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## PROJECTING CIVIL LITIGATION THROUGH THE LENS OF FILM THEORY

MELISSA COLE\*

### I. INTRODUCTION

At the end of the movie *Shadow of the Vampire*,<sup>1</sup> John Malkovich's power-hungry director goes into a frenzy of filmmaking ecstasy when the eccentric star of his film *Nosferatu* decides that he has waited long enough for the promised opportunity to drink his co-star's blood and kills the actors and crewmembers who try to stop him. When his cameraman moves to help the victims, Malkovich admonishes him to continue filming the gruesome sequence of events. "If it isn't in the frame," Malkovich rants, "it doesn't exist."<sup>2</sup>

As soon as I heard those lines, it occurred to me that the film was about Civil Procedure. What is procedure, after all, but the method by which information makes it into the frame of the trial? And what is the jury but the audience for the story?<sup>3</sup>

Certainly, the parallels between a film audience and a trial jury have been recognized before.<sup>4</sup> That observation, however, seems to be only the first step in a more searching analysis. If juries put together the evidence to form a legal narrative in the same manner that movie audiences put together the bits of visual information presented to them to form a filmic narrative, then lawyers play the role of the filmmaker. They choose what information is presented to their audience, how it is presented, and what conclusion the decision-maker is meant to draw from it.

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\* Assistant Professor of Law, Saint Louis University School of Law. My thanks to Arthur Knight for introducing me to film theory and for making space for my legal background in my study of it. Special thanks to the staff of the *Saint Louis University Law Journal* for giving me the opportunity to combine my interests in film theory and civil procedure, and, of course, to my research assistant, Jennifer Heintz, who filled in the spaces between my frames.

1. *SHADOW OF THE VAMPIRE* (Universal Studios 2000).

2. *Id.*

3. See MICHAEL E. TIGAR, *EXAMINING WITNESSES* 5 (1993) ("People, including judges and jurors, understand and restate events in terms of stories.").

4. See, e.g., Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 *STAN. L. REV.* 39, 40 (1994).

By extension, if lawyers are really filmmakers, then a course in Civil Procedure teaches them the mechanics of filmmaking. No director can survive without some knowledge of camera operation, lighting, editing, and acting. Likewise, the only way a civil litigator can hope to present her story in court is through a solid understanding of the tools available to help her tell her story. And just as most moviegoers remain oblivious to all the painstaking tasks that go into making a film, so it is equally tempting to think that a trial is all there is to civil litigation. However, a good film student knows how crucial the unseen elements—the lighting, the location, and the script re-writes—are to a successful film. One would hope that law students, presumably interested in legal narratives, would find strategic considerations like choice of jurisdiction, pleading, and discovery equally important.

Admittedly, few law students find a course in Civil Procedure as stimulating as a good film. Applying film theory to the course concepts might help to alleviate this understandable lack of interest in the “how-to’s” of a practice most Civil Procedure students will not see for three years. More importantly, film theory brings a critical perspective to our civil litigation system and exposes the issues of power and powerlessness we are more accustomed to confronting in substantive courses.<sup>5</sup> Failing to appreciate the power dynamics of procedure consigns even the most conscientious student, practitioner, or professor to replicate and perpetuate them.

In this essay, I survey the four basic units of a Civil Procedure course: jurisdiction, pleadings, discovery, and resolution. For each, I introduce an applicable tenet of film theory and apply it to a case or rule covered in most Civil Procedure courses. My goal is not merely to investigate how civil litigation frames real-life events and the consequences of that system, but also, hopefully, to convince others that these issues merit time in the classroom. While we may not have an obligation to entertain students in the way successful movies entertain their audiences, our job is certainly to educate them, not only on the mechanics of legal practices, but also on the power they employ as attorneys and on the responsibilities that accrue to such power.

## II. PERSONAL JURISDICTION, OR WHY THE AUDIENCE MATTERS

In the film *Fury*,<sup>6</sup> Spencer Tracy enjoys the unique experience of watching the trial of the mob accused of killing him. A happy-go-lucky regular Joe (his name in the film) when the story begins, he becomes an embittered phantom after barely escaping a lynch mob in the small town where he had been jailed

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5. Examining the specific substantive disputes between parties makes it easier to focus, for example, on which party had greater bargaining power because of her class, race, and/or sex, or how tort law favors parties with the financial means to account for their negligent actions in their yearly budgets.

6. *FURY* (Metro-Goldwyn-Mayer 1936).

because he fit the description of another stranger who had molested several children. Listening to the trial intently on the radio, Joe is horrified to discover that the witnesses—members of the same small community as the accused—do their best to protect their friends and that the jury seems disinclined to convict. In the end, Joe, the outsider, must appear in court to tell the truth, in the process, of course, absolving the defendants of murder charges.

Joe's downfall lies in the fact that he is an outsider in a small town, where the townspeople are bound to stick together. Although the audience can clearly see that Joe is the furthest thing from a child molester, the people of the jurisdiction in which he was arrested and lynched are not privy to the first half hour of the film, in which the audience learns what a good guy Joe is. The jurisdiction is far from Joe's home. It is a small town, committed to its own, with a less-than-sophisticated criminal and court system. In a big city, Joe would likely not have been jailed or lynched; in a different jurisdiction, the outcome of his attempted-killers' trial might have come to a different conclusion.

Jurisdiction, in other words, matters. Lawyers know this; anyone who practices regularly in federal courts is likely to have written her fair share of jurisdictional motions. First-year law students, however, quite understandably, have trouble appreciating its importance. Without exposure to the variety of state laws, the differences in court systems, and the hard realities of long-distance litigation, jurisdiction reduces for law students to a not-very-interesting intellectual exercise in which the Supreme Court seems to take an inordinate and unjustified interest.

Yet all of us can recall some film that we disliked because of our viewing experience—the bad date we saw it with, the movie theater whose air conditioner collapsed in the middle of the film, the epic that we rented and watched on video while paying the bills. Similarly, movie studios spend countless dollars determining which demographic group is most likely to see the movie and marketing it directly to them. Audiences determine whether a film breaks the bank or breaks the back of the distributor.

So, too, the jurisdiction in which a case is heard is probably the single greatest determinant of which party will succeed. As Janet Staiger has observed, “without an audience, some would argue, no text or maker of [the] text exists.”<sup>7</sup> By the same token, without a jurisdiction with authority to hear a case, the legal narrative—the means by which a dispute between two people acquires legal meaning and the power of redress—ceases to exist as well.

