

The Fun-House Mirror: Law and Popular Culture

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Law and society scholars are a large, diverse, and sprawling group. They use many approaches, study many different corners of the legal world, and employ many different techniques. If they have anything in common at all, it is the idea that something called “society” has a powerful influence on something called “law.” Of course, both these terms are problematic and hard to pin down. When we talk about law and popular culture, we add another rather shapeless concept: popular culture. The literature on law and popular culture is not that large but it too is sprawling and elusive. In this short essay, I will make a few observations about the nature of this particular beast.

Before we can figure out how “law” relates to popular culture, we need to have some notion of what popular culture consists of. Of course, popular culture can mean different things to different scholars. Basically, to me, popular culture is more or less the same as mass culture. The term refers to cultural productions (a movie, say) that are genuinely popular, that is, productions that attract a large audience.¹ The line between mass or popular culture, and high or elite culture, is not easy to draw. And it shifts over time. Shakespeare is high culture in our times but, in his day, his plays appealed to a mass audience; presumably this was also true of Euripides and Aristophanes. Extreme cases are pretty easy to assign either to popular culture or to elite culture. Romance novels and rock-and-roll music are obviously part of mass culture; along with movies full of car chases and explosions, some of which may gross a billion dollars (the word “gross” fits here quite well). James Joyce’s *Ulysses*, on the other hand, is definitely not mass culture; nor is the music of the late Elliot Carter. But there are all sorts of intermediate cases: the *Godfather* movies, some musical comedies, some shows on TV; certain movies, plays, or other forms of popular culture show definite ambitions to be something bigger and better. And sometimes they succeed.

Why should we be concerned with popular culture? Or, to be more precise, why should we be concerned with the relationship between law and popular culture? It is because popular culture is extremely important in modern, open, democratic societies. In general, the legal order necessarily reflects what is happening in society and what people think about it; and what is happening in society most definitely includes popular culture. What would modern life be like without movies, plays, books, television shows, popular music, blogs, YouTube videos and online games? In some ways, popular culture dominates society in the West. It has, or might have, or could have, a powerful role in politics and government—and thus in law. It seems likely that the largest industry, in developed countries (and to a certain degree

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¹ I want to distinguish between popular culture, and popular legal culture. If by “legal culture” we mean people’s ideas, attitudes, and expectations, with regard to the legal system, then popular legal culture can be defined as the legal culture of ordinary people, or, at least of lay people, rather than the “conscious theorizing of legal philosophers or professors of law.” Lawrence M. Friedman, “Law, Lawyers, and Popular Culture,” (1989) Yale L. J. 98: 1579, 1584. Popular culture is an important source and influence on popular legal culture.

everywhere), is the entertainment industry, taken broadly. Think about the size of this industry: a huge domain, which includes radio and television, movies, most forms of music, plus amateur and professional sports of all types, and a grab-bag of hobbies and leisure time activities, from origami and water-coloring to hang-gliding. And this huge industry is, above all, simply the commercial side of popular culture.

Scholarship on law and popular culture does not have a very long pedigree; but the pace seems to be picking up. There are many different kinds of study. Some of these are represented in the papers collected in this volume. There is a literature, for example, on the way lawyers are shown on television, or in the movies.² A scholar could study how popular culture deals with and describes lawyers and their work, or the police and their work, or the CIA. Or the scholar could study pop music and the attitudes it reflects toward law and order, or toward the position of women in society. Another type of study would be on the impact of popular culture: how it influences legal culture, how it shapes what people think about the law, and how this, in turn, affects the way the legal system operates. All of this, of course, is no easy task.

