I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY

The Future of Online Legal Journalism: The Courts Speak *Only* Through Their Opinions?

CHRISTOPHER J. DAVEY

I. INTRODUCTION

It is hard to avoid hyperbole when discussing the current state of the media and what the future holds. Even when describing, in 1964, the relatively boring media landscape at the time—compared to today—the iconic Canadian media theorist Marshall McLuhan wrote: "After three thousand years of explosion, by means of fragmentary and mechanical technologies, the Western world is imploding."[1] What would McLuhan say today? If the Western world was imploding in 1964—when the Internet was not even a dream, and the 8-track tape and Betamax had not even been invented, much less gone extinct—what do we make of today's media revolution? What does the future hold?

This article is intended as a snapshot of the media revolution as it affects one critically important slice: legal journalism. My perspective is that of a former journalist who has spent the past nine years as the chief communications officer of the Supreme Court of Ohio.[2] Specifically, this paper examines: (a) how overall trends in the media are impacting coverage of the courts, resulting in a decline in quantity and quality of court coverage; (b) how this is a matter of great concern when it is understood that the media have always played a critical role

---

[1] MARSHALL MCLUHAN, UNDERSTANDING MEDIA 3 (1964).

[2] Christopher J. Davey is the Director of Public Information for the Supreme Court of Ohio where he serves as the Court's chief spokesman and manages the eleven-member communications staff. Davey holds a master's degree in journalism from The Ohio State University, where he was a 2002 Fellow in the Kiplinger Public Affairs Journalism Program. He is a former Statehouse correspondent for the *Dayton Daily News* and the *Cincinnati Enquirer*.

in making courts open and understandable to the public; and (c) how courts themselves are responding in some innovative ways, using the same technology that has upended the media to ensure that courts remain transparent and understandable for the purpose of supporting trust and confidence in the judicial system. These topics are explored in the spirit of the 2009 report released by the Knight Commission on the Information Needs of Communities In a Democracy with the understanding that these issues are of fundamental importance because "if there is no access to information, there is a denial to citizens of an element required for participation in the life of the community."[3]

II. A RAPIDLY CHANGING MEDIA

In January 2012, former Cuyahoga County Commissioner, and local political kingpin, Jimmy Dimora was beginning a weeks-long federal trial on public corruption charges in the culmination of a scandal that had gripped the Cleveland area for years and led to the resignations and incarceration of several high profile figures. The local Fox television affiliate in Cleveland was struggling with a perennial question in television news: How to cover a federal trial with the visual medium of television when federal courts still bar cameras from the courtroom?

WOIO news director Dan Salamone came up with a highly unconventional idea: puppets. "Today in Puppets Court," a squirrel puppet announces, holding a 19 Action News microphone and wearing a black suit and tie, "a wiretapped conversation, played in court, where county employee Kevin Kelly jokes with Jimmy Dimora about the possibility he picked up herpes from a hooker in Vegas."[4] "Nutty" the squirrel reported each night in this way with various other animal and human puppet depictions of real testimony from the trial.

Salamone said the segment was an attempt to illustrate the comical aspects of the trial, and he emphasized that the puppets always came at the end of each night's news cast, after thorough coverage of the trial in traditional journalistic seriousness. "It's certainly an important trial, and we've put a lot of resources into it,

---

[3] Alberto Ibarguen & Walter Isaacson, *Foreword* to THE KNIGHT COMMISSION ON THE INFO. NEEDS OF COMMUNITIES IN A DEMOCRACY, INFORMING COMMUNITIES: SUSTAINING DEMOCRACY IN THE DIGITAL AGE, at II (2009).

[4] 19 Action News, *Dimora Trial: Puppet's Court Day 1*, YOUTUBE (Jan. 19, 2012), http://www.youtube.com/watch?v=-jEkAPYR5BM.

but there also are aspects of this trial that are circus-like," Salamone said in the *Cleveland Plain Dealer*. "Some of the conversations from the wiretaps are almost juvenile."[5]

"Juvenile" was how the puppet segment itself might be described. Predictably, it was not well received in all circles. Current Cuyahoga County Executive Edward Fitzgerald said, "It's really theater of the absurd."[6] Mr. Dimora's defense attorney stated, "I don't know what's more ridiculous, the puppets or the people they are supposed to be. It's sensationalizing something even further that doesn't need it."[7] The segment received bemused national media coverage. While some viewers complained, ratings surged as long as the puppets were on the air.[8]

After weeks of daily coverage and salacious testimony, the trial ended on March 10, 2012 with Dimora being convicted on thirty-two counts of racketeering and other charges. The *Cleveland Plain Dealer*'s *County in Crisis: The Dimora Trial* reported on the front page in three-inch type the screaming one-word headline: "GUILTY."[9]

Is this the future of online legal journalism? In many ways the surreal puppets segment and the media circus surrounding the Dimora trial are a reflection of the current media environment and its impact on the coverage of courts. The news media are undergoing a transformation that is driven largely by technology and is impacting every aspect of news, particularly the economics of the news business. The present and future of *online* journalism and *legal* journalism are inexorably intertwined with the past, present, and future of journalism itself.

If the future of court reporting will look anything like the present (and the recent past) we have a clear picture of what it will look like. There will be fewer knowledgeable reporters covering courts as their exclusive or partial assigned beat. We can continue to expect fewer

---

[5] John Caniglia, *Jimmy Dimora's Trial Spawns WOIO Channel 19's Puppet Court Based on Testimony*, CLEVELAND PLAIN DEALER (Jan. 18, 2012, 4:47 PM), http://www.cleveland.com/countyincrisis/index.ssf/2012/01/jimmy_dimoras_trial_spawns_the.html.

[6] Douglas Belkin, *Show Trial: Puppets Act Out Corruption Case*, WALL ST. J. (Feb. 28, 2012), http://online.wsj.com/article/SB10001424052970204653604577249391251534690.html.

[7] *Id.*

[8] *Id.*

[9] James McCarty, *GUILTY*, CLEVELAND PLAIN DEALER, Mar. 10 2012, at A1.

stories about the courts and the legal system in general. News sources will offer less serious coverage of the judicial branch as a governmental institution despite the fact that courts' decisions affect nearly every facet of society. The vast majority of court coverage at the local level will focus almost exclusively on crime and punishment—the more sensational and salacious, the better. And the little national coverage that is not sensational celebrity trials or forty-eight-hour mystery-style crime dramas will be devoted to a small handful of the most controversial or perceived political cases at the United States Supreme Court.

