move an accused out of the local judge's jurisdiction. Further, there are far less race-based demographic concerns in the Philippines, unlike in the United States.²¹⁵

There is, of course, one obvious limitation to this remedy: In an age of mass media, national level publicity can bias every possible jurisdiction.²¹⁶

D. CONTINUANCES

Martelino discussed its eventual remedy:

[W]e think that the suspension of the court-martial proceedings has accomplished the purpose sought... The atmosphere has since been cleared and the publicity surrounding the Corregidor

²¹³ Patricia Lemanowicz, *Recent Decision: Criminal Procedure - Death Penalty Defendant Not Entitled to Change of Venue for Pretrial Publicity - Commonwealth v. Crews*, 640 A.2d 395 (Pa. 1994), 68 TEMPLE L. REV. 907, 917-18, 925-26 (1995). Lemanowicz discusses how Irvin mandates a transfer of venue in the face of prejudicial publicity, but that requiring the establishment of a nexus between reports and actual juror prejudice before allowing the transfer may be too stringent. See, however, Feldman, *supra* note 148, at 227-32, 246-47. The author discusses how, in New Jersey, transfer of venue is a judge's option if he feels that prejudicial publicity will not subside. However, he posits that a transfer may draw media interest in the new venue, and actually increase prejudicial publicity.

²¹⁴ Studebaker, *supra* note 94, at 434, citing M.T. Nietzel & R. C. Dillehay, *Psychologists as consultants for changes of venue*, 7 L. & HUM. BEHAV. 309, 309-55 (1983).

²¹⁵ See Lemanowicz, *supra* note 213, at 915, citing Note, *Out of the Frying Pan or into the Fire? Race and Choice of Venue After Rodney King*, 106 HARV. L. REV. 705, 706, 708, 715 (1993). "[S]ome commentators on the Rodney King case suggested that the accused police officers were acquitted only because the trial venue was changed from inner-city Los Angeles to an affluent suburban community in Ventura County which was more sympathetic to the police officers." See Laurie Levenson, *Change of venue and the role of the criminal jury*, 66 S. CAL. L. REV. 1533, 1561-71 (1993). Levenson outlines how to maintain demographic concerns and parallel the original venue's community.

²¹⁶ Thomas Beisecker, *The Role of Change of Venue in an Electronic Age*, 4 KAN. J.L. & PUB. POL'Y 81, 85 (1995); Brecheny & Kelly, *supra* note 153, 391-92.

incident has so far abated that we believe the trial may now be resumed in tranquility.²¹⁷

This was the same "cooling off" period Estrada asked for, and was denied. This may be unpopular because it may be perceived as needless delay,²¹⁸ especially given intense scrutiny if public opinion is sympathetic to the prosecution.

Psychological data regarding continuances' effectiveness is mixed. On one hand, media attention does not usually focus on a case for extended periods of time. A study showed that a delay in the trial could negate the impact of factual information communicated by early publicity. However, prejudicial publicity's *emotional* overtones are unaffected by cooling off periods. Character impressions that form, as discussed earlier, are likewise difficult to remove.²¹⁹

Despite not being a complete solution, delaying proceedings appears to be the simplest and most practical solution available at present.²²⁰ Backlogs may be addressed through improved logistics and administration. The scope of witnesses' examination prior to trial may also be expanded²²¹ to counteract fears that testimony will lose accuracy.²²² Not only are continuances the solution *Martelino* ended with, they are also a poetically prescribed tool in American jurisprudence:

[T]his lapse in time had a profound effect on the community and, more important, on the jury, in softening or effacing

²¹⁷ *Martelino*, 32 SCRA at 117.

²¹⁸ See Whitebread, *supra* note 183, at 197-98. "[P]ostponement inevitably results in a backlog of cases. Even in regions where the number of high profile cases is small, postponing a trial will still cause a backlog of cases in that jurisdiction. Moreover, the threat of backlog is even greater in counties such as Los Angeles, where it seems as though all cases are high profile media events."

