

Legal Journalism Today: Change or Die

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Several years ago, I was a guest speaker for a media and law class at San Jose State University, volunteering my expertise as a legal journalist with a couple decades under my belt of covering courts and law. As I went through my usual dialogue, describing some of the newfound challenges of being a journalist in this brave new digital world, one of the students piped in about Twitter, which at the time was an emerging phenomenon that I frankly considered a mind-numbing threat to intelligent reporting with the shelf life of the Pet Rock (an obsolete cultural reference that can easily be Googled). This young student assured me that I needed to get plugged into Twitter, that it would help sell my “brand” of legal journalism and, as I recall vividly, that I would regret failing to jump on this Twitterverse bandwagon. I brushed off the idea, giving my reasons for moving in a different direction and assuring this group of young, aspiring journalists that this hired gun had no good use for Twitter. I finished up my speech, heading back to my office confident that I owned the proper, time-tested recipe for how to cover the very important institutions of the judiciary and justice system at large. Without Twitter, or its ilk.

That student, it turns out, was right. And I was wrong. Not because Twitter is such an indispensable tool for a legal journalist to succeed (it is important, but it’s debatable how important). Or that it is the only digital tool we need to succeed to get that critical information about the latest ruling or trial out to the public (far from it). Instead, I had veered off base because the emergence of information portals such as Twitter demonstrates where we are in the evolution of legal journalism in this country, indeed journalism generally, and that sticking to the hidebound ways of the past will come at a cost. Great coverage of the courts and law has always depended on depth and accuracy, and a devotion to understanding the complexity of the topic enough to turn around and explain it to a public that is hungry for legal news. But times have changed. People get their information from a constellation of sources. And Twitter was, and is, a big one.¹ So ignoring it, pretending it doesn’t matter to a generation that very much believes it does matter, is a mistake. The San Jose State experience was a teaching moment for me. I needed to change, and not just by paying attention to our website or perhaps using a laptop in court instead of a notebook. As the symposium at the University of

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1. See *About Twitter (Company)*, TWITTER, <https://about.twitter.com/company> (last visited Nov. 9, 2014). According to their website, Twitter’s current usage includes 271 million monthly active users and 500 million Tweets authored per day. *Id.*

Missouri School of Law demonstrated in January,² we are in an unprecedented period of self-examination in our profession, and certainly among those of us left who specialize in covering the law as journalists. Some offered a bleak outlook, others were a bit more optimistic. But we all certainly agreed that the same-old, same-old just isn't going to fly as we move forward.

It remains important to understand the past, when it comes to covering courts and law, in order to understand what will come next, although it's risky business to go there without sounding nostalgic or, worse, like a journalistic relic. But those of us who have made a career out of legal journalism know that the roots of getting this right haven't really changed. Immersing yourself in a thorough understanding of the legal system. Plugging yourself into lawyers, judges, clerks, anyone involved in the vast universe we are required to cover and explain. Knowing the phrases (demurrer vs. summary judgment), pouring through those court records. Spending time in a courtroom, even if in some instances it fails to produce a story. It would seem to be stating the obvious that the best legal journalists have never been tethered to their desks. No amount of technological innovation will diminish the need to retain that irreplaceable human contact with the movers and shakers in the legal world. Too many editors, with little substantive reporting experience of their own, fail to understand the import of keeping this part of a legal journalist's arsenal. But keep it you must. That certainly hasn't changed since I began popping into courthouses in the San Francisco Bay Area back in the late 1980s as a novice court reporter, without the slightest inkling I would spend the rest of my career in this specialty. But, at the risk of sounding like the relic, so much was different back then that it would probably shock the journalism students heading out into the world of new media and legal information today. And that's vital to keep in mind. That's why it's important to connect the past to the present.

