

USING NON-FICTION FILMS AS VISUAL TEXTS IN THE FIRST-YEAR CRIMINAL LAW COURSE

Philip N. Meyer*

with Stephen L. Cusick**

INTRODUCTION

More law professors are going to the movies these days, searching for appropriate visual texts to supplement the written appellate opinions excerpted in the casebooks that are at the pedagogical core of their doctrinal courses. There are many good, and some not so good, reasons for this practice. First, our law students are increasingly visually literate. They are visual and aural learners as well, and films often provide excellent illustrations of many of the doctrinal concepts, especially in criminal law. Thus, for example, teaching the nature of mens rea, and many related core issues in criminal law can be facilitated through the careful selection and use of visual hypotheticals or “clips” taken from brief excerpts of popular movies. Legally sophisticated concepts such as distinguishing between specific and general intent crimes, or understanding the various levels of culpability categorized by the terminology of the Model Penal Code—“purposely,” “knowingly,” “recklessly,” “negligently”¹—can often be readily visualized and discussed using illustrations drawn from filmic clips displayed in the classroom.

Second, many students find the constant diet of appellate opinions served up in the first year, the density and impenetrability of many opinions, and the decontextualized nature of these fragments severed from the full text of the opinion, often unsatisfying and unfulfilling. The legal texts raise questions that cannot possibly be fully anticipated and answered by the supplemental materials in the casebook. Students, especially in the criminal law course, have difficulty imagining and speculating upon what they cannot literally see for themselves. This includes many of the best and most sophisticated students, who become frustrated with the perpetual drill of dissecting appellate cases, teasing rules from cases, and understanding

* Professor of Law at Vermont Law School. I am, of course, deeply grateful to my former Criminal Law student Steve Cusick for his collaboration in writing this paper. Steve took my Criminal Law class in the spring semester of the 2001–2002 academic year.

** Third-year law student at Vermont Law School.

1. MODEL PENAL CODE § 2.02 (2)(a)–(d) General Requirements of Culpability (Proposed Official Draft 1962).

and arranging legal principles and doctrine in a sometimes forced and artificial systematicity based upon exclusive reliance upon judicial opinions as texts.

Law school curriculum, especially during the first-year when there are few options in course selection, is still about pervasively, as Anthony G. Amsterdam observed some years ago,² FARFing the law (fact and rule fit). This pedagogical practice attempts to develop one particular and limited type of legal reasoning—one important but extremely incomplete aspect of any law practice.³ Furthermore, regardless of how humane and intellectually alive professors are, for some students this pedagogical devotion to one incomplete aspect of the legal imagination ultimately inhibits rather than disciplines creativity, shaping it into a somewhat conventional, one-size-fits-all, legal imagination. This exclusive discipline drains some of the wildness, creativity, and the oppositional/critical thinking and narrative persuasion abilities that inform the effective practice of law, certainly in the context of litigation. Additionally, the narrative dimensions of criminal law trial practice, appellate practice, and post-conviction relief work, are especially crucial.

Consequently, many first-year students desire and manifest a psychological readiness for narrative understandings of criminal law that can be readily “rationalized” and justified pedagogically in terms of developing their lawyering skills. Film provides a marvelous vehicle and opportunity to go beyond doctrinal analysis, and to understand the law in some fuller, deeper and more complete context. This fulfills the needs of many students, and makes them far better students when they return to their own readings of doctrine and cases. This is especially so in the place where I teach—a rural, independent, and free-standing law school in Vermont. Let me explain briefly: Vermont truly offers a beautiful physical setting for the study of law. The school is located in a scenic rural village in the mountains, miles off the interstate. We say, with some pride, that ours is the only accredited American law school in a town without a stoplight. This setting provides many advantages for the reflective and contemplative study of law. There are, however, disadvantages as well. First, we are comparatively removed from the comings and goings of the law. Consequently, many students, especially our first-year students, are hungry to—quite literally—“see” how the law works, “hear” how it sounds, and

2. Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 613 (1984).

3. *Id.* at 615 (noting that traditional teaching at law schools has ignored “such analyses and skills as ends-means thinking, information acquisition, [and] contingency planning” that will be valuable to students once they begin to practice law).

“feel” vicariously what it is like to be a part of its processes. Our first-year students want to better understand how the doctrinal rules teased out from the cases fit into the more developed landscape of criminal law practice. They desire a deeper contextual understanding of the cases, beyond the power-to-weight ratio currently provided by study of excerpts from the opinions in the casebook, even as supplemented by discussion of the notes and hypotheticals in the classroom.

Second, all of my students have been, as the cognitive theorist and cultural psychologist Jerome Bruner has repeatedly observed,⁴ bathed and swaddled in endless popular stories. Furthermore, so many of these stories recently are about the law as it is transformed into the easy-to-digest melodramas and three-part plot driven visual narratives of popular storytelling on television and at the movies. My students are story addicts now-a-days, as we all are. We all need our fix of stories. Again, fulfilling this neediness can be easily rationalized in terms of purportedly legitimate pedagogical objectives. For example, students these days are “hungry” for context, and films provide contextual illustrations for rich discussions of sub-textual issues in criminal law often located just beneath the surface of the cases. Filmic documentaries especially provide an opportunity for visualizing the criminal law. While fulfilling this need, the stories told in these films invite students to participate in discussions engendering critical responses without, necessarily, creating or reinforcing the profound and easy consumerist moral skepticism that often infects some of our students’ responses to criminal law.

