

ARTICLES

LINKS AND CHOICES: POPULAR LEGAL CULTURE IN THE WORK OF LAWRENCE M. FRIEDMAN

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ABSTRACT

In 1989, Lawrence M. Friedman published *Law, Lawyers and Popular Culture*. Based in part on James Willard Hurst's idea that markets create a social aggregate of behavior that shapes law, Friedman's article offered one of the earliest arguments for the use of popular culture as a source of material for the study of law. According to Friedman, popular legal culture (a social aggregate of opinion about law) was both shaped by law and had the power to shape law. Thus, legal culture (opinions people hold about law), popular culture (mass generated opinions, norms and values held by people), and popular legal culture (mass generated opinions, norms, and values about law and lawyers)—because they represented public opinion—could provide a rich trove of information about how law is regarded by consumers of the legal system. But, Friedman warned, accessing this information required more than just a claim of influence; it required a social theory. To that end, Friedman proposed a three-pronged social theory for the study of law and popular culture that turned on three ideas: (1) explanations about law exist both inside and outside the legal system; (2) boundaries of law are porous and permeable to exchanged information; and (3) law is a dependent variable in a greater social system of other dependent variables. This paper considers Friedman's social theory and places it into a broader context of scholarship on the same topic.

I. INTRODUCTION: LOOKING FOR POPULAR LEGAL CULTURE

At a law school orientation, a professor of criminal law stood up to introduce himself. A few minutes into his introductory remarks the

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professor said, “Close your eyes. Count the number of television shows you’ve watched that deal with criminal law. You have ten seconds.”

After ten seconds the professor asked, “how many of you can think of at least one program?” All hands went up.

“How many of you can name five programs?” About one-third of the hands in a room of ninety-plus students remained in the air.

“How many of you can think of ten programs?” The students broke into laughter.

The professor conducted this exercise to illustrate that while the students might not yet know how to define a tort (“not a fruit pie”) or real property (“distinct from fake property”), they knew something about the criminal justice system because they had seen it represented on television.

Today, asking a lay person whether he or she is familiar with the criminal law system is like asking: “Have you watched TV shows about police, crime, or criminal cases?” TV mediates even the experience of the squeaky clean with the criminal justice system. And it is not just the message; it is also the medium as demonstrated by the efforts of trial lawyers to rely more on hypertexting sorts of visual/cultural logic rather than on the linear textual logic of old.¹ During the O.J. Simpson murder trial for example, prosecutor Marcia Clark cited the Walt Disney song “A Dream is a Wish Your Heart Makes;” Clark wanted the jury to hear that Simpson had once dreamed (as in Rapid Eye Movement sleep) about killing his wife Nicole.² A recent *Monk* episode imitates Clark’s Simpson trial move when a successful rapper named Murderuss (Snoop Dog) complains that he is a suspect in the murder of his rival Extra Large (Marcello Thedford) partly because he rapped about a dream (as in REM sleep) that he had about killing Extra Large.³

After attorney Joseph Cotchett won an initial \$3.3 billion verdict against Charles H. Keating Jr. on behalf of 23,000 bondholders in the 1980s Lincoln Savings and Loan scandal, Cotchett reportedly began coaching big-verdict trial attorneys on how best to sway a jury with visual images.⁴ Cotchett explained that he relied on visual images because the general public—the population from which the jury is pooled—watches four to six hours of television a day, meaning that jurors tend to feel more comfortable with visual images than with text.⁵

In my view, the criminal law professor’s use of popular culture in his law school orientation stalled. And it stalled for one important reason. The

¹ RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 18 (2000) [hereinafter SHERWIN, WHEN LAW GOES POP].

² Alan M. Dershowitz, *Life is Not a Dramatic Narrative*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 104, 99 (Peter Brooks & Paul Gewirtz eds., 1996).

³ *Mr. Monk and the Rapper* (#602), (USA Network television broadcast July 20, 2007) (episode overview available at http://www.usanetwork.com/series/monk/theshow/episodeguide/episodes/s6_rapper/index.html, last visited on Aug. 9, 2007).

⁴ SHERWIN, WHEN LAW GOES POP, *supra* note 1, at 18–19. See also Cotchett, Pitre & McCarthy, *Lawyers*, available at <http://www.cpsmlaw.com/profiles/cotchett.html> (last visited Aug. 2, 2007).

⁵ SHERWIN, WHEN LAW GOES POP, *supra* note 1, at 18–19. See generally Richard K. Sherwin, *Nomos and Cinema*, 48 UCLA L. REV. 1519 (2001) [hereinafter Sherwin, *Nomos and Cinema*].

students had been asked to imagine law's connection to culture, but when they opened their eyes their professor reassured them that despite any talk of TV, he would be the kind of professor who taught "real law" in the form of "real rules." This contrast between the professor's views on popular culture and his views on the role of legal scholarship implicitly reaffirmed for the students the message that law is an autonomous, textual, logical domain that provides answers to legal questions in the form of rules.⁶ This is indeed a professional approach. Yet there is a longstanding, still growing body of literature and practice that challenges the idea of law as an autonomous domain.⁷ Moreover, since the publication of Friedman's article, *Law, Lawyers, and Popular Culture*,⁸ this literature has spawned a subdiscipline of scholarship that takes seriously the relationship between law and culture, and more specifically the relationship between legal meanings and the visual logic of film and TV.⁹

II. LAW AND POPULAR CULTURE

Law, Lawyers, and Popular Culture argues that while scholars understand that popular culture represents and influences law, they are at a loss to explain why popular culture's representation of law is important, or how the popular culture/law relationship works. This sort of explanation, in Friedman's view, would require that legal scholarship be a different enterprise than it tends to be. It would need to move away from its practical focus on reform, and toward a more intellectual focus on social theory. It would also need to shift its view of law as an autonomous—or even partly autonomous—domain and consider more seriously the way in which law is porous and malleable. Friedman thought that over time this shift in focus might press legal scholarship to examine *how and why* law and (popular) culture shape and globalize each other—not to just assert that they do.

⁶ PAUL KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 18–30 (1999).

⁷ For a recent compilation of some of the most heavily cited literature, see, e.g., CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM (Austin Sarat & Jonathon Simon eds., 2003).

⁸ Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L. J. 1579 (1989) [hereinafter Friedman, *Law, Lawyers, and Popular Culture*].

⁹ SHERWIN, WHEN LAW GOES POP, *supra* note 1, at 19–25. An Aug. 10, 2007 Key Cited, Shepardized search for *Law, Lawyers and Popular Culture*, 98 YALE L.J. 1579 (1989) in both the Lexis and Westlaw databases resulted in eighty-one law review articles in the United States (one written in Spanish) and two articles in Canada, for a total of eighty-three law review citations on the topic of law and popular culture. For a partial list, see generally, e.g., Sherwin, *Nomos and Cinema*, *supra* note 5, at 1519 (2001); Richard K. Sherwin, *Law/Media/Culture: Legal Meaning in the Age of Images*, 43 N.Y.L. SCH. L. REV. 653, 653–54 (1999–2000) [hereinafter Sherwin, *Law/Media/Culture*] (discussing the use of visual evidence in, at, and for trial); Carolyn Lisa Miller, *What a Waste. Beautiful. Sexy Gal. Hell of a Lawyer*, 4 COLUM. J. GENDER & L. 203 (1994) (analyzing film so as to revisit and revise images of female attorneys in film); Daniel J. Steinbock, *Refuge and Resistance: Casablanca's Lessons for Refugee Law*, 7 GEO. IMMIGR. L.J. 649 (1993) (examining *Casablanca's* themes of flight, sanctuary, and resistance for persons seeking asylum); Naomi Mezey, *Legal Radicals in Madonna's Closet: The Influence of Identity Politics, Popular Culture, and a New Generation on Critical Legal Studies*, 46 STAN. L. REV. 1835 (1994) (reviewing DUNCAN KENNEDY, *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (1993)); Jeffrey E. Thomas, *Harry Potter and the Law*, 12 TEX. WESLEYAN L. REV. 427 (2005) (examining the role of individual accountability in Rowling's magical world where law and legal institutions are depicted negatively and satirically).

