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## TRUTH TALES AND TRIAL FILMS

*Jessica Silbey\**

Investigations into law and popular culture preoccupy themselves with understanding how law and popular cultural forms work together to challenge or sustain community structures, identity and power.<sup>1</sup> It is inevitable at this point in our cultural history that law and popular culture are intertwined.<sup>2</sup> There are too many television shows, films, popular novels and web-based entertainment to withdraw “the law” (whatever that is) from the domain of popular culture. This article takes as a given the intermixing of law and popular culture, embracing it as a new feature of our popular legal consciousness. I suggest that one result of this mixing—what I call truth tales, which are fictionalized films that are nonetheless based on true stories about law—is to enhance our critical capacity to engage the law as a hopeful and evolving web of social, civic and political codes that shape our expectations for justice in contemporary society.

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1. See 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 2–5 (Austin Sarat & Jonathan Simon eds., 2003); see also MICHAEL ASIMOW & SHANNON MADER, LAW AND POPULAR CULTURE: A COURSE BOOK 6–8 (2004) (describing the complex relationship between popular culture and the law); Susan S. Silbey, *Making a Place for Cultural Analyses 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 practice as communicating factors between individual agency and social structure”).

2. See, e.g., RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE (2000); Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 LAW & SOC. INQUIRY 139 (2002) [hereinafter Silbey, *Doing Law and Popular Culture*] (reviewing *When Law Goes Pop* and discussing the interdiscipline of law and popular culture more generally).

This article proceeds in five parts. Part I outlines a brief history of interdisciplinary legal studies, particular law and cultural studies. Part II discusses the subfield within law and cultural studies of law and film, as a way to set the stage for a longer discussion in Parts IV and V of two truth tales, *Compulsion*<sup>3</sup> and *Swoon*.<sup>4</sup> Part III more specifically describes the parameters of the “truth tale” as a subgenre of courtroom drama that affects a particular kind of popular legal consciousness, one that accepts as futile law’s presumed search for unconditional truth and embraces instead the legal system’s promise of due process as based on normative values of fairness. Parts IV and V are close readings of the two films by way of application of the interpretive methodology and conceptual framework outlined in Parts II and III.

#### I. THE INTERDISCIPLINE OF LAW AND CULTURE

When we engage in the interdiscipline of law and popular culture, we are doing many things at once. We are investigating how law and legal practice incorporate elements of popular culture in law’s adjudicative and regulatory functions.<sup>5</sup> We are exploring ways in which law is a discursive practice, a form of rhetoric such as literature and film that constitutes a community of speakers and listeners.<sup>6</sup> We are also disclaiming the autonomy of law and

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3. *COMPULSION* (20th Century Fox 1959).

4. *SWOON* (American Playhouse 1992).

5. See, e.g., SHERWIN, *supra* note 2; Neal Feigenson & Meghan A. Dunn, *New Visual Technologies in Court: Directions for Research*, 27 *LAW & HUM. BEHAV.* 109 (2003); 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*] (analyzing the use of film in courts of law and proposing film be treated more like substantive and assertive proffers than demonstrative or illustrative aids).

6. See, e.g., Rebecca Johnson & Ruth Buchanan, *The ‘Unforgiven’ Sources of International Law: Nation-Building, Violence and Gender in the West(ern)*, in *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* 131 (Doris Buss & Ambreena Manji eds. 2005); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984) [hereinafter WHITE, *WHEN WORDS LOSE THEIR MEANING*]; JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990); Rebecca Johnson & Ruth Buchanan, *Getting the Insider’s Story Out: What Popular Film Can Tell Us About Legal Method’s Dirty Secrets*, 20 *WINDSOR Y.B. ACCESS JUST.* 87 (2001); 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*].

recognizing that it can only be understood as situated within (or as part of) our contemporary culture.<sup>7</sup>

The study of law and popular culture has its roots in other interdisciplinary legal studies, such as law and history, law and economics, law and philosophy—each of which helped legitimize the idea of the interdisciplinarity of law itself.<sup>8</sup> The study of law and popular culture has strong roots in the law and literature movement.<sup>9</sup> As an infant, the study of law and literature was the study of representations of law in “great books,” the subfield that has become known as law-in-literature.<sup>10</sup> Law-in-literature analyzes literary texts, such as *Crime and Punishment*<sup>11</sup> or *Billy Budd*,<sup>12</sup> for how these texts describe law.<sup>13</sup> As a content analysis, law-in-literature is distinct from law-as-literature, which is a study of discursive persuasion and the constitution of a community through language.<sup>14</sup> Pioneers of the law-as-literature movement include James Boyd White, whose seminal book in the field describes law as an art essentially literary and rhetorical in nature, a way of establishing meaning and constituting community in language.<sup>15</sup> By “rhetoric,” White means something supremely political:

the study of the ways in which character and community—and motive, value, reason, social structure, everything, in short, that makes a culture—are defined and made real in performances of language. . . . As the object of art is beauty

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7. Generally speaking, this is what the “law and society” movement has been about. See Susan S. Silbey, *Law and Society Movement*, in LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL AND CULTURAL ENCYCLOPEDIA 860 (Herbert M. Kritzer ed., 2002). “[L]aw, legal practices, and legal institutions, can be understood only by seeing and explaining them within social contexts.” *Id.*; see also Sarat & Simon, *supra* note 1, at 5 (explaining that cultural studies often describe a model of law that is more coherent and functional than that revealed by legal studies).

8. See Silbey, *Doing Law and Popular Culture*, *supra* note 2, at 141.

9. *Id.*

10. *Id.*; see also William Domnarski, *Law and Literature*, 27 LEGAL STUD. F. 109, 109–10 (2003) (surveying and categorizing law and literature courses offered at law schools around the country).

11. FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (Courage Books 1996) (1886).

12. HERMAN MELVILLE, *BILLY BUD AND OTHER TALES* (New Am. Library 1961) (1924).

13. RICHARD H. WEISBERG, *THE FAILURE OF THE WORD* (Yale Univ. Press 1984) (1944).

14. See Silbey, *Doing Law and Popular Culture*, *supra* note 2, at 146.

15. WHITE, *WHEN WORDS LOSE THEIR MEANING*, *supra* note 6, at x–xi.

and of philosophy truth, the object of rhetoric is justice: the constitution of a social world.<sup>16</sup>

To some extent, the law-in-literature versus law-as-literature distinction tracks a more general methodological concern in cultural studies, which is the significance of the direction from which a scholar approaches her object of study. Cultural studies scholars tend to divide their analysis into the study of production, reception and representation.<sup>17</sup> We may investigate the means by which a cultural object is produced, the ways in which an object is perceived and operationalized by its audience, and the manner in which it may be interpreted based on its particular formal structure.<sup>18</sup> Thinking about the interdisciplinary endeavor of law and culture in these terms—these three points in the transmission, circulation and exchange of cultural form—helps to address several weaknesses in the interdisciplinary field of law and popular culture, especially as it has grown and aspired to achieve the epistemological goals listed above.

As White's work emphasizes, studying law as a discursive practice that constitutes a community is a study of social relations. Too often, the cultural analysis of law—law-in or -as literature, for example—omits the analysis of the subject of law, the citizen on which law acts and who acts on behalf of it. Locating the construction of that citizen in the text (as an effect of representational practice) or through the text (as a result of reception theory) emphasizes the political nature of all cultural production.<sup>19</sup> Remembering that the social subject and her community is at the center of a cultural study of law goes a long way to answer the cynics who ask "so what" when legal scholars write about film or literature.

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16. *Id.* at xi.

17. Richard Johnson, *What is Cultural Studies Anyway?*, SOC. TEXT, Winter 1986–87, at 46–47 (calling these three points "production," "texts/forms" and "readings").

18. *Id.*

19. Indeed, as Austin Sarat and Jonathan Simon note:

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.

Studies of law and popular culture also often fail to demarcate the terms of their analysis. Both “law” and “culture” are ubiquitous terms for analysis. As legal scholar Naomi Mezey has written, “[t]he notion of culture is everywhere invoked and virtually nowhere explained.”<sup>20</sup> As both law and cultural theorists, we could say the same thing about “law.” Law and literature scholars, such as James Boyd White, typically explore law as a language embodying and animating text, a distinct set of cultural practices that can be studied for their formal qualities and communicative and material effects. Law is, of course, much more than that. It is an understatement to say that the breadth of law’s possible manifestations is vast.<sup>21</sup> So what are we talking about when we talk about popular culture and law?<sup>22</sup> The nature of interdisciplinarity itself, as well as the pace at which this interdiscipline of law and culture is growing, dictates careful attention to the designation of subject matter about which we speak. This is not only so that we can proceed with a measure of clarity, but also so that as scholars, we can compare and test our analyses against one another. Demarcating our terms and attending to the analytic methodologies of the disciplines from which we draw (including, for example, a focus on one of the modalities of cultural analysis described above: production, reception or representation) will foster even more productive and innovative scholarship in an already very exciting field.<sup>23</sup>

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20. Naomi Mezey, *Law As Culture*, 13 *YALE J.L. & HUMAN.* 35, 35 (2001).

21. In fact, this author has previously discussed some of the varying methods of studying law and culture:

The following incomplete list only illustrates this point, as well as the further point that any study of law and culture will benefit from clarity by designating the field(s) of law in which it is participating. Law may be conceived as positive enactment (i.e., documentary, as it exists in statutes, constitutions, judicial decisions, regulations). Law may be studied as the embodiment of eternal and universal truths. For some, the practices of legal actors and institutions are the crucial part of the law. For constitutive theorists, law is implicated in the vast array of social phenomena as but one aspect of the social fabric that shapes and gives meaning to our interactions. Law can be defined as the legitimate use of force. It is also studied as that which contains arbitrariness in social life.

Silbey, *Doing Law and Popular Culture*, *supra* note 2, at 147 n.7.

22. *Id.* at 147.

