Law, Lawyers, and Popular Culture

Lawrence M. Friedman†

This essay concerns two distinct but related ways in which legal culture intersects with more general social norms, including those norms reflected in popular culture. In the first place, legal culture acts as an intervening variable, a mechanism for transforming norms of popular culture into legal dress and shape. In the second place, legal and popular culture, as images of each other, help explicate and illuminate their respective contents. This essay also examines some instances of popular legal culture. But I will begin with a few words of definition.

By *legal culture* I mean nothing more than the "ideas, attitudes, values, and opinions about law held by people in a society."[1] Everyone in a society has ideas and attitudes, and about a range of subjects—education, crime, the economic system, gender relations, religion. Legal culture refers to those ideas and attitudes which are specifically legal in content—ideas about courts, justice, the police, the Supreme Court, lawyers, and so on. (Obviously, one aspect of legal culture is what problems and institutions are *defined* as legal in the first place.) The term *popular culture*, on the other hand, refers first, and more generally, to the norms and values held by ordinary people, or at any rate, by non-intellectuals, as opposed to high culture, the culture of intellectuals and the intelligentsia, or what Robert Gordon has called "mandarin culture."[2] Second, and more narrowly, it refers to "culture" in the sense of books, songs, movies, plays, television shows, and the like; but specifically to those works of imagination whose intended audience is the public as a whole, rather than the intelligentsia: Elvis rather than Marilyn Horne.[3]

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1. L. FRIEDMAN, TOTAL JUSTICE 30, 31 (1985); *see also* Friedman, *Legal Culture and Social Development*, 4 LAW & SOC'Y REV. 29, 34 (1969); Sarat, *Studying American Legal Culture: an Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 427 (1977).

The concept of legal culture does not imply in any way that a particular society has *a* legal culture—or even, necessarily, a dominant one. As defined here, every person has his or her own cluster of attitudes and values; probably no two are the same. But there are statistical *tendencies* which (it is believed) show systematic patterns, that is, they run parallel to demographic and other factors, so that, very likely, there are characteristic differences in the distribution of ideas and attitudes as between men and women, or whites and blacks, or young and old, or taxi drivers as opposed to truck drivers, and so on.

2. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120 (1984).

3. On law and popular culture, see generally Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 AM. B. FOUND. RES. J. 281; Chase, *Toward a*

One can also speak of popular *legal* culture in two senses. That is, one can speak of ideas and attitudes about law which ordinary people or more generally lay people hold. What the average plumber, secretary or, for that matter, the average investment banker, thinks about courts and lawyers is undoubtedly much different from what lawyers themselves think, or judges, or professors of law.[4] One can also use the term in a second sense, that is, to refer to books, songs, movies, plays and TV shows which are about law or lawyers, and which are aimed at a general audience.

I. Popular Culture, Popular Legal Culture, and Social Theories of Law

Popular culture, and popular legal culture, in the first sense, are of fundamental importance in constructing *social* theories of law. By social theories of law, I mean theories of law whose premises deny, altogether or in large part, any notion of legal "autonomy." That is, these theories try to explain legal phenomena by searching for causes and causal factors "outside" the legal system. They treat law as a dependent variable, and assign a leading role in molding the shape of legal institutions and legal arrangements to systems or subsystems that society defines as "non-legal," that is, as economic, social, cultural, or political. Social theories assume some sort of meaningful boundary—conceptual or analytical—between law and not-law; between the legal and the social; but these theories also conceive of this boundary as wholly or largely porous, a kind of network or meshwork through which energy easily flows, rather than as a tough, tight skin.

This cluster of theories firmly rejects the idea that legal systems are sealed and inward-looking; that they respond entirely or primarily to their own logic, traditions, and demands; that they are "self-reproducing," or

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Legal Theory of Popular Culture, 1986 Wis. L. Rev. 527; Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 Law & Soc'y Rev. 185 (1987).

Obviously, popular culture merges into high culture, and there is no clear, clean way to draw a line between them. The analysis of law and popular culture thus blends, necessarily, into the study of "law and literature," a rather amorphous field of scholarship, growing in size; *see, e.g.*, R. Posner, Law and Literature: A Misunderstood Relation (1988); Weisberg, *The Law-Literature Enterprise*, 1 Yale J.L. & Humanities 1 (1988).

Scholars have, to be sure, looked to literature for insights into human behavior, or for insights into social history; or they have been interested in how particular great writers have used legal themes, *e.g.*, C. Lansbury, The Reasonable Man: Trollope's Legal Fiction (1981). In their day, of course, Shakespeare, Dickens, and Trollope were certainly popular enough to be part of the "popular culture," which simply underscores once more how artificial (though necessary?) is the line between popular and "mandarin" culture. But an analysis of the image of law in, say, Shakespeare is important in its own right because Shakespeare is important in his own right; a study of popular culture, however, does not distinguish between Shakespeare or Dickens and plays and novels which may even be totally worthless as works of art.

4. *Cf.* L. Friedman, The Legal System 223 (1975) ("The external legal culture is the legal culture of the general population; the internal legal culture is the legal culture of those members of society who perform specialized legal tasks.").

"self-referential," or the like. A living organism, for example, *is* "autonomous" in an important sense. A horse and a cow have clear boundaries that separate them from each other and from the world. Their skins and shapes are not purely conceptual; rather, they are the real limits of subworlds each of which develops according to its own internal rules. Both a horse and a cow eat grass, but the digested grass turns into more horse in one case, more cow in the other; never the other way around. The internal program determines exactly how food will be processed; and the organism grows and functions by these "autonomous" rules.

Some theories of law in fact treat legal systems as organisms in the sense discussed in the previous paragraph. Theories that stress the "relative autonomy of law" seem to be enjoying some vogue among legal scholars. The old-fashioned "conceptual jurisprudence" of the nineteenth century, of course, treated law as autonomous with a vengeance. Modern autonomists claim to be different, and are surely more sophisticated. But they do share some points in common with 19th century conceptualists. And they certainly insist that it makes sense to look at legal systems as if they were indeed tight, impermeable, and closed to the outside world; an insular realm controlled by the "mandarins" to a very high degree.[5]

A social theory of law, in contrast, is "social" to the extent that it denies or downgrades the autonomy of law, and insists instead that an analysis of social forces best explains why the legal system is as it is, what shapes and molds it, what makes it ebb and flow, contract and expand; what determines its general structure, and the products that it grinds out day by day. There are, of course, many different social theories of law, real or potential—classical Marxism embodies a social theory of law, for example; so too do some versions of the law and economics movement. But social theories are neither inherently right nor left; they span the spectrum of political views. They may isolate some particular "social force," and assign it the lion's share of responsibility for law and legal institutions; or they may credit some mixture of factors in the outside world. They may focus on politics, on economic organization, or on tradition or culture. It is also perfectly possible to have a "social theory" that explains legal phenomena in terms of more implausible factors—the movements of the tides, or the signs of the zodiac. "New age" social theory may be just around the corner.

Probably no serious scholar clings absolutely to either one of the two polar positions; nobody thinks that the legal system is totally and absolutely autonomous; and nobody (perhaps) seriously puts forward the op-

5. The literature is large and international. *See, e.g.*, R. COTTERRELL, THE SOCIOLOGY OF LAW 87-90 (1984); Luhmann, *The Self-Reproduction of Law and its Limits*, in DILEMMAS OF LAW IN THE WELFARE STATE 111 (G. Teubner ed. 1985). In R. LEMPERT & J. SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 401 (1986), the authors define an "autonomous legal system" as "one that is independent of other sources of power and authority in social life."

posite idea, that every last jot and tittle, every crumb of law, even in the short, short run, can be and must be explained "externally." But most lawyers, and a good many legal scholars and theorists, tend to cluster somewhere toward the autonomous end of the scale. Social scientists interested in law, and legal scholars with a taste for social science, tend to cluster somewhere toward the other end; they prefer external to internal explanations, and are deeply suspicious of the case for autonomy. It is probably true that neither basic view can be "proved" one way or the other. Rather, they are starting points, assumptions, frameworks.

