

JASON BAINBRIDGE

Swinburne University of Technology

**Sex, violence and the law:
new approaches to popular visual media**

ABSTRACT

Taking Thomas McLaughlin's idea of vernacular theory as its starting point, this paper explores the evolution of what can be termed vernacular jurisprudence, popular theories of law as presented in visual media. From case studies of Boston Legal, Dexter and 24, to the increasingly problematic portrayal of law and lawyering in legal television dramas more generally, this paper outlines how popular visual media both challenge and are challenging for the discipline of law and thus serves to contextualize the papers in this session.

KEYWORDS

Litigation... It's about more than knowledge of the law... it's about confidence... strategy...cheap theatrics... (Alan Shaw, Boston Legal, 7/8/06).

INTRODUCTION

Television has long been filled with images of law and lawyering, courts and criminals. The earliest law series were 'real law' programs that went little further than exploring the ritual of law, remaining partly educative and partly reassuring that yes, the legal system is capable of providing an answer for whatever social issues plague us. These are series like America's *Famous Jury Trials* in the fifties and Australia's own *Consider Your Verdict* in 1961, the latter of which also holds the distinction of being Australia's first, hour-long drama series. Their descendants are programs like *The People's Court* and *Judge Judy* that dispense with law and lawyers in favour of 'common-sense' judgments offered by appropriately sarcastic judges, together with the live coverage of trials that feature on the nightly news or a network such as *Court TV*.

As opposed to these types of programming, in this paper I will be focussing on scripted legal dramas. As these media texts are more prevalent and accessible to the general public than law reports or even visiting the courtroom for themselves, it is my contention that American law shows also become a source of popular knowledge about law (Meyrowitz 1985, Denvir 1996, Laster 2000), contributing to the global circulation of ideas, information and ideologies around law and lawyering, even in countries that have quite different legal systems. I want to think about the possibility of such television series themselves operating as sources of theory, conceptually similar to what Thomas McLaughlin refers to as ‘vernacular theory’ in his text *Street Smarts and Critical Theory: Listening to the Vernacular* (1996).

McLaughlin’s goal in this book is to ‘demonstrate the existence of theoretical work outside the academic disciplines of theory’ (McLaughlin 1996: 150). In its suggestion that all human beings engage in some level of intellectual work on areas the academy has traditionally reserved for itself, (i.e. the ability to theorize about larger cultural issues and institutions) it suggests that not only can vernacular texts – like popular visual media texts - reflect and articulate complex ideas, but that they can also offer up alternative theories and challenges to more culturally legitimate forms.

Here, ‘vernacular’ refers to ordinary language, ‘lacking’ what McLaughlin terms ‘the genteel cultural style of the academy’ (McLaughlin 1996: 29). This idea of the vernacular is frequently invoked in anthropology and literary studies, for example, as reflecting and contributing to ‘the social constructs of class, gender and professional and national identity’ (McLaughlin 1996: 29). ‘Theory’ is the more contentious word and here can be defined as a critical reflection on larger cultural issues, with the impulse to theorise in the vernacular coming out of what McLaughlin terms ‘a dissatisfaction with conventional thinking and authorised premises’ (McLaughlin 1996: 160). Such a definition acknowledges that ‘theory’ itself is not an evaluative term but rather, that the relative strength of a theory will depend on the methodology employed and thus reflective of McLaughlin’s aim - to demonstrate how theory is a widespread, everyday practice rather than something reserved by the academy.

Vernacular theory then refers to ‘the practices of those who lack cultural power... They do not make use of the language or analytical strategies of academic theory (rather) they devise a language and strategy appropriate to their own concerns. And they arise out of intensely local issues that lead to fundamental theoretical questions’ (McLaughlin 1996: 6). In the context of television, these ‘intensely local issues’ are the narratives of weekly television series like *Law & Order*, where a case-of-the-week may be used to comment on the erosion of civil issues. By way of comparison, in a non-legal series such as *Desperate Housewives* for

example, the ongoing dramas of the residents of Wisteria Lane may be used to comment on the larger struggle of women balancing work and home demands.

