

2006

# Manifesto for Visual Legal Realism, A Symposium: Access to Justice: Law and Popular Culture

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## Recommended Citation

40 Loy. L. A. L. Rev. 719 (2006-2007)

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# A MANIFESTO FOR VISUAL LEGAL REALISM

*Richard K. Sherwin\**

Society has become increasingly dependent upon computers in business and in our personal lives. With each technological advancement, the practice of law becomes more sophisticated and, commensurate with this progress, the legal system must adapt. Courts are facing the need to shed any technophobia and become more willing to embrace the advances that have the ability to enhance the efficacy of the legal system.<sup>1</sup>

For a long time, legal scholars treated law as an autonomous domain with its own rules and procedures and specialized forms of discourse.<sup>2</sup> There is, of course, some truth to this claim.<sup>3</sup> Few scholars today, however, would deny that the boundary between law and the culture in which it operates is highly porous.<sup>4</sup> In my own work over the last decade, I have concentrated on two intersecting themes. The first addresses the various ways in which law and popular culture interpenetrate, with particular emphasis on how visual culture and multi-modal communication technologies affect

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1. *Commonwealth v. Serge*, 896 A.2d 1170, 1176 (Pa. 2006).

2. See generally LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960* (G. Edward White ed., 1986) (exploring the evolution of legal realism); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 7–10 (1983) (discussing the “case by case” method of legal discourse); Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 495–96 (1996) (reviewing NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995)); Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 762 (1987) (discussing how the era of law as an autonomous discipline has ended).

3. See Robert Post, *Introduction to LAW AND THE ORDER OF CULTURE*, at vii, vii–xvii (Robert Post ed., 1991); Hugh Baxter, *Autopoiesis and The “Relative Autonomy” of Law*, 19 CARDOZO L. REV. 1987, 1997 (1998).

4. See generally RICHARD K. SHERWIN, *WHEN LAW GOES POP* (2000) [hereinafter SHERWIN, *WHEN LAW GOES POP*] (discussing the influence of culture on the legal system); see also Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1074 (1999) (“Early in the twentieth century, legal ‘realists’ began to question whether legal principles alone could dictate or explain outcomes . . .”). But cf. Jack Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 157 (2006) (noting that today law’s central relationship to the humanities “no longer seem[s] so obvious”).

the content and meaning of law.<sup>5</sup> The second addresses the importance of drawing from a variety of disciplines—including cognitive and social psychology, linguistics, cultural anthropology, and rhetoric, among other scholarly domains—in studying the various ways in which legal meanings are constructed and construed, and with what effect.<sup>6</sup>

It is a truism that powerful stories win cases.<sup>7</sup> But what do we really know about how a good story is put together? What is in our communal toolkit to help us make the stories we tell succeed?<sup>8</sup> What role do our mental and cultural categories play in shaping and informing the judgments that jurors and judges make in response to the stories lawyers tell?<sup>9</sup> How do we know what kind of story (a mystery? a melodrama? a heroic quest tale?) is the right one to fit the facts of the case at hand? What sort of characters should the story feature, and when should they be brought on or escorted off stage so that the story's moral may be effectively realized? How do we describe the real source of "trouble" that launched the legal story in the first place? And now that law has migrated to the screen, both in court and out, we also need to ask: how do we tell a compelling story in images as well as words? By grappling directly with these sorts of meaning making tasks it is possible to develop and apply a more sophisticated theory of legal practice.

A growing number of scholars are finding that the narratives lawyers, judges, and jurors tell in the everyday operation of law are particularly rich sources of insight into the legal meaning making process. Through a close study of the discourse used by legal (and non-legal) actors in a variety of legal settings, including visual and

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5. RICHARD K. SHERWIN, *Law in Popular Culture*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 95 (Austin Sarat ed., 2004); RICHARD K. SHERWIN, *POPULAR CULTURE AND LAW* (2006) (discussing the many intersections of law and culture).

6. Richard K. Sherwin, *Lawyering Theory: An Overview: What We Talk About When We Talk About Law*, 37 N.Y.L. SCH. L. REV. 9, 20 (1992) [hereinafter Sherwin, *Lawyering Theory*] (arguing for a cultural approach to legal analysis, which calls into question "taken-for-granted models, prototypes, schemas, or images of self, others, and social institutions that make up particular social domains and legal practices"); see also Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992) (examining the strategic methods lawyers use to convey their stories to juries).

7. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 528 (1991).

8. See JEROME BRUNER, *ACTS OF MEANING* (1990) [hereinafter BRUNER, *ACTS*].

9. For a good legal application of these elements to tort litigation, see NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000).

multi-modal digital forms of discourse, we find not only strategic clues regarding how a particular judge or advocate may nestle his or her theory of the case within a familiar story genre, but also how narratives activate particular memories, values, emotions, and beliefs under specific circumstances in order to spur particular kinds of judgments or decisions in a particular case. For example, if it is a whodunit, a favorite genre among prosecutors, the story's originating trouble is most likely historical in nature. Something has happened. A crime has occurred, and it is now up to the decision makers to solve the mystery. This will require the marshalling of salient evidentiary clues. If they have done their job right, by the time the state rests its case, the defendant sitting in the courtroom will merge in the decision maker's mind with the prosecution story's main character, the culprit who did the deed.

On the other hand, if it is a hero's tale, a genre often favored by criminal defense lawyers, the jurors most likely will never solve the prosecutor's mystery. How could they, the defense will argue, in view of the lack of evidence and the state's failure to make the pieces of the puzzle fit together. With nothing but disconcerting fragments floating before their eyes, the decision makers will face a serious dilemma. They will be sorely challenged by the prosecution's demand for a conviction; yet, the jurors have sworn an oath to keep the prosecutors to their burden of proof. Only by summoning the wisdom and moral courage needed to do the right thing will the jurors be able to honorably discharge that oath. Only by committing to a verdict of acquittal will they complete the defense's heroic tale, for as it turns out, the jurors themselves are the true heroes of the defense counsel's story—if they can fulfill the role in which they have been cast.<sup>10</sup> As Johnnie Cochran famously argued in the O.J. Simpson case, if the jurors won't do it, who will?<sup>11</sup>

Of course, there is no guarantee that the decision makers in a given case will either yield to the strict narrative logic of the prosecution or actively fulfill the defense's "subjunctive" (i.e., emotionally robust, albeit contingent)<sup>12</sup> invocation to "do the right thing" and acquit. One thing, however, remains certain. When

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10. See Amsterdam & Hertz, *supra* note 6.

11. SHERWIN, WHEN LAW GOES POP, *supra* note 4, at 46.

12. JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 25–26 (1986) [hereinafter BRUNER, ACTUAL MINDS].

lawyers set a particular narrative in motion, it is far easier to trigger expectations about how that particular kind of narrative is supposed to go. There is also a corollary to this point. It is far easier to cue up what is already inside the decision maker's head than to insert something new.<sup>13</sup> We all carry around (for the most part unconsciously) all the cultural and cognitive building blocks we need to make sense of what we see and hear around us. We follow familiar social scripts, and expect others to do the same. And when the expected script is transgressed in some way, we are quick to fill in meanings that explain the anomaly while at the same time preserving the order we expect, and prefer. ("Oh, they must be from out of town." "What poor manners!" "He must be crazy!")

