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Jurisprudence Popularized: Between Law, Literature, and Film[2]

1. Introduction

The introduction of new ideas and methods into any discipline is often met with hesitation and distrust. The academia is naturally conservative: the openness of mind requisite for doing the critical job correctly cannot overweight the pragmatic attachment to "old ways of thought" that have served the discipline successfully for a long time. Such a situation occurs in legal domain, especially in case of legal education. During the last hundred years two novel and important approaches have been introduced: the "literate approach" introduced by law and literature movement (hereinafter: "L&L") in the first half of the 20th century and the "visual approach" that has been gaining attraction recently. Both approaches share certain similarities, for they focus on nondogmatic ways of communicating and depicting law and legal process.

It is argued that novel approaches allow a conservative legal discourse to "catch up" with current ways of storytelling – what is an important point when one sees that teaching law and lecturing *about* law requires building narratives where legal parties and officials serve as heroes, legal institutions as *decorum*, and legal theories as developed interpretive tools.[3] What is contested, however, is not that discussing law requires *some* narrativity, but, rather, whether traditional doctrinal, technocratic, formalistic, and textual methods in law should be supplemented[4] by means developed through systematic study of literature and visual media. As in legal process, in this case the burden of proof of practical merit lies with the proponents of these novel methods: they have to show that their approaches bring some new *quality* into teaching, discussing, and conceptualizing law and legal problems.

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[3] Cf. M. Dubowska, A. Dyrda, *Legal Narrative and Legal Disagreement*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2018/1, pp. 47–59; P. Skuczyński, *Narracyjność języka prawniczego w procesie tworzenia prawa* [Eng. Narrativity of Legal Language in Law-Making Processes], "Archiwum Filozofii Prawa i Filozofii Społecznej" 2020/1, p. 66–83.

[4] Obviously not superseded!

Methods introduced by L&L proved themselves useful, notwithstanding serious doubts in times when they were originally introduced by Benjamin N. Cardozo, around a century ago. Today, an attempt to spouse law with visual media (including film) might seem to be a natural next step. However, the justification of teaching law *via* discursive methods related to visual media cannot rely simply on certain similarities with other nonorthodox, yet accepted, methods and approaches, like L&L. The case for the new approach has to be argued thoroughly and it must be won on its own merits.

In the first part of this paper I will briefly discuss the apparent similarities between the "literate approach" and the aspiring "visual (media) approach", whereas in the second part I will scrutinize arguments for utility of the second approach. It seems that even though both approaches are founded on similar humanistic considerations, they are nonetheless separate positions; thus the need to justify the application of the second approach independently of the first one. As an important task, in due course, I consider debunking the arguments concerning the accusations of "law and film" movement of being a threat to law and its legitimacy (as related to the "law going pop" argument by Richard K. Sherwin; see section 4).

2. The literate approach

Law is a matter of communication. People talk and write about it; the stories they tell are usually based on certain institutional elements or contexts. Narrativity appears where the purely mimetic (representative) tools of communication do not suffice. A narrative (story) is an account of what happened to particular actors and as such it is a "basic human strategy for coming into terms with time, process, and change".[5] This strategy is essentially embraced by literature.[6] The above observation is a cornerstone of L&L. When Cardozo introduced L&L his aim was to emphasize to role of literary style in judicial opinions and the importance of structuring an argument.[7] As Peter Brooks, a leading author within the L&L movement, noted: "narrative is one of the principal ways we organize our experience of the world – a part of our cognitive tool kit that was long neglected by psychologists and philosophers".[8] Narratologists often stress that narrative also encompasses the temporality, change, and causality, and focus on an experiencing subject: a "story, or, better, a narrative (because 'story' suggests a short narrative), is a true or fictional account of a sequence of events unfolding in time, the events being invented, selected, emphasized, or arranged in such a way as to explain, inform, or edify".[9]

Narration obviously plays an important role in legal discourse and is visible in attempts to communicate, justify or explain law. Legal documents and judgments contain narrative elements; legal actions do as well (i.a. orally delivered declarations of will, conventional actions, performative actions). But narratives not merely constitute forms (means) of legal communication. Narratives are also the subject of law, especially in civil or criminal proceedings where stories about what happened (and to whom) are judged in juristic terms. As Greta Olson notices:

[5] D. Herman, *The Cambridge Companion to Narrative*, Cambridge 2007, p. 3.

