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What is This?

Abstract
This commentary takes a new look at law and film studies through the lens of film as memory. Instead of describing film as evidence and foreordaining its role in truth-seeking processes, it thinks instead of film as individual, institutional and cultural memory, placing it squarely within the realm of contestability. Paralleling film genres, the commentary imagines four forms of memory that film could embody: memorabilia (cinéma vérité), memoirs (autobiographical and biographical film), ceremonial memorials (narrative film monuments of a life, person or institution), and mythic memory (dramatic fictional film). Imagining film as memory resituates film’s role in law (procedural, substantive and cultural) as authoritative rhetoric that must be disputed and reappropriated to serve the specific goals of justice.

Keywords
Law and film, law and literature, memory, evidence, cultural analysis of law, film, criminal law

Popular cinema was born in 1895 in France. The first public showing of a film to a theater audience was the Lumière brothers’ film called L’Arrivée d’un Train en Gare (The Arrival of a Train in the Station). This film shows a train arriving at a station, growing larger and larger on the screen as the train drew closer and closer to the station. The by-now mythic story is that when this short film was shown to the first film audience at the Grand Café in Paris, the audience screamed and ran from the theater, afraid the train would run them down.1 Unaccustomed to the illusion of reality in motion that film creates, the audience members feared for their lives and never saw the end of the film.2


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With the Lumière brothers' success and the development of these "actuality films," film's capacity to represent lived experience with unparalleled veracity became part of its pleasurable thrills. The film genres that followed - early narrative film, documentaries and pseudo-documentaries, film noir, and Classical Hollywood - would build on film's essential mimetic qualities to tell compelling stories and to constitute a rich and energized popular culture of moving images.

The "myth of total cinema," as André Bazin called it, was that film appears to reproduce reality in front of a viewer's eyes. Film makes spectators feel as though they are witnessing the event or object as it existed when filmed.

The guiding myth, then, inspiring the invention of cinema, is the accomplishment of that which dominated in a more or less vague fashion all the techniques of the mechanical reproduction of reality in the nineteenth century, from photography to the phonograph, namely an integral realism, a recreation of the world in its own image, an image unburdened by the freedom of interpretation of the artists or the reversibility of time.

It is, of course, not true that film alone most closely represents reality. Realist painting, documentary photography, theatrical drama, and the nineteenth century novel were all aesthetic forms that, at the time, drew popular fascination and awe for their mimeticism. Sometimes, still, controversies arise when customary expectations for truth in representation are frustrated: when journalistic photographs are doctored and novels purporting to be memoirs are later discovered to be fictionalized. We are generally tolerant of ambiguity in representational forms, however, even those making referential claims, such as film and written histories. Debates circulate in mainstream press and scholarship about the interpretation of historic documents and the veracity of documentary films. But when it comes to law and the adversarial courtroom trial in particular - the trial being the quintessential truth-telling mechanism of our modern society - film stands alone as a communicative medium that in the law remains naively unquestioned for its strategic storytelling and representational ambiguities.

I have written elsewhere how the American trial and the art of cinema share certain epistemological tendencies. Both stake claims to an authoritative form of knowledge based on the indubitable quality of observable phenomena and both are preoccupied (sometimes to the point of self-defeat) with sustaining the authority that underlies the knowledge they produce through visual perception. The American trial and art of cinema also increasingly share cultural space. Although the trial film (otherwise known as the courtroom drama) is as old as the medium of film, the recent spate of popular trial films, be they fictional such as Runaway Jury or documentary such as Capturing the Friedmans, suggests more than a trend. It suggests an inherent affinity between law and film.

The affinity of law and film lies in their mutual manufacture of truth through strategies of representation and storytelling and also in the power of these truth claims to structure and regulate social relations. Film, no less than law, changes our perceptions of reality; it shapes our understanding of the world. The power of both film and law derives at first from the intensity of the personal faith in believing what we see (bearing witness and judging based on the act of witnessing). Also, both film and law bolster their authority with a common storytelling feature that reflects on the limits of their authoritative endeavor. Early film masters taught that film in large part constructs a world and


13. Id.


18. Id.
experience by exposing its story-telling mechanisms that play on the hermeneutics of sight. In this way, the power and influence of film derives from its self-reflexive, often self-critical, qualities. By exposing the ways in which cinema is just another form of storytelling, film’s self-critique is experienced as empowering the audience to be better judges of visual stories, to stand apart from the film and question the images it projects. Presented with the singular story on film, but also with the critical perspective to evaluate its delivery, the audience experiences the film version of the story as self-reflexive and therefore uniquely credible.

