

## FIVE WAYS APPELLATE COURTS CAN HELP THE NEWS MEDIA

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The title of this article probably has some readers fuming already—especially those of you who wear robes to work.

I can hear you thinking, “No part of my job as a judge includes the odious task of assisting the media.”

Point taken, and you are not alone. At a social gathering, the late Chief Justice William H. Rehnquist once told a group of journalists standing around him (and I am paraphrasing from memory), “The difference between us and the other branches of government is that we don’t need you people of the press.” It was quite an ice-breaker, but it succinctly summarizes how he might have responded to the subject of this article.

John G. Roberts, Jr., the current Chief Justice, seems to share some of the same impulses expressed by his predecessor and mentor. In 2006, when asked the perennial question whether broadcast coverage of Supreme Court oral arguments should be allowed, the Chief Justice acknowledged that it would have educational value. But he added, “We don’t have oral arguments to show people, the public, how we function. We have them to learn about a particular case in a particular way that we think is important.”<sup>1</sup>

The comments of both chief justices suggest that for them, and probably for other judges, helping the media or explaining their work to the media or, by proxy, to the public, takes a decidedly back seat—if it occupies any seat at all—to the core function of resolving a case for the benefit of the parties and the

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1. Lorraine H. Tong, *Televising Supreme Court and Other Federal Court Proceedings: Legislation and Issues* CRS-3 (Cong. Research Serv. Nov. 8, 2006) (quoting remarks of the Chief Justice delivered at 2006 Ninth Circuit Judicial Conference) (also available at <http://www.fas.org/sgp/crs/secretary/RL33706.pdf>).

law. Put another way, many judges feel that they, perhaps unlike other public officials, have more important things to do than worry about how the news media report on their work.

I could argue and have argued that the public and its surrogate, the media, are as important an audience for decisions as other judges, legislators, and posterity. But whether or not you agree, there is one indisputable fact: The news media are not going away. As long as newspapers, radio, television, and digitized news outlets exist, we will be covering the work of the nation's courts. So, the point of my article is this: Why don't we all make the best of it and see if there are ways we can improve the quality of court coverage, and the tone and substance of how we—the media and the judiciary—relate to each other?

I approach this question with humility, for at least two reasons. First, I was taught a long time ago in journalism school that no one (and that would include judges) is obliged to speak to a journalist. We in the media should not become so self-important that we think judges should cater to us in any way. Second, I am deeply aware of the media's inadequacies in the enterprise of covering courts. For the most part, we are untrained and deadline crazed, with short attention spans and an inbred preference for heat over light and simplicity over nuance. None of this endears us to judges, and some of these faults are beyond repair. But we are way behind on the things we can improve—notably preparation and training, and also the effort required to understand and then to summarize matters both subtle and complex.

That said, here are some observations drawn from twenty-eight years of covering the United States Supreme Court and other courts, mainly federal, on simple things that judges could do to help improve media coverage of their work.

## I. WRITE WITH CLARITY AND VERVE

Not every appellate decision lends itself to being summarized in an aphorism that survives the ages. Justice Potter Stewart's "I know it when I see it" definition of obscenity in

*Jacobellis v. Ohio*,<sup>2</sup> is a perfect example of one that does, as is the Holmesian admonition that even the First Amendment “would not protect a man in falsely shouting fire in a theatre and causing a panic.”<sup>3</sup> Justice Holmes’s defense of eugenics is also a succinct—if regrettable—example: “Three generations of imbeciles are enough,” he wrote in *Buck v. Bell*.<sup>4</sup>

But even short of those timeless statements, it is entirely possible for judges to use plain language and well-turned phrases to explain their decisions. Politicians routinely revise the speeches they are about to give with an eye toward what phrase or sentence will be the “money quote” that is used on the nightly news or in the next day’s newspaper—or blog. I wouldn’t suggest such a crass project for judges, but there’s nothing wrong with giving decisions a second look with this in mind: If my next-door neighbor reads this, will he or she understand what I am talking about? That is certainly something we journalists are taught to think about when we write our stories, so if judges go through that exercise first, it’s a plus for everyone.

