

LAW AND POPULAR CULTURE

CURRENT LEGAL ISSUES 2004

Volume 7

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Law and Popular Culture

Current Legal Issues 2004

VOLUME 7

Edited by

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General Editor's Preface

This volume contains the product of UCL's seventh annual international interdisciplinary colloquium held in July 2003. I hope *Law and Popular Culture* will give scholars and students as much pleasure as was enjoyed by those participating in the colloquium.

I convened the colloquium but was able to call on the assistance of many colleagues, to all of whom I am grateful. I was also ably assisted by Lisa Penfold, the Law Faculty's events organizer, and by various secretaries including Alison Compton, Sarah Petrie, and Laura Smith. I am very grateful to Clintons who provided some much-needed financial support for the colloquium.

Future colloquia include Law and Sociology in 2004, Law and Psychology in 2005 and Law and Philosophy in 2006. Further details of these colloquia and the ongoing programme may be sought from Michael Freeman at Bentham House, Endsleigh Gardens, London WC1H 0EG (uclmdf@ucl.ac.uk).

Michael Freeman

May 2004

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Law in Popular Culture

Michael Freeman

Law's engagement with popular culture goes back to the mists of time, to the Old Testament, perhaps beyond. There is much jurisprudence in *Genesis*, as George Fletcher reminds us.¹ 'Adam, Eve, Cain, Abel, the serpent—we could hardly think about good and evil, free will and determinism, crime and punishment without them.'² Just as significantly, nor could those to whom these stories were originally addressed. The story of the patriarch, Abraham, remains deeply embedded with today's cultural imagination.³ His haggling with God over the fate of the cities of Sodom and Gomorrah is a model of legal negotiation.⁴ His trial,⁵ the 'Akedah'⁶ (the attempted sacrifice of Isaac), has fired artists (Mantegna,⁷ Rembrandt,⁸ Chagall⁹ amongst many others), poets (think of war poet Wilfred Owen's savage subversion of the Biblical account,

But the old man would not do so, but slew his son, -
And half the seed of Europe, one by one, . . .),¹⁰

composers (Stravinsky wrote a ballad,¹¹ Benjamin Britten juxtaposed Owen's lines with those from the Requiem 'quam olim Abrahae promisisti'¹² in his *War*

¹ 'The Jurisprudence of Genesis' (2003) 56 CLP 41–61. See also Ronald R Garet, 'Natural Law and Creation Stories' in J Roland Pennock and John W Chapman (eds), *Religion, Morality and the Law* (New York: 1988) 218–262.

² Fletcher, n 1 above, 41.
³ Note its influence, direct or indirect, in all three 'Abramaic' religions. Jews read the 'Akedah' on Rosh Hashanah and Muslims re-enact the event on the feast of the sacrifice at the end of the *Haj* rituals. For Christians it anticipates the Crucifixion and Genesis 22 is part of Easter week services.

⁴ Genesis 18: 22–23. This smacks of 'theological challenge and judicial debate' (*per* Stefan C Reif, *Judaism and Hebrew Prayer* (Cambridge: 1993) 32).

⁵ See Carol Delaney, *Abraham on Trial* (Princeton, NJ: 1998). See also David Lee Miller, *Dreams of the Burning Child* (Ithaca: 2003).

⁶ Literally 'the binding' [of Isaac]. See further, Shalom Spiegel, *The Last Trial* (New York: 1969). Muslims believe it was Ishmael who was the intended sacrifice, but see Reuven Firestone, *Journeys in Holy Lands: The Evolution of the Abraham-Ishmael Legends in Islamic Exegesis* (Albany, NY: 1990).

⁷ Painted about 1490 (it is in the Kunsthistorisches Museum, Vienna).

⁸ Painted in 1635 (it is in the Hermitage in St Petersburg).

⁹ Painted between 1960 and 1966 (it is in the Musée National Message Biblique Marc Chagall in Nice). Isaac in this painting has been sacrificed, presumably like Jesus. Alice Miller, *The Untouched Key: Tracing Trauma in Creativity and Destructiveness* (New York: 1990) critically examines a number of paintings of the incident.

¹⁰ Genesis 22: 1–14.

¹¹ *Abraham and Isaac* completed on 3 March 1963 and dedicated to the people of Israel.

¹² Which of old Thou didst promise to Abraham [and his seed].

Requiem,¹³ Bob Dylan too wrote a song—‘Highway 61 Revisited’—that imagined Abraham questioning God’s order¹⁴). It formed the sub-text for Woody Allen’s film *Crimes and Misdemeanors*¹⁵ and for Neil Gordon’s novel, *The Sacrifice of Isaac*, about the ambivalent legacy of the Holocaust.¹⁶ And, even if it passed Freud by,¹⁷ it has had enormous influence on later psychoanalysts.¹⁸ But why not, we may ask, on contemporary jurisprudence where there is so much concern with unjust law,¹⁹ civil disobedience,²⁰ even the ‘discretion to disobey’²¹? Or on family law? It raises issues of adult responsibility and care. What are Abraham’s obligations toward Isaac? Although Isaac is an adult, Abraham remains his father. To whom does Isaac belong? And where is Sarah?²² What her absence from the story tells us is obvious from today’s perspective, informed as it is with feminist insight. But how would those to whom the story was directed, thousands of years ago, have reacted? Where they would have taken the story literally—as many believers today still do—we, like Kierkegaard perhaps,²³ would see it as a story about the trials of faith and commitment, about trusting powers and purposes that lie beyond human understanding. And this remains relevant as we grapple to understand much beyond our comprehension: on one level disasters such as the Holocaust,²⁴ but rather more mundanely contemporary issues of life and death.²⁵ Richard Miller, I note, uses the Abraham-Isaac Midrash to offer insights into the trust we put in the medical profession in paediatric care.²⁶

Law’s engagement with popular culture reached a crescendo in Ancient Greece.²⁷ Kitto,²⁸ paraphrasing Pericles,²⁹ says of the Greeks that they ‘throw open to all our common cultural life, nor do we deny them any instruction or

¹³ Commissioned to celebrate the consecration of Coventry Cathedral in May 1962 (the original building having been destroyed by German bombs in 1940—a war crime passed over by Wai Chee Dimock (see p 520 below). I attended the second performance of this.

¹⁴ This was written as a protest to the Vietnam War.

¹⁵ The psychiatrist in this film is Martin Bergman, who subsequently wrote *In The Shadow of Moloch: The Sacrifice of Children and its Impact on Western Religions* (New York: 1992).

¹⁶ New York: 1995. The ‘Akedah’ had earlier been retold by Thomas Mann in *Joseph and His Brothers* (trans HT Lowe-Porter) (Harmondsworth: 1978) 64–67.

¹⁷ He wrote about Moses instead (see Yosef Hayim Yerushalmi, *Freud’s Moses: Judaism Terminable and Interminable* (New Haven, NJ: 1991)).

¹⁸ In particular, Erich Wellisch, *Isaac and Oedipus* (London: 1954), on which see n 5 above, 213–215 (who also considers Georges Devereux, David Bakan, Marie Balmay, Alice Miller and Martin Bergman (referred to at n 15 above)).

¹⁹ See David Dyzenhaus, *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: 1999).

²⁰ See, eg, Peter Singer, *Democracy and Disobedience* (Oxford: 1973).

²¹ Mortimer R Kadish and Sanford H Kadish, *Discretion to Disobey* (Stanford, California: 1973).

²² See n 5 above, 22–23. In the Muslim version, it is, of course, not Sarah, but Hagar.

²³ See *Fear and Trembling* (trans by Alastair Hannay) (Harmondsworth: 1985).

²⁴ Different views of which include Daniel Jonah Goldhagen, *Hitler’s Willing Executioners* (New York: 1996) and Götz Aly and Susanne Heim, *Architects of Annihilation* (London: 2002) (first published in German in 1991).

²⁵ See Michael Freeman, ‘A Time To Be Born and A Time To Die’ (2003) 56 CLP 603.

²⁶ See his *Children, Ethics and Modern Medicine* (Bloomington, Indiana: 2003).

