

A BROAD VIEW OF ACCESS

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I. INTRODUCTION

The wave of criminal trials of executives charged with various kinds of accounting fraud and other illegal activities has brought into sharp focus the role that access to the media can play in achieving access to justice. By using the phrase “access to justice,” I do not mean to refer only to the problem of getting into the courthouse, which is of tremendous concern to lawyers advocating on behalf of the poor. Instead, I use the phrase to refer to the broader challenge of obtaining access to other levers of power—levers that can enable individuals of moderate or even minimal means to seek redress for wrongs.

This Essay argues that media coverage is perhaps more important than ever for those lacking the means to prosecute a civil lawsuit, let alone to hire superstar lawyers like David Boies,¹ Mary Jo White² or Robert G. Morvillo.³ And while media access has become more important, attracting such coverage may have become harder to obtain. Clearly, some can afford more than their share of courtroom time regardless of the merits of their arguments, while

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1. Mr. Boies is currently chairman of the law firm of Boies, Schiller & Flexner LLP. <http://www.boies-schiller.com>. He is perhaps best known for his service as Special Trial Counsel for United States Department of Justice in its antitrust suit against Microsoft and as the lead counsel for former Vice President Al Gore in connection with the 2000 election Florida vote count. *Id.*

2. Ms. White is currently a partner at Debevoise & Plimpton LLP, <http://www.debevoise.com>. Formerly, she was the U.S. Attorney for the Southern District of New York, where she prosecuted several high-profile terrorism cases. *Id.*

3. *E.g.*, Chris Smith, *Can This Man Save Martha?*, N.Y. MAG., Dec. 15, 2003, available at http://www.nymag.com/nymetro/news/crimelaw/features/n_9620/index.html.

others cannot obtain the help they need no matter what.

The discussion proceeds in four parts. First, I briefly explore the role of the media in covering high-profile litigation. Second, I present some of the issues raised in discussions of traditional access to justice, and suggest that access to media organizations can also contribute to achieving a just outcome. Third, I discuss why news organizations may keep some important stories, off-air, off-line and out of print, even though, if suitably covered, the story could promote a more just outcome. Finally, I offer a few thoughts on why the work of news organizations—along with bloggers, podcasters and anyone else with a means to reach large numbers of people—may be more important than ever to promote access to justice.

II. MEDIA COVERAGE OF THE COURTS

Rarely does anyone wonder how certain civil disputes, let alone criminal prosecutions, end up dominating the newspaper or precious minutes on the evening news. When corporate egos are bruised, it goes without saying that executives will arrange to be represented by the best legal minds available given their budget. When a company's stock price plummets in the wake of an accounting scandal, flamboyant shareholder lawyers most certainly will appear with all manner of critical evidence, crusading in the media and in the courts for the recovery of investor losses—and their fees.

Managing extensive media coverage must be part of the litigation strategy in these cases because news reports can put pressure on an adversary. If the case is sufficiently noteworthy, news organizations will write about it willingly, though not necessarily to the client's advantage. During the trial of Martha Stewart, who was represented by Mr. Morvillo, television crews constructed a tent city across the street from the federal courthouse in Lower Manhattan where the trial was being held.⁴ Not surprisingly, the trial and the surrounding media coverage became fodder for late-night comedians.⁵

4. David Ho, *Legal Circus Distracts NYC; Manhattan Mayhem: Corporate Corruption Trials Become a Tourist Attraction*, ATLANTA J.-CONST., Mar. 7, 2004, at G6.

5. Daniel Kurtzman, *Martha Stewart Jokes: Late-Night Jokes About Convicted Felon Martha Stewart*, <http://politicalhumor.about.com/library/blmarthastewartjokes.htm> (last visited Apr. 14, 2006) (listing a series of jokes

Similarly, when a vicious spat broke out between Rosie O'Donnell and the former publisher of her eponymous magazine,⁶ the case was tried as much in the media as in the courtroom.⁷ At the bench trial,⁸ the lawyers for both sides were clearly superbly prepared. Consequently every motion was so meticulously argued that at the end of the trial, the impatient judge⁹ awarded nothing to either side and dismissed the complaint and counterclaims.¹⁰

In contrast with such high-profile trials, there are few reporters who are willing to slip into empty seats and listen to mundane state court proceedings, let alone follow an anonymous, lonely soul's struggle to recover money lost on a good deal gone bad in small claims court. Only the most notorious criminal case, in which the heinous nature of the acts alleged makes the defendant of interest, draws much attention.¹¹ As a result, the hidden consequences of inadequate or nonexistent legal counsel do not receive much attention.

