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LEXITAINMENT: LEGAL PROCESS AS THEATER

Lawrence M. Friedman*

INTRODUCTION

The general subject of this paper is the legal process as theater and entertainment. In this paper, I will talk about both civil and criminal process.

I want to begin by making a distinction between those aspects of the legal process which are didactic, those that are instrumental, and those that are (more or less) pure entertainment. For the purposes of this article, didactic means (roughly) educational. Entertainment can also be didactic, of course. The best teachers and the best teaching often have the same qualities as good entertainment. In turn, the higher forms of entertainment can be profoundly educational. Nevertheless, there is a clear distinction at the outer limits—between a calculus text, say, and a vaudeville show in which one man shoves a cream pie in another man’s face.

These are the outer limits. In between is a very gray area. If you use the word didactic in a broad, but not unreasonable sense, you can argue that most legal actions, and certainly most trials, turn out to be didactic, or contain a didactic element. In other words, most legal actions and trials impart a moral, convey ideas or admonitions, or teach a lesson.¹ Most legal actions, whether they are didactic or entertaining, or not, are certainly instrumental; they are expected to accomplish something. The line between the didactic and the instrumental is roughly the line between immediate and not so immediate consequences. The immediate result of a hanging is a broken neck. The not so immediate consequence is the message the hanging was intended to send. The message might be that society is very serious about the crime for which the hanging occurred. The intended, or hoped for, result is that individuals will stop the behavior that might earn them a trip to the gallows. Similarly, if a patient sues a doctor for medical malpractice, the immediate result might be a bundle of cash from doc-

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1. Of course, in most cases, legal process does not intend to teach a lesson; one credible distinction between what is didactic and what is entertaining is that the one deliberately tries to make a point, and the other does so only indirectly and unintentionally, if at all.
tor to victim (and the victim's lawyer, of course), but, the case might also send a message about the responsibilities of doctors to patients. I will begin by briefly discussing some didactic aspects of the legal process. I will then continue by addressing the issue of entertainment, bearing in mind, of course, that it is often hard to draw the line between the two concepts.

II. Trials and Tribulations

If a process or action in the legal system is very open, very public, and very theatrical or dramatic, we can assume that this action is intended to have some type of didactic effect—to impart a moral. The most obvious example is the highly publicized criminal trial. In the colonial period, and for a long time afterwards, all trials were public events. Executions took place in the public square. Everybody in town turned out. During this period, the condemned person often made a speech in the shadow of the gallows, confessing his sins, praying for forgiveness and warning the public not to follow in his footsteps. For example, in 1686, James Morgan, about to be executed for murder, admonished his listeners to “have a care of that Sin of Drunkenness,” which leads to all “manner of . . . Wickedness.” Morgan implored people to profit by his example, and to “beg of God to keep you from this sin which has been my ruine.” In 1790, Joseph Mountain, a thirty-two year old black man, was to be executed in New Haven, Connecticut. In the First Church, the Reverend James Dana delivered a sermon before a large audience that included Mountain himself. The Reverend preached about sin and evil, and addressed Mountain directly. You are to be hanged, “as a spectacle to the world, a warning to the vicious.”

During the colonial period, all punishment was open and public, and therefore, in a sense, theatrical. For example, sinners had to sit in the stocks or were whipped in public, or otherwise publicly humiliated. Many of the forms of punishment were designed to mark the condemned man or woman in some very public and obvious way: branding the poor wretch with a hot iron, or cutting off an ear or two. The infamous scarlet letter was also a device to mark a miscreant, and thereby teach a lesson. A New Hampshire law of 1701 prescribed a “Capitall Letter: A” for adulterers, “cut out in Cloath of a contrary

4. Id.
Colour to their Cloaths and Sewed upon their Upper Garments . . . in open View.” In 1773, Alexander Graham, a burglar in colonial Connecticut, was branded with a capital B on the forehead; he also lost an ear. Civil trials were very public, very open as well, and they were expected to illustrate a moral. For example, in 1686, Benjamin Knowlton complained that Charles Ferry defamed his wife by “false reports.” The court ordered Ferry to apologize publicly for his unjust aspersions.

These were small communities, rather tightly controlled by the people who ran the society: magistrates, the clergy, heads of households, and the respectable citizenry. These elites used overt dramas of punishment to teach a lesson, to impart the moral code, particularly for the benefit of young people, servants, and the lower orders. These public events, from whippings to humble apologies, thus served an important social function.

The situation changed dramatically in the Nineteenth Century. In the course of the century, punishment went private. Public executions in many states were banned. Pennsylvania did so in 1834, and New York followed suit in 1835. New York law ordered executions to be “inflicted within the walls of the prison . . . or within a yard or enclosure adjoining.” The privatization of punishment had complex causes and sources. Among the sources was the idea that these spectacles did not really teach a lesson, or maybe did not teach it anymore. Rather, public executions catered to the blood lusts of the masses; they were thus a source of unrest. This reflected a real change in conceptions of the nature of the public, some of which was undoubtedly based in reality. There were now biggish towns, full of strangers, unlike the tight little communities of colonial times. But, the critique was also a way of saying that these events had crossed an invisible line that separated moral teaching from sheer entertainment.

