

3-1-2003

Hercules, Omniscience, Omnipotence, and the Right Answer Thesis

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Recommended Citation

46 N.Y.L. Sch. L. Rev. 3-4

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CELEBRITY LAWYERS AND THE CULT OF PERSONALITY

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Throughout our nation's history, celebrated American lawyers have played a vital role in ensuring the vitality of our democracy. That, at least, is the story Alexis de Tocqueville brilliantly told in his classic account of America in the 1840s. "There are neither nobles nor men of letters in America," Tocqueville observed.¹ "Therefore, the lawyers form the political upper class and the most intellectual section of society."² If an aristocracy is found in this country, Tocqueville went on, "it is at the bar or the bench."³

This was no idle gentry. In Tocqueville's view, American lawyers provided an essential bulwark against the tyranny of the majority.⁴ The jurist's trained prudence and conservative instincts, his love of history and tradition, applied "an almost invisible brake" when the American people "let themselves get intoxicated by their passions or carried away with their ideas."⁵ In short, it was up to the American lawyer to neutralize the vices inherent in popular government. Who else could check the radical egalitarian impulse of Jacksonian populism?

How much has changed a hundred and sixty years on. If American lawyers once were perceived as a brake upon popular passions, today we see something very different. Law has entered the age of

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1. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 268 (1969).
2. *Id.*
3. *Id.*
4. *Id.* at 268-69.
5. *Id.* See also Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 739-42 (1988) (describing the jurist's expertise of "prudent interpretation," an acquired facility with the interpretation of inherited texts in concrete contexts).

images,⁶ and the best-known lawyers among us are show business icons, luminaries in the culture of celebrity.⁷ The lawyer as celebrity has become a willing participant in the mutually assured seduction that goes on between TV journalists and producers and the lawyer pundits, anchors, and screen personalities who help make entertainment king.

What has gone wrong?

Yale Law School Dean Anthony Kronman, in his darkly titled book *The Lost Lawyer*, argues that American lawyers today are experiencing a “spiritual crisis.”⁸ According to Kronman, traditional virtues of character, leadership, and wisdom have been eroded by greed, competition, and the loss of a sense of public service.⁹ But the spiritual crisis that Kronman describes is actually part of a much larger cultural phenomenon.

In times of disorder, the need grows for public rituals that will proclaim the resilience of the social order. As Justice Warren Burger wrote in *Richmond Newspapers v. Virginia*, an opinion advocating the need to keep courtrooms open to the public, “[t]o work effectively, it is important that society’s criminal process ‘satisfy the appearance of justice,’ and the appearance of justice can best be provided by allowing people to observe it.”¹⁰

6. Richard K. Sherwin, *Nomos and Cinema*, 48 UCLA L. REV. 1519, 1519-20 (2001) (“Law lives in images. We make sense of reality by drawing upon the stories and storytelling modes that are most familiar to us. And these days, television and film are by far the most popular sources of the stories and story forms that we all know.”).

7. See, e.g., Marilyn Kalfus, *Legal Eagles Soar in O. J.’s Trial*, PHOENIX GAZETTE, Feb. 8, 1995, at A1 (“What the [O.J. Simpson] trial has done is turn lawyers into celebrities in a way that has never happened before”); David Margolick, *New Television Stars in the O.J. Simpson Case Galaxy: The Lawyer-Commentators*, N.Y. TIMES, Nov. 4, 1994, at A32 (“One day not long ago, a local lawyer, Jay Jaffe, approached Roger Cossack, another member of the bar, in Nate and Al’s, the venerable Beverly Hills delicatessen and agora. ‘Rog, my ratings are higher than yours,’ Mr. Jaffe declared. ‘Nationally, but not internationally,’ Mr. Cossack replied. The ratings the two men were talking about were not from Martindale-Hubbell but Nielson. Both are among the spate of lawyer-celebrities spawned by the O.J. Simpson case.”); Rivian Taylor, *Celebrity Lawyer Pens Some Contrary Views*, SAN DIEGO UNION-TRIBUNE, Dec. 13, 1992, at E-11 (“Alan Dershowitz, the lawyer to celebrity criminals, such as Mike Tyson, Leona Helmsley, Jim Baker and Michael Milken, has become a celebrity himself. Columns and essays on contemporary legal, social, and political topics have been recycled in his new book, ‘Contrary To Popular Opinion’”).

8. See generally ANTHONY KRONMAN, *THE LOST LAWYER* (1995).

9. *Id.*

10. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980).

