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## Zen and the Art of Jursiprudence

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## BOOK NOTICE

### Zen and the Art of Jurisprudence

*Matthew K. Roskoski*

JURISMANIA. By *Paul F. Campos*. New York: Oxford University Press. 1998. Pp. x, 198. Cloth, \$23; paper, \$13.95.

Lawyer bashing is by no means a remarkable phenomenon. It was not remarkable when Shakespeare wrote, “[t]he first thing we do, let’s kill all the lawyers,”<sup>1</sup> and it’s not remarkable today. Paul Campos,<sup>2</sup> however, has written a particularly readable example, blending venerable Western lawyer-bashing and pop psychology with unsystematic invocations of Eastern religion. *Jurismania* is named after Campos’s theory that the American legal system has a lot in common with a person suffering from an obsessive-compulsive disorder, an addiction to law that does neither the patient nor those around him much good. In *Jurismania*, Campos criticizes our insistence on regulating and legalizing every aspect of our lives, and our insistence on exclusive rationality. Campos argues, with regular Taoist allusions, that rationality is not and cannot be the exclusive solution to the questions law raises, and that irrational methods are and should be employed. Campos’s intended audience is “the general reader whose experience of American law has made him or her wonder if there might not be something wrong” with it (pp. vii-viii). Should that audience take Campos’s critique seriously, it will strike close to the heart of law and the legal profession. Thus, although they are not the target audience, lawyers ought to think about *Jurismania* because it reflects and amplifies a perspective that may be common to many nonlawyers who encounter the legal system.

*Jurismania* should be read not as a didactic composition, a treatise on the flaws of American law and how to fix them, but rather as a literary composition of the type described by J.B. White.<sup>3</sup> As a literary text, *Jurismania* is not argument-oriented but rather “experiential and

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1. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2, in THE COMPETE WORKS OF SHAKESPEARE 540, 571 (Updated 4th ed., David Bevington ed., Longman 1997).

2. Professor of Law, University of Colorado.

3. JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 42 (1990) (discussing legal analysis from a literary perspective).

performative”: it seeks to persuade not by representative data but rather by sharing narrative experiences with the reader.<sup>4</sup> Similarly, as a literary exercise, *Jurismania* is “not reducible to other terms — especially not to logical outline or analysis — but express[es its] meaning[] through [its] form,”<sup>5</sup> thus generally avoiding the type of logical proof Campos seeks to critique. As an invitation to discourse, *Jurismania* is well taken. It has a broad, sweeping scope that can provide the starting point for a host of valuable inquiries: Are particular laws excessive, in that they attempt to regulate a sphere of life best left to private authority? Do particular cases rationalize excessively, or do they disguise leaps of intuition or preference as rational argument? Do particular lawyers, or does the profession in general, undervalue sincerity and overvalue artifice and feigned emotion?

Even though *Jurismania* is, fundamentally, a literary text, it still has substantive and legal aspirations. To be fair, Campos nowhere asserts that *Jurismania* is meant to be a self-sufficient critique of American law. In many places, he expressly disavows any attempt to suggest remedies for the problems he identifies. But these denials and disavowals go hand in hand with a treatment that looks and sounds thorough, such that a reader might be left with a sense that she has heard all she needs to hear. Further, *Jurismania* often does shade over from the narrative to the prescriptive and overtly directs the conclusions a reader is meant to draw. This Notice aims to preempt the sense of completeness one might get by reading *Jurismania* alone and to demonstrate that *Jurismania* is deficient as a free-standing critique of the American legal system.

Part I reviews the central themes of *Jurismania*. Part II identifies some ways in which *Jurismania* does not tell the complete story. Campos allows his perspective to color his thinking, distorting his view of the legal system in at least two ways. First, and perhaps most ironically (given his marked aversion to law-obsessions), since Campos is a law professor, he tends naturally to see only the ways in which law pervades any problem, missing nonlegal aspects. Second, as a modern law professor, Campos misses the extent to which the problems he isolates have been with us since antiquity. Part III raises a different kind of question about *Jurismania*, suggesting that when he complains about “too much law,” Campos condemns legal regimes aimed towards the redress of social and economic inequality. Campos’s vision of the law as intruding on a presumptively legitimate private sphere fails to take into account the ways in which the private sphere upon which law operates starts off warped by concentrations of wealth and power.

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4. *Id.*

5. *Id.*

## I.

If he has done nothing else, Campos has thoroughly escaped from the normal mode of legal scholarship that White critiques: “voices, audiences, and languages that seem impossibly sterile or empty.”<sup>6</sup> *Jurismania* is an easy and pleasurable read, and it speaks in Campos’s voice, revealing the breadth of his reading and the variety of ways in which he thinks about the American legal system. *Jurismania* develops several theses. In fact, the range of Campos’s analysis is so broad that any effort to summarize it in less than book-length form will necessarily fail. What follows is an attempt merely to review some highlights.

Campos’s central thesis is “that, in its more extreme manifestations, what Americans call the ‘rule of law’ can come to resemble a form of mental illness” (p. ix), specifically addiction. Further, the illness is self-perpetuating and self-destructive: “[I]t is in the nature of obsessions to cause us to pursue something in such an excessive way that we not only fail in our quest, but end up pursuing the opposite of whatever it was we were pursuing in the first place” (p. vii). In support of this proposition, Campos adduces a broad range of evidence, drawing from strictly legal sources to nonlegal sources emulating legal forms. He cites a variety of regulations and codes of conduct, including those of the NCAA (pp. 6-8) and the Louisville Public Library (pp. 129-30). He points to a battery of cases, some sensationalistic, some absurd. Included in his collection are the familiar staples: O.J. Simpson’s trial (pp. 17-18) and *Jones v. Clinton*.<sup>7</sup> But his collection also includes some cases that are less well-known to the popular media, including *Sawada v. Endo*,<sup>8</sup> a Hawaiian marital property case, and *Quill v. Vacco*,<sup>9</sup> a Second Circuit physician-assisted suicide case.

An additional theme in *Jurismania* is the inauthenticity of lawyers and legal thought. As Campos says, “inauthenticity is essential to authentic legal thought. Practicing lawyers must often maintain a peculiar mental state in which they fail — authentically — to recognize the inauthenticity of their claims” (p. 13). In Campos’s vision, lawyers displace politicians and used-car salesmen as the paradigm case of false sincerity. One cannot help but wonder how Campos feels about being a professor at a professional school yet having such utter con-

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6. *Id.* at 10 (“Those of us engaged in writing of this kind find that the worst and most painful consequences of the character of our discourse are those we suffer when we ourselves try to write, when we find that we are captured by voices, audiences, and languages that seem impossibly sterile or empty; diluted; defensive; full of static; in a deep sense unreal.”).

