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Cross-Examining Film

Jessica Silbey* Suffolk University Law School

The Supreme Court recently rendered a decision based on watching a video - and in so doing fell for a trick that has been seducing moviegoers for more than a century. The court's decision in *Scott v. Harris*¹ holds that a Georgia police officer did not violate a fleeing suspect's Fourth Amendment rights when he caused the suspect's car to crash, rendering the suspect a quadriplegic.² The court's decision relies almost entirely on the filmed version of the high-speed police chase taken from a "dash-cam," a video camera mounted on the dashboard of the pursuing police cruiser.³

This is not the first time the Supreme Court has acted as film critic in determining the scope of constitutional protection (the justices once routinely viewed obscene films to determine whether they conflicted with contemporary community standards).⁴ It may be

^{*} Associate Professor of Law, Suffolk University Law School. Ph.D., J.D. University of Michigan; B.A. Stanford University. Portions of this Article's introduction were first published as an Opinion Editorial in the Baltimore Sun by Jessica Silbey on May 13, 2007. This Article benefitted from the participants of the University of Maryland Symposium on "What Documentary Films Teach Us About the Criminal Justice System," which took place on February 29 and March 1, 2008. Many thanks to Taunya Banks and Michael Pinard for organizing the Symposium. I also am grateful to United States Magistrate Judge Andrew Austin who brought the civil case of *Patric v. Austin* discussed in this Article to my attention, and to my colleague Andy Beckerman-Rodau who is always sending me the latest development regarding the use of film at law. My sincerest appreciation to Dean Alfred Aman of Suffolk University Law School who supported this Article with a generous research grant. And finally, I am indebted to my colleague Professor Michael Avery, who tirelessly and with enthusiasm worked through several drafts of this article with me, adding his significant expertise in civil litigation and evidence.

¹ 127 S. Ct. 1769 (2007).

² Id. at 1773.

³ Id. at 1775.

⁴ Miller v. California, 413 U.S. 15, 24 (1973). See also Jessica Silbey, Judges as Film Critics:

the first time, however, that the Supreme Court has disregarded all other evidence and anointed the film version of the disputed events as the truth. Indeed, the Supreme Court said that in light of the contrary stories told by the opposing parties to the lawsuit, the only story to be believed was that told by the video. It "speak[s] for itself," the Court said, and, for the first time in history, links the moving-picture evidence to its slip opinion on the Supreme Court website.

In *Scott v. Harris*, the court fell into a dangerous and common trap of believing - to the point of enshrining in our law - that film captures reality. As Justice Breyer said in oral argument of the case seemingly flabbergasted by contrary findings below: "I see with my eyes ... what happened, what am I supposed to do?"⁷

The Supreme Court is not the first court to fall prey to the persuasive power of film. It is typical for courts and advocates to naively treat filmic evidence as a transparent window revealing the whole truth, as a presentation of unambiguous reality. Consider the impetus behind the trends in policing, which trends form the factual basis of the *Scott* case. Filming the crime scene, the police stop, an interrogation or a confession is a way to record without bias what happened: what was said, whether the defendant's statements are voluntary, whether the police acted on the basis of probable cause, "who dunnit" and why. The film of the car chase from the perspective of the police cruiser tells the whole

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New Approaches to Filmic Evidence, 37 U. Mich. J. L. Ref. 493 (2004) (describing how judges routinely act as film critics in evaluating filmic evidence) [hereinafter Judges as Film Critics].

⁵ Id. at 1775 n. 5.

⁶ See http://www.supremecourtsus.gov/opinions/video/scott_v_harris.rmvb.

⁷ Tr. Supreme Court Oral Argument at 45. Justice Stevens was the lone dissenter in the 8-1 decision, the only Justice who seemed to understand that the film was not the whole story.

⁸ Judges as Film Critics, supra note __ at 507.

⁹ See Jessica Silbey, Filmmaking in the Precinct House and the Genre of Documentary Film, 29 Colum, J. L& Arts 107, 116 (2005) (describing how film is increasingly being used as a policing tool to monitor police and suspect conduct because it is believed – however wrongly – to provide an objective and unambiguous representation of past events)[hereinafter Filmmaking in the

story, the only story, of how the crash happened and the how the use of force was justified.

But film has a history in art as a constructed medium. 10 It always has a point of view, a frame that includes some images and excludes others. Film is made of artificial light and color. As filmmakers and critics have known since the beginning of cinema, film's appearance of reality is an illusion, an illusion based on conventions of representation – like the conventions of perspective in drawing, or the convention of light and dark in oil painting. 11 These conventions produce images that look like reality but are not reality.

Justice Stevens, the only dissenter in *Scott v. Harris*, demonstrated his understanding of this age-old concept when he took the majority to task for disregarding the lower court's factual findings as based on all the evidence before it, evidence that included much more than the film. Indeed, Justice Stevens did what many astute film critics do: he noted that the film's portrayal of the event is but one version among others. ¹² Only Justice Stevens seemed to understand that whereas film appeared to be mono-ocular, the chase itself – the reality of the event to be adjudicated – was by its nature multi-ocular. And it was the many points of view to the chase (not only the filmic view) that were to be considered by the court when deciding whether to send the case to a jury. 13 Justice Stevens understood that film, no matter its form or genre, is never the whole story and should not replace the search for it in a court of law.

Precinct Housel.

¹⁰ See infra Part II.

¹¹ See supra Part II.

¹² Judges as Film Critics, supra note at 569-70.

¹³ Among other things, Justice Stevens points to the fact that the film obscures the part of the car chase that was on a four-lane highway, not a two-lane highway, which goes to the

What did the petitioner do wrong in failing to convince all but one member of the Court of his view of the facts? How could Mr. Scott have countered the weight of the film and its persuasive power? When faced with prejudicial filmic evidence, how does an advocate undermine the assertive nature of film and its overwhelming appearance of exposure? The advocate must cross-examine the film the way she cross-examines witnesses. Because films are assertive in nature, ¹⁴ an advocate faced with filmic evidence must treat it the way she treats other testimonial evidence, critically and with careful scrutiny. Although Scott v. Harris was decided on summary judgment, the kind of examination this article discusses could take place when debating the merits of a motion to strike evidence submitted as part of the record on summary judgment rather than at trial during cross-examination or during the pre-trial phase concerning motions in limine. This article will set forth certain examination techniques using a piece of filmic evidence from a recent case as an example. By doing so, it aspires to be a teaching tool for other courts and advocates in their treatment and consideration of filmic evidence.

The Article proceeds in three parts. Part I provides historical background on film and describes the wide array of films that are used as evidence. The film history in Part I debunks the three myths about film as evidence: (1) that it is objective and unbiased; ¹⁵ (2) that its meaning is unambiguous and obvious; ¹⁶ and (3) that the film transforms its viewer

dangerousness element of the legal inquiry. He also explains how the film's distance from traffic lights makes it difficult to discern the color of the signals, also relevant to dangerousness. He complains that the court minimizes the significance of the police sirens because the sound recording on the film was low, possibly because of soundproofing in the officer's vehicle.

¹⁴ Judges as Film Critics, supra note __ at 500, 508.

¹⁵ Filmmaking in the Precinct House, supra note at 111, 127; Judges as Film Critics, supra note __ at 508.

