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THE FOURTH BRANCH OF THE GOVERNMENT: EVALUATING THE MEDIA'S ROLE IN OVERSEEING THE INDEPENDENT JUDICIARY

RACHEL LUBERDA*

INTRODUCTION

An August 2006 article in *The New York Times* entitled *Women Suddenly Scarce Among Justices' Clerks* sheds light on the surprising dearth of female law clerks serving in the United States Supreme Court.¹ However, the noteworthiness of this article written by *Times* legal correspondent Linda Greenhouse went beyond its substance. What was most striking about this newspaper article was the buzz it generated among the media, the judiciary, and the average American citizen in response to its publication.² In the national conversation that followed the publication of the piece, many legal analysts, notably journalist Dahlia Lithwick, searched for the underlying cause of this female clerk shortage.³ Lithwick's piece examined a range of possible explanations, such as the role of justices' personal politics in selecting clerks and the lack of female lawyers flocking to "feeder" judges, before ultimately relating the scarcity of women in clerkship positions to the overall lack of diversity within the Court's chambers.⁴ Greenhouse's article, coupled with the reaction it caused, highlighted the media's presence as a considerable voice in the national dialogue surrounding the judiciary. Moreover, Lithwick's thoughtful analysis of the situation evidenced the media's capacity to critically analyze the Supreme Court's actions.

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1. See Linda Greenhouse, *Women Suddenly Scarce Among Justices' Clerks*, N.Y. TIMES, Aug. 30, 2006, at A1.

2. See, e.g., Dahlia Lithwick, *Clerked Around: Is There a Major Girl Crisis in Supreme Court Hiring?*, SLATE, Aug. 30, 2006, <http://www.slate.com/id/2148649>. Lithwick's article on *Slate* was one of many journalistic pieces reporting on the public, media, and judicial reaction to Greenhouse's August 30, 2006 article on female Supreme Court clerks. For background on the shortage of female law clerks, see Tony Mauro, *High Court Clerks: Still White, Still Male*, LEGAL TIMES, May 25, 2006, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1148461530991>.

3. See *id.*

4. *Id.*

Since many journalistic endeavors fail to provide a thorough investigation of legal matters,⁵ Lithwick's article on female law clerks presented a rare glimpse of successful reporting on the judiciary. While much legal scholarship has been devoted to the media's impact on the executive and legislative branches,⁶ little attention has been given to the dynamic between the media and the judiciary. The scarcity of legal scholarship on this relationship is particularly troublesome given the Founding Fathers' intent to "establish a free and vigorous press as an essential part of our unique system of government."⁷ Indeed, some scholars have deemed the media the "fourth branch" of the government because of the necessary check the institution as a whole provides over the three constitutionally-named branches: the legislative, executive, and judicial.⁸ The media's power to choose the news and issues that it reports, coupled with its influence over public opinion, forms the basis of its check over the judiciary.⁹ Focusing, then, on the often-overlooked relationship between the "fourth branch" media and the judicial branch, this Note examines the media's coverage of the judiciary and the implications of media coverage on American democracy and the public's perception of the courts.

As a starting point, this Note rests on the presumption that the media exists as a fourth branch of government, supplanting the traditional notion of the Constitution's three-branch govern-

5. See Mark Obbie, *Winners and Losers*, in BENCH PRESS 153 (Keith J. Bybee ed., 2007) (describing how journalists "distort the meaning of the rule of law" through their reporting on judicial matters).

6. See David Pritchard, *The News Media and Public Policy Agendas*, in PUBLIC OPINION, THE PRESS, AND PUBLIC POLICY 103 (J. David Kennamer ed., 1992) (discussing how policymakers react to critical media coverage). See generally MARTIN LINKS, *IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING* (1986) (documenting the role of the media in shaping government officials, institutions, and federal policies).

7. William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243, 243 (1984).

8. See, e.g., *id.* at 244; see also Walter H. Annenberg, *The Fourth Branch of the Government*, in IMPACT OF MASS MEDIA: CURRENT ISSUES 290, 290-93 (Ray Eldon Hiebert & Carol Reuss eds., 1985); DOUGLASS CATER, *THE FOURTH BRANCH OF GOVERNMENT* 3-4 (1959). For the purposes of this Note, only the media's check on the judicial branch will be analyzed.

9. See William L. Rivers, *The Media as Shadow Government*, in IMPACT OF MASS MEDIA, *supra* note 8, at 279, 282 (Ray Eldon Hiebert & Carol Reuss eds., 1985) (emphasizing that the media set the agenda for public discussion by controlling access to what the public reads); see also Gary A. Hengstler, *The Media's Role in Changing the Face of U.S. Courts*, ISSUES OF DEMOCRACY, May 2003, <http://usinfo.state.gov/journals/itdhr/0503/ijde/hengstler.htm> (describing the media's power to influence the public favorably or unfavorably toward the government).

ment.¹⁰ Furthermore, this Note departs from the long-recognized view that the ever-expanding administrative state exists as the fourth branch of the government.¹¹ Instead, the fourth branch analyzed in this Note can be characterized by the following traits: "autonomy from the government and politicians; having a duty to speak the truth, whatever the consequences; and having primary obligations to the public and to readers."¹² Rather than focus on the quasi-judicial, quasi-legislative, or quasi-executive qualities of the administrative state,¹³ this Note aims to investigate an unconventional branch that does not derive any of its authority from the traditional separation of powers. To accomplish this task, this Note will be divided into five sections.

Part I will explore the federal government's long-standing commitment to "judicial independence"¹⁴ and look to the media, as a fourth branch of the government, as providing a sustainable check on judicial accountability. Recognizing the substantial check the media wields over the judiciary, Part II will then focus on the media's increasingly invasive role in the everyday functions of the judiciary. Emphasis will be placed on the media's functions as "gatekeeper" and "watchdog" in reporting. Faced with the media's growing presence in the once mystified realm of the judiciary, Part III will investigate the ways in which both the media and the courts have undermined effective reporting of the judicial branch. Failures on the part of the media include its obsession with politicizing the judiciary as well as its outcome-determinative approach to reporting on the affairs of the Court.¹⁵ The judiciary undercuts efficient reporting as well, particularly through its detached disposition toward the media

10. Coleman, *supra* note 7, at 244.

11. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (espousing one of the first views of the administrative state as a "veritable fourth branch of the government"). See generally Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 700-02 (2006); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 950 (2000).

12. DENIS MCQUAIL, *MEDIA ACCOUNTABILITY AND FREEDOM OF PUBLICATION* 52 (2003) (discussing the rise of the "Fourth Estate" in describing reporters in the British House of Commons in 1841).

13. See *Ruberoid*, 343 U.S. at 487.

14. See David M. O'Brien, *The Imperial Judiciary: Of Paper Tigers and Socio-Legal Indicators*, 2 J.L. & POL'Y 1, 29-33 (1985) (noting that the tradition of judicial independence has continued through the bicentenary of the United States).