When questions arise about inequitable access to the legal system and the quality of representation available, the litigants are invariably obscure, and news organizations are unlikely to pay much attention to their problems. For example, attending a battle over legal fees and distribution of proceeds of a settlement in early 2005,¹² I found that I was the only person present who was not a lawyer in the transaction.¹³ In the underlying case, the plaintiff, the law firm of

at Ms. Stewart's expense).

6. Jonathan D. Glater, *O'Donnell and Publisher Spar Over Magazine's End*, N.Y. TIMES, Oct. 31, 2003, at C6.

7. See generally *id.* (discussing Ms. O'Donnell's statements to reporters at the end of the day's proceedings).

8. See *id.*

9. Cf. *id.*

10. David Carr, *Judge in O'Donnell Case Rejects All Claims*, N.Y. TIMES, Feb. 20, 2004, at C5.

11. See, e.g., Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95, 97-99 (1995); Robert S. Stephen, *Prejudicial Publicity Surrounding A Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus"*, 26 SUFFOLK U. L. REV. 1063, 1066 & n.11 (1992) (discussing greater media attention to criminal trials and analyzing the effects).

12. See Jonathan D. Glater, *When Law Firms Collide, Things Sometimes Get Ugly*, N.Y. TIMES, Feb. 12, 2005, at C2.

13. See *id.*

Parker & Waichman, sued the law firm, Napoli Bern, for breach of contract regarding their fee-splitting agreements.¹⁴ Parker & Waichman referred clients, all with personal injury actions involving the diet drug combination fen-phen, to Napoli Bern.¹⁵

One issue the lawyers attempted to raise concerned possible favoritism in the payment of compensation funds to economically injured members of a class.¹⁶ The attorney representing Parker & Waichman argued that Napoli Bern favored its direct clients over those clients Parker & Waichman referred.¹⁷ It was not an insignificant matter. But the complexity of the issue and the absence of any well known figure ensured that there would be little media coverage of the case. Consequently, there would likely be little scrutiny of what the lawyers in the case ultimately did.

III. FACETS OF THE PROBLEM OF ACCESS TO JUSTICE

A review of the literature on the subject of access to justice suggests that a discussion can be as broad or as narrow as the investigating scholar likes because of the many complex questions the topic presents.¹⁸ Each investigation has generated a range of answers, from creating a parallel system of non-lawyer legal advisers to assist people with legal issues,¹⁹ to the wholesale adoption of no-fault insurance that would eliminate the need for several types of civil litigation.²⁰

14. Parker & Waichman v. Napoli, 806 N.Y.S.2d 19, 20 (App. Div. 2005); Glater, *supra* note 12.

15. Napoli, 806 N.Y.S.2d at 20.

16. *See id.*

17. *Id.*

18. *See generally* Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 399–421 (2004) (discussing various alternatives to improve access to justice).

19. *See, e.g.,* Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 *passim* (1996) (discussing the “contributions and limitations of recent bar debates over nonlawyer practice”). Perhaps, probono staffed clinics, nonlawyer facilitators and multimedia interactive assistance could be used to give advice in simple legal areas to help drive down the expense and necessity of legal assistance. *Id.* at 713–16.

20. *See, e.g.,* Lawrence B. Solum, *Alternative Court Structures in the Future of the California Judiciary: 2020 Vision*, 66 S. CAL. L. REV. 2121, 2156–57 (1993) (discussing arguments in favor of and in opposition to adoption of a system of no-fault automobile insurance).

There is also the practical matter of economic access. Who can afford to sue, be sued or fight a criminal charge?²¹ What can be done to balance the economic incentives that encourage plaintiff-side lawyers to take only those cases likely to result in significant fees,²² while leaving deserving clients who most need good representation to wrestle a decent outcome from a difficult case on their own?