²¹⁹ Studebaker, *supra* note 94, at 440; Devine, *supra* note 95, at 649 T.5, citing G.P. Kramer et al, *Laboratory simulation and bias in the study of juror behavior: A methodological note*, 13 L. & HUM. BEHAV. 89, 89-100 (1990).

²²⁰ RULES OF COURT, Rule 119, § 4(a). "Whether or not the failure to grant a continuance in the proceeding would likely... result in a miscarriage of justice."

²²¹ See Rule 119, §§ 12, 15. At present, these examinations are explicitly allowed only when the witness is too sick or infirm to testify, or will be unavailable due to distance from the venue. Further, the present Rules permit only the conditional examination and no longer the deposition of prosecution witnesses. I FLORENZ REGALADO, REMEDIAL LAW COMPENDIUM 312 (8th Ed., 2000).

²²² Whitebread, *supra* note 183, at 197.

opinion... That time soothes and erases is a perfectly natural phenomenon, familiar to all.²²³

E. OTHER POSSIBLE REMEDIES

Changing times demand greater procedural creativity, and many new or unconventional remedies have been proposed in various discussions of prejudicial publicity. For example, trial procedure may be simply enhanced by requiring decisions to explicitly note pressures from undue publicity in decisions and any action taken, to facilitate appeals. Although *Teehankee* did not end with a reversal or retrial, it was able to render a detailed accounting of these pressures, something that would have made it easy to spot a *Cruz v. Salva* or *Sheppard* scenario. Another similar step is to include detailed media management plans in pre-trial orders.²²⁴

Another progressive remedy proposes to prohibit potential trial witnesses from selling their stories to media companies. One such law was enacted in California in reaction to the sensational O.J. Simpson trial.²²⁵ It was, however, struck down for overbreadth,²²⁶ failing to serve a compelling government interest, and not being narrowly tailored. In Minnesota and Arkansas, laws taxing publications likewise ran smack into the freedom of

²²³ *Patton v. Yount*, 467 U.S. 1025, 1035 (1984), citing *Irvin v. Dowd*, 271 F.2d 552, 561 (CA7 1959) (Duffy, J., dissenting).

²²⁴ Joseph Dailey, *Media in the courtroom*, 3 TENN. J. PRAC. & PROC. 1, 4-5 (2000). The closest provision in the present Rules requires pre-trial conferences to consider "such matters as will promote a fair and expeditious trial." RULES OF COURT, Rule 118, § 1(f). Judge Dailey, however, compiled a far more detailed sample list based on the Tennessee Supreme Court Rules:

"1. It is critical that cameramen know from the outset that they are not to photograph jurors at any time for any reason.

"2. Cameramen should also be notified if there are particular witnesses - such as juveniles - that are not to be photographed.

"3. Media representatives should be instructed that there will be no audio pick up, recording, broadcast, or video of conferences that occur in court between attorneys and their clients, between co-counsel, or between counsel and the presiding judge whether held at the bench or in chambers.

"4. The number and location of cameras should be clearly designated by the trial judge.

"5. Only equipment that does not produce distracting sound or light may be employed.

"6. All media personnel and representatives must dress and conduct themselves appropriately and in a manner consistent with the judicial proceedings that are taking place.

"7. A full explanation should be made to the media and their representatives of the consequences of violating the terms of the Order." See Cole, *supra* at 147 for an even more detailed media management checklist, with supporting jurisprudence.

²²⁵ Conboy & Scott, *supra* note 185, 792-93.

²²⁶ *Id.* at 793. The statute prohibited even reimbursements for cab fare, which indirectly restricted reporting.

speech.²²⁷ New York's "Son of Sam" law which prohibited criminals from profiting from crimes through media deals, however, was successfully revised to meet constitutional scrutiny. Despite remaining content-based, it was revised to exclude works that merely mentioned crimes without focusing on them, and to cover only convicts and exclude authors merely accused of crimes.²²⁸ Similar rules can be enacted to control other types of disclosures related to pending cases, so long as they meet constitutional requirements.²²⁹

