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Law as Film: Representing Justice in the Age of Moving Images

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"It is not easy to believe in unknowable justice"

— W.H. Auden, *Compline*

"We have raised a dust and complain that we cannot see"

— George Berkeley, *A Treatise Concerning the Principles of Human Knowledge*

Introduction

Two main theses are presented here. The first is that there is a conceptual resemblance between the ways in which messages are transmitted in the courtroom and the ways in which they are transmitted in the cinema. The second is that the evolution of legal procedure is being influenced by developments taking place in visual culture generally and film specifically. Taken together, these theses lead to the conclusion that the development of a theory of "law-as-film" can provide insights into the contemporary practice of law that might otherwise be overlooked.

Part I: Law as Film

How can justice be seen? Law as a system of visual representations

A commonly accepted concept of justice serves as the foundation of every legal system. Societies entrust judges with the authority to delineate the commonly ascribed-to concept of justice through the application of general law to particular situations, the development of precedent, and the interpretation of existing rules. The rulings of judges override private conceptions or interpretations of justice, and, where necessary, society empowers judges to order the use of physical force to ensure the supremacy of their views. In order to validate the supremacy of judicial interpretations over private ones, the law makes continuous and complicated efforts to provide itself with legitimacy.[1] One method it uses to create this sense of legitimacy is to present its actions as phenomenological embodiments of the abstract idea of justice, thereby creating an epistemological hierarchy between actions that take place within the legal system and those that occur outside of it.[2]

It is in this context that the maxim that "justice must be seen in order to be done"[3] becomes relevant. The visibility of justice in a court of law enhances the legitimacy of the act of judgment that has been performed. Yet this needs to be unpacked: Justice is not a concrete object that can be "seen", so when we speak of "seeing justice", we are actually speaking about seeing an image that we associate with justice. In order for the legal system to show us that it is doing justice, it must constantly present us with such images. Thus, for a particular society's legal system to gain broad social legitimacy as a justice-producing system, it must effectively represent, through its performances of adjudication, images of the abstract concept of justice commonly adhered to in that society.

One of the ways to think about law is as a system of representation that seeks to convince society that it maintains exclusive control over the meaning of the concept of justice. In furtherance of this goal, it continually seeks to demonstrate its skill in the identification and application of the concept in ways that are visible to, and accepted by, society at large.

To do this, the law must find the best means for effectively representing to the subjects of its legal empire that justice is being done. In furtherance of this goal, it uses various performative strategies, including narrative, rhetoric, ritual, and the like.[4] Through the rational use of these means of representation, law seeks to conjure phenomenological embodiments of the abstract concept of justice within the courtroom. Without such representations, the concept of justice will remain abstract and

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unrecognizable, and the legal system will find it difficult to create the impression that it is really *doing* justice.

The task of representing an abstract idea through performative or visual imagery is always a Sisyphean one, however. Members of society at large, as observers of the legal system and the recipients of its messages about justice, will always suspect that what is being observed is only a substitution for the "real thing" — for "truth", "justice", or, more concretely, for the bygone event that the legal system purports to be currently adjudicating.

When a judge (or other finder of fact under a judge's supervision) sets out to apply the law to a specific set of facts, he or she almost never has access to the actual event that took place, yet he or she needs to make normative determinations about that event on the basis of the evidence in front of him or her. That "evidence", however, consists entirely of the various representations of the event that are offered to the court by witnesses and advocates. Obviously, such testimony and exhibits can only partially reconstruct the full complexity of the event as it occurred. And even if the evidence could fully reconstruct the occurrence being adjudicated, the authoritative interpretation that the finder of fact is compelled to produce — the actual "finding of fact" — is necessarily truncated, and cannot possibly detail every shade, nuance and facet of the actual event. Therefore, the legally found "facts" to which the legal system applies the law are facially only a facsimile of the event that purportedly is being adjudicated. This gap between the actual and purported subjects of legal analysis — the gap between reality and representation — tends to throw into focus the limited ability of the law to apply justice to actual events. Thus, the legal system has to work very hard to *present* the re-creation of events in the courtroom as a direct, unmitigated view into the events as they actually occurred. If it fails to do so, the legitimacy of any legal decision regarding this purported reality will be undermined. The legal system's ability to convince us that justice has been done (or, more accurately, that in doing justice no injustice has been done) depends on its ability to conceal the gaps between reality and representation.

The primary instrument law uses in this respect is *visibility* — the translation of abstract adjudication into something that can be visibly apprehended, and accepted, by society. The more convincingly justice can be rendered visible, the more likely it is that members of the community will accept, even if only momentarily, that abstract justice has been done. Thus, to the degree the legal system can convincingly convey that it is operating upon the actual subject of its adjudication, as opposed to a mere representation thereof, it will be able to acquire greater legitimacy for the decisions made by its judges.

For instance, Roman law's institution of the legal principle of *habeas corpus* improved the visibility of a certain kind of adjudication. The meaning of the Latin term *habeas corpus* is "you may have the body", and it required that the accused be brought within the space in which the legal proceedings regarding his fate were to be conducted. Thus, even though the points to be adjudicated involved the person's prior actions, which of course could not be completely re-created in the courtroom, the law presented itself as acting upon a reality immediately before it: The question of whether the physical body in the room could or could not be held by the authorities. By rephrasing the question in this manner, the law enhances the legitimacy of its manner of adjudicating the fate of the accused, because it appears to be grappling directly with reality. Given its performative effectiveness, it is no wonder that the principle of *habeas corpus* has managed to survive the enormous changes Western law has undergone since the age of the Roman Empire.[5]

The status of legal procedure within the system of visual representation

The history of the "visibility" of law has been much neglected.[6] Given the importance of transforming adjudication into visible form, legal scholars should try to develop the critical tools necessary to analyze various legal systems' performance of this function. Discussions regarding judges' use of rhetorical and narrative strategies in their legal opinions are already prevalent in legal scholarship, but comparatively little critical examination has been done of the *performative* ways in which justice is represented during the actual course of legal proceedings. In part, this is an explicable academic skew: Careful analysis of judicial opinions is the main interest of legal scholars because they are plentiful, easy to access, and suit the textual proclivities of academics. Without questioning the importance of textual analysis, we feel it necessary to point out that such analysis fails to capture large swathes of legal activity.[7] We aim to rectify this situation by focusing on the way in which law transmits its messages during the actual process of adjudication, with an emphasis on the means by which procedural rules promote the visibility of justice. In embarking on this endeavour, we draw heavily on film theory, both because cinematic production is the primary field for the production of visual images, and because the tools that cinema has used to create an impression of transmitted reality cast light on the ways in which law seeks to obtain a similar goal.

The need to investigate the methods used to represent justice during legal proceedings derives from the need to broaden our perspective regarding legal performance beyond a study of written opinions. The reasoning of judges, as recorded in written opinions, is of course of fundamental significance; however, its ability to convince us of its basic soundness (both in general and with respect to particular opinions) depends to a great extent on our willingness to accept the propriety of the proceedings that led up to the legal opinion in question.

Take, for instance, the legal system presented in Franz Kafka's *The Trial*. Kafka imagined a legal system that abandoned any attempt at producing representations of legitimacy during the course of legal proceedings, and that instead sought to assert its authority and validity only after a decision had been reached. Characters simply wander the corridors of the investigation hall without encountering any visible representations of adjudication or symbols of "justice being done", until finally they are presented with a ruling, a *fait accompli*.[8] Kafka's thought experiment demonstrates the way in which robbing the adjudicative process of its presentational and performative aspects subverts the authority and credibility of the law. Moreover, it emphasizes the importance of centralizing the law's representational efforts in the loci of authority where adjudication actually takes place (i.e., in the courts).

Legal procedure plays a unique role in shaping legal performance. Procedure is the construct through which an entire legal proceeding is produced (we will focus on the nature of this production in Part II). Procedure dictates the setting in which representations of justice take place; it determines what will occur, and in what order and in what fashion. In this way, procedure establishes the space in which the legal system attempts to represent adjudication and the doing of justice. Accordingly, legal procedure is not merely a collection of rules for facilitating effective legal decisions; it is also, and perhaps primarily, a system for determining how one can produce effective performances within the courtroom, a semantic field in which attorneys, witnesses, judges, and the legal system at large seek to create meaning (justice, truth, reliability, objectivity, etc.) through their performances. Legal procedure, from this perspective, can be defined as a system of rules that determines the permissible means of articulation to be used within this semantic field. To employ a term from aesthetics, one can describe procedure as the poetics of legal proceedings.

The literal meaning of the Greek term poetics is "the art of doing". Following Aristotle, the term is usually used in analyzing aesthetic semantic fields. In a more general sense, however, a poetics is any system of rules that delineates how meanings are generated in a particular field and why they are accepted as meaningful.[9] Poetics views a semantic field in terms of the effects it generates in those who encounter it. Thus, a writer well versed in literary poetics understands how to create upon the reader the effect he or she desires.

Law also has a poetics. Through strict adherence to the poetics of law, the legal system attempts to ensure that the participants in a legal performance utilize the means available to them to transmit the message that justice is being done.[10] There are a number of recipients of this message: The judge and jury serve as the audience for attorneys and witnesses, while spectators, both in the courtroom and outside it, are the audience for the legal performance as a whole. Consider, in this regard, the symbolic entrance of a judge or panel of judges into a courtroom, accompanied by the voice of the bailiff and the rising of the public to its feet. It resembles nothing so much as the beginning of a piece of theatre whose internal rules are defined by legal procedure.

Through the use of devices drawn from the poetics of law, the legal system seeks to persuade observers of the legitimacy of the way in which it does justice.

The performance of adjudication has two facets, each of which depends upon the translation of the abstract into the visible. First, the legal system has to convince society that during the course of a trial, an incident that occurred in the past, and at which neither judge nor jury was present, was optimally re-created so that its consequences could be adjudicated and normative strictures fairly applied. Second, the legal system has to convince its audience, including the parties, spectators, and commentators, that it credibly performed justice, which means that the appropriate images of justice being done have to have been publicly displayed. To preserve its authority, every legal proceeding has to create within its audience the sense that the methods used to do justice are effective, which means that the abstract form of justice has to be convincingly translated into visual images. If the legal system is not convincing in its depiction of abstract justice being done, it will quickly lose the monopoly granted to it by society over the process of defining and applying justice.

Why law and film?

Using film theory to decipher legal representation

Why law and film?[11] First, law does not function in a vacuum. In order for its representations of "justice being done" to be effective, the legal system must make use of strategies and signifiers drawn from culture at large. Conceptions of justice are largely socially constructed, and to this extent they rely upon generally accepted conventions, images and ideas to derive their meanings.[12] Such images form the framework through which we filter and process reality. As part of this general framework, each of us has accumulated an enormous reservoir of audio and visual capital, comprised of hundreds of thousands of images, that influences our perceptions of justice. In our age, cinema has been one of the primary suppliers of this symbolic capital. It is therefore possible to speak of a certain cinematization of our thinking about justice, a cinematization that is part of a far broader cultural phenomenon.[13]

The field of cultural production is highly decentralized. Within its borders, meanings are dynamically and ceaselessly produced, without any clear hierarchies between producers.[14] When the law tries to entrench the supremacy of its interpretation of justice, it must compete with these masses of alternative meanings. Journal-

ists and entertainers, politicians and architects, stage directors and educators — all participate in the discourse regarding "what is just". But as the most popular artistic medium of the 20th century, the cinema has taken a central position in the debate and has emerged as an especially powerful generator of meaning. Just as cinema has come to influence the products we choose to buy, our interpersonal relationships, and our political preferences, it has come to shape our thinking about the shape of justice.