We are constantly in the business of telling ourselves and others around us stories that grow out of a surprisingly limited stock of familiar, frequently recurring narrative types.<sup>14</sup> And when others tell us their stories we respond knowingly, signaling our comprehension and emotional support. As well-mannered, acculturated members of the community, we naturally do our part to engage the storyteller on his or her own terms, seeking clarifying details as needed (or filling them in ourselves).<sup>15</sup> This is the way we negotiate social meaning and maintain a shared reality. Studies show that when the unfamiliar comes along, our first impulse is to push it, to the extent possible, toward pre-existing (i.e., familiar) categories or stock frames of meaning.<sup>16</sup> If there are gaps in an otherwise recognizable story, we are quick to make it conform to expectation. ("Everyone knows that these sorts of characters do those sorts of things in that sort of situation.") For surely, or so it will often seem, this individual is close enough to what we know and expect of that type, given the situation in question, for our expectations to be met. As social psychologists have shown, more often than we consciously realize, or perhaps care to admit, we tend to see what we expect to see, whether it is really there or not.<sup>17</sup>

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13. See AL RIES & JACK TROUT, POSITIONING: THE BATTLE FOR YOUR MIND 5 (1981) (McGraw-Hill 2001).

14. See generally ROGER C. SCHANK & ROBERT P. ABELSON, SCRIPTS, PLANS, GOALS, AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES (1997).

15. See BRUNER, ACTS, *supra* note 8, at 48 (discussing Grice's "Cooperative Principle").

16. *Id.* at 57-63, 120-22.

17. See Sherwin, *Lawyering Theory*, *supra* note 6, at 23-26.

And if the social data ultimately do not fit into one of the familiar templates we have for them in our cognitive stockpot? In that case, meaning tends to blur and pass out of memory, for there is nothing to hold it fast in our minds over time. To be sure, there are far too many inassimilable fragments and details in the whirr and swirl of everyday life to incorporate everything into shared mental categories about the real. In fact, our stock of mental short cuts is there precisely in order to save us the trouble. The cognitive heuristics that help us to make sense of what goes on around (and within) us mainly function as a filter in the selection-for-meaning process. Not surprisingly, given finite mental energy and the seemingly endless demands of daily events, the meanings that emerge are largely “pre-packaged,” built from readily available cultural modules or artifacts (if not factoids). What may be surprising, however, is the seemingly indiscriminate way that we reach for an available mental category or heuristic. In fact, cognitive studies have shown that once we internalize the category, we cease to remember its source. Fiction, it turns out, will do as nicely as non-fiction when it comes to assimilating categories for thinking and talking about the real.<sup>18</sup>

That is the gist of the so-called “constructionist” view that has come to dominate the social sciences and humanities. As Jerome Bruner puts it, “we cannot know an aboriginal reality . . . [and] any reality we create is based on a transmutation of some prior ‘reality’ that we have taken as given. We construct many realities, and do so from “differing intentions.”<sup>19</sup> This does not mean that we create reality out of whole cloth, but rather that we construct it “out of the myriad forms in which we structure experience.”<sup>20</sup> Contrary to what common sense would have us believe, even perception itself is a construction. Our senses decode and reconstruct external reality based on an intrinsic as well as a learned, culturally transmitted

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18. See RICHARD J. GERRIG, EXPERIENCING NARRATIVE WORLDS: ON THE PSYCHOLOGICAL ACTIVITIES OF READING 240 (1993) (“[F]iction will fail to have a real-world impact only if readers expend explicit effort to understand them as fictional.”); see also Deborah A. Prentice & Richard J. Gerrig, *Exploring the Boundary Between Fiction and Reality*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 529 (Shelley Chaiken & Yaacov Trope eds., 1999); Deborah A. Prentice, Richard J. Gerrig & Daniel Bailis, *What Readers Bring to the Processing of Fictional Texts*, 4 PSYCHONOMIC BULL. & REV. 416 (1997).

19. BRUNER, ACTUAL MINDS, *supra* note 12, at 158.

20. *Id.*

symbolic code. Moreover, the cultural code changes over time, particularly with the advent of significant changes in the technology of communication. We have seen this phenomenon before, for example, in the latter half of the fifteenth century when books began to displace visual images following Gutenberg's invention of the printing press.<sup>21</sup> A significant shift in the cultural code has occurred again in more recent times with the invention and broad dissemination of visual electronic mass media—particularly film and television, and the interactive cognitive and social dynamics of computers and the Internet.<sup>22</sup>

For our purposes here, suffice it to say that in the quest for certainty in the legal meaning making process it is incumbent upon lawyers as well as law teachers to understand the constitutive role played by dominant forms of communication media together with the popular story scenarios, character types, and narrative genres that they feature. Popular communication technologies not only help to produce cultural and cognitive content; they also provide the mental tools we use to think (and feel and judge) with. Thus, we may well ask, how exactly are the technologies of film, television, and the Internet changing the way law is being practiced, studied, and reformed?

The current technological moment calls for a new visual legal realism. The tools for thought and communication that are currently at hand are creating a revolutionary shift in the practice and operation of law. As goes popular discourse, so goes legal rhetoric. How else are lawyers to reach their audience if not by meeting popular expectations about how meanings are made? That is why, these days, legal meanings have migrated to the screen. No modern courtroom lacks for electronic monitors, and most come equipped

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21. LEILA AVRIN, *SCRIBES, SCRIPT AND BOOKS: THE BOOK ARTS FROM ANTIQUITY TO THE RENAISSANCE* 327 (1991); LUCIEN PAUL VICTOR FEBVRE & HENRI-JEAN MARTIN, *THE COMING OF THE BOOK: THE IMPACT OF PRINTING 1450–1800* (Geoffrey Nowell-Smith & David Wootten eds., David Gerard trans., 1976). See generally ELIZABETH L. EISENSTEIN, *1 THE PRINTING PRESS AS AN AGENT OF CHANGE: COMMUNICATIONS AND CULTURAL TRANSFORMATIONS IN EARLY MODERN EUROPE* (1979); Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 MICH. ST. L. REV. 1.

22. See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* (1999); Richard A. Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 49 N.Y.L. SCH. L. REV. 19 (2004); Beth Simone Noveck, *Introduction: The State of Play*, 49 N.Y.L. SCH. L. REV. 1 (2004).

with platforms for visual projection. Of course, whether lawyers and judges come into court adequately trained in the craft of producing and cross examining, or making informed rulings on the admissibility of visual evidence, or the propriety of visual arguments, is another matter altogether.<sup>23</sup> How long law schools will persist in the pretense that law remains exclusively a matter of words, regardless of whether we speak of “law on the books” or “law in action,” only time will tell. But the longer this ostrich-like behavior continues within the halls of legal academia, the further legal training will retreat from the practical realities of legal practice.