Finally, one proactive remedy proposes the creation of special court branches to handle high-profile cases, with carefully selected, experienced, and specially trained judges.²³⁰ Aside from being equipped to manage prejudicial publicity before trials, such courts would also exercise stricter control over highly publicized trials themselves. The proponent illustrated this by citing Los Angeles Judge Lance Ito, of O.J. Simpson fame:

Ito, from the beginning, had to battle the media, the egos of the prosecution and defense counsel, witnesses who lacked credibility, and dissident jurors.... Some feel that he lacked the ability to manage the media. These critics contend that Ito's courtroom turned into a media circus. Others criticize him as having become a star-struck judge, while still others assert that Ito did not possess enough control to curtail the grandstanding of the prosecutors and defense lawyers.²³¹

²²⁷ *Id.* at 794-95.

²²⁸ *Id.* at 795-96. See Hermida, *supra* note 152, at 202.

²²⁹ See Schweiker, *supra* note 185. The article discusses how CNN obtained government tapes of conversations between deposed Panamanian General Manuel Noriega and his lawyer, and appropriate legal remedies.

²³⁰ Robinson, *supra* note 183, at 1338-50.

²³¹ *Id.* at 1338. The author also notes several other factors involved in high profile trials. Celebrity defendants, for example, do receive special treatment and are held to different standards. "For instance, while in jail awaiting trial, it was reported that O.J. Simpson received special treatment not afforded to other inmates. He received a hot shower every day, was given unlimited visitation privileges, hot dinners, extra time out of his cell to stretch his legs, more access to the telephone, private no-contact visits with his girlfriend and children, and visitors on Christmas Day." *Id.* at 1332, citing Ralph Frammolino, Simpson Loses a Privilege; Others in Jail Gain One, L.A. TIMES, Dec. 29, 1994, at A1. The Philippines need not look beyond Joseph Estrada for its best example. When the former president was arrested on graft charges, supporters took to the streets and the nonexistent privilege of house arrest was proposed to appease them. Two years later, house arrest for Estrada was still being discussed at the highest levels of government. CNN, *Estrada detention triggers angry protests*, Apr. 26, 2001, ¶ 5, available at <http://www.cnn.com/2001/WORLD/asiapcf/southeast/04/26/estrada.petition.01>; Donna Pazzibugan Volt Contreras, *Estrada house arrest won't affect politics, says Palace*, PHIL. DAILY INQUIRER, Dec. 13, 2002, ¶

An alternative is the creation of a handful of special collegial trial courts, on the premise that deliberations diminish some of prejudicial publicity's effects.

V. NEED FOR LONG-TERM CONSCIOUSNESS OF MEDIA-DRIVEN PUBLIC OPINION

Even assuming the Court acknowledges that judges are only human and can be influenced by publicity, consciously or unconsciously, just like any other person, even the most promising remedies such as change of venue and continuances nevertheless appear limited. Perhaps they are, just as reversing convictions due to prejudicial publicity is merely a palliative.

Further, the need for impartial trials cuts both ways. Courts must be aware that they will also have to control *sympathetic* instead of prejudicial publicity in some cases. Public opinion in the Nida Blanca murder investigation, for example, became confused after telecasts of witness Philip Medel violently and psychopathically recanting his testimony against Blanca's husband Rod Strunk. Months later, the National Bureau of Investigation again pointed to Strunk and upheld Medel's original confession.²³² The clearest example of a "trial by newspaper's" immediate, unequivocal acquittal involved 80's rock star Sonny Parsons:

[T]he robbers would have raped his two daughters had he not been able to convince them that some policemen were coming for breakfast. Instead, they fled, and one of the household help untied Parsons, who went after the robbers with his own gun, engaging them in a running gunbattle in the street outside his home.

"It was hot pursuit," recalls Parsons...

He managed to kill one with a head shot and wound another, before running out of bullets. A third assailant went after him with a knife... Parsons was able to grab the knife and slit open his assailant's jugular...

1, available at http://www.inq7.net/brk/2002/dec/13/brkpol_2-1.htm; Inq7.net; *Priest slams supporters of Estrada house arrest*, PHIL. DAILY INQUIRER, Dec. 11, 2002, ¶¶ 1-6, available at http://www.inq7.net/brk/2002/dec/11/brkpol_4-1.htm.

