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"A Fascination without Scruples": American Popular Culture and Its Corrosive Impact on the Law (reviewing Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (2000)).

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## BOOK REVIEW

### "A FASCINATION WITHOUT SCRUPLES": AMERICAN POPULAR CULTURE AND ITS CORROSIVE IMPACT ON THE LAW

When Law Goes Pop: The Vanishing Line  
Between Law and Popular Culture.

By Richard K. Sherwin

Chicago: The University of Chicago Press. 2000.  
325 pp. \$27.00.

ROBERT F. BLOMQUIST\*

"The culture of law's rule needs to be studied in the same way as other cultures. Each has its founding myths, its necessary beliefs, and its reasons that are internal to its own norms."<sup>1</sup>

"Obviously, anyone of minimal intelligence over the age of four can— more or less— grasp the basic content of a film, record, radio, or television program without any special training. Yet precisely because the media so very closely mimic reality, we apprehend them much more easily than we comprehend them." "[The] film and the electronic media have drastically changed the way we perceive the world. . . ." [Y]et, we all too naturally accept the vast amounts of information they convey to us in massive doses without questioning . . . ."<sup>2</sup>

#### I. INTRODUCTION

In *When Law Goes Pop*<sup>3</sup>, New York Law School Professor Richard K. Sherwin formulates a cultural<sup>4</sup> and instrumentalist

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<sup>1</sup> PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 1 (1999).

<sup>2</sup> JAMES MONACO, *HOW TO READ A FILM: THE ART, TECHNOLOGY, LANGUAGE, HISTORY, AND THEORY OF FILM AND MEDIA* vii (1981).

<sup>3</sup> RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000).

<sup>4</sup> Among the multiple possible meanings of culture, the most relevant in understanding Professor Sherwin's book is a social-anthropological definition. In this regard, a good definition is as follows:

Cultures . . . as defined by their differences, not from nature or animal societies, but from each other . . . . A culture denotes a distinct, historic group of people C a society together with all its tools, artifacts,



theory<sup>5</sup> of "tragic constructivist jurisprudence,"<sup>6</sup> which he says

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possessions, and characteristic ways and conceptions of life . . . . Built into it are various presuppositions:

- a. A culture is not a heap of unrelated phenomena, but an organic whole, so that each feature of it, however obvious its biological explanation, also has meaning in relation to the others.
- b. So far as its features are unique, or, if shared with other cultures, so transformed by their context as to "mean" something substantially different, it too is unique.
- c. It is extended in time, as it must be to be transmissible between generations (even an emergent culture has emerged from something).
- d. It is also conscious of the fact, so that it conceives itself (in varying degrees) in terms of the past, present and future.
- e. In all of the foregoing respects a culture resembles an individual, and thus possesses a quasi-personal identity, even though its self-consciousness may be located nowhere but in the minds of its individual members, and though it may lack any unitary will.
- f. Though a response to circumstances (some of them of its own creation), a culture is a spontaneous growth . . . and (unlike a purely sociopolitical order) cannot be invented, planned or imposed.

A COMPANION TO AESTHETICS 100 (David E. Cooper, ed. 1995) hereinafter AESTHETICS] (emphasis added).

<sup>5</sup> Instrumentalist, or functual, theories of art presuppose that art serves functions for social purposes. See AESTHETICS, *supra* note 4, at 6. An instrumentalist theory then, opposes aesthetic doctrines of art whereby art should be valued for itself alone and not for any purpose or function it may happen to serve . . . . *Id.* Historically the idea of art for art's sake is associated with the cult of beauty, which had its roots in Kantian aesthetics and the Romantic movement . . . . *Id.* The history of instrumentalist/functional art theory is fascinating, and

has a very long and distinguished history C one that begins with Plato and has persisted in a variety of forms to the present day. The opposing idea that genuine art is non-functional, that it is always autonomous and is produced merely for its own sake, is a comparatively recent invention.

The distinction between the useful arts (or crafts) and arts that serve no purpose and are attended to solely as ends in themselves is not to be found in Plato or Aristotle; nor is it to be found in medieval theories of art. It was only at the time of the Renaissance that the notion of fine art began to take root as a way of distinguishing the functional from the non-functional arts. Up until then, all of what we now call fine art was considered to have a purpose C although in the case of some art forms like music and decoration the precise nature of its function was specified only with difficulty.

Functional views of art take at least two distinct forms. Some are normative and insist that art *ought* always to serve a specified function. To the extent that a work of art performs its designated function, it is considered meritorious; reciprocally, when a work fails to serve its function it is considered inadequate or bad . . . referred to as normative functionalism. *Descriptive functionalism*, by contrast, contends that by *their very nature works of art serve certain metaphysical, psychological, or cultural functions, and do so whether or not the artist knows or intends it.* Descriptive functionalism treats a particular function as a *necessary*



is "driven . . . by the felt need to acknowledge the vicissitudes of the irrational"<sup>7</sup> while avoiding American popular culture's obsession with "punitive retribution" in response to "the predatory other, " the 'alien' among us, the perennial favorite of film and TV . . . ."<sup>8</sup>

Sherwin's thesis is that while law has always been "shot through with [popular] fiction,"<sup>9</sup> by virtue of equitable maxims and ancient rhetorical teachings, in recent years "[l]egal meanings [have been] flattening out as they yield to the compelling visual logic of film and TV images and the market forces that fuel their production."<sup>10</sup> Accordingly, in Sherwin's view, law has become a "spectacle", like society in general<sup>11</sup>, and as "[a] consequence, the customary balance within the legal system among disparate forms of knowledge, discourse, and power is under great strain, and is at risk of breaking down."<sup>12</sup> Sherwin concludes that "what we are seeing today is no ordinary intermingling of law and popular culture, but a more generalized erosion of law's legitimacy," because "[t]his is what happens when law goes *pop*."<sup>13</sup>

*When Law Goes Pop* on one level is an exposition of what 21<sup>st</sup> century American culture finds persuasive and compelling as opposed to boring and inconsequential. Part II of this Essay,

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feature of all art; although it is true that both descriptive and normative functionalists are generally quite happy to allow that particular works of art may contingently serve a function on a certain occasion C where this function is entirely unrelated to its status as art.

*Id.* at 162-63 (emphasis added; selected emphasis in the original).

<sup>6</sup> See SHERWIN, *supra* note 3, at 9. See COOPER, *supra* note 4 at 260-64 for a synthesis of this proposed jurisprudence.

<sup>7</sup> SHERWIN, *supra* note 3 at 9.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.* at 4 (end note omitted).

