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Laws of Race/Laws of Representation: The Construction of Race and Law in Contemporary American Film

CYNTHIA D. BOND *

“Racial imagery is central to the organi[z]ation of the modern world.”
-Richard Dyer, *White*

“[T]his utterly inevitable species of schizophrenia is but one of the many manifestations of the spiritual and historical trap, called racial, in which all Americans find themselves, and against which, some of us, some of the time, manage to arrive at a viable and honorable identity.”
-James Baldwin, *The Devil Finds Work*

ABSTRACT

Popular film has a lot to teach us about social narratives of law. Both law and film are story-telling, narrative systems. Accordingly, films about law are “overdetermined” in terms of narrative: they are stories about stories. Race is also a narrative system in which visual representation is key. The significance of the visual apprehension of race is deeply relevant to the legal construction of race as well. For example, in early citizenship cases and racial “passing” cases which persisted through the latter part of the 20th century. Since society constructs racial categories in large part by visual identification and experience, all visual media, including film, necessarily participate in the constitution of race. Thus, films do not simply depict supposedly free-standing, objective, racial categories naturalized by the dominant discourse, but instead actually participate in the creation of race. As part of standard Hollywood practice, the mainstream film audience is constructed through identification with a norm of “whiteness.” Since that audience, when viewing a law film, is actively involved in constituting the law as part of its spectatorship, it follows that mainstream films construct law from the perspective of white privilege. The consequences and effects of this cinematic construction of law are many. This article discusses three main effects: 1) the raced construction of the lawyer-hero; 2) the denial or displacement of the law’s role in constructing race and race-based discrimination; and 3) the suppression or revision of politics and political history.

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I. A PREFACE FROM HISTORY'S WATERSHED

Within hours of the soul-stirring and nation-lifting election of Barack Obama as president, journalists and pundits were announcing the demise of all prior notions of race in America. Andrew Sullivan called Obama's election the "death of the identity politics of race."¹ Rachel Maddow of MSNBC news exhorted viewers to "laugh" at anyone who asserted "old," pre-Obama, ideas about the role of race and racial oppression in America.²

¹ Andrew Sullivan, *Barack Obama for President*, THE ATLANTIC, Nov. 3, 2008, http://andrewsullivan.theatlantic.com/the_daily_dish/2008/11/barack-obama-fo.html.

² *The Rachel Maddow Show* (MSNBC television broadcast Nov. 5, 2008).

Commentators, including Roland Martin of CNN, half-jokingly speculated that Rev. Jesse Jackson, televised weeping at Obama's election-day rally in Chicago's Grant Park, was crying because he was "out of a job."³

Finding evidence that old narratives and representations of race were very much alive was as simple as scanning the next day's reader comments on Henry Louis Gates, Jr.'s article, "In Our Lifetime," lauding Obama's victory, on "The Root" website.⁴ Remarkably, even the day after the jubilation of Obama's victory, bloggers were back at sniping over age-old biases regarding the persistence of slavery and white guilt.⁵ Or consider hapless Lindsay Lohan's characterization of Obama as "our first colored president" in a post-election interview.⁶ Or RNC chairman nominee Chip Saltzman's "Barack the Magic Negro" Christmas CD.⁷ Or a Greenwich Village bakery's sale of "drunken negro cookies" in "honor" of Obama's inauguration.⁸

Is Obama's election and presidency a "game-changer" as to issues of race in America? In some ways, undoubtedly yes. But the historic nature of Obama's ascendance does not obliterate or transcend the vast history of race and racial representation in America.⁹ Time will tell how the Obama presidency effects racial representation and myth. But to expect his presidency to undo hundreds of years of complex and deeply embedded attitudes about and images of race in this country is to vastly overburden it.

It is important to remember that despite, for example, the growing rate of Latino immigration to the United States,¹⁰ and the growing numbers of black professionals and elites over the last 30 years,¹¹ pop culture representation of non-whites has not improved in simple lockstep.¹² While we may not have the Stepin Fetchit of the 1920's and 30's,¹³ we

³ *The Situation Room* (CNN television broadcast Nov. 5, 2008).

⁴ Henry Louis Gates, Jr., *In Our Lifetime*, THE ROOT, Nov. 4, 2008, <http://www.theroot.com/views/our-lifetime>.

⁵ *Id.*

⁶ *Lindsay Lohan Calls Obama "First Colored President?"* THE HUFFINGTON POST, Nov. 11, 2008, http://www.huffingtonpost.com/2008/11/11/lindsay-lohan-calls-obama_n_143087.html.

⁷ Rebecca Sinderbrand, *RNC Chairman Candidate Defends 'Barack the Magic Negro' Song*, CNN, Dec. 26, 2008, <http://www.cnn.com/2008/POLITICS/12/26/rnc.obama.satire/>

⁸ *Fox New York News* (Fox television broadcast Mar. 4, 2009).

⁹ Robert L. Harris, Jr. & Rosalyn Terborg-Penn, *The End of Black History?*, COLUM. U. PRESS BLOG, Jan. 22, 2009, <http://www.cupblog.org/?p=508>.

¹⁰ Although "Latino" is not easily constructed as a purely "racial category," I include it here since it is often popularly considered as such in the United States. See Alberto Sandoval-Sanchez, *JOSE CAN YOU SEE: LATINOS ON AND OFF BROADWAY 11-17* (U. of Wis. Press 1999) (describing the origin and definition of the words "Latino" and "hispanic" within the context of racial categories). As Mae M. Ngai argues, "[U]nlike Euro-Americans, whose ethnic and racial identities became uncoupled during the 1920s, Asians' and Mexicans' ethnic and racial identities remained conjoined. The legal racialization of these ethnic groups' national origin cast them as permanently foreign . . . these racial formations produced 'alien citizens' . . ." *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 7-8* (Princeton U. Press 2004). See Section III *infra* for discussion of definitions of "race." The conflation of narratives of nation and race is on display in the rhetoric of the so-called "birther movement," which questions whether or not Obama is an American citizen. See e.g., [see www.stoptheaclu.com](http://www.stoptheaclu.com), for example.

¹¹ Mark Lowery, *The Rise of the Black Professional Class*, BLACK ENTERPRISE, Aug. 1, 1995, at 43.

¹² New York Times' film reviewers Manohla Dargis and A.O. Scott recently declared that pop culture prepared America for a black leader. *How the Movies Made a President*, N.Y. TIMES, Jan. 18, 2009, at A1. This argument is simplistic in its assertion that cinematic representations of race work by straight forward cause and effect. (This also implies that there has not been any popular racist backlash to Obama's campaign and election which is simply not the case.) As I argue below, narratives of race are more complex than the simple presence or absence of non-white actors. We cannot be certain that white acceptance of a non-white president will result in more expansive attitudes towards all non-whites, rather than exemplifying the white attitude that *some* African-Americans are exemplary, "transcending their race" due to some extraordinary gift (or by simply being "the good

have the Chris Tucker of today's *Rush Hour* films.¹⁴ While we may no longer have the passive "geishas" of the days of Anna May Wong,¹⁵ we have the passive "lotus blossom" of the character Hatsue Miyamoto in *Snow Falling on Cedars*.¹⁶ Finally, and perhaps more significantly, representations of "whiteness" and presumptions about "white privilege" have changed even less.¹⁷

It is impossible to determine, as of yet, whether Obama's presidency, despite its transcendence of a racial barrier, will make a significant, lasting break with popular representations and attitudes about non-white people more broadly, beyond just the elite of society.¹⁸ The campaign itself was certainly rife with raced¹⁹ characterizations in the mainstream media and elsewhere.²⁰ Despite the superficially groundbreaking developments of Obama's campaign, as well as Hillary Clinton's and Bill Richardson's campaigns, the mainstream media proved itself largely incapable of avoiding reproducing unexamined biases regarding race and gender. Part of this blindness came from a predictable inability to

black)." See GWENDOLYN AUDREY FOSTER, *PERFORMING WHITENESS: POSTMODERN RE/CONSTRUCTION IN THE CINEMA* 8 (State University of New York Press 2003) (discussing cinematic narratives of "the good black"). This notion has allowed "whites" for some time to overlook their own deeply embedded perceptions of race, instead gauging their attitudes by their affection for a distant celebrity. Spike Lee personified this phenomenon in *DO THE RIGHT THING* (Forty Acres and Mule Filmworks 1989), in the character of Pino (John Turturro), who defends his tacit racism by naming the black basketball stars he admires. In the mainstream media discourse surrounding the Obama campaign, the rhetoric of "the good black" was performed in Newsweek Editor Jonathan Alter's comment about Obama: "We were expecting Jesse Jackson [Sr.] and we got Will Smith." *Hardball with Chris Matthews* (MSNBC television broadcast Oct. 16, 2008).

¹³ See www.imdb.com for filmography. See also Donald Bogle, *TOMS, COONS, MULATTOES, MAMMIES AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILM* 40 (Continuum 4th ed. 2001) (depicting the 1930's "archetypal coon").

¹⁴ *RUSH HOUR* (New Line Cinema 1998).

¹⁵ See www.imdb.com for filmography. See also Keith Aoki, *Is Chan Still Missing?: An Essay About the Film 'Snow Falling on Cedars' and Representations of Asian Americans in U.S. Films*, 7 *UCLA ASIAN PAC. AM. L.J.* 30 (2001) (examining stereotypes of Asian women in U.S. film).

¹⁶ *SNOW FALLING ON CEDARS* (Universal Pictures 1999).

¹⁷ HERNÁN VERA & ANDREW M. GORDON, *SCREEN SAVIORS: HOLLYWOOD FICTIONS OF WHITENESS* 193 (Rowman & Littlefield Publishers, Inc. 2003) (arguing that even while images of non-whites in film may have improved over the years, images of "whites" have remained unchanged).

¹⁸ And of course I leave entirely aside as beyond the scope of this article the question of whether Obama's presidency will have significant impact on racial inequality in the United States and globally. As Angela Davis says, "[T]here's a model of diversity as the difference that makes no difference, the change that brings about no change." Gary Younge, *We Used to Think There Was a Black Community*, *THE GUARDIAN* (London), Nov. 8, 2007, at 10.

¹⁹ I use the words "raced" or "racialized" throughout this article, mostly avoiding the loaded term "racist" for two reasons. First, the term "racist" has become both vague with overuse and charged with emotional meaning; it is a word that may lead to oversimplification of my argument. Second, as D. Marvin Jones notes, to speak in terms of racism "...conceives of the difficulty as a problem of ethos—in the moral sphere. The problematic of race locates it as a problem of world view, structured by historical narratives that transform our picture of experience." *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 *GEO L.J.* 437, 489. The word "racism" tends to point to individual people, whereas the notion of a "raced" or "racialized" society points to larger social forces. As Jones notes, "[R]ace is not so much a category but a practice: *people are raced*." *Id.* at 440. This article takes as a given that society, and thus its participants, are steeped in racialized views of social reality. I posit this as a social 'default' position, but one capable of being resisted. See Section IV *infra* on notions of resistant spectatorship.

²⁰ One of the more overt examples of this was when George Stephanopoulos asked Barack Obama whether his "coolness" on the campaign trail was a "black thing." *This Week* (ABC Television Broadcast May 11, 2007). Or consider the Chaffey Community Republican Women Federated organization which circulated images of what money under an Obama presidency would look like. The image of the "money" in question is labeled "United States Food Stamps," and bears an image of Obama's head, a bucket of Kentucky Fried Chicken, a rack of ribs, the Kool-Aid Man and watermelon. See Michelle DeArmond, *Inland GOP Mailing Depicts Obama's Face on Food Stamp*, *THE PRESS ENTERPRISE*, Oct. 16, 2008, http://www.pe.com/localnews/inland/stories/PE_News_Local_S_buck16.3d67d4a.html.

self-scrutinize.²¹ And while media discussions of voting patterns have devolved to a demographic accounting along race (and occasionally gender and class) lines for many electoral seasons now, the mantras of “the black vote,” “the Latino vote,” and “the white working-class vote” were offered as irrefutable categories for evaluation,²² their legitimacy purportedly sponsored by the entry of “non-normative” candidates into the race.

Whatever opportunities for racial equality or for a “post-racial” society²³ Obama’s presidency may represent, the run-up to it (and subsequent events²⁴) reveals the persistence of the discourse of race that is, in part, acted out through representation. As narratives of race were performed on a highly publicized national stage and presented as “newly”²⁵ relevant to the office of the presidency, we were reminded of the crucial place of these narratives in daily life, even in the midst of history-making events.

II. INTRODUCTION

While film scholars may debate whether mainstream Hollywood cinema²⁶ creates social values or merely reflects social values,²⁷ or even creates and *then* reflects social values,²⁸ films inarguably resonate with their socio-historical-economic moment.²⁹ “Culture shapes media even as media shapes culture.”³⁰ In addition to social influences,

²¹ For example, the only (arguably) mainstream critique of Stephanopoulos’ comment came from Comedy Central’s *The Daily Show*.

²² There was a notable category offered by pundits in the 2008 election: “the white male vote.” Perhaps this represents an advance in raced political discourse: recognition of whiteness as a position rather than a default assumption of voter identity. In contemplating the candidacies of Clinton and Obama, one pundit interviewed on NPR’s *All Things Considered* opined, “[W]hite men [voters] don’t know what to do.” As a woman voter listening to this pronouncement, it was difficult to avoid a kind of “welcome to the club” feeling.

²³ See Hua Hsu, *The End of White America*, THE ATLANTIC, Jan./Feb. 2009, at 48, available at <http://www.theatlantic.com/doc/200901/end-of-whiteness> (analyzing the possibilities of a “post-racial” society in the context of U.S. Census Bureau projections that current racial minorities in the United States will be in the majority by 2042).

²⁴ See e.g., the media coverage of the arrest of Henry Louis Gates, Jr. in Cambridge, Massachusetts on July 16, 2009.

²⁵ Of course race is always already present in any aspect of American national discourse, whether acknowledged or not. Race was relevant when predominantly white men ran for president. However, as I argue in Section IV *infra*, “whiteness” typically goes unmarked as a constructed racial position with its own set of assumptions and myths.

²⁶ By “mainstream Hollywood cinema” I mean films that are produced in the United States with relatively large budgets, with the intent to capture broad commercial appeal, and to gross significant box office returns. See Section II *infra* for more on my definition of mainstream film.

²⁷ See Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91 (2005) for an excellent discussion of one aspect of the debate between the Frankfort School and the Birmingham School of criticism on cultural reception.

²⁸ See ROBERT RAY, A CERTAIN TENDENCY OF THE HOLLYWOOD CINEMA: 1930 – 1980 68 (Princeton Univ. Press 1985) (“[B]y helping to create desires, by reinforcing ideological proclivities, by encouraging certain forms of political action (or inaction), the movies worked to create the very reality they then ‘reflected.’”)

²⁹ This is not to suggest that all films merely and simply reproduce the attitudes of their times. To be sure, this “reflection” is varied and complex and can encompass matters of film style and film narrative. In addition, films may be more or less conscious of or critical of the context of their making. See DAVID BLACK, LAW IN FILM: RESONANCE AND REPRESENTATION 56-83 (Univ. of Ill. Press 1999) on the difference between films which reflect social values and films which critique social values.

