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CROSS-EXAMINING FILM

JESSICA SILBEY*

In the recent Supreme Court case, *Scott v. Harris*,¹ the Court fell for a trick that has seduced moviegoers for more than a century: it treated film as a depiction of reality. The Court held that a Georgia police officer did not violate a fleeing suspect's Fourth Amendment rights when the officer intentionally caused a car crash, rendering the suspect a quadriplegic.² The Court's decision relied almost entirely on the film 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.⁴ The Justices once routinely viewed obscene films to determine whether they conflicted with contemporary community standards.⁵ This may, however, be the first time that the Supreme Court disregarded all other evidence and declared the film version of the disputed events as the unassailable truth. Indeed, the Supreme Court said that, in light of the contrary stories told by the opposing parties in the lawsuit, the only story to be believed was the one the video told: "We are happy to allow the videotape to speak for itself."⁶ And, for the first time in

* 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* on May 13, 2007. This article benefited from the participants of the University of Maryland Symposium, *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 developments regarding the use of film in 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 enthusiastically 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, 1779.

3. *See id.* at 1775.

4. *See generally* Jessica Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 496 (2004) (describing problems and contradictions that occur when judges act as film critics when determining the admissibility and weight of film evidence) [hereinafter *Judges as Film Critics*].

5. *See Miller v. California*, 413 U.S. 15, 18–30 (1973) (discussing the evolution of the standards that the Court employs when reviewing obscenity cases).

6. *Scott*, 127 S. Ct. at 1775 n.5.

history, the Supreme Court linked video evidence to the slip opinion on its website.⁷

In *Scott v. Harris*, the Court fell victim to the widespread and dangerous belief—to the degree of enshrining this belief in our national jurisprudence—that film captures reality. As Justice Breyer stated at oral argument, seemingly flabbergasted by the contrary findings below: “I see with my eyes . . . what happened, what am I supposed to do?”⁸

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 naïvely treat filmic evidence as a transparent window revealing the whole truth—a presentation of unambiguous reality.⁹ Consider the impetus behind the trends in policing which form the factual basis of the *Scott* case, including the practice of filming crime scenes, police stops, interrogations, and confessions. Police use these video recordings to demonstrate what happened free from any questions of bias or misrepresentation: what was said, whether statements were voluntary, whether the police acted on the basis of probable cause, “who dunnit,” and why.¹⁰ From this perspective, the police cruiser’s dash-cam captured the whole story—the only story—of the car chase and the circumstances surrounding the policeman’s use of force.

However, film is a constructed medium.¹¹ The camera always presents a certain point of view and a frame that includes some images and excludes others. Films are depicted in artificial light and color. From the earliest emergence of film technology, filmmakers and critics recognized that the appearance of reality in films is an illusion based upon conventions of representation, much like the convention of perspective in two-dimensional drawings or the conventions of light and dark in oil paintings.¹² These conventions produce images that resemble and represent reality, but are not reality in fact.

7. See *Scott v. Harris*, No. 05-1631, (U.S. Apr. 30, 2007), available at <http://www.supremecourtus.gov/opinions>.

8. Transcript of Oral Argument at 45, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631) [hereinafter Transcript of Oral Argument]. Justice Stevens was the lone dissenter in the 8-1 decision, and the only Justice who recognized that the film was not the whole story. *Scott*, 127 S. Ct. at 1781–85 (Stevens, J., dissenting).

9. See *Judges as Film Critics*, *supra* note 4, at 506.

10. See Jessica Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 116 (2005) (observing that film is increasingly being used as a policing tool to monitor police and suspect interactions because it appears to provide an objective and unambiguous representation of past events) [hereinafter *Filmmaking in the Precinct House*].

11. See *infra* Part II.

12. *Id.*

Justice Stevens, the sole dissenter in *Scott v. Harris*, articulated this concept when he faulted the majority for disregarding the lower court's factual findings that were based on *all* the evidence—more evidence than just the dash-cam video.¹³ Indeed, Justice Stevens did what many astute film critics do: he noted that the film's portrayal of the event was only one possible version of what happened.¹⁴ Justice Stevens recognized that a filmic representation of events is monocular, but the chase itself—and the reality of the event that is at the heart of the adjudicatory proceeding—is, by its nature, multi-ocular. Justice Stevens understood that film, no matter its form or genre, cannot convey the whole story and should not replace the search for that story in a court of law. A court must consider the many points of view on the disputed event when deciding whether there is a material dispute of fact sufficient to justify sending a case to a jury, not just the filmic version of the story.¹⁵

How could Mr. Scott have countered the weight of the film and its persuasive power? How can advocates counter and undermine seemingly infallible filmic evidence? Advocates must cross-examine films the way they cross-examine witnesses. And because films are assertive in nature,¹⁶ advocates should treat films in the same way they treat other testimonial evidence: critically and with careful scrutiny. Although the lower court decided *Scott v. Harris* on summary judgment, the kind of examination this article proposes 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 pretrial in the form of motions *in limine*. This article will set forth examination techniques using a piece of filmic evidence from *Patric v. Austin*¹⁷ as an example. Courts and advocates can use this article as a resource for understanding how to critically assess and evaluate filmic evidence.

13. *Scott*, 127 S. Ct. at 1782 (Stevens, J., dissenting).

14. *See id.* *See also Judges as Film Critics*, *supra* note 4, at 570.

15. Among other things, Justice Stevens points to the fact that the film obscures the portion of the car chase that took place on a four-lane highway, not a two-lane highway. This would affect the “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 then 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. *Scott*, 127 S. Ct. at 1782 (Stevens, J., dissenting).

16. *Judges as Film Critics*, *supra* note 4, at 500, 508 n.62.

17. *Patric v. Austin*, No. A-05-CA-022-AWA, 2006 WL 5266759, slip op. (W.D. Tex. February 14, 2006) (a case brought under 42 U.S.C. § 1983 against Austin police officers for excessive use of force, among other claims, in which the parties used video from the dash-cam of a police cruiser as evidence at trial).

Part I provides a brief background on film and describes the wide array of films that have been used as evidence.¹⁸ This section debunks the following three myths about film as evidence: (1) film is objective and unbiased;¹⁹ (2) its meaning is unambiguous and obvious;²⁰ and (3) film transforms a viewer into an eyewitness.²¹ Part II discusses the case of *Patric v. Austin*, a civil rights lawsuit against the police where both sides used a video of the arrest as evidence.²² This section describes how both parties used the video evidence to validate their version of the events. Using the *Patric* film, Part II will also: (1) discuss the pros and cons of using film evidence; (2) use examination techniques to demonstrate that every film can tell more than one story and less than the whole story; and (3) employ various examination methods to show that every film suffers from ambiguity.²³ Part III will demonstrate how advocates can adapt traditional cross-examination techniques to the unique challenges of film evidence.²⁴ Finally, the article concludes with a comprehensive set of questions for advocates, judges, or fact-finders to use when considering introducing or accepting film evidence.²⁵

I. FILMIC EVIDENCE AND FILM FORM

A. *Typologies of Filmic Evidence*

Filmic evidence comes in a wide variety of genres. The category of filmic evidence I call *evidence verité* purports to be unmediated and unself-conscious film footage of actual events.²⁶ For example, surveillance film is a common form of *evidence verité*. Surveillance film might be taken by a private investigator, an automated device (e.g., ATM machine or toll booth cameras), or might originate from a mounted camera on a police car, as in *Scott v. Harris*. Surveillance footage is in real time, unedited, and not narrated.

18. See *infra* Part I.

19. *Filmmaking in the Precinct House*, *supra* note 10, at 111, 127; *Judges as Film Critics*, *supra* note 4, at 508.

