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## As Today's Tony Lewises Disappear, Courts Fill Void

David A. Sellers\*

Anthony Lewis was a giant in the world of journalism. I am honored to participate in this symposium to recognize his many contributions to journalism in general, and more specifically, to the coverage of the courts.

Tony was a gifted writer, who covered one of the most challenging beats in Washington. His nine "news makers" were not generally accessible to journalists, and their work product was not easily decipherable. Yet Tony made the Supreme Court both understandable and relevant to his readers.

Regrettably, the number of journalists who cover courts today, let alone those who write with Tony's insight and clarity, is very small and rapidly declining. Any number of reports, most notably, the annual *State of the News Media* by the Project for Excellence in Journalism ("PEJ"), chronicles the shrinking newspaper newsroom workforce, which in 2012 was reported to be at its lowest level since 1978.<sup>1</sup>

And even more relevant to Tony Lewis and his old beat were the remarks *Politico* reporter Josh Gerstein made in a 2012 speech entitled, "Have the Media Stopped Covering Courts?"<sup>2</sup> "[B]asic reporting on the courts has taken a huge hit in the current economic climate," Gerstein said. He further explained:

Newspapers that used to have a reporter in every courthouse in their communities now are lucky to have a single reporter covering the dozen or so courts in their coverage zone. TV stations and networks cover a few high-profile cases, but little more. Some reporters wouldn't

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1. Mark Jurkowitz, *The Growth in Digital Reporting: The Losses in Legacy*, PEW RES. JOURNALISM PROJECT (Mar. 26, 2014), <http://www.journalism.org/2014/03/26/the-losses-in-legacy/>.

2. Joshua Gerstein, *Have the Media Stopped Covering Courts?* (Sept. 27, 2012) [hereinafter *Gerstein: 2012 First Amendment Awards Dinner Remarks*] (transcript available at *Josh Gerstein: 2012 First Amendment Awards Dinner Remarks*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/gerstein1A2012> (last visited Nov. 11, 2014)); see also Joshua Gerstein, *Have the Media Stopped Covering Courts?*, THE CRIME REP. (Nov. 1, 2012, 4:26 AM), <http://www.thecrimereport.org/viewpoints/2012-11-has-the-media-stopped-covering-courts>.

have any idea if they're entitled to cover jury selection or copy a court exhibit because they've never tried, or been allowed to try.<sup>3</sup>

Even the press corps who regularly cover Tony's old beat, the highest Court in the land, have changed dramatically in nature and numbers. The full-time credentialed press corps, which once numbered forty, is now twenty-six.<sup>4</sup> Gone from the press room are reporters from evening papers, news magazines, and most regional papers. However, there are an equal, if not greater, number of people who parachute in to cover a single case before the High Court. And they may be bloggers, or writers for limited circulation, or special interest publications.<sup>5</sup>

When the Supreme Court makes news, it is often front-page news, but the Court hears only about eighty oral arguments per term.<sup>6</sup> The overwhelming majority of cases are resolved by the inferior courts, as they are called in Article III, Section 1 of the United States Constitution.<sup>7</sup> And it is the work of these courts – the cases, the people, the trends, and most importantly, the impact – that is increasingly ignored by the news media.

In a 2010 interview published in the *Maine Bar Journal*, U.S. District Judge D. Brock Hornby was asked, “[W]hat is the biggest challenge the federal judiciary faces today?”<sup>8</sup> As a highly respected jurist who has occupied several key national leadership positions in judicial administration,<sup>9</sup> Judge Hornby's response was prophetic:

We are becoming invisible except for the highest profile trials. . . .  
The federal judiciary must find a way to reach out. A primary reason for what we do is deterrence and if people don't know what we do, how can there be deterrence?<sup>10</sup>

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3. Gerstein: 2012 First Amendment Awards Dinner Remarks, *supra* note 2.

4. Mally Jean Tenore, *Why It's So Hard for SCOTUSblog To Get Supreme Court Press Credentials*, POYNTER.ORG, <http://www.poynter.org/latest-news/top-stories/180581/why-its-so-hard-for-scotusblog-to-get-credentialed/> (last updated July 11, 2012, 1:10PM).

5. Telephone Interview with Kathleen L. Arberg, Public Information Officer, Supreme Court of the U.S. (Jan. 6, 2014).

6. See, e.g., *2012 Term Opinions of the Court*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=12> (last visited Nov. 10, 2014).

7. U.S. CONST. art III, § 1.

8. Hon. Christina Reiss, *Learning from the Best, the Brightest, and the Kindest: An Interview with the Honorable D. Brock Hornby*, 25 ME. B.J. 197, 199 (2010).

9. See Seth S. Anderson, *Judge D. Brock Hornby of the U.S. District Court in Maine to Receive Devitt Award*, PR NEWSWIRE (May 12, 2014), <http://www.prnewswire.com/news-releases/judge-d-brock-hornby-of-us-district-court-in-maine-to-receive-devitt-award-61832032.html>.

10. Reiss, *supra* note 8.

Change comes slowly in most judicial systems, whether it relates to the law or the administrative apparatus that runs the courts. Aristotle said, "The virtue of justice consists of moderation, as regulated by wisdom."<sup>11</sup> While he was not referring to courts and their experiences with the changing media landscape, his observation and insights are applicable here.

Yet courts have made significant progress in their interactions with the media and the public, particularly since Tony Lewis stepped aside from his Supreme Court beat in the mid-1960s to become a foreign correspondent and columnist.<sup>12</sup>

These changes may seem modest to some, particularly compared to the other branches of government. Nearly every member of the United States Congress has both a Facebook page and a Twitter account, for example.<sup>13</sup> The White House uses Facebook, Twitter, LinkedIn, live-streaming, and podcasts, among other methods, for communicating with the public.<sup>14</sup>

Justice Felix Frankfurter reportedly said, "The public's confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media's portrayal of the legal system."<sup>15</sup>

And, I would add to Justice Frankfurter's observation: if not the media, who?

