

The Paradigm Case: Is Reasoning and Writing in Film Studies Comparable To (or With) Reasoning and Writing in Law?

Geoffrey Samuel*

Is comparing legal reasoning with reasoning and analysis in other disciplines of value? It has been suggested that a comparison between legal and medical reasoning is fruitful (Samuel 2015b, 323), but is such an exercise a one-off so to speak or might it be considered as the first step in a more general direction of comparative reasoning? This is a theme that certainly lies behind this present investigation which looks at the value that reasoning and writing in film studies might have for jurists (and vice versa). Now it must be said at once that reasoning in disciplines such as literature, theatre and film studies does not seem to be a focal point in itself that attracts much precise academic writing (although there are a number of works on law and literature). Plenty has been written on theory, but just as legal theory and legal reasoning, while closely interconnected at certain points, are rather different areas of analysis, so theory in the arts is different from the actual forms of reasoning employed by literary and film critics and academics. What are these forms of reasoning? It is the primary purpose of this article to examine this question with regard in particular to film studies. One reason for this emphasis on cinema is that it is an area in the arts disciplines that in many ways presents issues that are significantly different from those encountered in law. This difference is where the comparative challenge lies.

1. Overture: preliminary problems

The first, and of course overriding, question is the one concerning the value of comparing legal writing and reasoning with writing and reasoning in film studies.

* Professor of Law, Kent Law School, UK; Professor affili  ,   cole de Droit de Sciences Po, Paris.

** This article is based upon a paper to be presented to the British Association of Comparative Law workshop in September 2016 and is dedicated, as is the workshop, to the memory of Bernard Rudden who was a distinguished holder of the Chair of Comparative Law at Oxford (see generally Birks & Petto 2002). Professor Rudden had a great interest in cinema.

Yet before this question can be properly tackled there are a number of subsidiary issues that need to be considered. One obvious difference between the two disciplines is that in legal studies there are, seemingly, two classes or types of reasoning. There is the reasoning that might be regarded as an integral part of the subject itself; this is the reasoning of lawyers in arguing cases and of judges in their decisions to such cases (Samuel 2015c, 776). In the civil law systems—and perhaps to an extent even in the common law—it may well equally embrace the reasoning of the doctrinal writers (see Gordley 2013). Another form of reasoning in legal studies is the one associated with commentaries and criticisms on the positive legal texts; this is the reasoning of, for example, those who examine and write about case law and other legal texts (see Birks 1996). As has just been implied, the line between these two types of reasoning is at best unclear, but such a duality is not to be found in film studies. There is only one class of analytical and critical reasoning about films and this is the class of writers external to the film itself.¹ This said, ‘a large diversity of discourses is evident’ in film studies and that these discourses ‘are different from the analysis of films itself’ (Ibid., 9).

Another difference between legal discourse and discourse on film is that the former is subject to what might be called the authority paradigm. This is a characteristic that has been discussed elsewhere and so, for present purposes, it can be summed up as a paradigm that restricts legal reasoning, at least with regard to reasoning internal to legal studies, to limits imposed by the accepted fact that legal texts have an absolute authority (Samuel 2009, 431). The texts—legislation and judgements—can be criticised but they cannot be dismissed or ignored as invalid. They have an authority that might be described as a secular divinity. Moreover the authority paradigm imposes limits on the kind of arguments that can be used in presenting a case and in justifying a legal decision. Thus it is not normally acceptable in legal reasoning to state that a particular decision in the House of Lords was caused by the Law lords dislike of the judge or judges who decided the case at a lower appeal level. In other words it is not normally acceptable for lawyers and jurists, when reasoning within the authority paradigm, to have recourse to psychological or ideological theories (although this restriction would not apply to a jurist writing from outside this authority paradigm). Reasoning and analysis in film studies is not subject to such an authority paradigm and this means that a very much wider range of arguments, observations and assertions is likely to be found in the books and articles. Indeed, in addition to this absence of an authority paradigm there are factors inherent in the object of analysis itself—the films—which are not to be found (or at least not to be found with the same intensity) in legal reasoning. One clear example is a sense of the aesthetic; this is not really a dimension that normally applies to legal analysis, although some civil law countries have a tradition of *elegantia juris* or *elegantia jurisprudentia*. Indeed one film writer, Raymond Durgnat, has said that

¹ This said within this broad class several sub-classes (if not more) can certainly be identified. For example a distinction can be made between the writings of film critics and those of film analysts and between those of analysts, those of theorists and those of interpretativists (Aumont & Marie 2002, 9-13).

film is 'an art-form which seems to pose certain aesthetic problems more insistently than other media have done' (Durgnat 1967, 13).

A further difficulty is that in many ways films could be said to be more complex than cases and legislative texts. This is not to say that these latter objects of analysis lack complexity, but they might be said to be 'one dimensional' in as much as there is just a sole focal point, namely the language employed by the judges and legislators. And, it must be recalled, the methodology itself is traditionally operating within the authority paradigm. Films, in contrast, are complex in the sense of being multi-dimensional; there is the script, the narrative, the characters, the image of each frame, the editing, the acting, the sound and so on. The kind of analysis and reasoning methods are bound to be, it might be said, very different from those employed by a legal analyst. Moreover Raymond Durgnat has identified another complexity in addition to this multi-dimensional one: 'the medium generates conflicts between its function as an "art form" and its function as an entertainment "dream factory"' (Durgnat 1967, 13). In the middle of the last century this dichotomy was seriously problematic, as Durgnat explains. The critic wanted a picture to be so good that it stood up to educated taste, whereas the filmmaker wanted to produce something that could not be defeated by bad taste. 'All these confusions,' wrote Durgnat, '[were] further compounded by the controversies and tensions existing within the schools of aesthetic opinion' (Ibid.). This tension has now eased of course, but it has not completely disappeared.

Do these differences—and no doubt there are others—render any comparison between reasoning in law and in an arts discipline like film studies largely unhelpful or even valueless? The differences certainly present challenges. Yet there are some basic points that are worth repeating. The first is the often noticed idea that a basic institutional structure which links law with theatre (and by extension with film) is the tripartite system—associated with the Roman jurist Gaius—of *persona*, *res* and *action* (Gaius, I.8). Law, like film, consists of actors, props and actions (Villey 1979, 44-45). Indeed the Roman law expression for the legal subject—*persona*—is a term, so it has been said, ultimately derived from the masks used by a single actor to express different persons (Duff 1938, 3). This structural and institutional analogy should not be underestimated as one will see.

Secondly, as Jacques Aumont and Michel Marie point out, the principal distinction for the epistemologist examining methodology is the one between, on the one hand, the natural (or hard) sciences and, on the other hand, the social and human sciences. For 'there is always a basic difference of nature between the *facts*, the *objects*, of the ones and the others' (Aumont & Marie 2002, 29). It is fruitless to try to compare the analysis of a film with a scientific experiment because one is not looking for what is repeatable but for what is singular (Ibid). Now law—at least in the civil law tradition—likes to see itself more in the natural science category with the result that its methods have been compared to those in the sciences (Champeil-Desplats 2014, 58-75; Jestaz & Jamin 2004, 160). But such association is probably no longer sustainable save at an ideological level. There is, then, nothing inherently

objectionable in comparing two modes of reasoning that form part of the human sciences. Indeed the schemes of intelligibility employed generally in the social sciences are applicable as much to legal reasoning as to critical analysis in cinema studies (Samuel 2014, 81-92). These schemes provide, in other words, another *tertium comparationis*.