<sup>11</sup> *Id.* at 265, n.4 (citing GUY DEBORD, *THE SOCIETY OF SPECTACLE* (1995), among other sources).

<sup>12</sup> *Id.* at 4-5. Sherwin provides two illustrations of this strain: the virtues of the lay jury as a practical reflection of community values, expectations, and beliefs and the virtues of judicial expertise and prudence being negatively impacted by what he calls the homogenous stories and images of popular culture. *Id.* at 5. He goes on to observe, in this regard:

It is what happens when the active, off screen dimension of lived experience and the varieties of common sense that it produces give way to the passive, self-gratification-enhancing, and image-based logic of commercial media. Then, the capacity for critical judgment of external reality, of self and others, of truth and justice in the individual case, and of the media themselves C is significantly undercut.

*Id.* (endnote omitted).

<sup>13</sup> *Id.* (original emphasis).



therefore, discusses three key themes of Sherwin's book: (a) the problem of persuasion in a postmodern society<sup>14</sup>, (b) the problem of understanding and dealing with the "jurisprudence of appearances,"<sup>15</sup> and (c) the problem of popular culture's illicit impact on legal advocacy<sup>16</sup>.

Professor Sherwin's account, however, is more than a cautionary rumination on popular culture and legal meaning-making. It is also a reflection, albeit disjointed and dense at times<sup>17</sup>, on the respective roles of objectivity versus subjectivity in legal judgment.<sup>18</sup> Accordingly, Part III of this Essay explores various notions of legal indeterminacy embedded in Sherwin's text.<sup>19</sup>

## II. WHAT'S HOT/WHAT'S NOT?

### A. *The Problem of Persuasion in a Post-Modern Society*

Three outstanding books, published and revised over the last two decades, have had a dramatic impact on understanding the *au courant* art and practice of social persuasion, each within different, albeit overlapping, spheres.<sup>20</sup> The first book is Thomas A. Mauet's *Trial Techniques*.<sup>21</sup> Mauet's book is a standard text in many law school courses on trial advocacy; in the sphere of law this book has taught thousands of American lawyers the basics of trial preparation<sup>22</sup> and

<sup>14</sup> See *infra* notes 20-78 and accompanying text.

<sup>15</sup> See *infra* notes 79-100 and accompanying text. Sherwin defines this concept as a form of legal meaning making that adopts the media's visual logic as its own. SHERWIN, *supra* note 3, at 10.

<sup>16</sup> See *infra* notes 101-108 and accompanying text.

<sup>17</sup> According to the New York Times: Unfortunately, reading Sherwin is no day at the movies. His book is often irksomely repetitive, numbingly abstract and studded with hermetic jargon like hyper real and the esthetics of deliberate normative construction.

PAUL A. WEISSMAN, Book Rev. *Yo, Your Honor!*, N.Y. TIMES 40 (Dec. 10, 2000), at 40.

<sup>18</sup> Indeed, one of the most edifying features of Sherwin's book is the way it stimulates one to think of the parallels between aesthetic judgment and legal judgment. See *infra* notes 109-121 and accompanying text.

<sup>19</sup> *Id.*

<sup>20</sup> For other interesting and informative literature on various aspects of persuasion and rhetoric see "AA Brief Primer on Rhetorical Theory" in Robert F. Blomquist, *The Trial of William Jefferson Clinton: Impartial Justice, The Court of Impeachment and Ranked Vignettes of Praiseworthy Senatorial Rhetoric*, 84 MARQ. L. REV. 383, 398-402 (2000).

<sup>21</sup> THOMAS A. MAUET, TRIAL TECHNIQUES (4th ed. 1996).

<sup>22</sup> Professor Mauet notes:

My experiences as a trial lawyer and trial advocacy teacher have made me realize that effective trial lawyers always seem to have two



strategy.<sup>23</sup> In this regard, Mauet discusses the reality that "[j]ury trials are the principal method by which we resolve legal disputes parties cannot settle themselves through less formal methods,"<sup>24</sup> the differentiated roles of the judge, the jury, and the advocates within the American trial scheme<sup>25</sup>, and the fourfold tools "the litigants have, and [their lawyers] must understand" in influencing the outcome of trial.<sup>26</sup>

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complimentary abilities. First, they have developed an effective method for analyzing and preparing each case for trial. Second, they have the technical skills necessary to present their side of a case persuasively during trial. It is the combination of both qualities C preparation and execution C that produces effective trial advocacy.

This text approaches trial advocacy the same way. It presents a method of trial preparation and reviews the thought processes a trial lawyer uses before and during each phase of a trial. In addition, it discusses and gives examples of the basic technical courtroom skills that must be developed to present evidence and arguments persuasively to the jury. This is done in the firm belief that effective trial advocacy is both an art and a skill, and that while a few trial lawyers may be born, most are made. Artistry becomes possible only after basic skills have become mastered.

*Id.* at xix. Mauet's book consists of ten chapters which discuss, in broad terms, the following topics of trial preparation and technique: jury selection, opening statements, direct examination, exhibits, cross-examination, experts, closing arguments, objections, and trial preparation and strategy. *Id.*

<sup>23</sup> Mauet devotes a substantial portion of his final chapter to strategic considerations of a trial. For Mauet trial strategy boils down to eight key factors: (1) develop[ing] a persuasive theory of the case; (2) develop[ing] persuasive themes; (3) develop[ing] persuasive labels for people, places, [and] events; (4) identify[ing] the key disputed issues; (5) develop[ing] . . . important facts on the disputed issues; (6) persu[ing] only what [can] realistically [be] accomplish[ed]; (7) anticipat[ing] [the] opponent's strategy; and (8) anticipat[ing] problems and weaknesses. *Id.* at 497.

<sup>24</sup> *Id.* at 1. Mauet goes on to point out: Although alternative dispute resolution methods such as arbitration, mediation, summary trials, private trials, and the like are becoming increasingly important, jury trials in the federal and state courts remain the most important dispute-resolving method in the United States. *Id.* For some recent scholarship on alternative dispute resolution in America, and a sampling of other interesting and informative literature on various aspects of persuasion and rhetoric see the discussion and sources cited in Robert F. Blomquist, *Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Alternative Dispute Resolution in America*, 34 VAL. U. L. REV. 343, 343-50 (2000).

<sup>25</sup> MAUET, *supra* note 21, at 1.