²⁷ See Sir Arthur Pickard-Cambridge, *The Dramatic Festivals of Athens* (Oxford: 1968).

²⁸ HDF Kitto, *The Greeks* (Harmondsworth: 1951) 74.

²⁹ His funeral oration.

spectacle'. As Kitto explains, these words are 'almost meaningless until we realize that the drama, tragic and comic, the performance of choral hymns, public recitals of Homer, games, were all necessary and normal parts of "political" life'.³⁰ The theatre was popular culture, and through it the population was introduced to jurisprudential conflicts like positive law versus natural law, law and equity, rule versus discretion. The debates are reflected in many of the great tragedies. Thus, note the way Hecuba, in Euripedes' play of that name, implores Agamemnon to punish Polymestor, the King of Thrace, who had killed her son, Polydorus. She is a slave and therefore weak, but:

. . . the gods are strong, and over them
there stands some absolute, some moral order
or principle of law more final still.
Upon this moral law the world depends;
. . .
Apply that law to me. For if you flout it now, and those
who murder in cold blood or defy the gods
go unpunished, then human justice withers,
corrupted at its source.³¹

And observe also Agamemnon's response. He prays in aid expediency, pragmatism. The law should reflect public opinion. Posner sees a parallel in the judge of today who concedes the natural justice of a litigant's case whilst deciding against him on the ground that positive law, 'crystallised public opinion', entitles his opponent to judgment.³²

If Agamemnon was the first legal positivist, Creon (in Sophocles' *Antigone*) has some claim to be the second. When he orders that Polynices should remain unburied—a savage punishment in Greek theology³³—Antigone, his sister, defies the order and buries her brother. Her trial follows and contains her impassioned assertion of the primacy of divine law in language which has echoed over the millennia. *Antigone* is often performed when a country is in trouble.³⁴ Anouilh wrote an *Antigone* for occupied Paris in 1944.³⁵ In Brecht's version, Creon is a Fascist.³⁶ In Tom Paulin's *The Riot Act*, set in Northern Ireland, Antigone is a freedom fighter and Creon sounds like Ian Paisley.³⁷ And in Athol Fugard's *The Island*,³⁸ two prisoners

³⁰ See n 28 above, 74.

³¹ Euripedes, *Hecuba II*, 795–805. *Hecuba* may have resonated also with an audience of Shakespeare's day: note the allusion to the play in *Hamlet*.

³² *Law and Literature* (Cambridge, Mass: 1998) 95.

³³ It is to be found also in Homer's *Iliad* and in *Hecuba*. On disgust, shame and the law generally see Martha C Nussbaum, *Hiding from Humanity* (Princeton, NJ: 2004).

³⁴ See George Steiner, *Antigones: How the Antigone Legend has Endured in Western Literature, Art and Thought* (Oxford: 1984).

³⁵ First published in Paris 1946, in London in English in 1954.

³⁶ *In Die Antigone Des Sophokles*, written in 1948, and set after the Second World War. It is an adaptation based on Hoelderlin's translation.

³⁷ See Tom Paulin, *The Riot Act* (London: 1985).

³⁸ See Athol Fugard, *The Township Plays* (Oxford: 1993). The play was first performed in Cape Town in 1973.

perform *Antigone* in prison to preserve their sanity in the insane conditions of apartheid South Africa.³⁹

Perhaps the fullest exploration of justice in Greek literature is in Aeschylus' *Eumenides*. Aeschylus grapples with the notion of 'justice': what it is, how it is to be realized in the sphere of human activity, and what part the gods play in helping men to achieve it. In *Agamemnon* he has had the chorus in the first Choral Ode sing: 'Wealth provides no defence against greed for the man who kicks and obliterates the great altar of Justice'.⁴⁰ In *Eumenides* words derived from the root that designates 'justice' (*dik-*) occur with striking frequency.⁴¹ It is frequently used to refer to the state of affairs which parties who believe they are aggrieved wish to have restored. It is but a short step from this to the use of *dikē* with a specific, concrete legal or judicial connotation: 'prosecute at law', 'institute legal proceedings'. And as Podlecki notes,⁴² 'it is precisely this field of meaning which enables Aeschylus to bring Justice as an abstract concept or personification into the everyday reality of an Athenian law court'. But how would an Athenian audience have reacted to the trial in the play? As a reflection of contemporary legal practice or as a parody? Or both? Lebeck, I note, makes the point that 'accuracy is an essential ingredient of parody'.⁴³ Is the trial then a caricature of Athenian procedure, revealing both its strengths and its weaknesses? Orestes' acquittal, we observe, does not depend upon the trial but on divine will. Would the audience to whom the play was originally addressed have been as puzzled by the relationship of justice and injustice as some are today?⁴⁴ And how would they have reacted to many of the arguments which seem (to us) quibbling and trivial? One, which has always interested me as a student of parentage,⁴⁵ is that which proclaims the male as the true parent:

The so-called mother is no mother of a child,
but nurturer of a newly seeded embryo. The
parent is the one who mounts her . . .⁴⁶

The 'belittlement'⁴⁷ of the role of women in procreation makes Agamemnon's wrong (the killing of Iphigenia) seem less serious than Clytemnestra's in killing him and distinguishes parricide and matricide. But I doubt if an Athenian audience would have seized upon the belittlement or seen it as we do through feminist

³⁹ Could these only be brought to closure by truth and reconciliation? An *Antigone* to take account of this is still awaited. On this more generally, see Martha Minow, *Between Vengeance and Forgiveness* (Boston: 1998).

⁴⁰ *Agamemnon*, 381–384.
⁴¹ A point noted by Anthony J Podlecki in his Introduction to Aeschylus: *Eumenides* (Warminster: 1989) 42. Etymology connects this with 'the way' suggesting a common meaning with the Jewish *Halakhab* and Muslim *Sharia*.

⁴² See n 41 above, 43.
⁴³ Anne Lebeck, *The Oresteia—A Study In Language and Structure* (Cambridge, Mass: 1971) 135.
⁴⁴ eg, Austin Sarat and Thomas R Kearns, *Justice and Injustice in Law and Legal Theory* (Ann Arbor, Mich: 1996).

⁴⁵ Michael Freeman, 'Medically Assisted Reproduction' in I Kennedy and A Grubb (eds), *Principles of Medical Law* (Oxford: 2004) 639.

⁴⁶ In the translation by Christopher Collard, *Aeschylus—Oresteia* (Oxford: 2002) 103.

⁴⁷ See n 32 above, 65.

spectacles. What would have met the social realities of Aeschylus' Athens, to us today constitutes both palpable nonsense and through this injustice. It is possible, as Podlecki acknowledges, to read the *Eumenides* as 'an anti-feminist tract'.⁴⁸ The audience would have been predominantly, if not solely, male. But was Aeschylus feeding his audiences' prejudices or telling them they were misguided to acquiesce in a state of affairs that was so obviously unfair?⁴⁹

There are many engagements of law with popular culture in Shakespeare too.⁵⁰ I have always thought it interesting that Shakespeare's most popular character, so popular we are told that a further play was written about him just to please Queen Elizabeth the First,⁵¹ is Falstaff, an armed robber,⁵² a debt defaulter, a (would-be) serial adulterer!⁵³ But already in the very early *King Henry VI Part 2* Shakespeare was encouraging what we may think a refreshingly critical attitude to law, lawyers and legality. Into Jack Cade's mouth Shakespeare puts the memorable: 'The first thing we do, let's kill all the lawyers'.⁵⁴ The Jack Cade episodes 'comment indirectly on [Shakespeare's] own Tudor audiences'.⁵⁵ As Honan explains: 'Parodying inversions of misrule, and of "barring out" when pupils smashed school windows, Cade inverts civilized codes with cheerful blasphemy'.⁵⁶

There are, of course, famous trial scenes in Shakespeare. That in *The Merchant of Venice* is most often commented upon.⁵⁷ At the play's heart is a conflict between Tudor common law and the mitigating equity of the Chancery courts. Of course, the drama is a folk tale for no English law permitted anyone to put his life at jeopardy as Antonio had done. How would the 'folk' to whom the play was presented in the late 1590s have reacted? That such a thing was possible outside England? That anything was possible in a society with a Jew-villain like Shylock? It is of course doubtful if any of them would have encountered a Jew but phobia, prejudice and hatred were deeply ingrained.⁵⁸ Since usury is at the heart of the play it is worth noting that since 1571 the lending of money at interest had been de facto legal.⁵⁹

⁴⁸ See n 41 above, 48.

