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Law, Popular Culture, and Classical Culture: Representation of Underdogs in Arts and Media

Dear Reader,

Welcome to a new issue of the Journal of the Oxford Centre for Socio-Legal Studies (JOxCSLS). As guest editors for this special issue on law, popular culture, and classical culture, we appreciate the kind invitation to organise this issue from former general editors Matilde Gawronski and Felix-Anselm von Lier and the invaluable assistance of the current editors, Owain Johnstone and Fernanda Farina. It was a great opportunity to organise a thematic issue with the collaboration of scholars from the United Kingdom, the United States, Venezuela, and Brazil.

All of the essays explore the universe of arts and media, discussing socio-legal issues found in TV series, cinema, photography, opera, science fiction, and literature. The eight contributions were selected from a panel organised by Michael Asimow at the Law and Society Association Conference in New Orleans in June 2016 and from a volume edited by Pedro Fortes at the FGV LAW SCHOOL series (Cadernos FGV DIREITO RIO) in December 2015, which was published in Portuguese. All of the texts are original and published in English for the first time here.

Lawrence Friedman participated in both the panel, as a discussant, and the book, as a contributor, and we are delighted that he accepted our invitation to write a foreword for this special issue. Lawrence produced the seminal article on law and popular culture, establishing the foundations of this field of socio-legal studies with his article, Law, Lawyers, and Popular Culture, published in the Yale Law Journal in 1989. In his foreword, Lawrence revisits this theme, bringing new perspectives and ideas for our reflection. In a nutshell, he argues that understanding popular culture is important for understanding current law and it no longer makes sense to draw a sharp line between the real and the fictional.

Interestingly, all essays somehow include representations of underdogs in the arts and media. One essay claims that filmmakers may protect minorities through affirmative cinema and another critiques the negative stereotypes of Jewish lawyers in TV series. We also find socio-legal analyses of the underworld of drug traffickers and the lack of racial and ethnic diversity in corporate law firms depicted in TV series. In the universe of photography, we are reminded of the human rights and privacy of individuals under visual surveillance. We encounter a humiliated Asian wife, a sensual Spanish gypsy, and a number of villains, traitors, and anti-heroes in opera. In science

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1 Lawrence Friedman, Law, Lawyers, and Popular Culture (1989) 98 Yale Law Journal 1579
fiction, robots demand recognition of their rights to life and self-determination. The dilettante’s dream of law and literature emphasises the importance of analysing law from various standpoints, including from the perspective of the underdogs.

In *Jewish Lawyers on Television*, Michael Asimow discusses stereotypical representations that portray Jewish attorneys as greedy, unethical, and unattractive characters. The analysis is based on more than a dozen TV characters, such as Douglas Wambaugh from *Picket Fences*, Louis Litt from *Suits*, and Maurice Levy from *The Wire*. There is also the strange case of the highly unethical Saul Goodman, a non-Jew passing as a Jewish lawyer in *Breaking Bad* and *Better Call Saul*. Michael explains that these stereotypes are rooted in anti-Semitic attitudes toward Jewish lawyers that were prevalent until the 1960s. This article contrasts the negative representations of Jewish lawyers on television with mildly positive and strongly favourable portrayals, provides explanations for these contrasting images, and how they correspond to a Jewish commitment to social justice.

Manuel Gomez depicts the socio-legal universe of mafias, gangs, and criminal organisations in his *Outside but Within: the Normative Dimension of the Underworld in the Television Series ‘Breaking Bad’ and ‘Better Call Saul’*. Manuel reminds us that normative orders emerge from within the underworld, wholly outside the state legal order. Combining lessons from both normative pluralism and law and popular culture, his essay reminds us of the particular sense of right and wrong established in various representations of Italian mafias, including the Corleone family in the Godfather trilogy. His socio-legal analyses include the relevance of private ordering in competition with the state public order and of cooperation enhanced by social connections and multi-stranded ties of family, ethnicity, and common heritage. Manuel investigates the relevance of internal sanctioning, the construction of the sense of justice, and the special role of lawyer Saul Goodman in both *Breaking Bad* and *Better Call Saul*.

Peter Robson contributes to this issue with *The Portrayal of Corporate Lawyer on TV: The U.S. and British Models from McKenzie Brackman to Trust and Suits*. Corporate lawyers may not seem like underdogs because of their glamorous lives, expensive suits, and shiny glass towers but closer examination reveals highly conflictive working environments, in which intra-firm infighting may comprise 75% of their time in the office. Additionally, work in a corporate law firm is portrayed as incompatible with family life. Peter identifies a clear difference between the screenplays of these programs and series dealing with criminal law, in that series based in corporate law firms tend to focus on the characters instead of the cases. In *Suits*, for example, the focus is on the tragi-comic farce of Mike Ross, a man escaping from the police who runs into an interview and is hired as a corporate lawyer even though he never attended law school. There is very little discussion of law, which probably results from a perception that any legal issues relating to the corporate world are too complicated for the audience.

In *Lights, Camera, Affirmative Action: Does Hollywood Protect Minorities?*, Pedro Fortes examines the universe of affirmative cinema and investigates the dialogue
between film-makers and law-makers in advancing the protection of minority rights. The article examines the recognition of same-sex marriage by the Brazilian Supreme Court and suggests that the transformation of popular culture and public opinion may be the primary explanation for this landmark decision, since the formal sources of law had not changed. The article claims that the global diffusion of normative ideas supporting the protection of minorities, based on race and sexual orientation, is faster through the cinema than through the courts. Hollywood blockbusters like *Guess Who's Coming to Dinner?* and *Brokeback Mountain* are more easily translated, distributed, and disseminated than academic doctrine, judicial decisions, and legal opinions.

The use of photography as a tool for reflection of the relationship between law and culture is the core of Henry Steiner's essay *Photography's Transformation: Its Influence on Culture and Law*. His essay discusses two different sub-themes of law and photography, changing the centre of gravity from photography in the first part to law in the second part. In the first part, Henry proposes a thought experiment, in which we are invited to imagine the relationship of future generations with their ancestors, given the access to images and videos generated by contemporary smartphones. The second part of his essay moves into human rights law and analyses how the technological diffusion of images and videos, generated in public spaces monitored by a profusion of closed-circuit television cameras, bears on complex legal questions on the right to privacy.

Gabriel Lacerda has produced a real tour de force through the universe of European operas in his *Law and Opera: Stimuli to a Sensible Perception of Law*. After 10 years of teaching a course on Law and Cinema, Gabriel decided to explore the universe of normativity in a selection of works from well-known French, German, and Italian composers. In this essay, he shares with the reader snapshots of socio-legal issues found in Verdi’s *Otello* and *Don Carlo*, Puccini’s *Madame Butterfly*, and Bizet’s *Carmen*. Each opera involves individuals in positions of vulnerability and their legal dilemmas. Gabriel also discusses a legal case in Wagner’s *Lohengrin* and the scepticism of the devil towards jurisprudence in Goethe’s tragedy of Faustus and in Boito’s *Mefistofele*. In his conclusion, Gabriel emphasises the importance of sensibility and the emotions evoked by artistic expression for legal analysis.

In *More Human than Human: How Some Science Fiction Presents Artificial Intelligence’s Claims to Right to Life and Self-Determination*, Christine Corcos explores the universe of science fiction to investigate the possible recognition of personhood and rights for robots. This innovative intellectual journey covers several classic works from literature and cinema, providing insights based on normative elements developed within science fiction, such as Asimov's 'laws of robotics' and the 'Voigt-Kamff' test to identify robots. Christine reflects on the deeply philosophical question of the potential humanity of machines with artificial intelligence. She provides a powerful investigation of human nature, the constitutional rights of an autonomous personality, and the development of signs of consciousness. Through discussions of works such as *Bicentennial Man* and *Blade Runner*, Christine examines claims to sentience and self-
determination of humanoids in science fiction - another interesting example of underdogs in popular culture.

William Twining has written a somewhat confessional essay on Law and Literature: A Dilettante’s Dream. It is an abridged version of a lecture delivered at Wolfson College, University of Oxford in 2013 in which he explored the rich interplay between literature and law. This essay is full of autobiographical reminiscences, such as William's inspiration from his professor, H.L.A. Hart, at Oxford, his collaboration with Shakespeare scholar René Weis at UCL, and his exchange with Lord Denning at a Warwick workshop. William reveals that many socio-legal concepts developed in his jurisprudence were inspired by literature and literary theory, such as the differentiation of standpoint, the necessary use of narratives, and frames of reference for evaluating and interpreting evidence. Italo Calvino’s Mr. Palomar and Invisible Cities are used to explain the implications of globalisation for understanding law and society and the idea of legal cartography. William praises the multiple perspectives and descriptions of complex realities.

Additionally, Donald Papy provides a book review of Law and Popular Culture: A Course Book, by Michael Asimow and Shannon Mader (New York: Peter Lang Publishing, 2nd edition, 2013). In his review, Donald praises the qualities of the book, summarises some of the core ideas, approves the legal realist perspective, and offers the constructive feedback that future editions should explore popular culture beyond just the universe of cinema and TV series.

Finally, Sandra Ristovska provides a note from the field entitled Tackling Visual Knowledge: The Story of the Yale Visual Law Project. Sandra shares with us her vision about a change of paradigm regarding the value of images for legal argumentation, highlighting the sensory richness and relational thinking so relevant for the academic turn to visual rhetoric. Sandra focuses primarily on the activities and mission of the Yale Visual Law Project, but she points out that Stanford, NYU, Harvard, and the University of Pennsylvania also conducted similar initiatives. She calls for the development of a visual jurisprudence.

Editing this special issue of the Journal of the Oxford Centre for Socio-Legal Studies (JOxCSLS) was a great opportunity, given the collection of essays that combine academic quality with the contemporary insights brought to socio-legal studies by arts and media, pop culture and classical culture. We hope that you will enjoy reading this special issue as much as we appreciated reading, discussing, and editing these terrific essays.


Pedro Fortes and Michael Asimow

Guest Editors for the JOxCSLS
Law and society scholars are a large, diverse, and sprawling group. They use many approaches, study many different corners of the legal world, and employ many different techniques. If they have anything in common at all, it is the idea that something called “society” has a powerful influence on something called “law.” Of course, both these terms are problematic and hard to pin down. When we talk about law and popular culture, we add another rather shapeless concept: popular culture. The literature on law and popular culture is not that large but it too is sprawling and elusive. In this short essay, I will make a few observations about the nature of this particular beast.

Before we can figure out how “law” relates to popular culture, we need to have some notion of what popular culture consists of. Of course, popular culture can mean different things to different scholars. Basically, to me, popular culture is more or less the same as mass culture. The term refers to cultural productions (a movie, say) that are genuinely popular, that is, productions that attract a large audience. The line between mass or popular culture, and high or elite culture, is not easy to draw. And it shifts over time. Shakespeare is high culture in our times but, in his day, his plays appealed to a mass audience; presumably this was also true of Euripides and Aristophanes. Extreme cases are pretty easy to assign either to popular culture or to elite culture. Romance novels and rock-and-roll music are obviously part of mass culture; along with movies full of car chases and explosions, some of which may gross a billion dollars (the word “gross” fits here quite well). James Joyce’s *Ulysses*, on the other hand, is definitely not mass culture; nor is the music of the late Elliot Carter. But there are all sorts of intermediate cases: the *Godfather* movies, some musical comedies, some shows on TV; certain movies, plays, or other forms of popular culture show definite ambitions to be something bigger and better. And sometimes they succeed.

Why should we be concerned with popular culture? Or, to be more precise, why should we be concerned with the relationship between law and popular culture? It is because popular culture is extremely important in modern, open, democratic societies. In general, the legal order necessarily reflects what is happening in society and what people think about it; and what is happening in society most definitely includes popular culture. What would modern life be like without movies, plays,

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1 Marion Rice Kirkwood Professor of Law, Stanford University
2 I want to distinguish between popular culture, and popular legal culture. If by “legal culture” we mean people’s ideas, attitudes, and expectations, with regard to the legal system, then popular legal culture can be defined as the legal culture of ordinary people, or, at least of lay people, rather than the “conscious theorizing of legal philosophers or professors of law.” Lawrence M. Friedman, “Law, Lawyers, and Popular Culture,” (1989) Yale L. J. 98: 1579, 1584. Popular culture is an important source and influence on popular legal culture.
books, television shows, popular music, blogs, YouTube videos and online games? In some ways, popular culture dominates society in the West. It has, or might have, or could have, a powerful role in politics and government—and thus in law. It seems likely that the largest industry, in developed countries (and to a certain degree everywhere), is the entertainment industry, taken broadly. Think about the size of this industry: a huge domain, which includes radio and television, movies, most forms of music, plus amateur and professional sports of all types, and a grab-bag of hobbies and leisure time activities, from origami and water-coloring to hang-gliding. And this huge industry is, above all, simply the commercial side of popular culture.

Scholarship on law and popular culture does not have a very long pedigree; but the pace seems to be picking up. There are many different kinds of study. Some of these are represented in the papers collected in this volume. There is a literature, for example, on the way lawyers are shown on television, or in the movies. A scholar could study how popular culture deals with and describes lawyers and their work, or the police and their work, or the CIA, Or the scholar could study pop music and the attitudes it reflects toward law and order, or toward the position of women in society. Another type of study would be on the impact of popular culture: how it influences legal culture, how it shapes what people think about the law, and how this, in turn, affects the way the legal system operates. All of this, of course, is no easy task.

One fairly obvious point: “law” inhabits popular culture to an amazing extent. Think, for example, how much television time in the United States (and elsewhere) is devoted to crime shows, lawyer shows, and the like; what would be left of prime-time television, if we banned any mention of lawyers, judges, juries, police, trials, fingerprints, hair samples, forensic medicine, and prisons? Dull evenings, perhaps, devoted to sit-coms and documentaries. Daytime television is different, of course, but in the United States, “judge” shows are extremely popular; “Judge Judy” is the most notable example. These shows are supposed to be about real people, with real claims and counter-claims. They are, in effect, imitation small-claims courts, divorce courts, and the like. The litigants are ordinary people, with ordinary legal problems. My impression is that these judge shows are not as common elsewhere as they are in the United States, but the crime shows most definitely flourish everywhere.

“Judge Judy” is an example of “reality TV,” a genre in its own right. These shows are “real,” or at least supposed to be real, and the participants are not professional actors. But they are part of mass culture; they succeed because they are entertaining and compete quite successfully with the other shows on TV. This brings me to one of my main points; in our times, “news,” along with portrayals of “reality” in the media, form an important part of the entertainment culture, whatever else their purpose. The line between popular culture and whatever else is conveyed by the media, has broken down. It is not wrong to consider “Judge Judy” part of popular culture. Interview shows, and programs like Oprah Winfrey’s, are also part of popular culture.

And it is not wrong, or misleading, to include “news” (on TV or in the press) as part of popular culture.

What does the general public learn from all the legal material: the trials, the police shows, and yes, the “news” about legal matters, which flash before us on our screens. Hard to say: perhaps a lot, perhaps a little, but, in any event, what is “learned” is not very accurate. What we see on television and in the movies is an image of law and legal institutions that I compared elsewhere to a fun-house mirror—that is, to a weird distortion of reality.\(^4\) Certainly, the work of lawyers is not shown in any realistic manner.\(^5\) For one thing, most lawyers have little or nothing to do with criminal law and criminal justice; and yet both news and drama focus heavily on this part of the legal domain (more recently, some lawyer programs do tend to pay a certain amount of attention to civil cases). In any case, what lawyers in real life do is, on the whole, fairly routine or highly technical; they give business advice, they carefully craft and draft documents, they are architects of business plans and institutional arrangements, they conduct negotiations with business people, they represent clients in court, or in the halls of the legislature, they lobby, they monitor legal developments for clients, they write opinion letters. Almost none of this is the stuff of high drama. Almost none of this makes a good show on people’s screens. What people see, and watch, is largely tilted toward the sensational, the newsworthy, the dramatic.

In fact, studies show that the general public does not get much “education” about the legal system, either from popular culture or from other sources. People do not know much about the law and much of what they think they know is just plain wrong. Popular culture, in any event, is after all not explicitly meant to teach people. It is meant to be entertaining. Big trials, showy stories, lurid murders, salacious scandals—these make the grade on TV and in the press.\(^6\) People could, I suppose, come to realize that what they see and hear is neither typical nor particularly true to life. Still, what they see and hear is all they get. They are, in a way, like the citizens of some stern dictatorship, which tightly controls the media. The citizens in this dictatorship may well suspect that the government is lying to them. But they have no way of finding out the actual truth.

A number of studies have tried to find out what people know about the law. The general answer is: not much. Of course, people are aware of some of the bare essentials. They know that burglary is a crime. They know that rape and forgery and arson and murder and drunk driving are all crimes. They know that they have to pay taxes, and that there are all sorts of tax laws. They know that unhappy couples can get a divorce; they know that you can get a patent when you invent some new gadget. The details are another question. There is also a good deal of misinformation out there in


society. Many people, for example, honestly believe that people who live together a certain number of years earn rights more or less like the rights of people who are actually and legally married. This is the so-called myth of common law marriage. It is just plain false.\(^7\)

One study surveyed workers in three states: Missouri, New York, and California. Workers were asked whether their employer could fire a worker, simply because the employer found a replacement who was willing to work for less money. The overwhelming majority, in all three states, believed this was against the law. In fact, it is not. Can the boss fire a worker simply because he doesn’t like the worker? 89% of the employees in the Missouri survey thought violate workers’ rights. Except that it doesn’t.\(^8\)

What role do the media play in spreading actual disinformation? Probably quite a bit. Mostly, I suppose, they do not do this deliberately. But it happens anyway. Crime shows are obviously distorted, but so is the "news." Television covers the major decisions of the United States Supreme Court; but this coverage is for the most part superficial, when it is not downright wrong.\(^9\) A study in 1999 surveyed newspaper coverage of products liability cases brought against the auto industry. The study covered 361 cases in which car or truck companies were the defendants. The manufacturer won all but 92 of these cases. Punitive damages were awarded in just 16 cases. Newspapers ignored most of the decisions; they tended to report only cases in which plaintiffs actually won and they reported on ten out of the 16 cases of punitive damages.\(^10\) Like the coverage of big, juicy, and lurid murder trials, this gives a warped picture—a funhouse picture—of products liability cases. A similar distortion occurs, I imagine, in the coverage of medical malpractice cases and of lawsuits in general. The rare big verdicts get the most attention. And people surely think more cases go to trial than actually do.

At least newspaper accounts of product liability cases probably get the bare facts right, which means that the accounts are, in a way, accurate as far as they go; but they may nonetheless give a false impression. In other situations, however, the media do not get things right or, rather, they twist the facts out of all recognition. One notorious instance was the incident involving Stella Liebeck and a cup of hot coffee at McDonald’s. Ms. Liebeck, who was 79 years old, bought a cup of coffee in Albuquerque, New Mexico, in 1992, at a drive-in window at McDonald’s; her grandson was driving the car. The lid of the coffee cup came off, she spilled coffee on her lap, and ended up in the hospital with third-degree burns on parts of her body; she was permanently disfigured and was disabled for up to two years after the incident. She complained to the company, and got very little response. The coffee was in fact dangerously hot. McDonald’s had gotten many complaints about this fact. Liebeck


\(^9\)See Elliot E. Slotnick and Jennifer A. Segal, Television News and the Supreme Court: All the News that’s Fit to Air? (Cambridge University Press, 1998)

eventually sued McDonald’s, and won her case; the jury awarded compensation and also assessed punitive damages against the company.

Mrs. Liebeck had what was almost certainly a legitimate complaint but the media paid no attention to the merits of her case. They turned the affair into a cautionary tale of a greedy old woman, whose own behavior was reckless, but gave her the chance to bring a frivolous lawsuit against a rich, famous company. You were led to think that this was yet another example of stupid, money-hungry people preying on legitimate businesses, making false or trumped-up complaints against these companies, and of foolish juries handing these plaintiffs enormous sums of money. This was, of course, a gross distortion of reality, but it stuck.\(^{11}\) The McDonald’s coffee case was only one example of many, illustrating how the media can sensationalize—and fictionalize—the outputs of the legal system.

The saga of Stella Liebeck was not, in its bare outline, a piece of fiction. It was not a show. Stella Liebeck was a real person. The hot coffee was real. The lawsuit was real. The way the press covered the case was biased and distorted, but it purported to be coverage of “news,” and was (arguably) not part of the domain of popular culture. But, as we suggested, in our society, and in modern societies generally, the line between fact and fiction, between entertainment and reality, has blurred; in some ways, it has lost much of its meaning. “Popular culture” realistically includes much that we would not describe as fiction at all. This is the main point in this brief essay. A second, and related, point is that the media, including now the social media, have magnified the power of popular culture enormously—in some ways quite dangerously.

I. The Raw and the Cooked: Reality and Popular Culture

“Popular culture,” however one defines it, is in theory different from the popular reporting of actual events. A documentary is supposed to be different from a movie based on a made-up story. But reality and fiction are, as we said, sisters under the skin. A novel is written to entertain, and to sell, but it always carries some sort of message. The message may be implicit. It may be trivial. On the other hand, the message can be quite powerful; “fiction” can sometimes have the capacity to move, to educate, or even to change the political constellation. A work of popular culture may carry more real world power than any number of factual reports. The anti-slavery movement, before the American Civil War, published newspapers, documents, pamphlets, to further the cause. But none of this was as effective as Harriet Beecher Stowe’s novel, *Uncle Tom’s Cabin*, which appeared in 1852. Two generations later, Upton Sinclair’s novel, *The Jungle*, published in 1906, also had a powerful social impact. Sinclair’s description of the cruel, disgusting, and unsanitary conditions in Chicago’s meat-packing plants horrified the country and created a huge uproar. Sinclair wrote the novel as a form of social protest; he wanted to emphasize the way in which the American economic system exploited workers. In fact, the book did little or nothing for workers. But it aroused the public, it made them worry about the meat products they were buying and eating. His vivid and lurid descriptions led to a firestorm of protest, and enormous

pressure on the government to do something. This pressure was a factor in the passage of laws on meat inspection; it also had a significant role in the movement that led to the passage of a comprehensive food and drug law.\textsuperscript{12}

These two novels illustrate the power of popular culture, though each in its own way. There are many other examples: movies, plays, and novels that reflect popular culture but which also advance a cause. Here the line between the raw and the cooked is particularly fuzzy. Harriet Beecher Stowe got much of her inspiration from actual slave narratives. Sinclair’s description of life in the meat-packing plants was based on solid research. In the early 1930’s, Robert Elliott Burns painted a strong picture of the cruelty and inhumanity of Georgia’s penal system in his auto-biographical account, \textit{I Am a Fugitive from a Georgia Chain Gang}. In 1932, Hollywood made a film based on the book, with the title \textit{I am a Fugitive from a Chain Gang}; Paul Muni played Burns in the movie, and won an Academy Award. Georgia abolished the chain gang system; both the story and the movie were influences, and it is hard to say which was more effective.

All this underscores the point that, in modern culture, the boundary that separates the raw, that is actual occurrences, from fictional accounts, has blurred considerably. The media “cook” raw events, and turn them into “news,” into something to be reported and disseminated. After all, “news” must find an audience and, to do this, it has to be interesting and entertaining. News, after all, is mostly a business. TV news programs, for example, live or die according to the ratings. “News” reports events and situations that are supposed to be real but the emphasis, the coverage, is not “real” in a deeper sense. Coverage depends on decisions that TV stations (for example) make and these decisions turn raw events into something which might be dramatically different. If news stations decide an event is important enough, they drop all their other programs; they provide coverage 24/7. Almost certainly the underlying event (a massacre, for example) was real enough but its meaning is changed, enlarged, transformed, by the way it is reported. A suicide bombing, an earthquake, a massive flood: these, in a sense, do not need to be cooked. But even for these obvious examples, the message and the spin is important. The interpretation. The way in which the “news” gets reported. The message the news conveys. “News,” in short, is not what actually happened, but what the media say has happened; these are never quite the same and, occasionally, are very different indeed.

Past events, moreover, can be turned into fiction—either as documentaries, which at least purport to be “true,” or into forms that dramatize and heighten a “true” situation. The chain gang movie was not supposed to be a documentary, but it claimed to tell the true story of a man who did, in fact, escape from a chain gang. \textit{Uncle Tom’s Cabin} was pure fiction, and highly sentimentalized, but the underlying issue—the evils of slavery—was genuine indeed. Investigations showed that Sinclair’s description of conditions in the meat-packing plants of Chicago was all too real; the story, to be sure, was pure fiction.

The role of the media here is absolutely crucial. Probably there was something we could call popular culture even in the days when human beings lived in caves, but the rise of the mass media has utterly changed the role and the nature of popular

\textsuperscript{12} The two laws were enacted on the same day. The Food and Drug Law was 34 Stat. 768 (1906).
culture. The media are certainly powerful, but their success depends on their skill in
guessing what the public thinks, or believes, or wants, or will want, or can accept. The
media play up to their audiences, or potential audiences, and to the attitudes and
desires that underlie popular culture. Popular culture infects and, in a way, controls
the media; the mass media cannot survive without the masses. But the media in turn
infect and manipulate their audience. They depend on each other. Cop shows—and
crime news—reflect and feed on what ordinary people think, but cop shows—and
crime news—also help mold those views. Uncle Tom’s Cabin fed the zeal of anti-slavery
forces but it did not invent the abolition movement. Today, more than ever, media and
public are bound together in a form of symbiosis.

I want to stress once more how important a role entertainment plays in our
societies. Popular culture is entertainment culture. Entertainment has always been
important to people; but never so much so it is today. In our times, much of public life
has become a kind of show, or seems almost indistinguishable from a show. This is
definitely the case with political campaigns. Anyone running for President of the
United States, or governor of a state, will get nowhere if he or she has a squeaky voice,
or stutters. Politics is speeches, press conferences; it is TV ads, it is brochures; it is what
the polls suggest; it is whether the candidate makes “news;” it is the way the campaign
is conducted; it is slogans and rallies and all the rest; it is imagery. To be effective, the
campaign must be, in short, entertaining. A candidate must have “charisma,” meaning
roughly that he or she has to be attractive, appealing, sympathetic (Max Weber would
hardly recognize this modern use of his term, “charisma”). In a way, then, popular
culture swallows up many features of “reality,” including politics, and turns them into
a form of show business.

II. Going Viral

Two hundred years ago, humanity trudged from place to place on foot; the better off
had horses and carriages, but most people had to walk. A message from, say, New
York to London took many weeks to cross the Atlantic; a message from New York to
New Orleans took just as long. Customs, norms, habits, ways of thinking, ways of
life—all of these diffused, if at all, at a snail’s pace. Today’s world is incredibly
different. A jet can go around the globe in a day or less. Messages are even faster:
amost instantaneous. Ideas, images, news, fashions; these too can move from place
to place at warp speed.

The revolution in travel and communication increases the power of popular
culture enormously. It makes cultural convergence possible. In fact, modern travel
and communication are crucial agencies of cultural convergence. A new song, if it
catches on in Los Angeles, can be almost immediately downloaded in Tokyo,
Bangkok, Buenos Aires, and Capetown. Cultural and legal convergence, in general, is
a basic trait of modern society. Modern Japan has much more in common with modern

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13 The audience may be, and usually is, something less than the general public. At this time
(2017), some news media hardly even pretend to be objective; they are deeply political, and tilt
either left or right; people choose the shows that conform to their political tastes.
14 To Weber, charisma was an almost magical quality: the authoritative and legitimating power of
a heroic figure or a saint.
Sweden than medieval Japan had with medieval Sweden. People all over the world watch American movies and TV shows. Young people in every country like the same singers and songs. Sports culture is international. Pathologies of popular culture—doping scandals, for example—are equally international. More and more, people wear the same clothes, follow the same fashions, play with the same toys as children, the same video games as adolescents, and watch the same football matches as adults.

Also: what was once strictly local news can now “go viral”, that is, it can spread all over a society and, very often, all over the world. “Public opinion” has always influenced law but, in our day, it is easier to mobilize “public opinion”; it is possible to enlist millions of strangers in some enterprise, even if their only contact with each other is through email, or the internet, or some social network. Modern revolutions indeed seem to start with social networks.

Popular culture today, more than ever before, is focused on the visual, on pictures and images. These are more powerful than words. They can turn a small event into a big event; a minor sin can be blown up out of all proportions so that it reverberates in every part of a society. Consider the case of the so-called “dog poop” girl of South Korea, as Daniel Solove reported. This young woman’s dog did his thing in a subway car; she refused to clean up after her pet. It was her bad luck that all this was captured on a camera. Blogs and videos did the rest. To millions of people, she became an object of scorn. You can only imagine what this did to her life.

Shaming in the old days was bad enough—think of Hester Prynne’s scarlet letter. But a scarlet letter in a New England town in the 17th century meant nothing in South Carolina and less than nothing in England or France. Today, public shaming - the “ecstatic public condemnation of people” for small sins and local embarrassments - can reach an audience of fantastic size. This is also the age of “revenge porn” - scandalous or revealing pictures of ex-girlfriends or boyfriends. These pictures, originally meant to be private, get spread maliciously on the internet, for the benefit of countless prying eyes. The visual power of modern technology can expand the small and the personal to gigantic size, as if projecting it onto some monstrously large screen.

The magic and power of popular culture is also the magic and the power of the now. Uncle Tom's Cabin is history (or literature). But the latest song, play, movie, or image on the web speaks to a current audience, about current issues, and moves the audience in current ways. This power to magnify events, and to disseminate them, has enormous political and social importance. Police brutality, and police racism, has had a long history in the United States. It was often criticized, to be sure. But the public, on the whole, seemed indifferent. No longer. Videos of police behavior have aroused the anger of African-Americans and moved them to take action, to make demands, in new and stronger ways. Many members of the larger public have added their voices. The videos are, first of all, important pieces of evidence. They are also much more vivid than even the most fevered and personal account.

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Similarly, newspapers can and do report the suffering of men, women, and children fleeing for their lives from the horrors of the civil war in Syria. They can, and do, report how many are lost at sea, drowned when rickety, overcrowded, and unsafe boats founder and sink in the Mediterranean. But nothing in all these reports was quite as powerful as the pathetic image of a dead child, washed up on the shore of Turkey. The power of the new media is to the power of the old, as the atom bomb is to muskets and blunderbusses.

And the real merges with the fictional. Now “popular culture” means precisely what the words suggest: what is popular, that is, what catches the attention, what entertains, what fascinates; and what is cultural, that is, what moves people, what is congruent with their ideas and their ways of life.

I have, in this brief essay, tried to argue that understanding popular culture is important for understanding current law. I have also argued that it no longer makes sense to draw a sharp line between the real and the fictional, at least on the issue of popular culture. Popular culture and popular opinion are, essentially, twins. They operate in tandem and influence each other. Moreover, popular culture, today, is more and more a global culture. In other words, there is in many ways only one language, as it were, of popular culture; it exists in every modern, developed country—with certain differences of dialect. It is stronger than ever before. And more than ever, it deserves serious study and research.
Jewish Lawyers on Television
Michael Asimow

In a 1971 episode of *All in the Family,* Archie Bunker has an auto accident with a Jewish woman driver. After spouting his usual anti-Semitic opinions, Archie realizes that he can fake a back injury and make some real money. Clearly, this requires a smart but crooked lawyer. Archie and his son-in-law start leafing through the yellow pages looking for one and find Rabinowitz, Rabinowitz, & Rabinowitz. That’s it! But the Rabinowitz firm sends over Whitney Fitzhugh IV, its token gentile. Archie throws him out and cries “Bring me a Jew!” Sol Rabinowitz soon arrives, but the case falls apart when witnesses (a station wagon full of nuns) declare that the accident was Archie’s fault.

Norman Lear’s inspired idea for *All in the Family* (1971-1979) was to put all sorts of bigotry and right wing political slogans into the mouth of the buffoon Archie Bunker as a way of ridiculing those opinions. In this episode, Lear was parodying the stereotypes surrounding Jewish lawyers—they are greedy, unethical, and more cunning than other lawyers. Fortunately, the anti-Semitic stereotypes that Lear lampooned in 1971 no longer exist, correct? Well, not so fast.

This article identifies about a dozen Jewish lawyers who have appeared as regular characters on fictional television dramas from the 1980s to the present. Most of these representations occur in lawyer shows, but some are drawn from other genres, such as soap operas or police shows. After a brief discussion of stereotyping and media effect in Part I, the article turns to a discussion of these portrayals and speculates about where the stereotypes came from. It describes a spectrum that organizes the ways that Jewish lawyers are represented. On the left end of the spectrum are strongly negative stereotypes (Part II). These suggest that Jewish lawyers are worse than other lawyers. At the midpoint of the spectrum are mildly positive portrayals (Part III). These suggest that Jewish lawyers are about the same as other lawyers. On the right end are strongly

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2 “Archie’s Aching Back,” Seas. 1, Ep. 3.
4 These characters self-identify as Jews or are identified as Jewish in the literature or have surnames that make it very likely that they are Jewish. I suspect that a number of other important lawyer characters in various television series may be Jewish, but I have not included them because their ethnicity is uncertain.
positive characterizations (Part IV). These suggest that Jewish lawyers are better than other lawyers. Part V concludes.

I. Stereotypes and Media Effects

Stereotypes are narrow, oversimplified, and often inaccurate definitions of cultural identity. A stereotype reduces all aspects of a group to a small set of characteristics. Television shows often contain stereotypical characters because their use simplifies script production and casting. The stereotypes are familiar to those who create series as well as those who write the individual episodes. Moreover, the process by which programs are green-lighted tends to reward familiar types of stories and characters that have been well received in the past. Finally, stereotyped characters are familiar and non-distracting to audiences and thus require less dramatic explanation than a non-stereotypical characterization.

Stereotypical characterizations in mass media such as television are worth taking seriously for two distinct reasons. First, pop culture is a mirror, reflecting the attitudes and beliefs of those who produce and consume it. Of course, pop culture is far from a perfect mirror, since it always distorts reality for dramatic, commercial or ideological reasons. This paper is an example of mirror methodology. It suggests that the stereotypical characterizations of Jewish lawyers on television reflect deep-seated societal attitudes.

Second, pop culture serves as a lamp, constructing and reinforcing public opinion through the process of cultivation. Those who consume a large quantity of televised material are likely to perceive the world in ways that reflect recurrent messages of the television world, as compared to people who watch less television but are otherwise demographically similar. Since this article documents only about a dozen Jewish lawyer characters (many of them in supporting roles) over a thirty-five-year period, these characterizations are probably not recurrent enough to produce a cultivation effect.

II. Strongly Negative Portrayals of Jewish Lawyers

All in the Family satirized various negative stereotypes about Jewish lawyers, particularly that they are more cunning, more greedy, and less ethical than other lawyers. Obviously, the stereotype that Jewish lawyers are smarter than others isn’t all negative. Indeed, it may bring them business (as it did in the All in the Family episode that introduced this paper displayed none of these proclivities. The stereotype was all in Archie Bunker’s head.)

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5 Mittell (n. 2) 309.
8 The character of Sol Rabinowitz in the All in the Family episode that introduced this paper.
episode). In these portrayals, however, the emphasis is on cunning, trickiness, and the ability to manipulate others, rather than just intelligence. In addition to their smarts, stereotypical Jewish lawyers on television are physically unattractive and personally unpleasant. These negative portrayals fall at the left end of the spectrum of Jewish lawyer representation described at the beginning of this article.

In describing negatively portrayed Jewish lawyers, I am not suggesting that the creators of these shows were anti-Semitic or intended to cause harm to Jews. On the contrary, the writers had legitimate dramatic reasons to make these characters Jewish and endow them with negative traits. These reasons include developing interesting plot material, creating contrast in the acting ensembles, and exploiting the strength of the actors they cast in lawyer roles. In one situation, the writer based a character on actual Jewish drug lawyers he had known.

A. Examples of Negatively Portrayed Jewish Lawyers

1. Picket Fences: Douglas Wambaugh

_Picket Fences_ (1992-1996) was a much honored program created by David Kelley, the originator of numerous legal and non-legal shows on US television. The show tackled major, and often cutting-edge, legal and social issues as they arose in the daily life of a small town. Often, these issues were fought out in the town courthouse. One of the recurring characters was a Jewish lawyer named Douglas Wambaugh, played by a famous Yiddish actor named Fyvush Finkel.

Wambaugh is physically unattractive (especially in comparison to the other members of the ensemble) and is personally obnoxious (although never mean or malicious). Indeed, hardly anyone in town can stand him, particularly Judge Henry Bone. However, when somebody needs a lawyer, they want Wambaugh because he

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9 My statements about physical attractiveness and unpleasant personality are subjective. Some of those with whom I’ve discussed this article disagree with them. I leave to my readers the judgment on whether my assessments are accurate.

10 David Kelley, who is responsible for the negative Douglas Wambaugh character, created three other important Jewish characters discussed in this article, two of whom are mildly positive (Stewart Markowitz and Ellenor Frutt) and one of whom is very positive (Harriet Korn).

11 See notes 13, 40, 43, and 57.

12 See text at note 25.


14 Finkel was nominated for an Emmy for outstanding supporting actor in a drama series in 1993 and won the award in 1994. He also played a prominent role in Kelley’s series _Boston Public_. According to producer Robert Breech, Kelley had seen Finkel in a movie role as a gangster and wanted him for the _Picket Fences_ cast. Kelley especially admired Finkel’s ability to play comedy and to switch on a dime from being funny to dead serious. Another advantage of casting Finkel in the lawyer role was his highly distinctive appearance and accent which created contrast with the other prototypical mid-western characters. The characterization of Douglas Wambaugh was developed to fit Finkel’s persona. He was extremely popular with viewers. Phone interview with Robert Breech, March 25, 2016.

is fearless and crafty. He often wins hopeless cases because of his innovative arguments.

Wambaugh grabs every case he can get and sometimes cuts ethical corners. Yet he also displays more noble attributes, such as representing people despised by public opinion. Wambaugh explains: “My parents were murdered during the Holocaust. I know bigotry when I see it. I know oppression.”

The episode “Pageantry” captures Wambaugh’s shrewdness and his obnoxious traits as well as his willingness to represent underdogs. A local rabbi challenges the town’s decision to hold a Christmas pageant in a public facility. The pageant is organized by beloved teacher Louise Talbot. The town hires Wambaugh to defend it, even though nobody can stand him. Wambaugh loses, but the pageant is saved after being moved to a church. Later, Louise Talbot turns out to be transgender—a quite a cutting-edge issue in 1992. The school board fires her for failing to disclose her sex change. Wambaugh switches sides, successfully challenging the discharge. In the process, as always, he greatly exasperates Judge Bone.

2. Suits: Louis Litt
The premise of Suits (2011-date) is that a big New York firm hires an associate named Mike Ross who is extremely smart but never went to law school. Senior partner Harvey Specter is Ross’ mentor and the only one who knows about the fraud. Ross is always on the brink of being found out. A recurring character on Suits is Louis Litt, a junior partner who is supervisor of the associates. Litt is Jewish and is portrayed quite negatively. He is the only physically unattractive character in the cast and has a terrible personality. His usual expression is a malicious smirk. He is a bully, a cheat, and highly manipulative. He always has a scheme (usually to humiliate Ross or outmaneuver Specter), though he usually fails. Litt bills tremendous hours and seems a competent transactional lawyer. When he actually litigates, however, his insensitivity causes him

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16 McMillian (n. 14) 382.
17 Seas. 1, Ep. 11.
18 Litt mentions his rabbi and asks to take off work for Rosh Hashanah.
19 “[Show creator] Aaron Korsh and the writers decided to take their time to make this guy a true human being,” says the affable [Rick] Hoffman, 45, who’s played the annoying, obnoxious — and, yes, sweet and lovable — Louis for all five seasons of USA’s popular legal drama (it’s been renewed for a sixth season). “He’s the guy everyone has come across, whether it be at work or playing sports or any type of social environment. Most of the time we don’t want to go near this guy … who just steps on his own feet, can’t get out of his own way and is broken — like everyone else.” http://nypost.com/2015/08/05/meet-the-man-you-hate-to-love-on-suits/. See also ‘26 Signs Louis Litt from Suits is Your Soulmate,’ http://www.usanetwork.com/suits/blog/26-signs-louis-litt-from-suits-is-your-soulmate. It begins: “Sure we all get a kick out of Louis Litt. Even when he’s being a complete prick, there’s something endearing about a guy who plays mahjong with old ladies and loves Gilbert and Sullivan.” Litt describes a positive character arc over the five years of Suits and has become steadily less obnoxious and better liked by his colleagues.
to butcher the case.\textsuperscript{20} In the pilot episode (and frequently thereafter), Litt is cruelly mocked by Harvey Specter.

3. \textit{The Wire}: Maurice Levy

Maurice Levy is a Jewish lawyer for the drug trade in David Simon’s great series \textit{The Wire} (2002-2008). Levy (played by Michael Kostroff) exemplifies every negative Jewish lawyer trait. He is physically unattractive, arrogant and greedy. He is shrewd and utterly unethical. Indeed, Levy is as much a drug criminal as his clients.\textsuperscript{21}

Although Levy appears throughout all five seasons of \textit{The Wire}, he is especially repellent in Season 5 where he represents the murderous drug kingpin Marlo Stansfield. Levy repeatedly furnishes Stansfield with valuable money laundering advice.\textsuperscript{22} Ultimately, the police bust Stansfield’s gang with the aid of an illegal wiretap. Then it is discovered that Levy is paying off an attorney in the State’s Attorney’s office for inside information. In a deeply ironic conclusion, Levy negotiates an elaborate plea bargain for himself and for Stansfield. His leverage is based on threatening to expose the illegal wiretap, which would be highly embarrassing to the police and prosecutors. Levy avoids prosecution for his own corruption while winning freedom for Stansfield (if he leaves the drug trade). Other members of the gang get long prison terms. Levy exults over this great result which will generate lots of new drug business. We then see Levy introducing Stansfield to a group of Baltimore land developers who are happy to tap this wealthy new source of capital.\textsuperscript{23}

In an early episode in Season 1, Levy is called away from his Sabbath meal to spring one of his clients who is being grilled by the police.\textsuperscript{24} He refers to his wife’s brisket in that episode and refers to it again in the closing episode when he invites his investigator Herc (a former cop who moved to the dark side) to his home. “You should come over for dinner tonight. Yvette’s making brisket…You’re mishpocha now.”\textsuperscript{25} Herc was responsible both for leaking Stansfield’s cell phone number to the police, which enabled the wiretap, and then feeding that information back to Levy.