This, of course, was written before the O.J. Simpson trial burst upon the national scene, which is to say, before trying, testifying, and presiding over a criminal case came to be seen as an audition for audience approval. It came before the demand to fill airtime gave rise to a cottage industry of legal pundits and professional commentators, from *Burden of Proof*'s Greta Van Susteren and Roger Cossack to Geraldo Rivera on *Rivera Live*. It came before reality law programming proliferated, with the stars of the Simpson trial being recruited for TV shows (such as Johnnie Cochran's *Cochran & Company* and *Johnnie Cochran Tonight* and Marcia Clark's short-lived *Lie Detector*), commentary spots (Robert Shapiro signed with *CBS News*, Barry Scheck opted for *Dateline NBC*), and guest appearances (*Rivera Live*, *Larry King*, *Entertainment Tonight*, *Oprah*, *Hardball*, *Burden of Proof*, *Power of Attorney*)—not to mention Christopher Darden's budding TV acting career. It was before trial lawyer sages like Gerry Spence and F. Lee Bailey marketed their high profile personalities, providing the American public with nuggets of wisdom in staccato, twenty-second bursts. And it was before the highly aberrational criminal trials on Court TV set a new baseline for pop law in America, deceptively masking the reality of plea bargaining and the run of the mill cases in which death, sexual assault and celebrity defendants, contrary to TV appearances, are anomalies rather than the standard fare that plays on the screen.

As perceived by the American public, law today is becoming entertainment, and entertainment law. The line between the reality of lawyering and its fictional representation has all but disappeared. As cognitive psychologist Reid Hastie recently observed, “[t]oday media impact is more important than ever before in the history of the jury trial because there is much more widespread and detailed reporting of trials and crime events, especially on television.”¹¹ Such reporting is not especially known for getting things right. The media's distortions in this respect have significant consequences. Popular culture, including the culture of pop law and pop politics, provides people with a repository of familiar templates which tell them how a particular kind of story or scenario is supposed to go, or how a particular kind of character can be expected to behave, and why. In sum, popular media-based knowledge serves as a kind of “cognitive short-hand” that informs and structures ordinary common sense. These are the same

11. Reid Hastie, *Reflections in the Magic Mirror of Law: Media Effects on Juror Decisions*, 40 S. TEX. L. REV. 903, 903 (1999).

knowledge structures (the familiar images, scenarios, plot lines, and character types) that jurors bring with them into the courtroom and that voters bring with them into the voting booth. They are especially useful in helping people fill in the gaps between elusive technical rules of law or technical policy issues on the one hand, and the answers that media-informed common sense provides on the other. Lawyers and politicians know this, and they are adapting their strategies of communication and persuasion to take this knowledge gap into account.

Popular images of criminals, lawyers and judges leach into the courtroom, the political campaign and the advertising blitz for and against proposed law reforms. It is what we see when cynically promoted stereotypes of the criminal predator¹² covertly activate racial prejudice and a populist rage for retribution against, and isolation from, the dangerous “other” among us. It is what happens when a juggernaut media campaign in the wake of the kidnapping and murder of twelve year old Polly Klaas gives birth to the strictest populist sentencing regime in the nation, California’s so-called “three-strikes and you’re out” law.¹³ It is also what happens when competing public relations teams battle for the hearts and minds of Americans, as occurred during the presidential election crisis of 2000. While Al Gore’s spin masters urged patience as legal issues regarding proper vote counting procedures worked their way through the nation’s court system, George Bush’s media handlers warned against the growing chaos and the dark forces being unleashed as lawyers “high-jacked” the political process.¹⁴ Today, Justice Burger’s vaunted ideal of the appearance of justice seems to have become synonymous with the esthetic cues of reality TV.

In a time of disorder, televised order becomes a simulacrum, a serialized monument to our thwarted need for an “anchor” in the face of uncontrollable reality. The fate of the self travels a parallel path. In a time of insecurity concerning the authentic self, the need grows for models of self-aspiration. This is what the celebrity supplies: an intensified sense of being there, dressed in the trappings of material success.

12. See RAY SURRETTE, PREDATOR CRIMINALS AS MEDIA ICONS, MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME 131-58 (Gregg Barak ed., 1994).

13. See Richard K. Sherwin, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE, at ix (2000).

14. Richard K. Sherwin, *Visual Spin: Bush v. Gore, a Case Study in Litigation Public Relations* (June 2002) (unpublished paper presented at the annual Law & Society meeting, Vancouver, British Columbia) (on file with the author).

In the culture of celebrity, to be known is to be. And, as everyone knows, to be known you must be on TV. On this score, the celebrity lawyer is the lawyer par excellence.

