THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW AND SOCIETY

POPULAR CULTURE AND LAW

Richard K. Sherwin

Popular Culture and Law

Edited by

Richard K. Sherwin

New York Law School, USA

ASHGATE

Published by
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Popular culture and law. – (The international library of essays in law and society)
1. Culture and law 2. Popular culture – United States
3. Technology and law 4. Sociological jurisprudence
I. Sherwin, Richard K.
340.1'15

Library of Congress Control Number: 2005048202

ISBN 0 7546 2470 6

Printed in Great Britain by The Cromwell Press, Trowbridge, Wiltshire

Acknowledgements

The editor and publishers wish to thank the following for permission to use copyright material.

Arizona Law Review for the essay: Marc Galanter (1998), 'An Oil Strike in Hell: Contemporary Legends about the Civil Justice System', *Arizona Law Review*, **40**, pp. 717–52.

University of California, Berkley for the essays: Daniel M. Filler (2002), 'From Law to Content in the New Media Marketplace', *California Law Review*, **90**, pp. 1739–74; F. Gregory Lastowka and Dan Hunter (2004), 'The Laws of Virtual Worlds', *California Law Review*, **92**, pp. 1–73.

Columbia Journal of Gender and Law for the essay: Ratna Kapur (2001), 'Postcolonial Erotic Disruptions', *Columbia Journal of Gender and Law*, **10**, pp. 333–84.

Copyright Clearance Center for the essays: Richard K. Sherwin (1994), 'Law Frames: Historical Truth and Narrative Necessity in a Criminal Case', *Stanford Law Review*, **47**, pp. 39–83; Susanne A. Roschwalb and Richard A. Stack (1992), 'Litigation Public Relations', *Communications and the Law*, **14**, pp. 3–23.

Steven Lubet for the essay: Steven Lubet (2001), 'Slap Leather! Legal Culture, Wild Bill Hickok, and the Gunslinger Myth', *University of California Los Angeles*, **48**, pp. 1545–55. Originally published in 48 *UCLA Law Review* 1545 (2001).

New York Law School Law Review for the essay: Austin Sarat (1999–2000), 'Living in a Copernican Universe: Law and Fatherhood in a "Perfect World"', *New York Law School Law Review*, **43**, pp. 843–74.

New York University Law Review for the essay: Jack M. Balkin (2004), 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society', *New York University Law Review*, **79**, pp. 1–58.

Douglas S. Reed for the essay: Douglas S. Reed (1999), 'A New Constitutional Regime: The Juridico-Entertainment Complex', Presented at the Law and Society Annual Meeting, Chicago IL, pp. 1–16.

Norman Rosenberg for the essay: Norman Rosenberg (2001), 'Looking for Law in All the Old Traces: The Movies of Classical Hollywood, the Law, and the Case(s) of Film Noir', *University of California Los Angeles Law Review*, **48**, pp. 1443–71. Originally published in 48 *UCLA Law Review* 1443 (2001).

Sage Publications Inc for the essay: Sheila T. Murphy (1998), 'The Impact of Factual Versus Fictional Media Portrayals on Cultural Stereotypes', *The Annals of the American Academy*, **560**, pp. 165–78. Copyright © 1998. Reprinted by permission of Sage Publications.

Vermont Law Review for the essay: Philip N. Meyer (1994), '"Desperate for Love": Cinematic Influences Upon a Defendant's Closing Argument to a Jury', *Vermont Law Review*, **18**, pp. 721–49.

Wisconsin Law Review for the essay: Anthony Chase (1986), 'Toward A Legal Theory of Popular Culture', *Wisconsin Law Review*, **3**, pp. 527–69.

The Yale Law Journal Company for the essay: Lawrence M. Friedman (1989), 'Law, Lawyers, and Popular Culture', *Yale Law Journal*, **98**, pp. 1579–606. Reprinted by permission of The Yale Law Journal Company and William S. Hein Company.

Every effort has been made to trace all the copyright holders, but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

Series Preface

The International Library of Essays in Law and Society is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

AUSTIN SARAT
William Nelson Cromwell Professor of Jurisprudence and Political Science
Amherst College

Introduction

> The first rule for understanding the human condition is that [we] live in second-hand worlds . . . Between consciousness and existence stand meanings and designs and communications which other[s] . . . have passed on. (C. Wright Mills)

This book takes as its subject the interpenetration of popular culture and law. It gathers together a broad range of essays that explore the various ways in which law's stories and images migrate from the courtroom to the court of public opinion, and from movie, television, and computer screens back to electronic monitors inside the courtroom itself. It also examines what happens when lawyers and public relations experts market notorious legal cases and controversies as if they were just another commodity. In addition, it probes the formative relationship that is now developing between law and digital culture in virtual worlds on the Internet. Ultimately, this collection of essays invites readers to ponder what the interpenetration of law and popular culture means with respect to the current status and future fate of law, truth, and justice in contemporary society.