A third point to be made concerns the level at which comparison between legal reasoning and reasoning in film studies might be conducted. To talk at a macro-level of comparing the two forms of reasoning is likely to flounder almost immediately given the differences mentioned earlier. Such floundering may well be unjustified as will be seen, but there is perhaps a constant danger of a comparison that veers towards, if not superficiality or even pretentiousness, then a series of generalities whose epistemological value may seem at first questionable. In saying this, the purpose is not to undermine the earlier point that schemes of intelligibility provide a *tertium comparationis*. It has been indicated elsewhere that causal, structural, functional, hermeneutical, actional and dialectical *grilles de lecture* are as applicable to reading a film as to reading a case and its judgments (Samuel 2014.). The problem lies in comparing a structural or a hermeneutical analysis in film and in legal studies at some general level. As a matter of semiotics it might well be feasible to assert that both law and cinema consist of systems of signs—indeed ‘codes’. But are not the effects and concepts employed so different as to render any general comparison of little value? In fact it has been observed recently that the ‘image’ of the world that law represents is not one that is a ‘faithful copy’; it has its own ‘mental representation’ of reality (Mathieu 2014, 7-10). However in order to appreciate these images and mental representations it might be useful to descend to the micro-level—that is to say to the language and visual schemes employed by lawyers. At this level one finds that through the use of analogies, metaphors and diagrammatic schemes lawyers often resort to mental images, perhaps bringing law a little closer to the visual arts than one might at first think (Ibid., 181-199).

2. *Persona*: form and content

Operating, therefore, at a more micro-level might permit the identification of focal points capable of producing useful comparative insights. One might begin with an institutional notion or concept that appears fundamental to both film and law, namely the *persona* (Duff 1938). Leaving aside the film of this name by Bergman, a work that is based almost entirely on this concept is Alfred Hitchcock’s *Vertigo* released in 1958. The film has as its institutional structure (so to speak) three *personae*—indeed perhaps more—but only two actors, although there are other characters whose importance within the narrative must not be overlooked. Indeed there are two other individuals whose roles are crucial to the structure of the work. In addition to the *personae*, the *res*—clothes and a necklace in particular—are equally important; for the film is about how these props go far in shaping, and destroying, the persons and their personalities. One might add that the film has a structure that any French jurist might well find satisfying: it is in two distinct parts and this *plan* is integral to the

substance of the whole movie (Jestaz & Jamin 2004, 226-228).

The film opens with Scottie (James Stewart) and another policeman chasing a suspect over the rooftops; Scottie slips and is left hanging from a gutter high above a courtyard which results in the death of the other policeman when he tries to help the stricken detective. The next shot shows Scottie in Midge's (Barbara Bel Geddes)—his girlfriend's—apartment with, surprisingly, nothing more than a broken leg, but the audience learns that Scottie suffers from severe vertigo and, as a result of the rooftop experience, has resigned from the police force. He is subsequently contacted by an old friend, Gavin Elster (Tom Helmore), who offers him work as a private detective. What Elster wants is someone to keep his wife Madeleine (Kim Novak) under surveillance because she has come to believe that she is a reincarnation of her great-great grandmother Carlotta, who took her own life. Having been invited by Elster to glimpse his wife (in a mesmerising restaurant scene), Scottie accepts the offer and begins to trail Madeleine becoming ever more fascinated by her and her behaviour with regard to Carlotta, represented in a museum painting wearing a distinct jewelled necklace. This trailing episode ends when Scottie saves her from drowning in an apparent suicide attempt. Scottie by this time is in love with Madeleine and while she starts to reciprocate the whole episode seemingly ends abruptly with Madeleine's death in a fall from a bell-tower, Scottie, because of his vertigo, having been unable to save her.

The film then enters its post-Madeleine's death second part. This second section itself is sub-divided into two parts: the first part is Scottie's decline into severe trauma and depression—in which he is institutionalised—and the second part is his post-institution haunted period where he imagines that he keeps seeing, in various locations, Madeleine, although the women turn out to be different people who happened to be wearing clothes similar to those worn by Madeleine. One day, however, Scottie sees a woman (Kim Novak) who really does, in her facial features if not her clothes, seem to be the living image of Madeleine and, his detective skills reawakening, he follows her finally arriving at the modest hotel in which she is living. He summons up the courage to knock on her door and, having overcome her initial scepticism, this look-alike woman invites Scottie into her room, telling him that she is Judy from Kansas who works as a shop girl. When Scottie leaves, we see Judy in her room with a distinctly worried and intense look and the film slips into a flashback. Judy was both Madeleine and not Madeleine; she was Elster's mistress hired by Elster to impersonate his wife in an elaborate plot by Elster to kill his actual spouse, which he does by throwing her from the bell tower knowing that Scottie's vertigo will prevent him from intervening and learning the truth. Thus it was Elster's wife, and not the woman he had been trailing, who Scottie sees as the actual dead figure.

What follows is a deepening and disturbing relationship between Scottie and Judy in which the former obsessively tries to turn Judy into the image he has of the 'late' Madeleine and he only is able to consummate his relationship with Judy, in a physical sense, when he has transformed her into the perfect image of his imagination.

As Judy grows more confident in her relationship with Scottie she carelessly puts on a necklace that is identical to the one worn by Carlotta in the museum painting; and Scottie, on seeing it, immediately realises its significance. He has been tricked and reacts brutally, forcefully driving Judy all the way to the bell tower where, presumably, at its summit he hopes to learn the truth from her. But on reaching the summit it ends tragically when Judy, apparently startled by the appearance of a nun, falls to her death. The film ends with Scottie looking down from the tower and, seemingly, once again completely traumatised (although perhaps cured of his vertigo).

As one might expect much has been written on this film—including at least two books (Barr 2002; Esquenazi 2011). Many of the key commentaries analyse the film sequence by sequence emphasising for example the structural aspects of the film, the intention and outlook of the director (Hitchcock), the moral dimensions of the characters or the psychological obsessions of Scottie and Madeleine. Indeed the film is so rich in possibilities that it can be profitably read through all the various schemes of intelligibility. Who *caused* the Judy/Madeleine death? What *significance* have clothes and the necklace in the narrative? What are the *dialectical* possibilities inherent in the Madeleine versus Judy characters? What are the *functions* of the various narrative techniques employed by Hitchcock (for example in informing the audience almost immediately that Judy and Madeleine are the same person)? What role does the ‘actor’ have in the film given that by definition all narrative films have actors but in *Vertigo* these actors are, especially in the case of Kim Novak, actors playing people who themselves are acting? All of these questions (and others) have been, or could be, themes pursued by writers on film. Yet do these kinds of question really have relevance for jurists?

One concept shared by *Vertigo*’s vision of, and law’s vision of, the world is the notion of *persona*. Robin Wood, who has written one of the principal books on Hitchcock’s films, had this to say of *Vertigo*:

If we re-see the film, or carefully reconstruct the first two-thirds, we shall see that we have not yet taken the full measure of the subtlety and complexity of Hitchcock’s conception. For such a re-viewing or reconstruction will show us that the illusion is not *just* an illusion: Judy was not *merely* acting Madeleine—up to a point she *became* Madeleine. (Wood 2002, 121.)

Robin Wood goes on to explain:

Our very incredulity that the Judy we see could ever have been trained to act the part of Madeleine works for Hitchcock here. Judy—on her first appearance, and in her treatment of Scottie when he follows her to her hotel room—appears hard and vulgar, over made-up, her attitude at once defiant and cheaply provocative; she is playing up the tartness to deceive him, and her underlying vulnerability is gradually exposed, yet she is never depicted as intelligent. (Ibid.)