20. *Filmmaking in the Precinct House*, *supra* note 10, at 111–12; *Judges as Film Critics*, *supra* note 4, at 508–09.

21. *Filmmaking in the Precinct House*, *supra* note 10, at 124–25; *Judges as Film Critics*, *supra* note 4, at 519 & n.115.

22. See *infra* Part II.

23. *Id.*

24. See *infra* Part III.

25. See *infra* Part IV.

26. *Judges as Film Critics*, *supra* note 4, at 507, 515–20.

Another kind of *evidence verité* is after-the-fact crime footage, such as film of an interrogation, a criminal confession, or a crime scene.²⁷ These films are also in real time, but are less serendipitous and more deliberate. The camera records evidence that criminals leave behind or create with their confessions rather than catching them in the act of committing crimes.²⁸ Unlike serendipitous surveillance film, films of crime scenes or interrogations may be narrated, if not throughout the film, then 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.²⁹ These kinds of films differ in important ways from *evidence verité*. For example, they are usually rehearsed, produced, and edited in order to control the interpretation of the images on film.³⁰ The production process might use special camera lenses and filters; the editing process also involves cutting and splicing, which produces outtakes. These films are self-conscious performances made with trial in mind, most often after a lawsuit has already been filed.³¹ They are quite clearly advocative and testimonial, and yet these types of films often disarm opponents and undermine the power of cross-examination that is so critical to our adjudicative process.

With fast-paced technological change, the forms of filmic evidence are rapidly expanding. For example, advocates now use images from diagnostic imaging devices as evidence at trial that purport to illustrate, at a desirable level of scientific exactitude, various types of motion or objects inside the body.³² These devices include Magnetic Resonance Imaging (MRI), Functional Magnetic Resonance Imaging (fMRI), Computed Axial Tomography (CAT scans), and

27. See *id.* at 509–15 (analyzing the effects of after-the-fact crime films by using two cases in which after-the-fact footage played a role in obtaining criminal convictions). See also Jessica Silbey, *Criminal Performances: Film, Autobiography and Confession*, 37 N.M. L. REV. 189, 218–40 (2007) (discussing the use of criminal confessions as *evidence verité*) [hereinafter *Criminal Performances*].

28. See *id.* at 194–97 (criticizing the use of filmed confessions as evidence of voluntariness, truthfulness, or as a means of dissuading police from using coercive interrogation tactics).

29. *Judges as Film Critics*, *supra* note 4, at 520–21.

30. *Id.* at 520.

31. *Id.*

32. See, e.g., Neal Feigenson, *Brain Imaging and Courtroom Evidence: On the Admissibility and Persuasiveness of fMRI*, 2 INT'L J.L. IN CONTEXT 233 (2006) (discussing the nature and value of fMRI as evidence of mental states and capabilities and the likelihood of its admissibility in court).

Positron Emission Tomography (PET scans).³³ Similarly, the prevalence of digital film is increasing throughout our culture as more people carry a camera of some kind—whether in a phone, laptop, or daily planner.³⁴ This trend increases the likelihood that filmic evidence will appear in today’s courtrooms.³⁵

Applying the rules of evidence to these varied and changing genres of film can be a challenging endeavor. With the emergence of new kinds of evidence, the judicial system must either create new rules of evidence or find new applications for old rules. So far, many courts and advocates are forced into the latter tack, trying to fit these new film forms into old evidence categories. They analogize film to demonstratives, such as chalks or illustrations, or treat film as substantive evidence without conducting sophisticated analyses of the probative value or prejudice inherent in filmic evidence.³⁶ 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

33. See Laura Stephens Khoshbin & Shahram Khoshbin, *Imaging the Mind, Minding the Image: An Historical Introduction to Brain Imaging and the Law*, 33 AM. J.L. & MED. 171, 176–82 (2007).

34. See, Katie Hafner, *Film Drop-Off Sites Fading Fast As Digital Cameras Dominate*, N.Y. TIMES, Oct. 9, 2007, at C1 available at <http://www.nytimes.com/2007/10/09/business/09film.html>. Moreover, serendipitous film footage of citizen encounters with police abounds. A simple search of the website YouTube.com turns up hundreds of police videos. See YouTube.com home page, <http://www.youtube.com>. For example, in *Jones v. City of Cincinnati*, 521 F.3d 555, 561–62 (6th Cir. 2008) the court, on a motion to dismiss, disregarded footage from a police cruiser’s dash-cam that captured the arrest of Nathaniel Jones, but the film is on YouTube.com. <http://www.youtube.com/watch?v=o3-MrFOLXFf>. See also Press Release, Suffolk County District Attorney’s Office, Investigation into the Death of Victoria Snelgrove (September 12, 2005), available at <http://www.mass.gov/dasuffolk/docs/091205a.html> (noting the use of video footage in an investigation of an incident in which a Boston Red Sox fan died after police shot her with rubber pellets).

35. There is a now a field called digital forensics which is devoted to the determination of whether and how digital photographs and films (among other types of digital media) have been altered. See Brian D. Carrier, *Basic Digital Forensic Investigation Concepts* (June 7, 2006), 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*, N.Y. TIMES, Oct. 2, 2007, at F2, available at <http://www.nytimes.com/2007/10/02/science/02conv.html> (describing the digital forensics field within computer science); Susan Llewelyn Leach, *Seeing is No Longer Believing*, CHRISTIAN SCI. MONITOR, Feb. 2, 2005, at 15, available at <http://www.csmonitor.com/2005/0202/p15s02-lire.html> (discussing the ethical concerns with manipulating photographs).

36. See, e.g., Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 65 (1998) (noting that as of the early 1990s, photography “hovered uncomfortably on the boundary between illustration and proof”).

long rejected, such as: (1) film's objectivity;³⁷ (2) film's lack of ambiguity;³⁸ and (3) film's witnessing function.³⁹

Filmic evidence may be offered as demonstrative evidence to illustrate verbal testimony⁴⁰ or as substantive evidence that by itself tends to prove or disprove a disputed fact.⁴¹ 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."⁴² Common examples are diagrams and charts,⁴³ but photographs and films fit the category of demonstrative evidence as well. Substantive filmic evidence—through its representation of events, places, and people—asserts the existence or nonexistence of certain facts.⁴⁴ Film is particularly persuasive in making such assertions because of its apparent indexical relationship to reality.⁴⁵ When we watch film, we trust that it is capturing an event, place, or person as filmed. Indeed, to admit film into evidence, the evidentiary authentication doctrine requires that a witness testify as to whether the film is a fair and accurate portrayal of the thing it purports to represent.⁴⁶

37. See *Filmmaking in the Precinct House*, *supra* note 10, at 111, 127 and *Judges as Film Critics*, *supra* note 4, at 508. In their excellent treatise on evidence, Christopher Mueller and Laird Kirkpatrick call attention to the fact that all photographic evidence creates a risk of prejudice because images may be "unnecessarily 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 § 9.14 (3rd ed. 2003). They do not, however, discuss the limitations 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.

38. *Filmmaking in the Precinct House*, *supra* note 10, at 111; *Judges as Film Critics*, *supra* note 4, at 508–09.

39. *Filmmaking in the Precinct House*, *supra* note 10, at 124; *Judges as Film Critics*, *supra* note 4, at 519;

40. See BLACK'S LAW DICTIONARY 596 (8th ed. 2004).

41. See FED. R. EVID. 401. See also BLACK'S LAW DICTIONARY 599 (8th ed. 2004) (defining substantive evidence as that which is "offered to help establish a fact in issue").

42. Melvin Belli, *Demonstrative Evidence: Seeing is Believing*, 16 TRIAL 70, 71 (July 1980) (quoting *Judges as Film Critics*, *supra* note 4, at 503).

