

# THE MEDIA AND THE COURTS

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What I have to say will necessarily contain generalizations that give new meaning to the word "sweeping", all to accommodate limitations of time and expertise. So I ask for your indulgence in advance and hope that the wide brush strokes I use to fill my canvass don't offend your sense of perspective too much. I acknowledge too that there are varieties of medias, courts and even publics, but because I tend to treat them in this talk as monoliths, I accept in advance any criticism flowing from my failure to make distinctions between them.

There are many ways to approach this topic, most of which I'm not allowed to talk about. The question of gag orders, prior restraint, cameras in the courtroom, fair trial vs. free press -- all of these are the classic aspects of a media - court relationship and have been much written about. Since there is nothing I can offer about these high-profile pre-occupations without attracting the attention of the Judicial Council, I had to find another way to address the issue. The second tier in the relationship is the one which acknowledges the importance of the media to the courts and focuses on how best to keep the relationship open and healthy. This is the layer that addresses the need for more co-operation from the judiciary; a greater willingness to make more accessible its systems and its language; a greater role in training journalists who cover the courts, as Chief Justice Lamer suggested several years ago; and better clarification of the permissible limits of

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media conduct while a case is before the courts. All these are approaches I agree with, but all these too have been canvassed extensively and enjoy, I think, a healthy consensus from the judiciary. It is, after all, hard to quarrel with the theory that justice must not only be done, it must be seen to be believed.

It is to the third layer that I want to address myself, the foundational one that examines the respective institutional roles of the media and the courts.

For me, any discussion of the relationship between the media and the courts makes no sense unless we start with first principles. Without this intellectual grid, any discussion of the other two layers takes place without context and we are left in a perpetual and frustrating state of adversarial misunderstanding.

In many ways, the media and the courts perform analogous functions. We both watch the public; we both judge it; and we both attract criticism when our observations or judgments offend someone's alternative perspective. We are both expected to be fair, impartial, and independent of the persons we are observing or judging. We are both accepted as being central to a properly functioning democracy and we are both, from time to time, resented for this centrality.

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But there are also fundamental differences. The courts operate according to accepted legal standards and principles and can be judged accordingly; the media, which regrettably underreaches by treating itself as a trade rather than a profession, operates according to no overriding governing code and cannot as easily therefore be held to account. The courts watch only those aspects of the public brought to them by a litigant for review; the media is free to take its flashlight anywhere. Courts judge only those disputes before them; the media judges anything and anyone it wants. Judges, ever since the Magna Carta, have been truly independent, and can only be removed from office for manifest breaches of public confidence; the independence of journalists, on the other hand, is frequently circumscribed by the philosophies or economies of their owners. Fairness and impartiality for courts means hearing both sides with an open mind; for the media being fair frequently means getting as many of the facts as you can, in the deadline allotted.

Although both the media and the courts are institutional cameras taking snapshots of the public at various stages of its evolution, the media is by far the more influential and powerful of the two, because its camera is bigger, has

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more equipment, and above all, because it gets to decide which pictures it wants to take.

This is the source of the media's power and it is a power people in my generation have seen flourish. I was born the year after the second world war ended. The next 50 years contained, in my mind, the most dramatic constellation of economic, social, political and legal transformations ever to be found in a single half century, most of which I learned about from the media. It is no accident, in my view, that these reformations occurred when they did. The five previous decades had started with waves of immigration and the universality of industrialization, then moved through the two world wars which sandwiched the Dionysian hedonism of the 20's and the Apollian despair of the 30's. Most immediately and profoundly, the year before I was born exploded an atomic bomb and ended the genocidal nightmare of the Holocaust.

The pressure these events put on our understanding of human nature and needs eventually pushed us against most of our existing institutions and social alignments and bent them into new shapes. Once we recovered from the unforgivable years we had allotted to Joseph McCarthy's venom, and once we

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finished our post-war recuperative indulgence with our taste for banality and conformity in the 1950's, we finally put the pieces of the previous half-century together and started our Howl in the 60's.

What happened next were insistent demands from women, minorities, disabled persons, children, workers, gays, environmentalists, consumers, nationalists and aboriginal people, to name a few. Not that any of these issues were new -- North American history was replete with episodic requests for social revisionism from these groups. But by and large, the pre-war efforts on behalf of those on the margin who wanted in never engaged enough of the public's attention to find its way into the enthusiasm of elected officials and, therefore, into legislated change.