15. Obbie, *supra* note 5, at 159-60.

and the specific procedures it follows in issuing decisions.¹⁶ The combined result of the media's and the courts' actions is incompetent legal reporting, which fuels the American public's anti-court sentiment¹⁷ and fosters inaccurate views of the actual workings of the judicial system.¹⁸

In the wake of such inaccurate reporting, Part IV includes a dual call for reform among the media's current mode of coverage and the courts' communication style in an effort to re-affirm the fourth branch's role in providing a necessary check over the judiciary. Recognizing the need for further reform, Part V examines public journalism, where journalists are called to engage in the democratic process as "'fair-minded' participants,"¹⁹ as an alternative strategy for improving legal reporting. By elevating journalists to the status of public servants,²⁰ public journalism views reporters within an ethical framework that is often missing in many other critiques of legal journalism. This Note then evaluates how an independent judiciary would be better served by using that heightened ethical vision of the public journalist.

I. SEARCHING FOR AN ADDITIONAL CHECK ON THE JUDICIARY

While legal scholars have often expounded the need for a vital independent judiciary, there remains an underlying recognition that the free press serves a vital role in democratic society as a check upon the judicial branch.²¹ Judicial independence has often been hailed as a "centerpiece" of American government since the nation's founding.²² Its prominence as a legal issue has continued well into today. In September 2006, retired Supreme Court Justice Sandra Day O'Connor and Justice Stephen Breyer participated in a conference on judicial independence at

16. Richard Davis, *Lifting the Shroud: News Media Portrayal of the U.S. Supreme Court*, 9 COMM. & L. 43, 45 (1987).

17. Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in BENCH PRESS, *supra* note 5, at 1, 22.

18. Obbie, *supra* note 5, at 154.

19. Theodore L. Glasser & Stephanie Craft, *Public Journalism and the Prospects for Press Accountability*, in MIXED NEWS 120, 123 (Jay Black ed., 1997) (rejecting the view that journalists must disengage from public life).

20. JEREMY IGGERS, GOOD NEWS, BAD NEWS 116 (1998).

21. Gary A. Hengstler, *Dealing with the Media*, CTS. TODAY MAG., Mar./Apr. 2006, at 1, available at <http://www.judges.org/nccm/research/articles/courtstoday-april.pdf>; see also Coleman, *supra* note 7, at 244.

22. Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 708 (1997).

Georgetown University Law Center, where they touted the necessities of protecting the judiciary from outside interference.²³

Because federal judges receive life tenure and cannot have their salaries reduced,²⁴ many scholars have viewed the judicial branch's unique position in government as necessarily insulating it from public and government pressure.²⁵ Other safeguards against intrusive encroachments upon the judiciary's authority include the relative difficulty with which Supreme Court decisions can be overturned by constitutional amendments and the public's inability to submit decisions to popular vote.²⁶ All of these constitutionally-mandated and practical limitations on excessive judicial interference aid in establishing the independent judiciary as it exists today.

The underlying motivation for an independent judiciary can be traced back to the time of this nation's founding. As reflected in *The Federalist No. 78*, written by Alexander Hamilton, "[t]he complete independence of the courts of justice [was] peculiarly essential in a limited Constitution," where the courts' duty to declare acts unconstitutional required protection.²⁷ Such independence was viewed as being essential to the democratic process in that it positioned the Supreme Court "to resist shifts in popular opinion and to reject policies that ran counter to the Constitution's intent."²⁸ Moreover, as John Ferejohn and Larry Kramer emphasized, this commitment to judicial independence, coupled with an insistence on its counterpart, the separation of powers, stemmed from a fundamental belief that laws reflect substantive obligations "that must either be applied to analogous cases or changed through a specified lawmaking process."²⁹ Keeping the judiciary insulated from the public and the other political branches results ultimately in the promotion of "imparti-

23. Dahlia Lithwick, *The High Court Goes Courting: Supreme Court Justices Talk to the Media in Self-Defense*, SLATE, Nov. 14, 2006, <http://www.slate.com/id/2153759/>.

24. U.S. CONST. art. III, § 1; see also THE FEDERALIST NOS. 78, 79, at 377–85 (Alexander Hamilton) (Terence Ball ed., 2003) (arguing that life tenure and financial independence would guarantee judicial independence).

25. See THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 167 (1989); see also James H. Landman, *An Elusive Ideal: Judicial Selection and American Democracy*, 66 SOC. EDUC. 293, 293–94 (2002).

26. MARSHALL, *supra* note 25, at 167.

27. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 24, at 378.

28. MARSHALL, *supra* note 25, at 1.

29. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 966–67 (2002).

ality, fairness, and regularity in the interpretation and application of law," which, in turn, benefits the democratic process.³⁰

The ideal of judicial independence, however, stands in tension with other well-established concerns about the abuse of power by our nation's leaders. This distrust of rulers can be observed in the Founding Fathers' writings, most notably in *The Federalist No. 51*, where James Madison cautioned that men were not "angels" and that "auxiliary precautions" were needed to provide necessary checks on the actions of the government.³¹ Recognizing that power was of "an encroaching nature," Madison called for a system where the three traditional branches "provide[d] some practical security for each, against the invasion of the others."³²

Of concern in this Note is the manner in which the judicial branch has overstepped or exceeded the boundaries of its constitutionally-delegated powers. The present Supreme Court is a remarkably different institution than it was at the time of America's founding. This is due to a myriad of factors, including expanding federal jurisdiction, increasing dockets, and a booming population.³³ Wary of judicial expansionism and the increased discretionary power of the Supreme Court,³⁴ greater scrutiny of the judiciary and its actions may prove to be a worthwhile exercise.

A burgeoning desire for judicial accountability will not run counter to the imperatives of judicial independence. Rather, accountability and judicial independence serve as "means toward the construction of a satisfactory process for adjudication."³⁵ Finding a proper balance between the safeguards of judicial independence and the need for checks on the judiciary is a monumental task. As a result, the involvement of untraditional actors, such as the media, may assist in striking this balance within the judiciary.

A common question emerges in response to the Constitution's delineation of checks and balances across the three conventional branches of the federal government: can another entity serve as a competent, responsible check on the judiciary? One answer, which this Note will focus exclusively on, is that the media, as a private institution, has stepped in as a fourth branch of the government to provide an additional check on the judi-

30. *Id.* at 967.

31. THE FEDERALIST NO. 51 (James Madison), *supra* note 24, at 252.

32. THE FEDERALIST NO. 48 (James Madison), *supra* note 24, at 241.

33. O'Brien, *supra* note 14, at 54–55.

34. *Id.* at 36–37.

35. Ferejohn & Kramer, *supra* note 29, at 974.

ary.³⁶ The media thus becomes more than a mere institution; instead, the media acts as a direct participant in the traditional three-branch system of governance.³⁷

Before analyzing the ways in which the media has exerted its control over the judiciary, it is important to take a step back and scrutinize why the media has in fact emerged as a dominant, private entity influencing the courts. A common explanation for the media's influence is that the First Amendment provides the press with a constitutional safeguard against government encroachment into its professional duties.³⁸ Rather than creating an official government information system, the Founders attributed this function to the press alone, elevating the institution to a special position within the democratic process.³⁹ One of the fundamental responsibilities attributed to the press was a duty to inform citizens about government and public issues; without adequate information, the public would be unable to "exercise its sovereign powers."⁴⁰ Further, the First Amendment's protection for the freedom of the press⁴¹ intended to "curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches."⁴² Given that no branch under the Constitution could infringe upon the rights of the press under the First Amendment, the Founders revealed their desire that the media should possess a critical role in the new American democracy.⁴³ The underlying belief was that "[o]nly a free and unrestrained press [could] effectively expose deception in government."⁴⁴ Armed with the freedom to interpret and report on the various workings of the federal government, the media holds the potential to exert significant influence over the traditional constitutional branches. As a check on the judiciary specifically, the media provides an outlet for "public scrutiny of the justice system," perhaps one of the greatest cornerstones of American democracy.⁴⁵

36. See CATER, *supra* note 8, at 7; TIMOTHY E. COOK, GOVERNING WITH THE NEWS 1-2 (1998).

37. COOK, *supra* note 36, at 164.

38. *Id.* at 109; see also Annenberg, *supra* note 8, at 290.