The conversational style of many of Judge Richard Posner’s decisions on the Seventh Circuit is another model to consider. A recent book by William Popkin offers numerous examples of how Posner brings readers along with phrases like “We come at last to the merits of the case,” and addresses readers directly with phrases like “Remember that . . .”<sup>5</sup> Posner also defines obscure legalisms in a droll, helpful manner, as in: “When a court says the defendant received ‘constructive notice’ of the plaintiff’s suit, it means that he didn’t receive notice but we’ll pretend he did.” He’ll talk about a “whacky result” and how a party’s argument is “frivolous squared.”<sup>6</sup> Humor can often fall flat or distract, but judicious use of a light tone can help the reader, not to mention the journalist, understand what is going on.

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2. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

3. *Schenck v. U.S.*, 249 U.S. 47, 52 (1919).

4. 274 U.S. 200, 207 (1927).

5. William D. Popkin, *Evolution of the Judicial Opinion: Individual and Institutional Styles* 158 (N.Y.U. Press 2007).

6. *Id.* at 156-57.

Justice Stephen Breyer, who says he writes his decisions for the public, not the bar, to understand—a goal he does not always achieve—recently used a colloquial and funny example that effectively made his point in a statutory construction case. Noting that the word “any” can be limited by context, he wrote:

When I call out to my wife, “There isn’t any butter,” I do not mean, “There isn’t any butter in town.” The context makes clear to her that I am talking about the contents of our refrigerator.<sup>7</sup>

A volume’s worth of precedent and dictionary definitions could not have made the point better.

## II. BARE YOUR SOUL, A LITTLE

Another virtue of Judge Posner’s opinion-writing is that he sometimes brings the reader into his, and the court’s, thinking—with all the balancing, uncertainty, and self-doubt that entails. “We freely acknowledge that this is an uncertain area of the law,” Posner wrote in one decision.<sup>8</sup> In another, he stated, “How one translates all this vague information into a [legal conclusion] is a puzzler.”<sup>9</sup>

This kind of writing humanizes its author a bit, letting the reader know that the job of judging is not a soulless or robotic chore where the answer is obvious. It can also give important insight into how judges decide cases, in a way that is more interesting than detailing three-part balancing tests and the like. Let me offer a high-profile example.

No Supreme Court decision in the last decade, with the possible exception of *Bush v. Gore*,<sup>10</sup> has generated as much public controversy as *Kelo v. City of New London*.<sup>11</sup> By allowing the Connecticut city to use eminent domain to acquire private homes for the purpose of turning the land over to private developers as part of an overall economic development plan, the Court incurred the wrath of property owners nationwide.

7. *Ali v. Fed. Bureau of Prisons*, \_\_\_ U.S. \_\_\_, \_\_\_, 128 S. Ct. 831, 850 (2007) (Breyer & Stevens, JJ., dissenting).

8. *Flower Cab Co. v. Petite*, 685 F.2d 192, 194 (7th Cir. 1982) (Posner, J.).

9. *Lian v. Ashcroft*, 379 F.3d 457, 461 (7th Cir. 2004) (Posner, J.).

10. 531 U.S. 98 (2000).

11. 545 U.S. 469 (2005).

Justice John Paul Stevens, who wrote the decision, invoked a line of precedents to assert that the Court should not be second-guessing the economic development plans of local officials to use eminent domain for what they view as a valid public use.