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7. JANET STAIGER, *INTERPRETING FILMS: STUDIES IN THE HISTORICAL RECEPTION OF AMERICAN CINEMA* 3 (1992).

A. *The Film Theory: Reception Studies*

Reception studies “defin[es] the reader as the source of meaning [in a film].”<sup>8</sup> In other words, it posits that a particular film is not inscribed with a particular meaning, but rather that it acquires meaning through the audience members who interpret it. Reception studies’ objective lies “not [in] attempt[ing] to construct a generalized, systematic explanation of how individuals might have comprehended texts, and possibly someday will, but rather how they actually have understood them.”<sup>9</sup> Film theorists recognize it as a political tool for examining how different groups of people, particularly traditionally ignored or subordinated people, construct meanings from a text that might be very different from the meaning the filmmakers hoped to inscribe.<sup>10</sup>

Reception studies provides a useful framework for helping first-year law students understand the importance of jurisdiction because most of them can see how the perspective of different viewers influences how those individuals receive a film.<sup>11</sup> In the same way that a film theorist might ask, “[w]hat is the spectator’s relation to the cinematic text?,”<sup>12</sup> law students can ask about the relationship between the case itself and the audience that hears it—the jury, the judge, and the lawyers arguing the case. Their personal circumstances and biases can plainly color their perception of justice in the same way the students’ own perceptions differ from each other.

Perhaps, more importantly, reception studies also helps to highlight how the jurisdictional law that applies to a case can radically change the story that eventually makes its way into the courtroom. Just as a film spectator “is constituted within a social formation,”<sup>13</sup> so the “society” of a particular jurisdictional law influences how the case’s spectators will perceive it. Staiger explains that the meaning viewers inscribe onto a film “may reside in whether or not spectators use referential codes to presume correspondence between the moving images and the real world.”<sup>14</sup> In other words, how viewers make sense of the story—whether they find it believable—depends largely on their own frame of reference. The law of the jurisdiction provides the frame of reference in which the lawyers and decision-makers make sense of the events giving rise to the lawsuit.

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8. Marc Silberman, *Robert C. Holub’s Reception Theory: A Critical Introduction*, 33 NEW GERMAN CRITIQUE 249, 250 (1984) (book review).

9. STAIGER, *supra* note 7, at 8.

10. *Id.* at 96.

11. *See id.* (“[I]nterpreting a film requires perceiving from some perspective . . .”).

12. *Id.* at 95.

13. *Id.* at 96.

14. STAIGER, *supra* note 7, at 96.

Robert Darnton illustrated this process in the filmic context in his review of *Danton*, a Polish movie about the French Revolution.<sup>15</sup> Darnton explained that the film served an allegorical function for Polish audiences. Because Polish audiences had a tradition of “liv[ing] with veiled meanings and ambiguous protests,” they saw the film not so much as about the French Revolution, but as an allegory about Stalin and his thought-control tactics.<sup>16</sup> In this context, Robespierre was the personification of an evil that transcended his role in the film. French audiences, on the other hand, saw Robespierre, while a despicable historical figure in reality, as the character in the film who set the Revolution in motion, and, therefore, as representing republican values of which the French were proud.<sup>17</sup> If the filmic Robespierre were on trial for his acts, his attorneys would, no doubt, argue strenuously that jurisdiction should lie in France rather than Poland.

Once jurisdiction becomes about how different audiences can change the meaning of the lawsuit, the doors are open to consider the attendant inherent social biases in the law. Recognizing the range of possible interpretations of events arouses curiosity about the sorts of sociological factors that might influence such interpretations.<sup>18</sup> Staiger explains that differences in the received meanings of films “are not idiosyncratic but due to social, political, and economic conditions, as well as to constituted identities such as gender, sexual preference, race, ethnicity, class, and nationality.”<sup>19</sup> A discussion of why the parties preferred one jurisdiction over another would be incomplete without considerations of who the decision-makers are likely to be.

So, too, anyone teaching Civil Procedure would do well to recognize that the students themselves are audience members—not just of the course, but of the case being discussed. At a fundamental level, they should be encouraged to be an audience to the legal story that takes over from the events underlying the case. As audience members, students also bring their own backgrounds and perceptions to the discussion. To dismiss one student’s perception of what the case means as off the mark may say more about the professor who can not see beyond her own frame of reference than about the student’s understanding of effective procedural lawyering.

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15. Robert Darnton, *Danton and Double-Entendre*, N.Y. REV. BOOKS, Feb. 16, 1984, at 19.

16. *Id.* at 20.

17. *See id.*

18. *See* STAIGER, *supra* note 7, at 80-81 (describing her goals as “requir[ing], minimally, tracing as far as possible dominant and marginalized historical interpretive strategies as mediated by language and context”).

19. *Id.* at xi.

B. *Civil Procedure: Considering the Audience*

In Civil Procedure, of course, practice is more important than theory. Applying reception theory to *World-Wide Volkswagen Corp. v. Woodson*<sup>20</sup> illustrates how it can influence students' own reception to personal jurisdiction and open discussion to the important role of procedure in seeking social justice.

Any Civil Procedure professor is all too familiar with the facts of *World-Wide Volkswagen*. In 1977, Kay Eloise Robinson and her two children were seriously injured when the car she was driving was struck from behind and the gasoline tank ruptured, causing a fire in the passenger compartment.<sup>21</sup> The Robinsons brought suit in Oklahoma state court against the manufacturer of the car, the U.S. importer, the distributor, and the retail dealer.<sup>22</sup> The distributor and the dealer, both located in New York, challenged the jurisdiction of the Oklahoma court, arguing that neither one "[did] any business in Oklahoma, ship[ped] or [sold] any products to or in that State, ha[d] an agent to receive process there, or purchase[d] advertisements in any media calculated to reach Oklahoma."<sup>23</sup>

The *World-Wide Volkswagen* majority opined that, while it might be foreseeable that a car purchased in New York would be involved in an accident in Oklahoma, "the foreseeability that is critical to due process is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."<sup>24</sup> Due to the lack of evidence "that any automobiles distributed by World-Wide [were] sold to retail customers outside [the] tristate area," the majority found the Oklahoma court's exercise of jurisdiction over the defendants unconstitutional.<sup>25</sup>

The first and most obvious application of reception theory would prompt considerations of why the Robinsons fought so vigorously to have their case heard in Oklahoma in the first place. Beyond issues about the convenience of the parties, students surely would have views on how decision-makers might differ in New York and Oklahoma. Such discussions in the first months of law school seem particularly important in a course designed to introduce concepts of federalism.<sup>26</sup>

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20. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

21. *See World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351, 353 (Okla. 1978), *rev'd*, 444 U.S. 286 (1980).