The cost of hiring a lawyer, certainly an experienced litigator with the resources of a seasoned law firm, is very high—hundreds of dollars per hour.²³ This is, very likely, one reason why so many criminal cases result in guilty pleas²⁴—entering a plea is far cheaper than mounting a defense at trial.

From what most people see of the criminal justice system, on television shows like *Law & Order* or on the news, most defendants appear to be well defended.²⁵ News coverage of litigation, for example, may leave the impression that lawyers stand ready to assist with all manner of personal grievances, from “slip and fall” cases to stock losses. But the reasons lawyers choose to bring particular cases may be governed less often by the injury suffered than by the likelihood that an award will cover a lawyer’s costs—or better still, yield a significant profit.²⁶ Critics of shareholder litigation

21. See Deborah L. Rhode, *Access to Justice: Again, Still*, 73 *FORDHAM L. REV.* 1013, 1013–16 (2004) (addressing the high-cost of litigation and the reduction in national spending on legal aid).

22. Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 *DUKE L.J.* 447, 466–67 (2004) (noting that the lure of large attorney fees in certain lawsuits may inhibit less lucrative, yet socially useful, lawsuits).

23. See generally *id.* at 464–66 (discussing large attorney fees in mass tort lawsuits).

24. E.g., Emily Rubin, *Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 *V.A. L. REV.* 1699, 1700 (1994) (stating that roughly ninety percent of criminal cases are disposed of in guilty pleas).

25. Similarly, insufficient media attention is devoted to the thousands of individuals—including many long-term United States residents—who are deported each year in civil proceedings. Unlike criminal defendants, these individuals are not entitled to counsel at the expense of the government, and many proceed unrepresented in these critical proceedings. E.g., Donald Kerwin, *Revisiting the Need for Appointed Counsel*, *MIGRATION POL’Y INST.: INSIGHT*, Apr. 2005, at 1, available at http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

26. See, e.g., Jonathan D. Glater, *From Investor Fury, A Legal Bandwagon*, *N.Y. TIMES*, Sept. 15, 2002, § 3, at 1, 11 (noting how the appeal of shareholder

frequently express this view.²⁷

Then there are issues of client authority and lawyer responsibility. For example, what are a lawyer's duties when taking the case of a previously unrepresented, and possibly unsophisticated, group?²⁸ Who should make strategic decisions? Also, how should a class action lawyer in a massive case keep putative clients informed of the case's progress? How can he or she justify a twenty percent fee, when individual class members may receive mere pennies? And, should the lawyer alert the media?

Because the lawsuits people read about usually involve executives or other sophisticated people accustomed to dealing with lawyers and reporters alike, the question of a client's ability to make informed decisions affecting their legal options rarely arises. Few, if any, observers worried whether Ms. Stewart understood the strategy pursued by her lawyers in her criminal case.²⁹ After she was convicted, when it was safe to become a critic, many engaged in second-guessing that strategy.³⁰ In significant cases brought by public interest lawyers, whether a strategy was truly in the client's interest frequently comes under fire.³¹ Interestingly enough, the criticism of lawyers in certain civil rights cases sounds like that leveled at the securities plaintiff bar.³² For example, Stephen Yeazell observes similarities between leading civil rights cases of decades

litigation is growing because of the enormous settlement fees lawyers can collect).

27. *See id.* at 11.

28. *See* Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 *FORDHAM L. REV.* 2449, 2452–54 (1999) (discussing the lack of guidance provided by current ethics doctrine on how lawyers should handle group representation).

29. *See generally* Julie Hilden, *Should Martha Stewart's Lawyer Have Strongly Advised Her to Testify?*, *FIND LAW*, Mar. 15, 2004, <http://writ.findlaw.com/hilden/20040315.html> (discussing the competency level of Stewart's defense lawyer and noting that Stewart most likely knew of and made the decision not to testify).

30. I was as guilty of this as everyone else was. *See* Jonathan D. Glater, *Stewart's Lawyers Gambled with a Minimal Presentation*, *N.Y. TIMES*, Mar. 6, 2004, at C1.

31. *See generally* Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 *VAND. L. REV.* 1975, 1980–81 (2004) (describing how the NAACP's litigation strategy to end racial segregation occasionally resulted in dissatisfaction among its membership).

