

HOW NONINSTITUTIONALIZED MEDIA CHANGE THE RELATIONSHIP BETWEEN THE PUBLIC AND MEDIA COVERAGE OF TRIALS

MARCY WHEELER*

I

INTRODUCTION

Justice Brennan's concurring opinion in *Nebraska Press Ass'n v. Stuart*¹ puts citizenship and the public at the heart of the purpose of media coverage of legal proceedings:

Commentary and reporting on the criminal justice system is at the core of the First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.²

That is, media coverage of legal proceedings should further the public understanding of those proceedings and of the legal system generally and should foster oversight over its functioning. Unfortunately, much coverage of legal proceedings now serves to increase ratings rather than to increase the public's understanding of the justice system.³ Moreover, examples like early coverage of the Duke lacrosse case show that the press can exacerbate—rather than expose—abuses of the judicial system and the legal system generally.

Since the advent of the Internet, however, additional media outlets—like blogs and wikis—have begun to change the relationship between media

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* Marcy Wheeler blogs full-time at emptywheel.firedoglake.com. She received her Bachelor of Arts from Amherst College and her Doctor of Philosophy from the University of Michigan. She started blogging in 2003; much of her work on the CIA leak case appeared at TheNextHurrah.com. She was also the primary live-blogger for FireDogLake.com's coverage of the Scooter Libby trial.

1. 427 U.S. 539 (1976).

2. *Id.* at 587 (Brennan, J., concurring).

3. Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 424–29 (2006) (observing that economic pressures have pushed television networks “away from hard news and toward a greater emphasis on tabloid-style crime stories”).

coverage of legal proceedings and the public.⁴ That is partly because these newer media outlets are noninstitutional; they cover stories differently than do traditional media outlets. Just as importantly, these noninstitutional media outlets change the role of the reader in coverage of legal proceedings. Whereas these new media outlets carry their own risks, at their best, they go a long way toward accomplishing Brennan's goal of making the judicial system more transparent for the public.

This article explores select instances of noninstitutional media coverage of legal proceedings—by focusing on blogs—and examines the ways this coverage may differ from institutional coverage. Part II uses Timothy Cook's description of institutional media to lay out distinctions between institutional and noninstitutional media. Part III provides several case studies of noninstitutional legal coverage. Part IV explores what distinguishes noninstitutional coverage from institutional coverage. Part V describes some risks and checks unique to noninstitutional production on the Internet. Part VI concludes by returning to the role of the blog reader.

II

A DESCRIPTION OF INSTITUTIONAL MEDIA

The distinction between “institutional” and “noninstitutional” media is a more meaningful one than that between “old” and “new” media. The initial move by established media outlets to Internet publication did not lead to an immediate change in either the practices of production or the end product: existing media outlets “repurposed” the content that appeared in their newspaper or broadcast outlet, providing the same story in fairly static form.⁵ Thus, if there is anything new about “new” media on the Internet, it largely derives from the rise of noninstitutional outlets as an alternative to Internet production offered by the institutional press.

Timothy Cook's *Governing with the News* provides a useful definition of the characteristics of institutional media. Cook shows the many ways in which the institutional character of the press contributes to coverage that is, in process and content, very homogenous: “The news media, despite different technologies, deadlines, and audiences are structured similarly in their internal

4. “Blog” is short for “web log.” Dan Gillmor defines a blog as “an online journal comprised of links and postings in reverse chronological order, meaning the most recent posting appears at the top of the page.” Dan Gillmor, *We the Media: The Read-Write Web*, <http://www.authorama.com/we-the-media-3.html> (last visited Nov. 25, 2007). Gillmor uses the WhatIs.com definition for wikis: “A wiki (sometimes spelled “Wiki”) is a server program that allows users to collaborate in forming the content of a Web site. With a wiki, any user can edit the site content, including other users' contributions, using a regular Web browser.” *Id.*

5. J.D. Lasica, *Internet Journalism and the Starr Investigation*, <http://www.jdlasica.com/articles/starr.html> (last visited Sept. 11, 2007) (noting that when news organizations first set up Web sites, most followed their print cycle and updated their sites just once a day); see also Timothy E. Cook, *The Future of the Institutional Media*, in *MEDIATED POLITICS* 182, 189 (Lance Bennett & Robert M. Entman eds., 2001) (“[T]he more widespread dispersion of the news outlets says very little per se about the diversity of news content itself.”).

organizations, the way they interact with sources, the formats they use, and in the content they provide.”⁶ One key similarity in internal organization among media outlets is the relationship between reporter and editor; because reporters pitch stories to editors with a fixed idea of the desired end product, they tend to produce similar kinds of stories. In addition, the most typical sources for the institutional media—official or otherwise sanctioned sources—tailor their communications with the media to fit preexisting standards for what makes a good story.⁷ Also, institutional media use a fairly static narrative structure. Of particular note for court proceedings, journalists seek stories with clear protagonists and antagonists engaging in conflict that resolves in episodic fashion.⁸ “In the absence of such movement, journalists tend to conclude that ‘nothing happened’ and there is therefore no news”⁹ This has a particularly detrimental effect on the coverage of court hearings, in which the desired conflict may be elusive, but the proceedings are central to understanding the case. And journalists and editors rely on their peers and their colleagues—in short, on the institution—to help determine what is newsworthy.¹⁰ Cook’s description of the media as an institution provides one explanation for how the press develops—and reinforces—a dominant narrative about any given story.

Cook also highlights one of the areas in which the structures of the institutional and noninstitutional press differ most: their responsiveness to readers. Cook shows that the institutional press remains largely unaccountable to its readers.¹¹ Recent Pew Polls support this, showing in 2007 that a majority (fifty-three percent) of respondents believed the press’s stories are “frequently inaccurate,” and in 2005 that only twenty-eight percent thinks the press cares about the people they report on.¹² This lack of accountability to readers may impede the ability of the institutional press to fulfill the role envisioned by Brennan in *Nebraska Press Ass’n*.

6. TIMOTHY E. COOK, *GOVERNING WITH THE NEWS* 64 (1998); *see also id.* at 71–76 (discussing the limited scope for individual choice in institutional media).

7. *See id.* at 91–95 (observing that journalists reinforce authority and the official version of events), 102–09 (arguing that the “negotiation of newsworthiness” introduces officials’ views of the news).

8. *Id.* at 90, 101.

9. *Id.* at 90.

10. *See id.* at 73 (“[J]ournalists follow established rules and routines for coming up with the news.”).

11. *Id.* at 168 (noting that news organizations are attuned to advertisers, who constitute the media’s “most prominent audiences”).

12. Press Release, The Pew Research Center for the People and the Press, *Views of Press Values and Performance: 1985–2007, Internet News Audience Highly Critical of News Organizations* (2007), available at <http://people-press.org/reports/pdf/348.pdf>.

