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The Jurisprudence of Appearances

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THE JURISPRUDENCE OF APPEARANCES*

RICHARD K. SHERWIN¹

It is only the notorious trial which will be broadcast because of the necessity for paid sponsorship.

Estes v. Texas²

Surface appearances are more likely to conceal than to reveal how the judicial system operates. Television will create popular spectacles of great appeal but deceptive authenticity as it selects and interprets trials to fit the existing pattern of law in the world of television.

George Gerbner³

The crimes that dominate the public consciousness and policy debates are not common crimes but the rarest ones. Whether in entertainment or news, the crimes that define criminality are the acts of predator criminals. . . . Predator crime is a metaphor for a world gone berserk.

Ray Surette⁴

Let us begin with a rule of thumb. It will sound the theme that resounds throughout this article. *Whatever the visual mass media touch bears the mark of reality/fiction confusion.* There is also a corollary to the rule: *Once you enter the realm of appearances it may be difficult to*

* This article is adapted from RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000).

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2. 381 U.S. 532, 545 (1965).

3. George Gerbner, *Trial by Television: Are We at the Point of No Return?*, 63 JUDICATURE 416, 420 (1980).

4. RAY SURETTE, *Predator Criminals As Media Icons*, in *MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME* 131 (Gregg Barak ed., 1994).

control how the image spins. In what follows, I will trace the rule to its historic origin in the law. This effort will lead us to the United States Supreme Court, the institutional source of the jurisprudence of appearances. In the course of this analysis, we will see what happens to law when it comes to be dominated by image and perception. It is what happens when law enters the domain of the hyperreal, a realm in which appearances battle appearances for the sake of appearances—and where images risk spinning out of control.

The high court has long maintained a concern for the appearance of justice, insisting that justice not only must be done, but that the public must also *perceive* it to have been done.⁵ However, this concern with appearances assumed a more exaggerated and dubious form in two cases decided sixteen years apart—*Estes v. Texas*⁶ (1965) and *Chandler v. Florida*⁷ (1981). I believe that the story these two cases tell captures an inaugural moment in the ongoing development of the jurisprudence of appearances. Rather appropriately, both cases deal with televising criminal trials. They are all about appearances. In fact, they tell a cautionary tale about what happens to law when *appearances are used to counter appearances for appearances' sake*. That is the jurisprudence of appearances in a nutshell.

Billie Sol Estes, a financier and a confidant of President Lyndon Johnson, was prosecuted on swindling charges. It was a big deal at the time and caused a lot of media attention. In plain terms, it was a classic notorious case. The problem was that Estes did not want his trial to be televised. It was anyway. The legal question subsequently presented to the Supreme Court was whether the presence of TV cameras deprived Estes of a fair trial.⁸ A majority of the Supreme Court concluded that it did. Televising notorious criminal trials, they said, is inherently prejudicial to the defendant and thus violates due process.⁹

Sixteen years later, the question came up again. This time the trial was in Florida and involved some corrupt cops who got caught pulling off a burglary in a well-known Miami Beach restaurant.¹⁰ Unbeknownst

5. See *Offutt v. United States*, 348 U.S. 11, 14 (1954).

6. 381 U.S. 532 (1965).

7. 449 U.S. 560 (1985).

8. *Estes*, 381 U.S. at 534-35.

9. See *id.* at 586.

10. See *Chandler*, 449 U.S. at 566.

to the burglars, an amateur radio operator had fortuitously managed to record their walkie-talkie conversations as the crime was under way. This material made for some compelling media coverage. But when the defendants protested against the presence of cameras in the courtroom during their trial, the matter went all the way to the Supreme Court. And this time, in 1981, the Court said no problem. Cameras in the courtroom are fine with us. But what about the Court's earlier decision in *Estes v. Texas*? Didn't a majority of the justices say in that case that TV cameras were constitutionally prohibited in this sort of notorious criminal case? The matter calls for closer scrutiny.

Writing for the Court in *Chandler*, Chief Justice Warren Burger had an opportunity to revisit *Estes*. And by the time the visit was over, that case was no longer the same. In fact, Burger stood *Estes* on its head and then lied about it. His distortions live on in a surprisingly large number of law review articles as well as state and federal decisions which mimic Burger's account.¹¹ At the core of that account is a falsified description of what Billie Estes' trial was like. In *Chandler*, Burger looks back upon that trial and sees utter chaos, a courtroom out of control. For example, Burger describes the snaking cables that ran through the courtroom, the distracting klieg lights, the technicians scurrying under foot—a regular circus.¹² That is the word that keeps getting repeated.¹³ Sol Estes' trial, Burger tells us, was a “Roman circus.”¹⁴ Of course, Burger goes on to note, that was back in 1962, the early days of television;¹⁵ but things have changed. In 1981, telecasting trials no longer produces that kind of disruption. Television has evolved; it is much less obtrusive now than in the old days.

There is only one problem with the analysis of *Estes* that Chief Jus-

11. The standard reference to *Estes*—and there are scores of examples to choose from—characterizes it as a trial that was conducted in a “circus-like atmosphere.” On the federal level, see, e.g., *Murphy v. Florida*, 421 U.S. 794, 799 (1975); *DeLisle v. Rivers*, 161 F.3d 370 (1998). At the state level, see, e.g., *New Jersey v. Harris*, 716 A.2d 458, 468 (1998); *North Carolina v. Billings*, 500 S.E.2d 423, 429 (1998). The scholarly literature also reflects this factual misreading of the case. See, e.g., Leonard Pertnoy, *The Juror's Need to Know vs. the Constitutional Right to a Fair Trial*, 97 DICK. L. REV. 627, 652 (1993) (“A media circus surrounded the trial.”).