23. This is not to suggest that as law and culture scholars we must cover the vast terrain of “what law is.” To the contrary, we should only (or at least) define the kind of law or the manifestation of law we are studying—be it criminal trials, positive enactments or whatever. James Boyd White’s writing is exemplary of the field in that he focuses on one aspect of the life

## II. LAW AND FILM STUDIES

The discipline of law and film is itself a subfield of law and popular culture. As such, it reflects the methodological inquiries mentioned above. There are law and film scholars who are primarily concerned with the ways in which law and legal processes are represented in film, what might be analogized to “law-in-film” scholars.<sup>24</sup> Exploring the contours of law and legal questions in film resembles more familiar jurisprudential debates about how law should or should not regulate and order our worlds by critiquing the way it does so in the film.<sup>25</sup> There are also law and film scholars who investigate how law films constitute a legal culture beyond the film—that is, how film’s peculiar ways of world making shape our expectations of law and justice in our world at large.<sup>26</sup> Some of these law and film scholars pay particular attention to film’s visual embodiment of legal discourse in culture, focusing on the technology of the moving image (as opposed to the written text) as a uniquely powerful way of telling stories and creating (or sustaining) particular aspects of social relations.<sup>27</sup> Other scholars focus on the way in which film, like law, is a means through which communities form and pass judgment, law being a process of judgment and film being a medium through which we are subconsciously made to judge the

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of law—its textual manifestation—and investigates its broad ramifications on social life and the pursuit of justice. See generally WHITE, WHEN WORDS LOSE THEIR MEANING, *supra* note 6.

24. ANTHONY CHASE, MOVIES ON TRIAL: THE LEGAL SYSTEM ON THE SILVER SCREEN (The New Press 2002) (1948) (describing films about law as a vehicle to explore popular beliefs about law and politics); LEGAL REELISM: MOVIES AS LEGAL TEXTS (John Denvir ed., 1996) (collection of essays discussing film stories about law). Both of these books are most akin to the law-in-literature approach. See Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579 (1989).

25. 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).

26. See, e.g., 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); Norman Rosenberg, *Hollywood on Trials: Courts and Films, 1930–1960*, 12 LAW & HIST. REV. 341 (1994); Jessica Silbey, *Patterns of Courtroom Justice*, 28 J.L. & SOC’Y 97 (2001) [hereinafter Silbey, *Patterns of Courtroom Justice*].

27. See LUCIA, *supra* note 26; Silbey, *Filmmaking in the Precinct House*, *supra* note 6; Silbey, *Judges As Film Critics*, *supra* note 5; Silbey, *Patterns of Courtroom Justice*, *supra* note 26; see also DAVID A. BLACK, LAW IN FILM: RESONANCE AND REPRESENTATION (Univ. of Ill. Press 1999) (1959) (discussing the implications of representing court procedures in film and the cultural connections between cinematic and legal practices).

film characters and their actions.<sup>28</sup> In both of these latter approaches, fairly analogized to a film-as-law approach,<sup>29</sup> 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.<sup>30</sup>

The film-as-law approach to a cultural analysis of law through film engages most directly with the tripartite methodology of cultural studies. Generally, the discipline of film studies approaches the institution of cinema in light of its history and its formal attributes. The history of cinema includes its history of production, circulation and reception; film scholars consider that crucial to interpreting film texts and understanding film's role in society is an understanding of how film's mode of production, means of circulation and popular reception existed at specific times and how these attributes of the institution have evolved over time.<sup>31</sup> The study of film's formal qualities (a feature of production) would include attention to a film's narrative arc, casting choices, visual patterns, and camera techniques as a way of interpreting the individual text and its place in a canon of like films (film genre). These approaches to film as a cultural object, especially as the film's subject may be concerned with law and justice, help elucidate the popular representation of law-in-film and constitute the subject of film (its audience and community). Importantly, this method of analysis also contextualizes both the institutions of film and law in light of their formal limitations at specific historical time periods. These limitations may relate to internal attributes of film and law (e.g., visual qualities of film and law's adjudicative process), the reception and dissemination of film and law (e.g., theatrical releases and serialized court reporting), or particular modes of production of film and law (e.g., large film crews

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28. KAMIR, *supra* note 25; Jennifer L. Mnookin, *Reproducing a Trial: Evidence and Its Assessment in Paradise Lost*, in *LAW ON THE SCREEN* 153 (Austin Sarat et al. eds., 2005).

29. I deliberately reverse the nouns here. Whereas 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.

30. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (discussing rights enumerated in the first ten amendments to the Constitution as crucial to the "essence of ordered liberty"), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

31. A canonical example in film studies of this approach is DAVID BORDWELL ET AL., *THE CLASSICAL HOLLYWOOD CINEMA: FILM STYLE & MODE OF PRODUCTION TO 1960* (1985).



and politically appointed judges). Attending to any one aspect of this kind of cultural analysis of film-as-law will both demarcate the boundaries of analysis (in order to situate and evaluate the truth claims that are produced from it) and identify the social subject of law and of film (the citizen, the moviegoer, and his or her community).

I come to the field of film-as-law with a particular preoccupation. My interest is in trial films specifically, and thus the facet of law I investigate is the jury trial and its embodiment on screen.<sup>32</sup> I have elsewhere contended that the American trial and the art of cinema share certain epistemological tendencies based on common formal attributes and their powerful effect on social relations.<sup>33</sup> Both stake claims to an authoritative form of knowledge based on the indubitable quality of observable phenomena, and both are preoccupied (sometimes to the point of self-defeat) with sustaining the authority that underlies the knowledge produced by visual perception.<sup>34</sup> The American trial and art of cinema also increasingly share cultural space. Although the trial film (otherwise known as the courtroom drama<sup>35</sup>) is as old as the medium of film,<sup>36</sup> the recent spate of popular trial films, be they fictional such as

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32. See, e.g., Silbey, *Patterns of Courtroom Justice*, *supra* note 26, at 97.

33. See, e.g., Jessica Silbey, *A History of Representations of Justice: Coincident Preoccupations of Law and Film*, in REPRESENTATIONS OF JUSTICE (Antoine Masson & Kevin O'Connor eds.) (forthcoming 2007) [hereinafter Silbey, *A History*].

34. *Id.* The cinema brought its audience the novelty of moving image qualities, the significance of which is rooted in the ideological and yet overdetermined relationship between the image seen on film and the event that was filmed. From its beginnings in 1895, cinema generally (and the trial films specifically) were preoccupied with what it means to know through sight, with the relation between witnessing an event and judging its truthfulness and authenticity. The mythic story of film's birth begins on December 28, 1895, during a showing of Auguste and Louis Lumiere's *L'Arrivée d'un Train En Gare*—a short film of a train arriving into a station. ARRIVAL OF A TRAIN AT THE STATION (Lumiere 1895). The film camera was positioned on the quay such that on screen the train grows larger and larger as it enters the station. Apparently, when the film audience saw the train coming toward them, unaccustomed to the illusion of reality that film creates, the audience members feared for their lives and ran from the theater. This inaugurated the notion that film creates a peculiarly persuasive reality, producing in the audience the experience of bearing witness to some real event on screen. Silbey, *Filmmaking in the Precinct House*, *supra* note 6, at 143 (citing GERALD MAST & BRUCE F. KAWIN, *THE MOVIES: A SHORT HISTORY* 22 (1996)).

35. Silbey, *Patterns of Courtroom Justice*, *supra* note 26, at 97 (defining "trial film").

36. Silbey, *A History*, *supra* note 33 (describing the first trial film as *Falsely Accused* from 1907, only twelve years after the birth of film (citing Carol Clover, *God Bless Juries*, in REFIGURING AMERICAN FILM GENRES 259 (N. Browne ed., 1998))).

*Runaway Jury*<sup>37</sup> or documentary such as *Capturing the Friedmans*,<sup>38</sup> suggests more than a trend;<sup>39</sup> it suggests an inherent affinity between law and film that I elsewhere contend has existed since the birth of film in 1895.<sup>40</sup>

The affinity of law and film lies in their mutual manufacture of truth through strategies of representation and storytelling (film and trials), and also in the power of these truth claims to structure and regulate social relations. Film, no less than law, changes our perceptions of reality; it shapes our understanding of the world. The power of both film and law derives at first from the intensity of the personal faith in believing what we see (bearing witness and judging based on the act of witnessing). But both film and law bolster their authority with a common storytelling feature that reflects on the limits of their authoritative endeavor.<sup>41</sup> Early film masters taught that film in large part constructs a world and experience by *exposing* its storytelling mechanisms that play on the hermeneutics of sight.<sup>42</sup> In this way, the power and influence of film derives from its self-reflexive, often self-critical, qualities.<sup>43</sup> By exposing the ways in which cinema is just another form of storytelling, the film's self-

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37. RUNAWAY JURY (New Regency Pictures & Epsilon Motion Pictures 2003).

38. CAPTURING THE FRIEDMANS (HBO Documentary Films & Notorious Pictures 2003).

39. Just by way of example of the trend, consider the following trial films of the past decade: A TIME TO KILL (Regency Enterprises & Warner Bros. Pictures 1996), SLEEPERS (Warner Bros. Pictures et al. 1996), MIDNIGHT IN THE GARDEN OF GOOD AND EVIL (Warner Bros. Pictures et al. 1997), A CIVIL ACTION (Touchstone Pictures et al. 1998), ERIN BROCKOVICH (Jersey Films 2000), RETURN TO INNOCENCE (Lifeline Entertainment 2001), MURDER ON A SUNDAY MORNING (Maha Productions et al. 2001), LEGALLY BLONDE (Marc Platt Productions & Metro-Goldwyn-Mayer 2001), SNAP DECISION (Lifetime Television broadcast 2001), CHICAGO (Miramax Films et al. 2002), INTOLERABLE CRUELTY (Imagine Entertainment et al. 2003), AILEEN: LIFE AND DEATH OF A SERIAL KILLER (Lafayette Films 2003), THE LIFE OF DAVID GALE (Universal Pictures et al. 2003), THE STAIRCASE (Maha Productions 2004), NORTH COUNTRY (Warner Bros. Pictures et al. 2005), THE EXORCISM OF EMILY ROSE (Lakeshore Entertainment 2005).

40. See Silbey, *Filmmaking in the Precinct House*, *supra* note 6, at 143.

41. See *id.*

42. *Id.* at 143–44.