We recognize this same dynamic in law and its processes regarding the relationship between evidence and judgment. As with film, the trial process is based on the believability of observable phenomena: on seeing, bearing witness and judging. Much like stories told through film, the story that evolves in a courtroom and through the evidentiary process is emboldened with the privileged status of truth because of its basis in observation. Like film language, legal processes are self-reflexive and recursive in nature. By reflecting on the possibility of multiple and conflicting stories (the essence of the trial) and asking jurors to judge those stories, or by exposing legal judgments to appeal and citing those judgments as precedents, laws exposes its own recursive story-telling mechanism and reflects on the difficulty of claiming certain knowledge. The legal process nevertheless concludes with judgment that is both authoritative and (most) backed by popular belief. In this way, as with film, the legal trial sustains the knowledge it produces (the “knowledge” of guilt or innocence, for example) with the authority of self-critique, such that the trial’s outcome (as with the filmic version) is often perceived as the most persuasive account of “what happened.”

Consider the irony, here. Although both film and law rely on the incontrovertibility of observation – persuasive visions – to tell stories, these stories manage to convince their addressees that no story is undeniable. At the same time, the overwhelming influence of both film and law in our culture is to tell (or manufacture) the definitive story.

The courtroom and the trial film nexus goes deeper than the epistemological ties of seeing and knowing and the ontological ties of seeing and believing. The legitimacy of the courtroom trial is in large part based on its visibility and transparency to the public. “It is in this context that the maxim that ‘justice must be seen in order to be done’ becomes relevant. The visibility of justice in a court of law enhances the legitimacy of the act of judgment … performed.” Justice can be “seen” through concrete embodiments of the abstract concepts of fairness, empathy, rationality and openness. Recent scholarship on courthouse architecture and the popular culture of law (including television and literary analyses) complement law and film scholarship that investigates the public manner in which trial law and trial films mutually reinforce each other’s legitimacy in their storytelling. As Feigenson and Spiesel describe, the democratic nature of images today induces a comfortable and intuitive judgment about an image’s meaning, persuading a large audience of its claims, which may be nonetheless misleading. “To the extent that difficult problems of judgment can be pictured – that is, translated into visual descriptions, diagrams, or both – those judgments seem to become more tractable, even effortless.” The reliance on faith in images to influence and render justice grows ever stronger with the digital revolution, which feels even more open and democratic than in any past era. With the rule of law spreading throughout the world as the paramount justice-rendering system and images developing as the language that speaks most efficiently to the largest audience, the “co-implication” (to use Alison Young’s phrase) of legal and filmic claims appears inevitable.

20. The quintessential early example is Georges Melies’ 1903 film The Magic Lantern, a story on film about how film tells stories. The Magic Lantern purports to tell the history of Western dramatic art, showing first a landscape painting, then a play, and then an image of the newly developed moving pictures. Film, Melies taught, is no more than the next step in the evolution of cultural (and largely fictional) forms; Melies also taught that film’s self-reflexive qualities – exposing the audience to the film’s own ways of worldmaking and thereby involving the audience in the illusions created – is central to film’s authoritative claim. Melies’ point was to show how film does not reveal the world, but constructs it. Silvey, “Judges as Film Critics,” pp. 536-7.


24. Id.

25. Id. (citing for a more systematic history of the “visibility” and performative nature of law).


29. Id. at 18.

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One of my on-going projects has been to situate this “co-implication” within various legal postures and film genres – film evidence and documentaries (evidence verité), filmed confessions and autobiographical film, popular legal consciousness and fictional films about law.31 Increasingly, film is used as a legal tool to enhance policing and investigations (e.g., surveillance cameras, filmed crime scenes, interrogations).32 Film is also used as a species of legal advocacy to augment trial tactics (e.g., opening and closing statements),33 settlement conferences, penalty phases and administrative hearings (e.g., victim impact films, clemency videos).34 The interdisciplinary study of law and film connects the understanding of film as a complex visual rhetoric with the practice of law as an authoritative and forceful social ordering mechanism.

In this commentary, I reframe the above observations about film and law and experiment with a new perspective on this developing interdisciplinary. Instead of describing film as evidence and foregrounding its role in truth-seeking processes, what if we think instead of film as individual, institutional and cultural memory, placing it squarely within the realm of contestability?

I. Film and Memory

Memories are radically unstable. Knowing as much, we fix them personally and institutionally: in diaries, correspondences, to-do lists, family photographs, historiographies, memoirs, meeting minutes, administrative records, organizational files. Memories must be fixed to exist as reliable records (be they personal records or institutional ones) given that we rely on memories as indices of experiential truth for self-definition and socio-political organization. But as we remember people and events – as we fix the memories to be recalled later – we inevitably reconstruct both; the memories of people and events are necessarily rewritten. Memories are always already re-visions of a past.