¹⁶ Filmmaking in the Precinct House, supra note __ at 111; Judges as Film Critics, 508-509.

into an eyewitness.¹⁷ Part II discusses the case of Jason Patric against the City of Austin, a civil rights lawsuit, at the center of which was a police video of an arrest that Mr. Patric challenged as unlawful. This part describes how both sides to the lawsuit used the police film in their case-in-chief toward contradictory ends, believing the film provided clear answers in their respective favor to questions the lawsuit raised. Drawing on the police film from Part II, Part III will: (1) discuss the pros and cons of using film evidence in the first place; (2) demonstrate through examination techniques how any film always tells more than one story and less than the whole story; and (3) show through various methods of examination how any film when used assertively presents the problem of ambiguity. The Article concludes with a more comprehensive set of questions to ask about film evidence from the point of view of an advocate, judge or fact-finder.

I. Filmic Evidence and Film Form

A. Typologies of Filmic Evidence

Filmic evidence comes in a wide variety of genres.

There is the category of filmic evidence I call "evidence verité," which is filmic evidence that purports to be unmediated and unselfconscious film footage of actual events. Surveillance film is a common form of *evidence verité*. Surveillance film might be film that: is taken by a private investigator; is automated, e.g, ATM machines or toll booths; or originates from a mounted camera on a police car as in *Scott v. Harris*. Surveillance footage is real time, unedited, and unnarrated. Another kind of *evidence verité* is after-the-fact crime footage, such as the film of an interrogation, a criminal

¹⁷ Judges as Film Critics, supra note __ at 519; Filmmaking in the Precinct House, supra note at 124.

¹⁸ Judges as Film Critics, supra note __ at 507.

¹⁹ Id. See id. at 515-520 (discussing two surveillance films).

confession or of a crime scene.²⁰ These films are also in real time but are less serendipitous and more deliberate. The camera is not being used to catch someone in the act of committing a crime but to record evidence the criminal left behind (at the scene) or is in the process of creating (with his confession).²¹ Unlike serendipitous surveillance film, films of a crime scene or interrogations may be narrated, if not throughout the film, at the beginning and the end.

Beyond *evidence verité*, there are other types of filmic evidence that are more obviously staged and scripted, such as day-in-the-life films and videotaped expert reenactments. ²² These kinds of films differ in important ways from *evidence verité*. For example, they are likely to be rehearsed, produce outtakes and utilize special camera lenses and filters in order to control the interpretation of the images on film. ²³ These films are also self-conscious performances and made with a trial in mind, most often after a law suit has been filed. ²⁴ They are quite clearly advocacy and testimonial, and yet their filmic nature seems to disarm the opponent, undermining the power of cross-examination that is so critical to our adjudicative process. With technology changing at the rate it is, the forms of filmic evidence are rapidly expanding. For example, diagnostic imaging devices that purport to illustrate at a desirable level of scientific exactitude various types of motion or objects inside the body are now debated as evidence in the courtroom. ²⁵ These

²⁰ Id. at 509-515 (discussing two after-the-fact crime films). See also Jessica Silbey, Criminal Performances: Film, Autobiography and Confession, 37 New Mex. L. R. 189, 218-240 (2007) (discussing various criminal confessions as *evidence verité*).

²¹ Jessica Silbey, Criminal Performances: Film, Autobiography and Confession, 37 New Mex. L. R. 189, 194-197 (2007) (critiquing the use of filmed confessions as evidence of voluntariness or truthfulness or to dissuade police from using coercive interrogation tactics).

²² Judges as Film Critics, supra note __ at 520-22.

²³ Id. at 520.

²⁴ Id.

²⁵ See, e.g., Neal Feigenson, Brain Imaging and Courtroom Evidence: On the Admissibility and Persuasiveness of fMRI, International Journal of Law in Context, 2 (2006) 233-255.

devices include MRI (magnetic resonance imaging), fFMRI (functional magnetic resonance imaging technology), CATscans (computed axial tomography) and PETscans (positron emission tomography). Digital film itself is proliferating throughout our culture as almost everyone carries a camera of some kind, whether in their phone, lap top or daily planner. ²⁶ This makes the likelihood of filmic evidence ever more so. ²⁷

It is challenging to apply the rules of evidence to these varied and growing genres of film. Where new kinds of evidence are being created, new rules of evidence or new applications of old rules should be considered. So far, however, courts and advocates are stuck trying to fit these new film forms into old evidence categories, analogizing film to demonstratives (such as chalks or illustrations) or treating film as substantive evidence but without sophisticated analysis for their probative value or prejudice. Frequently courts and advocates muddle the evaluation of film as evidence and reinforce troublesome myths about film and its relationship to reality and truth. These are myths that filmmakers and film historians have long discredited: (1) that film is objective and

²⁶ Once one starts looking for examples of serendipitous film footage, they are everywhere. A simple YouTube search turns up hundreds of police videos. For example, the film at the center of the case of Nathanial Jones against the City of Cincinnati (*Jones v. City of Cincinnati*, 521 F.3d 555 (6th Cir. 2008)) is on YouTube at http://www.youtube.com/watch?v=o3-MrFOLXFs. See also "Investigation into the Death of Victoria Snelgrove" (discussing the investigation of the death of Boston Red Sox fan from rubber pellets shot by police officer) at http://www.mass.gov/dasuffolk/docs/091205a.html.

²⁷ There is a now a field called digital forensics – devoted to the determination of whether and how digital photographs and films (among other types of digital media) have been altered. See, e.g., http://www.digital-evidence.org/di_basics.html. See also Claudia Dreifus, "A Conversation With Hany Farid: Proving that Seeing Shouldn't Always be Believing," New York Times, October 2, 2007 (describing the digital forensics field within computer science) (http://www.nytimes.com/2007/10/02/science/02conv.html); Susan Llewelyn Leach, "Seeing is No Longer Believing," The Christian Science Monitor, February 2, 2005 http://www.csmonitor.com/2005/0202/p15s02-lire.html).

²⁸ See e.g. Jennifer Mnookin, The Image of Truth: Photographic Evidence and the Power of Analogy, 10 Yale J. L. & Human. 1, 65 (1998) (as of the early 1990s, photography "hovered uncomfortably on the boundary between illustration and proof").

unbiased;²⁹ (2) that film's meaning is unambiguous and obvious;³⁰ and (3) that film transforms its viewer into an eyewitness.³¹

Filmic evidence may be offered as demonstrative evidence to illustrate some verbal testimony. ³² The category of demonstrative evidence "is premised upon the theory that it is easier and much more effective simply to show the jurors what is being described, rather than to waste time and to risk possible confusion by relying solely upon oral testimony." Common examples are diagrams and chalks, but photographs and films may be used as demonstrative evidence as well.³⁴.

Filmic evidence may also be admitted as substantive evidence, evidence that by itself tends to prove or disprove a fact at issue.³⁵ This makes sense given that film asserts through its representation of events, places and people the existence or nonexistence of certain facts. Film is particularly persuasive in its assertions because of its apparent indexical relationship to reality. We watch film and trust that it is capturing an event, person or place as it was filmed. Indeed, to admit film into evidence, the process by which it was made must be authenticated and it must be offered through a witness who

²⁹ Filmmaking in the Precinct House, supra note __ at 111, 127; Judges as Film Critics, supra note __ at 508. In their excellent treatise on evidence, Mueller and Kirkpatrick call attention to the fact that all photographic evidence creates a risk of prejudice because images may be "gruesome, inflammatory, or otherwise unfairly prejudicial," and caution that modern technology makes it possible to "manipulate, distort, and fabricate all forms of photographic imagery." Christopher B. Mueller and Laird C. Kirkpatrick, *Evidence*, 3d Ed. § 9.14, 1021 (Aspen 2003). They do not, however, discuss the limitations described in this article, which are inherent in the use of film and video as evidence, even where it is not inflammatory and has not been intentionally manipulated to create a distortion.