PEJ noted that the time is ripe for government, among others, to fill the void left by vanishing journalists. "In 2012, a continued erosion of news reporting resources converged with growing opportunities for those in politics, government agencies, companies, and others to take their messages directly to the public," PEJ stated in its State of the News Media report.<sup>16</sup>

If the media is no longer able to report on the courts, what steps can courts take to more effectively communicate with the media and the public at large? In fact, courts can and have been doing quite a bit. That is the focus of this Article.

11. Aristotle, BARTLEBY.COM, <http://www.bartleby.com/348/authors/17.html> (last visited Nov. 12, 2014).

12. Adam Liptak, *Anthony Lewis, Supreme Court Reporter Who Brought Law to Life, Dies at 85*, N.Y. TIMES, Mar. 25, 2013, at A1, available at <http://www.nytimes.com/2013/03/26/us/anthony-lewis-pulitzer-prize-winning-columnist-dies-at-85.html?pagewanted=all>.

13. See *House: United States House of Representatives – Congress Social Media Wiki*, GOV. & SOCIAL MEDIA WIKI (May 19, 2014, 1:31PM), <http://govsm.com/w/House>; *Senate, GOV. & SOCIAL MEDIA WIKI* (Nov. 21, 2013, 2:56 PM), <http://govsm.com/w/Senate>.

14. See *Engage and Connect*, THE WHITE HOUSE, <http://www.whitehouse.gov/engage/social-hub> (last visited Nov. 10, 2014).

15. John Seigenthaler & David L. Hudson, *Journalism and the Judiciary*, NAT'L JUD. C. ALUMNI WINTER MAG. 15 (Winter 1997).

16. *The Pew Research Center's Project for Excellence in Journalism: The State of the News Media 2013: An Annual Report on American Journalism: Overview*, PEW RES. JOURNALISM PROJECT, <http://stateofthemediamedia.org/2013/overview-5/> (last visited Nov. 10, 2014).

In particular, there are four areas that merit specific consideration: 1) Court Public Information Officers; 2) Electronic Access to Court Records; 3) Court Websites; and 4) Video and Social Media Access. I will focus on the federal court experience in these areas. The National Center for State Courts<sup>17</sup> is an excellent reference tool for information about state court activities and programs.

## I. COURT PUBLIC INFORMATION OFFICERS

It is significant to note that an increasing number of courts have institutionalized the position of Public Information Officer (“PIO”). This is no longer a function a court can ignore, nor is it a responsibility that is assigned to an untrained, junior employee. Any discussion of court PIOs must begin with yet another Toni – Toni House – a name that may not be as familiar as Tony Lewis, but a name that is identified with the nation-wide birth and growth in the function and role of court PIOs.<sup>18</sup>

Toni House was the Supreme Court Public Information Officer from 1982 to 1998, when she died – much too early – at the age of fifty-five.<sup>19</sup> The two Toni(y)s did not work at the Court during the same years, but it’s very likely that they knew each other. They occupied very similar roles, albeit from different sides of the fence. Both were trailblazers in their field – concerned with the accurate portrayal of the high Court, as well as improving public understanding of the Court and its work.

Toni House was not the Court’s first PIO, but she was the first one who took an interest and leadership role in developing the profession of court PIOs. In 1992, she provided the vision, and the National Center for State Courts and well-known legal publisher Dwight Opperman<sup>20</sup> provided the organization and resources, to convene the first-ever meeting of court public information officers.<sup>21</sup>

“Sitting where I do, I have long seen the need for the development of a corps of professional judicial public information providers – on both the state and federal level – who could serve . . . as a buffer between the courts and the

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17. See NAT’L CENTER FOR STATE CTS., <http://www.ncsc.org/> (last visited Nov. 10, 2014).

18. See Ron Keefover, *In Tribute to Dwight D. Opperman: A History of the Conference of Court Public Information Officers*, CONF. OF CT. PUB. INFO. OFFICERS, 1 (Aug. 2012), <http://ccpio.org/wp-content/uploads/2012/02/Opperman-Tribute-CCPIO-History-8-2913.pdf>.

19. Linda Greenhouse, *Toni House, 55, an Ex-Journalist and Press Officer for High Court*, N.Y. TIMES (Sept. 30, 1998), <http://www.nytimes.com/1998/09/30/us/toni-house-55-an-ex-journalist-and-press-officer-for-high-court.html>.

20. Jeanine Cali, *A Tribute to Dwight D. Opperman, Legal Publishing Pioneer and Friend of the Law Library of Congress*, IN CUSTODIA LEGIS (June 20, 2013), <http://blogs.loc.gov/law/2013/06/a-tribute-to-dwight-d-opperman-legal-publishing-pioneer-and-friend-of-the-law-library-of-congress/>.

21. See Keefover, *supra* note 18, at 2.

media,” House said in a 1992 note. “An annual national conference is a step in that direction (and one, I admit, for which I have agitated over the last four or five years.)”<sup>22</sup>

There were only a handful of states and federal courts that had court PIOs at the time.<sup>23</sup> However, the development of a listserv in 1996 for court PIOs to share ideas and challenges, and the continuation of annual meetings, gave birth four years later to the Conference of Court Public Information Officers (“CCPIO”).<sup>24</sup>

Today, a majority of state courts and the District of Columbia have at least one PIO.<sup>25</sup> In fact, Florida has twenty-six court public information offices encompassing each of the twenty circuit (or general trial) courts, five district (or lower appellate) courts, and the Supreme Court.<sup>26</sup> CCPIO continues to meet annually and its listserv has 135 subscribers, including court PIOs in state and federal courts, as well as members from the Philippines, Scotland, Trinidad and Tobago, and Guam.<sup>27</sup>

The PIOs are at the center of what Judge Hornby called court efforts to “reach out.”<sup>28</sup> While some judges may have ethical restrictions or simply possess a level of discomfort in interacting with the news media, this responsibility is a key component of virtually every court PIOs’ job description.