43. See BLACK'S LAW DICTIONARY 596 (2004) (defining demonstrative evidence as evidence that may include an explanatory aid, such as a chart or a map).

44. See *Judges as Film Critics*, *supra* note 4, at 570 (describing filmic evidence as "assertive and accountable").

45. ANDRÉ BAZIN, WHAT IS CINEMA? 21 (Hugh Gray ed. & trans., University of California Press 2005) (1967) (describing the ontological relationship between film and the thing or event filmed).

46. FED. R. EVID. 901(b)(1).

There is, however, an important distinction between demonstrative evidence and substantive evidence. Demonstrative evidence is not actually admitted into evidence and does not go into the jury room during deliberations.⁴⁷ The trial judge might instruct the jury that demonstrative evidence is merely an aid to understanding the oral testimony connected to the film, but is not itself evidence in the case. Substantive evidence, on the other hand, is formally admitted and is ordinarily available to the jury during deliberations.⁴⁸ If the judge admits the film as substantive evidence, it may be considered with all other evidence as proof of the existence or non-existence of relevant facts.⁴⁹ One may wonder, of course, whether jurors understand or pay any attention to such nuanced instructions distinguishing demonstrative from substantive evidence, especially when a film is the object of the instruction. As a practical matter, regardless of whether a 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 as opposed to a demonstrative aid would recognize film's assertive nature. This would be a step in the right direction because assertive proffers of evidence are routinely tested for their accuracy and bias through cross-examination. However, most courts and advocates appear to believe that what they see on film is perfectly clear (unambiguous as to its meaning)⁵⁰ and unbiased (the film does not lie or present prejudices).⁵¹ These assumptions render any further examination unnecessary. *Scott v. Harris* demonstrates this phenomenon: eight of the nine Supreme Court Justices determined that the police video unambiguously and objectively demonstrated the absence of unreasonable force, despite a variety of substantive evidence to the contrary.⁵² Indeed, the Court stated that the video was the best evidence of the reasonableness of the use of force: the facts of the case were considered "in the light depicted by the videotape,"⁵³ and "summary judgment became

47. Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 959, 960 n.7 (1992) (discussing the historical and theoretical use of demonstrative evidence in law).

48. Nancy Hollander & Barbara Bergman, *Specific Evidentiary Issues*, in EVERYTRIAL CRIMINAL DEFENSE RESOURCE BOOK § 48:1 (2008).

49. See BLACK'S LAW DICTIONARY 599 (8th ed. 2004).

50. *Filmmaking in the Precinct House*, *supra* note 10, at 111; *Judges as Film Critics*, *supra* note 4, at 516.

51. *Filmmaking in the Precinct House*, *supra* note 10, at 111; *Judges as Film Critics*, *supra* note 4, at 508.

52. *Scott v. Harris*, 127 S. Ct. 1769, 1781–82 (2007) (Stevens, J., dissenting) (asserting that the lower court made its decision after examining all substantive evidence).

53. *Id.* at 1776 (majority opinion).

appropriate because a rational jury only could accept the singular, unambiguous version of events presented in the video.”⁵⁴

Film can be so persuasive that some cases and treatises say that film “speaks for itself,” a conclusion with which the Supreme Court now appears to agree.⁵⁵ Commentators call this the “silent witness theory” of photographic or filmic evidence.⁵⁶ The theory that a film operates as a “silent witness” is most prevalent when the evidence comes from an automatic camera, like film from unobtrusive surveillance cameras. In *Scott v. Harris*, the Court treated the film as representing the events so obviously and with such unimpeachable trustworthiness that the film effectively transformed viewers into eyewitnesses. This theory enables judges and fact-finders to feel as if they are seeing the disputed event with their own eyes and, therefore, are free to draw their own conclusions from the film without considering other witnesses or evidence.⁵⁷

B. A Critical History of Film Form

Filmic evidence is not an unambiguous representation of events; by its very nature, film has multiple meanings. So too, film images are not unbiased; rather, they represent one point of view to the exclusion of all others. This means that film viewers are not transformed into eyewitnesses to the event the film represents; instead, the viewer sees only one particular representation of one portion of an

54. *Id.* 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*, 91 JUDICATURE 180, 181 (Jan.–Feb. 2008).

55. *Scott*, 127 S. Ct. at 1775 n.5. This has elsewhere been called the “silent witness theory” which dictates that photographic and filmic evidence speaks for itself independent of a sponsoring witness. 3 WIGMORE ON EVIDENCE § 790 n.4 (1970) (noting that as early as 1897, judges have believed that the best evidence is a photograph or other representative evidence). See also *State v. Pulphus*, 465 A.2d 153, 158 (R.I. 1983) (holding that a witness “need not testify that the photograph accurately represents what he observed; the photograph, once properly admitted, ‘speaks for itself’”).

56. See *Judges as Film Critics*, *supra* note 4, at 54. See generally Steven I. Bergel, Comment, “Silent Witness Theory” Adopted to Admit Photographs Without Percipient Witness Testimony, 19 SUFFOLK U. L. REV. 353 (1985) (describing various courts’ applications of the silent witness theory); James McNeal, *Silent Witness Evidence In Relation to the Illustrative Evidence Foundation*, 37 OKLA. L. REV. 219 (1984) (describing the silent witness theory within the context of other categories of evidence).

57. *Judges as Film Critics*, *supra* note 4, at 519. See also Transcript of Oral Argument, *supra* note 8; Claire Duffett, *The Double Edge of Digital Video at Trial*, LAW TECHNOLOGY NEWS, Feb. 28, 2008, <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1204113035617> (quoting a practitioner who states that films “almost make [the jury] a witness to what takes place”).

event. With these limitations in mind, the film's assertive message—the story it tells—must be critically evaluated and tested. Indeed, as the discussion in Part II demonstrates, film's assertive character presents the same types of testimonial risks that traditional hearsay restrictions attempt to minimize: perception, ambiguity and sincerity.⁵⁸ For these reasons, film evidence requires the same cross-examination as a percipient witness to test its truth and accuracy, especially in light of film's powerful persuasive value.

The history of film and filmmaking demonstrates that film is an art form that reconstitutes experience through the play of light and dark, and other mechanisms of filmmaking. This history directly contradicts the perception of film as objective and unambiguous, and substantiates the necessity for critically evaluating this type of evidence.

1. The Illusory Witness

From its beginning, film has been understood as phantasmal and rhetorical. It has an apparent capacity to reveal the world, but this is an illusion; its objective, transparent quality is the source of its persuasive power, or what some call the “myth of total cinema.”⁵⁹

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.⁶⁰

The “myth of total cinema” is that film reproduces reality in front of viewers' eyes.⁶¹ Film makes spectators feel as though they are witnessing the event or object as the event or object existed when filmed. However, film re-presents the event or object as something never before seen.

58. See FED. R. EVID. 801 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.”)

59. BAZIN, *supra* note 45, at 17.

60. *Id.* at 21.