[6] It is also characteristic of history, but for this paper's purposes I take history to be a special branch of literature.

[7] B.N. Cardozo, *Law and Literature*, in: M.E. Hall (ed.), *Selected Writings Of Benjamin Nathan Cardozo*, New York 1947, pp. 339–356.

[8] Private communication quoted in William Safire, *On Language: Narrative*, "The New York Times Magazine" 2004/5, https://www.nytimes.com/2004/12/05/magazine/narrative.html?smid=url-share, accessed on: 13 February 2021.

[9] R. Posner, *Legal Narratology*, "University of Chicago Law Review" 1997/2, pp. 737–738.

> Applying an abstract legal norm to a particular case in the civil law tradition requires that an interpretive process is undertaken that involves recourse to methods of narrative analysis such as differentiating between the frame of the telling, the telling, and the told, naming, functions of narrative structures, and identifying types of tellers.[10]

She also notices that the act of narrating is central to legal proceedings: "the facts of a case are related with varying rhetorical intensity depending on the type of trial and legal system and the stage of the trial in which the narrational act occurs".[11]

One, however, should not equate law *with* literature too hastily. Storytelling in any discipline – law, history, philosophy or even medicine – may and probably should be influenced by literary tools that influence the literary style, but it does not automatically make the discipline a literary one. In legal context "despite a superficial resemblance to literary interpretation, adjudication is not primarily an interpretive act", but rather an imperative act – and this very difference defines the nature of adjudication and contributes to a distinguished status of "legal storytelling" in a long run.[12] Law is not only literature and cannot be reduced to it. Even though "legal interpretation takes place in a field of pain and death",[13] sensations (negative ones like pain, torment or death, or positive ones like care or trust) play a role not merely retrospectively, as historical facts, but also here and now, as well as prospectively (for the future). It is these spheres of sensation and emotion of the living persons, struggling with the institutional reality, which literary means help to saturate and expose. The fundamental question today is to what extent modern means of communication typical of visual media might join L&L in this expository task. At birth of the movement and continued in all its incarnations, law and literature's aim has been to bring back humanism and the human spirit that is so vividly captured in literature to the formality and technocracy of law looming large in legal academia, to go back to its roots of great rhetorical speeches. In a way, L&L studies have a peculiar epistemological ambition: they aspire to widen up the *perception* and *sensitivity* of lawyers, officials and laymen dealing with law. This ambition is genetically inscribed into the identity of the movement, for Cardozo himself understood literature as a means of opening students up to humanities.

By means of the Wittgensteinian idea of "forms of life", James B. White argues for a deeply humanistic study of law as a multi-dimensional study of our law-related linguistic performances in institutional, political, and moral contexts:

> Forms of language are forms of life. This means that our performances with language are ethical and political performances, whether we know it or not, and that they can be analysed as such. Thus to speak and act "like a lawyer", as one learns to do in law school, is to commit oneself to a certain community and discourse, to enact a view of language and the world that entails an ethics and politics of its own, even to give oneself a certain character, and these things can be studied and judged.[14]

And elsewhere he expounds his views about law, saying that it is far more than just a set of rules or policies, but

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[10] G. Olson, *Narration and Narrative in Legal Discourse*, in: P. Hühn (ed.), *Living Handbook of Narratology*, Hamburg 2014, http://www.lhn.uni-hamburg.de/article/narration-and-narrative-legal-discourse, accessed on: 13 February 2021.

[11] G. Olson, *Narration…*

[12] R.L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, "Tennessee Law Review" 1987/54, p. 207.

[13] R.M. Cover, *Violence and the Word*, "Yale Law Journal" 1986/95, p. 1601.

[14] J.B. White, *Justice as Translation. An Essay in Cultural and Legal Criticism*, Chicago 1990, p. 215.