PIOs are professionals, many with backgrounds in journalism or law – or both. For example, Toni House of the Supreme Court was a long-time *Washington Star* reporter.<sup>29</sup> Joe Tybor, Press Secretary to the Supreme Court of Illinois, was a reporter for the *Chicago Tribune* for seventeen years, including nine covering law and the courts. Laura Kiernan, who recently retired as Director of Communications of the New Hampshire Judicial Branch, was a long-time *Washington Post* reporter, who also covered courts.<sup>30</sup> Jane Hansen, the PIO for the Georgia Supreme Court, was a reporter, columnist, and member of the editorial board for the *Atlanta Constitution*.<sup>31</sup> Osler McCarthy, Staff Attorney for Public Information at the Supreme Court of Texas, is a Gonzaga Law School graduate and a journalism professor at the University of Texas.<sup>32</sup> Marcia McBrien, PIO for the Michigan Supreme

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22. *Id.*

23. *See id.*

24. *Id.* at 3-4.

25. *See Members*, CONF. OF CT. PUB. INFO. OFFICERS (CCPIO), <http://ccpio.org/about/members/> (last visited Nov. 10, 2014).

26. Telephone Interview with Craig Waters, Director of Public Information Office, Supreme Court of Fla. (Jan. 6, 2014).

27. *See Members*, *supra* note 25.

28. Reiss, *supra* note 8, at 199.

29. Greenhouse, *supra* note 19.

30. Conference of Court Public Information Officers, PIO Introductions 14, 2007 (on file with author).

31. *Id.* at 10.

32. *Id.* at 16.

Court, is a University of Michigan Law School graduate.<sup>33</sup> Leah Gurowtiz, Director of Legislative, Intergovernmental and Public Affairs for the D.C. Courts, is a Vanderbilt Law School graduate.<sup>34</sup>

Court PIOs perform a wide variety of duties. They manage content on court websites, develop and execute educational outreach programs and events, conduct courthouse tours, produce annual reports and newsletters, and serve as their court's liaison with the news media.<sup>35</sup> They all share the common goal of making the courts more understandable to the public and the media, and their role has become increasingly important in this era of shrinking resources in the news industry. Most PIOs work in the inner circle. They have regular access to their court administrator or chief justice. They are consulted and informed on key policy and administrative matters. Court PIOs are professionals who are essential to both the courts and the news media.<sup>36</sup>

“While court systems nationwide have been forced to deal with dramatic budget cuts, the role of the PIO has become increasingly important,” former Kansas Supreme Court Education Information Officer Ron Keefover wrote in a history of CCPIO.<sup>37</sup> “Someone must inform the public about the impact of the funding cuts; someone must handle the many issues relating to high profile trials; and someone must manage the court's Facebook page, Twitter account, and website. Court [PIOs] have become an integral part of a court's professional management team.”<sup>38</sup>

## II. ACCESS TO COURT RECORDS

Widget factories make widgets. Car companies manufacture cars. Courts make, or generate, documents – lots of them. The documents are not the final product. The end product is justice, but you simply do not reach the end product in most court proceedings without first generating a mountain of documents – often in paper.

Journalists simply cannot effectively cover courts if they are unable to easily access court records, pleadings, dockets, and opinions.

Twenty-five years ago, a journalist who wanted to review a federal court case document had to come to the courthouse and request the file from the clerk's office. Sometimes this process was complicated because the file might be in chambers. If they wanted to stay on top of the most recent filings, journalists relied on the clerk's office, which typically placed a box on its in-take counter so reporters could glance through the latest pleadings.

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33. *Id.* at 15.

34. *Id.* at 9-10.

35. *About*, CONF. OF CT. PUB. INFO. OFFICERS, <http://ccpio.org/about/> (last visited Nov. 10, 2014).

36. *See id.*

37. Keefover, *supra* note 18, at 5.

38. *Id.*

Sometimes an enterprising, though unscrupulous, reporter might take the sole copy of a pleading from the box, so he could scoop his competition in the morning paper. Needless to say, it was not the ideal situation for either the courts or the media.

In 1988, the federal judiciary's policymaking body, the Judicial Conference of the United States, approved the development of a new system for making court records available to the public – Public Access to Court Electronic Records (“PACER”). A decade later the Case Management/Electronic Case Files (“CM/ECF”) system was put in place to complement PACER.

CM/ECF is the front end, so to speak, the electronic method for filing documents, and PACER is the back-end system through which the public can access those documents.<sup>39</sup>

Today, virtually every docket entry, opinion, and case file document is filed electronically in a federal appellate, district, and bankruptcy court and, as a result, is available to the public over PACER world-wide in real time, unless the filings are sealed or otherwise restricted for legal purposes.<sup>40</sup> “This level of transparency and access to a legal system is unprecedented and unparalleled” anywhere in the world.<sup>41</sup>

Nearly six million docket entries are made each month and are available over PACER.<sup>42</sup> In 2012, there were 1.4 million PACER accounts with 13,000 new accounts created every month.<sup>43</sup>

As mandated by Congress, the public access program is funded entirely through user fees.<sup>44</sup> Funds generated by PACER are used to pay the entire cost of the judiciary's public access program, including telecommunications, the CM/ECF system, on-line juror services, electronic victim notification, and more.<sup>45</sup> Of particular interest to journalists are the growing number of courts that provide free RSS feeds that allow users to receive notifications in specif-

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39. *25 Years Later, PACER, Electronic Filing Continue to Change Courts*, THIRD BRANCH NEWS (Dec. 9, 2013), <http://news.uscourts.gov/25-years-later-pacer-electronic-filing-continue-change-courts>; *Case Management/Electronic Case Files*, U.S. CTS., <https://www.pacer.gov/cmecf/> (last visited Nov. 10, 2014).

40. *25 Years Later, PACER, Electronic Filing Continue to Change Courts*, *supra* note 39.

41. *Id.* (quoting Michel Ishakian, Chief of Staff of the Public Access and Records Management Division of the Administrative Office of the United States Courts) (internal quotation marks omitted).

