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LAW/MEDIA/CULTURE: LEGAL MEANING IN THE AGE OF IMAGES

FOREWORD

RICHARD K. SHERWIN*

“We're at the very early stages of the most radical transformation of everything we hear, see, know.”¹

“The very foundation of our system of justice--[is] our citizens' confidence in it.”²

It has often been observed that American law exercises a profound influence on American culture. Alexis de Tocqueville famously wrote: “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” According to Tocqueville, “the spirit of the law...infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.”³

Tocqueville's view of law, however, tells us only part of the story. The articles in this symposium issue explore what is missing from Tocqueville's account by reversing his insight. Rather than take stock of the law's influence on American society the articles that follow examine the various ways in which popular culture -- particularly mass media and technology -- shape and inform the law.

To be sure, the interpenetration of law and popular culture is not new. But the effects on law of new developments in mass communication are. We are living in the age of images. Law is rapidly adapting to this new reality. Today savvy lawyers know and are putting to use what

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1. Robert W. McChesney, *Rich Media, Poor Democracy* (1999) 121 (quoting Barry Diller, founder of the Fox Television Network).

2. *Georgia v. McCollum*, 505 U.S. 42, 49-50 (1992) (quoting *State v. Alvarado*, 221 N.J. Super. 324, 328 (1987)).

3. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 268-70 (1969).

advertisers and politicians have known and practiced for some time: how to get the message out, how to tailor content to medium, how to spin the image, edit the bite, and quickly seize the moment on the screen and in the mind of the viewer. Increasingly, lawyers are realizing that effective persuasion requires not only tapping into the reality that people carry in their heads, but also emulating the habits of perception and styles of thought that extensive exposure to mass-mediated popular culture has produced. Not surprisingly, cinematic and televisual styles of storytelling are proliferating in court along with the electronic monitors that display them. Reality-based police, surveillance, and amateur videos (not to mention their digital reconstruction, as was seen in the criminal trial of the Los Angeles police officers who assaulted motorist Rodney King), accident and crime reenactments, computer graphics, video depositions, documentary-style day-in-the-life videos, video summations that visually emulate popular television shows and commercials⁴ as well as familiar film styles and story lines⁵—all are influencing contemporary tactics of courtroom communication and persuasion. At the same time, public relations campaigns in the court of public opinion are rapidly becoming a familiar adjunct to litigation.⁶

These developments reflect a larger convergence in the culture at large. Technology, postmodern theory, and the power of the market place are coming together with tremendous synergistic effect. They are reshaping the way people perceive and make judgments about truth and blameworthiness. It is not the end of the modern (print-based, explanatory, proof-driven) legal storytelling style. But its monopoly of the tools and materials of reality making is over. New forms of communication are generating competing—image-based, associative—styles of thinking. Once this realization sinks in, the way we understand and teach what law is, where it is found, and how it is practiced, cannot remain the same.

One of the underlying themes of this symposium is that American law cannot be, and historically speaking never has been, insulated from

4. See Avi Stachenfeld and Christopher Nicholson, *Blurred Boundaries: An Analysis of the Close Relationship between Popular Culture and the Practice of Law*, 30 U.S.F. L. REV. 905 (1996).

5. See Philip N. Meyer, *Desperate for Love: Cinematic Influences Upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994) and Jeremiah Donovan, *Some Off-the-Cuff Remarks about Lawyers as Storytellers*, 18 VT. L. REV. 759 (1994).

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

American popular culture. At the same time, however, the interpenetration of law, culture, and mass media has not been adequately studied. This symposium represents an effort to begin to redress that lack. There is an important critical as well as descriptive component in the newly emerging field of cultural legal studies. The communication practices of lawyers, both inside the courtroom and in the court of public opinion, are increasingly going the way of contemporary political discourse. Simply put, law too is succumbing to the influence of public relations, mass advertising, and fabricated media events. In these and other ways law is showing signs of postmodernization. Along the way, it is inheriting many of the problems that we associate with postmodern culture generally.

