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LEGAL OUTSIDERS IN AMERICAN FILM*

The Politics of Law and Film Study: An Introduction to the Symposium on Legal Outsiders in American Film

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The articles collected in this Symposium Issue on “Legal Outsiders in American Film” are examples of a turn in legal scholarship toward the analysis of culture. The cultural turn in law takes as a premise that law and culture are inextricably intertwined.¹ Common to the project of law and culture is how legal and cultural discourse challenge or sustain communities, identities, and relations of power.² In this vein, each of the articles in this Symposium Issue looks closely at a film or a set of films as cultural objects which, when engaged critically, help us think about law as an evolving web of social and political

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1. See Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 *LAW & SOC. INQUIRY* 139, 145-47 (2002) (discussing the interdiscipline of law and popular culture more generally); see also Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, in *CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM* 1, 2-5 (Austin Sarat & Jonathan Simon eds., 2003).

2. Susan S. Silbey, *Making a Place for the Cultural Analysis of Law*, 17 *LAW & SOC. INQUIRY* 39, 41 (1992) (describing the law and cultural studies movement as one “that emphasizes the role of consciousness and cultural practices as communicating factors between individual agency and social structure”).

connections and, in light of those connections, about its capacity for justice. Each article differently imagines the legal outsider and the community against which the outsider is positioned. And yet each article similarly asks the fundamental question of law: is justice for all possible when exclusion and dominance appear as inevitable features of law's application?

Law and cultural studies can be too easily marginalized by the legal academy.³ This is because of an omission on the part of some law and cultural studies scholarship and a mistaken understanding by others of the import of cultural analysis. Cultural studies scholars tend to divide their analysis into the study of production, reception, and representation.⁴ We may investigate the means by which a cultural object is produced, the ways in which an object is perceived by its audience, and the manner in which it may be interpreted based on its particular formal structure.⁵ Too often, the cultural analysis of law omits the analysis of the *subject* of law: the citizen on whom the law acts and who acts on behalf of it. Locating the construction of that citizen in the text (as an effect of representational practice), through the text (as a result of reception theory), or as an origination of the text (a means of its production) emphasizes the political nature of all cultural production.⁶ Attending to the social subject and her community at the center of a text goes a long way to answer the cynics who ask "so what" when legal scholars write about film or literature.

The articles in this Symposium Issue are examples of law and film studies, itself a sub-discipline of law and cultural studies.⁷ "Doing law and film" usually takes one of two paths. There is the "law-in-film" approach, which is primarily concerned with the ways in which law and legal processes are represented in film.⁸ The "law-in-film" approach considers film as a

3. Law and cultural studies is also a kind of "outsider" in relation to the more dominant legal fields of study.

4. See Richard Johnson, *What Is Cultural Studies Anyway*, 16 SOC. TEXT 38, 47 (1986) (calling these three points "production," "texts/forms," and "readings").

5. *Id.*

6.

Cultural studies has also long been attentive to both the role of subjectivity in history and to the complex interpenetrations of power and subjectivity Indeed, much of the corpus of cultural studies consists of tools for tracking the production of subject positions as well as a growing set of 'case studies' in the subjective history of power in modern liberal democracies. Beyond methodological innovation, cultural studies can promote change in legal studies by widening the moments of subjectivity that are even considered in the analysis of law and legality.

Sarat & Simon, *supra* note 1, at 8-9.

7. See Silbey, *supra* note 1, at 145; see also Ruth Buchanan & Rebecca Johnson, *Strange Encounters: Exploring Law and Film in the Affective Register*, 46 LAW, POL. & SOC'Y 33, 33-34 (2008) (describing briefly law and film scholarship).

8. See generally ANTHONY CHASE, *MOVIES ON TRIAL: THE LEGAL SYSTEM ON THE SILVER SCREEN* (2002) (describing films about law as a vehicle to explore popular beliefs about law and politics); LEGAL REELISM: FILM AS LEGAL TEXTS (John Denvir ed., 1996) (collection of essays discussing film stories about law).

