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Volume 17  
Number 3 *Symposium—Using Law and Identity  
to Script Cultural Production*

Article 1

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3-1-1997

### Foreword

Lisa C. Ikemoto

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#### Recommended Citation

Lisa C. Ikemoto, *Foreword*, 17 Loy. L.A. Ent. L. Rev. 517 (1997).  
Available at: <https://digitalcommons.lmu.edu/elr/vol17/iss3/1>

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# SYMPOSIUM

## USING LAW AND IDENTITY TO SCRIPT CULTURAL PRODUCTION

### FOREWARD

*Lisa C. Ikemoto*<sup>\*</sup>

Using literary texts, techniques, and analysis to reveal the dichotomy between law and cultural production seems particularly appropriate in an entertainment law journal. We readily recognize that entertainment, in its high culture, popular, and subculture forms, expresses and reflects ideology. But the notion of law as a set of neutral operating principles and of legal analysis as objective masks the ideological content and effect of law as well as its location within, and not apart from, certain social norms and cultural myths. Treating law as text, comparing legal narratives with other narratives for what they say about the human condition, and identifying motifs, themes, and images are ways of showing the role of law in cultural production and the role of culture in shaping law.

The contributors to this symposium address a wide variety of issues, using a wide variety of texts. But they all share a critical perspective. They all seek to reveal the law's subjectivity.<sup>1</sup> And they all proceed to the next critical question: whose perspectives and norms does the law express and whose does it not? To paraphrase contributor Grace Pasigan's statement of the question, what relationship does the text of law have to the reality of its readers?<sup>2</sup> In asking and assessing this question, each of the

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\* Professor of Law, Loyola Law School; B.A. 1984, University of California, Los Angeles; J.D. 1987, University of California, Davis; L.L.M. 1989, Columbia University.

1. See DAVID RAY PAPKE, *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 3 (1991).

2. Grace A. Pasigan, *Sign Language: Colonialism and the Battle over Text*, 17 *LOY. L.A. ENT. L.J.* 625 (1997).

contributors shows that given the normative content of law, its interpretive nature, and its prescriptive force, law is interwoven with the fictional, biographical, and sociological texts used in this symposium.

Related themes, myths, and symbols appear in the articles and the texts the contributors reference. What emerges in these apparently disparate texts is the presence of a master narrative that privileges some perspectives along the lines of dominant social norms and mutes others. The contributions to this symposium, then, can be seen as counter narratives: points of resistance to dominant cultural myths and symbols that have gained prescriptive force in law to exclude and mute some groups and cultural practices while normalizing others. Recognizing the relationship between particular narratives embedded in law and social reality leads to the insight that law is not fixed, but is open to interpretation<sup>3</sup> and, hopefully, to participation.<sup>4</sup> Each of the contributors suggests changes in legal rules, analysis, or changes in broader interpretative practices that would expand the possibilities of participating in law and society.

The seven contributors have chosen a broad range of texts as reference points for their questions about the interactive relationship between law and culture. Trademark symbols, fan fiction, commercial signs, family history, literary and popular fiction, nonfiction literature, and of course, the law are among the texts examined in this symposium. Some of these sources—Jewish American literature, a John Grisham novel, essays by Chinese and Chinese American women, even a philosophical physician's account of colorblindness among Guamanians—fit traditional definitions of text. Some, including fan fiction, family biography, legal opinions, arguments, and regulations push the edges a bit. But it is the claim of commercial signs, trademark symbols, and media events as text that may raise eyebrows among the more literally minded. While it is true that sometimes a cigar is just a cigar, it is also true that everything can have discursive content. The point here is to go beyond the legal scientism that law is law. By connecting law with more and less traditional texts, the contributors question the law's assumption that there is a distinction between law and politics, fact and fiction, reality and social construct.

Several related themes connect these articles, and all of them relate, in turn, to issues of identity formation. One theme addresses ways in

3. PAPKE, *supra* note 1, at 3.

4. See, e.g., Keith Aoki, *How the World Dreams Itself to be American: Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech Norms*, 17 LOY. L.A. ENT. L.J. 523 (1997); Pasigan, *supra* note 2; Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

which claims of ownership and property constrict the production of culture. In *How The World Dreams Itself to be American: Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech Norms*,<sup>5</sup> Keith Aoki challenges the use of trademark protection through anti-dilution rules for corporate symbols that could otherwise be used by individuals and groups to expand their concepts of self and to resist marginalizing identities. In *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*,<sup>6</sup> Rebecca Tushnet argues that fan fiction should be protected by the fair use provision in copyright law, in part, because the media creations that form the starting point for fan fiction also provide a common language, and therefore a basis for shared identity and virtual community. Grace Pasigan, in *Sign Language: Colonialism and the Battle Over Text*,<sup>7</sup> shows how local ordinances requiring English on commercial signs represented longtime New Jersey residents' intent to assert territorial control against more recently arrived Korean- and Japanese-speaking residents.