The book's central premise may be simply stated. To a significant extent, *what* we think about and *how* we think when we think about law reflects the culture around us. We live today in an era of mass media. Instant communication, rapid image flow, immediate access to global information and a broad range of sophisticated visual literacy skills are increasingly common components of our 'hypermodern' lifestyle.[1] Electronic screens have proliferated in professional, as well as private, domains, and informational uptake has grown apace. We have learned to simultaneously view multiple 'windows' on to the real and the virtual; we have come to accept simulations interspersed with real-life documentation; and we have willingly absorbed narratives with fragmented timelines shaped by non-linear ('associative') forms of logic that flaunt self-reflexive allusions to the interpretive process of meaning making itself. In short, human perception and cognition have rapidly adapted to the nature and demands of new communication technologies – particularly film, television and, more recently, the Internet.

The essays in this volume reflect the transformative impact of these technologies on popular culture and law.[2] For a growing number of individuals today, life on the screen offers a sense of freedom and identity that is not possible elsewhere (Turkle, 1997). As information law scholar Beth Noveck (2004/05) observes, virtual worlds currently used for play and social interaction will soon be widely adopted as spaces for research, education, job recruitment, and work life.[3] Law has already invaded this new media domain (Noveck, 1997; Lastowka and Hunter, Chapter 13, this volume), and the prospect of more law to come, for better or worse, can hardly be gainsaid (Balkin, 2005).

The electronic mass media help to inform not only *what* we know, or think we know, about the world and others around us, including law and legal conflict in general, they also help to shape *the way* in which we know these things. The film and television cameras that bring our world into focus have taken up residence inside our heads. We see through the camera's eye and make sense of what appears on the screen through the logic of popular visual representations.

We absorb from today's mass mediated popular culture a variety of templates for making meaning. Cognitive psychologists refer to these tools for thinking as 'heuristics'. They are the familiar prototypes, scripts, scenarios, plot lines, and character types that quickly come to mind when we 'recognize' a certain kind of person or event.[4] As media scholar George Gerbner puts it, 'Transcending historic barriers of literacy and mobility, television has become the primary source of socialization and everyday information' (Gerbner *et al.*, 1986). And in our media-saturated world, where free markets reign, advertising may be the most important paradigm for communication and persuasion.

Law is not exempt from this historical development. Nor should this be surprising. Lawyers intent on succeeding in the business of persuasion must operate within the available bandwidth of popular culture. This means that they must learn to emulate common patterns of thinking, speaking and seeing. If persuasion is a matter of mobilizing the categories and meaning-making tools that people commonly carry around in their heads, where else would lawyers turn but to the screen? As Philip Meyer writes in Chapter 5, 'jurors seem to make sense out of increasingly complex simulations through references to *other* imagistic stories'. Based on his own in-court observations, Meyer notes that there is a newly emerging, open-ended legal storytelling style that is 'remarkably influenced by the conventions of contemporary popular imagistic storytelling'. In short, the storytelling practices of contemporary popular culture are finding their way into court and the legal culture proper. Indeed, as a matter of everyday practice, legal reality is being visually projected in a variety of ways inside the courtroom: from 'day in the life' documentaries in personal injury lawsuits, to reality-based police surveillance and security videos, to amateur and news journalist videos together with their digitized reconstruction, to computer graphics and digitally reconstructed accidents and crime re-enactments, to video montage as a form of legal argumentation (including the interweaving of commercial feature film footage and evidentiary material from a case file). The latter montage has even replaced an attorney's live summation at trial.[5] The blurring of Hollywood fictions and legal reality is also occurring in the stories told by trial lawyers. Consider the prosecutors in real homicide cases who compare the accused to film characters from Francis Ford Coppola's *The Godfather* or Oliver Stone's *Natural Born Killers*, or the state's attorney who establishes a 'knowing and voluntary' waiver of *Miranda* rights based on the defendant's familiarity with a popular TV show (Kemple, 1995).