Consider this essay, then, a manifesto for visual legal realism. Law scholars still have much to learn from makers and critics of pop culture such as Andy Warhol and Marshal McLuhan, who rightly grasped the extent to which the medium is (at the very least an important part of) the message.<sup>24</sup> The point to stress here is that radical shifts in the technology of communication alter our mind as well as our culture.<sup>25</sup> For example, unlike words on the page, visual images on the screen are far more likely to directly stimulate heightened emotional responses.<sup>26</sup> Viewers tend to react to screen

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23. See Richard K. Sherwin, Neal Feigenson & Christine Spiesel, *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227 (2006); see also Neal Feigenson & Meghan A. Dunn, *New Visual Technologies in Court: Directions for Research*, 27 LAW & HUM. BEHAV. 109, 110 (2003); Saul M. Kassin & Meghan A. Dunn, *Computer-Animated Displays and the Jury: Facilitative and Prejudicial Effects*, 21 LAW & HUM. BEHAV. 269 (1997); Fredric I. Lederer, *Courtroom Technology and Its Educational Implications*, 8 VA. EDUC. & PRAC. 3 (1998); Meghan A. Dunn, Poster Presented at the Annual Conference of the Society for Personality and Social Psychology: The Effects of Computer Animation on Mock Jurors' Decision Making (Feb. 2001) (copy on file with author).

24. See JOHANNES BIRRINGER, *THEATRE, THEORY, POSTMODERNISM* 117–18 (1993) (discussing how Warhol's assimilation to the totalizing commodity system was so complete that it exemplified the disappearance of art's separate status and of all traditional aesthetic values of distinction); MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 7 (MIT Press 1994) (1964).

25. See generally WALTER J. ONG, *"I See What You Say": Sense Analogues for Intellect, in INTERFACES OF THE WORD: STUDIES IN THE EVOLUTION OF CONSCIOUSNESS AND CULTURE* 121 (1977); WALTER J. ONG, *RAMUS: METHOD, AND THE DECAY OF DIALOGUE* (1958); M. Ethan Katsh, *Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681 (1995).

26. Recent studies have shown that this kind of emotional stimulation is especially discernible in the use of video games. See, e.g., Steven Reinberg, *Video Game Violence Goes Straight to Kids' Heads*, HEALTHDAY, Nov. 28, 2006, <http://www.healthday.com/Article.asp?AID=536261>. Reinberg's article reported on the first radiological study to demonstrate that “violent video games can affect brain physiology and the way the brain functions.” According to a lead researcher on the report, Dr. Vincent Matthews, “[a]fter playing a violent video game, these adolescents had an increased activity in the amygdala, which is involved in



images in the same way that they react to reality.<sup>27</sup> Naïve realism apparently is the natural default setting for visual common sense. Subject to our unthinking gaze, which is mostly how we watch, the screen seems to present a window onto reality. We tend to look *through* the medium rather than *at* it.<sup>28</sup> Moreover, once we *comprehend* what we see, that's usually all we need to *believe* it.<sup>29</sup> In other words, the familiar commonplace that "seeing is believing" is not just idle folk knowledge—not that there is anything "idle" about folk knowledge. Indeed, such knowledge is a major source not only of mental content but also of the cognitive tools most people use most of the time.<sup>30</sup>

In this respect, we might say that Descartes got it wrong. We do not first suspend disbelief and then deliberate on the truth or falsity of what we have seen in a concerted effort to arrive at true knowledge about the real. Rather, it seems that Spinoza's alternative view of the matter is the correct one. First we perceive, and if we comprehend our perception belief naturally follows.<sup>31</sup> As Spinoza understood, it is an extraordinary contradiction to perceive something and not believe it to be the case.<sup>32</sup> On this view, credulity is humanity's default mode. It takes a good deal of mental energy to confront an image for the purpose of critical assessment. And the plain truth is that people tend to conserve their mental energy whenever possible. Advertisers have learned this lesson well; with breathtaking skill they have exploited the way our mental systems

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emotional arousal. At the same time, they had decreases in activity in parts of the brain which are involved in self-control." *Id.*

27. See BYRON REEVES & CLIFFORD NASS, *THE MEDIA EQUATION: HOW PEOPLE TREAT COMPUTERS, TELEVISION, AND NEW MEDIA LIKE REAL PEOPLE AND PLACES* (1996); SHERRY TURKLE, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* (1995).

28. RICHARD A. LANHAM, *THE ELECTRONIC WORD: DEMOCRACY, TECHNOLOGY, AND THE ARTS* 76 (1993).

29. See Prentice & Gerrig, *supra* note 18.

30. See, e.g., DOROTHY C. HOLLAND & NAOMI QUINN, *CULTURAL MODELS IN LANGUAGE AND THOUGHT* (1987); GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987); VALDIMIR PROPP, *MORPHOLOGY OF THE FOLKTALE* (Louis A. Wagner ed., Laurence Scott trans., 2d ed. 1970).

31. Daniel T. Gilbert, *How Mental Systems Believe*, 46 *AM. PSYCHOLOGIST* 107, 108 (1991).

32. *Id.*

behave. Politicians have learned from the advertisers. And with increasing frequency lawyers are following suit.<sup>33</sup>

Law, too, is going visual. It, too, is adapting to the reality-shaping effects of visual mass media. By assimilating the way human perception and cognition respond to what is on the screen, however, law is also internalizing medium-appropriate ways of thinking and communicating.<sup>34</sup> The nonlinear logic of association and the intensification and quickness of emotional responses to visual legal evidence and argument are now being assimilated into the practice of law. The ensuing impact on how decision makers undertake the process we call “deliberation” has yet to be adequately studied. It is probably only a matter of time before deliberation incorporates the felt need for interactivity spurred by the dissemination of computer-assisted data retrieval systems inside the courtroom. Indeed, in some cases this is already taking place.<sup>35</sup> This kind of technological adaptation is not simply a matter of form. As every good rhetorician, every good storyteller, and every good video game designer knows, form and substance interpenetrate.

It is an intellectually challenging task even to begin to unravel where content production leaves off and formal meaning making begins. Most people are not concerned with such subtle processes. Lawyers, however, must be. It is, after all, their bread and butter. If lawyers do not know how to control the available media of persuasion, what, then, do they offer? As the rhetorician Isocrates taught two and half millennia ago in ancient Greece, eloquence without wisdom is blind, and wisdom without eloquence is mute.<sup>36</sup>

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33. See, e.g., Deborah A. Lilienthal, *Litigation Public Relations: The Provisional Remedy of the Communications World*, 43 N.Y.L. SCH. L. REV. 895 (1999–2000); Avi J. Stachenfeld & Christopher M. Nicholson, *Blurred Boundaries: An Analysis of the Close Relationship Between Popular Culture and the Practice of Law*, 30 U.S.F. L. REV. 903 (1996). See generally STUART EWEN, *PR! A SOCIAL HISTORY OF SPIN* (1996); JAMES B. TWITCHELL, *ADULT USA: THE TRIUMPH OF ADVERTISING IN AMERICAN CULTURE* (1996) (tracing the evolution of public relations and related persuasive techniques in the 1900s).

34. SHERWIN, *WHEN LAW GOES POP*, *supra* note 4. See The Visual Persuasion Project, <http://www.nyls.edu/pages/2734.asp> (last visited Feb. 13, 2007), for a broad range of examples of visual evidence, visual argument, and visual mediation brochures being used in practice.

