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before our eyes [...] phantasy on the other hand lacks the consciousness of reality in relation to what is phantasied” (Husserl 2005, 4). Differentiating between and among these forms is the direct task of psychoanalysis, which, on the basis of the source of the patient’s speech, or vocalization, helps the analyst design an appropriate method of intrusion into the unconscious along the path of some deviant manifestation. The path to the unconscious is coded, and dream serves as the main decoder. “Dream is a rebus; it must be understood quite literally” (Lacan 1989, 176). Thus, suggests Lacan, one should approach dreams on the basis of what they are, namely, as symbols. *Traumdeutung* is symbolic interpretation in a sense that it shows how the signifiers are combined in *Entstellung*, or “distortion,” “transposition,” and a reversal, in other words. *Entstellung* is the necessary condition for dreaming; more importantly, it helps establish “the effect of the signifier on the signified” (ibid., 177). This is to say that dreams incorporate the laws that govern both realms, the realm of presence and the realm of absence, but in a manner of distorted reflection, concealing certain inner aspects of one order, while exaggerating the backbone of the other. Lacan describes the final effect of *Entstellung* as “sliding of the signified under the signifier” (ibid.). Dreams’ partiality and temporal lapses, their polymorphous imagery, simultaneity of surface and depth, repeatability and cross sequentiality, the operations of fading in and out, and all their means, in other words, point to the work of this reversal. Unlike memory or fantasy that can be described as incomplete, the partiality of dreams is not a deficiency but an essence. We always experience dreams in the *mo de* of fragmentation; for an awakened consciousness, they are never complete.

If fragmentation is the syntax of the dream, its subject is a trope, or rhetorical figure that rises, paraphrasing Lacan, to uphold a symbolic meaning produced as a result of sliding of the signified under the signifier. Metaphor and metonymy are the most basic rhetorical figures.¹¹ They are directly associated with Jakobson’s transcendental structures of meaning-production: (a) syntagmatic axis, which is responsible for combining structural elements, and (b) paradigmatic axis, which is responsible for selecting these elements: “Signification is always dependent on the participation of both axes and therefore both figures” (Lacan 1989, 181). The two figures complement each other: metaphor evokes the promise of desire, while metonymy reveals its lack.¹² What one desires hides in the shadows; never fully exposed, it is always rendered only partially. Although definitional for the process of meaning-production, metonymy and metaphor are not the only figures that participate in generating symbols however. In addition to the basic pair of symbols, symbol-making is traced in “periphrasis, hyperbole, ellipsis, suspension, anticipation, retraction, negation, digression, irony [...] the figures of style (Quintillian’s *figurae sententiarum*); but also catachresis, litotes, antonomasia, hypotyposis” (ibid., 186). In dreams, these figures

¹¹ Considering Lacan’s emphasis on partiality as programmatic for his entire project allows de Certeau and Logan to suggest that for Lacan metonymy is “more fundamental than metaphor” (1983, 23).

¹² Another way of designating the difference between the two figures is to reference Caudill, who associates “Freud’s operation of ‘displacement’ with metonymy and the operation of ‘condensation’ with metaphor” (1997, 55).

often appear as actors whose actions help form fantastic plots, ensuring intensity and memorability of dreams. The sum of these figures forms a paradigm that provides interpretation with the nexus point and a frame of reference, explaining all other figures in terms of their positions in dream sequences.

Lacan calls this paradigm “the big other.” The big other is the first signifier, the Law. Standing behind the imaginary, the symbolic, and the real, as it were, the big other provides the connection to all the three realms.¹³ Originally conceived by Freud on the basis of the mythological figure of King Oedipus, for Lacan, the big other designates radical alterity, an otherness that transcends the illusory otherness of the imaginary because it cannot be assimilated through any kind of identification. Unequivocally, Lacan equates the big other with the laws of language; more specifically, the big other is inscribed in the symbolic order that divides, separates, polarizes, and otherwise diminishes all other orders. The big other is also an operation that mediates the relationship between the self and other subjects. As a result of this function, the Law connects the desires that operate in the unconscious with their symptomatic expressions, and having arisen in this manner, it stands up high, hovering over the ordinary and the every day. From this position, its main tasks are indeed upholding, arbitrating, and reconciling the relationship between the Self and the other. This is what constitutes both the morality of a person, but also the collective Law that rules over the mundane sociality. In order to bring its rule to the sensible, the big other must exercise violence. Here we find another parallel with Freud, whose idea of law is necessarily tied to aggression and death.

Elaborating on the ways the Law conducts its governance, Lacan refers to the “superimposition of the kingdom of culture in marriage rituals on the laws of mating that stay with the nature” (1989, 73). He thus differentiates between the primordial Law before the big other, so to speak, and the Law which is a modification of the primordial exchange. The big other is organized in the manner of language: “They say that none should be ignorant of the law, but actually none is ignorant of it since the law of man has been the law of language since the first words of recognition presided over the first gifts” (ibid., 67–68). The big other as the language is not the gift giver because the symbols it produces do not presuppose exchange but are forced upon the self and the other. Expressed in and by legal procedures, documents, activities, discourses, and verdicts, these symbols always involve an act of superimposition, that is, they bestow violence on the person and his or her biography, just as it was described by Derrida earlier. As a logic, as a system of rules and operations, language is designed to open speech to violence.¹⁴ It hampers expression by subsuming sense and its infinite ways under the constraints of the finite grammar and the expressive limits of specialized lexicons. The prison house of language signifies the impossibility of “free speech.”

¹³ According to Chaitin, “The ‘law’ that symbolic father represents is first the advent of desire, the *manqué-a-etre*, the law of the functioning of the signifier before any particular signification is attached to it: not some specific, historically defined, social order, but all such orders” (1988, 52).

¹⁴ See Lecercle (1990) for an elaboration of the relationship between violence and language in literature.

The significance of this scheme for the present study lies in the assumption that the big other that represents the unconscious by standing behind every dream and every interpretation can nonetheless be accessed through its own dreams. The dreams that are suppressed are also the dreams of suppression, “an act of homage to missed reality” (Lacan 1989, 58). Their content implies violence as the condition for the beginning of an order, whether social or natural: “Aggressivity helps us understand all the atypicalities that contribute to the notion of coming-into-being (*devenir*) of the primordial justice” (ibid., 23). The dreams of the Law come from the place where violence is applied to the matter, shaping it in the form of symbolic consciousness. The origin of violence can be traced to the beginning of symbol, the fact of birth that deals with an extraction, a forced appearance of the other to the self: “The division that alienates oneself from one’s self founds man’s aggressivity” (ibid., 21). All other forms of violence refer to this primordial severance, division, separation. In dreams, symbolic figures serve to deliver violence. In doing so, they evoke the Law that demystifies and traumatizes its subjects, shaping their identities as rhetorical figures.

There are a few peculiarities of symbolic interpretation that Lacan underscores. Among them is the problem of representing violence in terms of dream imagery. Following the distinction between perception images, memory images, and dream images, as it was elaborated by Husserl earlier, one can say that it is the relationship between word and image that singles out dreams as the only medium capable of fusing the two in a properly synthetic way. In dreams, images and utterances form a symbiotic whole while allowing them to transcend their origin on a higher plane of meaning. The surreal art provides a fertile ground for the work of transcendence. In this sense, instant justice is neither abnormal nor supreme, but precisely mundane, a paradigmatic instantiation of the ordinary which requires only a fitting figure to turn the nightmare of instant justice into a horrifying reality.

41.5 Conclusion

In this chapter, I have attempted an examination of instant justice. The examination was situated at the site of John Wagner’s comics *Judge Dredd*. My findings have shown that the comic conveys the desire for instant justice through violence. In other words, violence is law’s primary mode of givenness. The desire for violence can never be satisfied because it is immanent to the unconscious state and manifests in dreams only. When the desire for instant justice is brought into the conscious state, however, it is capable of eliminating the border between the law as a normative structure of the social order and lawless relativism, a virtual object of violent action. In the primitive state, this object does not depend on the state of exception, for it is a state-in-becoming, a condition for both the preservation and the negation of any social order.

In the second part of this chapter, two works of literature, Franz Kafka’s novel *The Trial* and Fridrich Dürrenmatt’s novella *Traps*, elaborate this thesis in a different aesthetic mode, showing instant justice to be a liminal phenomenon of the in-between, as the in-between the conscious and the unconscious, the imaginary and the real, the

self and the other. To put it forcefully, bringing the Law into the ordinary helped reveal the symbolic structure of legal consciousness. Most broadly, this structure appeared to replicate that of dreaming. This connection demanded an in-depth investigation of the relation between law and dreaming, and Jacques Lacan provided the study with the frame for understanding the emergence of the dream-driven legal symbology. The imagery in the production of dreams pointed to the importance of the imaginary not just for instant justice but for the law. Finally, the journey from the imaginary to the real through the symbolic demonstrates potential applicability of Lacan's theory of the symbolic to the study of various sociocultural phenomena and especially legal ones.

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Chapter 42

Oil and Water Do Not Mix: Constitutional Law and American Popular Culture

David Ray Papke

Abstract One might assume that the American cinema and television would be comfortable homes for constitutional deliberation and discussion, but that is decidedly not the case. Only a handful of films and television series contemplate the Constitution, and as a consideration of *First Monday in October* (1981), *The Pelican Brief* (1993), and short-lived television series from 2002 illustrates, constitutional deliberation in those films and series is stunted. Some suggest this phenomenon derives from the real-life Supreme Court's determination to preserve the secrecy of its workings and from the inherently "talky" and therefore boring nature of constitutional deliberation. In addition, the paucity of works with rich constitutional deliberation derives from the production processes of the culture industry. In particular, the culture industry's use of stock characters, devotion to familiar conventions, and reliance on established genres virtually preclude meaningful constitutional deliberation and discussion in cinema and television.

42.1 Introduction

The framers of the US Constitution might not have anticipated the development, but by the early decades of the nineteenth century, the Constitution had become a vehicle for discussing great national issues (Papke 1998, 6–8, 19–21). Was slavery to be protected? Should business concentrations be limited? Must different races be treated equally? Members of the appellate federal courts and especially the US Supreme Court employed the Constitution in sophisticated ways to consider these questions, and average citizens as well debated the question of whether a law,

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procedure, or social practice was “constitutional.” Deliberation and discussion of the Constitution became one of the richest parts of American political life.

In the present, one might expect that constitutional deliberation and discussion would make their way into the cinema and television, the preeminent commodities and experiences produced by the culture industry for mass audiences. Scholars have underscored the way the consumption of popular culture has become the most important cultural experience for a majority of Americans, and the titles of their works refer to popular culture as “the art of democracy” and dub the contemporary United States “the republic of mass culture” (Cullen 1996; Baughman 1992). Furthermore, Hollywood as the paradigmatic producer of popular culture has hardly shied away from bringing timely political concerns into the movies, albeit in dramatized and often reductive ways. “While Hollywood has traditionally defined its product as entertainment and has pooh-poohed ‘message filmmaking,’ in practice the industry has consistently relied on topicality as a crucial ingredient of box-office success” (Prince 2000, 65). The cinema and television as well, one might assume, would and should be comfortable homes for constitutional deliberation and discussion.

But this is decidedly not the case. Only a handful of mainstream films and television series consider the Constitution and its relationship to contemporary issues, and the constitutional deliberation and discussion in those films and television series are stunted. For this reason and others, what we might call “constitutional law films and television series” have for the most part been artistic and commercial failures. Indeed, these works are so unsuccessful as to discourage filmmakers and television producers from undertaking comparable projects. They are almost reminders that undertaking a film or television series in which constitutional deliberation and discussion are central would be foolhardy.

What explains the failure of Hollywood and the culture industry to produce successful works including constitutional deliberation and discussion? One might consider for starters the Supreme Court’s dogged efforts to protect its anonymity and to preserve a near-invisibility (Burton 2004, 67). In their best-selling book concerning the Burger Court of the early 1970s, Bob Woodward and Scott Armstrong underscored the way the Supreme Court has not only refused to allow television cameras but also consciously devised rules and approaches designed to preserve the secrecy of its workings. According to Woodward and Armstrong:

No American institution has so completely controlled the way it is viewed by the public. The Court’s deliberative process – its internal debates, the tentative positions taken by the Justices, the preliminary votes, the various drafts of written opinions, the negotiations, confrontations, and compromises – is hidden from public view. (Woodward and Armstrong 1976, 1)

Laura Krugman Ray has also underscored the remote and mysterious workings of the Supreme Court and the veritable seclusion of the justices: “They emerge from behind their red velvet curtains for carefully rational oral arguments before voting in the perfect privacy of their conference room and writing their opinions in chambers” (Ray 1997, 151). With such little public exposure, the public has no operating image of the members of the Supreme Court. Hollywood, the argument goes, is

denied a referent, and this limits attempts to produce pop cultural works featuring the members of the Supreme Court deliberating and discussing the Constitution.

More generally, it could be argued that constitutional deliberation and discussion primarily take the form of talking about the Constitution, its meanings, and its relevance and that popular culture would presumably take a comparable form. However, “talky” films or series, the argument goes, are not what consumers want. A place exists for this type of programming on American public television, but when Americans drive to the cineplex or turn on their family room television sets during primetime, they want to be entertained. By tradition, this entertainment is to be visual rather than wordy. Constitutional deliberation and discussion from this perspective seem lousy materials for the cinema or television.

There is of course some truth to these arguments, but the arguments look too much to the potential subject matter, themes, and meanings of the works. They treat films and television series almost as if they were literary works. In reality, films and television series are the material products of a sophisticated culture industry. The paucity of works and attenuated character of constitutional deliberation and discussion in those works may derive less from a lack of creativity and imagination and more from the ways such works are produced.

In particular, I am prepared to argue that the culture industry’s use of stock characters, devotion to familiar conventions, and reliance on established genres preclude meaningful constitutional deliberation and discussion in cinema and television. These aspects of pop cultural production are virtually industrial imperatives. They are main cogs in the culture industry’s system of signifying and portraying reality. Stock characters, familiar conventions, and established genres limit most films and television series, but the limitations are especially pronounced when consideration of the Constitution is a possibility.

In the discussion that follows, I consider narrational fictional works and focus in order on *First Monday in October* (1981), *The Pelican Brief* (1993), and *The Court* and *First Monday*, two short-lived American television series from 2002. The producers of these works included some variety of constitutional deliberation and discussion, and the works at first seem promising in that regard. With further scrutiny, though, we see that the general norms and standard components of popular cinema and television preclude any meaningful engagement with the Constitution and constitutional issues. Oil and water cannot be made to mix.