To examine the poetics of law (i.e., the unique methods that law employs to create its desired effect on its audience), we have to examine whether and in what way these methods are influenced by the dominant poetics of our time: The poetics of film. Different systems of poetics are in constant correspondence with each other.[15] Unsurprisingly, the introduction and development of film, and its growing impact throughout the last decades, has deeply influenced the poetics of other fields, from literature and theatre to politics and education. This has only been amplified by the rapid rise of television and the Internet, media that largely share the imagistic vocabulary and narrative conventions of film.[16] (Other computerized devices also rely, to some degree, on the principles of cinematic expression.)[17] Given the importance of the language of film to contemporary thinking generally, an examination of the interaction between cinematic expression and legal articulation is a prerequisite to any analysis of perceptions of justice in the age of the moving image. And even if the importance of the "silver screen" is gradually diminishing, the advanced technologies that are replacing it still must be interpreted through our existing epistemological framework. For the time being, we process these sophisticated manipulations of moving images using the interpretive strategies we have learned at the cinema.

Second, the methodological posture of law-as-film, like other "law &" disciplines, offers a critical perspective on the law that cannot be achieved from a viewpoint inside the legal discourse. Legal academia and practice tend to regard the deconstruction of legal language and performance as an esoteric pursuit, and it is therefore frequently overlooked. The result is a paucity of systematic, critical assessments of the representative functions of legal procedure; instead, procedure is all too often written off as a mere compilation of "the rules of the game". We hope to remedy this situation, in part, by applying the techniques developed in cinematic studies to legal procedure.

Film's enormous success in creating an impression of transmitted reality quickly led critics to question the extent to which cinematic depiction actually provides reliable information about an object or event. Film theory therefore deals extensively with the way in which "reality" is conveyed by cinematic poetics. A similar problem is posed by legal proceedings. Legal proceedings are a kind of controlled visual performance, and as such we have to examine the degree to which they contribute to our ability to perceive actual adjudication, or whether, perhaps, they merely serve to conceal the limits of the law's ability actually to do justice.

Using aesthetic theory to investigate legal discourses is not new, of course: "law as literature" has long thrived as an academic subgenre, and to a large extent it serves as a theoretical model for the course we are proposing here.[18] Law as literature seeks, among other things, to examine the rhetorical and narrative means used by judges to justify the "justness" of their decisions. Its primary tools are the sophisticated techniques of literary criticism, which are well suited for adaptation to the textual aspects of the law.[19] The emphasis on deconstructive textual analysis has helped unveil some of the methods legal actors use to legitimize their decisions, and has led to renewed focus on the ethical aspects of those decisions.[20] Our proposal for an investigation of "law as film" is an extension of this project, wherein an additional critical tool, film theory, is used to probe another, non-textual aspect of adjudication, the actual proceedings conducted in court. Although its roots go quite deep, the emergence of "law and literature" as an academic field is a relatively new phenomenon, generally dated to the publication of James Boyd White's *The Legal Imagination* in 1973.[21] The field is usually divided into two categories: law *as* literature, which focuses on literary readings of legal texts, and law *in* literature, which focuses on depictions of law in literary works. To date, "law and film" scholarship has generally paralleled the study of law *in* literature, that is, it has focused on representations of legal practice in film. We wish to focus on the alternative perspective — namely law *as* film.[22] Our goal is to apply cinematic criticism to legal proceedings themselves, in order to determine how meaning and representation are produced in the courtroom.

What does "Law as Film" mean?

At first glance, the substantial differences between producing a motion picture and conducting a legal proceeding are evident. To create meaning and narrative, a film crew uses tools — photography, editing, soundtracks, etc. — that are not available to those running a trial. Yet it would be wrong to fetishize the technological means employed in filmmaking. What is essential to cinematic poetics is the attempt to bridge the gap between reality and representation. More than any other artistic medium, cinema tries to limit the viewer's awareness that he or she is watching a constructed representation of reality as opposed to reality itself. Legal proceedings share this goal.

As described above, justice, indeed, must be seen to be done: The legal system must present convincing depictions of just adjudication if its pronouncements regarding law and justice are to be accepted as legitimate by society at large. To convey a message or tell a story, a film similarly has to produce convincing images of the

events and characters it purports to depict. The cinema's enormous success in doing so over the past 80 years has made it a powerful shaper of popular conceptions of love, beauty, virtue, and justice.

The need to create convincing visual representations of abstract ideas is thus a common component of legal and cinematic performance. Towards this end, both fields employ systematic poetics. Some of the devices they use are similar: Both in the courtroom and on a movie set, the scenery, costumes, and staging of the characters are tightly controlled. Many devices are different, but that is not a reason to abandon the analogy. At a conceptual level, there is a resonance between the ways in which the legal system and the cinema approach a common problem, and this conceptual similarity trumps the differences in the technologies employed in the two fields.

Phenomenological Aspects of the Cinematic and Legal Viewing Experiences

Watching a film and attending a legal proceeding both begin with the viewer's entrance into a defined performative space: A movie theatre in the first instance, a courtroom in the second.[23] Each is a bounded space where conduct is regulated by a set of idiosyncratic rules. Beyond these similarities, however, is a more all encompassing one: In each arena, those charged with generating meaning seek to create a type of mimetic illusion, and they use conceptually similar devices in order to do so.

The status of the audience both in a movie theatre and in the courtroom is characterized by an ambivalence caused by its simultaneous presence and absence. In a movie theatre, the audience and the screen are physically present, but the events depicted on the screen are not. Yet the visual precision of the filmed images, the impression of movement, and the addition of sound effects often succeeds in convincing the spectator that he or she is actually watching the filmed events as they unfold. When successful, a film manages to efface the gaps in time and space between the moment of photography and the moment of screening. This effect led a writer for the French newspaper *La Poste*, upon leaving the first public cinematographic show held in Paris on December 28, 1895, to declare: "This is life itself". A review in *La Nature* added: "This is nature caught in the act".[24]

Film theorists have long engaged in an attempt to analyze the secret behind creating images so close to the original, to the perceived "real", that they prompt such reactions. The French theorist André Bazin, one of the first to develop the idea of the unique representational quality of the cinematic shot,[25] wrote:

> The objective nature of photography confers on it a quality of credibility absent from all other picture making. In spite of any objections our critical spirit may offer, we are forced to accept as real the existence of the object reproduced, actually *re*-presented, set before us … in time and space.[26]

In his article "The Evolution of the Language of Cinema", Bazin describes the various means of expression that induce us to accept as "real" the images scampering by on the big screen. Most importantly, styles of photography, such as close-ups or slow-motion shots, can stress elements of the original event that likely would have gone unnoticed without the intervention of the camera. Similarly, an emphasis on the depth of the space filmed through the use of long shots and deep focus creates a dynamic, according to Bazin, that "brings the spectator into a relation with the image closer to that which he enjoys with reality".[27]

Like films, the legal system also tries to convince us that the procedures it employs to judge reality enable it to reconstruct it as precisely as possible. Through the rules of procedure, the participants in a legal proceeding isolate a certain event from all the events with which it is interconnected, breaking it off from the stream of history in order to focus on a certain, defined, "relevant" group of facts. Procedural and evidentiary rules limit a legal proceeding to certain kinds of facts by insisting that descriptions of an event be limited to certain narrators (witnesses who are acquainted with the event at first hand) who can only speak on certain topics (ones determined judicially "relevant"). These rules (and others) form an efficient framework for the narrative construction of reality. The fact of the matter is that reality cannot be assessed without some kind of segmentation into manageable chunks, which makes necessary the utilization of a process for performing this editing (physical editing in the case of film; procedural limitations in the case of the law). In order to ensure that the resulting, edited reality is still comprehensible, additional techniques have to be used to emphasize important points and downplay minor ones. In films, this is done through photographic techniques such as zooms, whereas in the courtroom, it is accomplished by procedural devices, such as the telescopic focusing of a cross-examination, redirect, and recross on an increasingly narrow subject matter.

In the field of poetics, the legal system's desire to convey that it is reproducing reality is described as an attempt at *verisimilitude*.[28] Verisimilitude is a poetic attempt to bridge the gap between what language is capable of expressing and the reality of the object being described. The degree to which a semantic, rhetorical, or narrative work succeeds in bringing the act of representation closer to its source, to minimizing the presence of the intermediary and giving the reader/spectator an unmediated view of the object or event being described, is corollary to the work's ability to give concrete form to represented reality. Of the various media, film possesses the highest degree of verisimilitude and the most conceptually sympathetic attitude towards attempts to eliminate the gap between representation and reality.

Consider the effect of other media. When reading a book, a reader is required to imagine for himself or

herself the reality represented in the text. Moreover, the necessity of physically holding the book constantly reminds the reader, no matter how much she emotionally succumbs to the descriptive power of the text, that her experience of the story is mediated. Paintings are capable of creating a fuller visual image of reality, sometimes even demonstrating a degree of photographic realism that "freezes" the scene being captured. Photographs narrow the gap even further. But photographs are unable to transmit the sense of dynamic motion or temporal passage possessed by experienced reality. Dance can represent both time and motion, but its conceptual approach is allegorical and not an attempt at copying reality. Theatre, which is perhaps closest to legal performance, actually emphasizes its representational qualities instead of effacing them. Bazin aptly describes this phenomenon in his comparison between the intentional artificiality of the theatre and the realistic character of the cinematic experience:

> A certain artificiality, an exaggerated transformation of the décor, is totally incompatible with that realism which is of the essence of the cinema. The text of Molière only takes on meaning in forest of painted canvas and the same is true of the acting.[29]

When we watch a film, on the other hand, we are meant to feel as if we have been thrust into the reality that the characters in the film are experiencing.

Legal verisimilitude is expressed in the legal system's attempts to produce for adjudication a readily recognizable re-enactment of reality. In other words, the legal system presents itself as having created an unmediated view onto the reality of the event being adjudicated, thereby effacing the gaps in space and time between its occurrence and its re-presentation in the courtroom.[30] In its strivings for verisimilitude, the law tries to minimize the fact that neither judge nor jury actually has had unmediated experience with the event they are being asked to evaluate.

"Presence" is experienced in both the court and the cinema on two levels. On one level, a film's audience and a trial's participants and spectators are conscious of their presence in a particular, defined space, be it movie theatre or courtroom. On a second, more important level, spectators of both films and legal proceedings are asked to assume or imagine their presence at the events being depicted (or, perhaps more accurately, to ignore their non-presence).

Yet it is impossible for a spectator to remain completely incognizant of his or her absence from the events being depicted, despite his or her presence at their depiction. The tension between these two levels of presence — the physical and the virtual — and their idiosyncratic relationship is one of the overlapping points between the cinematic and legal experiences, between the experience of watching a movie and observing a legal proceeding.