⁴⁹ See Philip Vellacott, *The Logic of Tragedy: Morals and Integrity in Aeschylus' Oresteia* (Durham, North Carolina: 1984) for the view that he was being elaborately ironic.

⁵⁰ See Ian Ward, *Shakespeare and Legal Imagination* (London: 1999).

⁵¹ The truth of this is debated by HJ Oliver in his Arden edition of *The Merry Wives of Windsor* (London: 1971) xlv–lii.

⁵² See the Gad's Hill incident in *Henry IV, Part 1*.
⁵³ In *The Merry Wives of Windsor*: executed so much more pithily in Verdi's *Falstaff* (there are at least nine operas based on the 'Merry Wives', exceeded only by *The Tempest*, *Romeo and Juliet*, *Hamlet*, *A Midsummer Night's Dream*, *The Taming of the Shrew* and *The Merchant of Venice*). See, further, Winston Dean, 'Shakespeare and Opera' in Phyllis Hartnoll (ed), *Shakespeare in Music* (London: 1964). In *Falstaff*, of course, the wit is in the music.

⁵⁴ IV, ii, 86. In Cade's London, literacy is a crime.

⁵⁵ Per Park Honan, *Shakespeare—A Life* (New York: 1999) 140. ⁵⁶ *ibid*.
⁵⁷ See eg Posner, n 32 above, 103–110 and 115–121, and John Denver, 'William Shakespeare and the Jurisprudence of Comedy' (1987) 39 *Stanford L Rev* 825.

⁵⁸ On the origins of the Jewish political economy see Derek J Penslar, *Shylock's Children* (Berkeley, California: 2001). On Shakespeare's Shylock (and much else) John Gross's *Shylock—Four Hundred Years in the Life of a Legend* (London: 1992) can be recommended. Medieval stereotyping lives on in Mel Gibson's 2004 film *Passion*.

⁵⁹ The interest rate could not exceed 10%. See, further, Norman Jones, *God and the Moneylenders: Usury and Law in Early Modern England* (Oxford: 1989).

'A reasonable return on a loan was coming to be given a grudging acquiescence'.⁶⁰ But in this and much else *The Merchant of Venice* may be a response to, as well as a reflection of, popular beliefs and prejudices.⁶¹ It is an historical document which contains 'history's complexities and ambiguities'.⁶²

The trial scene itself has all the rhetoric of what Karl Llewellyn⁶³ called the 'grand style' (the famous 'quality of mercy' speech⁶⁴) but it ultimately rests on legalism (and as such is Llewellyn's 'formal style' personified). As Lyon puts it: 'The Christians out-Shylock Shylock as the letter of the law defeats the letter of the law in ways oblivious to its spirit and destructive of the human spirit'.⁶⁵ Shylock after his degradation is not even allowed an exit line.⁶⁶ He is shown no mercy. Indeed, for all its eloquence, Portia's famous speech is irrelevant to the resolution of the dilemma the court confronts. The conflict is apparent too in *Measure for Measure*. When Isabella pleads 'Yet show some pity', Angelo responds 'I show it most of all when I show justice'.⁶⁷ Of course, the conflict between justice and mercy is stronger and more central in *Measure for Measure*.

There is much to interest the lawyer in *Measure for Measure*: the obsolescent laws 'Dead to infliction, to themselves are dead; And liberty plucks justice by the nose'.⁶⁸ But are laws against fornication enforceable? Or is this just our view? Would a different one have appealed to an early seventeenth century audience?⁶⁹ The emphasis is on the 'rule of law'. So when Isabella pleads for her brother's life, Angelo's response is 'It is the law, not I, condemn your brother'.⁷⁰ The insights we are offered into matrimonial law are also of interest. Why Shakespeare employed the 'bed-trick' he had already exploited in *All's Well That Ends Well* is marginal to my concerns.⁷¹ But how would a Jacobean audience have reacted?

The play hinges on Claudio's breach of the obsolescent fornication laws. No one doubts that he is guilty.⁷² But then the Duke tells Isabella that, in the light of the marriage contract with Marianna that Angelo had broken, it would be fitting to substitute Marianna for Isabella in Angelo's bed. In England (where, of course, the play is set despite its fictional location in Vienna), a marriage contract probably created a valid marriage even if it was not solemnized. That Shakespeare seems to

⁶⁰ Per Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: 1979) 66. By 1625 Francis Bacon in 'On Usury' was seeing it as a necessity and looking to the benefits of the practice.

⁶¹ As argued long ago by EE Stoll, *Shakespeare Studies* (New York: 1927) 255–336. And see James Shapiro, *Shakespeare and the Jews* (New York: 1996).

⁶² Per John Lyon, *The Merchant of Venice* (Hemel Hempstead: 1988) 28.

⁶³ *The Common Law Tradition* (Boston: 1960). ⁶⁴ Act IV, i, 180–201.

⁶⁵ See n 62 above, 107.

⁶⁶ Compare the ridiculed Malvolio in *Twelfth Night* who is allowed to retort 'I'll be reveng'd on the whole pack of you' (Act V, i, 364).

⁶⁷ Act II, ii, 99–100.

⁶⁸ Act I, iii.

⁶⁹ But cf Posner, n 32 above, 118 who believes the attempt to outlaw fornication as 'quixotic' in the culture of the play as it would be today.

⁷⁰ Act II, ii, 84. Much the same point is made in Herman Melville's *Billy Budd* by Captain Vere.

⁷¹ It could be to turn what would have otherwise been a tragedy into a comedy. On matrimonial law and Shakespeare see Margaret Loftus Ranald, *Shakespeare and Historical Context* (New York: 1987).

⁷² Including Claudio himself.

know this is implied by the bed-trick played on Angelo. Even if Shakespeare was aware of the outlawing of informal marriage by the Council of Trent a year before he was born⁷³—and this would have affected Vienna, represented in the play as Roman Catholic, and not England—would his audience have appreciated what was going on?⁷⁴ It may, of course, be that the two contracts were different—*de futuro* and *de praesenti*—but Shakespeare describes them in virtually identical ways.⁷⁵ It is hardly surprising that ‘the courts themselves in Shakespeare’s day were frequently at a loss to distinguish the two types of betrothal contract’.⁷⁶ One of the ironies of the play is that Claudio’s sexual relationship with Julietta is the only one undertaken with mutual consent and dignified by mutual love.⁷⁷

My last Shakespearean illustration is *King Lear*. As Posner observes, it is ‘not usually considered one of Shakespeare’s “legal” plays’.⁷⁸ This is surprising given the images of ‘nature’ and natural law⁷⁹ that permeate it, and the fact that it has three trial scenes, one, as in *The Tempest*, a trial of the imagination. Less surprising perhaps because we have left the law/equity debates of *The Merchant of Venice* and *Measure for Measure* for events and debates closer to the last judgment.⁸⁰ Of the three trials in *Lear* (the mock trial of Goneril and Regan by Lear, the trial of Gloucester on false charge of treason, and the trial by battle in which Edgar kills Edmund), the first is much the most interesting. The first may be ‘an ostensible farce’⁸¹ but from it we learn much about law, justice, authority, and, possibly, Shakespeare. Its radicalism is striking. It has been observed (by Charles Hobday) that ‘Lear’s ravings often come near to the thought of the egalitarians’.⁸² Justice fails because ‘those luxurious and voluminous “robes and furr’d gowns hide all”’—whether these are the robes and furred gowns of the justices themselves, which hide their taking of bribes, or the robes and furred gowns of the economically privileged, which hide their avarice, and which blind justice to their sins’.⁸³ The mock trial may be exploited as social or legal protest. But it is more than this. It could also be non-political bawdy and satiric fun. Mock arraignments were part of law students’ Christmas revels at the

⁷³ In 1563.

