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Department of **Law**

The University of British Columbia
Vancouver, Canada

Date **June 18, 1998**
abstract

Contemporary Western legal storytelling relies heavily on images and discourses in popular culture to secure meaning and give credibility to certain legal arguments. This thesis focuses on the legal stories told in the trial of a celebrity in Western society. As a system of meaning, the celebrity sign operates on the levels of signification and affect. The ambiguous semiotic power of the celebrity sign forces an examination by the legal audience regarding the "real" nature of the celebrity. Reality and truth are seen to emanate from this private self. Moreover, the affective power of the celebrity sign guarantees that, at times, emotion will dictate how much credibility will be given to particular celebrity legal stories and what stories will be considered plausible by a jury.

In the trial of a celebrity "Other" -- that is, one of the celebrated few who defies the white male norm -- celebrity legal storytelling looks towards issues of race, class, and gender, in addition to celebrity, in order to secure meaning and effect credibility. The aesthetic acceptance of the celebrity "Other," along with discourses of authenticity in Western society, work to shape what is considered credible and true in a courtroom. These factors place limits on the semiotic and affective power of the celebrity "Other" and, thus, on what celebrity legal stories will be accepted as truth in the courtroom.

Looking specifically at the 1949 acquittal of jazz singer, Billie Holiday, and the 1994 acquittal/partial conviction of gangsta rapper, Tupac Shakur, this thesis will demonstrate the ways in which law, culture, race, gender, class, and the celebrity intersect in the Western mass media and how this intersection affects legal process and the trial tactics utilized in the trial of a celebrity "Other."
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"In the future everyone will be world famous for fifteen minutes."

~ Andy Warhol, 1968
introduction

celebrity
(or the "tori spelling syndrome")

actor smactor
selloutfakewuss
wannabe this, wannabe that
you call this art?
bah, humbug!

anyone can do that
anyone can starve themselves
into
oblivion...

anyone can concentrate solely on their --
oops, gotta go check my hair -- looks

commercialized
commodified
stupified
IMAGE.

~ sara ramshaw, 1995

I have always been fascinated with the celebrity. This fascination led me to forgo lawyering after law school and, instead, go into acting. I was seeking fame. I was seeking fortune. Of course, after doing one play in Toronto, I realized celebrity was not all it was heralded to be (as the above poem evinces). Some people work their whole lives for fame. Others achieve it simply by doing some outlandish act. Regardless, once achieved, celebrity erases an essential part of what makes us human: our integrity as private beings. Celebrities are constantly put on display; they remain on stage until they are finally booed off because they have got too fat or too old or both. Celebrities are entirely image. No longer can they revel in their own humanity for humanity is lost on the celebrity. Celebrities, instead, are commodities, plucked off a Hollywood assembly line and sold at
the whim of a short, balding man named, Spelling. In light of this, I chose to forgo my
dream of becoming an actor and, instead, go to graduate school.

I never really got over my fascination with the celebrity, though. I continued to
read the *People* magazines lying around the graduate lounge. In my spare time, I surfed
entertainment websites on the Internet. However, it was not until I started reading Stuart
Nicholson’s biography of Billie Holiday\(^1\) that I realized I could integrate legal theory with
my interest in the celebrity phenomenon. Much of Nicholson’s book is dedicated to the
various encounters Holiday had with the United States legal system. I became intrigued
by the celebrity legal stories contained in this book. And so began my examination into
celebrity trials.

The significance and popularity of celebrity trials in contemporary Western society
is undeniable. Websites are dedicated solely to this phenomenon. “Who’s suing whom in
Celebrity Land? Who’s posing for police mug shots? It’s all here -- the latest news on the
hottest cases”, reads the headline for *E! Online*’s “Celeb Courthouse.”\(^2\) Celebrity trials
are *hot*! Even hotter, though, are the trials of celebrities who are atypical or lie outside the
white male norm of Celebrity Land.

This thesis will explore Western society’s fascination with celebrity, particularly
the celebrity “Other.” It will demonstrate the impact of celebrity on the legal system and
on the stories told in the courtroom. In Chapter One, the connection between law and
popular culture will be explored. In particular, images of the celebrity in popular culture


will be scrutinized for their impact on contemporary Western legal storytelling. In a
celebrity trial, the celebrity sign acts as a system of meaning, a system that is articulated on
two interconnected planes of meaning: signification and affect. The semiotic and affective
power of the celebrity will be carefully explored in this chapter and applied to the issue of
what stories can be told and which ones will be believed in the trial of a celebrity.

Chapter Two looks more specifically at the celebrity “Other” in Western society,
or celebrities who are not white males. In the trials of celebrity “Others,” factors such as
race, gender, and class further influence celebrity legal storytelling. Not only do such
factors affect the semiotic and affective power of the celebrity, they also work to shape
and limit what stories can be told and what will be believed in a celebrity “Other” trial.
Discourses of authenticity and aesthetics are deeply rooted in issues of race, class, and
gender. Determinations of truth and authenticity in the courtroom rely heavily on racist,
sexist, classist, and essentialist representations of “Otherness” in Western popular culture
and on the dominant ideology of white aesthetics which underlies the mass media. In the
end, the persuasiveness of the celebrity legal story looks towards all these factors in order
to secure meaning. Whether a jury will empathize with a particular celebrity or celebrity
story will depend not only on the social experiences of the audience but also on the “well-
knownness” of the celebrity and how well a legal audience feels they know her or him.

Chapter Three applies the theoretical framework outlined in the first two chapters
to the 1949 celebrity trial of Billie Holiday for narcotics possession. In this chapter,
Holiday’s celebrity persona as a woman “unlucky in life” is examined for its influence on
the celebrity legal stories told at her trial. While the influence of race, gender, and class on
the construction of this persona can not be denied, it is obvious that Holiday's celebrity persona made her claim that she was framed by her boyfriend/manager more believable and credible at trial.

Similarly, Chapter Four canvasses celebrity "Other," Tupac Shakur's 1994 indictment on the charges of sodomy, attempted sodomy, sexual abuse, and weapons possession. It looks at how Shakur's encounters with the United States legal system helped sustain and buttress his "Thug Life" celebrity persona. These encounters resulted in a blurring between Shakur's private and personal lives. This, in turn, worked to authenticate his voice in the courtroom and enabled him to transform the Prosecution's use of his Thug Life image into the more empathetic story of the Endangered Black Man.

In sum, this thesis combines my two loves: popular culture and the law. It looks at the way racism, classism, and sexism influence the meaning of both in contemporary Western society and how these factors shape what stories can be told and believed in a courtroom. After extensive research in this area, I have gained a more complex understanding of the celebrity in contemporary Western society. My fascination with the celebrity, though, remains.
chapter one: legal stories, celebrity-truths

Yes, the world has receded into its own flickering image, and nothing is true or false any longer, and it's very late, and the TV has been on for hours. But what's the matter with that? Images proliferate endlessly in the void, regardless of whether anyone is there looking at them or not. You don't watch programs on TV; you simply watch TV. Turn down the volume and go to bed, there'll be something else in the morning.

~ Steven Shaviro

i. pop culture, contemporary storytelling

It is now widely accepted that storytelling plays a significant role in the construction of meaning surrounding individual and collective experience within a given society. Storytelling has taken on new meaning in contemporary Western society. The convergence of mass communication with postmodern epistemology has led to a proliferation of televisual and multi-media styles of storytelling. Representations of reality on television and in the movies have become stand-ins for actual, lived experience. In this primarily visual -- postmodern -- culture, the truth of a story becomes irrelevant for “how can one assess the truth or falseness of nonverbal statements, of visual images that act as symbols?"
Concurrently, pecuniary truth -- 'truth is what sells' -- is extremely pertinent to contemporary commercial culture. Truth, in this instance, entails a modernist perspective: it is premised on a scientific world view which posits technology as the most powerful means of creating or reconstructing material reality. Accordingly, storytelling in contemporary popular culture is both modernist and postmodernist in nature. As Richard Stivers asserts, the truth of contemporary storytelling now depends on the power of the mass media to *make* reality.\(^5\) Stivers' assertion captures the relativity and arbitrary nature of truth in contemporary Western storytelling. At the same time, though, he allows for some pronouncement of truth to be made. In light of this, the ensuing chapter will examine the hybrid nature of truth in contemporary popular culture and how this affects the credibility of legal stories told in a courtroom. Stated another way, when faced with important tasks, such as ascertaining truth and promoting justice, what effect, if any, does (post)modern popular culture have on the stories told and believed by legal audiences?

**a. postmodern stories\(^6\)**

The advent of postmodernism has had a tremendous effect on Western popular culture and contemporary storytelling. Presently conceived, postmodern theory can be

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Summarizing Lyotard’s position, John Storey writes:

... the postmodern condition is marked by a crisis in the status of knowledge in Western societies. This is expressed ‘as incredulity towards metanarrative’ and ‘the obsolescence of the metanarrative apparatus of legitimation’. What he means by this is the supposed contemporary rejection of all overarching and totalizing thought: Marxism, liberalism, Christianity, etc., that tell universalist stories (metanarrative) which order and justify the everyday practices of a plurality of different stories. According to Lyotard, metanarratives operate through inclusion and exclusion as homogenizing forces, marshaling heterogeneity into ordered realms; silencing and excluding other discourses, other voices in the name of universal principles and general goals. Postmodernism is said to signal the collapse of all universalist metanarratives with their privileged truth to tell, and to witness instead the increasing sound of a plurality of voices from the margins, with their insistence on difference, on cultural diversity, and the claims of heterogeneity over homogeneity.

Expanding upon Lyotard’s theory, Jean Baudrillard claims that postmodern culture is the culture of the “simulacrum”: an identical copy without an original. Images simply refer back to other images; the very distinction between original and copy has been destroyed. This process, described by Baudrillard as “simulation,” generates models of the “hyperreal” or ‘real without origins or reality.’ The real, in this instance, continually collapses into the imaginary, the imaginary into the real.

One example of the hyperreality of contemporary popular culture can be found in the mass media representations of race and ethnicity. Despite the existence of a multicultural society, the majority of our knowledge regarding other cultures and races is

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7 “Although the term postmodern had been in cultural circulation since the 1870s, it is only in the 1960s that we see the beginnings of what is now understood as postmodernism.” John Storey, *An Introductory Guide to Cultural Theory and Popular Culture* (Athens, Georgia: University of Georgia Press, 1993) at 155 (discussing Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984)).

8 *Ibid.* at 159 (emphasis added).


manufactured; it does not arise spontaneously out of our daily experience. Looking specifically at white people’s knowledge of black people’s experiences in the United States, Clifford Staples asserts:

On average, white lives and black lives are probably just as segregated today as ever. Now, however, we watch a lot of images of black people on TV and in other media. The presence of such images creates an illusion of familiarity, a kind of simulated integration. Yet few of these images are produced by black people, or challenge stereotypes of black people, and almost all of them are constructed with profit in mind.

Representations of blackness, however, are not simply distorted in the mass media. In contemporary Western society, few (if any) images of blackness exist in popular culture that have not already been influenced or produced by the mass media. Accordingly, representation cannot be removed from reality. Instead, representation is reality. Images of blackness in the mass media constitute “reality” for white viewers.

Signs of blackness have, thus, lost their signifiers. They refer only to other signs. Truth has become that which can be reproduced. Signs about signs are taken as objective, universal, and real. The film, Do the Right Thing, by African American filmmaker, Spike Lee, evidences this. According to cultural critic, bell hooks, all the

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13 Ibid, at paragraph 11.
14 Ibid, at paragraph 12.
15 Storey, supra note 7 at 165.
16 Staples, supra note 12 at paragraph 12.
17 Ibid, at paragraph 15. For more on signs and signification, see discussion starting at page 30.
19 Do the Right Thing (Universal, 1989).
images of blackness in this movie relied on commodified images: ‘Practically every character...has already been ‘seen,’ translated, interpreted, somewhere before, on television, sitcoms, evening news, etc.’ Such is the condition of a postmodern society, a society in which a simulacrum or image is so widely reproduced and reified by the mass media that it becomes a commodity.

b. pop culture & postmodern stories

In his book, *Media Matters*, John Fiske applies Baudrillard’s theory of hyperreality to the field of popular culture and cultural studies. No longer, Fiske argues, does a clear distinction exist between the “real” event and its “mediated representation.” The media event surrounding Princess Diana of Wales’ death is one example of this obfuscation between reality and representation. For those of us living in North America, her demise became “real” only through its representations in the visual media. Although Princess Diana did die and her death was real, for the purposes of cultural analysis, the real event is no more important, more significant, or even more “true” than its representation in the mass media. The media event takes on its own reality, a reality which “gathers up into itself” the preceding event. It is these media events that constitute an important aspect of contemporary Western popular culture.

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21 Manning, *supra* note 18 at 7. Issues of race, gender, and class in law and popular culture will be discussed in more detail in Chapter Two.


Defining contemporary popular culture has proven to be an extremely difficult task for academics and cultural critics alike. Students of popular culture will argue that it is actually an *empty* conceptual category; its meaning, context-driven. More often than not, popular culture is viewed as the antithesis of “high” culture (that is, opera, art, classical music, classic theater, literature: ‘the best that has been thought and said in the world’). As such, notions of “popular” and “popular culture” often bring with them connotations of inferiority: “a second-best culture for those unable to understand, let alone appreciate, real culture...” The distinction between “high” and “low or popular” culture, however, has lost much of its meaning with the onset of postmodernism in the area of cultural theory. Postmodernist cultural theorists argue against analytical distinctions between the cultural, the social, and the political. This movement away from a limited focus on high culture has led to a more complex vision of “culture” being brought into academia.

Postmodern cultural theory highlights the paradoxical nature of Western popular culture. On the one hand, popular culture works to cretinize public consciousness, to preserve and maintain the status quo. On the other hand, it allows some room for social change. This social change, however, can never be radical. If anything, popular

24 Storey, *supra* note 7 at 1.
25 Ibid. cited at 10 (citing Matthew Arnold).
26 Ibid. at 10.
27 Ibid. at 155.
29 By radical social change, Fiske is referring to a major re-distribution of power in society, often described as “revolution.”: John Fiske, *Understanding Popular Culture* (Boston: Unwin Hyman, 1989) at 188.
culture is about popular change, an on-going process aimed at maintaining or increasing the power of "The People." At its best, popular culture promises progress; it may work to soften the harsh extremities of power and to produce small gains for the weak. At its most harmful, though, popular culture simply perpetuates racist, sexist, and classist ideologies in society.

That does not mean that popular culture cannot play a role in radical change. Room exists in popular culture to challenge the boundaries of our imagination. Fiction, for instance, is an extremely important medium for teaching about the lived experiences of racism, sexism, and classism. Whether it be poetry or prose, fiction communicates to the reader what oppression feels like and its affect on subjectivity. One example of this can be found in Alice Walker's novel, *The Color Purple*. According to Jordan and Weedon, Walker's novel is a "fictive attempt to articulate an authentic voice": the reader sees the world through Celie's eyes. This technique privileges one version of

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30 According to Fiske:

'The people' is not a stable sociological category; it cannot be identified and subjected to empirical study, for it does not exist in objective reality. The people, the popular, the popular forces, are a shifting set of allegiances that cross all social categories; various individuals belong to different popular formations at different times, often moving between them quite fluidly. By 'the people,' then, I mean this shifting set of social allegiances, which are described better in terms of people's felt collectivity than in terms of external sociological factors such as class, gender, age, race, region, or what have you. Such allegiances may coincide with class and other social categories, but they don't necessarily; they can often cut across these categories, or often ignore them. So that while there clearly are interrelationships between the structure of the social system and cultural allegiances, they are not rigidly determinate ones at all.


31 *Ibid.* at 188.


33 Celie is the female protagonist of this novel, a novel which documents two sisters' attempts to "assert positive identities in the face of both patriarchy and racism." *Ibid.* at 240.
history and meaning, namely Celie’s, over another. Having a voice and being the subject rather than the object of discourse, is central to the resistance of black women, for instance. The black subject positions in this novel work to reveal contradictions, simplifications, and mystifications in white definitions of blackness and gender.\textsuperscript{34}

Another paradox in contemporary Western popular culture is that, on the one hand, it is industrialized; its commodities are produced and distributed by a profit-motivated, industry-dominated sector of society. On the other hand, though, popular culture must bear on the interests of “The People”. Otherwise it will fail to be profitable. In other words, audiences and consumers reject that which is perceived to ignore their welfare and concerns. The movie, Waterworld,\textsuperscript{35} evidences this. After spending what many considered a ludicrous amount of money on a Hollywood film -- over $175 million dollars was channeled into its production\textsuperscript{36} -- Waterworld “crashed and burned”\textsuperscript{37} at the box office; few people went to see it. Those who did go and see the movie, failed to recommend it to their friends. The movie, they argued, was not worth the money spent.

Popular culture, then, is not based solely on consumption. Just because a person was curious enough to go see a movie, for example, does not mean she or he was tricked into seeing it by the moguls of movie magic. Instead, popular culture involves an

\begin{footnotes}
\item[34] Ibid, at 241, 244.
\item[35] Waterworld (Universal, 1995).
\end{footnotes}
"active process of generating and circulating meanings and pleasures within a social system". Simply because the industrial system provides commodities, be they cultural or material, does not mean that the consumption of these commodities constitutes a mass duping of the populous by the barons of industry.

It is this concept of struggle by the masses that has now become the focus of popular culture theory and cultural criticism. In response to the globalization of cultural production and distribution, the "new cultural studies" has turned to analyzing how ethnic and women's groups maintain and elaborate autonomous values, identities, and ethics. "Otherness" is affirmed and meta-discourse negated in contemporary cultural studies. Academic attention is presently directed towards marginal/minority discourses, towards a concern for the legitimation of inequality, and the struggle to transform disparate social relations. In sum, the focus of contemporary cultural studies is on how cultural politics, such as racism and sexism, affect the meanings of social

38 Fiske, Understanding, supra note 29 at 23 (emphasis added).
39 Ibid. at 25-6.
40 "As Stuart Hall put it, the consumers of cultural commodities are not all 'cultural dopes.' Their participation is not 'limited to the choice between buying and not buying.' Instead, the consumption of cultural commodities can be, and often is, an active, creative practice, in which the 'consumer' appropriates the product by investing it with (new) meaning.": Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights" (1993) 81:1 California Law Review 127 at 140.
41 "Other" is a term most often used to "describe those who have been demonized and excluded from the power structure.": Judith Olans Brown, Lucy A. Williams, Phyllis Tropper Baumann, "The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor" (Symposium: Institutional Barriers to Women in the Workplace) (1996) 6 UCLA Women's Law Journal 457 at FN34.
42 During, supra note 40 at 16-7.

practices and how some groups and individuals have the power to define these meanings while others do not.  

ii. (post)modern legal stories

Q. Did you, at the time of the accident, when you were asked if you were hurt, reply that you weren't hurt?
A. Yes, sir, I did...
Q. Well, sir, why have you been testifying all morning that you were hurt, giving the jury the impression that you were still suffering the effects of the accident?
A. Well, Mr. Lawyer, it was like this. I was driving my horse and buggy along the road, and along comes this client of yours in his automobile and knocks us in the ditch. You never saw such a mess in all your life. I was flat on my back with my legs in the air. The buggy was completely wrecked. Now this client of yours gets out of his car and looks at us. He sees my horse has a broken leg. He goes back to his automobile, gets a gun, and shoots him. Then he comes up to me and says, 'Now what about you? Are you hurt?'

In the past few decades, teaching and scholarship in the area of popular culture studies has become quite common. Legal scholars, though, are just now starting to catch the cultural studies wave. Until recently, legal theorists and students of law have taught and been taught to interpret legal meaning and authority through the rhetoric of "rhetoric's suppression." In other words, objectivity, neutrality, and acontextuality were the standards upon which legal scholarship was judged. Proper names were suppressed; impersonal abstractions were preferred over personal narratives.

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43 Jordan and Weedon, supra note 32 at 5.
approach was justified in terms of the perceived function of the court: determine the facts and apply the legal rule that covers those facts.\textsuperscript{46} Personal narratives were irrelevant to this quest for the “holy grail of truth.”\textsuperscript{47} Instead, truth was sought in generalized theories of justice, theories which “crank[ed] a fact pattern through a judicially crafted test.”\textsuperscript{48} Legal actors typically looked away from the “historied face of the other”\textsuperscript{49} towards the blinded eyes of “Lady Justice.”

This is not to say that storytelling or personal narratives were absent from law or legal practice. To the contrary, storytelling has been around for years in the form of hypotheticals, legal problems, and war stories regarding lawyers’ “real” experiences in the courtroom.\textsuperscript{50} Trial lawyers and judges have, throughout history, acted on the assumption that the truth of a witness’ testimony is never absolute: “human testimony is largely the product of inaccurate observation, distorted recollection, baseless inferences, and conjecture.”\textsuperscript{51} As such, it is generally accepted that witnesses fill in the gaps of their


See, also, Ronald Dworkin, \textit{Law’s Empire} (Cambridge, Massachusetts: Harvard University Press, 1986) at 3 (“First, what happened...Second, what is the pertinent law?” It is important to note Dworkin views there to be a third purpose to the court system. He argues that, if the law denies compensation, the court must decide whether doing so would lead to unjust results. If such would be unjust, the court should ignore the law and grant compensation anyway).


\textsuperscript{49} Sherwin, “Narrative Construction,” \textit{supra} note 45 at 683.

\textsuperscript{50} Arthur Austin, “Evaluating Storytelling as a Type of Nontraditional Scholarship” (1995) 74 Nebraska Law Review 479 at 488.

\textsuperscript{51} Ehrlich, \textit{supra} note 44 at 40.
observations with information they think is true.\textsuperscript{52} In other words, they tell stories.

Witnesses are not the only actors in the legal trial that tell stories. Trial lawyers view storytelling as necessary in order to persuade the jury (or the judge as fact-finder) that a certain version of the facts is accurate and a particular legal theory is sound and just.\textsuperscript{53} From the opening statement onwards, it is assumed that a story \textit{should} be told in a jury trial; every witness and every movement should be factored into this story.\textsuperscript{54} Actual human predicaments give life to issues; they lend empathy, immediacy, and authenticity to a legal story. Unlike abstract appeals to reason and justice, legal storytelling illuminates the human aspects of the process. Legal stories remind the jury that at the core of every legal trial is the tale of a real human being.\textsuperscript{55}

Over the years, many trial manuals and books have been written regarding the factors relevant in convincing a jury that a particular story is true. Many of these manuals simply rely on and perpetuate societal (and, thus, juror) prejudices. Take, for example, this passage from Jake Ehrlich’s 1970 book, \textit{The Lost Art of Cross-Examination (or Perjury Anyone?)}:

Some trial lawyers never select anyone with an obvious serious, somber, or sour disposition. Instead, they prefer smiles. This is an obvious conclusion and is frequently correct....

Other trial lawyers are wary of persons whose forebears were English, German, or Scandinavian. These people tend to believe in absolute law enforcement and in severe punishment for anyone who runs afoul of the law. It is thought that such people are ultraconservative, bullheaded, and usually have their minds made up in

\textsuperscript{52}Ibid. at 41.


advance of hearing testimony.

The outdoor athletic type can take either side, and if convinced, he [sic] will espouse his [sic] case with determination.

A Jew is acceptable only if the crime is a minor one; he [sic] is severe if the crime is one of violence...

One hard-and-fast rule that has served well is: Never accept a wealthy person if the client is poor, nor a poor person if the client is wealthy. The gap between client and juror cannot be bridged.

A businessman is not the best juror if the client is a labor official, nor is the person who is in debt a good juror if the client is a banker or an official of a loan company.

A Southerner is often a good juror if the client is black, because the Southerner will often best understand the black's problems.

Actors and salesmen are almost always desirable; they have seen all sides of life and know the meaning of misfortune and suffering....

Married men are more understanding and tolerant than bachelors. Women, of course, have always been - and always will be - a complete mystery....

A poll done at the University of New Jersey concluded that there is a small amount of pure-and-simple anti-black prejudice in today's juries. Generally speaking, the black juror tends to resent, slightly, the successful defendant, but the black man is more sympathetic toward youth, the out-of-work, and the poor. But a black banker would be an indigent black man who was charged with robbing a pawn shop....

Oddly enough, a man stands a better chance of getting a fair trial from a jury than does a woman. According to the Fairleigh Dickinson poll, both men and women earning less than $5,000 a year are strongly prejudiced against women.\footnote{Ehrlich, Lost Art, supra note 44 at 76-9.}

Simplistic and stereotypical renderings of human nature, such as those advanced by Ehrlich, are often supplemented by trial advocacy theories regarding the influence of dress and witness demeanor on determinations of credibility in the courtroom.\footnote{Ibid, at 79.}

Similarly, the appearance, sincerity, professionalism, concern, and attitude of the lawyer is said to affect the persuasiveness of a legal argument.\footnote{Edward T. Wright, Winning Courtroom Strategies (Englewood Cliffs, NJ: Prentice Hall, 1994) at 2. See, also, Edward T. Wright, How To Use Courtroom Drama To Win Cases (Prentice Hall, 1987).}

Canada is not immune to these simplistic trial advocacy theories. For example, in 1981, the late Supreme Court Justice, John Sopinka, wrote that young attractive “girls” with serious injuries are more apt to generate great sympathy then other plaintiffs. He
also maintained that women jurors ‘tend to reflect the views of their menfolk’. It is important to note, however, that several differences exist between the Canadian trial system and that of the United States. To begin with, the U.S. conducts more than ninety percent of the world’s criminal jury trials and nearly all its civil jury trials. This can be interpreted as an almost unquestioning worship for the adversarial ideal.

Secondly, the United States uses psychiatric and psychological profiling -- along with jury consulting firms, the subject of John Grisham’s novel, The Runaway Jury -- to aid with jury selection. In contrast, the Canadian selection process generally takes all of about five or ten minutes. Although the process of jury selection in Canada has become a bit more elaborate ensuing the Morgentaler jury trial on abortion, typically,


61 In this fictional novel about a multi-million dollar civil tobacco trial, Grisham writes: “For a small fortune, Carl Nussman and his firm could pick you the right jury. They gathered the data, took the photos, recorded the voices, sent the blondes in tight jeans into the right situations. Carl and his associates flirted around the edges of law and ethics, but it was impossible to catch them. After all, there’s nothing illegal or unethical about photographing prospective jurors. They had conducted extensive telephone surveys in Harrison County six months ago, then again two months ago, then a month later to gauge community sentiment about tobacco issues and formulate models of the perfect jurors. They left no photo untaken, no dirt ungathered. They had a file on every prospective juror.” John Grisham, The Runaway Jury (New York: Island Books, 1996) at 4-5.

62 “After a general challenge for cause of the jury panel, lengthy submissions were made by counsel for the appellant and for the respondents. The trial judge then determined that prospective jurors would be asked the following questions in determining whether they were impartial between the Crown and the accused:

(a) Do you have any religious, moral or other beliefs relating to abortion such that you would convict or acquit regardless of the law or the evidence? Answer yes or no.

(b) Have you, because of religious or moral beliefs or because of what you have read or seen in the media, formed an opinion as to the guilt or innocence of the accused? Answer yes or no.

(c) Despite any beliefs or opinions would you be able to set aside those beliefs or opinions and reach a verdict of guilty or not guilty solely on the evidence and the law you receive in this courtroom? Yes or no.

very few questions are directed towards prospective jurors.\footnote{In contrast, prospective jurors in the United States have to fill out extensive questionnaires. In the O.J. Simpson criminal trial, for example, the jury had to fill out a "75 page questionnaire drawn up by the defense and the prosecution, covering everything from their opinion on sports figures to their feelings about different races.: "The Jury - O.J. Central," 28-Aug-97 18:36:20 GMT <http://bigmouth.pathfinder.com/pathfinder/features/oj/subdir/jury.html> (19 May 1998).} Trial lawyers rely solely on the juror's card and a police list for information on the jury candidates. These sources list only the name, address, and occupation of the prospective jurors. Canadian juries are, thus, said to be chosen primarily on the basis of trial counsel intuition.\footnote{See, supra note 59 at 35.} If this is the case, Sopinka can be read as saying that the above stereotypical characterizations of women witnesses and jurors are simply intuitive. Such a reading would work to effectively insulate him (and similar theorists) from charges of sexism, racism, and the like.

Despite the difference between the Canadian and United States jury systems, trial lawyers in both jurisdictions have relied on persuasion and storytelling techniques for years in order to convince a jury that a particular version of the facts is the true one. Only just recently, though, have legal scholars and academics accorded any importance to legal storytelling. While most theorists do not take storytelling to the heights of Patricia Williams\footnote{See, for example, Patricia J. Williams, \textit{The Alchemy of Race and Rights} (Cambridge, MA: Harvard University Press, 1991) and Patricia J. Williams, \textit{The Rooster's Egg: On the Persistence of Prejudice} (Cambridge, Massachusetts: Harvard University Press, 1995).} or Derrick Bell,\footnote{See, for example, Derrick Bell, \textit{Faces at the Bottom of the Well: The Permanence of Racism} (New York: BasicBooks, 1992).} legal narratives are beginning to be looked upon for
the role they play in the construction of truth and reality. Even more conventional legal theorists, such as Ronald Dworkin, have begun to recognize the need for “relief from the daunting abstraction.” Dworkin argues that narrative provides “tone and texture” to legal argument and influences “each reader’s sense of what does and can happen in court.”

This shift in legal academia, away from depersonalized accounts towards more diverse rhetorical and narrative forms, has much to do with the culture-wide shift away from more positivist models of knowledge and cognition. Richard Sherwin argues that, in contemporary Western culture, legal scholars are beginning to give more thought and authority to the everyday realities of lawyers and judges and the stories being told to communicate, persuade, and sometimes just to be heard in a court of law. Scholars are looking at the ways in which stories trigger our “narrative expectations” and exploit our world knowledge, or the “numerous and varied cultural scripts, schemata, and stereotypes, that we carry around in our heads”.

67 Sherwin, “Narrative Construction,” supra note 45 at 684.
68 Dworkin, supra note 46 at 15.
69 Ibid. at 15.
71 Ibid. at 686.
a. theories of law & pop culture - general

The relationship between law and popular culture is complex and multi-faceted. With the advent of postmodernism in legal theory, legal theorists are beginning to look beyond the most obvious legal settings - cases, statutes, and other primary source material -- towards the "shadowy realms that lie at the intersection of law and popular culture." This increased interest in law and popular culture has worked to unveil and challenge certain legal fictions, fictions that have, in the past, succeeded in concealing law's interrelationship with popular culture.

One early example of law and popular culture theorizing can be found in the work of Anthony Chase. Similar to the theoretical approach of John Fiske, Chase links the study of law and popular culture to law-as-ideology theorists, such as Critical Legal

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74 Some of these fictions include: "...the fiction that law derives from dispassionate reason, that it is the product of objective analysis disengaged from feeling or desire, and the fiction that legitimate legal decisionmaking cannot occur in the absence of deductive or inductive logic, strict causal analysis, and well-reasoned explanations.": Sherwin, "Introduction," supra note 73 at 898.

75 Ibid. at 898.


76 Fiske criticizes theorists such as Baudrillard and Foucault for downplaying the complex and contested nature of discourse or language in social use, accented by a history of domination, subordination and resistance. Fiske views discourse as a "terrain of struggle." In other words, discourse, or making sense of certain events and experiences, is never solely determined by the experience itself; it relies on social power to give it meaning. A theory of discourse allows the masses a role in this struggle for The masses play a role in this struggle: Fiske, "Admissible Postmodernity," supra note 75 at 918; and Fiske, Media Matters, supra note 22 at 4.
Scholars (CLS) in the United States. According to Chase, CLS theorists hold law to constitute a "sophisticated ideological structure that has the functioning of legitimating an inequitable distribution of wealth and power in society." He criticizes their strict substantive focus on the text of American law's high culture: appellate case reports and the "walls of doctrine wound around them." 

Relying on the work of Franco Moretti, Chase asserts it is not enough for the social order to be legal; it must also appear culturally legitimate. In other words, law must be inspired by the fundamental values of society; it must reflect these norms and encourage them -- or at least seem to do so. Modern politics seeks legitimacy not merely through a "base-line notion of legality." Instead, much more elaborately, legitimacy emanates from an "all-pervasive sense of naturalness and familiarity inscribed within institutions of popular culture and everyday life."

Chase seeks to remedy the exclusion of popular culture from legal academia by proposing a systematic legal theory of American popular culture. Moving from fictional and nonfictional television to advertising, soap operas, and popular music, Chase details

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78 Chase, ibid. at 528.


80 Chase, ibid. at 531.
the images and ideas about law and lawyers that are generated in popular culture.\textsuperscript{81} These images, says Chase, are useful in order to give legal academics a sense of perspective from outside their own narrow discourse. It also aids in elevating academic debate above the false dichotomy between liberal behaviorism\textsuperscript{82} and the doctrinaire critical legal theory such as that of the CLS.\textsuperscript{83}

Another example of law and popular culture theorizing can be found in Martha Mahoney’s article, “Victimization or Oppression? Women’s Lives, Violence, and Agency.”\textsuperscript{84} In this work, Mahoney integrates the study of popular culture with feminist legal theorizing on domestic violence. The purpose of Mahoney’s work is to


\textsuperscript{82} According to B. F. Skinner, behaviorism consists of the following:

\begin{quote}
What a person is really like could mean what he [sic] would have been like if we could have seen him before his [sic] behaviour was subjected to the action of an environment. We should then have known his [sic] ‘human nature.’ But genetic endowment is nothing until it has been exposed to the environment, and the exposure immediately changes it.
\end{quote}


\textsuperscript{83} Chase, \textit{supra} note 77 at 527.


demonstrate the inability of law and popular culture to portray both oppression and struggle - victimization and agency - in discourses regarding women's experiences of domestic violence. According to Mahoney, both law and popular culture equate "agency" with the separation of a battered woman from the battering relationship. "Staying" in an abusive relationship, says Mahoney, is a "socially suspect choice"; it is often viewed as an acceptance of violence. Ignored, though, is the fact that the alternative to staying -- leaving -- is often as dangerous (if not more so). Accordingly, the dominant image of "exit" in law and popular culture discourse on domestic violence hides women's oppression behind a "mask of choice" and forces upon us a discourse of victimization, a discourse which emphasizes individualism and weakness over collectivity and strength.

Mahoney argues that both law and popular culture individualize women's behavior (or "misbehavior") and conceal the relations of power in the family. They

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85 Ibid. at 59.
86 Ibid. at 60 (emphasis added).
87 Society often disregards what Mahoney terms "separation assault," "the violent and sometimes lethal attack on a woman's attempt to leave a relationship." Separation assault may be used to prevent a woman from leaving an abusive relationship; it may also serve as retaliation for a separation or as a means of forcing the woman to return. "It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in the relationship, or to punish the woman for ending the relationship. It often takes place over time." Sayoko Blodgett-Ford, "Do Battered Women Have A Right To Bear Arms?" (1993) 11 Yale Law and Policy Review 509 at 529.
89 Both law and popular culture ignore the importance of women's connection to dependents, particularly children, in relationships characterized by abuse. "Battered women face the danger of losing custody of their children to abusive ex-partners for a number of reasons: because violence against the mother was often not considered relevant to custody decisions, although this legal regime is changing, because custody evaluators saw allegations about domestic violence as suspiciously manipulative actions by the mother, and because stigma regarding battered women tainted the evaluation of maternal fitness in custody decisions." The strict focus on exit from an abusive relationship "pretends away the work involved in forging a family and the love and commitment at stake in relationship[s]. The idea that women should leave relationships also hides real hardships for women and for
tend to emphasize victimization and implicitly deny agency in the person who “stays” in the abusive relationship. Women in abusive relationships assert themselves in a variety of ways.\textsuperscript{90} The cultural preoccupation with exit from abusive relationships, however, colors almost every legal and social inquiry about battering.\textsuperscript{91} Cultural stereotypes regarding battered women are “imported into the law through standards of reasonableness and ‘objective’ intuitions about what behavior is appropriate in women who are hurt by their partners.”\textsuperscript{92} The resulting legal and social focus on battered women’s exit from abusive relationships must be challenged, argues Mahoney, in order to make comprehensible the many ways women assert themselves in response to violence.\textsuperscript{93}

The above are but a few examples of law and popular culture theorizing. It is beyond the scope of this inquiry to evaluate the merit of these theories. Suffice it to say that popular culture is beginning to be used as a category of analysis in legal theory. Taking this proposition as a starting point, the remainder of this chapter will look at the impact of popular culture on contemporary Western legal storytelling.

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\textsuperscript{90} Abused women may attempt to change the situation or improve the relationship, seeking formal or informal help from family, friends, and organizations. They may flee temporarily from a situation, only to return when it is safe. Or, they may break off the relationship. Continuing the relationship, in this sense, may actually be “part of a pattern of resistance to violence on the part of a woman.” On the other hand, women may continue a relationship because they do not know where to go or they feel leaving may be deadly. In this case, staying in the abusive relationship is a matter of survival. Accordingly, the “physical acts and relocations which are summarized in the concepts of ‘staying’ and ‘leaving’...do not necessarily support conclusions about whether a woman is functioning as an agent in her life.”: \textit{Ibid.} at 73-4.

\textsuperscript{91} \textit{Ibid.} at 74.

\textsuperscript{92} \textit{Ibid.} at 65.

\textsuperscript{93} \textit{Ibid.} at 73.
b. legal storytelling in a postmodern world

The justice which courts administer is dependent on human facts. When facts fail in accuracy, justice fails.

~ J.W. Ehrlich

Within the courtroom, the effectiveness of a legal storyteller depends on the degree to which her or his legal story conveys a compelling sense of truth or reality. Much of the meaning of these legal stories (and thus, their appearance of truth or reality) comes from outside the courtroom, from popular culture and the mass media. As such, lawyers, judges, and legal scholars must have a sophisticated understanding of popular culture in order to grasp how truth, law, and justice are constructed in the popular imagination. Only then can they effectively tell their story before a particular lay audience (that is, a jury) and only then can they effectively analyze legal culture.

It is important to note that, despite the postmodern aspects of popular culture, purely postmodern legal storytelling is of limited use in a courtroom. Postmodernism entails “the demise of the author and authority in general, the dissolution of the autonomous, rational subject, the end of linear time and causation, the erasure of difference between truth and error, reality and fiction, and the abandonment of stability to the contingency of truth and justice....” These concepts sit uncomfortably with a judge or jury. As a result, although the partisan nature of the Western adversarial

94 Ehrlich, supra note 44 at 15.
95 Sherwin, “Introduction,” supra note 2 at 892.
96 Ibid. at 892.
98 Jerome Frank writes: “Many lawyers maintain that the ‘fight’ theory and the ‘truth’ theory coincide. They think that the best way for a court to discover the facts in a suit is to have each side strive as hard as it can, in a keenly
system is widely recognized by lawyers and theorists alike, not just any story can be told in a courtroom. Nor can storytelling involve the trailing off, the breaking up, or the addition of other storylines while one story is being told. Judges and jurors prefer neat, tidy accounts, stories that offer meaningful resolution and are easy to understand. While inherently problematic -- that is, neat storylines tend to leave important information out -- it is much easier to deal with stories involving "typical elements of our workaday narrative world",99 than postmodern stories, stories that offer little or no resolution.

Legal storytelling, then, similar to that of contemporary Western popular culture, involves a hybrid of postmodern and modernist philosophies. On the one hand, the courtroom in contemporary society is probably as modernist as ever. The only change that has occurred is one of context: it exists in a postmodern world. On the other hand, while substantive law remains primarily modernist in nature, it is effected through trials that are, and always have been, pre-modern100 or postmodern in their emotional manipulation.101 Either way, lawyers have to make certain choices about what stories they were going to tell in court. In many instances, the stories could have been otherwise. However, once a choice is made to tell a particular story in the courtroom, all other stories have to be repressed.102

partisan spirit, to bring to the court's attention the evidence favorable to that side.": Frank, supra note 46 at 80.
100 In contrast to the modern or the postmodern, the pre-modern "appeal[s] to the heart with a grasp on emotions, and [is] evocative of the romantic vision of creative social organization....": J.H.H. Weiler, "Bread and Circus: The State of European Union" (Symposium: The Euro: A New Single Currency for Europe? Legal Framework) (1998) 4 Columbia Journal of European Law 223 at 246.
101 Personal communication with Professor W. Wesley Pue, UBC, March 1998.
See, also, Salam Rushdie, Shame (New York: Adventura/Vintage, 1984) at 72 ("Every story one chooses to tell is a
It is this repression which takes on new meaning in a postmodern society. One cannot escape the atextual, nonlinear, image literacy which has come to dominate contemporary culture. It deeply informs the way we make sense of our lives and our world. This does not mean, though, that a wider array of storylines exist in contemporary society. As in the past, shared cultural storylines -- popular myths, stock metaphors, familiar character types, if you will -- continue to limit the stories told and what meaning can be derived from the material presented. These shared storylines, while problematic in that they perpetuate existing power structures, enable the legal theorist to make more sense out of the courtroom drama.

iii. Legal Storytelling & the Celebrated in Western Society

In the industrialized western world, especially since the coming of the mass media, the work of the priests and elders has been taken over by the creators and purveyors of widely produced popular culture.

~ Jack Nachbar

The previous section documented several ways in which popular culture and law intersect to influence the production of courtroom stories of truth and justice. This section expands upon this theoretical framework by uncovering the role of the celebrity and the celebrity persona in the contemporary courtroom. Borrowing from the work of

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103 Sherwin, *ibid.* at 67.