The difference in my generation was that the public's conscience was alerted and what made the difference, in my opinion, was the media. Never having experienced the heyday of yellow journalism for whom the 3R's, according to one columnist, were Rape, Rot & Ruin, I grew up in an era when for me journalism meant the Pentagon Papers and Watergate and This Hour Has 7 Days and the Journal. To many of us, the media seemed compassionate, fearless and ready to

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lend its influence to the forces for change who were unhappy with the way the status quo had distributed society's amenities.

And here the media merged seamlessly with the courts. It should come as no surprise to learn that many of the barriers to social entry sought by those pressing their noses to the system's windows were legal ones. One by one, with assistive attention from the media, they came down. One of the more defining examples of this court / media domino effect is the *Murdoch* case, galvanizing this generation's women's movement, a movement, I observe parenthetically and nostalgically, which at the time had the apparent support of both of Canada's official genders. *Murdoch* was the 1973 Supreme Court of Canada decision applying legal doctrine with a century old pedigree. The doctrine had the effect at the end of her marriage, of denying a farm wife any share of the farm she practically ran during the marriage.

The media grabbed the story, and jolted the public out of its complacency about family law. Most Canadians at the time thought universes and laws unfolded as they should, and were generally unaware of the economic consequences of marriage breakdown. Irene Murdoch, through the media,

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introduced those consequences to the wives of this country and the reaction was swift. By the end of five years, even before any statutes were changed, the Supreme Court reversed the principles in *Murdoch* with a 1978 case called *Rathwell*, and most provincial legislatures subsequently changed their family property law regimes to recognize marriage as a social and economic partnership with a more equitable distribution of entitlements on separation.

The media clearly played a leading if not primary role in changing public attitudes and the law, but *Murdoch* is by no means the only example of how the media's reaction to a court case helped formulate public policy. There can be little doubt that as the chief informer to the public, the media also plays a role as chief *former* of that public's opinions. Because the media decides what the public will know, the media acts as the gatekeeper of public policy, agendas and ideas. It decides what to bring to light and how to light it.

In my view, this puts the media in a kind of fiduciary role vis a vis a public dependent on it for information and the ideas that flow from it. Walter Lippmann conceded that people tend to define first and then see, rather than the other way around. This means we tend to observe events through our own

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preconceptions, most of which we get from the media. If I keep hearing that reducing deficits is government's over-riding duty to future generations, I may, over time, stop worrying about how a lack of resources will affect this one. If I keep hearing the slogan "Can we afford to", I may stop asking "Can we afford not to". If I keep hearing that the courts are trespassing on legislative territory, I may stop asking if the decision is fair. With daily, monthly, or yearly reinforcement about how a particular issue, or part of the world, or person is portrayed, most of us will, in the absence of evidence to the contrary, come to accept the media's perception as reality.

The courts are no less subject than any other institution to the media's transmission of perceptions to the public. But because the commodity the courts trade in is justice, and because justice is so universally seen as a defining entitlement, I thought it was worth spending my remaining minutes clarifying the context in which the justice stage seems to be lit by the media.

The 15th anniversary of the *Charter of Rights and Freedoms* provides a perfect *mise en scène* for this discussion because it is, in my view, the *Charter* that has brought most of the judicial myths out of the closet, dusted them off and

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paraded them even though the styles do not fit. The primary magnetic myths to which the media and therefore the public have become so attracted, are those four which hold that judges should only interpret, not make law; that "biased" means having opinions; that the courts have become politicized; and that the courts should pay more attention to public opinion. I make these comments not to resist criticism, because I appreciate that the media is neither the court's press agent nor adversary; rather, I make them in the spirit of trying to keep the criticisms constructive.