<sup>26</sup> *Id.* at 1-2. Mauet observes:

In our jury trial system, the jury determines the facts, the judge determines the law, and the lawyers act as advocates for the litigants. Our adversary system is premised on the belief that pitting two adversaries against each other, with each interested in presenting her version of the truth, is the best way for the jury to determine the probable truth. The tools the litigants have, and must understand, are fourfold: substantive law, procedural law, evidence law, and persuasion law. The first three, being principally legal, can be learned in a few years. The last, *the psychology of persuasion, is what fascinates true trial*



A second noteworthy book on the art and practice of persuasion is Robert B. Cialdini's *Influence: The Psychology of Persuasion*<sup>27</sup>. This best-selling<sup>28</sup> book is on the syllabi of several undergraduate and graduate business schools; within the sphere of advertising and marketing, Cialdini's text has influenced media professionals and sales executives who peddle everything from automobiles to soap to political candidates.<sup>29</sup> Cialdini's book consists of what he characterizes as a "study of compliance."<sup>30</sup> The impetus for his study is humorous but interesting. As he explains:

With personally disquieting frequency, I have always found myself in possession of unwanted magazine subscriptions or tickets to the sanitation workers' ball. Probably this long-standing status as sucker accounts for my interest in the study of compliance: Just what are the factors that cause one person to say yes to another person? And which techniques most effectively use these factors to bring about such compliance? I wondered why it is that a request stated in a certain way will be rejected, while a request that asks for the same favor in a slightly different fashion will be successful.<sup>31</sup>

Cialdini identifies and discusses six "weapons of influence"<sup>32</sup> that exploit "a fundamental psychological principle that directs human behavior and, in so doing, gives the tactics their power."<sup>33</sup> These persuasive weapons consist, according to Cialdini, of: (1) *reciprocation*, used with great effectiveness by the Hari Krishna Society in airports during the 1970s, whereby humans believe "that we should try to repay, in kind, what another person has provided us;"<sup>34</sup> (2) *commitment and*

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*lawyers*, and they spend a lifetime learning about, and learning how to apply, psychology in the courtroom.

*Id.* (emphasis added).

<sup>27</sup> ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (rev. ed. 1993).

<sup>28</sup> According to the back cover, with more than one quarter of a million copies sold worldwide, *Influence* has established itself as the most important book on persuasion ever published. *Id.*

<sup>29</sup> See e.g., JOE MCGINNISS, *THE SELLING OF THE PRESIDENT* (1969); KIKU ADATTO, *PICTURE PERFECT: THE ART AND ARTIFACE OF PUBLIC IMAGE-MAKING* (1993); KATHLEEN HALL JAMIESON, *PACKAGING THE PRESIDENCY* (Simon & Schuster, Inc., 1969)(1992) (As an example of recent books on the specific province of political advertising).

<sup>30</sup> CIALDINI, *supra* note 27, at xi.

<sup>31</sup> *Id.*; Cf. ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1981).

<sup>32</sup> CIALDINI, *supra* note 27, at 1-16.

<sup>33</sup> *Id.* at xiii.

<sup>34</sup> *Id.* at 17. Professor Cialdini expounds on this first principle of persuasion by noting:

If a woman does us a favor, we should do her one in return; if a man sends us a birthday present, we should remember his birthday with a



*consistency*, explaining why people who bet on a horse at the racetrack "are much more confident of their horse's chances of winning than they are immediately before laying down that bet;"<sup>35</sup> (3) *social proof*, which causes people to assess correct behavior by "find[ing] out what other people think is correct;"<sup>36</sup> (4) *liking*, the chief influence on Tupperware partygoers who "buy from . . . a friend rather than an unknown salesperson;"<sup>37</sup> (5) *authority*, the "deep-seated sense of duty to authority within

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gift of our own; if a couple invites us to a party, we should be sure to invite them to one of ours. By virtue of the reciprocity rule, then, we are *obligated* to the future repayment of favors, gifts, invitations, and the like. So typical is it for indebtedness to accompany the receipt of such things that a term like much obliged has become a synonym for thank you, not only in the English language but in others as well.

*Id.* at 18 (original emphasis).

<sup>35</sup> *Id.* at 57. Cialdini points out that prominent psychological theorists have viewed the desire for consistency as a central motivator of our behavior and that A[t]he drive to be (and look) consistent constitutes a highly potent weapon of social influence, often causing us to act in ways that are clearly contrary to our own best interests. *Id.* at 59.

<sup>36</sup> *Id.* at 116. The social logic of this weapon of influence is as follows:

We view a behavior as more correct in a given situation to the degree that we see others performing it. Whether the question is what to do with an empty popcorn box in a movie theater, how fast to drive on a certain stretch of highway, or how to eat the chicken at a dinner party, the actions of those around us will be important in defining the answer.

*Id.*

<sup>37</sup> *Id.* at 168. As Cialdini observes, however, the psychological dynamics of a Tupperware party are impacted by several weapons of influence the quintessential American compliance setting:

Anybody familiar with the workings of a Tupperware party will recognize the use of the various weapons of influence . . . : *reciprocity* (to start, games are played and prizes won by the partygoers; anyone who doesn't win a prize gets to reach into a grab bag for hers so that everyone has received a gift before the buying begins), *commitment* (each participant is urged to describe publicly the uses and benefits she has found in the Tupperware she already owns), and *social proof* (once the buying begins, each purchase builds the idea that other, similar people want the product, therefore, it must be good).

All the major weapons of influence are present to help things along, *but the real power of the Tupperware party comes from a particular arrangement that trades on the liking rule*. Despite the entertaining and persuasive salesmanship of the Tupperware demonstrator, the true requests to purchase the product does not come from this stranger; it comes from a friend to every woman in the room. Oh, the Tupperware representative may physically ask for each partygoer's order, all right, *but the more psychologically compelling requester is a housewife sitting off to the side, smiling, chatting, and serving refreshments. She is the party hostess, who has called her friends together for the demonstration in her home and who, everyone knows, makes a profit from each piece sold at her party.*

*Id.* at 167-68 (emphasis added). Liking is a powerful persuader in jury trials. As Clarence Darrow once said: The main work of a trial attorney is to make a jury like his client. *Id.* at 167.



us all"<sup>38</sup> such that even symbols of authority like the late actor Robert Young who played a physician on a popular television show selling Sanka brand coffee with the quasi-medicinal message "the 100% Real Coffee that lets you be your best;"<sup>39</sup> and (6) *scarcity*, whereby if something is characterized as "rare or becoming rare" it is generally perceived to be valuable.<sup>40</sup>

Finally, James Monaco's *How to Read a Film: The Art, Technology, Language, History and Theory of Film and Media*,<sup>41</sup> viewed by many as the basic book on film and media,<sup>42</sup> is a third exceptional book that examines the culture of persuasion by focusing on film and other visual media.<sup>43</sup> Monaco informs us along these lines that "[f]ilm is not a language in the sense that English, French, or mathematics is,"<sup>44</sup> because film has no grammatical conventions and "it is not necessary to learn a vocabulary."<sup>45</sup> Indeed, "[i]nfants appear to understand

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<sup>38</sup> *Id.* at 213.