35. See Sherwin, Feigenson & Spiesel, *supra* note 23, at 39–40.

36. See NANCY S. STRUEVER, *THE LANGUAGE OF HISTORY IN THE RENAISSANCE: RHETORIC AND HISTORICAL CONSCIOUSNESS IN FLORENTINE HUMANISM* 21 (1970); *cf.* MARCUS TULLIUS CICERO, *THE ORATIONS OF MARCUS TULLIUS CICERO* bk. 1 (C.D. Yonge trans., 1888), available at <http://classicspersuasion.org/pw/cicero/dnv1-1.htm> (“[W]isdom without eloquence is but of little advantage to states, but that eloquence without wisdom is often most mischievous, and is never advantageous to them.”).

In law's domain today, the rhetoric of visual representation interpenetrates with the substantive dialectic of knowledge production in the construction of truth and justice, emotion and reason, law and desire.

In this way, we are moving toward a more sophisticated understanding of what it means to say there is a two-way traffic between law and popular culture, that real legal issues and controversies give rise to popular legal representations just as popular legal representations and mental processes help to inform and shape real legal issues and real case outcomes. Our perceptions and thoughts have rapidly adapted to the nature and demands of the screen.<sup>37</sup> For example, film viewers understand cross cutting and parallel editing. They do not need anyone to explain these storytelling devices. The camera is inside our heads and we are prepared to reconstruct reality in accordance with the operative perceptual and cognitive codes that help to make up our visual common sense. In the same way we have learned to simultaneously view multiple "windows" onto the real and the virtual, we have come to accept simulations interspersed with real life documentation; and we have willingly absorbed narratives with fragmented time lines shaped by nonlinear ("associative") forms of logic. Consider, for example, box office hits such as Michael Gondry's *Eternal Sunshine of the Spotless Mind*,<sup>38</sup> or Quentin Tarantino's *Pulp Fiction*,<sup>39</sup> or Christopher Nolan's *Memento*.<sup>40</sup> In these films, and a good many other contemporary visual cultural products, audiences have learned not only to do without linear chronology. Today's screen viewers are comfortably postmodern. They can simultaneously hold in mind the meaning of a given narrative as it unfolds on the screen together with how that narrative comments on past screen productions ("meta-narration")—as in Keenen Ivory Wayans's *Scary Movie*<sup>41</sup> or Wes Craven's *Scream*<sup>42</sup> and its progeny, or how certain features of a visual narrative may be commenting on how the mind itself operates

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37. See generally MCLUHAN, *supra* note 24 (discussing mass media, including film and television, and their effect on audience members).

38. *ETERNAL SUNSHINE OF THE SPOTLESS MIND* (Anonymous Content et al. 2004).

39. *PULP FICTION* (A Band Apart et al. 1994).

40. *MEMENTO* (Newmarket Capital Group et al. 2000).

41. *SCARY MOVIE* (Brillstein-Grey Entertainment 2000).

42. *SCREAM* (Dimension Films & Woods Entertainment 1996).

(“hyper-reflexivity”)—as in Spike Jones’s *Being John Malkovich*<sup>43</sup> or Richard Linklater’s *Waking Life*.<sup>44</sup>

Recent studies in cognitive psychology have shown that our world knowledge is often scripted by a mixture of fictional and nonfictional claims.<sup>45</sup> What we know (or think we know) draws upon a mixture of fictional and nonfictional sources,<sup>46</sup> and we are not always able to differentiate real from fictional sources of remembered information.<sup>47</sup> So the blending of fantasy and reality that often occurs on film, television and computer screens is not an isolated phenomenon. In fact, the credibility of a particular image or story may depend on its faithful emulation of fictional storytelling techniques that fulfill popular expectations about what reality looks like on the screen. This includes popular expectations about legal reality. The striking irony is that facts can seem more “factual” the more like fiction they become. This happens because people generally are less motivated to process fictional information systematically than factual information.<sup>48</sup> When an audience unwittingly responds to a factual presentation aided by familiar fiction forms, the default mode—credulity—kicks in. Critical analysis, not disbelief, gets suspended. Effective critique requires not only knowledge of the requisite tools of critical analysis but also the energy and inclination to undertake it.<sup>49</sup> By contrast, stored fictions effortlessly come to mind when a familiar narrative genre or character or situation type stimulates recollection.

Law is not exempt from this familiar cognitive process. Consider, for example, the prosecutors in real homicide cases who compare the accused to film characters from Francis Ford Coppola’s *The Godfather*<sup>50</sup> or Oliver Stone’s *Natural Born Killers*,<sup>51</sup> or the state’s attorney who establishes a “knowing and voluntary” waiver of *Miranda* rights based on the defendant’s familiarity with a popular

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43. BEING JOHN MALKOVICH (Gramercy Pictures et al. 1999).

44. WAKING LIFE (Fox Searchlight Pictures et al. 2001).

45. Marcia K. Johnson & Carol L. Raye, *Reality Monitoring*, 88 PSYCHOL. REV. 67 (1981); GERRIG, *supra* note 18; Prentice & Gerrig, *supra* note 18, at 544 n.4.

46. Prentice & Gerrig, *supra* note 18, at 529.

47. See, e.g., Johnson & Raye, *supra* note 45.

48. Prentice & Gerrig, *supra* note 18, at 544.

49. See Sherwin, Feigenson & Spiesel, *supra* note 23, at 250–51.

50. THE GODFATHER (Paramount Pictures 1972).

51. NATURAL BORN KILLERS (Warner Bros. Pictures et al. 1994).

TV show.<sup>52</sup> Or consider in this regard the so-called “CSI effect,” which derives from a cluster of popular television shows featuring criminal science investigators armed with what are perceived to be nearly infallible advanced forensic technologies.<sup>53</sup> There is a concern, particularly among prosecutors, that these shows have led some jurors to experience doubt when the prosecution’s science falls short. “Where’s the DNA evidence? Something must be wrong with the state’s case.”<sup>54</sup> If the comparison with popular media scripts sticks in their minds, jurors may be inclined to fill in the rest of the story, reflecting familiar plot constructs and character traits unmentioned at trial, even if they are fictional. The point is that lawyers may have no choice but to adapt to the cognitive environment in which they work, even if this means anticipating and pre-empting, if possible, foreseeable jury expectations based on popular fictions.

As with most new communication technologies, the proliferation of computer-based digital images, graphics, multi-modal reenactments, “day in the life” video documentaries (and docudramas) together with other forms of visual mass media are double-edged swords when it comes to law. On the one hand, digital technology inside the courtroom makes it possible to depict complex subjects and events with previously unimagined clarity and detail. Yet, precisely because of their ease of access and credibility (“seeing is believing”) visual images introduce new challenges.

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52. See SHERWIN, *WHEN LAW GOES POP*, *supra* note 4, at 16–17.

53. Paul Rincon, *CSI Shows Give “Unrealistic View,”* BBC NEWS, Feb. 21, 2005, <http://news.bbc.co.uk/1/hi/sci/tech/4284335.stm> (quoting forensics expert Dr. Max Houck).

54. See Richard Willing, *‘CSI Effect’ Has Juries Wanting More Evidence*, USA TODAY, Aug. 5, 2004, at 1A, available at [http://www.usatoday.com/news/nation/2004-08-05-csi-effect\\_x.htm](http://www.usatoday.com/news/nation/2004-08-05-csi-effect_x.htm). Willing wrote:

The shows—CSI and CSI: Miami in particular—feature high-tech labs and glib and gorgeous techies . . . . [T]he programs . . . foster what analysts say is the mistaken notion that criminal science is fast and infallible and always gets its man. That’s affecting the way lawyers prepare their cases, as well as the expectations that police and the public place on real crime labs. Real crime-scene investigators say that because of the programs, people often have unrealistic ideas of what criminal science can deliver.