To begin with, it is, with respect, unrealistic to say that judges should not make law, they should only interpret it. Almost every time judges interpret, they make law and, implicitly, weigh competing values. Long before we had a *Charter*, we had judges taking values into account when they interpreted statutes or phrases or legal entitlements. When we consider the following examples, we see how difficult it is to say that these judges were not reaching legal conclusions based on their understanding of, or sympathy, or antipathy for current social values:

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The judge who in 1873 said "the paramount destiny and mission of women are to fulfil the noble and benign office of wife and mother"; the judge who in 1915 thought admitting women to the legal profession would be a "manifest violation of the law of ... public decency"; the judge who said in 1905 that fault-based support laws were desirable because wives "ought to be preserved from imminent temptation"; the court that said in 1975 that property rights take precedence over peaceful picketing; the courts that said in 1949 that sanctity of the contract and restrictive covenants took precedence over the rights of Jews to purchase property; and the court that said in 1939 that freedom of commerce took precedence over the rights of Blacks to be served beer; not to mention the entire history of common law. That was all law making, it was all weighing and applying values and policy, and it was all before the *Charter*.

Weighing values and taking public policy into account does not impair judicial neutrality or impartiality. Pretending we do *not* take them into account, and refusing to confront our personal views and be open in spite of them, may be the bigger risk to impartiality. It is of course fundamental that judges be free from inappropriate or undue influence, independent in fact and appearance, and intellectually willing and able to hear the evidence and arguments with an open

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mind. But neutrality and impartiality do not and cannot mean that the judge has no prior conceptions, opinions or sensibilities about society's values. It means only that those preconceptions ought not to close his or her mind to the evidence and arguments presented. We must be prepared, when the situation warrants, to experience what Herbert Spencer called the tragedy of the Murder of a Beautiful Theory by a Gang of Brutal Facts. In other words, there is a critical difference between an open mind and an empty one.

In assessing how impartial the courts are, however, I think the media's tendency to use labels or epithets instead of analysis is not particularly enlightening. Provocative phrases may all too easily become shorthand ways to avoid thinking through rights issues. The phrase "political correctness" may replace the need to think about disadvantage; the phrase "special interest groups" may replace the need to entertain valid grievances; the phrase "reverse discrimination" may replace the need to open the competition; and the phrase "the merit principle" may replace the need to discuss whether we have it. Not every pro-female decision is feminist and not every pro-male one reflects a chauvinist bias. And attributions like "progressive" and "conservative" are meaningless in most judicial contexts.

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One of the labels which is least helpful and the most inappropriately inhibiting, is that the courts, with the *Charter*, are becoming "politicized". The courts are not becoming politicized. They are becoming nothing they have not always been: reviewers and interpreters of the rules to which society, through the legislature, has proclaimed itself subject. The *Charter* is the klieg light that exposed this judicial reality, it was not the instrument of a new judicial norm. The relationship between courts and legislatures in the interpretation of public values has not changed with the *Charter*, only the public's interest has. In the 19th century, for example, the British Prime Minister, Lord Salisbury, felt sufficiently moved to rebuke Lord Halsbury as follows for the House of Lords' routine declawing of social welfare and labour legislation: "The Judicial Salad, he said requires both legal oil and political vinegar, but disastrous effects will follow if due proportion is not observed."

But courts *preventing* rights like those in the era of Lord Halsbury, or in the pre-court-packing plan era of the American Supreme Court, were rarely dismissed as being politicized, even though they were no less activist than later courts which *expanded* them. If it is clearly appropriate for courts to deal with the

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interpretation of rights, one wonders why they are deemed to be "politicized" only when they interpret them expansively.

There is no question that lines have to be drawn and care taken, but the sophisticated process of line-drawing does not lend itself to as easy an inquiry as whether a particular issue has a "political" component, since most constitutional issues do and always have had.

The reason legislatures give courts the power to enforce charters of rights is that while both courts and legislatures are entitled to enforce rights, only the courts have the institutional characteristic that best offers the possibility of responsiveness to minority concerns in the face of majoritarian pressures, namely, independence. Only courts have the independence from electoral judgment to risk controversy in enforcing rights. Controversy attracts attention. Attention attracts criticism, and the favourite criticism of courts in the enforcement of rights is the suggestion that they have become "politicized", when in fact all they have done is perform the interpretive duty assigned to them by the legislature.

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And here we come to the role of public opinion. Society is horizontal and vertical, and it is practically impossible to know at which point a consensus emerges. Until we know who the public is and how it forms opinions, courts deciding cases are entitled scrupulously to regard public opinion as the responsibility of the legislature and generally as immaterial to judicial determination. In Edith Wharton's *The Age of Innocence*, the van der Luydens and Mrs. Manson Mingott were the custodians and interpreters of social norms in old New York. They were the self-appointed and accepted arbiters of what passed for public opinion at the time. Judges have no such omniscient oracles of prevailing social opinions. Nor should they.