In any event, the whipping post was abolished, the shaming punishments became formally extinct, and punishment went indoors. The Nineteenth Century was the age of the penitentiary. Society now dealt with serious criminals by locking them away in huge, fortress-

7. Id.
8. 1835 N.Y. Laws 258, 299.
9. See generally, MASUR, supra note 2.
like buildings, isolating them and subjecting them to iron discipline.\textsuperscript{10} In a sense, however, open-air executions did not come to an end when the states abolished public hangings. Public executions popped up in the American West, among the vigilantes whose “necktie parties” were very public affairs\textsuperscript{11} and in the fiendish form of lynching in the American South. When the vigilantes strung up some evil hombre, they meant to convey a powerful message about law and order. The actions of the lynch mob were also meant to teach a lesson. The mobs that burnt and tortured black men accused of rape, murder, assault on whites, or just plain insolence, were proclaiming the norm of white supremacy, in violence and blood.\textsuperscript{12}

Trials, both civil and criminal, were open to the public, as always. Trials continued to be didactic in one basic sense: they defined, enforced, and publicized a code of norms. Trials dramatized law and morality. Throughout history, governments have been willing to use trials as theater in order to make an example of someone, or to convey, in vivid form, a political message. Obviously, this is most true of criminal trials. The trial of Guiteau, the man who shot President Garfield, or, in the Twentieth Century, the Sacco-Vanzetti case, or the trial of Julius and Ethel Rosenberg, were also political theater. In the age of radio and television, members of Congress utilized Congressional investigations and hearings in much the same way. This was especially true of the House Un-American Activities Committee, with its gaudy, high-profile investigations of Hollywood and other nests of reds, during the McCarthy era.\textsuperscript{13} The McCarthy hearings, as well as the Kefauver hearings on organized crime, were also examples of public theater. All of these events were designed for publicity, for show, and for education in the broadest sense of the word. The Kefauver hearings were an early and striking example of the sheer brute power of television as a carrier of images and ideas.\textsuperscript{14}


\textsuperscript{11} There is a large literature on the vigilantes. See RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM (1975); FRIEDMAN, supra note 4, at 172-92.

\textsuperscript{12} On lynching, see LEON LITWAK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 280-325 (1998). The lynch mobs were not the only legal institution that delivered this message. It was also delivered by the ordinary courts—for example, when they acquitted whites of crimes against blacks. For one powerful example, see STEVEN J. WHITFIELD, DEATH IN THE DELTA: THE STORY OF EMMETT TILL (1988).

\textsuperscript{13} See ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 319-30 (1998).

The state is the plaintiff in criminal trials, and the state has the ability to manipulate these trials for the state's own purposes. But they can also be used as theater by private parties—this occurs, for example, in defamation cases, where there is a powerful thrust toward vindication; and in some tort cases, where the plaintiffs are asking for punitive damages. It is also possible for defendants to turn the tables on the government, and use their trial as a form of guerrilla theater. Perhaps the most famous example of this was the trial of the "Chicago Seven," which began in 1969. The trial had its origins in the riots that took place at the Chicago Democratic convention of 1968. Protesters against the war in Vietnam swarmed into Chicago. The police, at the instance of Mayor Richard Daley, crushed the demonstrations with a good deal of force.

The "Chicago Seven" were indicted under a law that made it a crime to cross state lines in order to promote or encourage a riot. The Nixon administration indicted seven radicals and pacifists. A long, stormy, and dramatic trial followed. The judge, Julius Hoffman, was hardly a model of calm judicial serenity. At one point, Judge Hoffman "ordered the gagging and hog-tieing" of one of the defendants. The "Chicago Seven" fought back by mocking and jeering the judge at every turn. One day, the defendants paraded a flag of the Vietcong; on another day, they "entered the courtroom wearing robes covered by Stars of David," then "removed the robes, threw them on the floor, and wiped their feet on them." One defendant compared the judge, to his face, with Adolph Hitler. The defendants "sat at their table, often reading, writing speeches, munching jelly beans, making faces, or laughing. Sometimes they slept. Litter piled up on their table and the carpet underneath it." One defendant, in many ways the least outrageous, refused to refer to Judge Hoffman as "your Honor;" to him, the judge was referred to as "Mr. Hoffman," as a sign of "equality." The defendants (in the words of one of them) saw the defense table as a "liberated zone," a zone of "defiance of a court system that demands the repression of people."