In neither case is a spectator able to translate his or her sense of "presence" at the events being depicted into an active involvement with the events themselves. No matter how strongly an audience member experiences the events of a film, the means of representation — the screen, his or her position in the audience, the projection equipment — frustrate engagement and create estrangement. This estranging effect reminds the spectator that he or she cannot overcome the fact that what he or she pretends to be "experiencing" is merely a documentation of something that took place at another place and time (i.e., it highlights the fact that the film is an attempt at representation, not a conduit to an alternate reality).

Like the audience in a movie theatre, the spectators at a legal proceeding are powerless to intervene in the performance before them. In this sense, legal performances have more in common with films than with theatre, which might, at first glance, seem a more logical performative model. The cinematic medium does not allow the spectator any meaningful contact with the characters in the film; he or she is completely estranged from them. In the theatre, on the other hand, the audience's reaction is an essential part of the theatrical experience, and meaning is generated though a process of give and take between performers and observers.[31] Law, like film but unlike theatre, seals off the performance from the audience, thereby estranging viewers from the representational process.

Film mandates estrangement through technical means, whereas the estrangement of mere spectators to a legal proceeding is normative. In both cases, however, a well-defined barrier is maintained between the spectator and the events being documented. From a phenomenological point of view, the virtual presence of the represented reality seems to be intense, but the inability to intervene in the narrative reminds the spectator of the gap between the representation and the real. A spectator in the movie theatre or the courtroom cannot leap to the assistance of a character in trouble. Thus, the separation of the audience from the performance deepens the spectators' sense that they lack control over the events being represented. Instead, such power remains firmly in the hands of whoever controls the means of representation.

In a court of law, the barrier between spectators and participants is reinforced both physically and procedurally. Unlike in a Broadway theatre, the public is allowed only very limited active involvement in the performance, and thus any criticisms that might undermine the legitimacy of the legal process are silenced. Booing and clapping are not tolerated. The reconstruction of reality is conducted exclusively on the witness stand, according to the rules of legal procedure. The judge controls the means of representation, and he or she regulates the access of the other participants (the witnesses and attorneys) to those means.[32] Even if a spectator with firsthand knowledge of the events being adjudicated wishes to physically appear in the courtroom and participate in their re-creation, he or she will not be allowed to do so

unless he or she appears as a witness in the manner dictated by the rules of procedure, those same rules that make up the poetics of representing reality within the courtroom.[33] Any attempt to breach the procedurally mandated separation between spectators and participants will result in physical removal from the courtroom.

As a result, in both law and film the audience is present in the location of representation as *seers*, but is not itself *seen*.[34] In spite of the concreteness and vividness of the event being observed, the audience is nevertheless absent from it.

This experience of simultaneous presence and absence also characterizes our fraught awareness that there are both onstage and offstage components of the representational act. This awareness prevents the suspension of disbelief from being total in both law and film. Film, like law, tries to reproduce an event that actually took place in another place and time. The spectator knows, however, that the images in front of him or her are not merely spontaneously captured representations of another reality, but are instead the results of a complex production process aimed at creating precisely the performance now being viewed. Consequently, in spite of the considerable effectiveness of the mimetic illusion, the audience cannot entirely avoid the realization that the media's ability to transmit reality is ever limited by the boundaries of the frame. In the case of law, the frame is metaphorical and the boundaries are procedural. From the moment the complaint or statement of claim is served, through discovery, the hearing of evidence, and the final summations by the parties, the event at issue is framed, edited and reduced so that it fits within the boundaries recognized by the legal system. The narrative that results, and that forms the basis for whatever normative adjudication occurs, is constructed by combining into a linear sequence the reductive descriptions that emerge from the colander of legal procedure, which separates legally operative "facts" from the rest of reality.

The Performative Character of Legal Proceedings

The developing scholarship on law *in* film can be very helpful to our project of investigating law *as* film, because films themselves cast an experienced cinematographic eye on legal proceedings and thereby highlight many of their performative aspects.

Whenever one enters a court of law, even if for the very first time, one finds oneself in an environment that is immediately familiar. The importance of visibility to the legal process, and the commonality of the visual images that have been adopted to represent adjudication, contribute to the fact that visual representations of concepts such as "law" or "court" are easily identifiable across cultural and geographical boundaries.[35]

The visual power of the familiar icons of legal proceedings, such as the dark robes of the judges, the podium upon which the judge sits, often under a symbol of the state, and the ceremonial entrance of the judge after an announcement by the bailiff, is somewhat baffling, however. What makes these particular accessories such effective visual cues of "justice"? Why does the wearing of wigs in Britain, or of robes in Europe, so vividly represent adjudication and the exposure of truth? How is it that these apparently anachronistic visual symbols have managed to survive within the law's system of visual representation?

Our thesis is that societal familiarity with these symbols assists in the establishment of a link between observable legal proceedings and abstract concepts of justice and adjudication. Legal proceedings acquire authoritative status by, among other things, conforming to societal expectations of the way legal proceedings are supposed to appear. Such expectations dwell in our collective consciousness and largely have been shaped by visual images taken from popular culture.

Accordingly, the experience of observing a legal proceeding is interpreted by reference to our pre-existing visual conceptions of what justice and adjudication look like. One of the main sources of these conceptions is the thousands of images that depict "doing justice" in films. The intriguing conclusion, the implications of which we shall discuss in detail in the second half of this article, is that legal proceedings strive to resemble cinematic representations of legal proceedings, in order to thereby impart the message that they are, in fact, engaged in the legitimate process of doing justice.

This conclusion is compatible with scholarship that concentrates on representations of the legal system in films, and in fact emerges from many of the studies that have been published on the subject.[36] To a certain extent, it constitutes the *raison d'être* for engaging in such studies as a form of legal, as opposed to merely sociological, scholarship, because interpretations of law in film are only legally meaningful if they in turn inform the functioning of the actual legal system. But analysis of representations of law *in* film only addresses the manner in which society perceives and processes images of law. It leaves the other side of the equation — the ways in which the legal system generates meaning through the manipulation of visual images — unaddressed. It is to address this topic that a study of law *as* film is pertinent.

Let us take, for example, a key concept in cinematic theory, the concept of iconography.[37] In film theory, iconography describes the collection of visual images that have acquired cultural and symbolic values that exceed the bounds of any specific film.[38] Iconography fulfils an important function in the identification and definition of genre films. The attractiveness of genre films derives to a great extent from their use of familiar components that have become trademarks of the genre.

Legal proceedings also rely on the iconographic status of certain elements to provide each legal performance with a general meaning that exceeds the bounds of the specific event. Décor, costumes, and particular forms

of character delineation signify that a particular legal proceeding is of the genre "legal proceedings".

The décor of a law court includes a number of standard components. An elevated podium usually sits in the middle of the scene, with the judge or judges sitting behind a desk from which their upper bodies emerge, usually wrapped in robes. This presentation borrows from cinematic conventions in order to generate certain meanings and hierarchical relationships. For example, filming a character from a low angle usually stresses the character's commanding presence. In Westerns, this angle iconographically signals the great strength of the hero or the enormous wickedness of the villain. Similarly, the lines of perspective in the courtroom prescribe to a considerable degree the way the scene is received. The elevated, central positioning of the judge renders him or her into an emblem of power, thereby reinforcing the legitimacy for his or her decisions. The symmetrical lines stretching from the judge to the opposing parties presents a visual image of the objectivity desired of the legal system, epitomizing the normative even-handedness expected of the judge.

In most cases, the image of the judge is itself iconic. He or she fulfils a function in the concrete legal production being observed, but also serves as a recurring symbol of justice in legal performances. His or her appearance is therefore often as performatively meaningful as his or her actions.[39] Furthermore, the judge is typically perceived not as an individual with his or her own peculiarities, personal qualities, and private preferences, but rather as the embodiment of the iconic figure of the judge, exactly as a character in a film can be readily identified as the "hero" or the "good cop" or the "sheriff". Where judges wear gowns, the uniform helps to obscure the contours of the judges' private personalities and increases their ability to project the desired effects of impartiality and abstraction, thereby enhancing the legitimacy of the act of judgment.

In the previous subsection, we explored the means by which the events being adjudicated in a legal proceeding are represented so as to conceal the absence of the judge, jury, and spectators from the events themselves. In this section, we have taken a step back and analyzed the devices employed by the legal system to conform its performances to societal expectations of what adjudication looks like. In any given legal proceeding these two types of representation converge into a unity that endeavours to express the message that justice is being done, thereby reinforcing the legitimacy and authority of the legal system and contributing to social stability.

Part II: Changes in the Cinematic System of Representation and the Implications for Legal Procedure

Our starting premise has been that society has invested the legal system with the authority to do justice, and that in order to protect this authority, the law is required to show that justice is being done. This requires legal performances that conform to commonly shared perceptions of justice. Because film held a central place in the construction of these commonly held perceptions throughout much of the twentieth century, law tended to choose cinematic devices as the most effective way of achieving the desired effect. As we move from a filmic culture to a digital one, however, those devices are beginning to lose their effectiveness. In order to understand developments in contemporary legal practice, then, we must also come to grips with ongoing changes in contemporary visual culture.

The Age of the Moving Image

One of the earliest and most influential analyses of film's effect on viewers is found in Walter Benjamin's essay, "The Work of Art in the Age of Mechanical Reproduction",[40] which describes the dialectical nature of visual representation and its function as a parameter for the evaluation of social reality. Benjamin's work drew on the Frankfurt school of thought, which emphasized the profound social influence of popular art in the formation of the political consciousness of culture consumers.[41] Indeed, his discussion of the influence of cinematic expression on social perceptions extends beyond the aesthetic to the political. Benjamin notes film's powerful ability to represent visual reality as compared with the artistic mediums that preceded it. But he warns that these apparently realistic qualities of film threaten to distort our perception of reality, and to lead us to suspend our critical faculties rather than helping us to analyze the reality that is being reproduced.

Benjamin therefore speaks of the violence of the cinematic medium. This violence is revealed by the ambivalence inherent in film. On the one hand, the precision with which the changing images appear on the big screen correlates highly with our normal modes of perception.[42] On the other hand, the object being observed is nothing but the artificial result of complex processes of production. The close similarities between the way in which cinematic expression and "everyday life" are perceived make it difficult for the observer of a film to grasp and maintain a necessary critical distance. In other words, when watching a film, it is difficult to

hold on to our underlying skepticism about the reliability of the intermediating act of representation. The apparent similarity of the film-viewing experience to unmediated perception does not force the viewer to give pause so that he or she can reflect critically on the images being transmitted. As Benjamin writes:

> Let us compare the screen on which a film unfolds with the canvas of a painting. The painting invites the spectator to contemplation; before it the spectator can abandon himself to his associations. Before the movie frame he cannot do so. No sooner has his eye grasped a scene than it is already changed … The spectator's process of association in view of these images is indeed interrupted by their constant, sudden change. This constitutes the shock effect of the film …[43]

According to Benjamin, sequences of moving pictures distract the mind and impair one's ability to develop valid assessments and judgments. Kafka maintained a similar position.[44] Both regarded films as a novel mechanism for *restricting* perception and channeling it in a certain direction, to the exclusion of all others. Both of them, in fact, stressed film's tendency to *block* direct contact with reality. Time has confirmed Benjamin's misgivings regarding the use of films by interested parties and classes; some would say that he actually underestimated the threat.