However, as Wood notes, she was, as Scottie says in the film, ‘a very apt pupil’ (Ibid). As this author implies, Hitchcock is contrasting the visual image with the narrative

implied image. As Wood says:

If we mentally juxtapose her stance and manner in the doorway of the hotel room—her way of holding her body, her expression, her intonation, her vulgarised version of what is in part their love story—with, again, Madeleine's entry from Scottie's bedroom, her way of moving and standing, her hesitant words, her reticence and *pudeur*, we shall see that Madeleine was not just an acted role but another persona. (Ibid., 121-122.)

Or, as Wood asserts, 'the pretence partly became reality' (Ibid., 122). But did it?

The problem with this reasoning, although in many ways insightful, is that 'reality' and 'persona' are not really capable of existing in the same Hitchcockian space. Robin Wood certainly appreciates the subtleties of *Vertigo*—for example its fantastic (unreal) plot and its emphasis on the separation of *persona* and physical person—but there is no real attempt to 'drill down' into the paradoxes that the notion of *persona* engenders in Hitchcock's hands. One wonders, therefore, if the legal mind might not be more demanding in this respect. The jurist influenced by fiction theory might argue that all of the *personae* are surely constructed 'fictions' (see Samuel 2015a, 31). Wood seems to suggest that there are only two such persons, but a moment's reflection will doubtless indicate that there are more. There is, first, Elster's constructed *persona* of his actual wife which Judy is supposed to assume. Perhaps she does, but it is feasible that Judy's Madeleine *persona* is (secondly) not quite that of Elster's, just near enough. Thirdly there is Scottie's view of Madeleine's *persona* which, again, Elster and no doubt Judy hope will match with their constructed visions, but might not exactly.² The obsession with the grey suit worn by Madeleine might not have been fully foreseen by Elster (Scottie might instead have become obsessed with Madeleine's cream overcoat). Fourthly, Judy's construction of Madeleine can be seen as the construction of two personalities; there is 'Madeleine' herself and there is 'Madeleine-as-Carlotta' (Modleski 2005, 95). Fifthly, there is Judy's construction of the 'Judy' which she wants to project onto Scottie when they meet in the street, a *persona* that might actually be perceived (sixthly) differently by Scottie. Seventhly, there is Judy's metamorphosis back into the *persona* of Madeleine—but is it the same Madeleine?—which might not quite match (eighthly) Scottie's construction of this *persona*. Indeed Scottie 'knows' that the Judy-into-Madeleine *persona* cannot be the actual personality because Madeleine is (for him) dead. In short there could be at least eight different *personae* in play, none of which have any reality as such. They are fictional personalities created by actors playing at acting differently constructed personalities.³ Indeed these personalities are all participating in a film whose plot, as Robin Wood points out, 'hinges on a wild improbability' (Wood 2002, 109). The whole plot is quite fantastic, for 'no one would ever set about murdering his wife in *that way*' (Ibid.). Yet such 'unreality' still raises another concept noted by a film writer, that of *anima* (Durgnat 1974, 282).

² A point implied in Durgnat 1974, 283; 289.

³ As Modleski notes, Madeleine 'is a person with no identity' (Modleski 2005, 95).

3. *Psycho*: the role of *anima*

Fiction it all may be, but what is going on in the minds or souls (*anima*) of the various personalities? Here reasoning in film studies can seemingly wander off into areas that at first sight are of little interest to the jurist. The characters' psychological states of mind in *Vertigo* provide a rich source for analysis (Durgnat 1974); but such analysis is often unsupported in any research sense and can on occasions say as much about the film writer as the film itself. Yet aspects of this kind of reasoning about a film can raise issues that should be of interest to the jurist. Who are to blame for the various harms and deaths in the film? As Raymond Durgnat observes:

If we are to blame Scottie for errors which result in his losing Judy, we must also blame Midge [Scottie's long-time girlfriend] for errors which result in her losing Scottie. If we are to blame Scottie for causing the policeman's death, we must also blame the nun for causing Judy's. The pattern of guilts in the film is altogether ambiguous, simply because it is circular. It need not have been. Hitchcock might quite easily have inserted subtle yet effective pointers towards certain aspects or moments and not others. He does not. (Ibid., 287.)

Durgnat goes on to suggest all manner of possible readings, although, for the most part, with a certain scepticism. But he is much more confident in asserting that Scottie's relationship with Judy 'is one of Hitchcock's astute studies in, not male, but masculine, bullying of the female' (Ibid., 288). This remark unites film and legal analysis through feminist theory and although this aspect is not developed by Durgnat in respect of *Vertigo* it certainly raises some interesting issues for the jurist. One thinks of Lord Denning's and Cumming-Bruce LJ's depiction of—'bullying' of?—the female claimant in *Miller v Jackson*⁴ in which she is depicted as a 'newcomer' who does not like cricket—'the manly sport' (Ibid., 988)—and as a person who is 'obsessive' to an unreasonable extent (Ibid., 989). Even if this depiction of the claimant does not amount to bullying as such, it certainly involves an exercise in 'depersonalisation'.

This 'depersonalisation' is, however, as far as many jurists would go in deconstructing the 'person' in a case like *Miller*. The film writer is different in this respect; he or she is far more likely to offer, say, a Freudian or some other psychoanalytic analysis (see Wood 2002, 388-405). Why do lawyers, on the whole, traditionally shy away from this kind of theorising? Why do they not subject a reported legal case—a 'text'—to the same kind of analysis as a cinema academic adopts with regard to her 'text', the film? Now it must be said at once that feminist theory is firmly established in legal studies and, in the area of legal reasoning in particular, has made notable contributions (Hunter, McGlynn & Rackley 2010). Moreover a diachronic view of legal theorising indicates that there are writers who can be categorised under the heading 'psychological theories' (Jones 1940, 187-202). Indeed some of the jurists who formed part of the school of American Realism were more than prepared to take as their object of focus the *animus* of the judge. For example Jerome Frank,

⁴ *Miller v Jackson* [1977] QB 966.

after having set out the views of a judge who had written that judging was a matter of ‘hunching’, concluded that if ‘the law consists of the decisions of the judges and if those decisions are based on the judge’s hunches, then the way in which the judge gets his hunches is the key to the judicial process’. In short, whatever ‘produces the judge’s hunches makes the law’ (Frank 1949, 104).

The fact is, however, that much writing and commentary on legal cases by academic lawyers do not look beyond the actual formal legal reasoning employed by the judges in their judgements. The leading European law journals do not present to their readers a detailed analysis of the psychological states of mind of the judges in cases discussed by the academic writers. In some ways this is astonishing. Few would surely disagree with Jerome Frank when he says this:

His own past may have created plus or minus reactions to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or ministers, or college graduates, or Democrats. A certain twang or cough or gesture may start up memories painful or pleasant in the main. Those memories of the judge, while he is listening to a witness with such a twang or cough or gesture, may affect the judge’s initial hearing of, or subsequent recollection of, what the witness said, or the weight or credibility which the judge will attach to the witness’s testimony. (Frank 1949, 106.)