> that it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations- what might also be called a culture (…) and the law in another sense, as the profession we teach and learn and practice, is a kind of cultural competence (…).[15]

This view of law is of the utmost consequence for legal scholarship. Put in this manner, it is apparent that this set of "habits of mind and expectations" is an evolving matter and needs to be re-evaluated according to the spirit of times in which it is used. The "progressivism" in legal scholarship, which one may relate to a pragmatist and realist understanding of law,[16] is an important characteristic of the humanistic approach to law associated with the L&L movement. For one should remember that from this perspective the evolution of our ways of expression influences the way we perceive and imagine the legal world. The development of literary tools increased the understanding and contributed to better construing of social and institutional (including legal) narratives in the 20th century.

Although the proliferation of humanistic discursive methods that L&L brought may be seen as a virtue, many see it as a vice. Indeed, among many controversies that L&L sparked over the years, one of the most common and overall complaints involve its explicit interdisciplinarity. The complaint may be generalized, for the case against L&L is just an instance of the common argument about the pitfalls of any interdisciplinarity. In a way these pitfalls are results of embracing a humanistic perspective, so praised by legal scholars who referred to literature in order to escape from legal formalities and limits, narrowly (hermetically) imposed on what and in *what way* can or cannot be said in any *legal context*.[17] Even a dangerous path seems worth taking, however, if it leads to light and illumination.

It seems thus that L&L, once upon a time a true shock for traditional scholars and a small revolution in legal scholarship, nowadays holds a place in quite an academic limbo. On the one hand, it is regarded as quite an established and mundane topic, discussed over the years by numerous scholars, subject of hundreds of conferences; as such it has been discussed and criticized from what seems every possible angle. On the other hand, in some academic circles – mostly European, as the L&L movement has primarily been developed and criticized in North America – it seems like it has never been born and is treated by older generation of legal philosophers as a novelty, approached with amusement.[18] Still, it is a topic that cannot be ignored, even if now it is forcefully criticized from the point of its validity, as it faces accusations of being a thing of the past and essentially a theoretical cluster of superficial problems perpetrated by bored academics.[19] L&L has secured a place in academic legal discourse. Can we say the same about "law and film" or "law and visual media"?

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[15] J.B. White, *The Legal Education. Abridged Edition*, Chicago, 1985, p. xiii.

[16] Cf. A. Dyrda, *Realizm prawniczy* [Eng. *Legal Realism*], in: B. Dziobkowski, J. Hołówka (eds.), *Filozofia prawa* [Eng. *Philosophy of Law*], Warszawa 2020, pp. 514–532.

[17] By legal context I mean not merely institutional contexts, but any context in which law is invoked. I thus not limit this thesis to a narrow thesis discussed in theoretical literature according to which there are certain limits as to *what can be said* as a matter *of a legal* argument.

[18] In order to rectify this, there is a movement for "Europeanization of law and literature," initiated by Prof. Greta Olson and Prof. Jeanne Gaakeer.

[19] Cf. J.S. Peters, *Law, Literature and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, "Publications of the Modern Language Association (PMLA)" 2005/2, pp. 442–453; A. Schur, *Flourishing or Perishing? Law and Literature Airbrushed*, "Law & Literature" 2014/1, pp. 105–116.

3. Law and visual media

It seems that L&L was a starting point for the expansion of "law and …" movements, not only in culture, but also economics or psychology. The L&L movement has evolved from its simple original conception into a host of different approaches and lanes, many of which have evolved not only with the passage of time itself, but mostly due to technological advances. As indicated above, some scholars choose to treat "literature" as a broader term and apply it to different cultural artefacts under the umbrella of "humanities". Overall though, what once was a rather narrow domain of law and literature, now, under the wide umbrella of law and humanities, can include law and film, or more broadly – law and visual media.

The inclusion of the new current under the aegis of the L&L label might be justified to a certain extent. Just as in the case of development of L&L, the scholarship of law and film has grown into similar ventures. The first branch that comes to mind would be "law in film", which analyzes the portrayal of law in general in movies and television series – the field as rich with publications as cinema and TV are with legal portrayals. Scholars working within this branch consider if and how the portrayals correspond to reality and discuss the varying narratives and cultural reasons underpinning the choices made by the artists.

