

# The Production of Law (and Cinema): Preliminary Comments on an Emerging Discourse

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**A. Setting the Stage:**

**1. Lights, Camera...**

We have come a long way since an American Court determined that cinema is nothing more than a form of entertainment.<sup>2</sup> Already 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.<sup>3</sup> 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. Several law schools include, as part of their J.D. curriculum,

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<sup>2</sup> The court found that since a film is not a serious medium for discourse concerning opinions and it can not be seen as constitutionally protected speech. Therefore, the state can ban such “entertainment” so far as it poses a threat for society. *Mut. Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 242-245 (1915).

<sup>3</sup> *See United States v. Paramount Pictures, Inc.*, 334 U.S 131 (1948) ;*Joseph Burstyn Inc. v. Wilson*, 334 U.S 495 (1952).

a course on Law and Cinema.<sup>4</sup> Conferences are held in this field<sup>5</sup> and law reviews devote issues to it.<sup>6</sup> Cinema and cinematic technology invade courtrooms and classrooms.<sup>7</sup> With little fanfare we find ourselves discussing law and cinema, based on the assumption – itself a focus for serious debates – that there is a sufficiently common basis between these socio-cultural artifacts to warrant meaningful discourse. This essay proposes to examine the emerging discourse, its limits and promising potential.

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 few of its characteristics) – and the legal world? After framing the discussion of law and cinema, the second section of this essay will caution against too fast (and furious) moves. In the haste of modern inter-disciplinary discourse some key methodological issues must be noted before inferences are drawn on the basis of the apparent resemblances.

In the third part of the essay, the scholastic lens will focus on a possible taxonomy of the emerging discourse. I shall try to characterize, without exhausting the subject, several types of possible arguments within the law-and-cinema discourse, grouping these arguments into "families". More specifically, three such families will be presented: Structural arguments (referring to the manner in which cinematic and judicial practices are "structured" in society), methodological arguments (referring to law and cinema as methodological instruments for the examination of certain ethical

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<sup>4</sup> Laurent Mayali, for example, has taught such a course since 1992, and Ticien Sassoubre has taught one since 2003, both at UC Berkeley School of Law (Boalt Hall).

<sup>5</sup> A conference on law and art is held every year and several sessions are dedicated to the discussion of law and cinema. See <http://www.utexas.edu/law/news/colloquium/lawandarts/>.

<sup>6</sup> 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, *Documentaries & the Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 707 (2006); Symposium, *Law and Popular Culture*, 48 UCLA L. REV. 1293 (2001).

<sup>7</sup> Beyond discourse, the cinematic technology has become evermore present in court rooms. Videos are presented to juries and judges and, in some jurisdictions, oral arguments are broadcasted to the public. Some classrooms have also been modified to allow video presentations; events of legal significance are screened (ranging from actual events to the aforementioned oral arguments). 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 1L students learn basic techniques of oral argumentation by watching themselves argue a case on video, as part of the moot court class.

issues) and hermeneutic arguments (referring to law and cinema as engaged in interpretative functions that illuminate aspects of the human condition).

The essay will then, somewhat pretentiously, call for action: there is still much to explore and many lessons to learn. Insights gained within cinematic theory can illuminate key concepts in law, and perhaps vice versa. These somewhat philosophical musings can have a rather sharp (or perhaps a rather blunt) edge. In a nutshell, cinematic theory can tell us something about the production of law, and thus can inform our legal practice.

Before turning to taxonomy and method, it is necessary to say a few introductory words on the "stage" shared by law and cinema, namely culture, and a few words on "words," namely on 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, are welcome to skip ahead.

## **2. – Culture!**

The law-and-cinema discourse rests on the rather obvious observation that both the law and the cinema share a social domain – culture. Yet 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. Rather than attempting to define the cultural plane law and cinema share, I would like to highlight one feature that organizes law and cinema – as well as other expressive cultural practices – framework narratives. 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 behave) because we have, in the back of our minds (and sometimes in the forefront) this very basic narrative about how people behave in a situation like the one we are confronting, and what it means. We thus have a paradigmatic story of a robbery, or a rape, or an election, or going to law school. These framework narratives allow us to connect the dots in social situations so that when one person does something we can tell ourselves the story of what that person does, a story that is greater than his or her physical actions. 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 – where we came from and what we stand for; it is against these stories that we hone our sense of justice and determine right from wrong. As paradigmatic plots these stories and the ethical and emotional attitude they generate are taken as providing the 'behind the scenes' setting that enables meaningful social relationships and interactions.

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 written': they must be a part of actual ritualistic behaviors, often relying on historical developments and communal memories.<sup>8</sup> At the same time, these framework stories are not static: they are formulated, communicated and reformulated. The cinema and the law participate (along with other expressive social practices) in the organization, communication, generation and regeneration of these Meta narratives.<sup>9</sup> The law-and-cinema discourse is often aimed at identifying these framework stories – their content, their unstated assumptions and their ethical messages.

The cultural plane, where framework narratives reside, has long attracted the attention of scholars interested in the broader aspects of the legal phenomenon.<sup>10</sup> 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, since these rules cannot *really* tell us enough about the law. The formation of normative notions such as legitimacy, fairness, moral rights and their like is of great importance, since these notions breathe contextual life into the law. If we accept these observations, then the manner in which the practice of law and operation of legal rules are perceived and

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<sup>8</sup> See William J. Everett, *Ritual Wisdom and Restorative Justice*, 2004 HAMLINE J. PUB. L. & POL. 347 (2004).

<sup>9</sup> Suzanne Shale claims :“Law and 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 (1996).

<sup>10</sup> 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).

depicted by other expressive practices is significant. Understanding law in the domain of culture, that is, understanding of law in its culture and as culture<sup>11</sup> – including, for that matter, formalism as culture – requires that jurists take the neighboring expressive practices – including the cinema – seriously. These depictions, the basic theme goes, are not merely descriptive; they also carry formative elements, as they participate in the formation of our professional and lay consciousness, ideas of our roles in interacting with and within the system and expectations of professionals and the general public from the law.<sup>12</sup> Or put differently, we can appreciate the existence of "framework narratives" that shape the background contexts of legal practices themselves; in our day and age, the cinema plays a part in shaping segments of the legal practice and the context within which it operates, a.k.a. legal culture and popular legal culture.

It should be noted that these processes could turn out to be reciprocal: it could very well be that popular legal culture affects the cinema as well. It is possible, through a cultural investigation which places the cinema at the focus of examination, to illuminate not only the cinema's function in modern culture, but also to observe the crystallization of expectations of the cinema as generated by other practices, including the law. While much has been written on the hard-core effect legal rules have on the creation of cinema – mainly through intellectual property rules, distribution agreements and the regulation of expression – 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, it could very well be, is in the business of regulating culture not only through explicit rules, but also through generating certain framework stories – call them legal culture – that inform the production of other cultural domains, such as the cinema.

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<sup>11</sup> 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 in any social field. H. G. GADAMER *THE PROBLEM OF HISTORICAL CONSCIOUSNESS: INTERPRETIVE SOCIAL SCIENCE – A SECOND LOOK* 82, 93-95 (1979).

<sup>12</sup> For the importance of lay persons expectations from the law, see Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 *LAW & SOCIETY REV.* 631 (1980-1981); ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); and Richard K. Sherwin, *When Law Goes Pop*, 27 *LAW & SOC. INQUIRY* 139 (2002). For the importance of professional expectations from the law, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997); Richard K. Sherwin, *When Law Goes Pop* 27 *LAW & SOC. INQUIRY* 139 (2002).

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 in the realms of the law and the cinema for the production and reproduction of the framework stories.<sup>13</sup> For example, both law and cinema apply a rich system of self-references, and, to a degree, a system of cross-references.<sup>14</sup> This inquiry into the "how they do it" can illuminate for us something "about law" or "about 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.