⁷⁴ See, further Margaret Scott, ‘Our City’s Institutions: Some Further Reflections on the Marriage Contracts in *Measure for Measure*’ (1982) 49 *English Legal History* 790.

⁷⁵ See I, ii, 138–143 and III, i, 206–209.

⁷⁶ Per Davis P Harding, ‘Elizabethan Betrothals and *Measure for Measure*’ (1950) 49 *J of English and Germanic Philology* 139, 149.

⁷⁷ See Harriet Hawkins, *Measure for Measure* (Brighton: 1987) 23. Contrast the Duke’s ‘marriage’ of Isabella at the end of the play, which finds echoes in Gilbert and Sullivan’s *Trial By Jury* in which the judge says ‘I will marry her myself!’ (Muriel C Bradbrook has noted the parallel too: see ‘The Balance and the Sword in *Measure for Measure*’ in *Artist and Society in Shakespeare’s England* (Brighton: 1982) 146.)

⁷⁸ See n 32 above, 100.

⁷⁹ See John F Danby, *Shakespeare’s Doctrine of Nature* (London: 1949).

⁸⁰ See Act V, iii, 264–265 and Frank Kermode, *Shakespeare’s Language* (Harmondsworth: 2000) 184.

⁸¹ See n 32 above, 100.

⁸² ‘Clouted Shoon and Leather Aprons: Shakespeare and the Egalitarian Tradition’ (1979) 23 *Renaissance and Modern Studies* 75. This has led to debates about Shakespeare as proto-Leveller and to all sorts of speculation about why the scene was omitted in the Folio (eg was it censorship?).

⁸³ As argued by Judy Kronenfeld, *King Lear and the Naked Truth: Rethinking the Language of Religion and Resistance* (Durham, North Carolina: 1998) 204.

Inns of Court ‘when they set up miniature kingdoms and chose a monarch in direct imitation of the government at Whitehall’.⁸⁴ The mock trial is notable also for its meditation upon corrupt justice. Thus:

... plate sin with gold,
And the strong lance of justice hurtless breaks;
Arm it in rags, a pigmy’s straw doth pierce it.⁸⁵

There are several related ideas about corrupt justice in Lear’s imagined trial of his daughter. He remarks to Gloucester (who by then has had his eyes put out):

Look with thine ears: see how
yond justice rails upon yond simple thief. Hark, in
thine ear: change places, and handy-dandy, which
is the justice, which is the thief?⁸⁶

And, in lines which could have come from *Measure for Measure*:

Thou rascal beadle, hold thy bloody hand!
Why dost thou lash that whore? Strip thine own back;
Thou hotly lusts to use her in that kind
For which thou whipp’st her.⁸⁷

Lear rails not only against the ‘false justices’—this allows for the possibility that some judges are honest—but goes further, condemning the entire system of justice. He equates the ‘images of Authority’ with the ‘dog’s obey’d in office’.⁸⁸ He draws parallels between the ‘farmer’s dog [which] barks at a beggar’ and the ‘justice [who] rails upon yond simple thief’.⁸⁹ He relegates justice to a barking dog, yet promotes the thief to a beggar who is not guilty of theft. Seen as a barking dog that scares a beggar, the ‘image of authority’ is reduced to a brute animal who terrorizes the weak (in particular innocent beggars). But was this Shakespeare’s view when he wrote *King Lear* in the early years of James I? The criticisms of justice and of authority were not new or unique: Shakespeare was on well-trodden ground.⁹⁰ But we also find in Shakespeare exhortations to obey authority, most famously Ulysses’ speech in *Troilus and Cressida*.⁹¹ This is not the place to explain let alone resolve these contradictions, if they are to be characterized as such. Nor must we read the trial scene with an eye on today’s concepts. But it does throw, I believe, light on concerns of an early seventeenth century audience and reflected

⁸⁴ Per James Sharpe, ‘The People and the Law’ in Barry Reay (ed), *Popular Culture and Seventeenth Century England* (London: 1985) 261–262. The authorities did not approve of this sort of parody.

⁸⁶ Act IV, vi, 149–153.

⁸⁷ Act IV, vi, 158–161. It emerged in June 2004 that a Crown Court judge in Portsmouth who had presided over child abuse cases was downloading child pornography! And Portsmouth had earlier emerged as a hotbed of intolerance towards paedophiles with mass demonstrations on working class estates.

⁸⁹ Act IV, vi, 154 and 150.

⁹⁰ For illustrations see Kronenfeld, n 83 above, Ch 8.

⁹¹ Act I, iii, 86–137.

⁸⁵ Act IV, vi, 163–165.

⁸⁸ Act IV, vi, 156–157.

movements then current, and latent and not so latent discontents that would see, in the generation after Shakespeare, the civil war.

I have focused thus far on Biblical sources, the Greeks and Shakespeare. If I jump now to more modern times it is not because I do not think the popular culture of the seventeenth or eighteenth centuries does not ooze with images of law, lawyers and legal practice. A study of the law and justice in Ben Jonson⁹² or an exploration of matrimonial laws and manners in Restoration comedies⁹³ or the paintings of William Hogarth⁹⁴ would throw much light on the societies for whom these authors and painters produced their works. Nor, given space considerations, will I look at the novels of Dickens—we still take many of our images of nineteenth-century justice from his novels—or at Dostoevsky's *Crime and Punishment* (though is there a better example of interrogation than Porfiry's of Raskolnikov?⁹⁵) or at *Billy Budd*⁹⁶ or Kafka's *The Trial* (surely *the* key text for understanding so much about the insecurities of living under totalitarianism).⁹⁷ Instead, I will examine, albeit briefly, two socio-legal problems, domestic violence and abortion through examples of popular culture.

When Roddy Doyle's *The Woman Who Walked Into Doors*⁹⁸ was published to much acclaim in 1996 it was hailed as the first domestic violence novel.⁹⁹ But, as Marlene Tromp (one of the contributors to this volume) has shown in *The Private Rod*,¹⁰⁰ this is far from the case. Her title is taken from Wilkie Collins' *The Woman in White* published in 1860:¹⁰¹

The rod of iron with which he rules her never appears in company—it is a private rod, and is always kept upstairs.

Tromp excludes from her discussion George Eliot's novella 'Janet's Repentance',¹⁰² which is slightly earlier than *The Woman in White*, because, she argues, it is 'complicated by the question of drunkenness, a "moral disease" that was believed to go hand in hand with marital violence'.¹⁰³ Domestic violence was emerging as a social

⁹² In *Volpone*, for example. See generally, John J Enck, *Jonson and the Comic Truth* (Madison, Wisc: 1957). Note also the satire on marriage in *Epicene*.

⁹³ On which see Robert D Hume, *The Rakish Stage* (Carbondale, Ill: 1983) Ch 6. Restoration comedy is said to exhibit an 'awareness of the drawbacks and possible pitfalls of matrimony' (at 183).

⁹⁴ The series known as 'The Rake's Progress', for example. ⁹⁵ *Crime and Punishment*.

⁹⁶ On which see Richard Weisberg, *The Failure of the Word: The Protagonist As Lawyer in Modern Fiction* (New Haven, NJ: 1984).

⁹⁷ Posner discusses this, see n 32 above, Ch 4.

⁹⁸ London: 1996.

⁹⁹ But see Jane Smiley's *A Thousand Acres* (New York: 1991) and Fannie Flagg's *Fried Green Tomatoes at The Whistle Stop Café* (New York: 1987). It was not even the first modern domestic violence novel.

¹⁰⁰ Charlottesville: 2000.

¹⁰¹ London: 1860.

¹⁰² First published in serial form in Blackwood's *Edinburgh Magazine* in 1857 and republished in 1858 in *Scenes of Clerical Life*. It will be noted that in David Lodge's Penguin edition (Harmondsworth: 1973) the heroine's drinking problem is referred to without even mentioning that she is a battered wife. But Rosemary Ashton, *George Eliot—A Life* (London: 1996) refers to the 'remarkably accurate depiction of the psychology of a battered wife' (at 178).

