

Review of: L. Gies, *Law and the Media: The Future of an Uneasy Relationship* (Abingdon: Routledge-Cavendish, 2008) and K. J. Bybee (ed), *Bench Press: The Collision of Courts, Politics and the Media* (Stanford, CA: Stanford University Press, 2007).

Lieve Gies' book, *Law and the Media*, is a novel and intriguing account of representations and perceptions of 'law' and 'law making' in the modern media. It is – in part at least – a response to concerns that 'a persistent stream of distorted and sensationalised media portrayals [will] crowd out sober legal fact and may ultimately prove corrosive of law's authority and autonomy' (p.1), which aims to 'probe arguments about media harm and unravel the thinking behind the idea that media influence poses a serious risk to treasured legal values' (p.130).

Law and the Media revolves around a number of case-studies which explore the 'notion that law is constitutive of, instead of being external to, everyday life' (p.26). Analysing the role of law in society, Gies examines representations of rule-making and legal process in the seemingly ubiquitous genre of reality television (chapter 3), the growing trend towards using internet fora, magazine columns and radio phone-ins as tools of legal self-help (chapter 5), and the emergence of press judges in the Dutch legal system to act as an interface between the courts and press (chapter 7), and to 'manage public perceptions of the judiciary' (p.112). Each of these studies is supported by wide-ranging and theoretical discussion of the role of law in everyday life, the study of law and popular culture, and the relationship between legal institutions and the press in a liberal democracy.

It is perhaps Gies' discussion of reality television which is the most intriguing of these analyses. For Gies 'reality television narrates law as something in which ordinary people actively and extensively participate in everyday life' (p.37). The programme *Wife Swap*, for instance, 'explores the negotiability of rules in everyday life and gives women the opportunity to acquire the kind of law-making powers from which they are still to a large extent excluded in the official legislative realm' (p.7). *What Not To Wear* and *How Clean is Your House?* are given as examples of treating participants as 'suspects' in a pseudo trial (p.43). While *Pop Idol* and *X Factor* provide a 'master class in judicial bias' as a number of obviously partial 'judges' assess and adjudicate on the claims of the contestants (p.44).

Of particular concern is the effect of such programmes on perceptions of gender and of roles within the family unit. *Wife Swap*, in which the participants move in with another family for a time, first living by their hosts' rules, then designing rules of their own for the adopted family to live by, comes in for particular criticism in this regard. Gies argues:

Under the show's formula the result of the rule changes is often that the new rulebook is ignored, making the women even more vulnerable than before as the limited authority they have is completely undermined by the host family's lack of compliance. What is perhaps most troubling about this portrayal is its apparent suggestion that women have neither the authority nor the nous to be able to become successful legislators (p.53).

As Gies acknowledges however, the staged 'reality' of such programmes could be said to undermine their usefulness as a reliable indicator of 'the socio-legal reality of everyday life' (p.56). This conclusion leads to the speculative and (at first glance) slightly underwhelming concession that such programmes – rather than actually

providing valuable insights into everyday perceptions of legal systems and processes – may only ‘pre-figure new ways in which media culture defines the very category of legal reality’ (p.56).

As the book’s argument is developed however, it is also contended that established legal institutions may well also be accused of constructing their own ‘reality’; a ‘reality’ which is impervious to anything which might contest or challenge the autonomy or authority of the law (p.103). Presented as such, and through the inertia which accompanies this autonomy, legal actors may themselves be complicit in perpetuating the misunderstandings and distortions of legal process which may be found in sensational news reporting and the other media examined in this book.

Law and the Media challenges the suggestion that law and legal processes are being undermined by exaggerated reporting and an uncontrolled media, not least by reminding that the ‘reality’ of the court room is not, and should not, exist entirely independently of a wide range of societal perceptions and concerns which may be as manifest in reality television as they might be in serious news reporting. The challenge for the future, as Gies sees it, lies in recognising the validity of these alternate ‘realities’ and for scholars and legal actors to establish ‘how law can still operate as *law*, that is as something we recognise as distinctly legal, while also taking its place in a rich cultural tapestry where its symbols readily spill over into many different spheres’ (p.139).