This revisioning of memory is everywhere once we look. Memories are most obviously fixed in histories and memoirs, in written text. But they are also fixed in memorials such as physical statues or performed gatherings that conjure a life and an identity for

celebration today and the future. Memories are also fixed as memorabilia, collections of ticket stubs, photographs, wine corks, baseball cards. Collections of memorabilia are less self-consciously constructed than are public memorials but they are similarly tied to personal and situational identity and experience.35 As we pursue memoirs, memorials and memorabilia, events of the past return to the present in pieces and as partial. The aspects that are fixed become the parts that are remembered. Memories are revisioned and the fixed statue or collection becomes the embodiment of the memory. Thought to preserve his memory in some platonic form (like Hume’s idea of memory as a copy of an original experience)36 memorials and memorabilia are better understood as refashioning events and people (of the past) for the present and future.38

Film is reconstituted and revised memory. It is easily misunderstood as capturing a past in a way similar to memoirs, memorials or memorabilia. But like these traditional memory forms, film that is made in the past is necessarily of the present. It is a paradoxical living memory that emerges in present time.39 The theoretical literature on the embodiment of memory in objects generally, or photographs specifically, teaches us that “memory does reside in a photograph … so much as it is produced by it. The camera image is a technology of memory, a mechanism through which one can construct the past and situate it in the present. Images have the capacity to create, interfere with, and trouble the memories we hold as individuals and as a nation.”40 This is true of visuality generally – it is how we literally see (we construct it before our eyes).41 And it is true of moving images (film), which are both reflections of events past and constructions of present understandings and consciousness. Film scholarship describes ways in which film makes meaning by involving its audience42 and in so doing constitutes spectators and establishes spectatorship.43 It can also turn an everyday moment

31. Silbey, “Evidence Verité and the Law of Film”;
32. Silbey, “FILMMAKING IN THE PRECINCT HOUSE”;
33. Silbey, “Judges as Film Critics.”
34. Silbey, “CROSS-EXAMINING FILM”;
35. Silbey, “CRIMINAL PERFORMANCES”;
36. Silbey, “Patterns of Courtroom Justice.”
37. Silbey, “Criminal Performances,” p. 218;
41. See also University of Pennsylvania Program on Documentary and the Law at http://www.law.upenn.edu/academics/institutes/documentaries/.
42. Austin, “The Next ‘New Wave.’”
43. Silbey, “Cross-Examining Film”; Silbey, “FILMMAKING IN THE PRECINCT HOUSE”; Silbey, “Judges as Film Critics.”
44. Silbey, “CROSS-EXAMINING FILM”;
45. Silbey, “CRIMINAL PERFORMANCES”;
46. Silbey, “Patterns of Courtroom Justice.”
47. Silbey, “Criminal Performances,” p. 218;
(a "day in the life") into a historic event (a "trial of the century"). Film is a memory agent, a representational and relational experience relying on our dominant senses to recall, reconstruct and even implant familiarity and understanding of past stories (whether or not actual, whether or not personally experienced) in its present audience. Film is such a powerful memory agent that it is common error to mistake the memory of a film with the memory of a lived or reported experience of the past. Indeed, some scientists posit that viewing moving images may imprint in our brains in ways so similar to lived experience they are easily conflated.

Film genres resemble memory forms in at least these four ways. Like memorabilia and collectibles, film memory may be unconscious and episodic, marking the exact place and time of past details or an event. This kind of film memorabilia – evidence verité (e.g., surveillance and crime scene footage) – lacks context and richer significance. Like memorabilia and collectibles, evidence verité requires a present narration to render it meaningful.

Like written memoirs or correspondences, film memory may also be self-conscious, truthful and constructed. Filmed interrogations and confessions are like biographical and autobiographical memory. They recall parts of the past (episodes and emotions) for the purpose of reconstituting an identity and a life for the future.

Like ceremonial memories that are marked with a tangible keepsake (such as a monument or a memento), films can be memorials as well. They can become the repository of a person or event that has the integrity of historic truth but is nonetheless filtered and framed by the present ceremonial situation. Victim impact films and day-in-the-life films are examples of these kinds of film memorials. These film memorials aim to demonstrate the alteration of someone’s reality by tragedy. They bring the memory of the person or event into a new context – the courtroom – for a reckoning of the goal of which is to reshape (or revive) a life, reputation or identity.

