

12-18-2012

Frontmatter

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Frontmatter, 2012 BYU L. Rev. (2012).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2012/iss6/10>

This Frontmatter is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Brigham Young University Law Review

VOLUME 2012

NUMBER 6

RECEIVED



RECEIVED

MAY 15 2013

BRIGHAM YOUNG UNIVERSITY
Howard W. Hunter Law Library

BRIGHAM YOUNG UNIVERSITY LAW REVIEW (ISSN 0360-151X) will publish six issues in 2012 (February, March, April, October, November, and December). Business Office: J. Reuben Clark Law School, Office of Accounting, 460 JRCB, Provo, Utah 84602-8000.

SUBSCRIPTIONS: The subscription rate for subscribers in the United States is \$36 for one year, \$65 for two years, and \$90 for three years. Foreign subscriptions are \$44 for one year, \$81 for two years, and \$114 for three years. All claims on issues not received must be made within three months of publication if within the United States, or within six months for foreign subscriptions. Subscriptions are entered for an entire year only and are payable in advance. All subscriptions are renewed automatically unless timely notice of cancellation is given. Please send all correspondence regarding subscriptions to Office of Accounting, 460 JRCB, Provo, Utah 84602-8000. Issues older than one year may be obtained for \$16.00–\$20.00 from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209-1987, phone number: (800) 828-7571. Back issues are also available at HeinOnline, <http://heinonline.org>.

SUBMISSIONS: The Law Review is pleased to accept electronic submissions for publication through ExpressO or by email to lawrev@lawgate.byu.edu. The Law Review no longer accepts hardcopy submissions for publication. All other communications pertaining to articles should be sent to the attention of the Managing Editor of Administration: 471F JRCB, Brigham Young University, Provo, Utah 84602-8000.

CONTENT: All citations conform to *The Bluebook: A Uniform System of Citation* (19th ed. 2010) and the *Chicago Manual of Style* (16th ed. 2010). Views expressed herein are to be attributed to their authors and not to the Brigham Young University Law Review or Brigham Young University, unless otherwise indicated.

COPYRIGHT: Except as otherwise noted, the Law Review is pleased to grant permission for copies of articles to be made for noncommercial classroom use, provided that (1) a proper notice of copyright is affixed to each copy, (2) the author and source are identified, (3) copies are distributed at or below cost, and (4) the Brigham Young University Law Review is notified of the use.

Copyright © 2012 Brigham Young University Law Review

[Faint handwritten signature]

Brigham Young University Law Review

VOLUME 2012

NUMBER 6

Editor-in-Chief
JOSEPH A. ORIEN

Managing Editor of Administration
HEATH WADDINGHAM

Managing Editor of Publication
BRANDON SEAL

Managing Editor of Technology
GREGORY SCHULZ

Lead Articles Editors
JOSEPH BALLSTAEDT
BRIAN BLAKLEY
SPENCER DRISCOLL
RYAN MERRIMAN
REBECCA VAN TASSELL

GARRETT BARLOW
BRIAN CONGELLIERE
MARY DITTO
ANDREW DOUGHERTY
SETH ENSIGN
ERIC GILL
R. GREGORY ISRAELSEN
JESSICA JONES

JENS BEYRICH
JEDEDIAH BIGELOW
ANDREW BLAYLOCK
LYNDON BRADSHAW
CLINTON R. BRIMHALL
DUSTIN CAMMACK
TREVOR CROWLEY
JAKE GREEN
MITCH HADLEY
CHRIS HARDY
JARED HATCH
DAVID HEYWOOD
JASON HIRST
CARL HOLLAN
TRAVIS HUNT
HALEY JANKOWSKI
BRANDON JOHNSON
KATE KNOWLES

Executive Editors
AARON ARNSON
R. DANNY BRIMHALL
CORY S. CLEMENTS
ALEX MASON

Symposium Editor
LINDSAY NASH

Lead Note & Comment Editors
ADAM DAYTON
A.J. GREEN
BRIAN HAZEN
ANDY SELLERS
NATALI WYSON