12. See *Chandler*, 449 U.S. at 576, 582, 584.

13. See *Estes*, at 603, n.3 (Stewart, J., dissenting) (e.g., “I have heard some say that it makes a circus out of the Court.”).

14. *Chandler* at 582.

15. See *Chandler* at 576.

tice Burger provides in *Chandler*. It gets the facts and the law of *Estes* completely wrong. Burger is right about the snaking cables and technicians under foot. But that was at *Estes'* *pretrial hearing* on the motion to exclude cameras from the courtroom. The trial looked nothing like that. That's because the trial judge had ruled that cameras could be present at *Estes'* trial only if they were hidden behind a specially constructed booth in the rear of the courtroom.¹⁶ And that is precisely what was done. In short, no lights, no wires, no technicians, no circus. So what gives?

It is at this point in the *Estes* story that the rule of thumb makes its first entrance. As it turns out, Chief Justice Earl Warren did something novel in his concurring opinion in *Estes*. He appended a series of shocking oversized photographs. What they showed was a courtroom packed with camera tripods, cameras, cameramen, cables, lighting devices—in short, it was a circus, a scene one would associate more with a press conference than with a court of law. Warren relied on these images to bolster his view that televising trials was a bad idea. But the photos he used were not of *Estes'* trial. They were taken from *Estes'* *pre-trial* hearing. Apparently, what Warren had in mind was to show what criminal trials *might* look like if the Court allowed them to be televised. In other words, Warren used especially vivid visual images to convey what he feared, not what had in fact occurred in *Estes'* case. In doing so he led the way into the realm of appearances, the domain of the hyperreal. Warren wanted people to see the way television mocks the solemn atmosphere of the trial. He wanted people to grasp the inherently prejudicial nature of such a spectacle. So he used appearances to stand for the reality that he feared.

It is the rule of thumb at work. Warren was counting on the vividness of the images he showed to stick in the viewer's mind. Their power would overshadow their deceit. Once firmly embedded in memory they would come to stand in for the real. Warren's stratagem succeeded. Warren apparently had grasped something important about the cultural and cognitive shift from print to visual evidence. Photographic and video-based evidence tends to enjoy a presumption of accuracy that is qualitatively different from print-based evidence. As Walter Lippmann put it: "Photographs have a kind of authority over the imagination to-day which the printed word had yesterday, and the spoken word before that. They seem utterly real. They come, we imagine, directly to us without human meddling, and they are the most effortless food for the mind conceiv-

16. See *Estes* at 537.

able.”¹⁷ In our current visual culture the most powerful images acquire an iconic quality. Iconic images distill complex details into what Barthes has called “a blissful clarity.”¹⁸ S. Paige Baty calls these kinds of images “mediaphemes” or quick encapsulations: “Once a story, person, or event is translated into mediapheme form, it ricochets through the channels of mass mediation with ease.”¹⁹ The face of Willie Horton, the figure of Rodney King, and the chaos of Sol Estes’ “Roman circus” trial are all examples of mediaphemes in this sense. Notably, the truthfulness of these images is not essential to the meanings with which they are commonly invested within the culture at large.

Warren put this insight to good use in *Estes*. However, in *Chandler*, sixteen years later, Chief Justice Burger took a step further. Burger, too, understood the rule of thumb, but, unlike Warren, he was also aware of its corollary: *once you enter the realm of appearances it may be difficult to control how the image spins*. Burger would now seize Warren’s images and turn them against him. The same images, spun in the opposite direction, would now open rather than close the courthouse doors to television. In taking this step, Burger thought he could master the corollary to the rule of thumb. But his confidence was misplaced. There was a price to be paid after all.

This is how it worked. For Warren and the *Estes* majority, cameras in the courtroom do two things that are bad. They not only adversely influence participants in the trial (including the lawyers, witnesses, and the judge), but they also taint the entire trial process by causing the public to confuse law with entertainment. As the *Estes* majority put it, only by featuring certain kinds of defendants (such as fallen idols or celebrity figures) and certain kinds of cases (such as those offering particularly grisly details to satisfy the public’s voyeuristic impulses) would ‘TV law’ attract the commercial support necessary to sponsor courtroom tele-

17. See STUART EWEN, *PR! A SOCIAL HISTORY OF SPIN* 153 (1996) (quoting Lippman).

18. Roland Barthes, *Myth Today*, in *MYTHOLOGIES* 143 (1972); see generally Vivian Sobchack, *The Insistent Fringe: Moving Images and Historical Consciousness*, in *THE PERSISTENCE OF HISTORY: CINEMA, TELEVISION, AND THE MODERN EVENT* (1996).

19. Sobchack, *supra* note 18, at 11-2 (quoting S. PAIGE BATY, *AMERICAN MONROE: THE MAKING OF A BODY POLITIC* 60 (1995)). See also Daniel J. Boorstin, *The Image: A Guide to Pseudo-Events in America*, 637 (1961) (“We are haunted, not by reality, but by those images we have put in place of reality...[P]seudo-events tend to drive all other kinds of events out of our consciousness, or at least to overshadow them.”)

vision.²⁰ Televising trials would thus encourage the public to associate the trials they see on television with “the commercial objectives of the television industry.”²¹ When law marries entertainment a legitimization crisis is in the offing. Not a bad prophesy—though the Burger Court would surely beg to differ.