### 3. Law, Literature and Cinema

Having said that law and cinema share the medium of culture, and having mentioned the concept of "framework narrative," one is tempted to describe the relation between these practices as merely an extension of the relation between law and literature.<sup>15</sup> At first glance, this "accusation" has something to it. Much like in law-and-literature domain, we are able to discuss the several relative positioning of cinema and law.<sup>16</sup> We can talk about law in cinema: the manner in which law is portrayed in various films. Conversely, we can discuss cinema in law, namely the manner in which cinema is integrated in legal texts and practices. We can also think about law as cinema, by referring to legal practices as a specific type of cinematic-dramatic practices. It would follow that we can address cinema as law, by treating cinematic practices as a specific type of practices that contain law-making or adjudicative elements. Lastly, we can

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<sup>13</sup> Sherwin takes a somewhat cynical viewpoint by referring to one of *LA Law* episodes for the proposition that the law and cinema are similar because both provide the same illusion: the audience will see what you want them to see. Richard K. Sherwin, *Introduction: Picturing Justice: Images of Law & Lawyers in the Visual Media*, 30 U.S.F. L. REV. 891 (1996).

<sup>14</sup> GUNTHER TEUBNER ET AL., *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* (1988).

<sup>15</sup> 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). Black claims that there is a "family connection" between law and literature filed, and scholarly work in the field of law and cinema. DAVID A. BLACK, *LAW IN FILM: RESONANCE AND REPRESENTATION* 13-31 (1999).

<sup>16</sup> 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).

place law alongside cinema, thereby using the practices as arenas from which insights can be gained regarding human culture, or the human condition.<sup>17</sup>

Yet the fact that we can conceptualize the law-cinema relationship in manner similar to the law-literature relationship should not lead to an erroneous conclusion that cinema is but a type of text, and therefore that the treatment of law and cinema can be reduced to a particular case of law and literature (or law and narrative). Cinema has its own unique features. Cinema, just like law, occurs in a certain geographic space: films are shot in a location (even if sometimes that location is virtual), and are screened in a specific place. Furthermore, cinema has a unique socio-active dimension: actors (and many other functionaries) play an indispensable role, and that (active) role is hardly a one-person project; it is a social activity that is premised on institutions and organizations. And lastly, in cinema – as in law – the practice assumes a collective audience: people sitting together, somewhere, and participating in the practice as spectators. These characteristics enable us to set cinema apart from literature, but also to put forward research questions unique to the interaction between law and 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? And similarly, we can inquire about the socio-active dimension: What are the judicial and extra-judicial rules that govern cinematic performance? What institutions do (and should) govern it? What are (and should be) the legal and ethical commitments of the people who engage in the relevant practices?

Beyond the unique research questions, there is also an option to develop a unique conceptual language, stemming from the fact that cinema and law are dramatic practices that transcend text: Cinema and legal practice are viewed (and heard). In a movie theater (and in Court) we are physically present, mostly together 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. The presence of an audience, one could claim, provides for a unique

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<sup>17</sup> See Shulamit Almog and Ely Aharonson, *Law as Film - Representing Justice in the Age of Moving Images*, 3 CANADIAN JOURNAL OF LAW AND TECHNOLOGY 1 (2004); Edward Mussawir, *The Cinematics of Jurisprudence: Scenes of Law's Moving Image*, 17 CARDOZO STUD. L. & LIT. 1371, 137 (2005).

type of poetics; it just would not be the same without a group of people experiencing the event together in a defined location.

Moreover, it might be trite to note that the legal and cinematic poetics need not necessarily be organized solely around the concept of "narrative". It may also be structured around other dramatic elements, among them sound, color and lighting. Not the literary account, but the actual sound, color and light. We may thus address the cinema as containing a language unique to it, a non-verbal language with its own concepts and idioms. Such language would deviate from the language (concepts, idioms) of literature; while the latter revolves mainly around the story (and the literary effects that support the narratives), the former cannot be completely reduced to "narrative".

The case for treating law as something greater than its text is not as trivial, but hardly insurmountable. It would require us to acknowledge not only the practice of judging (that does seem to revolve around text) but also the practices of adjudication, negotiation and the political deliberation and bargaining that leads to legislation, which may all include dramatic elements that are not only text driven.

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.<sup>18</sup> 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.

## **B. Some Limitations of the Discourse**

### **1. "Talking about" Cinema (and Law)**

The experience of talking about something (such as an event or a practice) is essentially different from the experience involved in participating in that something

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<sup>18</sup> Such analysis is certainly formative 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 and Charles Musser eds. 1990).



(i.e., in the event or the practice). It seems that this point was at the core of Stanley Fish's observation regarding the distinction between theory and practice.<sup>19</sup> The position taken here is slightly different: when we "talk about" or analyze, we participate in a practice in itself.<sup>20</sup> Somewhat ironically, this practice can be termed "the practice of theorizing," which is distinguished from the practice about which we are theorizing.<sup>21</sup>

Therefore, addressing cinema by writing about it is limited by its very nature. The turn to speech in order to describe aspects of the 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.<sup>22</sup> Sometimes they are opaque, and in any case they have their own center of gravitation, 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).<sup>23</sup>

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<sup>19</sup> STANLEY FISH, *DOING WHAT COMES NATURALLY* 372-378 (1989).

<sup>20</sup> For the definition of practice, see ALASDAIR MCINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1994); Amnon Reichman, *Adjudication as Practice* 187-195 (on file with author).

<sup>21</sup> "Talking about" something, like photographing landscape, captures a certain expression, a certain perspective of "reality." But "talking about" cannot, just like photographing a landscape cannot, perceive the experience in its totality. It cannot fully capture the full splendor of the panoramic view, the color, the sound, the depth, or the gust of wind in the open field.

<sup>22</sup> For this matter, see, e.g., LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (2001) 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* 61-62, 4.002¶ (1981).

<sup>23</sup> 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" 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.

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.<sup>24</sup> No wonder, therefore, that classes that address 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.<sup>25</sup>

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

The answer, it seems, correspond 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 is part of the practice of theorizing about the cinema. Active participation in this practice could reveal, organize and thus enrich the experience of participating in the practices that form "the cinema". It is because the landscape photographer is limited in his ability to capture the full extent of the experience he encounters that he is able to choose which part to focus on, how to present the scene and the manner of organizing 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 un-mediated way, or even when we come to look at something that does not have that much in common with landscape.<sup>26</sup>

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 law (through

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<sup>24</sup> Cf. NICHOLAS NEGROPONTE, BEING DIGITAL 7-8 (1996).

<sup>25</sup> On the use of cinema for teaching law, see STEVE GREENFIELD, GUY OSBORN, PETER ROBSON, FILM AND THE LAW 6-11 (2001); Johnson, Buchanan, *supra* note 15, at p. 93; Donald H.J. Hermann, *The Law in Cinema: An Emerging Field of Stud.*, 42 NEW YORK L. SCHOOL L. REV. 305, 322-329 (1998); James R. Elkins, *Reading/Teaching Lawyer Films*, 28 VT. L. R. 813 (2004); Alan A. Stone, *Teaching Film at Harvard Law School*, 24 LEGAL STUD. F. 573 (2000).

<sup>26</sup> 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 shall be more alert viewers of cinema, or at least more aware viewers. This awareness might come at a price. Possibly, we may sometimes prefer to ignore certain aspects of the cinematic experience: 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.

lawyering, judging and/or legislating).<sup>27</sup> But – one would hope<sup>28</sup> – if we have done our work diligently enough, legal scholarship is not as detached from legal practice as one might think. After all, theoretical analysis may prove to have highly practical implications – in law even more than in cinema.<sup>29</sup> 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 role such analysis may play in enriching or reforming the way we think about and/or practice law, particularly given the role academics play in legal education.<sup>30</sup>

In that context it might be worth while to note that law and cinema share an important feature: not only do law and cinema make ubiquitous use of constructs – and thus call to be deconstructed – but law and cinema contain, as a central element of the practice, a social domain that can be termed "behind the scenes". Both law and cinema would operate quite differently – if at all – should this space be eliminated. The practices of legislation, negotiation, adjudication, judicial decision-making – all contain parts that are "internal" or "hidden", and that would have to be dramatically altered if they become part of the public domain. Likewise, if there will no longer be an area that the camera does not capture, fiction – and also documentary – cinema will no longer be the cinema that we know. Thus "talking about" law and cinema could be seen, from an external perspective, as an attempt to participate in defining the scope

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<sup>27</sup> See, e.g., Wade H. McCree Jr., *Partners in A Process: The Academy and the Courts*, 37 WASH. & LEE. L. REV. 1041 (1980).

<sup>28</sup> But see Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 166 (1990).

