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Introduction

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ACCESS TO JUSTICE: LAW & POPULAR CULTURE

INTRODUCTION

*John T. Nockleby**

The contributors to this Symposium all share a common perspective that law can only be understood as situated within popular culture, and is both reflective of and constitutive of that culture.¹ The contributors offer multiple ways in which law and literature or law and film relate to each other. Some read law as literature. Some focus on how law is portrayed in film. Others reflect on the effect that film and pop culture have on how law is practiced.

We have grouped the articles into three sections on the basis of their dominant themes. First, several essays examine culture in law and law as culture at the same time. These essayists read legal texts as though they are cultural texts, such as literature or film. The essays by Professors Silbey,² Chase,³ and Murray⁴ are in this section.

A second group of contributors do not interpret legal texts, such as cases for their literary or narrative features. Rather, they examine how cultural texts themselves portray law. Thus, Professors Bandes,⁵ Asimow,⁶ and Austin⁷ explore films about law. These authors critique these films by asking how they frame common legal

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1. See Jessica Silbey, *Truth Tales and Trial Films*, 40 LOY. L.A. L. REV. 551, 552 & nn.7-8 (2007).

2. *Id.* at 551.

3. Anthony Chase, *The Mass Culture of Property*, 40 LOY. L.A. L. REV. 589 (2007).

4. Yxta Murray, *A Lecture on Plessy v. Ferguson as Oedipus Rex*, 40 LOY. L.A. L. REV. 611 (2007).

5. Susan Bandes, *We Lost It at the Movies: The Rule of Law Goes from Washington to Hollywood and Back Again*, 40 LOY. L.A. L. REV. 621 (2007).

6. Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653 (2007).

7. Regina Austin, *Super Size Me and the Conundrum of Race/Ethnicity, Gender, and Class for the Contemporary Law-Genre Documentary Filmmaker*, 40 LOY. L.A. L. REV. 687 (2007).

issues. Professor Sherwin's contribution,⁸ also in this section, notes that cultural representations about law have become so profoundly important that legal actors such as judges and lawyers must become be aware of these representations as they engage with the law.

And finally, Professor Elkins's essay⁹ asks whether or not legal actors are uniquely insightful when they critique films and other cultural texts that deal with law. He asks us to examine their claim to particular expertise in this domain with great care.

I. CULTURE IN LAW AND LAW AS CULTURE

In the opening piece, Professor Jessica Silbey lays out an illuminating taxonomy of law and cultural studies. In this map, Professor Silbey contrasts the study of law *in* literature and law *as* literature. She then shows that law/film and law/literature studies are subsets of the wider discipline of cultural studies. Silbey argues that fictionalized films based on famous trials whose verdicts are well known, which she calls truth tales, encourage the viewer to reflect on the law's function in society. Because the viewer already knows the trial's outcome, the film's story extends beyond the courtroom. Through this wider framing, truth tales work to comment on the legal system's promise of delivering justice.

Silbey illustrates her idea by analyzing two trial films, *Compulsion* and *Swoon*, which were both made about the famous 1924 Leopold-Loeb murder case. In *Compulsion*, the film's focus is on the hypocrisy of a legal system that responds to murder by inflicting the death penalty.

This is a stark contrast to *Swoon*, which focuses on the homoerotic relationship between Leopold and Loeb. Rather than the injustice of capital punishment, the second film highlights how anti-Semitism and homophobia can distort justice. The differences between *Compulsion* and *Swoon* illustrate Silbey's point that the primary effect of truth tales is to foreground the changing social meaning of verdicts over time.

Anthony Chase also explores film to gain insight on the cultural power of law. More than twenty years ago, Chase told us that the

8. Richard K. Sherwin, *A Manifesto for Visual Legal Realism*, 40 LOY. L.A. L. REV. 719 (2007).

9. James R. Elkins, *Popular Culture, Legal Films, and Legal Film Critics*, 40 LOY. L.A. L. REV. 745 (2007).

legal academy was not paying enough attention to the depiction of law and lawyers in popular culture.¹⁰ He argued that critical scholars could learn much from popular culture about ideologies that legitimate power.

In this symposium, Chase reflects upon a basic contradiction in current American property law: on the one hand, the idea that use of private property should be unrestrained, and on the other, the idea that private property should be subject to public regulation and communitarian norms.