The sort of analyses described above can easily segue into another field – of what Jessica Silbey calls "film-as-law" approach, where the focus is not on *what* the films tell the audience, but *how* they do it.[20] Films are a vital part of legal culture and their form is symptomatic of their agency – it is necessary to bear in mind that each art form is created from a subjective standpoint and positions its viewer in a calculated way. Possible functions of "legal" films are numerous. To name a few:

1) Law and legal institutions may serve only as a contextual means allowing one to tell just another story – for example, the film might use the structure and climaxes of a legal process, while filmmakers rely on the associated moral values and emotional responses of the participants.
2) A film may aim to tell us something about law in general (as a significant type of social institution) by utilizing a fictional story; in this case legal problems and dilemmas might also serve as an *implicit* commentary about humanity, morality of institutions, as well as about the conditions of the society at a certain moment in time.[21]
3) A film may expose a legal case based on a true story; here the aim would be primarily to educate, illustrate or undermine the dominant cultural narratives embedded in law; of course, that genre is highly prone to oversimplification or modification in order to provide a dramatic (or even shocking) narrative.

From only those three examples we can already establish a number of pitfalls awaiting portrayals of law in film. The chosen standpoint, the agency of the creator, the way that the narrative is built – all are parts of the lasting effect on legal culture that the film perpetuates and therefore should be analysed accordingly.

It all might suggest that "law and visual media/film/…" is just a further development of certain strands of L&L, though this is by no means certain. The means by which L&L

[20] J. Silbey, *Images in/of Law*, "New York Law School Law Review" 2013/1, p. 177.
[21] A notable example here is: R. Mulligan (dir.), *To Kill a Mockingbird* (film), Universal Pictures, United States 1962.

operates are still literary in the sense that they focus on *written word*, whereas law and visual media focuses primarily on those ways of building narratives that where traditionally more closely associated with art and theatre. This in not just a minor epistemological difference, for we both imagine and perceive literary and artistic ways of storytelling differently. One does not need to know any particular language to understand visual depictions: that is why great art seems to be universally approachable; and that is why the first silent films are widely understood. Obviously, one needs to know *certain* canons and codes to *interpret* it *properly* (by which I mean: according to the creators' intents or its context of origin), but this does not require any particular, stronger linguistic and theoretical commitment.

It is indisputable that we live in a world of ubiquitous images, where a full conversation can be carried with pictures only, where our reactions are often best captured by memes; in this very world even judges insert pictures into their judgments in order to emphasize their point.[22] If only for this reason, legal education should go with the times in which it is taught and empower students with the visual codes necessary to thrive in a image-dominated legal world. To be in possession of these visual codes is not only to be aware of their existence, but also to understand their construction. It is important to understand how they came to be, and what they are indicative of in terms of legal culture and the public's expectations towards lawyers (officials etc.). Popular culture portrayals of law and lawyers are usually simplified, but no more than such portrayals of medicine or other professions that require a specific education.

As is the case with every newish movement within academia, there comes a wave of excitement over the new and unprecedented. Of course, it is absolutely necessary to analyse film's role in the public's perception of law, as it is vital to analyse any relationship between law and various elements of culture within which legal institutions exist. The question is how big of a part should law and film play in legal education. Is there anything particularly vital in incorporating classes like "courtroom drama" in a young lawyer's education apart from a necessary and welcome break from reading legislation? In what follows I will strive to answer these questions.

4. When law and popular culture mix

One of the aspects of law and visual media is the mixing of two seemingly opposite orders. Law is widely regarded as something of utmost importance, even approaching sacredness, a system of rules regulating us all and provided with a special type of authority.[23] Visual media and specifically popular culture are perceived as something rather different – a frivolous domain, a sphere of entertainment, deprived of any substance. For this reason, many people, laymen and lawyers alike, treat the marriage of law and popular culture as demeaning to law.

The conflict between the assumed majestic authority of law as traditionally taught and the perceived trivial character of any study on law as depicted in popular culture

[22] As did Judge Posner in *Gonzales-Servin v. Ford Motor Company*, describing the appellant's action as "an ostrich-like tactic", proceeding to show two images depicting an ostrich and a man, both burying their heads in the sand. Cf. P. Goodrich, *Pictures as Precedents: The Visual Turn and the Status of Figures in Judgments*, in: E. Anker, B. Meyler (eds.), *New Directions in Law and Literature*, Oxford 2017, p. 177.

