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# **“WE, THE JUDGES”: THE LEGALIZED SUBJECT AND NARRATIVES OF ADJUDICATION IN REALITY TELEVISION**

CYNTHIA D. BOND\*

“Oh how we Americans gnash our teeth in bitter anger when we discover that the riveting truth that also played like a Sunday matinee was actually just a Sunday matinee.”

David Shields, *Reality Hunger*

“We do have a judge; we have two million judges.”

Bethenny Frankel, *The Real Housewives of New York City*

## **ABSTRACT**

At first a cultural oddity, reality television is now a cultural commonplace. These quasi-documentaries proliferate on a wide range of network and cable channels, proving adaptable to any audience demographic. Across a variety of types of “reality” offerings, narratives of adjudication—replete with “judges,” “juries,” and “verdicts”—abound. Do these judgment formations simply reflect the often competitive structure or subtext of reality TV? Or is there a deeper, more constitutive connection between reality TV as a genre and narratives of law and adjudication? This article looks beyond the many “judge shows” popular on reality TV (e.g., *Judge Judy*<sup>1</sup>) to examine the law-like operations of the genre itself, and how legal narratives dovetail with the increasingly participatory nature of our “convergence culture.” In addition, this article examines how these shows constitute community and the role of the legalized subject within that community. How does the prevalence of images of judges and judging on reality TV fit into previous notions that media audiences empathize with legal processes by identifying with an “on-screen” jury, embodying shared, democratic decision-making? Do these shows play on pop cultural narratives of conflicts between judges (within the show) and juries (the viewing audience)? Finally, do such shows empower spectators by engaging them in democratic “knowledge collectives,” or instead act as a neo-liberal “technology of governmentality”? Ultimately, through its enactment of a range of adjudicatory and quasi-legal narratives, reality TV emerges as a highly regulatory space. Law is a compelling narrative for recirculation in a contemporary media culture marked by contestations of authority and

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<sup>1</sup> *Judge Judy* (Worldvision Enterprises television broadcast 1996-present).

community, as the interrelationships between cultural producer, text, and cultural consumer shift and are redefined.

## I. INTRODUCTION

Reality-based television is here to stay. Even the most cursory glance at a program guide reveals the extraordinary range and prevalence such shows have evolved into: from the networks' tried and true offerings like *Survivor*,<sup>2</sup> *The Bachelor*,<sup>3</sup> and *The Amazing Race*,<sup>4</sup> to cable shows like *Sister Wives*,<sup>5</sup> *Top Chef*,<sup>6</sup> and *Ice Road Truckers*,<sup>7</sup> the reality genre has proved itself immensely adaptive and capable of capitalizing on the most fragmented television audience market.

The economic reasons for this turn are well-documented: reality TV shows are infinitely cheaper to produce than scripted shows.<sup>8</sup> For example, in reality TV, there is no need for (often unionized) writers, nor trained (and unionized) actors, nor sometimes even sets (e.g., when filming takes place in people's homes and public places). The rise of reality TV programming in the late 1980s has been ascribed to television producers' attempts to cut costs by reducing the use of trained actors and writers, thus providing cheaper content and short-circuiting labor union battles.<sup>9</sup> In addition, reality TV programming is one response to an increasingly fragmented viewership that drives fiercely competitive channels to seek niche programming to get sufficient market share.<sup>10</sup>

Crucially, reality TV programming fits nicely into what media scholar Henry Jenkins has dubbed "convergence culture":

By convergence, I mean the flow of content across multiple media platforms, the cooperation between multiple media industries, and the migratory behavior of media audiences who will go almost anywhere in search of the kinds of entertainment experiences they want.<sup>11</sup>

Reality TV is particularly well-suited to flow across platforms, occurring not just on TV, nor only during programs, but also on fan websites, on Twitter where

<sup>2</sup> *Survivor* (CBS television broadcast 2000-present).

<sup>3</sup> *The Bachelor* (ABC television broadcast 2002-present).

<sup>4</sup> *The Amazing Race* (CBS television broadcast 2001-present).

<sup>5</sup> *Sister Wives* (TLC television broadcast 2010-present).

<sup>6</sup> *Top Chef* (Bravo television broadcast 2006-present).

<sup>7</sup> *Ice Road Truckers* (History Channel television broadcast 2007-present). This aptly-named show, about men driving trucks on icy roads, would seem to give new meaning to the expression "as boring as watching paint dry."

<sup>8</sup> See, e.g., Laurie Ouellette, *Real Justice: Law and Order on Reality Television*, in *IMAGINING LEGALITY: WHERE LAW MEETS POPULAR CULTURE* 152, 154-55 (Austin Sarat ed., 2011) (explaining the relatively low cost of producing legal-themed reality TV programs).

<sup>9</sup> See Chad Raphael, *The Political Economic Origins of Reality-TV*, in *REALITY TV: REMAKING TELEVISION CULTURE* 123, 127-28 (Susan Murray ed., 2009).

<sup>10</sup> *Id.* at 125.

<sup>11</sup> HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 2* (2006).

fans and reality “stars” may communicate, on YouTube where fans post critiques or parodies of shows, etc.

There may be other reasons for the appeal of reality TV. Reality programming, at its best, channels a documentary impulse. Reality shows allow viewers a glimpse into a broad range of human experience, and sometimes from a position of tolerance. This taste for the documentary format has perhaps been fostered in part by the rising popularity over the last ten years or so of mainstream documentary film releases, which some scholars have argued are increasingly focused on individual travails rather than social ills.<sup>12</sup>

So where does the law fit into an examination of reality TV? Certainly, law has provided content for such shows,<sup>13</sup> most obviously in the “judge” shows like *The People’s Court*,<sup>14</sup> *Judge Judy*, etc. There is already a relatively substantial body of scholarship addressing such shows.<sup>15</sup> In addition, to the extent a “law genre” of reality programs can be identified, a broad range of legal scenarios and institutions are depicted.<sup>16</sup>

This article goes beyond an analysis of law as reality TV content, arguing that narratives of law play a constitutive and essential role in the form and genre of reality TV *itself*. Further, this article argues that reality TV provides yet another forum for us to examine the deeply embedded nature of legal narratives in U.S. culture and discourse.

Consider, for example, VH1’s reality show *Mob Wives*,<sup>17</sup> which follows four Staten Island women who purportedly have organized crime connections. Superficially, the show resembles Bravo TV’s *Real Housewives*<sup>18</sup> franchise, which juxtaposes “day in the life” scenes of the “housewives” with one-on-one

<sup>12</sup> Some commentators argue that media production both “high” and “low” has moved to a prioritization of the personal: “This prioritisation is more to do with cultural shifts in thinking about and through the subjective and signals the increasing popularisation of the therapeutic as an avenue for filmmakers to explore the contemporary moment . . . .” ANITA BIRESSI & HEATHER NUNN, *REALITY TV: REALISM AND REVELATION* 71 (2005).

<sup>13</sup> Ouellette, *supra* note 8, at 152 (“Law and order are ubiquitous on reality television . . .”).

<sup>14</sup> *The People’s Court* (Warner Bros. Domestic Television Distribution broadcast 1981-1993, 1997-present).

<sup>15</sup> See, e.g., Taunya Lovell Banks, *Judging the Judges—Daytime Television’s Integrated Reality Court Bench*, in *LAWYERS IN YOUR LIVING ROOM!: LAW ON TELEVISION* 309 (Michael Asimow ed., 2009); Steven A. Kohm, *The People’s Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV*, 40 *LAW & SOC’Y REV.* 693 (2006); Nancy S. Marder, *Judging Judge Judy*, in *LAWYERS IN YOUR LIVING ROOM!: LAW ON TELEVISION* 299; Laurie Ouellette, “Take Responsibility for Yourself”: *Judge Judy and the Neoliberal Citizen*, in *REALITY TV: REMAKING TELEVISION CULTURE* 223 (Susan Murray & Laurie Ouellette eds., 2d ed. 2009); Kimberlianne Podlas, *The Tales Television Tells: Understanding the Nomos Through Television*, 13 *TEX. WESLEYAN L. REV.* 31 (2006).

<sup>16</sup> For example, Ouellette identifies several types, including “[shows] revolving around police use of . . . surveillance cameras . . . specialized activities such as the border control operations of the Department of Homeland Security . . . female [police] officers . . . specific crimes . . . .” etc. Ouellette, *supra* note 8, at 155.

<sup>17</sup> *Mob Wives* (VH1 television broadcast 2011-present).

<sup>18</sup> *The Real Housewives* (Bravo television broadcast 2006-present).

interviews. However, the series borrows equally from fictional tropes of the New York mob and from “real life” tropes of criminal surveillance and detection. For example, the lettering of the series title is in bold black and red caps, evoking the title style of the fictional HBO series, *The Sopranos*.<sup>19</sup> In addition, the show’s opening includes gritty, cinéma vérité style shots of New York City highways, again echoing the opening title sequence of *The Sopranos*. Finally, the show’s soundtrack incorporates contemporary music like *The Sopranos*. Yet *Mob Wives* also uses stylistic techniques of the “real” in its establishing shots of each character. For example, when we first encounter the “wives,” we are shown gritty footage of their houses with a time meter running at the bottom of the screen, as if the film was being shot in real-time by an F.B.I. surveillance camera. In addition, when we are shown individual characters, they are freeze-framed as the sound of a camera shutter click is heard and a caption with the character’s name types out on the screen. Thus, the image is styled like a surveillance photo obtained by law enforcement.

These formal techniques directly connect the image of the real to the law’s gaze. The real-life “characters” are visually established through the eye of legal surveillance: the mock F.B.I. footage. Thus, our estimation of the realness of what we see of the women’s lives as spouses, former spouses, or children of mobsters is sponsored by the narrative of law enforcement that hovers around them, visualized in the surveillance-style footage. Their lives are offered as documents of detection and law enforcement.

This article examines the embedded narratives of legality in reality TV, in part by analyzing what types of legal viewing subject<sup>20</sup> and, by extension, legal community<sup>21</sup> these shows construct or suggest. A key part of this analysis concerns how audience identification with legalized actors is made available by the reality “space.” Crucial to these opportunities for audience identification is

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<sup>19</sup> *The Sopranos* (HBO television broadcast 1999-2007).

<sup>20</sup> I borrow this concept from Jessica Silbey, *Patterns of Courtroom Justice*, 28 J. OF L. & SOC’Y 97 (2001), reprinted in *LAW AND FILM* (Stefan Machura & Peter Robson eds., 2001). Silbey defines a particular spectator who is created by “law films”:

The trial film’s viewer-subject mirrors the concept of the liberal legal subject (the subject of legal liberalism) and his central role in the pursuit of justice. In a three-stage process, the trial film encourages its viewer-subject both to believe in his crucial contribution to the law’s success and to critique the law’s all-encompassing constitutive capabilities.

*Id.* at 98. I am not as convinced as Silbey that there is a specific genre of law films (*see infra* note 23), but her concept is useful in recognizing mainstream media’s active construction of audience response to legal narratives.

<sup>21</sup> Hopefully, what follows will fully flesh out this concept of legal community. I mean to encompass a range of narratives of “legalistic” group decision-making, e.g., voting for contestants on *American Idol* (Fox Network television broadcast 2002-present). As will be more fully discussed in Section II, I also mean legalized community to refer to images of the jury in popular culture. Finally, national identity and citizenship are also key narratives of legalized community. As will be more fully revealed in the course of this article, reality TV itself constructs spectators as members of legalized communities, through enacted narratives of adjudication and voting.

the plethora of “judges” (and the less frequently depicted “juries”) that appear on reality TV. What emerges from the legalistic narratives constituting reality TV, is a viewing space that is pervasively and *explicitly* regulated.

However, when I argue that “the law” and “adjudication” are pervasively present in reality TV, I am not arguing that the image of law in these shows is unitary or monolithic. While the forms of adjudication presented in many of these shows are similar, especially within types of shows, (e.g., competition shows) the fragmentation of adjudicatory narratives across different show scenarios and judge panels suggests a multiplicity of visions of adjudicatory process. In addition, as discussed below,<sup>22</sup> judging can be explicitly inscribed with difference.

Furthermore, there is a range of public perception regarding the real-life legal system.<sup>23</sup> Thus, legal scholars examining law in the image must be wary of assuming that law is a monolithic referent being distorted by the fun house mirror of reality TV (and more broadly, pop culture). While legal scholars may decry the bizarre view of adjudication implicit in shows like, for example, *Judge Judy*, they should not assume that viewers will see the show as exemplifying *the* law, but rather a *version* of law, which may be more or less mythic.<sup>24</sup>

This article proceeds in eight sections. Section II examines Carol J. Clover’s influential argument that audiences identify with popular legal narratives through the image of the jury. Section III analyzes some data on real life attitudes towards judges, reading it within the context of cultivation theory. Section IV gives some historical background on the development of reality TV, tracking the prevalence of legal narratives in its earliest days. Section V analyzes what I have dubbed “unofficial judge shows”: those reality TV shows, unlike *Judge Judy*, et. al, that have implicit, rather than explicit, narratives of adjudication. Section VI discusses the constitutive role of legal narratives in reality TV, which act to bind anxieties about the loss of the real. Section VII brings into dialogue three distinct critical positions on the relationship between reality TV’s construction of a participatory audience and notions of democracy. Finally, Section VIII concludes by examining some alternate narratives of legalized community formed around television.

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<sup>22</sup> See *infra* Section VI(C).

<sup>23</sup> See PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 34-35 (1998) (analyzing the different ways in which laypeople use and think about law).

<sup>24</sup> This may be especially apt in describing *Judge Judy*, which is largely built around the cult of personality surrounding Judge Judy herself. In fact, as Steven Kohm argues, the key to *Judge Judy*’s popularity is the narrative of supplanting legal rules with Judge Judy’s “common sense.” See Kohm, *supra* note 15, at 721-22.

## II. IDENTIFICATORY SPACE IN VISUAL LEGAL NARRATIVES

### A. Juries R Us: Carol Clover's Concept of Film Audience as Jury

In "*God Bless Juries!*,"<sup>25</sup> Carol J. Clover argues that cinematic courtroom dramas engage film audiences not just through a "whodunit" plot, but by enlisting them as rhetorical "jurors" to ultimately decide the relative justice of what occurs in the onscreen trial.<sup>26</sup> Clover traces the centrality of the image of the jury in the American popular imagination to Tocqueville's early observations that legal actors were the *de facto* aristocrats of American society who evoked emulation from all classes and influenced the larger social discourse.<sup>27</sup> "[A]ll parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings . . . the jury is introduced into the games of schoolboys."<sup>28</sup> Clover finds persistent evidence of Tocqueville's assertion in, for example, television shows<sup>29</sup> that ask the audience to decide on the fate of actual litigants, the popular obsession with real-life, televised trials like that of O.J. Simpson, and most centrally, in law themed-films that constellate around trials.<sup>30</sup> "[S]o fundamental is the jury in the American imaginary that it turns up in and structures even the sheerest forms of play."<sup>31</sup>

To support her argument, Clover surveys early cinema's stylistic devices which explicitly invite viewers into the role of the jury, for example in *The Trial of Mary Dugan*<sup>32</sup> in which witnesses in the onscreen trial are told to "address the jury," whereupon they turn to look directly into the camera, thus addressing the film audience.<sup>33</sup> While this gesture now feels contrived and dated, Clover rightly

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<sup>25</sup> Carol J. Clover, "*God Bless Juries!*," in REFIGURING AMERICAN FILM GENRES: HISTORY AND THEORY 255 (Nick Browne ed., 1998).

<sup>26</sup> *Id.* at 256-57.

<sup>27</sup> *Id.* at 255-56, 272-73.

<sup>28</sup> Clover, *supra* note 25, at 256 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1863)).

<sup>29</sup> Clover lists as examples past shows such as *You Be the Judge* (NBC television broadcast 1999), and *Jones and the Jury* (Group W television broadcast 1994-1995). See Clover, *supra* note 25, at 256.

<sup>30</sup> Not all scholars subscribe to the notion of a law film genre, as I discuss in detail in: Cynthia D. Bond, *Laws of Race/Laws of Representation: The Construction of Race and Law in Contemporary American Film*, 11 TEX. REV. ENT. & SPORTS L. 219 (2010). See also DAVID A. BLACK, LAW IN FILM: RESONANCE AND REPRESENTATION 39-43 (1999). Black argues that a law genre may be difficult to identify as law is a pervasive social phenomenon, potentially implicated in even something as superficial as the image of a police officer.

<sup>31</sup> Clover, *supra* note 25, at 256. While Clover focuses almost exclusively on films in her article, she attributes identification with the jury broadly to "the entertainment system [which] draws on the legal system, playing to the juror in us all." *Id.* at 273.

<sup>32</sup> THE TRIAL OF MARY DUGAN (MGM 1929).

<sup>33</sup> Clover, *supra* note 25, at 259.

points out that even contemporary films cue their viewers to their place as jurors, though less explicitly.<sup>34</sup>

But paradoxically, especially the *absence* of jury depiction, Clover argues, is a cue that we, the audience, are to act as jury. “[W]e understand the jury to constitute a kind of necessary blank space in the [filmic] text, one reserved for us.”<sup>35</sup> Thus, the relative lack of jury depiction in films<sup>36</sup> is not just an accident, but is central to constructing the audience’s active participation in the legal narrative onscreen. For example, in *Compulsion*,<sup>37</sup> Orson Welles (playing a thinly veiled version of Clarence Darrow) delivers his impassioned closing argument against the death penalty for the Leopold and Loeb-type characters<sup>38</sup> he defends, directing his gaze toward the camera as if arguing to the audience. More recent examples Clover cites include *Presumed Innocent* and *Reversal of Fortune*, both of which open with voiceovers by the main characters<sup>39</sup> who give a kind of “jury charge” to the audience, exhorting them to decide the ultimate “truth” of the film.

This structuring of the jury as the central rhetorical core of a majority of law films<sup>40</sup> is not merely a plot point, Clover argues, but is a key element of popular culture’s construction of law and the citizen’s place within it. Crucially, the jury is typically immunized from any thoroughgoing critique in these films,<sup>41</sup>

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<sup>34</sup> Clover offers the example of *PRESUMED INNOCENT* (Warner Bros. Pictures 1990) with its opening and closing shots of the empty jury box under the voiceover of prosecutor Randy Sabich (played by Harrison Ford) explaining the jury’s role. See Clover, *supra* note 25, at 260-61.

<sup>35</sup> Clover, *supra* note 25, at 265.

<sup>36</sup> Of course, *12 ANGRY MEN* (United Artists 1957) is a notable exception. However, Clover argues that despite the film’s seemingly atypical focus on the jury, the role of the jury is to essentially reenact the trial for the “jury” that really matters, the film audience. Thus, *12 Angry Men* is not truly anomalous to film’s use of the jury to suture in audience participation. See Clover, *supra* note 25, at 266-71.

<sup>37</sup> *COMPULSION* (Twentieth Century Fox Film Corp. 1959).

<sup>38</sup> Michael Hannon, *Leopold and Loeb Case (1924)*, UNIV. OF MINN. L. LIBRARY, [http://darrow.law.umn.edu/trialpdfs/LEOPOLD\\_LOEB.pdf](http://darrow.law.umn.edu/trialpdfs/LEOPOLD_LOEB.pdf) (last visited Oct. 1, 2012).

<sup>39</sup> In *REVERSAL OF FORTUNE* (Warner Bros. Pictures 1990) the main “character” in question is Sunny Von Bulow, who spends the film in a coma, except for flashback sequences.

<sup>40</sup> Again, the validity of Clover’s argument in part depends on how central you think courtroom dramas are to depictions of law. Again, as Black argues, law is always already in many films; it is simply onscreen duration of explicitly legal actors and subjects that may ultimately determine whether we say a film is truly *about* law or not. See Black, *supra* note 30, at 39-43.

<sup>41</sup> “Even when the system has gone manifestly wrong, blame is laid at the door of a sleepy judge, an ambitious DA, a greedy lawyer . . . but not the jury . . . The institution of the jury has been much debated in the press in recent years, but it remains for the most part oddly secure in the movies.” Clover, *supra* note 25, at 264-65. Consider, for example, the jury in *TO KILL A MOCKINGBIRD* (Universal Pictures 1962), in which twelve white men convict Tom of rape, despite the clearly exculpatory evidence presented at trial and Atticus Fitch’s brilliant summation. While clearly the injustice in the film results from the biased, all-white jury, the film still manages to deflect or at least mute critique of the jury system or the legal system more broadly, directing audience attention instead to Atticus as an exemplar of law and justice. See Bond, *supra* note 30, at 254-55. Or to take a more recent example, *RUNAWAY JURY* (Twentieth Century Fox Film Corp. 2003), despite its over-the-top jury tampering plot, still manages to portray the jury system as a valuable



Clover argues, because it stands for the film audience, and by extension, American democracy. The jury thus represents legal community, a connection reinforced in the cinematic context by the resonance of community in a crowded theatre. Or, as David Ray Papke argues, “The jury [in courtroom dramas] is to represent the people generally as it makes up its mind.”<sup>42</sup>

As for depictions of judges, Clover argues that law films would have to repudiate the citizen jury if they were to place judges at the center of legal narratives. Instead, law films choose the narrative of the “common people”—the jury (and by extension, the film audience)—over the narrative of expertise and “elitism” judges embody. For example, in *12 Angry Men*, the image of the bored, detached judge at the film’s opening encourages viewers to think that twelve heads are better than one.<sup>43</sup> Clover emphasizes that the “American legal imagination . . . inhabits first and foremost *not the judge’s bench*, not the attorney’s chair . . . but the jury box.”<sup>44</sup> Part of this rejection of the judge as identificatory access for the audience is a rejection of the character of legal *expertise*. Crucially, these narratives stage an opposition between the “common man” jury and the expert judge.