43. The quintessential early example is Georges Méliès' 1903 film *The Magic Lantern*, a story on film about how film tells stories. THE MAGIC LANTERN (Georges Méliès 1903). *The Magic Lantern* purports to tell "the history of Western dramatic art, showing first a landscape painting, then a play, and then an image of the newly developed moving pictures." Silbey, *Judges As Film Critics*, *supra* note 5, at 536. Film, Méliès taught, is no more than the next step in the evolution of cultural (and largely fictional) forms; Méliès also taught that film's self-reflexive qualities—exposing the audience to the film's own ways of worldmaking and thereby involving the audience in the illusions created—is central to film's authoritative claim. *Id.* at 536–37. Méliès' point was to show how film does not reveal the world, but constructs it. *Id.*

critique is experienced as empowering the audience to be better judges of stories, to stand apart from the film and question the images it projects. Presented with the singular story on film, but also with the critical perspective to evaluate its delivery, the audience nonetheless experiences the film version of the story as credible and inescapable.

Cinema's play on the hermeneutics of seeing and believing and its self-reflexive tendencies raise questions of the epistemic foundations of filmic representation. This same dynamic exists 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.<sup>44</sup> 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 storytelling mechanism and reflects on the difficulty of claiming certain knowledge.<sup>45</sup> 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, such that the trial's outcome (as with the filmic version) is often perceived as the most persuasive account of "what happened."

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44. See Mnookin, *supra* note 28, at 154–55.

45. See Silbey, *Doing Law and Popular Culture*, *supra* note 2, 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 or 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"). See also Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1230 (2001) ("[The] rules governing what happens inside the courtroom can be understood adequately only in the context of the state's central project of regulating behavior outside the courtroom . . ." (emphasis omitted)); Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1500 (2001) ("Federal Rule [of Evidence] 102 defines the 'purpose' of the rules as 'that the truth may be ascertained,' but some of the rules themselves have no veritistic dimension, while others mix veritistic and non-veritistic concerns." (footnotes omitted)).

The irony is palpable. While both law and film (the trial film and courtroom adjudication) 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*. One of my ongoing projects is to situate this phenomenon, both to better investigate this irony and explain what I believe to be its implications.

### III. FILM'S TRUTH TALES

In contrast to truth tales, classic trial films are primarily fictional, such as *Anatomy of a Murder*,<sup>46</sup> *Witness for the Prosecution*,<sup>47</sup> or *To Kill a Mockingbird*.<sup>48</sup> In these classic trial films, their self-conscious form—the film's formal self-reflexive qualities and law's explicit procedural contingencies—facilitates in the spectator a critique of filmic and legal authority, which in turn emboldens the spectator in her pursuit of justice through law.<sup>49</sup> The self-consciousness of trial films is also a consistent thematic feature; it is a metaphor of law's relation to justice.<sup>50</sup> As the film camera consistently places the viewing audience in diverse relationships within the law's drama—as a juror, attorney, judge, plaintiff or defendant—the film as a whole encourages both an investment in the trial's outcome as well as a detachment from any one particular point of view.<sup>51</sup> The spectator can thus claim to know the result that is most just by virtue of her privileged multiperspective knowledge of the nuances of the case, as well as condemn the faults of a system which has nevertheless enabled her privileged insertion into the debate.<sup>52</sup> In these films, justice is reproduced through the visual metaphor of courtroom drama as a convergence of these many

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46. ANATOMY OF A MURDER (Carlyle Productions & Columbia Pictures Corp. 1959).

47. WITNESS FOR THE PROSECUTION (Edward Small Productions 1957).

48. TO KILL A MOCKINGBIRD (Brentwood Productions et al. 1962).

49. I have elsewhere called the effect of this recursive authority the "liberal legal subject" of trial films. See Silbey, *Patterns of Justice*, *supra* note 26, at 98. This effect occurs when the film's exposure of its own fiction and of the limitations of law's processes strengthens the spectator's claim to authority and autonomy in the face of both film's constitutive force and law's power. *Id.*

50. *Id.* at 115.

51. *Id.* at 116.

52. *Id.* at 111–12.

perspectives toward an inevitable result.<sup>53</sup> As a quest for a missing puzzle piece, this play in the house of law about dichotomous moral decisions concerning right and wrong actions, corrupt or honest people, and good or bad laws.<sup>54</sup> This notion of legality perceives a world already there; the truth of classic trial films sits in some pure form waiting to be found. The viewer is constituted within the unfolding drama to facilitate (through desire) the revelation of a truth that will enable a just result, and he thus experiences justice as the exposure of that one truth that will rid the disease from an otherwise healthy process.<sup>55</sup> This usually manifests itself during or after a climactic trial scene. Consider *Witness for the Prosecution*,<sup>56</sup> *Anatomy of a Murder*,<sup>57</sup> or even the more recent *Jagged Edge*,<sup>58</sup> all of which culminate in the revelation of the identity of the true murderer at the end of the film in court or just after court.

By contrast, in truth tales such as *JFK*,<sup>59</sup> *Helter Skelter*,<sup>60</sup> and *North Country*,<sup>61</sup> the film's self-conscious form works differently. Truth tales (and other nonfiction-like films, such as documentaries<sup>62</sup>) do not aim to reveal a certain truth either through legal process or film form. Despite claims that these films are based on a legal event in history, most often a historical or otherwise notorious trial, the story of truth tales is not necessarily about a particular pursuit of justice with a singular revelation of a guilty or innocent identity, but

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53. *Id.* at 112.

54. *Id.*

55. *Id.* at 115–16.

56. WITNESS FOR THE PROSECUTION, *supra* note 47.

57. ANATOMY OF A MURDER, *supra* note 46.

58. JAGGED EDGE (Columbia Pictures Co. & Delphi IV Productions 1985).

59. JFK (Warner Bros. Pictures et al. 1991).

60. HELTER SKELTER (Lorimar Productions 1976).

61. NORTH COUNTRY, *supra* note 39.

62. Courtroom dramas based on true stories are distinct from documentary trial films, such as CAPTURING THE FRIEDMANS, *supra* note 38, or MURDER ON A SUNDAY MORNING, *supra* note 39. Whereas COMPULSION, *supra* note 3, and SWOON, *supra* note 4, are fictionalized accounts of a notorious trial, the recent spate of documentaries about contemporary trials, of which *Capturing the Friedmans* is just one, are nonfictional accounts of relatively unknown legal cases. In many instances, these documentaries are personal accounts, versions of the filmic biography and autobiography made possible by the explosion of camcorders, personal film cameras and digital photography. These new film forms and the contrasting categories of fiction versus nonfiction (or docudrama versus documentary) affect the meaning produced by both film genres in terms of the role of law in attaining justice (the importance of truth and fairness). See Silbey, *A History*, *supra* note 33.

about how that pursuit can be *retold* in various ways, how justice manifests itself in diverse forms. Truth tales are explicit comparisons between the story that was told long ago (the notorious verdict with which the audience is familiar), and the story as it can be retold and resituated on film today. In this way, these truth tales are a kind of appeal, attempting to correct a popular perception. Like classic trial films, truth tales operate within a self-conscious framework, but the self-consciousness does not encourage or critique the participation of individuals within that legal system as much as it serves to reflect the film's and law's constitution of history. These films are less about verdict *qua* truth, and more about how film and law are constitutive social processes—how there is not one “true” story to be told about a singular event in time. It is these truth tales that complicate the notion of discovering a certain truth through law to which Parts IV and V of this article are primarily devoted.

Despite the truth tales' critique of singular truth claims, truth tales share a set of formal features less like those of fictional trial films and more like those of traditional documentary films.<sup>63</sup> Like documentaries, truth tales establish an expectation of faithfulness to past events through specific formal features coded to signal the “live” or the “real.”<sup>64</sup> One of these formal features is a promise, made at the film's beginning, that it is based on a true story, such as “The following motion picture was inspired by a true story” (which opens the film *Judgment in Berlin*).<sup>65</sup> Documentaries and truth tales also rely on black and white footage to index informational and factual film coverage, the purpose of which is to cultivate the

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63. For a general discussion of documentary film style and history, see BILL NICHOLS, INTRODUCTION TO DOCUMENTARY (2001) [hereinafter NICHOLS, INTRODUCTION TO DOCUMENTARY]. See also Silbey, *Filmmaking in the Precinct House*, *supra* note 6, at 142–55.

64. The “live” would include the generic markers of documentary, for example, the “reality effect” and people “being themselves,” or “dead” and “empty” time as Bill Nichols has written in his book *Representing Reality*. BILL NICHOLS, REPRESENTING REALITY: ISSUES AND CONCEPTS IN DOCUMENTARY 13, 40 (1991) [hereinafter NICHOLS, REPRESENTING REALITY]. As Nichols has also said, however, these signs—symbols of photographic realism—are “not, in fact a truth but a style.” NICHOLS, INTRODUCTION TO DOCUMENTARY, *supra* note 63, at 92.

65. JUDGMENT IN BERLIN (Sheen/Greenblatt Productions et al. 1988). Consider also the beginning of *Helter Skelter*: “You are about to see a dramatization of actual facts in which some of the names have been changed but the story is true. If it were not true, it would not be believable, for it is surely one of the most bizarre chapters in the history of crime . . .” HELTER SKELTER, *supra* note 60. There are, of course, some films that do not require a red flag to signal their reliance on historical events, such as JFK, *supra* note 59, THE TRIAL OF THE CATONSVILLE NINE (Melville Productions 1972), and SACCO AND VANZETTI (Italonaggio Cinematografico et al. 1971).

viewer's trust as regards the film's truth value. Many truth tales even incorporate black and white newsreel footage of the event in question or coverage of news broadcasts announcing to television audiences the details of the crime. Also, many truth tales employ handheld cameras, first person testimony, and what appears to be amateur film footage (footage that is unfocused, off-balance and hard to hear) evoking the sense of unedited, unadulterated film. This creates the appearance of a camera-witness that was merely present (and not "manipulated") to capture the event. As theorists of documentary films have already noted, however, these formal features say nothing about the inherent truth value of the film. These features are simply well-recognized codes whose purpose is to tell the viewer that the film is based on fact.<sup>66</sup>

Whereas in documentaries these formal features of the "live" and the "real" might signify immediateness and faithfulness of representation (whether or not that is the case),<sup>67</sup> in truth tales the same formal features highlight the inevitability of fiction in legal stories based on fact. As will be shown later in Parts IV and V, the truth in truth tales is not the coincidence of the filmic representation with its historic referent (a sense of bearing witness and originating evidence), but the understanding that filmic versions of the past are always a fictional telling—a remaking of history with contemporary filmic conventions and for contemporary audiences.<sup>68</sup>

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66. See NICHOLS, REPRESENTING REALITY, *supra* note 64, at 32–75. Nichols delves into the subgenres of documentary, dividing them into the "observational mode," the "expository mode," the "reflexive mode," and the "interactive mode," all which differently manipulate the viewer's expectations of the indexical relation of the film's images to the historical world. However, all modes share the common feature of the "basic expectation held by the documentary viewer . . . that the desire to know will find gratification during the course of the film." *Id.* at 30.

