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## A LAW CULTURE DIAGNOSTIC\*

by

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Review of *When Law Goes Pop: The Vanishing Line between Law and Popular Culture*

Author: Richard K. Sherwin  
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## A LAW CULTURE DIAGNOSTIC

It has become increasingly clear that law is no longer (if it was ever) an autonomous discipline. In the past 25 years, law has been theorized and re-positioned from disciplinary perspectives as divergent as economics and literary criticism, socio-biology and rhetoric, critical theory and religion. Richard Sherwin's *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* follows in this tradition, exploring law from a broad contextual/social/ political perspective. Sherwin's proclaimed interest is popular culture, but he writes as a cultural diagnostician exploring some difficult questions: What happens when the stiff formality of law and the social institutions that preserve law's stability and legitimacy are subjected to the powerful influences of today's new visual mass media and its focus on images, associative reasoning, spontaneity, and the shaping (and deforming) of our stock of cultural stories? More particularly, what happens as lawyers – Richard Sherwin in *When Law Goes Pop* refers to them throughout the book as "savvy lawyers" – use the power of media visual images and stories (the production of which is market driven) to shape the outcome of courtroom litigation to benefit their clients? Is law and our meaningful understanding of it, endangered or enlightened by the influence of popular culture? These are the questions Richard Sherwin, Professor of Law at New York Law School, addresses in a masterful, exhilarating, sometimes frustrating account of the influences of popular culture on law and courtroom litigation.

The reader should be forewarned – Sherwin doesn't present a systematic theory of how law undergoes cultural change, nor is he tempted by the academic's propensity to lay out definitions and then shoehorn observations to fit. For example, Sherwin simply ignores on-going efforts to distinguish (or erase) distinctions between "high culture" and "popular culture." Some academics and theorists will be disappointed in the way Sherwin ignores what they take to be preliminary and basic. Still other readers will object to the absence of empirical research findings; Sherwin doesn't

try to measure anything or report the efforts of those who have. He does, however, observe widely, interpret, and speculate wisely. His method is that of a cultural diagnostician. He doesn't say much about law – with a capital L – but focuses on the law practiced by lawyers who are now most attuned to popular culture. [End page 48]

*When Law Goes Pop* is one of the first engaging book-length accounts of lawyering to take into account the new narrative jurisprudence and scholarly interest in legal storytelling. Lawyers are storytellers, and always have been, as Sherwin observes, but the more significant point is that the legal profession (and legal educators) are becoming more conscious of the way lawyers tell stories and the effect of their storytelling (and their orientation toward it) on the fundamental virtues we associate with law. And what are these virtues? Law provides a regular means of resolving disputes by sorting through available facts (limiting the facts considered when the exclusion supports a more "rational" decision), reducing prejudice and bias, seeking so much of the truth (always elusive) so that legal decisions will be just.

The popular conception of lawyers today runs the gamut: lawyers are shysters and liars (brazenly empowered by their profession to lie) and they are the culture's orators and storytellers who help us understand and resolve the most troubling conflicts we have with each other and the world we inhabit. One of my law-teaching colleagues, [David Barnhizer \(2000\)](#), recently argued that in these diverse conceptions of lawyers we find lawyers are both "angels of light" and "princes of darkness." Sherwin follows Barnhizer in seeing that lawyers represent a part of our culture worth preserving (as "angels of light") but Sherwin warns that the virtue work of lawyers is in danger when they (and we) take up "media logic" and forego "law logic."

Sherwin's *When Law Goes Pop* is, as I have noted, a part of a larger intellectual movement to understand law from a cultural perspective, but oddly enough it is also part of still another tradition – a growing genre in which contemporary lawyering undergoes an ethical audit. Sherwin's assessment of lawyer ethics is refreshing in that he avoids the usual literature (for example, moral philosophy) and explores the ethics of lawyering from the standpoint of the critical polarities of post-modernism: reality/fiction; fact/fantasy; appearance/reality; truth/fiction (pp. x, 7, 146). Sherwin is concerned that popular culture influences on law will result in "image-based manipulation of irrational desire, prejudice, and popular passions" (p. 7), which will be destructive of the virtues we associate with law.