The law's assimilation of popular content takes other forms as well. Consider in this regard the movies and television shows that we watch. They tend to cycle and recycle through our minds, and the more compelling among them end up as templates for understanding and belief. This helps explain social phenomena like the so-called 'Perry Mason' effect, referring to the early, highly popular American TV show which led some jurors in real cases to expect to hear a confession from the witness stand at some point during the trial. These jurors experienced doubt when the expected admission of guilt was not forthcoming. Or consider the 'People's Court' phenomenon, referring to the spate of popular American reality judge shows which has led some jurors to conclude that, if the judge is not shouting her scepticism from the bench, she must find the witness on the stand credible. Or consider the more recent 'CSI' phenomenon, referring to a cluster of popular American television shows featuring 'criminal science investigators' armed with new forensic technologies. These shows have led some jurors to experience doubt when the prosecution's science falls short: 'Where's the DNA evidence? Something must be wrong with the state's case.'

Lawyers have no choice but to adapt to the cognitive environment in which they work. By influencing the way in which people think about the legal process, in conformity with the ordering properties of the cognitive programme they happen to be running, popular culture not only affects ordinary expectations about truth and justice in real cases, but also places new demands on legal advocates who feel compelled to meet, or at least offset, popular expectations. When the life of the law imitates art, aesthetics are not ancillary to legal reality; they are constitutive.

In our mass-mediated society, information and entertainment, facts and fictions, real events and strategically constructed media events, real law and artificially contrived folk law intermingle (Haltom and McCann, 2005). This blend of fantasy and reality is not an isolated phenomenon. Recent studies in cognitive psychology have shown that our world-knowledge is often scripted by a mixture of fictional and non-fictional claims (see Gilbert, 1991). We have seen this, for example, when film-makers skilfully emulate popular expectations about what reality looks like on the screen. Consider in this regard the credibility of the home video aesthetic. Several years ago this low-tech style was exploited in a popular American horror film called *The Blair Witch Project*. In this film, three amateur film-makers go off into the woods in search of a fabled witch. The rough, ill-lit images produced by an unsteady camera, off-centre framing and seemingly unscripted exchanges all contributed to an enhanced sense of immediacy and visual truthfulness. What began as a distinct cinematic visual style, however, may have serious consequences outside the realm of popular entertainment, particularly when the chief evidence in a law case is a film. Consider a recent criminal case prompted by an amateur video that was made by a group of college students. They used a camcorder to film what state prosecutors called a kidnapping and assault of a young woman, and what defence lawyers described as nothing more than an amateur horror film. Is it real horror, or is it staged? If this case had gone to trial,[6] a jury would have been called upon to watch and judge for themselves the 'truth' or 'simulation' of what they saw on the screen. This would be a criminal trial that turned on a jury's response to specific aesthetic cues.

Today, savvy lawyers know, and are putting to practical use, what advertisers and politicians have known and practised for quite some time: how to get the message out, how to tailor content to medium, how to spin the image, edit the bite and seize the moment on the screen and in the mind of the viewer (see, for example, Ritter, 2004; also Schmitt, Rogers and Vrotsos, 2004; Ewen, 1996). Lawyers are storytellers, and the best, most compelling stories are the ones that adapt familiar narrative forms featuring recognizable character types driven by ordinary feelings, motives and desires. Advocates who can integrate their case theory into an effective story form and play it out in court within evidentiary constraints, consistent with the applicable law, are more likely to be persuasive before a jury than those who merely present facts and recite black letter rules. The crime and the motive, the negligent act and the pain and suffering that it allegedly caused, the broken promise and the lost profits that resulted – none of these things exists, as a matter of law, unless and until they have been proven, which is to say, until the decision-maker, whether judge or juror, believes them to be so. To succeed in this effort reliance on the strength of deductive and inductive logic alone is not sufficient. Stories must be told, characters evoked, states of mind laid bare. And that requires the fictional method, the imaginary ground plot, the apt image – fruits of the advocate's facility with the raw materials out of which meanings are made, and made to stick in the decision-maker's mind. In short, it requires familiarity with the resources of popular culture (Sherwin, 2000).

But what are the consequences for law and society when popular culture comes to us by way of the screen? How does the shift to visual literacy affect the search for truth and justice both inside the courtroom and in the mass-mediated, global court of public opinion? Of particular concern in this respect is the peculiar efficacy of visual representation and visual persuasion. There are three factors to consider. First, because photograph, film, and video images appear to resemble reality, they tend to arouse cognitive, and especially emotional, responses similar to those aroused by the real thing depicted. Movies, television and other image-based entertainments have overwhelmed text-based media in popularity largely because they seem to simulate reality more thoroughly, engulfing the spectator (or, in the case of interactive computer and video games and immersive virtual environments, the participant) in vivid, lifelike sensations. To the extent that persuasion works through emotion as well as reason, images persuade more effectively than words alone. Second, because images appear to offer a direct, unmediated view of the reality they depict, they tend to be taken as credible representations of that reality. Unlike words, which are obviously constructed by the speaker and thus are understood to be at one remove from the reality they describe, photograph, film and video images (whether analogue or digital) appear to be caused by the external world, without the same degree of human mediation and hence interpretation; images therefore seem to be better evidence for what they purport to depict (Kassin and Dunn, 1997). Third, when images are used to communicate propositional claims at least some of their meaning always remains implicit. Images cannot be reduced to explicit propositions. In this respect, images are well-suited to leaving intended meanings unspoken, as would-be persuaders may prefer to do[7] – especially when evidentiary rules forbid making a given claim explicitly.