I do not want to overemphasize the social and historical significance of the "Chicago Seven" trial, aside from the way it illustrates that the government does not have a monopoly on the trial as a didactic de-

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16. Id. at 114.
vice. The term "guerrilla theater" also suggests that the lesson is conveyed in the form of entertainment. The defendants were deliberate in their desire to be outrageous and theatrical. Whether the defendants succeeded in turning the tables on the government is another question. I suspect that most people in the country were disgusted with the spectacle, and that the message never reached its audience.

One general point, frequently overlooked, is that the legal system cannot work unless it finds a way to communicate with the relevant part of the public. Unless its orders, commands, and principles reach their intended audiences, these orders, commands, and principles are empty wind. What has to be communicated is, first of all, information: what the rules or orders are, and, beyond that, lessons, warnings, and objectives. The subject of legal communication is complex, and needs much more research. The more arcane messages (tax regulations for example) cannot be sent directly to the public; nobody would understand them. These messages must be communicated through information brokers—lawyers and accountants. The deliberate use of drama and theater as a means of communication has to be reserved for large, simple messages. Hence, drama and theater only convey simple messages. A legal system that relies on drama must adapt its messages accordingly.

In addition, a lot depends on the nature of the audience. In colonial society, towns were small, and everybody basically knew everybody else. The law was also much less complicated than it is today. There was little need for information brokers; nor was there much need for "media," that is, an entity to mediate between the process (trials, for example), and the general public.

This was, naturally, no longer the case later in American history, and becomes less so all the time. The country is enormous, the population is heterogeneous, and the body of the law is of fantastic size. Most of the substance of the law is, and must be, communicated through information brokers. But, government can, and does, use the media to convey some simple, vivid messages.

Could the public be educated into a more sophisticated, or at least more nuanced, conception of law? Possibly; but, a number of factors conspire against this. One factor is the increasing dominance of sheer entertainment, a theme we will turn to shortly. It is also not in the interests of the legal profession to have a public that is too knowledgeable. Legal education in the United States is graduate education. The millions of people who go to college and are not pre-law get little, if any, instruction in the way the legal system works. The bar is also deeply suspicious of schemes to teach and advise the public. For ex-
ample, in 1935, in the midst of the depression, a radio program called “Good Will Court” went on the air in New York City. “Good Will Court” was a program that gave legal advice over the radio. Local judges took part in the radio show and helped provide answers to questions. The program was extremely popular. The people who presented their problems and asked for advice were not identified by name. The American Bar Association (ABA) put an end to this practice, which they found threatening to their professional monopoly.\footnote{Catherine J. Lanctot, Attorney-Client Relations in Cyberspace: The Peril and the Promise, 49 DUKE L.J. 147, 198-218 (1999).}

III. LEXITAINMENT

One general thesis of this paper is that, over time, at least in those legal spectacles which are public, the didactic element has declined, relative to the effect or value of these spectacles as sheer entertainment. It was the awareness of this shift which led to the privatization of executions. In modern society, ordinary criminal and civil processes are remote from everyday experience. Other than the litigants, very few, if any, people attend civil trials, and certainly no one observes, or can observe, what happens in lawyers’ offices, during settlement negotiations, plea bargaining, or the like. What the public sees are the large, noisy, high profile trials. Show trials depend on the media for their effect, since otherwise the message would not come across.\footnote{See generally, LAWRENCE M. FRIEDMAN AND ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870-1910 237-60 (1981).} The media are only too happy to oblige. Particularly in the late Nineteenth Century, the cheap and ubiquitous newspapers—“yellow journalism”—avidly dished out news of trials and executions. The motives of such papers were sometimes motives of propaganda and politics, but on the whole they were after a simpler game—money, sales, and the attention of a fickle public. For these purposes, everything else (including the truth) had to be subordinated to sensationalism. This, in a way, defeated the purpose of bringing executions indoors, since the newspapers reported, with enormous relish, every last bloody detail of trials and executions.

There were constant and loud objections to the bad habits of the press, the sensationalism, the constant appeal to prurient interests. One problem (in criminal trials in particular) was that the way in which the newspapers “work up a sensation over a crime . . . tends to bias the minds of all newspaper readers,” and newspaper readers
made up the pool of jurors. But, the main purpose of the objections was that this coverage did not, in fact, provide moral or didactic messages, but on the contrary, catered to the lusts and base instincts of the mass public. The media were not interested in moral instruction; they wanted to sell newspapers. This meant that coverage tilted strongly in the direction of entertainment; they needed to appeal to the public. Moreover, it was not (in the view of many of the elites) wholesome entertainment. Again, this was mostly true of the criminal trial; but the media also licked their chops over juicy and prurient divorce cases, for example.