22. *Id.*

23. *World-Wide Volkswagen Corp.*, 444 U.S. at 289.

24. *Id.* at 297.

25. *Id.* at 298.

26. This observation holds true even as the Internet jurisdiction cases shake the very foundations of that concept. *See, e.g., Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 908-09 (D. Or. 1999).

Not only would an Oklahoma audience for the case probably differ from a New York audience,<sup>27</sup> but the context in which the case must be interpreted is fundamental to the Supreme Court's articulation of personal jurisdiction as a concern of constitutional due process. Reading the Oklahoma Supreme Court's decision<sup>28</sup> introduces students to the difference between the prerequisite of ensuring that the state long-arm statute applies<sup>29</sup> and the subsequent question whether this application violates the due process rights of the defendant.<sup>30</sup> In essence, the U.S. Supreme Court is the audience for the Oklahoma court's construction of the Oklahoma long-arm statute. The U.S. Supreme Court constructs the rules by which federal courts interpret the application of such state statutes.

With the help of reception studies, jurisdiction might lose some of its thankless status as the one thing everyone remembers hating in their first year of law school and no one remembers understanding. Students may gain some perspective on jurisdiction by conceptualizing the cases they read as nothing more than stories told in an unfamiliar setting and the members of the legal community involved in the telling simply as the audience. So, too, they gain the added benefit of tackling that most difficult of first-year difficulties—believing that there is no “right” answer and that all of them have valuable interpretations to bring to the table, as long as they observe the necessary conditions for constructing legal meaning.

### III. PLEADINGS AND NARRATIVE FRAMES

In *Rear Window*,<sup>31</sup> the literal limits of the frames that make up a film create some of the best of Alfred Hitchcock's signature suspense films. Confined to a wheelchair with a broken leg, Jimmy Stewart's photojournalist “Jeff” Jeffries amuses himself by watching the dramas that unfold in the windows of the apartments he sees from his own. Viewing small pieces of his neighbors' lives as they walk in and out of the frame of their windows, Jeffries constructs stories about each of them—Miss Lonelyhearts waiting for the date who never arrives; Miss Torso dancing erotically for unknown men; and, of course, the sudden disappearance of Mrs. Thorwald and Jeffries' conclusion that she was murdered by her husband.

When Jeffries suggests his murder theory to a detective, the detective protests, “That's a secret, private world you're looking into out there. People

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27. Disagreement with this principle would, of course, probably lead to fruitful and engaging classroom discussion.

28. *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351 (Okla. 1978). The casebook I use, BARBARA ALLEN BABCOCK & TONI M. MASSARO, *CIVIL PROCEDURE: CASES AND PROBLEMS* (2d ed. 2001), helpfully includes the opinion.

29. See *World-Wide Volkswagen*, 585 P.2d at 353.

30. See *World-Wide Volkswagen*, 444 U.S. at 291.

31. *REAR WINDOW* (Paramount Studios 1954).



do a lot of things in private that they couldn't possibly explain in public."<sup>32</sup> The wisdom of this remark applies equally to the pleadings in a civil lawsuit. Certain facts, perhaps taken out of context, can create a very different story from the full picture. No doubt the views from the front windows of the apartments Jeffries watches would yield different scenes and, thus, different stories about the apartments' inhabitants. It is all a matter of which window the spectator looks into, of how the story is framed for her.

So, too, pleadings can be understood as the frames that must contain the messy, real-life events that give rise to a legal dispute; a means of choosing certain facts to construct a story. The law contributes to this structure by making available certain causes of action requiring the satisfaction of certain elements. The real strategy, then, lies with the parties as they struggle to gain the dominant voice in constructing the legal framework that will guide discovery and the story that they ultimately present to the decision-maker.

#### A. *The Film Theory: Feminist Film Theory*

In 1975, Laura Mulvey's influential essay, *Visual Pleasure and Narrative Cinema*,<sup>33</sup> radically altered—and, arguably, created—feminist film theory. In the piece, Mulvey posits the woman in filmic narrative as the object of the cinematic gaze. She explains how the female character is the medium upon which both the male protagonist and the viewer gaze, the conduit for the information the hero and the audience need to construct a coherent narrative.<sup>34</sup> As the object, rather than the subject, the woman has no volition of her own, and, instead, serves as the means of signifying what the story is about, rather than contributing to the story by her own actions.<sup>35</sup>

This theory is particularly significant for film viewers, who are not aware that they are gazing at the woman and identifying with the man, thus replicating the conditions of power inscribed into the filmic narrative. As Teresa de Lauretis explains, "the spectators are not aware of their own look, of themselves as looking on, as being voyeuristically complicit in the pleasures built into the image."<sup>36</sup> Not only do the viewers remain unaware of their own complicity in constructing the story, but "they are not aware of the look of the camera, so that they have the impression that the events, people, and places figured on the screen exist somewhere, in an objective—if fictional—world created by the filmmaker, the director, the artist."<sup>37</sup>

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32. *Id.*

33. Laura Mulvey, *Visual Pleasure and Narrative Cinema*, 16 *SCREEN* 6 (1975).

34. *Id.* at 13.

35. *Id.*

36. TERESA DE LAURETIS, *TECHNOLOGIES OF GENDER: ESSAYS OF THEORY, FILM, AND FICTION* 98 (1987).

37. *Id.*

The parallel to a lawsuit's audience is apparent. The decision-makers, the lawyers, and probably even the parties themselves must view events as they are framed by the pleadings. Common sense dictates that people's actions are not designed to conform neatly to legal dictates. If they were, there would be no need for the vats of ink that fill the pages of casebooks, treatises, and reporters, in which judges pontificate about whether a defendant owed a duty of care to the plaintiff or whether the parties actually agreed to the bargain. Yet, in the framework of the complaint, actions must satisfy the elements of the claim. Any actions beyond the chosen frame of the legal elements become irrelevant. The pleadings are, in effect, the shooting script for the movie, the preparation for what will appear onscreen before the decision-maker/audience.