61. See *id.* at 17.

The first film genre played with the myth that film transforms viewers into witnesses. Named “actualities,” these short films purported to document some lived experience.⁶² This is the genre that spawned documentaries.⁶³ The first of these films that played to a movie theater audience was *L’arrivee d’un train en gare de La Ciotat* (The Arrival of a Train at La Ciotat).⁶⁴ This film did what its title purported to do: it showed a train arriving in the station at La Ciotat. The camera was stationed on the quay such that the train grew larger and larger on screen as it got closer to the station. Upon showing this film at the Grand Café in Paris in 1895, the audience members reportedly screamed and ran from the theater, afraid the train was going to run them down.⁶⁵ 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.⁶⁶ The filmmakers of *L’arrivee d’un train en gare de La Ciotat* 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 with the pleasure of playing the role of witness to some event that feels live before them but which is, in fact, merely projected on a screen. The audience’s pleasure (both voyeuristic and based on the perceived acquisition of knowledge) persists regardless of whether the event portrayed occurred as the film represents it.⁶⁷

Less than a decade later, Edwin Porter created *The Great Train Robbery*.⁶⁸ This film is credited as the first pseudo-documentary: a documentary on how to rob a train.⁶⁹ With the popularity of this film came the fear and hope, unabated today, that film is powerfully explanatory and can show viewers the truth about an aspect of life of which they have no personal knowledge. Many pseudo-documentaries followed, including Flaherty’s *Nanook of the North*,⁷⁰ Dziga Vertov’s

62. DAVID BORDWELL, *ON THE HISTORY OF FILM STYLE* 13 (Harvard University Press 1997).

63. See BILL NICHOLS, *INTRODUCTION TO DOCUMENTARY* 83 (Indiana University Press 2001).

64. GERALD MAST & BRUCE F. KAWIN, *THE MOVIES: A SHORT HISTORY* 22 (Allyn & Bacon 1996); *L’ARRIVEE D’UN TRAIN EN GARE DE LA CIOTAT* (Lumière 1895).

65. MAST & KAWIN, *supra* note 64.

66. *Id.*

67. See generally LAURA MULVEY, *VISUAL AND OTHER PLEASURES* (Indiana University Press 1989).

68. *THE GREAT TRAIN ROBBERY* (Thomas A. Edison, Inc. 1903).

69. MAST & KAWIN, *supra* note 64, at 42.

70. *NANOOK OF THE NORTH* (Revillon Frères 1922) (documenting the daily life of an Inuit man); see Louis Menand, *Nanook and Me “Fahrenheit 9/11” and the Documentary*

newsreel montages,⁷¹ and Leni Riefenstahl's *Triumph of the Will*.⁷² Some categorize the films of Michael Moore and Errol Morris in this genre as well.⁷³ These pseudo-documentaries demonstrate that all films operate as a form of rhetoric and aim to persuade. All film is fiction. It is shaped, feigned, and created.⁷⁴ Therefore, its relationship to reality must be critically interrogated, especially if the film will be used as evidence upon which a legal judgment will be based.

2. *The Grammar of Film*

Another contribution *The Great Train Robbery* made to film form stemmed from the structure of its editing. Porter taught us that by juxtaposing shots of otherwise discontinuous images, the filmmaker creates logic where none existed before.⁷⁵ This is called *montage*, a principle exemplified by the famous experiments that filmmaker Lev Kuleshov conducted in the 1920s using students from the Moscow Film School.⁷⁶ These experiments demonstrated that the meaning of a single shot changes dramatically depending on the images that frame it.⁷⁷ In the experiments, Kuleshov juxtaposed the same image of a man's face with, alternatively, a bowl of soup, a corpse in a coffin, and a child playing. To the audience viewing the edited film, the actor portrayed a different emotion in each of these scenes.⁷⁸ When the man's face was juxtaposed with the image of the coffin, the audience reported that the man appeared deeply sorrowful.⁷⁹ Yet when the same face was juxtaposed with the image of the soup, the audience reported that the man appeared to be hungry.⁸⁰ When next to the child, the

Tradition, THE NEW YORKER, Aug. 9, 2004, at 90–92 (comparing the origins of documentary film with the contemporary resurgence of the genre).

71. CHELOVEK S KINO-APPARATON [MAN WITH A MOVIE CAMERA] (VUFKU 1929) (documenting the daily lives of citizens in Soviet cities); see also Vlada Petric, *Cinematic Abstraction as a Means of Conveying Ideological Messages in The Man with the Movie Camera in THE RED SCREEN: POLITICS, SOCIETY, ART IN SOVIET CINEMA 90* (Anna Lawton ed., Routledge 1992).

72. TRIUMPH DES WILLENS [TRIUMPH OF THE WILL] (Leni Riefenstahl-Produktion 1935) (documenting the Nazi party's 1934 Congress at Nuremberg).

73. *Filmmaking in the Precinct House*, *supra* note 10, at 109, 111 and accompanying notes.

74. "Fiction" is from the latin *factio*, meaning "a making, counterfeiting," and *ingere*, meaning "to form, mold." WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 502 (3d ed. 1996).

75. BORDWELL, *supra* note 62, at 13.

76. MAST & KAWIN, *supra* note 64, at 176.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

audience perceived the man as joyful.⁸¹ Therefore, the same image can mean different things depending upon its relationship to the shots before and after it: “Editing alone had created the scenes, their emotional content and meaning”⁸² This established one of the most important tenets of film editing: the human tendency to create relationships and imagine connections between otherwise unrelated scenes.⁸³ In other words, audiences perceive a narrative where none existed before.

Other than montage, film creates meaning by manipulating the camera’s perspective (angles) and breadth of view (wide shots and focus). Film director D.W. Griffith, the early American director and initial master of this kind of film language, engineered the close-up, deep focus, long shot, pan shot and traveling shot.⁸⁴

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 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).⁸⁵

By using the camera’s movement to mimic the mind’s eye, Griffith’s techniques are especially effective in blurring the camera’s recreation of some event in the past with the audience’s perception that it is witnessing some event in the present.

3. *Film Bias*

All films have a point of view or voice, whether conscious or mechanical. There is always a filmmaker or a camera operator whose perspective is captured on film while other perspectives are excluded: “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

81. *Id.*

82. *Id.*

83. BORDWELL, *supra* note 62, at 34.

84. *Id.* at 13–14; *see also* MAST & KAWIN, *supra* note 64, at 57–58.

85. MAST & KAWIN, *supra* note 64, at 54.

point of view, whether he is aware of it or not, whether he acknowledges it or not.”⁸⁶

The stakes in shaping that voice are particularly high when the voice is used in documentary films or *evidence verité*. The inevitability of a bias, a specific perspective that excludes others, provokes significant epistemological uncertainties. For instance, all stories, even true ones, can be told from different angles, with different morals and objectives. Each version may be entirely truthful, but no single version tells the whole story. Another epistemological uncertainty originates from every film’s demand that the film audience assess the authority of the film voice—whether an implicit or explicit narrator—as trustworthy or not.

When filmmakers developed a narrative point of view in films, this mechanism helped popularize the art of film and added to its sense of realism. First person narrative film developed in the 1920s and used the embodiment of a single subject whose thoughts, directions, and desires motivated the film. The first person narrative film form capitalized on the capacity of films to create a sense of intimacy and revelation by blurring the “boundary between subjective and objective perceptions.”⁸⁷ It also perpetuated a sense of singularity and wholeness in the viewing audience, adding to the sense that the audience was seeing the events on screen live. However, early films also made clear that knowing and seeing from that singular perspective was problematic because that perspective wholly relied on the trustworthiness of the storyteller. For example, the 1919 film, *The Cabinet of Doctor Caligari*,⁸⁸ typifies early first-person narrative film. Throughout the film, the audience believes that the main character is telling a tragic but true story. However, as the film progresses, it becomes clear that the character was actually telling the audience a deluded and paranoid fable from inside his suite at a mental institution.⁸⁹

Despite its capacity for distortion, the first-person narrative film style flourished and formed the basis of classic Hollywood film styles because it perpetuated the fantasy of the unique and central

86. STELLA BRUZZI, *NEW DOCUMENTARY: A CRITICAL INTRODUCTION* 4 (quoting ERIK BARNOUW, *DOCUMENTARY: A HISTORY OF THE NON-FICTION FILM* 313 (Oxford University Press 1983) (1974).

87. MAST & KAWIN, *supra* note 64, at 136.

88. *DAS CABINET DES DR. CALIGARI* [THE CABINET OF DR. CALIGARI] (Decla-Bioscop AG 1920).