<sup>39</sup> *Id.* at 221. Indeed,

There are several kinds of symbols that can reliably trigger our compliance in the absence of the genuine substance of authority. Consequently, they are employed extensively by those compliance professionals who are short on substance. Con artists, for example, drape themselves with the titles, clothes, and trappings of authority. They love nothing more than to emerge elegantly dressed from a fine automobile and to introduce themselves to their prospective mark as Doctor or Judge or Professor or Commissioner Someone. They understand that when they are so equipped, their chances for compliance are greatly increased.

*Id.*

<sup>40</sup> *Id.* at 239.

Collectors of everything from baseball cards to antiques are keenly aware of the influence of the scarcity principle in determining the worth of an item. . . . Especially enlightening as to the importance of scarcity in the collectibles market is the phenomenon of the precious mistake. Flawed items C a blurred stamp or a double-struck coin C are sometimes the most valued of all. . . . With the scarcity principle operating so powerfully on the worth we assign things, it is natural that compliance professionals will do some related operating of their own. Probably the most straightforward use of the scarcity principle occurs in the limited-number tactic, when the customer is informed that a certain product is in short supply that cannot be guaranteed to last long.

*Id.*

<sup>41</sup> MONACO, *supra* note 2.

<sup>42</sup> *Id.*, dust jacket.

<sup>43</sup> Monaco's book is divided into six chapters: (1) Film as an Art, (2) Technology: Image and Sound, (3) The Language of Film: Signs and Syntax, (4) The Shape of Film History, (5) Film Theory: Form and Function, and (6) Media. His book also contains three appendices: (I) A Standard Glossary for Film and Media Criticism, (II) Reading About Film and Media, and (III) Film and Media: A Chronology. *Id.* at xiii-xv.

<sup>44</sup> *Id.* at 121.

<sup>45</sup> *Id.*



television images, for example, months before they begin to develop a facility with spoken language;"<sup>46</sup> moreover, "[e]ven cats watch television."<sup>47</sup> Thus, "it is not necessary to acquire intellectual competence in film in order to appreciate it, at least on the most basic level."<sup>48</sup> Nevertheless, as Monaco asserts, there are varying gradations of sophistication in understanding and interpreting visual media and, therefore, "film is very much like language"<sup>49</sup> because:

People who are highly experienced in film, highly literate visually (or should we say "cinemate"?), see more and hear more than people who seldom go to the movies. An education in the quasi-language of film opens up greater potential meaning for the observer, so it is useful to use the metaphor of language to describe the phenomenon of film.<sup>50</sup>

Accordingly, research has established that film images are comprehended differently by children than by adults, and that there are "cultural differences in [the] perception of images."<sup>51</sup> Monaco concludes that film images must be "read": "There is a process of intellection occurring — not necessarily consciously — when we observe an image, and it follows that we must have learned, at some point, how to do this."<sup>52</sup>

Similarly, according to Monaco, the process of visual media "perception and comprehension involves the brain: it is a mental experience as well as a physical one,"<sup>53</sup> and "there is a strong element of our ability to observe images, whether still or moving, that depends on learning".<sup>54</sup> Interestingly, Monaco posits that the reason why film and TV images are psychologically so compelling and persuasive is that a visual image does not "suggest"<sup>55</sup> as an author or speaker suggests by choosing certain words, which semiologists call "signifiers." Signifiers" are the collection of letters or sounds that require hard intellectual work in translating into a number of possible

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* Monaco summarizes some relevant research on cultural differences in the perception of film images: In one famous 1920s test, anthropologist William Hudson set out to examine whether rural Africans who had had little contact with Western culture perceived depth in two-dimensional images the same way that Europeans do. He found unequivocally, that they do not. *Id.*

<sup>52</sup> *Id.* at 122.

<sup>53</sup> *Id.* at 123.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 128.



"signifieds," which are meanings that the words or sounds represent.<sup>56</sup> Rather, according to Monaco, a visual image "states."<sup>57</sup> The political risk to a culture presented by visual images, then, is that it is easy to watch a film, for example, and not do the difficult mental work of translating signifiers into signifieds. As Monaco explains:

[F]ilm is *like* a language. How, then, does it do what it does? Clearly, one person's image of a certain object is not another's. If we both read the words "rose" you may perhaps think of a Peace rose you picked last summer, while I am thinking of the one [a former girlfriend] gave to me in December 1968. In cinema, however, we both see the same rose, while the filmmaker can choose from an infinite variety of roses and then photograph the one chosen in another infinite variety of ways. The artist's choice in cinema is without limit; the artist's choice in literature is circumscribed, while the reverse is true for the observer. Film does not suggest in this context: it states. And therein lies its power and the danger it poses to the observer: the reason why it is useful, even vital, to learn to read images well so that the observer can seize some of the power of the medium. The better one reads an image, the more one understands it, the more power one has over it. The reader of a page invents the image, the reader of a film does not, yet both readers must work to interpret the signs they perceive in order to complete the process of intellection. The more work they do, the better the balance between observer and creator in the process; the better the balance, the more vital and resonant the work of art.<sup>58</sup>

The integrated insights of Mauet, Cialdini, and Monaco provide a solid intellectual foundation for exploring the key epistemological theories of *When Law Goes Pop*. The crux of Professor Sherwin's lament in *When Law Goes Pop* might be phrased in the following terms: we are *all* postmodernists now. In the first place, in Sherwin's view, Americans are quite aware at the outset of the 21<sup>st</sup> century that all reality is "constructed" and that there is no such thing as "ideal truth" or no such thing as "objectivist rationality" in the philosophical tradition of Plato and Descartes.<sup>59</sup> As Sherwin puts it:

If it is all being constructed, we can hear postmodern anxiety whisper, isn't one construction as true (or as false) as any other? This fear is fueled by advances in communication technology that increasingly blur the line between fiction and reality (from digitally manipulated photography and videos to

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<sup>56</sup> *Id.* at 127.

<sup>57</sup> *Id.* at 128.

<sup>58</sup> *Id.* (emphasis in original).

