

HORSE-AND-BUGGY DOCKETS IN THE INTERNET AGE, AND THE TRAVAILS OF A COURTHOUSE REPORTER

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If one dates the Internet Age from 1989, with English computer scientist Timothy Berners-Lee's invention of the World Wide Web, it is perhaps fair to suggest that news reporting from America's courthouses should have been digitally possible for most of two decades. With rare—too rare—exceptions,¹ however, the news-gatherer on the courthouse beat is still functionally inhibited by the backwardness of most courts in the design, operation, and maintenance of their electronic dockets.

Can one be serious in making that complaint? My gosh—poor legal reporting is a problem of *docket management*? Indeed.

How the digital docket is managed is a matter of utmost seriousness in “Covering the Appellate Courts.” This is not merely a functional failing within the middle and higher-level courts themselves: It is a direct threat to the accuracy and reliability of news accounts about the workings of the nation's appellate judiciary—federal, state, and local.

The underlying premise of this criticism is simple to state: No courthouse reporter can do his or her work without prompt—sometimes, virtually immediate—access to original documents.

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1. One exception that leaps easily to mind is the superb and pioneering work of the Florida Supreme Court in developing highly accessible electronic databases, in no small part due to the work of public information officer Craig Waters. This was perfectly demonstrated during the historic multiple-courthouse battle over the 2000 presidential election that led ultimately to the United States Supreme Court's ruling in *Bush v. Gore*, 531 U.S. 98 (2000). None of the documents filed in any court was easier to reach than those before Florida's highest court.

And this is especially true at the appellate level. News reporters and editors are fond of saying that a reporter is only as good as his or her sources. For the courthouse reporter—indeed, for any reporter who would undertake to cover the law, possibly at any level—there is no source equal to, and certainly none superior to, an actual document.

Perhaps there lingers a romantic notion (probably dating from the era when a sweating reporter, snap-brim hat askew, phone jammed in an ear, would call the office, and demand imperiously: “Get me rewrite, Sweetheart!”) that a reporter can be quite successful merely by using the telephone and shoe leather. Why can’t a legal reporter (any less than a reporter on the political beat) call up a court clerk, perhaps even a judge, and ask that most common of questions in the verbal commerce among the Boys on the Bus: “Hey, what’s happening? What do you hear?” A talented interview technique is part of all news reporting, sure; but for the reporter following the work of an appeals court, it is no substitute for having actual legal documents—in hand, or, in this Internet Age, displayed on a PC screen.

Let’s unpack these opening observations. And, to begin to do so, let’s start where courthouse news often begins (and where, too often, it actually ends)—the trial.

The vast number of newspaper inches and broadcast minutes devoted to legal news are reports about trials—mainly, criminal trials. News editors and news producers in all popular media have a perhaps-natural fascination with the drama, usually the human drama, of a trial. Is it possible to imagine a more compelling image in the law, to be broadcast and to be written about, than O.J. Simpson trying on an ill-fitting glove that had been found at the murder scene? That is not just great television imagery; it is the heart of most legal news in America’s popular media. Trial scenes allow journalists to capture the meaning of the criminal trial process, or at least the most vivid forms of trial tactics, in a capsule. Whether on the TV or PC screen, on a tiny PDA visual, or in the descriptive prose of a talented newspaper or magazine writer, such imagery tells the story. (Indeed, every reporter whose regular legal beat is the appellate courts should, every now and then, find a trial to cover, or at least to watch, just to know what that encapsulating

experience in journalism can be—for its entertainment value, if nothing else.)

In a journalistic era when personality news tends to predominate over substantive issue news, the characters that people a trial courtroom quite naturally are the main focus for reporters (and editors). An explanation of trial strategy, if it can be made vivid, will sometimes get into the story, but trial news is fundamentally people news. But this is not routinely the case if the trial is one about *civil* law. Editors, and reporters, generally do not feel the same professional affection for a civil trial. This is not to say that a newsworthy civil trial will go begging for coverage; the various first-tier proceedings—the trials—in the *Bush v. Gore* saga were saturated with coverage. So would be an important civil case about, say, abortion or gay rights or National Security Agency wiretapping. Or a civil trial where Really Big Money is at stake—like *United States v. Microsoft*.²

But, by and large, civil trials are not about people as much as they are about issues. And, as with criminal trials, it is the outcome—the verdict—toward which the journalistic fascination ultimately points. Whereas a criminal trial may well get day-by-day coverage, it is the rare civil trial that will. How often does a courthouse executive have to divide up seats among a throng of journalists for a high-stakes civil trial, compared with a high-visibility criminal trial? The answer is obvious: It happens, but seldom.