David Marshall, the ensuing analysis will demonstrate how the celebrity works as a system of meaning in the courtroom. Similar to popular myth, celebrity orients particular audiences towards a shared cultural storyline. The first section will examine the concept of celebrity and celebrity personas as a system of meaning in contemporary Western society. Next, the power of the celebrity will be analyzed as it pertains to the production of truth in society. Finally, the importance of the celebrity sign to legal storytelling will be demonstrated and the semiotic and affective power of celebrity-truths analyzed.

a. celebrity as a system of meaning

The remainder of this thesis focuses on a group of people who, while not really powerful in any overt political sense, wield a great deal of influence in contemporary Western society. We call these people celebrities. As a group, they comprise a very small proportion of the populace. Yet, they are given “greater presence and a wider scope of activity and agency than those who make up the rest of the population.” Celebrities are recognized by almost the whole of contemporary Western culture; they are closely observed both onstage and off; they are thought about, talked about and even dreamt about by the masses. It is indisputable: the celebrity is a vital force in Western popular culture.

106 See infra note 209 and accompanying text.
108 Ibid. at ix.
As a system of meaning in contemporary Western society, celebrity is articulated on two interconnected\textsuperscript{110} planes: (1) signification; and (2) affect. With respect to the former, signification involves the production and circulation of meaning in society. Semiotics, the scientific study of communication and signification, is defined as "the exchange of any message whatever and the systems of signs which underlie them...."\textsuperscript{111} Signs can be either words or gestures; they are the means by which information is exchanged.\textsuperscript{112} The meaning of the sign, however, is arbitrary in nature. In other words, no natural link exists between signifier and signified; between, for example, the signifier, "tree" and the conventional agreement about what the coded word, tree, means.\textsuperscript{113} Language, thus, is not pre-determined or immutable. It is, instead, a system of socially determined values; its meaning can only be determined in relation to other signs.\textsuperscript{114}

Applied to the celebrity, signification operates by collapsing the material reality of the celebrity sign -- that is, the actual person at the core of the representation -- into the cultural formation of meaning.\textsuperscript{115} In other words, at the level of denotation, the celebrity sign is an empty structure.\textsuperscript{116} The material reality of the celebrity, Madonna, for instance, is meaningless to us outside the connotative meaning. It is at the level of

\begin{footnotesize}
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\item\textsuperscript{110} The signifying system is a site of affective activity: Marshall, \textit{supra} note 107 at 73. This will be explained in more detail, starting at page 32.
\item\textsuperscript{111} Susan W. Tiefenbrun, "Legal Semiotics" (1986) 5 Cardozo Arts and Entertainment Law Journal 89 cited at 95.
\item\textsuperscript{112} Ibid, at 95.
\item\textsuperscript{113} Demonstrating the arbitrary nature of the sign was Ferdinand de Saussure's greatest contribution to semiotics. \textit{Ibid.} at 99, 114. For more information see Ferdinand de Saussure, \textit{Cours De Linguistique Générale} 16 (1955).
\item\textsuperscript{114} Tiefenbrun, \textit{ibid.} at 115-6.
\item\textsuperscript{115} Marshall, \textit{supra} note 107 at 56-7.
\item\textsuperscript{116} \textit{Ibid.} at 57.
\end{itemize}
\end{footnotesize}
connotation that meanings representing specific interests -- corporate interests, for instance\(^{117}\) -- are conflated with the denotative level. The result is that the origin of certain representations and meanings are masked and the given meaning becomes the real or natural meaning.\(^{118}\) "Madonna," in this instance, becomes "real" and culturally meaningful.

The process of signification ensures that there will always exist a degree of indeterminacy in the meaning of the celebrity sign.\(^{119}\) In other words, at any given moment, there may be a governing consensus about what the celebrity represents -- who or what is "Madonna," for instance -- but this representation may be from a variety of positions and perspectives; Madonna, in other words, may mean different things to different people. Her signification cannot be collapsed into a singular meaning.\(^{120}\)

The indeterminacy of the celebrity sign stems, in part, from the ambiguous nature of the celebrity in contemporary Western society. On the one hand, the celebrity represents success and achievement. It signifies the power of individuality, of upward mobility and of the universal image of fulfillment: being someone when "being no one" is the norm.\(^{121}\) On the other hand, the celebrity is viewed by many as a sign to be ridiculed and derided. The celebrity represents a falseness, an artificiality, that is not

\(^{117}\) The economic relationship between the celebrity image and the culture and advertising industry will be discussed in more detail on page 43.

\(^{118}\) Marshall, supra note 107 at 57-8.

\(^{119}\) Ibid. at xi.

\(^{120}\) Marshall, supra note 107 at 57-8.

always looked upon favorably in contemporary society.\textsuperscript{122}

The fact that the celebrity is simultaneously authentic and false, a media construction and a living, breathing human being contributes to this ambiguity.\textsuperscript{123} The celebrity must negotiate between these various competing and often contradictory definitions of its own significance. The cementing character of this negotiation -- and this is the key point regarding the semiotic power of the celebrity -- is always “the basic and essential authenticity that a ‘real’ person is housed in the sign construction.”\textsuperscript{124}

The signifying system is also a site of affective activity. In other words, the celebrity sign also gets its meaning from the realm of affect. Affect has been described as passion, will, mood, and attention; it is “the energy invested in particular sites: a description of how and how much we care about them.”\textsuperscript{125} Affect is not merely feeling, though. It is a “socially constructed domain of cultural effects.”\textsuperscript{126} As such, not all emotional experiences are felt the same way by everyone and particular experiences may not always feel the same way to the same person. As the affective investment of an experience changes, so does the experience.\textsuperscript{127}

The affective power of the celebrity is enormous. Celebrities help articulate and regulate emotions in contemporary Western society. Repressed aggression may be

\textsuperscript{122} Marshall, \textit{supra} note 107 at x-xi.
\textsuperscript{123} \textit{Ibid.} at xi.
\textsuperscript{124} \textit{Ibid.} at xi.
\textsuperscript{125} Lawrence Grossberg, \textit{We Gotta Get Out of This Place: Popular Conservatism and Postmodern Culture} (New York: Routledge, 1992) at 397.
\textsuperscript{126} \textit{Ibid.} at 80.
\textsuperscript{127} \textit{Ibid.} at 80.
sublimated through a music celebrity’s concert, a comedian’s joke, or an athlete’s winning performance; attractive celebrities may become fantasy objects and help relieve excess sexual energy. With one switch of a remote control button, needs for companionship are answered, feelings of suffering and self-pity are discharged. Even the audience’s fear of failure and drive for success is addressed by star performances. Accordingly, much of the appeal of the celebrity is to the emotive and not to the rational.

b. truth, power, & the celebrated

(i) signifying truth

...celebrity speaks not in lies but in a different language of neither lies or truth.

~ Joshua Gamson

The power of the celebrity sign to effect truth emanates from both the realm of signification and that of affect. On the plane of signification, issues of truth and reality center around an elaborate discourse on the individual and individuality, a discourse organized around the audience’s need to uncover a hidden truth or ascertain the “real” person behind the celebrity persona. In his book, Heavenly Bodies, Dyer examines the obsessive and incessant searching for the real and the authentic by audiences within the star persona. Most audience members only know the celebrity through what they see

128 Fowles, supra note 109 at 164.
129 Marshall, supra note 107 at 197.
130 Joshua Gamson, Claims to Fame: Celebrity in Contemporary America (Berkeley: University of California, 1994) at 193.
131 Marshall, supra note 107 at 4.
and hear before them. However, the whole media construction of celebrities edges them towards the question, “What is X celebrity really like?”\(^\text{132}\) A tension, thus, exists between the possibility and impossibility of knowing the authentic individual, the “real” person behind the persona. It is this tension which configures the celebrity sign.\(^\text{133}\)

Any intimacy that exists between audience and celebrity is purely discursive in nature. In other words, audiences utilize the information disseminated in the mass media in order to deconstruct the celebrity text and debate the nature of the celebrity’s public and private selves.\(^\text{134}\) In some instances, the audience will be drawn to the coherent authenticity of celebrities who appear to represent the same values on and off screen.\(^\text{135}\) At other times, audience members will look towards celebrities who externalize their private torments in the style of Marilyn Monroe.\(^\text{136}\) In both instances, though, the focus of inquiry centers on the public and private lives of the celebrity in question.

In the early years of the film industry, actors were simply known for their physical characteristics on the screen. The actor was celebrated as a “type” and remained virtually anonymous except for this screen image.\(^\text{137}\) Biographical narratives in the popular press during that time, focused on the link between an actor’s screen presence and her or his private lives. More often than not, the actor’s real life was viewed as


\(^{133}\) Marshall, *supra* note 107 at 90.

\(^{134}\) *Ibid.* at 18 (discussing Richard Dyer’s work).

\(^{135}\) *Ibid.* at 18.


being completely congruent with her or his "reel" life. Reality, in other words, posed no challenge to her or his filmic character.\textsuperscript{138}

The same can be said of lesser-known actors in today's society. Tom Cruise, for instance, in the initial stages of his career, was type cast as an all-American, athletic type. What little biographical information existed about him supported this particular screen representation. As Cruise's popularity and visibility increased, however, so did the number of media sources disseminating information about him. A proliferation occurred in the extratextual discourse concerning his private life and lifestyle.

According to DeCordova, this heightened scrutiny regarding actors' private lives is intimately connected to stardom. While often celebrities' lives are presented as "ordinary," more often than not, they are represented as extraordinary. Audience members, in their quest to find out what makes these celebrities so special, look towards the actors' private lives for answers. Extratextual information, produced and disseminated by the mass media, provides the audience with a discourse of intimacy and a constructed narrative which enhances the actor's independence from her or his screen image.\textsuperscript{139}

Celebrities may try scrupulously to "monitor" or "shape" their public image. However, they can never completely control what their persona will "mean" to the rest of society.\textsuperscript{140} Nor can the semiotic power of celebrity images be tied to one source. Star

\textsuperscript{138} Marshall, \textit{ibid.} at 99-100.

\textsuperscript{139} \textit{Ibid.} at 105.

\textsuperscript{140} Madow, \textit{supra} note 38 at 192.
images are authored by "...studios, the mass media, public relations agencies, fan clubs, gossip columnists, photographers, hairdressers, body-building coaches, athletic trainers, teachers, screenwriters, ghostwriters, directors, lawyers, and doctors." Celebrity personas are, thus, intertextual by nature. In other words, although a popular film star, for example, works primarily in one mediated form -- namely, the movies -- various extratextual discourses, or discussions stemming from newspapers, magazines, fanzines, and rumors, influence the configuration of the celebrity.

Investigators of public personalities -- paparazzi, gossip columnists, interviewers -- attempt to "catch" the celebrity as she or he leaves restaurants, galas, and the like. These sources compete to uncover the celebrity's true and "authentic" nature. No where is this more evident than in the instance of Princess Diana of Wales, a media icon who ultimately died trying to escape the paparazzi. The media's hounding of Diana and her family was rooted, in part, in the audience's need to venture beyond the artificiality of the pomp-and-circumstance persona of the Royal Family. Interested viewers saw a falseness in the prepared speeches and the staged photos. They did not want artifice, they wanted authenticity; they wanted the "real" Diana.

In essence, these extratextual sources provide the descriptive connections between a celebrity's "real" life and her or his "reel" life that configure the celebrity persona. These secondary sources deepen the meaning of the celebrity sign and connect it to the culture by highlighting its relevance to the daily life of the viewer. Audiences,

141 Coombe, "Author/izing," supra note 121 at 369-70.
142 Ibid. at 105-6.
143 Marshall, supra note 107 at 58.
in turn, 'select from the complexity of the image the meanings and feelings, the
variations, inflections and contradictions, that work for them.' While the precise
distribution of semiotic power will vary in every case, the role of the audience in the
creation of meaning cannot be ignored. Audiences, however, are often less concerned
with what stars think they "really" are than in what role celebrities play in the audiences'
struggle to make sense of human nature. Celebrities may be admired and worshipped
by audience members for their symbolic nature. However, to the actual celebrity
involved, this admiration may feel like an "embalming above ground." In the words
of Sylvester Stallone: "The image is forever. As much as I'd like to be broadening the
field, I have to be realistic. I'm caught in a certain persona. People see me a certain
way. It's a blessing, it's a curse, but it is something very rare. I can't fight it." 

The celebrity sign, then, is constantly engaged in a negotiation of authenticity, a
continual battle to make the image appear more true/real than what it is: an image. This

It is important to note that legal judgments are a part of these extratextual discourses. Though access may be
limited to law students and legal academics, the mass media often brings the law to the populous through reporting
and tabloid sources. Moreover, the law plays a role in the generation of "knowledges, spaces, categories,
identities, and subjectivities." Rights of publicity, freedom of expression guarantees, the reporting of celebrity
trials and the use of the celebrity trial as a popular genre on television and in movies (i.e., a fictionalized account of
a celebrity or notorious trial), all work in the production of meaning surrounding the celebrity persona. It is ironic
then that the law creates the cultural spaces necessary for the signifying practices of the celebrity images. It also
lends its authority to those meanings which the celebrity wishes to appropriate (see, for example, rights of publicity
and publicity law). Implicitly denied, in these instances, is the cultural value of other meaning: Coombe,
"Authorizing," supra note 121 at 386-7.


144 Madow, supra note 38 at 193.
145 Ibid. at 195.
147 Ibid. at 589.
148 Fowles, supra note 109 cited at 70.
discursive process is overseen by the "rhetoric of authenticity," a discourse which sets limits upon artifice.\textsuperscript{149} In other words, the power of the celebrity sign rests on the notion that the "markers of authenticity" can be trusted; they cannot be faked. When authenticity is revealed as technique, it loses its meaning.\textsuperscript{150} In other words, when behavior we usually consider authentic -- loss of control, lack of premeditation, privacy -- is proven to be constructed or artificial, we no longer believe in the realness of those actions.

Though the medium within which the celebrity performs -- film, television or popular music -- will influence the meaning of the celebrity sign, issues of truth and authenticity are central to each. In the film industry, for instance, celebrities are distanced from the audience and their image-text is far more controlled.\textsuperscript{151} In other words, the audience's will to knowledge about the screen celebrity's private and public life is dependent on the managed domain of knowledge provided by the narratives of his or her film texts.\textsuperscript{152} On the other hand, television celebrities embody the characteristics of "familiarity and mass acceptability."\textsuperscript{153} In the latter instance, the everydayness of the television celebrity allows her or his persona to move effortlessly between private and public spheres.\textsuperscript{154} Public discourse on Oprah Winfrey's weight loss and gain, along with

\textsuperscript{149} Gamson, supra note 130 at 143-4.
\textsuperscript{150} Ibid. at 144.
\textsuperscript{151} Marshall, supra note 107 at 188.
\textsuperscript{152} Ibid. at 117.
\textsuperscript{153} Ibid. at 119.
\textsuperscript{154} Ibid. at 146.
Jerry Seinfeld’s dating of a woman less than half his age, instances this. Constructed as authentic and sincere, Oprah and Jerry’s “real” lives are never elided from their stage performances; their public personas are “intensely invested with issues and concerns of the private sphere and associated subjectivity of that sphere.”

The popular music culture also centers on the discourse of authenticity. The popular music celebrity, as Marshall points out, is constructed quite differently than that of a film or television star. Music stars are constructed in accordance with the concept of “commitment.” Commitment refers to the intimate relationship of the audience to the star. It also refers to the authenticity of the artist:

At the center of these debates concerning the authentic nature of the music is the popular music performer; how he or she expresses the emotionality of the music and his or her own inner emotions, feelings, and personality and how faithful the performer is to the intentions of the musical score are all part of how the individual; performer is determined to be authentic.

At times, authenticity may be displayed through emotional sincerity. When this occurs, the artist’s very personal address is individualized even further by the private nature of audience reception. In other instances, however, discursive analyses of authenticity appeal to the recent apportioning of artists, industries, and artists into particular “taste cultures.” As such, a particular “consumption style” -- gangsta rap, for instance --


156 Also, the fact that both Oprah Winfrey and Jerry Seinfeld title their shows after their “real-life” names -- “The Oprah Winfrey Show” and “The Jerry Seinfeld Show” -- further blurs the distinction between private and public spheres of celebrity.

157 Marshall, supra note 107 at 148.

158 Ibid. at 150.

159 Ibid. at 163-4.
becomes central to the public presentation of identity.\textsuperscript{160} The significance of Tupac Shakur's celebrity evidences this.\textsuperscript{161}

The celebrity sign, thus, consists of two realities: (1) the celebrity's representation in films and on television, where the image is relatively fixed; and (2) the celebrity's supposed "real" life. With respect to the latter, this "real" life does not simply consist of her or his private life but also the public functions attended as a private person.\textsuperscript{162} While the fictional representations of the celebrity on the movie or television screen may greatly influence the audience's identification with a star, a celebrity may also attempt to gain autonomy from this more fixed image. Playing "serious" or against-type\textsuperscript{163} roles may achieve this. By doing so, an audience is unable to typecast a star or feel that they "know" a celebrity simply from the roles she or he plays.

A celebrity may also gain autonomy by actively reworking and publicly performing her or his private life for public consumption.\textsuperscript{164} One example of this can be found in the full-page advertisement taken out in by the celebrity couple, Cindy Crawford and Richard Gere, in the \textit{London Times}, May 1994. In this ad, Gere and Crawford proclaimed the strength of their marriage and indicated an interest in starting a family. This advertisement was extremely interesting, particularly in light of its timing.

\textsuperscript{160} \textit{Ibid.} at 164.

\textsuperscript{161} Tupac Shakur will be discussed in more detail in Chapter Four.

\textsuperscript{162} Marshall, \textit{supra} note 107 at 188.

\textsuperscript{163} "Off casting" or "playing against type" refers to the "flip side of matching offscreen and onscreen personas". This strategy provides the necessary variation in acting roles needed to sustain audience interest. It also works to 'enhance the image of the star as a great performer.' Gamson, \textit{supra} note 130 cited at FN 60 (citing Cathy Klaprat, "The Star as Market Strategy: Bette Davis in Another Light" in Tino Balio, \textit{American Film Industry}, Revised Edition (Madison: University of Wisconsin Press, 1985)).

\textsuperscript{164} Marshall, \textit{supra} note 107 at 188.
Not only did Gere and Crawford decide to separate two months after this advertisement was printed, but it came at a time when rumors were flying regarding the sexual orientation of both Gere and Crawford. Crawford had just finished a very risqué *Vanity Fair* cover with K.D. Lang and Gere was the subject of rumors concerning him and a gerbil (I will not go into details). Suffice it to say, regardless of the accuracy of these rumors, this advertisement was obviously an attempt to (re)construct Gere and Crawford’s heterosexual private life for public consumption.

In light of the above, it is obvious that the meaning of celebrity in contemporary Western society is based to a large extent on the audience’s need to know the celebrity’s true self or authentic nature. Knowledge of a celebrity’s “real” life, though, is always mediated through the (public) mass media. Accordingly, celebrity represents disintegration between the private and the public. This disintegration has taken on a particular form in contemporary society. In this instance, the private sphere is considered the “ultimate site of truth and meaning for any representation in the public sphere.”

As a result, these public accounts of the celebrity’s private life, together with what little first-hand knowledge an audience may have regarding a particular celebrity (obtained through public performances, press conferences, or concerts, for instance), work to convince the masses that they know a celebrity’s true personality. More than anything else, it is this knowledge which the audience strives to attain.

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167 Fowles, *supra* note 109 at 166.
(ii) affective truth

The all-American faith is that if you believe something hard enough, it must turn out to be true.

~ Steven Shaviro

If, in the antique legal maxim, to do justice is to follow the heart—corde creditur ad iustitiam—then how can justice be done by a subject who cannot feel?

~ Peter Goodrich

The populace does not accept, impetuously, everything it hears or sees in the mass media. Neither is audience participation 'limited to the choice between buying and not buying.' Instead, as consumers of cultural commodities, the audience is involved in an active, creative practice of appropriating the product (in this instance, the celebrity) and investing it with (new) meaning. This new meaning is often situated in the realm of affect. Marshall argues that the concept of affect is central to understanding the meaning and power of the celebrity. Studying the celebrity as a sign or as a system of signs (i.e., text) is necessary in order to reveal the affective attachments or connotations that are configured around the individual celebrity.

No where is the affective power of the celebrity sign more evident than in the area of advertising. It has become routine for culture and advertising industries to use celebrity images in order to enhance the marketability of certain commodities with which

168 Shaviro, supra note 1 at 15.
170 Madow, supra note 38 at 140.
172 Marshall, supra note 107 at 73.
173 Ibid. at 59.
they are associated. These attempts to link products with a massive public appeal beyond the realm of rational consumerism to that of affect and emotion. Even more than reason, affect is viewed as a powerful and expansive way to influence decision-making.

Most audiences realize the fictional nature of advertising. However, consumers can not help but feel an emotional attachment for the celebrity and product. This is because, on the emotional level, all images are real. Stated another way, "all images register an impact upon emotions." Accordingly, the entertainment industry, despite its artifice, provides an "emotionally-satisfying reality." Celebrities are a large part of this reality.

Similar to the process of signification, affect or the pleasure derived from celebrity images involves a negotiation between the viewer and the text. Julie D’Acci, for example, writes about how the lesbian viewers of the television series, *Cagney and Lacey*, often exploit the ambiguity of the textual relationship between the two female protagonists in order to highlight the homoerotic undertones and intensify the delight and desire they gain from the text. It is through these processes and pleasures of meaning-making that social audiences become spectators. In other words, while viewers may

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174 Coombe, "Authorizing," supra note 121 at 376.
175 Marshall, supra note 107 at 205.
176 Stivers, supra note 4 at 1267.
177 Ibid. at 1267.
179 Ibid. at 195.
180 D’Acci defines "social audiences" as already formed, a priori gendered and racialized subjects. In contrast,
initially be drawn to a television series or movie via disparate means (television promotions, talk shows, advertising, friends, etc.), once they enter into the show's 'regime of pleasure' and identifications, their subjectivities become influenced by the operation of the text.\textsuperscript{181}

In sum, the semiotic power of the celebrity sign to effect truth and reality stems from the disintegration of the distinction between the public and private spheres. The celebrity persona is inextricably linked to the private/personal realm, a sphere which is regarded not only as more "real" than the public one, but as one which is considered the ultimate site of truth and meaning for any public representation.\textsuperscript{182} In addition, affect has the power to take these truth-seeking inquiries out of the realm of the social and into that of the subjective or personal.\textsuperscript{183} In other words, as the pleasure derived from a celebrity text is experienced as "real" for many people, truth becomes a feeling, an emotion, and not always a rational response.

\textsuperscript{181} Ibid, at 172.
\textsuperscript{182} Marshall, \textit{supra} note 107 at 247.
\textsuperscript{183} Ibid, at 173.
c. legal stories & celebrity-truths

Truth in law...is simply a matter of how the forms of legal argument are used.

~ Michael Dorf, paraphrasing Dennis Patterson

...[R]ealism is the illusion of truth; non-realism is the truth of illusion.

~ Laurence Coupe

The adversarial system of justice is premised on a contest between two parties. Competing versions of truth and reality are presented. The legal audience -- jurors, judges, lawyers, law students, the media, and the public -- must assess which representation or story is the true or real one. Truth, according to cultural critic John Fiske, is as much a matter of social experience as it is universal nature. People decide what to treat as true. Social experience lends credibility to certain assertions; truth becomes the consequence of this credibility. What makes something credible involves a complex process of forming alliances among believers. Social experience and history often inform these connections. Reality, then, is social in nature: to become singular and attain the status of truth, other realities have to be denied. The power to deny other realities and get your reality treated as truth is one of the most important powers in

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186 Professor Wes Pue pointed out that, together, all these people constitute the audience in a legal play.: Personal communication with Professor W. Wesley Pue, UBC, March 1998.

187 Fiske, “Admissible Postmodernity,” supra note 75 at 918.

188 Ibid. at 925.

189 Ibid. at 925.
Effective legal persuasion, then, involves “gaining control over reality.” In the courtroom, the reality that counts most is the one that people carry around in their heads: “the popular images, stock stories and character types, the familiar plot lines and recurring scenarios.” Celebrity images, particularly visual representations, are not of this reality, but a part of it. These images have come to constitute a kind of language. Television images, for instance, appear to describe reality; more importantly, reality is perceived to be that which is on television. This is especially the case with television news programs, documentaries, talk shows and game shows. Other shows - soap operas, sitcoms and other dramas - are accepted as unreal. However, emotionally they are real, just as real as the programs that appear congruous with reality. Accordingly, truth -- “the perceived correspondence between image and reality” -- now equals the power to make reality through visual media.

Courtroom practices in a celebrity trial involve the employment of mythic images or culturally ingrained conceptions of what it means to be a celebrity in contemporary society. These images help orient the legal audience towards a shared cultural storyline. Using the O.J. Simpson criminal trial as an example, the following will demonstrate how,

190 Ibid. at 918, 926.
191 Sherwin, “Introduction,” supra note 2 at 893.
192 Ibid. at 893.
193 Fiske, “Admissible Postmodernity,” supra note 75 at 928.
194 Stivers, supra note 4 at 1266.
195 Ibid. at 1267.
196 Ibid. at 1272.
when faced with numerous versions of truth, the celebrity sign gives meaning to these stories and aids in the resolution of a particular case.

In Simpson’s trial, it is obvious that Simpson’s celebrity status, along with his race, class and gender, and aesthetic appeal, played a large role in his acquittal. Looking solely at Simpson’s celebrity for the moment, his public persona could be described as “[t]he smiling, ubiquitous rental car running back [who] moved seemingly effortlessly from the center of the football field to the center of the advertising world to the center of the movie screen, in command (though never obnoxiously assertive) of ever larger shares of national audience.” Simpson had that “indescribable je ne sais quoi” that made people want to follow him, know him, believe him and help him. Simpson’s “good guy” public persona soon became inseparable from the “real” O.J.; both images were considered one in the same - or at least considered a large component of the another.

The Prosecution’s job in Simpson’s trial was to present evidence that countered this image of O.J. as “national hero” and to destroy the popular conception of Simpson as a “handsome, suave, talented and charismatic spokesperson for the American dream.” This was a very difficult task for the Prosecution. And one that ultimately failed. States Los Angeles District Attorney, Gil Garcetti: ‘There is no doubt

197 Issues of race, class, gender, and aesthetics and their relationship to the celebrity sign, will be discussed in further detail in Chapter Two.


201 Ibid. at 1.
that O.J. Simpson the persona, the hero, is something that most people don’t want to let go....' Peter Arenella argues that the evidence presented regarding the domestic violence perpetrated by Simpson on his wife, Nicole Brown Simpson, was part of this "counter-attack." This evidence was necessary in order to "...strip O.J. of an advantage that most criminal defendants lack: a real, not just a legal, presumption of innocence." The introduction of domestic violence evidence can be interpreted as foresight on the prosecution’s part as to the possibility that Simpson’s celebrity would make the legal audience believe they “knew” him. And, the “him that they knew” -- the “Juice” -- would not, could not, commit something as heinous as murder. What the prosecuting lawyers underestimated, though, was the affective power of Simpson’s to influence the “emotions, fantasies, ideals and self-deceptions” of the mass of contemporary Western culture.

Law partakes in the affective realm when “jurors bring their feelings and fantasies (albeit unwittingly) to the task of crediting one legal story over another and when they determine how the law shall apply to the story they have chosen to

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204 It is important to note that Arenella’s comment is directed primarily at black criminal defendants. In the trial of William Kennedy Smith for date rape, for example, both the alleged perpetrator and the alleged victim were white. According to Devon Carbado, “Smith’s race and class made it difficult for America to see him as a rapist.” Smith was viewed as being ‘too cute’ to commit the crime: Devon W. Carbado, “The Construction of O.J. Simpson as a Racial Victim” (1997) 32 Harvard Civil Rights-Civil Liberties Law Review 49 at 98. Implied was that, given his race, his stature and his good looks, Smith did not need to rape someone; he could “get” any woman he wanted. This argument, however, completely ignores the racial foundation of aesthetics (discussed in Chapter Two), along with the issues of power, control, and misogyny, deeply embedded in male violence against women in contemporary Western culture.

204 Sherwin, “Introduction,” supra note 2 at 898.
believe."\(^{205}\) Although it is recognized that emotion exists in a courtroom, affect has yet to be accepted as a legitimate reason for deciding a certain way in a jury trial. For example, at least one commentator argued that, “Despite the amazing mountain of evidence, millions defend [O.J. Simpson’s] innocence to this day. They ditch logic and reason to find a way to make Simpson innocent.”\(^{206}\) This statement not only denies the affective power of the celebrity sign, it implies that Simpson was not innocent and that the (primarily African American) jury did not take their job as truth-seekers seriously.

Simpson, it must be remembered, was like a member of the family to many people in the United States (especially black Americans).\(^{207}\) So much a part of American life was he that Simpson was given the love usually reserved for a brother, uncle, or cousin. Accordingly, when Simpson was charged with murder, it was like having a friend or family member accused of a crime.\(^{208}\) Is it not possible, then, that the (primarily black) jury believed Simpson was innocent simply because people seldom believe someone they know and love could do anything so depraved?

This is, of course, a partial explanation. Factors such as race, gender, class, and aesthetics also played a role in the affective and semiotic power of Simpson’s celebrity and the stories told and believed in the courtroom. Although a discussion of these factors is forthcoming (see Chapter Two), suffice it to say that determinations of the

\(^{205}\)Ibid. at 898-9.

\(^{206}\)Siegal, supra note 199 at 3.

\(^{207}\)Rick Bragg, “Both Crimes Brutal, But Punishments Caught Vary,” Star Tribune (Minneapolis), January 23, 1995 at 4A.

\(^{208}\)Ibid. at 4A.
credibility of celebrity-truths,\textsuperscript{209} or stories held out as true by a celebrity, are extremely complex. Such judgments rely heavily on the cultural myths and shared storylines regarding what constitutes celebrity in Western society.

iv. summary

In sum, celebrity legal storytelling highlights the celebrity persona and the affective attachments therein. The meaning of the celebrity is looked upon in order to make some sense out of the mass of conflicting information presented at trial. The celebrity sign works to orient an audience towards a particular reality. It sets limits on what stories can be told about a particular celebrity and which ones audiences will believe. In this process, other realities are denied, other stories repressed. In the end, the truth of a legal story rests on the semiotic and affective power of the celebrity sign and persona to make reality.

\textsuperscript{209} This term relies on Fiske's concept of police-truth, or the production of truth, by the police, in the form of scientific, objective discourses of evidentiary procedures.

According to Fiske:

It is generally to the advantage of the power structure to believe that truth is produced by objective or scientific processes rather than social ones, and to 'know' that evidentiary procedures and the 'police-truth' they produce are scientific, objective and thus colorless. In cases where truth can never be absolute, relying on the enlightenment notion of truth that transcends the conditions of its production and is accessible by means of a universal, a social rationality is a modernist anachronism that is rhetorically effective because it disguises its advancement of the interests of the powerful.

It is important to note that the credibility of 'police-truth' differs significantly for black and white Americans. "a CNN poll taken after the three weeks of intensive cross-examination of police witnesses revealed that seventy percent of whites believe that police tell the truth on the witness stand, whereas only thirty-three percent of African Americans do." Accordingly, racialized "ways of knowing" with respect to the credibility of this police-truth include the process of its production. In other words, evaluations of credibility of police statements in court depend less on the skill of the lawyers involved and more on the social situation, experience and history of those who decide to treat a particular credibility as truth: Fiske, \textit{Media Matters, supra note 22} at 924-5.
chapter two:
legal storytelling
& the celebrity "other"

i. race, gender, class, & celebrity in law

Does everyone agree that this is not the time and place to even the score on any of those issues on women, on men, on race, on abuse, any of that or celebrities?

~ Marcia Clark, OJ Simpson Trial

Legal storytelling consists not only of those stories told inside a courtroom during a trial, but also of narratives outside the law, stories which influence the meaning of law within a given society. The latter type of storytelling, in its critique and departure from the normative assumptions of neutrality and objectivity in law, is particularly useful when examining issues of race, gender and class in the Western legal system. Stories told by black people, women, and the poor, to name a few, call attention to experiences and

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3 Though race, gender, and class are but a few categories of identity by which people make sense of their lives and the celebrity in contemporary Western culture, constraints in time and space dictate that I concentrate simply on those three. Race will be discussed primarily in terms of black/white relations. The purpose of this restrictive examination is not to exclude or trivialize the experiences of other people of color. Instead, as much of the material on popular culture comes from United States sources and issues of blackness and its representation in American popular culture weigh heavily in these discussions, I have decided to concentrate on the race issues as defined by black Americans in this thesis. Hopefully, the analysis itself can be applied to other Western capitalist countries and to people of other races, sexual preferences, classes, and abilities.

Throughout this chapter, I will capitalize neither "woman" nor "black." The reason for this is based on Angela Harris' assertion that "race and gender issues are intricately intertwined, and to capitalize 'Black' and not 'Woman' would imply a privileging of race with which I do not agree.": Angela Harris, "Race and Essentialism in Feminist Legal Theory," in D. Kelly Weisberg, ed., Feminist Legal Theory - Foundations (Philadelphia: Temple University Press, 1993) 348 at FN2.
viewpoints typically ignored in law and legal analysis. These ‘outsider jurisprudence’, as Mari Matsuda characterizes them, ‘open new windows into reality, showing us that there are possibilities for life other than the ones we live.’

“Outsider” legal storytelling is especially important in trials of celebrity “Others.” Despite the increasing visibility of celebrities that are neither white nor male in the mainstream popular media, Jib Fowles’ 1992 study of American celebrities demonstrates that the white male celebrity continues to be the norm. What happens, then, when the celebrity on trial is black or female or both? Although celebrity “Others”

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6 The term “Other” has gained much force and recognition since Edward Said’s critique of “orientalism.” Said’s work looks at the ways in which the West has represented the Orient. According to Said, ‘the Orient has helped define Europe (or the West) as its contrasting image, idea, personality, experience...The Oriental is irrational, depraved (fallen), childlike, ‘different’; thus the European is rational, virtuous, mature, normal.’: John M. Kang, “Deconstructing the Ideology of White Aesthetics” (1997) 2 Michigan Journal of Race and Law 283 cited at FN13 (citing Edward W. Said, Orientalism (New York: Pantheon Books, 1978) at 1-2, 40).

For more on the role of the “Western imperial gaze” in constructing cultural “Others,” or people whose “difference” works to reinforce and perpetuate the “norm,” see Leslie G. Roman, “Denying (White) Racial Privilege: Redemption Discourses and the Uses of Fantasy” in Michelle Fine, Lois Weis and Mun Won, eds., Off White (New York: Routledge, 1996) at 2 (The page number is referenced to a copy of the article given to me by Professor Susan Boyd, Faculty of Law, University of British Columbia).

In this instance, the term, celebrity “Other,” refers to the celebrated few who defy the white male norm.

7 For this study, Fowles chose 100 (out of a possible 433) celebrities listed in Current Biography — “the standard library reference work on those individual who evoke general interest” — between the years 1966-1985. Chosen were individuals who had an “indisputably high name recognition value and starring status.” According to this study, the contemporary celebrity profile is as follows: two-thirds of the performers are male; only eight percent are of minority origin; 51% are actors and actresses, 18% are musicians, 15% are comedians (in all media), 14% are athletes, and 2% are something else.

Although Fowles claims he adjusted his sample so that it matched these established distributions in performance field, gender, and ethnicity, it is interesting to note how the black celebrities fared in these categories. Statistically speaking, of the seven black celebrities chosen for this study, all were male. Moreover, of these seven, three were sports figures: Wilt Chamberlain, Joe Louis and Jackie Robinson. The remaining four were musicians: Louis Armstrong, Nat “King” Cole, Duke Ellington and Jimi Hendrix. No black women, no black comedians and no black actors or actresses were included in this sampling.

are celebrities, and privileged in that sense, these individuals are also members of subaltern and gender-subordinated social groups. Accordingly, they are "Othered," their experiences dismissed and/or simplified in contemporary Western society. How, then, do representations of race, gender, and class in popular culture influence the semiotic and affective power of the celebrity "Other"? What legal stories can be told in the trial of a celebrity "Other"? What effect does race, gender, and class have on the credibility given to celebrity-truths and celebrity legal stories in the courtroom?

a. judicial theater, cultural scripts

Many legal theorists reject the notion that law is theatrical in nature. Dramaturgical analogies are viewed as an "intrusive embarrassment to the scientific and businesslike austerities of the courts." Despite these criticisms, however, courtroom action is theater and celebrity trials provide the necessary source and setting for drama in this theater of justice. Though lacking a stage, curtains, and spotlights, the physical design of the courtroom, along with its costuming and ceremony, create a "dramatic aura." The presence of a judge, jury, and courtroom spectators lend a theatrical


10 This term comes from theorist, Jeremy Bentham, who "referred to the courtroom as 'the main theater of justice' and the judge's chambers as the 'little theater of justice'": Ibid. cited at 86 (citing Jeremy Bentham, "Rationale of Judicial Evidence" in J. Bowring, ed., VI Works of Jeremy Bentham (1838-1842) at 354).


12 Rising as a judge enters the courtroom is one example.

13 Ball, supra note 9 at 83.
ambiace to the whole proceeding. This audience helps the actors keep their perspective, “thereby prompting them to perform their proper roles.” In addition, the adversarial nature of the proceedings provides the format of drama: “Protagonist and antagonist confront one another, present conflicting versions of the past and establish a problem to be solved.”

In this judicial theater, materials of fact and law (text) are transformed into a persuasive statement of what should be done in a given situation (metaphor) via the courtroom presentation (performance). This courtroom presentation, or creation of metaphor, is “marked by the coincidence of the opposites of fact and illusion.” Illusion, in this case, is not falsehood or perjury. Instead, it consists of “facts selected and established through artful, sometimes fortuitous, sequence.” Such metaphoric techniques are necessary in order to persuade and convince in a courtroom. The more metaphoric and dramatic an argument, the more persuasive it will be. In other words, a “highly self-restrained style of legal storytelling may make poor theater”. Poor theater fails in its ability to convince an audience that what is being performed is real and true.

In the theater of justice, pre-ordained cultural scripts, or ways of talking about particular cultural phenomena, are relied upon in order to obtain maximum persuasive value. Embodied in these scripts are various ways of seeing and knowing. These scripts

14 Ibid. at 86.
15 Ibid. at 88.
16 Ibid. at 91-2.
help legal audiences establish their place in the surrounding world and the place of others around them. As such, the ensuing examination will explore the ways in which these cultural scripts intersect and give meaning to the judicial play, or, in this instance, the legal scripting of the celebrity "Other."

b. signifying the celebrity "other"

Judicial theater relies, in part, on meaning produced and disseminated via the contemporary Western mass media. Popular culture acts as an arena in which the struggle for and over meaning is fought. Dominant groups try to naturalize the meaning that best serves their interests; subordinate and marginalized groups try to resist this process. The effort and success of both groups varies. Factors such as race, class, and gender have a tremendous affect on the meaning given to and taken from popular culture images and symbols. These popular conceptions, in turn, influence judicial theater. Accordingly, it is important to look at the ways race, class, and gender act upon the semiotic and affective power of the celebrity before we can determine how a legal audience might respond to this power.

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18 John Berger, et al., *Ways of Seeing* (London: British Broadcasting and Penguin Books, 1977) at 7 (the "way we see things is affected by what we know or what we believe").


(i) aesthetics, celebrity, & truth

The true nature of a heart is seen in its response to the unattractive.\(^\text{21}\)

A celebrity's fame is never based solely on her or his talent.\(^\text{22}\) More often than not, it is the aesthetic appeal and charismatic charm of an individual, and not any innate all-encompassing talent, that catapults her or him to the top. Societal aesthetic values determine who or what will be considered 'valued, beautiful, and entitled to control' in any given society.\(^\text{23}\) Aesthetics is also connected to truth in Western society. As John Keats wrote long ago, "'Beauty is truth, truth beauty,' -- that is all/ Ye know on earth, and all ye need to know."\(^\text{24}\) According to Keats, beauty and truth are one in the same.\(^\text{25}\) Beauty is an "expression of emotion".\(^\text{26}\) Emotion is presumed to be true and real by the

\(\text{21}\) "Valentine's Story," e-mail received February 1998. This narrative tells the story of a young soldier, John Blanchard, who becomes taken with a women whose "soft" handwritten notes were penciled in the margins of a book he took out from a Florida library. He tracked this woman down and they corresponded by mail for a year and a month while he was overseas serving in World War II. Upon his return, he wanted desperately to meet this woman who he had been writing to for so long. They agreed to meet at Grand Central Station in New York City. To aid in his identification of her, she agreed to wear a red rose on her lapel.

The story goes on to explain how a beautiful women approached him on the platform, "her figure long and slim. Her blonde hair lay back in curls from her delicate ears; her eyes were blue as flowers. Her lips and chin had a gentle firmness...." She, however, was not wearing a rose. Instead, a woman directly behind her -- older, plump, with graying hair and "thick" ankles -- was wearing the rose on her lapel. Blanchard was torn. He so wanted to be with the beautiful woman. Yet, he convinced himself that, although it would not be love, he could find friendship with this older woman. He went up to the older woman and introduced himself. "The woman's face broadened into a tolerant smile. 'I don't know what this is about, son,' she answered, 'but the young lady in the green suit who just went by, she begged me to wear this rose on my coat. And she said if you were to ask me out to dinner, I should go and tell you that she is waiting for you in the big restaurant across the street. She said it was some kind of test!'"