<sup>59</sup> SHERWIN, *supra* note 3, at 220-21.



computerized simulations of reality), and by the shrewd exploitation of that confusion by savvy advertisers, politicians, and lawyers alike.<sup>60</sup>

In the second place, Sherwin argues, Americans now know that irrational forces play a significant role in human conduct. As "a variety of irrational forces flood into consciousness," Sherwin notes, "[t]he contingencies of fate, chance, fury, and desire threaten to overwhelm the mind, oppressing it with feelings of helpless passivity."<sup>61</sup>

Sherwin is concerned that in response to these consciously *known* indeterminate epistemological realities of the postmodern condition, American juries and judges are increasingly *unconsciously adopting* what he describes as the "skeptical postmodernism . . . strategy" of either "[adopting a posture of] bemused irony"<sup>62</sup> or "diving into the flow, in a triumph of Sadean or Nietzschean rapture."<sup>63</sup> For Sherwin, however, the "grim dilemma"<sup>64</sup> posed by the two prongs of the interpretative skeptical postmodernism strategy for legal ordering is an "unnecessary and illusory" type of "hobson's choice."<sup>65</sup> According to Sherwin's thesis, "there is a middle way, a way in which opposing forces and disparate modes of knowing, thinking, and talking interpenetrate in varied and complex fashion."<sup>66</sup> Sherwin's "middle way" is attainable through what he calls an "affirmative postmodern

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<sup>60</sup> *Id.* In sum, as the modernist benchmark for ideal truth and objectivist rationality gives way to constructivist insights, the task of judgment becomes a far more complicated matter. For now the search for objective truth must give way to the task of choosing among competing warrants for a variety of disparate truth claims. *Id.*

<sup>61</sup> *Id.* Indeed, as Sherwin asserts:

Faced with an onslaught of uncontrollable forces both within and without, the subject faces a crisis of identity and a foreboding sense that individual agency itself may no longer make sense. For how can one expect to direct events or even control one's own actions when irrational forces like chance and desire mock the best efforts of deliberation and intentionality?

*Id.*

<sup>62</sup> This strategic choice, according to Sherwin, entails a more or less stable posture of guarded detachment, to defend against the dual dangers of *incessant deception* on the one hand and *destabilizing incoherence* on the other. *Id.* (emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> The dilemma consists, in Sherwin's view, of an either/or strategic interpretative choice of the following: to play (or at least bemusedly watch) the manipulative games of language or to leap beyond language into the primary, incommunicable flux of irrational forces that surround and infuse our words and images. *Id.* at 221.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*



perspective."<sup>67</sup> This perspective is an embellishment of what Ernst Cassirer, in his 1946 book *Language and Myth*, termed "mature constructivism."<sup>68</sup> As Sherwin posits:

In the postmodern era we are burdened with the awareness that we live within forms of knowledge and belief that we both inherit and create. Thus, unlike those who dwelled among the Homeric myths, we know that the mythic forms in which we live, that establish our world, are subject to critical scrutiny. They may be deliberately affirmed or disavowed. The responsibility for meaning operates on both a collective (cultural) and an individual (cognitive) level. *We needn't accept the proffered warrants for enchantment. But we may. The question, therefore, is not whether we should be suspicious of enchantment. Rather, we must ask under what conditions should suspicion as opposed to belief prevail?*<sup>69</sup>

In essence, therefore, Sherwin conceives of the problem of persuasion in a postmodern society, like early 21<sup>st</sup> century America, as the burden we all bear. This burden, mythologically linked to the story of Adam and Eve who sampled the forbidden fruit of The Tree of Knowledge is one of *too much sensate, surface knowledge and too little deep understanding*. For Sherwin, Americans, reacting to the disenchantment of too many theories of human behavior, too many unmaskings of psychological motivation, and too much information running through their brains, have recently armored their psyches with a "hyper-estheticized and radically amoral perspective."<sup>70</sup> This perspective is, according to Sherwin, the *modus operandi* of filmmakers like Quentin Tarantino<sup>71</sup> and Oliver Stone, and it is the "skeptical

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (quoting ERNST CASSIRER, *LANGUAGE AND MYTH* (1946)).

<sup>69</sup> *Id.* (emphasis added) (endnote omitted).

<sup>70</sup> *Id.* at 224.

<sup>71</sup> According to Sherwin's critical review of Tarantino:

Everything . . . comes to be seen as an image within a vast flux of multiple, disparate images, a surface upon which our gaze falls seeking a response to the central reality-defining query: how does it make me feel? This is the image as commodity. If I consume it, what is its payoff? In short, the sensation it offers is its own reward. And in that reward lies the only truth we may lay claim to. It is in the context of such a morally depleted, wholly estheticized perspective that Tarantino may be understood when he says:

I don't take violence very seriously. I find violence funny, especially in the stories I've been telling recently. Violence is part of this world and I am drawn to the outrageousness of real-life violence. It isn't about lowering people from helicopters on to speeding trains, or about terrorists hijacking something or other.



postmodern defense in action" that serves to undermine our legal and political values.<sup>72</sup> As Sherwin observes, the very *meaning* of our public culture is endangered as exemplified in situations ranging

[f]rom the Simpson double murder trial to the constitutional crisis of the Clinton impeachment proceeding . . . . Estheticized responses (*what does the image make us feel?*) and estheticized judgments (*how does it create that effect?*) threaten to take the place of reflective judgment (*what self, social, legal and political reality are these images constructing? to what end? how do they make power flow? who benefits? who loses?*). The flow of power in society is real, with real effects; it's no joke. We cannot afford to feel superior, in an ironically detached way to the symbolic cultural forms that help to make up who we are and the reality we live in.<sup>73</sup>

Sherwin's project on popular culture and the law, it seems, is an extension and elaboration of Cialdini's "weapons of influence."<sup>74</sup> Thus, by way of illustration, Sherwin would probably agree that American jurors and citizens will tend to repay a legal image maker like Johnnie Cochran and a political imagemeister like Bill Clinton, who makes them feel outraged, appreciated, or justified as the case may be, with a reciprocated verdict or vote of confidence. Likewise, Sherwin would likely find explanatory power in the continued popularity of Bill Clinton in spite of his perjury and obstruction of justice, because Clinton is a likeable character (he plays the saxophone, enjoys fast food and rock-n-roll, and "feels our pain"), and the electorate had committed to electing and re-electing the man in spite of early knowledge of his colorful lifestyle. Also, the fact that Clinton's public approval rating remained high in spite of

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Real life violence is, you're in a restaurant and a man and his wife are having an argument and all of a sudden that guy gets so mad at her, he picks up a fork and stabs her in the face. That's really crazy and comic bookish but it also happens . . . . To me, violence is a totally aesthetic subject.

*Id.* at 224-25 (endnote omitted).