But Stevens's bow to precedent did little to tamp down public outrage and commentary that the ruling was an example of judicial activism, of the Court imposing its will against the wishes of helpless homeowners. One manifestation of the anger was an absurd and ultimately unsuccessful effort to have Justice David Souter's family home in New Hampshire acquired by eminent domain.<sup>12</sup>

A few months after the decision, Justice Stevens gave a little-noticed speech to the Clark County Bar Association in Nevada, in which he revealed, in essence, that he disagreed with his own opinion in *Kelo*. He said it was an example of a case in which his opinion of what the law authorized was "entirely divorced from [his] judgment concerning the wisdom of the program."<sup>13</sup> But to rule on the basis of what he thought about the wisdom of New London's plan, Stevens suggested, would amount to judicial activism: "Time and again judges who truly believe in judicial restraint have avoided the powerful temptation to impose their views of sound economic theory on the policy choices of local legislators."<sup>14</sup>

I tell this story because, when I read Stevens's speech, I thought: Wouldn't it have been nice if Justice Stevens had included those observations in his original opinion? What if Stevens had bared his soul a bit in his opinion by telling the world that he felt compelled by precedent to go against his own personal feelings? It surely would have been the dominant quote

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12. See e.g. John Tierney, *Supreme Home Makeover* 155 N.Y. Times A27 (Mar. 14, 2006) (reporting that a then-candidate for the Board of Selectmen in Weare, New Hampshire, was running on a platform that included a promise to seize Justice Souter's home and convert it into the "Lost Liberty Hotel").

13. John Paul Stevens, J., S. Ct. of the U.S., Speech, *Judicial Predilections* 7 (Clark Co. (Nev.) B. Assn., Aug. 18, 2005) (copies of relevant pages on file with Journal of Appellate Practice and Process); see also Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)* 154 N.Y. Times A1 (Aug. 25, 2005) (discussing Justice Stevens's speech, and referring to two Court decisions in which Justices O'Connor and Kennedy indicated that the results they reached as judges did not reflect the decisions that they might have made as legislators or the beliefs that they might hold as private citizens).

14. Stevens, *supra* n. 13, at 10-11.

in all the resulting coverage, and it might have spared the Court some of the criticism it got about judicial activism. Just as important, it would have been a “teachable moment” about how judges reach their decisions, and how judges, unlike legislators, don’t vote according to their policy preferences.

More broadly, the point is that in the writing of an opinion, judges can bring the reader along for the ride of their thought processes, how they came to their conclusion. Their doing so would shed light on the judicial process and help the media avoid our often-criticized obsession with the bottom line of each decision, rather than its rationale. (More about that later.)

### III. LIFT THE CURTAIN

Other articles in *Covering the Appellate Courts* will make this point in more detail, but I’ll just second the motion: Courts and judges should embrace the digital age and get as much as possible of what they do up on the Internet. That includes dockets, motions, briefs, decisions, and more: oral argument transcripts, audio, and video as well, where humanly possible. Throw in speeches and court rules, disciplinary procedures and complaint forms, and financial disclosure reports too; hold nothing back (except for certain personally identifying information that can only cause mischief).

The main beneficiary of courts’ posting on the Internet is the public, which can, with determination, find out almost all of what it needs to know about court decisions with a few mouse clicks. That in itself may appeal to judges as a way to circumvent journalists who get things wrong. Chief Justice Rehnquist’s admonition that the judicial branch does not need the press may, in a sense, be truer now than it was when he said it, nearly twenty years ago. Presidents and legislators have used television and radio for decades to speak to the public without the filter of the media; for broadcast-shy judges, the Internet offers the same direct pipeline to the public.

As Dahlia Lithwick, the Supreme Court correspondent for the online magazine *Slate*, puts it: “Gone are the days when I, as a reporter, must tell you what a case means; today I can urge you

to read it, start to finish, and decide for yourself. This is a form of democracy never imagined by the framers.”<sup>15</sup>

In reality, the public may not have the time or interest to read all the way through judicial opinions. And that, I hope, gives journalists a role to play for the foreseeable future in summarizing and analyzing the work of the courts. If that is the case, then putting everything online only helps the media as well. Courts that are digitally transparent will be covered more completely than those that force reporters to trudge down to the courthouse to find what they need. It’s as simple as that. Am I confessing that reporters are lazy? Let’s say they are pressed for time, and anything that puts court documents easily at their fingertips is a tremendous help.