³⁰ Filmmaking in the Precinct House, supra note __ at 111; Judges as Film Critics, 508-509.

³¹ Judges as Film Critics, supra note __ at 519; Filmmaking in the Precinct House, supra note __ at 124.

³² Black's Law Dictionary 432 (6th ed. 1990).

³³ Id. at 503 (quoting Melvin Belli, Demonstrative Evidence: Seeing is Believing, 16 Trial 70 (July 1980)).

³⁴ Cite MUELLER TREATISE?

 $^{^{35}}$ Fed. R. Evid. 401. See also Black's Law Dictionary 1429 (6th ed. 1990) (defining substantive evidence as that which is "adduced for the purpose of proving a fact at issue").

can testify that the film is a fair and accurate portrayal of the thing it purports to represent. ³⁶There is a technical distinction between demonstrative evidence and substantive evidence. The former is usually not actually admitted into evidence and does not go into the jury room during deliberations. ³⁷ Substantive evidence is formally admitted and ordinarily is available to the jury during deliberations. The trial judge may instruct the jury that demonstrative evidence is merely an aid to understanding the oral testimony in connection with which it was shown, but is not itself the evidence in the case, whereas film admitted as substantive evidence may be considered with all other evidence as proof of the existence or non-existence of relevant facts. One may wonder, of course, whether jurors understand or pay any attention to such instructions. But as a practical matter whether film is shown merely as a demonstrative aid or as substantive evidence, it can be expected to have a powerful impact on jurors.

Treating film as substantive evidence would not be troubling – assertive proffers being routinely tested for their accuracy and bias through cross-examination – but for the fact that most courts and advocates appear to believe what they see on film, or at least their version of what they see on film, as perfectly clear (unambiguous as to its meaning)³⁸ and unbiased (the film doesn't lie or have prejudices)³⁹ making any further examination unnecessary. *Scott v. Harris* is a case in point. Eight of the nine Supreme Court judges determined that the police video showed unambiguously and objectively the

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³⁶ Federal Rule of Evidence 901.

³⁷ Robert D. Brain & Daniel J. Broderick, The Derivative Relevance of Demonstrative Evidence: Charting its Proper Evidentiary Status, 25 U.C. Davis L. Rev. 957, n.7 (1992).

³⁸ Filmmaking in the Precinct House, supra note __ at 111. Judges as Film Critics, supra note __ at 516.

³⁹ Filmmaking in the Precinct House, supra note __ at 111; Judges as Film Critics, supra note __ at 508.

absence of unreasonable force, despite plenty of substantive evidence to the contrary. 40 Indeed, the Court stated the best evidence of the reasonableness of the use of force was the video. The facts of the case were considered "in the light depicted by the videotape," 41 and "summary judgment became appropriate because a rational jury only could accept the singular, unambiguous version of events presented in the video." 42

Film can be so persuasive a tool of proof that some cases and treatises say that film "speaks for itself," which is in fact what the Supreme Court in *Scott v. Harris* appears to have said. This has been called the "silent witness" theory of photographic or filmic evidence. The theory of the film as a "silent witness" is most prevalent when the camera is automatic (ATMs cameras or other optimally-placed surveillance cameras). Here, the film is considered so obvious a representation and unimpeachable in its trustworthiness that the film appears to transform the viewer into an eyewitness to the event the film captures. This enables the judge or fact finder to feel as if they are seeing with their own eyes the events to be adjudicated and are therefore free to draw their own judgments from the film without influence of other witnesses or evidence. 44

⁴⁰ Scott v. Harris, 127 S.Ct. 1769, 1781-82 (2007) (Stevens, J. dissenting).

⁴¹ Scott v. Harris, 127 S.Ct. at 1776.

⁴² For an excellent and concise essay on the failings of Scott v. Harris and its application of the standard at summary judgment, see Howard Wasserman, Video Evidence and Summary Judgment: The Procedure of Scott v. Harris, Judicature, Vol. 91, No. 4 at 181 (January-February 2008).

⁴³ See Judges as Film Critics, supra note __ at 541 and accompanying notes. See also 3 Wigmore, Evidence § 790 at 220 n.4 (Chadbourn, rev. 1970). See also Scott v. Harrs, 127 S. Ct. 1769, 1775 n. 5 (2007) (discussing video speaking for itself); State v. Pulphus, 465 A.2d 153 (R.I. 1983) (discussing photography speaking for itself).

⁴⁴ Judges as Film Critics, supra note __ at 519. See also supra **note 7** (**Justice Breyer's statement during oral argument.**). See also Claire Duffett, Law Technology News, February 28, 2008 "The Double Edge of Digital Video" at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1204113035617 (describing video exhibits as "almost mak[ing] [the jury] a witness to what takes place").

As the below history and analysis will show, filmic evidence is not unambiguous. It is by nature multiple in significance and meaning. Film images are not unbiased but represent one point of view and not others. And the viewer of a film is not an eyewitness to the event it represents. The viewer is watching a film, which is a particular representation of only one portion of the event in question. The film's assertive message (the story it tells) should therefore be evaluated and tested. Indeed, as the below discussion at Part II will demonstrate, film's assertive character presents the same kind of testimonial risks that traditional hearsay objections attempt to minimize, risks of perception, ambiguity and sincerity. For these reasons, film should be cross-examined as a percipient witness for its truth and accuracy claims. This seems especially important in light of the film's persuasiveness and power as evidence.

B. A Critical History of Film Form

In contrast to the view of film as objective, unambiguous and as way to witness an event, the history of film and of filmmaking demonstrate how film is an art form that reconstitutes experience through the play of light and dark and therefore requires critical interpretation to understand and evaluate.

1. Illusory Witnessing

From the beginning of film history, film has been understood as phantasmic and rhetorical. Its apparent capacity to reveal the world is understood as an illusion and its

⁴⁵ <u>FED.R.EVID. 801</u> Advisory Committee's Note ("The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Sometimes a fourth is added, sincerity.")

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objective, transparent quality part of its persuasive power, what has been called the "myth of total cinema." ⁴⁶

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 artist or the irreversibility of time.⁴⁷

The "myth of total cinema" is that film reproduces reality in front of one's eyes. Film makes spectators feel as though they are witnessing the event or object in the state of being filmed rather than re-presenting the event or object as something never seen before.

The first film genre played on film's illusion of witnessing. Called "actualities," these short films purported to "document" (as in a "documentary") some lived experience. The first of these films played to a movie theater audience was called *L'arrivee d'un train en gare* (The Arrival of a Train in the Station). It was a film of a train arriving into the station, the camera stationed on the quay such that the train grew larger and larger on screen as it got closer to the station. Upon showing this particular film at the Grand Café in Paris in 1895, the audience is reported to have screamed and ran from the theater, afraid the train was going to run them down. ⁴⁸ Unaccustomed to the illusion of reality in motion that film creates, the audience feared for their lives and never saw the end of the film. Knowing this, the filmmakers of *L'arrivee d'un train en gare*, played with the audience's expectations, expectations which remain part of the movie going experience today: film's mimetic quality of lived experience provides the audience

⁴⁶ Andrew Bazin, What is Cinema? 17 (Hugh Gray trans., 1967).