There is a long history of elite jeremiads, deploiring the low tastes of the multitude. Just as there had been objections to public hangings, there were also objections to the lurid descriptions of executions. Crime literature in general (it was said) led to anti-social acts. Boys enter a life of crime because they read “trashy literature and yellow journals, which exploit crime and criminals.” Anecdotes were repeated about men and women who killed after their minds were “inflamed” by reading lurid accounts of trials. One such woman, Mrs. Benjamin J. Granger, tied up her son, gagged him with a handkerchief, then cut his throat with a razor. Indeed, so worried were some states about letting the public wallow in crime, that they passed laws against crime magazines. Connecticut, for example, banned printed material, including newspapers, that might be “devoted to the publication of . . . criminal news, police reports or pictures, and stories of deeds of bloodshed, lust or crime.” Kentucky had a similar statute; it also banned printed material whose “principal characteristic is to depict by illustrations men and women inflamed by alcoholic beverages, drugs, or stimulants.” (So much for the freedom of the press.) These laws, no doubt, were totally ineffective. In a few states, laws were enacted to keep the exact time of an execution secret. Fear of sensationalism was a factor in the practice of executing people at night. An Indiana law, for example, required executions to take place “before the hour of sunrise.” A local newspaper explained that the “prominence given to details” of executions in newspapers “can have

23. Id.
24. CONN. GEN. STATS. § 6398, 1750 (1918).
none but a bad moral influence." Actual "gag" laws existed in a few states. In New York, for example, the law of 1888 on "Electrical Executions" made it illegal for newspapers to publish the details of an execution. The provisions of this law came from the recommendations of the so-called Gerry Commission (headed by Elbridge Gerry), established by the New York legislature to look into "humane" ways of executing the condemned. The Commission denounced "sensational" newspaper accounts that appealed to people with "a vicious and morbid appetite for the disgusting ...." The New York newspapers could not resist, however, the temptation to evade the "gag" law; the law was repealed in 1892. Apparently, nothing could stop the coverage of trials and executions in a society with such a hearty "appetite" for every last detail. Trials and executions continued to be grist for the mills of the press, and later, movies, radio, and television.

It is obvious that trials in particular, and to a lesser extent the whole criminal justice process, are endlessly fascinating to the public. The proof of this proposition, if proof is needed, can be found in the countless numbers of brochures, pamphlets, and the like, from the Nineteenth Century on, which recounted trials and executions. These pamphlets were extremely popular and displayed a "special interest in crimes of passion, rape-murders, prostitute-killings, and abortion-homicides," in vivid and often gruesome detail. Perhaps even in colonial times, when the audience was supposed to be solemn, humble, and awestruck, some of the onlookers might have gotten a guilty thrill, maybe even a sexual charge, out of the proceedings.

The fascination of the criminal trial shows no signs of abating; in fact, quite the contrary is true. There have been more books, movies, plays, and television shows than anyone can possibly count, depicting lawyers, courts, legal process, police, and prisons. All movies "offer the joy of escape," but crime movies offer "access" to an exotic and exciting, if sometimes repellent, world. They open a "window on exotica," and "enable viewers to become voyeurs, secret observers of the personal and even intimate lives of characters very different from

26. JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 85-87 (1997). A Minnesota law of 1889 also required executions to take place before sunrise. Id.

27. Michael Madow, Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York, 43 BUFF. L. REV. 461, 541 (1995). The Minnesota law of 1889 provided that no newspaper reporter could attend an execution, and newspapers were not to print any details, except the fact that the hanging had occurred. Bessler, supra note 23, at 98. Minnesota later abolished capital punishment. Id.

28. In terms of modern constitutional law, such gag laws seem incomprehensible. However, censorship of movie violence, which rested on very similar grounds, was accepted into the 1950s.

Detective stories, or crime and mystery—enormously popular forms of literature—depend on the public fascination with crime and punishment. We do not completely understand the source of this fascination, and the many elements which probably play a part. Perhaps, for most people, whose lives are humdrum and respectable, there is a secret and vicarious thrill that comes from reading about the subject or watching it as spectacle. Sexuality and violence (and the combination of the two) are definitely forbidden fruit, or on the borderline of the forbidden. News of crime gives people a picture of a world that is somehow attractive, but out of bounds and distant from their everyday experience. Criminals are daring and repellent, sordid even, but they have a kind of romantic glow. This was and is particularly salient in gangster movies, from the films of the 1930s to The Godfather.

There is also the special excitement that comes from the idea that this dark underside of life is not that far off both physically and psychologically. Many legends play on this theme: the werewolf, for example, who has human form, and is an ordinary person, except when the moon is full. Many of the most sensational trials, like the trials of Lizzie Borden or O. J. Simpson, get their biggest buzz out of this apparent duality of human life—the possibility that under the surface of bourgeois respectability, or the glamour of a celebrity’s life, lies a seething cauldron of hatred and pathology. In this regard, the civil trial lags seriously behind. The average American could not possibly get a charge out of an antitrust case. The Microsoft case makes headlines, but it hardly has people hanging on to every word at the trial. A few exceptional civil cases—libel cases and juicy divorce cases—sometimes provide the media with wonderful material; these cases have “human interest”—the phrase itself is significant.