7. P. ix; *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994), *modified by* 72 F.3d 1354 (8th Cir. 1996), *aff’d* 520 U.S. 681 (1997).

8. Pp. 107-113, 117-18; 57 Haw. 608 (1977).

9. Pp. 163-68; 80 F.3d 716 (2d Cir. 1996).

tempt for the professionals he is creating.<sup>10</sup> That qualm aside, however, Campos's criticism certainly resonates with the popular perception of lawyers and legal ethics.

The final core theme running through Campos's work is one he shares with his colleague Pierre Schlag: a critique of the legal system's reliance on exclusive rationality.<sup>11</sup> To illustrate why this claim to perfect rationality is mere pretense, Campos develops a three-part "efficient process" theory. The three parts of his theory are: "1) In a legal system, efficiently processed disputes will be settled to the extent that the available information predicts a likely outcome" (p. 60); "2) The further an efficiently processed dispute travels through a dispute processing system, the more firmly that dispute is lodged in a legal equilibrium zone" (p. 61); and, therefore, "3) In an efficient dispute processing system the terminal decision making structures of the system will resolve disputes arationally" (p. 64). In other words, the *really* easy cases settle, the *relatively* easy cases are decided at trial and not appealed, and since the Supreme Court only grants certiorari on the *extremely* difficult cases, the Supreme Court is almost invariably making it up as it goes along. Supreme Court cases, according to Campos, cannot be resolved by mere rationality; if they could, by definition they would not be Supreme Court cases. At some point, the Court simply has to make a call.

Apart from the substantive arguments, the rhetoric of *Jurismania* deserves mention. Two rhetorical threads that run through *Jurismania* are in curious tension. On the one hand, Campos employs a relatively standard rhetorical move: to belittle law and rationality, he employs religious metaphors, deliberately analogizing law and rationality to superstition. For example, he describes lawsuits as "a species of symbolic human sacrifice, performed by our relentlessly bureaucratic priesthood" (p. ix), and describes law school as "a seminary for the production of a mystifying priestcraft, whose obscurantist incantations help legitimate the power of the social and cultural elite" (p. 175). This strategy is certainly not unique to Campos — other authors have used it to belittle their nemeses of choice.<sup>12</sup> Not only is this strategy offensive — particularly to genuinely religious people — but it is also

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10. I owe this observation to Professor Don Herzog of the University of Michigan Law School.

11. See, e.g., PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998); Pierre Schlag, *Law as a Continuation of God by Other Means*, 85 CAL. L. REV. 427 (1997).

12. See, e.g., A. ERNEST FITZGERALD, *THE HIGH PRIESTS OF WASTE* (1972); RALPH GLASSER, *THE NEW HIGH PRIESTHOOD: THE SOCIAL, ETHICAL AND POLITICAL IMPLICATIONS OF A MARKETING-ORIENTED SOCIETY* (1967); RALPH E. LAPP, *THE NEW PRIESTHOOD: THE SCIENTIFIC ELITE AND THE USES OF POWER* (1965); MARY MIDGLEY, *SCIENCE AS SALVATION: A MODERN MYTH AND ITS MEANING* (1992); MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS* (1995).

in conspicuous tension with the Eastern religious themes Campos weaves throughout *Jurismania*.

Campos, in the process of criticizing our society's overemphasis on rationality and science, employs rhetoric strongly suggestive of some diluted variety of Taoism. For example, in Chapter 8 he isolates "two things" that we are all "required" by our rationalist and science-centered culture "to believe" (p. 138). They are:

1. The universe consists entirely of particles in fields of force. There are no such things as spirit or soul or karma or God, except to the extent those entities are projections of the human mind. The human mind itself is either: (a) an independent emergent property of otherwise mindless biological processes, or (b) can be reduced entirely to a nonmental account of those same processes.
2. All matter is a produce of mechanistic material processes, and all life is a product of mindless evolutionary processes. Therefore all teleological (mindful, design-based) accounts concerning the ultimate nature of the world are false.<sup>13</sup>

Campos then proceeds to question these propositions, pointing out that the decision to accept them instead of a religious explanation is, at bottom, a leap of faith. If science grounds at some level on a leap of faith, Campos asks, then what's wrong with the religious leap of faith? Consistent with this perspective, Campos offers his own "tentative contribution" towards the goal of slowly eroding America's jurismania:

*Law is suffering.*

*Suffering arises from the desire to get it right.*

*Rid yourself of that desire and rid yourself of suffering.*

*To eliminate the desire meditate on these other truths.*

We might call this "the way of renunciation." [p. 192]

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13. P. 139. This may be one of Campos's most aggressive overstatements. One wonders how we can be "required" to believe these things when it seems that every year, more and more people decline to do so. See, e.g., Robert Wuthnow, *Morality, Spirituality, and Democracy*, SOCIETY, Mar. 13, 1998, at 37 ("[T]he very trends that critics attempt to correlate with diminishing spirituality . . . have occurred despite constant rates of church going, virtually universal belief in God, and somewhat elevated levels of belief in heaven and hell."). Nor is it at all clear that modern science and religion are deeply incompatible. See, e.g., D. Boulter, *Public Perception of Science and Associated General Issues for the Scientist*, 50 PHYTOCHEMISTRY 1, 6 (1999) (distinguishing the province of science — descriptive reporting of causal laws and events — from the province of ethics and religion — normative analysis of why particular causes exist and whether events are good or bad); Holmes Rolston III, *Science, Religion, and the Future*, in RELIGION AND SCIENCE: HISTORY, METHOD, DIALOGUE 61, 73 (W. Mark Richardson & Wesley J. Wildman eds., 1996) ("Where is God in the story? God is the historian, the author who informs the action, slipping information into the world, making the improbable probable, converting contingency into destiny. Along these lines, the dialogue between biology and theology faces a promising future. . . . Such an account of God's agency, made for the biological sciences, is readily consistent with an account made for the human culture.").

There is manifest tension here. If we have no evidence to conclude that the antiteleological interpretations of the world are true, and if the teleological explanations are equally as plausible (p. 143), then why is religion the paradigm case for foolish and meaningless ritual? Even granting, *arguendo*, that a given religion's teleological worldview is correct (i.e., that the divinity the religion venerates exists and is responsible for the creation), suddenly their rituals no longer seem foolish and meaningless. Campos, in other words, switches faces from time to time — sometimes he is the relentless skeptic, analogizing law to religion (something we are meant to intuit is absurd), but other times he is the persecuted believer, decrying the secular dogma that we are “required to believe.”