Third, the cases and the texts of the criminal law casebook are not designed to, or perhaps *are* designed to *avoid*, raising some crucial issues. Perhaps, to quiet emotion and passion, casebooks do not raise and fully confront some issues, for example, those pertaining to racial injustice, or systematic imbalances in the system such as the impact of money, privilege, and power upon the outcomes in criminal law. Nor do they confront the overt politics of charging and sentencing, or the internal cruelty and violence of the system, or even issues pertaining to the post-9/11 criminal practices of our Government. These counter-stories are repressed, I suppose, in service of coverage, or the dispassionate articulation and elaboration of doctrine. Films provide an opportunity to turn discussion toward this repressed subject matter, often systematically avoided by the cases themselves, and by the hypotheticals and study questions posed in the casebooks.

4. See JEROME S. BRUNER, *ACTS OF MEANING* (1990) (highlighting a study documenting children’s constant exposure to narratives); JEROME S. BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* (2002) (stating that “[o]ur lives with stories start early and go on ceaselessly”).

Finally, despite the exploitation of the criminal law as material for popular storytelling, as fodder for talking heads, and as material for the drone of endless media exploitation, many of my students are remarkably “innocent” about the day-to-day workings of the criminal justice system and want to open and look behind the various doors for themselves. I attempt to seize opportunistically upon this “innocence.” That is, criminal law practice, and indeed any litigation practice, does not occur in clean well-lighted places of the classroom or within the laboratory of appellate cases. Litigation occurs in a shadow world, where narratives swirl dangerously far removed from the decontextualized slivers of textbook cases that are selected to re-present and embody the law. Thus, films, especially the “real” images of non-fiction films, often shot from the perspectives of and telling the stories of the legal actors and the players caught within the system, provide opportunities for students to observe and discuss law-in-action, and for students to explore the implications of these law stories for themselves.

In criminal law courses, many criminal law teachers are former practitioners of criminal law (former prosecutors, defense attorneys, judges) who can draw upon their experiences, and weave in and out of the anecdotes and imagistic storytelling. Furthermore, as I have written in several articles,⁵ trial attorneys comfortable with working and playing to juries are often gifted storytellers. Although I have some litigation and clinical teaching experience, I am not, primarily, a former practitioner of criminal law, and lack a repertoire of criminal law war stories. My law practice experiences, and my experiences as a clinician, are primarily in civil litigation practice. During my first year teaching criminal law, I initially borrowed some classroom anecdotes from literature. But many of my students were unfamiliar with the plots of these stories. However, during my second year teaching criminal law, I used the crimes depicted in the then hugely popular weekly episodes of *The Sopranos*,⁶ and the plots of

5. See Philip N. Meyer, *Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in The Estate of Karen Silkwood v. Kerr-McGee, Inc.*, 9 CLINICAL L. REV. 229, 232 (2002) (noting that effective attorneys often draw upon popular stories and narrative themes with which the jury is likely to be familiar); Philip N. Meyer, “Desperate for Love”: *Cinematic Influences Upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721, 722, 749 (1994) (explaining that attorneys can use storytelling elements to recapture the jury's attention after long periods of tedious testimony); Philip N. Meyer, “Desperate for Love II”: *Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 U.S.F. L. REV. 931, 932–933 (1996) (stating that attorneys often incorporate elements of popular stories into their work); Philip N. Meyer, “Desperate for Love III”: *Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715 (1999) (demonstrating how classical storytelling elements can be incorporated into the trial attorney's arguments).

6. *The Sopranos* (HBO television broadcast).

these episodes as hypotheticals, and the students seemed immediately engaged. Now I turn systematically to non-fiction films, and complementary visual excerpts (brief clips) from fictional movies as the basis for in-class hypotheticals.

To summarize, I use movies and films in my criminal law class in several discrete ways. First, documentary films provide visual context for the cases, a sense of the system-in-action, and a deeper understanding of how the excerpts from the appellate cases fit into a larger background. Second, these films raise issues that often are not addressed directly in the casebooks. Third, filmic excerpts enable students to visualize discrete doctrinal concepts in criminal law, and provide visual problems and hypotheticals for analysis by the students. Fourth, films enable students to explore, and shine a light upon, the shadowy imagistic narratives in criminal law. I use full "non-fiction" films to serve the first, second and fourth goals, and use brief edited visual sequences from popular fictional movies as visual hypotheticals and problems.

In this paper, I focus upon my choices for non-fiction films, and how each of these films works in relationship to the doctrinal curriculum. I leave the analysis of how I use visual hypotheticals and problems developed from popular movies for another time. My brief observations are supplemented by the perceptions of Steve Cusick, a student in my criminal law class two years ago. I enlisted Steve to help me to prepare this paper and provide a consumer perspective. Steve contributes six short mini-papers on these films and how these films fit into, or detract from, the basic first-year criminal law curriculum.

