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IMAGINING LEGALITY: WHERE LAW MEETS POPULAR CULTURE
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Upsides of the American Trial's "Anticonfluential" Nature: Notes on Richard K. Sherwin, David Foster Wallace, and James O. Incandenza

Michael S. Pardo*

> "anticonfluential cinema . . . 61. an après-garde digital movement, a.k.a, 'Digital Parallelism' and 'Cinema of Chaotic Stasis,' characterized by a stubborn and possibly intentionally irritating refusal of different narrative lines to merge into any kind of meaningful confluence . . . "[1]

Introduction

The relationship between law and popular culture is enormously complicated. The prevalence of legal topics and tropes in popular entertainment is well known, even if the reasons *why* raise complex psychological and sociological questions. Part of the explanation is that the law provides easily recognizable narrative forms for presenting stories of mystery, melodrama, and authority, but no doubt there is more to the story. Even if the causal relationships are hard to trace, the fact that law plays an important role in shaping popular culture seems well established.

Less well known is whether and how popular culture affects law. This is the complex question that Richard K. Sherwin takes up in his provocative chapter, "Law's Screen Life," where he explores effects on law when it adopts the "expressive forms" of "the visual mass media."[2] He tells a cautionary tale about a series of negative epistemic and moral consequences for law from this interaction. I pick up Sherwin's cautionary tale from the opposite direction and examine how different forms of legal decision-making may respond to the concerns he discusses, with a particular focus on factual decision-making at trial. I argue for the counterintuitive conclusion that the trial often provides a better forum for counteracting the dangers Sherwin

discusses than other types of issues in law (such as legislation, administrative decision-making, and judicial decision-making regarding questions of substantive law).

Part I of this chapter summarizes Sherwin's account of law's "screen life," and Part II discusses a number of epistemological aspects of this account. Part III then takes a brief detour from law in order to examine the narratives of the visual mass media and a particular response to these narratives in contemporary fiction. Here I discuss the work of David Foster Wallace and his novel *Infinite Jest*.[3] Part IV returns to law, arguing that, in some ways surprisingly similar to Wallace's novel, the American trial structures narratives in ways that respond to the problematic narrative forms of the visual mass media at the heart of Sherwin's cautionary tale.

I. Richard K. Sherwin and Law's "Screen Life"

Law, according to Sherwin, has a "screen life" in the sense that it "lives in images the way images live on the screen."[4] What does this mean? Generally, it means that law "enlists the expressive forms and authority of the visual mass media."[5] More specifically, these expressive forms manifest themselves in "interrelated ways," and include law's (1) "assimilation from the visual mass media of familiar cognitive and cultural templates, including character types and story forms"; (2) "exploitation of the viewer's sense of visual delight" in order to "hold attention, stick in memory, and authorize belief"; and (3) "emulation of the visual mass media's logic of desire that simultaneously stokes forbidden fantasies while providing moral cover in the form of a predatory Other onto whom the viewer may displace (and thus disown) guilty pleasures."[6] In exploring these interacting forms of law's "screen life," Sherwin tells a cautionary tale about "what can happen when law adopts (and enforces) the logic of the visual mass media as its own."[7]

Sherwin's cautionary tale is actually two different intertwined tales, each of which explores interactions among the three expressive forms ("cultural templates," "visual delight," and the "logic of desire"). We may call the first tale the "epistemological tale" and the second the "moral tale." I outline each in isolation before discussing their interaction.

The epistemological tale goes as follows. The relevant cultural template is the power of science: "[s]cience in contemporary popular entertainment has been invested with an almost mythical power of certainty."[8] According to this tale, "while witnesses may lie or make mistakes, science does not," and the science employed in forensic contexts is presented as "super-science."[9] Turning to the next form, the visual delight that holds attention and authorizes belief arises from visual evidence, typically accompanied by scientific expert testimony. Sherwin focuses primarily on the example of fMRI brain imaging[10]: "our aesthetic delight in the image . . . helps to authorize this kind of visual scientific evidence."[11] Finally, the logic of desire involves "the natural human craving for certainty" and uneasiness regarding any existing uncertainty or "disruptions that tell us the world is not certain at all."[12]

These interrelated forms of law's screen life reinforce one another. The mythic power of science, coupled with the delight created by visual evidence, allows legal actors (juries and judges) to satisfy their desire for certainty by giving unquestioned (and sometimes unconscious) credence to the evidence, even when the evidence may be highly unreliable. The "instant gratification" of the evidence "displaces more deliberate forms of judgment."[13] In short, the visual persuasiveness of the evidence may not track its epistemological warrant. Law's enactment of this tale is fueled and reinforced by similar tales enacted in the visual mass media, in particular in television programs such as *CSI*, *Law & Order*, *Criminal Minds*, *NCIS*, *Lie to Me*, and so on.[14]