### B. The Television Difference

Two of Clover’s propositions are crucial to my concerns in this article. First, that a key identificatory vehicle for the audience of American law films, and within popular culture more broadly, is the narrative of the jury. Second, that the on-screen jury is imaged as a positive narrative of democracy—or what I am calling a “legalized community”—that implicates all spectators as a “nation of jurors.”<sup>45</sup>

However, to the extent that Clover focuses her analysis on film, it is important to make clear at the outset that the machinations, technologies, and spectatorship of TV, my focus here, differ significantly from film. While it is well-documented that the rise of U.S. television in the 1950s was to some extent at the economic expense of film—for example, as a central contributing factor to decreased movie theater attendance<sup>46</sup>—TV cannot simply be analyzed as *supplanting* cinematic medium. “Culturally, film and television came by the mid-fifties to define and occupy different social places and to exercise different

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counterbalance to evil corporate interests. The film borrows jury room deliberation dialogue from *12 Angry Men* to reinforce its pro-jury message.

<sup>42</sup> David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 MARQ. L. REV. 471, 481 (1999).

<sup>43</sup> Clover, *supra* note 25, at 271.

<sup>44</sup> *Id.* at 273 (emphasis added).

<sup>45</sup> Clover, *supra* note 25, at 272.

<sup>46</sup> Robert Vianello, *The Rise of the Telefilm and the Network’s Hegemony Over the Motion Picture Industry*, in AMERICAN TELEVISION: NEW DIRECTIONS IN HISTORY AND THEORY 3 (Nick Browne ed., 1994); see also Nick Browne, *The Political Economy of the Television (Super) Text*, in AMERICAN TELEVISION, *supra*, at 69.

entertainment and ideological functions for their audiences.”<sup>47</sup> Rather, more fundamentally, the advent of television “altered the relation of the media, and of entertainment, to ‘culture’ by substituting a system of continuous, ‘free’ viewing for the theatrical system of discrete admissions on a pay-per-view basis.”<sup>48</sup>

Given these differences, to the extent that Clover’s thesis regarding audience identification describes film, it cannot simply be applied to images of law on television. This will become more apparent when I discuss theories of television as a participatory and interactive medium in Section VII below. Television is arguably a more participatory medium than cinema to begin with: it is in our homes, we structure our viewing of it by engaging in “self-editing” and time-shifting techniques as we view it, etc.<sup>49</sup> In addition, as Naomi Mezey and Mark C. Niles argue, the economic structure of television differs from that of cinema: “The unique profit structure of network television . . . helps account for the fairly narrow ideological range in its legal programming. Perhaps the best explanation for why television is so consistently crude ideologically is that it is almost entirely dependant on corporate advertisers.”<sup>50</sup>

Thus, while the more recent proliferation of DVDs, pay-per-view and on-demand services, and other Internet streaming technologies have embedded film

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<sup>47</sup> Browne, *supra* note 46, at 69.

<sup>48</sup> *Id.*

<sup>49</sup> John Hartley, *From Republic of Letters to Television Republic? Citizen Readers in the Era of Broadcast Television*, in TELEVISION AFTER TV: ESSAYS ON A MEDIUM IN TRANSITION 386 (Lynn Spigel & Jan Olsson eds., 2004).

<sup>50</sup> Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 170 (2005). Mezey & Niles argue that film is more likely to present critical views of the legal system than network TV because it sells itself directly to audiences unlike network TV, which must sell itself to advertisers. This argument is somewhat problematic. First, while it is true that, in theory, the possibilities for more decentralized, independent production of film are far greater than truly independent TV production (e.g., public access channel bandwidth is extremely limited), the vast majority of films receiving wide distribution are also commercial productions and often level at most clichéd and superficial critiques at the legal system. In addition, while subscription service TV like HBO is of course not dependent on advertisers, and is thus more like film than TV, shows like HBO’s *The Wire* (HBO television broadcast 2002-2008), with its extraordinarily rich and complex view of law enforcement is a testament to the possibilities of the serial TV format to be critical of the legal system. As will be discussed more fully in Section VII, the blossoming of transmedia (e.g., the existence of a character or story across multiple media platforms) increasingly remake boundaries between TV and film (and the Internet, etc.). See, e.g., *Confessions of an Aca-Fan*, OFFICIAL WEBBLOG OF HENRY JENKINS, [http://henryjenkins.org/Reality\\_television/](http://henryjenkins.org/Reality_television/) (last visited Aug. 29, 2012) (discussing concerns of media producers and consumers in light of evolving transmedia). Finally, while Mezey & Niles ably summarize the English Birmingham School of Criticism, which focuses on the potential for individual spectators within specific contexts to produce multiple readings of mass cultural texts, they limit their analysis of the meanings contained such texts to those purportedly intended by the media producers. As I discuss more fully below in Section VII, it is important to consider media consumer reappropriations as well as producer intent.

viewing in the home,<sup>51</sup> the form and economic considerations of television and film—in addition to their considerably different origins—differ greatly. In addition, in the world of cultural convergence,<sup>52</sup> television offers immediate opportunities for audience participation in “real time” (e.g., through texting or tweeting to producers during a show) that are not available in theatrical viewings of films.

That said, mainstream film and TV share some narrative techniques of fostering audience identification; for example, using individualistic (and typically male) heroes as central characters, employing highly emotional acting styles, etc. But reality TV and cultural convergence expand the possibilities for identification beyond the classical cinema model, allowing spectators to directly communicate with media makers and reality “stars” through the Internet and social media. As I will discuss more fully in Section VII, these participatory opportunities create different contexts for audiences to identify with narratives of the jury.

We might be tempted to ask if Clover’s concept of film audience identification with on-screen juries fits even more neatly into the television context, with its more profoundly mass distribution and its fostering of family or group viewing. Crucially, television’s very form and dissemination method help structure narratives of legal community. Thus, it is impossible to simply trace the “content” of the image of the jury without trying to account for the structural differences between television and film spectatorship. Accordingly, I will address the particular nature of the TV audience’s participatory opportunities as a crucial element in creating narratives of legal community.

This article also diverges from Clover’s argument in that she deals with fiction films while I am almost exclusively analyzing reality TV programs. While such programs still operate in part as fictions, their narrativization of actual events marks the place of the viewing audience differently, as I will discuss in more detail later. However, Clover’s observations are useful here in that they suggest the pervasiveness of legal narratives and the image of the jury across popular culture media, beyond film. Indeed, the narrative tension between judges and juries that Clover suggests informs film also informs television. Finally, Clover’s linking of the image of the jury to broader notions of democracy, thus implicating audience members as legalized subjects, also resonates with the pervasive narratives of adjudication on reality TV.

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<sup>51</sup> Mezey & Niles do acknowledge that these newer forms of film distribution have made the economic boundaries between the film industry and television less distinct. Mezey & Niles, *supra* note 50, at 167, 170.

<sup>52</sup> See JENKINS, *supra* note 11, at 11-12 (arguing that the inter-penetration of television, the Internet, and material culture creates new participatory opportunities for viewers/fans of popular culture).

### C. Judicial Character(s)

Overall, traditional depictions of judges in film and on TV provide a kind of character “blank space” not unlike the depictions of the jury that Clover describes. We rarely know anything about judge characters as individuals, and they do not take up much screen time. Since mainstream film and TV typically create audience identification by depicting a character’s personal and emotional life, the absence of such a life tends to limit audience identification in a thoroughgoing way. Thus, judges are not the vehicles for identification that lawyer characters often become. That said, as discussed more fully below (extrapolating from Clover’s argument), this “blank space,” this relative lack of character development,<sup>53</sup> suggests an opportunity to align the audience with the judge’s point of view.<sup>54</sup>

To the extent judges are depicted in cinema or television, that depiction tends to be rather enigmatic. As David Ray Papke argues about early pop cultural representations, “the judge generally was a simple, banal, even trivial character.”<sup>55</sup> Thus, like jurors, judges are not typically the center of attention or main characters in traditional legal dramas. “The judge lacked individualizing detail and was also static . . . did not develop or change in the course of the film, short story, or television show.”<sup>56</sup> Rather, the legal actor most films and TV shows focus on are attorneys, and arguably, police, who are even more prevalent legal actors in shows like *Law & Order*<sup>57</sup> and the seemingly ubiquitous forensic shows like *CSI*.<sup>58</sup> When judges do appear, they are depicted in fairly delimited stereotypes: for example, as overwhelmingly powerful (sometimes to the point of being corrupt<sup>59</sup>), absent and disinterested in judicial proceedings,<sup>60</sup> or noble but largely silent overseers of the court. On many law-themed television shows, several different judge characters appear in trial scenes somewhat randomly, without garnering much focus or screen time.

Papke argues that since the 1970s, pop culture judges have come to be more fully fleshed out characters. He ascribes this to a post-Watergate, more

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<sup>53</sup> “To put it trivially, the judge in film is a character. To put it less trivially, the judge in film is often a trivial character.” David A. Black, *Narrative Determination and the Figure of the Judge*, in *LAW AND POPULAR CULTURE* 677, 679 (Michael D. A. Freeman ed., 7th ed. 2005).

<sup>54</sup> In fact, unlike Clover, Black argues that one of the key metaphorical connections between spectators and law films is the judge, not the jury: “people who see films judge them. That much is obvious; less obvious, is the fact that people are *aware* of the fact they judge films.” *Id.* at 681. I discuss the implications of this idea for reality TV below.

<sup>55</sup> David Ray Papke, *From Flat to Round: Changing Portrayals of the Judge in American Popular Culture*, 31 *J. LEGAL PROF.* 127, 131 (2007).

<sup>56</sup> *Id.*

<sup>57</sup> *Law & Order* (NBC television broadcast 2000-present).

<sup>58</sup> *CSI* (CBS television broadcast 2000-present).

<sup>59</sup> *E.g.*, the aptly (if obviously) named Judge Noose in *A TIME TO KILL* (Warner Bros. Pictures 1996).

<sup>60</sup> *E.g.*, the aforementioned judge in *12 Angry Men*.

cynical public: “[o]n a deeper level, the acceptance of the new pop cultural portraiture relates to changing attitudes about the rule of law itself.”<sup>61</sup> However, the only example he offers of a show devoted entirely to a judge, (other than reality TV daytime shows like *Judge Judy*) is *Judging Amy*.<sup>62</sup> The other portrayals he grounds his argument on are judges who are simply shown as perhaps more explicitly corrupt or personally fallible than earlier portrayals: e.g., Judge Hoyle in *The Verdict*,<sup>63</sup> who is biased towards the defendant Catholic Church, or suicidal Judge Rayford and criminal defendant Judge Fleming in *...And Justice for All*.<sup>64</sup> These characters may represent a predictable evolution in the portrayal of judges as more negative or “human,” rather than as pillars of remote power. But judge characters are still predominately minor characters, not commanding significant screen time, not motivating the plot, and not providing a full site for audience identification.<sup>65</sup>

Papke attempts to draw a direct correlation between depictions of judge characters and actual popular attitudes towards law, but is ultimately unconvincing. First, Papke relies on a teleological analysis of pop culture, finding a linear evolution in judge characters from “flat” to “round.”<sup>66</sup> However, the vast majority of judge characters in film and television remain as undeveloped in contemporary media as they were in earlier productions. There may be more explicitly *negative* portrayals of judges than in previous decades, but that does not equate to a full-blown character with whom audiences can identify. (And arguably, *all* contemporary cinematic characters are more negative or at least morally ambiguous than in the days of classic Hollywood). In addition, Papke uses National Center for State Courts surveys indicating a general decline in public perception of courts to suggest a correlation between negative popular perception of courts and the evolution of law-themed shows.<sup>67</sup>

<sup>61</sup> Papke, *supra* note 55, at 149.

<sup>62</sup> *Judging Amy* (CBS television broadcast 1999-2005). See Papke, *supra* note 55, at 144-47. We could add to that Judge Phelan in HBO’s *The Wire* who, while a minor character, is a major mover and shaker in directing which cases the police and prosecutors pursue. While we do not know much about him on a personal level, we do see many scenes where he discusses cases directly with the police and district attorneys (“DAs”), and we get a sense of his personality. A film exception is Judge Weaver in *ANATOMY OF A MURDER* (Columbia Pictures 1959), who is played by real-life attorney Joseph N. Welch. But even in these more fleshed-out parts, the judge characters have relatively minor roles and are not key figures for audience identification.

<sup>63</sup> *THE VERDICT* (Twentieth Century Fox Film Corp. 1982).

<sup>64</sup> *...AND JUSTICE FOR ALL* (Columbia Pictures 1979).

<sup>65</sup> Indeed, Black suggests that judges who are portrayed negatively in film typically are less important to the action: “in most cases an interesting, psychologically developed judge is also corrupt . . . and does not ultimately succeed in controlling the flow of the narrative.” Black, *supra* note 53, at 679.

<sup>66</sup> Papke, *supra* note 55, at 131-32. Papke pays lip service to the non-linearity of pop culture: “The culture industry develops new conventions and genres, but it is also readapts and rediscovers older ones. It combines older types of narratives into one, and it varies older types of narratives in ways that produce new types of narratives.” *Id.* at 135. Yet his analysis of judge characters is still essentially teleological.

<sup>67</sup> In discussing more recent surveys, Papke acknowledges “[t]he study is hardly definitive.” Yet he

However, given the nature of the surveys, it is impossible to isolate respondents' attitudes about judges *qua* judges from more general dissatisfaction with the broader court system. As discussed more fully below, a correlation between real-life attitudes and media consumption cannot be presumed, but instead requires in-depth research to prove.<sup>68</sup>

Ultimately, Papke's project is limited by his narrow focus on the judge character as the sole representation of law in popular culture. Judges certainly play a key role in the imaging of law, but without analyzing other characters through which the legal system is portrayed (e.g., attorneys, police, juries) it is difficult to draw definitive and reliable conclusions about either mass media messages about law or public perceptions of them. In addition, as I argue more fully below, adjudicatory processes *themselves* have become essential "characters" in the depiction of law, exceeding images of judges. Thus, a full account of pop culture depictions of law requires a broader assessment of narratives of adjudication, rather than simply looking at adjudicators.

### III. "REAL LIFE" DATA: ATTITUDES ABOUT LAYPERSON ATTITUDES ABOUT JUDGES

Commentators have been speculating on popular attitudes towards real life judges for some time. And at least one commentator, Judge Bruce M. Selya (retired),<sup>69</sup> has suggested that the very notion of judicial hierarchy itself is repugnant to the average American: "To the extent the courts are under attack, therefore, we should understand the attack to be one aimed at authority and fundamental legitimacy as much as inefficiency, unrepresentativeness, excessive cost, or unfairness."<sup>70</sup> Selya argues that part of that suspicion emanates from a lack of understanding of the judiciary: "the public lacks even abecedarian knowledge of the judicial branch. The public cannot appreciate the courts and their function unless it understands the courts and their function."<sup>71</sup> Selya joins

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still plays fast and loose with the data, connecting survey respondents who said they gain knowledge about the legal system from TV with other survey answers about mistrust of the court system. *Id.* at 151. See *infra* Section III, notes 73-78 for a discussion of NCSC surveys regarding public perceptions of judges and the pitfalls of attempting to correlate TV viewing habits with real-life attitudes.

<sup>68</sup> Nor is there a clear linear relationship between surveys of popular opinion and media production, as Papke attempts to assert: "its antennae permanently raised to detect cultural change, the [media] industry was certainly aware of shifting popular attitudes about courts and judges. The shift provided an opportunity, indeed, an invitation, to produce pop cultural commodities with portrayals of judges other than the traditional flat portrayals. Judges could be portrayed in lots of new ways with the hope that one or more of these portrayals would 'strike gold.'" Papke, *supra* note 55, at 137-38. This assumes that media producers simply encapsulate popular opinion, rather than helping to shape it.

<sup>69</sup> Judge Bruce M. Selya sat on the United States Court of Appeals for the First Circuit from 1986 to 2006.

<sup>70</sup> Hon. Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 912 (1996).

<sup>71</sup> *Id.* at 913.

other commentators in placing some of the blame on the media, arguing that most laypeople obtain their information regarding judges from television:

What is not seen [in popular media] is a hard-working bench that functions quite well 99 44/100 percent of the time, that decides cases in a legally legitimate manner, and that maintains delicate balances among competing values, interests, and government institutions. By focusing on the sensational or aberrational, the media implant within the public psyche a potential for undue cynicism and the basis for rejecting judicial authority.<sup>72</sup>

Indeed, the 1999 National Center for State Courts and Hearst Corporation survey Papke discusses regarding public attitudes toward the courts found that 59.2 percent of respondents indicated they “regularly” gained information about courts from electronic media, and 26.3 percent said they “sometimes” gained their information there.<sup>73</sup> In 1999, the relatively early days of reality TV, 18.3 percent said they regularly gained information about courts from reality TV shows, while 22.2 percent said they sometimes gained their information there.<sup>74</sup> A full 25.6 percent of respondents said they gained their information about courts regularly from TV dramas, and another 35.8 percent “sometimes” gained their information from such dramas.<sup>75</sup>

These surveys understandably factor in direct public experience with the judicial system when polling public opinion. A 2009 National Center on State Courts survey of 1,200 Americans, aged eighteen and above, found the following:

A majority of U.S. adults (56%) reports having some form of direct experience, contact or involvement with a state court case. Forty-three percent of Americans report they have not ever had any contact with their state courts. The most common experience with the state courts involves being called for jury duty – 22% of those surveyed report having been called but not selected, while 15% report being selected as a juror or an alternate juror in a state case. Very few people report experiencing the courtroom as a defendant (7%), a person filing a

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<sup>72</sup> *Id.*

<sup>73</sup> NAT'L CTR. FOR STATE CTS., HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 19-20 (1999), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicViewCrtsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf). See also Papke, *supra* note 55 (discussing popular opinion regarding courts obtained from these surveys). While law-trained minds may assume a connection between popular opinions regarding courts and opinions regarding judges, laypersons may experience courts as constituted by many figures and instrumentalities beyond the judge—e.g., bailiffs, court clerks, attorneys.

<sup>74</sup> NAT'L CTR. FOR STATE CTS., *supra* note 73.

<sup>75</sup> *Id.*

lawsuit (4%), a person being sued (2%) or in some other capacity (2%).<sup>76</sup>

Interestingly, the 2009 survey concluded that direct personal experience with the judicial system was not key to forming opinions about it: “Personal experience with the judicial system has minimal influence on people’s opinions of state courts and judges. For the most part, adults who have been involved with the courts and those who have not share similar views about all aspects of the judiciary.”<sup>77</sup> What the survey did find central to public confidence in the court system was the education or knowledge level of the respondents. In general, the survey found that respondents who had more formal education had a higher opinion of the credibility of courts.<sup>78</sup>

Probably most spectators of popular culture have at some point found themselves making bold pronouncements about the effects media simply *must* have on impressionable viewers. But while it may be tempting to assume that there is a direct, discernible relationship between public attitudes towards courts, judges and the images of judges they consume on TV, there is no clear indication that media effects are readily traceable.

Since the inception of television, researchers have attempted to determine if there is a causal relationship between TV viewing and viewers’ beliefs or behaviors.<sup>79</sup> This early research was “interested in knowing how specific messages, channels and sources could produce *changes* in attitudes or behaviors.”<sup>80</sup> Early studies typically focused on a “before vs. after” analysis of the effects of television, frequently observing a subject’s behavior in artificial lab environments only immediately before and after he or she viewed a specific program.<sup>81</sup> Given this narrow measurement of viewership’s effects, it is not surprising that the results of this research were frequently rejected by both scholars and the television industry.<sup>82</sup>

This research took a different path in the late 1960s with the work of George Gerbner, widely viewed as the father of “cultivation theory.”<sup>83</sup> In their retrospective survey of cultivation theory and research, media scholars James

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<sup>76</sup> NAT’L CTR. FOR STATE CTS., SEPARATE BRANCHES, SHARED RESPONSIBILITIES: A NATIONAL SURVEY OF PUBLIC EXPECTATIONS ON SOLVING JUSTICE ISSUES 12 (2009), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctcomm&CISOPTR=118> (study conducted by Princeton Survey Research Associates International). The survey took into account the age, race and ethnicity, education, and political affiliation of the respondents, among other characteristics.

