

BLOGGING THE LAW,

The faculty blog on the Law School's website (law.marquette.edu/facultyblog) has become a lively forum for discussion of legal issues—and more. History, culture, sports, politics, and contemporary trends of many kinds have been addressed on the blog in thoughtful and readable ways. You think Lady Gaga doesn't belong on a Law School blog? Surprise. Here she is, together with an excerpted selection of other interesting recent posts. We hope that you will keep up with the blog and join in with your own comments.

Law & Order and the Rise of the Pop Cultural Prosecutor

May 25, 2010 | Posted by: David R. Papke

Years before *Law & Order* ended its incredible twenty-year run on May 24, 2010, the series had staked its claim to being the longest-running prime-time series featuring lawyer characters. In addition, the series included an important change in how the heroic pop cultural lawyer is represented. In earlier lawyer shows with especially lengthy runs, such as *Perry Mason* in the 1950s and '60s and *Matlock* in the 1980s and '90s, the lawyer hero was customarily a criminal defense lawyer. Even the fictional firm of McKenzie, Brackman, Cheney & Kuzak in *L.A. Law* had a department devoted to criminal defense work. In *Law & Order*, by contrast, the heroic lawyers are always prosecutors.

What explains this very popular shift in imagery? Part of the reason is the general sense that crime has run amuck. Starting in the 1980s, a commitment to crime control replaced the drive for racial and economic justice as the preeminent domestic policy. Any politician on the local, state, or national level who seems “soft on crime” is doomed at the polls. More generally, the Reagan presidency marked a national turn to the right, and in subsequent decades, even the Democrats who have occupied the White House have been moderates. The heroic pop cultural prosecutor is well suited to crack down on crime and to embody conservative values.

Over the years, *Law & Order* became a genuine cultural phenomenon. The series' popularity led to spin-offs and to countless reruns of both the original episodes

and the spin-offs. In the end, *Law & Order* in all its forms not only reflected a public sentiment and emergent politics but also powerfully reinforced that sentiment and politics.

Paul Robeson and Marquette Law School

June 4, 2010 | Posted by: J. Gordon Hylton

Most people remember Paul Robeson as a star of stage and screen and as a controversial African-American civil rights leader of the early and mid-twentieth century. His performances in *Othello*, *The Emperor Jones*, and *Show Boat* are legendary, as are his renditions of “Old Man River.” His support of radical politics and his enthusiasm for the Soviet Union made him a highly controversial figure during the Cold War.

However, before he became famous as an actor and an activist, Robeson was a law student and a professional football player, a combination that brought him to the Marquette College of Law in the fall of 1922.

Here is the story.

Robeson was born in 1898 in Princeton, New Jersey, and came of age at the height of the Jim Crow era in the United States. He was a superb student in the public



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schools of Somerville, New Jersey, and he was offered a full academic scholarship by Rutgers University, at which he enrolled in 1915. At the time of his enrollment, he was only the third African-American to have attended Rutgers, and he was the only black student at the school during the four years in which he was enrolled.

Few college students have ever excelled at the level at which Robeson performed at Rutgers. He graduated first in his class; was elected Phi Beta Kappa as a junior; and won the college's oratory contest each year that he was enrolled. He also won twelve varsity letters in football, basketball, baseball, and track.

After graduating from Rutgers in 1919, he moved to New York, where he enrolled at the New York University Law School. After a semester at NYU, he transferred to Columbia.

To support himself while in law school, Robeson played for two seasons in the National Football League (or the American Professional Football Association, as it was initially known). In 1921, he played for the Akron Indians, which were led by player-coach Fritz Pollard, the great running back and the first African-American to coach a predominantly white professional team.

In 1922, Pollard jumped to the Milwaukee Badgers and apparently convinced Robeson to join him. Robeson apparently decided that a weekly commute to Milwaukee would be too difficult, so he took a leave of absence from Columbia Law School that fall.