42.2 Romantic Comedy at the Supreme Court?

The film *First Monday in October* (1981) illustrates superbly well the way the culture industry’s reliance on stock characters, familiar conventions, and established genres destroys any hope for serious constitutional deliberation and discussion. Written by Jerome Lawrence and Robert E. Lee and starring Jane Alexander and Henry Fonda, the theatrical version of *First Monday in October* ran on Broadway in

the fall of 1978. The Hollywood adaptation of the play, starring Jill Clayburgh and Walter Matthau, appeared in 1981. Alexander on Broadway and Clayburgh in the film played fictional Justice Ruth Loomis, the first woman appointed to the US Supreme Court. Interestingly enough, between the end of the Broadway production's run and the completion of film production, Sandra Day O'Connor became the first actual woman nominated to the Supreme Court. In order to capitalize on the fortuitous correspondence between fact and fiction, Paramount scrambled to move up the film's release date from October to August, 1981.

First Monday in October was not the first film to portray the exploits of fictional Supreme Court justices. The World War II-era classic *The Talk of the Town* (1942), for example, featured law professor Michael Lightcap. While awaiting his confirmation as a member of the Supreme Court, Lightcap comes to the assistance of a factory worker falsely accused of arson, and at the end of the film the factory worker and his girlfriend travel to Washington, DC, to see Lightcap assume his duties on the nation's highest court. In *A Stranger in Town* (1943), fictional Supreme Court Justice Josphus Grant is dismayed by the corruption he discovers during a duck-hunting trip to what he thought was idyllic rural America. An upstanding citizen even while on vacation, Grant puts an end to the wrongdoing. Unlike these earlier films, meanwhile, *First Monday in October* emphasizes the exploits of fictional justices while they are in the midst of considering and deciding appeals to the Supreme Court.

Although *First Monday in October* underscores the appointment of Loomis to the Supreme Court, complete with stylized confirmation hearings and fusty awkwardness among the male justices when Loomis arrives, Loomis' first-of-a-kind appointment does not provide the primary dramatic tension in the film. Instead, the film's dramatic tension derives from the friction between Loomis, a conservative jurist from California, and Justice Dan Snow, a woolly liberal played by Walter Matthau. Snow dubs Loomis "the Mother Superior of Orange County," the latter being a politically conservative part of California, and Loomis suggests Snow "may want the absolute freedom to go straight to Hell." Fellow justices, eager law clerks, and assorted spouses and friends listen and sometimes flinch as Loomis and Snow hurl witty verbal barbs at one another.

A good portion of the bantering involves two cases that have supposedly come before the Supreme Court. One involves a company named Omnitech, whose owner bought up all the patents to a potential new engine and then buried them, prompting stockholders to demand an accounting. The case comes to the Supreme Court on a petition for certiorari, and that could perhaps explain the limited discussion vis-à-vis the Constitution. In essence, Loomis and the other conservatives on the Supreme Court do not want to grant cert because big business might suffer, and Snow and his liberal colleagues see the case as one which could limit misconduct by businessmen. The second case involves a pornographic film titled *The Naked Nymphomaniac*, and it at least raises a recognizable First Amendment issue. As is apparently true for real-life justices called upon to determine if a work is pornographic, the members of the fictional Supreme Court (minus Snow, who has already made up his mind that the film cannot be censored) adjourn to a private screening room. Viewers of *First Monday in October* then join the justices to watch a surprisingly lengthy and sexually

graphic part of the proverbial film within the film. Subsequent arguments among the justices about whether *The Naked Nymphomaniac* might be censored are animated, with Snow and Loomis sometimes pretending to make oral arguments before one another. Loomis asks Snow: "Doesn't your celluloid poison offend all human dignity and decency and beauty?" For his own part, Snow declares: "So it's crap. What if it is crap? That's not the point. Crap's got the right to be crap." Chief Justice Crawford, played by Barnard Hughes, has the unenviable task of keeping Loomis and Snow going directly for the jugular.

The verbal repartee involving these cases might conceivably have involved more constitutional deliberations and discussions, but the screenwriters and director were more interested in shaping Snow and Loomis into stock characters who happen to be Supreme Court justices than as Supreme Court justices who as such could be particularly interesting characters. Stock characters, Hollywood sometimes assumes, have a familiarity about them for moviegoers. They are like old friends who provide pleasant company but make few demands and rarely surprise.

To be more specific, Snow and Loomis take shape as older-than-average embodiments of the oblivious professional man and the spunky sexual object, respectively. The former has meandered across the big screen from the 1930s to the present, from Gary Grant's distracted paleontologist David Huxley in the classic *Bringing Up Baby* (1938) to Hugh Grant's confused bookstore owner William Thacker in *Notting Hill* (1999). In *First Monday in October*, Snow's obliviousness is present in a comical way during an ill-fated meal in a Chinese restaurant, in which Snow's dumplings successfully elude his chopsticks. Less comically, Snow cannot answer his wife's question about the pattern in their wallpaper. He might sit on the nation's highest court and wrestle with the most sophisticated of appellate briefs, but he has no clue what is on the walls of his home. His wife decides ultimately to divorce him, although her grounds are his general interpersonal inattentiveness rather than wallpaper ignorance per se.

The stock character stable into which Loomis is led is an even older and more troubling one. Unbelievable as it might seem, Loomis, a widow and Supreme Court justice, is portrayed as not only sexy but also on occasion a sexual object. Early in the film, viewers watch the frisky and remarkably fit Loomis charge the net in a skimpy and rather tight tennis outfit. Toward the end of the film, viewers get to peek at a naked Loomis through her steamy shower door, and then, when she steps out of the shower, viewers catch a glimpse of her breast.

Laura Mulvey, in what has become one of the classic articles in feminist film criticism, has pointed out how clearly shots of this sort reflect the power of patriarchy. Continuing in the footsteps of printed pinups and live striptease and also of vaudeville and nickelodeon shows, Hollywood films routinely display women as sexual objects and in the process play to male desire. "In their traditional exhibitionist role," Mulvey argued, "women are simultaneously looked at and displayed, with their appearance coded for strong visual and erotic impact so that they can be said to connote 'to-be-looked-at-ness'" (Mulvey 1975, 11). The sight of Loomis' buttocks smart-wrapped in tennis shorts or her still-wet breast as she leaves the shower momentarily trumps the saga of her dramatic ascent to the nation's highest court.

The cinema, Mulvey underscores, is especially adept at facilitating patriarchal voyeurism. Mainstream films often portray a private, sealed-off place and, seemingly unaware of an audience, allow that very audience to peek at that place. “Moreover, the extreme contrast between the darkness in the auditorium (which also isolates the spectators from one another) and the brilliance of shifting patterns of light and shade on the screen helps promote the illusion of voyeuristic separation” (Mulvey 1975, 9). Viewers of *First Monday in October* visually enter Justice Loomis’ bathroom and even her shower stall, and the good jurist, as sexual object, has no idea we are watching.

While the displays of Loomis, like the displays of countless women in many other Hollywood films, has the effect of virtually pausing the narrative, viewers have no trouble relocating themselves in the narrative once Loomis leaves the tennis court or the bathroom. The chief reason is that the narrative is essentially generic, that is, it has a recognizable general design. Hollywood can and frequently does refer to established genres in tailoring individual films, and genre is an important source of meaning and direction for film audiences. Genre becomes an important mode of exchange between the film industry and the audience (Grant 1977; Graves and Engle 2006; Schatz 1981).

Hollywood’s generic choice for *First Monday in October* was the romantic or screwball comedy. The genre appeared during the Great Depression of the 1930s, and according to film historian Georges Sadoul, *It Happened One Night*, released in 1934 and starring Clark Gable and Claudette Colbert, was something of a generic exemplar (Sadoul 1972, 160). Romantic comedies continued to appear during the 1940s and 1950s, with films pairing Spencer Tracy and Katharine Hepburn constituting something of a benchmark for romantic comedy achievement. In more recent years, immensely popular films such as *Pretty Woman* (1990), *As Good as It Gets* (1997), *You’ve Got Mail* (1998), *Runaway Bride* (1999), and *Two Weeks Notice* (2002) have continued the tradition. In all of these works and in many others, a seemingly mismatched man and woman meet in an unusual setting, frequently argue with one another, and then realize what the audience has already come to appreciate, namely, that the pair is a wonderful match. Romantic comedies in the end suggest a peaceful world in which effusive and subdued, black and white, rich and poor can close the gaps between them and live in loving harmony. Couples in romantic comedies symbolize worlds without continuing conflict. The generic process of romantic comedy is not so much repetitive Hollywood propaganda as it is the capturing and marketing of a popular fantasy time and again.

Although their age and positions on the Supreme Court make Justices Loomis and Snow unusual partners for a romantic comedy, the writers and director pushed them as far as possible in that direction. They are, as already noted, inveterate quipsters forever tossing pointed barbs at one another. They also are conveniently eligible for romance since Loomis is a widow and Snow’s wife leaves him early in the film. When late in the film Snow suffers a heart attack, there are surprisingly tender scenes involving them, including one with a chaste kiss. The writers and director had the good sense to stop short of unbridled passion and physical lovemaking, but the film ends with coded love. Loomis and Snow are rushing to a meeting with fellow justices. Briefly holding hands, they ascend the front steps of the Supreme Court

Building, soaring not only to equal justice under law, as the top of the building says, but also to some variety of sublime personal partnership. Loomis tells Snow, “You and I make each other possible,” and Snow says, “Damn right we do.”

Are they talking about their contrasting political philosophies or about their feelings for one another? The answer is both, but by using stock characters and especially by utilizing the romantic comedy genre, the Hollywood production process eliminated *First Monday in October* as a model for constitutional deliberation and discussion. The love interest in a romantic comedy, David R. Shumway has argued, is effective as a mechanism for narrative displacement (Shumway 1991, 7). The personal displaces the political. Love and affection overwhelm pointedly contrasting philosophies of constitutional interpretation. As the credits scroll on the screen and audience members leave the theater, they perhaps feel warm and happy, but they hardly head for home discussing the First Amendment.

42.3 A Supreme Court Thriller

The *Pelican Brief* (1993) also offers promise as a film with constitutional deliberation and discussion, but it, too, succumbs to the conventional characterization and reliance on genre likely to preclude such exchanges. The film is an adaptation of a novel with the same title by John Grisham, America’s best-selling writer of fiction during the 1990s, and Grisham managed to sell the film rights for the novel even before he had finished writing it. The columnist Dave Barry once lightheartedly speculated that there must be a Federal Aviation Administration rule requiring all airplane passengers to carry a Grisham novel (Pringle 1997, 6), but perhaps the quip, like many others concerning Grisham’s work, is sour grapes. Even if Grisham is something other than a fine prose stylist, it might still be said that his novels evidence a lively cinematic imagination. As one reads *The Pelican Brief* or any of Grisham’s novels from the 1990s, one frequently finds film scenes darting through one’s mind.

A major writer/director and accomplished actors assumed central roles in the production of *The Pelican Brief*, and, as a result, the film’s weaknesses and failures cannot be dismissed as beginners’ mistakes. The chief writer and director was Alan Pakula. He had previously directed the likes of *The Sterile Cuckoo* (1969), *Klute* (1971), *All the President’s Men* (1976), and *Sophie’s Choice* (1982), and he even had experience adapting a law-related novel, Scott Turow’s *Presumed Innocent* (1987) for the screen. Before his death in a freak car accident in 1998, Pakula had earned respect and admiration for his ability to create suspenseful feelings of paranoia.

The most prominent actors in *The Pelican Brief* were Julia Roberts and Denzel Washington. The former played law student Darby Shaw, whose freelance memorandum came dangerously close to figuring out why two Supreme Court justices had been assassinated. Roberts’ acclaim and recognition have fallen off in more recent years, but a 2001 Harris Poll found she reigned at that point as Hollywood’s

biggest “star.” The latter designation, while wholly subjective, refers to those especially well-recognized actors who are in themselves marketable commodities. Their presence in a film can be used to publicize and market a film, and consumers might actually choose to see a film not because of its type or theme but rather because of the presence of a “star” such as Julia Roberts.¹ “Star power” is one feature of Hollywood’s general production process, that is, the way the film industry generates its material products. On occasion, Hollywood even produces films that are little more than “star vehicles.”

Denzel Washington, who played courageous Washington, DC, journalist Gary Grantham in *The Pelican Brief*, was a “star” almost equal in recognition to Julia Roberts. Washington, an African American, had earlier distinguished himself by playing real-life political figures of African descent such as Steve Biko in *Cry Freedom* (1987) and Malcolm X in *Malcolm X* (1992), but in *The Pelican Brief* race has no particular significance in Washington’s role. Indeed, the original Gray Grantham character, as imagined by John Grisham in the novel on which the film is based, is a heroic white, and when it came to casting the film, Washington’s heroic demeanor easily outweighed consideration of race. The “star power” of Roberts and Washington was probably the chief factor in making *The Pelican Brief* the number one box office film in the United States during the lucrative Christmas week of 1993 and the number one box office film in the United Kingdom in March 1994.

Discussions related to the Constitution appear in two parts of the film, but both are limited. One part features Darby Shaw’s activities as a student at the Tulane University Law School. Indeed, there is an engaging scene in which Shaw makes valuable contributions to a surprisingly thoughtful classroom discussion of the Supreme Court’s decision in *Bowers v. Hardwick*.² Any inclination to think of Shaw as a budding constitutional scholar is nipped in the bud, meanwhile, when we realize that the professor with whom Shaw is discussing constitutional law is also her lover. The professor, Thomas Callahan played by Sam Shepard, lustily kisses and gropes Shaw in other scenes. The constitutional law discussion in the classroom, it seems, was designed primarily to enhance the surprise and titillation of an attractive law student sleeping with her older professor. In real-life law schools such liaisons are suspect, and the randy Professor Callahan might have anticipated a conversation with his dean or perhaps even the ominous “letter in your file.” However, sex involving a student and her professor plays to viewers’ unreflective fantasies and suspicions.

¹ This is perhaps even clearer in later films “starring” Roberts such as *Runaway Bride* (1998), *Notting Hill* (1999), and especially *Erin Brockovich* (2000). In *Notting Hill* Roberts actually plays the part of Anna Scott, a fictional Hollywood “star,” whose fame greatly complicates her life and love affairs.

² In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court found that a Georgia law criminalizing same-sex sodomy was constitutional, but this decision was later reversed in *Lawrence v. Texas*, 539 U.S. 558 (2003). One ambitious scholar has interpreted *Lawrence* as a makeover of *Bowers* in the style of the reality television series *Queer Eye for the Straight Guy* (Burgess 2008, 3).