Chase explores this tension in “property” by examining several films that both portray and exploit it in their narrative structure. Chase’s suggestion is that filmmakers regularly grapple with tensions between competing ideals, and thus the critical lawyer who studies them can gain insight about parallel contradictions within law.

In the third article in this section, Professor Yxta Murray, a novelist herself, writes about literature rather than film. In the conventional view, according to Murray, law imposes order while literature erupts from the imagination. Law is formal, rigid, and logical; literature impulsive, fanciful and intuitive. So, Murray says, it is no surprise that the law and literature movement often sees itself as discovering obscure similarities between legal texts and the writer’s art or studies literature for what it says about the law.

However, Murray wants to examine the relationship of law and literature from a different vantage point. From Murray’s perspective, law *is* literature. In her view, the same impulses that shape literature animate law texts. Law and literature derive from the same source, our imagination. Both mediums have tragic figures whose stories ultimately create emotional catharsis.

To illustrate the “profound relatedness” of those formally different disciplines, literature and law, Murray reads twin tragedies, *Oedipus Rex* and *Plessy v. Ferguson*. She wants to show that *Oedipus* is both law and tragedy, and *Plessy* both tragic art and law.

The tragic flaw in *Oedipus*, hubris, leads to his downfall, just as the truth-teller, the Oracle, foretold. In *Plessy*, the Supreme Court—standing in for the Oracle—pronounces powerful “truths”: that *Plessy* is “black,” despite his claims that he’s 7/8ths “white” and

10. Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WISC. L. REV. 527 (1986); Anthony Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 AM. B. FOUND RES. J. 281 (1986).

therefore entitled to all the privileges of being “white” entails—including not being forced to segregate. The Oracle/Court announces that Plessy must abide the state’s decree that he live under all the legal disabilities the state inflicts on people defined as “colored.” Like Oedipus, Plessy has lost control of his life, having been defined by the legal authorities. We experience both as tragic figures.

In concluding, Murray says law is a work of imagination. We use law to cabin our fears, and we employ legal categories to construct relationships with each other. As much as some might imagine that law as applied to humans in their activities is different from other narrative constructs, Murray’s goal is to establish their commonness.

II. LAW IN CULTURE

A different focus emerges from our second set of Symposium authors. Professors Susan Bandes, Regina Austin, Michael Asimow, and Richard Sherwin all address film and visual portrayals of key cultural tropes. Together, all four papers help us understand better how legal narratives derived from our visual culture can obscure or illuminate key facets of the legal system.

In her Article, Professor Susan Bandes explores the connection between the depiction of the judicial role in popular media such as movies and television and the caricature of judging that still holds sway in more serious non-fiction venues like Senate confirmation hearings and political campaigns.

Popular culture tends to create stock images, characters with which we become familiar. In popular venues, Bandes argues, the “judge” is generally depicted either as (1) a neutral or invisible placeholder for a fixed and determinate rule of law (which we might call the cultural “good judge”), or (2) as biased, vulgar, or downright villainous (the cultural “bad judge”). In the popular conception, the judge as the creator-of-rules is nowhere to be found.

This phenomenon—that judges as legitimate lawmakers is foreign to pop cultural portrayals of judging—should at one level strike us as puzzling. The *idea* of the judge-as-lawmaker has been with us for centuries, even if current popular cultural portrayals do not acknowledge that.

For example, Blackstone's 18th-century-era *Commentaries on the Law of England*¹¹ comprehensively surveys common law rules but pays scant attention to the "idea" of the judge-as-lawmaker. To Blackstone, rulemaking by judges is as legitimate as it is generally to us that legislation trumps common law rules. Indeed, Lawrence Friedman tells us, the "highest source" of law for Blackstone was not legislative enactment, but "'general custom,' as reflected in the decisions of the common-law judges."¹²

Despite this history, contemporary depictions of judging obscures judicial rulemaking, as Bandes's article relates. What should we make of the failure of popular culture to address this fundamental judicial role?¹³

Bandes draws upon the work of Robert Ferguson and Robert Cover to explore a number of possible reasons. For example, the formalist nature of the well-crafted judicial opinion seeks to achieve a tone of inevitability, suggesting that the judge has no choice in making the decision. The goal is to appear "neutral," a force without politics.