<sup>72</sup> *Id.* at 226. Sherwin writes the following about Oliver Stone's vision:

Perceiving the real world through . . . a skeptical postmodern screen turns reality into TV reality: surfaces to gaze on, to consume, for the sake of immediate (albeit free-floating) gratification. This is what filmmaker Oliver Stone seems to have had in mind when he referred to the mass media's effort to arouse everywhere a fascination without scruples resulting in a paralysis of meaning, to the profit of a single scenario. It is the same skeptical postmodern esthetic that prompts audiences to laugh in the face of horror and perversion.

*Id.* at 225 (endnote omitted).

<sup>73</sup> *Id.* at 226 (emphasis in original).

<sup>74</sup> See *supra* notes 27-40 and accompanying text.



his questionable behavior was social proof that he was a "good" president, and Clinton was masterful in using the trappings of the Presidency (the Presidential Seal, visual shots of him saluting the Marine guard as he alighted from the Presidential helicopter, and the like) to maintain his authority. Indeed, Sherwin would tend to share Cialdini's concern about "automatic, mindless compliance" in American society, "that is, a willingness to say yes without thinking first" in the face of "the ever-accelerating pace and informational crush of [contemporary] life"<sup>75</sup> and affirm Cialdini's conclusion that it "will be increasingly important for [American] society . . . to understand the how and why of automatic influence."<sup>76</sup> In this regard, Professor Sherwin has made a significant contribution by providing a powerful explanation of how and why key actors in American legal and political systems—jurors, judges and citizens—are often automatically influenced by aesthetic artistry of contemporary filmmakers. In the process, Sherwin has also added to the corpus of what Mauet refers to as "persuasion law": "the psychology of persuasion" that "fascinates true trial lawyers" who "spend a lifetime learning about, and learning how to apply, psychology in the courtroom."<sup>77</sup> Yet, Sherwin's book, which emphasizes the influence of contemporary filmmaking on the American legal and political ethos, also provides useful and important explanatory insights on Monaco's call that we "learn to read [film] images well."<sup>78</sup>

*B. The Problem of Understanding and Dealing With the "Jurisprudence of Appearances."*

Sherwin provides a number of interesting and important insights in his book on what he calls "the jurisprudence of appearances."<sup>79</sup> First, he conceptualizes the crux of the problem of the jurisprudence of appearances as "repression [by legal actors like judges and jurors] through unconscious displacement onto others of illicit and thus highly unpalatable impulses and desires."<sup>80</sup> Second, he identifies the genesis of the problem to be the extraordinarily potent influence that contemporary popular visual media has had on "legal meaning

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<sup>75</sup> CIALDINI, *supra* note 27, at xiv.

<sup>76</sup> *Id.*

<sup>77</sup> MAUET, *supra* note 21, at 1-2. See *supra* notes 21-26 and accompanying text.

<sup>78</sup> MONACO, *supra* note 2, at 128. See *supra* notes 41-58 and accompanying text.

<sup>79</sup> SHERWIN, *supra* note 3, at 10.

<sup>80</sup> *Id.* at 9.



making."<sup>81</sup> As Sherwin notes, "When law goes *pop* punitive retribution against the predatory other—the 'alien' among us, that perennial favorite of film and TV as well as 'real' law—becomes easy, perhaps too easy" because "legal meaning making . . . adopts the media's [seductive and confusing] visual logic as its own."<sup>82</sup> In this regard, Sherwin posits a helpful "rule of thumb" and related corollary about the so-called "visual logic" of contemporary popular culture:

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 control how the image spins.<sup>83</sup>

Third, in what is no doubt one of the best parts of the book, *When Law Goes Pop* offers a compelling analysis of filmmaker Errol Morris' 1988 "so-called documentary"<sup>84</sup> film, *The Thin Blue Line*, to illustrate Sherwin's concern about popular culture's impact on American legal meaning making.<sup>85</sup> Indeed, my personal viewing and understanding of this landmark, but hard to get,<sup>86</sup> film<sup>87</sup> was greatly enhanced by Sherwin's commentary. *The Thin Blue Line* is a film that the *New York Times* described as follows:

If Randall Adams and David Harris can agree on anything, it's that fate dealt them a terrible hand when, on Saturday, November 27, 1976, it threw them together. Mr. Adams knows that his whole life would have been different if he hadn't run out of gas that morning, if he hadn't been hitchhiking, and if Mr. Harris hadn't picked him up. Mr. Harris, who gave Mr. Adams a ride in a car he had stolen a day earlier, wonders what would have happened if Mr. Adams, who was living in a seedy Dallas motel with his brother, hadn't refused to give him

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<sup>81</sup> *Id.* at 10.

<sup>82</sup> *Id.* at 9-10 (emphasis in original). According to Sherwin, when [law goes pop] enters the domain of the hyper real, a realm in which appearances battle appearances for the sake of appearances C and where images risk spinning out of control. *Id.* at 141.

<sup>83</sup> *Id.* at 141.

<sup>84</sup> *Id.* at 107.

<sup>85</sup> Errol Morris, Director, *The Thin Blue Line* (Third Floor Productions, 1988) (cited in SHERWIN, *supra* note 3, at 107, n. 2).

<sup>86</sup> I was able to rent the video from Facets Multi-media, Inc., 1517 West Fullerton Ave., Chicago, IL 60614. Facets is an incomparable video rental resource that makes their bounty available to mail-ordering customers as well as the more traditional in-store-ordering customers. See generally, *Facets Complete Video Catalog No. 15* (Catherine Foley & Milos Stehlik, eds. 1999) (cataloging over 35,000 films in assorted film categories).

<sup>87</sup> *The Thin Blue Line*, despite its current obscurity, was included in *The New York Times Guide to the Best 1,000 Movies Ever Made* (ed. Peter M. Nichols 1999) at 866-67.



a place to sleep.

But the two men did meet and spend the day together, and they did wind up at a drive-in where a film called *Swinging Cheerleaders* was being shown. Mr. Adams, who was then a twenty-eight-year-old drifter, says he didn't like the movie and insisted on going home before it was over, leaving Mr. Harris to roam on his own. Mr. Harris, then a sixteen-year-old runaway, says the twosome were at the drive-in until midnight or so. The time is crucial, because at twelve-thirty A.M. a Dallas police officer named Robert Wood saw the stolen car moving with only its parking lights on. He signaled for the car to stop, walked over to talk to the driver, and the driver killed him.<sup>88</sup>

Sherwin devotes over thirty pages of his book to dissecting *The Thin Blue Line*. The most striking of his many perspicacious observations about the film are the following: (1) that "Morris' lead story in that film made so many people disbelieve the state's trial story that the [Texas] courts eventually reexamined the case"<sup>89</sup> and that this "reexamination led to Randall Adams' release from prison"<sup>90</sup>; (2) that the "film lays out two contemporaneous but opposing plot lines", to wit, "the story as told in a classically linear fashion (beginning, development, conclusion), and a provocative, unresolved nonlinear narrative"<sup>91</sup>; (3) that the film "is curious in that it

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<sup>88</sup> *Id.* at 866.