The second part of the film that hinted at constitutional deliberation and discussion involved ill-fated Supreme Court Justices Abraham Rosenberg and Glenn Jensen. The two had judicial philosophies almost as antithetical as those of Justices Loomis and Snow in *First Monday in October*, contributing to the type of depoliticizing balancing effect so common in law-related film and television. Judicial philosophies notwithstanding, both Justices were concerned about destruction of the environment and inclined to uphold a US Court of Appeals decision protecting Louisiana wetlands and the pelicans living there from development. This likelihood alarmed Victor Mattiece, the owner of an oil company more interested in lucrative development than the wetlands as a wildlife habitat. Mattiece decided to hire a professional assassin to kill Justices Rosenberg and Jensen, his thinking being that their replacements would be less concerned about the environment and inclined to discount the pelicans and their wetlands when the case came before the Supreme Court on appeal. The admittedly far-fetched promise of constitutional deliberation and discussion is broken when the nefarious assassin shot Justice Rosenberg as he slept in his bed and strangled Justice Jensen while he was watching a film in a gay pornography theater.

With Professor Callahan, himself a former law clerk to Justice Rosenberg, blown to smithereens by a bomb placed in his car and two-ninths of the Supreme Court dead and buried, the deck is cleared for a generic combination dear to Hollywood's heart. *The Pelican Brief* becomes in small part a murder mystery and in much larger part a suspense thriller. We should not be surprised that *The Pelican Brief* becomes predominantly the latter. Many of Grisham's novels, after all, are at least in part suspense thrillers, and Pakula's *métier* as a screenwriter and director was also the thriller.

The thriller is an especially common and intriguing genre. In the typical thriller, characters are repeatedly terrorized, and sustained tension and excitement result. Phrases such as "an edge-of-your-seat drama" or "a genuine nail-biter" are often used to describe thrillers, and consumers of popular culture turn to thrillers in hopes of being scared. Their fright, in turn, affords a few moments of unadulterated escape.

One can find thrillers in novels as well as in the cinema, and when Grisham attempted to capture the spate of legal novels written by lawyer-authors that began appearing in large numbers in the United States in the late 1980s, he actually characterized these novels as "legal thrillers" (Grisham 1992, 33). However, as Gordon Gow argued in *Suspense in the Cinema*, film is the medium that can most induce the kind of suspense that one expects from a thriller:

For no matter how deep a spell the written word may cast, none but the recluse can surrender completely. Any number of things will intervene: conversation, telephone, food, and even work, will demand that the thread be snapped repeatedly. The same goes for television and for movies viewed at home. (Gow 1968, 13)

Skilled film directors can use unsteady handheld cameras and a predictable set of techniques to leave viewers of thrillers literally breathless. Close-ups of panicked characters, short takes, and rapid physical movement abound. The hero, often an innocent and average person drawn into the fray, needs all of his or her personal resources to escape the villainous foe.

In *The Pelican Brief*, Darby Shaw realizes the bomb that blew up Professor Callahan was intended for her, and she scrambles desperately to escape those determined to kill her. Her flight affords a special opportunity to employ the “male gaze” discussed in conjunction with Justice Loomis’ sexual objectification in *First Monday in October*. Unlike Loomis, Shaw is fully clothed, but the eroticism relates to her peril. Hollywood has long delighted in the spectacle of imperiled women, and instead of merely leering at the female form, viewers have ample opportunities to watch threatened, endangered women. Shaw herself is fit and agile, but sometimes the culture industry adds to the titillation even more by making the imperiled woman handicapped. Examples include but are not limited to the bedridden woman in *Sorry, Wrong Number* (1948) or the blind women in *Wait Until Dark* (1967) and *See No Evil* (1971) (Graves and Engle, 196).

Darby Shaw eventually makes her way to Washington, DC, where the journalist Gray Grantham is also investigating the murders and has developed several promising leads. Shaw joins forces with Grantham, and they pursue the killers at the same time they flee them. Disguises, bombed cars, and dead bodies litter the turf, and “stars” of course manage to prevail. The CIA provides Shaw with a flight out of the country to a mysterious location, and at the end we see her watching Grantham being interviewed and commended on television. He refuses to identify her, and she smiles with satisfaction at a job well done and perhaps in anticipation of a future liaison.

How successful is the film as a star-studded thriller? Film critic Richard Schickel said, “Mostly this is a movie about people getting in and out of cars, which do or do not blow up when they turn on the ignition” (Schickel 1993, 62). How successful is the film as a model for constitutional deliberation and discussion? The film industry’s reliance on its “stars” and on the thriller genre made sense in the industry’s overall production process, but consideration of important issues vis-à-vis the Constitution drops out of the picture, assuming it was even there in the first place.

42.4 The Supreme Court on Primetime Television

Attempts to portray constitutional deliberation and discussion in television series have been even more striking failures than the failures in the Hollywood cinema. In 2002, two series – *The Court* (ABC) and *First Monday* (CBS) – embarrassingly flopped. Both had well established writers and producers and also popular actors. However, each series doggedly aped earlier television styles and formats, and this approach precluded meaningful constitutional deliberation and discussion.

The Court counted Oliver Goldstick and Tom Schulman as its chief writers and Sally Field as its biggest star. Prior to launching *The Court*, Goldstick had written and produced numerous episodes of series such as *Coach*, *Baby Talk*, and *Caroline in the City*. Schulman was also a culture industry insider, having written the screenplay for the surprisingly successful *Honey, I Shrunk the Kids* (1989) and produced *Indecent Proposal* (1993) and *Me, Myself & Irene* (2000). Sally Field meanwhile has long been one of America’s favorite actresses. She won Oscars for Best Actress

for her performances in *Norma Rae* (1979) and *Places in the Heart* (1984), and she starred on primetime television in *Gidget*, *The Flying Nun*, and *ER*. Her lengthy career continued into the twenty-first century with the popular primetime series *Brothers and Sisters*. In *The Court*, Field donned the robe of the fictional Kate Nolan, the Supreme Court's newest justice.

The set for Nolan's Supreme Court was a relatively realistic version of the actual Supreme Court Building in Washington, DC – a remarkable and self-conscious temple of the law with just one courtroom and various hallways, offices, and conference rooms in its two wings. An apparently permanent 4-4 split left Nolan as the inevitable swing vote, and her inherently tortured position functioned as the fulcrum of the series' drama. On Justice Nolan's first day on the Supreme Court, another Justice told Nolan, "There's no middle ground here. The fifth vote has to take sides." Poor Nolan was forever swapping votes and brokering compromises, an assignment that would understandably have worn her down had the series somehow continued.

Critics fairly saw *The Court* as attempting to replicate the extremely successful *West Wing*, a series concerning a fictional president and the fictional workings of the executive branch of the federal government. Virtually all the reviewers and critics made the connection. According to Caryn James, reviewing *The Court* for the *New York Times*:

Fast and smart, "The Court" has other "West Wing" trademarks, including heavily packed dialogue and a certain amount of zooming along corridors. (The characters running frantically here are reporters; the justices are more dignified so they just walk fast.) (James 2002, E6)

Dahlia Lithwick, writing in *Slate*, said of *The Court*:

Brought to you by the same folks who give you "West Wing." So, there's lots of quickety-quick dialogue, and everyone is very Washington – well-briefed, on the make, wearing pressed Khakis. We hurtle from confirmation hearings to airports to Ohio prisons to TV studios to judges' chambers, to courtrooms, to hotel rooms, and all the while we're talk-talk-talking about the law. (Lithwick 2002, n.p.)

The problem is that all the talking *about* the law was no more than that. The dialogue was fast and smart, but it lacked depth and seriousness. "The law talk is particularly quick: Eighth Amendment... Ninth Amendment... First Amendment... penumbral privacy rights... strict scrutiny," Lithwick said. "You'd best find your *Con. Law for Dummies* before next week's episode because no one is going to explain what the cases are about." The goal seemed to be to draw viewers into the purported freneticism of the Supreme Court rather than to draw out the characters' thoughts on the Constitution and its relevance to contested social issues. Stated bluntly, the dialogue did not really amount to constitutional deliberation and discussion.

Like *The Court*, *First Monday* rode on the shoulders of experienced television producers and established acting talent. The show's creator was Donald Bellisario, a one-time officer in the US Marine Corps who worked in advertising before making his way to Hollywood. He created a number of successful primetime television series before imagining a fictional Supreme Court; the series included *Magnum, P.I.*, *Quantum Leap*,

and *JAG*. Since the failure of *First Monday* to attract either viewers or critical approval, Bellisario has found immense commercial success with *NCIS*. As the list of Bellisario's series suggests, he has a special fondness for characters in law enforcement and/or the military. His series routinely include a jocular masculinity, one winning for some but off-putting for others. One senses it in *First Monday*, especially in the scene before each oral argument in which the fictional Thomas Brankin gathers his fellow justices in a football-style huddle. The image of the chief justice literally saying to his colleagues "Let's go out there and make history" hardly inspires confidence that rich and rewarding constitutional deliberation and discussion will follow.

Justice Brankin was played by James Garner, the best-known actor in the cast. As was the case with Sally Field, the star of *The Court*, Garner had long struck American viewers as a warm and congenial actor, one who had on one level earned the right to play himself. Before taking the role of Justice Brankin, Garner appeared on primetime as Bret Maverick in *Maverick* and as Jim Rockford in *The Rockford Files*. In 1985 Garner received an Oscar nomination for his performance in *Murphy's Romance*, a film in which Sally Field, who played his fellow fictional chief justice in *The Court*, also appeared.

Garner's Brankin was a sports-obsessed conservative, whose Supreme Court was as evenly divided as Justice Nolan's in *The Court*. Having an equal division of this sort helps create dramatic tension, but it also is depoliticizing. When there are always two evenly balanced sides, an unaligned centrist position seems always to emerge as the correct one. *First Monday in October*, the film discussed in the first section of this article, also depoliticizes with its dogged determination to balance the two political sides. As previously noted, that film ends with the crotchety liberal Justice Snow and the flippant conservative Justice Loomis striding together up the great white steps of the US Supreme Court Building.

First Monday forfeits its opportunity to portray constitutional deliberation and discussion on the joint altar of personal story lines and general cuteness. Dating back to at least *Hill Street Blues* in the early 1980s, American primetime legal drama has coupled the tales of police investigations and courtroom cases with stories concerning the private dilemmas of the major characters. While the former in most cases wrap up within a single episode, the latter tend to carry over from one episode to the next, sometimes even stretching through an entire television season. Hence, in *First Monday* we were invited to worry about Justice Szward, played by Gail Strickland, and her family living in a neighborhood with a registered sex offender. Or then there's the tale of the daughter of Justice Norelli, played by Joe Mantegna, refusing on principle to take the mandatory drug test for her high school soccer team.

First Monday's cuteness manifested in not just these personal story lines but also in some of the fictional cases that supposedly came before the Supreme Court for oral argument. To be sure, certain of the cases had some constitutional heft to them, but many others most certainly did not. In the pilot for the series that aired on January 15, 2002, for example, a Mexican transsexual seeks asylum in the United States, but the justices rule against the transsexual when they figure out the transsexual is "only" a transvestite. In the episode of January 25, 2002, a dwarf lawyer charges his law firm that discriminated against him when it installed and assigned him to a mini-office,

but the justices rule against the dwarf lawyer because the mini-office was a “reasonable accommodation” under the Americans with Disabilities Act.

The Court and *First Monday* each lasted much less than a season, and the television branch of the culture industry has not attempted to revisit the Supreme Court since the series’ demise.³ The series’ lack of meaningful constitutional deliberation and discussion was hardly the reason for their failure to attract viewers. The series’ truncated and sometimes ridiculous attempts to discuss the Constitution and its relationship to public policy might actually have reduced its appeal for the apolitical viewers of primetime television.

42.5 Conclusion

The films and television series discussed in this article are fictional narratives, but other types of law-related films and television series in which one might anticipate finding constitutional deliberation and discussion are also disappointing. For example, biographical films and series about actual Supreme Court justices are also limited when it comes to constitutional deliberation and discussion. The most noted case in point is the film *The Magnificent Yankee* (1950) concerning Justice Oliver Wendell Holmes. The film was adapted by Robert Hartung from the Emmet Lavery play with the same title, which had previously been adapted from Francis Biddle’s book *Mr. Justice Holmes* (Biddle 1942). The accomplished John Sturges served as the director. The film tours the 27 years Holmes spent in Washington, DC, and although there are a few scenes of the great jurist on the bench delivering opinions orally, the narrative primarily concerns the home life of Holmes and his wife Fanny Bowditch Holmes. Often maudlin, the film conveys the Holmes’ sadness over having no children and the way Holmes’ clerks were surrogate children of a sort. Despite the real-life Holmes’ acerbic brilliance, the cinematic Holmes emerges as the stereotypical old codger. The film was remade in 1965 for the *Hallmark Hall of Fame* television series, but the remake included no more constitutional deliberation and discussion than did the original.

Hollywood has also produced films tracing individual important cases from their origins to the Supreme Court, but these films as well for the most part fail to engage in sustained consideration of constitutional issues. The *Hallmark Hall of Fame* production of *Gideon’s Trumpet* (1980), for example, dramatized the case that prompted the Supreme Court opinion *Gideon v. Wainwright* (Gideon 1963). Henry Fonda played the drifter Clarence Earl Gideon, who demanded a right to legal representation at trial, and Jose Ferrar played Abe Fortas, the distinguished Washington, DC, lawyer who represented Gideon before the Supreme Court. *Separate But Equal* (1991), a television miniseries, portrayed the events and personalities in the case leading finally to the decision in *Brown v. Board of Education of Topeka*, which found

³I refer here only to primetime fictional narrative. There have been successful educational and informational series about the actual Supreme Court on American public television. For example, the series *The Supreme Court*, produced by Thirteen/WNET, appeared on PBS stations in early 2007.

segregated public school systems to be fundamentally unequal and therefore unconstitutional (Brown 1954). The actor Sidney Portier played the great civil rights attorney Thurgood Marshall with convincing aplomb. *The People vs. Larry Flynt* (1996), a major Columbia Pictures release directed by Milos Forman, dramatized the case resulting in the Supreme Court decision in *Hustler Magazine v. Falwell* (1988) (Hustler Magazine 1988). Starring Woody Harrelson, the film told the story of pornography publisher Larry Flynt's life, stretching from his impoverished youth through many twists and turns to the Supreme Court's reversal of a lower court's finding that Flynt's parody of minister Jerry Falwell was libelous. Like most mainstream works of popular culture, these works are character-driven, and the trials and tribulations of the litigants and lawyers take center stage. The films' characters claim and seek constitutional rights, and to the extent the characters obtain those rights, we can see the power of the Constitution. However, little emerges with regard to the rights' foundations and meanings. Once again, constitutional deliberation and discussion are superficial bordering on nonexistent.

In general, the culture industry's reliance on stock characters, familiar conventions, and established genres virtually precludes constitutional deliberation and discussion. The market for the culture industry's products is an uncertain one, with some films and television series reaping tremendous profits but many more losing money. The industry, as a result, tries always to make its products "familiar" for viewers. Sequels, prequels, and spin-offs are common, and, more generally, innovation takes place within that which has demonstrated popular appeal. Stock characters, familiar conventions, and established genres are virtually required components and aspects of cultural products.