jurisprudential text by asking how law should or should not regulate and order our worlds by critiquing the way it does so in the film.⁹ There is also a “film-as-law” approach, which asks how films about law constitute a legal culture beyond the film.¹⁰ This approach pays special attention to film’s unique qualities as a medium and asks how its particular ways of world-making shape our expectations of law and justice in our world.¹¹ Writings in the “film-as-law” vein explore the rhetorical power of film to affect popular legal consciousness.¹² They also may look closely at film’s capacity to persuade us of a particular view of the world, to convince us that certain people are good or bad, or guilty or innocent, by positioning the film audience as the judge or jury.¹³ This “film-as-law” scholarship explains “how viewers are actively positioned by film to identify with certain points of view; to see some groups of people as trustworthy, dangerous, disgusting, laughable; to experience some kinds of violence as normal; to see some lives as lightly expendable.”¹⁴ In this latter approach, film and law are compared as epistemological systems, formidable social practices that, when combined, are exceptionally effective in defining what we think we know, what we believe we should expect, and what we dare hope for in a society that promises ordered liberty.¹⁵

The articles in this Symposium Issue engage in both the “law-in-film” and “film-as-law” approaches. They are heavier on the “law-in-film” method—extracting the stories of the films and analyzing them for what they say about our laws and the society they seek to regulate.¹⁶ All of them explain how film

9. See generally ORIT KAMIR, *FRAMED: WOMEN IN LAW AND FILM* (2006) (reading “law films” as feminist critiques of power struggles in law to imagine a more inclusive, compassionate legal order).

10. I deliberately reverse the nouns here. Where law-as-literature is a study of law as a rhetoric, a discourse akin to literary discourse, film-as-law is a study of filmic practices that are as pervasive and effective as legal ones in the ways in which they influence and inspire social order.

11. See generally CYNTHIA LUCIA, *FRAMING FEMALE LAWYERS: WOMEN ON TRIAL IN FILM* (2005) (showing how the genre of the female lawyer film both emboldens and undermines women’s authority in law and society); Rebecca Johnson, *Leaving Normal: Constructing the Family at the Movies in Law*, in *NEW PERSPECTIVES ON DEVIANCE: THE CONSTRUCTION OF DEVIANCE IN EVERYDAY LIFE* 163 (Lori G. Beaman ed., 2000); Jessica M. Silbey, *Patterns of Courtroom Justice*, 28 *J.L. & SOC’Y* 97 (2001).

12. See generally Silbey, *supra* note 11.

13. See generally Jennifer Mnookin, *Reproducing a Trial: Evidence and Its Assessment in Paradise Lost*, in *LAW ON THE SCREEN* 153 (Austin Sarat et al. eds., 2005); Jessica M. Silbey, *Criminal Performances: Film, Autobiography, and Confession*, 37 *N.M. L. REV.* 189 (2007) [hereinafter Silbey, *Criminal Performances*]; Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 *COLUM. J.L. & ARTS* 107 (2005) [hereinafter Silbey, *Filmmaking in the Precinct House*]; Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 *U. MICH. J.L. REFORM* 493 (2004) [hereinafter Silbey, *Judges as Film Critics*].

14. See Buchanan & Johnson, *supra* note 7, at 33-34.

15. See Jessica Silbey, *A History of Representations of Justice: Coincident Preoccupations of Law and Film*, in *A REPRESENTATION OF JUSTICE* 131 (Antoine Masson & Kevin O’Connor eds., 2007) (comparing film and law as knowledge systems).

16. It makes sense that legal scholars focus on film’s narrative above all else, legal scholars’ tools of analysis being the word as opposed to the image.

convinces us of certain things about the world, whether true or not. And in this way, each of these articles emphasizes the power and preoccupation of film that has been at its core since its beginning: it is a formidable teaching tool, for good or for ill.¹⁷ Each of these articles also explores the subject of law—the advocate or the citizen—as located within the film’s story and as embodied beyond it, living in our cultural imagination.

Professor Taunya Lovell Banks, in *Outsider Citizens: Film Narratives About the Internment of Japanese Americans*, examines the development of film narratives about this particular part of American history from 1942 until 2007. By tracing the development of the historical representation of the internment camps, Professor Banks demonstrates how there is a master narrative of internment. This dominant narrative explains the outsider status of Japanese Americans during and after World War II as an incident of the bombing of Pearl Harbor rather than, as Banks would contend, as a by-product of preexisting anti-Asian racism in the United States dating from the early nineteenth century.¹⁸ Moreover, Banks shows how the dominant narrative highlights the injustice of the internment camps, but not by focusing on Japanese Americans. Instead, the film stories are told through the eyes of sympathetic white Americans and serve as vehicles for redemption of white Americans who understand the injustice of the camps but also are convinced of their necessity.