What makes the pleadings so effective is the fact that the audience tends not to notice how the legal framework reshapes events in its image. As de Lauretis explains, "the cinema screen acts like a dream screen for the spectator-subject, a screen at once bearing and hiding, displaying and displacing, unconscious images and 'thoughts.'"<sup>38</sup> In other words, as much unconscious thought goes into the decision-makers' construction of the story as conscious thought. Without seeing the constraints placed on the story—the blank spaces that fail to fit the pieces of the legal puzzle—the decision-makers arrive at an uncritical conclusion about what actually happened when, in fact, the story is likely far more complicated. What really happened disappears outside the frame, but they never miss it because they are not aware that a frame exists.

What the legal decision-makers arrive at is, like the story constructed by a filmgoer, "an integral realism, a recreation of the world in [their] own image, an image unburdened by the freedom of interpretation of the artist or the irreversibility of time."<sup>39</sup> The import of this conclusion gains resonance when viewed in light of a preceding examination of jurisdiction. As discussed,<sup>40</sup> different decision-makers bring very different backgrounds and expectations to their construction of what happened between the parties. In other words, ignorant of their position as spectators presented events within a limiting framework, they construct a version of reality that is imbued with their own sense of reality and that reinscribes the relationship of powerful subject to powerless object.

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38. *Id.* at 97.

39. ANDRÉ BAZIN, *The Myth of Total Cinema*, in *WHAT IS CINEMA?* 21 (Hugh Gray trans., 1967).

40. *See supra* Part II.

*B. Civil Procedure: Framing the Gaze*

Feminist film theory illustrates how the Supreme Court's decision in *Conley v. Gibson*<sup>41</sup> does far more than simply provide the controlling interpretation of Rule 8(a)(2)'s requirement that the complaint contain "a short and plain statement of the claim . . ."<sup>42</sup> The decision also exposes the practice and pitfalls of framing the narrative in the pleadings and the play of powers that determine meaning in a lawsuit.

In *Conley*, the plaintiffs, African-American employees of the Texas and New Orleans Railroad, brought suit on behalf of themselves and other similarly situated black employees after the Railroad discharged or demoted them in 1954 claiming that it was abolishing their positions, when in fact it filled the positions with white employees.<sup>43</sup> The plaintiffs had no cause of action against their employer,<sup>44</sup> so they sued the union to which they belonged pursuant to the Railway Labor Act ("RLA").<sup>45</sup> Because the collective bargaining agreement between the Union and the Railroad provided covered employees with protection from discharge and demotion, the plaintiffs argued that the Union violated the RLA because it "did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees."<sup>46</sup>

The Union moved to dismiss the complaint for failure to state a claim upon which relief could be granted.<sup>47</sup> According to the Union, the RLA imposed on it only a duty to represent union members fairly in the negotiation of the collective bargaining agreement, which it did, as evidenced by the provisions on discharge and demotion.<sup>48</sup> The Union argued that it could not be held responsible for the subsequent discriminatory conduct of the Railroad alleged in the plaintiffs' complaint.<sup>49</sup>

Two important points flow from an examination of the complaint within the tenets of feminist film theory. First of all, the dominant conventions of the storytelling medium—be it narrative cinema or the legal system—dictate how a story must be told in order for its audience to find it coherent. A legal story must be framed within the dictates of some substantive law. A lengthy and confusing piece of writing, the complaint did not set forth a coherent legal

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41. *Conley v. Gibson*, 355 U.S. 42 (1957).

42. FED. R. CIV. P. 8(a)(2).

43. *Conley*, 355 U.S. at 43.

44. Title VII, which provides a private cause of action for race discrimination by businesses with at least 15 employees, was not enacted until 1964. *See* 42 U.S.C. § 2000e (2000).

45. *See Conley*, 355 U.S. at 43.

46. *Id.*

47. *Id.* The Union also moved to dismiss on jurisdictional grounds and for the failure to join an indispensable party as a defendant. *Id.*

48. *See id.*

49. *Id.* at 47.

story. Therefore, although it presented the events as the plaintiffs understood them, it did not make sense to the trial judge, who expected a legal narrative.

The second point follows on this observation, although it is often ignored: the dominant discourse is not the only one. Discussing why the plaintiffs framed the complaint as they did gives rise to a consideration of how the narrative conventions of pleading exert tremendous power over the parties' ability to receive legal recompense for their injuries. In *Conley*, the plaintiffs, as African-American men working in Texas in the 1950s, were obviously disempowered. They had an important story to tell, yet they could not tell it in court. It, therefore, becomes relatively easy for law students to see the patterns of power and inequity embedded in the seemingly simple process of civil pleading.

Discussing the legal constraints the *Conley* plaintiffs faced lends yet another layer of complexity to the framing process. Quite apparently, the employer, the Railroad, engaged in blatant racial discrimination. Yet, at the time they filed their complaint, the plaintiffs had no federal cause of action against their employer.<sup>50</sup> In order to avoid a hostile Texas state court, they strained to fit events into the framework of the Railway Labor Act.<sup>51</sup> Under the RLA, however, the plaintiffs had to seek redress from their union representatives, not their employer who had harmed them.<sup>52</sup>

The law thus framed the complaint in a way that radically changed the plaintiff's story. They were forced to cast the Union as the sole perpetrator of discrimination. The Railroad's discriminatory acts, placed outside the narrative framework by the applicable law, was so diminished as to make both the district court judge and the appellate panel determine that they lacked jurisdiction to hear the dispute.<sup>53</sup>

The plaintiffs were, thus, quite apparently powerless within the dominant legal discourse that determined how they could frame their story. They were positioned much as feminist film theory posits women are positioned within a filmic narrative, as objects that are acted upon rather than subjects that can act of their own accord. They faced the problem of "speak[ing] as subjects of discourses which negate or objectify [them] through their representations."<sup>54</sup>

One might argue that all of this theory is negated by the fact that the Supreme Court reversed the decisions of the lower courts and found that, as

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50. *See supra* note 44.

51. *See Conley*, 355 U.S. at 42.

52. *Id.* at 46.

53. *Id.* at 43-44. The lower courts concluded that the National Railroad Adjustment Board (NRAB) had exclusive jurisdiction because the dispute was over the terms of a collective bargaining agreement. The Court reversed, stating that the Railway Labor Act conferred exclusive jurisdiction in the NRAB only for disputes between employees and their employers, not for claims of unfair discrimination by the union. *Id.* at 44-45.