Senior Editors

SZONIA LUDVIG
AARON MCKNIGHT
TOM OWENS
JAMES PARTRIDGE
TRAVIS ROBERTSON
DAYNA THOMAS
REX WATKINS

Associate Editors

HILARY LAWRENCE
KATHRYN LENHART
DAO LY
GINA MANCIATI
BRAD MASTERS
TRENT MAXWELL
MITCH MCCLELLAN
KIPP MUIR
STACIE A. STEWART
NATE SUMBOT
CHRIS WADE
ANDREW WALKER
RYAN WALLACE
JOHN WEST
BRODY WIGHT
CLARK WILKES
AARON WORTHEN

BRIGHAM YOUNG UNIVERSITY
J. REUBEN CLARK LAW SCHOOL FACULTY

- AUGUSTINE-ADAMS, KIF (1995), Associate Dean and Charles E. Jones Professor of Law. B.A., 1988, Brigham Young University; J.D., 1992, Harvard Law School.
- BACKMAN, JAMES H. (1974), Stephen L. Richards Professor of Law. B.A., 1969, Harvard University; J.D., 1972, University of Utah.
- BARADARAN, SHIMA (2010), Associate Professor of Law. B.S., 2001, J.D., 2004, Brigham Young University.
- BENNION, ELIZABETH (2012), Fellow. B.A., 1996, Brigham Young University; M.A., 1997, Stanford University; J.D., 2005, UCLA Law School.
- BRINTON, SARAH L. (2011), Fellow. B.A., 2003, Brigham Young University; M.A., 2005, University of Texas at Austin; J.D., 2008, Stanford Law School.
- CAMERON, SCOTT W. (1989), Associate Dean. B.A., 1970, M.A., 1971, Stanford University; J.D., 1976, Brigham Young University.
- DANIELS, BRIGHAM (2010), Associate Professor of Law. M.P.A., 2000, University of Utah; J.D., 2003, Stanford Law School; Ph.D., 2010, Duke University.
- DOMINGUEZ, DAVID (1989), Professor of Law. B.A., 1977, Yale University; J.D., 1980, University of California, Berkeley.
- DOXEY, GARY B. (2005), Associate Director of International Center for Law and Religion Studies. B.A., 1980, J.D., 1984, Brigham Young University; Ph.D., 1992, Cambridge University.
- DURHAM, W. COLE JR. (1976), Gates University Professor of Law and Director of International Center for Law and Religion Studies. B.A., 1972, J.D., 1975, Harvard University.
- FARMER, LARRY C. (1974), Marion G. Romney Professor of Law. B.S., 1968, University of Washington; Ph.D., 1975, Brigham Young University.
- FEE, JOHN E. (2000), Professor of Law. B.A., 1992, Brigham Young University; J.D., 1995, University of Chicago.
- FLEMING, J. CLIFTON JR. (1974), Ernest L. Wilkinson Professor of Law. B.S., 1964, Brigham Young University; J.D., 1967, George Washington University.
- GEDICKS, FREDERICK M. (1990), Guy Anderson Chair and Professor of Law. B.A., 1977, Brigham Young University; J.D., 1980, University of Southern California.
- GERDY, KRISTIN B. (1995), Teaching Professor and Director, Rex E. Lee Advocacy Program. B.A., 1992, J.D., 1995, Brigham Young University.
- GORDON, JAMES D. III (1984), University Assistant to the President for Planning and Assessment, and Marion B. and Rulon A. Earl Professor of Law. B.A., 1977, Brigham Young University; J.D., 1980, University of California, Berkeley.
- GOTBERG, BROOK E. (2012), Fellow. B.A., 2005, Brigham Young University; J.D., 2008, Harvard Law School.
- HERNANDEZ, CARL III (2001), Assistant Dean. B.A., 1988, J.D./M.P.A., 1992, Brigham Young University.
- HOAGLAND, MARY H. (1994), Assistant Dean. B.A., 1978, Brigham Young University; M.A., 1982, San Diego State University; J.D., 1984, San Joaquin College of Law; Ph.D., 2007, Brigham Young University.
- HURST, ALAN M. (2012), Fellow. B.A., 2007, Brigham Young University; J.D., 2010, Yale University.
- JENSEN, ERIC TALBOT (2011), Associate Professor of Law. B.A., 1989, Brigham Young University; J.D., 1994, University of Notre Dame; LL.M., 2001, The Judge Advocate General's School; LL.M., 2006, Yale Law School.
- JONES, RONNELL ANDERSEN (2008), Associate Professor of Law. B.S., 1995, Utah State University; J.D., 2000, The Ohio State University.