89. MAST & KAWIN, *supra* note 64, at 138.

subject who legitimates or vouches for the film's meaning.⁹⁰ But from its inception, this genre questioned the falseness of film's omniscience and transparency. This first-person narrative style has become so ubiquitous that its irony is lost on most audiences today. Film makes or designates its audience as centered and all-knowing when it is film itself that constitutes and influences the perspective to which the audience is subject.

4. *Film's Self-Critique*

Another hallmark of early film is its critique of its own mode of representation. Early films drew attention to their constructed nature by either manifesting their filmic qualities or breaking with the illusion and drawing the audience into the creation of the film's story. George Melies' *The Magic Lantern*,⁹¹ made in 1903, is often cited as the first film about a film, telling the history of Western dramatic art by showing first a landscape painting, then a play, and then an image of the newly developed moving pictures.⁹² 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. This recognition that the film's story is just one representational scheme among others acknowledges the viewer'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.⁹³ Although now a ubiquitous and varied feature of cinema—like in the film *Adaptation*⁹⁴ or Hitchcock's classic *Rear Window*⁹⁵—film's early self-reflexive tendencies were another way of commenting on its illusion of reality and providing a mode of resistance to the —“myth of total cinema.”⁹⁶

This resistance is all but lost when film is offered as evidence in an adjudicative context. Film is not a mechanism for witnessing, despite its prevalence in our surveillance society, which bombards us

90. ROBERT STAM, ROBERT BURGOYNE & SANDY FLITTERMAN-LEWIS, *NEW VOCABULARIES IN FILM SEMIOTICS: STRUCTURALISM, POST-STRUCTURALISM AND BEYOND* 186–87 (Routledge 1992).

91. LA LANTERNE MAGIQUE [THE MAGIC LANTERN] (Georges Méliès 1903).

92. MAST & KAWIN, *supra* note 64, at 31.

93. *Id.*

94. ADAPTATION (Beverly Detroit 2002).

95. REAR WINDOW (Paramount Pictures 1954). See generally Robert Stam & Roberta Pearson, *Hitchcock's Rear Window: Reflexivity and the Critique of Voyeurism*, 7 ENCLITIC 136–45 (Spring 1983). See also ROBERT STAM, *REFLEXIVITY IN FILM AND LITERATURE: FROM DON QUIXOTE TO JEAN-LUC GODARD* (Columbia University Press 1992).

96. BAZIN, *supra* note 45, at 17.

with real-time images and information about the world through cameras, television, and computers. The perception that film possesses the capacity to wholly and truthfully reveal the world is a myth and “an idealistic phenomenon . . . as if in some platonic heaven.”⁹⁷ Film no more reveals the world than it reconstructs the world. Like any representational form, film requires an interpreter to analyze its specific language and account for how it creates meaning. Given the explosion of the variety and uses of film as evidence, contemporary audiences of *evidence verité* must learn to analyze, critique and interpret film as rhetoric and a craft, rather than as a window into an unambiguous and objective truth.

II. PATRIC V. AUSTIN⁹⁸

The remainder of this article aims to help advocates transform viewers’ experience of film from one where viewers feel sure that they know what they are 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.” Effecting this transformation will help debunk the myth that film has the capacity for objective and unambiguous representation. When advocates face filmic evidence that might hurt their clients—whether a filmed confession or a day-in-the-life-of film—they must be better equipped to dispel the false perceptions that film is transparent, morally objective, and exposes the whole truth.

In 2004, actor Jason Patric was celebrating in Austin, Texas at the wrap party for a movie he had been filming when police arrested him outside of a bar for public intoxication and also charged him with resisting arrest. Both charges were later dropped.⁹⁹ During the arrest, Patric suffered physical injuries and subsequently filed a civil rights suit against Austin (the City) and the police. He alleged, among other things, that the police lacked probable cause to arrest him, used excessive force when effecting the arrest, falsely arrested him, and falsely imprisoned him.¹⁰⁰

Unbeknownst to the arresting officers, a police camera mounted on a nearby cruiser recorded the activity prior to the arrest

97. *Id.*

98. Patric v. Austin, No. A-05-CA-022-AWA, 2006 WL 5266759, slip op. (W.D. Tex. February 14, 2006).

99. Plaintiff’s Second Amended Complaint at para. 17, *Patric v. City of Austin*, No. A-05-CA-022-AWA, 2006 WL 5266759, slip op. (W.D. Tex. August 22, 2005).

100. *Id.* at para. 22.

and the arrest itself.¹⁰¹ The camera was in a fixed position throughout the incident and was not tended or manipulated by any operator. Both the plaintiff and the defendants used this *evidence verité* at trial.¹⁰² Patric used the film to show that he was unlawfully arrested and abused, and the City used the film to show that the police had probable cause to arrest Patric.¹⁰³ The film is part of the public record in the Western District of Texas.¹⁰⁴

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 as 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. It also shows a police officer arresting a man in a white shirt and walking him to the police car in handcuffs. All of this activity is difficult to see because it takes place in the background of the film and is out of focus. After several playbacks, viewers can follow the man with the white shirt, Jason Patric, as he walks down the sidewalk on the right side of the film frame and can see that he moves into the street in the background to talk to the man hailing the cab. He then walks out of the street to the street corner and is arrested shortly thereafter.¹⁰⁵

Both parties used the film at trial as evidence to determine, among other things, 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 he allegedly resisted arrest.¹⁰⁶ To the plaintiffs, the film showed that the police unlawfully handled Patric. To the defendants, it showed the police officers doing their job. Each party used the same film at trial to prove its point and, as such, this case exemplifies the trouble with filmic evidence.

101. See Transcript of Trial Proceedings at 33, *Patric v. Austin*, No. A-05-CA-022-AWA, 2006 WL 5266759, slip op. (W.D. Tex. February 14, 2006) [hereinafter *Patric v. Austin* Transcript] (Trial Transcripts from February 14, 15 and 16, 2006 are on file with author).

102. See *id.* at 45 (Plaintiff's use); *id.* at 136 (Defendant's use).

103. See *id.* at 71 (Plaintiff's case); *id.* at 149–50 (Defendant's case).

104. *Patric v. Harris* Video Clip, available at <http://www.law.suffolk.edu/faculty/directories/faculty.cfm?InstructorID=819> [hereinafter Video Clip]. The relevant portion of the video is very short (approximately three minutes), beginning at 2:32:48 and ending at approximately 2:35:54.

105. See *id.*

106. *Patric v. Austin* Transcript, *supra* note 101, at 43–67, 94–122, 132–161.

The focus, angle, and sound of the film render it particularly unclear; but all films give rise to problems of clarity, which translate into problems of interpretation. All films can be cast in an ambiguous light when the evaluator considers the categories of film form that shape film's meaning.¹⁰⁷ This film lends itself to a straightforward critique because of its obvious ambiguity. Nonetheless, the examination techniques discussed below are useful for all sorts of films. These techniques prove especially helpful in the context of cross-examining films that appear to tell only one story when in fact, like all films, they tell more than one story and less than the whole story.

A. The Threshold Question: Admit or Exclude?

1. Admission

Lawyers faced with filmic evidence that appears to help their case must first ask whether the film should be used at all. Patric had a fairly good case against the police without the film. The central witness against him was a police officer whose credibility could be impeached with evidence that he had previously lied to his superior officers.¹⁰⁸ Although juries are often unwilling to render a judgment against a police officer,¹⁰⁹ Patric's lawyer deftly handled both the deposition and trial when he asked the arresting officer to explain the responsibility that the police have to the community.¹¹⁰ At both opportunities, the officer stated that the police should be held accountable to Patric and the community to uphold the law.¹¹¹ 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—who would testify that the

107. See *supra* Part I.B.

108. *Patric v. Austin* Transcript, *supra* note 101, at 4.