One fairly obvious point: “law” inhabits popular culture to an amazing extent. Think, for example, how much television time in the United States (and elsewhere) is devoted to crime shows, lawyer shows, and the like; what would be left of prime-time television, if we banned any mention of lawyers, judges, juries, police, trials, fingerprints, hair samples, forensic medicine, and prisons? Dull evenings, perhaps, devoted to sit-coms and documentaries. Daytime television is different, of course, but in the United States, “judge” shows are extremely popular; “Judge Judy” is the most notable example. These shows are supposed to be about real people, with real claims and counter-claims. They are, in effect, imitation small-claims courts, divorce courts, and the like. The litigants are ordinary people, with ordinary legal problems. My impression is that these judge shows are not as common elsewhere as they are in the United States, but the crime shows most definitely flourish everywhere.

“Judge Judy” is an example of “reality TV,” a genre in its own right. These shows are “real,” or at least supposed to be real, and the participants are not professional actors. But they are part of mass culture; they succeed because they are entertaining and compete quite successfully with the other shows on TV. This brings me to one of my main points; in our times, “news,” along with portrayals of “reality” in the media, form an important part of the entertainment culture, whatever else their purpose. The line between popular culture and whatever else is conveyed by the media, has broken down. It is not wrong to consider “Judge Judy” part of popular culture. Interview shows, and programs like Oprah Winfrey’s, are also part of popular culture. And it is not wrong, or misleading, to include “news” (on TV or in the press) as part of popular culture.

What does the general public learn from all the legal material: the trials, the police shows, and yes, the “news” about legal matters, which flash before us on our screens. Hard to say: perhaps a lot, perhaps a little, but, in any event, what is “learned” is not very accurate. What we see on television and in the movies is an image of law and legal institutions that I

² See, for example, John Denvir (ed), *Legal Reelism: Movies as Legal Text* (University of Illinois Press, 1996); Michael Freeman (ed), *Law and Popular Culture* (Oxford University Press, 2005); Michael Asimow and Shannon Mader (eds) *Law and Popular Culture: A Course Book* (2nd ed. Peter Lang Publishing Inc, 2013).

compared elsewhere to a fun-house mirror—that is, to a weird distortion of reality.³ Certainly, the work of lawyers is not shown in any realistic manner.⁴ For one thing, most lawyers have little or nothing to do with criminal law and criminal justice; and yet both news and drama focus heavily on this part of the legal domain (more recently, some lawyer programs do tend to pay a certain amount of attention to civil cases). In any case, what lawyers in real life do is, on the whole, fairly routine or highly technical; they give business advice, they carefully craft and draft documents, they are architects of business plans and institutional arrangements, they conduct negotiations with business people, they represent clients in court, or in the halls of the legislature, they lobby, they monitor legal developments for clients, they write opinion letters. Almost none of this is the stuff of high drama. Almost none of this makes a good show on people's screens. What people see, and watch, is largely tilted toward the sensational, the newsworthy, the dramatic.

In fact, studies show that the general public does not get much “education” about the legal system, either from popular culture or from other sources. People do not know much about the law and much of what they think they know is just plain wrong. Popular culture, in any event, is after all not explicitly meant to teach people. It is meant to be entertaining. Big trials, showy stories, lurid murders, salacious scandals—these make the grade on TV and in the press.⁵ People could, I suppose, come to realize that what they see and hear is neither typical nor particularly true to life. Still, what they see and hear is all they get. They are, in a way, like the citizens of some stern dictatorship, which tightly controls the media. The citizens in this dictatorship may well suspect that the government is lying to them. But they have no way of finding out the actual truth.

A number of studies have tried to find out what people know about the law. The general answer is: not much. Of course, people are aware of some of the bare essentials. They know that burglary is a crime. They know that rape and forgery and arson and murder and drunk driving are all crimes. They know that they have to pay taxes, and that there are all sorts of tax laws. They know that unhappy couples can get a divorce; they know that you can get a patent when you invent some new gadget. The details are another question. There is also a good deal of misinformation out there in society. Many people, for example, honestly believe that people who live together a certain number of years earn rights more or less like the rights of people who are actually and legally married. This is the so-called myth of common law marriage. It is just plain false.⁶

One study surveyed workers in three states: Missouri, New York, and California. Workers were asked whether their employer could fire a worker, simply because the employer found a replacement who was willing to work for less money. The overwhelming majority, in all three states, believed this was against the law. In fact, it is not. Can the boss fire a worker

³ Lawrence M. Friedman, “The People’s Choice: Law in Culture and Society,” in Alison Diduck, Noam Peleg, and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy: Essays in Honour of Michael Freeman* (Brill, 2015), p. 83.