The prevailing notion of judges and judging that currently dominates the cultural discourse is simple ideology, according to Bandes. It not only claims priority over other possible images of the judicial role, but because it is invisible it seems both inevitable and not subject to critique.

Like Bandes, Professor Michael Asimow is also interested in popular portrayals of legal actors. In contrast to Bandes's focus on

11. WILLIAM BLACKSTONE, COMMENTARIES.

12. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 21 (2d ed. 1985). In Blackstone's era, judicial rule-making was legitimated by the mythology that law judges were "oracles", BLACKSTONE, *supra* note 11, at *69, whose pronouncements derived as though from a sacred text. To the 18th-century mind, judges "discovered" law, or at most drew upon existing principles. "In theory . . . judges drew their decisions from existing principles of law; ultimately these principles reflected the living values, attitudes, and ethical ideas of the English people." FRIEDMAN, *supra*. It took Holmes and the Realists a half-century to dislodge from lawyers' minds the notion that in common law adjudication judges merely "discovered" and "applied" law.

13. This question does not fall prey to what James Elkins refers to as the "inaccuracy" thesis—namely the critique of popular culture that it doesn't "accurately" represent the role of judges in the legal system. Bandes's point is not that portrayals of judges are merely inaccurate. Rather, she contends that our inability to visualize judges in their lawmaking role reflects an ideological stance. It's not that the portrayal of judging as either judge-as-umpire or judge-as-corrupt is inaccurate; it's that we don't "see" the judge-as-rule-maker when we visualize the idea of "judge."

images of judging Asimow draws our attention to a puzzle involving depictions of lawyers.

The puzzle is this: if the American public distrusts lawyers more than all professionals and holds judges in higher esteem, then why do Americans believe strongly in the adversarial system, where lawyers make all the important procedural decisions during trials?

Asimow discusses possible reasons for this paradox but focuses on one in particular: the influence of popular cultural portrayals of the trial process. This reason is rooted in “cultivation theory,” which proposes that people often form opinions based on the fictitious stories of pop culture media.

In Asimow’s view, the popular television show *Perry Mason* greatly influenced how the public looks at lawyers. *Perry Mason* taught media consumers that the adversary system delivers the truth. Even though Americans hate and distrust lawyers, they want a good one by their side. Countless films and television shows since *Perry Mason*’s day have conveyed the same basic message, solidifying Americans’ bone-deep belief in the adversary system.

In sum, since Americans learn about the justice system from popular portrayals of it, it should not surprise us that they embrace the cultural icons that make up the pop culture’s legal landscape. *Bandes* shows us how cultural portrayals of judging constrain our discourse about judges. Similarly, Asimow shows how the media construction of *Perry Mason* has enhanced the adversarial role of lawyers.

Like *Bandes* and Asimow, Professor Regina Austin is also interested in popular cultural representations. However, much like critical race theorists and feminist legal scholars transformed how legal scholars understand law’s effects on society, Austin brings a critical race & critical feminist perspective to bear on popular culture. She wants us to look especially at how cultural factors—the context in which certain stories arose—might be missing from films we see.

To situate Austin’s critique, let us recall that many fiction films have been made about civil litigation, among them *A Civil Action* and *Erin Brockovich*.¹⁴ Such films often follow standard story lines

14. Chase develops what he terms the “master narrative” of cinematic portrayals of tort law in four films, *THE VERDICT* (20th Century Fox 1982), *CLASS ACTION* (20th Century Fox 1991), *PHILADELPHIA* (Clinica Estetico Ltd. 1993), and *THE RAINMAKER* (American Zoetrope 1997).

involving conflicts between an average citizen and a powerful but irresponsible institution.

Film documentaries that examine powerful institutions sometimes employ a similar critique, but often their focus is not explicitly on law or legal rights, but on putatively anti-social (though not necessarily illegal) behavior of large corporate institutions.¹⁵ Morgan Spurlock's popular documentary film *Super Size Me*, about fatty McDonald's restaurant food, follows this path.