## OBSTACLES TO CULTURAL DIAGNOSTICS

There are serious obstacles to doing the kind of cultural analysis and diagnostics that Sherwin undertakes in *When Law Goes Pop*. Law culture diagnostic work is made problematic by the fact that the world of law has not been turned upside down or revolutionized by the influence (infection/affliction) of popular culture. Courtroom trials have never been forums reserved for truth-telling; lawyers have always been rhetoricians (of the classic and not so classic sort); and jurors are not, today nor have they ever been, paragons of rationality and objectivity who can step out of their prejudices and reach beyond their culturally-shaped understandings of the world (which is of course exactly what we ask them to do). [The classic film portrayal of a jury working through its biases and prejudices is *12 Angry Men* (1957)]. But to say there has been no revolution does not mean that subtle and significant, and according to Sherwin, disturbing changes, are not taking

place. We might, with Sherwin, ask: What changes can we expect from jurors who have learned law from images/stories portrayed in mass media venues? (pp. 19-21, 107). Even experienced courtroom lawyers may not as yet have tried to articulate (or adjust the way they practice law) to the fact that jurors are now more likely to have learned about **[End page 49]** law and lawyers from popular culture media than any other source. Sherwin is working not with revolutionary upheaval so much as the kind of erratic (and subtle) change that hides its effects. Consequently, Sherwin's cautionary observations are in the nature of an early warning rather than an autopsy of a social institution on the rocks. But Sherwin's warning does, at times, take on an ominous tone, as for example, his argument that: "[S]keptical postmodernism leads to law's vanishing point." (p. 172). But for the most part, Sherwin is, in his words, simply trying to follow (and confront), "the alien story lines of our time, both familiar and newly emerging." (p. 12).

While some academic readers will lament the absence of empirical research or research findings, *When Law Goes Pop* isn't a social science treatise and doesn't purport to be. (I suspect there is at present insufficient social science research data, to do much more than provide a set of interesting footnotes to Sherwin's cultural diagnostics.) The usual alternative to social science research is theory and while Sherwin's book is theoretically sophisticated he has done an admirable job of keeping his theory off center stage. Sherwin doesn't eschew theory, or argue theory, so much as he simply puts theory to interpretive use, never letting theory get the upper hand. Theory is put to interpretive use in the form of a series of interesting case studies, focusing on what Sherwin calls "notorious trials," the courtroom tactics of "savvy lawyers," and an analysis of films (the documentary *The Thin Blue Line*, the two versions of *Cape Fear*, and Kieslowski's *Red*).

Every cultural observer is dogged by fundamental conflicts, in Sherwin's case it is the tension between postmodernism's demystification of law ("postmodern skepticism") and the old virtues associated with law, which results in "nostalgia." (pp. 8-9). We may now see through the fantasy of law's self-representation as an embodiment of objective truth and justice (p. 7), but we must still find a way, according to Sherwin, to believe in law, to re-mythologize what has been deconstructed by the relentless critical skepticism of postmodernism. (p. 172). [More on myth, pp. 201-202]. Sherwin sees enchantment and disbelief (pp. 11, 17), denial and nostalgia (p. 172) as the fundamental tension, and it results in a time of "both danger and opportunity." (p. 209).

## THE DIAGNOSIS

Sherwin says he set out on this exploration of the influence of popular culture on law because "something is up," "a collective change of mind and culture" that has placed law under "great strain." The result is that the traditional (virtuous) meanings we associate with law are being "flattened" and have become "thin." (pp. x, 4, 22). Sherwin fears these "deleterious effects" (p. 7) will result in further loss of critical reflection (p. 22) and a "resurgence of the irrational" (p. 209), and ultimately, a collapse of meaning that will threaten law's stability and legitimacy.