Banks examines all sorts of films to show how this narrative remains constant until fairly recently. She examines a documentary film, *Japanese Relocation*, made in 1942 by the U.S. government to justify the internment camps. It depicts Japanese Americans as either loyal to their ancestral home (Japan) or as “model minorities” in the United States who uncomplainingly remit to the camps as an acceptable incident of war. Beginning with this government documentary, Banks reminds us that documentary filmmaking has a history as a genre as advocacy on behalf of state power rather than, as it has come to be understood today, as a tool for the downtrodden to expose injustice.¹⁹ Banks also explores commercial films that span the post-war period: *Daisy Kenyon* (1947), *Go for Broke* (1951), *Bad Day at Black Rock* (1955), *Hell to Eternity* (1960), *Come See the Paradise* (1990), *Snow Falling on Cedars* (1999), *Worlds Apart* (2004), and *American Pastime* (2007). In all

Both “Law” and “Film” are . . . sites for the circulation of stories society tells about itself. These legal and cinematic stories participate in constructing as well as in reflecting upon our nomos. It is hardly surprising, then, to see legal scholars bring their often formidable skills of narrative deconstruction and analysis to bear on the film’s story.

Buchanan & Johnson, *supra* note 7, at 34 (citation omitted).

17. Silbey, *Filmmaking in the Precinct House*, *supra* note 13, at 145.

18. See Taunya Lovell Banks, *Outside Citizens: Film Narratives About the Internment of Japanese Americans*, 42 SUFFOLK U. L. REV. 769 (2009).

19. Silbey, *Filmmaking in the Precinct House*, *supra* note 13, at 145.

of these films, familiar themes of a white male overcoming his racial bias, or of a Japanese American who must prove his loyalty to the United States, serve to explain the internment as momentary “racial prejudice, war hysteria and a failure of political leadership.”²⁰

Banks’s critique of these films is acute and insightful. She shows how the pathology of the master narrative has infected even those who tell the story of internment from the perspective of the Japanese Americans. Moreover, she explains that none of the films provide audiences with “sufficient context through which to understand the magnitude of the wrongs and prerequisite conditions” in the United States of “deeply embedded notions of all Asians as perpetual foreigners and thus outsider citizens” that made the internment appear inevitable.²¹ Banks cautions that these films as a whole form a cohesive narrative and thus are “a potentially powerful educational tool,” but because of their flaws are “only as effective as the stories [they] tell[.]”²² Even the recent documentaries that counter the earlier government propaganda films

ignore or minimize the extent of resistance, anger and fragmentation in the camps Instead, the counter-narrative is of a hyper-patriotic but mistreated loyal citizenry. [T]he persistence of this narrative reflects . . . Asian Americans’ continuing fear that their Asian ancestry will be used again by the government as the basis for differential and negative treatment irrespective of citizenship status; the fear that Asian Americans remain outsider citizens in the United States.²³

Only one film, *Rabbit in the Moon* from 2004, is a “slightly different documentary” that explores not only the resistance within the camps but long-term consequences of internment and the ill-treatment of Japanese Americans prior to the bombing of Pearl Harbor. For Banks, the exception proves the rule. Her reading of this collection of films depicting Japanese Americans as outsiders for only a short time in our nation’s history is a stinging critique of the legal system’s incapacity for self-reflexivity, especially as concerns its construction and treatment of race. Referring to post-9/11 law enforcement protocols, Banks is justified to wonder whether “the United States is doomed to repeat its unsavory past”²⁴ and whether films such as these make it all too easy to excuse our mistakes.

Like Professor Banks’s article, Professor Orit Kamir investigates a genre of

20. Banks, *supra* note 18, at 779 (citing U.S. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 18 (1982)).

21. Banks, *supra* note 18, at 783.

22. *Id.* at 771.

23. *Id.* at 772.

24. *Id.* at 793.

film that coheres around a dominant narrative. The law-films Professor Kamir explores are those that focus on the hero-lawyer who, in seeking justice, is rendered an outsider within the law. This theme has a long and consistent pedigree. It is succinctly summarized by the statement made to attorney Paul Biegler (played by Jimmy Stewart) in the classic Film Noir by Otto Preminger, *Anatomy of a Murder*: “Maybe you’re too pure, Paul, too pure for the natural impurities of the law.”²⁵ Kamir writes only about the film *Michael Clayton* (2007), but in so doing traces its themes of the lawyer-outsider through related film genres such as the Western, the thriller, and Film Noir. Like the hero of the Western, Michael Clayton “is that lone law-man, embodying natural law, who reluctantly join[s] the fight for a just cause [and] finds himself locked in a life-and-death, David and Goliath battle.”²⁶ A triumphant end does not render him powerful and included but still a “tragic lone wolf.”²⁷ Clayton’s relation to justice is like that of the Western hero. Although committed to law and order, albeit as a loner, when forced to choose between positive law and justice, the lawyer-outsider will choose justice.²⁸

