The Yale Law Journal
Volume 98, Number 8, June 1989

Symposium: Popular Legal Culture

Popular Legal Culture: An Introduction

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The Storrs Lectures at Yale have produced sharply differing views of law. In 1974, Grant Gilmore said "[t]he function of law . . . is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us."¹ Seven years later Clifford Geertz, the anthropologist, objected to Gilmore's concept of law.² Law, Geertz argued, "is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real."³ Geertz pointed to legal sensibil-

† Malcolm Piiman Sharp Professor, University of Wisconsin-Madison. Dr. Jacqueline Macaulay took time from her law practice to comment on this paper. She attributes the popularity of L.A. Law among lawyers to its portrayal of their fantasies of competence and power.
3. C. GEERTZ, supra note 2, at 173.
The articles in this symposium argue that popular legal culture may be influenced by messages transmitted both by legal officials and mass media. We can order the essays according to their discussions of sources of popular legal culture; these sources range from personal experience to fiction. We might expect, although little evidence is offered here, that some sources are more influential than others.

Most of us get some ideas about law from direct personal experience. We pay taxes, and we encounter tax forms, instructions, procedures and the other trappings of bureaucracy. We have driver’s licenses, and we were introduced to another bureaucracy when we first applied for one and when we renewed our applications. Many of us have received traffic tickets, and the experience introduced us to the role of law-breaker. Some have bought or sold real estate, made a will, sought a divorce or gone to a small claims court. Experience is a great teacher, but we must ask what these experiences teach.

Barbara Yngvesson looks at what legal professionals see as the not-really-legal demands citizens make to courts. She points to an important part of popular legal culture and tells us that people come to the court with a range of problems, from the quarrels of parents and children, lovers, neighbors, or other intimates, to conflict with employers, local companies, landlords and others. For these people, their understanding of “legal rights” involves the right “to control who is on one’s property and what happens on one’s property . . . [and] rights not to be insulted, harassed, or hit by neighbors or family members without sufficient reason.”

Local courts respond by treating these demands as garbage cases. Clerks and Small Claims Court Commissioners steer parties away from the courtroom, and into coercive mediation, or towards dropping the suit. We can guess that those who sought vindication of rights were not pleased by these encounters.

15. Cf. Cox & White, Traffic Citations and Student Attitudes Toward the Police: An Examination of Selected Interaction Dynamics, 16 J. POLICE SCI. & ADMIN. 195 (1988). Cox and White found that among university students tested, “receiving a traffic citation is associated with negative evaluations of police conduct, specifically, perceptions that the police sometimes behaved in abusive, even brutal, ways and that these perceptions likely lower the level of citizen trust and security in the police.” Id. at 108.


17. Compare Alschuler, Mediation With a Mudder: The Shortage of Adjudicative Services and the Need for A Two-Tier Trial System in Civil Cases, 99 HARV. L. REV. 1808 (1986) (arguing that Americans are coerced to abandon their rights and settle disputes when they should be able to vindicate such rights in court) with Gibelman & Demone, The Social Worker as Mediator In the Legal System, 70 SOC. CASEWORK J. CONTEMP. SOC. WORK 28 (1989) (arguing that mediation is positive shared problem solving as contrasted with adversarial procedures which impose resolutions on winners and losers).


21. But cf. D. ROSENTHAL, LAW AND CLIENT: WHO’S IN CHARGE? (1974). Rosenthal classified personal injury clients as active or passive. He found that active clients who played a role in the resolution of their case got better recoveries from their legal claims, and they better protected their emotional interests as well.
unreasonable lawyer on the other side. At least in the area of divorce, it may not be enough to change clients' expectations and ideas about the legal system if we want to empower them. Perhaps nothing less than major structural change would empower them. Perhaps the changes would have to come from far beyond the legal system.

We do not learn everything by direct personal experience. Legal officials and intellectuals who rationalize society tell stories which show that the legal process is necessary, acceptable or just. Some might accept those stories. Carol Greenhouse writes about a theory that appellate courts and their interpreters offer to justify adjudication. This theory challenges American common sense about time. The law has been, is, and always will be there. Judges serve this timeless law, not interests or power. Supreme Court decisions are unrelated to such events as the elections of Richard Nixon and Ronald Reagan or to Jimmy Carter's lack of an opportunity to appoint anyone. Judicial succession tests this story. "All aspects—biographical and political—of becoming a Justice are symbolically suppressed. Those aspects are precisely the ones that would (though they cannot) resolve the indeterminacies linking the times of the individual, the law and the nation in relation to the power of the presidency and the Congress." For example, the Senate hearings on President Reagan's nomination of Robert Bork to the Supreme Court became a morality play attempting to hide a power struggle. Bork's opponents pictured him as a man who would rely on his own eccentric views of what law ought to be rather than act as an instrument of modern American tradition. Bork attempted to paint himself as a mainstream neutral who would bring little to the Court other than his outstanding intellectual and technical skills. We might use Greenhouse's approach to analyze the messages sent out by the White House, the Senate Democrats, and Judge Bork himself.

