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

by

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

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Life today resembles a fictional paradigm more and more and sometimes even outdoes the movie version. O. J. Simpson's ride in a white Bronco might well have been an improbable episode on a television cop series; the televised Simpson and Menendez trials so convincingly melded the forms of [the popular television programs] "L.A. Law," "All My Children," and Oprah that talk show and soap opera ratings fell off.

(Goldberg, 1997, §2, p. 1)¹

When Law Goes Pop is the first book-length appraisal of the impact of popular culture on the criminal justice system in the United States written by a legal theorist. The author, a former prosecutor, skillfully motivates the need for the appraisal of this influence. Sherwin refers to numerous instances of the influence of the media on the framing processes of jurors and judges alike. He encourages his readers to think not only of the immediate import of this influence, but also to consider the potential long-effects of this influence on the justice system. Sherwin is alarmed at the threat posed by "skeptical postmodernism" most particularly. He is

determined to show us the roots of this threat within the nature of popular culture and to address productively the threat they pose.

Sherwin is not the first legal scholar that has remarked about the influence of popular culture representation on the justice system. Various ethnographic studies of the courtroom, (e.g. Schrager, 1998) have mentioned it in passing. However, Balkin first raised the effect of popular culture as a source of narrative frames as a troubling concern for legal scholars concerned with the integrity of the legal process. He provided a telling analysis of the influence of television at the highest level, from the Supreme Court nomination hearings of Clarence Thomas:

Thomas's defenders, however, invoked the plot of a contemporary movie, *Fatal Attraction*, to paint [Anita] Hill as a spurned lover ... Hill's accusations could then be reinterpreted as those of a calculating, unstable vixen ... narrative [End page 136] framings had enormous rhetorical power and may have helped turn the tide in favor of Thomas's eventual confirmation (1998, p. 197).

However, it is Sherwin, in this well documented account of the patterns and mechanisms of influence between the criminal justice system and popular culture, who opens our eyes to the breadth and depth of the connection between these two spheres and the potential for harm that this creates. The majority of American citizens form their opinions about the criminal justice system through the mass media, and more often than not, Sherwin contends, from fictional accounts of the trial process. His thesis is that this process takes on a negative cast within a postmodern culture, where "the symbols replace the real" to such an alarming extent that we mistake representation for reality. As Baudrillard noted about the present, "there is no corpse of the real, and with good reason, the real is not dead, it has disappeared" (1997, p. 141).² The author advances ample proof that due to this disappearance, we make due with our familiarity with the simulacra, with sometimes humorous (but often serious) effects.

THE EFFECTS OF THE SIMULACRA OF CRIMINAL JUSTICE

It appears that people construct prototype representations of crime categories similar to the way other social categories are organized, but contrary to the way these categories are organized under the law

(Smith, 1991, p. 863)³

Remember, your average juror spends four to six hours a day with a television in their home

(Sherman, 1993)⁴

The impact of American popular culture's representations of the criminal justice system is such that Canadian citizens routinely complain after arrest of having not been read their Miranda rights (p. 298, n. 27). Of course, the U. S. Supreme Court's jurisdiction ends at the 49th parallel, but the hegemony of American representations of the legal process does not. Sherwin's examples of the influence of the "frames" of the criminal justice system are taken largely from film, and he uses them to demonstrate how they can be seen as both causes and effects of changes in the American zeitgeist.

The detailed commentary on the documentary *The Thin Blue Line* and the differences between Thompson and Scorsese's versions of *Cape Fear* demonstrate that a feedback loop links the criminal justice system and the way it is represented in popular culture. His analyses of these films and the feedback loop fulfill three functions. They trace shifts in attitudes towards the courts, they reveal how public anxieties (as reflected in these films) are seized upon by lawyers and lawmakers, and they reveal how an ever-increasing number of contradictory "ideologemes" about the possibility of justice circulate within popular culture. **[End page 137]**

Sherwin also advances general evidence for the fact that general patterns of media representations of crime and criminals have affected the justice system. It is not the content of the media that he faults for unwarranted changes in the structure of the legal process, however, but rather its aesthetic form. Following Baudrillard and McLuhan, Sherwin adopts a position of technological determinism,

although his account of this process is tempered by an awareness of the role of the market in shaping the technological patterns. He singles out television in particular as a force that erodes the public's ability to think critically about crime, as its preference for the sound bite and pseudo-drama lead viewers to consider criminality in a dubious fashion.