Vigilante justice is a theme that endures in law-films, even in the law-thriller genre of the 1980s and 1990s. Kamir suggests that films such as *The Pelican Brief* (1993), *The Client* (1994), and *The Firm* (1993) are precursors for *Michael Clayton*, as their narratives are not motivated by a discovery (a mystery) but instead by *how* the protagonist-hero will survive.²⁹ As an “innocent-on-the-run,” the hero-lawyer is idolized as clever and crafty all the while wrestling with illegal and corrupt influences in order to survive. In many of these films, he has lost his way and is morally adrift. The life-or-death chase around which the film is structured “leads to a moral awakening [and helps] the lawyer . . . regain his commitment to both law and justice The lawyer is an innocent-on-the-run, pushed ‘outside’ [the law] so that he can reenter and better inhabit his inside”³⁰

Kamir argues that *Michael Clayton* is a new variation on these themes and especially those of Film Noir, which is characterized by dark lighting and twisted angles that are meant to reflect a cynicism and political helplessness in American post-war culture.³¹ Still the consummate outsider, today the lawyer-hero is faced with a more complex version of the inside/outside conflict. *Michael Clayton* does not present a coherent view of the “inside” or the “outside” despite the conclusive sense that Michael Clayton himself does not

25. As quoted in ROSS LEVI, *CELLULOID COURTROOM* 129 (2005).

26. Orit Kamir, *Michael Clayton, Hollywood’s Contemporary Hero-Lawyer: Beyond Outsider Within and Insider Without*, 42 SUFFOLK U. L. REV. 829, 833 (2009).

27. *Id.* at 833.

28. *Id.*

29. *Id.* at 839.

30. Kamir, *supra* note 26, at 842.

31. *Id.* at 843-46.

belong anywhere. In the film, the “legal world, like its social sphere, is a maze, a labyrinth.”³² What does this do to the pursuit of justice? If the Western hero could locate justice outside the law to redeem law’s promise, and the thriller’s suspense was motivated by whether the hero would survive his ordeal, find his way home, and recommit to the rule of law, is the absence of boundaries in *Michael Clayton* a development of Film Noir gone completely nihilistic? As Kamir rightly notes, *Michael Clayton* was a successful film. “[I]t captured something that speaks to the viewers, reflecting and refracting their notions of life and law.”³³ If the “something” is the notion that law is both everywhere and nowhere, that justice is fleeting and unpredictable in its gifts, then there is no inside or outside to designate, only the culture of which we are a part. Troubling perhaps, but these are precisely the reasons we look to film, to refocus, put things in perspective and reflect on life. As Henry Drummond (played by Spencer Tracey) in *Inherit the Wind* said, “I’ve been a lawyer long enough to know there are no total victories anywhere . . . [It’s] not as simple as all that, good or bad, black or white, day or night.”³⁴ Even in 1960, ambiguities won over clarity. Film critic and attorney Ross Levi responds to Drummond’s musings, “Imperfection leads to introspection, and introspection leads to art.”³⁵ Film, as Kamir reminds us, helps us understand the complexity of life, especially as regards truth and justice.

Professor David Ritchie also focuses on the outsider in the Western film genre, emphasizing that, in the Western, justice is found “outside accepted social institutions, if it is to be found at all” and that the hero “is not the sheriff, judge, or mayor, but is instead the quiet, solitary and somewhat shady character that lives on the edge” of town and the law.³⁶ Ritchie draws upon the generic expectations of the Western and specifically the films *The Man Who Shot Liberty Valance* (1962) and *Hang ‘Em High* (1968) to investigate whether, as the Western questions, justice is attainable through legal means at all.³⁷ In so doing, Ritchie relies on the notion that “cinematic theory can tell us something meaningful about the production of law.”³⁸

Ritchie’s analysis dwells as much on the films as it does jurisprudence and post-structuralist philosophy. Ritchie pairs *The Man Who Shot Liberty Valance* with Jacques Derrida’s *Force of Law: The Mystical Foundation of Authority*, and *Hang ‘Em High* with Foucault’s *On Popular Justice: A Discussion with Maoists*. The former is a fruitful pairing that reconceptualizes Derrida’s notion

32. *Id.* at 848.

33. *Id.* at 848.