*Id.*; see also Janine Robben, *The ‘CSI’ Effect: Popular Culture and the Justice System*, 66 OR. ST. B. BULL. 9, 9–10 (2005) (noting the disconnect between reality and television’s portrayal of forensic science). *But see generally* Tom Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050 (2006) (arguing that there is no direct evidence that supports the CSI effect on jurors).

The gist of these remarks may be expressed schematically as follows:

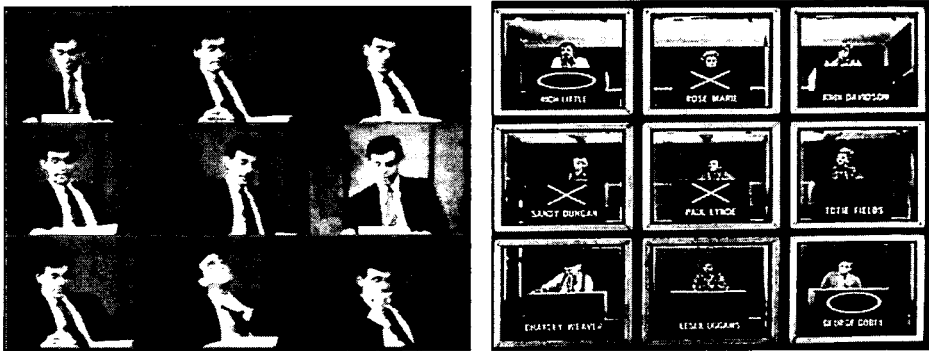
NEW MEDIUM = NEW CONTENT = NEW FORM OF  
EXPERIENCE = NEW THINKING = NEW DESIGN = NEW  
TRAINING.

In what follows, I offer four “rules of thumb” to help us think about how popular culture, and in particular how the tools of new visual communication technologies, help to shape and inform the way advocates and decision makers perform legal meanings in the context of real cases. The four rules are:

- (1) “*SIMPLIFY THE COMPLEX*”
- (2) “*EXPLOIT THE ICONIC*”
- (3) “*EMULATE GENERIC FICTIONS (TO PRODUCE TRUTH)*”
- (4) “*RESPECT THE MEDIUM*”

The first rule of thumb is “simplify the complex.” For example, in a series of detailed video graphics, Legal Video Services compellingly visualized the essence of the plaintiffs’ legal claim. At the center of the screen images of vividly colored ammonia molecules mingled with nicotine inside a cigarette. Subsequent images of key “nicotine binding sites” in the brain completed the picture. Taken together, these instructive, easy to grasp, and highly memorable visual displays quickly and effortlessly conveyed complex technical information that went to the heart of the plaintiffs’ claim: the defendants’ denials were groundless; their product, in essence a highly efficient nicotine delivery system, was manifestly designed to induce addiction—just as the plaintiffs’ trial experts said. Having now seen for themselves the defendants’ product in action, what more could the jurors want? Words alone could hardly match, or easily offset, the immediate and enduring impact that this kind of visual persuasion exerts on decision makers’ thinking and judgment. In a matter of seconds, plaintiffs had managed to “*simplify the complex.*” In so doing they rendered their theory of the case immediately accessible to ordinary common sense.

The second rule of thumb is, “exploit the iconic.” By “iconic” I mean here the strategic use of familiar pop cultural templates.<sup>55</sup> The illustrative visual, also produced by Legal Video Services, was taken from an insider trading case. In this lawsuit, Martin Siegel was accused of providing Ivan Boesky with inside information about a bank takeover, allowing them both to profit unlawfully from the pending deal. As a consequence, however, these illicit transactions elevated the market value of plaintiff’s takeover target well beyond its predicted value. In the visual graphic that was designed for plaintiffs’ use in their closing argument, we see defendant Marty Siegel perched in a three-by-three grid reminiscent of the tic-tac-toe board featured in the once popular television game show, “The Hollywood Squares.”



When all nine Siegels simultaneously ‘take the Fifth’ the effect is highly comical. The viewer laughs at such an incongruous sight: here is Marty Siegel, the once esteemed mogul of Wall Street, cast in

55. My use of the term “iconic” is to be distinguished from the semiotic vocabulary of Charles Sanders Peirce. According to Peirce,

There are three kinds of signs. Firstly, there are *likenesses*, or icons; which serve to convey ideas of the things they represent simply by imitating them. Secondly, there are *indications*, or indices; which show something about things, on account of their being physically connected with them. Such is a guidepost, which points down the road to be taken, or a relative pronoun, which is placed just after the name of the thing intended to be denoted, or a vocative exclamation, as “Hi! there,” which acts upon the nerves of the person addressed and forces his attention. Thirdly, there are *symbols*, or general signs, which have become associated with their meanings by usage. Such are most words, and phrases, and speeches, and books, and libraries.

CHARLES SANDERS PEIRCE, WHAT IS A SIGN? 3 (1894), available at <http://www.iupui.edu/~peirce/ep/ep2/ep2book/ch02/cho2.htm>.

a TV game show—just like the celebrity has-beens desperate to revitalize their careers (or at least make a buck) that the show typically featured. That this humorous image and the normative associations that it carries are being triggered by an iconic game show remains implicit, unarticulated, and hence unavailable to critical reflection (i.e., unconscious). The humor on display is disarming, but there is a more serious intent at work here. The visualization of the nine incanting Siegels simultaneously diminishes and demonizes its subject. It diminishes Siegel by implicitly portraying him as just another celebrity has-been. At the same time, while Siegel may look comical ensconced in all nine Hollywood squares, the humor at work serves to enhance—while also masking—the real source of his guilty appearance. The comical gloss distracts the decision maker from an implicit adverse inference that also may be taking place: namely, the unconscious association of Siegel with other so-called “Fifth Amendment criminals” who hide the truth of their misdeeds behind a wall of silence.

To say that this apparently innocuous humorous visual display demonizes the defendant for exercising his constitutional privilege against compelled self-incrimination<sup>56</sup> not only seems counter-intuitive from the standpoint of ordinary common sense (after all, the video clips accurately depict what Siegel said at his deposition), but it also spoils the simple fun of the display. In sum, the viewer gets the message because the visual code of a popular television game show icon is instantly recognizable, and the critical bite of a factually suspect (albeit unconscious) inference remains hidden. To preserve the joke, the viewer is disinclined to analyze it critically. As one trial judge aptly put it, “when the screen goes on everyone forgets to object.” This may be one of the goals of “*exploiting the iconic*.”

The third rule of thumb is, “emulate generic fictions (to produce truth).” This rule reflects insights discussed above from recent social psychology studies that have shown that different sources of information are not always kept neatly separated in people’s minds. Truth readily intermingles with fiction. Our world-knowledge is often scripted by a mixture of fictional and non-fictional claims. In

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56. See *Griffin v. California*, 380 U.S. 609, 615 (1965) (“[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.”). But see *Baxter v. Paligiano*, 425 U.S. 308, 318 (1978) (noting that the Fifth Amendment does not forbid adverse inferences against parties in civil actions).



this sense, we may say that the truth value of a particular image or story may depend on its faithful emulation of fictional storytelling techniques that fulfill popular expectations about what reality looks like on the screen.