³⁰ Kwame Anthony Appiah, *No Bad Nigger: Blacks as the Ethical Principle in the Movies*, in MEDIA SPECTACLES 77, 86 (Marjorie Garber, Jann Matlock, & Rebecca L. Walkowitz eds., N.Y. Routledge 1993).

mainstream film has as one of its major influences its *own* history³¹, which it reproduces and revisits in the endless playing out of narratives that have circulated in cinema for years.³²

If we accept that films are in some way affected by, or are in dialogue with, the culture of their making we should not expect that commercial films made in a highly-racialized³³ culture would do anything but reproduce that ideology.³⁴ Accordingly, there is nothing particularly groundbreaking or even informative about noting that mainstream Hollywood films are consistently vehicles for hegemonic depictions of race.³⁵

Sixty-five years ago, Theodor W. Adorno and Max Horkheimer argued that the mass art produced in a capitalist society (at the time, films, radio, magazines) merely extends the ideology of that society.³⁶ Far from an escape from, or an aesthetic transcendence of, daily life, the consumption of mass culture continues the ideological work of capitalism in its indoctrination and pacification of spectators:

The old experience of the movie-goer, who sees the world outside as an extension of the film he has just left . . . is now the producer's guideline. The more intensely and flawlessly his techniques duplicate empirical objects, the easier it is today for the illusion to prevail that the outside world is the straightforward continuation of that presented on the screen.³⁷

³¹ However, to historically situate film is not to ignore narratives of race, ethnicity, gender, class, etc. on historical grounds. It is common for new students of film to deflect any critique of the social attitudes of older films by simply referring to the film's age. The defense goes something like: "But film X was made in 1935 [any early-mid 20th century date will do] and *everybody* was racist/sexist/homophobic/etc. back then." This is problematic for a number of reasons, three of which are key to this discussion. First, this argument assumes that there was no critical or oppositional reading of the film at the time of the film's creation. Note this argument is typically phrased in terms of a universal subject—"everybody was racist"—yet most who argue this elide the existence of culturally marginalized spectators. Even the most cursory examination of the events surrounding the release and re-release of D.W. Griffith's *THE BIRTH OF A NATION* (D.W. Griffith Corp. 1915), for example, reveal substantial contemporaneous critique and condemnation of the film's astonishing racism. See THOMAS CRIPPS, *SLOW FADE TO BLACK: THE NEGRO IN AMERICAN FILM* (Delta ed., Oxford Univ. Press 1977) (2000). See also James Baldwin, *THE DEVIL FINDS WORK* 65 (Delta reprinted 2000) ("Liberal white audiences applauded when Sidney, at the end of [THE DEFIANT ONES] jumped off the train in order not to abandon his white buddy. The Harlem audience was outraged, and yelled, *Get back on the train, you fool!*"). Second, this approach avoids analyzing the *how* of the depiction of social attitudes, thus short-circuiting an understanding of both the film's history and its place in contemporary narratives concerning the same social issues. Finally, this argument assumes that these biased attitudes no longer exist today, but are mere incidents of the distant past.

³² RAY, *supra* note 28 at 68 ("[T]he course of the American Cinema's evolution was always influenced less by external, real-world events than by the self-perpetuating momentum of its own tradition."); see also DAVID BORDWELL & KRISTEN THOMPSON, *FILM ART* (8th ed. McGraw-Hill 2006) (the standard "Film 101" textbook, which discusses the recursive nature of narrative in film.)

³³ See *supra* note 19 for a discussion of the use of the word "racialized."

³⁴ As K. Anthony Appiah argues, *supra* note 30, films that reflect a racist culture are merely symptoms of that culture and thus do not necessarily merit even a boycott. But when films "reinforce" cultural racism, they should be condemned. *Id.* at 85. That said, since, as Barbara Flagg argues, we contribute to the construction of race everyday, it may not be easy to separate a film which reflects racism from one which reinforces racism. "*Was Blind, But Now I See*": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970 (1993).

³⁵ That is, depictions that seek to support ideas of white supremacy and authority. See VERA & GORDON, *supra* note 17; FOSTER, *supra* note 12.

³⁶ Theodor W. Adorno & Max Horkheimer, *The Culture Industry: Enlightenment as Mass Deception*, in DIALECTIC OF ENLIGHTENMENT 126 (John Cumming trans., Continuum 2001). This text was first published in 1944.

³⁷ *Id.* Horkheimer and Adorno's pointed critique of cultural production as a business (having spent time in Los Angeles, they had ample evidence of this to observe) reads as eerily prescient of today's highly-commodified culture industry in which the weekend's movie box office receipts are often the subject of news reports on

If Horkheimer and Adorno's premise is accepted,³⁸ what is the value of so-called "symptomatic" readings of individual films—that is, analyses of films that see them as symptoms of various cultural attitudes, myths, narratives, etc., held by the dominant culture of their creation? Is there any social or intellectual utility in analyzing dominant cultural products for reliable evidence of predictable social attitudes that perhaps find their more dangerous expression in the social, political, and economic life of a society? Must not such readings always render predictable expressions of culturally dominant paradigms? And again, what is the intellectual and heuristic value of that reading given the clear commercial origin and intent of most films that see mass distribution?

The preliminary answer to these admittedly rhetorical questions is yes, we are likely to find predictably hegemonic narratives in hegemonic Hollywood texts, but it is important to analyze such films for the cultural values they construct, reflect, and re-circulate. "We tend to dismiss the cinema as mere entertainment; yet it has profound effects, shaping our thinking and our behavior."³⁹ And, in an increasingly image-laden culture, visual critical thinking is key to a complete interpretation of cultural meaning.⁴⁰ Even the most cursory survey of YouTube offerings, for example, reveals how mainstream films are endlessly re-imagined, remade, and re-circulated.⁴¹ Thus, critical readings of mass-produced texts foster a broader cultural understanding.⁴²

In Part III of this article, I will examine the interlocking narratives of race, law, and film, attempting to trace the myriad overdeterminations that echo back and forth between these three systems of meaning. In Part IV, I will discuss mainstream Hollywood film's construction of law from the perspective of "white privilege"⁴³ and how this structures

television and the internet, as well as fodder for seemingly every run-of-the mill cocktail party. But of course, what we have seen in its major flowering—the media monopolies, vertical integration of cultural products, multiplying media distribution channels—had already begun in the expansion of mass produced culture of the mid-1940s.

³⁸ And it has been critiqued, especially from the perspective of audience reception. Some argue that cultural consumers are not merely passive and in fact reappropriate mass culture for their own use, thus participating in the creation of popular culture. See discussion of the Birmingham School of criticism in Mezey & Niles, *supra* note 27. However, even granting that spectators have some agency in how they consume and reinterpret mass culture, it is still possible to analyze cultural artifacts for their ideological content, and perhaps even to discern if not the intent of their producers, then the overall effect of their organization of formal elements, regardless of their reception.

³⁹ VERA & GORDON, *supra* note 17, at 8.

⁴⁰ What follows will hopefully prove this point. However, I am conscious of asserting this to an audience of legal scholars. A recognition of the significance of representation, mass and popular culture, and analysis thereof has been perhaps slower to come to legal education and scholarship than to other academic fields. Within legal pedagogy there are still significant differences of opinion about what it means to teach law and what it means to ask legal questions (Does this mean purely theoretical, doctrinal training? Where do law and society courses belong in the institution? etc.). Some members of the law school community view the study of popular culture and its intersection with law as "trivial," somehow outside of "real" legal questions. But a growing number of legal scholars are writing about the deep interdependence between law and mass culture. See e.g., ORIT KAMIR, *EVERY BREATH YOU TAKE: STALKING NARRATIVES AND THE LAW* (U. of Michigan Press 2001); FRAMED: WOMEN IN LAW AND FILM (Duke Univ. Press 2006); Austin Sarat, *Imagining the Law of the Father: Dread, Loss, and Mourning in The Sweet Hereafter*, 34 *LAW & SOC'Y. REV.* 3 (2000); RICHARD SHERWIN, *WHEN LAW GOES POP* (U. of Chi. Press 2002); Jessica Silbey, *Videotaped Confessions and the Genre of Documentary*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 789 (2006).

⁴¹ See Mezey & Niles, *supra* note 27 (discussing the interplay between mass culture and popular culture).

⁴² In fact, some critics have argued that superficially "trivial," commercial films provide special cultural information that is not as readily available in so-called "art films." See Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law & Inequality in Popular Film*, 15 *LEG. STUD. FORUM* 242 (1991).

⁴³ See Vincent Rocchio's discussion of this concept, especially in the context of the film *MISSISSIPPI BURNING* (Orion Pictures Corp. 1988). VINCENT F. ROCCHIO, *REEL RACISM: CONFRONTING HOLLYWOOD'S CONSTRUCTION OF AFRO-AMERICAN CULTURE* 99-113 (Westview Press 2000).

character subjectivity in and audience identification with film. In Part V, I will focus on three main, but by no means exclusive, narrative effects of the construction of law from this white perspective. Finally, in Part VI, I will examine the possibility of critiquing narratives of race within mass culture by briefly surveying three films that critically position narratives of law and race, marking and/or decentering whiteness.

But first, a few words on what this article will *not* cover. For no clearly defensible reason, I will not discuss the multitude of scripted television shows devoted to law. One rationale for this is, despite the fact that film and television are both visual media, they have sufficiently distinct histories and narrative and stylistic systems to merit separate discussion.⁴⁴ And though I began with the news media, I will make only passing reference to it throughout, though it is arguably one of society's key forums of racial visual signification. There are many rich readings of racial narratives implicit in the representation of "real-life" events. There is a lot of wonderful scholarship in this area⁴⁵ and certainly room for much more, just not in this article.

III. FILM, LAW, AND RACE: OVERDETERMINING NARRATIVES

A. Definitions

I need to first define the terms I am working with, terms most people undoubtedly use without feeling the need of definition: film, law, and race. However, it is important to note at the outset that this article intends to analyze how these terms define *each other* in their interrelationship. Accordingly, at this point I will define them with a distinctness that is somewhat artificial.

1. Film

I focus largely on mainstream, commercial film: mass-distributed, Hollywood films that seek to make a profit.⁴⁶ I use fiction film; that is, films that tell stories rather than more formally abstract films or documentary films.⁴⁷ There are always exceptions in cinema, as

⁴⁴ In addition, some critics argue that legal narratives significantly differ in film and TV, with television being even less willing than film to critique the legal system it portrays. See Mezey & Niles, *supra* note 27.

⁴⁵ See e.g., PHILLIP BRIAN HARPER, ARE WE NOT MEN: MASCULINE ANXIETY AND THE PROBLEM OF AFRICAN-AMERICAN IDENTITY (Oxford U. Press 1996); READING RODNEY KING/READING URBAN UPRISING (Robert Gooding-Williams ed., Routledge 1993); ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA (U. of Chi. Press 2001); STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION (N.Y.U. Press 2003).

⁴⁶ I also mean films that are made in the "invisible style" of classic Hollywood. See Ray, *supra* note 28, at 32. That is, through editing techniques which create time and space continuities, films create a visual "reality" that audiences have learned to read without recognizing disjunctions in editing cuts, etc. (unless of course the film draws attention to editing through its stylistic choices). See, e.g., MOULIN ROUGE! (Bazmark Films 2001). A mainstream film shot in the classic style seems to simply "be" rather than be the product of a carefully strategized set of choices. Jean-Louis Baudry has called this film's "denial of difference." *Ideological Affects of the Basic Cinematographic Apparatus*, in FILM THEORY AND CRITICISM 355, 359 (6th ed. 2004). (While Ray limits his study to films made before 1980, many contemporary films employ editing and stylistic techniques of the classic period such as continuity editing, and the "shot-reverse shot" which synchronizes a character's gaze with the audience).

⁴⁷ Documentary films also tell stories, but may merit a separate analysis with their arguably stronger pull towards being truth-based. See Regina Austin, *The Next "New Wave": Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809 (2006).

in life,⁴⁸ but my goal in establishing these parameters is to construct a body of what we might call “socially normative” films to analyze. The questions I ask here may have very different answers if posed in the context of so-called “art films” or truly independent cinema where economic constraints exist and audiences differ.⁴⁹

I utilize mainstream films for a number of reasons. First, my inquiry is not whether film is capable of presenting race critically; that is, as a problematic rather than a set of assumptions and biases.⁵⁰ There is nothing inherent in the medium to suggest that it cannot. Rather, my emphasis is on the circulation of narratives of race in the dominant culture.⁵¹ Second, whether film scholars and cineastes like it or not, the vast majority of U.S. filmgoers will have their only cinematic experience watching Hollywood product. Since I am interested in examining socially normative representation, it seems to make sense that I limit my study this way. Third, despite a large apparatus of critical film scholarship (albeit still rather limited in legal studies), the majority of filmgoers watch films with a relatively blind eye to the ideology they embody. We would expect most viewers to be able to identify the oft-cited racism in *The Birth of a Nation*.⁵² But can we have similar confidence that those same viewers are capable of detecting the persistence of, for example, the “black mammy” theme in American film, in which black characters exist solely to take care of white characters?⁵³ As filmmaker Issac Julien said in a lecture at Harvard, “while the left refuses to take Hollywood cinema seriously, the right uses these media images to secure a symbolic order that is difficult to dislodge.”⁵⁴

My teaching of film to law students informs my fourth reason for choosing to analyze mainstream film.⁵⁵ With few exceptions, my students do not initially take readily to analyzing the ideology behind their entertainment.⁵⁶ While I try to encourage them to track the source of their pleasure (or displeasure) with a film rather than wholly accepting or rejecting it, it is hard work getting them to look beneath the orchestrated surface of the film to the values and ideology implicit in it. Critical analysis can be a difficult project for anyone analyzing film. But legal training, with its strict boundaries between culture and

⁴⁸ That is, not all films that are produced for major distribution receive it, nor are all films that achieve box office “success” always produced under conventional Hollywood conditions.

⁴⁹ See discussion *infra* Part VI.

⁵⁰ See JACQUELINE NAJUMA STEWART, *MIGRATING TO THE MOVIES: CINEMA AND BLACK URBAN MODERNITY* (U of Cal. Press 2005) (discussing the idea of race as a problematic rather than a static category); see also Jones quote, *supra* note 18.

⁵¹ This is not to say all viewers of such films are members of the dominant culture or, even if they are, are incapable of reading mass culture critically. See *infra* Part IV for more on resistant readings of dominant culture.

⁵² *THE BIRTH OF A NATION* (D.W. Griffith 1915).

⁵³ One aspect of this phenomenon was dubbed the “magic negro” motif, which appears in movies such as *THE LEGEND OF BAGGER VANCE* (Allied Filmmakers 2000), where mystical golf caddie Will Smith appears out of nowhere to help Matt Damon get his game back. See David Ehrenstein, “*Magic Negro* Returns,” *THE LOS ANGELES TIMES*, Mar. 19, 2007, at A13. I would include in these “black mammy” films *HITCH* (Columbia Pictures Corp. 2005), in which Will Smith again counsels white folks (this time on their love lives), *THE BUCKET LIST* (Storyline Entertainment 2007), in which Morgan Freeman teaches Jack Nicholson how to be sick and how to recover his family (and of course Nicholson survives whereas Freeman dies), and *MAN ON FIRE* (Fox 2000 Pictures 2004), in which Denzel Washington sacrifices himself to save a rich white girl.

⁵⁴ As quoted in Ruth Elizabeth Burks, *Back to the Future: Forrest Gump and the Birth of a Nation*, 15 *HARV. BLACKLETTER L.J.* 83, 86 (1999). While I agree with Julien that many people dismiss mainstream film as too shallow to require analysis, within academia many cultural critics clearly take mainstream film seriously as a site of ideology. See, e.g., HENRY GIROUX, *BREAKING INTO THE MOVIES: FILM AND THE CULTURE OF POLITICS* (Basil Blackwell Press 2002).

⁵⁵ K. Anthony Appiah rightly asserts that academics’ cultural readings are motivated by “the needs of our teaching, our concern to bring texts to the classroom to teach.” Appiah, *supra* note 30 at 87.