Television, more than any other medium, is responsible for a flattening of our perceptions, making it impossible to burst out of the frame and to see crime as a result of anything other than a demonized class of uncontrollable "hyper-criminals." However, it is not simply that the threat to our safety posed by criminal violence has been dramatically over-inflated by networks hungry for the ratings they can procure when they cater to our voyeuristic impulses; it is more importantly true that television promotes an awareness of the condition of hyper-reality.

THE SEDUCTIVENESS OF HYPER-REALITY

Sherwin posits that there are two sets of effects of "the law going pop." The first is the snowballing trend towards the court system's reliance on the techniques of representation most common in popular culture. This trend leads to a moment when the legal system becomes the parasite rather than the symbiote of media representations of the criminal justice system. In the past, lawyers merely made surreptitious or causal references to popular representations of the justice system (e.g. *Perry Mason* or *Dragnet*) to punctuate their speeches. At present, effective summations (which are often the pivotal moment of the trial) largely depend upon the incorporation or mimesis of mass media formats that have shortened our attention spans and fueled our preference for the immediate gratification of deeply repressed desires.

Rather than delivering marathon speeches, the advocates now often rely upon "summation videos, which incorporate computer-generated graphical representations, or even video clips of movies in order to present a suggestive metaphor" (p. 25). Judges' and other authorities' negative intuitions about the appropriateness of these mass-media style techniques within the courtroom are called into doubt by their sheer weight, and they have begun to accept what would previously have been considered blatantly prejudicial.

The legal scholar George Fletcher highlighted an excellent

example in his analysis of the trial of Bernhard Goetz. Goetz's lawyer, Barry Slotnik, desperately wanted to convey to the jurors the fear of a white person surrounded by four Black⁵ "predators,"⁶ and he smuggled it into the trial, in much the same way as it would be done in the mass media, by means of a dubious re-enactment. Ostensibly designed to discuss the paths of the bullets fired in a subway car, Slotnik's re-creation involved four large Black volunteers, who crowded around the dummy representing Goetz. Fletcher [End page 138] perceptively labeled this re-enactment "a courtroom mini-drama." His explanation of why this was permitted is even more illuminative:

After all, when the television show *20/20* showed a re-creation of the shooting scene, they had cast four black young men in the parts of the victims. Why should Barry Slotnick, as the director of this re-creation, not enjoy the same dramatic freedom? Most observers thought that he should, and Justice Crane temporarily concurred ([Fletcher, 1998, p. 207](#)).

CORROSIVE EFFECTS OF HYPER-REALITY AND OF OUR AWARENESS OF ITS FORCE

To a great extent, the American public has been seduced by the cognitive strategies required to process high-speed visual stimuli (which Sherwin demonstrates is central to producing the "atavistic response" so crucial to advertising). The result is that many people only respond positively to this sort of information, and many no longer have the critical ability to understand why this reliance on this format is dangerous, Sherwin contends. Even more portentous is the fact that techniques drawn from the sales-driven mass media, which have become interpenetrated within the trial format, have reached a stage when they can no longer be skillfully manipulated even by the most experienced and media-literate attorney without provoking a cynicism that defeats their purpose.