It is precisely in the sense of a methodology, a strategy, that the case for (some version of) a social theory is strongest. It seems to me that there is more explanatory power, more richness, more bite, in exploring the manifold connections between the legal system and its surrounding society, than in treating law as an isolated domain. To take one simple, and fairly obvious, example: suppose the question is how to understand and explain the 19th century law about work accidents. Where shall we start? One place is with doctrine itself: maybe the rules somehow emerged out of older rules, out of immanent necessities of legal logic, or the interplay of ideas in the writings of jurists, or out of the "taught tradition,"[6] or through recipes concocted by lawyers playing with elements of doctrine, a spoonful here, a half-cup there. To me, it is much more plausible to begin with the "outside"; that is, with the impact (or perceived impact) of competing rules and institutions on railroads, on industry generally, on labor and labor organizations, and the like, and to go on from there to imagine what sorts of connections the "outside" might have had with the "inside"; and how these connections came to be.[7]

Social theories, in other words, are mighty tools for grappling with problems of explanation. They are not, as some critics fantasize, infected irremediably with a disease called "behaviorism," which I assume means either a concept of human beings as crude economic robots, or a methodological stance that takes overt, physical "behavior" as the sole social reality (or, in any event, as the only reality we are able to study). Social theories can be, and usually are, deeply aware of emotion, opinion, and the fact of consciousness; and some social theories—the more anthropological ones, for example—are fixated to a fault on culture and consciousness. Nor are social theories necessarily vulnerable to the charge that they

6. The phrase is from the classic—and highly "internalist"—article by Pound, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 367 (1940), in which Pound argued that the "strongest single influence both in determining single decisions and in guiding a course of decision is a taught tradition of logically interdependent precepts and of referring cases to principles."

7. For the debate, see M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351; Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COL. L. REV. 50 (1967); Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946); Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981).

(unrealistically) assume a radical distinction between "law" and "society," instead of recognizing that the two are really inseparable, intertwined, faces of the same coin.[8] No doubt the two *are* inseparable. However, it is possible to separate them analytically, and it may also be sociologically useful to do so, since in many societies the two are undoubtedly separated in the minds of their consumers. If anything, it is the believers in an autonomous system who are open to this particular criticism; after all, they, and not social theorists, are the ones who insist most loudly on the radical separation of law from the social matrix.

But the *idea* of a social theory is a far cry from an actual theory, fully developed, and strong enough to carry on its back a heavy load of explanation. Most attempts at social theory of law are crude and inadequate because they ignore or gloss over what I will call the issue of the *mechanism* or channel. This is nothing more or less than the question of *how* "social forces" actually do their number on the legal system. In what way and through what paths, tubes, hollows, and conduits do the "forces" set up by concrete events, persons, situations, and structures in "society" move, as they deliver their punch to legal institutions, manufacturing or "causing" legal phenomena—statutes, rules, institutions, and cases? A social theory that does not try to answer this question is a blind and almost meaningless abstraction.

For example, if you consider the possible impact of telephones or computers on legal systems, any social theorist will feel sure that there must *be* some impact, and no doubt a substantial impact; and such fundamental social changes as urbanization or the so-called "sexual revolution" must make a fantastic difference to the legal system. But telephones, computers, and sex acts do not automatically transform themselves into change in legal rules and legal institutions. If social and technological inventions have an "influence" (a most slippery concept), that influence must be indirect. At the very least, there must be some intervening steps. Hence any social theory must go beyond the simple-minded equation that joins together particular social and legal events or changes, and find a process or mechanism that *actually* links the two together.

Legal culture expresses one such intervening link. If we explore—to continue along the same lines as before—how new inventions like the telephone affect the law, if we ask how innovations produce legal change, the most general answer is that technology reacts chemically with elements of general culture—with existing habits, arrangements, ideas, and institutions. Out of this chemical reaction come *new* ideas and expectations, new patterns of demand and response. Some of these demands and expectations are directed toward law and legal systems, or relate to it in some way. Changes in society, in short, alter the way people think and feel, and this

8. On this point, see Gordon, *supra* note 2, at 102, 109.

in turn creates a new network or web of norms, ideas, attitudes and opinions. These elements of legal culture act as an intervening variable between *social* innovation and legal change. The germ theory of disease alters the way people feel about disease and their understanding of disease. They see disease, and the chance of curing it, in a radically different light. Out of this new consciousness flow demands, some of them addressed to the legal system; and at the end of a string of events we find laws creating boards of health, laws mandating vaccination, food and drug laws, and so on.

The "legal culture" described here, however, is *popular* legal culture in the first, more general sense. That is, it is not the conscious theorizing of legal philosophers or professors of law. It is the mind-set of the people who interact with legal institutions—lay people, bankers, merchants, policemen, women who want a divorce, and so on. The links in the chain of events can be obscure or obvious, simple or complex, few or many. Major changes—"revolutions"—are like huge stones dropped in the water, producing immediate, palpable consequences, waves, backwash, along with slower, larger, lazier ripples of change. Take, for example, the "automobile revolution," which has had an incalculable impact on every aspect of life in modern Western societies. The legal system must, necessarily, take account of the automobile, and it does so in dozens of ways, commensurate with the overwhelming significance of the automobile in contemporary life. To name a few of these consequences: auto accidents are the bread and butter of tort law, and have shaped some of its doctrines and practices; the automotive society sprouts drivers' licenses, traffic laws, regulations against drunk driving, auto safety laws, and so on endlessly. Modern nations spend gigantic sums of money on road-building, traffic lights, bridges, tollroads, and overpasses; chains of gas and service stations shoot up like weeds; and all of the new institutions create, implicate, and use great quantities of law.

This vast amount of legal matter is not derived directly and immediately from the *fact* of the automobile; the new legal arrangements could not be logically *deduced* from the invention of the internal combustion engine; all of it is one or two steps removed, at the minimum; all of it is contingent, not determined. But the invention of the automobile led to demands—for highway construction, for example—that pressed forcefully upon existing legal and political arrangements. People crowded onto the roads, at first a few rich men and women, for whom the auto was a toy, then more and more of the middle class; with increasing numbers of drivers, accidents multiplied, other forces were set in motion, which reacted, catalyzed, set off still other processes; and licensing of drivers, laws about compulsory automobile insurance, tow-away zones, parking meters and the like appear at the end of the chain.

Even more important are the more remote consequences. The automo-

bile made suburban sprawl possible. It ruthlessly redesigned the cities. Many of us today look at these designs and redesigns as essentially destructive—traffic, noise, exhaust fumes, gridlock, the decay of public transportation, disintegration of downtown areas. But the automobile also cleansed the city. It got rid of horses, stables, horse manure, flies, and an enormous amount of squalor and filth. At one time, these benign designs seemed primary. Above all, however, what the automobile produced and produces is a feeling of freedom, of *mobility*, in the most concrete sense: owning or having a car gives millions of people the ability to move, to transfer, to shake themselves loose, to get about, on an unprecedented scale. The automobile gives drivers a sense of power; they can take rides in the country, they can pitch their habitations more distant from factory and office than before; it shakes off dependence on trains and streetcars, it loosens the tight corsets of traditional family life; conversely, it shrinks distances between lost sheep and their families; it increases the length of the strings that tie people to friends and relatives.

This mobility, subjective and objective, is the foundation on which a fragmented, atomistic society, a society of individuals, has been built up in the 20th century. This is not the dominant individualism of 19th century theory—an individualism of markets and votes—but the more characteristic individualism of modern life, "expressive" individualism,[9] an individualism of habits and life-styles. The automobile is not the only fulcrum of this mobility—trains, planes, and telephones, among others, have their roles to play—but it is an important force, perhaps a dominant one.

Mobility has had a profound effect on law and legal institutions, just as it has had on society in general; and indeed, if the postulates of social theories have any meaning, this *must* be the case. Characteristic of modern law, as of modern society, is the enthronement of individual choice and consent; if there is a single leitmotif of modern law, whether civil rights law, commercial law, family law, or the law of landlord and tenant, it is an extreme emphasis on the *individual*, and on individual choice or consent; the whole system turns on this point. Law here mirrors what is happening in society; perhaps it also reinforces these social tendencies. The *legal* individual, like the individual of today's popular culture, is not to be confused with the pale, economic actor of the 19th century, that humorless, God-fearing, hard-working, eager maximizer; rather, the individual of contemporary times is a full-blooded autonomous *person*; an expressive individual, a kaleidoscopic individual, an individual of a million

9. For the term, see R. BELLAH, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985). Bellah and associates distinguish expressive individualism from other strains of individualism in American history, such as "utilitarian" individualism—roughly, the individualism of the 19th century, with its emphasis on free markets, on "getting ahead," on work life and public life, rather than on "life style" and private life. *Id.* at 44–46.

choices of styles, habits, colors, religions, modes of dress, cuisines, and sexual preferences; an individual whose "rationality," so to speak, goes far beyond 19th century "rationality," and whose needs and demands as expressed in life and law are greater and more complex.