Finally, film, like memory, can be mythic. Mythic memory is rooted in lived experience but tends to be unstable in meaning and grandiose in its significance. Fictional filmic renderings of law – dramatic courtroom scenes, heroic Hollywood lawyers – are present in formal legal proceedings as memories of past film stories. They are raw cultural material that people bring into a legal situation and that influence their expectations of and hopes for the law. This mythic memory is law’s popular consciousness.

Briefly in what follows, I discuss these four kinds of film memory in light of specific films and provide a context for understanding their relationship to law and justice. Some film examples will relate directly to law as episodic and indexical memory that requires narration to discern a putative message. Other examples will relate more broadly to law as a cultural domain: semantic and symbolic in form and content, but also in need of interpretation and analysis to connect the cultural memes to a broader message about law in society.

Together these film forms span the history-memory spectrum, from institutional and verifiable representations of the past to individual and idiosyncratic renderings of lived experience to recreations of fabled stories with roots in American culture. Many film memories will be all of these things. All are "legal" broadly construed, contributing to the pursuit of justice through the rule of law as based on visual renderings of the past – memories illuminated – that demand an accounting today.

II. Film Memory

I Film Memorabilia

Police surveillance footage (of detainment and arrests) is one form of evidence verité, film that parrots to be unmediated and unselfconscious footage of actual events. On an evening in March 2003, in Shreveport, Louisiana, one such event was recorded by three separate dash-cameras after a short pursuit by Shreveport Police. The cameras were mounted on the police cruisers.

The film of the first police car to arrive at the scene shows the police following another car into a parking lot, the suspect crossing the path of the police car, and the police getting out of the car with their guns drawn. Two police officers yell for the suspect (later identified at Marquise Hudspeth) to stop and put his hands up. Hudspeth continues to walk away from the police officers. The police officers continue shouting and, after Hudspeth refuses to follow orders, the police officers shoot him in the back and he falls to the ground. Parts of the film described herein can be seen on-line.

The second film shows very little. It was taken from a parked police car that was not positioned opportunistically to film the event. The third film has no sound, but is better angled to see more of the altercation than the second film. The third film looks almost

45. Thomas Elsaesser and Malte Hagener, Film Theory: An Introduction Through the Senses (New York: Routledge, 2010) (building on a diverse range of film theory from Europe and the United States to develop a course in film aesthetics built around most of the cases).
50. Clips from the three scenes of the film are available on YouTube here: http://www.youtube.com/watch?v=YGnHqGvpejk (last visited April 5, 2011). The film is subtitled by the blog poster and the second film is slowed down to highlight gun fire. I make no claim about the subtitles here or the opinion taken by the poster of these clips. The film clips that I received were from one of the experts in the law suit and were the official films of record. My film clips are the same as the ones posted at the YouTube link above, except for the variance in sound and the subtitles. Anyone interested in a copy of the films in my possession, please email me at julibey@suffolk.edu.
like the first film except for two critical differences. When the police officers get out of their cars and follow Hudspeth, the film shows him turn around and wave something metallic at the police officers who are behind him. Hudspeth appears to be holding the metallic object with two hands. Hudspeth then turns around and continues to walk away from the police. When the police officers follow him, the film shows Hudspeth again threaten to raise his fist hand that is holding an unidentified object and wave it in the police officers’ direction. It is then that the police officers shoot him in the back and he falls to the ground.

These films are of an event that transpired so quickly the police officers involved could not say under oath exactly what happened from moment to moment. They remember only bits and pieces of the actions of each of the relevant parties. They did testify, however, that they believed they were justified in their use of lethal force. The two films together form a coherent story of the event in question despite the police officers being unable to remember or testify to all the details contained in each of the films. The films serve as surrogate memory—objects that conjure facts otherwise lost to the passing of time and the clutter of events experienced. Like a ticket stub that says “I attended this ball game” (even if I can’t remember much of it) or a photograph that shows that I sat near home plate, these films authoritatively testify to certain particulars about the event in question whether or not the police officers can.51

The police officers justified their use of lethal force in this case by asserting their belief that Hudspeth was waving a gun at them. Simply asserting this belief is not—nor was it—as persuasive as watching the film of Hudspeth waving a metallic object at the police officers after resisting arrest. In comparing the two films—one revealing a held metallic object, the other silent on this fact—the court and viewers can “see for themselves” the likelihood that the suspect was concealing something from the officers that gave rise to their claim of reasonable fear that their lives were in danger while attempting to detain Hudspeth.52

