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Fictionalized films based on true stories, “truth tales,” serve to encourage the viewer’s critique of the law’s function in society. Truth tales are based on famous trials the verdicts of which are well-known. Accordingly, the climax of a truth tale does not occur at the time of the verdict, unlike a classic courtroom drama. Instead, the truth tale’s main purpose is to examine the legal system’s promise of truth and fairness in trials based on societal expectations of justice, which can change through time. In this article, Professor Silbey explores the intersection of law and popular culture by examining two trial films, *Compulsion* and *Swoon*, about the famous 1924 Leopold-Loeb murder case. The differences between *Compulsion* and *Swoon* illustrate that the primary effect of truth tales is to

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Justice can lie outside of the adversarial legal system. This is clearest in the context of criminal law, such as the assassination of Reinhard Heydrich, but applies to civil law as well. But access to the civil justice system is an important form of justice. The American culture industries—mass communications and popular arts—often portray the struggle for access to civil justice as a struggle between the average citizen and wealthy, powerful, and irresponsible social institutions. This raises the question: is property a natural, inviolable right or an artificial convention upon which society always retains a claim? The tension between these characterizations of property is a recurring theme in American culture, and is thematic in popular books and movies.

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In popular-culture venues, the judge is generally depicted either as a neutral or invisible placeholder for a fixed and determinate rule of law, or as a biased, vulgar villain. In this article, Professor Bandes explores the connection between the depiction of the judicial role in popular media such as movies and television, and the very similar caricature that still holds sway in more serious non-fiction venues like Senate confirmation hearings and political campaigns. Professor Bandes argues that the simplistic and prevailing notion of judges and judging that currently dominates the public discourse is inherently conservative, and suggests that this state of affairs poses dangers for the rule of law and the evolution of the judicial system.

POPULAR CULTURE AND THE ADVERSARY SYSTEM

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If Americans distrust lawyers more than all professionals and hold judges in higher esteem, then why do Americans believe strongly in the adversarial system, where lawyers make all the important procedural decisions during trials? One possible reason for this paradox is the influence of popular-culture portrayals of the trial process. This reason is rooted in “cultivation theory,” which proposes that people often form opinions based on the fictitious stories of popular-culture media. Since the days of history’s greatest teacher of trial tactics, Perry Mason, media consumers have been taught that the adversary system delivers the truth. Regardless of the distrust Americans may have for lawyers, they want a good one by their side.

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Although Morgan Spurlock’s popular documentary film *Super Size Me* was initially inspired by a highly publicized lawsuit in which two African-Americans alleged that eating McDonald’s food caused them to become obese and to suffer from obesity-related medical problems, the documentary skirts social and economic factors. Spurlock fails to address how racial, gender, and socioeconomic cultural norms affect rates of obesity in America. Because inexpensive fast food restaurants are often more abundant than grocery stores in poorer communities, obesity among the lower classes is more prevalent. Further, cultural differences between white and black Americans may impact obesity rates in minority populations.

A MANIFESTO FOR VISUAL LEGAL REALISM

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Whereas traditional legal scholars have treated law as an autonomous domain with insular forms of discourse, contemporary scholars recognize the porous borders between law and culture. In this article, Professor Sherwin announces a “manifesto for visual legal realism,” a recognition of the profound effect of visual culture and multi-modal communication technologies on legal practice. Practicing attorneys borrow persuasion techniques from well-known film or television conceits in both their rhetoric and visual exhibits. These images are present also in the minds of jurors, whose decision-making suggests influence by memes from popular culture and the attorneys that exploit them. Acknowledging this influence

is important to effectively confront any knowledge gaps or distortions it may cause.

POPULAR CULTURE, LEGAL FILMS, AND LEGAL FILM CRITICS

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The effect of fictional depictions of law and lawyers on audiences remains elusive, while the conventions of legal film criticism, including “effects” and “reality” theories, are mired in obvious contrasts between fiction and reality. The remedy may lie in the iconography of lawyer films. The legal practitioner’s tools of persuasion are comprised of storytelling techniques from popular culture. This perspective defers the preoccupations of the “reality critique,” which cuts off an exploration of lawyer films as meaningful text. The legal film critic is freed to fully examine dramatic narratives and their literal elements, whereas a “pedagogical” approach analyzes the link between the legal profession and life beyond the law.

NOTES & COMMENTS

EMPLOYERS BEWARE! THE SUPREME COURT’S INTERPRETATION OF TITLE VII’S EMPLOYEE NUMEROSITY REQUIREMENT DISADVANTAGES SMALL BUSINESSES

by Patten Courtnell 793

The Supreme Court, in *Arbaugh v. Y&H Corp.*, held that Title VII’s fifteen-employee requirement to qualify as an “employer” for purposes of litigating discrimination suits is a substantive, rather than jurisdictional, element of a claim. The Court’s misguided rationale results in disadvantages to small businesses that Congress intended to protect. Moreover, regardless of what Congress intended the requirement to be, conserving judicial resources is better served by allowing the trier of fact to establish the threshold before trial. The Court should restrict federal jurisdiction to those cases involving employers with fifteen or more employees and leave Congress to expressly extend Title VII to employers without the requisite number of employees.

THE FIFTH AMENDMENT’S TAKINGS CLAUSE: PUBLIC USE AND PRIVATE USE; UNFORTUNATELY, THERE IS NO DIFFERENCE

by Emily L. Madueno 809

The Takings Clause of the Fifth Amendment prohibits government takings of private property for public use without just compensation. *Kelo v. City of New London* contains the Supreme Court’s most recent interpretation of the public-use restriction. The Court’s decision in *Kelo* generated uproar as if it restructured the Takings Clause. In this note, Emily Madueno suggests

that *Kelo* did not restructure the Clause, but instead expanded the takings power by enlarging an already broad definition of public use. Madueno argues that, the Court should adopt a narrower definition of public use to protect private property ownership, and highlights possible ways of doing so.

A CALL TO ACTION: THE FOURTH AMENDMENT, THE FUTURE OF RADIO
FREQUENCY IDENTIFICATION, AND SOCIETY

by David J. Warner 853

Nuclear materials. Barcelona club-goers. Mexican diplomats. Japanese schoolchildren. Your next pair of underwear. All of these items either currently contain, or could soon contain, a radio frequency identification (RFID) tag inside them. In this note, David Warner looks at the future of RFID technology and addresses the growing privacy concerns surrounding this emerging technology. While the Fourth Amendment protects individuals from government intrusion, most RFID-related privacy concerns come from the private sector. In addition, once private information is given to a third party (e.g., a supermarket), the government can access that information without a warrant. Thus, because the Fourth Amendment is not the proper tool to dispel privacy concerns, all parts of society—government, corporations, and citizens—have a role to play in properly integrating RFID technology into society.