<sup>77</sup> *Id.* The survey did find some divergence regarding perceptions of court budgetary issues between respondents who had experience with the courts and those who did not.

<sup>78</sup> *Id.* at 23-25.

<sup>79</sup> JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS: CULTIVATION THEORY AND RESEARCH 8-11 (1999).

<sup>80</sup> *Id.* at 9.

<sup>81</sup> *Id.* at 10.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 11.



Shanahan and Michael Morgan explain that “[i]f cultivation is a critical theory, it is a theory of media’s role in social control. That is, it examines how media are used in social systems to build consensus . . . on positions through shared terms of discourse and assumptions about priorities and values.”<sup>84</sup> Crucially, cultivation theory assumes that, since mass media is produced by cultural elites in a commercial system, “the system works so as to benefit social elites.”<sup>85</sup>

While Gerbner is perhaps best known for his research on television violence and its effects on viewers through his “Cultural Indicators” project,<sup>86</sup> Shanahan & Morgan emphasize that cultivation theory has frequently been mischaracterized as being capable of discerning clear causal relationships between spectatorship of specific TV programs and specific human behavior.<sup>87</sup> “Did *Kojak* cause Ronald Zamora to murder his elderly neighbor, as his lawyer famously argued in 1977? . . . [C]ultivation research wouldn’t tell us, but it might help us understand something about the broader social environment in which such a question could even be asked.”<sup>88</sup> And indeed, cultivation theory does find an ideological enculturation that TV exercises over its viewers, chiefly through the stories it tells: “Stories socialize us into roles of gender, age, class, vocation and lifestyle, and offer models of conformity or targets for rebellion. . . . The story-telling process was once more hand-crafted, home-made, and community-inspired. Now it is mostly mass-produced and profit-driven. It is the end result of a complex manufacturing and marketing process. It both defines and then addresses the public interest.”<sup>89</sup>

<sup>84</sup> *Id.* at 15.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 6-8. This research focused on the amount of television viewers consumed and found that heavy viewers of violence on TV were more afraid of being the victims of violence in their own lives than people who viewed less TV on a regular basis. Thus, Gerbner found evidence that popular attitudes about crime policy could be affected in some cases by heavy television viewing. Gerbner did not find that heavy viewers of TV violence were more likely to engage in violence themselves. *Id.* at 20.

<sup>87</sup> *Id.* at 5.

<sup>88</sup> *Id.* at 6.

<sup>89</sup> George Gerbner, *What Do We Know?*, Foreword to SHANAHAN & MORGAN, *supra* note 79, at ix. While Gerbner traces the transformation of story-telling from its origins in the home, to the church and state, to the electronic outlets of corporate capitalism, it would be a mistake to engage in a blanket nostalgic longing for the stories of pre-corporate culture. Obviously, the family, church, and state have also told stories of power and social marginalization, long before the advent of the corporate “monopoly” over storytelling Gerbner describes. In addition, while Shanahan & Morgan downplay the need to get cultivation analysis to respond to the tremendous “DIY” aspect of cultural production that the Internet and widely available media software now allows average citizens, as noted above, the Birmingham School argues that any interpretation of mass culture must take into account the reappropriations of viewers and fans. See Mezey & Niles, *supra* note 50, at 107 (summarizing the Birmingham approach as “acknowledg[ing] that cultural meanings were constructed both from above and below . . . and hence subject to negotiation and contestation.”). Gerbner’s discourse sees cultural production moving in one direction, from maker to consumer. But fan culture observer Henry Jenkins argues that spectatorship is not purely hegemonic: “Unimpressed by institutional authority and expertise, the fans assert their own right to form

Unfortunately, a significant portion of law and visual studies scholarship takes a fairly unexamined view that direct correlations can be made between pop cultural images of the legal system and popular attitudes regarding the “real life” legal system. Understandably, many such scholars approach images of law in mass visual culture from a purely content perspective, rather than analyzing media on its own representational terms.<sup>90</sup> There is a pessimistic or negative throughline connecting much of this criticism, which seemingly seeks to “safeguard” imagined realities of how law *actually* functions from gross misrepresentations found in the media.<sup>91</sup> Perhaps these commentators have, in the words of Henry Jenkins, “transformed fandom into a projection of their personal fears, anxieties, and fantasies about the dangers of mass culture.”<sup>92</sup>

Law professors and scholars may feel a pedagogical, or perhaps even moral, imperative that law be depicted with doctrinal “accuracy,” but from the perspective of how visual media is constructed and consumed, there is simply no hard data on what real-life attitudes about law, if any, viewers actually acquire from the images they consume. It is impossible to isolate specific attitudes that viewers may obtain from watching specific TV programs.<sup>93</sup> That is, even followers of cultivation theory,<sup>94</sup> who ostensibly believe in quantitative analysis of TV viewer response, would say that while analyzing TV viewers’ reception may reveal a range of beliefs about the role of law in society, it cannot show

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interpretations, to offer evaluations, and to construct cultural canons.” HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE* 18 (1992). See also Mezey & Niles, *supra* note 50, at 100 (“like all mass culture, television and film are always available for popular reinvention and reclamation by their viewers.”). See generally *infra* Section VII (discussing the role of fan culture in Reality TV).

<sup>90</sup> Many legal scholars who examine law through visual culture may not have an academic background in media studies to bring to bear on the media with which they work. However, just as an accurate interpretation of law requires knowledge of how law is made and the rhetorical terms of legal analysis, an accurate interpretation of the meaning of visual media also requires an understanding of the production and rhetoric of visual mass media.

<sup>91</sup> See BLACK, *supra* note 30, at 144-45 (asserting that some legal scholars engage in “corrective” readings of law in film, evaluating images solely by how realistic or accurate they are about “real” law). In addition, it is not uncommon for Hollywood films to be taught this way in law schools: as exemplars of mistakes about the law and thus as heuristic devices to teach the *real* law, rather than as examples of how pop culture reconfigures and mythologizes legal narratives.

<sup>92</sup> JENKINS, *supra* note 89, at 6.

<sup>93</sup> James R. Elkins, prominent professor of law in film, notes: “[W]e know far less about the effects of popular culture on law and lawyering than we would like to think we do. Scholarship is thin, speculation rife, particularly concerning the purported effects of popular culture which both permeate and under-mine legal film criticism. James R. Elkins, *Popular Culture, Legal Films, and Legal Film Critics*, 40 *LOY. L.A. L. REV.* 745, 747 (2007).

<sup>94</sup> And of course, cultivation theory has its critics. Some critics have argued that it is impossible to quantify the complexities of human spectatorship. This critique asserts that media messages are polysemic, and may mean different things to viewers in different socio-economic, gendered, and raced categories. Other critiques have focused on the irreproducibility of results in other TV markets (e.g., Great Britain). See SHANAHAN & MORGAN, *supra* note 79, at 59-80. Accordingly, there is no critical consensus on the ability to accurately judge media’s impact on viewers.

whether negative characterizations of *particular* judge characters inculcate negative viewer perceptions of judges.<sup>95</sup>

Rather, what we may be able to borrow from cultivation theory<sup>96</sup> is a focus on the overall ideological systems embedded in TV depictions of law that may inform broader attitudes about law in society. Gerbner clearly saw TV as a mechanism of social control: “The formulas [of TV programs] themselves reflect the structure of power that produces them and function to preserve and enhance that structure of power.”<sup>97</sup> If we subscribe to Gerbner’s approach, the depiction of law may be particularly telling, since law itself is a mechanism of social control.<sup>98</sup>

Judge Selya’s observation that Americans resist the authority that the judiciary represents due to ideas “implanted” by contemporary media is overly reductive and historically shortsighted. The American psyche has been inflected, perhaps as early as its genesis, as one suspicious of authority. Tocqueville’s observations that Americans incorporate the jury model into the “games of schoolboys” suggests that the American psyche was forged as one which felt no qualms about domesticating images of legal authority to its own (imaginative) control.<sup>99</sup> We see further examples of this in literature and culture dating back to the nineteenth century.<sup>100</sup> The entire tradition of the American Western, for example, embraces the rugged individual’s right to self-determination, even when conflicts arise with the spread of legal institutions attendant to “civilization.” Media undoubtedly has historically played a role in romanticizing and reifying this “American spirit,” but it would be overly reductive to assume that contemporary media is largely responsible for contemporary attitudes about judges.

Ultimately, survey data may reveal broad trends over time, but it may not be a reliable indicator of the role of popular culture in public perception of judges. While the data contained in the aforementioned NSSC surveys suggests that people see themselves as gaining ideas about courts and judges from television, we cannot be sure *what* ideas they are gaining. In addition, it is perhaps impossible to isolate those perceptions of law that emanate *solely* from

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<sup>95</sup> *Id.* at 6.

<sup>96</sup> Notably, film is a significantly different medium with different viewing practices not easily amenable to this theory.

<sup>97</sup> Gerbner, *supra* note 89, at xii.

<sup>98</sup> However, as discussed above, others argue that media is also made and remade from the “bottom up.” See Mezey & Niles, *supra* note 50. My own perspective on these approaches is that they need not be mutually exclusive: while the mass media purveyed by commercial producers is undoubtedly culturally normative and “top-down” in its production and distribution, it is significant that consumers of media may repurpose it or otherwise “talk back” in ways which are more or less empowering. See *infra* Section VII for a more thorough discussion of fan participation.

<sup>99</sup> See Clover, *supra* note 25, at 256.

<sup>100</sup> See generally ROBERT B. RAY, A CERTAIN TENDENCY OF THE HOLLYWOOD CINEMA, 1930-1980 (1985) (tracing the tension between American desires for libertarian individuality and the fear of lawless anarchy in early frontier narratives up through late twentieth century Hollywood films).

media. (Certainly these particular surveys were not designed to focus on media consumption). Finally, we cannot assume that such attitudes will simply be “pro” legal system or “con” legal system; undoubtedly, viewers’ perceptions are more complex, plural, and nuanced.<sup>101</sup>

#### IV. ORIGINS OF THE REAL: LAW STORIES AND REALITY TV

While reality TV gets a lot of attention nowadays as a purportedly new turn in television programming, arguably narratives of the real have been essential to TV from its beginnings.<sup>102</sup> Consider, for example, *Queen for a Day*, which ran on television (after beginning on radio) from 1956-1964<sup>103</sup> and rewarded real life housewives who told their tales of domestic toil. In addition, *Candid Camera*,<sup>104</sup> urtext of *America’s Funniest Home Videos*<sup>105</sup> and *Punk’d*,<sup>106</sup> migrated from radio to television in 1948 and showed footage of real people allegedly being duped by tricks set up by show host Alan Funt.

The earliest example of a legal themed reality TV-type offering may be *Public Defender*,<sup>107</sup> airing in 1954.<sup>108</sup> Another early example of an explicitly legal reality-type offering is *Divorce Court*,<sup>109</sup> which in its original airing from 1957-1969 employed actors who purportedly portrayed real litigants testifying at a divorce trial.

It is no accident that some of the first examples of what we now call reality TV had legal themes. Law is, in many people’s minds, the quintessential realm of the real.<sup>110</sup> Thus, legal narratives are a perfect vehicle for the acting out

<sup>101</sup> See EWICK & SILBEY, *supra* note 23, at 34-35.

<sup>102</sup> See e.g., *Queen for a Day* (NBC television broadcast 1956-1960, ABC television broadcast 1960-1964) (beginning on radio in 1945, on television from 1956-1964), available at [http://en.wikipedia.org/wiki/Queen\\_for\\_a\\_Day](http://en.wikipedia.org/wiki/Queen_for_a_Day); and *This is Your Life* (NBC television broadcast 1952-1961) (presenting profiles of “real people” and their lives), available at <http://www.thisisyourlife.com>.

<sup>103</sup> The show was briefly revived from 1969-1970. See *Queen for a Day*, IMDB.COM, <http://www.imdb.com/title/tt0198211/combined> (last visited July 6, 2012).

<sup>104</sup> *Candid Camera* (CBS television broadcast 1960-1967), available at <http://www.candidcamera.com> (last visited July 6, 2012).

<sup>105</sup> *America’s Funniest Home Videos* (ABC television broadcast 1989-present), available at <http://beta.abc.go.com/shows/americas-funniest-home-videos>.

<sup>106</sup> *Punk’d* (MTV television broadcast 2003-2007, 2012-present), available at <http://www.mtv.com/shows/punkd/series.jhtml>.

<sup>107</sup> *The Public Defender* (CBS television broadcast 1954-1955), available at [http://en.wikipedia.org/wiki/The\\_Public\\_Defender\\_\(TV\\_series\)](http://en.wikipedia.org/wiki/The_Public_Defender_(TV_series)).

<sup>108</sup> Ouellette, *supra* note 8, at 170.

<sup>109</sup> *Divorce Court* (Twentieth Century Fox television broadcast 1957-1969, 1985-1992, 1999-present). The show had a brief revival in 1985, re-airing in 1999, and is now the longest running reality courtroom show on television. See *Divorce Court*, IMDB.COM, <http://www.imdb.com/title/tt0133300/> (last visited July 6, 2012).

<sup>110</sup> Whether law is actually viewed as reaching the right or just outcome, law is generally understood to involve real life consequences for its participants. See my fuller discussion of this in:

of real peoples' experience. One of the earliest reality shows in the 1980s, *The People's Court*<sup>111</sup> (since much replicated), purported to resolve the legalistic disputes of the real people who appeared before it. In addition, crime watch show *America's Most Wanted*,<sup>112</sup> which began in 1988, actively enlists audience members to participate in tracking down real-life criminals.

Obviously, there are now numerous iterations of simulated court shows in *The People's Court* vein: e.g., *Judge Judy*, *Judge Mathis*, *Judge Joe Brown*.<sup>113</sup> But as further and persistent evidence of Clover's observation (following Tocqueville) of the deep embeddedness of legal narratives in the "sheerest forms of [American] play,"<sup>114</sup> beyond these explicit judge shows, narratives of judgment and quasi-legal proceedings are pervasive throughout much reality programming. These shows, which I have dubbed "unofficial" judge shows, reveal the extent to which adjudicatory processes themselves have become a character in American popular culture.

## V. UNOFFICIAL JUDGE SHOWS

### A. "Pack Your Knives and Go": Competition Shows and the Role of Judges

Reality television shows assume various formats.<sup>115</sup> Yet many shows enact competition, even across genres. These competitions may be presented without irony, as serious combats of physical and mental endurance (e.g., *Survivor*, *Fear Factor*,<sup>116</sup> *The Amazing Race*). Or they may focus more on creative or artistic competition (e.g., *Project Runway*,<sup>117</sup> *American Idol*, *Top Chef*, *Work of Art: The Next Great Artist*<sup>118</sup>). Or they may be more self-conscious, campy send-ups of interpersonal contests (e.g., *RuPaul's Drag U*,<sup>119</sup> *Flavor of Love*,<sup>120</sup> *I Love New York*<sup>121</sup>).

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Cynthia D. Bond, *Documenting Law: Reality and Representation on Trial*, 39 LINCOLN L. REV. 1 (2012).

<sup>111</sup> *The People's Court*, WIKIPEDIA, [http://en.wikipedia.org/wiki/The\\_People's\\_Court](http://en.wikipedia.org/wiki/The_People's_Court) (last visited July 6, 2012).

<sup>112</sup> *America's Most Wanted* (Twentieth Century Fox television broadcast 1988-present), available at <http://www.amw.com>.

<sup>113</sup> *Judge Mathis* (Warner Bros. Pictures 1998-present); *Judge Joe Brown* (CBS television broadcast 1998-present).

<sup>114</sup> Clover, *supra* note 25, at 256.

<sup>115</sup> See e.g., LAURIE OUELLETTE & JAMES HAY, BETTER LIVING THROUGH REALITY TV: TELEVISION AND POST-WELFARE CITIZENSHIP (2008) (describing various types of reality shows).

<sup>116</sup> *Fear Factor* (NBC television broadcast 2001-2006, 2011-present), available at <http://www.nbc.com/fear-factor>.

<sup>117</sup> *Project Runway* (Bravo television broadcast 2004-2008, Lifetime television broadcast 2008-present), available at <http://www.mylifetime.com/shows/project-runway>.

<sup>118</sup> *Work of Art: The Next Great Artist* (Bravo television broadcast 2010-2011), available at <http://www.bravotv.com/work-of-art>.

<sup>119</sup> *RuPaul's Drag U* (Logo television broadcast 2010-present), available at [http://www.logotv.com/shows/rupauls\\_drag\\_u/season\\_3/series.jhtml](http://www.logotv.com/shows/rupauls_drag_u/season_3/series.jhtml).

<sup>120</sup> *Flavor of Love* (VH1 television broadcast 2006-2008), available at <http://www.vh1.com/>

Across types of competition shows, some type of adjudicatory process is used to declare a winner.<sup>122</sup> That process typically takes the form of a panel of judges. And three seems to be the magic number for judges (with the frequent addition of a guest judge).<sup>123</sup> The contestants typically perform or produce something upon which they are judged by the panel. One contestant wins (which often consists of simply being able to continue in the contest), and one (or more) contestant loses and is removed from the show.<sup>124</sup>

Typically, the audience is treated to a performance of the “adjudicatory process” in that the judges are shown debating the various contestants. This “judicial conference” is typically preceded by a kind of “trial” or “crit” where the judges query and analyze each contestant’s work or performance in his or her presence. Often the judges deliver their verdict (usually voiced by a pretty woman judge) with somber expressions, over background music that is ponderous and suspense-filled. And the spoken decision is always formulaic, much like a courtroom verdict. The catch phrase used is expressive of the theme of the show (e.g., for *Top Chef*, the cooking show, the phrase is “Please pack your knives and go”) and dismissive and harsh (e.g., a terse “You’re out” on *Project Runway*).<sup>125</sup>

In today’s intertextual television world, where shows frequently quote other shows or even films, the resonance of real-life judges and courtrooms that underlies reality TV competition shows is made explicit. For example, in the season one finale of Lifetime’s *Drop Dead Diva*, a dramedy that follows Jane, an overweight lawyer who has been merged with the soul of a skinny diva, Paula Abdul makes a guest appearance as a courtroom judge.<sup>126</sup> In the comical dream sequence, Jane’s struggle in choosing between two romantic interests is enacted as a courtroom trial, with Paula Abdul presiding in sequined black judicial robes. Thus, the fantasy judge in the attorney character’s dreamworld courtroom is a

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shows/flavor\_of\_love/season\_3/series.jhtml.

<sup>121</sup> *I Love New York* (VH1 television broadcast 2007-2008), available at [http://www.vh1.com/shows/i\\_love\\_new\\_york/season\\_1/series.jhtml](http://www.vh1.com/shows/i_love_new_york/season_1/series.jhtml).

<sup>122</sup> A notable exception to this is *The Amazing Race* which has a kind of self-activating adjudication since winners are decided essentially by who does (and does not) cross the finish line at the end of each leg of the race. The host/line judge does not adjudicate or consider facts, he merely delivers the news of who wins and who loses.

<sup>123</sup> See, e.g., *American Idol*, *Project Runway*, *Top Chef*, *So You Think You Can Dance* (Twentieth Century Fox television broadcast 2005-present), *America’s Got Talent* (NBC television broadcast 2006-present).

<sup>124</sup> In the world of *Project Runway*, this has come to be known as being “auf’d” because host Heidi Klum bids “auf wiedersehen” to each losing contestant at the end of the judging.

<sup>125</sup> My favorite “verdict” is the one issued on *RuPaul’s Drag Race*: “chanté, you stay” for the surviving contestant, or “sashay away” for the losing contestant. See *RuPaul’s Drag Race* (Logo television broadcast 2009-present), available at [http://www.logotv.com/shows/rupauls\\_drag\\_race/season\\_4/series.jhtml](http://www.logotv.com/shows/rupauls_drag_race/season_4/series.jhtml). The phrase is imported from RuPaul’s dance hit *Supermodel (You Better Work)*. RUPAUL, *Supermodel (You Better Work)*, on SUPERMODEL OF THE WORLD (Tommy Boy Records 1992). See *infra* Section VI for a discussion of the RuPaul difference.