⁴⁷ *Id*. at 21.

⁴⁸ GERALD MAST & BRUCE KAWIN, THE MOVIES: A SHORT HISTORY 22 (1996).

with the pleasure of playing the role of witness to some event that feels live before them but which is simply projected on screen. The audience's pleasure (both voyeurstic and based on the perceived acquisition of knowledge) persists regardless of whether the event portrayed occurred as the film represents it.⁴⁹

Less than a decade later, Edwin Porter's *The Great Train Robbery* was made.⁵⁰ *The Great Train Robbery* is credited as the first pseudo-documentary depicting the ins and outs of robbing a train.⁵¹ With the popularity of this film came the fears and hopes – unabated today – that film is powerfully explanatory, showing its audience the truth about a slice of life. Many pseudo-documentaries would follow, including Flaherty's *Nanook of the North*,⁵² Dziga Vertov's newsreel montages, and Leni Riefenstahl's *Triumph of the Will*.⁵³ Some categorize the films of Michael Moore and Errol Morris in this manner too.⁵⁴ The point is not that there is such a thing as a real documentary and a pseudo one.

The point is that all film is a form of rhetoric that aims to persuade. All film is fiction – shaped, feigned, made⁵⁵ – and therefore its relation to reality should be interrogated, especially if the film will be evidence on which a legal judgment is going to be made.

2. Film's Grammar

The Great Train Robbery's other contribution to film form was its editing structure. Porter taught us that by juxtaposing shots of otherwise discontinuous images,

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 $^{^{49}}$ Laura Mulvey, *Visual Pleasure and Narrative Cinema*, in Visual and Other Pleasures (1989).

⁵⁰ The Great Train Robbery (1903) (Edwin Porter, dir.)

⁵¹ Mast & Kawin, supra note __ at 42.

⁵² Nanook of the North (1914) (Robert Flaherty, dir.). See Louis Menand, Nanook and Me: "Fahrenheit 9/11" and the Documentary Tradition, The New Yorker, Aug. 9 & 16 2004, at 90-92 (comparing the origins of documentary with the contemporary resurgence of the genre).

⁵³ Triumph of the Will (1935) (Leni Riefenstahl, dir.)

⁵⁴ Filmmaking in the Precinct House, supra note __ at 109, 111 and accompanying notes.

⁵⁵ Dictionary definition/ latin roots.

the filmmaker creates logic where there was none before. This is called *montage*, a principle exemplified by the famous "Kuleshov experiments," performed on students at the Moscow Film School in the 1920s.⁵⁶ These experiments demonstrated how the meaning of a single shot changes dramatically depending on the images that frame it. In the experiments, Kuleshov juxtaposed the same image of man's face with a bowl of soup, a corpse in a coffin, and a child playing. To the audience viewing the edited film, the same man with the same expression suddenly becomes differently involved in each of these scenes. The experimental audience reported that when the man placed next to the coffin showed deep sorrow. The same man next to the soup looked hungry. When next to the child, he is perceived as joyful.⁵⁷ The same film image of the man means different things depending on its relation to the shot before and after it. "Editing alone had created the scenes, their emotional content and meaning..."58 This established one of the most important tenets of film editing: the human tendency to create relationships and imagine connections between otherwise totally unrelated scenes. In other words, audiences create narrative meaning where none existed before.

Other than montage, film makes meaning by manipulating the camera's perspective (angles) and breadth of view (wide shots and focus). D.W. Griffith, the initial master of this kind of film language, was the engineer of the close-up, deep focus, the long shot, pan shot and traveling shot. ⁵⁹ "Griffith had learned ... [that] films were capable of mirroring not only physical activities but mental processes. Films could recreate the activities of the mind: the focusing of attention on one object or another (by

⁵⁶ Mast & Kawin, supra note __ at 176.

⁵⁷ Mast & Kawin, supra note __ at176.

⁵⁸ Id.

⁵⁹ Id. at 57.

means of a close up), the recalling of memories or projecting of imaginings (by means of a flashback or forward), the division of interest (by means of the cross-cut)."⁶⁰ By having the camera's movement mimic the mind's eye, Griffith's technique is especially effective in blurring the camera's recreation of some event in the past with the audience's perception of unmediated witnessing some event in the present.

3. Film Bias

All films have a point of view or voice (be it conscious or mechanical). There is always a filmmaker or a camera whose perspective—and not others—is being captured on film.

"The documentarist, like any communicator in any medium, makes endless choices. He . . . selects topics, people, vistas, angles, lens, juxtapositions, sounds, words. Each selection is an expression of his point of view, whether he is aware of it or not, whether he acknowledges it or not."

The stakes in shaping that voice are particularly high especially with regards to documentary films or *evidence verité*. The inevitability of a bias (a specific perspective that excludes others) provokes significant epistemological uncertainties. One is 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. They are by necessity partial. Otherwise said, no story, not even a non-fiction story (be it documentary film or a form of *evidence verité*) tells the whole truth. Another is to enable (perhaps even encourage) a judgment by the film audience about the authority of the film voice (whether it be an implicit or explicit narrator).

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⁶⁰ Id. at 54.

⁶¹ See Bruzzi, *supra* note 86, at 4 (quoting Eric Barnouw).

The development of narrative point of view in film was a significant step in film history toward popularizing the art form and adding to its perception of realism. The development of first person narrative film in the 1920s – the embodiment of a single subject whose thought, direction and desire motivate the film – capitalized on film's capacity for intimacy and revelation by blurring the "boundary between subjective and objective perceptions."62 The first person narrative helped perpetuate the sense of singularity and wholeness in the viewing audience, the sense that they were seeing with their own eyes the events on screen as if live before them. On the other hand, however, knowing and seeing, from that singular perspective, was problematized as based on who does the telling and to whose view the audience is privy. So, for example, *The Cabinet of* Doctor Caligari of 1919 is exemplary of the early first-person narrative films in which the film audience thinks it's being told a tragic but true story by the main character, who turns out, in the end, to be telling a deluded and paranoid fable from inside a mental institution. The omniscient first-person narrative film style flourished – it is the basis of Classical Hollywood film style – because it perpetuated the fantasy of the unique and centered subject who legitimates or vouches for the film's meaning. But from its beginning as a genre, the first person narrative art already questioned film's false sense of omniscience and transparency. This first-person narrative style has become so ubiquitous that its irony is lost on most audiences – the irony being that the film makes or designates it audience as centered and all knowing when it is really the other way around. Film constitutes and influences a world view to which the audience is subject.

4. Film's Self-Critique

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⁶² MAST & KAWIN, *supra* note ___, at 136.

Being critical of the filmic representation – recognizing film as representation and artful – was also a hallmark of early film. Early films would draw attention to their constructed nature by either making manifest its filmic qualities or breaking with its illusion by drawing the audience into the making of the meaning of film's story. George Melies' The Magic Lantern, made in 1903, is one such film. It is often cited as the first film of a film, telling the history of Western dramatic art, showing first a landscape painting, then a play, and then an image of the newly developed moving pictures. By placing film in the trajectory of Western representational art, Melies' film explains that film art is no more or less faithful to its subject than painting. To recognize that the film's story is just one representational scheme among others is to acknowledge one's complicity in the perpetuation of the illusion of film's omniscience. It became a common practice in early films to tell stories about telling stories through pictures. Although now a ubiquitous and varied featured of cinema – think of films like Adaptation, 63 or Hitchcock's classic *Rear Window*⁶⁴ – film's early self-reflexive tendencies were considered another way of commenting on its illusionism, of providing a mode of resistance to the "myth of total cinema." 65

This resistance is all but lost in the reception and treatment of filmic evidence. Despite our "surveillance society" which aims to tell us more about the world by witnessing its goings-on twenty-four hours a day and seven days a week, film is not a mechanism for witnessing. The perception of film's capacity to wholly and truthfully reveal the world is one of its myths and "an idealistic phenomenon ... as if in some

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⁶³ Adaptation (Dir. Spike Jonze, 2002).