[23] The claim that law has or claims authority is commonplace amongst legal philosophers, although they obviously differ in explaining why it is so. For my purposes it suffices to assume that law possesses *some sort* of authority, which relates to the form of *normative guidance* that law, as an instrument of social control, is supposed to provide.

serves as a major and general argument against the "law and film" movement. One needs to deal with it first, before indulging into any more detailed justification of the enterprise.

In his influential book, Richard Sherwin discusses what happens when law goes pop.[24] Though written 20 years ago, Sherwin's book provides a good example of a well--meant warning of the effect that popular culture may have on law, which warning is commonly expressed to this day. But just as most of such stances, it falls into oversimplification, perpetuating reductive divisions (pop-culture – bad, law – pure and right), without recognizing the complexity of both of those spheres and their similarities in the construction of narrative and the power of social influence. The book has incited a great uproar in the academia and was the subject of numerous reviews. The most notable one, in my opinion, is Silbey's *What We Do When We Do Law and Popular Culture*,[25] which transcends the criteria of a typical review. It is a thorough and methodological study on not only what Sherwin says, but mostly on what he fails to prove. My views on the matter correspond largely with Silbey's, as presented below.

Richard Sherwin builds his argument on the assumption of popular culture invading law and the possible catastrophic repercussions. This already places the argument on weak foundations, as law and popular culture were always married: the involvement of the public (or rather a mob) was an inherent part of the legal sphere, most visible in such events as trials or executions. A fact that Sherwin himself emphasizes at the very beginning of his book: "No, the intermingling of law and fiction, like the interpretation of law and popular culture generally, is hardly new".[26] But to Sherwin, "lawyers are storytellers, and the stories they tell reflect changes in the culture around them".[27] And there it is – the culprit that Sherwin warns about – the current culture, that of visual media dominating the public sphere. Even though Sherwin sets out on an interesting quest for exploring the possible ramifications of visual popular culture[28] dominating law, he makes two cardinal mistakes that invalidate his entire argument. Firstly, he positions law as the holder of the truth and principle, whereas popular culture as the epitome of danger. That pushes him into the second wrongful assumption, namely falling into the dichotomy of high and low culture, which is not only unapplicable in this case, but also reductive and elitist.[29] Below I would like to present three dominant thoughts in Sherwin's reasoning, while counterarguing why they fail to answer the questions posed.

Firstly, Sherwin claims that popular culture is compromising for law's legitimacy. He diagnoses a "jurisprudence of appearances",[30] mostly apparent in so-called "notorious trials". Jurisprudence of appearances is what happens in trials where a community is largely involved, be it because of a pop-cultural connection or an especially salacious story, turning it into a social event rather than legal process. This applies mostly to criminal cases, which by their very nature provoke the most extreme emotions. In Sherwin's view, such popular following is provoked (it only remains unclear by whom) in order to ensure a deserved outcome of the case, which stands against the principles of law.

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[24] R. Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture*, Chicago 2000.

[25] J. Silbey, *What We Do When We Do Law and Popular Culture*, "Law & Social Inquiry" 2002/1, pp. 139–168.

[26] R. Sherwin, *When Law*…, p. 4.

[27] R. Sherwin, *When Law*…, p. 4.

[28] It should be noted that under this term Sherwin considers film and TV together as "media", even though the agency and structure of a film/series as an art form and media as news are differ greatly and should be analysed separately.

[29] Cf. J. Silbey, *What We Do*…, p. 151.

[30] Richard Sherwin explains it as "what we see when law's need for legitimation and the media converge on the same set of images", R. Sherwin, *When Law*…, p. 226. Cf. J. Silbey, *What We Do*…, p. 140.

The incorrectness of this argument lies in the very history of criminal trials (because these are the ones Sherwin focuses on). The notoriety of salacious trials is not a novelty – in fact, it is a tradition as old as the trial itself. Blaming pop-culture for lawyers inciting popular passions grossly ignores the fact that lawyers themselves construct a narrative with which they aim to achieve a desired outcome for their client.