⁵⁶ See VERA & GORDON, *supra* note 17, at 193 (discussing pedagogical challenges to teaching about race in film).

legal rules, between rationality and emotion, between the visual and the textual, makes such analysis more challenging for law students than, for example, undergraduates in a humanities department.⁵⁷ Accordingly, a critique of mainstream cultural representations of race, while perhaps old hat in some academic settings,⁵⁸ is still unfinished business in the law school context. Finally, while law and film scholarship has many fine practitioners,⁵⁹ it is still a fledgling enterprise. Studies of race and law in film are even more scarce.⁶⁰ I seek to expand these studies beyond an assessment of racial stereotypes and bring to bear theoretical tools from other disciplines to dig deeper into the problematic of racialized representation.⁶¹

Finally, a note about representation and reality: while I critique the ideology represented by fiction film narratives, it is not a call for more “realism” or “accuracy” in film. Part of film narrative is inevitably condensation, suggestion, metaphor, and myth. These techniques are not inherently “bad.” But while fiction films don’t purport to be “truthful,” they seek to create a kind of reality that audiences will accept as valid. Accordingly, it is fair game to judge film’s construction of reality.⁶² While this article critiques the ideology of representations of race in film, it does not propose the “corrective” didacticism conjured by people who favor the epithet “politically correct.” Rather, as I show in the final section of this paper, films can be more self-conscious in constructing narratives of race without being preachy, Pollyanna, or dull.

2. Law

I use the term “law” here to encompass not simply legal rules themselves as they appear in cases and statutes, or the performance of legal rules and procedure in a courtroom, but also law as an overall system of social order.⁶³ I will mostly discuss popular images of law and legal processes as they appear in film. While actual law and legal history may be relevant to analyze the choices filmmakers make in structuring their stories, I am not so much interested in pointing out inaccurate representations of law for the sake of clarifying the law,⁶⁴ but rather to ask what ideological purpose those inaccuracies serve in the film narrative. As Norman Rosenberg notes, “Hollywood’s major goal has never been to dispense correct lessons in legal procedure or to devise legally viable solutions for everyday problems.”⁶⁵ That said, “[T]he representation of law within any motion picture

⁵⁷ For an excellent example of a law and film pedagogical guide for law students, see James R. Elkins, *Pedagogical Film Reading, or, “What Does This Film Teach?”*, LAWYERS AND FILM, <http://myweb.wvnet.edu/~jelkins/film04/reading-2.html> (last visited Apr. 4, 2010).

⁵⁸ See, e.g., MARK REID, *REDEFINING BLACK FILM* (U. of Cal. Press 1993) (arguing that film scholarship overemphasizes images of blackness in white produced and directed mainstream films rather than examining films where black people control film production).

⁵⁹ For example: Austin Sarat, Jessica Silbey, Orit Kamir, and James Elkins.

⁶⁰ See, e.g., articles by Regina Austin, Margaret Russell, Taunya Lovell Banks, Keith Aoki.

⁶¹ This is by necessity an interdisciplinary project, and accordingly, I draw here from the fields of literary theory, cinema studies, and cultural studies.

⁶² But see BLACK, *supra* note 29, at 141-56 (arguing that readings of films which seek to “correct” them factually risk missing the representational terms inherent in the medium).

⁶³ The system of rules and meaning at stake in this analysis are from the American legal system.

⁶⁴ See BLACK, *supra* note 29, for a discussion of the theoretical limitations of this type of law and film scholarship.

⁶⁵ Norman Rosenberg, *Looking For Law in All the Old Traces: The Movies of Classical Hollywood, The Law, and the Case(s) of Film Noir*, 48 UCLA L. REV. 1443, 1448 (2001). While I will frequently look beneath Hollywood’s intentions, it is important to remember that, as Rosenberg says, the conventions of depicting law in

has always mattered to commercial filmmakers.”⁶⁶ Hollywood’s self-conscious attention to legal narratives may offer yet another reason to plumb cinematic legal narratives for dominant ideology.

Finally, while I will use the expression “the law” throughout this article, I do not mean to suggest that there is one unitary or monolithic law that predates and transcends the various social matrixes of those subjects who experience the legal system, or that transcends the representation of law. That is, the law’s narratives are constructed from myriad points of view, and how the law appears will depend, among other things, on the positionality of the interpreter.⁶⁷ In this article, I seek to show how mainstream cinema flattens these multiplicities of perspective into one, which I argue is the perspective of “white privilege.”

3. Race

“Race can be understood as the historically contingent social systems of meaning that attach to elements of morphology and ancestry.”⁶⁸ What has long been asserted as the objective, biological fact of race and racial categories—and still frequently legitimized as such in the dominant discourse, whether implicitly or explicitly—is in fact a narrative developed through a combination of law and conventions of visual identification.⁶⁹ “Racial categories are neither objective nor natural, but ideological and constructed.”⁷⁰ Put more simply, “[t]he truth is that there are no races”⁷¹

This article will examine narratives of race through the relational discourse between notions of “whiteness” and “non-whiteness” as they are enacted in film.⁷² Until relatively recently, discussions about and analyses of race tacitly avoided any discussion of “whiteness”: “Indeed, to say that one is interested in race has come to mean that one is interested in any racial imagery other than that of white people.”⁷³ While it frequently still

commercial film involve a vastly different practice than the law as it exists in legal practice. Thus, analyzing films by law’s terms will not reveal anything about the representational terms or meanings of films themselves.

⁶⁶ *Id.* at 1449.

⁶⁷ See LAW’S STORIES (Peter Brooks & Peter Gerwitz eds., Yale U. Press 1996).

⁶⁸ IAN F. HANEY LÓPEZ, WHITE BY LAW 10 (2d ed., N.Y.U. Press 2006).

⁶⁹ See *id.*; Robert Westley, *First-Time Encounters: ‘Passing’ Revisited and Demystification As a Critical Practice*, 18 YALE L. & POL’Y REV. 297 (2000).

⁷⁰ See Jones quote, *supra* note 18.

⁷¹ Kwame Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race* in “Race,” *Writing, and Difference*, 12 CRITICAL INQUIRY 21, 35 (1985).

⁷² One of the ironies of writing about race is that no matter how carefully one uses language, some form of racial reification results. While this article proceeds from the by now well-established concept that race is a construction (see *infra* Part III), to discuss race I must still use a language that demarcates race. In choosing to predominantly adopt the terms of “white” and “non-white,” I follow scholars like Haney López, *supra* note 68, who emphasizes the key categories in the legal construction of race are “white” and “non-white,” not the racial categories that most people commonly use (i.e. Asian, black, Latino, etc.). I also join my esteemed colleague Cecil J. Hunt, II in his concern over the inaccuracy of phrases like “people of color,” preferring to use “non-white” in recognition of the construction of “whiteness” as privilege. *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477 (2006). See also RICHARD DYER, WHITE 11 (Routledge 1997). For purposes of typographic simplicity, I do not follow Skip Gates’ ‘RACE’, WRITING AND DIFFERENCE (Univ. Chi. Press 1985), and quote the word “race” every time it appears, though I applaud this strategy for keeping the reader ever mindful of the constructed nature of race. In one draft of this paper, I quoted every use of the words “white” and “whiteness,” but that necessitated that I quote every racial term, which resulted in a confusing thicket of punctuation. I ask the reader to bear in mind that all of these terms mark constructs, not real biological or cultural fact.

⁷³ DYER, *supra* note 72, at 1.

remains “invisible,”⁷⁴ the idea of whiteness is crucial to strategies of racial representation, and recognition of this idea is now commonplace in the relevant scholarship.⁷⁵ The persistent lack of recognition of “whiteness” as a constructed racial category sponsors the notion of whiteness as the neutral “default” position of human consciousness: “As long as race is something only applied to non-white peoples, as long as white people are not racially seen and named, they/we [whites] function as a human norm. Other people are raced, we are just people.”⁷⁶ Thus, it is important to remember that *all* narratives of race are constructed, including “whiteness.” As Gwendolyn Audrey Foster observes in her study of the cinematic construction of whiteness, it has taken “. . . a great deal of time and effort to define and maintain whiteness.”⁷⁷

In 1998, a scholar writing on race and representation noted, “America dreams of race in black and white.”⁷⁸ While this has changed somewhat over the last ten years with increased recognition of Latino immigration and recent narratives of a “post-racial” society, there is still evidence that the popular imagination frequently continues to focus on the black-white binary.⁷⁹ Thus, many of my case studies here deal with that pervasive dynamic.

⁷⁴ For example, much of the recent presidential campaign coverage focused on race as an issue of blackness, not of *white interpretations* of blackness.

⁷⁵ Some writers were theorizing “whiteness” as early as the late 1980s. See e.g. Richard Dyer, *White*, 29 SCREEN 44 (1988); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, originally published in 1988, reprinted in CRITICAL WHITE STUDIES (Richard Delgado & Jean Stefancic eds., Temple U. Press 1997). (Though arguably James Baldwin’s essays on film, *The Devil Finds Work* (Delta 2000), originally published in 1976, began to explicitly theorize whiteness). By the mid-1990s, “white studies” were in full swing, arguing that “whiteness” had been too long absent from discussions of the narrative of race, often forming the unannounced “backdrop” against which racial categories were projected. See, e.g., DYER, *supra* note 72; VERA & GORDON, *supra* note 17. For a collection of representative articles, see CRITICAL WHITE STUDIES. See also RACE TRAITOR MAGAZINE (John Garvey ed.) (no longer publishing); articles collected in NOEL IGNATIEV & JOHN GARVEY, *RACE TRAITOR* (Routledge 1996). White studies can go a long way towards exposing the assumptions underlying unacknowledged white privilege. And, as Stephanie Wildman argues in *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL’Y 245, 246 (2005), despite the development of critical theories of “whiteness”, “White privilege persists. Identifying the reasons for the persistence of white privilege is a necessary precursor to combating it.” While critical white studies have offered much to the understanding of racial narratives, it is important to realize that, as Eric Arnesen argues, the “withering away of whiteness” requires much more than simply “whites imagin[ing] the abdication of white privilege. *Whiteness and the Historians’ Imagination*, 60 ILWCH. 3 (2001). In addition, it is important to not let the focus on “whiteness” sponsored by critical white studies simply become another tool for keeping “whiteness” as the central, “originary” position against which everything “non-white” will be judged. Making “whiteness” more “self-conscious” is not alone enough to de-center it.

⁷⁶ DYER, *supra* note 72, at 1. Recent pop cultural phenomena show the possible praxis of white studies. See e.g. Weird Al Yankovic, *White & Nerdy*, on STRAIGHT OUTTA LYNWOOD (Volcano Entertainment 2006)(spoofing Chamillionaire’s hit *Ridin’* on THE SOUND OF REVENGE (Universal Records 2005)). In reality television shows like *The White Rapper Show* (VH1 television series 2007) and *Black & White* (FX television series 2006), “whiteness” is marked as a distinct racial category rather than an assumed, “transparent” positionality. In the former show, white contestants are ensconced in the South Bronx where they meet hip-hop legends, and compete for the \$100,000 prize and title of “Best White Rapper.” In *Black & White*, two middle class families, one identified as black and the other as white, live together and discuss race, while periodically venturing forth in full make-up meant to enable them to “pass” as the “opposite” race. Similarly, websites like Stuff White People Like, <http://stuffwhitepeoplelike.com> (last visited Feb. 5, 2010) self-consciously (if humorously) seek to construct “whiteness” as a culture. See also CHRISTIAN LANDER, *STUFF WHITE PEOPLE LIKE: THE DEFINITIVE GUIDE FOR THE UNIQUE TASTE OF MILLIONS* (Random House 2008). Note that most of these media productions focus on the black/white binary rather than a broader notion of race’s constructedness.

⁷⁷ FOSTER, *supra* note 12, at 7.

⁷⁸ Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in The Birth of a Nation, The Cheat, and Who Killed Vincent Chin?*, 5 ASIAN L.J. 41, 42 (1998).

⁷⁹ This is not to say there are not many good reasons to examine the specifics of this relationship, given America’s history of African slavery, etc.

Overall, there certainly is validity in discussing the representation of particular minority groups separately.⁸⁰ In focusing on the construction of whiteness and non-whiteness in law films, I seek in part to track legal constructs of race more broadly.⁸¹ I undoubtedly sacrifice attention to some of the specific dynamics of racial representation in my case studies by choosing this route.

For the sake of brevity and focus, I somewhat artificially separate narratives of race from the co-constitutive narratives of gender, class, and sexual orientation. Nor do I discuss the interplay of nation and race, key to representations of people whose national origin has been reduced in the United States to notions of race.⁸² While I do not spend much time on these other elements of constructed identity, clearly they play an important part in the overall narrative of race.⁸³

It is sometimes argued that to speak about race at all is to legitimize it as having objective content, thus reinforcing its semiotic power. One certainly needs to be deeply self-conscious⁸⁴ about how one speaks about race since to speak about it is to constitute it as a reality.⁸⁵ As Barbara Fields suggests, we create race every day; it is not simply a product of the past.⁸⁶

On my more pessimistic days, the project of a white person discussing white cinematic discourse and law seems a hopelessly closed and circular enterprise in a closed and circular hegemony. I reassure myself with the words of Kwame Anthony Appiah who notes that “reading race in our culture—high or low, popular or elite—is a large and

⁸⁰ See, e.g., Margaret Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. 4, 5 (1995) (“Asians occupy unique cultural spaces: spaces that cannot be readily reduced to the racial experiences of other non-whites within the U.S.”) See also Chang, *supra* note 77, at 43-44 (“Persons of Asian ancestry were judicially constructed as racially distinct from whites; in that sense, we exist as a racial “Other” to whites. However, this doesn’t capture the sense in which persons of Asian ancestry were also constructed as a foreign “Other” to (white) Americans.”) This interweaving of notions of nation and race is also relevant to Latinos in the U.S. See also NGAI, *supra* note 10.

⁸¹ See *infra* Part III.B

⁸² See NGAI, *supra* note 10.

⁸³ See FOSTER, *supra* note 12, for an excellent discussion of the interplay between gender, sexual orientation and race.

⁸⁴ Part of the self-consciousness required in a discussion of race is the need to acknowledge one’s own positionality in critiquing race.

⁸⁵ Some information about me is in order: I write as a culturally-designated white woman working within legal academia. I have in the past written on issues of race in the context of African-American literature. See e.g., THE PEN IS OURS: A LISTING OF WRITINGS BY AND ABOUT AFRICAN-AMERICAN WOMEN BEFORE 1910 (Cynthia D. Bond & Jean Fagan Yellin eds., Oxford University Press 1991); *Language, Speech and Difference in Their Eyes Were Watching God*, in ZORA NEALE HURSTON: CRITICAL PERSPECTIVES PAST AND PRESENT (Henry Louis Gates, Jr. K. Anthony Appiah eds., Amistad Media Ltd. 1993). Though my Southern parents and grandparents never told me, I discovered in a family genealogy somewhat recently that my ancestors owned enslaved Africans in Virginia and Georgia. I agree with Prof. Haney López that legal scholarship regarding issues of race should be as important to scholars identified as white as it may be to scholars identified as “non-white.” Haney López says: “For the most part, White scholars have been reluctant either to produce or to engage intellectually this emergent race-based scholarship . . . Whatever its origins, this white silence has resulted in the accumulation of a body of race-conscious scholarship that focuses almost exclusively on people of color and on the epistemological importance of being a minority.” See HANEY LÓPEZ, *supra* note 68, at 14-15. (Haney López made this observation in the 1996 edition of WHITE BY LAW (N.Y.U. Press), and left it in the 10th anniversary edition, though there has been an increase in white scholarship on whiteness during that time. Haney López does note the emergence of white studies in both editions).