## II.

While Campos clearly succeeds in speaking in his own voice and avoiding the dry and sterile forms of ordinary academic discourse, he perhaps goes too far in this endeavor. Robert Pirsig begins *Zen and the Art of Motorcycle Maintenance* with a small disclaimer — the book “should in no way be associated with that great body of factual information relating to orthodox Zen Buddhist practice. It's not very factual on motorcycles, either.”<sup>14</sup> In this Part, I critique the proof and perspective of *Jurismania*, suggesting that it is not very factual on law or the contemporary American legal system. Specifically, I suggest two structural problems with Campos's analysis. First, Campos's professional perspective — as a lawyer and a law professor<sup>15</sup> — biases his analysis, leading him to see the hand of law at work even when law is far from the most sensible explanation. Second, Campos's contemporary perspective — at times blind to history — also influences his analysis, such that he sees the world around him as something new, as a departure from the “old days” even when it is not.

### A. *The Bias of Profession*

If the only tool you have is a hammer, every problem will look like a nail. Paul Campos is a lawyer and a law professor. One would expect that central fact to have a profound influence on how he sees the world, and *Jurismania* bears that expectation out. When Campos describes the extent to which our society is juridically saturated (i.e., permeated by law in every direction), it bears asking: How much of this “juridical saturation” is noticeable only to law professors who always see and hear the legal side of every issue? How much, in other

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14. ROBERT M. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* (1974).

15. Before joining the faculty at the University of Colorado, Campos practiced law with Latham & Watkins, Chicago.

words, is merely the ironic symptom of Campos's inability to remove the law-colored glasses?

Campos opens with the example of Mahmoud Abdul-Rauf, a guard for the Denver Nuggets. Abdul-Rauf refused to stand during the national anthem, claiming a religious objection. The *New York Times* called to get Campos's opinion on the matter. Campos draws insight from the subjects the reporter wanted to discuss with him:

I do have some questions I'd like to discuss with the *Times* reporter, questions in which he seems to have no interest. For example, what does it tell us that the NBA actually has a formal rule addressing this particular contingency? How is it that Abdul-Rauf claims to believe his Islamic faith prohibits him from saluting the flag when no sect of Islam enforces such a prohibition? And is he ever going to get his game back together?

But the reporter doesn't want to hear about any of that. He wants to talk about the First Amendment. [p. 4]

One wonders what Campos, who is after all a professor of *law*, expected. Surely a reporter interested in the religious side of the controversy (whether Islam actually prohibits flag salutes) would consult an expert on religion, not a law professor. Likewise, just as a *New York Times* reporter would not consult Billy Packer (a college basketball broadcaster) about the implications of *Roe v. Wade*<sup>16</sup> (or any other complex case), he or she wouldn't consult Paul Campos about religion or sports questions.

Furthermore, Campos's dialogue with the *New York Times* reporter could be taken as evidence of a *lack* of juridical saturation. One would expect — juridical saturation or not — that the average citizen would be aware of the major provisions in the Bill of Rights. That is simply a part of our political culture.<sup>17</sup> Thus, the reporter's interest in discussing the First Amendment is to be expected. The fact that the reporter does not want to discuss the details of the NBA agreement, or "what [it tells] us that the NBA actually has a formal rule addressing this particular contingency" reveals not the reporter's fixation on law but rather the reporter's ignorance of and disinterest in the esoterica of law. Campos's interviewer saw the constitutional law issues raised by Abdul-Rauf's case, but neither saw nor cared about the contracts or property issues. Campos's evidence is at least indeterminate: the jurismaniacal glass can be either half-empty or half-full.

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16. 410 U.S. 113 (1973).

17. See, e.g., 1 ALFRED H. KELLY, WINFRED A. HARBISON, & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* xiii ("The constitution thus has a configurative effect. This effect is seen further insofar as the Constitution provides the institutional forms, procedures, rhetoric, and symbols by which politics is carried on in the United States."). Campos doesn't miss this point. See p. 181 ("As parochial as our own peculiar concept of the rule of law may be, we nevertheless know or sense that this concept is in many ways identical with the constitutive ideology of our public political culture.").



To skip now to the end, Campos reaches a remarkable conclusion in Chapter 10. Beginning with the proposition that “[l]awyers are often impelled by their professional obligations to become something akin to emotional prostitutes; that is, to be persons whose public personae require the simulation of inauthentic affective states” (p. 176) — most notably, outrage — Campos asserts that “various dramaturgical requirements of the adversary system are now being assimilated gradually into all forms of public conversation” (p. 177). The key problem, per Campos, is that:

[T]hose who mimic the professional personae of lawyers are usually unaware that lawyers are almost always faking it. So it is that when a Boulder citizens’ group expresses “outrage” over a zoning variance that will allow a McDonald’s to be built, its various members really *are* outraged. In this way the gradual juridification of public debate leads to a general cheapening of political discourse. Such a generalization of courtroom language and affect to all matters of public controversy causes people to use the same terms to condemn a proposed slowing in the rate of growth of Medicare outlays as they do to lament the practice of genocide in Bosnia or Rwanda. [pp. 177-78]

So, as I understand Campos, public rhetoric has escalated lately, and the law is to blame.

Surely that stretches credibility. If in fact public rhetoric has been escalating of late, a desire to imitate lawyers is hardly the most likely culprit. A desire to capture media attention is more likely: the more extreme the rhetoric, the more likely the protest is to appear on the nightly news or in the local paper, and to get picked up by the national media. Lawyers or no lawyers, sensationalism always has and always will sell papers.<sup>18</sup> But Campos is not a journalist, Campos is a lawyer, so Campos places his emphasis on the role of law.

### B. *The Bias of Time*

*Jurismania* describes many of the phenomena it identifies in a manner that implies that they are somehow new; yet prior generations suffered through strikingly similar legal excesses. Virtually every complaint Campos identifies shares a similar historical pedigree, a pedigree which one might not perceive from the pages of *Jurismania*. While Campos concedes that jurismania “is hardly unique to modernity” (pp. 4-5), he insists that we are experiencing a uniquely high dose: “[T]he increasingly bureaucratic structure of modern life has allowed [the juridical saturation of reality] to accelerate to a truly

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18. See SUSAN D. MOELLER, COMPASSION FATIGUE: HOW THE MEDIA SELL DISEASE, FAMINE, WAR AND DEATH 68-69 (1999) (“Since the news media are part of the entertainment media, they are primed to tell the most compelling stories they can. If they don’t, they lose their audience to other, more arresting sources or more simply to apathy and compassion fatigue.”).

striking extent” (p. 5). One wonders how true that really is. Perhaps today’s legal excesses strike us as particularly bad because they are the ones we are suffering through. To take only two examples, Campos identifies and complains about overly hyped trials and the invasion of procedurally complex law into formerly private, unregulated spheres (“juridical saturation”). Both have lengthy historical pedigrees.