Hudspeth, who died, was carrying a cell phone. This evidence verité—actual and truthful footage of the event—does not lie. But it also does not tell the whole story. It might not even tell the legally relevant story: whether the police officers had to shoot this suspect dead to protect themselves from what they thought was imminent danger but turned out to be harmless. In Hayden White’s words, these films are chronicles that must be explained through narration, here a story of fear and justification.53 Alone—and not together—the films leave us with more questions than answers. Why shoot to kill? What happened before this? Who are these police officers and what was their training and experience? These films demand explanation, which the police officers and the attorney will provide in order to render them meaningful in the context of the deceased’s police brutality claim. Chronicals such as these are a collection of isolated

51. This is sometimes called the “silent witness” theory in evidence law. See Silbey, “Judges as Film Critics,” p. 519 and note 115.
52. Silbey, “Cross-Examining Film,” pp. 17–19 (describing U.S. Supreme Court decision based on watching film and “seeing with own eyes” the event in question).

facts from the past, fixed details that float without anchor in the history (or histories) of which they are a part.

These two police films were used at trial to demonstrate and illustrate police testimony about the night in question. In this capacity, these films are not themselves memories, as in a record of consciousness, but they become memories, as in an appropriation of a record of facts from the past in service to a present judgment warranting the trustworthiness of a witness. These films as facts were given purpose, which is one way that memories work. We don’t conjure facts from the past except for a reason, usually to put them in a story for the present. These films, while episodic and unself-conscious (purposeless on their face, without intent or message except to record) become purposeful in the context of justifying the state’s use of lethal force.54

2 Film Memoirs

Filmed confessions are like autobiographical memoirs. Police around the country film interrogations and criminal confessions for many reasons.55 One reason is to have a record of the interrogation and confession in order to demonstrate that the confession was voluntary and truthful. Another reason is to provide an external check on police conduct. Recording the event ostensibly keeps police honest and prevents misconduct in the interviewing room.

Filmed confessions, like filmed autobiographies, are complex constructions of a person’s present identity based on his retelling of past actions.56 The simple disclosure of facts from the past is rarely the reason for the confession. Usually, the retelling (the autobiographical memoir) has as its purpose some present pressing constraint, such as an imminent life event or transition.57 We are trained to read autobiographies and memoirs in light of the present context in which they are written and later read. In the criminal confession context, the present context is the custodial situation itself,58 and the later viewing of the filmed confession is for the purposes of prosecutorial negotiation or legal adjudication. The memory that the filmed confession captures or creates, therefore, is not a recollection of past deeds for which the defendant should be judged, but the facts and circumstances of the interrogation process and the discursive situation produced by the act of filming.

54. Silbey, “Filmmaking in the Precinct House,” pp. 121–4 (describing police films as overwhelmingly being used to justify police action rather than as support for defendant’s rights). I am not suggesting here that the plaintiffs could not have used the films to their advantage by telling an alternative story with the same facts in the film. Their story lacked persuasiveness in part, however, because there was no one alive to link the facts of the film to their living memory. The police served that function at trial on behalf of the state.
In 1984, Bernhard Goetz famously confessed to the shooting of four unarmed Black men on a New York subway car. Goetz thought he was about to be beaten and mugged by the four men. He maintained that in order to protect himself, he pulled out a gun and shot them all. Goetz shot one man (Daryl Cabey) twice. Goetz fled the scene, rented a car, and drove to New England. He turned himself in to the police in New Hampshire and, over the course of many hours, he confessed. Despite claiming that he was not going to fight the charges, Goetz eventually pleaded self-defense and was subsequently acquitted at trial on charges of attempted murder and aggravated assault. His filmed confession was key evidence at his trial.

During his confession, Goetz was a highly self-conscious storyteller. The film of Goetz's confession shows his own awareness of (1) the power of film to persuade its viewers and (2) the imaginative capacity of film rhetoric to supplement and frame its indexical content. By repeating phrases and underscoring certain points, Goetz appears to struggle during the interrogation to control the terms on which his confession and the film will shape his identity. This struggle demonstrates Goetz's awareness of the tension between presenting himself as he wants to be understood and as he might otherwise be seen. He very much wants to control his identity in the future by being clear about his message in the film, despite the inherent ambiguity of the film medium that destabilizes meaning about his past.

The film's role in Goetz's trial further demonstrates the instability of film as an evidentiary proffer – a memory that purports to conclusively establish relevant legal facts of the past. The prosecution perceived his filmed confession as conclusive evidence of Goetz's guilt: that he was not justified in his use of deadly force against the four men. Goetz admits on the film that he "cold-bloodedly" shot the four men, one of them a second time after returning and saying "You look alright, have another." But the jurors interviewed after the not-guilty verdict said that the film of the confession was key in reaching an acquittal. The jurors perceived Goetz's persistent statements of guilt (as seen on the film, because he did not testify at trial) as evidence of his own capacity to exaggerate. To the contrary, the prosecutors perceived Goetz's filmed confession as unambiguously demonstrating his culpability. Together, these interpretations demonstrate how a single confession can spawn multiple (and even opposing) narratives of identity, character, and legal subjectivity. The kind of memories autobiographical film produces are diverse and unstable.