34. LEVI, *supra* note 25, at 129.

35. *Id.*

36. David T. Ritchie, “Western” *Notions of Justice: Legal Outsiders in American Cinema*, 42 SUFFOLK U. L. REV. 849, 850-51 (2009).

37. *See generally id.*

38. *Id.* at 851 (citing Amnon Reichman, *The Production of Law (and Cinema): Preliminary Comments on an Emerging Discourse*, 17 S. CA. INTERDISCIPLINARY L.J. 457, 457 (2008)).

of justice as an ethical relationship in particularized circumstances. Importantly, justice is not a social or political ideal and thus does not reside outside law to be approached asymptotically.³⁹ “Viewed in this way, the Derridian notion of justice can be used to form and restrain laws, as opposed to the traditional view that laws are formed to achieve justice.”⁴⁰ This is an elegant argument and Ritchie illustrates it through the hero in *Liberty Valence*, Ransie Stoddard, who learns the “only possible route to justice is through individual engagement with the other.”⁴¹

Pairing *Hang ‘Em High* with Foucault, Ritchie addresses the lingering issue in Westerns of vigilantism and popular justice. As Ritchie explains, for “Foucault, the consolidation of power into any established structure . . . is just a remaking of the problematic structures of the bourgeois state. [As such,] Foucault . . . champion[ed] . . . the people acting as their own instruments of justice.”⁴² This is not mob-rule or individualized vengeance, but instead a mediation of legal boundaries whereby potentially violent conflicts are resolved through populist, non-institutionalized action. Ritchie illustrates this by describing the conflict in *Hang ‘Em High* where the hero takes on the mantle of the law (becomes a federal marshal) only to exact personal justice for those who nearly killed him. Played by Clint Eastwood, the hero Jed Cooper becomes a literal insider to the law but remains on the margin of its institutions to stay focused on its flaws.

In his conclusion, Ritchie alludes to the possibility that films such as *Liberty Valence* and *Hang ‘Em High* that question law’s capacity for justice and that glorify the outsider to legal institutions help audiences engage in the ethical relationships and the non-violent alternative jurisprudences posited by Derrida and Foucault. I might take it one step further, bring it back to film theory, and emphasize a signature effect of law-films: their transformation of audiences into jurors to judge not only the acts of the heroes but also the capacity of the legal institutions that constrain them.⁴³ Ritchie draws on these classic Westerns because, like so many good films, they help us experience as pressing the ageless problem of law’s relationship to justice (Is law necessary for justice? Is justice reached despite legal formalities?) and because they urge us to think beyond the film to solutions for today.

Professor Cheyney Ryan compares three major genres of American film—romantic comedy, the Western, and Film Noir—for how they constitute outsiders and their relationship to law. For the romantic comedy, the conflict between desire and the law makes the lovers the legal outsiders. The

39. See Ritchie, *supra* note 36, at 861 n.86.

40. *Id.* at 860.

41. *Id.*

42. *Id.* at 864.

43. See generally Carol J. Clover, *Movie Juries*, 48 DEPAUL L. REV. 389 (1998); Silbey, *supra* note 11 (describing how trial films position their audience as jurors).

reconciliation at the end of most American romantic comedies, Ryan explains, is almost always through forgiveness. The law, as rules of decorum or some other social norm, is made more human through its eventual transformation (softening) by the film's climax bringing lovers together. Ryan describes the romantic comedy's *modus operandi* as a "flight to the forest" (from inside to outside) where the forest is wild and free, where desire resides and is eventually tamed (brought home) for the ever after. In contrast, the Western revolves around the frontier. Where the forest, in romantic comedies, might embrace the lovers as outsiders, in Westerns, the frontier is an exclusionary place, where outcasts—vigilantes and heroes—live but have no homes. In both genres, the forest (as desire) and the frontier (as the wild) are outside the law. But in the romantic comedy the forest is playful and freeing. In the Western, the frontier is dangerous. It is something to be mastered.

Where does Film Noir fit and what does it say about law and its reconciliation with the outsider? Where the romantic comedy features a pair of lovers who learn from the forest to come together in harmony and the Western revolves around the hero who masters the frontier to effect justice, Film Noir concerns a hapless victim, a criminal or a detective whose relation to the law is much more complicated. None of these Film Noir characters have clear jurisprudential roles, says Ryan. Where romantic comedy and the Western revolve around "fairly clear distinctions between the legal and illegal, human law and natural law," in Film Noir "the image of law is a maze."⁴⁴ Here, Ryan echoes the themes in the articles by Kamir and Ritchie where Film Noir is considered as an outsider genre itself, characterizing law as both everywhere and nowhere.