In fact, it would not be misguided to think of characterization, convention, and genre as mainstays in the figurative pop cultural assembly line. References to genre are also often used after production is complete for purposes of advertising films or even for placing films in desirable sections in video rental stores (Grant 1977, 2). Something similar happens in automobile assembly lines with makes and models being comparably required. While assembly lines, be they figurative or literal, might function smoothly and produce marketable commodities efficiently, mass production on a day-in and day-out basis is bereft of significant variations and innovations. Rarely does anyone find something particularly new.

Furthermore, the Hollywood films and television series that roll off the culture industry's assembly line tend to be supportive of the dominant myths and ideologies that serve as foundations for stock characters, familiar conventions, and established genres. As Barry Grant has argued, the traditional western "offers a series of mythic endorsements of American individualism, colonialism and racism" (Grant 1977, 33). Horror films feature the elimination of symbolic challenges to the bourgeois society, and both the musical and the previously discussed romantic comedy glorify heterosexual partnering. American law-related films, meanwhile, tend to condemn lawbreaking and also in direct and indirect ways endorse the dominant ideological belief in a rule of law. This stance, as copasetic as it is for most viewers, does not amount to critical reflection on the law, be it the Constitution or some other variety.

None of this is to suggest that Hollywood films and primetime series are devoid of good writing, directing, and acting or that this body of cultural work is merely a huge

mélange of system-supporting propaganda. Playfulness and irony are possible, and some films and television series even gently tweak the norms. In addition, different viewers or even the same viewer at different points in his or her life can take different meanings from a film or television series. But still, mainstream films and television series are more likely to provide easy answers than to pose difficult questions. The portrayal of genuine deliberation and discussion would be the opposite of this type of closure. In the end, we should not really expect to find constitutional deliberation and discussion in the Hollywood film or the primetime television series.

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Chapter 43

Where There Is No Need to Screen Local Justice: Law and Film in Israel

Shulamit Almog

Abstract This chapter describes the minor representation of law in Israeli feature films and demonstrates it by pointing at various films that deal with issues that pertain directly to legal proceedings or legal matters, yet bear merely marginal reference to the legal domain, or avoid it altogether. Possible explications for the relative absence of law in Israeli cinema will be reviewed. One is the Israeli legal tradition, which refrains from visualizing justice. The other draws from the differences between Israeli and American cultures and the dissimilar perceptions of lawyers and their role in society, as well as the differences in legal procedure. The chapter concludes by suggesting that the current scarcity of legal representation in Israeli feature films is a meaningful signifier in the Israeli societal context. The lack of interest in law in Israeli films, compared with the central function of law in Israeli life, might reflect a gap between the ardent legal rhetoric of Israeli courts and the perception of the public, who views law mostly as an instrumental option of providing practical answers to specific cases.

43.1 Introduction

Israeli cinematic industry, though rather modest in terms of production data,¹ is lively and thriving and has gained considerable scholarly attention.² However, cinematic law and film discourse is just emerging in Israel and has not yet seriously

¹Roughly about 12–14 new features are created each year, getting about two thirds of their budgets funded by the Israeli Film Fund, according to the new Cinema Law. The Cinema Law, established in 1999, specifies the targets of the Israeli Cinema Council which mainly supports and promotes the Israeli film industry. Significant commercial investments are not common.

²See, for example, Kronish (1996), Kronish and Safirman (2003), Loshitzky (2002), Ben (1993), Ne’eman (1995), and Shohat (1989).

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touched Israeli films.³ A primary reason is probably that Israeli films that deal directly with legal proceedings as their main theme or Israeli cinematic courtroom dramas hardly exist. If relevance to law is present in Israeli cinema, it is usually unobtrusive. It can be derived from the main subject matter of the films, but it is not a central topic.

In contrary, many Israeli documentaries focus upon legal issues and deal directly, sometimes blatantly, with individual cases and with some ensuing questions pertaining to the rule of law. Yet, law remains almost absent from Israeli feature films. The relative absence of law in Israeli feature films stands out due to two reasons. The first reason is the traditional interest of cinema in law. Trials, lawyers, and legal proceedings are recurrent subjects in movies and appeal both to moviemakers and audiences worldwide. American courtroom dramas, for instance, won popularity all over the world.⁴ The second reason is the central standing of law in Israeli public life. Almost every controversial social or public issue is brought to court, and legal issues are daily part of public discourse. Yet, generally speaking, the film industry did not choose to represent or to depict legal events.

This chapter departs from the fairly conventional focus of law and film scholarship on discussing cinematic representations of actual legal processes or legal issues. The absence of law is taken here as an object of observation and preliminary analysis. This stand stems from the belief that law and film scholarship (and probably the cultural study of law at large) can achieve significant insights about the place law captures in the collective consciousness, by theorizing not only law's presence in popular culture but also its relative absence. Such absence is particularly significant when traced in cultural texts which represent situations in which law could be expected to appear.

In the following, the absence of law in Israeli cinema will be demonstrated by mentioning various films that deal with issues that pertain directly to legal proceedings or legal matters. In spite of that, these films bear some marginal reference to the legal domain or avoid it altogether. This minimization of legal reference will be enhanced by describing some examples of Israeli legal documentaries, which deal directly and uncompromisingly with legal issues.

I will conclude by suggesting three possible explanations on why Israel's cinematic industry does not follow the popular cultural trend of producing fiction legal films, though plenty of legal documentaries are being produced.

³ In 2005 I was guest editor of an issue of Bar-Ilan Law Studies Journal that was dedicated to law and film. The contributors dealt with interesting compilation of films [*Festen*, directed by Thomas Vinterberg (1998); *Délits Flagrants*, directed by Raymond Depardon (1994); *Rashomon*, directed by Akira Kurosawa (1950); *Death and the Maiden*, directed by Roman Polanski (1994)], none of which are Israeli.

⁴ See Machura and Ulbrich (2001).

43.2 Feature Films with Implicit Legal Relevance

43.2.1 *From Collective Narrative Toward Personal Stories*

As in many other cultures, Israeli cinema reflects shifts and changes that take place in society. It seems that the primary societal shift that Israeli films resonate is the gradual move in Israel from intense pursuit of collective, national issues toward expanding focus upon personal and individual points of view. Uri Klein, one of Israel's leading film critics, aptly describes this progression:

One of the main questions that guided the history of Israeli cinema was whether to discuss only questions that concern the collective, or is it legitimate to deal with questions that concern the individual within this collective; is it its duty to deal with historic, social and political questions that distinguish the Israeli existence, or is it appropriate to discuss the personal or what is referred to as universal. Certainly, best films combine both. Contemporary Israeli films find it difficult to handle existing reality, maybe similarly to Israeli society at large, and this is perhaps why many films center upon describing individual families and their troubles. In the best films of that genre...., the creators manage, by depicting the plot of one family, to say something relevant to the entire society.⁵

Let me elaborate on this shift, focusing on Israeli cinema since the state of Israel was established, in 1948.⁶ The films that were created during the first years of Israel generally represented what could be referred to as Israeli national narrative. This narrative was derived, for the most part, from the collective need to heal from the holocaust dark legacies and to secure the collective existence in the new founded homeland. Alongside the holocaust, the pivotal events that shaped the collective identity of Israeli society were the wars Israel went through. Again, this is sharply reflected in Israeli cinema. Many films focused upon Israeli army, depicting heroic accomplishment of a military mission, while confirming and verifying themes of national identity and collective solidarity.⁷ The salient ideological orientation of such films was linked to a wide consensus about the constant threat to its existence Israel faces, and the need to address this threat by maintaining military power and supporting the army, and by expressing the collective solidarity with its actions.

Two examples are *Pillar of Fire* (1958), which tells about the war of kibbutz members in the Negev against the Egyptians attacking their kibbutz during the War of Independence, and *Exodus* (1960), which despite being a Hollywood product, became the ultimate model of the heroic-Zionist cinema. The absence of law from such films is hardly surprising. The pattern of the national-heroic narratives usually did not leave any space to legal diversions.

⁵ See Klein (2009).

⁶ It should be noted, however, that Israeli cinema was born in the twentieth century. For description and discussion of the first cinematic production in Israel, see Feldstein (2009).

⁷ See Talmon (2001).

Israeli early cinema refrained from dealing with political or social controversies. That, together with the fact that the practice of law in the new state was merely emerging, contributed to the minimum reference to law and legal matters. During the 1960s, more and more films illustrating the daily realities of Israeli life were produced, including melodramas, comedies, and even “author” films, influenced by the new wave in French cinema. However, the new and exciting diversity of the 1960s did not motivate any significant concern with law, although indirect or marginal relevance of law could be detected in some films created during that period.

Films that carry implicit or embedded legal relevance became even more common during the 1970s. Many have regarded the Israeli films created in the 1970s as fundamentally different from earliest production. Renan Shor writes that by the end of the 1970s, normalization of the Israeli cinema had begun; a period of “shattering of pseudo-myths” and of normalization of Israeli cinema has begun.⁸ Numerous films deal with sociopolitical issues, and even more do so during the 1980s, following the First Lebanon War.

From the late 1980s, films start overtly deconstructing the collective solidarity narrative and critically scrutinize it, in a way that sometimes ensues implicit legal meaning. The legal relevance, however, is usually secondary to the main themes of the films. Let me specify, by focusing upon three categorizations: human rights films, social drama films, and war films. Though the borders are not sharp, and often war films and human rights films touch conflict of values, the suggested categorization is useful in order to enhance the implicit legal relevance and the lack of actual concern with legal issues in all categories.

43.2.2 *Human Rights Films*

Starting in the 1980s, Israeli films present new heroes – illegal immigrants and foreign workers, orthodox Jews, Arabs, and minorities. Collective issues that were dealt with in earlier movies are being replaced with issues concerning individuals and their dire circumstances. While some films are all about the self-indulgent, materialistic way of life in contemporary Israel or about stories of individual artistic or romantic fulfillment,⁹ there are many films that reflect commitment to social injustice issues.

Numerous films deal with social and human rights issues, sometimes uncompromisingly tackling some of the most acute ailments of Israeli society. Such issues usually carry legal bearing, even if what they reveal is merely law’s failure and impotence. These films bring up problems that could and should be addressed by law, but in actual reality, law is exposed through them as a largely inadequate or impotent tool or, even worse, a tool that supports the exploitive nature of society.

⁸ See Shor (1984, 39–40).

⁹ See Talmon (2001, 241). For example, see *Song of the Siren* (directed by Eytan Fox, 1994) and *Shuru* (directed by Savi Gabizon, 1990). See Kaufman (2006).

A fine example is Uri Barbash's 1983 film *Beyond the Walls*. The film describes Jewish and Arab prisoners who overcome the initial antagonism and even racist hatred and unite forces to rebel against the cruel and unjust prison administration. The denial of basic human rights affects all men and bridges, at least temporarily, the cultural, religious, and national gap between them.

Another Example is Eran Riklis' 2004 film *The Syrian Bride*. Mona is an Arab Israeli woman who is about to cross the border between Israel and Syria to marry a Syrian TV star and never be allowed back to her family in Majdal Shams, a Druze village in Israel. The legal norms, applied in similar harshness by both sides, the Israeli and the Syrian, are perceived in the film as an infuriating and unnecessary infringement of human rights. The uncompromising security considerations used by both sides appear unconvincing and hypocrite. However, human solidarity and empathy succeed in overcoming the obstacles and alleviating the tyranny of arbitrary legal rules. It is worth noting that while in everyday Israeli reality, such issues are rushed to court, *The Syrian Bride* conspicuously ignores the legal path that does exist in reality.

Some films deal with the severe problem of trafficking women to Israel. Amos Gitai's *Promised Land* (2004) depicts the smuggling of Eastern European women to be prostitutes in Eilat and Haifa. The film depicts a cruel reality of exploitation and sufferance that Israeli authorities are unable to prevent. Human trafficking is a legal matter per se, and Israel did address the issue legally during the last years,¹⁰ but in the film law is clamorously absent.

Some films critically examine the contemporary situation of foreign workers in Israel. *James Journey to Jerusalem* (2003), directed by Ra'anana Alexandrowicz, is a sad, somewhat funny story about a young man from a village in Africa who sets out on a religious pilgrimage to Israel. When in Israel, James is immediately arrested by the immigration police. An Israeli who hires illegal immigrants pays James' bail and makes him work for him. A blend of strict immigration laws, social injustices, and cultural gaps make James' life in Israel an experience that shatters his naivety.¹¹ However, James legal escapades are depicted by using a humoristic light tone that conceals rather than criticizes social injustice and legal incompetence.

The last example is *Noodle* (directed by Ayelet Menahemi, 2007). A Chinese illegal immigrant leaves her 6-year-old son at the house of an El-Al flight attendant she works for. She says she is going out for an hour but does not return, because the authorities arrest her and send her back to China. The only legal aspect of the movie is a short discussion of unavailability of legal solutions to reunite the mother and son. If that movie was made in Hollywood, the pro-bono-hero-immigration-lawyer would show up and reunite the mother and her son. In the Israeli version, the solution is smuggling the child from Israel to China. Again, the humoristic, generally humanistic tone evades seriously tackling human rights infringements and ensuing legal issues.

¹⁰ See Penal Law (Amendment no. 56), 2007.

¹¹ Another film that deals with foreign workers in Israel is *What a Wonderful Place* (directed by Eyal Halfon, 2005). The film depicts the life of a Ukraine "sex worker," Filipino caretaker, and Thai worker. For additional examples, see *Janem Janem* (directed by Haim Bouzaglo, 2005) and *Foreign Sister* (directed by Dan Wolman, 2005).

43.2.3 *Social Drama Films*

The following social dramas depict pivotal situations that are highly relevant to law, and in all of them, law is perceived irrelevant or immaterial to the core of the narrative. The first is *Walk on Water*, Eytan Fox's 2003 internationally successful film that brings together Eyal, an Israeli Mossad agent, the son of holocaust survivors, and a brother and sister from Germany, who are the grandchildren of a notorious Nazi who escaped justice. Unexpected close friendship develops between the three. Eyal, however, has a mission – to find and kill the grandfather of his new friends. But when he finally reaches the old man, he must face one of these eternal, almost clichéd questions – the conflict between the rule of law and the urge for revenge.

The law-against-revenge conflict is treated in the film in an ancillary way, and it is almost veiled by the dominant presence of profusion of other heavy subjects, such as sexual politics and homophobia, global terrorism, and Israeli-Palestinian relations. The result is a rather interesting film, which reflects some aspects of the societal shift from the collective narrative toward personal fulfillment. Eyal experiences a partial deliverance from the heavy, demandingly suffocating historical burden represented in the old collective narrative and advances toward new possibilities of personal fulfillment and choice. However, this story of personal liberation renders the legal elements of the narrative marginal and unimportant.