<sup>29</sup> There is nothing more practical than a good theory, said Kurt Lewin and if that is so with respect to the social sciences, it must be so for law as well. LEWIN K. FIELD, *THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS* 169 (1951). For recent use of this approach to cinema, see Henry Breitrose, *There is Nothing More Practical Than a Good Film Theory*, [http://www.agrft.uni-lj.si/conference/Ljubljana/Henry\\_Breitrose.pdf](http://www.agrft.uni-lj.si/conference/Ljubljana/Henry_Breitrose.pdf).

<sup>30</sup> In that respect, it is interesting to note the dialogue between judges and academics. See Abner J. Mikva, *The Lester W. Roth Lecture: 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, 451-456 (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."

of that which is exposed in both practices. In that respect, it is useful to place law along side the cinema.<sup>31</sup>

## 2. "Law" and "Cinema"

The practice that is termed in loose language "Law" is actually a collage of several interrelated practices. The law, as we know, is not a single, uniform practice, but rather includes several sub-practices. What family law lawyers do is rather different from what corporate lawyers do, which is still different from legislative aids who draft legislation regulating the 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 these strata of law are part of "the law".<sup>32</sup> 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.<sup>33</sup> Similarly, when talking about statutory law it is difficult to ignore that 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).<sup>34</sup> As easy as this

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<sup>31</sup> The claim is not that law and cinema are necessarily unique nor that the relation between them is necessarily unique. Clearly it is possible to expose, reveal, develop and understand any practice in itself. Possibly, 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.

<sup>32</sup> Amnon Reichman, *Formal Legal Pluralism*, OUTLOOK 24-27 (Spring 2003).

<sup>33</sup> Cf. Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. OF COLORADO L. REV. 615 (1992).

<sup>34</sup> As stipulated by Prof. 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...” Jessica M. Silbey, *What We Do When We Do Law and Popular Culture: Richard Sherwin. When Law Goes Pop*, 27 LAW & SOC. INQUIRY 139, 145 (2002). See also ANTHONY CHASE, MOVIES ON TRIAL 3-6 (2002).

might seem, identifying the contours of the practices under analysis is far from trivial, yet for the analysis to be sound, it may prove to be indispensable.

Stressing the importance of identifying the practices under consideration should not be confused with either a behavioral or a positivistic approach to human practices. I am not suggesting here that because law and cinema are practices, we are confined in our analysis to the specific physical or verbal actions taken within these practices. Nor am I subscribing to a positivistic approach that focuses solely on the “is” (i.e., that which is practiced) and not on the “ought” (namely how things should be practiced). The practice of law, like all practices, also include a certain internal viewpoint – consciousness – based (at least in part) on an "ideal type" that informs the practitioners what is considered a "good" or "correct" action within that practice. By defining the "good" or the "correct" way to practice, the ideal type does not necessarily imply that the practice itself is morally “good”, only that there is a standards which fulfillment provides the practice its internal significance.<sup>35</sup> Capable of perceiving the meaning of their actions from a view point internal to the practice, and guided by the practice's ideal types, the participants can – and do – form purpose and aim unique to that practice.<sup>36</sup> So when dealing with practices such as the law and the cinema, we are not merely dealing with certain "facts" – a set of physical motions some people do on certain occasions – but with a rich structure of normative constructs.<sup>37</sup> The law and cinema discourse can thus acknowledge the ideal types of various legal or cinematic practices, and appreciate the internal view point the practices offer, providing, of course, that we have defined for ourselves, at least broadly, the practices with which we are dealing.<sup>38</sup>

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, engages both legal practitioners (who put forward their

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<sup>35</sup> For a discussion of the "ideal type," see MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 89-95 (1949).

<sup>36</sup> 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 & SOCIETY REVIEW* 163 (1996); H.L.A HART, *THE CONCEPT OF LAW* 86-87 (1961).

<sup>37</sup> HABERMAS JURGEN, *BETWEEN FACTS AND NORMS* (1995).

<sup>38</sup> Cf. Charles B. Rosenberg, *The Myth of Perfection*, 24 *NOVA L. REV.* 641 (2000).

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 in the arguments of counselors and in the materials soon-to-be advocates and judges read. The role the academia plays in civil law systems is even more pronounced.<sup>39</sup> This is not necessarily so when it comes to the cinematic practices. While academic writing is, at least to a certain extent, part of (common) law, cinematic analysis, as written by scholars, is not necessarily part of the cinematic practice. It is thus easier for us to confuse between 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.

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.<sup>40</sup> The law is not merely the creation of judgments by judges or legislators, it also includes 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). The law, according to one dominant approach, is all around us.<sup>41</sup> This is another aspect in which law differs from cinema; to speak about cinema beyond the making (and viewing) of films would be metaphoric. While it would be possible to argue that in every interaction with society we participate in law, it is not clear that it is possible to claim that we participate in cinema in an identical manner. Life is not a film, even if we sometimes feel like actors in someone else's script.<sup>42</sup>

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<sup>39</sup> R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY 53-54, 155-157 (1987).

<sup>40</sup> 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.”

<sup>41</sup> Austin Sarat and 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).

<sup>42</sup> In the last years, the blur between reality and perception and between life and fiction has received attention by the cinema itself. *The Truman Show* (Peter Weir 1998), *Wag the dog* (Levinson, 1997), *EDtv* (Ron Howard, 1999) and certainly reality television, are part of that genre. For analyzing the secret of the success of one Australian reality T.V show, see TONI JOHNSON-WOODS, *BIG BROTHER; WHY DID THAT REALITY-TV SHOW BECOME SUCH A PHENOMENON?* (2002).

In this sense, the sociological discourse that regards "law" as ubiquitous in all spheres of society (and describes a variety of social norms of many kinds, many of which have never been formally promulgated, as "laws") does not yet regard cinema as all-embracing. However, because the cinema offers a rich conceptual language by which it is possible to refer to social relationships and to human culture as such, it seems that theoretically it would be possible to try to develop the terminology that would explain social scenarios by relying on the cinematic conceptual realm. Time will tell whether the development of such a discourse will occur (and will turn out to be fruitful). Only then would we be able to observe the "directing", "production", "stage setting", "casting" and other cinematic aspects coming into expression in social practices that are considerably distant from the cinema.

Just as the purview of "law" requires clarification, so does the purview of "cinema". Should we refer to a television series as "cinema"?<sup>43</sup> 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 short – or longer – films circulated on the Internet?

The position of this author is 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. Further consideration reveals that law no longer takes place in a courtroom (or the legislative halls); the practice(s) of law include alternative ways to resolve disputes which are often conducted out of court (even if under its shadow).<sup>44</sup> Developments in the realm of film 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 a choice whether to view a film in her own space. More recent interactive developments grant the viewer the power to participate in setting the pace, if not in molding the plot itself.

The technological and cultural developments oblige us to carefully examine the relations between the media and the popular perception of law. For example, we may inquire into the media's ability to broadcast a certain portrayal of the law effectively.

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<sup>43</sup> Cf. Black *supra* note 15, at 6-7.

<sup>44</sup> Mark Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 JOURNAL OF LEGAL PLURALISM 1 (1981).

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 TV 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 "theatre-films", we should be mindful that we may be covering but a portion of the relevant practices (or artifacts).

### 3. Law vs. Cinema

But are not the differences between law and cinema too profound? Can theoretical discourse – even if we are careful to distinguish between "talking about" something and experiencing it, and even if we define properly the subjects of discussion – bridge the gap between law and cinema? Establishing the discourse on a sufficiently solid foundation – one that would enable us to draw insights from one practice in order to shed light on the other – requires that the differences between the two practices are highlighted.<sup>45</sup>

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 and thus, in law, words can kill. A legislative act and/or a court order are not just a story or an idea, and the characters are not fictitious. Legislation or a judicial decision have an impact on the lives of real flesh and blood persons – the actual parties to the case

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<sup>45</sup> 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 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 (often, at least in our contemporary social reality, for the purpose of profit, 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* U.S 201 (1953).