Of particular concern in this respect are: the increasing conflation of truth and fiction; the image-based manipulation of irrational desire, prejudice, and popular passions; and the concerted effort to construct preferred versions of (and judgments about) self and social reality. These and other meaning-making practices are displacing what, in earlier times, one might have more readily (albeit naïvely) referred to as the search for “objective” truth and “universal” justice through law. The belief that truth and justice are ‘out there,’ just waiting to be ‘discovered,’ is of course only one among numerous ideas handed down to us from the European Enlightenment that postmodern thought has rendered problematic. Notions of the unified self, universalistic reason, and the linear logic of causation are others.⁷

In the essays that follow, contributors draw insights from media and film studies, anthropology, social psychology, and advertising, as well as more traditional legal studies. The effort here is to begin to address the challenges we face when, in Austin Sarat's words, “the proliferation of law in film, on television, and in mass market publications has altered/expanded the sphere of legal life itself.”⁸

In the opening essay, media scholar Elayne Rapping connects television's reliance upon the genre and conventions of melodrama to the mass production of emotionally loaded images and narratives about criminal justice.⁹ Rapping contends that the rise to national prominence of the Victims Rights Movement may be viewed, at least in part, as an offshoot

7. See generally RICHARD K. SHERWIN, WHEN LAW GOES POP.

8. Austin Sarat, *Living in a Copernican Universe: Law and Fatherhood in A Perfect World*, 43 N.Y.L. SCHL. L. REV. 843, 847 (1999-2000).

9. Elayne Rapping, Television, *Melodrama and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCHL. L. REV. 665 (1999-2000).

of television's transformation of legal proceedings into familiar melodramatic spectacles. Here we see law being substantively influenced by the emotional demands and cognitive patterns established by commercial television.

Professor Ann Kibbey marshals the tools of anthropological analysis to study the formative impact of mass media on the public's perception and assessment of the JonBenet Ramsey murder case.¹⁰ The media's fixation on the body of the six-year-old beauty queen spawned a strange and potent dissonance. On the one hand, the sexual titillation associated with JonBenet's "vamping her way across the television screen" led to a media script of child molestation -- a sex game gone wrong, probably at the hands of a depraved parent. On the other hand, such intimations of perversity in the heart of an outwardly stable and affluent community prompted an urge to deny guilt, to displace the polluting agent elsewhere. Hence the obsession with scientific evidence—the ever-elusive semen, blood, and saliva—that would point to some guilty Other. In this way, Kibbey observes, representations of the young victim's body oscillated between shared fantasies of perversion and pollution on the one hand, and mystery-defying scientific data on the other.

The subject of Professor Martha Umphrey's essay is the notorious 1907 trial of Harry Thaw for the fatal shooting of famed New York architect and socialite Stanford White.¹¹ Umphrey shows how popular and legal accounts of core concepts like criminal responsibility "come to clash and intermix and are made meaningful in relation to one another."¹² In the course of this historical case study law's dependence upon popular notions of agency and responsibility become manifest. Here we see how and why the narrative popularity of melodrama played into the hands of Thaw's prosecutors and defenders alike—albeit with starkly different results.

In Professor Neal Feigenson's contribution, melodrama asserts its influence yet again.¹³ Here, however, rather than concentrating upon changing narrative conventions and expectations, the author focuses our

10. Ann Kibbey, *Trial by Media: DNA and Beauty Pageant Evidence in the Ramsey Murder Case*, 43 N.Y.L. SCHL. L. REV. 691 (1999-2000).

11. Martha Merrill Umphrey, *Media Melodrama! Sensationalism and the 1907 Trial of Harry Thaw*, 43 N.Y.L. SCHL. L. REV. 715 (1999-2000).

12. *Id.* at 716.

13. Neal Feigenson, *Accidents as Melodrama*, 43 N.Y.L. SCHL. L. REV. 741 (1999-2000).

attention upon the cognitive structures of common sense. Applying the tools of contemporary social psychology, Feigenson traces the ways in which common sense thinking about accidents displays important features of melodrama. For example, Feigenson points to empirical studies that show the intuitive inclination of jurors in personal injury cases to blame morally suspect actors for bad outcomes. A similarly unreflective intuition inclines jurors to treat plaintiffs more favorably in simple “good guy/bad guy” situations—as opposed to more complex scenarios involving multiple causation and mixed blame. In both of these ways, the emotional/cognitive structures of ordinary common sense track the narrative patterns of melodrama. The tendency of common sense to individualize wrongdoing, and to minimize more systemic reasons for bad outcomes, is but one of the striking conclusions to which this analysis leads.

Stepping back from specific applications of popular cultural influences upon law, Professor Stuart Ewen traces the ascendancy of the public relations movement in 20th century America.¹⁴ Of crucial importance in this history is the intellectual appreciation by the movement's founders of the power of irrational impulses and the efficacy of strategic efforts to manipulate them. The psychology of the crowd and the pervasive power of new visual technologies such as film and photography served as important tools in the newly emergent “engineering of consent.” This history of the management of American public opinion and habits of consumption must be recalled if we are to appreciate adequately the consequences today of law's yielding to the persuasive strategies of mass advertising and public relations.