42. *CM/ECF Next Gen Enters New Phase*, U.S. CTS. (Feb. 2012), [http://www.uscourts.gov/news/TheThirdBranch/12-02-01/CM\\_ECF\\_Next\\_Gen\\_Enters\\_New\\_Phase.aspx](http://www.uscourts.gov/news/TheThirdBranch/12-02-01/CM_ECF_Next_Gen_Enters_New_Phase.aspx).

43. *Electronic Public Access Program Summary*, PACER.GOV 1 (Dec. 2012), <http://www.pacer.gov/documents/epasum2012.pdf>.

44. *Frequently Asked Questions*, U.S. CTS., <https://www.pacer.gov/psc/faq.html> (last visited Nov. 10, 2014).

45. *Electronic Public Access Program Summary*, *supra* note 43.

ic cases or types of cases.<sup>46</sup> In addition, a new mobile web version of the PACER Case Locator now allows users to perform a single search for court records in all district, bankruptcy, and appellate courts.<sup>47</sup>

PACER has been a welcome tool for the public, the bar, and courts, said Dennis Rose, a commercial litigator from Cleveland who helped draft local rules when the Northern District of Ohio became one of the first courts to use PACER. Rose was interviewed recently by the federal judiciary's *Third Branch News*.<sup>48</sup> He called PACER "a boon to practitioners."<sup>49</sup> Rose added:

We didn't have to keep paper files at our desk. We didn't have to send runners to the clerk's office to retrieve copies of filings. We didn't have to pay a copy charge. PACER is cheaper than old-fashioned paper files. Best of all was the expanded transparency on court affairs . . . . While the vast majority of court records always have been public, they were available only at a federal courthouse, and hard for many to access. Online access makes the public record truly public, which I think is of great value.<sup>50</sup>

### III. COURT INTERNET SITES

Websites are hardly cutting-edge, just a step or two more advanced than the typewriter; nevertheless, today more people are likely to enter a court through a court's homepage than through the front door of the courthouse. Twitter, Facebook, and today's latest social media tools can be useful, when managed effectively, but much of what they accomplish results in driving users back to a court's website.

Bill Gates said, "The Internet is the town square for the global village of tomorrow."<sup>51</sup> Shouldn't the courthouse occupy a prime location in that virtual town square?

In early 2011, the federal judiciary initiated a court website toolbox project.<sup>52</sup> Its genesis came from a series of judges and journalists meetings over

46. *Automatic Notification Available for PACER*, THIRD BRANCH (Feb. 23, 2012), [http://www.uscourts.gov/news/newsView/12-02-23/Automatic\\_Notification\\_Available\\_for\\_PACER.aspx](http://www.uscourts.gov/news/newsView/12-02-23/Automatic_Notification_Available_for_PACER.aspx).

47. *PACER Quarterly Announcements*, PACER 1 (Jan. 2012), <https://www.pacer.gov/announcements/quarterly/qa201201.pdf>.

48. *25 Years Later, PACER, Electronic Filing Continue to Change Courts*, *supra* note 39.

49. *Id.*

50. *Id.* (internal quotation marks omitted).

51. Axelle Tessandier, *Citizens of the Internet*, HUFFINGTON POST, [http://www.huffingtonpost.com/axelle-tessandier/citizens-of-the-internet\\_b\\_4495550.html](http://www.huffingtonpost.com/axelle-tessandier/citizens-of-the-internet_b_4495550.html) (last updated Mar. 3, 2014, 5:59 AM).

52. Memorandum from Judge D. Brock Hornby, Chair of the Comm. on the Judicial Branch & James C. Duff, Dir. of the Admin. Office of the U.S. Courts, to the

the past decade. Two recurring themes emerged: first, journalists were increasingly relying on court Internet sites for their reporting; and second, the number of journalists covering courts was rapidly declining.

After reviewing federal court Internet sites, a group of judges, working with the Administrative Office of the U.S. Courts, launched a project that had several purposes.<sup>53</sup> The first goal was to assure that content that was required by statute or Judicial Conference policy appeared on every court site.<sup>54</sup> Second, they sought to bring greater uniformity and consistency in design and functionality to court websites.<sup>55</sup> Third, they wanted to make information on court sites more easily accessible.<sup>56</sup> The fourth and final goal was to “offer a consistent user experience for the public.”<sup>57</sup>

These goals were accomplished by the development of an Internet site toolbox.<sup>58</sup> The toolbox contains a template, which courts may adopt in whole or in part.<sup>59</sup> Many courts have made local modifications, such as incorporating an image of their courthouse or a historic courtroom on their home page.<sup>60</sup> The toolbox also features a service that reads text to users who are vision impaired; an e-mail subscription service that courts can use when communicating with the public; and centralized hosting by the Administrative Office, reducing costs, as well as assuring a secure environment.<sup>61</sup>

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Chief Judges of the U.S. Dist. Courts, Dist. Court Execs., and Clerks of the U.S. Dist. Courts 1-2 (Jan. 31, 2011), <http://legaltimes.typepad.com/files/fedct-memo.pdf>.

53. *Id.* at 1.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See *Improving Public Knowledge of the Judiciary*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2012/assistance-to-courts-and-their-programs/improving-public-knoweldge-of-the-judiciary.aspx> (last visited Nov. 10, 2014) (“[S]ites [using the toolbox] are customized by each court to provide appropriate information . . .”). Cf. Attachment to Memorandum from Judge D. Brock Hornby, Chair of the Comm. on the Judicial Branch & James C. Duff, Dir. of the Admin. Office of the U.S. Courts, to the Chief Judges of the U.S. Dist. Courts, Dist. Court Execs., and Clerks of the U.S. Dist. Courts 4-5 (Jan. 31, 2011), <http://legaltimes.typepad.com/files/fedct-memo.pdf> (stating that “history of the district” and “history of the courthouse” are “recommended” information and “useful information to consider” in choosing District Court website content, respectively).