67. This is especially so in observational documentaries, despite the fact that the relationship between the feeling of authenticity and the fact of authenticity is entirely stylistic and conventional. See NICHOLS, INTRODUCTION TO DOCUMENTARY, *supra* note 63, at 92–93; see also Silbey, *Filmmaking in the Precinct House*, *supra* note 6, at 144. "[T]he 'realism' of early documentary film was a constructed reality, one intentionally conjured by the film (and filmmaker) to project onto and reproduce in its viewing audience a specific rendering of how 'reality' might look and feel." Silbey, *Filmmaking in the Precinct House*, *supra* note 6, at 144.

68. Indeed, many documentaries—even those that purport to reveal something true about the past—demonstrate the inevitability of narrative choice and point of view to shape truth claims. Some would even say this is what documentary filmmaking has always been about. See Silbey, *Filmmaking in the Precinct House*, *supra* note 6, at 145–50.

The development of . . . different perspectives in documentary film provoked significant epistemological uncertainties. One was to highlight the by-now obvious fact that all stories, even true ones, can be truthfully told from different angles, with different morals and objectives. Another was to enable . . . a judgment by the film

Truth tales primarily accomplish this historical comparison by virtue of their famous conclusions. As truth tales, they were not made to retell the ubiquitous verdict. Instead, the point of truth tales is to resituate the story of the crime and the trial in a newly meaningful way. The truth tale takes a story from the past whose ending most people know well and represents it in a manner that should make a difference in how people will remember the verdict in the future. The difference between the truth tale and the historic trial on which it is based cannot be uncontested facts of the case—the verdict, for example, or the identity of the victim—but instead the process and conditions that resulted in those facts. The renown of the verdict shifts interest in the film from the result of the trial (the “truth” at law) to its process as a way of making good or bad sense of the illegal act at issue. Less concerned with law’s capacity to reveal the truth of the guilt or innocence of an individual, spectators of the truth tale instead learn that the justice of law’s process relies entirely on one’s perception of context—a time and a space that situates each retelling of the infamous verdict. In truth tales, “truth” is not the correctness of the legal verdict, but an understanding of the situation that produced it.<sup>69</sup>

This notion of “truth” is very different from the thematic feature of many classic trial films with which Part III began, such as *To Kill a Mockingbird*<sup>70</sup> and *Anatomy of a Murder*.<sup>71</sup> In these films, truth sits in some pure form waiting to be found as the inevitable result of the convergence of the film viewer’s privileged perspectives.<sup>72</sup> The viewer of these classic courtroom dramas is constituted within the unfolding drama to facilitate (through desire) the revelation of a truth that will enable a just result, experiencing justice as the exposure of

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audience about the authority of the film voice . . . . Indeed, given the combination of factual assertions and epistemological uncertainties that were embedded in the documentary genre from the outset, attention to documentary voice—although varied—almost always concerns building credibility and authority for the story being told.

*Id.* at 147.

69. Central to this notion of “truth” in documentary filmmaking, writes Bill Nichols, “is less a process of ‘fleshing out’ on the part of the text than ‘filling in’ on the part of the viewer.” BILL NICHOLS, *BLURRED BOUNDARIES: QUESTIONS OF MEANING IN POPULAR CULTURE* 146–47 (1994).

70. *TO KILL A MOCKINGBIRD*, *supra* note 48.

71. *ANATOMY OF A MURDER*, *supra* note 46.

72. See Silbey, *Patterns of Courtroom Justice*, *supra* note 26, at 111–13.



that one truth that will rid the disease from an otherwise healthy process.<sup>73</sup> The culmination of truth tales that are trial films, however—such as *Judgment at Nuremberg*,<sup>74</sup> *Helter Skelter*,<sup>75</sup> *Inherit the Wind*,<sup>76</sup> *Reversal of Fortune*<sup>77</sup>—cannot be the revelation of a truth *qua* verdict because the verdicts in these truth tales are too famous to create narrative suspense.<sup>78</sup> In truth tales, the object is not to wait and wish for the coincidence of verdict and truth. What would the truth be of films like *Judgment at Nuremberg*<sup>79</sup> or *JFK*?<sup>80</sup> In these films, the story's motivation and suspense—indeed, the relationship of the film to its representation of law—must be structured around something else.

That something else is *not* how much of the film is true and untrue (*i.e.*, historically accurate or inaccurate). In truth tales, the truth functions not as an endpoint (a verdict) but as a process. By contrast, in entirely fictional films about law, such as the classic courtroom drama, the truth of law lies in its verdict, the outcome around which much of the ideological play of the film and its legal story is based. In classic trial films, their self-conscious form helps viewers critique as an illusion film's comprehensiveness and law's top-down authority so that the viewer may inject his perspective into law in the name of individualized justice, eventually embracing law as a system that can tell a true story as long as the right people are included in the telling. In truth tales, by contrast, the law is not about the trial's conclusion but about the reason for it as a social system. The self-conscious form of truth tales helps constitute in viewers an appreciation of the fictive quality of both law and film, how both are about processes of storytelling (and worldmaking) where the "truth"

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73. See *supra* notes 43, 45, 65 and accompanying text.

74. *JUDGMENT AT NUREMBERG* (Roxlom Films Inc. 1961).

75. *HELTER SKELTER*, *supra* note 60.

76. *INHERIT THE WIND* (Lomitas Productions 1960).

77. *REVERSAL OF FORTUNE* (Sovereign Pictures et al. 1990).

78. In contrast, consider the more commonly structured trial films like *JAGGED EDGE*, *supra* note 58, or *WITNESS FOR THE PROSECUTION*, *supra* note 47, where both film narratives unfold around the missing identity of the guilty party. The search for the murderer in both films dovetails on the hope and faith that the trial process will serve justice—that is the truly innocent will be set free and the guilty will be punished. Both films culminate in surprise endings, unmasking the guilty party to vindicate the work of the attorney and to confirm faith in the law. This schema directly contrasts with truth tales.

79. *JUDGMENT AT NUREMBERG*, *supra* note 74.

80. *JFK*, *supra* note 59.

may be unknowable, if perhaps also irrelevant.<sup>81</sup> The truth tale has as its aim not to tell (what in documentary jargon would be) a true story based on the culmination of multiple perspectives, but instead to cultivate and accommodate multiple notions of truth based on irreconcilable points of view. It does so by investigating truth as a filmic and legal construct whose significance for justice changes over time.

The truth tale accomplishes this aim by making plain the distinction between the notion of law as a revelatory mechanism and law as constitutive of society and culture. The viewer of truth tales presumably knows the legal outcome of the case on which the film is based, but nevertheless watches the film in anticipation of a wrinkle in the story. Already anticipating that the film's representation of the story—which ends in an infamous verdict—will shed new light on an old tale, the truth tales' spectator is inaugurated into a realm of critical historical consciousness. This historical subject watches the film expecting a different “take”<sup>82</sup> on what has already become historical fact and in this way is already comfortable with the notion that history is not a static story but a kind of (filmic) palimpsest. The viewer is made critical not only of film's ability to capture reality (to make any faithful claims to truthful representations), but also of law's claim to adjudicate towards one truth—the “right result”—as it so often promises. This means that the film viewer's self-consciousness services a critical stance on *both* filmic representation and the legal process, not in order to enable a single verdict on the accused, but to demur to a legal system that is as fissured and contradictory as the individuals the law aims to categorize. The viewer of a truth tale watches a film that claims to tell the story of a specific historical event that nevertheless is premised on the fictive quality of all historical accounts. In this way, the viewer is asked to account for (to bear witness to) the changing significance of law and legal verdicts through time.

The next two parts of this Article trace the construction of this critical viewer by comparing two very different films that are about

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81. Silbey, *Doing Law and Popular Culture*, *supra* note 2, at 156–57; also sources cited *supra* note 45; Jessica Silbey, *Criminal Performances: Film, Autobiography and Confessions*, 37 N.M. L. REV. 1 (forthcoming 2007) [hereinafter Silbey, *Criminal Performances*].

82. I intend the double-entendre as in both “take” in film jargon and “take” in opinion.

the same legal trial, the Leopold-Loeb case from Chicago in 1924.<sup>83</sup> The case concerns the premeditated murder of a young teenage boy by two teenagers, Nathan Leopold and Richard Loeb. The case was notorious for many reasons. The prosecutors searched in vain for a motive and found none. Although the defendants confessed to the murder, the best explanation for their actions was thrill-seeking.<sup>84</sup> The boys were represented by Clarence Darrow, who successfully argued to spare them the death penalty.<sup>85</sup> Many films were made about the case, including *Compulsion*,<sup>86</sup> a 1959 film starring Dean Stockwell and Orson Welles, and *Swoon*,<sup>87</sup> a 1991 film by Tom Kalin.<sup>88</sup> *Compulsion* is shot in classic Hollywood style. *Swoon* is more avant-garde and stars a cast of fledgling actors. Both films borrow heavily from uncontested facts of the Leopold-Loeb case but they are nonetheless drastically different in film form and narrative focus.

The analysis of *Compulsion* and *Swoon* in Parts IV and V attends primarily to the film form itself—to style, technique and narrative. Also relevant to the analysis is the relation of these films as a category to other similar genres, namely the documentary and the classic trial film. This is, therefore, an analysis from the perspective of cultural production and reception, two of the three prongs of a cultural analysis of legal representation. My claim is that the effect of truth tales as a genre is to instill an open mindedness as regards the changing meaning of verdicts over time. In comparison to classic trial films that cultivate in their viewers the desire for law to reveal a truth as a means of achieving justice, these truth tales, by embracing multiple ways of telling a similar story, celebrate law (and whatever truths it seeks) as a constitutive process whose truth claims

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83. For an accessible discussion of the Leopold and Loeb case, see GILBERT GEIS & LEIGH B. BIENEN, *CRIMES OF THE CENTURY* 13–47 (1998).