In her Symposium Article, Austin examines how Spurlock's film ignores several factors that might actually have made his film much more situated in the culture, including the impact of race, gender, and socioeconomic status on "super-sized" Americans. Although Spurlock's film was initially inspired by a highly publicized lawsuit in which two African-American teenage girls from the Bronx allege that eating McDonald's food caused them to become obese and to suffer from obesity-related medical ailments, Austin notes that Spurlock neglects to address how racial, gender and socioeconomic cultural values and norms interact to affect rates of obesity in America.

Austin's critique of *Super Size Me* offers several hypotheses for why poorer minorities, especially women, are more likely to be obese than affluent white Americans based on consumption of fast food. For example, fast food restaurants are cheaper and oftentimes more abundant than grocery stores in poorer communities; they are safe, and clean; they offer a family an inexpensive experience outside the home; they save time for tired and overworked parents.¹⁶ Furthermore, cultural differences between white and black Americans may also have an impact on higher obesity rates in the minority population.

We can analogize Austin's critique to that posed by critical race and gender theorists to law more generally. The "frames" chosen to describe legal issues present in a given controversy often obscure the role of race, class or gender. This is true even for "frames" chosen by those who are critical of law or popular culture.

See ANTHONY CHASE, MOVIES ON TRIAL: THE LEGAL SYSTEM ON THE SILVER SCREEN 108 (2002).

15. See Austin, *supra* note 7, at 691-92 & nn.16-23.

16. Austin may be referring here to decades of work by community activists and lawyers to find ways to ensure healthier food is available in impoverished communities.

Similarly, Austin notes, the frame chosen by Spurlock affects how we see obesity. Spurlock critiques corporate advertising and obliviousness to the unhealthful bodies that would result from reliance on fast food. But, as Austin cogently explains, Spurlock nowhere examines the disparate impact on impoverished communities, many of which are majority minority, and communities in which working women have few healthy food choices.

Finally, Austin reflects on the difficulties that filmmakers of particular (elite?) backgrounds may have in contextualizing documentaries to take into account poverty and race. In an earlier article, Austin examined how “Law-Genre Documentaries” could be employed in the service of public interest advocacy.¹⁷ She made the point that documentarians who engage in activism have to overcome the challenge of behaving paternalistically towards their subjects, while maintaining fidelity to their craft.

The concluding challenge posed by Austin to documentary filmmakers in both this and her earlier article is to address the reality of poverty and race without either meddling, or treating their subjects paternalistically.

The last piece in this section, *A Manifesto for Visual Legal Realism*, concludes with a call to lawyers and legal scholars. According to Professor Richard Sherwin, for generations at least some legal scholars saw law as an autonomous discipline, separate from culture, with its own distinctive style of reasoning and discourse.¹⁸ Consistent with the views of other scholars writing for this Symposium issue, Sherwin argues that these supposedly “autonomous” disciplines were never very autonomous in fact.

Focusing attention on language, images, and communications, Professor Richard Sherwin urges that lawyers need to understand the

17. Regina Austin, *The “Next New Wave”: Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809 (2006).

18. See, e.g., Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 (1987). However, in contrast to Posner, I would suggest that the idea of the autonomy of law is associated with 19th-century American Classical Legal Thought, whose decline as a mode of reasoning could be dated to key writings of Oliver Wendell Holmes, such as *The Path of the Law*, 10 HARV. L. REV. 457 (1897), and *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894), date the “decline” of the view that law was autonomous (or, more accurately perhaps, the rise of legal realism) to a much earlier time. See generally *Introduction to THE CANON OF AMERICAN LEGAL THOUGHT* 1, 1–18 (David Kennedy & William W. Fisher III eds., 2007).

fluidity between law and popular culture. The borders between the two are porous; law bleeds into popular culture, and the feedback loop ensures that culture deeply influences the meaning and discourses of law.

For more than a decade, Sherwin has been advocating a new breed of scholarship that explores techniques of persuasion and framing, particularly by examining how visual technologies change the very nature of how we learn.¹⁹ Sherwin's core insight is that proliferating technologies of communication are transforming the way people map language, social cues, and visual stimuli. The *form* in which a given communication takes is transforming the *substance* of what is conveyed.

Sherwin thus calls for a deeper scholarly understanding of visual knowledge. Visual learning is nonlinear. When we see images, our brains work in associational rather than logical ways. More than written or oral communications, visual images call for emotional responses. Sherwin argues that lawyers need to understand better how technologies of the internet, film and television are changing how people learn.

