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The American Courtroom Trial: Pop Culture, Courthouse Realities, and the Dream World of Justice

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THE AMERICAN COURTROOM TRIAL: POP CULTURE, COURTHOUSE REALITIES, AND THE DREAM WORLD OF JUSTICE

DAVID RAY PAPKE*

When in the 1830s the French government sent Alexis de Tocqueville to investigate developments in the United States, de Tocqueville was intrigued by the importance of courts in American life. The courts, he thought, were "the most obvious organs through which the legal body influences democracy."[1] The average judge had "the taste for order" and "high social standing among his equals."[2] Juries, meanwhile, "instill[ed] some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free."[3] Working together in a courtroom trial, judge and jury were exemplars and champions of a democratic republic. What happened in the courtroom was not merely a matter of meting out punishments or settling disputes. Americans, de Tocqueville was sure, had "given their courts immense political power."[4]

In the present, comparably glowing endorsements of the courts and courtroom trials are few and far between. According to a recent American Bar Association survey, forty-seven percent of the American population thinks that courts are ethnically and racially biased and—as if that is not sobering enough—a whopping ninety percent think the affluent and corporations have an unfair advantage

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1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 269 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1969).

2. *Id.*

3. *Id.* at 274. De Tocqueville goes on to add that the idea of a jury is even prevalent in games played by American children. *See id.* at 305.

4. *Id.* at 102.

in court.[5] A "trial of the century" seems to take place every few years. Proceedings involving the likes of Claus von Bulow, William Kennedy Smith, Lorena Bobbit, O.J. Simpson, and the British nanny hardly inspire thoughts regarding the republican mode of government.

Is the courtroom trial dead as a civic institution? Perhaps, but, interestingly enough, pop cultural courtroom trials continue to inspire confidence and to proffer encouraging lessons about law in American life. Such trials are present at every turn in American prime-time television, Hollywood movies, and popular fiction.[6] And even though viewers and readers know these trials are "only" entertainment, pop cultural trials help develop and fortify certain beliefs. These trials invite confidence in the rule of law. They suggest a dream world of justice.

This essay will consider American pop cultural trials in three ways. First, what distinguishes the courtroom trial in American popular culture? What are the standard features of the pop cultural convention? Second, how do pop cultural trials differ from actual ones? How do proceedings in the pop cultural courtroom compare to those in the real one? Third, what are the ramifications and significance of the differences? Even assuming the pop cultural courtroom trial is in some sense inaccurate, what does it teach us about law and American life?

THE POP CULTURAL COURTROOM TRIAL

Pop culture has a certain degree of diversity, but it tends to be diversity within types, genres, and cultural conventions. The chief reason is what may be characterized as the "economic logic" of pop culture.[7] If producers and publishers can find something that catches the public's eye, they will try to double, triple, and quadruple their investment by coming back to it time and again.

5. Survey results are reported in Linda Greenhouse, *47% in Poll View Legal System as Unfair to Poor and Minorities*, N.Y. TIMES, Feb. 24, 1999, at A12.

6. A literature has begun to emerge concerning law-related popular culture. Book-length studies include PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES (1996); JON L. BREEN, NOVEL VERDICTS: A GUIDE TO COURTROOM FICTION (1984); THOMAS J. HARRIS, COURTROOM'S FINEST HOUR IN AMERICAN CINEMA (1987); LEGAL REELISM: MOVIES AS LEGAL TEXTS (John Denvir ed., 1996); PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE (Robert M. Jarvis & Paul R. Joseph eds., 1998).

7. The critic and scholar John Fiske distinguishes between pop culture's "cultural" dimension, which circulates its meanings and pleasures, and its "financial" dimension, which is driven by profit-seeking. *See generally* JOHN FISKE, UNDERSTANDING POPULAR CULTURE 26 (1989).