It is, after all, the *individual* who is the unit of mobility. Modern mobility is not a migration in *groups*; it is a mosaic of individual choices. Of course, the *individual* of popular culture—this point cannot be overemphasized—is the individual as felt and experienced. I am not arguing about powers and rights in the *objective* sense. There is a good deal of conflict in the literature over the reality of mobility in Western societies and good reason to be skeptical about how easy it is in practice to glide from class to class or stratum to stratum. For our purposes, in an important sense, the studies and arguments are beside the point. Geographical mobility is certainly real enough. And, as concerns social and economic mobility, the door is open wide enough to support a *belief* in mobility.

This is the crucial point: whether people can do what they wish matters less, for these purposes, than whether they think so, or think they *ought* to be able to do and go and make. People blend cynicism with faith: that the deserving poor really rise, and the rotten rich fall like overripe fruit; that choices and opportunities are real, options available, and so on.[10] The popular culture seems to put great faith in freedom and freedom of choice. It seems to hold as a matter of faith that freedom of choice is within a person's grasp. To be sure, as everybody knows, social arrangements often fall short of the ideal; freedom, and the context for freedom, are flawed, tattered, imperfect. But this situation is treated as abnormal, as a flaw, as corruption or social pathology. The options can be extended, the choices made real, if the government, or somebody else, only makes the proper moves.[11] Thus mobility, though it is rooted in "fact," is not a thing, not an element of the real world, but in large part a mental construct. An automobile does not take us anywhere; it has no mind of its own; it goes where the driver tells it to go. The automobile does not create mobility in itself, though it may be a condition for mobility; social change is a chemical reaction, as we said—it is a series of explosions which take place when

10. And, as is usually the case with popular culture, it is probable that different groups and elements of society have different perceptions. For example, it is undoubtedly true that more blacks than whites feel trapped within prisons of circumstance.

11. Here and elsewhere, when I use the term "popular culture," I do not mean to imply that there is *a* popular culture, any more than that there is *a* legal culture, and certainly not in so complex and heterogeneous a country as the one we live in; but, as in the case of legal culture, there are undoubtedly generalizations that could be made if we had the data, which in most cases we do not.

The statements made in the text are, of course, not backed up by "authority;" they are interpretations of what I see and feel in society, and they stand on no better or worse plane than statements an anthropologist might make after years of thinking and living inside some distant culture. It is not that such statements are inherently beyond evidence or proof; the void is an empirical void, not a theoretical void. Unless and until the gap is filled, the only test of the correctness of an interpretation of culture is whether it produces a harmonic ringing in the reader's brain.

"real" events (technological change, earthquakes, droughts) collide with the thoughts, habits, and dispositions of some human population. Nonetheless, the main danger in legal theory, it seems to me, is the tendency to ignore the "real" events, and to focus attention on the internal world of legal thought, on the intervening variable, and, worst of all, on the intervening variable only as it is refracted though the minds and writings of the "mandarins."

In any event, the main point of the argument remains: popular legal culture, in its many manifestations, is central to the social theory of law. The starting point of social change can be located in the outer context: material and technological changes, natural disasters, and the like. But these do not operate in a human or social vacuum. They interact with an existing structure, and existing minds and personalities. These create popular legal culture; and popular legal culture makes law. Ultimately, social forces, social movements, social change—and social statics—lead to legal change. But the process goes through the stages described.

I am not arguing, however, that any one factor, or combination of factors, "determines" all the others. A chain of events led from the invention of the automobile to the living law of torts of the 1980's. But this statement does not mean there were no elements of chance, no forks in the road, no coiled springs of chance. That is a different and separate question.

II. Reflections of Law in Popular Culture

We consider now another connection between law and popular culture, that is, the characteristics of popular legal culture in the second sense of that term: law as it appears in songs, in stories, in movies, in newspapers, in novels and detective fiction; the law as shown on TV or recounted in *Time* or *Reader's Digest*; law and its practitioners as butt and punchline of scores of jokes. The study of popular legal culture is a relatively new field of inquiry, with a small but growing literature.[12]

The subject is, of course, important. The argument in Section I stressed the critical role of legal culture in socio-legal theory. But what do we know about legal culture? Very little. Not that legal culture is beyond measurement and research; but hardly anybody has bothered to measure or research it. Legal culture, except for a few recent, and probably unreliable, surveys, can only be gotten at through stealth, through indicators, effects, indirections. *Popular* legal culture, then, is (potentially) an important witness and source. Law and legal institutions are absolutely ubiquitous in modern society, and thus, quite naturally, in the media. People are

12. In addition to the works cited *supra* note 3, see Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. Miami. L. Rev. 229 (1987).
On the distinction between popular culture and "literature" as such, see *supra* note 3.

involved with law, like it or not. They grumble about legalism, they complain endlessly about lawyers, about the plague of lawsuits, and so on; but in fact these complaints arise out of dependence, since it is hard to get along in America without this extraordinary profession and these extraordinary institutions, at least as society is presently constituted. Popular culture is therefore involved with law; and some of the more obvious aspects of law are exceedingly prominent in popular culture. But of course not *all* of law. No songs have been composed about the Robinson-Patman Act, no movies produced about the capital gains tax. This is not surprising, since most people do not have a clue as to what these are all about. But there are also no songs, movies or TV programs about medicare, dog licenses, zoning laws, or overtime parking, all of which most people certainly *do* know something about. On the other hand, television would shrivel up and die without cops, detectives, crimes, judges, prisons, guns, and trials.

This suggests a first, obvious point: popular culture, as reflected in the media, is not, and cannot be taken as, an accurate mirror of the actual state of living law. Suppose our legal sources were all destroyed in a nuclear nightmare which wiped out the West Digest, the Federal Register, the revised statutes, federal and state, and all casebooks; later generations, digging in the ruins, discover intact only the archives of NBC Television. The diggers would certainly get a distorted picture of the legal system. They would learn little or nothing about property law, tax law, regulation of business, and very little about tort law or even family law; but they would find an enormous amount of material on police, murder, deviance, rape, and organized crime.[13]

Quantity is not accuracy, moreover, and the products of popular culture are wildly off-key even with respect to those parts of the legal system that they deal with obsessively. Cop shows aim for entertainment, excitement; they are not documentaries. They exaggerate ludicrously, for dramatic effect. Crime shows, for example, overrepresent violent crimes; shoplifting is no great audience-holder, but murder is. A study of prime-time TV in 1972 counted 26 murders and 20 cases of aggravated assault out of 119 total crimes in a single week; there were only two burglaries and three cases of drug possession.[14] Nor are television programs safe indicators of

13. If we assume (and why not?) that the diggers found archives of news programs as well as commercials, soap operas, sitcoms, and crime shows, there would be some fragmentary information about a few of the topics—important legislation, and the doings of the Supreme Court. These would be presented, of course, in thirty-second sound bites, and the diggers would have a great deal of trouble reconstructing whole animals from these scattered and cryptic teeth.

14. Dominick, *Crime and Law Enforcement on Prime-Time Television*, 37 PUB. OPINION Q. 241, 245 (1973). There were other gross discrepancies between "real life" criminals and victims, and television criminals and victims: blacks were underrepresented as perpetrators, and vastly underrepresented as victims; juveniles were almost never shown as criminals; only a few people (7%) were victimized by family members (in real life, "roughly 25 to 30 per cent of violent crimes occur in a family context," *id.* at 248); and, perhaps most striking, "[t]elevision crime does not pay. TV

public opinion on the subject of law and legal institutions. What people actually think about law, what they worry about, what they hope for, what they use, what they contend with, are not congruent with what goes into the picture tube, or with what comes out.

Moreover, the mass media, though they aim at and reflect popular legal culture, are not by any means identical with it. There are, for example, taboos that prevent certain materials from appearing on TV. Dirty jokes or racist jokes can sweep through the country without making it on prime-time TV. And everything that *does* appear is filtered through cultural and commercial screens that bias and distort in their own right. Nonetheless, to understand law in this society, it is desireable to study its relationship to culture; these relationships take a number of forms.

A. *Popular Legal Culture as a Reflection of Social Norms*

First, popular legal culture, and the legal system itself, rest on more general norms, which they exemplify. The legal system invests, inhabits, and flows out of the same society that produces and sustains popular culture. That society has its structure, its traditions, its norms and ideologies. In society, there are general ideas about right and wrong, about good and bad; these are templates out of which legal norms are cut, and they are also ingredients from which song- and script-writers craft their themes and plots. As general social norms shift over time, themes of the legal system shift with them; and so too of popular culture. Art, sub-art, and law move in parallel directions—more or less.