<sup>126</sup> *Drop Dead Diva* (Lifetime television broadcast Oct. 11, 2009); see also <http://www.mylifetime.com/shows/drop-dead-diva/photos/season-1-gallery#id=4> (last visited Aug. 29, 2012).

reality TV judge.<sup>127</sup> Similarly, in an episode of *The Simpsons*, bartender Mel is added to the *American Idol* judge panel by Simon Cowell, who is secretly trying to abdicate his position as judge.<sup>128</sup> At one point, the Ryan Seacrest character in the spoof remarks that the judge panel on *American Idol* will soon be “larger than the Supreme Court.”<sup>129</sup> Intertextual considerations of the significance of reality TV have also taken more serious forms. For example, the HBO movie *Cinema Verite*<sup>130</sup> dramatizes arguably the first full-blown reality TV venture in the United States, *An American Family*, which broadcast on public television in the 1970s and followed the dissolution of the Loud family.<sup>131</sup>

Competition shows engage the audience with the judging process in various ways. First, viewers may feel educated in more arcane areas of creativity in shows such as *Top Chef* and *Project Runway*, which purport to give access to the worlds of foodie culture and high-end fashion, respectively.<sup>132</sup> Both shows frequently feature well-known and well-respected practitioners in their fields as guest judges. And in addition to trafficking in such recondite culinary concepts as “sous vide” and “foam,” *Top Chef* invites viewers to pursue recipes and other information on the Bravo TV website,<sup>133</sup> exploiting the marketing potential of media convergence.

Second, these shows ask viewers to predict what the judges might decide, essentially offering the opportunity to judge the judges.<sup>134</sup> This is crucial because the main suspense factor in these serialized shows is the question of who is going to be “kicked off” next. Fans may pore over the promo segments for the next week’s show, seeking clues and discussing predictions on websites maintained by the shows themselves or more homegrown fan sites. Fans may also analyze and characterize “judicial temperament,” especially when a judge panel is wildly diverse in its approach, as was, for example, the original

<sup>127</sup> The interrelationship between the real and the fictive in these intertextual references is often dizzying. Here, a fictional lawyer (Jane) dreams of a fictional judge (Abdul) who, in the “real life” that is *American Idol*, acts as a fictional judge of real people. Or consider a recent Lifetime channel show, *My Life is a Lifetime Movie* (Lifetime television broadcast 2012), in which purported non-actors discuss real events in their lives which have the drama and pathos of Lifetime made-for-TV movies. The events are reenacted by actors (thus seemingly becoming a Lifetime movie before our very eyes) as the real-life subjects provide voiceover explaining the events depicted.

<sup>128</sup> *The Simpsons* (Twentieth Century Fox television broadcast May 23, 2010).

<sup>129</sup> *Id.*

<sup>130</sup> *CINEMA VERITE* (HBO 2011).

<sup>131</sup> *An American Family* (PBS television broadcast 1973), available at <http://www.pbs.org/programs/american-family>.

<sup>132</sup> For example, arguably *Project Runway* has ushered in an unprecedented level of mass consumer recognition of high-end fashion designers than ever before. *Project Runway* and shows like it are either lauded or accused (depending on one’s perspective) for playing a key part in “democratizing” fashion. See John Jannuzzi, *Fashion to the People: The Democratization of an Industry*, LUCKY MAGAZINE (Mar. 28, 2012, 10:30 AM), <http://www.luckymag.com/blogs/luckyrightnow/2012/03/Fashion-to-the-People>.

<sup>133</sup> BRAVOTV.COM, <http://www.bravotv.com/foodies> (last visited July 9, 2012).

<sup>134</sup> See Black, *supra* note 53.

*American Idol* panel of (reading left to right on your TV screen) Randy Jackson, Paula Abdul, and the much-despised Simon Cowell.<sup>135</sup>

Finally, these shows engage viewers by encouraging them to resist or oppose the decision of the judges. That is, most shows invite viewers to match their own judgment of the winner against the judges.<sup>136</sup> Some shows provide outlets for spectator opinion or adjudication as part of the show itself. *American Idol* is of course the most noteworthy example, as contestants eventually move forward based not on what the judges decide, but rather on audience member votes made by phone call or text message. Crucially, the judges only “rule” during the preliminary rounds to establish the contestants; the ultimate vote is left to the audience “jury.” Thus, *American Idol* performs tensions between expert judges and audience masses (represented during filming by a studio audience which is frequently demonstrative in its objection to the judges’ pronouncements).

But even in those competition shows where the on-screen judges make the ultimate decision, audience members may challenge that decision in other forums, such as in their living room watch parties or on Internet blog posts. And where does the audience take its “judicial” authority from? In part, it comes from the audience’s “insider” perspective on behind-the-scenes events that the judges do not see.<sup>137</sup> Many competition shows are structured so the judges are absent from the process that went into creating the performance (e.g., contestant rehearsals) or product (e.g., contestants’ trips to the store to buy goods, their late nights in the workroom creating the object). The judges purportedly only judge the “final product.”<sup>138</sup> The audience, however, is given access to “cinéma vérité” style footage of the rehearsal hall, the workroom, and sometimes even the contestants’ residence.<sup>139</sup> Thus, the audience is privy to the “back story” of the

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<sup>135</sup> Cowell’s image as resident hard-ass on *American Idol*, has been recuperated somewhat by his more recent endeavor, *The X Factor* (Twentieth Century Fox television broadcast 2011-present), available at <http://www.thexfactorusa.com>, which almost reads as an apologia for *American Idol*, given the judges’ gushy empathy for contestants.

<sup>136</sup> Food shows such as *Top Chef* do not fully allow for this, as viewers cannot taste the dishes the judges taste. Thus, viewers must content themselves with evaluating the judge’s responses. But shows like *American Idol* and *Project Runway*, which require just as much expert knowledge, are at least superficially open to judgement by anyone who can hear or see. The fact that food contests like *Top Chef* remain popular is in some ways testimony to how much authority and credibility is granted to reality TV judges, since they alone can experience the objects of their judgment.

<sup>137</sup> Audiences may create what Henry Jenkins calls “knowledge communities” surrounding shows, in which fans contribute to the reading of various reality TV texts. JENKINS, *supra* note 11, at 20-21; see also *infra* Section VII (discussing the role of audience participation in reality TV).

<sup>138</sup> That said, it is clear that producers share details from behind the scenes goings-on with the judges, as occasionally judges ask pointed questions during adjudication, thus heightening the drama around particularly controversial contestant behavior. In addition, most competition shows run a disclaimer in their end credits indicating that producers may consult with judges on ultimate outcomes, confirming that judgments are not necessarily based on a contestant’s merit alone, but may also be based on a contestant’s telegenic charisma, the narrative arc of the show, etc.

<sup>139</sup> See, e.g., *Top Chef* where contestants live together and are filmed at home for brief periods.



contestants' work and lives, watching predictable enmities and intrigues arise as they compete.

Most of these shows rely on repeated "witnessing" by the contestants, who address the cameras intermittently in close-up interviews. In these sessions, contestants explain the challenges, contextualize the personal dynamics between the other contestants, and reveal often emotional personal information about themselves. Presumably, a producer elicits responses as part of an interview, but no interlocutor is shown nor are his or her questions audible. Rather, the contestant "testifies" directly to the camera/audience; the context for that testimony is provided by the film clips that precede and follow each interview. Again, the audience is given "evidence" in these settings that the judges presumably do not see.

This apparent viewer omniscience may serve to undermine audience acceptance of the judges' ultimate decision. For example, audience opinion regarding a contestant may be swayed by knowledge it has about the personality of the contestant, which the judges (purportedly) are not privy to. Or in team challenges, spectators may form opinions based on how well the contestants work together behind the scenes, whereas typically the judges will not appear to take that factor into account. In addition, sometimes possible contestant foul play is only shown to the audience, potentially affecting its ultimate decision but not becoming a factor to the judges.<sup>140</sup>

Thus, the judges' and audience's different access to information or "adjudicatory facts" may create a narrative of split judgment between the judges and the audience. There is nothing new about this split perspective; rather, it merely enacts pre-existing pop cultural notions of rifts between the elitist judge and the "everyman" jury.<sup>141</sup> This rift may be further informed by what some scholars have identified as a particularly American disdain for experts and an anti-intellectual tendency to dismiss specialized knowledge as "elitist."<sup>142</sup>

Yet despite the deeply formulaic nature of reality TV, competition shows inhabit a range of judge/audience positionalities. For example, two recent shows emphasize the significance of the judge figure, reworking *American Idol* to focus more on the judges than the audience-jury. NBC's *The Voice*<sup>143</sup> employs judges

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<sup>140</sup> This is not to say that actual controversies do not arise, creating intervention opportunities for the producers. For example, when allegations were made in *Project Runway* season 3 that contestant Keith Michael had cheated by using pattern books, it led to his expulsion from the show.

<sup>141</sup> See Clover, *supra* note 25.

<sup>142</sup> See Peter Walsh, *That Withered Paradigm: The Web, the Expert, and the Information Hegemony*, in *DEMOCRACY AND NEW MEDIA* 365 (Henry Jenkins & David Thorburn eds., 2003), available at <http://web.mit.edu/comm-forum/papers/walsh.html>. See also RAY, *supra* note 100. We might also consider the pro-jury nullification movement (such as it is) as an example of the public discourse of rifts between juries and judges, or the law more broadly. See FULLY INFORMED JURY ASS'N, <http://fija.org/> (last visited July 9, 2012); see also *infra* Section VII (discussing American attitudes towards experts in the Internet age).

<sup>143</sup> *The Voice* (NBC television broadcast 2011-present), available at <http://www.nbcthevoice.com>.

who are high-profile, contemporary music stars: Christina Aguilera, Cee-Lo Green, Adam Levine of Maroon 5, and Blake Shelton. Unlike other shows that clearly separate competitors from judges, *The Voice* devotes several of its early episodes to the *judges* competing against each other to choose and woo contestants to their teams. Much of the show's focus is on the judges as they playfully banter back and forth from their prominently positioned, throne-like chairs that swivel to face the stage when they pick a desirable contestant. And unlike other shows where performance is separated from its judgment, the judges coach their team prior to their final performances. Only late in the process is the audience allowed to vote for the final winner.

Similarly, FOX's *The X Factor*, created by *American Idol* judge Simon Cowell, develops the judges more fully as characters than *American Idol*<sup>144</sup> did. Like on *The Voice*, the *The X Factor* judges coach teams of singers. And, also similar to *The Voice*, the judges themselves are cast as competitors as they strive to beat the other judges in grooming the ultimate winner of the contest. The contestants are invited to the judges' palatial houses, to be coached and winnowed out by the "judge in residence" (and to temporarily revel in the wealth to which they aspire). *The X Factor* also ultimately turns the decision over to the audience, but only after extensive, purportedly rigorous expert vetting by the judges.

These shows maintain the central trope of "experts vs. audience," as the audience ultimately votes, but the means of this adjudicatory collaboration differ, as does the relative antagonism implied. The dynamic of *The Voice* and *The X Factor* focuses more specifically on the judge character, thus enhancing opportunities for audience identification with the more fully fleshed out judges. And since audiences are typically engaged by identifying with contestants, the "judge as competitor" model invites similar identification. These newer iterations of the competition genre reveal that producers are savvy about the opportunities for exploiting flamboyant judge personalities to get viewership, and that the narrative of full audience participation in decision-making is not essential to a show's success.<sup>145</sup>

On the other hand, competition shows may eschew the judge figure all together. One of the first major reality shows, *Survivor*, adjudicates through the on-screen "jury" panel of the opposing tribes who cast blind votes to send their comrades "off the island." In this setting, audience members may kibbutz the tribes' decisions based on backstory information they have about conniving, "alliances," etc., but they do not have a vote in the process, as they do in *American Idol*.

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<sup>144</sup> See *supra* note 137.

<sup>145</sup> To some extent this echoes official judge shows, which emphasize the judge's individual personality—e.g., *Judge Judy*, *Judge Mathis*—where "variation among the judges has less to do with legal interpretation than with modes of addressing everyday conflicts that exceed juridical frameworks." Ouellette, *supra* note 8, at 158.

Other shows may rely on judges for adjudicatory process without setting up an explicit “judge vs. audience/jury” dynamic. For example, “cultural” competition shows like *Project Runway* and *Top Chef* do not invite viewer adjudication into the decision-making directly. While we are encouraged to evaluate and second-guess the judges in forums outside of the show, we do not have a vote, as we do in *American Idol*.

Another indicator of the importance of the dynamic between judge and audience/jury can be found in how reality competition shows evolve. For example, NBC’s *The Marriage Ref*<sup>146</sup> began as a sort of mock divorce court proceeding in which real-life couples “adjudicate” their trivial disagreements to a panel of celebrity “experts.” In the show’s first season, the celebrities debated both sides of the couple’s argument, then turned the ultimate decision over to the host, Tom Papa. However, in its second season, the show replaced Papa’s “expert” decision with a studio audience vote, undoubtedly seeking to engage viewers more fully by taking the *American Idol* route.

These examples reveal that, while adjudicatory processes are key to the competition genre, the form that adjudication takes varies. It is safe to assume that the motivation for these variations is increasing viewer market share. Regardless, key to all of these variations is a manipulation of the balance or tension between judges and audience/juries. This balance is thus central to the success of these shows. Despite the many similarities in reality TV competition shows, audiences may assume various adjudicatory positionalities: they may judge through identification with judge characters, through actual voting in a real-life “jury,” or through some combination of both.

## B. Mean Girl Nation: *The Real Housewives* Franchise

Narratives of judgment in reality TV extend beyond the “overt” judges of the competition genre. For example, while Bravo’s *The Real Housewives* series<sup>147</sup> does not have judges, it is deeply embedded in notions of witness and judgment. All of the *Real Housewives* series follow the same format: 5-6 wealthy (and predominantly white<sup>148</sup>) women purportedly live their lives in front

<sup>146</sup> *The Marriage Ref* (NBC television broadcast 2010-2011), available at <http://www.nbc.com/the-marriage-ref>.

<sup>147</sup> The franchise began in 2006 with a cast in Orange County, California (*The Real Housewives of Orange County* (Bravo television broadcast 2006-present)), seemingly as a “real” response to the popular fiction TV show *The O.C.* (Twentieth Century Fox television broadcast 2003-2007, available at <http://www.the-oc.com>), also set in Orange County. The series then expanded to New York, Atlanta, New Jersey, Washington, D.C., and Beverly Hills. The most recent *Real Housewives* offering is from Miami. See BRAVOTV.COM, <http://www.bravotv.com/shows> (last visited July 9, 2012).

<sup>148</sup> More recent additions to the franchise have expanded the *Real Housewives* discourse to non-white women, notably *The Real Housewives of Atlanta* (Bravo Cable television broadcast 2008-present). In addition, the one-season *The Real Housewives of D.C.* (Bravo television broadcast 2010) included African-American castmate Stacey, and actually directly addressed questions of

of the cameras, occasionally intersecting to socialize, gossip, drink, and, most importantly, argue.

Unlike the competition shows, there is no panel of judges in the *Real Housewives* series. Rather, the viewer is encouraged to believe that she is watching the real events of the women's lives unfolding. The shows focus on the women's conspicuous consumption of luxury goods and services, and their conflicts with each other. However, interspersed with this "vérité" footage is the requisite reality TV testimony of the housewives themselves, offered as a kind of counterpoint to the depicted "reality." Notably, the editing cuts between the "real" footage and the "witnessing" footage are more pointedly designed to encourage the viewer to judge the veracity of what the particular housewife "talking head" is saying than in competition shows. So, for example, a scene in which a housewife is fighting with another will be followed by a clip of the housewife "testifying" to the camera, rationalizing her actions in a way which leads the viewer to question her honesty/veracity/self-reflection/remorse. Every reality show must have its villain, and each *Real Housewives* series has one or two women who are presented as less credible or even downright untrustworthy in their testimony.<sup>149</sup>

Thus, throughout the show, we are treated to a constant back-and-forth between footage of the real and footage of testimony by the participating witnesses (limited usually to the wives, but sometimes husbands or friends also witness to the camera). This juxtaposition would seem to invite the viewer to question the underlying premise of the show: that we are witnessing reality unfold. Indeed it becomes clear in watching successive episodes that the timing of the interviews is radically discontinuous with the actual events depicted in the real footage. For example, footage of an event may be immediately followed by a housewife interview in which she discusses the event as if it had just happened. Yet in subsequent shows we may see the housewife in the exact same outfit, makeup and on the same set testifying about an event that appears to have transpired at a significantly different time. Thus, it becomes clear that the interviews are shot *after* the "real life" footage, when the women are presumably asked to opine about several incidents throughout the season in one post-production interview.

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race. Finally, *The Real Housewives of Miami* (Bravo television broadcast 2011-present) has a predominately Latina cast, inverting the typical *Housewives* racial politics by including only one white/Anglo castmate, Lea.

<sup>149</sup> For example, we are asked to doubt the credibility of Michaela Salahi in the Washington, D.C. series. Michaela and her husband made news off the show by crashing the first Obama State dinner. See Helene Cooper & Rachel L. Swarns, *At the First Obama State Dinner, The First State Dinner Crashers*, N.Y. TIMES, Nov. 26, 2009, at A24). In the Atlanta franchise, we are buffeted between the frenemy fire of Nene and Kim, and asked to judge both women's motivations and sincerity. In addition, the apparent reliability of the housewives may change season to season. For example, in the 2010 season of the New York franchise, we initially feel some connection and respect for Jill Zarin, but Jill subsequently becomes suspect in her testimony as she undergoes a persistent and falling out with former best-friend, Bethenny Frankel.

However, the juxtaposition of interview and the real draws the viewer's attention not so much to a disjunction in the show's depiction of that reality, but rather a disjunction between the housewife's testimony and what *actually* happened in the "real time" footage. The viewer is often encouraged to trust her own reading of the "real events" depicted, rather than the apparently contradictory testimony of the other housewife. However, that judgment is necessarily enacted by conflicting interviews that raise the question of the gap between reality and perception. Thus, quasi-judicial analysis—i.e., spectators evaluating testimony in the context of images of the "actual event"—is presented as the method by which the gap between reality and representation can be mediated.<sup>150</sup>

Crucially, the women themselves sit in judgment over their own and their "colleagues" performance on the show in the end-of-season reunion shows. During these shows,<sup>151</sup> the participants are questioned about their past behavior by the moderator, who frequently reads questions the audience submits via email, text message, or tweets. The reunion episode cuts between footage from the original shows to the participants explaining their past behavior. This process reenacts a kind of cross examination in which the women are presented with the filmic evidence of their behavior and asked to jibe it with either audience disapprobation or their own previously contradictory explanations. Key to this process is the treatment of this filmic evidence as the "truth."<sup>152</sup>

In some respects, the reunion show reenacts the show format: the women are still testifying about "real events," but this time these events are clearly in the past, re-screened at the reunion. While the reunion show reenacts the real footage/interview footage juxtaposition of the series, it inverts the regular show. That is, in the reunion show, the interviews of the housewives (though no longer "one-on-one") are given the aura of the real and appear to take place "now," and

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<sup>150</sup> Of course, the type of judgment activated by *The Real Housewives* may be understood as personal or moral, rather than explicitly legal. However, the surrounding context of witnessing and contested truth claims between what is depicted and what is "real" lends a legalistic aura to spectators' judgments. Bethenny Frankel's observation, contained in this article's epigraph, reveals the narrative of adjudication at the foundation of even "lifestyle" reality shows.

<sup>151</sup> The reunion shows have expanded to encompass 2-3 part episodes, broadcast over a few weeks.

<sup>152</sup> This resonates with what Black notes about the overdetermination of the camera as "witness" in the filmic regime and the trial witness in the legal regime. See BLACK, *supra* note 30, at 2. It has become common practice for the housewives and other reality stars to claim selective editing as the source of embarrassing portrayals of them. While reality TV superficially reinforces notions that we can access the reality of past events through the seamless "window" of the camera, arguably it has simultaneously done more to educate spectators about the *construction* of a media text than other mass culture texts. Fans frequently comment on the contrivance of reality TV editing, etc. This is at odds with the classic Hollywood film style which strives to distract audiences from noticing a film's fragmentary nature. See generally RAY, *supra* note 100 (discussing classic Hollywood's invisible style). Reality TV shows themselves follow different production models, and may significantly differ in the degree to which events are staged or allowed to unfold in front of the camera in a more unscripted way. Interview with Scott Foley, former camera operator for reality shows on HGTV and MTV (Oct. 2012).

the “real” footage of the show now looks like the constructed, past element. This inverts the temporality and positioning of the moment of the real in the regular series.

Essentially, the housewives are asked to read the show as a text at the reunion shows. Without sacrificing the conceit that the show is comprised of real events unfolding, the host sketches the season’s narrative arc (of course already constructed by the editing and production of the episodes) and gets the housewives to comment on it. This essentially amounts to the housewives stepping into the role of “judge” of the reality text, their own behavior, and their castmates’ behavior.

Thus, even without designated “unofficial” judges, lifestyle shows like *The Real Housewives* evoke narratives of adjudication in their “witnessing” operations and in their juxtaposition of filmic “evidence” with that testimony. And like competition shows, they position spectators as adjudicators, although that judgment may take place on fan blogs, etc., rather than as an integral part of the show. With more recent interactive options like inter-show tweeting, fans may even share their judgments during the viewing process.