⁶⁴ Rear Window (Dir. Alfred Hitchcock, 1954); Robert Stam & Roberta Pearson, *Hitchcock's Rear Window: Reflexivity and the Critique of Voyeurism, in* Enclitic 7 (1): 136-145; *see also* ROBERT STAM, REFLEXIVITY IN FILM AND LITERATURE: FROM DON QUIXOTE TO JEAN-LUC GODARD (1985).

⁶⁵ BAZIN, *supra* note _____, at 17.

platonic heaven."⁶⁶ Film no more reveals the world than it reconstructs it. Film, like any representational form, must be interpreted and its specific language, its ways of making meaning, accounted for. Given the explosion of the varies and uses of film as evidence, it is imperative that contemporary audiences of *evidence verité* learn to analyze and critique film as a craft that must be interpreted, rather than as a window onto some unambiguous and objective truth.

The aim of the rest of his article is to help lawyers transform the viewer's experience of film from one where the viewer feels sure that she knows what she is seeing (the ideology of "seeing with my own eyes") to the experience of "the more I watch, the less sure I am of what I see." Affecting this transformation would go a long way to debunking the myth of film's capacity for objective and unambiguous representation. When faced with filmic evidence that appears to hurt their clients (be it a filmed confession or a day-in-the-life film), lawyers would be better armed to disarm the false perceptions of film's transparency, its moral objectivity, and its capacity to expose the whole truth of the matter.

II. Jason Patric v. City of Austin⁶⁷

While celebrating the wrap of a movie in Austin Texas, Jason Patric was arrested outside a bar for public intoxication. He was then also charged with resisting arrest. Both charges were dropped. During the arrest, Jason Patric suffered physical injuries that he alleges were caused by the police's unlawful use of force. He subsequently filed civil

⁶⁶ BAZIN, *supra* note _____, at 17.

⁶⁷ Jason Patric v. The City of Austin and Officer Joshua Visi, No. A-05-CA-022-AWA. With respect to the difficulties inherent in bringing claims against police officers, see generally, Michael Avery, David Rudovsky and Karen Blum, *Police Misconduct: Law and Litigation*, 3d Ed. (Thomson/West, 2007-2008).

rights claims against the City and the police force alleging, among other things, that the police lacked probable cause to arrest Patric and that they violated Patric's rights to be free from excessive force and from false arrest and imprisonment.⁶⁸

Unbeknownst to the arresting officers, a police camera mounted on a nearby police cruiser recorded the activity prior to the arrest and the arrest itself. The camera was in a fixed position throughout the incident and was not tended or manipulated by any operator. This film was used as evidence (*evidence verité*) by both plaintiff and defendants at trial. It was used by Patric to meet his burden to show that he was unlawfully arrested and abused. It was used by the City to show that the police had probable cause to arrest Patric. The film is part of the public record in the Western District of Texas – it was played during a public trial – and it may be accessed at: http://www.law.suffolk.edu/faculty/directories/faculty.cfm?InstructorID=819.69

Generally speaking, the film shows a man trying to hail a cab from the middle of the street while a group of people congregate on a corner sidewalk. It then shows a police officer on a bicycle approach the man in the crosswalk and more people join the group on the corner. Then, the film shows a tussle at the street corner, which is partially blocked by a parked car and another police officer dropping his bike and running over to the crowd. The film records some talking and shouting that is mostly inaudible. And it also shows a

⁶⁸ See Docket No. 27 (Plaintiff's Second Amended Complaint) at para. 21.

⁶⁹ The relevant portions of the film are very short and begin at time 2:33 on the digital video. Anyone reading this Article who wants to watch the film can therefore do so without having to sit through hours (if not days) of film footage. This would not have been the case had this Article discussed criminal confessions such as those analyzed in *Criminal Performances*, supra note ____. The vast majority of the criminal confessions that I have collected as part of my on-going project on filmed confessions are very long. See Criminal Performances, supra note ____; Filmmaking in the Precinct House, supra note ___. Also, the film used in *Patric v. City of Austin* is in part of the public record in the Western District of Texas. By showing it as part of this project, we are not breaking any confidences. By contrast, in collecting the filmed confessions for prior projects, promises were made to keep the identities of the criminal defendants confidential.

police officer arresting a man in a white shirt and walking him handcuffed to the police car. All of this is difficult to see at first viewing because it takes place in the background of the film and is out of focus. After several viewings, a person can follow the man with the white shirt, who is Jason Patric, as he walks down the side walk (the right side of the film frame) and, watching carefully, can see how he moves into the street in the background to talk to the man hailing the cab, walks out of the street to the street corner, and then is arrested shortly thereafter.⁷⁰

The film was used by both sides at trial as evidence of whether Patric was drunk and belligerent, whether he disobeyed the police when they asked him to get out of the street, whether they told him he was under arrest, and whether they threw him to the ground unnecessarily after allegedly resisting arrest. To the plaintiffs, the film showed Patric unlawfully handled by the police. To the defendants, it showed the police doing their job. The use of this film by both sides at trial is an object lesson in the trouble with filmic evidence. It is a particularly unclear film as regards its focus, angle and sound. But all films give rise to problems of clarity, which translate into problems of interpretation. All films can be rendered ambiguous with proper evaluation as long as the evaluator is considering the categories of film form (discussed supra) that shape film's meaning.⁷¹ This film lends itself to a straightforward critique because it is at the extreme end of the ambiguous spectrum. Nonetheless, the examination techniques discussed below will be useful for all sorts of films. They will hopefully prove especially helpful to cross-examine those stubborn films that appear to be telling only one story when in fact they, like all films, tell more than one story and less than the whole story.

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 $^{^{70}}$ The relevant portion of the film begins at time 2:32:48 $\,$ and ends at approximately 2:35:54. $\,$.

⁷¹ See supra at Part I.B.

A. First things first: Admit or Not?

1. Admit?

As a lawyer faced with filmic evidence that appears to help your case, you must ask preliminarily: do I use the film at all?

As claims against police departments go, Patric had a pretty good case without the film. The sole witness against him was a police officer whose credibility would be impeached by a prior history of lying to his superior officers. Although juries are generally unwilling to rule against a police officer, Patric's lawyer did well at deposition and again at trial by having the police officer explain that police should be held accountable to Patric and the community to uphold the law. In other words, the police officer himself gave the jury permission to find him responsible for Patric's injuries should the jury determine that Patric's arrest was unlawful. Patric also had many witnesses – friends and acquaintances who were at the scene and who would testify to the police's mishandling of the situation. Finally, the case seems to rise and fall on whether the officer actually said "you're under arrest." As the film is silent on that point – the sound is so poor – the film does not help or hurt Patric's case on this point. When presented with this kind of evidence, why show the film at all?