A legal journalist plying their craft until about ten to fifteen years ago knew only one world, and it was a world where the idea of electronic filing of documents that pop into your email the moment they land in a court's computer system was unthinkable. Everything was paper, stuck in court files littered around a clerk's office. Getting hold of a judge's fresh new ruling could depend on how lazy the clerk was, or how accommodating the judge was – if they hated journalists, you were going to wait. Old court dockets were on something called microfiche, making the unearthing of important nuggets from a bygone court case more akin to archaeology than legal journalism. And with this very different era of court information came a very different approach to covering law and courts. The practice of pulling together a story on an important development in the law, that big ruling, or that big jury verdict, was all about polishing your story for the next day's newspaper, or for electronic media, that evening's newscast or radio spot. There

2. See *The Art, Craft, and Future of Legal Journalism: A Tribute to Anthony Lewis*, Jan. 29, 2014, UNIV. OF MO. SCH. OF L., <http://law.missouri.edu/faculty/symposium/lawreview2014/>.

were no Tweets heard ‘round the world. Immediacy was in the eye of the beholder, and even information we view today as routine to acquire was a chore to pull together decades ago.

One easy example of the difference was an early blockbuster trial I covered involving the racketeering indictment of a federal judge from San Jose, California, Robert Aguilar, who had been accused of getting way too cozy with a loose knit band of felons and would-be local mobsters.³ After the jury came back with its verdict, the “get” of the day was to interview the jurors, who left the San Francisco federal courthouse through a back exit to avoid the gathered media. A trick I’d learned as a young journalist was to track people down through voter registration, as most people summoned to serve on juries are typically registered voters.⁴ I knew the jury foreman lived in a county East of San Francisco, so I drove over to a county building, pulled up his voter registration information and – bingo – found my quarry. I was the only reporter in the Bay Area to track down a juror that day, much less the foreman, and scored a nice little story that later won me an award. I bring up this story because if the same scenario played out today, all I would have to do is flip open my laptop, pull up our online voter registration records on our company’s internal library and plug in the guy’s name. It would take me a couple minutes. No awards there. But that is where we were twenty-five years ago in covering courts and law as journalists. It’s not where we are today.

Legal journalism today is a frantic, push-button affair. Immediacy is the name of the game. That isn’t to say that in-depth, important explorations of the justice system do not still hold an important place in our business. In 1997, shortly after I arrived at the *San Jose Mercury News*, myself and four colleagues collaborated on a six-month investigation into a group of criminal court judges who regularly took off on Fridays to play golf while the local courts suffered the worst backlog on the criminal docket in the county’s history. There was nothing digital about the story. And it would be accomplished in much the same way today, and have the same jarring impact on the local judiciary. Perhaps the only difference is that nowadays we’d have taken some video with our smartphones that would make fun fare on the *Mercury News* website. The nation’s news outlets are filled with similar examples. When it comes to examining topics such as how the justice system handles the death penalty, instant gratification is not the way to carry out our journalistic mission. But on a day-to-day basis, the realities of covering the law and courts have changed dramatically as a result of the online explosion.

The federal courts, through the PACER system (which we discovered at the symposium has its imperfections because of the heavy costs to the public and media for its use), have eliminated forever the long-forgotten expeditions to the clerk’s office in search of a new filing or judge’s ruling. A district judge’s opinion is available on PACER immediately, popping into your email

3. See *United States v. Aguilar*, 994 F.2d 609, 611 (9th Cir. 1993).

4. *Registration FAQs*, ORANGE COUNTY REGISTRAR OF VOTERS, <https://www.ocvote.com/faqs/registration-faqs/> (last visited Nov. 9, 2014).

at all hours of the day and night. I know this well just from covering cases such as *Apple v. Samsung*⁵ in San Jose's federal courthouse, where the judge presiding over the endless patent feud, Lucy Koh, has been known to unleash orders when the rest of the world is asleep. And the armies of lawyers for the two companies do the same, filing their pleadings from dawn 'til dusk. With the growing import of our websites, Twitter and other forms of getting our journalism to the public on the spot, this round-the-clock aspect of covering the important legal battles in your backyard has truly obliterated the notion of deadlines. Newspapers still operate on that almost quaint time constraint, but that is fading in importance. Online availability of court information has made our jobs easier. But no less demanding.