Images, therefore, do not simply 'add' to the persuasive force of words; they transform argument and, in so doing, have the capacity to persuade all the more powerfully. Unlike words, which compose linear messages that must be taken in sequentially, at least some of the meaning of images can be grasped all at once. This rapid intelligibility permits visual messages to be greatly condensed (it takes much less time to see a picture than to read a thousand words), and allows the image-creator to communicate one meaning after another in quick succession. Such immediacy of comprehension enhances persuasion. When we think we've received the whole message at once we are disinclined from pursuing the matter further. And increasingly rapid image sequences disable critical thinking because the viewer is too busy attending to the present image to reflect on the last one. For both reasons, the visual message generates less counterargument and is therefore more likely to retain our belief. Images, moreover, convey meaning through an associational logic which operates largely subconsciously and through its appeal to viewers' emotions. Finally, images readily lend themselves to intertextual references that link the communication to other works and other genres, enabling arguments to draw on the audience's presumed familiarity with those other works and genres and thus to appropriate meaning from the culture at large. An audience's pleasure in the familiar, their belief that they are perceiving reality, combined with quick and easy comprehension, make it more fun to watch than to read. And because viewers are occupied and entertained, they are both less able and less willing to respond critically to the persuasive visual message. Hence, the message is more likely to be accepted.

The consequences of disseminating popular culture in a virtual flood of visual images on the screen cannot be confined to America alone. The globalization of commerce has sped the exportation of American popular culture, together with its representations of law and the legal

process. Consider, in this regard, the Canadian nationals who insist on their *Miranda* rights when stopped by Canadian police. Having been virtually 'naturalized' by an inundation of American law films and TV shows they apparently feel entitled to the same constitutional rights and privileges as 'other' American citizens. Or consider German lawyers who rise in court to contest rulings from the bench or who dramatically cross-examine witnesses on the stand. Here, too, the habitual consumption of American popular legal culture, together with the adversarial norms that it embodies, seems to have led some jurists to forget the inquisitorial (non-adversarial, dossier-oriented) character of their own continental legal tradition (see Machura and Ulbrich, 2001). Such developments lead one to speculate whether the transnational appeal of adversarial legal melodrama, a genre prominently featured within Anglo-American popular culture (Clover, 2000), might be reconstituting global common sense about legal process and the search for truth inside the courtroom (Herman and McChesney, 1997).

Assigning meaning and authorizing norms in everyday life are not, and have never been, the exclusive province of law, for this, too, is a principal task of culture. Law draws upon the materials of popular culture just as popular culture draws upon the materials of law. It is appropriate, therefore, for us to ask to what extent and in what ways do law and popular culture share these meaning-making and value-affirming (or value-denying) functions in society (Sarat and Kearns, 2000; Amsterdam and Bruner, 2000; Mezey, 2001; Coombe, 1998)? To be sure, the migration of law stories to the screen is fraught with consequences both for law and for popular culture. As media theorist John Fiske observes, 'The nature or truth of an event is determined in part by the discourse into which it is put, and no event contains its own prescription for the correct discourse by which to know and communicate it' (Fiske, 1996). What establishes a sense of verisimilitude in a given narrative, then, is not simply a matter of correspondence to something in the real world. To a significant extent, it stems from the text's consistency with well-known linguistic or audiovisual usages or cues in a particular social and cultural context at a given moment in time. It behoves us therefore to take seriously the aesthetic forms of legal process and law-making. Popular culture and law converge in both the stories that are being told and the images that are being screened via the mass media. These popular mediations constitute a cultural repository of common knowledge and belief, as well as a common set of tools which we (unconsciously) use to think with.

A basic premise of this volume is that the study, practice and critique of law must now take into account new developments in popular culture and communication technology and the socioeconomic conditions under which popular legal representations are produced and disseminated. Building on critical insights into the construction of legal consciousness in society (see, for example, Ewick and Silbey, 1998), the study of popular culture and law offers a multidisciplinary approach to the reciprocal process of institutional and individual legal meaning-making.

In this collection of essays the interpenetration of law and popular culture is examined from five discrete perspectives.