Series creator David Simon (who is Jewish) was challenged for the anti-Semitic implications of the Maurice Levy character. He replied:

\begin{quote}
\textit{Why did we make this guy Jewish? Because when I was covering the drug trade for 13 years for the [Baltimore] Sun, most of the major drug lawyers were Jewish. Some of them are now disbarred and others are not but came pretty close. Anyone who is anyone in law enforcement in Baltimore knows the three or four}\end{quote}

\textsuperscript{20} See \textit{Seas. 1, Ep. 8 “Identity Crisis.”} Litt cross-examines a witness to death in a deposition he shouldn’t have taken, hopelessly antagonizes the decedent’s widow, and is caught attempting to bribe a witness. However, he manages to redeem himself through his skill with numbers and computer hacking.


\textsuperscript{22} “Transitions” and “Late editions,” \textit{Seas. 5, eps. 4 and 5.}\n
\textsuperscript{23} “.30-,” \textit{Seas. 5, Ep. 10.}\n
\textsuperscript{24} “The Detail,” \textit{Seas. 1, Ep. 2.}\n
\textsuperscript{25} \textit{Seas. 5, Ep. 10, “.30-.”} In Yiddish and Hebrew, the word “mishpocha” means “family.”
guys Maury Levi is patterned on. If I have people from every other tribe in Baltimore portrayed negatively, everyone is maligned in some way, how can I not do that to the Jewish guy? How can I pull that punch? At that point, I’m just being hypocritical. Here are good people from my own tribe who say how can you do that, and my answer is how can I not?26

4. Hill Street Blues: Irwin Bernstein

Irwin Bernstein (played by George Wyner) appears as a prosecutor in 57 of the 144 episodes of Hill Street Blues (1981-1987).27 The show is primarily about the travails of the police, but prosecutors and public defenders often get into the stories. Bernstein is physically unattractive. He is consistently portrayed as amoral. When there is a sleazy plea bargain to be struck, Bernstein pulls it off.

For example, in “GQ,”28 three members of the housing police get into a fight with Ware, a black tenant in the public housing facility they patrol. The inference is that blacks have just started moving in and the housing cops don’t like it. They frame Ware for car theft. Bernstein is part of a scheme to cover this up and persuade Ware (who has a long record) to accept a plea bargain and get the cops off the hook. The politically motivated deal came straight from the District Attorney and Bernstein tries to implement it. He is always contrasted with the beautiful public defender Joyce Davenport, who is tough and principled.

5. The Good Wife: David Lee and Howard Lyman

In the long-running show The Good Wife (2009-2016), David Lee (played by Zach Grenier) is a senior partner in Lockhart, Gardner and its successors. He self-identifies as Jewish.29 He is always portrayed as cynical and greedy. Physically he’s rather unattractive and he has an unpleasant personality. Howard Lyman is another Jewish character who frequently appears on the show; Lyman is incompetent and mentally over the hill but clings to his perks.30

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27 See Thompson (n. 12) 59-74.
28 “GQ.” Seas. 4, ep. 21.
30 In the final episode of The Good Wife, Lyman marries Peter Florrick’s mother Jackie and signs a ketuba (a Jewish marriage contract.). Seas. 7, Ep. 22. Eli Gold, a recurring Jewish character on The Good Wife is presented as a cynical and manipulative political campaign manager but probably is not a lawyer.
6. Sex and the City: Harry Goldenblatt

Harry Goldenblatt (played by Evan Handler) was Charlotte’s divorce lawyer and became her boyfriend in the fifth and sixth seasons of Sex and the City (1998-2004). Goldenblatt is pretty unattractive (he has excessive back hair, for example, but none on his head) and a complete slob. She says “He’s bald and short and talks with his mouth full. I don’t want to be seen in public with him.” Charlotte wants to have sex with Harry but doesn’t want her friends to meet him. Ultimately, however, Charlotte converts to Judaism and marries Goldenblatt, who turns out to be quite a decent guy. We never learn much about him as a lawyer.

7. The Strange Case of Saul Goodman

Lawyer Saul Goodman (Bob Odenkirk) emerged during the second season of the epic show Breaking Bad (2008-2013). He became the lawyer for Walter White (the chemistry teacher turned crystal meth cooker) and his young partner Jesse Pinkman. The writers introduce Goodman by showing his sleazy TV commercial which ends “Better Call Saul.” Goodman is an engaging character who is more than willing to violate every ethical rule in sight, yet always gets away with it. He’s actually quite capable and very resourceful. And he functions as the consigliere of the White-Pinkman meth business. He takes a cut of the profits and has many good ideas on money laundering. He is neither physically unattractive nor personally unpleasant.

After Breaking Bad ended, Goodman got his own spinoff, Better Call Saul, a prequel set six years before Breaking Bad (2015-date). Here he is portrayed as a struggling lawyer with a phony mail-order degree. Before taking up the law, he was a professional con man and he often pulls off scams just for fun. He is prepared to do anything to make money and frequently resorts to crimes such as extortion, unethical solicitation, lying to the police, faking accidents, and the like. In every episode in seasons 1 and 2, Goodman tramples another ethical rule underfoot.

Although TV watchers and the characters within the Breaking Bad narrative must have assumed that Goodman was Jewish because of his name, he wasn’t. He is really Jimmy McGill, an Irish Catholic. Thus he is passing as a Jewish lawyer. Of course, many Jews have passed as non-Jewish, but reverse-passing is distinctly unusual. How and why this character switched from being Jimmy McGill to Saul Goodman has not yet been disclosed, as of the time this article was written. Presumably, however, McGill wishes to capitalize on the Jewish lawyer stereotype exemplified in All in the Family. Jewish lawyers get business because they are thought to be shrewder and less ethical than other lawyers and McGill definitely wants all the business he can get.

31 Seas. 2, ep. 8, “Better Call Saul.”
32 For a good summary of Goodman’s work on behalf of White and Pinkman, see https://en.wikipedia.org/wiki/Saul_Goodman
B. Sources of The Negative Stereotype of Jewish Lawyers

The negatively stereotyped Jewish lawyers on television echo the not-so-distant past when Jewish lawyers were referred to as “shysters” and discrimination against them was pervasive. The era of anti-Semitism directed toward American lawyers dates from around 1880 to somewhere in the 1960s. During this era, the number of Jewish lawyers increased rapidly but Jews were mostly excluded from top law schools as both students and professors. Hardly any were hired at large corporate law firms and, of those few, even fewer made partner. They were excluded from bar associations and mentoring programs. Most Jewish lawyers had to compete for clients at the bottom rung of the ladder—personal injury, criminal defense, and the like. The institutions engaging in lawyer anti-Semitism were mostly too discreet to make public statements evidencing their attitudes, but such statements are not difficult to discover.

These sentiments have gone underground today, but are not extinct. The negative lawyer stereotypes on television mirror those beliefs. A recent study of anti-Semitism showed that, depending on how the question was asked, 10% or 19% of Americans believe that Jewish lawyers are less honest and more unscrupulous than other lawyers and an additional 10% didn’t know.

33 The etymology of the word “shyster” is unclear and disputed. The term first appears around 1840 and was used to describe crooked lawyers who were not Jewish. It may be derived from the German word for excrement (scheisse). See Gerald Leonard Cohen, Origin of the Term “Shyster” (Peter Lang, 1982). Later the term took on an anti-Semitic meaning and was often applied (though not exclusively) to Jewish lawyers.

34 Obviously, the negative literary stereotypes of Jews go back much further. Shylock in The Merchant of Venice, Isaac of York in Ivanhoe, and Fagin in Oliver Twist come to mind. To take a less exalted example, a character named Sylvester Shyster appeared in Walt Disney comic strips dating back to 1930 and in early Disney cartoons. Sylvester was a crooked lawyer who schemed to deprive Minnie Mouse of her inheritance. In appearance he looked like a canine rat and had a long nose. http://disney.wikia.com/wiki/Sylvester_Shyster


36 This discrimination led to the formation of numerous elite Jewish law firms. Even within the Jewish community, the better established German Jews often despised those of Eastern European origin. See Jerold S. Auerbach, Unequal Justice (OUP, 1976) chap. 4, 6; Eli Wald, ‘The Jewish Law Firm: Past and Present, in Ari Mermelstein et al. Jews and the Law (Quid Pro Books, 2014); Russell Pearce & Adam Winer, ‘From Emancipation to Assimilation: Is Secular Liberalism Still Good for Jewish Lawyers’ in Mermelstein (supra).


38 For example, an unnamed lawyer wrote “of the great flood of foreign blood…sweeping into the bar…with little inherited sense of fairness, justice and honor as we understand them…How are we going to preserve our Anglo-Saxon law of the land under such conditions?” Bar luminary Theron Strong wrote that the rising proportions of Jewish lawyers was “almost overwhelming—so much so as to make it appear that their numbers were likely to predominate, while the introduction of their characteristics and methods has made a deep impression on the bar.” Auerbach (n.35) 107. Supreme Court Justice McReynolds was a blatant anti-Semite and made no effort to conceal it. He refused even to speak to Justices Brandeis and Cardozo. See the tasty anecdotes in https://en.wikipedia.org/wiki/James_Clark_McReynolds

Regardless of their actual feelings, most people now avoid explicit racist, sexist or anti-Semitic jokes and comments, but not all of them. In 2007, Micheal Ray Richardson, former pro basketball star and now coach, had a contract dispute and hired a Jewish lawyer. He said:

*I've got big-time Jew lawyers… They're real crafty. Listen, they are hated all over the world, so they've got to be crafty… They got a lot of power in this world, you know what I mean? Which I think is great. I don't think there's nothing wrong with it. If you look in most professional sports, they're run by Jewish people. If you look at a lot of most successful corporations and stuff, more businesses, they're run by Jewish. It's not a knock, but they are some crafty people.*

For these candid comments, Richardson lost his coaching job.

III Mildly Positive Portrayals of Jewish Lawyers

The portrayals of Jewish lawyers discussed in this section form the mid-point of the spectrum of Jewish lawyer characterizations. They are essentially neutral. Viewers of these shows would be left with the impression that Jewish lawyers are competent professionals and decent human beings. These lawyers are not presented as heroic or saintly, but they are likable and sometimes admirable. They are conscious of their Judaism but don't make a big deal of it. Interestingly, however, some of these positively portrayed Jewish lawyers (Stuart Markowitz and Ellenor Frutt) are less physically attractive than the other actors in the ensemble.

The mildly positive Jewish lawyers are similar to most of the non-Jewish professionals who play prominent roles in the series. A television series must provide at least some characters with whom mainstream audiences can empathize in order to keep them tuning in. Thus most recurring characters on TV series (whether or not lawyers) have nuanced personalities and are reasonably likable but are neither heroic nor anti-heroic.

*A. L.A. Law: Stuart Markowitz*

Stuart Markowitz is a fixture on all 8 seasons of the pioneering show *L.A. Law* (1986-1994). He is the tax and estate planning lawyer at the firm of McKenzie, Brackman. As a person, Markowitz is kindly and loyal, although a bit on the nerdy side. He briefly
becomes managing partner (meaning the partner in charge of running the business) and drives everyone crazy with his meticulous attention to trivial details involving firm expenses. He is quickly relieved of duty.  

Markowitz is a competent tax lawyer and estate planner and pretty ethical, especially in comparison to some of the other lawyers at the firm. However, he is never presented in noble and heroic terms like Ann Kelsey or Michael Kuzak. Markowitz is the least physically attractive member of the ensemble (with the possible exception of managing partner Douglas Brackman or Bennie Stulwicz, a learning-disabled staff member). Markowitz is lonely and socially inept, so is thrilled when the beautiful Ann Kelsey (who is about four inches taller) takes an interest in him. Ultimately, Markowitz and Kelsey fall in love and get married. Their highly contrasting appearance and personality, as well as their differing ethnic backgrounds, provide humorous plot material for many episodes.

In a notable episode in Season 2, Markowitz met Kelsey’s blatantly anti-Semitic mother for the first time. For a while, he politely ignored such comments as “my deceased husband ‘used to say that if we’d had a Jewish bookkeeper, we’d all be millionaires.’” At a party, however, he overhears Kelsey’s mother and another relative talking about how Jews look different and keep to their own kind. He asks whether Jews have ever done anything to you to earn such hostility. They say no, and he says “well you do now,” as he overturns a cabinet full of precious china. Later he apologizes to Kelsey for this uncharacteristic tantrum, explaining “I’m not a very good Jew, I don’t go to temple or observe the holidays, but it’s who I am. It’s the weight of 5000 years.”

B. The Practice: Ellenor Frutt

Ellenor Frutt is a member of Bobby Donnell’s firm on The Practice (1997-2004) who self-identifies as Jewish. This series involves a bottom-feeding Boston law firm that accepts low-grade civil or criminal cases and struggles to pay the rent. Frutt shares in the negative appearance stereotype. She is obese and physically unattractive in sharp contrast to the rest of the ensemble. She has a miserable personal life, is insecure about her appearance, and can’t get a date. When she manages to form romantic relationships, they end disastrously.

Yet Frutt is positively portrayed. She cares deeply about her colleagues. She persistently takes cases involving underdogs who can’t pay fees. She declares that all

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42 “The Unbearable Lightness of Boring,” Seas 3, ep. 15.
44 Frutt was played by actress Camryn Manheim who won an Emmy for Outstanding Supporting Actress in a Drama Series (1998). Producer David Kelley cast Manheim because she could project great authority as a lawyer while also seeming personally vulnerable. Her appearance provided a good contrast with the other actors. When interviewed, producer Robert Breech did not even remember that the character was Jewish. Phone interview with Robert Breech, March 25, 2016.
45 See Jeffrey E. Thomas, ’The Practice: Debunking Television Myths and Stereotypes’ in Asimow (n. 14).
46 “Part V,” Seas. 1, ep.5.
she ever wanted to do was to represent the little guy. Her clients include a woman claiming intentional infliction of emotional harm after being taunted because of her obesity and an intelligent chimpanzee targeted for medical research.

Like her colleagues, Frutt is a tough and resourceful litigator. She and her partner Eugene Young run the “Plan B” gambit in which they try to pin the murder on the defendant’s innocent brother to create reasonable doubt. Both of them feel terrible about it afterwards. She is also known to cut ethical corners for clients, yet she has a strong personal ethical code. Thus, she refuses to help her colleagues in a case involving a rabbi who encouraged his parishioner to commit a revenge killing. She says: “You wore that yarmulkah on that television program. When a rabbi speaks as a rabbi, he represents Judaism. You represented it as vengeful, and as a Jewish person I am offended.”

C. Law and Order: Adam Schiff and Danielle Melnick

*Law & Order* (1990-2010) is tied with *Gunsmoke* for the longest-running US television series of all time. Adam Schiff (Steven Hill) was the District Attorney for the first ten years. I am not aware of whether Schiff ever self-identified as Jewish, but his name is likely Jewish and a reference work on the show identifies him as such. Schiff is a wise old owl who has seen it all. He’s always conscious of the political realities, often tamping down the enthusiasm of the ADAs who work for him.

Danielle Melnick (Tovah Feldschuh) was a defense attorney who appeared in 13 episodes of *Law & Order*. In one episode, she was described by her disgruntled client as a “Jew lawyer.” Melnick (a longtime personal friend of prosecutor Jack McCoy) is shown as a skillful and zealous lawyer, totally devoted to her clients and usually operating within appropriate ethical limits.

Both Schiff and Melnick are portrayed positively as consummate professionals, working within the system to achieve justice as best they can. Neither is unattractive or personally unpleasant. Thus, I regard them as falling near the middle of the spectrum—mildly positive but neither terrible nor heroic.

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47 “End Games,” Seas. 3 ep. 16.
50 “One of These Days,” Seas. 3, ep. 6.
51 She gets in trouble for failing to report an unintentional contact with a juror. “Dog Bite,” Seas. 2, ep. 4. She advises a client arrested for drunk driving to consume more alcohol after the accident to confuse the breath test. “Passing Go,” Seas. 3, ep. 1.
52 “Part V,” Seas. 1, ep. 5.
56 As this article was written, a Jewish patent lawyer named Buzz (played by Richard Masur) emerges as Shelley’s boyfriend in *Transparent* (Seas. 2, Ep. 7, 8). He seems a decent fellow and not bad looking. He’s the president of his temple, but we know little else about him. Of course, nearly all the characters on this show are Jewish and most are pretty dysfunctional.
IV. Strongly Positive Portrayals of Jewish Lawyers on Television

This section considers two strongly positive portrayals of Jewish lawyers on TV. These characterizations fall at the right end of the Jewish lawyer characterization spectrum. They suggest that Jewish lawyers are more noble and heroic than other lawyers.

A. Examples of Strongly Positive Portrayals

1. Harry’s Law: Harriet Korn

*Harry’s Law* (2010-2012) starred the great actress Kathy Bates as Harriet Korn (better known as Harry). Korn is a burned-out patent lawyer who is fleeing big firm law practice and opens a storefront office in Cincinnati’s African-American ghetto. She is joined by Adam Branch, who is much younger and also a big-law refugee. Korn is rather gruff, but nevertheless inspires loyalty from her staff and trust from the local community.

Since nobody in the community can pay a fee, this practice cannot possibly be profitable. Indeed, the firm survives by selling high fashion shoes left behind by a prior tenant. Moreover, there are serious issues of personal security for the lawyers and staff because of gang activity and drug trade on the street. The decision to open a practice in the ghetto seems motivated entirely by Korn’s social justice concerns. Her practice tackles all manner of urban problems and she is totally committed to helping the community. Korn self-identifies as Jewish, so she is among the few strongly positive portrayals of Jewish lawyers. However, she is less physically attractive than others in the ensemble and appears to have no personal life.

2. The O.C.: Sandy Cohen

*The O.C.* (standing for Orange County) was a successful teenage-oriented soap opera that ran from 2003-2007. It is set in Newport Beach, California, amid great wealth and opulent homes. Sandy Cohen (played by Peter Gallagher) is a key adult character. Cohen, who self-identifies as Jewish, has been a public defender for 15 years. He is married to Kirsten, who is one of the richest women in Orange County. He came from the Bronx, via Berkeley.

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58 Producer Robert Breech stated that producer David Kelley made Korn Jewish to make the character more interesting and provide story ideas. Phone interview with Robert Breech, March 25, 2016.
We see Cohen engaged in various noble actions. Ryan Atwood is one of Cohen’s juvenile clients. Ryan comes from a terrible home in the working class town of Chino and gets in trouble because of the evil influence of his older brother. Cohen spots Ryan’s intelligence and essential goodness and adopts him into his own household, despite his wife’s opposition. Later in Season 1, Cohen switches from being a public defender to taking a law firm job, but the only work we see him doing is a big environmental case to block a development in the Orange County wetlands. His opponent is his father-in-law and his wife’s employer.

Cohen is a wonderful father to his son Seth as well as to Ryan. He resists all attempts at seduction by the beautiful women of Orange County. He is handsome and attractive (although noticeably different looking than the various golden blondes who surround him). In Sandy Cohen, we find a Jewish lawyer who is more noble than other lawyers.

B. Sources of the Positive Stereotypes of Jewish Lawyers

1. Commitment of Jews to Social Justice
The highly positive stereotypes of Sandy Cohen and Harriet Korn resonate with data about the attitudes of contemporary American Jews. A commitment to social justice seems to be an essential element of contemporary Jewish religious belief, especially among Reform Jews and among self-identified Jews who are not affiliated with any religious institutions. The Pew study on Jewish Americans concluded that 56% of American Jews say that working for justice and equality is essential to what being Jewish means to them. According to two perceptive commentators on Jewish attitudes, “For many American Jews, the non-Orthodox in particular, political liberalism is constitutive of what it means to be a good and caring Jew. For them, the quest for social justice, civil and human rights, and the concern for the welfare of the disadvantaged are the moral and religious content of the Jewish tradition.”

However, this commitment varies with Jewish denominational preference. A 1988 study by the Los Angeles Times asked: “As a Jew, which of the following qualities do you consider most important to your Jewish identity: a commitment to social equality, or religious observance, or support for Israel, or what?” About half answered “equality.” But the proportion giving this answer was only 18% of those defining themselves as Orthodox, 44% of those defining themselves as Conservative, 65% of those defining themselves as Reform, and 63% of those who were...

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60 Pew Research Center, ‘A Portrait of Jewish Americans,’ (Oct. 1, 2013). Jewish voting preferences are related to this phenomenon. The Pew study states: “As a whole, Jews support the Democratic Party over the Republican Party by more than three-to-one. 70% say they are Democrats or lean toward the Democratic Party, while 22% are Republicans or lean Republican. Among Orthodox Jews, however, the balance tilts in the other direction: 57% are Republicans or lean Republican and 36% are Democrats or lean Democratic.” Space limitations on this article preclude further discussion of Jewish voting behavior.

nondenominational. And studies of Conservative and Reform Jews indicate that “many measures of liberalism were found to be inversely proportional to synagogue attendance.”

2. Representation of Jewish Lawyers in Social Justice Organizations

The Jewish commitment to social justice has often played out in the lives of Jewish lawyers. Many of them have led the way in fighting for civil rights for both Jews and non-Jews. The names of Louis Marshall, Julius Cohen, Louis D. Brandeis, Jack Greenberg, Joseph Rauh, and numerous other historically important figures are often referred to in the literature. Jewish lawyers were instrumental in establishing the doctrines of international human rights.

Jewish lawyers appear to be over-represented on the staff of liberally-oriented public interest organizations, including public interest law firms, legal aid, leftist-oriented bar associations, and organizations promoting international human rights, civil rights, or environmental or feminist agendas. For obvious reasons, it would be difficult to provide precise statistics on this point. According to Donna Arzt, however:

That Jews are over-represented among the public interest bar is an undocumented but commonly acknowledged fact. A partial list of the most prominent could not fail to include [Arzt gives 46 examples of prominent Jewish lawyers and judges with leadership roles in a variety of public interest organizations and campaigns.] These are the historically and nationally known. Any glance at the directories of local ACLU chapters, Lawyers’ Committees for Civil Rights Under law, legal services and public defender offices, volunteer lawyers’ projects, public interest law firms, miscellaneous law centers and legal defense and education foundations will yield thousands more Jewish names.

3. Explanations of Jewish Commitment to Social Justice

There are two ways to understand the persistent American Jewish commitment to social justice. It can be traced to the history of American anti-Semitism and to shared

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62 Quoted in id. 64.
63 Id. 64.
67 Auerbach (n. 35) 209.
68 Jewish lawyers are also well represented in conservative public interest organizations but not in proportions greatly different from the percentage of Jewish lawyers in the overall lawyer population. Ann Southworth, ‘Jewish Lawyers for Causes of the Political Right,’ in Mermelstein (n. 35).
feelings of social responsibility embodied in the phrase *tikkun olam* (meaning ‘repair of the world.’)

a. American anti-Semitism

One plausible account roots the social activism of contemporary Jews in the history of anti-Semitism in Europe and in the U.S. Perhaps Jews believe that their history of being subject to discrimination and prejudice obliges them to fight similar injustice against others less fortunate than themselves. Or perhaps Jews feel that they might once again be the victims of anti-Semitism in the U.S. and should act in a way that might make that less likely (for example by building bridges to other minority groups). As this article is written in 2016, some American politicians are scapegoating defenseless minorities. Many Jews believe they could be next, as they have been so often in their long and tragic history.  

Anti-Semitism was long a reality of Jewish life in America. In 1938, 36% of respondents agreed that Jews had too much power; by 1945 that figure rose to 58%. In 1944, 24% identified Jews as greatest menace to American society with only 9% identifying Japanese and 6% identifying Germans.  

For most American Jews today, this kind of virulent anti-Semitism is thankfully in the past. It is not socially acceptable today for non-Jews to publicly voice anti-Semitic sentiments or to tell Jewish jokes. Overt anti-Semitism isn’t part of the daily experience of assimilated American Jews of the 21st century. Staunch support for Israel is mainstream doctrine for both liberals and conservatives. Probably, there has never been a time in all Jewish history where Jews have become so assimilated, so successful, and so accepted by non-Jewish society as in the U.S. today.

Yet anti-Semitism is far from extinct. Millions of Americans still hold anti-Semitic beliefs. Some Jews still experience anti-Semitism in their daily lives and even more believe it is a real concern or fear that some terrible event will force rampant anti-Semitism back to the surface. Thus the reality of past and present discrimination and fear of renewed discrimination probably motivate many Jews to identify themselves as social liberals.

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71 Mitchell (n. 36) 158-160; Susser & Liebman (n. 60) 43-44. In 1948, Gerald L.K. Smith ran for president on a platform of deporting all Jews. *Id.* 43.
72 The world’s leading authority on lawyer jokes reports that once-common jokes about Jewish lawyers as well as Jewish litigants have virtually disappeared, while lawyer jokes have flourished. Marc Galanter, ‘Lawyer Jokes and the Jewish Question: Jews, Lawyers, and Legalism in American Life,’ in Mermelstein (n.35).
73 Susser & Liebman (n. 60) 43.
74 ‘Anti-Semitic Beliefs in the United States’ (n. 38).
75 The Pew Report (n. 59) reported that 43% of Jews “say Jews face a lot of discrimination;” 15% stated they had been snubbed or called offensive names during the past year.
76 Susser & Liebman (n. 60) 46, 54-60.
b. Cultural Judaism and tikkun olam

The doctrine of tikkun olam, literally “repair of the world,” incorporates the idea that Jews owe an obligation to pursue social justice. Indeed, tikkun olam has become a fundamental tenet of contemporary Jewish thought, at least in the Reform movement and among the many Jews who consider themselves culturally Jewish but are religiously unaffiliated. The phrase can be traced back to ancient prayers, to Jewish legal sources, and to Jewish mysticism, but in those sources it lacks the secular, social-justice, and universalistic connotation that it has developed today. The current use of the phrase probably dates back to the 1950s.

Since about the 1970s, the doctrine of tikkun olam has become for many Jews the emblem of what it means to a Jew in the modern world. It connotes an obligation to achieve social justice and is not limited to helping other Jews. It has been fervently embraced by the Reform and Conservative movements. Many see tikkun olam as a reason for Jews to remain Jewish, given the advance of secularism and assimilation in modern American life.

IV. Conclusion

Much of popular culture is trash produced for profit and most of it is intended to be consumed by mass audiences and quickly forgotten. Nevertheless, this vast outpouring of cultural product should be taken seriously. As discussed previously, pop culture serves as a crude mirror of public opinion. As a result, stereotypes projected through movies, television, and other instrumentalities of popular culture likely reflect the opinions of many people and may reinforce those opinions. I hope that this article will cause its readers to view more critically stereotypical representations in pop culture of Jews in general and Jewish lawyers in particular.

The numerous strongly negative portrayals of Jewish lawyers on television unfortunately echo the long history of contempt for Jewish lawyers in the legal profession and the general public. These representations suggest that negative stereotypes of Jews and Jewish lawyers still linger. On the other hand, the mildly positive portrayals of Jewish lawyers on television suggest that most people now view Jewish lawyers as being about the same as all other lawyers. These representations signify a strongly assimilationist message. Finally, the relatively few strongly positive portrayals of Jewish lawyers reflect the fact that a commitment to social justice has become, for many American Jews, an essential element of what it means to be a Jew.

[78] See text at notes 5-6.
Outside but Within:
The Normative Dimension of the Underworld in the television series “Breaking Bad” and “Better Call Saul”¹

Manuel A. Gomez

I. The portrayal of the legal system in popular media

The fascination of popular media with the operation of the legal system is not new. For many years, novelists, playwrights, and screenwriters have produced an endless catalogue of works focused on crime and punishment, trials, lawyers, judges, and other pieces of the intricate puzzle that comprises the legal system.² The universe of such works is so vast that it has led to the development of many sub-genres, which have persevered throughout the evolution of the different artistic and intellectual forms of written, oral, and audiovisual expression.

From the long gone days of the “silver screen” when motion pictures were only shown in theaters, to our current time when anyone with a palm sized electronic device can access and watch virtually any movie in existence; video recordings have attained a prominent place in our modern culture. Their sensory-stimulating potentials, and ability to reaching viewers in virtually every corner of the world, makes video recordings a premier vehicle for the propagation of cultural values, ideas, and attitudes about many facets of social life, including the legal system.

An average lay person today would likely describe the scene of a courtroom hearing as featuring a black robed judge, gavel in hand, presiding from an elevated podium whilst questioning a witness seated to her side. The jurors are contained in a special section (the jury box) and are situated farther apart, and the lawyers stand side-by-side, front and center, in a spacious courtroom where members of the public, too, are in attendance. Such a scene, taken from an American trial, has become a staple in popular culture in countries as far as Argentina, the Philippines or Malaysia, in great part due to the global reach of American television series.³ The impact has been such that even foreign movies and television shows routinely feature American-style

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¹ An earlier version of this work was published as MANUEL A. GÓMEZ, No Limite: A Representação do Direito e da Ordem Social Não-oficiais na Série de Televisão Breaking Bad, in LAW AND POPULAR CULTURE (Pedro Fortes, ed.) (Fundação Getulio Vargas: São Paulo, 2015) volume 12 of FGV LAW SCHOOL SERIES (CADERNOS FGV DIREITO RIO). The author acknowledges the suggestions and insight from the two external blind reviewers to the original manuscript, and the invitation of Professor Pedro Rubim Fortes to participate. Megan Roth and Itay Ravid also provided valuable commentaries to earlier versions of this article.


courtrooms, and all the theatrics that it entails. Predictably, people from foreign countries have reported, “that they are more familiar with the American trial system than with their own countries’ legal regimes.”

We do not know exactly how many law-related television shows have ever been produced, but we can reasonably estimate that there have been at least two hundred, of which the vast majority are American-made. The sub-genres, specific content and storylines of legal television series are numerous, and their taxonomy is beyond the scope of this article. Notwithstanding, we can say that law-related television series tend to have at least two features in common. First, their portrayal of the legal system tends to be neither completely accurate nor real, but instead dramatized, skewed, and distorted to varying degrees. This should come as no surprise given that their main goal is to entertain. Second, law-related television series also tend to put emphasis on the dramatic twists and turns of legal cases, courtroom drama, and shocking events that are often seasoned with gore and disproportionate violence.

Anyone who is familiar with the operation of the legal system knows that most dramatic events as depicted in television series are not common, and that the real life of the law is instead filled with mundane activities and routine tasks that would certainly seem dull and uninteresting to a lay person, and therefore unappealing to film producers and playwrights, too. Unless it helped support some dramatic twist, the writer of a television series would never focus their story on the average legal dispute between a tenant and her landlord, the administrative processing of a traffic violation, or the filing of a motion to dismiss a case for lack of jurisdiction. The situations from which screenwriters generally get their inspiration tend to be unusual crimes, political scandals, pressing social issues, or notorious court cases. Current events such as terrorist attacks, drug trafficking, gender and racial tensions, and gang violence inundate popular television series these days.

In any instance, scriptwriters take those situations as raw material and manipulate them, add drama to their plot, and embellish otherwise lackluster stories, but also make sure that some realistic or familiar content remains. After all, people (the audience of a play, television show, or movie) are more likely drawn to stories that are familiar to them, events and messages that have symbolic meaning, or about which they have an opinion. In this sense, television series and other popular media become valuable forms of cultural expression. Their depiction of events or situations where the law intersects with social behavior, norms, ideologies, and values is likely to have an impact on how the public sees the legal system and relates to it. Measuring such impact is another story.

In any case, the relationship between popular media and culture is synergetic in the sense that they impact each other. Popular culture is both a touched-up expression of real social phenomena and an influencer; whereas the depictions offered

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4 Jessica Silbey, 'A History of Representations of Justice: Coincident Preoccupations of Law and Film' in Antoine Mason & Kevin O'Connor (eds.) Representations of Justice (Peter Lang, 2007) at 140


by popular culture may be biased, partial, or exaggerated, at the same time they help us understand the dynamics of social phenomena vis-à-vis the legal system. Furthermore, popular media reflects a particular set of values, ideas, and attitudes that certain people hold about the law (legal culture), and in turn contributes to reshaping and disseminating similar values, ideas, and attitudes back to society, as in a never-ending cycle.

The concept of justice is also important here. Popular media serves as a conduit that transmits an interpretation of what justice is, from the screenwriters—through the characters that they create—to the viewers, and from them to the rest of society. Conversely, the general public’s view of justice is also susceptible to be collected and reinterpreted in a script for further dissemination through popular media; so the cycle goes on and on.

In many law-related movies and television shows the idea of justice is presented in more than one way. The most obvious depiction is the one in which justice is perfectly aligned with the official legal system, and the characters that play the roles of lawyers, judges, and law enforcement agents are called upon to maintain such alignment, even through heroic actions. More often than not, the impeccable behavior of the agents of the law is exaggerated; conversely, the actions of those depicted as deviants are dramatized as well. The result here is a clear good guy/bad guy dichotomy.

On the other end of the spectrum, there are storylines where the formal authority is presented as having become illegitimate, so the only way to achieve justice and save the day is by breaking the formal law and confronting the officials who have gone astray. Given the unlimited reach of human creativity, imagination, and the incredible technological advances at our disposal, the variations among plots: the twists, the turns, and the situations between one extreme and the other, seem endless.

One of the most common representations of law and justice in popular media focuses on the official level, and the hurdles faced by those involved in one way or another with the workings of the state. There is also an important sub-genre where the normative order depicted is one that emerges and operates outside of the official legal system, and is often presented as being at odds with it. These private, unofficial, or indigenous legal systems might be portrayed as dependent on their own sets of norms, institutions, and enforcement mechanisms. The reasons for their indigenousness obviously vary depending on the plot, but the most common depiction is of social groups, the members of which are criminals, deviants, or act outside the law, and yet

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8 See Marc Galanter, Indigenous Law and Official Law in the Contemporary United States, Symposium in Bellagio, Italy: State Institutions and Their Use of Folk Law: Theoretical and Practical Issues (Sept. 21-25, 1981) (unpublished manuscript) (on file with author) [hereinafter Galanter, Indigenous Law]. Following Galanter, “by indigenous law (we) refer not to some diffuse folk consciousness, but to concrete patterns of social ordering to be found in a variety of institutional settings.” Id. at 2.
devotedly abide by their own unofficial normative regime. Simply put, despite being outside the state those groups act within the confines of their own legal system.\(^9\)

Some popular examples of these private ordering structures are the mafias, gangs, and other groups of the underworld such as the Corleone family in *The Godfather* movie trilogy, the Soprano family in the eponymous television show, the Barksdale Organization in series *The Wire*, and more recently the Juárez Cartel in the award-winning show *Breaking Bad*, and its spin-off *Better Call Saul*. Despite the obvious differences that stem from each story, and the characters involved, there seem to be some common features among the criminal organizations depicted in popular films.

First, criminal organizations in popular television shows usually feature a clear hierarchical structure whose core members are related to each other through multi-stranded ties that include family, ethnicity, or some other affiliation such as longstanding friendships. The bonds that result from these connections are often shown to signal the sense of intra-group identity, loyalty, unquestionable obedience, and cooperation toward attaining a common goal,\(^10\) regardless of whether it involves committing a crime or engaging in illegal behavior vis-à-vis the official legal system.

Second, the roles in each of these groups are also clearly defined from top to bottom, and recognized both within and outside the organization, especially among the law enforcement officials that are naturally depicted as their nemesis. Unsurprisingly, most of the attention given to the characters of the underworld in popular culture tends to focus on their criminal activities, and the intrepid behavior of their members who are usually featured among the main characters of the show.

With the exception of the characters depicted as ruthless villains whose antisocial behavior challenges every convention and breaks every possible rule including their own intra-group norms, criminal organizations are generally shown as having their own internal legal order of sorts. At the core of these indigenous orders are their own sets of laws and internal control mechanisms that ensure compliance with those laws. One common feature of these indigenous legal systems is the presence of a leader or kingpin who makes important decisions, including the adjudication of disputes. In other instances, collective bodies such as the council of the “five families” in the *Godfather* perform such an adjudicatory function in a similar way to how courts or other state institutions would operate, but applying their internal community norms or standards.

None of these standards or normative codes, however, appears to be contained in any document or written record, which is not surprising given the purported illegal nature of those organizations. Notwithstanding the absence of written laws, there is never confusion as to the scope and effect of those laws, or their meaning, which all members seem to understand and abide by. Unlike the case of many television series and movies about the official legal system, where important parts of the story are

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\(^9\) Conversely, the law enforcement agents depicted in popular media shows tend to be portrayed as acting both inside the state and within the boundaries of the formal legal system.

devoted to showing intense disagreements between the parties to a dispute, their lawyers, and the court regarding the interpretation of a particular law, the laws of the underworld always appear to be crystal clear and compliance seems to be very high.

One key element in the legal systems of the underworld portrayed by the popular media is the internal sanctioning power of the group. Depending on the severity of the violation, mafias and other criminal organizations shown in television shows act swiftly when imposing fines and giving other economic consequences to violators. Among organizations such as drug cartels or smuggling operations, sanctions range from the loss of a market share, a monetary sanction, or the deprivation of an earned commission. For other type of infractions, including the betrayal of colleagues or “family” members, the punishment may entail intimidation, physical harm, or even death, which is frequently portrayed prominently to enhance the dramatic effect of the story. Occasionally, the injured party also seeks revenge, retaliation, or decides to snitch to the official authorities, so these may in turn prosecute and punish the guilty party.

Intra-community sanctions are usually decided summarily at the highest level by the bosses or leaders, but are carried out by specially designated enforcers who are usually depicted as ruthless individuals otherwise unconditionally loyal to their bosses and to the criminal organization to which they belong. Inter-group violations, on the other hand, are generally dealt with directly by collective bodies comprised by the heads of each family, an alliance of gangs or drug cartels, acting as a court of last resort. Despite their apparent efficiency, the normative orders of the underworld in popular media are sometimes depicted as marred with bouts of injustice and extreme cruelty. At the center of the plot there is usually an individual or a group of individuals whose moral compass is mislaid, and who act as if no laws or norms apply to them. In other words, these characters are both outside of the state apparatus, and also act without any regard for their own community or intra-group norms.

The inside/outside distinction refers to the insertion or not of a particular social group or individual into the state bureaucracy. The within/without dichotomy denotes instead the submission or not to a given normative order, be it inside or outside the state. The interplay between the two dimensions, and the degree to which they appear in the different storylines, may lead to an array of different possibilities. The following coordinate system shows four basic combinations that illustrate this dynamic.

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11 Some famous examples are Strinkum and Wee-Bey in The Wire, Luca Brasi in The Godfather, Tuco Salamanca in Breaking Bad, and the twin brothers Leonel and Marco Salamanca in Better Call Saul.

12 Such is the case of The Council of the Five Families in The Godfather, or the New Day Co-Op in The Wire.
The professional legal actors such as lawyers, judges, and law enforcement officers are mostly depicted as being inside and within the official legal system (A). A police officer or a lawyer who breaks the law (regardless of his or her motives) could still remain inside but act without respect for the rules (B). The less respect the character shows for the law, the farther he or she will be from (A) along the “X” axis line. The members of outlaw groups such as crime syndicates, mafias, and other close-knit organizations will always be outside, but as long as they follow their own normative order we will place them along the within continuum (C). Finally, the individuals whose behavior challenges all normative systems, including the rules prevailing in the underworld, will be deemed both outside (the state) and without (rules) (D). As in a geometrical plane, the possibilities are infinite and will move along or up, depending on whether each character is inserted inside or outside the official legal system, and acts within or without conforming to any norms.

The popular media depiction of how outlaw organizations operate, their purported internal efficiency, and their relationship with the official legal system, is most likely an idealized and exaggerated rendering of their real-life version. In this sense, popular culture cannot be taken as “an accurate mirror of the actual state of living law,” as a true representation of the social relations that those laws are meant to regulate, or even as an accurate representation of the content of the law itself.

Nevertheless, as I explained earlier, law-related televisions shows and movies serve as conduits for the dissemination of the traditions, ideologies, and norms prevalent in society as interpreted by their authors and scriptwriters.

Each of the movies and television series mentioned earlier feature certain characters depicted as criminals who seem to place a high value on their own version of justice, fairness, due process, and other ideals generally associated with the official legal system. Members of the criminal organizations, gangs, and the like, depicted in popular movies and television shows also tend to follow indigenous codes of conduct where honor, loyalty, and even the right to present one’s case and be heard seem to be

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of paramount importance. Following my proposed classification, these characters tend to be outside the state but within their own normative systems.

The notion of justice portrayed in such cases is, of course, retributive and also at the service of their family, gang, or enterprise, and not the interest of society at large. As a result, one could argue that what is depicted there cannot be considered real justice, but perhaps something else. In any case, the fact that these indigenous normative systems exist contributes to reaffirming the idea that dispute processing is not the exclusive business of the state. Furthermore, this also shows that even those depicted as deviants in the eyes of the official legal system are able to develop their own normative system, including a sense of what is right and wrong, and what is just and unjust.

In the sections that follow, this article explores the aforementioned dynamics using two acclaimed television series; *Breaking Bad* and its spin off *Better Call Saul*, as points of reference. *Breaking Bad* traces the journey of Walter White, a terminally ill high school teacher, from his uneventful middle class life to becoming the most powerful and dangerous methamphetamine manufacturer in the Southwestern United States. *Better Call Saul*, a spin off, follows the story of lawyer Saul Goodman, one of the supporting characters in *Breaking Bad*. The show is written as a prequel to *Breaking Bad* and focuses on the transformation of Jimmy McGill from a small time swindler into a mediocre lawyer, and then into a powerful intermediary in New Mexico's underworld.

These shows not only portray how the formal legal system appears to respond to crime but, more importantly for our analysis, how criminal organizations as depicted in popular media regulate themselves, process disputes, and deliver sanctions. In a broader sense, these examples help illustrate how popular media disseminates the notions of law and justice developed and supported outside the formal legal system. In addition, this framework also has the potential to contribute to the discussion about what values, perceptions, and images about the law are transmitted to the public through popular media and how such transmission occurs.

II. S’all Good, Man! Legal actors and the official legal system in *Breaking Bad* and *Better Call Saul*

One of the central characters of both *Breaking Bad* and *Better Call Saul* is attorney Saul Goodman. A tacky lawyer who routinely represents crooked clients and assumes the legal representation of the main characters of *Breaking Bad*: Walter White and Jesse Pinkman. Goodman embodies the opposite of what an ethical lawyer should strive to be. He is portrayed as a money-hungry individual who views the legal system as a pliable tool, and who is willing break any rule that stands between him and the possibility of attaining personal gain. Goodman’s moral compass runs counter to what
professional ethics dictate, and his character appears to be continuously navigating back and forth between both worlds; *outside and inside* and *within and without*.