This change in the access to court information cuts across the spectrum. The United States Court of Appeals for the Ninth Circuit posts its published opinions by 10 a.m. every business day.⁶ That court, which appears to be more progressive on public information than most in the federal system,⁷ has gone even further in the past year, providing live video of en banc arguments, audio of panel arguments and other ways of accommodating "virtual" legal reporting.⁸ It is no substitute for being in court for an argument. But with a court that spans nine states, as the Ninth Circuit does,⁹ it has no doubt made the task of covering the appeals court easier for many reporters. The California state court system also has made progress, although its offerings of online documents remain scattershot. The California Supreme Court not only puts its opinions online on Monday and Thursday mornings, but posts a notice the day before letting the media and public know which case it will decide the next day (but not the result). For a legal journalist, this is indispensable. When the court was preparing to decide its first case involving California's ban on gay marriage in May 2008,¹⁰ I was able to pull together all my background the previous day for what turned out to be an earthshaking, 4-3 ruling that invalidated the state's existing laws.¹¹ The California Supreme Court also puts the briefs for cases set to be argued each month on its website.¹² In the past, that required a trip to the court's San Francisco headquarters to

5. *Apple Inc. v. Samsung Electronics Co., Ltd.*, 888 F. Supp. 2d 976 (N.D. Cal. 2012).

6. See *Opinions*, U.S. COURTS FOR THE NINTH CIRCUIT, <http://www.ca9.uscourts.gov/opinions> (last visited Nov. 9, 2014).

7. See *Access & Services, Frequently Asked Questions*, U.S. CTS. FOR THE NINTH CIR., <http://www.ca9.uscourts.gov/library/access/> (last visited Nov. 9, 2014).

8. *En Banc Video Streaming*, U.S. CTS. FOR THE NINTH CIR., http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000710 (last visited Nov. 9, 2014).

9. *Map of the Ninth Circuit*, U.S. CTS. FOR THE NINTH CIR., http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135 (last visited Nov. 9, 2014).

10. *In re Marriage Cases*, 183 P.3d 384, 397 (Cal. 2008).

11. *Id.* at 453.

12. See *Briefs of Argued Cases*, CAL. CTS., <http://www.courts.ca.gov/2951.htm> (last visited Nov. 9, 2014).

rummage through those bulky files. Another change in the way we do business (up to and including the fact that it's then easy to link those briefs to your stories on your website, a service to many readers).

Even the U.S. Supreme Court, which seemingly continues to prefer legal journalists operate with quill and parchment, has not escaped the urgency of today's legal journalism. SCOTUSblog has transformed the wait for the Court's rulings in ways unimaginable just a few short years ago.¹³ Legal journalists all over the country waited and watched the blog's every move when the Supreme Court was preparing to rule on the challenge to the health care laws in 2012.¹⁴ That was equally true in June 2013, when the Court was set to decide the same-sex marriage cases – the challenge to California's Proposition 8¹⁵ and the challenge to the federal Defense of Marriage Act (“DOMA”).¹⁶ For a legal journalist such as myself, it was going to be critical to get the rulings in the same-sex marriage cases on our website as swiftly as possible, particularly because of their importance in California. But it was equally important to get the story right, as the health care rulings demonstrated to our profession.¹⁷ Several news outlets got that outcome wrong as Chief Justice John Roberts read his ruling from the bench.¹⁸ It was a warning shot to all of us that getting it right still matters more than posting it first. It may sound trite. Yet the Proposition 8 case, with its issues of standing (which ultimately produced the outcome) was not going to necessarily provide a clean result and an easy read. The rulings, however, were an explosion of our push-button climate, right down to the fact that when I was ready for my story on Proposition 8 to post on our websites, I sent a simple email: “Push the button.”