39. WILLIAM L. RIVERS, THE OPINIONMAKERS 3 (1965); see also LEE C. BOLLINGER, IMAGES OF A FREE PRESS 1 (1991); WILLIAM L. RIVERS, THE ADVERSARIES 8 (1970) [hereinafter RIVERS, THE ADVERSARIES]; WILLIAM L. RIVERS, THE OTHER GOVERNMENT 15 (1982) [hereinafter RIVERS, THE OTHER GOVERNMENT].

40. BOLLINGER, *supra* note 39, at 1.

41. U.S. CONST. amend. I.

42. *New York Times Co. v. United States*, 403 U.S. 713, 716 (1971).

43. *Id.* at 717; see also RIVERS, THE ADVERSARIES, *supra* note 39, at 8.

44. *New York Times Co.*, 403 U.S. at 717.

45. Gary A. Hengstler, *Pressing Engagements: Courting Better Relationships Between Judges and Journalists*, 56 SYRACUSE L. REV. 419, 430 (2006).

Besides deriving its authority from the First Amendment, the media likely acquired its role also as a check over the government from its long-standing association with the workings of efficient democracy. Under this view, the media serves a fundamental role in making democracies run efficiently, even though it may frequently clash with branches like the judiciary.⁴⁶ The media system thus often "reflects the political philosophy in which it functions,"⁴⁷ one that cannot be disregarded as a trivial player in the functions of the government. As John Calhoun Merrill contended, "journalism is largely determined by its politico-social context,"⁴⁸ implying that the need for an additional check on the judiciary has likely emerged from the very demands of American society. Merrill further offered three ways to analyze the media's relationship with the government. One may view the media as one of the following: an "equal contender," a "cooperating servant," or a "forced slave" of the government.⁴⁹ Of these three views, it seems that the media most likely exists as an "equal contender" in the context of its relationship with the judicial branch. As the fourth branch of the government, the media acts as a "self-developed-and-managed" entity⁵⁰ and serves as a check on the actions of the independent judiciary. Thus, as a result, a symbiotic relationship emerges between these two branches—one created under the Constitution and one produced by the needs of the American democracy—as they work to co-exist in society.

Once the media has been recognized as a fourth branch of the government capable of providing a consistent check on the judiciary, it is important to examine the mechanisms by which the media interprets, reports, and shapes information about the judiciary. In the wake of the diminishing presence of the church and the marketplace as viable information sources, the media's role in reporting and circulating information has only magnified.⁵¹ Thus, as the predominant disseminator of information to the public relating to the legal field, the media retains a level of authority that the judiciary cannot ignore.⁵² Given the media's

46. Hengstler, *supra* note 21, at 1.

47. JOHN CALHOUN MERRILL, *THE IMPERATIVE OF FREEDOM*: 24 (1974).

48. *Id.*

49. *Id.* at 24–25.

50. *Id.* at 24.

51. IGGERS, *supra* note 20, at 118.

52. See Paul W. Jamieson, *Lost in Translation: Civic Journalism's Applicability to Newspaper Coverage of the U.S. Supreme Court*, 20 COMM. & L. 1, 5 (1998) (noting how citizens without legal training must rely on the media for their knowledge of the Supreme Court); see also McQUAIL, *supra* note 12, at 5 (regarding the media's capacity to communicate, "most significant was their capacity to: cap-

relationship with the public, the manner in which the media communicates information about the actions of the judiciary serves as an instrumental check on a seemingly independent branch. The following section will focus on how the media, as a conduit of information to the public, influences the judicial system through its professional journalistic functions.

II. THE GROWING PRESENCE OF THE "GATEKEEPER" AND "WATCHDOG" IN AMERICAN SOCIETY

According to William L. Rivers, "full acceptance of the media's new authority and responsibility came at the end of the Watergate crisis, when the President of the United States posed his word against that of the press and lost."⁵³ While it may be difficult to establish the exact moment at which the media acquired its authority in relation to the federal government, the rising influence of the media in the United States has been an ongoing historical process. This has culminated in the society that exists today, one in which the media acts as a "shadow government" that not only checks on the various traditional branches but also controls and limits the public's access to these branches.⁵⁴ Having carved out a significant chunk of authority for itself, the media exerts a tremendous amount of control over the public, which tends to depend on the media for its news rather than on direct experience or observation.⁵⁵ The result of media coverage has been an increased public awareness of the actions of the courts, as reporters translate the decisions of the courts for ordinary citizens.⁵⁶ Based on the public's reliance upon the media for the gathering, processing, and disseminating of information, the manner in which the media reports on issues surrounding the judicial branch has a substantial impact on public perceptions of the judiciary. Thus, the media performs an "essential task[] of public communication, especially in relation to democratic politics and the rule of law."⁵⁷ For a judiciary concerned with preserving its reputation among citizens, it cannot ignore the media's capacity to either foster or erode public confidence in the judicial system.⁵⁸

ture and direct public attention; become a trusted source of information about current events; promote certain opinions"); Hengstler, *supra* note 9.

53. Rivers, *supra* note 9, at 281-82.

54. *Id.*

55. *Id.*

56. Jamieson, *supra* note 52, at 6, 35; see also Hengstler, *supra* note 9.

57. McQUAIL, *supra* note 12, at 5-6.

58. See *id.* at 6.

The media's power to directly contact the public enables it to often set the political agenda.⁵⁹ Implicit in this authority is the ability to maintain and foster public debate, as well as the capacity to serve as a needed check on government abuses.⁶⁰ Depending on whether it is acting in its traditional investigative or adversarial functions,⁶¹ the media can be said to be fulfilling one of its two typically assigned functions: "gatekeeper" and "watchdog."⁶² These two essential media functions provide a helpful framework with which to analyze how the media interprets and reports news stories involving the judicial branch.

As a "gatekeeper," the professional journalist opens and closes the "portal that lets information through the fence" and to the public.⁶³ In the process, the reporter should ideally "screen[] out unreliable messages" so as not to distort the information received by the public.⁶⁴ Based on their own "professional judgment,"⁶⁵ reporters determine which stories or issues to report, which, in turn, affects what the public will know about given topics and events.⁶⁶ Journalists tend to be particularly influential as gatekeepers in the following ways: (1) creating a reality in which the government leaders act; (2) playing the role of public opinion representatives; (3) giving attention to particular issues; and (4) acting as a link between governmental bureaucracies.⁶⁷ Of these various influences, the media's abilities to draw attention to certain issues—at the expense of others—and to shape the ways in which the public perceives its governmental branches are particularly noteworthy for their potential effects on coverage of the judiciary.