This story says much about the connection of love, truth, and aesthetics.


\(\text{25}\) Kang, *supra* note 6 at 285.

\(\text{26}\) E.F. Carritt, *An Introduction to Æsthetics* (London: Hutchinson's University Library, 1949) at 68.
person experiencing these feelings.

Emotional or aesthetic reactions, however (i.e., feelings of beauty, ugliness, attraction, repulsion), are not given or unmediated. They stem from personal experience and from social habits and patterns. Aesthetic meaning, in other words, is semiotic as well as corporeal. Nothing is inherently beautiful or ugly. Instead, notions of beauty and ugliness serve solely as symbols. These symbolic images and cultural icons operate as a distinctive language of aesthetics. Aesthetics, thus, involves not only the judgments we make in reaction to an image but also the images themselves. Neither the image nor the reaction is epistemologically stable or certain. Both simply contain the appearance of objective and absolute Truth.

The semiotic aspect of the aesthetic realm helps explain the dominance of, for example, the ideology of white aesthetics in Western society. Whatever its origin, feelings of racial hostility find “sensory intensification and symbolic expression in an aesthetic element.” This ideological aesthetic of race ensures that the physical racial features of white people are viewed as “objectively appealing” and “universally true.” In contrast,


29 For example, “racist attitudes to migrants stem from diverse cultural, emotional, and economic sources, including fear of change, employment insecurity, and the disturbance of a community’s complacent approach towards its own traditions. These factors often generate an intense and violent resentment...Xenophobia employs aesthetic arguments as well as economic and social ones. It appeals to a certain norm of beauty and ugliness.”: Manderson, supra note 27 at 89-90.
“the physical racial features of people of color are seen as subjective and deviant.” Like other contemporary ideologies, the ideology of white aesthetics attempts to explain society through a system of shared beliefs. These ideological assumptions allow individuals to make certain judgments and evaluations about this society and to justify their thoughts and actions regarding social hierarchies and cultural differences.

The ideology of white aesthetics is sustained through popular culture and the mass media. Most Western celebrities embody, without challenge, accepted notions of femininity and masculinity. These conceptions are intimately tied to aesthetics: "Masculinity has been associated, perhaps most notably, by a powerful physique. By contrast, femininity is associated with a slight, delicate body." Both are based on contemporary Western white standards of aestheticism. In other words, despite the possession of a powerful physique, black men, for instance, have historically been labeled hyper-masculine and, thus, outside acceptable standards of masculinity. For black women, femininity itself is based on light skin and white features. Writes Judy Scales-Trent in her book, *Notes of a White Black Woman: Race, Color, Community*: ‘Finally I had straight hair to match my light skin. Finally I looked beautiful. Finally I looked white.’

Notwithstanding the ideology of white aesthetics, occasions arise in contemporary

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30 Kang, *supra* note 6 at 286.
33 *Ibid.* at 310.
society for white people to admire and idolize people of different races. One example is the enormous semiotic and affective power the athletic black male has over white men and women. This reverence, though, is often based on a fixation with the black male’s “racially peculiar” characteristics. In other words, seemingly positive images are actually based more on racial exoticism than racial aesthetic acceptance. Instead of viewing different races as aesthetic equals, racial exoticism, attributes “some extraordinary quality to a race by virtue of the members’ physical features which, in turn, makes them appear alluring or attractive.” In a society premised on the ideology of white aesthetics, positive images of Asian, black and other men and women of color, are portrayed in a manner closer to racial exoticism than genuine racial aesthetic acceptance.

The principal danger of racial exoticism lies in its failure to challenge the existing systems of oppression and the racial and gender stereotypes embedded within. As Edward Said’s work in orientalism has taught us, a thin line exists between “admiring fascination and loathsome fear” for the “Other.” While white society may hold a particular celebrity “Other” in high regard, this admiration is very unstable. With the underlying system of oppression being left intact, it takes very little for a white audience to turn against the celebrity “Other” and towards racist and sexist stereotypes. In addition, if the celebrity “Other” is admired because of certain stereotypical racial or gender qualities —

35 Kang, supra note 6 at 344.
36 Ibid. at 286-7.
37 Ibid. at 287.
38 See footnote 6 for more details on Said and “orientalism.”
39 Kang, supra note 6 at 344-5.
the athletic prowess of a black male, for instance -- no guarantee exists that what one day is loved by a white audience, might, the next day, be despised by the same audience. Aesthetic assessments, in other words, are intimately connected to issues of power and social control.

In light of this racial exoticism, the semiotic and affective power of the celebrity "Other" is inconsistent and volatile. The O.J. Simpson murder trial evidences this. Once looked upon fondly by members of white society for his athletic accomplishments and masculine appearance, O.J., during his trial, became characterized as "an excessively masculine beast-like man who needed to be punished for sexually seducing, and then killing, a White woman." Accordingly, the alleged acceptance of a black man in the mainstream media does not necessarily undermine the ideology of white aesthetics. It may, instead, uphold this ideology. Racist and sexist stereotypes may be used to justify the exclusion of the celebrity "Other" from aesthetic values.

Racial exoticism is also problematic in its acceptance of the physical characteristics of the "Other" only when appropriated by white celebrities. For example, celebrity George Hamilton is renowned for his permanently-tanned skin, Bo Derek for her cornrowed hair in the movie, 10. In both instances, the appropriation of black features -- brown skin and cornrowed hair -- does not challenge the ideology of white aesthetics. The darkening of the skin through artificial or natural means is not equated with blackness; it, instead, epitomizes leisure and the good life. In other words, Hamilton's tan, darker than the skin of many black people, does not subsume his whiteness. Instead, it

40 Ibid. at 344-5.
“compliments and enhances” his privileged status as a white celebrity.\(^{41}\) In addition, Bo Derek’s appropriation of the cornrow hairstyle for a Hollywood movie signaled not a welcoming of black aesthetics to mainstream media. Instead, in this instance, racial exoticism worked to “deculturize” and “depoliticize” the meaning of cornrows in African American culture and the black aesthetic.\(^{42}\)

bell hooks writes about the appropriation of black culture by white celebrities such as Madonna and Sandra Bernhard. She argues that white audiences view this appropriation as yet another sign of the “radical chic”-ness of these female celebrities.\(^{43}\) In seeking the “‘nasty’ blackness” that good white girls are supposed to stay away from, white and other non-black consumers come to see Madonna and Sandra as rebellious, unique, and ever so cool. The fortunes of these women attest to the lucrativeness of this appropriation. One interview has Madonna stating that she has always envied black culture and, as a child, had wanted to be black. According to hooks, it is a sign of white privilege to be able to idolize and imitate black culture without fully understanding the complexity of black pain or pleasure and without taking into account the fact that this culture was created out of resistance to racism and oppression.\(^{44}\)

Black women may try to distance themselves from white standards of beauty via “negation and antithetical behavior.” However, they can never free themselves completely of the racism that underlies aesthetic standards; “they merely give themselves

\(^{41}\) Ibid. at 320.

\(^{42}\) Ibid. at 312 and 316.


\(^{44}\) Ibid. at 158.
over to it.”\(^{45}\) In other words, although many black women dismiss and defy dominant standards by adopting a distinctively black aesthetic, these women are aesthetically assessed in terms of their difference/deviance from the norm: whiteness.\(^ {46}\)

In light of the prevalence of racial exoticism in contemporary Western society, any pleasure derived from representations of racial and gender difference in the mass media is often premised on the commodification of “Otherness.” In other words, racial and gender difference are offered as new delights, intensified ways of doing and feeling. According to bell hooks, “[w]ithin commodity culture, ethnicity becomes spice, seasoning that can liven up the dull dish that is mainstream white culture.”\(^ {47}\) hooks terms this commodification “eating the other”:

> The desire to make contact with those bodies deemed Other, with no apparent will to dominate, assuages the guilt of the past, even takes the form of a defiant gesture where one denies accountability and historical connection. Most importantly, it establishes a contemporary narrative where the suffering imposed by structures of domination on those designated Other is deflected by an emphasis on seduction and longing where the desire is not to make the Other over in one’s image but to become the Other.\(^ {48}\)

The acknowledgment that there is pleasure to be found in racial difference can, on the one hand, present a challenge to dominant systems of oppression. However, with this challenge lurks the danger that “cultural, ethnic, and racial differences will be continually commodified and offered up as new dishes to enhance the white palate - that the Other will be eaten, consumed, and forgotten.”\(^ {49}\)

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\(^ {46}\) Ibid. at 883.


\(^ {48}\) Ibid. at 25.

\(^ {49}\) Ibid. at 39.
It is important, then, to always be critical of “border-crossing, ‘eating the other’ culture bandits” who use “Otherness” as a commodity in mainstream media. However, equally harmful is the “white cool” cynicism of white filmmakers, such as Quentin Tarantino. Tarantino’s vision of contemporary postmodern society recognizes that racism, sexism, and homophobia do exist. Yet, “none of that shit really matters”; or if it does matter, it means nothing “cuz nuthin is gonna change.” It is implied that domination is here to stay, it is going nowhere, and everybody is in on the act. Women’s liberation, in this instance, is just another scam; blackness -- personified solely by black men -- is simply a “dick thing, wanting to be right there in the mix, doing the right thing in the dance hall of white supremacist capitalist patriarchy.”

Audiences may seek some “hidden subversive message” from Tarantino’s films. However, the only message, says hooks, is this: “everybody is in the corrupt jungle doing their own sweet version of the domination dance. This is multiculturalism with a chic neofascist twist.”

In light of the above, it is obvious that the semiotic and affective power of a celebrity “Other” is very incoherent and ambiguous. The acceptance of racialized and

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50 bell hooks, Reel to Real: Race, Sex, and Class at the Movies (New York: Routledge, 1996) at 47.

Director/screenwriter/actor, Quentin Tarantino has been described as “the most distinctive and volatile talent to emerge in American film in the early ‘90s.” By 1994, with films such as Reservoir Dogs (Miramax, 1992), True Romance (Warner Bros., 1993) and Pulp Fiction (Miramax, 1994) under his belt, “Tarantino was elevated from a cult figure to a major celebrity.” “All-Movie Guide” <http://allmovie.com/cg/AVG.exe?sql=2p_IDPl13658> (24 April 1998).

51 hooks, ibid. at 47-8.

52 Ibid. at 48.

53 Some other examples of Tarantino’s work include Four Rooms (Miramax, 1995) (Screenwriter/ Executive Producer/ Director/ Actor), and Jackie Brown (Miramax, 1997) (Screenwriter/ Director/ Actor).

54 hooks, Reel, supra note 50 at 49.
gendered images in popular culture does not ensure that such images will be aesthetically acceptable or affectively powerful. Nor does it mean that racism and sexism no longer exist in mass media representation.\textsuperscript{55} As bell hooks writes: "Until both colonizer and colonized decolonize their minds, audiences in white supremacist cultures will have difficulty 'seeing' and understanding images of blackness that do not conform to the stereotype."\textsuperscript{56}

(ii) authenticity, credibility, & power

The race, class, and gender of the celebrity will influence the perceived authenticity of the celebrity sign. No simple one-to-one correlation exists, however, between whiteness, maleness, wealth, and truth-telling power. Instead, the social situation of the audience, along with discourses of authenticity and the desire to journey "into and beyond the world of the other,"\textsuperscript{57} work to influence the credibility given to the celebrity "Other."

In order to determine credibility, treatments of difference in the mass media are read in terms of how they stand up against "reality" as experienced by members of the viewing-community.\textsuperscript{58} The sense of authenticity derived from certain representations in popular culture will depend on the social experience of those interpreting these images. For instance, often rappers are viewed as being authentic voices of blackness in popular culture; they narrate the "real lowdown inside story"\textsuperscript{59} on what it is like to grow up poor,

\textsuperscript{55} Ibid. at 74.
\textsuperscript{56} Ibid. at 72.
\textsuperscript{57} Ibid. at 2.
\textsuperscript{58} Herman Gray, Watching Race: Television and the Struggle for 'Blackness' (Minneapolis: University of Minnesota, 1995) at 7.
\textsuperscript{59} This phrase is borrowed from Billie Holiday. See: Billie Holiday (with William Dufty), Lady Sings the Blues
black and male in America. Rappers who resist the telling of this narrative, are often regarded as impostors to the tradition. While many people, white male conservatives for example, may not dispute rap’s authenticity, they may challenge the violence embedded in rap and its corruptive potential on middle-class white children. In other words, rap may signify authentic ghetto-life but they do not want their children to hear about it. It is important to note, however, that mainstream white culture is less concerned with black male sexism and misogyny, when unleashed against black women and children, than it is the with the utilization of black vernacular popular culture by young white consumers to disrupt bourgeois values.

Other audience members, particularly those who have experienced poverty and racism in America, may doubt the authenticity of popular rap. In other words, their experience is not the experience rapped about in popular culture. Alternatively, they may dispute the authenticity of the rappers who are getting paid large sums of money to talk about the “realness” of poverty. For example, the authenticity of Tupac Shakur’s gangsta persona was called into question due to his status and wealth as one of America’s most popular rappers. Still others may argue that rap simply represents urban male

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60 Todd Boyd, *Am I Black Enough For You?: Popular Culture From the 'Hood and Beyond* Bloomington: Indiana University Press, 1997) at 41.


62 Rappers, such as Shakur, are often despised by real gangsters (or Original Gangsters -- OGs -- as they are called) because rappers get rich off the commodification of violent ghetto images - while bringing nothing back into the ‘hood. Some argue that it was Shakur’s commodification of ghetto life that got him killed: ‘This is a man who leeches off the community, gave nothing back. This is a man who owed people...This is a man who was gunned down because he owed. Fuck Tupac Shakur.’: Ivan Solotaroff, “Gangsta Life, Gangster Death,” *Esquire*, December, 1996 cited at 78 (citing “Steel,” former Crip gang member).
existence. It configures a "boys' world" where men are featured as violent "gun-toting misogynists". Authenticity, in this instance, is a little one-sided, male-sided.

The authenticity of an image is assessed not only in relation to the audience's experience. It is also judged in terms of how it stands up against other representations in the mass media. Authenticity, then, depends on the nature of other images disseminated on television or movie screens. Unfortunately, representations in popular culture rarely challenge us. Instead, they tell familiar stories and rely on popular myths that affirm dominant ideology. This is especially the case when faced with issues of race, gender or class. The experiences of minority and subaltern groups are seldom depicted in the mass media. If presented, issues of race and gender, for instance, are often constructed as mutually exclusive categories of representation.

The authenticity of an image and the credibility given to a celebrity "Other" are inherently connected to these racist and sexist representations in popular culture. According to Robert Gooding-Williams, black bodies, both male and female, have become saturated with meaning in contemporary Western society through their representation in the mass media. From the dawn of the motion picture industry, racist portrayals of black men and women have been offered up as reality on the big screen. D.W. Griffith's Birth

63 Boyd, supra note 60 at 41.
of A Nation (1915) is but one example of this. This film tracks the breakup and reunification of the United States by following two white families, one from the North and one from the South, through the Civil War, Reconstruction, and Redemption. Black slaves are depicted throughout the film as “content, expressing their happiness in song, dance, and faithful service to master...In contrast, the lascivious ‘black buck’ emerged after the Civil War, ‘oversexed and savage, violent and frenzied as they lust for white flesh.’" The Ku Klux Klan is cast as the heroic rescuer of a white woman being raped by a group of black men. Not only does this film deny the place and function of black women in the cinema, black men are portrayed as sexual threats to the purity of white women and biological threats to the purity of the white race.

Mass media producers continue to represent black men and women in ways that are little more than racist stereotypes. For instance, with respect to black men, Hollywood continues to offer images that are at the extremes of good and evil: criminals and drug dealers on the one end and sexually (and thus politically) impotent human beings on the other. Resulting from these simplified images is ‘a vast empty space in representation.’

69 Harris, supra note 65 at FN62.
70 hooks, Reel, supra, note 50 at 202.
72 Sidney Poitier often played characters in line with the latter stereotype: Ibid.
For more information, see Ed Guerrero, Framing Blackness (Philadelphia: Temple University Press, 1993) at 72.
73 Ibid. (citing Guerrero, Black at 397).
This flat binary construction of black manhood neglects 'the intellectual, cultural, and political depth and humanity of black men, as well as their significant contribution to the culture and progress of this nation.' Instead, black male bodies are represented as a 'nexus of sex and savagery': whites' 'worst fear and their best fantasy.' These representations shape contemporary views of desirable male sexuality.

As a result, representations of blackness in contemporary Western popular culture work to sexualize racial difference. The hypersexualization of the black male works as a strategic mechanism for arguing that racism is not imperialist, but defensive: white society must protect "its women" from black men. These racist assumptions effectively work to keep "whiteness" invisible and off the agenda for interrogation. Racial issues become (dis)located exclusively on the black side of the case. Implied is the notion that only non-white people have racial identity, that racial interests are shared only among non-white people, and that the whites involved are "raceless." Such singularity can lead white audiences to infer that racism simply exists only in the perceptions of people of color. Whiteness can, once again, "evacuate itself from the racial problem."

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74 Ibid. (citing Guerrero, Black at 397).

75 Glenn Jordan and Chris Weedon, "Chapter 6: Feminism and the Cultural Politics of Gender" in Glenn Jordan and Chris Weedon, Cultural Politics: Class, Gender, Race and the Postmodern World (Cambridge, Mass.: Blackwell, 1995) 177 at 193. Representations of Rodney King, for instance, evidence the role of racial ideology in the contemporary portrayal of black men and black male sexuality: "By casting a black body in the role of the wild animal and portraying it as nemesis to civilization, the defense attorneys were producing a narrative retake of an interpreted image of black bodies that had appeared in European representations of African 'others' at least since the seventeenth century.": Gooding-Williams, supra note 66 at 166-7.

76 John Fiske, Media Matters: Race and Gender in U.S. Politics (Revised Edition) (Minneapolis: University of Minnesota Press, 1996) at 45.

77 Ibid. at 273.

78 Ibid. at 273.
Representation is doubly complex for black women. In both high and popular culture, the racist representations of black women are compounded by sexist stereotypes. Typical portrayals of black women include the asexual, white-loving matriarch (Mammy or Aunt Jemima), the sexually promiscuous Jezebel, or the domineering, shrill, Sapphire. Whoopi Goldberg, for instance, is a celebrity famous for the asexual Mammy-type characters she plays. Her comedic fame, however, lies predominantly in her Sapphiric assertiveness. Black women, bell hooks argues, are negatively defined in relation to both white women and black men. Black women find themselves excluded from acceptable definitions of femininity, standards that draw on “white middle-class norms of beauty, life-style and family organization.” Moreover, these negative images are used to explain the social position and behavior of Black men and work to blame Black women, rather than racist social structures and practices, for Black men’s

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79 Jordan and Weedon, supra note 75 at 198.
80 bell hooks, Ain‘t I a Woman: Black Women and Feminism (Boston: South End Press, 1981) at 84.
82 See, for example, Goldberg’s work as Celie, a survivor of slavery and abuse, in The Color Purple (Warner Brothers, 1985); as Clara Mayfield, housekeeper, in Clara’s Heart (Warner Brothers, 1988); as Oda Mae Brown, psychic, in Ghost (Paramount, 1990); and as Corrina Washington, housekeeper/nanny, in Corrina, Corrina (New Line Cinema, 1994).
83 Kang, supra note 6 cited at 356-7.
84 Jordan and Weedon, supra note 75 at 208.
85 Wrote Senator Daniel Patrick Moynihan in a 1965 federal government report entitled “The Negro Family: A Case for National Action”: At the heart of the deterioration of the fabric of Negro society is the deteriorization of the Negro family. It is the fundamental cause of the weakness of the Negro community...In essence, the Negro community has been forced into a matriarchal structure which, because it is too out of line with the rest of the American society, seriously retards the progress of the group as a whole.
disadvantage.”

Much of contemporary popular culture is predicated on the subjugation of both black and white women’s bodies and experiences to the interpretation and control of the white heterosexual “male gaze.” In this instance, pleasure becomes predicated upon the acceptance of a white patriarchal worldview: white men look, women (both black and white) are looked at, white men act and women are acted upon. The “male gaze,” by forcing the viewer (whether male or female, black or white) to “identify with and adopt a perspective which objectifies and dehumanizes women,” simply reinforces and perpetuates patriarchy. Women become “voyeuristic delights: body parts and human objects for ogling.”

Margaret Russell’s article, “Race and the Dominant Gaze: Narrative of Law and Inequality in Popular Film,” expands the “male gaze” to include ways in which popular culture tends to “objectify and trivialize the racial identity and experiences of people of color, even when it purports to represent them.” Russell uses the term “dominant


86 Jordan and Weedon, supra note 75 at 208 (footnote added in text).


88 Russell, ibid. at 244.

89 Ibid. at 244.


91 Russell, “Dominant Gaze,” supra note 87 at 244.
gaze” to explain how such representations invite the viewer to regard its viewpoint as natural, universal, and beyond challenge; other perspectives are marginalized in order to bolster its own legitimacy with respect to defining narratives and images. Accordingly, the power of the dominant gaze lies in its projection of stereotypes and biases as essential “truths.”

It is important to note that even non-racist, non-sexist images can be damaging if they perpetuate the notion that race and gender are distinct categories of analysis, disconnected from one another. Many feminists, for example, have been criticized for positing of an “universalized” woman, a subject position for whom gender is the primary determinant and whose experience “as a woman” is ‘untouched by other forces of systemic subordination…. The result of this gender essentialism is to create theory that is partial. All women are not white, nor are all black people men. In continuing to treat women’s issues as being disconnected from race issues “the connected nature of race and gender is obscured and myths about race and gender are given power.”

Producers of popular culture have, for the most part, ignored these critiques of essentialism. The postmodern era has been heralded as an age when fixed identities and

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92 Ibid. at 244.
93 Ibid. at 244.
96 Harris, *supra* note 65 at 230.
boundaries have lost their meaning. However, despite this alleged societal proclivity towards border crossing, little seems to have changed in the representations of identity in the mass media. The 1995 MGM-UA movie, *Tank Girl*, illustrates the refusal of Hollywood, and popular culture in general, to show the interconnected nature of race, gender and class. Set in the year 2033, this movie traces Tank Girl’s post-apocalyptic attempt to overthrow WaterPower (WP), an evil corporation that controls all the world’s water supply and thus has all the power. *Tank Girl: The Movie* commences with the annihilation of Tank Girl’s friends and family (including her boyfriend) by WP. She fights back, killing eight WP soldiers, but is eventually captured and taken to WP headquarters. She is imprisoned, escapes, and subsequently wages war on the WP.

Tank Girl is lauded by many (men and women alike) as the “feminist superhero of the future”, a “punkish heroine who battles evil in the traditional manner, but who also swears, smokes, drinks, belches and often wakes up with a monstrous hang-over...” The lyrics from the movie soundtrack say it all. In a song entitled “Big Gun,” famed musician, Ice-T, raps:

...The most venomous feminist,
Homey, she ain’t soft.
You give her trouble

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97 hooks, *Reel, supra* note 50 at 2.

98 “Tank Girl was born in 1988, aged 19 - the child of two fathers, Jamie Hewlett (a struggling artist) and Alan Martin (a successful bum).” The strip premiered in the British mag, *Deadline.* “Bemused by the success of their creation, Hewlett and Martin subverted the character at every turn. Just when you thought you knew what TANK GIRL was about, she would change. She flirted with a hippy revival and new age fashion before it was fashionable, dabbled in post-modernism, hung out with the beat generation.” Jamie Hewlett and Alan Martin, “Tank Girl: The Unauthorised Biography,” 03-Jul-95 20:23:16 GMT <http://www.sonnet.co.uk/tank-girl/history.htm> (16 April 1998).

99 Pursuant to a comet crashing into the Earth and altering the world’s climate, water has become the world’s most scarce and valued resource.

100 Kate Muir, “All mouth (and ripped trousers),” *The Times*, October 8, 1994 (no page number).
And she might cut your head off.
For somethin’ that you like to think’s the best [?]
She’ll blow big holes in your chest.
She says she got it cuz she says a lotta ladies won’t;
She says she got it cuz she says a lotta ladies don’t;
She says she got it cuz she says a lotta ladies can’t;
She says she got it cuz she knows a lotta ladies romance
The thought of givin’ men their own medicine,
Electrocute them, light ‘em up like Con Edison... 101

The plot of the movie centers on Tank Girl’s attempts to save her young friend, and substitute-daughter, Samantha (Sam). Tank Girl’s battle takes place at the level of gender relations. She is mother; she is goddess; she is bitch/whore. The movie is saturated with images and references to heterosexual sex and sexuality. Tank Girl is the sexiest superhero Western capitalist society has ever seen. However, this sexualization of female agency is simply another example of what Duncan Kennedy terms the “eroticization of domination”; that is, the domination of men by women is eroticized and female agency is belittled. Power, once again, congeals in patriarchal structure. 102

In order for Tank Girl to triumph, she must conspire with the Rippers, “a nomadic army of blood-thirsty, human-eating, purse-snatching mutant creatures.” 103 The Rippers are a group of half-man/half-kangaroo creatures engineered to be the “Ultimate Soldiers.” Left for dead after the comet, the Rippers spend their days (I should say nights; they work


According to one reviewer: “The album’s final track, ‘Big Gun’ by Ice-T, is delivered under the guise of raging feminism. Unfortunately, Mr. T. should pity himself a fool, for he simply reverses the roles of sexist discourse without ever transcending the inherent hostility of the paradigm of sexism. Ice-T asserts that women can become angry men if they wish, but someone must always play the role of the essential man (and someone the eternal woman).”: Cameron Frey, “Tank Girl Soundtrack,” The Washington Square News, Friday, April 21, 1995, 01-Jul-95 02:54:21 GMT <http://www.nyu.edu/pages/wsn/1995/04_21.html#music2> (20 April 1998).


103 Tank Girl: The Movie (United Artists, 1995).
better in the dark) foiling WP's plans to take over the world. Representations of the Rippers in this movie are racialized, “Othered.” The refusal of the Rippers to use technologically advanced weaponry (e.g., guns) and their tribal-style religion solidifies their primitive image in the white imagination. Moreover, the highly sexed nature of the group, a group who happen to be all male, plays upon stereotypes and fears of the hyper-sexual “Other.” It is interesting to note that the actor playing the Ripper, T-Saint, is famed black rapper, Ice-T. Ice-T’s distinctive voice and in-your-face manner of challenging dominant power structures makes him an intense signifier of the movie’s racialization of identity and struggle.

In the end, the Rippers and Tank Girl team up to defeat WP (and Tank Girl becomes romantically involved with one of the Rippers). This partnership, however, continues to be depicted as two different battles: Tank Girl wants to save Sam; the Rippers want to destroy WP in order to save themselves and the rest of society. Women’s issues are portrayed as personal issues; race/cultural survival issues are fought at the macro level. *Tank Girl: The Movie* clings to essentialized representations of race and gender issues. Its simplistic portrayal of struggle, agency and morality create images that only tell part of the story. Huge gaps exist as to the connected nature of the oppression

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104 See, for instance, Ice-T’s song, “Cop Killer”: “I got my 12 gauge sawed off/ I got my headlights turned off/ I’m bout to bust some shots off/ I’m bout to dust some cops off/COP KILLER, it’s better you than me/ COP KILLER, fuck police brutality.../...My adrenaline’s pumpin’/ I got my stereo bumpin’/ I’m bout to kill me somethin'/ A pig stopped me for nothin’...”. Ice-T, “Cop Killer,” *Body Count* (Time Warner, 1992).

“Ronald Hampton believes that the song was not a call for murder, but a song of protest. Responding to the very real issue of police brutality in the black and latino communities, Hampton concedes that the song is about the LAPD and is merely an artistic expression of the rapper's outrage over the King verdict.”: Robin D. Barnes, “Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel” (1996) 81 Iowa Law Review 1079 at FN291 (paraphrasing Chuck Philips, “Cop Killer Controversy Spurs Ice-T Album Sales,” *Los Angeles Times*, June 18, 1992 at F5).
experienced by both Tank Girl and the Rippers. Instead, the white male power of WaterPower is simplified. Victory for Tank Girl or the Rippers does not challenge the material or ideological structures of this power: Tank Girl is saluted in the end by one of the Rippers and addressed as “General, Sir”. Finally, as the film completely ignores both the voices and faces of women of color, one can not help but wonder what the movie would have been like had Tank Girl been black.

In view of popular culture’s proclivity towards essentialism, it is not enough to simply explore the condition of women or the condition of black people in isolation to one another. Poor and black women experience intersecting patterns of oppression and, accordingly, demand an analysis which looks at the ways in which racism, sexism and classism intersect in their lives.105 Such an intersectional analysis is necessary in order to decipher the ways in which gender and sexuality are inherently linked to issues of race and class and the ways in which the concerns and experiences of women of color are silenced and/or trivialized in feminist and anti-racist discourse.106

Racist, sexist and essentialist representations of identity and experience all influence the semiotic and affective power of the celebrity “Other.” The authenticity of a certain image or persona is judged in terms of simplistic, stereotypic notions of what it is to be black or what it is to be a woman in today’s society. Celebrities who do not fit into


106 Kline, ibid. at 371.
these neat categories may be considered fake, artifice and, thus, denied credibility. This process, though, is not so straightforward. Celebrity meanings involve a process of contestation and negotiation. Producers attempt to construct definitions and shape cultural representations, genres, narratives, audiences, spectators, race and gender. Audiences respond by resisting these representations or by actively using them to (re)fashion their social, racial, and gendered possibilities and positionings.\textsuperscript{107}

This is especially true of groups outside the cultural mainstream. Often there exists an intense audience-star relationship among groups who are at least partially excluded from dominant articulations of white heterosexual male culture.\textsuperscript{108} That women\textsuperscript{109} and African Americans\textsuperscript{110} are the largest consumers of television in the United States demonstrates the power of the celebrity on groups outside the cultural mainstream.

Audiences do not passively accept the images offered them by producers of texts. Instead, these celebrity images play a role in the self-authoring of subaltern social groups.\textsuperscript{111} Rosemary Coombe, for example, has observed that "gay male appropriations of female stars in camp subcultures, lesbian reworkings of James Dean, and middle class women's use of the Star Trek characters in the creation of fan magazines (fanzines) are

\begin{footnotes}
\item[107] Julie D'Acci, \textit{Defining Women: Television and the Case of Cagney and Lacey} (Chapel Hill, NC: The University of North Carolina Press, 1994) at 9, 3 (discussing the issue of women and gendered representations on television).
\item[109] "[F]rom its earliest days, the white, middle-class women's audience had been the linchpin of U.S. television....": D'Acci, \textit{supra} note 107 at 67.
\item[110] A 1988 \textit{Newsweek} report stated that "in an average week, black viewers watch nearly 40 percent more television than the rest of the population.": Gray \textit{supra} note 58 at 67.
\end{footnotes}
practices that rewrite media imagery in subversive but politically expressive fashions.\textsuperscript{112}

The producers of mass media may try to construct a certain viewing audience through extratextual discourses, such as “programme scheduling, on-air promotions, \textit{TV Guide} advertising, press releases, through-the-mail publicity and promotional events.”\textsuperscript{113}

However, audiences play a large role in the consumption of and the meaning derived from these texts.

(iii) figuring the celebrity “other”

He is a celebrity. We talked about that earlier. Celebrities get the best tables, you know. You always get everything you want. You get what you want. There are no rules for celebrities.

~ Charles Darden, OJ Simpson Trial\textsuperscript{114}

What meaning, then, is derived from the celebrity text when the star in question is a member of a subaltern or gender-subordinated social group? What sort of challenge (if any) does stardom pose for racist and sexist ideology? In contemporary Western society, the celebrity emphasizes the exceptional nature of an individual person. At the same time, though, the structures within which she or he succeeds remain unchallenged. For an audience to be critical of the star system while celebrating a diva “requires a complexity of vision which ideology seeks to gloss over.”\textsuperscript{115} Celebrities revel in consumer capitalism, buying possessions and glamour. This behavior does little to critique consumer capitalism.

\textsuperscript{112} \textit{Ibid.} at 366.

\textsuperscript{113} D’Acci, \textit{supra} note 107 at 63-4.


\textsuperscript{115} Margaret Marshment, “Substantial Women” in Lorraine Gamman and Margaret Marshment, eds., \textit{The Female Gaze: Women As Viewers of Popular Culture} (London: The Women’s Press, 1988) 27 at 32.
or societal standards of beauty. Instead, the consumer culture and the celebrity culture become inseparable: "anyone of aspiration feels compelled to present himself or herself in the familiar terms by which others are bought and sold by the world."  

As is the case with most celebrities, celebrity "Others" are allowed to participate in mainstream culture so long as it remains profitable to certain corporate interests. Conversely, many African American celebrities may accept the exploitative aspects of popular culture so long as this exploitation leads to material possessions, possessions that make living in this racist society a bit more bearable. In this instance, the subversive potential of the celebrity "Other" is rather limited.  

More often than not, popular and commercial representations of "Otherness" simply perpetuate racist, sexist, and classist stereotypes. In the 1970s, for example, in response to a call for more "relevant" and "authentic" images from members of the black community, the primarily white television producers created shows such as Good Times and Sanford & Son. These shows did little more than represent what white liberal middle-class television programmers thought were "authentic" accounts of urban black life.

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117 Boyd, supra note 60 at 66.
118 Ibid. at 66.
119 Gray, supra note 58 at 8.
120 Ibid. at 5.
121 These 1970s sitcoms about black life were, according to Poussaint, 'full of jivin', jammin', streetwise style stuff that is the worst kind of stereotyping': Sut Jhally and Justin Lewis, Enlightened Racism: The Cosby Show, Audiences, and the Myth of the American Dream (Boulder, Co, Westview Press, 1992) cited at 2 (Poussaint was cited in Denise Hartsough, "The Cosby Show in Historical Context: Explaining its Appeal to Middle-Class Black Women," Paper Presented at the Ohio University Film Conference, 1989 [unpublished]).
ghetto experience. In other words, abject and uncritical stereotypes of poor black men and women were held out as "authentic" or "real" images of urban black life.

On the other hand, *The Cosby Show* of the 1980s attempted to dismantle racial mythology and stereotyping. Finally, black people were portrayed as human beings, as successful, attractive individuals whom white people could respect, admire, and even identify with. Not only were non-racist images sought, but the sitcom frequently used humor to expose and undermine sexist stereotypes. Chauvinistic male characters, such as the son-in-law, Elvin, were deliberately "set up to be undermined." While it was the mother, Clare Huxtable (played by Phylicia Rashad), and her daughters who usually lead in these instances, the father, Cliff Huxtable (played by Bill Cosby) ultimately supported them. This finding of a strong male character who supports a feminist stance is extremely rare in contemporary Western mass media.

*The Cosby Show* has been criticized extensively for not presenting a realistic view of the lives and experiences of typical black Americans. The Huxtable family, like its creator, Bill Cosby, is portrayed as attaining a level of wealth and success that few black people in the United States have achieved. Accordingly, the show is said to gloss over and ignore the deep-rooted discrimination and economic disadvantages that black people face. In essence, *The Cosby Show* perpetuates the myth of the American Dream -- You, too, can have all this! The fact that, in real life, Bill Cosby is wealthy himself, configures

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122 Gray, *supra* note 58 at 77.
123 Jhally and Lewis, *supra* note 121 at 5.
124 Ibid. at 5.
125 Ibid. at 8.
the Huxtables as “truth.” Herein lies one aspect of the show’s popularity in the United States: the wealth of the Huxtables (along with their cultural “whiteness”) makes them less threatening to white viewers. Bill Cosby represents “a threat contained,” offering ‘deep solace to a white public terrified that one day blacks might come with guns to steal the copperware, the juicer, the microwave, the VCR, even the TV itself”....”\(^{126}\)

Similarly, Oprah Winfrey’s reported annual income of $40 million dollars makes it easier for white audiences to accept her into their homes. Spectators find Oprah appealing despite that fact that she is black, female, that she ran away from home at thirteen to escape sexual abuse, got pregnant at fourteen, and smoked crack at age twenty-five. Oprah has been voted “most admired” in a United States Gallup poll five years in a row (more times than Princess Di, Elizabeth Taylor and Rush Limbaugh)\(^{127}\) and continues to be one of the most celebrated daytime talk show hosts in history.\(^{128}\) Her wealth as the highest paid woman in show business overrides her tainted past and provides inspiration to audience members who still believe that the American Dream is possible.

In light of this, it is important to note that celebrity “Others,” such as Oprah and Bill Cosby, imbue Western popular culture with new ways of looking at black people. However, their configuration also works to create a world in which class boundaries are shifted upwards. Now, what is considered “normal” no longer includes the working


\(^{128}\) Ibid. at 49.
That the line between television and reality is becoming "exceedingly hazy" in contemporary society, makes this even more problematic. According to Jhally and Lewis, we know, for example, that the Huxtables are not real. Yet, we "continually think about them as if they were." This view is supported by the fact that Bill Cosby is himself wealthy in real life. As a corollary to the notion that the American Dream is possible, poverty is viewed as a choice; social welfare services are considered unnecessary and a waste of government resources. In the end, working-class blacks and women, for whom poverty is very real, are, once again, dismissed; their concerns are ignored and their experiences relegated to the margins of mainstream culture.

ii. the play's the thing: celebrity legal storytelling

[Freudian passage about guilt and the role of theater in uncovering and addressing real issues]

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129 Jhally and Lewis, supra note 121 at 131, 133, 135.

130 Ibid, at 133.

131 Personal communication with Franc Boltezar, Vancouver, B.C., May 1998.

132 There exists, in the United States, the notion that 'there are no socioeconomic systemic flaws that produce poverty'. "Indeed, the 'enthusiastic[ ] celebration of] ... the Horatio Algers, the Abraham Lincolns, or the Clarence Thomases of this country' seems crucial to maintaining our collective faith in 'the American dream ... of opportunity' ... In this context 'individual flaws merely produce the appearance of system failure,' and people become scapegoats for conditions and circumstances largely beyond their control.": Lisa A. Crooms, "An 'Age of Impossibility': Rhetoric, Welfare Reform, and Poverty" (Review Essay: Joel F. Handler, The Poverty of Welfare Reform (New Haven: Yale University Press, 1995); Mark Robert, Living on the Edge: The Realities of Welfare in America (New York: Columbia University Press, 1994)) (1996) 94 Michigan Law Review 1953 at 1959.
Out of my weakness and my melancholy,
As he is very potent with such spirits,
Abuses me to damn me: I'll have grounds
More relative than this: the play's the thing
Wherein I'll catch the conscience of the king.

~ William Shakespeare, Hamlet\(^{133}\)

This section will look at how pre-ordained cultural scripts, such as those regarding "Otherness" or the celebrity in society, influence the scripting of a performance in the judicial theater of a celebrity "Other" trial. What influence does the affective and semiotic power of the celebrity "Other" have on the theater of justice? How is authenticity and credibility determined in this legal play? What might the legal audience's reaction be to this performance?

a. legal audiences, celebrity acts

The trial of a celebrity "Other" involves a complex process of determining the "truth" or "reality" of courtroom assertions. Who can be trusted and who cannot? When is manipulation acceptable and when must it be resisted?\(^{134}\) It is these cultural tensions and conflicts that inform determinations of guilt or innocence above and beyond simple (or not so simple) findings of truth in the trial of a celebrity "Other." In such a trial, cultural scripts regarding race, class, gender, and the celebrity cannot be separated from legal storytelling or from the legal audience's determinations of truth or reality.

Edward Ohlbaum points to several principles of persuasion that may help explain why cultural scripts and celebrity stories influence the trial outcome of a celebrity

\(^{133}\) William Shakespeare, The Tragedy of Hamlet, Prince of Denmark, Act 2, Scene 2, Final Speech at lines 601-17.

\(^{134}\) Joshua Gamson, Claims to Fame: Celebrity in Contemporary America (Berkeley: University of California Press, 1994) at 12.
"Other." Persuasion demands that a legal story, or a "case theory" as Ohlbaum calls it, be comprehensive: "A comprehensive theory is a story line on which all the pieces of the case are consonant.... Virtually everything that a lawyer does at trial is based on the case theory."\textsuperscript{135} This theory must be simple, neat, and concise; it must convey an image of the party as one entitled to the verdict.\textsuperscript{136} It must also be consistent. Divergent, inconsistent positions will only confuse a jury. In addition, it must remain consistent with the beliefs of the jurors regarding how people act and how laws operate. In other words, it must be plausible and have visceral appeal to the jury. It is also extremely important that the case theory confront its flaws and admits its deficiencies. Failure to do so invites an opponent to introduce and exploit those facts, thereby undermining one's legal argument. The community and the social setting in which the case is tried are also important to this case theory. Social currents, mores, values, and public opinion help shape the case for the judge and jury. Finally, trial practice requires that a case theory always be flexible and adjustable. It may be necessary for a trial lawyer to "change gears" as a result of a disruption in the storyline (e.g., an adverse evidentiary ruling, newly discovered evidence, etc.).\textsuperscript{137}

Cultural scripts and celebrity legal stories, or legal stories that rely on the celebrity sign to secure meaning, involve the application of these persuasive principles. A brief examination confirms that celebrity legal stories may be comprehensive in that they tend to

\textsuperscript{136} \textit{Ibid.} at 19 (emphasis added).
\textsuperscript{137} \textit{Ibid.} at 19-22.
concentrate on the celebrity's persona. In other words, celebrity legal storytelling looks towards the celebrity's "reel" and "real" lives in order to gain meaning. By focusing on the perceived correspondence, or lack thereof, between the private and public lives of the celebrity, the case theory remains neat, simple and consistent. In addition, the extratextual discourses in popular culture provide the backdrop and the setting for the drama; they put limits on what explanations will be viewed as plausible by a jury.