Eytan Fox's next film, *The Bubble* (2006), further pursues the blurring borders between individual circumstances and collective issues. Again, legal relevance is indirectly present. It is a story of three young Israelis who share an apartment in the heart of Tel Aviv. They manifest indifference to the political situation and lead hedonist life. The situation changes when one of them falls in love with a Palestinian he briefly meets while doing his reserve duty at a checkpoint in the West Bank. When the Palestinian comes to Tel Aviv, the three Israelis decide to illegally hide him in their apartment. The uncompromising realities of Israeli existence penetrate their hedonistic existence and shake it. However, and in spite the somber ending, the tone of the film, which depicts the heavy political difficulties as part of a mesh of contemporary popular culture, love, prejudice, and whatnot, remains lighthearted.

The next example is *Campfire* (2004) directed by Joseph Cedar. The film tells the story of a young widow who dreams to join with her two daughters a religious settlement in the beginning of the 1980s. In one of the scenes, one daughter is sexually attacked (maybe even raped) by youngsters of her community. The leader of the community tries and succeeds in covering up the event. The mother cooperates with him. The criminal act, despite its gravity, remains devoid of any legal consequences and, again, is overtoned and overshadowed by other narrative developments.

The last example is *Ajami* (directed by Scandar Copti and Yaron Shani, 2009). *Ajami* is an impoverished, crime-infected Arab Christian and Muslim neighborhood which is part of the Jaffa/Tel Aviv metropolis. The characters, most of them Arabs and some Jews, are caught in a tragic chain of events that creates a forceful portrait of life in Jaffa. Family obligations and feuds alongside national and religious

hostilities and hatreds constantly demand victims, which are involuntarily drawn into impossible situations. Turning to the protection of the formal law enforcement institutions is not even an option. *Ajami* resembles in this sense the Wild West, a territory with its own norms, not fully annexed to the law and order existence outside its borders. However, in *Ajami* the lawless present is not a temporary phase, as it is in westerns; it is the past, present, and desperate future altogether. The absence of law gains a particularly powerful meaning in *Ajami*. The characters do exist in a normative universe. However, it is an opposite of the conventional one. As the plot proceeds, the gap between “the law of *Ajami*” to “the law of Tel Aviv” becomes wider and eventually unbridgeable. That leaves *Ajami* as an enclave abandoned by the law.

The absence of law in *Ajami* is not accidental, as it is in previous films. It is pivotal. It is the heart of this important film, created together by an Arab (Copti) and Jewish (Shani) directors. The absence of law represents here a deep wound in Israeli society that demands immediate attention.

43.2.4 War Films

War films, which have a prominent place in Israeli cinema, are almost innocent of law, although most of them raise issues with clear legal relevance.¹² Here are several examples. *Paratroopers* (directed by Yehuda Ne’eman, 1977) is a film that depicts a death of a soldier in unclear circumstances during training. The focus of the film is far-off from the sphere of law, even though its central event – death in circumstances that demand clarification – is clearly a legal subject and requires a full legal investigation. However, engagement in the practicalities of legal investigation is easily shunted aside.

The film does not present the exclusion of law as connected with a significant conflict between the demands of law and the experience of “good soldiery” or as the result of a struggle between security needs and what the rule of law demands. In the world of the regiment, the absence of law is portrayed as clearly understood and as natural. The film represents the army as an enclave that forcefully and determinedly shoves law away, a perception which is repeated in many Israeli war films.

Another example is Uri Barbash’s 1989 film *One of Us*, which deals with the unique solidarity that exists within a group of soldiers. According to Israeli ethos, such groups are characterized by loyalty and total commitment that reigns supreme between comrades in arms.¹³ Reoccurring theme that carries legal application is

¹² See Almog (2009).

¹³ Other examples for army films are *Two Fingers from Sidon* (directed by Eli Cohen, 1986), *Wooden Gun* (directed by Ilan Moshenzon, 1979), *Paratroopers* (directed by Yehuda Ne’eman, 1977), and *Repeat Dive* (directed by Shimon Dotan, 1980). *Avanti Popolo*, Bukai’s 1987 film, goes even further and tells the war story from the perspective of two Egyptian soldiers stranded in the Sinai Desert during the 1967 war.

whether a warrior should give up the solidarity to the group members in order to make place for other values or put the loyalty to comrades in arms in the first place. *One of Us* deals with such conflict and with the enormous personal price an officer that decides to be loyal to his conscience and in the same time to the rule of law must pay. Not surprisingly, the hero succumbs to the prevailing convention and eventually destroys evidence pertaining to the killing without trial of Arab prisoner that was involved in killing his best friend.¹⁴

The last example is Ari Folman's 2008 film *Waltz with Bashir*. The film, classified as a "documentary animation," describes the first months of the First Lebanon War, at the end of 1982, and focuses upon the massacre at the Sabra and Shatila refugee camps that took place on September 1982. *Waltz with Bashir* is different from most other Israeli war films. It is certainly not a "law film." Yet, acts of judgment are central to it – the judgment that the author-narrator of the film activates against himself, against his friends, and against the decision-makers of that time. Folman does ask questions of accountability and blame but suggests that answers could be found only by personal soul search and not by legal tools.

To sum up, in spite of *Waltz with Bashir* atypical occupation with some questions of accountability and responsibility and perhaps some additional examples that may be available, Israeli war films generally avoid legal issues or legal themes. The avoidance is striking when placed alongside the declarations of Israeli Supreme Court, that every Israeli soldier carries with in his or her knapsack not only army equipment but also all the norms of Israeli law.¹⁵ Yet the films insist on describing the army as an enclave from which law is absent.

43.3 Legal Documentaries

What is sometimes referred to as the *documentary trend* in cinema has not skipped Israel.¹⁶ The making of documentaries dates to the birth of Israeli cinema,¹⁷ but recent years reveal a real breakthrough of the genre. Many documentaries choose legal proceedings as their main theme. Again, one could detect a move from documentaries that treat national issues and employ consensual, confirmative tone, to documentaries that choose a personal, sometimes controversial perspective.

An interesting example is Eyal Sivan's *Specialist – Portrait of a Modern Criminal* (1999). The film deals with Eichman trial. Adolf Eichmann, Nazi officer who was

¹⁴ See Talmon (2001, 244–252).

¹⁵ See HCJ 1661/05, Regional Council of Gaza Coast and Co. vs. Knesset Israel and Co. (2005).

¹⁶ For description of the documentary trend in American culture and cinema, see Silbey (2006, 109). As Silbey describes, there is a "trend in contemporary film and television that combines a developing taste for documentary-like form with fiction-like content. Indeed, the surge in documentary films going mainstream confirms that the excitement for documentary-like films has reached 'far beyond the art house crowd.'"

¹⁷ See Zimmerman (2002, 33–42).

in charge of the expulsion of Jews and other minorities from the Reich and then of their deportation from Europe to the death camps, was captured in Argentina by Israel in 1960. His trial in Jerusalem took place the following year and was one of the first public events entirely recorded on video in the world. Sivan uses the historic recordings in order to create a provocative reading of the seminal trial. He uses abrupt, rapid editing of images taken from the trial in order to emphasize the contrast between the monstrosity of the crime and the mediocrity of the man that committed them. The film was influenced by Hannah Arendt's famous depiction of the trial, *Eichmann in Jerusalem*,¹⁸ which was perceived in Israel as insensitive and failing to capture the meaning and significance of the event for the survivors and for Israel's collective historical memory.¹⁹

Another example is Yoav Shamir's *Checkpoint* (2003), which is a critical depiction of a journey between the various Israeli checkpoints in the West Bank and Gaza. The film, which is now being used by the Israeli army to prevent abusive and illegal behaviors, was shot between 2001 and 2003, in the midst of the second Intifada. It concentrates on revealing the mood and action of a checkpoint, forming a subtle and intricate narrative of the absurd and tragic checkpoints reality.²⁰

There is a thriving production of documentaries that deal directly with actual legal cases. Such documentaries are sometimes prompted by legal proceedings that leave issues that are perceived by the Israeli public as unresolved.²¹ One of the notable examples is Yitzhak Rubin's *Murder for Life* (2002). The film is a documentary drama, tracing the events surrounding the one of the most disturbing murder cases in Israel's legal history. Amos Baranes, a young man from the northern city of Akko, was convicted of the murder of a young woman soldier. After claiming his innocence during 28 years of legal battles, Baranes finally became the first man in Israel to win an acquittal after a sensational retrial. The film depicts the police efforts to point the finger to someone as the murderer at any price, the overzealous efforts made by the police and the prosecution that lead to perhaps false confession, and problematic evidence that was used in order to convict Baranes. The hero of the film, besides Amos Baranes himself, is the late defense lawyer, Dr. David Weiner. David Weiner killed himself shortly after the film was completed, after getting involved in a lurid police investigation concerning another client that was convicted in murder, to whom Weiner was trying to help in getting a retrial. Rubin has just completed another documentary, titled *The Defender*, that describes this tragic

¹⁸ See Arendt (1979).

¹⁹ Perhaps this is the reason that only 27 years after its publication, the book was translated to Hebrew. See Arendt (2000). For analysis of the film, see Raz (2005).

²⁰ For analyses of the film, see Zanger (2005) and Avila (2006).

²¹ Perhaps one could detect a universal trend of creating documentaries that critically reveal the shortcomings and failures of legal systems by reexamining cases that expose allegedly faulty legal proceedings. Such are, for example, the films of Jean-xavier De Lestrade, *Murder on A Sunday Morning* (2001), and *Souçons (The Staircase)*, (2004). See also Raymond Depardon's *Delits Flagrants* (1994) and Ofra Bikel's *Burden of Innocence* (2003) and *An Ordinary Crime* (2002).

affair.²² *The Defender* (2005) reveals the sordid “behind the scenes” of Israeli legal system. The hero of the film – David Weiner – is caught in an impossible situation that involves the contradictory interests of the police, the court, the state attorney’s office, and his client. Rubin’s most recent documentary is *Murdering a Judge* (2010), which focuses on the murder of the Israeli Tel Aviv District Court judge Adi Azar, who was assassinated in a drive-by shooting in 2004, marking the first judicial assassination in the history of Israel. Rubin’s film reenacts the trial, in which two people were convicted of committing this murder, and raises doubts as to the soundness of the conviction.

A legal documentary that focuses on the army is the 2003 *Clear Conscience*, by Uri Barbash (who directed the feature film *One of Us*). This is the story of five Israeli teenagers who claimed their conscience does not allow them to serve in the Israeli army. The film presents them as heroes, quite contrary to Israeli common perception in this matter that tends to treat such behavior as deplorable. The film includes interviews with the five teenagers and the lawyers involved, as well as reenacted parts of their trial. Oppositely to the feature films that deal with army matters, it is replete with actual legal proceedings.

To sum up, unlike fiction films, many Israeli legal documentaries suggest a direct and clear legal significance. It is often highly critical, emphasizing law’s failures and incompetence. Yitzhak Rubin’s documentaries, for example, depict Israeli courts and the investigating authorities in a most unattractive light.

This phenomenon could be perhaps linked to the observation mentioned before about the instrumental perception of law that prevails in parts of Israeli society. On one hand, the tendency to intensively scrutinize and criticize the legal system, as well as its performances, achievements, and failures, leads toward abundance of legal documentaries. On the other hand, the same pragmatic, mundane approach toward law leads toward lack of artistic interest in it, which is represented in the absence from Israeli fiction films.

43.4 Why Is Law Absent from Israeli Feature Films

As elaborated, there are very few Israeli films that deal directly with fictional trials or legal cases. While the absence of law in Israeli cinema until the 1980s seems to be in accord with the other indications of a dominant anti-legalistic trend in Israeli

²² Many documentaries on legal cases are made for television and sometimes are being screened in movie theaters. Here are some examples: Nili Tal’s movie *Mighty as Death* (1997) tells the story of a young woman who was murdered by her partner and follows his appeal on his conviction. It is the first time that an Israeli movie includes real footages of a trial. Limor Pinchasov’s film *4.7 Million* (2005) tells the story of a man who worked as a security guard in one of the biggest security transportation companies in Israel and robbed a truck with 4.7 million NIS. The director interviews the friends (who were suspected for helping him) and brings exclusive footages from the police’s investigation.

society and in the political establishment during those years, the minor representation of law in films since the 1980s can be perceived as somewhat surprising in view of the status of the Israeli Court as a central forum to which Israeli society addresses almost any significant issue.

At the present time, law is very prominent in Israel and salient in everyday life. Israel does not have formal constitution yet, but all major and sometimes trivial issues find their way to the Israeli Supreme Court and to lower courts. Courts dealt with the legitimacy of settlements, with political feuds, with election issues, with government budget, and with almost every aspect of public life. It seems though that the constitutional substance that continuously occupies the media and public attention is not very inspiring for fiction films. Even if they easily sustain long discussions in law faculties and conferences, the lengthy texts produced by Israeli judges are not enticing sources for movies.

In the following, I will suggest three possible approaches that might explain the poor presence in law from Israeli feature films.

Firstly, Israeli and perhaps Jewish culture in general never emphasized the formal, external, and visual dimensions of law. There are no visual historic traditions of trials being held in specific familiar locations (like Westminster Hall or any other collectively recognized judicial site) or of robed and wigged judges in Jewish tradition, in spite of the clear legal orientation of this tradition.²³

Ceremonial and visual aspects of the law, which are common fare in cinematic representation of law, and are prominent features in the Anglo-American and some Continental systems of law, are also notably missing from Israeli law, which has never emphasized visibility.

Israeli legal system is also devoid of jurors, who contribute an important dimension to the public appeal of the legal proceedings. The only noticeable element of the legal attire of Israeli Judges and lawyers is a black robe. Colorful adornments such as wigs or ribbons, which are common in other systems, are absent from the Israeli one. An interesting query raised by Ella Shohat is what would have been the cinematic implications of the traditional Hebraic love for listening, in contrast with the Greek preference for seeing. Indeed, In Jewish tradition, there is no need to see justice, but to listen to it; it is important to hear the commandment, to interpret its meaning, and to tell stories about it, but it was never essential to create a visual realization of it.

Secondly, Israeli legal culture is very different from the American one. As Yoram Shachar maintains, in the American cultural and cinematic tradition, it seems that the community produces heroes as jurors and lawyers, in order to become, through them, a judging and redeeming community. Many scenes of metaphoric collective and personal redemption take place in the court of law and during legal proceedings.²⁴

²³ Jewish law is perceived as an autonomic system that governs all the aspects of relationship between people and between people to God. Most of the huge corpus of Jewish scripture is what might be referred to as legal debates between sages as to the accurate meaning of norms.