Let me conclude this introduction with some observations about the mechanics of using full-text documentary films in criminal law classes. First, I have taught both three and four-credit versions of criminal law and the use of full-length film works better in a four-credit criminal law class. Specifically, the four-credit version (previously taught at Vermont Law School) meets three times per week and the three-credit version meets two times per week. Showing one film in class approximately every two weeks (approximately seven films in fourteen weeks) does not cut too deeply into coverage in the syllabus for the four-credit class. In fact, film days are a relief for many students, spared class preparation and permitted to simply sit in the darkness, watch a movie, and then discuss their reactions spontaneously.

Also, I want to note that showing films seemed more satisfying to the students when the screenings were supplemented by some discussion afterwards. Fortunately, my classes were scheduled from 11:20-12:35, and there was an open lunch hour period at least one day per week after class.

This enabled me to show entire films, and have an optional discussion afterwards. On several occasions, when I had to leave to attend a meeting during the open lunch hour, some students stayed in the classroom and continued to discuss the film. In other classes, after showing such films as *The Case for Innocence*⁷ and *Snitch*,⁸ students seemed riveted in their seats when the lights came up, drained by what they had seen, and did not want to discuss the film. Additionally, the films stayed in the students' minds in a way that, often times, the cases did not.

There are other up-sides to employing films as texts. For example, several times I left town to attend academic conferences and, last year, went away for one week to coach our school's National Moot Court team. Fortunately, because I had allowed room for screening films in my syllabus, I did not have to cancel class, or schedule make-ups. I simply showed the films instead.

Finally, especially after reviewing the comments by Steve, I have decided it may be helpful to have students write short reflective papers two or three times per semester. These papers could then be incorporated into the oral or class participation portion of the grade. Students could, like Steve has done, attempt to connect the films to the doctrinal materials covered in the class. Several papers could be selected and read aloud by their authors at the start of class. Furthermore, the papers need not be edited by the instructor, but simply marked with a check, check plus, or check minus. I have not implemented this system in my criminal law class because, simultaneously, I teach a first year three-credit Legal Writing II—Criminal Law class, and would not want to bite off any additional papers for review. It would simply be more than I could chew.

Here are some specific suggestions for non-fiction films that I have used or intend to use, with a brief note on my choice of the film, and then the place of the film in the curriculum as developed by Steve Cusick.

I. JUSTICE, INJUSTICE, AND "JUST US"—BETRAYAL STORIES

I went to the courtroom looking for justice, and that's exactly what I found: Just us! I went to the jails, and who's serving time? Just us! So who gets justice in this country? Right again? Just us!

Richard Pryor⁹

7. *Frontline: The Case for Innocence* (PBS television broadcast, Oct. 31, 2000).

8. *Frontline: Snitch* (PBS television broadcast, Jan. 12, 1999)

9. RICHARD PRYOR, IS IT SOMETHING I SAID? (Reprise Records 1975).

I use two PBS *Frontline* films—*Snitch* and the *Case for Innocence*—as course bookends. The investigative journalism by the reporters at *Frontline* often provides passionate critique of the legal system, characteristically in the form of multiple oppositional stories wound together around core themes of institutional betrayal and injustice. The individual stories reveal how the criminal justice system works and how it fails, how it is often dysfunctional, and the victims are not just the victims of the crime itself, but also victims of the system's processes. The films are well-researched narrative compositions; often the stories are intercut with commentary by various players who are well-situated within the criminal justice system. I show *Snitch* at the beginning of the semester and *The Case for Innocence* at the end of the semester. *The Case for Innocence* sounds a cautionary note for my students who may take only this course in the area of criminal law. I have supplemented these two documentaries with an optional mid-semester showing of Errol Morris' *The Thin Blue Line*.¹⁰ I do not comment upon *The Thin Blue Line* in this paper since so much has already been written about this film.¹¹ The three movies taken together provide a powerful narrative antidote to the positivism of the cases.

Snitch is the first film in the course, and I try to show it when we are covering such topics as theories of punishment and proportionality in sentencing. "Snitch" tells the stories of various defendants convicted and sentenced under federal drug laws passed during the Reagan years in the war against drugs, punishing the sale of drugs with harsh mandatory minimum sentences.¹² The primary way that defendants can obtain sentencing relief is by cutting a deal with the U.S. Attorney's office to inform on other drug sellers, rendering substantial assistance or "testilying" as the practice is described by a primary drafter of the federal drug laws.¹³ These stories are powerfully and darkly compelling, especially when layered one-atop-the-other. There is the story of a young man, a high school senior from a bourgeois Florida family with no prior criminal record

10. THE THIN BLUE LINE (Miramax Films 1988).

11. Because I have written about this film at some length, several times, including student journals as well as my own, I will not repeat this analysis here. See Philip N. Meyer, *Law Students Go to the Movies*, 24 CONN. L. REV. 893, 900–908 (1992) (describing *The Thin Blue Line* and comparing it to the film *Chinatown*); Philip N. Meyer, *Visual Literacy and the Legal Culture: Reading Film as Text in the Law School Setting*, 17 LEGAL STUD. F. 73, 82–83 (1993) (discussing the role of truth in *The Thin Blue Line* and other stories); see also Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 41, 48–63 (1994) (analyzing the persuasive force of the form used in *The Thin Blue Line* and its impact on the life of defendant Adams); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994).