The causes of this pessimistic picture of court coverage lay in the same radical changes affecting the media generally, changes that many have described as revolutionary. The complete transformation of the media landscape currently underway makes Marshall McLuhan's envisioned implosion of the Western world seem understated. The ongoing fundamental shift to Internet-based digital media has obliterated the old economic model for newspapers and seriously undermined the economics of nearly every other form of commercial journalism.[10] About a decade after the Internet became a nearly ubiquitous facet of life, it was becoming clear that the impact on media and culture has been profound. In 2006, the *Economist* heralded the new age this way: "Society is in the early phases of what appears to be a media revolution on the scale of that launched by Gutenberg [inventor of the printing press] in 1448."[11] Eric Alterman wrote in the *New Yorker* in 2008 that after three centuries in existence,

> [I]t no longer requires a dystopic imagination to wonder who will have the dubious distinction of publishing America's last genuine newspaper. Few believe that newspapers in their current printed form will survive. Newspaper companies are losing advertisers, readers, market value, and, in some cases,

---

[10] *See* Jack Fuller, WHAT IS HAPPENING TO THE NEWS: THE INFORMATION EXPLOSION AND THE CRISIS IN JOURNALISM (2010).

[11] *What Sort of Revolution?*, ECONOMIST (Apr. 20, 2006), http://www.economist.com/node/6794256.

> their sense of mission at a pace that would have been barely imaginable just four years ago.[12]

In 2011, communications professors Robert W. McChesney and Victor Pickard brought together essays from some of the preeminent journalists, editors, publishers, and cultural critics of our time to assess the current state of journalism in a substantial volume whose title summarizes the conclusion succinctly: *Will the Last Reporter Please Turn Out the Lights: The Collapse of Journalism and What Can be Done to Fix It.* "American journalism is in an existential crisis," they wrote:

> Although the crisis has been developing for decades and is rooted in long-term structural and technological factors, it flew underneath the radar until the bottom finally came out of the cup around 2007 with the Great Recession . . . [W]e are in a 'critical juncture' for journalism and our media system. The existing news media system is in collapse, and something is going to replace it.[13]

In 2012, it is clear that the revolution continues. In its most recent annual report, the Pew Center's Project for Excellence in Journalism found that while some sectors of the journalism industry appeared in the most recent year to stave the bleeding, challenges persist. "It may be that in the digital realm the news industry is no longer in control of its own future," said the report.[14] Among other grim facts for the news business, the report found: while most original content consumed through any media originates with newspapers, the newspapers capture very little return revenue on this investment, while third-party aggregators profit from the free labor; newspaper ad revenue is down 50% since 2006 and still declining; circulation and advertising

---

[12] Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, THE NEW YORKER (Mar. 31, 2008), http://www.newyorker.com/reporting/2008/03/31/080331fa_fact_alterman#ixzz1vzz5QshK.

[13] Robert W. McChesney & Victor Pickard, *Introduction* to WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS: THE COLLAPSE OF JOURNALISM AND WHAT CAN BE DONE TO FIX IT, at ix (Robert W. McChesney & Victor Pickard eds., 2011).

[14] Tom Rosenthal and Amy Mitchell, *Overview* to PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2011 (2012), http://pewresearch.org/pubs/1924/state-of-the-news-media-2011.

combined equals a total newspaper industry shrinkage since 2000 of 43%; 5% of newspapers have closed in five years; even though the rate of losses declined in 2011 for the first time in nearly a decade, there were still nearly industry-wide declines in revenue: newspapers (-7.8%), local television (-6.7%), magazines (-5.6%), and network television (-3.7%); and the only two areas that saw significant revenue growth in 2011 were cable news (+9% for the first time in years) and online news (+23%).[15]

Even at the time of this writing, the daily news contains the latest ominous sign. The publisher of the 175-year old *Times Picayune* announced on May 24, 2012 that New Orleans would become the most prominent major city on the United States without a daily newspaper, as continued economic difficulties and reduced advertising revenue forced them to move to printing only three times per week.[16] "This is a forced march to digital, brought on by the fact that advertising this year has declined so much more than the industry expected," a newspaper industry consultant told the *New York Times* in a report on the scale back.[17] "Everyone knows that print editions are going the way of the steam engine, but I question whether they have the readiness to make this switch in such a hurry."[18]

What effects has this upheaval in the overall news media had on legal journalism specifically? To answer this question, it is first important to make a fundamental distinction between the two broad types of legal journalism that exist. First, there is specialized legal journalism for a legal audience. Second, there is mainstream legal journalism for a generalized public audience. This article is concerned primarily with the latter of these for reasons that are detailed below. But first, we will look briefly at the former.

A. *Specialized Legal Journalism for a Legal Audience*

There is a long tradition of specialized legal coverage for lawyers, judges and scholars. As the movement toward professionalism in the legal practice accelerated in the early twentieth century, the American

---

[15] *Id.*

[16] David Carr & Christine Haughney, *New Orleans Newspaper Scales Back in Sign of Print Upheaval*, N.Y. TIMES, May 25, 2012, at A1.

[17] *Id.*

[18] *Id.*

Bar Association began publishing the *Annual Bulletin* in 1908, the first comparative law journal in the United States. It became the *American Bar Association Journal* in 1915, a name it retained until 1984 when it became the *ABA Journal*. As local bar associations began to thrive throughout the twentieth century, many of the larger metropolitan bar associations and specialty bars (representing women, minorities and particular areas of practice) also began publishing periodicals with specialized news and information of interest to practitioners in their membership. While the Great Recession has not spared these associations and their respective publications, they do not face the same tumult as the general news industry because of the specialized nature of their content models and because they are largely subscription-based, rather than dependent upon advertising revenue. Thus, they have been in a better position to manage the transition to online delivery platforms.

Parallel with the rise of the bar association press in the twentieth century, in nearly every major city there developed commercial daily and weekly legal news publications catering to the practicing lawyer and judge needing to keep up on the major cases of the day.[19] Today there are 110 legal newspapers in the United States, most still heavily print based, some still exclusively so.[20] Just as the economic model of the mainstream press has been threatened by the information revolution, the model for these commercial niche publications is in flux today because of three major developments driven by the Internet. First, the rise of free case information provided directly by courts and other sources threatens to undermine the need for relying on legal newspapers and bar association publications. Second, the rise of the "blawg" (web logs devoted to legal content) has created a thriving ecosystem of free sources of news and analysis on nearly every conceivable specialty legal topic. The compendium site, blawg.com, lists 4,333 active blawgs with nearly half a million posts as of February 2013.[21] Sites like "How Appealing" receive thousands of hits per day and reliably generate revenue through online advertising.[22] The third threat to commercial legal newspapers has

---

[19] *See* PUBLIC NOTICE RESOURCE CENTER, PUBLIC NOTICE: AN AMERICAN TRADITION, http://www.pnrc.net.

[20] THE LEGAL RESEARCHER'S DESK REFERENCE 369–74 (Arlene L. Eis ed., Infosources Publishing 2012-2013 ed. 2012).

[21] BLAWG, http://www.blawg.com (last visited Jan. 22, 2013).

[22] Howard Bashman, HOW APPEALING, http://howappealing.law.com (last visited Jan. 22, 2013).

come in the form of a public-policy push in some jurisdictions away from the costly requirement for legal notices (e.g. formal notices of judgment liens, divorces, etc.) to be published in print form in newspapers designated as the "official law journals." Instead, some states and local jurisdictions are moving toward allowing some notices to simply be posted online. The movement is being driven largely by cost concerns and is being stoutly opposed by the legal press industry.[23] It remains to be seen where this will lead.