84. *Id.* at 16.

85. *Id.* at 17–20. In *Compulsion*, Orson Welles played Jonathan Wilk, the fictional character of Clarence Darrow, an attorney who was famous in his own right as the criminal defense attorney who represented (among others) John Scopes in what became known as the “Scopes monkey trial” defending a school teacher’s ability to teach Darwin’s theory of evolution.

86. *COMPULSION*, *supra* note 3.

87. *SWOON*, *supra* note 4.

88. Alfred Hitchcock’s *Rope* is also based on the Leopold-Loeb case. See *ROPE* (Transatlantic Pictures & Warner Bros. Pictures 1948).

(guilt or innocence) are contingent on cultural and historical circumstances.

Both films employ self-conscious film form to critique hegemonic representational strategies of film. Both films also draw on that self-consciousness to critique the power and influence of law that threatens individual liberty. The films nonetheless conclude with different versions of law's constitutive force in society with regard to the Leopold-Loeb case. The viewer of *Compulsion* is made to account for the potential hypocrisy in a legal system that calls for the premeditated death of two young men convicted of killing in cold blood. The viewer of *Swoon* is made aware of the homophobia that served as a specious explanation of Leopold's and Loeb's antisocial and criminal personalities. Side-by-side the resulting effect of these films is to demonstrate the possibility for the same trial and the same verdict to mean different things. Their self-conscious form does not lead to revelation of any one truth (why the boys committed murder and how), but instead that the significance of the case (insofar as verdict is concerned) is ongoing. The aim of Parts IV and V is therefore to show how truth tales affect a film viewer (and a legal subject) who is conscious of history's dynamic moral narratives, and who accepts law's capacity for contradiction and change, especially as concerns the relation of justice to the outcome of legal adjudication.<sup>89</sup>

#### IV. COMPULSION

*Compulsion* is structured around a system of visual symbols and symbols of vision—eyeglasses, headlights, newspapers—that establish expectations of the film's allegiance to empirical knowledge and historical accuracy. These signs that are symbolic of revelation and understanding also point to the film's self-conscious fictionalization (retelling through narrative and visual imagery) of the Leopold and Loeb story. The film viewer, who knows the guilty verdict and also experiences the intrigue of the film's narrative, is made able to critique the film's claim to historical accuracy that makes plain the interdependence of historical circumstance with

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89. Sociolegal scholars have been making this claim for some time: that as legal agents we may accept the law not as a system of truth and justice, but as a game we can play, shape and manipulate. PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW* at xii–xiii (1998) (describing the mapping of “complex and contradictory fabric of legality”).

legal outcomes. In the end, the film viewer accounts not for the facts of the Leopold-Loeb case (*e.g.*, a static verdict: are the defendants guilty or not?), but for law's evolving role in the ordering of society over time (*e.g.*, the propriety of the death penalty: should the defendants have been spared?).

The theatrical trailer to *Compulsion*, the film preview that advertised the film to movie going audiences, begins the film's discursive mixing of documentary style with fiction filmmaking. It shows scenes from the film and then freezes on a shot of a speakeasy in which the two main characters and their school chums are drinking whiskey. The announcer in the trailer breaks with the diegesis of the film and addresses the audience, "Ladies and Gentlemen! We stop this film deliberately to tell you that two of the young people you are watching have just committed what has become the crime of the century. . . ."90 The two young people are not Richard Loeb and Nathan Leopold, however, but the actors Bradford Dillman and Dean Stockwell playing Arty Strauss and Judd Steiner. The promise to show the film audience the defendants is therefore complex. The celebrity actors make the spectator immediately aware that the film is not a documentary. And yet, the announcer promises a tell-all movie experience, presuming the successful conflation of the film's inherent fiction with its revelatory feeling of being rooted in historical facts (the activities and trial of the two teenage murderers, Leopold and Loeb). An audience going to see *Compulsion* would expect, from this trailer, to be entertained by the likes of Stockwell and Orson Welles as well as educated about the historical circumstances of the Leopold-Loeb case.

The announcer ends his introduction by asking "Do you know the strange relationship that existed between them?" This is an explicit invitation to investigate and scrutinize the film for the answer—to expect from the film a persuasive and candid analysis of

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90. This is a form of "breaking the fourth wall," a technique that was originally theorized by Bertolt Brecht through his theory of epic theater and the "alienation effect." ROBERT STAM ET AL., *NEW VOCABULARIES IN FILM SEMIOTICS* 198–201 (1992). "Breaking the fourth wall" involves actors breaking with their character to directly address the audience, thereby breaking the illusion of reality that the theater (or film) creates and "making strange" the previously very real-feeling experience of the play (or film) before them. *See id.* The experience is of at once realizing that what you're seeing is fiction, but believing what you see to be authentic and true based on the personal and direct address of the actor. *See id.*

the Leopold-Loeb case.<sup>91</sup> A screen shot of Meyer Levin's semiautobiographical book *Compulsion*<sup>92</sup> (also about the Leopold-Loeb case) buttresses the announcer's promise.<sup>93</sup> Meyer Levin's book was heralded as a "significant and moving work"<sup>94</sup> and as "accurate and vivid"<sup>95</sup> when it came out three years prior to the film.<sup>96</sup> The image of the book is superimposed over shots of frantic newspaper printing presses. The book's reputation, in combination with the sense of immediate and reliable news, builds the announcer's credibility and thus also the believability of the film images that follow.

The film's referential claims and its revelatory promises are nevertheless complicated by the theatricality of the trailer. The trailer is carefully crafted, pasting scenes together from the film, framing them with a whirlpool-effect overlay. Each scene looks like the eye of a tornado as seen from above the clouds looking down at the storm; around the film's edges swirls white mist, keeping the audience's eyes focused on and grateful for the clarity of the whirlpool's center. After introducing the Leopold-Loeb case as "the

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91. Although the invitation rings of the homophobia surrounding the Leopold-Loeb case, as will be discussed later, *Compulsion* doesn't explain the "strangeness" of the two young men's relationship as homoerotic love but instead as narcissism and ego-mania.

92. MEYER LEVIN, *COMPULSION* (Frederick Muller 1957).

93. The film *Compulsion* is specifically credited to the book *Compulsion* (1956) written by Meyer Levin, which predates the film by three years. Levin's book claims to be historical fiction. Meyer Levin was a school friend of both Leopold and Loeb and cast himself in the book as the reporter, Sid Silver, who helped crack the criminal case. He writes in his autobiography of the impact the Leopold-Loeb case had on his young adulthood. "The murder stood before me as a personal lesson in morality . . . . In a confused and awed way, and in the momentary fashionableness of 'lust for experience,' I felt that I understood them, that I, particularly, being a young intellectual Jew, had a kinship with them." Charles Shapiro, *The Crime of Our Age*, NATION, Dec. 1, 1956, at 483. This kinship gave Levin what he considered the authority and credibility to write so persuasively about what has elsewhere been called one of the "crimes of the century." GEIS & BIENEN, *supra* note 83.

94. Shapiro, *supra* note 93.

95. *Books for Christmas*, Book Review, NATION, Dec. 15, 1956, at 199.

96. Meyer made no claims to complete historical accuracy in his book, although it was nevertheless considered a major breakthrough in the understanding and significance of the Leopold-Loeb case. "To its telling, Levin brings a compelling creative power rooted in both subjectivity and objectivity. As a campus contemporary of the two criminals. . . . he writes with the immediacy and intimacy of firsthand knowledge of the principals of the case." Book Review, N.Y. HERALD TRIB., Oct. 28, 1956, at 5. "Since this is a novel, Mr. Levin has used fictitious names throughout, yet he follows the established facts of the Loeb-Leopold case so closely that any libelous statement would still be actionable." Book Review, N.Y. TIMES, Oct. 28, 1956, at 7. Ironically enough, Nathan Leopold did sue Meyer Levin for libel many years after the book was published and the film released. Leopold lost the lawsuit.

story that electrified the world,” this creative whirlpool effect encourages the feeling of a clarification and a culmination. It says that this film version is the latest in groundbreaking news. Blindingly bright car headlights that illuminate the screen begin the opening montage. As the car drives toward the audience, the lights get larger and whiter. Themes of sharp focus (the tunnel effect of the tornado) and enlightenment (headlights) further the message that the film will be eye-opening. The trailer closes with the additional endorsement that the film’s producer, Darryl Zanuck, “pioneered some of the most daring subject matter the screen has ever known.” This film will be Zanuck’s coup-de-grâce. Not only will it be shocking because it is based on a true story, but because it will expose more about the Leopold-Loeb case than any previous account.

Although the trailer depends on the images of newspapers, investigative reporting and the symbolism of enhanced vision to convince the audience of its search for the truth of the Leopold-Loeb case, it nevertheless embellishes its pronouncements with the allure of stars like Orson Welles and Diane Varsi. Also, the trailer does not look like a news announcement despite its attempt to signify the truth value of news. Many films from this time period might show a cover story from a local paper announcing the crime to be investigated or live film footage from an arrest or arraignment.<sup>97</sup> Instead, this trailer is a very carefully edited film sequence that makes no qualms about sensationalizing an already scandalous story.<sup>98</sup> Despite the expectations of truthfulness this trailer encourages, its splashy introductory form frames these expectations with exaggerated and imaginative filmic devices.

The film builds on the documentary expectations established in its theatrical trailer by weaving its narrative around the symbolism of a pair of eyeglasses and a newspaper investigation—both signifiers of learning and knowledge that dovetail on the trailer’s truth claims and highlight the film’s self-conscious form. The eyeglasses and newspaper investigation index the desire to see and know all that is possible about the Leopold-Loeb case. What is shown in this film,

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97. BORDWELL, *supra* note 31, at 24–41.