12. *Snitch*, *supra* note 8.

13. *Id.*

who receives a ten-year mandatory minimum for selling several “hits” of LSD to an undercover federal agent. But this is just the beginning of the truly Kafka-esque story. The young man refuses to provide assistance to the government. Instead, the local U.S. Attorney benevolently offers his father the opportunity to find other drug dealers in the son’s place. The father mortgages the family home, and exhausts his funds searching to find drug dealers for the Government, who might be turned in to provide the necessary substantial assistance to reduce his son’s sentence. But when the father attempts to appeal his son’s conviction, an angry U.S. Attorney reneges on the deal, observing unapologetically to the *Frontline* interviewer that “you can’t have it both ways.”¹⁴

Snitch also presents the cautionary story of an elderly black cleaning woman who is prosecuted and convicted as a drug dealer under Federal Conspiracy laws and given a severe mandatory minimum sentence, as the former federal prosecutor admits candidly, simply because she refused to testify against her son and not because she was truly a party to any drug conspiracy. Likewise, there are the disturbing multiple prosecutions of defendants in a poor rural black community that affect virtually every family in the community, based upon the testimony of an admitted major drug dealer cooperating with the government. And then there is the sadly compelling story of a young black college student sentenced to multiple consecutive life sentences after arranging for drug dealers in his small rural southern town to meet with drug dealers on his college campus. He is given these consecutive sentences because he refused initially to snitch on his more culpable co-defendants until it was too late. All his co-defendants had already cut deals; he simply had no more testimonial chips left to bargain with. Finally, there is the cautionary tale of a major drug importer who snitches on his socially prominent and politically left-leaning defense attorney, identifying the attorney as the purported drug king pin and “consigliere” in his drug smuggling operation. The prosecution of the attorney, a person of such social prominence and political stature, was an especially compelling target.

These stories are, I believe, especially chilling to view these days. Taken together, they are darkly suggestive of tyrannical possibilities and horrible results that may be caused by zealotry, poorly drafted legislation, overreaching prosecutors, and strategic disequilibrium created by eliminating judicial discretion. Indeed, the wrong legislative tools seem to invite and, in some cases, compel systemic abuse. My students are affected

14. *Id.*

by the stories, and, I think, quickly get the point. Here, for example, Steve Cusick comments upon *Snitch*:

Steve Cusick on "Snitch"

This film builds upon class discussion over the concept of "proportionality" in the criminal justice system. In particular, it forces the student to consider whether the federal minimum sentencing guidelines in drug cases result in disproportionately harsh sentences for minor drug offenders. Further, the film leads the student to again ponder the consequences of public policy on criminal law, and how that policy can sometimes conflict with the basic concepts of fairness and truthfulness that are supposed to underlie the system.

In our course textbooks, we studied the concept of proportionality of punishment: essentially, the punishment should fit the crime, and the Constitution theoretically protects against disproportionately harsh punishment. Numerous case studies in *Snitch* call into question whether the minimum sentencing guidelines adopted in 1986 as part of the "War on Drugs" violate that concept. Under the sentencing law, a defendant may avoid the stiffer penalties if he or she agrees to inform on fellow drug dealers. On the other hand, even minor offenders who do not inform are subject to severe minimum penalties. Much of the film focuses on the corruption of the system that occurs because of its over-reliance on snitches, who are often witnesses of suspect credibility and who are given strong incentive—prospects of a shorter sentence—to lie again.

But beyond considering that policy concern, students are forced to examine the results of the guidelines and whether they are consistent with the concept of proportionality. The film suggests they are not consistent. Indeed, they turn the concept on its head. For example, in one case study a young college athlete who had no previous criminal record received three consecutive life sentences for his involvement in a drug conspiracy. For \$1,500 he had set up a meeting between some former high school classmates who were drug dealers and some drug dealers at college. The former classmates, who had previous criminal records, informed on him, and all of them were spared the minimum mandatory sentences. Even the acknowledged "kingpin" of the group received only 12 years. Yet the defendant, likely the least culpable member of the conspiracy, received the harshest sentence, and three consecutive life sentences, which are arguably disproportionate to the defendant's relatively minor role in the crime. Without apparent appreciation of the irony, the U.S. Attorney explains that the defendant could have avoided the life sentences by becoming a snitch

himself. The defendant notes that since the others had already informed on him, there was no one left to snitch upon.

As noted above, the film raises questions about how public policy can affect basic tenets of the criminal justice system. A congressional aide who helped draft the guidelines observed that Congress passed them at the height of the crack epidemic in an atmosphere of hysteria. Some members of Congress appear in the film to defend the measure as a necessary get-tough policy. But the film raises questions about the particular method for carrying out this policy and its impact on the integrity of the criminal justice system. As so much of the process becomes dependent on the dubious word of the snitch, the system's capacity for truth comes into question. As the informant gets the lesser sentence and the minor offender goes to jail for life, the system's capacity for administering punishment in a fair and proportional manner comes into question as well. The film leaves the student pondering these fundamental questions about the system.