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.<sup>46</sup>

Furthermore, when we compare the roles of a judge to those of a film director if that is the right comparison – we see that as an "ideal type", the law (at least from a positivistic outlook) requires the judge to decide on the basis of rules, in response to a motion put forward by the litigants' claims. The decisions made by a film director are not necessarily rule driven. Indeed, on a certain level there are cinematic norms that could be – and are – studied in cinema schools, such as types of photography, ways of editing a film, maintaining the flow of a plot, etc; but at a very basic level, one could claim, art does not – or should not – conform to rules: if there is any rule in art, its content perhaps would be that there are no rules. Some would say that the more original and innovative the artistic idea, or the more it disrupts established norms, the more the film is considered to have a creative value.<sup>47</sup> Thus, the consequences of

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<sup>46</sup> 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 overplayed. 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 not conceptual or moral reason for not undermining cinematic rules. Practically, yet, it remains to be seen whether it is easier to reform legal rules than cinematic rules.

<sup>47</sup> Aristotle's view, in his book *Poetics* (George Whalley trans, 1997), was that art, like biology can be listed and sorted by species. Every type of art, such 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 it belongs to. Innovation and revolution in art are therefore not of positive value. Immanuel Kant in his book *The Critique of Judgment* (J.H. Bernard trans, 2000) agreed that art is based on a set of rules which instruct how to produce it. 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 page 18). In fact, the essence of the word genius according to Kant is based on originality, not rule-following (See pages 189-206). See also the dialogue Plato, *Ion*: Complete Works, (John M. Cooper - ed., 1997) 937, 941 where Socrates explains how the

violating established rules are completely different: in cinema, pushing the boundaries of the envelope – as long as they correspond to the cultural horizon of the audience -- is considered an appropriate form of innovative and appreciated work. In law, on the other hand, the breach of norms by those who are subject to the law leads to sanctions or invalidation. Indeed, judicial innovation is occasionally respected (as long as it is not overly iconoclastic), but sometimes even this creativity is perceived as unacceptable "activism"; law, in general, is in the business of regulating change by placing checks on its pace. Revolutions are the exception. Furthermore, although internal norms exist in the world of cinema, these norms, by definition, lack the official authority (and the enforcement mechanism) of the state (otherwise, these norms would be "law", rather than norms internal to the practices of cinema). The duty to obey these internal norms, therefore, either rests on pragmatic considerations of funding (and peer-pressures mechanisms)<sup>48</sup> or is in a deep sense a demand that the film director places upon herself. The concept of formal coercion – central to law -- would thus be approached quite differently in cinema.

Does this difference of essence mean that between legal practices or products and cinematic practices and products there exists an irreconcilable chasm? Such a conclusion would be an overshot. First, while law is indeed performative – it tells people how to behave – it is possible to find performative elements in cinematic practices as well: the director instructs his actors how to act, and disobedience is accompanied by sanctions, even if these are not necessarily formal. This, obviously, bridges the gap only marginally. It is difficult to see how a director can instruct persons who have not explicitly subjected themselves to her authority. Yet even though fewer people are under the purview of the movie director than under that of a judge, and even though those engaged in the production of a movie are under the purview of the director of their own volition (whereas the jurisdiction of the judge is usually not a matter of choice), there might be enough common ground to enable us to say something meaningful about the performative feature, or more precisely, about the exercise of judgment involved in telling others what to do. While telling *others*

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creation is governed by inspiration that comes mysteriously and uncontrollably to the artist, until it drives him out of his mind. The conclusion is that there is no place for rules or studying as far as art is concerned.

<sup>48</sup> 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).

what to do, both the movie director and the judge is ultimately passing judgment on their own craft.<sup>49</sup>

Furthermore, although a film does not "instruct" anyone to do anything in the way a legislative or a judicial ordinance does, still it is possible to claim that motion pictures generate "soft", but no less effective, social sanctions that exert pressure on deviation from "accepted" behavior. Law itself does not rely solely on formal enforcement 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). In that respect, both the law and the cinema operate by constituting standards (or points of reference) regarding how we should behave, and these reference points are incorporated in the socializing processes. It would be difficult to deny that the cinema participates in the creation of such social norms, even if these norms are not directly enforceable by state officials. In other words, it would be possible to say that motion pictures take part in shaping what would be considered a "normal" way to behave in a certain situation or what would be "an accepted" way think about a certain issue; it thus participates in shaping social consciousness. Such consciousness, if internalized by members of a society, may become just a fashion – what to wear – but it may also become a certain social attitude, a linguistic fashion and perhaps even an ideological fashion. It precisely because of this power that the movie industry has attracted the attention of legislatures and censorship agencies.<sup>50</sup>

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<sup>49</sup> While it seems as though the film director reviews the routine work of the actors, scriptwriters, photographers and others 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 it would be desirable that she should be aware that her actions can be viewed in this manner. DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES; TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (1998). Consequently, the difference between law and cinema is not a difference that prevents a comparative analysis, but is rather a difference that has a potential to serve as fertile ground for discussion.

<sup>50</sup> For example, the original version of *Les Nouveaux Messieurs* (Feyder Jacques – director, 1929, Feyder Studios), which represented criticism of the French parliamentarians, was forbidden public showing in 1929 by the French censor. In the United States, the attention McCarthy paid 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).

And if we are already dealing with the performative aspect, the meaning of the word is not only to command or instruct others; to perform is also to act, to play a role.<sup>51</sup> To suggest that appearing before judge or jury can be seen as a performance, or more precisely, that when one participates in adjudication one is playing a role, would seem trivial to practitioners. Lawyers, expert witnesses, judges and other functioners are players in the sense that they all perform. Their performance is measured by their ability to act their role in a credible manner, in other words, to appear as adhering to the framework narratives that define the ideal type in the light of which the role is constructed. Needless to say "acting" in law is not valued for its own sake, nor is the practice designed to encourage double-play. Acting one's role means the internalization of the demands of the role.

The performative element applies 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.<sup>52</sup> 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 the "performative" element in law and cinema stands, it seems, to reveal that despite the difference between the practices, a comparison is capable of yielding valuable insights.

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<sup>51</sup> For a discussion on social life and social roles as performance, see ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 17-76 (1959).

<sup>52</sup> Consider, for example, a judicial order requiring that one party apologizes to the other; the party publishes in the paper an apology that begins with "pursuant to the court order, I hereby apologize." That theme is central to "The Story of Qiu Ju" (Yimou Zhang – director, 1992).

In this context, caution is yet again advised. The fact that the element of "performance" serves as a possible measure for evaluating the lawyer, the judge, a party to litigation or even the legislator, should not blur the differences between the performative element in legal practices and in cinematic practices, just as it shouldn't blur the fact that the element of performance is not the only element constitutive of these practices. One of the basic criteria for determining whether a movie is "good" is the extent of its ability to suspend disbelief, in other words, 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.<sup>53</sup> After all, the film is a creation of fantasy, a "fiction", and films do not pretend to reflect "the truth" (except in the case of documentaries, and even there the claim is only to capture part of the truth, as seen by the director). A good trial, on the other hand, at least aspires to be based on truth (at least insofar as the inquiry into the truth does not prejudice other fundamental values). Furthermore, 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.<sup>54</sup> A "good" judicial decision not only should 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.<sup>55</sup>

Moreover, a good trial resolves a conflict, both between the parties and between competing policies, by following, and thus offering for future cases, some regulative standards. Obviously, an opening is left for future examination, but all in all we expect the law to settle things. Good cinema may embody a similar choice, but not necessarily. It seems that cinema which raises questions, encourages reflection, and motivates us to see other aspects of the issue is just as worthy, if not more. Good

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<sup>53</sup> 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.

<sup>54</sup> Films are measured and quantified constantly, as seen in various awards bestowed upon films in various ceremonies. This system, fortunately, does not exist in law. However, some lawyers, judges and scholars still look, for whatever reason, for "the most important" or "the most influential" judicial opinions, briefs, books or law-review articles. *See, e.g.*, Michael L. Closen and Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15 (1996).

<sup>55</sup> *See, e.g.*, JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

cinema, then, 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 determining right from wrong.<sup>56</sup> Good cinema stimulates the imagination. It is not at all clear that good law – a good judicial decision or a good piece of legislation – are also required to stimulate the imagination.

True, both the practices of law and those of the cinema contain a communicative component (the transmission of messages) and a representative component (representation of reality or of a possible reality). True, 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. Put differently, it is a metaphorical use of the terms. 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. We are liable to think that law is really only show business or that cinema actually legislates. We are liable to turn a statement that might be partially correct – because litigation has elements of show business<sup>57</sup> - into a reductive statement, as if there is nothing in law beyond show business<sup>58</sup> This blurring is liable to cast a doubt on the

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<sup>56</sup> Cf. A. Reichman, *Between Reserving and Withholding Judgment*, forthcoming in the Journal of Legal Education.