¹⁰³ See n 100 above, 252, n 31. But see Sandra Gilbert and Susan Gubar, *The Madwoman in the Attic* (New Haven, NJ: 1979) and Virginia B Morris, *Double Jeopardy: Women who Kill in Victorian Fiction* (Lexington, Kentucky: 1990).

problem for which legal solutions were sought. John Stuart Mill had written of 'a bulldog set at the heels of a wife, blows with a poker, attempted murder by hanging, stabbings, murder in a fit of drunkenness' in *The Sunday Times* in August 1851.¹⁰⁴

Frances Power Cobbe's pamphlet *Wife Torture in England* was published in 1878 and was instrumental in putting legislation onto the statute book.¹⁰⁵ Each time domestic violence has surfaced,¹⁰⁶ there is feminist questioning of women's role and of patriarchy (the other occasions being the suffrage movement before the First World War¹⁰⁷ and the 1970s¹⁰⁸).

It is all too easy to overlook the significance of 'Janet's Repentance'. Certainly, when I read it for the first time as an 'A' Level student—*Middlemarch* was then a set text!—I glossed over the domestic violence (though this concept was not yet in common currency¹⁰⁹). Eliot challenges the hierarchical view of marriage and the ramifications of its physical abuses. And she was writing when there were few challenges to patriarchy,¹¹⁰ and the so-called 'rule of thumb'¹¹¹ was far from dead. Eliot captures the conflicts and tensions that beset battered women then, and now. And she seeks solutions: through the Evangelical Minister she suggests mediation by 'some man of character and experience',¹¹² through the victim's mother, a man who 'knows the law'¹¹³ and of whom the battering husband is 'afraid' is posited as an answer. But Eliot must have known the law offered no solutions, not even the option of divorce.¹¹⁴ Even more surprising, at least in the light of present knowledge is 'the absence of any helpful verbal discourse for defining and appraising domestic violence'.¹¹⁵ None of the middle-class characters admits that the husband in 'Janet's Repentance' beats his wife and only a few hold him accountable.¹¹⁶

¹⁰⁴ I quote this in MDA Freeman, *Violence In The Home: A Socio-Legal Study* (Aldershot: 1979) 5. See also Margaret May, 'Violence In The Family: An Historical Perspective' in JP Martin (ed), *Violence and the Family* (Chichester: 1978) 135–168. Another example is JW Kaye, *North British Rev* 25 May 1856, 249–250 who explains that husbands wanted to return home to 'a comfortable arm chair, a singing kettle, a tidied room'.

¹⁰⁵ She discusses the background in her *Autobiography* (London: 1894). The legislation was the Matrimonial Causes Act 1878 (the first 'separation order').

¹⁰⁶ Of course, it is always 'there'. The earliest legal case I have found is *Neffeld v Neffeld* in 1395. RM Helmholz, *Marriage Litigation in Medieval England* (Cambridge: 1974) 105 discusses the case.

¹⁰⁷ See Jill Liddington and Jill Norris, *One Hand Tied Behind Us* (London: 1978).

¹⁰⁸ Erin Pizzey's *Scream Quietly or the Neighbours Will Hear* (Harmondsworth: 1974) was the first graphic portrayal which made a modern audience sit up.

¹⁰⁹ I doubt if it was in use before the early 1970s.

¹¹⁰ See Sylvia Walby, *Theorizing Patriarchy* (Oxford: 1990), Ch 6.

¹¹¹ On which see RE Dobash and RP Dobash, *Violence Against Wives* (New York: 1979).

¹¹² *Scenes of Clerical Life* (Oxford: 1985) 292. ¹¹³ *ibid*, 295.

¹¹⁴ Divorce was introduced in 1858, the same year as *Scenes of Clerical Life* was published.

¹¹⁵ Noted by Mark Spilka, *Eight Lessons In Love* (Columbia, Missouri: 1997) 35.

¹¹⁶ And note the silence of Eliot's leading biographer: see Gordon G Haight, *George Eliot: A Biography* (Oxford: 1968).

There are numerous novels and stories after ‘Janet’s Repentance’ which portray domestic violence. Spilka¹¹⁷ and Tromp¹¹⁸ offer excellent, and very different, analyses of these. Tromp uses the genre of the Victorian sensation novel, which was particularly popular in the 1860s and 1870s. Novels raised questions about domesticity, the relationships of men and women, and violence against the backdrop of public and parliamentary debate about rights and obligations within and outside marriage. Of *The Woman in White* Tromp notes that it ‘took up the tensions represented in the Divorce Act of 1857’. It ‘re-marks the language of violence in the domestic space, anticipating and casting the frame of later debates’.¹¹⁹

The sensation novels ‘challenged the solidity and impermeability of the legal and cultural understanding of violence in the home, offering not the pleasing safety of morality in the ranks of the well-to-do, but a wealthy family in strife’.¹²⁰ Spilka shows us domestic violence in the writings of Lawrence,¹²¹ Joyce,¹²² Hemingway¹²³ and Steinbeck¹²⁴ amongst others. Of these others the most interesting is Isaac Bashevis Singer¹²⁵ with an account of domestic violence in a shtetl in Poland in circa 1900. Spilka finds Singer’s ‘struggles with his own hostilities toward women, his attractions toward violence . . . offers a useful key to the male struggles in our time with abusive propensities’.¹²⁶

The Woman Who Walked Into Doors reflects today’s greater sensitivity and deeper understanding of domestic violence. It is narrated by the victim of 17 years of a brutal, now dead, husband. And it is graphic:¹²⁷

There wasn’t one minute when I wasn’t afraid . . . waiting for the fist, waiting for the smile. I was brainwashed and brain-dead, a zombie for hours, afraid to think, afraid to stop. . . . I sat at home and waited. I mopped up my own blood. I lost all my friends, and most of my teeth. He gave me a choice, left or right; I chose left and he broke the little finger on my left hand. Because I scorched one of his shirts. Because his egg was too hard. Because the toilet seat was wet. Because because because. He demolished me. He destroyed me. And I never stopped loving him.¹²⁸

The narration answers so many questions posed by those who look for solutions, and not just legal solutions, to domestic violence. Why did she put up with it, why

¹¹⁷ See n 115 above. ¹¹⁸ See n 100 above. ¹¹⁹ *ibid*, 71. ¹²⁰ *ibid*, 72.

¹²¹ Spilka concentrates on ‘The White Stocking’ but equally, perhaps more, interesting is *The Rainbow* where physical abuse/sexual abuse of a child by a young schoolmistress masquerades as legitimate corporal punishment. The novel has two moving-image versions, a 1984 film directed by Ken Russell and a 1989 BBC TV drama (in the latter the caning was extremely violent).

¹²² ‘Counterparts’ in *Dubliners*, first published in 1914.

¹²³ ‘The Snows of Kilimanjaro’. See, further, Mark Spilka, ‘Hemingway and Lawrence As Abusive Husbands’ in *Renewing the Normative D. H. Lawrence: A Personal Progress* (Columbia, Missouri: 1992).

¹²⁴ ‘The Murder’ in *The Long Valley* (New York: 1948).

¹²⁵ ‘The Wife Killer: A Folk tale’ in *Gimpel The Fool and Other Stories* (New York: 1957).

¹²⁶ See n 115 above, 10–11. ¹²⁷ See n 98 above. See eg, 175–176.