The courtroom trial is a pop cultural convention that can be and has been revisited frequently. In fact, it is a bit like a pop song. The critic and scholar Fredric Jameson has said of pop songs that you can never really hear them for the "first" time.[8] You hear them with reference to countless other songs of the same type. In the same way, consumers of pop culture never see a courtroom trial for the "first" time. We watch or read a portrayal of a courtroom trial in American pop culture with reference to countless others we have already watched or read about.

What are the features of the convention?[9] The setting is in fact the courtroom itself and not the larger courthouse. Sometimes, as in *Kramer vs. Kramer*[10] or the television series *The Defenders*,[11] external shots of the courthouse building first establish locale. The camera takes us up staircases and elevators and through hallways and conference rooms. But ultimately we reach the courtroom, and that is where the most significant drama takes place.

And what a courtroom it tends to be! Instead of the peeling paint, plastic chairs, and bright fluorescent lighting so common in contemporary urban courtrooms, the pop cultural courtroom is customarily wood-paneled, well-upholstered, and soothed in soft light from ornamental lamps attached halfway up the walls. In the background huge wooden doors stand ready to swing open and shut for dramatic entries and exits. Local and national flags and also stern-faced men in uniform fill out the scene. The judge's bench stands like an altar at the exact center-front and rises above, suggesting something higher and truer. Defense and prosecution tables are symmetrically stationed, and the jurybox and rows of seats behind the bar, respectively, are the balcony and orchestra seating.

Producers, directors, and writers sometimes alter this august, stage-like pop cultural courtroom to establish region, time, and atmosphere. So, for example, we have southern courtrooms which are always sweltering. Trials in the south in American pop culture never take place in winter or in air-conditioned courthouses. In novels such as John Grisham's *A Time to Kill*[12] or movies such as *To Kill a*

8. *See* FREDERIC JAMESON, SIGNATURES OF THE VISIBLE 20 (1990).

9. I have addressed the pop cultural convention in greater detail in David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 MARQ. L. REV. 471 (1999).

10. KRAMER vs. KRAMER (Columbia 1979).

11. *The Defenders* (CBS television series, 1961–65).

12. JOHN GRISHAM, A TIME TO KILL (1989).

Mockingbird[13] or *Inherit the Wind*,[14] everybody sweats.[15] A Los Angeles or Southern California variation also exists. In a television show such as *L.A. Law*,[16] the courtroom is smaller and without ornament, suggesting something faster, leaner and less ceremonial.[17]

But despite these variations, the traditional setting dominates. In such contemporary prime-time series as *Law & Order*,[18] *The Practice*,[19] and even *Ally McBeal*,[20] producers continue to employ traditional and old-fashioned courtrooms.

The characters, like the setting, are standardized. Judges tend to be relatively one-dimensional. Occasionally, we see them off the bench, as in Howard Goldfluss's *The Judgement*,[21] a novel in which the judge turns out to be the murderer, or in *Picket Fences*,[22] in which Judge Bone evolved into a fully developed character.[23] But more commonly, the judge, robed and sitting on high, symbolizes justice or, at least, the state's ability to referee the struggle at hand. Rarely is the pop cultural judge a full-bodied character.[24]

Jurors also tend to be undeveloped as individual characters. One exception is the juror played by Dennis Quaid in the terrible movie *Suspect*.[25] He manages to provide tips and even clandestine investigative services to a public defender improbably played by Cher. Of course, they also fall in love. But usually, we do not get to know jurors, and the jury serves more as collective character, one representing the people and decision-making. Indeed, we are often invited to at least briefly identify with the jury, especially during

13. TO KILL A MOCKINGBIRD (United Artists 1962).

14. INHERIT THE WIND (United Artists 1960).

15. Indeed, in the film version of *Inherit the Wind*, the prosecutor moves that those present in the courtroom be allowed to remove their suit coats.

16. *L.A. Law* (NBC television series, 1986–1994).

17. *See* John Brigham, *L.A. Law*, *in* PRIME TIME LAW, *supra* note 6, at 26.

18. *Law & Order* (NBC television series, 1990–Present).

19. *The Practice* (ABC television series, 1997–Present).