Overly hyped trials are nothing new, Campos’s emphasis on the O.J. Simpson trial (pp. xi, 17-18, 22, 178, 182) notwithstanding. The Trial of the Century, Bruno Hauptmann’s 1935 trial for kidnapping the Lindbergh baby,<sup>19</sup> which was the first criminal trial to be viewed nationally on film,<sup>20</sup> drew hundreds of reporters to Flemington, New Jersey<sup>21</sup> and sparked a media sensation every bit as extravagant as Simpson’s:<sup>22</sup>

Every unit of the most complete news distributing setup yet devised clicked perfectly in Flemington yesterday as the attention of the world focused on the countyseat of Hunterdon for the opening session of the trial of Bruno Richard Hauptmann. Radio, telegraph, teletype, telephone and cable facilities were supplimented [sic] by aeroplane and motorcycle service to flash second-by-second developments in the courtroom where the jury was being selected and the scene in the community where there was a whirl of activity and excitement but every semblance of order.<sup>23</sup>

The media attention was so manic that reporters literally climbed on counsel tables to get pictures.<sup>24</sup> Every detail of the trial was extensively covered, with headlines like “Wood Expert Ties Ladder Rail to Attic of Hauptmann’s Bronx Home”;<sup>25</sup> “Bruno Put Thru Readin’, ‘Ritin’, ‘Rithmatic Tests’”;<sup>26</sup> “Dr. Hudson Infers State Police Bungled Taking of Fingerprints”;<sup>27</sup> and “Hauptmann Sentenced to Die

19. The trial itself is unreported. For the (unsuccessful) appeal, see *State v. Hauptmann*, 180 A. 809 (N.J. 1935).

20. See Jonathan Turley, *Transformative Justice and the Ethos of Nuremberg*, 33 LOY. L.A. L. REV. 655, 660 n.27 (2000).

21. See Jonathan L. Entin, *Using Great Cases to Think About the Criminal Justice System*, 89 J. CRIM. L. & CRIMINOLOGY 1141, 1151 (1999) (book review).

22. Note that my argument here is not that the Hauptmann trial tracked every contour of the Simpson trial. It did not, for example, raise questions of race, or jury nullification. It did not raise expressly the ability of wealthy defendants to buy superior legal services. My point here is merely that it did reflect a public obsession with law and lawyering—and that the phenomenon of media fixation on high-profile trials is nothing new.

23. Alan Painter, *Vast News System Clicks Perfectly As Trial Starts*, HUNTERDON COUNTY DEMOCRAT, Jan. 3, 1935, at 1; see also Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 201 (1999) (describing the sensationalistic coverage of the Hauptmann trial).

24. See Laurie L. Levenson, *Cases of the Century*, 33 LOY. L.A. L. REV. 585, 592 (2000).

25. Alan Painter, HUNTERDON COUNTY DEMOCRAT, Jan. 24, 1935, at 1.

26. D.H. Moreau, HUNTERDON COUNTY DEMOCRAT, Jan. 31, 1935, at 2.

27. HUNTERDON COUNTY DEMOCRAT, Feb. 7, 1935, at 1.

Week of March 18 for Lindbergh Murder.”<sup>28</sup> Local papers ran weekly timelines, with day-by-day summaries in case someone (presumably lost at sea or buried in a mountain cave) had somehow managed to miss the latest details.<sup>29</sup> Hosts of pictures were a daily feature.<sup>30</sup> In fact, the discovery that the proceedings had been secretly videotaped led to the adoption of ABA Canon 35, prohibiting cameras in court.<sup>31</sup>

The press covered, as they did to death with O.J., the secondary effects of the trial: “Hotel Owner Fears the Big Trial Will Ruin Flemington,”<sup>32</sup> and “Notables Continue to Flock to Flemington for the Big Trial.”<sup>33</sup> The Hauptmann trial even exhibited the same meta-news effect that the Simpson trial did, as reporters wrote stories about other reporters.<sup>34</sup> And, while modern commentators describe the Simpson trial as a joke or theatrical, evidently both the Hunterdon Sheriff and the Hauptmann jury were actually approached by traveling vaudeville companies and offered contracts.<sup>35</sup> As the frenzied atmosphere surrounding the Hauptmann trial so aptly demonstrates, it is hard to say that the current obsession with the law that Campos describes is worse than that of sixty-five years ago.

Literature also betrays a long history of popular interest in high profile trials. Harper Lee’s *To Kill A Mockingbird*<sup>36</sup> and Arthur Miller’s *The Crucible*<sup>37</sup> are but two examples in American literature. The obsession is not, however, unique to America. Starting with

28. HUNTERDON COUNTY DEMOCRAT, Feb. 14, 1935, at 1.

29. See, e.g., *The Trial In Brief*, HUNTERDON COUNTY DEMOCRAT, Jan. 24, 1935, at 5.

30. See *Photographers Have Taken 350 “Shots” in Courtroom*, HUNTERDON COUNTY DEMOCRAT, Jan. 31, 1935, at 2; see also, e.g., *Gloomy Trenton Death House Awaits Hauptmann*, HUNTERDON COUNTY DEMOCRAT, Feb. 21, 1935, at 14.

31. See Kelly L. Cripe, *Empowering the Audience: Television’s Role in the Diminishing Respect for the American Judicial System*, 6 UCLA ENT. L. REV. 235, 260 (1999) (“The camera’s first, surreptitious appearance in the courtroom resulted in its expulsion for sixteen years. Following the discovery of a hidden newsreel camera recording the trial of Bruno Hauptmann, in 1937 the American Bar Association adopted Canon 35, which prohibited all courtroom photography.”); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 798 (1993) (linking the Hauptmann trial to the passage of Canon 35).

32. HUNTERDON COUNTY DEMOCRAT, Jan. 24, 1935, at 1.

33. Constance Allen Ward, HUNTERDON COUNTY DEMOCRAT, Feb. 7, 1935, at 1.

34. See, e.g., Carl W. Ackerman, *The Press At The Hauptmann Trial*, HUNTERDON COUNTY DEMOCRAT, Jan. 31, 1935, at 1; *All Cameras Barred From the Courtroom Until Trial Is Over*, HUNTERDON COUNTY DEMOCRAT, Feb. 7, 1935, at 1; D.H. Moreau, *Gabriel Heatter Is One of the Busiest Men Covering Trial*, HUNTERDON COUNTY DEMOCRAT, Feb. 7, 1935, at 1.

