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Persuasive Visions: Film and Memory

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Abstract

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

Keywords

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

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

1. Gerald Mast and Bruce Kavin, *The Movies: A Short History* (New York: Macmillan, 1996), p. 22.
2. Mast and Kavin, p. 22.

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With the Lumiere brothers' success and the development of these "actuality films," film's capacity to represent lived experience with unparalleled veracity became part of its pleasurable thrill.³ The film genres that followed – early narrative film, documentaries and pseudo-documentaries, film noir, and Classical Hollywood – would build on film's essential mimetic qualities to tell compelling stories and to constitute a rich and energized popular culture of moving images.⁴

The "myth of total cinema," as Andre Bazin called it, was that film appears to reproduce reality in front of a viewers' eyes.⁵ Film makes spectators feel as though they are witnessing the event or object as it existed when filmed.

The guiding myth, then, inspiring the invention of cinema, is the accomplishment of that which dominated in a more or less vague fashion all the techniques of the mechanical reproduction of reality in the nineteenth century, from photography to the phonograph, namely an integral realism, a recreation of the world in its own image, an image unburdened by the freedom of interpretation of the artists or the irreversibility of time.⁶

It is, of course, not true that film alone most closely represents reality. Realist painting, documentary photography, theatrical drama, and the nineteenth century novel were all aesthetic forms that, at the time, drew popular fascination and awe for their mimesis.⁷ Sometimes, still, controversies arise when customary expectations for truth in representation are frustrated: when journalistic photographs are doctored and novels purporting to be memoirs are later discovered to be fictionalized.⁸ We are generally tolerant of ambiguity in representational forms, however, even those making referential claims, such as film and written histories.⁹ Debates circulate in mainstream press and scholarship about the interpretation of historic documents and the veracity of documentary films.¹⁰ But when it comes to law and the adversarial courtroom trial in particular – the trial being

3. Jessica Silbey, "Filmmaking in the Precinct House and the Genre of Documentary Film," *Columbia Journal of Law and the Arts*, Vol. 29 (2005), p. 143.
4. Jessica Silbey, "Patterns of Courtroom Justice," *Journal of Law & Society*, Vol. 28 (2001), pp. 97–116; Jessica Silbey, "A History of Representations of Justice: Coincident Preoccupations of Law and Film," in A. Masson and K. O'Connor eds., *Representations of Justice* (Brussels: Peter Lang, 2007), pp. 131–54.
5. Andre Bazin, *What is Cinema?* (Hugh Gray ed. & trans., University of California Press, 2005), p. 17.
6. Bazin, *What is Cinema?*, p. 17.
7. E. H. Gombrich, *Art and Illusion: A Study in the Psychology of Pictorial Representation* (Princeton, NJ: Princeton University Press, 1969).
8. Jessica Silbey, "Criminal Performances: Film, Autobiography, and Confession," *New Mexico Law Review*, Vol. 37 (2007), pp. 189–90; Jessica Silbey, "Evidence Verité and the Law of Film," *Cardozo Law Review*, Vol. 31 (2010), pp. 1267–8.
9. Silbey, "Criminal Performances," p. 211; Silbey, "Filmmaking in the Precincthouse," p. 109.
10. Philip Gourevitch and Errol Morris, "Exposure," *The New Yorker*, March 24, 2008, pp. 44–55. Louis Menand, "Nanook and Me: Fahrenheit 9/11 and the Documentary Tradition," *The New Yorker*, August 9 & 16, 2004, pp. 91–6. For a recent and award-winning revision of American history based on a wealth of documentation, see Annette Gordon-Reed, *The Hemingses of Monticello: An American Family* (New York: W.W. Norton & Company, 2008).

the quintessential truth-telling mechanism of our modern society – film stands alone as communicative medium that *in the law* remains naively unquestioned for its strategic storytelling and representational ambiguities.¹¹

I have written elsewhere how the American trial and the art of cinema share certain epistemological tendencies.¹² Both stake claims to an authoritative form of knowledge based on the indubitable quality of observable phenomena and both are preoccupied (sometimes to the point of self-defeat) with sustaining the authority that underlies the knowledge they produce through visual perception.¹³ The American trial and art of cinema also increasingly share cultural space. Although the trial film (otherwise known as the courtroom drama¹⁴) is as old as the medium of film,¹⁵ the recent spate of popular trial films, be they fictional such as *Runaway Jury* or documentary such as *Capturing the Friedmans*, suggests more than a trend.¹⁶ It suggests an inherent affinity between law and film.¹⁷