In addition, *The Real Housewives* and shows like them contain what Clover might call “a secondary trial”<sup>153</sup> on what is cast as the morality of the excessive spending and consumption endlessly displayed. On the one hand, these shows glorify consumption, taking us to high-end restaurants and on designer shopping sprees; lovingly panning across the oceans of Christian Louboutin shoes that the women luxuriate in, etc. The show frequently flashes the price of expensive jewelry on the screen as it is being purchased, and details the outlandish fees housewives pay for their toddlers’ birthday parties, etc. The apparent glamour of these women’s lives undoubtedly evokes viewer envy.<sup>154</sup> Yet, the show’s editing often undercuts the women’s self-serving assertions, inviting viewers to disdain the orgiastic spending revealed on the show. Thus, the role of spectator in constituting the value of the show is multivalent.<sup>155</sup> Fans may at once empathize with emotional or personal dilemmas of the housewives, envy their style of dress or house, and simultaneously despise their lip implants, their latest outfit, and, of course, their behavior. This kind of “frenemy” relationship with the characters is exemplified for spectators by the housewives themselves, who constantly gossip about and otherwise backstab their castmates.

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<sup>153</sup> “The double-trial structure is fundamental to trial narratives. [For example] [f]ilms about rape or wife beating usually mount a second, unofficial trial on the legal system’s ability to serve (female) victims of intimate crimes.” See Clover, *supra* note 25, at 264.

<sup>154</sup> And viewer emulation; as described more fully below, some fans mimic makeup, hairstyles, and clothing from the series.

<sup>155</sup> The YouTube spoof, “The Real Housewives of South Boston” skewers the decadent wealth of *The Real Housewives* by depicting the low-rent pretensions of the working class South Boston Ladies. See PauliluProductions, *The Real Housewives of South Boston*, YOUTUBE (Oct. 17, 2011), <http://www.youtube.com/watch?v=SQoTIVgmPK8>.

Given the show's often ironic positioning of the women, and the highly detailed adjudicatory facts regarding each gesture, party outburst, purchase, outfit, etc., spectators act more as judges than what we might call "jury-like." Again, the show depicts a constant social warfare that undermines narratives of community in an "every woman for herself" atmosphere. And viewers identify not just as judges in this context, but with the housewives themselves. Significantly, the Bravo TV website offers "tests" viewers can take to determine which housewife they most resemble (in temperament, presumably). Thus, the show enacts a kind of "mise-en-abyme" of adjudication: spectators both identify with and judge particular housewives, who are shown "judging" other housewives.

### C. Adjudicatory "Blank Space": Clover Revisited

Despite the formal and spectatorial differences between film and television discussed previously, something like Clover's "blank space" into which the spectator can project himself as a jury member is indeed operative in reality shows where viewers will vote at some point in the process. Some reality programs show a studio audience—e.g., *American Idol*, *Dancing With the Stars*,<sup>156</sup> *The Voice*, *The X Factor*—which acts as the TV spectators' stand-in, not unlike the minimally visible juries in courtroom dramas that Clover discusses. And TV spectators in this instance may have even greater access to the "case," having an omniscient view of the backstage action as well as the performance.

However, the adjudicatory narrative of reality TV shows does not always create a "blank space" for the viewer to step in as adjudicator. Competition shows like *Top Chef* and *Project Runway* do not include studio audiences as spectator placeholders, even at their end-of-season reunion shows. Yet despite the lack of a visual space cleared for the audience to project itself into as adjudicator, the nature of television as a home viewing experience coupled with media convergence opportunities beckons the viewer in. As mentioned above, part of the invitation to adjudication comes from the superior position spectators occupy regarding the surrounding facts of the show, which is not unlike the audience omniscience in courtroom dramas that Clover describes. Moreover, there is trans-media space for audience participation in these shows in the form of Internet TV channel and fan sites, where viewers may post comments and "dish." In addition, some shows make room for audience judgment during the show's airing in the form of polls conducted via text message in between the show and commercial breaks.<sup>157</sup> Finally, as discussed above, lifestyle shows like *The Real Housewives* create space for spectator adjudication in the "one-on-one"

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<sup>156</sup> *Dancing With the Stars* (ABC television broadcast 2005-present).

<sup>157</sup> These polls are clearly an effort by producers to keep viewers from ignoring the commercial breaks. In addition, Bravo TV shows like *Top Chef* allow viewers to vote online for a season-end "fan favorite," who is awarded a cash prize.

interviews conducted with the participants. The lack of a visible interviewer in these segments emphasizes the sense that the participants are speaking directly to us. This makes room for us to listen and, given the juxtaposed footage of the “real” events being described, to judge. Thus, while there may not be an explicit “blank space” marked in the TV reality text for the audience to enter as juror, the shooting, editing, and format of such shows do provide cues to engage the adjudicating spectator.

## VI. THE INESCAPABLE ALLURE OF THE REAL

### A. Reality Hunger

In his epigrammatic “manifesto,” *Reality Hunger*,<sup>158</sup> David Shields traces the narrative and performance of the real throughout the history of Western cultural production. Shields knits together current cultural phenomena ranging from the memoir, hip hop, and reality TV, accreting his argument indirectly through epigrams and quotes taken from a variety of sources. However, far from tagging the American cultural obsession with the reenactment of the real as a new phenomenon, Shields argues that literature and art throughout history have sought in some way to evoke the real, or are judged by their evocation of the real. For example, Shields asserts: “The origin of the novel lies in its pretense of actuality.”<sup>159</sup>

The form of *Reality Hunger* is a key part of its argument. The book is divided into twenty-six chapters, lettered A-Z. Each chapter contains numbered paragraphs of varying lengths, which Shields freely admits are a combination of unattributed quotes and paraphrases from texts and voices throughout history, as well as some “original texts.” Thus, the book performs a free flow of information across authors, texts, and centuries.<sup>160</sup> In the citation appendix, Shields explains his approach: “Who owns the words? Who owns the music and the rest of our culture? We do—all of us—though not all of us know it yet. Reality cannot be copyrighted.”<sup>161</sup>

What Shields sees in contemporary narratives of the real—or rather, what he *channels* from the wider discourse about such narratives—is an alternating hunger for the real in cultural representation and an anxiety about the tension between reality and representation. “Our culture is obsessed with real events because we experience hardly any.”<sup>162</sup> This obsession is a reaction to our inundation with the unreal:

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<sup>158</sup> DAVID SHIELDS, *REALITY HUNGER: A MANIFESTO* (2010).

<sup>159</sup> *Id.* ¶ 30, at 13.

<sup>160</sup> At Random House lawyer’s request, Shields tells us in the Appendix, citations are listed for the epigraphs, which contain unacknowledged quotes. *See id.* at 209.

<sup>161</sup> *Id.* at 209.

<sup>162</sup> *Id.* ¶ 242, at 82 (quoting Andrew O’Hehir, *The Long Goodbye*, SALON (Oct. 18, 2005, 10:00 AM), [http://www.salon.com/2005/10/18/didion\\_6/](http://www.salon.com/2005/10/18/didion_6/)).



Living as we perforce do in a manufactured and artificial world, we yearn for the “real,” semblances of the real. We want to pose something nonfictional against all the fabrication—autobiographical frissons or framed or filmed or caught moments that, in their seeming unrehearsedness, possess at least the possibility of breaking through the clutter.<sup>163</sup>

This yearning exists in tension with a desire for narrative. For example, in discussing the controversy over James Frey’s purported memoir, *A Million Little Pieces*,<sup>164</sup> Shields says, “The whole huge loud roar, as it returns again and again, has to do with the culture being embarrassed at how much it wants the frame of reality and, within that frame, great drama.”<sup>165</sup> This observation, embodied in the epigraph from *Reality Hunger* that opens this article, reveals the paradox of the public’s desire for stories that are at once banal and dramatic; stories that are both actual and fantastic. Reality TV shows like *The Real Housewives*, among others, with their obsessive chronicling of such quotidian functions of human life as eating, shopping, and going to the gym, juxtaposed with personal scandals and public altercations, are perfect exemplars of this paradox.

### B. The Legal as the Mark of the Real

The relevance of this “hunger for the real” in the context of legal narratives is that law is often popularly perceived as a key staging place of the real. While legal theorists, and even practitioners, make much of the narrative

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<sup>163</sup> SHIELDS, *supra* note 158, ¶ 239, at 81.

<sup>164</sup> JAMES FREY, *A MILLION LITTLE PIECES* (2005). Readers may recall that Frey’s book, originally published in 2003 and billed as a memoir, was in 2005 selected by Oprah Winfrey for her book club. Subsequently, the website *The Smoking Gun*, published an article alleging that Frey had included inaccurate details about his life in the book, substantially falsifying key facts. See *A Million Little Lies: Exposing James Frey’s Fiction Addiction*, THE SMOKING GUN (Jan. 8, 2006), <http://www.thesmokinggun.com/documents/celebrity/million-little-lies>. Winfrey had Frey on her show in 2006 to discuss the incident, and to publically excoriate him and his publisher. Winfrey subsequently apologized to Frey in 2009. See Evgenia Peretz, *James Frey Gets a Bright, Shiny Apology from Oprah*, VANITY FAIR (May 11, 2009, 2:40 PM), <http://www.vanityfair.com/online/daily/2009/05/james-frey-gets-a-bright-shiny-apology-from-oprah>; see also Winfrey’s website for a timeline of the events, *Oprah’s Most Memorable Guests: James Frey – Five Years After the A Million Little Pieces Controversy*, OPRAH (May 16, 2011), <http://www.oprah.com/showinfo/James-Frey-After-the-Million-Little-Pieces-Controversy-Part-1>. Amid the televised hubbub, there was some debate about how true any memoir ever is. The flap over *This American Life*’s subsequent retraction of its NPR radio broadcast of portions of Mike Daisey’s performance piece, *The Agony and Ecstasy of Steve Jobs*, is a similar example of contestation and confusion about the boundaries between representation, performance, and the real. See Nelson Pressley, *Mike Daisey Attempts Damage Control With His Audience*, WASH. POST, Mar. 28, 2012, available at [http://www.washingtonpost.com/lifestyle/style/mike-daisey-attempts-damage-control-with-his-audience/2012/03/28/gIQAr4eUHS\\_story.html](http://www.washingtonpost.com/lifestyle/style/mike-daisey-attempts-damage-control-with-his-audience/2012/03/28/gIQAr4eUHS_story.html).

<sup>165</sup> SHIELDS, *supra* note 158, ¶ 92, at 35.

quality of law,<sup>166</sup> many laypersons see the law, and trials especially, as the locus for getting at the truth underlying litigated events. While arguably laypersons are ambivalent about law's truth claims, and have varying views of the function of the legal system,<sup>167</sup> it would be impossible to imagine adjudication without at least the narrative of the real, which is deeply embedded in the public imagination as the goal of the process. Even if adjudication does not result in "accurate" or just outcomes, it functions by way of analyzing evidence purportedly submitted to establish the reality of past events. For many people, whether or not a trial ends with a just result depends on how fully the reality of the case at bar is revealed in court. Whether or not that truth is actually revealed, the narrative that it is *obtainable* is key to a popular understanding of the process.

Accordingly, legalistic or adjudicatory devices in reality TV are essential to binding audience anxiety about the slippage between the actual and its representation, to which Shields alludes. That is, panels of judges, contestant "testimony," the interrogation of real footage, etc., import a legalistic method to reality shows that provides a social technology or "regulatory" framework for establishing the real. These devices may be explicitly legalistic (judge panels and verdicts) or implicitly legalistic (contestants' on-camera "testimony"). In both instances, the narrative of legal process reinforces the formal techniques of "cinéma vérité" style to insist on the reality—via the adjudicability—of depicted events.<sup>168</sup>

This is not to say that this binding of anxiety is successful. That is, the tension between whether depicted events are real or staged remains a key appeal of certain reality shows, such as *The Real Housewives* franchise. To say that people yearn for an experience of the real is not to say that they do not revel in the *frisson* of uncertainty about what is real and what unreal. The phenomenon of reality TV frequently elicits the following reactions from skeptics: "No way are these events really happening; it's all staged and fake;" or, phrased somewhat differently, "How can viewers be so stupid as to think this stuff is real?" However, these responses miss the point. Audiences are not merely looking for the real *or* the staged in these shows. Rather, they are entranced by the nexus between the real and the unreal that reality TV represents.

Paradoxically, legalistic plot devices may serve to underline this *frisson* more than resolve it. One indication of this is that viewer debate about the "realness" of what is screened continues after the shows' final adjudication.

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<sup>166</sup> See, e.g., PETER BROOKS & PAUL GEWIRTZ, *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (1998); see also BLACK, *supra* note 30; ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

<sup>167</sup> See generally EWICK & SILBEY, *supra* note 23 (analyzing laypersons stories to discover the different ways in which people use and think about law).

<sup>168</sup> This is not to say that narratives of adjudication are the only means, or even always the chief means, of establishing the real in these shows. Formal devices such as shooting style and editing, as well as non-diegetic elements like reality star blogs and press coverage may also be key elements in establishing the vibe of the real.

While adjudicatory processes create a point of decision, the decision may be critiqued, replayed, and subsumed in subsequent episodes of the show, as well as in fan conversations, on blogs, and on the show's website. Yet despite the potential contestability of an adjudication, the legal apparatus in competition shows asserts itself with a kind of grim finality. So, for example, on *Top Chef*, we are alerted that the adjudicatory phase has been entered by the screen caption "Judge's Table." The soundtrack for the adjudicatory sessions is always sonorous and foreboding. The judges sit formally behind a long table. The contestants are brought out ritualistically and stand somberly before the judges. As previously mentioned, the final judgment is issued in a stern, formulaic way which emulates a verdict. This ritualized formality emphasizes the authority adjudicatory, legalistic processes exert over "real events."

While narratives of legality may put the "real" in reality TV, it is important to remember that, actual legal processes themselves are also a site of contestation between the real and its representation. As noted above, trials must rely on representations of past events (e.g., witness testimony, physical evidence) to get to the reality of what happened. As many commentators have pointed out,<sup>169</sup> trials function by way of elaborately constructed narrative, yet may simultaneously (or even paradoxically) be understood as seeking the truth. Thus, the interdependency of reality and representation implicit in adjudicatory processes overdetermines the tension between reality and representation implicit in reality TV, while simultaneously seeking to bind anxieties about that tension.<sup>170</sup>

### C. "Truly Real": RuPaul's Drag Race

The economic viability and popularity of the reality TV format is evidenced by the fact that every major network (including public television) and many cable stations now offer significant reality programming.<sup>171</sup> The Logo channel, owned by Viacom (which also owns MTV and VH1, among other channels), is pitched at an LGBT audience and offers substantial reality programming.<sup>172</sup> One of the channel's most popular offerings, *RuPaul's Drag Race*, critically situates (albeit somewhat tongue-in-cheek) the notion of

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<sup>169</sup> See BROOKS & GEWIRTZ and AMSTERDAM & BRUNER, *supra* note 166; see also ALAN M. DERSHOWITZ, *Life Is Not a Dramatic Narrative*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 99 (2006).

<sup>170</sup> See generally BLACK, *supra* note 30 (arguing that images of law in film are unavoidably overdetermined as to narratives of the real and its representation).

<sup>171</sup> There are now even two channels solely devoted to Reality TV programming: Fox Reality and TruTV. See FOX REALITY CHANNEL, <http://www.foxreality.com/> (last visited Aug. 13, 2012); TRUTV, <http://www.trutv.com/index/html> (last visited Aug. 13, 2012). Given the highly consolidated ownership of mass media, the widespread nature of such shows is no surprise.

<sup>172</sup> The Logo TV website is astonishingly honest about the economic benefits to the network of Reality TV: "Scripted programming is very expensive. It's like the Gucci of TV shows." LOGO TV, <http://twitter.com/LogoTV/statuses/85684741470294016> (last visited Aug. 13, 2012).

“realness” as narrative trope. That is, rather than trying to evoke a sense of actual events or gritty realism like other reality offerings, *Drag Race* repeatedly asserts reality as a performance.

*Drag Race* superficially resembles other competition shows, like *Project Runway*. Performers are given various challenges (e.g., creating a drag outfit to reflect different themes or time periods for a runway show, posing for photo shoots, performing in a video). The show opens with a citation to *America’s Next Top Model’s*<sup>173</sup> “Tyra Mail” as the drag hopefuls watch a televised message from RuPaul entitled “She Mail.” Interspersed with *Project Runway*-type scenes of the workroom where the contestants design their outfits are the standard one-on-one interviews. These “testimonies” are similar to those given in other competition shows, but the contestants often deliver self-consciously performative and camp responses, implicitly calling into question the “realness” function of the interviews on typical reality shows. Even the back-biting and bitchiness that is the stock in trade of shows like *The Real Housewives*, is contextualized as performance; or, in the parlance of drag performance, “reading” or “throwing shade.” As season three winner Raja explained, defending his occasionally “elitist” performance on the show, as self-anointed “Heather” among “Booger” contestants:

I think we [the “Heathers”] had a good time with it. And I think people who misunderstand it need to understand that it was tongue and [sic] cheek and it was done to be funny. The entire group [of contestants], we’re all boys who were picked on. . . . We’ve always been fascinated with movies like “Heathers” and “Mean Girls” and we were just kind of playing with it. It’s not meant to be taken seriously. . . . We don’t pick on people in our daily lives. It was just within the competition and we were having a good time. Like RuPaul said, “Reading is fundamental,” so it’s just something you do as a drag queen.<sup>174</sup>

Thus, the bread and butter “real” emotions contestants display on many reality shows are clearly marked as performance on *Drag Race*, in part sponsored by broader narratives of drag performance.

The show’s openness about its performativity undermines claims of realness common to reality TV competition shows. A good example of the show’s explicit embrace of the tension between reality and performance is the phrase RuPaul uses to initiate each episode’s challenge: “Gentlemen, start your engines, and may the best *woman* win!” This phrase surprises audience members who take the gender binary not just as a reality of life, but as foundational. How

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<sup>173</sup> *America’s Next Top Model* (CW Television Network broadcast 2003-present).

<sup>174</sup> Jethro Nededog, ‘RuPaul’s *Drag Race*’: Raja on Her Controversial Win, ‘I Don’t Mind the Criticism,’ ZAP 2 IT (Apr. 26, 2011, 7:13 PM), <http://blog.zap2it.com/frominsidethebox/2011/04/ru-pauls-drag-race-raja-on-her-controversial-win-i-dont-mind-the-criticism.html>.

can a contestant be both a man and a woman at the same time? On *Drag Race*, this is accomplished through performance.

Clearly, the show's critical positioning of the real is heavily dependent on the practice of drag performance, which of course prefigures the show. The notion of realness as a performance is an essential part of drag culture.<sup>175</sup> In part, this stems from the male performers' attempt to "pass" for biological women through drag.<sup>176</sup> *Drag Race* imports the notion of "realness" that was key to Harlem ball culture, whose heyday in the late 1970s-early 1990s is immortalized in the documentary, *Paris is Burning*.<sup>177</sup> In ball competitions, drag performers may compete within different categories of "realness."<sup>178</sup> In such competitions, the performer is charged with realistically embodying, or "serving" in the argot of drag culture, different personas of dress and attitude. Examples portrayed in *Paris is Burning* include "Evening Wear" in which drag performers dress as upper-class women, and "Executive Realness," where performers embody male, ostensibly heterosexual executives, replete with suits and briefcases. Thus, "realness" and passing as "real" in this period of Harlem ball culture included gay men passing as straight and upper-class (and arguably white), not simply passing as female.<sup>179</sup>

Like other reality TV contestant shows, *Drag Race* ultimately ends in an adjudication. The drag performers strut their stuff down the runway and are judged by RuPaul, also dressed in drag, and other guest judges. Crucially, the judges are in large part judging the "realness" of the performers; that is, how well they embody a biological woman.<sup>180</sup> Thus, the realness of this particular reality TV program is *explicitly* dependent on the adjudicatory process: to win is to be

<sup>175</sup> See, e.g., *PARIS IS BURNING* (Miramax Films 1990) (depicting the Harlem "ball" scene in the mid-to-late 1980s). RuPaul articulates an expansive view of drag performance, also evidenced by the Harlem balls: "'You're born naked and the rest is drag' . . . Whatever you put on after you get out of the shower is your drag." RUPAUL, *WORKIN' IT!: RUPAUL'S GUIDE TO LIFE, LIBERTY, AND THE PURSUIT OF STYLE* ix (2010).

<sup>176</sup> That said, contemporary drag encompasses numerous styles and personas. See *infra* note 183.