Public opinion, in its splendid indeterminacy, is not evidence. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion, susceptible to wild mood swings, and reliably unreliable. Part of the task, in fact, may be to reach a conclusion *despite* the perceived, prevailing public opinions. When we speak of an independent judiciary, we are talking about a judiciary free from precisely this kind of influence. As Lillian Hellman once said: "I will not cut my conscience to fit this year's fashions".

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Whatever evidentiary tool the legislatures use to gauge public acceptance, judges use a totally different measurement of relevance because the object of *their* task is totally different. In framing *its* opinions, the public is not expected to weigh all relevant information, or to be impartial, or to be right. The same cannot be said of judges.

But although judges are not accountable to the public in the same way as are elected officials, this does not mean that they are not accountable. While they may not be accountable to public *opinion*, they are nonetheless accountable to the public *interest* for independent decision-making based on discernable principles rooted in integrity. Performing the task properly may mean controversy and criticism. But better to court controversy than to court irrelevance, and better to court criticism than to court injustice.

Because delivering justice to the public is the object of the exercise for courts, and because the media plays such a fundamental role in communicating whether the public is entitled to feel confidence that the delivery is fair, I want to close with a story which for me shows the link between the knowledge and justice poetically and forcefully.

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The story is taken from a book called *Fragments*. It has just recently been published and was written by a man now in his mid-fifties living in Switzerland. The title of the book comes from the fragments of memories he recovered with the help of a therapist in recent years. The memories relate to the years he spent, from the age of 4 or 5, in concentration camps. After the war, when he was 10 or 11, he was placed in a foster home in Switzerland. The horror and brutality of the only life he had really known left him totally unprepared for the civility of his new surroundings. School in particular was utterly bewildering to this little boy. And hence this story about the day he was totally humiliated by his teacher in front of a giggling classroom when he was asked to identify a coloured poster of the Swiss hero, William Tell, whom he had of course never heard of:

"What do you see here?" [the teacher] asks.

"Tell! William Tell! The arrow!" they're calling from all the benches.

"So -- what do you see? Describe the picture", says the teacher, who's still turned toward me.

I stare in horror at the picture, at this man called Tell, who's obviously a hero, and he's holding a strange weapon and aiming it, and he's aiming it at a child, and the child's just standing there, not knowing what's coming.

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I turn away, .. Why is she showing me this terrible picture? Here in this country, where everyone keeps saying I'm to forget, and that it never happened, I only dreamed it. But they know all about it!

"You're supposed to be looking at the picture -- what do you see?" she asks impatiently, and I make myself look at the picture again.

"I see -- I see an SS man," I say hesitantly, "and he's shooting at children," I add quickly.

A gale of laughter in the classroom.

"Quiet," barks the teacher, then turns back to me.

"I'm sorry -- what did you say?" and I can see that she's getting angry.

"The hero's shooting the children, but ..."

"But what?" the teacher says fiercely. "What do you mean?" Her face is turning red.

"... But ... but it's not normal," I say, trying not to cry.

"Who or what isn't normal here?" Now she's beside herself, and shouting. I force down the lump in my throat and try to concentrate. But I can't interpret what's going on. What's this about? ...

"It's not normal, bec -- because .. " I'm stuttering again.

"Because why?" she says loudly.

"Because our block warden said, 'Bullets are too good for children,' and bec - bec - because only grown-ups get shot .. or they go into the gas. The children get thrown into the fire, or killed by hand -- mostly, that is."

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... She screeches, losing her composure.

.....

"Sit down and stop talking drivel." ...

I look over the teacher, standing there shaking with anger, standing there in front of the big blackboard, her hands still on her hips. My eyes begin to smart, and the big blackboard turns watery, gets bigger and bigger until it surrounds the whole classroom and turns into a black sky.

This is a story about a child who interprets the world based on what he knows, and a teacher who judges his answers based on what she does *not* know. Ignorance in a child is understandable. Ignorance in an adult who should know better is unforgivable.

We are each limited by what we do not know and we are each limited by what others do not know. With knowledge comes understanding, with understanding comes wisdom, and with wisdom comes the capacity to judge fairly. This in the end is what the public expects from both the courts and the media, and this, in the end, the public is entitled to get.