Law in Popular Culture

In Part I we examine how law is represented in popular culture. After helpfully clearing away some terminological undergrowth, Lawrence Friedman (Chapter 1) sets up the principal task at

hand, namely: to explore 'the manifold connections between the legal system and its surrounding society'. Friedman perceptively addresses the key challenge in confronting the 'web of norms, ideas, attitudes, and opinions' that serves as an intervening variable between social innovation and legal change. Among the factors at work here, according to Friedman, are the multiple inaccuracies that pervade popular legal representations, such as the gross overrepresentation of violent crime and the exaggerations that entertaining legal dramas demand. Nonetheless, popular legal representations influence the way people think about law, lawyers, and legal institutions generally. As Friedman saliently points out, the legitimacy of judicial review itself 'is a question of public opinion – or, more accurately, of popular legal culture'. In this view, the task of understanding the way in which popular culture represents the law, and with what effect, is no idle undertaking. In Chapter 2, Norman Rosenberg's sophisticated analysis of Hollywood film making usefully advances our understanding by laying out the diverse factors involved in the production of popular legal representations. Taking his examples from two film noir classics (*The Big Sleep* (1946) and *Force of Evil* (1948)), Rosenberg leads us to see the 'fragmentary, contingent, and multivocal nature' of these representations. We discover that Hollywood's own legal system – known in the 1940s as 'the Production Code' – is no less a part of the 'law within movies' than its visual and story construction skills and its savvy exploitation of celebrity culture in the quest for audience share. In Chapter 3, Ratna Kapur uses film to explore the relationship between law and sexual identity in contemporary India. Focusing, in particular, on Deepa Mehta's controversial film, *Fire* (1998), Kapur shows how the Indian legal regime has helped to construct and perpetuate popular cultural categories of legitimate and illegitimate sexual identity and speech. Writing as a 'postcolonial feminist intellectual in law living and working in the context of India' (p. 63), Kapur challenges the typically 'anti-Western' status of Indian feminism, and strives to disentangle, on the one hand, notions of Western pop culture as an 'alien contaminant' and, on the other, changing notions of female desire and sexual authenticity. With striking candour, Kapur acknowledges that hers is both a 'project of desire' ('to displace the body in flames with the dancing body in ecstasy') as well as a quest for political and legal reform (p. 64). Her strategy is one of cultural and legal disruption in the face of the false necessities (or 'cultural essentialism') of traditional Indian stereotypes of female sexuality. This critical undertaking enjoys an interesting affinity with the next essay (Chapter 4), Austin Sarat's lucid and moving analysis of American film director Clint Eastwood's depiction of fathers in *A Perfect World* (1993). A number of different images of fatherhood and law emerge from Sarat's treatment of the film. In the course of his analysis, Sarat invites us to 'demythologize' and 'humanize' the symbolic network of power and privilege that has traditionally linked patriarchy and law. Guided by Sarat's sensitive reading of Eastwood's film, we discover that coming to grips with mourning for the ideal father – the perfect world of unproblematic authority, a model law – makes possible new imaginings and ultimately allows a more mature vision to replace our historically ambivalent relationship to law and fatherhood. As in Kapur's essay, Sarat's approach to popular representations of law in film serves as a vehicle for exploring the contingent, and hence non-essential, nature of cultural and legal categories. The essays in Part I thus suggest that popular legal representations may either help solidify popular beliefs or, alternatively, open up a path to new legal and cultural aspirations.

Popular Culture in Law

In Part II we flip the perspective in order to examine the various ways in which popular cultural representations help to shape and inform law in actual legal practices. We begin with Phil Meyer's sharply observed and amusing description of a masterful defence strategy in a complex organized crime case (Chapter 5). Faced with overwhelming evidence linking his client, Louis Failla, to a network of mob activities, defence attorney Jeremiah Donovan turns Failla into a comic 'bumbling mobster wannabe', a character 'who could have stepped from the pages of Damon Runyon' (p. 150). In the course of his compelling, humour-laced, two-hour closing argument, Donovan transforms 'Failla the fool' into 'Failla the Hero'. Meyer shows how Donovan's cinematic, three-act summation created a character 'who existed in a narrated dream state framed by popular cinematic representations of Mafia archetypes and the codefendants in the trial' (p. 167).