Friedman's article turns on the idea that culture and law are distinct yet interrelated phenomena.¹⁰ According to Friedman, law has its own culture—a legal culture that can interact with media to transform popular images into “legal dress and shape.”¹¹ Film, for example, identifies issues with mass appeal, and legal culture responds by delivering a professionally recognized version of these issues to legal professionals (and vice versa).¹² The same is increasingly true of advertising, which responds to pop culture news of the day so as to influence mass-market consumers.¹³ Legal culture and popular culture get linked—in Friedman's argument—when they translate, transmit, and explain each other's content.¹⁴ The important task for scholars who want to move beyond the current boundary of legal scholarship, then, is to explain not just that this link happens (an observation about influence) but how it happens (a social theory).¹⁵

Law, Lawyers, and Popular Culture was published at a time when legal scholarship was viewed by many of its practitioners as a reform driven discourse whose primary purpose was to clarify legal rules and doctrines for judges and lawyers.¹⁶ In most law schools, legal scholarship was a professional endeavor, not an academic discipline. Law meant professionals talking to other professionals about law as an autonomous or partly autonomous domain with impermeable boundaries. Legal scholars developed the law, or identified sites in need of reform, but other than that, their disciplinary methods imposed no clear duty on them to move toward an understanding of why law functions the way it does in society.¹⁷ Law and legal scholarship were an insider's game, weapons in the greater political battle, not tools with which to expand knowledge. Legal scholarship did little to explain why law moved as it did in the market place or the theatre or other venues of society.¹⁸

¹⁰ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1579.

¹¹ See *id.*; LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 4 (1990) [hereinafter FRIEDMAN, *THE REPUBLIC OF CHOICE*] (defining popular legal culture as “people's ideas, attitudes and expectations about law and legal process. Out of the legal culture flow lines of force, pressures, and demands that envelope legal institutions and ultimately determine their shape.”). See generally *LAW AND POPULAR CULTURE* (Michael Freeman ed., 2004).

¹² See, e.g., Daniel J. Steinbock, *supra* note 9, at 12.

¹³ SHERWIN, *WHEN LAW GOES POP*, *supra* note 1, at 4, 26–29 (discussing how advertising increasingly influences how law is practiced). “Legal meanings are flattening out as they yield to the compelling visual logic of film and TV images and the market forces that fuel their production.” *Id.* at 4.

¹⁴ Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8; Lawrence M. Friedman & Issachar Rosen-Zvi, *Illegal Fictions: Mystery Novels and the Popular Image of Crime*, 48 *UCLA L. REV.* 1411, 1412 (2001). See also SHERWIN, *WHEN LAW GOES POP*, *supra* note 1, at 4, 26–29 (asserting that “law is a co-producer of popular culture.”).

¹⁵ Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1583.

¹⁶ See, e.g., *id.* See also KAHN, *supra* note 6.

¹⁷ See also Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 *Ratio Juris* 117, 129 (1994) [hereinafter Friedman, *Modern Legal Culture*] (“The job of the law and society tradition is to understand how legal systems work, and what their place is in society. Nobody is likely to disagree with this simple, rather banal goal. But in practice, as I have said, many legal scholars—including some who consider themselves part of the law and society tradition—seem far more interested in what they call ‘theory,’ that is, ideas about law in society, philosophical attitudes toward the subject, exposition of the thought of great thinkers, and, in short, the intellectual history of the subject, rather than the subject itself.”).

¹⁸ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1605–06; KAHN, *supra* note 6, at 19.

This meant that traditional legal scholars sought to “mak[e] a claim as to what the law is or should become,” not to look to culture for information about how law might intersect with other domains in society.¹⁹ When social norms were cited, as in the criminal law professor’s law school orientation lecture, those citations lacked a useful theory for linking law with culture. At the theoretical site that legal scholars tended to value, law and culture were separate, unrelated domains.²⁰ So too were law and popular culture.

It is not as if Friedman’s article appeared in a vacuum since the idea that legal scholars, as academics, would make an effort to understand law rather than to practice it was decades strong in interdisciplinary legal scholarship.²¹ Nor was the interdisciplinary study of legal culture a new concept. Friedman was in no sense the first to link law and culture, though he was likely the first in legal literature to use the phrase to refer to the influence of the social aggregate of individuals on the formation of law.²² Nevertheless, there was at the time a lack of strong support for the idea that scholars could look at law as an intellectual pursuit—what Friedman called “understanding Leviathan”—and considerably more support for legal study as a practical, reform-driven, quasi-judicial, normative pursuit with a focus on internal explanations.²³ Rather than describing why Leviathan did what it did, legal scholars—having been duly swallowed—were busy describing the good and bad parts of Leviathan’s belly.

Thus it was Friedman—with *Law, Lawyers, and Popular Culture*—who expanded the universe of possible source material for legal scholarship beyond what it had been previously. In 1969, he linked legal culture to social development.²⁴ In 1989, he expanded the view, this time beyond economics, beyond markets, beyond literature, narrative theory, anthropology, and sociology, to the derided phenomenon (not even a field) of popular culture: swimming pools and movie stars.²⁵ Whereas *Legal Culture and Social Development* gave scholars a reason and a way to take culture seriously, *Law, Lawyers, and Popular Culture* gave legal scholars a reason and a way to take popular culture seriously. Even more importantly, *Law, Lawyers, and Popular Culture* sidestepped law and literature by

¹⁹ See KAHN, *supra* note 6.

²⁰ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1583, 1606; Mark Kessler, *Lawyers and Social Change in the Postmodern World*, 29 LAW & SOC’Y REV. 769, 774 (1995).

²¹ Austin Sarat, *Book Review: Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129, 132–33 (2000) [hereinafter Sarat, *Book Review*].

²² A HeinOnline search of the phrase “legal culture” resulted in well over one thousand citations, with the earliest usage of the phrase in the period 1870–1880, but Friedman appears to have been the first to use the phrase when speaking of a modern legal culture. See Lawrence M. Friedman, *Legal Culture and Social Development*, 4 LAW & SOC’Y REV. 29, 30 (1969) [hereinafter Friedman, *Legal Culture*] (noting a “freshborn field, which aims to explore general connections between law, culture, and development,” that at the time “so far lack[ed] a name and shape of its own”).

²³ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1583, 1605 (“The people inside and the people outside judge law in terms of good and bad, right and wrong. Hence it is not easy to disentangle legal scholarship from its compulsive normativity.”); Friedman, *Modern Legal Culture*, *supra* note 17, at 117–18 (arguing, in an essay, to “introduce the concept of legal culture,” that “[o]rthodox legal scholarship tends to be strongly normative; it is interested in labeling this or that practice of doctrine as right or wrong, valid or invalid.”).

²⁴ See Friedman, *Legal Culture*, *supra* note 22, at 30.

²⁵ Search results, *supra* note 9.

speaking to those scholars whose exposure to the cultural imagination came in the form of popular films, television shows, and popular fiction (the kind of materials consumed by lawyers in sabbath-like states of respite from the demands of law), not in the form of classic novels studied in English departments.²⁶

By the time such works as Paul W. Kahn's *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP*²⁷ or Richard Sherwin's *WHEN LAW GOES POP*²⁸ were published, Friedman's legal culture concept was well-integrated in the law and society tradition and in legal culture in general.²⁹ Yet Kahn's book argued that "the culture of law's rule," what Kahn also referred to as "the legal imagination," ought to be studied "in the same way as other cultures."³⁰ Sherwin's book urged scholars to adopt an epistemological shift that he called, among other things, "affirmative postmodernism."³¹ Critical of a "jurisprudence of appearances," Sherwin expressed a strong concern that the flattened images of popular culture, which were already so enmeshed with law as to be seemingly inseparable by the lay person, posed a direct challenge to law's institutional legitimacy.³²

Skeptical about the intellectual possibilities of traditional legal scholarship in a world where "control is exercised through an economy that no single institution or state manages," Kahn advocated an interdisciplinary approach. However, when his idea to study law as one would study another culture morphed into an architectural/genealogical approach in the form of eight rather fixed methodological rules, his book boomeranged back to the traditional view of law as an autonomous entity, this time in the form of a building or a line of descent.³³ Additionally, rather than acknowledge that he was joining an existing field, Kahn suggested—much in the conventional rhetoric of mainstream legal scholarship—that he was

²⁶ Cf. Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 *LAW & SOC. INQUIRY* 139, 141-42 (2002) (identifying the roots of the study of law and popular legal culture with the law and literature movement by citing Richard Posner).