In fact, when the issue of cameras in the courtroom came up again sixteen years later, the political and legal landscape had changed dramatically from the Warren years. The new majority, under Chief Justice Warren Burger, was not so much worried about TV cameras prejudicing criminal defendants. Their concern was a growing public perception that the judicial system was lurching out of control. Consider the historical backdrop:

- Richard Nixon’s strong crime control and anti-judicial activist rhetoric during the 1968 presidential campaign had convinced a significant number of Americans that the Warren Court’s “pro-criminal” rulings had in fact made life a lot more dangerous than before; ironically, this created a popular anti-Court backlash that the Burger Court inherited;
- Following the assassination of Martin Luther King domestic unrest over race relations surged; many feared that a new militancy

20. For Warren this represents a throwback to “the early days of this country’s development” when the criminal trial was regarded by many as a source of entertainment, a combination of theater and public spectacle. *Estes*, 381 U.S. at 570. Warren associates this perception of law with “frontier justice,” a corrupt form of justice in which entertainment values predominate. *Id.* at 571. In a startlingly prescient anticipation of media spectacles such as the O.J. Simpson double-murder trial, Warren noted the “natural tendency on the part of broadcasters to develop the personalities of the trial participants, so as to give the proceedings more of an element of drama.” *Id.* Warren was equally prescient when he observed that “[t]he television industry might also decide that the bare-boned trial itself does not contain sufficient drama to sustain an audience. It might provide expert commentary on the proceedings and hire persons with legal backgrounds to anticipate possible trial strategy, as the football expert anticipates plays for his audience.” *Id.* at 572. That is precisely the format that Steve Brill’s Courtroom Television Network would adopt a score and six years later. As Brill himself would say, Court TV was conceived as a combination of C-SPAN and soap operas. See Peter Pringle, *The Channel Where the Stars Are Behind Bars*, *THE INDEPENDENT*, October 11, 1994, at 27. Brill’s new commercial network would have to compete with both in order to succeed. This ratings-driven environment is precisely what the *Estes* Court anticipated and feared. Indeed, the network has gone on to blur the reality/fiction divide even further by broadcasting fictional law dramas such as *Homicide: Life on the Streets*.

21. *Estes*, 381 U.S. at 571.

would supplant Dr. King's politics of passive resistance. At the same time, the protest movement against the war in Vietnam fueled a counter-culture that had little trust of government and at times responded with skepticism toward the rule of law itself. This sentiment was vividly expressed by the absurdist ("guerilla theater") tactics that defendants used to mock judicial proceedings in the Chicago 7 conspiracy trial in 1969;

- Revelations about political corruption stemming from the Watergate crisis commencing in 1972 enhanced public skepticism not only toward political institutions, but also toward lawyers. After all, hadn't the nation's highest-ranking attorneys—from Attorney General John Mitchell to presidential counsel John Dean—shown themselves perfectly willing to advance the President's unlawful designs?
- Finally, only two years before *Chandler* was decided, investigative reporters Bob Woodward and Scott Armstrong published the first ever behind-the-scenes look at the Supreme Court itself. *The Brethren*, which had a long run on the bestseller list, produced many disconcerting revelations about the Court under Chief Justice Burger's leadership. Indeed, the picture of Burger that emerged was of a judge obsessed with appearances, often to the exclusion of all other values. Consider, for example, the scene in *The Brethren* in which Burger openly voices his concern to an amazed Justice Harlan about how a particular Court decision might play out in the media, or accounts of Burger circulating outrageous opinions simply to draw the attention of the media.²²

With images such as these dominating the popular imagination, a new anxiety hung over the high court. It looked as if the courts were losing control over appearances. Something had to be done.

Burger realized that the best way to counter bad images was to oppose them with good ones. But where could such images be found? Burger had an answer. Permit TV cameras inside the courtroom. Let the public see orderly criminal proceedings with convictions being swiftly

22. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 73-74 (1979).

and surely dealt out. This would not only provide the sought-after images of judicial order and control, but would also reinforce the crime control values that Burger championed.

Burger had good reason to believe these "confidence-building" images would prevail once cameras were allowed inside the courtroom. After all, it was logical to assume that only the strongest cases, the ones the government was most certain of winning, would be the ones the public would see. Weaker cases would most likely never reach the trial stage. They would be resolved by negotiated guilty-plea settlements. As for those cases where publicity might influence the state's decision to proceed to trial, surely they would receive the most government resources and be handled by the most experienced prosecutors. Criminal defendants are rarely in a position to match this level of investigative and adversarial power. And if a case threatened to send the public the wrong message, if it placed the appearance of order and solemnity in the courtroom at risk, trial judges were likely to be responsive to the prosecutor's call for the cameras to be shut off.²³

But even if Burger had good reason to expect favorable, confidence-building images to play on the air, a problem remained. The Court's earlier decision in *Estes* had concluded that it was precisely the highly publicized criminal case that could *not* be televised without violating the defendant's constitutional right to a fair trial. Clearly, something would have to be done about *Estes*, preferably in a way that would leave the appearance of justice intact.

Burger proved himself up to the task. Working off of Warren's deceptive images of Billie Sol Estes' trial in chaos, in *Chandler* Burger disingenuously explains why Estes' conviction had to be reversed. It was like being tried in "Yankee Stadium," he says.²⁴ By contrast, Chandler's trial was nothing like that. And that is why his conviction must stand. In short, now we can go on televising criminal trials—so long as they don't look like they are out of control. It is the bad images, the ones that (regardless of their source or accuracy) show a lack of proper decorum and

23. For example, in the aftermath of the O.J. Simpson criminal trial, a case in which the appearance of justice was more often eclipsed than evoked, courtrooms around the country moved to bar TV cameras. The list of blacked-out trials includes: the California trial of Richard Allen Davis, who killed Polly Klaas; the South Carolina trial of Susan Smith, who drowned her two young sons; and the Colorado trial of Timothy McVeigh, who was convicted of multiple murders in the Oklahoma City bombing case.