109. See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 468 (2004) ("Judges and juries (and most ordinary citizens) view police officers as public servants who work under difficult, dangerous, and uncertain conditions to maintain the 'thin blue line' between order and chaos."); see also Scott Turow, *Why the Diallo Verdict Isn't Surprising*, WASH. POST, Mar. 13, 2000, at 22, reprinted in POLICE BRUTALITY 189 (Louise I. Gerdes ed., Greenhaven Press 2004) (stating that "when a police officer is trying to do what he's been sworn to do, which is to corral bad guys, even if he has gone about it overzealously or stupidly, juries often refuse to convict.")

110. *Patric v. Austin* Transcript, *supra* note 101, at 9–10.

111. *Id.*

police mishandled the situation.¹¹² Finally, the case seemed to turn on whether the officer actually said, “You’re under arrest.”¹¹³ The film is silent on that point because of the poor sound quality, so the film does not help or hurt Patric’s case on this point. With all of this evidence, why show the film at all?

One possible problem for Patric at trial could be the jury’s perception or expectation of his ego. Since Patric is a Hollywood actor,¹¹⁴ the jury might perceive him as entitled or cocky, and the film does not negate that perception. It shows Patric sashaying down the street, shirt open, cuffs undone, hanging out with friends. In this way, the film might 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 that he was a danger to himself or others—but it also contains images that might damage Patric’s case. These would be viable reasons for Patric’s defense team to not use the film at all. However, that choice runs against the grain because film is an enticing litigation tool. This is part of the challenge with filmic evidence: deciding when to forego its captivating qualities precisely because those qualities might be used against the client.

Patric’s lawyer fell prey to the film’s lure and used it on direct examination to help Patric explain the event in question.¹¹⁵ Patric’s lawyer then asked leading questions of his witness such as, “I am going to start [the video] up again. What I want you to watch for is stepping up. Did you step up?” and “[W]e saw on the video . . . an officer behind you pushing you down to the ground . . . [W]e’re at 2:34:16 and you’ve been thrown to the ground, correct?”¹¹⁶ These questions elucidated points on which the film is not sufficiently clear and for which the plaintiff carried the burden of proof.¹¹⁷ However, Patric’s testimony on these crucial issues was not persuasive because

112. *Patric v. City of Austin*, Docket No. 60 (Combined Witness and Exhibit List from Jury Trial). See also *Patric v. Austin* Transcript, *supra* note 101, at 56 (listing Patric’s witnesses).

113. *Patric v. Austin* Transcript, *supra* note 101, at 55–56.

114. *Imdb.com, Jason Patric—filmography*, <http://www.imdb.com/name/nm0000574/>.

115. *Patric v. Austin* Transcript, *supra* note 101, at 102.

116. *Id.* at 106, 112–13.

117. Claims that police officers used excessive force during an arrest are analyzed under the Fourth Amendment. *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003). The plaintiff must show (1) an injury (2) that resulted directly and solely from the use of force that was clearly excessive to the need, and (3) the excessiveness must have been objectively unreasonable. *Ikerd v. Blair*, 101 F.3d 430, 433–34 (5th Cir. 1996). See also *Bryant v. Muth*, 994 F.2d 1082, 1086 (4th Cir. 1993) (“Once the defendant raises a qualified immunity defense, the plaintiff carries the burden of showing that the defendant’s alleged conduct violated the law . . .”).

the film tended to weaken the otherwise strong testimonial evidence in Patric's case. The film did not contradict the testimony, but it nevertheless weakened Patric's case because it was not dispositive one way or another. Because viewers expect film to be clear, when it is unclear, many viewers might undervalue other reliable evidence that tends to prove the very thing the person offering the film as additional evidence hoped the film would substantiate.

The centerpiece of most personal injury and constitutional tort cases is the direct examination of the plaintiff or plaintiffs. The direct examination provides a unique opportunity for plaintiffs to tell their story in their own words. Additionally, it presents the best opportunity for juries to appreciate what the plaintiffs claim they were subjected to and felt at each stage of the incident. By avoiding leading questions and maintaining a low profile, lawyers conducting direct examinations enable plaintiffs to share their experiences with the jurors in a direct, unmediated manner. If at all possible, it is important for plaintiffs to be likable and for jurors to feel the plaintiff's humanity. When the plaintiff is a professional actor, the chances of establishing this necessary rapport with jurors would likely be enhanced. Film, however, can easily overshadow the plaintiff as a witness, especially if the plaintiff is the star of the film, as was the case in *Patric*. Arguably, playing the film in the *Patric* case detracted from Jason Patric's presence and capacity as a witness on his own behalf. Not offering the film as evidence might have given Patric a better chance of being an effective witness.

Using the film of the incident during Patric's direct examination made it extremely difficult to achieve the desired results. First, the lawyer conducting the examination kept inserting himself into the testimony as he called attention to specific sections of the video.¹¹⁸ 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.¹¹⁹ As a result, 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 images and a more dramatic visual narrative, a film might be helpful in augmenting the testimonial narrative. One can imagine showing a video of a

118. See *Patric v. Austin* Transcript, *supra* note 101, at 102, 103, 106, 113, 121.

119. *Id.*

dramatic incident and then asking the plaintiff a simple non-leading question that would allow him to add something to the film, injecting the event with emotions not apparent on film. For example, an attorney might ask: "How did you feel while that was happening to you?" However, as discussed above, 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. Exclusion

Lawyers can challenge the admissibility of film evidence just like other types of evidence. If the evidence is admitted, lawyers can then challenge the weight that it should be afforded. For example, the opponent to the admission of evidence may argue that the film's prejudicial qualities may mislead the jury.¹²⁰ Alternatively, the opponent may frame objections to the admission of evidence based on the authentication doctrine and argue that the film cannot be authenticated as depicting what it purports to show.¹²¹ 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 this doctrine.¹²² Nonetheless, the opponent may choose to raise issues about what "fair and accurate" means with respect to film at the admissibility stage, especially in light of the partiality and bias inherent in all film. Even if the judge admits the evidence, well supported objections can educate the court about weaknesses in the film that otherwise may not have been apparent.¹²³

For instance, in *Scott v. Harris*,¹²⁴ it might have been helpful if the plaintiff's attorney had primed the trial judge to think critically about the biases inherent in film before the judge decided the issue as a matter of law based on the film alone.¹²⁵ Moreover, a hearing on a pre-trial motion to exclude or strike the filmic evidence provides opponents with the opportunity to question the subscribing witness and obtain information about the circumstances under which the film was

120. See FED. R. EVID. 403.

121. See FED. R. EVID. 901(a).

122. This tends to be a low hurdle. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 9.14, 1020–1021 (3d ed. 2003).

123. For a discussion on the weaknesses inherent in filmic evidence, see *infra* Part II.B.

124. 127 S. Ct. 1769 (2007).

125. See *id.* at 1776 (holding that the lower court erred in not viewing "the facts in the light depicted by the videotape").

made. This might provide useful ammunition when contesting the weight of the filmic evidence before the jury.

B. The Limits of the Film's Frame

If an attorney plans to use a film or loses a motion to suppress and must face an opponent's use of a persuasive film, what is the next step? How can lawyers recast the film in terms of its partiality and bias, thereby questioning the film's point of view? How can lawyers use the other stories the film might tell, thereby harnessing its ambiguity?

