

THE PRODUCTION OF LAW (AND CINEMA): PRELIMINARY COMMENTS ON AN EMERGING DISCOURSE

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I. SETTING THE STAGE:

A. LIGHTS, CAMERA...

We have come a long way since an American Court determined that cinema is nothing more than a form of entertainment.¹ More than half a century ago it became widely accepted that cinema is a paradigmatic medium for the communication of ideas, and is thus covered by the First Amendment.² Currently, we are on a threshold of a new era, in which cinema—fiction, documentary, and other genres—is perceived not only as an instrument for the expression of thoughts and reflections, but also as a sufficiently rich practice from which it is possible to learn about other practices, and, specifically, about law.³ Several law schools include, as part of their J.D. curriculum, a course on Law and Cinema;⁴ law professors resort to film in “traditional” classes⁵ and scholarly articles;⁶ and law

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¹ The Court found that a film is not a serious medium for discourse concerning opinions, and it can thus not be seen as constitutionally protected speech. Therefore, the State can ban such “entertainment” inasmuch as it poses a threat to society. *Mut. Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 242–45 (1915).

² See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Joseph Burstyn Inc. v. Wilson*, 334 U.S. 495 (1952). For the claim that films—at least some films—are ideas, see JACK C. ELLIS, *A HISTORY OF FILM 1* (1979).

³ See WILLIAM P MCNEIL, *LEX POPULI: THE JURISPRUDENCE OF POPULAR CULTURE* 61 (2007). See also RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW & POPULAR CULTURE* (2000); STEVE REDHEAD, *THE BIRTH OF LAW AND POPULAR CULTURE* 13 (1995) (offering a comparative historical analysis).

⁴ For example, courses are taught at UC Berkeley School of Law (Boalt Hall) (by Laurent Mayali and Ticien Sassoubre); Michael Asimow teaches a course at UCLA, based on the course book he co-authored with Shannon Mader: *LAW AND POPULAR CULTURE* (2004) [hereinafter ASIMOW & MADER]. Courses are taught in other law schools across North America, including in Canadian law school (such as the University of Toronto and Victoria University).

⁵ For a discussion of the British context, see Guy Osborn, *Borders and Boundaries: Locating the Law in Film* 28 *J. LAW & SOC.* 164 (2001).

⁶ Typically, scholars would refer to a movie as a legal text. For example, in setting the framework for his discussion of prosecutorial responsibilities, Fred C. Zacharias states the following: “Consider a related, but perhaps even more difficult question: does a prosecutor have any responsibility to assist persons

libraries provide academics with library resources tailored to research the subject matter.⁷ Conferences are held in this field,⁸ law reviews devote issues to it,⁹ and books¹⁰ and articles¹¹ explore its various angles. Cinema and cinematic technology invade courtrooms and classrooms.¹² With little fanfare we find ourselves discussing law and cinema, based on the assumption—itself a focus for serious debate—that there is a sufficiently common basis between these socio-cultural artifacts to warrant meaningful discourse. We talk about law in cinema: the manner in which law is portrayed in various films.¹³ We also talk about the legal regulation of the cinema.¹⁴ We inquire into the manner in which cinematic or quasi-cinematic techniques are used in the legal process.¹⁵ By extrapolation, we can also think about law as cinema, by referring to legal practices as a

who are injured by a defendant's incarceration? An innocent wife or children of a defendant, for example, may become homeless as a result of his conviction. Does the answer change if the very thrust of the prosecution was to punish a parent for conduct that injured a child or to remove a parent from the home?" Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions* 58 VAND. L. REV. 171, 184 (2005). In the following footnote that usually would point to a case in which the matter was discussed, Zacharias refers to an episode of the television series *The Practice*, where a prosecutor insisted on criminally prosecuting parents of a child who refused to authorize medical attention for their child because of their religious beliefs. As a result of the prosecution, both loving parents were (at least in theory) incarcerated, leaving the child homeless and parentless. *The Practice: The Cradle Will Rock* (ABC television broadcast Oct. 20, 2002).

⁷ The library at the University of Texas at Austin, for example, includes a special collection dedicated to law and popular culture. The online catalogue for the collection is available at <http://tarlton.law.utexas.edu/lpop/> (last visited Feb. 26, 2008).

⁸ See for example the symposium on law and arts, which includes sessions on law and cinema: <http://www.utexas.edu/law/news/colloquium/lawandarts/> (last visited Feb. 26, 2008).

⁹ See *A Symposium on Film and the Law*, 22 OKLA. CITY U. L. REV. 1 (1997); Symposium, *Law in Film/Film in Law*, 28 VT. L. REV. 797 (2004); Symposium, *Law and Film*, 24 LEGAL STUD. F. 559 (2000); Symposium, *Law and Popular Culture*, 48 UCLA L. REV. 1293 (2001); Symposium, *Documentaries & the Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 707 (2006).

¹⁰ Recent publications include LAW AND POPULAR CULTURE (Michael D. A. Freedman ed., 2005); MELANIE WILLIAMS, SECRETS AND LAWS (2005); MARGARET THORNTON, ROMANCING THE TOMES: POPULAR CULTURE, LAW AND FEMINISM (2002); RICHARD K. SHERWIN, POPULAR CULTURE AND LAW (2006).

¹¹ For a recent and interesting examination of the interaction between law and cinema, see Daphne Barak-Erez, *The Law of Historical Films: In the Aftermath of Jenin Jenin*, 16 S. CAL. INTERDISC. L.J. 495 (2007); Ed Morgan, *Cannibal Holocaust: Digesting and Re-Digesting Law and Film*, 16 S. CAL. INTERDISC. L.J. 555 (2007).

¹² Cinematic technology has become ever more present in court rooms. The moot courtroom in the National Judicial Council in the University of Reno, Nevada, where state court judges often practice, is a fine example. In many jurisdictions videos are presented to juries and judges and, in some jurisdictions, oral arguments are broadcasted to the public. Many classrooms have also been modified to allow video presentations. Short documentaries, lectures and, sometimes, fiction movies have joined the syllabus as well. Moreover, it has become standard practice to film moot courts, and it is often the case that first year law students learn basic techniques of oral argument by watching themselves argue a case on video as a part of their moot court instruction.

¹³ See, e.g., Barbara Allen Babcock & Ticien Mary Sassoubre, *Deliberation In 12 Angry Men*, 82 CHICAGO-KENT L. REV. 633 (2007).

¹⁴ Regulating cinema is almost as old as cinema itself, and seems equally universal. See, e.g., Gregory D. Black, HOLLYWOOD CENSORED: MORALITY CODES, CATHOLICS, AND THE MOVIES (1996); Matthew Bernstein (ed.), CONTROLLING HOLLYWOOD: CENSORSHIP AND REGULATION IN THE STUDIO ERA (2000); Stephen Prince, CLASSICAL FILM VIOLENCE: DESIGNING AND REGULATING BRUTALITY IN HOLLYWOOD CINEMA, 1930-1968 (2003); LAW'S MOVING IMAGE (Leslie Moran, Emma Sandon, Elena Loizidou eds., 2004), esp. part III; Stephen Vaughn, FREEDOM AND ENTERTAINMENT: RATING THE MOVIES IN AN AGE OF NEW MEDIA (2005); Keith A. Rosten, *Legal Control of the Soviet Cinema: The Scenario Writers Contract*, 14 RUTGERS L. J. 115 (1982).

¹⁵ Richard K. Sherwin, *Introduction: Picturing Justice: Images of Law and Lawyers in the Visual Media*, 30 U.S.F. L. REV. 891 (1996); Richard K. Sherwin, *Celebrity Lawyers and the Cult of Personality*, 46 N.Y. LAW SCHOOL L. REV. 517, (2003) 521-522.

specific type of cinematic-dramatic practices.¹⁶ It would follow that we can address cinema as law, by treating cinematic practices as a specific type of practices that perform law-making or adjudicative functions (or functions analogous thereto).¹⁷ Lastly, we can place law alongside cinema, thereby using the practices as windows for gaining a glimpse at the human condition.¹⁸ Is it that we, the jurists, have finally seen the light? Have we finally realized the similarities between the various aspects of the cinematic world—the script, the staging, the location, the aesthetics, the performance (to name a few of its characteristics)—and the legal world? This article proposes to examine the emerging discourse, its limits and promising potential.

The first part of this article will address the case for the law-and-cinema discourse. More specifically, this part will examine the elements law and cinema share—elements that enable using films to understand the law, using law to understand the cinema, or using both to understand aspects of modern social life (or the human condition more generally). This section will also examine whether law-and-cinema adds anything to the law-and-literature discourse or whether it merely extends the insights gained from narrative-based theories.

The second part of this article will take a closer look at some methodological difficulties the discourse faces, and caution against too fast (and furious) claims made about “the law”, “the cinema” and the law-and-cinema interplay.

In the third part of the article, the scholastic lens will focus on a possible mapping of the emerging discourse. More specifically, three clusters, or “families” of conversations will be identified. The first is comprised of propositions about the manner in which cinematic and judicial practices *qua* practices are “structured”. The second cluster includes the ubiquitous use of films and law to illuminate something about culture (or the use of film to understand the law, and the use of law to understand film). The third centers on the normative claims regarding how the law *should* be, based on insights gleaned from cinema, or how cinema should conduct its business, based on normative arguments underlying legal doctrines.

The fourth and final part of this article will abandon the somewhat aloof vantage point of the musing spectator and call for action. The particular claim this paper will advance is that cinematic theory can tell us

¹⁶ Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991) (suggesting that law can be approached as a performing art). Sherwin, critically, argues that by processes of social diffusion the law is being transformed into a form of cinema, and legal procedures are being reconfigured to match the logic of image and appearances. SHERWIN, *supra* note 3, at 142.

¹⁷ Orit Kamir, for example, rightly recognizes that the camera “judges”. ORIT KAMIR, *FRAMED: WOMEN IN LAW AND FILM* (2006). It is unclear, however, whether the cinematic “judgments” are as linear or as binary as legal judgments.

¹⁸ See Shulamit Almog & Ely Aharonson, *Law as Film—Representing Justice in the Age of Moving Images*, 3 CAN. J. LAW & TECH. 1 (2004); Edward Mussawir, *The Cinematics of Jurisprudence: Scenes of Law’s Moving Image*, 17 CARDOZO STUD. L. & LIT. 1371, 1371 (2005).

something meaningful about the production of law—a heretofore under-appreciated aspect of the legal phenomena.

But before turning to method, taxonomy and production, it is necessary, as mentioned above, to say a few introductory words on the “stage” shared by law and cinema, namely culture, and a few words on “words,” namely the distinction between the law and cinema discourse and the law and literature discourse. Those who have tired from detailed introductions or who have come to view the law and cinema discourse as a fact that requires no further elaboration, will, no doubt, find the next section stating the obvious; yet, because a few eyebrows are still raised among respectable jurists at the mention of cinema as a serious source from which legal insights can be gleaned, the following is necessary.

B. CULTURE!

For a law-and... discourse to operate, an axis shared by the law and the other practice (or system) must be established.¹⁹ The law and cinema discourse rests on the observation that both the law and the cinema reside in the same social domain—culture—and therefore each practice influences (and is influenced by) the other.²⁰ As sound as this observation may be, culture—legal, popular and legal-popular—is one of those concepts which definition is ever-more elusive, even though its contours are intuitively evident to members of society.²¹

Rather than attempting to define the full ambit of the cultural plane law and cinema share,²² it suffices, for the purposes of grounding the interdisciplinary discourse of law and cinema, to highlight the role both the law and the cinema play in forming (and maintaining) society’s ‘framework narratives’.²³ These are the narratives that provide the background meaning against which ordinary—and unordinary—events are instantly interpreted and become meaningful. They are the paradigmatic accounts of experiences—cases, or stories—that infuse social interactions with context: we know what is going on around us (and how to understand the

¹⁹ Law and economics share the notion that both the law and the market (and market incentives) regulate (and are regulated by) incentives; the law-and-literature discourse focuses on the uses of text central to both practices; law and critical theories rests on the realization, central to law and to sociology, that political power (and its distribution) matters. One can conceive of other systems with which law shares a central feature (such as sports) but the onus remains: to establish the contours on the element the law and the other practice share.

²⁰ For the general observation, see Lawrence Freidman, *Law, Lawyers and Popular Culture*, 98 *YALE L. J.* 1579 (1989). Some have identified a closer link between law and cinema. As Suzanne Shale claims, “Law and the cinema are both theaters of conflict, spectacles through which we understand essential aspects of our humanity and society.” Suzanne Shale, *The Conflicts of Law and the Character of Men: Writing Reversal of Fortune and Judgment at Nuremberg*, 30 *U.S.F. L. REV.* 991, 991 (1996).

²¹ For an illuminating discussion of culture as providing a “tool kit” for action, see Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 *AM. SOC. REV.* 273 (1986). For the difficulty of defining culture, see Naomi Mezey, *Approaches to the Cultural Study of Law: Law as Culture*, 13 *YALE J.L. & HUMAN.* 35 (2001).

²² In that respect, I share Adler’s concerns: Amy Adler, *The Folly of Defining Art*, in *THE NEW GATEKEEPERS: EMERGING CHALLENGES TO FREE EXPRESSION IN THE ARTS* 90 (2004).

²³ Sherwin, *Picturing Justice*, *supra* note 15; Philip N. Meyer, “Desperate for Love II”: *Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 *U.S.F. L. REV.* 931, 932 (1996).

motivation and behavior of the players around us) because we have, in the back of our minds (and sometimes in the forefront) this very basic outline of how people behave in a situation like the one we are confronting. We can thus easily surmise where the various actors are coming from (or going to); in light of the framework narrative, we ascribe motivation to their behavior. For example, each culture has a paradigmatic story of a robbery, or a rape, or an election, or going to law school, and, in relation to this framework narrative, we, as members of the society (and consequently as participants in its culture) fill in the blanks and link those segments of an interaction to which we are privy into a greater whole, the social meaning of which is readily accessible to us. These framework narratives are often communicated (and culturally maintained) through symbols: visual and audio-visual images, signs and notes, the representation of which carries a set of cognitive and emotional connotations.²⁴ Such framework narratives participate in forming social conventions (and are, of course, formed by conventions). They play a role in the shaping of individual and group identity and in the formation of collective memory. They may also play a part in formulating certain moral positions: it is against certain paradigmatic stories that we become aware of—or construct—what we stand for; it is against these stories that we hone our sense of justice and determine right from wrong (or allocate blame or empathy). These framework narratives are obviously not random: they fit contemporary power structures as they participate in the processes of stratification and re-stratification of society. They cannot be simply scripted (or narrated): they must be a part of long-standing ritualistic behaviors, often relying on common history and collective memories.²⁵ At the same time, these framework stories are not static; in the processes of their communication, they evolve, for reformulation often (if not always) occurs.

The cinema and the law participate (along with other expressive social practices) in the organization, communication, generation, and regeneration of these cultural building blocs. Legal cases (and, to a degree, statutes) interact and correspond with existing framework narratives, and take part in their evolution, either by refining elements of the storyline (including adding layers to the makeup of the characters or to their social environment) or, on occasion, by transforming the framework altogether. Consequently, this cultural plane has long attracted the attention of scholars interested in the broader aspects of legal phenomenon.²⁶ Among law and culture aficionados, it is understood that law is greater than the sum of the rules, orders, and decrees generated and issued therein, and therefore

²⁴ Compare Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture* in CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 3-30 (1973), with EDMUND LEACH, *CULTURE AND COMMUNICATION: THE LOGIC BY WHICH SYMBOLS ARE CONNECTED* (1976), in which Leach, interestingly, refers to the performing arts—the symphony orchestra—as an organizing metaphor.

²⁵ See William J. Everett, *Ritual Wisdom and Restorative Justice*, 2004 *HAMLIN J. PUB. L. & POL.* 347, 348 (2004).

²⁶ See Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW AND EVERYDAY LIFE* 21 (A. Sarat & T. Kearns eds., 1993); SHERWIN, *supra* note 3.

simply reading the rules (or the cases that announced them) cannot tell us enough about the law. The formation of notions such as legitimacy, fairness, moral rights, and the like—which arguably reside outside black-letter law—plays an important role, because these notions breathe contextual life into the law; they are central ingredients in law’s framework narratives.

If we accept these observations, then the manner in which the practice of law (and the operation of legal rules) are perceived and depicted by other expressive practices is significant. Understanding law in the domain of culture—that is, understanding the law in its culture and as culture²⁷—requires that jurists take the neighboring expressive practices, such as cinema, seriously. These depictions, the basic theme goes, are not merely descriptive; they also carry formative elements, as they participate in shaping our professional and lay consciousness, the understanding of our roles within the system, and the expectations of professionals and the general public from the law.²⁸ Given the pervasiveness of the cinematic medium, movies (and the industry’s culture) influence the general culture and apparently the legal culture (and the practice of law) as well. The vice-versa may also be true: given the pervasiveness of law, legal culture plays a role in the formation of popular culture. As Carol Cover has noted, Hollywood’s fascination with the legal process, and primarily with the idea of juries, played a central role in the development of American cinema.²⁹ What we know about the law, and, to an extent, what we have come to expect from the law, is partly shaped, it would seem, by the cinematic representation of the legal process, and, conversely, the legal process may influence the cinematic world (not only via the actual regulation of production but also by introducing adjudicative images into the framework narratives that undergirds cinematic genres).

Outlining this aspect of the field that law and cinema share will not be complete without noting the significance of the means that are utilized both

²⁷ See generally, PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* (1999); ANTHONY G. AMSTERDAM, *MINDING THE LAW* (2000). Culture, it has been argued, is important for understanding any social field. See H. G. Gadamer, *The Problem of Historical Consciousness*, in *INTERPRETIVE SOCIAL SCIENCE—A SECOND LOOK* 82, 93–95 (1979).

²⁸ For the importance of lay persons’ expectations from the law, see William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 *LAW & SOC’Y REV.* 631 (1980–1981); ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). For the importance of professional expectations from the law, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997). For the debate in the context of law and cinema, see Austin Sarat, *Exploring The Hidden Domains of Civil Justice: "Naming, Blaming, And Claiming" in Popular Culture*, 50 *DEPAUL L. REV.* 425 (2000); Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 *LAW & SOC. INQUIRY* 139 (2002); Victoria S. Salzmann & Philip T. Dunwoody, *Prime-Time Lies: Do Portrayals of Lawyers Influence How People Think About the Legal Profession?*, 58 *SMU L. REV.* 411 (2005) (finding little evidence to the “realist” claim that portrayals in fact change expectations).

²⁹ See, e.g., Carol J. Clover, *Movie Juries*, 48 *DEPAUL L. REV.* 389 (1998). To the extent that academic discourse has focused on the (presumed) effect of law on the creation of cinema, it has been mainly through analysis of intellectual property rules, distribution agreements, and the regulation of expression. With few notable exceptions (such as Colver), little has thus far been written on the cultural effect the law (and legal culture) may have on the practices that comprise the cinema. Law could very well be in the business of regulating culture, not only through explicit rules that deal with product placement, personality rights and the like, but also through generating certain framework stories that influence the legal culture and inform the production of other cultural domains, such as cinema.

in the realms of the law and the cinema for the production and reproduction of the framework narratives. For example, both law and cinema apply a rich system of self-references, and, to a degree, a system of cross-references.³⁰ Furthermore, some would say that both use poetic and aesthetical tools to create an illusion by which the audience will see what you want them to see.³¹ This inquiry into the “how they do it” may illuminate something about law or cinema by revealing the internal mechanisms through which these practices generate social meaning. Such an inquiry can also tell us something more general about the mechanics of culture, namely how the “stage” (shared by law, cinema, and other expressive practices) is constructed.