²⁷ KAHN, *supra* note 6.

²⁸ SHERWIN, *WHEN LAW GOES POP*, *supra* note 1.

²⁹ See authorities cited in note 22, *supra*.

³⁰ See KAHN, *supra* note 6, at 1, 135 ("To understand the power of the law, we must stop looking so much at the commands of legal institutions and start looking at the legal imagination.")

³¹ See SHERWIN, *WHEN LAW GOES POP*, *supra* note 1, at 205, 235 (describing his method, at p. 205, as "affirmative postmodernism" and, at p. 235, as "a highly contextualized approach to law . . . [that is] postmodern theory, of the affirmative kind").

³² See SHERWIN, *WHEN LAW GOES POP*, *supra* note 1, at 226, 246-47 ("In short, what we are dealing with here is a fundamental epistemological shift."). See also Silbey, *supra* note 26, at 139 (understanding Sherwin to argue that "popular culture and law do not mix, or at least they should not mix.").

³³ See KAHN, *supra* note 6, at 1, 91-127. Cf. Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1580 ("Popular culture and popular legal culture, in the first sense, are of fundamental importance in constructing *social* theories of law. By social theories of law, I mean theories of law whose premises deny, altogether or in part, any notion of legal 'autonomy.'"). "Nor are social theories necessarily vulnerable to the charge that they (unrealistically) assume a radical distinction between 'law' and 'society,' instead of recognizing the two are separable, intertwined, faces of the same coin If anything, it is the believers in the autonomous system who are open to this criticism; after all, they, and not social theorists, are the ones who insist most loudly on the radical separation of law from the social matrix." *Id.* at 1583.

inventing one.³⁴ Sherwin's book, for its part, took seriously the relationship between law and popular culture, but only as a way to urge scholars to study law, culture, and media "from a broadly interdisciplinary perspective" for the instrumentalist purpose of protecting the public.³⁵ Other than stress "enhanced awareness of contingency, chance, uncertainty, and multiplicity (of truth and reason and of self and social reality)"—an anthropological approach—Sherwin's approach called for a return to the traditional method where law was an autonomous entity worth shielding from the distorting tendencies of (popular) culture.³⁶

In at least three important ways, Friedman's work demonstrated an internal consistency in its approach to culture that neither Kahn's nor Sherwin's book did. First, Friedman used his mid-1990s publications to explore culture as a pervasive force, one that was entirely up for grabs but still located inside—if not in reaction to—local practices and social relations.³⁷ Friedman repeatedly developed the point that law in modern society was growing increasingly dense and ubiquitous (thus leaving fewer gaps) as it got imagined and re-imagined by a legal culture characterized by modern individualism and public opinion.³⁸ By contrast, Kahn's book, despite a concluding assertion that political life is so fluid that courts cannot command its form, managed to analyze legal scholarship's limits from within a form of law that was nevertheless well-bounded by doctrinal perspectives, principles, arguments, calls for reform, and, at the fringes, traditionalist interdisciplinarian critiques of law like those offered by Richard Posner.³⁹ Sherwin's approach was equally promising at the start, but it stumbled in its concern about re-securing law's legitimacy, which for Sherwin meant re-labeling the traditional pole—where law was autonomous—as a new (and improved) postmodern pole.⁴⁰ Additionally, despite a nod to the importance of finding law "in the multitude of ordinary

³⁴ See, e.g., KAHN, *supra* note 6, at 1 ("There is remarkably little study of the culture of the rule of law itself as a distinct way of understanding and perceiving meaning in the events of our political and social life."). Yet, Kahn is skeptical of the ways in which the rule of law can be taught as radically separate from the social matrix—see the quote: "[o]nly law students believe that the courts are about to remake the family on the basis of a new reading of the Thirteenth or Fourteenth Amendment, intervene in the political process to lessen the impact of wealth, or demand a greater redistribution of resources to the least well-off." *Id.* at 130. See also Sarat, *Book Review*, *supra* note 21, at 133.

³⁵ See SHERWIN, WHEN LAW GOES POP, *supra* note 1, at 235 ("Law, culture, and media interpenetrate and co-constitute one another. They need to be studied from a broadly interdisciplinary perspective."). Cf. Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1605 ("[I]t is not easy to disentangle legal scholarship from its compulsive normativity.").

³⁶ See SHERWIN, WHEN LAW GOES POP, *supra* note 1, at 38–39. Cf. Friedman, *supra* note 8, at 1582 ("Social theories can be, and usually are, deeply aware of emotion, opinion, and the fact of consciousness; and some social theories—the more anthropological ones, for example—are fixated to a fault on culture and consciousness.").

³⁷ In this regard, Friedman's view is consistent with the view expressed by James Clifford, *Introduction: Partial Truths*, in WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY 6 (James Clifford & George E. Marcus eds., 1986) (defining culture in an anti-essential sense as "domains for the playing out of experimental, avant-garde transgressions [that] have no essential or eternal status [as they are] changing and contestable.").

³⁸ See LAWRENCE M. FRIEDMAN, THE HORIZONTAL SOCIETY 41 (1999) [hereinafter FRIEDMAN, THE HORIZONTAL SOCIETY].

³⁹ See KAHN, *supra* note 6, at 1, 91–97 (providing that "[t]he culture of law's rule needs to be studied in the same way as other cultures. Each has its founding myths, its necessary beliefs, and its reasons that are internal to its own norms." Additionally, he asserts his first methodological rule: "the rule of law is not a failed form of something other than itself.").

⁴⁰ See SHERWIN, WHEN LAW GOES POP, *supra* note 1, at 254.

decisions at the microlevel of everyday transactions”—a comment that could have warranted a citation to any number of law and society scholars including Friedman—Kahn advocated studying law as if one were doing anthropological field work in Washington, D.C.,⁴¹ where the Supreme Court and the U.S. Congress sit, not in the trial courts of Wisconsin⁴² or of Alameda County, California,⁴³ or in the aisles of one’s favorite grocery store,⁴⁴ and certainly not in cheap horror movies.⁴⁵ Sherwin, for his part, studied movies, but mostly as a way of illustrating how flatly they portrayed law and legal institutions.⁴⁶

Second, Friedman’s work started from the point of studying law as a socio-cultural phenomenon. He spent little time, if any, addressing the traditions or limits of legal scholarship, which (at least to my reading) he took as somewhat obvious, especially to scholars from other fields and legal scholars with a bent toward other fields.⁴⁷ Kahn, by contrast, grounded his discussion in an implicit view of law as an autonomous entity, and thus of culture as its equally autonomous twin.⁴⁸ Indeed, Kahn’s eight methodological rules, though intended to set out the parameters of what he called the culture of law or “the legal imagination,” in the end sounded much like traditional legal scholarship where law was autonomous and independent (or at least mostly so) and where the most and best answers could be found inside the legal system itself.⁴⁹

Third, for Friedman, the idea of culture was so powerful as to be fixed and anti-essential, agreed upon and yet contested, certain and yet ephemeral, total and yet partial.⁵⁰ Culture was deeply affected by global

⁴¹ See KAHN, *supra* note 6, at 92 (“If we came to our legal culture from outside, as if we were members of a truly different culture doing anthropological field work in Washington D.C., it would make no sense to say that the meanings apparent under law’s rule were only a partial realization of some other set of ideals.”).

⁴² See, e.g., JAMES WILLARD HURST, *LAW AND MARKETS IN UNITED STATES HISTORY: DIFFERENT MODES OF BARGAINING AMONG INTERESTS* (1982) [hereinafter HURST, *LAW AND MARKETS*]; JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN* (1964) [hereinafter HURST, *LAW AND ECONOMIC GROWTH*].

