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THE MEDIA'S ROLE IN CHANGING THE FACE OF U.S. COURTS

By Gary A. Hengstler



As the distinguished U.S. appellate court judge Learned Hand observed, "The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country." Moreover, Judge Hand also concluded that media's power was an unchangeable fact of life: "Whether we like it or not, we must learn to accept it."

What is remarkable is that Justice Hand reached this conclusion in 1942, before the advent of television. Today the world is a changed place, due in part to advances in mass communications. We see humanitarian crises as they unfold. We get to judge for ourselves the truthfulness of leaders questioned by journalists before the cameras.

The net result is that governments have been forced to be more open and accountable. Governments now must take into account public opinion in ways they never had to before. Gone are the days when powerful rulers could operate largely in secrecy, indifferent to their citizens' views.

As people everywhere have grown accustomed to being better informed about developments in their nation and around the world, a byproduct has been to endow the messengers with recognition and consequently great influence. For better or for worse, the media have considerable power to influence people favorably or unfavorably toward those in government.

It comes as no surprise that the courts, the judiciary, and the legal profession have not escaped heightened media scrutiny. Today, the media capitalize on an enduring American appetite for the law and regularly turn to it both to provide information and to captivate. More and more time in the nightly newscasts and space in the daily newspaper are devoted to judicial proceedings, especially criminal cases. Stories with legal themes are also a staple of book publishers, moviemakers, and television drama producers in the U.S. Indeed, much of the fictionalized material is simply repackaged news stories.

American interest in the application of law to life in the United States is rooted in the nation's origins. The Founding Fathers had one thing in common - a deep distrust of the potential for the abuse of power by rulers. Therefore, the Constitution was written to ensure the United States would be governed by the rule of law and not a system based on anyone's societal status.

These concepts of equal application of the law, fundamental fairness, and due process were embedded in the American consciousness from the beginning of the Republic, which is why the themes of right and wrong and fair play appear regularly in U.S. media entertainment and news coverage. These are values that Americans have come to care about passionately - ones that are regularly monitored as they observe their courts in action.

At the same time, another critical factor in the increasing and intense public focus on U.S. courts and the cases filed in them is simply human nature. Whether told in the daily news or fictional story telling, Americans are curious about what happens to others. People are interested in people - the hardships they face, the way they wrestle with challenges, and their exultations in triumph over adversity.

Nowhere is there a greater source for compelling stories than in those cases filed every day in U.S. courts. Now that the courts have come under the media's microscope, they likely will remain there. The heightened demand for information from the courts has required significant changes in the way the courts have traditionally operated. As with most changes, there have been both positive and negative consequences.

A positive byproduct of the changes spurred by the media and addressed by the courts is that more Americans are aware of their constitutional rights than ever before. They are more familiar with how police investigate crime and how the courts try the case to determine guilt or innocence. In short, citizens are more aware of the law and its impact on them than their forefathers were.

Preserving the Courts' Integrity

On the other hand, the new demands of the media can create internal conflict for judges as they attempt to reconcile two obligations seemingly at odds with each other. For example, ethical rules governing U.S. judges require them to refrain from public comment about a case before the court. The prohibition against such commentary is designed to make sure the judge does not say anything that might cause the public to question his or her impartiality. Most media questions a judge will face, however, will deal with a specific pending case because it is newsworthy at the moment. Consequently, judges have to become more media savvy. They have to find ways to assist reporters in getting the story while at the same time staying within the boundaries of ethical rules about public comment.

Since the courts have no enforcement powers in and of themselves, U.S. judges know that their authority exists only to the degree that the people have confidence in the courts' integrity and fairness in administering justice. Because most people do not attend court regularly, perceptions of the quality of justice come largely from media accounts of the courts' work. That means more courts now try to cooperate more fully with the media to help educate the public about the judicial system.

The media share the courts' recognition that improved cooperation is necessary to strengthen the public's confidence in both institutions. A 2002 survey commissioned by the American Bar Association found that lawyers, judges, and the media need to do a better job in earning the public's trust. According to the survey, only 19 percent of U.S. citizens say they are "extremely or very confident in" lawyers and the legal profession. The judiciary rated higher at 33 percent, and the media came in lower at 16 percent. By comparison, the medical profession led the list of possibilities at 50 percent.

Media's Increased Focus

One of the positive ways the media have affected the judicial system is to help spur a greater sense of openness by the courts so the public can see for itself how the court serves the people. At the same time, the media have begun to focus on the activities of individual judges as well, sometimes to the judge's detriment.

For example, a Denver, Colorado, television station followed the state's judges to their annual three-day judicial education workshop. The required workshop was designed to keep judges current with changes in the law and was funded with money from the state. The TV station used hidden cameras to show that nine out of the 300 judges enrolled in the workshop engaged in recreational activities instead of attending some of the classes. The judges caught on camera were certainly embarrassed when it looked like they were vacationing at taxpayers' expense, exemplifying how expanded media coverage can have a negative effect on the image of the courts.

However, the media would argue that exposing public officials who are not performing their required duties is a positive public service. Whatever one's point of view, the fact remains that the media's increased focus on the courts also includes focusing more intensely on the individual judges themselves.

The area where increased media coverage has caused U.S. courts the greatest concern is the pretrial news coverage in a criminal case. The difficulty is that the U.S. Constitution sometimes pits the courts and media against each other in a clash of amendments. The First Amendment guarantees the media freedom to report just about anything it wants to, including as many details as the media can learn about the arrest of a criminal suspect. The Sixth Amendment guarantees a defendant a fair and public trial, with the burden of ensuring fairness implicitly placed on the trial judge.