Goetz is aware of this instability and calls attention to it with several discursive gestures. For example, while confessing he compulsively reiterates his message of self-defense in hopes that his audience would unambiguously understand his perspective. He also regularly highlights his understanding that he is incriminating himself and that his confession is meant to be official, for the legal record. He says "I want to say a couple things here about the statements that have been made" and "I don't care if I live or die. That should be in my statement." Statements such as these highlight Goetz's role as metanarrator. He is both narrating a story of the crime and narrating the narration. Goetz's self-consciousness exposes the constructed and layered nature of the story being told. If the relevant memory is referenced in the story he tells (that in fact he shot one unarmed man twice; once in cold-blood), the film of his story is a remembering of a memory. Distinguishing these different layers of memories from each other – the story and the story of the story – is important for delineating the purpose of his official statement to the police from its relevance to the legal matter at hand: whether he reasonably feared for his life when he shot the four unarmed men.

The prosecution misses the point that the film's significance is not straightforward. They play the film for the jury and presume it will guarantee a guilty verdict as an unambiguous statement of intended cold-blooded murder. But the jury saw Goetz as a performer, someone who plays for an audience (and maybe not only the police audience in front of him). Goetz says one thing but might be or do another. How do we evaluate a film such as this? Instead of asking the evidentiary question: "Is Goetz accurately recalling the event at issue?" we might ask instead a question about memory: "what does this filmic re-memory warrant? To what does it attest as a statement by and about a person?" Conceiving of this film as memoir – as a present representation with purpose and conceit for its future reception – Goetz's statement of recall as recorded on the film describes less past actions (what happened on the NYC subway) and more Goetz's confessional situation and his aspirations for its future interpretation.

In other words, the accuracy of Goetz's recall (memory) that he said "You look alright, have another" seems less important than his creative storytelling in the interrogation and the fact that he performs for future film audiences. By narrating, editing and highlighting his statements for his future audiences, Goetz shows how the story he tells to the camera may override the fact of his past violence. He recognizes something the prosecutors do not: that his statement on film (authorized by the word "memory" and "confession" in law) effectively re-members or revises (as in re-vision) the significance of his past action.

The jurors' reactions to the film were nearly uniform. They were certain that they knew and understood Goetz from the confessional videotape, so much so that they could know when he was telling the truth on the video (when he said he feared for his life) and when he was telling a lie (when he claimed to shoot Daryl Cabey in cold-blood for a second time). To the jury, the filmed confession was a window onto Goetz's consciousness both at the time he confessed (they believe that he behaved as he did in the interrogation room out of desperation for attention) and also as he contemplated his demise weeks earlier on the subway car. The jurors understood Goetz's confessional act as a form of contested memory, and yet one that authoritatively warrants Goetz's believability. What they missed (although it is hard to know whether it would have made a difference) was the added layer of the film as conduit shaping the confession, how the confession on film was itself a revision of the confession in person, which was a revision of the event remembered.

3 Film Memorials

Video victim impact statements, sometimes called “video scrap books,” are becoming popular as mechanisms through which victims’ families express their outrage and hurt to judges and juries without themselves testifying in court. Video scrap books are also effective tools with which attorneys advocate on behalf of the deceased. Victim impact films serve as memorials to the victim. They are testament to that which will be remembered of the victim and all that was lost by the defendant’s unjustified violence.61

The United States Supreme Court recently denied certiorari in a case concerning the admissibility of a film memorial at the penalty phase of a criminal trial. At the center of Kelly v. California62 was a twenty-two minute film about Sara Weir, a young murder victim. The film was a montage of photographs and home movies featuring Sara, her family, and her friends. Sara’s mother narrates the video, which begins with images of Sara as an infant and ends with photos and videos taken before her death after graduating from high school. The images are played against a musical soundtrack, the haunting and lyrical music of Enya, who was purportedly Sara’s favorite female singer. Readers of this commentary can watch the entirety of the video by visiting the United States Supreme Court website and searching for the case under its media links.63

The case was appealed to the United States Supreme Court from the California Supreme Court, which upheld the admissibility of the film at the penalty phase of the trial of Sara’s murder. The California Supreme Court held that the film was relevant and not overly prejudicial to the sentencing matter to be decided by the court. As to the film’s probity, the California court said:

The videotape ... illustrated the gravity of the loss. ... In the videotape, Sara appears at all times to be reserved, modest, and shy — sometimes shunning the camera. Her demeanor is something words alone could not capture. ... The viewer knew Sara better after viewing the videotape than before ... 64

The United States Supreme Court, in denying certiorari, let this ruling stand. But Justices Stevens and Breyer dissented from the denial of certiorari, opining that this kind of evidence raises due process problems that are sufficiently important for the United States Supreme Court to intervene.