Cook's description, then, allows for the creation of a schema that defines institutional and noninstitutional press in contradistinction:

Institutional	Noninstitutional
Editor-reporter structure	Little, if any editorial structure; readers vet content and find errors
Established genre for stories, with fairly set length limitations and narrative requirements	Fewer genre rules
Human sources heavily influence news cycle	Less reliance on human sources for both content and news-setting agenda
Definition of "news" determined collectively as an institution; reporters and editors look to their peers to define "news"	Fewer demands to meet typical standards of newsworthiness
Gatekeeper relationship with readers	Conversational relationship with readers

The media outlets increasingly associated with the Internet—particularly blogs, though this holds true for wikis as well—meet many of these qualities of the noninstitutional media. However, the distinction remains very fluid: many blogs are becoming institutionalized even while the institutional press continues to integrate features of blogs (and indeed, blogs themselves) into their Web sites. Yet in general, Internet production remains different largely because it still lacks the institutional structure described by Cook.

III

CASE STUDIES OF NONINSTITUTIONAL MEDIA

Starting in the late 1990s, a number of factors contributed to the rise of noninstitutional media on the Internet. The first significant noninstitutional media outlet covering legal proceedings—the Drudge Report¹³—largely replicated the institutional media's standards of newsworthiness. But as more lawyers and other professionals participate in Internet journalism, as blog software has made blogging more accessible, and as documentary sources from legal proceedings have become more accessible, there have been notable examples in which noninstitutional media provided important, in-depth reporting that the structure of the institutional press often foreclosed.¹⁴

13. The Drudge Report, <http://www.drudgereport.com>, was started by Matt Drudge in 1995. Joel Sappell, *Hot Links Served Up Daily*, L.A. TIMES, Aug. 4, 2007, at A1.

14. See discussion *infra* III.A.

A. Matt Drudge: Monica Lewinsky

The first significant Internet-based noninstitutional reporting happened to pertain to a legal proceeding: when Matt Drudge reported that *Newsweek* had held back publication of a story on the Clinton–Lewinsky affair, it was one of the first times a noninstitutional media outlet forced the institutional media to cover a story.¹⁵ By that point, Drudge had already been a party in a legal proceeding himself: a libel suit from Sidney Blumenthal after Drudge reported—based on Republican gossip—that Blumenthal beat his wife. Thus, noninstitutional reporting on legal proceedings consisted of the immediate breaking of sensational (and, in Blumenthal’s case, false) news. In that role, Drudge, as the most prominent representative of the noninstitutional media (and he still is), did more to set the news agenda than offer detailed reporting on legal proceedings.

That said, Drudge shares key similarities with other noninstitutional media outlets that have followed his rise: most notably, Drudge relies on his readers for tips. “You would be amazed what the ordinary guy knows,” Drudge said in a key speech.¹⁶ Also, he rails against the way editors distort news content, claiming that because he has no editor, he presents the news in less biased fashion.¹⁷ Thus, even though Drudge is much more of a gossip columnist than some contributors to other noninstitutional media that have followed him, he embodies two key aspects of the noninstitutional media ethic: the absence of an editorial structure and the openness to readers’ knowledge.¹⁸

In the several years since Drudge’s rise, noninstitutional publication has expanded exponentially. Several factors have contributed to that expansion: improved Internet (and broadband) access, growing frustration with existing news coverage, and the growth of Internet communities that could sustain media outlets. In particular, the development of blog software contributed to the rise of noninstitutional media.¹⁹ Blog software allows a person with little knowledge of HTML or other Web programming to post news items in a chronological format. Such software, which is as easy to use as word-processing

15. See Lasica, *supra* note 5 (“Throughout the Starr investigation, Drudge’s reports . . . set the tone for the media’s coverage of the scandal.”).

16. Matt Drudge, *Anyone with a Modem Can Report on the World*, Address before the National Press Club (June 2, 1998), <http://www.libertyroundtable.org/library/essay.drudge.html>.

17. See *id.* (“We get to see the kinds of cuts that are made for all kinds of reasons; endless layers of editors with endless agendas changing bits and pieces, so by the time the newspaper hits your welcome mat, it had no meaning.”).

18. For a recent profile of Drudge, see Philip Weiss, *Watching Matt Drudge*, N.Y. MAG. (Aug. 24, 2007), available at <http://nymag.com/news/media/36617/>; see also Lasica *supra* note 5 (“Drudge described himself as the vanguard of a new populist era in which every citizen with an Internet account would be a reporter—without interference from editors and publishers, whom he saw as beholden to special interests and archaic practices.”).

19. Rebecca Blood, *Weblogs: A History and Perspective*, http://www.rebeccablood.net/essays/web_log_history.html (Sept. 7, 2000).

programs, truly made it possible for anyone with a computer and a good Internet connection to publish his or her own content.

Over the same period, two things led to the rise in blogging on legal proceedings. Lawyers were among the earliest and most successful blog proprietors.²⁰ And legal resources became more accessible via the Internet, as with PACER (Public Access to Court Electronic Records).²¹ These two changes meant that a large number of legal experts contributed to online discussions with ordinary citizens, who could access information on cases themselves. Whether or not blogs covering legal proceedings were written by lawyers, blogs facilitated an open conversation between lawyers and those following legal cases closely.

B. Groklaw: The Open-Source-Software Cases

Paralegal Pamela Jones started Groklaw as a way to learn blogging software she might need for work. Soon after, she started tracking a series of open-source-software legal cases, particularly those associated with the SCO Group. She provided profiles of judges, discussions of court filings (with links to searchable and PDF filings), and detailed explanations of how legal cases work.²² The result was praised as a paradigm of what blogs can do far beyond their scope as media. The Groklaw community worked together to write an "Open Letter to SCO's CEO, Darl McBride," which contested SCO's claims, an example of open-source collaboration to formulate persuasive arguments.²³ More recently, Jones has invited lawyers to solicit the technical advice of the Web site's community.²⁴

Groklaw's work was even alleged to affect the outcome of the case. Last year, SCO subpoenaed Jones, alleging she and her coverage of the case were supported by IBM.²⁵ In a response to SCO's claims that Groklaw was

20. Influential legal blogs include Scotusblog (<http://www.scotusblog.com/wp/>), The Volokh Conspiracy (<http://www.volokh.com/>), and Balkinization (<http://balkin.blogspot.com/>). Other top bloggers who are attorneys include Glenn Greenwald (<http://www.salon.com/opinion/greenwald/>), Glenn Reynolds (<http://www.instapundit.com/>), Jeralyn Merritt (<http://www.talkleft.com/>), and Patterico (<http://patterico.com/>). For more legal blogs, see *ABA Journal Blawg 100* (Dec. 2007), http://www.abajournal.com/magazine/aba_journal_blawg_100.

21. For a description of PACER, see What is a PACER?, <http://pacer.psc.uscourts.gov/pacerdesc.html> (last visited May 7, 2008).