20. *Ally McBeal* (Fox television series, 1997–Present).

21. HOWARD E. GOLDFLUSS, THE JUDGEMENT (1986).

22. *Picket Fences* (CBS television series, 1992–1996).

23. For a treatment of legal themes in *Picket Fences*, see Douglas E. Abrams, *Picket Fences*, *in* PRIME TIME LAW, *supra* note 6, at 129.

24. Judge Cynthia Ayers pointed out that female and/or African-American judges are much more common on the pop cultural bench than they are on the real one. Letter from Judge Cynthia Ayers, Marion Superior Court, Indianapolis, Indiana, to David Papke, Professor of Law, Indiana University School of Law (Feb. 2, 1999) (on file with author). Pop culture tries not to capture "reality" but rather renders a bourgeois vision of it. Apparently, this white, middle, and upper-class vision can now accommodate the female and minority judge.

25. SUSPECT (Columbia/TriStar 1989).

closing arguments. Note the shots from behind the jurors during the closings in television shows or Hollywood movies. These shots, often with jurors' shoulders and heads in the foreground, in effect assign the viewer to pop cultural jury duty.

The most developed characters, meanwhile, are almost always the attorneys. Pop cultural trials are usually criminal proceedings, and, therefore, the attorneys are most frequently prosecutors and defense lawyers. However, since the 1980s with the success of such movies as *The Verdict*[26] and television shows such as *L.A. Law*,[27] civil litigators have also frequently found their way into the pop cultural courtroom.

In either the civil or the criminal setting, the attorneys tend to have some degree of pronounced involvement in the case. The attorney may know one of the parties, or a party's cause may correspond to a pressing personal, moral, or political concern in the attorney's life. Sometimes the attorney must actually develop a commitment to the client and symbolic cause as, for example, attorney Joe Miller played by Denzel Washington in *Philadelphia*.[28] At first hesitant to represent a lawyer with AIDS played by Tom Hanks, Miller comes to appreciate the variety of discrimination that is at issue. Either from the outset or as result of growth, attorneys more so than victims, defendants, or litigants are the featured players.

Since World War II, heroic defense attorneys have outnumbered heroic prosecutors in pop cultural criminal trials. Defense lawyers such as Perry Mason, who actually thrived in novels, radio plays, and the television series of the late 1950s and early 1960s, or Atticus Finch, in both the novel and the movie *To Kill a Mockingbird*,[29] have indeed inspired people to become lawyers.[30] Only recently has the heroic prosecutor resurfaced. Tess Kaufman, who was played by Marlee Matlin in *Reasonable Doubts*,[31] and Jack McCoy, played by Sam Waterston in *Law & Order*,[32] are heroic prosecutors.

While setting and characters remain fixed as imaginative constructs in the pop cultural trial, the trial itself moves through time.

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26. THE VERDICT (Twentieth Century Fox 1982).
27. *L.A. Law* (NBC television series, 1986–1994).
28. PHILADELPHIA (TriStar 1992).
29. TO KILL A MOCKINGBIRD (United Artists 1962).
30. Useful biographies of Erle Stanley Gardner, the creator of Perry Mason, include DOROTHY B. HUGHES, ERLE STANLEY GARDNER: THE CASE OF THE REAL PERRY MASON (1978) and ALVA JOHNSTON, THE CASE OF ERLE STANLEY GARDNER (William Morrow & Co. 1947) (1946).
31. *Reasonable Doubts* (NBC television series, 1991–1993).
32. *Law & Order* (NBC television series, 1990–Present).

This plot (or subplot if the courtroom trial is just part of a larger story) is, in essence, a sequence of actions and developments.[33] Here, too, the viewer or reader encounters the predictable. Regardless of whether the fictional proceeding is criminal or civil, the courtroom trial in American pop culture has two opening statements, a stretch of examinations and cross-examinations, two closing arguments, and a jury verdict. How often does a pop cultural trial lack any one of these components? They are almost mandatory.