Secondly, because of these portrayals of law in media, in Sherwin's opinion, jurors expect a film-like presence from trial lawyers, who in turn modify their professional behaviour in order to meet the jurors' expectations. Apparently, the ubiquity of over-simplified portrayals of law in popular culture causes an "effect of suppressing the capacity for critical reflection".[31] Considering how limited the scope of this assumption (criminal trials) is and the fact that it is not backed by any juror research (or at least no research is mentioned), the argument falls flat on the preface. However, even granting a charitable interpretation, assuming that a juror is unable to tell the difference between movies and reality seems exaggerated. We can argue how the jurors' expectations may shift due to pop-cultural portrayals; we can analyse how it can influence the jurors' own ability to reconstruct a trial narrative based on the narratives presented by the opposing sides.[32] I would argue that being exposed to many different narratives and modes of their construction, even via fictional lawyers' actions, can and does broaden the scope of comprehension on how one can manipulate facts in order to fit a desired narrative and make a juror more wary of such techniques. Certainly, from this we should not conclude that law and pop-culture have become so indistinguishable that a layman is prone treat a criminal trial like a TV show.[33]

Those two presumptions lead Sherwin to a third point. He stands in defence of truth and integrity, supposedly inhabited by law. He claims that the result of "law going pop" is a growing skepticism about law, as demonstrated in legal films,[34] as a consequence of which law loses its integrity.[35] I cannot help but ask when exactly were people not skeptical about law, especially law enforcement? Also, when was the last time integrity was a virtue associated with law? Richard Sherwin discusses at length how the point of the trial is to reconstruct truth and reality, without realizing how the simple "reconstruction" already presupposes constructing a narrative. What is more, he alleges that the "postmodern media" actually eliminate the need for reality.[36] It seems to me that if we position skepticism towards law as a result of law going pop, it can only be categorized as a good thing. If law going pop meant law becoming more apparent in popular culture and visual media, that would also mean legal cases being more transparent and accessible. Thanks to them the public becomes more informed and aware of their

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[31] R. Sherwin, *When Law*…, p. 242.

[32] Especially in light of juror research, such as: "Only 11% of American respondents ranked court programmes like *Judge Judy* as very important; 9% said television dramas were very important; 7% said that movies or videos were very important. These three sources were the least helpful sources on the entire list", M. Asimow, S. Greenfield, S. Machura, G. Osborn, P. Robson, R. Sockloskie, C. Sharp, G. Jorge, *Perceptions of Lawyers – A Transnational Study of Student Views on the Image of Law and Lawyers*, "International Journal of the Legal Profession" 2005/12, p. 430, fn. 18.

[33] For a more in-depth analysis of the influence of pop-culture on jurors: K. Podlas, *Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry*, "American Business Law Journal" 2001/1, pp. 1–24; S.A Cole, R. Dioso-Villa, *Investigating the "CSI Effect" Effect: Media and Litigation Crisis in Criminal Law*, "Stanford Law Review" 2009/6, pp. 1335–1374; T.R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, "The Yale Law Journal" 2006/5, pp. 1050–1085; K. Podlas, *The "CSI Effect": Exposing the Media Myth*, "Fordham Intellectual Property, Media and Entertainment Law Journal" 2005/2, pp. 429–465.

[34] Examples used by R. Sherwin are i.a. *A Thin Blue Line* and *Cape Fear*.

[35] Cf. J. Silbey, *What We Do*…, pp. 141–142, citing R. Sherwin, *When Law Goes*…, p. 182.

[36] R. Sherwin, *When Law*…, p. 128.

rights and how they are stripped away. People learn how to act within the law and how to argue for law's integrity, which is not a presupposed virtue of law, but rather one that has to be fiercely defended.

A separate question concerns what constitutes the "real" in a trial? How can we recognize the truth among various narratives constructed at different stages of the legal process?[37] How is it independent from any narrative and their reconstructions? The answer is simple: it is not. Reality and authenticity, free of form and construction, are not terms to be associated with a trial, especially in opposition to the supposed corruptive fiction of popular culture.