The moral tale is more complicated but follows a similar pattern. The relevant cultural template is the sexual predator ("popular entertainment seems to be obsessed with this figure")[15] and more general notions of good and evil ("aesthetic clarity of good guys and bad guys in a moral universe where the truth will out in the end, and justices prevails").[16] The visual delight takes the form of various kinds of sexual and/ or violent acts depicted in the visual mass media. Here, Sherwin focuses primarily on the role of sexual violence in popular movies (e.g., *8mm* and *The Hills Have Eyes*) and television programs such as *Law & Order: SVU*. The logic of desire at work in this story involves both (1) the desire to witness, fantasize about, and perhaps experience, the sexual and/or violent acts depicted, and (2) the conflicting desire for a moral order that condemns these acts as immoral. Sherwin argues that graphic depictions in the visual mass media provide "titillating screen images" that "arouse illicit desires that draw (and hold) viewers' attention," while simultaneously causing a sense of "crisis" and "moral panic" that authorizes legal punishment.[17]

In this tale, the forms likewise reinforce one another. Through the image of the predator, viewers witness illicit acts and then, through appeal to law's punishment of the predator, simultaneously condemn these actions. The use of law within the visual mass media thus serves as a useful dramaturgical device: law's authority is used to restore moral order. In Sherwin's tale, however, the interaction creates negative effects when law repeats a similar pattern with actual criminal defendants. The same psychic forces driving the tale in popular entertainment, Sherwin contends, also occur within the law itself, where legal actors are legislating or adjudicating "from the unconscious."[18] For example, with regard to legislation, he argues that substantive laws regarding sexual offenses may be driven more by these unconscious forces (in

particular, unwarranted fears regarding the pervasiveness and recidivism of sexual predators) than by evidence justifying current laws.[19]

Moreover, with regard to adjudication, the epistemological and moral tales intertwine. The belief process at work in the epistemological tale becomes the means for resolving conflicts in the moral tale. The cravings for certainty and for the return of moral order allow jurors and judges to convict defendants based on visually persuasive—but epistemically suspect—scientific evidence: "[e]ven weak evidence may provide a plausible basis for acting on a desire to convict."[20] This interaction provides a "hidden alliance in the visual mass media between the quest for certainty and the logic of desire"[21]—one that is likewise allied in law. And this alliance "poses a serious risk of increasing conviction rates." [22] Sherwin thus concludes by calling for "a new toolkit and a new jurisprudence—a visual jurisprudence—that can help us adapt to law's life on the screen" in order to "protect against distortions in the quest for fact-based justice."[23]

II. Eight Points (More or Less) about the Epistemology of Law's Screen Life

Sherwin's cautionary tale raises a number of important concerns for the epistemology and political morality of law, including a number of constitutional issues. His tale of law's screen life applies to law at the levels of legislation, administrative decision-making, judicial decision-making regarding the substantive law, and jury (and judicial) factual decision-making. I focus primarily on the ways, and the extent to which, Sherwin's tale applies to factual decision-making.[24] Although the dangers Sherwin flags may contribute (as he contends) to over-severe punishments and over-broad criminal laws regarding sexual predators, such crimes do exist and no one contends that all such laws are unjust.[25] Any effect the visual mass media has on the accuracy of judgments is thus an important consideration for justice, even if it is not the only consideration.[26]

My aim in this part is to clarify some of the assumptions underlying Sherwin's tale as it applies to factual decision-making; to challenge some of these assumptions and to suggest some limitations to Sherwin's analysis; and to articulate principles that ought to guide the "visual jurisprudence" that Sherwin calls for in this area. This discussion is organized around eight distinct, but related, topics.

1. *Accuracy, not convictions*. Sherwin's cautionary tale of law's screen life assumes that the primary epistemic danger of visual evidence is that it "poses a serious risk of increasing conviction rates."[27] From an epistemic perspective, however, this should not be the proper metric. The proper metric for visual evidence is the effects that it has on the *accuracy* of verdicts. More specifically, visual evidence ought to be assessed based on the role it plays in fostering four different trial outcomes: true convictions, true acquittals, false convictions, and false acquittals.[28] Visual evidence ought to be evaluated based on how it contributes to each of these four categories and the ratios among them.[29] This assessment ultimately depends on answers to complex empirical questions, but we can gain some insight into these questions by focusing on two subsidiary questions: the probative value of the evidence[30] and the assessment of the probative value by the fact-finder. Before turning to these issues, however, one other related point . . .

2. *The concerns also apply to defendants' evidence*. Based on its interactions with the other forms of law's screen life (cultural templates and the logic of desire), visual evidence, Sherwin argues, poses a danger of increased convictions. Widespread use of visual evidence by defendants, however, may also lead to epistemic problems—for example, a significant decrease in true convictions. For the reasons discussed above, this is not necessarily good or bad from a systemic perspective; what matters is the overall effects the evidence has on the four possible

trial outcomes. Nevertheless, from an epistemic perspective, any assessment of the evidence must also examine use by defendants.[31]

3. *Probative value*. Sherwin's tale primarily concerns visually persuasive evidence that has low probative value. The probative value of evidence is highly contextual, depending on the factual disputes in particular cases, the other evidence, and the explanations and stories the parties tell about the evidence. In some cases, Sherwin is no doubt correct that persuasive visual evidence will in fact have low probative value. In other cases, however, evidence that is both persuasive and "delights the eye" will also be highly probative because it conveys better and more information about the disputed issues of fact than other evidence.[32] Moreover, even evidence of low probative value may contribute to more accurate outcomes when the value of the evidence and its limitations are understood by fact-finders.[33] In other words, the danger is not just that the evidence is weak; it is that the evidence is weak *and* the jury thinks it is strong[34]—which takes us to the next point . . .