Notwithstanding his departure from the fundamental ethical duty of an attorney, in *Breaking Bad* Goodman appears to always bring common sense to his desperate clients and to provide them with practical advice. He is also swift in helping them cover their tracks, launder their money, and avoid being caught. On occasion, Goodman is shown condoning or even supporting illegal behavior (i.e. acting *without* respect for the law), but, at the same time, he appears to hold a high regard for the notion of attorney-client privilege, like someone who acts *within* the confines of the legal profession.

Goodman’s role is that of a broker or middleman, which is much more than being a simple legal advisor to his clients. His intermediation is not only between his clients and the state, but, more importantly, between the official legal system and the underworld, which puts him alongside similar characters like Tom Hagen from *The Godfather* trilogy. The difference between Goodman and Hagen, however is that the latter worked exclusively for the Corleone family as their *consigliere* or advisor, whereas Goodman is an independent lawyer with multiple clients and an elastic sense of loyalty that depends on the circumstances. The effectiveness of both Hagen and Goodman rested on their capacity to navigate between the official legal system, which they formally vowed to defend as licensed attorneys, and the world of crime where their clients and their business associates routinely operated.

Saul Goodman is obviously an over-dramatized character whose exaggerated unethical behavior ridicules lawyers. The fact that he never gets caught makes the official legal system appear inept and ineffective, although it also raises an occasional giggle from viewers with a dark sense of humor. Goodman’s intrepid character was further developed in the spinoff series *Better Call Saul*, the second season of which finished broadcasting in the United States in early 2016. The central plot of *Better Call Saul* concerns Saul Goodman’s early professional career; his transformation from a small time swindler nicknamed “Slippin’ Jimmy” into a struggling lawyer, and later on into a highly effective intermediary and fixer who eventually became the go-to person of New Mexico’s underworld. The series’ title is taken from the slogan that Goodman coined for the televised infomercials and billboards inconspicuously displayed in many of the scenes of *Breaking Bad*.

In *Better Call Saul*, Goodman – whose real name in the series is James “Jimmy” McGill – is portrayed as a novice attorney who started his legal career in the shadow of his older brother, Charles “Chuck” McGill Jr., who is one of Albuquerque’s most successful and respected lawyers and also co-founder of the prominent law firm Hamlin, Hamlin & McGill (“HH&M”). Due to a medical condition described as “electromagnetic sensitivity”, Chuck is confined to stay at home for a long period of

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15 Saul Goodman is actually a made up name from the words “S’all good, man”, which McGill invented.
time and his brother Jimmy becomes his primary caretaker while also trying to make ends meet by working as a public defender.

Throughout the first season we learn that prior to becoming an attorney Jimmy was a grifter with no promising future in sight. At some point, Jimmy got into legal troubles and was saved by his brother Chuck who then hired him to work in the mail room of HH&M. Later on, Jimmy enrolled at the University of American Samoa Law School, graduated and passed the bar, but HH&M refused to hire him as an associate, thus forcing him to leave. Jimmy’s first legal experience comes from his work as public defender in the criminal courts, and then as an attorney specializing in elder law. While trying to recruit clients, Jimmy becomes aware of a possible multimillion-dollar fraud committed by the owners of the nursing home Sandpiper Crossing against its residents. He began assembling a potentially lucrative class action based on the alleged fraud, which lands him an associate position with the firm Davis & Maine (D&M), and he is given the main task of developing clients for the case.

Despite having been given several opportunities to become a respectable attorney and therefore staying inside the legal system and within the law, Jimmy never stops engaging in unethical and fraudulent behavior. Most of his illegal actions appear to be well intentioned, or in pursuit of a laudable goal, but the fact that Jimmy carries them out in total disregard of the law puts the spectator in a quandary. In other instances, Jimmy reveals himself to be a very effective negotiator, like in the scene when he persuades drug kingpin Tuco Salamanca to break one leg of each of his con artist associates, Lars and Cal, instead of killing them. Aside from Jimmy, his brother Chuck, Jimmy’s girlfriend Kim Wexler, and Chuck’s partner Howard Hamlin, who are all attorneys, Better Call Saul does not focus on other legal actors or on any other aspect of the official legal system.

The contrary happens in Breaking Bad where the presence of the official legal system is much more salient. This is not surprising given that illicit drug trafficking is an essential part of the story. Unlike some other law-related shows that tend to highlight the flawed side of the official law enforcement by showing police abuse, corruption, and inefficiency, almost none of that occurs in Breaking Bad. The depiction of the official legal system in Breaking Bad, which is mainly represented by members of the Drug Enforcement Agency (DEA) led by Hank Schrader and, to a more minor extent, the local police force, the state’s correctional system, and lawyer Saul Goodman, is one of a reasonably well-functioning apparatus managed by competent agents willing to sacrifice their own lives for the good of society.

Aside from Schrader and his colleague Steven Gomez, who is killed while on duty, none of the characters playing law enforcement roles become known for their heroic actions, as routinely occurs in shows of this nature. Every law enforcement character in the series seems to perform their job normally and, with the exception of Schrader, their lives are unremarkable. In other words, they stay both inside the legal system, and act within its principles.

Breaking Bad has been dubbed one of the highest rated television shows of all times. During the years when Breaking Bad was aired in the United States (between 2008 and 2013), the series won more than one hundred industry awards, including
sixteen Primetime Emmy Awards, two Peabody Awards, and the Writers Guild of America Award for Television for two consecutive years. Aside from serving as inspiration to the spinoff Better Call Saul, Breaking Bad gave life to a Spanish-language version dubbed Metástasis, and also encouraged the production of a contemporary opera. Because of its focus on the illegal drug trade and other related problems, the series also stirred a public debate about its potential pernicious effect on American society. One prosecutor, for example, blamed the show for glorifying the manufacturing and trafficking of methamphetamine\textsuperscript{16}, one of the most harmful illegal drugs in the United States.

Breaking Bad’s premise is the tragic story of Walter White, an Albuquerque public high school chemistry teacher who, upon being diagnosed with a terminal cancer, became a manufacturer and dealer of crystallized methamphetamine, in order to help build a financial nest egg for his pregnant wife and his teenage son afflicted with cerebral palsy. White launched his dangerous venture in partnership with a former student, Jesse Pinkman, an amateur drug dealer with contacts in the underworld. Both Walter and Jesse begin by “cooking” meth in a retrofitted RV that they drive into the desert to avoid being caught. Soon after realizing the potential economic success, due in great part by their high-quality product which they call “blue sky”, White and Pinkman become associated with an erratic kingpin by the name Tuco Salamanca, and later on joined the organization of the well-established distributor Gustavo Fring, who in turn worked with the powerful Juarez Cartel, led by Don Eladio Vuente.

Walter’s initial association with the drug cartel was involuntary, and resulted from a series of events that slowly brought out his violent and ruthless side. Instead of revealing his real identity to the members of the underworld, Walter introduced himself as Heisenberg. His increasingly aggressive behavior and cold-blooded demeanor easily places Walter not only outside the legal system, but also without any normative boundaries. His character develops into an incredibly anarchical trafficker, even for the most seemingly merciless drug lords. The dramatic effect of the story was enhanced by the fact that White’s brother in law, Hank Schrader, was an important drug enforcement agent whose main quest was to bring down the illicit drug trade in New Mexico.

As it commonly occurs in the world of legal thrillers, Breaking Bad is full of dramatic twists and turns, suspense, and even a certain dose of black humor. The central story poses some moral dilemmas such as the decision of Walter White to “break bad”\textsuperscript{17} and turn into a ruthless drug dealer in order to provide for his needy


family before his impending death.\textsuperscript{18} Another important character, Gustavo Fring, poses as a meticulously organized businessman with a sophisticated taste for good food and music. His front business is a chicken restaurant chain called “Los Pollos Hermanos”, but his real lucrative enterprise is the distribution of meth across the Mexico-United State border, which goes in hand with his persona as a coldblooded drug dealer.

III. Outside but Within: Breaking Bad, Better Call Saul, and the indigenous legal system of the underworld

Despite the frequent appearances of Hank Schrader, his law enforcement colleagues, and lawyer Saul Goodman as representatives of the official legal system, \textit{Breaking Bad} also underlines the existence of a private justice system embedded in the criminal organizations of Fring and Vuente. This order, which is displayed in bits and pieces throughout the series, focuses mainly on the enforcement of rules through intra-community sanctions carried out by specially designated individuals who appear to follow their bosses’ orders without hesitation. For the most part, the internal hierarchies of the criminal organizations depicted in Breaking Bad seem to be well defined.

The most prominent group is the Juárez Cartel led by Don Eladio Vuente, a godfather-like figure who also symbolizes the stereotypical Latin á la Tony Montana in the movie \textit{Scarface}.\textsuperscript{19} At some point during the show, the viewers are provided with some history about the relationship between Vuente and his longtime business associates; Gustavo Fring and Hector “Tio” Salamanca. During most of the show, however, Salamanca appears as a sick and severely disabled man, probably the victim of a stroke or other crippling condition, who only communicates through a bell attached to his wheelchair or through his desperate facial expressions. During his youth, Salamanca was clearly an active cartel member and Vuente’s enforcer, although he also appeared to be revered within his own family.

\textit{Better Call Saul} offers a better glimpse of Hector Salamanca’s life prior to him succumbing to his affliction. The vigorous Salamanca is portrayed as a ruthless and coldblooded man with no concern for the consequences of his actions. In one particular scene, Hector is shown threatening to kill Mike Ehrmantraut unless he retracts a witness statement that he gave to the police incriminating Hector’s nephew, Tuco Salamanca. Hector offers Mike several thousand dollars to smooth the deal and appears to leave no room for negotiation. Acting as a hardball negotiator Mike makes Hector a counteroffer ten times higher, which the latter reluctantly accepts, while


\textsuperscript{19} In fact, the actor who portrayed Eladio Vuente in Breaking Bad (Steven Bauer) was also in the movie \textit{Scarface} as Manny Ribera, the loyal sidekick of Tony Montana played in turn by Al Pacino.
praising Mike for his audacity. This settlement, however, does not end the conflict between the two, as Mike still carries out a plot against Hector and robs one of his cash-filled drug delivery trucks on its way back to Mexico. Mike’s actions are obviously criminal but they seem justified under the circumstances, given the humiliation he endured from Hector and the fact that the monies Mike stole from him were also ill obtained.

Another villain featured in *Breaking Bad* is Gustavo Fring, who unlike the Salamancas, is depicted as a well-established and calculating businessman who uses his successful fast food chain, Los Pollos Hermanos, as a front for his methamphetamine laboratory and related illicit drug business. Whereas Vuente’s operations were confined to Mexico, Fring and Salamanca seemed to only work in the United States. Even though Eladio Vuente appears to be the most powerful leader, both Fring and Salamanca had their own area of influence and did not view themselves as complete subordinates to Vuente. A particular scene in Season 3 serves to illustrate this point.

Upon learning from their uncle Hector that Walter White had killed their cousin “Tuco”, Leonel and Marco Salamanca went to execute Walter in his home. When they are about to carry out their mission, a text message with the word “Pollos” (as in Gustavo Fring’s restaurant) makes them abort and instead go to a meeting between Gus and Hector, with Juan Bolsa (another one of Vuente’s associates) acting as a mediator. During the meeting, Fring persuades the Salamanca brothers to spare Walter’s life for the time being, because he is using him to produce methamphetamine, and offers to kill Hank Schrader for them instead. The parties reach an agreement, although Fring breaches it later by warning Hank and snitching on Juan Bolsa to the Mexican police.

The interest in negotiating in the aforementioned situation seems to be the best option, given the contending parties’ similar status within the organization and their apparent interest in maintaining their long-term relationship. Juan Bolsa is not entirely neutral, but his role as representative of the Juárez Cartel carries important weight and commands certain respect. How the negotiation is conducted, by allowing each party to present their arguments and propose a solution facilitated by Juan Bolsa, also shows the parties’ concern for the appearance of some level of fairness, as it would have occurred in any legitimate business dispute.

Throughout the development of *Breaking Bad*, different disputing parties seem to prefer handling their conflicts through various forms of self-help, including intimidation and violence. This is what we see in one of the first interactions between Tuco Salamanca, Jesse Pinkman, and Walter White, when the former threatens and intimidates Jesse and Walter in order to force them to enter into a business deal. Other similar scenes involve Victor, one of Gustavo Fring’s henchmen, who use intimidation to force Walter into selling methamphetamine for Fring at a fixed price. Another character routinely employed as an executioner and cleaner is Mike Ehrmantraut, a former police working for Gus Fring and, on occasion, for Saul Goodman. Unlike the other
hired guns in the show, Mike appears to be more sensitive and avoids hurting any innocent people or bystanders, which makes him look fair-minded and just.

Mike's character, as a fair-minded yet determined executioner, is well developed in *Better Call Saul*. Mike and Saul (then Jimmy McGill) met when the former was working as cashier in the parking lot of the Albuquerque courthouse. Despite their constant arguments over Jimmy's repeated attempts to avoid paying for parking, Mike eventually hires him as his lawyer but ends up using Jimmy in a scheme to steal a notebook from a Philadelphia detective who flew to New Mexico to interrogate Mike. Their relationship strengthens, as they need each other for different tasks, but never truly becomes a lawyer-client relationship. Throughout the show, Mike takes occasional jobs as an enforcer, bodyguard, and as a hired gun by members of the underworld. Mike stands out for being reliable and a man of his word, which sets him apart from other characters, such as the members of the Salamanca clan.

Mike's dependability explains why he ended up working for Gustavo Fring in *Breaking Bad*. Mike and Gustavo's professionalism, and their abidance by their group's internal norms and codes of conduct, are very different from what we see in the behavior of Walter White. Walter's character evolves from a fearful and amateur drug manufacturer into an ambitious, vain, and ruthless criminal with a very low tolerance for error and a great disdain for compassion and loyalty.\(^{20}\) Even Walter's seemingly laudable actions, like when he tries to save his brother in law Hank from his executioners or when he asks his former friends Elliot and Gretchen Schwartz to set up a trust fund for his children with his illegal money, are undermined by his frequent cold-blooded and unreasonable conduct.\(^{21}\) The exaggerated and over-dramatized behavior of Walter White in *Breaking Bad* offers an interesting contrast with the seemingly orderly conduct of the underworld leaders and their subordinates. White's chaotic descent into anarchy is not only an affront to the official legal system but, more importantly, to the private normative order created and maintained by Fring, Vuente, Ehrmantraut, and even the Salamancas.

### IV. Conclusion

From the standpoint of the formal legal system represented in *Breaking Bad* and *Better Call Saul* by licensed attorneys, drug enforcement agents, and ordinary police officers, the underworld is identified with chaos and disorder. The criminals and gangsters portrayed in the plot appear to be excluded, alienated, and *outside* the boundaries of society. If we look at it from a different angle, we can see that, despite the illegality of the criminal world depicted in *Breaking Bad* and *Better Call Saul*, its members also show abidance by certain rules and codes of conduct that originated *within* their social groups. Furthermore, such groups also feature a sophisticated level of organization and a set of norms that maintain their social balance. With very few exceptions, the

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criminals and other deviants depicted in the series conform to certain intra-group expectations and follow a pre-established set of rules that are deemed legitimate within their gangs, criminal networks, and the underworld in general. In short, they are both outside (of the legal system) and within (their own normative order).

These observations are obviously about imaginary societies and individuals created by talented scriptwriters with the main objective of providing entertainment to the general public. Nevertheless, as we mentioned earlier, their inspiration almost always comes from real events and also reflects the values, perceptions, and images held about the relationship between law and society. The cross-border criminal activity that takes place in Breaking Bad with almost absolute impunity brings to memory the ongoing efforts by the United States government to build a wall along its border with Mexico as a way to physically impede such crimes.

Regardless of whether any walls, fences, or any other barriers are raised, the private order and normative pluralism of the underworld will likely continue to exist similarly to how it did in Breaking Bad, despite any government efforts to eradicate the strong networks built by the likes of Vuente, Fring, Salamanca, and Heisenberg. Very much like in the popular television series, the development, success, and eventual demise of drug cartels and similar organizations of the underworld does not seem to come from outside, but rather from within.

Television series such as Breaking Bad and Better Call Saul, where the central focus is not just on how the formal legal system responds to deviant behavior and exercises its function of social control, but rather how criminal organizations regulate themselves, offers an interesting example of how the notions of law and justice can develop and be supported outside the formal legal system. Whereas the portrayal of the private normative order in Breaking Bad and Better Call Saul has been certainly enhanced for dramatic effect, it nonetheless helps understand the relationship between law and culture and “between the functioning legal system and its essential social matrix”.  

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22 Friedman (n.13) at 1605
The Portrayal of the Corporate Lawyer on TV: 
the US and British models from L.A. Law to 
Trust and Suits

Peter Robson

I. Introduction

Various forms of media, including television and cinema, were suggested by scholars like Stewart Macaulay 1 and Lawrence Friedman 2 in the 1980s as being the likely source of the public's knowledge of the legal system. Little was known through direct experience of the justice system or its personnel. More people have heard of Judge Judy than Mr Justice Scalia. In Britain, Judge Robert Rinder 3 has a higher recognition factor than Brenda Hale. 4 More recently, Richard Sherwin suggested in When Law Goes Pop 5 that, in these days of media saturation, it is from popular culture learn about law. Frank Abagnale showed us how to become a lawyer in the film Catch Me If You Can 6 - he watched a law show and learned the methods of Perry Mason from the TV.

People's knowledge of medicine comes from watching, over the years, a number of shows: Dr Kildare, ER, and Gray's Anatomy and, in Britain, Dr Finlay's Casebook, Casualty and Holby City. The non-lawyer learns about what lawyers do from the screen. 7 Much attention has, hitherto, been focused on the big screen image of the lawyer and the claimed change in these role models. 8 Paul Biegler 9 and Atticus Finch 10 have been replaced by the less worthy Frank Galvin 11 and Martin Vail. 12 Whatever the merits of this notion of decline, another, more interesting, shift has taken place. Scholars have finally started to pay attention to the other major source of lawyer images in popular culture, namely those found on our TV screens.

3 Judge Rinder (ITV; 2014 - ) – British version of Judge Judy with a telegenic and witty young gay judge shown daily on afternoon TV on one of the principal channels
4 Lady Hale was the first, and at the time of writing, only woman judge on Britain's Supreme Court.
6 2002 , Spielberg, Amblin Entertainment
9 Anatomy of a Murder 1959, Otto Preminger
10 To Kill a Mockingbird 1962, Robert Mulligan
11 The Verdict 1982, Sidney Lumet
12 Primal Fear 1996, Gregory Hoblit
II. The Context

TV lawyer dramas have developed significantly in the past half century since the days of Perry Mason,13 The Defenders,14 and Petrocelli 15 in terms of style, narrative approach, and personnel. In place of the simple trial-based episode in which the major protagonists achieved justice and, in the case of Perry Mason, revealed the true perpetrator, we have had developments in the areas of civil justice and, most recently, corporate law. In place of the one-off drama with a single major storyline dominating each weekly episode, we often have a combination of rolling issues which are resolved at some later dates, as well as a couple of series focusing on a single, long-running case. Finally, as far the lawyers we encounter, the shift in the balance of gender, ethnicity, and sexuality has undergone major changes. These changes have been noted elsewhere by various writers.16

This essay focuses much of its attention on the most radical of the approaches to a TV lawyer series in the seasons of Suits.17 As indicated, there has been a shift from the dominance of white male lawyers defending someone unjustly accused of a crime to a roster of male and female characters wrestling with crimes, divorces, and issues like intellectual property rights. The clients have ranged from the rich and privileged clients of Mackenzie Brackman in L.A. Law 18 to the poor and disadvantaged clients of Bobby Donnell and his partners and associates in The Practice.19 In Britain, with its legal profession split between full-time court lawyers – barristers - and office based practitioners – solicitors - the focus has usually been away from office-centred legal practice and on the pleaders.20 From Boyd QC 21 and Rumpole of the Bailey to Kavanagh QC 22 and Silk British TV has featured the trial process extensively from the 1950s until the present decade.

The prevalence of women lawyers, too, has changed in a number of subtle ways. Just as in the cinema of justice, women lawyers have gone from being simply absent, to virtual invisibility, to a major presence on the small screen.25 Looking at the

13 1957 – 1966
14 1961 – 1965
15 1974 - 1976
17 2011 – 6th season in progress at the time of writing
18 1986 – 1994
19 1997 – 2004
20 In reality the distinction between court and office-based practitioners in Britain is now more blurred since many solicitors do appear in the lower courts in many matters. There has also been since 1990 the concept of the Solicitor Advocate in Scottish courts allowing solicitors to plead before the highest courts – Willock and White (2005)
21 1958 – 1964
22 1975 – 1992
23 1995 – 2001
24 2011 – 2014
genre we can note the difference between the role of Della Street in *Perry Mason* through those of Abby Perkins and Ann Kelsey in *L.A. Law* to the eponymous *Ally McBeal*, Shirley Schmidt in *Boston Legal*, and Patty Hewes in *Damages*. Women have not only moved from behind the typewriter but also up the ladder, from background characters to enjoying major roles in the dramas in which they appear. In both the United States, Britain, and Australia we have series in the current decade in which women have been accorded the role of principal protagonist with Alicia Florrick in *The Good Wife*, Martha Costello in *Silk*, Claire Goose in *The Coroner* as well as the eponymous Australian series, *Janet King*.

What has been missing from these changes, however, has been to have a woman as the undisputed head of the organisation. *Suits* achieves this, and goes even further, with the character of the senior partner and powerhouse decision-maker in the practice being an African American woman. This is part of the interesting nature of this series which breaks new ground in a number of different ways. This essay seeks to explore these features and locate them in the context of how TV lawyer series have altered and developed over the past 50 years. *Suits* appears to draw on all the conventions of TV lawyer drama and yet subvert them at the same time. It is both a conventional TV lawyer series whilst simultaneously appearing to be mocking the genre. It playfully both meets and confounds our expectations. It is about law but, while there are plenty of plate glass offices and meetings, there are no trials. It is a post-modern knowing wink at the genre and its normal portrayal of law and justice. It is *Taggart* without the “murders”.

In terms of style, *Suits* initially appeared to be a standard one hour show with an “issue” dominating the lives of the two principal protagonists, Harvey Specter and Mike Ross. They have a client who has a problem in the corporate world which they inhabit and the twosome must resolve this. The hostile takeover must be resisted at all costs. The matter, though, is almost always complicated and the resolution exacerbated by the Unique Selling Point of the series. Mike Ross is not the Harvard law graduate he claims to be and is not the qualified lawyer the world assumes him to be. He simply stumbled into an interview while on the run from the police in a drugs bust. He was given his job by his quirky boss who liked his mental dexterity and

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26 1958-1964
27 1986-94
28 1997 – 2002
29 2004 – 2008
30 2007 – 2012
31 2009 –
32 2011-2014
33 2015
34 2014-
35 2011 - although not shown in the UK on mainstream television there is also a women head in *Harry’s Law* (2011-2012) and an African American one in *How to Get Away With Murder* (2014 - )
36 1983 – 2010
37 Detective Jim Taggart was faced in the series between 1983 and 1994 with homicides in each episode and it became part of Scottish folklore to refer to the series with Mark McManus’ extremely broad Glaswegian response in every episode “There’s been a murderr”. The series continued without the named character after McManus’ death in 1994 for over 15 years but many more murders.
admired his *chutzpah*. This improbable “secret,” known only to 3 people, manages to remain hidden for several seasons within a drama rather than a comedy series. The concern with the weekly cases, however, as the series develops, becomes less of a focus. The precise details of the legal issues are overtaken by both large and small office politics which begin to dominate the series.

The notion of shifts in time, developed in *Damages* is also adopted, to an extent, in *Suits* and serves to allow the background of some of the characters to be filled in. It is the standard goal of most series producers to achieve re-commissioning and to become a staple of the schedules. It does not seem unreasonable to suspect that the success of this “one trick pony” may have come as something of a surprise to those behind the series. This has led to some awkward and clunky “infilling” to be undertaken, as well as changes in characters like Louis Litt.

It is in the personnel encountered in Pearson Hardman that the conventional/unconventional mix is most vivid. In any series in the 21st century one would not be surprised to find women lawyers. Here, the senior partner is a woman, no less. By the same token, ethnic diversity would be expected. Here, this comes in the form of the two principal woman characters, Jessica Pearson and Rachel Zane. Jessica is powerful, driven, and compassionate, while Rachel is at the start of her career, ambitious and caring. By contrast, the two major players we encounter, Specter and Ross, are WASPs, with Harvey particularly “Aryan” and self-centred. Unusually, too, for the 21st century, we find a piece of blatant stereotyping in the part of the ambitious would-be partner, Louis Litt. Louis is a sneaky, conniving, self-serving lawyer on the staff with whom Specter appears to have a hate/hate relationship. Although apparently a brilliant lawyer, Louis is the butt of Harvey’s ill-humour and their ongoing relationship is one of the major drivers in the series. Litt is Jewish and appears to portray the role of the Jewish lawyer in much the way that Stepin’ Fetchit represented African Americans in films in the 1930s. This essay seeks to locate this innovative series in its context and provide a provisional assessment of corporate law as seen on TV.

### III. Criminal Law

Watching the majority of TV’s doughty fighters-for-the-underdog over the years, from *Rumpole of the Bailey* and *Judge John Deed*, to Martha Costello in *Silk*, what is clear over the years is that law involves criminal trials in which the police invariably get the wrong person. Our lone protagonist is on hand to prevent or cure miscarriages of justice. From the eponymous Perry Mason, and his English equivalent Richard Boyd in *Boyd QC*, to Jack Roper of *New Street Law*, and from Ben Matlock in *Matlock* to Kavanagh QC, and *Silk*, television lawyers have been predominantly criminal law

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38 Donna Paulsen (Sarah Rafferty), Harvey Specter’s PA, is also in the know as she was with Harvey at the “interview” where Mike got the job. Her ability to keep this secret is a powerful sign of her loyalty and commitment to Harvey.

39 on Louis as a crude Jewish stereotype see Asimow 2016

40 Bogle, 2001

41 2001 – 2007

42 2006 – 2007
practitioners. They spend their time involved defending unjustly accused murderers, robbers, arsonists, and the like. Civil law hardly gets a look in. Occasional exceptions, such as suits for damages for defamation and the divorce work of Arnold Becker in *LA Law*, are mentioned below and are worthy of note. Here, the court actions result in damages or other remedies rather than jail time or execution. The courtroom location, however, is the same.

IV. The Mixed Legal Practice

The "new wave" law series started in 1986. *LA Law* introduced a new notion into television lawyers of the firm. Hitherto, our fighters for justice had been lone practitioners - whether they were barristers like Margaret Lockwood's Harriet Peterson in *Justice* or attorneys like Anthony Petrocelli in *Petrocelli*. Indeed, starting at the same time as *LA Law* and running for the same time, we find a version of the lone defender in the criminal courts, Atlanta's Ben Matlock in *Matlock*. *LA Law* gave us a new approach, stemming from producer Steven Bochko's success in the police format with *Hill Street Blues* and its multiple storylines and a range of ethnicities, genders, and sexuality.

*LA Law* offered a mix of civil and criminal issues but the common feature was the courtroom. The firm had a range of private client work. This covered divorce, contract cases, and defamation, along with criminal defence work. In the 8 series and 171 episodes the show was on air, the focus is on the problems of individuals and corporate law is seldom encountered. In a lone episode from series 1, aired in October 1986, Ann Kelsey defends a toy manufacturer who is trying to stop a takeover. That apart, the series shifts from the offices of McKenzie, Brackman, Chaney, and Kuzak to the court and back, covering criminal and civil issues and, of course, the negotiations for Arnold Becker's divorce practice.

Again, as noted with the retro example of *Matlock* and its tribute to the Perry Mason crime-solving last-minute-reveal lawyer, a diverse set of lawyer programmes continued in the 1990s. There was another Steven Bochco offering with *The Practice*, with its clientele from a much less well-heeled district in Boston. The unusual surreal mixture of romance, music, and legal practice in *Ally McBeal* achieved great commercial and critical success between 1997 and 2002. Maintaining a slightly wacky relationship between straightforward cases and odd lawyers, Boston was also home to the mixed workload of the firm of Crane, Poole and Schmidt in *Boston Legal*. These programmes feature lots of interesting changes of emphasis with strong central female roles rather than the traditional white male lawyer.

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43 1986 – 1992
44 1971 – 1974
45 1986 - 1995
46 1981 - 1987
V. British Corporate Lawyers on Screen

From Britain, with Wing and a Prayer and North Square, there was a shift in the geographical focus and the income of the clients. Again, however, all criminal material. It is not until 2003 that we get a series set in the city of London and featuring people making deals in the BBC series Trust. This six part series from January to February 2003 features people engaged outwith the courtroom, involved principally in making deals for and on behalf of companies. It had a cast of experienced British TV actors - Robson Green, Neil Stuke, Sarah Parish and Ian McShane - alongside actors with existing film credits - Chiwetel Ejiofor and Eva Birthistle.

This look into the life of a city law firm is the first legal drama that involves no time spent in court. The drama comes from the range of issues which affect our main protagonists; Steven Bradley (Robson Green) and Annie Naylor (Sarah Parish). Steven is a partner in the firm, seeking to become a senior partner, and Annie has ambitions to get to the partnership stage. Right from the start of the series, and throughout its run, we see how the commitment of these two to the office has affected their marriages. Steven's marriage is "on the rocks". During the series he divorces, although he pledges to spend "quality time" with his pre-teen sons in the future. Annie manages her work life balance a little better, due to the necessity of being a mother of a small girl and having a patient husband. Both end the series separated from their respective partners and in each other's arms.

Following the lines adopted by John Mortimer in the Rumpole series, we have an intermix of three elements - legal issues, internal office politics, and family life. Unlike Rumpole and other shows which also relied on this formula, like Kavanagh QC, however, these three "areas" play out largely within the workspace.

This workspace makes for a high degree of intensity. For what is reputed to be a major city firm, the office space is cramped and by no means luxurious. The series of one hour episodes also introduces us to the other main players. Martin Greig (Neil Stuke) appears, initially as a relaxed gay lawyer, comfortable with his sexuality and lacking naked ambition. Vying for the place of the least ambitious assistant is Ashley Carter (Chiwetel Ejiofor). He is seen as a hedonist, drifting through life and relying on his charm rather than being truly committed to legal practice. He might, one begins to suspect, be employed by the law firm simply to fulfil a commitment to ethnic diversity. Less clear cut is the young ingénue lawyer, Maria Acklam (Eva Birthistle) who is making her way in the firm as Steven's assistant. She can see the strain her boss' commitment to his work is placing on his marriage and the impact on his family life. Maria clearly has doubts as to whether this is the path she wants to tread. The

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47 1997 – 1999
48 2000
49 Soldier Soldier; Close and True
50 Game On
51 The Bill; Peak Practice
52 Lovejoy and subsequently Deadwood
53 Love Actually
54 Ae Fond Kiss
55 Mortimer 1993
enigmatic Senior Partner, PG (the Power and the Glory) Alan Cooper-Fozard (McShane) flits in and out of the action unaccountably with little to do but to pronounce wise nostrums about commitment to the firm and its ethos.

The pattern of coverage centres around a mix of the lawyers and their personal problems and a client-centred issue. It would be misleading to use the term "case". The essence of the law being practiced here is about people coming to an agreement. The lawyers for the various parties merely seek to facilitate this process. In the first episode, for instance, Steven Bradley has concluded some unspecified all-through-the-night deal. He is then immediately involved in getting two brothers to wrap up their deal selling their family company to a large conglomerate. In a later episode, there is an agreement to be concluded with a travel agency business being bought over by one of the employees. The seller stalls at the last minute before signing. In both instances, the intuition of Maria and Annie in the two respective cases allows the sellers to see the error of their ways. As Steven himself opines:

What's important is you put the people first and the law second \(^{56}\)

Whilst this is the essence of the way the various client-centred issues are resolved in all the episodes of Trust, it is never clear why any lawyers are involved. In another episode, an American tycoon flies in to complete a deal with a couple running a young British magazine. They are seeking to get distribution in the United States but are unwilling to compromise their principles by not covering sensitive issues like a woman's right to choose. In the end, the American is won over by their belief in their product and the deal is signed.

The merging of a green energy company and a large polluting oil company to get the oil company some environmental credibility stalls in a later episode. This has happened because two of the in-house lawyers involved have been acting in bad faith to further their own career interests. This is revealed when a secret memorandum is unearthed by Maria while being instructed to do "due diligence" on the potential takeover company.

The key to the success of the agreements, however, is not so much hard facts but the intuition of the lawyers at the firm. Whether it is Steven, Annie, Maria, Ashley, or Martin, all rely for their success in being able to sniff out when something is "not quite right". Ashley does this when a client is seeking to bring a "wonder drug" to market. He starts to suspect that the test data is flawed. Annie "senses" that the reason the seller of the travel business does not want to complete, despite there being no alternative offer on the table, is because of a past affair with the buyer which ended on a sour note. Steven works out from taking the food and drink order of a trio of young fashion entrepreneurs that they are all really best mates who do not want to break up at all. Maria deduces that the reason one of the brothers does not want to sell their company is because he fears he will lose his brother. Martin relies on his sense that his client's crucial financial backing will emerge at the last minute and this duly occurs. As

\(^{56}\) Episode 1
Steven Bradley points out, success in their line of work is "70% instinct". As has been pointed out in the context of reality entertainment, this is precisely the concern of scholars analysing the way in which Judge Judy Scheindlin reaches her decisions.\(^57\) Law is in danger of going back to being a product of some kind of priestly revelation to those with the gift rather than the product of rational analysis of established facts.

If Richard Sherwin is right, and the viewer learns about the law from watching television, then what can we glean from watching Trust? Corporate law involves little sleep. It involves one firm buying out another firm and people having to sign agreements. Finalising these mergers is often fraught. Corporate lawyers, themselves, have complicated social lives. Corporate lawyering is incompatible with family life. Corporate law takes place in shiny glass towers? There are no actual courtrooms involved. Corporate lawyers are obsessed with intra-firm infighting and this occupies, it appears, 65% of their time in Trust.

This entertaining and interesting series ran in 2003 for a single season. This analysis of what Trust tells us about corporate law might sound rather churlish. It is worth bearing in mind that, as David Papke has suggested, the entertainment industry which produces these shows about law and lawyers

...... does things and shapes works in hopes of financial success.....the culture industry tries almost desperately to produce works it thinks will appeal to the public, will catch the public's eye, will win its favor\(^58\)

More recent British law series have taken the more conventional approach of looking at criminal law: New Street Law,\(^59\) Outlaws\(^60\), and Silk; or set in either the 18th century as in Garrow's Law\(^61\); or the modern equivalent, Norfolk, in Kingdom.\(^62\) The latter does involve some civil disputes as well as criminal law. Whilst we do not see the inside of a courtroom in the 3 series, this is a world well away from the deals of Trust. It involves minor matters of inconvenience and frustration rather than world shattering issues.


\(^{58}\) D Papke, ‘Comedic Critique: The Pop Cultural Divorce Lawyer’ in M Asimow, K Brown, and D Papker (eds.) Law and Popular Culture: International Perspectives Cambridge Scholars Press, 2014

\(^{59}\) 2006 – 2007

\(^{60}\) 2004

\(^{61}\) 2009 – 2011

\(^{62}\) 2007 – 2009
VI. Corporate Lawyers – the American Way

Despite the caveats that Papke mentioned, one might expect the United States to have ventured beyond the criminal and civil courtroom. There is, indeed, a strong hint of corporate law practice in the much-lauded series aired late on Sunday nights in Britain with Glenn Close - *Damages*.63 This was hailed for its innovative use of time shifts and its focus, in its five series, not on a string of cases for our lawyer protagonist but rather on a single matter. In its first, and most successful, series, *Damages* is centred on Patty Hewes and her attempt to defend a businessman. He is accused of having siphoned off money from his firm and of leaving the hapless employees to a future without jobs or pensions. The crucial question revolves around whether the asset stripping which Arthur Frobisher (Ted Danson) is accused of has taken place and whether or not it involves serious criminal actions. The plot demands a high level of concentration and cannot really be "dipped into" on a casual basis. Even with the advantage of a box set, one gets a great deal of plot with very little law. Using the Richard Sherwin "law learning" test provides precious little. This is not to say that the plot is not worth sticking with, but it does not pretend to provide a glimpse into the running of a law firm with rich clients owning big companies. We learn that corporate bosses sometimes siphon off money from the pension schemes of their companies and then shut down the companies. In addition, we discover that the lawyers who represent corporations have very complicated lives and will resort to drastic action, including the murder of dogs. The same kind of complex and convoluted plotting is encountered in the later series. These give tantalising glimpses into the world of business, with a Ponzi scheme featuring in the third season and whistleblowing in season five.

The trope of the strong female justice protagonist is also encountered in the recent long-running series, shown in Britain on niche channel More 4, *The Good Wife*. This is a story of redemption. With her husband jailed for bribery, Alicia Florrick returns to legal practice as a lowly Assistant. Over the next 7 seasons and 155 episodes, we see her rise in the firm of Stern, Lockhart and Gardner and then break away to set up her own, rival firm. Again, initially we encounter a powerful woman in charge of the firm who recognises Alicia's qualities. She shows these skills in the same kind of mix of criminal defence work and private civil litigation as was found in *LA Law*. Although, in fairness, it does involve shiny towers, lack of sleep, and a huge amount of office-in-fighting and intra-office skulduggery.

As we noted above, the most recent American law show to be shown in Britain on Channel 5 late at night, *Suits*, is set in a high powered New York law firm. Its special factor is that it is a version of a single comic/tragic Shakespearean notion of mistaken identity – here, as mentioned, a young man accidentally gets a job as an associate in a law firm although his boss knows intuitively that he has no law degree. The young man just happens to have a brilliant memory. Given the limited theme, one might be forgiven for not persisting with this programme. The Managing Partner, the head, of the firm of Pearson Hardman however was an African American woman, Jessica Pearson. This factor alone was, at the time, worthy of attention.

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63 2005 - 2009
For the next 6 seasons and some 76 episodes we follow the firm, the progress of the pseudo-lawyer and that of the man who hired him knowing him to be unqualified, along with supporting roles for 4 other characters. The difference here is that they are working in the corporate division of a large successful New York law firm. This is a firm with 12 senior partners and a variety of divisions. The first two major male characters we meet, Harvey Specter and Mike Ross, are in Mergers and Acquisitions. We discover in due course that the firm has various divisions: Real Estate, Contracts, Bankruptcy, Mergers, and Taxes. What these individuals do, within these divisions, remains largely a mystery.

The show is still running at the time of writing and there are changes between the first two seasons and the next two in the issues covered. The characters, their presentation, and the narratives veer wildly between the realist and the caricature. The tone shifts from absolutely serious to wildly improbable. Some characters, such as Harvey Specter (Gabriel Macht) and Stephen Huntley (Max Beesley), appear as hard-headed, if ruthless, operators. Others, like Louis Litt (Rick Hoffman) and his English counterpart in Series 3 and 4 Nigel Nesbitt (Adam Godley), are portrayed as small-minded, petty buffoons who, in spite of their inability to relate to others in the office, nonetheless possess highly valued, although largely unspecified, skills. One of the perplexing features of Suits is the way in which it shows the viewer a world in which personal qualities, rather than background, are valued. This work environment is one in which people from ethnic minority backgrounds, like Jessica Pearson and Louis Litt, are not held back from securing advancement. Lack of high social status is not a barrier to progress, either. We see this with the treatment by the firm of Mike Ross. He is promoted on his demonstrated merits irrespective of his humble origins.

The male lawyers and associates all have an extraordinary ability to think three steps ahead of those with whom they interact. Harvey Specter is the finest deal closer in New York. He flashes his lupine smile a great deal and wears the smart suits of the title. His style is part foreknowledge and part bluff. Sometimes he magically knows what someone's weakness is and, at other times, he takes a chance that his guess is right. This includes, on the one hand, having evidence of the crimes of the former District Attorney and using this knowledge whilst also playing poker to win back a client's company which has been lost in a gambling spree in Atlantic City.

His protégée, Mike Ross (Timothy J Adams), has a photographic memory and an uncanny ability to remember data. As indicated, although he has no qualifications he is able to pass as a lawyer with the connivance of Harvey and Harvey's Personal Assistant, Donna Paulsen (Sarah Rafferty.) She, like Harvey, has a level of prescience which is extraordinary. She is able to second-guess her boss' needs and knows all his secrets and foibles, as well as those of many others in the firm. She is not, however, some self-serving Iago figure intent on her own self-promotion. There are early hints that the relationship between her and Harvey has perhaps more to it than employer/employee.
Most odd of all is the character of the ambitious Louis Litt. Although portrayed as socially dysfunctional, he is entrusted with the task of looking after the training of all the firm's Harvard-sourced Associates. He is also the recognised firm expert on Corporate Finance. We see him glancing at files presented to him and immediately spotting the flaw or weak spot which the firm can exploit. We also see him as manipulative and mendacious in a childish way, seeking to buy friendship and loyalty and ready to cast these alliances aside at the merest hint of a slight to his perceived authority. This has both serious and comic aspects. He is susceptible to the crude flattery of Andrew Hardman on his return to the firm in series 2 and is easily swayed into giving him his support in exchange for promotion. In a very different vein, however, we see him negotiating with the new power in the firm, Nigel Nesbitt, over the role of quartermaster so that he can guarantee access to free Raspberry nutribars and a certain kind of ballpoint pen. Both actions have negative impacts on his work but are treated in the same way in the narrative.

By contrast, two of the five principal characters are women who appear to be grounded in reality and value effort. Jessica Pearson, the Managing Partner, runs the firm efficiently, although without ever having so much as a file or a piece of paper in her hand and without any obvious administrative support. The engaging paralegal, Rachel Zane, has managed to keep from the firm that her father is a highly successful and respected African American Attorney with whom the firm clash on occasion. She is naive and ambitious but also seems to have none of the "special" gifts of the three men. It seems to be a reverse of the division noted by Kamir in her analysis of Adam's Rib in which she complained that Adam got all the rational "male" arguments and Amanda was left with the emotional "female" appeals to sentiment.64

Watching Suits provides a view of contemporary corporate lawyers in America in the wake of the financial meltdown of 2008. Again, as Papke stresses, the perspective provided interacts with public expectations as to what such lawyers are like. Papke wrote about TV divorce lawyers being "manipulative, money-grabbing and lusty"65 because this was what the culture industry took the "public sentiment" generally to be. As far as corporate lawyers are concerned, this expectation is similarly negative but allied with notions of envy that these "masters of the universe" (and increasingly "mistresses")66 deserve, perhaps, their rewards for their Stakhanovite workloads and personal sacrifices.