We are concerned here, though, with the future of mainstream legal journalism for a generalized public audience. The reason we focus on this is simple: the Information Revolution is having a far more profound impact on legal journalism for the general public, and this has the potential to impact society in some important ways that must be considered. The legal system and the courts rely more than any other branch on the public's trust and confidence. And the general public's level of confidence in the legal system is directly related to its level of access to quality information about the legal system.[24] As the news media continues to undergo transformation, the strength of American democracy depends in part on ensuring that the general public continues to have access to quality news and information about the courts and the legal system. We will explore this in further detail below. First, we will look at how the Information Revolution is affecting mainstream legal coverage. And to understand this question it is helpful to examine the history of mainstream coverage of the courts.

In 1935, Bruno Hauptmann went on trial in New Jersey for the kidnapping of famed aviator Charles Lindbergh's infant son. Hundreds of reporters descended on the courtroom creating a circus-like atmosphere and breathlessly disseminating sensationalized details of the trial's every turn. While Hauptmann was convicted and ultimately executed, the case is still cited today as the beginning of the modern era of mainstream court reporting. One scholar noted:

> Few cases in the annals of American crime received wider attention or gave greater impetus to criticism of the press than the Lindbergh kidnapping trial, which

---

[23] *See Time to Fight to Keep Public Notice in Arizona Newspapers*, AZ CAPITOL TIMES (Jan. 30, 2012), http://azcapitoltimes.com/news/2012/01/30/time-to-fight-to-keep-public-notices-in-arizona-newspapers.

[24] JAMES L. GIBSON & GREGORY A. CALDEIRA, KNOWING ABOUT COURTS (2007), http://ssrn.com/abstract=956562.

> may have been a watershed for court reporting in America. Never again would the press descend like vultures upon a defendant without risking the wrath of peers, readers and the court system itself.[25]

Never again? Thirty years later, prominent Cleveland physician Sam Sheppard was the focus of an intense media spotlight as a prime suspect in the murder of his wife at their Bay Village home in suburban Cleveland in 1963. The *Cleveland Press* ran a now infamous headline, "Why Isn't Sam Sheppard in Jail?"[26] He was charged, tried and convicted. But his conviction was later overturned by the United States Supreme Court in a case that is still cited as a seminal case in pre-trial publicity compromising the right of due process. [27] Interestingly, even in overturning Sheppard's conviction essentially on the basis that the media had so abused its role to the point that it violated the very integrity of the proceedings, the Supreme Court went out of its way to reaffirm the unique and critical role that the media plays in explaining the judicial system to the lay public: "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[28]

1. *Fewer Reporters*

Today, the media's ability to play this watchdog role is hampered by its general economic malaise. Erica Smith, a graphics designer for the *St. Louis Post-Dispatch*, in 2007 began systematically tracking the total number of job losses in the journalism industry through a "crowd-sourced" website. While 2012 so far has been the best year since she started counting, with *only* 991 journalism job cuts as of May 28, 2012, the cumulative numbers are remarkable: 41,133 jobs

---

[25] Mickey H. Osterreicher, *Cameras in the Courts: The Long Road to the New Federal Experiment*, 1 REYNOLDS COURTS & MEDIA L.J. 221, 223 (2011) (quoting D. GILLMOR & J. BARRON, MASS COMMUNICATION LAW, CASES & COMMENT 392, note 10 (2d ed. 1974)).

[26] Jonathan Turley, *Zimmerman: Media Circuses Make for Bad Justice*, JONATHAN TURLEY (Apr. 26, 2012), http://jonathanturley.org/2012/04/21/zimmerman-media-circuses-make-for-bad-justice.

[27] Sheppard v. Maxwell, 384 U.S. 333 (1966).

[28] *Id.* at 350.

lost since 2007.[29] The United States Department of Labor Bureau of Labor Statistics reported that the total number of people working in the United States as "reporters, correspondents and broadcast news analysts" was 58,500.[30] No empirical analysis has been done on how many of the journalism job losses were court and legal affairs reporters. But the anecdotal evidence is strong that the ranks of professional journalists dedicated to covering the courts and legal affairs have been decimated.

Judges and journalists participating in a 2008 conference at the William H. Rehnquist Center on the Constitutional Structures of Government at the University of Arizona discussed how fewer and fewer reporters are showing up in America's courtrooms.[31] This is consistent with my experience as the director of public information for the Supreme Court of Ohio. Starting in the post in 2003, nearly every major newspaper in Ohio had a Statehouse correspondent who, among his or her duties, had at least to check in daily on the activities of the Ohio Supreme Court. In 2012, there are no longer any reporters in the state who cover the Ohio Supreme Court as a designated beat.

The federal courts for over a decade have sponsored regional and national gatherings of judges and journalists who cover the courts to discuss areas of common concern. A steep decline in the number of journalists attending these sessions was among the factors that led the federal courts to form a committee in the Federal Judicial Conference to study ways that the federal courts can still support public understanding with less coverage from the media, according to David Sellers, assistant director for public affairs at the Administrative Office of the United States Courts.[32]

---

[29] PAPER CUTS, http://newspaperlayoffs.com (last visited Jan. 22, 2013).

[30] U.S. BUREAU OF LABOR AND STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK: REPORTERS, CORRESPONDENTS, AND BROADCAST NEWS ANALYSTS (2010), http://www.bls.gov/ooh/media-and-communication/reporters-correspondents-and-broadcast-news-analysts.htm.

[31] Sally Rider & Russell Wheeler, *The 'New Media' and the Courts: Journalists and Judges Consider Communications By and About Courts in the Internet Era*, 4-5 (May 2009), http://www.rehnquistcenter.org/documents/postsymposiumfinal.pdf.

[32] Interview with David Sellers, Assistant Director for Public Affairs, Administrative Office of the United States Courts (May 31, 2012).

2. *Fewer Stories*

Predictably, then, the sheer volume of court coverage in mainstream news media would appear to be in decline. Members of the Conference of Court Public Information Officers report fewer journalists covering the day-to-day business of the nation's trial courts and coverage centering around intense high-profile celebrity trials. A simple Lexis search centered on coverage of the Ohio Supreme Court is instructive. From 2003 to 2006, the average number of news stories in the major metropolitan Ohio newspapers combined featuring the term "Ohio Supreme Court" was 1,224.5 per year. From 2007 to 2011, the average was 925 per year. In 2011, there were only 783 stories written about the Ohio Supreme Court in these newspapers, a forty-one percent drop from the peak year (2006: 1,332).[33] This reduction in overall quantity of mainstream legal affairs and courts coverage is consistent with a more general trend toward less public affairs coverage. For example, a recent report from the Pew Centers found that news coverage of the 2012 presidential campaign in May 2012 was down by more than thirty percent from the same period in 2008.