C. LAW, LITERATURE, AND CINEMA (OR THE IMPORTANCE OF “IMAGE” AND “EXPERIENCED PERFORMANCE”)

Having based the link between law and cinema on the concept of framework narratives and their formative cultural role, one is tempted to describe the relation between law and cinema as merely an extension of the relation between law and literature.³² This “accusation” has something to it, and it appears that the theoretical foundation literature offers is rich enough to encompass the cinema as well. However, the fact that we can conceptualize the law-cinema relationship in a manner similar to the law-literature relationship should not necessarily lead to the conclusion that cinema is but a type of text, and, therefore, the treatment of law and cinema can be reduced to a particular case of law and literature (or law and narrative).

Cinema has at least two inter-related features that sets it apart from literature: performance and image. In this respect, cinema is more closely aligned with photography—for its reliance on the depictions by the camera³³—and with other performing arts—for its reliance on performance. It has more in common with the theatre than with literature. Paying closer attention to the concept of performance reveals that whereas literary text demands little by way of physical attributes—words have to be communicated via some physical medium, but beyond pen and paper little else is required—performance has a defined spatial (or geographical) dimension. Films are shot in an actual location (even if this location is a

³⁰ See, e.g., *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* (Gunther Tuebner ed., 1988) [hereinafter *AUTOPOIETIC LAW*].

³¹ Sherwin, *Picturing Justice*, *supra* note 15, at 893.

³² See Rebecca Johnson & Ruth Buchanan, *Getting the Insider's Story Out: What Popular Film Can Tell Us About Legal Method's Dirty Secret*, 20 *WINDSOR Y.B. ACCESS JUST.* 87, 94 (2001). David A. Black claims that there is a “family connection” between the legal and literature fields and the scholarly work in the field of law and cinema. See DAVID A. BLACK, *LAW IN FILM: RESONANCE AND REPRESENTATION* 13–31 (1999). For more on law and literature, see, e.g., JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* (2002); Sunil Rao, *Making Sense of Making Stories: Law, Literature, Life*, 95 *LAW LIBR. J.* 455 (2003).

³³ Seymour Chatman, *What Novels Can Do That Films Can't (and Vice Versa)*, reprinted in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS* 445 (Leo Braudy and Marshal Cohen eds., 6th ed. 2004).

studio) and are screened (at least for the time being) in a specific place. Furthermore, performance has a unique socio-active dimension: actors (and many other functionaries) have to *do* something—act their role—and, at least in fictional, non-animated cinema, that means that actual interactions are taking place (or events occur) for the purpose of their capture on film.³⁴ Moreover, cinematic performance is rarely a one-person project; unlike writing a book, which may be a solitary exercise, producing a movie—not a short clip for the internet, but a full-length feature—is usually a social activity that requires collective cooperation. Equally important is the fact that the practice of cinema assumes an audience, which experiences the screening collectively: people sitting *together* and participating in the practice as spectators.

As for image, it would be trite to note that the cinema is unique because it projects an actual image—a moving image, interlaced with sound—rather than its literary account. A documentary, which may depict the beauty of Mount Everest, is different from a verbal description of the mountain because words have their own, distinct essence.

These characteristics, which enable us to set cinema apart from literature (and place it much closer to theatre) are directly relevant for the law-and-cinema discourse: they offer an opportunity to develop a unique conceptual language which fits the non-textual dimensions of law and cinema. First, cinema and law are dramatic practices that transcend text, in the sense that both practices are experienced: they are viewed (and heard). As mentioned, in a movie theater (and in court), we are physically present, most often with other people. A film (or a judicial proceeding) is therefore not merely a narrative, but is rather a social occurrence or event, in which we participate. The public nature of law and cinema is not accidental, but is rather a key element in the structure of these social practices: it produces a unique type of poetics.

Second, as mentioned, cinema, the art of the moving image, is organized on framing, shot, and montage,³⁵ as well as sound, color, and lighting. We may thus address cinema as premised in part on a non-verbal language with its own idioms, “concepts” and structure. Such non-verbal mode of expression and communication is distinct from the literary mode, precisely because it is not restricted to words and thus cannot be fully translated or transformed into words. The moving images on the screen are not something words can fully capture, and the dynamic layers of video and audio present a medium capable of transcending the plane where verbal narratives reside.

³⁴ Whereas events in documentary films do not occur, one would hope, for the purpose of their documentation on screen, but they still occur, so the socio-active dimension is present (although we must recognize the difference between acting for the sake of the film, and the film capturing actions that would have occurred irrespective of the film). At the very least, the socio-active dimension in documentaries is present with respect to the actions of the production team, which places itself in the vicinity of the actions it seeks to capture (with various degrees of separation between subject and object).

³⁵ See generally, LAW’S MOVING IMAGE, *supra* note 14. For an illuminating review, see generally, Mussawir, *supra* note 18, at 1371.

The case for treating law as something greater than its text is not as trivial, but further consideration reveals its merits. It would require us to acknowledge that law is broader than the practices of writing judgments or statutes (that do seem to revolve around text); it also includes the practices of adjudication, negotiation, and the political deliberation and bargaining that leads to legislation, which may all include dramatic elements that are not merely text driven, and which cannot be fully translated into the language of words and narratives. The practices of law, properly understood, are greater, it would seem, than the texts around which they evolve.

Beyond the opportunity to develop a unique set of concepts with which to capture the non-narrative dimensions of law and cinema, the law-and-cinema discourse expands the law-and-literature's approach by presenting the possibility to put forward research questions unique to the interaction between the law and the cinema. To whom does the space in which the film is photographed (or projected) belong? How is this space designed and regulated? Who controls it? Similarly, we can inquire about the socio-active dimension: how, or to what extent, does the law govern cinematic performance? And via which institutions do (or ought to) societies exercise such governance? As for the notion of image, again, questions are abound: how does the law capture an image? What are, and should be, the laws of the image? And what about law's image(s)? Is law itself an image of sorts? Who controls law's images—who produces them, and what are the aesthetic conventions that govern the production of legal images?

The argument that law and cinema is not but an extension of law and literature should not, of course, lead to an overly strong conclusion, namely that the insights of law and literature are irrelevant to the law and cinema discourse. For example, narrative theory can certainly inform the analysis.³⁶ The cultural world is sufficiently complex to enable, if not to require, the use of theories developed in the field of law and literature as well, provided that the differences are noted.

Having briefly touched upon “the stage” that the law and cinema share (and its uniqueness), it is time to expand on some of the limitations of this discourse.

II. METHODOLOGY: SOME LIMITATIONS OF THE DISCOURSE

A. “TALKING ABOUT” CINEMA (AND LAW)

Perhaps the most obvious methodological difficulty the law-and-cinema discourse faces stems from the limit of words. The experience of talking about something (such as an event or a practice) is fundamentally different from the experience involved in participating in that something. It

³⁶ Such analysis is certainly prominent in the study of cinema. See, e.g., Ella Shohat, *Master Narrative/Counter Readings: The Politics of Israeli Cinema*, in *RESISTING IMAGES: ESSAYS ON CINEMA AND HISTORY* 251 (Robert Sklar & Charles Musser eds., 1990).

seems that this point was at the core of Stanley Fish's observation regarding the distinction between theory and practice.³⁷ The position taken here is slightly different: when we engage in a conversation regarding a practice, we are in fact participating in a practice distinct from the practice we are seeking to analyze.³⁸ Somewhat ironically, this practice can be termed "the practice of theorizing," which may be distinguished from the practice about which we are theorizing.

Therefore, addressing cinema by writing about it is limited by its very nature. The turn to speech in order to describe aspects of particular practices or certain experienced artifacts is conducted under the internal limitations of the use of written (or spoken) language. The multilayered richness of an experience is compressed (and thus reduced) into a word. Much has been written about the fact that words are not transparent; they do not just describe.³⁹ Sometimes they are opaque, and, in any case, they generate their own gravitational pull, an associative weight that is liable to divert the discussion to other spheres and to blur the clarity of the actual experience as it was directly felt (or as it was captured without resorting to words).⁴⁰

This shortcoming applies all the more to a printed academic journal, where, at least for the time being, it is impossible to incorporate video and audio as an element in the presentation of an argument.⁴¹ No wonder, therefore, that classes addressing law and cinema themes are almost never confined exclusively to written materials; without a film, or scenes from films, such a class would fall short of fully addressing the subject-matter.⁴²

³⁷ STANLEY FISH, *DOING WHAT COMES NATURALLY* 372–78 (1989).

³⁸ For the definition of "practice," see ALASDAIR MCINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 187–95 (1994).

³⁹ For more regarding this matter, see generally, LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., Macmillan Publishing 3d ed. 1968) (1953). As he mentioned, "Colloquial language is a part of the human organism and is not less complicated than it. From it, it is humanly impossible to gather immediately the logical of language. Language disguises the thought The silent adjustments to understand colloquial language are enormously complicated." LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 61–63 ¶ 4.002 (C.K. Ogden trans., Routledge & Kegan Paul 1983) (1922).

⁴⁰ Words have a tendency to judge while they attempt to describe. A discussion of anything, including cinema, frequently (and maybe always) includes a certain judgmental load. Indeed, words are not unique in this; non-verbal forms of expression, communication, and reference are also judgmental. Yet, the judgmental load involved in "talking about" something is an additional weight added onto the existing value judgments already interwoven into the cinematic presentation. This added weight may obscure or may otherwise interfere with the value-judgments expressed by the cinematic representation. Furthermore, words judge in a manner that is unique to them. Judgments in cinema are spread out over several levels, some of which are non-verbal: the angle of camera, the light and shadows, the sound score, the setting, the silences, etc. The richness of the medium enables us to convey and perceive complex and sometimes dialectical ethical positions (in addition to the possible dialectics of the verbal dialogues or the narrated story). Accessing the cinematic value-laden expression by using words (i.e., by "talking about" the cinema) is liable to be lacking and even misleading. This limitation, it should be stressed, is not unique to a discussion of cinema, and is valid also with respect to "talking about" other practices, but this by no means detracts from its significance.

⁴¹ Cf. NICHOLAS NEGROPONTE, *BEING DIGITAL* 7–8 (1996).

⁴² On the use of cinema for teaching law, see, for example, STEVE GREENFIELD, GUY OSBORN & PETER ROBSON, *FILM AND THE LAW* 6–11 (2001); Johnson & Buchanan, *supra* note 32, at 93; Donald H.J. Hermann, *The Law in Cinema: An Emerging Field of Study*, 42 N.Y.L. SCH. L. REV. 305, 322–29 (1998); James R. Elkins, *Reading/Teaching Lawyer Films*, 28 VT. L. REV. 813 (2004); Alan A. Stone, *Teaching Film at Harvard Law School*, 24 LEGAL STUD. F. 573 (2000).

If so, why bother to write an academic essay dealing (even in part) with cinema? Wouldn't this article, according to the aforesaid, be seriously lacking? And more importantly, why bother to read such an article?

The answer, it seems, corresponds to the position that we are dealing with different practices. An analysis of cinema does not directly compete with watching a movie or participating in the making of one. Rather, this analysis—conducted in words and thus limited by words—is part of the practice of theorizing about cinema. Active participation in this practice could reveal hidden elements, organize salient elements in an innovative fashion, and may enrich the experience of participating in the practices that form the cinema itself. It is because the landscape photographer is limited in her ability to capture the full extent of the experience she encounters that she is forced to choose which part to focus on, how to present the scene, and how to organize the parts of the composition. This new creation, if it is successful, will enrich our experience the next time we come to view the landscape in an unmediated way, or even when we come to look at something that does not have that much in common with the landscape.⁴³

Similar things, at least to a certain extent, can be said about the academic treatment of law. Talking about law is not equivalent to practicing the practices of law (i.e. litigating, judging and/or legislating).⁴⁴ But—one would hope⁴⁵—if we have done our work diligently enough, legal scholarship is not as detached from legal practice as some might worry.⁴⁶ After all, theoretical analysis of doctrine and underlying principles, but also of the kind undertaken by law-and-cinema scholars, may yield some practical insights.⁴⁷ While the academic research may—and perhaps should—entail some loss of innocence (as the by-product of exposing the real impact of a certain legal rule or the power-structure underlying a certain practice), it is difficult to ignore the potential of such analysis to

⁴³ If we have done our work faithfully, if in our research of cinema we have revealed certain aspects which we did not notice earlier, we stand a chance to be more aware in our next encounter with the movies of those hidden elements. This awareness might come at a price. Possibly, we may sometimes prefer to ignore certain aspects of the cinematic experience. For example, a mystery book writer would never read mystery books in the same way these books are read by a person who is not privy to the behind-the-scenes of literary work. A certain measure of innocence is lost the more we become aware of various aspects of the work that is in front of us. But this loss of innocence may nonetheless be worth it, as a richer world may be revealed and illuminated.

⁴⁴ See, e.g., Wade H. McCree, Jr., *Partners in a Process: The Academy and the Courts*, 37 WASH. & LEE L. REV. 1041 (1980).

⁴⁵ But see Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 166 (1990).

⁴⁶ For the relationship of legal practice and legal academia, see recently Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619 (2008); Lawrence Baum, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

⁴⁷ “There is nothing more practical than a good theory,” said Kurt Lewin, and, if that is so with respect to the social sciences, it stands to reason that the same would apply to legal analysis as well. KURT LEWIN, *FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS BY KURT LEWIN* 169 (1951). For recent application of this approach to cinema, see Henry Breitrose, *There is Nothing More Practical Than a Good Film Theory*, http://7www.agrft.uni-lj.si/conference/Ljubljana/Henry_Breitrose.pdf (last visited March 10, 2008).

transform our understanding of doctrine, underlying principles, or the legal project more generally.⁴⁸

Law-and-cinema discourse, therefore, like any other discourse, is limited by the nature of words, but such methodological limitation need not doom the project. It requires maintaining the distinction between the various practices at hand: law, cinema, and theorizing about law and cinema.

In that context—i.e., in dealing with the limits of verbal analysis of law and cinema—a second-order limitation should be noted: the inability to “talk about” law and cinema in their totality. Law, cinema (and perhaps all other practices) contain a social domain that can be termed “behind the scenes.” The law, like any other social construct, hides the scaffolding that holds its segments together; the construct is likely to collapse if exposed as a mere construct. Such scaffolding includes, among other tools, metaphors that “breath life” into a “legal universe” where “reasonable people” reside, where “reasonable doubts” can be measured, where legislation has purpose and legislatures have intent. These metaphors are part of the devices the practice deploys to maintain its boundaries and set itself apart from neighboring practices, such as politics or the market. A court of law thus insists (i.e., the people who work in the legal profession insist) on a certain language and decorum (which supports and reinforces the logic internal to the legal process). The cinema also uses devices to conceal its scaffolding and to ensure that the construct “works”. Were we exposed to the director’s orders and to the stage setting as part of the film, the artifact would become undone. In fact, it is doubtful that we can conceive of cinema unbounded by frame.

At the very least, we must recognize the limits of our ability to talk about all aspects of law and cinema at once. For the “talking about” to be meaningful (i.e., for the conversation to have a sufficiently distinct subject matter), some aspects of law and of cinema must be, at any given moment, taken as a given. Surely these aspects themselves may become the object of inquiry, but for that to happen other aspects must rescind to the “taken for granted” and become part of the behind-the-scenes. Another way of stating the same methodological limit rests on the realization that a “view from nowhere” is unattainable. The “behind the scenes”—or segments thereof—would remain hidden because our human gaze is directional, and it casts its own shadows. While we may shift our gaze and shed light on a heretofore hidden element, by so doing we would lose sight of the elements that are outside the frame of our gaze,⁴⁹ and therefore some elements of the practices are bound to stay unseen.

⁴⁸ For the dialogue between judges and academics, see Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1371 (1988); Abner J. Mikva, *The Role of Theorists in Constitutional Cases*, 63 U. COLO. L. REV. 451 (1992); Ira C. Rothgerber, Jr., Conference on Constitutional Law, *Constitutional Theory and the Practice of Judging*, 63 U. COLO. L. REV. 291, 451–56 (1992). Also of great importance is the input of practicing lawyers; it is often lawyers that reveal the dirty secrets of practice and thus partake in the unveiling of legal myths.

⁴⁹ The claim is not that law and cinema are necessarily unique, nor that the relation between them is necessarily unique. It is possible to expose, reveal, develop, and understand any practice in itself.

B. “LAW” AND “CINEMA”

Another methodological difficulty that should be acknowledged is the ever-shifting definition of the practices under consideration. The practice that is termed in loose language “law” is actually a collage of several interrelated practices. The law, as we know it, is not a single, uniform practice, but rather includes several sub-practices. What family law lawyers do is quite different from what corporate lawyers do, which is still different from the business of legislative aids, confronted, for example, with drafting legislation regulating insurance companies. Using a different matrix, we can appreciate that the common law is profoundly different from statutory law. Constitutional law is intrinsically different from statutory law even though both are part of “the law.”⁵⁰ Moreover, each of these components of the law itself incorporates several practices. Common law, for instance, juxtaposes litigation (i.e., advocacy), judicial decision-making, and academic discourse (that affects legal education, advocacy, and judicial reasoning). It is difficult to analyze the common law, without referring to these three practices. Surely, these practices are distinct: what lawyers do is different from what judges do, and these two practices are different from what academics do; yet these practices nonetheless intersect.⁵¹ Similarly, when talking about statutory law, it is difficult to ignore the practice of legislation and the practice(s) of bureaucratic enforcement and policy formation in addition to the practices mentioned above. In coming, therefore, to analyze ‘law’ in the law and cinema discourse, we should first identify the practices at the core of our analysis, including their internal procedures and outcomes (or products).⁵² As easy as this might seem, identifying the contours of the practices under analysis is far from trivial, and thus far few scholars—and this author is no exception—have taken the time to carefully define what they mean by ‘law’. But for the analysis to be sound such an exercise may prove to be indispensable.

It should be stressed that law, at least pursuant to certain theories of law, is (much) broader than the judgments that interpret or apply any specific law.⁵³ The law is not merely the creation of judgments by judges or legislators, and it does not take place only in a courtroom (or the legislative halls). The practice(s) of law include alternative ways to resolve disputes

Furthermore, we could find other practices that are better suited for the task of illuminating the behind-the-scenes of law than the practice of cinema, and vice versa. But that does not negate the benefit or the validity of the discourse of law and cinema. The existence of a field of discourse does not depend on the fact that through it, it is possible to optimally illuminate or to fully apply all possible insights to the examined practices. It is just one more inquisitive venue of doing so.

⁵⁰ Amnon Reichman, *Formal Legal Pluralism*, OUTLOOK 24–27 (Spring 2003).

⁵¹ Cf. Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. COLO. L. REV. 615 (1992).

⁵² As stipulated by Professor Silbey, “I am offering only that which may seem obvious but which is rarely done in studies of law and popular culture: that we circumscribe our inquiries by explicitly naming the conception(s) of law which we rely so that we can proceed with our analysis with a measure of clarity . . .” Silbey, *supra* note 28, at 145. See ANTHONY CHASE, MOVIES ON TRIAL 3–6 (2002).