Consider, for example, the way Hollywood and television have treated race relations in American life; consider the effect of the feminist movement on Hollywood and television. Changes in attitudes of "taste-makers" track changes in attitude in society in general; and so too in the body and blood of the law. For example, in the early years of television, blacks were as invisible as they were in white society generally; that is, they only appeared on the peripheries, sweeping the floor, helping the heroine get dressed, or, once in a while, tap dancing or singing a song. Blacks never appeared in commercials. Women, of course, were essential in story lines as the "love interest," and in soap operas; but they were never shown playing important roles in politics or business; and certainly never as detectives or police. In commercials women appeared as sex objects, or as simpering, servant-like creatures, *Hausfrauen* whose main objective in life pivoted around getting and fooling husbands, brewing coffee so good that the man would smack his lips, or making sure his shirts were whiter than white.

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criminals are almost always apprehended. In real life, the legal system is not nearly so efficient." *Id.* at 249.

That these primitive themes have changed somewhat[15] is not because there is a positive command to do so, certainly not because the Civil Rights Act of 1964 says so, or through a direct order of the FCC. Television companies, their writers, and their advertisers, have merely reacted to what one part of the audience demands and another part respects or allows—reacted, that is, to the same social currents that *produced* the civil rights acts in question.

The style and content of popular culture have been altered—under the impact of feminism, the civil rights movement, gay liberation and resurgent ethnicity—in an obvious way: the jokes that cannot be told, the old stereotypes that have to make way for new stereotypes, the cliches that retire to the ashheap of history, the new slogans that trot out in their place. Civil rights norms also affect popular culture in deeper, more subtle ways. The civil rights *idea* is broader than the actual categories that make up the *law* of civil rights. It is, in its expanded form, nothing less than expressive individualism itself: the notion that each individual is unique, that the central task of a human being is to somehow constitute a self, to *choose* a way of life. This does not mean an end to group identification. Race, gender, ethnicity, and sexual preference are not abolished as categories of human significance. Quite the contrary. But the culture redefines these categories in characteristic ways—either as freely chosen, personal aspects of culture or life-style; or as "immutable" characteristics which, precisely because they lie beyond choice, should never be used to the detriment of the precious, underlying self.

This deeply-imbedded principle—vague but powerful—inhabits and colors all of popular culture. For example, it is not farfetched to see it as a factor in the style of depicting "aliens" on TV and in the movies. "Aliens"—creatures from outer space—were almost uniformly described as hostile in the works of pioneers of science fiction, H.G. Wells among others. In movies like *The War of the Worlds* or *Invasion of the Body Snatchers*, the aliens are sinister, inhuman; they come to destroy the planet, attacking us directly, or at times with insidious indirection, sucking our blood, destroying our substance, draining our personalities. This is still, of course, a common theme of science fiction. But in the last two decades, a counter-image of the "alien" has appeared, more positive and at times downright sympathetic. Some "aliens"—ET is the classic case; or the aliens in *Close Encounters of the Third Kind*, or *Cocoon*—are friendly, even loveable creatures; there has been a wave of such stories and movies; as one newspaper put it, aliens are now "in," offering "awestruck humans an irresistible surge of hope, faith and euphoria."[16]

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15. *See, e.g.*, Humphrey & Schuman, *The Portrayal of Blacks in Magazine Advertisements: 1950-1982*, 48 PUB. OPINION Q. 551 (1984).

16. Goldstein, *Outer Space "In" at the Movies*, San Francisco Chronicle, Nov. 20, 1988, at 36, 39, col. 1. Goldstein, and other critics, have interpreted the 1950's science fiction movies, notably

Aliens, in short, are not horrifically and irredeemably other, as they were once almost exclusively portrayed; in some instances, they are simply different in some regard, and that difference is perhaps only superficial, only physical. If we could only learn to understand them, put ourselves in their shoes, or some homologous part, we would find that while creatures from all over the universe may not be *human* in the literal sense, they share some precious core of dignity and heart.[17] The very term, "aliens," is a this-planet term which has taken on a slightly different twist; these creatures from outer space need not be enemies, rather they are visitors, emigrants, like those earlier aliens who took ship for America or slipped across the border. The American community must be broad enough to encompass these foreigners, these visitors in our midst, despite differences in color, language, and shape. *ET* is thus the expression of a "civil rights" mentality—a profound pluralism, a wide-eyed acceptance of otherness, which would have been simply unthinkable in the 19th century.[18]

On the other side, so to speak, modern fiction, including movies and TV, even as it learns to accept the alien, becomes, on the whole, much more paranoid about large-scale organization—about traditional authority. Book after book, program after program, peel away the skin and expose the secret doings of American government, and especially its security forces. Is the CIA *ever* shown in a favorable light? The police, the basic shock troops of state security and law-and-order, occupy a somewhat ambivalent position. Sometimes they are heroes, sometimes fools (in comparison with Perry Mason, for example), and sometimes bullies or worse. In modern popular culture, there is certainly a strain of the philosophy of the Warren court: suspicion of the police, suspicion of large organizations,

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Invasion of the Body Snatchers, as "political allegories" which were "inspired by Cold War paranoia or fears of technology"; these were movies which "sounded a warning cry against a conformist, gray-flannel-suit society," as they portrayed "human beings subverted by passionless aliens." The new movies reflect a "friendly" attitude toward technology. They reflect "optimistic visions" during a "time of born-again religious revivals and social upheaval." *Id.* at 38–39.

I find some attraction in this political-cultural explanation. It is not inconsistent with the "civil rights" explanation in the text accompanying this note. Nor is that explanation, in turn, inconsistent with another aspect of life in the modern West: the rebirth (or was it ever dead?) of interest in the occult, the fad-like popularity of off-beat religion, astrology, "channeling," Shirley MacLaine hokum, revolts against technology, UFO-mania, Kennedy assassination cultists, Elvis-is-not-dead-ism, and the like, espoused by the ignorant and also by intellectual Luddites who should know better but apparently do not. All this reflects not only a yearning for the faith of the past, but narcissism, distrust of experts, and the stubborn notion that what feels good to *me* must be *right* for me, and you who do not agree, why, that's *your* privilege; different strokes for different folks.

17. I have, of course, no information about the relative distribution, in movies, books, and TV shows, of "good" aliens, and "bad" aliens. In much recent science fiction—*Star Wars* and many of the *Star Trek* episodes and movies—there are many different kinds of aliens, and some are good and some are bad, just as we are here on Planet Earth.

18. Allied to this notion is the romantic pluralism which allowed so conservative a jurist as Warren Burger to write a glowing tribute to the Amish in Wisconsin v. Yoder, 406 U.S. 205 (1972)—a small and deviant group which the 19th century would have treated with the same sort of disgust and intolerance which the Mormons encountered; or for that matter, the disgust and intolerance which was the nineteenth century attitude toward "primitive" peoples in general.

and a groping for ways to control government and its troops, including ways to curb the guardians and enforcers of law.

To be sure, there is a strong law-and-order countertrend, a lot of flag-waving and jingoism, a lot of Rambo and Dirty Harry. The Warren court is history, and the years since it departed have been ambivalent years of backing and filling. The culture sometimes glorifies police, detectives, and outraged citizens the most when they are acting in the most lawless way, though in the interests (of course) of a higher justice. There is a literature of praise for vigilantes, old-style and new. There is also a recurrent theme of the police as bumbling idiots; or as little better than criminals themselves.[19] Still, my impression is that popular literature of (say) the early part of the century was much more lopsided. There were, of course, the Keystone Cops, a riotous ballet of clumsiness and empty-headedness; nonetheless, the policeman usually stood on the side of right. And the public winked at or defended police brutality as a necessary dose of social self-defense. The law could do no wrong.

The trend toward suspicion of authority is of course another reflex of our special brand of individualism—a form of consciousness which *literally* stresses the individual, and which is deeply distrustful of whatever is large-scale, organized, governmental; not to mention what comes clothed in traditional trappings of authority. Twentieth-century authority, unlike earlier versions, is what we might call *horizontal*, rather than vertical. It is oriented toward peers and equals.

B. *Popular Legal Culture and Popular Culture*

Popular legal culture and popular culture are related to one another in two important respects. First, popular culture gets its ideas of law, or at least some of them, from popular legal culture. In other words, popular culture *reflects* popular legal culture.