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The performance artist Anna Devere Smith, who bases her performance pieces upon "witness" testimonial reconstruction, spoke to law students at NYU School of Law. She observed that, in her initial interviews, the single most compelling question that engages the passions of her interviewees and gets them telling their stories is simply this: "Have you ever been accused of doing something you didn't do?"¹⁵ There is, perhaps, no more powerful theme in criminal law than that of wrongful punishment, as a manifestation of injustice, betrayal, and abandonment. These stories are especially compelling when there is clear scientific evidence of a defendant's innocence, such as that provided by recent technological advances in DNA testing, and still the wrong is not rectified.

The second film that I use as a critique of the system, is shown toward the end of the semester. *The Case for Innocence* translates the power of Anna Devere Smith's question into the first-person stories of wrongfully convicted inmates, their testimony supplemented by reinvestigations of the crimes and proceedings by the television journalists at *Frontline*. These cases are even more compelling to students because in several of the cases, the wrongful convictions are revealed through the work of clinical law students at Northwestern and at the Innocence Project at Cardozo School of Law. Students often readily identify with the student attorneys in this documentary, in addition to being drawn in by the stories.

I also use this film as a text because it enables me to surface and

15. I attended this session of the Lawyering Colloquium at the invitation of Peggy Davis, then Director of the Lawyering Program during the 2001-2002 academic year.

discuss the importance of narrative in criminal law practice. These detective-like stories, reinvestigating the crime, the trial, and post-conviction relief proceedings, are akin to the work of post-conviction relief practitioners that now compels my attention in my own scholarship about legal narratives and narrative persuasion. That is, from the perspective of narratology, the work of post-conviction relief practitioners is akin to the work of the investigative journalists in this film—going back over the past to discover the true story, if not the identity of the “real” culprit. Meanwhile, the plot also moves inexorably forward—as the wrongfully convicted defendant goes deeper toward the fate, the “doom,” of endless imprisonment or even the execution that awaits him. The stories that the post-conviction relief practitioner tells in her briefs are, likewise, often structurally and thematically akin to those depicted in this film—one version of dark mysteries and betrayal stories, about a dysfunctional system that has turned upon an innocent victim. The role of the post-conviction relief practitioner is to stand between the individual and institutional forces gone awry. They retell the once told story to compel resolution and narrative closure via the imposition of a different judicial ending. These dark stories of practice are often as compelling as any literary novel. Discussion of *The Case for Innocence* and *The Thin Blue Line*, enables me to foreground my interest in narratology and reading case law as stories, in addition to providing exposure for my students to this crucial aspect of criminal practice.

Again, from a student’s perspective, here is how Steve Cusick reads *The Case for Innocence*, and its place in the course curriculum:

Steve Cusick on “The Case for Innocence”

While this film does offer doctrinal distinctions on the burden of proof at trial and subsequent burden on the defendant seeking retrial, its greater contribution is that it forces the student to critically question whether the basic notion of innocence has any place in the criminal justice system. The film offers case studies in which advancement in technology enabled more accurate DNA testing that could have potentially exonerated the convicted defendants in those cases. While one of the cases does end with exoneration and release from prison, in the other instances the criminal justice system seems unable and unwilling to adapt its procedures to the new technology. Further, the system has no mechanism for self-evaluation that may help it adapt. In that way, the film challenges the student to consider critically whether the system discounts the basic notion of innocence because of its inflexibility and inability to change. That is a

broad policy question that goes to the integrity of the system and, therefore, has its place in an academic study of criminal law.

Doctrinally, the film touches on the distinctions between the burden of proof at trial and the subsequent burden on defendant's seeking retrial. Considerable class time focused on discussion of the "beyond the reasonable doubt" standard placed on the state at trial, but no attention was given to the post-conviction burden that the defendant faces. Judges and prosecutors in the film articulate that heavy burden, declaring that a defendant must show by irrefutable proof that he is innocent. Or in the words of a Texas Criminal Appeals Court Judge, not that the defendant *might* be innocent, but that he *is* innocent.¹⁶ The critical question posed by the film, and the one that the courts have clearly not come to terms with yet, is whether exonerating DNA evidence constitutes that irrefutable proof of innocence.

Interestingly, judges and prosecutors in the film respond to that question not by attacking the scientific validity of the DNA evidence, but by constructing new theories of the crime that can accommodate the existence of the DNA evidence—theories that never appeared at trial. This may entertain and educate students on the artful nature of argument. But its greater importance is that it reveals the criminal justice system, beyond the substantive and procedural law, as a fallible system made up of fallible human beings who have a deep interest in protecting the system. That is a lesson beyond the casebook.

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II. CONTEXT

The second use of documentary films is to provide the students with the precious "context" that they are hungry for; that is, to provide an opportunity to reflect upon how the cases and the doctrinal rules studied in the curriculum fit into the larger framework of "real" criminal law practice. I choose two films—*Real Justice, Part 2*¹⁷ and *First Degree Murder Trial*.¹⁸ *Real Justice, Part 2* focuses upon felony cases in nearby Boston. Again, as with the other *Frontline* programs that are systemic exposés, the methodology here is to closely observe multiple case narratives. Thus, the publicity blurb on the video cover reads:

Homicides, drug arrests, car theft, assault and battery . . . it's all

16. *The Case for Innocence*, *supra* note 7.