> From Jan. 1 to May 15, about a quarter (26%) of the newshole was devoted to the presidential contest. That puts campaign coverage well ahead of the number two story, the economy, at 8%. In the same period four years ago, the campaign accounted for 39% of the newshole, while the economy accounted for 7%.[34]

3. *Less Serious Coverage*

Serious academic study on the nature of court coverage has been limited. Most has been focused on coverage of the Supreme Court of the United States by print and broadcast journalists.[35] One of the most

---

[33] Lexis Search for Ohio Supreme Court, LEXISNEXIS, http://www.lexis.com/research (select "News & Business" search filter, under "Individual Publications" select "Akron Beacon Journal," "Cincinnati Enquirer," "Cleveland Plain Dealer," "Columbus Dispatch," "Dayton Daily News," and "Toledo Blade" and then search "Ohio Supreme Court").

[34] *This Time Around, Less News from the Campaign*, PEW RESEARCH CENTER, (May 25, 2012), http://pewresearch.org/databank/dailynumber/?NumberID=1506.

[35] *See* Stephen Wermiel, *News Media Coverage of the United States Supreme Court*, 42 ST. LOUIS U. L.J. 1059 (1998); RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS (1994); Richard Davis, *Lifting the Shroud: News Media Portrayal of the U.S. Supreme Court*, 9 COMM. & L. 43 (1987).

comprehensive analyses of various studies was done in 1998 by political scientists Elliot Sotnick and Jennifer Al Segal. They generally found that coverage of the U.S. Supreme Court has been inadequate as measured by the public's overall level of understanding and awareness of the court as an institution, that coverage has tended to focus on major, usually controversial decisions, that this coverage has tended to focus on public reactions to the decisions to the exclusion of serious analysis of the reasoning in the decisions themselves, and that a lack of subject matter expertise on the part of many major network television reporters assigned to the court beat resulted in cursory coverage and at times simplification to the point of distortion, particularly in the case of reports on the denial of writs of certiorari.[36]

Most other academic work examining coverage of the courts has focused on just a few topics. These include fair trial versus publicity issues, cameras in the courtroom, judicial selection (coverage of judicial campaigns), and the working relationships between judges and journalists as professionals and the courts and journalism as institutions.[37] Most of it predates the rise of the Internet as a central facet of American life and its attendant impact on journalism.

Richard Vining and Teena Wilhelm set out to investigate when and how the news media decides when it gives high-profile coverage to state supreme court decisions.[38] Vining and Wilhelm studied 28,045 state supreme court cases over all fifty states, between the years 1995 and 1998.[39] They found that the likelihood of high-profile coverage increases when certain case characteristics are present, specifically declarations of unconstitutionality and a dissent within a court.[40] They reviewed previous research findings that, although Congress and the president receive roughly equal amounts of news coverage, the U.S. Supreme Court receives less than one-fourth of the same amount.[41]

---

[36] ELLIOT SLOTNICK & JENNIFER A. SEGAL, TELEVISION NEWS AND THE SUPREME COURT: ALL THE NEWS THAT'S FIT TO AIR?, 8-14 (1998).

[37] *See* ROBERT GILES & ROBERT W. SNYDER, COVERING THE COURTS (1999); WILLIAM HALTOM, REPORTING ON THE COURTS: HOW THE MASS MEDIA COVER JUDICIAL ACTIONS (1998).

[38] Richard L. Vining, Jr. & Teena Wilhelm, *Explaining High-Profile Coverage of State Supreme Court Decisions*, 91 SOC. SCI. Q. 704 (2010).

[39] *Id.* at 704.

[40] *Id.* at 704.

[41] *Id.* at 704.

The main cases that get covered in the U.S. Supreme Court include criminal justice issues, high-profile civil litigation, First Amendment issues, and nomination and confirmation of potential Supreme Court justices.[42]

Vining and Wilhelm examined media decisions in covering a state's highest court.[43] They developed a model to predict how major newspapers (the most circulated newspaper from each state) chose front-page coverage of cases from state supreme courts.[44] Vining and Wilhelm found that just 414 of the 28,330 state supreme court decisions in their data (1.46%) were covered on the front page of the newspapers they examined on the day after the courts made a decision.[45] They concluded that media covers state supreme court news when "laws are struck down for being at odds with the state or federal constitution, 'friends of the court' attract attention to cases, disunity is evident within the court, or these state supreme courts address controversial issues."[46]

In another study, Christopher Johnston and Brandon Bartels examined if sensationalist media exposure depresses both diffuse and specific support for American courts.[47] Sensationalist media included political talk radio and cable news, while sober media included newspapers and network news. Johnston and Bartels wanted to find out if "exposure to sensationalist media does indeed exhibit negative consequences for evaluative dimensions of the Supreme Court and state courts whereas exposure to traditional, sober media sources exhibits positive effects on court evaluations."[48]

> Our theoretical claim is that where an individual receives information about the courts will shape the way they think about the courts. Sensationalist media

---

[42] *Id.* at 706.

[43] *Id.* at 720.

[44] *Id.* at 704.

[45] *Id.* at 715.

[46] *Id.* at 720.

[47] Christopher Johnston & Brandon Bartels, *Sensationalism and Sobriety: Differential Media Exposure and Attitudes Toward American Courts*, 74 PUB OPINION Q. 260 (2010).

[48] *Id.* at 262.

> sources provide 'myth-busting' information and commentary to a larger degree, and should thus break apart the foundations of court attitudes, leading to lower levels of diffuse and specific support. Sober media, on the other hand, generally focus on the legalistic nature of court processes, and should thus reinforce socialized, mythological views of the courts as above the political fray.[49]

Johnston and Bartels measured the degree to which a given individual is differentially exposed to one source relative to the other. They concluded that "greater sophistication leads to an increase in both specific and diffuse support for the court,"[50] "marginal effect of sophistication conditional on purely sober exposure is nearly twice as large and statistically significant,"[51] and "find that higher levels of exposure to sensationalist relative to sober media sources predict more negative attitudes toward the court."[52]

According to Johnston and Bartels' study, "For individuals exposed to sober media sources, the 'to know courts is to love them' hypothesis is supported. But for individuals exposed to sensationalist media, the opposite effect suggests itself. The authors found that 'to know courts is to dislike them.'"[53] Johnston and Bartels concluded that "where one gets their knowledge is determinative if other subsequent attitudes."

Johnston and Bartels' work demonstrated that, not surprisingly, negative coverage results in negative perceptions of the courts: "We find that exposure to sensationalist media sources does indeed lead to substantially lower levels of both specific and diffuse support for both the Supreme Court and the state courts. If these media continue on their current path toward greater sensationalist, derogating judges, highlighting political decision making, and emphasizing the bitterly partisan and ideological nation of the confirmation process, then we should expect deleterious consequences for opinion."[54]

---

[49] *Id.* at 264.

[50] *Id.* at 269.

[51] *Id.* at 271.

[52] *Id.* at 273.

[53] *Id.* at 276.