²³² Philip Tubeza, *NBI: New witness saw Strunk, Medel together before Nida's murder*, PHIL. DAILY INQUIRER, Jul. 31, 2002, at A25.

...

... "It was their fault. I only defended myself. Morally and legally, I believe what I did was right."

Both President Arroyo and the Senate seem to agree. The homicide charges filed by the Marikina PNP against Parsons will likely just be a formality. With Malacañang's present focus on fighting crime, Parson's case has become something of a *cause celebre* for anti-crime groups.²³³

Given the broad nature of the issue, the long-term solution is to do no less than recast the idea of judicial independence in the context a wired world. One author even pointed out:

As long as court coverage was primarily the domain of print media, it was possible for courts to retain their detached aura. Print coverage places intermediaries—reporters, editors, words, and interpretation—between the citizen and the courts... Television puts the citizen in an entirely different position... Television brings the participants into the citizen's own world, where the viewers can size them up the way they have learned to size up candidates, coaches, and characters in soap operas.²³⁴

Although the place of the judiciary remains fixed in its sphere of government, the way it interacts with the citizenry and public opinion has forever been changed by mass media. Perhaps it is no longer enough to say that there are no simple fields of blacks and whites because there are penumbras of gray;²³⁵ after all, television is in color.

Fortunately, the Court already recognizes this, and no less than former Chief Justice Hilario Davide, Jr. lamented that the Bench remains a mystery to the general public, causing some misunderstanding. During the "Davide Watch," he envisioned a Bench fully accountable to the public and

²³³ Eric Caruncho, *Sonny Parsons stands his ground*, SUNDAY INQUIRER MAGAZINE (Phil.), Aug. 4, 2002, at 1, 2.

²³⁴ David Anderson, *Democracy and the Demystification of the Courts*, 14 REV. LITIG. 627, 642 (1995).

²³⁵ *Binging Ho v. Municipal Board of Canvassers*, G.R. No. 29051, 28 SCRA 829, Jul. 28, 1969, quoting *Springer v. Gov't of the Phil. Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."

one that could communicate with the citizenry. Responsiveness to the media's needs was an important policy highlight.²³⁶

The Court has formed a Committee on Public Information, and created a Public Information Office under the Office of the Court Administrator.²³⁷ At present, for example, this office promptly informs reporters covering the justice beat of newly promulgated Supreme Court cases.²³⁸ Similar organizational evolutions should be duplicated in the lower courts. Further training and specific, concrete procedures on dealing with the press should be instituted.²³⁹

Going back to the Estrada plunder trial, the accused's impeachment trial was broadcast live, daily, and brought a nationwide audience to a standstill. Those telecasts ended with only the prosecution evidence presented. That "most-watched program in the boob tubes" was unprecedented in Philippine history, and *none* of the remedies discussed can completely remove the taint of prejudicial publicity. None of the situations in the American cases cited even come close.

Clearly, the judiciary's only permanent solution is to visibly develop a critical but not hostile attitude towards the influences of mass media.

CONCLUSION

Over the last two centuries, the newspaper has facilitated ideas' spread throughout communities. It was then joined by its broadcast cousins, television and radio. Soon afterwards came prejudicial publicity, a technological offshoot that can damn a man before the fickle tribunal of public opinion even before he stepped into the courthouse.

This Frankenstein's monster, however, is merely the modern reincarnation of a much older debate. Formalists hold that law is a creature of pure logic complete in itself while realists violently protest that so many

²³⁶ Hilario Davide, Jr., *The Partnership between the Judiciary and Media in the New Millennium*, 4 CRT. SYSTEMS. J. 1, 3 (1999).

²³⁷ *Enhancing Communication between the Judiciary and the Citizenry*, 4 CRT. SYSTEMS. J. 28 (1999).

²³⁸ Letter to the editor of Supreme Court Public Information Office Chief Ismael Khan, Jr., PHIL. DAILY INQUIRER, Feb. 24, 2003, at A10. The letter rebuked *Inquirer* columnist Victor Agustin's allegation that a decision regarding Banco Filipino had not been made public, even though it was already available at the Court's website.