Is not, therefore, Frank clearly right to conclude that if ‘the personality of the judge is the pivotal factor in law administration, then law may vary with the personality of the judge who happens to pass upon any given case’ (Ibid., 111)? As Frank goes on to ask: Why such resistance to the truth? Why has there been little investigation of the actualities of the judging process (Ibid., 116)? Of course academic lawyers have, since Frank’s time, produced monographs on racism, sexism, anti-Semitism and other psychological prejudices to be found within the legal profession, just as there are works on the influence of politics on judicial decision-making (see Griffith 1997). But this focus on the judicial *animus* cannot by any means be said to be the norm in academic law writing.⁵ In film studies it is quite different. While there are many works analysing a film like *Vertigo* scene-by-scene, or in terms of the motivations of its characters, there is equally no reticence in looking at the personality and psychological orientations and (or) prejudices of a director like Alfred Hitchcock (see Spoto 1983), and of course how this *animus* reflects itself in his films.

Jerome Frank’s own answer to his questions is one based upon what he calls ‘childish emotional attitudes’. There is a childish introspection by lawyers with regard to their own discipline (Frank 1949, 117). And as a result ‘the inclination towards a critical analysis of the motives which lie behind thinking is not very vigorous’ (Ibid). One perhaps should add that any potential jurist in France, and no doubt in other countries as well, tempted to adopt a more vigorous attitude towards legal reasoning and judicial motivation might well find that their careers as academic lawyers do

⁵ Especially in the civil law systems (see generally Jestaz & Jamin 2004). With respect to UK legal writing see Cownie 2004.

not progress. One has to conform to the tradition of the corps of professors and this tradition insists upon a particularly positivistic approach to legal analysis (Jestaz & Jamin 2004, 193-200). As has been mentioned, one difference between reasoning in law and reasoning in film studies is the constriction imposed on the former by the authority paradigm. Nevertheless such a paradigm need not necessarily exclude, even if it does discourage a direct examination of the judicial psychology as a source of law, a more vigorous approach to the methodological and epistemological aspects of legal reasoning. In pursuit of this objective, can reasoning in film studies offer any insights?

The first possibility is to be found in the way that film criticism managed to escape from the 'authority paradigm' of literary criticism. One of the key writers in this paradigm battle was the critic Raymond Durnat who himself had had a traditional Cambridge English literature education (see generally Miller 2014). He attacked (in 1963) the critical tradition in England of the 1950s and 1960s caused in part, he said, by the literature courses in universities (Ibid., 13). In these courses eighteen year olds 'are required to turn out weekly essays in each of which they solemnly "evaluate" Wordsworth, Milton, Webster, etc, and often from the vantage point of, society hopes, total virginity where sex, violence, death and even barrack-room camaraderie are concerned, discuss whether the "texture" of Fielding, Hardy or Baudelaire "reproduces the authentic density of lived experience"' (Ibid., 13). In addition, Durnat went on to assert, 'the Anglo-Saxon culture puritan braces himself against the temptation to relax in the opium-dens of light entertainment' and 'he treats all entertainers and artists as putative drug-peddlers whose work has to be carefully scrutinised before it may be allowed to communicate' (Id.). As for film criticism itself, as represented in the British Film Institute journal *Sight & Sound*, its 'tone of superiority' buttressed by 'heavyweight intellectual quotes (Aristotle, Thomas Mann, Balzac)' (Ibid., 21) kept it 'naïve' and infected with 'a lofty disinterest in what the general public wants and why' (Ibid., 24). The result of this 'paradigm', academic criticism was, said Durnat, 'condemned to misunderstand' films like *This Island Earth* (1955) and *Forbidden Planet* (1956) and 'to dismiss [them] as routine trash, because [their] psychology is straightforward, [their] terms melodramatic, and so on' (Durnat 1967, 268). Today the huge literature on cinema and television attests to the fact that Durnat and his followers and successors were successful in freeing film writing and reasoning from the then existing literary 'paradigm'.

Such attacks on the authority paradigm have of course been part of the jurisprudential literature at least since the American Realists. In particular, just as Durnat was critical of the literature faculties, the Critical Legal Studies (CLS) movement took aim at legal education (see Cownie, Bradney & Burton 2013, 126-129). Yet while these attacks have definitely opened up the boundaries of academic legal writing (Ibid., 133), at least within the common law tradition, open-minded French jurists still describe such American legal writing as an 'anti-model' [in comparison to their own French model (Jestaz & Jamin 2004)]. Indeed even within the common law tradition, the effects of both Realism and CLS, although of major

importance, have been limited (Cownie, Bradney & Burton 2013, 126). One should not be surprised by this since law as a discipline rests upon a foundation that is very different from film studies. In England, for much of its history, the law faculty was simply irrelevant to legal thought and to legal studies; and it is still perfectly possible to envisage law as a formal discipline and reasoning process without academic law professors (Siems 2011, 71). In short it is a professional subject and those faculties in Europe and elsewhere that work outside the authority paradigm can largely be ignored by those in practice. By way of analogy, some of this structure is applicable to cinema as well. The actual production of films has never been dependent upon university faculties.

4. *Images: representation and dimensions*

The second possibility, stimulated in part by the publication of a book in France by a law professor with a mathematical as well as a juridical background, is to look at the extent to which law is represented in terms of images rather than language as such (Mathieu 2014). According to Professor Mathieu such images—mental representations of law—can be conveyed through analogies, metaphors and graphic images (diagrams, graphs and the like). Now one problem with using the page to convey information, either through language or by means of a diagram, is that one is trapped within two dimensions. Reducing, therefore, an image to a diagram or a set of words will always result in a loss of information (Delacour 1995, 35-36; Mathieu 2014, 140); one is operating in a ‘flat’ world (Mathieu 2014, 135-141). This creates its own reasoning patterns in respect to categories and concepts in that the world of fact has to be reduced to categories that often function in terms of a dichotomy. Is this a ‘property’ or an ‘obligations’ issue? Is this a ‘public’ or a ‘private’ law matter? As Professor Mathieu points out, in this flat world a factual situation—a new type of contract for example that cannot be categorised under one of the existing heads—can only be accommodated either by forcing it into an established category or by locating as a hybrid between two or more existing categories (Ibid., 112-120).

More generally one can talk, in this flat world, of reasoning that is binary in nature (Ibid., 125). Either something is X or it is Y. Indeed if one looks at legal reasoning in its historical context it was the ability to reduce problems to what one might call a binary algorithm that made a jurist like Bartolus so notable. The dialectic method in its most perfected form consisted of drilling down using an ‘either...or’ (*aut...aut*) method of *divisio* and *distinctio*. Manlio Bellomo provides an illustrative example of this technique:

[I]f a servant acquired a sick animal, he either was aware that the animal was unhealthy or not; if he was aware of the state of the animal’s health, one must ask whether he acquired for himself, out of his own *peculium*, or for his master; in the latter case one must distinguish whether or not the master knew of the acquisition or not, and if not, whether or not he could have known about it. (Bellomo 1995, 181.)