The other manner in which the media has made its presence known is through its actions as a watchdog of government abuses. Under a traditional watchdog role, the reporter "keeps

59. Kristine A. Oswald, Comment, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385, 390–91 (1994).

60. *Id.* at 391.

61. Rivers, *supra* note 9, at 283 (quoting Justice Potter Stewart).

62. Mark Schulman, *Control Mechanisms Inside the Media*, in QUESTIONING THE MEDIA 115–16 (John Downing et al. eds., 1990) (describing the media's role as gatekeeper); see Annenberg, *supra* note 8, at 290 (referring to the media's actions as a watchdog); Amanda S. Reid & Laurence B. Alexander, *A Test Case for Newsgathering: The Effects of September 11, 2001 on the Changing Watchdog Role of the Press*, 25 LOY. L.A. ENT. L. REV. 357, 360 (2005) (referring to the "time-honored watchdog role" of the media); Rivers, *supra* note 9, at 283 (highlighting the power of the press as an investigative or adversarial body).

63. Schulman, *supra* note 62, at 115.

64. IGGERS, *supra* note 20, at 117.

65. Schulman, *supra* note 62, at 116.

66. Oswald, *supra* note 59, at 393.

67. ROBERT E. DRESCHER, NEWS MAKING IN THE TRIAL COURTS 14 (1983).

the government accountable for its actions or inactions and plays an important role in the democratic system" by informing the public through his reporting.⁶⁸ The most obvious result of this watchdog-style journalism is that judges "have become less insulated from the media."⁶⁹ As the media has fixated its gaze on the President and Congress, the media's suspicious glance has also frequently fallen upon the judicial branch. It is when the media acts in this watchdog function that it perhaps most effectively performs its role as the fourth branch of the government. As the media becomes more suspicious of the government, fueled by the less than credible actions of the various branches, it only strives to direct more probing questions toward the federal government.⁷⁰ The end result of the media's demand for the continuous investigation of government actors has been the creation of an institution that is often adversarial toward the traditional three branches of government.⁷¹

The next section will discuss how the media's functions as adversarial watchdog and selective gatekeeper affect coverage of the judiciary. However, before delving into this next area for discussion, a brief review of the media's basic journalistic duties as gatekeeper and watchdog reveals that the information communicated to the public has significant consequences. Indeed, Merrill has linked communications media to the attitudes and perceptions possessed by the public. Of note are his determinations that media coverage contributes to "people's awareness of potentialities" as well as their "dissatisfaction and a desire to change."⁷² Therefore, as Merrill concluded, reporters often exude their influence in a manner that impacts how society views its goals and expectations.⁷³ Because of the media's capacity to affect society's perceptions of the judicial branch, it becomes crucial to evaluate how the media fares in completing its essential functions of gatekeeper and watchdog.

III. DE-MYSTIFYING THE JUDICIARY OR PROMOTING PUBLIC SKEPTICISM?

Despite the media's pervasive role in reporting on judicial matters, there are a variety of setbacks that prevent the media from efficiently serving in its capacity as the fourth branch of the

68. Reid & Alexander, *supra* note 62, at 360.

69. Oswald, *supra* note 59, at 406.

70. Rivers, *supra* note 9, at 289.

71. *Id.* at 283.

72. MERRILL, *supra* note 47, at 50.

73. *Id.*

government. These setbacks stem from institutional and procedural features belonging to both the judiciary and the media. According to *Times* reporter Linda Greenhouse, the media and the Supreme Court each maintain conventions that "create obstacles to producing the best possible journalism about the Court, journalism that would provide the timely, sophisticated, and contextual information necessary for public understanding of the Court."⁷⁴ It is only upon recognizing the obstacles created by both the Supreme Court and the media that one will be able to comprehend the pitfalls of current judicial reporting.

Before investigating the specific habits of the Court and the media, it is critical to realize, as a threshold matter, that judges and journalists are "often speaking different languages."⁷⁵ While courts are generally concerned with precedent, Tom Goldstein noted that the press' primary concern is finding novelty and conflict in news stories.⁷⁶ At the same time, the media often pushes for judicial openness whereas the courts press for a greater distance from excessive media scrutiny.⁷⁷ The manner in which the Supreme Court communicates its decisions and the methods by which the media generally gathers information from its sources also stand in direct opposition of one another. Rather than providing interviews or news releases, the Supreme Court speaks predominantly through the opinions it issues, which, for the most part, are indiscernible to the average citizen.⁷⁸ However, unlike their contact with members of the executive and legislative branches, reporters cannot call upon the Court to comment on its actions. As Greenhouse noted, the media is prevented from utilizing the most "obvious journalistic technique for fathoming the Court's actions, that of interviewing the newsmakers to ask them what they meant."⁷⁹ Absent judicial press conferences and interviews, reporters are left to their own devices in deciphering dense, complex legal opinions and in translating them into a form that the public will understand.⁸⁰

74. Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1539 (1996).

75. Tom Goldstein, *The Distance Between Judges and Journalists*, in BENCH PRESS, *supra* note 5, at 186.

76. *Id.* at 185-86.

77. *Id.* at 190-91; see also RIVERS, THE OTHER GOVERNMENT, *supra* note 39, at 12 (noting how courts have attempted to restrict media access).

78. Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119 (1995) (describing how journalists must translate the Supreme Court's opinions into a "form the public can digest"); Greenhouse, *supra* note 74, at 1538; Kaye, *supra* note 22, at 712.

79. Greenhouse, *supra* note 74, at 1543.

80. Ginsburg, *supra* note 78, at 2121, 2124.

Given the relative disharmony between the language of the courts and the language of the media, it should come as little surprise that media coverage of the judiciary often fails to provide a comprehensive analysis of the legal matters at hand.

The Supreme Court's internal motivations when dealing with the media create a barrier that often inhibits media scrutiny. These goals include preserving public deference by restricting the media's inquiry to opinions, downplaying individual differences among the Justices, and depicting the Court as being guided by precedent rather than personal agendas.⁸¹ As a result of these inner motives of the Court, common criticisms of the judiciary are its detached disposition toward the media and its reluctance to supply journalists with information other than opinions.⁸² Often the only source of information for reporters is the Court's Public Information Office, which merely distributes documents and cannot comment on the substantive elements of recent decisions.⁸³ Often with nothing more than documents to rely upon in their investigation, journalists report on the judiciary almost in complete isolation from their subjects and with little outside guidance.⁸⁴ The judiciary's hands-off approach with the media hints at its indifference toward the general conventions of the media, which culminates in the ineffective reporting of its actions.⁸⁵ This judicial detachment only results in media isolation, which makes room for misinterpretation of the Court's legal reasoning and for opportunities for subjectivity in reporting.⁸⁶

Other obstacles faced by the media in its dealings with the Supreme Court involve the judicial branch's distinctive procedural features, which hinder efficient reporting. For instance, the manner in which the Court issues its opinions—clustering announcements over a very short period of time—may enhance inaccuracies within media coverage.⁸⁷ Some scholars argue that the physical location and proximity of the media within the Court fosters a “pack mentality” among the journalists as well as deferential leanings toward the Justices.⁸⁸ Finally, critics point to the structure of the Court-issued opinions themselves as a key

81. Jamieson, *supra* note 52, at 7–8.

82. Davis, *supra* note 16, at 45, 54.

83. Jamieson, *supra* note 52, at 8.

84. *Id.* at 9; *see also* RIVERS, *THE OTHER GOVERNMENT*, *supra* note 39, at 87–88.