Again, we get a sense of immense workloads and sacrificing of personal time. Corporate lawyers work through the nights and do not need sleep. Corporate lawyers have very complicated personal lives. Corporate law is incompatible with normal family life and maintaining healthy inter-personal relationships. Corporate law involves people taking over companies or merging. Corporate law negotiations are fraught. Corporate lawyers know things about other lawyers which gives them an edge

65 D Papke, ‘Comedic Critique: The Pop Cultural Divorce Lawyer’ in M Asimow, K Brown, and D Papker (eds.) Law and Popular Culture: International Perspectives Cambridge Scholars Press, 2014) 38
66 T Wolfe, Bonfire of the Vanities, (Farrar, Straus, Giroux, 1987)
in fraught negotiations. Corporate law takes place in very shiny glass towers. Corporate lawyers in the United States, if we follow *Suits*, spend most of their time involved in intra-firm infighting - by now up to 75% of their time.

Allied with this awe at their ability to work selflessly on "deals", is a suspicion that, like criminal defence lawyers and compensation seeking lawyers, their work perhaps does not have much to do with the public interest. As the DA ex-boss of one of our protagonists says when accusing ex-prosecutor Harvey Specter of having sold out by working as a Corporate lawyer -

*You help rich people keep their money and that's all you do*

This is reflected in the contrast between the lyrics of the theme song and its title and refrain – Greenback Boogie. Here the references to the modest aspiration for a “bean pie” with “little cream cheese” contrasts with the megabucks deals the lawyers are involved in and their lifestyles. The repeated refrain - Greenback Boogie – implies that the enterprise is about making money and has nothing to do with justice. It may be one of the reasons for the varying tone and shifts of perspective that have been mentioned in the lawyers working in *Suits*. Harvey Specter may be the new Gordon Gecko for the post-2008 capitalism but there is an ambivalence in our view of him.  

We are not sure if he is Louis Litt with a better suit and hairstyle. He too switches his allegiances and loyalties in a capricious way. At the end of each segment, however, he seeks to justify these actions according to a grand scheme centred on the interests of the firm, whether it be Pearson Hardman, Pearson Darby, Pearson Specter, or Pearson Specter Litt. Quite why a man whom we see as a narcissist should be so concerned with the collective good is only hinted at. Given that the narrative is ongoing, that is an issue which the various writers have not really had to address. He is surrounded, throughout the various series, however, by a group of equally unadmirable characters. He hovers between icon and hate figure. His loyalty to his friends may be his saving virtue but that is mediated by his betrayals over the years. As the series progresses his moral arc is not yet fully determined. There is the possibility that he may achieve a state of grace. He may, on the other hand, defy the tradition of moral redemption and join Graham Greene's Harry Lime and Patricia Highsmith's Tom Ripley as one of the great fictional amoral protagonists.

VII. Concluding Remarks

Portraying corporate law on television has faced the same problems which all fictionalisations of the justice system face. In real life, the law and its machinations are highly dramatic, at turns both shocking and inspiring. Fictionalising this should be easy. Achieving originality after almost 60 years of TV lawyers is the problem. One part of the solution has been a shift from plot driven narratives to character focused

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67 *Wall Street*, 1987, Oliver Stone
68 *The Third Man* 1949, Carol Reed
69 *The Talented Mr Ripley* 1999, Anthony Minghella
material. This focus is far more suitable for exploring characters and their lives over as many series as possible, as opposed to fresh cases appearing every week and being disposed of within an hour of TV time. The emergence of the rolling storyline in the wake of *Hill Street Blues* has produced a soap opera like quality to many legal dramas which have adopted the serial form. We find this in *Judging Amy* about a corporate lawyer “dropping out” to become a Family Court judge in Hartford, Connecticut. This is not to say that the neatly packaged episodic television law drama has had its day. As noted, it continues to thrive in its natural setting of the criminal legal series and it makes the syndication of a series easier. When, however, programme makers have turned their attention to the world of law and its interaction with business, they have opted to focus on the personal and private. In a sense, here any lack of due process and resultant injustice from Mike Ross being unlicensed means there are no obvious victims. The clients’ goals and problems centre on making or retaining money. No-one is going to languish in jail for a crime they did not commit when a takeover goes awry. A further possible explanation is assumptions about the audience; those in charge of running modern justice systems take the view that lay juries cannot absorb complex material and that issues like corporate fraud should be left to those who can follow such matters with professional acumen. This may be why there is a difference between the corporate law world on television and that of the criminal mainstream. The viewing public would not be able to cope with the abstruse nature of corporate business. In fairness, this lack of confidence is not entirely fanciful if the recent excellent films on the workings of modern capitalism are anything to go by.

*Judge John Deed* was reportedly popular with High Court Judges with its portrayal of a crusading fighter for justice with a remarkably active sex life with counsel, witnesses, and others. Corporate lawyers watching the portrayals of themselves in television will know how their lives measure up to the fictional version. In their real working lives they know if, indeed, they do have complicated personal lives with no sleep, relying on their secret knowledge of the foibles of the lawyers of the other side, and confident that can resist the backstabbing that pervades corporate law on television. The rest of the population will assume that is what they do. Their role, and the perceived reality, may be far from the heroic noble role which popular culture has generally assigned to their criminal law counterparts from Perry Mason and Richard Boyd to Alicia Florrick and Martha Costello. In the post-2008 political climate helping rich people keep their money is, however, only slowly beginning to emerge as something which is problematic. It does offer scope, though, for a fictional

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70 1999 – 2005
71 see most recently *Billions* (2016 - ) on the Federal prosecution of financial crimes as a “soapy melodrama”
72 Criminal Justice (Mode of Trial) Bill 1999 and Criminal Justice (Mode of Trial)(No2) Bill 2000 both sought to limit the right to elect for jury trial. Provision for such restriction, as yet not in force, is, however made in the Criminal Justice Act 2003. Section 43 allows, where serious and complex fraud cases are likely to make “the trial so burdensome” to the jury for the trial to be conducted without a jury.
74 Interview by author with members of the Court of Appeal in October 2010 on the reactions of the judiciary to the series
exploration of how and why the wealth and power gap in many advanced societies is widening and what role the hitherto little examined world of corporate law plays in this process.
Lights, Camera, Affirmative Action: Does Hollywood Protect Minorities?¹

Pedro Rubim Borges Fortes²

I. Introduction

The interplay between law and cinema is extremely important as representations of popular culture influence legal cultures and have the power to ultimately change positive law. In this sense, legal culture is an important reservoir of ideas, attitudes, and perceptions of law, that influences the transformation of materials from the broad range of popular culture – novels, films, and other social artifacts – into legal materials – opinions, rulings, and norms.³ Therefore, the argument presented by this essay is that Hollywood films could very well be a source of legal change. Even though lawyers may refrain from citing Guess Who’s Coming to Dinner (1967) in their briefs and judges will not mention Brokeback Mountain (2005) as a rationale for their decisions, cinema and other forms of popular culture, such as novels and television, nevertheless remain highly influential in shaping the legal universe and preparing the juridical field for groundbreaking verdicts regarding sexual orientation.⁴

Popular representations of discriminatory practices from Hollywood films carry conceptions of injustice and, therefore, have significant impact on the protection of minorities. Images of subordinate African-Americans or gay men have entered the socio-cultural psyche of many societies across the globe. Once internalized inside minds and hearts of judges, lawyers, and activists, these images of unfair practices provide the grounds for social mobilisation towards, for example, the legal recognition of affirmative action or same sex marriage. Obviously, cinema does not function independently from the society in which it is produced. Film-makers and law-makers

¹ This essay was presented at the Law and Public Affairs Discussion Group at the Faculty of Law at the University of Oxford and at the “Law and Pop Culture: International Perspectives” Conference at Tilburg University in 2013. I benefited enormously from the feedback of participants and would like to thank especially Iginio Galgliardone, Christoph Berlin, David Restrepo Amariles, Francisco Urbina, Po-Hsiang Ou, Michael Asimow, Richard Weisberg, Peter Robson, Leslie Moran, and Christine Corcos for their comments, suggestions, critiques, and feedback. I am also grateful to the lawyer and the LGBT activist, whom I interviewed. Errors are all mine.
² Professor of Law at FGV Law School (Rio de Janeiro); DPhil c., Centre for Socio-Legal Studies, Oxford; J.S.M. Stanford Law School; LL.M. Harvard Law School; Grad. Cert. at COPPE/UFRJ; BA in Business at PUC-Rio; LL.B. at UFRJ; Public Prosecutor at Attorney General’s Office, Rio de Janeiro.
⁴ The notion of ‘juridical field’ was coined by Pierre Bordieu in his works on critical anthropology as one of the several ‘fields’ in a given society that are transformed through power dynamics in an interplay with the ‘habitus’, a reservoir of practices, ideas, and norms that shape and are shaped by the ‘field’. See Pierre Bordieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’(1977) 38 Hastings Law Journal 805; Pierre Bordieu, An Outline of a Theory of Practice (Cambridge University Press, 1977)
are not isolated decision-makers that produce meaning from a privileged standpoint.\(^5\)

On the contrary, Hollywood films often reproduce standard social norms thereby reinforcing discriminatory stereotypes within a given society simply by, for example, emphasizing the search for romantic love of white heterosexual couples as the leading motif of contemporary cinema.

 Nonetheless, alternative narratives also depart on occasion from the mainstream and provide compelling symbols of subordination of minorities.\(^6\) These films raise the level of consciousness about discrimination due to race or sexual orientation and the archetypical images of injustice towards African-Americans and gay men become a part of the repertoire of popular culture. In this context, films like *Guess Who’s Coming to Dinner?* (1967) and *Brokeback Mountain* (2005) disseminate ideas that contribute to the suppression of discriminatory practices, once minorities articulate their emancipative claims in the juridical field before courts, congress, or the government. Even when these films are not expressly mentioned in the text of legal opinions, their symbolic value is part of the law-making process due to the interplay between cinema and law.

 This argument can be supported by empirical evidence. Based on empirical observation of films and cases in U.S. courts involving the protection of racial and religious minorities, the argument that there is a dialogue between cinema and law begins to take shape. Observing the Hollywood films that were nominated for best motion picture at the Academy Awards during the terms of various different U.S. Supreme Court Chief Justices, one may note the high number of movies that focus on racial minorities during the Warren court. Film-makers and law-makers were essentially establishing a dialogue with American society regarding the issue of discrimination within it\(^7\). Hollywood blockbusters – along with landmark judicial precedents – were symbolic artifacts that mediated debate in the social field during the period of abolition of the ‘separate but equal’ doctrine and the aftermath of the Holocaust. In addition to cinema and law, social activists intensively challenged the status quo and were decisive in the process of social transformation that reshaped the United States.

 The empirical data, however, does not provide grounds for an argument of causation. It is probably impossible to prove that society changed because of messages transmitted by popular culture, simply because art is also a social phenomenon embedded in society. Therefore, it is simply artificial to isolate a work of art and suggest that, for instance, a single film was responsible for broad social transformation. On the other hand, it seems difficult to deny the role of cinema in disseminating the core tenets of the rights revolution during the civil rights and human rights era, for

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\(^5\) In contemporary philosophy, this idea is expressed by the reference to an ‘archimedean point’ - a vantage point to which a person would have removed herself and, thus, could have an objective view of the subject of observation in its totality. The notion of a god eye’s perspective, however, is rejected in contemporary empirical studies.

\(^6\) This idea is inspired by the notion of ‘hegemony’ and the possibility of development of counter-hegemonic ideas too. See Antonio Gramsci, *Prison Notebooks* (Columbia University Press, 2011)

instance. Some scholars like the metaphor of a mirror or of a lamp, but my argument here is that cinema may function as a resonance chamber that amplifies the sound of these messages, making them much louder and more difficult to ignore. For instance, many films with an anti-discriminatory message got nominated for Oscars during the Warren Court period, establishing a certain dialogue between Hollywood and the U.S. Supreme Court.

Another prominent argument, however, rests on the impact of Hollywood movies beyond national borders. In contrast with judicial precedents, Hollywood blockbusters are quickly translated, widely distributed, and pervasively publicized. As previously mentioned, films such as *Brokeback Mountain* (2005) can function to disseminate the injustice of homophobia globally. On one hand, these symbolic images of injustice flow from the United States to the peripheries without the social field in which they were produced. On the other hand, in the absence of activist courts and legal entrepreneurs, Hollywood films can initiate a process of agenda-setting for dormant social movements that culminates in emancipative action. In this sense, the impact of Hollywood films is evident and one case study of a recent decision from the Brazilian Supreme Court clearly demonstrates this impact on legal change. Without citing the recent precedents from the State Supreme Courts of Hawaii, Massachusetts, California, and Iowa, the Brazilian Supremo Tribunal Federal accepted same-sex marriage and altered the concept of marriage in Brazilian law, even though the Constitution expressly refers to this union as a legal relationship between a man and a woman. Without the transformation operated on the social field by popular culture, the juridical field would probably not have changed.

Finally, it seems ironic that some local minorities are vulnerable when they do not have any correspondence with minorities depicted in Hollywood films. In the past decades, Brazilian society established an ambitious program of affirmative action in public universities that guarantees quotas for black students. This program has changed the allocation of resources and opportunities for racial minorities in Brazil. However, it favors only candidates whose racial origins are similar to the African Americans depicted in Blaxploitation films. On the other hand, there are no equivalent ‘affirmative action’ policies for individuals coming from indigenous cultures or for local migrants from the poor Northern states. Even if these minorities are somewhat similar to the Native Americans or to the Latino immigrants in the United States, Brazilian migrants and indigenous peoples do not identify themselves with their North American counterparts. While gay and black men are represented regardless of nationality by characters in *Brokeback Mountain* (2005) and *Guess Who’s Coming to Dinner* (1967), Brazilian migrants do not feel empathy for Puerto Rican or Mexican characters.

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11 In re Marriage Cases (2008) 43 Cal.4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384].
Likewise, most Brazilians are aware of the Holocaust and the suffering of the Jews during and beyond the World War II. Nonetheless, awareness of discrimination against this religious minority does not mean that the Brazilian audience will acknowledge that other local religious minorities also need protection. For instance, Santeria believers suffer discrimination in Brazil and Hollywood films carry no message that may protect them. These and other limitations of cinema as a protective tool should also be noted.

In the next section, I will analyze a case study in which the Brazilian Supreme Court recognized the constitutionality of same sex marriage, even though the constitutional text describes family as an entity originated by the union between a man and a woman. I argue that the Brazilian Justices were more influenced by films and television than by American scholarship or law. In section 3, I will highlight the critical role played by Hollywood films when racial segregation and sexual orientation were discussed in courts, especially because they carry emancipatory messages abroad.

II. Did Hollywood Influence Same-Sex Marriage in Brazil?

The working hypothesis of the present essay is that cinema influences legal change. As mentioned above, when observing Oscar-nominated movies in the United States, the interplay between law-making and film-making is evidenced by the simultaneous production of landmark decisions by the U.S. Supreme Court and blockbusters by Hollywood, that altered the mainstream perception of public opinion about both race and sexual orientation. Symbolic artifacts produced by progressive film-makers reshaped the social field and, as a result, provided fertile ground for the subsequent transformation of the juridical field. Correlation is not necessarily evidence of causation, as the ideas that shaped the decision-making of judges in the United States were a result of selected cases brought to court by legal entrepreneurs, who challenged the status quo and managed to reverse the judicial precedents that supported, for instance, the ‘separate, but equal’ doctrine. The importance of the advocacy skills of lawyers cannot be ignored, and neither can the influence of cinema – the courts are embedded in the social fabric, being, as they are, hugely influenced by pop culture.

In the past two decades, Hollywood has become a powerful voice for the denunciation of homophobia. Cinema and TV series have been extremely influential in framing the debates, establishing broad social recognition, and cultivating social constructions of unfair discrimination against sexual minorities. Cultural studies are, therefore, essential to the socio-legal analyses that I propose. First, these narratives are framing public debates all over the globe. Philadelphia (1993) for instance, locates the audience in a courtroom, in which discrimination against LGBT in the workplace is debated. Brokeback Mountain (2005) frames the discussion about same-sex marriage,

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inviting the audience to reflect on the reason the lead characters were prohibited from experiencing their love as a married couple. Once these Hollywood blockbusters were released, these framed debates were reproduced everywhere and thus became global discussions. To quote Richard Sherwin, “through law films we confront the great moral dilemmas of the day, whether it is the intractable racism depicted in To Kill a Mockingbird (1962), the effects of homophobia depicted in Philadelphia (1993), or the legitimacy of capital punishment in films like Dead Man Walking” 15.

Second, members of the LGBT movement now possess a different type of social recognition. Cinema and TV series are powerful sources of status and social recognition; not surprisingly, then, LGBT associations have criticized the negative image of sexual minorities in films like Silence of the Lambs (1991) and Basic Instinct (1992) and battled to reverse the trend of Hollywood films in the early 1990s. Gays, lesbians, bisexuals, and transsexuals were no longer depicted as insane criminals, but instead as victims of an unjust society. This difference, of social recognition in cultural artifacts, transformed the regime of incentives and sanctions in many societies. Since 1993, many members of LGBT associations have openly assumed their sexual orientations and denounced the discrimination they have suffered. Their stories are analogous to the narratives of Philadelphia (1993), Boys Don’t Cry (1999), and Brokeback Mountain (2005), constituting a very important part of the LGBT strategy to overcome subordination 16. Moreover, increased visibility of LGBT people in the media has naturally resulted in the demystification of sexual minorities 17. On the other hand, invisibility could lead to the conclusion that same-sex relations are unusual and deviant 18.

Third, films and TV series shape the mind of frequent viewers through the ‘cultivation effect’ 19. Social constructions are cultivated through the pop culture one consumes and heavy viewers tend to believe that television is a mirror of social life, even though cinema, TV series and the overall content of mass media often do not correspond to social experience. Pop culture also creates expectations about how the law should be and, therefore, can induce people to idealize legal experience. Sometimes the influence of mass media can be identified clearly, as when Canadian citizens complained that the local police were not respecting their Miranda rights 20.

Most of the time, however, the influence of mass media is less visible, since the message contained in a fictional narrative is absorbed by a viewer and used unconsciously as a source for decision-making. Judges can recall references from pop culture that are subtly etched into their memories, whilst genuinely believing that they

20 Sherwin (n. 14) 100.
are actually referring to traditional legal sources. Imagine, for instance, that a foreign Justice was persuaded of the unfairness of homophobia after watching *Brokeback Mountain* (2005) or *Will and Grace*. Once faced with a same-sex marriage case in his own jurisdiction, this foreign Justice could eventually interpret U.S. constitutional law according to the pop culture previously consumed.

The idea that same sex marriage should be the law of the land was, in this hypothesis, cultivated inside the mind of this Justice and, faced with the case, he refers to U.S. law instead of Hollywood cinema. Nonetheless, the real influence behind his decision was pop culture rather than any judicial precedent. This particular influence of pop culture is termed ‘availability’; the use of pop culture as a source for decision-making without being conscious of it.\(^21\)

Empirical research has also shown that pop culture creates the impression that we live in a violent world, by intensifying the public awareness of criminality. Even though contemporary societies are extremely safe,\(^22\) mass media cultivates a “mean world view”. Given all the conflict and the violence consumed in cinema and TV, viewers tend to think that we live in an extremely violent and uncaring society.\(^23\)

Regarding the LGBT movement, as mass media and social activists that publicize cases of discrimination and homophobia, the message that sexual minorities are victims of constant violence is disseminated and cultivated in the minds of viewers. This particular effect is known as “resonance”, in which such cultivation is amplified by the fact that fictional characters from these minority groups are more frequently victimized in mass media.\(^24\)

Narratives in the pop culture of today rarely contain messages of moral condemnation, but often depict LGBT as martyrs of their sexual orientation. Since 1993, cinema has shown sexual minorities in a more positive light. In addition to films, TV series have also helped to alter society’s perception of homosexuality\(^25\) and watching *Will and Grace* may encourage more tolerant attitudes toward gay men.\(^26\)

Mass media, therefore, has influenced social transformation.

Would it be possible, however, to demonstrate that pop culture influenced the Brazilian Supreme Court decision to recognize same sex marriage as the law of the land? My argument is that pop culture has impacted the Brazilian Justices. Hollywood movies are quickly translated, widely distributed, and pervasively publicized. Their narratives contain implicit messages that influence people in peripheral countries more than judicial precedents, academic work, and legal writings could.

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\(^{23}\) Gerbner (n. 18) 185.

\(^{24}\) Gerbner (n. 18) 182-3.


\(^{26}\) Edward Schiappa, Peter Gregg, and Dean Hewes, ‘Can one TV Show Make a Difference? Will and Grace and the Parasocial Contact Hypothesis’ (2008) 51 Journal of Homosexuality 15The authors did not demonstrate causation, but rather correlation between watching the show and having positive attitude towards gay men. They did not discard the possibility that viewers with favorable opinion about gay men were more likely to watch the program in the first place.
Analyzing, for instance, the same sex cases in the Brazilian Supreme Court (*Governor of Rio de Janeiro v. Federal Republic of Brazil; Federal Attorney General v. Federal Republic of Brazil*), the court did not cite any traditional legal source produced in the recent academic debate about same sex marriage in the United States. Likewise, Brazilian Justices did not cite any of the relevant precedents of State Supreme Courts. Rather than citing the contemporary legal materials related to sexual orientation, the Brazilian Supreme Court cited philosophers – from Nietzsche and Plato to Hart and Dworkin – as well as older precedents from the Warren court. There was no reference, however, to contemporary legal theory or to the same sex cases in Hawaii, Massachusetts, California, and Iowa.²⁷

Furthermore, the legal source for the Brazilian Supreme Court decision remains unclear. As Justice Mendes highlighted, the Brazilian Civil Code reproduced the constitutional text, which states that the family is constituted by the stable union of a man and a woman. The constitutional text, therefore, could not provide the legal source for the right to marry someone of the same sex. Likewise, Brazilian legal scholarship has not developed Queer legal theory, nor a liberal discourse of legal protection for sexual minorities. In contrast with the United States, law schools do not offer courses on sexual orientation and the law.

Finally, there was no judicial precedent that recognized same sex marriage in Brazil. Until the landmark decisions of the Brazilian Supreme Court in *Governor of Rio de Janeiro v. Federal Republic of Brazil* and *Federal Attorney General v. Federal Republic of Brazil*, courts protected gay property rights as de facto associations between two individual partners, but not as a family law regime. Finally, as pointed out by Justice Lewandowski, constitutional drafters discussed the consequences of this constitutional clause and acknowledged the fact that Article 226 would prevent those identifying as LGBT from marrying. In summary, neither textual interpretation and legal doctrine, nor judicial precedents and original intent of the framers could be considered as the source of the Brazilian Supreme Court decision that recognized same sex marriage.

Pop culture, on the other hand, is arguably a source of these landmark decisions of the Supreme Court. Methodologically, it is impossible to demonstrate causation between the cultural artifacts from Hollywood and the judgment in the Brazilian Supreme Court. Empirical research in the field of cultural studies does not demonstrate the impact of mass media over decision-making. Rather, it proposes provocative discussions and suggests probable influences on individual opinion. On one hand, it is impossible to demonstrate that Hollywood films and TV series directly caused the

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²⁸ ADPF n. 132/08, j 05/05/11; ADI n. 4277/09, j 05/05/11.
recognition of same sex marriage in Brazil. On the other hand, it is also impossible to deny its influence.\textsuperscript{29}

Another strategy for evaluating the impact of pop culture on Governor of Rio de Janeiro v. Federal Republic of Brazil and Federal Attorney General’s Office v. Federal Republic of Brazil,\textsuperscript{30} is the search for signals of the cultivation effect. There is no citation of Brokeback Mountain (2005) or Will and Grace in the opinions of the Brazilian Supreme Court. There is, however, evidence of cultivation. Three Justices individually referred to cultural transformation in society and that the new spirit of the times demanded the recognition of these LGBT rights. This transformation can be clearly attributed to the change promoted by Hollywood films and TV series since Philadelphia in the social recognition of those identifying as LGBT as martyrs of their sexual orientation.

In addition, three opinions also referred to the necessity to eliminate the constant homophobia that victimizes LGBT and generates daily violence against sexual minorities. Their comments could be attributed to the before-mentioned “resonance” that amplifies the perception that these minorities suffer constant violence, and lead to the Justices highlighting the notion that it is a “mean world” for the LGBT community. Regardless of the truth of such a statement, this kind of justification is peculiar for a Supreme Court ruling.

Justice Fux classified the case as a “human drama”, which should be solved by the normative force of the constitution.\textsuperscript{31} Drama is the fabric of Hollywood and this choice of words starkly demonstrates how the Justice analogized the facts of the case with cinematic narrative. Justice Fux also mentioned the U.S. Supreme Court precedents as comparative evidence for the recognition of same sex marriage in Brazil. According to his opinion, “the U.S. Supreme Court provides examples that constitutional values require the constitutional protection of same sex marriage”.\textsuperscript{32} Since there was no precedent of the U.S. Supreme Court at that point in time, Justice Fux could be said to have tapped in to pop culture as a source of his decision-making and in fact merely imagined that his decision was based on a judicial precedent.\textsuperscript{33} It is an example of the previously referred ‘availability’, in which the brain accesses

\textsuperscript{29} Borrowing a methodological insight from the film Smoke (Miramax Films, 1995), measuring the influence of Hollywood is analogous to measuring the weight of smoke. According to Paul Auster’s screenplay, in Queen Elisabeth I’s reign, Sir Walter Raleigh weighed a cigar, smoked it carefully, deposited the ashes and leftovers on the scale, and measured the weight of smoke by subtracting the weight of all the other elements from the original weight of the non-smoked cigar. In the case of the Brazilian Supreme Court decisions on same-sex marriage, subtracting the extremely low weight of text, doctrine, precedents, and original intent, the influence of the cultural transformation promoted by mass media becomes evident - even if it is difficult to capture it through standard social science methods.

\textsuperscript{30} ADPF n. 132/08, j 05/05/11; ADI n. 4277/09, j 05/05/11.

\textsuperscript{31} Id p 80.

\textsuperscript{32} Id p 84.

\textsuperscript{33} Michael Asimow suggested that perhaps the Brazilian Justice was influenced by the widespread news regarding the recognition of same-sex marriage by the Supreme Court of California. Even if this is the case, it would just demonstrate that the Brazilian Justice did not examine the direct sources of law, but instead recurred to sources from the media and popular culture instead of carefully examining the relevant cases from U.S. Constitutional Law, especially since Obergefell v. Hodges was only decided later by the U.S. Supreme Court.
information from pop culture and interprets it as originating from a different and more legitimate source.

Similarly, Justice Mello expressed a distorted view of American constitutional law and based his decision on the right to pursue happiness, alleging that the U.S. Supreme Court recognized this right in several rulings. It would appear another clear case of “availability”, since the U.S. Supreme Court has never recognized that plaintiffs are entitled to pursuit of happiness. Many opinions, therefore, justified same-sex marriage on the basis of cultural transformations, the “mean world view”, the existence of a human drama, and misinterpretation of U.S. Supreme Court precedents.

Finally, two interviews were conducted to evaluate the hypothesis that popular culture was influential in the legal change in Brazil regarding same sex marriage. I interviewed a lawyer who litigated these cases as the attorney of an LGBT association. In his interview, he admitted that his thesis would be based on property rights, but he was warned by the LGBT association that this case was a special one and their arguments should be based on human dignity and LGBT identity rights. In his opinion, it would be unlikely that the Brazilian Supreme Court would have reached this verdict twenty, ten, or even five years ago, as the Justices were far more conservative, even in very recent history. He felt that the Supreme Court was making history that day and that this single decision could have a revolutionary effect on people’s behavior towards minorities.

When asked about the reference to a “human drama” in the Supreme Court ruling, the attorney did not associate it with cinema, TV series, or indeed any form of pop culture. Even if he watched Brokeback Mountain (2005), Philadelphia (1993), and Boys Don’t Cry (1999) and enjoyed these movies, he did not accept that these cultural artifacts could have played a role in the decisions of the Brazilian Supreme Court. Asked about the lack of citation of precedents from the United States in the Brazilian same sex marriage cases, the attorney explained that they could not cite Lawrence v. Texas since it was a sodomy case, but they did cite the Californian case in their petition.

Asked about the reversal of the Californian ruling by a state constitutional amendment and about precedents from Hawaii, Massachusetts, and Iowa, the attorney admitted that he was not aware of these legal developments. Asked about the source of law in the Brazilian same sex marriage cases, the attorney admitted that he could not reference any of the traditional sources of law. According to him, the Supreme Court could not have used the constitutional text as the justification, as the Civil Code basically reproduced the words of the Brazilian constitution, which states that the family is constituted by the stable union between a man and a woman. The court bypassed the constitutional text, asserting that article 226 provided only an example, but not the concept of marriage nor the definition of family. However, he remained unable to explain the legal source for this decision. At the end of his

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interview, the attorney conceded that perhaps society has changed its perception of LGBT rights and, therefore, the Brazilian Supreme Court redefined the definition of family and the concept of marriage in Brazilian law.

I also interviewed an LGBT activist, who was named by the lawyer as the leading strategist of the same sex marriage cases among the LGBT associations. The LGBT activist explained that the governor of Rio de Janeiro took the initiative to protect gay rights and decided to take this opportunity to advocate LGBT civil unions. They lobbied with the Brazilian President, Minister of Justice, Human Rights Secretary, and the Federal Attorney General, as well as other public authorities. As a consequence, the Federal Attorney General filed a constitutionality control claim and argued that the limitation of marriage to heterosexual couples only in the Brazilian Civil Code was unconstitutional. Before the judgment, LGBT activists visited all the Brazilian Supreme Court Justices in order to distribute writings that supported same sex civil unions.

Asked about precedents from other courts, the LGBT activist mentioned that a case from the Colombian Supreme Court was cited in the documents given to the Brazilian Justices, but was not alluded to by any of them when voicing their opinions. From their conversations with each Justice, their confidence that they would win the case grew. In these meetings, three Justices reacted to the subject with comments about excesses of judicial activism and were considered to be unsympathetic to their cause. Surprisingly, these three justices were favorable to civil unions. The other seven justices recognized same-sex marriage in Brazilian law and ruled the limitation in the Brazilian civil code to be unconstitutional. Thus, a unanimous Supreme Court recognized LGBT marital rights related to their personal relationship and a majority granted the status of marriage to these same-sex relationships.

Due to the changing social climate of the nation over the previous years, public response to the decision was generally positive. The LGBT movement was essential for this transformation in both the social climate and institutional environment towards the recognition of same sex marriage in Brazil. In 1995, a Brazilian Association of Gays, Lesbians, Bisexuals, and Transsexuals (ABGLBT) was created. There were only 31 NGOs, the gay pride parade of 1995 united only 200 people in São Paulo, and only 7% of the population supported same sex marriage. It was then that LGBT activism began its exponential increase. There are currently 237 NGOs and the gay pride parades in Rio and São Paulo are huge.

Asked specifically about the role of cinema, TV series, and soap operas in this social transformation, the LGBT activist recognized the importance of pop culture for the broad acceptance of same sex marriage. Particularly in the case of soap operas, the LGBT movement mobilized its constituents and has campaigned against stereotypical representations of sexual minorities in popular soap operas since 1999. The LGBT activist pointed to the example of a relatively obscure couple of lesbian characters in a particular soap opera and how hundreds of critical letters were sent to the TV station requesting that better treatment be given to sexual minorities by screenwriters.

In the same way, the impact of Hollywood films cannot be ignored, since the Supreme Court Justices do not live inside a bubble and are influenced by pop culture...
just as much as the average citizen. The LGBT movement considers cinema to be a fundamental tool for the positive reshaping of sexual minorities in the eyes of society and, to this end, their national association website includes a long list of recommended films.36 Asked about the absence of a list of books, the LGBT activist blamed the lack of resources. Regarding the lack of reference to foreign sources in the Brazilian Supreme Court judgment, the LGBT activist supposes that the Justices preferred to produce an original opinion and, therefore, did not cite the Colombian constitutional court.

However, all Justices cited the concept of homoaffection coined by Maria Berenice Dias, vice-president of the Brazilian Association of Family Law; the idea that LGBT relationships are not only based on sex, but are also focused on affection.37 Even if some criticize the cleanliness of the concept of homoaffection,38 it was essential for the acceptance of same sex marriage in a conservative society. The LGBT movement remained discreet during the judgment and deliberately avoided a march on the capital. It was a strategy to avoid a large-scale conservative reaction from the Catholic Church and the religious right. The LGBT activist would have preferred a more confrontational style, but was aware that the Brazilian society does not respond well to this line of advocacy. If possible, he would have adopted the style of American activist Harvey Milk, whom he views as a paradigm for the LGBT movement.39

After the Supreme Court decision, conservatives proposed a popular referendum against same-sex marriage, but the proposition was rejected in the Brazilian congress. In addition, 45% of Brazilians supported same-sex marriage according to a poll made in Brazil after the Supreme Court decision.40 Asked about the constitutional clause limiting family to an entity originated by the union between a man and a woman, the LGBT activist stated that the rule established by Article 226 of the Brazilian constitution should not prevail over fundamental principles of human dignity and equality. In his opinion, this clause violates the essence of the Brazilian constitution.

III. Does Hollywood Protect Minorities?

It would be absurd to propose the argument that Hollywood is a champion of minority rights in the vein of (for instance) the National Association for the Advancement of the Coloured People (NAACP). It would also be absurd to suggest that Spike Lee and Sidney Poitier have been more important figures for the legal protection of African Americans than Thurgood Marshall and Martin Luther King. Clarifications are,

36 See http://www.abglt.org.br/port/filmes.php (last checked on 01/31/16).
38 According to the interviewee, some LGBT activists consider that they should adopt a more radical perspective instead of adjusting their conduct to patterns and standards borrowed from heterosexual relationships. Therefore, in this context, the idea of cleanliness expressed in the interview seemed to be equivalent to straightness.
39 http://milkfoundation.org/about/harvey-milk-biography/ (last checked on 25/03/17).
40 See http://ultimosegundo.ig.com.br/brasil/pesquisa-revela-que-55-dos-brasileiros-sao-contra-uniao-gay/n1597104761368.html (last checked on 25/03/17)
therefore, essential. Minorities protect themselves predominantly through human rights movements, community organization, counter-hegemonic discourses, and adjudication of their interests in courts. The battlefield for racial affirmative action can be seen to involve the power dynamics of everyday life, ranging from the Montgomery bus boycotts and the electoral registration practices to the march on Washington and the litigation in *Brown v. Board of Education*.\(^{41}\)

Furthermore, it should be noted that Hollywood films are generally reproducing the hegemonic discourse within U.S. society. Between 1934 and 1968, film producers were expected to comply with the rigid standards of the MPPDA production code.\(^{42}\) It was strictly prohibited to discuss miscegenation, homosexuality, and abortion during this period, in which film content was purified by this conservative self-regulatory mechanism.\(^{43}\) Additionally, prejudice against black individuals was a common connotation of many Hollywood films, such as D.W. Griffith's *Birth of a Nation* (1915) and David Selznick's *Gone With the Wind* (1939). Moreover, black characters of this era were often representations of painfully misguided stereotypes of slaves, criminals, or servants. As Asimow and Mader put it, ‘all these constantly repeated stereotypical roles in the movies as well as television became a powerful signifier of black inferiority and white superiority,’ reinforcing the ideology of racism, damaging prospects for racial equality, and affecting the self image of blacks within society.\(^{44}\) Likewise, contemporary romantic movies usually depict the search for romantic love of white heterosexual couples, reinforcing the marginalization of interracial and same-sex couples. Even films sympathetic to minorities had their discriminatory moments, such as in *Philadelphia* (1993), when the movie needlessly questions whether Tom Hanks' character had sex with strangers - an irrelevance to the overall plot and, therefore, a strange part.\(^{45}\) Therefore, in general, Hollywood films often reproduced mainstream hegemonic ideas as opposed to alternative counter-hegemonic narratives. On the other hand, it would also be disingenuous to ignore the importance of the symbolic capital of counter-hegemonic films that challenged the status quo and advanced the African American cause.

For instance, the landmark ruling of *Loving v. Virginia*\(^{46}\) – declaring the state anti-miscegenation act unconstitutional and prohibiting all race-based restrictions on marriage – was accompanied by the release of *Guess Who's Coming to Dinner* (1967). The movie portrayed tensions emerging from the decision of a white upper-class woman to marry an African American physician she met in Hawaii. When Joanna brings home her fiancé to introduce to her parents, she is puzzled by the reluctance of her supposedly liberal Californian parents to accept their decision of having an interracial marriage. Not only are Joanna's parents surprised with the prospect of having a black son-in-law, but also at her fiancé's family's resistance to the idea that the bride was not an African American woman. Therefore, symbolically, the film is a companion to the

\(^{41}\) See, for instance, Mark Tushnet, *Brown v. Board of Education: the Battle for Integration* (Franklin Watts 1995)

\(^{42}\) Asimow and Mader (n. 20) 22.

\(^{43}\) Id.

\(^{44}\) Id.

\(^{45}\) Asimow and Mader (n. 20) 222.

\(^{46}\) 388 U.S. 1 (1967).
U.S. Supreme Court decision, inviting the audience to reflect on the discomfort that their families felt with interracial marriage and providing powerful images of the unjust discrimination experienced by the couple. As expected of any typical Hollywood screenplay, there is a happy ending as both families ultimately bless the interracial marriage. In spite of the strong criticism the film received due to its perceived artificiality and refusal to denounce the severe racial injustice of the United States, \(^{47}\) *Guess Who’s Coming to Dinner* (1967) offered the first interracial kiss in a Hollywood movie and provided the first favourable depiction of a marriage between a white woman and an African American man. Being a Hollywood blockbuster, the movie was nominated for eight Oscars and made a profit of seventy million dollars at the box-office. Critically, it was well received even in the Southern states, became an iconic text, and constituted symbolic capital for affirmative action defenders throughout the globe.

A connection could also be established between the landmark U.S. Supreme Court case *Brown v. Board of Education* \(^{48}\) and *To Kill a Mockingbird* (1962). \(^{49}\) During the Warren court (1954-1969) the U.S. Supreme Court took an active role in desegregation, establishing a dialogue with civil rights activists that abolished the ‘separate but equal’ doctrine of Jim Crow laws. \(^{50}\) During this period, minorities entered the Oscar running with repeated nominations of movies about the dramas of African-Americans, Asians, Puerto Ricans, Jewish, and other immigrant groups. \(^{51}\) From a slim spectrum of eighty movies nominated for the Oscar for best film during the Warren period, twelve contained plots or sub-plots related to discrimination of race, religion, or ethnicity.

On one hand, it is clear that Hollywood did not cause the wave of identity rights associated with the civil rights movement. On the other hand, even restricted by the conservative rules of the MPPDA production code, Hollywood cinema echoed the voices of activists, protesters, and lawyers in various productions inspired by the

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\(^{48}\) 347 U.S. 483 (1954).

\(^{49}\) Asimow and Mader (n. 20) 38.

\(^{50}\) see Klarman, (n. 12).

\(^{51}\) ‘Love is a Many-Splendored Thing’ (1955) discussed the ostracism imposed to an Asian woman in Hong Kong after her marriage with a white American man; ‘Sayonara’ (1957) focused also on prejudice as the consequence of a marriage between an Asian woman and a white American Air Force member, except that this time she was Japanese and they suffered discrimination inside the military; ‘12 angry men’ (1957) touched discrimination against a Puerto Rican defendant as a grand jury seems ready to convict him based on stereotypes; ‘The Defiant Ones’ (1958) showed how a white and a black fugitive learn to respect each other while cooperating to escape prison; ‘The Diary of Anne Frank’ (1959) revealed the suffering of a Jewish teenager, while hiding in Nazi-occupied Amsterdam; ‘West Side Story’ (1961) addressed discrimination by telling a contemporary version of Shakespeare’s ‘Romeo and Juliet’ with Puerto Ricans instead of Capulet; ‘Judgment at Nuremberg’ (1961) dealt with holocaust, persecution of Jews, and the Nuremberg trials; ‘To Kill a Mockingbird’ (1962) portrayed the unfair trial of a black defendant in Alabama; ‘America, America’ (1963) denounced the massacre of Armenians in Turkey; ‘Lilies of the field’ (1963) placed an African American in the position of guardian angel in a community of poor European nuns; ‘In the Heat of Night’ (1967) placed an African American policeman inside an investigation in racist south; ‘Guess Who’s Coming to Dinner?’ (1967) discussed inter-racial marriage between a white woman and an African American physician.
emancipative climate of the Warren years. Therefore, there was a public dialogue established between the film-makers and law-makers. During this period in which these twelve films were produced in Hollywood and subject to great discussion in the public sphere, before being awarded their nominations for best film, the Warren Court delivered landmark verdicts against racial discrimination in the US.

In addition to Brown v. Board of Education (1954) and Loving v. Virginia (1967), there were six other extremely important cases: Bolling v. Sharp (1954) addressed school desegregation in DC;\(^ {52}\) Lucy v. Adams (1955) addressed school desegregation at University of Alabama;\(^ {53}\) Cooper v. Aaron (1958) decided that states had to adopt policies to desegregate their schools;\(^ {54}\) Gamillion v. Lightfoot (1960) prohibited electoral districts especially designed to disenfranchise African American voters;\(^ {55}\) Griffin v. County School Board (1964) prohibited an educational program that closed public schools and provided private vouchers to students, so that they could attend private segregated schools;\(^ {56}\) Green v. County School Board of New Kent County (1968) banned a ‘freedom of choice plan’ that masked de facto segregation, determining the formulation of a realistic desegregated system.\(^ {57}\) Since the U.S. Supreme Court did not determine the immediate end of segregation, but rather its gradual abolition with ‘all deliberate speed’,\(^ {58}\) popular culture can still be seen as an essential aspect of the huge cultural transformation experienced in the US. In the case of racial discrimination, however, it was the Warren court that demonstrably led the revolution.\(^ {59}\) Hollywood simply followed the wave of anti-discrimination judicial decisions with a series of anti-discrimination films.