54. DE LAURETIS, *supra* note 36, at 127.

much as the complaint deviated from legal narrative conventions, it did, in fact, state a claim sufficient to withstand the defendants' motion to dismiss.<sup>55</sup> Indeed, raising the question of why the Court worked so hard to find a valid claim inevitably leads to fruitful classroom discussion about the circumstances justifying the Court's decision in *Conley* and its ramifications as a rule of law for subsequent cases. Students can surely see that the Court's interpretation of Rule 8(a)(2) was not objectively divorced from the circumstances of the case before it, which few people would dispute militated in favor of allowing the claim to proceed in federal court.

The protective stance of the Court, however, leads back to the issues of power and powerlessness exemplified by the lower courts. The Supreme Court, from its position of authority, essentially rewrote the complaint in the terms of the legal discourse it dominated. The Court constructed a story different from the one the plaintiffs told. Certainly, such a retelling was necessary if the plaintiffs were to have any hope of legal redress. But just as a female moviegoer must gaze at and therefore objectify the female character in the film,<sup>56</sup> so the *Conley* plaintiffs had no choice but to participate in their own powerlessness within the legal system.

Feminist film theory thus can do for Civil Procedure what it has done for narrative cinema. It can wake us up to the fact that we are observing a constructed narrative, not a depiction of real life. It can remind us of our own role in constructing the story we see. And, most importantly, once we have been exposed to it, it refuses to let us ignore the power of the subject and the powerlessness of the object within the telling of any legal story. As responsible lawyers, we must, at least, admit to this dynamic. As responsible law professors, we should, at least, give the students the same option.

#### IV. DISCOVERY AND THE "SOCIAL IMAGINARY"

The infamous Rodney King video exposed people who had never seen a police baton removed from an officer's belt to the reality of physical force. It reopened and reworked discussions about racism in the United States. It sparked riots across the city of Los Angeles, with grave damage to property, individuals, and communities. But it did not, at their first trial, convict the police officers who were captured beating Rodney King on videotape.

The shock at the first verdict finding the police officers innocent<sup>57</sup>—even when the video footage had been replayed so many times on television—reverberated into riots. It found less violent expression in the belief that the

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55. *Conley*, 355 U.S. at 45.

56. See DE LAURETIS, *supra* note 36, at 127.

57. Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 29, 1991, at A1.

jury was racist.<sup>58</sup> What other explanation could there be for a failure to convict in the face of such indisputable videotaped evidence of excessive force?

Considering the videotape and the trial outcome in the context of civil discovery might provide some answers to this question. For the purposes of understanding Civil Procedure as the construction of a legal narrative, film theory explains the ways in which viewers may interpret the information the filmmakers present and, therefore, how the parties to a lawsuit seek to use the information they receive in discovery to construct a narrative that fits their framing of the story. Discovery thus becomes a crucial part of the filmmaking process of civil litigation, for the legal stories can be told only through the documentary footage at the parties' disposal.

A. *The Film Theory: The "Blurred Boundaries"<sup>59</sup> of Documentary Film*

Documentary film theory seems a particularly useful framework for considering civil discovery because, as Bill Nichols observes, documentary films "appear as pale reflections of the dominant, instrumental discourses in our society."<sup>60</sup> While they purport to record "reality"—just as discovery is designed to find out what "really" happened<sup>61</sup>—documentary films, "[l]ike fiction, . . . can . . . suggest that [their] perceptions and values belong to [their] characters, or adhere to the historical world itself: the film merely reveals what we could have seen around us had we, too, looked with a patient, discerning eye."<sup>62</sup> In suggesting to the viewer that what she is seeing is "true" and unbiased, documentary film has the power to engage in "the discursive formations, the language games, and rhetorical stratagems by and through which pleasure and power, ideologies and utopias, subjects and subjectivities receive tangible representation."<sup>63</sup> This power brings with it the decline of "[t]he goal of documenting reality . . ."<sup>64</sup>

The ability of the defense to obtain an acquittal in spite of the Rodney King video illustrates this process of documentary distortion, received by its audience as documented reality. In his essay *The Trials and Tribulations of Rodney King*, Nichols calls the prosecution's belief that the videotape was the

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58. See BILL NICHOLS, *BLURRED BOUNDARIES: QUESTIONS OF MEANING IN CONTEMPORARY CULTURE* 21 (1994) [hereinafter NICHOLS, *BLURRED BOUNDARIES*].

59. See *id.*

60. BILL NICHOLS, *REPRESENTING REALITY: ISSUES AND CONCEPTS IN DOCUMENTARY* 6 (1991) [hereinafter NICHOLS, *REPRESENTING REALITY*].

61. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

62. NICHOLS, *REPRESENTING REALITY*, *supra* note 60, at 6.

63. *Id.* at 10.

64. *Id.*

“proverbial smoking gun” a “positivist fallacy.”<sup>65</sup> While the prosecution viewed the tape as a document of one particular reality, the defense reworked the “reality” it documented, turning it into “[c]onfirmation . . . [o]f the rough and brutal nature of police work. . . the risk and uncertainty that confront officers in the street. . . [and] the dire necessity of controlled force to safeguard the men in blue and preserve the lives of suspects who might otherwise be killed.”<sup>66</sup>

The defense in effect changed the meaning of the videotape—and, in the process, showed that no piece of evidence is imbued with absolute meaning—by constructing a story outside the frame of the video, a story of “[i]mportant, mitigating events [that] occurred before the tape began.”<sup>67</sup> In this story, King’s own behavior justified the officers’ brutal actions. According to the defense, the officers had reason to believe he was a dangerous felon, so that the frame of the video “treats all King’s subsequent behavior as confirmation: King was a serious threat who ‘knew all the tricks to take out a police officer.’”<sup>68</sup> Hence, “[j]ustification and motivation for what follows resides in this prior set of events for which no video record exists.”<sup>69</sup>

What made the defense’s use of the documentary video so brilliant, Nichols concludes, was that their reinterpretation depended on “the degree to which [their] claims correspond[ed] to the social imaginary within which the listener, or jury, already lives.”<sup>70</sup> In other words, the defense simply tapped into the jury’s “social imaginary”—“those social relations members of [the jury] imagine they have to their actual relation to another group”<sup>71</sup>—and recognized how the jury would be inclined to read the videotape as confirmation of their own preexisting prejudices and fears.

The lessons for civil discovery are apparent. First of all, there is no absolute and unified story to be found in discovery. Treating each piece of information as indicative of the truth of one’s story disadvantages the attorney through her own ignorance. Rarely does the information obtained through discovery appear to be the “smoking gun” that the King video seemed to the prosecution; yet even this supposedly indisputable evidence of police brutality

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65. NICHOLS, *BLURRED BOUNDARIES*, *supra* note 58, at 22; *see also* DE LAURETIS, *supra* note 36, at 133 (“The space constructed by the film is not only a textual or filmic space of vision, in frame and off—for an off-screen space is still inscribed in the images . . .”).