The affinity of law and film lies in their mutual manufacture of truth through strategies of representation and storytelling and also in the power of these truth claims to structure and regulate social relations. Film, no less than law, changes our perceptions of reality; it shapes our understanding of the world. The power of both film and law derives at first from the intensity of the personal faith in believing what we see (bearing witness and judging based on the act of witnessing). Also, both film and law bolster their authority with a common storytelling feature that reflects on the limits of their authoritative endeavor.¹⁸ Early film masters taught that film in large part constructs a world and

11. Jessica Silbey, "Cross-Examining Film," *University of Maryland Journal of Race, Religion, Gender & Class*, Vol. 8 (2008), pp. 17–46; Jessica Silbey, "Judges as Film Critics: New Approaches to Filmic Evidence," *University of Michigan Journal of Law Reform*, Vol. 37 (2004), pp. 493–569.

12. Silbey, "A History of Representations of Justice: Coincident Preoccupations of Law and Film," pp. 131–3.

13. Id.

14. Silbey, "Patterns of Courtroom Justice," p. 97.

15. Silbey, "A History of Representations of Justice: Coincident Preoccupations of Law and Film," p. 140 (describing the first trial film as *Falsely Accused* from 1907, only twelve years after the birth of film).

16. Just by way of example of the trend, consider the following trial films: *A Time to Kill* (Dir. Joel Schumacher, 1996), *Sleepers* (Dir. Barry Levinson, 1996), *Midnight in the Garden of Good and Evil* (Dir. Clint Eastwood, 1997), *A Civil Action* (Dir. Steven Zaillin, 1998), *Erin Brockovich* (Dir. Steven Soderbergh, 2000), *Returned to Innocence* (Dir. Rocky Costanzo, 2001), *Murder on a Sunday Morning* (Dir. Jean-Xavier de Lestrade, 2001), *Legally Blonde* (Dir. Robert Luketic, 2001), *Snap Decision* (Dir. Alan Metzger, 2001), *Chicago* (Dir. Rob Marshall, 2002), *Intolerable Cruelty* (Dir. Joel Coen, 2003), *Aileen: Life and Death of a Serial Killer* (Dir. Nick Broomfield, 2003), *The Life of David Gale* (Dir. Alan Parker, 2003), *The Staircase* (Dir. Jean-Xavier de Lestrade, 2004), *North Country* (Dir. Niki Caro, 2005), *The Exorcism of Emily Rose* (Dir. Scott Derrickson, 2005).

17. Silbey, "Filmmaking in the Precinct House," p. 143.

18. Id.

experience by *exposing* its story-telling mechanisms that play on the hermeneutics of sight.¹⁹ In this way, the power and influence of film derives from its self-reflexive, often self-critical, qualities.²⁰ By exposing the ways in which cinema is just another form of storytelling, film's self-critique is experienced as empowering the audience to be better judges of visual stories, to stand apart from the film and question the images it projects. Presented with the singular story on film, but also with the critical perspective to evaluate its delivery, the audience experiences the film version of the story as self-reflective and therefore uniquely credible.

We recognize this same dynamic in law and its processes regarding the relationship between evidence and judgment. As with film, the trial process is based on the believability of observable phenomena: on seeing, bearing witness and judging. Much like stories told through film, the story that evolves in a courtroom and through the evidentiary process is emboldened with the privileged status of truth because of its basis in observation.²¹ Like film language, legal processes are self-reflexive and recursive in nature. By reflecting on the possibility of multiple and conflicting stories (the essence of the trial) and asking jurors to judge those stories, or by exposing legal judgments to appeal and citing those judgments as precedents, law exposes its own recursive story-telling mechanism and reflects on the difficulty of claiming certain knowledge.²² 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

19. Silbey, "Filmmaking in the Precinct House," pp. 143–4.

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

21. Neal Feigenson and Christina Spiesel, *Law on Display: The Digital Transformation of Legal Persuasion and Judgment* (New York: NYU Press, 2009), pp. 6–17. See also Jennifer Mnookin, "Reproducing a Trial: Evidence and Its Assessment in *Paradise Lost*," in Austin Sarat et al eds., *Law on the Screen* (Stanford, CA: Stanford University Press, 2005), pp. 154–5.