The lesson we learn from reading Sherwin's book is critical. We must be cautious of treating both pop-culture and law superficially and positioning them as the opposing sides of some fight for truth and integrity. Both law and film have their own narratives. They construct them with specific tools, referring to the world around us. As both have the power to construct narratives and deliver them to the public, both are capable of influencing and effecting social and political change. Their results may occur in different spheres and have different trajectories, but nevertheless, "the way that they both legitimate their force is through rhetorical persuasion. Both can liberate or oppress".[38] By being condescending towards popular culture narratives, we are ignoring their ability to empower. Because they have a wider audience than institutional legal narratives, they can reach citizens otherwise unaware of their public potential and engage them in matters of social justice and convince them to stand up against oppression.[39] This aspect of popular culture is especially relevant nowadays, when social media and short films are the primary means of defiance and organization of social change. What often becomes forgotten is that apart from cultural artefacts creating meaning themselves, it is the audiences who generate their significance and are largely responsible for the effect they have on society. The other side of the same coin is being worried, like Sherwin, that popular culture influences on law result in "image-based manipulation of irrational desire, prejudice, and popular passions".[40] This concern has to be kept in mind, but certainly not in a dogmatic and restricting way.

The study of popcultural legal discourse, including the analysis of how it is constructed, is not merely important from the philosophic and sociological point of view. It has also more mundane, practical merits for practicing lawyers. It is vital to one's effective legal practice and communicating clearly with a client, understanding his expectations coming from popcultural portrayals of anything legal. Even more importantly, what Sherwin actually emphasizes and what deserves attention, we should not accept any given portrayal of law as it is, but rather understand how it came to be and what stands behind its construction. What Sherwin omits in his approach, though, is the necessary analysis of the concept-terms used and the overall discourse.[41] Failing to demarcate even the simplest of terms like "law" or "culture", whose understanding may be intuitive, but which cover a complex array of meanings, make his argument speculative instead of theoretical and only add to the confusion of mixing law with

[37] Cf. J. Silbey, *What We Do*…, pp. 153, 155.

[38] J. Silbey, *American Trial Films and the Popular Culture of Law*, "Northeastern Public Law and Theory Faculty Research Papers Series" 2018/321, p. 12.

[39] Cf. M.K. Milbrandt, *Understanding the Role of Art in Social Movements and Transformation*, "Journal of Art for Life" 2010/1, pp. 7–18.

[40] R. Sherwin, *When Law*…, p. 7.

[41] Cf. J. Silbey, *What We Do*…, p. 145.

popular culture. Clearly, he bases his view on very specific cases, like notorious criminal cases, juries in criminal trials, and certain movies and TV shows, but at the same time he draws general conclusions about the relationship of law and media from these isolated cases.[42] Richard Sherwin seems more preoccupied with the apparent effects of post-modernist thinking about law than with treating popular culture artifacts with seriousness they deserve.

Having said that, Sherwin poses necessary questions that, in my opinion, should accompany every law student and future lawyer in studying any legal case, either real or fictional (in this situation, as depicted by film or TV series). Among them, the most noteworthy ones are: (1) How is the reality we see being constructed?;[43] (2) What reality will my judgment call into being?,[44] and (3) How to create a just representation of the human actions that lie at the heart of the legal controversy at issue?[45] These well-positioned questions are a helpful starting point for developing a comprehensive instruction of how to approach portrayals of law in visual media and how to navigate law and popular culture.

Sherwin's book, even though written in 2000, captures a sentiment that is still widespread today, according to which popular culture is positioned as a possible villain compared to the alleged purity of law. Richard Sherwin himself, however, has since refined his view from *When Law Goes Pop*…, for he now claims:

> New visual media, new digital communication technologies, and new social networks together with the diverse codes of visual meaning making that they entail require new forms of critical awareness. We need to retool the mind, the better to attain the visual literacy that is required of us in the digital age, so that we may judge well that which calls out for judgment.[46]

Possibly influenced with the proliferation of the forms of visual communication, in the above-quoted publication Sherwin focuses more on what is so sorely missing from *When Law Goes Pop*…, namely on the need to restructure our cultural codes in order to apply our legal codes, or as has been earlier described by White, "the language of law":

> Facts have a tendency to carry abstract legal codes into the realm of real human drama. Facts spawn stories. And stories are not easily bred in captivity, much less the lab. They are a part of our everyday lives, and they permeate the popular culture in which we live. In the stories that we hear and tell, popular culture speaks. Our sense of self is distributed by the stories that circulate around and through us (…). Those very stories cross over into law whenever human conflicts crank up the law's machinery of dispute resolution. Law without storytelling is like having rules without human conflict.[47]