⁴ Yet, interestingly, law students draw “heavily on media news sources in forming their views on lawyers as well as on ...popular culture.” Michael Asimow et al., “Perceptions of Lawyers—a Transnational Study of Student Views on the Image of Law and Lawyers,” (2005) 12 *Int’l J. of the Legal Profession* 407, 427

⁵ See Lawrence M. Friedman, *The Big Trial: Law as Public Spectacle* (University Press of Kansas, 2015).

⁶ See Pascoe Pleasence and Nigel J. Balmer, “Ignorance in Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation,” (2012) 46 *Law & Society Review* 497 (2012).

simply because he doesn't like the worker? 89% of the employees in the Missouri survey thought violate workers' rights. Except that it doesn't.⁷

What role do the media play in spreading actual disinformation? Probably quite a bit. Mostly, I suppose, they do not do this deliberately. But it happens anyway. Crime shows are obviously distorted, but so is the "news." Television covers the major decisions of the United States Supreme Court; but this coverage is for the most part superficial, when it is not downright wrong.⁸ A study in 1999 surveyed newspaper coverage of products liability cases brought against the auto industry. The study covered 361 cases in which car or truck companies were the defendants. The manufacturer won all but 92 of these cases. Punitive damages were awarded in just 16 cases. Newspapers ignored most of the decisions; they tended to report only cases in which plaintiffs actually won and they reported on ten out of the 16 cases of punitive damages.⁹ Like the coverage of big, juicy, and lurid murder trials, this gives a warped picture—a funhouse picture—of products liability cases. A similar distortion occurs, I imagine, in the coverage of medical malpractice cases and of lawsuits in general. The rare big verdicts get the most attention. And people surely think more cases go to trial than actually do.

At least newspaper accounts of product liability cases probably get the bare facts right, which means that the accounts are, in a way, accurate as far as they go; but they may nonetheless give a false impression. In other situations, however, the media do not get things right or, rather, they twist the facts out of all recognition. One notorious instance was the incident involving Stella Liebeck and a cup of hot coffee at McDonald's. Ms. Liebeck, who was 79 years old, bought a cup of coffee in Albuquerque, New Mexico, in 1992, at a drive-in window at McDonald's; her grandson was driving the car. The lid of the coffee cup came off, she spilled coffee on her lap, and ended up in the hospital with third-degree burns on parts of her body; she was permanently disfigured and was disabled for up to two years after the incident. She complained to the company, and got very little response. The coffee was in fact dangerously hot. McDonald's had gotten many complaints about this fact. Liebeck eventually sued McDonald's, and won her case; the jury awarded compensation and also assessed punitive damages against the company.

Mrs. Liebeck had what was almost certainly a legitimate complaint but the media paid no attention to the merits of her case. They turned the affair into a cautionary tale of a greedy old woman, whose own behavior was reckless, but gave her the chance to bring a frivolous lawsuit against a rich, famous company. You were led to think that this was yet another example of stupid, money-hungry people preying on legitimate businesses, making false or trumped-up complaints against these companies, and of foolish juries handing these plaintiffs enormous sums of money. This was, of course, a gross distortion of reality, but it stuck.¹⁰ The

⁷ Pauline T. Kim, "Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge," (1999) U. Ill. L. Rev. 447.

⁸ See Elliot E. Slotnick and Jennifer A. Segal, *Television News and the Supreme Court: All the News that's Fit to Air?* (Cambridge University Press, 1998)

⁹Seven Garber and Anthony G. Bower, "Newspaper Coverage of Automotive Product Liability Verdicts," (1999) 33 Law & Society Review 93

¹⁰ On this case, see William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (2nd ed. University of Chicago Press, 2004), pp. 183-226.