Courts also use judicial opinions to send messages attempting to legitimate their actions. Professors, newspaper columnists, politicians and lawyers may translate the messages and offer their interpretations to the interested public. Peggy Davis suggests that at least some blacks have learned that the present Supreme Court of the United States is insensitive to, if not biased against, their interests. They do not see the present majority applying timeless law. Rather, justices appointed by right-wing presidents seem to be carrying out a racist mandate that elected and reelected those presidents. If the assumptions underlying legal opinions are foreign to members of a particular audience, these people will see the authors as fools or knives. Legal rhetoric legitimizes the legal system only for those who accept the case made by such rhetoric as honest and plausible.

Davis discusses the Supreme Court's opinion in the McCleskey case. There the Court rejected the empirical work of Baldus, Pulaski and Woodworth concerning bias in Georgia's use of the death penalty. Baldus and his associates found what many blacks thought was obvious, but Justice Powell imposed a very high burden of proof to avoid accepting what many blacks just knew was so.

For another example of Davis' point, consider Professor Charles Lawrence's discussion of City of Memphis v. Greene:

The city of Memphis, acting at the behest of white property owners, erected a barrier which closed the main thoroughfare between an all-white enclave and a predominantly black area of the city. Justice Stevens, writing for the majority, examined the evidence developed at trial and concluded that the decision was motivated by an interest in protecting the safety and tranquility of a residential neighborhood. One reads Justice Stevens' words with incredulity: Could he really believe what he says? Did this man grow up in the same United States of America that I did? There is hardly a black in the country who would not agree with Justice Marshall that the city's action was "nothing more than 'one more of the many humiliations which society has historically visited' on Negro citizens."

Both Davis and Lawrence remind us that the stories courts tell in imagining the real work only some of the time with some people. Indeed, it is possible that Professors Davis's and Lawrence's angry reactions to the Supreme Court's opinions are magnified by the Court's claim of timeless judicial neutrality.

Most Americans, however, learn about their legal system even more indirectly. They have little personal experience with law and lawyers. Few of us ride in a squad car, play any role in litigation or participate in administrative decisionmaking. Newspapers and television news, however, take us

23. Id. at 1649.
24. Karl Llewellyn offered a somewhat different story than the one analyzed by Greenhouse to legitimate bounded judicial discretion within which a judge's 'situation-sense' might operate. See K. Llewellyn, The Common Law Tradition—Deciding Appeals 121-57 (1960).
27. The Law and Society Association gave the Baldus project its Harry Kalven Prize for excellence after the Supreme Court's opinion, and the negative comment on the Court's opinion was quite intentional. LSA's citation said, "history will look back on this work as extremely significant on the issues of the death penalty even if the present Supreme Court cannot appreciate its utility."
to some parts of the legal system in operation. Nevertheless, news is not social science, and journalists do not offer a representative sample of the work of the legal system. Sometimes they even misreport what happens.

Moreover, most Americans read mystery novels or watch films or television that deal with dramatic aspects of the legal system. Schattenberg suggests that police and private-detective television programs send information about moral boundaries as public hangings once did. One common message is that the appropriate punishment for being a bad guy is to have police officers administer capital punishment without a trial in a shoot-out. However, Lawrence Friedman cautions that we cannot tell what people make of books, film and television programs just by reading and watching them ourselves. He sees a complex interrelationship between popular culture, the functioning legal system, and the ideas that books, films and television shows attempt to sell. Armchair self-analysis of our own reaction is not enough. People will deconstruct Miami Vice or Hill Street Blues for themselves in light of the way they imagine the real.

Friedman and Stephen Gillers look at L.A. Law, a television program which is surprisingly popular in the United States and many countries abroad. Charles Rosenberg, legal advisor to L.A. Law, responds to Giller’s paper. Both Friedman and Gillers agree that the program portrays lawyers and the law unrealistically. However, Friedman argues that the lawyers of L.A. Law are caricatures; but caricatures are always caricatures of something, and that something has to be real. Gillers defends the program against several charges of its critics. At its best, he says, the program is a series of moral questions that can be developed dramatically in a legal setting. He asks, “What difference does it make if McKenzie, Brackman lawyers consistently ignore the rules of evidence or if they make speeches to witnesses when they should be asking questions?” Gillers has more doubt about L.A. Law’s handling of ethical questions. Nonetheless, he points to examples where “L.A. Law has taken a hard, ambiguous ethical problem and portrayed it in a serious, dramatic way without making it seem self-evident and without pretending to have solved it.” Finally, Gillers asks whether L.A. Law’s influence is constructive. His answer is mixed. However, he emphasizes that L.A. Law provides wonderful if unrealistic role models:

33. Friedman, supra note 31, at 1601.
35. Id. at 1614-15.

With a nearly subversive zeal, the writers and producers have populated the show’s legal terrain with a rainbow coalition of characters. Women, blacks, Latinos, Asian-Americans, and individuals of various sexual orientation are shown as lawyers, judges and other persons of achievement.