[54] *Id.*

An emphasis on sensationalized crime coverage has long been the bread and butter of tabloid print news, and this model was largely replicated with the rise of the tabloid television genre in the 1980s.[55] The last twenty years are replete with examples of the national news media—particularly cable television news—sensationalizing high profile criminal trials. From the acquittal of the police officers in the beating of Rodney King to the O.J. Simpson trial to Casey Anthony, it seems each year the national news media get even more carried away with sensationalized coverage of the celebrity trial du jour. As the economic problems of the news industry continue, it can be expected that this trend in court coverage will continue as it has been found to be highly effective at attracting audiences.

The impacts on mainstream commercial news coverage of the courts and the legal system will continue to unfold for years to come, and further study will be needed in this area. Clearly, though, the same changes that are affecting mainstream news are affecting court coverage, and the result is a decline in overall quality and quantity of coverage, which means less quality information for the citizenry about the third branch of government and its impact on daily life.

III. IMPACT ON THE COURTS

The general decline in the news media has received plenty of attention from scholars and commentators who express nearly universal concern about the potential negative impact of this decline on civic engagement and the very strength of American democracy. "America's democracy is predicated on an informed citizenry," writes FCC Commissioner Michael J. Copps.[56] "Absent robust, fact-informed civic dialogue on issues that matter most to our future, self-government cannot endure. With present day media demonstrably failing to produce the critical mass of news and information that democracy requires, we find ourselves at a media crossroads where important decisions about the path ahead need to be made."[57]

---

[55] *See* LEONARD DOWNIE, JR. & ROBERT G. KAISER, THE NEWS ABOUT THE NEWS 18, 28, 236 (2003).

[56] Michael J. Copps, *What about the News? An Interest in the Public, in* WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS: THE COLLAPSE OF JOURNALISM AND WHAT CAN BE DONE TO FIX IT 289 (Robert W. McChesney & Victor Pickard eds., 2011).

[57] *Id.* at 289.

"The benefits of good journalism are not hypothetical, but obvious and palpable," write former Washington Post editor Leonard Downie Jr. and longtime Washington Post journalist Robert Kaiser in their expansive look at the history and future of the news business. "News is an important part of the culture. The United States will be a better place if the citizens can get from the news what they need to know to govern themselves effectively and improve their lives."[58]

As "good journalism" becomes scarcer in general, the negative impacts on legal journalism are a particular problem. From the beginning of the Republic, there has been the understanding that the courts are in many ways the weakest of the three independent branches of government in the American system. Alexander Hamilton wrote in the Federalist Papers that the courts "have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[59] Former U.S. Supreme Court Justice Sandra Day O'Connor has referred to the judiciary's power as the "Power of the Quill," saying, "The Judicial power lies in the force of reason and the willingness of others to listen to those reasons."[60] So, it has always been understood that because of this fundamental nature of the judicial branch, it is imperative that judicial processes be open, accessible, and understandable to the public.

Slotnick and Segal identified the issue in their seminal work on television coverage of the U.S. Supreme Court:

> The Court's legitimacy and ability to perform its functions depend largely on its reputation and perceived legitimacy in the public. It must rely, at times, on the willingness of people to go along with its decisions; it generally cannot force them to do so. And, its reputation and the peoples' willingness to follow the Court's rulings depend in large measure on the availability of information about the Court.[61]

---

[58] LEONARD DOWNIE, JR. & ROBERT G. KAISER, THE NEWS ABOUT THE NEWS 266 (2003).

[59] THE FEDERALIST No. 78 (Alexander Hamilton), *available at* http://www.constitution.org/fed/federa78.htmhttp://www.constitution.org/fed/federa78.htm.

[60] *See* Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 489 (2009).

[61] SLOTNICK & SEGAL, *supra* note 36, at 5.

In fact, supporting public trust and confidence are considered so integral to the mission of courts that this objective is contained in the national standards that are used to evaluate the performance of U.S. courts. This mission statement can be found in the Trial Court Performance Standards, first published in August 1987 by the National Center for State Courts ("NCSC") and the Bureau of Justice Assistance ("BJA") of the U.S. Department of Justice. The BJA's mission statement informs readers: "Taken as a whole, this publication and its 22 standards represent a proposed philosophy for trial court self-assessment and self-improvement. They define what . . . should guide and govern trial court performance."[62]

The performance standards commentary on public trust and confidence are worth quoting at length here:

> Compliance with law depends, to some degree, on public respect for the court. Ideally, public trust and confidence in trial courts should stem from the direct experience of citizens with the courts. The maxim 'Justice should not only be done, but should be seen to be done!' is as true today as in the past. Unfortunately, there is no guarantee that public perceptions reflect actual court performance. Several constituencies are served by trial courts, and all should have trust and confidence in the courts. These constituencies vary by the type and extent of their contact with the courts. At the most general level is the local community, or the "general public"—the vast majority of citizens and taxpayers who seldom experience the courts directly. A second constituency served by trial courts is a community's opinion leaders (e.g., the local newspaper editor, reporters assigned to cover the court, the police chief, local and State executives and legislators, representatives of government organizations with power or influence over the courts, researchers, and members of court watch committees). A third constituency includes citizens who appear before the court as attorneys, litigants, jurors, or witnesses, or who attend proceedings as representatives, family friends, or victims of someone before the court. This

---

[62] *Trial Court Performance Standards with Commentary*, BUREAU OF JUSTICE ASSISTANCE (July 1997), http://www.ncjrs.gov/pdffiles1/161570.pdf.

> group has direct knowledge of the routine activities of a court. The last constituency consists of judicial officers, other employees of the court system, and lawyers—both within and outside the jurisdiction of the trial court—who may have an "inside" perspective on how well the court is performing. The trust and confidence of all these constituencies are essential to trial courts.[63]

A handbook published by the national association representing court managers, puts the obligation in more practical terms:

> Why should the judiciary care about its image and the services it renders to the public? Simply put, lack of understanding about the role of the judiciary decreases the respect given to the courts, resulting in loss of esteem toward judges and other court professionals . . . Like other branches, the judiciary must strive to inform, educate and be responsive to the needs of the public.[64]

A report by the Conference of Court Public Information Officers in 2010 summarized the relationship between the courts and the media this way:

> Ever since the First Amendment established the right of free expression and the Sixth Amendment guaranteed criminal defendants the right to a "speedy and public trial," judges and journalists each have played unique roles. The courts have a responsibility to be accessible to the news media, to explain the system, and to protect constitutional rights of both litigants and the media.[65]

The nation's largest court system so recognizes the imperative of supporting trust and confidence in the judicial system, that they

---

[63] *Id.*

[64] MARCUS W. REINKENSMEYER ET AL., NATIONAL ASSOCIATION FOR COURT MANAGEMENT, DEVELOPING COMPREHENSIVE PUBLIC INFORMATION PROGRAMS FOR COURTS (June 1996).