⁵³ *But see* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 84 (1963) (“The law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties.”).

which are often conducted out of court (even if under its shadow).⁵⁴ The term ‘law’ also covers many practices that consist of legal acts carried out by “the authorities” (namely, state agencies) and by other entities, including “private” persons (who contract, write wills, and generally act in light of legal rules).⁵⁵ The law, according to one dominant approach, is all-encompassing,⁵⁶ and therefore the need to identify what is meant by the legal phenomena is ever more acute. Some may claim that this problem is not as pervasive in defining the contours of cinema. While it would be possible to argue that in every interaction we participate in law, it is not clear that it is possible to claim that we participate in cinema in an identical manner. According to this view, life is not a film, even if we sometimes feel like actors in someone else’s script. However, others may argue that “[a]ll the world’s a stage, and all the men and women merely players”⁵⁷ and that the cinema (like the theatre) offers a rich-enough conceptual language with which it is possible to understand social relationships off-screen as well.⁵⁸ Time will tell whether the development of such a terminology will prove fruitful, and whether there is merit in analyzing social interactions and practices in general by resorting to the language of “directing,” “production,” “stage setting,” “casting,” “image editing” and other cinematic features.

In any event, even if we reject the claim that the cinema is all-encompassing, questions regarding the boundaries of the practice are abound. Should we refer to a television series as “cinema”?⁵⁹ What about a film produced for theaters but released directly to video and television? How should we relate to commercials made for and screened on the silver screen? Does “cinema” include novel creations, including films of various lengths circulated on the Internet?

As alluded to above, it appears that there is something unique in a film that is screened in movie theaters just as there is something unique in a trial that is conducted in a courtroom. But this somewhat intuitive position is far from trivial. Developments in the film industry also liberate it from a certain physical-social space in which the film director and the cameraman are omnipotent. The transition to television, video, and the Internet provides the spectator with a choice to view a film in her own space and on

⁵⁴ See generally Mark Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

⁵⁵ Lauren Edleman, *The Legal Lives of Private Organizations*, in *The Blackwell Companion to Law and Society* (Austin Sarat ed.) (2004) 231; Orly Lobel, *The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINNESOTA LAW REVIEW 342 (2004).

⁵⁶ Sarat & Kearns, *supra* note 26, at 21.

⁵⁷ WILLIAM SHAKESPEARE, AS YOU LIKE IT (first printed in 1623), Act II, Scene 7, available at http://www.shakespeare-literature.com/As_You_Like_It/

⁵⁸ In the last years, the blur between reality and perception and between life and fiction has received attention by cinema itself. See *THE TRUMAN SHOW* (Paramount Pictures 1998); *WAG THE DOG* (Baltimore Pictures 1997); *EDTV* (Imagine Entertainment 1999). Certainly reality television is also part of that genre. For analyzing the secret of the success of one Australian reality television show, see generally, TONI JOHNSON-WOODS, *BIG BROTHER: WHY DID THAT REALITY-TV SHOW BECOME SUCH A PHENOMENON?* (2002).

⁵⁹ Cf. BLACK, *supra* note 32, at 6–7.

her own time. More recent interactive developments grant the viewer the power to participate in setting the pace, if not in molding the plot itself.

The evolving boundaries of the cinema bear on the precision with which we pursue our research questions within the realm of the popular perceptions of the law. A key question warranting empirical research addresses the portrayal of the law on screen and its reception among different viewers.⁶⁰ It seems that a television series such as *L.A. Law* or even the series *The Paper Chase*, influenced the popular perception of law not less, and maybe more, than many films, including the film *The Paper Chase*, which served as the inspiration for the television series, or the film *L.A. Law*, which was produced in the wake of the television series. What are the elements that distinguish the cinematic experience from that of television? We could, of course, point to many differences. But a theory explaining the relation between these differences and the influence of cinema or television on popular culture, including the creation of framework narratives has not yet surfaced. Consequently, at this stage the law and cinema discourse is not developed enough to enable us to make an informed choice on whether to focus on films screened in theaters or whether we should expand the focus to include related types of media as well. Therefore, while we may focus on theater-films, we should be mindful that we may be covering but a portion of the relevant practices (or artifacts).

Identifying the practices with a sufficient degree of precision is important for yet another reason: it enables an empirical research of the ideal types⁶¹ that inform the practitioners of the professional standards definitive of the practice. Adopting a viewpoint internal to the practice⁶² allows us to examine the makeup of heroes or villains as well as artifacts (films, legal cases) that are taken by the practice to be emblematic of a certain way of thinking.⁶³ Such an inquiry need not base itself solely on a literary analysis of the representations; it may also resort to a law-and-society tool-kit.⁶⁴

One very basic realization that stems from identifying the contours of the practices under consideration is somewhat self-reflective: the role academic discourse plays in the practices that form “the law” is quite different from the role played by academic discourse in the cinematic world. As aforesaid, the common law, while resting on judicial decisions,

⁶⁰ Compare, in a more general context, Michael Schudson, *How Culture Works: Perspectives from Media Studies on the Efficacy of Symbols*, 18 THEORY & SOCIETY 153 (1989).

⁶¹ For a discussion of the “ideal type,” see MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 89–95 (1949).

⁶² For further discussion on the internal perspective, see B.Z. Tamanaha, *The Internal/External Distinction and the Notion of ‘Practice’ in Legal Theory and Sociological Studies*, 30 LAW & SOC’Y REV. 163 *passim* (1996); H.L.A. HART, *THE CONCEPT OF LAW* 86–87 (1961).

⁶³ Cf. Charles B. Rosenberg, *The Myth of Perfection*, 24 NOVA L. REV. 641, 642–43 (2000). For suggesting that the law-and-cinema discourse is most helpful in reexamining ideal types (with one eye to the ideal and the other to the possibility of holding up to this ideal in reality), see James R. Elkins *Symposium: Popular Culture, Legal Films, And Legal Film Critics*, 40 LOY. L.A. L. REV. 745 (2007).

⁶⁴ Cf. JOHN FISKE *INTRODUCTION TO COMMUNICATION STUDIES* (1982) ch.8. For a different approach, see GRAEME TURNER, *FILM AS SOCIAL PRACTICE* (1989).

engages both legal practitioners (who put forward their claims about what the law is and how it should apply to the case before the court), and the academics who evaluate the judicial output, provide possible interpretation as to its meaning, and offer possible alternatives as to the way the law ought to be interpreted and applied. These alternatives then appear—one would hope⁶⁵—in the arguments of counselors and in the materials soon-to-be advocates—i.e., law students—and judges read. The role academia plays in civil law systems is even more pronounced.⁶⁶ This is not necessarily so when it comes to the cinematic practices. While academic writing is, at least to a certain extent, part of law, cinematic analysis, as written by scholars, is not necessarily part of the cinematic practice (notwithstanding the occasional representation of academics on screen).⁶⁷ It is thus easier for us to confuse legal theory and the law, because the law itself contains an element of theory. This type of confusion is not necessarily so acute in the sphere of cinema.

C. LAW, CINEMA, AND SOCIAL REALITY (OR THE IMPORTANCE OF ASSUMPTIONS)

A third set of methodological difficulties that face law-and-cinema scholars relates to the relation between law, cinema and “reality”. As mentioned above, law and cinema participate in the construction of the framework narratives within which we organize social life, form our identity, shape our collective memory, and engage in meaningful public life. It is often mentioned that both the law and the cinema generate specific kind of framework narratives—those that inform our perception of justice⁶⁸ and fairness, rights and the manner of their realization, and our general expectations from our fellow citizens and from the State. However, caution is advised lest an oversimplified picture is painted. Neither law, nor the cinema are the only (or even the main) sources for ethics-shaping framework narratives.

Let’s look at law: one would expect that to the extent that our sense of fairness and justice is rule-based, the primary practice that would shape our sense of being rule-bound would be the law. However, anecdotal experience teaches us that other practices deal with the formation of our rule-based sense of justice and fairness to no lesser a degree. For example, the practices of sport ostensibly shape our notion of procedural fairness and

⁶⁵ The actual effect of academic writings is a bit of a mystery: should it have an effect or should it simply seek to discover a heretofore hidden element or create a new way of understanding? Some lawyers, judges, and scholars still look, for whatever reason, for the most important or the most influential book or law review article. See, e.g., Michael L. Cloven & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15 *passim* (1996).

⁶⁶ R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY 53–54, 155–57 (1987).

⁶⁷ David Ray Papke *Symposium: Law In Film/Film In Law: Crusading Hero, Devoted Teacher, And Sympathetic Failure: The Self-Image Of The Law Professor In Hollywood Cinema And In Real Life*, 28 VT. L. REV. 957 (2004).

⁶⁸ Analyzing theories of adjudication (and their relation to theories of justice) as reflected in the cinema receives consideration both in scholarly research and in teaching of professional responsibility. See, e.g., Teresa G. Phelps, *Atticus, Thomas, and the Meaning of Justice*, 77 NOTRE DAME L. REV. 925 (2002).

impartiality quite profoundly; one could argue that our sense of legalism is related to sports more than to law.⁶⁹

We should be equally careful with our assumptions about the framework narratives constructed by the cinema. As mentioned above, literature, theater, television programs, the Internet, the press—all of these deal with framework narratives, including the framework narratives that inform our ethical thinking. It is not clear that the relative power of cinema in shaping consciousness is greater than that of contemporary television; cinema is but one source of framework narratives, often dwarfed by the volume of other media and the centrality of other formative arenas, such as politics and sports.

The problem of multiple variables is related to the problem of causation: it is quite difficult to ascertain with a sufficient degree of academic rigor which cultural component cause what effect. Consequently, any claim regarding the manner or the power through which law and cinema shape our consciousness is but a supposition. Although it is fairly safe to assume that the stories of the Bible, for example, influenced the notions of legality in western society, other assumptions, such as those with respect to the general influence of cinema or of any particular film, are not necessarily factually true, and their validity needs to be demonstrated empirically. In any case, it seems that the most that can be said at this stage of the discourse about law and cinema's influence on the creation and refinement of the framework narratives is that while we may assume such influence exists, we know very little about how exactly it operates or what different social processes partake in it.

This, obviously, is not enough to pull the rug from under the law and cinema discourse altogether. We simply have to be clear about our assumptions, and shy away from presenting hypothesis as fact. In other words, assuming that law and cinema indeed do participate in the creation of social and individual consciousness, there is room to examine the connection between the two.⁷⁰ The presence of other practices in the shaping of the framework narratives does not negate the *possible* role of law, cinema, or both; there is plenty of room for addressing the role of other practices as well.⁷¹

The importance of being clear about one's assumptions is reinforced when two other leaps common in the law and cinema discourse are

⁶⁹ Cf. e.g., ALLAN C. HUTCHINSON, *IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION* (2000).

⁷⁰ For example, David Ray Papke claims that American trial movies in the sixties were an important ingredient in forming the national American consciousness. "Why were so many important law-related films produced and distributed in this period [the late 1950s and early 1960s]? My contention is that Hollywood grew increasingly determined to assert its 'Americanism.' One way to do this was to promote lawyers, legal proceedings, and the rule of law to a public which had itself become convinced that a faith in law was one thing that distinguished the United States from the Communist countries, especially the Soviet Union." David Ray Papke, *Law, Cinema, and Ideology: Hollywood Legal Films of the 1950s*, 48 *UCLA L. REV.* 1473, 1487 (2001).

⁷¹ Michael A. Baldassare examines that assumption in *Cruella De Vil, Hades, and Ursula the Sea-Witch: How Disney Films Teach Our Children the Basics of Contract Law*, 48 *DRAKE L. REV.* 333 *passim* (2000).

identified: over-generalization and treating the representation (i.e., the image) as if things are actually so. By over-generalization, I mean that based on a couple of films, or a couple of cases, assertions are made about the cinema, or about the law. The fact that in a certain film the director presents a certain scenario, or the fact that a judge allocates blame in a certain manner in a given case (with or without referring to “the way things are”), only says that there exists such a film or such a case that presents a certain claim about reality while taking up a certain ethical position with respect to this claim about reality. This by no means attests that things are in fact so, or even that a framework narrative exists, as part of the common cultural reservoir of a given society, according to which such things occur around us or could occur routinely.

Likewise, we should distinguish between a normative claim contained in a case or in a movie from the determination that this claim is correct. It is certainly not enough that the film exists to make us accept the ethical positions of the film’s creators. In the same manner, the fact that a certain judicial ruling exists does not say anything more than that a certain case was decided a particular way, on the basis of the evidence and the arguments presented to the judge and jury. From these occurrences there is still a long way to a general statement about the law or about the framework narratives in society. Therefore, focusing on a specific film or even on a group of films and their analysis vis-à-vis a specific precedent (or other sources of law, such as plea-bargain agreements, divorce settlements, and the like) can hardly bear the heavy burden of such statements about “the law” or “the cinema” in general or with respect to the general relationship between them. All we can do, when faced with a film or a case, is to raise a conjuncture that the state of social reality (the law, the framework narratives in society, etc.) *might* be such as represented by the film or the legal decision; the artifacts (the case, the film) are merely an indication that this postulation could be correct. Given that exhaustive research that sufficiently covers a phenomenon by examining a large number of legal and cinematic sources seems to be the exception, it appears that the law and cinema discourse is primarily concerned with *suggesting* ways of interpreting the social reality in which we live, while indicating *possible* patterns of thought, action, collective consciousness, and other ingredients of the framework narratives. Yet, the fact that we contain ourselves with raising hypotheses with respect to the “bigger picture” and the fact that these hypotheses are liable to be rebutted in the future obviously cannot negate the value of raising them. Speculations are important for their own sake. Moreover, case studies—detailed analysis of a specific film or a specific case—are worthy because they tell us something important about the “little picture”, namely the specific film or case, from which we can learn about how culture—legal or cinematic—‘worked’ in a specific instance.

Lastly, we should recognize that methodologically the act of examining culture (or aspects thereof), like any other anthropological endeavor, may alter the object under examination. The process of engaging with the

practices of law and cinema is creative not only because the law and the cinema are creative practices, but also because the discourse itself—so goes the hypothesis—generates the possibility of new symbols and perhaps even new framework narratives. Put simply: by talking about law and cinema we partake in shaping the meaning of law, cinema, and that which connects them. By raising a certain hypothesis about the relation between law and cinema or about a certain framework narrative, we, the participants in these practices, might think a bit differently about various aspects of the practices, or of social reality as a whole. For example, we might read cases a bit differently or formulate certain positions with respect to this or that legal procedure or even adopt a normative position about a legal outcome of one kind or another. In the same manner, as has already been said above, it can be expected that as a result of the arguments made within this interdisciplinary discourse—persuasive arguments, obviously—our manner of watching motion pictures, if not the manner by which we relate to the cinematic experience in general, might also change. We may also alter our specific interpretation of this or that movie. Such an influence may modify, albeit minutely, the framework narratives, and perhaps even cause us to act or interact differently. While chances are slim that major modifications in legal, popular, or popular-legal culture will in fact occur pursuant to the emergence of the law-and-cinema discourse, it nonetheless important to note that possibility (for better or worse).

D. LAW VS. CINEMA (OR “PERFORMANCE AND IMAGE—TAKE 2”).

And there is this one last methodological issue that cannot be overlooked: are not the differences between law and cinema too profound to warrant meaningful discourse? Assuming we are careful to distinguish between talking about something and experiencing it, and assuming that we define properly the objects of discussion and are careful about our assumption about reality and its representation in (or by) the law and the cinema, is there enough in common to enable solid analogies, comparisons or the sound use of one artifact to shed light on another? Or put more concretely: accepting that law and cinema, as segments of modern culture, partake in generating and regenerating framework narratives (and thus influence and are influenced by each other), and accepting that law and cinema are distinct for their performative dimension—is that enough? The methodological point this section makes is that yes, it is enough, provided we tone down the metaphoric use of the inter-disciplinary jargon.

It would clearly be trite to note that law and cinema are different in essence. Law is concerned with conflict resolution and the regulation of behavior through the ultimate use of the coercive power that rests exclusively with the State. That is the law’s *raison d’être*. Cinema is a form of art, the institutionalized segment of which operates as an industry, i.e., for the purpose of profit (although not exclusively).⁷² It would thus be

⁷² But like any art, cinema exists as an expression of our humanity, without a necessarily ulterior, utilitarian purpose. Commercial art is also a form of art, or at least it is recognized as a creation which is not only instrumental. *See, e.g., Mazer v. Stein*, 347 U.S. 201, 205 (1953).

methodologically ludicrous (and unlaywerly) to state that “law is like film” or that “film is like law”; as one (helpful) anonymous reviewer of this article noted: one might as well ask why law is like or not like a bicycle, a beetroot jar, *etc.* However, unlike comparing the practice of law to beetroot, comparing law to cinema yields some interesting insights regarding the thread that connects these practices as performative practices. The danger we should avoid—and hence the methodological warning sign—is the “language-game” trap which may result in concepts becoming slippery and analogies over-extended. Here are some examples, all relating to aspects of “performance”.

1. *Performance as “Thou Shall Perform”*

The law includes a performative element, and at its edge lies a decree to act (or not act) in a certain way; that decree is backed by the coercive power of the State. Thus, in law, words can kill. A legislative act and/or court order are not just a story, an idea or a moving image, and the characters are not fictitious. Legislation and judicial decisions have a direct impact on the lives of real flesh and blood persons—the actual parties to the case as well as potential litigants—in a manner that grants a unique moral significance to the choices of judges and legislatures.

A film is not performative towards its viewers in the same manner.⁷³ The closest equivalent we find to the coercive power of the lawmaker or the adjudicator is the power a director may have over her cast (and some would say—the powers the studios wield over those operating in the industry), because disobedience is accompanied by sanctions of sorts (ultimately backed not only by law but also by the internal codes by which the industry self-governs, such as reputation). Putting it that way reveals that it is conceivable to examine the codes governing cinematic productions and the “orders” the director issues as “law”—because the official law plays a part in regulating the scene but also because the term “law” can be expanded to include “softer” norms, namely social norms that perform a role very similar to law in regulating behavior.⁷⁴ It is exactly at this point

⁷³ From this distinction stems another obvious difference between law and cinema. For it to operate, the law demands that in a given jurisdiction its status as the exclusive normative apparatus of the State will not be challenged. The rule of law demands a monopoly on official norms, and a certain loyalty that is authoritatively binding. On the other hand, in art in general—and specifically in cinema—there is no need for such exclusivity. Competition is not only tolerated but expected among different genres which may undermine each other. While conflict-of-law rules are essential in the legal domain, no such rules are called for in the cinematic arena. As a matter of concepts, then, law and cinema are worlds apart. However, in practice, this difference should not be over-played. The cinematic industry produces soft (yet blunt) rules that regulate poetic standards. Moreover, cinema itself is not free from conventions and certain genres certainly behave as if governed by defined rules. However, it is true that the authority of these standards is different than legal authority. While undermining legal authority is by definition not tolerated (but for situations of civil disobedience), there is no conceptual or moral reason for not undermining cinematic rules. Yet, practically it remains to be seen whether it is easier to reform legal rules than cinematic rules.