Sherwin attributes these effects to the "synergist impact" of new communication technologies, market demands, and postmodern ideas (primarily constructivism). (pp. x, 4, 8, 22, 27). The new "media logic," if I understand Sherwin, operates something like a slow-acting virus; it ever so gradually infects a healthy organism (law) which has achieved a form of "law logic" on which the culture depends. **[End page 50]**

One result of the invasion of law by popular culture is that "law comes to inherit the baggage of postmodern anxiety. . . ." (p. 226). The anxiety manifests itself in both personal and cultural form. In law it has created what Sherwin calls (and describes at some length) as the "jurisprudence of appearances" (pp. 141-168). We are afflicted with this jurisprudence of appearance because everything the visual mass media touches "bears the mark of reality/fiction confusion." (p. 141). Sherwin explores "what happens to law when it comes to be dominated by image and perception," "when law enters the domain of the hyperreal, a realm in which appearances battle appearances for the sake of appearances – and where images risk spinning out of control." (p. 141). Law thoroughly invaded by popular culture will, according to Sherwin, present problems far beyond those we associate with lawyers who tell fanciful stories to benefit their clients. The "deleterious effects" that concern Sherwin are the erosion of basic beliefs by which we know what is true and meaningful, resulting in a world in which fewer and fewer of us know the difference between "truth and fiction, image and reality, fact and fantasy" (p. 146).

The response to a popular culture that overwhelm us (and law), according to Sherwin, is a stance of "detachment, irony, and cynicism" (p. 144), a stance that inoculates us against the worst effects of popular culture but comes with its own serious and debilitating side-effects. The cure for postmodern skepticism, re-enforced by visual mass media and constructivist theories of reality, may turn out to be as poisonous as the symptoms it addresses.

In psychological terms, we might reformulate Sherwin's diagnosis of law in something like the following way: Individuals have begun to experience anxiety about law, and even lawyers are increasingly anxious by the work they do, especially their efforts to persuade juries using (and manipulating) stories and story technology. (Or put differently, law itself can be diagnosed as suffering from anxiety.) Between serious attacks of anxiety induced by "notorious trials," we experience sustained periods of confusion in which we (patient/citizen/consumer/TV viewer/juror/lawyer) cannot distinguish between fact and fiction, between appearance and reality. Social institutions like law, which once helped us distinguish between fact and fiction, appearance and reality, are now so invaded by "visual mass media" (p. 21) and the "visual logic of film and TV images" (p. 4) that law loses its meaning and its stability and legitimacy are threatened. The symptoms of anxiety are expressed in, and most fully exposed in, our "notorious trials." These trials, rich with meaning and symbolic significance, reflect the serious and debilitating underlying fault-lines in our culture and our psyches. They are at once a kind of manic acting-out and a healthy airing of conflicts (and secret desires). But we do not, of course, heal ourselves by way of the occasional "notorious trial," but we can use them to better understand what ails us. The meaning we might derive from such trials and the work of our best lawyer storytellers is attenuated by the fact that we are so over-hyped by a manic culture whose spasms of belief and disbelief are manipulated by the visual images and cultural stories produced by the market demands of popular culture.

To diagnose the influence of popular culture on law as harmful, as Sherwin does (with caveats), requires him to view law in some healthy (prior) state subject to new afflictions brought on by popular culture. But Sherwin knows that law has its problems, and that most of these problems were not induced by popular culture, indeed, that the law/popular culture relationship is **[End page 51]** itself not a "new phenomenon." (p. 7). So Sherwin makes some rather adroit moves to address these concerns, but leaves the reader unclear about exactly where he stands on the status of law

