
COMMENTS ON PANEL 2

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These are wonderful papers. Like all real first-order scholarship, they push you to think differently about things that you have previously taken for granted. That is certainly the case for me. I spend a fair amount of time these days driving between Washington, D.C. and its precincts of men in marble and the Eastern shore of Virginia. On this drive, you work your way out of the District past various looming stone objects and sprawling building complexes named for Ronald Reagan. Eventually, you reach the countryside where the sky grows big and land grows flat. And if you pay very close attention, by the side of Route 50 somewhere near Cambridge, Maryland, you may note a small marker placed by the Maryland Civil War Centennial Commission, which indicates that you are passing near the birthplace of Harriet Tubman—"The Moses of Her People." As I was reading Ann's paper, I began to think about how we memorialize figures like Ronald Reagan and Harriet Tubman, and I did what any self-respecting American academic would do: I googled them together!

Eventually, something interesting came up: Wisconsin Assembly Bill 559 from 2005, directing the Wisconsin Department of Transportation to designate the segment of US Highway 14, from the Wisconsin-Illinois border to Madison, as the Ronald Reagan Highway, "in recognition of appreciation of the public career of Ronald Reagan who served with distinction for two terms as fortieth president and who subsequently demonstrated grace and dignity in his struggle with Alzheimer's disease." The same bill also directed the Department of Transportation to designate the entire route in the state of State Highway 142, as the Harriet Tubman Memorial Highway "in recognition and appreciation of the life of Harriet Tubman and the leader of the movement to abolish slavery in the 19th century, who led over three hundred slaves to freedom on the Underground Railroad...." Initially, I was impressed. I remembered Wisconsin's progressive tradition and observed that while the legislature obviously was under pressure to name something for Ronald Reagan, he got just a portion of a highway. But Harriet Tubman, a true hero who was the counterweight in this naming exercise, got an entire road. That's true balance, I thought,

or maybe even a bit better! Then I investigated further, taking advantage of a wonderful web site which I recommend for you all, called “Wisconsin Highways,” www.wisconsinhighways.org, which gives you the down and dirty on all state roads.

I am sorry to tell you that even though Ronald Reagan only got part of Highway 14, it turns out to be a really important highway, running for more than 200 miles across the Midwest—a major artery feeding the Wisconsin state capital. In fact, it is so important that another part of it (in a different state) is actually named after Laura Ingalls Wilder—which is another story. And every inch of Highway 14 to be found in Wisconsin, as it sweeps from the Illinois border to Madison, belongs to the former President. By contrast, Highway 122, the Harriet Tubman Memorial Highway, is a somewhat less impressive proposition. For one thing, it is only 14.6 miles long, end to end. And it is one of the four so-called “unanswered state trunkline connections,” which were originally going to be connected into a single road along the Michigan coastline, but somehow never were. So, basically, this is a 15-mile road that goes from nowhere to nowhere! Thus, the appearance of neutrality that was so attractive about this Assembly Bill 559 dissolved when I began to look more closely.

The papers on this panel deal with practices that we might initially expect or assume to have a neutral character. The authors describe, examine and probe to reveal the profound absence of such neutrality (especially, although not exclusively, with respect to gender) in these practices and their associated discourses. They do this, as I suggested earlier, by using the vocabulary of embodiment. It’s a general shortcoming of much of our legal scholarship that we don’t talk enough about bodies—that we make such an earnest effort to distinguish between the corporeal and the doctrinal. Criminal law, for example, is all about bodily restraint and bodily display and the infliction of pains and punishment on bodies, but we manage to discuss it, most of the time, in rarified and abstracted vocabularies of procedural rights and constitutional limitations. Other branches of scholarship have done a lot better with bodies than we have, and that includes, of course, feminist scholarship. These papers impress, in part, because they are part of an effort to bring various notions of embodiment into the domain of legal scholarship.

Eileen’s paper provides us with a gendered account of the struggle over access to medicine, something we tend to think about in terms of North-South conflicts, but which exists within our society as well. She writes persuasively—and poignantly—about how the outcomes of our IP system are sometimes literally written on the human body, demonstrating that patent protection actually reduces women’s ability to receive needed treatment for breast cancer. In fact, Eileen points out, the operation of the IP system has blunted the effectiveness of initiatives to achieve more

scientific focus on and more governmental support for breast cancer treatment. Rebecca's paper reminds us of the disturbing effect that the intrusion of the body may have on legal doctrine itself. She demonstrates the ways in which public representations of the female body, reflecting the male gaze, are privileged in fair use "transformativeness" analysis. She also explores the ways in which another aspect of fair use analysis, the assessment of market harm, elevates the significance of stereotypically male modes of economic participation over stereotypically female ones. She reminds us that how even admirable and useful aspects of intellectual property doctrine, like fair use, may be built on unstable foundations of embodied discrimination.

I started my remarks by channeling the Wisconsin State Assembly, and I want to end by giving you the voice of the artist-transgressor Jeff Koons, talking through an affidavit in the litigation between himself, on the one hand, and a photographer named Andrea Blanche, on the other.¹ The issue is fair use, and (in particular) "transformativeness." Blanche had taken a fashion photograph which Koons had assimilated through repainting as part of a larger composition entitled "Niagara." And, here is what Koons said:

When I saw the article in Allure Magazine about cosmetics, certain physical features of the legs of the model represented for me a particular type of woman frequently presented in advertising. In this photograph, I saw legs and especially elongated toes that were glossy, smooth, expertly manicured, and dressed in very expensive and not particularly practical sandals.... For Niagara, the painting, I removed these anonymous legs from the context of the photograph, and totally inverted their orientation. I then added these legs to other contrasting images of legs... and along with ice cream, donuts and pastries, floated them playfully and ethereally above a liberating landscape of grass, a waterfall and sky. In so doing, I transformed the meaning of those legs (as they appeared in the photograph) into the overall message and meaning of my painting. I thus suggest how commercial images like these intersect in our consumer culture and simultaneously promote appetites, like sex, and confine other desires, like playfulness. This photograph is typical of a certain style of mass communication. Images almost identical to it can be found in almost any glossy magazine, as well as in other media. To me, the legs depicted in the Allure photograph are a fact in the world, something that everyone experiences constantly; they are not anyone's legs in particular.

That's interesting, I think, because although Koons is speaking literally to the claim of transformative use of the photograph in his painting, he nevertheless finds it necessary, nevertheless, to talk about the alienation of

1. *Blanch v. Koons*, 2006 U.S. App. LEXIS 26786 (2d Cir. 2006).

the depicted body part from the model who sat for the photograph. And this is, I think, another example—perhaps a useful one, perhaps not—of the rich confusion that Rebecca’s paper reveals.