Writers for newspapers, television and the movies, along with songwriters, gossipers and the anonymous inventors of jokes—few of these people are lawyers themselves, and their ideas of what lawyers are, and how the law works, come out of common, lay conceptions. The lay public, of course, does not understand the complexities and convolutions of law—how could it? Some misunderstandings are patterned, systematic, and important. The law, after all, does not affect the behavior of citizens directly. What affects behavior is only what is communicated. What therapists think *Tarasoff v. Regents of the University of California*[20] actually holds is thus as important as what it "really" holds, if not more so.[21]

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19. On this point, see Stark, *supra* note 12, at 230, 238-39, 249, 279.

20. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In *Tarasoff*, the Supreme Court of California held that a therapist has an obligation to exercise reasonable care to protect third parties when the therapist determines, or should reasonably determine, that his or her patient presents a serious danger of violence to the third party.

21. *See* Bowers, Blitch & Givelber, Tarasoff, *Myth and Reality: An Empirical Study of Private*

Lay conceptions, to be sure, often reflect actual experience, though it may be filtered through a consciousness distorted by ignorance or bias. There really was a *Tarasoff* case, and the therapists get some of the point, even if the message they hear is not as accurate as a lawyer's understanding. If people think of lawyers as rapacious sharks, this is unlikely to be pure invention; probably something really swims out there in the water, sharp-toothed and greedy, which produces the fear and the loathing.

Popular legal culture also *creates* popular culture, or at least influences it, insofar as it acts as a medium or channel for transmitting values and attitudes. Popular culture delivers messages *to* the public, from and about legal institutions. This is a second way in which the two cultures are related.

Both American and foreign studies[22] show (not surprisingly) that modern populations know abysmally little about law and legal systems. Most people have never consulted a lawyer and have not experienced the legal system directly through law offices, courts, trials, and litigation.[23] Their information (and misinformation) comes mostly second-hand. Trade groups, for example, keep their members informed of legal developments; this is how the news of the *Tarasoff* case reached the average therapist. For the rest of us, and for much of what we think we know, it is a good bet that it comes in the form of popular culture. The relationship between popular culture and popular legal culture is reciprocal, so much so that it is almost impossible to disentangle the elements. For some purposes, however, it may be sensible to consider how (for example) trials on TV or in the movies influence how people think trials are conducted or ought to be conducted, and it is in any event important to note what ideas TV and the movies might be putting in people's heads.

There are some stirrings of a literature on the subject.[24] Some of the writing deals with themes of popular legal literature, what they are, and what they signify. It is a trail worth following. To take one example: in the movie, *Twelve Angry Men*, starring Henry Fonda, a single courageous juror (Fonda, of course) resists the easy course of action—convicting the defendant. Fonda holds out for acquittal. In the end, he convinces the

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Law in Action, 1984 WISC. L. REV. 443. The study showed that the *Tarasoff* holding had been communicated to mental health professionals primarily through professional organizations and word of mouth; but therapists got the message in a somewhat garbled form. *Id.* at 459-68.

22. *See, e.g.*, Williams & Hall, *Knowledge of the Law in Texas*, 7 L. & SOC'Y REV. 99, 117-18 (1972); Podgorecki, *Public Opinion on Law*, in KNOWLEDGE AND OPINION ABOUT LAW 65 (C. Campbell, W. Carson & P. Wiles eds. 1973).

23. Of course, in a broader sense, everybody is exposed to "law" and legal institutions, every day and in innumerable ways—every time a person buys a newspaper, or parks a car, or performs any act structured by a scaffolding of laws and as to which legal actors serve as sentinels. But I am speaking here of the more popular, narrow meaning of "law."

24. In addition to works cited *supra* note 3, see Katsh, *Is Television Anti-Law?: An Inquiry into the Relationship Between Law and Media*, 7 A.L.S.A. F. 26 (1983); Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379 (1987).

other eleven jurors to change their vote from guilty to innocent. The entire action takes place inside the jury room. The movie is claustrophobic, tense, exciting, sharply edited. Accuracy is not its strong suit, however. Jury studies tell us that a single hold-out has almost no hope of bringing the others around.[25] But drama is not bound to the modal or the ordinary; the modal and the ordinary are not dramatic. *Twelve Angry Men* is gripping and persuasive as drama, and it conveys a number of significant messages. One is about the presumption of innocence and what that means in this culture: before society consigns a man or woman to the hell of punishment, due process must have its day; the defendant must get a careful, probing, searing, and unbiased trial. Guilt is individual, not collective, and so in a way is assessment of guilt. The jury is a collective body, and it acts collectively; but the norms that govern it are norms that insist on treating each case, and each defendant, in the most profoundly *individual* way. Each juror brings his individual conscience to bear on the collective task of the jury.

The trial in *Twelve Angry Men* takes place offstage, so to speak. But both in popular culture, and in real life, many criminal trials are public dramas, representations of morality played out in open forums. The form is highly stylized, but the content is not. Sociologically, trials serve an important educational function. They broadcast and reinforce society's norms. In this regard, they serve to bind a society together—or try to—into a single normative community. "In almost every trial," Carl Smith writes, "there is a second drama going on. . . . the ceremonial enactment of the law itself and the affirmation of the principles, good or bad, by which society is ordered."[26]

Trials, in other words, are "boundary-maintaining" devices; they help cement social solidarity by redefining and proclaiming the norms.[27] The interactions which do "the most effective job of locating and publicizing the group's outer edges" are those "which take place between deviant persons on the one side and official agents of the community on the other."[28] This is an important insight, with a noble lineage all the way back to Emile Durkheim. Of course, the "boundaries" defined, the norms "proclaimed," the values "affirmed" at trials are, almost necessarily, norms of the dominant culture. They are the norms of the strong, not the weak; the norms of the majority, not the minority—though in a complicated, mixed-up, pluralistic society, it is not always easy to identify the privileged

25. "Almost inevitably, hung juries are found in groups which contain several dissenters at the beginning of the deliberation. Psychologically, jurors are able to hold out against a majority only when they have some initial support." V. HANS & N. VIDMAR, JUDGING THE JURY 168 (1986). *A fortiori*, the chance of a lone juror actually getting the rest to change their minds is very small.

26. Smith, *American Law and the Literary Mind*, in LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS, 1, 12 (1980).

27. *See* K. ERIKSON, WAYWARD PURITANS 10 (1966).

28. *Id.* at 11.

norms and their boundaries, and who they belong to. The United States, as a society, is overwhelmingly middle-class. Of course the middle class itself is not a monolith. Often, trials are dramas of *competing* norms, struggles between opposing viewpoints and habits; and what is affirmed and proclaimed is not always what an observer would have predicted in advance. This makes trials all the more interesting items of social evidence, or indicators of general culture.

A trial is also a *narrative* competition. Each side tells a story, and tries to convince the jury (or judge) to buy its particular vision and version of fact. In an important sense, neither story line is "true" or "false." The two sides spar with each other before the trier of fact; each embroiders and displays its message with slogans and narrative bits which are thought to be particularly compelling, logical, or attractive. Hence arguments presented in trials are often important clues to what stories count as good, or true, or compelling stories, within a particular culture. A few historians and others have used trials for this specific purpose: as dramatizations of cultural norms.[29] Other legal rituals or documents can also serve this purpose. Divorce complaints, for example, provide valuable information about behaviors and attitudes that count as cruelty or unfairness within marriage; they indicate what stories might impress a court as grounds for dissolving a loveless marriage.[30] Complaints in tort cases, or the stories told during dickering over plea bargains,[31] can also be uncommonly revealing.

C. *Popular Culture and Authority*

There is another way in which popular culture and law relate: popular culture serves as an indicator of forms of *authority* within some particular society. Nothing is more basic to a society than the shapes and guises of authority; the way authority sustains itself, and transmits its power to its subjects. Much of the message of popular culture is necessarily *about* authority or, at times, about rejecting authority. In modern America, and in the Western world in general, authority, once strongly vertical, has become much more horizontal. That is, in traditional society, authority was hierarchical—it was exclusively a matter of up and down. Powerful face-to-face authorities—the father, the village priest, the squire, the schoolteacher—exercised control over individual souls. They were the vessels

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29. *See, e.g.*, L. FRIEDMAN & R. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910, at 237-60 (1981); M. HARTMAN, VICTORIAN MURDERESSES (1977).

30. *See generally* R. GRISWOLD, FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890 (1982); E. MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA (1980); Such evidence, of course, must be used with great care, especially in uncontested and perhaps collusive cases.

31. *See* Maynard, *Narratives and Narrative Structure in Plea Bargaining*, 22 LAW & SOC'Y REV. 449 (1988).

which transmitted habits and norms of society into the heads of little children; they exercised constant, daily, incessant authority. In the small, local world of traditional society, there was no such thing as choice of authority or consent of the governed.