Consider in this regard the credibility of the “home video” aesthetic, such as was seen in George Holiday’s serendipitous filming of the Los Angeles police officers who beat Rodney King. The initial criminal assault case involved the prosecution of four Los Angeles police officers for the roadside beating of Rodney King following a prolonged chase. The trial became a contest not only between untutored common sense and the counter-intuitive knowledge base of professionally trained police officers, but also a contest between high and low technology. In short, this case pitted the genre of the ‘amateur documentary’ against the more sophisticated genre of ‘polished professionalism.’ According to the prosecutor, by simply watching the videotape the jurors would learn all they needed to conclude that the police had used “excessive force.” And, indeed, throughout his summation, this was pretty much all that the prosecutor had to say. “Just watch the tape.” Meanwhile, unbeknownst to the assistant district attorney, the defense team had managed to thoroughly re-contextualize the Holiday videotape, wrapping it in a completely different narrative.

Seen without the gloss of professional re-editing, the Holiday videotape is shockingly violent. In the defense’s digitized version, however, the jurors saw another reality unfold before their eyes. According to the lawyers who defended the officers, it was a reality that was entirely consistent with the professionalism of the police in action. By slowing down the action to a deliberate frame by frame sequence, the defense’s micro-analysis did more than simply remove much of the violence from the scene. The chaos of officers shouting and the loud thud of police batons striking a body amid the unsettling background noise of an overhead helicopter were now gone. In their place the silent digital version of the Holiday tape was accompanied in court by the calm and evenly delivered live commentary of an expert witness. The expert’s stop-action analysis conveyed in no uncertain terms the propriety of the officers’ response to the situation at hand. Stripped of all emotion-provoking cues, the scene could now be clinically assessed through the eyes of those who had been trained in the “escalation” and “de-escalation” of force. In this view,

the “strokes” of the “PR-24 baton” appeared to come in direct response to King’s own aggressive resistance of arrest.<sup>57</sup> The defense claim was as clear as it was simple: Rodney King himself caused the police to act as they did. Indeed, they were simply following the protocols of their training.

Studies have long shown that the perception of causation can be evoked simply by showing the juxtaposition of two events in sequence.<sup>58</sup> To support their claim that the officers had acted in accordance with their professional training and that Rodney King had in fact been “in charge” of the situation from the outset, the defense needed to show causation on the screen. The digitized version of the Holiday videotape did precisely that. The defense strategy unfurled in three simple stages: First, it established the protocols of police training. The officers had been taught to order those subject to arrest to remain prone on the ground; force is to be applied as needed to protect the officers and to ensure compliance. Second, it constructed visual causation to show Rodney King provoking the police to strike him. As the slow motion digitized images revealed, King did not follow police orders; consequently, every time he rose up off the ground, the PR-24 batons came down; when King lay prone, the batons rose up; and when he continued to resist, the batons came down again. Finally, it recapitulated the main assertion. The police did what they were trained to do; Rodney King caused the police to use their batons to compel him to comply with their orders to lay prone on the ground. Had he not resisted arrest, he would not have been struck.

The jury agreed. Indeed, after the verdict of acquittal, a number of jurors in news media interviews repeated the defense’s key narrative point: Rodney King had been in charge all along. Little did the prosecutor realize the futility of his exhortations to the jurors to simply “watch the tape,” for when they did so they “saw” the defense’s case theory being enacted. The discourse of professionalism in conjunction with the visual construction of causation had managed to trump the untutored visual common sense of the jurors.

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57. For an exhaustive treatment of the King beating and the various trial uses of the Holiday videotape, see Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1 (2005).

58. See BRUNER, *ACTUAL MINDS*, *supra* note 12, at 17 (noting that “when objects move with respect to one another within highly limited constraints, we see causality”).

In the end, we can say that the prosecutor's naïve realism undid him. Contrary to his naïve assumption, visual images do not make meaning all on their own. Visual meaning is highly malleable. As photojournalists know, captions can turn a photo's intended meaning on its head.<sup>59</sup> If you do not provide a context of meaning, if you do not wrap a sequence of images in a narrative of your own, you will leave open the possibility that their meaning will be captured by the narrative of another. That is why trial lawyers in the digital age of on-screen reality must know how to "emulate generic fictions (to produce truth)."

My final illustration addresses the last rule of thumb, namely: "respect the medium." Whenever we shift to a new medium of communication, whether it is print, photography, film, or massive multi-player online gaming, we not only encounter new content, we also become accustomed to new ways of experiencing and thinking about that content. Just as the cultural templates and cognitive

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59. The caption that accompanied the picture below was: "The mayor of Tyre said that in the worst hit areas, bodies were still buried under the rubble, and he appealed to the Israelis to allow government authorities time to pull them out." Posting of John Hinderaleer, Sorry, Wrong Caption, to PowerLine (Aug. 9 2006), <http://www.powerlineblog.com/archives/014951.php>.



The picture presumably depicted one of the "bodies . . . buried under the rubble," in the act of being pulled out. *Id.* Only the "body" was very much alive, and hardly buried, as any but the least skeptical photo editor could plainly see. On August 9, 2006, the Times issued the following correction:

A picture caption with an audio slide show on July 27 about an Israeli attack on a building in Tyre, Lebanon, imprecisely described the situation in the picture. The man pictured, who had been seen in previous images appearing to assist with the rescue effort, was injured during that rescue effort, not during the initial attack, and was not killed.

The correct description was this one, which appeared with that picture in the printed edition of The Times: After an Israeli airstrike destroyed a building in Tyre, Lebanon, yesterday, one man helped another who had fallen and was hurt.

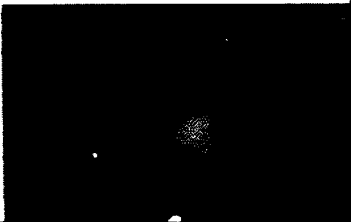
*Corrections: For the Record*, N.Y. TIMES, Aug. 9, 2006, available at <http://www.nytimes.com/2006/08/09/pageoneplus/corrections.html>. See generally SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 10 (2003) ("All photographs wait to be explained or falsified by their captions.").

heuristics that we learn from early childhood on help to shape and inform the way we perceive the world outside our skin, so too digital image-making machines embody an underlying program that helps to shape our internal sense of reality. Once our minds learn these artificial programs they become “second nature” to us. Their common sense logic is immediately “at hand” and “invisible” (which is to say, unconscious).

This applies to common expectations that are generated by our interaction with popular computer software and video gaming. When digital information is on the screen, it seems increasingly natural to play, to interact with what we see. It also seems increasingly natural to absorb information through multiple media: we expect to peer through multiple windows on the screen, and we are used to simultaneously seeing, hearing, and reading information as its multi-modal forms play out together over time.