The 1922 Milwaukee Badgers began their season on October 1. On October 17, the *Milwaukee Journal* ran a story under the heading "Robeson, Giant Pro End, in M.U. Law Dept." (Robeson was 6'3" tall and weighed approximately 220 lbs. at that point in his life, which apparently qualified as "giant-size" under the standards of 1922.) The brief story went on to report that Robeson "has taken up a course of review and research work in Marquette [University's] school of law, preparatory to taking the New York state bar examinations late this year." Counting his semester at New York University, Robeson had already attended law school for three years, so he was already eligible to take the New York bar examination. In 1922, most states required applicants for admission to the bar to have only a specific number of years of legal education rather than a law degree.

While the *Journal* story seems to suggest that Robeson may have enrolled at the law school, the law school bulletins for 1922 and 1923 do not list Robeson

as a student in the fall of 1922, and he is similarly absent from the records of the university registrar.

Robeson's affiliation with the law school was likely somewhat informal. In the 1920s, several law professors at Marquette offered "bar prep" courses for students who were preparing to take the Wisconsin bar exam. Normally these classes were held after the end of the academic year and just before the summer bar examination.

After the season, Robeson returned to New York and re-enrolled at Columbia. He graduated from law school in the spring of 1923 as a member of a class that also included future U.S. Supreme Court Justice William O. Douglas. Already immersed in his theatrical career, Robeson apparently never got around to taking the New York bar examination, and he never again played in the National Football League.

Can we say that Robeson attended Marquette Law School? Probably not, but he was one of many fascinating individuals whose lives have intersected with our institution.

"Greta Garbo and Monroe, Dietrich and DiMaggio": Persona, Authenticity, and the Right of Publicity Then

June 15, 2010 | Posted by: Kali N. Murray

Summer is here and, much to my joy, videos are back! The confluence of Lady Gaga, Glee, OK GO, and YouTube has reminded us of the great art form of the 1980s, the video, a four- to five-minute presentation of a lip-synched musical song in which dance choreography was more often than not a crucial element. The video had elements of a copyrighted work (under Section 102 of the Copyright Act, it can comfortably be classified as audiovisual work), but more importantly than that, the video served as an extended commercial to prompt the viewer to go out and purchase the artist's work.

The video, though, at its greatest heights, was used by its more skilled practitioners to build and shape the



individual artist's persona beyond the popularity of any particular song. This often had the effect of strengthening the long-term commercial value of an artist's work. Madonna used the video art form to its maximum extent, making relevant her persona for over 25 years (yes, people, 25 years).

Thus, the video also invokes a more neglected sister of copyright, the right of publicity, which broadly protects the commercial value of a person's identity.

A typical right of publicity statute, the Illinois Right of Publicity Act, grants the "right to control and to choose whether and how to use an individual's identity for commercial purposes" (765 Ill. Comp. Stat. 1075/10). While the right of publicity began as a narrow right to protect one's name and likeness, it has often been interpreted by courts to protect other indicia of identity (most famously in *Vanna White v. Samsung Electronics*). Although the existence of the right of publicity often prompts questions about why we want to protect a person's commercial identity (Paris Hilton, shudder), the video also prompts the question of exactly what identity does the right of publicity seek to protect?

The video era featured two great female video stars, Madonna and Janet Jackson, both of whom used the art form of the video to construct identity in different ways. Janet Jackson used the video to construct an "authentic" person in that she referenced a persona that did not shift from video to video (for example, go to YouTube, take a look at her "crowd" videos, "When I Think of You," "Alright," "Escapade," and "That's The Way Love Goes"). In each, Janet's persona is much the same. She is an approachable individual, seeking love and enjoying friendship, amidst a series of different dancers.

Madonna, by contrast, famously changed her persona often. Unlike Janet, she took another name, Madonna, rather than be Madonna Louise Veronica Ciccone from Michigan. Madonna then changed personas so frequently that any Madonna fan has a favorite Madonna persona (my favorites are Boho New York Early Eighties Borderline Madonna and Ray of Light Madonna). In a way, Madonna changed so much that we knew she had become constant in, at least, the ability to change.

So, as these videos demonstrate, when we talk about identity as to the right of publicity, there is an open question. What is identity? As we define the right, should we protect only a person's authentic identity (name, likeness, voice, etc.), or do we protect that constructed identity? Are Madonna's many personas as valid as Janet's one?