4. *Assessments of probative value by legal fact-finders*. Sherwin's tale depends to a significant extent on the assumption that jurors will overvalue the epistemic value of visual evidence. This assumption, however, may itself arise from a cultural template with insufficient empirical support—i.e., a picture of the jury as naïve and incompetent when presented with expert testimony. Although there is mixed empirical evidence on this issue—and variance among types of issues—the general picture appears to be, to the contrary, that jurors do a fairly competent job understanding scientific and other complex expert testimony.[35] Moreover, many of the problems with juror understanding have more to do with the way evidence is presented.[36] Perhaps, however, neuroscientific brain imaging provides a particularly problematic case? There is some empirical evidence to support this proposition, including studies concluding that subjects

do a poor job of sorting good explanations from bad ones when presented with neuroscientific evidence.[37] Importantly, however, these studies do not involve realistic legal settings and subjects are not presented with important information regarding the nature of the evidence and its limitations. The question for law is not what jurors make of neuroscience at first blush; it is what they make of it when presented with the information necessary to understand and to evaluate it.[38] This is not to suggest that the concerns regarding jury overvaluation of visual evidence are ones the law need not take seriously. Rather, more study appears to be needed before we can determine whether this problem is real and significant.

5. *Sufficiency review is an answer to weak visual evidence*. Sherwin is correct to conclude that the law must protect against convictions that arise primarily from visual evidence that is highly persuasive but epistemically weak, i.e., evidence that has low probative value but the jury thinks has high value. Such protection exists doctrinally in the form of review for sufficiency of the evidence. Due process requires that convictions must be supported by sufficient evidence to support a conviction beyond a reasonable doubt.[39] Unfortunately, courts have not developed robust doctrine on this issue, but more developed review in this area could provide a useful check on the concerns Sherwin raises.[40]

6. *The "logic of desire" is a two-way street*. Sherwin assumes that the psychological processes and cultural templates he invokes—in particular, a desire for certainty and belief in the infallibility of science—will tend to favor the prosecution over the defense. Even putting aside defendants' evidence, however, the same processes may also sometimes push in the opposite direction. Jurors, in other words, may in some cases hold it against the prosecution when the evidence fails to live up to the "super-science" of the visual mass media, and their desires for

justice and certainty may push against conviction when the evidence (scientific or otherwise) fails to meet their expectations.[41]

7. *There is a counternarrative to the moral tale.* According to Sherwin's tale, neuroscientific brain-imaging evidence will combine with a desire for moral order to punish defendants perceived to be evil or immoral. In a provocative essay, however, Joshua Greene and Jonathan Cohen argue that this same evidence (brain imaging) will *undermine* these same retributivist tendencies.[42] According to their tale, the prevalence of brain-imaging evidence in the culture will cause greater belief in a deterministic view of mind and behavior, which will undercut notions of free will and, with it, ideas of criminal punishment that condemn defendants as deserving of punishment because of their immoral actions. Now, which of these competing tales is correct? Who knows? From an epistemic perspective, what matters is the quality of the evidence and the quality of the arguments regarding the inferences it warrants—not what anyone (or most people) find to be psychologically persuasive for non-epistemic reasons.

8. *Legal structure matters.* Sherwin's tale assumes that the visual mass media will affect law as a whole, unmediated by differences within the law. In treating law as a single entity, however, it ignores how different legal structures respond to information flowing from the visual mass media. This assumption may itself create problematic distortions. In Part IV of this chapter I explore this point in more detail, after a brief detour through contemporary American fiction.

III. Narrative, Fiction, and the Visual Mass Media

Sherwin's tale raises concerns for law based on uses of narrative by the visual mass media. For similar reasons, these uses of narrative also raise concerns for other cultural areas. Examining one other such area, contemporary fiction, will be illustrative for purposes of this

chapter for two reasons. First, it presents Sherwin's concerns as specific examples of a larger pattern and general problem. Second, it articulates a particular response to this general problem that, as I argue below, shares important similarities with how different areas of law may respond to the visual mass media. This part focuses on the work of David Foster Wallace, whose nonfiction analyzes the general problems and whose fiction exemplifies a response.