85. Greenhouse, *supra* note 74, at 1559; Jamieson, *supra* note 52, at 9.

86. Jamieson, *supra* note 52, at 10.

87. Greenhouse, *supra* note 74, at 1558; Jamieson, *supra* note 52, at 13.

88. Jamieson, *supra* note 52, at 13.

procedural obstacle. Because opinions focus on the specific application of the decision to the parties directly affected, they generally lack any discussion of the decision's scope or practical effects.⁸⁹ This creates an opportunity for pure speculation on part of the journalist, who must attempt to make inferences from the Court's opinion.⁹⁰ Although members of the current Court recognize the frequent call for a "practical effects" section in opinions, they frequently respond that the law does not facilitate the creation of such sections.⁹¹ All of these procedural conventions create a formidable obstacle, on the part of the Supreme Court, to successful media coverage of the judiciary and its actions.

Turning to the media's role in hindering efficient reporting, perhaps the most noteworthy failing is its relative lack of legal training and knowledge. Confronted with the overwhelming task of translating complex Supreme Court opinions to the public, reporters are frequently inaccurate in the legal terminology and reasoning they employ.⁹² Not versed in the legal terminology or requisite background information, many legal reporters are without the proper legal tools to report accurately to the public.⁹³ These deficiencies in legal expertise may serve to promulgate additional defects within media coverage of the judiciary: a propensity to politicize the actions of the judiciary, a preoccupation with outcome over substance, and a thirst for finding conflict in stories.

According to a recent poll on public attitudes towards the judiciary conducted by the Maxwell School of Citizenship and Public Affairs, fifty-seven percent of respondents believed that judges, at times, determine their cases based on their own personal dispositions.⁹⁴ Moreover, while the public considers original intent and precedent as acceptable influences on courts' decisions, it thinks that "ideology, partisanship, and the preferences of other branches" all too readily dictate outcomes

89. *Id.* at 14.

90. *Id.*

91. Ginsburg, *supra* note 78, at 2125.

92. Hengstler, *supra* note 45, 425–26; Jamieson, *supra* note 52, at 2.

93. See Greenhouse, *supra* note 74, at 1549 (describing the "inattentiveness or lack of sophistication" of reporters).

94. See Mark Bernstein, *Balancing Justice*, SYRACUSE U. MAG., Winter 2005–2006, available at <http://sumagazine.syr.edu/winter05-06/features/feature2/index.html> (referring to the data and results of the Maxwell School Poll).

instead.⁹⁵ The media's propensity to perpetuate an inaccurate depiction of the judicial system may be partially to blame for such negative views of the judiciary. Rather than focusing on the independence and impartiality of judges, the media often tends to politicize the decisions made by courts, likely driven by its thirst for conflict and its pursuit of newsworthiness.⁹⁶ Journalists' limited legal experience may also fuel their tendency to emphasize Justices' personal beliefs as well as the ideological implications of a decision. Politicizing the judicial process results in "distort[ing] the judicial role in the public's eye."⁹⁷

John M. Walker presented an interesting look at the actions of the media in the context of confirmation hearings.⁹⁸ Walker found that the media tended to question nominees on their agreement with precedent and their political views, continuing a common misconception that judges ignore legal precedents in pursuit of their personal beliefs or affiliations.⁹⁹ Such a misrepresentation of judges' reliance on personal or political factors "foster[s] a serious misconception of the judicial function and thereby undermine[s] an independent judiciary."¹⁰⁰

Intertwined with the media's propensity to politicize or personalize judges' decisions is the media's preoccupation with case outcomes over legal reasoning. Mark Obbie defined "results-oriented legal journalism" as the media's tendency to report on the "outcome of a court case without acknowledging the legal authority that the court cited in reaching that outcome."¹⁰¹ Based on the media's preference for story-telling, outcome-focused journalism places a priority on brevity, simplicity, impact of the decision, and reactions to the decision within legal journalism.¹⁰² By placing the decision out of context and avoiding any explanation of the underlying legal reasoning, the media perpetuates a view of the judiciary as haphazardly reaching its conclusions and simply relying on personal ideologies.

95. John W. Scheb & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 184-86 (2001).

96. Goldstein, *supra* note 75, at 185 (emphasizing that the press are interested in seeking novelty and conflict in their stories); Jamieson, *supra* note 52, at 7-8, 15.

97. John M. Walker, Jr., *Politics and the Confirmation Process: Thoughts on the Roberts and Alito Hearings*, in BENCH PRESS, *supra* note 5, at 125.

98. *Id.*

99. *Id.*

100. *Id.* at 126.

101. Obbie, *supra* note 5, at 159.

102. *Id.* at 158-61.

According to Lithwick, *Kelo v. New London*¹⁰³ exemplified the media's predilection for focusing on the outcome, rather than on the legal reasoning, of a decision.¹⁰⁴ Media criticism of the Supreme Court's decision upholding the government's power of eminent domain ignored "any recognition of the nuanced dance of legislative interpretation, statutory construction, and the application of precedent" that supported the outcome.¹⁰⁵ By focusing exclusively on outcome, journalists have all too readily omitted one of the essential "five W's" of journalism when reporting on legal substantive issues: the "why."¹⁰⁶ Because of such disregard for the legal standards and explanations supporting decisions, the public receives an inaccurate depiction of the real workings of the judicial system—one where impartiality and indiscriminate decision-making trump legal precedent and reasoning.

The media's appetite for conflict is the driving force behind both its affinity for politicizing judicial decisions and its preference for covering outcome over substance in articles. The triumph of the journalist "hero" during the Watergate era opened the floodgates for ambitious reporters eager to find ways to bring down corrupt government officials.¹⁰⁷ As a result, the media as the watchdog "mutated into the attack dog," amplifying the "worst aspects of journalism's embedded cultural traits."¹⁰⁸ Skepticism morphed into a deep distrust of the government, fueling the media's desire to seek out conflict and scandal in its reporting. Indeed, as David Merritt suggested, the media's mutation into attack dog in the post-Watergate era resulted in viewing "conflict as the most valued journalistic coin."¹⁰⁹ Linked to the media's emphasis on conflict is its preoccupation with reporting dramatic events and developments.¹¹⁰ By placing such a high value on conflict and drama in reporting, the media is more likely to produce articles that emphasize the political differences of judges. Moreover, such a thirst for tension may lead reporters to focus solely on the outcome of cases, which they may view as the ultimate resolution of conflict in their stories. Thus, the media's three fundamental defects—its politicization of the judi-

103. See *Kelo v. City of New London*, 545 U.S. 469 (2005).

104. Dahlia Lithwick, *The Internet and the Judiciary: We Are All Experts Now*, in BENCH PRESS, *supra* note 5, at 177.

105. *Id.*

106. See Obbie, *supra* note 5, at 158. The "five W's" of reporting are as follows: who, what, where, when, and why.

107. DAVID MERRITT, PUBLIC JOURNALISM AND PUBLIC LIFE 62 (1998).

108. *Id.* at 63.