In terms of sexual orientation, however, a conservative Supreme Court was pushed into debating same-sex marriage by a progressive Hollywood. With Hollingsworth v. Perry and United States v. Windsor,\(^ {60}\) the U.S. Supreme Court finally entered into the socio-legal dispute regarding same-sex marriage, referencing Californian Proposition 8 and the Defense of Marriage Act (DOMA).\(^ {61}\)

Hollywood has promoted discussions about sexual orientation for decades. It is true, however, that until very recently gay and lesbian characters were depicted in a

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\(^{52}\) 347 U.S. 497 (1954).  
\(^{54}\) 358 U.S. 1 (1958).  
\(^{55}\) 364 U.S. 339 (1960).  
\(^{56}\) 377 U.S. 218 (1964).  
\(^{57}\) 391 U.S. 430 (1968).  
\(^{60}\) 570 U.S. ____ (2013).  
\(^{61}\) Proposition 8 was a statewide initiative to make same-sex marriages illegal in California, which was approved during elections of 2008. DOMA was a federal U.S. law defining marriage as the union between a man and a woman and allowing states to deny recognition of same-sex marriages celebrates in other states.
very negative light in Hollywood movies. In the early years of cinema (1900-1934), representations of racial and sexual minorities frequently and consistently contained scenes of naive – but nonetheless harsh – discrimination. *Uncle Tom's Cabin* (1927) and *The Gay Divorcee* (1934) provide striking examples of this era, in which representations of black and gay men manifested in a highly stereotypical fashion; characters were submissive and did not dispute their low rank in society.\(^{62}\)

In the intermediate years (1934-1960s) there was strong censorship as the Hay Code prohibited narratives of sexual ‘perversion’ and interracial relationships. Over the course of three decades, African Americans and sexual minorities were invisible on the screen. During these ‘closet years’, gay motifs in *Spartacus* (1960), *Ben Hur* (1959), and *Cat on a Hot Tin Roof* (1958) were either removed from the screenplay or disguised in various subtle ways – so as not to be rejected by censors yet still convey the message. During the sixties, however, the gradual erosion of the MPPDA code coincided with a period of films that dealt directly with the conflict and emancipation of racial and sexual minorities. In addition to Blaxploitation cinema and its anti-‘Uncle Tom’ films, there were a growing number of productions nominated for best motion picture at the Academy Awards that engaged with the issue of discrimination against lesbians, gays, bisexuals, and transsexuals (LGBT).\(^{63}\)

Throughout the history of LGBT representation in Hollywood cinema, many of its films functioned to denigrate the image of sexual minorities. Take the example of *The Silence of the Lambs* (1991), in which the serial killer is the transsexual Buffalo Bill. LGBT-led protests regarding the film’s perceived homophobic content did not prevent it from winning all major five Oscars (film, director, screenplay, leading actor, and leading actress). It could be said that up to and including *The Silence of the Lambs* (1991), the dominant Hollywood image of the gay man or woman was a very negative one.

*Philadelphia* (1993) is a clear turning point, as the core of its narrative constitutes a powerful critique of homophobia in contemporary American society. In Philadelphia, the gay character is a successful lawyer who is fired because his supervisors discover that he suffers from AIDS. Instead of simply accepting social discrimination, he decides to sue the law firm for his discriminatory marginalization. *Philadelphia*, therefore, represents an early attempt by Hollywood to project a message of support for sexual minorities and, indeed, a call for their emancipation. Once again, however, the gay character dies, but this time the narrative contains a Christ-like virtue,\(^{64}\) encouraging audiences to empathize with him, as a messianic bearer of old-fashioned bigotry.

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\(^{62}\) One of the reviewers asked for a clarification about the film *Gay Divorcee*, because this film is not about homossexuals but about divorce. Even if it is true that the word ‘gay’ of the movie’s title doesn’t mean homossexual, there is a homossexual character in a supporting role, which is depicted in a highly stereotypical way. The reference here is not to the main character, but rather to this one in the supporting role.

\(^{63}\) Among the films nominated for the Oscar of best motion picture are the following films: Rachel, Rachel (1968); Midnight Cowboy (1969); Kiss of Spider Woman (1985); The Crying Game (1992); American Beauty (1999); Brokeback Mountain (2005); Capote (2005); Milk (2008).

\(^{64}\) Asimow and Mader (n. 20) 36.
In the past two decades, sexual minorities have largely ceased to be depicted as murderous maniacs – as seen in Basic Instinct (1992), for example – and, instead, have been cast as martyrs of the LGBT cause. Milk (2008), Brokeback Mountain (2005), and Boys Don’t Cry (1999) are examples of blockbusters that denounced the conflict, violence, and subordination experienced by sexual minorities. Since 1993, Hollywood depicts those identifying as LGBT no longer as crude villains, but instead as heroic victims of our society. These films – and the TV series such as Will & Grace and Modern Family, for instance – are calls for justice in favour of sexual minorities. By denouncing the subordination of sexual minorities in cinema, Hollywood advances the protection of the LGBT community throughout the globe. This radical transformation of the cultural representation of sexual orientation was followed by a series of state Supreme Court decisions favorable to same-sex marriage that eventually culminated with the landmark decision of the U.S. Supreme Court in Obergefell v. Hodges.

IV. Final remarks

In conclusion, popular culture is important for legal change and influenced the legalization of same-sex marriage in Brazil. Obviously, LGBT activism was fundamental for the Supreme Court decision, but popular culture was arguably an even more important vehicle for normative ideas than U.S. doctrine, foreign scholarly articles, or precedents from the U.S. State Supreme Courts. There are no references to books or foreign legal materials on the website of the ABGLBT, but there is a list of international films. By the time of the Brazilian Supreme Court decision, there were not many doctrinal books written on the subject and the existing ones were not widely discussed in Brazilian society or academia. Popular culture was clearly a powerful source of transformation of the social climate and institutional environment regarding the recognition of same sex marriage in Brazil. Since it is difficult to identify traditional formal sources of law as justification for the Brazilian Supreme Court decision, popular culture could be perceived as a key source of legal transformation in the Brazilian same-sex marriage cases. Unfortunately, we cannot precisely measure its impact, but we should also not deny its strong influence.

Additionally, Hollywood films carry messages of affirmative action regarding anti-discrimination, protection of minorities, and racial tensions. In peripheral countries, most decisions from the U.S. Supreme Court are unknown or are only superficially known. However, cinema is a vehicle for the dissemination of emancipatory ideas. Even if these films are never cited as a legal source by courts across the world, they definitely travel much more easily than judicial precedents, inspiring legal change and adoption of affirmative action policies elsewhere. Even if the Warren

Court was the main engine of the civil rights revolution in the U.S., Hollywood movies facilitate the circulation of these values to other countries. This affirmative cinema carries these normative ideas, amplifying their volume and reaching more audiences than the few elite lawyers familiar with the U.S. Supreme Court elsewhere. Therefore, Hollywood movies protect minorities across the globe as a resonance box of affirmative action initiatives developed originally in the U.S. that are reflected in their narratives.
Photography’s Transformation: Its Influence on Culture and Law

Henry J. Steiner

I. Introduction

This era’s revolutionary remaking of cameras and picture-taking dramatically deepened photography’s influence on diverse aspects of our culture and institutions, from popular habits and expectations all the way to fine points of constitutional law. That broad reach embraces both private and public phenomena within contexts as varied as family celebrations and prevention of terrorism. This essay selects two subjects to illustrate the radically different ways in which photography’s technological transformation has stamped or may stamp prominent facets of our personal lives and political-legal system.

The essay first speculates about plausible consequences of the new digital photography in enabling people to record life’s events from the ordinary to the startling, through devices as commonplace today and as easy to operate as the smartphone. A few decades or even centuries later, members of new generations may consult those recordings to deepen their knowledge about their ancestors’ lives, and indeed more broadly about their family history. They may do so recurrently, perhaps as part of family or religious celebrations, to stay in touch with their past. Through videos (audio and visual devices) that have become today’s standard fare, descendants could deepen the understanding of family history that earlier still photography had offered.

Such pictures were generally posed and formal, and often taken at special occasions with cumbersome photographic equipment. Picture-taking became an “event,” an interruption of the normal flow of family life that frequently was thought about in advance by those involved. The people photographed were very aware of what was happening. Today’s ubiquitous and automatic digital cameras can be transported in pockets and rapidly deployed. They seem likely to capture more casual, unplanned and perhaps revealing behavior and interactions.

What consequences might flow from such novel and easy access to prior generations? What effect would such encounters with the past have on people’s sense of their relationship to the departed, or indeed of their own identity? Ranging beyond the family, what information might the availability of such recordings bring to bear on the understanding of social and political history?

The second subject addresses a radically different phenomenon: the influence of modern photography and related technologies on public policy, personal rights, and the legal system. Unlike the earlier discussion exploring some possible effects of digital photography on people who view it decades or centuries later, this topic explores its
current effect on those who (perhaps unknowingly) are being photographed or who are aware of the possibility of their being photographed. We shift our attention from the viewers to the viewed.

While including both private and public parties, this discussion will focus on governmental operation of systems of surveillance that monitor public spaces in an effort to curb common crimes and terrorism. Walking on streets or in parks, among occasional others or even within crowds, an individual may feel alone, ignored by and even oblivious of surrounding strangers, and free of interference with his privacy by photographic recordings that may later become widely available. Current means of surveillance such as closed circuit television (CCTV), together with the uses to which government can put the information thereby gathered, clearly impinge on privacy.

Today the commonplace encounters between pedestrians or cars and surveillance cameras – sometimes concealed, but in any event not readily observable - have stirred public argument over the appropriate breadth of an individual’s “right” to privacy in public spaces. Such argument lies at the core of a developing strand of constitutional adjudication. Unlike the first topic, judicial decisions here play a significant role. The same issues have come to figure in the business of Congress and state legislatures.

In this essay, these two independent topics serve to illustrate selective features and applications of the new technology, particularly digital photography. Other important features unexamined by the essay readily come to mind. For example, surveillance by private parties that is random and adventitious may usefully complement systematic and ongoing surveillance by governmental authorities. Individuals who just happen to be in a certain place at a certain time have been able to record on their smartphones a growing number of interactions between police officers and private citizens that have involved violence, ended in injuries or deaths, and raised questions of racial discrimination by the police. Numerous public authorities now require police officers to wear body devices that photograph all interactions. This accelerating use of digital cameras assists both law enforcement and the protection of individual rights.

Although the essay focuses on photography, its illustrations draw on other advances in technology that may complement photography or function independently of it. The first discussion includes audio as well as visual recordings; seeing and hearing through digital devices have become companion experiences. In the second discussion, investigative strategies of government such as surveillance reach well beyond photographic devices such as CCTV to include other technologies like Global Positioning System (GPS) tracking devices.

II. Cameras, Memory and History

In a strikingly short period, the digital camera has permeated the everyday rhythms of life by instituting fresh practices. Its benefits are perhaps more widely perceived than
concerns stemming from its use. The camera reaches the market at prices that many can afford, attracting a vast body of consumers. Together with other novel features of modern life like GPS devices and the worldwide web (all of which completely elude most users’ understanding of their principles of operation), smartphones have come to seem indispensable to people’s personal and working lives.

Given its recent arrival, the most startling feature of the digital camera may be its ubiquity. These cameras are likely to be embedded in smartphones, tablets and related devices, as one among an abundance of those devices’ offered services. In this new world we inhabit, we are all photographers, we are all photographed. Grandchildren, whose grasp of smartphones dates from their kindergarten year, learn to their astonishment that their grandparents have managed to enjoy a well-informed life even without them.

Compared with the more deliberative process of picture-taking a generation ago, how effortlessly one photographs today. The comprehensive programming of highly automated digital cameras demands of the user no more than to “point and shoot.” Photography does not stand alone in this regard. Our modern capacity to photograph on the spur of the moment parallels our heightened capacity to listen to music almost at will and wherever we want, itself an abrupt departure from millennia of hearing music only when the listener made it or was within earshot of those who did. The modern appetite for prompt and effortless realization of so many desires, in this case merely by the agency of one pocket-size device, seems insatiable.

The uses of the camera extend as far as the photographer’s imagination. It readily yields the adequate image desired by most amateur photographers who take pictures as a matter of course, upon their slightest whim, almost reflexively. Smartphones’ capacity to take videos expands the photographer’s repertoire to include the flow of an entire event and ongoing human interaction rather than only isolated fragments of that event through still pictures. Human memory no longer has to bear the full burden of recalling yesterday’s or last year’s adventure. On the threshold of its third century of use, photography has assumed a far larger part of that task.1

Let me illustrate my speculation about some of the consequences of our digital world by recollecting a family event long ago. My mother, nephew and I were having great fun playing impromptu roles in a radio drama that we were in the process of inventing. The effort, we thought, merited a recording. While commonplace today, sound recorders were then rare in households, and surely couldn’t fit in a pocket. Good-quality recordings generally required bulky reel-to-reel machines. After our escapade, I put the reels away and forgot about them.

Years after my mother’s death, I came across the reels and recalled our fun-making. Of course, I immediately wanted to hear the recording, but strong second thoughts took hold. My generation and far earlier ones were accustomed to seeing still

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1 For illuminating essays on photography’s earlier development and relationship to culture and politics, see Susan Sontag, On Photography (Farar, Straus and Giroux, 1973). 79
photographs of deceased relatives and friends. Of course, for centuries before photography became prominent, many people could view ancestors in paintings or sculpture – even if portraits were carefully posed and often expressed more the artistic ambitions of the painter than the character of the ancestor. Such pictures complemented traditional ways of remaining in touch with the dead – memory, memorials, observance of a death’s anniversary by visiting the cemetery, and rereading ancestors’ intimate diaries and letters.

But my generation was not accustomed to “hearing” its ancestors. The novelty of the intimate experience that I was considering gave me pause. Perhaps I felt that my mother’s voice would provoke a more vivid and emotional reaction than would merely seeing her picture. It might suggest her very presence. Whatever the reasons, I decided not to listen to the recording but rather to honor the boundary established over the years between my life and my mother’s death.

In these circumstances, the significance of devices like sound recorders for remembrance of the dead would depend on the stage of technological development and the degree of popular familiarity with that development. What are our habits and experiences at a given time? What practices are habitual and thus unlikely to raise a novel issue? What strikes us as a novel experience that may generate unease and make us hesitate? The viewing today by younger people of videos showing deceased loved ones may offer them no more dramatic or distinctive an experience than did my own browsing decades earlier through the family album.

Devices like smartphones (not to mention their successors-to-be) may vastly expand our knowledge of the past, surely including our ancestry. Perhaps these devices will partly fill the void in our knowledge left by the near disappearance of personal writing. Diaries or intimate correspondence of a probing and self-examining character were long a prime means of enlightening their authors’ descendants – and sometimes the literary public as well.

Today videos might generate fresh thoughts about a family’s past as they portray people in comfort and in poverty, as educated and uneducated, as self-assured and subservient, in conversations and play, smiling and glowering, celebrating and mourning, connecting with others or guarding their distance. Perhaps viewing such recordings would figure in annual rituals of remembrance to complement the lighting of a memorial candle or the visit to an ancestor’s gravesite. Perhaps patients would consult these videos to stimulate their own memories before the start of the therapeutic hour.

How might we apply these speculations to more remote ancestors? Suppose that our present technology and cameras had become available by the mid-19th century. How much richer could our knowledge about family history become as we watch videos carrying us back at least to our great-grandparents, observing and listening to them in their familial, social and cultural environments. Within an immigrant country like the United States, that capacity to explore history would transport Americans to their ancestors’ pre-emigration lives in foreign countries, tongues and cultures.
We can modify my image by trying to imagine life 150 years ahead, when our great-great-grandchildren will be observing events in our lives with some incredulity. The videos handed down over generations might become a familiar part of a family’s legacy and education, deepening awareness of historical roots, and likely influencing how family members would understand their own identity. Perhaps such videos would expand family trees to include more remotely connected people who would previously have been seen as strangers, thereby strengthening feelings of human connectedness. Perhaps observing and hearing ancestors participating in ceremonies that survive to this day would reinforce particular identities such as religious ones: saying grace at table, attending a baptism, celebrating the Seder, breaking the Ramadan fast.

Such imagined consequences of the new video photography seem to be plausible, but surely not inevitable. The thoughts and feelings stemming from the viewing of much earlier family recordings might be polar to what has just been suggested. Perhaps a viewer will be appalled by aspects of what the recordings reveal and distance herself more deliberately from the world of ancestors. Perhaps observing earlier family participation in religious rituals will reinforce the viewer’s secular orientation. The felt urge may be to escape the past rather than to imitate and conform to it.

Moreover, predictions that the expanding reach of modern photography will affect people’s views about their ancestors rest on a problematic assumption. The enthusiastic, indeed profligate use of today’s cameras may create an unmanageable mass of videos. The abundant photographers may lack the skill, ambition or energy necessary to bring order to that mass, in order to pass on to their children a collection sufficiently informative and brief to hold their attention.

Of course, the appeal of today’s video cameras extends well beyond family boundaries. Consider formal education. Instruction in American history, for example, now assigns a modest role to photography. If we again imagine that today’s sophisticated devices were broadly available by the mid-19th century, our present teachers could complement books and lectures with videos: haying the fields, discussions among foot soldiers or slaves during the Civil War, a factory production line, a high school class learning American history. Perhaps the public media of the earlier period produced documentaries and newscasts about such classic events as the Lincoln-Douglas debates. What different insights into the past might such teaching materials generate by endowing study with an immediacy and fresh sense of discovery?

III. Public Surveillance and Privacy

The essay’s focus here shifts from digital photography’s effect on its viewers to its effect on the people being photographed. Devices like smartphones or CCTV make it possible for people to be routinely photographed in public spaces without their consent or even their knowledge. Such uninvited and perhaps unwanted picture-taking has
become so ordinary a feature of urban life that a high percentage of people expect it. No longer can we speak confidently of disappearing into a crowd. It is ironic that one of the reasons for prior generations to flee rural life and relocate to the booming cities was to escape the ever-present constraints of smaller communities and achieve greater privacy in their personal lives. The anonymity conferred by city life could expand freedom of action. Today, however, the individual in cities’ public spaces loses some of that privacy.

The common justifications for governmental surveillance are broadly understood: enhance public safety, particularly through monitoring a vast number of people in public spaces in order to reduce the likelihood of criminal conduct, as well as to assist in identifying the criminals. Increasingly, surveillance also aims at thwarting terrorism. In public places, the operation of a surveillance system is predominantly governmental, although devices like CCTV may be privately owned and placed at entrances to and inside stores and offices. Urban dwellers who simply leave home, commute to their places of work, have lunch, and perhaps shop before returning home may have their pictures taken dozens of times by an integrated network of cameras. The practice was not born yesterday. More than a decade ago, about 100,000 fans were photographed as they entered a stadium to enjoy the annual “superbowl” game. These face shots were speedily checked against government files with the help of biometric and other modern means of identification.

Now that government has entered the surveillance business with ambitious goals, do we regret the loss of an earlier feeling that in public spaces we were unlikely to have our actions monitored and recorded? Complaints have escalated that “Big Brother” may be snooping into what were once our private lives as we go about our daily affairs. From the perspective of erosion of privacy, what can be done to keep the diverse strategies for surveillance in appropriate check?

One might argue that public spaces -- by which I mean principally places open to the public -- are fair game for surveillance by any governmental agency or private person or institution. Those present in the public arena, the argument asserts, must know that they have left any right to privacy at home. People are aware of their exposure to the eyes of countless strangers when in streets or parks or at government agencies, as well as at privately owned institutions attracting customers seeking goods, services or entertainment.

2 See Fergal Davis, Nicola McGarrity and George Williams (eds.), Surveillance, Counter-Terrorism and Comparative Constitutionalism (Routledge, 2014)

3 The spreading practice of photography raised concerns about its effects on individual privacy in the very century of its invention. A landmark, extremely influential article about a right to privacy in the American legal system was published in 1890: Samuel Warren and Louis Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193. The United States Constitution makes no mention of such a right. The authors note concerns about interferences with privacy stemming from photography, referring for example to “instantaneous photographs” invading the “sacred precincts of private and domestic life”. They argue that “existing law” affords a principle supporting protection of individual privacy from invasion by the photographer. They caution that the “latest advances” in photographic art have made it possible to take pictures “surreptitiously”.

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Quite a range of such places comes to mind: gay bars, commercial stores, churches, theatres and stadiums, psychiatrists' offices, headquarters of associations, abortion clinics, investment advisers, massage parlors, and sites for mass demonstrations for a political cause. At certain locations, the likelihood of being photographed by a public authority may soar. Street cameras, for example, may target the entrances to institutions whose activities and visitors may interest governmental security services. Of course constitutional issues other than privacy may arise in these last circumstances, such as governmental surveillance's interference with individuals' freedoms of expression and association.

The U.S. Government's role in gathering information through surveillance, and determining the uses to which it will be put, spurs intense political debate. Legislative investigations and massive unauthorized disclosures fuel that debate as we learn how fragile our privacy has become in other everyday activities such as making phone calls, dispatching emails, or searching for information on the web. Federal and state legislation and judicial decisions wrestle with the implications for individual privacy of myriad forms of surveillance. Much new law, together with new institutions to administer and enforce it, are in the making.

In some familiar contexts such as the wiretapping of telephonic communications, a network of statutory regulation has developed that spells out the governing rules and thereby lessens demands on the courts to develop the law in this area through constitutional adjudication. The present discussion, however, concentrates on judicial participation in the broad national debate at the constitutional level. It illustrates today's problems by examining the 2012 decision of the United States Supreme Court in *United States v. Jones*. Although this case does not involve photography, it examines another modern mode of surveillance posing analogous issues of privacy.

Although the U.S. Constitution does not mention a right to privacy, that right nonetheless figures importantly in a well-known field of constitutional litigation. The Fourth Amendment to the Constitution declares that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.” As expounded in judicial decisions and scholarly writings, the amendment forbids governmental action that is found to constitute an “unreasonable” search and seizure in order to protect a right to privacy against governmental intrusion. The home is the paradigmatic place to be protected against (unreasonable) intrusion. The “right” to privacy articulated by courts in these cases is understood to inform and underlie, or to be derived from, the Fourth Amendment’s provision.

The amendment's primary application has involved governmental investigation of crimes and the related enforcement of the criminal law. In most cases, the law-enforcement officer making the search or seizure must have secured an official

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4 565 U.S. 400.
and valid warrant ("search warrant") authorizing it. Absent the necessary warrant, the search or seizure is judged unreasonable.

The decision in United States v. Jones illustrates the interplay of different lines of reasoning used by the Justices to address privacy, even though each of the three opinions in that case accepted the Fourth Amendment as the constitutional point of departure. The opinions follow familiar methods of interpreting constitutional text, and of developing different tests or standards for handling the many questions that stem from the amendment’s application. More generally, the three opinions wrestle with the dilemma of applying a centuries-old constitutional text to a modern society in the grip of rapid technological advances that raise issues implicating that text.

Prominent among the methods of surveillance is the GPS unit. When the unit’s receiver is carried, knowingly or unknowingly, by a person or vehicle under investigation, it enables the governmental monitor to track the movements of that person or vehicle. GPS may be used as an alternative to or a complement of photographic surveillance through such standard devices as video cameras and CCTV. Depending on the context, each system offers distinctive advantages.

In Jones, a federal government agency secretly installed a GPS tracking device on the underbody of defendant’s car, and thereby monitored the car’s movements for 28 consecutive days. The agency failed to obtain a proper warrant to engage in this conduct. Partly on the basis of evidence derived from this surveillance, the government won a conviction in federal court for the trafficking of drugs. An appellate court reversed the conviction on the ground that the surveillance violated the Fourth Amendment. The case then came to the Supreme Court. All nine Justices agreed that the conviction should be reversed, but for differing reasons. The case produced one opinion for the Court itself, and two concurring opinions.

The Court’s opinion, written by Justice Scalia and joined by four other Justices, followed a traditional path of reasoning in such cases. Understanding the car itself to constitute an “effect” within the terms of the Fourth Amendment, it viewed the attachment of the GPS device as an illegal “trespass” (the government had not obtained a proper warrant to engage in this conduct) on defendant’s property. The attachment therefore constituted an “unreasonable search” within the meaning of the amendment. For that reason, evidence gathered through the surveillance had to be excluded from the trial. Justice Scalia quoted approvingly from an earlier decision based on the Fourth Amendment to the effect that the Court must preserve “that degree of privacy against government that existed when the Fourth Amendment was adopted.”

Well before the decision in Jones, Supreme Court opinions had become more nuanced and complex in their consideration of both the kind of conduct that constituted a “search” and the notion of privacy. The use of electronic devices to investigate a suspect could not be readily fitted into the familiar reasoning of judges in cases of physical intrusion (a trespass), reasoning to which the fundamental notion of the protection of property rights was germane. In the new circumstances of electronic
devices, what property was being protected against what kind of intrusion? Did government’s operation of these devices amount to a “search” under the Fourth Amendment? Confronted with such vexing questions, Justices had reached beyond the notions of physical intrusion and trespass to develop a different test for determining if the amendment had been violated: whether the government’s conduct violated a person’s “reasonable expectation of privacy.”

Justice Scalia stressed that the “reasonable expectation” test was an additional rather than exclusive way to determine whether a search had occurred. Without a search warrant, physical trespass to a “home” or an “effect” continued to be sufficient to find a search unreasonable. The opinion did however speculate about how the law might develop if the government tracked a person through electronic means without any tangible interference with property, so that no claim of a traditional trespass (such as the attachment in Jones) was possible: “It may be that achieving the same results [of collecting incriminating evidence by following a person’s movements] through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.” Note that this potentially far-reaching observation suggests neither what legal argument might lead to such an imagined decision, nor what constitutional provision would serve as its foundation.5

In her concurring opinion, Justice Sotomayor agreed with the Court that the trespass was sufficient to find a violation. Nonetheless, she criticized the Court’s opinion as too formal and technical in its effort to adhere to traditional notions of trespass to property. In the present world of electronic surveillance, she urged a different approach. Contemporary modes of surveillance that do not require physical intrusion into privately-owned space may nonetheless violate a person’s “subjective expectation of privacy that society recognizes as reasonable,” particularly if the surveillance is designed by the government to learn more about the conduct of a specific person or institution, rather than to cover a public place (like a park) in the

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5 All three opinions can be read to open to one or another degree the question whether judicial decisions in this field of electronic surveillance in public spaces should continue to rest on the Fourth Amendment as the only foundation for arguments about privacy and constitutionality. The Supreme Court has developed arguments and doctrine independent of the Fourth Amendment to declare a constitutional right to privacy—though in limited and very different contexts. Those decisions, mostly involving states and state action rather than the federal government, are sometimes grouped within the rubric “substantive Due Process,” referring to the Due Process Clause of the Fourteenth Amendment that applies to state governments. The leading decisions involve primarily issues related to marriage, family, procreation and sexual relations. They locate the source of a constitutional right to privacy in several related but distinct ways, referring to or explicitly relying on: the Liberty clause of the Fourteenth Amendment, particular provisions of the Bill of Rights (the first ten amendments) such as the First Amendment (freedom of expression) and the Fourth Amendment, and a “penumbral” area formed by emanations from several rights declared in the Bill of Rights. Some statements in the Jones opinions could be understood to express sympathy with or at least openness to consideration of this approach. Leading decisions that found restrictive state regulation to be unconstitutional and that were based on such a right to privacy include Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use contraceptives) and Roe v. Wade, 410 U.S. 113 (1973) (right to abortion, subject to stated conditions).
interest of general safety. For example, a surveillance camera might focus on the
entrance to the headquarters of a particular organization in order to learn more about
its membership. Or surveillance may track a particular car’s movements through the
use of license plate readers.

When referring to the range of facts about private lives that long-continuing
surveillance of a specific person or a small group might reveal, Justice Sotomayor asks
“whether people reasonably expect that their movements will be recorded and
aggregated in a manner that enables the Government” to learn such information – for
example, religious and political commitments or sexual practices. In deciding whether
the government has unconstitutionally invaded privacy, Justice Sotomayor would
consider “the existence of a reasonable societal expectation of privacy in the sum of
one’s public movements.”

In exploring such issues, a broader range of constitutional issues becomes
relevant. For example, people being surveilled or fearing surveillance about some
aspect of their lives may become more cautious about engaging in “public” activities
that could enable others to learn more about their private lives: the company they keep,
the meetings they attend, the institutions they join, their sexual partners, their place of
worship. Long-term surveillance compounds the problem, for it casts a wider net and
enables operators of a monitoring system to draw important links among what
otherwise might appear as unrelated actions. As Justice Sotomayor notes, an
awareness that government is watching “chills associational and expressive freedoms.”
Her opinion opens the possibility that such kinds of public surveillance might be found
to violate a constitutional right to privacy, wherever its source in the Constitution
might be located.

Justice Alito (joined by three members of the Court) wrote the other concurring
opinion. He too criticized the Court’s opinion for drawing on the long-established
doctrine of trespass in an artificial and unconvincing way. In this case, it was
preferable to inquire whether reasonable expectations of privacy were violated by such
long-term monitoring. The tracking of the car for a month “involved a degree of
intrusion that a reasonable person would not have anticipated.” The opinion notes
that public concern about these technologically sophisticated intrusions into areas of
privacy may lead to political pressure for legislative regulation offering some degree of
precision and protection.

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6 Following the Jones decision, and based partly on comments such as those of Justice Sotomayor,
several scholars have suggested that the Court may be moving towards a “mosaic theory” of the
Fourth Amendment under which courts, when inquiring whether the surveillance at issue
constituted a “search” within the meaning of that amendment, would look not for one discrete act
that amounted to a search (such as the attachment to a car of the GPS device, as in this case) but to
the surveillance in its totality, including elements such as relationships among its different
components and the duration of such monitoring. That is, the court might find a “search” in the
aggregate of the government’s acts, in a sequence of discrete acts which in their totality led to
important information and constituted a search. See Orin Kerr, The Mosaic Theory of the Fourth
Amendment, 111 Mich. L. Rev. 311 (2012); Monu Bedi, Social networks, Government
Many countries now practice public surveillance and confront these problems, including numerous parties to the European Convention on Human Rights. Not surprisingly, the European Court of Human Rights has been called upon several times to determine the practice’s legality. Its decisions, delivered as the judicial organ within a regional organization of considerable political diversity, offer fruitful comparisons with Jones. In both of the following cases, the European Court focuses on Article 8 of the Convention, which provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” No interference by a public authority with this right is permitted unless it is “necessary in a democratic society” in the interests of national security and public safety, for prevention of disorder or crime, or for the protection of the rights and freedoms of others.

A 2003 decision, Peck v. the United Kingdom,7 explores these issues. A borough Council in the U.K. operated a CCTV system in public areas, and maintained the tapes for a set period before destroying them. The applicant, a U.K. citizen, suffered from depression. One night, while carrying a kitchen knife, he walked down a street monitored by a camera. In an unsuccessful attempt at suicide, he cut his wrists. In view of its placement, the camera did not record this act, although the tapes did show the applicant soon afterwards while he was still holding the knife. The monitoring operator notified the police who soon arrived, released him without charge, and brought him home.

Over the following months, the CCTV footage including the applicant’s picture was shown several times on TV in order to demonstrate to the public the effectiveness of this surveillance system in alerting the police to potential crimes. Those in charge of the CCTV tapes did not take adequate steps to mask the applicant’s face before releasing the tapes for broadcast. To his shame, family, friends, and neighborhood residents were able to recognize him acting in a way that he had assumed would never be observed by others. The applicant initiated administrative and judicial proceedings, alleging an unwarranted infringement of his privacy through the public disclosure on television. Failing to gain the relief he sought in the U.K., he brought the case to the European Court of Human Rights.

That Court’s decision turned on its interpretation of Article 8’s justifications for interference with the right to privacy, particularly the justifications concerning national security and public safety, and the prevention of disorder and crime. The opinion referred to the Court’s observations in its earlier decisions that facts about a person such as his name and sexual life, as well as his rights to personal development and to establish relationships with other human beings are “important elements of the personal sphere protected by Article 8. . . . There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life.” The opinion noted that governmental photographing of events in a public place like a street does not itself constitute an interference with the protected

7 ECHR, Application No. 44647/98, Judgment 28 January 2003
right if the visual data is not recorded and preserved. Recording with the possibility of later use of the footage “may give rise to such considerations.” Indeed, in this case the applicant complained neither of being photographed by the CCTV camera nor of the creation of a record, but only of the later public broadcasting without his consent and without an effort to conceal his identity.

Given the context of a nighttime walk and the applicant’s mental distress, the opinion concluded that the governmental authority’s conduct leading to the applicant’s public identification went beyond any expectation the applicant might have had. The disclosure of the relevant footage constituted a “serious interference” with the right to privacy. The government’s justifications for this interference failed to satisfy the conditions stated in Article 8. The Court awarded damages to the applicant.

In *Uzun v. Germany*, the applicant’s movements and relationships were tracked through a combination of high-technology methods, but the applicant challenged only the lawfulness of surveillance by means of GPS. That surveillance, which led to the government’s storing the collected data, continued for about three months. Information thereby gathered was used to prosecute the applicant. Stressing such factors as the long period of tracking, the Court found that the government authorities had interfered with the applicant’s “private life.” However, taking into account the seriousness of the crimes investigated as well as the limitations on surveillance that German legislation imposed in the interests of privacy, the Court decided that the interference was justified under Article 8.

Note in these cases the relatively straightforward reasoning of the European Court of Human Rights, interpreting and applying a treaty that explicitly provides a right to privacy and that indicates in general terms what justifications for interference with that right are permitted. Opinions of the Court within this legal structure can follow an ordained sequence of thoughts, moving from a statement of facts to the issue of interference, and finally (if there is found to have been an interference) to the question of justifications. Compare this characteristic structure of opinions of the European Court with opinions of Justices of the U.S. Supreme Court who, lacking guidance from authoritative constitutional or statutory provisions about the structure of an opinion and about what justifications are relevant, compose their opinions in freer and more diverse ways. Moreover, in this case, the Justices do not restrict their views to the question of privacy. Rather they feel constrained to use the very different constitutional text about “search and seizure” as the formal point of departure for addressing the problem of modern technology’s threats to privacy.

IV. Conclusion

I view as dramatic and significant the changes in our popular culture and legal system emphasized in this essay: the paths that individuals may follow to explore the past,

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8 ECHR, Application No. 35623/05, Judgment 2 September 2010
and the paths that governments are following to monitor the present. Digital photography has been instrumental for both developments.

To be sure, the essay illustrates only a few fields in which the current era’s brilliant inventions may work pervasive social change, for good and for bad. With elation or concern, we have heard numerous predictions of substantial changes in our culture stemming from the new technology. Merely a few decades of cell phones, email, the web and social media have begun to transform not only economic and political life, but also deep aspects of our personal lives. Photography is but a sliver of this vast domain.

My remarks about these developments merely touch the proverbial tip of the iceberg. Scientists, economists, authors of utopias or dystopias, and venture capitalists may have a clear vision of where we are heading. I surely do not. All seems possible, in this brave new world breathlessly awaiting self-driving cars and all-purpose robots. Pop culture is in for some shocks. The legal system will necessarily engage with inventions whose applications challenge fundamental values.
Law and Opera
Stimuli to a Sensible Perception of Law
Gabriel Lacerda

This article is an abridged version of a longer one, published by FGV Law School Series, vol. 11 (Rio de Janeiro, 2015). The title and the idea, however, remain the same. The obvious purpose is in effect to stimulate the perception of law with the senses, to feel the law, as opposed to the traditional approach of trying to learn and understand it, with a supposedly rational and verbally articulate set of theories and concepts. The original text starts by revisiting the work and the experiences of the author, during his previous ten years at the school, using the exhibition and discussion of movie pictures as a tool to initiate beginner students into the mechanisms through which the legal system interacts with any given society to which it applies.

In all the courses that the author taught at the school, he emphasized, right from the very first class, that the purpose of the program was not to distribute to students the contents of a basket full of information, knowledge, or science, but merely to exercise an ability. Metaphorically, just like exercising at the gym strengthens muscles and helps to build a healthy body, watching and debating movies sharpens the mind and helps to build the ability to analyze any given set of facts with a particular look, a juridical look, which almost instinctively moves away from the traditional right or wrong, black and white approach that other professionals tend to adopt when dealing with legal or moral rules and standards of conduct.

Law lives in the gray area and any legal professional must be able to perceive and elaborate the almost infinite number of tonalities that lie somewhere within the extremely broad spectrum between plainly black and plainly white. Apart from that, the whole exercise hopefully implied per se a single lesson or perhaps a message; the importance of developing a holistic perception of law. The set of rules which regulate the social life in any given human community, at any particular moment in time, is always a part of a whole, an element of an open system. Law did not fall from heaven and nor was it bestowed upon humanity by an omnipotent God. The texts and theories which regulate a community are generated by the community itself and carry with them the history, the economy, the language, the predominant religion and even the climate of that community.

This article proposes a similar exercise, using operas instead of movies. An opera is essentially a plot, most of the time a hyperbolically romantic one, expressed in a theatrical way, and enhanced by elaborate music. The aggregate result of words, music, scenario, ballet, and action working together is that people watching a good performance of an opera usually experience a strong emotional response. A person whose mind is legally trained will necessarily capture with intensity and depth the
several legal issues which may be perceived in-between the many lines of poetry and music involved in an opera. Conversely, locating, showing, and underscoring legal issues that may be hidden in opera librettos to someone not similarly trained, may hopefully sharpen an overall sensibility to such issues.

That is, in a nutshell, the purpose of this article: to review a number of operas, singling out and magnifying sections that somehow encompass legal questions or themes. The exercise may at first surprise, perhaps even shock learned scholars. There are practically no references to sources or footnotes, no logical explanation or articulate arguments. Quite frankly, the purpose of the article is not to inform but to generate feelings using the hyperbolical words of opera librettos and the music that accompanies them. When confronted with a problem the intuitive impulse of a jurist, even more so in the case of law professors, is to mobilize his/her logical mind to analyze, to put the problem into a so-to-speak verbal equation, and to articulate, and theorize in search of, a solution or, at least, a learned and elegant digression. The idea of the article is different. It intends to shake, to mobilize the reader so that he/she can grasp the situation with the heart not with the mind, sense the drama that often underlies scenes that normally he/she would be seeing from a cold technical standpoint.

Someone without a legal background might take a contrary view, and be led from a primarily sensitive perception in their attempt to rationalize any given situation, so as to identify in dramatic opera scenes any possible similarities with some classic legal theoretical questions.

The overall effect will hopefully be to bring legal scholars closer to the rest of the outside world while planting a seed of familiarity with legal reasoning in the minds of lay people and maybe helping jurists to become clearer and more humble, by agreeing to take lessons on how to translate their sometimes incomprehensible jargon into common people's language.

As the purpose of the article is just to exemplify, I could have picked just two or three, or maybe thirty or forty operas. A true jurist can perceive legal issues practically anywhere and operas are essentially works of art meant to provoke and exaggerate feelings. The only pattern for the selection used in this article was to pick examples from the most well-known composer from the three fundamental schools of opera – Italian, German and, French. Since the intention is not to prove any specific point but just to stimulate feelings and perceptions, I picked totally at random five among the best-known operas and added a quick glance at the celebrated Richard Wagner’s four opera cycle, The Ring of the Nibelungen. Each work was approached in a slightly different way, mostly, but not exclusively, selecting given parts of the libretto and always focusing on the underlying legal issue or issues.
Otello

The well-known Shakespearean tragedy was adapted into an opera libretto by Arrigo Boito and, based on this libretto, Giuseppe Verdi composed his own before the last opera, perhaps the musically most elaborate of his works. The plot is dense, deep, and raises several different questions; from racial prejudice to the very nature of evil. From a strictly legal point of view, however, the whole story could be perceived as built around a single yes or no factual question: is Desdemona guilty or not guilty of the crime of adultery of which she is accused? The viewer knows that she is innocent but Otello, her husband, does not. The envious Yago forges a suspicion, manipulating the subtly implied insecurity that the marriage to a white and blonde Venetian girl might have caused in the mind of the dark-skinned moor.

Otello is nervous, suffering the intense agony of doubt. At the very beginning of the intrigue he confesses to Yago: I believe Desdemona is loyal and that she did not betray me. I believe she is not loyal. I want proof. I want certainty.¹

Yago’s reply is cruel and cold:

- What kind of certainty could you expect? Catch them in the act, perhaps? It would be a very hard task.

Otello screams to the heavens above:

- Death and damnation!

The moor is desperate. He loves Desdemona and the mere idea that she may have committed adultery terrifies him. Yago, in turn, rejoices. His wife, Emília, obeying his order, has already stolen from Desdemona the delicate handkerchief with which she has just dried the sweat from her husband’s forehead, after he had an epileptic fit. The music reflects the contrast. Yago’s lines are sung to an extremely soft and sweet melody, while Otello’s are based on aggressive strikes with a predominance of the brass.

In the tragedy’s plot, Otello is of course the victim of the suspected crime of adultery and this position intensifies his agony. His feeling, in substance, is nevertheless very similar to the most typical of the many agonies that afflict law professionals, particularly judges: What is the truth? What exactly happened? Is the accused guilty or not guilty?

Once he is finally convinced by Yago that Desdemona did in fact betray him, Otello issues his decision, perfectly in line with customs of the time: she is sentenced

¹This and all other quotations in this article were taken from the same source: PÂRIS, Alain – Livrets d’opéra- Édition bilingue. Éditions Robert Laffont, Collection Bouquins, Paris 1991. The translations into English were made by the author from French and Italian originals or from the French translation of German originals. Please use OSCOLA formatting.
to death. He asks Yago to arrange a poison. Yago, in his usual sweet tone, cynically suggests a more suitable means of execution:

- *It would be better to strangle her. There, on her bed, where she has sinned.*

Judges face a similar dilemma. Once guilt is determined, an adequate penalty must be applied.

The final scene magnifies an even more acute question. Right after Otello has killed his wife, three quick depositions show him, without a shadow of a doubt, that Desdemona was innocent. Yago’s plot is fully disclosed. The last aria of the opera is Otello’s lament:

- *Nobody should fear me, even though I am armed. This is the end of my path.*
  *Oh glory! Otello was.*

The melody of the aria is poignant; a sequence of chords based on the strings and soft woodwind support the words.

The moor contemplates Desdemona’s corpse, kisses her lips three times and stabs himself to death.

Otello’s suicide was an individually plausible, almost logical, reaction to his error in evaluating the evidence. What would be the adequate reply had institutional justice sentenced to death and executed a suspect, later proved innocent?

With music, action, and words, any person watching the opera is given the opportunity to experience in his/her own heart two of the most dramatic sensations that sometimes torture professionals who have to apply the law to facts. Watching Otello’s afflictions, a legal professional would presumably share a little of the anguish a judge sometimes has to go through in his efforts to evaluate the evidence; a lay person could be put in a position to appreciate better how difficult it is to formulate correct rules of evidence.

‘Give me the facts, I will give you the law’ (*da mihi fact dabo tibi jus*) is one of the most traditional legal sentences, but determining facts may become a difficult task and wrong determinations can produce enormous injustices. An obvious statement of course, but, exactly because it is so obvious, it is also extremely important to have it deeply and dramatically ingrained in the heart and mind of anyone dealing with legal questions.