It is, of course, impossible to analyze the vast field of law and popular culture within this article. It is clear, however, that crime literature, like everything else, must reflect its social background. This literature flourished in the Nineteenth Century, in a world of shifting

33. Another example is the case of Dr. Sam Sheppard, one of the most sensational trials of the 1950s, which eventually reached the United States Supreme Court. Sheppard v. Maxwell, 384 U.S. 333 (1966). The charge was that this wealthy and prominent medical man beat his pregnant wife to death in their suburban Cleveland home. Id. The Sheppard case served, in some form, as a basis for the popular television series and movie entitled The Fugitive.
values, characterized by extreme social and geographic mobility. The Nineteenth Century also saw the invention of the mystery or detective story. A baffling and intriguing mystery story depends on the idea that people often are not at all what they seem. Take, for example, the classic "English" mystery. The setting, say, is ten respectable people together in a country house: the vicar, the doctor, the family members, the rich uncle, and his secretary. All of them have such respectable appearances, and yet one of them must have laced the uncle’s soup with arsenic. The "detective" (often an amateur) will, in the end, unmask the villain, and restore the balance between justice and crime. But the mystery and the thrill come from the fact that we cannot know people to their depths. The heart has secrets, sometimes bloody secrets.³⁴

In the detective story, what satisfies the reader is the fact that the case is "solved" at the end of the book. There is a definite resolution which provides closure, like the speech of the condemned man from the gallows. Closure also usually comes from the criminal trial itself; there is a verdict, and this ends the matter officially (unless there is an appeal or a hung jury). But we cannot ever be sure that the solution was correct. There is still room for doubt. Most experts believe Lizzie Borden killed her father and stepmother, even though she was acquitted; that O. J. Simpson was guilty of a double murder, even though he was acquitted; but that Dr. Sam Sheppard might be innocent after all. In fiction, the detective is never wrong.

Most of these fictional detectives are not, in fact, detectives at all. Rather, these characters are people from all walks of life. There have been “detectives” of every human shape and type, even, in one famous instance, a Catholic priest (G.K. Chesterton’s Father Brown). Perry Mason, one of the most popular “detectives” of all time, had an exceptional occupation—he was a practicing lawyer. The plots of the Perry Mason books follow a remarkably similar pattern. Mason is hired to defend a man or woman charged with murder. For some reason, Perry Mason’s clients are always innocent; no guilty person has ever crossed his threshold.³⁵ Mason never solves the case right away. Things look bad for his client. They either go to trial, or face a difficult preliminary investigation. Not to worry, however; Perry Mason comes through in the end. He saves his client by finding the true killer, often with a dramatic twist in the courtroom itself. In the

³⁴. See generally, Lawrence M. Friedman, True Detective, in 14 STUDIES IN LAW, POLITICS, AND SOCIETY 9-24 (Susan S. Sibley & Austin Sarat eds., 1994).
³⁵. I make this statement with some hesitation, because I certainly cannot claim to have plowed my way through all of Erle Stanley Gardner’s Perry Mason novels.
course of doing this, to be sure, he proves that the police and prosecu-
tors were wrong-headed, or were stubborn fools. The real killer is
almost always a surprise—someone that the average reader, like the
police, never really suspected.

Perry Mason sold millions of books. The author, Erle Stanley
Gardner, wrote eighty Perry Mason novels and novelettes from 1933
on. Seven movies were made from this rich lode of material. Perry
Mason also appeared on radio, and as a comic strip for a short time.
Perry then made the leap to the world of television. Between Septem-
ber 1957 and May 1966, the Perry Mason Show ran on the networks; it
has been in reruns ever since. There have been other prominent
television programs devoted to “mysteries.” And there have probably
been thousands of other fictional trials on television or in the movies
since these mediums began.

Of course, there are messages in all of these popular programs and
movies. In the broadest sense, a certain amount of education and ide-
ology is conveyed by such programs. The detective story, in general,
asserts conventional ideas about right and wrong. The murderer is
usually a person of evil and catching him or her is a Good Thing. In
general, of course, everything is subordinated to the goal of
entertainment.

The O.J. Simpson case was the most prominent trial of the last dec-
ade. The trial had the whole country riveted to the tube. People gobb-
led up every moment with almost indecent passion. The public had
the benefit of gavel to gavel coverage, and in between gavels, there
was endless punditry and commentary. The public also found the trial
of the Menendez brothers fascinating—two young, rich men accused
of murdering their parents for money. Another recent sensation was
the nanny trial in Massachusetts—the trial of a young English woman,
accused of killing the child she was taking care of. And earlier there
was Dr. Sam Sheppard, Lizzie Borden, the Lindbergh kidnapping
trial, Harry Thaw, Loeb and Leopold, and many others. Each of these
trials was a cultural artifact, and can be so interpreted; they lead us to
ask what they meant and why they worked their magic on the public.
But essentially, these cases succeeded as diversion, entertainment,
something to talk about and share, something to titillate the public.