Of course, vertical authority is still incredibly important in our lives; and perhaps always will be. But it has declined, relative to horizontal power: the influence of peers. "Peer group" is a term that suggests friends, schoolmates, colleagues; but in the age of television and radio, peers can be spatially distant—literally on the other side of the world. What television brings into the home is a peer group of infinite possibilities—a riot of styles, colors, fads, and ways of life; the viewer can decide whether and how much and to which to conform. The local peer group is strengthened by the massive authority of the media, which continually bypass the vertical authorities. The media dilute, in short, the otherwise overwhelming power of face-to-face authority.

Media cultures and mass cultures, as we have said, are not identical, but the media are nonetheless the most powerful carriers of popular culture. Popular culture is today inseparable from media culture. In traditional society, before the age of newspapers and magazines—and then of radio, film, and TV—popular culture was confined, narrow, local; it spread, but very slowly; it was almost impossible to see the wheel of fashion turning; and people dressed, ate, sang, and talked more or less as their ancestors did. Folk tales, for example, traveled from the mouth of a grandmother or an old uncle to the ears of a child who, grown old, repeated it to the children on *her* knee. Popular culture was traditional in content and form, and it reflected themes and ideas of vertical authority. It was full of magic and wonder, kings and princesses, witches and demons; and it spoke of an enchanted, mysterious world, sometimes fearful, sometimes marvelous, far beyond the experience and grasp of the ordinary human being.

The media have changed the nature of popular culture, or permitted it to change. Popular culture today is as rapid as a whip, glitzy, intolerant of tradition; it twists and turns and changes colors constantly; the media express and make possible a culture in which yesterday's model is old-fashioned, and in which a song is a "golden oldie" at the age of ten. The media are celebrity vehicles, not vehicles of traditional authority; when they presents messages about powerful people, they transmute these people into celebrities, that is, they present these figures as famous but familiar and ordinary at the same time. A celebrity is somebody who can be *imitated*, at least in habit and style; authority, in the traditional sense, was terrible and all-present, or, at the upper reaches, remote and ineffable. On TV, nothing is remote and ineffable. The media present a culture of the now, of peers rather than ancestors and patriarchs, of the rich and famous—of celebrities—rather than distant castles and kings.

Inevitably, a popular culture of this type transforms legal institutions, just as it transforms (or is transformed by) other elements and systems in society: education, work-life, leisure, gender relations. A media culture is a culture of pluralism, almost by necessity; the person who stares at the tube, no matter how isolated and provincial, is no longer quite so ineluctably cocooned within a given tradition. Of course, this is all a matter of degree. Parental socialization is still amazingly powerful; so is organized religion. But these sources of power now face formidable rivals: messengers from a larger, more manifold world, conveyed from the outside by the media. No peasant in medieval France, no villager in 18th century Africa, was exposed to so wide a range of messages, so many models, so many patterns of life. Vertical authority, as it was and had been, enjoyed a monopoly of social control. That monopoly has been smashed in the age of a mass-media culture.

The political system, too, has been transformed. Modern popular culture, with its horizontal leanings, demands a certain flattening of political authority. "Breeding" simply will not do as a qualification for leadership and rule; classical deference is gone. Presidents wield enormous power, but they must *behave* like ordinary citizens, or at least like ordinary celebrities. Their pomp and might must be mixed with the common touch. They must at least *appear* to defer, at all times, to popular opinion. Political authority has become obsessed with polls, surveys, oracles of public opinion. Ironically, the ideal of horizontal authority, the ideal of participation, makes possible, necessary, and legitimate the most shameful manipulation of public opinion. But on the surface at least, political life bows to the horizontal. Everybody complains about the plague of polls and the tyranny of surveys, but government seems unable or unwilling to go on without them. The referendum is another swollen form of popular sovereignty. California is, as usual, the extreme case. Election days have become a positive orgy of voting. In the 1988 election, the California voter, after choosing national, state, and local officials, down to municipal judge, confronted on her ballot no less than twenty-nine state-wide "propositions." Residents of San Francisco had another twenty-six local issues to chew over. A few state and local issues were bitterly contested, most were absurdly technical, a handful were patently irrelevant, some were painfully obscure. Whatever else one can say of them, this was a runaway train of horizontal authority.

Thus, popular culture is important if it forms or helps form popular *legal* culture, what people think about law; and what people think about law is important because this is a "public opinion" society, which makes heavy use of referenda, and in which government does not lift a finger or move a muscle, without reading the tea-leaves of public desire. Each successive administration seems more wrapped up in the apparatus of television coverage, polls, public soundings, and media imagery. There was a

considerable rumpus when the news leaked out that President Reagan may have consulted astrologers.[32] This was, arguably, only a harmless foible. That government is locked into almost superstitious dependence on the oracles of alleged public opinion is probably far more dangerous.

In one sense, the word oracle here is misleading. The original oracle was beyond the reach of human power; in our times, the government feverishly bribes and seduces, in order to influence how the oracle speaks; election campaigns have degenerated into TV ad campaigns; referenda are decided on the basis of giant billboards; on a day by day basis, all levels of government expend their maximum efforts trying to tilt the news in such a way as to make pleasing propaganda for their side. Media advisers are as important to the President, and as potent, as the Council of Economic Advisers.

III. Aspects of Popular Legal Culture

This essay has argued that legal culture is a key variable in understanding social theories of law. It has also examined various points of intersection between legal and popular culture. This section discusses two specific aspects of popular legal culture.

A. *Images of Law and Lawyers*

TV programs, popular novels, and the like, also tell us something about views of law and lawyers prevalent among members of the general public. Systematic research, to be sure, is rare. The material at hand at least allows us to indulge in harmless speculation. It seems reasonably clear that "law," in its various guises and forms, is more salient than was true in the past—more in the public eye. The mass media, of course, play an important role here. But this is only a part of the story. A middle-class society confronts and uses law—in the form of mortgages and "closings," parking-ticket incidents, divorce settlements, tax returns and countless other ways. Life in modern America, and the West in general, is a vast, diffuse school of law.

Changes in the law itself have been vitally important in pushing legal institutions into center stage. We have already mentioned the civil rights revolution. Unquestionably, the great cases of the Warren court attracted fresh attention to the judicial branch, or at least to the apex of that branch. The Burger court made itself highly visible—and controversial—when it decided *Roe v. Wade*.[33]

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32. The story first emerged in a book of memoirs by Donald T. Regan, former White House Chief of Staff. It concerned the President and, more notably, his wife, Nancy. *See* N.Y. Times, May 4, 1983, at 1, col. 5.

I suspect that most people were not particularly shocked. There is an amazing tolerance for this kind of nonsense in a "life style" society.

33. 410 U.S. 113 (1973).

Exactly what people think about the law is, of course, not easy to document, especially since "law" is such a large, amorphous domain. The hullaballoo over tort liability, the incessant whining and complaining about litigation explosions,[34] the controversy over "coddling" criminals—these suggest a fairly low opinion; but such views are, to a degree, deceptive. The public seems, in fact, to have a love-hate relationship with law. It sees law as a bag of tricks, a bottomless pit of artifice and legalism; but it also sees law as a shining sword of justice, a powerful weapon of public purpose. Law is, indeed, one of the the very foundation stones of liberty.

The image of lawyers is a special case. No doubt many lawyers feel, with some justice, that nobody appreciates them. There are so many jokes and cartoons about lawyers that it would be easy to fill a good-sized joke book or cartoon book; and a number of people have done so.[35] Everybody has her own favorite lawyer joke. I think it is fair to say that almost none of them put lawyers in a favorable light. The best lawyers can do is to come off as clever and precise. The worst—and this is by far more common—is to come off as vile, money-mad, heartless sharks.

Popular literature, too, presents an ambivalent picture. Americans "carry around with them," as Anthony Chase puts it, a "split image" of law and lawyers:[36] there are lawyers who seem noble and just, "ardent defenders of the isolated individual;" others conform more to the image of the shyster.[37] The criminal defense lawyer gets much of the good press; other lawyers tend to be dismissed as mountebanks.

In some ways it is easy to understand why people dislike lawyers. The ordinary person goes to a lawyer only in times of serious trouble. Nobody likes morticians either. These professions batten off human misery. But at least the public does not accuse morticians of *creating* death. Lawyers, on the other hand, are widely suspected of stirring up demand for their product, making trouble, in the interest of fees.