This concept of vernacular theory is therefore radical because it suggests, first, that theory exists outside the academy that it is widespread and being practiced daily by ‘ordinary’ people and that popular cultural texts can do interesting intellectual work on their own terms - not as symptoms of either capitalism or a controlling subconscious. Indeed, McLaughlin acknowledges this when he states that he has ‘always been sceptical of the academy’s easy conflation of genteel cultural style and intellectual skills. Not all sharp minds get to college, and not all theorists are in the academy’ (McLaughlin 1996: 29). Vernacular theory then is predicated on the idea that ‘individuals who *do not* come out of a tradition of philosophical critique are capable of raising questions about dominant cultural assumptions’ (McLaughlin 1996: 29) – that non-academics are capable of theorising and engaging with larger bodies of theory.

By locating vernacular theory in the context of popular media, we can start to understand the writers, directors and producers of popular media like film and television as vernacular theorists. This is especially apparent in the writer/producer figure (also termed the ‘show runner’) on American television series. Popular media therefore becomes a way of connecting these theorists to the public sphere, allowing them to disseminate their theories across nations and countries. Moving outside the academy, popular media forms like television can themselves become sources of theory, sites where alternative vernacular theories are constantly being tested and explored. This makes the media sphere a kind of theoretical patria dish and allows us, as viewers, immediate engagement with alternative theories across a range of topics.

But beyond simply providing a popular knowledge of issues and institutions and disciplines its audience may otherwise not have access to, television can also more critically engage with and problematize larger disciplines. I would therefore argue that television representations of law produce an entirely new form of jurisprudence, *vernacular jurisprudence* - popular theories of law as developed by the producers of popular media.

Using popular media to talk about law in this way may seem strange but it is not without precedent. As Joshua Meyrowitz (1985) notes, film and television are the most prevalent popular cultural forms and therefore the most accessible to a mass audience. Roland Barthes similarly states that ‘iconic images distil complex details [in this case of legal process] into blissful clarity’ (Barthes 1972). This leads Kathy Laster to conclude that film and television constitute ‘the main source of *common* knowledge about the law ... [exerting] a

powerful influence on ordinary people's attitudes to, and expectations of, law and the legal system' (Laster 2000: 10-11) because they *are* so much more accessible to the general public than law reports or even visiting courtrooms for themselves.

Beyond simply representing the legal system, we can also read film and television as being in a dialogic relationship with these ideas, actively commenting upon notions of law and justice. In his writing on 'Courtroom TV' for example (a genre defined to include everything from *L.A. Law* to *Court TV*) cultural theorist Douglas Rushkoff (1994) suggests that these 'popular cultural forums' like television offer a 'conceptual interface between the order of our laws and the chaos of our world' (Rushkoff 1994: 51) making them 'the place for us to evaluate our rules and customs' because lawyers, unlike detectives or policemen, are well-suited for open discussion of such issues as they are nominated as 'our culture's best professional debaters' (Rushkoff 1994: 52). Popular media are therefore vitally important for making visible how law is constructed and, in the very process of representing law on screen, putting these ideas out into the public sphere where they can be debated and contested.

Accepting McLaughlin's idea that popular culture as vernacular theory involves thinking through questions of social organization and ethical comportment, we can understand these popular media representations of the legal system as part of a much wider process of thinking about how the system, and the more nebulous notions of truth and justice associated with it, are conceptually related. This forms the basis of a vernacular jurisprudence – a popular philosophy of law based around how popular media reflects, dissects and challenges law. For reasons of space I want to explore two of the concerns of these scripted legal dramas - violence and sex – and analyse how they are used to challenge two aspects of legal process: the pursuit of justice and the conduct of lawyers.