Ironically, when I covered the oral arguments in the Proposition 8 and DOMA cases, I was locked in the Supreme Court's ornate chambers with just a notepad and pen. My iPhone and laptop, like missing limbs, remained behind in the press room. There was not a tweet from me for hours as I reported on the arguments as if I were still in a state courtroom back in the late 1980s, ready to rush outside and write my story rather than provide any contemporaneous coverage of what had transpired with the justices. And this is truly another dramatic transformation in how legal journalism is now practiced in this country, notwithstanding the Supreme Court's nine justices and their dim view of anything that can be plugged into an electrical socket being

13. See SCOTUSBLOG, <http://www.scotusb-log.com/> (last visited Nov. 9, 2014).

14. See Nat'l Fed'n of Indep. Bus. et al., v. Sebelius, 132 U.S. 2566 (2012).

15. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

16. United States v. Windsor, 133 U.S. 2675 (2013).

17. See Jason Linkins, *CNN Flubs Supreme Court Decision, But It Was Perhaps Inevitable*, HUFFINGTON POST (June 28, 2012, 12:51 PM), http://www.huffingtonpost.com/2012/06/28/cnn-supreme-court_n_1634257.html.

18. See *id.*

allowed to operate in their domain.¹⁹ However, our nation's highest court is the exception, not the rule, when it comes to the digitized approach to covering legal developments.²⁰

This is best exemplified by a few trials I've covered in recent years, in which I abandoned the old reporter's notepad for my laptop to blog in real time for our websites. My first experiment in this technique was in the 2010 Proposition 8 trial before former Chief U.S. District Judge Vaughn Walker, who had allowed the media to use electronics in what, at that point, was the first trial in history involving gay marriage (more on the electronics in court issue later).²¹ Judge Walker, in fact, tried to allow a webcast of the trial, but got slapped down by the U.S. Supreme Court, which on the eve of trial pulled the plug on the idea – an absolutely backward decision with no logical justification whatsoever.²² But it paid off for me because it relegated a world eager to know what was going in his courtroom to my blog, which generated hundreds of thousands of so-called “clicks” for our website during the trial. The local Society of Professional Journalists chapter thought the blog was original enough to earn a James Madison Freedom of Information Award.²³ My experiment worked, and I had a blast doing it, in no small measure because doing a blog is a sort of editor-free zone. Did I get a way with a few things? Oh yeah.

As my own view of how to cover such mega-cases evolved, I used the blog technique again in the perjury trial of Barry Bonds,²⁴ baseball's all-time home run leader who got snagged in the crosshairs of the government's investigation into a Bay Area laboratory known as BALCO and its ties to spreading steroids in sports.²⁵ In *United States v. Barry Bonds*, federal prosecutors alleged that Bonds lied to a federal grand jury investigating that lab, and charged him with the crime in a trial that to many was really about whether the government could prove he cheated during his great years with the San Francisco Giants.²⁶ This trial was a whirl of electronics in the courtroom, which was not only filled with legal journalists but many sports report-

19. See *Visitor's Guide to Oral Argument*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx> (last visited Nov. 9, 2014).

20. See e.g., *Cameras in the Courtroom*, CAL. CTS., <http://www.courts.ca.gov/10018.htm> (last visited Nov. 9, 2014).

21. See *infra* notes 27-31 and accompanying text.

22. See Amanda Beck, *U.S. Supreme Court Halts Trial Broadcast*, BERKELEY L. BLOGS (Jan 13, 2010, 4:54 PM), <http://prop8.berkeleylawblogs.org/2010/01/13/us-supreme-court-quashes-trial-broadcast/>.

23. Sandra Gonzales, *Mercury News Staff Writers Win Awards*, SAN JOSE MERCURY NEWS (Feb. 11, 2011, 10:03 PM), http://www.mercurynews.com/breaking-news/ci_17367812?nclick_check=1.

24. See *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010).

25. *BALCO Fast Facts*, CNN, <http://www.cnn.com/2013/10/31/us/balco-fast-facts/> (last updated Apr. 25, 2014, 5:50 PM).