MOORE, DAVID H. (2008), Professor of Law. B.A., 1992, J.D., 1996, Brigham Young University.

NÚÑEZ, D. CAROLINA (2007), Associate Professor of Law. B.A., 2001, J.D., 2004, Brigham Young University.

PRESTON, CHERYL BAILEY (1989), Edwin M. Thomas Professor of Law. B.A., 1975, J.D., 1979, Brigham Young University.

RASBAND, JAMES R. (1995), Dean and Hugh W. Colton Professor of Law. B.A., 1986, Brigham Young University; J.D., 1989, Harvard Law School.

SCHARFFS, BRETT G. (1997), Francis R. Kirkham Professor of Law. B.S.B.A., 1986, M.A., 1987, Georgetown University; B.Phil., 1989, Oxford University; J.D., 1992, Yale Law School.

SMITH, D. GORDON (2007), Associate Dean and Glen L. Farr Professor of Law. B.S., 1986, Brigham Young University; J.D., 1990, University of Chicago Law School.

STAHELI, KORY D. (2007), Director, Law Library. B.A., 1984, J.D., 1987, M.L.I.S., 1991, Brigham Young University.

STEELE, MICHALYN (2011), Fellow. B.A., 1992, M.A., 1994, Brigham Young University; J.D., 2001, Georgetown University Law Center.

SUN, LISA GROW (2008), Associate Professor of Law. B.S., 1994, University of Utah; J.D., 1997, Harvard Law School.

WARDLE, LYNN D. (1978), Bruce C. Hafen Professor of Law. B.A., 1971, Brigham Young University; J.D., 1974, Duke University.

WELCH, JOHN W. (1980), Robert K. Thomas University Professor of Law. B.A., 1970, M.A., 1970, Brigham Young University; J.D., 1975, Duke University.

WORTHEN, KEVIN J (1987), University Advancement Vice President, and Hugh W. Colton Professor of Law. B.A., 1979, J.D., 1982, Brigham Young University.

ADJUNCT FACULTY

AFFLECK, ADAM S.	KIMBALL, DALE A.	PINEGAR, KEVIN
BAILEY, J. MICHAEL	KIRKHAM, DAVID M.	RICE, VERNON R.
BENSON, DEE V.	LAMBERT, SAMUEL A.	RICHARDS, JONATHAN W.
BENSON, RANDALL	LEE, THOMAS R.	ROBERTS, CHARLES L.
BRAMBLE, CATHERINE	LEHNHOF, LANCE	SANDBERG, STEVE
CAMP, CAROLYNN	LEITHEAD, HEIDI	SHAPIRO, JOSEPH M.
CHANDLER, WILLIAM	LINDSAY, KAY A.	SILVA, JOSE
CLARK, ELIZABETH	LINTON, MORRIS D.	SINE, JARED
COOK, BENJAMIN J.	LYMAN, PAUL D.	SMITH, ROBERT T.
CRABB, KELLY	MANDARINO, CHASE	STRINGHAM, JOHN C.
CUNDICK, TED	MANGELSON, MICHAEL	TENNEY, RYAN
DAVIS, MARK D.	MCCLEVE, SHEILA K.	THOMAS, DAVID A.
FERRIN, SCOTT E.	MCCULLOUGH, LEE S.	THOMAS, SUSANNAH
GALLI, CRAIG	MILLER, DOUGLAS P.	TIPPETT, RUST
GLADE, LEEANN	MORTENSEN, DAVID N.	TODD, DAVID R.
GRIFFITH, SUSAN W.	MURRAY, KEVIN R.	VAN WOERKOM, DAN
GRIFFITH, THOMAS B.	NEELEMAN, STANLEY D.	WALKER, JEFFREY N.
HAMILTON, KEITH	NIELSON, HOWARD C. JR.	WARNER, PAUL M.
HEYMAN, KURT	NUFFER, DAVID	WELCH, MEGAN
HOPKINS, STEVEN W.	OLDHAM, J. LAVAR	WISE, JANE H.
JANIS, BLAIR E.	OWEN, STANFORD B.	WRIDE, BRENT
JENKINS, JENS C.	PARKINSON, JAMES W.	WRIGHT, DAVID R.
JENSEN, MARY O.	PEARSON, JOI GARDNER	
KEELE, JEREMY	PETERSON, JANET G.	