VIOLENCE AND JUSTICE

Think of justice. In the majority of police procedurals there is either a disenchantment with the legal system or it is dispensed with altogether so that the modern signifier of 'law' becomes 'the police force'. DI 'Jack' Frost (David Jason) titular character of the English series *A Touch of Frost* (1992-2003) and characteristic of the 'individual policeman' type sets out the policeman's 'pre-modern' approach to the law while trying to cheer up a colleague during *A Touch of Frost: Hidden Truth*:

Look, this is not the sort of thing that I say out loud too often, but the reason why some of us do this job is because we care. Now I know it sounds a bit naff and all of

that... I can't help what the courts do, or what some of these fancy lawyers get away with. All I know is if I can nick a few of those low-life out there then this is what I'll do.

Detective Inspector 'Jack' Frost (David Jason)

With a different conception of law at its heart, the police procedural clearly places a transcendent 'justice' over equality (in the figure of the policeman) and emotion over rationality (as a conduit to 'truth'), while still maintaining a sense of progress – 'nicking a few low-lives', 'cleaning up the streets' - i.e. making society better, safer and therefore more efficient. Individual rights are suspended for the good of the community and crime's 'causes and definitions [become] self-evident, that criminals are easily recognizable and the punishments that we should give them, obvious' (Grant 1992: 58). Lawyers are therefore sidelined, the renewed focus on police drama meaning that:

The complexities of social order, law and criminality are reduced to crime, identification, pursuit and capture . . . detection and apprehension become synonymous with guilt; the police become agents not only of law, but of justice too (Moran 1985: 162).

Just as present in the desire for justice is the possibility of violence, a possibility that becomes more apparent the further we move along the scale of alternative justice figures – to government agents like *24*'s Jack Bauer (Kiefer Sutherland, who sanctions torture as a means of finding justice). Compare for example the interrogation scenes from the *Law & Order: SVU* Season Six episode 'Rage' to the interrogation scenes in *24*. In *L&O* Detective Elliot Stabler (Christopher Meloni) is seen setting up the interrogation room for Gordon Rickett (Matthew Modine), a child rapist he tried to convict 14 years ago and now suspects has murdered a young girl. Stabler ensures the lights flicker, Rickett's chair is uneven and the heat has been turned up, everything to make Rickett uncomfortable. He even has food and drink provided for Rickett in the hope that it will force him to use the toilet. In contrast *24* features CTU agent Jack Bauer shooting suspects in knee caps, squeezing bullet wounds and making it appear he has executed someone – all presented as legitimate means of obtaining information from a suspect.

Here the pursuit of justice has shifted from the intimidation and threats (of the police procedural) to actual physical torture. As television writer Clive Thompson notes:

This crop of smart thrillers ... began twisting the thumbscrews right after 9/11, three years before Guantanamo and Abu Ghraib [the facilities where mistreatment of terrorist detainees occurred] hit the headlines. *Alias* launched nineteen days after the World Trade Center attacks. The shows are unusually good at capturing the dark sensuality of torture: the Cartesian horror of being trapped in a vulnerable body, the sub-dom relationship of the torturer and his victim (Thompson 2005).

Most interestingly for Thompson is that often 'it's the good guys in the tormentor's seat' (Thompson 2005) and they are still celebrated as heroic in their endeavours to garner the truth from their suspects. In these dramas, lawyers are again sidelined and seen as an impediment to the delivery of justice. In *24* for example, a terrorist suspect calls 'Amnesty Global' to get a lawyer and ensure due process applies. Here the point is well made: terrorists are about to get their hands on a nuclear warhead, millions of American lives are in the balance and Bauer believes that only this suspect can help them. He needs to make him talk, by any means necessary (i.e. torture). The lawyer therefore becomes an impediment to justice. To drive the point home, Bauer even asks his superiors: 'Why won't he let us do our jobs?' Justice and preventing terrorism are conflated into one and the same thing with the message being that sometimes you need to move outside the law to find justice.