McDonald's coffee case was only one example of many, illustrating how the media can sensationalize—and fictionalize—the outputs of the legal system.

The saga of Stella Liebeck was not, in its bare outline, a piece of fiction. It was not a show. Stella Liebeck was a real person. The hot coffee was real. The lawsuit was real. The way the press covered the case was biased and distorted, but it purported to be coverage of “news,” and was (arguably) not part of the domain of popular culture. But, as we suggested, in our society, and in modern societies generally, the line between fact and fiction, between entertainment and reality, has blurred; in some ways, it has lost much of its meaning. “Popular culture” realistically includes much that we would not describe as fiction at all. This is the main point in this brief essay. A second, and related, point is that the media, including now the social media, have magnified the power of pop culture enormously—in some ways quite dangerously.

I. The Raw and the Cooked: Reality and Popular Culture

“Popular culture,” however one defines it, is in theory different from the popular reporting of actual events. A documentary is supposed to be different from a movie based on a made-up story. But reality and fiction are, as we said, sisters under the skin. A novel is written to entertain, and to sell, but it always carries some sort of message. The message may be implicit. It may be trivial. On the other hand, the message can be quite powerful; “fiction” can sometimes have the capacity to move, to educate, or even to change the political constellation. A work of popular culture may carry more real world power than any number of factual reports. The anti-slavery movement, before the American Civil War, published newspapers, documents, pamphlets, to further the cause. But none of this was as effective as Harriet Beecher Stowe's novel, *Uncle Tom's Cabin*, which appeared in 1852. Two generations later, Upton Sinclair's novel, *The Jungle*, published in 1906, also had a powerful social impact. Sinclair's description of the cruel, disgusting, and unsanitary conditions in Chicago's meat-packing plants horrified the country and created a huge uproar. Sinclair wrote the novel as a form of social protest; he wanted to emphasize the way in which the American economic system exploited workers. In fact, the book did little or nothing for workers. But it aroused the public, it made them worry about the meat products they were buying and eating. His vivid and lurid descriptions led to a firestorm of protest, and enormous pressure on the government to do something. This pressure was a factor in the passage of laws on meat inspection; it also had a significant role in the movement that led to the passage of a comprehensive food and drug law.¹¹

These two novels illustrate the power of popular culture, though each in its own way. There are many other examples: movies, plays, and novels that reflect popular culture but which also advance a cause. Here the line between the raw and the cooked is particularly fuzzy. Harriet Beecher Stowe got much of her inspiration from actual slave narratives. Sinclair's description of life in the meat-packing plants was based on solid research. In the early 1930's, Robert Elliott Burns painted a strong picture of the cruelty and inhumanity of Georgia's penal system in his auto-biographical account, *I Am a Fugitive from a Georgia Chain Gang*. In 1932, Hollywood made a film based on the book, with the title *I am a Fugitive from a Chain Gang*; Paul Muni played Burns in the movie, and won an Academy Award. Georgia

¹¹ The two laws were enacted on the same day. The Food and Drug Law was 34 Stat. 768 (1906).

abolished the chain gang system; both the story and the movie were influences, and it is hard to say which was more effective.

All this underscores the point that, in modern culture, the boundary that separates the raw, that is actual occurrences, from fictional accounts, has blurred considerably. The media “cook” raw events, and turn them into “news,” into something to be reported and disseminated. After all, “news” must find an audience and, to do this, it has to be interesting and entertaining. News, after all, is mostly a business. TV news programs, for example, live or die according to the ratings. “News” reports events and situations that are supposed to be real but the emphasis, the coverage, is not “real” in a deeper sense. Coverage depends on decisions that TV stations (for example) make and these decisions turn raw events into something which might be dramatically different. If news stations decide an event is important enough, they drop all their other programs; they provide coverage 24/7. Almost certainly the underlying event (a massacre, for example) was real enough but its meaning is changed, enlarged, transformed, by the way it is reported. A suicide bombing, an earthquake, a massive flood: these, in a sense, do not need to be cooked. But even for these obvious examples, the message and the spin is important. The interpretation. The way in which the “news” gets reported. The message the news conveys. “News,” in short, is not what actually happened, but what the media say has happened; these are never quite the same and, occasionally, are very different indeed.