[65] CHRIS DAVEY, THOMAS HODSON & KAREN SALAZ, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE 19 (2010).

publish a guide for judges on the topic, titled "The Courts and the News Media." Quoting from a speech one of the authors often gave about the importance of quality courts coverage, the volume's preface states: "If we do not entrust the coverage of sports, music and science to reporters with only a surface understanding of the subject matter . . . how can we justify coverage of the Legal System by reporters lacking basic knowledge of how the system works?"[66]

Increasingly, judges are recognizing that in the new media environment, they will need to play a direct role in explaining judicial processes and informing the public. In 2007, in testimony before a Congressional committee supporting the Sunshine in the Courtroom Act of 2007, U.S. District Judge Nancy Gertner argued for judges to be more active in explaining their decisions and judicial process to the lay public. She stated, "[j]udges in one sense have to prove their legitimacy. It's no longer assumed by the public. And I would rather prove that legitimacy in my own voice with my own face and my own words than have my words described by a late night TV anchor."[67]

One commentator goes even farther:

> Whether judges have a constitutional right to speak publicly about their ideas is an open question, but whether they should do so is not. The American public will no longer accept the traditional secrecy of the judiciary. It is time for judges at all levels to open their mouths, take out their pens, and speak to the public. Not just through formal opinions, but through opinion pieces in local newspapers, interviews on the radio and television, and roundtable discussions with other judges, scholars, and the public.[68]

There is evidence to suggest that openness and transparency in the judicial system can lead to the desired result of more positive perceptions of the judicial branch among the general public. A 2007 study by two political science professors examining previous research on the public's knowledge and perceptions of the courts concluded

---

[66] CALIFORNIA JUDGES ASSOCIATION, THE COURTS AND THE NEWS MEDIA, at v (7th ed. 2001).

[67] Michael D. Schoepf, *Removing the Judicial Gag Rule: A Proposal for Changing Judicial Speech Regulations to Encourage Public Discussion of Active Cases*, 93 MINN. L. REV. 341, 341 (2008).

[68] *Id.* at 370.

that the more the public knows about the courts, the more positive their perceptions are.[69] If this is true, then the latest numbers on public perceptions of the United States Supreme Court are not encouraging and would support the conclusion that more needs to be done to support public understanding of the judicial system. In May 2012, the Pew Research Center for People and the Press released a study that found that the general public's view of the Supreme Court had reached its lowest point in twenty-five years, and the negative view was held by both Democrats and Republicans in nearly equal numbers.[70] The study found that fifty-two percent of adults had a favorable opinion of the Supreme Court, which was down from fifty-eight percent in 2010 and the previous low of fifty-seven percent in 2005 and 2007.[71]

This development is particularly noteworthy when understood in historical context. In studies dating back to the 1970s, courts and judges generally—and the United States Supreme Court in particular—have traditionally enjoyed a significantly higher level of public support and positive sentiment relative to the other institutions of government.[72]

IV. COURTS RESPOND

Recognizing the decline in traditional media coverage and understanding that an informed citizenry is vital to the health of a functioning judiciary in a democracy, courts over the last several years have begun to move toward utilizing digital media technology to fill the void and connect directly with the public.

In October 2009, the Knight Commission on the Information Needs of Communities in Democracy released its report, *Informing Communities: Sustaining Democracy in the Digital Age*.[73] Reflecting

---

[69] JAMES L. GIBSON & GREGORY A. CALDEIRA, KNOWING ABOUT COURTS (2007), http://ssrn.com/abstract=956562.

[70] PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, SUPREME COURT FAVORABILITY REACHES NEW LOW (2012), http://www.people-press.org/2012/05/01/supreme-court-favorability-reaches-new-low.

[71] *Id.*

[72] DAVID B. ROTTMAN, PUBLIC PERCEPTIONS OF THE STATE COURTS: A PRIMER (2000).

[73] THE KNIGHT COMMISSION ON THE INFORMATION NEEDS OF COMMUNITIES IN A DEMOCRACY, INFORMING COMMUNITIES: SUSTAINING DEMOCRACY IN THE DIGITAL AGE (2009).

on the rapidly changing media landscape, the report concluded that national local action should be pursued with three overarching objectives: (1) "maximize the availability of relevant and credible information to all Americans and their communities," (2) "strengthen the capacity of individuals to engage with information," and (3) "promote individual engagement with information and the public life of the community." [74] The report details fifteen specific recommendations for meeting these objectives. A follow up white paper examining the public media recommendations of the Knight Commission recommended "building on existing models of innovation, making a virtue of the decentralized structure of public broadcasting and redefining what is included under the umbrella of public service media."[75] "Public service media can take advantage of the digital revolution to remake itself," the report concluded.[76]

When conceived of broadly and in this context, courts at every level in the United States are taking steps that—intentionally or not—are contributing to the fulfillment of this broader vision of "public service media" articulated in the work of the Knight Commission. In 2012, the Conference of Court Public Information Officers, a national association of professionals working as communications officers for state and federal courts at all levels, published its third annual survey on new media and the courts, offering year-to-year comparison data examining how the media revolution is affecting judges and the courts. The *2012 CCPIO New Media and the Courts Survey* examined "state judges' perceptions about social media in general, their use of social media profile sites like Facebook, how courts are using new media tools, and other related issues."[77] Federal judges were not included in the survey. Among some of the report's key findings: From 2010 to 2012 the percentage of judges using social media sites increased from 40.2 %to 46.1%[78]; routine jury instructions regarding the use of new media rose from 55.5% in 2010 to 66.2% in 2012[79]; the

---

[74] *Id.* at 3.

[75] BARBARA COCHRAN, RETHINKING PUBLIC MEDIA: MORE LOCAL, MORE INCLUSIVE, MORE INTERACTIVE, at vii (2010).

[76] *Id.* at xii.

[77] Christopher Davey, Karen Salaz & Thomas Hodson, *2012 CCPIO New Media Survey*, CCPIO 2 (2012), http://ccpio.org/wp-content/uploads/2012/08/CCOIO-2012-New-Media-ReportFINAL.pdf.

[78] *Id.* at 5.

percentage of judges indicating who disagreed or strongly disagreed with the statement that professional use of social media does not compromise ethics went down to 45.4% in 2012.[80]

As the 2010–2012 reports indicate, numerous courts have adopted social media tools. Examples of courts using social media include the Michigan Supreme Court's recent move in 2012 toward live tweeting accounts of oral arguments,[81] the New Jersey Courts' Facebook page launched in January 2010,[82] and the Superior Court of Arizona in Maricopa County, which was one of the earliest Facebook pages for a court in the country dating back to 2009.[83] The California court system and the Administrative Office of the Federal Courts have both had successful YouTube channels for several years that integrate online content from their Web sites with other elements of their communications programs.[84]

While the CCPIO report predicted continued growth in courts using social media, it is still worth noting that, for a variety of reasons, courts are still more conservative in their approach to sites like Facebook and Twitter than other private and public sector entities. While the 2012 CCPIO survey found an increase in courts using social media sites, the number was still only 13.2%, and a majority of judges surveyed still reported that they had some reservations about courts' involvement in social media as institutions, even though the individual social media use tracked closely with that of the general population (just about half).[85]

Perhaps one of the most innovative and ambitious efforts to use digital media to make courts more transparent and understandable is

---

[79] *Id.* at 25.

[80] *Id.* at 7.