22. See Groklaw, Oh, That Is Why They're Saying That, <http://www.groklaw.net/article.php?story=59> (June 17, 2003) (explaining that SCO had asked for a permanent, not preliminary, injunction and anticipating how long it would take for the case to get to trial).

23. IBM introduced the letter as an exhibit to its opposition to SCO's request for summary judgment.

24. Groklaw, Open Letter to SCO's CEO, Darl McBride, <http://www.groklaw.net/staticpages/index.php?page=20051113153750111> (Sept. 20, 2003). The drafting threads are available at: <http://www.groklaw.net/article.php?story=304>, <http://www.groklaw.net/article.php?story=307>, <http://www.groklaw.net/article.php?story=311>, <http://www.groklaw.net/article.php?story=315>.

25. SCO's Memorandum in Support of its Motion to Deem a Prospective Third-Party Deposition in Related Litigation to be a Deposition Taken in This Case as Well, Filed in the United States District Court for the District of Utah 1, 4 (Apr. 2, 2007), available at <http://www.groklaw.net/pdf/IBM-1018.pdf>.

inappropriately intervening in the suit, Novell celebrated the close attention the Groklaw community paid to its case against SCO: “To the contrary, the close scrutiny the Linux community—Groklaw in particular—has brought to bear on SCO’s litigation is a testament to the power of open-source ideals and their potential for application to spheres outside software.”²⁶ Groklaw has won a number of awards and recognitions²⁷ and has inspired several readers to attend law school.²⁸

C. FireDogLake and Affiliates: The CIA Leak Case

FireDogLake and a number of other blogs provided close coverage of the investigation into the exposure of Valerie Plame’s covert identity as a CIA operations officer and I. Lewis “Scooter” Libby’s associated perjury trial.²⁹ In its early phases, much of the coverage consisted of critiques of media organizations’ own conflicts in the case. Yet, particularly after the Libby indictment, FireDogLake and other liberal blogs (and the conservative blog JustOneMinute) provided close analysis of the pretrial court filings in the case.³⁰ Attorneys Christy Hardin Smith and Jeralyn Merritt provided context on the meaning of the filings or events.³¹ FireDogLake’s founder Jane Hamsher also teamed with DailyKos’s Markos Moulitsas Zúniga to publish my book on the case, *Anatomy of Deceit*, in one of the early blogs-to-books efforts.³² The FireDogLake team was also among a group of bloggers that received some of the first press credentials for a federal trial.³³ With a team of two or three onsite bloggers throughout the trial, FireDogLake provided the most extensive real-

26. Groklaw, A Mountain of Filings in *SCO v. Novell* and a Kind Word About Groklaw, <http://www.groklaw.net/article.php?story=20070831214804465> (Aug. 31, 2007).

27. Groklaw, Awards and Recognition, <http://www.groklaw.net/staticpages/index.php?page=awards> (last visited Feb. 12, 2008).

28. Groklaw, Two—No, Three, No Four—More Groklaw Members Go to Law School, <http://www.groklaw.net/article.php?story=200608241141557> (Aug. 24, 2006).

29. See FireDogLake, CIA Leak Case, <http://firedoglake.com/category/cia-leak-case/> (last visited May 7, 2008) (collection of blogs on the subject).

30. Jane Hamsher, This Snark Business Is Getting Crowded, <http://www.firedoglake.com/2006/01/07/the-snark-business-is-getting-crowded/> (Jan. 7, 2006). Libby was indicted on two counts of false statement, two counts of perjury, and one count of obstruction of justice for his testimony about what he had said to journalists during the week of the leak. Neil A. Lewis, *Libby Guilty of Lying in C.I.A. Leak Case*, N.Y. TIMES, Mar. 6, 2007, available at: <http://www.nytimes.com/2007/03/06/washington/06end-libby.html>. Libby was convicted on four charges, but his sentence was commuted in July 2007. *Id.*; Adam Liptak, *Bush Rationale on Libby Stirrs Legal Debate*, N.Y. TIMES, July 4, 2007, at A1.

31. Christy Hardin Smith, New Libby Filing: A Bit of Analysis, <http://www.firedoglake.com/2006/04/13/new-libby-filing-a-bit-of-analysis/> (Apr. 13, 2006) (discussing the discovery arguments in Libby’s reply memorandum); Jeralyn Merritt, Life on Supervised Release, <http://www.talkleft.com/story/2007/7/5/12846/90740> (July 5, 2007) (explaining the meaning of supervised release).

32. MARCY WHEELER, *ANATOMY OF DECEIT* (2007).

33. The first blogger credentialed for a federal trial appears to be Gene Borio, an activist who, as a book author, received a credential to cover the government’s lawsuit against the tobacco industry. In addition, the Houston Chronicle had a live blog from the Ken Lay–Jeff Skilling trial. The District of Columbia district court made a conscious decision to provide about five to ten credentials to bloggers for the Libby trial. Scott Shane, *For Bloggers, Libby Trial Is Fun and Fodder*, N.Y. TIMES, Feb. 15, 2007, <http://www.nytimes.com/2007/02/15/washington/15bloggers.html>; Alan Sipress, *Too Casual to Sit on Press Row*, WASH. POST, Jan. 11, 2007, at D01.

time coverage of the trial proceedings, which institutional media outlets used as a resource.³⁴

D. TalkingPointsMemo: The U.S. Attorney Scandal

When Josh Marshall established the TPM Muckraker (TPMM) site associated with his TalkingPointsMemo blog, he intentionally incorporated tips from readers into coverage on scandals.³⁵ The site's earliest coverage of the U.S. Attorney firings—in December 2006 and January 2007—consisted of magnifying the work of local journalists covering aspects of the story, identifying the unifying thread behind the firings, and connecting the two with TPMM's own reporting on congressional events.³⁶ That early work helped raise the story to national prominence. Then, as the Department of Justice started releasing large numbers of e-mails and other documentation in response to congressional requests for information, TPMM posted "Document Dump Research Threads" to encourage TPMM readers to contribute to reading through the materials.³⁷ In addition, TPMM provided extensive video coverage of congressional hearings on the scandal, using YouTube clips.³⁸ Whereas traditional media outlets (particularly McClatchy)³⁹ had important scoops in this story, Marshall and his team provided the unifying narrative and many important scoops.⁴⁰ Marshall received a 2007 Polk Award for TPMM's coverage of the U.S. Attorney scandal.⁴¹

34. For FireDogLake's live coverage of the trial, see FireDogLake, *Libby Trial Live Blog*, <http://www.firedoglake.com/category/libby-trial-live-blog/> (last visited May 7, 2008). For more on the team's coverage of the trial, see Jay Rosen, *They're Not in Your Club But They Are in Your League*, http://journalism.nyu.edu/pubzone/weblogs/pressthink/2007/03/09/libby_fdl.html (Mar. 9, 2007) (observing that FireDogLake provided the best live feed) and Shane, *supra* note 33 ("Many mainstream journalists use [the FireDogLake live blog] to check on the trial.").