To be sure, lawyers get people *out* of trouble, too. But even this hardly endears them to their public. To defend myself against what I consider a groundless suit, I will have to hire a lawyer; but I am likely to resent the whole episode. The lawyer is a necessary evil: all that money, and nothing to show for it, except averting some evil fomented by other lawyers. People no doubt have a more favorable impression of their own lawyer than

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34. On the subject of the litigation explosion, see generally L. FRIEDMAN, *supra* note 1, at 6-34; Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious Society*, 31 UCLA L. REV. 4 (1983).

35. Two recent examples of this rather low-grade genre: B. BERGER & R. MARTINEZ, WHAT TO DO WITH A DEAD LAWYER (1988) (cartoons); SKID MARKS: COMMON JOKES ABOUT LAWYERS (M. Rafferty ed. 1988).

36. Chase, *On Teaching Law and Popular Culture*, 3 FOCUS ON L. STUD., Spring 1988, at 1, 9.

37. As an example of a movie with an "ardent defender," Chase cites *To Kill a Mockingbird*. *Id.* at 9. For a movie with a shyster lawyer, he cites Billy Wilder's *The Fortune Cookie*. *Id.*

of the lawyers for the other side. Still, the animus against *that* so-and-so seems stronger than whatever good will one's own lawyer generates.

Most people are part of the middle-class; and though members of the middle-class are exposed to law every day, as we noted, they do not "have" a lawyer, and certainly do not regularly visit or make use of lawyers; much of what they think about lawyers and the profession comes from hearsay, and what the neighbors tell them; some of it may come from the mass media. In the last few years, a television show about lawyers, *L.A. Law*, has become an astonishing hit. No doubt this one program has conveyed more "bytes" of information (truthful or not), more images about lawyers, than all the Legal Studies Programs, all the op-ed pieces, all the PBS shows put together.

Needless to say, *L.A. Law* is a massive distortion of reality: lawyers snicker at it; many of them despise it. It conveys, in many ways, the same message as the *Perry Mason* shows, with somewhat more complexity, and with a soap-opera format. The lawyers on *L.A. Law* are interesting people who lead glamorous, colorful lives, and who deal with one fascinating *human* problem after another. I have seen only a few of the programs; but none of the ones I watched dealt with the workaday drudgery of a lawyer's life. Most viewers, perhaps, are aware (at least dimly) that the worklife of the lawyer cannot possibly be so exciting as the worklife of the lawyers on *L.A. Law*. After all, it's "just a show." But they may nonetheless retain some residue of the vivid impression which their weekly fix of *L.A. Law* provides for them.

The plots and subplots of *L.A. Law*, to the best of my knowledge, seem to turn on "cases," that is, litigation, except when they turn on the lovelife of the lawyers. One commentator complained, therefore, that the worst thing about *L.A. Law*, and other lawyer programs, "is not their inaccurately glowing portrayal of judges and lawyers, but their inaccurately glowing portrayal of the litigation process."[38]

The point is well taken; but we cannot dismiss *L.A. Law* out of hand as a social indicator. The stress on litigation, for all its hyperbole and mumbo-jumbo, does capture a strain of modern legal life, in a way that *Perry Mason* never did.[39] I cannot imagine making much dramatic hay out of the work of a Wall Street firm of, say, 1900, or even 1940. There is, I believe, a connection between the new world of "litigation process," glowing or not, and the flashy lawyering of *L.A. Law*. The lawyers of *L.A. Law* are caricatures; but caricatures are always caricatures *of* some-

38. Machlowitz, *Lawyers on TV*, A.B.A. J. 52, 55 (Nov. 1, 1988). On TV, "[j]ustice is always done, especially if your lawyer can beat up their lawyer."

39. Perry Mason was a lawyer, and the hero of a mystery program, in which he always solved the mystery. The climactic scene usually took place in the courtroom; and almost every episode featured a criminal trial. But a mystery has a fixed, highly conventional style, which constrains it greatly; the loosely-constructed soap-opera format of *L.A. Law* is much less confining.

thing, and that something has to be real. The imagery of *L.A. Law* reflects, very likely, real changes in the modal personalities of lawyers, or at least business lawyers—changes that can be linked to changes in litigation and litigation style in recent years.

At this point, a bit of history is necessary. Litigation—or at least court appearances—were once the mainstay of American lawyers. The most famous and successful lawyers of the early 19th century were the great courtroom warriors, and the prototypical lawyer-hero was Daniel Webster.[40] In the late 19th century, along with the development of a major urban, industrial economy, there were massive changes in the upper strata of the bar.[41] The richest, most successful lawyers of the period were the Wall Street lawyers—lawyers for industry, banking, railroads, big business; they were gray, invisible, business planners who were photophobic and nocturnal, so to speak; and who avoided litigation and the courtroom at all costs.

These lawyers were movers and shakers, but they did their moving and shaking behind the scenes. They were eminences in gray, not red. Successful Wall Street lawyers did not need to promote themselves, because their firms handled legal affairs for a steady, reliable clientele. They represented businesses on a long-term basis; they sat on boards of directors; they were intimately concerned with every facet of their corporate clients, day in and day out. A single law firm took care of all the legal needs of its big business clients; and the two stuck together through thick and thin. A big business hardly ever changed its law firm.

Wall Street lawyers thought of themselves as gentlemen; they kept a low profile, and above all kept their names out of the newspapers. The loud, flamboyant lawyers, the ones who preened and paraded before the public, the ones who shouted their names and promoted themselves, were a lesser breed. They were lawyers who lacked permanent clients. Their work was personal injuries, divorce, criminal law—work with "one-shot" clients.[42] These were the lawyers who were in and of mass culture; they needed mass culture; they needed word of mouth, publicity, newspapers; and the upper echelons of the bar despised them, snubbed them, fought them professionally.[43]

Over the last two decades, big-time practice has been undergoing major change. In a number of critical regards, the cultural boundary between

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40. On the lawyers of this period, see L. FRIEDMAN, HISTORY OF AMERICAN LAW 303-33 (1985); G. GAWALT, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840 (1979).

41. For a discussion of the bar during the late nineteenth century, see L. FRIEDMAN, *supra* note 40, at 633-54.

42. The term refers to the categories in Marc Galanter's *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974), and the distinction between "one-shot" litigants and "repeat players."

43. For a description of the struggle, see, e.g., J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

the top and the bottom of the bar has become somewhat blurred. Big-time practice has apparently become much more volatile; it is much less usual for a business to retain a single "outside" firm, and to stay married to that firm forever. Legal practice has become more "transactional," that is, a big company will hire lawyers and law firms for a particular "matter" or "deal," often a very large one to be sure. There is less or no loyalty to the "old firm." Law firms are becoming expendable, like advertising agencies.[44] In a transactional legal world, slow and steady no longer wins the race. Law firms cannot rely on fixed, stable relationships with business clients. And the firms themselves are almost as volatile as their practice. Firms emerge, merge, split apart, rejoin, branch out. There is considerable lateral movement in the profession—lawyers shuttling from firm to firm. Firms gobble up isolated partners, or clumps of partners; other firms hemorrhage whole departments.[45] In recent years, a number of mighty firms, old and new, have crumbled into dust. The ground shakes under the feet of Wall Street lawyers. The Bar worries about "professionalism." The old verities no longer hold.

The result is what one might expect: the behavior of lawyers has begun to shift. Self-promotion and self-advertisement are accepted in a way which the forefathers of the Wall Street bar would have found disgusting. After all, even a great firm like Skadden, Arps now represents "one-shotters;" the massive takeovers, the mighty mergers are as much one of a kind events as the most sordid divorce, the lowliest arrest for drunk driving—those small crumbs of practice which the TV lawyers beg for on commercial "spots." Publicity no longer seems as unseemly as it once was: a big story in the *American Lawyer* or the *National Law Journal*, if it is favorable, is valuable advertisement, not an embarrassment. It is good for business if the article describes a lawyer as a hot-shot, talks about his success in deals, and shows him in shirt-sleeves, in a glossy photograph, leaning on his desk. Of course, the lawyer magazines are not "popular culture" in the literal sense; only lawyers read them. But within the subworld of the bar, they are the functional equivalent of the mass-market magazines for the general public. Their appearance suggests a newer, more intimate connection between mass communication and the practicing bar.

Moreover, the big-time practice of law is becoming increasingly *na-*

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44. *See generally* R. NELSON, PARTNERS WITH POWER: SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988); Galanter & Palay, *The Big Law Firm and Its Transformation* (forthcoming 1989).