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

For example, in *Patric*, the film of the plaintiff's arrest tells us nothing about whether Patric smelled of alcohol. Smell is probative of the police's lawful behavior and this film (or any film) would not capture this kind of real evidence. Similarly, the film tells us nothing about how many beers Patric consumed or whether he stumbled out of the bar or left steadily. Viewers can only imagine what went on before Patric and his friends tried to hail a cab, and these events 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 the event is interpreted. Lawyers should challenge themselves to come up with facts that are not present in the film that they can use to reinterpret the facts that are in the film. This exercise can undermine the story that the film appears to be telling.¹²⁶

In the *Patric* case, the film's point of view was not optimal. Mounted on a police car and running automatically, the film failed to

126. 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 voluntary nature 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.

capture relevant portions of the event because a parked car blocked its vantage.¹²⁷ The film did not show the curb, yet, whether Patric was on or off the curb in response to the officer's request was crucial to the plaintiff's case.¹²⁸ When watching the film, viewers must strain to see this relevant detail, but the film is uncooperative.¹²⁹ No matter how much viewers look, they won't see past the parked car blocking the view. Recognizing the film's silence on important facts undermines its status as comprehensive and complete.¹³⁰

C. Ambiguity in Film Images

In addition to considering what is off-camera or invisible to the camera, a lawyer faced with filmic evidence should also evaluate whether there is a lack of clarity in what the camera does show. This lack of clarity can occur in at least two ways: (1) literally unclear, meaning the film is out of focus; or (2) narratively unclear, meaning the film is ambiguous as to its significance to the issues in dispute at trial.

1. Literally Unclear

Pointing to the film's lack of visual clarity is one of the easiest and most obvious ways to undermine the film's perceived transparency. Most examples of *evidence verité* are bad quality films—out of focus, shot from a distance, and of poor sound and color quality. Emphasizing that 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.¹³¹ The film shows someone in a white shirt falling down—Patric says that it is him—but the film does not show him hitting the sidewalk.¹³² The film shows police rushing to the scene, as if

127. See Video Clip *supra* note 104, at 2:33–2:35.

128. *Patric v. Austin* Transcript, *supra* note 101, at 44–45, 53–55, 104–06.

129. *Id.* at 44–45.

130. For a drastic example of problems with film framing, see the police video documenting the beating and arrest of Nathaniel Jones, discussed *supra* note 34. Most of the beating took place off-screen although the sound quality is quite good. Where one does not see the reception of pain and only hears the words of the police and criminal suspect, the appearance of brutality can be minimized merely by its visual absence. I am grateful to my former student Michael Kaplan for this insight.

131. Plaintiff's Second Amended Complaint at para. 12, *Patric v. Austin*, No. A-05-CA-022-AWA, 2006 WL 5266759, slip op. (W.D. Tex. August 22, 2005).

132. Video Clip, *supra* note 104, at 2:35.

something startling was occurring, which suggests that whatever was occurring might have been violent or require police back-up.¹³³ But from the film, it is impossible to discern how Patric 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.”¹³⁴ But the film’s sound quality is poor because the camera was positioned far from the incident and its microphone was weak. 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 rested.¹³⁵

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.¹³⁶ This is not a disputed fact. What is disputed is the significance of this movement—again, a point the film cannot answer. Patric calls his movements “a reflexive response” to the officers’ abrupt move to grab him.¹³⁷ The officers interpret Patric’s movement as pushing them away, shrugging them off and resisting arrest.¹³⁸ As such, the officers assert that they merely responded with appropriate force to put Patric under their control.¹³⁹

Patric’s arm movement—a fact of the film—is narratively ambiguous because of its differing significance in the competing stories told at trial. One story was 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” in order to take him down and teach him and his friends not to disobey or disrespect the police.¹⁴⁰ The police told a different story. They said they heard Patric say “fucking pigs, fucking fascists” as he moved from the crosswalk toward the curb.¹⁴¹ Again, we don’t hear this on the film. However, the police claim that Patric’s

133. *Id.*

134. *Patric v. Austin* Transcript, *supra* note 101, at 55–57.

135. *Id.* at 56.

136. *Id.* at 150.

137. *Id.*

138. *Id.* at 59–61, 71.

139. *Id.*

140. *Id.* at 133–34.

141. *Id.* at 43, 107.

aggressive language led them to suspect that Patric was out of control.¹⁴² When Patric moved away from the police officer and waved his arm, the police described this movement as an affirmative push, at which time the officers tried to restrain Patrick's arm, put him in a headlock and handcuff him.¹⁴³

The "alpha dog, police-humiliation" story that the plaintiff told was juxtaposed with the "drunk and out-of-control crowd" story that the defendants told.¹⁴⁴ These are the two dominant narratives spun during the trial. Both parties relied on the film to ground their stories and provide illustrations of 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 unreasonable force or unlawfully arrested Patric. The significance of the facts shown on film is ambiguous until they are strung together in a story—the story that is provided by the attorneys' advocacy and other testimonial evidence—but not by the film's content.¹⁴⁵ This case illustrates the difficulty of relying on film as a guaranteed way to discover the one true story. Advocates use film to put their story in the best possible light, trying to exploit what is perceived as the film's clarity and objectivity. Yet, in *Patric*, the battle over the film's determinacy only highlighted the relative weaknesses of each side's story and the indeterminacy of the film.¹⁴⁶

III. METHOD OF CROSS-EXAMINING FILM

Obviously, a lawyer cannot literally cross-examine a film; rather, a lawyer either examines or cross-examines a witness about the film in evidence. The examination is a "cross-examination" of film because it aims to fortify or destabilize the dominant story the film appears to be telling. The examination seeks to accomplish this by

142. *Id.* at 58–59.

143. *Id.* at 59–61.

144. *See generally id. passim.*

145. *See* HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 14, 19–20 (The Johns Hopkins University Press 1987) (discussing the moralizing role of narrative on historical or factual discourse).

146. *See* Duffett, *supra* note 57. This article describes a case where the father of a deceased soldier sued members of Topeka's Westboro Baptist Church who protested at his son's funeral. Plaintiff's attorneys used film footage offered by the defendant to help prove the plaintiff's claim of intentional infliction of emotional distress. The jury awarded the plaintiff nearly \$11 million. The plaintiff's attorney exclaimed that the video was "like a Christmas gift" because the defendant submitted the videos; therefore, the plaintiff was free to use them to support his own arguments. Furthermore, the videos showed the church's actions with inside access that an outside party could never replicate. The plaintiff's attorney stated: "I don't care how good of a lawyer you are, you cannot articulate this yourself." *Id.*

attacking either the story that the film seems to tell through its representation of reality, or the story that a witness on the stand narrates. Below are two methods for conducting this cross-examination that harness the concepts about film form, including framing and ambiguity, discussed above. Again, the film at the center of *Patric v. Austin* is used as an example.

A. *Lock in Testimony and Contrast Film*

In *Patric v. Austin*, the usefulness of the film on direct examination is questionable for the reasons discussed above, but Patric's attorneys could have used the film more effectively when cross-examining the arresting police officer. The officer's story centers on a few key facts: Patric's eyes were glassy, he swore, stood in the street contrary to the officer's command, smelled of alcohol, resisted arrest, and pushed the police officer with his arm.¹⁴⁷ If 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 these factual assertions. Then, upon playing the film to the jury, the attorney could ask the officer to show the jury which parts of the film confirm these elements and, therefore, confirm 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, along with the fact that the officer had been disciplined for lying the past,¹⁴⁸ it does taint some of the strongest evidence against Patric—the officer's testimonial evidence. This cross-examination relies on the assumption that the film would tend to reveal those essential facts necessary to find a fair and truthful result. It also effectively undermines the clarifying role of film and shifts the focus from the film as conclusive proof to other forms of evidence that may be more reliable and less prejudicial.

B. *Exploit Filmic Fragments*

Lawyers may also cross-examine film by exploiting its inherent partiality. For example, Patric's attorneys might have shown the film in its entirety to buttress his case and show that he and his friends were not particularly loud, were not blocking the street in any significant

147. *Patric v. Austin* Transcript, *supra* note 101, at 43, 50, 52, 56, 59.