Move the setting, then, up to the appellate level. It is a scene mainly of blue serge and black robes, of talking heads and almost no props. No bloody knife in a plastic bag resting on a polished table. No ghastly photos of crime scenes, with body forms in grotesque poses outlined in chalk. No scratchy audiotapes of overheard criminal plots. No soaring, pleading, even shouting orations to the jury (the jury box, if there is one, is quite possibly filled with law clerks, attempting to look

2. See e.g. *U.S. v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D. D.C. 2000) (ordering divestiture of some software lines by Microsoft and setting conditions under which Microsoft could continue to conduct part of its business), *aff'd in part, rev'd in part, and remanded in part*, 253 F.3d 34 (D.C. Cir. 2001). Even at the Microsoft trial, there was a vast disparity between the number of news reporters in the courtroom when Bill Gates testified than when, for example, a nearly anonymous software designer was on the stand. Bill Gates is news, personified.

inconspicuous). Benign (or not so) portraits of past luminaries stare down impassively from the walls. Where is the drama, the human drama, here? And, indeed, where is the news?

The news is, for the most part, in the documents.

Appellate news, like appellate law, is not primarily about the facts. Reporters on the appeals court beat, like the judges they observe, largely take the facts as they find them—that is, as they appear in the trial court’s record. Editors will insist, to be sure, that the facts get woven into the account of appellate proceedings, but they are a kind of window-dressing for the news about argument. This is what editors may call “humanizing” the story. But the reporter who is good at covering an appeals court proceeding will remember that the facts are secondary—useful, in the main, to give content to the sometimes abstract substance of legal argument; not to dumb it down, but to make it clearer to the lay reader or listener. And argument, of course, is mostly found in documents, not in oral presentations. Not many appellate hearings run on for more than a few hours, at the absolute outside, and most are completed on a much more abbreviated schedule.³ Seasoned reporters can “read” a court by the exchanges between judges and lawyers, but drawing conclusions that one is prepared to defend in print or on the air is a dare to be approached with genuine caution. The judicial votes have not been counted yet, so a news account should not invite the reader or listener to conclude that they have been. A multiple-judge court, typical at the appeals level, is, of course, harder to “read,” even when the judges have sat for some years and have trod supposedly well-marked judicial paths.⁴

Back, then, to the documents, on the way toward a discussion of the contemporary problem of electronic access to dockets and the documents that they log.

When a lawsuit unfolds at the appeals court level, it will do so primarily (because of the limitation on oral argument time) in

3. It is a truly rare Supreme Court argument that will be allotted more than thirty minutes on a side, with only two sides customarily arguing. It makes real news when Chief Justice John G. Roberts, Jr., lets lawyers run on beyond the red glare of the “stop” light on the front of the lectern.

4. One of the favorite speculative games of reporters covering the present Supreme Court is to try to gauge in which direction Justice Anthony M. Kennedy is leaning. It has been proven foolhardy, though, to assume that the other eight Justices will divide evenly, four to four, so that Kennedy holds control.

the briefs filed by the lawyers. These are documents that are supposed to be prepared with exquisite, or at least attentive, care. (When they are not, their deficiencies fairly shout at the courthouse reporter who has read too many briefs to be taken in by exaggeration, misquotation, manipulation of precedent, conclusions that do not follow [easily or at all] from premises, and plain shoddiness.) If there is truth to the old adage that the adversary system is a remarkably effective mode of getting at legal truth, the adage lives vividly in the briefs, the counter-briefs, and the friend-of-court briefs filed at the appellate level.

In times past, when more lawyers were inclined to avoid talking to reporters, with the conventional response that they do not try their cases on the news pages, there was no substitute at all for familiarity with what they had written and submitted to an appeals court. Lawyers are much more accessible to the media these days, but it very likely is the rare lawyer who will take a telephone call from a reporter and recount, verbally, the breadth and scope of the briefs that have been filed. Good lawyers, including good lawyers in appellate practice, know the painstaking task it is to compose a persuasive brief, so why would they be really comfortable giving a reporter a quick “fill” on what they have written? It is not that lawyers cannot be trusted to summarize well (they often do that exceptionally well when on their feet in a courtroom); it is rather that they make their case better in written format than they do in a verbal exchange perhaps done on the fly.