¹²⁸ *ibid*, 176–177.

stay, why not leave him? ‘She didn’t exist, she was good for fuckin’ nothing’,¹²⁹ she ‘needed him to punish her’.¹³⁰ Her family saw nothing. She went to her GP accompanied by her husband and he prescribed valium.¹³¹ She told the A&E that she had fallen down stairs and doctors believed her.¹³² She insists she would have ‘told them everything . . . if they’d asked’,¹³³ but would she? She is, we discover, full of defence mechanisms.¹³⁴ Her sister suggested the police and barring orders but it was ‘none of her business’.¹³⁵ Instead, she ‘ran away in her dreams’, ‘to twenty years ago’, ‘to another country’.¹³⁶ Eventually she strikes back: she ‘wallops’¹³⁷ him with a frying pan and throws him out. But is her reaction that of the provoked reasonable man or the battered woman?¹³⁸ He is subsequently killed by the police in the course of an armed robbery, but what if she had killed him?¹³⁹ What would have been her defences and how would they have been responded to?¹⁴⁰ Would her story have been the same?¹⁴¹

Debate about abortion may begin with moral argument,¹⁴² it often proceeds to the interpretation of statistics, but it usually ends with stories. The 14-year-old girl who would not have had an abortion had she been able to tell her mother about her predicament¹⁴³—the law gave her the ‘right’ to have an abortion because she was ‘Gillick competent’.¹⁴⁴ The woman, who would have had an abortion, had she known her child was going to be disabled or that her partner was going to leave her. Perhaps one day, at least in fiction, the story of the aborted foetus who lived.¹⁴⁵ The abortion debate is framed within overlapping narratives of pregnancy and birth. As Judith Wilt explains, one of these is ‘abstract, scientific or religious’. Others are ‘essentially female’.¹⁴⁶ The law, though more liberal since 1967¹⁴⁷ (1973 in the United States¹⁴⁸) remains essentially contested. In recent US elections it has been

¹²⁹ See n 98 above. See eg, 177 and passim. ¹³⁰ *ibid*, 177. ¹³¹ *ibid*, 190.

¹³² *ibid*, 199. ¹³³ *ibid*, 201. ¹³⁴ See especially the first paragraph on 188.

¹³⁵ *ibid*, 205 (curiously the only reference to legal remedies, a sign perhaps of their perceived irrelevance to a woman in her position or their general perceived impotence).

¹³⁶ *ibid*, 210, 211. ¹³⁷ *ibid*, 216.

¹³⁸ See *R v Humphreys* [1995] 4 All ER 1010. In relation to the US see Anne M Coughlin, ‘Excusing Conduct’ (1994) 82 *California L Rev* 1.

¹³⁹ According to Holly Maguigan, ‘Battered Women and Self-Defence: Myths and Misconceptions in Current Reform Proposals’ (1991) 140 *U of Pennsylvania L Rev* 379–486, 80% of battered women who kill do so in a direct confrontation.

¹⁴⁰ See Susan Edwards, *Women on Trial* (Manchester: 1984). See also Dan M Kahan and Martha Nussbaum, ‘Two Conceptions of Emotion in the Criminal Law’ (1996) 96 *Columbia L Rev* 269–374.

¹⁴¹ See Peter Brooks, ‘Storytelling Without Fear? Confession in Law and Literature’ in Peter Brooks and Paul Gewirtz (eds), *Lau’s Stories* (New Haven, NJ: 1996) 114–134. See also JM Coetzee, ‘Confession and Double Thoughts: Tolstoy, Rousseau, Dostoevsky in *Doubling The Point* (Cambridge, Mass: 1992) 274.

¹⁴² One of the earliest and most famous defences is Judith Jarvis Thomson, ‘A Defense of Abortion’ (1971) 1 *Philosophy and Public Affairs* 47.

¹⁴³ This ‘story’ got considerable media coverage in May 2004.

¹⁴⁴ See *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

¹⁴⁵ Sensationalized in the *Daily Mail*, 22 June 2004, 1–2. And see Thomas Keneally, *Passenger* (London: 1979).

¹⁴⁶ *Abortion, Choice and Contemporary Fiction* (Chicago: 1990) 3.

¹⁴⁷ Abortion Act 1967: liberalized further in 1990 (Human Fertilisation and Embryology Act).

¹⁴⁸ *Roe v Wade* 410 US 113 (1973).

virtually the only issue of legal policy on which votes hinged. In England, as I write, the courts are hearing a challenge to the 'foetal abnormality' ground brought by a young female priest, herself born with a (now corrected) cleft palate.¹⁴⁹

Where there are early depictions of the maternity dilemma, often after rape,¹⁵⁰ the issue is infanticide rather than abortion. But infanticide did not exist as a separate category of crime until juries' refusals to convict women of murder and thus potentially to condemn them to death led Parliament to create the crime of infanticide in 1938.¹⁵¹ Tess dies for killing her seducer, not her baby.¹⁵² When pregnant she had cried out to her mother, 'why didn't you warn me? Ladies know what to fend hands against, because they read novels that tell them of these tricks; but I never had the choice of learning in that way, and you did not help me!'¹⁵³ I am not sure what novels Tess had in mind. Presumably not *Anna Karenina*,¹⁵⁴ or *The Scarlet Letter*,¹⁵⁵ or *The Heart of Midlothian*¹⁵⁶ or *Adam Bede*.¹⁵⁷ Would it have been those of Jane Austen (look at the hostile attitude to children in *Persuasion*¹⁵⁸ where 'being released from' her sister's child begins the process of becoming reattached to her lover and future husband)? Or the Brontë sisters? Wilt comments that: 'The crowd of foster mothers in the Victorian novel generally signified not only the true state of maternal mortality in the nineteenth century but also the subliminal sense of the whole culture that pregnancy has in it a death as well as life'.¹⁵⁹

The morality of abortion, its status as a key issue in gender politics, the ways in which a masculine law drove women into the back streets and a medical profession which even today (in Britain at least) acts as gatekeeper and policeman—all are to be found represented in modern fiction. There are so many examples—I can pick out only a couple.

The classic short story about abortion¹⁶⁰—Ernest Hemingway's 'Hills Like White Elephants'¹⁶¹ even omits the word. A young American couple are at a railway junction in Spain. He remarks on the 'awfully simple operation'¹⁶² that they are travelling for. 'It's really not anything. It's just to let the air in.'¹⁶³ He only wants her but she (speaking for Hemingway) senses that it will change their relationship

¹⁴⁹ See *The Times* 12 April 2004.

¹⁵⁰ As in one of the earliest novels, *Clarissa* by Samuel Richardson, published in 1748.

¹⁵¹ See Infanticide Act 1938, s 1.

¹⁵² See Thomas Hardy, *Tess of the D'Urbervilles*, first published in 1891.

¹⁵³ London: 1954, 106.

¹⁵⁴ Tolstoy's novel was first published in 1878 but it seems unlikely that Hardy would have known it.

¹⁵⁵ Nathaniel Hawthorne, *The Scarlet Letter*, first published in 1850.

¹⁵⁶ First published in 1818.

¹⁵⁷ George Eliot, *Adam Bede*, first published in 1859. Hetty Sorrel is convicted of the murder of her baby but saved from the foot of the gallows by a pardon obtained by her seducer. It is common to say she was convicted of infanticide, but that is anachronistic.

¹⁵⁸ First published in 1818. This is glossed over in all the critical accounts to which I have referred.

¹⁵⁹ See n 146 above, 24.

¹⁶⁰ To Wilt, *ibid*, 103 it is the classic 'American' short story about abortion.

¹⁶¹ First published in 1927. I am using *The First Forty-Nine Stories* (London: 1939).

¹⁶² *ibid*, 250. ¹⁶³ *ibid*.

as much as would the birth of their child. She probes: 'And you think then we'll be alright? If I do it you won't worry?'¹⁶⁴ He insists it is her decision: 'I don't want you to do it if you don't want to'.¹⁶⁵ And she is driven to a final outburst: 'would you please please please please please please stop talking'.¹⁶⁶ An aborted dialogue, symbolic perhaps of their relationship and certainly of their different ways of viewing the pregnancy: for him as an end, for her as the beginning of something else. And we note the station is between the 'dry side' of the valley and the fertile side, banked by hills 'like white elephants'. He remarks he hasn't seen white elephants. 'No you wouldn't have'¹⁶⁷ she replies. She, of course, has, for they are a symbol of her pregnancy.