This dialectical scheme is not the only methodological approach used by lawyers. But it does illustrate how legal reasoning based on the authority of texts operated within a world that was flat. It was either this or that. One divided the world into a series of alternative categories and, as far as possible, forced facts into this two-dimensional dialectical scheme. Even the interpretation of words and expressions can be subjected to this binary form of reasoning. A word in a legal text can be defined in terms of what it is not and thus the word 'state' in respect to the 'state of the premises' can be distinguished from the word 'layout'. Thus a badly designed apartment which subsequently was deemed to be prejudicial to health did not fall within the word 'state' because the problem was one of 'layout'.⁶ As Professor Mathieu points out, flat (two-dimensional) images can create their own particular problems given the absence of a third dimension (Mathieu 2014, 137-141). Yet they can equally exclude and thus provide a type of space for an important form of rhetoric: 'those who are not with us are against us'.⁷

Representation of images on film would seem at first sight to be far less restrictive. The photograph reveals a three-dimensional landscape in a way that the two-dimensional map does not. Lawyers are not of course writing as such about maps, but in fact the metaphor of a map is surprisingly strong in legal thought and acts as an important image in the debate about legal taxonomy. 'Many attempts have been made', writes Stephen Waddams in a chapter entitled 'the mapping of legal concepts', 'to explain the relation to each other of categories (organizing divisions) and concepts (recurring ideas) in private law, leading, since Blackstone's time, to a great many maps, schemes, and diagrams' (Waddams 2003, 1). As Professor Waddams goes on to point out, law is as much about facts as law and no map is capable of classifying all imaginable facts (Ibid., 14). Yet factual reality can prove just as challenging for the film-maker. Hitchcock himself is reported as saying that the cinematic image lacks depth and that in *Vertigo* he was restricted 'to more or less two-dimensional effects' (Durgnat 1974, 294).

5. Imitation of life: depicting 'reality'

This lack of dimensional space applies more generally in cinema. Discussing the impossibility of 'realism' in film, Raymond Durgnat says that it is 'a means, not end' and goes on to ask to what end. 'To showing, surely, something deeper than the surface of life', he suggests, 'whether it be the subjective experiences of the characters in the story, or a clarification of social processes, or the artist's feelings about these things'. He then makes the point:

All of these things are invisible to the camera-eye, which can't see the inside of a man's mind, or a historical process, or a sociological generalization, or a theological or philosophical belief, or the artist's own responses. These 'invisible'

⁶ *Birmingham CC v Oakley* [2001] 1 AC 617.

⁷ *Qui non est mecum, contra me est* (Bartolus, commentary on C.1.9.9 No 1.).

realities can, must, be reached through diverse methods, or by different methods in various combinations: the ‘sample moment’ of *cinema-vérité*, expressionism, or studio trickwork, or dialogue, or music [...] (Durgnat 1967, 33.)

More recent writing has developed this kind of observation into what has become known as representation theory. As one film writer puts it:

Representation is the depiction of things, classes, relationships, experiences, and other phenomena by means such as signs, images, models, formulas, and narratives. In an important sense the notion of representation—something standing for something else—implies that the real world is not simply out there for us to perfectly copy or experience without mediation. We assume material reality exists irrespective of our consciousness but only representations enable us to create a meaningful and workable relationship to that reality. (Bacon 2014, 402.)

The starting point of representation theory is the idea that films do not simply depict reality, even films that claim to be realistic. They construct an artificial world into which the viewer is then drawn (Ibid., 406). Some directors quite openly did this—Von Sternberg for example created his closed and exotic European and Asian places only within Hollywood studio sets—but in fact whole genres of films such as horror, fantasy, science-fiction and so on are deliberately ‘real’ unrealities in which the audience participates in fully accepting such constructions.⁸ Indeed this in many ways is what the visual and literary arts are about. Yet the cinematic constructions of a depicted reality are imbued with a particular complexity because, as one saw with *Vertigo*, the *personae* and the *res* always have a hermeneutical implication. The audience is presented with actors who often themselves have a distinct *persona* but they remain signifiers of another *persona* which is the thing signified. James Stewart and Kim Novak are ‘real’ people yet they are, equally, always playing somebody else. The same is true of the props and the landscapes; they are ‘real’ in one sense but stand for something else within the constructed context of the film. The landscapes, the cars, the guns, the clothes and so on are things to be ‘read’ by the viewer. Thus the sets of Hammer and of Roger Corman horror films are as important as the actors and the storyline while firearms and landscapes have a particular iconic role not just in the films of Sergio Leone but in many of the Hollywood westerns that inspired him (Frayling 2000, 190-191). In short ‘realities’ are carefully crafted representations.

Law is faced with similar representation complexities. As one appeal judge famously said, ‘the state of a man’s mind is as much a fact as the state of his digestion’,⁹ but of course actually trying to determine such a fact cannot be done directly. Whether a person has consented or agreed to something has to depend upon what

⁸ Roger Corman, for example, stated that he never filmed outside of the studio when making his Edgar Allen Poe adaptations, except for sea-shores and burned out forests (Pirie 1970, 58). Actually he abandoned this rule for his final adaptation, *The Tomb of Ligeia* (1964).

⁹ Bowen LJ in *Edginton v Fitzmaurice* (1884) 29 Ch D 459, 483.

is observable and so whether parties to a contract ‘have reached agreement on the terms is not determined by evidence of subjective intention of each party’.¹⁰ Such intention is ‘determined by making an objective appraisal of the exchanges between the parties’.¹¹ This usually involves interpretation of the words used by the parties, the object of the exercise being ‘to determine what each party *intended*, or must be deemed to have *intended*’.¹² As with cinema, one might be said to be dealing with ‘realities’ that are hidden and can be expressed only through other ‘realities’ (Ivainer 1988).

Yet there is an important difference. In cinema the author (or authors) of the film will often deliberately be using certain methods or signs to convey a particular message whereas in law the person involved in a legal situation such as the making of a contract might not have such a deliberate intention to convey a particular message to another person or persons. The party may not have thought about the words he or she used.¹³ There may not exist, therefore, the same understanding between the sender of the message and the receiver of it. Nevertheless the hermeneutical situation can, in the world of cinema, operate at different levels in that the film-maker may be sending a message either to all the world so to speak or just to a more restricted ‘sophisticated’ audience such as critics. A film-maker may use weather or the colour of the landscape or clothes to convey to the mass audience the state of a character’s mind (storms for example traditionally being employed to give expression to mental instability). But the film could also contain more subtle messages which might well not be consciously perceived by those who do not have a store of film knowledge (Constable 2014, 377). In David Cronenberg’s *A History of Violence* there are many references to earlier violent films with the result that his product is both (arguably) a gripping entertainment in itself and—for those who have an interest in *film noir* and westerns—a vehicle for some more ‘subtle’ reference messages.¹⁴

These examples are simplistic to say the least and are used just to make the point that there are different levels of hermeneutical operation in relation to a cultural product such as a film, a painting, a play or a novel. One role of reasoning and theorising in film-studies is to bring out these different levels and meanings. This can be done at a very general level—at the level of theory—or at a close-reading ‘textual’ (image) level, that is to say in relation to a particular film; equally the analysis can be pitched anywhere between these two poles. In other words one can theorise about, say, the use of image in *film noir* generally or one can focus on the particular images in one particular film in order to expose and to discuss invisible realities associated with certain images and (or) their edited juxtaposition.

10 Lord Phillips in *Shogun Finance Ltd v Hudson* [2004] 1 AC 919, para 123.

11 *Ibid.*

12 *Ibid.*, emphasis in the original.

13 See eg *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195. In this case the defendant most probably did not intend that its words (the conditions of tender) would be contractually binding.

14 Sergio Leone’s *Once Upon a Time in the West* (1968) has endless references to Hollywood westerns (see Frayling 2005, 59-63). Even the *res* (the land at the centre of the dispute) is a direct reference to *Johnny Guitar* (1954). This 1954 film is discussed at length in Durgnat 1967, 187-192.

To what extent can images be used to expose ‘invisible realities’ in legal reasoning? Before considering this question it might be useful to make the point here that a barrister presenting an argument to judges may be in a different position—one that is closer to the film-maker—than a litigation party whose words and actions are being assessed by a court (did such a party intend to contract on these terms?). The advocate may well be deliberately sending a message to the judges.