⁴³ LAWRENCE M. FRIEDMAN, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CA, 1870–1910* (1981) [hereinafter FRIEDMAN, *THE ROOTS OF JUSTICE*].

⁴⁴ LAWRENCE M. FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* 13–34 (1998) [hereinafter FRIEDMAN, *AMERICAN LAW*].

⁴⁵ LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE: WHAT AMERICANS WANT FROM THE LEGAL SYSTEM AND WHY* 6–7 (1985) [hereinafter FRIEDMAN, *TOTAL JUSTICE*].

⁴⁶ See SHERWIN, *WHEN LAW GOES POP*, *supra* note 1, at 5, 205 (“Perceiving the real world through a skeptical postmodern screen turns reality into TV reality: surfaces to gaze on, or consume, for the sake of immediate (albeit free floating) gratification”).

⁴⁷ See FRIEDMAN, *THE REPUBLIC OF CHOICE*, *supra* note 11, at 28, 206.

⁴⁸ See, e.g., Rosemary Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, in *LAW IN THE DOMAINS OF CULTURE* 21, 46–52 (Austin Sarat & Thomas R. Kearns eds., 1998).

⁴⁹ See KAHN, *supra* note 6, at 91–92, 135.

⁵⁰ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1581–82 (“Probably no serious scholar clings absolutely to either one of two polar positions; nobody thinks that the legal system is totally and absolutely autonomous; and nobody (perhaps) seriously puts forward the opposite idea, that every last jot and tittle, every crumb of law, even in the short, short run, can be and must be explained ‘externally.’ But most lawyers, and a good many legal scholars and theorists, tend to cluster somewhere toward the autonomous end of the scale. Social scientists interested in law, and legal scholars with a taste for social science, tend to cluster somewhere toward the other end; they prefer external to internal explanations, and are deeply suspicious of the case for autonomy. It is probably true that neither basic view can be ‘proved’ one way or the other. Rather, they are starting points, assumptions, frameworks.”).

forces.⁵¹ But at the same time, it was local, situational, contingent, and subject to constant negotiation, as was law.⁵² Friedman regarded both culture and law as pervasive and permeable forces, not as bounded or boundable entities. While Friedman did not follow the vogue of writing against culture, and while he avoided the word *postmodern*, his work was nevertheless inherently critical of how the idea of culture got polarized, one way or the other, in the law review literature, and indeed it was critical of any model that rested on fixed poles (one way or the other).⁵³ In a phrase, Friedman's work was distinctively both-and, not either-or.

By contrast, Kahn and Sherwin employed the well-bounded poles of law and culture with the very fixity that Friedman rejected.⁵⁴ Kahn defined culture as social practices.⁵⁵ Sherwin defined it as the "symbolic order [that] provides the signs, images, stories, characters, metaphors, and scenarios, among other familiar materials with which we make sense of our lives and the world around us."⁵⁶ By dispensing with what one might call the format, traditions, or parameters of traditional legal scholarship, by imagining culture(s) and counterculture(s) as factors that were potentially so truly fluid and contingent as to be beyond uncontested description, Friedman instead arrived at a scholarship that was a powerful intellectual tool for understanding law's role in society. Skeptical of the legal scholar's compulsive need to reform or to create reason and order where none might actually exist, Friedman pushed his scholarship toward a social understanding of law. His, however, was an understanding with a memory (history), an intellectual/methodological lineage (the Law and Society movement), and a writer's concern for making scholarship interesting and accessible to general readers.⁵⁷

Where Kahn's and Sherwin's books treated culture (and law) as autonomous or semi-autonomous domains, Friedman's work stayed firm in its regard of culture as porous. And where Kahn's book critiqued the assumptions of traditional legal scholarship by using those very same assumptions, Friedman looked to sociological, historical, economic, and cultural data to support his argument that the law gets shaped by the culture it serves.⁵⁸ Indeed, Friedman devoted at least two books—THE REPUBLIC OF CHOICE and THE HORIZONTAL SOCIETY—to the idea that modern individualism, popular opinion, and technology shape and get shaped by law, and to the parallel idea that culture is a fluid, changing, and contestable

⁵¹ See FRIEDMAN, *THE REPUBLIC OF CHOICE*, *supra* note 11, at 202–04. See generally Volkmar Gessner, *Global Legal Interaction and Legal Cultures*, 7 *RATIO JURIS* 132, 132–136 (1994).

⁵² Sarat, *Book Review*, *supra* note 21, at 143–49; Coombe, *supra* note 48, at 46–52; Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in the Sweet Hereafter*, 34 *LAW & SOC'Y REV.* 3, 9, 29 (2000) (noting that law lives in images "that today saturate our culture").

⁵³ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1582 ("Social theories can be, and usually are, deeply aware of emotion, opinion, and the fact of consciousness; and some social theories—the more anthropological ones, for example—are fixated to a fault on culture and consciousness.").

⁵⁴ See *id.* at 1583.

⁵⁵ See KAHN, *supra* note 6, at 35, 91–92.

⁵⁶ See SHERWIN, *WHEN LAW GOES POP*, *supra* note 1, at 5.

⁵⁷ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1605.

⁵⁸ See, e.g., *id.* at 1584–87.

process of affiliation that shapes and gets shaped by law.⁵⁹ Finally, Friedman voiced no concern about using scholarship instrumentally to shore up law's legitimacy. In Friedman's view, serious scholars knew that the past was not necessarily more or less legitimate than the present. Rather, within the parameters of demonstrable fact it was equally contested, contestable, and thus in constant co-creation.⁶⁰

In *Law, Lawyers, and Popular Culture*, Friedman identified the elements for writing social theory and then expanded upon them in *THE REPUBLIC OF CHOICE* and in *THE HORIZONTAL SOCIETY*.⁶¹ If Kahn's and Sherwin's books implied a world of solid, modernistic givens or universals—culture as an autonomous entity—Friedman's work did not.⁶² When it came to describing the ephemeral, Friedman's work was exceptionally practiced and fluid. In it, one could look “at the material structure of law to see it in play and at play, as signs and symbols, fantasies and phantasms.”⁶³ So although legal culture was about attitudes and opinions, it was not a “mysterious, invisible substance,” rather it was measurable by “asking people questions; or indirectly, by watching what people do and inferring their attitudes from what we see.”⁶⁴

For Friedman, a social theory of law, first looked for explanations outside of the legal system to explain changes in the system as much as it looked to explanations within the system.⁶⁵ Second, a social theory recognized law as its own domain, but it also recognized law as part of society and thus, as part of a porous bounded “kind of network or meshwork through which energy easily flows, rather than a tough, tight skin.”⁶⁶ Third, a social theory of law regarded law as a variable domain (system) dependent on other variable domains in society, thus making law contingent, negotiable, and subject to the shifting winds of global, national, tribal, and local affiliations. This three-pronged approach was Friedman's basic analytic framework—his social theory—for studying the dynamic between legal culture and popular culture.⁶⁷

III. TUNE IN, TURN ON, DROP OUT: A SOCIAL THEORY

Law, Lawyers, and Popular Culture passes on a method for writing social theory about the intersection of law and culture. It is also one of

⁵⁹ See FRIEDMAN, *THE REPUBLIC OF CHOICE*, *supra* note 11, at 286–87; FRIEDMAN, *THE HORIZONTAL SOCIETY*, *supra* note 38, at 16–17.

⁶⁰ See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973) [hereinafter FRIEDMAN, *A HISTORY OF AMERICAN LAW*].

⁶¹ See FRIEDMAN, *THE REPUBLIC OF CHOICE*, *supra* note 11; FRIEDMAN, *THE HORIZONTAL SOCIETY*, *supra* note 38. For a precursor to this argument, see also FRIEDMAN, *TOTAL JUSTICE*, *supra* note 45, at 23–37.

⁶² See FRIEDMAN, *THE REPUBLIC OF CHOICE*, *supra* note 11, at 5–6; Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1580; Friedman, *Modern Legal Culture*, *supra* note 17, at 119; Friedman & Rosen-Zvi, *supra* note 14, at 1430.