²³⁹ See Cole, *supra* note 147; Robinson, *supra* note 183, at 1342-44.

intangible factors precede logic in decisions. Put in these terms, the *Martelino* standard is clearly antiquated. How can a judge reply to an accused who, after running a gauntlet of photographers and cameramen, cries out against a "naïve state of mind,"²⁴⁰ that law obviously "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics?"²⁴¹

In 2007, the judge would have to agree.

Philippine jurisprudence has treated the concept of prejudicial publicity with seeming skepticism. A short line of defendants has complained of it, yet not even a former president whose impeachment trial was broadcast live daily was able to dent the Court's impossible requirement of proof of actual prejudice.

Strangely, however, related areas of jurisprudence revealed less exacting standards. Ruling on media coverage of the *same* former president's trial, the Court pronounced that the mere possibility of taint in a capital trial was paramount, and denied the TV cameras entry into the courtroom. The same Court held that decisions regarding transfers of venue to guard against potential intimidation of prosecution witnesses must err in favor of the transfer. However, not a single such transfer has been granted on the grounds of prejudicial publicity to date.

Many different disciplines show why the accused must be wary of prejudicial publicity. Philosophers say that the law is what the judge says it is, and "the Constitution is what the Supreme Court says it is,"²⁴² thus one must carefully identify the stimuli that influence the judge. Psychologists have conducted numerous surveys and studies, and have concluded that pretrial publicity can influence impressions, perceptions, and most importantly, preconceptions of guilt. Journalists have recorded everyday reports which vividly show the pressures judges face, especially those in high-profile cases. Finally, American jurists, in a longer line of cases, have maintained a bar lower than the actual prejudice required in the Philippines.

²⁴⁰ Oliver Wendell Holmes, *The Natural Law*, 42 HARV. L. REV. 40 (1918).

²⁴¹ Jerome Frank, *Mr. Justice Holmes and Non-Euclidian Legal Thinking*, 17 CORNELL LAW Q. 568, 572 (1931), quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881).

²⁴² Merlin Magallona, *Philippine Experience in Judicial Independence: General Context and Specific Problems*, 72 PHIL. L.J. 164, 166 (1997).

The two remedies prescribed in *Martelino* may be explored to reduce the effects of prejudicial publicity, though they would seem unconventional at present. Psychological data has proven the positive effects of both delaying the trial and transferring the venue. However, they remain incomplete solutions. Newer, more unconventional approaches fall short as well.

"Supremacy of the judiciary is the price the people pay for its independence."²⁴³ In this interconnected age, perhaps the key word is no longer supremacy, but integration. The young, powerful force of mass media galvanizes and amplifies public opinion, rousing the judiciary from its seeming aloof perch and forcing it to ride its wave to remain afloat. There is thus no substitute for a long-term, critical, healthy attitude towards pervasive media.

Law must look at a man and see only his merits, and remain blind to his fame and his fortune. Mass media has not changed this fundamental truth, not even if Lady Justice now has to close her ears in addition to blindfolding her eyes. Public opinion may be powerful enough to shake the cold, impartial judge,²⁴⁴ but it is also fleeting.

As Judge Joseph Bellacosa wrote:

The substance, process, and pursuit of human justice... are found in quiet nooks and crannies of careful thoughtfulness, far away from marching fields of populists waving banners, who propagandize a brand of truth through lazy symbols, slick slogans, and quick fixes.²⁴⁵

Thus, "perhaps we must stand fast a little, even at the risk of being heroes."²⁴⁶ And stand we must for Joseph Estrada, Claudio Teehankee, Jr., Hubert Webb, Rolito Go—and the essence of our Bill of Rights.

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²⁴³ *Id.* at 167.

²⁴⁴ *Luque v. Kayanan*, G.R. No. 26826, 29 SCRA 165, 178, Aug. 29, 1969.

²⁴⁵ *Judging Cases*, 65 FORDHAM L. REV. 2401, 2403 (1997).

²⁴⁶ *Sir Thomas More in A Man for all Seasons* (Robert Bolt screenplay, 1966).