Margaret Drabble's *The Millstone* was published at the very end of the pre-legal abortion days.¹⁶⁸ I vividly recall reading it as I taught criminal law (and hence the nineteenth century law of abortion) at Leeds University in 1966 and 1967. And I remember the deep impression it made upon me then. The metaphor is drawn from the book of Matthew: 'Whoso shall offend me of these little ones which believe in me, it were the better that a millstone were hanged about his neck, and that he were drowned in the depth of the sea'.¹⁶⁹

The protagonist of *The Millstone* is a literary scholar enjoying an active but sexless social life when love—itself a 'millstone'—brings pregnancy. Logic dictates an abortion but maternal force inclines her to pregnancy.¹⁷⁰ Initially she was inclined to induce an abortion herself: she half remembers the old wives' prescription of gin and hot baths.¹⁷¹ It doesn't work. Abortion is still at this time a criminal offence, only not unlawful under the vague defence of *Bourne's* case¹⁷² that it was necessary to save the life or health of the mother.¹⁷³ One of the characters in *The Millstone* points to the 'Catch-22' of this that abortion might only be lawful where the mother was mentally unstable but that abortion might destabilize her further. She chooses birth as an 'initiation into reality'.¹⁷⁴ It means learning to live within a human limit.¹⁷⁵ Pregnancy is part of the process of discovery, mirroring the intellectual activity with which she is engaged. The baby has a serious birth defect, a flawed heart that requires a life-threatening operation to correct. She survives. Much of the remainder of the novel is about—or should one say also about—challenging rules, for the hospital rules forbid mothers visiting their infant children. Up to now the mother has been fighting tensions, battling conflicts within

¹⁶⁴ First published in 1927. I am using *The First Forty-Nine Stories* (London: 1939), 251.

¹⁶⁵ *ibid.* ¹⁶⁶ *ibid.*, 253.

¹⁶⁷ *ibid.*, 249. And see Pamela Smiley, 'Gender-Linked Miscommunication in "Hills Like White Elephants"' in Jackson J Benson (ed), *New Critical Approaches to the Short Stories of Ernest Hemingway* (Durham, NC: 1990) 288–299.

¹⁶⁸ London: 1965. Another Drabble novel whose fulcrum is pregnancy and the choice to bear or abort is *The Middle Ground* (London: 1980).

¹⁶⁹ Matthew 18:6.

¹⁷⁰ Drabble was in her third pregnancy when she wrote *The Millstone*.

¹⁷¹ In a case in 1927, a girl of 13 was prosecuted for attempting to induce an abortion by taking laxative tablets and sitting in a hot bath.

¹⁷² *R v Bourne* [1939] 1 KB 687.

¹⁷³ The judge said there might be a 'duty' to abort to save the 'yet more precious life' of the mother.

¹⁷⁴ See n 168 above, 41. ¹⁷⁵ *ibid.*, 65.

herself. Now the conflicts are with authority, with hospital middle management, all women. The attitudes they exude are, like the laws of abortion, of another age: ethics within health care barely merited consideration. She wins the right to see her daughter, but only because she enlists the support of a male doctor, a friend of her father. Wilt comments: 'The quality of this life is that mothers can mother only through the influence of men'.¹⁷⁶

This is the historical context—or a slice of it—for this volume. What follows is not a summary of the papers—they can speak for themselves—but rather a few thoughts, some pointers, some responses.

Only one of the papers explores children's literature: Desmond Manderson on Maurice Sendak's *Where the Wild Things Are*. As Manderson notes, Sendak took children's literature seriously. I fear too few of us do.¹⁷⁷ As a result there are too few examples which examine such literature through law spectacles. Of course, the category itself is far from unproblematic.¹⁷⁸ What is *Harry Potter*? Those I see reading JK Rowling's books on the tube are certainly not children! And if children's literature has been neglected, what of children's comics?¹⁷⁹ There are few better examples of popular culture. And as with children's literature more generally lots of insights into children's concepts of law emerge. Piaget, as is well-known, found that children commonly thought it was naughtier for a child to break ten glasses when doing their best to help than to break one on purpose in a fit of rage.¹⁸⁰ A young child's sense of justice can be similarly crude. S/he may well believe in an expiatory form of justice, where the wrongdoer should be made to suffer a punishment painful in proportion to the offence committed. This can be found in the literature they read which reflects this, and may well reinforce it. Manderson shows how *Where the Wild Things Are* encourages a positivistic model of law with authority not expected to be questioned.¹⁸¹ Seymour challenges this.¹⁸² The book itself is one of the most striking picture books published in many years. And it divided both critical and lay opinion. Sendak himself said his 'object is never to lie to children'.¹⁸³ But what is a 'lie'? Into what category do fantasy and escapism, prime ingredients of adult entertainment, come? As a child I remember being absorbed in Frank Richards¹⁸⁴ and Anthony Buckeridge.¹⁸⁵ On one level these

¹⁷⁶ See n 146 above, 58.

¹⁷⁷ A good recent illustration is Brian Klug's study of 'Peter Pan' in Kathleen Alaimo and Brian Klug, *Children As Equals—Exploring the Rights of Children* (Lanham, Maryland: 2002).

¹⁷⁸ See generally Nicholas Tucker, *The Child and the Book* (Cambridge: 1981).

¹⁷⁹ See George Perry, *The Penguin Book of Comics* (Harmondsworth: 1971). See also n 178 above, Ch 5.

¹⁸⁰ Jean Piaget, *The Moral Judgment of the Child* (London: 1932). But see Peter Bryant, *Perception and Understanding in Young Children: An Experimental Approach* (London: 1974).

¹⁸¹ Associated particularly with HLA Hart, *The Concept of Law* (Oxford: 1961).

¹⁸² See p 71 below. Seymour is responding to an earlier version of Manderson's paper, but the differences are not material to his argument.

¹⁸³ See Maurice Sendak, *Where the Wild Things Are* (London: 1967).

¹⁸⁴ See ES Turner, *Boys Will Be Boys* (London: 1975).

¹⁸⁵ His 'Jennings' stories. On books for girls see Mary Cadogan and Patricia Craig, *You're a Brick, Angela: A New Look At Girls' Fiction from 1840 to 1976* (London: 1976).

authors wrote (harmlessly) about challenges to authority: in Richards' 'Bunter' stories, then extremely popular children's television, the end was always a beating; in Buckeridge's 'Jennings' stories the chief character was invariably good at bungling things so as to bring maximum danger to himself from exasperated teachers. At least children then read. Has anyone considered what impact the absence of reading—its replacement by computer games—has on legal socialization for the current generation of children?¹⁸⁶

A number of the papers in this book explore aspects of the novel. Papke's account of five US lawyer/story-tellers is fascinating and thought-provoking. What equips lawyers like Erle Stanley Gardner ('Perry Mason'), Scott Turow and John Grisham to write popular fiction? What is it about lawyers and law that sells so well? Are we troubled by the law, excited by it, searching for the 'right answer'?¹⁸⁷ Does it tell us anything about societal change that where once—as in the Perry Mason stories—there was formulaic justice, now it is not uncommon (Turow's *Presumed Innocent* is an example¹⁸⁸) to find ambiguity rather than closure? Do these examples of popular fiction offer us a view (or views) on fears and expectations about law and lawyers in twentieth-century America?¹⁸⁹ Or do they go beyond this and offer insights into the United States more generally? Why, one may ask, has this cultural phenomenon (Papke calls it 'complex and varied') not taken root so persuasively in other countries such as Britain? I remember devouring the stories of Henry Cecil, a county court judge at Willesden, and he was very popular in the 1950s and 1960s.¹⁹⁰ But is he read today? I doubt it, and no one springs to mind as an obvious successor, though claims may be made for Frances Fyfield.

However, as Gearey shows, a novelist does not have to be concerned with lawyers, courts or 'what has passed until now as the themes of legal philosophy' to engage with jurisprudence. And he argues that JG Ballard does just this. Perhaps any text seen as fundamental, around which society defines itself, can be read in this way. The Bible, the Greek Tragedies, Shakespeare, as I have already argued, can be seen thus. As can other forms of popular culture: Verdi's operas in Risorgimento Italy,¹⁹¹ Wagner's 'Ring'¹⁹² and his 'Meistersinger'¹⁹³ in Bismarck's Germany (and rather more malignly in Hitler's¹⁹⁴), the Hollywood musical, the

¹⁸⁶ See Elliot Turiel, *The Culture of Morality* (Cambridge: 2002).