Because the U.S. uses a jury system, ordinary citizens of the community determine the guilt or innocence of a defendant. The problem arises when potential jurors learn from the media facts or purported facts about the case that are not permitted to be introduced at trial. An example might be when the police announce to the media that the defendant has confessed to the crime. However, at a later hearing the judge might rule that the confession was unlawfully obtained by police and will not permit the prosecutor to introduce the confession as evidence. In effect, the judge has to hope that the jurors selected to hear the case will have the ability to disregard knowledge of the confession they read about in the newspaper or heard on television. If the jury cannot disregard that evidence, the trial no longer is considered fair.

Guaranteeing a Fair Trial

The result is that when media coverage of a trial is especially heavy, the courts often have to consider alternative and more expensive means of guaranteeing a fair trial.

These alternatives include:

- Transferring the entire trial to another city where the news coverage has not been as strong;
- Directing the jury not to read newspapers or watch TV newscasts;
- Issuing "gag orders" that direct the prosecutor, defense attorney, and other court personnel not to talk to the media about the case; or,
- In rare cases, keeping the jury sequestered in a hotel where they are monitored and prevented from accessing the media.

"High profile" cases, such as the O.J. Simpson murder trial in 1995, draw extreme media coverage and have caused significant problems for the courts. In addition to the routine coverage of the trial, the courts now have to contend with evening television talk shows where attorneys talk about what happened in the trial that day and speculate on what will transpire in future days. The result is that the serious trial can begin to seem like a spectacle, much as sports contests fuel talk shows that second-guess and analyze the game. Judges now have reason to worry about the public perception of the courts when individual cases are treated similarly to sporting events.

Judges are also concerned about the potential for erosion in the public's confidence, because there have been a few cases in U. S. history where media coverage appears to have affected the fundamental fairness of the trial. For instance, the 1935 trial of Richard Bruno Hauptmann, accused of kidnapping and murdering the son of aviator Charles Lindbergh, drew unprecedented media coverage. Hauptmann was convicted, but subsequent research has raised questions as to whether the media frenzy created a rush to judgment that caused an innocent man to be convicted.

The media coverage in the 1954 case of Dr. Sam Sheppard was so pervasive that the U.S. Supreme Court used that case to place the responsibility on the trial court judge to prevent prejudicial publicity. Dr. Sheppard was charged with the murder of his wife and his story was the basis for the American television series (and later film) "The Fugitive."

It is fear of the possibility of media coverage adversely affecting the quality of justice that leads the U.S. Supreme Court to prohibit television coverage of its arguments. The Court has permitted audio taping, but, until recently, has only released the tapes for historical or archival purposes long after the cases were decided.

The recent case involving the 2000 presidential election between then-Governor George W. Bush and former Vice President Al Gore was the first instance of the Court releasing the audiotape in a timely fashion for the news media to cover the event. Whether that will lead to further relaxation of electronic media coverage of the Court remains to be seen.

Public Access and "Live" Coverage

A related problem is the question of public access to the trial itself. Increasingly, television stations are asking courts to permit "live" coverage of trials. They argue that the public has a right to see the trial and that limited seating in the actual courtroom should not be a bar to the public because TV cameras can bring the trial to the public in their homes. Opponents, however, argue that the presence of television cameras will change the behavior of the witnesses and court personnel in ways that will affect the fairness of the trial. At present, no TV cameras are permitted in U.S. federal courts. Each state is permitted to decide for itself whether to accept televised trial coverage, and the issue of televised proceedings is one on which the courts have not yet reached consensus.

The first television coverage of a court case is believed to have taken place in Oklahoma City, Oklahoma, in 1953 in the criminal trial of Billy Eugene Manley. The first "live" broadcast of a trial occurred in 1955 when Harry L. Washburn was tried for murder in Waco, Texas.

In 1984, CNN broadcast the first nationally televised "live" coverage of a trial in New Bedford, Massachusetts, where multiple defendants were accused of raping a woman on a barroom pool table at a local bar. The strong interest in that case led to the creation of Court TV, which offers daily coverage of court activities, focusing on America's most newsworthy and controversial legal proceedings in courtrooms where live coverage is permitted.

Currently, 25 states permit televised coverage when the presiding judge agrees to let the cameras into the courtrooms. Eight states restrict televised coverage when witnesses object to having television cameras in the courtroom. And 17 states essentially prohibit TV coverage at the trial level through a variety of court rules. There are, however, indications that more courts are opening their doors to the media.

Modern Demands and Solutions

What judges have discovered in the wake of expanded news media coverage is that the old ways and traditional personnel will not be sufficient to cope with modern demands. That is why more courts are hiring specialists, called court public information officers, to work with the media. These media liaisons serve three purposes:

- They are a resource for reporters to check their facts and help ensure accurate reporting of the court's work;
- They provide a court spokesperson who can answer media questions, thus protecting the judge from inadvertently making a comment to the press that violates ethical rules; and
- They provide the court with a specialist who knows how to promote the good news of the courts' work to the media in a

newsworthy manner.

Additionally, more U.S. courts are providing information directly to the public through their own web sites on the Internet. The advantage the courts see in this change is that it allows greater control over what information is provided to the public. It also provides the public -- including the media -- with electronic access, which reduces the amount of time court personnel spend searching paper files for reporters. Finally, it provides the court with an alternative means of correcting the record when the court feels the media have inaccurately reported on a case.

Just as other segments of society today have had to adjust to advancing technology and expanded communications, so too have U.S. courts. But one thing remains certain. While the courts and media have made adjustments in how they operate in this changing environment, both have remained true to their vital roles in the American democratic system. The late, great CBS newsman Edward R. Murrow captured the importance of courts and media to the United States when he said, "What truly distinguishes a free society from all others is an independent judiciary and a free press."

However the day-to-day interaction between the courts and media may be altered in the future, both will make the changes with an eye always on their mission of safeguarding the freedoms of the citizens they serve.

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