109. *Id.*

110. See Warren Francke, *The Evolving Watchdog: The Media's Role in Government Ethics*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 109, 116–117 (1995).

ciary, its fixation with outcome over substance, and its appetite for conflict—remain inextricably linked.

Due to the shortcomings of media coverage—perpetuated by features of both the Court and the media—an imprecise picture of the independent judiciary emerges before the public. Faced with this disingenuous depiction of the Supreme Court, ordinary citizens may become increasingly skeptical of the actions of the judiciary. The media's personal predilection for viewing all government branches with suspicion may further fuel the public's escalating cynicism.¹¹¹ A strategy that simply seeks out scapegoats within the various branches of the government fails to account for the intricate nuances and institutional conditions behind reporters' stories.¹¹² Thus, the media, acting in its traditional adversarial watchdog role, may be responsible for eroding public confidence in the judiciary.¹¹³ According to Robert M. O'Neil, "intense media coverage has made a fragile institution more visible and . . . vulnerable"¹¹⁴ As a result, O'Neil asserted that "bench-bashing" has moved from the fringes of society to the mainstream.¹¹⁵ Lastly, Roscoe Pound believed that one of the causes underlying the public's dissatisfaction with the judiciary was due to "ignorant and sensational reports in the press."¹¹⁶ The end result in Pound's mind was that the public negatively perceived the daily work of the courts and believed that the administration of justice was a "game" rather than a substantial proceeding grounded in legal analysis.¹¹⁷ Although media coverage of the judiciary may never overcome all of the aforementioned obstacles, a push toward reform, on part of both the Court and the media, may assist in improving the fourth branch's necessary check over the judicial branch.

IV. TOWARD AN IMPROVED MEDIA CHECK ON THE JUDICIARY

As William T. Coleman emphasized, the "role and responsibility of a free press in preserving a democratic society and in ensuring that government is responsive to the people are more

111. JAMES FALLOWS, *BREAKING THE NEWS* 7, 243 (1996).

112. See Francke, *supra* note 110, at 113.

113. See Geyh, *supra* note 17, at 22.

114. Robert M. O'Neil, *Assaults on the Judiciary*, 34 SEP. TRIAL 54, 54 (1998).

115. *Id.* at 55.

116. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address at the Twenty-Ninth Annual Meeting of the American Bar Association (Aug. 29, 1906), in 10 CRIME AND DELINQUENCY 355, 370 (1964).

117. *Id.* at 370–71.

vital today than ever before.”¹¹⁸ If the media is to succeed in its duties as the fourth branch of the government, various reforms in coverage will be necessary. As interdependent actors responsible for different failings in legal reporting, both the judiciary and the media will need to implement these reforms. These reforms will occur in two different capacities: in one instance, these improvements will involve institutional and procedural features, whereas in the second instance, suggested reforms will call for broader changes in the ways the judiciary and the media pursue their respective responsibilities.

The judiciary, notably through the actions of the Supreme Court, may facilitate the reporter’s job by choosing to issue its opinions differently and by assisting in the translation of dense, technical legal information. Rather than issuing multiple opinions over a short period of time, Greenhouse suggests that the Court attempt to space out the publication of its decisions.¹¹⁹ This deliberate choice to spread out the issuing of opinions would enable reporters to devote more time to the preparation of their stories on the diverse array of opinions issued every term. Given the media’s complex task of translating opinions for the public, the Court may also assist the media by making its opinions more accessible.¹²⁰ This can be achieved by crafting what would otherwise be complicated legal reasoning in a more “readily obtainable” and “understandable” fashion.¹²¹ Court clarification on confusing legal matters would only further promote efficient legal reporting.

Guaranteeing that the public receives a comprehensive translation of judicial opinions involves more than the minor changes mentioned above. It also requires a fundamental shift in the way the Court perceives its obligations to the public and the media. Instead of distancing itself from public and media scrutiny, the Court should “take more affirmative steps to ensure that the journalist, and thus the public, better understands the decisions.”¹²² A significant affirmative action by the Court would entail an abandonment of its “prized goal of deference”¹²³ and a stringent adoption of a policy of openness. Undoubtedly the Court has increasingly sought out the spotlight by providing more interviews.¹²⁴ Current Chief Justice John Roberts’ Novem-

118. Coleman, *supra* note 7, at 253.

119. Greenhouse, *supra* note 74, at 1561.

120. Jamieson, *supra* note 52, at 17; Kaye, *supra* note 22, at 723.

121. Kaye, *supra* note 22, at 723.

122. Jamieson, *supra* note 52, at 35.

123. *Id.*

124. Davis, *supra* note 16, at 46–47.

ber 13, 2006 appearance on the television program *Nightline* is indicative of a growing trend among Justices to participate in a national media dialogue.¹²⁵ According to Lithwick, as ordinary “Americans begin to see their justices as real people with real concerns and real dandruff, their fear of an isolated, elitist, and out-of-touch judiciary begins to recede.”¹²⁶ Ultimately, by reaching out to the media, the Court will not only be perceived as being more open by the public, it will also be able to engage citizens using the media as its medium.

The media, for its part, can promote better legal coverage by instituting changes in the way it reports on the judiciary. A central focus for any improvement must involve a commitment to “provide qualitative news services” on the judiciary.¹²⁷ Given the general lack of legal expertise among reporters, Obbie advocates that the media should employ legal specialists and that reporters should increase legal literacy.¹²⁸ A pool of legal-savvy journalists versed in the requisite legal terminology and reasoning will be more successful in providing the public with accurate reporting of the judiciary and its actions.¹²⁹ According to Edmund B. Lambeth, one of the crucial principles journalists must follow is the principle of truth-telling.¹³⁰ Promoting this principle requires “apprenticeship, dialogue, and attention to detail” on the part of the reporter.¹³¹ Unless a journalist is fluent in the vocabulary of specialists—such as for legal coverage—he or she will be merely scraping the surface of the news rather than providing adequate information to the public.¹³² Appropriate legal training, coupled with reflection on the part of the reporter, may ultimately result in legal reporting that no longer needs to resort to conflict-driven news and dramatic developments in recounting the activities of the courts.

In addition to gaining legal knowledge, the media must also strive to produce a more accurate depiction of the Supreme

125. See Lithwick, *supra* note 23 (noting how Justice Roberts embarked upon a “media charm offensive” in the fall of 2006).

126. *Id.*

127. Elliot D. Cohen, *Journalism, Rational Subjectivity, and Democracy*, 9 U. FLA. J.L. & PUB. POL’Y 191, 206 (1998).

128. Obbie, *supra* note 5, at 170–72.

129. Greenhouse, *supra* note 74, at 1561.

130. EDMUND B. LAMBETH, COMMITTED JOURNALISM 4–27 (1992). Lambeth further expounds on the other principles journalists should follow, including justice, freedom, humaneness, and stewardship. *Id.* at 29–33.

131. *Id.* at 25.

132. *Id.* at 25–26. For Lambeth, adhering to the principle of truth-telling requires that a reporter gain specialized knowledge of a subject area to properly ascertain the truth of any story.