¹⁸⁷ cf Ronald Dworkin, *Taking Rights Seriously* (London: 1977). For a contrast with literature see Maria Aristodemou, *Law and Literature* (Oxford: 2000) 230.

¹⁸⁸ New York: 1987. And see Christine Corcos, 'Presuming Innocence: Alan Pakula and Scott Turow Take on the Great American Legal Fiction' (1977) 22 *Oklahoma City U L Rev* 129.

¹⁸⁹ See Mary Ann Glendon, *A Nation Under Lawyers* (New York: 1994).

¹⁹⁰ His best story (and most well-known) was *Sober As A Judge*. As a 14 year old I appeared before him (Judge Leon) to ask for an adjournment—I got it!

¹⁹¹ The people would chant Verdi's name—it stood for 'Vittorio Emanuele Re D'Italia'. Many of Verdi's early operas, in particular *Nabucco*, paralleled the Italian peoples' fight for independence. See Mary Jane Phillips-Matz, *Verdi—A Biography* (New York: 1993).

¹⁹² See Deryck Cooke, *I Saw the World End: A Study of Wagner's Ring* (Oxford: 1979).

¹⁹³ In particular the paean to 'die heil'ge deutsche Kunst' at the opera's conclusion.

¹⁹⁴ On which see Paul Lawrence Rose, *Revolutionary Antisemitism in Germany From Kant to Wagner* (Princeton, NJ: 1990).

Beatles, the 'Bollywood' film. Even a medium such as a photograph—Valier describes that of a man about to be tried and condemned to death—can 'code' the terror of law. As Douzinas points out, 'the law loves and fears images'.¹⁹⁵ Hence the reluctance in Britain to allow cameras into courtrooms¹⁹⁶ and the development of the stylized courtroom sketch, discussed in Lynda Nead's paper. Are the 'images' then different in countries which allow cameras into courtrooms? And would the trials, both image and discourse, change if the trial were presented as entertainment? Imagine (say) the Jeffrey Archer trial 'staged' in the United States, or as it would have been had it taken place in the United States.

There are several contributions to this volume that focus on novels which at first sight have nothing to do with legal issues and yet which in different ways throw light on aspects of law. Thus Marlene Tromp addresses 'sensation' fiction which questioned not just social policy, but also normality and morality. In terms of popular culture, what is of particular interest is how this genre of literature was received by nineteenth century readers and critics. As Tromp points out, when fiction leaves us 'feeling vexed, unsettled, discomfited—as sensation fiction did its Victorian readers, it may be providing us with a cue for social change'. Put this into a contemporary context and the most likely vehicles of such transformation become the 'soaps'.¹⁹⁷ Certainly, they have been credited with bringing home to a mass population an awareness of any number of social (and therefore potentially legal) problems,¹⁹⁸ much as the television drama *Cathy Come Home* did for homelessness a generation ago.¹⁹⁹

The contemporary significance particularly for our understanding of jurisprudence, of genres of earlier ages is brought out in Leslie Moran's exploration of the Gothic imagination.²⁰⁰ His argument is that some recent jurisprudential scholarship, informed by post-structuralist and psychoanalytic thought, engages with themes that are integral to the Gothic imagination. Uncertainties about the nature of power, law, society, family, and sexuality dominate Gothic fiction. This is true also of literature influenced by the Gothic imagination, for example Kafka's work.²⁰¹ From Kafka it is not a long way to the Nazi concentration camps²⁰²—or to Guantanamo Bay. The opacity of the law could not be 'clearer', nor could its hypocrisy or contradictions be more manifest.²⁰³

The film, of course, is a modern genre. It is a focus of the majority of the papers in this collection. It is not surprising that there should be such a vibrant interest in law

¹⁹⁵ 'The Legality of The Image' (2000) 63 MLR 815.

¹⁹⁶ On which see Martin Dockray, 'Court On Television' (1988) 51 MLR 593.

¹⁹⁷ J. Fiske, *Television Culture* (London: 1987)

¹⁹⁸ One can only speculate what the possible impact of John Irving's *The Cider House Rules* (New York: 1985) would have been on *Roe v Wade*, had it been published earlier.

¹⁹⁹ It led to the passing—albeit 10 years later—of the Housing (Homeless Persons) Act 1977.

²⁰⁰ See p 226 below.

²⁰¹ See C Agamben, *Potentialities: Collected Essays In Philosophy* (Stanford: 1999) Ch 10.

²⁰² It is not surprising that Kafka's work was banned both by the Nazis and post World War by the Communists. See Nicholas Murray, *Kafka* (London: 2004) 387–388.

²⁰³ See Ronald Dworkin, 'Terror and the Attack on Civil Liberties', *New York Review of Books* 6 November 2003.

and film studies.²⁰⁴ Themes about subjects concerned with law have had such a pervasive influence in the first century of film making. And many of them are wonderful introductions to law. Is there a better way of introducing jury decision-making than by showing *12 Angry Men*?²⁰⁵ It may also reinforce myths, for example, as John Denvir points out,²⁰⁶ of good lawyers and bad legal systems. It also tends to bring out the pathological side of law, with a greater emphasis on dispute resolution, in particular the trial, than on, what Llewellyn called, 'preventive channelling'.²⁰⁷ Film has, it would seem, emerged as a legitimate element of law studies because it provides 'an apparently credible account of the operation and personnel of the law'.²⁰⁸ If, as Stewart Macaulay has argued,²⁰⁹ people derive their knowledge about the law from popular culture, in particular film, then the accuracy of its portrayal must be of concern. Of course, films can show features of the law, such as jury decision-making, from which research is banned.²¹⁰ It would not altogether surprise if jury persons acquired an understanding of their role more from films than a judge's instructions. It is probably more complex than this, and so Sherwin²¹¹ and Meyer²¹² have argued. They have argued that the form and nature of presentations in trials in the United States increasingly corresponds to the expectations of juries. The 'autonomy' model of law does not work when there is interpretation and mutual dependence. But it is not just juries who may get their understanding of law from films, but the population in general. As Sherwin notes: 'popular legal representations serve as a cultural barometer revealing pressing needs, fantasies, and anxieties, as well as beliefs, hopes and aspirations that are circulating in society'.²¹³ And they shape the way we understand the role of law in society. This itself may change as a result. Of course, not all films which portray legal issues are set within legal systems with which the audience has familiarity. Do we know if audiences appreciate the differences? And if they do, are films a medium of legal pluralistic awareness? Or do they reinforce stereotypes or foster xenophobia? Machura points out that Nazi propaganda films used conventions of American courtroom dramas to denounce the American legal system.²¹⁴

These are just a few of the themes which emerge in the papers in this volume. Legal *realism* threw light on the legal system in the twentieth century, even if it often exposed the obvious. Legal *reelism*—and other forms of law and popular culture studies—similarly has much to offer to the student of law and society. Our jurisprudence is constantly enriched from new sources and perspectives. This volume takes the pulse of a new and vibrant field. It offers explanations of the past, understandings of the present, and pointers as to the future.

²⁰⁴ Exemplified by the many books that have been published in recent years including David Black, *Law in Film* (Kansas: 1999), Nicole Rafter, *Shots in the Mirror* (Oxford: 2000), Steve Greenfield, Guy Osborn and Peter Robson, *Film and the Law* (London: 2001).

²⁰⁵ United Artists, 1957. ²⁰⁶ See p 183 below.

²⁰⁷ See Karl Llewellyn and EA Hoebel, *The Cheyenne Way* (Norman, Oklahoma: 1941).

²⁰⁸ See p 186 below.

²⁰⁹ 'Images of Law in Everyday Life' (1987) 21 *Law and Society Rev* 185–218.

²¹⁰ On problems of researching juries see Contempt of Court Act 1981, s 8.

²¹¹ *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (Chicago: 2000).

²¹² See p 65 below. ²¹³ See p 90 below. ²¹⁴ See p 148 below.