148. *Id.* at 4–5.

way, and that Patric appeared to respond to the police officer's command to return to the sidewalk. In that case, opposing counsel could then 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."¹⁴⁹ Here, the film fragment is significant. Without an explanation from this person to give context to that statement, it seems that Patric's friend confirmed that Patric did something he should not have, perhaps swearing at the officer or resisting arrest. The defense attorney could play the film and then ask, "Mr. Patric, can you explain why your friend apologized for your behavior?" or, "Mr. Patric, isn't it true that your friend appears to be saying that you did something for which you should be sorry?"

Many of the statements contained in the film would be inadmissible hearsay if offered for their truth.¹⁵⁰ As such, they should be redacted by splicing the film or editing out the sound. But if Patric admitted the film in its entirety in his case in chief, he presumably waived that objection.¹⁵¹ His opponent should, therefore, be free to use those statements in his defense. Doing so could effectively exploit the contradictory aspects of film: its inherently fragmentary nature, its partiality, and its perceived comprehensiveness—the myth that it shows the whole story.¹⁵² The puzzle from Patric's angle is that he presumably sought to admit the entire film on the premise that admitting it in full would avoid the problem of appearing to distort the truth by showing fragments without providing a context.¹⁵³ But admitting the whole film meant that those unfavorable aspects of the film, such as Patric's friend's apology, were not edited out.¹⁵⁴ Given the persuasive power of film, these negative aspects become practically impossible to rebut.

149. *Patric v. Austin* Transcript, *supra* note 101, at 118, 160. See also Video Clip, *supra* note 104, at 2:34–2:35.

150. FED. R. EVID. 801(c), 802.

151. See, e.g., *United States v. Baker*, 432 F.3d 1189, 1215–16 (11th Cir. 2005) (holding that doctrine of invited error precluded review of a claim that the admission of testimony violated the hearsay rule when the party's counsel elicited the testimony at trial).

152. See *infra* Part II.

153. See FED. R. EVID. 106.

154. This is the situation absent a successful FED. R. EVID. 105 objection with an effective jury instruction.

A film may also conjure memories or recall facts that would not otherwise be recoverable. The attorney for the defense 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 arrived at the police station for booking and was standing outside the police cruiser, we hear (but do not see) an officer say to Patric "I don't know why you're staring me down?"¹⁵⁵ At trial, Patric hears the words on the film but says he does not recall the incident and does not remember staring down a police officer.¹⁵⁶ The officer's statement is hearsay if offered to prove Patric was staring at him, but is within the present sense impression exception to the hearsay rule,¹⁵⁷ an exception that is likely to arise frequently when dealing with *evidence verité*.¹⁵⁸

By playing this conjuring fragment for the jury, the film acts as a "silent witness," effectively testifying to the truth of an event—in this case Patric's allegedly hostile behavior—that no one can verify.¹⁵⁹ This film fragment conjures an image of Patric facing off with the officer, which lends credibility to the officer's story that Patric was belligerent. Using it to cross-examine Patric would exploit the film's ambiguity to the defendant's benefit by asking Patric to clarify the statement. Though the statement is unmoored from any human witness, its filmic incarnation, emphasized by the cross-examination question, taints the case against Patric.

These two examples of the use of film fragments should encourage 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.¹⁶⁰ An inevitable objection to the edited version will be that the film's unique relationship to the event—its witnessing function—has been distorted by attorney advocacy. The benefit of film is that it captures an event

155. *Patric v. Austin* Transcript, *supra* note 101, at 157.

156. *Id.*

157. FED. R. EVID. 803(1).

158. *Evidence verité* of this nature records altercations, so it would 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).

159. For a discussion of the silent witness theory, see *supra* note 56 and accompanying text.

160. It is proper to redact portions of a film that contain inadmissible material, such as hearsay that does not fall under an exception. A party will not, however, be able 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.

without distortion and bias. But, as discussed above, all film distorts the real event. Film of an event is but a slice of that occurrence; it is necessarily partial and, therefore, no more immune to critical analysis regarding prejudice and probative value than any other documentary or testimonial proffer.¹⁶¹ If, however, the whole film is admitted, whether over objection or not, the above methods of cross-examination can help turn the film's qualities to the advantage of the attorney who might have opposed its admission in the first place.

IV. CONCLUSION

The *evidence verité* in *Patric v. Austin* is a perfect example of how any film, when used assertively to adjudicate a case, presents the problem of ambiguity and partiality.¹⁶² Each subsequent viewing of this film merely decreases viewers' certainty of what they are seeing. This case illustrates the myth of film as the best evidence of "what happened" because it is *not* the best evidence of anything relevant to the issues at the *Patric* trial. An effective examination of the film would have shifted the focus of the trial to all the other evidence marshaled by the parties, most of which had more probative value than the film itself.¹⁶³

One could ask the same questions and apply the same tools to a film that appears much less ambiguous or partial, like a filmed criminal confession, the film of the police chase in *Scott v. Harris*, or a surveillance film that appears to fully corroborate one side—for example, the film at the center of the Rodney King case.¹⁶⁴ Faced with filmic evidence, a lawyer should 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

161. An attorney particularly concerned with how a film was edited can use discovery requests to learn exactly which portions were edited and how. This would enable the opposing attorney to reconstruct the film and evaluate how the film was re-narrativized and to what extent the re-narrativization requires a rejoinder. For a related example of this practice, see Duffett, *supra* note 57.

162. See *supra* Parts II and III.

163. See *supra* Part III.

164. Seth Mydans, *Police Verdict: Los Angeles Police Acquitted in Taped Beating*, N.Y. TIMES, April 30, 1992, at A1 available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE3DE163DF933A05757C0A964958260>. See also BILL NICHOLS, *BLURRED BOUNDARIES: QUESTIONS OF MEANING IN CONTEMPORARY CULTURE* 17–42 (Indiana University Press 1994) (discussing the use of film at the trial of Rodney King).

by someone with skill, can be turned around to mean something entirely different?

- 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 from the film but that could have been present had the film been framed differently?
- 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 my adversary is telling?
- Can I undermine the film's dispositive nature by comparing witness testimony to the film's images?
- Can I exploit the ambiguity of film fragments and film's conjuring capacity by asking leading questions on cross-examination, thereby animating 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 create a structure for a set of facts. In *Scott v. Harris*, only one Justice determined that the ambiguity in the film was sufficient to necessitate sending the case to a jury.¹⁶⁵ It would be difficult at this stage to know whether a more robust record—based on aggressive motion practice contesting the bias and meaning of the film as evidence of the chase—would have avoided the summary judgment decision. But it certainly would have primed the fact-finders and any appellate court to view the evidentiary value of the film in a more limited way. Attorneys who can successfully pose and answer the questions above will be more persuasive on their client's behalf, especially in light of film's dominant story-telling role in our contemporary culture. The value of a narrative lies not only its cohering effect in the hands of a skilled attorney, but in its inevitable multiplicity.¹⁶⁶ There is always already more than one story to be told.¹⁶⁷ This is the reason for trials and the judicial system in the first place. Finding the alternative stories that the film tells or could have told will go a long way toward demystifying the marked effect of filmic evidence and furthering the promise that law will deliver meaningful due process and justice.

165. 127 S. Ct. 1769, 1781 (2007) (Stevens, J., dissenting).

166. Hayden White, *The Value of Narrativity in the Representation of Reality*, 7 CRITICAL INQUIRY 5 (1980).

167. Barbara Herrnstein Smith, *Narrative Versions, Narrative Theories*, 7 CRITICAL INQUIRY 213 (1980).