The Press, the Public, and the U.S. Supreme Court

RonNell Andersen Jones, Edward Carter, and Richard Davis

The 2012 BYU Law Review Symposium, “The Press, the Public, and the U.S. Supreme Court,” brought together prominent national reporters who regularly cover the United States Supreme Court and top scholars from the fields of law, communications, and political science whose academic work focuses on the relationship between the media and the Court. During two days of scholarly presentations, panels, and workshop discussions, the participants in the multidisciplinary event investigated the complex dynamic between the Court and the media that reports on its work. They explored proposals that might improve public understanding of the Court and in turn improve the health of the democracy.

The scholarship produced by the event is voluminous and insightful. This symposium issue of the law review offers thoughtful research on the behavior of justices and journalists, commentary on the Court’s historical relationships with and views of the media, comparisons of the Court’s press accommodations with those of other courts of last resort, and important new insights into the ongoing debate over the use of cameras and other new media technology at the Court. It should serve as a valuable resource to scholars and to decisionmakers in the judiciary and the media.

The final session of the symposium was a workshop discussion in which groups of journalists and scholars from all three academic fields engaged in collaborative conversations focused on four main questions related to the symposium’s theme. The responses from the workshop groups offer proposals for consideration and provide guidance for scholars and policymakers who wish to continue the important dialogue about the relationships between and among people, the press, and the United States Supreme Court:

What are the biggest problems in the relationship between the Court and the press?

Symposium participants cited large-scale misunderstandings on the part of both the media and the Court that seem to plague the work of both institutions. The media at least sometimes misunderstand the work that the Justices do, and the Justices often appear to misunderstand the goals and needs of reporters.

Some of the problems identified in the workshop were related to the nature, style, or depth of news coverage. Participants recognized problems with the evolving economics of newsrooms and the dwindling number of reporters dedicated to covering the Court. They expressed discouragement at the increasing frequency with which scholars and lawyers comment to the press before having read an opinion of the Court. Many felt that news stories too frequently focus on 5-4 decisions and speak of the Court as a political institution by mentioning the appointing president of the Justices in question. Some also believed that there are too few stories that offer background on cases or provide a full context for the decision the Court is making. One group expressed concern about the temptation of members of the press to write stories that curry favor with the Justices or are overly protective of the institution, to the detriment of public understanding.

Other perceived problems center on the Court's lack of confidence in the media and general negative perceptions of it. Participants believed the Justices do not trust journalists to report well, to behave ethically, or to draw boundaries in their coverage of personal lives. Many participants cited as the primary problem plaguing the relationship between the press and the Court the fact that access by the press is seen as threatening. The Justices—like all individuals in authority—prefer to operate without close coverage, and the workshop participants found many of their arguments for exceptionalism unconvincing.

Journalists and scholars at the symposium argued that at least some of the Court's policies toward the press intentionally or inadvertently convey that the Justices do not care about members of the media, do not believe them to be engaged in any public-serving behavior, and do not consider their needs. Several participants found the timing and sequencing of opinion release the single greatest problem in the Court/media relationship, arguing that when the Court hands down several major decisions on a single day or announces major decisions on the day of oral arguments in other important cases, the press is most likely to be at its worst in terms of accuracy and thoroughness of coverage and the Court is at its worst because it is signaling disregard for the needs of the media as a whole and cultivating a broad disconnect between the two institutions. Although workshop participants uniformly acknowledged the constitutionally unique role of the Supreme Court and its insulation from politics, many expressed concerns that the desire for insularity undercuts important public-information goals and prevents the media from conveying the Court's actions to the wider population and