The visual mass media fosters an environment in which viewers passively receive escape, comfort, and reassurance. Sherwin's tale provides specific instances that fit this general pattern. Wallace argues that the general pattern works by training viewers "to respond to and then like and then expect" entertainment that is "trite, hackneyed, numbing."[43] Even popular entertainment that presents itself as otherwise is really just "tiny transparent variations on old formulas."[44] The law-related television shows noted earlier are some of the best examples of this phenomenon. The comfort and reassurance arises not only because evil fictional characters are caught and punished; it arises because viewers can recognize and take comfort in and be reassured by the familiar narrative patterns.[45] In presenting these familiar patterns to viewers, the visual mass media invites viewers to "assume, inside, a sort of fetal position, a pose of passive reception to comfort, escape, reassurance."[46] The general pattern is one of a "strangely American, profoundly shallow, and eternally temporary reassurance."[47]

Wallace's fiction, primarily his novel *Infinite Jest*, provides a response to this feature of the visual mass media.[48] In denying readers the kind of temporary reassurance that the narratives of the visual mass media provide, Wallace expresses a kind of benevolent "cruelty" toward readers and requires that they do their share of "linguistic work."[49] Wallace discusses the constructive aspects of this response in creating the kinds of meaningful, genuine, authentic human interactions that the visual mass media do not. The cruelty is that of a writer who "could

hate enough to feel enough to love enough to perpetuate the kind of special cruelty only real lovers can inflict."[50] And the required work is to remind the reader "she's receiving heavily mediated data, that this process is a relationship between the writer's consciousness and her own, and to have anything like a real full human relationship, she's going to have to put in her share of the linguistic work."[51]

The novel *Infinite Jest*, published in 1996, describes a largely dystopian America at some point in the near future.[52] The plot revolves around three distinct, but intertwined, narratives involving a tennis academy, a half-way house for recovering addicts, and a Canadian terrorist group. The book presents a largely infantile American population obsessed with entertainment.[53]

One primary character in the novel is James O. Incandenza. He is the founder of the tennis academy, a renowned scientist (with a specialty in optics), and, most relevant for this discussion, an "après-garde" filmmaker.[54] Incandenza spends much of his film career making highly conceptual, abstract, art films, which garner some academic attention but not much else. Many of the films are "anticonfluential": "characterized by a stubborn and possibly intentionally irritating refusal of different narrative lines to merge into any kind of meaningful confluence."[55] Later, before killing himself, he attempts to make a film so entertaining that it will allow him to connect in a meaningful way with his son, Hal. The film—also titled *Infinite Jest*—ends up being so compelling that anyone who watches it becomes so addicted to it that they want nothing but to continue watching (until death).[56] A search for the film then becomes part of a terrorist plot, as the Canadian group may be attempting to show the film widely in America as an attack on its entertainment-addicted population.

Incandenza's films exemplify possible (failed) responses to the narratives of the visual mass media. One possible response is to largely ignore the visual mass media (except, perhaps, to parody it). Prior to the film *Infinite Jest*, Incandenza's après-garde films were consistent with this approach. Although highly sophisticated in technique, they failed to connect with audiences in a large-scale way about anything genuine, authentic, human. One academic commentator in the novel titles an article on his films: "Watching Grass Grow While Being Hit Repeatedly Over the Head With a Blunt Object."[57] A second response would be to adopt the techniques of the visual mass media. With the film *Infinite Jest*, in making something that is even more entertaining than the visual mass media, Incandenza may be heading down this path. But it ends up creating worse problems, leading to stasis and death.

Infinite Jest the book, however, exemplifies a third, more successful, response. The book is highly entertaining (trust me). However, it presents readers with a number of challenges. The book is 1,079 pages, and pages 983 to 1079 consist of endnotes, some of which have their own endnotes. The endnotes appear to serve a variety of functions[58] (and the reader learns that two bookmarks are extremely useful). Relevant to the issue of narrative reassurance, the notes often interrupt narrative flow—making the reader work at times she may prefer to get lost in the story. Also relevant to this purpose, the notes may contradict, qualify, or challenge information given in the text—drawing the reader's attention to the mediated nature of the narrative, often through the perspective of a particular character or narrator.[59] (The series of back-and-forth flipping between text and endnotes also at times comes to fit with the tennis theme of the book.)

Along with the length and the endnotes, the plot itself requires significant work by the reader. The plot is complex, told in nonlinear fashion, and with a number of important gaps (including a year-long gap between the first chapter and most of the action in the rest of the

novel). Most significantly, it is itself "anticonfluential" in a specific way: rather than providing narrative threads that fail to "merge into any kind of meaningful confluence," the three narrative threads in the novel begin to merge as the novel progresses but the apparent confluence ceases before the threads connect. The novel ends—taking the narrative back to the first chapter, which occurs one year in the future from the last chapter and most of the action in the novel.

In the first chapter, the reader learns that something awful has happened to main character, Hal Incandenza, but exactly what is not clear. Nor is it by the end of the book. The book suggests a number of different possibilities: he watched his father's movie *Infinite Jest*; he ingested a powerful drug ("Madame Psychosis"); his condition is the result of withdrawal; and others.[60] Although a number of clues support different interpretations, the book denies readers narrative closure, and the reader is left to fill in the gap of a seemingly ambiguous situation. This lack of narrative closure calls out for a rereading (and another, and another), but with each new reading the reader must continue to participate in the process of completing the narrative.

The reading process provides an experience very different from the passive reception of temporary reassurance of the visual mass media. Those who return to the book ultimately realize they have to do some of the work to construct what it is about, what values may underlie it, what to make of the mostly sad characters, and what it says about humanity and about art.[61]

What might any of this have to do with law?