**Don Carlo**

This other Verdi masterpiece had its première in 1867 in Paris, with a French libretto by G. Méry and C. du Locle, and was subsequently staged in Milan in a revised version in Italian, the version that is quoted here. The opera that initiates the final phase of Verdi’s career is based on a play by Schiller and takes place during the 16th Century in the court of the Spanish king Phillip II, with the customary historical licenses.
The title character is Phillip’s son, the heir to the crown, who, in real life, died in prison on the orders of his father, allegedly because he had gone mad. To settle the peace between Spain and France, Phillip II had agreed with Henry II, the King of France, that Don Carlo, then just 14 years old, would marry Henry’s daughter, Princess Elizabeth de Valois. Shortly after the agreement, Phillip changed his mind and, being a widower, decided to marry Elizabeth himself.

Elaborating on these historical facts, the libretto fancies an intense and reciprocal passion between Carlo and Elizabeth. In one of the first scenes of the opera, the desperate Don Carlo is advised by his friend, Rodrigo, Marquis of Posa, to seek solace from his afflictions by moving to Flanders, then a predominantly Protestant Spanish colony and severely repressed by Philip in his effort to impose Catholicism.

The delirious romantic intrigue and the wider political and religious issues are densely interwoven in the plot. In this context, a very specific point is brought up that induces immediate and deep legal thought: the tense relation between the king’s absolute power and a strong external and independent source, the Catholic church, represented by the Inquisition.

The presence of the Inquisition is marked with lively colors in a solemn scene, of strong visual aspects and brilliant music, representing a big auto da fé. From their thrones, placed on a platform high above a square in Madrid, Phillip and Elizabeth preside over a parade of heretics, sentenced by the Inquisition, who march slowly and solemnly to the rogue where they are to be burned alive. The square is crowded; orchestra and chorus play themes that mix festive and sinister tones.

A delegation coming from Flanders interrupts the ceremony to present a demand to the King. They are rudely repealed. Don Carlo, in an outburst of compassion and revolt, steps forward and asks his father to appoint him to take over the government of the colony. Phillip firmly denies the request. Carlo then draws his sword and threatens to attack Phillip. Carlo’s friend, the Marquis of Posa, detains the prince and compels him to turn over the sword to his father.

The climax of the main juridical/political theme in the opera occurs a couple of scenes after. Phillip calls to his presence the Grand Inquisitor, a blind 90 year-old Dominican monk. The music is slow and dark.

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2 One scholar who analyzed the text observed that the facts as described in the libretto are not representative of the truth and they are not representative of legal phenomena which is not dramatic but rather very boring. Both assertions are of course correct. Opera plots do not represent truth and legal phenomena are normally studied in a manner that often deserves to be qualified as very boring. The same commentator also added that the legal system is sober in contrast to the world of the operas. Another essentially correct statement. What the commentator may possibly have missed is that, to elaborate on this obvious contrast was a technique used by the author to generate what is anticipated in the title of the work - stimuli to a sensible (neither rational and, hopefully, not boring) approach to the study of law and legal phenomena.
Carlo, says the King, opening his heart to the priest, fills my heart with a bitter sadness. He armed himself against his father.

The Inquisitor’s answer is a question:

- How do you intend to punish him?
- Extreme punishment – says the king.
- Noted, concludes the Inquisitor.

Phillip is reluctant. The thrilling dialogue, made even more impressive by the dense music and the cavernous deep bass voice of the two characters, deserves transcription:

- If I send my son to death, will your hand absolve me?
- The peace of the empire is more valuable than the days of a rebel.
- May I sacrifice my son to the world, I, a Christian?
- To redeem us God sacrificed His.
- But can you enforce such a severe law?
- It shall be enforced everywhere if it was enforced in the Calvary.
- Could nature and love silence in me?
- Everything must silence to praise faith.

The Inquisitor has sealed Carlo’s fate. The dialogue about what to do with the Prince is finished. The Inquisitor then asks the King whether he has any further questions; after Phillip confirms that he has nothing more to ask, the Inquisitor directly asks him to punish Rodrigo, Marquis of Posa. The Marquis openly defends the Flemish heretics and his treason is even more serious than that of Carlos, he argues. The King, who already liked the Marquis, was immensely grateful to him for having taken the sword from Carlo and so does not abide by the Inquisitor’s request. A short discussion takes place but, as the Inquisitor threatens to go away, Phillip finally agrees to punish Rodrigo and declares with solemn bitterness:

- The throne must always bow to the altar.

In this single sentence one can immediately perceive the most serious question that has been, and will always continue to be, put before law and legal systems everywhere and at all times. In XVI century Spain, the King, in spite of his absolute and unquestionably God-given powers, was nevertheless subject to a higher power. Present-day jurists, historians, philosophers, and political scientists debate what is or should be the fundamental standard, the ultimate directive, or, in Kelsen’s theory, the basic norm, to
inform not just the legal systems of the Western democratic states, but the whole modern, globalized world.

The words and the music of the duet between Philip and the Inquisitor are a powerful and dramatic illustration of a cold theoretical concept. Humble and depressed, the powerful absolute monarch realizes and accepts that *the throne must bow to the altar*. Would strict, hard-core normativists be capable of a similar attitude? To what higher authority, if any, should interpreters and makers of the law at all times bow?

**Madam Butterfly**

The legal mind almost instinctively identifies in the plot of Puccini’s *Madam Butterfly* the conflict between two different cultures and respective legal systems. The story is well known and very simple. A Nagasaki-based American navy lieutenant, Benjamin Franklin Pinkerton, buys himself a wife, the delicate 15 year-old Cio Cio San (literally *Miss Butterfly* in Japanese.) The contract is, he says, *elastic*: it is valid for 999 years but he is permitted to unilaterally terminate it at any time. Pinkerton is not really a bad person. He is just taking advantage of Japanese cultural and legal institutions to sweeten his mission in the country with feminine company. The problem is that Cio Cio San is really in love with her handsome blue-eyed American husband, going as far as to convert herself to the Christian religion, attracting the malediction of her uncle, a Buddhist monk, and of the rest of her family.

The outcome is almost predictable. Pinkerton leaves Japan and promises Butterfly that he will be back. She believes his word, waits and waits, bears him a son, and refuses to marry a Japanese suitor. Three years after his departure, Pinkerton finally returns to Nagasaki, now married to an American young lady. He did not even know that he had a son from Butterfly but, once informed, he and his wife want to adopt the child and take the boy to America. Pinkerton does not even know that he had a son from Butterfly but, once informed, he and his wife want to adopt the child and take the boy to America. Butterfly must obey her husband; she agrees but with one condition: she will give the boy only to his father in person. Pinkerton accepts the condition and shows up, overwhelmed with remorse, just to see his boy blindfolded, holding a Japanese flag in one hand and the United States flag in the other, sitting by his mother who, as could be expected, has just committed suicide by cutting her throat.

A particular dialogue in the second act of the opera goes straight to the point and deals specifically with the legal question brought about by the libretto. Pinkerton is away but Sharpless, the American consul in Nagasaki, already knows that he is coming back and that he is now married to an American wife. He tries to convince Butterfly to accept a marriage proposal from a rich Japanese man, Mr. Yamadori Goro, the agent who is trying to close the marriage contract, tells Sharpless:

- *She believes she is still married.*
I don't just believe. I am. I am married, Butterfly affirms.

Abandonment of the wife under law is the same as divorce, states Goro.

Japanese law, not the law of my country, the United States. It is known that to open the door and chase away the wife here is considered divorce. But in America this cannot be done. There, a brave judge, stands upright and seriously asks the husband: “so you want to go away? Let us hear why. I am just tired of marriage. And the judge: ah you scoundrel! go right up to jail”.

Cio Cio San’s notions of the prevailing theories of conflict of laws are obviously wrong. The whole opera, the tender and touching melodies and the sensitive dialogues, are so structured as to touch the feelings of Western romantic spectators, who usually shed warm tears for the sort of pure innocent Japanese girl who had the misfortune to believe the word of a frivolous Yankee. Butterfly’s delicate sensibility simply did not adapt to her country’s current customs and laws. She was, in effect, cruelly hurt just because she was different and more sensitive than the majority of her fellow citizens.

The question that comes to mind is that, perhaps more frequently than it would be desirable, a given legal system will unjustly hurt pure souls like Cio Cio San’s. Laws are designed to represent the general feelings of the community to which they apply and normally cannot be bent to accommodate the particular sensibilities of given individuals. But art sometimes can open a community’s eyes to the agonies of minority groups and produce changes that will counteract rooted prejudices. Laws permitting marriage between people of the same sex are a good example of a situation where traditional legislation was changed to accommodate feelings of people who do not live according to the accepted patterns of the majority.

Carmen

George Bizet’s Carmen is unquestionably the best-known opera in the vast French repertoire. Based on a somewhat mediocre novel, Meilhac and Halévy managed to produce a libretto and Bizet composed a musical score that resulted in a genuine masterpiece, which inspired many other works, movies, ballets, and several adaptations, from rock & roll to samba. Carmen deals with essential and eternal elements that frequently contaminate man-woman relationships. It tells the tragedy of Don José, the modest soldier who falls passionately in love with the sensual gipsy, Carmen. Carmen’s loves don’t last

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1 Cf. Carmen Jones, movie picture, produced in 1954, directed by Otto Preminger, with Dorothy Dandridge as Carmen and Harry Belafonte as Don José. The music is adapted to rock and roll and the bullfighter appears as a boxer. Carmen – Sambópera adaptation of the opera to samba rhythm, by Augusto Boal, and music by Cláudio Late, staged in Rio de Janeiro, São Paulo and Paris in 1991. The bullfighter here becomes a soccer player.
long and, in a short time, she breaks up with Don José and replaces him with a rich and popular bullfighter - the classical love triangle that has occurred so many times, under countless different circumstances.

In the end, as in many other similar cases, the jealous José stabs Carmen to death at the gate of the arena, as his rival the bullfighter pierces the bull’s nape with his sword.

The drama is intense, the music extraordinarily brilliant, the sequence of facts satisfactorily plausible. The aggregate result entails, at first sight, just one obvious association with a traditional legal issue: how to react to a type of crime that has been with humanity at all times. Much has been, and will still be, said about this issue: is the death penalty an appropriate punishment? If so, how should it be applied? If not, what should society’s reaction be? Could Don José’s crime somehow be morally excused by the many humiliations that he suffered at the hands of Carmen?

A trained legal mind will be able to perceive in the plot many other circumstances that might, in some way, be related to legal themes.

Carmen, in the first place, is a gypsy. Reference to this circumstance appears many times in the libretto. Would this not be tantamount to legitimizing a stereotype of a given minority group? Carmen works in a cigarette factory, possibly under conditions that current law would consider unhealthy. The female workers, as a group, are presented as a morally reprehensible caste of women who smoke, seduce, and engage in knife fights. Carmen’s friends are part of a team of contrabandists, technically professional criminals. They follow a code, a flagrant illustration of how law is inevitably associated with community life and necessarily and spontaneously generated by the mere fact of association. When Carmen refuses to go with her friends on an ambitious expedition because she wants to meet Don José, she tells her friend that particular night: love is more important than duty. She had a quasi-contractual duty to the group.

Wherever there is a community, there is law (or, in Latin, ubi societas ibi jus), a proven fact that is sometimes overlooked by people dealing with the law in their day-to-day life. Last, but not least, the bullfighter is perceived in the opera as a glorified popular hero which may not sound proper at the present time, when bullfight spectacles are no longer generally perceived as sport but rather as an outdated and cruel activity.

Once again, legal minds see legal issues almost everywhere and Carmen is one more illustration of this. Jurists watching the opera may fail to notice most of the issues underscored above, intoxicated by the beauty of the music and the intensity of the drama. They may even go as far as to disregard completely the eternal question of what should be the state’s proper answer to the crime committed by Don José. The penalty of death by strangling is almost taken for granted, regardless of the circumstances that generate the public’s sympathy for the poor, desperate deserter. The effort to stimulate a sensible perception of legal phenomena should not be so intense as to let the legal mind be totally carried away from its intrinsic analytical structure. In contrast, anyone
who is not legally trained certainly will never observe that the intense romantic plot may be used as an illustration in a discussion about themes currently debated in the legal scenario.

Perhaps the force of an extraordinary work of art is so intense that the proper attitude in the case of Carmen would be simply to abandon any and all speculation and surrender to the emotion generated by the brilliant music and the excellent libretto. Concerns with law and legal issues cannot and should not occupy us 100 percent of the time. A jurist moved by the emotion may sometimes become a better and deeper jurist.

**Lohengrin**

Moving from French to German opera, let us now use the example of one of the works of Richard Wagner. Different from Carmen, almost all the librettos of Wagner's operas, written by the composer himself, raise issues that directly induce thinking about some of the most important legal questions. This is particularly true in the case of Lohengrin, an opera plot which departs precisely from the decision of a legal case.

The opera takes place during the Middle Ages, in the German duchy of Brabant. The former Duke died when his two children, Elsa and Gotfrey, were still very young. Gotfrey has mysteriously disappeared and one of the nobles, Friedrich von Talramund, in support of his claim to be nominated as the Duke's legitimate successor, argues that the late Duke had appointed him as tutor of his children and had offered him the hand of his daughter, Elsa, if he so wished.

Friedrich goes further and, as Germany's King Henry visits the duchy, formally accuses Elsa of killing her brother. A quick verdict of guilty or not guilty must be issued. King Henry declares himself not competent to judge Elsa and submits the case to the ancient judgment (in German, Urteil, sharing the same origin as the English word ordeal). Only God Himself, the omnipotent Lord of the Christian culture, can know the truth. Elsa's fate is to be decided in a duel between her accuser and any other noble who volunteers to defend her. The will of God will grant victory to the advocate of the truth. Elsa is then brought to the scene and the king asks her to appoint someone to support her cause.

Elsa's replies in a poetical daydreaming state:

- I see a glorious knight, immersed in a splendid light. His eyes contemplate me with sweetness. He rests with his sword amidst the clouds, next to a house made of gold. Heaven sent him to save me. He will be my defender.

The assembled court only perceives that Elsa is not delirious when they see, out in the distance, that a knight has just disembarked from a boat, pulled by a big white swan. With slow majestic steps the knight marches through the open door and enters the hall. Elsa throws herself at his feet and he immediately accepts to defend her in combat, without saying who he is or where he comes from. Is Elsa's perception of
her defender akin to the way anyone unjustly accused of crime feels about his or her lawyer?

The combat takes place and the mysterious knight wins. God has expressed His will. Elsa is innocent. According to the tradition of *urteil*, the knight has now the right to kill Friedrich von Talramund. But he does not. Talramund is just ordered to leave the duchy. The plot continues and, at the very end, the audience is informed that the knight is really Lohengrin, one of the knights of the Holy Grail, the legendary cup used by Christ at the last supper which collected the blood shed by him when he was crucified.

As if to confirm the truthfulness of the judgment, the flying swan that had brought Lohengrin’s boat acquires a human form – it is actually Gottfrey, Elsa’s brother, who had been bewitched by Talramund’s wife.

The procedure used in Brabant to judge Elsa is just one of the many examples of trials that appear in the opera repertoire. Judgments are actually a rather common feature in opera plots: in Donizetti’s *Roberto Devereux*, the title character, supposedly a lover of Queen Elizabeth I of England, is sentenced to death by a council of noble men; in early Verdi’s *I Due Foscari*, another council, the Council of Ten of medieval Venice, sentences the son of its own head, the old Doge, to perpetual exile; Radames, the hero of late Verdi’s *Aida*, is considered guilty of treason and also sentenced to death by one of the gods of ancient Egypt, who announces the decision through a council of priests. Gods have no role in XVIII century revolutionary France though, where the title character in Giordano’s opera *Andrea Chénier* is sent to the guillotine by a human committee.

Essentially, all these forms are different dramatized responses to the same eternal question that has always haunted those who must apply the laws, especially criminal laws: how to determine whether or not someone accused of a crime is guilty. In modern times, the vast majority of countries in the Western world seem to have accepted the method of trial by jury as the most adequate, especially in murder cases. But it is universally accepted that juries are not perfect and will inevitably commit errors. God, however, at least to believers, is perfect. After Lohengrin won his duel with Talramund, no one in Brabant was left with any doubt whatsoever that Elsa was innocent. Faith and beliefs are, by definition, not based on reason or logic - just feelings. Modern civilizations ultimately believe that, albeit imperfect, trial by jury is still the most reasonable method to determine an always uncertain truth. Lohengrin and other opera plots remind us that other methods exist and that any conceivable method is only as good as its consistency with the prevailing beliefs in the society to which it is to be applied.

Right and wrong, good and bad, are, after all, always relative and essentially subjective. Opera helps jurists not just to realize that simple truth in their minds but to feel it with their hearts.
The Ring of the Nibelungen

One anonymous commentator on the draft of this article observed that an article on law and opera has to discuss Wagner’s Ring. The point is absolutely correct. The Ring or The Ring of the Nibelungen, is not just an opera but a full cycle of four operas, based on German/Scandinavian mythology. Its complete performance lasts for 16 hours and the extremely elaborate libretto has all sorts of fantastic characters and events: a giant that turns into a dragon, brother and sister, the son and daughter of a god, who fall in love with each other and generate a hero without fear who ultimately kills the dragon, which is sitting on a ring made from a piece of gold, stolen from the bottom of the river Rhine, that gives power but brings death to its possessor, and so on and so forth.

Even a compressed summary of such a huge plot would take all the space of this article. But, if focusing on just the legal issues, a particular feature of the plot of the Ring, dealing with the very nature and scope of the laws, should be emphasized.

The whole universe covered by the saga, human beings, gods and goddesses who communicate with humans and live in a palace built in the skies, the strange gnomes who live in the bottom of the Earth – the Nibelungen, are all governed by laws and treaties, the runes, which are obeyed by all, at all times.

The runes are engraved in the handle of the spear of Wotan, the most important of the gods, the father of twins and grandfather of the hero, Siegfried. Siegfried and Wotan get involved in a fight and the spear is broken. A frustrated Wotan orders a group of heroes who defended his palace to cut off all the branches of the ash tree from which the spear had been made. To reinforce the symbolic value of the legend, the ash tree has roots, deep into the earth, and grows all the way to heaven, keeping the whole universe together. Around its cut-off branches, three old ladies used to weave the destiny of the universe.

The cycle ends with an apocalyptic scene. Siegfried is killed; from the pyre built to burn his dead body a big fire grows and destroys everything on land and the palace of the gods in heaven.

Some see the mythological plot as adapted by Wagner as a criticism of XIX century capitalism in Europe. It is a plausible interpretation - the ring made from the stolen gold brings power and disgrace. However, for a legal mind, maybe the more important symbolic material is the force of laws and the fact that when the spear on which they are written is broken, the whole world collapses. Without laws, human beings and gods can no longer exist.

Watching the final colossal scene of the destruction of the world - music, voices, flames, all at the same time in apocalyptical harmony, it would be plausible to wonder if what we are watching today in the modern world is not akin to the breaking of the spear where the laws are written and possibly bring about some kind of catastrophe. Significant places and institutions in the countries that are the cradle of modern Western culture are being attacked - the twin towers were destroyed, the
Pentagon severely damaged, the 14th of July party in Nice was rendered chaotic, the subway stations in London and Madrid were bombed.

That sinister scenario is of course an overly sensitive, clearly personal, and certainly exaggerated vision. But no one reflecting on the current legal scenario could dispute the fact that the fundamental premises of Western democracy are being challenged. Throughout the world, people seem not to feel represented by their supposed representatives. A small but certainly impressive number of citizens of the leading nations of the world are converting to a distorted version of Islam that preaches terrorism and destruction as a route for salvation.

Once more, this is a scenario to be studied and theorized in depth by scholars. But the opera plot of the Ring of the Nibelungen delivers a strong symbolic message, capable of producing a relevant feeling - the order of the universe is reflected in laws, written on the handle of a spear. Don't break the spear.

**Mefistofele**

One of the most remarkable pieces of western literature is the tragedy Faust by Johann Wolfgang Goethe. It took Goethe more than 60 years to finish the two separate parts of his dramatic version of the legend of the old wise man who entered into a contract with the devil. The play inspired at least three operas: the less popular The Damnation of Faust by Hector Berlioz, Charles Gounod’s Faust (libretto by Jules Barbier and Michel Carré), and Mefistofele, by the Italian composer Arrigo Boito, who also wrote the libretto for Otello, cited above, and the words for his own opera – La Gioconda.

The two best known versions of Goethe’s tragedy will be commented on below. Before that, it is worth quoting parenthetically a part of the original Goethe play that, to some extent, reflects a point of view about the legal profession akin to the ideas expressed in this article. The devil is chatting with Wagner, Dr. Faust's young assistant, who is in doubt about which career to follow. For jurisprudence – he says, *I feel no special bent*. The reply of the devil is extremely skeptical:

*I scarcely blame you for the sentiment.*

*I know about this endeavor.*

*We drag prerogatives and laws*

*From place to place by slow degrees,*

*Age handing age ancestral flaws,*

*Like an inherited disease.*

*Sense turns to nonsense, boon to plague.*

*Woe to the grandson that you are!*
Our human birthright prior to the bar,

On that, alas! the gentlemen are vague.


Going back to the operas, both the Gounod and Boito versions include the pact with the devil. In the French libretto, based just on Part I of Goethe's tragedy, Dr. Faust commits his soul to the devil in exchange for getting his youth back. The contract, signed with the old man’s blood, is unconditional. Faust becomes young again, falls in love with Gretchen, a young and naïve peasant girl, and seduces her. Gretchen goes insane and drowns both her mother and the baby she had with Faust. She is sentenced to death and beheaded but her soul is saved; Angels come down onto the stage and take Gretchen to heaven. The verdicts of human and divine justice are widely apart.

Mefistofele encompasses both parts of Goethe’s tragedy. The critical difference is that the pact with the devil is conditional; Dr. Faust would only surrender his soul to burn in hell if he is granted an hour of so much peace and quiet that he says to the fleeting moment of time “stop, you are beautiful.” Under the traditional theory of Roman law, such a clause would not be considered valid as it includes a condition that is totally at the discretion of one of the parties (condition si volam – if I want).

But Mefistofele accepts the condition. Faust turns young again, lives his love affair with Gretchen, attends with Mefistofele a mythical witches' night (the night of Walpurgis at the peak of Brocken mountain), travels to ancient Greece, and lives another romance with Helen of Troy.

In the epilogue after the last act of the opera, Faust starts an especially beautiful aria by saying:

- I have tasted every single mortal mystery. Reality and ideal. Love of the virgin love of the goddess. But reality was sorrow and ideal was dream.

Faust gradually realizes that he is again old and is dying. Singing a serene melody, extremely harmonious and sweet, he delights his soul in a dream.

- King of a placid world, in an infinite land, I want to give my life to fecund people.

The devil seems disturbed. Faust continues his aria:

- Under a wise law, I want that people and herds, houses, fields and villages appear by the thousands. I want this dream to be the saint poem, the last wish of my existence.

Mefistofele perceives that Faust is already enjoying a glimpse of Paradise. He extends his mantel and invites Faust to fly way to inebriate himself among beautiful sirens.
The music emphasizes the contradiction in a superbly dramatic form. Mefistofele gets more and more agitated and sings repeatedly the same line - *turn your look; turn your look* – each time stronger and in a higher tone. Faust is totally alienated in his soft delirium. Gradually, a melodious chorus of children’s voices is heard from the distance, angels who praise the Lord. Mefistofele insists that Faust must turn his gaze to other visions. The old man grabs the thick book of the Gospels and rejects the devil and keeps his eyes fixed on the vision of paradise. Magnificent chords create a musical atmosphere of dream. The choir of angels gets stronger and higher at every moment. Faust finally exclaims:

- *Fleeing moment of time: stop, you are beautiful! Come to me oh eternity.*  
  (Or, in the above quoted translation of Goethe’s text: *I might entreat the fleeting minute: Oh tarry yet, thou art so fair!*)

Faust bends his head and dies. A rain of rose petals falls from heaven amidst brilliant beams of light. Mefistofele plunges slowly into earth, whistling sharply and in contortions. Angels pray for the soul that rises to heaven.

Several questions that might be classified as strictly technical, such as the possible invalidity of the contract between Faust and the devil, could be built around Boito’s *Mefistofele*. But in the libretto of the opera and in Goethe’s immortal text on which it is based, there is a much deeper question: Dr. Faust is a scholar, a wise man, always seeking knowledge and tormented by doubts. He is not concerned with the other life; his only wish is that himself and the world be revealed to his somber thought. Would this posture not be identical to that of the true jurist? Would not the brain that questions everything at all times, seeking answers that it does not find, be typical of one who studies law, its reach and its limits?

The idea becomes clearer with a closer analysis of the final scene. Faust literally fulfills the condition inserted in his contract with Mefistofele and tells time to stop. He pronounces exactly the same words of the agreement: *fleeing moment of time: stop, you are beautiful*. However his soul is not, as he had promised, *swollen by hell*. The devil himself gradually realizes that he has lost the bet he had made with God and has not succeeded in corrupting Faust. Angels proclaim in glorious hymns that the soul of the old wise man has ascended to paradise.

How many judges would not have believed themselves to be doing a similar thing, on a smaller scale, when they deny the application of contractual clauses or even statutes to express texts, guided by higher intuition, perhaps illuminated by a light from above.

Paradise, after all, as glimpsed by Faust in the last moments of his life, *is a placid word, an infinite land, subject to a wise law, where thousands and thousands of people live in Peace in houses, fields and villages.*

Would this not also be the dream to which jurists aspire, the saintly poem, the absolute justice, that strives to reach the ultimate goal of their search?
Justice, actually, has always been, and will always be, essentially an ideal. Unfortunately, as Faust says, the ideal is a dream and reality sorrow. In real life, all that jurists can do is to try to mitigate as much as possible the inevitable pain of the imperfection of justice.

The marvelous final scene of Mefistofele unquestionably translates this crucial and essential dilemma of law and of legal professionals into an intense emotional experience—Interpreters must, as a general rule, accept and apply laws and contracts as they are written but there are circumstances where this runs totally against a vivid inner feeling of justice and right. Angels carry Dr. Faust to Heaven; the Devil plunges back to his deep domain, whistling and arguing the validity of the literal words of his contract with the old wise man.

Tentative Conclusion

Readers of academic papers normally expect to derive from their reading some sort of conclusion, be it a proposal, a discovery, a theory, bright new ideas, or at least some intelligent and elegant sentences to quote from. This particular article, however, was originally meant to be just a series of short examples, illustrating how operas could be used to stimulate what was called a sensible, as opposed to a rational, perception of law.

In his effort to stimulate the readers’ feelings the author also stimulated his own, which, in turn, generated questions, not answers, about a significant set of phenomena that affect modern societies. Let us mention both feelings and questions. And also, for the sake of mere speculation, dare to launch some scattered insights about what could possibly be the answers to said questions.

In the duet between Phillip II and the Inquisitor in Verdi’s Don Carlo, the powerful Spanish king, who ruled over the largest empire then existing on Earth, humbly bowed his head to the will of the church, personified by a blind 90 year-old monk. The throne must always bow before the altar he would have said, in reply to the statement of the Grand Inquisitor that everything should silence so praise faith. The impressive scene naturally induces the spectator to feel the inherent and essential need of any legal system to be supported by some higher directives, rooted on beliefs shared by the community to which it is applied.

The events referred to in Don Carlo happened in the second part of the XVI century. The protestant reform had already occurred and the power of the Catholic church had already started to decline as the power of sovereign kings of national states and multinational empires increased.

At end of the XVII Century, the so called Century of the Lights, the French, the American, and the Industrial Revolution completely revised most of the then predominant ideas in the Western world.

As mentioned above, present day jurists, historians, philosophers and political scientists debate what is or should be the fundamental standard, the ultimate directive, or, in
Kelsen's theory, the basic norm, to inform the legal system not any longer just of the western democratic states but of the whole modern globalized world.

The intuitive answer suggested is that very soon the whole world will be forced to accept as a fact that legal systems of all countries must absolutely adopt the preservation of the environment as their basic norm.

Another classical opposition is constant in opera plots, romantic literature, TV series and in the common person’s perception of life – the opposition between reason and emotion, or, in other words, the conflict between rational and irrational motives in any context where lines to separate right from wrong must be drawn. Madam Butterfly’s delicate emotions were totally dissociated from the intrinsic logic of her country’s legal system in harmony with the nation’s culture. The decision in Talramund v. Elsa, unquestionably accepted by all the subjects of the Duchy of Brabant as being perfectly just and consistent with the true facts of the case, rested strictly on the belief – a feeling, by definition irrational - that the victory of Lohengrin, the knight who appeared in court having arrived in a boat pulled by a swan, over the accuser, represented a revelation of the true facts of the case as disclosed by God our Lord. Angels, coming from heaven, knew better to interpret the real spiritual meaning, as opposed to strict lexical meaning, of contract words.

The century of lights generated a sort of radical approach to such alleged opposition between the rational and irrational, which are really not as irreconcilable as it may sometimes seem. More sophisticated thinking, and even sheer common sense, tell us that both reason and emotion can, must, and generally are weighted in an elaborate attempt to reach a reasonable and just decision regarding any conflict.

But the fact of the matter is that the influence of the views of XVIII century rationalist philosophers is still very powerful today. In the Portuguese language, to say you have reason still means exactly the same as to say you are right. Decisions and policies and, of course, laws, decrees, and court rulings, still strive to show some sort of apparently consistent logical reasoning, no matter how artificial they may sometimes sound. Reason, consistency, and rationality are still revered by presidents, kings, prime ministers, lawyers and courts.

Such a scenario is, however, undergoing a visible change; as a matter of fact, every day a growing number of attempts are made, in courses, books, lectures and essays, to relate law to other cultural expressions that historically were always perceived as having nothing to do with the dense and wordy speculations that used to be a common characteristic of legal academic production; law and movies, law and literature, law and Shakespeare, law and art, become every day a more frequent theme4.

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This might perhaps be regarded as an indirect admission that the basic theoretical structures on which legal studies in the Western world have been built – the cult of logical reasoning, the search for an allegedly scientific approach to legal and social issues – are, to say the least, insufficient to cover vast and increasingly complex modern societies.

After all, the ultimate purpose of legal studies, the final goal of the solemn columns and formalities that still form most modern legal systems, is simply to deliver Justice. And justice is perhaps an undefinable concept, something that can be perceived, felt, but not rationally and scientifically demonstrated.

King Solomon consulted his heart, not any code, theory, or doctrine, when he issued this tentative sentence ordering that the child disputed by two women both alleging to be the child’s true mother be cut in half and each half given to one of the claimants. Solomon’s decision stands until today in the Jewish Christian civilization as an example of perfect justice, a justice that transcends any conceivable modern formal legal system, possible only because issued by a wise man acting in his capacity as an absolute monarch.

In one sentence: the sensible (irrational) element seems to be getting back into law.

We are unquestionably closing the era which is generally thought to have begun at the end of the XVIII century with the French, American, and Industrial Revolutions and entering a new era. The XXI century will possibly go into history as the century of bites, when all the concepts and ideas generated in the century of lights underwent radical changes.

The feeling, akin perhaps to one of terror, that haunts the author’s mind is that conflicts, especially the ones involving legal entities and/or citizens on one side and the State on the other, will tend to be resolved by allegedly fair, objective, neutral and rational sets of computer programs. Until some relatively short time ago, computers were not yet capable of beating individual masters at the game of chess, allegedly because the huge capacity of storing and processing data could not replace human intuition. When Gary Kasparov lost his match against Deep Blue, computers proved that now they can beat even the best human player in the world. Would they not shortly be accepted as capable of evaluating more adequately than human beings the best possible interpretation of legal texts and concepts?

The only alternative to this scenario seems to be to face the risk of authoritarian rules and go back to the times of King Solomon when pure feelings, not allegedly logical reasoning, exercised over pre-determined written rules were used to resolve

(Electronic Games and Law); Schwartz, Germano - Law and Rock – When two worlds collide or break through to the other side; Gebara, Ana Elvira Luciano and Ghirardi, José Garcez – Look at all these lonely people: ainda a interpretação em artes e direito (still the interpretation in arts and law); Sampaio Ferraz Júnior, Tercio - Moses and Aron – Música e libretto de Arnold Schoenberg (Moses and Aron - Music and libretto by Arnold Schoenberg); and many others.
disputes. In other words, going back somehow to a government of men, not a
government of laws, may be the only alternative a perceived trend towards a
government of machines.

To what extent has the predominant approach traditionally used by jurists to
analyze legal problems become as inadequate to the cybernetic world of the present as
Cio-Cio-San’s romantic and naïve efforts to be accepted as Madam Butterfly were to
the society of her time? Is the spear in which the runes were inscribed about to be
broken? Will Angels not soon be descending from heaven to consecrate a different
perception of contractual clauses and legal texts?

The strong feelings provoked by watching operas may help to capture those
certainly far-fetched but not plainly absurd statements and hopefully may be a useful
exercise in any attempt to anticipate how the process of resolving conflicts will be
designed in this new era.
More Human Than Human: How Some Science Fiction Presents AI’s Claims to the Right to Life and Self-Determination

Christine A. Corcos

“I ask me what I am. Why, a machine. But even in that answer we know, don’t we, more than a machine.

I am all the people who thought of me and planned and built me and set me running. So I am people…”

But I am no bear trap, I am no rifle. I am a grandmother machine, which means more than a machine.”

I. Introduction

In the quotation above, from Ray Bradbury’s *I Sing the Body Electric!,* the android grandmother expresses both the attitudes of the human who observes and evaluates an android living with humans and the android who interacts with humans. The human poses the question, and the android responds. Obviously, the human expects to exert control and the android will begin by being, and then remaining, passive. Yet the android has obviously thought about the answer, and the answer is more than just a

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1 The Tyrell Corporation, the company that makes “replicants” in the film *Blade Runner* uses the motto “More human than human” (Warner Brothers, 1982). In the novel *Do Androids Dream of Electric Sheep?* Philip K. Dick never uses the term “replicant,” instead referring to the AI as “androids.”

2 I presented portions of this essay at the Law and Society Association conference, New Orleans, LA, June 3, 2016. I thank the members of the panel, including Professors Michael Asimow and Peter Robson, for their helpful comments on the essay. I also wish to thank W. Chase Gore (LSU Law, 2017) for research assistance, Melanie Sims (LSU Law Center Library) for assistance in obtaining research materials, and Cynthia Virgilio for secretarial assistance.

3 Richard C. Cadwallader Associate Professor of Law, Louisiana State University Law Center; Associate Professor of Women’s and Gender Studies, Baton Rouge, Louisiana. This article is one in a series on rights talk in popular culture. See also Christine A. Corcos, *Visits To a Small Planet: Rights Talk in Some Science Fiction Film and Television Series From the 1950s to the 1990s,* (2009) 39 Stetson L. Rev. 183, “I Am Not a Number: I Am a Free Man!” 25 Legal Stud. F. 471-483 (2001), and *Double Take: A Second Look at Law, Science Fiction and Cloning.* (with Corcos and Stockhoff), (1999) 59 La. L. Rev. 1041-1099. I presented portions of this essay at the Law and Society Association conference, New Orleans, LA, June 3, 2016. I thank the members of the panel, including Professors Michael Asimow and Peter Robson, for their helpful comments on the essay. I also wish to thank Carolina De La Pena (LSU Law, 2017) and the staff of the LSU Law Center Library for research assistance with this essay.

programmed response. The android is not “just” a machine, or a weapon, or the sum of her programming. She is the sum of every human being who has participated in her creation, thus the descendant of those who have “built” (created) her, and the ancestor of those who will come after her. She is a machine, but one who is ready to create on her own. She is a “grandmother” machine.

In this story, Bradbury demonstrates his interest in interactions between humans and AI (androids or robots) in society. Like some other science fiction authors, Bradbury subtly contrasts the social and moral expectations of the humans with those of the AI and leaves his readers to conclude that humans create and use androids (robots) as “devices,” just as they use vacuums, cars, and weapons: as machines for use, but with one important difference: androids in Bradbury’s story are so like humans that it is difficult to tell the two apart.

These androids might have immense intelligence, far greater than that possessed by humans, and they might even be able to imitate human emotions. They might be, in that sense, “perfect” humanoids in that they have no flaws: they are intelligent, they respond to their human owners in the ways that the humans desire, they never resent their owners, they never rebel, they never change their appearance, and, except for routine maintenance, they cost nothing. If their human creators program them according to Asimov’s Laws, they will never harm humans or humanity. They could be humanity’s salvation in terms of care and defense, allowing human beings to enjoy leisure and security. But their very resemblance to human beings raises the question: if even the least self-aware human being has the right to life, simply because it exists, then could AI at some point also claim that right? Or can human-created AI, simply because it is human-created, never have the legitimacy to put forward such a right? The idea that human beings, because they are human, create and become the norm for such decisions is one that it is difficult to overcome, but it is one that philosophers, lawyers, and artists wrestle with. It is also one that we see depicted in many science-fiction films and television series. Thus, who defines what personhood is becomes an important question.

What happens if AI develops sentience and emotions? What happens if AI develops personhood? We are only now beginning to consider whether such creations, having equivalent or greater intelligence and abilities than their creators, should have the same or qualified liberties and privileges.


6 F. Patrick Hubbard, “Do Androids Dream?: Personhood and Intellectual Artifacts”, (2011) 83 Temp. L. Rev. 405, discusses treatment of personhood in some sf novels, beginning with Mary Shelley’s Frankenstein and Isaac Asimov’s Robot novels at 455-473. In this essay I discuss personhood only as it applies to manufactured beings, not in relation to humans or animals.
If we do consider that question, what test should we apply to determine whether these artificial beings should have such rights?\(^7\) Some legal regimes, such as the European Union, are already beginning to take such questions seriously.\(^8\)

II. Regulating Robots: Moving From Asimov’s Laws To Singer’s Regime: AI and Personhood

What are the applicable tests that film, television, and written science-fiction presents to determine whether artificial life can make a colorable claim to any kind of human rights?

Isaac Asimov developed the first fictional legal regime to rule AI: the Three Laws of Robotics. These Laws made their appearance in 1954 and attempted to answer the questions: do artificial life forms have the right of self-defense and self-preservation?\(^9\)\(^10\) The three laws are:

1. *A robot may not injure a human being or, through inaction, allow a human being to come to harm.*

2. *A robot must obey orders given it by human beings except where such orders would conflict with the First Law.*

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\(^7\) Only rarely and recently do some theorists suggest that human norms, including sentience, have no relevance at all to AI. In the alternative, some argue that AI cannot by definition demonstrate sentience or independent action, because humans program all AI. See Alex Knapp, *Should Artificial Intelligences Be Granted Civil Rights?* Forbes, Apr. 4, 2011, at http://www.forbes.com/sites/alexknapp/2011/04/04/should-artificial-intelligences-be-granted-civil-rights/#3851c0f877b2 (visited May 11, 2016). I am not discussing either of those position in this essay; I am solely interested in the view, articulated in many sf novels and films, that human (and sometimes humanoid) norms of personhood, including sentience (however defined), should govern whether AI receives rights.


\(^9\) Asimov first published these laws in his short story “Runaround.” (Astounding Science Fiction, 1942). He refers to them in the short story “Feminine Intuition,” in *The Bicentennial Man and Other Stories* (NY: Doubleday, 1976), at 6. He later added a law zeroth: A robot may not injure humanity or, through inaction, allow humanity to come to harm in *Robots and Empire* (Doubleday, 1985). Note that law zero could conflict dramatically with the First Law. Do I hear any requests for the development of “Conflicts of law” in the laws of robotics sphere? Other “unified laws” have made their appearance, including Arthur C. Clarke’s statement:

When a distinguished but elderly scientist states that something is possible, he is almost certainly right. When he states that something is impossible, he is very probably wrong (Profiles of the Future, 1962), The only way to discover the limits of the possible is to go beyond them into the impossible (Report on Planet Three, 1972) and Any sufficiently advanced technology is indistinguishable from magic (Report on Planet Three, 1972).


3. A robot must protect its own existence as long as such protection does not conflict with the First or Second Law.11

Commentators and authors have used and heavily referred to these “laws of robotics,” as in Arthur C. Clarke’s 2001 in which Dave, the last surviving astronaut, deactivates (“murders”) HAL, the renegade computer.12 Asimov’s laws justify Dave’s treatment of HAL, and of robots and AI generally, as servants for human beings.13

One of the most popular tests for sentience is the Turing Test, which Alan Turing first proposed in a 1950 paper.14 In essence, the Turing Test examines whether a computer could be programmed so that it could deceive a human who could not see it into believing that it was another human, simply through answering certain types of questions within a set period of time. Obviously, if the computer were an android that looked completely human, the two could be in the same room. Thus, the iconic film Blade Runner offers the famous “Voigt-Kampff test,” a variant of the Turing Test,15 that Deckard uses to unmask Nexus 6 androids.

When asked whether there is a “Clarke test” for computer consciousness, which would be applicable both to stationary and mobile robots, Arthur C. Clarke, who created the character HAL in the novel 2001 responded, “I’ll tell you what: if it showed a really genuine sense of humor, then I’d decide it was conscious. That could be a really good test. It would have to be able to make jokes - and make jokes at its

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12 “The Zeroth Law is: ‘A robot may not injure humanity, or, through inaction, allow humanity to come to harm.’ This automatically means that the First Law must be modified to be: ‘A robot may not injure a human being, or, through inaction, allow a human being to come to harm, except where that would conflict with the Zeroth Law.’ And similar modifications must be made in the Second and Third Laws.” See Isaac Asimov, Foundation and Earth (Garden City: NY, Doubleday, 1986) at 347.

13 HAL would, I think, make the argument that he has every right to defend himself, an argument that the astronauts and the government would deny. But the point is that if HAL is sentient, then HAL might have exactly that right.


own expense.” The United Nations test in Asimov’s *Bicentennial Man* is another human-centered test, and a stark one—the test of death.

Philosopher Peter Singer’s approach offers a comprehensive way to think about personhood, combining a number of factors: “(i) A rational and self-conscious being is aware of itself as an extended body existing over an extended period of time. (ii) It is a desiring and plan-making being. (iii) It contains as a necessary condition for the right to life that it desires to continue living. (iv) Finally, it is an autonomous being.” Although science-fiction authors and filmmakers do not explicitly adopt Singer’s personhood test, I would suggest that they seem to be moving closer to his approach and further from Asimov’s Laws of Robotics, and have been doing so for some time.

I argue that in many ways, the AI in the science fiction I discuss reflect the more extensive and sophisticated Singer definition of personhood.