educating the citizenry on this constitutional mandate. One group noted the stark contrast between the trend of state supreme courts—which hold oral arguments at public places other than their own courtroom and appear to prioritize exposing ordinary citizens to the work of the court—and the U.S. Supreme Court, which takes very few efforts to make its proceedings available to a wider audience and sometimes appears to see adjudicating cases and educating the public as inconsistent alternatives, rather than as consistent aims. The lack of broadcast access to oral arguments, the failure to give a plain-English summary of the holdings of decided cases, and the favoritism of legacy media over online media in the credentialing of journalists all were cited as illustrations of the Court’s unnecessarily strong resistance to change in areas that could improve public exposure to and appreciation of the work of the judiciary.

What could the Court do differently than it is doing now to improve its relationship with the press?

Although the group was not unanimous in its view, many participants argued that their top priority for a change in Supreme Court policy would be for it to allow cameras to be present during oral arguments and any other proceeding at which public already is permitted. These scholars and journalists urged the Justices to think more critically about arguments against broadcast coverage and whether this coverage in fact introduces any harm or amplifies any harms already existing from available coverage.

Other changes in policy that would seemingly be even simpler to implement also gained strong endorsement from workshop discussion groups. Many participants strongly urged the Court to spread out the release of opinions, with journalists suggesting that even a policy of issuing no opinions on oral argument days or of issuing no more than two decisions per day would lead to major advances in public understanding and quality reportage. Some suggested that the Court could explore other policies that would assist the media in conveying information accurately, like announcing in advance which cases will be handed down on a given day or implementing a “lock-up” system in which members of the press are given the decided case with a two-hour embargo on its publication to give all reporters the time to read and understand the holding and the ramifications.

Some participants believed that the Court should issue statements on denials of certiorari, giving succinct explanations for why a case did not warrant review. Many believed that the Court could make more minor adjustments in its work product to enhance the understandability of its

decisions by the press and, in turn, the public. Most participants agreed that it would be a positive development for the Court to commit to writing shorter opinions—perhaps holding itself to word limits of the sort imposed on litigants in briefing the cases—and that a clear, authorized summary of the opinion from the Court would make a profound difference on the accessibility of its work to both the media and the general public.

Finally, workshop participants believed that the Justices should seek to inform themselves about the process of journalism, the needs of reporters, and the workings of various media technologies. Some proposed that law schools might offer courses on journalism to help educate future judges and justices. Others suggested that the Court could formally increase the contact between Justices and the media or empower the Public Information Office to provide greater information about the Justices, their work, their schedules, and, perhaps, their health developments and other information pertinent to their public service. Many journalists and scholars at the workshop believed that the Justices should avail themselves of more opportunities to see broadcast technology and other reporting tools in action, so that they can more carefully consider the advantages and disadvantages of changes in policy on media issues. Some participants praised the Justices for recent willingness to participate in interviews with C-SPAN, to speak to the press, and to contribute to public events or debates where there is media coverage. They appreciated the effort of members of the Court to better explain the institution to the public, and urged a continuation of this trend.

What changes in journalistic practice might improve news coverage of the Court or the relationship of the media with the Justices?

Symposium participants expressed serious concern over the tendency of reporters—especially those working under severe time constraints of television, radio, or social media obligations—to produce initial reports about Supreme Court decisions that are erroneous or incomplete and that create confusion in the legal community and beyond. Although many believed that any system of embargo would best be enforced by the Court itself, it was agreed that responsible journalism demands that editors give reporters adequate time to read and digest material and that the rush to coverage has been detrimental to public and judicial perceptions of the press.

Several recommendations were focused on improving aspects of Court media coverage that participants believe have traditionally been

problematic. Confusion of denial of certiorari with a substantive holding from the Court (with headlines or cases suggesting that the Supreme Court “upheld” a decision below) was a widely recognized error. More careful explanation of the role of a dissent and the basis for disagreement among Justices and greater caution in speculating about recusals were also urged. Many participants believed the media should aspire to produce more “effects” stories, going beyond a description of the holding to an explanation of the likely consequences of the Court’s decision, or a discussion of a decision’s results after the passage of time. Most participants agreed that providing links to original material from the Court enhances the public-education value of journalism about its decisions and should be standard practice.