²⁴ See Shachar (2007).

American courtroom dramas and other legal genres reflect this tendency,²⁵ which in many ways turned global and influenced the public concept of justice far beyond American borders.²⁶ The adversarial proceedings in American courts resemble battling or competing sides. In this aspect the lawyers are comparable to competing athletes.²⁷ The public witnesses an exciting match and looks forward to the formal announcement of winners. The admiration grows if the winners happen to be human rights heroes or conglomerates defeaters. The judges' roles in such spectacular legal performances are typically secondary to the roles of the lawyers or jury. Most films focus indeed on the stories of lawyers and jury that save the day and redeem the public by paving the way for justice.

In Israel, in contrast, the scenes of collective redemption and courage take place or used to take place in battlefields and wars. Israeli heroes used to be soldiers and generals, not lawyers. Ethical, personal, and legal dilemmas took place during wars. That was faithfully reflected in films. True enough, it seems that soldiers and generals passed their glory in Israeli society (*Clear Conscience* is one example for that), but lawyers or judges did not replace them yet, neither at society at large nor on theaters screens. The Atticus Finch-like figure of a lawyer as a hero does not have Israeli parallel, and the legal chronicles of Israel seem to inspire only documentary film makes.

Thirdly, the Israeli legal system is a young one and a mixed one.²⁸ While deriving in many ways from old, even ancient, systems like the Jewish law, the common law, and Continental law, it operates as an independent system only from 1948. The young Israeli legal system reflects years of national and ideological intensity that characterized the first decades of Israel existence as an independent state; it is perhaps too early to anticipate the creation of variety of legal narratives that typically derive from density of history and experience. Israeli courts do confront major conflicts, but the public discourse around such confrontations is still active and far from being resolved, and thus, they cannot readily set off cinematic inspiration.

Additionally, the mixed Israeli system became more and more inquisitorial throughout the years, which means that judges became more involved and the roles they play during the legal proceedings gradually became more significant. In this sense the Israeli legal system resembles Continental legal systems, where mostly inquisitorial proceedings are being practiced, and thus the role of lawyers is less central, and less likely to serve as a rich cinematic source as it is in America.

All these possible reasons for the minor representation of law in fiction films are less relevant to documentaries. Israeli legal documentaries are usually not inspired by legal visual grandeur or by past achievements of famous lawyers or judges.

²⁵ For the centrality of the courtroom dramas in American culture, see Rafter (2001), Papke (1998–1999), Kuzina (2001).

²⁶ See Machura and Ulbrich (2001).

²⁷ Sports films are also a popular genre, perhaps because of the element of competition and victory that also characterizes many legal dramas.

²⁸ See Barak (1992).

Typically they draw from materials created by reality and offer a critical gaze upon certain legal proceedings. Often they aim to promote or deliver a definite message, as Yitzhak Rubin does in his legal documentaries that highly criticize the ability of the legal institutions to reach justice. Thus, many documentaries criticize alleged failure of law enforcement in Israel, by using mainly footage from actual legal proceedings and investigations.

An interesting example, alongside the documentaries that were mentioned already, is documentary films that focus on the murder of a 12-year-old girl named Tair Rada in 2006 and the 2010 conviction of Roman Zadorov as the murderer. Although the case stands now before the Supreme Court, the affair had already ensued three documentaries that analyze or vehemently criticize the legal proceedings and the conviction by the district court.²⁹

Legal documentaries, then, derive from existing materials and from real-life issues and usually offer comments that are part of the Israeli public discourse pertaining to these issues. Causes that hinder the production of legal feature films usually do not apply to legal documentaries, which are abundant.

As much as there is a need or even attraction in Israel for fictional representations of legal practices and trials, and I believe there certainly are such need and attraction, it looks as if the American industry fully caters for it. Hollywood courtroom dramas and television legal thrillers such as *Law & Order* are as popular in Israel as anywhere and perhaps saturate the public appetite for cinematic trials while making redundant the need to produce local legal films.³⁰ Consequently, documentaries take hold of the vacant space, often aim a critical gaze toward legal institutions, and evoke lively public debate.

43.5 Conclusion

This chapter described the minor representation of law in Israeli fiction films and, in attempt to map out the reasons the absence of law from Israeli cinema, suggested three possible explanations. The first is the legal tradition in Israel that is derived from the Jewish law, where there is no desire to visualize justice. Furthermore, the visual reality of the Israeli legal system lacks adornments that create visual interest in law. The second explanation draws from the differences between Israeli and

²⁹The films are *Only Tair Knows* (directed by Sharon Gal, 2008), *Nailing an Innocent Man* (directed by Haim Sadovsky and Doron Baldinger, 2011), and *Who Murdered Tair Rada?* (directed by Michal Kafra, 2011).

³⁰It should be mentioned, however, that few legal series were produced for Israeli television. One example is *Siton*, a series about the legal and personal adventures of a Jerusalem lawyer, and another is *Franco and Spector*, a series which combines both courtrooms drama with familiar personal life dilemmas. Such legal series are scarce, though. I believe that in this context as well, American TV products such as *Law & Order* and *The Practice* meet most of the public demand for “legal television.”

American cultures and the dissimilar perceptions of lawyers and their role in society, as well as the differences in the legal procedure. The third explanation suggests that the 60-year-old legal tradition in Israel is not rich or laden enough to challenge feature filmmakers and to trigger cinematic representations.

It is hard to forecast what shifts are about to happen and which themes will be dominant in future films. Since there is an obvious gap between the eminence of law in the public eye, to its peripheral place in Israeli culture, it may well be that Israeli legal films will evolve. Or, perhaps, the unique characteristics of Israeli society and legal system will continue to resonate in the thriving of legal documentaries, the scarcity of Israeli legal feature films, and the intense consumption of American court dramas.

In any event, the current scarcity of legal representation in Israeli fiction films is a meaningful signifier in the Israeli societal context. It can lead toward an exposure of the cultural and political assumptions which account for the absence and thus deserve careful attention. The lack of interest in law in Israeli films, compared with the central function of law in Israeli life, might reflect a gap between the festive legal rhetoric of Israeli courts and the instrumental approach of the public, who associates law not so much with higher values and celebratory statements but merely with the instrumental option of providing practical answers to specific cases.

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Chapter 44

Influence of Public Perceptions of Media Legality on Making Biopic Films

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Abstract The symbolic presence of the law in everyday life influences the actions and beliefs of the general public. This perception of the law is carried into our daily lives, leading us often to act or not to act on a belief that something is or is not “legal.” Thus, the law determines a kind of “truth” in the sense that if it is allowed, then it must be legal and therefore provable, or true. This awareness includes our belief that information delivered via the public media has an obligation to be truthful and free from malicious or deceitful intent. This is especially true for information regarding the lives of individuals, including those who must live their lives in the public view. Thus, if we hear about famous and public figures on television or see their stories at the movies, we assume that, unless there is a strong disclaimer preceding the information, what we see and hear is true. This philosophical understanding of how the law draws boundaries around what can and cannot be included in a filmed biography greatly shapes the trust of viewers that filmmakers will present truthful and accurate portrayals of subjects of biopic films.

44.1 Introduction

The world of lawyers, courtrooms, and the law as depicted in films is often the subject of scholarly consideration, but the matter of the abstract presence of the law as part of the context for validity in narrative films is less investigated. Viewers bring to the film certain assumptions about the law that condition their ability to imagine cinematic reality and ultimately truth. This is particularly true in biopic films, specifically unauthorized narrative biographies in which some creative license for truth and accuracy is necessitated by cinematic form. Screenwriters must often select from only a few segments of a person’s life to illustrate a significant point

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while also conveying a believable universe and character to the viewer. If the character is well known, the screenwriter must also respect the public's prior knowledge of the character, both in behavior and motivation. Of specific relevance to these films are laws concerning defamation, privacy rights, and rights to publicity. The public's sense of these legal areas determines, to a large extent, how likely viewers of biopic films are willing to accept the story as authentic.

Given the ability of film to represent abstractions of reality through the semiotics of the visual medium, most viewers are all too willing to believe that what they're watching is actually and unequivocally true. Consequently, filmmakers must find paths around these expectations and potential legal consequences. Both the writer and the production personnel have to anticipate the response of the viewer to the final product in which the viewer is involved by all sorts of sensory signs—sights, sounds, and even touch and smell in some movie theaters. In rendering a believable biographical story, filmmakers must pay attention to such obvious variables of biography as the integrity of background research, factual accuracy, and respect for whatever character myths may exist in the public domain. The writers must consider how else to truthfully represent the defining episodes of the character's life with respect to audiences' expectations for accuracy. Encoding the meanings and values inherent in the character's life—especially any controversial sensibilities of the subject's character or events of questionable accuracy—within a compressed system of semiotic manipulations (election, emphasis, preference, and privilege of visual images) will allow filmmakers to reconcile the need for artistic freedom and the constraints of film form to the audience's concept of the legal limitations on the need for the media to be truthful in regard to the telling about the private and public lives of others.

Examining media renditions of courtroom culture, I will investigate the sources and bases for the public's perception of legal parameters assumed in biopic productions. I will establish that most Americans have acquired a notion of law and justice that translates as an expectation for truthful accounts of lives presented in public media. I will then consider how the idea of law as logical truth constructs what viewers are willing to accept as biographical (and perhaps artistic) truth. I will consider how this knowledge is socially and systemically affirmed culturally. Finally, I will look at the overall impact these expectations have on filmmakers and the limitations imposed on their ability to render an artistic account of a life. As part of that consideration, I will discuss the semiotic detours that filmmakers employ to increase the boundaries in which they construct the biographical representation of a person's life. My specific concern in this chapter is how ordinary citizens, untrained in the law, are influenced by their sense of legal sanction and restriction in interpreting representations of the "truth" in biopic films.

44.2 The Legal Imperative for Truth

Those who work within the realm of film biography are constantly picking their way through issues of truth, interpretation, and embellishment. The screenwriter, the actors, the director, the camera person, the film editors, and all those involved in

the creation and production of a biographical film are all involved in the business of constructing a sense of historical accuracy, and the key is that it must only be a *sense* of accuracy. If the final product inspires a sense of belief that the story is a true representation of the subject's life and if the viewers are convinced that the essential events and character are revealed in the film, then the film is deemed a "true story." Most of what people are willing to accept as the truth of a portrayed life is defined by what details they may already know about the subject, their notions of what represents typical human behavior and motivation, and their desire to see certain public values affirmed and validated in the stories they witness. Filmmakers, they believe, have a responsibility to tell the truth, an obligation that is substantiated by the parameters of what they believe the law allows. Public perceptions of the legal boundaries of libel and slander, along with the notion of one's legal right to privacy, convince most viewers that the law allows only the verifiable and demonstrable facts of a person's life to be used for public examination.

The sense that there is a legal imperative for truth in representing the life and the reputation of another is further supported by the tradition of popular courtroom drama. With nearly a century of television and cinematic films sensationalizing the drama of trial law, most Americans believe that they are informed with at least a semblance of common legal knowledge. Armed with media cases "ripped from the headlines," and whole networks devoted to court procedures, we not only know that truth really means logical reality and "the letter of the law," but we have acquired a whole literacy and language for how the law determines the rules for social behavior.

This procedural and philosophical understanding of how the law draws boundaries around what can and cannot be included in a filmed biography greatly shapes the trust of viewers that filmmakers will not cross those boundaries with excessive embellishment or lies. In the case of popular cultural heroes, the public also expects a certain degree of reverence or care not to defame these public figures. The viewing public has little tolerance for violating its myths. In biopic films, cultural heroes, despite their human flaws and fallibility, must be redeemed by film's end. Even tragic heroes must survive their downfall and inevitably allow viewers the catharsis of judgment. When a rough spot in the life of a respected public figure does not have a good outcome, viewers are likely to adopt the cinematic version as a true account of events in that person's life, revising whatever prior knowledge they may have had of that character. Viewers, however, are not naïve. They understand the genre of film and its limitations, yet they also understand the legal allowances in treating the facts of a person's life for public entertainment.

Cases in point are two recent presidential biographies: *W* and *Frost and Nixon*. A flurry of attention surrounds the "controversial" cinematic versions of the lives of both George W. Bush and Richard M. Nixon—controversial because there are arguments about how true (though truth *is* an absolute!) these film versions are and can be. Both film biographies are unflattering and reveal all too human fallibilities of the subjects. When asked how he manages to get by with such a damaging portrayal of the current President, director Oliver Stone claims that "it's all true; nothing in the film did not happen" (Svetkey 2008). He was only asked that question because his interviewer, as well as those listening to the talk show interview, expected that

Stone would be subject to suit for libel, infringement of the president's right to privacy, or some form of character defamation for telling anything but the truth. Writer Paddy Briggs sees Stone's use of "the known facts" as his not just avoiding any possible libel suit but as making an even more chilling film" (2008).

44.3 The Presence of the Law in Social Experiences

The venues which contribute to the viewer's idea of the truth are ubiquitous throughout media. Examples abound for the contexts in which popular culture acquires a general knowledge and understanding of what the law is and how it works. There is a certain amount of journalistic integrity we expect when we are watching purely informative genres of news and biography. News programs, reality shows, and documentaries on educational channels are virtually unchallenged in their authority to present accurate and true information, because we, as a society, assume that responsible journalism requires honesty and truth. However, when we watch shows about the same issues, subject to creative treatment—fictionalized accounts of actual lives and events—we extend the standard of truth, include the possibility of truth, and sustain our beliefs by this trust in the media and by our understanding of the law as defined by popular culture. Law school is in session everyday for the average citizen.

Early one morning, I awoke to hear a local news story about an Illinois statute which bans hanging ornaments from one's rearview mirror. According to the reporter, it is the officer's prerogative to enforce this ordinance, which is most likely to be invoked as a means to stop suspicious, or perhaps annoying, drivers. My immediate response was that the statute represented an infringement of First Amendment rights. Prohibiting these hanging ornaments, often a symbol or emblem of one's personal identity, disallows free expression of one's self. I wondered if anyone had challenged the law in court.

Not long after that, the news broke of golf "phenom" Tiger Woods' splashy driveway accident. It was the lead story on the NBC Today show (Bell 2009a). Amidst the speculation of what a domestic altercation had provoked, the incident was the rumor that the Woods' marital problems might possibly explain Mrs. Woods' incidental possession of a nine iron at the scene of the accident. This story took precedence over war and economic news: "Still not talking!!!" headlined the story—Tiger asserted his right not to talk to the police. Something was not right. As the details unfolded via media venues, the story mushroomed into a public scandal, delving into the private life of Woods and leaving his "squeaky-clean" image tarnished and subject to late-night humor. News stations claimed that Woods' initial reluctance to address the incident earned him the public's curiosity and media attention.