IV. The "Anticonfluential" American Trial

On their surface, American trials resemble aspects of *Infinite Jest.* Much like the plot (what happened to Hal?), many trials begin at the end of the story with some (alleged) wrong or problem, which jurors otherwise unfamiliar with the events must reconstruct from conflicting evidence and accounts, often with several missing gaps.[62] I argue that, beyond these superficial

similarities, the trial structures and filters information analogously in important ways to *Infinite Jest* and that these similarities respond to the concerns at the heart of Sherwin's tale. Most significantly, the trial engages and challenges the active intelligence of jurors to participate in the narrative process in ways that deny them the passive reception of reassurance that comes from the familiar formulas and narrative closure of the visual mass media. This "anticonfluential" process is facilitated by a number of structural features in the trial (similar to structural features of *Infinite Jest*) that respond to the epistemic and moral concerns Sherwin raises. These features are largely absent from other types of legal decision-making (primarily legislation), leaving these areas more vulnerable to Sherwin's concerns. Recognizing this difference may provide insight useful toward Sherwin's larger project of constructing a "visual jurisprudence."

First, unlike the narratives of the visual mass media, in a well-tried case (an important qualification) legal decision-makers are typically presented with (at least) two competing narratives of what occurred.[63] Lawyers organize their cases around narrative structures ("theories of the case"), and these narratives will contradict each other on one or more key points (although there may also be substantial overlap). Lawyers typically present these narratives during opening and closing statements.

Second, and unlike with the visual mass media, the narratives at trial are constrained by a number of important features. Most importantly, the narratives must account for and explain the evidence. The evidence and the many details about it remind legal decision-makers that they are dealing with events in the real world, which "resists the sheer coherence of art."[64] Similarly, the endnotes and the anticonfluential plot of *Infinite Jest* function to resist easy coherence.

At trial, the rules of evidence structure the presentation of evidence in ways that facilitate jurors in evaluating the competing narratives. Witnesses typically testify in the "language of

perception" in order to give jurors a detailed, firsthand account of what they saw, heard, smelled, felt, or tasted. And the process of cross-examination allows parties to interrupt, contradict, and challenge the narratives being told by the other side. Similarly, *Infinite Jest* often provides its narrative from shifting character perspectives, and the endnotes will often interrupt narrative flow and sometimes challenge or contradict the account in the main text. In both the novel and the trial, structural features constrain the narrative presentations in ways that challenge their audiences to adopt a more active response.

Third, these structures of the trial not only constrain the narratives: they also "individualize" them.[65] The competing narratives at trial employ a number of generalizations, but the inferences and conclusions at trial are not (usually) choices among different, free-floating cultural templates. They are choices about a particular situation and what is to be done about it. The detailed information at trial brings the generalizations down to the individualized level and often pushes the narratives toward each other.[66] Jurors must therefore often decide which of the competing generalizations matter in this unique situation and ought to control this case.

In ways similar to the reader's experience of *Infinite Jest*, these various features of the trial place decision-makers in a situation that frustrates passive reception and reassurance. Jurors decide cases by evaluating and constructing possible narratives of the events. According to the well-confirmed "story model" of decision-making, jurors impose a narrative structure on the evidence, attempting to organize the conflicting evidence and details into coherent versions of events through their background knowledge, generalizations about the world (including cultural templates), and assumptions about gaps in the evidence.[67] After constructing narratives, jurors then decide which narrative to accept based on three criteria: coverage, coherence, and uniqueness.[68] Finally, jurors consider verdict alternatives and match the narrative to the verdict

categories, choosing the best fit between narrative and verdict category.[69] Beginning the trial as the passive audience of conflicting narratives, they end it by becoming an active participant in the narrative process, collectively deliberating and deciding on the narrative that will control the outcome. Moreover, they typically do so in the face of some uncertainty and they must take responsibility for their decision in awareness that significant consequences will follow. This is a long way from the infantilizing temporary reassurance of the visual mass media.

Sherwin's cautionary tale describes epistemic and moral problems that arise for law from the combination of visual evidence and the desire for certainty and moral order. But, the trial's anticonfluential nature provides a response that may alleviate some of the problems. From an epistemic perspective, the narrative process requires active participation from jurors in the face of uncertainty. The participation generally involves abductive inferences or a process of "inference to the best explanation" of the evidence and events.[70] As in other areas such as many scientific contexts and in everyday life, this comparative, abductive process will serve a positive epistemic function,[71] at least to the extent that better explanations are more likely to be true than false ones.