61. Attachment to Memorandum from Judge D. Brock Hornby, *supra* note 60, at 1 (“Email delivery service” and “[r]ead-aloud service” are included in the toolbox); see *Public Accessibility and Service*, U.S. CTS. (2013), <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/administrativeoffice/directorannualreport/annual-report-2013/the-courts/public-accessibility-and-service.aspx> (“[C]ourts are leveraging the cost-savings and efficiencies of the AO’s web-hosting service . . .”).

In 2013, four courts of appeals, twenty-seven U.S. district courts, and thirty-two bankruptcy courts were using the template.<sup>62</sup> The number is growing.

A similar project is now underway for federal court probation and pre-trial services offices.<sup>63</sup> On the drawing board is the development of a content library, which will allow courts to select from a variety of content they may wish to use on their site. A mobile version of the websites should be available later this year.

#### IV. VIDEO AND SOCIAL MEDIA

I will touch only briefly on the federal courts' experience with cameras in the courtroom. This topic has been fully debated and a day-long law review symposia could be dedicated to this issue alone. In fact, several already have.<sup>64</sup>

The current state of affairs is as follows: Fourteen federal trial courts currently are participating in a video pilot that will run through the summer of 2015.<sup>65</sup> It is for civil cases only and utilizes court cameras and posts videos of motion hearings, trials, evidentiary hearings and other civil proceedings on the federal judiciary's website.<sup>66</sup> Over 132 proceedings have been recorded and posted on-line since July 2011.<sup>67</sup>

The ban on photographing or broadcasting criminal proceedings in a courtroom, which is governed by Rule 53 of the Federal Rules of Criminal Procedure, has been in place for seventy years.<sup>68</sup> At its March 1996 session, the Judicial Conference of the United States voted to authorize each court of appeals to decide for itself whether to permit broadcasting of appellate arguments.<sup>69</sup> Since then, the Ninth and Second Circuit Courts of Appeals have

62. *Public Accessibility and Service*, *supra* note 61.

63. *Id.*

64. See Judge Richard Baumgartner, *Tennessee Journal of Law and Policy Second Annual Symposium: The Tennessee Supreme Court's Impact on Law and Policy: Celebrating the Legacies of Justices Anderson, Birch and Drowata: Cameras in the Courtroom*, 3 TENN. J.L. & POL'Y 29 (2006); Jason Harrow, *A Symposium on "Cameras in the Court"*, SCOTUSBLOG (May 25, 2007, 12:38 PM), <http://www.scotusblog.com/2007/05/a-symposium-on-cameras-in-the-court/>.

65. *Overview of Pilot*, U.S. CTS., <http://www.uscourts.gov/Multimedia/Cameras/OverviewofPilot.aspx> (last visited Nov. 10, 2014).

66. *Cameras in Courts*, U.S. CTS., <http://www.uscourts.gov/multimedia/Cameras.aspx> (last visited Nov. 10, 2014); *Courts Selected for Federal Cameras in Court Pilot Study*, THIRD BRANCH (June 8, 2011), [http://www.uscourts.gov/News/NewsView/11-06-08/Courts\\_Selected\\_for\\_Federal\\_Cameras\\_in\\_Court\\_Pilot\\_Study.aspx](http://www.uscourts.gov/News/NewsView/11-06-08/Courts_Selected_for_Federal_Cameras_in_Court_Pilot_Study.aspx).

67. *Cameras in Courts*, *supra* note 66.

68. FED. R. CRIM. P. 53.

69. Rep. of the Proceedings of the Jud. Conf. of the U.S., at 17 (Mar. 12, 1996), <http://www.uscourts.gov/uscourts/FederalCourts/judconf/proceedings/1996-03.pdf>.

opted to do so.<sup>70</sup> Late last year the Ninth Circuit announced that it will live video stream all en banc arguments and provide a live audio stream of all arguments.<sup>71</sup>

In an increasing number of high profile proceedings, federal trial courts are providing closed circuit video feeds to overflow courtrooms so that a larger public audience can view a proceeding (civil or criminal) live in the courthouse.<sup>72</sup>

In the 2007 trial of Lewis "Scooter" Libby, Vice President Cheney's former chief of staff, the federal court in Washington, D.C. added a new wrinkle.<sup>73</sup> It established an overflow courtroom, and, for what is believed to be the first time in the federal courts, press credentials were provided for bloggers, accommodating between five and ten on a busy day.<sup>74</sup> The court also converted a magistrate judge's courtroom into a temporary press room where reporters (and bloggers) could watch a live feed of the trial and post content, using the court's wireless network.<sup>75</sup>

With the exception of periodic experiments with cameras, the federal trial courts have prohibited broadcasting, televising, recording, or taking photographs of courtroom proceedings.<sup>76</sup> However, in recent years, courts have struggled with how this prohibition relates to requests to blog or tweet from a federal trial court. Are blogging and tweeting from the courtroom during a proceeding a form of broadcasting? Are they live transmissions that conflict with existing rules?

In early 2008, U.S. District Judge Mark Bennet of Sioux City, Iowa allowed a reporter from the *Cedar Rapids Gazette* to use a laptop to cover a tax fraud trial by posting live courtroom updates.<sup>77</sup> According to an article in the *ABA Journal*, the judge approved the request, as long as the reporter sat to-

70. *History of Cameras in the Federal Courts*, U.S. CTS., <http://www.uscourts.gov/Multimedia/cameras/history.aspx> (last visited Nov. 11, 2014).

71. *Court of Appeals to Open En Banc Proceedings to Internet Viewing*, PUB. INFO. OFFICE U.S. CTS. FOR THE NINTH CIRCUIT (Dec. 2, 2013), [http://www.ce9.uscourts.gov/absolutenm/articlefiles/641-En\\_Banc\\_Streaming.pdf](http://www.ce9.uscourts.gov/absolutenm/articlefiles/641-En_Banc_Streaming.pdf); *Court Offers Live Audio Streaming of All Proceedings*, U.S. CTS. FOR THE NINTH CIR., [http://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000717](http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000717) (last visited Nov. 11, 2014).