⁷⁴ The term “soft law” is primarily used to denote norms that apply within organizations or by bodies that are otherwise authorized to issue binding law but chose to issue “softer” norms. However, it is suggested that cinema be seen as generation a form of soft law, to the extent that the cinema can be conceived as participating in the processes of cultural governance. “[S]oft law[s.] include [those] regulatory instruments and mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or on a regime of formal sanctions.” Anna di Robilant,

that we should be careful, lest everything becomes “law” (with various degrees of “softness”). It is difficult to see how a director can instruct persons who have not explicitly subjected themselves to her authority, since those engaged in the production of a movie are bound by the director’s command of their own volition—one would hope⁷⁵—whereas the jurisdiction of the judge is usually not a matter of choice.

Maintaining the distinction between “law” and “softer law” allows us to appreciate the interplay between the two. Although a film does not instruct anyone to do anything in the way a legislative or a judicial ordinance does—and not even in the way informal corporate codes or “understandings” reached with state officials do—still it is possible to claim (provided empirical support is produced)⁷⁶ that motion pictures project an image of “desirable” ways of behaving (and reasoning) and thereby may participate in generating social norms and codes of behavior. In that sense, films may be part of social governance. Put differently, the cinematic image may be indirectly performative, by affecting social consciousness. Such consciousness, if internalized by members of society, may become a fashion—what to wear—but it may also become a certain social attitude, a linguistic attitude, and perhaps even an ideological attitude. As such it may effect behavior (and attitudes towards behavior) which may be backed by social sanctions that exert pressure on deviation from the “normative” or the “expected”. It is precisely because of this power that the movie industry has attracted the attention of legislatures and censorship agencies,⁷⁷ and it is because of this feature that ethicists, social scientists and jurists worry about pornography, violence and drug use on screen.⁷⁸ In that respect, law and cinema may either compete with each other—the cinema being subversive or the law being oppressive—or may complement each other (as appears to be the case with respect to the norms of consumerism).

Genealogies of Soft Law, 54 AM. J. COMP. L. 499, 499 (2006). See also Jacob E. Gersen & Eric A. Posner, *Soft Law*, 61 STAN. L. REV. (forthcoming), available at SSRN: <http://ssrn.com/abstract=1113537>.

⁷⁵ To the extent that actors participate in the production of films out of coercion or without meeting the ethical requirements of informed consent, the movie-industry becomes a form of servitude, as is the case with pedophile films and as was the case with the production of some pornographic movies, such as “Deep Throat”, according to Linda Lovelace who participated in that film.

⁷⁶ In the context of affecting professional attitudes, see Nancy B. Rapoport, *Dressed For Excess: How Hollywood Affects the Professional Behavior of Lawyers*, 14 NOTRE DAME J. L. ETHICS & PUB POL’Y 49 (2000); Victoria S. Salzmann & Philip T. Dunwoody, *supra* note 28.

⁷⁷ For example, the original version of LES NOUVEAUX MESSIEURS, which represented criticism of the French parliamentarians, was prohibited from being shown in public in 1929 by the French censor. (Feyder Studios 1929). In the United States, the attention McCarthy paid to Hollywood is well documented. See, e.g., RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE (1990); ROBERT GRIFFITH, THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE (1987).

⁷⁸ See Andrea Dworkin, *Pornography is a Civil Rights Issue* in DEBATING SEXUAL CORRECTNESS (Adele M. Stan ed., 1995); Catherin MacKinnon, JUST WORDS (1996), sections I and III; Catherin MacKinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1988) section III; Susanne Kapler, *The Pornography of Representation* (1986); Craig A. Anderson et. al., *The Influence of Media Violence on Youth*, 4 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 81 (2003); Susan Villani, *Impact of Media on Children and Adolescents: A 10-Year Review of the Research*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 392 (2001); John P. Lovell (ed.) INSIGHTS FROM FILM INTO VIOLENCE AND OPPRESSION: SHATTERED DREAMS OF THE GOOD LIFE (1998).

Just as the relationship between law and softer law is important when examining the concept of performance, so is the relationship between the visual image and the social image. Eliciting performance through images (or imagery) is not limited to cinema; the law may also resort to “image” in the sense of a certain social perception (or a symbol). Law cannot rely solely on formal enforcement mechanisms by state officials; the system of enforcement would be overwhelmed (and most likely collapse) if the law would actually have to be enforced by the relevant agency in each human interaction (or even with respect to each dispute). The legal system efficacy relies on an image it projects regarding enforceability and the message it communicates regarding legitimacy. However, there is a difference between cinematic images and legal “images”. “Images” in case-law are produced via words (i.e., images conjured by invoking the legal imagination). To the extent that the courtroom produces actual images, for such images to reach a crowd that resembles the crowd exposed to cinematic images the courtroom images need to be broadcasted, either by the news media or via documentaries, and since these intermediaries operate according to their own (poetic) logic (even if the placement of the cameras is strictly regulated), the legal images of modern-day are filtered. The legal spectacle of old days, which certainly entailed non-mediated audio-visual elements, resides primarily in our collective memory. The presence of contemporary intermediaries (which cover “newsworthy” trials and thereby turn them into “events” or “shows”) and the ubiquitous background of cinematic courtroom dramas (which forms the reference point for the lay-persons’ grasp of the legal process) incorporate the legal image into the stream of images that comprise popular culture as one more image among others. Consequently, if we keep our language precise enough, and acknowledge the various meaning of the term “image”, examining the processes of image construction and projection in both practices may prove illuminating.⁷⁹

2. *Performing by the Rules (and the Matter of Judgment)*

If movie directors generate “soft law” it is tempting to relate their activity to that of a judge, which under the common law system is also in the business of generating norms via rhetorical and poetic tools. Such an analogy has something to it because it allows us to explore the cultural limits placed on such an activity—both a judge and a director are constrained, it seems, in important dimensions—but for the law-and-discourse cinema to be sound it must acknowledge that the judge and the director operate within two different paradigms of “rules”. As an ideal type, the law requires the judge to decide on the basis of legal rules, in response to a motion put forward by the litigants’ claims. The decisions made by a film director are not necessarily rule driven in the same manner and not necessarily reactive. However, to portray the cinema as rule-free would be grossly misleading. A director’s creative environment is far from lawless

⁷⁹ See, e.g., ALISON YOUNG, *JUDGING THE IMAGE: ART, VALUE, LAW* (2004), especially Chapter 4.

because the cinema is one of the more legally regulated forms of art,⁸⁰ and soft law is also pervasive in the modes the industry deploys to self-regulates both process and product.⁸¹ But beyond law or soft law, other “rules” are at play: the leveling pull of the market to “high concepts” cannot be ignored.⁸² And the rules of the genre are compelling.⁸³ It is difficult to understand the cinema without understanding the cinematic “rules”—and here the term is used to signify non-legal rules—that could be, and are, studied in cinema schools, such as rules of photography, ways of editing a film, maintaining the flow of a plot, etc. The duty to obey these internal norms rests on pragmatic considerations of funding (and peer-pressure mechanisms),⁸⁴ as well as on cultural conventions—whether general or specific to the cinematic world. In a deeper sense, such a duty is a demand that the film director places upon herself. On the other hand, depicting the production of film as if it is rigidly governed by rules would also be inaccurate. At a very basic level art does not, or should not, conform to rules. Some would say that the more original and innovative the artistic idea, or the more it transgresses on established norms, the more the film is considered to have a creative value.⁸⁵ Thus, the consequences of violating established rules would be different. In cinema, pushing the boundaries of the envelope is considered an appropriate form of innovative and appreciated work (as long as it corresponds to the cultural horizon of

⁸⁰ Unlike in the United States, in most jurisdictions, the rating function is performed by the state. See for example the legal regulation in Ontario, Canada and the Film Classification Act of 2005, Chapter 17. Similar provincial statutes empower boards in other provinces as well: http://www.media-awareness.ca/english/resources/ratings_classification_systems/film_classification/canada_film_classification.cfm. Moreover, the law in most jurisdictions, including the United States, governs almost all steps of production, ranging from copyrights to distribution agreements and to labor agreements.

⁸¹ The US review board is a clear example. See the critical depiction in *THIS FILM HAS NOT BEEN RATED* (Director: Kirby Dick, 2006).

⁸² “High concepts” is a mode of organizing a script (and the pitch thereof to a studio). High concepts are those that can be stated very succinctly, usually by juxtaposing two famous movies or by using a short sentence that captures the script’s basic story, its uniqueness and its genre affiliation.

⁸³ Leo Braudy, *Genre: The Conventions of Connections*, in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS* 663 (Leo Braudy & Marshal Cohen eds., 6th ed. 2004); Thomas Schatz, *Film Genre and Genre Film*, in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS* 691 (Leo Braudy & Marshal Cohen eds., 6th ed. 2004); Jim Leach, *The Screwball Comedy*, in *FILM GENRE: THEORY AND CRITICISM* 75–89 (Barry K. Grant ed., 1977).

⁸⁴ John G. Cawelty, *Who’s Running This Show? Ideology, Formula, and Hegemony in American Film and Television*, in *MOVIES AND POLITICS* 31–54 (James Combs ed., 1993).

⁸⁵ Aristotle’s view, in his book, *POETICS*, was that art, like biology, can be listed and sorted by species. (John Baxter & Patrick Atherton eds., George Whalley trans., 1997). Every type of art, such as tragedy or comedy, is based on a system of specific and clear rules which define its structure. The artistic value of a creative work is therefore measured by its adherence to the rules that define the genre to which it belongs. Innovation and revolution in art are therefore not of positive value. Immanuel Kant, in his book *THE CRITIQUE OF JUDGMENT*, agreed that art is based on a set of rules which instruct how to produce it. (J.H. Bernard trans., 2000). However, Kant believed that creating art according to artistic rules is not enough. A masterpiece created by a genius does not stem from wisdom or knowledge of rules. The art genius does not create only according to existing rules but part of his or her creation is “legislating” new rules. An artist therefore cannot teach a fellow artist how to create, since rule-making talent is personal and spontaneous and cannot be transferred or reconstructed (as opposed to a scientist who is able to teach others how to reach the same result he did). “There is no science in beauty, there is only critique” *See id.* at 18. In fact, the essence of the word genius according to Kant is based on originality, not rule-following. *See id.* at 189–206. See also the Platonic dialogue where Socrates explains how the creation is governed by inspiration that comes mysteriously and uncontrollably to the artist, until it drives him out of his mind. *PLATO: COMPLETE WORKS* 937 (John M. Cooper ed., 1997). The conclusion is that there is no place for rules or studying as far as art is concerned. *See id.* at 941.

the audience). Not all artists are confined to for-profit studios and independent cinema seeks to challenge the “establishment”. In law, on the other hand, the breach of norms by judges leads (or ought to lead, according to the “rules of the game”) to sanctions or invalidation. While judges are “independent”—at least on the Federal level—over-independence (in attitude and deeds) is highly discouraged by the profession and may even result in pressures from neighboring systems, such as the media or politics, for impeachment. Whereas a degree of creative judicial performance is not rejected per-se, its scope (and accompanying style) is quite different. Law, in general, is in the business of regulating change by placing checks on its pace, and therefore judicial innovation is only occasionally respected (as long as it is not too iconoclastic so as to deem it overly “activist”; a slow, marginal progression is usually preferred to a “revolution”).

The question of “performing by the rules” could be viewed from a different angle: as a matter of interpretation. As Balkin and Levinson noted, adherence to rules—legal or otherwise—entails an interpretative dimension (in law as in other performing arts). It thus raises the question of fidelity: is the judge faithful to the law? Is the conductor to the piece as written by the composer? Is the actor to the instruction to the director? Or the director to the essence of the script or to the poetic principles in light of which she operates?⁸⁶ Such fidelity is gauged by the audience but also by the performers themselves, including not only those who perform on stage—the lawyer or the actor—but also those who perform by instructing others how to perform, namely the director and the judge. Ultimately, evaluating the fidelity of one’s performance is a matter of self-reflection: the judge and the movie director are required to judge their own performance.⁸⁷ Yet once again we should, of course, note that judgment in law is different from judgment in cinema, not because the human faculties engaged are necessarily different, but because the meaning of “adherence” may be different, given the different attitude towards “creativity” and the different meaning of “rules”. Placing cinema alongside law could therefore illuminate what it means to “perform by the rules”, as long as we do not succumb to the erroneous notion that all rules are of the same ilk.

⁸⁶ Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, *supra* note 16, at 1619; *see also* Carol Ann Weisbrod, *Fusion Folk: A Comment on Law and Music*, 20 CARDOZO L. REV. 1439 (1999).

⁸⁷ While it seems as though the film director reviews the routine work of the actors, scriptwriters, photographers, and other participants, ultimately it is her own work that she judges (according to artistic criteria). The judge in a court of law is required to pass judgment on the acts of others—including other state agencies—while remaining neutral and above the fray (or so is the ethos). However, upon closer inspection it becomes apparent that in every normative decision the judge also judges herself, or at least she should be aware that her actions can be viewed in this manner. *See, e.g.*, DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES; TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (1998). Consequently, the differences between law and cinema are not differences that prevent a comparative analysis, but are rather differences that have the potential to serve as fertile ground for discussion.

3. *Performance as Acting*

To perform is also to play a role.⁸⁸ To suggest that appearing before a judge or jury can be seen as a performance, or more precisely, that when one participates in adjudication one is acting, would seem trivial to legal practitioners. Lawyers, expert witnesses, judges, and other functionaries are actors in the sense that they all put on a show, as their role requires. Their performance is measured by their ability to act their role in a credible manner, in other words, to appear as adhering to the ideal type in the light which the role is constructed. Again, we should recognize that performance in law means something different than performance in the cinema: “acting one’s role” in law—by lawyers, judges or legislatures—is not valued for its own sake, nor is the practice designed to encourage double-play. Whereas in cinema an actor is valued for his ability to detach from aspects of his own personality and assume someone else’s—like a chameleon—a lawyer who loses his self in his role risks betraying the ideal type of the profession. At the end of the day, actors in law often direct their own acting on the legal stage, and have to own up, ethically, to their conduct. The role morality of acting as a lawyer is therefore different from the role morality of acting one’s role as an actor. It would therefore be stretching the concept of acting to suggest that Shakespeare should be taken literally. But neither can we ignore the affinity between the two forms of performance (providing we proceed with sufficient methodological caution).

The performative dimension of law is relevant not only to the officials, practitioners, and other players in the courtroom, but also to the consignees of the judicial decree (or legislative act). The judicial order requires performance. The addressees (and, for that matter, the audience that observes the proceeding) are not required to feel that the instruction is necessarily justified (that is, that the judge necessarily “got it right”), or otherwise internalize the motivation expected of them. In this sense, the litigants are like actors in a cinematic production: they are required to follow the instructions, as directed. The outside world needs to see their performance for it to be “performed,” but the players—the litigants performing under a court order (or legislative act) need not necessarily identify morally with the actions they were ordered to perform as their own, since these actions were not fully voluntary.⁸⁹ Clearly, unlike acting in a cinematic production, the “act” the litigants perform is obviously “for real,” in other words, it is not performed under a moratorium in which the action has no significance beyond the sphere of the performance. Nevertheless, conceptualizing the similarity and the difference of this performative element in law and cinema stands, it seems, to reveal some valuable insights as to the way culture operates, especially when it comes to the performance of “the general public”.

⁸⁸ For a discussion on social life and social roles as performance, see ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 17–76 (1959).

⁸⁹ Consider, for example, a judicial order requiring that one party apologize to the other; the party publishes in the paper an apology that begins, “Pursuant to the court order, I hereby apologize.” The inherent difficulty of legally mandated apologies is central to *THE STORY OF QIU JU* (Sil-Metropole Organization 1992).

4. *Performance and the Suspension of Disbelief (Or the Relationship between Image and Imagination)*

One of the basic criteria for determining whether a fiction movie is good is the extent of its ability to suspend disbelief—the extent to which it enables the audience to accept what is being presented to them as a possible reality, at least for the duration of the film.⁹⁰ After all, the film is a creation of fantasy, a fiction. Films usually do not pretend to reflect the truth, and when they do, such as is “this film is based on a true story,”⁹¹ or in documentaries, the claim is only to capture part of the truth, as seen by the director.⁹² Some suspension of disbelief is required in law as well: we have to believe that truth is ascertainable, or at least, in adversarial systems, that there are no great disparities between the parties with respect to their ability to ascertain and then portray the truth. We also have to treat the image of truth, presented in Court, as comprehensive enough: we know the jury is liable to see only a portion of the truth—the segment not only deemed relevant but also found to have been attained without violating other norms—and we have to believe these “facts”, namely the representation thereof, are sufficiently indicative of the entire picture. Other elements in law also have to be “assumed”—for example, that the political process fairly represents the will of the people and therefore has a legitimate claim for obedience. Elements of performance are required to maintain the suspension of disbelief: processes have to be “orchestrated,” “staged,” or otherwise *mis-en-scene*. We can therefore assume a certain affinity between law and cinema, but if we treat the processes of legislation or adjudication as a mere show we have gone too far. A good trial at least aspires to be based on truth. Similarly, the political process, which clearly has something in common with the cinema, given its staged and scripted theatrical dimension and vulnerability to the lure of the image-generating photo-ops, nonetheless would go awry were it to function as a form of show-business. A film is not required to hold certain ethical positions or to broadcast necessarily good or morally positive values. A film can support the villains but still be considered a good film or a film that is worthy of artistic esteem. A movie can simply entertain.⁹³ A good judicial decision should not

⁹⁰ As an example of the way the world of cinema suspends disbeliefs, we could refer to the common practice among actors to assimilate into an environment they later have to depict on-screen, or experience in the real world an event they are about to present as actors.

⁹¹ For an interesting discussion of this genre, see Jessica M. Silbey, *Truth Tales and Trial Films*, 40 LOYOLA OF LA L. REV. 551(2007). See also Charles Musser, Symposium: Picturing Justice: Images of Law and Lawyers in the Visual Media, *Film Truth, Documentary, And the Law: Justice at the Margins*, 30 U.S.F. L. REV. 963, (1996).

⁹² A closer look at the genre reveals that it is hard to avoid at least a degree of advocacy in documentaries. Michael Moore’s *Fahrenheit 9/11* and Errol Morris’s *Fog of War* are clear examples, but even documentaries designed to demonstrate that a confession was free from coercion are suspect. See Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J. OF LAW & ARTS 107 (2005); Jessica M. Silbey, *Videotaped Confessions and the Genre of Documentary*, 16 FORDHAM INTELLECTUAL PROPERTY, MEDIA & ENTERTAINMENT L. J. 789 (2006).

⁹³ Cf. MacCabe, *Theory and Film: Principles of Realism and Pleasure*, in NARRATIVE, APPARATUS, IDEOLOGY 179 (Philip Rosen ed., 1986); Jean-Louis Baudry, *The Apparatus: Metapsychological Approaches to the Impression of Reality in Cinema*, in FILM THEORY AND CRITICISM, *supra* note 83, at 206, 219-220; Miriam Hansen, *Pleasure, Ambivalence, Identification*, in FILM THEORY AND CRITICISM,

only be factually credible but, equally importantly, a good judicial decision (and certainly a good statute), should comply with moral standards. We evaluate a legal norm as good insofar as the choices it realizes are ethical and to the extent that the behavior implemented by the norm fulfills ethical standards.⁹⁴ It is plausible that these features are external to the art of suspending disbelief which focuses on the “how” belief is suspended and not the “why” we choose or led to do so, and therefore the differences may not necessarily detract from the possibility of analogizing between law and cinema. But it is equally plausible that the reverse is true, and the “how” may not so easily be detachable from the “why”.