When a news reporter reads a well-prepared appellate brief, shadings and nuances often reveal themselves, sometimes contradicting prior assumptions that even a knowledgeable reporter may have made about the true nature of a lawsuit. Indeed, a reporter who has spent more than a little time on an appeals court beat discovers, over and over again, that the substance of law generally tends to move in smaller rather than in grand increments; a lot of the great questions in law, perhaps especially in constitutional law, have been addressed and answered innumerable times, and what often seems to remain unsettled are narrower applications. A modern-day appellate dispute over school desegregation is not *Brown v. Board of*

*Education*⁵ all over again; a *Roe v. Wade*⁶ sequel will not reach the plateau of that precedent until, perhaps, *Roe* someday were to be overruled.

In a legal brief's accumulation of authorities (precedent, statute or constitutional provision, logic, judicially "noticed" social science data, as examples), it will mark the paths that will lead to a news reporter's understanding of what is really at stake. The brief is, of course, designed to promote a conclusion, but it articulates a series of syllogisms that point in that direction, and they are as necessary to appreciation of the substance of the dispute as is the judgment pursued in the process.

For a reporter who may be more accustomed to the easy informality of life on the police beat, or to the press-the-flesh, feigned intimacy on the campaign trail or in council and legislative chambers, a focus on documentary materials is hardly likely to start the journalistic juices to flowing. This is, however, what life in the press room at an appeals court is mostly about. Although Supreme Court nominee Robert Bork got into trouble with the Senate Judiciary Committee when he described appellate judging as "an intellectual feast,"⁷ that is the banquet at which many reporters covering appeals courts regularly sup. That is, perhaps, why many Washington, D.C., reporters who pass through the press room at the Supreme Court on their way to supposedly higher journalistic callings do not dwell long, in years—because life among the documents is very different from life among power people.⁸

5. 347 U.S. 483 (1954).

6. 410 U.S. 113 (1973).

7. *The Bork Hearings: An Intellectual Appetite*, 136 N.Y. Times 50 (Sept. 20, 1987) ("ALAN K. SIMPSON, Republican of Wyoming: And now I have one final question. Why do you want to be an Associate Justice of the United States Supreme Court? BORK: Senator, I guess the answer to that is that I have spent my life in the intellectual pursuits in the law. And since I've been a judge, I particularly like the courtroom. I like the courtroom as an advocate and I like the courtroom as a judge. And I enjoy the give-and-take and the intellectual effort involved. It is just a life and that's of course the Court that has the most interesting cases and issues and I think it would be an intellectual feast just to be there and to read the briefs and discuss things with counsel and discuss things with my colleagues.").

8. In more recent years, Justices of the Supreme Court have been more accessible, in person, to reporters covering their Court—as, indeed, many of them have become more available for public appearances, including television interviews. They are interesting people, of course, but those encounters do not provide the whole—or even a substantial part—of quality journalism about the Court.

A clarifying note: This life among the documents is not a monastic pursuit, like Nathaniel Hawthorne closeting himself in his New England study for a decade of reading history. It is still active journalism—getting the news, getting it right, and getting it out, sometimes very rapidly. And the stuff of the news is that journalistic obsession: conflict. It is conflict that is deeply infused with history,⁹ and sometimes with philosophy, that has real political or social meaning,¹⁰ that is often infused with economic substance, and, as an added bonus, perhaps, that sometimes involves very interesting people and situations. Much of this plays out in the arena of legal combat in which great social and political controversy gets examined, and decided, judicially. And all of this, happily, is enclosed within the briefs, and their supporting documents.

If briefs and other filings in the nation's appeals courts are that important (and that interesting, if read and studied as they ought to be), it would seem that everyone associated with developing appellate law would be joined in a grand project to make certain that these materials are routinely, and inexpensively, available—to news reporters, and, indeed, equally to the general public as well. And with the advent of the Electronic Case Filing system (and access through PACER) in the federal courts, bringing those courthouses into the Internet Age, one might assume that court papers could be scanned from any desktop or laptop computer, even many miles away from the courthouse. That is not routinely the situation that prevails, however.