(and lawyers) un-afflicted by today's heavy saturation of popular culture influences. If the stability and legitimacy of law are now threatened, as Sherwin fears, then he must envision an old (healthy) order of things – a time when legal meaning was, well, deeply meaningful. But Sherwin is not an apologist for the old legal order and warns against a nostalgic account of law's great virtues. [By the old virtues, Sherwin means that "time when universal truths, and rational norms reigned" (p. 17), when law was associated with objective truth and universal justice. (p. 7)]. "I maintain," says Sherwin, "that the advent of postmodernism is not without value with regard to law. Certain unrealistic aspirations and repressive tendencies in the immoderately rationalist culture of modernity are now undergoing an important and necessary corrective." (p. 7). In this admission, one sees an alternative interpretation to Sherwin's more cautious warning about law and popular culture. The "deleterious effects" of law influenced by popular culture may, contrary to Sherwin's argument, be offset by the vigorous (and healthy) demystification of law (which in turn makes possible a more rational mystification). In this interpretation, which shares Sherwin's understanding of the symbolic and mythic significance of law, law is seen as cultural institution which moves (ever so painfully) through a cycle of mystification and demystification, a cycle that renews foundational virtues by exposing "unrealistic aspirations and repressive tendencies." (p. 7). Sherwin's cautionary warnings about popular culture may, if one follows this interpretation, prompt an assessment of popular culture's affirmative contributions to a more broadly-based (popular) and distinctive place for law in American culture and the lawyers who serve as "angels of light" and "princes of darkness" (in Barnhizer's characterization).

### AN UNFULFILLED PROMISE

Sherwin promises early in the book to offer an alternative to the dilemma posed by postmodernism (as reflected in constructivist theory and visual mass media) which results in skepticism and denial on the one hand or pure nostalgia and glorification of the old days (prior to the influence of popular culture) on the other. Sherwin calls his new, middle-way between skepticism and nostalgia, "affirmative postmodernism" and he devotes a concluding chapter to efforts he calls "Redrawing the Line between Belief and Suspicion." (pp. 235-264). "[I]s it possible reflectively to reframe the myth of modernity in a way that allows us to avoid the excesses of skeptical postmodern irrationalism and disenchantment on the one hand, and of modernist rationality and repression on the other?" (p. 233). This is the question Sherwin addresses in his fitful and frustrating conclusion to an otherwise stunning work of law culture analysis.

While Sherwin has skillfully and artfully practiced something that might be called "affirmative postmodernism" throughout *When Law Goes Pop*, his efforts falter when he tries to spell-out the theoretics of this new middle-way. Sherwin contends he has told the reader what "affirmative postmodernism" is (p. 229), but it seems more accurate to say he has told us what it is not (it's not the dichotomizing of Plato, or the super-rationality of the Enlightenment; and it is not the defensive, ironic, detached psychological response to skeptical postmodernism).

So what is affirmative post-modernism? It is an alternative to radical skepticism and **[End page 52]** conservation nostalgia and it is, according to Sherwin, bound up in "tragic wisdom." It will take "tragic wisdom" to get things right in a culture so awash in image and rhetoric, intensified contingency, and constant multiple claims to truth; a world in which postmodernism and popular culture have put fiction and reality into constant play. In his exploration of a foundation for