Past events, moreover, can be turned into fiction—either as documentaries, which at least purport to be “true,” or into forms that dramatize and heighten a “true” situation. The chain gang movie was not supposed to be a documentary, but it claimed to tell the true story of a man who did, in fact, escape from a chain gang. *Uncle Tom’s Cabin* was pure fiction, and highly sentimentalized, but the underlying issue—the evils of slavery—was genuine indeed. Investigations showed that Sinclair’s description of conditions in the meat-packing plants of Chicago was all too real; the story, to be sure, was pure fiction.

The role of the media here is absolutely crucial. Probably there was something we could call popular culture even in the days when human beings lived in caves, but the rise of the mass media has utterly changed the role and the nature of popular culture. The media are certainly powerful, but their success depends on their skill in guessing what the public thinks, or believes, or wants, or will want, or can accept. The media play up to their audiences, or potential audiences, and to the attitudes and desires that underlie popular culture.¹² Popular culture infects and, in a way, controls the media; the mass media cannot survive without the masses. But the media in turn infect and manipulate their audience. They depend on each other. Cop shows—and crime news—reflect and feed on what ordinary people think, but cop shows—and crime news—also help mold those views. *Uncle Tom’s Cabin* fed the zeal of anti-slavery forces but it did not invent the abolition movement. Today, more than ever, media and public are bound together in a form of symbiosis.

I want to stress once more how important a role entertainment plays in our societies. Popular culture is entertainment culture. Entertainment has always been important to people; but never so much so it is today. In our times, much of public life has become a kind of show,

¹² The audience may be, and usually is, something less than the general public. At this time (2017), some news media hardly even pretend to be objective; they are deeply political, and tilt either left or right; people choose the shows that conform to their political tastes.

or seems almost indistinguishable from a show. This is definitely the case with political campaigns. Anyone running for President of the United States, or governor of a state, will get nowhere if he or she has a squeaky voice, or stutters. Politics is speeches, press conferences; it is TV ads, it is brochures; it is what the polls suggest; it is whether the candidate makes “news;” it is the way the campaign is conducted; it is slogans and rallies and all the rest; it is imagery. To be effective, the campaign must be, in short, entertaining. A candidate must have “charisma,” meaning roughly that he or she has to be attractive, appealing, sympathetic (Max Weber would hardly recognize this modern use of his term, “charisma”).¹³ In a way, then, popular culture swallows up many features of “reality,” including politics, and turns them into a form of show business.

II. Going Viral

Two hundred years ago, humanity trudged from place to place on foot; the better off had horses and carriages, but most people had to walk. A message from, say, New York to London took many weeks to cross the Atlantic; a message from New York to New Orleans took just as long. Customs, norms, habits, ways of thinking, ways of life—all of these diffused, if at all, at a snail’s pace. Today’s world is incredibly different. A jet can go around the globe in a day or less. Messages are even faster: almost instantaneous. Ideas, images, news, fashions; these too can move from place to place at warp speed.

The revolution in travel and communication increases the power of popular culture enormously. It makes cultural convergence possible. In fact, modern travel and communication are crucial agencies of cultural convergence. A new song, if it catches on in Los Angeles, can be almost immediately downloaded in Tokyo, Bangkok, Buenos Aires, and Capetown. Cultural and legal convergence, in general, is a basic trait of modern society. Modern Japan has much more in common with modern Sweden than medieval Japan had with medieval Sweden. People all over the world watch American movies and TV shows. Young people in every country like the same singers and songs. Sports culture is international. Pathologies of popular culture—doping scandals, for example—are equally international. More and more, people wear the same clothes, follow the same fashions, play with the same toys as children, the same video games as adolescents, and watch the same football matches as adults.