These techniques produce an inflation of affective responses that is unsustainable, especially given the fact that their proliferation creates cognitive dissonance, an inability to reconcile disparate points of view. This condition leads to an indefinite suspension of

judgement, since the reference point by which to judge the simulacrum has become the shifting ground created by the incompatible simulacra itself. Even if one can perceive that what is represented of crime in popular culture is not moored to reality, this creates no escape from the effects of a sign system that has broken down the barrier between the categories of reality and fiction. This breakdown is clearly indicated by the effects in ubiquitous re-enactment and obvious re-framing of the purportedly genuine in "reality TV" formats. The inability to distinguish the "real" is indicated by the decision of a news programmer not to air a murderer caught on tape because "it looks like a re-enactment" (p. 15).⁷

Sherwin argues that when the cultural fabric becomes saturated with these fundamentally manipulative techniques, both in popular culture and the trial, the depictions of the legal system leave us incapable of the affective response that they were designed to provoke. The public loses faith in their ability to produce a just response in this cultural context. The ability of juries to respond to the puzzle of re-creating meaning in the courtroom, the ability to attempt to right wrongs and to discover how meaning can be created collectively, must be resurrected in the face of dangers of the proliferation of cynical, aestheticized responses to the abyss of meaning engendered by the simulacrum of criminal justice that we confront. **[End page 139]**

The cynical response is toxic from the point of view of the justice system, as "skeptical postmodernism renders judgement impossible." However, the destruction of the capacity for faithful legal judgement is only the most noticeable of the cultural effects of hyper-reality that have the ability to tear cultures to pieces.

Following James Boyd White, Sherwin claims that skeptical postmodernism endangers the collective creation of meaning that the justice system engenders. White's influence is pervasive in this text, as Sherwin's sense of urgency indicates that he believes there is far more at stake in this transition to skeptical postmodernism than the loss of faith in a once-respected institution. White believes that the primary purpose of the justice system is to serve as a forum for the articulation and recreation of shared meanings and values. Sherwin uses an evocative metaphor to underscore this point, comparing the trial to the Dionysian rites that appease the spirits; the trial also restores order to society by means of a ritual

purification that not only punishes the guilty and compensates the injured. Crucially, however, the trial is an example of how competing values and meanings can be compared and even integrated productively in a just examination that leads to a judgement that affirms our ability to deal positively with a surfeit of perspectives and values. Because the legal system has recourse to what Robert Cover called "the field of pain and death," it is a powerful influence upon those who look to it as a site where the values of the community collectively triumph, although tested by much more than the confrontation with the lawbreaker: by the confrontation with the specter of the breakdown of all meaning.

THE RESPONSE: AFFIRMATIVE POSTMODERNISM

Sherwin believes that the trial can be an example of affirmative postmodernism, where the proliferation of values and meanings can be considered as a source of strength and vitality rather than the root of a skeptical paralysis. In the light of the erosion of meaning through the commodified circulation of images, the justice system can be a source of optimism about our ability to make sense of our collective reality even in the face of the near-infinite number of competing representations.

Sherwin's ideal for the justice system is suggestive of the crux of Drucilla Cornell's *Philosophy of the Limit*, which itself displays the influence of Emanuel Levinas' plea to consider the other as other. Sherwin (following Cornell) believes that if we turn skeptical postmodernism on its head, we see everything as potentially meaningful and important to our judgement – we rise to the challenge of making sense of reality despite its many paradoxes.

In a new twist on the importance of the value of openness to difference, Sherwin reminds us that we must not also suppress the time-tested means of assessing perspectives most prized by the justice system, even though they are no longer fashionable. Precedential arguments and the techniques for the appraisal of logical cogency must not fall by the wayside if we are to regain the confidence to assess the meaning of crime without falling back upon this sort of dogmatism and rejection of differences in perspectives. Sherwin's rationale for the salvaging of a modicum of [End page 140] rationalistic approaches to judicial problems in a postmodern world is evocative of Derrida's response to his critics: "reading otherwise ... means always passing through the classical

discipline, and never having abandoned or jettisoned it" ([Derrida, 1998](#)).

Hopefully, the justice system will then, by means of the segment of the feedback loop which leads back from it to popular culture, not only counter the erosion of its own ability to judge adequately, but also counter the hegemony of skeptical (rather than affirmative) postmodernism. The public, if they were made aware of the way in which the justice system integrates competing perspectives to good effect, can be convinced that it is worthwhile to participate not only in institutions but also in processes where our ability to create collectively affirmed meanings is put to the test. Naturally, the media's hegemony of representations of the criminal justice system will need to be destroyed if this is to be possible.