22. Jessica Silbey, "What We Do When We Do Law and Popular Culture," *Journal of Law and Social Inquiry*, Vol. 27 (2002), pp. 156–7 (describing how the "truth" has less to do with criminal legal process than one might think). For the proposition that legal trials are not about finding the truth but about some other good, see Charles Nesson, "The Evidence of the Event? On Judicial Proof and the Acceptability of Verdicts," *Harvard Law Review*, Vol. 98 (1985), pp. 1357–9 (noting that the purpose of adjudication is to produce "acceptable verdicts"); Ronald J. Allen and Brian Leiter, "Naturalized Epistemology and the Law of Evidence," *Virginia Law Review*, Vol. 87 (2001), p. 1500 ("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 dimensions, while others mix veritistic and non-veritistic concerns.").

knowledge it produces (the “knowledge” of guilt or innocence, for example) with the authority of self-critique, such that the trial’s outcome (as with the filmic version) is often perceived as the most persuasive account of “what happened.”

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

The courtroom trial and the trial film nexus goes deeper than the epistemological ties of seeing and knowing and the ontological ties of seeing and believing. The legitimacy of the courtroom trial is in large part based on its visibility and transparency to the public.²³ “It is in this context that the maxim that ‘justice must be seen in order to be done’ becomes relevant. The visibility of justice in a court of law enhances the legitimacy of the act of judgment ... performed.”²⁴ Justice can be “seen” through concrete embodiments of the abstract concepts of fairness, empathy, rationality and openness.²⁵ Recent scholarship on courthouse architecture²⁶ and the popular culture of law (including television and literary analyses)²⁷ complement law and film scholarship that investigates the public manner in which trial law and trial films mutually reinforce each other’s legitimacy in their storytelling. As Feigenson and Spiesel describe, the democratic nature of images today induces a comfortable and intuitive judgment about an image’s meaning, persuading a large audience of its claims, which may be nonetheless misleading. “To the extent that difficult problems of judgment can be pictured – that is, translated into visual descriptions, diagrams, or both – those judgments seem to become more tractable, even effortless.”²⁸ The reliance on and faith in images to influence and render justice grows ever stronger with the digital revolution, which feels even more open and democratic than in any past era.²⁹ With the rule of law spreading throughout the world as the paramount justice-rendering system and images developing as the language that speaks most efficiently to the largest audience, the “co-implication” (to use Alison Young’s phrase) of legal and filmic claims appears inevitable.³⁰

23. Shulamit Almog and Ely Aharonson, “Law as Film: Representing Justice in the Age of Moving Pictures,” *Canadian Journal of Law and Technology*, Vol. 3, No. 1 (2004).

24. *Id.*

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

26. Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy and the Rights of City-States in Democratic Courtrooms* (New Haven, CT: Yale University Press, 2010).

27. Antoine Masson and Kevin O’Connor (editors), *Representations of Justice* (Brussels: Peter Lang Publishing, 2007); Mariana Valverde, *Law and Order: Images, Meanings, Myths* (New Brunswick, NJ: Rutgers University Press, 2006), pp. 91–114; Michael Asimov and Shannon Mader, *Law and Popular Culture* (New York: Peter Lang Publishing, 2004).

28. Neal Feigenson and Christina Spiesel, *Law on Display: The Digital Transformation of Legal Persuasion and Judgment* (New York: NYU Press, 2009), p. 10.

29. *Id.* at 18.

30. Alison Young, *Judging the Image: Art, Value, Law* (New York: Routledge, 2005), p. 10.

One of my on-going projects has been to situate this “co-implication” within various legal postures and film genres – film evidence and documentaries (evidence vérité),³¹ filmed confessions and autobiographical film, popular legal consciousness and fictional films about law.³² Increasingly, film is used as a legal tool to enhance policing and investigations (e.g., surveillance cameras, filmed crime scenes, interrogations).³³ Film is also used as a species of legal advocacy to augment trial tactics (e.g., opening and closing statements),³⁴ settlement conferences, penalty phases and administrative hearings (e.g., victim impact films, clemency videos).³⁵ The interdisciplinary study of law and film connects the understanding of film as a complex visual rhetoric with the practice of law as an authoritative and forceful social ordering mechanism.