36. This account is taken from J. Dennis Bounds, Perry Mason: The Authorship and
37. There is a growing literature on the way movies describe the legal system, or, in general,
how the legal system figures in movies. See, e.g., Legal Reelism: Movies as Legal Texts
The television program, L.A. Law, presented to an eager audience the inner workings of a fictional law firm. The show was extremely popular and ran for a long period of time. Today, there is Court TV, which provides the public with an ample taste of the real thing. Television is no stranger to the courtroom. In Sheppard v. Maxwell, the Supreme Court described the trial of Dr. Sam as "bedlam," because of the way the media "inflamed and prejudiced the public." Sheppard won a new trial. But, the Supreme Court has never said that television has no place in the courtroom. In any event, television is now most definitely there.

IV. Judge Judy and Friends

Somewhat surprising has been the rise to prominence of the "judge" shows in the 1990s. For a change, these shows are concerned with civil matters. First, there was Judge Wapner, and now there is Judge Brown and Judge Judy, to name only two of the most popular. There is also People's Court and Divorce Court. In May 1999, Fortune Magazine reported that Judge Judy was the "hottest show" on television. Judge Judy has set the pattern for a number of imitators. "Judge Judy," in real life, is Judith Sheindlin, who once served as a family law judge. She has been described as a "diminutive, abrasive, Jewish grandmother from Manhattan" and as the "little judge who kicked Oprah's butt," that is, got higher ratings.

Oprah is not the only one to get her butt kicked by Judge Judy. Mostly, it is the litigants who get this treatment. The entertainment value, such as it is, comes from watching real people with their problems, and probably more important, watching them squirm as Judge Judy dumps on them. Judy's sharp tongue is normal practice for the judge shows. The judge of Divorce Court, a very acid black woman, rails and snarls and wise-cracks at the couples who stand in front of her bench. She sits in a robe, with a gavel in her hand, while they whine and bicker about who did what to whom, who gets the dog, who is responsible for the car payments, whether the ring has to be given back or not, and similar trivia.

The television judges are not "real" judges. They are not actually sitting in courtrooms, and these shows are not real trials, with real

39. Id. at 355-56.
40. Id. at 335.
42. Id.
winners and losers, in the legal sense. But Judge Judy and the others invariably look like judges. They wear judicial robes, and they sit on a bench in what looks like a courtroom. There is some evidence that many people think these are real courts. The California Commission on Judicial Performance, for example, receives complaints from people who think Judge Judy goes too far. The Commission is bothered by the fact that the “standards for judicial conduct are set by imposers [sic].” What dismays the Commission even more than the people who find these judges offensive are the people who do the opposite, those persons “who write us to complain that when they went to court, the judges didn’t act like they do on television.”

The courts may be fakes, but the proceedings look like the genuine article. A man in a uniform leads in the litigants, as if they were in a courtroom. The litigants stand in front of the judge, saying “yes your honor” and “no your honor,” and they tell their stories, often interrupting each other, when the judge is not interrupting them herself. The litigants are usually ordinary people, who might otherwise be pressing their claims in a small claims courts. You will not find any antitrust suits on these shows. The cases are about individuals squabbling with other individuals. The television courts are people’s courts, not courts for businesses. The litigants are either so foolish, or so greedy for their fifteen minutes of fame, that they are willing to let an imitation judge monitor their claim and decide who wins. The millions “out there” who watch these shows get a thrill somewhat different from the thrill of crime shows. These people are peeping Toms, in a sense, looking through a window, not into some strange and exotic world, but into something which is part of their own world, something as ordinary as the next door neighbors, but as seductive as watching those neighbors take off their clothes. What do the viewer’s actually see? A bunch of pitiful marital losers, dimwitted ex-boyfriends, homeowners wrangling over fences or driveways, an army of deadbeat dads, faithless wives, and hapless debtors, parading endlessly before the audience, a menagerie of people who put no value on pri-

45. There may be another factor: I am told that the litigants really run no risk, since the program pays what the losers owe to the winners.
I assume that the litigants are real people, and that they have real disputes. There is, of course, the possibility that some of them are actors and actresses. This is undoubtedly the case on the “trash talk shows;” these shows also sometimes manipulate the “scripts,” even when the participants are genuine. See Joshua Gamson, Freaks Talk Back: Tabloid Talk Shows and Sexual Nonconformity 70-80 (1998).
vacy, who have forgotten that dirty linen should not be washed in public, and who, most of all, have lost sight of the line between entertainment and private life.

But the larger society has in a way done exactly that. Entertainment has triumphed over all its rivals. The line, in fact, between education and entertainment has become much dimmer. Education now has an obligation to be entertaining. From museums and libraries, to school texts, everything has become jazzy, rapid, colorful, “multi-media,” and souped-up. Today, almost anything goes, as long as the product is not “heavy” or “boring.” All this is, perhaps, a general result of changes in the technology of culture. Radio, movies, television, and the Internet are all devices of great power and seductiveness, which bring an enormous amount of entertainment into everybody’s home, every night, 365 days a year, in vivid color, and all at the flick of a switch. It is entertainment, after all, which can be turned off with the flick of a switch, and whose commercial value is gauged by the number of viewers.