66. NICHOLS, *BLURRED BOUNDARIES*, *supra* note 58, at 22-23.

67. *Id.* at 23.

68. *Id.* (quoting STACEY KOON & ROBERT DEITZ, *PRESUMED GUILTY: THE TRAGEDY OF THE RODNEY KING AFFAIR* 32 (1992)); *see also id.* at 29 (describing the defense’s presentation of the tape as confirmation of “‘buffed out’ black males, urban danger, and the police as the thin blue line between chaos and civilization”).

69. *Id.* at 24.

70. *Id.* at 30.

71. NICHOLS, *BLURRED BOUNDARIES*, *supra* note 58, at 30.

and racism was capable of more than one interpretation. Far from uncovering the truth about the events giving rise to the lawsuit,<sup>72</sup> discovery, at best, provides the parties with scenes to play before the jury in a certain sequence that constructs the story they want to tell.<sup>73</sup>

In the discovery phase, civil attorneys finally emerge clearly as filmmakers. While the role may have been subtle as they chose their jurisdictional audience and framed the dispute in the pleadings, the filmmaking aspects of these roles become apparent as, like documentary filmmakers, they gather the facts that they will construct into their own version of “reality.”

### B. *Civil Procedure: Gathering the Footage*

The dangers and possibilities of civil discovery as documentary filmmaking can be illustrated by considering the recent change in Rule 26(b)(1).<sup>74</sup> In 2000, the Rule was revised in an attempt to cabin the extremely broad scope of discovery. Under the prior version of the Rule, parties were free to discover any information “relevant to the subject matter involved in the action,” while the 2000 amendment restricts discovery to information that is “relevant to claims and defenses of any party.”<sup>75</sup>

Under the old “relevant to the subject matter” Rule, what was “relevant” was framed entirely by the “social imaginary” of the viewers—the parties and their representatives engaged in the discovery process. Because the scope of discovery under the old Rule was extremely expansive,<sup>76</sup> the parties were free to inscribe their own story onto events by searching broadly for any events that confirmed their conceptualization of the dispute. As Nichols explains, “meaning is what we, audience or jury, attach to a signifier, to render it intelligible.”<sup>77</sup> In other words, events have no inherent meaning other than what individuals assign to them.

Viewed in the context of documentary film theory, the new “relevant to the claim or defense of any party” Rule is a distinction without a difference. The language of the revised Rule specifically links discoverable information to the parties’ framing of the story, their claims or defenses. Yet, as discussed previously, parties develop their claims or defenses in order to frame a story

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72. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (characterizing liberal discovery as designed to ensure “[m]utual knowledge of all the relevant facts gathered by both parties”).

73. See André Bazin, *The Evolution of the Language of Cinema*, in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS* 89 (Gerald Mast & Marshall Cohen eds. 1974) (describing how “the mind of the spectator . . . accept[s] the viewpoints of the director which are justified by the geography of the action or the shifting emphasis of dramatic interest”).

74. FED. R. CIV. P. 26(b)(1).

75. See FED. R. CIV. P. 26(b)(1) advisory committee’s note.

76. See, e.g., *Blank v. Sullivan & Cromwell*, 16 Fair Emp. Prac. Cas. (BNA) 87 (S.D.N.Y. 1976).

77. NICHOLS, *BLURRED BOUNDARIES*, *supra* note 58, at 29.



that corresponds to their version of events, not to tell the whole “truth” about what happened.<sup>78</sup> Just as the defense in the Rodney King case used the video to confirm their version of events, so the parties in civil discovery are directed to seek information that verifies their own “social imaginary,” or at least what they hope will be the “social imaginary” of the decision-maker.<sup>79</sup> “Relevance” under the new version of the Rule is thus even more closely aligned with the power of the parties’ narratives.

Another layer of strategy also goes into the construction of documentary film, one that further belies the truth-seeking function of liberal discovery.<sup>80</sup> Just as the documentary filmmaker must construct a narrative out of whatever footage she is able to capture, so the civil attorney’s narrative is limited by the information she is able to obtain in discovery. Any information that is not discovered ceases to exist for the purposes of the legal narrative. Information, in turn, will not be discovered unless the lawyers specifically ask for it.<sup>81</sup>

What the lawyers seek to discover, however, depends on what they believe is relevant—how they create the story. Because lawyers create the story for a particular audience, their goal is not to tell an empirically true story, but the version of it that will convince the decision-maker to rule in their favor. Limiting discovery to information relevant to the stories constructed by each party thus clarifies that discovery is not about uncovering the true version of events, but about constructing the narratives of the parties, imbued as they are with expectations about the “social imaginary” of the decision-maker.<sup>82</sup>

Using documentary film theory to deconstruct the tenets of liberal discovery certainly provides fodder for classroom discussion. Some people would surely see nothing wrong with the proposition that the parties construct their own stories in a way designed to ensure that the decision-maker believes they are true; such, one might argue, is the nature of an adversarial system. Others might decry the entire deconstructionist project as nothing but skepticism, a theory that distorts the empirical nature of certain facts and the ability of the decision-maker to arrive at a correct version of reality. Both

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78. *See supra* Part III.

79. *See* Sherwin, *supra* note 4, at 40 (“People prefer stories neat. Recognizable characters, familiar motives, and recurring scenarios of conflict and resolution are typical elements of our workaday narrative world. Legal narratives are no different.”).

80. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947).

81. *But see* FED. R. CIV. P. 26(a)(1) (requiring parties to disclose certain information without a request such as the names, addresses and phone numbers of people likely to have discoverable information, a description or copy of all tangible items that will be used at trial, a computation of damages, and a copy of a relevant insurance policy).

82. *See* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 277 (1989) (“In an actual case there will be many potential frames of reference which could be recalled by jurors from their schematic databases and contribute to assessments of similarity. However, . . . cognitive biases and limitations cause jurors to filter out many of these potential frames of reference.”).

positions bring up ethical issues about how much to disclose and how to disclose it, as well as the limits of legal strategizing. And, as with all film theory, such discussion exposes students to the great power of legal storytellers and of their responsibility to resist the temptations of using the stereotypes and inherent biases of the “social imaginary” to fill in the gaps in their own cases.