Others may construe the portrait of the rainbow coalition less favorably than Gillers. Friedman suggests that Americans have a love-hate view of lawyers. Some lawyers champion individuals’ claims to justice, and the public applauds if it agrees with these claims. Other lawyers champion unpopular causes or serve their own interests while manipulating the legal system for the undeserving, and the public hisses and boos. Or do some people admire crafty and unscrupulous lawyers who exercise great power? Would it make any difference if J.R. on Dallas had been presented as a lawyer? Such questions are far easier to ask than to answer.

Gillers and Friedman can only offer plausible suggestions about the influence of L.A. Law. We simply do not know how Americans interpret the series and why it is so popular. Rosenberg thinks Gillers may overstate the influence of the show. Rosenberg argues that Americans can distinguish fact from fiction: “[I]t is part of our culture to learn from an early age what is story and what is not. If you doubt this, ask any five year old if there are really thousand foot beanstalks and giants.” Perhaps Rosenberg is right, but L.A. Law sends few signals that it is fantasy; it looks very real. L.A. Law’s messages are complex.

Judge Richard Posner continues his new-found role as literary critic and confronts Tom Wolfe’s best-selling novel, The Bonfire of the Vanities. He finds that the book adds little to our knowledge about how lay people view the law. He says that Wolfe follows better books in arguing:

[the public] expect[s] technicalities to matter ... [t]hey are not surprised when miscarriages of justice occur ... [t]hey expect legal proceedings to be interminable and excurciatingly expensive; and ... they are unillusioned about the moral and intellectual qualities of judges, lawyers, jurors, and other participants in the machinery of...
legal justice, and about the corrosion of that machinery by political
and personal ambitions and fears.41

Judge Posner questions whether Americans really view “their legal sys-

tem in quite so bleak a light.”42 Again, we might remember Friedman’s

comment about L.A. Law. He saw it as a caricature, but continued “car-
icatures are always caricatures of something, and that something has to be
real.”43 The judge is right when he insists that whether Wolfe reflects

popular legal culture is unclear.44 But the American audience can recog-

nize these themes, and this suggests that there might be some there there
to investigate.

This symposium raises many important questions concerning popular

legal culture, a topic far too broad to exhaust in seven articles. For example,

we might ask what people learn in school about law, rules, lawyers

and the legal system. Here we must look at both the open and the hidden

curriculum. School textbooks offer a very simple and formal view of law

when they mention it at all. However, school children learn to cope with

or evade authority, decide whether and when to cheat, and pick up practi-
cal views about the interplay of rights and power as they interact with

administrators, teachers, coaches, and other students. We might expect

that attitudes developed from encountering the micro- and the macro-

aggressions of the powerful at school would be sharpened by the contrast

between experience and the fantasies found in schoolbooks and in class.

We might guess that those who learn to cheat on multiple-choice exami-
nations in school are more likely than others to violate traffic laws and

evade taxes later in life. This guess might be entirely wrong, but the ques-

tion is worth considering.