35. But my experience running this site for more than five years tells me that some of the most telling clues and breaks in the story first pop up in news outlets that run beneath the radar of the national political press—local and regional papers, television stations, magazines, and so forth. And of course we want your tips too. So as we move forward, if you see a story in your local paper about your congressman and Jack Abramoff or any other nugget you see that you think deserves wider exposure, send it in to use. If you think it's muck-worthy, flag its muckitude for Paul in the subject line.

Josh Marshall, *Talking Points Memo: January 8, 2006–January 14, 2006*, <http://talkingpointsmemo.com/archives/007427.php> (Jan. 12, 2006).

36. See Justin Rood, *White House Pushes Out Another Prosecutor*, <http://www.tpmuckraker.com/archives/002340.php> (Jan. 15, 2007) (observing that within the space of one week, the U.S. Attorneys for San Diego and Nevada were forced to resign); Justin Rood, *What's the White House Doing to Prosecutors?*, <http://www.tpmuckraker.com/archives/002347.php> (Jan. 16, 2007) (listing the names of seven U.S. Attorneys who left between December 2006 and January 2007).

37. Josh Marshall, *Document Dump Research Thread*, <http://www.tpmuckraker.com/archives/002863.php> (Mar. 24, 2007).

38. Paul Kiel, *Specter Questions Sampson on Avoiding the Senate*, <http://www.tpmuckraker.com/archives/002917.php> (Mar. 29, 2007).

39. As a newspaper chain with local outlets in the cities where U.S. Attorneys were fired, McClatchy combined solid local reporting with aggressive reporting from its D.C. reporters.

40. For more on TPMM's coverage of the U.S. Attorney firings, see Terry McDermott, *Blogs Can Top the Presses*, L.A. TIMES, Mar. 17, 2007, at A1; Paul McLeary, *How TalkingPointsMemo Beat the*

E. Durham-in-Wonderland: The Duke Lacrosse Case

History professor KC Johnson started covering the Duke lacrosse case when eighty-eight Duke faculty members condemned the accused players. He offered a detailed analysis of the contradictory evidence in the case and discussions of the improprieties of Mike Nifong and others involved in the case. In addition, Johnson paid particular attention to some of the evidentiary issues in the case, such as the SANE (Sexual Assault Nurse Examiner) procedures.⁴² Johnson also live-blogged several of the hearings and press conferences in the case.⁴³ His blog has been widely credited to be among the most important outlets covering the case.⁴⁴ Johnson coauthored a book with Stuart Taylor, Jr., *Until Proven Innocent*, which chronicles the injustices of the case.⁴⁵

IV

CHARACTERISTICS OF NONINSTITUTIONAL MEDIA

The coverage from these case studies—and other blog and wiki legal coverage—does more than simply report the same kind of stories on legal proceedings as the traditional news. Because they lack the institutional structure of more established media, these outlets can report legal stories differently, in ways that may be valuable for the legal coverage. Three key differences in the kinds of stories that noninstitutional media will tell are sources, genre, and open-source collaboration.

A. Human Source v. Documents and Links

For a number of reasons, noninstitutional media rely more heavily on documents than on human sources. This is partly out of necessity: amateur bloggers, at least, have fewer human sources than professional reporters and,

Big Boys on the U.S. Attorney Story, COLUM. JOURNALISM REV., Mar. 15, 2007, http://www.cjr.org/behind_the_news/how_talkingpointsmemo_beat_the.php.

41. Press Release, Long Island Univ., Long Island University Announces Winners of 2007 George Polk Awards (Feb. 19, 2008), *available at* <http://www.brooklyn.liu.edu/polk/press/2007.html>.

42. Durham-in-Wonderland, Understanding Levcy, <http://durhalmwonderland.blogspot.com/2007/04/understanding-levcy.html> (Apr. 19, 2007). SANE nurses are specially trained in forensic examination of sexual assault victims. Kristin Little, U.S. Dep't. of Justice, Sexual Assault Nurse Examiner (SANE) Programs: Improving the Community Response to Sexual Assault Victims (Apr. 2001), *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/sane_4_2001/welcome.html.

43. Durham-in-Wonderland, Nifong to the Stand, <http://durhalmwonderland.blogspot.com/2007/06/nifong-to-stand.html> (June 15, 2007).

44. *Sports Illustrated* called him “[a]rguably, the most important media figure” on the case. Richard Deitsch, *Media Circus*, SL.COM, Apr. 27, 2007, http://sportsillustrated.cnn.com/2007/writers/richard_deitsch/04/25/media.rankings/index.html. Stuart Taylor Jr. judged that Johnson “has produced more insightful (if sometimes one-sided) analysis and commentary on the Duke case—about 60,000 words—than all the nation’s newspapers combined.” *Witness for the Prosecution*, SLATE, Aug. 29, 2006, <http://www.slate.com/id/2148546/>.

45. STUART TAYLOR, JR. & KC JOHNSON, *UNTIL PROVEN INNOCENT* (2007). For more on KC Johnson’s coverage of the Duke lacrosse case, see Mary Vallis, *Midnight Blogger Exposes a Scandal*, NAT’L POST, Apr. 16, 2007, *available at* <http://www.canada.com/nationalpost/news/story.html?id=41cf8ef1-d41a-45e9-83e4-aae85d0fd52c&k=52797>.

since they often do not live in the cities where the stories they cover take place, it is harder for them to cultivate such sources.⁴⁶ In addition, professions widely represented among bloggers—legal professionals, business writers, computer professionals, and academics—tend to have specialized skills in document analysis.⁴⁷ Finally, document analysis lends itself to the kind of open-source investigation at which blogs excel. Of course, the expansion of online access to court documents such as PACER makes legal coverage particularly accessible to bloggers without human sources.⁴⁸

This closer focus on documents means noninstitutional media may provide more-detailed analysis of evidence and court filings, and fewer scoops relying on anonymous sources involved in the proceedings.⁴⁹ By way of example, compare the treatment of a story Scooter Libby told in his grand-jury testimony: On the blog *The Next Hurrah*, I pointed out a number of contradictions in Libby's story that, some time after July 6, 2003, he was ordered to leak the Iraqi National Intelligence Estimate (NIE) exclusively to *New York Times* reporter Judith Miller.⁵⁰ David Corn and Michael Isikoff, by contrast, repeated the anonymous assurances of a "lawyer close to the principals" that Bush and Cheney had decided to leak the NIE in June, not July—thereby providing an explanation for Libby's earlier leaks.⁵¹ Neither

46. Marshall's TPMM adopts a more traditional structure. As the masthead on the front page of *TalkingPointsMemo* describes, Marshall serves as Editor and Publisher, and the blog also has a number of Editors, Reporter-Bloggers, and Research Interns. *TalkingPointsMemo*, <http://talkingpointsmemo.com/> (last visited May 7, 2008).