Certain other important parts of the process that trial lawyers might take for granted—voir dire, jury instructions, statements by crime victims and their family members, sentencing—seem not to qualify for the pop cultural convention. Also missing, of course, is all the dogged preparation that precedes trial. In the immensely popular *L.A. Law*, attorneys often informed colleagues in a firm conference that they had a major trial starting the next day or perhaps even the same afternoon. Without apparent preparation, the attorneys then sashayed confidently into the courtroom.[34]

In the pop cultural opening statement, we usually encounter not only a stirring plea to make sure justice is done, but also something coherent and tentatively convincing. The defense's opening statement, by contrast, is often more tentative, revealing uncertainties and creating doubt that the defense has any chance at all.

At the end of opening statements, communications professor Carol J. Clover points out, "[t]here is an abrupt shift of gears, almost a change of tense, as we enter the examination phase."[35] In Clover's terms, the "highly bound, reasoned, syntactic, storytelling mode" gives way to "disarticulated and disordered" fragments offered by the two sides.[36] This stage of the courtroom trial, Clover says, is "narrative parataxis—a stretch of textual bits and pieces, without coordinating conjunctions, as causally unbound as possible."[37]

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33. Setting and characters, of course, do not truly stand separate and apart from the plot. Setting and characters are central in plot development, and plot development in turn enhances setting and characters.

34. Judge David J. Dreyer called the absurdity of *L.A. Law*'s opening scene to my attention. In his words, "[c]ases are usually won or lost in this phase [trial preparation], but the audience is usually led to believe that it all happens in the courtroom for the first time." Letter from Judge David J. Dreyer, Marion Superior Court, Indianapolis, Indiana, to David R. Papke, Professor of Law, Indiana School of Law (Feb. 16, 1999) (on file with author).

35. Carol J. Clover, *Law and the Order of Popular Culture*, *in* LAW IN THE DOMAINS OF CULTURE 97, 103 (Austin Sarat & Thomas R. Kearns eds., 1998).

36. *Id.*

37. *Id.*

Put more colloquially, a scrambled, exciting part of the overall drama winds its way forward. Both sides bring forward amazing and crucial pieces of evidence. In Scott Turow's popular *Presumed Innocent*,[38] the prosecution of ex-prosecutor Rusty Sabich for killing prosecutor Carolyn Polhemus revolves around not only medical records and phone logs but also a drinking glass complete with fingerprints and mysterious birth control gel. Readers of the best-selling novel or viewers of the subsequent movie[39] cannot blink for fear of missing a piece of evidence.[40]

Standing in the well—the flat, unadorned space at the foot of the bench and adjacent to the jurybox—or sometimes prowling around the courtroom, pop cultural lawyers histrionically examine and cross-examine the witnesses, experts, and defendants. In some cases people on the stand are exposed as liars; in other cases they break down and either identify the guilty party or confess. A superbly acted example of the latter occurs in *A Few Good Men*.[41] Subjected to blistering cross-examination from Lieutenant Daniel Kaffee played by Tom Cruise, Colonel Nathan Jessep played by Jack Nicholson comes clean right on the stand.

Invariably, disputes occur as to whether particular questions or whole lines of questioning are permissible, and the judge must confer with attorneys at the bench. Somewhat miraculously, the jury is out of earshot and presumably unaffected. When the judge does rule, the two sides pout, gloat, and imply the other is cheating.

When the action stops, we find ourselves watching, hearing and reading closing arguments. As in the opening statements, two lawyers tell coherent stories and make passionate pleas while staring intently into the eyes of the jurors. This is where years of acting classes and preparation come to the fore. The fictional lawyers are articulate and impassioned as they deliver the special type of argumentative coliloquy indigenous to a legalistic culture.