35. See *Jury Vaudeville Appearance “Hooey,”* HUNTERDON COUNTY DEMOCRAT, Feb. 21, 1935, at 1; *Sheriff Not Interested in Vaudeville Offer*, HUNTERDON COUNTY DEMOCRAT, Feb. 21, 1935, at 1; see also Levenson, *supra* note 24, at 592 (describing the media activity as having all the trappings of a circus coming to town).

36. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

37. ARTHUR MILLER, *THE CRUCIBLE* (1976).

Plato's rendition of the trial of Socrates,<sup>38</sup> literature is replete with examples of trial narratives — which often parody actual trials. Shakespeare seems virtually obsessed with trials. For example, consider the graveyard scene in *Hamlet*, in which two clowns debate Ophelia's suicide.<sup>39</sup> The arguments they make track, and were surely meant to parody, the English case of *Hales v. Petit*.<sup>40</sup> *Hales* raised the issue of whether a suicide victim has committed a felony during his lifetime (to determine whether the suicide's property reverts to the Crown): can the crime be complete before death occurs? Surely this is as absurd a legal distinction as is the example on which Campos relies — *Quill v. Vacco*'s<sup>41</sup> awkward analysis of physician-assisted suicide (p. 166). As another example, recall the trial in *The Merchant of Venice*, in which Shylock proceeds pro se.<sup>42</sup> Charles Dickens's *Bleak House*<sup>43</sup> traces the (fictional) case of *Jarndyce v. Jarndyce*, parodying the way lawsuits sometimes have of taking on a life of their own, well beyond the issues to which they were originally addressed. Kafka's *The Trial*<sup>44</sup> and Camus's *The Stranger*<sup>45</sup> both depicted the legal process as incomprehensible and senseless, in a way that presaged many of Campos's complaints. Again, Campos's complaints isolate phenomena that are hardly new.

Further, the invasion of an all-encompassing and procedurally complex law is no innovation. Seven centuries before Campos wrote, Iceland exhibited the same "juridical saturation" that Campos identifies in America. Law in thirteenth-century Iceland provided both a solution to problems and a vocabulary for discussing social arrangements. "Law played a role in more than the definition and processing of disputes. . . . Norms of good kinship provided the basis for imposing legal obligation, which in turn buttressed the norms and so on in continual feedback of mutual influence."<sup>46</sup> Law governed familial and kinship ties, interactions with other kinship groups,

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38. See Plato, *The Trial and Death of Socrates* (2d ed., G.M.A. Grube trans., Hackett Publishing Co. 1975).

39. See WILLIAM SHAKESPEARE, *HAMLET*, act V, sc. 1.

40. *Hales v. Petit*, 75 Eng. Rep. 387 (K.B. 1562).

41. 80 F.3d 716 (2d Cir. 1996).

42. See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4, sc. 1.

43. CHARLES DICKENS, *BLEAK HOUSE* (Oxford U. Press 1998) (1853). I owe both this and the *Hamlet* example to A.W.B. Simpson, *Legal Iconoclasts and Legal Ideals*, 58 U. CIN. L. REV. 819, 823-24 (1990).

44. FRANZ KAFKA, *THE TRIAL* (Willa Muir & Edwin Muir trans., Everyman's Library 1992) (1925).

45. ALBERT CAMUS, *THE STRANGER* (Matthew Ward trans., Vintage Books 1989) (1942).

46. WILLIAM IAN MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND* 221 (1990).

production of food, etc. And, just as “American legality” incorporates “an obsessive proceduralism that often seems to amount to a belief in process for its own sake,” (p. 179), so “Icelandic procedure is remarkable for its extraordinary complexity and its formalism.”<sup>47</sup> Icelandic lawyers were not above deliberately manipulating the intricacies of legal procedure.<sup>48</sup> Saga lawyers were regularly accused of “mere lawyers’ quibbles and cheating.”<sup>49</sup> In other words, “obsessive proceduralism” is hardly unique to modern American law; rather, the example of Iceland demonstrates that societies were pervaded and shaped by complex law hundreds of years ago.

The fixation on law predates even thirteenth-century Iceland. The Roman Empire developed an immense body of judge-made common law,<sup>50</sup> replete with the same sort of inconsistencies that Campos decries in American law.<sup>51</sup> Law was simultaneously an avenue of privilege — “an entry to the governing class . . . [for] many provincials”<sup>52</sup> — and a scarce resource generally unavailable to the poor or underprivileged.<sup>53</sup> Further, Roman law exhibited the same form of sophism, and the same obsession with the argument in and of itself, that Campos identifies in American law. As Gibbon teaches, the Roman lawyers:

considered reason as the instrument of dispute; they interpreted the laws according to the dictates of private interest . . . Others, recluse in their chambers, maintained the gravity of legal professors, by furnishing a rich client with subtleties to confound the plainest truth, and with arguments to colour the most unjustifiable pretensions.<sup>54</sup>

47. *Id.* at 248.

48. See, e.g., NJAL’S SAGA 300 (Magnus Magnusson & Hermann Pálsson trans., Penguin Books 1960) (describing strategic maneuvers designed to lure a plaintiff into improper selection of venue).

49. *Id.* at 305-07.

50. See Nicholas Purcell, *The Arts of Government*, in *THE ROMAN WORLD* 172 (John Boardman et al. eds., 1988).

51. To demonstrate law’s alleged inconsistencies, Campos offers the hypothetical example of a school principal confronted with a male student’s desire to wear a t-shirt with a sexist message. According to Campos, the principal is confronted with inconsistent legal duties: he must respect the student’s First Amendment right to freedom of expression, but he must also respect the rights of female students not to be sexually harassed. Pp. 35-36.

52. Purcell, *supra* note 50, at 171.

53. See *id.* at 172 (“[L]egal measures show the same variety, casualness, and lack of generality which we find in Roman administrative decisions, and indeed it is difficult to separate the two. . . . The result was that the law was not always sufficiently universal, and the underprivileged might well not reap its benefits.”).

54. EDWARD GIBBON, 1 *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 616-17 (David Womersley ed., Penguin Books 1994) (1781); see also Kenneth Pennington, *The Spirit of Legal History*, 64 U. CHI. L. REV. 1097, 1099 (1997) (book review) (“Just as the hunters are not concerned with the birds, [the Roman jurists] were not really interested in law, but only in winning the approbation of their fellows (and others) by proffering an ingenious opinion based on an accepted style of reasoning.”) (internal quotations omitted).