47. The examples highlighted here (with the exception of Drudge) include significant contributions from Ph.D.s (Josh Marshall at TPM, KC Johnson at Durham-in-Wonderland, Marcy Wheeler at *The Next Hurrah*), legal professionals (Jeralyn Merritt on both the CIA Leak case and the Duke lacrosse case, Christy Hardin Smith at *FireDogLake*, Pamela Jones at *Groklaw*), and business writers (Swopa at *needlenose* and *FireDogLake*, Marcy Wheeler at *The Next Hurrah*, both blogging the CIA Leak case).

48. KC Johnson also notes the importance of open discovery in the Duke lacrosse case:

[T]he state's first-high profile trial since North Carolina adopted an open discovery law, which requires the prosecution to turn over all of its material—not just evidence it considers exculpatory—to the defense, and to turn over all that evidence in a timely fashion. As a result, we know far more about the facts of this case than would occur in most jurisdictions.

Durham-in-Wonderland, *Court TV Will Have the Answer*, <http://durhamwonderland.blogspot.com/2006/07/court-tv-will-have-answer.html> (July 23, 2006).

49. This is all relative—both reporters and bloggers rely on human and documentary sources. But bloggers are more likely to enter a story via documentary sources.

50. Scooter Libby is telling two contradictory stories with respect to the NIE. The first is that the NIE was a consistent prop in administration attempts to rebut Joe Wilson, one they used on June 27 with Bob Woodward, on July 2 with an unnamed journalist, on July 8 with Judy Miller, on July 12 with Cooper and Judy, and on July 17 with the *WSJ*. This story seems to correlate with the normal declassification of the NIE that Bartlett, Hadley, and Tenet were pursuing. This is a story that suggests the NIE leak was an everyday event, and one that constituted no more than a fair refutation of Joe Wilson's claims. But then Libby tells a completely different story. He describes that the leak of the NIE to Judy Miller on July 8 was a unique event.

Marcy Wheeler, *Libby's Contradictory NIE Leak Stories*, http://thenexthurrah.typepad.com/the_next_hurrah/2006/07/more_on_the_nie.html (July 5, 2006).

51. In late June, Cheney discussed with Bush the steady stream of negative news stories about the administration's prewar use of the Iraq intelligence, according to a lawyer close to the principals. Cheney and Bush agreed that to refute the criticism they ought to divulge portions

approach will discover all of the truth, but having both document-focused and human-source-focused coverage provides readers with more ways to assess a story.

The emphasis on documents as sources contributes to one of the most important ethical precepts of blogs and wikis: the acquisition of credibility by linking to sources.⁵² As Dan Gillmor observes, “the authority of a story increases with the links to the best original material from which it was derived.”⁵³ Because of the premium placed on linking to sources, noninstitutional media will provide these links so readers can assess the sources themselves or contribute to the analysis. For example, the Groklaw site includes the court filings from over seven court trials of interest to the open-source-software community as well as the relevant contracts at issue in the cases and exhibits from the trials.⁵⁴ Online timelines, such as dKosopedia’s Plame-leak-investigation timeline, provides links to both court documents and key press coverage of the story.⁵⁵ Although institutional media sometimes offer collections of links related to legal proceedings,⁵⁶ they often report on documents without providing direct links to those documents.⁵⁷ The emphasis on links, then, provides readers with direct access to primary sources in a given story.

of the classified National Intelligence Estimate on weapons of mass destruction that had hastily been prepared prior to the congressional vote on the Iraq War resolution. ‘The president declassified the information and authorized and directed the vice president to get it out,’ the lawyer said. How that would be done—who should leak the information and to which reporters—was left entirely up to Cheney, the lawyer noted.

MICHAEL ISIKOFF & DAVID CORN, *HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR* 250 (2006). Neither the trial record nor Special Counsel Patrick Fitzgerald ever resolved the issue, though Fitzgerald specified that Woodward and Sanger received “substantially less information” than Miller, thereby highlighting one of the inconsistencies in Libby’s story on timing. *Government’s Response to Defendant’s Motion*, *United States v. Libby*, CR. NO. 05-394 (D.D.C. Nov. 15, 2006) (on file with author).

52. B.J. Fogg, *What Makes a Website Credible*, <http://www.slideshare.net/bjfogg/web-credibility-bj-fogg-stanford-university/> (last visited Nov. 25, 2007). Wikipedia, too, requires links to credible sources as a key editorial guideline. *See* Wikipedia, *Verifiability*, <http://en.wikipedia.org/wiki/Wikipedia:Verifiability> (last visited Feb. 12, 2008).

53. Dan Gillmor, *We the Media: Professional Journalists Join the Conversation*, <http://www.authorama.com/we-the-media-7.html> (2004); *see also* J.D. Lasica, *Transparency Begets Trust in the Ever-Expanding Blogosphere*, *ONLINE JOURNALISM REV.*, Aug. 12, 2004, <http://www.ojr.org/ojr/technology/1092267863.php> (“The more people who link to you, the greater your authority.”).

54. Groklaw, *Legal Documents*, <http://www.groklaw.net/staticpages/index.php?page=legal-docs> (last visited Feb. 12, 2008); Groklaw, *Comes v. Microsoft Documents*, <http://www.groklaw.net/staticpages/index.php?page=2007021720190018> (last visited Nov. 24, 2007).

55. dKosopedia, *Plame Leak Timeline*, http://www.dkosopedia.com/wiki/Plame_Leak_timeline (last visited Nov. 26, 2007).

56. *See, e.g., Evidence Submitted in the Scooter Libby Trial*, *WASH. POST*, http://www.washingtonpost.com/wp-srv/politics/special/plame/trial_evidence.html (last visited Nov. 26, 2007).

57. For example, consider reporting on the indictment of Dickie Scruggs. *The New York Times* and the *AP*’s coverage included no link to the indictment. Joseph B. Treaster, *Lawyer Battling for Katrina Payments Is Indicted*, *N.Y. TIMES*, Nov. 29, 2007, at C2, *available at* <http://www.nytimes.com/2007/11/29/business/29bribes.html>; Michael Kunzelman, *Tobacco-Deal Lawyer Indicted in Miss.*, *AP*, Nov. 29, 2007, *available at* <http://abcnews.go.com/US/WireStory?id=3929830&page=1>. However, *The Clarion-Ledger* of Jackson, Mississippi did link to the indictment. Jerry Mitchell, *Oxford Lawyer Indicted*, *CLARION-LEDGER*, Nov. 29, 2007, *available at* <http://www.clarionledger.com/apps/pbcs.dll/article?AID=/20071129/NEWS/711290378>. *TPMM*, *The Wall Street Journal*’s Law Blog, and *The Huffington*

B. Genre Conventions and Genre Flexibility

Unlike the institutional media, blogs and other noninstitutional media have few set genre conventions. One way this affects coverage is article length. A noninstitutional blog post—and at least in theory, Internet productions more generally—have no length limits. This allows bloggers to conduct longer substantive analysis that often cannot be done in print media—perhaps as long as 3000 words, compared to a more typical 700–1200 words for newspaper articles.⁵⁸ This provides blogs the space to explain complex issues in more depth than all but a few magazine formats. Similarly, blogs can continue to report on a legal proceeding even when no one event relating to the proceeding rises to the level of news. “[N]ot being commercially constrained, a blogger can stick with and dig into a story longer and deeper than the conventional media dare to, lest their readers become bored.”⁵⁹ As a result, bloggers can develop a deep exposition of a proceeding over time.