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

I. Film and Memory

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

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

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31. Silbey, “Evidence Verité and the Law of Film”; Silbey, “Filmmaking in the Precinct House”; Silbey, “Judges as Film Critics.”
 32. Silbey, “Cross-Examining Film”; Silbey, “Criminal Performances”; Silbey, “Patterns of Courtroom Justice.”
 33. Silbey, “Criminal Performances,” p. 218; Silbey, “Filmmaking in the Precinct House,” pp. 112–24.
 34. See The Visual Persuasion Project at New York Law School, at <http://old.nyls.edu/pages/2734.asp>. See also Regina Austin, “The Next ‘New Wave’: Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy,” *Fordham Intellectual Property Media and Entertainment Law Journal*, Vol. 16 (2006), p. 809. See also University of Pennsylvania Program on Documentary and the Law at <http://www.law.upenn.edu/academics/institutes/documentaries/>.
 35. Austin, “The Next ‘New Wave.’”

celebration today and the future. Memories are also fixed as memorabilia, collections of ticket stubs, photographs, wine corks, baseball cards. Collections of memorabilia are less self-consciously constructed than are public memorials but they are similarly tied to personal and situational identity and experience.³⁶ As we peruse memoirs, memorials and memorabilia, events of the past return to the present in pieces and as partial. The aspects that are fixed become the parts that are remembered. Memories are revisioned and the fixed statue or collection becomes the embodiment of the memory. Thought to preserve the memory in some platonic form (like Hume's idea of memory as a copy of an original experience³⁷) memorials and memorabilia are better understood as refashioning events and people (of the past) for the present and future.³⁸

Film is reconstituted and revised memory. It is easily misunderstood as capturing a past in a way similar to memoirs, memorials or memorabilia. But like these traditional memory forms, film that is made in the past is necessarily of the present. It is a paradoxical living memory that emerges in present time.³⁹ The theoretical literature on the embodiment of memory in objects generally, or photographs specifically, teaches us that "memory does not reside in a photograph ... so much as it is produced by it. The camera image is a technology of memory, a mechanism through which one can construct the past and situate it in the present. Images have the capacity to create, interfere with, and trouble the memories we hold as individuals and as a nation."⁴⁰ This is true of visuality generally – it is how we literally see (we construct it before our eyes).⁴¹ And it is true of moving images (film), which are both reflections of events past and constructions of present understandings and consciousness. Film scholarship describes ways in which film makes meaning by involving its audience⁴² and in so doing constitutes spectators and establishes spectatorship.⁴³ It can also turn an everyday moment

36. Marita Sturken, *Tangled Memories: The Vietnam War, The AIDS Epidemic and the Politics of Remembering* (Berkeley, CA: University of California Press, 1997), pp. 1–17, 19.

37. Kurt Danziger, *Marking the Mind: A History of Memory* (Cambridge: Cambridge University Press, 2008), p. 190.

38. Sturken, *Tangled Memories*, p. 3; Pascal Boyer, "What are Memories For? Functions of Recall in Cognition and Culture," in Pascal Boyer and James V. Wertsch eds., *Memory in Minds and Culture* (Cambridge: Cambridge University Press, 2009), p. 11.

39. Mary Ann Doane, *The Emergence of Cinematic Time: Modernity, Contingency, the Archive* (Cambridge, MA: Harvard University Press, 2002) (in the context of modernity studies, exploring the role of the filmic paradox of temporal continuity in the face of its constitution as fleeting moments and stopped time). See also Sturken, *Tangled Memories*, p. 19.

40. Maria Sturken, *Tangled Memories: The Vietnam War, The AIDS Epidemic, and the Politics of Remembering* (Berkeley, CA: University of California Press, 1997).

41. Donald Hoffman, *Visual Intelligence: How We Create What We See* (New York: W.W. Norton, 1998), pp. 5–9.

42. David Bordwell, *Making Meaning: Inference and Rhetoric in the Interpretation of Cinema* (Cambridge, MA: Harvard University Press, 1989).

43. Miriam Hansen, *Babel & Babylon: Spectatorship in American Silent Film* (Cambridge, MA: Harvard University Press, 1991).

(a “day in the life”) into a historic event (a “trial of the century”).⁴⁴ Film is a memory agent, a representational and relational experience relying on our dominant senses to recall, reconstruct and even implant familiarity and understanding of past stories (whether or not actual, whether or not personally experienced) in its present audience.⁴⁵ Film is such a powerful memory agent that it is common error to mistake the memory of a film with the memory of a lived or reported experience of the past.⁴⁶ Indeed, some scientists posit that viewing moving images may imprint in our brains in ways so similar to lived experience they are easily conflated.

Film genres resemble memory forms in at least these four ways.