The technology, in turn, is the product and the producer of a leisure society, a society of affluence. Veblen wrote about the behavior of the leisure class, especially their conspicuous consumption; but in the contemporary world, in the rich, industrial countries, everybody is at least a part-time member of this class. The average person may work hard and put in a long, dreary day; but he or she still has time in the evening to sit and stare at the tube. He or she has days off, holidays, and vacations, chances to be amused, dead hours to be filled up with “fun.” In America today, everybody, except the absolutely destitute, owns a television set, or two or three. The typical American spends hours in front of the set. In a way, entertainment comes to dominate life. The entertainment industry is one of the largest in society; and entertainment, in general, has a vastly greater social role than ever before in history.

The media cannot survive unless they entertain. But they carry messages, even when it is not broadcasting “news” or trying consciously to educate. The messages of the media are implicit but powerful. They are messages of consuming, messages of self-realization through consumption, and messages of hedonism, fun, leisure, buying, and enjoying. These are the messages of the interminable and incessant commercials that punctuate almost every program, but they are also the messages of the medium itself. People have a right not to be bored, at least not in their leisure time. Nobody has to, or should,

46. See THORSTEIN VEBLEN, THEORY OF THE LEISURE CLASS (1899).
delay gratification. Television glorifies gratification. Even the television evangelists promise cures, jobs, and money. Evangelists hawk spirituality as if it was a product that cures acne or gives you sex appeal. Television exalts and celebrates money, wealth, fame, and celebrity. The most admired people in America today are not political, religious, or business figures. Rather, they are people from the world of entertainment—sports, music, movies, and television. In 1986, a study of teenagers underscored this point. The ten people they most admired were all from the world of sports or entertainment. The only exception (if it was an exception) was President Ronald Reagan.

In fact, entertainment has swallowed up politics. Politics has become a form of entertainment, or, at the very least, has been transformed by the mass media. Politics must be entertaining, vivid, and quick on its feet. Politics must also avoid, at all costs, being boring. Politicians are celebrities, like rock and roll musicians and movie stars. They are judged on the basis of image, charisma, communication skills. Steve Forbes, who spent millions trying to get the Republican party to pay attention to him, was sneered at, and ultimately dismissed, because he seemed so tedious. Vice President Al Gore was said to be a problem as a campaigner because he seemed "wooden." It is perfectly possible that George Washington or Thomas Jefferson were wooden speakers, but it mattered little at that time. Today, the message is submerged in the image. The President of the United States, in Neal Gabler’s mordant phrase, is "entertainer-in-chief."

The “judge shows” are part of the triumph of lexitainment, in an obvious way. They open a window to what purports to be a civil process. Of course, trials have always been “public” in the United States. Trials do not take place in secret, and anyone could always wander into the courtroom and take a seat. The television cameras open the doors to millions of people. Justice becomes something that we can, and ought, to see. And it has to be entertaining.

As we said, there is no such thing as pure entertainment. Entertainment always carries some sort of a message, though the message is usually not explicit. The “judge shows” present a picture of the legal system as a kind of people’s court, a place of justice for the ordinary person, where the citizen can get quick, decisive answers. Justice here

48. And of course, since television time is very expensive, the role of money in political campaigns has grown enormously.
is raw, naked, and basic, with none of the excrescenses of due process, technicalities, and the games lawyers play. Justice here has an obvious appeal. It looks like the right way to resolve disputes and settle claims. Justice in these courts is also diverting, exciting, and often quite funny. The shows also allow the rest of us to feel superior to the litigants standing in front of these judges. On the other hand, the problems are everyday problems and workaday disputes and quarrels. There is nothing hard to understand, no jury instructions, in fact no jury. Legal process has been stripped to the barest essentials, and the judge administers a kind of Weberian kadi justice. There is closure: decisions are made on the spot. No waiting, no suspense, no hung juries, no settlements out of court, no delays, and no continuances (except for a short break for commercials, of course).

Who is watching these shows? Demographically, the viewers are the same people who watch television in general. Like “reality” shows in general, the judge shows blur the line between “entertainment” and real life. This is a growing theme in contemporary culture. It was also the theme of a movie, The Truman Show, except that the hapless subject of that movie did not know he was on television. In the new reality shows, people deliberately subject themselves to the all-intrusive eye of a camera. These programs are a logical extension of the trash talk shows. For all the talk about privacy as a value in modern society, these programs could not exist without some people who are willing to throw away every shred of privacy and tell their troubles to an audience of millions. Perhaps these people merely point up the need for privacy protection in an age when the technology of intrusion is so advanced, and some people eagerly embrace this technology. In the same way as only a society truly frightened of liquor and obsessed with it would dream of trying prohibition, only a celebrity society, a society of radical intrusion, would struggle to place a zone of privacy around the personality.