As a political philosopher, Ryan relies on theories of American politics to delineate his discussion of film and law. He describes American political culture as being marked by competing conceptions of law: the civic and the vigilante tradition, both originating in the American Revolution. He sees both of these traditions manifesting in the most beloved of law films, *To Kill A Mockingbird*, a film that marks an end to the Film Noir period. Atticus Finch embodies the civic tradition, the lawyer standing for truth and justice who fights against the misguided populism of the Jim Crow South represented by the mob and embodying the vigilante tradition.⁴⁵ Both traditions, as represented in *To Kill a Mockingbird*, render the audience skeptical of law's capacity for justice and the everyman's capacity for wise judgment. Film Noir, the genre that embraces the ambivalence of law's rightful place in our social order and that seems most "realistic" in its muddiness, nonetheless fails to articulate a predictable or dependable jurisprudence. Ryan is intrigued by Film

44. Cheyney Ryan, *The Legal Nocturne*, 42 SUFFOLK U. L. REV. 869, 893 (2009).

45. See generally Silbey, *supra* note 11. The presence of a mob as representative of populism and injustice is a generic feature of many American law films. *Id.*

Noir for this reason, believing, like Professors Ritchie and Kamir, that the amorphousness of Film Noir may yet hold some promise for the reimagining of law in our contemporary society.

The two remaining articles are concerned less with the story the law film tells (the film's plot) and more with the *way* in which it tells them (the film's form). These articles focus their analysis more acutely on the particular way that film stories are differently embodied as visual representation and, therefore, how they differently embody their audience. Professor I. Bennett Capers focuses on the meta-narrative in the film *Minority Report*, a film that tells a story about the search for truth and justice but undermines that story by critiquing its mode of delivery: sight and vision. Professor Rebecca Johnson interrogates the television series *Deadwood* for the way it constructs certain "structures of feeling" that invite particular emotional investments in characters and a national ethos both of which reproduce the subordination of certain political and legal outsiders (aboriginal inhabitants) in the United States.

Professor Capers reflects on the film *Minority Report* to examine the paradox of film's relationship to reality. On the one hand, film may expose how the criminal justice system works, what Capers calls a "de-shadowing effect."⁴⁶ On the other hand, most films, including *Minority Report*, demonstrate how seeing is not believing and how film can easily trick its audience into believing it is seeing with their own eyes incontrovertible facts about lived reality. Film's double-edged status as both fact and fiction has endured since its inception.⁴⁷ For this reason, film's growing role in law enforcement as the best evidence of the truth is particularly troubling.⁴⁸ *Minority Report* is exemplary of this trouble.

Minority Report uses . . . photographic evidence to challenge it. The images projected . . . turn out to be accurate, but not true . . . Perspective matters, angles matter, framing matters. What appears from one angle to be Police Chief John Anderton committing premeditated murder, appears from another angle as suicide. Photographic evidence that amounted to certain guilt thus becomes photographic evidence that concealed actual innocence.⁴⁹

Caper's discussion of outsiders in *Minority Report* is richly complex. The protagonist police chief (played by Tom Cruise) is the archetype legal outsider: he strives for justice within the bounds of the law but is forced to break with the

46. I. Bennett Capers, *Notes on Minority Report*, 42 SUFFOLK U. L. REV. 795, 798 (2009).

47. See Silbey, *Judges as Film Critics*, *supra* note 13, at 532-34.

48. See generally Silbey, *Criminal Performances*, *supra* note 13 (comparing filmed confessions with filmed autobiographies to show that the former do not necessarily expose the truth of the matter); Silbey, *Filmmaking in the Precinct House*, *supra* note 13 (arguing that filmed interrogations are state-sponsored documentaries and are examples of advocacy rather than objective depictions of detention).