17. *Frontline: Real Justice, Part 2* (PBS television broadcast, Nov. 21, 2000).

18. *First Degree Murder Trial* (KRMA-TV (Denver) television broadcast, 1987).

in a day's work for the prosecutors of Boston's Suffolk County district attorney's office. FRONTLINE goes inside the real-life workings of America's criminal justice system to reveal the offers, counter-offers, deals and compromises that keep the cases moving through our crowded courts.¹⁹

Each of the multiple stories explores prosecution of a different felony we have studied in the casebook in a visually compelling framework. Here are Steve's reflections and commentary:

Steve Cusick on "Real Justice, Part 2"

The value of this film lies not in the doctrinal law or policy insights it offers. Rather, the film provides students a glimpse of how the "real" criminal justice system works. It is a world of discussions and maneuvers that occur outside the courtroom, as opposing counsel weigh the strength of their cases and cut deals. In that way, the film offers a perspective that students do not see in the classroom.

The film does reinforce the distinctions between manslaughter and second-degree murder and the differing levels of culpability. But those distinctions are presented in the context of plea-bargaining, a real world tool not on the syllabus of first-year criminal law classes. In *Real Justice*, opposing counsel are constantly on the phone or in the hallway staking out bargaining positions and discussing the deal. In one instance, a murder case, the plea-bargaining breaks down and the murder case proceeds to trial. The outcome is decidedly unfavorable for the co-defendants. But even in the film's presentation of that case there is little background provided on whether to apply the finer points of doctrinal law.

Nor does the film prompt the student to examine the policies that would steer a criminal justice system to rely so heavily on plea-bargaining. Rather, it seems to serve more as a primer for those students who want to practice criminal law and who have not had exposure to the criminal justice system. One could question whether that is a necessary lesson in a first-year criminal law class. On the other hand, one could argue that the theoretical discussion in criminal law class—in law classes in general—can benefit from the occasional intrusion of real-world practice.

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The second "context" film—*First Degree Murder Trial*²⁰—was produced by a news department at a local Denver television station. It

19. Video cover, *Frontline: Real Justice, Part 2* (PBS Video 2000).

20. *First Degree Murder Trial*, *supra* note 18.

follows a single case: a man is on trial for murdering another man after a Thanksgiving Day altercation. The defendant attempts to raise self-defense to the murder charge. The prosecution argues that, after an initial altercation, the defendant left the victim's house, and then returned with the intent to harm the victim. The defendant argues that he acted in self-defense. The second tape of the two tape series (four half-hour segments) focuses upon the defendant's case at trial, the legal arguments during the trial, the direct and cross examination of the defendant and defendant's witnesses, the closing arguments, and the return of the jury verdict in this case. While *Real Justice, Part 2* focuses primarily upon the prosecutor's perspective; this tape (Tape 2 including Programs 3 and 4) provides the perspective of the defendant and defendant's attorney. Steve Cusick observes:

Steve Cusick on "First Degree Murder Trial"

This film touches directly on doctrinal law regarding levels of culpability and the elements of self-defense discussed in class. It also offers valuable insight into how the concept of "time framing" can be critical to the outcome of a case.

This film makes clear the distinctions between the level of culpability required for first-degree murder and the lesser offenses of second-degree murder or manslaughter. But it does so in the context of a trial, as each attorney attempts to manipulate the facts and the inferences drawn from them. The student can recognize the elements, not from a recitation as it might appear in a casebook, but in the context of attorneys attempting to establish those elements through their presentation and interpretation of the facts. In that way, the instruction offers greater dimension than the normal truncated analysis in a casebook.

In this case, the district attorney attempts to create a scene in which the defendant—a man accused of stabbing to death another man on Thanksgiving after a day of drinking and argument—acts with deliberation and reflection before killing the victim. The district attorney attempts to portray the stabbing as the culminating violent act in a day of escalating tension between the defendant and a group of men that included the shooting of the defendant's work van and the theft of \$20. The defense attorney, on the other hand, attempts to narrow the story to the time of the killing itself—interpreting the facts to show that the defendant grabbed a nearby knife in self-defense as he was being surrounded by the group of men. Besides attempting to show the immediacy of the action, the defense knows it must show that the defendant was not the aggressor, a requirement

of self-defense.

Perhaps the most fascinating and instructive part of the film is how it shows that criminal law must rely on facts and inferences to determine intent. In this case, the location of the knife itself was one of those facts. The prosecution maintained it was in the kitchen and that the defendant had left the living room, retrieved the knife from the kitchen, and returned to the living room to stab the victim. This sequence of events suggests intent to kill and possibly deliberation. The defense, conversely, argued that the knife was somewhere in the living room nearby, and that the defendant grabbed it instinctively to protect himself from the men who were threatening him. This scenario suggests self-defense. The jury will never truly know the intent of the defendant, because it cannot enter the mind of the defendant. Ultimately the jury must decide on the competing set of facts to determine the intent and level of culpability. Seeing the two attorneys construct those competing stories on film and at trial helps the student understand more clearly how the legal processes must rely on interpretations of circumstances to determine intent.