<sup>177</sup> *PARIS IS BURNING*, *supra* note 175. The origins of Harlem ball culture have been traced back to the 1920s Harlem Renaissance. See *Harlem's Drag Ball History*, HARLEM WORLD (April 27, 2011), <http://harlemworldmag.com/2011/04/27/harlems-drag-ball-history/>.

<sup>178</sup> *Id.*; see generally Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357 (2010) (addressing the narrative of gender "realness" and its impact on tort litigation involving sexual identity issues).

<sup>179</sup> *PARIS IS BURNING*, *supra* note 175.

<sup>180</sup> That said, the judges also attend to other aspects of the performance, such as the quality of the costumes the contestants create, the overall charisma of the performer, etc. In the 2011 season of *RuPaul's Drag Race*, Raja, the winning contestant, was known for performing without prosthetic female breasts, often embodying a more explicitly androgynous look rather than "passing" as female; or, in drag parlance, looking "fishy." See ART OF RAJA, <http://www.artofraja.com/mainmenu.html> (last visited Oct. 30, 2012). Similarly, the winner of season 4, Sharon Needles, often styles himself in zombie or horror motifs, rather than embodying traditional drag queen glamour. See *RuPaul's Drag Race: Season 4 Full Episodes & Clips*, LOGO, [http://www.logotv.com/shows/rupauls\\_drag\\_race/season\\_4/series.jhtml](http://www.logotv.com/shows/rupauls_drag_race/season_4/series.jhtml) (last visited Nov. 3, 2012).

adjudicated “real” (or more precisely, best performer of the real). Thus, *Drag Race* unfolds as meta-text on reality TV itself.

In addition, unlike other contestant reality shows, the line between contestants and judges, performance and adjudication, is not as rigidly drawn. Here, the judges “read” the contestants as they strut down the runway: kibbutzing, riffing on the themes of the outfits, launching double entendres, and spinning out fanciful judgments/readings of the performances.<sup>181</sup> Judgment thus is presented *simultaneously* with performance; judgment is *itself* performance. This differs significantly from the strict progression of performance and judgment in other competition shows. Rather, judgment actively constructs the drag performance rather than simply adjudicating it.

This participatory adjudicatory model tacitly acknowledges the interdependence of the judge’s subjective point of view and the events being judged. Undoubtedly, this is in part because the show is positioned as the drag community judging itself, rather than being judged as “other” by outsiders.<sup>182</sup> Thus, it is not accidental that contestants frequently recount instances of judgment, rejection, and bullying by childhood family and friends, further contextualizing *Drag Race* adjudication. As a model of legalistic process, *Drag Race* adjudication, with its humor and high spirited dialogue, significantly differs from the purportedly objective, ponderous, authoritarian scenes of judgment in other reality TV shows.<sup>183</sup>

Thus, unlike most reality TV shows, *RuPaul’s Drag Race* is explicit about the centrality of adjudicatory processes in constructing the real. The combination of the show’s effects—the naming and performance of “realness,” the undermining of testimonial practices, the participatory adjudication—all undermine the central appeal of reality TV: that audiences can truly access the real through its representation. *Drag Race* reinforces that viewers can only ever see *performance* on TV, not the reality of performers’ lives. Crucial to this

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<sup>181</sup> Of course it is important to note that the adjudicatory method of *Drag Race* is overdetermined in that it reflects not only narratives of legal adjudication, but also invokes the type of judging that takes place at drag balls, as shown in *Paris is Burning*. Ryan Ashley Caldwell suggests that this nexus between judging and realness may be central to drag identity itself: “‘Realness’ . . . has to do with a dramatic performance that gives the illusion of an ontology or theoretical ‘beingness’ as such. It is based on the *judging* of a performance of identity as being real in terms of the category aimed at imitating . . . .” Ryan Ashley Caldwell, *Gender Queer Productions and the Bridge of Cultural Legitimacy: “Realness” and “Identity” in Paris is Burning*, in CO-OPTING CULTURE: CULTURE AND POWER IN SOCIOLOGY AND CULTURAL STUDIES 77, 79 (B. Garrick Harden & Robert Carley eds., 2009) (emphasis added).

<sup>182</sup> There are, however, non-drag but drag-friendly judges who guest judge on the panel, including such luminaries as Chloe Sevigny and Pamela Anderson. RuPaul, however, is depicted as making the final decision.

<sup>183</sup> That said, the adjudicatory mode is still regulatory, involving an analysis of outfit, runway walk, performance style, make-up, relative “fishiness,” etc. The adjudication depicted in *Paris is Burning* is highly regulatory, with numerous narrowly defined “categories” in which performers walk and are rigorously judged (e.g., the category “Winter Wear: the Poconos vs. the Catskills”). See PARIS IS BURNING, *supra* note 175.

critique of the real is the show's modified legalistic process: adjudication itself appears in drag.

That said, *Drag Race* should not be read as purely transgressive, or as a complete rejection of the hegemonic commercial narrative at the core of television. First, its drag performances represent a domesticated version of the pinnacle of Harlem drag ball scene depicted in *Paris is Burning* where the performances frequently subversively undermined race and class categories, ultimately amounting to performance art. In addition, the show is after all broadcast on commercial television, and thus takes place within an unrelentingly commercial context. Product placements, albeit drag performer- and gay-friendly, are legion throughout the show; commercial breaks are peppered with ads for show sponsor Absolut vodka, featuring former contestants from *Drag Race*. RuPaul also takes advantage of media convergence by promoting his book and music during the show, though often with an amusing self-consciousness that lessens the mercenary sting. Thus, while the show places the "real" of reality TV in the context of difference, frequently providing a forum for important community concerns like gay-bashing, tolerance, same sex marriage, etc., this discourse remains ensconced in a marketing environment.

## VII. JUDGES OR JURORS?: FANS & PARTICIPATION/DEMOCRACY & COMMODIFICATION

While we can analyze the way reality shows seek to construct viewer identification, it is of course impossible to know how audience members actually identify in practice. How might fans describe their identification with the judges in competition shows? Do they feel a sense of community with other viewers in a kind of *de facto* jury, seeking to distinguish their judgment from the judges? Or do they feel their role as some combination of both judge and jury member? And how do these positions of judgment interplay with audience identification with contestants and other reality stars?

As noted above, media theorists have challenged, or at least problematized, Gerbner's notion of a "top-down" media influence, flowing unidirectionally from producers to consumers.<sup>184</sup> The highly participatory, trans-media world of contemporary mass culture provides numerous outlets for media fans to become media critics, and even producers.<sup>185</sup> Yet within current television theory, critics remain somewhat polarized as "optimistic" or "pessimistic" regarding the ability of television to allow for or encourage a truly democratic participation in its audiences.

As a threshold matter, it is important to think of audiences as fragmented, in both demographics and dispositions. As noted above, one of broadcasters' biggest challenges since the advent of proliferating cable channels is gaining

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<sup>184</sup> Gerbner, *supra* note 89.

<sup>185</sup> The old joke, "everybody's a critic" no longer amuses because its too close to true.

adequate market share. As part of their marketing analysis, broadcasters distinguish between spectators based on the way that they watch television. These spectators are referred to as “zappers, casuals, and loyals.”<sup>186</sup>

Zappers are people who constantly flit across the dial—watching snippets of shows rather than sitting down for a prolonged engagement. Loyals actually watch fewer hours of television each week than the general population: they cherry pick those shows that best satisfy their interests . . . they tape them and may watch them more than one time . . . Loyals watch series; zappers watch television. . . . Casuals fall somewhere in between; they watch a particular series when they think of it or have nothing better to do.<sup>187</sup>

One of the best-known examples of participatory phenomena in reality TV is the vast number of people who vote for *American Idol* contestants via phone calls or text messages.<sup>188</sup> In addition, shows increasingly run viewer comments via Twitter at the top of the screen during the show’s broadcast.<sup>189</sup> Similarly, many shows, reality and otherwise, now have viewer polls in which fans can participate via text message during the show, with results posted between segments. Finally, in perhaps the most boring use of new media on television, *The Voice*’s first season had a segment in which the show’s singing contestants were shown tweeting back and forth with fans during the live broadcast.

This interaction between audience members and reality shows is frequently narrated by the shows themselves as a democratization of TV programming, purportedly an opportunity for fans to “call the shots.” And like Clover noted about film depiction of juries, reality TV shows frequently conflate the audience with broader notions of nation and democracy.<sup>190</sup> The very name of shows like *American Idol*, *America’s Got Talent*, *America’s Next Top Model*, *American Pickers*, etc. seek to establish themselves as emblematic of American culture.<sup>191</sup> And, as noted above, the prominent depiction of the studio audience on shows like *American Idol* and *Dancing With the Stars* provides an associative mirroring of the viewing audience, uniting a community of viewers as nation. Many reality shows mark the audience as a stand-in for nation by explicitly

<sup>186</sup> JENKINS, *supra* note 11, at 74.

<sup>187</sup> *Id.* Obviously, it is important to bear in mind that this is the perspective of media elites seeking to market programs and goods to viewers, not necessarily viewers’ perception of their own practices. We should be wary of adopting industry perspectives on viewers, but it is important to bear them in mind when analyzing how media producers structure and market shows.

<sup>188</sup> Purportedly, votes for the *American Idol* rival those cast in national elections. See OUELLETTE & HAY, *supra* note 115, at 212.

<sup>189</sup> And shows sometimes include tweets from the judges themselves, which somewhat disconcertingly appear while the judges are on-screen. See *e.g.*, *The Voice*.

<sup>190</sup> See Clover, *supra* note 25.

<sup>191</sup> Though of course *American Idol* and *America’s Got Talent* have English cousins, as well as international spin-offs.



linking program participation with notions of democracy and patriotism. For example, narratives of regional identity play out in the various *Real Housewives* iterations (New York, Atlanta, etc.), and in *Wife Swap*, which pointedly exchanges spouses between so-called “red” and “blue” states. In addition, shows frequently devote episodes to patriotic themes; for example, celebrations of active duty military service personnel, etc.<sup>192</sup>

Narratives of participation and democracy may be enacted through jury-like narratives, as Clover describes, or as electoral or voting narratives. Here, I am interested in any and all narratives of what I have earlier called “legalized community.”<sup>193</sup> That is, spectators who are constructed by mass media texts as legal viewing-subjects who interact with a television text (through “voting,” commenting on-line, tweeting, etc.) and are often positioned in opposition to an on-screen “expert” adjudicator.

Since notions of participation, collaboration, and democracy are key to questions of the role of the audience as “adjudicator” in reality TV, it is useful to survey a few theories regarding audience interactivity with television. I will summarize three major strands of scholarship on participatory spectatorship, after which I will attempt to analyze and synthesize these arguments.

### A. A Democracy of Fans

One place to look for clues on audience identification is in the fan culture that surrounds reality shows. Examples of this fan culture can be found in a wide range of Internet websites<sup>194</sup> and in the plethora of YouTube videos in which various homages and remounting of the shows are performed, as well as other blogs and websites.

For example, YouTube fan videos referencing *The Real Housewives* franchise take a variety of forms. Some videos are simply scenes from episodes apparently posted by fans. Some are parodies of the shows made by industry producers (e.g., Chelsea Lately’s spoofs), but also by smaller video producers

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<sup>192</sup> Examples include episodes of Bravo’s *Top Chef* and *Top Chef Masters*, in which contestants may cook for military service-members, or ABC’s *Dancing With the Stars*, in which the contestants danced to American-themed songs (broadly conceived to include Miley Cyrus’ “Party in the U.S.A.”) wearing red, white, and blue costumes, etc. Also consider Bravo’s *Top Chef: D.C.* (Bravo television broadcast 2010) and *The Real Housewives of D.C.*, which appeared immediately after Obama’s election and overtly perform the connection between nation and the reality format. The choice of Washington, D.C. as a locale was seemingly motivated by narratives of liberalism and stylishness imputed to the Obama presidency by mass media. It is clear in both *Top Chef D.C.* and *The Real Housewives of D.C.* that the capitol functions as more than just a new urban setting for two popular franchises, but resonates with the re-enactment of government. In *Top Chef D.C.*, the contestants even cook for members of NASA and the CIA.

<sup>193</sup> See *supra* note 21.

<sup>194</sup> Such websites include apparently independent fan sites like <http://www.RealityTVfan.org>, apparently commercial sites like <http://www.realitynation.com>, as well as aggregator sites like <http://www.fanpop.com>, and of course the TV channel websites themselves.

(e.g., PauliluProductions, with its hilarious “The Real Housewives of South Boston”<sup>195</sup>). Some videos offer fashion advice inspired by *The Real Housewives*; for example, tutorials on how to emulate the Housewives’ make-up,<sup>196</sup> or posts in which fans model wigs and weaves like the Housewives wear.<sup>197</sup> In addition, some “YouTubers” post videos of themselves reviewing or recapping the show.<sup>198</sup> There is even a fan who posted caricatures he had drawn of the women from the Orange County cast.<sup>199</sup>

Self-proclaimed fan and media scholar Henry Jenkins was one of the first academics to insist that an examination of fan culture was essential to a full understanding of television’s operations: “I am dismayed by general theories of television spectatorship that gave little attention to the specificity and complexity of the practices I experience as a fan.”<sup>200</sup> For Jenkins, fan cultures represent “interpretive communities” that are effectively “alternative social communities.”<sup>201</sup> These alternative cultures are hard to fix; they remain “constantly in flux.”<sup>202</sup> Jenkins finds thorough and rigorous textual analysis in, for example, the fan communities surrounding the *Star Trek*<sup>203</sup> and *Beauty and the Beast*<sup>204</sup> television shows, groups “insistent on making meaning from materials others have characterized as trivial and worthless.”<sup>205</sup>

Contrary to the “top down” reading of the influence of television which Gerbner and cultivation theorists subscribe to,<sup>206</sup> Jenkins focuses on how spectators and fans re-appropriate and augment pop culture, rather than simply being controlled by it. Jenkins argues that media fans “raid mass culture, claiming its materials for their own use.”<sup>207</sup> Rather than simply being passive consumers, Jenkins insists that fans are “active producers and manipulators of

<sup>195</sup> See PauliluProductions, *supra* note 155.

<sup>196</sup> See, e.g., emilynoel83, *Real Housewives of Orange County Makeup*, YOUTUBE (Nov. 22, 2009), <http://www.youtube.com/watch?v=QyuGyf8p3ys>.

<sup>197</sup> See, e.g., supergin777, *How to Style Short Wig Tutorial (Nene Style) Cute!!!*, YOUTUBE (Dec. 23, 2010), <http://www.youtube.com/watch?v=OwuPVhmrWmY> (emulating Nene Leakes from *The Real Housewives of Atlanta*).

<sup>198</sup> See, e.g., EbonieButterfly, *RHOA Real Housewives of Atlanta Season 3 Episode 3*, YOUTUBE (Oct. 19, 2010), <http://www.youtube.com/watch?v=HY78xBxzyWU>.

<sup>199</sup> The video is no longer available on YouTube. In yet another example of convergence culture, Vicki Gunnvalson, one of the Orange County housewives, posted a response commending the caricatures.

<sup>200</sup> JENKINS, *supra* note 89, at 7.

<sup>201</sup> *Id.* at 2.

<sup>202</sup> *Id.* at 3.

<sup>203</sup> *Star Trek* (NBC television broadcast 1966-1969).

<sup>204</sup> *Beauty and the Beast* (CBS television broadcast 1987-1990).

<sup>205</sup> JENKINS, *supra* note 89, at 3.

<sup>206</sup> See *supra* Section VI.

<sup>207</sup> JENKINS, *supra* note 89, at 18.

meanings.”<sup>208</sup> Crucially, part of fan participation is a challenge to cultural hierarchy itself:

Unimpressed by institutional authority and expertise, the fans assert their own right to form interpretations, to offer evaluations, and to construct cultural canons. . . . Fan culture stands as an open challenge to the “naturalness” and desirability of dominant cultural hierarchies, a refusal of authorial authority and a violation of intellectual property.<sup>209</sup>

Jenkins styles fans as actively constituting the pop cultural text. Fans are not simply spectators, they are “active participants in the construction and circulation of textual meanings.”<sup>210</sup> They “reread [popular texts] in a fashion that serves different interests, as spectators who transform the experience of watching television into a rich and complex participatory culture.”<sup>211</sup> Nor are fans simply charmed and enthralled by their show of choice: “The fans’ response typically involves not simply fascination or adoration but also frustration and antagonism, and it is the combination of the two responses which motivates their active engagement with the media.”<sup>212</sup> Thus, it is fandom itself that generates participation.

Jenkins made these observations before the explosion of social networking, online fan sites, YouTube, and other key fan outlets the Internet has provided. Jenkins expands his analysis of participatory mass culture in his 2006 book *Convergence Culture*, where he examines the interaction between old media (e.g., newspapers, television) and new media (e.g., the Internet), and the multiple media platforms between which fans now “migrate” to follow their media content of choice. Jenkins focuses on what he calls a “paradigm shift” in media ownership, production and consumption that convergence opportunities signal.<sup>213</sup> This paradigm shift creates “ever more complex relations between top-down corporate media and bottom-up participatory culture.”<sup>214</sup> Part of this complexity involves the increased opportunities for consumers to become producers that the new technology allows for: “Convergence doesn’t just involve commercially produced materials and services traveling along well-regulated and predictable circuits. . . . It also occurs when people take media in their own hands.”<sup>215</sup>

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<sup>208</sup> *Id.* at 23. For his 1992 book, Jenkins mostly found evidence of this in fan conventions and fan letter writing campaigns. Since then, the Internet has provided numerous opportunities for fans to “speak back” to mass culture.

<sup>209</sup> *Id.* at 18.

<sup>210</sup> *Id.* at 24.

<sup>211</sup> *Id.* at 23.

<sup>212</sup> *Id.* As examples of this, Jenkins discusses various letter-writing campaigns fans mounted in attempts to save their doomed favorite shows.

<sup>213</sup> JENKINS, *supra* note 11, at 5, 243.

<sup>214</sup> *Id.* at 243.

<sup>215</sup> *Id.* at 17.

That said, Jenkins does not completely discount Gerbner's thesis that media is largely controlled by elites who dictate its terms. Instead, Jenkins gives detailed accounts of how convergence culture serves the interests of highly centralized corporate media producers, who seek to exploit it to more profitably market their products. For example, he quotes a CBS executive who admits the importance of following fan discussion lists online: "It's just the best marketing research you can get."<sup>216</sup> But he describes not a hierarchy of media producers and consumers (for example, in his analysis of *Survivor* and the "spoiler" community), but rather a circularity: "the [media] producers wanted to direct traffic from [*Survivor*] to the Web and other points of entry into the franchise. Those various points of contact became opportunities to promote both the series and its sponsors. Yet, fans also exploited convergence to create their own points of contact."<sup>217</sup> Crucially, "the interests of producers and consumers are not the same. Sometimes they overlap. Sometimes they conflict."<sup>218</sup>

In exploring spectator interaction with reality TV, Jenkins analyzes *Survivor* and *American Idol* in detail.<sup>219</sup> Two of his main points are relevant to my analysis of reality TV's construction of legal community. First, Jenkins argues that media producers seek to construct fan communities and exploit existing communities to market products across media platforms. Second, fans may create "knowledge communities" around reality shows, pooling their own expertise in ways that may challenge media producers.

On the first point, Jenkins traces the elaborate methods by which media producers manipulate product placement and multi-platform brand presence to transform devoted fans of a show into devoted fans of a product. Jenkins explains, "Audience participation is a way of getting *American Idol* viewers more deeply invested, shoring up their loyalty to the franchise and its sponsors."<sup>220</sup> Jenkins suggests that the participatory structure of shows like *American Idol* is designed to foster group engagement with the show. In this context, debating and voting for contestants creates an "adjudicatory" community, while increasing brand loyalty for sponsors' products. But Jenkins also finds the potential for an inversion of hierarchy through fan collectivities. For example, he notes the "Vote for the Worst" campaign in the 2007 season of *American Idol* in which some fans convened via Internet to seek to sway the *Idol* outcome by voting for the "worst" contestant. Significantly, this act was initiated as a challenge to producers allegedly "fixing" earlier votes.<sup>221</sup>

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<sup>216</sup> *Id.* at 46 (quoting Marshall Sella, *The Remote Controllers*, N.Y. TIMES, Oct. 20, 2002, at 68); see also Stephanie Clifford, *We'll Make You a Star (if the Web Agrees)*, N.Y. TIMES, June 6, 2010, at BU1 (describing how Bravo TV scours the web and social networking services, in addition to doing traditional market research, to find reality stars and even to shape plots to pursue on existing shows).

<sup>217</sup> JENKINS, *supra* note 11, at 57.

<sup>218</sup> *Id.* at 58.

<sup>219</sup> *Id.* at ch. 1-2.

<sup>220</sup> *Id.* at 70.

<sup>221</sup> *Id.* at 87-92.