32. *See id.* at 1985–2003.

past and the oft-maligned class action lawsuits brought by the plaintiff bar today.³³

Then there are questions of efficacy. What does litigation achieve? Is it sufficient? How is a desirable outcome enforced, at what cost, and who pays? These are questions that surface with greater frequency given the ease with which a defendant can put out a press release announcing a settlement and internal changes to prevent future harm, compared with a plaintiff's cost of returning to court to ensure compliance with such promises.

It is a positive sign that more and more lawyers and law professors are thinking about these issues, both as they relate to pro bono work by lawyers in private practice³⁴ and in the provision of services by nonprofit legal service organizations and advocacy groups of all kinds.³⁵ However, even a cursory review of some of these articles, along with the perusal of headlines, makes plain that there is at once too much litigation in the United States and too little. That is, some people engage in frivolous litigation and can afford to do so, while many others cannot obtain representation no matter how valid the need.³⁶

IV. THE CHOICES OF NEWS ORGANIZATIONS

Attracting the attention of news organizations has become ever more important to litigants, especially those without money or power. That goal, however, may have become more difficult to achieve. If poor or powerless litigants are less able to attract media

33. *See id.* at 1991–2000. Professor Yeazell cites civil rights decisions, in particular *NAACP v. Button*, 371 U.S. 415 (1963), which declared several portions of Virginia's regime to regulate lawyers unconstitutional because those regulations hindered the litigation efforts of the National Association for the Advancement of Colored People. Yeazell, *supra* note 31, at 1986–87. As a result of such decisions, certain tactics became available to lawyers to recruit clients. *See id.* at 1987–91. Some of these same tactics, when adopted by plaintiff-side law firms in other contexts today, are often criticized. *See generally id.* at 1994–95.

34. *See generally* Bruce A. Green, *Deborah L. Rhode's Access to Justice*, 73 *FORDHAM L. REV.* 841 *passim* (2004) (introducing a colloquium of law review articles by law professors and practicing lawyers which discuss issues such as the cost of litigation, poor access to litigation and possible pro bono solutions to these problems).

35. *See generally id.*

36. *See, e.g.,* Rhode, *supra* note 22, at 473–74.

coverage, it is a significant development. After all, access to justice must encompass more than access to the courtroom itself. The potential for public shaming that accompanies litigation can be vital to reaching a favorable settlement, while the spectacle of a trial can ensure enforcement of a judgment. Without question, when the issue underlying a case has broader societal significance, wider concerns are likely to be better satisfied when the public can see and understand the outcome.

Many lawyers have observed this power of the news media.³⁷ Consider the number of lapsed lawyers who are now on television and in print.³⁸ Furthermore, in the blogosphere, practicing lawyers have become incredibly influential and powerful journalistic voices in their own right.³⁹ These lawyers have even brought the so-called mainstream media to heel.⁴⁰ For instance, a blog run by attorneys helped reveal CBS' reliance on documents, later discredited, concerning President Bush's National Guard service.⁴¹

However, the attention of all these spectators describing, analyzing and commenting on current events is typically drawn to the same few lawsuits. This makes the task of lawyers representing the interests of people who are not celebrities more difficult. For instance, consider the example of a major company settling a discrimination lawsuit filed by a group of employees. Such a settlement might appear unexciting to reporters and editors who fear that readers and viewers will skip past the news as depressing—or worse, as routine. Thus, the matter may receive little coverage.

V. WHY NEWS COVERAGE MATTERS

It is not surprising that much of the existing literature on access

37. *E.g.*, Symposium, *Mass Media's Impact on Litigation, Lawyers, and Judges: What to Do When Your Case is Front Page News*, 14 REV. LITIG. 595 (1995) (giving accounts of media impact upon litigation).

38. *See, e.g.*, PBS, *Online NewsHour: Lawyers on Television* (2006), <http://www.pbs.org/newshour/bb/media/july-dec98/lawyers.html> (last visited Feb. 10, 2006) (listing several notable lawyers appearing on television).

39. *See* Sarah Kellogg, *It's Not Your Father's Web Site: Lawyers in the Blogosphere*, 31 LAW PRAC. 32 (2005), <http://www.abanet.org/lpm/magazine/articles/v31is5an1.html>.