Finally, the film shows how the concept of time-framing can be critical to the outcome of a case. In this case, the defense tried mightily (and apparently successfully, as the defendant was convicted on the lesser charge of manslaughter) to focus the jury's attention only on the time of the stabbing. The prosecutor, on the other hand, wanted the jury to focus on the fact that the defendant had left the house and returned in his van with a chainsaw and that he threatened the men with the chainsaw. In expanding the time-frame to this point, the prosecutor was attempting to show that the defendant was intending to do harm, and that he was the initial aggressor and could not claim self-defense. The difference between the two strategies tracks the discussion in class as to how attorneys will attempt to use broad or narrow time-framing, and how the selection of one theory over the other can be critical to the outcome of a case.

* * *

Both *Real Justice, Part 2* and *First Degree Murder Trial* feature extensive courtroom footage, in addition to out-of-court investigations, plea bargains, lawyer-client interviews, and candid interviews with the legal players in the drama. Furthermore, both films provide context in several fascinating and unanticipated ways. In addition to the ways suggested by Cusick's observations, the attorneys and judges offer a range of interesting role models for the students to contemplate. Also, these films enable students to discuss how the analytical thinking developed in classroom discussions of legal doctrine merely establish an intellectual framework and the rules of the game that frame the narrative practices predominating at

trial. Thus these films enable the students to begin to read the statutes and cases in a different way, as just the tip of the iceberg surfaces above the procedures and stories underneath. These films suggest other types of reasoning crucial in the law, and illustrate powerfully the difficulty of choice and importance of judgment in criminal law practice. Finally, the stories depict the often extreme consequences that result depending upon how these choices and judgments are exercised.

III. ILLUSTRATIVE CASE STUDIES FOR DISCRETE SYLLABUS TOPICS

The final grouping of films includes case studies focusing upon particular issues covered in the syllabus of the criminal law course. I include *Frontline: The Execution*²¹ discussed in context of a brief syllabus segment on the Death Penalty. I plan to incorporate the second film—*Frontline: A Crime of Insanity*²²—into our final unit on defenses and, specifically, the insanity defense. The films are interpreted from Cusick's student-perspective, and his essays provide insight into the specifics of the films without need for my duplication of their contents.

Steve Cusick on "The Execution"

Clifford Boggess was either a contrite murderer who found God and wanted forgiveness for his unspeakable acts, or an articulate psychopath who was attempting to mask his amorality with a cheerful smile, diligent artwork, and professions of devotion to Jesus. One cannot derive the answer from this film and, indeed, the film acknowledges the ambiguous result of attempting to do so. However, the film's greater contribution for law students is the question it raises over the value of capital punishment as a form of punishment. Whether the condemned was truly contrite is not as important a question as whether putting him to death served the best interest of society or of the people he left behind. In that way, the film expands on previous class discussion over justifications for punishment.

On the one hand, the film challenges retributive justifications for capital punishment, that the condemned man must repay a debt to society with his life. The film suggests that the families of his victims, who want to see him die, are not satisfied after the execution occurs that such punishment is enough. The inference is that there may be no retribution, which is adequate, in their eyes. On the other hand, the film allows no satisfactory conclusions about the possibility of rehabilitation because of

21. *Frontline: The Execution* (PBS television broadcast, Feb. 9, 1999).

22. *Frontline: A Crime of Insanity* (PBS television broadcast, Oct. 17, 2002).

the lingering suspicion of Boggess as a smooth-talking con man. Nor does it offer a utilitarian reason for sparing his life—unless one considers the condemned man's death row conversion to Christianity or his production of artwork as offering some benefit to society. Given his questionable conversion, it seems to make little difference whether he is dead or alive, so long as he is locked up and society is protected from any harm he may bring.

The film gives considerable detail and context that otherwise might not enter a discussion on punishment in general and capital punishment in particular. For instance, while a typical casebook excerpt might touch on childhood abuse suffered by a suspect—usually in the brief context of a defense—this film offers a detailed accounting of Boggess' pitiful childhood. The film doesn't provide answers, but it provides context that makes examination of punishment more meaningful. Additionally, hearing the devastating impact on the victims' families, from the family members themselves, provides context that excerpts from the appellate opinions in the casebook cannot match.

The film relates a compelling story, told with great care and detail. Yet, for the law student, it lacks a connection to the criminal law process itself. The film only summarily relates the particulars of the trial, and it does not explore in depth the process or reasoning behind the selection of death as the punishment in the case. One is left to guess about the reasoning of the jury or the court, in arriving at that punishment.

But perhaps the law student doesn't need those details, because of the broader questions raised by the condemned man's seeming conversion and the inability of the execution to satisfy the victims' families. What is the value, as the film asks, of executing Clifford Boggess? The film cannot answer that question. But it encourages students to more thoughtfully examine the justifications for capital punishment in our criminal law system.