But on TV, the celebrity lawyer's being is a screen presence, all surface no depth. As veteran journalist Nina Totenberg put it, "[i]deas do not work particularly well on television . . . Talking heads work best by bouncing one talking head off another, but the statements that work best in counterpoint are not necessarily the best things those two or three people said."¹⁵ Barry Scheck is more direct: "[t]he problem is that . . . the producers are picking people so they'll fight with each other to make good television, to create a certain kind of ratings vehicle, and basically we're not getting context, we're not getting a sense of proportion, we're not really getting educated."¹⁶ In other words, meaningful substantive content yields to effective, which is to say, dramatic visual stimulation. Television needs strong pictures and a very simple story line. Novelist Philip Roth recently described this as "the triumph of the surface."¹⁷

On TV, everyone has the right answer and is quick to do battle with those who venture opposing views. It is a world in which Judges Judy, Brown, and Wapner dispense quick justice, lecturing, cajoling, and insulting the parties before them.¹⁸ Populist TV judges, like populist TV DAs and TV detectives, do not suffer fools gladly. Their job is to cut through the deceptions, counter the rip-offs, and sweep up the deadbeats. No one has time for the technicalities of law. Tough love, swift action. The medium won't bear hard-to-visualize abstractions, like the presumption of innocence, the right against unreasonable search and seizure, or the potentially unpopular demands of due process.

In the current age of images, legal reality is being projected in a variety of ways inside the courtroom itself: from day-in-the-life videos in personal injury cases, to police surveillance videos, to civilian and journalist videos and their digital reconstruction (as jurors saw in the criminal trial of the Los Angeles police officers who beat Rodney King), to computer graphics, digitally reconstructed accidents and crime re-en-

15. Nina Totenberg, *Capturing an Audience's Attention: Explaining the Law Through Radio, Television, and Print*, 40 S. TEX. L. REV. 957, 967 (1999).

16. *Newshour with Jim Lehrer* (PBS television broadcast, Oct. 19, 1998), at http://www.pbs.org/newshour/bb/media/july-dec98/lawyers_10-19.html (last visited July 15, 2002).

17. PHILIP ROTH, *THE HUMAN STAIN* (2001).

18. See Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry*, 39 AMER. BUS. L.J. 1 (2001).

actments, to video montage as a form of legal argument (including the strategic interweaving of commercial feature film footage¹⁹). Effective legal advocates today know and are putting to use what advertisers and politicians have known and practiced for quite some time: how to get the message out, how to tailor content to medium, how to spin the image, edit the bite, seize the moment on the screen and in the mind of the viewer.

The domain of experience independent of the mediation of popular culture is shrinking. The visual mass media has become the major source of the building blocks of worldly knowledge and common sense. The convergence of new visual communication technologies and an unrestrained market is changing our mind and our culture. Speed is king. Sound bites rule. And as we all surf the image-flow, meanings yield to the visual logic of film and television. It is above all a logic of visual association in a medium bent on intensifying emotion. After all, it is the intensity and immediacy of emotional payoff that keep us watching.

We live in a time of blurred boundaries, when film characters from Oliver Stone's *Natural Born Killers* help the prosecution get the death sentence in a real capital case²⁰ and when fictional re-enactments in Errol Morris's docudrama *The Thin Blue Line* have the power to re-open a real murder case and ultimately free a defendant who spent over eight years on death row.²¹ It is a time when a president's video deposition, in the early stages of impeachment, is reviewed on the front page of the New York Times by the paper's film and television critic (dutifully noting the tape's "unlikely resemblance to [Louis Malle's film] *My Dinner With Andre*").²² It is also a time when the fate of criminal defendants turns on the jury's response to a film's esthetic cues.²³

19. See *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317 (Ariz. Ct. App. 1996).

20. See *Beasley v. State*, 269 Ga. 620, 627 (1998).

21. Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994).