Court—one that is not driven by its desires to politicize the judiciary or by its preoccupation with the results and outcomes of cases.¹³³ To advance a more precise portrayal of the judicial branch, the media must comprehend that a “useful story about a Supreme Court decision . . . entails more than an accurate statement of the holding.”¹³⁴ More attention must be given to the context of a decision, the decision’s procedural history, the arguments advanced by the parties during the proceedings, and the decision’s various implications for the public and the Court.¹³⁵ Simply put, reporters must be willing to alter the way they currently frame their articles on the judiciary.¹³⁶ The media must only look to some of the articles produced by current legal reporters, such as Linda Greenhouse and Dahlia Lithwick, to find noteworthy examples of effective legal journalism.¹³⁷ While Greenhouse and Lithwick are not without their own flaws, they produce the type of legal journalism to which more reporters should adhere: a comprehensive analysis of the practical, institutional, and historical factors that affect the judiciary in its decision making.

Perhaps the most significant transformation of the media would result from the institution’s recognition that it does in fact provide a sustainable check over the judiciary. As the primary source by which the public obtains its information about the judiciary, the media retains its powerful position in American society through its selective coverage of issues and the manner in which it chooses to report on legal news.¹³⁸ As James Fallows has proposed, journalists face a tough choice today: “[d]o they want merely to entertain the public or to engage it?”¹³⁹ If journalists elect to educate the public through their reporting, they will be

133. See *supra* text accompanying notes 92–110 (describing the media’s emphasis on personal conflict, ideology, and outcomes in their coverage of the judiciary).

134. Greenhouse, *supra* note 74, at 1545.

135. *Id.*

136. See Richard V. Ericson, *The Future of Fact: How Journalists Visualize Fact*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 83, 88 (1998) (describing journalists’ unwillingness to deviate from their established frames for their articles).

137. See Greenhouse, *supra* note 1; Lithwick, *supra* note 2; *supra* text accompanying notes 1–5 (examining Greenhouse’s and Lithwick’s recent articles); see also, e.g., Dahlia Lithwick, *Doctor, There’s a Lawyer in My Womb: The Supreme Court Attempts to Understand Partial-Birth Abortion*, SLATE, Nov. 8, 2006, <http://www.slate.com/id/2153280/>. While Lithwick’s “Supreme Court Dispatch” is not without its editorial comments, it is a useful example of effective reporting on the judiciary with its discussions of procedural history, Justices’ involvement in oral argument, and legal precedent.

138. See *supra* Part II.

139. FALLOWS, *supra* note 111, at 267.

providing the average citizen with the necessary tools to participate in American democracy.¹⁴⁰ Proponents of public or civic journalism have called for reporters to “reestablish [their] implicit ‘compact’ with the public by engaging the citizenry actively” in their coverage.¹⁴¹ At the center of civic and public journalists’ calls for reform is a recognition that the media has failed in its basic institutional capacities of linking the government and the public.¹⁴² This Note’s final section will examine public journalism as an alternative avenue of reform for the media, taking into account the ethical dimensions of being a legal journalist. It will also examine public journalism’s impact on the independent judiciary in the context of the dynamic relationship between the press and the courts.

V. PUBLIC JOURNALISM: A HIGHER CALL FOR LEGAL JOURNALISTS REPORTING ON THE JUDICIARY

Journalists, as part of a distinct private entity, stand out from their peer professional institutions. As Robert M. Steele has asserted, they are “unparalleled in their responsibility to gather information and present it to the public [and] to seek out the truth and report it as fully as possible.”¹⁴³ Due to their primary status as conduits of information for the public, reporters satisfy a “societal mandate to tell the community about significant issues, so people can make important decisions in their lives”¹⁴⁴ Despite its critical duty to circulate information to everyday citizens, the media often “ignores its obligations to effective public life.”¹⁴⁵ This final section will address the impact of public journalism on legal reporters, as well as the consequences such a form of journalism will have for the independent judiciary.

Drawing from Edmund B. Lambeth’s “framework of principles for journalism ethics,”¹⁴⁶ this Note initially attempts to apply a broad ethical framework to the professional pursuits of legal reporters. As a starting point, Lambeth noted that a system of journalism ethics “should embody the values of Judeo-Christian

140. Coleman, *supra* note 7, at 252; FALLOWS, *supra* note 111, at 269.

141. Jamieson, *supra* note 52, at 3–4.

142. See FALLOWS, *supra* note 111, at 247.

143. Robert M. Steele, *The Ethics of Civic Journalism: Independence as the Guide*, in MIXED NEWS, *supra* note 19, at 162, 173.

144. *Id.*

145. MERRITT, *supra* note 107, at 6. Merritt further claims that journalism and public life were co-dependent and that journalism should change to reflect that relationship. *Id.*

146. LAMBETH, *supra* note 130, at 23.

and classical Greek civilizations" because these values have influenced society over time.¹⁴⁷ Therefore, journalism has "inherit[ed] the legacy of the larger society: the principles of truth, justice, freedom, humaneness, and individual responsibility."¹⁴⁸ Among such diverse principles, three stand out because of their relationship to journalists' coverage of the judiciary: the principle of truth, the principle of justice, and the principle of stewardship. Each principle offers a different glimpse into the role of the media in reporting on legal affairs.

First, the principle of truth highlights the "intimate relationship between competence and a journalist's capacity as a moral agent."¹⁴⁹ As described in the preceding section, journalists who are not well-versed in a specialized area, such as the law, fail to fulfill their moral duties as truth-tellers.¹⁵⁰ The principle of justice relates to a reporter's "assumed responsibility, as a practitioner under the First Amendment," to monitor the Constitution and to observe "whether the preamble's promise to establish justice and promote the general welfare has, in fact, been fulfilled."¹⁵¹ Here, the principle of justice's concern with scrutinizing the guarantees promised by the Constitution echoes certain elements of public journalism, which will be discussed below. Lambeth's principle of stewardship likewise parallels many aspects of public journalism, most notably with its emphasis on the role of the press in engaging public dialogue about issues concerning the democratic process.¹⁵² Under the stewardship view, journalists "are in a unique position to *help* keep the wells of public discourse unpoisoned, if not wholly clean."¹⁵³ Taken together, these three principles lay the groundwork for a discussion of the public journalism model.

Public journalism is rooted in the notion that "journalism has a role beyond telling the news," a role that transforms the reporter from a detached, disinterested observer to a "fair-minded participant."¹⁵⁴ Readers are no longer simply viewed as

147. *Id.*

148. *Id.* Lambeth traces the rise of journalism ethics from when they were first conceived in the Renaissance, through their birth during the Enlightenment, and ultimately culminating in their current status within modern Western journalism.

149. *Id.* at 25.

150. See *supra* text accompanying notes 130–32.

151. Lambeth, *supra* note 130, at 28.

152. *Id.* at 32; see also Glasser & Craft, *supra* note 19, at 124 (describing public journalism's shift from "journalism of information" to "journalism of conversation").