With the closing arguments complete, the courtroom trial in the pop culture pauses. It does not change tense but more or less stops for awhile. Lawyers confer with clients and discuss possible deals with one another. On television, we get a commercial break. But then, in the final act, the jury returns, the foreman hands the judge a

38. SCOTT TUROW, PRESUMED INNOCENT (1987).

39. PRESUMED INNOCENT (Warner Brothers 1990).

40. I reviewed *Presumed Innocent* and other recent lawyer novels in David Ray Papke, *The Advocate's Malaise: Contemporary American Lawyer Novels*, 38 J. LEGAL EDUC. 413 (1988) (book review).

41. A FEW GOOD MEN (Columbia/TriStar 1992).

mysterious piece of paper, the judge looks at it and returns it to the foreman. The foreman then stands up straight, clears his or her throat, and reads it aloud. People in the courtroom swoon and exult. They hug and cry. Sometimes the judge must ask for calm before confirming the verdict and pounding the gavel one last time.

This type of pop cultural proceeding is fully within the ken of American pop cultural consumers. They watch or read portrayals of it easily and with pleasure. The pop cultural courtroom is a familiar form of meaningful drama. Foreign visitors are sometimes totally bewildered by the pop cultural courtroom trial, but Americans know well the path the pop cultural courtroom trial will follow.

Indeed, resourceful writers can sometimes play off our familiarity with the pop cultural courtroom trial. In one episode of *The Practice*,[42] one of the subplots featured a senior litigator who turns to Bobby Donnell for help during an upcoming trial. It seems the senior attorney is slipping. He is suffering short-term memory loss even during trial, and his concerned wife points out that the litigator tellingly clenches a fist behind his back whenever the problem occurs. We watch as the fist closes and the attorney forgets whom he is cross-examining. We watch as the fist closes and the attorney drifts away in the midst of his own closing. The dramatic tension is enhanced because we as viewers know the pop cultural trial convention so well we can anticipate each stage. The whole story could not have worked without the convention.

WHAT ABOUT THE REAL WORLD?

Some judges and trial lawyers find it virtually impossible to enjoy pop cultural trials because of their lack of correspondence to what the judges and lawyers experience in actual courtrooms. Their complaints are well taken, and the differences between pop cultural and real-life trials merit underscoring.

For starters, we of course have to acknowledge what most movies, television series, and novels do not mention: the great majority of cases never get to trial. Charges are dropped, sentences are threatened, and pleas are bargained. Defendants, after all, are not necessarily well-healed or resourceful. In most urban areas, over seventy-five percent of the defendants are indigent.

In the small minority of cases that actually get to trial, we do not encounter the punchy, provocative opening statements so typical of

42. *The Practice* (ABC television broadcast, January 23, 1999).

pop culture. On television or in the movies, the opening statement is a powerful prologue or an extended first act, but in the real world lawyers are quite economical. They disdain large civic messages in favor of simply setting out a fact or two and identifying the legal issue.[43]

As for the presentation of evidence and both examination and cross-examination, things are much less dramatic than in the pop cultural courtroom. Real-world attorneys do like visuals when it comes to evidence, and autopsy photos are a favorite in murder trials. But frequently physical evidence is minimal. Defense counsel, most of whom are public defenders, are particularly strapped when it comes to finding or presenting useful evidence. Their caseloads and budgets rarely allow for the large-scale utilization of investigators.

Side-bar conferences among the judge and attorneys are also rare. Usually important evidentiary questions are settled through motions in limine or through pre-trial compromise, and judges in general do not like to slow down their proceedings to sort out evidentiary or procedural matters. Little tête-à-têtes immediately before the bench are difficult because lawyers seem congenitally unable to speak in a soft voice. Excusing the jurors and adjourning to chambers, meanwhile, is risky business. The lawyers can make their way to chambers, but jurors have the distressing habit of disappearing into restrooms, wandering off, and even on occasion going home.

If a conference does occur in chambers, lawyers tend to be very business-like and abandon their pronounced advocate's posture. Janet Malcolm, commenting on the case of a convicted doctor suing a prominent journalist, compared the real-life lawyers she observed to pro wrestlers.[44] In court they behaved like sávages who hated and wanted to hurt one another.[45] In private conferences they were their regular selves and spoke in clipped, passionless ways. In pop culture, by contrast, lawyers in conference argue just as they would in open court.