The structure provides a response to some of the moral concerns as well. As Robert Burns argues, the tensions in the trial between general norms and the particulars of the case facilitate a capacity for moral judgment in jurors that is absent from "mass-circulation journalism and sentimental mass-media fiction," which "are designed to anesthetize this capacity by eliminating" these tensions.[72] The details of the trial and the demand for action by jurors in a particular individualized context activate this capacity by forcing jurors to think hard about which norms matter and why. This experience, Burns explains, provides "the basis of so many jurors' testimony to the personal satisfaction of jury service," where "they are offered a set of

linguistic practices that is more demanding of and more adequate to the range of their subjective capacities."[73] As at the epistemic level, the trial's structure at the normative level provides a response that counteracts the easy temporary reassurance of the visual mass media: "the critical devices of the trial can take the jury to a moral plane somewhat beyond the narrative resources their own society alone would allow."[74]

Legislation and, to a lesser extent, some judicial decision-making[75] fail to provide analogous structures to respond to Sherwin's tale regarding the potential distorting effects of the visual mass media. First, these areas are driven more by generalized concerns of social control rather than concerns for individualized accuracy.[76] A generalized, bureaucratic decision-making process is more likely to fall prey to the easy generalizations of the visual mass media than one concerned with examining which of competing generalizations ought to apply to particular situations. Second, the narratives in these areas are not as constrained by evidence as they are in the trial. Although these other areas have some clear epistemic advantages,[77] the open free-for-all of political debate fails to respond to (and is not constrained by) evidence in a way that would counteract distorting aspects of the visual mass media.[78] Indeed, much political debate and commentary just *is* a particular species of the visual mass media. Nor are politicians or agencies—captured by industries and/or beholden to consumers of the visual mass media for votes—likely to be in a similar position to engage with the epistemic and moral issues that arise in the gap between (competing) generalized norms and individual situations.

Conclusion

I conclude with a few remarks about how my discussion relates to Sherwin's larger project of a "visual jurisprudence." From an epistemic perspective, evidence is evidence, whether visual or not, and in an important sense "the intellectual tasks remain constant regardless

of the mode of evidence: to understand and to reason about the materials at hand, and to appraise their quality, relevance, and integrity."[79] The epistemic focus of a visual jurisprudence thus ought to be on how legal actors perform these intellectual tasks with regard to visual evidence, how the visual mass media affects these tasks, and how these tasks may be improved. For the reasons above, the trial provides a number of features, unique in law, that assist in these tasks and that respond to negative effects of the visual mass media.

In a previous work, Sherwin refers to the trial as a "symbolic drama," in a "mythic space and time," in which "ordinary conventions" and "ingrained habits" "drop away."[80] Jennifer Mnookin and Nancy West argue that Sherwin's description of the trial "resembles, in fact, the ideal cinematic experience" and that, like film, the trial "invites the viewer to watch with an extra-ordinary kind of attention."[81] The description also resembles the ideal reading experience. The confluence of these situations may illuminate the relationships between narrative, this "extra-ordinary kind of attention," and the intellectual tasks of evidence evaluation. Toward this end, I present one such example: the anticonfluential nature of *Infinite Jest* and the American trial.

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1 David Foster Wallace, Infinite Jest (Boston: Little, Brown & Co., 1996): 185, 996.

2 Richard K. Sherwin, "Law's Screen Life: Criminal Predators and What to Do about Them: Popular Imperatives from Screen-Based Reality," in this volume. "Visual mass media" refers primarily to television and popular movies.

3 Wallace's novel (like his work in general) is rich and complex, raising a number of interesting questions far beyond the scope of this chapter. I focus below on one particular aspect of the novel: how a number of structural features deny narrative closure and easy coherence and appear to challenge readers toward active engagement with the narrative process.

[4] Id. at 5.

[5] Id. at 1.

[6] Id.

[7] Id. at 2.

[8] Id. at 8.

[9] Id. at 11. Sherwin refers to this as "the magical realism of pop science." Id.

[10] Id. at 10-12. Sherwin mentions a number of issues for which this evidence may be offered—e.g., to show brain injury, insanity, incompetence, and mitigation at sentencing based on brain abnormalities—however, his discussion appears to focus more generally on psychological effects the evidence will have on jurors, regardless of the specific issue for which it is offered.

[11] Id. at 11.

[12] Id. at 8.

[13] Id. at 14.

[14] These programs often rely on a formula in which the viewer is presented with both a privileged view of "the truth" and a story in which the police (or other law enforcement agents), often with the help of science, arrive at this truth toward the end of the episode.

[15] Id. at 14.

[16] Id. at 9.

[17] Id. at 15-16. See also id. at 9 ("Law provides moral cover for the viewer's guilty pleasures.")

[18] Id. at 10. See also id. at 14 ("Law is at risk of being fueled by the same illicit fantasies and symbolic prohibitions as our popular entertainments.")

[19] Id. at 15-16.

[20] Id. at 20.

[21] Id. at 8.

[22] Id. at 12.

[23] Id. at 20.

[24] There are, of course, epistemic aspects to these other areas of legal decision-making. Some of these aspects are explored in Part IV.

[25] By focusing on the epistemic aspects, I do not mean to deny that the visual mass media may contribute to problems with legislation. See Sara Sun Beale, "The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness," William & Mary Law Review 48 (2006): 397. I discuss legislation in Part IV.

[26] Factual accuracy thus provides a necessary, not sufficient, condition in what Sherwin refers to as the "quest for fact-based justice." Although my discussion focuses primarily on epistemic aspects, it will also touch on related moral aspects.

[27] Sherwin, "Law's Screen Life . . ." 12.