One might expect that a significant problem for Patric at trial would be the jury's impression of his ego. As a Hollywood actor, the jury could perceive him as entitled or cocky. And the film doesn't help him here. It shows Patric sashaying down the street, his shirt open, his cuffs undone. He's hanging on his friends a bit. This is the problem of a film that may be "too complete." It may do some good for Patric – perhaps it tends to

lend credibility to the idea that Patric was not so drunk he was a danger to himself or others – but it also contains images that might do damage to Patric's case. And so, if I were Patric's lawyer, I wouldn't have used the film at all. This goes against instinct, because the film is an enticing tool. But this is part of the challenge with filmic evidence: deciding when to forego its captivating qualities precisely because those captivating qualities might swing against you.

Patric's lawyer fell into this trap. Patric's lawyer used the film on direct to have Patric explain the event in question. In so doing, Patric's lawyer seemed to think he had to ask leading questions of his witness "And is this where you stepped up on the curb?" "Is this where the officer threw you down?" Because the film is not sufficiently clear on these points, Patric's testimony on these crucial issues during direct examination is not persuasive on precisely the points on which the plaintiff has the burden. Here, the use of the film tended to weaken the strength of otherwise good testimonial evidence of Patric's claim – not because the film contradicts the testimony, but because the film is not dispositive one way or another. And because we expect film to be clear, when it isnot we undervalue the other reliable evidence that does tend to prove what we had hoped the film would.

The direct examination of the plaintiff is the centerpiece of most personal injury and constitutional tort cases. It is a unique opportunity for the plaintiff to tell his story in his own words and the best time for the jury to appreciate what the plaintiff was subjected to and felt at each stage of the incident. By avoiding leading questions and maintaining a low profile, the lawyer conducting the direct examination enables the plaintiff to share his experience with the jurors in a direct, unmediated manner. If at all possible, it is

important for the plaintiff to be likable, and for the jurors to feel his humanity. When the plaintiff is a professional actor, the chances of establishing this necessary rapport with jurors should be enhanced. Film, however, can easily overshadow the plaintiff-witness, especially if the plaintiff is the star of the film, as was the case here. Arguably, the playing of the film in the *Patric* case detracted from Patric's presence and capacity as a witness and actor on his behalf. Not admitting the film might have given Patric the chance to better shine as a witness.

Using the film of the incident during the direct examination of Jason Patric made it extremely difficult to achieve the desired results. First, the lawyer conducting the examination could not avoid constantly inserting himself into the telling of the story as he called attention to specific sections of the video. Second, because of the incomplete and ambiguous nature of this film, the struggle to relate Patric's account of the incident to the film was distracting. Patric's lawyer repeatedly attempted to demonstrate that the film corroborated the plaintiff's testimony. As a result, however, the examination was chopped up and lacked the fluency that recounting a powerful and persuasive narrative requires. As a witness, Patric spent too much time trying to explain the film, rather than telling his story.

In a different case, with more explicit film footage, the images might be helpful in augmenting the narrative. One can imagine showing a video of a dramatic incident and then asking the plaintiff a simple non-leading question that would allow him to add something to the film, inflecting it with emotions not apparent on film, for example, "How did you feel while that was happening to you?" For the reasons stated above, however, even with an unusually clear film, it is probably better to leave detailed

explanations of how the film corroborates the plaintiff's story to argument, rather than trying to interweave them with the direct examination of the plaintiff.

2. Or Not

Filmic evidence, like other types of evidence, can be challenged initially on the ground that it is inadmissible, and then if it is admitted, challenged again before the jury with respect to the weight it should be afforded. For example, the opponent may frame objections to admissibility on Federal Rule of Evidence 901, arguing that the film cannot be authenticated as depicting what it purports to show; or under Federal Rule of Evidence 403, arguing that the film's prejudicial aspects may mislead the jury. With regard to Federal Rule of Evidence 901, however, as long as there is a subscribing witness who testifies that the film is a fair and accurate representation of what it purports to show, challenges to admissibility are not likely to be successful under Federal Rule of Evidence 901.⁷² Nonetheless, the opponent may choose at the admissibility stage to raise issues about what "fair and accurate" means in the case of film, especially in light of the partiality and bias inherent in all film. Even if the judge admits the evidence, objections that are well supported will educate the court to weaknesses of the evidence that otherwise may not have been apparent.⁷³ Priming the judge to think critically about the biases inherent in the film might have been helpful to the plaintiff in Scott v. Harris before the judge decided the issue as a matter of law based on the film alone. Moreover, a hearing on a pre-trial motion to exclude the filmic evidence (or a motion to strike from the record on summary judgment) will provide the opponent with the opportunity to

⁷² This tends to be a low hurdle. See **Christopher B. Mueller and Laird C. Kirkpatrick**, *Evidence*, **3d Ed.** § **9.14**, **1020-1021 (Aspen 2003)**.

⁷³ For weaknesses inherent in filmic evidence, see discussion infra Part II.B.

question the subscribing witness and obtain discovery of information about the circumstances under which the film was made. This might provide useful ammunition later in contesting the weight of the filmic evidence before the jury.

B. The Limits of the Film's Frame

If you are going to use the film or you have lost a motion to suppress and you are faced with your opponent's persuasive use of the film, what next? How do you recast the film in terms of its partiality and bias (harness its point of view) or the other stories it might tell (harness its ambiguity)?

Consider first the film's frame: what is visible in the film and what is not due to its beginning and ending and its spatial attributes (its borders, its point of view and its mechanical capacity). Despite film's realistic representational capacity, there is much of the real event that the film does not capture that is nonetheless relevant to the case at hand. Pointing to the limited scope of the film's representation may effectively undermine the film's appearance of completeness. It will also point to the differences between how the film makes sense and how the trial, with all the other evidence, makes sense of the event being adjudicated.

For example, the film of Patric's arrest tells us nothing about whether Patric smelled of alcohol. Smell is probative of the police's lawful behavior, and the film (or any film) would not capture this kind of real evidence. Similarly, the film tells us nothing about how many beers Patric had or whether he stumbled out of the bar or left easily. We can only imagine what went on before we see Patric and his friends trying to hail a cab that may or may not be relevant to the issues in dispute in the case. Indeed, any number of facts that are not caught on film could change how it is interpreted. Challenging

yourself to come up with those facts not in the film to reinterpret what is in the film goes a long way to undermining the story the film appears to be telling.⁷⁴

The film's point of view is not optimal. Mounted on a police car and running automatically (without direction from an officer), relevant portions of the event are blocked by the parked car. The film does not show the curb. And yet, whether Patric was on or off the curb in response to the officer's request is crucial to the plaintiff's case. When watching the film, we strain to see this relevant detail, among others, but the film is uncooperative. No matter how much we look, we won't see past the parked car blocking our view. Recognizing the film's silence on important facts undermines its status as comprehensive and complete.⁷⁵

C. Ambiguity in the Film's Images

In addition to considering what is off-camera or invisible to the camera, a lawyer faced with filmic evidence should evaluate how that which is seen on film is unclear in at least two ways: literally unclear (out of focus) or narratively unclear (ambiguous as to its significance for the stories being disputed at trial).

1. Literally Unclear

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⁷⁴ In the case of a filmed confession, for example, knowing how long a suspect has been held in custody prior to being interrogated and prior to his confession being filmed would influence a determination regarding the voluntariness of his confession. Likewise, although a defendant might appear comfortable in an interrogation room, the film does not reveal the temperature in the room. Sweat or shivers from the defendant could indicate a mental state or simply a response to extreme heat or cold undetectable by the camera.