72. David A. Sellers, *The Circus Comes to Town: The Media and High-Profile Trials*, 71 DUKE J.L. & CONTEMP. PROBS. 181, 189 (2008).

73. See generally Thomas Pierce, *Bloggers Join Frenzy at Media-Saturated Libby Trial*, NPR (Feb. 1, 2007), <http://www.npr.org/templates/story/story.php?storyId=7098188>.

74. *Id.*; Scott Shane, *For Bloggers, Libby Trial Is Fun and Fodder*, N.Y. TIMES (Feb. 15, 2007), [http://www.nytimes.com/2007/02/15/washington/15bloggers.html?\\_r=0](http://www.nytimes.com/2007/02/15/washington/15bloggers.html?_r=0).

75. Pierce, *supra* note 73.

76. *History of Cameras in the Federal Courts*, *supra* note 70.

77. Debra Weiss, *Judge Explains Why He Allowed Reporter to Live Blog Federal Criminal Trial*, ABA J. (Jan. 16, 2009, 10:46 PM), [http://www.abajournal.com/news/article/bloggers\\_cover\\_us\\_trials\\_of\\_accused\\_terrorists\\_cheney\\_aide\\_and\\_iowa\\_landlor/](http://www.abajournal.com/news/article/bloggers_cover_us_trials_of_accused_terrorists_cheney_aide_and_iowa_landlor/).

ward the back of the courtroom, where her typing would not be a distraction.<sup>78</sup> Bennett explained, “I thought the public’s right to know what goes on in federal court and the transparency that would be given the proceedings by live-blogging outweighed any potential prejudice to the defendant.”<sup>79</sup>

On the other hand, in November 2009, U.S. District Judge Clay L. Land of the Middle District of Georgia turned down a request from the *Columbus Ledger Enquirer* for a reporter to be allowed to tweet from a criminal proceeding in Judge Land’s courtroom.<sup>80</sup> The judge wrote, “The Court finds that the term ‘broadcasting’ . . . includes sending electronic messages from a courtroom that contemporaneously describe the trial proceedings and are instantaneously available for public viewing.”<sup>81</sup>

Another 2009 case, the corruption trial of Pennsylvania State Senator Vincent Fumo in the Eastern District of Pennsylvania, was notable for its novel approach to electronic coverage.<sup>82</sup> A *Philadelphia Inquirer* reporting team brought together live blogging from the courtroom with audio that was provided by the court as the official record of the proceeding through the PACER system.<sup>83</sup>

In the 2011 trial of baseball star Barry Bonds in the U.S. District Court for the Northern District of California, presiding Judge Susan Illston specifically permitted quiet use of laptops in the trial and overflow courtroom.<sup>84</sup> She further provided for the use of Blackberry or other similar personal devices for electronic transmission of e-mail, including on-site filing of reporters’ stories.<sup>85</sup> This may be the highest profile federal court proceeding that has allowed live, non-photographic transmissions by the media from the courtroom.

Information about social media use by individual federal courts is largely anecdotal. There is no policy supporting or opposing official institutional use of social media by federal courts. In April 2010, the Codes of Conduct Committee of the Judicial Conference published a *Resource Package for Developing Guidelines on Use of Social Media by Judicial Employees*.<sup>86</sup>

78. *Id.*

79. *Id.*

80. *United States v. Shelnett*, No. 4:09-CR-14 (CDL), ¶ 49,848, 2010 WL 857869 (M.D. Ga. Nov. 2, 2009).

81. *Id.*

82. Chris Krewson, *In Philly, Trial by Twitter*, KNIGHT DIGITAL MEDIA CENTER (Mar. 17, 2009), [http://archive.knightdigitalmediacenter.org/leadership\\_blog/comments/in\\_philly\\_twittering\\_a\\_trial/](http://archive.knightdigitalmediacenter.org/leadership_blog/comments/in_philly_twittering_a_trial/).

83. *Id.*

84. *Guide for Journalists: USA v. Bonds*, U.S. D. N.D. CAL. 5 (Mar. 2011), <http://www.cand.uscourts.gov/filelibrary/506/USA%20V.%20Bonds%20Guide%20for%20Journalists.pdf>.

85. *Id.*

86. *Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*, U.S. CTS. (Apr. 2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf>.

Some courts subsequently adopted local rules and guidelines for their employees.<sup>87</sup> Most recently, in March 2014, the Codes of Conduct Committee published a formal advisory opinion on the use of social media by judges and judicial employees.<sup>88</sup>

On the institutional level, the information is a bit murky. In fact, there have been questions at times whether some social media sites have in fact been sponsored and operated by a court. For example, some mistakenly have thought that a Twitter site that uses the name "USSupremeCourt" is an official Court site.<sup>89</sup> It is not. The site is run by GovTop Network, which "curates" information from the Supreme Court, the House, Senate, and other government institutions and shares it via Twitter.<sup>90</sup>

Of the dozen or so federal court Facebook pages that existed when this Article was written, at least half had not had any activity since they were created, some had been inactive for as long as two years.

There are more bankruptcy courts using social media than federal appellate or district courts. Among the more active courts is the Bankruptcy Court in New Mexico, which uses its Facebook page to post weekly news feeds from the Administrative Office of the U.S. Courts; local announcements about public workshops, training programs, policy and rule changes; and links to news articles of interest.<sup>91</sup>

With regard to Twitter, again, bankruptcy courts are the primary users. They typically tweet announcements of case filings, which link to PACER;<sup>92</sup> announcements of estate sales;<sup>93</sup> and court openings and closings, primarily due to weather.<sup>94</sup> In addition, a small number of district courts, such as the

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87. See, e.g., *United States District Court Northern District of Illinois: Social Media and Social Networking Policy*, IL. N.D., [http://www.ilnd.uscourts.gov/home/clerksoffice/CLERKS\\_OFFICE/lca/pdf/Social%20Media%20and%20Social%20Networking%20Policy.pdf](http://www.ilnd.uscourts.gov/home/clerksoffice/CLERKS_OFFICE/lca/pdf/Social%20Media%20and%20Social%20Networking%20Policy.pdf) (last visited Dec. 31, 2014).