⁶³ See Sarat, *Book Review*, *supra* note 21, at 147.

⁶⁴ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1580.

⁶⁵ Cf. KAHN, *supra* note 6, at 134 (agreeing with Friedman in statement—“[t]he institutions of control are effect, not cause”—but not in ultimate methodology).

⁶⁶ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1580.

⁶⁷ See *id.* at 1579–87.

Friedman's early looks at something he called popular legal culture. Despite its brevity, *Law, Lawyers, and Popular Culture* is cited as giving rise to a field called law and popular culture, a new field that concerns itself with how the legal system is connected to the imaginary life of (American) society.⁶⁸ In addition, Friedman is cited in nearly one hundred articles on the topic of law and popular culture.⁶⁹ Where he is not indexed or mentioned in a work on this topic, his absence is a notable error of omission.⁷⁰

James Willard Hurst, Friedman's mentor, might have envisioned an American legal culture as well. However, when Hurst delivered the Curti Lectures in 1981 he referred more to "social order" and "culture" than to "legal culture."⁷¹ Hurst's concern was with analyzing law's relation to the market;⁷² his main point being that law was marginal to the factors that produced the market, even though "law exerted material leverage on [the market's] development and working character."⁷³ Hurst recognized three elements that figured into the proposals of early theorists who shaped the country's national beginnings.⁷⁴ First, they "did not accept the private market as a self-sufficient instrument."⁷⁵ Second, they "had no purpose to displace the private market as the principal engine of the economy."⁷⁶ And third, they believed that an expanding market fostered social peace as well as other important social intentions, goals, and innovations.⁷⁷

Friedman, for his part, drew from Hurst's work on markets, but then wrote more specifically than Hurst did about the phenomenon that Friedman called legal culture and eventually popular legal culture.⁷⁸ For Friedman, legal culture, like national culture, had inherent norms. Legal culture could be found in cases and rules, the internal sources of opinion about law, as well as in ideas, attitudes, values, and opinions that people held about law, the external sources of opinion about law.⁷⁹ Thus, a lawyer could form an opinion about law based on her work; an investment banker

⁶⁸ See, e.g., Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1341 (2001) (citing Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1580 as "an article of great importance in launching the field of law and popular culture" and defining the term "popular legal culture").

⁶⁹ Search results, *supra* note 9.

⁷⁰ See, e.g., KAHN, *supra* note 6, at 162; Sarat, *Book Review*, *supra* note 21, at 133 (criticizing Paul Kahn's book for its "failure to take [the interdisciplinary literature of law's cultural life] into account"). See also SHERWIN, *WHEN LAW GOES POP*, *supra* note 1, at 311; Coombe, *supra* note 48, at 22.

⁷¹ See HURST, *LAW AND MARKETS*, *supra* note 42, at 10 (referring, at the start, to the United States as having a "culture" and citing J. HECTOR CREVECOUER, *LETTERS FROM AN AMERICAN FARMER* (1904) as noting a "culture which fostered the individual's self-respect through mingled features of the economy and the polity, by giving him access both to freehold land title and to the vote").

⁷² See HURST, *LAW AND MARKETS*, *supra* note 42, at 4–5 (noting that "the market" is shorthand for the many diverse markets that make up the institution we conventionally refer to as "the market").

⁷³ See *id.* at 9. *But cf.* KAHN, *supra* note 6, at 97 (reasserting that "[t]he first [methodological] rule emphasizes the autonomy of law [which] must be understood as a structure of meanings that make possible particular experiences which in turn sustain that structure.").

⁷⁴ See HURST, *LAW AND MARKETS*, *supra* note 42, at 14 (citing ALEXANDER HAMILTON, *REPORT ON THE SUBJECT OF MANUFACTURES* (1791)).

⁷⁵ See *id.* at 14.

⁷⁶ See *id.* at 15.

⁷⁷ See *id.* at 15–16.

⁷⁸ See FRIEDMAN, *THE REPUBLIC OF CHOICE*, *supra* note 11, at 95–97.

⁷⁹ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1579.

could form a technically based opinion about law from her work; and a pre-school teacher could form an opinion about law based on his work.

Popular culture was more specific to source; it was defined as “the norms and values held by ordinary people, or at any rate, by non-intellectuals, as opposed to high culture, the culture of intellectuals and the intelligentsia, or what Robert Gordon has called ‘mandarin culture.’”⁸⁰ These definitions could expand over time, of course, but the basic idea was both clear and clearly based upon Hurst’s idea of the interdependent and mutually sustaining relationship between the social (aggregated) opinion and society (law and the market).⁸¹

Additionally, Friedman’s work echoed the Hurstian view of the individual and society as independent carriers of shared legal values.⁸² Friedman defined popular legal culture as culture in the sense of “books, songs, movies, plays, television shows which are about law or lawyers and which are aimed at a general audience.”⁸³ Despite their differences, to Friedman these potentially disparate expressions of culture—general culture, market culture, legal culture, popular culture, and popular legal culture—were useful in the study of the vaporous ephemerals of the legal system.⁸⁴ They had the power to provide answers to the question of why the legal system functioned the way it did. Legal culture (people’s opinions about law), for example, had the power to shape actual law; but popular legal culture (the way in which consumers of law reflected law back in forms of entertainment) had the power to shape opinion.

National culture and legal culture were connected to norms of commerce and law, both ostensibly rationalizing forces. So too was popular culture. But popular culture was connected to emotion as well, sometimes drawing on the types of images that Sherwin warned could challenge law’s legitimacy. Like *American Psycho*’s investment banker Patrick Bateman, popular legal culture was legitimately connected to the pillars of society and especially to commerce, but because it also derived from the non-linear, non-textual recesses of popular culture (the aggregate social imagination that had the potential to verge toward the insane), it was potentially irrational, dangerous, and utterly capable of murdering law’s legitimacy (just as Sherwin suspected).⁸⁵

Here again, Friedman parallels Hurst’s analysis. Hurst asserted that though the study of law could be aware of markets, market awareness was

⁸⁰ See *id.* (citing Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120 (1984)).

⁸¹ See HURST, *LAW AND MARKETS*, *supra* note 42, at 53 (asserting for the first time in the Curti Lectures that “[t]he individual and society are interdependent, in large measure mutually sustaining, not necessarily antagonistic”).

⁸² See *id.* at 53–54 (using the word “culture” for the second time and asserting for the first time in the Curti Lectures that “the culture enriches individual life, but the individual is also the carrier of shared values and is creative in developing them”); Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1580.

⁸³ Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1580.

⁸⁴ See FRIEDMAN, *A HISTORY OF AMERICAN LAW*, *supra* note 60, at 1–19; Austin Sarat, *Legal Effectiveness and the Social Study of Law: On the Unfortunate Persistence of a Research Tradition*, 9 LEGAL STUD. F. 23, 24 (1985) [hereinafter Sarat, *Legal Effectiveness*]; Sarat, *Book Review*, *supra* note 21, at 149 (using the phrase “law’s cultural life”).

⁸⁵ AMERICAN PSYCHO (Edward R. Pressman Film 2000).

not a requirement of legal study. Friedman picked up on Hurst's assertion to note that any analysis of popular legal culture was or could be "deeply aware of emotion, opinion, and the fact of consciousness," but such awareness was not a requirement of the genre.⁸⁶ For Hurst, the study of markets was important because it provided scholars with a view of law as seen through the eyes of ordinary people who nonetheless "thought and acted in market terms" based on "shared values."⁸⁷ Friedman, expanding on this idea, argued that popular legal culture was similarly important because it provided scholars with a view of law as seen from "the minds of its consumers."⁸⁸ Both markets and popular legal culture—though apparently unrelated on the surface—melded in Friedman's analysis to the degree that they concerned themselves with ordinary people holding ordinary opinions: opinions that might be right or wrong, safe or dangerous, rational or irrational, but that in the aggregate had the power to shape and redefine law.