We see a test more clearly approximating the Singer test in the Star Trek universe. According to the episode *Measure of a Man*, sentience (self-awareness) is necessary to signal personhood in an android, although it may not be sufficient. While the android Commander Data is loyal to StarFleet, his employer, he asserts his own right to self-determination, which contravenes the First and Second Laws, and he creates his own offspring, an act of volition which illustrates both self-awareness and, in the Star Trek universe, contravenes the First and Second laws because StarFleet orders him to surrender his offspring and he refuses. Even though the show references Asimov in its mention of Data’s “positronic brain,” Asimov’s Laws do not govern Data.

Generally speaking, however, science-fiction discussion of whether robots, or androids, being much more like human beings at least in appearance than we fully

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19 The Committee on Legal Affairs of the European Parliament responsible for making recommendations on the issue of what rules should govern robots seems to have begun with the notion that Asimow’s laws are still of importance, although it recognizes that those rules are “directed at the designers, producers and operators of robots, since those laws cannot be converted into machine code;” European Parliament. Draft Report with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), Committee on Legal Affairs, published 31.5.2016 at 4/22.

20 Singer explicitly uses his test in work designed to argue for animal rights. See e.g. Peter Singer, *Animal Liberation: A New Ethics for our Treatment of Animals* (Random House, 1975).

21 Air date February 11, 1989


23 Airdate 12 March 1990.
expected decades ago, includes a consideration of whether they are also entitled to at least some of the rights that human beings enjoy. This discussion has moved us beyond Asimov’s now well-known robots’ rights legal regime. Yet science-fiction seems to postulate that personhood also requires emotion—again, an assumption that in order for AI to assert human rights, it must demonstrate an ability to “feel” human. In the films, novels, stories, and television episodes I mention above, the AI described manifest emotion -anger, love, affection, loyalty- which make AI seem “human” and thus allow viewers and readers to imagine AI as more like themselves (even though such AI can obviously also easily seem threatening to humans). Thus, science-fiction conceptions of AI put forward the idea that AI that develops emotions could easily assert a claim for rights, although some science-fiction conceptions of AI do not require sentient AI to manifest emotion in order make that claim. The more science-fiction images of AI mirror human beings, the more likely it is that the question of rights for AI will arise.

The entire question of robot rights has evolved from changing images and opinions about computers in human society. When computers first made their

24 Although we should have. Robots that do not look like humans are not as cuddly. See for example Heather Knight, How Humans Respond to Robots: Building Public Policy Through Good Design, at http://www.brookings.edu/research/reports2/2014/07/how-humans-respond-to-robots (visited June 20, 2016).


26 See Frude (n 10) at 87-95, for an overview of the Asimovian legal regime.

27 I would suggest, however, that our fear of computers does not derive simply from a belief that computers control far too much information and power in today’s society. While we certainly distrust computers because of their power, and to some extent, their inscrutability (ten year olds are currently much more likely than their parents to understand the workings of the machine, and consequently much less likely to fear them), we also distrust them because we created them. They seem to be Frankenstein’s monster, or the Sorcerer’s Apprentice, or ethereal creatures out of Pandora’s Box. They are technology, they are servants, they are machines. They ought not to be our equals and they are certainly not supposed to be our superiors in terms of what matters, that is, what makes us human: real intelligence, emotion, judgment, creativity, sentience and self-awareness. That technology has become the tail that wags the dog is a problem that we must acknowledge. See Johnson, Shea, and Holloway, The Role of Trust and Interaction in GPS Related Accidents: A Human Factors Safety Assessment of the Global Positioning System (GPS) (http://www.dcs.gla.ac.uk/~johnson/papers/GPS/Johnson_Shea_Holloway_GPS.pdf) (visited May 21, 2016).
appearance in society, humans viewed them as servants. Indeed, they viewed them as particularly stupid servants. An entire roomful of computers could not duplicate the power of one of today’s desktop or laptop PCs. As computers acquired more powers and abilities, and became ubiquitous throughout daily life, critics began to sound the alarm regarding our reliance on them, and our willingness to entrust so much power and information to them. We are now concerned about the amount of personal privacy that the Internet and computer databases now invade and will continue to invade.

Rossum’s Universal Robots has quickly evolved into scary depictions of computers that

28Before 1800 we generally tended to believe that technology, as differentiated from magic, could only be helpful. Edward Tenner, Why Things Bite Back: Technology and the Revenge of Unintended Consequences (Vintage, 1997), at 10. The “ghosts in the machine” feared by Cornishmen, who started this legend, were until then considered to be spirits of dead miners, called “tommyknockers.” Tenner (n 11). The time was right for the first appearance of a genuinely technological horror story, Mary Shelley’s Frankenstein, Or the Modern Prometheus (1818), literature in which a creation turns on its creator with unintended consequences. Until Shelley gave the idea literary shape, it dwelt in the area of myth with the legends of Prometheus and Pandora. Frankenstein articulates in ways that arguably have never been bettered the danger of playing God. See also Patricia A. Neal, Mary Shelley’s Frankenstein: Myth for Modern Man, at http://mural.uv.es/lolevyba/articleabouts14.htm (last visited June 29, 2016). However, consider the reaction of those who saw technology as a threat to job security. For the impact of the “new Luddites” see Kirkpatrick Sale, Setting Limits on Technology, The Nation 785 (June 5, 1995) and Kirkpatrick Sale, Rebels Against the Future: The Luddites and Their War on the Industrial Revolution: Lessons for the Computer Age (Addison-Wesley Publishing Company, 1995).


seem like robotic versions of megalomaniac human despots, like those in *Colossus: The Forbin Project.* 34 Forbin’s computer, “Colossus,” and its Soviet Union analog, “Guardian,” believe that they know much better than the humans that created them what is best for humanity, and they proceed to take over, telling Forbin, “Freedom is just an illusion.”35 These two supercomputers measure “the good” by AI abilities; for them human norms are irrelevant.36

Indeed, the definition of *robot* has evolved from the mechanical and unthinking servants of Karel Capek’s play, through Asimov’s sentient but subservient beings, to today’s androids (which are not robots, strictly speaking) and cyborgs: humans with surgically attached robotic parts.37 That today’s robots actually *learn* is something else to put into the mix; if they do not need us to program them to acquire new skills, or to reprogram them, but can acquire new skills on their own, then they are well on their way to becoming self-aware.38 Thus, any legal system wishing to encompass the notion of robot rights needs to identify very carefully what sort of being it is discussing.39

Further, one of the continuing concerns of both scholarly literature and science fiction on artificial intelligence (AI) is the possibility that these constructs will inevitably escape the limits that humans intend to place on them and evolve into a kind of life that challenges humanity for legal and moral recognition. Mary Shelley posed the question in *Frankenstein,* and science-fiction writers have continued to ponder it.40

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34 (Universal Pictures, 1970).
35 *Id.* Compare with War Games (United Artists, 1983), in which “Joshua,” the computer, seems ready to destroy the world but is actually benignly “playing games” with its human opponents. Like a large, powerful toddler, in the beginning it doesn’t know its own strength. It eventually learns the outcome of the “no-win” scenario and at the end of the film offers to play “a nice game of chess.” Equally, the androids that populate an amusement park malfunction, killing visitors and employees until one of the visitors (who is significantly a lawyer) defeats the most powerful of the androids, bringing an end to the destruction. *Westworld* (MGM, 1973).
36 One could argue again that such AI programmed by humans is only replicating the human patterns of its creator, whether “good” or “bad” (see for example the Star Trek episode *The Ultimate Computer,* first broadcast March 8, 1968). But once Colossus and Guardian carry out behavior in concert, we might reasonably wonder whether their own “will” rather than human programming has taken over. See also the Star Trek episode *The Return of the Archons* (first broadcast February 9, 1967), in which a computer dictates the rules of a society based on the rules of a long dead humanoid.

39 Currently the scientific/engineering definition of what constitutes a robot is under lively discussion. See http://www.ite.his.se/ite/research/automation/course/definit.htm.
40 See simply as examples the television episode “Kill Switch,” in the U.S. series “The X-Files,” written by William Gibson and Tom Maddox and broadcast Feb. 15, 1998 (Fox); the films *A.I.*
inquiry is fundamental: what right do humans have to create an (ever closer) imitation of themselves and yet demand that it remain subservient to them?\textsuperscript{41}

Even more than a discussion of the rights of alien life forms, a discussion of rights for AI life forms raises significant problems—two in particular. As creators of AI we want to continue to control the environment in which they operate.\textsuperscript{42} We would prefer that our inventions not attempt to take over our universe, or demand at least equal treatment for themselves in a universe that we control. Similarly, we have difficulty relinquishing total control of rights decision-making in order to make a place for non-human, non-Earth-based life forms.

We don’t consider computers and artificially based life to be \textit{alive} as we use the term in normal conversation. The creation of a sentient computer\textsuperscript{43} is even more frightening than the creation of human life through artificial technologies. Cloning, after all, presupposes existing biological life, leaving the question of a First Cause open. We do not speak of “cloning” a robot. Artificial intelligence and artificial life push the First Cause farther into the domains of philosophy and religion, since to a large extent the First Cause for artificial intelligence is not a perfect superior being, but a flawed human one.\textsuperscript{44} Further, if we can create life, even artificial life, we have much less ammunition in our arsenal to assert that our particular belief system is superior to any other, hence meritorious of being imposed on others.

\begin{footnotesize}
\begin{itemize}
\item[(41)] Lolita K. Bruckner-Inniss discusses this issue at some length with respect to the android Andrew Martin in her article \textit{Bicentennial Man - The New Millennium Assimilationism and the Foreigner Among Us}, (2002) 54 Rutgers L. Rev. 1101.
\item[(42)] The lack of control viewers feel is expressed in such films as \textit{Falling Down} (Warner Bros., 1993) in which a man stuck on the corporate ladder finally takes revenge on the world and the heist film \textit{Fun With Dick and Jane} (Columbia Pictures, 1977) in which two yuppies get their revenge on financial institutions, other members of the middle class and the legal system. See also Christine A. Corcos, “\textit{Who Ya Gonna C(S)ite?}” \textit{Ghostbusters and the Environmental Regulation Debate}, (1998) 13 J. Land Use & Envt'l L 231.
\item[(43)] Some would argue that IBM’s Deep Blue, which defeated chess champion Garry Kasparov, was clever enough to be a real thinking machine. Other creations, including Google’s AlphaGo, seem to be at a minimum the next generation of AI, capable of far more amazing accomplishments than Deep Blue (now named “Watson.”) See Cade Metz, \textit{Google’s AI Is About to Battle a Go Champion, But This Is No Game}, Wired Mag., March 8, 2016, at http://www.wired.com/2016/03/googles-ai-taking-one-worlds-top-go-players/ (visited March 22, 2016).
\item[(44)] This is the point that James T. Kirk hammers home to Nomad in the episode “The Changeling.” Airdate 29 September 1967.
\end{itemize}
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III. Some Examples of Specific Popular Culture: Science-Fiction AI and Its Claims to Sentience and Self-Determination

A. Specific Types of AI in Science-Fiction Popular Culture

A number of specific types of AI exist in science-fiction popular culture, from the earliest type that vaguely tends to resemble human beings, at least outwardly, to computers that look much more like the traditional box-like machines that occupied entire rooms, and now fit into one’s pocket, or are even smaller. Still newer is the AI that exists as “pure” intelligence, and infiltrates and takes over our lives. Of all the pop culture manifestations of AI, this third type may be the most frightening. The first type, the oldest type, is the most familiar, from films and television shows like The Day the Earth Stood Still45 and Lost in Space,46 and later made much more humanoid in films like Bicentennial Man47 and Blade Runner.48 A subset of this type is the “cuddly” robot, which appears in films like Short Circuit49 and Star Wars.50 The IBM machine-like computer depicted in such films as Colossus: The Forbin Project51 and War Games52 is less immediately frightening, but its size coupled with an ominous voice, often signals danger to both the characters and the audience. Finally, the “pure” type of AI, evidenced in the X-Files episode “Kill Switch,”53 depicts an artificial intelligence gone rogue and threatening any human attempting to destroy it.

B. Bicentennial Man and the Choice to Be Human

In Bicentennial Man, based on an Isaac Asimov short story, an artificial lifeform’s abilities to mimic human characteristics are both the measure of “human-ness” and the measure of danger to humanity. Human characteristics are more desirable than non-human ones. Human weaknesses are to be protected, and non-human strengths must be compensated for.54 Andrew the sentient robot asks an international court to allow him to “be human,” so that “he” can marry. The international tribunal refuses

46 (CBS, 1965-1968). Such robots also appeared in cartoons. The maid Rosie the Robot from The Jetsons (ABC, 1962-1964) is one such example.
47 (n 16)
48 (Warner Brothers, 1982).
49 (TriStar Pictures, 1986).
50 R2D2 and C3PO (Lucasfilm, 1977).
51 (Universal Pictures, 1970).
52 (United Artists, 1983).
53 Fox (first broadcast Feb. 15, 1998).
54 Stephen Coleman and Richard Hanley argue that by the end of the film Bicentennial Man, Andrew has achieved personhood. See Stephen Coleman and Richard Hanley, Homo Sapiens, Robots, and Persons in I, Robot and Bicentennial Man, in Sandra Shapshay (ed) Bioethics at the Movies, 44, 50-51 (Johns Hopkins University Press, 2009). Similarly, Star Trek: TNG treats the android Commander Data’s search for a sense of humor as amusing, but the implication is clear: humor is human, therefore desirable. See the episode The Outrageous Okona for example.
on the grounds that death is a necessary part of the human experience. Because Andrew cannot experience the fear or omnipresence of death, he can never really understand what “being human” means. Yet, the film’s dramatization of Andrew’s desires both to marry and (because he wishes to validate that right) to experience death, present both traditional human marriage and human death as good, proper, desirable, and as sensible for an android to seek out, presumably because it has spent its existence among humans. That an android might privilege other goals is not a point of view that most humans in the film or short story on which the film is based consider. Andrew, as a character, wishes to become human; for the android that is the highest possible goal.

"I was very much against the operation, Andrew," Magdescu said, "but not for the reasons you might think. I was not in the least against the experiment, if it had been on someone else. I hated risking your positronic brain. Now that you have the positronic pathways interacting with simulated nerve pathways, it might have been difficult to rescue the brain intact if the body had gone bad." "...My body is a canvas on which I intend to draw . . ." Magdescu waited for the sentence to he completed, and when it seemed that it would not be, he completed it himself. "A man?" "We shall see," Andrew said. "That's a puny ambition, Andrew. You're better than a man. You've gone downhill from the moment, you opted to become organic." "My brain has not suffered." "No, it hasn't. I'll grant you that. But, Andrew, the whole new breakthrough in prosthetic devices made possible by your patents is being marketed under your name. You're recognized as the inventor and you're being honored for it-as you should be. Why play further games with your body?" Andrew did not answer.

Andrew does not answer because for him the answer is obvious; the highest goal is to be “human.” Being an android is “second-best.” It is non-human; it is “other.” It is to be not of the creator, not of the dominant group. It is to be completely subservient, even though by the time Andrew undergoes the operations that make him at least outwardly human in appearance, he is the only android who has rights equivalent to those of humans. He prefers being human to being android, even though the choice to be human entails a choice to die rather than to live forever.

_Bicentennial Man_ obviously demonstrates the Asimovian legal regime at work; Andrew cannot act in a manner that is contrary to his human-created programming and he cannot make the decision to privilege an android existence above a human one. Ultimately, in order to be human, he must surrender the functioning of his “positronic brain,” and to reach that goal he surrenders his immortality.

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55 For an insightful discussion of this film see Bruckner-Inniss (n.41) Keith Aoki also discusses Bicentennial Man briefly in his essay One Hundred Light Years of Solitude: The Alternate Futures of LatCrit Theory, (2002) 54 Rutgers L. Rev 1031.


57 Id. at 166-167.
C. Blade Runner and Imposed Limitations

The replicants in *Blade Runner* reject the limitations of Asimovian programming, and other limitations that their human creators and human law have imposed on them. They return to Earth from “off-world,” a violation of the law, because they have discovered that they have a limited life span that their creator, Dr. Tyrell, has imposed on them because of their intelligence and physical power. If they did not have a termination date, and humans did not ban them from Earth, they would pose an overwhelming threat to the human race. “Blade runners” like Rick Deckard, the main character in the film, licensed to track down and destroy replicants who violate the laws against returning to earth (or violate other laws) find their job profoundly disturbing, precisely because the replicants are so similar to humans. In order to distance themselves from the job, they call what they do “retiring” the replicants rather than “executing” or “killing” them. The very word “replicant” implies that the beings are not human—they are reproductions. They are imitations of human beings rather than originals of anything.

For cyborgs and for extremely advanced androids, like the Nexus 6 in *Blade Runner*, death is the cessation of all “positronic brain” activity, as the Nexus 6 Roy Batty indicates in his final words, “I've seen things you people wouldn't believe. Attack ships on fire off the shoulder of Orion. I watched c-beams glitter in the dark near the Tannhäuser Gate. All those moments will be lost in time, like tears in rain. Time to die.” Throughout *Blade Runner*, Batty, who is after all only four years old in human years, continually points out the differences between himself and Deckard, noting ultimately that death is inevitable and that he is willing to save Deckard, a man who wants to end his existence, at the cost of his own existence. Batty dies for Deckard, but not as an Asimovian robot would.

Compare Roy Batty’s self-awareness and claims to life with those of Rachael, another Nexus 6, who is stunned to discover that the memories that are so much a part of her identity are not really hers at all. “They're anybody's memories. They're Tyrell's nieces.” Rachael, bewildered, begins to abandon her self-awareness at this point, as Deckard asks the question, “How can it not know what it is?” For him, Rachael is an “it.” Deckard determines whether a being is an android or a human by administering the Voigt-Kampff test, a complex series of questions, which determines primarily

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58 Isaac Asimov did, however, invent the term “positronic.”


60 Dick does not use the word “replicant” in *Do Androids Dream of Electric Sheep?* but the film *Blade Runner* uses the term to refer to the androids in the film. In a fascinating essay, Joseph Francavilla reflects on the role that replicants play as doubles for the human characters in *Blade Runner*. The Android as Doppelganger, in Judith B. Kerman (ed) *Retrofitting Blade Runner 4* (2d ed., University of Wisconsin Press, 1997).

whether the being responds to emotions. The test eliminates the possibility of rights for replicants, because only humans are capable of feeling emotion.

D. "Number Five Is Alive!": Short Circuit
Films like Making Mr. Right, The Companion and Bicentennial Man feature androids built to assist humans, unlike the film Short Circuit, which features an adorable and seemingly non-threatening robot. The 1986 movie is a modernization and adaptation of Mary Shelley’s creation story Frankenstein, centering on the adventures of robot “Johnny Five” that escapes the confines of the facility at which it and its four robot companions have been developed for military uses (in other words, to serve and protect humans). “Johnny Five”, or “Number Five”, is accidentally hit by lightning, which fries its circuits and brings it to sentience, much as an electrical storm animates Dr. Frankenstein’s monster. Number Five’s designer, Dr. Norman Crosby, however, had no intention of creating life, and has a great deal of trouble believing Number Five’s self-appointed protector, Stephanie Speck, when she assures him that the unbelievable has happened. Life, in Number Five’s case, is accidental, raising the

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62 (Orion Pictures, 1987).
63 (MCA Television Entertainment, 1994).
65 Likewise, nearly everyone who has seen Star Wars adores tubby little R2D2, while C3PO’s officiousness sometimes outweighs his charms.
67 Its acronym is S.A.I.N.T. (for Strategic Artificially Intelligent Nuclear Transport) an attempt by the military to sanitize its killing function. Calling a “killer robot” an S.A.I.N.T. associates the device with a religious, pacifist and non-military mission by co-opting the meaning of the acronym, regardless of the fact that some Catholic saints were actually warlike. Using the acronym also disturbs (get a different word) the notion that saints are by nature non-militaristic, especially if they are female. The transformation of the character “Number Five” from militaristic robot to pacifist sentient being is, interestingly, analogous to the transformation of Joan of Arc from quiet female peasant to militarist feminist leader. See Marina Warner, Joan of Arc: The Image of Female Heroism (Oxford University Press, 1981, repr. 2013). Number 5’s transformation is his second: note that he began as a “marital aid,” as inventor Newton Crosby (Steve Guttenberg) says. The word “marital,” one can note, uses the same letters as “marital.”
69 See Mary Shelley, Frankenstein (n 27)
question of what the relationship is between its existence and the electrical spark.\textsuperscript{70} Number Five translates demands for “input,” that is, a method of obtaining information with which it is already familiar, into a useful means of orienting itself to the world. Like Rhoda the Robot in the television series \textit{My Living Doll},\textsuperscript{71} and Vicki in \textit{Small Wonder},\textsuperscript{72} Number Five discovers that the world of humans frequently makes no logical sense. Stephanie initially believes that Number Five is an alien, and shouts joyfully, “I knew they’d pick me!”\textsuperscript{73} When Stephanie explains to Number Five that its\textsuperscript{74} creator plans to take it back to the secret facility where it originated and “fix [its] programming,” the robot understands the phrase as “disassemble,” equivalent to “dead” and decides that it does not want to die. It embarks on a crusade to save its life and educate its creator on the subject of the very real claims of AI to self-determination.

It quickly develops its own sense of purpose, which is diametrically opposed to its creator’s original intention. Long after Number Five displays obvious signs of sentience, Crosby continues to insist that “it” is only a robot, thus still controllable. Indeed, Number Five’s refrain, “Number Five is alive!” indicates that the robot is sentient. It knows its name, and it knows its condition: “alive” as opposed to “disassembled,” the fate that awaits it back at the company.

We can examine \textit{Short Circuit} as a film that re-defines the question of what AI is and whether we should recognize its personhood. \textit{Short Circuit} more clearly approximates the Singer definition of AI than it does the Asimovian regime, even though some of the characters in the film believe that the robots in the film were developed using Asimov’s Laws. It also references Clarke’s test.

It can do so more easily than other films because it is a comedy; thus both its human and AI characters are less threatening than those in a drama would be. Number Five does not look like an android. It looks like a “cute” monster. It begins its journey to personhood as a weapon, and the one character in the early part of the film that understands how dangerous it is, is the military man Skroeder. Crosby and his team

\textsuperscript{70}Compare Number 5’s “birth” with Stanley Miller’s creation of protolife in the laboratory in 1950. In the experiment, generally referred to as the Miller-Urey experiment, Miller used inorganic elements and an electrical spark fired through primordial ooze to create amino acids, then theorized that such an event might have triggered protolife on Earth millions of years ago. See Stanley L. Miller, \textit{Production of Amino Acids Under Possible Primitive Earth Conditions}, (1953) 117 (3046) Science 528-529.

\textsuperscript{71} This Chertok Productions 1964-1965 series featured Julie Newmar as “The Robot”, aka “Rhoda Miller,) and Bob Cummings as Dr. Bob McDonald, her minder.

\textsuperscript{72}(20th Century Fox, 1985-1989). Ted Larson (Dick Christie) created Vicki as a companion for his nuclear family. She was an object of great curiosity for the neighborhood.

\textsuperscript{73} She is immensely upset to discover that Number Five is a “robot,” and not only that, but a weapon. This scene recalls the many films like \textit{Colossus: the Forbin Project} (Universal, 1970) and \textit{War Games} (1983). In both of those films, as in several others, AI serves a destructive purpose, the better to send an ultimately pacifist message.

\textsuperscript{74} Number Five, frankly, acts male. His voice is male, though high-pitched and robotic, and his crush on Stephanie is obvious. He eventually renames himself “Johnny Five.” Tim Blaney provides his voice (IMDB.com at http://www.imdb.com/title/tt0091949/ (visited March 3, 2016)). Compare Number Five’s crush, and his acceptance of his rival Norman Crosby’s attraction to Stephanie with the behavior of the computer in \textit{Electric Dreams} (MGM, 1984), which attempts to out-maneuver and murder its human rival. It eventually commits suicide.
try to track down Number Five using its own signaling devices, and send it instructions, including an order to power itself down, which it ignores, mystifying the scientists. Crosby’s supervisor, Dr. Howard Marner, says, “How can it refuse to turn itself off?” The military man, Skroeder, comes closer than anyone knows to identifying the problem when he suggests, “Maybe it’s pissed off.” Responds Crosby with misplaced self-assurance: “It’s a machine, Skroeder. It doesn’t get pissed off. It doesn’t laugh at your jokes. It just runs programs.”

Once the group realizes that Number Five has really “gone rogue” (that is, moved beyond its creator’s effective control and well on its way to developing free will), and unfortunately still armed, (that is, able to defend itself) Skroeder again identifies the problem: “It could decide to blow away anything that moves.” The use of the word “decides” is significant. Skroeder’s anthropomorphizing of Number Five demonstrates that he understands instinctively that Number Five is possibly unpredictable: a characteristic both of out of control technology and of human beings, although he doesn’t know why (that is, he hasn’t done the analysis). Unknowingly, he senses the truth. Number Five is now a sentient being that can make decisions. Number Five has free will. Of course, both Skroeder and Marner assume that a piece of military technology would necessarily be destructive. That it could decide not to take any destructive action is not within their frame of reference. Why would a machine capable of destruction deliberately decide not to destroy? Human beings have trouble making that decision daily. Worries Marner, “What if it goes out and melts down a busload of nuns?” Frightened at the possibility of runaway technology, which is bad for public relations if nothing else, the military decides to destroy Number Five. Snarls Skroeder, “Whatever it takes to put that stupid contraption out of commission, gentlemen, that’s what you do.”

Number Five also attacks to defend itself (when it makes and carries out a successful plan to attack other robots sent to destroy it) as well as Stephanie (when it

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75.“It just runs programs” is a favorite rejoinder for Crosby and his friend Ben. Unfortunately for them, in Number Five’s case they are no longer correct. In addition, the assumption that “It doesn’t laugh at your jokes”, a test that determines the difference between computers and humans, no longer applies by the end of the film. See infra.

76. The notion that a powerful man-made machine could be loosed upon the universe with no effective control, either through mistake, accident, or intent, is also common in science fiction. See the Star Trek: TOS episodes The Doomsday Weapon (in which a powerful destructive weapon, a stand-in for the atomic and hydrogen bombs, is accidentally turned loose in a distant galaxy), The Changeling (in which an alien probe damages an Earth probe, and the Earth probe as a result misunderstands its programming, deciding to look for “perfect life” rather than “new life”), The Ultimate Computer (highly developed computer goes berserk during war games and destroys friendly vessels), the first Star Trek movie, essentially a retelling of the “Nomad” episode, Colossus: The Forbin Project (a U. S. computer and a Soviet computer combine forces to take over the world), and WarGames (a NORAD computer plays war games with U. S. military who don’t understand it is “just playing”).

attacks her ex-boyfriend), and we see it conceal itself successfully. Thus it demonstrates the ability to plan, the desire to exist and to continue its existence, and the wish to act autonomously, all part of Singer’s test for personhood. Number Five has decided, however, only to attack when someone or something attacks it or someone it cares about. It has transformed itself from a one-dimensional weapon to a multi-dimensional being, which demonstrates its ability to make decisions about its future (assert its right to self-determination), ultimately deciding to remain with Stephanie and Crosby as part of their “family.” In one of the last scenes of the film, we also see Crosby telling Number Five a joke, and Number Five laughing heartily, thus fulfilling Arthur C. Clarke’s ultimate test of computer consciousness.78

Number Five seems non-threatening to the audience because although it does not outwardly resemble a human it is friendly and eager to discover life and love. Its loyalty to Stephanie, and eventually to Crosby, resembles Data’s faithfulness to his Star Fleet comrades. Both Number Five’s outward appearance and its behavior signal that it understands human norms, although even by the end of the film we are not certain if human norms truly govern Number Five’s approach to life. After all, Stephanie and Crosby must rein in its enthusiasm for destruction and we are not certain if, absent their presence, Number Five would carry out a destructive or fatal strike against Stephanie’s mean-spirited boyfriend, for example, or against Skroeder. For Number Five, “disassembling” (death) is the ultimate evil. We are not sure that Number Five would give up its life for someone it doesn’t care for.79

For other popular culture robots, “wiping clean” or physical destruction is the equivalent of “Number Five’s “disassembling.” That humans might not choose to replace worn out parts, or might choose to destroy or “reprogram” an android and that robots that become sentient might object to such destruction or reprogramming is a recurring theme in science-fiction. For androids, reprogramming or destruction is the equivalent of death because it causes the destruction of the android “self.” That is the choice Ted Rice makes when his robot wife becomes suddenly assertive in William F. Nolan’s first published short story The Joy of Living.80 She is so perfect that Ted decides he simply can’t stand her; only when she objects does he relent, discovering that assertiveness is actually attractive. “Men built me, gave me human impulses, human desires, put into me part of themselves, part of their own humanity…I feel a human hunger, a human thirst, a desire to be respected for myself, as I respect others, a desire to be loved as I love others.”81 “Death” for androids and robots is having their

78 Supra n. 62 and accompanying text.
79 Note that the two situations are not entirely the same. Roy Batty has a limited lifespan. As far as we know, Number Five does not.
81 Frude (n 10) at 118-119. Note also that the notion of “sex robots” or “sexbots” has been around for much longer than we may care to admit. As researcher Genevieve Liveley notes, consider Pygmalion’s entreaty to the goddess Venus to make his statue real. See Why Sex Robots Are Ancient History, The Conversation, May 4, 2016, at https://theconversation.com/why-sex-robots-are-ancient-history-58112 (visited May 5, 2016).
memories “wiped clean,” often followed by reprogramming. If humans cannot reprogram androids, then they will destroy them.

Although Number Five’s affectionate feelings for Stephanie may not rise to the level of love, they are obviously an emotional attachment. However, the film Electric Dreams explores what might happen if a computer and its owner fall in love with the same human female. The computer tries to derail the man’s relationship, but eventually commits “suicide” to take itself out of the picture. 83

IV. Conclusion: Science-Fiction’s Tests for Sentience

Asimov provided science-fiction novelists and filmmakers with the foundations of a workable legal regime for the evaluation of robot behavior. His robot laws focus primarily on humans as the creators of AI. Such laws assume that should AI actually acquire sentience, that AI would necessarily privilege human norms over AI norms in creating and maintaining AI behavior. These assumptions are natural, but fail to take into account increasing acceptance of human diversity and growing understanding of what “humanity” and “personhood” actually mean.

As writers and filmmakers have pushed the limits of creativity, they have sought different philosophies and legal regimes that can allow them to explore viable claims for personhood and self-determination for AI constructs. In their artistic work, they have used AI as a proxy for minorities, the unrepresented, and the oppressed parties in society to explore legal issues implicating human rights. Increasingly, though, they are using actual AI in order to explore to what extent human norms, and more specifically, Western norms, are effective, practical, and/or appropriate ones to use in deciding whether advocates can and/or should advance human rights claims on behalf on this new, emerging as a minority, unrepresented, and oppressed class.

82 (Virgin, 1984).
83 Note that the android in Ex Machina exhibits voluntariness and emotion: it murders one human and abandons another in order to pursue its existence. (Film4 and DNA Pictures, 2015).
Law and Literature: A Dilettante’s Dream?

William Twining

I. Introduction

In November 2013 I gave a lecture in Wolfson College, Oxford entitled: “LAW AND LITERATURE: A DILETTANTE’S DREAM?” It was in two parts. Part A expressed guarded scepticism about ‘The Law and Literature Movement’ (LLit). The thesis was simple: in this context neither ‘Literature’ nor ‘Law’ have one referent. As academic fields, these disciplines are far too broad and internally fragmented to have one coherent set of relations; as phenomena (e.g. literature as a heritage of texts, law as institutions, processes in ‘the real world,’ as well as laws as ideas) they are too varied and amorphous to be reduced to a coherent set of subject-matters that can be sensibly juxtaposed. There are specific, focused topics and themes that have produced illuminating insights, such as Shakespeare’s constitutional ideas and assumptions, but much of the secondary discussion of the ‘movement’ is overgeneralized.

In Part B, abandoning any effort to generalize about the movement or alleged ‘field,’ I descended into autobiography. I told some specific stories about how some eclectic engagements with ‘literature’ had influenced my own thought and work: not just as grace notes, or quotation-dropping, or otherwise showing off or frolicking. Part B was more successful than Part A. It suggested a question that each of you may ask yourself: what, if anything, in the heritage of literature or literary studies has significantly influenced my work in law? Why?

Part B, with only minor changes, is reproduced here. In this version I have retained the informal style of the lecture, but I have added a few footnotes. It deals with three topics: (i) standpoint; (ii) narrative and argument in fact-finding; (iii) Italo Calvino and Jurisprudence.

II. Standpoint

My first example of being helped as a jurist by “literature” relates to what is now old-fashioned literary criticism. As an undergraduate my interest in Jurisprudence - indeed

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in law - had been inspired by Herbert Hart, especially his inaugural lecture, delivered in 1952.\textsuperscript{3} However, over time I became increasingly dissatisfied by his narrow view of the agenda of Jurisprudence.\textsuperscript{4} This linked up with an adolescent worry about belief pluralism that I have never grown out of: how to cope with the fact that there are many belief systems, all claiming to be right? Shortly after I graduated I read, and was enthralled by, R.G. Collingwood’s \textit{Autobiography} - surely a great work of literature, indeed of fiction.\textsuperscript{5} The key idea for me was that all history is the history of thought: to understand Aristotle, or Nelson’s decisions at Trafalgar, one needs to put oneself in the writer’s or actor’s shoes and try to understand the their situation, concerns, concepts, and information in order to reconstruct what they were thinking and what it meant. Reading Collingwood was for me a huge step forward, but it did not quite dissolve all my puzzles.

Soon after being excited by Collingwood, I read E. M. Forster’s \textit{Aspects of the Novel}, written in 1927.\textsuperscript{6} As a serious-minded auto-didact, I even read some of the works he discussed. Two related, seemingly contradictory, ideas grabbed me. First, Forster praised Percy Lubbock’s \textit{The Craft of Fiction} (first published in 1921) and quoted with approval his statement:

\begin{quote}
“The whole intricate question of method, in the craft of fiction, I take to be governed by the question of the point of view - the question of the relation in which the narrator stands to the story.”\textsuperscript{7}
\end{quote}

I devoured Lubbock and his distinctions between the impartial or partial onlooker and the omniscient author; and seeing everything through the eyes of one or more participants. This developed Collingwood’s idea of history by differentiating several different types of points of view and, as we shall see, it had immediate resonance in relation to studying law.

In the latter parts of \textit{Aspects of the Novel} Forster seemed to alter course. He sharply criticised Henry James for adhering too rigidly to a consistent standpoint - sacrificing humanity and life to aesthetic form. In particular, in \textit{The Ambassadors} James constructed an aesthetically complete form - like an hourglass:

\begin{quote}
Brooklyn L. Rev. 189 (reprinted in GLT, Ch. 5); and ‘Institutions of Law: Globalization, non-state law and legal pluralism’ in M. Del Mar (ed.) \textit{Law as Institutional Normative Order: Essays in Honour of Sir Neil MacCormick} (Ashgate 2009), and HTDTWR, ANj, RE, GJB (indexes under ‘standpoint’).
\end{quote}

\begin{quote}
HLA Hart, ‘Definition and Theory in Jurisprudence’, (1953) 70 LQR 57., reprinted in various collections. This introduced a naïve undergraduate to some startling ideas: that questions such as ‘what is law?’ ‘what is a right?’, can be wrongly or misleadingly posed; that much depends on who is asking the questions; and that attributing different questions to seemingly conflicting texts is one way of differentiating disagreement from mere difference.
\end{quote}

\begin{quote}
William Twining, “Academic Law and Legal Philosophy; the Significance of Herbert Hart” (1979) 95 LQR 557.
\end{quote}

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\begin{quote}
EM Forster, \textit{Aspects of the Novel} (Edward Arnold 1927)
\end{quote}

\begin{quote}
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“[B]ut at what sacrifice! … the cost is a very short list of characters, - mainly one observer who tries to influence the action and the second-rate outsider - and these characters ….are constructed on very stingy lines…. Why so wanton with human beings?”

In short, James’ formalism cut out the messy reality of life. That was just how I felt about law and the dominant tradition - only a little less dominant today - of doctrinal formalism (whatever that means). So, I defected from Hart at least he thought so to something called “realism” and from then on standpoint and multiple perspectives became key concepts.

I soon recognized that differentiation of standpoint was already a powerful tool in Analytical Jurisprudence and Philosophy. For example, Bentham’s distinction between expository and censorial jurisprudence and Rawls’ claim to dissolve a puzzlement about act- and rule-utilitarianism by assigning the former to the judge’s question and the latter to the legislator’s question in respect of punishment: the legislator asks who should be punished under what conditions? The judge asks: should I punish this person? In Jurisprudence Hart, Lasswell and McDougal, and Holmes were among those who used differentiation of standpoints to advance their ideas.

However, it seemed to me that standpoint analysis should not stop at abstract distinctions between observers and participants, external and internal points of view, and elusive differentiations between subjective and objective such distinctions often break down. Take, for example, the distinction between participants, observers, and participant-observers. Much of legal scholarship, legal theorising, and legal education is participant-oriented. A central part of Anglo-American traditions of pedagogy involves making students adopt different roles: advise your client; make the case for the plaintiff; decide this case; change the law. We ask them to pretend to be different kinds of actors, mainly in the upper reaches of the system: Supreme Court Justices, legislators, Lord Chancellors or Justice Ministers. Less often do they pretend to be lowly actors such as consumers, victims, convicted criminals, or other users of law and legal processes. Subaltern points of view are not well-developed in our tradition of…

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8 Forster (n.7) 147-8. Henry James, The Ambassadors (Methuen 1903). Forster acknowledges that ‘There is a masterly analysis [by Percy Lubbock] from another standpoint in The Craft of Fiction’ (Forster n. 7) 141.
9 The concept of standpoint is highly ambiguous and means different things in different contexts. Terms such as vantage point, situation, role, perspective, and objectives need to be differentiated how important each of them is depends largely on context. For example, “clarification of standpoint’ is different for a law student preparing to write an essay on causation and a lawyer meeting her client for the first time. See GJB 29-37 and references in n.3 above.
11 HTDTWR Preface xv-xvi
academic law but have been seized on by some members of the Law and Literature Movement.\textsuperscript{12}

Nietzsche suggested that the commonest form of stupidity consists in forgetting what one is trying to do.\textsuperscript{13} For my students, I have found that the commonest form of stupidity is forgetting who they are pretending to be. So, I make the clarification of standpoint an essential first step for them in a variety of intellectual exercises.\textsuperscript{14}

There is a standard repertory of stereotypical or abstract roles in legal discourse - the legislator, the judge, prosecutor, defence lawyer, negotiator, adviser, and so on. There are also familiar images like economic man, Hart’s internal point of view (mainly of officials), Kelsen’s “legal point of view”,\textsuperscript{15} Dworkin’s ideal judge Hercules, Holmes’ Bad Man, the puzzled interpreter, a cynical tax consultant, Mutt and Jeff (soft/hard police interrogation), the upright judge.\textsuperscript{16} There are many kinds of legal actor and each kind can be further broken down into sub-species. But at some point, especially in socio-legal studies, one needs to focus on particularities. If one is interested in what actually happens, what actual participants are like, and real-life experiences, one needs to think empirically in terms of the actual characteristics of real people - how they in fact think, reason, argue, decide, behave.

So, two 1920s literary critics or commentators inspired some of what for me has been a crucial set of tools for thinking about law. Of course, literary theory has moved on and has become more sophisticated - indeed, often too sophisticated for a mere jurist. From time to time I have dabbled with reader response theory, perspectivism, the intentionist fallacy, deconstruction, and some other fads, fashions, and frolics of academic literary studies. But that has been more like dilettantism on my part and I personally have not found any of them very helpful.

\textbf{A. Standpoint and narrative: The Shakespearean and the Jurist}

The subtleties of standpoint analysis are illustrated by a strange collaboration that I have had with a Shakespeare scholar (and social historian) René Weis of the English Department at University College London. For years, in teaching law students how to analyse evidence and construct arguments about questions of fact in complex cases, I have used the English 1920s \textit{cause célèbre} of \textit{R v Bywaters and Thompson}.\textsuperscript{17} Frederick Bywaters and Edith Thompson were convicted of murdering Edith’s husband Percy - Freddy for stabbing him, Edith for inciting and conspiring with Freddy to kill Percy.

\textsuperscript{12} For me, one of the most powerful pleas for ‘subaltern’ voices to be heard and accorded their rights is by an academic lawyer, Upendra Baxi, “Voices of Suffering: Fragmented Universality and the Future of Human Rights” (1998) Law and Contemporary Problems 125, reprinted in full in W. Twining (ed.) \textit{Human Rights: Southern Voices}. (Cambridge University Press 2009) Ch.5..

\textsuperscript{13} Often translated as “forgetting one’s purpose” (\textit{The Wanderer and his Shadow}, 1880).

\textsuperscript{14} Of course, there are many types of historians and many types of observer that can be further differentiated.

\textsuperscript{15} On which see Joseph Raz, \textit{The Authority of Law} (Oxford University Press 1979) .140-43.

\textsuperscript{16} For examples see HTDTWR 15-23.

\textsuperscript{17} AN. Ch. 7, RE Ch. 12.
Edith was convicted largely on the basis of some sixty love letters to Freddy, many in a gushing, stream-of-consciousness, elliptical style. I chose the case, because as one student said: “If you can analyse Edith’s prose, you can analyse anything.” The case, like the Sacco Vanzetti case in America, became something of a literary event: it stimulated several plays, at least one very bad film, and a brilliant feminist novel, *A Pin to See the Peepshow*. Opinion is still divided about Edith’s guilt.

After some years, I wrote an article using Bywaters and Thompson to illustrate the method of analysis and argument construction that I was trying to teach. Only after the essay was complete did I learn that a colleague in English at UCL had just finished a whole book on the case, passionately arguing Edith’s innocence. We compared notes and decided to publish our pieces separately without changing them, but then to write a joint paper comparing our different approaches to the case. For me, this was a fascinating and instructive experience. Here, I will only deal with this insofar as it illustrates the complexities of standpoint. We both reached similar conclusions about Edith’s guilt, but by strikingly different routes.

The first point is whether, in considering Edith’s guilt, we were addressing the same question. The answer to this is contested. I maintain that we were not concerned with the fairness of the trial, but adopting the standpoint of historians 80 or so years after the event we were asking whether Edith was criminally responsible for Percy’s death in fact on the basis of the law at the time. To answer the question a historian would need to know the applicable law of murder, including the murky doctrine surrounding incitement and conspiracy. Weis’s perspective, objectives, and methods were different from mine and he produced a lot of new data. The fact that Weis is not a lawyer is irrelevant. Some students disagree, emphasizing our different methods. In my view, they are wrong. Our question was shared.