Roman lawyers exhibited every bit as much “jurismania” then as American lawyers do now. Obsessive proceduralism and sophism are hardly new or unique to American law.

To the extent that Campos describes a phenomenon that is not unique to our time, but rather has a lengthy historical pedigree, the character and contour of the argument changes. Campos should give more thought to the history of law and legal excess, because it informs the strategy for change. A problem that is relatively recent may be easier to uproot. A problem that has been with us since the Roman Empire may be more difficult to address. Those who disagree with Campos should care about the history as well. Perhaps, even though we’ve successfully weathered at least two millennia of jurismania, the time has come to worry seriously about it and seriously attempt a change. But that case would be much harder to make than the case against a relatively recent obsession with legalism, and Campos’s slim volume falls substantially short. Yes, Rome fell, but not at the hands of procedurally fixated lawyers. A historical view simply causes one to question the significance of the problem Campos identifies.

### III.

*Jurismania*’s central thesis — that we have “too much law” — raises issues of power and equality that Campos fails to analyze deeply. This Part begins by noting that generic polemics against “too much law” are unhelpful. Law is not undifferentiated, nor is it fungible. Moreover, since law is one of the few institutions in our society expressly dedicated to providing the powerless a voice and a tool with which to challenge the powerful, analyzing “surplus” law invariably raises equality questions. This Part next argues that Campos approaches his analysis with a flawed assumption: that the private sphere without law is entitled to a presumption of neutrality. Often, however, the private sphere starts out skewed — heavily biased in favor of wealth, power, and privilege — such that the incursion of law has a leveling influence. Finally, this Part concludes that, beginning from his flawed assumptions about the pre-law baseline, Campos often selects for derision precisely those elements of the law that are directly concerned with remedying inequality.

#### A. “Too Much Law” is Meaningless

Campos analogizes law to water: some is “without doubt a good thing,” but too much “and we drown” (p. 178). This analogy fails, however, because water, unlike law, is fungible such that one need only measure quantity to ascertain excess. Law consists not of an undifferentiated mass but rather of a multiplicity of discrete items: stat-

utes, regulations, and cases. Judicial decisionmaking is decentralized and incremental; it proceeds case-by-case.<sup>55</sup>

Further, if one is to do anything other than merely bewail the complexity of law, one must select from among the various bits and pieces of law. A person troubled by too much water can remove it indiscriminately — sandbagging or bailing. A community troubled by too much law cannot remove it indiscriminately. Starting a law-reduction campaign by abolishing the homicide law, for example, would be absurd. Note that one need not understand *Jurismania* as a polemic against all law to accept this critique. Indeed, Campos is clear that he does not intend to advocate anarchy: “[T]he real argument isn’t about whether law is a good or a bad thing,” but rather about whether or not we have *too much* law (p. 178). That question — too much law? — is empty, however, without specifics, and Campos has no vision of how to separate the wheat from the chaff.

### B. *Jurismania’s Flawed Assumption*

*Jurismania* not only fails to identify which laws are surplusage, but it also fails to appreciate that any attempt to do so necessarily raises fundamental equality issues. Equality is certainly a major concern (though, admittedly, not the only concern) of the law. While our legal system is not immune to capture by wealth and power,<sup>56</sup> it is no coincidence that the Constitution chooses the phrase “equal protection of the laws.”<sup>57</sup> The courtroom as a level playing field is deeply embedded in our cultural mythology.<sup>58</sup> Therefore, before condemning law’s excesses, one should examine the questions of inequality to which law is addressed; and before valorizing a regime of informal social sanctions, one should ask whether the emphasis on law increases or decreases inequalities of power and voice.

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55. See generally Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000). Hadfield makes this point in the context of an economic analysis of the excessive complexity of law, which she argues raises the cost of law beyond the means of individuals. The point is equally applicable to Campos’s thesis, that the esoteric complexity of law makes it both absurd and economically inaccessible.

56. For thoughtful and well-documented exposition of this point, see generally *id.*

57. U.S. CONST. amend. XIV, § 1 (emphasis added).

58. Cf. Marc Galanter, Planet of the APs: Reflections on the Scale of Law and its Users 39 (Oct. 11, 1999) (unpublished manuscript, on file with author) (“We like to think of the legal system as a site of remedies and protections for the injured and disadvantaged . . . . We cherish court as institutions immune to capture. . . .”). Whether law can ever achieve this goal is largely immaterial, as long as the effort is worthwhile. As Dr. King said, “The law may not be able to make a man love me, but it can keep him from lynching me.” Martin Luther King, Jr., quoted in ALAN F. WESTIN & BARRY MAHONEY, *THE TRIAL OF MARTIN LUTHER KING* 41 (1974).

*Jurismania* does not do that. A fundamental problem with *Jurismania* is its assumptions about the baseline — the regime into which law intrudes. Campos conceives of law as an undesirable incursion into a presumptively superior private sphere, as his analogies reveal: “[I]magine a culture in which doctors thought chemotherapy was so wonderful they encouraged people to undergo treatment whether they were sick or not, or in which generals routinely sang paeans to trench warfare and saturation bombing” (p. 184). Both examples depict law as fundamentally destructive — an evil we sometimes have to tolerate to secure its benefits — and both examples treat the status quo, before law’s incursion, as fundamentally desirable.

Campos’s baseline assumption is clearly visible in his explanation of the goals of law. Campos sees the aim of “final elimination of risk itself” as driving “total juridical saturation” (p. 29). He analogizes this objective to living in Boulder, and more particularly to shopping at Alfalfa’s, an expensive Boulder grocery store where the shopping experience is “risk free and 100 percent guaranteed” (p. 29). This section of the book is quite revealing — it speaks from privilege, to privilege, while mocking privilege; but its vision of law’s aim is extremely limited. A text by a law professor begins from a point of privilege and leaves little room for alternative views. Maybe people “buying the \$30 per pound smoked salmon they will carry back to the communal condominium in new Range Rovers and Saabs” (p. 28) see law as a vehicle for the elimination of risk, but others less privileged may see law as a vehicle for the redress of inequality. Indeed, this view sees inequality as “[t]he Theme that dominates all others” in the sphere of law,<sup>59</sup> because “equality in our system is inherently and necessarily unstable. Without strenuous efforts, it fades over time.”<sup>60</sup> Perhaps then the question is not whether we have too much law, but rather, “Can legal strategies and techniques be improved and, if so, would this make any real difference to the position of those who are disadvantaged?”<sup>61</sup>

The section “Welcome to the Working Week” is even more illuminating, and the disjunction between the experience Campos narrates and the experience of an average blue-collar worker sharply exposes the extent to which private power tilts the pre-law playing field. Campos finds a “modern panopticon” in the daily routine of an office worker: getting up at precisely 6:17, getting dressed, driving to work, performing meaningless office tasks, and “emerging from

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59. HAROLD W. HOROWITZ & KENNETH L. KARST, *LAW, LAWYERS AND SOCIAL CHANGE* 1 (1969).