<sup>57</sup> The movie *Chicago* (Rob Marshall – director, Miramax, 2002).

<sup>58</sup> 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. Hunt claims that 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 during history is the publishing of books whose goal was to report famous trials held during the course of history. See, e.g., FRANK

validity of the claims or the conclusions at which we may arrive. 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.

#### 4. Law, Cinema, and Social 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 justice<sup>59</sup> 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, our 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 impartiality quite profoundly; one could argue that our sense of legalism is related to sports more than to law.<sup>60</sup>

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 these deal with framework narratives, including with the framework narratives that inform our ethical thinking. It is not

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MCLYNN, FAMOUS TRIALS: CASES THAT MADE HISTORY (1995) ;*Great World Trials* (Edward W. Knappman ed., 1997).

<sup>59</sup> 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).

<sup>60</sup> Cf. ALLAN C. HUTCHINSON, *IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION* (2000).

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.

Therefore, any claim regarding the manner or the power through which law and cinema shape our consciousness is but a supposition. Although it is a 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 are the different social processes that 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.<sup>61</sup> 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.<sup>62</sup>

The importance of being clear about one's assumptions is reinforced when two other leaps common in the law and cinema discourse are identified: over-generalization and treating the representation (i.e., the image) as if things are actually

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<sup>61</sup> 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 – A.R.]? 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).

<sup>62</sup> 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 (2000).



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, only says that there exists such a film or such a case that presents a certain "reality" while taking up a certain ethical position with respect to this reality. This by no means attests that a framework narrative exists, as part of the common cultural reservoir of the members of a given society, according to which such things occur around us or could occur routinely. In other words, one or two cases are not sufficient to establish a framework narrative, only to suggest that it may exist. Likewise, we should distinguish between a 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 certain 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. The case may nonetheless be wrong, both with respect to the facts and with respect to the law. 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 body of case law, statutes or laws, or other legal sources, such as a plea-bargain agreement, divorce settlements and the like) cannot bear the burden of such a "heavy" claim with respect to "the law" or "the cinema" or the 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. Yet the fact that all we can do is to raise hypotheses and the fact that these hypotheses are liable to be rebutted in future obviously cannot negate the value of raising them.

Therefore, the law-and-cinema discourse is primarily concerned with suggesting certain ways of interpretation of the social reality in which we live, while indicating possible patterns of thought, action, collective consciousness, and other ingredients of the framework narratives. This process of engaging with the practices is creative not only because the law and the cinema are creative practices, but also because the very

existence of this interdisciplinary discourse – so goes the hypothesis – generates, or participates in the generation of the 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 this or that aspect 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. Put somewhat hyperbolically, the discourse, if engaged with seriously enough, may itself contain a formative aspect.

### **C. 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. The next section will offer a tentative classification of the possible claims thus far put forward as part of the law and cinema discourse. Needless to say, this classification is far from exhaustive.

#### **1. The Family of Structural Arguments**

##### *a) Definition and Examples*

One possible way of organizing the arguments raised within the law-and-cinema discourse is by determining whether a given argument points to a structural element of a legal or cinematic practice. The expression "structural element" is intended to set aside types of arguments that shed light on the way in which a legal or cinematic practice is "built", or how its products are "constructed". By "built" and "constructed" I refer to the underlying codes (or forms) that define the different roles, institutions, ways of interactions and shared assumptions without which a practice would

disintegrate. The purpose of these structural arguments, therefore, is to reveal aspects of the social makeup of law qua law or of cinema qua cinema.

For example, a discussion of the relationship between the general and the particular in law and cinema is a structural argument in the sense that it reveals a tension in law and in cinema that is part of their "genetic composition": both navigate between relying on a general norm or narrative and dealing with the specific, idiosyncratic case. The existence of this relation is not necessarily unique to law and cinema, but positioning law next to cinema provides an interesting perspective in that context. Another example along similar lines: it has been argued that both law and cinema are constructed around enclaves, in which the characters – the actors – operate.<sup>63</sup> These enclaves are created through the use of esthetic and rhetorical means. Such enclaves include the singularity of the courtroom,<sup>64</sup> 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.

The family of structural elements also includes arguments that examine the mode of operation – the available moves – within each practice. For example, both the cinema and the law are "self-referential".<sup>65</sup> 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. In addition, both cinema and law control, at least to a certain extent, the entry of the "external" into the practice. Both cinema and law refer to precedents created in the frame of the practice in order

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<sup>63</sup> Shulamit Almog & Amnon Reichman, *Casablanca: Judgment and Dynamic Enclaves in Law and Cinema*, 42 OSGOODE HALL LAW JOURNAL 201 (2004) .

<sup>64</sup> For analyzing the legal space (mostly court rooms) as shown on cinema, see Greenfield, Osborn, Robson, *supra* note 23, at 31-53; Black, *supra* note 15, at 73-81.

<sup>65</sup> Cf. Gunther Teubner et al., *supra* note 14, at 2.

to establish a citation system that provides authority, meaning, a field of associations and even validity as part of a "tradition" or "culture". In this context there is no need to expand on the role of precedent in the field of law, but it is worthwhile noting that in cinematic practice the use of references to previous works is quite common.<sup>66</sup> An examination of the relationship between self reference in law and in cinema could, consequently, shed light on the different ways in which these practices operate, are self-maintained, and develop.

As has been mentioned above, the intersection of law and cinema can also reveal the rhetorical and aesthetic means utilized by law and cinema to influence the formation of framework narratives. 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 tools of the trade. Although cinema's main focus is on the aesthetic while the legal approach to aesthetics is complex,<sup>67</sup> aesthetics is incorporated in both these fields. 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. Videotaped evidence, video-conferences and other cinematic tools are available in court-rooms, legislative halls and lawyers' offices. Similarly, cinema doesn't resort to the exact same rhetorical and aesthetical devices definitive of law, such as special customs for the participants (robes), special architecture where the practices are performed (a court room with an elevated dais for the judge, a box for the juries, etc.), special parlance (legal terminology) and procedures to establish "legal truth" (distinct from "real truth") which include ritualistic elements, such as an oath. Yet despite the different devices, their effect is sometimes similar.

For example, both law and cinema establish enclaves, that is, place segments of the human interaction behind the scenes, while other segments are placed under the

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<sup>66</sup> There are a lot of examples, such as Carol Reed's reference in *The Third Man* (1949) to the famous balloon scene of Fritz Lang in *M* (1931).

<sup>67</sup> The separation between law and aesthetics is apparent in the area of intellectual property. When a court has to determine whether a creation is protected or not, it does not discuss the artistic or aesthetic value of the creation. As Justice Holmes advised, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

limelight, captured in the frame and deemed relevant. It would be difficult for us to form coherent narratives if social reality in its entirety is illuminated (or given voice). Therefore examining the devices that illuminate or darken in each practice can prove fruitful, be it rules of procedure or the angle of the camera and the use of lights.

Another example of aesthetical and rhetoric devices that are "built-into" the practices, is the devices that participate in the formation of empathy (or dis-empathy, namely blame) towards the characters; empathy, it has been argued, plays an important part in ethical (and legal) judgment.<sup>68</sup> 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. But the former – the jurist – also has a couple of useful tools to build or undermine empathy, as classes in legal advocacy, moots trials and similar courses demonstrate.<sup>69</sup> 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.<sup>70</sup>

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.

b) *The Specific Elements of Production (et. al).*

Almost hidden in the midst of this mapping of the field lies this article's substantive contribution: Some moves – activities – within the practices has thus far not received sufficient attention in the scholarship (and legal education, for that matter), but their influence should not be overlooked. 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 suit has to

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<sup>68</sup> See, e.g., MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995).

<sup>69</sup> 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); Jam V. Vun 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 15 at 13-31.

<sup>70</sup> Black connects between the testimony of a witness in court to the operation of a camera in a cinematic creation. Black, *ibid*, at pp. 99-103. See also Orit Kamir, FRAMED: WOMEN IN LAW AND FILM 3-4 (2006).

be financed.<sup>71</sup> Strategies have to be coordinated among the different parties whose interests are aligned. Witnesses have to be prepped and available at the right time in the right place (dressed properly, having had a glass of water, etc.). And evidence, well, needs to be produced. The same, of course, applies to other aspects of legal practice, such as corporate law or administrative law. 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. 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. This study can illuminate heretofore under-theorized aspects of the making and unmaking of laws, as well as aspects of implementation of legal norms.