#### V. TRIALS, VERDICTS, AND POSTMODERN THEORY

The documentary film *The Thin Blue Line* is probably best known for leading to the release of Randall Dale Adams from death row.<sup>83</sup> The film’s success showed how it had the power to reinforce its own message—that the legal process, like a documentary film, is not designed to uncover empirical truths and that a miscarriage of justice is not simply the result of insufficient information.

The filmmaker Errol Morris, however, set out in *The Thin Blue Line* to dispute the notion of his own documentary’s power. Rather than the more typical mode of documentary filmmaking as presentation of a reality objectively constructed through interviews and investigation, *The Thin Blue Line* expressly subverts the notion of its own objectivity. It contains moments of obviously suspended reality—clips from old gangster movies, exaggerated reenactments signaling that they are merely the director’s version of reality, and the repeated vision of a cup of coffee falling to the floor in slow motion, literally suspended by the film medium.<sup>84</sup>

Most importantly, in *The Thin Blue Line*, Morris consciously and expressly tells the audience that the film presents only one version of events and invites them to witness their own attempts to construct a coherent narrative. The film’s power lies in its message that we create our own truths, whether as a movie audience or as a jury. Just as the jury became convinced that Adams murdered a police officer, so the movie audience concludes that they convicted the wrong man.

*The Thin Blue Line* thus illustrates the equally thin line between filmmaking and civil litigation. It exposes the lie of documenting reality in a way that applies to trials as well as documentary films. Understanding the film as a postmodern meditation on legal storytelling offers insight into the verdicts obtained through civil litigation.

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83. See Sherwin, *supra* note 4, at 43 (describing *The Thin Blue Line* as “a cultural symbol . . . that helped free a man from the corrupt grip of an ugly frameup”).

84. See *id.* at 61-63 (discussing the absence of captions to identify the people interviewed, leaving the viewer with no direction of how to take the words in terms of the speaker’s social or legal status; “the endlessly circling red police light”; and the “black and white clips of Hollywood detective movies from the 1940s, a Tinseltown landscape of crimesolving offered to illustrate the mental reality that [one of the trial witnesses] inhabited”).

A. *The Film Theory: Affirmative Postmodernism*

Richard Sherwin uses *The Thin Blue Line* to show how “[i]n the context of the law and legal judgments, the internalized frameworks that we draw upon to organize and interpret events, experiences, and actions are necessary to the most basic acts of separating out the believable from that which is false, incredible, or simply unacceptable.”<sup>85</sup> He explains that, like a trial, the movie presents a linear, narrative story, in which “the audience as detective/juror traces the clues that point to a sinister plot by state officials to frame Randall Dale Adams.”<sup>86</sup> In the narrative mode, “[t]he clues fit neatly into a story that ends when the mystery of the frameup is revealed and solved.”<sup>87</sup> The linear story succeeds because “[w]e want to believe Adams is innocent; he fits our image of a likely victim of official abuse. Similarly, it is easy for us to distrust the people who participate in the frameup; they fit the script for the corrupt and deceitful.”<sup>88</sup>

At the same time, Sherwin explains, the film engages in a “less familiar, nonlinear (arguably postmodern) form of storytelling.”<sup>89</sup> In this story, “we find ourselves in a universe of fate and fortune, circularity and irresolution. The nonlinear story about the murder of Officer Wood suggests that our conventional knowledge about causation and meaning may not be sufficient.”<sup>90</sup> The coexistence of this obviously nonlinear plot—with its message that we can never know what is true—and the linear narrative “draws our attention not only to how we recognize truth and justice, but also to those underlying shared beliefs that allow us to agree upon a particular interpretation or meaning of an event.”<sup>91</sup> *The Thin Blue Line* gains its power, as Sherwin describes, by “implicat[ing] all of us in our complacency about how easily we employ ready-made notions of truth and justice to save ourselves from the anxiety and doubts that might otherwise plague our judgments.”<sup>92</sup>

Sherwin spells out the message for the legal narrative of the trial by reminding us that “the only reality that counts for a trial lawyer is the one in the jury’s mind.”<sup>93</sup> In a trial, lawyers provide jurors with “familiar mental constructs” to help them create the linear narrative they crave, one “that best reflect[s] a preferred sense of truth and justice.”<sup>94</sup> In other words, although the nonlinear, unknowable reality is truer to life, the trial is designed to create a

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85. *Id.* at 50.

86. *Id.* at 52.

87. *Id.*

88. Sherwin, *supra* note 4, at 59.

89. *Id.* at 52.

90. *Id.* at 53.

91. *Id.* at 61.

92. *Id.* at 63.

93. Sherwin, *supra* note 4, at 65.

94. *Id.* at 54.

linear narrative that provides closure and absolutism. The only place for the nonlinear lies in discrediting evidence that disturbs the clarity of the constructed narrative.<sup>95</sup>

The lesson for a course in Civil Procedure is obvious. The prior examinations of the importance of jurisdiction to select an audience, of framing the legal narrative through the pleadings, and of drawing on the “social imaginary” in the discovery process deposit one comfortably in the realm of postmodern theory occupied by *The Thin Blue Line*. The civil verdict is exposed as a neat narrative conclusion to a story that can not hope to convey the reality of the events that gave rise to the lawsuit. Rather, it serves to placate our desire for a clear “sense of truth and justice.”<sup>96</sup>

### B. *Civil Procedure: Deconstructing the Jury’s Narrative*

The Supreme Court’s decision in *Gallick v. Baltimore & Ohio Railroad*<sup>97</sup> serves as a classic example of how both the jury and the reviewing courts must manipulate the trial evidence in order to arrive at a sufficiently linear legal conclusion to satisfy the fiction that civil litigation leads to truth. The plaintiff in *Gallick* was a crew foreman working on the railroad’s right of way.<sup>98</sup> On that stretch of road lay “a pool of stagnant water, in and about which were dead and decayed rats and pigeons, or portions thereof.”<sup>99</sup> While working near the pool, Gallick was bitten by an insect; the bite subsequently became infected, the infection spread throughout his body, and eventually both of his legs were amputated.<sup>100</sup> After a trial in state court, the jury returned a special verdict, and the trial court awarded damages to Gallick.<sup>101</sup>

The first lesson postmodern film theory offers in considering the *Gallick* case is the foolhardiness of special jury verdicts, or, for that matter, general verdicts with interrogatories.<sup>102</sup> To the lawyers and judges involved, the jury’s particular findings must comport with a general legal conclusion: if the elements of the claim are proven by the plaintiff, he wins; if they are not, he loses. However, this expectation ignores the “social imaginary” of the jury, in

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95. See *id.* at 75 (describing how the film’s “use of gangster filmstrips and cops-and-robbers clips attempts to create a . . . dramatic tension. . . [that] communicate[s] the absurdity of the prosecution’s case against Randall Adams”).