His life, public and private, was fair game for news making. As the news coverage advanced deeper into Woods' private life, the matter of his privacy seemed a non-issue. The details of Woods' private life were accepted as true because the public had a tendency to trust broadcast news to report truth. The public has learned to assume

that, if the news media has erred in its accuracy, either a legal suit for libel or an aired apology will follow. In other words, most of us assume that the news wouldn't report the information if it were not true. Our concept of the legal definition of the right to privacy exists somewhere between constitutional amendments and the notion that individuals are entitled to keep their personal business private. We make no distinction between famous and ordinary individuals.

My thoughts about what is legal, what is right, and what is allowable in regard to a person's privacy and right to free expression are typical of most Americans. Most of us claim a working knowledge of the law, assuming that what we know can be practically applied to situations and contexts in our actual lives. Our rudimentary understanding of the law informs our sense of legality in terms of protection of our individual rights and definitions of permissible civic behavior. We carry this perception of the law into our everyday lives, often acting or not acting on our belief that something is or is not "legal." Thus, the law determines a kind of "truth" in the sense that if it is allowed, then it must be legal and therefore provable, or true. This awareness includes our belief that information delivered via the public media has an obligation to be truthful and free from malicious or deceitful intent. This is especially true for information regarding the lives of individuals, including those who must live their lives in the public view. Thus, if we hear about famous and public figures on television or see their stories at the movies, we assume that unless there is a strong disclaimer preceding the information, that what we see and hear is true.

Such a disclaimer is often aired preceding episodes of the popular detective and court drama, *Law & Order*, which often advertises its upcoming episodes as "ripped from the headlines." One disclaimer reads, "The following story is fictional and does not depict any actual person or event." Another, earlier disclaimer reads, "Although inspired in part by a true incident, the following story is fictional and does not depict any actual person or event." Viewers will probably construe these disclaimers as NBC's effort to avoid being sued for the libelous exploitation of public persons or events. In one episode, "Political Animal" (Slack et al. 2008), for example, Detectives Green and Lupo investigate a triple homicide that appears to be tied to a politician. This episode alludes to at least three persons and events in the news at the time. The plot suggests political subterfuge, as the politician suspected of murdering another politician takes desperate measures to keep his freedom by fleeing from the country. The politician's murder was reminiscent of the suspicious death of Vince Foster, Deputy White House Counsel during Bill Clinton's presidency, and the flight of the politician was suggestive of the 2007 scandal involving Norman Hsu, who had gained notoriety for his suspicious campaign contributions to the Democratic Party and questionable business activities. Inserted in the story is a scene in which Detective Lupo, assigned to a stall in the men's bathroom at the airport, nabs the local politician for sexual misconduct. The politician's play of footsies under the stall was not unlike those attributed to US Senator Larry Craig in his Minnesota airport tryst.

Although viewers may be aware that the melding of all these individual events is a ploy to create an engaging story, they are generally familiar with the details of the real life, disclaimed events, and principals involved, and despite this awareness,

they may not be aware that they are being subtly swayed by the media portrayal to make those associations and temporarily suspend values for truth and accuracy. A sophisticated understanding of cinematic reality acknowledges that the ability to imagine possibility rather than to demand actuality is essential in constructing film narratives. Beyond suggesting “it could have happened this way,” such presentations make powerful use of visual images to instill in viewers a conceivable version of what actually happened. In other words, the acted out scene, because it must adhere to our accepted knowledge and expectations of human behavior, is a logical argument for the possibility of truth and accuracy.

The disclaimer endorses this sensibility as it affirms our belief that such shows are not legally allowed to flagrantly abuse the reputations of public figures. The public holds a sense that laws exist which can determine how much truth and accuracy viewers are entitled to in being told about the lives of others. All of this, however, depends on the viewers’ concept of privacy and libel laws, which may or may not be accurate.

Despite *Law & Order’s* standard disclaimer, TV commentator Bill O’Reilly saw enough of himself in an episode (“Anchor”) of the crime drama that he publicly lambasted the series as “despicable” and “out of control” (Green et al. 2009). O’Reilly’s objection was primarily to a scene which referred to him and two other conservative news commentators as “like a cancer spreading ignorance and hate” (Dykes 2009). He called the scene “defamatory and outrageous.” In concluding, O’Reilly threw out a few epitaphs of his own, calling producer Dick Wolf a “coward” and a “liar.” O’Reilly’s use of the words “defamatory” and “outrageous” seems to nullify the legitimacy of his claim. A defamatory statement is false and harmful to the subject’s reputation. Such conditions may be difficult to prove, especially as the claim of defamation does not include hurt feelings or harsh opinions. Hyperbolic or inflammatory statements, such as the reference to cancer, tend to be regarded by the courts as mere opinion and not defamation (Crowell 2007, 280). The majority of the public, as demonstrated in the online comments of viewers, did not know the particulars of libel laws. Their remarks concerned the fairness of the implied reference and its tackiness. At no time did their comments refer to any potential legal ramifications for the use of likeness or reference to O’Reilly. According to viewers, the show, though tacky, was entitled to such portrayals, especially since the show flashed the disclaimer at the start.

44.4 A Public Understanding of the Law

Considering the lay public gleans its legal knowledge most likely from the media itself—through news programs, courtroom dramas, and perhaps a few residual facts from high school civics—the public’s understanding of the law is, at best, a pragmatic and powerful social contract that allows us to process the events of everyday life in terms of fairness and justice, and belief and question. The network news coverage of the child custody dispute between Levi Johnston and Bristol Palin, daughter

of celebrity politician Sarah Palin, illustrates how we acquire a kind of public understanding of the law and matters of privacy and publicity (Bell 2009a). The news interview was fraught with allusions to privacy laws and laws governing the public's access to the private lives of celebrities. The aura of live news and ticker captions running across the bottom of the screen added to the authority of the report and the lawyers being interviewed. The discussion, a heated debate, however, did little to clear up confusion about guaranteed constitutional rights to privacy and the distinction between privacy laws and publicity laws. Nonetheless, the segment engaged the viewer's attention as it involved a juicy story and piqued the viewer's curiosity about the lives of famous people and how the law restrains their tendency to live above the laws of common people.

Palin and Johnston were arguing for sole custody of their child, born out of wedlock. The network news report focused on the judge's decision to deny the Palins' request for a closed trial, which meant that the judge decided to allow media presence. Levi's lawyers claimed the necessity for an open trial on the basis of Levi's fear of Sarah Palin's potential to negatively influence court proceedings. The Palins counterclaimed that Levi, who had recently posed nude for *Playgirl* magazine, was simply using the trial publicity to promote himself for a role in a future reality show. The superior court judge ruled that the Palins had failed to prove that the anticipated publicity would harm the child, and the presiding judge for the district also denied the Palins' request to use pseudonyms. Following the report, the host interviewed the two legal experts, one of whom argued that the judge had been influenced by the celebrity status of the parties and had made an unwise ruling. She said, "The legal standard is to balance the public's right to know against the private interest of the parties." Her comments were followed by a volley of heated opinions between the two lawyers on media privilege versus legal allowances, which included, on the part of one of the lawyers, a near case of the dozens and name calling. Ironically, in an obvious "huff" over the matter, she capped off her comments by saying that, if Johnston were truly concerned that Sarah Palin might harm his reputation or say something damaging and untruthful about him, "he could sue her for slander or something." Though the other lawyer emphasized that it was ridiculous to think that the judge could ignore the public lives of the Palins and Levi Johnston, the first expert shot back, "You don't allow people to exploit public proceedings!"

This entire conversation is a notable example of the ways in which the public becomes informed about the law's relation to media and public lives. The reference to "the public's right to know versus the private interest of the parties" suggests that the public does indeed have legal rights to the lives of public persons, and in fact, though most people believe that the right to privacy is constitutionally guaranteed, they also believe that public people give up those rights when they become celebrities. That lawyers reference these rights gives credence to the idea that such laws exist. As one of the interviewees commented, it does not really matter if the stories are true or not; the public has a right to know. In this case, it doesn't matter if the law exists or not; the public will take what information it can get, and sometimes what it gets is a good story.

44.5 Constructing Legal Reality in Visual Media

The difficulty in writing a biopic screenplay lies in straddling the line between creativity and reality. The point of creativity, some critics would say, is to create things that reflect or mirror life; that is to say that the idea is to create something that will seem believably real, in the sense that it demonstrates the qualities of life itself. Hence, the goal is to create something that is realistic and, perhaps, also realistic in a beautiful or pleasing way. Certainly, the expectation for viewers of biographical films is to experience a truthful, insightful, and reasonably unexpurgated representation of the subject's important life events. A biography, then, is more than a story. It is a means for judging culture and for understanding ourselves ultimately as agents in an imagined universe, and in doing so, absolute truth is not such a critical factor. It is sufficient to accept that the law restrains flagrant exaggeration and misrepresentation of a person's life for public entertainment.

So viewers may assume, when viewing biopic films, that filmmakers are presenting a reasonably factual account of the subject's life. Understanding that it would be impossible to cover every detail and nuance of a person's life within the time limits given for the genre of screenplays, viewers are willing to accept that the episodes and conversations observed represent the screenwriter's choice of defining moments of the subject's life or at least the key events that lead up to a single turning point in the subject's life. Biographer Meryle Secrest calls these moments "pivotal moments or primal episodes" (Menand 2007). Secrest notes one necessary factor in biography—viewers come to biography with an image of the subject already preconceived, an image which is most considerable when the subject's life is well known or a matter of public record or myth. That is, viewers expect to see, occurring in the life of the subject, certain events and behaviors that are associated with the subject's story. Constrained by these expectations, the biopic film writer's choices for additional scenes may seem somewhat arbitrary, as Secrest suggests, but she resolves that "biography is a tool for imagining another person, to be used along with other tools. It is not a window or a mirror." In that biography is not a window or mirror, the condition of accuracy or factual image is not a necessity.

Film reality is a kind of virtual reality in which the field of imagination occurs between the mind and the screen. Much as we do in reading text, we engage a medium with literacy for the genre. For example, the standard length of feature films is 2 h. It would be absurd to think that, given 2 h or 120 pages of written script, any one could possibly tell the complete, unabridged story of a person's life, let alone the story of anyone who has lived above the level of most mediocre lives, but still we will watch a 2-h biographic movie and feel as if we have experienced the life of the main character. We do not interrupt our viewing with questions of whether or not the characters actually had those conversations or if the relationships between characters are accurate or even documented. What we expect is not a documentary, but a believable and concentrated presentation of the events and influences that drove the character to a particular point in life. We are aware of and appreciate the artistic license used to both entertain and inform us. As long as

the presentation is logically consistent with whatever preconceptions we had about the character and with what we believe the law allows for accuracy, we are satisfied.

Because of necessary limitations of time and accuracy, screenwriters use tools and methods to assimilate real-time and irretrievable dialogue. The viewer's preconceptions and expectations factor critically into the "tools" that the screenwriter may use in creating the milieu of the biography. For example, in the film *Amelia*, the ambiance of 1930s America and the social climate of hope have likely been established prior to the movie through shared cultural knowledge and lore of the depression era. This understanding of the "times" supplies the desired respect for the cultural values and trends that backdrop the events and characters of the film. Sebastian Mahfood, a researcher of intercultural trends, argues that the means for conveying these sensibilities in film requires a different language than that used in literary representations (Mahfood 2000). The language of film, he says, as opposed to the written word, is conveyed through various camera angles and speeds, time shifts, vocalization of words, and visual images. Another aspect of film language, he continues, is its semiological nature—its ability to represent cultural and countercultural values. The language is necessarily semiotic in that it takes advantage of imagery, signs, and cultural understandings preexisting in the social psychology of viewers.

Unlike documentaries, which persistently interrupt the presentation of information with documentation of authorities, references and allusions, and analytic commentary, feature film biographies simply tell the story, assuming that the concentration of events will sustain an understanding and presumption of what may have happened. The entire script is somewhat a large and extended metaphor in which a life is semiotically conveyed through the writer's choice of words, actions, and cinematic method. The use of a single episode in a character's life, for example, may become representative of several similar events in the person's life, and often the scene may be actually a composite of events and persons from those other events. Although the time and actual event may be embellished or changed to reflect a particular point or aspect of the character's life, it still maintains a truth in that it signals the reality of the context to the sum total of the character's life. However, the elusive nature of signs and metaphors make it all the more difficult to constrain truth within the limitations of the law.

The movie, *Blind Side*, is the story of Michael Oher's incredible rise from the Memphis slums to a professional football career with the Baltimore Ravens. Initially avoiding interviews about the movie (Alpour 2009), Oher allowed the reporters of ABC's *20/20* news show to interview him about his life and the movie (Neufeld 2009). Oher commented that one particular aspect of his popular biographical movie was simply not true. It was rather, he said, an effort to embellish the facts to enhance the plot. He was referring to scenes in which he appears to need instruction on how to play football and encouragement to be more aggressive and mean. Oher said that he had always known how to play the game and when and how to be aggressive and intimidating on the field. "But," he said, "It's all right. It's Hollywood, I mean at the end of the day—it's still a good story."

44.6 The Limits and Allowances of Privacy Law

Whenever a writer chooses to dramatize a subject's life story, she has a choice to make—whether to acquire permission to tell some else's life story or whether to take her chances in composing an unauthorized biography, shielded, hopefully, within the sympathies of the law. Getting prior permission is the less risky approach, as a Life Rights Consensus Agreement can help the writer avoid all sorts of claims that can be filed against the writer or filmmaker. Such an agreement typically grants the writer the right to portray the subject's life in whole or in part and to fictionalize parts of that person's story. Sometimes the agreement will indicate whether the use of pseudonyms would be necessary or required. A life rights agreement may also contain waivers and releases that will protect the filmmaker from a number of intellectual property and privacy claims. The grantor of the life rights agreement promises that the life story of the subject is true and accurate. Securing permission to film a biography through the life rights agreement clears the way for whatever adaptations and creative revisions a filmmaker may need to make for the cinematic genre, not to mention that the agreement helps the filmmaker avoid potential lawsuits (Crowell 2007).

As clear cut as this arrangement sounds, many filmmakers must choose another route. For low-budget or independent films, high fees for prominent subjects may be prohibitive. Understandably, some subjects of biography, or representatives of a deceased subject's estate, may not wish to have their life stories filmed. For whatever reason, filmmakers who produce unauthorized biopic films must work around substantial legal risks, including libel, infringement of intellectual property rights, violation of the right to publicity, and invasion of privacy.