Both Justices Stevens and Breyer were concerned that a film memorial of this kind could create substantial prejudice as compared to its relative probity. Justice Stevens said that “[a]lthough the video shown to each jury was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of the offense. ... [I]t invited a verdict based on sentiment rather than reasoned judgment.”65 Justice Breyer described the video as “poignant, tasteful, artistic, and above all, moving” but that its emotional impact is driven in part by the music, the mother’s voiceover, and the use of scenes without victim or family ... [which] ... tell the jury little or nothing about the crime’s circumstances but nonetheless produce a powerful purely emotional impact ... It is this minimal probity coupled with the video’s purely emotional impact that may call due process protections into play.66

Both Justices are concerned with precisely that which makes the film memorial useful and persuasive in the first instance: its emotional and non-verbal appeal. What is a court to do when the very reason the film is made and shown — its peculiar affectivity — becomes the basis for its regulation?

Had the Court taken the case, perhaps we would have seen more sophisticated analysis in the briefs and in the Court’s decision regarding the power of images and sounds to move and educate audiences in ways we want to encourage in law. We might have also had the opportunity to analyze in more detail the way these kinds of victim impact videos are memorials the way statues and live gatherings can be.67 The controversy surrounding victim impact films highlights the power of visual rhetoric to corral an audience and focus its attention around the absence of the person whose image the film conjures. The film is a memorial — a fixed set of memories, recalled images and events — that purports to bring the victim to the courtroom for the purpose of judging the severity of the crime. But in their controversy and emotional intensity, these memorials mostly focus us on the activity of judging itself rather than the nature and quality of the person on whom the film is focused. The victim impact video defines its audience and their task. It belongs to the genre of film that is self-consciously political insofar as it shapes the viewing experience and context around an exercise of judgment to spur action on the part of the audience in the future. The controversy around these films is in the unspoken aspect of judging as political (as in shaping our communities) and as emotional (as in based on feelings of loss and vengeance). In recognizing these films as memorials, in this way, we expose the uncontainability of a film memorial’s affective reach.

These film memorials are unlike film memorabilia and film memoirs because they do not trigger recollection in their audience or in any witness. They do not facilitate

63. The video is here: www.supremecourt.gov/media/media.aspx next to the case number 07-11073.
knowledge either – despite California Supreme Court’s unfortunate statement that the video helps us “know Sara better.” What the Court must mean, and what we ourselves understand by watching these film memorials, is that they make us feel a certain way. And that feeling – precisely Justices Stevens’ and Breyer’s points – may be unwelcome (or not) in the legal process, depending on what one thinks is the proper role for emotion in criminal proceedings in light of due process requirements. But memories are feelings. Science shows that memories trigger similar (if not the same) brain activity as do the actual events to which the memories refer. A dream of sitting on the beach, a film of sitting on the beach, and the experience of sitting on the beach could all reside in our brain in like ways.68 This is, of course, the anxiety of memory – and of film: that as between recalling a memory or a film we have seen, we struggle to know truth from fiction, experiential or episodic memory from fantasy and imagination. A defense attorney would be misled to ask whether this film about Sara Weir is truth or fiction. That would be the wrong question to ask of film memorials such as this. Justices Breyer and Stevens got it right: we need to understand what the film does to its audience – as ceremony and advocacy – and how it does so before we can say whether it is properly part of our legal system. Studying the ways in which films constitute collective memory and a particular understanding of the past – as symbolic text and affective rhetoric – is central to this endeavor.