* * *

Steve Cusick on "A Crime of Insanity"

This film builds upon class discussion in several ways. First, it reinforces the distinction between the legal standard for competency to stand trial and the standard for a finding of not guilty by reason of insanity at trial. Second, the film pointedly raises the issue of prosecutorial discretion and how it can be heavily influenced by factors beyond the law books and courtroom. Finally, as a policy matter, it raises questions not discussed in class over whether the adversarial system and the jury are even

equipped to recognize who is not guilty by reason of insanity. That issue is pointedly raised by the case study in the film in which the accused maintained, among other things, that the government had implanted microchips in his brain and penis. Even the prosecutors recognized the genuineness of the accused man's mental illness, and an expert employed by the prosecutors determined that the accused was not even competent enough to assist in his own defense.

The film is not an exploration of the various technical legal tests to determine insanity. But it does give the student enough of a view of the process to see the clear distinction between the test for competency and the test for insanity. It also suggests to the student that the general test for competency—or fitness to aid in one's own defense—is almost laughably low, with one of the prosecutor's noting (half-jokingly) that it amounts to "knowing the difference between a judge and a grapefruit." Elsewhere in the film, the prosecutor clearly articulates the insanity test: 1) did the accused know what he was doing when he committed the criminal act; and 2) did he know it was wrong?²³ The test mirrors one of the insanity tests discussed in class.

While the film does not discuss the policy behind the insanity defense, it does offer thoughtful commentary on the standard for competency and leads the student to question whether it truly has any meaning, or whether its existence is merely a formality. Such a discussion adds context to the study of the competency standard as presented in class.

Perhaps the film's most valuable lesson for students is what it says about the use and abuse of prosecutorial discretion. While discussion in class sometimes touched on prosecutorial discretion, such discussion usually focused on the relative strength or weight of evidence in a case and the prosecutor's ability to bring the case to court. This film shows that prosecutorial discretion can be heavily influenced by factors beyond the law itself. At one point, the prosecutors asked their superiors to consider a plea bargain in part because of the accused man's obvious mental illness. But their request was rejected seemingly because the District Attorney's office did not want to be seen as not aggressively prosecuting wrongdoers on behalf of the victims and the community.

The final critical point raised by the film is whether the adversarial system and the jury are even equipped to make thoughtful determinations concerning insanity. Students are left to ponder whether a jury should be given that responsibility, and in that way the film touches on class discussion over the roles of judge and jury in the criminal justice system.

23. *Id.*

All of the expert testimony in this case suggested the defendant—who later committed suicide while serving his prison sentence—was insane, yet the jury failed to find him not guilty by reason of insanity. Should the court and jury functions be readjusted in insanity cases? That question goes beyond the class discussion, but it is relevant to the study of criminal law and the insanity defense.

* * *

Finally, let me note that there are other fine films that may supplement specific areas of doctrinal coverage. For example, I hope to incorporate some coverage of the government's prosecution of terrorism after 9/11 into the course. Potentially, I may screen *Frontline's* case study of the prosecution of Sahim Alwan of Lackawanna, New York, for his participation in alleged terrorist cell activities, and connections with Al Qaeda, in the documentary initially broadcast on PBS in October 2003.²⁴

IV. A FINAL OBSERVATION

Some years ago, during the 1990-1991 and 1991-1992 academic years, I taught a Law and Popular Storytelling course at the University of Connecticut School of Law. I was a Visitor, and a generous-spirited administration squeezed the course in beneath the academic radar to humor me. The idiosyncratic course was titled "Convicts, Criminals, Prisoners and Outlaws: A Course in Law and Popular Storytelling" and straddled lines between law and narrative, and law and film studies. Those lines had not yet been marked out clearly; law and narrative scholarship was nascent, and law and film scholarship nonexistent. I alternated visual texts (mostly fictional movies about convicts, criminals, prisoners and outlaws, although some of these films were based upon "real" stories), and novels and creative non-fiction. The students were primarily upper-level law students in the law school's part-time evening division. Many had full-time "day" jobs as policemen, nurses, hospital administrators, teachers, and housewives. They were a remarkable group. Although perpetually exhausted from their day jobs, they were deeply responsive to the texts in the course, especially the movies. As with Steve Cusick's short papers, I collected and published excerpts from their course papers in several law review articles. Many students apparently felt the course was scratching at the surface of something untapped in their other courses but nevertheless important to their future lives as lawyers. *Law Students Go to the Movies*,²⁵ my article

24. *Frontline: Chasing the Sleeper Cell* (PBS television broadcast, Oct. 16, 2003).

25. Meyer, *Law Students Go to the Movies*, *supra* note 11.

excerpting from some of their papers, serves as the precursor to the theme of this symposium, and to the AALS Law and Humanities section presentation in Atlanta in 2004 titled, *Law Professors Go to the Movies*.

Now, it is over ten years later, and the dam has apparently broken—everywhere there seems to be talk of the visual and popular culture in the law, and the law in visual and popular culture. These days I find the incorporation of non-fiction films as visual texts in teaching doctrinal Criminal Law less problematic, and indeed compelling. What some of my younger law students now call a “no brainer.” Initially, I used films and movies to compensate for my lack of criminal law practice experience. But now I use films because they are rich teaching texts, exploring valuable lessons that are sometimes insufficiently addressed in the casebooks, and sometimes omitted altogether. Films are complementary to the cases, statutes, and textual notes in the casebooks. I can no longer contemplate teaching Criminal Law without them.