In the trial of a celebrity "Other," these celebrity legal stories may also rely on elements of race, gender, or class to give them persuasive quality. Take, for instance, the trial of Tupac Shakur for sodomy and sexual abuse. In this trial, Shakur's celebrity persona as a thug -- the only acceptable/celebrated image in the gangsta rap subculture -- was highlighted. Two case theories were advanced by the Defense. The first pointed to the manufactured aspects of Shakur's gangsta rap persona. It was argued that Shakur was distinct from his image and was incapable of sexual abuse, sodomy and weapons possession.

For those in the legal audience, though, who found it impossible to let go of Shakur's gangsta image, an alternative theory was advanced. This case theory, consistent with the notion that Shakur was not capable of committing these crimes, focused on Shakur's race. In other words, the audience's belief in Shakur's authenticity as a black "gangsta" enabled the Defense to argue that Shakur was feared by the dominant structures of power and, thus, "framed" by the police. This argument was strengthened by Shakur's various run-ins with the law -- one notable example being the shooting of two

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138 This case will be discussed in more detail in Chapter Four.
Atlanta police officers by Shakur, a shooting in which the charges were dropped -- and his familial connection to the Black Panther Party.\footnote{Both Shakur's mother and step-father were Panthers. For more discussion, see Chapter Four.}

\textbf{b. celebrity storylines, empathetic readings}

In addition to being persuasive, a celebrity legal story must engender empathy in the jury. Empathy entails the vicarious experience of another’s feelings and ideas. Although it is argued that people are more likely to emphasize with someone of their own race, such is not always the case.\footnote{Douglas O. Linder, “Juror Empathy and Race” (1996) 63 Tennessee Law Review 887 at 889, 891.} In instances of celebrity trials, the key to gaining jury empathy is to highlight the “familiar” and “everyday” aspects of the celebrity sign. The celebrity persona is a part of this “familiarity”, it is part of the everyday reality of the jury members. With respect to celebrity “Others,” emphasizing the race or the gender of the celebrity may aid the jury in connecting emotionally and cognitively with the defendant celebrity. The more well-known a celebrity, the easier it will be to discern her or his celebrity persona and to construct the shared cultural storyline. In addition, the better an audience thinks it knows a star, the greater its alleged understandings of the motives and feelings of a celebrity. Hence, the greater the empathy.

In a trial of a celebrity “Other,” juror empathy depends on the extent to which audience members think they know the true nature of a celebrity (semiotic power), as well as the emotional impact this person has on them (affective power). Both the semiotic and affective power of the celebrity sign depends on the configuration of race, class and gender within this sign. Race, class and gender affect the celebrity sign, the celebrity sign
influences juror empathy and juror empathy determines, at least in part, what legal stories will be told and found credible in the trial of a celebrity “Other.”

c. oj simpson: an example

The trial of O.J. Simpson\(^{141}\) is a good example of the ways in which various cultural scripts become integrated in the celebrity legal story in order to get the jury to empathize with a celebrity defendant and persuade them that a particular case theory or legal story is credible.\(^{142}\)

(i) celebrity scripts

From the outset of the Simpson trial, O.J.’s celebrity status influenced both the legal stories told in the courtroom and those told outside in the mass media. In light of Simpson’s fame, his trial for murder became a “cultural event.”\(^{143}\) People worldwide knew about Simpson’s arrest and his trial. Discussions regarding his guilt or innocence filled the daily conversation of a wide range of people from a wide range of social backgrounds and geographical locations. For instance, it was rumored that, on a visit to the United States, Margaret Thatcher, former British Prime Minister, had ‘wanted to


\(^{143}\) David Shaw, “The Simpson Legacy, Obsession: Did the Media Overfeed a Starving Public?; Chapter Two: A Shared Adventure; ‘A National, Real-Life, Cross-Channel Soap Opera’,” Los Angeles Times, October 9, 1995 at S3.
know about O.J.’. Similarly, Benazir Bhutto, the Prime Minister of Pakistan, listed Marsha Clark and Robert Shapiro as people she wanted to dine with while in the U.S. Even Boris Yeltsin, President of Russia, asked President Clinton, as soon as he stepped off the plane, ‘Do you think O.J. did it?’ The fact that 100 million Americans had their eyes glued to television screens when the verdict was announced evidences Simpson’s power as a celebrity. “Congressional hearings were rescheduled. So was the daily State Department briefing. Airline flights were delayed. Long distance calls dropped almost 60%. Stock trading plummeted.”

Throughout the trial, Simpson’s celebrity status was highlighted and used to persuade the jury that Simpson was (or was not) guilty of murder. The Prosecution used Simpson’s celebrity status as part of their case theory or legal story. The prosecuting lawyers, Charles Darden and Marcia Clark, emphasized the need for the jury to not be blinded by Simpson’s stardom. In the opening statement alone, Darden and Clark pointed to Simpson’s celebrity status at least six times: three references were made to Simpson as a “star,” two were made to his “celebrity” status and one reference was made to how “famous” he was. In addition, their closing argument contained this warning: “Some people think that because the defendant in this case is a celebrity, that perhaps he is someone above the law, that there ought to be special rules for him or that somehow he

144 Ibid. at S3.
145 Ibid. at S3.
should be treated differently than any other defendant. But that’s not justice.”

Defense counsel highlighted Simpson’s celebrity in order to rebut the Prosecution’s theory. In his closing argument, Johnnie Cochran stated:

Part of what makes [the Prosecution’s] theory so ridiculous is, is O.J. Simpson going to get in the white Bronco that’s well-known in Brentwood, drive over to his ex-wife’s house, park the Bronco in this well-lit alleyway that you’ve just seen, leave the car there? Everybody knows him, knows that car.

Defense counsel, though, was careful not to make it look as if Simpson was trying to use his privileged status to get away with murder. Instead, Cochran made explicit that he did not want “any of the jury to infer at all that Mr. Simpson is not entitled to the same rules as every other defendant. He [Simpson] expects that and that is what he wants.”

As part of its case theory, the Defense argued that O.J. was not gaining anything from his celebrity status. If anything, the opposite was the case. When the Prosecution objected to having O.J. himself (instead of his attorney) declare Simpson’s innocence at the commencement of the trial, Defense attorney, Gerald Uelman, responded:

It is really incredible to suggest that somehow the jurors will be prejudiced by actually hearing the plea of not guilty from the mouth of the defendant himself. Actually the only person who can enter the plea is the defendant himself and that plea is what sets the proceedings in motion....

The suggestion that this is some sort of ploy to capitalize on the defendant’s charisma or celebrity status, it is just the opposite. It is just the opposite. We do not want this jury to view the defendant in terms of celebrity. We want them to view him as a human being, and that suggests the greater need in this case to do it, because there is just so much star struck quality about this -- about this whole proceeding and we think it would be very healthy to remind everyone, especially the jury, that what is at stake here

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Likewise, Simpson’s celebrity status was focused upon outside the courtroom, in the news and on the television. One of the arguments made in the media was that Simpson’s celebrity status insulated him from any culpability (and from the racism which Defense attorneys argued O.J. was the victim of). “Celebrity is power without responsibility”, said one media commentator. “...Contrary to what pundits say, the O.J. Simpson murder trial had nothing to do with race and everything to do with celebrity.” Accordingly, Simpson’s “singularly compelling persona” was viewed by many as all-encompassing. It was said to make people want to follow him, know him, believe him, and help him. However, Simpson’s celebrity was not the only element that informed the legal stories told and believed in court.

(iii) race scripts

In addition to celebrity, racial scripts, or ways of talking about race, were utilized in the Simpson trial. It is important to note that racial scripts are often implied simply by the presence of black attorneys and defendants in the courtroom. In other words, “it is


151 See page 90 for a more detailed explanation.


154 Ibid. at 3.
often assumed people of color initiate or even ‘instigate’ extemporaneous comments about race in legal proceedings....”¹⁵⁵ This may explain why the race-based arguments of O.J.’s lawyer, Johnnie Cochran, were so vehemently criticized by lawyers and media pundits alike as “playing the race card.”¹⁵⁶ In this instance, Cochran’s case theory regarding police conspiracy and racism was viewed as “unfairly skewing reasonable debate on the ‘merits’ of a case by insisting that racism is a relevant issue in an otherwise raceless context.”¹⁵⁷

Issues of race within and outside the Simpson courtroom centered on the concept of authenticity. Simpson’s unquestioning association with white America was viewed as a dismissal of his race.

Simpson is black, but it doesn’t mean he spent any time being black in the larger and more important cultural sense. It’s funny how we don’t see or hear from these people in any social context until they’re tied to the tracks with a train coming. Then, all of a sudden, they’re black.¹⁵⁸ Even O.J., himself, pointed to his racelessness: ‘People identify with me, and I don’t think I’m offensive to anyone...People have told me I’m colorless. Everyone likes me. I stay out of politics, I don’t try and save people for the Lord.’¹⁵⁹

Despite Simpson’s proclaimed race-neutrality, his blackness was made quite visible


¹⁵⁶ The phrase, “playing the race card,” frequently used outside the Simpson courtroom, was introduced into the proceedings by Christopher Darden himself. Darden, it is argued, used this phrase in order to rebut Cochran’s claim that Darden was simply added to the Prosecution team in order to show that ‘if a black prosecutor sees O.J. guilty, he is being judged by the evidence at hand and not for some deep-seated bias.’ Ibid. at 789.

¹⁵⁷ Ibid. at 788-9.

¹⁵⁸ Wilbon, supra note 142 at F01.

¹⁵⁹ Fiske, Media Matters, supra note 76 cited at 274 (citing O.J. Simpson).
throughout the trial. The Defense was quick to portray Simpson’s race as “one of the prime reasons he was being victimized.” His lawyers concentrated on “convincing the jury that Furhman and countless other cops conspired together to frame O.J. Simpson.” The theme underlying this case theory was, “Let a brother get too big and the white man will bring him down. Now he’s going to find out what it is like to be treated like a black man.” This sentiment, accepted by many African Americans as truth, seeks to explain why the “white establishment,” including big business, the government and the media, are ‘hellbent’ on eliminating highly visible and successful black men.

The notion that white society will do anything to keep a black man from getting to powerful manifest itself in divergent readings of Simpson’s guilt or innocence along racial lines: seventy percent of African-Americans thought O.J. was innocent, while seventy percent of white America thought the opposite. For the majority of white Americans, O.J. Simpson was guilty even before the trial began. Black Americans, though, were suspicious of the evidence right from the start; they saw plausibility in the argument that O.J. might have been framed. According to Roger Cossack, a seasoned criminal trial

162 Banks, supra note 142 at 7. See, also, Kimberlé Crenshaw, “Perspective on the Simpson Case; Racism Ploy Can Hurt Blacks,” Los Angeles Times, July 24, 1994 at M5.

See Appendix A for a visual representation of the racial differences between O.J. Simpson’s supporters and his denouncers.
lawyer and host of CNN’s Burden of Proof, ‘what we saw and heard depended upon our
life experiences.’ Similarly, Michael Wilbon states: “blacks and whites have a
completely different reality when it comes to some things. You see evidence, I see a plant.
I see a racist cop, you see a defense attorney’s diversionary tactics.”

Many African Americans are so instinctively mistrustful of white society that they
automatically reject any idea or judgment that did not originate in the black community.
In contrast, many white people find much of black conspiracy theory to be so far-fetched
that they do not even attempt to understand these differences in thinking. This points to
different “ways of knowing.” Knowledge, in this instance, is rooted in social
experience. A case in point would be the different manner in which black people in the
United States experience the legal system. To them, justice is not color blind. Instead,
concerns about human error and prejudice in law enforcement take on heightened meaning
when a disproportionate number of black people, particularly black men, are subjected to

165 Paul, supra note 141 cited at 693 (citing Roger Cossack, “What You See is Not Always What You Get: Thoughts
166 Wilbon, supra note 142 at F01.

In the words of Sam Fulwood III, “[a]s the O.J. Simpson case has dramatically illustrated, vast differences exist
between the way black and white Americans view everyday reality.” Fulwood, supra note 163 at A1.
167 Fulwood, ibid. at A1 (‘Black people don’t trust the white media‘; they ‘just don’t buy the reality that’s sold to
[them] by whites‘, asserts Mary Helen Washington, a professor of African American literature at the University of
Maryland).
168 Ibid. at A1.

An Indianapolis poll reports that 70% of its black participants believe the judicial system treats blacks and whites
differently; only 37% of the whites polled took this position.: Kevin Brown, “The Social Construction of a Rape
Victim: Stories of African American Males About the Rape of Desiree Washington” (1992) University of Illinois Law
Review 997 at 1001.
169 Fiske, Media Matters, supra note 76 at 924-5.
criminal justice in America. The credibility, then, given to a black defendant in a trial does not result solely from the skill of the lawyers in that particular case; the social situation of those who decide to treat a certain credibility as truth must also be taken into account.

This is acutely evident in the jury's treatment of the DNA evidence in the Simpson case. To be more specific, the prosecution introduced evidence that the blood allegedly recovered from O.J.'s Bronco matched that of Simpson and the victims, Nicole Brown Simpson and Ronald Goldman. The defense, as expected, attacked the accuracy of this evidence -- "A match can only establish high probability of the suspect's guilt" -- and introduced the notion that the police planted the blood in O.J.'s Bronco. This Defense strategy became more than just an argument about "scientific" accuracy. It became one of "racially different knowledges." In other words, not everyone holds "official discourse" as truth. Many black Americans, for instance, believe that science, the most


172 It is important to note that the majority of the jurors in the Simpson trial were black women over the age of 24. The remaining jurors consisted of two white women, one black man and one man of hispanic origin. "Who's the Boss" edited by Beverly Gaglione, 07-Jun-95 06:17:14 GMT <http:www.dnai.com/~caz/jury.html> (24 April 1998).


175 1.5 cc of O.J.'s blood, taken for the DNA tests, was left unaccounted for. It was implied that the LAPD had tampered with the blood: "Dmitri's O.J. Reasonable Doubt FAQ," 29-Jun-96 21:31:24 GMT <http://php.indiana.edu/~dmiguise/OJ/ojfaq.html> (13 May 1998).

176 Fiske, Media Matters, supra note 76 at 265.
official discourse of all, is “not universal but white, if not in its essence, at least in its uses.” One only has to look at how scientific discoveries of racial differences always seem to work against black people and in favor of whites to find support for this claim. Accordingly, the credibility accorded scientific procedure, be it at the crime scene or in the laboratory, will depend on the social situations and experiences of those engaged in the determining of this credibility.

(iii) class scripts

In addition to race and celebrity, class becomes an important signifier of authenticity and part of the celebrity legal story (inside and outside the courtroom). O.J.’s connection with white corporate America was interpreted as meaning he was either embarrassed to be black or he had forgotten his roots. As Simpson had not “lived the experience of oppression, at least not in an on-going way since his childhood growing up in a San Francisco housing project”, his authenticity as a black man was challenged. In this instance, the celebrity’s wealth and class overrides his or her experience of race or

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177 Ibid. at 264.

178 For example, The Bell Curve, published during the Simpson trial, argues that genetic differences are the reason why African Americans score, on average, lower that European Americans on intelligence tests: Ibid. at 264 (discussing Charles Murray and Richard Herrnstein, The Bell Curve (New York: Free Press, 1994)).


181 Weiss, supra note 142 at 80.
gender.\textsuperscript{182}

At least one commentator insisted that “[t]he money factor [was] the current upon which O.J.’s Black maleness rides.”\textsuperscript{183} Though black men are usually accorded worse treatment than any other group by the United States criminal justice system, “O.J. was insulated from this unfair treatment by his class privilege.”\textsuperscript{184} O.J.’s wealth enabled him to purchase the “best legal defense team money could buy: the ‘Dream Team.’”\textsuperscript{185} The status of these lawyers was even noted by the judge in Simpson’s criminal trial, Lance Ito. He cautioned the jury to ‘not be influenced in any manner by the defendant’s wealth or celebrity status or by the celebrity status of the defendant’s attorneys.’\textsuperscript{186}

Simpson’s credibility was influenced not only by his wealth and the wealth of his lawyers but also by the wealth (or lack thereof) of the jurors in his trial.\textsuperscript{187} According to

\begin{itemize}
\item \textsuperscript{182} Ibid. at 81.
\item \textsuperscript{184} Ibid. at 226.
\item \textsuperscript{185} Ibid. at 227.
\item \textsuperscript{187} Presenting the O.J. Simpson Jury,” 03-Feb-97 17:50:56 GMT <http://pages.prodigy.com/CA/spf/jury.html> (19 May
John Fiske, television tabloid or talk show watchers are more likely to distrust the official version of truth.\textsuperscript{188} This phenomenon, which Fiske terms "Oprahization," has its roots in the class of the consuming audience. In other words,

The socially powerful readers of \textit{Time} are well served by a modernist belief in a transcendent reality, for this enables them to make their reality universal and dismiss other realities as false. On the other hand, the less privileged readers of the \textit{Enquirer} know that their knowledge of the truth is typically contradicted by that of the powerful; they are always aware of the socially-located nature of knowledge, and that some social locations grant knowledge greater truth effect than others.\textsuperscript{189}

Accordingly, just as many black people viewed the scientific evidence in the Simpson trial as "white," much of the information disseminated in the courtroom may have been looked upon skeptically by the lower class (and black) jury members.

\textbf{(iv) gender scripts}

O.J.'s wealth and celebrity status, as mentioned previously, was said to have "whitened" him in the eyes of Western society. This allowed him to partake in the privileges of white American men, namely sexual access to and control over white women.\textsuperscript{190} White America, though, quickly reneged on Simpson's privilege after he was accused of killing two white people. As is often the case with racial exoticism, white people's admiration for Simpson soon turned to fear and hatred during the trial. The prosecution introduced domestic violence evidence in order to show Simpson's propensity towards violence. This evidence effectively played upon white fears and stereotypes.

\textsuperscript{1998).}

In light of this information, it is obvious that the majority of the jurors had middle- to lower middle-class incomes.\textsuperscript{188} Fiske, "Admissible Postmodernity," \textit{supra} note 171 cited at 927 (citing professional jury consultant).

\textsuperscript{189} \textit{Ibid.} at 921.

\textsuperscript{190} Harris, \textit{supra} note 65 at 236.
regarding the savage black man: white people’s worst fear and best fantasy.191

The contradictory position of black men in the white imagination may help explain the cross-racial appeal of attractive, articulate celebrity “Others,” such as O.J. Simpson. At least one commentator (a female prosecutor nonetheless) directed a comment towards the female jurors in the Simpson trial, arguing that women, regardless of their race or that of the defendant, ‘tend...to base their verdict on external appearances....’192 Although this statement is sexist in its perpetuation of the notion that women are irrational and emotive beings, it also signals the power of aesthetics to effect truth. Many have argued that Simpson benefited from his handsome face. Crystal Weston writes that it is “common knowledge” that physically attractive defendants receive more lenient sentences. In the Simpson case, the fact that the Prosecution refused to pursue the death penalty, despite its availability for the charge of double murder, is taken to support this assertion.193 Moreover, when O.J.’s lawyer, Robert Shapiro, stated that his dream jury would consist of ‘All women, mixed race’, it was this that motivated his reasoning.194


193 Weston, supra note 183 at 227.


At least one Los Angeles poll showed that “[m]ore women (52%) were sympathetic than men (43%)” to O.J. Simpson’s plight.” Richard Lee Colvin, “The Simpson Murder Case,” Los Angeles Times, June 28, 1994 at A16.
(v) intersectional scripts

Insofar as the above analysis configures Simpson’s race, gender, class and celebrity as if they were unconnected to each other, it is lacking.\textsuperscript{195} Celebrity is constructed out of “a multiplicity of sites of discursive practice....”\textsuperscript{196} Discourses of race, gender, and class are all part of this configuration. It is unproductive to talk about someone being famous \textit{despite} her or his race and gender or \textit{because} of it. As John Fiske points out, O.J. Simpson became one of the most resonant media figures in the 1990s precisely because he was a black man whose mediated racial identity was sexualized, whose masculinity was racialized, and whose celebrity was criminalized.\textsuperscript{197} In this instance, race, sex, celebrity, and law all intersected in this figuring. All were practices of signification.\textsuperscript{198}

\textbf{iii. summary}

Storytelling in law is particularly important when the narrators, along with the protagonists, are those typically excluded from dominant stories or discourses. Celebrity “Others” are in the very unique cultural position to have a voice (maybe even a privileged voice) in mainstream society. Yet, at the same time, the truth-producing power of their stories is constrained by the racism, sexism, and classism in Western society. In other words, though not necessarily silenced, limitations exist as to what stories celebrity “Others” can tell and which ones will be believed by an audience.

\textsuperscript{195} Jones, \textit{supra} note 19 at 440 (talking about significance accorded race in conventional legal theory).
\textsuperscript{196} \textit{Ibid.} at 365.
\textsuperscript{197} Fiske, \textit{Media Matters}, \textit{supra} note 76 at 256.
\textsuperscript{198} Jones, \textit{supra} note 19 at 446.
The stories told and believed in the trial of a celebrity “Other” are influenced by the aesthetic acceptance of the celebrity “Other,” along with the discourses of authenticity in Western society, discourses that shape what will be considered credible and, thus, true within and outside a court of law. These factors place limits on the semiotic and affective power of the celebrity “Other” and the meaning of celebrity in general. In the trial of a celebrity “Other,” not only is the client’s celebrity used to persuade a jury, but also factors such as race, class and gender. How all these intersect and influence a jury depends on the social experience of the jury members and their ability to empathize with a particular celebrity “Other.” With the above in mind, Chapters Three and Four will look towards the trials of two celebrity “Others,” Billie Holiday and Tupac Shakur, in order to find a practical application for this theoretical framework.

199 Rosenthal Kwall, supra note 127 at 1.
chapter three:
"he's my man!": lyrics of pain & betrayal in the people v. billie holiday

Billie Holiday's burned voice
had as many shadows as lights,
a mournful candelabra against a sleek piano,
the gardenia her signature under that ruined face.

(Now you're cooking, drummer to bass,
magic spoon, magic needle.
Take all day if you have to
with your mirror and your bracelet of song.)

Fact is, the invention of women under siege
has been to sharpen love in the service of myth.

If you can't be free, be a mystery.

~ Rita Dove

If ever an ambassador existed for the postmodern condition, Billie Holiday --

a.k.a. Billie Halliday, Elinore DeViese, Eleanora Fagan, Eleanora

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1 Rita Dove, Grace Notes (New York: W.W. Norton & Co., 1989) at 64.

2 As the illegitimate daughter of a poor black maid, not much is certain about Holiday's early years. As such, various names and dates have been utilized in Holiday's biographies. Little effort has gone into consistency, though.

The first words ever published about Billie Holiday were written in the London Magazine, Melody Maker, by John Hammond: 'This month there has been a real find in a person of a singer named Billie Halliday. Although only eighteen she weighs over two hundred pounds, is incredibly beautiful, and sings as well as anybody I ever heard.'

When Billie was first discovered, she was using the last name "Halliday." It is surmised that she used this name because she "felt reluctant to capitalize on her relationship to her father, Clarence Holiday, then a popular big band, rhythm guitarist, or else she preferred to rely upon her own merits, because her father did nothing to encourage her at the start of her career."

3 "Elinore DeViese" is the name on Holiday's birth certificate. When registering Billie's birth, her mother, Sadie (Sarah Harris Gough), gave the father's name as Frank DeViese, a 20-year-old waiter. However, Sadie always told her daughter that her father was Clarence Holiday, a musician: Stuart Nicholson, Billie Holiday (London: Victor Gollancz, 1995) at 18.

4 Ibid. at 34.
Gough, Eleanora Gough Fagan, Eleanor Fagan, Elenore Gough, Eleanor Harris, Leanore Holiday, Eleanor Fabian, and Eleanor McKay -- would be it. If ever a trial epitomized the pre-modern and/or postmodern aspects of the Western legal storytelling, it would be People of the State of California v. Billie Holiday. Several accounts have been written outlining this trial. No two versions are exactly the same. From each author springs a unique narrative, a specific construction of “Billie Holiday: celebrity”; similarity stops where claims to “truth” end. The only thing that can be stated with any certainty is that Billie Holiday was found “Not Guilty” of a violation of Section 11500 of the Health and Safety Code in San Francisco, June 3, 1949. She was found not to be guilty despite the fact that she was

9 Nicholson, supra note 3 at 24.
caught with narcotics in her possession and despite the fact that the "ace investigator" of the Federal Bureau of Narcotics, Colonel George H. White, was the one who caught her.\textsuperscript{16}

Billie Holiday's acquittal is interesting in many regards. To begin with, it signaled the shattering of "the sworn word of Colonel White",\textsuperscript{17} a respectable white man in an era where black people, and black women in particular, continued to be treated as second-rate citizens.\textsuperscript{18} Also intriguing is the notion that, in order for a jury to find Holiday not guilty, they would have had to somehow be convinced that Billie Holiday -- "a once-confessed drug addict"\textsuperscript{19} -- "could be more truthful than the plain evidence against her."\textsuperscript{20} These issues will inform this analysis of Billie Holiday's 1949 acquittal, an analysis which will look at the semiotic and affective power of the celebrity "Other" in post-World War II United States.

The purpose of this chapter is to demonstrate how Holiday's celebrity persona was

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\textit{Penguin Group, 1994).}\textsuperscript{16} Averbuch and Noble, \textit{supra} note 10 at 237.\textsuperscript{17} \textit{Ibid.} at 237.\textsuperscript{18} On the prevalence of racism, see: Derrick Bell, "The Triumph in Challenge" (1995) 54 Maryland Law Review 1691 at 1692 ("Segregation condemned black people to the status of second-class citizens...The great challenge of the civil rights movement was to ring down the veil of racial segregation raised a century earlier at the insistence of working-class whites who wanted to maintain the myth developed during slavery that, despite working-class whites' social subordination, they nonetheless were superior to blacks - blacks who, while no longer slaves, were far from free."); Mary L. Dudziak, "Desegregation as a Cold War Imperative" (1988) 41 Stanford Law Review 61 at 103 (It was not until the late 1940s and early 1950s that segregation was challenged in the courts); and "Billie Holiday's Homepage," 9-Nov-96 18:12:28 GMT <http://socserv2.mcmaster.ca.soc/courses/soc3k3e/stuweb/pindar/pindarw4.html> (25 March 1998) (The Emancipation Proclamation of 1863 may have abolished slavery in the United States but it did not abolish racism).\textsuperscript{19} Averbuch and Noble, \textit{supra} note 11 at 236.\textsuperscript{20} \textit{Ibid.} at 237.\end{flushright}
influenced by her (very well-publicized) encounters with the legal system and with certain “bad” men in the years leading up this particular trial. The ensuing signification enabled her lawyer, Jake Ehrlich, to spin a chivalrous tale of wounded womanhood and white justice in the courtroom, a tale that the jury members felt empathetic towards. More importantly, the semiotic and affective power of Holiday’s celebrity persona lent credibility to her “all-purpose-victim” narrative, her celebrity-truth. Accordingly, it was the interrelationship between law, society, and popular culture that was at least partly responsible for Holiday’s acquittal in this instance.

i. race, gender, & class in post-ww ii u.s.a.

Celebrity legal storytelling employs mythic images in order to orient jurors to a shared cultural storyline. This allows for a pronouncement of truth to be made in a particular instance. The meaning of the celebrity sign, like other “texts,” can only be deciphered with a thorough knowledge of the social context in which it is produced.21 Mariana Valverde asserts that language as discourse is not separate from the real world. Rather, it refers to “organized sets of signifying practices that often cross the...boundary between ‘reality’ and ‘language.’”22 Accordingly, in order to understand the meaning of Holiday’s celebrity to the members of the jury, it is important to first outline the social climate at that time and the place of the celebrity “Other” in it.

The notion that prejudice and racism were undemocratic, and hence un-American,
informed scholarship, political discourse, and popular culture during the post-WW II period in the United States. Anti-communist ideology was so pervasive during this era that it set the terms of debate for all sides of the civil rights issue. In other words, “[s]egregationists argued that efforts to abandon racial segregation were communist-inspired, and would undermine the fabric of American society”; the NAACP “cast its efforts at racial reform as part of the struggle against communism.”

During this time, an uneasy co-existence endured between the idea that racism was un-American and the reality of race discrimination. “Notwithstanding the attention given to the ‘un-American’ nature of prejudice, in the 1940s race discrimination was a characteristic experience for persons of color in the U.S.” Compounded with sexism and classism, pervasive discrimination in employment had created a segregated labor market. For instance, in the northern United States, the majority of black women working outside the home in 1940 held jobs in domestic service; only 12.9 percent of employed white women held such jobs. Characteristic of the working conditions for black women at that time: street-corner markets were set up in New York and other large cities in the 1940s -- reminiscent of slavery’s auction block -- inviting white women to pick from the

23 Dudziak, supra note 18 at 75.
24 Ibid., at 76.
25 Ibid., at 70-1.
26 Ibid., at 71. Angela Davis writes that white women only resorted to domestic work if they were certain of finding nothing better. Black women, on the other hand, were trapped in these occupations before and after the second world war.: Angela Davis, Women, Race and Class (New York: Vintage Books, 1981) at 95.
crowds of black women seeking work.\textsuperscript{27}

Billie Holiday’s acquittal relied, at least in part, on the ambivalence that existed in the United States during the time of her trial regarding race and racism. In many ways, people (especially those in the North) subscribed to the notion that racism was incompatible with democracy. And yet, the material condition and everyday experiences of black people in post-WW II America was one of racism and segregation. Applied to the entertainment industry, women on stage during Holiday’s grandeur were viewed by men as sexual commodities; it was often assumed that these women were publicly available to men both on stage and off. This notion was particularly problematic for a black women whose sexuality was (and is still thought to be) intricately connected to issues of race and racism.\textsuperscript{28}

It is not surprising, then, that racism and sexism overshadowed much of Holiday’s musical success. Though traveling with the musical greats, Count Basie and Artie Shaw, at an early age, her time with them was tainted by racism and sexism.\textsuperscript{29} As a woman (particularly a black woman), Holiday had few options in the music business save from being a vocalist, a “girl singer,” in an all-male band (all white male, in the case of

\textsuperscript{27} Davis, \textit{ibid.} at 95.


\textsuperscript{29} Billie toured with Count Basie from March 13, 1937 to early 1938. She was with the Artie Shaw band from late March 1938 to early December 1938.
Shaw). As such, she often found herself discriminated against both because of her race and because of her sex, while on tour. For example, with Basie, Holiday had to ‘black up’ in a Detroit theater because she was too ‘yellow’; with Shaw, she sometimes was not allowed to sit on the bandstand with the band. Says Les Robinson: ‘Especially in the South...they didn’t like the idea of a black girl sitting on the bandstand. They didn’t care if she sang, as long as after she finished she returned to her place, as they would say....’ Sometimes Billie had to sleep in separate hotels and eat in separate restaurants because blacks were not allowed in the places Shaw’s band went.

This was not always the case. Some black women were able to overcome racism and sexism and play more of a role in the music industry. For instance, Sarah McLawler worked as a bandleader for the all-female combo, The Syncolettes in the 1940s. "She emerged in the swing era, when women singers were considered Big Band trinkets and the only real musicians were male. This was despite the record of top instrumentalists such as 'Jazz Wonder Child' Lil Hardin Armstrong, wife of Louis, who was house pianist at Decca and leader of male and female bands from the early 1930s; or trumpet player Valaida Snow, pianist Hazel Scott, and Blanch Calloway who led her 'Joy Boys' to stardom, but was continually passed over by Irving Mills's influential booking organization.” “Women's bands were often formed in response to the problem of getting access to the male jazz world - yet they were dismissed as gimmicks or novelty acts.”: Lucy O'Brien, “Sisters of Swing: Stardom, Segregation and 1940s/50s Pop” in Sarah Cooper, ed., Girls! Girls! Girls! Essays on Women and Music (New York: New York University Press, 1996) 70 at 70, 71.

According to Holiday, “they told Basie I was too yellow to sing with all the black men in his band. Somebody might think I was white if the light didn’t hit me just right. So they got special dark grease paint and told me to put it on.”: Holiday, supra note 15 at 61.

The irony of the situation was that, according to Artie Shaw, in the Southern states, ‘[y]ou had this Charlie Chaplin City Lights thing happening, where they wanted the black musicians' autographs at the performance, then wouldn’t let them eat in the restaurants.’: Bob Blumenthal, “First-person memories of swing; swing jazz, Down Beat 60th Anniversary Issue, "Volume 61, Number 7, Down Beat, July 1994 at 18.

This was not only in the Southern parts of the United States. Holiday encountered racism in the North too. One time in New York, at the Blue Room of the Lincoln Hotel, Lady Day was asked to use the freight elevator so that the hotel’s patrons would not assume that black people were patronaging the hotel. According to Holiday:

...every night Artie made me stay upstairs in a little room without a radio or anything all the time I wasn’t downstairs with the band singing.

Finally, it just got so I would stay up there, all by myself, reading everything I could get my hands on, from 10 o'clock to nearly 2 in the morning, going downstairs to sing just one or two minutes...

Dave Dexter Jr., "I'll never sing with a dance band again.” Billie Holiday; originally appeared in the Nov 1, 1939
a. black & blue(s)

It was rumored that Billie Holiday was fired from the Basie band because she would not sing the blues: John Hammond, Basie’s manager, wanted her to be ‘a coloured mammy’; Holiday refused and so she was fired. This anecdote is important as it signifies the battle Holiday fought throughout her career to be perceived as a jazz vocalist and not as a blues singer. While respectful of Holiday’s insistence that she was not a blues singer, Holiday’s music was, nevertheless, deeply rooted in the blues tradition. More importantly, her celebrity persona was intimately connected to that of the women blues artists before her. As a result, her configuration in the audience’s imagination was premised on the articulation of struggle, both cultural and political, over sexual relations.

issue; Down Beat 60th Anniversary Issue; Interview,” Volume 61, Number 7, Down Beat, July 1994 at 22.

Holiday also experienced racism while touring with Count Basie. However, “[t]he entire Basie Band had to put up with racism on the road, with all its insulting inconvenience with regard to food and lodging, so that at least Lady was not alone; but a black singer with a white band faced special problems.”: Clarke, supra note 15 at 141.

The recordings of black musicians were also often restricted to minority markets, or “race records.” According to Hazel Carby, ‘race records’ consisted of “…a section of the recording industry which recorded both religious and secular black singers and black musicians and distributed these recordings through stores in black areas: they were rarely available in white neighborhoods.”: Hazel V. Carby, ‘ ‘It Jus Be’s Dat Way Sometime’: The Sexual Politics of Women’s Blues” in Vicki Ruiz and Ellen Dubois, eds., Unequal Sisters: A Multi-Cultural Reader in U.S. Women’s History, Second Edition (New York: Routledge, 1994) 330 at 334.

“[T]he ingrained racist and classist methods of marketing and distribution kept the so-called ‘minority musics’ away from the mainstream. An Armed Forces Radio Poll saw Roy Acuff beat Frank Sinatra as the most popular vocalist among American servicemen, but Acuff’s records never appeared in the pop chart; jazz was once again a small-group genre, and great records were made but they were not much heard on the radio either.”: Clarke, supra note 15 at 237-8.

35 Clarke, ibid. at 135.

36 Holiday disliked being called a blues singer. And for good reason as she was not a blues singer at all, at least not in the classic tradition of “Ma” Rainey, Bessie Smith or Clara Smith. Paradoxically, though, Billie imparted a blues feeling to almost every song that she ever recorded.” Chilton, supra note 15 at 203-4.


38 Carby, supra note 34 at 333.
According to Hazel Carby, women’s blues lyrics of the 1920’s and 1930’s reclaimed women’s bodies as “the sexual and sensuous objects of women’s songs.” Narratives of the blues mythologized the female blues singer; these mythologies became texts concerning black women’s sexuality.

The mythologized texts of women’s blues, however, often blatantly contradicted mainstream ideological notions of sexuality and love. Blues lyrics of the 1920s and 1930s deviated from the mainstream in that they were provocatively and pervasively sexual -- including homosexual -- in nature. Both Bessie Smith and Ma Rainey, two famous blues singers from that era, were extremely outspoken regarding their affairs with women. For example, after her 1925 arrest for conducting an indecent (read homosexual) party in her home, Ma Rainey wrote her infamous “Prove It On Me Blues”: “It’s true I wear a collar and a tie/ Make the womens do all wild/ They say I do it, ain’t nobody caught me/ Sure got to prove it on me....”

In contrast to the saccharinized depictions of heterosexual love relationships in mainstream music, the blues spoke of extramarital relationships, domestic violence, and sexual promiscuity. Angela Davis argues that, in light of the historical context from

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39 Ibid. at 333.
40 Ibid. at 333.
41 Davis, supra note 37 at 11.
42 Ibid. at 3.
44 Davis, supra note 37 at 3.
which the blues originated (i.e., post-slavery), these discourses regarding sexuality were specifically African American in nature. In other words, ensuing emancipation, it was the areas of personal relationships and sexuality that were most affected. As slavery had controlled almost every aspect of black people's personal lives, sovereignty in sexual matters was something new and revolutionary.\textsuperscript{45}

Sexuality, then, has played a very different role in the lives of black women and men, a difference not acknowledged by the dominant culture. This difference must be kept in mind when reading various biographers' assertions that Holiday's celebrity image entailed a "sexualization" of simple love songs and a transformation of these lyrics into "narratives of sexual desire."\textsuperscript{46} Stuart Nicholson, for instance, maintains that Holiday claimed a song for the character part she created for herself as a singer: someone unlucky in love.\textsuperscript{47} All her songs contained lyrics that "drew on the romantic conventions of being let down or stood up, about loneliness and frustration in love."\textsuperscript{48} Being one of the few roles which was able to survive the conflicting demands of jazz singer and cabaret artist, Nicholson asserts that Holiday carefully chose material that, when sung a particular way,

\textsuperscript{45} \textit{Ibid. at 4.}

Similarly, writing on post-antebellum marriages, Laura Edwards argues that black Americans, while appropriating some tenets of legal marriage, "maintained their own vision of marriage and insisted on defining the substance of marital relations by their own rules - rules that often overlapped with the practices of many poor whites.": Laura F. Edwards, ""The Marriage Covenant is At the Foundation of All Our Rights': The Politics of Slave Marriages in North Carolina After Emancipation" (1996) 14 Law and History Review 81 at 85.

\textsuperscript{46} Nicholson, \textit{supra} note 3 at 229.

\textsuperscript{47} \textit{Ibid. at 112.}

\textsuperscript{48} \textit{Ibid. at 112.}
would invoke the blues mood without actually being the blues.\(^{49}\)

Angela Davis challenges this characterization of Holiday as fully controlling her repertoire and persona. According to Davis, Holiday began her career at a time when popular music was becoming a highly specialized business and subject to very rigid market requirements.\(^{50}\) Songwriters responded to this specialization by pumping out countless mediocre songs, all based on predicted marketable formulas. While quality songs did exist -- it was the era of Irving Berlin, Cole Porter and the Gershwin brothers nonetheless -- black musicians generally received the worst material.\(^{51}\) This was evidenced in the material supplied for Holiday’s first two recordings, “Riffin the Scotch” --

\[
\begin{align*}
&\text{I jumped out of the [f]ryin’ pan} \\
&\text{And right into the fire} \\
&\text{When I lost me a cheatin’ man} \\
&\text{And got a no-count liar} \\
&\text{Swapped the old one for a new one} \\
&\text{Now the new one’s breakin’ my heart} \\
&\text{I jumped out of the fryin’ pan} \\
&\text{And right into the fire} \\
&\text{Lord, right into the fire}^{52}
\end{align*}
\]

-- and “Your Mother’s Son-in-Law” --

\[
\begin{align*}
&\text{You don’t have to have a hanker} \\
&\text{To be a broker or a banker} \\
&\text{No siree, just simply be} \\
&\text{My mother’s son-in-law} \\
&\text{Needn’t even think of tryin’} \\
&\text{To be a mighty social lion} \\
&\text{Sipping tea, if you’ll be} \\
&\text{My mother’s son-in-law}
\end{align*}
\]

\(^{49}\) *Ibid.* at 126.

\(^{50}\) *Davis,* *supra* note 37 at 168.

\(^{51}\) *Ibid.* at 168.

Ain’t got the least desire
To set the world on fire
Just wish you’d make it proper
To call my old man papa
You don’t have to sing like Jessel
You can tell the world I said so
Can’t you see you’ve got to be
My mother’s son-in-law
You don’t have to sing like Jessel
You can tell the world I said so
Can’t you see, you’ve got to be
My mother’s son-in-law.

The “lyrical inanities” of both these songs, Davis contends, would have been “utterly embarrassing if rendered by any singer but Lady Day.”

When Holiday began recording more regularly during the mid-1930s, few black people could afford to buy her records for private listening in their homes. Accordingly, the selections chosen for Holiday by the recording companies were those which would sell to jukebox operators in black urban areas. These songs “were not chosen with any regard for the prevailing tastes of the black community. More often than not, they were discards, sometimes blatantly ridiculous tunes.” The very prospect of producing her music, then, became contingent on an acceptance of often insipid Tin Pan Alley material. Moreover,

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54 Davis, supra note 37 at 169.