I examine some of these consequences in my own contribution. The focus now shifts to what I call the “jurisprudence of appearances”—a form of legal discourse in which images refer to other images.¹⁵ Here is the face of law as it appears in the domain of hyperreality, what Jean Baudrillard has referred to as the “simulacrum”.¹⁶ The origin of the jurisprudence of appearances may be traced to the Supreme Court itself in *Estes v. Texas*¹⁷, an opinion that prohibited on due process grounds the

14. Stuart Ewen, *Reflections on Visual Persuasion*, 43 N.Y.L. SCHL. L. REV. 811 (1999-2000).

15. Richard K. Sherwin, *The Jurisprudence of Appearances*, 43 N.Y.L. SCHL. L. REV. 821 (1999-2000).

16. See Jean Baudrillard, *FATAL STRATEGIES* (1990).

17. 381 U.S. 532 (1965).

televising of notorious criminal trials. It is a fitting irony that deceptive appearances (in the form of misleading photographs appended to Chief Justice Earl Warren's concurring opinion) initiate a postmodern conflation of truth and fiction in the very process of confronting the disquieting effects of television. A critical lesson emerges here: once we begin spinning images to construct competing realities there may be no controlling the direction in which the image turns, or the reality toward which it subsequently leads us.

Taking Clint Eastwood's 1992 film *A Perfect World* as his point of departure, Professor Austin Sarat examines the patriarchal genealogy of law's authority.¹⁸ Sarat's close analysis of this popular film uncovers a profound instability within the collective imagination concerning law's violence and the proper source of its authority. Sarat shows that addressing our collective fears, fantasies and anxieties regarding law's authority may open the way to—and in so doing model—a highly self-reflective reconstruction of the cultural and psychological bases for law's legitimacy. Sarat's deconstruction of the traditional patriarchal paradigm for law's authority allows a far more complex model to come into view. In its embrace of the tragic realities of loss, dread, mourning, and contingency, Sarat's “fragmented, contested, [and] polyvocal” construct holds out the promise of greater stability and affirmation.

The contribution by visual evidence expert Gregory Joseph provides a useful overview of the strategic considerations that must accompany efforts to admit computer-generated evidence at trial.¹⁹ We encounter the practical issue of law's ability to adapt to ongoing technological developments in the way truth and justice are represented within the legal system. Of course, it is not only inside the courtroom that law is being visually represented. As Deborah Lilienthal recounts, the court of public opinion is another arena in which important legal issues also play out.²⁰ Increasingly, advertising and public relations firms are providing litigants with an additional opportunity to spread their message. Television is a particularly potent medium for this effort – to those who can afford access. Publicity on the screen is litigation's second front. It is yet an-

18. Austin Sarat, *Living in a Copernican Universe: Law and Fatherhood in A Perfect World*, 43 N.Y.L. SCHL. L. REV. 843 (1999-2000).

19. Gregory P. Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations*, 43 N.Y.L. SCHL. L. REV. 875 (1999-2000).

20. Deborah A. Lilienthal, *Litigation Public Relations: The Provisional Remedy of the Communications World*, 43 N.Y.L. SCHL. L. REV. 995 (2000).

other sign of American law taking the same image-saturated path as American journalism and politics.

Then, again, in its quest for truth and justice law has always been on a slippery slope with the quest for beauty. As Andie Tucher writes in her closing essay, “[i]t’s not just this post-modernist age that understands truth is relative.”²¹ From as early as the 1836 trial of a teenaged clerk for the murder of a glamorous prostitute, comforting and congenial truths have gained sway with the public and jurors alike, keeping harsher, more unsettling realities at bay.

One may hope that more adept students of law, media and culture will refuse to go along for the ride. Indeed, if the quest for beauty, or perhaps it is just sensation, is part and parcel of law’s reality, surely it is beneficial to learn more about how legal stories and images are constructed and conveyed, and with what effect. How else are we to discern whether truth and justice have been made over by money, power, or some other influence?

If this collection of essays shall have fulfilled its purpose, it should be apparent that the cultural and legal ramifications of the interpenetration of law, media, and technology include, but also go well beyond the adaptability of conventional evidentiary rules. Significant shifts in our storytelling practices betoken a collective change of mind and culture. For this reason, it behooves us to study with great care what happens when law—like journalism, advertising, and politics—takes root in the culture of spectacle.

21. Andie Tucher, *Framing the Criminal: Trade Secrets of the Crime Reporter*, 43 N.Y.L. SCHL. L. REV. 965, 968 (2000).