In any event, there is no doubt that the dawning of the age of cinema fundamentally increased the importance of visual representation in every sphere of life. The visual image has become a central component in the way in which we process reality. The interdependency between poll ratings and policy making, or violence and aesthetics,[45] are examples. Nevertheless, it seems that the extreme effects that Kafka and Benjamin predicted have not fully come to pass with respect to film itself, even though the seeds of such effects are inherent within the medium.[46] Instead, both authors read like prophets of the simulacra phenomenon that came to be described decades afterward in relation to later, follow-on technologies such as television, video, and the Internet.

These technologies enhanced and improved the ubiquitous systems of visual representation that cinema previously had placed at the centre of cultural consciousness. Dialectically, these novel technologies simultaneously reduced the value of visual representation as a valid epistemological criterion, a process that has come to be called the virtualization of reality.

Benjamin identified the seeds of this process in the filmic culture that gave birth to the age of the moving image. By 1960, the art critic E.H. Gombrich had already described the phenomenon in full bloom. Gombrich writes:

> Never before has there been an age like ours when the visual image was so cheap in every sense of the word. We are surrounded and assailed by posters and advertisements, by comics and magazine illustrations. We see aspects of reality represented on the television screen and in the cinema, on postage stamps and on food packages … I think that the victory and vulgarization of representational skills create a problem for both the historian and the critic.[47]

Gombrich, like Benjamin and Kafka, describes the distorting effect and illusionary power of visual representation.[48] The ever-increasing quantity and quality of images has acutely disrupted the epistemological value that we can ascribe to those images as a representation of reality. When our perception of the world is shaped so extensively through the filter of visual culture, such a complete and sophisticated mechanism of representation is created that our ability to interpret visual images is not only undermined (as suggested by Benjamin and Gombrich), but nullified. With the advent of ever more technologically sophisticated means for representing "reality", the distortion between signifier and signified has reached such enormous proportions that it is impossible to differentiate between the two. The dialectical tension foreseen by Benjamin is now being experienced on a massive scale. This condition is expressed by reference to the concept of the simulacra.

From the Moving Image to the Simulacra

The term "simulacrum" (Latin for image, shadow, or mask) is borrowed from Plato's metaphor of the cave.[49] Plato's cave dwellers see shadows on the walls and imagine them to be the only realities. They lack all access to the source of the images (which is outside the cave), and therefore perceive these reflections not as mere representations of reality, but as reality itself.

Following Plato, our ability to recognize the essential nature of justice turns on our ability to scrutinize images of justice, whether created by law or by popular culture, and to identify the degree to which they reflect and participate in the abstract concept of justice. The postmodernist claim is that the current uncontrolled abundance of representations has cloaked the epistemological lighthouse that Plato posited as standing independent of these representations, making it impossible to evaluate their legitimacy and validity.

The concept of the simulacrum was developed by several thinkers, including Jameson,[50] Baudrillard,[51] and Deleuze & Guattari.[52] It describes contemporary culture as a continuous flow of images or copies "whose relation to the model has become so attenuated that it can no longer properly be said to be a copy".[53] The condition of simulacra is complemented by the erosion of verisimilitude.

This can be clearly recognized in film. The digital revolution has made it possible to create imitations of "reality" that were not previously possible. The power of cinema to suspend disbelief and produce verisimilitude has passed beyond anything that previously was possible. Yet the ability to use computer simulation to create visual effects that until now could only be envisaged by the imagination — to reproduce "realities" that do not, and cannot, exist in reality — actually distances us from verisimilitude. In commenting on this phenomenon, Baudrillard noted that technological developments in

contemporary cinema erase cinematographic illusion almost to the point of disappearance.[54] In an interview conducted in 1993, he added: "The more things you add to make things real, to achieve absolute realistic verisimilitude, perhaps the further you stray from the secret of cinema".[55]

The simulacra first appeared as a concept in art criticism, but soon spread to popular culture. The transference of the experience of artistic observation from defined spatial areas (museums, concert halls) to domestic spaces, first identified by Benjamin, lies behind the wide social implications of the simulacra condition. When the primary locus of the moving image was transferred from the public cinema hall to the private home television screen, the simulacra penetrated into the realm of private, domestic experience. As a result, the uncontrolled torrent of visual images now spills into every area of our lives, influencing our constructions and reconstructions of nearly every concept. Inevitably, our notions of justice — and the legal system's ability to provide it — are caught up in the flow.

The time has come to examine how the legal system, as a major producer of cultural meaning, has absorbed and internalized the simulacra condition. How has legal procedure, the poetics of performative adjudication, grappled with the Sisyphean task of representing justice in an age in which notions of visual representation are undergoing such dramatic changes?

The legal implications of cultural developments: How the transition from the age of the moving image to the culture of simulacra has influenced visual representations of adjudication

Law has always needed to render itself visible, and it uses the rules of legal procedure to govern the manner in which it does so. Legal proceedings purport to re-create in the courtroom an event that occurred at another place and time so that the judge and jury can "look" upon it and evaluate its normative aspects. Those same proceedings simultaneously produce images of themselves that comport with societal conceptions of what adjudication looks like, thereby reinforcing the legitimacy of the legal system's decisions. We have proposed that at a certain level of abstraction the cinema has similar objectives (with a greater stress on aesthetic production and a wider range of subject matter), which it attempts to achieve through recourse to particular technical and poetic means.

The legal system was developing methods for effacing the gap between representation and reality hundreds of years before film was invented, but the technological capabilities of film allow it to achieve a level of verisimilitude far beyond the capacity of law. Moreover, the popularity of cinema and its profound social influence have made systems of visual representation into an increasingly dominant component in our structuring of reality. At first this process suited the social interests of law, because it enhanced the legal system's ability to use visual, ceremonial, and narrative representations of reality in order to assert its own legitimacy. In other words, the emergence of filmic culture originally promoted the project of verisimilitude in law.

Changes in patterns of consumption of moving images have led to a diminishment of the verisimilitude effect, however. The profusion of images racing across television, video and computer screens has led to profound changes in the meanings people ascribe to the representations appearing before their eyes. The foregrounded artificiality of many of these images, along with their sheer number, has made the status of a visual representation as a reliable indicator of reality ever more doubtful. Seeing is no longer believing.

The Internet increases the tension between images and their representative capacity even further. Exposure to the continuous and ever-increasing flow of information available on the Internet results in a loss of the ability to distinguish or define specific sections of significance,[56] or to endow them with moral and emotional meaning. In a culture that is flooded with data that does not coalesce into narratives, that is inundated by an endless stream of images of images, the ability to formulate normative positions is undermined.[57]

The gradual shift from a culture of verisimilitude to a culture of simulacra threatens the legal system's ability to continue using visual images to create legitimacy. Law is no longer on equal footing with other producers of meaning in the cultural sphere. In the world of simulacra, we are flooded with courtroom dramas, with television channels devoted entirely to ceaseless screenings of legal deliberations and simulated legal deliberations, and to innumerable representations and representations of representations of the law on the Internet. The quaint legal performances put on in the courtroom by the legal system simply cannot compete. Therefore, our commonly shared perceptions of justice and adjudication are constructed with ever increasing predominance from cultural representations of the adjudicative process, rather than from the visual representations of that process performed by the legal system itself. The result is a subversion of verisimilitude.

As a result, the law's monopoly on authoritative interpretations of justice is gradually eroding. This transformation parallels and echoes a century-long cultural shift that accelerated at the end of the twentieth century, wherein the loci of production of meanings shifted from defined, bordered spaces such as courtrooms, cinemas, or museums, to decentralized spaces largely devoid of fixed interpretive hierarchies. The first kind of cultural production is characterized by the autonomy and authority retained by specialized producers of meaning within their defined fields. Contemporary, decentralized production, on the other hand, yields a wealth of representations that appear everywhere and at all times, but

without any structural hierarchies to aid in the process of decipherment. This sumptuousness subverts the barrier between reality and image, undermines the inter-institutional balance of power, and subverts the exclusivity of "legal" justice. It is no wonder then that even legal scholars have come to realize the necessity of using cinematic themes to develop new moral sensitivities and guidelines appropriate to this new environment.[58]

The following section will examine some practical implications of the conditions we have been describing. We maintain that a realization of the resonance between legal and cinematic expression can be used to develop innovative critical thinking about the intersection between visual representations of adjudication and the actual process of doing justice. In this light we will explore the parallel erosion of verisimilitude and the normative status of procedural rules in the courtroom.

We will then discuss two well-known representations of procedural justice in criminal law, the *Miranda* warning and the warrant requirement, both of which, we believe, developed out of a belief that visual representation serves as an effective epistemological criterion — a belief derived, in large part, from the cinematic enterprise. The recent erosion in the normative standing of the *Miranda* warning and the warrant requirement, we believe, has similarly been influenced by the erosion of verisimilitude in visual culture more generally.

The Miranda Warning and the Warrant Requirement — The Blurring of Procedural Representations

The *Miranda* warning[59] and the warrant requirement[60] are exclusionary rules that prevent evidence that is unconstitutionally obtained from being offered into evidence. Evidence so obtained, or evidence discovered based on information so obtained, is described as the "fruit of the poisonous tree".[61]

Exclusionary rules elevate, in certain circumstances, procedural fairness over results-oriented justice. This favouring of procedural fairness can be described in terms of the legal system's need to convince society that the means it uses to achieve justice are legitimate. In order to do that, law has to convince us that the re-creation of the events to be adjudicated that occurs in the courtroom provides the judge and jury with an unmediated glimpse into the reality of those events, rather than merely presenting a speculative representation of past events to which neither the judge nor the jury has any direct access. When the legal system prioritizes procedure over what would appear to be the merits, it is motivated by the concern that has been the subject of this article: The need to create convincing visual representations of adjudication in order to legitimize the system as a whole. A legal system that strictly upholds exclusionary rules may occasionally sacrifice the accuracy of some of its results by choosing, as a matter of policy, to block certain reconstructions of reality from entering the courtroom,[62] but such a legal system will also be sheathed in an aura of verisimilitude attributable to the presumed trustworthiness of the narratives that it creates for purposes of adjudication. By ensuring that only those narratives that strictly follow the rules of legal poetics (i.e., those that are produced according to the rules of legal procedure) are performed before it, the legal system can portray itself as only dealing with "facts" (or, to put it more obliquely, with unmediated transmissions of reality).

When a movie director tries to create an effect of verisimilitude (i.e., when he or she tries to narrow the audience's awareness of the gaps between reality and its cinematic representation), he or she uses visual devices and cues (such as camera movements and editing sequences) appropriate to cinematic poetics. The legal system uses procedural rules to the same effect. The American legal system takes great pains to ensure that evidence that is obtained in a way that might arouse suspicions as to the accuracy of the re-creation being performed in the courtroom is not offered. Just as unexpected editing or the inclusion of the film crew in the background of a scene would ruin the effect of verisimilitude in a movie by calling attention to the gaps between reality and representation, a failure to follow the rules of legal poetics would subvert the notion that what is being watched and analyzed in the courtroom is "reality."