Our methods were indeed very different and we brought to bear different lenses. I focused on the trial record, mainly Edith’s letters to her lover, and subjected it to critical analysis, illustrating the method I was trying to teach. I concluded that the evidence for conspiracy was very weak, but the evidence of incitement was colourable, though not quite strong enough to satisfy the reasonable doubt standard, especially in

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18 The trial record and some other letters are published in full in Filson Young (ed.) *The Trial of Frederick Bywaters and Edith Thompson* (W. Hodge, 1923)
19 David Felix, *Protest: Sacco-Vanzetti and the Intellectuals* (University of Indiana Press, 1965)
21 W. Twining, “Anatomy of a cause célèbre” in RE (1990) Ch.8 and 9 (abbreviated in RE 2nd edn. Ch.12, Parts 1 and 2.)
24 The claim that the Sacco Vanzetti case was the only literary event in America between two world wars is sometimes attributed to H.L. Mencken. I have not yet been able to trace the original quotation.
relation to the question whether Freddy killed Percy because of Edith’s incitement - on this a reasonable jury and commentators could disagree.

What did the Shakespearean do? First, he set the trial in the context of social conditions and attitudes of the time, the life stories of the main actors, and, most tellingly, the stormy course of their relationship. He dug up a great deal of new material about the trial, the personalities involved, and the romantic novels in which Edith immersed herself --- using all this to construct a theory of Edith living in a fantasy world and never intending that Percy should be murdered. Second, he constructed a master narrative of Edith’s life and death in the social context of her times. Third, he brought his skills as a textual scholar to bear on a minute and scrupulous examination of Edith’s letters as texts. He constructed a detailed, almost day-by-day, account of the 18-month relationship with Freddy and then set each letter in the context of the ups and downs of that relationship. By doing this for each significant letter he was able to infer Edith’s mood, the effect of each passage, and that some words and phrases were thematic or part of a lovers’ code.

You can imagine that this prosaic lawyer was made goggle-eyed by this scintillating performance. I learned a lot about the case and how to read love letters, but almost nothing about Shakespeare. There was one flaw. Weis’s argument was that Edith lacked criminal intent. At least a dozen letters could be construed as acts of incitement - some subtle, but some crude: “I wish we had not got electric light - it would be easy.”

“What exactly would be so easy, Mrs. Thompson?” “I used the “light bulb” three times but the third time - he found a piece - so I’ve given up until you come home.”

“I’ll risk and try if you will.” It stretches the imagination that none of these passages involved intent to kill Percy and incite Freddy. Weis did not focus exactly on what the prosecution had to prove and on the several material facts, as we lawyers call them. A better line of defence would be that Freddy did not take Edith’s letters seriously and that his knifing of Percy was spontaneous rather than premeditated, so that he did not kill Percy because of Edith’s incitement or in pursuance of a conspiracy.

It is tempting to say that Weis used a narrative approach and I used a logical one. But this is misleading. Each of us used both. Weis tested key elements in his grand narratives and sub-plots against evidence - especially the evidence of the letters. I used narrative to imagine possible scenarios, to construct hypotheses, and to wrap the strongest case for and against Edith in a coherent story that made sense of the case as a whole. By the time I came to write about the case, I was already convinced that both narrative and logic are necessary in reconstructing past events. There was however a major theoretical problem: in this kind of approach to reconstructing particular past events, what is the relationship between evidence, narrative, and argument?

25 Trial Exh 17, AN p.189.
26 Trial Exh. 18, AN at p. 185.
III. Narrative

A. Uses and abuses of narrative: stories as necessary, but dangerous

This brings us to another story. Once upon a time, in the early seventies, the French philosopher, Paul Ricoeur, visited the University of Warwick. His legacy was a series of seminars on “Narrative as an instrument of culture”, which was interpreted as academic culture. The organizers divided academic disciplines into three rough categories: ‘Not Obvious’, such as economics, the philosophy of science, physics, and geography; ‘Obvious’, such as literature, history, and theology; and ‘In-between’, including law, anthropology, and sociology.27

They began with ‘Not Obvious’ and invited scholars from disciplines in that category to discuss the role of narrative in their own discipline or sub-discipline. Whether or not they had thought about it before, all of the contributors found storytelling playing various roles in their field.28 For example, a philosopher of science, Rom Harré, reported how scientific journals rarely give a realistic account of the story of an experiment (‘Milly sneezed and knocked over the Bunsen burner’, or ‘how we coped when the grant ran out’), rather working in accounts of the contributions of the principal researcher, thereby lending authority to the findings, and writing up scientific research projects as if they were heroic quests, with heroes, villains, and magic helpers.29

When they turned to law, the organizers invited Lord Denning, the most famous judge of his day, who was well-known both as a raconteur and for vivid evocations of the facts of cases in his judgments. The invitation did not scorn flattery. It read in effect: ‘Dear Lord Denning, We believe you to be the greatest legal storyteller of your generation. Will you please come to Warwick to tell us your secret(s).’ Lord Denning is reported to have replied along the following lines: ‘Dear Warwick, I am indeed the greatest story teller of my generation, perhaps of the twentieth century, but I am too old to travel to Warwick. Yours sincerely, Denning.’

There were two sequels to this rebuff. First, despairing of finding a single substitute for Denning, the organizers invited two academic lawyers: Professor Bernard Jackson, who had written about legal semiotics, and myself, a former member of staff at Warwick, and known for a dilettante interest in literature.30 I accepted, but

28 A striking example is Donald McCloskey, who went on to write The Rhetoric of Economics (University of Wisconsin Press, 1985) in which he showed “the “hardest” of the social sciences to be literary even when mathematical, rhetorical even when nonverbal. In general argument and detailed case studies he reveals the extent to which economic discourse employs metaphor, authority, symmetry, and other rhetorical means of persuasion.” (Cover synopsis).
29 I am grateful to Rom Harré for checking this.
30 B. Jackson who went on to write Law, Fact and Narrative Coherence (Merseyside, 1988) and Making Sense in Law (Deborah Charles Publications, 1995) and some distinguished works on Rabbinic legal theory.
also suggested that if Denning could not come to Warwick, Warwick might go to Lord Denning. We did; it was fun, but that is another story.  

Until the Warwick workshops, I had never thought in a sustained way about narrative in relation to law. My previous engagement with law and literature had been mainly in relation to standpoint and to quotations as grace notes. As soon as I focused on narrative, stories and themes popped up from many different contexts: barristers’ “war stories”, lawyer jokes, accounts of causes célèbres and miscarriages of justice, Brian Simpson’s wonderful contextual studies of leading cases, lawyer novels, Lord Denning’s famous after dinner stories, and so on. But apart from such frivolities, stories also figure prominently in legal practice. The law reports are a vast anthology of short stories about disputes of every kind. And in the law reports, one may find several kinds of story in a single judgment: the facts of the case (sometimes retold two or three times), the story of the proceedings leading up to the decision (but rarely the end of the story as far as the parties were concerned), and the story of the law, tracing the development of the applicable doctrine through a series of precedents, often stretching back a century or more (Lord Denning was a master of this technique). Or a case may be just one episode in a long-running feud or campaign. In the subject of evidence story-telling is often contrasted with rational argument and logical analysis, and “atomism” with “holism”. Psychologists tell us that juries decide more by weighing the plausibility of competing stories than by careful analysis of the evidence. Manuals of advocacy stress the importance of constructing and presenting vivid, coherent, persuasive stories. Even in appellate cases, a standard mantra is: “The statement of the facts is the heart of the argument.”

This introduction to ‘the narrative turn’ had an immediate impact on my approach to evidence. Up to then I had been focusing on the logic of proof and Wigmore’s chart method for constructing and criticizing arguments about disputed facts in complex cases. I was aware that psychologists had shown that American juries choose between plausible stories rather than trying to decide in a mainly logical
way, but that suggested a deficiency in jury decision-making. Wigmore had claimed that his logic of proof was a superior alternative to “the story method”, which he dismissed as lazy, seat-of-the-pants impressionism. It soon became clear to me that Wigmore was wrong and that stories play a crucial part in investigation, advocacy, and judicial determination of facts and “in making sense of a case”, whatever that means. Less obvious was the fact that story-telling transcends the divide between questions of fact and questions of law and that persuasive story-telling is an important part of determining disputed questions of law in particular cases. The relationship between rational argument and story-telling and between background generalizations and stories became a central concern of my work on evidence.

I decided that stories played an important, perhaps essential role, in investigation, advocacy, and adjudication, but I also realized how dangerous they can be. Of course, this has been a central theme in the history of rhetoric from the sophists through Cicero and Quintillian to Chaim Perelman’s school of new rhetoric. I once tried to use Plato’s Gorgias in teaching Jurisprudence, with mixed results. My main concern at the time was with uncritical acceptance of narrative and a failure to see its relevance to the problematic distinction between law and fact. Enthusiasm for the narrative turn led to many excesses: “narrative” became a kind of magic wand for solving problems; the term was extended beyond tightly defined stories, involving temporality, particularity, and coherence, to almost any kind of discourse. In some writings, they were lauded as a substitute for evidence: for example, in an empirical study, two American sociologists, Bennett and Feldman, argued that stories serve as aids to selecting from a superfluity of information and to filling in gaps in that information. Their argument was that stories provide frames of reference for evaluating and interpreting evidence in terms of completeness and consistency. But the idea that stories can be used to fill in gaps in the evidence goes against all legal standards of fact-determination; it means the same as papering over the cracks in the argument. Further enquiry, including into that neglected brand of literature manuals of advocacy, suggested that stories are wonderful vehicles for cheating according to defensible ideas about what is involved in proving facts. Innuendo, confabulation, sneaking in irrelevant or ungrounded facts, focusing on the actor rather than the act, appealing to hidden prejudices and stereotypes, emotive language, and other dubious means of

38 See n.35 above.
40 RE pp. 296-306.
42 W. Lance Bennett and Martha S. Feldman, Reconstructing Reality in the Courtroom (Rutgers University Press 1981). In their interesting book, H. F. M. Crombag, W. Wagenaar, and P. Von Koppen Anchored Narratives (Harvester Wheatsheaf, 1993), three Dutch social-scientists suggest that the main supports for narratives are background generalisations rather than particular evidence, criticised GJB Ch.13.
persuasion are commonplace in advocacy. And, of course, good or familiar stories are often more appealing than true stories. It is not just advocates who use stories in such ways. In the opening paragraph in the famous case of Miller v Jackson Lord Denning, a brilliant but erratic story-teller, can be shown to have been unjudgelike in about a dozen ways: The opening story reads;

“In summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played for these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer has bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped; with the consequences, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.”

In this passage, extraordinary even by common law standards, the great judge can be convicted of inventing facts, suppressing facts, using emotive terms to characterise one of the parties, and giving a completely misleading impression of the

43 ‘Lawyers’ Stories’ in RE Ch.10. This drew on a number of English and American books on advocacy up to 1985.
44 GJB Ch. 14.
46 Id., 340-1.
context of the case, evoking nostalgic images of nineteen-thirties village cricket in rural Hampshire in respect of the fiercer game in a depressed Northern mining village.\textsuperscript{47}

Of course, there are deep contested issues about the relationship between logic and rhetoric, between story-telling and inferential reasoning, and what are legitimate and illegitimate techniques of persuasion in forensic contexts. The tensions in the study of evidence are particularly acute because evidence in legal contexts is a field that has been invaded by statisticians, especially Bayesians, epistemological sceptics, and post-modernists who blur or deny distinctions between fact and fiction.\textsuperscript{48}

\textbf{B. Italo Calvino}

Old-fashioned literary criticism influenced my thinking on standpoint; “the narrative turn” challenged some important assumptions about evidence in law; the writings of Italo Calvino had other important effects. Notice that my concerns and literary influences were of different kinds. Note, too, that each of these examples is a fit topic for socio-legal studies. Clarification of standpoint is as important in empirical enquiry as it is in legal analysis and legal practice; studies of how legal actors in fact reason and use stories are almost as important as normative thinking about how they should and should not reason or use stories; and, I shall suggest, Calvino is at least as relevant to socio-legal enquiries as to some other concerns of the discipline of law.

I undertook to make the case for Italo Calvino’s significance for jurisprudence. My thinking on standpoint and narrative was greatly helped by writings about literature. Calvino tapped into other existing concerns even more. I shall begin with a personal account of three ways in which I have been influenced by him, before making the general case. I shall focus on two books: \textit{Mr Palomar} and \textit{Invisible Cities}.\textsuperscript{49}

I first encountered Mr. Palomar when I was starting to think about the implications of so-called “globalisation” for understanding law in the world as a whole - surely a worthy aspiration for our discipline. Mr. Palomar wishes to understand the universe and ‘reduce it to its simplest mechanism.’ He decides to start with particulars. He tries first to see and fix in his mind one individual wave as a precise and finite

\textsuperscript{47} RE . 303-306.

\textsuperscript{48} On probabilities and proof, a good introduction to the debates is Paul Roberts and Adrian Zuckerman, \textit{Criminal Evidence} (Oxford University Press 2\textsuperscript{nd} edn. 2010) 148-63. An early example of deliberate blurring of the lines between fact and fiction is Simon Schama, \textit{Dead Certainties (Unwarranted Speculations)} (Knopf, 1991), containing imaginative reconstructions of the Deaths of General Wolfe and a Harvard Professor, claiming to be ‘true to the facts’, but filling in the gaps through imaginative reconstruction, and told as seamless narratives. Richard Rorty is the most quoted post-modern epistemological sceptic, although he denied the label. See especially, R. Rorty, \textit{Objectivity, Relativism, Truth} (Cambridge University Press, 1991) (Philosophical Papers vol. I) esp. Part I and \textit{Contingency, Irony and Solidarity} (Cambridge University Press, 1989) For a brilliantly scathing and persuasive attack on Rorty’s claims to be a “pragmatist” in the tradition of Peirce and Dewey, see Susan Haack, \textit{Manifesto of A Passionate Moderate} (University of Chicago Press, 1998) Ch.2 ‘We Pragmatists… Peirce and Rorty in Conversation’.

\textsuperscript{49} Italo Calvino, \textit{Mr Palomar} (trs. William Weaver; Harcourt Brace 1985) (hereafter MP)); \textit{Invisible Cities} (trs. William Weaver Harcourt Brace 1974) (hereafter IC). This section is based on several sections in GJB (index under Calvino), but extends the analysis in respect of the Great Kahn’s chessboard (below).
object. He fails. He tries again and again and becomes neurasthenic. He tries to work out how many blades of grass there are, how thick, and how distributed he uses statistical analysis, description, narrative, and interpretation. He fails again. He feels oppressed, insecure. He nearly has a nervous breakdown. Maybe describing the moon or a constellation of stars viewed from the earth is easier than describing a wave or a patch of grass. But “this observation of the stars transmits an unstable and contradictory knowledge.”

They move, they change, there are faint glimmerings. He distrusts the celestial charts.

Mr. Palomar’s predicament is that of any scholar dealing with a complex subject. It obviously applies to socio-legal enquiries. It is also especially acute for those who try to write histories of the world or to give an account of the universe of law. To be sure, there are patterns to be discerned, but they can be elusive, fragile, unstable, impressionistic, and mainly on the surface. If we are to avoid Mr. Palomar’s neurosis and paralysis, we may have to be content with painting bold selective pictures with fragile, crude, unreliable materials. And, as Palomar realises, there is no closure on scholarly enquiry.

A second inspiration from Calvino concerns legal cartography. In thinking about globalisation, I started to explore the idea of depicting legal phenomena in the world as a whole and significant portions of it in terms of maps: both physical maps and mental maps. I found some help in the literature on urban sociology - for example there are four images of cities recurring in that field: the city as organism, as machine, as bazaar, and as jungle. It immediately struck me that these images or metaphors could be almost equally applied to depicting legal systems or institutionalised normative orders.

Images of the common law as an organic form of law or as a kind of social engineering are commonplace in our discipline. The standpoints of people as users or consumers of law in a bazaar is less developed. The metaphor of jungle is richly ambiguous: we wish to preserve and visit rain forests, but the image of jungle can be alien, oppressive, requiring skills of survival. This is an image of law as a hostile product of other people’s power. This was a helpful counterpoint to the thinking of depicting law in terms of physical maps, but neither solved the problem of depicting immensely complex and varied phenomena in terms of a total picture.

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50 MP 47; cf. IC 98: “[T]he form of things can be perceived better at a distance”.

51 “Oppressed, insecure, he becomes nervous over the celestial charts, as over railroad time-tables when he flips through them in search of a connection.” (MP 47)

52 GLT Ch. 6. Later versions are GJB 322-328, GJP Ch.3 and Ch 4.4. While I consider physical mapping to be useful for elementary demographic realism about the broad distribution of legal phenomena (e.g. where in the world do common law, Islamic law, Luo law exist in the form of institutionalized normative practices?), the metaphor of mental mapping has a wider application. (GJP 67n 10.) I prefer to treat the idea of an historical atlas of legal phenomena in the world as a virtual rather than an actual project, which in practice might have rather limited utility.

After I had presented my rudimentary ideas on legal cartography to a seminar in Miami, a colleague (Michael Froomkin) came up to me and said in effect: “I thought you liked Calvino. Why on earth did you not use his Invisible Cities?” The answer was that I had not read it. When I did I had not only to rewrite my paper, but also to adjust my ideas. It opened up vast new territories of thinking about and seeing law.

Invisible Cities is a rich, elusive, wonderful book. If only one member of this audience is stimulated to read it, this talk will have served a purpose. I cannot begin to do justice to it here. But I can pluck out a few themes:

The bulk of Invisible Cities is taken up with Marco Polo the world traveller depicting to the great Emperor, Kublai Khan, the places he has seen on his travels. For example, Esmeralda is only one of 55 depictions of different cities, or perhaps 55 depictions of one city, Venice. Esmeralda suggests to me one image of how people inhabit and use legal orders that legal scholarship and even socio-legal studies rarely reach. The 55 depictions are fanciful, playful, amusing, bemusing, cryptic; most are open to different interpretations. Calvino seems to agree with Sir Patrick Geddes, a prominent town planner, that “Though the woof of each city’s life be unique, and this may be increasingly with each throw of the shuttle, the main warp of life is broadly similar from city to city.” Ditto legal systems. Can one imagine a modern state legal system without a constitution, law-making bodies, courts, judges, criminal laws, enforcement agencies, contracts, registers, and so on? As we jet set around the word there is a sameness about municipal legal systems. As Calvino remarks, “Only the name of the airport changes”. Yet for him the variety within each city is infinite, and nearly everything seems to change. Calvino’s central concern is to present universality in an anti-reductionist way. He does this by presenting the almost endless possibility of multiple perspectives on even simple objects; “Cities like dreams are built of desires and fears, even if the thread of their logic is obscure, their rules absurd, their perspectives deceiving.” “Only in Marco Polo’s accounts was Kublai Khan able to discern, through the walls and towers destined to crumble, the tracery of a pattern so subtle it could escape the termites’ gnawing.”

Invisible Cities captures the endless difficulties of describing, explaining and generalizing about cities and legal phenomena. It is especially suggestive in relation to comparative law - still in my view a subject that is under-theorised.

C. Confronting post-modernism

In the 1990s fashionable ideas about “post-modernism” reached legal theory largely through literary theory, after a typical intellectual lag. My reaction was deeply ambivalent. My work on evidence had convinced me that I was a cognitivist in epistemology. Following Susan Haack, I accepted her “innocent realism” which builds on the work of the American pragmatist, Charles Saunders Peirce. There is a real world

55 IC p. 50
56 IC pp.5-6.
largely independent of our knowledge of it. A description is true “if “something is so...whether you or I, or anybody thinks it is true or not.” How can one make sense of the idea of evidence and inferential reasoning without at least a working distinction between ontology (what exists) and epistemology (how we ascertain what exists)? When I came to confront post-modernism in its many shapes including cultural relativism, Rortyian pseudo-pragmatism, and various kinds of epistemological scepticism, I was both an innocent realist and a fan of Borges, Barthes, and some magic realist novels. So I felt that I was experiencing cognitive dissonance.

Post-modernism has done much to undermine simplistic views of interpretation and to challenge sharp dichotomies between fact and fiction, reason and imagination, objectivity and subjectivity. I thought such ideas to be important, but dangerous. These are healthy challenges, but they can descend into extreme forms of irrationalism, irrealism, or relativism that threaten ideas worth defending. For example, in respect of evidence, how can one talk of miscarriages of justice, wrongful conviction of the innocent, convincing evidence (e.g. of weapons of mass destruction or chemical weapons), reasonable doubt, good as opposed to true stories, or errors of fact without some differentiation of ontology and epistemology, of fact and fiction or falsehood?

Calvino (along with Charles Saunders Peirce and his henchman Sherlock Holmes) rescued me from this deep ambivalence towards post-modernism. He emphasises the elusiveness and complexities of reality, multiple perspectives and multiple descriptions, and anti-reductionism, but he still maintains a distinction between epistemology and ontology, and, on my reading, he is a cognitivist in a way that is compatible with innocent realism, which allows for all of these. Multiple descriptions of the same object are important, often necessary, but incompatible descriptions cannot be jointly true.

Of course, “post-modernism” means many things and Calvino is open to many interpretations. He rejected the label, but he disliked being labeled. I ended up distinguishing between imaginative post-modernism typified by Calvino and irrealist post-modernism, typified inter alios by Richard Rorty. There is much that could be debated on this.

So, I have found Calvino helpful in respect of the nature of scholarship [and enquiry] in legal cartography, in comparative law, on standpoint and narrative, in confronting post-modernism, and for many specific insights. Calvino attracts me personally in many ways: I love his succinctness; his playfulness as well as his serious intentions; he adds new dimensions to the idea of standpoint; he dwells on the limits as well as the uses of language; he stresses history; he is au fond a pessimist, but he is a joy to read. But beyond my personal tastes and particular concerns, he seems to me to offer a lot to the enterprise of understanding legal phenomena. Colleagues will find

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57 Cited in Haack, Manifesto (n. 51) 22
58 Haack see above n.51.
other themes and particular apercus. I find that the analogy between depicting cities and legal orders is highly suggestive; he has much to teach about the problems of describing, comparing and generalizing about social and legal institutions and relations as they operate in practice. And he is fun to read. If I had to select one general theme which is central to my discipline it relates to the general exchanges between Marco Polo and Kublai Khan. These are as significant as the descriptions of particular cities. The great Khan is concerned to reduce his empire to order to try actually to control it. He is a systematiser, a reductionist. In a wonderful passage, they are contemplating a chessboard: “By disembodied his conquests to reduce them to the essential, Kublai has arrived at the extreme operation: the definitive conquest, of which the empire’s multiform treasures were only illusory envelopes. It was reduced to a square of planed wood.”\(^{59}\) Then Marco Polo spoke: “Your chessboard, sire, is inlaid with two woods: ebony and maple. The square on which your enlightened gaze is fixed was cut from the ring of a trunk that grew in a year of drought: you see how its fibres are arranged? Here a barely hinted knot can be made out: a bud tried to burgeon on a premature spring day, but the night’s frost forced it to desist…”\(^{60}\) And Polo goes on to talk about “ebony forests, about rafts laden with logs that come down the rivers, of docks, of women at the windows…”\(^{61}\) For Polo, a single square in a chessboard is a launching point for a potentially endless enquiry. Katherine Hume suggests that the exchanges between Polo and Kublai Khan can be treated as a dialogue within a single composite mind.\(^{62}\) I think that is right about both Calvino and basic tensions within the discipline of law.

That is sufficient.

\(^{59}\) IC 131. (signifying nothingness)
\(^{60}\) IC 131
\(^{61}\) IC 132.
Law and Popular Culture: A Course Book
by Michael Asimow and Shannon Mader

Donald Papy

The field of law and popular culture, as a relatively new area of legal study, has needed canonical works to help define itself. An offshoot of the law and literature movement (itself a descendant of legal realism), and later the law and film movement, law and popular culture developed in the 1980’s with an attempt, as in all modern law “movements,” to explain its place in the legal curriculum. One of the leading scholars in this area of law (as well as contracts and other areas), is Michael Asimow, Professor Emeritus at UCLA Law School and currently a visiting professor at Stanford Law School. As a distinguished pioneer in the field of law and popular culture, Professor Asimow has written and taught extensively on the topic, producing a number of law review articles and books. A recent effort is the excellent book he has written with Shannon Mader, Law and Popular Culture: A Course Book. In a way, this book constitutes the culmination of Professor Asimow’s efforts at systematizing this area of law and making it accessible not just to the law school community but also to the wider university community, including undergraduates.

Law and Popular Culture is an outstanding work that can be used in many academic settings. Subtitled “A Course Book,” (in contrast to a casebook, the typical law school book), the text means that law students can be offered a course that combines legal analysis with academic and practical guidance in the ever-evolving field of popular culture. Future lawyers can learn how popular culture informs law and the legal system. Undergraduates or non-law graduate students can learn about the area as well, in understanding the connection and relation between law and popular culture, rather than its role in the practice of law.

The iconic cover image, depicts a courtroom scene from the film version of To Kill a Mockingbird, based on the novel by Harper Lee. The fictional Atticus Finch and his client, the wrongly-accused black man, Tom Robinson, sitting next to each other at counsel table, the reader is put into the middle of the law and popular culture milieu by way of the law and film movement. Finch was named by the American Film Institute as the greatest hero in the history of the movies in 2003, not just a hero in the legal world. In fact, Law and Popular Culture devotes an entire chapter to the movie (and Lee's book). That fictional lawyer as liberal hero is even cited as a by a conservative attorney as unlikely as Kenneth Starr, tormentor-in-chief of Bill Clinton.2

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1 www.afi.com/100years/handv.aspx
The field of law and popular culture, derived most immediately from the law and film movement, starts with the premise that the public consumes large quantities of popular culture in the form of television and film (fiction and non-fiction), along with other media such as books, comics, news, and now the Internet. A great deal of popular culture deals with law or legal issues such as police procedurals. Popular culture penetrates the legal system in the United States through the jury system. It is one of the primary insights of the law and popular culture movement that the public largely derives its understanding of the law through its voracious consumption of popular culture.³

The aim of the book is to give a comprehensive summary of how law and popular culture affect one another, using the language of law and popular culture, largely through the study of law films. The book is divided into three parts: the first is an overview of the legal system, largely through its actors; the second and third consist of discussions of legal subjects, grouped under criminal justice and civil justice. Each chapter addresses particular actors in part I, and particular legal subjects in parts II (criminal) and III (civil). Each chapter treats legal and media concepts using the assigned film or television series as the focal point of the chapter. The assigned preliminary “text” for discussion in each chapter is a carefully curated fictional film (or, for two chapters, a television series) which is used to explore the chapter’s subject. Some of the “texts” are classics, such as *To Kill a Mockingbird* or *Anatomy of a Murder*; others are more obscure yet still worthy, such as *Counsellor at Law* (1933).

The book’s structure allows the reader, regardless of prior knowledge of law and popular culture, to examine the elements of both and, more importantly, how they interact. For example, Chapter 3, “Lawyers as Heroes,” begins with a description of both the book and the film version of *To Kill a Mockingbird,* followed by a brief discussion of the Scottsboro Boys, the inflammatory 1931 charges of alleged sexual assault against a group of black teenagers in Lee’s home state of Alabama, as well as referring to the progression of the civil rights movement. Thus, the background of the case and times are addressed, leading to a discussion of the role of attorneys as heroes in popular culture. The film is then deeply analyzed, both in terms of legal strategy and filmic presentation. The chapter then delves into the role of law in American society and films, tying in more recent films with that theme. Finally, at the end of each chapter, the authors offer thoughtful review questions to stimulate class discussion.

Similarly, Chapter 12 on “The Civil Justice System,” uses the film *A Civil Action* to examine how civil cases are handled in legal theory and practice, as well as in popular culture. The chapter begins with an overview of the civil justice system, including the roles of lawyers, judges, and juries. It then moves to an examination of the real cases that form the basis for the film and the best-selling book on which it is based. This is followed by coverage of the broader issues of toxic tort litigation, the

role of litigation financing, the importance of the judge in such proceedings, as well as the importance of settlement negotiations, and finally how big business is portrayed in popular culture, especially in film.

Thus, the book offers a comprehensive examination of the legal system as presented in popular culture and how the two are interrelated. The book could be used as a primary text or as a supplement in a law school, graduate school, or undergraduate course. Each course naturally has different goals based on the students’ and teachers’ needs.

One area which could be considered further is the decision to primarily use film as the vehicle to explore popular culture and its relationship to law. The field derives initially from the legal realism movement, based on the premise that the study of law must consider non-law matters to fully understand how the legal system, including judicial decision-making, operates. An offshoot of this is the law and literature movement that examines literature’s presentation of law, especially classics such as Dickens’ *Bleak House* or Shakespeare’s *The Merchant of Venice*. The law and film movement developed from it, in effect using films as “texts,” especially classics such as *Anatomy of a Murder*, *Witness for the Prosecution*, and *To Kill a Mockingbird*. One of the primary reasons for this is the focus on texts (like appellate opinions were for Christopher Columbus Langdell, the nineteenth century Harvard Law Dean credited with originating the “case-method” of legal instruction). Langdell wanted a readily available, distinctive “text” to study, and appellate opinions were available for that purpose. (Later, excerpted, rather than whole opinions were included in casebooks.) Legal realist critics in the mid-twentieth century, such as Judge Jerome Frank, criticized the case-method approach of relying exclusively on reading appellate opinions as too narrow, ignoring trial courts and other omissions that did not lend themselves to textual availability.

I would argue that the easy availability of films with the advent of videotape, then DVD, and more recently streaming, perhaps along with many law professors’ natural interest in film over TV, and the length of films (generally less than two hours) making a convenient “text” for analysis, have led to an overemphasis on film over all other media. I suggest that the law and popular culture movement should go beyond film by integrating television, news reports of trials and other legal matters, books, and the Internet. The increasing availability of television and other media on DVD or online platforms make it feasible to study all media in understanding how law and popular culture affect each other. The enormous audience for law on television (and now the Internet) suggests that film is likely not the most significant source of influence on the public’s attitudes toward law and the legal system. Furthermore, that popular culture is one of, if not the, biggest export by the United States, and the impact of

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4 See Jerome Frank, “Why Not a Clinical Lawyer-School?”, 81 University of Pennsylvania Law Review 907 (1933)

5 Id.
representations of American law on foreign cultures and their legal systems, suggests that those influences are fruitful areas of study and teaching for courses in law and popular culture and should be included in course materials and books.⁶

To its credit, Law and Popular Culture integrates more television into its second edition. The book now incorporates television series as the focal point of two chapters, Ch. 7 (“Law on Television”) (Boston Legal), and Ch. 8 (“The Criminal Justice System”) (Law & Order). Perhaps in later editions the book will integrate even more television and other media in its analysis of popular culture’s interaction with law, as well as the impact of American popular culture on legal systems throughout the world.

In conclusion, Law and Popular Culture: A Course Book is an outstanding addition to the teaching literature in this burgeoning field, offering a comprehensive yet concise resource for the law school, graduate school, and undergraduate curriculum. The second edition has improved upon the first. The book can be used as a primary or secondary source. I highly recommend the book for any teacher serious about delving into the ever-changing, and increasingly important, field of law and popular culture.

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Tackling Visual Knowledge: The Story of the Yale Visual Law Project

Sandra Ristovska

Words have long been privileged as tools for ordering knowledge across the academy and in the various institutions central to civic life. Images, by contrast, have typically been used as visual aids to words, illustrations on the side or works of art. Despite providing knowledge that is complementary to, but also different from, that accessible through words, images have experienced an inferior status not only in the academy—where text is seen as the legitimate way of presenting research—but across multiple institutions, among them the law. The Visual Law Project (VLP) at the Yale Law School is a student-run collective that recognizes that 'the visual medium is a unique set of analytic tools that are not available in text.' Consequently, it explores the relationship between the law and visual media through a year-long practicum, workshops, film screenings, master classes with international documentary filmmakers and lecture series. It also trains students in the craft of visual legal advocacy.

This essay briefly situates the story of VLP within the broader academic programs that tackle the particularities of visual knowledge and the value of critical media practices as legitimate modes of scholarship. Then it provides an overview of VLP’s work and contributions to legal pedagogy and practice. In doing so, this essay argues that understanding the knowledge provided by visual media on its own terms is becoming an important set of critical skills in the academy and law schools specifically.

I. The Turn to Visual Practices in the Academy

Contrary to words—as the assumed vehicles of reason that promote linear logic—images are characterized by sensory richness and relational thinking. Images move across the levels of evidentiary and emotional signification at once. They appeal to the imagination, exceeding their presumed representational modes. This fluidity of images has long complicated their sidelined academic and institutional status. In the current media moment, though, visual media account for the majority of global consumer

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3 Rebecca Wexler, personal communication, April 29, 2016.
traffic, penetrating into various institutional spaces and intensifying demands for visual literacy.

It is not so surprising, then, that interdisciplinary programs and initiatives that seek to address the full complexity of the kind of knowledge accessible through visuals have proliferated across the U.S. academy in the humanities and social sciences over the last decade. The multimodal research collective CAMRA at the University of Pennsylvania, the Program in Culture and Media at New York University, the Sensory Ethnography Lab at Harvard University, and the newly created Ph.D. program in Media Research and Practice at the College of Media, Communication and Information at the University of Colorado Boulder are among those innovative academic undertakings. Albeit different, they all share a common recognition of the value of visual knowledge that merits engagement on its own terms. They tackle, for example, the criteria through which film and video can count as scholarly research in their own right in the respective disciplines—anthropology, communication, education, media studies and sociology, among others.

Although for different purposes, law schools across the country have also turned to visual practices. The Visual Law Project at the Yale Law School is among growing numbers of programs and initiatives that tackle the unfolding role and potential of visual media in the law alongside the Penn Program on Documentaries & the Law, the Visual Persuasion Projects at New York University, and the Quinnipiac University School of Law, as well as the visual law initiatives at Stanford University and Harvard University. These institutions offer courses that interrogate the multifaceted relationship between legal judgment and visual meaning making through production and analysis. In doing so, they respond to growing needs for visual jurisprudence as ‘the newly emerging field that sets out to assess the aesthetic and ethical implications of visualizing law in practice and in theory. Visual rhetoric must now become part and parcel of law’s aspirational claim to truth-based judgment.’

Why is visual jurisprudence so necessary in the current moment?

II. The Calls for Visual Jurisprudence

The law has long been an institution that considers words to be the best vehicle for transporting its logic. Like many social and political institutions, the law associates words with reason, systematic thinking, and deliberation, pushing aside the value of images as tools that work differently from words. As legal scholar Neal Feigenson writes, ‘the infrastructures of legal knowledge have been generally unreceptive to pictures.’ When used, the law insists that visuals need words to anchor their legal

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meaning. Visuals and words, however, facilitate different processes of knowledge acquisition, and 'now, as never before, [the law] is also about pictures displayed on screen.' Video, for example, can be used as evidence, advocacy, testimony, confession, closing argument, settlement, or as audio-visual record of trial proceedings (as in the case of the Supreme Courts of Canada, Brazil, the U.K. and international human rights courts like the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda).

As visual media enter into the law, their prominence necessitates training in visual jurisprudence. How images work, how they facilitate legal understanding, what practical and ethical considerations are needed to assess images and to render them legally meaningful is at the heart of the emerging and pressing calls for this kind of legal training. As Rebecca Wexler, the first VLP instructor and former director, writes:

*The increasing use of film and video as evidence in courtrooms has not been matched by a parallel increase in the critical visual literacy skills of legal practitioners. The resulting disconnect is dangerous, and may be the most urgent area of film and law scholarship today. Need for standards development exists not only in areas of authenticity, proof and evidentiary inclusion and exclusion practices, but also in measures of what is and is not constructed in video images.*

Beyond evidence, visual media also permeate the law at the level of advocacy and analysis, demanding close scrutiny of the evolving roles and shapes of visual legal judgment. VLP offers one response to this growing need for visual jurisprudence.

### III. Brief Overview of VLP’s Work

Valarie Kaur and Rebecca Wexler co-founded the Yale Visual Law Project during the academic year 2010/2011. The Information Society Project (ISP) at Yale Law School administers VLP, whose founding mission was built around the idea of visual advocacy. Coming to law school with a background in documentary filmmaking, Kaur reflected on her experience as a first year law student:

*I saw stories all over the law, storytelling coursing through the life of our cases and arguments and briefs. The legal field is a site for narrative contestation, a battle of storytelling. But I also saw the absence of stories. The stories of people who most bear the consequences of the law, their faces and voices are often left out of legal analysis and debate. So that gave rise to the question: if law is about narrative contestation, and film best makes vivid buried stories, how can we*

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9 Rebecca Wexler, personal communication, April 29, 2016.
better use film in the legal field, both inside and outside the courtroom, to advance the public interest.\textsuperscript{10}

The rising importance of the visual in the law—both inside and outside the courtroom—requires understanding the theories and practices of visual culture. VLP seeks to train students in the nuances of audio-visual modes of information relay and storytelling. Reading groups discuss the growing interdisciplinary scholarship on visual media and legal judgment, incorporating analysis of how images work in the wider culture and how documentary film and video engage audiences. They are supplemented with workshops on the various aspects of documentary filmmaking, such as directing, interviewing, camera, lighting and editing.

Rebecca Wexler also came to law after working as a documentary filmmaker for seven years. She notes, ‘the visual medium has a different type of traction in the public sphere, so it is a way to learn a new form of rhetoric that can help with legislative advocacy.’\textsuperscript{11} Visual legal advocacy rests upon the notion that documentary film and video provide a platform to humanize the stories of injustice and to render legal knowledge accessible both to the communities affected by the issue and to the wider public. Documentaries can communicate legal knowledge outside of its technical existence in courts and documents. Learning about visual law, therefore, can provide an important set of skills. This was key to why Helen Li, a third year law student and this year’s VLP director, came to Yale:

\emph{VLP was one of the primary reasons I came to Yale Law School. I was interested in the ability of imagery and visual context to bring the law out of the shadows created by complex statutes and legalese. For the average citizen, law exists only in casebooks, regulations, and expensive law firms. I wanted to work with other students seeking to understand the laws that affect every fabric of our lives and make those laws open and transparent on the screen.}\textsuperscript{12}

Driven by this vision, VLP has produced numerous documentaries over the years about wide-ranging legal issues, including immigration, detention centers, prison reforms, privacy and surveillance.\textsuperscript{13}

\emph{Honorable Discharge?}, for example, tells the story of how Arnold Giammarco, a non-citizen veteran of the U.S. Army, was deported from the U.S. The documentary begins with the testimony of Giammarco’s wife: ‘People go: ‘What? They can do that? They really do that?’ And I’m like, yes, they really do that. They did it to us.’ Throughout the documentary, the viewer finds out about the difficulties that

\begin{itemize}
  \item Rebecca Wexler, personal communication, April 29, 2016.
  \item Helen Li, personal communication, September 12, 2016.
  \item Most documentaries can be accessed at the VLP’s Vimeo channel: https://vimeo.com/user7522770
\end{itemize}
Giammarco’s wife and daughter experience because their family has been torn apart. Their personal stories are contextualized with the information provided by Michael Wishnie, Director of Jerome N. Frank Legal Services Organization at Yale Law School, who has worked on this case.

*The Worst of the Worst: Portrait of a Supermax* is a 30-minute-long documentary that depicts Connecticut’s supermax prison, where some inmates are held in solitary confinement for extensive periods. It weaves together testimonies by inmates and correctional officers along with interviews with a range of experts and administrators. It includes Misael’s voice-over-narration which describes his experience of being held in solitary confinement for a total of 16 months:

> You sleeping on other people's blood and dirty stuff. You can’t talk through the doors. You can’t speak to other inmates. I started talking to the wall. I started seeing stuff. You can hear these voices and literally hear them and…they talk to you and tell you to do things and…you go and do them and not realize that you’re going, that you’re going through this pain, and that's when I started cutting myself, biting myself. And it all happens because of that cell because of that cell.

Misael’s testimony captures the viewer’s attention through its appeal to the emotions. Through his testimony, solitary confinement moves away from being an abstract concept to a vivid experience of someone’s trauma. Video combines sound and images. The testimony is heard while a series of images flickers on the screen, including close-up shots of blurry images and an extreme close-up of a man’s face whose eyes are closed. Ultimately, it is the viewer who needs to infer meaning from the relationship between the testimony and the images.

Video, indeed, provides knowledge that works by association and appeals to the senses. It engages the viewer’s emotions and imagination. Legal scholar Regina Austin draws a parallel between how documentaries and the law construct knowledge. She writes,

> In both law and documentary film, reality or the truth of the real world is mediated by the senses; essentially the eyes see what they want to see and the ears hear what they want to hear. The object of both good legal practice and good documentary practice is to expand the field of sight and sound to the realm of what justice requires.14

This understanding underpins how VLP trains students in visual legal advocacy. VLP sees video as an important vehicle for justice, teaching students how to embrace visual storytelling while still carefully crafting legal arguments. Reflecting

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on her experience working on the documentary *Stigma: Stop and Frisk in New York City*, Aeryn Palmer wrote,

*The law is not as resistant to creative interpretation as I had initially believed it would be. Making a legal argument on film...is difficult. But showing the consequences of the law – that’s doable...film is about all the things that the law as written and executed ignores...Film might not be suited to arguing the details, but it is very powerful for conveying what the law really means.*

Palmer’s comments reiterate that words and images compliment the law’s quest for truth and justice. Law students, however, spend much of their time learning the craft of legal writing and little about visual modes of meaning making. As a result, initiatives like VLP are of utmost importance to legal pedagogy in the current moment.

Over the years, VLP has expanded its curriculum and approach to visual knowledge. This year, for example, it has been working to enhance its collaboration with the legal clinics at the Yale Law School on visual legal advocacy projects. VLP students also continue to work across disciplines with artists and social justice advocates throughout Yale and New Haven. Furthermore, VLP has been strengthening its training in how visual knowledge works, how it is used in the law and how to better harness the power of the visual. To that end, it hosted a lecture series on visual jurisprudence in the Fall 2016, and organized a reading group this Spring. VLP now also features workshops and master classes that go beyond the focus on audiovisual media, examining the intersection between the law and visual culture more broadly. The motivating factor remains that law students can greatly benefit from tackling the nuances and the value of visual knowledge for legal theory and practice.

**Acknowledgement**

The author would like to thank Rebecca Wexler, past VLP director, and Helen Li, this year’s VLP director, for sharing their insights and providing helpful suggestions for this article.

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15 Aeryn Palmer, end-of-the-year-reflections, April 8, 2011.