[28] Larry Laudan and Harry D. Saunders, "Re-Thinking the Criminal Standard of Proof: Seeking Consensus about the Utilities of Trial Outcomes," International Commentary on Evidence 7 (2009): 1, available at http://www.bepress.com/ice/vol7/iss2/art1; Ronald J. Allen and Larry Laudan, "Deadly Dilemmas," Texas Tech Law Review 41 (2008): 65. "True" and "false" refer to whether an outcome matches whether the defendant actually committed the crime, not a statement about the sufficiency or insufficiency of the evidence. I am also not referring to issues of jury nullification.

[29] Ideally, we would also want to compare the outcomes in the absence of this evidence.

[30] See Fed. R. Evid. 403. "Probative value" refers to the strength of the evidence in proving a particular proposition.

[31] This is not to suggest that evidentiary rules regarding this evidence need to apply symmetrically for the prosecution and defendants. For example, a more lenient rule for defendants may be justified by the fact that other evidentiary rules are shifting more of the risk of error onto defendants than is warranted. See Michael S. Pardo, "On Misshapen Stones and Criminal Law's Epistemology," Texas Law Review 86 (2007): 347, 372-73.

[32] See, e.g., Linda C. Morell, "Experimental Research on the Influence of Computer-Animated Display on Jurors," Southwestern University Law Review 28 (1999): 411.

[33] See Timothy Williamson, Knowledge and Its Limits (Oxford: Oxford University Press, 2000): 189-90.

[34] The reverse is also an epistemic problem: strong visual evidence that is perceived as weak. Sherwin's discussion fits into a larger issue of the law's uneasiness about new forms of evidence in general and visual evidence in particular. See Jennifer L. Mnookin, "The Image of Truth: Photographic Evidence and the Power of Analogy," Yale Journal of Law & the Humanities 10 (1998): 1.

[35] For a survey of the literature see Neil Vidmar and Valerie Hans, American Juries: The Verdict (Prometheus Books, 2007): 177-80. See also Robert B. Bennett, et al., "Seeing is Believing; or is it? An Empirical Study of Computer Simulations as Evidence," Wake Forest Law Review 34 (1999): 257.

[36] Vidmar and Hans, American Juries . . . 177-80. There is also a tendency of jurors to undervalue evidence they do not understand.

[37] See Deena Skolnick Weisberg, et al, "The Seductive Allure of Neuroscience Explanations," Journal of Cognitive Neuroscience 20 (2008): 470; David P. McCabe and Alan D. Castel, "Seeing is Believing: The Effect of Brain Images on Judgments of Scientific Reasoning," Cognition 107 (2008): 343.

[38] For example, with brain imaging, one concern is that jurors may think it is similar to a photograph of the brain, rather than statistical information regarding magnetic properties in the blood, flowing to different areas of the brain, projected onto an image of a brain. The key question for law is whether, when it is relevant, jurors can appreciate this difference after it is explained.

[39] See Jackson v. Virginia, 443 U.S. 307 (1979).

[40] More developed sufficiency review may provide a response to problems with forensic science generally. See Michael S. Pardo, "Evidence Theory and the NAS Report of Forensic Science," Utah Law Review (forthcoming 2010). For a discussion of these problems, see National Research Council, Strengthening Forensic Science in the United States: A Path Forward (National Academies Press, 2009).

[41] The prevalence of either type of effect (Sherwin's or this countereffect), or other similar effects, in the legal system is not clear. See Simon A. Cole and Rachel Dioso-Villa, "Investigating the 'CSI Effect' Effect: Media and Litigation Crisis in Criminal Law," Stanford Law Review 61 (2009): 1335.

[42] Joshua Greene and Jonathan Cohen, "For Law, Neuroscience Changes Nothing and Everything," Philosophical Transactions of the Royal Society of London 359 (2004): 1775. For a critical discussion of Greene and Cohen, see

Michael S. Pardo and Dennis Patterson, "Philosophical Foundations of Law and Neuroscience," University of Illinois Law Review 2010 (2010): 1211.

[43] David Foster Wallace, "E Unibus Pluram: Television and U.S. Fiction," in A Supposedly Fun Thing I'll Never Do Again: Essays and Arguments (Boston: Little, Brown & Co., 1997): 40.

[44] Id.

[45] For example, have you ever noticed how often a seemingly minor character early in an episode turns out at the end of the episode to be the criminal?

[46] Id. at 41

[47] Id. Less relevant for purposes of this chapter, Wallace also discusses television's uses of self-conscious irony and cynicism toward authority and values; the relationship between television and loneliness and solipsism; and what these issues mean for contemporary fiction.

[48] Wallace's other fiction also frequently refers to and mythologies aspects of popular culture. See, e.g., David Foster Wallace, Girl with Curious Hair (New York: Norton, 1989); David Foster Wallace, "Tri-Stan: I Sold Sissee Nar to Ecko," in Brief Interviews with Hideous Men (Boston: Little, Brown & Co., 1999).

[49] For a discussion of this aspect of Wallace's fiction see Marshall Boswell, Understanding David Foster Wallace (Columbia: South Carolina Press, 2003): 120.