Take the following quite recent case. A schoolgirl suffered serious injury during a school swimming session and sought compensation from the school; the school argued that it was not liable because, although it had organised it, the session itself was supervised by an independent contractor. It was well-established law that the employer of an independent contractor is not to be liable for any tort committed by the contractor, save in exceptional circumstances where there is a non-delegable duty owed by the employer to the victim. The Court of Appeal, holding the school not liable, drew an analogy with a school outing to a zoo. A mishap ‘such as an accident in the bus on the way, or an animal bite at the zoo, would not expose the school to liability where the respective causes were the negligence of the bus driver and the zookeeper.’¹⁵ This decision was reversed in the Supreme Court. Lord Sumption, delivering one of the lead judgments, suggested a rather different ‘image’ than the zoo example; he thought that an analogy with public services was more appropriate. ‘The analogy with public services’, he said, ‘is often close, especially in the domain of hospital treatment in the National Health Service or education at a local education authority school, where only the absence of consideration distinguishes them from the private hospital or the fee-paying school performing the same functions under contract.’¹⁶ As he pointed out, a patient in an NHS hospital injured by the negligence of an agency (independent contractor) nurse would certainly be able to seek redress against the hospital since it would owe a non-delegable duty to patients.

One can of course regard the difference of opinion between the Court of Appeal and the Supreme Court as one of interpretation of a rule in the law of tort (the rule of non-delegable duty). But what is surely striking is the role of images employed to give force to the opposing arguments. If one replaces the school with a parent, picturing a day at the zoo resulting in an accident to the child caused by a negligent zoo employee does not entail, one would imagine for most people, any breach of duty on the part of the parent. In contrast, a visit to a hospital where the child is harmed by a negligent agency nurse would not, for many people, absolve the hospital itself of any responsibility. Both the parent and the hospital are technically ‘independent’ from the actor who directly causes the harm, yet somehow the hospital exposing the child to the agency nurse is different from the parent exposing the child to a zoo. Imagine an audience watching these scenarios in a film. There is a kind of audience participation in which they feel that the day at the zoo, while involving risk, is a ‘reasonable’ parental thing to do. Indeed to refrain from going because of all the risks might well be regarded as obsessive and thus ‘unreasonable’

15 Laws LJ in *Woodland v Essex County Council* [2013] 3 WLR 853, para 26.

16 *Woodland v Swimming Teachers Association* [2013] 3 WLR 1227, para 7.

parental behaviour. But watching a hospital official informing the parent that, while regretting the incompetent treatment by the agency nurse, the hospital is in no way responsible, would, surely, provoke some anger on the part of the audience. Raymond Durgnat has talked of the spectator's response as 'resonance'. It is the individual's response to the image which involves 'the whole interplay of culture and human nature'; and one 'might call it "human content", provided that one remembers that it is created out of style as well as out of the patterns of the story' (Durgnat 1967, 174). The Supreme Court judges' reaction to the images presented to them proved very different to the reaction of the Court of Appeal judges. But the 'human content' is an 'invisible reality' that is the message contained in the image; and perhaps reasoning in film studies can help jurists acquire a deeper understanding of this 'resonance' between audience and representation.

6. The audience: reception theory

This reference to audience reaction forms the basis for another possible connection between reasoning in literary and film studies and in law. This connection is reception theory which originates in literature but has been taken up by a film theorist. It has been summarised as follows:

'Reception theory' refers both to a model for literary history developed by Hans Robert Jauss in 1967 and to a more general approach in literary and film and media studies. In its recent incarnation, reception theory does not denote a theory *per se* but rather a collection of models, practices, and heuristics that are concerned with historicized and active responses by readers and viewers as opposed to intended meanings by authors and film-makers. (Dzialo 2014, 390.)

In fact reception theory has quite a long history going back to Max Weber, but its strongest proponent in film studies is Janet Staiger (Staiger 1992).

This writer has argued that in literary theory texts can be categorised into three kinds. There are text activated theories where the text itself strongly determines the meaning for the readers and the latter are regarded as being passive in terms of the reception of the message contained within the text. 'Text-activated theories', writes Staiger, 'assume or imply that the text controls or provides information for the reader's routine, although perhaps learned, activities' (Staiger 1992, 36). In contrast to these author and text theories there are what Staiger labels reader-activated theories in which the text is seen as weak and the reader as strong. 'Where text-activated theories focus on features of the texts and the effects they produce', says the author, 'reader activated theories examine features of readers and those features' consequences for the reading experience' (Ibid., 43). Here the meaning of the text is determined much less than the text itself and much more by the experiences and psychology of the audience of readers. Thus the readers 'constitute a valuable part of a "feedback loop"' (Id.). Somewhere between these two positions are context-activated theories

which, as the name suggests, ‘differ from the first two by looking at the contexts for reading experiences’ (Ibid., 45). The meaning is ‘in’ the contextual event (Ibid., 47). Thus historical and sociological circumstances are crucial, but a wide variety of data ‘might be used by a reader to hypothesize the appropriate communicative process into which a specific instance fits’ (Ibid., 46).

These categories have a relevance for lawyers and jurists. The authority paradigm, particularly in respect to legislation, would suggest that legal texts are largely text-activated in their design and in their acceptance within the legal community. Indeed the legislative text is seemingly specifically designed to assert control over its readers, the only counter-weight so to speak being the judges’ right to interpret. Even this right to interpret is subject in most Western systems to the will of the legislator (*mens legislatoris*).¹⁷

This said, the position is not always so straight-forward. For a start, not all legislation, at least in English law, is aimed at quite the same audience. Some pieces of legislation are aimed directly at specialist lawyers and will use terms and expressions such as ‘bailor’ or ‘bailee’ without express definition because these words will be understood by the specialist target audience.¹⁸ Take section 2(1) of the Misrepresentation Act 1967 which reads as follows:

Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

To the person on the London underground (to use the fictional figure employed by the judiciary) this statement would make little sense. The word ‘misrepresentation’ is hardly in common use today (or in 1967) and ninety word sentences are at best difficult to comprehend even by readers of a sophisticated newspaper. Moreover most non-lawyers, even if they spent time and energy on the sentence, would probably end up wondering what the author was trying to say. However to those readers with a good knowledge both of the law of misrepresentation and of the history of the tort of deceit the sentence would be comprehensible. It is simply extending the tort of deceit to non-fraudulent misstatements. Now there is no doubt that this section is author-activated in that it is sending a clear message to the specialist lawyer. Yet it is also in some ways a reader-oriented text in as much as the statement is specifically targeted at a very specialist audience whose must actively participate in the interpretation of the section.

One might compare section 2(1) of the 1967 Act with another piece of

¹⁷ For a historical discussion see Maclean 1992.

¹⁸ Torts (Interference with Goods Act) 1977 s 2(2) and 12.

legislation, this example belonging to the field of criminal law rather than the civil (private) law of obligations. The Obscene Publications Act 1959 section 1 states:

For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

Arguably this sentence, despite its length, is aimed at the ordinary person on the London underground in that it is this type of reader who is likely to make up a panel of jurors. It is, in other words, not aimed at a lawyer with specialist knowledge but at a person who has to judge whether a publication is one that ought not to have been published. The actual criteria—‘deprave’ and ‘corrupt’—employed by the author of the text are completely meaningless in any scientific or philosophical sense. They are words designed entirely to stir emotions and activate intuition. They are probably intended as a means of bestowing discretion on a jury whose own ‘common sense’ will decide whether the publication is obscene. This piece of legislation is, then, rather less author-activated and more context-activated than the 1967 section in that what amounts to deprave and corrupt changes over the decades. Films that might have been prosecuted in the 1950s might well be considered somewhat tame today. In fact one might go further and argue that section 1 of the 1959 Act is more reader-activated than author-activated in that the wording is designed to ensure that a jury—the ordinary readers of the prosecuted text—are the ones who will interpret the words.