98. The fact that the film is specifically indebted to the book by Meyer Levin seals its fate as both an objective and subjective account of the Leopold-Loeb case.

however, is not the story of the planning and murder of young Bobby Franks, the victim of Leopold's and Loeb's passion for crime, but the story of Leopold's and Loeb's attempt and failure to cover-up their crime. In *Compulsion*, the audience never sees the murder or its planning. Instead, the audience watches as Arty and Judd craft mendacious alibis and furnish the police with others to mislead the investigation. Given that the story is about the power of lies, what then is the point of the film's symbolic structure around clarity of vision and factual reporting?

The reoccurring visual and narrative themes of the missing eyeglasses (a breakthrough clue in the murder case), which is iterated in the film as car headlights in some scenes and as the blind eyes of a teddy bear in others, is one mark of the film's self-conscious form that highlights its own fictionalized storytelling mechanism. By telling a story about a criminal investigation that must negotiate a swamp of lies and by arming its audience with the knowledge of the investigation's conclusion (the guilt of the accused), the film maintains its suspense through the intrigue and ingenuity of the fabricated stories and not with the anticlimactic revelation of the murderers' identities, whom everyone knows already from the film's beginning. In this way, the eyeglasses and newspaper reporting do not stand for the infallibility of empirical investigations, but ironically for the diverse and persuasive narratives such investigations can produce. Likewise, the film, which promises to be an exposé, produces its own critique of the possibility that film (which is a kind of bearing witness) exposes any singular truth at all.

Indeed, from beginning to end, the film contrasts expectations of truthfulness with fantastic filmmaking. Two central devices for this contrast are the symbolic narratives revolving around Judd's eyeglasses that he lost at the scene of the crime and a newspaper intern's investigative reporting of the murder of Bobby Franks. The glasses form a pattern in the film that weaves scenes together and draws the connection between lost sight and criminal culpability. The glasses are eventually traced to Judd, the one mistake in their masterful plan. Found by a newspaper intern, Sid, the glasses are wrongly perceived to be his first big break as an investigative reporter. Sid follows the case to its culmination in pleas of guilty; and the film audience follows his progress on the case, forcing a contrast between Sid's misleading discoveries with what they know



to be the details of the crime and cover-up. The symbolism of the eyeglasses together with the newspaper investigation highlight the motivated relationship between sight (empirical investigation) and knowledge. But the stories of eyeglasses and the newspaper investigation fail to tell the film audience anything new. Neither is clarifying or revelatory. As narrative devices they merely confirm that many stories (whether the one that Arty and Judd tell about the lost glasses or the one that Sid reports) can flow from or be crafted around the same pieces of evidence.<sup>99</sup> The glasses, which are symbolic of sharpened vision, and the news reporting, which stands for the high value of empiricism, undermine rather than sustain the film's revelatory claims. These framing devices do not enhance the truth value of the film but instead stress the film's self-conscious storytelling and an awareness of the inevitably constructed nature of all stories, whether historically grounded or legally motivated.

In a later scene, the glasses serve a similarly ambivalent purpose. When the state's prosecutor, Mr. Horn, interrogates Judd, Mr. Horn wears glasses exactly like those Judd lost. He also shows Judd a pair of glasses that he knows Judd lost at the murder site. The doubleness of the glasses in the film shot—on Mr. Horn's face and in his hand, a kind of double vision—undermines Mr. Horn's identification of the glasses as Judd's, their style being common enough to be shared by both the prosecutor and the accused. When Mr. Horn explains to Judd that he knows they are his—there is a special hinge on the frame made for only three customers in the Chicago area, one of whom is Judd—the double vision turns into accurate vision and the audience feels as if Mr. Horn has the upper hand. But the discovery of Judd's glasses at the murder site is not the evidence that seals the boys' fate. When Sid first discovered the glasses in the autopsy room, he thought they would break open the criminal investigation. But Judd and Arty are clever, and for most of the film they successfully mislead the police and reporters with complex, hard-to-verify alibis. Judd crafts a credible story about his bird watching class, which ostensibly took place in the park in which the murdered boy was found. He suggests that his glasses must have

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99. The possibility of competing stories structured around common facts is, of course, the essence of the trial. ROBERT P. BURNS, *A THEORY OF THE TRIAL* 103–104, 123 (1999) (where there are “few factual disputes,” describing situation in which opening statements in a trial is a battle over “what th[e] case is about”).

fallen when he was stumbling around the rugged terrain looking at birds. All because of the glasses, symbolic of clarity and vision, Sid spends substantial time following false leads.

The newspaper investigation is another red herring. It adds little to the film's informational aura. Only a fluke statement by a family chauffeur that he had the car the day the boys testified to using it convinces Mr. Horn that Judd and Arty are liars and perhaps also murderers. If anything, the film contrasts what the reporters do not know with what the audience learns by following Arty and Judd in their private adventures. Although the criminal investigation serves both as a backbone of the case against the two boys and as a narrative structure for the film, it does not propel the story's conclusion. The glasses and the other symbols of enlightenment do not end up revealing anything new about the murder of Bobby Franks. They only serve to symbolically bind that film's visual story together, a structure around which one version (or many versions) of the story can be told.

Like so many trial films, *Compulsion* culminates in a climactic trial scene. The suspense of the trial, however, is not directed at the verdict, nor does it revolve around the investigation or evidence mentioned above. In fact, the boys plead guilty, removing the jury from the case. What is left to know or understand about the murder? What is left for the role of judgment (knowing application of the law to a set of facts in light of social codes and moral norms)? Up until now, the film's formal self-consciousness pointed to the film's own constructed nature, questioning the value of empiricism and observation (acute vision and investigation) in a legal case thwarted by clever, mean-spirited teenage boys. The self-reflexive film form is not self-defeating, however. It does not undermine the film's message of legal authority and judgment. Self-reflection can lead to justice, argues the defense attorney, Jonathan Wilk (who is supposed to be Clarence Darrow, the attorney who represented Leopold and Loeb).

The self-reflexive nature of the film's story about vision, knowledge and law mobilizes the film's central and climactic debate about the cruelty of the death penalty. In the final scene, Wilk asks the judge (and the film audience who is put in the position of the judge with a perspective from his bench) to scrutinize the law's justification for the death penalty with the same intensity given the

stories that led to the defendants' confession. Despite the boys' confessions to cold-blooded murder, and because the existence and relevance of facts explaining the boys' actions remain elusive, the law of punishment calling for the boys' deaths remains subject to debate. Whereas the prosecutor argues that the death penalty exists for precisely this kind of case—premeditated, random murder—the defense attorney argues the opposite. The film borrows directly from Darrow's argument in the Leopold-Loeb case asserting that for crimes like this, the death penalty makes no sense.<sup>100</sup> He tells the judge and the film audience, "If these boys hang it must be by your own cool deliberate act." In other words, the legal system cannot be consistent with its principles and also plan to kill the two boys as punishment for the premeditated murder of the young Bobby Franks.

The film emphasizes this point by having the actor playing Clarence Darrow address the film camera directly, appearing to confront the judge and the film audience face-to-face and close up. By breaking with the fiction of the film and appealing directly to its audience, as if we were the judge and jury in the case, the film questions the line between truth and fiction, illusion and reality.<sup>101</sup> Despite the filmic nature of the story before us and despite its status as history, we are asked to judge and make sense of the verdict—to have an opinion about the law's punishment and about the injustice of the death penalty. Facing the camera, the boys' attorney says:

This court is told that it should give [the murderers] the same mercy as they gave their victim. But your honor, if our state is not kinder, more humane, more considerate, more intelligent, than the mad act of these two boys, I am sorry to have lived this long . . . . Through the centuries our laws have been modified so now men look back at the horror of hangings and killings of the past. It has been proven that as the penalties are less barbarous, the crimes are less frequent. Do I need to argue with your honor that cruelty only breeds cruelty? Our religious leaders . . . have taught that if there is any way to kill evil, it is not by killing men. If there is any way of destroying hatred . . . it is

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100. GEIS & BIENEN, *supra* note 83, at 19.

101. Breaking with the fiction of the film is a form of "breaking the fourth wall," which involves actors breaking with their character to directly address the audience. See STAM ET AL., *supra* note 90.

through charity and love and understanding . . . . A hanging would be done, of course, in the name of justice. Justice? Who knows what it is? If you hang these boys, you turn back on the past. I'm pleading for the future.

The film addresses its audience as "you," "pleading" with its audience to be critical of law's claim to being impartial and fair while also advocating murder. By scrutinizing law's claim that it can kill without committing murder, the film puts to honorable use a sensitivity to discursive strategies (like law) which claim to hold a monopoly on truth and justice. As the judge is finally convinced to eschew the death penalty in this case, the audience, in the position of judge, facilitates mercy. In so doing, the defense attorney (and the film) shows how rhetoric alone—and not the facts, as none were controverted—can shape a community's notion of justice.

The film's formal self-consciousness services the film's legal conclusion. From the film's beginning, its moral narrative is the mantra that no one is above the law—not the lawmakers, not the super-intellec[t]s, not the legal system itself. *Compulsion's* self-conscious film form—a critique of discursive strategies for representing truth and history—does not make the audience sensitive to historical accuracy in film, but instead to the film's moral message about law's own accountability for the social order it generates. The film's climax neither concerns the details of the crime nor even the idiosyncrasies of the boys' personalities. Instead, the trial is devoted to the hypocrisy and cruelty of the death penalty in a legal system that proclaims, "Thou shalt not kill." The final scenes in court, in which the defense attorney argues directly to the camera (supposedly to the judge, but also to the film audience), extends the viewer's critique of discursive strategies to the legal system. Orson Welles playing Jonathan Wilk as Clarence Darrow says, "We're told it was a cold blooded killing because they planned and schemed, and yet here are officers of the state who have planned and schemed to take these boys' lives. . . . A hanging would be done, of course, in the name of justice. Justice? Who knows what it is?" However understandable it might be to condemn these two convicted child murderers to death, the film viewer is now armed with an awareness of law's role in crafting stories of condemnation and blame without also holding itself accountable for the results of its merciless punishment. This film poses an age-old puzzle of law's own accountability: is there

such a thing as an ultra-vires act committed by the legal system itself? The defense rhetoric suggests there is: as Arty and Judd must be accountable for the immorality and illegality of their act, so too must the court justify its impulse for eye-for-an-eye punishment. Whatever significance the Leopold-Loeb case had for the film's audience before watching *Compulsion*, the film's narrative and formal features compel scrutiny of the legal system's penchant for vengeance while also condemning the same in the social subjects it disciplines. The viewer of this film—positioned throughout as skeptical of the value of legal investigation, but also as hostile to both defendants—is nonetheless asked to cultivate a historical consciousness sympathetic to both informing the progressive evolution of law.