#### IV. TALK TO US

In December 2007, the buzz began almost immediately when President Bush nominated Missouri Supreme Court Justice Stephen Limbaugh, Jr., to a judgeship in the Eastern District of Missouri. Questions were raised, not because the nominee is conservative broadcaster Rush Limbaugh’s cousin, but for a different reason. If confirmed, Limbaugh would serve on the same court with his father, senior judge Stephen Limbaugh—an apparent violation of the law barring nepotism on the federal judiciary.<sup>16</sup> How could Bush have nominated the younger Judge Limbaugh in defiance of this law?

When I read about this wrinkle, I found it immediately interesting and wondered how the legal hurdle would be overcome. I tried to reach the nominee on the telephone, and when that was unsuccessful, I called the elder Judge Limbaugh. I was put right through to him, almost as if he was waiting for a journalist to call.

“The answer is simple,” he said. “If my son is confirmed and sworn in, I am required to resign, and I will do so.” Senior

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15. Dahlia Lithwick, *The Internet and the Judiciary: We Are All Experts Now*, in *Bench Press: The Collision of Courts, Politics, and the Media* 178 (Keith J. Bybee ed., Stanford U. Press 2007).

16. See 28 U.S.C. § 458(b)(2) (LEXIS 2008) (barring appointment of judges related to each other “by affinity or consanguinity within the degree of first cousin” to the same court).

Judge Limbaugh went on to say, “I’m in good health, carrying a full load, but I’m 80. But he has his career ahead of him.” He added that he disagrees with the anti-nepotism law as it applies to district court judges, since they, unlike appeals judges, operate independently and are not reviewing each other’s opinions. “But Congress passes the law, and we go from there.”<sup>17</sup>

By agreeing to talk to a reporter and spell out what would happen when his son was sworn in, the senior Judge Limbaugh instantly made the speculation, which might have gotten nasty, disappear. Mystery solved. Story over.

Yet it is safe to say that many judges would not have spoken to a reporter even in these circumstances. In addition, regrettably, many reporters might not have tried to call the judge, accustomed as we are to federal judges not giving the press the time of day. The speculation, and possible inaccuracies, might have continued to circulate.

Judges’ reticence about talking to the press is traditional, which makes it a hard habit to break. Judicial canons about not speaking about pending cases are often used as a much broader shield against talking to the press about everything or anything. There is one court—I won’t embarrass anyone by revealing its name—that won’t even give reporters informal guidance on which upcoming oral arguments might be newsworthy.

But I often tell young reporters to give judges a call, and they are surprised at how often judges will talk to them, either on or off the record. And when they do, in my experience, the result is almost always beneficial for the media’s and the public’s knowledge about how courts work. Courthouses have not crumbled because judges sometimes talk to reporters.

“I see nothing wrong with a judge talking to the media about court process, procedure, and basic legal principles,” Mississippi Supreme Court Justice James Graves, Jr., wrote in a recent essay. “There is an obvious benefit when those who report on the courts have some general knowledge of the courts

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17. See Tony Mauro, *Rush to Judgment on Limbaugh*, BLT: The Blog of Legal Times (3:08 p.m., Dec. 7, 2007), <http://legaltimes.typepad.com/blt/2007/12/rush-to-judgmen.html> (accessed Mar. 10, 2008; copy on file with Journal of Appellate Practice and Process).



and legal procedures.”<sup>18</sup> And yet, when I speak on panels and urge judges to speak with reporters, some are horrified at the prospect. Some cite the canons; others remember a time when they were burned by the media and swear they’ll never talk to a reporter again. Still others say they have tried talking with reporters who cover their courts and investing time in explaining things and developing a good working relationship . . . only to find that the reporter is whisked away to another beat after six months or less.