Perhaps it is unsurprising then, that at the far end of the premodern ideal of law we find *Dexter* a serial killer in the role of the heroic protagonist, trying to learn how to be 'human', to have a family and a life and to follow a code (taught to him by his adoptive policeman father) even as he indulges the 'dark passenger' he carries within, the impulse to kill and kill again. A vigilante like Dexter Morgan (Michael C. Hall) personifies the tension between a modern adherence to the rule of law and pre- (or even post-) modern explorations of Derrida's (1992) *aporia* in different *personae*: the modern secret identity on the one hand (eg. the blood-splatter expert) and the pre-modern justice figure on the other (eg. the serial killer or 'dark defender') (with a postmodern exploration arguably arising from the continuing oscillation between these two *personae*). In this way the vigilante can personify the inherent tensions in law in a way that other crime-fighters, be they Perry Mason or Harry Callaghan, cannot.

As Thompson notes, 'the fact that such shows cater to our creepier revenge fantasies isn't reason to condemn them; for all their flash and gore, they can also be a step toward a moral debate' (Thompson 2005) confirming Rushkoff's idea that popular culture is 'the place for us to evaluate our rules and customs'. Indeed it can be argued that the violent excesses of Bauer and Dexter actually encourage us to debate their methods, that in providing 'a perverse

mirror of the real-life response to terror. They've reflected, and sometimes eerily predicted, the rise of torture as a government policy' (Thompson 2005) encouraging us to critically reflect on our own real-world practices. In academic Steve Redhead's (1995) terms, they expose the '(legal) fiction' that is presented as 'legal authority' in our world that violence in pursuit of justice is legitimated by law.

SEX AND LAWYERING

The other aspect of vernacular jurisprudence I want to canvass in this paper is present in the title -sex- as it is sex that becomes a theoretical tool in unpacking the contingency of law on the highly physical and often highly sexualized bodies of lawyers. As in David E. Kelley's earlier scripted legal drama *Ally McBeal*, *Boston Legal* can be seen in John Denvir's terms as questioning 'not so much the morality of law as it is practiced in the United States of America but rather its sanity. The show challenges us to ask whether sane people would choose to live this way' (Denvir 1996: 10).

Romance and the law are the same', says Ally (Calista Flockhart) in the pilot episode of *Ally McBeal*, 'Romantic in concept, but the actual practice can give you a yeast infection.' Later in the series, legal secretary Elaine Vassal (Jane Krakowski) tries to get one of the firm's clients, Ling Wu (Lucy Liu), to look more sympathetic to a jury by fitting her with a neck-brace. During the farcical scene that ensues, when Elaine is warned that faking an injury is the equivalent of false testimony she defends her actions by saying: 'Trial (is) all about presentation' (2:9).

These clips are important because they reveal both how deeply invested in the body the practice of law really is (akin to 'romance') and how important *performance* is to this practice of law ('it's all in the presentation'). It is Richard Bauman's (1992) definition of *performance* that I am adopting here: 'an aesthetically marked and heightened mode of communication, framed in a special way and put on display for an audience' (Bauman 1992: 41) as opposed to the notion of *performativity* popularized by Judith Butler (1993). While performativity has previously been linked to social and legal change, it also remains a largely *unconscious* activity, an aspect of discourse that produces that which it names (Butler 1993). In contrast, performance implies a conscious, *willful* activity on the part of the lawyer and is therefore the preferred terminology to describe an action that lawyers deliberately invoke.

American law shows encourage us to think of court appearances as performance pieces because they are clearly 'marked and set off from ordinary activities' as they occur in a courtroom and only allow certain people to perform. Furthermore they 'call attention to

themselves as particular productions with special purposes or qualities' (Schiefflin qtd Hughes-Freeland 1998: 194-5) in the way lawyers argue their cases before a judge and/or jury with the aim of setting out why their position is stronger/more tenable. Schieffelin goes on to tease out the elements of performance as dealing with:

Actions more than text: with habits of the body more than structures of symbols, with illocutionary rather than propositional force, with the social construction of reality rather than its representation ... [performances] create and make present realities vivid enough to beguile, amuse or terrify. And through these presences, they alter moods, social relations, bodily dispositions and states of mind (Qtd Hughes-Freeland 1998: 194).