If the world of cinema can teach us something about production, it can certainly teach us something about directing, scriptwriting,<sup>72</sup> and staging.<sup>73</sup> 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 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 that not only will the know-how developed in cinema prove useful for lawyers in conveying a story or an argument, but also, if not primarily, that

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<sup>71</sup> 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 Finance Should be Tamed not Outlawed*, 10 Fordham J. Corp. & Fin. L. 55 (2004); ERIN BROCKOVICH (Universal Studios 2000); A CIVIL ACTION (Paramount Pictures 1998).

<sup>72</sup> Intuitively, it seems as if the scriptwriting doctrine is relevant not only for writing political speeches, but also for writing deposition drafts, in addition to preparing witnesses for cross examination regarding those depositions. So, 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.

<sup>73</sup> Staging raises serious ethical issues. In every day parlance a staged trial, or a 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 "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 has 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.

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.<sup>74</sup>

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 her or his 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 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 essay about the aesthetics of courtrooms. A visitor to the newly designed marble-clad courtrooms in some parts of the worlds, or the other court rooms 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.<sup>75</sup>

Since this sub-section already reads as promoting the inclusion of cinema 101 to the law school curriculum, we might as well acknowledge 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

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<sup>74</sup> See also Richard K. Sherwin, *The Jurisprudence of Appearances*, 43 NEW YORK LAW SCHOOL LAW REVIEW 821 (1999).

<sup>75</sup> *Id.* at 654.

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 acting. 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.

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 to 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, it is also beneficial.<sup>76</sup>

## **2. Methodological Uses for Practical Ends**

### *a) Using Cinema to Explore the Law*

A different category within the law and cinema genre places at its core arguments which purpose is methodological: using the cinema to understand a certain legal doctrine or turning to law to understand the state of the cinema.<sup>77</sup> The side of the family of arguments that uses the cinema to explore the law argues that a certain legal norm (doctrine, executive decree, statutory provision, etc.) does not take into account a relevant segment of the social reality by discussing that segment as it is represented in a film. The idea is to show that the provisions of a certain statute or a decision of a certain court do not realize their purpose and/or lead to injustice because they do not take into account certain elements of the reality of human life – elements about which one can learn through watching films.<sup>78</sup> Such a use of cinema, of course, cannot by itself support a critique of the existing law. It could very well be that the cinematic expression merely represents the director's position, her artistic preference or the

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<sup>76</sup> This, it seems, would be the right place to note once again the qualifications belabored over 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).



commercial interests of the studio.<sup>79</sup> 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.<sup>80</sup>

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,<sup>81</sup> so can cinematic artifacts. Another result of such a discussion could 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.<sup>82</sup> A

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<sup>77</sup> “[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 (1996). For example, cinema can reflect on the complexity in lawyer-client relationship often from perspective unavailable in traditional legal discourse. See J. Thomas Sullivan, *Imagining the Criminal Law: When Client and Lawyer Meet in the Movies*, 25 UNIV. ARKANSAS AT LITTLE ROCK L. REV. 665 (2003).

<sup>78</sup> See, e.g., the discussion of the film "The story of Qiu Ju" (Yimou Zhong - director, 1992) 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 581, 613 (1999).

<sup>79</sup> Commercial reality directs filmmakers towards dramatic stories, and stimulates them to enlarge the dramatic construction of the story they chose. 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, Roston mentions, "Truly realistic portrayals of lawyers' work would hardly make for entertaining or interesting movies. Few, for instance, would line up to see a film titled *Adventures in Document Production* or *The Man Who Did Due Diligence*". Alan Roston, *Book Review: Lawyers, Law & the Movies: The Hitchcock Cases*, 86 CALIF. L. REV. 211, 214 (1998).

<sup>80</sup> As Brooks 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'." Peter Brooks, *Lawyers, Law & The Movies: The Hitchcock Cases*, 86 CAL. L. REV. 211, 232 (1998).

<sup>81</sup> Cf. Nussbaum, *supra* note 65.

<sup>82</sup> The limits of law are apparent in many movies. *To Kill a Mockingbird* is perhaps the most famous one. A less obvious example is "Death and the Maiden" (Roman Polanski – director, 1994). The lawyer in that movie cannot surrender his "neutral" position, even when faced with the rape of his wife. Indeed, Mel Gibson fans would probably want to see the lawyer takes 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.

better acquaintance with the limitations of the law that stem either from the nature of law or from the relations between the law and other practices could illuminate the possible tension between the rhetoric that is sometimes used by the law – as if the law is omnipotent – and the cultural reality, at least as it is perceived from the director's perspective.<sup>83</sup> Recognition of the existence of this tension could lead legal professionals to a different reading of the sources of the law, to an altered legal writing, and at least to an adjustment of expectations from the law.<sup>84</sup> 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.<sup>85</sup>

Besides illuminating blind spots within the existing legal canon, cinematic artifacts could serve for honing our understanding of the pros and cons (or scope and limits) of various theories that explain and justify certain legal processes, institutions, doctrines or presumptions. It has become common place that contract theory, constitutional judicial review, tort law, and professional ethics<sup>86</sup> -- to name but a few examples – are approached by screening a certain film (in class, before lawyers, judges, legislatures or any other professional audience).<sup>87</sup> Such use of a film does not necessarily rest on the assumption that the movie puts forward a "realistic" claim or expresses normative criticism.<sup>88</sup> The appeal to a film is made because it presents a hypothetical story from which it is possible to draw certain assumptions or positions

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<sup>83</sup> For example, cinema portrays a brighter picture by casting women and members of minority groups as enjoying full and equal membership in the profession. See Greenfield, Osborn, Robson, *supra* note 23, at 117-139.

<sup>84</sup> 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). Judge Scalia states that "... it is the function of the courts to provide relief, not hope". (paragraph V).

<sup>85</sup> Hila Keren, and Kathy Abrams, *Law in the Cultivation of Hope*, Forthcoming in California Law Review (2006).

<sup>86</sup> See John Jay Osborn, Jr., *Atticus Finch – The End of Honor*, 30 U.S.F. L. REV. 1139 (1996); Tonja Haddad, *Silver Tongue on the Silver Screen: Legal Ethics in the Movies*, 24 NOVA L. REV. 672 (2000).

<sup>87</sup> Chase, *supra* note 31, 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.

<sup>88</sup> 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 also Sullivan, *supra* note 73, at 668; Silbey, *supra* note 31, at 152-158; Greenfield, Osborn, Robson, *supra* note 23, at 55-84.

that are relevant to the clarification of certain points in legal theory. The film serves as a theoretical statement; a statement not in a full verbal form, nor written using analytical or professional terms, but rather embodied in an artistic expression. 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.<sup>89</sup>

Another recurring theme in the methodological use of cinema in law 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.<sup>90</sup> We are therefore able to discuss normative criticism as it was expressed at a certain period towards a certain statute (or a certain doctrine), as we can discuss the representation of social reality at 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.<sup>91</sup> *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 or the law in general or legal proceedings, etc.) during that period, obviously with the support of other sources to verify the claim. 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. Again, *To Kill a Mocking Bird* reflects back on the 20's. We can thus examine how

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<sup>89</sup> For example, the movie "Death and the maiden" (Roman Polanski – director, 1994), analyzed in Kamir's book (*supra* note 70, 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 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 being "punished," or end up paying a price, for their actions, including their desire to achieve justice.

<sup>90</sup> ROBERT A. ROSENSTONE, VISIONS OF THE PAST – THE CHALLENGE OF FILM TO OUR IDEA OF HISTORY 194-195 (1995).

<sup>91</sup> 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 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's Administration), "Clinton films," but also talk about September 11<sup>th</sup> films, Watergate films, etc. This allows not only the study of the affect political events had on the cinema, but equally, if not more interesting, we can analyze films as political events that broadcast and consolidate ideological concepts.

the 20's were considered in the 60's. Similarly, the Westerns 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 Westerns as representations of the period in which they were made, as well as representing perceptions regarding the period during which the plot is situated.