49. See Capers, *supra* note 46, at 802.

formalities of law to attain justice. We cheer him on all the way. The PreCogs—the futuristic innovation of three especially “sighted” people who can see homicides before they happen—are also outsiders within the film’s community. They are enslaved by the PreCrime system, kept in a state of semi-consciousness, for the good of the rest of the community. The audience is numbed to this injustice, made to believe until the film’s climax that treating people (the PreCogs) like objects is unproblematic given the benefits their gift provides. The combination of these two outsiders (the police chief and the PreCogs) makes for a third: the audience to the film. The audience identifies with the Police Chief Anderton, who learns to “see differently”⁵⁰—literally because he replaces his eyes with someone else’s to avert capture and figuratively because he learns to interpret the PreCog visions against the grain. The audience also identifies with the PreCogs because upon their emancipation the film transforms from a tight, tense, dark visual roller coaster to a loose, calm, light tableau. We are physically released from the futuristic city upon the PreCogs’ liberation and their sheltering in the country. By tracing these various outsiders within the film, Capers demonstrates how film constitutes its subject (the audience) beyond the film as an outsider too. We learn from the film “that images are not always trustworthy, that evidence is not always true,” and are therefore tasked “[t]o see deeper. To see through. To see around. To see what is *outside*.”⁵¹ We learn to see like outsiders, against the grain, to subvert the dominant narrative and articulate the subordinated story.

This is profound stuff for a Spielberg film, but then again, self-reflexivity has been the stuff of film from its earliest stages, typically invoked to question the knowledge produced by the film (a particularly intriguing move when the subject of film is law, truth, and justice). Early film masters taught that film in large part constructs a world and experience by exposing its story-telling mechanisms that play on the epistemology of sight.⁵² In this way, the power and influence of film derives from its self-reflexive, self-critical, qualities.⁵³ By exposing the ways in which cinema is just another form of storytelling, the film’s self-critique is experienced as empowering the audience to see its parts,

50. *Id.* at 804.

51. *Id.*

52. See Silbey, *Filmmaking in the Precinct House*, *supra* note 13, at 143-44. The quintessential early example is Georges Méliès’s 1903 film *The Magic Lantern*, a story on film about how film tells stories. *The Magic Lantern* tells the history of Western dramatic art, showing first a landscape painting, then a play, and then an image of the newly developed moving pictures. By placing film in the trajectory of Western representational art, Méliès’s film shows that film art is no more or less faithful to its subject than painting. To recognize that the film’s story is just one representational scheme among others is to acknowledge one’s complicity in the perpetuation of the illusion of film’s omniscience. It became a common practice in early films to tell stories about telling stories through pictures. Although now an ubiquitous and varied featured of cinema—think of films like *Adaptation* (2002) directed by Spike Jonze or Hitchcock’s classic *Rear Window* (1954)—film’s early self-reflexive tendencies were considered another way of commenting on its illusionism.

53. See Silbey, *Judges as Film Critics*, *supra* note 13, at 536-37.

its mechanisms, its tricks, and thus to be better judges of the film stories and to question the images it projects. Presented with the persuasive story on film, but also with the critical perspective to evaluate its delivery, the audience feels empowered to judge the film, and ironically enough, to experience the film version of the story as credible and inescapable.

The mechanisms of film authority and legal authority share these self-reflexive features.⁵⁴ Cinema's play on whether seeing is believing raises questions about the epistemic foundations of filmic representation. We can investigate this same dynamic in law and its processes as regards the relationship between evidence and judgment. As with film, the trial process is based on the believability of observable phenomena, on seeing, bearing witness, and judging. And much like stories told on film, the story that evolves in a courtroom and through the evidentiary process is emboldened with the privileged status of truth because of its basis on observation.⁵⁵ Like film language, legal processes are self-reflexive and recursive in nature; by reflecting on the possibility of multiple and conflicting stories (the essence of the trial) and asking jurors to judge those stories, or by exposing legal judgments to appeal and citing those judgments as precedents, law exposes its own recursive story-telling mechanism and reflects on the difficulty of claiming certain knowledge.⁵⁶ The legal process nevertheless concludes with judgment that is both authoritative and (most often) backed by popular belief. In this way, as with film, the legal trial sustains the knowledge it produces (the "knowledge" of guilt or innocence, for example) with the authority of self-critique. In this way, the trial's outcome (as with the filmic version) is often perceived as the most persuasive account of "what happened." The irony is palpable. Although both film and law rely on the incontrovertibility of observations to tell their stories, these stories manage to convince their addressees that no story is undeniable. At the same time, the overwhelming influence of both cinema and law in our culture is to tell the definitive story.

Minority Report is no exception, as Professor Capers explains. *Minority Report* tries to convince us that justice is best achieved without the clarity of the PreCogs' vision. Sight is not insight. The dystopia of *Minority Report*'s futuristic hyper-surveillance state is cleansed by going outside the frame of the PreCogs' vision and eventually by turning off the cameras. We are convinced that justice is best achieved without PreCrime. Why? Because we are made

54. I have elsewhere contended that the American trial and the art of cinema share certain central epistemological tendencies. See generally Silbey, *supra* note 15.