Many of the concerns which illuminate Gies’ study of the relationships between courts, law and the press are also examined – albeit initially from a more ‘constitutional’ perspective – in *Bench Press: the collision of courts, politics and the media*, edited by Keith Bybee. *Bench Press* provides a series of essays, written by a selection of US-based judges, academics and journalists, exploring the tensions between views of the courts as independent defenders of rights or as political institutions which ‘create vast opportunities for judicial elites to pursue their own interests under the guise of unbiased adjudication’ (p.1).

An editor’s introduction outlines the origins of the collection in a nationwide survey carried out by staff at Syracuse University and subsequent conference at which the chapters in *Bench Press* were first presented. Bybee’s synopsis of the results of the survey provides some initial, sobering, reflections on the state of judicial independence in the US, with findings that ‘an astounding 82 percent of those surveyed believe that the partisan background of judges influences court decision making’ (p.3) to a significant degree, and that:

A majority of poll respondents agree that even though judges always say that their decisions flow from the law and the Constitution, many judges are in fact basing their decisions on their own personal beliefs (p.3).

The debate is further contextualised through chapters by Charles Gardner Geyh and G. Alan Tarr examining, respectively, the relationship between perceptions of judicial propriety and public confidence in the courts, and the consequences of the ‘hyper-politicization’ (p.53) of judicial selection processes.

In the context of ‘a heightened attack on judicial independence during the early years of the twenty-first century’ (p.132) a number of essays from serving judges contribute from the perspective of, what Hamilton in *The Federalist Papers* famously termed, the ‘least dangerous’ branch of government. Among those commenting from the bench, Harold See – Justice of the Supreme Court of Alabama – explores mechanisms of appointment from the perspective of the judiciary as a

constitutional check on the executive and legislature. See asks – given that ‘the judiciary can command and the legislative and executive be expected to comply only so long as the public demands such compliance, and that will happen only if the people hold the voice of the judiciary to be legitimate’ (p.89) – whether appointment by elected officials or election holds the key to the legitimacy of the judicial branch as a check and balance. Similar issues are considered by John M. Walker Jr in the context of the recent confirmation of John Roberts, as Chief Justice, and Samuel Alito, as Justice, of the US Supreme Court. The confirmation process, and its reporting in the media, Walker finds, remains crucial to shaping a realistic popular view of how ‘judges perform ... their proper role within the judiciary’s institutional limitations’ (p.123). The difficulty of translating this aspiration into practice within the confines of a soundbite-driven news media – ‘when journalists boil all substance out of the law before serving it to the public’ (p.154) – is however brought home in the following chapter, by Mark Obbie, of the Newhouse School of Public Communications, Syracuse University. It is this, and the following chapters – all ‘views from the media’ – which have most in common with the concerns outlined in Lieve Gies’ book. Dahlia Lithwick explores the ability of the internet to disseminate information and misinformation at a speed to which the law is generally unaccustomed; while Tom Goldstein’s chapter reminds that the objectives of journalist and judge are not co-existent and any attempt to examine relations between the two should appreciate as much – a desire to uphold judicial independence and further the rule of law should not get in the way of a good story.

Judicial independence provides the backbone which holds this set of essays together, and the threads of democratic accountability, free speech, constitutional propriety and popular participation run clearly through the contributions. While the ‘views from the media’ depart from the constitutional dimensions of independence examined in the ‘views from the bench’, focusing instead on the role of the press, this is no weakness, given the centrality of journalistic freedom to the appointments processes – many of which are conducted ‘more like political campaigns’ (p.200) – and to the constitution itself. With the increased emphasis on perceptions of judicial partiality which has in part occurred as a result of the influence of Article 6 ECHR in the United Kingdom, and considering recent and ongoing debates on the processes of judicial appointments, this collection offers a number of enlightening perspectives on the relationships between courts and the media which demonstrate just how similar, and yet starkly different, our two jurisdictions are.

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