⁸⁶ Barbara Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REVIEW 95 (1990).

difficult enterprise”⁸⁷ Accordingly, this article offers an inevitably partial analysis of the representational issues it addresses.⁸⁸

B. Narratives of Law, Narratives of Film, Narratives of Race

At first glance, law does not appear to bear any formal similarity to film.⁸⁹ The former is, after all, a system of rules and their enforcement concerning real life events. The latter is often conceived of as a world of creative fantasy with no “real” outcome in the audience’s lived experience. Setting aside for now the notion that films may affect audience attitudes, both law and film are story-telling, narrative systems.⁹⁰ The narrative connection between law and film is perhaps most clearly evident in trial films,⁹¹ which are stories about stories: the broader plot of the film tells a story, which encompasses the story the lawyer depicted in the film tells at the trial. However, given the pervasiveness of law in society, it is fair to say that law plays a role in just about every aspect of life, and thus is reflected, however indirectly, in many popular culture representations.⁹²

Thus, films about law may have a “double narrativizing” effect, which, while not drawing attention to itself, produces interesting analytical opportunities regarding the nature of narrative itself. Another way of saying this is that narrative functions in films about law are “overdetermined.”⁹³ Thus, law films reveal much about the narratives both constructing and surrounding the law.⁹⁴

⁸⁷ Appiah, *supra* note 30 at 77.

⁸⁸ Nor do I think all film theory need be monolithically capable of answering every question about every film, see David Bordwell, On the merits of “mid-range” film theory that need not neatly account for every aspect of a film. CONTEMPORARY FILM STUDIES AND THE VICISSITUDES OF GRAND THEORY IN POST-THEORY: RECONSTRUCTING FILM STUDIES (David Bordwell & Noel Carroll eds., U. of Wis. Press 1996).

⁸⁹ That is, beyond the content relation of films *about* law, such as the standard courtroom drama.

⁹⁰ BLACK, *supra* note 29, at 34 et. seq. While the extent of narrative in law may be debatable (for example, is a sales contract truly “narrative?”), most would agree that courtroom trials are narrative; that they circulate around the telling of a story, or stories. See LAWS STORIES (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1998).

⁹¹ While it may be easier to track legal themes in movies that focus on legal processes, such so-called courtroom dramas, notions of social order and law are relevant across a broad number of films and film genres. For example, Westerns are largely concerned with the tensions between individual freedom and the expansion of systems of law. See Timothy P. O’Neill, *Two Concepts of Liberty Valance: John Ford, Isaiah Berlin, and Tragic Choice on the Frontier*, 37 CREIGHTON L. REV. 417 (2004) (analyzing narratives of law and civilization in Westerns). Detective movies usually revolve around the relationship between crime, the police and private legal actors. Action films have at their core the tension between following legal processes to achieve justice and the individual’s desire for vigilante solutions. See *infra* Part V.A for a discussion of the “outlaw hero.” For the purposes of clarity, I will mostly focus on films that explicitly take law as their subject, but I agree with David Black’s argument that the question of whether a film is “about law” is mostly a question of degree of screen time rather than a question of genre. See BLACK, *supra* note 29, at 55-83.

⁹² See BLACK, *supra* note 29, at 58-62; see also CAROL CLOVER, GOD BLESS JURIES IN REFIGURING AMERICAN FILM GENRES: THEORY AND HISTORY (Nick Browne ed., U. of Cal. Press 1998) (arguing that de Toqueville’s observation that law was a pervasive American narrative is still true today).

⁹³ “Overdeterminations” refers to a system of meaning within which any signifying element may have more than one source of meaning. See BLACK, *supra* note 29, at 55, 58 (explaining overdetermination occurring in law films when the narrative elements in a courtroom drama emanate both from the film’s narrative strategies *and* from the storytelling mechanisms in the trial which the film depicts); see also CLOVER, *supra* note 92 (discussing the “double trial” and other narrative techniques in cinematic courtroom dramas). Geoffrey Bennington offers the following explanation: “[T]he somewhere where you always start is overdetermined . . . by historical, political, philosophical, and phantasmatic structures that in principle can never be fully controlled or made explicit.” Geoffrey Bennington (with Jacques Derrida), *Jacques Derrida* (Univ. of Chi. Press 1999).

⁹⁴ As Black argues, *supra* note 29, at 35-37, the recognition of shared narrative mechanisms in law and film is not to say they share the same social weight or effect. Narrative theorizing should not ignore the profound adjudicatory effect law has on people’s lives. A criminal defendant’s participation in the justice system, for

As suggested above, race is also a narrative system.⁹⁵ One key element in creating the narrative of race is representation. Indeed, “representation is at the heart of racism.”⁹⁶ This is in part because “visuality” is key to the constitution of notions of race. “For the most part, racial recognition is a visual phenomenon. I see you and, by the very act of seeing, know that you are black, white, or Asian.”⁹⁷

The significance of the visual apprehension of race is deeply relevant to the *legal* construction of race as well. “It is perhaps safe to say that every other experience of racialization, including its documentary production within the law, has as its origin the visual apprehension of difference, which seemingly naturally and simultaneously is categorized as an apprehension of racial difference.”⁹⁸ Ian Haney-López traces how this racial representation was (and arguably still is) central to the creation of the United States as a nation. The granting of United States citizenship required a court to explicitly adjudicate an applicant’s race, as late in our history as 1952.⁹⁹ That is, courts had to decide whether or not the applicant was “white.” In making this decision, courts relied not only on legal precedent, but also on one of two rationales: “common knowledge” of racial divisions or “scientific evidence” of racial divisions.¹⁰⁰

Significantly, these cases relied on visual identification, whatever rationale the court applied.¹⁰¹ In discussing the citizenship application of Ricardo Rodriguez, a Mexican national, the District Court of Texas for the Western District noted: “As to color, he may be classed with the copper-colored or red men. He has dark eyes, straight black hair, and high cheek bones.”¹⁰² Clearly, visual identification was key to establishing whiteness legally.¹⁰³

example, is certainly likely to have far greater impact on his life than his participation as an audience member at a film. Law’s effect is more than merely “literary.” *See also* Appiah, *supra* note 30 (emphasizing the necessity of distinguishing between representation and reality when theorizing about culture).

⁹⁵ As Haney López points out, race is in fact a discourse between various narratives: “[T]he construction of race is the construction of relationships.” HANEY LÓPEZ, *supra* note 68, at 116. Robert Westley suggests this when he declares that “to be Black is to be visually overdetermined” by layers of social political and economic meaning *see supra* note 69, at 323.

⁹⁶ ROCCHIO, *supra* note 43, at 8.

⁹⁷ Westley, *supra* note 69 at 300. This visual dependency was famously encapsulated by Frantz Fanon’s analysis of the words of a white onlooker: “Look, a negro!” FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 109 (Grove Press 1967).

⁹⁸ Westley, *supra* note 69, at 323.

⁹⁹ Haney López has analyzed the Act of March 26, 1790, ch. 3 § 1,1 stat. 103, and its subsequent revisions. HANEY LÓPEZ, *supra* note 68, at 1 *et. seq.* He divides the history of racial prerequisites to naturalization into two periods: 1790-1870 and 1870-1952. In the second period, applicants designated as “black” and “white” were allowed to naturalize, whereas Chinese and most other non-whites were not. *Id.* at 43-44. This historical framework is not to suggest that race plays no part in contemporary immigration and naturalization issues. Haney López argues that the construction of America as a white nation persists in present day political discourse. *See id.* As recent evidence of this *see, e.g.*, Patrick J. Buchanan, *A Brief for Whitey*, Mar. 21, 2008, <http://buchanan.org/blog/pjb-a-brief-for-whitey-969>. What is fascinating about the early prerequisite cases is the unabashed explicitness of the judicial construction of “whiteness” under the 1790 Act. HANEY LÓPEZ, *supra* note 68, at 35-55.

¹⁰⁰ HANEY LÓPEZ, *supra* note 68, at 3-9. “‘Common knowledge’ rationales appealed to popular, widely held conceptions of races and racial divisions,” whereas “scientific evidence” rationales were based on supposedly objective, technical, and specialized knowledge. *Id.* at 5. Initially, the courts chose one rationale or another, ultimately relying solely on “common knowledge” as a means of establishing “whiteness.” Haney Lopez notes that the “social construction of the White race is manifest in the Court’s repudiation of science and its installation of common knowledge as the appropriate racial meter of whiteness.” *Id.* at 9.

¹⁰¹ *Id.*

¹⁰² *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897).

¹⁰³ The prerequisite cases are not the only instances in which United States courts have adjudicated “whiteness.” Since then, courts have continued to adjudicate race. *See Green v. City of New Orleans*, 88 So. 2d 76

That said, it is important to bear in mind that legal narratives of race are not maintained by visual categorization alone. For example, as Robert Westley points out in his analysis of Louisiana's "Black Blood Law," which provided that one-thirty-second or less of "Negro blood" was required to be designated as white, the law extends its power beyond visual apprehension to maintain the boundaries of race.¹⁰⁴ Also consider the role of government accountings such as the U.S. Census, which ask responders to self-identify as to race and form the basis of many of our assumptions about race in this country.

Nor are racial narratives solely legal. As Vincent Rocchio argues, race is constructed in extra-legal forums as well, and "cannot be made to disappear through a series of laws. Racism functions in and through specific meanings and beliefs, a domain in which the law has little power to change or effect . . ." ¹⁰⁵ Rather, concepts of race have complex, overdetermined sources of meaning. Race is "a way of relating to others, a way of conceiving ourselves," whose terms are "learned at our parents' knees and in our communities and culturally reinforced through religion, education, the workplace, and the media."¹⁰⁶

Thus race is a construct, a categorization of people and cultural behavior sponsored by pseudo-empiricism, legal pronouncement, and deeply embedded experiential and linguistic habit. However, to say that race is a socially-constructed narrative is not to suggest that race doesn't matter in social discourse. As Haney-López says, "Races clearly exist in terms of fabricated attributes and failings."¹⁰⁷ While it is important to avoid viewing race as having objective content, to discuss race as it operates as a narrative system of meaning is not to lessen the violence it visits on all its participants; which, as with law, encompasses all members of society.

In a similar movement to the depiction of law in films, films are unavoidably overdetermined in their "depiction" of race.¹⁰⁸ Since society constructs race in large part by visual identification, all visual media, including film, necessarily participate in the constitution of race. Thus, films do not simply depict supposedly free-standing, objective racial attributes naturalized by the dominant discourse, but instead actually participate in the *creation* of race.¹⁰⁹ Thus, to analyze representations of whites and non-whites in mainstream, largely white-produced and directed¹¹⁰ films is really to analyze a white point

(La. Ct. App. 1956) (where the petitioner sought to have his foster daughter's birth certificate changed to designate her race as "black" rather than "white" so that he, a socially designated black man, could adopt her); *see also* Doe v. State, 479 So. 2d 369 (La. Ct. App. 1985) (holding that the Guillory family, which had been designated as "colored" on birth certificates, was not in fact "white" as petitioner argued).

¹⁰⁴ Westley, *supra* note 69, at 317. *See also* Jones, *supra* note 18, at 438 (arguing that race is still "the lens through which courts continue to view claims by blacks," analyzing high-profile incidents such as the L.A.P.D. beating of Rodney King and subsequent trials, the Bernard Goetz trial, and the Boston murder of Carol Stuart by her husband Charles); Cecil J. Hunt II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 483, 487 (2006) (arguing that "the central mythological scaffolding upon which opposition to affirmative action is built is based on a juridical rhetoric of white innocence").

¹⁰⁵ ROCCHIO, *supra* note 43, at 5.

¹⁰⁶ VERA & GORDON, *supra* note 17, at 16. I would of course add "the law" to this litany.

¹⁰⁷ HANEY LÓPEZ, *supra* note 68, at 119 (noting that these racial characteristics are real, "exactly because they exist as a powerful ideology about the world.").

¹⁰⁸ *See* FOSTER, *supra* note 12. The choices films make about casting, setting, dialogue, and narrative both help construct racial narratives, and necessarily partake of social narratives of race, whether or not race is an explicit part of a film's plot and whether or not the film's cast is "racially diverse."

¹⁰⁹ Films do not, of course, wholly constitute race and racialized identity. Cinematic constitution of race is merely another strand in a large and complex social fabric of racial narrative. *See* HANEY LÓPEZ, *supra* note 68.

¹¹⁰ VERA & GORDON, *supra* note 17, at 8. It is not necessary to examine the racial identity of these film personnel; rather, the formula of "whiteness" can be participated in and recreated regardless of racial identity.

of view, acted out through various racial masks.¹¹¹ Narratives of whiteness are simply “out there” as formulas to employ.¹¹²

So, for example, a character in a film who is presented as black is not simply a character in the film, but will also bear the particular overdetermined meanings that are socially attached to his “non-whiteness.”¹¹³ Thus, audience reaction to this character depends not only on what the film conveys about the character, through both the stylistic and narrative systems of the film, but is overdetermined by “external” social narratives of race which condition audience attitudes about the character’s non-whiteness.¹¹⁴

This operation also must occur with white characters in films, but whereas mainstream Hollywood films typically mark non-white characters as having particular “racial content,” the whiteness of characters typically goes unmarked.¹¹⁵ As Barbara Flagg suggests, whiteness usually operates as a “transparent” category, as a sort of default normative position for subjectivity,¹¹⁶ without being seen as a narrative of race as any other.¹¹⁷ While theorists have helped mark the characteristics of whiteness in film,¹¹⁸ it is safe to say that the majority of white film viewers see white screen characters as devoid of any particular *racial* significance, but rather as normative subjects with whom they identify.¹¹⁹ Vera and

Certainly non-white producers and directors can create movies that reproduce experience from an identifiably white point of view. An example is *BRINGING DOWN THE HOUSE* (Touchstone Pictures 2003), featuring Quen Latifah as star and executive producer. Latifah plays an ex-con who tricks Steve Martin into an date using the internet. She subsequently turns his house into a clichéd “ghetto” house party. The film reproduces biased assumptions towards African-Americans despite the participation at high levels of African-American filmmakers.

¹¹¹ See Jones, *supra* note 18, at 449 (“The white mask becomes a lens through which the eye/I may visualize itself at the center of the universe, hermetically sealed.”) The metaphor of race as a mask has a long history. See, e.g., W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (Modern Library 2003) (originally published 1903); FANON, *supra* note 96; VERA & GORDON, *supra* note 17, at 150-51. While film actors may participate and contribute to the structuring of racial narratives, such a performance is strongly regulated by script, direction, lighting, costume and editing. See Baldwin, *supra* note 31, at 63 (arguing that some performances of black actors such as Sidney Poitier occasionally transformed films which otherwise had repugnant racial narratives).

¹¹² An example of this is the first two installments of the *SCARY MOVIE* series (Dimension Films 2000, 2001), co-produced by Wayans Brothers Entertainment, directed by Keenen Ivory Wayans, and written by Shawn and Marlon Wayans. In spoofing horror movies, *SCARY MOVIE* makes the “whiteness” of the genre visible. See *infra* Part V.

¹¹³ Despite this overdetermination, the social meanings attached may be complex and multi-valent, (e.g., *BROTHER FROM ANOTHER PLANET* (Anarchist’s Convention Films 1985), or simplistic and predictably offensive (e.g. *GONE WITH THE WIND* (Selznick International Pictures 1936), or anything in-between. Those meanings may be interpreted differently depending on the spectators viewing the film. Note, however, that these social narratives are never truly external to signification as culture and its representation are intimately interrelated.

¹¹⁴ This is not to suggest that all spectators will have the same attitudes to a character’s “whiteness” or non-“whiteness.” As I more fully discuss in Section IV *infra*, Manthia Diawara argues that spectators can resist the dominant readings of race that films present. See Manthia Diawara, *Black Spectatorship: Problems of Identification and Resistance*, in *BLACK AMERICAN CINEMA* (Manthia Diawara ed., Routledge 1993).

¹¹⁵ Of course narratives of race are dependent on the interplay between depictions of whiteness and non-whiteness, thus I have artificially discussed these depictions separately to point out the invisibility of whiteness.

¹¹⁶ “The most striking characteristic of whites’ consciousness of whiteness is that most of the time we don’t have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness . . .” Flagg, *supra* note 34 at 957. See also Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 *YALE L.J.* 2009 (1995).