96. *Id.* at 54.

97. *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108 (1963).

98. *Id.* at 109.

99. *Id.*

100. *Id.*

101. *Id.* at 110, 112.

102. See FED. R. CIV. P. 49.

which they unconsciously bring their own expectations and beliefs into the story, constructing it as they see reality, not necessarily as the law demands.<sup>103</sup>

The majority opinion of the Court appears to affirm the jury's power to fill in the gaps between frames, to deduct what they believe happened out of the range of the camera, or the evidence presented. The Railroad argued that the jury's special verdict failed to establish either causation or foreseeability.<sup>104</sup> As to causation, the Court found it sufficient that Gallick had testified that he was bitten a second or two after walking away from the pool and that he had previously seen similar insects in the pool.<sup>105</sup> In addition, "two medical witnesses testified that stagnant, rat-infested pools breed and attract insects."<sup>106</sup> Finally, in their special verdict, the jury found that the pool "attracted bugs and vermin."<sup>107</sup>

Although the jury never specifically found that the pool attracted this particular insect or that the insect that bit Gallick came from the pool, the Court found the evidence sufficient to support a finding of causation.<sup>108</sup> Implicit in this conclusion is the recognition that the decision-maker must fill in some gaps in the evidence to achieve the linear narrative that guarantees a clear legal conclusion. Similarly, a movie audience might see only a shot of a couple climbing out of a cab in front of a restaurant, immediately followed by a shot of them sitting at a table inside the restaurant, but they will unconsciously intuit that the couple walked across the sidewalk and into the restaurant, where they were shown to the table. Indeed, they probably do not even notice the missing "evidence."

As to the Railroad's argument that the special verdict did not support the conclusion that Gallick's injury was a reasonably foreseeable consequence of the Railroad's negligence, the Court found it "clear that the jury concluded that [the Railroad] should have realized the increased likelihood of an insect's biting [Gallick] while he was working in the vicinity of the pool."<sup>109</sup> Although the jury reached two conclusions that seemed inconsistent with a finding that the Railroad was liable—that the Railroad "could not foresee that the stagnant pool would set into being a chain of events that would culminate in petitioner's present physical condition" and that the Railroad "did not have reason to anticipate that its maintenance of the pool 'would or might probably result in a

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103. See TIGAR, *supra* note 3, at 5 ("[Decision-makers] take the available evidence and weave it into a coherent whole. If pieces are missing, they will fill in the gaps based on intuition, probability, or prejudice . . .").

104. See Gallick, 372 U.S. at 117.

105. See *id.* at 113.

106. *Id.*

107. *Id.*

108. *Id.* at 111.

109. Gallick, 372 U.S. at 119.

mishap or an injury”<sup>110</sup>—the Court iterated “the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them.”<sup>111</sup>

Again, the Court made clear the necessity of reconstructing the jury’s construction of the story in a way that would satisfy the particular linear dictates of the law. Under Sherwin’s theory of *The Thin Blue Line*, the film’s nonlinear techniques succeed where they support the linear, narrative storyline that the audience craves.<sup>112</sup> The audience, constructing a story that makes sense to them, can account for things that make no sense by according them the role of that which they choose not to believe, much like a discredited witness. While the jury acts like an audience, the reviewing courts must adhere strictly to a storyline that is not just linear, but that is linear in a peculiarly legal way. Just as the underlying events had to be framed within the constraints of the law in the pleadings,<sup>113</sup> so too the verdict must not stray from the logic of adding up the elements to equal the wrong. The *Gallick* majority therefore “harmonized” the jury’s otherwise understandable conclusions so that the general linear narrative the jury constructed became a specifically legal one.

The *Gallick* dissent recognized that the majority was, in fact, filling in the gaps to support an unequivocal legal conclusion to *Gallick*’s story. “By undertaking to reconcile irretrievably conflicting findings of the jury,” the dissent complained, “the Court, we think, has . . . invaded the province of the jury.”<sup>114</sup> The jury’s findings, according to the dissent, simply could not be combined into a coherent legal narrative free of ambiguity. On the other hand, the dissent subscribed to the belief that an unambiguous conclusion could be reached by a different jury.<sup>115</sup>

Considering the jury verdict through the lens of postmodern film theory suggests that the more the law strives for unambiguous legal conclusions, the more it must “harmonize” the inconsistencies that exist in any representation of events. Just as a film audience tends not to tolerate plot inconsistencies, so the legal system abhors evidentiary ones, even when they reflect life’s ambiguities.<sup>116</sup>

#### CONCLUSION

The audience never discovers whether justice is served at the end of *Shadow of the Vampire*. They receive no information about a legal investigation or trial. The film is not about social justice, but about the thin

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110. *Id.*

111. *Id.*

112. Sherwin, *supra* note 4, at 75.

113. *See supra* Part III.

114. *Gallick*, 372 U.S. at 127 (Stewart, J., dissenting).

115. *Id.* (suggesting vacating the judgment and remanding for a new trial).

116. *See* Sherwin, *supra* note 4, at 71.

lens of the camera that purports to separate reality from fiction and about the ultimate invisibility of that glass borderline. The linear narrative of the film concludes with the grisly actions of Willem Dafoe's "vampire"; it is complete and coherent without the aftermath of investigation and prosecution.

Civil Procedure picks up where the events of the film leave off. Just as the filmmaker constructs a narrative "reality" that invites the audience to feel as if they are living through the events in real time, our system of civil litigation sets up a medium to view the events *ex post facto*, literally sitting in judgment. If anything, applying film theory to Civil Procedure shows that the possibilities for manipulating the audience's perception of the story are even greater in civil litigation than in filmmaking.

Given both the dangers of manipulation, misperception, and domination and the inherent expectation that lawyers exploit the audience in the name of zealous advocacy, the lessons of film theory have a particular urgency. As with any innocent entertainment, film theory can be used merely to make Civil Procedure interesting. But all innocent entertainments have a dark side, an invocation of the unexamined biases we all carry with us and of our role in the replication of systems of power and powerlessness. By employing film theory to illuminate the dark side of our civil litigation system, Civil Procedure professors can truly empower their students to work within a system that they understand deeply, rather than being thoughtlessly directed by rules they fail to question.