However, filmmakers receive some protection through limited interpretations of their First Amendment rights. For media cases, especially those involving celebrities, the courts usually defer to the First Amendment in protecting free speech rights. Biographers, as a rule, can write an unauthorized biography if the story is accurate, respects the subject's privacy, and does not infringe upon the subject's right to publicity (Crowell 2007). This allowance pertains as well to honoring copyright terms and other intellectual property rights. The courts generally favor the media writers in behalf of preventing encroachment on basic First Amendment rights. The law argues that those who place themselves in the eye of the public are subject to its scrutiny. Thus politicians, film celebrities, professional athletes, and the popular performing artists are fair game for the tabloids and biographers—though, such public persons are not totally unprotected from the pen or curiosity of their public. The right of publicity at least entitles celebrities ownership to their name and likeness, specifically, the use of the celebrity's name or likeness for commercial gain. Lloyd Rich, at the Publishing Law Center (Rich 2000), claims that the name and likeness of public persons, to a large degree, have an “intrinsic value ... as a symbol of their identity,” a symbol that can be construed as a “form of property” that can be sold or passed on to third parties. Yet, if the biographer can prove that the famous person's name and likeness were not used for commercial

purposes, the right of publicity does prevent the writer from using either, and certainly, a writer may argue that the public's right to have a truthful accounting of a public person's life justifies telling a potentially controversial story, as long as the story is told without malice or intentional falsity.

However, authorized or not, most viewers are unaware of the many legal agreements and interpretations that surround the writing of a biopic screenplay. They just assume that the legalities have been taken care of and that they are viewing the required standard of truth and accuracy in portraying a person's life story.

A good case in point is Oliver Stone's 2008 movie, *W*. Prior to the movie's release, Stone was interviewed by *Entertainment Weekly*. Stone insisted that every scene in the movie was based on truth derived from his and cowriter Stanley Weaver's extensive research with published biographies and perhaps based upon information from "a few disgruntled former staffers." Interestingly, Stone admits to having to alter the timing and order of certain events, as well as speculating on possible dialogue for most of the movie: "You take all the facts and take the spirit of the scene and make it accurate to what you think happened ... but if you take one scene from Cincinnati and one speech from the U.N. and then turn them into one scene, who cares?" (Svetkey 2008).

Moviegoers are certainly sophisticated enough to understand the need to invent dialogue, and they can even sustain a kind of coherence to merged scenes. However, many viewers claimed that Stone had gone too far in representing the serendipitous life of Bush, often showing him as misdirected, insecure, and downright "goofy." Some were suspicious that he had subordinated accuracy to political motives, as the movie was released in October of an election year. Given the controversial nature of some of Stone's prior films—dramas like *JFK* (1991) and *Nixon* (1995)—few viewers and critics were surprised that Stone had taken such risks.

At a chat site, Askville.com, maintained by Amazon.com, users weighed in on their impressions of the accuracy of Stone's portrayal of the president and their responses to the legality of Stone's actions (Moody 2008). The discussion began with a simple question, "How did Oliver Stone manage to make the film, 'W.' without getting sued?" The comments revealed that viewers have some understanding of legal restrictions on biopic screenwriters, but the comments also reveal that, though film goers may not be exactly sure what the laws allows, they believe that those who make films are aware of their legal limitations and do not violate them:

- Analee: "His films are protected by the First Amendment Rights! Look at the trailer ... that disclaimer is all he needs to set the First Amendment into play."
- Yellowdog: "Public figures do not have the right to privacy that private citizens have. You can delve into any public figure—or celebrity's private life, even lie about them."
- PamPerdue: "I assume Stone has a legal department that allows him to keep precisely to the legal side of libel. I imagine there is nothing completely fictional in it ... And Bush probably doesn't want to make any of the more embarrassing unknown incidents part of the public conversation, because I assume that Stone has at least enough supporting material to avoid a libel charge."

Within these comments lies reference to the most common issues of privacy and publicity: First Amendment rights, privacy, and right to publicity. Though only partially correct, the comments reveal that viewers assume that writers are not allowed to or should not be malicious in their intent in portraying episodes of the subject's life. These assumptions are the basis for the presence in films of legal boundaries which act as a kind of assurance for viewers that filmmakers will not abuse their ability to craft the truth of a person's life story. The representation of these legal restrictions allows viewers to believe in the accuracy of the details presented in the biopic film. They suggest the law as an abstract concept, a concept that is semiotically conveyed by a general, common public sense of the influence of these laws have upon the filmmaker's creative prerogatives.

44.7 Semiotic Uses of the Law in Films

The question ultimately is if a construct—the abstraction of the law as a presence—can be signified semiotically in biopic films. The answer may, at first, seem obvious: of course, it can. The point of a symbol is to act as a concrete metaphor for the abstract, the inexpressible. It would seem, then, that this abstraction of the law as a restrictor can be construed as simply a metaphor for a socially contracted value and expectation for truth. This, however, requires that we regard the essence of the law as symbolic, not so difficult a feat if you can conjure up the image of a blindfolded Lady Justice toting the scales of justice. The question, however, is not about symbols or metaphors but about signs, and since the presence of the law in these films is more a perception on the part of viewers, it is more a sense than a thing.

Social critic and rhetorician Kenneth D. Burke (1966, p. 5) defines humankind as “a symbol using animal” that manipulates its symbols to construct reality, a reality that helps people deal with and make sense of the world they operate in. Peter Berger and Thomas Luckman, in their book *The Social Construction of Reality* (1966), contend that symbol building systems are determined by socially shared understandings. First as individuals and then as communities, we interpret the phenomenal world through symbols which signify meaning through association. In order to have this cultural or community understanding of certain kinds of reality, the social dimension of the sign or convention is necessary (Shank 1995).

The law, as signified in social groups, is one such social construction. Nineteenth-century philosopher and pragmatist Charles Sanders Peirce had recognized earlier that cultures—socially shared sensibilities of impinging values and norms. He set up a triadic model, identifying three kinds of signs, one category of which he calls “thirdness.” Peirce defined “thirdness” as those aspects of reality that deal with “such issues as rules, laws, and habits” (Shank 1995). Our sense of the law and its presence in our lives are systemically instantiated through our social institutions, primarily religious and educational systems. School lessons, beginning with those featuring early European immigrants, teach children the sense of the law as a socially controlling and shaping presence in their lives.

Consider, for example, the ideas explicit in our most revered documents: the Mayflower Compact and the US Constitution. We are presented with the Mayflower Compact as an agreement among the Pilgrims to subordinate the rights of an individual for the common welfare of the whole community. The Preamble to the US Constitution defines a legal system by which citizens agree to be governed, based on a desire to “form a more perfect union.” We respect the character of our law and its roots in European political philosophy, acknowledging the restrictive influence of the law on our behaviors. The notion that the law restricts the instincts of individuals for the betterment of societies is solidly grounded in our European cultural heritage. Its evolution into an assumed attribute of democratic societies allows us to presume its presence, signified in our perceptions of its ability to determine civic rules and often extended to include moral aspects of fairness and protection in our human interactions.

This sense of the law’s presence is sustained by the various cases that challenge its validity and extent. In the case of libel and privacy, occasional cases, such as Carol Burnett’s 1981 case against the tabloid newspaper, *The Enquirer*, and her 2007 suit against Twentieth Century Fox over infringement of her intellectual property rights reaffirm our faith that the courts are keeping an eye on media makers and keeping them honest (Jones 2005). The *New York Times, Company. vs. Sullivan* Case ended in the Supreme Court’s determination of libel law boundaries. All of this goes to establish that when screenwriters are composing scripts and producers are making films, they have both an awareness of the limitations and the allowances of the law that permits them to use, perhaps exploit, the viewing public’s trust that filmmakers will render truthful and accurate versions of life.

44.8 Scripting a Life: Real and Imagined

The fact that the public believes that blatant lies and damaging characterizations are prohibited by law can be used by filmmakers to enhance the credibility of their cinematic presentation of a person’s life story. Viewers will think that, obviously, if the story makes it to the screen, it must be mostly true. They will allow some room for creative embellishment, but not in the essential facts of a person’s life. Too much accuracy and not enough creative interpretation would make “a good story” perhaps too much like a documentary and far less entertaining. This was the situation for my writing of a biopic screenplay, *Zora*, based on the life of Harlem Renaissance writer and personality, Zora Neale Hurston.

When I set out to write biopic script, I wanted to present a coherent story about a person who lived a larger life than most people. There was no need to make up events; rather, the problem was in deciding which events would most efficiently characterize her life. Hurston had written her own biography, and there were several scholarly biographies written about her, two of which were standard references on the details of her life (Boyd 2003; Hemenway 1980). I had done extensive research

on her life, including visiting her hometown, Eatonville, Florida, which holds an annual festival in her honor; attending conferences; writing scholarly articles on her life and its interpretation; and reading all of her literary works, including a volume of her letters. I watched a filmed version of a stage play written about her life, and I studied three recently filmed documentaries on her life. For the most recent, I was fortunate enough to interview the writer/producer who advised me to secure the rights to tell the Hurston story, though the process might not be easy.

One of the difficulties in telling the Zora Neale Hurston story is that biographers have discovered that Hurston often altered the facts of her life, most notably her age (Boyd 2003, 347). Though actually born around 1891, Hurston claimed that she was at least 10 years younger (and more on some occasions). Regarding writing her autobiography, "Dust Tracks on a Road," Hurston was not particularly supportive of the project; her publisher had strongly suggested that she write it though. Much of the material turns up in other publications, some of which are her collection of local folktales and cultural anecdotes. Her embellishment and performance of these stories were often the height of entertainment at the parties she attended in Harlem and made her very popular, but there was always that gnawing suspicion and criticism from her own people that fed her doubt about her acceptance among them. In short, there were few who knew the "real" Zora behind the fun and performances.

There are those who would argue that the outward life of Zora Neale Hurston is an elaborate façade, a covering for a character whose interior life is characterized more by her disassociation from those closest to her, by her odyssey away from home, and by her inexhaustible need for experience and acceptance. The "real" Zora might be a worthy candidate for the same kind of aching pathos rendered to President Bush in Oliver Stone's "W." There is, after all, a kind of forgiveness in humiliation.

Hurston died in near obscurity in 1960 in Florida. A resurgence of interest in her life was generated by the writer Alice Walker's discovery of her work and Walker's identification of Hurston's grave site in Ft. Pierce, Florida. Walker proclaimed Hurston "a genius of the South." From then on, research on the body of her works and her life has grown substantially. Societies have sprung up, documentaries have been made, and her work has been canonized in literary anthologies. Her life is well known, and her work highly publicized.

Because Hurston's life is so scrutinized by critics, it is difficult to be less than accurate in relating her story. Her name and likeness are heavily protected by the Zora Neale Hurston Trust which is represented by Victoria Sanders & Associates [n.d.]. This agency handles all property rights with the exception of those books published by HarperCollins. The Hurston Trust would have to sign a life rights agreement for the script if the screenplay is to be authorized; otherwise, though Hurston is deceased, the screenplay would carefully have to avoid those hazards that could lead to large property rights suits. The problem of rights is further compounded in that Hurston hung out with a number of well-known celebrities and artists from that era—the early 1900s. For example, in the script, there is a scene in which she and poet Langston Hughes are in a Georgia bar, listening to blues singer Bessie Smith. Hurston, Hughes, and Smith are all famous enough (and infamous, as well) to

require permission authorizing their appearance in this script. Hurston and Hughes did, in fact, run into each other in the South and travel through Georgia, stopping at a bar and hearing Bessie Smith. Working with a script consultant, I was encouraged to include a glitzy night scene from one of Harlem's night clubs of the period. This would surely have made for some fine entertainment, but the truth is that it would have been unlikely that Hurston or any of her friends would hang out at the more famous clubs (often depicted in period movies of the Roaring Twenties). More than likely, they would have attended a rent party, a much more colorful and riotous affair. Whether they did or not, or which specific party they attended, is not important, I think, to the story. What are important and truly entertaining are the wild and festive atmosphere and the characters interacting in that environment. I wrote in the scene and featured several famous musicians and artists of the times, including Count Basie and Louis Armstrong. Both men would have, at some time or another, been at such a party, and it is also likely that Zora Neale Hurston would have been at one, too. I speculated on how such a gathering might play out, and I wrote the scene. There is no account in any of her biographical material that would substantiate this event, but Hurston mentions her active social life and being on the party scene frequently. Does this speculative truth matter if it "could have happened that way"?

Some of the stories are conflicting. Though the scholarship on Hurston traditionally has her becoming mysteriously ill in Haiti following a foray into voodoo, a relative, speaking at the Hurston Festival declared that the family knew that she was really incarcerated in Haiti for criticizing the Haitian government too heavily. The public, being more familiar with the likelihood that Hurston was the victim of some voodoo potion, will probably want to believe the voodoo version (more entertaining) over the jail story (more accurate).

One of the major concerns in portraying the life of Hurston was in deciding which of many episodes would best represent her life. The facts of these events were not in question. Most of her personal writing and her biographies substantiated the major line of the stories. The problem had more to do with the genre of screenplays which only allows an average of 120 pages per script. This is the equivalent of 2 h of run time for a film. Any choices I made would be an editorializing of her life. What I chose to show and what I chose not to show would form its own reality of her life. Originally, I exceeded the recommended length of the play because I just couldn't decide which events were major and which might be less important in shaping the character. My assumption was that the majority of my intended viewers would care to know as much about her as I could give. It didn't occur to me until later that, for the type of script I was writing, viewers might not care to know so much. I was advised that a focus on a central event in the life of the subject to show a single facet of the character's personality would be sufficient and would maintain the ultimate purpose of feature films—to entertain the viewer.

Once I had untangled my confusion of purpose—that is, whether I was doing scholarly work, which demands a thorough hunt for truth and accuracy, or creative work, which makes only superficial demands on accuracy—I thought about the sort of composite reality that could be achieved by combining certain events and by

rearranging the time line of occurrences within the story. Some creative decisions were made with regard to whether or not a particular scene made logical and consistent sense with other parts of the story; others were made with an eye toward entertaining the viewer with lively people doing lively things. In the latter case, the consistency of the truth and the logistics of people, places, and time did not matter as much as the opportunity for a colorful and entertaining scene. In the end, the concern was not with absolute truth. I'd leave that to the scholars. The concern was with simply telling a good story.

If you were to compare the screenplay with some of the documentaries on Hurston, you would find out that the documentaries are much more concerned with accuracy and maintaining Hurston's reputation as a writer. Few of those documentaries mention her weak points, her sexual adventurousness, her dubious status with the black community, and her Communist leanings. Only her biographies, with careful documentation, dare breach these areas of her life. To present them in the public arena of movie house is to expose and create a new value for her life and her accomplishments. Doing so would challenge the accepted version of her life, yet depicting a different, possibly negative, side of a famous person such as Hurston would only have validity in the wake of people's expectation that the law only allows what is fair and true about a person to be presented.

Writer James Baldwin once commented that "society is governed by hidden laws, by unspoken but profound assumptions on the part of the people. That the law is not visibly present does not deny its power" (Baldwin 2009).

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