At a certain point, however, this obsession with formal proceduralism came to be seen as excessive (in both law and film). The preference for procedural justice and realism over "essential" justice and truth began to seem empty, an undeserved favouring of form over content. Strict adherence to procedure, originally adopted as a way of ensuring the system's legitimacy, became, instead, a threat to it.

We earlier noted that film's ever-increasing technological ability to produce apparently realistic images, which was once its source of epistemological validity, eventually led to widespread suspicion of the credibility of filmic depictions. A similar dialectic can be observed with respect to the law. The tendency to sacrifice results-oriented justice on the altar of procedural purity — a phenomenon we have described in terms of the necessity of adhering strictly to the rules of legal poetics in order to maintain the illusion of verisimilitude — began to arouse wide spread criticism.[63] These critics argued that the American legal system had stretched the maxim that "justice must be seen to be done" too far, to the extent, in fact, that the representation of justice had become more important than the actual doing of justice. Such criticism damaged the very legitimacy that the legal system had tried to obtain through its emphasis on clear representations of societal expectations of just adjudication in the first place. This damage resulted from the inevitable eruption of the tension between representation and reality that occurs when dedication to the means of production goes unchecked, leading to an over-

emphasis on procedure, or technology, for their own sakes, rather than for the sake of the production of a convincing portrait of reality.[64]

Chronologically, the "age of verisimilitude" in the cinema, which began in the second quarter of the past century and reached its height in the third quarter, overlaps almost exactly with the golden age of procedural justice established by the Warren Court.[65] These years witnessed both strict enforcement of the warrant requirement and the formulation and rigorous application of the *Miranda* warning. There is also a remarkable affinity between the subsequent erosion of faith in cinematic verisimilitude, and the decline and fall of legal proceduralism.

The Miranda Warning

The Supreme Court's 1966 ruling in *Miranda v. Arizona*,[66] which established the famous "*Miranda* warning", was the centerpiece of a line of decisions that dealt with the admissibility of statements by suspects under interrogation.[67] Justice Warren's majority opinion provided a specific formulation of the warning that henceforth had to be recited to suspects before they could be questioned. Because it is quoted so frequently in films and on television, the holding is well known even among laymen:

> [T]he person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.[68]

If we try to ignore our kitsch-like familiarity with *Miranda* from popular culture, we can probe these words for the motivation that lay behind the ruling. Warren's opinion, it seems to us, reflects a belief in the power of clear verbal and visual messages to authenticate any resulting narratives (here, the information provided by the suspect after he or she has received the *Miranda* warning). Warren uses rhetoric that emphasizes the visibility of legal and procedural safeguards: He demands the performance of a visual warning along the lines of what he has written — almost a line reading.[69] And he demands such a warning because it *shows* the legal system acting fairly, thereby reinforcing the idea that it is capable of doing justice.[70] For Warren, this visibility was more important than the superior information that might be extracted from the suspect using other, more covert, means.

> [W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; *a warning is a clear-cut fact.*[71]

Mandatory issuance by the police of *Miranda* warnings creates a situation in which judges and juries do not have to speculate on the voluntary nature of statements made by suspects under interrogation: A fact-specific inquiry that inevitably highlights the fact that neither judge nor jury was at the scene. Instead, what is presented to judge and jury is a simple visual image: The playing out of the "warning-giving" scene scripted by Justice Warren. Legal scholars have long debated this preference for a bright line rule over more subtle tests for evaluating the trustworthiness of information provided by suspects under interrogation.[72] To comment intelligently on the matter, one has to take into account not just the suspect's rights but the legal system's interest in the performative nature of legal proceedings.

A familiar poetic device in cinematic language is the ordering of scenes so as to indicate that a character obtained information in one scene that is relevant in a later scene. A mere alternation of camera shots, with no inherent meaning, builds, pursuant to cinematic poetics, into a comprehensible narrative. The *Miranda* warning dictates a narrative in a similar fashion.

Critics of *Miranda* have argued that rather than protecting the rights of the interrogated, the warning actually threatens them, because even suspects who have no understanding of those rights are deemed to have comprehended them if they received the warning. But from a performative perspective, *Miranda* fills an important function: The clear visual spectacle it proscribes, in which the suspect takes place in a scene in which he or she receives certain information, arouses narrative expectations among its audience (the judge, the jury, or the spectators in the courtroom) that are not easily dispelled. There is thus a tension inherent in *Miranda*. The visually evocative scene dictated by the Warren Court enhances the legitimacy of the legal system on one level, because the system appears to be complying with narratives of fairness and justice, but in the process, the actual *doing* of justice is rendered more difficult, because the narrative pull of conventions like the giving of the *Miranda* warning is so strong that it threatens to obscure, rather than elucidate, what actually happened.

In the age of the simulacra, the representative power and visual spectacle of the *Miranda* warning has led to its endless reproduction in cinematic and televised depictions of arrest. When we see someone being read his or her rights, we immediately draw the conclusion "that person has been arrested". Through sheer repetition, the *Miranda* warning has gone from being a legal performance that enhances legal legitimacy through the creation of an image that complies with societal expectations of justice, to a progenitor of simulacra. There are now so many images of *Miranda* floating around that as a signifier, it no longer points to a particular, intended signified (in this case, that the suspect understands his or her rights and can reliably provide information under interrogation).

While the devaluation of the epistemic reliability of the *Miranda* warning is but one manifestation of a more general undercutting of visual representations' status as authoritative indicators of the truth, from a dialectical

perspective this is not the only result of the cultural overflow of *Miranda* images. Images of *Miranda* are often used in films to deconstruct and expose the gap between representation and reality that the legal system originally used *Miranda* to conceal. *Miranda* was originally imposed as a way of indicating that the legal system acts justly. In films, however, we often see a character who we know to be innocent being read his or her rights as a way of indicating that he or she is being arrested. In these instances, the familiar visual image of the *Miranda* warning sends the image not that the legal system is legitimate and applies normative evaluations only to reality, but instead that it is fallible and undeserving of its monopoly over interpretations and pronouncements of justice. Cinematic depictions of *Miranda* are thus used to set forth alternative interpretive hierarchies, in which other conceptions of justice compete for authority with the official ones produced by the legal system.

Along with decreased confidence in the representational capacity of the *Miranda* warning has come a series of efforts to chip away at *Miranda* itself. This began with Congress's passage of a law that sought to circumvent the decision. According to the law, the admissibility of statements made by suspects would depend entirely upon a holistic determination of whether such statements were made voluntarily.[73] This legislative attempt has been followed by a series of judicial decisions, creating a string of exceptions and limitations to the Warren Court's original ruling.[74]

The Warrant Requirement

The warrant requirement arises from the Fourth Amendment to the American Constitution.[75] Although the Fourth Amendment makes no mention of the inadmissibility of evidence obtained by illegal means, the Supreme Court held as early as 1914 that the amendment compelled exclusion of evidence procured unconstitutionally.[76] Seven years later, in *Gouled v. United States*, the Court made a comprehensive ruling that evidence obtained through illegal searches or seizures conducted by federal authorities was inadmissible in federal court.[77] In 1961 the ruling was extended to the states.[78] During the 1960s the warrant-based exclusionary rule attained its broadest sweep.[79] For example, in *Katz v. United States*, the Court announced that:

> … searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.[80]

Beginning in the 1970s, and with increasing rapidity during the 1980s and 1990s, a gradual erosion began to take place in the rule established by *Weeks*, *Gouled*, *Mapp* and *Katz* .[81] Matters soon reached the point where critics claimed the warrant requirement "is theory, not fact",[82] that "[t]he *per se* rule fails to reflect judicial practice",[83] and that "in practice warrants are the exception rather than the rule".[84] Over the course of the last 30 years, then, a warrant has gone from being an absolute prerequisite if the fruits of a police search are to be offered into evidence, "to a procedural requirement sometimes acknowledged and rarely enforced. Current fourth amendment doctrine is so muddy, and the Court's message is so deprecatory of fourth amendment rights".[85]

The status of the warrant requirement (like the status of the Fourth Amendment as a whole) has been further weakened in the aftermath of the events of September 11, 2001.[86]

The warrant requirement, like the *Miranda* warning, dictates that a certain scene be played out for purposes of narrative continuity and verisimilitude. Just as a film director uses particular camera shots and cinematic devices to establish the trustworthiness of a given character, the law mandates that performers act out certain scenes in order to create an effect of verisimilitude. According to legal poetics (i.e., the rules of legal procedure), information obtained during a search must be preceded by the obtaining of a warrant in order to be authentic. Thus, the audience in a courtroom has a means for evaluating whether the events being re-created in a legal proceeding are a glimpse onto a past "reality" or a mere fabrication. Pursuant to the rules of legal poetics, the evaluation turns on the existence of a preceding scene in which the authorities obtained a warrant.[87]

Procedural rules' ability to shape the ways in which expression is produced in the courtroom creates ambivalences, however. Systems of poetics, like other systems of rules, not only proscribe ways of producing meaning, but also block other ways of doing so. Thus, steps that serve the purposes of producing procedural justice and performative legitimacy likely obstruct the production of other kinds of meaning, such as results-based justice. In order to obscure the costs of such choices, the legal system employs noble-sounding maxims, such as "justice must be seen to be done." But in today's nonhierarchical, virulently multi-polar visual culture, it is impossible for the legal system to control the images of itself that it transmits to the public, including the visual representations of adjudication that it formerly used to establish its own legitimacy. The proliferation of representations of the warrant requirement in popular culture, where they cannot be controlled by the legal system, threatens to expose the gaps between reality and representation that the legal system itself struggled to conceal, as well as the associated costs.

From the 1960s onward, audiences have been frequently confronted with depictions of the warrant requirement in Hollywood films, including many scenes that cast doubt on the reliability of evidence procured during a search undertaken "according to law". There are also innumerable scenes in which criminals block the authorities by demanding a warrant; determined policemen take the law into their own hands and ignore the warrant requirement in order to serve a higher good;

smooth-talking attorneys save dangerous criminals from being convicted by arguing that a warrant was lacking; judges hurriedly sign unjustified orders and allow for the invasion of innocent people's privacy (while other judges obstruct hard-working cops by making them fill out red tape). Legal proceedings never play out the *consequences* of the warrant requirement, which take place outside the bounds of a legal performance, but films do so with startling frequency. And those consequences can be subversive.

Cinematic representations of the warrant requirement track the legal evolution of the warrant requirement. The warrant requirement is gradually being downgraded and eroded by the courts[88] as part and parcel of the general erosion of procedural and evidentiary protections originally enacted to promote legal visibility. Simultaneously, depictions of the warrant requirement in films, on television, and on the Internet increasingly question its efficacy and reveal its costs, disputing, in the process, the interpretive authority of the legal system (which is tied up with the legitimacy it gains through the persuasive power of legal performances governed by rules like the warrant requirement). Thus, the legal system's authoritative status as the primary producer of "justice" in society begins to be called into question.