Also: what was once strictly local news can now “go viral”, that is, it can spread all over a society and, very often, all over the world. “Public opinion” has always influenced law but, in our day, it is easier to mobilize “public opinion”; it is possible to enlist millions of strangers in some enterprise, even if their only contact with each other is through email, or the internet, or some social network. Modern revolutions indeed seem to start with social networks.

Popular culture today, more than ever before, is focused on the visual, on pictures and images. These are more powerful than words. They can turn a small event into a big event; a minor sin can be blown up out of all proportions so that it reverberates in every part of a society. Consider the case of the so-called “dog poop” girl of South Korea, as Daniel Solove

¹³ To Weber, charisma was an almost magical quality: the authoritative and legitimating power of a heroic figure or a saint.

reported.¹⁴ This young woman's dog did his thing in a subway car; she refused to clean up after her pet. It was her bad luck that all this was captured on a camera. Blogs and videos did the rest. To millions of people, she became an object of scorn. You can only imagine what this did to her life.

Shaming in the old days was bad enough—think of Hester Prynne's scarlet letter. But a scarlet letter in a New England town in the 17th century meant nothing in South Carolina and less than nothing in England or France. Today, public shaming -the "ecstatic public condemnation of people" for small sins and local embarrassments - can reach an audience of fantastic size.¹⁵ This is also the age of "revenge porn" - scandalous or revealing pictures of ex-girlfriends or boyfriends. These pictures, originally meant to be private, get spread maliciously on the internet, for the benefit of countless prying eyes.¹⁶ The visual power of modern technology can expand the small and the personal to gigantic size, as if projecting it onto some monstrously large screen.

The magic and power of popular culture is also the magic and the power of the now. *Uncle Tom's Cabin* is history (or literature). But the latest song, play, movie, or image on the web speaks to a current audience, about current issues, and moves the audience in current ways. This power to magnify events, and to disseminate them, has enormous political and social importance. Police brutality, and police racism, has had a long history in the United States. It was often criticized, to be sure. But the public, on the whole, seemed indifferent. No longer. Videos of police behavior have aroused the anger of African-Americans and moved them to take action, to make demands, in new and stronger ways. Many members of the larger public have added their voices. The videos are, first of all, important pieces of evidence. They are also much more vivid than even the most fevered and personal account.

Similarly, newspapers can and do report the suffering of men, women, and children fleeing for their lives from the horrors of the civil war in Syria. They can, and do, report how many are lost at sea, drowned when rickety, overcrowded, and unsafe boats founder and sink in the Mediterranean. But nothing in all these reports was quite as powerful as the pathetic image of a dead child, washed up on the shore of Turkey. The power of the new media is to the power of the old, as the atom bomb is to muskets and blunderbusses.

And the real merges with the fictional. Now "popular culture" means precisely what the words suggest: what is popular, that is, what catches the attention, what entertains, what fascinates; and what is cultural, that is, what moves people, what is congruent with their ideas and their ways of life.

I have, in this brief essay, tried to argue that understanding popular culture is important for understanding current law. I have also argued that it no longer makes sense to draw a sharp line between the real and the fictional, at least on the issue of popular culture. Popular culture and popular opinion are, essentially, twins. They operate in tandem and influence each other. Moreover, popular culture, today, is more and more a global culture. In other words, there is in many ways only one language, as it were, of popular culture; it exists in every modern,

¹⁴ Daniel J. Solove, *The Future of Reputation* (Yale University Press, 2007), pp. 2-3.

¹⁵ Jon Ronson, *So You've Been Publicly Shamed* (Riverhead Books, 2015), p. 275.

¹⁶ Joanna L. Grossman and Lawrence M. Friedman, "The Power and Peril of the Internet: How Should 'Revenge Porn' Be Handled?" *Justia's Verdict*, Feb. 4., 2015.

developed country—with certain differences of dialect. It is stronger than ever before. And more than ever, it deserves serious study and research.