55. See Mnookin, *supra* note 13, at 154-55.

56. See Silbey, *supra* note 1, at 156-57 (describing how the "truth" has less to do with criminal legal process than one might think). For the proposition that legal trials are not about finding the truth but about some other good, see Charles Nesson, *The Evidence of the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359 (1985) (noting that the purpose of adjudication is to produce "acceptable verdicts").

critical of that which we see. Why really? Because the film shows us it is so.

Whereas Professor Capers demonstrates how *Minority Report* demands that we see alternative narratives—the outsider story—in order that justice be reached, Professor Johnson investigates the mechanism by which the television series *Deadwood* stifles the imagination’s ability to think beyond the logic of empire. Drawing on the work of political philosopher Jim Tully, economic geographers J.K. Gibson-Graham, and cultural theorist Edward Said, Professor Johnson suggests that *Deadwood* engages its audience such that the experience of empire and colonialism is desired and irresistible. Professor Johnson explains how visual stories such as *Deadwood* that cohere around compelling characters and fundamental myths of social contract and natural law make “imagining otherwise” very difficult.

Johnson asks a question not often asked of law: how is it that we come to *feel* about our world and our circumstance?

For all of law’s assertions about the importance of reason in the face of unchecked passion, it is clear that emotion and feeling matter to law. Justice is not simply ‘an idea.’ It is something felt deeply . . . ‘[S]tructures of feeling’ are important to the ways that cultures—in both their aspirational and discriminatory faces—are held intact.⁵⁷

And so, Johnson explores how *Deadwood* makes us feel about the place of law on the frontier of the United States in the 1870s.

Deadwood is different from many Hollywood Westerns because it is “up-front with the themes of its time, including colonization, racism, and gender issues.”⁵⁸ Contrary to being uncomfortable, one of *Deadwood*’s maddening effects is the pleasure its viewers experience despite its portrayal of violence and domination. It accomplishes this by portraying Indian murders and gender subordination as part of the “inevitable logic of the myth of progress and economic development”⁵⁹ that defines the United States’s national identity. *Deadwood* effects an affinity between its audience and the frontier settlers. We (audience members) experience the killing of Indians and the abuse of women as “just an accident of fate and chance . . . an unavoidable tragedy in the ‘savage wars of peace.’”⁶⁰ The series works hypnotically on us: first showing the violence done to outsiders and then encouraging us to accept it by sympathizing with the central characters (“white men . . . with money, men who need to drink, to gamble, and to fuck”⁶¹). We are privy to the intimate

57. Rebecca Johnson, *Living Deadwood: Imagination, Affect, and the Persistence of the Past*, 42 SUFFOLK U.L. REV. 809, 816-17 (2009).

58. *Id.* at 818.

59. *Id.*

60. *Id.* at 822.

61. Johnson, *supra* note 57, at 823.

thoughts of these men, who we come to experience as flawed heroes of the frontier, who are trying to keep order where there would be only savagery. We cannot help but imagine ourselves as these national heroes, doing what we can to survive.

Deadwood's engrossing struggle forecloses resistance to its narrative of political, economic, and social domination by the white man. Despite its nineteenth-century storyline, *Deadwood*'s pleasure "celebrate[s] . . . [and] affirm[s] the roots of persisting Empire, imperialism, and colonial rule."⁶² There is no "[d]issenting imagination"⁶³ in *Deadwood*. And this is another way *Deadwood* feels good. Consensus about the way the frontier was and had to be is pleasurable. It is a relief. Johnson's investigation of this feeling in *Deadwood* is both disarming and revelatory. Johnson reminds us that the "humanities are one tool for those who wish to take seriously the claim that 'it can be otherwise.'"⁶⁴ But if our study of law and the humanities, such as a study of *Deadwood*, demonstrates that our cultural products do not themselves "contest the shape of colonialism, gender [or the] economy," it is then up to us to "interrogate the 'structures of feeling'" that encourage us *not* to "imagin[e] otherwise."⁶⁵

All of these papers—but especially those of Professors Banks, Capers, and Johnson—incorporate the audience as a social category on which film acts and through which law's authority persists. Each of these articles, in describing the outsider to law in film and the popular legal consciousness constituted by the film, critique the relations of power the film enables. In so doing, each of the pieces in this Symposium Issue engages the politics of law and film studies.

62. *Id.* at 824.

63. *Id.* at 826.

64. *Id.* at 828.

65. Johnson, *supra* note 57, at 828.