Sherwin suggests that the trials that should be televised are precisely those which do not mesh well with the media's aestheticization of representations – the trials that are broadcast should be devoid of the sensationalistic elements that currently make trials attractive to the mass media. If this were possible, then perhaps rather than novelty singles being released to chronicle Goetz's crime (witness Ronny and the Urban Watchdogs *Subway Vigilante*)⁸ more reflective public discourse would be stimulated by high profile trials.

PROBLEMS

Sherwin paints an appealing picture of how the feedback loop between law and popular culture might be turned against the tide of nihilism. Unfortunately, his account of the problem is not devoid of problems. The most significant is that it remains unclear, when rationality is reduced to one heuristic tool amongst many, that we would be able to judge whether or not we have balanced it judicially against other ways of perceiving and judging. Sherwin's approach seems to call for a form of meta-judgement (about whether we have in fact been appropriately open to all forms of reasoning, and have done so appropriately.)

For this reason, it is unfortunate that Sherwin dismisses Habermas' theory of discourse ethics in such a perfunctory manner, and that he pays attention only to Aristotle's conception of rhetoric and poetics, but not to the dialectic. As a result, in *When the Law Goes Pop* there exists a deficit of normativity. Sherwin takes a

strong stand against the destruction of the power to affirm shared values but is unable to justify his position, other than by pointing to the consequences. As Habermas would note, Sherwin is reduced to a form of crypto-normativity. This form of argument will make it difficult for Sherwin to engage in dialogue with postmodern legal thinkers who will have no truck with normativity, such as Richard Delgado ([1992](#)).

On the subject of the book's faults, there are a few other problems that are not quite as thorny that still warrant mention. The fifth chapter, previously published in the *Stanford Law Review*, breaks the flow of the book in an unfortunate manner and could [End page 141] have been omitted without creating any difficulties. Likewise, Sherwin's discussion of Kieslowski's *Red* ends the book on a slightly self-indulgent note.

However, none of these faults detracts from the strengths of this book in any serious way. *When Law Goes Pop* is a thought provoking and compelling appraisal of the link between popular culture and criminal justice. It shines a light on a process of the loss of meaning that many would rather not think about, and has the courage to propose a course of action to address it. It is a book that will hopefully have an influence far beyond the boundaries of interdisciplinary legal theory, and will undoubtedly influence the works of those who analyze the intersection of law and popular culture most of all.

ENDNOTES

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1. Cited in Sherwin ([2000 p. 29.](#))
2. Cited in Sherwin ([2000, p. 282n. 24](#)).
3. Cited in Sherwin ([2000, p. 47](#))
4. Cited in Sherwin ([2000, p. 18](#))
5. Following V. Caldwell's comments in *Critical Race Theory* ([1994](#)), I capitalize the proper noun "Black."

6. One of Slotnick's sound-bite style catchphrases during the trial.
7. The response of this inability to draw meaning from representations is to make use of the consumption of images to fulfil the desires that these same images spark in our psyches. Our consumption of the media images, even when we assume a posture of ironic detachment, is one in which we derive pleasure from pure consumption. We no longer attempt to engage in a process of collective meaning making that is the heart of a common identity and set of values so important for a culture; we merely take pleasure from "the debauchery of signs ... the vertiginous subversion of all effects of meaning" ([Baudrillard, 1990, p 74](#)).

The avatar of this sensibility created by our dependence on the simulacra, for Sherwin, is Quentin Tarantino, who has aestheticized violence with abandon, "who inhabits Gorgias' world, a world where knowledge is deemed to be impossible ... it is the same skeptical postmodern aesthetic that prompts audience to laugh in the face of horror and perversion." Hyper-real popular culture not only displaces the law, but replaces it in this scenario, as there is no longer any need for the courts as a site where meaning is re-imposed on what is otherwise not understandable (i.e., criminal violence). **[End page 142]**

8. The lyrics of that single include:

He's the subway vigilante
The brave subway vigilante (...)
He had enough and came out fightin'
Drove the rats back into hidin'
Let's cheer the subway vigilante
He's one special kind of man. (Cited in [Fletcher, 1995, p. 201](#)).

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