55 Ibid. at 169.

56 Ibid. at 166.

“Tin Pan Alley was the name given to the publishing business that hired composers and lyricists on a permanent basis to create popular songs in sheet music form with attractive covers to the general public by means of extensive promotion campaigns. Originally, Tin Pan Alley was a nickname given an actual street (West 28th Street between Broadway and Sixth Avenue) in Manhattan where many of the fledgling popular music publishers had their offices. In time, it became the generic term for all publishers of popular American sheet music, regardless of their geographical locations.” “Tin Pan Alley / Sheet Music,” A History of Tin Pan Alley (Adapted from the book Tin Pan Alley by David Jasen) <http://kcmetro.cc.mo.us/pennvalley/biography/lewis/crosby/tinpan.htm> (17 June 1998).
the sexualization of her image, that occurred in order to sell these songs, became configured in terms of dominant notions of black female sexuality.

b. the jazzed “other” and the “othered” jazz

Important in this debate over Holiday’s agency and persona are the changes that were occurring in the music and club scene around that time. When jazz first became popular in New York in 1917, it was considered a “naughty novelty.” White patrons would flock to Harlem to listen to “jass” bands - the word “jass” referred to sexual intercourse - and “trade on the sexual innuendo through their dancing and floor shows as well as hot music.” Recalls singer Lena Horne: “The shows had a primitive, naked quality that was supposed to make a civilized audience lose its inhibitions. The music had an intensive, pervasive rhythm - sometimes loud and brassy, often weird and wild. The dances were eloquently provocative.” It was this sense of adventure that took white people to Harlem clubs; they presumed themselves to be abandoning the restraints of respectability. This feeling of adventure was intensified by the fact that Harlem clubs were some of the few places in the segregated United States that blacks and whites could mix. Indicative of the mood of the time, the row of clubs in Harlem was called “Jungle Alley.”

In 1939, a white shoe buyer from New Jersey (and a lover of jazz music) decided to open the first inter-racial nightclub in downtown New York City. The man was named

57 Paul Chevigny, Gigs: Jazz and the Cabaret Laws in New York City (New York: Routledge, 1991) at 40.
58 Ibid. cited at 40.
59 Ibid. at 41.
Barney Josephson. The club was the “Café Society.” During the years leading up to this purchase, Josephson had become frustrated by the segregation that took place in the New York clubs: the artists he liked best were all black and yet black people either had to sit in the back of the club or could not even get in at all (e.g., Cotton Club). Although Café Society attracted primarily white left-wing intelligentsia, it had the effect of reversing (in a small way) the flow of color from Harlem to downtown.

Prior to the opening of Café Society, racial mixing of an audience had “mostly taken place in black neighborhoods and had been tinged with a one-way sense of the exotic…” Such stereotypes continued into the 1940s. Mono Hadler argues that this fascination with the “exotic” and/or “primitive” aspects of jazz was indicative of the anthropological and Jungian context typical of the 1940s. The discourse that predominated the time was one which discussed the “primitive” as a representation of the “ancestral nature of humanity”; such art was viewed as instinctive in nature. Accordingly, jazz was looked upon for its “ancestral voices,” its roots in African tribal music and ritual.

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60 In an interview for the television special, Song Birds (WTN), Barney Josephson spoke of his experience at the Cotton Club: ‘My first experience in the Cotton Club on 125th Street - the black ghetto so to speak - and here was this enormous place, jam-packed always, whites only for patronage; the black maître d', all the staff, Duke Ellington with his band, and [] a line of gorgeous chorus girls and they couldn’t be a shade darker than a certain shade....': Song Birds, Women's Television Network (WTN), aired 1994.


62 Ibid. at 22.


64 Ibid. at 252 (interview with Lipton).
With the advent of World War II, though, and a growing number of blacks fighting for America and democracy, a new discourse of race emerged: the folkloric, simplistic rural typecasting of black people was being critiqued and Hollywood was being attacked by the NAACP for the plantation stereotypes which American films consistently portrayed black people. Consequently, a tension emerged in the 1940s between perceptions of jazz as “an image of twentieth-century modernity” and jazz “as a facet of an outmoded pastoral myth”; “urban” on the one hand and “primitive” on the other.  

From the black perspective, jazz has always been music of protest against discrimination and segregation: ‘It expresses anger at lynchings and at direct or indirect slavery, resentment of poverty. It expresses hope and struggle for freedom, the vitality which enables a people to wrest joy out of misery and to assert the triumph of human beings over the obstacles which would grind them down.’  

It is no coincidence, then, that, during the post-war period, a Cabaret Identification Card system was developed. This system of regulation enabled New York police officers to fingerprint every person who worked in a licensed place and to issue identification cards to all employees. Cards were denied to anyone who was not thought to be of “good character.” This system stemmed from a 1939 Presidential Directive instructing the FBI to ‘prepare a list of those whose presence might be adverse to the security of the United States.’ With the  

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65 *Ibid.* at 253

66 Davis, *supra* note 37 cited at 167 (citing Sidney Finkelstein).

67 Chevigny, *supra* note 57 at 58 (citing Maxwell Cohen, a lawyer who crusaded for the elimination of Cabaret Identification Cards in the 1950s).
establishment of the Cabaret Card system, it became unlawful for a club to hire a person who did not have a card. Cabaret Cards were denied anyone with a criminal record; a provision in the Alcoholic Beverage Control Act expressly forbade the employment of convicted felons in clubs that sold alcohol.\textsuperscript{68}

Not only was the Cabaret Card system extremely degrading to the musicians, it was conducted in an atmosphere of "petty graft, corruption and personal influence."\textsuperscript{69} Musicians applying for a Card were often sent next door to a photo studio to pay for an identification photo - even if they had brought their own picture. Some musicians denied cards at first, found they could hire a lawyer and eventually get a card.\textsuperscript{70} However, some musicians did not have the money or an adequate knowledge of the system to fight the problem. Others, such as Billie Holiday,\textsuperscript{71} were rumored to have their appeals denied because of their political commitment to desegregation.\textsuperscript{72} The irony of this system was that artists denied a card could perform in theaters, Central Park and, as Holiday later demonstrated, the nation's foremost stage, Carnegie Hall.\textsuperscript{73}

\textsuperscript{68} Nicholson, \textit{supra} note 2 at 167.

\textsuperscript{69} \textit{Ibid.} at 167.

\textsuperscript{70} Says an unnamed musician, quoted in \textit{Downbeat} magazine December 22, 1960: 'Everybody knows you can buy a police card if you have money and the right connections. Look at the guys with police records who are working New York clubs and then look at the lesser known musicians who are working because they don't have the money or the influence.': Chevigny, \textit{supra} note 57 at 60 -1.

\textsuperscript{71} Holiday was denied a Cabaret Card after her 1947 conviction for narcotics possession. Though she occasionally worked in a club without one (see page 133 for details), Holiday spent the rest of her life fighting to get a card.


\textsuperscript{73} Nicholson, \textit{supra} note 3 at 167.
In his book *Gigs: Jazz and the Cabaret Laws in New York City*, Paul Chevigny argues that, cabaret laws were extremely symbolic in nature: "they expressed the view of the New York City lawmakers - rooted ultimately in racism as well as fear of bohemian mores - that vernacular music was not entitled to be treated with respect." Applying Joseph Gusfield’s classic formulation, Chevigny shows how the cabaret system of regulation expresses the public worth of one subculture’s norms relative to those of others. This control works to legitimize and enhance the social status of the groups carrying the affirmed culture. Groups deemed deviant have their culture degraded. Such happened in New York City where, according to Chevigny, the cabaret laws branded jazz music as deviant with great precision and for a very long time.

**c. drugs, jazz, & the “hip” elite**

By the mid-1940s, the big-band swing era was coming to an end; it’s replacement, small-group bebop, was percolating “underground.” This shift from swing to bop “marked a change in jazz from a mainstream music to an explicit art music, an assertively black music.” It was during this era that the idea of “hip” developed. Beboppers

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74 Chevigny defines vernacular music as connoting collectively “all the forms of music with a popular base that are played in the New York clubs...” He uses this word in order to convey a sense of the “attitude of class superiority that the City has often exhibited toward the music, and because an alternative term like ‘popular music’ is often used to describe only commercialized forms of music.” Chevigny, supra note 57 at 12.

75 Ibid. at 4 (footnote in text not included in original cite).


77 Chevigny, supra note 57 cited at 4.

'created a language, a dress, a music and a high which were closed unto themselves and allowed them to one-up the rest of the world.' According to Chevigny, the bebop era was the first time that the black ego was expressed in the United States with self-assurance; this self-assurance owed much of itself to heroin, a drug that blocked out doubt and facilitated self-confidence.

From early on, Holiday associated marijuana and alcohol with good times. Eventually she graduated to opium and heroin for her highs. Within the status gradations that existed among the 'hip' crowd at that time, opium smoking was considered the epitome of cool, the "province of the big-timers." According to Nicholson, "[s]mall but elite circles considered it a luxurious vice and within the society in which Billie moved, it was associated with desirables: the big spenders, the flashy dressers and the big tippers." At the height of opium's popularity, though, the illicit drugs market was radically restructured. Due, in part, to the Second World War and to the federal narcotic control measures, opium became in short supply. This void was effectively filled by an increase in heroin on the underworld market.

Holiday was just one of many who got caught up in the restrictive drug sub-

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79 Chevigny, supra note 57 cited at 46.
80 Ibid. at 46.
81 Nicholson, supra note 3 at 234.
82 Ibid. at 135-6.
83 Ibid. at 136.
84 Ibid. at 136.
culture. During the war, the shortage of both opium and heroin meant that only those with money and connections could get supplied. One area where money and supply intersected was the music business.\footnote{According to Stuart Nicholson, "[s]ome 50-75 per cent of the bop players had experience with the drug, a quarter to a third were seriously addicted, and as many as 20 per cent were killed by there addiction." \textit{Ibid.} at 136-7.} The entertainment industry, though, and the jazz scene in particular, has never been without the taint of drugs:\footnote{One acute example of the intermingling of art and drugs is the "informal nationwide phenomenon of the viper's club" that raged in the show business and the entertainment industry during prohibition. According to Marie Bryant, singer and dancer: You didn't drink liquor or do anything else at all. But whenever you went to different cities, soon enough a guy would knock on your hotel door with a phonograph and Louis's and Billie's records, and other records he thought you'd like, and a little thing of pot, and then if you'd like to buy some more pot from him, it was fine; if not, you were just as welcome to this....Anywhere in this country. This was before it became a federal offense. We were against liquor - nix on the lush-heads...You could buy pot from them, or they would let you know the other people in town who had good pot. But the first bit was given to you gratis. Clarke, \textit{supra} note 15 cited at 203.} first it was cocaine, sold freely in New Orleans Storyville District; then, it was marijuana; alcohol has always been widely available in the entertainment infrastructure. Moreover, it is widely accepted that musicians and writers have long consumed drugs and alcohol to help them relax and enhance their creative imagination.\footnote{Nicholson, \textit{supra} note 3 at 137.}

In 1937, the use and possession of marijuana became a federal offense in the United States. The government argued that marijuana was so dangerous it needed to be prohibited under federal law. Interestingly enough, the campaign to criminalize marijuana coincided with proposed budget cuts to all federal agencies, including the Federal Commission of Narcotic Drugs. It was speculated that the Federal Commissioner of Narcotic Drugs, Harry J. Anslinger, lead the campaign to criminalize marijuana in order to...
ensure his Department (and his job) was not eliminated in the cutbacks. This campaign is particularly intriguing in light of the fact that the only people who really smoked marijuana at that time were people in show business (or ‘Mexicans or Indians’). 

Ironically, in response to, or for protection from, this criminalization, entertainers started to drink more: ‘if you were smoking pot you weren’t drinking’ and visa versa. This criminalization meant that the price of a marijuana cigarette increased from five cents to a dollar. It also meant that, when heroin hit town shortly after this criminalization, it was welcomed with open arms.

The criminalization and regulation of narcotics was intricately connected to issues of race, gender, class, and jazz. People in the jazz scene, especially black musicians and singers, worked in a society largely controlled by people who were extremely prejudiced against them. Getting high helped black performers cope with racism; insults could be effectively ignored when high. Since most of the heroin users in the jazz world were men, Holiday’s particulars -- her “flamboyant personality,” her femaleness, her blackness and her success as a singer -- led to much attention being focused on her and

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88 Clarke, supra note 15 at 204.

89 It has been argued that California, one of the first states to enact anti-marijuana legislation in 1915, did so in a “subliminally racist attempt to keep its Spanish-speaking population under control...”: Ibid. at 204.

90 Ibid. cited at 205.

91 Ibid. at 205.

92 Ibid. at 266.

93 For example, drummer, Roy Porter, remembers his own arrest in San Francisco in the late 1940s: “Stopped in the street, he threw two ‘papers’ of heroin in the gutter, the cop shined the flashlight on them and said, ‘Okay, now run, you black junkie son-of-a-bitch, so I can blow your nigger brains out. Run, go on, try it!’”: Ibid. at 252.
her drug use. Accordingly, as a successful black woman in a racist, sexist society, Holiday became the target of much public attention and police surveillance.

ii. configuring "lady day" in pop culture

As a black woman, I know she is my sister, in tears if not in blood. There is nothing that she sings about or brings to us - warmly wrapped in her amenable voice - that does not stir in me, and many other black women, immediate and emotional spiritual recognition. There is an existential correctness about everything she ever said or sang about being a woman. She documented for all time, the experience of loss that is characteristic in a black woman's life. Some of that loss she invited upon herself and that is distressing to me as a black feminist. But some of it just seeks you out and sweeps you up and I can't deny that as a black woman. My final sense of the matter is that Billie Holiday paid too deeply for her expertise.

~ Michele Wallace

The semiotic and affective power of a celebrity is often ambiguous and unstable.
This is especially true of the celebrity "Other." Contradictions abound when talking about Billie Holiday (a.k.a. Lady Day) and her life. She has been described as a victim,

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For instance, just prior to both Holiday's 1947 and 1949 arrests for narcotics possession, economically-disadvantaged drug users had become extremely vocal regarding the fact that rich and famous celebrity drug-users were either being ignored by the police or were able to pay for high-class lawyers and avoid jail. They pointed to the unfairness of the system and, at least in Billie Holiday's case, they seemed to get some response from the Federal government: Clarke, supra note 15 at 252.

Ibid. at 252.

According to Annie Ross, a jazz singer and friend of Holiday, "I'm sure that there were many people in America then of a different class and colour able to take drugs and lead relatively normal lives - but her livelihood was taken away when they denied her cabaret card.": O'Brien, supra note 30 at 79.


The origins of Holiday's "Lady Day" nickname are somewhat ambiguous. One source, Jo Jones, recalls that one night in Baltimore, some musicians were being real foul-mouthed. He yelled to them, 'Wait a minute. You guys can't do that. There's a lady present.' Lester Young responded by saying, 'What do you mean, lady?' Said Jo, 'There's a lady in here...' Immediately, Young said, 'Lady Day' and that is how the nickname came into existence: Nicholson, supra note 3 at 92.

Another source argues that Billie's nickname for Lester Young was "Prez" -- 'cuz he was the "president of the saxophone." Young thought that Holiday "must be the First Lady." Hence the name, Lady Day.: Clarke, supra note
a masochist, a person concerned with race issues, and "non-political"; Holiday has been cast as an introvert, an extrovert, a 'simple lookin' girl' and a sophisticate. Some argue she was as honest as they came; others state that she was a 'pathological liar.' Despite the contradicting descriptions of Holiday, though, one quality finds agreement with everyone: Billie Holiday was (and still is) a "legend."

a. image & aesthetics

Using Herbert Marcuse’s notion of ‘aesthetic dimension,’ Angela Davis attempts

15 at 221-2.
99 Nicholson, supra note 3 at 234.
100 Recalls Jimmy Rowles, 'She was unfortunate enough to be mentally arranged that she had to have a cat that beat the shit out of her three times a week to keep her happy.': Clarke, supra note 15 at 309.
102 Clarke, supra note 15 at 163.
103 Ibid. cited at 81.
104 Ibid. cited at 81.
105 Ibid. cited at 83.
106 Ehrlich, The Lost Art, supra note 15 at 136.
107 Clarke, supra note 15 cited at 273 (Bobby Tucker).
108 Ibid. cited at 343 (Carl Drinkard).
109 Nicholson, supra note 3 at 235.
110 This notion, elaborated on by Marcuse in The Aesthetic Dimension, explores the political potential of art. It is argued that:

The radical qualities of art...are grounded in the dimensions where art transcends its social determination and emancipates itself from the given universe of discourse and behavior while preserving its overwhelming presence. Thereby art creates the realm of in which the subversion of experience proper to art becomes possible: the world formed by art is recognized as a reality which is suppressed and distorted in the given reality.

Davis rejects the universalized application of Marcuse’s notion and, instead, proposes a “conceptualization of
to understand Holiday's power and appeal.\textsuperscript{111} As mentioned above, Holiday was often mistaken for a torch singer i.e., “a mood singer specializing in love songs, who, through a combination of stylization and repertoire, evokes the sadness and pain that love can bring.”\textsuperscript{112} Although Billie was not a torch singer per se,\textsuperscript{113} it is argued that she created a 'character' role for herself (or "image") that followed the theme of being unlucky in love.\textsuperscript{114}

Davis complicates this understanding of Holiday by demonstrating how the 'aesthetic dimension' of her work draws on and contributes to an African American social and musical history and simultaneously confirms and subverts racist and sexist representations of women in love.\textsuperscript{115} In other words, despite and perhaps because of the dominant white ideological notions of aesthetics, Holiday's talent and aesthetic appeal as a celebrity "Other" allowed for inherent challenges and implicit critiques of those narratives of white heterosexual love. For example,

[Holiday] transformed the song ["You Let Me Down"], which was full of clichéd images conjuring up propagandistic idealizations of spurned love, into a critique of its own content, a rapture exposing black people's status in a culture infused with the attitudes expressed in a song. Yet, this is a song that also reached across racial and

\textsuperscript{111} Davis, \textit{supra} note 37 at 163-4.
\textsuperscript{112} \textit{Ibid.} at 164.
\textsuperscript{113} Nicholson, \textit{supra} note 3 at 48.
\textsuperscript{114} "She sang more than just love songs, she sang about the world she lived in and that's why she's still great.": Bret Primack, "Billie Holiday: Assessing Lady Day's Art and Impact" <http://www2.jazzcentralstation.com/newjcs/main/article.asp?artid=2722> (8 May 1998).
\textsuperscript{115} Nicholson, \textit{supra} note 3 at 56.
class boundaries in its exposure of the futility of masculinist notions of romantic love.  

Holiday, then, did not passively accept the songs she was given. Instead, she insinuated challenge into every musical phrase. This signifying battle, Davis argues, became “the lyrical and dramatic core” of Holiday’s performances.  

For Davis, Holiday’s songs were extremely subversive in nature; they contained insights into the dominant culture that could be utilized by the black community. Lady Day negotiated an entrance for herself into the dominant culture and the domain of white love through the commodified images and market strategies of Tin Pan Alley. She brought back to her people a warning, a cultural critique of the ideologies of male dominance and heterosexism that overshadowed white consciousness of love and sexuality. According to Davis,  

...[Holiday] recast for her own ends the very elements of that culture that might have devoured her talents and her identity. Because she brought an original vision of popular song to the world and at the same time expanded the world of jazz, she communicated critical social meanings - across racial and class boundaries - to the populations, and especially to the women, of both worlds. 

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116 Ibid, at 170.  
117 Ibid, at 166.  
118 Ibid, at 171.  
119 Ibid, at 171.  
120 Ibid, at 171.  
121 Ibid, at 172.  
122 Ibid, at 170.  
123 Ibid, at 171.  
124 Ibid, at 171.  
125 Ibid, at 171.  
126 Ibid, at 172.  

For instance, Davis observes that in the recording of “You Let Me Down” (see: Appendix A), Holiday “does not sound like she is attempting to represent a gullible, disillusioned young woman in love, who had been promised marriage and riches by a deceitful lover. Rather, she sounds as though she is protesting something more than the fickleness of an individual lover, thus transforming the song into an indictment.”: Davis, supra note 37 at 170 (emphasis added).
It is here that Holiday’s connection with women blues singers of the 1920s and 1930s is most apparent. As with the blues performers before her, Holiday represented love and sexuality as both “concrete daily experience” and as “coded yearning for social liberation.”

Holiday’s performances were subversive in other ways too. The control with which she sang about being at the mercy of love had the effect of reformulating and reshaping such emotion into a critique of the “‘out of control’ woman in love.” In other words,

[this rendering represent[ed] a juxtaposition and performance of the conflict between representations of women’s sexuality in the dominant popular musical culture and those in the blues tradition - the former denying female agency, the latter affirming the autonomous erotic empowerment and independent subjectivity of female sexuality.

Songs with mediocre lyrics were challenged by Holiday’s renditions. They seemed to violate the seriousness of the subject matter and so she chose to sing them playfully. Other songs earned the full extent of her emotion. Throughout all her performances and recordings, however, she conferred a woman’s understanding: “In the music, in her phrasing, her timing, the timbre of her voice, the social roots of pain and despair in women’s emotional lives are given a lyrical legibility.” Accordingly, Holiday’s style was forged, not out of the literal signification of the lyrics, but out of the independent meaning of her vocals in relation to the instrumental accompaniment. The instruments --

122 Ibid. at 173.
123 Ibid. at 175.
124 Ibid. at 175.
125 Ibid. at 177.
all played by men -- signified the easy existence of men in love relationships. Her voice challenged this existence. In the end, Holiday illuminated the deeply disturbing disjunction between overt statements and their aesthetic meanings. 

b. strange fruit

The subversive potential of Holiday’s work relied in part on her performance of the protest song, “Strange Fruit.” Not only did this song transform her status in the United States popular culture, it helped configure Holiday’s image in the popular imagination. Holiday’s decision to sing this song is often downplayed by white popular culture. Several of her biographers, John Chilton and Donald Clarke to name a few, argue that, when first presented with the extremely political anti-lynching song, Holiday demurred. Some say that Billie, being “non-political,” did not know what to make of the song. They claim that she did not understand the lyrics or the magnitude of the message --

Southern trees bear strange fruit
Blood on the leaves and blood at the root
Black bodies swinging in the southern breeze
Strange fruit hanging from the poplar trees
Pastoral scene of the gallant south
The bulging eyes and the twisted mouth
Scent of magnolias, sweet and fresh
Then the sudden smell of burning flesh
Here is a fruit for the crows to pluck
For the rain to gather, for the wind to suck
For the sun to rot, for the trees to drop.

126 Ibid, at 180.

127 Born Abel Meeropol, the author of “Strange Fruit” wrote under the name of Lewis Allen. According to his adopted sons, Michael and Robert Meeropol (the children of Julius and Ethel Rosenberg, executed in the 1950s for treason), Allen, a former member of the Communist Party, was asked during an investigation in the McCarthy era whether Communists had asked him to write ‘Strange Fruit.’: Leah Garchik, “The Red Menace, Politics and ‘Strange Fruit’,” The San Francisco Chronicle, November 28, 1995 at E8.

128 In the words of Barney Josephson: ‘At first I felt Billie didn’t know what the hell the song meant.’: Clarke, supra note 15 at 164.
Here is a strange and bitter crop.

Statements, such as these by Josephson and Clarke, that deny Holiday any political agency, only make more evident the extent to which her artistry and her politics were both disparaged and defined by savvy white men. Angela Davis asserts that "Chilton's, Clarke's, and Josephson's stories capture Holiday in a web of gendered, classed, and raced inferiority and present her as capable of producing great work only under the tutelage of her racial superiors." The staging of Billie's Café Society performances of "Strange Fruit" by Society's owner, Barney Josephson, also evidences this. In an


Lewis Allen later wrote another very important plea for racial tolerance in 1945. "The House I Live In" was made into a short film starring Frank Sinatra. Sinatra, himself a victim of anti-Italian prejudice, dedicated himself to righting social wrongs: "'I'm in it for life,' he said. 'After all, I'm only coming out for the basic American ideal, and who can object to that?" "The House I Live" is indicative of the Post-World War II racial atmosphere. The film attempts to show how un-American racial prejudice is and that Nazi racism and anti-semitism are incompatible with democracy. The contradictions in the film, however, are quite apparent. Although intolerance of Italians was discouraged in this film, the same was not true of the Japanese (both nations fought against the United States in the war): Dudziak, supra note 18 at 68 and FN30.

In addition to "Strange Fruit" and "That House I Live," Lewis Allen also wrote a song called 'Over Here' which Holiday added to her repertoire in 1940. This song, a parody of Irving Berlin's 'Over There,' was "[a]s much a propaganda song against American involvement in the European war against Hitler as 'Strange Fruit' was against lynching..." Unfortunately, when the song began to enjoy modest success, FBI agents leaned on Holiday and told her to stop singing what was considered "unpatriotic" material. Though outraged, she was forced to accede. What she had not realized, though, was that the Federal Bureau of Investigation had now opened a file in the name "Billie Holiday: Singer" (#4855389): Nicholson, supra note 3 at 121

130 Davis, supra note 37 at 187.

Another example of a paternalistic construction of Holiday as being saved by the white man can be found in Scott Yanow's biography of Lady Day. In this article, Yanow writes "Billie essentially grew up alone, feeling unloved and gaining a lifelong inferiority complex that led to her taking great risks with her personal life and becoming self-destructive...Holiday's life becomes clearer after [sic] she was discovered by John Hammond singing in Harlem clubs. He arranged for her to record a couple of titles with Benny Goodman in 1933 and although those were not all that successful, it was the start of her career." Scott Yanow, "Billie Holiday," 26-Apr-96 05:36:18 GMT <http://www.nd.edu/~jkim/mft/jazz/lady.txt> (1 April 1998) (emphasis added).

131 It is important to note that "'[t]he importance Holiday herself accorded 'Strange Fruit' is revealed not only by the fact that she reconstructed her entire repertoire around it, but also by her thwarted decision to name her autobiography Bitter Crop, the last two words of the lyrics. Lady Sings the Blues was deemed a more marketable title by her publishers." Davis, supra note 37 at 187.
interview with Josephson after Holiday's death, he boasted:

I made her do it as her last number, and no matter how thunderous the applause, she had orders from me not to return for even a bow. I wanted the song to sink in, especially since it closed every show. The room was completely blacked out, service stopped - at the bar, everywhere. The waiters were not permitted to take a glass to the table, or even take an order. So everything stopped - and everything was dark except for a little pin spot on her face. That was it....The tears never interfered with her voice, but the tears would come and just knock everybody in that house out. The audience would shout for 'Strange Fruit'; those who'd never been down before and didn't know her sets closed with it would shout for it when they felt her set was coming to a close.  

As further evidence of his alleged "ingenuity," Josephson added:

Up to that time the national mags did not print black pictures....Soon after Billie started singing "Strange Fruit," *Time* came down, and a picture appeared, and they printed the lyric. To my knowledge, that was the first time a Negro's photo appeared in *Time*/*Life*, and from then on others began to appear. But it was the impact of that song that made them print her picture.

As if to subvert any control Josephson had in the staging of this song, Holiday appropriated "Strange Fruit" as her song, her own "personal protest song". Holiday attempted to control its meaning, to make it about her life: "It still depresses me," says Holiday, "every time I sing it...It reminds me how Pop died." But I have to keep singing it, not only because people ask for it but because twenty years after Pop died the things that killed him are still happening in the South." While it is impossible to know for

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134 Holiday, *supra* note 15 at 84.
135 According to Holiday, her father died after a bout of pneumonia which he could not get any penicillin for because no hospitals in the Dallas, Texas area would help a black man: "...he walked around trying to get help. But none of them would even so much as take his temperature or take him in." By the time he was admitted in the Jim Crow ward at a Veteran's hospital, he had a hemorrhage. "All they could do for him was give him a bed to die in and notify his next of kin.": *Ibid.* at 69.
certain the extent of Holiday’s influence over the meaning of the song, “Strange Fruit” continued to be part of Holiday’s repertoire throughout her career.

Holiday finally recorded “Strange Fruit” in April 1939.\textsuperscript{137} It was with this recording, along with her 1944 rendition of “Lover Man” that Holiday’s celebrity persona became configured in American popular culture. Here perhaps was the ‘lyric moment’ that defined her celebrity image.\textsuperscript{138} Important in this configuration was the lyrics of “Lover Man”:

\begin{verbatim}
I don’t know why but I’m feeling so sad
I long to try something I’ve never had
Never had no kissin’
Oh, what I’ve been missin’
Lover man, oh, where can you be?

The night is cold and I’m so alone
I’d give my soul just to call you my own
Got a moon above me
But no one to love me
Lover man, oh, where can you be?

I’ve heard it said
That the thrill of romance
Can be like a heavenly dream
I go to bed with a prayer
That you’ll make love to me
Strange as it seems

Someday we’ll meet
And you’ll dry all my tears
Then whisper sweet
Little things in my ear
Hugging and a-kissing
Oh, what I’ve been missing
\end{verbatim}

\textsuperscript{137} Columbia Records refused to record Holiday performing “Strange Fruit.” They feared potential repercussions from the song. Holiday instead went to Milt Gabler of Commodore Records, a smaller record company that used Columbia’s equipment to press records. Gabler agreed to record it and then convinced Columbia to let him use their equipment.: Clarke, \textit{supra} note 15 at 168.

\textsuperscript{138} Nicholson, \textit{supra} note 3 at 141.
Lover man, oh, where can you be? However, equally important, was the instrumental backdrop, comprised of string instruments and fiddles, in this configuration. According to Nicholson, here the instrumental backdrop frames the singer in quite a different way; the whole emotional climate is given over to the singer who takes centre stage. The jazz elements of her singing, such as syncopation, modifying and simplifying the melodic line, are less important than the almost perfect symmetry between words, rhythm and personality, the latter signified by the ‘grain’ of her voice.

“Lover Man” thus signaled a change in the configuration of Holiday’s status from jazz vocalist to pop singer. Moreover, the success of this widely distributed recording meant that Holiday was reaching a wider, non-jazz following.

c. the federal reformatory for women, 1947-8

Biographical narratives of Holiday’s life allege that, around the time of “Lover Man’s” success, Holiday became addicted to heroin. The tale of Holiday’s addiction is saturated with references to white paternalism and masculine attempts to control Holiday through drugs and money. From the beginning, Joe Guy, her lover at the time, charged Billie exuberant amounts of money for her drugs, way over the street price. When her use started getting in the way of her performing and began to drain her bank account, Joe

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140 According to Milt Gabler, Holiday was the “first black girl to record with fiddles.”: Song Birds, Women’s Television Network, 1994.

141 Clarke, supra note 15 at 185.

For instance, on February 16, 1946, Holiday had a solo concert at New York’s Town Hall. This event was extremely important to the jazz world as a solo concert was almost unheard of at the time for a jazz singer. This event was filled to capacity; seating was erected on the stage for overspill. Holiday’s Town Hall concert was covered not only by music press but by national newspapers such as the New York Times: “The glamorous Miss Holiday’s singing was pure enchantment.” With the exception of the song “Strange Fruit,” all the songs Holiday sung at this concert were consistent with the character part of a woman unlucky in love.: Nicholson, supra note 3 at 150.
Glaser, her manager, made her check herself into a New York clinic and get the "cure." According to musician, Bobby Tucker, though, it was no cure: 'They had glucose to clean out her system, they had great big bottles of that stuff - jugs - it's like purifying the system and those kinds of things don't work, all it does is make her a virgin when she comes out...And it ended up that she was getting stuff from the nurse.' Holiday left the clinic still addicted to narcotics and two thousand dollars poorer.

When Glaser found out that the cure did not work, he decided to go to the cops for help. Glaser confided in Jimmy Fletcher, one of the few black narcotics agents in New York at that time, about 'Billie being his girl, how he'd like to save her, and the only way to save her is to have her knocked out by the government.' It was this "concern" for Holiday's well-being that inspired her arrest on May 19, 1947 for a violation of Section 174 of the U.S. Narcotics Act. On May 27, 1947, Holiday appeared in the District Court of the Eastern District of Pennsylvania before Judge J. Cullen Ganey. At Glaser's request, she waived her right to legal representation and pleaded guilty to the charge.

Holiday requested that she be sent to a hospital in order to get help for her addiction. In her autobiography, Holiday wrote that the judge had responded to her

142 Clarke, supra note 15 at 249-50.
143 Ibid, cited at 255.

Furthermore, it is strongly doubted whether Holiday even read anything Dufty showed her, or even the book for that matter: Nicholson, supra note 3 at 233.
request for medicalization by saying, 'I want you to know you are being committed as a criminal defendant; you are not being sent to a hospital alone primarily for treatment. You will get treatment, but I want you to know that you stand convicted as a wrongdoer.' Holiday was sentenced to one year and a day at the Federal Reformatory for Women in Alderson, Virginia. After serving nine and a half months of her sentence, Holiday was released on parole, March 16, 1948.

d. carnegie hall, 1948

On March 27, 1948, eleven days after her release from Alderson, Holiday returned to New York to perform on the nation's foremost stage, Carnegie Hall. Despite, or perhaps because of, Holiday's stint in jail, she was as popular as ever with the United States public. Billie's Carnegie concert gross set a house record. According to Time magazine, the place was "jam-packed (300 were seated on the stage) with a crowd of Holiday cultists whose hysterical applause gave the event the quality of a revival meeting. They were telling their martyred Billie that nothing mattered, just so she was back..."

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145 Holiday, supra note 15 at 131. It ought to be noted that a controversy existed around that time regarding the treatment of the drug addict: medicalization or criminalization. Jake Ehrlich, a vocal opponent of criminalization, argued:

There is hardly a physician, psychiatrist or professional authority today who fails to recognize that narcotic addiction is an illness instead of a crime; it is a problem to be solved with treatment rather than with punishment and incarceration; and even more importantly true, that it's a problem deepened by the application of penalty.

Ehrlich, A Life in My Hands, supra note 15 at 143.

146 Nicholson, supra note 3 at 158.

147 Chilton, supra note 15 at 118.

148 "New Life," Time, Volume 51, April 12, 1948 at 68.
Time magazine wrote that Holiday’s voice -- “a petulant, sex-edged moan”\textsuperscript{149} -- was stronger than ever. All in all, she sang 32 numbers, mostly favorites such as “Billie’s Blues,”\textsuperscript{150} “Fine and Mellow”\textsuperscript{151} and “Strange Fruit,”\textsuperscript{152} to name a few. On April 17, 1948, she re-appeared at Carnegie Hall, only to break her own box-office record.\textsuperscript{153}

\textbf{e. new york cabaret laws}

Holiday’s conviction for narcotics possession and her prison term at Alderson, meant that she was denied a cabaret card when she returned to New York. For jazz fans, it appeared that the state and City authorities were more concerned with her criminality than her artistry.\textsuperscript{154} However, this was an oversimplified interpretation of what actually happened. Such denigration of artistic greatness was not done blindly. Instead, the authorities must have “recognized and feared the power of the work, even if they denied it. Otherwise why bother to control it?”\textsuperscript{155}

Consequent of this denial, Holiday found out the hard way that “an entertainer exiled from New York suffers extensive career damage.”\textsuperscript{156} Without her Cabaret Card,

\begin{footnotesize}
\begin{enumerate}
\item Ibid. at 68.
\item See Appendix B.
\item See Appendix B.
\item See \textit{supra} text accompanying note 129.
\item Nicholson, \textit{supra} note 3 at 166.
\item Chevigny, \textit{supra} note 57 at 59.
\item Ibid. at 59.
\end{enumerate}
\end{footnotesize}
Holiday had limited options. When offered a job by John Levy, co-manager of the Ebony Club (later to become Birdland), with the promise that action would not be taken against her by the police, what choice did Holiday have but to take Levy up on his offer.

For the next year, Holiday sang at the club undisturbed by the police and was extremely successful doing that. She had become the "in figure" with a vociferous crowd of New York sophisticates, whose interest was stimulated by the publicity concerning her past misdemeanors.

As one author explained, Holiday’s illegal performances at Club Ebony added to the thrill of hearing her sing.

**f. the media & billie holiday**

In the years following her release from Alderson Reformatory, Billie attracted much attention. In particular, *Metronome* featured Holiday in their October 1948 issue. In the article, "Day or Night, a Great Lady," one phrase was repeated throughout to describe Billie Holiday: "...the true, the real, the undeniable and the unanswerable."

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157 The hypocrisy of the system was that, although Holiday was prohibited from working in licensed clubs, she could sing in places such as theaters, Central Park and even Carnegie Hall. The reason for this pertained to the intimacy of a small club: "this characteristic of the regulation suggests that one of its functions was to prevent any close contact between the audience and the seductive art and supposedly seductive life of Billie Holiday and at least to control contact with others who practiced the abandoned arts of these nightclubs.": Chevigny, *supra* note 57 at 60.

158 Levy ‘was doing business with both sides of the law.’: Nicholson, *supra* note 3 cited at 169 (Bobby Tucker).

159 It is uncertain whether Levy was actually influential enough to get the police to ignore this blatant contravention of a New York police regulation or whether the detectives allowed Holiday to work in Club Ebony in order to monitor her drug use. "Certainly the police not only attended the club, but also kept Billie under close observation even though her parole had ended.”: *Ibid.* at 124.


162 Ulanov, "Day or Night," *supra* note 101 at 13.
The author, Barry Ulanov, discussed Holiday’s recent success at Carnegie Hall; Holiday shrugged off this success saying: ‘They come to see me get all fouled up. They’re just waiting for that moment. Just waiting.’ Ulanov then took a moment to pontificate about Holiday’s arrest and conviction:

If I may be allowed a lapse into ministerial discourse, let me say that though a sling was made of the color of her skin and an arrow of the prejudice of her unbrotherly white brethren, that’s not where or why or how Billie fell. Billie fell as others fell, victim of the same temptations, a temptress of the same victims. Only she fell in scale. As she sings better and looks better than most people, she fell harder than most. Others go home and are sick and have a hangover and are forgiven their trespasses and are free, at least legally, to begin all over again. Billie was arraigned. Billie didn’t go home.

Ending on an optimistic note, Ulanov pronounced that Holiday had come through the ordeal “...older, cleaner, closer to herself and the truth.” Maintaining a belief that Holiday would keep her word and would “hold with what she now knows to be right,” Ulanov concluded by stating his loving admiration and “high regard” for “the true, the undeniable and the unanswerable” Billie Holiday.

In addition to the increased publicity, Billie’s public image was undergoing a transformation during this time. According to Stuart Nicholson, “no longer was she seen as simply unlucky in love, the original character part she had created for herself. Now she was seen as unlucky in life.” This new configuration of Lady Day was reinforced by a

163 Ibid. at 14.
164 Ibid. at 31.
165 Ibid. at 31.
166 Ibid. at 31-3.
167 Nicholson, supra note 3 at 170.
series of articles in the popular press. One article titled “Lady Day’s Comeback” appeared in American Weekly and Negro Digest. “It told of her fall from grace, her addiction, and her cure, culminating in her Carnegie concerts. In interviews for PM and Metronome, Billie spoke freely of her past addiction: ‘When I was on it, I was on it! she asserted.’ All of these articles contributed to her notorious history and this, in turn, was viewed as giving her “a new base for singing about life.” Truth was becoming viewed as her habit, heroin, only a part-time crutch.170

**g. the recording studio**

Following her return to the popular music scene, Holiday’s “metaphorical turns of phrase” and her unfolding of a song began to assume greater subjective meaning to the members of her listening audience. Her personal life became configured in both the songs she sang and the way she sang them. “Now it was what she sang, the authenticity of her voice and the way her audience attributed special significance to it, that mattered. Audiences looked to Holiday’s “real-life story” in the popular press as the source of meaning in her voice.171

This vocal authenticity of experience (or experiential authenticity of voice) was reinforced when she went back into the recording studios on December 10, 1948 and

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168 Ibid. cited at 170.
169 Ibid. at 170.
170 William Dufty, “Cover Notes to Compact Disc,” The Billie Holiday Story (MGM, 1944; reissued on CD, MCA).
171 Ibid. at 170.
recorded "My Man" and "Porgy." The lyrics of "My Man" are particularly important. In this song, Holiday bemoans her man and his bad treatment of her:

It cost me a lot
But there's one thing that I've got
It's my man
It's my man

Cold or wet
Tired, you bet
All of this I'll soon forget
With my man

He's not much on looks
He's no hero out of books
But I love him
Yes, I love him

Two or three girls
Has he
That he likes as well as me
But I love him

I don't know why I should
He isn't true
He beats me, too
What can I do?

Oh, my man, I love him so
He'll never know
All my life is just a spare
But I don't care
When he takes me in his arms
The world is bright
All right

What's the difference if I say
I'll go away
When I know I'll come back
On my knees some day

For whatever my man is
I'm his forevermore.

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172 See Appendix B.

At this point in Holiday’s career, lyric content was becoming viewed as inseparable from the singer’s personal life.

Nicholson argues that this blurring of Holiday’s private and public lives was a conscious attempt on her behalf to manipulate her persona. He argues that these songs were chosen carefully by Holiday and were songs “she felt suited her and which she could become emotionally entangled.”\(^{174}\) Angela Davis, though, has a different interpretation. According to Davis,

Billie Holiday’s gift of aesthetic communication did not consist simply in her ability to render a song the profound emotions underlying her personal woes. However skillful she may have been in musically conveying her own state of mind, she also achieved a mode of expression that forged community even as it remained deeply personal. Her songs acted as a conduit permitting others to acquire insights about the emotional and social circumstances of their own lives.