[81] MICHIGAN SUPREME COURT PUBLIC INFORMATION, https://twitter.com/#!/CourtInfo (last visited Jan. 22, 2013).

[82] NEW JERSEY COURTS, http://www.facebook.com/pages/New-Jersey-Courts/92569242329 (last visited Jan. 6, 2013).

[83] SUPERIOR COURT OF ARIZONA IN MARICOPA COUNTY, http://www.facebook.com/SuperiorCourtofArizona (last visited Jan. 22, 2013).

[84] *See* The Federal Judiciary, YOUTUBE (July 6, 2006), http://www.youtube.com/uscourts; California Courts, YOUTUBE (Jan. 30, 2009), http://www.youtube.com/user/californiacourts.

[85] DAVEY, HODSON & SALAZ, *supra* note 65, at 19.

the OpenCourt 2.0 project.[86] In May 2011, public radio station WBUR in Boston, Massachusetts began showing live video of arraignments and other court proceedings from the Quincy, Massachusetts trial court on the website www.opencourt.us. The project is part of a larger, social media pilot program that also includes a Twitter feed, a Facebook page, a blog and a provision that allows live blogging by both professional and citizen journalists while court is in session. The program is funded by a $250,000 grant from the John S. and James L. Knight Foundation as part of the foundation's efforts to support community news coverage.[87]

Interestingly, as has so often been the case throughout the history of the relationship between the courts and the media, the OpenCourt project has met with some resistance from defense lawyers and others concerned that the cameras threaten to disturb the balance between openness and due process, both of which are guaranteed in the U.S. Constitution. After a protracted court battle, the Supreme Judicial Court of Massachusetts ruled in March 2012 that OpenCourt cannot be prohibited from archiving the recordings of daily court hearings and posting them on its website without getting prior approval from judges. "We conclude that any order restricting OpenCourt's ability to publish–by 'streaming live' over the Internet, publicly archiving on the Web site or otherwise–existing audio and video recordings of court room proceedings represents a form of prior restraint on the freedoms of the press and speech," wrote Justice Margot Botsford in the unanimous decision. The court found that the exercise of prior restraint in this instance would violate both the U.S. Constitution's First Amendment and Article 16 of the Massachusetts Declaration of Rights.[88]

The program was largely viewed as a success. "Despite some of the issues that have come up along the way, there has been overall support from all aspects of the Quincy Court community," said John Davidow, the managing editor and news director for WBUR and the person who wrote the grant submission for the program. "All are trying to come up with the fairest and a balanced approach to bringing

---

[86] *See Open Court*, OPENCOURT.US, http://www.opencourt.us (last visited March 24, 2013).

[87] Christopher Danzig, *Cameras in the Courtroom: Now With More Internets*, ABOVE THE LAW (May 5, 2011, 12:23 PM), http://abovethelaw.com/2011/05/cameras-in-the-courtroom-now-with-more-internets.

[88] Commonwealth v. Barnes, 461 Mass. 644, 646 (2012).

digital technology to the court."[89] However, in late 2012, the program was ended.[90]

Despite their perennial reluctance to allow cameras in the courtroom, the federal courts at the administrative level have quietly been placing the federal court system in a forward position among courts nationally using digital technology to support a transparent and understandable judicial branch. The Administrative Office of the Federal Courts has a YouTube channel, has been working to standardize the configuration of Web sites among the thirteen courts of appeals, ninety-four district courts, and ninety-two bankruptcy courts, and recently moved toward an all-electronic distribution of its decades-old newsletter, the Third Branch. "I think what we're trying to do is address a couple issues," said David Sellers, assistant director for public affairs at the Administrative Office of the United States Courts, "One is the decline in traditional journalists covering the courts, and two is the blurring of the line between who is and is not a journalist, with more and more bloggers covering the courts and more everyday citizens wanting direct access to the news and information, we no longer make a distinction between a journalist and a citizen. What we're trying to do is to make as much information as widely and easily available as possible."[91]

Among the most recent developments in court-sponsored media is a program in Ohio. Court News Ohio, launched in July 2012 by the Supreme Court of Ohio through its Office of Public Information, is a comprehensive, multimedia, multiplatform program that covers news about the Ohio judicial system.[92] Its target audiences are members of the judiciary and the legal community, as well as the general public. Court News Ohio operates on four platforms:

---

[89] Patriot Ledger Staff, *Online Court Video Is a Hit So Far; Creator of Quincy Project Hopes to Get Funding for an Extension*, PATRIOT LEDGER (Oct. 14, 2011).

[90] Jack Encarnacao, *Radio Station WBUR Ends Live Streaming at Quincy District Court*, THE PATRIOT LEDGER (Dec. 22, 2012), http://www.patriotledger.com/topstories/x1671797927/Radio-station-WBUR-ends-live-streaming-at-Quincy-District-Court.

[91] Interview with David Sellers, Assistant Director for Public Affairs, Administrative Office of the United States Courts (May 31, 2012).

[92] *Court News Ohio to Feature Expanded Judicial System News*, SUPREME COURT & JUDICIAL SYSTEM NEWS (July 16, 2012), http://www.supremecourt.ohio.gov/PIO/news/2012/CNO_071612.asp.

- *Online at courtnewsohio.gov.* The image-heavy website has links to videos and slideshows and has streamlined its coverage into four areas: (1) On the Bench – News about Ohio justices and judges, (2) Cases – Coverage of Supreme Court and district appellate court arguments and decisions, (3) "Happening Now" – Original content about administrative and programmatic news in the Ohio judicial branch and the legal system generally, (4) Headlines– Aggregated links to Ohio newspaper articles about the Ohio judicial system. Each news category is available for subscription as an RSS feed and is distributed to several thousand subscribers by email using a dedicated email distribution platform called GovDelivery.[93]

- *Court News Ohio TV.* Airing periodically on the Ohio Cannel's broadcast and cable outlets, this is a weekly news package produced from videos posted to the website during the previous week. It is also available as a free podcast through Apple iTunes, and in an online archive.[94]

- *Social Media.* The social media aspect of CNO is a central part of connecting the news of Ohio's courts with those interested in receiving it. CNO maintains a Twitter feed and Facebook page both of which serve as an alternative platform for delivering the site's main headlines with links to the source stories.[95]

---

[93] *See* GOVDELIVERY, http:www.govdelivery.com (last accessed Jan. 22, 2013).

[94] *See* COURT NEWS OHIO-TV, http://www.courtnewsohio.gov/CNO-TV/default.asp#.URU1DKWX98E (last accessed Mar. 31, 2013).

[95] *See* COURT NEWS OHIO, https://www.facebook.com/CourtNewsOhio (last visited Mar. 31, 2013); COURT NEWS OHIO, https://twitter.com/CourtNewsOhio (last visited Mar. 31, 2013).

- *CNO Review.* A monthly publication available online and in print to subscribers that provides a recap of select stories from the website along with original content.[96]

From Ohio to the federal courts to a trial court in suburban Boston, the pace of change in the courts is fast as it relates to the media. There is an emerging recognition among courts that in order to fulfill the requirement that courts are transparent and understandable to the public in the new media age we are in, courts will have to play an active role in facilitating access to information and perform many of the same functions that traditionally have been performed by the now dwindling traditional media.