22. *THE THIN BLUE LINE* (Miramax 1988); see Richard K. Sherwin, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE, at ix (2000)

23. See *Buried Alive Kidnapping* (ABC News television broadcast, Apr. 4, 2002), at <http://www.abcnews.go.com/sections/GMA/GoodMorningAmerica> (last visited July 15, 2002) ("A group of friends charged with kidnapping a teenage girl, tying her up, and staging her mock burial say they were just trying to make a *Blair Witch Project*-style horror flick. But prosecutors say the videotaped incident on March 6 was all too real for the victim"); see also Chris Green, *Kinda Sorta Buried Alive! What Hath Reality TV*

As real lawyering and its fictional representation on television merge, content as well as the new visual esthetics leach from popular fictional culture into the legal culture. And one wonders whether a popular television lawyer, someone like Ally McBeal, say,²⁴ for whom private is public, emotion is reason, and fantasy is real, might have been telling us something significant about the new, postmodern lawyer prototype. Do we recognize our post-O.J., post-Monica Lewinsky culture, in Ally's incessant blurring of inner and outer, in her strange mix of reality and fantasy? Is there some new esthetic of persuasion at work here: one-part emotional vulnerability, one-part genuine caring, taking us as close as we're likely to get to the oxymoronic ideal of postmodern authenticity and hence trustworthiness, that core element of rhetorical power? In a culture in which the boundaries between reason and emotion have broken down is the pomo trial lawyer better off defying conventional logic and following the dictates of intimate feelings? As Ally McBeal once declared to a colleague, she, like her profession, is "anti-sense."²⁵ Does this foreshadow the new visual advocate: master of emotional logic and non-deliberative association based on audio-visual montage and simulation?

We have come a long way from Tocqueville's admiring account of lawyers in America as champions of prudent, counter-majoritarian restraint. Rather than serving as a deliberative brake upon popular passions, celebrated lawyers today have more often appeared in the role of high profile agents of the media's artificial enhancement of emotion and spectacle. As UCLA Law Professor Arenella notes, "[t]he television audience tends to forget the human tragedy it is witnessing as the trial merges with the other soap operas presented for the audience's pleasure."²⁶ But if law is merging into the "supra-ideology" of entertainment, as culture critic Neil Postman puts it,²⁷ popular legal rep-

Wrought? Amateur Michigan Filmmakers are Accused of Kidnapping, and The Tabloid Shows Eat it Up. But the Real Culprit May be The Entertainment Industry's Phony Cult of "Realness" (Apr. 23, 2002), at http://www.salon.com/ent/feature/2002/04/23/buried_alive.html (last visited Sept. 30, 2002).

24. *Ally McBeal* (Fox Network television broadcast).

25. See Joan Gershen Marek, *The Practice and Ally McBeal: A New Image For Women Lawyers on Television?* 22 J. AM. CULTURE 77 (1999) ("Ally McBeal is the epitome of the post-modern lawyer who exists in a world where there is little distinction, if any, between private conduct and public image").

26. Peter Arenella, *The Perils of TV Legal Punditry*, 1998 U. CHI. LEGAL F. 25, 43 (1998).

27. See NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* 87 (1986).

resentations from the culture of entertainment are also merging into law.

Today, the most unrepresentative (“sensational”) cases inform the popular legal imagination and become the basis for public policy and law making. As Stanford Law Professor Lawrence Friedman recently wrote, “Criminal policy is made by Polly Klaas and Willie Horton.”²⁸ A similar phenomenon is occurring with regard to the lawyer as celebrity. Today we encounter the lawyer as self-promoter, hawking personality for fame and profit. On Court TV’s *Cochran & Company* host Johnnie Cochran wins every show. When an actor from the soap opera *All My Children* tells him “you’re our prototype,” Cochran graciously offers to open an office in Pine Valley, the fictional setting of the soap.²⁹ It is the same TV logic that allows us to watch actor John Travolta commenting on the real lawsuit in a television documentary about the making of the movie, *A Civil Action*, based on the book of that title.³⁰ If we stick around we can watch reality TV episodes of *COPS* sandwiched between dramatic episodes of *Homicide*. Or perhaps we’ll catch the real Erin Brockovich campaigning on TV against tort reform, having gained notoriety on the heels of actress Julie Roberts’ acclaimed portrayal of her in the box office hit, *Erin Brockovich*.³¹ Or perhaps we’ll see an ad seeking personal injury caps, bruiting the litigious irresponsibility of people who spill coffee in their lap and then ask for millions from corporate deep pockets. The latter reference to the notorious lawsuit against McDonald’s reflects the highly distorted information about the case that endlessly cycled through the mass media. As it turns out, this was the fruit of a public campaign fueled by conservative think tanks and funded by corporate beneficiaries.³² But as Jeffery Miller has astutely observed, when folklore beliefs are pled in court they shift from half truths to something people believe in as a

28. Lawrence Friedman, *Lexitainment: Legal Process as Theater*, 50 DEPAUL L. REV. 539 (2000).

29. Lisa Scottoline, *Get Off the Screen*, 24 NOVA L. REV. 653, 664 (2000).

30. *Id.* at 661.