Friedman's analysis centered on the psyche, consciousness, or awareness of the ordinary actor to a greater degree than Hurst's did, and in that sense it was more implicitly ethnographic.⁸⁹ In other words, if Friedman started with Hurst's idea that the behavior of ordinary people (in the aggregate) reveals cultural norms, he quickly expanded that idea beyond its original parameters to include the study of the psychological opinions that ordinary people might hold about law. Hurst's everyman was a businessman in a certain industry, like logging, who worked closely with legal realities that required wheeling, dealing, negotiating, and reaping profit in "the shadow of the law."⁹⁰ Friedman's everyman was less explicitly concerned with law by many degrees. He was not necessarily important because of his industry, ability, business habits, or negotiating skills. He did not need direct experience with law in order to be affected by it.⁹¹ What made the ordinary person worth studying, as far as Friedman was concerned, was not what the person-on-the-street did in relation to law, but what he or she thought, if anything, about law, lawyers, courts, and the other apparatuses of the law. These opinions were outside the legal system, to be sure, and yet—like market behavior—they could affect, even shape,

⁸⁶ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1582.

⁸⁷ See HURST, *LAW AND MARKETS*, *supra* note 42, at 16–17, 54 (discussing landownership in the early national years of the United States, where the common person regarded land as a commodity, as compared to the English tradition, where landholding was culturally regarded as an aristocratic institution. He uses the phrase "shared values" to refer to the dynamic between the individual and the general culture).

⁸⁸ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1583.

⁸⁹ See, e.g., HURST, *LAW AND MARKETS*, *supra* note 42, at 178 (citing four works by Lawrence M. Friedman).

⁹⁰ See HURST, *LAW AND ECONOMIC GROWTH*, *supra* note 42, at 90. See also HURST, *LAW AND MARKETS*, *supra* note 42, at 7, 119 (discussing bargaining through law); ROBERT H. MNOOKIN, *BARGAINING IN THE SHADOW OF THE LAW: THE CASE OF DIVORCE* (Ctr. for Socio-Economic Stud., Wolfson Coll. 1979); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

⁹¹ Of course Friedman took the view that even if a person lacked a direct experience with the law, he or she was, nevertheless, directly affected by the law. See, e.g., FRIEDMAN, *AMERICAN LAW*, *supra* note 44, at 38–44 (providing a look at the myriad of ways that law intrudes in an ordinary trip to the grocery store).

the law if one adopted the premise that the individual and the culture were carriers and co-creators of shared values.⁹²

For Friedman, when popular culture concerned itself with law, it gave rise to a sub-domain called popular legal culture. Popular legal culture happened when people dealt with law in their art, media, pulp fiction, and the like. Like popular culture, popular legal culture was and could be everywhere. It could be anything, with one exception: it could not be “mandarin materials,” meaning materials otherwise beyond the reach of the ordinary person-on-the-street.⁹³ In the end, *Law, Lawyers, and Popular Culture* stretched the idea of a unique American legal culture from its Hurstian law, market, social order beginnings to something bigger, something non-quantifiable yet measurable, something popular (non-mandarin) and yet cultural that allowed scholars to study how expressive and imaginative aspects of society shape and globalize law and legal institutions, and, in turn, get shaped by them.⁹⁴

For Friedman, popular legal culture was an American phenomenon, but it could just as easily originate from any identity context, meaning from any nationalistic, cultural, tribal, ethnic, or racial context. Popular culture was expressed in music, TV, movies, even sports (which Friedman claimed to vehemently dislike).⁹⁵ Popular legal culture had the power to illuminate the porous, permeable boundary between law—a legal domain—and almost every other ostensibly non-legal domain. In high-church legal culture—meaning the law school, the appellate court, and traditional positivist or historical-jurisprudential scholarship—popular culture got dismissed as a low brow, non-explanatory source. If it was even mentioned, it was derided as the opiate of the masses, and therefore not important enough to shape law or the legal system. For Friedman, all that might be true in degree or context, but the fact remained: popular culture was a powerful shaping force in the modern world and thus a potential treasure trove of information for legal scholars. By setting out a methodological primer for writing about popular legal culture in *Law, Lawyers, and Popular Culture*, Friedman opened the door to illuminating how scholars might better understand the relationship between law and culture in society.

Like Timothy Leary, Friedman’s message was tune in, turn on, and drop out. Of course, Friedman didn’t mean doing LSD, as Leary had, or revolution, as Karl Marx had.⁹⁶ Friedman meant that legal scholars should tune in to how law gets portrayed in popular culture, turn on to the idea that

⁹² See HURST, *LAW AND MARKETS*, *supra* note 42, at 54.

⁹³ See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120 (1984).

⁹⁴ See generally FRIEDMAN, *A HISTORY OF AMERICAN LAW*, *supra* note 60; Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 98–99; FRIEDMAN, *THE REPUBLIC OF CHOICE*, *supra* note 11.

⁹⁵ See generally Stewart Macauley, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC’Y REV. 185 (1987–1988).

⁹⁶ See, e.g., Steven Baur, *You Say You Want a Revolution: Marx and the Beatles*, in *THE BEATLES AND PHILOSOPHY: NOTHING YOU CAN THINK THAT CAN’T BE THUNK* 98 (Michael Baur & Steven Baur eds., 2006) (providing a brief history of the phrase “tune in, turn on, drop out:” “Not surprisingly, many of the leaders of the counterculture, from hallucinogenic drug guru Timothy Leary to folk-influenced rock musicians like the Beatles, were deeply influenced by the writings of Marx. ‘Tune in, turn on, and drop out.’ echoes Marx’s demand that people begin to look critically at the state of society under capitalism (‘tune in’), learn to think outside the capitalist box (‘turn on’), and reject bourgeois notions of success and refuse to compete in the capitalist rat race (‘drop out’).”).

popular culture can and does shape law, and drop out of the high church view of law as an autonomous, doctrinally-bound domain.

IV. LAW AND MARKETS

Law, Lawyers, and Popular Culture encouraged legal scholars to use sources that traditional legal scholars who compile casebooks, treatises, restatements, and the like would not be inclined to take seriously. The article linked the Hurstian idea of the legal economy (law and markets) to the idea of a cultural economy (law and culture). And it encouraged scholars to pay particular attention to how this link occurs. Thus scholars got directed to the (intangible) realm of the expressive, imaginary, cultural contexts of society for the purpose of studying how those forces/threads/phenomena shape the law and legal systems. According to Friedman, it was not enough to say that popular culture influenced law—one had to show *how* it did.⁹⁷

Friedman's work on popular legal culture was perhaps a precursor to the now accepted and resolute legal strategy that tries to prove a copycat link between media and action.⁹⁸ These strategies are often based on works that tend to take Friedman's idea of the link between law and popular culture literally, something Friedman himself would not likely advocate.⁹⁹ Friedman would not himself argue, for example, that the social theory he sets out in *Law, Lawyers, and Popular Culture* gives lawyers the insight to direct how and what artists should write. Nor would Friedman agree that John Grisham "owes it to his public to write a novel" that portrays a capable female attorney—even if such a novel might make its way to Friedman's reading list. Though Friedman's theory would regard Grisham's work as worthy of study by legal scholars.¹⁰⁰ Indeed, Friedman suggested that the idea of mining popular legal culture for information about law is powerful, not because it links artists with social problems, or otherwise makes them tow a political line, but because it moves legal scholarship toward a deeper, more ethical understanding of the relationship between media and law.¹⁰¹

In the Curti Lectures, a book notable for its multiple references to Friedman, Stewart Macaulay, Marc Galanter, Morton Horwitz, and other law and society scholars, Hurst wrote a short but stunningly memorable explanation of how the car changed American life and why that change mattered.¹⁰² One could replace the car with the television, or the video game, or the Internet in Hurst's or Friedman's respective accounts and get

⁹⁷ Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1583.

⁹⁸ See, e.g., Friedman & Rosen-Zvi, *supra* note 14, at 1430.

⁹⁹ See, e.g., Carrie S. Coffman, *Gingerbread Women: Stereotypical Female Attorneys in the Novels of John Grisham*, 8 S. CAL. REV. L. & WOMEN'S STUD. 73, 74–75, 79 (1998) (stating a thesis that "Grisham's portrayal of women attorneys reinforces stereotypes and perpetuates the perception that women cannot achieve full development as both women and attorneys[,] . . . affect[s] the way that society at large views female attorneys[, and] . . . affect[s] those readers who are or desire to be attorneys.").