⁷⁵ For a drastic example of problems with film framing, see the police video documenting the beating and arrest of Nathanial Jones at http://www.youtube.com/watch?v=o3-MrFOLXFs, discussed supra at note ___, where most of the police force takes place off screen although the sound quality is quite good. Where one does not see the reception of pain and only hears the protests of the police and criminal suspect, the appearance of brutality is minimized merely by its visual absence. I am grateful to my student Michael Kaplan for this insight.

Pointing to the film's lack of visual clarity is one of the easiest and most obvious ways to undermine the film's perception of transparency. Most examples of *evidence verité* are bad quality film – out of focus, shot from a distance and of poor sound and color quality. Emphasizing how key moments in the film are actually quite difficult to see or hear will weaken the film's force as evidence.

For example, Patric accused the officers of throwing him to the ground with unreasonable force and slamming his head on the concrete. The film shows someone in a white shirt go down – Patric says that it is him – but the film does not show him hitting the sidewalk. The film shows police rushing to the scene, as if something startling is going on, suggesting it might be violent or require back-up. But from the film, it is impossible to discern how he hit the ground, whether it was accidental or intentional and whether it was done with unreasonable force (or with any force at all). Also, the officers accused Patric of walking away when they allegedly said "You're under arrest." But because the camera is positioned far from the incident and its microphone is weak, the film's sound is poor. We therefore cannot hear whether the officer actually said the words "you're under arrest," a fact on which much of the defense's case rests.

2. Narratively Unclear

Although the film is literally unclear in many places, it does show Patric shaking his arm loose from the officer's grasp and taking a few steps away from the officers.

Indeed, the film buttresses testimony from both the arresting officer and from Patric that Patric shook his arm loose. This is not a disputed fact. What is disputed is the significance of this movement – again, a point the film does not answer. Patric calls his

movements "a reflexive response" to the Officers abruptly grabbing him. ⁷⁶ The Officers call it resisting arrest – pushing the officers away, shrugging them off and walking away – to which they responded with some force to put Patric under their control. ⁷⁷

Here, a fact of the film (Patric's arm movement) is rendered narratively ambiguous because of its competing roles in the differing stories told at trial. One story is about an instinctive response to force and the power of the police. Patric says he took a step away to diffuse the situation, contending that the police picked him out of the crowd as the "alpha dog" (or "leader of the pack") in order to take him down and teach him and his friends not to disobey or disrespect the police. The police tell a different story. They said they heard Patric say "fucking pigs, fucking fascists" as he moved from the crosswalk toward the curb. Again, we don't hear this on the film. But the police claim that Patric's aggressive language lead them to suspect that Patric was out of control. When Patric moves away from the police officer and waves his arm, the police describe this movement as an affirmative push, at which time the officer tries to get a hold of Patrick's arm to put him in a head lock and cuff him.

The "alpha dog," police-humiliation story that the Plaintiff tells is played against the "drunken and out of control crowd" story that the Defendants tell.⁸¹ These are the two dominant narratives spun during the trial. They both rely on the film to ground the stories, to provide illustrations to their tales. But the film itself does not confirm or deny the truth of these narratives. The film does not explain whether the police used

⁷⁶ Trial Transcript, February 14, 2006 at 150.

⁷⁷ Id. at 59, 71.

⁷⁸ Id. at 134-5.

⁷⁹ Id. at 43, 107.

⁸⁰ Id. at 59-61.

⁸¹ Id. at 46-47.

unreasonable force or unlawfully arrested Patric. The significance of the facts shown on film are ambiguous until they are strung together in a story, the story that is provided by the attorneys' advocacy and other testimonial evidence, but importantly not by the film's content. Here we see the difficulty of relying on film as a guaranteed way to get to the one true story. Advocates use the film to put their story in the best possible light, trying to exploit what is perceived to be the film's clarity and objectivity. And yet their battle over the film's determinacy only highlights the relative weakness of each side's story and the indeterminacy of the film. 83

D. Methods of Cross-Examining Film

A lawyer does not literally cross-examine film. A lawyer either examines or cross-examines a witness about the film in evidence. The examination is a "cross-examination" of film because its aim is to destabilize the dominant story the film appears to be telling, either as it appears to speak for itself through its ideological relationship to reality or as it is narrated by the witness on the stand. Below are two methods to conduct this cross-examination that harness the concepts about film form (about framing and

⁸² Hayden White, The Content of the Form, 14, 19-20 (1987) (discussing the moralizing role of narrative on historical or factual discourse).

⁸³ Consider this cautionary tale describing how film footage offered by one party to show consistent commitment to religious beliefs (a church-defendant that protested the a funeral of a gay soldier) was reedited by plaintiff and played for the jury to help prove the plaintiff's claim of intentional infliction of emotional distress. The jury award in the plaintiff's favor totaled nearly \$11 million.

[&]quot;'It was like a Christmas gift,' [plaintiff's attorney] recalls. Because defense submitted the videos, plaintiffs were free to use them to support their arguments. Further, the videos showed the church's actions with inside access an outside party could never replicate. 'I don't care how good of a lawyer you are, you cannot articulate this yourself," [Plaintiff's lawyer] said." See Claire Duffett, Law Technology News, February 28, 2008 "The Double Edge of Digital Video" at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1204113035617.

ambiguity) discussed above. Again, the film at the center of the Patric v. Austin case is used by way of example.

1. Lock in Testimony and Contrast Film

Whereas I doubt that the use of the police film on direct is a good idea given the reasons discussed above, had I been representing Patric, I may have used the film to cross-examine the arresting police officer. Key to the officer's story is that Patric's eyes were glassy, he had been swearing, he was standing in the street contrary to the officer's command, he smelled of alcohol, he resisted arrest and he pushed the police officer with his arm. He film the officer includes all of these facts in his testimony, an attorney writing them on a white board in front of the jury could effectively lock the officer into his factual assertions. Then, upon playing the film to the jury, he could ask the officer to show the jury which parts of the film confirm these elements and therefore his testimony as well. The officer would not be able to do it. None of these things are in the film, visibly or audibly.

This method does not prove the officer a liar (but recall that this officer was disciplined for lying to a superior officer in the past⁸⁵). It does, however, use the film to taint some of the strongest evidence against Patric – the officer's testimonial evidence – by relying on the assumption that the film would tend to reveal those essential facts necessary to adjudicate to a fair and truthful result. It also effectively undermines the clarifying role of film that is more mythical than true by decentering the film as conclusive proof and refocusing the evidentiary search around those proffers that may be more reliable and less prejudicial.

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⁸⁴ Trial Transcript, February 14, 2006 at 43, 50, 52, 56, 59.

⁸⁵ Id. at ____ .

2. Exploit Filmic Fragments

Another method of cross-examining film is to exploit its inherent partiality. For example, had Patric shown the film in its entirety to buttress his case – as evidence that he and his friends were not particularly loud, that they were not blocking the street in any significant way, that Patric appears to respond to the police officer's command to return to the sidewalk – were I representing the City of Austin, I would exploit the film's ambiguity by pointing to its fragmentary nature and its conjuring capacity.