Nor do blogs have the same requirement to provide narrative conflict and resolution with each post. While RSS feeds and increased competition between blogs are putting an increased premium on a traditional lead, blogs with established expertise on a story have more leeway in narrative form. For example, a blog focusing on a particular case can provide just one new detail, without having to construct it as “news.”⁶⁰ For that matter, blogs can publish longer analytical pieces without highlighting one particular item of news—they can point to several items in the same post.⁶¹ Or blogs can simply pose questions, without the expectation they will be answered.⁶² Without the expectation of narrative resolution and newsworthiness, blog posts have the ability to remain less definitive in their conclusions, to delve into details at more

Post also included links. See Paul Kiel, Today's Must Read, TPMM, <http://www.tpmuckraker.com/archives/004798.php> (Nov. 29, 2007); Peter Lattman, Dickie Scruggs Indicted on Federal Bribery Charges, <http://blogs.wsj.com/law/2007/11/28/dickie-scruggs-indicted-on-federal-bribery-charges/> (Nov. 28, 2007); Max Follmer, Trent Lott's Brother-in-Law, Nephew, Indicted on Federal Bribery Charges, http://www.huffingtonpost.com/2007/11/28/trent-lotts-brotherinl_n_74572.html (Nov. 28, 2007); see also Marty Lederman, Learning to Link: The Military Commission Decision Disqualifying the Legal Adviser, Brig. Gen. Thomas Hartmann, <http://balkin.blogspot.com/2008/05/learning-to-link-military-commission.html> (Mar. 10, 2008) (counting six institutional outlets that provided no link to the decision, compared to one institutional outlet and one legal organization providing the link).

58. See, e.g., Marcy Wheeler, Libby's Contradictory NIE Leak Stories, http://thenexthurrah.typepad.com/the_next_hurrah/2006/07/more_on_the_nie.html (July 5, 2006) (3830 words); Liestoppers, Enough from Duff, <http://liestoppers.blogspot.com/2006/08/enough-from-duff.html> (Aug. 25, 2006) (3107 words).

59. Richard A. Posner, *Bad News*, N.Y. TIMES, July 31, 2005, § 7 (Book Review), at 1.

60. See, e.g., Groklaw, SCO's Lawyer's October Bill, as text, <http://www.groklaw.net/article.php?story=20071121192549394> (Nov. 24, 2007); Seth Hettena, The Mug Shot, <http://sethhettena.com/blog/?cat=6> (Nov. 4, 2007) (posting photographs used in a trial).

61. See, e.g., Durham-in-Wonderland, Reflections on the Civil Suit, <http://durhamwonderland.blogspot.com/2007/10/reflections-on-civil-suit.html> (Oct. 8, 2007) (discussing topics ranging from withholding exculpatory evidence to city officials' inadequate response to the Duke lacrosse case).

62. See, e.g., Spencer Ackerman, Did Cookie Try To Convince Buzzy Not To Join Blackwater's Advisory Board?, <http://www.tpmuckraker.com/archives/004729.php> (Nov. 16, 2007).

length, and to allow details to accumulate into a larger story, rather than reassert a narrative interpretation with each new installment.

Finally, noninstitutional media—and the increasingly sophisticated use of the powers of the Internet among institutional media—provide less-mediated ways to tell a story. Blogs are particularly good at offering narratives of a case, which provides the opportunity to assess the case as a whole.⁶³ Similarly, blogs and wikis can offer straight timelines, with direct links to evidence and key coverage. (The institutional media often offer similar timelines, yet they infrequently link to competitors' coverage and legal evidence, giving their readers much less ability to assess evidence for themselves).⁶⁴ In addition, blogs and other noninstitutional media offer casts of characters, direct links to evidence, embedded video and audio, and live blogs.⁶⁵ Such tools—whether provided by institutional or noninstitutional media—give readers a way to engage with a story that may allow for more individual judgment and certainly provides access for different kinds of readers.

The point here is that, without editors and genre conventions, a blogger can gather information in ways that are useful—the purpose might be to reveal the complexity of the information itself, to make the law accessible to nonlegal readers, or to do something else, but the flexibility of the medium allows for more experimentation. Dan Gillmor, a journalist who blogs, encourages institutional journalists to experiment to establish more of a conversation with their readers.

Journalists need to experiment more as a group—not with our core values or with things like getting it right, but with things like how we produce news. We're just going to get dull if we don't. We're in the midst of a change, where journalism is changing from a lecture into something that resembles something between a conversation and a seminar, and that's pretty exciting to me.⁶⁶

Noninstitutional media may not invent all the new forms, but the competition with noninstitutional media makes it more likely that institutional media will adopt new ways to produce the news.

63. Durham-in-Wonderland, Overall Case Narrative, <http://durhamwonderland.blogspot.com/2007/03/overall-case-narrative.html> (Mar. 11, 2007); Marcy Wheeler, Anatomy of a White House Smear 3.7, http://thenexthurrah.typepad.com/the_next_hurrah/2006/06/anatomy_of_a_wh_3.html (June 29, 2006) (including earlier linked posts).

64. Compare TPM Canned U.S. Attorney Scandal Timeline, <http://talkingpointsmemo.com/usa-timeline.php> (May 14, 2007) and dKosopedia, *supra* note 55 (providing links to transcripts of Senate testimonies and to newspapers such as *The New York Times*) with Timeline: The Criminal Investigation, WASH. POST (July 3, 2007) <http://www.washingtonpost.com/wp-dyn/content/custom/2007/03/06/CU2007030600916.html> (no links).

65. Durham-in-Wonderland, Cast of Characters, <http://durhamwonderland.blogspot.com/2007/02/cast-of-characters.html> (Feb. 3, 2007).

66. J.D. Lasica, *Weblogs: A Source of News*, ONLINE JOURNALISM REV., May 31, 2001, <http://www.ojr.org/ojr/workplace/1017958782.php> (quoting Dan Gillmor).