26. *Bonds*, 608 F.3d at 497-98.

ers who took to Twitter and other forums to cover the proceedings.²⁷ Again, U.S. District Judge Susan Illston allowed electronics in court, from laptops to smartphones. And again, I took liberties with the blog. Let's put it this way: when the topic of an orchidometer (look it up) came up in regard to Bonds', um, physical capabilities, there's a lot more you can do from the courtroom with a blog than what you can get into a family newspaper.²⁸

In many respects, I bring these two cases up because of how they promise to change legal coverage even in the insular world of federal courts. State and federal judges across the country continue to tussle with, and muddle through, the still emerging concept of allowing reporters to use electronics in their kingdoms, with wildly disparate results.²⁹ In California, state judges, given leeway to use their "discretion," seemingly have no idea how to deal with the issue on a consistent basis. As Judges Illston and Walker demonstrated, we've found it easier going in the Northern District of California than in other federal courts around the nation (Judge Koh also allowed electronics in both *Apple v. Samsung* trials, including the most recent in April 2014). But it is still a judge-by-judge decision. When the U.S. Department of Justice in March 2014 brought a political corruption case against a state legislator in San Francisco,³⁰ Leland Yee (who was charged along with dozens of defendants), the magistrate judge in the matter refused to allow reporters to use any device in their first appearance or the subsequent arraignments. However, U.S. District Judge Charles Breyer, assigned to the case for all other purposes, made a decision to allow laptops as the case progresses. He has decided to bar cell phones, which the media viewed as a reasonable compromise given the potential for more mischief in court with a smartphone. Ironically, the Ninth Circuit, if the case ever reaches appeal, would not blanch at a reporter using any such device in its courthouse.³¹

In February 2014, a group of Boston University communications students created a bit of a stir in the media world when they drew up a spoof game of bingo called "Journalist Guest Speaker Cliché Bingo."³² This was

27. See, e.g., *ESPN, Your Place for Barry Bonds Trial Coverage*, EURWEB (May 18, 2011), <http://www.eurweb.com/2011/03/espn-your-place-for-barry-bonds-trial-coverage/>.

28. See Howard Mintz, *Barry Bonds Trial, Courtroom Blog Day 4: More Steve Hoskins, Steroid Expert*, SILICON VALLEY MERCURY NEWS, http://www.mercurynews.com/barrybonds/ci_17690594 (last updated Mar. 30, 2011).

29. See, e.g., Eric P. Robinson, *Federal Courts Discuss Smartphone Policies*, DIGITAL MEDIA L. PROJECT (Apr. 1, 2011), <http://www.dmlp.org/blog/2011/federal-courts-discuss-smartphone-policies>.

30. See Scott Gold, et al., *State Sen. Leland Yee Arrested on Corruption Charges in FBI Sting*, L.A. TIMES (Mar. 26, 2014), <http://articles.latimes.com/2014/mar/26/local/la-me-yee-arrest-20140327>.

31. *News Media*, U.S. CTS. FOR THE NINTH CIR., http://www.ca9.uscourts.gov/news_media/ (last visited Nov. 9, 2014).

32. See Jim Romensko, Blog, *Students Are Tired of Hearing There's Never Been a Better Time To Be a Journalist*, JIMROMENSKO.COM (Feb. 4, 2014),

partly in frustration with being told repeatedly that, as one of the bingo squares said, “There’s no better time to be a journalist.”³³ The item drew some attention on blogs such as Romenesko’s media website because it clearly hit a nerve. I’m not sure anyone who attended the *Missouri Law Review* symposium would have walked away with the sense that they were fed that type of unbridled optimism. But whether it was *New York Times* Supreme Court reporter Adam Liptak’s speech on covering the high court, or Gene Policinski’s reminder of the difficulties confronting our brand of coverage, the message really was that we’re in an age of experimentation. And as with any experiment, some may fail miserably, others might emerge as success stories, hopefully providing new templates for how to maintain great legal journalism as we move forward. And it doesn’t matter if that comes in the newspaper dropped in the driveway every day (as long as that lasts) or from a newfangled website. Or, of course, from what you find in that Twitter feed. The change in legal journalism is really nothing more than a fresh opportunity. Which is why you can find me on Twitter, at @hmintz.

<http://jimromenesko.com/2014/02/04/students-are-sick-of-being-told-theres-no-better-time-to-be-a-journalist/>.

33. *Id.*