¹¹⁷ This is not to suggest that films with non-white characters reveal their own participation in creating racial narratives. Rather, these films typically invite us to see race as relevant to the character’s behavior and identity only when he or she is non-white.

¹¹⁸ DYER, *supra* note 72; FOSTER, *supra* note 12; VERA & GORDON, *supra* note 17.

¹¹⁹ See DYER, *supra* note 72. Such an interpretation may also depend on the gender, able-bodiedness and sexual orientation of on-screen characters. Dyer talks about the inability of “whites to discuss their own racial position without devolving to discussion of other racial categories, which are viewed as clearly ‘other.’” My own

Gordon suggest that the invisibility of images of white privilege is key to its survival: “These images [of whiteness] bring about the ‘misrecognition’ of the true bases of the social relations being fictionalized. White privilege can only be exercised without guilt by denying its existence and by ignoring its historical origins and continuing injustice.”¹²⁰

As a function of white transparency, movies typically only signal that they are “about” race when they include several non-white characters or otherwise focus on issues that are constructed as confronting non-whites.¹²¹ In reality, of course, race is an ever-present narrative in any film that depicts human beings¹²² because race remains a dominant system of social organization, and because, as discussed above, race is in part a visual construct. So even a film that depicts only white people and does not explicitly make race part of its plot is unavoidably about race in part because it takes place and is viewed in a culture constructed around the narrative of race.¹²³ These narratives of race are already present in the filmgoer as well, predetermining aspects of the viewer’s perception of the film.¹²⁴

Since narratives of law and narratives of race are both dominant systems of social organization, on some level, all films can be said to implicate law and race.¹²⁵ In addition, since race is in part a legal construct, law films that address race are overdetermined in their representational strategies: any narrative of race necessarily springs from a narrative of law. Thus, the narratives of law and race are deeply relational and interdependent.¹²⁶

Crucially, the overdetermined nature of the narratives of law and race in film is in large part invisible. Hollywood movies are particularly adept at making their meaning appear unsponsored, natural, and inevitable.¹²⁷ Similarly, in day-to-day discourse narratives of race are often treated as merely “natural” descriptions rather than social constructions.¹²⁸ In this sense, narratives of race tend to be seamless or invisible as they exist socially and

experiences in the law and film classroom largely echo Dyer’s experience. Foster describes her process of de-centering whiteness for her students as a process of “. . . mak[ing] whiteness strange and . . . engag[ing] in self-othering.” See FOSTER, *supra* note 12, at 17.

¹²⁰ VERA & GORDON, *supra* note 17, at 15.

¹²¹ E.g., Civil Rights protests of the 1960s (MISSISSIPPI BURNING) and segregation in the U.S. military (SOLDIER STORY). I will discuss the representational strategies of these types of films in Section V *infra*.

¹²² Even films which don’t depict human beings implicate narratives of race. For example, animated films may code characters through dialogue, voicing, and plot in ways that play on audience’s racial assumptions. (MADAGASCAR (Dreamworks SKG, 2005).

¹²³ As argued at note 91 *supra*, although all films can be said to implicate law since society is regulated by it, it may make sense to examine more sustained and self-conscious productions of a cinematic legal narrative. Similarly, in analyzing law films “about” race, it can be expedient to focus on films that make explicit surface claims about addressing race and its nexus with law.

¹²⁴ See *supra* Part II for a discussion of resistant spectatorship.

¹²⁵ These narratives may be more or less apparent given screen duration, and other factors. See BLACK, *supra* note 29.

¹²⁶ See BRYAN WAGNER, *DISTURBING THE PEACE: BLACK CULTURE AND THE POLICE POWER AFTER SLAVERY* 21 (Harv. U. Press 2009) (“Contrary to the claim that the black tradition is somehow unrepresentable, I am arguing that it is possible to detect the tradition’s contours against the background conditions of its legal history. It is the history of law that gives us what we need to discern the tradition’s ongoing self-predication.”)

¹²⁷ Part of this ability emanates from the very nature of what has been dubbed the “classic” Hollywood style. RAY, *supra* note 28, at 32-55. While I focus much more on films’ narrative choices in constructing race than on films’ stylistic choices, things like lighting and costuming are key to racial narratives. For an excellent discussion of classic Hollywood’s stylistic techniques (focusing especially on the role of lighting techniques in constructing race), see DYER, *supra* note 71, at 82-142

¹²⁸ See *supra* Part III. The dominant discourse of race tends to construct racial categories and impute essential attributes to those categories (e.g., a socially designated white person may assume certain essential attributes of a socially identified Asian person simply on sight: “X exhibits Y behavior because he is Asian”). See also Jones, *supra* note 18; VERA & GORDON, *supra* note 17, at 12.

legally.¹²⁹ While lip service may be paid to recognition of racial stereotypes, the dominant discourse consciously or subconsciously usually takes for granted that racial categories have an inherent, quasi-biological truth to them. This discourse gives content to labels like “Latino voters,” “Black women,” etc.—content that is presumed to spring from a unitary, knowable racial identity.¹³⁰

IV. MOVIE LAW IS “WHITE”

A. Audience Identification and the Creation of the White Legal Subject

Essential to the success of commercial cinema is its construction of identification between audience members and on-screen characters.¹³¹ A good way to evaluate the ideology of mainstream film is to analyze the characters with whom the film asks the audience to identify. This is a direct path to unpacking the core values of a film.

In this process of creating audience identification with screen characters, commercial cinema, some critics argue, construct the audience as white.¹³² Expanding on Laura Mulvey’s groundbreaking argument that the projected audience for mainstream film is male,¹³³ Manthia Diawara argues that, whatever the socially-constructed race of a filmgoer, mainstream films present their narratives in ways that, implicitly or explicitly, garner identification with whites or whiteness.¹³⁴ In so doing, Diawara defines the spectatorial subject/object split as having a racial element rather than simply being a product of

¹²⁹ See Flagg, *supra* note 34.

¹³⁰ See HANEY LÓPEZ, *supra* note 68, at 18 (quoting Virginia Dominguez: “[T]here is a willingness to recognize nature as the architect of racial distinctions, and man simply as the foreman who interprets nature’s design”).

¹³¹ This is not to suggest that audience identification does not also play a role in non-mainstream film. Film theorists who apply psychoanalytic principles to film reception argue that films are deeply connected to the creation of subjectivity in audience members, often through the manipulation of identification with on-screen subjects. See, e.g., ANNETTE KUHN, *WOMEN’S PICTURES* (Verso 1994) (explaining psychoanalytical concepts of identity formation and spectatorship as they apply to cinema).

¹³² Diawara, *supra* note 114; see also Russell, *supra* note 42; VERA & GORDON, *supra* note 17, at 16 (“[M]ovies aim to address a mass audience through . . . narratives that will reverberate among the largest possible number of viewers. Most of these narratives deal with the way whites feel, think, and act.”) *But see* JACQUELINE NAJUMA STEWART, *MIGRATING TO THE MOVIES: CINEMA AND BLACK URBAN MODERNITY* (U. of Cal. Press 2005) (arguing that film audiences cannot simply be constructed as white to understand identification dynamics in film). Some would argue the presumptive audience for commercial film is white (see Diawara), male (see LAURA MULVEY, *VISUAL PLEASURE AND NARRATIVE CINEMA*, in *VISUAL AND OTHER PLEASURES* (Ind. U. Press 1989), and heterosexual (see BELL HOOKS, *IS PARIS BURNING?*, in *REEL TO REAL: RACE, SEX, AND CLASS AT THE MOVIES* (Routledge 1996)).

¹³³ See Mulvey, *supra* note 132. *But see* STEVE NEALE, *MASCULINITY AS SPECTACLE*, in *FEMINISM & FILM* (E. Ann Kaplan ed., Oxford U. Press 2000) (arguing that mainstream films also construct the masculine as object).

¹³⁴ Diawara, *supra* note 114, at 211-12. This is true even when films have multi-racial casts. For example, Lawrence Kasdan’s *GRAND CANYON* (Twentieth Century-Fox 1991), with a pseudo-mystical message of unity obscures the politics of difference existing between Kevin Kline’s character and Danny Glover’s character. Also consider *MONSTER’S BALL* (Lee Daniels Entertainment 2001), a film which, though beginning with a black working class family and a white working class family, kills off its two main black male characters (Sean Combs and Coronji Calhoun), and offers the final coupling of a black woman (Halle Berry) and a white man (Billy Bob Thornton) as the answer to racism.

psychoanalytic identity functions¹³⁵: “. . . the dominant cinema situates black characters primarily for the pleasure of White spectators.”¹³⁶

Diawara takes as his case study the construction of audience identification in *The Birth of a Nation*, a film whose racial depictions remain notorious almost 100 years after its release.¹³⁷ While the film has several main characters who are non-white,¹³⁸ as well as large crowd scenes of non-white characters, identification throughout the film is forged between the audience and the white Cameron family.¹³⁹ What makes *The Birth of a Nation* an extraordinary example of audience identification,¹⁴⁰ Diawara argues, is that the white characters we are asked to identify with are former slave-owners who create the Ku Klux Klan as a heroic protector of the white women of the South.¹⁴¹

Diawara highlights the film’s construction of a white audience by posing the question of how a black audience member would identify with *The Birth of a Nation* with its white Klan characters and its disparaging images of blacks as rapists, scheming “mulattoes,” and incompetent politicians.¹⁴² He argues that such a viewer would be forced to reject the identification dictated by the film.¹⁴³ This reading against the film’s intended character identification marks what Diawara calls the “resistant spectator.”¹⁴⁴ Crucially, this resistant spectator can be white as well as non-white; resistance is defined as the ability to resist the mechanisms of audience identification and analyze films critically rather than merely accepting them emotionally.¹⁴⁵

While Diawara concerns himself with the relationship of black spectators to white-produced film, his concept of resistant readings of the “race” of films can easily be expanded to any spectator of any film narrative of race. In Keith Aoki’s discussion of depictions of Asian-Americans in film, he performs resistant spectatorship as he analyzes the presumptive white audience constructed by commercial cinema, asking: “Why do filmmakers generally seem to assume that a mainstream audience wants, indeed needs, a white character as an avenue into any story about an Asian American, or for that matter any other minority community?”¹⁴⁶

Margaret Russell reinforces that the construction of the dominant character on screen is crucial to the reinforcement of a dominant ideology in spectators.¹⁴⁷ Russell calls this the “dominant gaze.”¹⁴⁸ She defines the dominant gaze as “. . . the tendency of mainstream culture to replicate, through narrative and imagery, racial inequalities and biases which

¹³⁵ Diawara, *supra* note 114.

¹³⁶ *Id.* at 215.

¹³⁷ *Id.*

¹³⁸ Most of the main characters are played by whites in blackface.

¹³⁹ Diawara, *supra* note 114, at 212-14.

¹⁴⁰ This is in addition to the fact that it was the first full-length film in American cinema and the first film to be shown in the White House. See Margaret M. Russell, *Rewriting History with Lightning: Race, Myth and Hollywood in the Legal Pantheon*, in *LEGAL REELISM* 172 (John Denvir ed., U. of Ill. Press, 1996).

¹⁴¹ Diawara, *supra* note 114.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 211, 214-15. I oversimplify Diawara’s argument somewhat for expediency’s sake; he details the complex levels of identification that can occur between black/resistant spectators and white produced films.

¹⁴⁵ *Id.* at 214-15. This is a curious level of film analysis a spectator can reach, where the emotional manipulations of a film can be discerned or maybe even felt, but also analyzed critically. I would argue that attention to the emotional affect of film deepens an analysis of its ideology.

¹⁴⁶ Aoki, *supra* note 15, at 48. Although it is a question worth asking, Hollywood still clearly makes this assumption.

¹⁴⁷ Russell, *supra* note 42.

¹⁴⁸ *Id.*

exist throughout society.”¹⁴⁹ The dominant gaze “subtly invites the viewer to empathize and identify with its viewpoint as natural, universal, and beyond challenge”¹⁵⁰ In fact, Gwendolyn A. Foster argues that film is particularly adept at maintaining whiteness: “Whiteness as a construct depends on myths and distortions. What better place than the cinema to define, create, and maintain such myths and distortions?”¹⁵¹

What makes the construction of a white subjectivity for audiences particularly significant in the context of law films is that law itself is the provenance of subjectivity. Law creates individual legal subjects in myriad ways: by defining when human life begins (e.g. *Roe v. Wade*), by determining individual rights (e.g. the United States Constitution), by determining who is a person for purposes of lawsuits (e.g. rules regarding standing and corporate identity), by deciding when a person is no longer a person (e.g. right-to-die decisions), or no longer has the right to exist (e.g. death penalty statutes).¹⁵² Thus, there is another kind of overdetermination in law films: while films arguably activate processes of subjective identification by linking the gaze of the spectator to the gaze of the on-screen character,¹⁵³ the law also defines the individual through the notion of legal rights and proscriptions. Thus, the subjectivity of characters depicted in law films is overdetermined, emanating from multiple sources, both legal and extra-legal.

Narratives of race under law also are narratives of subjectivity and identity. Consider, for example, the *Dred Scott* decision, which held that people of African descent could not be United States citizens.¹⁵⁴ Or the alien land laws with the intent to forbid “foreign-born” United States inhabitants from being landowners.¹⁵⁵ It is “the mask of race,” D. Marvin Jones argues, that divides between self and other under law.¹⁵⁶

The viewer is essential to constituting the legal meaning of a film.¹⁵⁷ Jessica Silbey argues that law films create a particular type of spectatorship, one where audiences both critique *and* participate in constructing the legal system as “viewer-subjects.”¹⁵⁸ The “viewer-subject” constructed by these films is a liberal legal subject who believes in individualism and the institution of law.¹⁵⁹ While Silbey’s subject is asked to critique law’s all-encompassing constitutive capabilities, ultimately he or she is not a resistant spectator in

¹⁴⁹ *Id.* at 243. Analyzing images of African-Americans in film, Russell argues that the dominant gaze functions in 3 ways: (1) proliferation of degrading stereotypes; (2) marginalization or complete absence of indigenous perspectives on blacks’ history and (3) co-optation of ostensibly ‘racial themes’ to capitalize on perceived trendiness. *Id.* at 245.

¹⁵⁰ *Id.* at 243.

¹⁵¹ FOSTER, *supra* note 12, at 93.

¹⁵² This is, of course, a short list. It does not suggest the myriad ways in which laws regulate daily life, which have significant effects on subjectivity. *See* Jones, *supra* note 19.

¹⁵³ *See* KUHN, *supra* note 131.

¹⁵⁴ *Scott v. Sandford*, 60 U.S. 393 (1856). Jones, *supra* note 19, argues that this notion of blacks as “anti-citizens” persists in more recent times, such as the Rodney King beating and subsequent trial of the L.A.P.D. officers.

¹⁵⁵ *See infra* Part V.B. for more on the alien land laws.

¹⁵⁶ Jones, *supra* note 19.

¹⁵⁷ Jessica Silbey, *Patterns of Courtroom Justice*, in *LAW AND FILM* 97, 116 (Stefan Machura & Peter Robson eds., 2001). Silbey tracks narrative and formal patterns in law films that induce in viewers particular expectations of their role in constituting the legal meaning of film, and by extension, the justice system. Silbey unapologetically focuses on courtroom dramas as a genre. *Id.* at 97. *But see* BLACK, *supra* note 90 (arguing against genre classifications).

¹⁵⁸ Silbey, *supra* note 157, at 98.

¹⁵⁹ *Id.*

Diawara's sense, since these law films resolve in a manner that elicits the viewer's reaffirmation of the validity of the legal system.¹⁶⁰

Reading Diawara and Silbey together, it follows that mainstream films construct the white legal subject,¹⁶¹ depicting the law from the perspective of white privilege. While I will develop specific case studies on how this works in the next section, briefly what this means is that legal machinations and outcomes in films are depicted as supporting the supremacy of whiteness.¹⁶² Significantly, this is even the case in films that, on their surface, deplore racism and purport to champion the legal rights of non-whites. Thus the raced nature of the depiction of law can be vastly more difficult to read in these films than in films like *The Birth of a Nation*.