C. Open-Source Investigation

The most promising thing noninstitutional media brings to reporting on legal cases is open-source investigation. Any mid-sized blog or larger brings together people with a range of expertise. In 2003, Groklaw described its community in such a way that captures the diversity of most blog communities:

Quite a number in the group are software engineers Others are proprietors of Linux-based businesses or executives or employees of Linux-related businesses. A few of us are lawyers, one is a paralegal, one a stockbroker, at least one is a physicist, a couple are journalists, one is a retired policeman, another a retired truck driver, others are in or have been in the military, and some work or have worked in government. We also have experienced UNIX programmers among us who personally witnessed the history of UNIX since its inception, participated in its development, and know the software well. One of us is a nontechnical grandmother who installed GNU/Linux herself recently and fell in love with the software.⁶⁷

Such diverse communities exist within a context that remains largely a gift culture—in which experts are willing to contribute their expertise for free. As a result, regular readers of a blog often contribute in some way to the content of that blog. As Gillmor has famously explained, “It boils down to something simple: readers (or viewers or listeners) collectively know more than media professionals do. This is true by definition: they are many, and we are often just one. We need to recognize and, in the best sense of the word, use their knowledge.”⁶⁸ Many blogs take advantage of this dynamic naturally through the use of comment threads.

For blogs covering legal proceedings, such open-source investigation has helped the public wade through masses of evidence, fine-tune legal understanding, and even provide legal advice used in trials. In the case of Groklaw, for example, self-identified software professionals provided expertise about code to the site and to lawyers soliciting their advice.⁶⁹ During the Libby coverage, bloggers and commenters on the left and on the right repeated the same experiment to determine that Richard Armitage was almost certainly Bob Novak’s source⁷⁰—five months before it was “scooped” in the media.⁷¹ In a particularly celebrated case, TPMM used threads to wade through thousands of

67. Groklaw, Open Letter to SCO’s CEO, Darl McBride, <http://www.groklaw.net/staticpages/index.php?page=20051113153750111> (Sept. 20, 2003).

68. Gillmor, *supra* note 53.

69. Groklaw, Another Lawyer Would Like to Pick Your Brain, Please, <http://www.groklaw.net/article.php?story=20061229171726760> (Dec. 29, 2006); *see also* Groklaw, The Code, <http://www.groklaw.net/article.php?story=229> (Aug. 19, 2003), in which Pamela Jones solicits help from programmers to understand the software disputes at the heart of the SCO claims, and Groklaw, Groklaw Takes A Closer Look at the ABI Files, <http://www.groklaw.net/article.php?story=20040130235310123> (Jan. 30, 2004), in which a group led by Frank Sorenson examines some of the software behind SCO’s legal claims.

70. Marcy Wheeler, About the Journalists, http://thenexthurrah.typepad.com/the_next_hurrah/2006/03/about_the_journ.html (Mar. 2, 2006) (including comments); Rick Ballard, <http://amerivic.blogspot.com/2006/03/these-images-compare-original-pdf-file.html> (Mar. 10, 2006).

71. The “scoop” appeared on August 2006, a teaser for Isikoff and Corn’s book. Michael Isikoff, *The Man Who Said Too Much*, NEWSWEEK, Aug. 27, 2006, at 40.

pages of documents turned over in the U.S. Attorney investigation—virtually overnight.⁷² All of these examples relied on not just the expertise of a few individual readers, but also the combined power of the group members working together. Such collaborative “reading” of legal proceedings dramatically changes the role of the public—from passive consumer to critical participant, often guided by experts in a particular field. In this way, the noninstitutional media can as Brennan envisioned—in certain circumstances—“contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system”⁷³ by engaging the public in those discussions directly.

V

THE CONTROLS ON NEW MEDIA

Noninstitutional media are not without their risks. The noninstitutional media employ norms and controls quite different from those of the institutional media.

A. Reputation

First, traditional journalists, some readers, and credentialing organizations like courts are unfamiliar with the controls on accuracy and quality in the noninstitutional world—they are used to having the backing of an institution and the controls of the editorial process to vouch for any particular reporter. Yet, as Richard Posner argues, there are indeed checks on the content of blogs: “The charge by mainstream journalists that blogging lacks checks and balances is obtuse. The blogosphere has more checks and balances than the conventional media; only they are different.”⁷⁴

Larry Ribstein provides a detailed description of how the dynamic of online reputation serves as a check on the quality of noninstitutional media.⁷⁵ He describes how Google and other online search engines prioritize results based on the authority of a Web page, which is measured by the number and quality of links that page has already gotten—that is, selecting posts deemed reputable via an algorithm. These links bring new readers to a blog. If the blog consistently offers quality content, some of these readers will return to the blog and become regular readers. Over time, blogs slowly build their reputation for consistency and thereby build their readership. Thus, the process of attracting attention serves to differentiate the useful blogs from the less useful blogs. “[E]ntry to amateur journalism is free but without value until the author makes

72. Josh Marshall, Document Dump Research Thread, <http://www.tpmuckraker.com/archives/002863.php> (Mar. 24, 2007).

73. See *supra* text accompanying note 2.

74. Posner, *supra* note 59.

75. Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 212 (2006).

the additional investments in time and credibility necessary to build readership.”⁷⁶

The central assumption to this method of quality control is that not all noninstitutional media will meet professional standards of quality, but that the outlets that attract attention either meet those standards or (like Drudge) offer a unique service that many readers find valuable. David Ribstein elaborates:

The accuracy difference between the professional media and blogs, then, might be viewed as the difference between “horizontal” checking by other bloggers and “vertical” checking within the hierarchy of the conventional media firm Although uncoordinated horizontal checking may leave mistakes, widely followed blogs will tend to be corrected quickly and completely.⁷⁷

In other words, the editorial process (as well as the hiring and training process) of an institutional media outlet will catch most errors; the acquired reputation of a blog will indicate that it has been reliable over time, has readers who police it for accuracy in any given post, and then fixes errors quickly and prominently (usually more prominently than corrections run in the institutional press).

The importance of links in assigning credibility offers one possible way for credentialing agencies to deal with the challenge of determining which bloggers are reliable. In addition to asking for evidence of blog longevity and posting frequency, a credentialing organization might ask not just for links to the work on a particular story or general topic the blogger has done herself, but also to the links that person has received from others—a kind of referral system to ensure quality. The Web site Technorati rates the influence of all blogs; if a blog acquires links from an influential blog such as one that appears on Technorati’s listings, it is one mark of the first blog’s credibility on a given subject (keeping in mind that few of the most popular blogs, because of their subject matter, would link to a site reporting on a legal proceeding).⁷⁸

B. Pseudonymity

The reputation- and link-based controls on blogging also exert some control over another issue that causes widespread concern: the practice of writing under a pseudonym. Note the word. At least among bloggers and wiki contributors, most contributors post *pseudonymously* as distinct from *anonymously*. The difference is important, since pseudonymity implies a stable online identity, one that can accrue credibility, be held accountable for inflammatory speech or erroneous reporting, and one that will have a recognizable voice (if not a distinct IP address).