V. CONCLUSION

When journalists these days discuss journalism, you can generally overhear a mixture of two somewhat dichotomous sentiments. On the one hand, there is recognition of the inescapable fact that the practice and business of journalism are transforming before our eyes in ways that are as much unpredictable as they are ominous for the future of a democratic system that relies on an informed citizenry for its health and vitality. On the other hand, there is widespread recognition that there has never been a more exciting time to be a student or practitioner of journalism. Indeed, the same technologies posing economic challenges for the news *business* offer some of the greatest promise for the advancement of journalistic *practice* since the advent of printing press.

The same economic and technological trends affecting the media as a whole are having an impact on legal journalism and coverage of the courts, resulting in a decline in quantity and quality of court coverage. Because the judicial branch is particularly reliant on an informed citizenry that has confidence in the system, these changes in the media landscape are of particular concern to judges, lawyers and court personnel who all have an active interest in supporting open, transparent and understandable courts. There are still a relatively small number of courts actively embracing new media technologies to bridge this gap, but there is great promise for the future as more and more courts recognize the necessity of the Third Branch using media

---

[96] *See* COURT NEWS OHIO REVIEW, http://www.courtnewsohio.gov/CNOReview/default.asp#.URU1bqWX98E (last visited Mar. 31, 2013).

technology to connect with the public in an era of continued change for the Fourth Estate.

On February 27, 1968, news icon Walter Cronkite delivered his "Report From Vietnam," declaring fatefully that the conflict was a stalemate. The broadcast reportedly prompted President Lyndon Johnson to reportedly declare privately, "If I've lost Cronkite, I've lost the country."[97] Cronkite died in 2009 having lived long enough to see the ushering in of what can be called the post-Cronkite era, the new media world we now inhabit where no one news personality, network, or outlet commands such universal respect that where they go, so goes the nation. Instead, we now have thousands of fragmented news sources streaming not news but "content" to equally fragmented audiences with no discernible center of gravity. It remains to be seen what this will hold for the future of democracy in general. Speculation has ranged from dystopian to utopian and nearly everything in between.

What will it mean for the future of legal journalism, specifically? Will the new media world described in this paper make for a more or less informed citizenry when it comes to the judicial system? Of course only time will tell. However, it's not too early to offer some qualified speculation. What I have described is a future for legal journalism that will be characterized by courts bypassing the traditional news media and reporting news directly to the people. In many ways this is borne of necessity, as fewer and fewer news outlets cover the courts and the law. It also is a product of the technology itself, as the ability to tell stories, deliver timely information and connect directly with large groups of people becomes more and more inexpensive and accessible.

There are two fundamental reasons that I believe this can only be a net positive for democracy. First, of all the institutions of government, the judicial branch is the most ideally suited to provide truthful, accurate, objective information in the form of news. The judicial branch is by design the least political of the three branches of government. Judicial institutions are designed to be independent of political influence for the purpose of being impartial arbiters of disputes. The same culture of impartiality and independence that characterizes the judiciary is also central to the journalistic enterprise. The business of judging is inherently similar to the business of reporting. Judges and journalists have not always been the best of friends but they in many ways have shared a kinship that is born of their shared mission of seeking truth. This is part of the reason that

---

[97] Chris Matthews, *And That's the Way It Was*, N.Y. TIMES (July 6, 2012) (book review).

judges and courts have been less enthusiastic about embracing new media. Public communications programs by courts have traditionally been formal and conservative. The quintessential example is the now nearly legendary obstinacy on the part of the United States Supreme Court to prohibit cameras in the courtroom. By contrast, agencies in the executive branch and legislatures tend to be much less reticent to engage in robust communication programs and in fact were among the first to adopt social media and other forms of new media. The reverse of this contrast in styles is that with the legislative and executive branches' eagerness to engage comes also a less rigorous adherence to traditional journalistic conventions of objectivity. This is not to say that all communication programs in the legislative and executive branches are propaganda. But, some of it is. And there tends to be a focus on the accomplishments of the elected office holder and a sensitivity to other political considerations. There is no guarantee that courts, as they increasingly expand into the use of new media and direct communication with the public, are immune from the pitfalls of politics. However, I believe that the inherent nature of courts as conservative institutions, designed to be politically insulated and committed at the core to principles of impartiality and objectivity, places them in the position to successfully venture into this new world of direct media engagement.

Finally, I believe that the expansion of direct engagement by courts will have a salutary effect on the democratic system by providing a counterbalance to the increasingly polarized nature of our political discourse. Much has been written and said in recent years about the deterioration of the quality of public discussion on matters of great public interest. With the proliferation of information and news sources, citizens have the ability to self-select those news sources that reinforce their preexisting ideological perspectives. There no longer is the need to engage in the messy business of sorting out the actual facts of the matter when you can simply turn off the channels that contradict your presuppositions and turn on the channels that give you the visceral comfort of always being right. Liberals watch MSNBC and, Colbert and read Slate. Conservatives watch Fox, listen to Rush Limbaugh and read Drudge. Never the twain shall meet.

The reasons for this polarization are as complicated as the problems that go unsolved by our current body politic. No one remedy will solve the problem. But, one thing that will certainly help is the forceful injection of objective, demonstrable facts into the content stream. U.S. Supreme Court Justice Oliver Wendell Holmes wrote that "the ultimate good desired is better reached by free trade in ideas–

that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[98] Of course, he was writing in defense of the freedom of expression enshrined in the First Amendment. The same reasoning applies to the general belief in a free market approach to the exchange of information. Even in the hands of the most skilled propagandist, a hard fact can only be bent so much before it reaches the breaking point. When the United States Supreme Court announced its historic decision in the Affordable Care Act ("Obamacare" in Fox News parlance) Fox News and CNN both breathlessly reported misinformation from the steps of the courthouse in the minutes after the decision's release.[99] They got it horribly–almost willfully–wrong. This was a perfect storm of overzealous reporters aided and abetted by the arcane, outdated and obstructionist media practices of the Supreme Court itself. Within minutes, the truth was set free by one very simple thing: the opinion itself. The initial foray into falsehood could have been avoided if the court had simply posted the opinion online the moment it was released, preferably with a simple summary written by a trained journalist approved ahead of time by the justices (this has been the practice at the Supreme Court of Ohio for more than a decade). By generating original content and ensuring that objective facts are the currency in the marketplace of ideas about legal and judicial matters, courts can play a central role in at least mitigating the damages caused by the current information climate.

---

[98] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

[99] Paul Farhi, *Early Reports on Health-Care Decision from CNN, Fox Overturned on Mandate: Accuracy*, WASH. POST, (June 28, 2012), http://www.washingtonpost.com/lifestyle/style/cnn-fox-botch-supreme-court-health-care-decision-in-latest-media-misstep/2012/06/28/gJQA7tU19V_story.html.