In other words, the semiotic power of Holiday’s celebrity, and the blurring of her private and public lives, was deeply tied to her affective power over the emotional lives of her listeners.

\section*{h. more media attention}

While working at Club Ebony, Holiday got involved with John Levy, “a balding, overweight, middle-aged businessman” who had drifted into show business from retailing.\(^{176}\) Levy has been described as a pimp,\(^ {177}\) a thief,\(^ {178}\) a gangster\(^ {179}\) and a ‘miserable

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\(^{174}\) Nicholson, supra note 3 at 172. It is interesting to note that Holiday’s first version of the song “My Man” had no direct reference to physical violence. Clarke speculates that this omission could be because violence had not come to the fore in her life (thus supporting Nicholson’s theory of a blurred public and private persona) or that perhaps “the tougher lyrics would have been less acceptable in 1937.” Clarke, supra note 15 at 154.

\(^{175}\) Davis, supra note 37 at 194.

\(^{176}\) Nicholson, supra note 3 at 172.

\(^{177}\) In the context of Holiday’s men, ‘pimp’ refers to a man who lives off women’s earnings, as though it were
Yet, Holiday needed a man who could negotiate with the white world and 
Levy was this man. With his "ethnically misleading" name and his skin light enough to 
pass for white -- Levy "once described himself as half Jewish and half Negro" -- Levy was able to "pound the table" for Holiday on a somewhat equal basis with the white man.

In the beginning, Levy used his own money to buy Holiday exquisite gowns, a mink coat and a pea-green Cadillac. Later, though, Holiday reportedly found herself completely controlled by Levy, financially and emotionally. Even though she was making about $3,500 a week, she had to plead with Levy for pocket money; every purchase she made had to be accounted for. Without a cabaret card, Holiday had to go back on the road in order to make enough money. She decided to go to California. One night, while singing at a Hollywood club on New Year's Eve 1948, Holiday was involved in a minor unnatural for women to earn more than a man: Clarke, supra note 15 at 202.

It is said that Levy was controlling Holiday’s finances and, after her acquittal, Holiday was entirely without funds: “She [Holiday] said that John Levey [sic], her manager, flew to New York last Saturday, taking not only all her money, but all personal belongings as well.” “Acquit Billie Holiday on Opium Charge,” Variety, 8 June 1949 at 51.

Clarke, supra note 15 at 284 (Clarke dedicates a chapter to Levy called “The Gangster and the Bassist”).

Ibid. cited at 284 (Levy's ex-wife, Wilhelmina Gray).

Ehrlich, A Life in my Hands, supra note 15 at 146.

Clarke, supra note 15 at 285.

Ibid. at 285.

Ibid. at 285. “Someone who knew the couple well said, ‘John Levy could easily be mistaken for white, and with the name of Levy, he was often considered white. This was really a blessing in disguise, as he was able to book Lady Day at many places that it would have been impossible for her to work if she had continued associations with her previous “partners”.’”: Chilton, supra note 15 at 135.

Chilton, ibid. at 124.
altercation which led to John Levy stabbing a club patron. Neither Holiday or Levy were injured in the incident. However, both were charged (Holiday’s arrest came three days after the fact) and released on $2,500 bail. On January 13, 1949, the day of the preliminary hearing for the New Year’s Eve arrest, Holiday opened at Joe Tenner’s Café Society in San Francisco. The publicity from Holiday’s assault charges attracted a huge crowd at Café Society. Ten days later, Billie was involved in an even more sensational story. It is this incident that will inform the rest of this chapter.

iii. truth, justice, & the american way

Magna est veritas - truth is great....It is against tremendous odds that man battles to destroy false gods once an idol has been built....Magna est veritas.

~ J.W. Ehrlich

a. the crime

The following “facts” of the case are generally accepted by the varying sources and are not in dispute. On Saturday, January 22, 1949, Billie Holiday and her boyfriend/manager, John Levy, were in her suite at a midtown San Francisco hotel.

\[186\] "1949 was not many minutes old when Billie, who had finished her first set, walked through the club’s kitchen where a group of the owner’s friends were celebrating.

Billie complained to John Levy that one of the revellers had tried to get fresh with her as she passed by. Levy charged into the kitchen and demanded an explanation, Henry Martin spoke up and said he had only bumped into Billie as she walked through the room; another guest, John Petiva, joined in the ensuing argument. Insults were traded, tempers spiraled, then Levy picked up a carving knife and lunged at Petiva, but he was so wild and angry that he misses him completely and slashed another one of the crowd, Robert Donovan, in the shoulder. All hell broke loose as Billie began hurling crockery and glasses at the wounded man’s friends....": \textit{Ibid.} at 130-1.

\[187\] Holiday was charged by the District Attorney on three counts of assault with a deadly weapon. \textit{Ibid.} at 131.

\[188\] \textit{Ibid.} at 131.


\[190\] Some accounts say it was in Room 203 that Holiday was arrested. Holiday herself states it was Room 602. Whichever room it was, the Mark Twain Hotel, 345 Taylor, San Francisco has ‘dedicated’ Rooms 203-4 as the ‘Billie
There was a phone call, then a rap on the door. It was at this point that Levy handed Holiday a small package and told her to flush it down the toilet. Billie did what Levy said. However, before she could flush the contents down the toilet, four men darted into her hotel room. One Colonel White grabbed Holiday and the package as she tried to throw it into the toilet. Both Holiday and Levy were arrested for possession of opium.

Immediately following the arrest, Levy tried to bribe the officials. He was, however, unable to persuade them to drop the charges. Levy and Holiday were taken to the police station and bail was set at $500. Joe Tenner, the boss of the Café Society Uptown where Holiday was scheduled to perform, called Jake Ehrlich, the famous San Francisco criminal lawyer. Tenner asked whether Ehrlich would take on Holiday's case. Ehrlich said 'yes' and that night Holiday was out on bail and performing at Tenner's club. The publicity paid off and the Café was packed nightly. On February 7, Holiday pleaded not guilty to the charge of violating Section 11500 of the Health and Safety Code.

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191 One account says: “It was for Levy. He took the receiver and exchanged a few monosyllables with a person on the other end of the line. Later he claimed that someone had asked for a business appointment and that he had agreed to it.” Ehrlich, *Lost Art*, supra note 15 at 137. In Holiday’s autobiography, she states that a voice she did not recognize asked for Levy. However, the person on the other end of the line hung up before Levy could talk to him or her: Holiday, *supra* note 15 at 157.

192 Clarke, *supra* note 15 at 297.

193 "J. W. Ehrlich is best known to millions of Americans as one of the country's most celebrated trial lawyers.": "About the Author" in J. W. Ehrlich, *Reasonable Doubt*, *supra* note 189 at 299.

194 Ehrlich, *Lost Art*, *supra* note 15 at 139.

195 Both Nicholson and Chilton give this date as February 11, 1949.
The charge against John Levy was dismissed.\footnote{196}

At this point, the facts of the case become less certain. Some of the sources argue that Holiday was "clean"; others argue that Ehrlich delayed the trial date in order to give her time to detoxify. Ehrlich himself recalls that he had suggested:

\begin{quote}
...she go and get her personal physician to put her in and dry her out so to speak, because when we went to court I didn't want to have that facing me, or her for that matter. I assumed she was using opium; he handed it to her to throw away. I'm a lawyer, I play safe; I wouldn't walk into a courtroom and have something that would reflect the use of it and I couldn't win...\footnote{197}
\end{quote}

It is generally accepted that Holiday went and stayed with a friend, Dr. Herbert B. Henderson, because no hotels would allow Levy and Holiday as guests. Henderson referred Holiday to a nearby psychiatrist, Dr. James Hamilton; Hamilton, in turn, arranged that Holiday be admitted to the Belmont Sanitarium in order to prove that she was not addicted to any narcotics.\footnote{198} Holiday willingly underwent urine and blood tests; they proved negative and, after two weeks, Holiday left Belmont.\footnote{199}

To avoid being subpoenaed as a witness, John Levy left California and went back to New York. Billie began a tour of Northern California but quit soon after its inception. She went back to New York to be with Levy. While back east, she was delivered another huge blow when her cabaret card was once again denied, costing her an engagement at the

\footnote[196]{It was argued that, because the opium was in Holiday's possession, she should be the one charged: Chilton, supra note 15 at 132.}
\footnote[197]{Clarke, supra note 15 at 300.}
\footnote[198]{While in the sanitarium, Holiday was given enormous quantities of alcohol in order to quell her thirst for drugs. After a few days, it was obvious that she was not addicted to any narcotics; she displayed none of the withdrawal symptoms that an addict would have: Ibid. at 302.}
\footnote[199]{Chilton, supra note 15 at 133.}
Royal Roost in New York (at $3000 a week). According to *Down Beat* magazine, on a formal appeal against the card ruling, Justice Aaron Levy commended the police force for refusing to issue Holiday a card.\(^{200}\) Holiday returned to California, without Levy, at the end of May 1949 to stand trial for narcotics possession. On, June 3, 1949, she was acquitted of all charges.

**b. the defense**

Not much else is known for certain about this incident. Even Holiday herself, when asked by friends for the “real lowdown inside story,” confessed that she wish she knew herself.\(^{201}\) Holiday pleaded innocent to the charge of possession. The story argued in court was that Holiday had been set up by Levy. Her Lawyer, Jake Ehrlich, came to this conclusion via the following reasoning: (a) with the charges against Levy dismissed, it was obvious that White was trying to send Billie and *only* Billie to prison; (b) Levy’s exemption from bribery charges signaled something more sinister was going on: during the pre-trial examination, White put himself on record as having ‘declined’ the offer of a bribe from Levy. Why would he tarnish his reputation of a no-nonsense cop unless “White and Levy were partners in the enterprise to dispose of Billie”?\(^{202}\) (c) Ehrlich had asked Billie whether she had ever noticed Colonel White before. She said she had seen him at a table with John Levy at the Café Society Uptown. Ehrlich found a photo to prove

\(^{200}\) *Ibid.* at 133. (Quoting *Down Beat*, 6 May 1949 with respect to Aaron Levy’s comment).

\(^{201}\) *Holiday*, supra note 15 at 163.

\(^{202}\) *Ehrlich, Lost Art*, supra note 15 at 138. See page 144 for more details.
it, and (d) "word around town" was that Levy had got himself a new girl; he had stole enough of Billie's money and he wanted out. However, he could not just dump Lady Day; he had his image to think about. "He had to do something more subtle and conclusive, something that would leave him looking loyal and faithful and appearing noble." He had to frame her.

Ehrlich's argument had obvious problems. To begin with, there was no evidence to support his claim; Ehrlich simply insinuated that Holiday had been framed. His insinuation was an impetuous one at that. Why would someone go through all these pains simply to get out of a relationship? Levy could simply have walked away from Lady Day. Actually, it was more in character for him to "continue to steal her money as long as he could." The jury, though, seemed to take Ehrlich's argument as truth (or at least holding the possibility of truth). The reason as to why this happened lies in the power of Holiday's celebrity persona and the credibility it lent to her narrative of pain and betrayal.

c. the trial

The first step in obtaining Holiday's acquittal was forwarding a defense so potent as to shatter the sworn word of Colonel White. This was achieved by Jake Ehrlich,

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203 While unclear as to whether this event happened before or after the arrest was made, there was a picture taken by the club photographer that proved this meeting did take place: Averbuch and Noble, supra note 10 at 246.

204 Ehrlich, Life in My Hands, supra note 15 at 149.


206 Clarke, supra note 15 at 296.

207 Of all the characters in this trial narrative, White seems to generate the least disagreement. It is generally accepted that White was a "tough, experienced investigator, with a reputation as a fair man and a honest cop." White had broken up narcotics rings all over the world. He served O.S.S. with "cloak-and-dagger devotion" during
Holiday's extremely clever lawyer, who combed over the Grand Jury transcript and virtually committed to memory Colonel White's testimony. Convinced that Holiday was innocent -- "There was a basic honesty in Billie Holiday" -- Ehrlich focused on Levy and White as the villains in this scenario. Ehrlich's job in court was to prove Levy and White's connection and thus "crack the colonel's austere invincibility." In doing this, two things were focused on: (1) the fact that White had denied knowing Levy -- 'I knew him by description and reputation, but not by sight' -- and yet a photo was found of Levy and White sharing a drink together at Café Society; and (2) White admitted that Levy had tried to bribe him and yet he did not arrest or charge Levy for this crime: 'Q - Did you accept the bribe? A - No. Q - Did you arrest him for offering you a bribe? A - No. Q - Did you ever charge him with offering you a bribe? A - No.' To Ehrlich, this provided "unrebuttable evidence that White and Levy were partners in the enterprise to dispose of Billie."

Interestingly, in an 1971 interview with Linda Kuehl, White explained that it was

World War II, only to return to narcotics investigation immediately following the war. In 1948, White moved to San Francisco, in the hope of helping stop the flood of dope coming into the West Coast ports Noble and Averbuch, supra note 11 at 237-8.

208 Ibid. at 242.

This contradicts a statement made by Ehrlich in an interview with Linda Kuehl that he "assumed she was using opium." See supra note 141.

209 Ibid. at 242.

210 Ibid. cited at 240 (Colonel White on the witness stand).

211 Ibid. cited at 248 (Ehrlich).

212 Ehrlich, The Lost Art, supra note 15 at 138.
Levy and not Holiday who the Federal Bureau of Narcotics had wanted to arrest. They knew that Levy had “connections” in the underground drug realm and that he had been an informer for the New York police department. While Levy and White did meet at Café Society, it had nothing to do with framing Holiday, argued White. Instead, White was trying to coax the names of important players in the narcotics racket out of Levy. Unfortunately, when the case went to the Grand Jury, the District Attorney decided to indict Holiday and not Levy: ‘...Billie Holiday is the name and we want to get some publicity....,’ said the Assistant District Attorney to White after the hearing had ended. Levy then left town and White never got the information he desired.

White played an important role in Ehrlich’s trial narrative. Had Levy allegedly dealt with anyone other than a police officer or government agent, it would have made the story less believable. It was well-documented in the popular press that Holiday was hounded by narcotics squads throughout her life. She, herself, maintained that ever since she checked herself into a private sanitarium in 1946 to get “clean,” the law had been tailing her. Even Maya Angelou, in her autobiography, described a scene in which her son, on meeting Billie Holiday for the first time, commented:

Billie Holiday? Oh. Yes. I know about you...I read about you in a magazine. They said the police have been giving you a hard time. And that you’ve had a very hard life. Is that true? What did they do to you? Is there anything you can do back? I mean, sue them or anything.

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213 Clarke, supra note 15 at 298. According to an interview with Linda Kuehl, White had asked the Assistant District Attorney why the Grand Jury had indicted Holiday and not Levy. White knew that the Grand Jury did whatever the District Attorney told them to do. The Assistant District Attorney told White that they could have indicted Levy but, ‘Levy to us is a nothing guy.’ Instead, for publicity’s sake, they indicted Holiday: Ibid. at 298.

214 Holiday, supra note 15 at 123.

Accordingly, the argument that Levy conspired with a Federal Narcotics agent became credible in light of the trouble Holiday had been having with the law. This alleged conspiracy, in turn, made the implication that Levy framed Holiday more probable.

Also necessary was Levy’s absence from the stage. Had Levy been present in the courtroom and supportive of Holiday, the jury would not have believed he tried to frame her. It is said that Ehrlich encouraged Levy’s departure from San Francisco, intimating that Levy may be called as a witness if he stayed in town. Whatever the reason for his leaving, by virtue of his absence, it became easier to construct Levy as the “bad guy”, the “he” in Billie Holiday’s “My Man” narrative: “He isn’t true/He beats me, too/What can I do?”

With doubt cast on White’s testimony — “White came off the stand a tired, solemn man” — and the absence of John Levy from the courtroom — ‘I wish he was here, and we would be trying him,’ asserted Ehrlich — the next task was to convince the jury that Billie Holiday was more truthful than the “apparently ironclad case for the prosecution.” As mentioned previously, truth in a courtroom is a matter of deciding what to treat as true. Social experience lends credibility to certain assertions; truth

216 Clarke, supra note 15 at 299.
217 Percy Foreman argues that “...the first, essential act of the defense [is] to cast a shadow of doubt over the validity of the prosecution’s testimony.”: Ehrlich, The Lost Art, supra note 15 at 7.
218 Clarke, supra note 15 at 249.
219 Ibid. cited at 248 (citing Ehrlich).
220 Averbuch and Noble, supra note 11 at 237 and Ehrlich, Lost Art, supra note 15 at 138.
becomes the effect of this credibility. In light of the human predilection towards prejudice, emotion, and the like, though, issues of truth and credibility in a celebrity trial can not be separated from the meaning of the celebrity sign to a particular audience. In this particular instance, the semiotic and affective power of Holiday’s celebrity influenced the narratives told and believed by the legal actors and audiences regarding the judicial play.

(i) chivalric narratives

In the trial of Billie Holiday, the affective and semiotic power of her celebrity fed upon chivalric narratives of white justice. Carolyn Strange’s work on courtroom chivalry helps account for the emotional attachment of the jury to Holiday’s legal narrative. Discussing the acquittal of two disadvantaged women (one was mulatto; the other was poor), for the murders of upper class white men, Strange argues that chivalry sometimes plays a role in judicial leniency towards female defendants. She warns, however, that such a simplistic argument misses the way in which “judicial chivalry merely obscures and perpetuates injustice beyond the stage of chivalric courtroom dramas.”

Given that the power of the celebrity “Other” is unstable and ambiguous, white audiences are relatively fickle when it comes to their attachment with celebrities outside

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222 A.S. Cutler, Successful Trial Tactics (New York: Prentice-Hall, 1949) at 156.

the cultural mainstream. However, in this instance, Holiday was configured in the courtroom via Ehrlich’s appropriation of her “melodramatic tale of wounded womanhood as his masculine quest for chivalric justice.” As will be shown below, this chivalric narrative left intact, and even relied upon, dominant ideologies of white aesthetics and racial superiority. In other words, Ehrlich’s chivalrous tale was loaded with what Mariana Valverde calls ‘slippages.’ These slippages gave Ehrlich’s masculine narrative of chivalry a strong subtext of white paternalistic justice.

Ehrlich’s chivalrous narrative of wounded womanhood and white justice played upon the image of Holiday as a “big, scared, [dark] girl.” The appearance and demeanor of Holiday were extremely important in this construction. Holiday entered the courtroom on May 31, 1949 dressed uncharacteristically in a shabby suit. She was visibly upset and her eyes were puffy from crying. One eye was bruised and swollen. She told a reporter for *Downbeat* magazine (15 July 1949) that Levy had hit her: ‘You should see my back’; ‘He done it Friday night. It looks better now than what it did. He went off Saturday night - even took my mink - eighteen grand worth of coat...I got nothing now,

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225 Wesley Pue, “In Pursuit of a Better Myth: Lawyers’ Histories and Histories of Lawyers” (1995) 33 Alberta Law Review 730 at 741. Slippages have the effect of conveying, simultaneously, the meaning of a text directed towards one purpose to that of quite another sort. For instance, a discourse on single women can easily have a strong and complex subtext on race, or a discourse apparently on race and immigration might slip into moral categories: Valverde, *supra* note 21 at 13-14.

226 Averbuch and Noble, *supra* note 11 at 237.

and I'm scared.\textsuperscript{228}

It has long been held by trial lawyers that the witness’ appearance and demeanor in court is as important as an actor’s costume and conduct on stage.\textsuperscript{229} The ‘witness’ demeanor, notes Wigmore, ‘is always...in evidence.’\textsuperscript{230} Accordingly, Holiday’s visible anguish and drab appearance enabled the jury to more readily accept her in the role of poor, helpless victim. Ehrlich used Billie’s obvious emotional and physical pain to his advantage, letting her “pour it out while the indictment was being read and the first twelve jury candidates took their places.”\textsuperscript{231}

Dress and demeanor were not the only pertinent factors in Ehrlich’s chivalric tale. Also important was the selection of the jury. As all the prospective jurors were white,\textsuperscript{232} Ehrlich’s task was to determine who would be most empathetic to a black woman, regardless of her celebrity. And so, he asked each of the prospective jurors: ‘Do you believe...that because Billie Holiday is of another race, though American and entitled to equal protection under our laws, she is more likely than another person to commit the offense charged?’\textsuperscript{233} Ehrlich dismissed one woman whom he thought to be racially

\textsuperscript{228} Averbuch and Noble, \textit{supra} note 11 at 243.

\textsuperscript{229} Cutler, A.S., \textit{Successful Trial Tactics} (New York: Prentice-Hall, 1949) at 150.


\textsuperscript{231} Averbuch and Noble, \textit{supra} note 11 at 243.

\textsuperscript{232} This is evidenced in Holiday’s words: “Mr. Ehrlich sweated over the picking of the jury. So did I. He asked \textit{each one of them} if they had anything against Negroes.” Holiday, \textit{supra} note 15 at 161 (emphasis added).

\textsuperscript{233} Averbuch and Noble, \textit{supra} note 11 at 243.
prejudiced. He finally accepted a jury of six men and six women, to which Judge Wollenberg further admonished: 'Under the law you must have no reservations because Miss Holiday is of a different race.'

The trial commenced with Holiday being case in the role of "wounded woman" with relative ease. She took the stand and led the jury through her (selectively chosen) humble origins: "She had completed only the fifth grade in school because her father, a guitar player, had died of pneumonia when a Dallas hospital refused to admit him, a Negro. She had waited on table [sic] in her mother’s restaurant, singing for tips when she was only fourteen." This tale of poverty and bad luck worked to further authenticate Holiday’s narrative of "wounded womanhood."

Another well-known trial strategy entails gaining the jury’s respect by talking about a weakness in your case before the other side does; "confessing your sins," if you will. This confession effectively establishes credibility through frankness. As Edward T. Wright argues: "By making it part of YOUR STORY you will relegate it to a less important status than if opposing counsel bursts forth with it during cross-examination or argument." It was with this in mind that Ehrlich made certain Holiday’s past drug use was brought to the forefront and dealt with before the prosecution could cross-examine

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234 Ibid. at 243.
235 Ibid. at 249. It is important to note that Billie’s alleged father, Clarence Holiday, took off on Holiday and her mother when she was just a baby. It is not even certain whether he was her father. Although he did die of pneumonia in a Dallas hospital, such occurred on 23 February 1937. Billie was eighteen at the time, working as a vocalist at the Uptown, and long finished with school.: Chilton, supra note 15 at 43.
237 Ibid. at 37.
her on this issue. Holiday responded to Ehrlich’s probing of her past with brilliance: ‘I’ve been in trouble before!,’ she told the jury. ‘Two years ago, it was. I volunteered for the narcotics cure. It wasn’t for opium. But I ain’t had no drugs since. I came home and society took me back. Thank God for allowing me this second chance!’ Holiday’s candidacy gave her testimony the added appearance of honesty and remorsefulness that was required for Ehrlich’s chivalric tale of white justice.

Having cast Holiday in the role of honest but regretful victim, Ehrlich brought Levy and White in the picture. What emerged from Ehrlich’s reference to the Café Society picture was an emotional appeal to domination narratives: poor “Miss Holiday” had been set-up by her man, one of the only people she loved and trusted completely. Playing upon the power of anti-Semitic stereotypes (rampant in post-World War II America), Ehrlich asked Holiday to account for her $200,000 annual income. She replied that Levy controlled all her finances and that this had been a source of contention between them: ‘We had been arguing for a couple of months...I ask him where was the money and what was I making and why didn’t he give me some money and what was happening with my money.’

This line of questioning aided in the power of the chivalrous tale of wounded womanhood and the appeal to white paternalism and justice to save her. In the end, not only did the jurors come to despise the absent Jewish man named Levy -- a man they were told stole all her money and refused to marry her -- but they felt obliged to help this poor,

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238 Averbuch and Noble, supra note 11 at 250.
239 Ibid. at 250.
helpless black woman and save her from the bad luck that had befallen her. Said one jury member to Holiday’s doctor after the trial: ‘We think there is something funny about this whole case, and we think the real culprit is Mr. Levy who went out of town.’

This configuration of Holiday as a “wounded woman” was further consolidated by Ehrlich’s probing as to why she had not said anything to the arresting officer about her innocence. ‘What could she say?’ she replied. ‘Everything happened so fast. I didn’t expect anything like that. What could I say? And after all I was arguing with John about my money and he takes care of my whole life. What could I say? I didn’t know what was goin’ on.’ This speech neatly summed up all the gender, racial and moral components of her chivalrous tale of wounded womanhood. Her words carried with them the message of pain and powerlessness: the powerlessness of a black person against a white system, of a woman against a man, of a former drug-user against a tough, no-nonsense cop, and a black woman against a Jewish man.

Finally, Ehrlich asked Holiday whether Levy had went back to New York. ‘Yes, he lef’ me’, she confirmed. At this point, the Prosecution furiously asked the judge to make a ruling regarding this line of questioning. ‘It is obvious what counsel is doing,’ Weinberger, the prosecuting attorney yelled. ‘He is making speeches. He isn’t interested in answers!’ Then, in a dramatic move, Ehrlich turned to Weinberger and belligerently replied, ‘I want the truth! I am only interested in the truth.’ Holiday was asked one final

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240 Clarke, *supra* note 15 cited at 303 (citing Dr. Hamilton, Holiday’s psychiatrist).

241 Averbuch and Noble, *supra* note 11 at 251.

time whether she had used drugs within the past two years - 'No!,' she professed. The Defense rested its case.

(ii) signifying authenticity

Celebrity-truths, or statements purported as truth regarding a particular celebrity, are based in part on how they are measured against what the audience thinks is the "real person" behind the celebrity persona. It must be remembered, though, that authenticity is the product of power: certain groups decide what will be considered authentic in society. In the trial of Billie Holiday, the jurors gave a great deal of credibility to Holiday's celebrity-based claim that she was innocent. This credibility was shaped, in part, by the power of Holiday's "unlucky in life" persona and its authentication through the visual and vocal juxtaposition of Holiday's "simple and obviously unimprovised story" against the expensive and highly advanced resources of the State.

John Fiske argues that the "rawness" of language, contrasted with grammatically correct speech, gives the former a heightened sense of authenticity. By the same token, analogous arguments were used to prohibit Defense counsel from participating in felony trials during the early eighteenth century. Citing William Hawkins, John Beattie writes:

it requires no manner of Skill to make a plain and honest Defense, which in Cases of this Kind is always best; the Simplicity and Innocence, artless and ingenuous Behaviour of one whose Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own.

243 Ibid. at 251-2.
244 Ehrlich, Lost Art, supra note 15 at 137.
In other words, throughout history it has been held that a Defendant’s speech, gestures and countenance speak to her or his guilt and go far to disclose the “truth” in a criminal trial.  

Applied to Holiday’s case, her “street-wise” grammar, her unfinished sentences and emotional responses in the courtroom enabled her to speak with “the accent of the disempowered.” In other words, despite her fame, Holiday was configured as a typical black person in the mind of the jury, a black woman who had been cheated on, lied to, used and abused by men (both black and white). The “lowness” (that is, the blackness and femaleness) of the social position from which she spoke carried with it a heightened sense of authenticity regarding the “experiential truths (or ‘true’ experiences) of the socially disempowered.” In contrast, the abstracted and unemotional responses of White represented a lack of fear and, hence, a position of power. At one point, White joked about how bad he looked in the picture of he and Levy. This joke solidified Holiday’s and White’s varying social positions in the jury’s imagination: the jury laughed with Colonel White; the jury laughed at Billie Holiday, the “big, simple, dark girl.”

The credibility of Holiday’s narrative was also authenticated by its contrast with the “highness” of the social power of the State. Not only was the “ace investigator” of

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246 Ibid. at 223.
248 Ibid. at 127.
249 See supra text accompanying note 226.
the Federal Bureau of Narcotics one of the main characters in this drama, but the State’s “first team” in litigation played the prosecution. The high status of these figures, rather than increasing the jury’s deference to the court, became interpreted as another example of collusion against Billie Holiday. The State was using its best men to bring the poor celebrity down. This belief was reinforced by earlier media coverage regarding government surveillance of Holiday.

Further evidence of conspiracy came from the court’s disallowance of Dr. Hamilton’s testimony regarding Holiday being “clean” during her brief stay at Belmont Sanitarium. Although irrelevant to the issue of possession, the disallowance of Dr. Hamilton’s testimony was viewed as suspect by the jury: ‘Well, it was a funny thing that they shut up that guy Hamilton when he had been her doctor; why didn’t they let him testify?’ In an interview with Linda Kuehl years after the trial, Hamilton relayed that he had known someone on the jury at Holiday’s trial. This person had told him after the fact that the jury had found the whole thing very suspicious, especially him not being able to testify.

Also important to the authenticity of Holiday’s narrative was the societal suspicion surrounding the government’s handling of drug cases during the time. It is uncertain how much knowledge the jury had of the debate raging in United States popular culture.

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250 Averbuch and Noble, supra note 11 at 242.
251 Personal communication with Franc Boltezar, Vancouver, B.C., May 1998.
252 Clarke, supra note 15 cited at 303.
253 Ibid. at 303.
regarding the proper use of government resources during that time. However, in a March 1949 edition of *Metronome*, Barry Ulanov blasted the government for wasting resources on Holiday's trial: “Guilty or innocent,” Ulanov stated, “framed or not, I don’t think Billie is the proper point of all this indignation about the drug market. Something else is involved and I think it is time we got around to it.” The “something else” alluded to by Ulanov, involved “the gangsters who run the dope and rope into the country and peddle it from dressing-room to dressing-room, from night club entrance to night club entrance, from alley to alley.” Inferring that it was not the American drug user, of which celebrities were the majority, but the “foreign” drug pusher who was the villain, Ulanov urged the state to “stop the flow at its source, and start directing the publicity as well as the undercover activity toward that end.” The “real villains,” at least from Ulanov’s perspective, were the foreigners. And Billie Holiday, while a black woman, was still American (and a celebrity at that).

The authenticity of Holiday’s trial narrative was also influenced by the semiotic and affective power of Holiday’s celebrity persona. Such effectively blurred the line between Holiday’s public image and private life. This blurring allowed Holiday to argue (and a jury to believe) that her manager/boyfriend would do something like this to her. To the white jurors, as to the listening audience in general, Holiday not only sang about love and betrayal, she lived this pain: ‘When you listened to Billie Holiday sing, you felt that

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256 *Ibid.* at 42.
she had lived that experience and she was telling a story about it." The "bad" treatment she received from men was frequently documented in the popular media. For instance, in April 1948, the *New York Amsterdam News* announced: 'A famous singer prominent in the news has all her friends worried because she's gone back to her old love.' This old love was Jimmy Monroe, a man notorious for beating up Holiday in public.

During her cross-examination by Weinberger, Billie played on the semiotic and affective power of her "all-purpose victim" celebrity persona. She testified that she had known Levy for about a year, and when asked whether Levy was her business manager, she vehemently replied 'He's my man!' At this remark, the judge, jury, the entire courtroom erupted with spontaneous laughter, laughter that continued into the District Attorney's resumption of his questioning. Holiday testified that '...when Levy gave her something to get rid of, she was doing what her man told her.' One author stated that Billie 'did everything but sit on a piano and sing "My Man."' When asked why she handed the phone to Levy instead of taking the call herself, she said, 'I never did anything without John telling me!' When asked why she threw the large package in the toilet she replied, 'If your wife asked you to throw something away would you notice how large it was? You'd just throw! I'd just do anything John told me....'

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257 Clarke, *supra* note 15 cited at 296 (John Levy, the bassist).
259 Clarke, *supra*, note 15 at 303.
d. the verdict

After that performance, closing arguments were superfluous. Two and a half hours later, the jury came back with a "Not Guilty" verdict. It took only two ballots for them to decide: the first was nine-three for an acquittal; the second was unanimous. In the end, '[t]he jury believed the defense contention that she was framed.'

iv. conclusion: celebrity legal storytelling

There’s no damn business like show business...You had to smile to keep from throwing up.

~ billie holiday

Irrespective of whether Holiday actually believed Levy had tried to frame her or whether it was simply a clever ploy by a resourceful lawyer, the argument worked. Here stood a women who had a previous record for narcotic possession and was a self-confessed user of drugs (although, at the time, she maintained that she was "clean"). Yet, she was able to overcome an apparently ironclad case against her and emerge victorious. This victory owed much of its success to Ehrlich’s chivalrous tale of wounded womanhood. However, it was Billie Holiday’s “My Man” routine, a routine she had been doing for years on the stage, that secured her acquittal.

Holiday’s “all-purpose victim” celebrity persona became, in this instance, the shared storyline, the cultural myth, around which the jury oriented itself. This orientation was made possible through many factors. For instance, the social position of the jury as

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262 Averbuch and Noble, supra note 11 at 253-4.
263 “When the Diva Takes a Dive,” The Herald, Monday, March 31, 1997 at 15 (taken from Holiday, Lady Sings the Blues at 61).
people who had “no reservations” about Holiday being “of a different race”,²⁶⁴ made them more sympathetic towards a black woman’s narrative of pain and betrayal. Secondly, information regarding Holiday’s personal life was mediated through the white-dominated media. Thus, the narrative authenticity of an out-of-control and down-in-luck black woman found its basis in the congruency between this representation and those simplistic and stereotypical images of black people, and black women in particular, in popular culture during the time. Finally, the semiotic and affective power of Holiday’s “unlucky in life” celebrity persona lent credibility to Ehrlich’s chivalrous tale of wounded womanhood and to Holiday’s celebrity-based claim that she had been framed by her Jewish manager/boyfriend.

In essence, Holiday’s “My Man” narrative triumphed in court because it fed on the blurring of Holiday’s private and public lives. Specifically, Lady Day’s trouble with the law (and with men) in her private life helped authenticate her voice and her “unlucky in life” narratives in her songs. This, in turn, worked to obscure the line between where Holiday’s public life ended and where her personal life began. Lady Day not only sang about pain, she lived that pain. It was this heightened authentication which gave Holiday’s testimony the quality of “truthfulness” needed to overcome the prosecution’s “ironclad” case against her. In the end, Billie Holiday’s narrative of pain and betrayal became lyrics on the courtroom transcript.

²⁶⁴ See Judge Wollenberg’s admonishment at page 150.
Some people say this is Generation X and for some white folks subsisting on fast-food paychecks, it may be; but not for the majority Americans – of all colors, income brackets, races and creeds – this is the age of the Gangsta.

~ Ronin Ro

Rap music is a form of black cultural expression that prioritizes black voices: ‘It’s made by black people for black people.’ Rappers speak from the voice of personal experience, conferring upon the masses the experience of growing up poor and black in...
the ghettos of the United States.⁴ These stories articulate the “shifting terms of black marginality” in contemporary Western society. They are distinctively black narratives, spoken in elaborate black slang and referencing black cultural figures and little-known black heroes.

One narrative that figures prominently in rap music is that of the Endangered Black Man: victim of a racist society, beaten up by the police, over-represented in the United States prison system, unemployed, and living in the ghetto. This is a narrative that tells the story of the very real experiences of poverty and racism faced by many black men throughout the history of Western colonial society. Gangsta-ism, or the violent underworld life of drug dealers and gang affiliates, is considered the necessary outcome of growing up black and male in the United States.

Gangsta rap, the most violent and misogynist of all rap narratives, takes the Endangered Black Man trope one step further. The gangsta rap genre requires its celebrities to live (and sometimes die) by a code of “realness,” a standard which insists that those who sing the song also live the life.⁵ In this instance, the Endangered Black Man narrative becomes more than just material for a song or an image. It becomes a way


See, also, John Leland, “The Word on the Street is Heard in the Beat,” *Newsweek*, May 11, 1992 at 52 ("'Rap,' says Chuck D of the group Public Enemy, ‘is Black America’s TV station...Black life doesn’t get the total spectrum of information through anything else.’").

⁵ For example, gangsta rapper, Tupac Shakur, was shot outside the Mike Tyson-Bruce Seldon fight in Las Vegas on September 7, 1996. He died in the hospital on Friday, September 13, 1996. Though the police do not know (or do not want to know: “‘The cops don’t want to find out who did it — they think whoever did it did them a favor,’ says aspiring rapper Jerome ‘Butter’ Wilson...”) who shot Shakur, one theory is that the shooting was done by a Compton Crip gang member, as revenge for a fight between another Crip and Shakur following the Tyson bout.: Dana Kennedy, “Deadly Business,” *Entertainment Weekly*, December 6, 1996 at 34.
of life. The story of prominent gangsta rapper\textsuperscript{6} and actor,\textsuperscript{7} Tupac Shakur (a.k.a. 2Pac), illustrated this.\textsuperscript{8} Shakur’s success as a gangsta rapper flowed primarily from his image as a gangsta\textsuperscript{9} and a thug.\textsuperscript{10} Shakur configured his popular image, Thug Life,\textsuperscript{11} as the product of growing up poor, black, and fatherless in the United States. Thugs, argued Shakur, are ‘niggas who don’t have anything.’\textsuperscript{12} In other words, Thug Life was inherently connected to the Endangered Black Man narrative. As Shakur told \textit{Rolling Stone} magazine in 1993:

\begin{quote}
In any other country with any other skin color, I would have been a great lawyer. I would be Tom Cruise in \textit{The Firm}. But in America with black skin, I’m just Tupac the cop-killer dude. You know, I’m a revolutionary. I’m a straight thuggin out here. Thuggin’ against society. Thuggin’ against the system that made me.\textsuperscript{13}
\end{quote}


\textsuperscript{7} In addition to his rap career, Shakur acted in several movies including \textit{Juice} (Paramount, 1992), \textit{Poetic Justice} (Columbia Pictures, 1993), \textit{Above the Rim} (New Line Cinema, 1994), \textit{Bullet} (Roadshow, 1995), \textit{Gridlock’d} (Gramercy, 1997), and \textit{Gang Related} (MGM, 1997). The last three movies were released posthumously. \textit{Ibid.}

\textsuperscript{8} \textit{Obituary: Tupac Shakur,} \textit{The Economist,} September 21, 1996 at 91.

\textsuperscript{9} “Gangsta” is a “[g]eneric name, coined circa 1987, for tough-talking West Coast hip-hop...Gangsta style revolved around ‘gats’ (from the 19th century Gatling gun), gang wars, treacherous females (‘bitches’ and ‘ho’s’), and lowrider car culture. Later accessories came to include blunts (fat joints) and 40-ounce bottles of malt liquor. For hip-hop, gangsta meant an irrevocable change of tenor, a tectonic shift away from politically aware performers like Public Enemy and KRS-One to a music of boastful, vengeful pleasure seeking.”


In February 1994, United States Congress staged hearings regarding gangsta rap. “The politicians failed to remark on gangsta’s patriotic spirit: an unrelenting emphasis on the first two amendments to the constitution (free speech and the right to bear arms); rampant individualism; superhero persona as sales tool; and an unquestioning endorsement of capitalist gain.” “alt.culture:gangsta” 17-Feb-98 17:41:45 GMT \texttt{<http://www.pathfinder.com/altculture/aentries/g/gangsta.html>} (5 March 1998).

For more information on the history of gangs and gangstas, see Ro, \textit{supra} note 2.

\textsuperscript{11} An acronym for “The Hate U Gave Lil Infants Fuck Everybody,” Thug Life was more than just Shakur’s celebrity persona, it was his life: “November 96 - Last Testament,” \textit{Vibe Online,} 05-Feb-97 21:05:31 GMT \texttt{<http://www.vibe.com/archive/nov96/docs/lasttest.html>} (14 March 1998).

Shakur even went so far as to get “Thug Life” tattooed on his abdomen. See Appendix C.

\textsuperscript{12} “Last Testament,” \textit{ibid.}

Shakur’s Thug Life image, and the Endangered Black Man narrative embedded within, was bolstered by Shakur’s confrontations with the United States’ legal system. Looking specifically at Shakur’s 1993 indictment and trial in New York City for sodomy,\textsuperscript{14} attempted sodomy, sexual abuse,\textsuperscript{15} and criminal possession of a weapon, this chapter will demonstrate the interconnected nature of contemporary Western law and popular culture. Shakur’s indictment and trial worked to bolster and sustain his Thug Life gangsta rap persona. This image (and the reality that helped sustain it), in turn, gave Shakur a certain claim to the Endangered Black Man narrative in the courtroom. It was this story, a tale of racism and police conspiracy, that led to Shakur’s eventual acquittal on the more serious charges of sodomy and weapons possession.

i. his life: thug life

\textbf{...Thug Life, y’all know the rules}
Gotta do whatcha gotta do (Stay True)
Maaaannnn, I don’t worry about the Five-O
If they start, cuz it’s all about survival
Just stay smart
Keep your mind on your bank roll
Always
Stay ahead of these stank hos
These days
It’s an all out rat race
And look at MEEE just caught another cat case
That makes three
My lawyers getting cash up the ass

\textsuperscript{14} According to the New York Penal Code, a person is guilty of sodomy in the first degree when she or he engages in “deviate sexual intercourse with another person.” “Deviate sexual intercourse” consists of any “sexual contact between two persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.”: McKinney’s Consolidated Laws of New York Annotated Penal Law, Chapter 40, Part 3, Title H, Offenses Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation, Sections 130.00 and 130.50.