88. *Committee on Codes of Conduct Advisory Opinion No. 112*, U.S. CTS. (July 22, 2014), <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>.

89. *US Supreme Court*, TWITTER, <https://twitter.com/USSupremeCourt> (last visited Nov. 11, 2014).

90. *GovTop Network*, TWITTER, <https://twitter.com/GovTop> (last visited Nov. 11, 2014).

91. See *United States Bankruptcy Court, District of New Mexico*, FACEBOOK, <https://www.facebook.com/NMBankruptcyCourt> (last visited Nov. 11, 2014).

92. See, e.g., *USBC Cal Central*, TWITTER, <https://twitter.com/cacbnews> (last visited Nov. 11, 2014) (United States Bankruptcy Court, Central District of California).

93. See, e.g., *id.*

94. See, e.g., *US Bankruptcy Court*, TWITTER, <http://twitter.com/USBCNJ> (last visited Nov. 11, 2014) (United States Bankruptcy Court, District of New Jersey).

District of Kansas, tweet local and national court news – typically about twice a week.<sup>95</sup>

Finally, in 2010 the Administrative Office of the U.S. Courts and the Federal Judicial Center jointly launched a YouTube Channel.<sup>96</sup> As of November 11, 2014, there were 143 videos posted, ranging from an annual round-up of key Supreme Court decisions, featuring nationally known law professors, to a series of videos in English and Spanish about how to file for bankruptcy.<sup>97</sup> The videos have generated more than 311,000 total views as of November 11, 2014. The most watched video on that date was “The Patent Process: An Overview for Jurors,” which had more than 29,000 views.<sup>98</sup>

## V. THE FUTURE

What does the future look like with regard to court-media interactions? There are two major factors that will exert the greatest impact on the answer to this question: funding and technology – both independently and together.

In a recent interview with the *ALI Reporter*, Tom Goldstein, the founder of the SCOTUSblog, offered a fairly pessimistic view:

This is really a wrenching time for the media. On the one hand, the easy and cheap distribution of information makes it very easy for new voices to be heard. . . . On the other hand, cutbacks in the traditional press mean that we’re losing a huge amount of excellent work conducted at the highest ethical standards. . . . I suppose we’ll adapt, but on the whole I think we’ll be worse off than in the glory days of the press.<sup>99</sup>

It is also a wrenching time for the courts. The impact of frozen budgets and then sequestration, which, in 2013, reduced federal court funding by \$350 million, or about five percent, has been devastating.<sup>100</sup>

Current on-board court staffing levels in federal courts are the same today as they were in 1997, despite the significant growth in workload over the

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95. E-mail from Tim O’Brien, Ct. Clerk, Dist. Ct. Kan., to author (Apr. 12, 2014); *US District Court KS*, TWITTER, <https://twitter.com/ksdcourt> (last visited Nov. 11, 2014).

96. *United States Courts: Federal Judiciary Channel*, YOUTUBE, [youtube.com/uscourts](http://youtube.com/uscourts) (last visited Nov. 11, 2014).

97. *See generally id.*

98. *See The Patent Process: An Overview for Jurors*, YOUTUBE, <http://www.youtube.com/watch?v=ax7QHQTbKQE> (last visited Nov. 11, 2014).

99. Shannon P. Duffy, *Q&A with Tom Goldstein*, A.L.I. REP. (Fall/Winter 2013), [http://www.ali.org/\\_news/reporter/fall-winter-2013/06-QandA.html](http://www.ali.org/_news/reporter/fall-winter-2013/06-QandA.html).

100. Chief Justice John G. Roberts, *2013 Year-End Report on the Federal Judiciary*, SUP. CT. 4-5 (Dec. 31, 2013) <http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf>.

same period.<sup>101</sup> Numerous projects have been cancelled or delayed due to funding shortages.<sup>102</sup> This includes several projects that are designed to save money in the long run, such as a national centralized accounting system and an electronic system for reviewing payment vouchers submitted by court-appointed lawyers.

Will funding reductions also impact access to justice and in turn access to court information? Over the years, the federal courts have eliminated public information officer positions in the First, Second, and Fifth Circuits, as well as the Northern District of Illinois. While this is not fully tied to funding shortages, it certainly was a factor.

Developing improvements and maintaining technology is also costly. Because courts depend so heavily on technology to share information with the media and public, we all should be concerned about reduced funding in this area.

We also should be concerned about the impact and implications of easy remote electronic access to virtually all court documents. Privacy and instantaneous access to court documents increasingly are clashing. Not only are there issues concerning identity theft caused by posting on the Internet documents that contain dates of birth, Social Security numbers, bank account numbers, and other personal identifiers, there also are significant and real personal security and safety issues.

In 2007, the Department of Justice contacted federal judiciary officials to request that courts restrict public Internet access to plea agreements, which often reflect the involvement of a cooperating witness.<sup>103</sup> The easy availability of this information could jeopardize the safety of such witnesses and even discourage them from cooperating. At the time, a prime offender was the website [www.whosarat.com](http://www.whosarat.com), which identified undercover officers, informers, and defendants who provide information to law enforcement.<sup>104</sup> As a result,

101. Statement of Honorable Julia S. Gibbons, Chair, Comm. on the Budget of the Judicial Conference of the U.S. Before the Subcommittee on Fin. Servs. and Gen. Gov't of the Comm. on Appropriations of the U.S. House of Representatives, U.S. CTS. 3 (Mar. 26, 2014), [http://news.uscourts.gov/sites/default/files/Judge-Gibbons\\_2015-Budget.pdf](http://news.uscourts.gov/sites/default/files/Judge-Gibbons_2015-Budget.pdf).