Summary

The shifting status of the *Miranda* warning and the warrant requirement demonstrate how changes in visual cultural generally are reintegrated into the legal system, disrupting the system's ability to control the production of meanings in legal proceedings, a theatre of performance in which it had long perceived of itself as acting autonomously. The inquiry we have conducted into the interdependent dialectics of visual representation in film and legal procedure has enabled us to identify some of the pressing challenges facing the legal system as it attempts to preserve its authority and legitimacy in a radically changing world. The disintegration of the *Miranda* warning and the warrant requirement as epistemologically reliable devices supports our thesis that traditional legal poetics — expressed through the rules of legal procedure — lack the ability to continue to function as an effective system of visual representation. Where a visual representation once implied verisimilitude (i.e., reliable information regarding the reality depicted by the representation), visual representations have now come to be seen as mere images or simulacra, signifiers that only point to other signifiers and bear no connection to any reality or source. As a result of these changes, legal poetics — like cinematic poetics — have difficulty in producing representations that are considered legitimate or authoritative by contemporary audiences. People no longer buy into the maxim that seeing is believing.

In shaping the *Miranda* warning and the warrant requirement, the rules of legal poetics proved themselves flexible enough to favour the creation of visual representations when society demanded them as a guarantor of accurate depictions of reality. The slow but inexorable proliferation of *Miranda* and warrant-requirement images has changed them, however, from mimetic devices to pastiche,[89] from rules that promote visibility to those that function as simulacra. As a result, the law has had to adjust in turn, both in its doctrinal treatment of the exclusionary rule and in the methods it uses to perform convincing depictions of adjudication and justice.

We take no normative position as to the developments we have been describing. Our point throughout has been that there is an interplay between filmic culture and legal procedure that long has been overlooked, and that can help us inquire into and explain developments that otherwise might appear puzzling or random. Further inquiry along these lines can strengthen our understanding of the goals of law and the methods available for achieving them, as well as deepening our knowledge of the way law is practised on an everyday basis.

Conclusion: From Motion Pictures to Moving Images

In the preface to *Simulacra and Simulation*, Baudrillard describes the concept of simulacra by analogy to a psychosomatic patient. For purely psychological reasons, psychosomatics develops real symptoms of illnesses. Thus, when a given psychosomatic appears to fall ill, there is no way for an external viewer to determine whether the illness is a real one or a psychosomatic one. Such a patient blurs the distinctions between true and false, between the real and the imagined:

> Is the simulator sick or not, given that he produces true symptoms? Objectively one cannot treat him as being either ill or not ill. Psychology and medicine stop at this point, forestalled by the illness's henceforth undiscoverable truth. For if any symptom can be produced, and can no longer be taken as a fact of nature, then every illness can be considered as simulatable and simulated, and medicine loses its meaning since it only knows how to treat illnesses according to their objective causes.[90]

Baudrillard's observations about medicine are equally applicable to law in today's environment. Representations of justice have become so predominant in popular culture, and the influence of those representations on societal constructions of justice runs so deep, that it is longer possible to distinguish between "real" justice (symptoms of real, physical illnesses) and externally produced images of it (psychosomatic symptoms). And just as the study of reality can no longer be separated from the study of images of reality, so the study of adjudication — the doing of justice — can no longer be separated from the representation of justice. But unlike those post-modernists (and their traditionalist critics) who insist that such premises inevitably lead to the "death of justice", we, instead, would like to propose that

our current position gives us a uniquely interesting critical perspective.

In this article, we have argued that there is a symbiotic link between cinema and the law, and that this link can be used to deepen our understanding of the ways in which the legal system functions. Film theorists would benefit from pursuing this resonance as well. For example, the complex interconnections between the poetics of legal proceedings and cinematographic poetics may help to explain the abiding popularity of legal proceedings as a theme and plot device in films. If the law is really, as Todorov claims, the natural arena for performative attempts at verisimilitude, then it is no wonder that the medium whose main objective is the creation of verisimilitude revisits the law again and again.

We have tried to map out some of the ways in which the poetics of law replicate, or resonate with, the poetics of film. We hope that the initial lines of delineation presented here will encourage others to continue this process, thereby further shedding light on the legal system's attempts to render justice and adjudication visible. Such attempts will surely run parallel with continued efforts to trace the relationship between law and other semantic fields, such as literature and theatre, not to mention film's potent, much unexamined offspring, television and the Internet.

The technological capabilities available today for representing factual events in a virtual, apparently fail-safe manner titillates the imagination of legislators and academics. Some zealously call for the mass adoption of these technologies as evidentiary tools that can greatly improve the quality of judges' and juries' decision-making.[91] Those who question the incursion of such technologies into the courtroom are accused of being reactionary, anachronistic, and technophobic. A higher awareness of the epistemological processes involved might shift the focus of the debate. In this connection, a historical understanding of the semantic changes that film has undergone over the past century could prove vital.

The development of the basic theoretical tools we have suggested will make it possible to reexamine polemical debates, including those surrounding the evidentiary status of reenactments, the televised broadcast of trials, and other areas in which the performative aspects of the law are foregrounded, in a new light.[92] They will also help us weigh the desirability of any restrictions the legal system might place upon the introduction of new technologies in order to limit the total imposition of the simulacra effect in the courtroom. Without such regulations, courtrooms may soon find themselves flooded with an uncontrolled, and uncontrollable, stream of moving images that threaten to undermine the epistemological and societal status of the law as the entity that defines both how justice must be seen, and how it must be done.

Notes:

[1] See Franco Moretti, *The Way of the World* (1987) at 16.

[2] Throughout the article, we will use the concept of form in the Platonic sense. According to the *Concise Routledge Encyclopedia of Philosophy*, "an account of the form of beauty will explain what it is for something to be beautiful, and indeed other things are caused to be beautiful by their participation in the beauty". Hence, images of justice, like any other phenomenon in our earthly world, can never exhaust the form of justice, which is "a kind of being that is quite unlike the familiar objects of the phenomenal world: something eternal and changeless, eminently and exclusively whatever — beautiful or just or equal — it is, not qualified in time or place or relation or respect". *Concise Routledge Encyclopedia of Philosophy* 2000, s.v. "justice".

[3] As Curtis and Resnik write, referring to one aspect of legal visibility: "For more than 2000 years, people have looked at images of justice, drawn meaning from them, and written about them." Dennis E. Curtis & Judith Resnik, "Images of Justice" (1987) 96 Yale L.J. 1727 at 1729. Curtis and Resnik focus on the visual representation of the idea of justice through icons such as the blindfolded goddess of justice and the scales of justice, and on the essentiality of those "images of justice", and their manipulative power. For further discussion of the visibility of law, see Bernard Hibbits, "Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse" (1994) 16 Card. L. Rev. 229.

[4] This article focuses on legal procedure as a representational tool. Although procedure is more important in this capacity than it is generally thought to be, it is nevertheless only one of the methods of representation utilized by the law. Language, for instance, is a vital means of legal representation. For a thorough discussion of the representational dimension of legal language, see Alfred Phillips, *Lawyer's Language: How and Why Legal Language is Different* (2003). For a discussion of narrative and rhetorical means of representation, see Peter Brooks & Paul Gewirtz eds., *Law's Stories: Narrative and Rhetoric in the Law* (1996); Robin West, *Narrative, Authority, and Law* (1993); Guyora Binder & Robert Weisberg, *Literary Criticisms of Law* (2000). On the use of textual representations, see V. Turner, *From Ritual to Theatre* (1982); C. Geertz, "Local Knowledge: Fact and Law in Comparative Perspective" in *Local Knowledge* (1993) at 167.

[5] A writ of habeas corpus is a judicial mandate to a prison official ordering that an inmate be brought to court so that it can be determined whether that person is imprisoned lawfully or should be released from custody. Online: The Lectric Law Library's Legal Lexicon: <http://www.lectlaw.com/def/h001.htm>.

[6] Peter Goodrich, *Languages of Law* (1990) at 288.

[7] It has been claimed in this context that:

> Laws on the books — that is, legal texts — by themselves do not constitute the social practice of law, just as music on a page does not constitute the social practice of music … like music and drama, law takes place before a public audience to whom the interpreter owes special responsibilities.

J.M. Balkin & Sanford Levinson, "Law as Performance" in Michael Freeman & Andrew D.E. Lewis eds., *Law and Literature: Current Legal Issues* (1999) at 729. For an illuminating examination of the performative function of law, see Sally Engle Merry, "Courts as Performances: Domestic Violence Hearings in a Hawai'i Family Court", in Mindie Lazarus-Black & Susan F. Hirsch eds., *Contested states: Law, Hegemony and Resistance* (1994) at 35.

We believe inquiry into the performative aspects of legal proceedings will complement the study of legal texts that are the products of such proceedings. For a similar perspective in the field of film theory, see David Bordwell, *Making Meaning* (1989). Bordwell delineates the decisive differences between two distinct semantic fields: the written script, and the script as processed into cinematic language (the film represented on screen). A major part of a film's effect derives from the poetic qualities of the second field, in which the spectator is an active partner in the process of constructing meaning. Therefore, effective criticism cannot be based

solely on the script, but must encompass the interaction between the film presented on the screen and the spectator.

[8] Kafka's man from the country frustratingly spends his life "before the law", fruitlessly looking for the signs of justice, but when he "bends down to peer through the entrance", all he manages to see is "a radiance that streams inextinguishably from the door of the Law". Franz Kafka, *The Trial*, trans. by Willa & Edwin Muir (1956) at 267.

[9] The earliest theory of poetics is found in Aristotle's *Poetics*, which was described as a "mere manual on poetry in general and on epic and dramatic literature in particular." See J. Gassner, "Introduction" in Samuel A. Butcher, *Aristotle's Theory of Poetry and Fine Art* (1951).

[10] For uses of poetic terms in legal contexts, see Robert Weisberg, *Poetics and Other Strategies of Law and Literature* (1992) and James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985).

[11] Illuminating references to the similarity between legal proceedings and the cinema can be found in the work of Philip Meyer. See, for example, Philip N. Meyer, "Law Students Go to the Movies" (1992) 24(3) Conn. L. Rev. 893; Philip N. Meyer, "Desperate for Love: Cinematic Influences Upon a Defendant's Closing Argument to a Jury" (1994) 18(3) Vermont L. Rev. 721. We are indebted to Meyer's discussion about the influence of cinematic narrative on the narrative(s) that attorneys delineate in court. However, the basic analogy that Meyer draws is between the attorney and the film director. Our analysis is much broader in scope. Just as a film is produced by a team of specialized players, each of whom creates a part of the final cinematic expression, so attorneys, judges, witnesses, and other participants in a legal proceeding join together (though not necessarily according to a declared policy of cooperation) to produce the performance of adjudication encountered in the courtroom.

[12] In this regard, research on collective memory is relevant. See Maurice Halbwachs, *On Collective Memory* (1992); Kervin Lee Klein, "On The Emergence of Memory in Historical Discourse" in (2000) *Representations* 69 at 127; Shlomo Zand, *Cinema as History* (2002).

[13] For discussions of the cinematization of law, see, for example, Barbara Maria Stafford, *Good Looking, Essays on the Virtue of Images* (1997) at 27; Rebecca Johnson & Ruth Buchanan, "Getting the Insiders Story Out: What Popular Film Can Tell Us About Legal Methods Dirty Secrets", in (2001) *Windsor Yearbook of Access to Justice 87*; Jennifer L. Mnookin & Nancy West, "Theaters of Proof: Visual Evidence and the Law in Call Northside 777" (2001) 13 Yale J. L. & Human. 329 at 334 [Mnookin & West, "Theatres of Proof"].