24. *Chandler*, 449 U.S. at 580.

respect for the judicial process, that violate due process. They are the ones that must be shut off.

In this way, Burger subverts both the facts and the law of *Estes*. For he not only treats Warren's deceptive images as if they were accurate, but he also makes it seem as if the *Estes* majority were mainly troubled by the cameras' physical obtrusiveness. The subdued atmosphere at *Estes*' trial, however, hardly raised that concern. Rather, it was television's *psychological* effects that concerned the majority. Televising notorious criminal trials, they said, changes the way people behave in the courtroom. It is these effects, in conjunction with distortions in the way the public perceives the judicial process, that are inherently prejudicial to the defendant. In the wake of *Chandler*, however, that conclusion was erased from the books. Burger's analysis in effect gutted *Estes* as a matter of law and fact—without saying so. Having entered the hyperreal courtroom that Warren's images conjured, Burger effectively exploited their fiction/reality confusion to suit his own purposes. As Burger would put it, tracking Warren's deceptive images of cumbersome cameras, cables, and technicians underfoot, the "negative factors found in *Estes*" are "less substantial . . . today than they were at that time."²⁵ In other words, with the evolution of technology, complaints like *Chandler*'s had become all but anachronistic.

Fearing what criminal trials might become with the advent of cameras in the courtroom, Chief Justice Warren sought to superimpose upon the reality of Billie Sol Estes' trial vivid photographic images of a courtroom in chaos. These images were meant to legitimate Warren's fears. In *Chandler*, however, Burger reversed their spin. The same images were now used to avoid what Burger feared most: namely, conveying to the public the appearance of a court out of control. As Charles Nesson has aptly observed, "[t]o one deeply concerned with the image of the courts it would make little difference whether the default in judicial decorum and control occurred at a pretrial proceeding or in an actual trial. Either situation would call for a correction."²⁶ Burger's lack of concern about getting the facts of *Estes* right seems to have carried over to his legal analysis as well. Here, too, it is the appearance of justice that counts

25. *Chandler*, 449 U.S. at 576.

26. Charles R. Nesson & Andrew D. Koblenz, *The Image of Justice: Chandler v. Florida*, 16 HARV. C.R.-C.L. L. REV. 413 (1981). Professor Nesson's insight is of particular interest in light of the fact that he was Justice Harlan's law clerk at the time *Estes* was decided.

most.

If the popular perception was that Billie Sol Estes' trial was a "Roman circus," Burger was content to let it be so. In a similar vein, if the popular perception was that only liberal ("activist") judges break with recent past rulings, Burger would let that be so too. It would not do to risk the impression that the Court was reversing *Estes* simply to gratify its own ideological preferences. That was the bane of the Warren Court years. No, if the legal effect of *Estes* was to be avoided it would have to be done covertly. And this is precisely how Burger proceeded. Consider, for example, his chief legal claim in *Chandler*, namely: that the whole matter was really out of the Court's hands. As Burger explains, the case is governed by the principle of "federalism."²⁷ And what federalism tells us is that even if a bunch of federal judges are convinced that it is a bad idea for cases like *Chandler*'s to be televised, it is not for them to decide. Federal judges cannot elevate their own prejudices into rules of law. Here, then, is Burger as champion of states' rights, the living antithesis of liberal activism. Let the states decide whether or not to televise criminal trials, he humbly concludes. If problems arise it is only through "continuing experimentation" by the various states, not by federal intervention, that we will come to know what they are.²⁸

Burger's analysis is fine as far as it goes. With one reservation: the view he is espousing comes from the *Estes*' dissent. It was Justice Stewart in dissent who attacked the *Estes* majority for "escalating" their "personal views" into a "constitutional rule."²⁹ Just as it was Stewart's dissenting claim that "the constitution does not make us arbiters of the image that a televised state criminal trial projects to the public."³⁰ He has not said so, but in his talk about federalism, Burger has actually assumed the voice of *Estes* staunchest opponents. Nor is that all.

Aside from relying upon the "governing principle" of federalism, Burger's opinion in *Chandler* also expressly notes the absence of any showing of "specific prejudice" suffered by the defendant as a result of his trial being televised.³¹ But here too Burger is speaking in the voice of the *Estes* dissent, not the majority. It was Justice White, writing in dis-

27. *Chandler*, 449 U.S. at 571.

28. *See id.* at 580-81.

29. *Estes*, 381 U.S. at 601-02.

30. *Id.* at 614.

31. *Chandler*, 449 U.S. at 568.

sent, who criticized the *Estes* majority for finding in *Estes*' favor despite *Estes*' failure to show specific prejudice. Of course, what makes White's criticism possible is precisely its rejection of the majority's view that cameras in the courtroom are *inherently* prejudicial. Inherent prejudice means that showing specific prejudice is unnecessary. By the same token, White also rejected the *Estes* majority's contention that a showing of actual prejudice in these kinds of cases is impossible.³² On this view, then, White, in his *Estes* dissent, and Burger, writing for the majority in *Chandler*, are actually placing an impossible burden of proof on defendants who claim that TV cameras have prejudiced their trial. It is equivalent to saying that such defendants are bound to lose. Of course, that is precisely the result Burger wanted. His goal was to open the courtroom to cameras, even if the law of *Estes* had to appear other than it was.