<sup>89</sup> SHERWIN, *supra* note 3, at 107-108.

<sup>90</sup> *Id.* at 108. Adams had served twelve years, a good part of it on death row. In many people's eyes Morris's film served as the key catalyst in righting a terrible wrong. By helping to set Randall Dale Adams free the film also helped set the Dallas criminal justice system straight. *Id.* (endnote omitted).

<sup>91</sup> *Id.* at 115. As Sherwin explains:

The classic linear story line is perhaps best exemplified by the familiar genre of the detective story wherein the detective-hero, by identifying and combining significant clues, resolves a disturbing mystery. In Morris's film, the audience as detective/juror traces the clues that point to a sinister plot by state officials to frame Randall Dale Adams. The clues fit neatly into a story that ends when the mystery of the frame-up is revealed and solved. Once revealed, the plot is obvious and familiar. Lies, corruption, and abuse of power made Adams a scapegoat for a crime he did not commit.

The film's opposing plot line operates within the context of a less familiar, nonlinear (arguably postmodern) narrative form. Rather than offering closure, this form leaves a disquieting sense of inadequate resolution and residual mystery. Was Harris the gunman? If he was, is that all there is to the story? What about the loose ends? Where was Adams at the time of the murder? What were the two of them up to that day? Does it take a serendipitous interview with an artful filmmaker to save a prisoner from life in jail or death by electrocution? What if the plotting of chance or fate actually played a larger part in the criminal justice system? Surely such uncontrollability of events and



simultaneously enacts and refutes the classic modern narrative of straight-arrow truth and constant justice"<sup>92</sup>; and (4) that "[i]n a film about the different forms of deception, Morris leaves room to realize that certainty often demands self-deception."<sup>93</sup>

Sherwin provides a fourth noteworthy exposition of the jurisprudence of appearances by his discussion of how contemporary visual media "that combines quick gratification through intellectual relaxation, emotional excitement, and escapism" in its portrayal of "[l]aw stories"<sup>94</sup> has perniciously shaped the cognitive pathways of the American public in a way that makes them vulnerable to manipulative distortion when making public judgments in the legal realm. The manipulation occurs, according to Sherwin, as "savvy litigators with increasing frequency emulate the popular cultural constructs and visual storytelling techniques that dominate the culture at large"<sup>95</sup> and, in the process, create a "conflation of truth and fiction, image and reality, fact and fantasy."<sup>96</sup>

Fifth, the jurisprudence of appearances is also played out "outside the courtroom as well, as a growing number of lawyers deploy the strategies of public relations using sound bytes, photo-ops, and a variety of spin control tactics to win their cases in the court of public opinion,"<sup>97</sup> to affect the course of litigation and the legal rulings in a case.<sup>98</sup> Thus, Sherwin explains how "[w]ith the advent of litigation public relations we see how legal advocates exploit the visual mass media's tendency to blur the line between reality and fiction."<sup>99</sup>

Finally, Sherwin discerns a "cultural crisis" in what he comprehends as the jurisprudence of appearances run amok. He writes:

[Legal and political spinmasters'] 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

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human actions dissipates in rather short order, the complacent all's right with the world because truth and justice will out in the end attitude that the linear story would have us believe.

*Id.* (endnote omitted).

<sup>92</sup> *Id.* at 116-17.

<sup>93</sup> *Id.* at 121.

<sup>94</sup> *Id.* at 143.

<sup>95</sup> *Id.* at 146.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 148-150.

<sup>99</sup> *Id.* at 152.



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.<sup>100</sup>

C. *The Problem of Popular Culture's Illicit Impact on Legal Advocacy*

In Sherwin's view, as expressed in *When Law Goes Pop*, it is highly problematic to the proper functioning of law that contemporary pop culture arouses illicit, secret, and unexamined impacts on American jurisprudence. He sums up his concern in this area by arguing:

The convergence of law and popular culture . . . provides an account of increasing distortions within the discourse competencies of both the public and the judiciary. It also suggests a growing imbalance in the distribution of various discourse competencies within the legal system as a whole. A synergistic convergence of skeptical postmodern theory, communications technology, and the insistent gratification demands of the marketplace is leading to a flattening out of disparate discourse competencies. Common sense and to an increasing extent legal discourse and knowledge are showing signs of collapsing into the same gratification-based esthetic that dominates contemporary popular culture. It is precisely this distortion that [exists] . . . with the advent of the jurisprudence of appearances and the litigation public relations movement. As a result, the discrete virtues of popular knowledge and discourse, like those of the judiciary, which must at times operate as a brake upon popular opinion, are being encumbered and diminished.<sup>101</sup>

Professor Sherwin suggests, in other words, that the distorting affect of popular culture's unexamined impact on legal reasoning is "up for grabs: causation, the autonomy and moral responsibility of the individual, and the coherence of reason itself."<sup>102</sup> Moreover, this crisis, in Sherwin's view, represents "the foremost legal challenge of our time."<sup>103</sup>

Sherwin, however, urges a rather ambiguous remedy to this "crisis." He argues that "[w]e must begin to

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<sup>100</sup> *Id.* at 168-169.

<sup>101</sup> *Id.* at 240-41.

<sup>102</sup> *Id.* at 169.

<sup>103</sup> *Id.*



reconceptualize and relegitimize 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."<sup>104</sup> If we take this path, Sherwin tells us, the "effort will lead us from hyper-catharsis to real catharsis – in the face of tragic suffering and the affirmative potential of legal enchantment."<sup>105</sup>

It is difficult, however, to find a clear explanation of *how* Sherwin would specifically change things. Ultimately, it seems, Sherwin advocates a return to ancient classical rhetorical principles as a cure for our crisis of legal meaning-making.<sup>106</sup> The following excerpt, while general and idealistic, is Sherwin's best articulation in *When Law Goes Pop* of his solution:

I believe that [my] affirmative postmodern perspective . . . has much in common with [a] pre-Platonic perspective. Postmodern constructivist insights have shown us in a broad range of social and cultural and even scientific contexts that the particular form of expression—the discourse, the metaphor, the visual image that is used—is essential to the kind of truth that may be expressed. This is not to say that truth is reducible to esthetics, that content equals style, as the fifth-century Gorgian Sophists and their contemporary skeptical postmodern counterparts seem to believe. *Rather, it is to acknowledge the complexity, contingency, and multiplicity of truth and reason. It is to accept the interpenetration of truth, morality, and esthetics as well as of reason and the irrational in all its varied forms and disguises. And it is to affirm responsibility for choosing among the disparate claims to truth and reason that confront us when conflicts demand resolution.*

On this view it becomes apparent that we share a deep insight with rhetoricians like Isocrates and Philip Sidney. Without the fictional method, without the efficacy of verisimilitude, and the motivating power of emotion, truth may simply fail to come to life in the mind<sup>107</sup>.