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. 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). It seems natural to turn to cinema for claims about different popular or cultural understandings of a legal doctrine, a legal institution (its power, its limitations) or law in general. We can also compare how native films (or cases) are perceived by foreign jurisdictions. Consequently, hypotheses or speculations can be put forwarded 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 context-specific if the manner in which the problems are raised time or culture-sensitive. For example, some of the arguments raised by *Rashomon* are not limited to a historical period (even if an understanding of the historical-political background certainly does illuminate important aspects of this film). Our ability to understand reality is limited today in the U.S. and was limited in the 1950s in Japan as it was limited in the 13<sup>th</sup> 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 – different technology to determine "the truth" – or had it been situated in France or in Canada. At the very least, had the film been made today, the cinematic artifact would have been different, since the reference to the cultural and legal materials would have been different. 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 in inquiring into the truth.

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 film. Is it important for us to choose a legally-oriented film, namely a film that presents legal proceedings?<sup>92</sup> 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 draw the analysis to the social issues that are regulated by the law or to the legal proceedings that should govern, given the unstated assumptions in the film about law and the legal process? In justifying our choice we shall need, it seems, to refer also to the issue of genre: what is considered a "law film"? Take *Rashomon* again, 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 rather helps us to better expose elements present in conventional criminal procedure?

b) *Methodological Example: Interpreting Rashomon*

As mentioned above, a common strand in the law and cinema discourse focuses on a particular film to advance certain hypothetical claims pertaining to "law". To illustrate this move – after all, how could there be discussion of law and cinema without an analysis of a film – this section will focus on *Rashomon*. The point of the example is not only to demonstrate how interpreting a certain movie may tell us something about matters relevant to law and the legal process, in this case, to the law of evidence. Rather, it is to suggest that it may also tell us something about interpretation itself. Interpreting a film allows us to treat the processes of interpretation in the abstract – and ask theoretical questions such as "what is interpretation?" and "is interpretation practice-specific?" In that respect, interpretation is approached as a "structural" element. Yet the discussion may also allow us to examine the methodologies of interpretation, an examination that can be useful both in law and cinema. It is with the latter in mind that *Rashomon* is approached.

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<sup>92</sup> For an outline of the law and cinema scholarship focusing on that which defines "law films," see Greenfield, Osborn, Robson, *supra* note 23, at 14-24. In their opinion on page 24: "...law films are always concerned with the enforcement of justice in some shape or form and that is a crucial starting point."

*Rashomon* presents four different accounts of what appears as rape and murder. Yet each account contradicts the others so as to preclude the ability to ascertain whether in fact the death that occurred was murder and the sex that took place falls under the definition of rape (at least as it was understood then). The film stresses the inherent, and to an extent unsolvable, problems involved in the determination of facts, and consequently in establishing guilt. The film's great achievement, in highlighting our questioned ability to grasp, record, and later recount the reality around us, has also earned it a fair amount of criticism. For example, it was claimed that the film is "sterile", in the sense that it does not deal with the question "So what are we supposed to do with that in the legal realm?" If we are unable to know what the truth is – or if perhaps there is no such thing as truth at all – how are we supposed to deal with acts of injustice? Obviously, in our world there are unjust occurrences. Acts of rape occur. Acts of murder occur. Does the film claim that because we can never know what exactly happened, we should give up the legal practices as we know them? Doesn't the director's choice to leave us devoid of knowledge of what happened prevent us from being able to condemn the particular injustice that was carried out, while hiding behind the mask of reasonable doubt?

One interpretative approach that addresses this concern is to view the situation described in *Rashomon* as an exception, rather than as the rule; in legal parlance – a sport. We can call this "interpretative exclusion": the case is an exception and thus should be isolated to its circumstances, thereby affirming the norm. Should we in fact encounter a situation in which it is impossible to cross-check the evidence or testimonies, a case in which each witness utter "statements against their own interest" and insist on pleading guilty, and moreover, a case in which we encounter an apparition from the beyond, then the law must come to a conclusion that there is reasonable doubt, and in this situation it must avoid a conviction. By making an exception of the events described in *Rashomon* we strengthen the accepted practice, according to which criminal law enables conviction when it is possible to establish a set of facts beyond reasonable doubt.

Some might regard such an exception as a type of xiatic interpretation: an interpretation which focuses not on the resolution – the manner in which the events arrive at a conclusion – but rather regards the high point of the film in its middle (the

place where the arms of the X intersect).<sup>93</sup> According to this approach, the manner in which the film ends – the chosen arm of the X – is marginal, because the focus is found in the dilemma as it solidifies at the center of the film (from the aspect of the plot's development). According to this approach, the film *Rashomon* stresses the importance of conducting a thorough legal process to determine the truth, whether or not the proceedings will lead to such a truth, because the alternative to the legal process, as it is clarified in the middle of the film (plot-wise and time-wise), is an anarchic situation in which faith in human beings is entirely lost.<sup>94</sup>

Another interpretative alternative is to view *Rashomon* as making a provocative tactical statement intended to curb the judgmental instinct that is inherent in each of us, and that we apply, as *Rashomon* possibly claims, too swiftly. According to this interpretation, *Rashomon* claims that it is not possible to judge not because it *really* isn't possible to judge, but rather as a certain preventive measure for our tendency to be overly-judgmental. This is a tactical move intended to correct our manner of behaving. While it is unlikely that we will accept the extreme position that is presented in *Rashomon*, we may nonetheless end up adopting a more modest position, that accepts the possibility and the need to use our judgment, including judgment of facts, yet recognizes the need to do so with greater humility, given our epistemological limitations; we are not divine nor are we infallible. In order to lead us towards that attitude, the film makes a stronger case, as a means to prompt us to re-evaluate our position.

A third possible interpretation of *Rashomon* weakens the statement the film makes. Not "there is no truth", not "we are not epistemologically capable as humans, of perceiving the truth", but rather "truth is really difficult to ascertain". Determining the truth is so difficult because as humans we are exposed to biases that affect the

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<sup>93</sup> The Chiastic interpretative approach was developed in a Christian religious script. See WAYNE BROUWER, *THE DEVELOPMENT OF JOHN 13-17: A CHIASTIC READING* (2000).

<sup>94</sup> Applying chiastic interpretation to the movie "Death and the Maiden" will lead, as one would expect, to a totally different conclusion than an interpretation that focused on the end. Whether or not we eventually discover if the doctor committed the crimes, the movie becomes one that deals with the tensions on two levels: commitment to the family vs. commitment to the rule of law, and commitment to the wellbeing (and healing) of the community vs. commitment to (historical) justice. The cinematic end, in which it is revealed that the doctor did commit the actions, is but one possible arm of the 'x', but this arm is coincidental and should not influence our normative evaluation of the clash any more than the other arm, left un-pursued.

manner in which we remember and describe reality.<sup>95</sup> The film presents a situation in which the characters tend to absorb, understand, and interpret their surroundings according (at least partially) to their own personality makeup. They project, (whether consciously or unconsciously), their own traits onto the outside world (or more accurately, onto their understanding of it, and later onto their representation of it). According to this interpretation of the movie, we should all be aware of the biases that operate as part of truth-gathering faculties, and attempt – the best we can – to offset these biases.

Finally, another interpretative move available to us is to focus on the events that occurred after the truth-finding process (which did not lead to any determinative answer) was over. Indeed, the judicial proceeding (in its broadest sense) cannot lead to a remedy in certain situations (whether many or few). But should we therefore accept a relativistic perception as if factual or moral judgments are impossible? Apparently, the film holds up a decisive position against such an approach. It is indeed possible that events that happened in the past are not accessible to us, because our memory isn't fully reliable and we tend to remember things inaccurately; therefore adjudicative mistakes in certain cases are possible. But ultimately, the film demonstrates that as far as present events are concerned, we are capable of understanding the reality that surrounds us well enough.<sup>96</sup> Furthermore: while obstacles that stem from an individual perspective are inevitable as far as understanding the facts that happened to us, when it comes to the normative sphere we are equipped with adequate instruments that enable us to distinguish between good and evil quite reliably. Good and evil, the film claims, are not purely subjective, but

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<sup>95</sup> Careful observers have probably noticed that the various descriptions of the events which are the basis of *Rashomon* are not randomly different, but instead, there is some correlation between the personality of the witness and the reported story. The fiery robber comprehends his environment as violent and aggressive. Such appreciation provides for conduct codes that are based on heroic struggle. The fourth and last man witness is a rather reluctant person, who refuses to participate in the judicial procedure out of his wish to avoid bureaucracies and spare himself possible complication. He is basically risk averse, if not down-right afraid. According to the latter's description of the events, the other characters are equally hesitant.