"affirmative postmodernism" Sherwin, oddly, turns to theorists like Habermas and Rawls but only to criticize their failure "to give due consideration to the particular linguistic, cultural, and cognitive competencies by which those who advocate the norms in question, and those whose actions are judged accordingly, construct their own disparate senses of self and social reality." (p. 236). Sherwin questions the way Habermas and Rawls posit "abstract notions" of right, justice, and truth delivered from the top (theory) down (to the world where we live in popular culture constructed worlds). (p. 236). But how are we to address such a failure? Wouldn't any theoretical conception of "tragic wisdom" suffer the same problems? And if "tragic wisdom" is not to be theoretically devised how is it to be formulated and known? Perhaps "tragic wisdom" can only be seen and experienced in the form of individual lives, particular communities, and given its most intentional and artfully crafted form in the work of novelists/poets/dramatists who present tragic wisdom in fiction (hand-crafted, created reality). I suspect Sherwin is trying to say something of this sort about "affirmative postmodernism"/"tragic wisdom" but he turns to theory at just the juncture when it can serve him least. It results, in my view, in what I would characterize as a rather thin conclusion to a robust cultural analysis and diagnosis: "Tragic wisdom expressly takes into account the contingencies, uncertainties, and limitations of human understanding and the imbalances that exist in particular linguistic interactions. In this way it invites us to take cognizance of the competing claims or warrants for belief that arise within a given conflict situation . . ." (p. 237). Sherwin has the right impulses, and wants to help us navigate an obstacle-strewn path, but provides little helpful guidance. Indeed, when he outlines the "skills and techniques" that will permit us to evaluate the "discrete claims to truth and justice" (p. 237) which confront us, he lays out a line of questions and there's not a skill or technique in sight. In my view, an affirmative postmodernism grounded in tragic wisdom is best seen and understood in the case studies Sherwin undertakes, that is, in his interpretive and diagnostic work, in contrast to his theoretical efforts.

Sherwin offers a host of suggestions which he identifies with "affirmative postmodernism," but I find them disconcertingly flat in comparison to the rich, theoretically informed, and sophisticated close readings of the various cultural texts which inform *When Law Goes Pop*. Sherwin's suggestions include: cultivation of "a more sophisticated appreciation of the extent to which the 'antinomies' of modernity may be viewed as a complex mosaic of interpenetrating forces and constructs" (p. 246); more interdisciplinary studies (p. 246) (in legal education, Sherwin calls for "a new interdisciplinary domain of law, media and cultural studies") (p. 252); "restore the discrete virtues of disparate modes of legal discourse and reasoning and redress imbalances in the way power is allocated among them" (p. 246) (as best I can interpret it, this means we need jurors who can exercise common sense and judges who can do best what good judges do and legislators who act like real/ideal legislators); we must pay more attention to the cost of externalizing the means of repression ("excessive police power") (p. 247); we need more "media literacy skills" and "[t]he public needs to be trained to decode the skewed meanings and distorted effects of mediatized legal representations" (p. 252); we need to further develop our critical thinking skills (p. 252); we need more "deliberate strategies" to encourage "cultural affirmation" (p. 253); **[End page 53]** "cultivate heightened critical appreciation" of the work of "cultural critic(s)" (ibid.); work more with "notorious cases" (ibid.) (trying to view them "as a rich source of knowledge and insight rather than as simply a bizarre media spectacle.") (p. 253); and develop more participation, choice, and responsibility "regarding the creation of self and social reality" (pp. 253-54).

## PRAISE FOR SHERWIN'S DIAGNOSTIC WORK

In summary fashion, let me outline the substantial accomplishments of Sherwin's *When Law Goes Pop*:

(1) Far too much cultural diagnostic work is burdened by the reiteration of theory, and overly confined by existing academic conceptions of intellectual work. To read academic writing today one needs a glossary of terms and a handbook on contemporary theory. Sherwin has done an excellent job (with the exception of his efforts to describe "affirmative postmodernism") to use theory without dragging the reader into a theory thicket. It is, I think, a compliment to Sherwin to say, he is a theory man who strives not to let his theory get the best of him. The focus in *When Law Goes Pop* is on ideas, analysis, and interpretations, not theory mongering. Sherwin is a thinking man who takes popular culture and visual media seriously. By seriously, I mean that Sherwin's knowledge of (and background use of) psychoanalysis, narratology, rhetoric, constructivism, film and communication studies provide a rich context for his law culture analysis.