153. LAMBETH, *supra* note 130, at 32.

154. MERRITT, *supra* note 107, at 139.

consumers of information; rather, they become “potential actors . . . arriving at democratic solutions to public problems.”¹⁵⁵ It is the responsibility of the press to facilitate such resolution by actively engaging public discourse. The definitive goal of public journalism then is to advance civic life by “fostering participation and debate.”¹⁵⁶ By characterizing journalists as democratic advocates, the public journalism model attaches an ethical significance to reporters’ actions: journalists “have a duty to transmit the information that we as citizens in a democracy must have to be active participants in self-governance.”¹⁵⁷ Yet, it is important to realize that while public journalism encourages democracy, it does so “without advocating particular solutions” to public problems.¹⁵⁸

What is particularly noteworthy about the public journalism approach is the ease with which it discusses values. As Merritt has emphasized, reporters tend to be uncomfortable associating values with their profession.¹⁵⁹ The main reason for this caution concerning values is the media’s preoccupation with the nearly unattainable ideal of objectivity.¹⁶⁰ Rather than retreating from values, public journalism aims to “develop the skill and vocabulary for dealing with values as they impinge on public issues”¹⁶¹ Thus, public journalism requires that journalists confront and manage values relating to the function of the democratic system. Reporters should not just observe and circulate news stories; instead, they should promote democratic values and provide a forum for community discourse about public problems.

Public journalism also concerns itself with finding and promoting the common good.¹⁶² To determine what is a common good or interest requires deliberation among the public. For

155. *Id.* at 140.

156. McQUAIL, *supra* note 12, at 60. McQuail further notes that the “main thrust” of public journalism is producing a “more engaged form of journalism,” one that forges a closer relationship between the media and the community at large.

157. IGGERS, *supra* note 20, at 68.

158. ARTHUR CHARITY, *DOING PUBLIC JOURNALISM* 146 (1995) (emphasis omitted).

159. MERRITT, *supra* note 107, at 95.

160. *See id.* (claiming that “dealing in values” and “journalistic objectivity” are not incompatible); *see also* IGGERS, *supra* note 20, at 91 (noting that while objectivity has been discredited, it remains a legacy that “shapes journalists’ daily practices”); McQUAIL, *supra* note 12, at 60 (“[public journalism] parts company with the tradition of neutrality and objective reporting”).

161. MERRITT, *supra* note 107, at 96.

162. *See* C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 354 (1998) (discussing the pursuit of common interests); Clifford G. Chris-

democracy to flourish, citizens must be "fully informed about events and circumstances and have access to argument, alternative points of view, and guidance."¹⁶³ Under the public journalism model, the media should "intervene in public affairs—not on behalf of particular viewpoints, but on behalf of invigorating public involvement."¹⁶⁴ As an active press encourages public participation and deliberation, society, as a whole, will be better able to reach a consensus over common goods and interests.

As was the case with all of the reforms suggested in Part IV, the media's responsibility for improving legal coverage is purely voluntary.¹⁶⁵ Having explored the broad ethical dimensions of the public journalism model, one may now turn to examining the specific types of reforms associated with this alternative media approach. In order to better serve democracy, public journalists should essentially adhere to the reforms mentioned in Part IV, including improving legal literacy, avoiding the politicization of judicial decision making, and focusing on the substance—rather than the outcome—of cases.¹⁶⁶ Regarding the media's traditional watchdog role, public journalism requires an added dimension to that journalism function. Rather than simply scapegoating corrupt officials, public journalism asks whether the "public voice is the basis" for pursuing public action against the government.¹⁶⁷ Another significant difference between the reforms associated with public journalism and those described in Part IV is the pursuit of publication values under the public journalism model. For instance, Denis McQuail has recognized five "publication values" that public journalists should utilize in their reporting: truth; freedom; order and cohesion; solidarity and equality; and right purpose and responsibility.¹⁶⁸ By pursuing those values, public journalism establishes a higher calling for reporters—one that engages the public in active deliberation and promotes the democratic process.

Having analyzed the goals and reforms associated with the public journalism model, the following question emerges: how will the media's pursuit of public journalism impact its relationship with the judiciary? The media exerts significant influence over the judiciary based on its close relationship to the public

tians, *The Common Good as First Principle*, in *THE IDEA OF PUBLIC JOURNALISM* 67 (Theodore L. Glasser ed., 1999).

163. MCQUAIL, *supra* note 12, at 52.

164. Baker, *supra* note 162, at 355.

165. See MCQUAIL, *supra* note 12, at 297.

166. See *supra* Part IV.

167. CHARITY, *supra* note 158, at 133, 136.

168. MCQUAIL, *supra* note 12, at 68.

and the way it oversees the democratic process through its traditional gatekeeper and watchdog functions. However, the goals of public journalism drastically enhance the involvement of the media in what would otherwise be restricted territory. Under the public journalism model, the media no longer stands on the sidelines of the political arena. On the contrary, reporters fully engage the public and the judiciary by acting as fair-minded participants.

A common criticism of public journalism is that it intrudes upon the democratic process and becomes too involved in a system that would otherwise only involve citizens.¹⁶⁹ Faced with that intrusion, the judiciary may worry that an overtly active press will encroach upon its independence. Judges may worry that public journalists will become zealous activists or advocates, “force-feeding” political issues and solutions to the public.¹⁷⁰ Wary of journalists becoming political actors, the judiciary may be reluctant to welcome civic-minded reporters, which, in turn, may only amplify pre-existing defects in legal reporting. Public journalism’s call for politically-conscious reporters to directly engage public discourse may seem particularly invasive to the judiciary, who has long grown comfortable with the role of the press as a passive bystander. Thus, while the judiciary may be receptive to procedural reforms, such as altering the method of issuing opinions, it may be less willing to accept reforms that promote the development of a politically-active press.

What may ultimately facilitate the judiciary’s acceptance of public journalism is recognition of the fact that the media, as a fourth branch of the government, exerts tremendous influence over both the public and the courts. In addition to disseminating information to the public, the media shapes legal coverage of the judiciary through its “gatekeeping” and watchdog functions, as well as through the content and quality of its reporting. The public journalism model, with its emphasis on the heightened involvement of the press in public deliberation, seems to coincide with the view of the media as the fourth branch of the government. Indeed, by actively engaging and educating the public through its reporting, the media likely serves its most vital check over the judiciary. If the media is to fulfill its responsibilities as an additional check over the judiciary, an affirmed commitment to initiating public engagement appears crucial. Reluctance, on part of the judiciary, to accept the expanded role of the media may subside as judges recognize that public journalism aims to

169. JAY ROSEN, *GETTING THE CONNECTIONS RIGHT* 12–13 (1996).

170. *See id.* at 15, 59.

promote democracy rather than to curtail judicial independence.

CONCLUSION

Finding the appropriate balance between judicial independence and judicial accountability is no easy feat. However, this Note has attempted to illustrate the media's burgeoning influence as a fourth branch of the government, which prevents the judiciary from becoming too insulated from public opinion. According to Stephen Bright, "[e]nsuring independent courts in the current climate" of the American legal system necessitates "positive action."¹⁷¹ This Note foresees the action of the media, as a fourth branch of the government, as providing one aspect of this "positive action." As the media pursues more efficient legal reporting and fosters greater public awareness of the courts, it will accomplish more than a mere co-existence with the judiciary. The media will ultimately assist in striking the adequate balance between judicial independence and accountability.

171. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 326 (1997).