¹⁰⁰ See, e.g., Friedman & Rosen-Zvi, *supra* note 14, at 1430.

¹⁰¹ See *id.* at 1426–27. See, e.g., SHERWIN, WHEN LAW GOES POP, *supra* note 1, at 236–64.

¹⁰² See HURST, LAW AND MARKETS, *supra* note 42, at 61.

an analysis of equal force. Yet, Friedman specifically expanded on Hurst's car example in *Law, Lawyers, and Popular Culture*, driving it around until he sketched how the car gave clear shape to the Twentieth Century law of negligence.¹⁰³

For Hurst, and later Friedman, the law did not create the car (technology); the car created the law. Stated more generally, one could say that the law did not create markets; markets created the law.¹⁰⁴ Hurst many times noted that the prime function of markets was to allocate material resources to produce and distribute goods and services for sale.¹⁰⁵ He also repeatedly stressed that markets carry out their function on a "great scale" and with such a "pervasive reach" that they impact other sectors of society having to deal with resources, politics, and "the values toward which its people oriented their lives."¹⁰⁶ This was true even in the United States where people were not, in Hurst's view, "much given to philosophizing about their values."¹⁰⁷ Markets allocated goods in a literal sense, but in a broader institutional and cultural sense, they defined shared norms and thus participated in creating society.

For Hurst, a study of the market revealed social norms. Specifically, markets maximized the exercise of private will in transactions. Markets acted as a frame, or a container, or a domain. And even though their framing mechanism was predictable, markets enhanced individuality. It was people after all—individuals—who exercised what Hurst called private will, because it was people who acted in multiple, unique, idiosyncratic ways, even when making predetermined and standard market choices. So while there was lock step conformity in the market set by "established structures of power and order"¹⁰⁸ and "shared values,"¹⁰⁹ there was also, at the same time, room for individuality and for that something virtually indescribable that individuality brings with it. Something called personality, or in the aggregate, culture.¹¹⁰

Hurst's economic/historical study of markets was an approach that Friedman adopted when he focused on the interplay between objective (quantifiable social order) and subjective (cultural) realities as the key to understanding the Twentieth Century. So long as ordinary people believed in freedom of choice, Friedman argued, it did not seem to matter to them if freedom of choice actually existed in any meaningful or deep way.¹¹¹ In the Twentieth Century and certainly by the Twenty-First Century, especially with the increased prominence of the Internet, the perception of choice was more powerful than was the fact of choice, as web surfers around the world learned to vote with the unaccountable click of a mouse on everything from

¹⁰³ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1584–85.

¹⁰⁴ See HURST, *LAW AND MARKETS*, *supra* note 42, at 9–50.

¹⁰⁵ See, e.g., *id.* at 21 (stating that late nineteenth century policy "settled for antitrust programs designed to leave the private market in place as a principal resource allocator").

¹⁰⁶ See *id.* at 32.

¹⁰⁷ See *id.* at 51.

¹⁰⁸ See *id.* at 51–54.

¹⁰⁹ See *id.*

¹¹⁰ See, e.g., *id.* at 91.

¹¹¹ Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1586. See also FRIEDMAN, *THE HORIZONTAL SOCIETY*, *supra* note 38, at 137–38.

presidential popularity to which band should win the music video awards on MTV. In Friedman's view, media allocated opinions with a reach at least as grand and pervasive as that of markets, and both allocations resulted in links between permeable domains that then led to images by which people could understand the choices available to them for the construction of shared meaning.¹¹²

But if Friedman was commenting on popular culture, he was also commenting on the gap literature that studied the divide between law-on-the-books and law-in-action.¹¹³ Law on the books did not put people at ease. It could not because people did not necessarily know about its existence. Plus, there was too much of it.¹¹⁴ Nor did law-in-action affect all the people at whom it was directed. Yet beliefs about law, even if inaccurate, could affect individual, political, and cultural movements.¹¹⁵ The debate over the estate tax offered a good example of this. In the late 1990s, proponents of the estate tax repeal harnessed the media to target their message that the estate tax was a tax on middle class Americans.¹¹⁶ The idea was that if public opinion could be turned against "the death tax," then the estate tax might come to be regarded as a confiscatory measure of the sort that the middle class should oppose, even if their own (small) estates would transfer untaxed, and even though the tax served important public revenue functions.¹¹⁷

V. POPULAR LEGAL CULTURE

Law, Lawyers, and Popular Culture offers one of the earliest, if not the first, definitions of the term popular legal culture. Drawing on Hurst's general idea of the way in which markets and law interact, as well as on his idea about the role of shared values in the creation of norms, Friedman defined popular legal culture in such a way as to encompass not just cases or reform minded scholarship (legal culture), not just popular ideas, attitudes, and opinions (popular culture), but popular ideas, attitudes, and opinions that lay people (whether day laborers, plumbers, or investment bankers) hold about law, lawyers, and the legal system (popular legal culture)—accurate or not.¹¹⁸

Friedman did not explain or theorize his definition of popular legal culture in *Law, Lawyers, and Popular Culture*, but he gave examples of how legal scholars could use popular legal culture sources to further the study of law. It was from this framework that Friedman asked: Where do legal rules come from? How does the legal system, operating as it does in

¹¹² See, e.g., FRIEDMAN, *THE HORIZONTAL SOCIETY*, *supra* note 38, at 21–27.

¹¹³ See Sarat, *Legal Effectiveness*, *supra* note 84, at 24. See also FRIEDMAN, *A HISTORY OF AMERICAN LAW*, *supra* note 60, at 13; FRIEDMAN, *THE REPUBLIC OF CHOICE*, *supra* note 11; Frank Munger, *Sociology of Law for a Postliberal Society*, 27 *LOY. L.A. L. REV.* 89, 89–105 (1993).

¹¹⁴ See FRIEDMAN, *A HISTORY OF AMERICAN LAW*, *supra* note 60, at 1–2.

¹¹⁵ See, e.g., ROBERT SHILLER, *IRRATIONAL EXUBERANCE xviii* (2005) (describing the formation of market bubbles).

¹¹⁶ See WILLIAM H. GATES & CHUCK COLLINS, *WEALTH AND OUR COMMON WEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES 57–69* (2002).

¹¹⁷ See *id.* at 78–92.

¹¹⁸ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1580.

accordance with free-floating attitudes about law, get shaped? What is the process by which this happens, given that high church articulations and popular culture representations of law meld together in every moment of every day in all the most extraordinary and ordinary ways, whether any one of us wants them to or not?¹¹⁹

For Friedman an autonomous legal system was an undesirable and probably impossible myth that legal insiders were taught by professional training to believe in.¹²⁰ It was as much the first year student's comfort as it was the professor's. But while the myth of autonomy, or even of semi-autonomy, plays a central role in legal pedagogy and scholarship, in Friedman's view it nevertheless "seem[s] fairly clear . . . that legal systems as a whole cannot be autonomous in the long run . . . [s]ooner or later [the] shape [of a legal system] gets bent in the direction of [its] society (more or less)."¹²¹ Legal scholars can choose to observe and study that shaping/bending process, or not. They can choose to acknowledge it, or to deny it. But regardless of the legal academy's collective, traditional, or taught choices about pedagogy or scholarship, the process wends on—that is, culture shapes law as law shapes culture.¹²² This happens with or without their/our bearing witness.¹²³ Hurst's car example revisited: the car incrementally changed our world without our realizing all that was at stake.¹²⁴ On a different scale, so too could TV, or horror movies, or pulp detective novels.¹²⁵

Friedman's essay concludes that legal systems are parochially global, a term I use but that he did not. They are products of the societies whose disputes they resolve or address. Yet in a world of global (shared) economies, technologies, values, and beliefs about the rights of the individual in relation to the state, "the legal systems of the world are becoming more and more interconnected."¹²⁶ However, until they actually link up (and perhaps even after they do), they remain tribe, nation, and culture bound.¹²⁷ Economic forces, in Friedman's analysis, can globalize a legal system. So too can technological ones. But it was not until *Law, Lawyers, and Popular Culture* that Friedman added popular culture and, more specifically, popular legal culture to the list of powerful globalizing forces that affect law. Popular legal culture in Friedman's view became more than an influencer or a shaper of law. It became a force and a phenomenon with the potential to globalize law, meaning to link up a still

¹¹⁹ See FRIEDMAN, THE REPUBLIC OF CHOICE, *supra* note 11, at 1–35. See also Friedman & Rosen-Zvi, *supra* note 14, at 1426.