4 Film Myths

Classical Hollywood films about law, such as To Kill a Mockingbird or Inherit the Wind, form a canon of beloved and immediately recognizable American courtroom dramas.69 The American trial film genre constitutes a popular legal consciousness, a collective memory about the limits and promises of the American legal system formed in and through the filmic imagination.70 These films, spanning the decades from the 1930s (film noir), through the heyday of Classical Hollywood in the 1950s and 1960s, into the present, affect what we as audiences have come to demand and hope from American justice. They form recollections and vague reference points for: the role of judging (compare Judgment at Nuremberg (1961) with And Justice for All (1978)); the deliberative and rational jury (Twelve Angry Men (1957)); the noble criminal defense attorney who fights for the wrongfully accused (To Kill a Mockingbird (1962); A Few Good Men (1992)); and plaintiff’s counsel who represents the underdog despite a steep uphill battle (The Verdict (1982); Class Action (1991); Erin Brockovich (2003)). Sometimes the legal system is flawed and insufficiently capacious to punish the wrongdoers. We see films of lost cases that should have been won (A Civil Action (1998)), tricked proceedings (Jagged Edge (1985); Runaway Jury (2003)), and vigilante justice forming the only cathartic response (A Time to Kill (1996)). But these tragedies only make our aspirations for law and its fulfillment in justice all the more acute. These films create and show us what we want from law. They manufacture the desire for a certain kind of legal hero who can and should deliver justice.71 These films, their stories and characters, frame the mythic memory of law.

Attention to these American trial films helps us arrive at a deeper understanding of popular legal consciousness. They form a history of a public meaning of law. There is a growing body of impressive scholarship on the constitutive force of fiction films about law on the legal imagination.72 These books and essays speak to the power of fiction film (as a particularly influential subset of representational art) to shape expectations and beliefs in our society. They speak to the enduring role of popular culture in our socio-legal organizations. They also describe how film forms part of individual memory, which is “a much larger category than the recorded past.”73 This last category of film memories – film myths – may seem different from the other three described above, as these are linked to the influence of film genres in the culture more generally (such as Westerns74 or film noir75). But to my mind, the breadth and depth of the film myths’ penetration throughout American culture, overlapping with other socio-political trends, makes their shaping of expectations for law and justice that much more profound.

68. Boyer, “What Are Memories For?”, pp. 4-5.
70. Silbey, “Patterns of Courtroom Justice.”
76. There are also, of course, many films about memory itself and are only tangentially connected to law, such as Inception (2010), Eternal Sunshine of the Spotless Mind (2004), and Memento (2000): Insofar as these films shape popular beliefs in the stability and trustworthiness of memory, they contribute to the “myth of memory” rather than a mythic memory of law. Akira Kurosawa’s Rashomon is perhaps the quintessential film about both law and memory. See Orit Kamir, “Judgment by Film: Socio-Legal Functions of Rashomon,” 12 Yale Journal of Law & Humanities 39 (2000). I thank an anonymous reviewer for reminding me of these films.
Legal proceedings privilege both the individual memory (the witness) and the recording of a past (the film, be it documentary or not), oftentimes pitting the one against the other. In light of film’s capacity for myth-making — but especially in light of the film myths that already form a bedrock of legal expectations — I wonder and worry about whether the live human witness will soon be displaced in the courtroom by filmic technologies. Film memories — especially mythic ones — may communicate more convincingly than do live witnesses speaking to particular facts. And yet in law we have not yet learned how to closely analyze film, to talk back to it as we do to witnesses, to cross-examine them and contest their memory-making and judgment-seeking function. Literary and film theorists do this regularly in the humanities, but law and legal scholarship has yet to embrace this kind of literary and film studies as integral to questions of justice and the rule of law.

* * *

Historian David Blight has written that studying memory is crucial “because it has been … an important modern instrument of power. … Memory is usually invoked in the name of a nation, … race, or religion, or on behalf of a felt need for peoplehood or victimhood. [Memory] thrives on grievance, and its lifeblood is mythos and telos. Like our subjects, we can risk thinking with memory rather than about it.”

Professor Blight writes as an historian, as someone who belongs to a profession of people who write “histories of memory.” But I take his counsel to heart as a film and legal scholar, as someone who evaluates the form, content and function of representation through time and the role of film as authoritative assertions within legal disputes. In other words, legal actors can also risk thinking with memory rather than about it, especially when the crux of the matter is a factual dispute “allegedly caught on film.” We might learn something important about ourselves and our legal institutions if we look at the way in which certain memory forms are elevated and others are repressed, if, for example, into the dispute resolution process we inflected self-awareness of film’s contested and social history and structure, as well as its contingent content.

Film is an example of authoritative and contested memory. By rethinking film in its various forms as memories, the history of film in law becomes yet another way (this time in twenty-first century terms) to study law’s diverse authoritative rhetoric based on ways in which memory can be disputed and reappropriated. We can then set out anew to observe and explain the deep hold both law and film as cultural forms and institutional processes have on our personal identities, communities and national ethos.

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81. Since at least the Critical Legal Studies movement in 1970s, and the law and literature movement in the mid-1980s, challenges to the law’s language and rhetorical structure as a means of undermining its authority has persisted in the legal academy. Challenging the authority of film rhetoric as a part of law is in many ways an extension of these movements.