Discussions about the risks of pseudonymity often ignore the reasons for pseudonymous posting and commenting. The reasons bloggers and others write under pseudonyms almost exactly mirror the reasons why journalists’ sources

76. *Id.* at 192.

77. *Id.* at 209.

78. See Technorati, Popular Blogs, <http://technorati.com/pop/blogs/> (last visited Nov. 30, 2007).

demand anonymity. Most frequently, people blog or comment pseudonymously on political blogs to protect their livelihood or their employer.⁷⁹ These are precisely the reasons cited by Justice Stewart in his defense of journalists' use of anonymous sources in *Branzburg v. Hayes*.⁸⁰

An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information to the public discourse, yet each may be willing to relate that information only in confidence . . . either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views.⁸¹

Pseudonymous posting and commenting is at least as central to freedom of speech as anonymous sources, as pseudonymity allows all to participate in discussion, regardless of whether their employers would approve. That said, a tolerance for pseudonymity does entail certain risks (as, indeed, anonymous sourcing does). Pseudonymous posters may use violent or otherwise hateful speech, though most sizeable blogs have comment moderation that will remove an offensive comment and, if necessary, ban the commenter from the site. Pseudonymous commenters may offer information that cannot be properly vetted without knowing the person's real identity—though bloggers often learn the real identities of their pseudonymous commenters. Although blog owners can check IP addresses to see if they raise any obvious concerns (such as comments coming from a law firm involved in a case), it remains easy to manipulate comment threads. Perhaps the biggest risk—particularly in the context of legal proceedings—comes when newer members of a community leave comments with details that may affect an ongoing case. For example, in TPMM threads in August 2007, a number of commenters purporting to be John Michael's family members left allegations about corruption of Tommy Kontogiannis (both had been charged in the Duke Cunningham scandal).⁸² As the products of pseudonymous commenters, there is little way to vet such comments, yet these comments attracted enough attention that they might have influenced the coverage of the ongoing legal proceedings. In addition, there continue to be cases in which one party in a legal dispute attempts to learn the identity of a pseudonymous blogger, alleging that blogger is a party in the suit.⁸³

79. See Krysten Crawford, *Have a Blog, Lose a Job?*, CNN/MONEY, Feb. 15 2005, available at <http://money.cnn.com/2005/02/14/news/economy/blogging/>; Jacob Gershman, *Blogging Prof Fails to Heed His Own Advice*, N.Y. SUN, Oct. 11, 2005, available at <http://www2.nysun.com/article/21296>; Amy Joyce, *Free Expression Can Be Costly When Bloggers Bad-Mouth Jobs*, WASH. POST, Feb. 11 2005, at A01; Posting of Josh Marshall, <http://talkingpointsmemo.com/archives/009691.php> (Sept. 8, 2006) (discussing attorney David Kurtz's need for anonymity).

80. 408 U.S. 665 (1972).

81. *Id.* at 729–30 (Stewart, J., dissenting).

82. The original thread, from which comments have been removed, is <http://www.tpmuckraker.com/archives/003892.php>. Some of the comments have been preserved at War and Piece, *A Big Fat Greek Family Feud*, <http://www.warandpiece.com/blogdirs/006573.html> (Aug. 31, 2007).

83. See *Quixtar Goes on Warpath Against Bloggers*, CBS NEWS.COM, Oct. 13, 2007, <http://www.cbsnews.com/stories/2007/10/13/business/main3364365.shtml> (describing Quixtar seeking injunctions to discover the identities of those who posted unflattering remarks about the company); Kelly Heyboer,

These attempts to discover the identity of a pseudonymous blogger risk chilling the protected speech of citizens not involved in the dispute and dampening criticism.

C. Blogosphere Norms

Finally, whereas bloggers and other Internet production exist within a framework that is still largely noninstitutional, they do exist within growing communities that have evolving—but enforceable—norms. This dynamic, for example, discourages bloggers in many subcommunities from publishing the personal information of private—or even public—individuals.⁸⁴ Yet these norms differ from subcommunity to subcommunity. As Ribstein rightly observes, “[g]iven blogs’ diversity, multiple codes likely will develop for particular categories, such as for academics and lawyers. Some specific rules might develop to suit blogs generally.”⁸⁵ Because of this diversity, discussions of the risks of noninstitutional media would do well, first, to include an awareness of the norms of the particular subcommunity in question, and second, to try to pressure for changes within the subcommunity itself.

VI

CONCLUSION

There is real reason to approach noninstitutional media with caution—if only because there is such a great range in quality among noninstitutional media outlets and because rumors can spread quickly through these outlets.

At the same time, one thing is undeniable. In at least a few cases, the noninstitutional media have dramatically accomplished the objective intended for the media in legal proceedings—increasing the awareness and knowledge of those legal proceedings. As Pamela Jones explained of her own site’s popularity, “Groklaw has proven that the law interests millions of people outside the legal field, if you explain it so they can understand it.”⁸⁶ Or better yet, as a FireDogLake reader herself described the process of following a trial:

During the Libby trial the links to the case files[,] etc[.] deepened my understanding of the Judicial process and had me feeling that it really mattered if a peasant like myself understood what was going on. I felt part and parcel to the Judicial process and

Officials in Monmouth Town Want ID of Anonymous Blogger, STAR-LEDGER, Nov. 27, 2007, available at http://www.nj.com/news/index.ssf/2007/11/who_is_datruthsquad_for_months.html.

84. See, e.g., “Hunter,” A Movement of Petty Thugs, <http://www.dailykos.com/storyonly/2007/10/9/224358/287> (Oct. 9, 2007) (describing the deletion of all Michelle Malkin’s personal information from threads, even while she intruded on a family highlighted in a Democratic radio address); Mike Stark, I Just Returned from Falafel Bill’s House, <http://www.dailykos.com/story/2007/7/31/9920/91146> (July 31, 2007) (providing fodder for the debate over whether Daily Kos diarist Mike Stark should have confronted Bill O’Reilly at his house).

85. Ribstein, *supra* note 75, at 215.

86. Groklaw, Two Nice Things for Groklaw, <http://www.groklaw.net/article.php?story=20051009213017135> (Oct. 10, 2005).

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found myself questioning, understanding and appreciating what our Constitution and laws are based on.⁸⁷

The proliferation of noninstitutional media carries the risk of dubious reliability. But its upside goes right to the heart of the role of media in legal proceedings: to educate citizens, and perhaps even to make them active participants in ensuring the fair exercise of justice.

87. Posting of Kathleen to FireDogLake (Sept. 13, 2007, 9:39am), <http://www.firedoglake.com/2007/09/13/internet-access-to-federal-criminal-cases/#comment-963621>.