9. Reporters unfamiliar with the federal laws that had emerged from the Tilden-Hayes controversy in 1876 were, for example, at a considerable disadvantage, in substance as well as in historic appreciation, when covering *Bush v. Gore*. Many of them, astounded that the Supreme Court would intrude so deeply into political matters, were unacquainted with the Court's decision in *McPherson v. Blacker*, 146 U.S. 1 (1892), discussed in the briefs as the basis for turning this political dispute into one for the courts, too.

10. There are few legal controversies in modern America that can match the political and social intensity of the long-running and nationwide debate over access to guns and over their regulation. The focus of that debate, the Constitution's Second Amendment on "the right to keep and bear arms," gets deep and serious examination in the legal briefs filed in the long train of court cases testing its meaning—especially those submitted to the Supreme Court as a direct test of the meaning of that amendment. See e.g. *D.C. v. Heller*, ___ U.S. ___, 128 S. Ct. 645 (2007) (granting certiorari). *Heller* was argued in the Supreme Court on March 18, 2008.

In the federal system, once again, one can look first to the trial courts for the best digital access. If one is covering trials, of course, that is a boon. But it is only court filings in civil lawsuits that are commonly available for download.¹¹ Criminal case dockets do not provide the same access; only now is a “pilot project” underway to test some greater electronic access to criminal case materials in the federal courts.¹²

Move up to the federal appellate level, however, and the story is very different. While appellate lawyers increasingly are filing their briefs in electronic format, those briefs are not commonly made available through the courts’ electronic dockets. Opinions and some orders are downloadable, but not briefs. Unless a reporter obtains them from counsel, the only alternative is a visit to the courthouse to examine and/or copy the briefs on file there. Exceptions are made, but they remain exceptions. Another failing is that dockets are not always

11. Papers filed in civil cases are available through the PACER system, at eight cents a page, which is better than the fifty cents per page often assessed when copies are obtained at clerks’ offices.

12. The pilot project on Internet access to some criminal case materials is discussed in a recent news release. See Administrative Office of the U.S. Courts, *Comments Sought on Internet Access to Some Criminal Case File Documents*, http://www.uscourts.gov/Press_Releases/privacy091007.html (News Rel. Sept. 10, 2007) (including link to public comments on proposed public-access policy) (accessed March 4, 2008; copy on file with Journal of Appellate Practice and Process).

Hearing transcripts in U.S. District Court civil cases are being made available electronically, but only after a ninety-day delay, through PACER. See Administrative Office of the U.S. Courts, *Transcripts of Federal Court Proceedings Nationwide to Be Available Online*, http://www.uscourts.gov/Press_Releases/judconf091807.html (News Rel. Sept. 18, 2007) (accessed March 4, 2008; copy on file with Journal of Appellate Practice and Process).

One very conspicuous exception to the absence of access to criminal docket materials was the case of *U.S. v. Moussaoui*, No. 01-455 (E.D. Va.), a major terrorism trial in the United States District Court for the Eastern District of Virginia. See e.g. <http://www.vaed.uscourts.gov/notablecases/moussaoui/index.html> (updated index page providing links to documents filed in district court) (accessed March 4, 2008; copy on file with Journal of Appellate Practice and Process) Under the initiative of Judge Leonie M. Brinkema, the filings in that case (unless classified) were routinely and promptly available for reading or for download. Unfortunately, this helpful arrangement is not being imitated as *Moussaoui*’s appeal proceeds in the Fourth Circuit. Instead a link to PACER, through which the *Moussaoui* docket can be accessed for a fee, is available on the Fourth Circuit’s website, as are direct links to some documents filed with that court. But significant portions of many of those filings have been redacted. See <http://www.ca4.uscourts.gov> (court page on which a link to “Cases of Public Interest” was available on Apr. 24, 2008).

updated quickly; an order may be issued days before it shows up on a federal appeals court docket. And still another deficiency is that technically unpublished (non-precedential) opinions are often not available at all.

The situation in state courts is, as a general matter, hardly better, and often is worse. A number of state courts, though, are beginning to make briefs available in what are deemed to be “high profile” cases. The California Supreme Court is a notable example of that approach.