Announcing a "manifesto for visual legal realism," Sherwin calls attention to the profound effect of visual culture and multi-modal communication technologies on legal practice. This effect is clearly evident in persuasion techniques by practicing attorneys, who borrow from well-known film or television conceits in both their rhetoric and visual exhibits. It is also present in the minds of jurors, whose decision-making suggests influence by memes from popular culture (and the attorneys that exploit them). Acknowledging this influence is important to effectively confront any knowledge gaps or distortions it may cause.

III. CRITIQUING LEGAL FILM CRITICISM

A symposium on popular culture and law should also ask penetrating questions about cultural scholarship itself. For example, what does legal film criticism help us understand?

Professor James Elkins performs the task for us. He offers a sort of historiography of film criticism, to examine what he describes as

19. Sherwin does this through his website, Visual Persuasion Project, <http://www.nyls.edu/pages/2734.asp> (last visited Apr. 17, 2007).

“the new ‘law and film’ scholars, to see how *they* engage legal films.”²⁰

Elkins takes as his texts two types of lawyer-in-film criticism: first, Elkins challenges the “reality critique”—the supposition by some legal scholars that law as portrayed on screen inaccurately represents law, lawyers, or the “legal system.”²¹ As described by Elkins, the “reality critique”

is, at once, a reassuring move for legal film critics—it . . . draw[s] on a purported expertise the lay viewer does not have—and it represents a substantial failure. The problem with the reality critique is that it props up and maintains a convention of legal film criticism that leaves us thinking we are film critics when what we are doing is defending the legal profession.²²

Elkins’s point is not so much that the reality critique is faulty, but that it is uninteresting.²³ So what if a film doesn’t mention the distinction between trial judges and appellate judges, or gets “the law” wrong?

In Elkins’s view, “reality criticism” does not contend with film as art; it impedes confronting the text and drama as it unfolds. Focusing on legal “inaccuracy” absolves the legal scholar from true film criticism, such as how a film may indeed embody “truth” despite its infidelities to law-as-known-by-lawyers. The reality critique obscures the meaning of lawyer films even as it purports to be essential to their critical evaluation. It leaves us with an inadequate understanding of a film as a film, as a story, as a drama with meaning, as a struggle to tell stories about justice.

Turning to his second subject, Philip Meyer, Elkins quotes Meyer’s view on the relationship between the trial and the film about law:

Like the movie-maker, the trial attorney is an oral cultural storyteller who tells fact-based narratives that convey a story and a particular vision of the world. The principles of narrative ordination for a trial storyteller are like the

20. See Elkins, *supra* note 9, at 754.

21. Elkins chooses the work of David Raye Papke to illustrate this thesis. See *id.* at 755.

22. *Id.* at 767 (footnote omitted).

23. *Cf. id.* at 780–81.

aesthetic structures that compel movie directors to craft stories along a tightly ordered narrative spine.²⁴

To Meyer, the trial attorney and movie director share important characteristics: both portray events in an external world. Elkins is sympathetic to this view, for it treats filmmaking and lawyering both as crafts. Both the filmmaker and the trial lawyer use narrative devices in telling a story; both seek to exploit common frames of understanding.

But film criticism for lawyers can't be just about learning to be better lawyers, or to learn how to tell better stories. Elkins suggests also that the legal film critic's ultimate goal must be to unsettle our conventional selves, to attempt to understand how justice might or might not unfold, and to challenge conventional views of lawyering. Legal film critics should therefore view films about law like other films, as stories or dramas with meaning, as struggles about justice.

IV. CONCLUSION

The articles that make up this Symposium all address the subject of law and culture from the perspective that the "border" between the two is fluid. Literature tells stories, as do our law cases. Law is influencing film and literature, and culture is rebounding on law.

The aspiration of a Symposium like this is to add perspective; not definitively to resolve questions but to bring multiple views to bear on a complex relationship. The articles that follow offer unique contributions to studies of law and literature and law and film. We hope you enjoy them.

24. *Id.* at 769 (quoting Philip N. Meyer, *Law Students Go to the Movies*, 24 CONN. L. REV. 893, 897-98 (1994)).