Films invite us to suspend our disbelief not only for the purpose of entertainment: artistic films provide us the opportunity to experience something unique, emotionally and cognitively, by engaging our verbal and non-verbal senses and stimulating our imagination. The relationship between law and imagination has long attracted the attention of law-and-literature scholars,⁹⁵ who focused, as one would expect, on the literary imagination, but whose work is relevant to the visual and audio-visual as well.⁹⁶ The relationship between image and imagination can, it seem, enrich our understanding of law’s makeup, provided we are not seduced to ignore the differences forms of imagination. Good cinema inspires the imagination. It is not at all clear that good law—a good judicial decision or a good piece of legislation—is also required to stimulate the imagination in the same manner. Whereas it is plausible that for law to operate it must rely, to an extent, on our imagination, but it is equally plausible that in the run-of-the-mill cases for a judge, counselor, witness or juror to kindle our imagination would be to act in a manner inconsistent with the system’s internal mode of operation. While imagination plays an important role in allowing us to appreciate the complexities of the cases⁹⁷—including the run-of-the-mills cases—it seems that law is much more ambivalent in its relation to imagination. Examining the art of illusions in law may benefit from cinematic theory only if an eye is kept on the danger of suggesting that imagination acts the same in law and in cinema. Ignoring the possible difference may lead us to turn a statement that might be partially correct—litigation has elements of show business⁹⁸ or a component that relies on imagination—into a reductive statement, as if there is nothing in law beyond show business⁹⁹ or as if imagination in law is as pervasive as it is in other performing arts.

supra note 83, at 634; Laura Mulvey, *Visual Pleasure and Narrative Cinema*, in *FILM THEORY AND CRITICISM*, *supra* note 83, at 837.

⁹⁴ See, e.g., JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

⁹⁵ JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1985); MARTHA NUSSBAUM, *POETIC JUSTICE* (1995), ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2001).

⁹⁶ Alison Young, ‘*Into the Blue*’: *The Image Written on Law*, 13 *YALE J. OF LAW & HUMANITIES* 305 (2001).

⁹⁷ Amnon Reichman, *Law, Literature, and Empathy: Between Withholding and Reserving Judgment*, 56 *J. LEGAL EDUC.* 296 (2006).

⁹⁸ The movie *CHICAGO* illustrates this point. (Miramax 2002).

⁹⁹ Some may claim that famous trials, like that of O.J. Simpson, are to an extent “show trials,” which are perceived by the public as a modern substitute for circus shows in the Roman Empire. Indeed, writers tried to understand the American fascination with O.J. Simpson’s trial. Darnell Hunt claims that

5. *Performance, Drama and Conclusion*

Some cinematic genres rely on drama. It is usually these genres that directly address the legal process—primarily adjudication, but, on occasion, legislative business as well¹⁰⁰—by dramatizing (if not sensationalizing) the “legal plots”. This mainly American cultural phenomenon is quite fascinating (and will be addressed in a different context below) but in terms of the methodology of the law-and-cinema discourse it relates to the point of dramatic performance. Performance in non-documentaries, accompanied by other cinematic elements such as sound and the work of the camera, is often stylized so as to evoke drama: conflicts, high-powered action, the thrill of romance, etc. Performance in law is often purposefully non-dramatic (despite the contrary representation in cinema). The work of the corporate lawyer, if done well, should not lead to dramas. Even litigators would often steer away from drama, since drama may raise the stakes and increase uncertainty. Judges certainly seek to process their cases by resorting to drama in rare occasions only. Not only, as Sherwin notes, does the transportation of the “cinematic lawyer” into the real courtroom create practical problems (as lawyers are pressured to meet cinematic expectation by “over acting”),¹⁰¹ but such transportation is in tension with the theory of client-representation as well, since the best interest of the client are not necessarily served by upping the dramatic ante.

Moreover, artistic films aside, performance in law and in cinema is directional: it is geared towards some destination. In law successful trial resolves a conflict, both between the parties and, to an extent, between competing policies. Obviously, an opening is left for future examination, but all in all we expect the law to settle things. Negotiation—the more common mode of resolving legal disputes—is geared even more toward the comprehensive conclusion of the conflict. Good cinema may embody a similar choice, but not necessarily. It seems that cinema—fictional and even documentary¹⁰²—which raises questions, encourages reflection, and motivates us to see other aspects of the issue is just as worthy, if not more. Good cinema, as rare as it may be, includes a non-judgmental element, in the sense that a director or a certain film may call on us not to be so swift in seeking moral or ethical resolution of the conflict.¹⁰³ In other words, whereas performance in law seeks a resolution, performance in cinema often seeks to stir disturbance. The upshot of this refers back to the notion

the public interest is more profound than a “media circus” that fed the public hunger for entertainment. He termed this interest ritualistic in nature. See DARNELL M. HUNT, O.J. SIMPSON FACTS & FICTIONS: NEWS RITUALS IN THE CONSTRUCTION OF REALITY 17–48 (1999). Another interesting phenomenon that illustrates the importance of trials to our historical consciousness is the “classical trials” genre of books. See, e.g., FRANK MCLYNN, FAMOUS TRIALS: CASES THAT MADE HISTORY (1995); GREAT WORLD TRIALS (Edward W. Knappman ed., 1997).

¹⁰⁰ A great example is *ADVISE AND CONSENT* (Otto Preminger, 1962).

¹⁰¹ SHERWIN, *WHEN LAW GOES POP*, *supra* note 3.

¹⁰² “The documentary films that I most respect don’t come to closure and don’t produce audiences of compassionate spectators of the dilemmas of others.” Regina Austin, Symposium: Documentaries & the Law, *The Next “New Wave:” Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 809, 837 (2006) (emphasis added).

¹⁰³ Cf. Amnon Reichman, *Law, Literature and Empathy*, *supra* note 97.

of performance: if we jump too quickly between law and cinema, we might ignore the different vectors of performance in law and cinema, which may lead us yet again to a language-game trap.

In conclusion of this part, it is worthwhile to reiterate that both the legal and cinematic practices contain a communicative component (the transmission of messages) and a representative component (representation of reality or of a possible reality). Both practices deal with clashes of values, the formation of normative judgments, and generally, with aspects of the human condition. But the perception of law as part of “show business” (in the sense that the entire essence of the law is nothing but an image and the marketing of expectations, not to say illusions) or the perception of cinema as “legislative” (in the sense that cinema creates a universe of norms which the audience views as binding) is exaggerated. At the very least, the use of expressions such as “show business” to describe law or “legislation” to describe cinema rests on a language-game that perceives the law in a much wider sense than the law of the State, and show business not only as the familiar collection of plays, musicals, and other such artifacts and events. A sociological approach that expands the concepts of “law” and “legislation” to the cinematic action and, conversely, portrays the law as show business, illuminates certain similarities but such an approach is liable to obscure significant differences between the practices. It seems therefore, that when discussing law and cinema, it would be wise to tread with appropriate methodological and conceptual caution. In particular, when we import the vocabulary native to one practice to another practice, we should acknowledge the different meaning the terms gain, and the limited scope of the possible analogies.

III. PRELIMINARY TAXONOMY OF ARGUMENTS IN LAW AND CINEMA

Having touched upon some of the methodological mines spread in and about the field, it is high time to observe how the field is organized. This section will offer a tentative classification of the possible claims thus far put forward as part of the law and cinema discourse. The classification sketched here is rendered in broad brush only and, needless to day, is far from exhaustive; other ways of organizing the field are possible,¹⁰⁴ and more nuanced analysis of the key concepts advanced here (and their relation to *narratologie* in general)¹⁰⁵ would certainly refine this rough taxonomy. It appears that the law and cinema field may be organized in a three-dimensional matrix. On one axis lies the subject matter of the conversations. As will be developed below, we can identify three such clusters of conversations: structural (i.e., concerned with articulating the

¹⁰⁴ See, e.g., Douglas J. Goodman, *Approaches to Law and Popular Culture*, 31 LAW & SOC. INQUIRY 757 (2006).

¹⁰⁵ A more fine-tuned analysis will have to address the possible distinctions between narrative (understood as the recounted chain of event and the structure of the recounting), argument (understood as an attempt to persuade the audience of some proposition) and description (understood as the evocation of properties of objects for their own sake). See SEYMOUR CHATMAN, *COMING TO TERMS: THE RHETORIC OF NARRATIVE IN FICTION AND FILM* 3–9 (1990).

various devices around which law and cinema are “engineered”), cultural (i.e. concerned with describing the social phenomenon of law and cinema as components of a given culture) and normative (i.e., concerned with examining the moral foundations or implications of legal codes and cinematic artifacts). On the second axis lies the object of the examination: the artifacts of law and cinema (movies, cases, statutes) or the actual behavior of key players in the legal and cinematic worlds as observed not only by looking at their output. The more we turn our attention to the actual workings of the players, the more we adopt law-and-society terminology and tools and thus the accent turns sociological. The more we move to the other side of the spectrum, where the focus is the artifact, the more we rely on analysis of narrative, image and other dimensions of the performing arts and thus the hue turns humanistic.¹⁰⁶ The third axis refers to the interdisciplinarity (or the filters we use to examine the law, cinema or society in general). As mentioned earlier, we may place the legal lens parallel to the cinematic lens; we may examine law in cinema or cinema in law by using legal and/or cinematic lenses; and we can approach law as cinema or cinema as law by adopting a filter sensitive either to the legal or the cinematic phenomena (provided, as mentioned earlier, that we are sensitive to the “language game” involved). This matrix may sound confusing, but were law reviews accompanied with video, it would be rather simple to demonstrate the workings of the conceptual device and its effects in mapping the field. This part of the article will focus on the first axis—the subject matter of the conversations. It should be noted that while the clusters are detailed here as the three distinct families, conversations may often include trails or prongs in all three bases, with arguments corresponding on various fronts. A couple of examples will be provided at the end of this part.

A. CONCEPTUAL ENGINEERING: THE FAMILY OF STRUCTURAL ARGUMENTS

The string of conversation defined here as “structural” is interested in the how performing and performative social practices, such as law and cinema, are “built”. These conversations could be understood as variations on Luhmann’s “system theory”¹⁰⁷—even if reference to this theory is rarely explicitly made—in so far as the their focus is the internal mechanisms designed to govern communication with other practices, the flow of

¹⁰⁶ The notion that there is a spectrum that connects the humanities and the social sciences rests on the possibility of examining a certain phenomenon as it is, its representation, and their relation. For example, Austin Sarat first identified (with others) a cultural phenomenon that organizes our attitude towards filing a lawsuit. Felstiner, Abel, & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, *supra* note 28. He then proceeded to identify the representation of that phenomenon on screen. Sarat, *Exploring The Hidden Domains of Civil Justice*, *supra* note 28. Future research could examine the relation between the phenomenon and its representation either by looking at the effect of the presentation on the phenomenon, or by looking at the “humanistic” aspect of the phenomenon, such as its ideal type and narratological manifestation, by using tools such as ethnographies and narrative analysis.

¹⁰⁷ NIKLAS LUHMANN, *SOCIAL SYSTEMS* (John Bednarz, Jr. with Dirk Baecker trns., 1995); NIKLAS LUHMANN, *ART AS A SOCIAL SYSTEM* (Eva M. Knodt, 2000); NIKLAS LUHMANN, *THE REALITY OF THE MASS MEDIA* (Kathleen Cross trns., 2000).

information within the practices and the possessing of this information into knowledge, justification and action. At an abstract level, these conversations deal with the building blocs of social practices: their boundaries, entrance and exit, processes of absorbing and generating images, etc. This cluster is not concerned so much with whether a certain feature of the practice—such as certain product, process or institution—is morally just, nor is the cluster attuned to the particularities of the social context (beyond the distinction between system and environment). The language is primarily conceptual and the purpose of the structural arguments is to reveal aspects of the social makeup of the practices *qua* practices.

For example, it has been argued that both law and cinema are constructed around enclaves, in which the characters—the actors—operate.¹⁰⁸ These enclaves are created through the use of aesthetic and rhetorical means. Such enclaves include the singularity of the courtroom,¹⁰⁹ the uniqueness of a legislative hall, or the distinctiveness of a movie theater. Location is a key concept both in cinema and in law, as it allows us to parse away interactions that are taking place in other locations. Enclaves are not, of course, only a matter of physical space; enclaves also have an emotional and symbolic dimension. In broad terms it could be said that both law and cinema demarcate social domains or social arenas in which meaningful action and interaction are enabled. The uniqueness of such enclaves, goes the argument, is that they also enable ethical or legal judgment. Without these enclaves we would possibly lack those contextual elements that guide us when we come to deal with the ethical aspects of social life.

Along similar lines the practices of law and cinema operate so that a certain social domain integral to their operation remains “behind the scenes.” As mentioned earlier, both law and cinema would operate quite differently—if at all—should this space be eliminated. The practices of legislation, negotiation, adjudication, and judicial decision-making all contain parts that are internal or hidden, and that would have to be dramatically altered if they were to become part of the public domain or were to be exposed to the gaze of other domains. Put somewhat blatantly, the “behind the scenes” of the law, if unveiled, would stand in rather stark contrast to the “seen” law. Likewise, if there will no longer be an area that the camera does not capture, cinema will no longer be the cinema that we know; the “magic”¹¹⁰—a romantic term for “perceptive illusion” will disappear.

If the “behind the scene” is a structural element shared by law and cinema, so is the “seen”, or more accurately, the “represented”. As a matter

¹⁰⁸ Shulamit Almog & Amnon Reichman, *Casablanca: Judgment and Dynamic Enclaves in Law and Cinema*, 42 OSGOODE HALL L.J. 201, 206 (2004).

¹⁰⁹ For an analysis of legal space (mostly courtrooms) as shown on cinema, see GREENFIELD, OSBORN ET AL., *supra* note 42, at 31–53; BLACK, *supra* note 32, at 73–81.

¹¹⁰ Cf. Katherine Biber, Book Review, *Law's Moving Image*, 15 SOCIAL LEGAL STUDIES 607 (2006); Rebecca Johnson, Book Review, *Judging Magic: Can You See the Sleight of Hand*, 105 MICH. L. R. 1343 (2007).

of structure, representation relies on operational closure and cognitive openness. Operational closure allows each practice to retain its perceived autonomy and its commitment to “playing by its own rules” (without which representations within the practice would become meaningless, or would attain multiple meanings and thus become meaningless). Cognitive openness is essential for the practices to absorb representations from other practices. Yet maintaining this structure of closure and openness is challenged once the boundaries of the practices are no longer clear. If indeed the legal process “turns pop”, as Sherwin suggests, if fact (as represented in law) and the image of fact (as projected on screen) become interlaced,¹¹¹ the structure of law is threatened at least in so far as its aspiration to ensure due process becomes hollow. Similarly, should the law invade the creative space of cinema (for example, by imposing intellectual property rules that are powerful enough to change the logic of the domain from one premised on innovation to one premised on defensive—or offensive—legal representations) the structure of cinema would be threatened. It would thus follow that a structural analysis of law and cinema would look at what “representation” means, since it is through “representation” that practices regulate the communication with neighboring practices.

The family of structural arguments, more abstractly, is premised on examining the mode of operation—the available moves—within each practice. For example, both the cinema and the law are self-referential.¹¹² Both cinema and law establish the ethos and the rationale for action in the frame of their practice. They do not depend on any external base for their action, but rather provide the justifications and standards for measuring excellence from within the practice itself. A law-and-society investigation into structure would compare, as an empirical matter, how information enters and then represented in the law and in the cinema (and also in the media that covers both law and cinema).¹¹³ It would also examine the social mechanisms that play as gatekeepers (with respect to information but also with respect to people who seek to assume—or withdraw from—offices within the practice). Richard Sherwin, for example, documents the possible ways of diffusion between the legal and the cinematic worlds in term of representation and perception.¹¹⁴ Further work may address the mobility of professionals between these two worlds.¹¹⁵ A law-and-humanities examination would look into the system of internal citations in law and in

¹¹¹ “In an image-saturated society, representations are not of reality, but a part of it.” John Fiske, *Admissible Postmodernity: Some Remarks on Rodney King, O.J. Simpson, and Contemporary Culture*, 30 U.S.F. L. REV. 917, 928 (1996).

¹¹² Cf. AUTOPOIETIC LAW, *supra* note 30, at 2; ART AS A SOCIAL SYSTEM, *supra* note 107, especially Chapter 5.

¹¹³ John Fiske, *Admissible Postmodernity*, *supra* note 111.

¹¹⁴ SHERWIN, WHEN LAW GOES POP, *supra* note 3; Richard Sherwin, *Law in Popular Culture*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 95 (Austin Sara ed., 2004).

¹¹⁵ Some lawyers end up working in companies that produce audio-visual evidence. See, e.g., Avi J. Stachenfeld & Christopher M. Nicholson, Symposium: Picturing Justice: Images of Law and Lawyers in the Visual Media, *Blurred Boundaries: An Analysis of the Close Relationship Between Popular Culture and the Practice of Law*, 30 U.S.F. L. REV. 903 (1996). Others, such as Otto Preminger, end up as movie directors.

cinema¹¹⁶—at the level of the artifact, not the social occurrence—and identify the construction of authority, meaning, connotations and even validity that follows. Cinematic theory is rather sensitive to the structure of the cinema, and therefore insights of theorists—primarily European—serve as important sources.¹¹⁷

In addition to placing law alongside cinema the discussion of structure could adopt any of the other modes of interdisciplinary, depending on the focus of the examination. For instance, we may examine the structure of the aesthetic devices used by law and cinema to conjure an image. True, the law doesn't make use of cameras, studios, and special effects in the same manner the cinema industry does (although it should be noted that modern technologies have now blurred the boundaries and videotaped evidence, video-conferences, and other cinematic tools are available in courtrooms,¹¹⁸ legislative halls, and lawyers' offices, as many law and cinema scholars have noted). Similarly, cinema doesn't resort to the exact same rhetorical and aesthetic devices definitive of law, such as special customs for the participants (robes), special architecture where the practices are performed (a courtroom with an elevated dais for the judge, a box for the juries, etc.), special parlance (legal terminology), and procedures to establish legal truth (distinguished from scientific truth) which include ritualistic elements, such as an oath. Yet, despite the different devices, they nonetheless may have similar functions: for example, they sway us to accept the viewpoint of the Court¹¹⁹ or the Camera¹²⁰ as the only sensible viewpoint. Hence we may examine legalistic devices in the poetics of the cinema, or cinematic devices in the poetics of law, and so on. These rhetorical and aesthetic devices establish the necessary conditions for the stories of the characters to be persuasive, and analyzing these devices can be seen as a subclass of structural arguments, as they are the "plumbing"—the tools with which the practice is "maintained" or is operationalized.

Another example of aesthetic and rhetoric devices that are built into the practices are the devices that participate in the formation of empathy (or disempathy, namely blame) towards the characters; empathy, it has been argued, plays an important part in ethical (and legal) judgment.¹²¹ Again, a jurist has a different arsenal than a filmmaker. The latter has at her disposal scriptwriters, camera-people, sound and lighting experts, as well as the make-up artists. All these tools – perhaps especially the camera – are

¹¹⁶ There are a lot of examples, such as Carol Reed's reference in *THE THIRD MAN* (London Film Productions 1949), to the famous balloon scene of Fritz Lang in *M* (Nero-Film AG 1931).