(2) Sherwin is at his best in the close reading of trials and trial lawyers as cultural texts. The most intriguing and pedagogically useful sections of *When Law Goes Pop* consist of Sherwin's nuanced readings of an eclectic set of texts/trials/legal cases: Gerry Spence's closing argument in the Randy Weaver case (pp. 52-66); the history of Randall Dale Adams and the making of *The Thin Blue Line* (pp. 107-126); an insightful, detailed, psychoanalytic reading of the film, *Cape Fear* (1962) and its remake in 1991 by Martin Scorsese (pp. 171-185); two Supreme Court cases, *Estes v. Texas* (1965) and *Chandler v. Florida* (1981), decided 16 years apart which prohibited the televising of criminal trials and then permitted it (pp. 152-168); some fine pages on David Lynch's *Twin Peaks* (1990) and his film *Lost Highway* (1996) (pp. 187-194); commentary on a Philip Haas film adaptation of Paul Auster's novel, *The Music of Chance* (pp. 195-200); and some interesting observations on the Krzysztof Kieslowski film, *Red* (pp. 254-260).

(3) Sherwin presents a unique perspective on the new "narrative jurisprudence" and the growing fascination with stories and storytelling by legal academics (as they join academics in virtually every discipline).

(4) *When Law Goes Pop* is an important first look at the new "savvy lawyer" (Sherwin's term) who knows (and puts to use) visual mass media, popular culture, rhetoric, story basics, and myth.

(5) Sherwin doesn't hold himself out as an ethicist but *When Law Goes Pop* is [End page 54] surprisingly good on the problem of lawyers and truth. Sherwin presents a simple, elegant, and workably productive, instructive scheme on the kinds of truth we find (and try to discover) in the courtroom – distinguishing between factual truth, legal truth, and symbolic truth (pp. 49-50). He explores and helps the reader understand how representations of law in popular culture both clarify and confuse these various forms of truth.

In Sherwin's view truth is complex, bound up as it is in the way lawyers tell stories, the purposes (and means) by which these stories are told, our postmodern and constructivist understandings of reality, the market driven nature of mass media images, and the manipulation of cultural stories within the world of popular culture. We might say, of this aspect of Sherwin's



study, that it's a round-a-bout exploration of quite old themes – truth, justice, and order – and how they are represented within a culture saturated, mediated, and manipulated by mass media visual images and stories.

(6) There are any number of books, which focus on particular (and selected) notorious trials, but little in the way of cultural analysis of the meaning of these trials. Sherwin argues that the most celebrated trials presented to us today are "cultural riddles" (p. 75).

(7) Sherwin's work far exceeds in reach and sophistication much of what now passes for popular culture studies. *When Law Goes Pop* is a sophisticated (if speculative) exploration of what happens to law "when skeptical postmodern theory, communications technology, and the demands of the marketplace converge, as they are now doing" (p. 227).

(8) Sherwin's *When Law Goes Pop* will be of special interest to colleagues in the criminal justice field as much of the book focuses on criminal trials, trials made increasingly visible and compelling by *CNN* and *Court TV* coverage, informed by a steady offering of TV drama programs (*The Practice*, *Law and Order*, *Alley McBeal*, and new offerings every fall).

(9) Finally, Sherwin has presented a sophisticated account of the subtle changes in our legal culture induced by the growing reaches of popular culture. He provides a way of "reading" these changes (something like taking sonar readings to see what lies in the depths beyond what we most readily see and hear) and an interpretation of their practical effects. Sherwin suggests that to understand law and lawyers and the "trials" in which law exposes itself most fully, requires a new understanding of lawyers as storytellers, working with different kinds of truth, and the effect of media images and stories on both the work of lawyers and jurors.

The forces of modern culture – theory, technology, and commerce – are bearing down on us. As these forces invade a social institution like law they are going to change, erode, and threaten the virtues we associate with law – stability, meaning-making, rationality, truth, justice. The changes must be observed, and the threat studied, and this is what Sherwin has done so well. **[End page 55]**

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**WEB RESOURCES**

"Picturing Justice: On-line Journal of Law and Popular Culture," <<http://www.usfca.edu/pj/>>

"Lawyers and Film," <<http://mentalsoup.net/jelkins/lawyersfilm.shtml>>

**ENDNOTE**

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