45. In 1984, according to one source, there were at least 109 firms that made a living by "headhunting;" that is, they battened off "lateral mobility." Abel, *United States: the Contradictions of Professionalism*, in LAWYERS IN SOCIETY: THE COMMON LAW WORLD 186, 230 (R. Abel & P. Lewis eds. 1988). According to Nelson, "[o]nly a few years ago it was virtually unknown for corporations to ask for bids on major pieces of litigation or on major transactions. Corporate counsel now ask for such bids with increasing frequency." R. NELSON, *supra* note 44, at 59.

tional, even international. Traditionally, law firms were rooted in a single community. They were New York firms; or Seattle firms; or New Haven firms. Business is increasingly national and international today; and client demand is at the root of the increase in the sheer size of firms and in the remarkable increase in branching. Sullivan and Cromwell is not Holiday Inn or Burger King, but neither is it a one-city operation any more. Thus firm reputation is itself no longer exclusively local. This fact enhances the value of publicity. The lawyer magazines carry messages—advertisements, as it were—for firms, throughout the country.

B. *Substance and Procedure*

A second aspect of popular legal culture — the public's views on substance and procedure — sheds light on the political dynamics of public law.

Freedom and democracy, in the minds of lawyers, in contrast with the public at large, tend to be conceived of largely in *procedural* terms. Lawyers are taught and trained to regard "due process" as the very essence of fairness and the rule of law.[46] "Due process" is used here in both a broad and a narrow sense. The narrow sense implies notice and a hearing in administrative hearings, and honest trial processes, run according to Hoyle. The broad view adds voting and majority rule: the legislative process, in short. If an agency follows the rules scrupulously, if it allows full participation, if it gives notice, then due process has been served, even if the agency denies the license, or takes away the pension, or awards the television channel to this company rather than that one. After all, there are always winners and losers; the same is true of a criminal trial, or a lawsuit arising out of tort. And a law that comes out of the state capital, or out of Congress, passed by majority vote, bears on its face one of the ultimate stamps of legitimacy.

So much for the culture of lawyers. What about the wider public? Does the average American (or Italian, for that matter, or Japanese) share the lawyer's zeal for process, pure and simple? I suspect that the answer is no. On the whole, the layman thinks of justice, freedom, and democracy in markedly *substantive* terms. A fair trial is a nice thing; but if an innocent person ends up with his neck in a noose, fair process is not much consolation. A free society means a society in which matters are so arranged that the system produces what people consider right *results*; the opportunities, choices, and social goods they find desirable, for whatever reason. In modern times, it is likely that wide segments of the public think of a free society as a society of guarantees and entitlements; a society which, more-

46. On the basically procedural legitimation of modern law, see N. LUHMANN, LEGITIMATION DURCH VERFAHREN (2d ed. 1975); *see also* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

over, allows or provides a wealth of options and leeways. It is a society with fences and assurances protecting freedom, privacy, and other social goods; the protections make the choices and opportunities real. A free society, in other words, is built on and supported by a tough, resilient scaffolding of *rights*. When rights and entitlements are impaired, interfered with, or taken away, the lay public becomes righteously indignant. By the same token, the public tends to assign high marks to institutions that honor and nurture rights, and protect them from encroachment; which fiercely champion those rights against the attacks of the powerful. These institutions amass huge stores of legitimacy in public opinion.

For this reason, activist courts occupy a central role in modern legal culture—in the United States, most certainly; and increasingly in other Western countries. Conservatives, and the professionally timid among legal scholars, find the activist role of courts profoundly unsettling. Judicial review is a source of theoretical bewilderment. Courts are, after all, "countermajoritarian;" they fracture the central assumptions of parliamentary democracy. In the United States, the judiciary has become more and more "imperial." Courts "usurp" the roles of other branches of government. They seem too powerful for the country's good.

Many actions of courts have offended powerful interest groups, and large segments of the population—from *Brown v. Board of Education*[47] through *Roe v. Wade*[48] and beyond. Yet the judiciary enjoys, I believe, widespread support among average citizens, and in particular among society's underdogs. Popular culture does not label "undemocratic" an institution that guards rights or expands them. Pro-choice women do not think that the abortion decision was undemocratic. Right-to-lifers, for their part, do not think that cases cutting back on *Roe* are undemocratic, or that they are good because they are more democratic. Environmentalist groups do not think courts are undemocratic when they stop the destruction of wilderness. Civil rights groups see nothing undemocratic about court-ordered desegregation. These groups—and almost all of us—are result-minded, substance-minded; the "legitimacy" of law and legal institutions, for us, is understood and assessed by what these institutions *do*.

The debate about the "legitimacy" of judicial review, or about judicial activism, or original intent, or whatever, is not uninteresting, or unimportant. But there are two distinct ways of looking at legitimacy. One way is theoretical-philosophical-normative. The other way is descriptive. An institution is legitimate in this second sense if it is *seen* that way by some relevant public. Thus, in this society at least, the "legitimacy" of judicial review, or judicial activism, or the cult of the living constitution, is a question of public opinion—or, more accurately, of popular legal culture.

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47. 347 U.S. 483 (1954).
48. 410 U.S. 113 (1973).

That culture is result-oriented and, by virtue of its boundless adherence to the spirit of modern individualism, it is also rights-minded and privacy-minded. In any event, clues to the legitimacy of courts, and other agencies of law, insofar as we consider this a social and empirical question, are not to be found in the structure of doctrine, or in the formal texts of jurists, but in the broad messages travelling back and forth between the public and the organs of popular culture.

These messages are not, to be sure, very easy to interpret, and they are often conflicting and muddled. How could it be otherwise? Neatness and system are intellectual constructs, imposed on a living legal order. In any event, the public learns its law from the evening news, in tiny bites that convey upshots, not theories, results, not reasoning. The jurists and system-makers are talking only to each other.

III. Conclusion

I have argued that legal culture is crucial to any *social* understanding of law and the legal system; and I have tried to show some points of intersection between legal and popular culture. I have also examined two specific aspects of popular legal culture. Law as it is lived and experienced is in large part a normative enterprise. The people inside and the people outside judge law in terms of good and bad, right and wrong. Hence it is not easy to disentangle legal scholarship from its compulsive normativity. Most of the movements and schools of thought which excite scholars (and students) of law, whether right, left, or center, are normative to their very bone, sometimes unconsciously.

The case for a *social* understanding of law is easy to make, intellectually; but in practice, it seems to lack sex appeal and zip. In any event, it has not made much of a dent on legal scholarship, certainly not in the law schools, except for the rather special case of law-and-economics.[49] But it is clear—to me at least—that there is independent value in studying the connections between the functioning legal system and its essential social matrix.

After all, we live in a society which places incredible emphasis on accessibility, democracy, the rule of law; it is also a society in which courts, judges, lawyers, and other legal institutions have come to play an amaz-

49. *See generally* Friedman, *The Law and Society Movement*, 38 Stan. L. Rev. 763 (1986). Owen M. Fiss, in launching the new *Yale Journal of Law & the Humanities*, describes economics as "the queen of the social sciences" and remarks that it has become "*the* interdisciplinary method for studying law." Fiss, *The Challenge Ahead*, 1 Yale J.L. & Humanities viii, ix (1988) (emphasis in original). He mentions no others. The challenge ahead, it seems, is to "restore to legal studies a proper place for the question of values" and to displace the "premium upon purely behavioral or empirical studies." *Id.* at x, xi. Of course, "values" as social facts are and have always been a central concern of the social sciences; and, on the other hand, some of the criticism of law and economics rests on the charge that it does *not* place a premium upon "behavioral or empirical studies," but is excessively theoretical and abstract.

ingly central role, and in which they exercise a great deal of power. This power, however, is supposed to be limited—bounded by law and governed by law. The people are supposed to make the law; and the law that they make is supposed to run the country. On the other hand, there are some crucial natural-rights ideas that segments of the public also subscribe to, and which crop up as powerful agents of change or reaction from time to time. For all these reasons, the popular *idea* of law is of enormous causal significance.

Of course there is no single idea of law; groups and individuals carry around in their heads an incredible hodge-podge of notions about rights and duties, half-baked bits of misinformation, conceptualist fantasies about "the law," religio-mystical concepts of right, along with a rag-bag of other components. What these are is for the most part unknown, either from a failure of research, or from the sheer difficulty of deciphering culture in a world as complicated as the one we live in. The pity is that the law schools stand isolated from most of the issues about law and its role that have or should have an empirical base. To me at least it seems patent that explorations of legal and popular culture, and the way they interact, should be high on the list of scholarly priorities.