"Rah-Rah-Ah-Ah-Ah, Roma-Roma-Ma-Ma, Gaga, Ooh-La-La": Persona, Authenticity, and the Right of Publicity Now

June 16, 2010 | Posted by: Kali N. Murray

These questions of authentic and constructed personas are still very much an issue in today's video culture. Our current great video stars, Lady Gaga and Beyoncé, have often played with this question of authenticity versus construction.



In fact, I would argue that Beyoncé and Gaga can be seen as "baroque" versions of the authentic Janet and the constructed Madonna. Beyoncé heightens the authentic tradition in her videos. For example, in the video "Crazy in Love," she sings, standing next to the man who would become her husband, Jay-Z, about how much she loves him. Like Janet, Beyoncé uses her given name. Lady Gaga, very obviously, extends the constructed tradition. In the video for "Bad Romance," Lady Gaga changes personas 14 times in one video. Lady Gaga makes us call her Lady Gaga.

Lately, however, Beyoncé and Lady Gaga themselves have sought to confuse these boundaries, between the authentic and constructed, through their two videos "Videophone" and "Telephone."

"Videophone" is very much within the tradition of the "authentic" video persona (the video is shot in black and white, Lady Gaga is in white the entire time, and even the choreography revisits previous Beyoncé videos). By contrast, "Telephone" (which clocks in at 9:30 minutes) is an extended play on constructed personas where both Lady Gaga and Beyoncé play with any number of personas, and indeed in the penultimate scene, use the trope of a traditional authentic video (lunch with boyfriend in a diner) to poison all of the participants.

Thus, these videos attempt to bridge the authentic and constructed identity, and then question it even more by asking, is there a difference? Are our authentic selves "constructed"? Are our "constructed selves" authentic?

All of this is interesting to me because it raises the

question of whether we should be protecting this right of publicity in the first place. What are the markers of identity? How can we judge what is the best protection for identity if we cannot decide what it is that constitutes those “indicia” of identity?

And I have not begun to delve into Minor Threat, OK GO, Nirvana, Sleator-Kinney, and the authentic DIY Alternative Music Video!

Can Google-TV Help Liberate Cable-TV?

May 24, 2010 | Posted by: Erik Ugland, Marquette University Diederich College of Communication

Tech nerds and media junkies have been buzzing lately about Google’s announcement that it will soon rollout Google-TV—a new device/platform that will turn people’s televisions into portals for online video and other web content.

There is no denying Google’s determination to expand its dominion over the communications universe, nor the inevitability of the web’s eventual absorption of traditional television.

These two things terrify broadcast and cable executives. But the advent of web television might benefit traditional TV businesses—particularly cable companies—in one important category: First Amendment protection.

Even though the courts have long acknowledged that cable television is a First Amendment-protected medium, they have assigned it a kind of second-class constitutional status, based on the premise that cable markets are not sufficiently competitive.

In 1994, the U.S. Supreme Court held in *Turner Broadcasting v. FCC* that cable companies operate as effective monopolies, creating bottlenecks for the dissemination of video content in the communities where they operate. In *Turner*, the Court upheld the constitutionality of the must-carry rules, which require cable operators

like Time Warner and Comcast to add the signals of local broadcast stations to their channel lineups. In addition, cable operators must set aside channels for leased-access by third parties, and they can be compelled to subsidize and disseminate public, educational, and governmental (PEG) programming, among other things.

These regulations are constitutional only because of the lack of competition that existed when the laws were adopted in the early 1990s. But a lot has changed since then.

Phone companies, such as AT&T and Verizon, now offer cable service (which they were not allowed to do until 1996), DirecTV and Dish Network offer DBS service to nearly every home in the country, and video content is now ubiquitous on the web, even without the seamless packaging of Google-TV. The bottleneck, in short, has broken.

The disconnect between these policies and their underlying premises is not merely a public policy problem; it is a constitutional problem. All of these regulations interfere with the expressive autonomy of cable operators and put special burdens on them that are not imposed on newspapers, magazines, or web communicators.