[50] Wallace, "Westward the Course of Empire Takes its Way," in Girl . . . at 331-32.

[51] "An Interview with David Foster Wallace," Review of Contemporary Fiction 13 (1993): 142.

[52] Much of the plot takes place in 2009, but the year is not obvious because in the novel the years have been sold to corporate sponsors. The novel opens in the "Year of Glad" and most of the action takes place in the "Year of the Depend Adult Undergarment." The reader can figure out the year based on a number of references to events in "pre-subsidized time." Useful outlines and chronologies of the plot can be found in Greg Carlisle, Elegant Complexity: A Study of David Foster Wallace's *Infinite Jest* (Los Angeles: Sideshow Media, 2007) and Stephen Burn, David Foster Wallace's *Infinite Jest:* A Reader's Guide (New York: Continuum, 2003).

[53] The theme of American "infantilism" looms large throughout the novel. For examples and discussion of this theme, see Boswell, Understanding . . . 124-58.

[54] Wallace, Infinite Jest . . . 985-93 n. 24 provides a "filmography" for Incandenza.

[55] Id at 996 n. 61

[56] The exact nature of the film's content is not clear, but it appears to be shot with a special lens that recreates the vision of an infant, while a mother character apologizes over and over again. See Wallace, Infinite Jest . . . 788, 939.

[57] Wallace, Infinite Jest . . . 1026 n. 144. The subtitle of the article, published in "Art Cartridge Quarterly" in the "Year of the Perdue Wonderchicken," is "Fragmentation and Stasis in James O. Incandenza's *Widower, Fun with Teeth, Zero-Gravity Tea Ceremony,* and *Pre-Nuptial Agreement of Heaven and Hell*."

[58] These functions concern aesthetic structural aspects of the book as well as their phenomenological effects on the reading experience. Regarding the former, aspects of the book are structured around a variety of geometrical tropes (e.g., conic sections, circles, fractals); geometrical themes and references also occur frequently in the text. For a discussion of the endnotes, see Boswell, Understanding . . . 120.

[59] For illustrative examples, see endnote 142 ("The speaker doesn't actually use the terms *thereon, most assuredly,* or *operant limbic system*, though she really had, before, said *chordate phylum*") and endnote 143 ("*Sic*.")

[60] For a discussion see Carlisle, Elegant . . . 480-85.

[61] It has also prompted a rich online community discussing the book and Wallace's work more generally, including the hyperactive and informative listserv: wallace-l. See Matt Bucher, "Fantods: David Foster Wallace, wallace-l, and Literary Fandom Online," (Nov. 24, 2009), available at http://www.mattbucher.com/2009/11/24/fantods/ . For recent academic discussions of Wallace's work, see Consider David Foster Wallace: Critical Essays (David Hering, ed., Los Angeles: Sideshow Media, 2010).

[62] There is also some residual level of uncertainty with these decisions. The law manages this uncertainty through decision rules (e.g., proof "beyond a reasonable doubt" or "by a preponderance of the evidence") that allocate the risk of error among the parties.

[63] An exception is defendants who focus exclusively on attacking the prosecution's case without offering an alternative theory.

[64] Robert P. Burns, A Theory of the Trial (Princeton: Princeton University Press, 1999): 55.

[65] See id. at 72.

[66] See Robert P. Burns, The Death of the American Trial (Chicago, University of Chicago Press, 2009): 30. The fact that the trial structure pushes narratives toward the evidence and thus toward one another makes it "anticonfluential" in a way that more resembles *Infinite Jest*, the book, rather than Incandenza's films.

[67] Nancy Pennington and Reid Hastie, "A Cognitive Model of Juror Decision Making: The Story Model," 13 Cardozo Law Review 13 (1991): 519.

[68] Id.

[69] Id.

[70] See Michael S. Pardo and Ronald J. Allen, "Juridical Proof and the Best Explanation," Law & Philosophy 27 (2008): 223.

[71] Id.

[72] Burns, A Theory . . . 181.

[73] Id.

[74] Id. at 244.

[75] Judicial decision-making regarding the substantive law shares some similarities with legislation (e.g., a concern with general applicability) and some with factual decision-making (e.g., adversarial presentation by the individual parties).

[76] Burns, Death . . . 81, 128-30.

[77] For example, in these areas there often will be more time to make decisions; the possibility of waiting to decide until more evidence becomes available; and more total information.

[78] There is a popular, but epistemically dubious, myth in First Amendment jurisprudence that a free "marketplace of ideas" will produce more accurate results than one with some constraints. For a discussion of the relevant epistemic considerations see Alvin I. Goldman, Knowledge in a Social World (Oxford: Oxford University Press, 1999).

[79] Edward Tufte, Beautiful Evidence (Graphics Press, 2006)

[80] Richard K. Sherwin, When Law Goes Pop: The Vanishing Line Between Law and Popular Culture (Chicago: University of Chicago Press, 2000): 50-51.

[81] Jennifer L. Mnookin and Nancy West, "Theaters of Proof: Visual Evidence and the Law in *Call Northside 777*," Yale Journal of Law & the Humanities 13 (2001): 388.