When people take the stand in actual trials, attorneys rarely grill them, and the attorneys also do not pepper the air with objections. Experienced practitioners appreciate that they have only a "limited

43. In the words of Judge Ted R. Todd, real-life opening statements "tend to be bland but also mercifully short." Letter from Judge Ted R. Todd, Jefferson Circuit Court, Madison, Indiana, to David R. Papke, Professor of Law, Indiana University School of Law (Feb. 15, 1999) (on file with author).

44. *See* Janet Malcolm, *The Side-Bar Conference*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 106, 108 (Peter Brooks & Paul Gewirtz eds., 1996).

45 *See id.*

good will account" with the jury.[46] Jurors do not want lots of interruptions, and if the lawyer keeps objecting, they begin to wonder what he or she is hiding.

While in pop culture almost every witness has a critical piece of the story, real witnesses are often forgetful, boring, or unprepared. People on the stand might cry, but they do not break down, offer dramatic revelations, or confess. The most effective testimony probably comes from police officers, and this is another reason that prosecutors generally have an advantage over defense counsel. Police arrest with an eye to conviction, and in some districts, their formal training includes lessons on how to testify.

The majority of defendants do not take the stand. Jurors would like to hear from the defendant, and some defendants would like to get on the stand because they are cocky enough to think they can put one over on people. But defense counsel are justifiably leery. If a defendant takes the stand, a prior record can be revealed, and in addition, defendants tend not to make good witnesses. As noted, most are poor. They also tend to be poorly educated and relatively inarticulate. These factors in turn create "believability" problems.

The roughly contemporaneous rape trials of William Kennedy Smith and Mike Tyson illustrate the point. The former—an atypical defendant—was well groomed and articulate. He took the stand and convinced the jury that he could not possibly rape anyone. Tyson is a different package and, alas, more similar to the typical defendant. When his attorneys made the mistake of putting him on the stand, Tyson's crude, sexist, uneducated world view convinced the jury that he had in fact raped somebody.[47]

Closing arguments are important in actual trials, and jurors listen intently to them. Why? It is not because the case is still undecided, as it almost always is at the time of a pop cultural closing. One theory is that even though most jurors have already made up their minds as to guilt or innocence, they are starting to collect their thoughts for the deliberations right around the corner. They are culling the closings for what they think they will need in the jury deliberation room.

In many cases the jurors hear only limited closing arguments. In Indiana, for example, closing arguments have time limits. A lawyer

46. The notion of "a limited good will account" comes from my faculty colleague Frances Watson Hardy. Prior to assuming her current academic position, Professor Hardy served as Chief Public Defender for Marion County, Indianapolis, Indiana.

47. I am also indebted to Professor Hardy for this comparison of the Kennedy Smith and Tyson trials.

may request more time if he or she wishes, but the maximum time available is presumed to be twenty minutes unless the trial has gone into a second day. The closings, regardless of length, are rarely as stirring as they are on television or in the movies. A surprising number of trial lawyers are at best average speakers, and many cling desperately to their notepads during closing arguments.

As for what happens in the jury room, this is a bit of a mystery. It appears that despite the jadedness and cynicism of contemporary life, Americans still take jury duty very seriously. They may not welcome jury duty, but when they serve on a jury, they are earnest and do their best. In criminal trials the jury's "best" usually takes the form of a conviction. In most urban areas the conviction rate is between eighty-five and ninety percent. One would never guess it from prime-time television, Hollywood movies, or popular novels. Not even a couple of popular prosecutor series on prime time have led to an overall pop cultural conviction rate of any magnitude.