As for the second point, Jenkins argues that creating meaning out of shows like *Survivor* is a deeply communal process. As evidence of this, he focuses on the “spoiler” websites and message boards that sprung up early in the show’s airing, which he sees as communities of “collective knowledge.”<sup>222</sup> Jenkins points to the structuring of the show to generate audience adjudication: “*Survivor* asks us to speculate about what happened. It practically demands our predictions.”<sup>223</sup> Using another legal metaphor, he describes the spoiler phenomenon as “an adversarial process” between fans and producers: “Spoiling is also adversarial in the same sense that a court of law is adversarial, committed to the belief that through a contest over information, some ultimate truth will emerge.”<sup>224</sup> Again, Jenkins sees media producers and consumers as deeply interdependent, with producers tracking fan web activity and postings, and fans tracking producers’ comments on the show for clues on ultimate show outcomes.

Jenkins sees the fan community around reality TV (at least around *Survivor*, which gets the most detailed attention), as a rejection of what his MIT colleague Peter Walsh has called “the expert paradigm.”<sup>225</sup> Walsh enumerates five aspects of the Expert Paradigm:

1. The Expert Paradigm requires a body of knowledge . . . abstract knowledge tends to have higher prestige than practical knowledge . . . .
2. The expert paradigm creates an “exterior” and an “interior,” an outer group of laypersons and an inner group of experts . . . .
3. The expert paradigm uses rules . . . . A self-appointed, self-regulating hierarchy typically manages . . . rules . . . .
4. The expert paradigm uses ritualistic ways to define the expert group from outsiders . . . . Expert-insiders also typically use a specialized language that tends to make their utterances incomprehensible . . . to the uninitiated . . . .
5. The expert paradigm is inherently unstable. It is constantly threatened by factions and turf battles within and by skepticism . . . from without.<sup>226</sup>

Walsh argues that the expert paradigm is being diminished by new communication technology, such as the Internet. Walsh offers as an example Matt Drudge of the Internet blog *Drudge Report*, who scooped mainstream journalists in reporting President Bill Clinton’s affair with Monica Lewinsky.<sup>227</sup> While Walsh does not foresee the complete destruction of the expert paradigm,

<sup>222</sup> *Id.* at 28, 282.

<sup>223</sup> *Id.* at 28.

<sup>224</sup> *Id.* at 43. Note that Jenkins references the popular imagination of law as a system grounded in truth, as previously discussed in *supra* Section V.

<sup>225</sup> *Id.* at 50-53; Walsh, *supra* note 142, at 365-68.

<sup>226</sup> Walsh, *supra* note 142, at 366-67.

<sup>227</sup> *Id.* at 368.

he sees the Internet's transformation of the paradigm as equivalent to the radical change occasioned by the invention of the printing press.<sup>228</sup>

Jenkins also sees evidence of this transformation in convergence culture's participatory fandom: "While participants in a collective intelligence often feel the need to demonstrate or document how they know what they know, this is not based on a hierarchical system and knowledge that comes from real-life experience rather than formal education may be . . . more highly valued . . ." <sup>229</sup> Even within the fan community, Jenkins finds evidence of mistrust of expertise and a preference for group analysis and communal fact-gathering.

Ever generous in his interpretation of fan culture, Jenkins rejects the idea that mass culture diverts public attention from politics and the machinations of actual democracy. Rather, the fault lies with the nature of political discourse itself: "I would argue that one reason more Americans do not participate in public debates is that our normal ways of thinking and talking about politics requires us to buy into . . . the expert paradigm: to play the game, you have to become a policy wonk, or, more accurately, you have to let a policy wonk do your thinking for you."<sup>230</sup> Jenkins thus seeks to redeem the objects of fans' affection, refuting causal connections between commercial TV consumption and political apathy.

### B. Citizen Spectator

Media scholar John Hartley argues for an even more explicit relationship between television and democracy than Jenkins.<sup>231</sup> Hartley compares the rise of print literacy and the subsequent importance of "the republic of letters" in Western democratization to the rise of a "republic" of television viewers. Challenging the "television rots your brain" dismissal of the democratizing possibilities of the medium, Hartley posits an optimistic view of the television audience as "an extension and reformulation of the reading public rather than . . . its demise."<sup>232</sup> And Hartley situates the reading public at the heart of the U.S. republic, quoting Thomas Paine: "As the republic of letters brings forward the best literary productions, by giving to genius a fair and universal chance; so the representative system of government is calculated to produce the wisest laws, by collecting wisdom from the place where it can be found."<sup>233</sup> In this analogy, "Paine united the three elements of [the] republican approach by bringing together: textuality (republic of letters); nation ('res publica,' the common weal);

<sup>228</sup> *Id.*

<sup>229</sup> JENKINS, *supra* note 11, at 54.

<sup>230</sup> *Id.* at 29.

<sup>231</sup> Hartley, *supra* note 49, at 388-89. Note how Jenkins' notion of TV audiences as collective intelligences also resonates with Paine's language.

<sup>232</sup> *Id.* at 388.

<sup>233</sup> *Id.* at 389 (quoting THOMAS PAINE, RIGHTS OF MAN (1791)).

and citizenship (representative government).”<sup>234</sup> Thus, “[t]he reading public was literally, historically, the model for the public.”<sup>235</sup> Since reading was key to disseminating ideology, it was an important part of governance at the founding of the United States, as it is today.<sup>236</sup>

Rather than seeing the twentieth century developments of cinema and television as a radical break from and displacement of textual reading, Hartley argues that the new media simply represented a different *type* of reading, one which “migrated across platforms.”<sup>237</sup> Crucially, “[r]eading as a public persisted, even though the mode of literacy required changed [with television].”<sup>238</sup> Thus, the act of reading TV, a mass text, is an essentially social act, constitutive of community and nation.

Similar to Jenkins, Hartley sees in television a democratizing breakdown of the boundaries between authors and readers, allowing audience members to participate in the “writing” of their television experience. Examples of this participation include the use of the remote control to “redact” undesirable parts of the television text; production of public access cable shows; participatory fan cultures; the use of amateur video on regular broadcast TV shows; and amateur appearances as reality TV performers.<sup>239</sup> Hartley hails this blurring or outright destruction of the boundary between those who produce culture (“authors/producers”) and those who receive culture (“readers/viewers”) as a radical shift in the republic of letters innovated by the television medium.

Hartley admits his analysis is deliberately optimistic and that the content of commercial TV may not appear particularly democratic on its surface. However, his argument asks us to consider the democratic possibilities inherent in the television medium and its intertextual place within new media. Perhaps the uses to which these democratic discourses are put appear largely trivial and even crass in TV’s current iteration.<sup>240</sup> But given the nature of the medium as mass text, the possibility exists for audience redaction or rewriting of the television text in more or less politically critical ways.

### C. Spectatorship as Self-Governance: Reality TV as Neo-Liberal Phenomenon

Not all commentators view “the Republic of TV” as a potentially empowering force for democracy. Some commentators have diagnosed the prevalence and popularity of reality TV as symptomatic of neoliberalism with its “greater reliance on the privatization and personalization of welfare . . . as the

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<sup>234</sup> Hartley, *supra* note 49, at 389.

<sup>235</sup> *Id.* at 390.

<sup>236</sup> *Id.* at 398.

<sup>237</sup> *Id.* at 391.

<sup>238</sup> *Id.* at 391.

<sup>239</sup> *Id.* at 403-04.

<sup>240</sup> And of course we all know that “real” political discourse *never* becomes trivial or crass.

State entrusts “pastoralism” to private entities (including media) and emphasizes that citizens be not only active, but also “enterprising” in the pursuit of their own empowerment and well-being.<sup>241</sup>

Ouellette and Hay analyze reality TV within a Foucauldian “analytic of government”: “[a]n analytic of government considers the multiple ways that individuals and populations are made and continually reinvented as active, responsible citizens.”<sup>242</sup> Thus, television is a “cultural technology” that provides a “resource for acquiring and coordinating the techniques for managing the various aspects of one’s life.”<sup>243</sup> The resource represented by reality TV works within the ethics of neoliberalism, with its “heightened attention to ‘care of the self’” over State-sponsored or social solutions, and its preference for “private over public, self-sufficiency over ‘dependency,’ and personal responsibility over collective or ‘socialistic’ conceptions of society.”<sup>244</sup> Thus, “TV as cultural technology of self-actualization operates as a form of citizenship training.”<sup>245</sup>

Ouellette and Hay trace this “privatization” of governance through various types of reality shows, from competition shows to makeover shows. They find a persistent thread in these shows where “lessons often take the form of *experiments* or ‘civic laboratories,’ in which human subjects are tested on their ability to master certain technologies of citizenship . . . .”<sup>246</sup> Ouellette and Hay stress that “these lessons do not necessarily affirm the *settledness* of rules or laws, nor do they have predictable results . . . .”<sup>247</sup> Rather, it is the narrative of experimentation and reinvention of self and government *itself* which is key.

Rather than adopting Hartley’s position that viewers control the television viewing experience by time-shifting, etc., Ouellette and Hay argue that television’s very nature, with its regularly scheduled shows requiring viewers to “synchronize” to them, reinforces its role in citizenship training.<sup>248</sup> More importantly, the “reinvention of self” narratives that structure reality TV resonate with neo-liberal notions of reinvention of government, with its “intensification of the concern with making over government, and of designing a government that ‘frees’ citizens of cycles of dependency on government . . . .”<sup>249</sup>

Like Jenkins, Ouellette and Hay emphasize the importance of cultural convergence to the power of contemporary TV. However, rather than seeing the multi-platform phenomenon from the perspective of participatory fan interaction, they focus on how convergence serves commercial interests. “The strategy of embedding the TV program within lifestyle clusters inserted television within an

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<sup>241</sup> OUELLETTE & HAY, *supra* note 115, at 12; *see also* Kohm, *supra* note 15.

<sup>242</sup> OUELLETTE & HAY, *supra* note 115, at 12.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 12, 17-18.

<sup>245</sup> *Id.* at 15.

<sup>246</sup> *Id.* at 16.

<sup>247</sup> *Id.* at 16.

<sup>248</sup> *Id.* at 31.

<sup>249</sup> *Id.* at 19.



economy for delivering viewers to the commercial providers of resources required to maintain those lifestyles. In so doing, it provided a mechanism for delivering customers from one medium (TV) to another . . . .”<sup>250</sup>

That said, Ouellette and Hay do not argue that reality TV is novel in its reinforcement of messages of governmentality which serve those in power. They acknowledge that other commercial media such as magazines, etc. also have fulfilled this role. However, they contend that reality TV is new in “the intensity with which . . . [it] has taken up and regularized post-welfare grammars of choice, personal responsibility, and self-empowerment and applied them to a whole range of ‘problems’ that encompass everything from obesity to housecleaning to ineffective parenting.”<sup>251</sup>

Predictably, Ouellette and Hay do not join Jenkins in celebrating the participatory fan culture surrounding such programming. Instead, they directly challenge Jenkins’ and Hartley’s description of active spectatorship as a democratic, or potentially democratic, phenomenon. Rather than allowing for democratic expression, Ouellette and Hay see reality TV as a location for spectators to participate in “games of citizenship.”<sup>252</sup> Ouellette and Hay question what they argue is Jenkins’ core assumption: that media culture is *either* democratic *or* non-democratic. They argue that democracy is not simply an abstract, “universally recognized ideal and a moral good”<sup>253</sup> that may be “veiled or perverted as *spectacle*” by TV.<sup>254</sup>

Instead, Ouellette and Hay insist that the important question is not whether democracy is present or not, but *how* television constructs the instrumentalities necessary to democracy and the qualifications of citizenship. “[R]ather than asking whether these developments have made TV *more* democratic, it is necessary to ask how TV has been redesigned to accommodate more techniques of self-government and more forms of the democracy game, and how that development has been useful to the discourse . . . about the present . . . being ‘more democratic’ than before.”<sup>255</sup> In addition, they argue that the freedom of the individual spectator that Jenkins lauds as democratic sounds similar to the justifications made for neo-liberal advancements, with their emphasis on self-governance and their disdain for social or communal solutions to problems of governance.

That is, for Ouelette and Hay, reality TV’s schema of participation is identical to that provided by notions of neo-liberal citizenship, not a transgressive challenge to media producers, as Jenkins imagines it. Crucially, they emphasize that democracy is not abstract content, but rather “is an achievement that—for better or worse—occurs through specific techniques, experiments, and

<sup>250</sup> *Id.* at 30.

<sup>251</sup> *Id.* at 73.

<sup>252</sup> *Id.* at 204.

<sup>253</sup> *Id.* at 205.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 206-207.

demonstrations . . . .”<sup>256</sup> Thus, “[t]he question should be, what is it that governmental rationalities ask or require of particular members in order to perform democracies?”<sup>257</sup>

In *Real Justice: Law and Order on Reality Television*,<sup>258</sup> Ouellette narrows the arguments from *Better Living Through Reality TV* to explicitly law-themed reality shows. For example, she examines the ways that shows which depict legal systems (e.g., official judge shows, prison shows) enact neo-liberal operations when they “take over and privatize the activities of the judiciary.”<sup>259</sup> While Ouelette still mostly examines law as content for shows instead of as a deeply structuring narrative for reality TV itself,<sup>260</sup> as I argue here, she includes within the problematic of governmentality the actual collaborations between policing agencies and reality TV producers; for example, in shows like *America’s Most Wanted*.<sup>261</sup> Ouellette argues that given this collaboration, merely looking at the representational questions reality TV raises misses the contemporary interdependence of legal apparatuses and media:

When scholars protest the ideological work accomplished by “real justice” programs, they draw from old ways of talking about the spectacle of representation. In the most simplistic version of this thinking, television is an ideological instrument for manipulating minds and buttressing uneven power relations in the real world. This conceptual framework breaks down in the context of reality television, where “real conditions of existence” cannot be neatly separated from the production and spectacularization of those conditions.<sup>262</sup>

The collaboration between reality entertainment producers and actual law enforcement suggests that television has a “constitutive role” in “producing the truth of law and order, in part by participating in and claiming to facilitate the empowerment and control of citizens.”<sup>263</sup>

#### D. Analysis

The critical approaches outlined above reveal the marked divergence between television scholars who are optimistic about spectators’ ability to

<sup>256</sup> *Id.* at 208.

<sup>257</sup> *Id.*

<sup>258</sup> Ouellette, *supra* note 8.

<sup>259</sup> *Id.* at 162.

<sup>260</sup> That said, Ouellette does acknowledge the “broader seepage of policing and judgment techniques into all reality entertainment . . . .” *See id.* at 173.

<sup>261</sup> *Id.* at 160-61.

<sup>262</sup> *Id.* at 158. This critique perhaps makes more sense when directed at media scholars working in more or less formalist traditions. As I have argued above, many legal scholars fail to adequately account for the representational forms media inhabits and how those forms structure the legal viewing-subject’s spectatorship and readings of mass cultural texts. *See supra* Section III.

<sup>263</sup> *Id.* at 172.

reappropriate and re-envision TV, and those who are pessimistic about the ability of spectators to remake or resist TV's core messages of consumerism and social control. While it is something of an oversimplification, Jenkins and Hartley clearly represent the optimistic view, while Hay and Ouellette (and Gerbner's cultivation theory) take the pessimistic view. However, both approaches make important contributions to an analysis of how television constitutes its audience and how narratives of democratic participation play out.

Despite the democratic aspects and possibilities of television that Jenkins and Hartley describe, given its commercial and almost wholly privatized nature,<sup>264</sup> it is difficult to imagine this democratic potential. And even if we acknowledge the participatory elements of reality TV, we might question the value of "democratic" participation in choosing a pop music star, or weighing in on the breast implants of a purportedly "real" housewife.<sup>265</sup>

However, Jenkins' insistence on the inclusion of spectators' own cultural production in any accounting of television's reception remains an important corrective to scholars who hypothesize about media without any attention to the actual practice of media "consumers."<sup>266</sup> His description of the richness of fan culture suggests that spectators actively interpret and re-imagine media, rather than simply being passive victims of "top-down" programming.<sup>267</sup> Similarly, Hartley's focus on nation as constituted by reading and interpretation allows for the possibility of progressive and resistant interpretations of mass texts. While as Ouellette and Hay suggest, these interpretations and reappropriations may be largely bound by the hegemonic TV texts they respond to, the sheer fact that spectators "talk back" (and on increasingly varied and visible platforms) reveals the possibility of resistant readings. To consider an admittedly non-television example, we have recently seen how the social networking site Facebook has facilitated not just corporations' efforts to get people to "like" their products and help sell them to their friends, but also political revolutions in Tunisia and Egypt, and the global Occupy movement. Of course, the Internet provides more access for individuals to produce and disseminate media than commercial TV. However, the Facebook example reminds us that mass reappropriation of apparently settled venues, texts, and meanings can be unpredictable, and potentially politically progressive.

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<sup>264</sup> Nick Browne notes that the United States was anomalous among nations in its failure to provide public funding for television during its founding, development, and currently. See Browne, *supra* note 46, at 69-70.

<sup>265</sup> Ever generous in his readings of fan culture, Jenkins dismisses the content-based critique of fandom as grounded in a cultural elitism inseparable from highly contestable notions of "taste." See JENKINS, *supra* note 89, at 3.

<sup>266</sup> It is perhaps especially salutary for the type of legal scholarship referenced above, which sees layperson audiences as hopelessly incapable of reading popular legal texts skeptically, much less critically or resistantly.

<sup>267</sup> See also Mezey & Niles, *supra* note 50, at 105-10 (discussing the Birmingham School's analysis of popular engagement with remaking mass culture).

That said, I am less convinced by Jenkins' assertion that the so-called expert paradigm is largely dismantled by participatory culture. How do we jibe the explosion of media platforms and interactions between fans and shows with the concomitant explosion of reality TV depictions of the essence of expertise: judging? As discussed more fully above, unofficial judge shows abound across show formats and myriad channels. While Walsh<sup>268</sup> may be correct that the Internet has undermined or at least transformed the expert paradigm, narratives of adjudicatory expertise are repeated in show after show. In addition to the obvious commercial incentive for TV producers to repeat successful formulas, this obsessive repetition symbolically resonates with media producers' anxiety about the loss of clearer channels of "top-down" influence that convergence culture represents. That is, the plethora of images of judicial expertise, far from representing a secure relationship between audiences and experts, instead represents media producers' attempts to maintain their own position at the top of the cultural production hierarchy; or, at a minimum, to profit from the narrative of viewers challenging experts. Maintaining the touchstone of the expert may be a key way for media producers to direct unruly spectators to the all-important central spectacle of television: product consumption.

As discussed above, some fan interaction is structured as a "juror-like" challenge to "judicial" authority; most notably, in the voting on *American Idol*. But even the act of challenging a judge panel reveals an investment in the expert paradigm. Again, narratives of law are crucially constitutive of the form of reality TV: the encouragement of audience participation is always anchored to a narrative of authority, expertise, and judgment.<sup>269</sup> Thus, media fan rejection of the expert paradigm is far from clear. Experts in the form of reality TV judges are legion, and even if fans engage in an adversarial relationship with them on fan sites, the *concept* of expertise, and the combative dance between the expert and "the people," remains intact.

In defending the apparently apolitical nature of the objects of many media fans' affections, Jenkins asserts that it is not the trivial nature of commercial pop culture that diverts fans from politics. Instead, Jenkins argues that the reason Americans do not engage in politics is because they are required to be experts to do so. This argument is also unconvincing. First, it begs the question of what Jenkins means by "politics."<sup>270</sup> Rather than a paucity of fan political commentary in the new media, I defy anyone to surf the Internet for any

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<sup>268</sup> See Walsh, *supra* note 142, at 365-68.

<sup>269</sup> This may be more clearly the case in the competition shows than in the lifestyle shows, in which there is a clearer "blank space" where the judge should be, which the spectator fills with her judgment of the "testimony" of the participants.

<sup>270</sup> One of my favorite, accessible definitions of politics is that of artist Kenny Crucial: "Politics . . . describes how I make myself part of community and a shared experience. . . . Politics is not about *doing something*. You are already political." *Politics*, KENNY CRUCIAL, <http://www.kennycrucial.com/POLITICS.html> (last visited Nov. 5, 2012). Arguably, citizens of the Internet and social network—blogging, commenting, posting, tweeting—exemplify this definition of politics, whether they articulate it explicitly or not.

period of time and not encounter numerous acts and statements which we would be hard-pressed to not classify as political,<sup>271</sup> from YouTube commentary to user comments on a range of online publications. In addition, if Jenkins' own description of knowledge communities surrounding pop culture is to be taken seriously, how can a clear line be drawn between such communities and politics? If, as Jenkins asserts, fans are free to rewrite pop cultural texts, why is this not a political act already; and why would such reappropriation not already have more explicitly political content?<sup>272</sup> Disdain for expertise does not fully explain the lack of more politically pointed fan critique.