\textsuperscript{15} A person is guilty of sexual abuse in the first degree when she or he “subjects another person to sexual contact.” “Sexual contact” means “any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing.”: McKinney’s Consolidated Laws of New York Annotated Penal Law, Chapter 40, Part 3, Title H, Offences Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation, Sections 130.00 and 130.65.
Don't even ask
...Is that Tupac Thug Life?
Hell yah
Try to dirty up my name
But it's still here
Which way do I turn?
I'm strapped
Lost in the storm
I can't turn back with that
...Thug Life, y'all know the rules
Gotta do whatcha gotta do (Stay True)  
~ 2Pac, "Stay True"\(^{16}\)

a. the background

The story of Thug Life begins prior to Shakur's birth. It is said that 2Pac 'was in jail even as a fetus'.\(^{17}\) All biographical narratives discuss the fact that his mother, Afeni Shakur, spent most of her pregnancy with him in jail. As a member of the famed New York 21 Black Panthers, she had been charged with "several felonies including conspiracy to bomb public places. Acquitted and released for lack of evidence in her eighth month, Afeni gave birth to Tupac in East Harlem."\(^{18}\) She struggled to raise her son alone, living in the Bronx and Harlem and, at times, sleeping in homeless shelters.\(^{19}\) With each move, Shakur re-invented himself: 'People think just because you born into the ghetto you gonna fit in.'\(^{20}\) He sought solace as a child in writing poetry. At age twelve, Afeni enrolled him in the 127th Street Ensemble, a Harlem Theater Group. While with this group, Shakur played Travis in *A Raisin in the Sun*. From there, Shakur went on to be accepted at the


\(^{17}\) Bill Hewitt, "Hip-Hop Hitmaker Tupac Shakur is Busted for Sexual Assault," *People*, December 6, 1993 at 89.

\(^{18}\) Ken Baker, "All Eyes on Her: Afeni Shakur tends to her son Tupac's fortune - and some of his troubles," *People* (December 1, 1997) at 154.

\(^{19}\) "Tupac Shakur," *Contemporary Black Biography*, Volume 14, 1997 (ALLNWS, LEXUS NEXUS Database; no page numbers).

prestigious Baltimore School for the Performing Arts in Maryland. Unfortunately, his family moved to Marin City, California before he could graduate high school.

Once in Marin City, "a desolate stretch of northern California known locally as 'The Jungle'" -- cuz 'niggas there like to kick up dust' -- Shakur moved away from home, "sold dope, befriended everyone, and became the running joke in the area." 'All through my time there they used to dis me,' says Tupac. 'I got love but the kind of love you would give a dog or a neighborhood crack fiend. They liked me because I was at the bottom.' Despite this, he finally felt like he belonged somewhere. At the age of nineteen, Shakur got a job as a dancer with the group, Digital Underground. He began touring with DU during its 'Humpty Dance' phase, "bumping and grinding with a rubber doll to the latest dance craze."

Shakur released his debut album, 2Pacalypse Now, in 1991. "[H]is album's tough stance -- in the increasingly popular 'gangsta' mode -- created his first major controversy." In April, 1992, Shakur's track "Soulja's Story" was cited as the impetus for the shooting death of a Texas state trooper. The young perpetrator argued that he had been listening to Shakur's album at the time. The violent, police-hating lyrics -- "...They finally pulled me over and I laughed,/ Remember Rodney King and I blast on his punk

21 "Tupac Shakur," supra note 19.
23 Ibid.
24 Ibid.
25 Ibid.
26 "Tupac Shakur," supra note 19.
ass...”

27 Shakur’s song played a role in the crime. However, they did not view this as decreasing the blameworthiness of Ronald Howard, the killer. In response to this shooting, Dan Quayle, Vice President at the time, urged record stores to remove Shakur’s first album from the shelves.29

Shakur was beginning to be noticed - and not just by rap fans. In December 1991, Tupac was arrested for jaywalking and responded by filing a $10 million lawsuit against the Oakland police force for alleged brutality. He also began his movie career around that time, first starring in Ernest Dickerson’s 1992 film, Juice. In this movie, Shakur played Bishop, a boy “addicted to the high of violence. Though reviews of the film were mixed, his performance received uniform raves.”

30 He had everyone wondering whether he was “just acting or putting forth his real life persona in the movie.” Interviewer Davey D, who had known Shakur for a couple years prior to this time, said it was even hard for him to tell, especially since Shakur “had a loaded gun on him” when interviewed.31 Not long after the release of the movie, at a Marin City Celebration, a six year old boy was killed in the crossfire between Tupac’s posse and some antagonists.32 Tupac’s notoriety was on the rise. So were his record sales. Shakur’s 1993 effort, Strictly for My N.I.G.G.A.Z.,

29 “Rapper is shot, robbed as jury weighs case against,” The Austin American-Statesman, December 1, 1994 at A2. See also “Tupac Shakur,” supra note 19.
30 “Tupac Shakur,” ibid.
32 “Tupac Shakur,” supra note 19.
“went gold in a matter of months.”

Much of the substance for Shakur’s notoriety came from his rap-sheet outside the entertainment industry, the extensive list of criminal and civil charges against him. Between March and October in 1993, Tupac was arrested several times for numerous offenses:

In the spring of 1993, Shakur allegedly attacked the director of the film Menace II Society after [he] dismissed him from the project. Shortly afterward, on March 11, he was arrested in Los Angeles for carrying a concealed weapon, and two days later he was arrested again for allegedly attacking a limousine driver. In late October, Tupac was arrested for allegedly shooting two off-duty Atlanta police officers.

Despite these arrests, Shakur had yet to spend any time in jail. Moreover, with respect to the alleged police shooting, the most serious offense, the charges were dropped. With his movie career well underway (he had just starred in John Singleton’s 1993 film, Poetic Justice with Janet Jackson), Shakur went to New York in November 1993 to film the movie, Above the Rim. It was at this time that Shakur was arrested for sodomy, sexual abuse, and various weapons offenses.

b. the facts

Shakur’s indictment for sexual abuse, sodomy and weapons possession followed an incident involving himself and a 20-year-old fan. According to the Complainant’s

33 Ibid.
34 Talerman, supra note 28 at 118-9 (citations in text omitted).
35 Tupac was arrested on October 31, 1992 for allegedly shooting two off-duty police officers, brothers Mark and Scott Whitwell. Much about this incident is uncertain. “The Whitwells say Tupac fired at them; other witnesses say Mark Whitwell was the first to pull a gun. Tupac contends that he was merely coming to the aid of a black man the Whitwells were harassing....On the day of Tupac’s hearing, Mark Whitwell was charged with aggravated assault, and the investigating detective admitted the officers’ report stated that ‘niggers came by and did a driveby shooting.’”: “This Thug’s Life: 3,” Vibe Online, 31-May-95 18:35:23 GMT <http://www.vibe.com/vibe/archive/tupac/docs/tupac3.html> (8 March 1998).
36 “Tupac Shakur,” supra note 19.
37 For the purposes of this chapter, she will be referred to as “the Complainant.”
testimony at trial, she met Shakur at a New York club called Nell’s the night of November 14, 1993. Her friend, Tim, introduced her to Shakur. Having never met a celebrity before, the Complainant “was ‘very excited’ to meet [Shakur]. She was also sexually attracted to him.” Later that night, after much dancing and kissing --Shakur and the Complainant digress on the issue of who “came on” to whom first on the dance floor -- she returned with him to his hotel and had consensual sexual relations with him.

According to Shakur’s appeal lawyer, Charles Ogletree, the Complainant gave Shakur her phone number and electronic beeper number and called him at least six times between November 14th and 17th, “leaving one message indicating quite graphically that she missed him and had enjoyed the sex they had”. The Complainant testified that it was

Under the New York Civil Rights Law §50-b(1) the victim’s identity must remain confidential. For this reason, the victim’s name has been redacted from the Appellant’s and Respondent’s brief forwarded to me. Moreover, this statutory provision prohibits my getting access to the trial transcripts. In light of this, I am relying solely on the briefs requested from the lawyers involved in this appeal and in the various reported judgments surrounding this case. Shakur died before this appeal went to trial. Fuller has never perfected his case. See Appendix D, Letter from District Attorney, New York County, Robert M. Morgenthau.

See also: The People of the State of New York v. Tupac Shakur and Charles Fuller, 169 Misc.2d 961, 648 N.Y.S. 200 (N.Y.S.Ct. April 12, 1996) [Defendants moved to vacate their conviction on the grounds that Craig McKernan, an officer who testified at trial, had been suspended from the force for 30 days and put on departmental probation for one year as a result of an off-duty incident that took place in 1991. “The defendants claim that the prosecutor’s failure to turn over this information prior to trial prevented them from impeaching McKernan’s credibility at trial, and that they are therefore entitled to a new trial” (962). Judge FitzGerald held that: “(1) defendant’s boilerplate request for discovery of prior disciplinary actions involving any officer who participated in investigation of case did not impose duty on prosecutor to make wholesale review of every officer’s confidential personnel file, and (2) in any event, prior bad acts of officer who testified at trial were not Brady material. Motion denied” (961)].


Professor Ogletree was a member of Anita Hill’s legal team during the Hill-Thomas hearings in 1991. In addition to numerous publications, he assisted in preparing the book Beyond the Rodney King Story: An Investigation of Police Conduct in Minority Communities (Boston: Northeastern University Press, 1995).

41 Brief for Appellant, supra note 39 at 5-6.
Shakur who suggested she leave her phone and beeper number. She admitted to calling several times but primarily because she had left her keys in Shakur's car and she needed to get them back (although she admitted to leaving one extremely graphic message).\textsuperscript{42}

A few days later, on November 18, the Complainant was awakened early-morning by a phone call. When she asked who was calling, a voice said, 'This is Thug-Life.' The Complainant queried, 'Tupac?' and he replied, 'yes'.\textsuperscript{43} The Complainant agreed to meet him once he had finished filming that day. Shakur gave her his pager number and the Complainant paged him around 6:30 in the evening. It was reported that Shakur's road manager, Charles Fuller, had called her back. He informed the Complainant that Shakur wanted to see her.

The Complainant took a cab to Shakur's hotel. She was greeted in the lobby by Fuller and brought upstairs. She spent some time in the living room with Shakur, Fuller, Ricardo Brown (a.k.a. Jacques Agnant) and "a man with a Jamaican accent,"\textsuperscript{44} watching television. During this time, the Complainant noticed several guns lying on a nearby table. One gun appeared to be an automatic weapon and another looked like a revolver. Shakur told Fuller to remove the guns, and then, led the Complainant into his bedroom.\textsuperscript{45}

According to the Complainant's testimony, she and Shakur were kissing in the bedroom when Fuller, Brown and the other man, burst into the room. She asked Shakur what they were doing there, and he replied, 'Chill, Baby. These are my brothers. They're

\textsuperscript{42} \textit{Brief for Respondent, supra} note 38 at 10.
\textsuperscript{43} \textit{Ibid.} at 11.
\textsuperscript{44} \textit{Ibid.} at 2. The given name of "man with the Jamaican accent" is never revealed in the Respondent's brief. He is simply referred to by this label throughout.
\textsuperscript{45} \textit{Ibid.} at 13.
not going to hurt you. This is Thug-Life. What you do for me, you got to do for them.\textsuperscript{46} Despite her protests that she had come only to be with Shakur, the Complainant testified that Shakur physically forced her to perform oral sex on him by pulling her head down by her braids and placing her mouth over his penis. She testified to being extremely scared. She was shaking and crying; she thought about the guns. She wondered whether these men would use them to seriously hurt her.\textsuperscript{47}

After she was “passed around” between Shakur and his buddies and forced to have oral sex with at least two of the three men, the Complainant was compelled to remain in the hotel room “until she calmed down.” ‘I’m calm; I’ll calm down,’ she testified telling Fuller. Unfortunately, she started crying again. She queried as to why Shakur did this to her; ‘I thought he really liked me.’ Fuller responded by saying,

‘He does like you. He likes you so much, he decided to share you with his friends.’ Fuller explained that defendant wanted to give his ‘boys’ a ‘reward’ for taking good care of him while he was in New York...He asserted that ‘millions of women’ would have loved to have been in her place, and that she should be happy because defendant could have had any woman he wanted.\textsuperscript{48}

The Complainant told Fuller that Shakur ‘should have chosen someone else because [she] didn’t want it’.\textsuperscript{49} Overhearing this, Brown inquired, ‘You’re not going to run to the Daily News or anything like that, are you?’ The Complainant replied that she just wanted to go home. Brown explained that Shakur was young and ‘need[ed] his fans’; she should ‘[j]ust take it and handle it’. Brown added that he would hate to see ‘another brother go down.’

\textsuperscript{46} Ibid. cited at 14 (Complainant’s testimony).
\textsuperscript{47} Ibid. at 14.
\textsuperscript{48} Ibid. at 17.
\textsuperscript{49} Ibid. at 17.
'[Y]ou know what happened to Mike. I would hate to see what happened to Mike happen to Tupac', asserted Brown, urging the Complainant not to 'run to the white man for this.'

After being confined to the hotel room for about fifteen minutes, the Complainant was allowed to leave. However, she had not reached the end of the hall when the three men ran after her and grabbed her. It seemed Tupac had awoke from his nap and wanted to speak to her. They pushed her into room 3809. Shakur, who was lying on a couch, asked the Complainant, 'What's the matter?' She testified at trial that, while she was still crying at that point, she was 'more angry than anything else'. She told Shakur that she hated him and could not believe that he 'did this' to her. She protested that 'he writes songs about women and it's not true.' Defendant said that he was tired, had a headache, and did not 'need to hear this shit.' He said, 'Get this bitch out of here.' [The Complainant] looked back at defendant, told him, 'You're not going to get away with this,' and left.

Once out in the hall, the Complainant called the hotel operator from a house phone near the elevator. Hotel security responded to her call, finding the Complainant sitting on the floor next to the phone, crying, her clothing disheveled. When asked what happened, she replied that she “had been sexually assaulted by four men, including defendant, ‘in that room’.... She was upset and ‘seemed like she was in a daze’”, testified the hotel security officer. Fuller, Shakur, and Brown were apprehended in different parts of the hotel. The Complainant identified all three men as her assailants. The “man with the Jamaican

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50 Ibid. at 18.
51 Ibid. at 19. The songs the Complainant was referring to are “Keep Ya Head Up” (considered an anthem for black women) and “Brenda’s Got a Baby” (song about teenage pregnancy); 2Pac, “Brenda’s Got a Baby,” 2Pacalypse Now (1991, Interscope Records). For more information on “Keep Ya Head Up,” see infra note 144 and accompanying text.
52 Ibid. at 19-20.
"accent" was able to walk out of the hotel after being frisked. 53

While executing a search warrant in Shakur’s hotel rooms the next evening, the police found two semi-automatic weapons, one of which had a defaced serial number. In addition, a videotape marked “Thug-Life” was taken into evidence. The videotape revealed the interior of Shakur’s hotel rooms, along with other portions of the hotel. Both Shakur and Fuller were shown on the tape. Shakur, as the person operating the videocamera, was identified by his bare abdomen and his “Thug Life” tattoo, which was revealed when he pointed the videocamera at his reflection in a mirror. One of the guns the Complainant had seen in the living room was captured on videotape and someone wearing a gold band, similar to the one the Complainant had seen on Shakur’s wrist, was shown reaching for the gun. 54

While in a holding cell, Officer Craig McKernan testified that he overheard Fuller and Brown tell Shakur, ‘We should have taken the bitch downstairs, you know, and put her in the limo.’ Shakur had replied, ‘I’m not going to let these bitches push me around’. 55 Meanwhile, the Complainant was taken to St. Luke’s/Roosevelt Hospital Center where she was examined. The doctor, though, could not say conclusively whether the oral sex was consensual or not. 56

53 Ibid. at 2-3.
54 Ibid. at 2-3.
55 Ibid. at 32.
56 Ibid. at 27.
c. the trial

Shakur's trial commenced in the New York Supreme Court December 1994. His celebrity persona, Thug Life, became the case theory, or the celebrity legal story, upon which the Prosecution based its legal argument. Throughout the trial, the Assistant District Attorney, Melissa Mourges, repeatedly made reference to Shakur's Thug Life image. From the first sentence of her opening statement, the Prosecutor constructed Shaker as a thug who had set the Complainant up for a "gang-bang." Several references were made to the videotape, labeled "Thug Life," that Shakur allegedly filmed. The "Thug Life" tattoo on Shakur's abdomen was pointed to as proof that Shakur had made the videotape and, thus, had access to the various weapons in the video. This evidence went not only to the issue of weapons possession, but also to that of forcible compulsion in the sodomy and sexual abuse charges. Mourges argued that the Complainant, fearing for her life, was forcibly compelled to perform oral sex on the three men. Accordingly, through these various references to Thug Life, the Prosecutor was able to configure Shakur in accordance with his celebrity persona. Implied was that Shakur not only sang about guns, "hos," and violence, he actually "lived the life."

57 Assistant District Attorney Mourges has been described as "a frail, nondescript white woman who speaks tentatively and haltingly." Toure, "The Professional: Tupac Shakur Gives the Performance of His Life," Village Voice, December 13, 1994 at 75.

58 Brief for Appellant, supra note 39 at 9.

59 Brief for Respondent, supra note 38 at 49-50.

60 In gangsta rap terminology, "hos," short for "whores," references women for whom respect is denied. "Hos" and "Bitches" are considered "treacherous" women, traitors to the black race (i.e., black men).

61 It is important to note that, in the appeal brief, Shakur's lawyer, Charles Ogletree, objected to this characterization of Shakur as a Thug. It was argued that these references were inflammatory and a malignant attack on Shakur's character: "Name calling is impermissible, and so disapproved by courts that if a prosecutor resorts to such tactics, regardless of the merits of the case, it is assumed that such conduct constitutes blatant prejudice which automatically
The Defense responded to the Prosecution's Thug Life trial narrative by highlighting the Endangered Black Man narrative embedded within the Thug Life story. Two strategies were relied on to achieve this. The first focused on the Complainant and her character. The Endangered Black Man narrative was authenticated by the Defense's construction of the Complainant as a greedy co-conspirator in the white man's attempt to bring Shakur down. The second Defense strategy focused on Shakur's life and his antagonistic relationship with the police as a black man in post-Rodney King United States. Both strategies relied on the authenticity of Shakur's voice in popular culture to give them meaning and force in the courtroom.

(i) defense strategy #1: the complainant

The first technique used by the Defense in order to highlight and sustain its Endangered Black Man trial narrative was to construct the Complainant in a way that did not challenge the authenticity of this narrative. Relying on sexist and racist stereotypes of results in depriving defendant of a fair trial.”: Brief for Appellant, supra note 39 at 13-4.

Ogletree challenged the prosecutor’s reference to the words “Thug Life” tattooed across Shakur’s abdomen and to the home videotape. According to Ogletree, this videotape left “the prosecutor with the power to characterize appellant as a thug.... To describe appellant in such terms by using the admitted evidence of his tattoos was a backdoor maneuver that effectively vilified defendant's character. The law does not permit such conduct.”: Ibid, at 16-7.

In the Respondent’s brief, District Attorney Morgenthau pointed to the relevancy of Shakur’s image to his real life actions:

Indeed, it is hard to understand how defendant can complain about the prosecutor’s use of the term 'Thug-Life' when that is the nickname he freely chose for himself, even going to the point of tattooing it on his body. Thus, while a prosecutor normally should not characterize a defendant as a ‘thug,’ surely a prosecutor cannot be faulted for using that term when it is not only the defendant’s own chosen title, but also is directly relevant to the issues the jury has to decide.

Brief for Respondent, supra note 38 at 49-50.

62 Rodney King is a black man whose beating by four Los Angeles police officers was captured on videotape. Despite this videotape, the officers were acquitted by a predominantly white jury. This verdict triggered a national debate in the United States regarding the state of race relations in the U.S., the fairness of the criminal justice system, and the role of blacks and other minorities in the jury selection process.: Mark Hansen, “Different Jury Different Verdict?” (1992) 78-AUG A.B.A. Journal 54 at 55.
black women, the Defense argued that the Complainant was a Sapphire ("black bitch"\textsuperscript{63}), a Jezebel (sexually promiscuous), and a traitor to the black race. Similar to the Defense strategy in the Mike Tyson trial, the Complainant’s accusations of sodomy and sexual abuse were trivialized by referencing these accusations to the "greedy self-interest" of the Complainant. This assertion of female greed became all the more believable in light of the celebrity aspects of Shakur’s trial. The Complainant was constructed as “getting something” out of this charge (i.e., publicity, money from a civil trial, vengeance at being spurned by a celebrity, etc.). Argued throughout his trial was that Shakur was the victim of a greedy woman who just wanted to exploit Shakur for his money.\textsuperscript{64} This sentiment was reinforced in the popular press by the fact that the Complainant planned to launch a civil suit after the criminal trial ended.\textsuperscript{65}

The Complainant’s allegations were also constructed by the Defense as stemming


\textsuperscript{64} Hewitt, supra note 17 at 89.

\textsuperscript{65} It appears the civil suit never did get decided. In Doe v. Shakur, et al., Judge Chin addressed the issue of the anonymity of the plaintiff in a sexual abuse case. The issue arose after Judge Sprizzo issued an ex parte order sealing the complaint and permitting the plaintiff to file a substitute complaint under a pseudonym. Though Judge Chin recognized the ‘very legitimate privacy concerns’ in this case, he nonetheless found that four factors outweighed these concerns. He argued that ‘fairness requires that she be prepared to stand by her charges publicly.’ Also, he differentiated between civil suits for damages which “the plaintiff seeks to vindicate primarily her own interests’ as opposed to a criminal case where she has little control over the prosecution. Third, Shakur would be placed at a disadvantage for he would have to defend himself publicly while she could hide behind a cloak of anonymity. Finally, Judge Chin argued that the public has a legitimate right to know the identity of the parties.

“As to plaintiff’s further arguments concerning the significant media attention that Shakur’s notoriety would bring to the case, as well as the death threats the plaintiff claimed to have received, Judge Chin pointed out plaintiff’s own concessions that the media has already known her true identity for some time. So too, presumed Judge Chin, do those who have been issuing the alleged threats.”: Michael C. Silberberg, “Sexual Assault, Damages and the Issue of Anonymity,” New York Law Journal, March 7, 1996 at 3.


No information exists as to what happened to this suit after Shakur’s death.
from Shakur’s dismissal -- that is, “dissing” -- or rejecting her. It was argued in court that the Complainant “fabricated her allegations of a forced group assault due to jealousy and a desire for vengeance.”

Introduced was the testimony of Shakur’s personal publicist, Talibah Ambonisi. Ambonisi stated that she had been in a bedroom with Shakur, discussing media strategies regarding Above the Rim, when the Complainant ‘stormed in’ and ‘started yelling at’ Shakur: “Who is this “B”...’You have me in the other room, fucking me, and got this “B” in here waiting for you’.” Shakur allegedly replied, ‘I don’t have time for this shit; I have a show tonight; get out of my face.’ To which the Complainant yelled, “‘This is not the last time you’re going to hear from me,’ and then ‘stormed out of the room’.” In essence, these charges, argued the Defense, arose because the Complainant had been ‘infatuated’ with Shakur; ‘as a result of [a] perceived failure on his part to meet her expectations,’ the Complainant had become a ‘vengeful suitor’.

66 Brief for Respondent, supra note 38 at 40.
67 Ibid. cited (in part) at 34 (citing Defense witness, Talibah Ambonisi’s testimony at trial).
68 Ibid. cited (in part) at 34 (citing Defense witness, Talibah Ambonisi’s testimony at trial).
69 Ibid. cited (in part) at 51 (citing Defense lawyer, Michael Warren’s opening statement at trial).

Relying solely on the appeal briefs, it is unclear whether Shakur argued that only he had sex with the Complainant (and it was consensual) or whether she had consented to performing oral sex with all four men. In a Vibe magazine article after the fact, Shakur recalled that he and the Complainant were in his room when

...some niggas came in, and I froze up more than she froze up. If she would have said anything, I would have said, ‘Hold on, let me finish.’ But I can’t say nothing, because she’s not saying anything. How do I look saying, ‘Hold on’? That would be like I’m making her my girl. So they came and they started touching her ass. They going, ‘Oooh, she’s got a nice ass.’ Nigel isn’t touching her, but I can hear his voice leading it, like, ‘Put her panties down, put her pantyhose down.’ I just got up and walked out of the room.

...Never did nothing. Only thing I saw was all three of them in there and that nigga talking about how fat her ass was. I got up because the nigga sounded sick. I don’t know if she’s with these niggas, or if she’s mad at me for not protecting her. But I know I feel ashamed - because I wanted to be accepted and because I didn’t want no harm done to me - I didn’t say nothing.:

The assault on the Complainant’s character and credibility intensified during summations. The Defense lawyer insisted that Shakur had been ‘set-up’; the jury was asked not to believe the Complainant for “her testimony was ‘[n]onsense’..., and...she was ‘being untruthful in all of this’. Shakur’s lawyers took every opportunity to berate the Complainant for having voluntary sexual contact with him a few nights prior to the attack. They stressed the fact that, although the Complainant had never met Shakur before, “she had kissed his penis on the dance floor and had then gone back to his hotel room and had sex with him.” ‘That’s a nice girl?’, the Defense council spewed sarcastically at the jury.

All these characterizations of the Complainant simply bolstered Shakur’s image as an Endangered Black Man and gave him a claim to “authentic blackness.” In Shakur’s words: ‘There are sisters and there’s bitches’. “Sisters” do not turn brothers over to the white judicial system. Shakur’s trial narrative focused on the experiences of a black man in a white system: the Endangered Black Man, a man betrayed by his own community and sent out alone to face the white man. This sentiment was captured in Shakur’s speech to the media: ‘Just because I don’t want to be with that girl don’t mean she has the right to

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70 Brief for Respondent, supra note 38 at 52.
71 Ibid. at 53.
73 “This Thug’s Life: 3,” supra note 35 (emphasis added).
say I did all these things she said I did...It was her who sodomized me.\textsuperscript{74} The metaphorical sodomizing of Shakur by the Complainant perpetuated the notion that, simply by voicing their experiences of intra-racial violence, black women contribute to the criminalization, or ‘Willie Hortonization’\textsuperscript{75} of black men.\textsuperscript{76}

Admittedly, the “Endangered Black Man narrative speaks to very real assaults on the material and spiritual well being of black men.”\textsuperscript{77} However, as Zook writes,

\begin{quote}
[we] live in an era in which the narrative of the Endangered Black Man resonates with increasing force among both women and men because, as Cornel West put it, ‘the vilification of the black male is a crucial component in the way in which white supremacy is being used in our society.’ But by exalting the persecutions of black men, the narrative elevates their particular truths to the mythical status of universal black reality.\textsuperscript{78}
\end{quote}

In other words, such a simplistic rendering contributes to the “larger myth of racial authenticity that has been so successfully cultivated in ghetto-centered culture, a myth that renders invisible the specific contours of living in female, working-class, gay and lesbian

\textsuperscript{74} Jeanne King, “Shakur Unhappy He Wasn’t Completely Cleared,” \textit{Reuters World Service}, December 2, 1994 (no page numbers, ALLNWS, LEXUS NEXUS Database).


The Willie Horton story was discovered by the George Bush presidential campaigners and was aired as part of a muckraker campaign to destroy any chance Dukakis had of winning the presidential election. Although this ad was eventually denounced by George Bush and withdrawn, it was aired even more frequently by the news media. The ad became news because of the racist portrayal of Willie Horton and the portrayal of Dukakis as soft on crime.


\textsuperscript{77} \textit{Ibid.} at 86.

\textsuperscript{78} \textit{Ibid.} at 86.
black bodies.” Accordingly, the characterization of the Complainant as greedy and vengeful brought credibility to the Endangered Black Man narrative. In turn, this trope, viewed as more authentic in contemporary Western society, worked to erase the Complainant’s story and her narrative of abuse in the courtroom.

(ii) defense strategy #2: the police

Shakur’s trial narrative not only trivialized the Complainant’s experience, it worked to transform the Prosecution’s characterization of Shakur as a Thug into a tale of black male victimization and police racism. Highlighted in court was the possibility that, in light of Thug Life -- particularly the recent shooting by Shakur of the Atlanta police officers -- the police planted the weapons found in Shakur’s hotel room: ‘Who was safeguarding the room during the period of time that the guns could have been [placed] in that room by a cop or some other person?’ The appeal brief noted that, between 12:30 and 1:00 am the night of the assault, “[t]he officers closed the doors, but did not post a guard or seal the rooms, and anyone with a card key could have entered Room 3809.” At 7:50 am, Officer James Seiferheld was “posted outside the rooms and assigned to safeguard them.” Although he had relieved another officer (identity unknown) who

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79 Ibid. at 86.
80 See footnote 35 for more detail into this shooting.
81 Brief for Respondent, supra note 38 at 84 (citing Fuller’s attorney at trial).
82 Ibid. at 25.
83 Ibid. at 28.
84 According to Ogletree’s brief, the prosecution failed to offer any explanations to why this officer was never found and put on the witness stand. “Despite the defendant’s request that the relieved officer be identified so that the defendant might cross-examine him..., the prosecutor neither identified nor produced the witness.” Brief for Appellant, supra note 39 at 22.

According to the Respondent’s brief:

Between the search for armed perpetrators conducted by ESU [Emergency Services Unit] after
had been on shift since midnight, it was uncertain what time the rooms were sealed with tape and began to be guarded.

Playing upon Shakur’s Black Panther lineage, Shakur and his trial attorney, Michael Warren, hinted at police involvement in both the weapons charges and the sexual abuse and sodomy counts. As stated in a Vibe magazine interview, ‘I feel like somebody’s setting me up because I’m Tupac Shakur. My mother was a Panther. It’s based on what they did and what I’m doing.’ To add fuel to the conspiracy fire, on December 1, 1994, the final day of the trial, Shakur appeared in the courtroom “heavily bandaged and in a wheelchair.” Several Nation of Islam bodyguards surrounded him. He had been shot several times just a few short hours before this courtroom visit. An alleged robbery attempt had left Shakur with five bullet holes in his body: two grazing his head, one in the groin, one in his hand, and one more in the thigh. Miraculously, he survived, only to

12:25 a.m. on November 19..., and the execution of a search warrant at about 9:00 p.m. that night, a succession of individual police officers guarded Rooms 3809 and 3811. The People called the last two of those officers, James Melendez and James Seiferheld. They did not call the officer whom Melendez had relieved. Melendez did not know that officer’s name, and could only say that he was a white man from Melendez’ precinct whose shift had begun at about midnight on November 18-19....

_Brief for Respondent, supra_ note 38 at 80-1.

85 “This Thug’s Life: 3,” _supra_ note 35.

86 It is important to note that many believe this was not a robbery attempt but a concerted effort to kill Shakur. Some conspiracy theorists leaped to the conclusion that Tupac had been set up and that the ‘robbery’ was a payback for his perceived attacks on police; others concocted a revenge plot by the rape accuser. Tupac’s lawyer fanned the flames, citing his’ [sic] client’s exaggerated suspicion of cops to explain his flight from the hospital. [sic] The lawyer rejects the notion that this was a simple robbery: ‘These circumstances give rise for a reasonable person to raise an eyebrow.’; “Sweatin’ Bullets: Tupac Shakur Dodges Death but Can’t Beat the Rap: 2,” _Vibe Online_, 25-Jan-95 22:35:57 GMT <http://www.vibe.com/archive/feb95/docs/tupac2.html> (8 March 1998).


Interestingly, two of the first four police officers on the scene at Shakur’s shooting were the same ones involved in Shakur’s arrest for sodomy, sexual abuse and weapons possession. Officer Craig McKeman, the officer who had just testified at Shakur’s rape trial, showed up shortly thereafter. ‘Hi, Officer McKeman,’ Tupac allegedly said. ‘Hey, Tupac, you hang in there’, McKeman responded. “Sweatin’ Bullets: Tupac Shakur Dodges Death but Can’t Beat the Rap,” _Vibe Online_, 25-Jan-95 22:31:33 GMT <http://www.vibe.com/archive/feb95/docs/tupac.html> (8 March 1998).
check himself out of the Bellevue hospital, and show up in the courtroom the following day.

Though sequestered, Shakur’s lawyer acted on the assumption that the jury was aware of Shakur’s troubles outside the courtroom: ‘No sequestering is failsafe,’ he argued. ‘Jurors get information in the strangest ways.’ That no one on the jury “seemed surprised when, the day after the shooting, they entered the courtroom and for the first time in weeks Tupac was not in his seat”, seemed to support Warren’s assertion that the jury knew about the shooting. In statements made to the press, Shakur’s lawyers stressed the conspiracy elements of the shooting and hinted at police involvement: ‘Bellevue was not secure, and Shakur was afraid for his life...The place was crawling with cops who wanted to speak to him, and Shakur doesn’t trust them.’ In another interview, Warren stated, ‘My instincts tell me that this looks like a setup, smells like a setup and feels like a setup....’

In the end, the jury found Shakur innocent of the more serious sodomy and weapons charges. Although convicted of sexual abuse in the first degree, this charge carried with it a much lesser penalty. It was reported that at least eight of the twelve

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88 Toure, supra note 57 at 75.
89 Ibid. at 75.
92 Toure, supra note 57 at 75.
93 The judge could have given Shakur probation or imposed a maximum sentence of 2 1/3 to 7 years.: George James, “Rapper Faces Prison Term For Sex Abuse,” *The New York Times*, February 8, 1995 at B1.
jurors argued for a full acquittal\textsuperscript{94}: “There was a very strong feeling that there just was not enough evidence,” says juror Richard Devitt.”\textsuperscript{95} For those jurors who believed Shakur was innocent (or guilty) of all charges, the sexual abuse conviction was a compromise.\textsuperscript{96}

In the end, the Endangered Black Man narrative triumphed in court as the real and true story.

\textbf{ii. thug life on trial}

Ladies and gentlemen, you are looking at a man who chose to have the words ‘Thug-Life’ tattooed across his belly, and it's clear from his behavior that he's got thug-life tattooed on his brain, where his conscious (sic) ought to be. Thug-life.

~ Prosecutors Final Sentence in Tupac Shakur’s Trial\textsuperscript{97}

Shakur’s Endangered Black Man trial narrative relied on various cultural scripts in society regarding race, gender and sexuality, class, and celebrity. These scripts intersected to give authenticity and credibility to certain legal stories and constructions of Shakur and the Complainant. In the end, it was the intersection of these scripts which gave meaning to the legal play and enabled the legal audience to believe Shakur’s Endangered Black Man construction of himself and to acquit Shakur of the more serious charges.

\textsuperscript{94} This information was leaked to Michael Warren by one of the jurors, Patricia Stern. In an affidavit to the court, after the trial, Warren stated that Stern came up to him in a restaurant and told him that “the jury was split 8 to 4 to acquit on all accounts, and that she was in favor of conviction on all counts until a compromise was reached.” Warren later tried to get the verdict overturned on the basis that Stern lied during the voir dire. \textit{Brief for Appellant, supra} note 39 at 33.

\textsuperscript{95} “Sweatin’ Bullets,” \textit{supra} note 87.

\textsuperscript{96} “It was a split between acquittal (on all charges) and (conviction on) sexual abuse....There was some discussion of the sodomy charges, but we moved quickly to the sexual abuse charges.” New York Daily News, “Shakur Can’t Beat the Rap, is Found Guilty; Performer Shot and Convicted in the Same Week,” \textit{Sun-Sentinel (Fort Lauderdale)}, December 2, 1994 at 8A. See also \textit{Brief for Appellant, supra} note 39 at 33.

\textsuperscript{97} \textit{Brief for Appellant, supra} note 39 cited at 9 (citing Melissa Mourges, Assistant District Attorney and Prosecutor in Shakur’s trial, November 1994).
a. race & authenticity: reality in rap

Pac was the realest nigga in a world full of fakes.

~ Ice Cube, gangsta rapper

Both the construction of Shakur as an Endangered Black Man and the Complainant as a vengeful woman relied heavily on the genre in which Shakur achieved success and notoriety in, namely gangsta rap music. Ask any young fan what they prize in rap music and they are likely to cite "reality" - implying that rap has a superior authenticity to any other sort of music. Whether rapping about racist police violence, the perils and pleasures of gang life and life on the streets, or the disillusionment and the consequent reversion to nihilism and hedonistic pleasure, rap musicians are referenced as the CNN reporters of the black community: they tell the real lowdown story on what it is to grow up black and male in the U.S.A. Authenticity, in this instance, entails remaining true to one's cultural identity. It also means refusing to accommodate audiences - regardless of how offended they may become by the lyrics or the message.

Within rap, however, there exist infinite degrees of authenticity. Originally, New York rap was "high on 'reality'; "music from elsewhere was somehow less authentic." In 1988, all that changed:

An LA group called NWA, or Niggas With Attitude, rewrote the hip-hop agenda with

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98 Leland and Samuels, "Generation Gap," supra note 3 cited at 52 (citing Ice Cube, gangsta rapper).
101 Boyd, supra note 1 at 14.
102 Ibid. at 15.
103 Shaw, supra note 99 at 20.
an entirely new concept of ‘reality’ on an extraordinary album called Straight Outta Compton - the rap equivalent of Sgt Pepper - which shifted the direction of the genre completely. To outsiders it was a merely brutal and boastful album: to O [sic] those who loved rap it was a bruianity [sic] evoked depiction of the life of pimps, murderers and dealers in LA and NewYork [sic].

This album signaled the end of New York’s supremacy in the rap industry. *Straight Outta Compton* contained violent, first person accounts of street life in South Central Los Angeles: ‘Straight outta Compton, another crazy ass nigga/ More punks I smoke (kill), yo, my rep (reputation) gets bigger’. These lyrics deliberately obscured the line between fantasy and reality; to rap’s authenticity-obsessed fans, this was as real as it got.

Gangsta rap, as this West Coast sound is called, claimed the streets as its own, “skewing the notion of ‘reality’ even further. Authenticity became conflated with violence and degradation.” Gangsta-ism was a reality that New York could not compete with.

With its origins in Hollywood, West Coast rap drew “much of its visual imagery from the blaxploitation films of the 1970s such as *Shaft* and *Superfly*.” Though updated for the 1990s, the stereotype remains the same: “Men feature as gun-toting misogynists who reinforce the sexual myths and associations of criminality that continue to plague black men to this day.” The appeal of gangsta rap, with its “filmic, painting eloquent Sergio Leone-style scenes of male violence”, spawned a series of successful films about life in

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110 Shaw, *supra* note 99 at 20.
the ghetto.\textsuperscript{111} These films, in turn, helped bring visual authenticity to that which was rapped about in popular gangsta material.

Much of rap's authenticity stems from the concept of struggle. Authentic blackness, in other words, is signified by poverty and ghetto-ized life. Henry Louis Gates Jr. writes that ‘[c]ulturally speaking the “street” has been deemed the repository of all that is real, that is “black”.'\textsuperscript{112} Gates charges rappers with romanticizing the ghetto. James Bernard responds to this charge by stating:

\begin{quote}
The black middle class hasn’t really left the ghetto...Your parents or their parents were dirt poor. [Also], there’ve [sic] never been any values to replace it. Either you identify with white people, and that’s disgustingly empty – not to mention you’ll be rejected and go insane – or you look for something that’s rich and real.\textsuperscript{113}
\end{quote}

Accordingly, the ghetto, whether romanticized or not, continues to be viewed as a source of inspiration and authenticity for many gangsta rappers.

One example of the ghetto’s connection to black cultural authenticity can be found in a February 3, 1994 issue of the \textit{Wall Street Journal}. This article contrasted female rapper, Boss’, real-life background with her gangsta image. Boss (a.k.a. Lichelle Laws) had a very middle-class upbringing: Catholic school education, ballet and piano lessons. However, this lifestyle was incompatible with gangsta-ism. And so, Lichelle re-invented herself as Boss the rapper, “a hardened violent female on a murderous warpath”. This image of Boss obliterated “the real-life circumstances that may have defined her existence

\textsuperscript{111} See, for example, \textit{Boyz in the Hood} (Columbia, 1991), \textit{Juice} (Paramount, 1992), and \textit{Menace II Society} (New Line, 1993).


\textsuperscript{113} \textit{Ibid.} cited at 52 (citing James Bernard, fonder of the hip-hop magazine, \textit{The Source}).
Boss refused to conceal her luxurious past. Instead, she publicly rejected it: “we hear her mother’s voice lamenting the loss of her ‘little girl’ from the answering machine on the opening track of her debut album, *Born Gangstz*. 

Through these personal narratives, Boss staked her claim in the ghettoized world regarded as “real,” the authentic milieu of black America.

b. racial exoticism & authentic blackness

The Endangered Black Man narrative relies heavily on the associated nature of “authentic blackness” and “the ghetto.” In gangsta rap, this association is premised on notions of racial exoticism and the commodification of Blackness, especially in the form of hardened black masculinity, in contemporary society. Rap experts and historians allege that gangsta rap originated as a marketing strategy by various record companies:

Noting that even the most hard-core rap music was enjoying popularity with white as well as black audiences, labels began to mass market and promote the image of swaggering black men holding guns and drinking beer on album covers. As a result, rap’s biggest heroes have come out of the new ‘gangsta’ surge.