Indeed, even when Burger is procedurally correct in noting that Justice Harlan's concurring opinion in *Estes* provided "the fifth vote necessary in support of the judgment"³³ and thus "must be read as defining the scope of that holding,"³⁴ he still gets the substance of Harlan's opinion wrong. For example, in *Chandler*, Burger claims that Harlan had never endorsed prohibiting cameras from the courtroom because of their inherently prejudicial effects. But that is inaccurate. In Harlan's view it is publicity that makes televising trials inherently prejudicial or, to use Harlan's words, that creates a substantial danger of "distorting the integrity of the judicial process."³⁵ For it is publicity, Harlan says, that causes people to become "emotionally involved" in a case—thus introducing the risk of undue influence and the related danger of a "popular verdict."³⁶ As Harlan puts it:

[Publicity] introduces into the conduct of a criminal trial the element of 'professional showmanship' and extraneous influ-

32. Writing for a plurality of four justices, Justice Clark expressly states that with respect to television, "one cannot put his finger on its specific mischief and prove with particularity wherein [the appellant] was prejudiced." *Estes*, 381 U.S. at 544. Similarly, in his concurring opinion, Chief Justice Warren describes in general terms the adverse effects of television on trial participants and the judicial process as a whole. *See id.* at 552-86.

33. *Chandler*, 449 U.S. at 571.

34. *Id.* at 573.

35. *Estes*, 381 U.S. at 592.

36. *Id.* at 592.

ences whose subtle capacities for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena. . . .³⁷ The critical element is the knowledge of the trial participants that they are subject to such visual observation.³⁸

In short, for Harlan when it comes to *notorious criminal trials*—by which Harlan means *highly publicized* trials in which the participants have good reason to believe they are being observed by a large audience—the risk of prejudice and unfairness is too great to ignore.³⁹ Harlan's crucial "fifth vote" in *Estes* thus holds that in notorious criminal cases cameras in the courtroom are constitutionally impermissible. That is as far as Harlan felt he needed to go in *Estes*, for on the specific facts of that case there could be no doubt that the justices were dealing with a "notorious" criminal case. Thus, if Harlan's "fifth vote" is dispositive of *Estes'* outcome, as Burger rightly concedes, *Estes* must stand for the legal proposition that televising notorious criminal trials is inherently prejudicial and thus in violation of due process. Under such circumstances, according to Harlan, the absence of specific prejudice "should not matter."⁴⁰

If *Estes* had been left intact, as Burger claims, the proper inquiry for the *Chandler* Court would have been the following: are we dealing here with a notorious criminal case? If the answer is yes, the rule in *Estes* says that the presence of TV cameras violates due process. Accordingly, the

37. *Id.* at 591.

38. *Id.* at 595.

39. In Harlan's view, in notorious cases, jurors face the danger of being drawn into a variety of heated popular controversies surrounding the trial and becoming subject to a variety of pressures from family, friends, neighbors, and colleagues to whom even sequestered jurors must return. Harlan also believed that, in notorious trials, defense lawyers are drawn to grandstanding tactics for the sake of their reputations and the potential draw of future clients. He believed as well that prosecutors similarly feel the tug of their own personal ambitions, whether it is the ambition for advancement in their present office or the ambition for future public office. And even judges, particularly elected judges, Harlan contends, cannot be expected to remain unaffected by trial publicity. They too watch the news and read the papers, as do trial witnesses who will be similarly gripped by the glare of publicity. *Id.* at 591-92.

40. *Estes*, 381 U.S. at 593 ("The State argues that specific prejudice must be shown for the Due Process Clause to apply. I do not believe the Fourteenth Amendment is so impotent when the trial practices in question are instinct with dangers to constitutional guarantees.").

defendant's trial conviction would have to be reversed. But the *Chandler* Court never confronted that question. Indeed, if they had, there is good reason to believe that an affirmative answer would follow. For it is difficult to imagine that the participants in this botched police burglary trial would have been unaware of their being observed by a large television audience. In Harlan's view nothing more is needed to establish an unacceptable risk of prejudice. And that is precisely why, notwithstanding Burger's claim to the contrary, *Estes* and *Chandler* are essentially alike. Chandler was surely justified in his reliance upon *Estes* when he asked the courts to reverse his conviction. Even Justice White, who dissented in *Estes*, conceded as much in his concurring opinion in *Chandler*. White simply could not understand why Burger did not reverse *Estes* outright. Why the need for such subterfuge and distortion?

Unlike Burger, White wanted to play the game straight. But Burger was playing according to a different set of rules. He was playing by the rule of thumb and its corollary. Having entered the hyperreal courtroom that Warren's images conjured, Burger effectively exploited their fiction/reality confusion to suit his own purposes. He reversed Warren's spin, using hyperreal facts to generate *Chandler's* hyperreal law. As a result, *Estes* remained legally intact but practically irrelevant. The quiet and decorum of *Estes'* actual trial had now been replaced by the more compelling fiction of a courtroom out of control. *Chandler's* trial would thus stand in stark contrast to the "circus" that Billie Sol *Estes* supposedly had to endure. As Burger would put it, tracking Warren's deceptive images of cumbersome cameras, cables, and technicians underfoot, the "negative factors found in *Estes*" are "less substantial today than they were at that time."⁴¹ Having framed the matter in this way, Burger's conclusion seems inevitable. Since the televised trial that *Chandler* received was nothing like the "circus" in the infamous *Estes* case, there is no reason to rule now as the Court had in *Estes*. In short, no circus, no prejudice, no constitutional taint, no need to reverse the conviction. *Chandler* stays in prison, and *Estes* stays on the books as a matter of law. Meanwhile, the television cameras are free to roll. After all, they are new and improved. Television has been made safe for due process.