How do the judges perceive the real-life courtroom trial as a whole? To the person, they speak of the remarkable range of human behavior they encounter in their courtrooms. One judge said, "In over twenty-two years of presiding over jury trials, one thing I have learned is that no creative, imaginative Hollywood screenwriter could dream up what happens in real life."[48] The same judge also noted the practice which began with *L.A. Law* and apparently continues into the present: surfing Westlaw for cases which might work as television drama.[49]

A recent example of the fictional drawing on the factual was the episode of *The Practice* that aired on March 7, 1999. Only a month after a comparable case made its way into the actual case reports, the fictional lawyers in the series brought and won a civil suit against the manufacturer of a gun that was used to kill a boy. How do television producers work so fast?

While expressing amazement at what they see in their courtrooms, real-life judges also acknowledge that they often have significant managerial responsibilities.[50] Trials do not necessarily have

48. Letter from Judge Lorenzo Arredondo, Lake Circuit Court, Crown Point, Indiana, to David R. Papke, Professor of Law, Indiana University School of Law (Feb. 5, 1999) (on file with author).

49. *See id.*

50. Judge Ruth Reichard sometimes characterizes both her trials *and* the lawyers who appear before her as either "low maintenance" or "high maintenance." Letter from Judge Ruth Reichard, Marion Superior Court, Indianapolis, Indiana, to David R. Papke, Professor of Law, Indiana University School of Law (Feb. 3, 1999) (on file with author).

fully shaped story lines. Inconsequential matters surface. We see mistakes in procedure, displays of pettiness, and frequent delays. Sometimes observers feel as if they have walked through the bureaucratic looking glass, hardly the reaction of someone who has just enjoyed a gripping pop cultural courtroom drama.

RAMIFICATIONS AND SIGNIFICANCE

As previously noted, men and women who earn their livelihoods as legal professionals are probably most struck by what could be thought of as the "inaccuracy" of courtroom trials in American pop culture, and commentators have in fact spoken to this issue. Defense lawyers worry that jurors will have images of pop cultural trials in their heads when they serve, and many use *voir dire* to exclude jurors who expect defense counsel to identify the truly guilty, to pull rabbits out of hats, or even to prove their clients innocent. The late Edward Bennett Williams, a famous trial lawyer, complained that television series featuring Perry Mason and the like created unrealistic expectations among real-life clients.[51] The best of criminal defense lawyers, Williams said, are lucky to win acquittals in a bare majority of their cases.[52]

Even an occasional literary critic such as Jon L. Breen is concerned with questions of "legal accuracy." In a book surveying no fewer than 421 novels with trials, he singles out for full rejection three with especially horrible examples of inaccurate trial procedure.[53] A novel cannot be a good one, he implies, if its law and legal process have an unsatisfactory relationship to reality.

But should a "reality aesthetic" control our comparative commentary on pop cultural and actual courtroom trials? Pop cultural trials and actual ones, after all, are driven by different engines. In the realm of pop culture, writers and producers need a coherent story line with pieces that fit together. They must have drama to engage viewers and readers. Who in the pop cultural world would want mechanical opening statements or boring testimony? Surely not the consumers. Actual trials, by contrast, in their

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Lawyers of the latter type seem always to have a crisis—a new argument to make, a witness who fails to appear, or an exhibit found at the last minute.

51. *See* Edward Bennett Williams, *The High Cost of Television's Courtroom*, 3 TELEVISION Q. 11, 12–15 (1964).

52. *See id.* at 15.

53. *See* BREEN, *supra* note 6, at x. The novels singled out by Breen include: WILLIAM ARD, HELL IS A CITY (1955); HAROLD R. DANIELS, THE ACCUSED (1958); and BARBARA FROST, INNOCENT BYSTANDER (1955).

stumbling, woefully imperfect way are struggling for justice. The goal is neither to tell good stories nor to put heroic lawyers in the spotlight. We would like instead to have just or at least fair results.