While arguments regarding the raced nature of law is beyond the scope of this article and already capably handled by other scholars,¹⁶³ it is clear that these popular culture images occur in the context of "real world" law, which has worked throughout history to support white privilege.¹⁶⁴ Thus, mainstream cinema has ample prefiguring and support for its white-centered narratives of law.

While I argue here that film helps construct race and its place in cultural attitudes about law, it does so in a discourse with larger cultural forces, including the legal system itself and people's experiences with that system. I echo Kwame Anthony Appiah's assertion: "I know that representations are also real, but we still need to keep a clear grip on the distinction between representations and the reality they represent."¹⁶⁵ But even though, as argued above,¹⁶⁶ the consequences of our "raced" legal system have a far more significant impact on our daily lives than the raced aspect of film, a representational feedback loop of sorts exists within the two narrative systems which reinforces the power of both.¹⁶⁷ Representations help shape the attitudes of legal actors, and actions within the legal field are re-imagined in popular culture representations.¹⁶⁸

B. The White Subject and the Non-White Object in Film

White hegemony "works to define subjectivity itself as white."¹⁶⁹ Perhaps the most immediately obvious example of this in film is the preponderance of white legal subjects¹⁷⁰

¹⁶⁰ *Id.* at 115-16. While Silbey does not explicitly limit her analysis to mainstream commercial films, this mechanism of eliciting compliance with prevailing legal ideologies is a mainstay of such films. That being said, there is no reason that a spectator could resist a film's solicitation of unquestioning consent to the legal system it portrays, just as Diawara suggests can be done with resistance of racial narratives. Diawara, *supra* note 114. This article proposes some paths of inquiry to inform that resistance.

¹⁶¹ Silbey, *supra* note 157; Diawara, *supra* note 114.

¹⁶² Again, as discussed earlier, this is not any "real" or "biological" whiteness, but rather a constructed idea of "whiteness" and its value and superiority.

¹⁶³ See e.g., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, et. al. eds., New Press 2001); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (Harv. U. Press 1991); THE DERRICK BELL READER (Richard Delgado & Jean Stefanic eds., N.Y.U. Press 2005).

¹⁶⁴ See also FOSTER, *supra* note 12, at 26-30 for a discussion of the persistence of narratives of race and white supremacy in contemporary politics.

¹⁶⁵ See Appiah, *supra* note 30, at 88.

¹⁶⁶ See *supra* Part III.

¹⁶⁷ Can there be any real doubt, for example, that the majority of white audience members viewing film depictions of criminals as African-American men experience a sense of "authenticity," given their experience of news reporting practices on African-American men in the context of crime? See HARPER, *supra* note 45; see also Jones, *supra* note 19, at 488-96. Most jurors have seen more movies than trials.

¹⁶⁸ SHERWIN, *supra* note 40.

¹⁶⁹ FOSTER, *supra* note 12, at 98 (emphasis added).

and the dearth of non-white legal subjects. This focus on white subjects is by no means unique to law films. Rather, “the range of human experience is denied to non-whites in a huge percentage of films.”¹⁷¹ Typically mainstream law films focus on white legal subjects without acknowledging the context of white privilege. Again, this preponderance of white legal actors is simply an extension of the focus on white subjectivity that characterizes mainstream film. This subjectivity is structured in a world where “[t]he judgment of Blackness [or non-whiteness] is fixed, immediate, irrevocable; the judgment of whiteness is ever subject to modification, revision, error.”¹⁷² This imagined fluidity of white identity, and imagined fixity of non-white subjects as defined primarily *as* non-white, sponsors mainstream film’s fixation with white film characters.¹⁷³

One example of this construction of subjectivity as white is that most law films have white lawyer protagonists.¹⁷⁴ And lawyers in mainstream films are usually authoritative and self-possessed agents who move the plot along. Whatever the foibles, imperfections, and challenges of these white lawyers, they command the viewer’s full attention as heroic (or anti-heroic) central figures around whom the plot revolves.¹⁷⁵

Concomitant with this depiction of white legal subjects is that most non-whites in law films appear as criminal defendants.¹⁷⁶ Thus, these characters are objects to be acted upon by the legal system, rather than subjects who can act within or against the system. Yet even these appearances by non-white actors as objects of law are minimal, and overwhelmingly limited in this context. And as with the preponderance of white legal actors, most films do not especially mark, much less critique,¹⁷⁷ this object status.

¹⁷⁰ By subject here I mean a character who is self-directed, who motivates the action, and who the film action typically centers on. MULVEY, *supra* note 132. Obviously, this notion of subjectivity has resonance for the reinforcement of audience subjectivity through identification. *Id*; see also KUHN, *supra* note 131; Diawara, *supra* note 114.

¹⁷¹ FOSTER, *supra* note 12, at 93.

¹⁷² Westley, *supra* note 69, at 301.

¹⁷³ This is not to say that there is not a bald economic element to this: producers focus on their majority audience. Though this is presently white, most observers think that will cease to be the case within the next 50 years, with the projected demise of a “racial majority” in the United States. See VERA & GORDON, *supra* note 17, at 192. But again, following Aoki, *supra* note 15, why should filmmakers assume that even a white majority audience can only be won through identification with white characters?

¹⁷⁴ For a survey, see PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES (Andrews McMeel 1996) which synopses Sixty-nine American law-themed films, of which only four arguably have a non-white protagonist (lawyer or other main character).

¹⁷⁵ See *infra* Part V.A for a discussion on the concept of the “heroic lawyer.”

¹⁷⁶ The examples of non-white lawyers in mainstream law films are few: PHILADELPHIA (Clinica Estetico 1993) (Denzel Washington as attorney); A SOLDIER’S STORY (Columbia Pictures 1984) (Howard Rollins as military attorney); CLASS ACTION (Interscope Communications 1991) (Laurence Fishburne as sidekick attorney); LOSING ISALAH (Paramount Pictures 1995) (Samuel L. Jackson as attorney). Only PHILADELPHIA and A SOLDIER’S STORY spend any significant time focusing on the non-white lawyers. Non-white criminal defendants abound. See, e.g., MONSTER’S BALL (Lee Daniels Entertainment 2001); THE GREEN MILE (Castle Rock Entertainment 1999); TO KILL A MOCKINGBIRD (United Artists 1962); A TIME TO KILL (Regency Enterprises 1996); A SOLDIER’S STORY (Columbia Pictures Corporation 1984); LOSING ISALAH (Paramount Pictures 1995); HURRICANE (Azoff Entertainment 1999); SNOW FALLING ON CEDARS (Universal Pictures 1999); ZOOT SUIT (Universal Pictures 1981); AMERICAN ME (Universal Pictures 1992); CHANGING LANES (Paramount Pictures 2002) (Samuel L. Jackson as civil defendant); AMISTAD (Dreamworks SKG 1997) (maritime law of property applied to Africans); 12 ANGRY MEN (Orion-Nova Productions 1957) (while the film clearly marks the defendant as “other,” in the film’s class-conscious narrative, he could arguably be read as lower class, though some commentators read him as Latino).

¹⁷⁷ For example, by commenting on racial period profiling in law enforcement, unequal sentencing based on race, unequal application of the death penalty. 12 ANGRY MEN is an exception to this in its explicit marking of the differential legal treatment of socially marginalized groups.

While the sheer appearance of non-white bodies on the screen may be significant,¹⁷⁸ the *how* of such representation is much more important than the simple existence of it.¹⁷⁹ The relevant questions about such representations must go much deeper than whether a character is portrayed “positively” or “negatively.” For example, a film may have positive portrayals of non-white characters, yet not give them full focus or full subjectivity.¹⁸⁰ And of course, positive characterizations can be just as limiting and stereotypical as negative characterizations, so they alone do not necessarily mark true character subjectivity.¹⁸¹ Rather, the more significant inquiry is whether “[w]hite discourse implacably reduces the non-white subject to being a function of the white subject, not allowing her/him space or autonomy, permitting neither the recognition of similarities or the acceptance of differences except as a means for knowing the white self.”¹⁸²

The dichotomy of white subject and non-white “object” discussed above interconnects with a key narrative at the core of many mainstream law movies: the conflict between law and justice. Examining this duality in the context of gender, Mark Tushnet argues that law is typically aligned with socially-dominant actors and justice with non-dominant “Other[s].”¹⁸³ “[L]aw is associated with the Dominant, usually the white male, and justice with the Other. The Dominant is regulated by rules whose rigidity must be tempered from the outside, by mercy and a case-specific particularism associated with justice.”¹⁸⁴ The Other “may be an indigenous person, a woman, a man who somehow has escaped the bonds of the Dominant”¹⁸⁵ An Other frequently appears in a legal narrative as a criminal defendant, an object of the system.¹⁸⁶ “The Other cannot, however, easily become a subject

¹⁷⁸ HOOKS, *supra* note 132; Aoki, *supra* note 15; Baldwin, *supra* note 31 (discussing reaction in minority communities to images of minorities in film and on TV).

¹⁷⁹ Nor do sheer numbers of white and non-white characters necessarily dictate a film’s perspective on race. Though probably not a law movie by anyone’s definition, *THE ROYAL TENENBAUMS* (American Empirical Pictures 2001) occasionally de-centers whiteness even though it contains only a few non-white characters. Royal Tenenbaum (Gene Hackman), the estranged patriarch of the family (and disbarred lawyer), provokes an argument with his ex-wife’s new fiancé, Henry Sherman (Danny Glover), using racial epithets that are depicted as ugly, childish, and ultimately disempowering to him. In addition, Royal’s quasi-colonial relationship with part sidekick, part retainer Pagoda (Kumar Pallana) is periodically decentered by Pagoda’s comical stabbing of Royal with a penknife. (That said, arguably these brief scenes don’t override the film’s overwhelmingly white upper class milieu.)

¹⁸⁰ The perfect exemplar of this is Morgan Freeman, who almost always plays a virtuous character—including, notably, God—yet is rarely the main character in a film, instead frequently sharing the screen with a white character. This is the so-called “biracial buddy” formula. See ED GUERRERO, *FRAMING BLACKNESS: THE AFRICAN AMERICAN IMAGE IN FILM* 127-37 (Temple U. Press, 1993) (discussed more fully at Part V, *infra*); see also VERA & GORDON, *supra* note 17, at 154-80. Even when Freeman plays the most powerful being in the universe, such as in *BRUCE ALMIGHTY* (Universal Pictures 2003) and *EVAN ALMIGHTY* (Universal Pictures 2007), he occupies far less screen time and has less subjectivity attributed to him than the white main characters of the films (Jim Carrey and Steve Carrell, respectively).

¹⁸¹ One thinks of Brock Peterson’s character Tom in *TO KILL A MOCKINGBIRD* (United Artists 1962). While Peters does a fine acting job with the material he is given, the film depicts Tom as a virtuous, but almost childishly powerless man. We are told he is a father, but he is never shown with his children or in a position of patriarchal authority (a patriarchy which virtually defines lawyer Atticus Finch). This is the sort of purity trap that Kwame Anthony Appiah, *supra* note 30, at 83 discusses arguing that the figure of the “good negro” or “saint” in movies is offered up perhaps to “address the guilt of white audiences, afraid that black people are angry at them, wanting to be forgiven, seeking a black person who is not only admirable and lovable, but who loves white people back....”

¹⁸² DYER, *supra* note 72.

¹⁸³ Mark Tushnet, *Class Action: One View of Gender and Law in Popular Culture*, in *LEGAL REELISM* 244, 244 (John Denvir ed., U. of Ill. Press 1996).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 247. Curiously, Tushnet does not explicitly mention a non-white person in his litany of “Others,” but clearly minority racial identity fits the category.

¹⁸⁶ *Id.*

actively constructing the law inside the courtroom precisely because he or she stands for justice and against the law.”¹⁸⁷ Thus, mainstream films’ narrative framing of law versus justice further imbeds the connection between whiteness and legal subjectivity and the object status of non-white social actors.

While the connection of justice to non-white characters is a kind of valourization, it does not equate to true subjectivity. Ultimately, the focus must remain on the Dominant, typically the white male character: “Because popular culture finds it difficult to sustain a moral structure in which the subordinate is valued as much as the Dominant, those who use this trope must somehow reconcile the implicit valourization of the Other with the valourization of the Dominant that domination entails.”¹⁸⁸

Most films accomplish this simply by keeping the film’s focus on main characters who are white, thus directing audience identification with white characters. And since most of the types of law narratives Tushnet discusses style justice as only possible *outside* the legal system, non-white characters are cast as ultimately external to the system; either incapable of prevailing through procedural law in court, outright criminal, or both.¹⁸⁹

V. THREE NARRATIVE STRATEGIES FOR THE CONSTRUCTION OF “MOVIE LAW” FROM THE PERSPECTIVE OF WHITE PRIVILEGE

Narrative strategies for the cinematic construction of law from the perspective of white privilege are many. In this article, I will focus on three interrelated elements: the raced construction of the lawyer-hero; the denial or displacement of law’s role in constructing race and race-based discrimination; and the suppression or revision of politics and political history.

A. The Raced Construction of the Lawyer-Hero

In mainstream film, the subtleties of character subjectivity and audience identification are boiled down to the phenomenon of the hero. The image of the hero is particularly crucial in law films because “[h]eroes are cultural signifiers who embody society’s traditions. Their significance lies in the way that the laws of social existence are coded in the signifier of the hero. Hence, the hero functions as moral arbiter who seeks to guarantee the legal conditions of society.”¹⁹⁰ Heroes, thus, *are* the law.

That is not to say that heroes always act within the confines of law. Rather, “[o]ne function of the hero in traditional cinema is the extension of society’s boundaries and laws within acceptable outlines. The film hero is a settler on the frontier of change who colonizes the new territory in the name of the status quo.”¹⁹¹

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 244.

¹⁸⁹ See *infra* Part V for detailed discussion and examples.

¹⁹⁰ Gladstone L. Yearwood, *The Hero in Black Film: An Analysis of the Film Industry and Problems in Black Cinema*, 5 WIDE ANGLE 42, 43 (1983).

¹⁹¹ *Id.*

This seeming contradiction between the hero's simultaneous place as law's embodiment and as adventurer *beyond* law's confines represents a core thematic opposition in classic Hollywood film: the outlaw hero and the official hero.¹⁹²

Embodied in the adventurer, explorer, gunfighter, wanderer, and loner, the outlaw hero stood for that part of the American imagination valuing self-determination and freedom from entanglements. By contrast, the official hero, normally portrayed as a teacher, lawyer, politician, farmer or family man, represented the American belief in collective action, and the objective legal process that superseded private notions of right and wrong.¹⁹³

Films in the classic Hollywood model maintain these two "contradictory traditions," frequently "blurring the lines between the two sets of heroes."¹⁹⁴ But despite the maintenance of both heroes simultaneously, "the national ideology clearly prefer[s] the outlaw."¹⁹⁵ Ray interprets the American love affair with the outlaw as suggestive of "an ideological anxiety about civilized life," a life represented by the official, law-abiding/law-embodiment hero.¹⁹⁶

The notion of the hero is central to films that explicitly take law as their subject. As Steve Greenfield argues, lawyer characters such as Atticus Finch¹⁹⁷ or "the young Mr. Lincoln,"¹⁹⁸ are the ultimate film heroes, standing up for the oppressed, and seen as above the community for doing so.¹⁹⁹ However, despite this heroic status, "[t]hese films . . . demonstrate that the cinematic lawyer will often freely flaunt the procedural rules and disregard client considerations in order to achieve a subjective notion of justice."²⁰⁰

¹⁹² RAY, *supra* note 28, at 58-59. Ray uses the past tense because he defines the classic period of Hollywood cinema as extending from 1935-1980, but many films made after 1980 continue the techniques and ideologies of the heyday of classic cinema. Most of the mainstream films I examine in this article are consistent with classic Hollywood Cinema.