5. Conclusion

With visuality dominating every sphere of public and private life, some scholars pose the question: is L&L on its way out? Peter Goodrich suggests that considering how the

[42] Cf. J. Silbey, *What We Do*…, p. 151.
[43] R. Sherwin, *When Law*…, p. 25.
[44] R. Sherwin, *When Law*…, p. 237.
[45] R. Sherwin, *When Law*…, p. 213.
[46] R. Sherwin, *Introduction: Law, Culture and Visual Studies*, in: A. Wagner, R. Sherwin (eds.), *Law, Culture and Visual Studies*, Dordrecht 2014, p. xxxvi.
[47] R. Sherwin, *Introduction*…, p. xxxiv (footnote omitted).

movement is constantly under attack for its alleged interdisciplinarity, for being burned out, no longer offering anything of substance, maybe jurists should truly "do literature, politics or cultural criticism on their own time".[48] Another argument against the movement is that of it being too narrow a discipline – being limited to literature only, as opposed to other more timely endeavours such as film and media – for it to have any kind of academic future. Notions like that grossly ignore the very essence of L&L. As Goodrich points out,

> law and literature must now be viewed as an illusion. (…) Literature is, after all and amongst other things, the study of illusion, of fiction and play, and it makes sense that in addressing these imaginary bases of society, the invention of social institutions and the fictions that support them, the literary and the legal variously take on the illusions, the figures of social theater they describe.[49]

Law and film, just as L&L, should be a vital part of legal scholarship. In order for it to be successful, though, it has to be treated as more than just a distraction for bored academics and overworked students. It cannot equal a superficial discussion on how a legal process or a lawyer is portrayed in comparison to "the real thing". As is with other subjects, it should be met with exhaustive research of the surrounding legal culture and the narratives build within it, along with fundamental moral and social problems around which these narratives revolve. As our culture is predominantly visual, legal education should be adjusted accordingly. When law goes pop it *literally* gains *popularity* and thus credibility, which can be followed by authority.

One of the effects of the distortion of reality perpetrated by the mass media and, by extension, by lawyers, which Sherwin warns us about, is compromising "the discrete virtues of ordinary common sense".[50] As he notes: "Put simply, members of the public cannot adequately fulfill their legal and political decision-making responsibilities, either as jurors or as voters, under the conditions of sustained communicative distortion. Prolonged public skepticism in response to these conditions risks law's delegitimation".[51] It seems that Sherwin's understanding of the phrase "law going pop" relies on literate meaning of "pop" – bursting, destruction, annihilation of law's institutions, making way for a "populist jurisprudence". It's hard to disregard such a linguistic intuition, especially considering today's culture of fake news and populism spreading throughout the world. Still, even though in the light of Sherwin's theory I am probably a skeptical post-modernist and remain radically disenchanted (to use Sherwin's terminology), in this case my attitude remains positive. When I hear of public skepticism leading to law's delegitimation, my mind embarks on dismantling archaic institutions, their democratization and making legal process more transparent and available to all. The "pop" I hear is one of breaking down the barriers which render law unavailable for so many. This may sound overly ideological, but certainly no more than Sherwin's quest to defend the virtues of truth and integrity, which have been absent from the public image of law for a long time.

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[48] P. Goodrich, *Screening Law*, "Law and Literature" 2009/1, p. 1.
[49] P. Goodrich, *Screening*…, p. 2.
[50] R. Sherwin, *When Law*…, p. 244.
[51] R. Sherwin, *When Law*…, p. 244.

Jurisprudence Popularized: Between Law, Literature, and Film

Abstract: In this paper I discuss the apparent similarities between the "literate approach" and the aspiring "visual media approach". Then, I scrutinize arguments for utility of the second approach. It seems that even though both approaches are founded on similar humanistic considerations, they are nonetheless separate positions; thus the need to justify the application of the second approach independently of the first. As an important task in due course I consider debunking the arguments in support of accusations of the "law and film" movement of being a threat to law and its legitimacy (as related to the "law going pop" argument by Richard K. Sherwin).

Keywords: law and literature, law and film, law and popular culture, narrative, jurisprudence

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