In *Richmond Newspapers v. Virginia*,⁴² an opinion handed down by the Court a year before *Chandler*, Burger shed light on the core beliefs

41. *Chandler*, 449 U.S. at 576.

42. 448 U.S. 555 (1980).

that inform what I am calling his jurisprudence of appearances. In that case Burger wrote:

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. . . . *[N]o community catharsis can occur if justice is done in a corner or in any covert manner. . . .* To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' and [satisfying] the appearance of justice can best be provided by allowing people to observe it.⁴³

The logical corollary is not hard to figure: *the more people who see it, the better.*⁴⁴ Rather than serving as the paradigm case for inherent prejudice, as Justice Harlan believed, the notorious criminal trial has now come to embody the ideal vehicle for "community catharsis." On the basis of that broadly shared experience, Burger believed, public faith in the legal system would be restored. People would see that the courts are doing their job, obtaining swift and sure justice and in the process placating the urge for retribution. In short, the notorious criminal case had now become the cornerstone of law's legitimacy.

But an unforeseen problem remained. Burger may have been savvy about the rule of thumb, but he was naïve when it came to the rule's corollary. What he didn't realize was how easy it is for images to spin out of his control. And that is precisely what we have seen in the aftermath of *Chandler*. The corollary to the rule of thumb has turned against Burger, even as it turned against Warren before him.

Consider first in this regard the impression television gives of being there, live, inside the courtroom. TV makes viewers feel like a thirteenth juror. But, of course, they are not. Few television viewers actually see all that the jury sees—from the parties' opening statements, to the complete presentation of evidence, to the attorneys' complete closing arguments, to the judge's full instructions on the law. And, of course, no TV viewer swears an oath to follow the law and uphold his or her duties as a juror.

43. *Richmond Newspapers*, 448 U.S. 570, 571-72 (1980) (emphasis added)

44. See Gerbner, *supra* note 3, at 421 (stating that "[a]rbitrary power wants no public witness to its private deliberations, but needs all the hoopla it can get to legitimize its actions.").

In any event, things may be changed when they play on the screen. For example, Professor Peter Arenella of UCLA Law School has noted that Detective Mark Fuhrman in the O.J. Simpson criminal trial looked far more credible on television than he did inside the courtroom.⁴⁵ Arenella suggests that television has a tendency to exaggerate insignificant matters while trivializing important ones. Take Simpson's not-so-famous houseguest Kato Kaelin. There was something about this struggling actor that worked on the screen. His mannerisms, his speaking style, his man-boy image struck a chord with the viewing public. There was something about his appearance that charmed some and revolted others. It was a visceral response, more emotional, in keeping with the electronic medium, than anything else. Yet, despite his having become a major "character" in the Simpson drama, his actual contribution to the case was minor.

TV viewers' confidence in their opinions about how a case should come out persists notwithstanding the gaps and distortions in what they see and hear on the screen or the fact that what they have seen and heard might lie beyond the purview of the jury. The latter includes legally inadmissible evidence as well as expert commentaries on various aspects of the trial, such as a particular witness's credibility or a particular attorney's trial strategy. Yet, notwithstanding these discrepancies, when a jury's verdict is not what the viewer expects, it is the jury that is to blame as well as the legal system that allowed their "mistakes" to occur. The public's largely skeptical response to the Simpson verdict illustrates the point. Disparities between TV-trial viewers' expectations and actual trial outcomes tend to erode public confidence in the judicial system. Nor is this the only risk associated with Burger's notion of televisual catharsis.

Let us pause a moment to consider more closely Burger's claim. If television is our surrogate, if images on the screen really do end up informing the public's perceptions of legal reality, it seems appropriate to consider the images of law that are being shown. As it turns out, rather than serve Burger's strategic ("confidence-building") objectives, TV-law tends to subvert them.

It is not simply that the real trials that show up on TV distort legal reality. For example, Steve Brill knew perfectly well when he established the Court TV network that his main competitors were CNN and after-

45. Peter Arenella, *Explaining the Unexplainable: Analyzing the Simpson Verdict*, 26 N.M. L. REV. 349, 356 (1996).

noon soap operas. He would have to combine the best of both if he was to make his commercial venture a success. Little wonder, then, that a vastly disproportionate number of the trials that viewers see on Court TV are criminal trials of the most titillating sort: murders, sex crimes, and, if an occasional civil case sneaks through, odds are it will involve a celebrity. For example, actress Pamela Anderson of *Bay Watch* fame appeared in a rarely featured type of dispute, a contract case. This allowed the network to promote its trial coverage of the case by showing scenes of the bikini-clad defendant from the internationally popular TV series in which she starred.

Violence, voyeuristic titillation, the cult of celebrity: this is regular TV fare. Now, if this familiar programmatic expectation drives Court TV (which disingenuously bills itself as "justice without scripts"), consider what we see when we turn to "reality TV's" eye on law and crime. I am referring to the spate of TV programs that allegedly show us the police in action. As more than one media scholar has shown, there are unmistakable patterns at work here as well. Take, for example, the prototypical "predatory criminal." We know him when we see him, and so do the police. He is violent and his violence is usually of the most irrational sort. The world he inhabits is utterly unlike the world we know. The message that these images convey is clear. Criminals are not like the rest of us. They are the deviant Other among us.