Americans also learn from sports about breaking rules or honoring

them in form but not in substance. Part of the lesson is taught in school

and part by sports programs on television. Professional baseball, for ex-

ample, honors tricking and intimidating umpires. A cynical might speculate

that American intercollegiate athletics shows that many universities act as

if they honored only the amoral principle: “Don’t get caught!”468 Gam-

bling on professional sports is illegal in almost all states. Nonetheless,

newspapers regularly publish the current odds, and CBS Television long

offered Jimmy The Greek, a former gambler giving us the inside dope

41. Id. at 1659.
42. Id. at 1659-60.
43. Friedman, supra note 31, at 1601.
44. Posner, supra note 40, at 1660.
48. Bourdieu asserts that “[l]aw is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects.” Id. at 838. However, he continues, “symbolic acts of naming achieve their power of creative utterance to the extent, and only to the extent, that they propose principles of vision and division objectively adapted to the preexisting divi-
sions of which they are products.” Id. at 839. Naming works “only to the extent that the law is socially recognized and meets with agreement, even if only tacit and partial, because it corresponds, at least apparently, to real needs and interests.” Id. at 840.
47. I think it is clear that we must take Bourdieu as saying that legal professionals have the power to attempt to construct the meaning of everyday events and influence cultural understandings of justice. However, not all their attempts succeed. If we were to read Bourdieu without noticing the important qualifications to his argument, he would seem to say that once the Supreme Court decided that states must desegregate schools, stop school prayers and allow abortions, then everyone accepted these deci-
sions as statements of what was morally proper. While the Court’s decisions put all these matters on the public agenda, Bourdieu does not say that “law creates the social world [simply] by naming it.” Yngvesson, supra note 16, at 5.
48. Compare Karl Llewellyn’s statement: “Who in the literature or in the classroom has followed up the implications of Jerome Frank’s insight that a court ‘reads’ a statute as a performing violinist ‘reads’ his music or an actor ‘reads’ his part?” K. LLEWELLYN, The Study of Law as a Liberal Art, in JURISPRUDENCE, REALISM IN THEORY AND PRACTICE 375, 390 (1962). I think jazz is a better meta-
phor. Violinists and actors tend to stay closer to the score and the script than jazz musicians to a song-
writer’s composition. In my view, Americans freely improvise on the law.

about professional football. This, too, may be an important part of popu-
lar legal culture.

Then we might look at what political campaigns teach about law. Again our cynic might conclude that recent campaigns taught citizens that due process and civil liberties are slogans for those who champion the interests of criminals and that the death penalty is the solution to most of our civic dilemmas. Furthermore, campaigns for judicial office have be-
come increasingly political. We can wonder how far the successful cam-
paign against Chief Justice Rose Bird in California undercut the legitima-
tion myth analyzed by Greenhouse.

Most of the articles in this symposium identify a source of information

about legal matters and then consider the explicit and implicit messages

being sent out at that place. However, all teachers who have read final

examinations know that not every thing sent out is received exactly as

intended. Listeners and readers must make sense out of what they per-

cieve, and their experience colors their perceptions and interpretations.

Yngvesson argues that, on one hand, legal professionals are empowered by

their capacity to reveal rights and define wrongs, to construct a mean-
ing of everyday events and thus to influence cultural understandings of

fairness, of justice, and of morality.46 On the other hand, she tells us, law

is invented, negotiated or made in local settings.

Both propositions are undoubtedly true to some unknown extent. We

can draw an analogy to classic jazz. Composers such as Gershwin,

Porter, and Berlin wrote songs which jazz musicians reinvented in many

ways. Moreover, George and Ira Gershwin composed Porgy and Bess, an
legal policies that defend the haven. Nor does the story necessarily suggest that legal culture is good. A lynching mob can be viewed as an expression of a legal culture, and Nazi Germany had a legal culture too.

Legal culture also includes what people see as necessary, acceptable or just, and this may be the basis for their support of the legal system. These ideas may affect how specific legal rules or the operating legal system affect society. Too often we write as if we think citizens are puppets attached to strings held by legislators and judges. However, we have far too few police, IRS auditors, customs inspectors and other administrative personnel to watch everyone always. We think of ourselves as a law-abiding nation, and we say we are not a “banana republic.” Yet we know that most Americans achieve faster than the speed limit, many cut corners when they fill out their income tax returns, some bribe legal officials for favorable treatment, and others buy or sell illegal drugs. At best, we are selectively law-abiding; we do not “really” cheat, we just cut a few corners. We have only begun to ask what working rules Americans follow, how we rationalize other-than-strict compliance, and how far we will go when there is a good chance that we will not be caught. Popular legal culture should supply some of the answers. And those questions are at least as worthy of attention as the mailbox or consideration rules so celebrated in contracts courses required in all law schools.

Finally, the study of popular legal culture has another major virtue—it promises to be fun. I think what lay people think lawyers do day to day is at least as interesting as legal rules. We may choose to put aside our latest issue of the Harvard Law Review, or even, for that matter, the Yale Law Journal, and watch an episode of L.A. Law. As I have said before, “[p]erhaps, best of all, I no longer need feel guilty as I watch the Badgers, Bucks, Brewers, and Packers struggle with so little success. It’s not wasting time. It’s research.”

55. Many Central Americans might find our claim to be particularly offensive when we use this phrase. North Americans forget that insofar as there is truth in the image connoted by the term “banana republic,” North Americans are largely responsible for creating that truth. Most of us would do well to remember Neruda’s The United Fruit Company. P. Neruda, Five Decades: A Selection (Poems: 1925–1970) 78 (B. Belit ed. 1974).
56. But compare Harris’s view: “Rules facilitate, motivate, and organize our behavior; they do not govern or cause it. The causes of behavior are to be found in the material conditions of social life. The conclusion to be drawn from the abundance of ‘unless’ and ‘except’ clauses is not that people behave in order to conform to rules, but they select or create rules appropriate for their behavior.” M. Harris, Cultural Materialism: The Struggle for a Science of Culture 275 (1980).