Continuing the theme of legal reality imitating the art of film, in the next essay (Chapter 6) I examine how film director Errol Morris's genre-bending documentary, *The Thin Blue Line* (1988), helped to gain the release of Randall Dale Adams, a man who had spent over eight years on death row for the murder of a Dallas policeman. Through one-on-one interviews with actual eyewitnesses, the defendant, the lawyers and the judge who presided over Adams' conviction and sentence to death in the electric chair, Morris in effect restages the trial. This is no ordinary documentary, however. Morris integrates a seamless sequence of fictional re-enactments, both of the crime and the criminal investigation that followed, into an ingenious array of cognitive and cultural cues triggered by stereotyped characters and scenarios. The result is a fine-spun whodunnit, the story of an official frame-up that targeted Adams, the scapegoat 'outsider' and protected the likely killer, local son David Harris.

In Chapter 7, Sheila Murphy skilfully advances the analysis of how jurors, like the rest of us, actively construct legal reality by 'incorporating [their] past memories and expectations as well as the current context'. Referring to a host of recent and classic studies in cognitive psychology, Murphy demonstrates that there is no pure, unmediated act of perception. Ordinary perception and cognition are typically made up of a web of inherited categories and prejudgements. Sounding an optimistic note, she maintains that 'disconfirming information' can be effective in countering the strategic manipulation of cultural stereotypes based on race, gender, or cultural origin. In a less sanguine vein, however, she also acknowledges that mass media portrayals, particularly fictitious ones, may exacerbate gender or other group-based prejudices.

In the final essay in Part II Steven Lubet reaches back to the historic origins of the classic American gunslinger archetype. Challenging the popular Western film image of the quick-draw ('slap-leather') gun duel, Lubet notes that '[c]ontrary to cinematic imagery, the [post-Civil War American] Wild West was not devoid of law and order' (p. 241). To clinch his point, Lubet recounts the fascinating and ironic fate of the iconic 'dime-store' Western hero, James Butler ('Wild Bill') Hickok. Wild Bill was in fact tried in 1865 for the death of Davis Tutt, a former friend, whom Hickok gunned down in a shoot-out involving a personal insult rooted in a dispute over a woman. Wild Bill argued self-defence. Faced with a choice between the written law (which says that self-defence requires a desire to avoid conflict) and the unwritten law of the frontier – which says 'a man is not compelled to stand with his arms folded until it is too late' (p. 245) – the jurors apparently opted for the latter. They voted to acquit him. Having

escaped the hangman's rope, Wild Bill Hickok and his gunfighting exploits subsequently became the stuff of popular culture legend. Did the jury's acquittal *reflect* the popular folklore of the Wild West or did it help to *create* it? Regardless of how one answers this particular question, the essays in Part II leave no doubt that popular culture helps shape and inform legal reality.

Law as Commodity

In Part III we examine law's emulation of mass culture in its strategic use of marketing and public relations techniques, including the dissemination of folklore and the staging of media events to advance particular legal interests and preferences. Douglas Reed (Chapter 9) leads off with a highly original political and cultural analysis that features a broadly applicable category: the 'juridico-entertainment complex'. According to Reed, this new constitutional regime 'transforms legal proceedings and legal conflict into consumable commodities that purport to educate and enlighten, but simultaneously titillate, amuse, and otherwise entertain a mass audience' (p. 253). Reed describes this complex of extra-judicial norms and practices as a 'constitutional regime' in light of its apparent ability to organize, control, deploy and maintain power over the governing process. Fusing education with entertainment, the juridico-entertainment complex gains political influence with the help of a discrete class of professional analysts. They range from television pundits to political pollsters who interpret public reactions to pop cultural episodes of legal drama. According to Reed, the mass media's commodification of legal and political reality inaugurates a transformation of governance into a species of mass entertainment.

We proceed next to Susanne Roschwalb's and Richard Stack's primer on litigation public relations. Their essay (Chapter 10) clearly sets out the various ways in which professionals in public relations use 'communication strategies to influence public opinion' (p. 269) – particularly in reference to notorious (that is, highly publicized) legal controversies. In addition to helping to construct mass media images for particular parties in a specific legal controversy, communication professionals also help to design public media campaigns in support of special legal interests and policies. One such example, as we see in the next essay by Marc Galanter (Chapter 11), is the American 'tort reform' movement, which was organized by legal and media professionals, among others, to limit the damage awards that corporate defendants face in civil lawsuits. According to Galanter, numerous 'legal legends' (or popular folklore) have been strategically disseminated in the mass media by corporate agents and professional think tanks in order to advance their special interests in the court of public opinion. So-called 'atrocity stories' (p. 298), involving distorted facts in personal injury cases, for example, help set the public mood regarding 'irresponsible victims' and their 'greedy tort lawyers' who help to perpetuate an alleged 'litigation crisis'. The skilful mapping of these popular stereotypes on to a readily available class of 'villains' has proven an effective tool in helping to shape American public opinion.