60. RICHARD DELGADO, *WHEN EQUALITY ENDS: STORIES ABOUT RACE AND RESISTANCE* 6 (1999).

61. Bob Hepple & Erica Szyszczak, *Preface*, in *DISCRIMINATION: THE LIMITS OF LAW* ix (Bob Hepple & Erica Szyszczak, eds. 1992).



towers of glass that, at precisely 5:07 every afternoon, disgorge rivers of their exquisitely regulated occupants” (pp. 31-34). This narrative is meant to illustrate the all-pervasive (and impliedly negative) nature of law.

It’s hard to imagine, however, a description that could more thoroughly ignore the experience of people not fortunate enough to have a white-collar job. For example, while Campos’s clothes may be a “delicately calibrated semiotic system” (p. 32), the blue-collar worker’s are often a uniform demanded by her employer — one that costs her an average of \$95 per month.<sup>62</sup> Occasionally, such uniforms are supplemented by “pads worn inside her uniform (which, incidentally, cost her almost one-tenth of her weekly wages)” because employers do not allow workers “a [bathroom] break for six-hour stretches.”<sup>63</sup> In the absence of government intrusion (juridical saturation), private regulation dominates even the most intimate and embarrassing minutiae of people’s lives. Campos’s hypothetical worker burns his time away developing the paper trail necessary to fire a useless employee who “clings to his sinecure with all the tenacity of a python,” relying on various elements of the labor law to protect him from dismissal (p. 32). His portrait of the entrenched, untouchable employee bears no resemblance to the reality of the worker who begins her day with verbal sexual harassment, and complains to her personnel manager, who “grab[s] her breast and sa[ys], ‘Be nice to me and I’ll take care of you.’”<sup>64</sup> While law may be pervasive and obstructive, private power (which reigns supreme in the absence of law) is equally, if not more, injurious.

Campos’s assumption — that the status quo, without law’s intervention, is inherently worthwhile and deserves preservation — thus neglects the effects of privilege and the importance of law as a leveling force. Privilege, wealth, and power pervade the background against which law is superimposed, such that removing law (entirely or in part) leaves not a neutral, objectively fair and right condition, but rather a tilted condition, biased by wealth and power even more than the legal system is. The core objection to Campos’s account is that Campos sees law’s intervention as presumptively unjust, imposing unnecessary regulation and supervision. That analysis presumes — im-

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62. See KATHRYN EDIN & LAURA LEIN, *MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK* 97 (1997) (reporting results of a survey of over 400 welfare and low-income single mothers from cities in four states over a six-year period).

63. MARC LINDER & INGRID NYGAARD, *VOID WHERE PROHIBITED: REST BREAKS AND THE RIGHT TO URINATE ON COMPANY TIME* 2 (1998) (detailing the extent to which blue-collar workers are routinely required to work for long durations without access to restroom facilities).

64. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 49 (1979).

licitly or explicitly — that the background against which law regulates is presumptively just. Such a presumption cannot be supported. Wealth and power inequalities tilt the pre-law playing field such that legal intervention and regulation can no longer be presumed objectionable.

### C. Campos's Neglect of Equality Law

Just as Campos misses the inequality of the status quo, so too he misses the equalizing effects of the laws and legal processes he derides. If Campos's examples are to be taken seriously, he seems to have selected as surplus those laws that directly relate to redressing power imbalances. Campos criticizes the laws requiring handicapped parking spaces (p. 32); laws regulating the firing of employees (p. 32); and the hostile work environment sexual harassment doctrine (pp. 35-36).

Take, for example, Campos's analysis of what he calls "the sordid national spectacle which is the Paula Jones-Bill Clinton litigation."<sup>65</sup> That is, to be fair to Campos, all he says about it in *Jurismania*. In other settings, however, he has described *Jones v. Clinton*<sup>66</sup> as exemplifying the problem of jurismania.<sup>67</sup> The fact that Campos selects a sexual harassment case as an example of *Jurismania* is itself telling,<sup>68</sup> but more telling is the absence of an alternative. If the law (or at least the legal theory) upon which *Jones v. Clinton* was based is an example of legal excess, then what nonlegal solution does Campos propose? Speaking of Abdul-Rauf, he says: "Not so long ago informal social pressures would have been exerted on a basketball player to stand for the national anthem" (p. 5). If this analysis is meant to be of general applicability, it is deficient because it fails to recognize inequality of

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65. P. ix. Perhaps Paula Jones is a poor example, since she received substantial support from President Clinton's political enemies. Absent a *legal* remedy, however, would Ms. Jones have received such support? Absent the lawsuit, supporting Paula Jones would have been a poor investment for anti-Clintonites.

66. 869 F. Supp. 690 (E.D. Ark. 1994), *modified by* 72 F.3d 1354 (8th Cir. 1996), *aff'd* 520 U.S. 681 (1997).

67. *See, e.g.*, Paul F. Campos, *Clinton in Crisis*, THE SAN DIEGO UNION-TRIBUNE, Jan. 30, 1998, at B7 ("Only in America do we have a legal system that is so thoroughly out of control and so certain of its own rectitude that incidents such as the surreal proceedings surrounding the Paula Jones affair are not only tolerated, but actually held up as exemplars for other cultures. 'Learn from us,' we say to other countries. 'You, too, can enjoy the benefits of a dispute processing system that allows platoons of hostile lawyers to harass your nation's chief executive with six straight hours of questions regarding the most intimate details of his sex life and the precise appearance of his genitals. We call ours "the rule of law."').

68. This assumes, of course, that Ms. Jones' allegations were true. The author recognizes that this proposition is certainly open to controversy. If they were false, then *Jones v. Clinton* might be an example of legal excess. Notably, Campos seems willing to entertain the assumption that the allegations were true. *See* Campos, *supra* note 67 ("I am not minimizing the significance of either the Jones or Lewinsky affairs. If substantially true, these various allegations of sexual impropriety would form an excellent basis for refusing to vote for Clinton.").

power. One wonders exactly what “informal social pressures” a 24-year-old government clerk can bring to bear on the Governor of her state.<sup>69</sup> Presumably ostracization is not an option given the relative power disparity. Shaming, an option Campos has advocated,<sup>70</sup> would be rather tricky for Ms. Jones to arrange, especially once her target was elected President. Law, for all its flaws, at least provides the powerless with a vehicle to challenge the powerful. Mere derision for the “sordid spectacle” of *Jones v. Clinton* is insufficient unless one is either willing to leave Jones with no remedy at all, or able to suggest a viable alternative.