After watching a feature length film structured around the critique of documentary form and truth-telling mechanisms, a viewer is likely to embrace this call to interpretation, to understand and reinvent the history of crime and punishment. As *Compulsion's* self-conscious form critiques the defendants' alibis, the effectiveness of the legal investigation, and the film's claim to truthfully represent events in the past, it also evokes a critique of the law's interest in singular truths and proportional punishments as the goal of the trial. When the defense attorney looks up at the camera (which looks down from the judge's bench) and concludes his speech by stating that "Mercy is the highest attribute of man," he implores us as judges of the legal system (and of the defendants) to reject the death penalty as an appropriate punishment for any crime. Mercy requires faith, the opposite of truth. To be convinced by him—which we are at the end of the film<sup>102</sup>—means we no longer take for granted the existence of any certain truth about culpability and justice. With this, the law has ceased being a revelatory mechanism and becomes a constitutive and historically contingent process. The film viewer learns that law

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102. Of all the characters in the film, the boys' attorney is the one with which the audience identifies most strongly. His faith and principles motivate and sustain the film's otherwise violent storyline. In arguing so eloquently and against heavy odds for the cruelty and hypocrisy of the death penalty, the film stands for the power of rhetoric to move law, to reshape facts and to save lives. It also stands for the ability of the legal process to accommodate unpopular views. Whether it also makes the Leopold-Loeb case stand for all of this is probably up to the changing experiences of contemporary audiences. What is clear, however, is that the scandal of the Leopold-Loeb trial—the homosexuality of the two boys, their wealth and criminal desires—is overshadowed at the end of this film by the compassion Orson Welles' performance affects in the audience as represented in the judge's decision to forgo the death penalty for life in prison.

is not about the search for a definitive story, but instead that legal truth (what counts as justice) evolves over time. *Compulsion* may be a story of a specific historical event, but it teaches that all historical accounts—even those that form the basis of legal judgment—require narrative choice, symbolic play and faith.

#### V. SWOON

Unlike *Compulsion*, *Swoon* does not begin with an explicit truth claim. There is no voice-over announcer promising a shocking or tell-all film. Instead, *Swoon* makes its truth claim through its explicit documentary features.<sup>103</sup> Shot in black and white and with a handheld camera, *Swoon* looks like a home movie or an amateur documentary film. The handheld camera signals immediate and unmediated footage, suggesting an eyewitness account from someone holding a film camera in the presence of Leopold and Loeb in 1924. The choice of black and white film in the year 1991 makes the film look antique, as if from the 1920s that it references. The film's blurry edges and low-tech monocular focus compound its aged and authentic feeling. If the film were not clearly dated 1991 in the credits and packaging, it would be unclear to an untrained eye that the film was made in the last decade of the twentieth century. Perhaps most importantly for the film's truth claims, the film director, Tom Kalin, does not use pseudonyms for the subjects of his film: Nathan Leopold and Richard Loeb are the film's central figures in name and character. In fact, Kalin goes as far as to have them narrate the story as if reading from diaries. Throughout the film, we hear recitations such as: "March 4, 1923: Dick threw a brick through the Paulson drug store window . . . . May 20, 1924: Nathan bought a chisel and nineteen feet of rope. I'm afraid he'll ruin everything." This first person narration mimics the form of a memoir or an autobiography, each of which have their own conventions and

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103. The packaging and distribution of *Swoon* highlight its documentary qualities. The cover of the 1992 New/Line Home Video version of *Swoon* reads:

Trapped in the dark corners of our unconscious lurks the most shocking murder of this century: the true case of Nathan Leopold and Richard Loeb, young men who horrified the nation when they were convicted for the murder of a 13 year old boy . . . . Acclaimed film artist Tom Kalin has fashioned a darkly fascinating richly impressionistic film noir that transcends history to give life and voice to the figures that history has condemned.

traditions for representing truth.<sup>104</sup> All of these formal features participate in the conventions of documentary filmmaking and create the illusion of authenticity.<sup>105</sup>

Despite these indices of documentary filmmaking, *Swoon* is not a documentary. It may be a chronicle of sorts and an attempt at an explanation of a historic trial, but unlike most documentaries, *Swoon* is difficult to both watch and understand. *Swoon* is not a straightforward representation of past events. To the contrary, its canted shots, fragmented editing and narrative tangents make it feel more like an experimental or avant-garde film.<sup>106</sup> The film opens with a shot of a pale, cloud-swept sky, of women and men performing a play in a field, and then of (what we learn later to be) Nathan and Richard throwing glass bottles at cement walkways. These opening shots are from disparate angles; none are sutured together along anticipated sight-lines. The voices are stilted. The actors seem self-conscious of their performance. And the fast-paced scene of vandalism that introduces the film audience to Nathan and Richard is left unexplained. It neither sets the tone for the pace of the film that follows, nor serves as a kernel for the film's plot. The opening is punctuated by a clandestine ceremony where, in a dimly lit abandoned barn, the two young men exchange commitment rings. As a beginning, it is enigmatic and slightly frustrating. Although one might think that the film is anticipating questions that it will later answer, its avant-garde form forecloses that possibility. *Swoon* may poach some features from the documentary genre such as the genre's central promise of revelation and truth, but it will not fulfill that promise. In the end, the film audience learns more about a legal system that looks unbending and bigoted than it does about the Leopold and Loeb duo who remain shrouded in mystery and intrigue.<sup>107</sup>

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104. Silbey, *Criminal Performances*, *supra* note 81.

105. NICHOLS, REPRESENTING REALITY, *supra* note 64, at 8–31.

106. "Shot in the hauntingly stylish manner of avant-garde advertising, the black-and-white 'Swoon' is a tricky, unpredictable synthesis of the mannered and the real." Janet Maslin, *A New Vision of Leopold and Loeb*, N.Y. TIMES, Mar. 27, 1992, at C8.

107. The focus on the legal system and not the characters may work analytically, but it leaves something missing cinematically. As one film reviewer noted,

In the end, "Swoon" is more successful in taking apart this particular chapter in criminal history than in reassembling it with a clear point of view. The film's most unnerving aspect, aside from its utter fearlessness in tackling this subject, is the pitiless calm with which Mr. Kalin surveys his landscape. Although "Swoon" sounds a

Although the film narrates the premeditated murder of Bobby Franks in excruciating detail, shifting back and forth between Nathan and Richard in the form of first person diary entries, the story is not without glaring gaps in time, space and narrative logic. We hear about the boys' feelings about being Jewish, their dreams of Ancient Egypt, and their concerns about each other. These personal commentaries, while intriguing, are left unconnected to the film's obvious central narrative: the murder for which both boys will stand trial at the film's end. For example, at one point, the film shows Nathan listening to a foreign language tape and reciting the phrase "I am small, my heart is pure" in French, Spanish and German. Then we hear him listing some of Europe's more famous homosexual men: Oscar Wilde, Prince Yulenberg, Marcel Proust, and Frederick the Great. And then later, we hear Nathan say, "April 19, 1924: Best time yet. Dick seemed to enjoy himself." These scattered thoughts leave the viewer with more questions than answers. Do we feel sorry for Nathan, who appears lonely? Do we scoff at his hubris as he compares himself to accomplished men of the past? Do we worry about the boys' relationship as they navigate the delicate terrain of teenage romance and sexual intimacy? What does all of this have to do with the murder of Bobby Franks? The film provides no clear answers. So whereas these specific and personal details make the film feel more "real," they also contribute to the film's confusion, forcing the viewer to focus more on the film's form than its narrative,<sup>108</sup> and on its structure rather than its contents and claims. Canted shots and impressionistic uses of light (as in the beginning with the ring exchange which we see by the glare of light through the barn's floor planks) reinforce the film's construction and its mediating framework, undermining and complicating the truth claims (transparency and clarity) it pledges at the outset.

And yet, despite its obscure narrative and form, *Swoon* shows Nathan Leopold and Richard Loeb kill Bobby Franks. It also shows the two boys sexually active with one another. This is in direct

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resounding protest against the homophobic attitudes that influence Leopold and Loeb's trial, and acknowledges the swift social changes that may have contributed to the kidnapers' behavior, its true attitude toward this duo is finally elusive.

*Id.*

108. Ironically, these details of the boys' daily lives together, which serve to make the film so much more believable, may be the most fictionalized part of the film. I have found no historical accounts that verify this level of detail.



contrast with *Compulsion*, which although promising an exposé, never shows the murder on screen or the boys' intimacy with one another. *Swoon* is thus much more explicit and voyeuristic than *Compulsion*, despite it being much less straightforward in style or narrative structure. Like ogglers at the periphery of an accident site, the film viewer stares at the film screen as it shows the murder of Bobby Franks, the bloody murder weapon, the disposal of the body, and the cover-up.

The transparency of vision does not necessarily translate to clarity of understanding, however. Indeed, it is unclear what this close look at a clandestine relationship between Nathan and Richard tells us. *Swoon* devotes so much of its story to the establishment and justification of the loving and dependent relationship between the two boys, that the story about the murder feels secondary to the story of their intimacy. Indeed, the murder of Bobby Franks is not the focal point of the film. Instead it feels like a culmination—perhaps even a consummation—of the boys' love.<sup>109</sup> Unlike *Compulsion*, most of *Swoon*'s film time is devoted to the planning and commission of the murder, the intensity of which bind the two boys in friendship and commitment. Whereas *Compulsion* concerned the propriety of the law's judgment of the boys' act without a back story to illuminate the boys' motives and mindset, *Swoon*'s premise and fulfillment is in the details of the bargained for relationship between Nathan and Richard.