In the judge shows, the real judge is the audience—judge and jury. Judge Judy in a way is only an instrument. Her program would fail, and her decisions would not ring true, if they did not mesh with norms of popular justice. Judge Judy administers popular justice, but with much less dignity and mystery than judges of older societies. In a curious way, the judge shows might be seen as throwbacks to the colonial period, where justice was open and popular. Of course, instead of the

50. See generally, Gabler, supra note 41.
51. The Truman Show (Paramount Pictures 1998).
52. Or, at least, they pretend to tell their troubles to the television audience. Gamson, supra note 45.
town square, we have the great television box with its flickering images. But the style of justice, like its predecessor, is popular, accessible, and (in a way) democratic. At least that is the image that the television shows project. Above all, the judge shows are entertainment. And in the domain of entertainment, anything goes, including lust, deception, stupidity, greed—everything, that is, except the one capital offense: boring the audience.

The judge shows may be a passing fancy, a gaudy float in a passing parade. The shows might be eclipsed at any moment by something else, such as game shows, cop shows, survival shows, quizzes, programs about cats and dogs, or beauty contests. The shows are more significant as indicators of popular culture than they are as indicators of change in the legal order. Judge shows must also stay within certain boundaries. Curiously enough, the legal system is one of the firewalls which limit these programs. Fear of litigation and liability keeps them (relatively) restrained. As one columnist pointed out, the danger of legal trouble is remote in a cartoon or a sitcom. A hundred anvils can fall on Homer Simpson's head and no lawsuit will emerge, but Judge Judy must be careful not to injure, insult, or defame.53

What happens when people's knowledge and ideas of law are filtered through the media, and when the overriding goal of the media is simply to provide entertainment and amuse people enough for them to watch the program?54 This goal, as Peter Arenella has reminded us, trumps all other considerations.55 What pulls in the audience on television is "the kind of entertainment that combines quick gratification . . . emotional excitement, and escapism."56 This biases the presentation in a number of directions. If we put together what we know about popular culture and the media, a number of aspects emerge which ought to trouble us as lawyers (and citizens). The first is how utterly shallow the presentations are on television. All complexities and ambiguities tend to be leached out; they are too boring for the audience to tolerate. At least that is what the people who run the media think. Second, and connected with the first, is an impatience with technicality and procedure. Technicalities are always shown as obstacles to justice. This is particularly serious in criminal matters. Does any movie or television show ever glorify, or even justify, stick-

ing by the rules? No: the hero is a man (almost always a man) who cuts through technicalities and metes out swift, sure, and usually lethal justice. The archetype of such a scenario is Dirty Harry.

Moreover, lexitainment ignores some of the harsher realities of life in the world of criminal justice. As David Papke points out, one would never get a clue from books, movies, and television, that race, class, and similar factors have anything to do with the way the system works.\textsuperscript{57} The media also love to show very violent, awful crimes. They downplay the dominance of property crimes, and this "groundlessly fuels viewers' perceptions that threats to them and their safety are growing."\textsuperscript{58}

The bias against "technicality" also appears in the "judge shows." These shows disregard anything strictly legal in civil cases. The litigants are more legalistic than the judges. The litigants are always reaching into their pockets, purses, or briefcases, and dragging out letters, contracts, documents, or other writings, whatever they think might buttress their case. The judge, however, rarely seems impressed with these, or with formal lines of argument. The judge is decisive, blunt, and judgmental. The judge never cites cases, statutes, or the Constitution. Decision comes from the gut.

Moreover, the media highlight and exaggerate the weird and the problematic. This skews the political demands on the legal system, since demands are driven by reactions to incident, scandal, anecdote, horror stories. The media spread slogans like "three strikes and you're out" or "old enough to do the crime, old enough to do the time." Criminal policy is made by Polly Klaas and Willie Horton; tort policy is made by the hot coffee at McDonald's, and various other urban legends.\textsuperscript{59} To be more precise, these incidents play into the hands of interests who use them to enlist public support for their very instrumental goals. No matter how much we deplore this, it has a certain feeling of inevitability.

The "judge shows" may be only a passing fancy but "reality" seems to be riding high on television these days and "reality" includes a heavy dose of the criminal justice system. Lexitainment, in general, is certainly here to stay. So is the show trial. The influence of lexitain-


\textsuperscript{58} Kenneth D. Tunnell, \textit{Reflections on Crime, Criminals, and Control in Newsmagazine Television Programs, in Popular Culture, Crime, and Justice} 111 (Frankie Y. Bailey & Donna C. Hale eds., 1997).

ment on popular notions of law, and perhaps on law itself, will also last. In fact, this influence is likely to grow. Lexitainment, in the larger sense, does not depend on fashion, but rather on real changes in social organization. As a society, we are unlikely to turn around and head back to where we came from. The world we left behind, if it ever existed, is no longer there.