In the final essay in Part III Daniel Filler (Chapter 12) draws our attention to a new development within the juridico-entertainment complex: namely, the transformation of judicial opinions and other official legal documents into marketable, entertaining content. As an example of this mass market phenomenon, Filler examines the bestselling indictment that launched the impeachment, in 1998, of President Bill Clinton, entitled *Communication from Kenneth W. Starr, Independent Counsel Transmitting a Referral to the United States House of Representatives*

Filed in Conformity with the Requirements of Title 28, United States Code Section 595(c) (popularly known as the *Starr Report*). The report's insistently racy style – replete with explicit references to unbuttoned dresses, stimulated genitalia and multiple orgasms – ensured its popularity in the marketplace worldwide. This commercial success was managed in this case, as well as others involving legal documents, by the authors' deliberate appropriation of fiction techniques which transformed the legal material in question into saleable, popular cultural artifacts for the general public. As Filler appropriately cautions in his closing analysis, when law becomes a consumable commodity targeting the public on the strength of its entertainment value, the temptation to 'promote a client's agenda, the opportunity to shape public perceptions of lawyers and the law, the possibility of tainting a jury pool, and even the attractive potential of personal gain' (p. 354) cannot be discounted.

Law in Cyberspace

In Part IV we turn to yet another cutting-edge dimension of the relationship between law and popular culture: namely, how law is adapting to new markets and new pop cultural lifestyles in cyberspace. Of particular interest in this regard is the emerging legal order in virtual worlds. Greg Lastowka and Dan Hunter open this Part with an impressive survey of the range of legal issues presented by the unprecedented migration into virtual worlds. After presenting a brief history and description of virtual worlds, the authors pursue two central legal questions, namely: (1) whether virtual objects might be understood as constituting legal property; and (2) whether democracy and government are concepts that might be applied meaningfully to social conflicts that arise within virtual worlds. The authors conclude that property interests in virtual assets are legally indistinguishable from other legally recognized property interests. They express some scepticism, however, about the ability of real-world rules to allocate these rights. Whether virtual worlds will be self-governing in accordance with indigenous norms or norms imported from 'real-life' law, in their view, still remains an open question.

This is followed by Jack Balkin's exploration of the implications of the digital revolution with regard to the way in which we understand and practise free speech. According to Balkin, by broadly promulgating sweeping new powers over the organization and capture of information, digital technologies have radically altered the social conditions of speech. In response, he offers a theory of free speech that takes these new conditions into account. After guiding us through a systematic rethinking of the meaning of robust democracy in the digital age, Balkin challenges the disparagement of popular culture that one often encounters in traditional political theories of free speech. As an alternative, Balkin's theory restores popular culture to its proper role as part of a strong, highly participatory, democratic society. In a magisterial and succinct assessment of the current situation, he states: 'Freedom of speech is becoming a generalized right against economic regulation of the information industries. Property is becoming the right of the information industries to control how ordinary people use digital content.' Having concluded that we are now living through a 'Second Gilded Age', Balkin ends on a note of caution concerning the risk to basic rights of free speech and property that we all face.

In Part IV we learn that the possibility of realizing (or stifling) the technologically enabled democratization of popular culture has now become one of the pivotal legal and political issues of our time.

Popular Culture and Law in Theory

The last two essays, in Part V, tackle the question, how does one think and talk about popular culture and law in theory? The response to this challenge begins with Christopher Buccafusco's perceptive analysis of recent scholarship from Visual Culture Studies (Chapter 15). Buccafusco describes the diverse methodologies and multidisciplinary nature of this technologically updated critical approach to popular culture. He also usefully explores the radical shift from Renaissance perspectivism that new digital technologies have helped to bring about. The ensuing collision between old and new measures for truth acquires special salience in the context of admitting visual evidence at trial – an increasingly pervasive development. Buccafusco's exploration of this legal context successfully integrates key notions of contemporary critical theory (regarding the various ways in which we construct meaning in everyday life) with the practical demands of legal practice. It is precisely this goal that Anthony Chase, in a path-breaking essay written nearly two decades ago, exhorted legal theorists to realize. It is fitting, therefore, that we close this final Part with one of the earliest efforts to recognize popular culture and law as an authentic and fruitful field of study. Looking back now, from a point in time that has witnessed the apparent exhaustion of the Critical Legal Studies movement's contribution to our understanding of law and the legal mind, allows a fuller appreciation of the prescience of Chase's ideas. In his attempt to enrich critical theory, and perhaps also increase its relevance, Chase struggled to counter its characteristic preoccupation with disembodied abstractions. His objective was to redirect critical legal theorists' attention to the concrete particularities of everyday life, particularly the life of popular culture. Chase's early effort to accumulate 'popular culture's raw materials', to stockpile 'the formats of mass culture through which images of and ideas about law and lawyers are generated', has been followed by others and, as Chase predicted, it has proven to be a fruitful effort (see, further, Sherwin, 1992).