¹¹⁷ For important collections of essays, see *FILM THEORY AND CRITICISM*, *supra* note 83; *NARRATIVE, APPARATUS, IDEOLOGY*, *supra* note 93; see also ROBERT STAM, *FILM THEORY: AN INTRODUCTION* (2000).

¹¹⁸ Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 *YALE L.J.* 449 (1995); Christopher J. Buccafusco, *Gaining/Losing Perspective on the Law, or Keeping Visual Evidence in Perspective*, 58 *U. MIAMI L. REV.* 609 (2004); Ann Kibbey, *The Semiotics of Photographic Evidence*, 5 *LTC* 157 (2001).

¹¹⁹ Robert Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 109 (1984).

¹²⁰ Christian Metz, *The Imaginary Signifier*, in *FILM THEORY AND CRITICISM*, *supra* note 83, at 820, stating that the spectator can do no other than identify with the camera.

¹²¹ See, e.g., MARTHA NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995); KAMIR, *FRAMED*, *supra* note 17.

unique to film. But the former—the jurist—also has a couple of useful tools to build or undermine empathy, as classes in legal advocacy, moot trials, and similar courses demonstrate.¹²² Understanding the processes by which empathy is elicited requires the understanding of the rhetorical modes utilized in a certain film or a certain statutory of judicial authorities.¹²³

These examples of the discussion of the structural aspects of law and cinema are, of course, only partial examples. They are not exhaustive. Their presentation was intended only to outline a certain dimension in this field of discourse, and invite further discussion.

B. DESCRIBING CULTURE: CONVERSATIONS ABOUT REPRESENTATIONS PERCEPTION AND RECEPTION)

1. *Using Cinema to Explore the Law (and Culture)*

The second family of conversations in the law and cinema field is occupied not so much with structure but with characters and processes in a given society and their representation in legal sources and in cinematic artifacts. At bottom, this exercise is an attempt to better understand human culture: its institutions and ideologies.¹²⁴ This conversation will look at the representation of fathers (and children),¹²⁵ deviant families,¹²⁶ women,¹²⁷ the corporation¹²⁸ or any other entity that resides in the various systems that comprise society. We would want to get to know these characters better: who they are (i.e., how are they described or depicted), where they come from (as represented in law and in cinema), what is their psychological make-up (ditto), under what ideal-types are they operating, etc. The focus may also be the processes these characters undergo—their interactions and relationships—and how these are treated in law and in film. Of interest, for example, is how property is acquired.¹²⁹ Less tangible human phenomena,

¹²² Since the pen and the word are the only “weapons” of the lawyer, it is no surprise that the most powerful “weapon” for identity-building in law is the narrative. See, e.g., Kim L. Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989); Jan M. Van Dunne, *Narrative Coherence and its Function in Judicial Making and Legislation*, 44 AM. J. COMP. L. 463 (1996). For the centrality of narrative in law and cinema, see BLACK, *supra* note 32, at 13–31.

¹²³ Black makes a connection between the testimony of a witness in court and the operation of a camera in a cinematic creation. See BLACK, *supra* note 19 at 99–103. See also KAMIR, *FRAMED*, *supra* note 17, at 3–4.

¹²⁴ Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91 (2005).

¹²⁵ Austin Sarat, Presidential Address, *Imagining the Law of the Father: Loss, Dread, and Mourning in the Sweet Hereafter*, 34 LAW & SOC’Y REV. 3 (2000); Austin Sarat, Symposium: Law/Media/Culture: Legal Meaning in The Age of Images, *Living in a Copernican Universe: Law and Fatherhood in a Perfect World*, 43 N.Y.L. SCH. L. REV. 843 (2000).

¹²⁶ Rebecca Johnson, *Leaving Normal: Constructing the Family at the Movies and in Law*, in NEW PERSPECTIVES ON DEVIANCE: THE CONSTRUCTION OF DEVIANCE IN EVERYDAY LIFE 163 (Lori Beaman ed., 2000).

¹²⁷ KAMIR, *FRAMED*, *supra* note 17.

¹²⁸ Anthony Chase, *Civil Action Cinema*, 1999 L. REV. M.S.U.-D.C.L. 945 (1999); Anthony Chase, Symposium, *Subterranean Government, Underground Film*, 22 OKLA. CITY U.L. REV. 167, 182–83 (1997).

¹²⁹ See, e.g., David M Seymour, *Representation and the Framing of Modernity*, 10 GRIFFITH L. REV. 259 (2001).

like emotions¹³⁰ may also be examined, and attention could be paid to the manner in which identity and collective memory are constructed via cinematic and legal representations.¹³¹ Parallel to the humanistic investigation into character and image, a social-science perspective would inquire into the accuracy (or comprehensiveness) of the representation and the effect representation of an entity in one system has on the other are common. The purpose is to challenge a representation – ubiquitous in one or more films—by juxtaposing it with an alternative image or with data collected via scientific methods. This process of challenging the representation may also include uncovering a less conspicuous and sometimes even partially hidden images that nonetheless play a central role in the representation of the examined character, institution, process etc (or the in the manner it is “judged” by the camera).

The examination may also undertake a diachronic approach by examining the evolution of the representation of a certain social character or institution over time. References to social context, power structures, dominant ideologies and cultural and technological horizons are an integral part of the conversation.

It is within this family of conversations that the American cinematic fascination with law—criminal and civil—is addressed.¹³² The pull of conflicts to the domain of lawyers and courts, identified early in American life by de Tocqueville,¹³³ is reinforced by the American cinema (read: the cinema in the United States)¹³⁴ and its depiction of lawyers,¹³⁵ law-firms,¹³⁶

¹³⁰ Hila Keren & Kathy Abrams, *Law in the Cultivation of Hope* (Bepress Legal Series, Working Paper No. 1205 2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=5762&context=expresso> (last visited March 10, 2008).

¹³¹ See, e.g., Ruth Elizabeth Burks, *Back To The Future: Forrest Gump And The Birth Of A Nation*, 15 HARV. BLACKLETTER L.J. 83 (1999).

¹³² Nicole Rafter, *American Criminal Trial Films: An Overview of Their Development, 1930–2000*, 28 J. LAW & SOC. 9 (2001); Mariana Valverd, *LAW AND ORDER: IMAGES, MEANINGS, MYTHS* (2006); Jessica M. Silbey *A History of Representations of Justice: Coincident Preoccupations of Law and Film*, in REPRESENTATIONS OF JUSTICE 131 (Antoine Masson & Kevin O'Connor, eds.) (2007); CHASE, *supra* note 52, discusses the way the different fields of law are represented on screen. He thus reviews the representation of constitutional law, criminal law, civil law (mainly torts), international law, and comparative law.

¹³³ “[S]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,” wrote Alexis de Tocqueville. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., 1945). It would not be surprising if as a consequence the legal process gained considerable public visibility.

¹³⁴ The relationship of U.S. cinema to Canadian cinema or to the European continent has also attracted the attention of scholars. See Stefan Machura & Stefan Ulbrich, *Law in Film: Globalizing the Hollywood Courtroom Drama*, 28 J. LAW & SOC 117 (2001) (for a law-and-society perspective); Ed Morgan, *The Mild, Mild West: Living by a Code in Canadian Law and Film*, 2 LAW, CULTURE AND THE HUMANITIES 115 (2006); Guy Osborn Steve Greenfield & Peter Robson, *Genre, Iconography and British Legal Film*, 36 U. BAL. L. REV. 371 (2007) (for a law-and-humanities perspective).

¹³⁵ John Brigham, *Representing Lawyers: From Courtrooms to Boardrooms and TV Studios*, 53 SYRACUSE L. REV. 1165 (2003); David Ray Papke, Symposium, *Cautionary Tales: The Woman as Lawyer in Contemporary Hollywood Cinema*, 25 U. ARK. LITTLE ROCK L. REV. 485 (2003); Louise Everett Graham & Geraldine Maschio, *A False Public Sentiment: Narrative and Visual Images of Women Lawyers in Film*, 84 KY. L.J. 1027 (1996); Carole Shapiro, *Women Lawyers in Celluloid: Why Hollywood Skirts The Truth*, 25 U. TOL. L. REV. 955 (1995).

¹³⁶ Michael Asimow, Symposium: Law And Popular Culture, *Embodiment of Evil: Law Firms In The Movies*, 48 UCLA L. REV. 1339 (2001)

judges,¹³⁷ and the legal process could be a testament that the attraction to the law, and the underlying notion that we are all juries,¹³⁸ has far from abated. Law and its minions—prosecutors,¹³⁹ defense lawyers,¹⁴⁰ the corporate bar,¹⁴¹ family lawyers¹⁴² *et al*—are often depicted as both the solution and the problem,¹⁴³ and the idea that we cannot do without the law but that justice is ultimately achieved outside its boundaries (or in violation of its processes) is a theme many films flirt with.¹⁴⁴ Whether it is the notion that in the absence of aristocracy or an organic all-American community, law is the medium for managing social conflicts (lest we succumb to fist law);¹⁴⁵ whether it is the notion that the ultimate resolution of important conflicts must be reflected in law (or in the constitution) as the civil religion;¹⁴⁶ whether it is the personal history of the early Hollywood film moguls who sought the rule of law but were equally captivated by unrestricted freedom;¹⁴⁷ or whether it is simply the fact that the adversarial system easily lends itself to dramatization¹⁴⁸—the prominence in legal figures and process on the silver screen has been identified by the law-and-cinema scholars and consequently receives great attention.¹⁴⁹

A slightly different use of interdisciplinary studies within this family is more instrumental (or pedagogical): using the cinema to understand a certain legal doctrine.¹⁵⁰ The family of arguments that uses the cinema to

¹³⁷ David Ray Papke, *From Flat to Round: Changing Portrayals of the Judge in American Popular Culture*, 31 J. LEGAL PROF. 127 (2007).

¹³⁸ Carol J. Clover, *Movie Juries*, *supra* note 29; Phil Meyer, *Why a Jury Trial is More Like a Movie Than a Novel*, 28 J. LAW & SOC. 133 (2001).

¹³⁹ See, e.g., Roger Berkowitz, *The Accusers: Law, Justice and the Image of Prosecutors in Hollywood*, 13 GRIFFITH L. REV. 131 (2004).

¹⁴⁰ J. Thomas Sullivan, Symposium, *Imagining The Criminal Law: When Client and Lawyer Meet in The Movies*, 25 U. ARK. LITTLE ROCK L. REV. 665 (2003); Rob Atkinson, *Liberating Lawyers: Divergent Parallels in Intruder in The Dust and To Kill A Mockingbird*, 49 DUKE L.J. 601 (1999); John Jay Osborn, Jr., Symposium: *Picturing Justice: Images of Law and Lawyers in The Visual Media, Atticus Finch - The End of Honor: A Discussion of To Kill a Mockingbird*, 30 U.S.F. L. REV. 1139 (1996); Francis M. Nevins, Symposium: *Picturing Justice: Images of Law and Lawyers in The Visual Media, Man in the Middle: Unsung Classic of the Warren Court*, 30 U.S.F. L. REV. 1097 (1996).

¹⁴¹ William J. Wernz, *The Ethics of Large Law Firms—Responses and Reflections*, 16 GEO. J. LEGAL ETHICS 175 (2002).

¹⁴² Michael Asimow, *Divorce In The Movies: From The Hays Code To Kramer Vs. Kramer*, 24 LEGAL STUD. FORUM 221 (2000).

¹⁴³ Steve Greenfield, *Hero or Villain? Cinematic Lawyers and the Delivery of Justice*, 28 J. LAW & SOC. 25 (2001).

¹⁴⁴ Even films that portray the lawyer as a great hero are more skeptical about the law. See, e.g., *TO KILL A MOCKINGBIRD* (Brentwood Productions 1962).

¹⁴⁵ For the proposition that Hollywood courtroom dramas are a guise for addressing social problems, see Matthias Kuzina, *The Social Issue Courtroom Drama as an Expression of American Popular Culture*, 28 J. LAW & SOC 79 (2001).

¹⁴⁶ Robert N. Bellah, *Civil Religion in America*, 96 J. AM. ACAD. ARTS & SCIENCES 1 (1967).

¹⁴⁷ Simcha Jacobovici, *HOLLYWOODISM: JEWS, MOVIES AND THE AMERICAN DREAM* (TV, Associated Production 1997), based on NEAL GABLER, *AN EMPIRE OF THEIR OWN: HOW THE JEWS INVENTED HOLLYWOOD* (1989).

¹⁴⁸ Michael Asimow, Symposium, *Popular Culture and The Adversary System*, 40 LOY. L.A. L. REV. (2007).

¹⁴⁹ Austin Sarat, Lawrence Douglas, & Martha Merrill Umphrey, *On Film and Law: Broadening the Focus*, in *LAW ON THE SCREEN* (Austin Sarat, Lawrence Douglas, & Martha Merrill Umphrey eds., 2005).

¹⁵⁰ “[F]ilm provides perspectives on law that the traditional legal canon ignores.” J. Denvir, *One Movie No Lawyer Should Miss*, 30 U.S.F. L. REV. 1051, 1051 (1996). For example, cinema can reflect on the complexity in lawyer-client relationship often from a perspective unavailable in traditional legal

explore the law argues that a certain legal norm (doctrine, executive decree, statutory provision, etc.) could be better (i.e., more comprehensively) understood by discussing that segment as it is represented in a film.¹⁵¹ Such a discussion may quickly shift to the normative (the third family, discussed below), but may also remain at the level of the “is”, i.e., at the level of trying to understand the doctrine (or the legal character) as it is, without either justifying or criticizing it. It has become commonplace that civil procedure, contract theory, constitutional judicial review, tort law, and professional ethics, to name but a few examples, are approached by screening a certain film (in class, before lawyers, judges, legislatures, or any other professional audience).¹⁵² Such use of a film does not necessarily rest on the assumption that the movie puts forward an empirical claim (about how things in the world necessarily “are”) or expresses normative criticism.¹⁵³ The appeal to a film is made because it presents a hypothetical story from which it is possible to draw certain assumptions or positions that are relevant to the clarification of certain points in legal theory. The use of a cinematic artifact as an illustration, or as raising a hypothesis, is often useful, as it allows us to examine relationships governed by law afresh, as well as a tool for sharpening our understanding of a legal norm by detecting its violation or misrepresentation in the movie.¹⁵⁴

An interesting question that arises when we come to use a film as a basis for a discussion of legal or extra-legal paradigms focuses on the considerations that have led us to choose that particular film. Is it important for us to choose a legally-oriented film, namely a film that presents legal proceedings? Is the focus of our discussion the legal process, or perhaps would we be better off with a film that does not present any proceedings, and from that seemingly unrelated starting point analyze the social interactions their legal relevance? In justifying our choice we shall need, it

discourse. See J. Thomas Sullivan, *Imagining the Criminal Law: When Client and Lawyer Meet in the Movies*, 25 UNIV. ARK. LITTLE ROCK L. REV. 665, 667–68 (2003).

¹⁵¹ See, for example, Margaret Y.K. Woo’s discussion of the film *THE STORY OF QIU JU*, *supra* note 89, as part of the discussion of the Chinese legal system. Margaret Y.K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM. L. & POL’Y J. 581, 613 (1999).

¹⁵² See, e.g., Melissa Cole, *Approaches to Teaching Civil Procedure: Projecting Civil Litigation Through The Lens of Film Theory*, 47 ST. LOUIS L.J. 21 (2003); John Jay Osborn, Jr., *Atticus Finch—The End of Honor*, 30 U.S.F. L. REV. 1139, 1141 (1996); Tonja Haddad, *Silver Tongues on the Silver Screen: Legal Ethics in the Movies*, 24 NOVA L. REV. 673, 674–75 (2000); Norman L. Rosenberg, *Constitutional History and the “Cultural Turn”*: *Cross-Examining the Legal-Reelist Narratives of Henry Fonda*, in *CONSTITUTIONALISM AND AMERICAN CULTURE: WRITING THE NEW CONSTITUTIONAL HISTORY* (Sandra F. VanBurkleo, Kermit L. Hall, and Robert J. Kaczorowski eds., 2002), especially Chapter 12.

¹⁵³ Lawrence Friedman claims that, “Popular culture, as reflected in the media, is not, and cannot be taken as an accurate mirror of the actual state of living law.” Lawrence M. Friedman, *Popular Legal Culture: Law, Lawyers and Popular Culture*, 98 YALE L.J. 1579, 1588 (1989). See Sullivan, *supra* note 150, at 668; Silbey, *supra* note 28, at 152–58; GREENFIELD, OSBORN ET AL., *supra* note 42, at 55–84.

¹⁵⁴ For example, the movie *DEATH AND THE MAIDEN* (Canal 1994), analyzed in Kamir’s book, *supra* note 17, at 185, allows us to examine the difference between “private” legal order and the official legal process, the advantages and disadvantages of reconciliation procedures in the collective and personal realms in relation to other alternatives such as active struggle or opting for the criminal law model. One basic element in reconciliation procedures is the full confession—a confession from the mouth of the perpetrator that includes a request for forgiveness. The movie provides us with such a confession—in an artificial way—and thus makes us wonder whether the knowledge of what “really” happened helps us to reach reconciliation and at what price. One possible conclusion is that all the characters are punished or end up paying a price for their actions, including their desire to achieve justice.

seems, to refer also to the issue of genre: what is considered a “law film”?¹⁵⁵ Take *Rashomon*,¹⁵⁶ a film that presents a legal process but does not at all present accepted procedural elements—is our ability to discuss the film in the context of a criminal procedure undermined by that, or does this help us to better expose elements present in conventional criminal procedure?

Another recurring theme in the family of conversations centered around “describing culture” is the issue of historical context. A certain film, or a certain genre, is located in a certain historical context in which politics, economics, ideology, etc., are intertwined.¹⁵⁷ We are therefore able to discuss, as a descriptive matter, the moral and ideological perceptions as represented at a certain period towards a legal question, as we can discuss the representation of social reality in a given era (i.e., as it was perceived when the movie was made). Contextual insights can therefore be drawn regarding theory—legal or political—that was commonly held at that time.¹⁵⁸ The film *To Kill a Mockingbird* was made during a certain period, and therefore can be taken as an indication of the existence of certain perceptions (with respect to a certain law, the law in general, or legal proceedings, etc.) during that period. In the same manner, it would be possible to examine how a certain historical period (including its laws) was perceived and represented by different generations (provided, of course, such perceptions or representations are corroborated). Again, the film *To Kill a Mocking Bird*, produced in the 60s, reflects back on the 20s and thus allows us to examine how the 20s were considered in the 60s (at least by the director). Similarly, the Western films of the 60s reflect, in one way or another, a certain attitude towards the law (towards violence, towards women, towards minorities) which Hollywood thought was prevalent during the period of the “wild west.” It is therefore possible to discuss Western films as representations of the period in which they were made, as well as representing perceptions regarding the period during which the plots are situated.

¹⁵⁵ For an outline of the law and cinema scholarship focusing on that which defines “law films,” see GREENFIELD, OSBORN ET AL., *supra* note 42, at 14–24. In their opinion, “. . . law films are always concerned with the enforcement of justice in some shape or form and that is a crucial starting point.” *Id.* at 24.

¹⁵⁶ RASHOMON (Daiei Motion Picture Company 1950).