As criminologist Ray Surette has written: "The crimes that dominate the public consciousness and policy debates are not common crimes but the rarest ones. Whether in entertainment or news, the crimes that define criminality are the acts of predator criminals...Predator criminals are modern icons of the mass media."⁴⁶ What the screen shows us is plain: the criminal predator's acts of violence are impulsive, unpredictable, without reason. In this way, the criminal as social predator not only enhances the TV viewer's sense of fear, but it also makes the strictest punitive response the most desirable measure for coping with the threat. For surely one cannot expect to "rehabilitate" such irrational beings. And, since the criminal predator is usually presented without personal history or any semblance of having come from a normal social milieu, since they are depicted, in short, as abstract threats divorced from the rest of soci-

46. SURETTE, *supra* note 4, at 131-32; see generally Elayne Rapping, *Aliens, Nomads, Mad Dogs and Road Warriors: The New Face of Criminal Violence on Tabloid TV*, in MYTHOLOGIES OF VIOLENCE IN POSTMODERN MEDIA (Christopher Sharett ed., 1999).

ety, their punishment is hardly likely to prompt sympathy or regret.

Thank God for the police, these TV shows teach us to realize. It is their street smarts that keep the rest of us safe. We have but to rely upon their instinctive and seemingly infallible ability to quickly identify crimes that are either in progress or just about to happen and to seize the criminals who are pulling them off. The carefully chosen and carefully edited footage on these shows leaves no doubt in the viewer's mind: the police invariably get it right. The people they stop really are criminals.

But there is a problem associated with this sort of programming. Because viewers never get to see the police battering down doors to the wrong apartment or arresting the wrong man, there appears to be no reason to place legal checks on how they do their job. Why should there be, since they're doing so well? In short, on this view, legal rules invariably appear to needlessly hamper the police. Law's formal demands appear only to get in the way of effective law enforcement. It is "legal technicalities" like these that keep incriminating evidence from juries and that discourage guilty suspects from confessing their crimes to the police. In other words, once the criminal accused becomes the deviant Other, someone who is utterly unlike the rest of us, constitutional safeguards make no sense. Who needs them if they only help criminals? In this respect, then, popular TV images of the reality of crime and law enforcement argue against the rule of law. Based on what we see on TV, the rule of [police] men seems to be doing just fine—until legal formalities enter into the picture and mess things up.

These popular representations of crime and of the need to punish serve multiple purposes. For one thing, they reflect the electronic medium's need for striking images, such as extreme criminal violence and/or sexual abuse, to rivet the viewer's attention. As we have seen, even the most realistic of televisual portrayals of the judicial system, the predominantly criminal trials featured on Court TV, are disproportionately violent and eroticized. Murders, rapes, and familial abuse are represented here in numbers far exceeding statistical reality. As a consequence of this misrepresentation, the impression that television gives is of a far more violent world, populated by far more violent criminal predators than is actually the case.⁴⁷

The irrationally violent criminal predator also serves as a potent symbol of what Surette calls "a world gone berserk, for life out of con-

47. See Gerbner, *supra* note 3, at 419-20.

trol.”⁴⁸ In this sense, the images we are dealing with here are not about law or even about reality, strictly speaking. They are about hidden fears, deep uncertainties—in short, the predominant cultural anxieties of our time. These images tell us about our intense need to stave off what are perceived as potent chaotic forces (both within and without). They tell about the struggle to feel more in control of our lives. These needs are especially acute nowadays, for there is a growing sense that our ability to govern our lives in the face of powerful irrational forces is diminishing.⁴⁹ At the same time, our ability to find security within an identifiable moral community seems increasingly elusive. This is what many political conservatives as well as new communitarian Republicans, like Harvard political scientist Michael Sandel, are so concerned about.⁵⁰

Based on what has been said so far, their concerns are well placed. For in the absence of more self-reflectively affirmed values, we are at risk of falling victim to symptoms, of promulgating laws and policies, for example, that act upon the “reality effects” of repressed or distorted fears, impulses, and desires. This is law imitating appearances prompted by denial. The predatory criminal icon may be a media construct, but it is also a construct that the law has increasingly adopted as its own. The problem is that no matter how hard we try, no matter how many new laws we create, no matter how great the punitive measures they hold out, the predatory Other cannot be subdued. Nor should we be surprised at this outcome. He is, after all, a phantom, the virtual offspring of law’s dalliance with the commercial mass media. The predator criminal is a spur to desire—the very fuel that helps make the media’s images flow. In this respect, every short-term victory over the Other represents a battle in a larger war that cannot and indeed *must not be won*. For in the current scheme of things, such a victory would ultimately spell law’s defeat. The engine of desire would then come to a halt. The image flow would stop, leaving no place for law to appear in, no place for it to be consumed like the commodity that it has become. That is the price for deriving law’s legitimacy from the screen. It is the price society must pay for making law’s legitimacy depend upon broad public consumption of popular images, like the highly charged images we consume when notorious crimi-

48. SURETTE, *supra* note 4, at 147.

49. See RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000).

50. See generally MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

nal cases are on the air.

Chief Justice Burger spoke of the need for "community catharsis" in the service of law's legitimation. But by associating the judicial process and the retributive impulse with other images (and other impulses) to be found on the screen, what he gave us was something else entirely. Call it "hyper-catharsis," the illusion of catharsis, catharsis in appearances only. In real catharsis, repressed fears, wishes, and desires are confronted and consciously worked through. Hyper-catharsis does the reverse. Like the TV trials that produce it, hyper-catharsis is a spectacle that masks rather than reveals unconscious impulses and the fantasies they produce. In this way it perpetuates the repression and displacement of illicit gratifications which drive the flow of appearances. Burger's jurisprudence of appearances exploits images—of victims and aggressors alike—for the sake of their emotional payoff, converting them into fuel for the viewer's sensation. This demeans the dignity and authenticity of both the viewer and the viewed alike. For surely one who colludes in the exploitation of others can hardly hope to escape its effects. But it does more than this. Hyper-catharsis also perverts the enchantment of meaning itself. This is what we see when meaning collapses into mere sensation—meaning's "use value." In this sense, the clash between hyper-catharsis and real catharsis points up a corresponding distinction between skeptical and affirmative postmodernism.⁵¹ Two opposing forms of enchantment are at work here: one in the service of deceit, illicit desire, and self-gratification, the other in the service of feelings, beliefs, and values that we consciously aspire to affirm.