102. *Id.*

103. Memorandum from John R. Tunheim, Chair, Comm. on Ct. Admin. & Case Mgm't Judicial Conference U.S., to Chief Judges, U.S. Cts. of Appeals, Judges, U.S. Dist. Cts., U.S. Magistrate Judges (Sept. 10, 2007) [hereinafter "Tunheim Memo"] (on file with author); *see also* Memorandum from James C. Duff, Director, Admin. Office of U.S. Courts, to Chief Judges, U.S. Courts of Appeals, Judges, U.S. District Courts, U.S. Magistrate Judges (Mar. 20, 2008) (on file with author). *See generally* Theresa Cook & Jason Ryan, 'Who's a Rat': Intimidation or Information?, ABC NEWS (May 25, 2007), <http://abcnews.go.com/TheLaw/story?id=3209627&page=2>; Adam Liptak, *Web Sites Listing Informants Concern Justice Dept.*, N.Y. TIMES (May 22, 2007), [http://www.nytimes.com/2007/05/22/washington/22plea.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/05/22/washington/22plea.html?pagewanted=all&_r=0).

104. Liptak, *supra* note 103.

the Administrative Office of the U.S. Courts notified courts of this concern and asked them to take appropriate action.<sup>105</sup>

Specifically, courts were asked “to consider adopting a local policy that protects information about cooperation in law enforcement activities but that also recognizes the need to preserve legitimate public access to court files.”<sup>106</sup>

Some courts reacted by limiting public access to plea agreements to the paper copies in case files at the courthouse.<sup>107</sup> Some reviewed each plea individually to determine if there was a reason to seal it.<sup>108</sup> Some made no changes.<sup>109</sup>

It is likely there will be an ongoing need for courts to recalibrate the delicate balance between access and privacy in the coming months and years.

There is another concern that arises due to the easy remote electronic access to case information and that relates to the craft of news-gathering. If journalists, or at least those who remain, can watch live streams of hearings on their laptop and obtain case documents over the Internet, are they still going to come to the courthouse?

Can you envision Tony Lewis covering the Supreme Court without climbing the majestic marble steps at One First Street, sitting in the press section to the right of the bench where he could carefully watch every justice, as well as the opposing counsel, copiously taking notes, and then banging out his story on his typewriter downstairs in the pressroom?

If journalism is truly history’s first draft, to paraphrase former *Washington Post* President Philip Graham,<sup>110</sup> shouldn’t history be written by those who are on the scene and who can see history unfold before their eyes and interview the news makers in person?

As *Politico*’s Gerstein put it: “The meat and potatoes of reporting on what’s happening in the legal system is achieved not by filing motions, but by actually sending reporters into courts to watch what’s happening. There is a lot of vital news happening in our courts today that is simply not being covered.”<sup>111</sup>

105. See Tunheim Memo, *supra* note 103; Liptak, *supra* note 103.

106. David M. Reutter, *Florida U.S. District Court Rescinds Policy Restricting Access to Plea Agreements*, PRISON LEGAL NEWS 24, June 2009, available at <https://www.prisonlegalnews.org/news/2009/jun/15/florida-us-district-court-rescinds-policy-8232restricting-access-to-plea-agreements/> (quoting the Committee on Court Administration and Case Management of the Judicial Conference of the U.S. Courts) (internal quotation marks omitted).

107. Brian Westley, *Access to Plea Agreements*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/secret-justice-access-plea-agreements/access-plea-agreements> (last visited Nov. 11, 2014).

108. *Id.*

109. *The Policies*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS, <http://rcfp.org/secret-justice-access-plea-agreements/policies> (last visited Nov. 11, 2014).

110. Rachel Rodriguez, *Journalism Is the First Draft of History*, CNN (Aug. 16, 2011), <http://ireport.cnn.com/docs/DOC-653000>.

111. Gerstein: 2012 First Amendment Awards Dinner Remarks, *supra* note 2.

But this is not something courts can influence. They can, however, make their websites easier to use, assure that public information is available in an easy to use and timely manner, encourage transparency, and hire and empower court public information officers.

In other words, the decline of the media is an opportunity for the courts to fill a void – not with funding or staff – but with information.

“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,” Chris Davey, the former Director of Public Information for the Ohio Supreme Court wrote.<sup>112</sup>

Traditionally, it had been the Tony Lewises of the world who reminded the public, through their reporting, that the courts matter. They were masters of clear, balanced, and concise writing. Their stories explained the importance of the latest court decision, plea agreement, sentencing, or judicial appointment so the common man or woman could not only understand what occurred, but could also see how it was relevant to them.

But times have changed. The courts can no longer rely solely on the media to inform the public about their work.

“The traditions of the judiciary, including the setup of the courtroom and even the robes that judges wear, have changed very little over the centuries,” Marilyn Warren, the Chief Justice of Victoria, Australia said in a 2013 lecture on Open Justice in the Technological Age.<sup>113</sup> However, she continued:

[T]he means by which courts communicate and therefore open justice has changed dramatically. There is now an expectation that open justice involves the judiciary adopting new media technologies and engaging in a direct dialogue with the community. The judiciary must find a way to meet these expectations whilst at the same time preserve the fundamental aspects of the rule of law – fairness and judicial impartiality.<sup>114</sup>

Chief Justice Warren's vision is one that both Tony Lewis and Toni House likely would applaud and facilitate. It also is a vision whose fulfillment is important to the vitality of the Third Branch of government.

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112. Christopher J. Davey, *The Future of Online Legal Journalism: The Courts Speak Only Through Their Opinions?*, 8 I/S: J. L. & POL'Y FOR INFO. SOC'Y 575, 603 (2013).

113. Marilyn Warren, Chief Judge of Victoria, Remarks at the 2013 Redmond Barry Lecture (Oct. 21, 2013) (transcript available at *Open Justice in the Technological Age*, STATE LIBR. VICT., <http://www.slv.vic.gov.au/marilyn-warren-open-justice> (last visited Nov. 11, 2014)).

114. *Id.*