This is precisely what jurors saw in the hyper-media summation used by the state in the homicide prosecution of Kennedy cousin Michael Skakel. During the Connecticut District Attorney’s closing argument in the trial of Michael Skakel for the murder, twenty-seven years before, of fifteen-year-old Martha Moxley, jurors heard and read Skakel’s own words appear on the screen before them. And in the instant that Skakel admitted to feeling a sense of “panic” when he saw Martha Moxley’s mother on the morning after the killing, there on the very same screen appeared the image of Martha Moxley’s lifeless body, just as it was found at the scene of the murder. Mrs. Moxley. Panic. Martha’s young body.

**and I remember just  
having a feeling of panic.  
Like "Oh shit."  
You know.  
Like my worry of what I went to bed with,  
like may..., I don't know,  
you know what I mean  
I just had,  
I had a feeling of panic.**



We understand the sequence. Of course Skakel experienced a feeling of panic when Martha's mother asked him the next morning if he had seen Martha the night before. The picture of Martha's battered lifeless form immediately explains the implicit meaning of his words. The viewer instantly makes the connection: immediately upon being reminded that morning of the night before, Skakel must have recalled with horror what he had done. Because Skakel's self-professed emotional response and the viewer's reality-based response to the screen image of Martha's lifeless body make sense in combination, the latter is readily transferred to Skakel himself. The viewer now "knows" for him or herself what Skakel was reacting to. It is as if we were in his head. And the revulsion at what Skakel has done readily casts an image of guilt in the viewer's mind. This associative understanding is immediate; it elides the passage of time—between the murder and the morning after (in 1975), and between the time Skakel uttered these words (in 1997), and the time they were replayed at the trial itself (in 2002). In short, the jury's unconscious associations to the various media (Skakel's audio commentary and its written version timed to coincide with the victim's visual image) effectively allowed them to fill in the unstated reason for Skakel's feeling of panic by vicariously associating, as visually and aurally instructed, to its cause: Martha Moxley's battered, dead body. In this way, the prosecution effectively exploited the virtues of multi-modal communication; as the fourth rule of thumb requires, they had succeeded in "*respecting the medium.*"

The above examples of my four rules of thumb are meant to illustrate how the tools of new visual communication technologies help to shape and inform the way advocates and decision makers perform legal meanings in the context of real cases. Now, let us shift our focus, consonant with the specific theme of this symposium. In addition to considering how the tools and content of popular culture help to constitute legal meanings inside the courtroom, let us now consider how popular culture frames meaning in the courtroom of public opinion when it comes to depicting lawyers on the screen. Here, too, the four rules of thumb help us to assess what is going on. For as it turns out, popular films take advantage of the same cognitive and cultural heuristics that are busily at work constructing (albeit invisibly) legal meaning inside the courtroom.

Our first example is the box office hit *Liar, Liar*.<sup>60</sup> The film's theme is brilliantly announced even as the opening credits scroll down the screen. We see an attorney named Fletcher Reede (played by Jim Carrey) walking down the courthouse steps. In rapid sequence Reede (1) replies to a colleague's affable "How's it going?" with the gleefully sarcastic words, "Just another victory for the accused," ("Yeah, right," his colleague returns); (2) refuses to take back his suit jacket from a client, ("I'm sure you'll be needing it —again and again."); and (3) initially fends off a woman seeking his attention ("I'm sorry, it's my day to be with my son") until she identifies herself as a reporter who wants to interview Reede about his recent court victory (to which he instantly replies, as he joins her down the steps, "How's my hair?").

In a matter of seconds, *Liar, Liar*, has managed to activate the most trenchant and persistent negative stereotypes about lawyers. (1) *Lawyers lie*. They will claim a "victory for justice" and say they are servants of the truth in defense of their clients when they (and we) know full well that neither truth nor justice has been served at all. (2) *Lawyers are cynical*. They will not only actively misrepresent their clients' appearance by dressing them up for trial, but they will also happily accept that this ritual of misrepresentation will be restaged "again and again." (3) *Lawyers are vain and heartless*. All it takes is a quick promise of publicity for Reede to sacrifice his duty as a father on the altar of personal vanity. Indeed, as we shall soon see, Reede will not only sacrifice the interests of his own child, but he will also do the same, with equal aplomb, when it comes to the best interests of other fathers' children as well.

In this rapid sequence of scathing critique, film viewers witness all four rules of thumb at work. The images they see on the screen "simplify the complex," "exploit the iconic," "emulate generic fictions (to produce truth)," and "respect the medium." To be sure, without the aid of these unconscious cognitive heuristics, which rapidly cue up and call into play the appropriate cultural patterns and stereotypes, this opening series of rapid-fire vignettes could not carry off its undeniably humorous effect. For that effect to be achieved, viewers must be prepared to recognize and fill in the familiar

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60. LIAR, LIAR (Imagine Entertainment & Universal Pictures 1997). *Liar, Liar* is one of the top grossing lawyer films of all time, with a net box office take of \$181,395,380. Business Data for *Liar, Liar* (1997), <http://www.imdb.com/title/tt0119528/business> (last visited Jan. 19, 2007).

expectations that are being prompted by the words they hear and the images they see on the screen. Only by actively filling in from their own stock of popular knowledge can viewers vouch for themselves the credibility of the screen meanings that they themselves help to construct (and thus solidify in the process).

Consider, in this regard, the finer-grained depiction later on in the film of Reede's cynical willingness to lie in order to advance his career. In a subsequent scene, we see Reede preparing a female client for trial. It is a child custody case.



LIAR, LIAR, *supra* note 60.

Even after learning of the client's "seven single acts of indiscretion," Reede nevertheless persists in persuading her that it is her husband, not she who is at fault. On his knees before her, Reede takes the client's hand as he smarmily intones, "Mrs. Cole, you're the victim here." The trope of blaming the victim is a familiar act of moral jujitsu, loaded with cultural ambivalence. It readily activates feminist wisdom, even as it simultaneously evokes an impulse of anti-feminist rebellion ("down with the politically correct").

The conventional feminist critique asserts that women, particularly in sexual offense cases (such as date rape) are frequently made to appear as willing participants in their own victimization.<sup>61</sup>

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61. See, e.g., Neal R. Feigenson, *Accidents as Melodrama*, 43 N.Y.L. SCH. L. REV. 741, 782 (1999–2000) ("The tendency to engage in defensive attribution—to blame the victims of rapes, muggings, or environmental disasters in order to preserve one's faith that one will not be victimized oneself—has been proven in many studies.") (citing Kelly Shaver, *Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned for an Accident*, 14

The joke here, by taking the situation to an absurd extreme, implicitly mocks feminist wisdom while leaving its truth unscathed. The claim that Mrs. Cole is a victim in this case is patently absurd. Her extra-marital dalliances clearly cast her character in a poor light, leaving the alleged victimizer, her husband, doubly offended (first by deed, second by word). But that, of course, is the source of the scene's humor. Reede cannot possibly believe what he is saying. He knows it, and the audience knows it. Consequently, the truth of the feminist critique (gender bias protects male aggressors by victimizing female victims) only serves to feed the comic effect of the lawyer's lie (gender bias protects female adulterers by victimizing their innocent husbands).<sup>62</sup> Notably, this entire cognitive process, together with the cultural knowledge in play, while active, remains subliminal. We may laugh, but we do not immediately know why. The speed of unconscious associations necessary to make the joke work far exceeds the time available to make sense of its component parts. Of course, a viewer unfamiliar with the requisite cultural knowledge would be left to wonder why anyone is laughing in the first place.