Beginning in October 2007, the United States Supreme Court began requiring counsel to file merits briefs in electronic as well as in paper booklet format. But the Court does not make them available on its own website; they are transmitted to the American Bar Association, which decides on its own when it will display them on the ABA’s site.¹³ It would be only a matter of a few computer clicks to display them promptly on the Court’s own website, but that is still in the offing. Only a year before, the Supreme Court began making transcripts of oral arguments available on a same-day basis—a vast improvement¹⁴ over the ten-day to two-week delay in obtaining them commercially (except at significant cost). Those publicly released transcripts, too, are free.

It may not be obvious, in a day of gigantic news organizations, but not all news outlets are deep-pocket firms that can afford sizable copying fees. And, given the limited fascination among editors and broadcast producers with appellate law news, even modest spending for court filings is not a welcome line-item on expense accounts.

13. The ABA displays these briefs on the “Supreme Court Preview” section of its site, <http://www.abanet.org/publiced/preview/briefs/home.html> (accessed March 4, 2008; copy on file with *Journal of Appellate Practice and Process*).

Scotusblog, for which this author writes, regularly provides links to briefs in granted and argued cases. See <http://www.scotusblog.com> (accessed March 4, 2008; copy of main page on file with *Journal of Appellate Practice and Process*). A new sister blog, ScotusWiki, inaugurated on October 1, 2007, provides a more extensive array of case materials, including briefs. See http://www.scotuswiki.com/index.php?title=Main_Page (accessed March 4, 2008; copy of main page on file with *Journal of Appellate Practice and Process*).

14. This innovation, largely resulting from the efforts of Chief Justice Roberts, broke decades of tradition. See S. Ct. of the U.S., *Untitled News Release*, http://www.supremecourtus.gov/publicinfo/press/pr_09-14-06.html (Sept. 14, 2006) (accessed March 4, 2008; copy on file with *Journal of Appellate Practice and Process*).

But, if the news media are not all that enamored of news out of the appeals courts, does it make any sense to suggest that there is a problem that needs fixing, that dockets and the materials they contain need to be made more widely reachable? It does make sense, and a good deal of sense, to voice that complaint. As long as docket materials, especially briefs, are out of reach as a practical matter, reporters who are assigned to appeals court coverage will have less incentive to develop habits of relying upon the core materials in lawsuits. If ever there is to develop a journalistic culture of relying upon documents, rather than misleading or incomplete “briefings” or “fills” (or the “spin” of advocacy organizations with active press release operations¹⁵), it will only come about if getting a brief is not a time-consuming, and too often a fruitless, venture. When reporters are faced, as they often are, with serious time pressures, they must have materials on short notice. Although it is not a typical journalistic habit to get prepared well in advance before a case is decided (that *is* a habit among some reporters who specialize in appellate court coverage), a change of circumstances that put briefs and other filings within easier reach could well encourage more preparation. The quality of the coverage, it is practically a certainty, would improve.

Reporters who have been working at appellate court coverage for years (this author, for example) can remember a day when a copying machine and regular postal delivery were the primary means by which one obtained court documents of almost any kind, when a reporter did not live in the city where the courthouse or the lawyers involved were located. All of that, presumably, began to change with the Web’s invention in 1989. News reporting has changed vastly since then, and the whole digital village has grown smaller, with news-gatherers and news-makers living as virtual next-door neighbors.

A reporter covering an imminent execution of a death row inmate in Texas or Nevada or Missouri or Georgia can reach electronic “shelves” full of background information about that

15. It is not uncommon for such organizations to hold press briefings to get out their versions of what is at stake in appellate court cases, nor is it out of the ordinary for them to have previously prepared news releases for issuance on the day decisions come out, even if they have not yet read or digested the actual opinion. These are not universal faults among advocacy organizations, of course, but they are perhaps too prevalent.

case and similar ones, can download long lists of past court precedents on capital punishment, but can that reporter extend his or her digital grasp to get the briefs the lawyers are filing in that particular case, in lower to higher courts, right then? The answer, of course, is: "That depends." But what does it depend upon? It depends, much of the time, upon mere fortuity. To a degree, then, the Internet Age and much of the nation's judiciary have failed that reporter—literally as well as virtually.