¹⁹³ *Id.* at 59.

¹⁹⁴ *Id.* at 63, 64.

¹⁹⁵ *Id.* at 66. Again, while Ray limits this phenomenon to films produced in the "classic period," it persists in many films today. For example, consider the films released in the summer of 2008. These included several superhero narratives-- IRON MAN (Marvel Enterprises 2008), THE INCREDIBLE HULK (Marvel Enterprises 2008), HELLBOY II (Dark Horse Entertainment 2008), and HANCOCK (Columbia Pictures 2008)--, which garnered from respectable to strong box office returns. THE DARK KNIGHT (Warner Bros. Pictures 2008) stands out, not just for its record-breaking box office receipts, but also for its management of the official vs. outlaw hero trope. The plot sets up Gotham District Attorney Harvey Dent (Aaron Eckhart) as the official hero lawyer, cleaning up the city by prosecuting its criminals. Set against him is Batman (Christian Bale), whose crime fighting methods are that of a vigilante outlaw. While the audience is more drawn to Batman's pyrotechnics and Christian Bale's brooding energy, the film ends with the notion that Dent is the true hero the city needs, as he represents the due process of law. The loss of Dent at the end of the film is meant to be a tragedy, and is the catalyst for sending Batman out of Gotham as a hunted criminal. Batman chooses to accept responsibility for the recent spate of killings and goes on the lam to help reinforce Gotham's devotion to law over chaos. Resonating with Bush-era concerns about the erosion of constitutional rights, the film makes a strong case for an embrace of the order and justice implicit in the official hero.

¹⁹⁶ *Id.* at 60.

¹⁹⁷ TO KILL A MOCKINGBIRD (United Artists 1962).

¹⁹⁸ YOUNG MR. LINCOLN (Twentieth Century-Fox 1939).

¹⁹⁹ Steve Greenfield, *Hero or Villain? Cinematic Lawyers and the Delivery of Justice in Law and Film*, 28 J.L. & SOC'Y 25, 37 (2001).

²⁰⁰ *Id.*

Thus, the cinematic lawyer's identity is comprised of both the skill and ability to manipulate legal rules and the power to ignore the law as he²⁰¹ sees fit. This lawyer-subject embodies the contradictions between the official and outlaw heroes. This duality establishes a narrative split between the lawyer and the institution of law. "Lawyers are shown as morally strong characters prepared to take great risk in defen[s]e of the concept of law or, more accurately, justice. Yet, the films portray the process of law as instrumental in the obstruction of justice."²⁰²

This distinction of the lawyer from the system supports the hero identification that mainstream films thrive on.²⁰³ More importantly, the shift of focus from the system of law to the lawyer-subject neatly avoids any structural examination or critique of the system, or of the possibility that lawyers are agents for social change. "These films are telling us to have faith in the idea but not the system of law . . . these films are telling us to have faith in the lawyers themselves."²⁰⁴

Thus, while the raced nature of the cinematic lawyer hero goes unmarked in these films and in Greenfield's commentary,²⁰⁵ the power of these lawyer characters emanates both from their whiteness²⁰⁶ and their role as lawyers. Both positions put them in the role of Dominant. Almost without exception,²⁰⁷ cinematic white lawyers are depicted as masterful at their craft.²⁰⁸ This mastery is depicted in various ways, including: having sophisticated knowledge of intricate court procedure (e.g., James Stewart in *Anatomy of a Murder*;²⁰⁹ Ron Silver as Alan Dershowitz in *Reversal of Fortune*²¹⁰); using negative office politics to gain advantage (e.g., Tom Cruise in *The Firm*;²¹¹ Ben Affleck in *Changing Lanes*²¹²); arguing forcefully and eloquently in court and with adversaries (e.g., Gene Hackman in *Class Action*;²¹³ Orson Welles in *Compulsion*;²¹⁴ Spencer Tracy and Fredric March in *Inherit the Wind*²¹⁵); putting every resource, professional and personal, into zealously

²⁰¹ I use the male pronoun intentionally here, in defining the dominant as typically male. See Tushnet, *supra* note 183, at 244.

²⁰² Greenfield, *supra* note 199, at 39.

²⁰³ RAY, *supra* note 28, at 62 ("The outlaw mythology portrayed the law, the sum of society's standards, as a collective, impersonal ideology imposed on the individual from without").

²⁰⁴ Greenfield, *supra* note 199, at 37-38.

²⁰⁵ *Id.*

²⁰⁶ Also, as mentioned above, their power also emanates from their maleness, able-bodiedness, straightness, etc. See FOSTER, *supra* note 12 (discussing the interplay between the narratives of race, gender, and sexual orientation).

²⁰⁷ The film *THE SWEET HEREAFTER* (Alliance Communications Corp. 1997) is a notable exception to this pattern. For an excellent discussion of the fallible lawyer character in the film, see Sarat, *supra* note 40.

²⁰⁸ Again, the examples are too numerous and familiar to require listing. See BERGMAN & ASIMOW, *supra* note 174. Even Paul Newman's character in *THE VERDICT* (Twentieth Century-Fox 1982), who is initially depicted as a washed-up alcoholic, regains his moral authority by the end of the film and competently conducts his trial.

²⁰⁹ *ANATOMY OF A MURDER* (Carlyle Productions 1959).

²¹⁰ *REVERSAL OF FORTUNE* (Sovereign Pictures 1990). There certainly was a time when Alan Dershowitz would not be considered white in America because he is Jewish, and arguably that time is still with us. *REVERSAL OF FORTUNE* does highlight the stereotypes and "casual" anti-semitism Dershowitz encounters in his representation of Claus von Bulow. See MICHAEL ROGIN, *BLACKFACE, WHITE NOISE: JEWISH IMMIGRANTS IN THE HOLLYWOOD MELTING POT* (U. of Cal. Press 1996) (analyzing the use of blackface minstrelsy by early Jewish performers as an avenue to construct a white American identity); see also VERA & GORDON, *supra* note 17, at 1. While this article doesn't address the intersection between religious practice, nation, and race, arguably depictions of Jewish lawyers could be fodder for an interesting analysis.

²¹¹ *THE FIRM* (Paramount Pictures 1993).

²¹² *CHANGING LANES* (Paramount Pictures 2002).

²¹³ *CLASS ACTION* (Interscope Communications 1991).

²¹⁴ *COMPULSION* (Twentieth Century Fox Film 1959).

²¹⁵ *INHERIT THE WIND* (United Artists 1960).

pursuing a client's case (e.g., Matthew McConaughey in *A Time to Kill*²¹⁶; Alec Baldwin in *Ghosts of Mississippi*²¹⁷). Cinematic white lawyers frequently fight for what are depicted as social justice or moral causes (e.g., Gene Hackman in *Class Action*, Dustin Hoffman in *Runaway Jury*,²¹⁸ Gregory Peck in *To Kill a Mockingbird*; Alec Baldwin in *Ghosts of Mississippi*, etc.). And if such characters should lose or otherwise slip in competence, they manage to regain authority by the end of the film (e.g., *Adam's Rib*,²¹⁹ *The Verdict*, *Changing Lanes*). There is no final fall from grace for these characters; regardless of how they have manipulated the law to meet their own ends, at the end of the film, they remain the subject-center, intact as attorneys with their attendant power also intact.²²⁰

The characteristics imputed to the heroic cinematic lawyer align with what Richard Dyer has identified as the purported mythical characteristics or "spirit" of "whiteness."²²¹ As race is a concept dependent on embodiment²²² there is a corporeal element: "[T]he white spirit could both master and transcend the white body, while the non-white soul was the prey to the promptings and fallibilities of the body."²²³ Dyer describes the corporeality attributed to whiteness as ". . . get up and go, aspiration, awareness of the highest reaches of intellectual comprehension A hard, lean body, a dieted or trained one, an upright, shoulders back, unrelaxed posture, tight rather than loose movement" ²²⁴ D. Marvin Jones argues that embodiment is also an inescapable element of the law's construction of race: "[T]he body remains the medium in which the significance of race is most dramatically seen in law."²²⁵

Dyer's description of the physicality of whiteness (and clearly he is describing white maleness in the passage quoted) is consistent with the performance of lawyering in cinema. In law films, these physical characteristics are depicted as inseparable from the performance of lawyering in courtroom scenes. Gene Hackman (*CLASS ACTION*) and Ben Affleck (*CHANGING LANES*) may be depicted as having had loose morals in cheating on their wives, but they are "hard, lean" "upright" and "tight" in their courtroom scenes. And James Stewart (*Anatomy of a Murder*) may tickle the piano keys in his spare time, swapping riffs with Duke Ellington,²²⁶ but in the courtroom he is ramrod straight and all efficiency. Even

²¹⁶ *A TIME TO KILL* (Warner Bros. Pictures 1996).

²¹⁷ *GHOSTS OF MISSISSIPPI* (Castle Rock Entertainment 1996).

²¹⁸ *RUNAWAY JURY* (Twentieth Century Fox 2003).

²¹⁹ *ADAM'S RIB* (Metro-Goldwyn-Mayer 1949).

²²⁰ A brief survey of law films portraying (white) female attorneys highlights the unshakeable dominance of their white male counterparts. Female lawyer characters frequently end the film uncertain as to whether they will continue in the profession, some having lost their jobs (Mary Elizabeth Mastrantonio in *CLASS ACTION*), some nearly having lost their lives (Rebecca De Mornay in *GUILTY AS SIN* (Buena Vista Pictures 1993) and Glenn Close in *JAGGED EDGE* (Columbia Pictures Corp. 1985)), and some having shifted their focus to an emotional involvement with their client/boss (Sandra Bullock in *TWO WEEKS NOTICE* (Warner Bros. Pictures 2002)).

²²¹ DYER, *supra* note 72, at 18.

²²² *Id.*

²²³ *Id.* at 23.

²²⁴ *Id.* The argument here is not that, in reality, whites have these characteristics consistently, naturally, or exclusively. Rather they are projected narratives frequently used to underwrite, whether explicitly or implicitly, white hegemony. Dyer seeks to make visible the constructs of white identity which are frequently viewed from a white perspective as "natural" (and generally positive) attributes, rather than as mere projections and/or cultural practices.

²²⁵ Jones, *supra* note 19, at 489.

²²⁶ The use of Duke Ellington and his music in *ANATOMY OF A MURDER* (Carlyle Productions 1959) further reinforces its narrative of white hegemony. Stewart borrows the Duke's inexhaustible coolness by being his buddy, even sharing keyboards with him. Ellington's casting is an exercise in the uncanny since, even though he isn't cast as himself, the audience knows who he is, and thus is momentarily taken out of the film world. Reducing him to a bit player in Stewart's world further reinforces the totality of white hegemony, which in this instance contains the rational mastery of law along with the apparently effortless, "emotional" world of jazz. Here, jazz is

the hopelessly alcoholic Paul Newman (*The Verdict*) can put on a suit and go through the requisite authoritative motions in court. Again, while the raced nature of the cinematic lawyer hero goes unmarked in these films²²⁷ (and in most commentary about them), the source of the white lawyers' power is overdetermined: whiteness is power, law is power. And as Margaret Russell argues, mainstream film makes this correlation appear natural and simply part of the way the world works.²²⁸

Yet despite this embodiment, the cinematic white lawyer's depicted ability to go outside the law to find justice reflects the fluidity assigned to white identity.²²⁹ Since whiteness is the normative position of power and law-making, the Dominant, it follows that whiteness is also the position from which laws can be ignored. "At the level of social mores, the right not to conform, to be different and get away with it, is the right of the most privileged groups in society."²³⁰ To make the law is to be able to unmake law. To be the law is to *always* be the law, even when acting outside of its explicit instructions.²³¹

What then is the place of non-white characters in this heroic legal narrative? Not surprisingly, "[t]he cinematic rhetoric and style of the traditional hero predicated a social positioning in which blacks, women and other less powerful socio-cultural groups are constantly defined in a subordinate status."²³² For example, focusing on the black hero in popular film,²³³ Yearwood argues that the perpetual cultural association of blacks with lawlessness undermines the ability of such characters to be heroes in mainstream film.²³⁴

portrayed as merely the faint outlaw behavior of black people, rather than a rigorous cultural and intellectual production with its own particular "laws."

²²⁷ As we have begun to see, the pervasiveness of the legal narrative is flush with the pervasiveness of the white narrative. It may be simply easier to see this overlap in courtroom dramas, but it is also readily apparent in action film genres like the DIE HARD movies (Twentieth Century-Fox 1988, 1990, 1995), the RAMBO franchise (Anabasis N.V. 1982-2008), and the ROCKY franchise (Chartoff-Winkler Productions 1976-2006), just to name a few. See VERA & GORDON, *supra* note 17, at 34. These outlaw/official heroes are as essential to cinematic narratives of law as the "heroic" lawyers heretofore mentioned, and their heroic narrative further reflects the characteristics of the narrative of "whiteness" that Dyer sketches. See *supra* note 71. One drawback of insisting on a law film genre with distinct formal codes is that one risks ignoring the ever-present existence of "whiteness" as law. This narrative is inherently already present, even when a film does not contain courtroom scenes.

²²⁸ Russell, *supra* note 42.

²²⁹ Westley, *supra* note 69.

²³⁰ DYER, *supra* note 72, at 12.

²³¹ Greenfield does not address the racially coded aspect of this in his description of lawyers as villains or heroes. See *supra* note 199.

²³² Yearwood, *supra* note 190, at 44.

²³³ *Id.* While I am trying to theorize the interplay between images of whiteness and non-whiteness more broadly, there is value in examining the specific tropes of black male criminality, given their historical persistence and pervasiveness. It is important to not fall into the trap of assuming that the simple replacement of "whites" with "non-whites" within the heroic narrative would be alone a positive development. As long as the hero is associated with the status quo or a modest expansion thereof, a simple substitution of character morphology will not guarantee a critical approach to heroism itself or race.

²³⁴ A cursory examination of the one entry in the superhero film line-up of the Summer of 2008 that presented a non-white superhero (leaving aside HELLBOY II) supports this argument. In HANCOCK, Will Smith plays a superhero on the skids. Unloved and an alcoholic, Hancock wreaks havoc at the site of every rescue. Eventually, he is saved by a white PR executive who teaches him how to use his power in a media-friendly way. (It is significant that the primary problem of a non-white superhero would be depicted as one of *image*). While one's initial reaction is pleasure at the inclusion of a non-white superhero in the mix once again non-whiteness is marked in a way whiteness is not. Rather than being a superhero who happens to be black, Hancock is presented as a kind of example of what a superhero would be *if* he were black, activating various stereotypes of urban, black underclass life. Yet the movie also simultaneously ignores the politics of race in its presentation of Hancock's immortal romantic relationship with white superhero-in-hiding Charlize Theron. While it is suggested the couple was attacked when they were last together in Miami in the 1930s, the film leaves the nature of the attack vague rather than giving it an obvious grounding in historical hostility toward interracial relationships. In this gesture, the

Given the conflation of whiteness and law, a non-white hero necessarily “is by nature a subversive, and is thus unable to take a place in the system of exchange on the same basis as traditional heroes.”²³⁵

Since narratives of race are always relational,²³⁶ we should expect some key representational strategies of race and law to be revealed in films which cast main characters across racial lines. Accordingly, let us examine the lawyer-hero dynamic as it plays out in two films that set up white/non-white character dyads at their core: *A Time to Kill*²³⁷ and *Philadelphia*.²³⁸ Both of these films were made in the mid-1990s and both directly address discrimination under law against socially-marginalized Others. Even so, both films participate in representational strategies that inhere lawyer-heroism in “whiteness.”²³⁹

*A Time to Kill*²⁴⁰ follows the conventional white lawyer-hero model. Novice white attorney Jake Brigance (Matthew McConaughey) is hired by African-American lumber worker Carl Lee Hailey (Samuel L. Jackson) to defend him after he shoots two white racists who brutally raped his 10-year-old daughter in Mississippi. Hailey is explicitly aligned with justice as we are told that, given Southern racism,²⁴¹ his daughter’s rapists would inevitably escape conviction for their crimes. Thus, in announcing its explicit message condemning racial inequality, the film superficially marks the whiteness of the attorney hero as part of his place in the Dominant—Hailey seeks him out because he is a member of the power elite and thus can ably represent him.