By focusing on the boys' relationship instead of the murder, *Swoon* questions the dominant story told about Leopold and Loeb (that they were cold-blooded murderers and thrill-seekers). The film replaces the question of the boys' criminality with an investigation into their intimate and devoted relationship. As a story about homoerotic love instead of the more infamous Franks' murder, *Swoon* makes the film viewer aware of the possibility that there are multiple persuasive accounts about the same event in history. Thus, when the film's narrating voice changes near the end of the film from the intimate first person of Leopold and Loeb to more distant third person in the role of legal arbiter, the film viewer has been trained to accept the possibility of multiple story lines and storytellers. For

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109. As Nathan says in the film, "Killing Bobby Franks together would join Richard and me for life." *Swoon*, *supra* note 4.

example, upon finding the murder victim, a radio newscaster announces: "Police go undercover in an attempt to nab the degenerate kidnapper of Bobby Franks." And on the day of the trial, a newscaster reports: "Today [during] the case of angel face Loeb and mastermind Leopold [...] veteran defense attorney Clarence Darrow avoids jury by admitting guilt of clients [...]" Not until this late in the film are Leopold and Loeb described as "masterminds" or "degenerates." Not until the end of the film does the law (against murder and homosexuality) become a third character with a new perspective on Leopold and Loeb. Until this point, the viewer knows the two boys only through the film's portrayal of them, as angry adolescents, as lovers, and as prodigies. And because from the beginning the film divulged so much of their life together and their complex personalities, the film viewer resists the ease with which the media covering the legal trial judges Nathan and Richard. By juxtaposing the film's complex characterization of the two boys with the snap judgments of them by the press and the legal system, the viewer is urged to compare the two frames of reference, and to critique the two stories told on film and rooted in historical fact. Given that the substantial part of the film is devoted to the boys' intimate relationship, the experience of the film's legal judgment, which is overwhelmingly of moral condemnation and legal guilt, feels in large part motivated by homophobia and anti-Semitism, sensibilities that for a 1991 audience are unpalatable and out-of-date.

Given the focus of the film on the boys' relationship and the film's ambivalence toward law as a central ordering mechanism, *Swoon*'s trial scene is understandably anticlimactic. *Swoon*'s trial does not dwell on the facts of case or Clarence Darrow's historic court performance. In *Swoon*, there is no flashy closing argument, no direct address to the viewer. In contrast to *Compulsion*, in *Swoon*, the boys' attorney is neither a focus nor the legal hero.<sup>110</sup> The trial is about the vagaries of the boys' mens rea and not about current death penalty policy. Indeed, *Swoon*'s representation of the law is so uncomplicated as compared to the film's complex representation of the boys' relationship that the film reinforces the lack of sophistication the legal system brings to an understanding of Nathan Leopold and Richard Loeb.

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110. See STAM ET AL., *supra* note 90; *infra* text accompanying note 102.

For example, the trial scene begins with what looks like a shot of an old photograph. The screen is sepia colored, not black, like an aged and faded photograph. And because no one moves for several seconds in the opening trial sequence, the viewer wonders if the film is incorporating actual photographic stills from the 1924 trial. But then an actor crosses the courtroom in the back, and the viewer hears a psychoanalyst explaining the nature of the two young men's sexual relationship. Women are told to leave the courtroom to be shielded from the "inappropriate" discussions. And the viewer hears talk of the boys' basic motive as being "the desire to satisfy unnatural lust." Given the ancient feel of the film during this sequence, the homophobia and gender bias is dismissed as outdated. And when, through its caricatures of psychologists and criminologists, the film ridicules the once held beliefs that "Jewish" noses, wide brows and weak chins are markers of criminal identity, the viewer feels sure that the film is arguing against these stereotypes and not in support of them. Despite the gruesome details of the murder and the boys' deviant relationship, the callous discrimination enacted in the trial scene creates sympathy and tolerance for the boys and undermines the viewer's faith in the legal system.

Neither the trial nor the punishment is the climax of *Swoon*.<sup>111</sup> The trial and the handing down of the sentence lasts for approximately four minutes in a film that it is over an hour and a half long. (Recall that in *Compulsion*, the closing argument of the trial itself was over fifteen minutes of the film.) *Swoon*'s trial merely serves as a bridge connecting the private life of Nathan and Richard (as represented by the first person narration throughout the bulk of the film) with their public reputation (as represented by the third person narration surrounding their trial). The trial's focus is the homophobia that served to explain the boys' anti-social and criminal activities. Despite the scientific and legal rhetoric mobilized by the defense attorney and judge to explain and condemn the boys' behavior, these legal actors are portrayed as executioners who pervert the role of law by conflating homosexuality with criminal

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111. The trial is far from the emotional climax of the film. The film's denouement takes place in jail and unravels quickly like an epilogue. We see James Day kill Richard in prison, hear of Day's acquittal of the murder, and then we see Nathan mourning Richard's death. He returns the ring we saw the two boys exchange in the beginning of the film to Richard, and then he wails like a baby inside his cell. Richard's death leaves Nathan emotionless for the rest of the film and Nathan's high pitched crying leaves the viewer scarred.

deviance. *Swoon*'s viewer is positioned by the film to feel that the law misjudged Leopold and Loeb, not because the murder they committed was justified, but because their intimacy with each other (which the viewer appreciates as genuine) should have been irrelevant to the public judgment of their crime. Without believing that the film is factually comprehensive, *Swoon*'s viewer comes to understand that the legal system unjustly condemned the boys for their homosexuality and perpetuated a cruel intolerance for homoerotic love.

In this way and like *Compulsion*, *Swoon* portrays law not as a machine through which facts go in and truth comes out. The only truth to which *Swoon* seems to subscribe is the possibility that the legal system's verdicts and sentences are at best incomplete and at worst narrow-minded and discriminatory. But then, how do we make sense of the film's documentary features, especially in light of its avant-garde and expressive flourishes? As the first person narration fades into the third person, the viewer is like a court stenographer, relentlessly processing information without contesting it or believing it. Like documentary film, *Swoon* is an argument.<sup>112</sup> It is not an argument about the guilt or innocence of the young Leopold and Loeb because the viewer sees that they are guilty of murder and of criminal malice. The film is nonetheless an argument in favor of the retelling of the history of Nathan Leopold and Richard Loeb as lovers as well as criminals. Because the trial is not the focus of this trial film, the trial serves merely to make this point: the result of legal proceedings may be explained by a lack of context surrounding their crime, which is later forgotten in the wake of rumor and scandal. *Swoon* advocates for the consideration of social and cultural context when judging criminal behavior and criticizes the legal system for shunning both. The film places the legal judgment of Leopold and Loeb in the perspective of contemporary history in order to denounce the legal system's expressed homophobia as bigotry.

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112. I have elsewhere made the point that all documentary film is argumentative and assertive. See Silbey, *Judges As Film Critics*, *supra* note 5, at 498 & n.22, 499 & n.25 (proposing that filmic evidence be treated as assertive proffers subject to cross-examination and critique like other testimonial proffers, and not as illustrative evidence under Fed. R. Evid. 1001); see also Silbey, *Filmmaking in the Precinct House*, *supra* note 6, at 168–171 (arguing that filmed confessions made by police and detectives are like state sponsored documentaries that advocate on behalf of the modern state).

The film also suggests that it is wrong for a legal judgment to define with certainty an individual's identity. Instead of answering the questions planted at its beginning—"why did they do it" and "is this a true story?"—the film tells a complex tale of homophobia, anti-Semitism, fame, genius, and emerging homoerotic desire. The historical consciousness constituted by this film—part voyeur and part witness to law's errant categorization—is critical of legal, filmic, and historical discourses that claim to tell the truth, the whole truth and nothing but the truth.<sup>113</sup>

## VI. CONCLUSION

*Compulsion* and *Swoon* could not be more different in form, focus or for what each says about law and its role in society. But what about what each says about Nathan Leopold and Richard Loeb? What is it a viewer can say he or she knows about the Leopold-Loeb case based on the viewing of these films? Inevitably, these are the questions a viewer should be eager to ask. But, as suggested above, these are the wrong questions. These trial films, already self-conscious in form and content of the undeniable fictiveness of all stories and of law's conspiratorial role in crafting them, begs us, their audience, not to ask what we can say we know about the characters and their history from film. Instead of answering questions and settling disputes as to the truth of the matter (as tell-all films promise and trials as adjudicative processes must), these trial films raise questions about the diverse and controversial role of law in perpetuating certain stories over others. These trial films about true stories are not about revealing a truth—whatever that could be said to be—but instead are about the production of truths through law as

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113. The film's epilogue confirms the film's factual ambiguity and its emphasis instead on metaphor and symbolism to make its point. At the film's conclusion, an unidentified narrator reports that Nathan becomes an X-ray technician in prison and was freed on parole after thirty-three years. While watching what looks like a televised interview with what seems to be an aged Nathan Leopold, the viewer is then told that Nathan moved to San Juan, Puerto Rico, married Gertrude Feldman Garcia and had a child. We are left wondering whether this is actual footage of an interview with Nathan Leopold spliced into an otherwise entirely staged film about the Leopold-Loeb case. The film concludes with the announcement of Nathan Leopold's death on August 30, 1971, in San Juan and then also with the fantastic suggestion that immediately following his death, his eyes were successfully transplanted to a blind woman. I have been able to confirm only that Leopold donated his body to the University of Puerto Rico for research, not that his eyes were successfully transplanted upon his death. See, e.g., Roz Young, Op-Ed., *Leopold, Loeb Made to Pay*, DAYTON DAILY NEWS, Nov. 26, 1994, at 15A.

merely temporary resting places for trial verdicts, constellations in the process we know to be the common law.

The truth tale's cultivated expectation of historical accuracy through its documentary features, when combined with its self-consciously fictive form, produces a film viewer and a legal subject who is critical of law's promise of individual and equal justice. This viewer is made aware of historical and cultural contingencies that limit law's application. As time passes and stories accumulate about the same case, the legal verdict loses its significance and status as the "final word" on the matter at issue. The film viewer of multiple versions of the same story accounts for the possibility that law is not a teleological system (its goal being the uncovering of the truth each side is fighting over) but a pragmatic process, a process which is motivated by contemporary and often contradictory circumstances that change over time. Although these truth tales initially cultivate a desire for exposure and discovery based on the ideological correlation in film and law between truth and perception, the self-conscious form of the film and the law as portrayed through each truth tale enables the viewer to critique the desire for certainty and truth. As viewers of truth tales, we can say we know only what the film tells us and that the law can do no better. While we appreciate the law's requirement for static verdicts at specific moments, truth tales help us understand the renewed significance of legal verdicts through time.