Workshop participants debated the question of how much legal education, if any, is necessary or desirable for journalists who cover the Supreme Court. Most agreed that complete understanding of the processes of the Court and an ability to read and digest complex legal documents is crucial. Nearly all felt that better training for general assignment reporters would be a positive development.

What are your recommendations for ongoing scholarship and research on the topic of the press and the Supreme Court?

Workshop participants believed that the relationship between and among the Supreme Court, the media, and the public presents many ongoing needs for both social scientific inquiry and legal analysis.

Many of the participating scholars and journalists expressed interest in ongoing empirical work related to the question of broadcast coverage and its potential effects on the Justices, on the proceedings, and on public awareness and opinion. Comparative studies analyzing public opinion of courts or the degree of civic awareness in other jurisdictions, including courts of last resort in states or other nations permitting broadcast coverage of arguments, were thought to be necessary. Assessments of judicial experiences with cameras in the courtroom, including evidence that it does or does not alter judicial behavior, were also proposed. Some participants suggested that political psychology research, comparing the perceived legitimacy of courts after seeing oral arguments with the legitimacy after merely hearing them, would be a useful scholarly contribution. Others believed that research on the Justices’ behavior when on camera at confirmation proceedings might offer insights into the larger question of the introduction of cameras at the Court. It was also suggested that studies of the impact of other changes in press accommodations—the release of same-day audio, for example—and the

impact, if any, that they had on judicial behavior, public perception, or case outcome might be helpful in considering further accommodations.

Many participants expressed ongoing interest in empirical studies of media coverage, including content analyses that might track trends in errors in coverage, oversimplifications, and differences in coverage of the Supreme Court and lower federal courts. Some believed that there is a paucity of content analysis on the question of how well press coverage engages in explaining, teaching, or educating about the role of the Court in a democratic society. Others wished to have more data gathered on the relationship, if any, between the volume and tone of news stories about the Court and changes in public opinion of the Court. It was also suggested that it would be useful to have research focused on various sub-categories of reporting, such as comparisons of court reporting and political reporting, analyses of coverage of nominees and confirmation proceedings, and analyses of press coverage of recusals. Many were interested in new research focused on coverage of the Supreme Court in blogs, social media and other changing media technology.

In another vein, many of the scholars and journalists at the symposium were eager to read more scholarship and analysis of Supreme Court Justices' personal experiences with media and how it shapes their jurisprudence. Research on the influence of prior or current media exposure, analysis of Justices' ability to judge newsworthiness and awareness of journalistic standards, and other data on apparent trends in the Justices' perceptions of the press would all be welcome additions to the literature in the area.

* * *

The scholarly presentations, panels, and workshop sessions of the symposium served the important purpose of bringing together academics and practitioners to engage in a multidisciplinary dialogue about the relationship between the media and the U.S. Supreme Court and the ramifications for the public of various aspects of that relationship. The scholarship contained in this issue, coupled with the proposals made and ideas shared in the workshop session, launches a large-scale conversation about concerns that can be addressed and changes that can be made in both journalism and the judiciary to achieve a balance of interests that serves the people and improves our democracy.

Brigham Young University Law Review

VOLUME 2012

NUMBER 6

SPEECH

- A Failure to Communicate
Erwin Chemerinsky..... 1705

ARTICLES

- Supreme Court Oral Argument Video:
A Review of Media Effects Research and Suggestions for Study
Edward L. Carter..... 1719
- The Justices and News Judgment:
The Supreme Court as News Editor
Amy Gajda 1759
- U.S. Supreme Court Justices and Press Access
RonNell Andersen Jones 1791
- Not a Free Press Court?
Lyrissa Barnett Lidsky 1819
- Cameras at the Supreme Court: A Rhetorical Analysis
Lisa T. McElroy 1837
- Moving Beyond Cameras in the Courtroom:
Technology, the Media, and the Supreme Court
Mary-Rose Papandrea..... 1901
- The Monster in the Courtroom
Sonja R. West..... 1953
- Cameras in the Courtroom in the Twenty-First Century:
The U.S. Supreme Court Learning From Abroad?
Kyu Ho Youm..... 1989