On the other hand, Ouellette and Hay's arguments regarding the ideology inherent in reality TV are very convincing, chilling even, as they reveal how well-matched reality TV narratives are to neo-liberal political discourse. Their analysis of the specific governmentalities inherent in TV leads me to put a finer point on the question of whether audience members identify with judges *or* juries. Following Ouellette and Hay's description of democratic narratives as not simply "present" or "absent," we might more properly ask what *kind* of judiciary and jury, what *kind* of adjudication, does reality TV make possible?

That said, Ouellette and Hay's argument belies the extent to which reality TV constructs a regulatory space which is still dependent on notions of expertise, centralized authority, and positive law. Obviously, to call reality TV a narratively regulatory space is not inconsistent with Ouellette and Hay's focus on the governmentalities of neo-liberalism that reality TV represents. However, the pervasive images of judges, trials, and adjudications suggest that the regulatory space of reality TV is not purely one of neo-liberal self-governance. Rather, the obsessive repetition of expert judge figures suggest the continuation of notions of hierarchical, centralized government that issues edicts for "top down" governance.

Finally, multivalent spectator reactions are clearly possible, yet Ouellette and Hay, unlike Jenkins, largely ignore spectators' contributions in riffing on, remounting, and critiquing popular culture. It is safe to say that, as compelling as their argument is, it is largely pessimistic about the possibilities of viewers wresting progressive or critical messages from reality TV. While Ouellette and Hay themselves present a critical reading of a wide swath of reality TV, they do not seem to admit to the possibility of spectators creating resistant readings. Yet even the most cursory glance at YouTube fan parodies reveals that resistant

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<sup>271</sup> To be fair, Jenkins does include an afterword in his 2008 revised edition of *CONVERGENCE CULTURE* on the role of YouTube in the CNN presidential debate in 2008. See HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* (rev. ed. 2008). "The rise of networking computing, and the social and cultural practices that have grown up around it, has expanded the ability of average citizens to express our ideas, circulate them before a larger public, and pool information with each other in the hopes of transforming our society." Henry Jenkins, *Why Mitt Romney Won't Debate a Snowman*, in *SATIRE TV: POLITICS AND COMEDY IN THE POST-NETWORK ERA* 187, 189 (Jonathan Gray et al. eds., 2009).

<sup>272</sup> Again, Jenkins obviously felt the need to include this more explicit political commentary in his 2008 revisions.

readings of the shows are possible. Even if fans are critiquing within the terms established by reality TV shows, they are still critiquing. The very fact of such critiques, and the Internet community that social networks offer, suggest that fan community involvement can be truly politically empowering.<sup>273</sup> Even if the majority of fan reappropriations implicitly accept (or ignore) the neo-liberal underpinnings of reality TV, the phenomenon of reappropriation itself leaves open the possibility of more politically self-conscious reappropriations.

## VIII. CONCLUSION

I have argued that reality TV has more to do with legal narratives than simply mining them for content. Rather, reality TV may use legalistic devices to bind spectator anxiety about the disjunction between reality and performance, capitalizing on popular perceptions of law as the realm of the real. In addition, the neo-liberal operations of reality TV may situate it as an instrument of governmentality. Thus, legalistic operations are deeply constitutive of the reality format.

In the nearly two decades since Carol Clover's influential and compelling argument that the public identifies with legal narratives through the image of the jury, we have seen an extraordinary rise in images of judges and adjudication on reality TV. Seemingly, the more "reality" we get on TV, the more regulation of that reality through adjudicatory narratives we get. And like the classic "jury charge" issued to film audiences, these shows either implicitly or explicitly charge the audience with decisional authority.

I began this article by asking whether the plethora of adjudicatory narratives on TV creates a space for spectators to identify with judges rather than with a more communal and perhaps more democratic narrative of the jury, as Clover suggests about courtroom films. We have seen that on a formal level, TV—a more participatory, daily medium than cinema—may more readily evoke Clover's narratives of legal community. And reality TV explicitly enacts the narrative of the jury (and the electorate more broadly) in eliciting audience participation, in shows like *American Idol* where the audience casts its vote, affirming or disaffirming the pronouncements of the judges. Spectators also clearly position themselves in a wide range of positions vis-à-vis judges: yes, identification; but also critique, resistance, and rejection. Some of those positions are facilitated by media producers themselves; for example, in shows which evoke narratives of the judge versus the audience/"jury" (e.g., *American Idol*). But fans may also assume various adjudicatory positions through gestures

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<sup>273</sup> Imagine, for example, fans organizing on Facebook, as did Egyptians and Tunisians, based on some unsavory information revealed about the legal system on a law-themed show, advocating for changes in the law. Obviously, such a thing is possible, and websites like CHANGE.ORG, <http://www.change.org> (last visited Aug. 20, 2012), that allow people to generate and circulate petitions have shown that such grassroots efforts can have an impact. Spectators can be aware of the manipulations and commercialism of reality TV yet use it for different ends.

of reappropriation on Internet fan sites and elsewhere. Fans continue to remake the pleasure and narrative of these shows, as Jenkins argues.

Thus, while narratives of adjudication are pervasively constitutive of reality TV, across all show formats, modes of decision-making and judgment vary. Accordingly, spectators may shift their identification from contestant-litigant, to judge, to *judge* of the judge (appellate court?), or to jury. And, as we have seen in *RuPaul's Drag Race*, adjudication can be inscribed with difference.

One of the central paradoxes of contemporary media production is that while U.S. mainstream producers are at their most centralized, with just a few corporations owning multiple media outlets, technological advances allow for more de-centralized production of media content than ever before (e.g., independent blogs, YouTube). Within this context, the apparent contradiction of the simultaneous emphasis on participatory TV programming and the legion of images of judicial authority on TV resonates with the current state of media production and consumption. In addition, the obsessive repetition of judicial figures of expertise in adjudication scenarios may symbolically represent an attempt to reinscribe the participatory text with unitary authority. Law is a particularly compelling narrative for recirculation in a plural, convergence culture marked by contestations of authority and community, as the interrelationships between cultural producer, text, and cultural consumer shift and are redefined. The expert may be an embattled figure, as Walsh suggests, but the narrative of expertise persists.

Ultimately, there is no definitive answer to the question of whether the audience identifies as judge or jury. The question itself may be the problem: as already noted, fans may assume multiple relationships with the TV text. And, as Gray Cavender has noted, reality TV simultaneously and alternately promotes *both* notions of community *and* values that are destructive of communal identity; at once creating “tribes” (e.g., on *Survivor*) and rewarding self-serving individualism (also on *Survivor*).<sup>274</sup>

Whatever our misgivings about images of law on contemporary reality TV, we must not project some lost halcyon era of an interpretively unified TV spectator community.<sup>275</sup> Different spectators will bring different interpretations to their viewing, based on a variety of social, economic and experiential factors. Nor can we assume that Clover’s suggestion that courtroom films have historically acted to “empanel” their audiences represents a golden age of shared interpretation or sense of community among spectators, now lost.<sup>276</sup>

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<sup>274</sup> “I uncover . . . a polysemic relationship wherein these programmes assume and reinforce a traditional sense of community even as their depictions negate the viability of it.” Gray Cavender, *In Search of Community on Reality TV: America’s Most Wanted and Survivor*, in UNDERSTANDING REALITY TELEVISION 154, 158 (Su Holmes & Deborah Jermyn eds., 2004).

<sup>275</sup> *Id.* at 170.

<sup>276</sup> Consider, for example, Manthia Diawara’s critique of the “white gaze” in classic mainstream Hollywood film, which, he argues, forces African-American spectators to become resistant readers to remake the meanings of normative texts. See Manthia Diawara, *Black Spectatorship: Problems*

As suggested above, the more important question to ask amid the rash of adjudicatory narratives on reality TV is what *type* of adjudicatory community is imagined in these shows? While the Internet and social networking may allow for critique and repositioning of reality TV narratives, unavoidably the “choice” and “judgment” elicited by participatory show formats is directed at powering product consumption. Thus audiences are offered the guise of discernment, expertise, and judgment to superficially elevate their submission to the role of consumer. This may be especially evident in shows that use more “jury-like” notions of deciding and/or voting. *American Idol* is of course one of the first shows to capitalize on the new marketing potentials of reality TV, by creating an audience for pop stars who have not yet recorded an album—essentially selling a product before it is made.

Such techniques have now reached dizzying heights (or depths, depending on your point of view): NBC’s recent entry in the fashion reality TV genre, *Fashion Star*,<sup>277</sup> involves two panels of judges: the “creative” fashion industry panel that coaches and kibbutzes the budding designers, and a panel of buyers from department stores who bid on designs, and ultimately produce clothing which spectators can purchase (the very next day!). *Fashion Star* thus purports to involve its audience in the heart of production decisions to lure them into consumption decisions.<sup>278</sup> *Fashion Star* completely collapses, temporally and otherwise, the already diminished space between watching TV and shopping; the show and the commercials are one.

In a post-modern context, where images are a key part of capitalism and consumption, identity itself may be largely constructed through this consumption: “the postmodern fragmented individual believes that the consumption of images and representations is the means to identity creation.”<sup>279</sup> In turn, narratives of adjudicatory choice (i.e., judging and voting), key narratives of law and democracy, operate in reality TV to facilitate consumption, with shows cultivating spectator loyalty simultaneously with brand loyalty.

Thus, if we are judges or juries, we are arbiters of “taste.” We form our allegiance with other citizen-spectator-jurors by our shared products of choice: we are “Team Bethenny” or “Team Jill.”<sup>280</sup> We imagine that what we like

of *Identification and Resistance*, in *BLACK AMERICAN CINEMA* 211 (Manthia Diawara ed., 1993). In addition, theorists of post-modernism would argue that for the post-modern subject, “all interpretations are simultaneously both equally valid and invalid. Noise results from these many ‘voices’ all speaking at once, thereby depriving each voice of significant discursive power.” Ryan Ashley Caldwell, *The Unicorn is Dead: Postmodernism, Consumption, and the Production of the “Self,”* in *CO-OPTING CULTURE*, *supra* note 181, at 44. Thus, multiple spectator interpretations may result not in a “unanimous verdict,” but in cacophony.

<sup>277</sup> *Fashion Star* (NBC television broadcast 2012-present).

<sup>278</sup> Expertise remains relatively unchallenged on this show, as with other fashion reality TV offerings, where the audience typically does not have a vote. That said, of course fans may speak back to the judges and the show on the Internet.

<sup>279</sup> Caldwell, *supra* note 276, at 48.

<sup>280</sup> Reality TV “stars,” like *Real Housewives of New York City*’s Bethenny Frankel and Jill Zarin, are themselves commodities, self-branding in book spin-offs, beverage spin-offs, or show spin-offs. The meme of “team so-and-so” is a perfect example of the tension between community values and



distinguishes us from the mass, yet we revel in the validation that other fans of our loved object brings. We vote to be, we vote to belong, we vote to buy.<sup>281</sup>

While we may see other modes of analysis and judgment in reality TV—e.g., moral judgment, contests and competitions—what is certain is the deeply, pervasively regulatory space reality programs enact and endlessly reproduce. The legalized subjects and communities constituted by reality TV are regulated: chosen, challenged, judged, and dispatched. Key to this process is the “law” and law-like operations, which still structure our “sheerest forms of play” (and consumption).

I want to close with two more optimistic examples of positive facilitation of community through interactions between TV’s representation of law in community and law in community in real life. My first example is revealed by the documentary film *Afghan Star*,<sup>282</sup> which chronicles the *American Idol*-type show of the same name produced in Afghanistan. *Afghan Star* is essentially the same format as *American Idol*, albeit on a significantly more modest production budget:<sup>283</sup> contestants compete to be named the top pop star, and audiences vote via phone or text messages.

The documentary follows the TV show’s producers, Tolo TV (one of the first independent commercial television channels in Afghanistan after Taliban rule) and the show’s charismatic host, Daoud Sediqi.<sup>284</sup> Early in the documentary, we hear the producers explicitly announce that one of the show’s goals is to facilitate a more open and democratic Afghanistan. And indeed, it is hard to resist the documentary’s apparent message: that reality TV has truly democratic and transformative potential. We see scenes of the dedicated producers reflecting on the show’s impact on the creation of tribal harmony and national unity. We see the ingenuous enthusiasm of the contestants and their embrace of the role of social ambassadors, refreshingly different than the familiar

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individualism that marks the contestations of reality TV: one is the member of a team, but supporting an individual (and to some extent constructing a subjectivity through that identification). The phenomenon also denotes an adjudicatory context; that is, marking the proclaimed team members allegiance in opposition to another team. The meme extends to real life events—e.g., “Team Jennifer” vs. “Team Angelina” (reflecting actor Brad Pitt’s break-up with Jennifer Anniston and subsequent relationship with Angelina Jolie), to reality TV characters, as noted, and to fictional characters—e.g., the t-shirts HBO generated for the show *Entourage*, “Team Drama,” etc. See HBO.COM, <http://store.hbo.com/entourage-team-drama-heathered-t-shirt/detail.php?p=302272> (selling *Entourage* “Team” t-shirts).

<sup>281</sup> See Mezey & Niles, *supra* note 50, at 105-10 (discussing the Birmingham School’s analysis of popular engagement with remaking mass culture).

<sup>282</sup> AFGHAN STAR (Aria Productions 2009). The documentary was shot in 2007, not long after independent television broadcasting and music were legalized by the new Afghan government. More information about *Afghan Star*, the television show, is available at the show’s website: AFGHAN STAR, <http://www.afghanstar.tv> (last visited Aug. 29, 2012).

<sup>283</sup> Judging from the show’s website, *Afghan Star* now looks significantly more like its United States counterpart, with flashy sets and more contemporarily styled contestants than in the 2007 season which the documentary follows.

<sup>284</sup> Sediqi later was granted asylum in the United States. See Wendy Grossman, *Afghanistan’s ‘Ryan Seacrest’ a Star Far From Home*, PEOPLE MAGAZINE, Sept. 7, 2009, at 110.

Western model of self-absorption. And we see interviews with the energized and unity-seeking public, some of whom will be voting for the first time in their lives when they vote for the next *Afghan Star*. In addition, the three finalists the film depicts in the 2007 season represent three different Afghan ethnic tribes. Voting for contestants is occasionally described in tribal terms, but also explicitly as an opportunity to affirm Afghan unity. In addition, two of the finalists are women, and are held out as representative of the advances women have made after Taliban rule.<sup>285</sup> This is heady stuff, and it leads the viewer to marvel at how a show that sometimes seems like little more than a running ad for Coca-Cola could be so profound in another national context.

While I am unaware of any facts to indicate that the U.S. occupying force was directly involved with the creation of *Afghan Star*,<sup>286</sup> we must of course be wary of uncritically lauding the importation of a Western, essentially commercial model as a cultural “advancement” in an effectively colonized nation.<sup>287</sup> Nor can easy analogies be made between this version of reality TV and the U.S. version: narratives of democracy will have a different character in a country that is occupied by a purportedly democratizing force. In addition, television means something different in a culture where it has been banned. And voting for a pop star means something different in a culture where widespread voting for *anything* is not a matter of course.

Thus, we can see the show as acting within the narratives of nation and governmentality from a specific political moment in Afghanistan, a moment where the nature of government is highly contested. If we read *Afghan Star* this way, despite its apparently democratizing influence, it is perhaps not a real challenge to Ouellette and Hay’s theories, but a confirmation of the deep citizen-building at work in reality TV formats, simply playing out differently in a different national and political context. Again, as Ouellette and Hay emphasize, democracy is not simply “on” or “off,” but constituted in specific ways by specific governmentalities, both on TV and in the real world.

What we see in *Afghan Star* is the governmentality and citizenship lessons Ouellette and Hay find as the subtext of U.S. reality TV made explicit. Thus, *Afghan Star* is no more or less “political” than *American Idol*, it is simply a different expression of spectatorial participation and democratic narrative. That

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<sup>285</sup> However, we see the persistence of vicious misogyny as both women ultimately become subject to death threats, and one is eliminated for taking off her headscarf and dancing during a broadcast, which even the other contestants describe as “going too far.” Thus, the film reveals the particular political conditions surrounding the democratic narratives of the show.

<sup>286</sup> Not surprisingly, it has been more recently reported that the United States has sought to use the market share that Tolo has acquired to support its own agendas in Afghanistan. For example, the *Wall Street Journal* reports that the United States has provided funding for a crime show, “Eagle Four,” purportedly in an attempt to raise public opinion about Afghan police. Maria Abi-Habib, *U.S. Courts Afghans Through Television*, WALL ST. J., Nov. 17, 2010, at A17.

<sup>287</sup> At least one right wing journalist presents the show in glowing terms as a positive by-product of the American invasion. See Deborah Weiss, *Afghan Idol*, FRONTPAGEMAG.COM (July 24, 2009), <http://archive.frontpagemag.com/readArticle.aspx?ARTID=35693>.

said, the difference between the nature of the Afghani television industry and the U.S. makes *Afghan Star* crucially different. Tolo television station that creates and produces *Afghan Star* is commercial, but one of the first governmentally independent stations in Afghanistan after Taliban rule. In addition, while *Afghan Star* may channel certain Western hegemonic norms, the documentary shows that it was initially considered a threat to post-Taliban Afghanistan by the Ulema and the Taliban.<sup>288</sup>

Thus, even commercial television here does not clearly represent the political or economic (or, in this case, theocratic) elites. In this context, it is impossible not to view *Afghan Star* as a resistant cultural production, no matter how superficially banal. Even if *Afghan Star* represents what Ouellette and Hay would call democracy or citizenship “games,” it is not entirely clear that such games, in this context, are all bad. Instead, *Afghan Star* suggests that reality stars can self-consciously situate their participation, and the participation of the viewing audience, in explicitly politically progressive terms—e.g., by promoting peace, national unity, and women’s equality. The “privatization” of governmentality Ouellette and Hay argue is implicit in reality TV has a decidedly different quality when it is situated within a context of resistance.

While, as mentioned above, we cannot make direct analogies between reality TV in the political context of Afghanistan and the current U.S. political context, *Afghan Star* does reveal that reality TV has the potential to be a vehicle for facilitating civic engagement in ways that are not solely consumerist, and can offer “democracy games” which model or encourage a more just society.<sup>289</sup>

My second example of fan identification with a TV show being used for social and political empowerment is “ReWired for Change,” a non-profit organization<sup>290</sup> founded by Sonja Sohn and other castmates and production staff of HBO’s *The Wire*. ReWired for Change seeks to help at-risk youth in the neighborhoods of Baltimore depicted in *The Wire*. ReWired for Change could be viewed as a “self-governance” response to the compounding problems of poverty, race discrimination, crime, and drug addiction in Baltimore, perhaps born in reaction to neo-liberal policies which have cut public social services. But ReWired for Change is more properly understood as a grassroots organization, founded by people who have survived daunting socio-economic environments, to help others manage similar obstacles.

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<sup>288</sup> At one point, the documentary depicts Islamic scholars from the Ulema condemning the broadcast for being inconsistent with “Islamic values” and unduly influenced by the West. And, as noted above, the United States has used Afghan TV to promote propaganda. See *supra* text accompanying note 286-87.

<sup>289</sup> That said, as noted above, the show also served as another nexus for expressions of violence and subjugation of Afghan women, so its meanings were interpreted in varying ways by Afghan spectators.

<sup>290</sup> Information about the organization is available at REWIRED FOR CHANGE, <http://rewiredforchange.org> (last visited Aug. 29, 2012).

While *The Wire* is obviously not a reality TV show, like most cultural products, it in part functions as a portrayal of the realities of Baltimore's streets. This sense is reinforced by the origins of *The Wire*, which evolved out of the experiences of series creator David Simon when he was a Baltimore crime reporter. In addition, the ReWired for Change website details the real life "hard knocks" experiences of *The Wire*'s actors to promote the organization's expertise. Tellingly, ReWired for Change offers an educational program for at-risk youth, "ReWired for Life," which uses episodes of *The Wire* to facilitate discussion and reflection by the participants.<sup>291</sup> Thus, the show's producers and actors link the events depicted in *The Wire* to the real events on Baltimore's streets, explicitly engaging participants through their spectatorship of the show.

Again, while ReWired for Change may not represent a dismantling of neo-liberal models of self-governance, it does represent the possibilities for harnessing TV spectatorship to social empowerment and rebuilding community. And it does so within the context of a television show that meticulously (and, some argue, accurately) depicted the dynamics of law and law enforcement as having both negative and positive effects on community. Undoubtedly, the organization's credibility in part emanates from the high-profile success of its founders—actors and producers who inhabited a televised representation of the city they now seek to help. Here, the real and its representation meet in community, not commodity.

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<sup>291</sup> For details see *ReWired for Life!*, REWIRED FOR CHANGE, <http://rewiredforchange.org/rewired-for-life/> (last visited Aug. 29, 2012).