40. *See* Jonathan D. Glater, *Liberal Bloggers Reaching Out To Major Media*, N.Y. TIMES, Mar. 14, 2005, at C1.

41. In fact, the conservative blog, Powerlineblog.com, run by three attorneys, was one of the first media outlets to break the story. *See id.*

to justice, in particular the incisive and insightful comments on the status quo by Professor Deborah Rhode, criticize news organizations as part of the problem.⁴² In the eagerness to capture viewers and readers in an increasingly competitive media market where less attention is paid to traditional news coverage, reporters and editors are apparently willing to devote more time and attention to lawsuits deemed “loony.”⁴³ According to Professor Rhode, by giving undue publicity to cases easily characterized as extreme⁴⁴—at least when taken out of context—news organizations may assist, purposely or not, in a broad effort to convince the public that a litigation crisis has engulfed the country and hobbled its businesses.⁴⁵

It is testimony to the power of the media today that what is shown, said, and written about some cases may be as important as the verdict. With broad efforts to reshape the rules that govern civil litigation underway,⁴⁶ voters’ opinions about the legitimacy of cases they see in the media are crucial as well. Of course, this makes it more important that news organizations get the story right.

Unfortunately, the resources of most news organizations are thinning, and their focus on what will lure readers and viewers grows ever more desperate.⁴⁷ News stories that are not immediately attractive to the news outlet’s audience are less likely to get the time and attention that may be critical to telling the story properly, with nuance, and in context. In particular, few publications have the personnel and money to fund investigations. Thus, investigations into such matters as the availability of legal services for the poor are unlikely, even though such a story might be a good idea.

The twin hurricanes that struck the United States in 2005 offer a test.⁴⁸ By the time this Essay appears, we will know how diligently

42. See Rhode, *supra* note 22, at 450–51.

43. See *id.*

44. See *id.* at 463.

45. See *id.* at 450–52, 463.

46. See, e.g., John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021 (2005) (discussing modern tort litigation reform as a political movement).

47. See generally Katharine Q. Seelye, *Even a Darling of the Newspaper Industry Is Starting to Sweat a Bit*, N.Y. TIMES, Sept. 19, 2005, at C1 (discussing challenges newspapers face with decreasing readership, lower advertising revenues, and competition from the Internet).

48. See Tom Rosenstiel & Bill Kovach, *Media Anger Management*, WASH. POST, Oct. 2, 2005, at B7.

news organizations have covered the obstacles facing poor people whose lives were disrupted by the storms. Perhaps reporters will closely chronicle the ways in which poverty and wealth determine opportunity. I certainly hope so. Reporters clearly were outraged and surprised at the conditions endured by victims of the storms—both before and after the disaster struck.⁴⁹ Perhaps this shock and outrage will result in more and stronger stories addressing the problems of poverty.⁵⁰

VI. CONCLUSION

Access to the media enhances, in some cases, access to justice. But stories about the everyday effects of a lack of recourse to lawyers, legislators and courts are easily lost when they compete with stories involving famous people or outrageous events. Even reporters who have devoted themselves to writing about the challenges faced by people coping with poverty may not focus on the impact of a lack of means on the ability to obtain justice.⁵¹

One of my colleagues at the New York Times, a wise and experienced journalist, once said to me that a good storyteller can tell most any individual experience in a compelling way. The challenge is to recognize the story in an experience, and then to take the time to tell that story in a way that makes a difference. I suspect that there are numerous stories out there, not yet told, that may highlight the challenges many people face in obtaining justice.

49. *See id.* (noting “the surge of emotion felt by reporters covering Hurricane Katrina and Hurricane Rita”).

50. *See, e.g.,* David K. Shipler, *Monkey See, Monkey Do: If Pols Ignore Poverty, the Press Does, Too*, COLUM. JOURNALISM REV., Nov.–Dec. 2005, at 11, 11–12 (criticizing the mainstream media for not adequately covering poverty issues).

51. *Cf.* Howard Kurtz, *Wiped Off the Map, and Belatedly Put Back on It*, WASH. POST, Sept. 19, 2005, at C1. Kurtz comments on this issue in his usual incisive fashion, observing, “The mounting problems of the urban poor, from unemployment to high infant mortality to family dysfunction, were long ago reduced to a blip on the media radar screen.” *Id.*