Cable networks must limit the amount of advertising time during children’s programs. They must provide equal opportunities to political candidates whose opponents appear on those networks in nonexempt programming. And they must abide by the payola rules, which prohibit nondisclosed payments made by third parties in exchange for airtime.

It is probably hard for most people to get exercised about the rights of giant cable companies, with their ever-expanding rates and outsourced customer service. But they are constitutionally protected speakers, and the claim that they are differently situated from their competitors using other media just isn’t credible anymore.

It is time for Congress and the FCC to scrap the current regulatory scheme and for the courts to reconsider cable’s constitutional status in light of the new technological and market realities.

Maybe Google-TV will provide the impetus for the end of cable regulation as we know it.



Violence and Social Order

April 14, 2010 | Posted by: Bruce E. Boyden



The *L.A. Times* published an op-ed in April touting Randolph Roth's recent book, *American Homicide*. Roth is an historian at Ohio State University who studies violence and social change, a subject I am intensely interested in as well. In *American Homicide*, Roth argues that the homicide rate

in the United States tends to spike not as a result of gun ownership or poverty, but when people lose faith in their government. He claims that the first such notable rise in violence occurred in the aftermath of the Civil War, "a catastrophic failure in nation-building," when a significant proportion of the population became extremely suspicious of their fellow Americans.

If true, that thesis bodes ill for our current situation, in which oddly apocalyptic rhetoric over ostensibly ordinary government actions seems to be on the rise. Loss of a debate now seems to no longer be an invitation to try harder next year, but rather conclusive evidence that the entire system is corrupt. While some have expressed the fear that such rhetoric will lead to large outbursts of explicitly antigovernment violence, such as that planned by the militia members recently arrested in Michigan, the connection between overwrought rhetoric and such extremists seems tenuous at best. What seems more likely is that heated rhetoric augurs simply more violence, not violence directed at a particular target.

But predicting the future is treacherous business; it is far safer to try to explain the past. And Roth's thesis, as I understand it (I haven't read the book), helps explain some aspects of a phenomenon I've been interested in for a while now—the outbreak of violence in Tombstone, Arizona, in 1881 and 1882, usually referred to as "the Gunfight at the O.K. Corral."

The "Gunfight at the O.K. Corral" is usually conceived of as a single and semi-mythic instance of Western

heroism, in which officers of the law faced down ruthless criminals and brought them to justice. That's certainly the way Wyatt Earp spun the tale almost 50 years later. But what captured my interest in the subject in college, after having written a high-school book report debunking the standard story told in such films as *The Gunfight at the O.K. Corral* and *My Darling Clementine*, was that the famous gunfight turned out to be simply one episode in a general storm of lawlessness that spiralled out of control in southeastern Arizona. "Lawlessness" is actually the wrong term, since it implies the absence of law. What happened in Tombstone was a struggle for control of the social order of a boomtown. Each side of the conflict had some claim to be associated with the formal structures of government—the Earps were associated with the city police force, appointed by the Republican mayor (and editor of the Republican *Tombstone Epitaph*); the Clantons, their opponents, were ranchers associated with the Democratic county sheriff, and supported by the Democratic *Tombstone Nugget*.

The irony of Tombstone was that the violence there was not the result of the absence of social order but the result of too many social orders.

Among the things that struck me as I researched the society of Tombstone, and this ties back to Roth, was the incredible antipathy left over from the Civil War. George Parsons, a Republican entrepreneur who had migrated to Tombstone early on to seek his fortune, described Democrats repeatedly as "traitors" in his diary and expressed amazement that, essentially, all Southerners had not been rounded up and tried for treason—15 years after the end of the Civil War, a war that ended when Parsons himself was only 14. The deep distrust between Republicans and Democrats in Tombstone had some of its origins in their different norms and social practices, certainly, but Roth's thesis suggests that the two groups may have already been predisposed to define the other as a group that put no reasonable limits on what it was willing to do. And if one's opponents are without limit, then it does not make sense to limit one's own behavior, as George Smiley recognized.

That's the danger then in coming to see a system of government as not simply wrong, but deeply corrupt. ■