Both of these legislative texts are author-activated in as much as the drafters of the legislation had the intention of imposing a normative proposition designed to achieve an objective. However there are occasions where this objective is not always reached. The judges, as readers, might interpret a text in such a restrictive way (as viewed by the author) that the wording does not cover a situation envisaged by the legislator. This may often be unhelpful as far as the legislator (author) is concerned; but it is not always the case. It is possible that the readers (judges) might adopt an interpretation that is narrower than the words seemingly permit in order to achieve an objective that, at least at the time of the litigation, accords with that of the author (legislator).

Can one talk, therefore, of a relationship between author and reader as one that is capable of being both non-receptive and receptive depending upon context? Can one conclude that while legislation might at first sight be author-activated it is, in the end, always context-activated (if not reader-activated) because much will depend, first, on the target readership (specialist lawyer or ordinary juror) and, secondly, on the receptive attitude of the readers themselves? Certainly, the great civil law codes—legislative texts of course—can arguably be understood, today, only in terms of a context-activated (if not a reader-activated) reception theory. As Professor Niglia has written, ‘codification is a dynamic and never-static phenomenon, for, to

exaggerate, there is never a well-defined code-text, but always interpretation of it and perspectives on it—and struggles’ (Niglia 2015, 157). Thus understanding ‘a code is about capturing these perspectives, and capturing them is about detecting struggles as well as participating in them’ (Id.). For a ‘code, once enacted, may enjoy weak authority or no authority at all in being highly contested and resisted, depending on the degrees of contestation and resistance that surround the code-product’ (Id.).

7. Ashes and diamonds: from theory to interpretation

Reading legislation is no doubt somewhat different than reading a film. Yet reasoning about cinema (or literature in general) is relevant in the way that it emphasises the essential role of the viewer (reader), a role that is arguably eclipsed in legal studies by the authority paradigm. Instead of talking about reception lawyers talk instead of the permissible rules or methods of interpretation (see Bell & Engle 1987, 46-111). The notion of interpretation is of course important both in law and in film studies; but literary and film theory have gone beyond the narrow rules of interpretation by situating interpretation within a sophisticated epistemological context. Such a context—for example the categories envisaged by Staiger (1992)—permits in turn jurists to go beyond the positive rules or methods of interpretation discussed in law textbooks and treatises and to start examining the work of social scientist, and humanities, theorists in general. The idea, for instance, that English statutory interpretation can be understood as an intellectual exercise simply by learning the three rules of interpretation—the literal, golden and mischief rules—is epistemologically absurd. Much the same can be said in relation to the rules of precedent. One may or may not be impressed by Staiger’s categories, but there is no doubting that they force one to think about legal texts in a much more sophisticated way.

At a more specific level a film like *Vertigo* can equally inform conceptual legal reasoning. The film can encourage jurists to think about their own structural model, built upon the elements of persons, things and actions, and the way that this model has insinuated itself into the psychology of jurists. For example one academic lawyer has attacked a particular argument about causation in the law of tort on the basis that ‘it refers not to each defendant as an individual but to the defendants as a collective unity’ (Nolan 2009, 174). Yet the defendants that this writer is treating as individuals are not individuals at all; they are corporations which, of course, are a ‘collective unity’. The constructed social world here is as much a fantasy as the one created by Hitchcock. Later on in the same paper the jurist distinguishes between ‘objective probability’ and ‘epistemological probability’ (Ibid., 185-186). But is not the corporation simply an ‘epistemological individual’ rather than a ‘factual one’? If one is going to make a distinction between an ‘epistemological’ and ‘factual’ world, then what Hitchcock has to offer is a vision that seriously questions such a dichotomy. If Madeleine is an ‘epistemological’ construct, what about Judy? Is she ‘factual’? Or is she, as Robin Wood suggests, more Madeleine and thus more ‘epistemological’? The great fear that some jurists have is that of incoherence (Ibid., 189). However no one

can accuse Hitchcock's major films as lacking coherence. Quite the opposite, even if the coherence comes, as in *Vertigo*, at the price of factual credibility (would one really plan a murder in this way?) *Vertigo*, in short, ought to provoke the jurist into asking this question. Is much legal reasoning based upon a social world as reliable in its 'epistemological' construct as the world of Scottie, Madeleine and Judy? Is it a fantasy world that, like cinema, seems to be offering a vision of reality?

Another writer on tort has noted that 'the goal of an "interpretative legal theorist" is to "reveal" an "intelligible order" in the present law' (Bagshaw 2009, 247). This is of course an important restatement of the role of academics in the social sciences and humanities. Interpretation (hermeneutics) and order (structuralism) are two key schemes of intelligibility employed by social and human scientists. The inspiration behind this interpretative theory, Ronald Dworkin, not only argued that the jurist could better understand law by comparing legal interpretation with interpretation in other disciplines (especially literature) but also suggested that jurists might well be able to provide a better understanding of interpretation in general (Dworkin 1985, 146). Interestingly when one turns to the topic of interpretation in film studies, it has been observed that an exclusive hermeneutical training, which, says the author, is the educational background of many film writers, has had a limiting effect on the development of any sustainable films theories. Because of a lack of training 'in theoretical discipline such as the natural or social sciences, or philosophy', the result is that 'most film scholars do not really understand the difference between theory and interpretation, an obvious liability if theory is to prosper' (Carroll 1996, 42). What Dworkin offered is interpretation as a theory in itself. Law is interpretation (Dworkin 1986). But according to Noël Carroll the two cannot be merged in film studies because 'the interpretation of individual films is not theory, no matter how technical the language of the interpretation appears'. Theory, for Carroll, 'involves evolving categories and hypothesizing the existence of general patterns; but finding that those categories and hypotheses are instantiated in a particular case is not a matter of theory' (Carroll 1996, 42). Theory is about 'the regularity of the norm, while film interpretation finds its natural calling in dealing with the deviation, with what violates the norm or with what exceeds it or re-imagines it' (Ibid., 43).

One may or may not agree with Carroll. Would for example Carroll deny that Stagier, and her representation 'theory' categories, is not propounding a theory? Moreover film studies has surely been dominated—and to some extent is still dominated—by the two fundamental 'theories' of *auteur* and *genre*? (Tudor 1974, 116-152). It is difficult to imagine any film interpretation being conducted without some reference to these theories. Yet, whatever the situation, there is perhaps a problem within law in trying to distinguish theory from interpretation in that law is different from film studies in its discipline paradigms. It is not open in the same way to the criticism that 'showing that a film is an instance of a general theory would imply that the film is, in certain respects, routine, that is, pretty much like everything else in the same theoretical domain, and, therefore, not really worthy of special interpretation' (Carroll 1996, 43). As has been seen, the goal of the legal

theorist is to find an intelligible order in the cases and statutes that are the objects of the interpretation.¹⁹ Indeed Dworkin has argued that the role of the judge is to participate in a grand project that is analogous to writing a chain novel and thus the judge as interpreter is indeed working towards the idea that each instance is part of a greater general theory. In short coherence has been a major objective in legal reasoning, especially since the 16th century (Samuel 2012, 448).