¹⁵⁷ ROBERT A. ROSENSTONE, VISIONS OF THE PAST: THE CHALLENGE OF FILM TO OUR IDEA OF HISTORY 194–95 (1995); TONY BARTA, SCREENING THE PAST: FILM AND THE REPRESENTATION OF HISTORY (1998); Norman Rosenberg, Symposium: Law and Popular Culture, *Looking For Law In All The Old Traces: The Movies Of Classical Hollywood, The Law, And The Case(s) of Film Noir*, 48 UCLA L. REV. 1443 (2001); David Ray Papke, Symposium: Law And Popular Culture, *Law, Cinema, And Ideology: Hollywood Legal Films Of The 1950s*, 48 UCLA L. REV 1473 (2001).

¹⁵⁸ Cf. Rennard Strickland, *The Cinematic Lawyer: The Magic Mirror and the Silver Screen*, 22 OKLA. CITY U. L. REV. 13, 22 (1997); Richard K. Sherwin, *Cape Fear: Law's Inversion and Cathartic Justice*, 30 U.S.F. L. REV. 1023 (1996); Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J. L. & ARTS 91 (2005). To this it should be added that there is a developing taxonomy that relates films to political eras. We can thus identify “Bush films” (meaning films, fictional and documentary, which focus on the Bush Administration), “Clinton films,” September 11th films, Watergate films, etc. This allows not only the study of the effect political events had on the cinema, but equally, and perhaps more interestingly, we can analyze films as political events that broadcast and consolidate ideological concepts. See, e.g., Alan Nadel, *God's Law and the Wide Screen: The Ten Commandments as Cold War "Epic"*, 108 PMLA 415 (1993).

Context, of course, is not just time-sensitive, but also culture-dependant. It would not be surprising if the film *Rashomon* was perceived in the West differently compared to the meaning ascribed to it in the East.¹⁵⁹ The discussion of cinema and law could thus include a comparative dimension: we could examine how films from different cultures perceive (reflect, criticize) various aspects of the legal world in their culture (or in other cultures). We can also compare how native films (or cases) are perceived by foreign jurisdictions. Consequently, hypotheses or speculations can be put forward with respect to similarities and differences among the different popular-legal cultures or between popular-legal cultures during different periods. If indeed there is a relation between law and popular culture, such research could also tell us something about the law itself in a given cultural context.

It should be noted, however, that historical and geographic context do not necessarily limit the field of discourse. Certain films raise problems that are not dependant on a specific historical or geographic context. For example, some of the arguments raised by the film *Rashomon* are not limited to a historical period (even if an understanding of the historical-political background certainly illuminates important aspects of this film). Our ability to understand reality is limited today in the United States and was limited in the 1950s in Japan as it was limited in the thirteenth century (where the legend is situated). It is obviously reasonable to assume that we would have dealt with the problem of *Rashomon* differently had the plot been situated in the present—by resorting to different technology to determine the truth—or had it been situated in France or in Canada. But the challenge at the basis of the film would have remained the same challenge, because any legal system is required to deal with human limitations when inquiring into the truth. Treating *Rashomon* in that fashion brings it closer to the structural domain, as issues of truth are issues all practices, as practices, must deal with.¹⁶⁰

2. “Cultural Jurisprudence”: Transporting Legal Philosophy To the Final Frontier

An interesting sub-sector in the cluster of conversations that examines cinema for its culturally embedded legal themes focuses not on the representation of legal doctrine or process neither on exploring cultural unstated assumptions as represented in film and in law. Rather, cinema is used as a virtual field with which we can play with basic themes of legal philosophy by plucking them from their “natural” locus and transplanting them in the fictional world a movie creates. As stated by one of the

¹⁵⁹ *Rashomon* was made immediately following WWII, and thus we could hear the Camera telling the audience that although we think we are looking at reality heads-on, we are in fact caught in our own historical and cultural horizon. The movie depicts a legend from the 13th century, but the fable is clear: allocating blame for past actions will lead to a loss of faith in human nature, whereas focusing on future and healing is the honest thing to do. This lesson addresses Japan’s honor and shame culture—which is very much past looking—as well as the West’s justice-seeking mentality, but it is clear that the movie will be understood differently by a Japanese and an American.

¹⁶⁰ Cf. Jessica M. Silbey, *Truth Tales and Trial Films*, 40 LOY. L. A. L. REV. 551 (2007).

discussants: “The first tenet of [t]his [approach] is that popular texts can be viewed as animating concepts and themes from jurisprudence. The second is that talking jurisprudentially through popular culture opens a space for critical engagement with jurisprudence, a space that is liberated from the accretions of the discipline's formal lexicon and institutional forms.”¹⁶¹ This work often addresses the more stimulating genres of the cinematic art—science fiction¹⁶² (although an embryonic version of the genre addressed European masters and their affinity to CLS legal concepts).¹⁶³

The idea of this philosophical game is not only to achieve better dexterity with legal philosophy by playing with its concepts in alternative worlds such as that created by a film, but also to reflect back on key questions and concepts from a different perspective. So key concepts like the *grundnorm*¹⁶⁴ or sovereignty¹⁶⁵ are examined in an alien context precisely because this context provides an opportunity to examine the “essence” of these concepts. In that respect, this family of conversation could be classified as belonging to the “structural” or “conceptual” family, as it seeks to take a closer look at the conceptual structure of the law. Equally interestingly, this “game” allows us to understand film better, to the extent that the philosophical concepts reflect some truth that transcends conventions of the legal system. This sub-group of conversations is well aware of the language game involved in borrowing concepts, and stimulates our thought also with respect to what it means to compare, borrow or transplant.

3. *Using the Law to Understand Cinema*

As cinema could prove useful for the understanding of law and legal doctrine, so can the law prove useful for the understanding of cinema (as was just noted). However, it appears that this family of arguments has thus far been less developed. For starters, we could investigate the influence of the law on cinematic creation.¹⁶⁶ Intellectual property rights, distribution

¹⁶¹ Kieran Tranter, “*Frakking Toasters*” and *Jurisprudences of Technology: The Exception, The Subject and Techne in Battlestar Galactica*, 19 LAW AND LITERATURE 45, 46 (2007) (describing the work of William P. MacNeil and aligning himself therewith).

¹⁶² William P. MacNeil, *One Recht to Rule Them All! Law's Empire in the Age of Empire*, 34 STUDIES IN LAW, POLITICS AND SOCIETY 279 (2004); William P. MacNeil, *PreCrime Never Pays! Law and Economics in Minority Report*, 19 CONTINUUM 201 (2005). And see also his writings on the edge of good science fiction: William P. MacNeil, *You Slay Me!': Buffy as Jurisprude of Desire*, 24 CARDOZO L. REV. 2421 (2003); William P. MacNeil, *'Kidlit' as 'Law and Literature': Harry Potter and the Scales of Justice*, 14 LAW AND LITERATURE 545 (2002).

¹⁶³ Jeffrey L. Harrison & Amy R. Mashburn, *Jean-Luc Godard And Critical Legal Studies (Because We Need The Eggs)*, 87 MICH. L. REV. 1924 (1989).

¹⁶⁴ Kieran Tranter & Bronwyn Statham, *Echo and Mirror: Clone Hysteria, Genetic Determinism and Star Trek Nemesis*, 3 LAW, CULTURE AND THE HUMANITIES 361 (2007).

¹⁶⁵ Jason Bainbridge, “*This is the Authority. This Planet is Under Our Protection*” — *An Exegesis of Superheroes' Interrogations of Law*, 3 LAW, CULTURE AND THE HUMANITIES 455 (2007).

¹⁶⁶ By providing First Amendment protection, the Constitution isolates the creative process from direct governmental interference. Yet the First Amendment may clash with other constitutional rights, including the fundamental right to property. Sometimes, a compelling state interest may appear. Clearly the issue of classification is alive—is film political speech, worthy of full protection, or mainly commercial speech? Law regulates art by defining its border and allowing private actors and governmental actors to control the distribution of art. In that respect, the regulation is negative, in the

agreements, age restrictions (of audience and performers), constitutional limitations on the freedom of expression and other legal doctrines influence—at least that is the assumption—filmmaking in a manner that is not always transparent.¹⁶⁷ Even the form of contract—the famous oral agreement—matters.¹⁶⁸ The cultural product we receive, the empathy, identity, and collective memory that are generated by a certain film or by cinema in general, are an outcome not only of the director's creativity, but also of the legal environment and specific laws within which she operates,¹⁶⁹ including the “soft law” applied by market forces and key players in the industry.¹⁷⁰ The regulatory environment in which the director operates and in which the distributive and screening licenses are located, including the norms that govern the employment of personnel in the various fields (i.e., labor law), influence the cultural product and are thus worthy of research.¹⁷¹ Such research could enrich our abilities to understand the possible reasons for certain cinematic developments, and could even provide a reference point for normative critique of specific cinematic trends.

sense that there is no duty to create, nor is there an entitlement that the government provides access to the creative process.

¹⁶⁷ The influence of law on the creative process was discussed in a number of films. For example, the lawyers in David Mamet's film *STATE AND MAIN* (Filmtown Entertainment 2000) play leading roles in presenting different concepts regarding “who owns Main Street,” namely the production of culture. The influence of the lawyer behind the scenes is of no small importance. Steven Spielberg, the director of *AMISTAD*, was sued for copyright violation. *Compl. Chase-Riboud v. Dreamworks* ¶ 9. Because the terms of settlement remain undisclosed, we cannot estimate what influence the lawsuit had on the film itself. See *Chase-Riboud v. Dreamworks*: “*The Amistad Case*,” COURT.TV.COM (1999), available at www.court.tv.com/trials/amistad. In order to receive an R rating rather than an NA-17, one scene in Stanley Kubrick's film, *EYES WIDE SHUT*, was altered digitally by blurring masculine sexual organs. As noted by Donald Hermann, “[i]ssues of film censorship, particularly the influence of the American film industry's Production Codes, on film content can provide a rich basis of inquiry.” Hermann, *supra* note 42, at 329.

¹⁶⁸ Michael S. Bogner, *The Problem with Handshakes: An Evaluation of Oral Agreements in the United States Film Industry*, 28 COLUM. J.L. & ARTS 359 (2005).

¹⁶⁹ It is difficult to imagine the film industry without copyright law and intellectual property law in general. See, e.g., Nick Gladden, *When California Dreamin' Becomes a Hollywood Nightmare: Copyright Infringement and the Motion Picture Screenplay—Toward an Improved Framework*, 10 J. INTELL. PROP. L. 359, 360 (2003); Douglas Y'Barbo, *Aesthetic Ambition Versus Commercial Appeal: Adapting Novels to Film and the Copyright Law*, 10 ST. THOMAS L. REV. 299 (1998); K.L. Greene, *Motion Picture Copyright Infringement and the Presumption of Irreparable Harm: Toward a Reevaluation of the Standard for Preliminary Injunctive Relief*, 31 RUTGERS L.J. 173 (1999).

¹⁷⁰ Lucille M. Ponte & Jennifer L. Gillan, *From Our Family To Yours: Rethinking The “Beneficial Family” And Marriage-Centric Corporate Benefit Programs*, 14 COLUM. J. GENDER & L. 1 (2005) (addressing corporate sponsorship of TV programs); BRUCE A. AUSTIN (ED.) *CURRENT RESEARCH IN FILM: AUDIENCES, ECONOMICS, AND LAW* (Vol 3) (1987).

¹⁷¹ While official censorship is jurisdiction specific, some themes are universal. In some states censorship is exercised by national state agencies, while in others it is carried out by local agencies or by the industry itself, through self-regulation. Nicholas Pronay, *The First Reality: Film Censorship in Liberal England*, in *FEATURE FILMS AS HISTORY* 113 (K.R.M. short eds., 1981). For the realities of film censorship in the United States, see *THIS FILM IS NOT YET RATED* (British Broadcasting Corporation (BBC) 2006). For a brief historical review of U.S. practices, see ASIMOW & MADER, *supra* note 4, at 22–24. For an attempt to exercise film censorship in the United States—overturned by the judiciary—see the case of the *LAST TEMPTATION OF CHRIST*. Associated Press, *Judge Overturns Ban on Film*, N. Y. TIMES, Sept. 11, 1988, at 34. It should be noted screenings of that film in Europe resulted in fierce clashes. For example, the theatre that showed the film in Paris was burnt. See Paul Webster, *French Police Find Web of Extremist Violence: Le Pen and Lefebvre Linked to Cinema Attacks*, THE GUARDIAN, Nov. 1, 1988.

Beyond an examination of the influence of positive law on the process of cinematic creation and its products, including the manner in which these products are woven into the general cultural fiber, law can serve as a point of origin for shedding light on blind spots in a film or a group of films. Equipped with a legal lens, we would be able to examine how a director in a given film perceives the law.¹⁷² Is the director justified in making the legal claims contained in the film or in her approach to the law in general? Is the story developed in the film reliable from a legal perspective? This could tell us something interesting about the film, and could, if corroborated, tell us something interesting about popular culture. Further, in law we are usually rather sensitive to the phenomenon of normativity: what makes a certain behavior a norm? Legal insights could be brought to bear in examining the cinema's take on these questions. How does the director perceive normativity in general and legal norms in particular? Or more broadly, what is the film's take on the relationship between social norms and legal norms? Is the film aware of the theories developed in law (and the sociology of law) regarding the relevant processes? Lastly, the law (legal theory, legal doctrine) allows us to inquire into the ethical dimension of a movie (or of several movies): have the ethical-moral understandings that have been consolidated over the course of years in the legal tradition with respect to a certain field of activity been seriously considered by the director?

For example, in the film *Death and the Maiden*, Milos Forman chose to deviate from Dorfman's excellent play and "solve" for us the factual question (is the doctor guilty of rape and abuse?) in an unambiguous manner, which reaches the spectators by means of a confession from nowhere. According to the director, such an ending "is more satisfactory",¹⁷³ but it could be argued that at least legally it is not persuasive.¹⁷⁴ To this we could add the obvious tension between the process that led to the confession and the requirements of due process that govern criminal proceedings since the demise of the Inquisition.¹⁷⁵ It seems that

¹⁷² In the United States, for example, the director often places the camera, on behalf of the audience, as they jury (as if we are all 12 Angry Men). See Carol J. Clover, *Movie Juries*, *supra* note 29.

¹⁷³ Others, it seems, may disagree, and yet others may wonder whether "satisfaction" is an adequate criterion for evaluating possible narratives. The play leaves the spectators with a strong sense that the doctor is guilty but a (reasonable?) doubt remains. A question therefore is presented: what would you do in this situation? Milos Forman decided to steer away from such an ending—an ending that is typical of real judicial events. Instead, Forman provided us all the facts and reminded us that the director is omnipotent, unlike ordinary fact finders. The advantages of such an ending have been discussed by Orit Kamir, *supra* note 17, and some were also mentioned here: we are able to evaluate our positions regarding the consequences of judging and the ethical meaning of following different types of procedures. The disadvantages are also clear, chiefly pulling the sting out of the real-life dilemma associated with fact finding.

¹⁷⁴ KAMIR, *supra* note 17, at 210–11.

¹⁷⁵ Perhaps the exact interpretive conclusion called for is that because criminal law is obligated to preserve procedural justice, it is not capable of reaching substantive justice on all occasions. Kamir suggests that we should update procedural rules by allowing identification by scent, assuming such identification meets the requirements of rationality (namely that the procedure is capable of repetition and corroboration). Yet, the ethical stance according to which even the most heinous criminal deserves the procedural safeguards set to ensure that the process does not offend his or her dignity entails that even if scent-based evidence is admitted, the above tension is not fully resolved. It could very well be that Forman's *Death and the Maiden* may be taken as a film about the ever-tainting consequences of

this perspective, an examination of the plot, including the rhetorical devices used from a legal perspective, was internalized by the industry, at least partially. It is now common that in television series (as well as in films) screen-writers and directors turn to professional legal consulting, so as to ensure that the cinematic narrative does not clash with framework narratives that organize the legal practice. From a law-and-society perspective this is a rather fascinating phenomenon, as it expands the role of lawyers in society. To the extent that modern society is indeed a republic of images, the various lawyers who work in the industry—on IP rights, distribution agreements and providing counsel on legal doctrine and the workings of the legal process—are perhaps not the priests of the old but neither are they lost. Behind the scenes they play a pivotal role, even if their on-screen image has fallen into disrepute.¹⁷⁶

As part of examining the cinema with a legal lens we can also say something about the ability of the cinema, in view of its constitutive elements, to deal satisfactorily with certain issues, compared (or contrasted) to the manner in which the legal practices deal with these issues. This discussion may teach us something about the limitations of the cinema in comparison with those of other practices, such as the law. As mentioned earlier, key to some genres in cinema is that drama must be present; otherwise the movie might simply be considered boring. Legal proceedings, in real life, would often shy away from drama (at least in certain areas of the law). Cinema would therefore be a rather limited medium to address aspects of social life not strife with drama, and hence very few movies are made on the various methods of designing a value-added-tax system (despite the obvious importance of the issue).¹⁷⁷ Looking solely at cinema to understand what matters to society, then, would be just as partial as looking solely at law.

Finally, as part of the family of arguments that focus on law and the cinema as reflecting culture, we should also note the possibility of referring to films as statistical data, in the same manner that the repository of adjudication and legislation can be viewed statistically. Such an exercise would examine, for instance, how many films were made on a certain issue and in how many films a certain issue was presented in a certain way, in comparison, for example, with the number of times that issue was adjudicated and the number of times the decision was made in a certain way. The conclusions from such a quantitative statistical analysis could

torture: once unleashed into society the dignity of all—victims, torturers, investigators, arbiters, judges—is compromised.

¹⁷⁶ Examples to this sentiment abound. See, e.g., David Margolick, *Film: The Cinematic Law Firm of Greedy, Vain & Immoral*, NY TIMES, July 4, 1993: "Something there is in the American psyche that is fascinated with lawyers, and, not surprisingly, that fascination has frequently found its way onto film. But if lawyers are a constant in American cinema, the character of those lawyers is not. The heroic type immortalized a generation ago by Gregory Peck as Atticus Finch in "To Kill a Mockingbird" has fallen victim to everything from the anti-authoritarianism of the Vietnam era to the lawyer-infested world of Watergate to America's diminished standing in the world economy (for which Dan Quayle blamed the bar) to the growing ubiquitousness, and vulnerability, of lawyers themselves." See also Tim Appelo, *Atticus Doesn't Live Here Anymore*, 12 CALIFORNIA LAWYER 174 (1992).

¹⁷⁷ But see Erik M. Jensen, *The Heroic Nature Of Tax Lawyers*, 140 U. PA. L. REV. 367 (1991) (discussing John Grisham's *The Firm*).

indicate parallel patterns within legal and cinematic practices, or could indicate whether the law has any effect on the perception of the movie industry of the legal workings. Other statistical examinations could be mentioned, among them the extent of exposure to the cinema vis-à-vis the extent of exposure to case law and legislation, as well as data that indicates whether mounting a legal challenge is more effective than mounting the same campaign via the cinematic media. It is too early at this stage to refer to the possible validity of such statistical-quantitative analysis, mainly because so far no adequate discussion of the field has been conducted.