On the one hand, Sherwin's suggested approach is worthwhile because it tries to imaginatively synthesize theoretical parallels between pre-Platonic rhetoricians and present 21<sup>st</sup> century post-modern cultural practices. On the other hand the lingering generality of its prescription for reform is reminiscent of other recent, trendy, somewhat shallow calls for reform that we, for example, "Act for the best,

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See id.* at 228. It may be that current developments in culture, technology, and the history of ideas have led us to a fork in the road similar to the one Plato faced. *Id.*

<sup>107</sup> *Id.* at 229.



hope for the best, and take what comes."<sup>108</sup>

### III. THE NATURE OF AESTHETIC-LEGAL JUDGMENT IN A CULTURE OF LAW

Despite its abstract and jargon-infused quality<sup>109</sup>, *When Law Goes Pop* has a significant redeeming aspect: it is a creative contribution to what one legal theorist has called "the key issue in legal scholarship today,"<sup>110</sup> which is the indeterminacy debate about whether law or things outside of the law "determine the outcome of particular legal disputes."<sup>111</sup>

Rooted in a philosophy that posits that the rule of law is *not* radically *interdeterminate*, but rather moderately *underdetermined* (by such factors as political ideology, class background, racial and gender identification and the like),<sup>112</sup> the singular significance of Professor Sherwin's book, *When Law Goes Pop*, is that it urges the incorporation of *aesthetic judgment* into the calculus of how law should determine human disputes. As such, Sherwin extends and elaborates the recent path breaking work of Professor Paul W. Kahn, who in *The Cultural Study of Law*<sup>113</sup> called for "a legal aesthetic" consisting of a Kantian-inspired "study of the time and space within which legal experience, both belief and practice, becomes possible."<sup>114</sup>

The crux of Sherwin's original contribution to the cultural study of law is his melding of the insight that there exists multiple forms of "truth" in postmodern America, including the critical "truth" of irrational emotion, with his plea for an American "tragic wisdom" gestalt that would serve to "cultivate

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<sup>108</sup> ALAN C. HUTCHINSON, *IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION* 331 (2000) (internal quotation marks omitted; endnotes omitted).

<sup>109</sup> See *supra* note 17 and accompanying text.

<sup>110</sup> Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990).

<sup>111</sup> Lawrence B. Solum, *Indeterminacy in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 488 (Dennis Patterson ed., 1996).

<sup>112</sup> *Id.* at 489-99.

<sup>113</sup> KAHN, *supra* note 1.

<sup>114</sup> *Id.* at 40. Kahn went on to note:

The rule of law is an organization of institutions, practices, persons and objects within the ongoing historical and spatial project that is the state. The state occupies time and space not as an object in the natural world, but as an imaginative construction of temporal and spatial meanings. The state's time is history; its space is territory. These are the subjects of a legal aesthetic.



our capacity for enchantment."<sup>115</sup> "Enchantment," for Sherwin, connotes the requisite social and institutional maturity to transmogrify the conflict of necessary legal rituals into sufficient symbolic cultural meanings.<sup>116</sup>

*When Law Goes Pop* is important because, at its heart, it polemically applies two valuable theoretical constructs to the study of law — one from the field of personal psychology, the other from art. First, Sherwin makes out a convincing, albeit implicit, case that "the struggle for meaning," which Bruno Bettelheim examined on the personal aesthetic level in his book *The Uses of Enchantment*, needs to be taken up by the American legal system.<sup>117</sup> Sherwin's book, indeed, resonates with the following excerpt from Bettelheim's monumental work:

If we hope to live not just from moment to moment, but in true consciousness of our existence, then our greatest need and most difficult achievement is to find meaning in our lives. It is well known how many have lost the will to live, and have stopped trying, because such meaning has evaded them. An understanding of the meaning of one's life is not suddenly acquired at a particular age, not even when one has reached chronological maturity. On the contrary, gaining a secure understanding of what the meaning of one's life may or ought to be this is what constitutes psychological maturity. And this achievement is the end result of a long development . . . .

Contrary to the ancient myth, wisdom does not burst forth fully developed like Athena out of Zeus's head; it is built up, small step by small step, from most irrational beginnings.<sup>118</sup>

Second, Sherwin has created a vision of the flourishing of the American legal system by his call for a sophisticated collective consciousness that incorporates "a symbolic as well as a practical dimension to legal adjudication"<sup>119</sup> and his implicit agreement with the aesthetic theory of James Joyce's character, Stephen Dedalus, in the book *Portrait of the Artist as a Young Man*.<sup>120</sup> The Joycean theory is that "true" art should seek to achieve objective *stasis* through "wholeness, harmony, and radiance," not subjective *kinesis* of desire or loathing.<sup>121</sup>

<sup>115</sup> SHERWIN, *supra* note 3, at 230.

<sup>116</sup> *Id.* Sherwin observes: Culture, like art and . . . law cannot flourish without the enchantment of esthetics, what the ancient Greeks called *terpsis*. *Id.*

<sup>117</sup> BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* (1977).

<sup>118</sup> *Id.* at 3.

<sup>119</sup> SHERWIN, *supra* note 3, at 230.

<sup>120</sup> JAMES JOYCE, *PORTRAIT OF THE ARTIST AS A YOUNG MAN* (1916).

<sup>121</sup> See generally WILLIAM YORK TINDALL, *A READER'S GUIDE TO JAMES JOYCE* 94-100



Sherwin, then, would urge American judges and jurors to deploy their post-modern aesthetic judgment, stimulated by their exposure to film media, *not* to satisfy subjective fears and wishes but, rather, to achieve a coherent social conception of justice in an individual case.

#### IV. CONCLUSION

Richard Sherwin's *When Law Goes Pop*, while difficult to read and decipher because of its repetitive use of abstract jargon, is, nonetheless, a fascinating and valuable contribution to the cultural study of law. Sherwin raises a number of interesting issues including the problem of persuasion in a post-modern society, the problem of understanding and dealing with the "jurisprudence of appearances," and the problem of popular culture's illicit impact on legal advocacy. The most significant aspect of *When Law Goes Pop*, however, is its endorsement of aesthetic-legal judgment to achieve deep cultural meaning in 21<sup>st</sup> century America.