Conclusion

Over the last decade or so, a new critical empiricism has emerged. It is being undertaken by scholars of law and culture who have, as Chase urged, 'gotten out of the library' and into the field. As part of an inspiring and highly edifying, multidisciplinary group of like-minded colleagues committed to precisely this kind of pragmatic, bottom-up approach to theory, I expressed some years ago what I then took, and still believe, to be an insight that lies at the heart of the effort to rethink the relationship between law and culture:

> The shift from analytic philosophy to narrative (the so-called 'interpretive turn') is now directing us to new sources of knowledge not only about the different ways in which we experience ourselves, others, and the social and natural world around us, but also about the nature of the human mind, how it operates in the construction of meaning and reality, and how social and cultural forms of expression help determine the way we think, speak, and feel about events in the world. (Sherwin, 1992, pp. 14–15)

This volume's multifaceted exploration of the interpenetration of popular culture and law represents an outgrowth of the theoretical enterprise that began with Legal Realism in the 1920s and 1930s and has since gained momentum from insights provided by critical legal

studies, law and literature, legal feminism, critical race studies, lawyering theory and, more recently, visual culture studies. These elements are part and parcel of the newly emerging field called law and popular culture studies, a movement intent on mobilizing a broad range of interdisciplinary tools in the service of applied theory. A central goal of this effort is to gain a better understanding of the cognitive, cultural and rhetorical models that people use – lawyers and law teachers, judges and jurors, laypeople and experts – to communicate, dispute, and perhaps also change the way in which we understand and practise law in our time.

Notes

1 See Aubert (2004, p. 16) who characterizes the 'hypermodern individual' as burdened with a sense of excess, fragmentation, and uncertainty; see also Virilio (1980).
2 Popular culture studies typically range across a broad spectrum of topics, from soap operas and sitcoms to fan magazines, comics and music videos. The emerging scholarly movement known as 'popular (or "cultural") legal studies' also embraces a variety of subjects, including law and literature, law and journalism, law and sports and law and music. This volume's focus on visual mass media (especially film and television), public relations and the Internet (including the popular culture of virtual worlds) reflects the belief that these are the most salient and fertile topics in the field today. 'Law and literature' has been well represented elsewhere; accordingly, it receives only tangential treatment in these pages. See, for example, Dolin (1999); Aristodemou (2000). See also Binder and Weisberg (2000).
3 Noveck (2004–05) notes that 20–30 million regular participants spend more time in virtual societies than on the job or in their own communities.
4 When Czech supermodel Petra Nemcova spoke to the media, in December 2004, about how she survived the powerful tsunami that swept through Phuket, Thailand, where she had been vacationing, she described the disaster scene as being 'like a war movie'. See Gabler (1999). See also Gerrig (1993).
5 *Standard Chartered PLC* v. *Price Waterhouse*, CV 88–34414 (Super Ct, Maricopa County, Arizona 1989).
6 According to Elba County, Michigan Prosecutor Byron Konschuh, the defendants in this criminal case chose to plead guilty to attempted kidnapping and felonious assault. They spent two months in jail. Apparently, the defendants could not get their story straight. Only one of them asserted the 'amateur horror movie' defence. When one of the defendants pleaded guilty this prompted the others to follow suit. (Telephone conversation with Byron Konschuh, 1 March 2004).
7 For example, in his 1988 presidential campaign, George Bush ran television ads accusing his opponent, Governor Michael Dukakis, of being soft on crime. The ads prominently featured the face of an African-American man named Willie Horton, a convicted murderer who raped a white woman and stabbed her fiancé while on furlough from a Massachusetts prison. A number of commentators believed that the Bush campaign was playing upon racial fears by using Horton's face as a symbol of the threat that black males posed to innocent whites. See Estrich (1989). See generally Messaris (1997).

References

Amsterdam, Anthony G. and Bruner, Jerome (2000), *Minding the Law*, Cambridge, MA: Harvard University Press.
Aristodemou, Maria (2000), *Law and Literature*, Oxford: Oxford University Press.
Aubert, Nicole (2004), *L'individu hypermoderne*, Ramonville: Editions Eres.
Balkin, Jack (2005), 'Law and Liberty in Virtual Worlds', *New York Law School Law Review*, **49**, pp. 63–80.
Binder, Guyora and Weisberg, Robert (2000), *Literary Criticisms of the Law*, Princeton, NJ: Princeton University Press.