In a world where the mass media love nothing so much as the mass media, it is the media's own images that are the most certain means to catch the camera's eye. It is hardly surprising, then, that lawyers often find their dramatic, real life stories of loss, suffering, and death welcome on the air. Passion sells. Images of grief, horror, and violence are in high demand. They fill television news holes, docudramas, fictional police, crime, and law shows, as well as the "reality TV" programs that millions of Americans watch daily. Yet, amid the intertwining of law, crime, and media, significant problems arise—the problems that come with the conflation of truth and fiction, image and reality, fact and fantasy. The mutually assured seduction between trial lawyers and the commercial mass media has created a feedback loop that elides the real and legitimates the

51. For more on the distinction between skeptical and affirmative postmodernism see SHERWIN, *supra* note 49.

fanciful.

The process goes like this. The trial stories that offer the most familiar images, characters, and plot forms are the ones most likely to get on the air. Once ensconced there, they are more likely to stick in the viewer's mind (including actual or prospective jurors). In fact, the more they stick, the more credible they become. This encourages lawyers and their public relations agents to pitch their clients' stories in terms of TV reality. In this way, the media's law stories lend credence not only to the legal reality that they portray, but also to the media that portray them. By lending its badge of authority to the popular images and stories that it embraces, law enhances not only its own persuasiveness and legitimacy, but also the persuasiveness and legitimacy of the media themselves.

As popular stock images, character types, and plot lines from commercial television acquire enhanced verisimilitude, TV's commerce-driven, attention-riveting programming increasingly comes to provide models for legal reality. It is as if the familiar images, categories, and story lines disseminated by the visual mass media are supplying cognitive heuristics for society as a whole. And whether true or not, it is on the basis of these compelling images that public policies, criminal statutes, and sentencing guidelines are being drafted and passed into law.

Chief Justice Burger thought TV would be good for law. But he didn't realize how good for TV law could be. Or how legal appearances could be made to spin in commercial currents that exploit the public's unconscious fears and desires. Contrary to Burger's naive confidence, the courts cannot control appearances on TV. And, to the extent that TV has become our surrogate, confidence in the judicial process and respect for the rule of law have, contrary to Burger's design, only declined. If current trends continue, they are likely to decline even more.

Here then is a cautionary tale about what happens to law when it becomes beholden to commercial pop culture for its legitimacy. It is an account of what becomes of law, and society as a whole, when symbolic dramas involving law enforcement agents, lawyers, and the system of justice in general cycle through media-fueled expectations, fantasies, and desires.

In the end, paradox remains. Today prisons abound, yet the cry for more imprisonment has not softened. The prison population soars, even as the proportion of nonviolent offenders increases—making prison the remedy of choice for nonviolent crime. Executions increase, yet the desire for more capital offenses continues to grow. The chain gang is back; the demand for public shaming is on the increase. Indeed, we are reach-

ing a point where shunning the deviant Other may no longer require a criminal act. As the United States Supreme Court recently said, sexual offenders who "cannot control their behavior and who thereby pose a danger to the public health and safety" may be civilly confined against their will.⁵² Notably, such forcible confinement is not a response to a specific act. It is a precautionary measure, in response to what a potential offender *might* do in the future. For the so-called "mentally abnormal," the Other among us, there is no escaping character as fate. The Other's expulsion from society is required by the kind of person he is—or the kind our irrational fear and uncertainty, our frustration and rage, have made him out to be.

In recent years, we have seen a concerted effort by ad masters, political spin doctors, public-relations-minded litigators, and Supreme Court Justices to exploit the power of the mass media, particularly television. Their willingness to use the media to manipulate desire, to conflate fantasy and reality, and to merge self-identity with self-gratifying acts of consumption—regardless of whether the commodity consumed is a product, a political candidate, or a matter of law—is contributing to a significant cultural crisis. Powerful irrational forces seem to be erupting all around us. Chance events and uncontrollable impulses threaten to subvert rational explanation, throwing causation itself into doubt. New forms of associative thinking and disparate logics are eroding conventional notions of modern reason and the autonomous self. An emerging sense of contingency—of the historical, cultural, and psychological *constructedness* of self and social reality—is making it harder to agree upon shared moral and ethical standards for community life.

In short, the very rudiments of law in the western liberal tradition seem to be up for grabs: causation, the autonomy and moral responsibility of the individual, and the coherence of reason itself. To address this sweeping cultural development we must begin to reconceptualize law in a way that is consonant with current lived realities, which is to say, with the cultural constructs and anxieties actually circulating in society. A renewed basis for law's legitimation is needed. That quest will lead us

52. See *Kansas v. Hendricks*, 521 U.S. 346 (1997). In *Hendricks*, the Court upheld a state statute providing for the civil commitment of "sexually violent predators" who are found to have a "mental abnormality," a condition that makes them "likely to engage in the predatory acts of sexual violence." *Id.* at 352 (citing Kan. Stat. Ann. § 59-29a02(a) (1994)). According to the statute, involuntary commitment may continue "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." *Id.* (citing Kan. Stat. Ann. § 59-29a07(a) (1994)).

from *hyper*-catharsis to real catharsis—in the face of tragic suffering and the affirmative potential of legal enchantment.