The irony of the rap industry is that the largest buyers of gangsta rap recordings in contemporary society are, in fact, middle-class white boys. Accordingly, the images of “curl-lipped aggression,” presented as “reality” in gangsta rap, are not so much for the people in the ‘hood and on the street but for the white middle-classes, suburbanites obsessed with the image of a violent urban African-American culture. Writes Boyd:

In suburban bungalows they have created stereotype images of what they think real black American men are like: images of pimps, drug dealers, thieves and fighters. It is,

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114 Boyd, *supra* note 1 at 70.
115 Ibid. at 70.
116 Ibid. at 70.
after all those with the purchasing power who have made gangsta rap what it is, who have decided what is authentic and what is not.\textsuperscript{118}

Racial exoticism is, thus, one of the driving forces behind the success of gangsta rap in Western popular culture. According to Kang, “[i]n our present society of ‘political correctness’ where masculinity is often besieged and uncertain, young White men and boys might seek reassuringly clear examples of manliness as personified by Black men.”\textsuperscript{119} Gangsta rap provides audiences with images of “violent, aggressive, and intimidating Black men.”\textsuperscript{120} Black rappers symbolize “assertiveness, self-efficacy, toughness, and bravery.”\textsuperscript{121} Young white men and boys may begin to associate with the masculinity displayed by the black rapper, finding fascination in the violent, sexist lyrics. Accordingly, gangsta rap works to “reinforce the boy’s burgeoning and very insecure sense of masculinity.”\textsuperscript{122} Accordingly, this distinctly “black” masculinity, derived from some “caricatured version ‘authentic’ ghetto life,” finds its way into the homes and lives of white suburban youth.\textsuperscript{123}

In addition, gangsta rap provides white boys with the forbidden fruit. These violent, sexist lyrics are intriguing precisely because white boys are not allowed to say or

\textsuperscript{118} Boyd, \textit{supra} note 1 at 20.

\textsuperscript{119} Kang, \textit{supra} note 63 at 342.

\textsuperscript{120} \textit{Ibid.} at 342.

\textsuperscript{121} \textit{Ibid.} at 342.

\textsuperscript{122} \textit{Ibid.} at 343.

\textsuperscript{123} \textit{Ibid.} at 343.

do the things contained in the music. The white fans who do attempt to adopt the black modes of dress and conduct made fashionable in the gangsta rap genre are ridiculed by many in the black community. They are labeled “wanna-be’s,” “suckers,” or “wiggers” (“white Negroes”). According to James Ledbetter, the disgust in the black community with wanna-be’s stems, in part, “from the sheer vulgarity of the white who cavalierly adopts the black mantle without having to experience life-long racism, restricted economic opportunity, or any of the thousand insults that characterizes black American life.” This adaptation often results in a version of appropriation that looks an awful lot like racism itself.

Similarly, the racially exotic aspect of black masculinity always “runs the risk of being easily manipulated and being fluidly, often subconsciously, transformed into a paradigm that has historically subordinated Black men. In the area of racial exoticism, the difference between admiring fascination and loathsome fear is often a tenuous one.” Accordingly, the emphasis in the Western mass media on black masculinity is “complimentary and inherently dangerous because of its association with a racial exoticism that is always unstable and readily amenable to manipulation in the political arena.”

At the same time, the survival and profit-making capacity of gangsta rap depends

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124 Personal communication with Franc Boltezar, Vancouver, B.C., June 1998.
125 Ledbetter, supra note 100 at 540-1.
126 Ibid. at 541.
127 Kang, supra note 63 at 344.
128 Ibid. at 344.
on the existence of racial exoticism and "a massive audience of white Negroes."\textsuperscript{129} Often young black rappers, hungry for money and fame, play into these racially exotic images of black masculinity and sell themselves as thugs, as "pathologically aggressive".\textsuperscript{130} Increasingly, though, the "strength and 'rep' of a rapper is based largely not just on his ability to articulate the struggles of 'the 'hood,' but also on staying close to the lifestyle of the streets...."\textsuperscript{131} This creates severe problems for up-and-coming rappers, such as Tupac Shakur, artists who find it increasingly difficult to reconcile "staying true" with staying out of jail.\textsuperscript{132} Authenticity in gangsta rap, then, becomes inherently connected to both the myth and the reality of the Endangered Black Man.

c. authentic blackness & black women

I am the young woman that was sexually assaulted by Tupac and his thugs. I've read Kevin Powell's interview with Tupac ['Ready to Live,' April], in which I was misrepresented. Up until this point I have only told my story under oath in court; nobody has heard my story, only his side, which is much different than what Tupac stated is the true story.

~ The Complainant, \textit{Vibe Magazine}\textsuperscript{133}

Black men often recognize that black women are similarly victimized in a racist society. However, the Endangered Black Man is taken to be the more important and authentic narrative. Writes Earl Ofari Hutchinson:

...America has not made the black woman its universal bogeyman. The black man is. Here are four reasons why I say that. First, I'm a black man. I hear, see, and feel the pain of black men daily. Second, I can count. For a black man, here's the grim picture: He will live, on average, to be sixty-seven years old. She will live to be seventy-three years old. He's one and one-half times more likely than she to drop dead of a heart

\textsuperscript{129} Ledbetter, \textit{supra} note 100 at 541.
\textsuperscript{130} Boyd, \textit{supra} note 1 at 65-6.
\textsuperscript{131} Williams, \textit{supra} note 117 at B1.
\textsuperscript{132} \textit{Ibid.} at B1.
attack. He will have a far greater death rate from cancer, stroke, pneumonia, or AIDS.

Then there are the unnatural causes of death. Compared to her, he's five times more likely to kill himself by his own hand, three times more likely to be killed in a car accident, and four times more likely to be killed by someone else. Meanwhile, one out of three young black males languish in prison, on parole, or on probation. One out of seven will be murdered. One out of three males is unemployed.

Third, I know another one of America's dirty little secrets. Many Americans hate and fear black men. Yet they are fascinated with them. They love to see them sing, dance, lug, and toss these balls. In deeply sexist America, the game is still about white male ego, power, and control. Black men are perceived as threats to all.

Fourth, black women are black and poorer... But the privileged and wealthy men that call the shots in America don't wage the same ego war against black women as they do against black men. 134

The racism and sexism black women face is, thus, trivialized by both white society and black men. Black women are negatively defined in relation to both white women and black men. 135 Negative images of black women are used to explain the social position and behavior of black men and blame black women for the Endangered Black Men (see, for example, the Moynihan Report which blames the deterioration of the black family on the prevalence of a matriarchal structure 136).

Black women, thus, become constantly "haunted by the mythology that surrounds the American black male." 137 Argues Michele Wallace:

Every time she starts to wonder about her own misery, to think about reconstructing her life, to shake off her devotion and feelings of responsibility to everyone but herself, the ghosts pounce. She is stopped cold. The ghosts talk to her. 'You crippled the black man. You worked against him. You betrayed him. You laughed at him. You scorned him. You and the white man.' 138

136 For more information, see Chapter Two, supra note 85 and accompanying text.
138 Ibid. at 16.
Accordingly, the Endangered Black Man narrative depends on the betrayal of black women to give it force and effect. It also requires black women’s silence. This is especially true when it comes to issues of racism and the civil rights movement. Black women often observe a code of silence and racial solidarity in order to protect black men from a hostile white public.\textsuperscript{139}

Black women’s silence, though, does not mean that they do not experience racism (and sexism) in contemporary Western society. Black women are surrounded by a barrage of labels and stereotypes regarding their supposed promiscuity (Jezebel), their asexual suffering and submissiveness (Mammy), their amazon-like strength (Sojourner Truth), and their evil treacherousness (Sapphire).\textsuperscript{140} In addition, at least in contemporary United States, black women are further characterized as either lazy and demonic (Welfare Queen) or as overachieving betrayers of their community and, thus, black culture (Black Lady). These characterizations are not simply social taxonomies. According to Wahneema Lubiano,

...they are also recognized by the national public as stories that describe the world in particular and politically loaded ways...They are...part of the building blocks of ‘reality’

\textsuperscript{139} This does not mean that sexism does not exist within the civil rights movement. For example, although black female members of the NAACP, the U.S.A.’s oldest civil-rights organization, have “always dominated at the grassroots level, outnumbering men 2 to 1 among the group’s estimated 675,000 members”, almost all the positions of power and authority in the organization are filled by men. Black men hold ten of the twelve top national leadership positions and three quarters of the sixty-five seats on the board of directors.

The nomination of Tupac Shakur, during his trial for sodomy and sexual abuse, for one of the NAACP’s Image Awards, evidenced the continued sexism in the civil rights movement. Argues Lucille Watkins, a 20-year old NAACP member, who quit in disgust of this nomination: ‘It’s bad enough that these young rappers don’t respect us.... Must we also get treated the same way by educated black men?’: Bill Turque (with Allison Samuels, Patrice Johnson and Frank Washington), “The Struggle Within a Struggle,” \textit{Newsweek}, September 5, 1994 at 35.


for many people; they suggest something about the world; they provide simple, uncomplicated, and often wildly (and politically damaging) inaccurate information about what is 'wrong' with some people, with the political economy of the United States. Accordingly, these stereotypes regarding the supposed nature of black women influences the construction of black women in a courtroom and what narratives a jury may believe with regard to this woman.

In Shakur’s trial, the jury alleged that it was not influenced by the Defense’s construction of the Complainant as a self-interested, greedy Sapphire. Juror, Richard Devitt, argued that: ‘The whole tac of trying to attack the woman’s character was totally archaic and unnecessary and everybody immediately disregarded it....We just threw that all out. The business at Nell’s and all that stuff -- we all agreed that that was utterly irrelevant. And we immediately threw it all out.’ However, as neither the Prosecution or the Defense challenged these various social taxonomies regarding black women in the United States, the stereotypes and myths remained in force. They most likely colored the jury’s perception of the Complainant. They most likely bolstered the authenticity of Shakur’s Endangered Black Male narrative.

The only challenge to this demonic constructions of black womanhood came from Shakur himself. Around the time of his trial, Shakur released the song, “Keep Ya Head Up.” This song both praised black women and criticized black men for disrespecting them.

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142 Toure, supra note 57 at 75.

143 “This Thug’s Life,” supra note 20.
Some say the blacker the berry, the sweeter the juice
I say the darker the flesh then the deeper the roots
I give a holler to my sisters on welfare
Tupac cares, and don’t anyone else care
And uhh, I know they like to beat ya down a lot
But please don’t cry, dry your eyes, never let up
Forgive but don’t forget, girl keep your head up
And when he tells you you ain’t nuttin don’t believe him
And if he can’t learn to love you you should leave him
Cause sista you don’t need him
And I ain’t tryin to gas ya up, I just call em how I see em
You know it makes me unhappy (what’s that)
When brothers make babies, and leave a young mother to be a pappy
And since we all came from a woman
Got our name from a woman and our game from a woman
I wonder why we take from our women
Why we rape our women, do we hate our women?
I think it’s time to kill for our women
Time to heal our women, be real to our women
And if we don’t we’ll have a race of babies
And since a man can’t make one
He has no right to tell a woman when and where to create one
So will the real men get up
I know you’re fed up ladies, but keep your head up...

In the music video for this song, 2Pac is shown smiling, laughing and dancing with an assortment of black women. Shakur “extends his arms toward the crowd of mothers and children...His smile is magnetic, his message empathetic. A bona-fide bad boy with a heart for his people.”

The message of “Keep Your Head Up,” though, was left unacknowledged in the courtroom. The jury in Shakur’s trial was predominantly white and female. How many white females listen to gangsta rap? Although this song was quite marketable in the

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145 Sherri Winston, “Shakur Now Bears the Scars of a Gangster,” Sun-Sentinel (Fort Lauderdale), December 11, 1994 at ID.
146 According to the lawyer in Shakur’s trial, Michael Warren, of the nine women and three men on the jury, four were black and the remaining eight were white (there may have been one Latino juror but Warren could not recall exactly). Warren remembers the jury as being predominantly white women: Telephone conversation with Michael W. Warren, New York Attorney, May 21, 1998.
For more information on the gender composition of the jury, see New York Daily News, supra note 96 at 8A.
mainstream media, it was doubtful that many of the jury members had heard it. More importantly, while “Keep Your Head Up” allowed for a more complex vision of black womanhood, it did not challenge the Sister/Bitch dichotomy at the foundation of the Endangered Black Man narrative. In the end, this song simply reinforced the authenticity of the Endangered Black Man narrative: it was pointed to by the media as proof that Shakur was not misogynist and, thus, he was being set-up by the Complainant. It also signified Shakur’s inability to commit sodomy and sexual abuse -- “’This is not something he is capable of doing,’ says his mother, Afeni” -- and his terminal bad luck when faced with these charges: “How can I be a magnet for such trouble? It’s so unlike my character and my songs.”

The Endangered Black Man narrative reinforced the notion that “the fight against racial subordination generally will trump the fight against racial subordination of African American women in the Black community.” In other words, when the victim of the crime is a black woman, the notion that a black man is the victim of a racist criminal justice system necessarily obscures the black female’s narrative of pain and betrayal. Simply by reporting a crime, the black Complainant is viewed by the black community as allying with the white man to bring down a “Brother.” The Complainant is warned: ‘Don’t cooperate with the Man in taking down a Brother, even if you think he is wrong, especially one who is a celebrity.’

147 Hewitt, supra note 17 at 89.
148 Ibid. cited at 89 (citing Afeni Shakur, Tupac’s mother).
150 Brown, supra note 140 at 1002.
151 Ibid. at 1002, 1005.
Shakur’s Endangered Black Man trial narrative effectively trivialized the oppression faced by the black female Complainant in contemporary United States. She played no role in this tale of “authentic blackness” - except for that of the villain. Shakur, on the other hand, “claimed and celebrated [his] right to speak and represent blackness.”

In this instance, blackness remained masculine in nature; its “nationalist cultural vision of unity at all costs” employed to dispel whatever internal differences threatened to “divide” the community. For black women, though, issues of race and gender are intertwined. It is possible that the Complainant’s blackness may have influenced the credibility given to Shakur’s trial narrative and the trial tactics of the Defense. Her race made it easier for Shakur’s attorney to discredit and trivialize her trial narrative - especially to a predominantly white jury. When Warren asserted at trial that ‘these accusations are totally without foundation’, that the Complainant was ‘highly incredible’ and that the jury should ‘consider the unbelievability of her assertions’, stereotypes regarding black female sexuality were called into play. In the end, the authenticity of the Endangered Black Man narrative was left intact.

d. nullifying guilt: celebrity, race, & gender

Police Officer: What are you nervous about?
Q: Cuz with three niggaz in a police station doesn’t matter what happened. If ya’l want us to be guilty, we’ll be guilty.

Also, see page 171 for similar warning made by Brown and Fuller to the Complainant after the attack.

152 Herman Gray, Watching Race: Television and the Struggle for Blackness (Minneapolis: University of Minnesota Press, 1995 at 54.
153 Ibid. at 53.
154 Allard, supra note 140 at 199.
155 Brief for Respondent, supra note 38 cited at 51 (citing Michael Warren).
Police Officer: If you didn’t do nothing, you’ve got nothing to worry about.

~ Scene from movie, Juice

With the focus of Shakur’s trial being on the authenticity of the Endangered Black Man narrative, it is possible to argue that the jury acquitted Shakur of the more serious offenses because, although they thought he was guilty, they did not want to see another black man (particularly one so famous) go to jail and see Shakur’s career effectively ended. This racially based jury nullification, or the refusal of juries to convict a black man despite finding him guilty, is nothing new to the United States legal system. Nor are situations where jurors often “bend the law when they believe the outcome would be unjust....” For example, in the recent narcotics trial of Marion Barry, the black mayor of District of Columbia, the predominantly black jury in this case acquitted Barry of all but one charge in a fourteen count indictment. They did so despite the fact that the FBI had videotape of Barry smoking crack cocaine and “despite the trial judge’s assessment that he had ‘never seen a stronger government case.’”

In an article on racially based jury nullification, Paul Butler defends the decision made by the black jurors in the Barry case. They refused to convict Barry, asserts Butler, because they felt his arrest was racially motivated. Although he places limits on the use of

156 Juice (Paramount, 1992).
159 Barry was found guilty of perjury but not for the count in which he was caught smoking cocaine on videotape.: Butler, supra note 157 at 684.
160 Ibid. cited (in part) at 678 (citing U.S. District Judge Thomas Penfield Jackson).
this nullification (i.e., it should not be used in trials for violent crime), Butler argues that, particularly in "victimless" crimes such as drug possession, the presumption should properly be towards nullification.\textsuperscript{161}

Racially based jury nullification may help explain the verdict in Tupac Shakur's trial. Nullification is premised on the understanding that black people, particularly black males, do not get fair treatment from the United States' criminal justice system.\textsuperscript{162} A related notion is that if a black man gets too powerful the white man (with the aid of the criminal justice system) will "bring him down." As Tupac stated the night of his arrest: "I'm young, black...I'm making money and they can't stop me. They can't find a way to make me dirty, and I'm clean."\textsuperscript{163} Although this suspicion regarding the manipulative nature of white society predominates in the black community, many white people also believe it to be true. In light of the acquittal of the Los Angeles police officers who beat up Rodney King, it is quite obvious (even to white people) that justice is not always color-blind.

In addition, for a black rap star, celebrity is not only power but black power. Rap

\textsuperscript{161} According to Butler:

The crack cocaine case is simple: Because the crime is victimless, the proposal presumes nullification. According to racial critiques, acquittal is just, due in part to the longer sentences given for crack offenses than for powder cocaine offenses.... According to a recent study, African-Americans make up 13% of the nation's regular drug users, but they account for 35% of narcotics arrests, 55% of drug convictions, and 74% of those receiving prison sentences. Most of the people arrested for crack cocaine offenses are black; most arrested for powder cocaine are white. Under federal law, if someone possesses fifty grams of crack cocaine, the mandatory-minimum sentence is ten years; in order to receive the same sentence for powder cocaine, the defendant must possess 5000 grams.

\textit{Ibid.} at 718-9 (footnotes in text omitted).

\textsuperscript{162} Brown, \textit{supra} note 150 at 1001.

\textsuperscript{163} "This Thug's Life," \textit{supra} note 20.
stars signify authentic blackness; they are a voice for the black community. As such, it is possible that Shakur’s rap status sent a ‘hidden message to jurors’ and they acquitted more on the basis of racial identification than on the evidence. This was viewed as a possibility in the Barry trial. Minister Louis Farrakhan, leader of the Nation of Islam, and Reverend George Stallings were prohibited from attending this trial on the basis that their presence might send an “impermissible message” of ‘intimidation’ and ‘racial animosity’ to jurors and witnesses” In other words, the judge was afraid that the presence of these black leaders would persuade the jury that this was not a case about narcotics but one concerning race and race issues. It was feared that the jury might acquit on this basis alone.

Tupac’s lawyer, Michael Warren, also signified authentic blackness and the Endangered Black Man throughout Shakur’s trial. Warren, a distinguished black man and former member of the Student Non-Violent Coordinating Committee (SNCC), made his

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164 For example, John T. Harvey III is an African American criminal defense attorney who, at an arraignment, accessorized his business suit with a “colorful stole of kente cloth. Kente cloth is a multihued woven fabric originally worn by ancient African royalty, and many African-Americans have adopted it as a fashion statement and a symbol of racial pride.” In the pretrial proceedings, the judge warned Harvey not to wear kente cloth before a jury. It was assumed that the fabric would send a ‘hidden message to jurors’ and that the “black jurors might acquit on the basis of racial identification rather than on the ‘evidence.’” Butler, supra note 157 at 684-6.

165 Ibid. at 682-3.

166 Toure, supra note 57 at 75.

The SNCC “began in 1960 as a rather conservative, idealistic movement.” Non-violent civil disobedience was used to demand service at “whites only” restaurants, bus stations, etc. According to Jon Rice:

Freedom required sacrifice and cooperation - the commitment to use any means necessary to achieve the vote. For them, non-violence was a tool, a means to an end, and it was often an ineffective tool.

When violence destroyed their movement in Albany, Georgia and McComb County, Mississippi, they armed themselves for self-defense in Lowndes County, Alabama and formed a political organization whose voting symbol (for illiterate voters) was a black panther. The local people referred to them as the Black Panther Party....

In 1965...[t]he push for indigenous black power awakened a latent radicalism in the poor, abused black farmers. SNCC wanted a change from the bottom up, and now, so did the bottom. The year
living defending alleged victims of conspiracy and racism. Just prior to Shakur's trial, Warren had defended one Warren Bolton, a black man beaten up by several white policemen while carrying a battery he said he bought at a nearby store. Bolton was arrested and later confined to the psychiatric ward at Woodhull Hospital. Warren viewed Bolton's detention as a 'classic' cover up and was very vocal about this in the national media. Warren received much publicity from this case. He was "repeatedly referred to in follow-up stories in the *Amsterdam News...*, and the entire story was the subject of a 'comprehensive' series on NBC TV as well as a WBAI-FM radio series". Warren's involvement in this case may have sent a message to the jurors that Shakur's indictment was a classic example of the Endangered Black Man narrative.

A nullification hypothesis is, however, difficult to sustain in Shakur's case -- if only because the jurors were predominantly white and female. It is reasonable to presume that racial identification would not have had the same impact as it would have had on a primarily black jury. Despite the belief in the black community that the criminal justice system is unfair and biased against the black man, many white people still believe in the criminality of the black male. Shakur's Thug Life persona did little to challenge this notion or the demonization of blackness within popular culture. This persona simply perpetuated societal stereotypes regarding the brutish and violent nature of the black male.

was 1966 and, coincidentally, the Black Panther Party was about to be born.


167 *Brief for Appellant*, supra note 39 at 32.


169 Boyd, *supra* note 1 at 54.
On the other hand, Leonard Baynes argues that white juries are often able to look beyond the stereotype of the savage black man if the black defendants are "cast in the stereotypical light of a White man, such as avenging an ultimate wrong -- fighting for truth, justice, and the American way." In Shakur's case, this is exactly what happened. Shakur's story was that of an avenging and endangered black man. He was the son of former Black Panther, purveyor of racial justice, victim of police misconduct and conspiracy. The combination of Shakur's black maleness, his celebrity, and his Black Panther lineage, made the assertion that Shakur "was being used as a scapegoat" more believable, even plausible. This authenticity gave Shakur more power to define what it meant to be an Endangered Black Man in this society, what pain (racism vs. sexism) would be considered important, and what constituted truth in a courtroom. It also may have made it easier for the jury, especially one so influenced by the Endangered Black Man narrative, to nullify Shakur's guilt.

**e. empathy for the endangered black man**

In the alternative, it is possible that the predominantly female jury felt empathy with Shakur's narrative and found him innocent of the charges. This hypothesis is supported by the jurors own admissions that they thought Shakur was innocent of the more serious charges. It is often alleged by trial lawyers that women jurors are far more compassionate and empathetic to Defendants' anguish. This belief was actualized in the

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171 Jones, supra note 87 at A1.

172 See footnote 94 for more details.
Erik Menendez’s trial. In the Menendez trial, the male jurors pressed for a first- or second-degree murder conviction. The women, sympathetic to his narratives of abuse, “lined up solidly for lesser charges.”

Contrary to the widely held view of attorneys, though, studies in the United States have found that the gender of the jurors does not influence most verdicts. Stanford University professor, Barbara Babcock, argues that women jurors have little power on the jury. Male jurors still do most of the talking, they are more likely to be elected foremen (as the Tupac Shakur trial demonstrated), and the male jurors’ suggestions during jury deliberations are taken more seriously than those of the women jurors. Whatever the case, we must be extremely careful with arguments that base verdicts solely on the gender composition of the jury. Constructions of women as primarily emotive, as opposed to rational, beings, encourage advocates of legal rationality to argue for ‘the total exclusion of women from juries.’

Having said that, it is still possible that the primarily white female jury empathized with Shakur’s Endangered Black Man narrative (especially after his showstopping appearance in court as an injured man) and truly believed he was innocent. Although the jurors alleged that Shakur’s injuries did not influence the verdict -- ‘The judge instructed

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173 Erik and his brother, Lyle, Menendez were charged with killing their parents. The Prosecution argued that the Menendez brothers murdered their parents out of hatred and greed; the Defense contended that they feared for their lives after years of abuse by their father.: Dolan, supra note 158 at A1.

174 Ibid. at A1.

175 Ibid. at A1.


us to make no speculations whatsoever, and we honestly didn’t. We were much too involved with trying to figure out the details of the evidence we had\textsuperscript{178} -- they were caught “wincing” and “nudging” one another at the sight of Shakur’s obvious pain.\textsuperscript{179} A mere eight hours later, the jury came back with its verdict. Accordingly, it was possible that Shakur’s shooting gave his Endangered Black Man trial narrative heightened authenticity and enabled the jury to perceive Shakur’s story as the true one.

\textbf{iii. only god can judge me}

\begin{quote}
\textit{...I’d rather die like a man}  
\textit{Than live like a coward}  
\textit{There’s a ghetto up in heaven}  
\textit{And it’s ours}  
\textit{Black Power}  
\textit{Is what we scream}  
\textit{As we dream}  
\textit{In a paranoid state}  
\textit{And our fate}  
\textit{Is a lifetime of hate}  
\textit{Dear mama, can you save me}  
\textit{And fuck peace}  
\textit{Cuz the streets got our babies}  
\textit{We got to eat}  
\textit{No more hesitation}  
\textit{Each and every black males trapped}  
\textit{And they wonder why we suicidal}  
\textit{Walkin’ around strapped}  
\textit{It’s the police}  
\textit{Please try to see to this}  
\textit{There’s a million mutha-fuckas}  
\textit{Stressing just like me}  
\textit{Only God can Judge Me...}  
\end{quote}

\textit{~ 2Pac, “Only God Can Judge Me”}\textsuperscript{180}

Shakur’s success as a gangsta rapper in popular culture enabled him to speak with

\textsuperscript{178} Toure, supra note 57 at 75.

\textsuperscript{179} Jones, supra note 177 at 2D.

heightened authenticity at trial. The intensity in which he was able to express pain and struggle in his music made him stand out among other rappers: ‘Nobody can talk about pain like Tupac. No one knows it like me,’ he said. ‘It separates me from the other rappers. All that pain I’m talking about in my rap, you can see it.’\(^{181}\) The pain Shakur talked about was his pain. It supposedly came from his experience of racism and poverty. Yet, he also talked about the pain of others, namely the Endangered Black Man. Shakur’s radical Black Panther ancestry transformed his Thug Life message into a broader political narrative of the situation of black men in contemporary United States. Shakur’s thuggery was considered more politically significant; his lyrics, broad-thinking. As one commentator noted: “2Pac has seemed to stand outside his characters, looking for a broader view.”\(^{182}\)

For Shakur, the criminal charges in his personal life helped solidify his Thug Life image in the minds of the listening audience: any demonstration of Thug Life in real life could only but reinforce this image.\(^{183}\) As with gangsta rapper, Snoop Doggy Dogg (a.k.a. Calvin Broadus), Shakur’s criminal record gave him a further claim to realness. In the case of Snoop Doggy Dogg, his indictment for murder-related charges made him appear more ‘real’ to his fans. It “showed that he really was a gangsta. The shooting gave him respect because everyone that bought his album believed what he was talking about.”\(^{184}\)

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\(^{181}\) “This Thug’s Life: 3,” *supra* note 35.

\(^{182}\) Toure, *supra* note 57 at 75.

\(^{183}\) Boyd, *supra* note 1 at 71.

Similarly, Shakur’s sexual assault conviction not only bolstered Shakur’s gangsta image, it bolstered his fame, his record sales, and his authenticity as a thug. This trial gave Shakur a forum for reasserting his masculinity, his thuggery, and his authentic blackness. It gave him a forum to re-tell the old Endangered Black Man narrative. In the end, Shakur, “more than any other rapper,” was viewed as personifying and articulating “what it was to be a young black man in America.” In the end, Shakur became configured as the epitome of the Endangered Black Man, a man for whom everyone was out to get.

Before Shakur’s legal troubles began, “no one was eager to tell the story of Tupac Shakur, save a few fanzines.” As his brushes with the law piled up, so did the number of people watching and listening to Tupac. Shakur’s forays into Thug Life inflated his reputation with inner-city kids. They saw him more as freedom fighter than felon: ‘You can’s take him down, and there ain’t been nobody like him since Malcolm. He shot those white cops in Atlanta and didn’t miss a step. He gets shot here and keeps fighting.’ His “sociopath” stature also gained him popularity with white audiences.

Many black people viewed Shakur as simply perpetuating and trading in on negative images of black men. Some members of the black community argued that

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186 “This Thug’s Life,” supra note 20.


It was estimated that, during his short lifetime, 2Pac sold $90 million worth of albums; the people who liked Shakur’s music best were white people. For example, “Soundata, a firm that tracks musical tastes, found that 51% of blacks said they ‘liked’ or ‘strongly liked’ his music, compared with 100% of whites.”: “Obituary,” supra note 8 at 91.
average black men were “forced to suffer the consequences of Shakur’s erratic, irresponsible behavior.”

According to one commentator, “in a society where celebrities, such as Shakur, [made] headlines just breathing, and where many whites base their perceptions about black men on what they see on television and read in newspapers, Shakur [had] an obligation to be more than a thug.” He argued that Shakur’s Thug Life image deeply wounded the black men of America and continued to make black men suspects in society’s eyes. Yet, in truth, Shakur’s music and life actually highlighted the issue of poverty and racism in the United States. Shakur brought to the mainstream the problems facing many black men in contemporary society.

It was said that Shakur’s Thug Life persona was just an act, “an image he has to keep up to sell records.” Some argued that Shakur actually started out his career as a “‘sweet,’ ‘polite’ and ‘friendly’” person; “well-read, well-mannered -- and well-behaved.” But kindness and good manners do not sell records -- not if you are a celebrity “Other” in white Hollywood. Shakur proved this. Despite the feature role of authenticity in gangsta rap music, social stereotypes do not allow for the presentation of a

190 Ibid. at A20.
192 Calvin Baker, Karen Brailsford in Las Vegas, Tom Cunneff in Los Angeles and Brooke Stachyra in New York City, “Living Dangerously; Rap Star Tupac Shakur is Gunned Down Again – This Time in Las Vegas,” People, September 23, 1996 at 75.
2Pac, it was argued, “was a media myth, just like his whole gang-banging, stupid negativity stereotype.”: Ivan Solotaroff, “Gangsta Life, Gangster Death,” Esquire, December, 1996 cited at 78 (citing “Steel,” former Crip gang member).
gentle, articulate, and intelligent black man as "authentic." Accordingly, Shakur transformed his congenial personality into a hardened image of Thug Life. He made certain that the events in his private life did not contradict this persona or his songs. He carried a gun. He engaged in violence, smoked weed, drank malt liquor, and perhaps even committed rape. In the end, Shakur claimed “authenticity” not only as a gangsta and a thug, but as the most “real” thug in a genre that prizes itself on realness.

The events in Shakur’s personal life -- especially his encounters with the law and the United States legal system -- helped authenticate the truth of his Thug Life image. Thug Life lent credibility to Shakur’s claim to realness. This realness gave him a claim to truth. Truth became Shakur’s to do with as he wished. In this instance, though, an unproblematic avowal of Thug Life would not have obtained Shakur an acquittal. It simply would have gave credence to the Prosecution’s assertion that Shakur could and did commit these crimes. And so, most brilliantly, Shakur transformed his Thug Life message into the story of the Endangered Black Man.

It was not too difficult to effect this transformation. Thug Life and the Endangered Black Man were not mutually exclusive narratives. Thug Life could actually be considered a more contemporary version of the old trope. In other words, Shakur may have violated the rules 194 but he did so for good reason. Contemporary United States, and the associated law enforcement agencies, all worked against the black man. Survival was key. He had no choice but to do what he did. Shakur’s trial narrative implied that the

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music industry and his black and white fans pushed him back to his roots. They rewarded him for staying close. In his effort to stay “real and true to the streets”, Shakur may have squandered away his talents and reified those stereotypes that formed the foundation of the white power structure he purported to oppose. But what else could he do? This was Thug Life nonetheless and he was an Endangered Black Man.

In the end, the authenticity Thug Life accorded Shakur’s voice carried over to authenticate his Thug Life-as-Endangered Black Man trial narrative. The ensuing trope triumphed over the Complainant’s version of the facts. His authentic blackness overshadowed that of his nameless accuser, whose lonely plea -- ‘I did not deserve to be gang-raped’ -- paled in comparison to Shakur’s Thug Life-as-Endangered Black Man allegory. Though the Prosecution put forth Thug Life as a counter-narrative, Shakur argued that it was one in the same. Thug Life stemmed from the pain and struggle of racism and poverty. It was the necessary conclusion to the story of the Endangered Black Man. In the end, Shakur’s image and private life authenticated his Endangered Black Man narrative in the courtroom. However, it was his experience in the courtroom that enabled Shakur to go back out into popular culture and speak of Thug Life with heightened authority:

Who you callin’ rapist??
Ain’t that a bitch
You devils are so two faced

See also: “November 96 - Last Testament,” supra note 11.
198 Zook, supra note 76 at 86.
Wanna see me locked in chains
Doperand [sic] in shame
And getten socked by these crooked cops and game
Fuckin' with tha young black male
Tryin’ ta stack bail
And stay away from tha packed jails
Told tha judge I’m in danger
And that’s why I had that 45 with one in tha chamber
Fuck tha World...

conclusion

Joshua Gamson commences his book, *Claims to Fame: Celebrity in Contemporary America*, with a description of the "oddity of Angelyne", a buxom blond who in 1987 had her own billboard near Hollywood and Vine in Los Angeles, California. Angelyne is untalented by her own admission. She is famous simply for being herself, Angelyne. Her celebrity status intrigues Gamson. She is simultaneously a sexist stereotype ("the objectified body and commodified sexuality, the auto-shop calendar image, the appeal to the 'male gaze'"\(^1\)) and an "ironic commentary on herself."\(^2\) The exaggerated nature in which she partakes in the stereotypic image of the Hollywood bombshell, a woman worthy of celebrity based solely on the size of her breasts and the color of her hair, is not only an ironic commentary on herself but also on fame and the celebrity in contemporary Western society.

Gamson's discussion of Angelyne points to many issues that were addressed in this thesis. The first is the enormous power of the celebrity, and contemporary Western popular culture in general, to effect meaning in society. Angelyne became meaningful only through her billboard. For those of us who have not seen her billboard or have not heard about her in the mass media, she means nothing. At the same time, though, the concept of celebrity carries with it a certain significance and affective meaning. When we hear of her celebrity in California, we can not deny that she is famous or that she is a celebrity. For

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2 Ibid. at 2.
what is celebrity if it is not an assertion of being known? Telling us about her, makes her existence known. Telling us about her celebrity, makes her celebrity known.

A court of law is not isolated from the meanings articulated and disseminated in Western popular culture. Nor is it isolated from the power of celebrity. The same semiotic and affective meaning that the celebrity carries outside the courtroom seeps into it in myriad ways. To begin with, our experience of the celebrity is primarily an experience of "unreality." As Ian Mitroff and Warren Bennis argue, "unreality has become in effect our primary mode of reference." The typical Westerner comes to know a celebrity through her or his representation in the public mass media, a medium famous for its constructedness and artificiality. At the same time, though, "the unreal look[s] so real that we cannot tell the difference between the two." The reality of unreality is complicated by the fact that different races and sexes are as segregated as ever in contemporary society. White people know little about the every day reality of black people; men and women, though not necessarily segregated from each other, interact primarily according to stereotypes and preconceived notions of the opposite sex.

In light of this, celebrity trials evoke the realization of this unreality, an unreality audiences experience as reality. In other words, what was once pure image becomes a real live person in the courtroom. Celebrities sit before juries. They converse with lawyers. They are asked to speak in front of a judge. It is understandable, then, that, as audiences experience the image in mass media as real, this would carry over into a courtroom. No

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4 Ibid. cited at 7 (citing Mitroff and Bennis, ibid.).
other reality is known to a legal audience. No other way of seeing or knowing this
celebrity exists.

Good trial lawyers know and use this everyday way of seeing and knowing to
construct celebrity legal stories that will be considered plausible to a legal audience. The
juror’s experience outside the courtroom necessarily influences how she or he will
understand truth and authenticity in the courtroom. In the trial of a celebrity, the everyday
knowledge that counts most is the celebrity’s persona or image in the popular media. It is
through this image that the audience comes to know the celebrity. More often than not,
this is this image that audiences take to be reality.

And so it follows that law is not an island, isolated from the meaning produced in
popular culture. Celebrity trials, such as those of Billie Holiday, Tupac Shakur, and O.J.
Simpson, prove this. However, other factors also come into play. Other cultural scripts
bring meaning to the legal play. As the “oddity of Angelyne” demonstrates, celebrity
images, particularly those of celebrity “Others,” are both a perpetuation of and a
subversive challenge to sexist and racist stereotypes in contemporary Western mass media.
While popular celebrity images are not revolutionary in their message, they do have the
potential to effect some change in society. Those celebrities who belong to social groups
typically silenced in Western society may be given a voice, a forum, to speak out about
their experiences in a racist, sexist society. However, the authenticity with which they
speak is defined and limited by the dominant discourses in society. In other words,
celebrity “Others” speak in a voice that does not challenge contemporary discourses of
authenticity. Instead, they rely on these dominant discourses to give them meaning.
As such, the authenticity accorded a particular celebrity voice, the credibility given a particular celebrity legal story, can not be explained with simple reference to a person’s fame or her or his image in the popular media. Various cultural scripts regarding race, class, gender, and celebrity intersect to authenticate or deny credibility to a celebrity legal story. None of these scripts can be viewed in isolation to the others. They all work to effect meaning in the courtroom.

This leads us to a very important question and one asked by Gamson at the beginning of his book: “Does democracy remain democratic if authenticity and reality and truth are no longer discernible, if they themselves are mimicked, stylized, and marketed?”

This question is crucial to lawyers because it goes to the heart of the intersection of law and popular culture in contemporary Western society. Critics of the celebrity, and popular culture in general, lament over the refusal of audiences to see these images in the mass media for what they really are: images, constructed, inauthentic, untrue. They argue that Western society’s unquestioning adherence to, and worship of, these images (and popular culture) signals the end of democracy, the end of justice, and maybe even the end of the rule of law.

It should be obvious at this juncture, though, that the very thing these theorists are lamenting -- the marketing and commodification of truth and authenticity -- is what trial

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5 Ibid. at 7-8.

6 These concerns are parodied in the prime-time animated sitcom, The Simpsons. In an episode entitled, “Homer Bad Man” that first aired November 27, 1994, Homer is charged with sexual harassment after grabbing for a candy treat out of the new babysitter’s back pocket. It is not until Groundskeeper Willy comes forward with a video tape showing what actually happened that Homer is cleared of the charges. Homer’s daughter, Lisa, remarks, “Dad, this clears you completely!” Homer’s wife, Marge, then states, “You know, the courts might not work any more, but as long as everybody is videotaping everyone else, justice will be done.” “2F06] Homer Bad Man,” The Simpsons Archive, 11-Jun-98 18:24:26 GMT <http://www.snpp.com/episodes/2F06.html> (15 June 1998).
lawyers have been doing for years. Truth and authenticity have always been commodities in the courtroom. For decades, trial lawyers have sold truth to the jury, manipulated and constructed facts so as to make their story seem the true one. Contemporary popular culture and the mass media may help aid in the construction of these stories -- if only to place limits on what will be considered plausible by a jury -- but this manipulation is not a new phenomenon in the Western adversarial courtroom.

Such an understanding of law’s processes is deeply threatening to those who wish to believe in law’s objectivity and neutrality. However, as law and popular culture theorists have demonstrated time and time again, the law is not isolated from society. It is deeply affected by the meanings produced in popular culture. Celebrity trials are simply the most obvious example of the influence of popular culture on the law. The sooner judges and legal academics realize the interconnected nature of law and society, the better prepared they will be for dealing with the ways in which legal stories attach themselves to certain ways of knowing and seeing. Recognizing that cultural scripts regarding race, gender, class, and the celebrity are what give meaning to our lives, will better prepare judges, lawyers, and other legal actors to ensure that justice is done in the courtroom. This is the case whether or not it is a celebrity who is on trial.

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7 For example, Madame Justice L’Heureaux-Dubé of the Supreme Court of Canada responded to a question regarding the role of the mass media in Supreme Court decision-making by stating, “If you are asking me what role public opinion plays in our decision making, I would say very little.” Madame Justice L’ L’Heureaux-Dubé, UBC Law School, Winter 1997.
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appendix b

BILLIE'S BLUES
Billie Holiday

Lord I love my man, tell the world I do
I love my man, tell the world I do
But when he mistreats me
Makes me feel so blue

My man wouldn't give me no breakfast
Wouldn't give me no dinner
Fought about my supper and put me outdoors
Had the dark clay make black spots on my clothes
I didn't have so many
But I had a long, long way to go

Some men like me talkin' happy
Some calls it snappy
Some calls me honey
Others think I got money
Now if you put that all together
Makes me everything a good man needs

FINE AND MELLOW
Billie Holiday

My man don't love me
Treats me oh so mean
My man he don't love me
Treats me awfully
He's the, lowest man
That I've ever see

He wears high trimmed pan
Stripes are really yellow
He wears high trimmed pan
Stripes are really yellow

But when he starts in to love me
He's so fine and mellow

Love will make you drink and gamble
Make you stay out all night long
Love will make you drink and gamble
Make you stay out all night long

Love will make you do things
That you know is wrong

But if you treat me right baby
I'll stay home everyday
But if you treat me right baby
I'll stay home everyday

But you're so mean to me baby
I know you're gonna drive me away

Love is just like the faucet
It turns off and on
Love is just like a faucet
It turns off and on

Sometimes when you think it's on baby
It has turned off and gone.

*I all transcriptions can be referenced to: “Billie Holiday’s Homepage” <http://users.bart.nl/~ecduzibilly/song/songs.html> (2 April 1998).
appendix c