Greed and vanity are also at work in another popular lawyer film, Taylor Hackford's *The Devil's Advocate*.<sup>63</sup> Here, rather than using humor as in *Liar, Liar*, the filmmaker mobilizes popular moral authority in support of the film's severe condemnation of lawyers. The central plot device in *The Devil's Advocate* is that the devil himself is in league with the legal profession. How better to advance the project of man's continued fall from grace into a cesspool of sin than to mobilize the immoral deceptions (and vain conceits) of lawyers.

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J. PERSONALITY & SOC. PSYCHOL. 101 (1970)); see also Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 420 (2006) (pointing to evidence that suggests "we preserve our favorable self-images by attributing responsibility to the harmed individuals, in extreme cases dehumanizing them as demons, beasts, or brutes").

62. By implicitly re-asserting male integrity in the face of a feminist (albeit sorely distorted) truth, the film also implicitly invites an anti-feminist backlash. That is, viewers predisposed to laugh at the feminist critique may also find permission here to do so. See Paul A. LeBel, *The Good, The Bad, and the Press*, 1986 DUKE L.J. 1074, 1082 (1986) (reviewing RODNEY A. SMOLLA, *SUING THE PRESS* (1986)) ("The temptation not only to blame the victim but to snicker at the victim's resort to the legal system for redress might be resisted more easily if one considers the changes in the media that have accompanied the 'thinning of the American skin' that Professor Smolla perceives.").

63. *THE DEVIL'S ADVOCATE* (Warner Bros. Pictures et al. 1997).



Consider Kevin Lomax (played by Keanu Reeves): Unbeknownst to him through most of the film, Kevin is the devil's own son. It should come as little surprise, therefore, that by the time he joins his father, "John Milton" (played by Al Pacino), the satanic head partner of a powerful international New York law firm, as a young associate, this honey-tongued protégé had never lost a case. Kevin is understandably proud of his accomplishments. And in the penultimate scene in the film, it is precisely this deep sense of vanity that Milton successfully manipulates in an effort to get Kevin to actively embrace his fate as the devil's foremost agent of evil in the world. To this end, Milton reminds Kevin of the immoral choices that Kevin willingly made for the sake of victory in court. They range from cruelly shifting moral blame onto a young victim in his defense of an unremorseful pedophile in one case, to suborning perjury from a key witness in order to obtain a desperately needed alibi for a client in a homicide case.

Step by step, Milton builds his case against his son's rapidly shredding moral integrity. When Kevin seeks to evade personal responsibility ("You put me there, you made her lie [on the witness stand]"), Milton sets him straight by reminding him that the devil may trick humans, but he has no power to directly interfere with free will ("I don't do that, Kevin"). Milton even takes credit for explicitly giving Kevin an opportunity to avoid moral compromise, like the time when he told Kevin straight out that maybe it was "his time to lose." And with that, the trap has been sprung. Milton's all too successful son finally lets his pride get the better of him: "Lose?" he shouts. "I don't lose. I win. I'm a lawyer. That's my job. That's what I do. I win." After an impeccably timed pause, Milton mildly replies, "I rest my case. . . . Ah, vanity, my favorite sin."

This scene offers us yet another instance of the third rule of thumb at work: "*emulate the generic.*" In *Liar, Liar*, the film made the same point playing off of the emotional truth of selfish fathering. We all carry around in our heads images of what poor parenting looks like, and Jim Carrey's character in *Liar, Liar* embodied that image in spades. In *The Devil's Advocate*, the film works off of a common moral vernacular: temptation, greed, *vanitas*—we all recognize these as the cardinal sins to which humanity is prone. And by the film's end, there can be no doubt: this young devil's seed lawyer has repeatedly acted in a way that manifestly warrants the

film viewer's strongest moral condemnation. Our most cherished cultural values, skillfully mobilized by the biblical narrative in play, tell us this is so. Once having been cued up in our minds, our moral common sense quickly fills in the appropriate condemnatory judgment of the character in question. In *The Devil's Advocate*, that moral condemnation is part and parcel of an entertaining film experience. Yet, the same cultural authorities, deliberately implicated by similarly implicit cognitive processes, have very real effects in the everyday life of the law.

In a democratic republic such as our own, in which the rule of law prevails and prudent deliberation serves as the watchword of justice, the cultural and cognitive components of legal meaning making, in lay and judicial judgments alike, ought to be known. We can ill-afford the lack of thorough training in civics as well as in contemporary forms of rhetoric. In the current digital age, much of the content and many of the tools of legal meaning making have changed from what they once were. The education of lawyers, judges, and citizens must follow suit.

And so, having duly struck the imperative note that all worthy manifestos are expected to sound, this visual legal realist manifesto stands ready to conclude.

#### CONCLUSION

A stable society settles upon a shared repertoire of rhetorical elements for its members to mix, remix, and supplement at need – consonant with the shifting demands of the times – in order to maintain the preferred stock of social meaning. In a largely visual society, our rhetorical moves will naturally include a visual code and a visual toolkit. Explicit knowledge regarding the content and craft of visual communication allows for greater deliberation and skill in the visual persuasion process as well as in the judgments that it promotes. We call this state of affairs “visual literacy.” In a visually literate culture, legal advocates and cultural critics alike understand how we get our visual knowledge from the screen and what kind of knowledge this is. Visual literacy allows us consciously to confront gaps and distortions in our screen-based knowledge and, in so doing, allows us, with the aid of visual and other sources of knowledge and forms of cognition, to arrive at sounder judgments.

Of course, my invitation here to learn more about *how* popular culture shapes images of lawyers says nothing about the truth or falsity of those images. Paradoxically perhaps, many of the critiques of lawyers that we find in the movies today mirror the kinds of in-house critiques that one finds in legal academia. For example, former Yale Law School Dean Anthony Kronman has noted that bad things happen when the legal profession becomes no more than a commercial trade, when legal knowledge becomes a commodity sold to the highest bidder, when greed displaces professional ethics, and when the pressures of the marketplace alienate lawyers from the better part of who they are.<sup>64</sup>

Personally, I do not think the game is lost. We may concede that commercialization, hyper-competition, and greed are part of the problem. But another part is that other kinds of stories—stories about lawyers as knights of faith, stories about lawyers, both in the public sector and in private practice, who work for the public good—are not being told often enough. We need to do more to re-capture the lawyer's image. We need to produce true stories of service and virtue. In this regard, we may find ourselves turning increasingly to the distributed resources of the Internet as a great cultural equalizer even in the face of Hollywood's vertically-integrated engines of culture production. The Internet can generate and widely disseminate well-crafted, compelling counter-images. It is, of course, a two-way street. If more members of the profession were to engage in more ethical and more inspiring acts of social service, that would help to facilitate precisely this type of affirmative culture production. And who knows? Over time, the current pool of excessively negative popular images of lawyers might give way to a truer picture of the profession as a whole. Gazing into that mirror, perhaps more lawyers and lawyers to be might find the warrant they need to be truer to the self they hold most dear.

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64. See generally ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (describing a spiritual crisis in the legal profession caused by valuing legal technique above the search for wisdom and truth).