[14] Pierre Bourdieu, *Outline of A Theory of Practice,* trans. by Richard Nice (1977).

[15] For contemporary illustrations of correspondence between different poetics, see, for example, *Adaptation* (2002), a film that describes the challenge of translating literary work into cinematic language; *All About My Mother* (1999), in which the dialogue between theatre and cinema is addressed, and *Talk To Her* (2002), in which the dialogue between dance and cinema is parsed.

[16] For the links between film and new forms of moving images, see Laura Kipnis, "Film and Changing Technologies", in John Hill & Pamela Church Kipnis eds., *The Oxford Guide to Film Studies* (1998) at 595; John Hill, "Film and Television" in John Hill & Pamela Church Kipnis eds., *The Oxford Guide to Film Studies* (1998) at 605. On the convergence of novel technologies and films, see Jill Nelmes, ed., *Introduction to Film Studies* (1999) at 73.

[17] Currently available devices for producing reenactments and presentations of evidence apply the principles of cinematic expression, and thus thrust cinema itself into a central role in legal proceedings. Two such devices that have aroused controversy are the CGE (computer generated evidence), and the IEPS (integrated evidence presentation systems). For an examination of the procedural aspects of these devices, see Elan E. Weinreb, "Counselor, Proceed With Caution: The Use of Integrated Evidence Presentation Systems and Computer Generated Evidence in the Courtroom" 23 Card. L. Rev. 393 [Weinreb, "Counselor"].

[18] Law and literature scholarship suggests a methodological paradigm for law and film scholarship; to a great extent the latter can be described as an offshoot of the former. See Mnookin & West, "Theaters of Proof", *supra* note 13 at 334, n.19. The vigorously emerging field of law and popular culture has also helped to propel interest in the intersection of law and film. See, for example, Anthony Chase, "Toward a Legal Theory of Popular Culture" (1986) Wis. L. Rev. 527; Paul Joseph, "Introduction: Law and Popular Culture" (2000) 24(2) Nova L. Rev. 527; Robert M. Jarvis & Paul R. Joseph eds., *Prime Time: Fictional Television as Legal Narrative* (1998); Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (2000); Richard K. Sherwin, "Law/Media/Culture: Legal Meanings in the Age of Images" (2000) 43 N.Y.L Sch. L. Rev. 653.

[19] See, for example, Martha Minow, ed., *Narrative, Violence, and the Law: The Essays of Robert Cover* (1992); Bernard S. Jackson, *Law, Fact and Narrative Coherence* (1991); Robin West, *Narrative, Authority, and Law* (1993); Milner S. Ball, *Called By Stories: Biblical Sagas and Their Challenge for Law* (2000).

[20] See Shulamit Almog, "As I Read I Weep: In Praise of Judicial Narrative" (2001) 26 Okla. City U.L. Rev. 471; Jonathan Yovel, "Running Backs, Wolves, and other Fatalities: How Manipulations of Narrative Coherence in Legal Opinions Marginalize Violent Death" Cardozo Stud. L. & Lit. [forthcoming].

[21] James Boyd White, *The Legal Imagination* (1973).

[22] Recently stirrings have begun in this field as well. See, for example, David A. Black, *Law in Film: Resonance and Representation* (1999); John Denvir, "Introduction" in John Denvir, ed., *Legal Reelism: Movies as Legal Texts* (1996); Philip N. Meyer, "Visual Literacy and the Legal Culture: Reading Film as Text in the Law School Setting", (1993) 17(1) Legal Stud. F. 95; Mnookin & West, "Theatres of Proof", *supra* note 13.

[23] The designation of a specific site for the practice of judging — an important aspect of the "performance" of adjudication — has deep roots. To mention one example, in 1215, the *Magna Carta* provided that proceedings should not follow the King but should be held "in some fixed place" ("in *aliquo loco certo*"). For ages, this fixed place was Westminster Hall. See Dorian Gerhold, *Westminster Hall — Nine Hundred Years of History* (1999). Today, the concept of fixed courts is common to almost all legal systems. The overwhelming majority of trials are now held in purpose-built courtrooms, which typically contain identical, familiar appointments: A raised bench for the judges, a witness stand, seats for the public, etc. See Joseph Jaconelly, *Open Justice: A Critic of the Public Trial* (2002).

[24] René Jaenne & Charles Ford, *Le Cinema Et La Presse 1895–1960* (1961) at 14.

[25] Hugh Gray wrote about Bazin: "[O]ne might call him the Aristotle of the cinema and his writing its *Poetics*". See Hugh Gray, "Introduction", in André Bazin, *What is Cinema*, trans. by Hugh Gray (1967).

[26] *Ibid.* at 13. The "immutable aura of validity" that the screen image is vested with is demonstrated by Hitchcock's experience with the film *Stage Fright* (1950). Hitchcock had a character narrate a flashback and lie. The audience reacted angrily. They were not able to accept the possibility that the image before them could represent anything other than the truth. See James Monaco, *How to Read a Film* (2000) at 210 [Monaco, "Film"].

[27] *Ibid.* at 25. According to Bazin, the primary difference between cinema and theatre lies in this characterization. For an earlier reference to the qualities of the cinematic shot from a Marxist perspective, see Walter Benjamin's observation:

> With the close-up, space expands; with slow motion, movement is extended. The enlargement of a snapshot does not simply render more precise what in any case was visible, thought unclear: it reveals entirely new structural formations of the subject.

See Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction" in John C. Handart, ed., *Video Culture: A Critical Investigation* (1986) at 27 [Benjamin, "Video Culture"].

[28] Literary critic Michael Riffattere describes verisimilitude as "a system of representations that seems to reflect a reality external to the text, but only because it conforms to a grammar". Michael Riffattere, *Fictional Truth* (1990).

[29] Bazin, *supra* note 25 at 86.

[30] The close link between law and verisimilitude is described (or narrated) by Todorov as follows: One day in Sicily, in the fifth century B.C., a dispute between two men ended in violence, with damages. The next day they appeared before the authorities so it could be decided which of the two was guilty. But how to reach such a decision? The dispute did not occur before the eyes of the judges, who were unable to observe and ascertain the truth. When the senses are powerless, only one means remains — to hear the narratives of the litigants themselves, whose position is thereby altered, for their problem is no longer to establish truth (which is impossible), but to approach it, to produce an impression of it. … That day witnessed the simultaneous birth of the consciousness of language, of a science which formulates the laws of language (rhetoric),

and of a concept (verisimilitude) which would fill the gap between these laws and what is claimed to be language's constitutive property: its reference to reality. See Tzvetan Todorov, *The Poetics of Prose*, trans. by Richard Howard (1977).

[31] The level of audience participation changes from one theatrical genre to another. Certain genres, such as *commedia dell' arte* or stand-up comedy, seek to intensify this aspect of the theatrical experience and place it at the center of the work. In other genres, the involvement of the audience is humbler, yet it is never as subdued as it is in cinema and in law. For an odd cinematic experience that reconstructs the participatory aspects of the theatrical experience, consider the phenomena of cult films such as the *The Rocky Horror Picture Show* (1975), in which audience interaction with the characters on the screen has become a regular occurrence.

[32] See Fed. R. Evid. 611, which gives the trial court control over the presentation of evidence.

[33] A well known motif in law dramas is the helplessness of those physically present, sometimes including the accused himself, to interfere in the presentation of the reality occurring on the witness stand.

[34] For a cinematic illustration of the presence-absence experience that typifies cinematic viewership, see Woody Allen's *The Purple Rose of Cairo* (1985), wherein the hero exits the screen and invites the spectator, played by Mia Farrow, to participate in the represented events.

[35] To mention just one of many possible examples, the interior of the courtroom in African Kilimanjaro (Marangu) contains a raised platform where the magistrate sits. In front of the magistrate's desk, embedded in the cement, is the stone once used by the tribal chief. See Sally Falk Moore, *Social Facts and Fabrications* (1986) at 159. This mise-en-scène resembles the Woolsack, the traditional seat of the Lord Chancellor in The House of Lords in Westminster, London.

[36] See, for example, Neal Feigenson, "Law/Media/Culture: Legal Meaning in the Age of Images: Accidents as Melodrama" (2000) 43 N.Y.L. Schl. L. Rev. 741; Richard K. Sherwin, "Law and Popular Culture: Nomos and Cinema" (2001) 48 UCLA L. Rev. 1519 [Sherwin, "Nomos"]; Austin Sarat, "Law/Media/Culture: Legal Meaning in the Age of Images: Living in a Copernican Universe: Law and Fatherhood in a Perfect World" (2000) 43 N.Y.L. Schl. L. Rev. 843.

[37] The word *icon* is derived from the Greek *eikon*, meaning "likeness" or "image". Iconography means the identification, classification and analysis of conventional images. David Macey, *The Penguin Dictionary of Critical Theory* (2000).

[38] For example, the figure of the vagabond in Charlie Chaplin films, or the generic topography of Westerns with their open spaces, one-street towns, saloons and sheriffs.

[39] This distinction is valid mainly with regard to the Supreme Court Justices, who are often endowed with an iconic status in the legal culture.

[40] Benjamin, "Video Culture", *supra* note 27.

[41] For the writings of the Frankfurt School, see Theodor W. Adorno, *The Culture Industry: Selected Essays on Mass Culture*, ed. by J.M. Bernstein (1991); Max Horkheimer & Theodor W. Adorno, *Dialectic of Enlightenment*, trans. by John Cumming (1973).

[42] An image that appears on the screen for one second is composed of 24 individual pictures. This speed is considered standard in cinematic poetics because it correlates with the rate of change at which images appear to the human eye. See Monaco, "Film", *supra* note 26 at 93-94.

[43] Benjamin, "Video Culture", *supra* note 27 at 44.

[44] See Gustav Yanouch, *Conversations with Kafka* (1953) at 86 [Yanouch, "Conversations"]. Kafka saw the drawn picture as "both true and false. It is true only in one sense. It is false in that it proclaims this incomplete view to be the whole truth". He saw the photograph, on the other hand, as completely deceptive: "Nothing can be deceiving as a photograph." Compare Franz Kafka, *Letters to Felice*, trans. by Erich Heller & Jurgen Born (1983) at 201. (Kafka's response to the photos of his fiancée, Felice); Elizabeth Boa, Kafka: Gender, Class, and Race in Letters and Fictions (1996) at 71–75. Thus, Kafka's evaluation of cinema's distorting effect is unsurprising:

> Of course it is a marvelous toy. But I cannot bear it because perhaps I am too "optical" by nature. I am an Eye-man. But the cinema disturbs one's vision. The speed of the movements and the rapid change of images force men to look continually from one to another. Sight does not master the pictures, it is the pictures which master one's sight. They flood one's consciousness. The cinema involves putting the eye into uniform, when before it was naked … Films are iron shutters. See Yanouch, "Conversations", at 88-89.

It should be noted, however, that although Kafka's remarks on cinema have gained much attention within film studies, the authenticity of Yanouch's book is doubted by many (see: Martin Brady and Helen Hughes, "Kafka Adapted to Film" Julian Preece, ed. *The Cambridge Companion to Kafka* (2003), 240. It is also worth mentioning that Kafka was fascinated by the new medium. He frequently visited the cinema, and often referred to it in his letters and diaries. See Janns Zischler, *Kafka Goes to the Movies* (2003).