C. LAW, CINEMA AND NORMATIVE CRITIQUE

The Third Cluster of conversations we can identify in the field of law and cinema is explicitly normative. It is concerned with reforming the law, or reforming cinematic attitudes, or perhaps reforming both (provided an Archimedean point upon which to establish such critique is established).¹⁷⁸ Here the main theme is one of moral or ethical critic. The question is “is it just”? or “does it achieve the purpose it is set to achieve?” or “can we think of a better way to approach the matter”? Whereas the second cluster is concerned with understanding the “is”—which of course includes a reformative dimension, for the “is” isn’t obvious, and once our perception changes the “is” gains new meanings—this cluster directly deals with the “ought” by calling for change in the way we do things (including the way the law is written on the books or is applied, or the way a certain movie depicts certain characters or the movie industry as a whole treats a certain issue). The political hue of the discussion is usually pro-human rights among law-and-society and law-and-humanities aficionados alike. The idea is to counteract the “cold” economic analysis of law and focus on the human in the social, on solidarity and equality.¹⁷⁹

Cinema may serve as a platform from which to criticize the law to the extent that the moral judgment embedded in a film is more convincing, or that the film assists in exposing the internal inconsistencies in the legal treatment of a matter. In other words, the film is used a rhetorical device, not necessarily as a claim about occurrences in the world. It could very well be that the cinematic expression merely represents the director’s position, her artistic preference or the commercial interests of the studio.¹⁸⁰

¹⁷⁸ David M Seymour, *Film and Law: In Search of a Critical Method*, in *LAW’S MOVING IMAGE*, *supra* note 14, at 107.

¹⁷⁹ As put by Balkin and Levinson in the context of law and literature: “Contemporary legal scholars like James Boyd White and Patricia Williams use the humanities not to uphold the values of the legal establishment, but rather to criticize those values in the name of more egalitarian sensibilities which they (correctly or incorrectly) link to a humanist approach. Contemporary law and literature scholars now offer the humanities as an antidote to, or an escape from, a legal world which, they believe, has become all too technocratic and divorced from any human values save economic efficiency.” Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 *YALE J.L. & HUMAN* 155 (2006).

¹⁸⁰ Commercial reality directs filmmakers towards dramatic stories, and stimulates them to enlarge the dramatic construction of the story they choose. It should be remembered that basically the film industry is working for profit. Therefore, filmmakers often use their creative freedom as they wish, to present the attorney’s work or how law operates in general. In this context, Allen K. Rostron mentions, “Truly realistic portrayals of lawyers’ work would hardly make for entertaining or interesting movies. Few, for

Lacking independent, reliable empirical data, any reliance on films would be merely speculative; but films can breathe life into data already known, or encourage the gathering of such empirical data, as part of a critical discussion of the prevalent law.¹⁸¹ More importantly, such analysis could prompt us to consider how consciousness is manipulated and whether such manipulation is ethical or beneficial.

The result of such a discussion can be a call to a certain legal reform, including a call to a reform in legal training or education. If reading books could expand our relevant skills and attitudes,¹⁸² so can cinematic artifacts. Similarly, the result can be a call for the reform of certain cinematic practices, such as the abuse of performers' rights or the use of coercive pressures by the studios.¹⁸³ As mentioned above, such a call can also be directed at the expressive "message" or "judgment" contained in a movie (or in a cluster of movie), to the extent that such a message reinforces stereotypes, misunderstands the social conditions within which the fictional characters interact or is otherwise unethical.

Beyond direct critique, the normative discussion may also lead to a better or more complete understanding of the limits of the law or its ability, in view of the basic assumptions on which it is established, to deal in an ethically satisfactory manner with social problems of one type or another.¹⁸⁴ A better acquaintance with the limitations of the law could illuminate the possible tension between the rhetoric that is sometimes used by the law and its agents, as if the law is omnipotent, and the cultural reality, at least as it is perceived from the director's perspective, according to which law is far

instance, would line up to see a film titled 'Adventures in Document Production or the Man Who Did Due Diligence.'" *Lawyers, Law & the Movies: The Hitchcock Cases*, 86 CALIF. L. REV. 211, 214 (1998).

¹⁸¹ As Rostron mentions, both legal and cinematic scholarship are a fertile ground for critical theories:

Alongside their corrosive, demystifying core, critical legal and film studies share a common progressive element. In film studies, Marxist, feminist, and other critics have searched for repressed meanings that disrupt Hollywood movies' reactionary themes. In law, the Legal Realism and Critical Legal Studies movements have included a 'utopian enterprise in which Realist writers have attempted to reimagine law, to adumbrate a vision of what legal institutions might look like in a just society.'

Id. at 232 (1998).

¹⁸² *Cf.* NUSSBAUM, *supra* note 121.

¹⁸³ Thus far the literature reveals little joint conversations between advocates for performers' rights and law-and-cinema scholars, but attention is paid to questions relating to IP rights by law-and-cinema scholars, and representation of IP related matters on screen certainly provide an opportunity worth examining in closer detail for possible normative conclusions. The recent writers' strike is equally fascinating from a law-and-cinema perspective, as we can only hope for law-and-society inquiry into its underlying dynamics and law-and-humanities look into its representation.

¹⁸⁴ The limits of law are apparent in many movies. *TO KILL A MOCKINGBIRD* (Brentwood Productions 1962) is perhaps the most famous example. A less obvious example is *DEATH AND THE MAIDEN*, *supra* note 154. The lawyer in that movie cannot surrender his "neutral" position, especially when faced with the rape of his wife. Indeed, Mel Gibson fans would probably want to see the lawyer take the law into his own hands. Others would want to see a lawyer who prefers loyalty to his wife over loyalty to the rules of evidence. In the film, however, the director shows the price of adhering to professional norms in private life by refusing to determine guilt until any reasonable doubt has been removed. By adopting this approach the lawyer loses the little respect his wife (the victim of the crime) felt for him. Yet, as a human rights activist, the lawyer cannot forgo his commitment to the rights of the accused. His approach is presented as a weakness, yet, perhaps it is because the law is so powerful, that limits are incorporated to its rules and also internalized by legal practitioners.

from a magic wand. Recognition of this tension (between promise and deliverance, or between the “ought” and the “is”) could lead students of the law to a different reading of legal sources, and could also inform the performance of legal actors by altering their legal writing. At least, such recognition could lead to an adjustment of expectations of professionals and laypersons from the law.¹⁸⁵ This is not to say that we should make any allowances for the law; we should not give up the expectation that the law should pursue justice. But neither should it be regarded as the one and only, exclusive cluster of practices through which this purpose can be attained, or even the most effective one.¹⁸⁶

Similarly, such conversation may inquire into the ethical responsibility of the movie industry regarding the images it projects and the type of considerations that influence the production of such images. Surely, we would not wish to exercise censorship over the industry nor would we seek to impose stifling norms of political correctness. But such aversion from “disciplining” art and the artistic process does not mean that the industry is immune from normative critique. Is the creative process indeed “free”, or are there mechanisms in place – economic or otherwise—that already exercise forms of silencing or that already channel the creative processes towards certain avenues (and away from others)? Assuming that indeed art occupies a unique social space, which “irritates” the logic of neighboring systems, what ethical norms should govern this space? And equally importantly: is this space—where popular culture resides—so powerful? Or, as might be the case with the law, we might be over-estimating the force of culture?

IV. BEYOND TAXONOMY: THE PRODUCTION OF LAW, CINEMA AND THE LAW-AND-CINEMA DISCOURSE

Stepping out of the role of the observer and putting down the taxonomer’s kit, this section assumes the position of an active participant by calling for action. This article’s substantive contribution to the discourse lies in noting that some key components of law and cinema have thus far not received sufficient attention in the scholarship (and legal education, for that matter), but their influence should not be overlooked. In a nutshell, we have overlooked production. For a film to exist it has to be financed, all the technical-organizational details have to be at a certain place at a certain time for the event to happen, people have to be ready and know their role, etc. Law (both litigation and legislation) is at least to a certain extent also produced. The law suit has to be financed, and there is certain logic to the market of financing law suits.¹⁸⁷ Furthermore, strategies have to be

¹⁸⁵ See the recent debate regarding the ability of the constitutional doctrine to curb “too much” political influence on the process of districting. *Vielth v. Jbelire*, 541 U.S. 267 (2004). Justice Scalia states that “. . . it is the function of the courts to provide relief, not hope.” *Id.* at 304.

¹⁸⁶ Hila Keren & Kathy Abrams, *Law in the Cultivation of Hope*, *supra* note 130; Howard J. Vogel, *The Terrible Bind of the Lawyer in the Modern World: The Problem of Hope, the Question of Identity, and the Recovery of Meaning in the Practice of Law*, 32 SETON HALL L. REV. 152 (2001).

¹⁸⁷ See, e.g., Douglas R. Richmond, *Other People’s Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649 (2005); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of*

coordinated among the different parties whose interests are aligned (or at least aligned to a degree). It would be naïve—or, put mildly, typically scholastic—to assume that legal arguments simply appear before a court of law. It will be equally partial to imagine that witnesses simply appear before a jury or a tribunal, without having been prepped and without the logistics of the appearance at the right time and in the right place (dressed properly, having had a glass of water, etc.) have been attended to. And physical evidence, well, needs to be produced as well. Similarly, for an advocacy group to promote a legislative amendment—be it primary legislation, regulations or bylaws—it cannot ignore the element of production. Things usually do not happen on their own; legal things are no exception. The cinematic world has long recognized the importance of production, components of which are ingredients of the *mis-en-scene*, but little novel sociological examination of its actual working has penetrated the law-and-society camp. Nor have law-and-humanity scholars focused on the meaning of production by examining its representation in the performing arts or by delving into its conceptual importance.

Or put in the terminology this article offers: a conversation about production would engage all three families of conversations: it contains a structural component, because production is an ingredient of all social practices qua practices. It contains a cultural dimension that calls for examining what production is or how it is carried out in context. And it certainly invites normative and critical analysis. Moving from the object of the conversation to the tools or methods, examining the element of production invites the recourse to empirical sociological tools that examine the social phenomenon, but it also calls for engaging the humanistic apparatus, for examining production for its ethical, aesthetical and rhetorical dimensions, as well as for examining the representation of production. And as for the interdisciplinarity axis, the study of production and its terminology can place law alongside (or parallel to) literature, can look for cinematic production in law or legal production in the cinema—actual production and/or the representation of production—or it can examine law as cinema or cinema as law (provided the methodological warnings detailed in the first section are addressed). In short, the conversation about production would fit the three-dimension conceptual device proposed by this paper by involving each of the three axes.

Realizing the element of production both in law and cinema opens up a window to a wealth of know-how, available in both practices at various degrees, but equally importantly, such realization highlights the need for further research into the theory (or methodology) of production as well as into its practice. This study can illuminate heretofore under-theorized aspects of the making and unmaking of laws, as well as aspects of implementation of legal norms.

The term “production” of course requires clarification. We can talk about production with a small p, namely the work of the executive producer in charge of coordination, organization and administration, as well as the input of the producer in terms of finance. And then we can talk about Production with a capital p, which includes all other elements of the *mis-en-scene*, such as the staging, the use of the camera, the sound and the special effects, as well the acting and directing. If the world of cinema can teach us something about small production, it can certainly teach us something about directing, scriptwriting,¹⁸⁸ and staging.¹⁸⁹ It seems that it is difficult to ignore the directing and staging component required in most legal events—both in the proceedings of litigation as well as in the annals of legislation (to say nothing of procedures for creating other types of norms constitutive of national identity, such as the signing of multinational treaties, peace agreements, and the like). Again, the claim here is that not only will the know-how developed in cinema prove useful for lawyers, but also, if not primarily, that the different theories developed in the cinematic context about the role and methods of directing, scriptwriting, and staging might tell us something of value about the phenomena of law and legal practice. Understanding appearance is important.¹⁹⁰

Take, for example, two very basic devices applied by directors in instructing their camera-people: the zoom-in and the zoom-out. Zoom-in allows us to connect to the character and identify with him or her, to feel his or her emotions and, depending on the angle, lighting, makeup, and the like, to form a certain attitude towards the character. This technique is often used in law (even though it is generally not done with the aid of a camera, but via other rhetorical devices). Lawyers arguing a case and judges writing their decisions often choose to focus closely on a party (or a witness, or another player); such legal close-ups can generate a certain emotional attitude (attachment or disgust) towards the object of the examination. This applies, *mutatis mutandi*, to a close-up on a certain event. Of equal importance is the analysis of the zoom-out, a technique that enables an examination of a comprehensive totality in a somewhat detached manner. But not only are the techniques of photography relevant. Investigation of the legal “set” would probably lead also to important insights with respect to the modes of operation of law in society, as well as the theory of

¹⁸⁸ Intuitively, it seems as if the scriptwriting doctrine is relevant not only for writing political speeches, but also for writing deposition drafts and preparing witnesses for cross examination regarding those depositions. Different lawyers prepare a script for different situations in which the other side is going to act one way or another, and prepare an alternative script so the different actors can know their parts and understand where they come from and where they are headed.

¹⁸⁹ Staging raises serious ethical issues. In everyday parlance a staged trial, or mock trial, is antithetical to professional ethics, since such an event is only a trial in name (or appearance), not in essence; the outcome is pre-determined on grounds that are inconsistent with due process or other substantive norms. Yet, staging may have less invidious meaning. A “mock trial”—now often referred to as a “moot trial”—is a staged trial held as part of a law course in which students act as advocates in a fictional case before a fictional panel. In appearing before a real court, some staging and directing is unavoidable. If arguments and testimony have to be brought forward, there is often more than one way to present it, and therefore staging and directing insights are relevant, not to subvert the factual truth or the normative claim, but rather to present it in its clearest possible light.

¹⁹⁰ See generally, Richard K. Sherwin, *The Jurisprudence of Appearances*, 43 N.Y.L. SCH. L.REV. 821 (1999).

costume-design, lighting, sound, and special effects. All these are worthy of attention if we are serious in our desire to understand how the legal process operates. Much has been made in this article about the aesthetics of courtrooms. A visitor to the newly designed marble-clad courtrooms in some parts of the world, or the other courtrooms that resemble corporate boardrooms, undoubtedly understands that the effect produced by the architectural props cannot be ignored, just as any analysis of legal proceedings should be aware of possible uses of various dramatic devices, from the erection of a screen between the accused and the plaintiff to the use of video and computerized presentations.¹⁹¹

Since this section already reads as promoting the inclusion of cinema 101 to the law school curriculum, we might as well acknowledge again the centrality of acting and performance in the world of the law. Members of Parliament who deliberate before the public, lawyers, judges, witnesses, and other functionaries of the legal process can also be assessed by means of insights drawn from various theories of acting. If there is anything substantial in the research of the art of rhetoric, there is also something substantial in studying the art of performance. The connection between the manner in which people are required to act and the role they are required to fulfill could potentially be a fruitful field of research, if only to assist us in learning where the manipulation lies.

Furthermore, an integral element of production is marketing. The media—the creation of the relevant spin or buzz—is an inherent component of the public face of law (and cinema). Many lawyers claim that we would do well if we properly studied the relation between the law and the media (if only to neutralize it). In this area as well we could draw insights from the world of the cinema and its relation to the electronic and printed media. If there is substance at all in these claims—and this article only raises this as a possibility that still needs to be proven—then it could be said that the discourse on law and cinema is not only unique, but also beneficial.¹⁹²

Finally, a sharp zoom-out would put into focus the law-and-cinema discourse itself; it also has to be produced. Fora for discourse have to be established (conferences, journals interested in the matter, perhaps a book series); a professional association has to be founded; funding available for serious research needs to be secured. Strategic questions regarding its future production are wide and deep, and include the incorporation of film theorists and practitioners as active participants in the conversations, broadening the conversation beyond the English-speaking common law world (and thus beyond Hollywood or, for that matter, Sundance), and taking a serious look into expanding the media through which the discourse takes place to include cinematic tools as well.

¹⁹¹ Richmond, *supra* note 187, at 654.

¹⁹² This, it seems, would be the right place to note once again the qualifications belabored at the beginning of this essay: law is not about entertainment, and the cinema is not law. Immense differences separate these practices. Yet these differences ought not preclude us from studying the similarities or developing analogies, even if we do not care at all about theory, only about being effective lawyers (or movie directors).

V. INTERIM CONCLUSION

Analyzing the law and cinema discourse could, in fact, be classified as a family within the discourse; it is a discourse on discourse. This family is naturally limited, all the more so, when the discourse that it studies is yet to become canonized.¹⁹³ Although the law and cinema discourse has been around since the 80's, in many respects it is still in its infancy. This article sought to highlight some methodological difficulties associated with the discourse, and then offered a possible taxonomy of the conversations which currently inhabit the field. It is too early to say whether the law and cinema discourse will overcome the many obstacles in its path and will succeed in creating modes of analysis that are capable of withstanding conceptual, empirical, and ethical critique. Ornamenting our jurisprudential analysis with a reference to a particular film or attaching an analysis of a film to a legal or moral statement¹⁹⁴ may ultimately be but a transient fashion. Yet, the conclusion that the discourse of law and cinema is doomed to be just a fad is equally hasty. *Prima facie*, there are theoretical axes which connect some of the structural and normative aspects of the law and the cinema in the fields of culture, art and language; these axes could prove solid enough to sustain serious analysis.¹⁹⁵

Furthermore, this article has put forward the claim that law entails elements of production, thus far left under-theorized and scantily documented. It would be worthwhile, it was further argued, to pay close attention to this dimension. The law and cinema discourse offers a promising launching pad for such an endeavor.

Only time (and films, essays, case law, and other cultural elements) will tell whether the insights drawn from an examination of law and cinema shall turn out to be fruitful.¹⁹⁶ Even if the answer to this question turns out to be negative, it seems that those who engage in the discourse enjoy it. It is beyond the ambit of this article to fully develop the argument, but perhaps the ability of the law, just like the ability of the cinema, to generate consciousness (identity, memory) and even symbolic capital (social esteem) is not disconnected from the attitude of those who participate in the discourse. Put differently, maybe we should give greater credence to the pleasure principle.¹⁹⁷ In any event, it may very well be that as long as this

¹⁹³ For the importance of canonization, see Austin Sarat (ed), *THE BLACKWELL COMPANION TO LAW AND SOCIETY* (2004), especially Chapter 1.

¹⁹⁴ Specifically, the influence of cinema (and other creations of art) on politics, is interesting. Ronald Reagan used to interweave lines from films in his political speeches. Recently, the influence of the show business on politics was analyzed in Frank Rich's book, *THE GREATEST STORY EVER SOLD: THE DECLINE AND FALL OF TRUTH* (2006).

¹⁹⁵ See Richard K. Sherwin, *Nomos and Cinema*, 48 *UCLA L. REV.* 1519, 1521–22 (2001).

¹⁹⁶ For possible future developments in the law and cinema field, see GREENFIELD, OSBORN ET AL., *supra* note 42, at 189–203.

¹⁹⁷ Colin MacCabe, *Theory and Film: Principles of Realism and Pleasure*, in *NARRATIVE, APPARATUS, IDEOLOGY* 179 (Philip Rosen ed., 1986); Jean-Louis Baudry, *The Apparatus: Metapsychological Approaches to the Impression of Reality in Cinema*, in *NARRATIVE, APPARATUS, IDEOLOGY* 206, 219–220 (Philip Rosen ed., 1986); Miriam Hansen, *Pleasure, Ambivalence, Identification*, in *NARRATIVE, APPARATUS, IDEOLOGY* 634 (Philip Rosen ed., 1986); Laura Mulvey, *Visual Pleasure and Narrative Cinema*, in *NARRATIVE, APPARATUS, IDEOLOGY* 837 (Philip Rosen ed., 1986).

attitude remains—as long as people share their appreciation of law and of cinema—the interdisciplinary discourse of law and cinema is here to stay.