<sup>96</sup> Indeed, we don't know – and probably won't know for sure – why a baby was abandoned in the Japanese temple, but still, the three characters were facing a helpless baby. The men who found a shelter from the rain were thus forced to form a position towards the baby. Should they ignore it since it's not their problem? Should they take his clothes since they have to take care of themselves and their families first? Should they adopt the baby and provide it with a caring home? In that context, the film is romantic: the selfish position it rejected outright.



are inter-subjective<sup>97</sup> if not fully objective. When we come to make our forward-looking choices, order returns to its proper place (harmony is restored, faith in humanity is renewed) once we choose to help those in need (thereby promoting the common good).

These possible explanations of the movie have a potential of enriching our understanding not only of the movie, but of the possible interpretative moves available in cinema and in law; they may also suggest something about social life or the human condition. Although law and cinema interpret reality and structure reality – including normative reality – differently, sometimes it is specifically the differences that enable us to learn about the methodologies of each practice.<sup>98</sup>

c) *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. 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.<sup>99</sup> Intellectual property rights, distribution agreements, age restrictions, 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.<sup>100</sup> The cultural

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<sup>97</sup> See, e.g., Donald Davidson, *SUBJECTIVE, INTERSUBJECTIVE, OBJECTIVE* (2001), esp. chapter 9.

<sup>98</sup> Greenfield, Osborn, Robson, *supra* note 23, at 24-25.

<sup>99</sup> By providing First Amendment protection, the constitution isolates the creative process from direct governmental interference. Yet First Amendment may clash with other constitutional rights, including the fundamental right for property. Sometimes, a compelling state interest may appear. And clearly the issue of classification is alive: is it political speech, worthy of full protection, or mainly commercial speech? Law regulates art by defining its boarder and by allowing private actors and governmental actors to control the distribution of art. In that respect, the regulation is “negative” in the sense that there is no duty to create, nor is there an entitlement that the government provides access to the creative process.

<sup>100</sup> 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* (2000) play leading roles in presenting different concepts regarding “who owns main street,” namely the production of culture. The influence of the lawyer behind scenes is of no small importance. Spielberg, the director of *Amistad*, was sued for copyright violation: <http://www.libraryjournal.com/article/CA155648>. Because the terms of settlement remained undisclosed, we cannot estimate what influence the law suit had on the film itself: ([www.libraryjournal.com/article/CA155700](http://www.libraryjournal.com/article/CA155700)). See also [www.courttv.com/trials/amistad](http://www.courttv.com/trials/amistad). In order to receive an R rating rather than an NA-17, one scene in Kubrik's film “*Eyes Wide Shut*,” was altered digitally by blurring masculine sexual organs (for critique, see [http://www.suntimes.com/ebert\\_reviews/1999/07/071601.html](http://www.suntimes.com/ebert_reviews/1999/07/071601.html)). As noted by 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 23, at 329.

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 regulating system of legal rules, including the regulation of economic structure of the industry.<sup>101</sup> The legal 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.<sup>102</sup> 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.

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 (the role of the legal process, of the lawyers, judges, jury<sup>103</sup> or of a specific doctrine). Is the director justified or not in the legal claims contained in the film or in her approach to the law in general? Is the story that is brought up in the film reliable from a legal

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<sup>101</sup> It is difficult to imagine the film industry without copyright law and IP 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).

<sup>102</sup> 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," (Kirby Dick – director, 2006). For a brief historical review of U.S. practices, see MICHAEL ASIMOW & SHANON MADER, *LAW AND POPULAR CULTURE: A COURSE BOOK*, 22-24 (2004). For an attempt to exercise film censorship in the US – overturned by the judiciary – see the case of the *Last Temptation of Christ*: AP, *Judge Overturns Ban on Film*, N. Y. Times, Sept 11, 1988. It should be noted that screening of that film in Europe resulted in fierce clashes. 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, November 1, 1988.

<sup>103</sup> Concerning American law and cinema, for example, the jury phenomenon attracts considerable attention. Audiences are compared to members of a jury who are requested to determine a certain matter, as if they themselves were the 12 Angry Men. (*12 Angry Man*, Lumet, 1957). See, e.g., Carol J. Clover, *Movie Juries*, 48 DEPAUL L. REV. 389 (1998).

perspective as one of the criteria for evaluating the "quality" of the film? This could tell 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): Are 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(s)?

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's claim, such an ending "is more satisfactory";<sup>104</sup> but it could be argued that at least legally it is not persuasive.<sup>105</sup> To this we could add that it is not clear how it could be possible to reconcile the process which led to the "confession" with the requirements of due process that govern criminal proceedings.<sup>106</sup> It seems that this perspective – an examination of the plot, including the rhetorical devices used from a legal perspective,

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<sup>104</sup> Others, it seem, 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: "and what would you do in this situation?" 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 70), and some were even 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 a the real-life dilemma associated with fact finding.

<sup>105</sup> Kamir, *supra* note 70, at 210-211.

<sup>106</sup> Perhaps, this is the exact interpretive conclusion called for: 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 the conviction of the innocent is more severe than acquittal of the guilty entails that even if non-orthodox evidence is admitted, the above tension is not fully resolved.

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 accepted legal framework narratives.

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 some things about the limitations of the cinema in comparison with those of other practices, such as the law. For example, it could be that the key to some genres in the cinema, 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; looking solely at cinema to understand culture, then, is just as partial as looking solely at law.

As part of the family of arguments that focus on law and the cinema as methodological tools, 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 handed in a certain way. The conclusions from such a quantitative statistical analysis could indicate parallel patterns within legal and cinematic practices. Further cross references could be made with enforcement records; for example the number of cases that were reported to the authorities on a given issue could be correlated with their occurrence in the cinema and in actual legal proceedings, all as part of the study of the possible cross-relations between the practices. 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 challenge 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.

#### **D. 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 still in its initial stage of development. Nonetheless, I have tried to show that the discourse is rich enough to motivate us to outline classes of arguments as they take shape, as well as to outline their methodological and other limitations

Although the law and cinema discourse is still in its infancy, already at this stage it is possible to say that regarding a film as something "simple" is inaccurate, at least when we are considering films that contain an "idea."<sup>107</sup> It would be similarly inaccurate to ascribe to cinema a role or status it does not possess in society by treating it as if it was identical to law. The legal system, with its concepts, values and institutions, is not a "film" (just as a film is not "law" in the formal sense). 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 such or such a film or attaching an analysis of a film to a legal or moral statement of one type or another<sup>108</sup> are liable to 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.<sup>109</sup>

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<sup>107</sup> JACK C. ELLIS, A HISTORY OF FILM 1 (1979).

<sup>108</sup> Specifically the influence of cinema (and other creations of art) on politics, is interesting. The actor Ronald Reagan used to interweave lines from films in his speeches. Recently, the influence of the show business on politics was analyzed in Frank Rich's book. FRANK RICH, THE GREATEST STORY EVER SOLD: THE DECLINE AND FALL OF TRUTH (2006).

<sup>109</sup> See also Richard K. Sherwin, *Nomos and Cinema*, 48 UCLA L. REV. 1519 (2001).

Since law operates within a certain legal culture,<sup>110</sup> and since culture is broader than the written word, it seems a comprehensive study of law should entail paying attention to law's aesthetic aspects. Although law is not just about appearance, appearance is an element of the law.<sup>111</sup> 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.<sup>112</sup> 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 essay to fully develop the argument – and certainly not as part of the conclusion -- 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. In any event, it may very well be that as long as this 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.

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<sup>110</sup> “By Legal Culture I mean nothing more than the ‘ideas, attitudes, values, and opinions about law held by people in a society’.” Lawrence M. Friedman, *Popular Legal Culture: Law, Lawyers and Popular Culture*, 98 YALE L. J. 1579 (1989).

<sup>111</sup> Sherwin, *supra* note 70.

<sup>112</sup> For possible future developments in the law and cinema field, see Greenfield, Osborn, Robson *supra* note 23, at 189-203.