[45] For cinematic illustrations of this interdependence see, for example, *A Clockwork Orange* (1971), *Pulp Fiction* (1994) and *Hero* (2003).

[46] In *The Work of Art in the Age of Mechanical Reproduction*, Benjamin describes such gradual developments:

> The enormous changes which printing, the mechanical reproduction of writing, has brought about in literature are a familiar story. However, within the phenomenon which we are here examining from the perspective of world history, print is merely a special, through particularly important case … Just as lithography virtually implied the illustrated newspaper, so did photography foreshadow the sound film. The technical reproduction of the sound was tackled at the end of the last century. See Benjamin, "Video Culture", *supra* note 27 at 28.

[47] E.H. Gombrich, *Art and Illusion* (1986) at 7.

[48] See in this regard Benjamin's prediction:

> In 1927 Abel Gance exclaimed enthusiastically: "Shakespeare, Rembrandt, Beethoven, will make films … all legends, all mythologies and all myths, all founders of religion, and the very religions … await their exposed resurrection, and the heroes crowd each other at the gate". Presumably without intending it, he issued an invitation to a far-reaching liquidation. See Benjamin, "Video Culture", *supra* note 27 at 31.

[49] Plato, *The Republic of Plato*, Book VII, trans. by Allan Bloom (1968) at 515.

[50] Fredric Jameson, "Postmodernism, or the Cultural Logic of Late Capitalism", 146 New Left Rev. 53 (1984).

[51] Jean Baudrillard, *Simulacra and Simulation*, trans. by Sheila Faria Glaser (1994) [Baudrillard, "Simulacra"].

[52] Gilles Deleuze & Felix Guattari, *Anti-Oedipus*, trans. by Robert Hurley, Mark Seem & Helen R. Lane 1977).

[53] Brian Massumi, "Realer Than Real: The Simulacrum According to Deleuze and Guattari", 1 Copyright (1987).

[54] Jean Baudrillard, *The Perfect Crime* (1996) at 30.

[55] Mike Gane, *Baudrillard Live: Selected Interviews* (1993) at 32. As Merrin notes, Baudrillard focuses his criticism on hyperrealistic films created in the 1970s, but his critique is even more pertinent with regard to computer generated, digital cinematography. See William Merrin, "'Did You Ever Eat Tasty Wheat?': Baudrillard and The Matrix", Online: Scope: An On-Line J. of Film stud. <http://www.nottingham.ac.uk/film/journal/articles/did-you-ever-eat.htm> [Merrin, "Did You?"]. Merrin's article deals with the film *The Matrix* (1999). In one of the early scenes we see Baudrillard's book *Simulacra and Similation* next to the bed of the hero, Neo, played by Keanu Reeves. Baudrillard's inclusion is "an acknowledgment that his theory of simulation and the simulucrum is, in some way, central to the film". See Merrin, "Did You", *supra* at 1. However, perhaps ironically, this acknowledgment appears in a film that represents, for the reasons persuasively presented by Merrin, a form of filmmaking that promotes simulacra.

[56] Shulamit Almog, "From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative and Law" (2002) 13 Fordham Intell. Prop. Media & Ent. L. J. 1 at 24.

[57] *Ibid.* at 25.

[58] See, for example, Sherwin, "Nomos", *supra* note 36.

[59] See *Miranda v. Arizona*, 384 U.S. 436 (1966) [*Miranda*].

[60] See U.S. Const. Am. IV.

[61] See *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961).

[62] As Jeremy Bentham straightforwardly put it: "Evidence is the basis of justice: to exclude evidence is to exclude justice". Jeremy Bentham, "Rationale", ed. by Peter Murphy, *Evidence, Proof and Facts* (2003) at 61.

[63] See, for example, James Allan, "To Exclude or Not to Exclude Improperly Obtained Evidence" in James Allan, *Sympathy and Antipathy: Essays Legal and Philosophical* (2002) at 75.

[64] It is worth considering, in this respect, the spectacular representations of events that can be produced by technologies such as GRE or IEPS. Through their sheer representational capacity, these technologies call into doubt their own evidentiary value. Compare Weinreb, "Counselor", *supra* note 17.

[65] Phyllis T. Bookspan, "Reworking the Warrant Requirement: Resuscitating the Fourth Amendment" (1991) 44 Vand. L. Rev. 473 at 487 [Bookspan, "Reworking"].

[66] *Miranda*, *supra* note 59.

[67] The *Miranda* ruling was the culmination of a process that included a number of precedential milestones. See, for example, *Townsend v. Sain*, 372 U.S. 293 (1963); *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Haynes v. Washington*, 373 U.S. 503 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964); and *Escobedo v. Illinois*, 378 U.S. 478 (1964).

[68] *Miranda*, *supra* note 59 at 444.

[69] *Miranda*, *supra* note 59 at 467: "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent."

[70] *Miranda*, *supra* note 59 at 444: Judge Warren writes, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination".

[71] *Miranda*, *supra* note 59 at 468-69.

[72] See Louis Michael Seidman, "*Brown* and *Miranda*" (1992) 80 Calif. L. Rev. 673.

[73] *Control and Safe Streets Act of 1968*, 18 U.S.C. § 3501.

[74] See *Michigan v. Tucker*, 417 U.S. 433 (1974) [*Tucker*]. In the wake of *Tucker*, a number of rulings further limited *Miranda*. For a survey of these developments, see Willard Pedrick, "*Miranda* Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in *Dickerson*" (2001) 33 Ariz. St. L. J. 387; I.M. Rosenberg & Y.L. Rosenberg, "Of *Miranda* and Homely Brides: Imperfect Rules for an Imperfect World" (2001) 28 Am. J. Crim. L. 337; Conor G. Bateman, "Case Note: *Dickerson v. United States*: *Miranda* Is Deemed A Constitutional Rule, but Does It Really Matter?" (2002) 55 Ark. L. Rev. 177. The last significant decision in this line was *Dickerson v. United States*, 530 U.S. 428 (2000). Contrary to the expectations of the legal community, *Dickerson* held that *Miranda* and its progeny were constitutionally compelled.

[75] For a detailed discussion, see Wayne D. Holly, "The Fourth Amendment Hangs In The Balance: Resurrecting The Warrant Requirement Through Strict Scrutiny" (1997) 13 N.Y.L. Sch. J. Hum. Rts. 531 at 548. The analysis is relevant to the "Fruit of the Poisonous Tree" doctrine generally, which arose from a series of Fourth Amendment cases. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), *Wong Sun v. United States*, 371 U.S. 471 (1963). The creation of numerous exceptions eventually led to an undermining of the doctrine as a whole. See Yale Kamisar, "Response: On The 'Fruits' Of *Miranda* Violations, Coerced Confessions, And Compelled Testimony" (1995) 93 Mich. L. Rev. 929 at 980; Jeffery M. Bain & Micheal K. Kelly, "Comment: Fruit Of The Poisonous Tree: Recent Developments As Viewed Through Its Exceptions" (1977) 31 U. Miami L. Rev. 615 at 625; "The Supreme Court, 1983 Term-Leading Cases" (1984) 98 Harv. L. Rev. 87 at 124.

[76] *Weeks v. United States*, 255 U.S. 298 (1921).

[77] 255 U.S. 298 (1921). See also Bookspan, *supra* note 65 at n. 51.

[78] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[79] *United States v. Ventresca*, 380 U.S. 102 (1965) at 105. In *Thompson v. Louisiana*, 469 U.S. 17 at 20 (1984), the Court noted that the warrant requirement "was not a principle freshly coined for the occasion in *Katz*, but rather represented this Court's longstanding understanding of the relationship between the two clauses of the Fourth Amendment." See Charles W. Chotvacs, "The Fourth Amendment Warrant Requirement: Constitutional Protection Or Legal Fiction? Noted Exceptions Recognized by The Tenth Circuit" (2002) 79 Denv. U. L. Rev. 331.

[80] 389 U.S. 347 (1967) at 357.

[81] Bookspan, "Reworking", *supra* note 65 at 476, and further discussion at 477–512. For as Justice Scalia observed in *California v. Acevedo*, the Fourth Amendment warrant requirement has become "so riddled with exceptions that it is basically unrecognizable". *California v. Acevedo*, 500 U.S. 565 (1991) at 582.

[82] Bradley, "Two Models of the Fourth Amendment" (1985) 83 Mich. L. Rev. 1468 at 1475.

[83] James B. Haddad, "Well Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause" (1977) 68 J. Crim. L. & Criminology 198 at 199.

[84] William J. Stuntz, "Warrants and Fourth Amendment Remedies" (1991) 77 Va. L. Rev. 881 at 882.

[85] Bookspan, "Reworking", *supra* note 65 at 512.

[86] See, for example, Orin S. Kerr, "Internet Surveillance Law After The *USA Patriot Act*: The Big Brother That Isn't" (2003) 97 Nw. U. L. Rev. 607; David Hardin, "The Fuss over Two Small Words: The Unconstitutionality of the *USA Patriot Act* Amendments to FISA Under the Fourth Amendment" (2003) 71 Geo. Wash. L. Rev. 291; Michael P. O'Connor & Celia Rumann, "Emergency and Anti-Terrorism Power: Going, Going, Gone: Sealing the Fate of the Fourth Amendment" (2003) 26 Fordham Int'l L.J. 1234; Roberto Iraola, "Terrorism, the Border, and the Fourth Amendment" (2003) Fed. Cts. L. Rev. 1.

[87] See, for example, *Illinois v. Gates*, 462 U.S. 213 (1983) at 216, where Justice Rehnquist wrote:

> In addition, the possession of a warrant by officers conducting an arrest or search greatly *reduces the perception of unlawful or intrusive police conduct*, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search. [Emphasis added.]

[88] Bookspan describes the two parts of the erosion process:

> (1) the Court has whittled away the fourth amendment's probable cause requirement, shifting it from a rule-based test to a "common sense, fair-probability" standard; and (2) the Court has sacrificed the fourth amendment's prohibition against warrantless searches and seizures for a chameleon-like "reasonableness" approach. The result is almost no reliable substantive law applying the warrant clause. See Bookspan, "Reworking", *supra* note 65 at 476, and further discussion at 477–512.

[89] According to Jameson, pastiche is "the imitation of a peculiar or unique, idiosyncratic style, the wearing of a linguistic mask, speech in dead language". Fredric Jameson, *Postmodernism, Or the Culture Logic of Late Capitalism* (1991).

[90] Baudrillard, "Simulacra", *supra* note 51.

[91] See, for example, Fred Galves, "Where the Not So Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance"; *The Harvard Law School Journal of Law and Technology*, Volume 13, No. 1: Fall, 1999 300:

> It is easy to imagine a future lawyer, looking back to the 'old days' and ridiculing our initial fears of CGE's and our various attempts to exclude technology from the courtroom … let us proceed and embrace CGE's in the courtroom as the new and powerful tools for justice and jurisprudence that they truly are; an actual picture, especially with motion, is far better than the attempt to create that very same image in the minds of jurors through the indirect and ephemeral medium of mere words.

[92] See Mnookin & West, "Theatres of Proof", *supra* note 13; Heiden Nasheri, *Crime and Justice in the Age of Court TV* (2002).