I have no good comeback for that last complaint; at some media organizations, I am ashamed to say, the court beat is not as high a priority as it should be, and it is often a stepping stone to others. And as news budgets tighten, reporters are often required to cover several other institutions along with the courthouse, to the detriment of quality coverage of the courts.

All we can ask, then, is for judges to give reporters a chance. The vast majority strive to report things accurately, and to treat judges and others with respect and fairness. Making time to talk to journalists about things that fall outside the canons can, in my view, only help us deepen our understanding and appreciation of the judicial enterprise.

## V. UNDERSTAND US, JUST A LITTLE

With regularity, Justice Antonin Scalia attacks media coverage of the courts for its obsession with the bottom line. We are too concerned with who won and who lost, he says, when for him, how the court reached its conclusion is what counts.

“The press is never going to report judicial opinions accurately,” Scalia said at a forum in 2006. “[W]ho is the plaintiff? Was that a nice little old lady?” is the only sort of question that he thinks we will ask. “And who is the defendant? Was this, you know, some scuzzy guy? And who won?”<sup>19</sup> It’s a popular complaint that often wins applause from an audience of judges.

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18. James E. Graves Jr., *Judicial Independence: The Courts and the Media*, in *Bench Press*, *supra* n. 15, at 119.

19. John Heilprin, *Scalia Sees Shift in Court’s Role* Wash. Post A19 (Oct. 23, 2006) (reporting on panel discussion sponsored by National Italian-American Foundation).

And yet I am betting that when Scalia and other judges who share his view open the sports section every day, they expect to find out who won or lost in the first paragraphs of the stories about their favorite teams. And I am guessing too that they would be hopping mad if they encountered a story about a ballgame that did not give the final score until sometime after the seventh paragraph.

Covering the courts is no different: Of course we are going to tell readers the punch line of an appellate court decision—who won or lost—as soon as possible. And if we humanize the parties a bit, it is only to keep the readers' interest—so that by the time we start explaining the rationale of the court decision, they are still paying attention.

If we never get to the rationale, then judges have a right to be angry. But try to understand that if we start off a story with something like “The Supreme Court used only heightened scrutiny rather than strict scrutiny in reaching a decision yesterday,” then we will soon be invited to try another profession.

Similarly, if you issue seven decisions late on a given afternoon, don't expect that all of them will be fully and cogently covered by the time of the next blog posting, much less by the next morning's newspaper. If we are to be more than copy machines and stenographers, we as reporters must read a decision and talk to those affected by it and to experts who can put it in context. Even in this digital age, that takes time.

I realize that some judges might be surprised to learn that we in the media feel pressed both to report quickly on important decisions and to write about them with some degree of expertise. And I can say that with some assurance, because on one day in June of 1988, the Supreme Court issued nine opinions, several of them very newsworthy, spanning 446 pages. After that debacle, we in the press corps politely asked Chief Justice Rehnquist if, in the future, he could spread the rulings out over several days. This was his response: “Just because we announce them all on one day doesn't mean you have to write about them all on one day. Why don't you save some for the next day?”<sup>20</sup>

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20. Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 Yale L.J. 1537, 1558 (1996).

His suggestion was either stunningly or charmingly naive, displaying a remarkable ignorance about how journalism works. It was the rough equivalent of asking reporters to agree to set aside the second half of a President's State of the Union address to report on at a later date. It's not going to happen.

In a telling way, Chief Justice Rehnquist's comment also confirmed the need for judges and journalists to increase and improve their dialogue with each other. No doubt judges can recite anecdotes about things reporters have written about judges that are as boneheaded as what Rehnquist said about covering his court. But if we don't know about those boneheaded mistakes, how can we correct them?

By speaking clearly, frequently, and respectfully with each other, judges and journalists can only deepen their understanding of each other. These exchanges will increase journalists' understanding of the courts, and that will improve both the public's perception of the courts and their knowledge about how the courts operate. Judges and journalists do need each other, and taking steps to improve our relationship is in everyone's interest—especially that of the public, which we both serve.