Note that, just as I do not impute to Campos the extreme position — no law, *just* social sanctions — so I do not advocate the opposite extreme — no social sanctions, *just* law. As to any of the phenomena I identify as symptoms of a tilted playing field, informal social mechanisms can sometimes play a vital role. In the case of sexual harassment, for example, women can often achieve impressive results by confronting their harassers.<sup>71</sup> The example of sexual harassment is illuminating, because it highlights the relationship between law and social sanctions. Law can lead as well as follow,<sup>72</sup> and one important way in which law can lead is through its symbolic or expressive force.<sup>73</sup> Before law recognized sexual harassment as a violation of women’s civil rights, I suspect it was more difficult to bring social pressures to bear against a harasser. The harassee may have felt isolated, may have wondered if she was overreacting, and may have had no reason to believe that anyone else would support her in her objection to the harassment. She may not even have known to call it harassment. Once the law lends its legitimizing force, however, it establishes the validity of the harassee’s complaint. Now she has words for what is happening to her, and she knows that she is neither alone nor overreacting, because her society has placed its imprimatur on her complaint. That, in

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69. See Richard Lacayo, *Jones v. The President*, TIME, May 16, 1994, at 45.

70. See Paul F. Campos, *A Way Out: Hold Public Shaming*, LOS ANGELES TIMES, Sept. 22, 1998, at B7. In his article, Campos seems to envision Congress engaging in the act of shaming. That solution does not resolve the power problem, it merely displaces it: How is Paula Jones to secure the attention of Congress? She must first capture the attention of the public, and doing that is infinitely more possible with a legal claim.

71. See MARTHA J. LANGELAN, BACK OFF! HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS 153-200 (1993).

72. See, e.g., Thurgood Marshall, *Law and the Quest for Equality*, 1967 WASH. U. L.Q. 1, 7 (“[L]aw cannot only respond to social change but can initiate it, and . . . lawyers, through their everyday work in the courts, may become social reformers.”); Kathryn E. Suarez, Comment, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 CAL. L. REV. 423, 470-71 (1994).

73. For discussion of law as a symbolic and expressive device, see Sherman Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

turn, makes it easier to invoke informal social sanctions — to confront the harasser personally, to elicit the support of other women in the workplace, etc.

I do not mean to suggest here that Campos is entirely insensitive to questions of privilege and power. Far from it — one central theme of Campos's critique is that the hypertrophy of American law tilts the legal playing field in favor of the rich. He uses the Simpson trial to show that very point (pp. 22-23):

The grand irony of the American legal system is to be found in precisely this: that it is by their very efforts to make law 'fair' — efforts that perversely make the benefits of law ever more dependent on the expertise of a specialized sector of the upper class — that lawyers in this same sector of the upper class have made many of the benefits of law unavailable to anyone other than members of the class to which those lawyers belong. [p. 25]

He also recognizes the irony associated with lawyers' purporting concern for the poor:

This is generally followed by utopian statements to the effect that the government 'should' make 'high quality' (a.k.a. expensive) legal services available to everyone: statements that to be actualized would necessitate the sort of wealth redistribution that would in turn require the elite legal establishment to surrender some of its economic and social privilege, which of course it isn't going to do. [pp. 18-19]

Thus, I mean not to suggest that Campos is blind or insensitive to questions of privilege, but rather to suggest that before Campos can condemn the American legal system as excessive and overly developed, he must necessarily grapple with the equality questions raised by the obvious implication of his critique.

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One element of Campos's complaint is surely well-taken — *exclusive* rationality, as his colleague Pierre Schlag has pointed out, is difficult if not impossible to sustain. Yet, rationality necessarily pervades the law — if Campos urges us to emote our way to legal solutions, he owes us an explanation of how we can make such a regime function. Campos says that "apologists for American law always claim in its defense that 'the system works' without ever bothering to explain what they mean by this" (p. viii). What I, at least, mean, is that the system's emphasis on rationality provides a framework for consensus — a basis upon which people bitterly opposed can agree to accept a decision. Per Brandeis, "in most matters it is more important that the applicable rule of law be settled than that it be settled right,"<sup>74</sup> yet issues of con-

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74. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

troversy cannot be settled on emotive grounds. An opinion that reads, “we’ve thought long and hard about this; we gazed into the sea; we communed with forests of Yosemite; and we consulted — at length — our consciences” is unlikely to persuade. Perhaps Campos is right that “we cannot decide efficiently processed legal disputes on the basis of ‘reason.’ We merely decide” (p. 185). Judges, however, must persuade — they speak with authority, but at bottom that authority rests on persuasion, on the willingness of the populace and the coordinate branches of government to accept judicial decisions. Rationality is the judiciary’s tool to effectuate that persuasion and achieve that support.

Campos’s point cannot stand in its strongest form. Although some legal disputes cannot be resolved by resort to reason, reason is necessary to reach the point where we know which disputes are efficiently processed. Further, reasoning can certainly eliminate some options, suggest others, and narrow the range of choices from which we must select. Elements beyond formal logic surely enter into the calculus, but to mock reasoning in toto is to stretch a point too far. Solzhenitsyn struck much closer to the truth: “I have spent all my life under a communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worthy of man.”<sup>75</sup> Solzhenitsyn emphasizes the centrality of balance. Perhaps Campos concurs, but if so it would be easy to leave *Jurismania* under a misapprehension.

The problems with *Jurismania* that this Notice identifies can easily be taken to reflect the enormity of the task Campos set himself. *Jurismania* is a small book, under 200 pages. *Jurismania* is also a fun read, full of lively examples and clear, engaging prose. If Campos attempted to include the perspective of nonlawyers, discuss the degree to which the phenomena he identifies are new and the degree to which they are old, and identify the specific laws he thinks are and are not surplusage, *Jurismania* would become a massive book and profoundly tedious to read. Campos is certainly entitled to choose readability. Take *Jurismania* as an open question, an invitation to consider the breadth and territory of American law, an inquiry into the merit and necessity of aspects of our legal regime. Do not take *Jurismania* as an answer — its foundations are not firm enough to support a prescription, but they certainly suffice to suggest an inquiry.

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75. Alexander I. Solzhenitsyn, *A World Split Apart, Commencement Address at Harvard University*, VITAL SPEECHES OF THE DAY, June 8, 1978, at 680.