Like memorabilia and collectibles, film memory may be unselfconscious and episodic, marking the exact place and time of past details or an event. This kind of film memorabilia – evidence verité (e.g., surveillance and crime scene footage) – lacks context and richer significance. Like memorabilia and collectibles, evidence verité requires a present narration to render it meaningful.

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

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

Finally, film, like memory, can be mythic. Mythic memory is rooted in lived experience but tends to be unstable in meaning and grandiose in its significance. Fictional filmic renderings of law – dramatic courtroom scenes, heroic Hollywood lawyers – are present in formal legal proceedings as memories of past film stories. They are raw cultural material that people bring into a legal situation and that influences their expectations of and hopes for the law.⁴⁷ This mythic memory is law’s popular consciousness.

Briefly in what follows, I discuss these four kinds of film memory in light of specific films and provide a context for understanding their relationship to law and justice. Some

44. Lawrence Douglas, *Trial as documentary: images of Eichman*, in *Law’s Moving Image* (London: Cavendish Publishing Ltd, 2004), pp. 95–105.

45. Thomas Elsaesser and Malte Hagener, *Film Theory: An Introduction Through the Senses* (New York: Routledge, 2010) (building on a diverse range of film theory from Europe and the United States to develop a course in film aesthetics built around most of the senses).

46. Sacchi, D. L. M., et al, “Changing history: doctored photographs affect memory for past public events,” *Applied Cognitive Psychology*, Vol. 21 (2007), pp. 1005–22.

47. Silbey, “Patterns of Courtroom Justice,” pp. 97–8, 116.

film examples will relate directly to law as episodic and indexical memory that requires narration to discern a putative message. Other examples will relate more broadly to law as a cultural domain: semantic and symbolic in form and content, but also in need of interpretation and analysis to connect the cultural memes to a broader message about law in society.

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

II. Film Memory

I Film Memorabilia

Police surveillance footage (of detainment and arrests) is one form of evidence *verité*, film that purports to be unmediated and unselfconscious footage of actual events.⁴⁸ On an evening in March 2003, in Shreveport, Louisiana, one such event was recorded by three separate dash-cameras after a short pursuit by Shreveport Police.⁴⁹ The cameras were mounted on the police cruisers.

The film of the first police car to arrive at the scene shows the police following another car into a parking lot, the suspect crossing the path of the police car, and the police getting out of the car with their guns drawn. Two police officers yell for the suspect (later identified at Marquise Hudspeth) to stop and put his hands up. Hudspeth continues to walk away from the police officers. The police officers continue shouting and, after Hudspeth refuses to follow orders, the police officers shoot him in the back and he falls to the ground. Parts of the films described herein can be seen on-line.⁵⁰

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

48. Silbey, “Judges as Film Critics,” p. 507.

49. *Hudspeth et al v. City of Shreveport et al.*, 270 Fed. Appx. 332; 2008 U.S. App. LEXIS 5829 (Appeal from the United States District Court for the Western District of Louisiana, *Hudspeth v. City of Shreveport*, 2006 U.S. Dist. LEXIS 91053, USDC No. 5:04-CV-587 (W.D. La., Dec. 18, 2006)).

50. Clips from the three films of the scene are available on YouTube here: <http://www.youtube.com/watch?v=YGtNug8gvpk> (last visited April 5, 2011). The film is subtitled by the blog poster and the second film is slowed down to highlight gun fire. I make no claim about the subtitles here or the opinion taken by the poster of these clips. The film clips that I received were from one of the experts in the law suit and were the official films of record. My film clips are the same as the ones posted at the YouTube link above, except for the variation in sound and the subtitles. Anyone interested in a copy of the films in my possession, please email me at jsilbey@suffolk.edu.

like the first film except for two critical differences. When the police officers get out of their cars and follow Hudspeth, the film shows him turn around and wave something metallic at the police officers who are behind him. Hudspeth appears to be holding the metallic object with two hands. Hudspeth then turns around and continues to walk away from the police. When the police officers follow him, the film shows Hudspeth again threaten to raise his fisted hand that is holding an unidentifiable object and wave it in the police officers' direction. It is then that the police officers shoot him in the back and he falls to the ground.

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

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

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

51. This is sometimes called the “silent witness” theory in evidence law. See Silbey, “Judges as Film Critics,” p. 519 and note 115.

52. Silbey, “Cross-Examining Film,” pp. 17–19 (describing U.S. Supreme Court decision based on watching film and “seeing with own eyes” the event in question).

53. Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore, MD: Johns Hopkins University Press, 1987), pp. 9, 24.