The specific legal rules at issue in each essay are very disparate, yet the creation or application of the legal rule in each case represents a familiar struggle that is mythic in American culture. In our capitalist democracy, property rights based on creation or first-in-time claims receive great respect and protection. These analyses also show that "creation" and "first in time" are malleable constructs mediated by dominant social norms.<sup>8</sup> The resulting territory being protected is invested with an identity that is represented as particularly "American": productive, masculine, and English-speaking. The potential invaders are identified as economically, socially, aesthetically, and culturally subversive. What becomes clear is that protected cultural formation extends to corporate, heteropatriarchal, and nativist content.

A second theme that runs through these articles is the reproduction of identity by restrictive understandings of race, religion, and other social categories. Leonard Baynes, in *A Time to Kill, the O.J. Simpson Trials, and Storytelling to Juries*,<sup>9</sup> points to how racial stereotypes operate in criminal trials of African American men. Images of African American men as inherently brutish and violent are so pervasive that they operate in every trial where the defendant is an African American man. Professor

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5. Aoki, *supra* note 4.

6. Tushnet, *supra* note 4.

7. Pasigan, *supra* note 2.

8. See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

9. Leonard M. Baynes, *A Time to Kill, the O.J. Simpson Trials, and Storytelling to Juries*, 17 LOY. L.A. ENT. L.J. 549 (1997).

Baynes argues that this “blackening” of African American men constricts the defense to a strategy of “whitening” the defendant. In *Swimming from the Island of the Colorblind: Deserting an Ill-conceived Constitutional Metaphor*,<sup>10</sup> Chris Iijima uses the very textured account of color given by achromotypes to critique both the assumption by those with rods and cones that achromotypes see less, and the flat notion of color-blindness set out in equal protection law. As Professor Iijima points out, the claim that law is colorblind denies the existence of racial hierarchy, just as the claim by color-normals that what they see is complete denies the reality experienced by achromotypes. In these articles, we see how totalizing identity concepts restrict both self-definition and interpretive acts in law.

Two other articles focus on identity and address both interpretive risks and strategies for resisting totalizing concepts of identity and territorial claims over culture. Peter Margulies’ article, *The Identity Question, Madeleine Albright’s Past, and Me: Insights from Jewish and African American Law and Literature*,<sup>11</sup> uses the categories of “close family,” that group we typically refer to as relatives, and “figurative family,” whose relations are “based on larger claims of identity, including race, gender, ethnicity, religion, politics, sexual orientation, and combinations of the above,”<sup>12</sup> to explore constricted and resisting identity stances. He grounds this exploration in both family history, literary fiction and legal theory. Margaret Chon, in *Being Between*,<sup>13</sup> reviews a recently published collection of writings, *Chinese Women Traversing Diaspora: Memoirs, Essays, and Poetry*.<sup>14</sup> In doing so, she examines the expressly self-conscious critical writing strategies deployed in the book, and she calls upon herself to read these narratives constructively and openly. Professor Chon observes, “I find the question of how to read an increasingly important one for lawyers. Our training often disables us from ‘hearing’ what needs to be heard or ‘reading’ what is there to be read.”<sup>15</sup> And like Professor Margulies, she also acknowledges the risk of reading too much—what we want or need to see—into a story and thereby rewriting it in a way that mutes the teller or makes the subject into object.

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10. Chris K. Iijima, *Swimming from the Island of the Colorblind: Deserting an Ill-conceived Constitutional Metaphor*, 17 LOY. L.A. ENT. L.J. 583 (1997).

11. Peter Margulies, *The Identity Question, Madeleine Albright’s Past, and Me: Insights from Jewish and African American Law and Literature*, 17 LOY. L.A. ENT. L.J. 595 (1997).

12. *Id.* at 598.

13. Margaret Chon, *Being Between*, 17 LOY. L.A. ENT. L.J. 571 (1997) (book review).

14. CHINESE WOMEN TRAVERSING DIASPORA: MEMOIRS, ESSAYS, AND POETRY (Sharon K. Hom ed., 1997).

15. Chon, *supra* note 13, at 572.

The lesson of reading too little and too much into the interaction between law and culture echoes through each of these contributions. The questions raised here about the political nature of cultural formation is important generally, but particularly for those engaged directly in that endeavor through entertainment law. Whether or not the insights in this symposium can be applied to the narrow concept of legal practice, they clearly suggest that legal practices do resound in our social and cultural lives.