¹²⁰ See LAW AND SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 7 (Stewart Macaulay, Lawrence M. Friedman, & John Stookey eds., 1995) [hereinafter LAW AND SOCIETY].

¹²¹ See *id.*

¹²² See FRIEDMAN, THE HORIZONTAL SOCIETY, *supra* note 38, at 41 (describing the public opinion state).

¹²³ See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S xiv (1983).

¹²⁴ See HURST, LAW AND MARKETS, *supra* note 42, at 61.

¹²⁵ See Friedman & Rosen-Zvi, *supra* note 14, at 1425–30.

¹²⁶ See LAW AND SOCIETY, *supra* note 120, at 10.

¹²⁷ See FRIEDMAN, THE REPUBLIC OF CHOICE, *supra* note 11, at 206.

parochial American legal system to the rest of the world on the level of values and beliefs about such concepts as authority, identity, and choice.¹²⁸

VI. LINKS AND CHOICES

Friedman's scholarship portends of a tension within legal scholarship. It is a tension reminiscent of the identity crisis that other disciplines like anthropology, literary studies, and history have faced.¹²⁹ On one hand are the legal scholars who clarify doctrine for judges. They assume the role of reformers intent on developing the law.¹³⁰ These scholars identify as (academic) lawyers whose task it is to fix the threadbare places in the mantle of legal reason (those worn places illustrated by the odd example of arguments criticizing the so-called tendency of popular artists like John Grisham to use their work to spread erroneous information about institutions, policies, and even law).¹³¹ They need to imagine law as an autonomous or partly autonomous domain with a solid skin in order to do their work of protecting the law from all that is common.

These scholars, for better or worse (Friedman thought for worse), are in the cathedral with the drapes drawn.¹³² That is, it is their *disciplinary bias* to privilege rules over context.¹³³ It is their *disciplinary bias* to hypothesize that mixing law (rules) with popular culture, or hyphenated masses of people, or any other external force will come to little good. It is their *disciplinary bias* to simplify (state and restate rules), rather than to complicate law with social or cultural context. These legal scholars write from the law professor's disciplinary bias, but—like a first generation

¹²⁸ See generally SICKO (Michael Moore 2007), available at <http://www.michaelmoore.com/books-films/index.php> (last visited on Aug. 10, 2007) (providing a popularized comparative analysis of insurance and health care in the United States, Canada, the United Kingdom, and France, thereby allowing the ordinary movie fan to form his or her own opinion ("correct" or not) about the political possibilities for health care in the United States).

¹²⁹ See, e.g., EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (George Simpson trans., 1964); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983); BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926); RENATO RESALDO, *CULTURE AND TRUTH: REMAKING SOCIAL ANALYSIS* 27–30 (1989); Marc Galanter, *The Legal Malaise of Justice Observed*, *LAW & SOC'Y REV.* 537 (1985); Sally Engle Merry, *Resistance and the Cultural Power of Law*, 29 *LAW & SOC'Y REV.* 11, 12 (1995) ("[O]ur faith in the progressive possibilities of law has been shaken. It is no longer clear that law can produce a more just society."); Richard K. Sherwin, *Lawyering Theory: An Overview: What We Talk About When We Talk About Law*, 37 *N.Y.L. SCH. L. REV.* 9, 10 (1992) ("[B]ecause law is both a by-product and a co-producer of mainstream culture, those of us who are concerned about law and its practices are bound to feel the need to come to grips with the change that has taken place.").

¹³⁰ See KAHN, *supra* note 6 (describing scholarship as legal practice).

¹³¹ See Coffman, *supra* note 99, at 74, 77–78 (applying Friedman's view to assert that "not only does Grisham affect the way that society at large views female attorneys, he also affects those readers who are or desire to be attorneys"); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 *ARIZ. L. REV.* 785 (1993); Miller, *supra* note 9, at 204–05 (1994) (arguing that "despite their incredible influence, there is no requirement that . . . fictionalized accounts of lawyering be accurate, or even be held accountable for their consequences.").

¹³² This is a reference to Guido Calebrisi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972).

¹³³ Cf. SHERYL J. GRANA, JANE C. OLLENBURGER, & MARK NICOLAS, *THE SOCIAL CONTEXT OF LAW* 2ND ED. 1–3 (2002) (explaining their disciplinary biases as sociologists).

Terminator¹³⁴—they are programmed by the machines of law school or law review or court clerkships or (ironically) by popular culture itself to practice their disciplinary bias, and their disciplinary bias only. When they remain in the cathedral with the drapes drawn, when they write solely from their disciplinary bias no matter what, they choose (whether intentionally or not) to remain isolated and blind to the ways in which law and society are bound, and why. The disciplinary bias of the law professor, then, is like the car in Hurst's analysis, or popular culture in Friedman's analysis, in that the disciplinary bias works to bring about a future of a certain affect, effect, and direction.

Then there are the legal scholars who perceive their function as being to increase the general fund of knowledge. These scholars tend to consider law as its own intellectual discipline. They accept that law is contextualized in cultural realities. They—for better or worse (Friedman thought for the better)—start in the cathedral but then venture outside into the “often confusing maze” of society, markets, technologies, popular culture, literature, religion, and the like.¹³⁵ Their mission is not to direct, fix, or reform, but to observe, analyze, understand, and converse with those whom Friedman called the consumers of the legal system. Their goal is not to shore up the legitimacy of law or its institutions, so much as it is to understand why law and its systems function the way they do in particular moments and circumstances.

In the last two decades, legal scholars have come to realize that popular legal culture—popular culture about law, lawyers, and legal institutions—influences law. But because everything potentially influences law, the claim of influence, at least in Friedman's view, is a pedestrian one. The better project for legal scholars—who, after all, know how to “do law”—is to begin to understand how forces—like the car, or the market, or popular film—shape and spread (globalize) law and legal systems. According to Friedman, markets, technology, and popular culture have the power to globalize legal systems, which are otherwise parochially tied to their host cultures.¹³⁶ Therefore the important work for legal scholars is to expand their approach to include a study of how the influencing, shaping, and globalizing process works.¹³⁷ Social theory helps move the legal scholar to that choice.

Together, Friedman's three basic propositions about law provide a social theory for how to start the process of disciplinary expansion for the legal scholar. First, accept that explanations about law exist both inside and outside of the legal system. Second, accept that the boundaries between law

¹³⁴ THE TERMINATOR (Orion Pictures Corp. 1984) (a human-looking, apparently unstoppable cyborg is sent from the future to kill Sarah Connor before she gives birth to John Connor, who will lead the human resistance against machines in the post-nuclear twenty-first century).

¹³⁵ Cf. GRANA, OLLENBURGER & NICOLAS, *supra* note 133, at 2 (“Two of the ‘promises’ of sociology are its creation of a new awareness of the social world and its ability to help us find our way through the often confusing maze of societal norms, roles, and obligations. By creating a new awareness and helping us to understand the maze, sociology can show us how legal systems are developed and how they work.”).

¹³⁶ See FRIEDMAN, THE HORIZONTAL SOCIETY, *supra* note 38, at 54.

¹³⁷ See Friedman, *Law, Lawyers, and Popular Culture*, *supra* note 8, at 1606.

and other systems or domains in society are porous and therefore permeable to exchanged information. Third, assume that law is one, and only one, dependent variable in the greater social system of many other dependent variables, as law, like every other force in society, is subject to the winds of local, national, and global culture and events. Considering these propositions turns popular legal culture from a phenomenon to control, to look down upon, to remove, to block, or even to censor, into a treasure trove of source material for the study of law.