The American lawyer's performance here implies three things; an awareness of being watched, a corresponding awareness of how you move and use the space around you and a desire to engage the 'audience' that is watching (Tuan 1990, Hooks 1994). This kind of performance therefore relies on both rhetoric *and* movement, it is simultaneously a verbal *and* physical act.

Again and again in *Boston Legal* we are reminded of the 'constructedness' of law by focusing on the bodies of the lawyers themselves, exposing how truth is constructed by the performative bodies of the lawyers in the courtroom – none more so than through the figure of Denny Crane who believes that simply repeating his own name 'Denny Crane, Denny Crane' can be enough to win a case. In this way law becomes invested in physicality, an embodied knowledge enacted through the sexual and the performative. Law is revealed to be human and affected by human feeling – love, remorse, fear, biases motivated by human feeling. No longer is law an impartial thing, in *Boston Legal* it is suddenly rendered subservient to the sexual appetites of Denny Crane (most infamously by his erection beeper) or the passionate argument of Alan Shore, relying on dress-up, or appeals to the jury's feelings, or 'cheap theatrics' (as indicated in the quote that opens this paper). Therefore *Boston Legal* not only exposes the contradictions in the modern approach to law, revealing the contingency of how law operates, but in its unsettling of the binaries and boundaries between private and public, it offers an alternative form of law in its place, one based in equity and emotion, as opposed to precedent and legal reasoning.

Legal theorist Costas Douzinas (1994) claims that the 'contemporary contingency of legality is aligned to the prolonged collapse of certain specific beliefs in a positivised and closed world of abstract legal rules' (Douzinas and Hachamovitch 1994: 1). He sees legality

as only being capable of expression through ‘the contingency of the body, its actions and passions; it has no existence outside this expression’ (Douzinas and Hachamovitch 1994: 25). To posit objective truth then is to think, as Nietzsche puts it, ‘mythologically’ (Nietzsche 1989 [1966]: 29). In response, scripted legal dramas like *Boston Legal* posit a counter-mythology that truth is embodied. By making visible how the body of the lawyer, as much as the body of the policeman or the body of the victim, provides the contingency for legality to exist, American law shows make visible that it is the lawyer’s performance that convinces, the lawyer’s performance that persuades and the lawyer’s performance that ultimately constructs ‘the truth’ in each case.

CONCLUSION

If we take film and television seriously, as sources of theory about law, then we can adopt an alternative position for thinking about what law is, how it operates and how successful it is. As Richard Rorty (1989) notes the legal system is premised on ‘a belief [that] can still regulate action, can still be thought worth dying for, among people who are quite aware that this belief is caused by nothing deeper than contingent historical circumstance’ (Rorty (1989: 189). According to Douglas Litowitz this means ‘we are ‘situated’ to such a degree that we cannot step outside our culture to judge it according to some neutral moral framework, although, as was noted earlier, we can criticize our society from alternative perspectives’ (Litowitz 1997: 141).

Popular culture, in scripted legal dramas like those outlined in this paper, can offer us these alternative perspectives. They can provide us with ways of stepping out of our own culture, parallel worlds from which to gain a better perspective on our own, affording new insights into how our most important institutions operate and how they connect to the wider culture.

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CONTRIBUTOR DETAILS

Jason Bainbridge is Associate Professor and Discipline Leader of Media at Swinburne University of Technology. He has written widely on media representation, law, popular

culture, toys and franchising and is PopCAANZ area chair for both the Toys and Gaming and Law Areas.

Contact: jbainbridge@swin.edu.au

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