Alan Derschowitz, who has left the halls of academe for more than his share of courtroom work, has contrasted Chekhov's advice to an aspiring dramatist with what happens in the actual courtroom.[54] Chekhov told the dramatist that if a character hangs a gun on the wall in the first act, someone had best use it by the third act.[55] In the real-life courtroom, by contrast, defense counsel would like to hang guns all over the place without necessarily using them. Irrelevant actions and testimony, randomness, purposelessness, and delay abound. Jurors, journalists, and others do their best to articulate coherent narratives and interpretations, but things are often indeterminate.

However, the pop cultural trial does not have to be "accurate" in order to teach us something about law. Regardless of its correspondence to actual trials, the pop cultural trial can and does contribute to the popular understanding of law. The pop cultural trial educates at the same time it entertains.

Just what does it teach us? Some minor instruction is forthcoming in the substantive law, and perhaps a bit more is taught about civil and especially criminal procedure. It even seems that pop culture has had some cross-national impact. After a steady diet of American cop, lawyer, and trial shows, people in other countries have purported to state the law only to learn American criminal law and criminal procedure do not cross the oceans as easily as television programming does.[56]

The instruction in substantive and procedural law notwithstanding, the greatest impact of pop cultural portrayals of courtroom trials involves our societal understanding of law as a large, abstracted concept. The pop cultural trial serves as a symbol of law. The symbol obfuscates inequalities of race and class. It assures us that legal representation is available and effective. It probes facts and uses objectivity to reach fair decisions. It inspires and reassures rather than boring or alienating. The pop cultural courtroom trial does not create reality but rather portrays, symbolizes, and serves up an acceptable version of reality under a rule of law. Americans may not be particularly law-abiding, but we do like to think of ourselves as a

54. *See* Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 44, at 99–100.

55. *See id.* at 99.

56. *See* Clover, *supra* note 35, at 97–98; *see also* Peter Bowal, *A Study of Lay Knowledge of Law in Canada*, 9 IND. INT'L & COMP. L. REV. 121, 139–41 (1998).

people living by the rule of law.[57]

Perhaps the observations of Thurman W. Arnold, a legal realist and political commentator from the 1930s, are relevant. "Law," he said in a work titled *Symbols of Government*, "is a sort of Heaven which man has created for himself on earth. It is a characteristic of all paradises that they should be different from what we actually experience in everyday affairs."[58] Law, in his opinion, "develops the structure of an elaborate dream world where logic creates justice."[59] Speaking more specifically, Arnold argued that for the great mass of Americans the laws themselves are unknown. Yet he also felt that instead of the posited law it was "the public judicial trial" that symbolized "the heaven of justice which lies behind the insecurity, cruelty, and irrationality of an everyday world."[60]

All of Arnold's comments went to actual trials. He was not discussing pop cultural trials. But as suggested at the outset of this essay, the real trial has been supplanted ideologically by the pop cultural trial. Most Americans have never participated in or even witnessed an actual trial, but virtually all adult Americans have hundreds, perhaps thousands of times, watched or read a portrayal of a pop cultural trial. The latter may be *the* first civic image of the dominant American culture. The pop cultural trial not only contributes mightily to the popular understanding of law but also transports us to the dream world of justice.

57. The "rule of law" has more features to it than is sometimes assumed. I summarized the American belief in a rule of law that settled into place in the nineteenth century as follows: "Americans believed that the laws were to be made in public, without bias for particular individuals or classes and with an honest commitment to the public good. Lawmakers were to expressly promulgate the laws in clear, general, non-retroactive and non-contradictory form. The laws were to be feasible and predictable, and the people were for the most part to know them or at least be able to find them out. Officials applying the law, especially judges, were to be fair and impartial, treating similar cases in similar ways, extending due process, free from public pressure, to one and all." DAVID RAY PAPKE, HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH 13 (1998).

58. THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 33–34 (First Harbinger Books 1962) (1935).

59. *Id.* at 34.

60. *Id.* at 129. Echoing this thought, Judith N. Shklar argued in a ground-breaking work that, "[t]he court of law and the trial according to law are the social paradigms, the perfection, the very epitome, of legalistic morality." JUDITH N. SHKLAR, LEGALISM 2 (1964).