Yet Carroll's assertion has perhaps some resonance for lawyers. Tony Weir, in an article comparing contract in English and Roman law, once attacked theorists in asserting that he had no theory to propound. Legal technique was, in his view, casuistic and thus Roman jurists were practical lawyers who 'hypothetically varied the actual facts of the situations presented to them, and considered what the legal effect of such hypothetical variations would be' (Weir 1992, 1617). One might respond to Weir's—and Carroll's—assertion in saying that he was in effect propounding a theory, but perhaps the real problem is that the role of theory in law is more complex (or perhaps more simplistic) than the interpretativists' view might suggest. Many lawyers operate not only within a particular rule-model of law—that is to say an epistemological thesis that regards knowledge of law as knowledge of rules—but equally within the authority paradigm. The result is that most lawyers are, theory-wise, operating within a largely positivist tradition, even if some might temper this, like Dworkin, with what used to be called natural law thinking (Atias 2002, 139-140). Legal method is undoubtedly subject to a paradigm and theory framework even if this is unacknowledged (see Atias 2002).

In contrast, separating interpretation from theory is of value in film studies in that it permits an interpretative approach that can intermix at one and the same time a range of schemes of intelligibility which in turn focus on what Raymond Durnat has called the difficult sources of confusion presented by cinema. There are not just aesthetic and style problems, but also 'the controversies and tensions existing within the schools of aesthetic opinion' (Durnat 1967, 13). This led Durnat to abandon theory in favour of exploring specific films (Ibid., 14). And the result of this exploration is, arguably, one of the richest works on cinema writing in that there are real insights into both a range of very different films and a number of more theory-orientated issues such as Realism and Expressionism. Yet this exploration was conducted through what might be called certain interpretative frameworks (or 'signposts' as Durnat called them) such as the relationship between content and style and between content and 'certain sociological facets' (Id.). Indeed if one was to isolate a single interpretative idea it is that of 'resonance' which in turn can

19 It has to be said that there has been a very long running reflection on the role of what might be called legal maxims (*regulae iuris*) as legal statements and their relation with individual cases. The final title of Justinian's *Digest* is devoted entirely to a list of legal maxims, but the first of which issues a warning (D.50.17.1). The law will not be found in these *regulae*. Where is, then, the law to be found? The medieval jurist Baldus said, on commenting on D.9.52.2, that it was to be found in the facts: *ius ex facto oritur; ius est implicitu facto* (Baldus, *In primam Digesti Veteris partem Commentaria*, D.9.2.52.2.). Is a case law decision always to be seen as an aspect of a more general theory? One gets the feeling that one of the Post-Glossators who succeeded Baldus began to struggle with this issue (Philippus Decius, *In Titulum de Regulus Iuris*).

be approached through a rich methodological tapestry of causality, functionalism, structuralism and so on, not forgetting of course issues of style and script that can take one beyond the schemes of intelligibility.

There is no reason, except if one belongs to the Dworkinian interpretivist school, why the jurist could not, at least to some extent, abandon the positivist and authority paradigm in order to approach say cases through the idea of resonance. Of course resonance itself is of little help and so behind it are to be found a range of schemes and focal points which can be deployed in order to create the interpretative structures. Why not teach contract and tort cases through empirical focal points such as debt and personal injury, for these are the focal points that statistically are the most relevant? Might one go further and group the cases and statutes around 'supermarkets' (*Double Indemnity*, *The Ipswich File*),²⁰ 'swimming pools' (*The Swimmer*, *Deep End*),²¹ 'buses' (*Voyage Surprise*, *Bus Stop*),²² 'ships and boats' (*The Wreck of the Mary Deare*, *Knife in the Water*),²³ 'aircraft and airports' (*The Crowded Sky*, *Airport '77*, *Snakes on a Plane*, *Flightplan*)²⁴ and so on? One might not be constructing the great literary chain novel envisaged by Dworkin, but, in the spirit of the Roman jurists (as envisaged by Weir), one can vary the facts and push outwards towards new situations. One might even be able to identify a certain aesthetic in the style of, and in the metaphors employed in, judgments, as has been seen with Lord Sumption's approach in the swimming case. Durnat could entice the jurist into a world of visual scenery so as to find some diamonds in the ashes of theory.

8. Exodus: concluding remarks

Can, then, reasoning and argumentation within cinema studies be of value to jurists? Certainly representation theory and response theory are of value and a film like *Vertigo* should, at the very least, provoke reflection on the role of *personae* and *res* in the construction of a narrative. But it is the actual differences between the epistemological underpinnings of each discipline that are, perhaps, the most

20 *Pharmaceutical Society of G.B. v Boots* [1953] 1 QB 401; [1953] 2 WLR 427; *Ward v Tesco Stores Ltd* [1976] 1 WLR 810; [1976] 1 All ER 219; *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1998] AC 1; [1997] 2 WLR 898; [1997] 3 All ER 297; *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] 1 All ER (Comm) 737.

21 See eg *Ruxley Electronics Ltd v Forsyth* [1996] 1 AC 344; *Radcliff v McConnell* [1991] 1 WLR 670; *Woodland v Swimming Teachers Association* [2014] AC 537.

22 *Topp v London Country Bus (South West) Ltd* [1993] 1 WLR 976; *Keppel Bus Co v Sa'ad bin Ahmad* [1974] 2 All ER 700.

23 See eg *Clarke v Dunraven* [1897] AC 59; *The Moorcock* (1889) 14 PD 64; *The Great Peace* [2003] QB 679; *Home Office v Dorset Yacht Co* [1970] AC 1004; *Marc Rich & Co v Bishop Rock Marine Co Ltd* [1996] 1 AC 211; *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1996] 1 WLR 38; *Jolley v Sutton LBC* [2000] 1 WLR 1082 (HL); *Constantine (Joseph) SS Ltd v Imperial Smelting Corporation* [1942] AC 154; *Reed v Dean* [1949] 1 KB 188; *Transfield Shipping INC v Mercator Shipping INC* [2009] 1 AC 61.

24 *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195; [1990] 3 All ER 25; *Morris v Murray* [1991] 2 QB 6; *Manchester Airport Plc v Dutton* [2000] 1 QB 133; *Parker v British Airways Board* [1982] QB 1004; Civil Aviation Act 1982 sections 76-77; *Dennis v MOD* [2003] EWHC 793; *Hatton v UK* (2003) 37 EHRR 611; *Aerial Advertising Co v Batchelor's Peas Ltd* [1938] 2 All ER 788.

valuable when one is reflecting on legal reasoning. Coherence and the authority paradigm, together with a rule-model assumption, are the frameworks within which many lawyers and jurists reason. There have been serious attempts to break out of these frameworks—particularly by some of the Legal Realists and their successors—and this has resulted in a shift from conceptual structuralism (coherence) towards a functional approach. This has led to a major debate within law between the interpretivist school and the functionalists which has the merit of exposing the role of schemes of intelligibility in legal methodology. The major debate in cinema studies is now rather different since it is one between grand theory and individual interpretation. This debate is relevant for jurists as well, but more positively perhaps, jurists might well be able to inform thinking in cinema studies. Certainly grand theory is a problem for film writers as Carroll indicates; but the debate raised by writers like Carroll is, arguably, rather unsophisticated in that it does not begin to investigate the inter-space between interpretations and theory (see Boucher 2013). There is some understanding of the role of schemes of intelligibility and paradigm orientations but this is, arguably, underdeveloped by writers like Carroll. Both film studies and law can, accordingly, mutually benefit from a comparison of their reasoning and methods; the comparisons could aid a rethinking in both disciplines.

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