31. The film ERIN BROCKOVICH (Universal Studios 2000) depicts the true story of a young woman who helped to launch a toxic torts lawsuit that ultimately resulted in a \$333 million class action settlement against a California utility for polluting the local water supply.

32. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 725 (1998).

cultural or moral norm.³³ We see a similar phenomenon when legal pundits, animated by public criticism of unpopular jury verdicts, use notorious trials as a benchmark for social policy. Here, too, legal reality follows close on the heels of legal legends, factoids and fictional representations.

These developments cannot but erode the public's faith in the legal system's good working order. And as polls indicate, law and lawyers have never fared worse in the public's eye.³⁴ Atticus Finch, it seems, has gone the way of Joe DiMaggio. Yet, beneath the radar of popular culture, dedicated lawyers continue to serve the public interest, placing the persistent ideals of prudent deliberation, equal justice, and the rule of law above the seductions of wealth, power, and the cult of celebrity. The American experiment in democracy will continue to flourish so long as we take seriously, as citizens and jurists, our shared responsibility for values that transcend self-interest alone. Speaking out on behalf of the poor and the powerless, calling attention to serious erosions in constitutional safeguards against unchecked state power, casting light on systemic abuses in the private sector resulting in gross inequalities in the distribution of resources, or unfairness in the imposition of disproportionate criminal sentencing, including race-based distortions in capital sentencing — issues such as these are not the stuff of popular entertainment. Their complexity does not readily translate into sound bites and gripping visuals.

Notwithstanding these obstacles, we may still take some comfort in the thought that many anonymous lawyers continue to perform heroic acts in the service of higher principle. Meanwhile, on the Internet and elsewhere one may still encounter pockets of informed communication that cut through the distortions of mass media journalists and producers who are wedded to the entertainment principle and who, in its thrall, are willing to embrace the most compelling image-provider, whether it is Microsoft³⁵ or the United States Defense Department.³⁶

33. Jeffrey Miller, *Before His Passion Had Time To Cool: The 'Unwritten Law of Adulterous Provocation' and Urban Legend*, 10-FALL, CAN. J. L. & SOC'Y 99, 102-03 (1995).

34. See Michael Asimow, *Bad Lawyers In the Movies*, 24 NOVA L. REV. 533, 537 (2000). See also Michael Asimow, *When Lawyers Were Heroes*, 30 U.S.F. L. REV. 1131, 1133 (1996) (“[L]awyers today are presented in courtroom movies as money-hungry, boozed-out, burned-out, incompetent, unethical sleazebags . . . [T]hey accurately reflect and no doubt reinforce the popular culture in which attorneys have about the same public approval rating as the criminals they represent.”).

35. See Joshua A. Newberg, *The Narrative Construction of Antitrust Law*, 12 S. CAL. INTERDISC. L.J. __ (forthcoming 2003).

The incentive to break the grip of the entertainment principle will not come from the quick rewards that the culture of celebrity and mass distraction provide. Yet, within highly mediated, image-saturated democratic societies like our own it is an imperative of responsible political and legal participation that citizens seek out more informed sources of information in an effort to get beyond the conventional popular fare. They must also be willing to cultivate the art of visual literacy and critical viewing in order to separate the visual wheat from the chaff to which they are exposed in the courtroom as well as in the mass-mediated court of public opinion.

I place my bet on the young and on all those, regardless of age, who seek to translate their feeling of alienation, their aversion to inauthenticity, and their resistance to compromise and collusion with power (for power's sake) into meaningful and constructive public actions. But whether the lure of instant gratification will prove stronger than the call to public service and civic virtue, whether the narcissism of fame and greed will trump an ethos of care and respect for others, particularly those who are most in need, remains to be seen.

It is not up to the American lawyer alone to make a difference. But if enough American lawyers were to actively seek personal fulfillment in their professional lives in pursuit of larger values, their contribution just might peel away some of the tarnish that has darkened the image of lawyers since the days when, once upon a time in America, Alexis de Tocqueville celebrated a great democracy and a noble profession.

36. See Katherine Q. Seelye, *When Hollywood's Big Guns Come Right from the Source*, N.Y. TIMES, JUNE 10, 2002, at 1 ("The military establishment has been cooperating with Hollywood for a century, with a noticeable break in the Vietnam years. But in recent times, with movie budgets swelling into the hundreds of millions of dollars, the Defense Department's contribution – and thus the American taxpayer's – has grown ever bigger and more elaborate. . . [Y]ou have a study in mutual exploitation. . . Each side wants to get whatever it can.").