To undermine Patric's story, an attorney could replay certain parts of the film that are particularly unfavorable to Patric. For example, an attorney might replay for the jury the part of the film where one of Patric's friends repeats over and over "He didn't mean it officer. He apologizes, please officer, let him go, he's sorry." Here, the film fragment is significant. Without an explanation from this person (that is, absent the context for this statement), it seems that Patric's friend is confirming that Patric did something he should not have (swore at the officer or resisted arrest). So an attorney might play the film and then ask: "Mr. Patric, can you explain why your friend is apologizing for your behavior?" Or, "Mr. Patric, isn't it true that your friend appears to believe that you did something for which you should be sorry?"

These statements contained in the film are inadmissible hearsay if offered for their truth. As such, they should be redacted (the film spliced) or the sound edited out. But if Patric admitted the film in its entirety in his case in chief, he has presumably waived that objection. His opponent should therefore be free to use those statements in his defense. Doing so effectively exploits the contradictory aspects of film: its inherently fragmentary nature (it is always partial) and its perceived comprehensiveness (it shows the whole

story). The puzzle from Patric's angle is that he presumably seeks to admit the entire film on the premise that admitting it in full avoids the problem of distorting fragments taken out of context. ⁸⁶ But admitting the whole film means that those unfavorable aspects of the film (such as Patric's friend's apologies) are not edited out. ⁸⁷ And given the persuasive power of film, these negative aspects become practically impossible to rebut.

In addition to adding emphasis, a film may conjure memories or recall facts that would not otherwise be recoverable. The City's attorney in this case might have harnessed this film's conjuring capacity by replaying certain film fragments. For example, at a point later in this film when Patric has arrived at the police station for booking and is standing outside the police cruiser, we hear (but do not see) an officer telling Patric to "stop staring me down." At trial, Patric hears the words on the film but says he does not recall the incident. In any event, Patric says at trial, he does not remember staring any police officer down. The statement of the officer is hearsay if offered to prove Patric was staring at him, but is within the present sense impression exception to the hearsay rule, a hearsay exception which is likely to arise frequently when dealing with *evidence verité* of this kind.

By playing this conjuring fragment for the jury, the film acts as a "silent witness," effectively testifying to the truth of an event (Patric's allegedly hostile behavior) that no

⁸⁶ See Fed. R. Evid. 106.

⁸⁷ That is, absent a successful Fed. R. Evid. 105 objection and effective jury instruction.

⁸⁸ Transcript or February 14, 2006 at 157.

⁸⁹ Id

⁹⁰ Fed. R. Evid. 803(1).

⁹¹ Evidence veritéof this nature that records altercations might routinely contain verbal reactions to the event, which would comfortably fit within the present sense impression or the excited utterance exceptions. See Fed. R. Evid. 803(1) and (2).

one can verify. 92 This film fragment conjures an image of Patric facing off with the officer, which lends credibility to the officer's story of Patric's belligerence. Using it on cross-examination of Patric exploits the film's ambiguity to the defendant's benefit by asking Patric to clarify the statement. Despite the statement being unmoored from any human witness, its filmic incarnation, emphasized by the cross-exam question, taints the case against Patric.

These two examples of the use of film fragments should educate attorneys to think twice about admitting a film into evidence in its entirety. To the extent possible counsel may attempt to edit all *evidence verité* with an eye to redacting those portions that may be used against a client in the ways discussed above. ⁹³ An inevitable objection to the edited version will be that the film's unique relationship to the event (its witnessing function) is therefore distorted by attorney advocacy. The benefit of the film is that it captures the event without distortion and without bias. But as the above shows, all film is a distortion of the real event. It is but a slice of that event, necessarily partial and therefore no more immune to critical analysis for prejudice and probative value than any other documentary or testimonial proffer. ⁹⁴ If, however, the whole film is admitted,

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⁹² For a discussion of the silent witness theory, see supra note __ and accompanying text (citing to Judges as Film Critics, supra note __ at 541 and accompanying notes. See also 3 Wigmore, Evidence § 790 at 220 n.4 (Chadbourn, rev. 1970)).

⁹³ It is proper to redact those portions of the film that contain inadmissible material, such as hearsay that does not come within an exception. A party will not be able, however, to delete material simply because it is unfavorable if the opponent insists upon its inclusion. These matters should be addressed prior to trial in a motion in limine so that counsel knows from the outset which portions of the film the jury is going to see.

⁹⁴ Should an attorney be particularly concerned with how a film is edited, discovery might be taken on exactly those portions that were edited and how. This would enable the opposing attorney to reconstruct the film and evaluate how the film was renarrativized and to what extent the renarrativization requires a rejoinder. For a related example of this practice, see Claire Duffett, Law Technology News, February 28, 2008 "The Double Edge of Digital Video" at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1204113035617.

whether over objection or not, the above methods of cross-examination should prove helpful in turning the film's qualities to one's client's advantage.

III. Conclusion

The *evidence verité* in *Patric v. City of Austin* is a particularly easy film to employ as an example of how any film, when used assertively to adjudicate to a truth, presents the problem of ambiguity and partiality. For certain, with this film, the more you watch it, the less you are sure of what you see. This case illustrates the myth of film as the best evidence of "what happened;" it simply is not the best evidence of anything relevant to the issues at trial. Effective examination of the film should shift the focus of the trial to all the other evidence marshaled by the parties, most of which was more probative than the film itself.

One could ask the same questions and apply the same tools to a film that appears much less ambiguous or partial – a filmed criminal confession, the film of the police chase in *Scott v. Harris*, or a surveillance film that looks like a slam dunk for one side (the film at the center of the Rodney King case, for example ⁹⁵). Faced with a film of this kind, a lawyer would ask:

- Should I use the film at all? Does it present the paradox of providing context but also containing prejudicial statements? Is there other evidence that would be as or more persuasive, keeping in mind that film, when analyzed by someone with skill, can be turned around to mean something entirely different.
- O What is and is not in the film that might be relevant? Which facts would make a difference to the interpretation of the film that are absent but that could have been present had the film been framed differently?

⁹⁵ Bill Nichols, Blurred Boundaries: Questions of Meaning in Contemporary Culture 17-42 (1994) (discussing the use of film at the trial of Rodney King).

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- What is unclear in the film, either out of focus or narratively ambiguous?
 How might I put pressure on these points of ambiguity to tell an alternative story to the one told by my adversary?
- Undermine the film's dispositive nature by comparing witness testimony to the film's images.
- Exploit the ambiguity of film fragments and film's conjuring capacity to ask leading questions on cross to give life to these filmic images and sound-bites that might otherwise be overlooked or forgotten.

All of these tools focus on the problems of storytelling and the inevitability of competing narratives that might structure a set of facts. In *Scott v. Harris*, only one justice saw the ambiguity in the film sufficient to decide that the case should have gone to a jury. Who is to say whether a more robust record – based on more active motion practice contesting the bias and meaning of the film as evidence of the chase – would have avoided summary judgment altogether. But it certainly would have primed the fact finders and any appellate court to the more limited evidentiary value of film.

Successfully asking the questions above can be a powerful tool, especially in light of film's dominant story-telling role in our contemporary culture. The value of narrativity is not only its cohering effect in the hands of a skilled attorney, but its inevitable multiplicity. There is always already more than one story to be told. This is by its nature the reason for a trial. Finding the alternative stories that the film tells or could have told will go a long way toward demystifying the overwhelming effect of filmic evidence and toward furthering law's promise of due process and justice.

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⁹⁶ Hayden White, The Value of Narrativity in the Representation of Reality, 7 Critical Inquiry 5,5 (1980).

⁹⁷ Barbara Herrnstein Smith, Narrative Versions, Narrative Theories, 7 Critical Inquiry 213 (1980).