Yet this marking of race inequality fails to de-center a white privilege perspective on law, and instead acts to reinforce white subjectivity and supremacy. The majority of this film focuses not on Hailey or racial inequality in criminal sentencing or at trial, but rather on Jake Brigance, who undergoes great travail to defend Hailey.²⁴² Brigance’s fledgling

film performs the typical Hollywood repression of political narratives in favor of personal narratives See RAY, *supra* note 28.

²³⁵ Yearwood, *supra* note 190, at 43. Yearwood quotes critic Thomas Cripps: “[T]he success of the heroic black film derives from a black hero as outlaw who hustles a living outside the dominant social system.” All eyes are currently on actor Will Smith who has become a top box office draw, and is increasingly cast as the main character. In addition, Smith pursues control of his production. See Tatiana Siegel, *Smith, Lassiter Bent on World Conquest*, VARIETY, Dec. 12, 2008, <http://www.variety.com/article/VR1117997301.html?categoryid=13&cs=1>. But again, the mere presence of non-white heroes is no guarantee of true de-centering of white representational hegemony.

²³⁶ See HANEY LÓPEZ, *supra* note 68.

²³⁷ A TIME TO KILL (Regency Enterprises 1996); PHILADELPHIA (Clinica Estetico 1993).

²³⁸ It is probably not surprising that the vast majority of the few non-white lawyer characters we find in mainstream film are African-American. This is no doubt part of Hollywood’s marketing strategy to maximize audience, and it is consistent with the black-white binary that still dominates much casual discourse about race in America. Accordingly, I examine many films within this central narrative.

²³⁹ PHILADELPHIA is certainly on its surface a more nuanced and intelligent film than A TIME TO KILL, and arguably more politically progressive. What makes these films an interesting comparison is that while most casual viewers would view them as significantly different in narrative complexity and style, they have more in common ideologically than initially meets the eye.

²⁴⁰ In fact, this film is based on John Grisham’s 1989 novel of the same name.

²⁴¹ Not surprisingly, many Hollywood films are comfortable cabining racism in the South (and typically in the lower class), rather than examining it throughout the country, or examining the psychic and economic interdependence between the North and South. See VERA & GORDON, *supra* note 17, at 42-47; see also Rob Atkinson, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1370 (1999) (arguing that TO KILL A MOCKINGBIRD shifts responsibility for racism to lower class whites).

²⁴² This focus on white sacrifice for non-white characters is a phenomenon I like to call, a *là* W.E.B Dubois, “the souls of white folks.” See W.E.B DUBOIS, *THE SOULS OF BLACK FOLK* (Modern Library 2003) (originally published 1903). (Dubois also wrote an essay called *The Souls of White Folk* in DARKWATER (Harcourt, Brace &

law firm is fragile and clientless, yet he takes on this, his first capital case. His house is fire-bombed and his wife and child threatened and pressured to leave town temporarily. Even Brigrance's secretary is forced to quit after her husband is literally scared to death by old-school²⁴³ Klan harassment. Brigrance's persistence is presented as truly heroic.

Key to this heroism is what only can be described as male masochism.²⁴⁴ From repeated images of McConaughy's bloodied bare chest, to scenes of him literally throwing himself in front of bullets to protect others during mob riots, there is an evocation of Christ-like sacrifice in this white lawyer hero. While audience sympathy for Hailey is actively cultivated (in part by the inclusion of the almost unwatchable rape scene at the beginning of the film) *A Time to Kill* avoids fully valourizing Hailey and his justice claim and Hailey by focusing most of its screen time and attention on Brigrance and *his* struggles. Thus, the Dominant (Brigrance) appropriates the "aura" of justice surrounding the Other (Hailey).²⁴⁵

In a superficial attempt to achieve the appearance of racially-balanced character subjectivity, the film activates certain aspects of the "biracial buddy formula,"²⁴⁶ with Brigrance and Hailey working crafty ruses together to advance Hailey's case. But the representational reality of the film has Hailey spending 90% of the film caged—first behind the screen door where he awaits his daughters' rapists, and then for the majority of the rest of the film in prison.²⁴⁷ While the film depicts Hailey as unjustly on trial, Brigrance is the character offered for audience identification and empathy. Thus, through use of the lawyer-hero model, the film's message condemning racial inequality in criminal sentencing remains superficial. The film's true focus is the nobility of the white lawyer hero.²⁴⁸

Howe 1920) which doesn't use the phrase in the way I do here, but addresses white supremacy and white racism). It is called by some the "white savior" or "white messiah" complex. See VERA & GORDON, *supra* note 17.

²⁴³ Interestingly, whenever I teach this film, someone inevitably expresses confusion about the time of the events depicted. While there are no explicit indications of the film being set in the past, such as antique cars or other obsolescent technology, the tone of the film evokes civil rights era violence and robust Klan activity of yore. I would argue that the willfully anachronistic quality of the film serves to further reinforce the image of Jake Brigrance as a white savior, lending him an aura of civil rights era heroism.

²⁴⁴ See DAVID SAVRAN, *TAKING IT LIKE A MAN: WHITE MASCULINITY, MASOCHISM, AND CONTEMPORARY AMERICAN CULTURE* (Princeton Univ. Press 1998) (arguing that images of white masculinity reflect masochistic victimization fantasies, in part sponsored by fear of political advances made by women and non-whites).

²⁴⁵ See FOSTER, *supra* note 12, at 98, for a discussion of white characters' appropriation of otherness in specific genre films such as musicals, etc.

²⁴⁶ ED GUERRERO, *FRAMING BLACKNESS: THE AFRICAN AMERICAN IMAGE IN FILM 128* (Temple U. Press 1993) ("[W]ith the biracial buddy formula Hollywood put the black filmic presence in the protective custody, so to speak, of a white lead or co-star and therefore in conformity with white sensibilities and expectations of what blacks, essentially, should be.")

²⁴⁷ While this depiction might seem appropriate given that he is in police custody awaiting trial, the filmmakers choose to depict Jackson in a particularly dehumanized fashion, especially in an earlier scene in which he lies in wait for the rapists in the courthouse. An extreme close-up shot of Jackson's eyes behind a wire mesh door, contorted in rage, cast Jackson as animalistic. See Yearwood, *supra* note 190, at 43 (arguing that part of cinema's "acquisition of the black body through symbolic domination and control" involves camera use and lighting which "attach[es] semes of inferiority, fear or suspense to blackness"); see also Barbara Menzel, *White Law and the Missing Black Body in Fritz Lang's Fury*, 20 Q. REV. OF FILM & VIDEO 203 (1936) (discussing the "Hollywood formula that associates whiteness with the law and blackness with the body.")

²⁴⁸ An interesting contrast to this is the depiction of the white lawyers in *AMERICAN VIOLET* (Uncommon Productions 2008), a film about racially targeted police enforcement of drug laws. First, we are given a team of defense attorneys (played by Will Patton and Tim Blake Nelson) rather than a heroic individual. In addition, their efforts in representing an African-American defendant (Nicole Beharie) are not the focus; rather, the defendant's struggles are kept at the center of the film. Finally, the conduct of the case is presented as a group effort between the defendant and her attorneys rather than the result of the white attorneys' *noblesse oblige*.

Any genuine critique of the raced nature of the law is undercut by the film's suggestion that vigilantism is acceptable if performed by a black person to acquit racist white violence. In the film's simplistic logic this is offered, along with the frequent beatings black Sheriff Ozzie Walls gives white suspects, as a kind of thematic recompense for a history of abuse of African-Americans under law. Leaving aside for a moment the perversity and shallowness of such a gesture, this plot's strategy serves to reinforce the inevitability of whiteness' hegemonic hold on legal subjectivity, consigning non-white Others to self-help solutions outside of the legal system, while superficially valorizing their justice claims.

Ultimately, Brigance obtains Hailey's complete acquittal on the improbable grounds of insanity, which is presented as a just result despite Hailey's admitted murder of the two white rapists. Whatever the convoluted nature of this purportedly just outcome, the film maintains the primacy of the perspective of white privilege by keeping the white lawyer character as the "interest center" of the film, despite the black criminal defendant character's place as the "moral center" of the film.²⁴⁹

Compare the film *Philadelphia*,²⁵⁰ which also takes as its subject legal discrimination.²⁵¹ Joe Miller (Denzel Washington), attorney for plaintiff Andrew Becker (Tom Hanks), an HIV-infected attorney who is fired by his upscale law firm when it discovers his illness. Becker hires Miller to represent him after no other lawyer will take the case, sues his law firm for employment discrimination, and ultimately prevails.

While Joe Miller is a significant character in the movie and gets enough screen time to qualify as a main character, Andrew Becker remains the focus of the film and Miller's identity as a lawyer is fleshed out largely in comparison and as a counterpoint to Becker's, mirroring the relational narrative of race.²⁵² While Becker is a high-end corporate lawyer, Miller is depicted as his opposite: an ambulance-chasing, "shyster" personal injury attorney working out of a ramshackle office. In addition, while Becker is initially portrayed as apolitical in his legal career, simply taking corporate cases as part of his "neutral" legal mastery, through the course of the film he is radicalized by his discriminatory treatment by his former firm. Miller's practice, on the other hand, is continuously depicted as apolitical. He expresses no social justice motivations for his work, even though as a plaintiff-side personal injury lawyer, he could be framed as a champion of the "little guy" against corporations.²⁵³

While *Philadelphia* is exemplary for making Miller a lawyer first rather than a *black* lawyer, it limits its focus on difference to sexual orientation thus avoiding a broader critique of discrimination against all socially marginalized groups. This is a familiar dynamic in law films, which sometimes pit one 'otherness' against another, never able to give 'equal time'

²⁴⁹ See RAY, *supra* note 28, at 66 (arguing that one way classic Hollywood films maintain the official hero-outlaw hero disjunction is by making one character represent the moral center of the film (the official hero) and the other represent the interest center (typically the outlaw hero)). This is a common way to direct audience identification and comes into play in many films which share screen time between a major white and non-white character. See GUERRERO, *supra* note 180 (discussing film's management of audience identification in biracial buddy films of the 1980s). Arguably, Brigance also claims the film's moral center at the end of the film when he shows up at Hailey's house for a picnic in a gesture of racial "healing."

²⁵⁰ PHILADELPHIA (Cinica Estetico 1993).

²⁵¹ A key difference here is that the legal claim articulated in PHILADELPHIA is more concrete in that it involves a violation of the ADA, whereas the discrimination suggested in A TIME TO KILL is not clearly grounded in a violation of law.

²⁵² See HANEY LÓPEZ, *supra* note 68.

²⁵³ As is, for example, Gene Hackman's character in CLASS ACTION, *supra* note 212.

or articulate a cohesive agenda across ‘groups.’²⁵⁴ Thus, Miller is depicted as initially homophobic, the film perhaps in part channeling (without real commentary or examination) assumptions about homophobia in the black community. Thus, the film valorizes one type of “Other” in its adherence to the hero model.

In service of this, Miller’s character reflects the characteristics of the typical cinematic white lawyer discussed above²⁵⁵—he is rational, persuasive, and authoritative in court. The film works to code him as professionally “neutral,” i.e. white,²⁵⁶ in its depiction of his legal mastery. But instead of the characterization of Miller de-centering a white hegemonic perspective on law, it is used to shift potential audience identification with Miller to focus instead on Andrew Becker.

Miller is seemingly slipped into the role of Dominant, displaced from assuming the role of Other aligned with justice²⁵⁷ which is filled by Becker, the film not having room for two Others at the same time. Yet crucially, Miller’s positioning as Dominant does not equate to a central position as the film’s hero. Even though Miller wins the case and excels in the courtroom, he is not elevated to hero status as he would be in other law films where a white male lawyer acted similarly such as *A Time to Kill*. While he experiences some self-doubt and endures homophobic jokes from colleagues, Miller is not presented as going through great personal sacrifice to represent Becker, as Brigance. Most of the screen time and the hero position must go to Andrew Becker, who is aligned with justice in his fight for equal protection of the laws. In addition, the depiction of Miller as functioning in the mode of white lawyer deracinates him²⁵⁸ and displaces opportunities for his own political voice, or a shared political voice, in favor of Becker’s struggle for inclusion.²⁵⁹

In this “battle of the Others,” the depiction of Washington’s character is necessarily underwritten by the “straight-ened” version of a gay man offered for audience identification. While there is undoubtedly value to Director Jonathan Demme putting a gay man at the center of a mainstream film at a time when such a thing was relatively unheard of, we barely see Tom Hanks kiss his partner (played by Antonio Banderas), much less make love with him. Hanks’ character is depicted as straight-acting, straight-dressing, straight-talking.²⁶⁰ He is a more acceptable Other for normative audience identification by not appearing Other.²⁶¹ And while Washington’s character cannot avoid the *appearance* of

²⁵⁴ CYNTHIA LUCIA, FRAMING FEMALE LAWYERS 22 (U. of Tex. Press 2005). Lucia discusses this phenomenon in the context of depictions of women lawyers in law films. The same phenomenon was in evidence during the 2008 presidential campaign where for some reason the notion that both Democratic front-runners Hillary Clinton and Barack Obama might be suffering from sexist and racist perceptions could not be simultaneously entertained. See Randi Kaye, *Some Voters Say Sexism Less Offensive Than Racism*, CNN, Feb. 15, 2008, <http://www.cnn.com/2008/POLITICS/02/15/kaye.ohioracegender/index.html>.

²⁵⁵ See *supra* Part IV.

²⁵⁶ For a humorous take on the assumed neutrality of whiteness in the context of the Justice Sonia Sotomayor confirmation hearings, see *The Colbert Report: The Neutral Man’s Burden* (Comedy Central broadcast on July 16, 2009), available at <http://www.colbertnation.com/the-colbert-report-videos/238783/july-16-2009/the-colbert-report--the-word---neutral-man-s-burden>.

²⁵⁷ Tushnet, *supra* note 183.

²⁵⁸ Diawara, *supra* note 114.

²⁵⁹ There is a vague sense in this that civil rights for non-whites are already largely achieved and the focus should now turn back to whites, albeit marginalized whites.

²⁶⁰ See Anne Thompson, *Ang Lee’s ‘Brokeback’ Explores ‘Last Frontier,’* THE HOLLYWOOD REPORTER, Nov. 11, 2005, http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1001477928. (“PHILADELPHIA was less a romance (the gay couple didn’t kiss) than a courtroom drama about fighting for justice”).

²⁶¹ Perhaps where he is more profoundly “othered” is in his physical disability. Yet while the film deserves some credit for focusing on a main character who is disabled, its empowerment of him emanates largely from his

Otherness, the depicted neutrality of his legal mastery is used to deracinate the racial Other's relationship with the law for audience consumption.

Paradoxically, this representation of a sexual Other in the guise of the white male Dominant²⁶² allows the symbolic reassertion of the Dominant as the center of the narrative, further displacing Washington's character from exercising any real authority. While the antics of the typical biracial buddy film are not employed here, a similar dynamic of the white character retaining "custody" of, or otherwise giving meaning to, a non-white character takes place.²⁶³ Hanks is both law—accomplished attorney who can walk the walk *and* talk the talk—and justice—gay activist acquitting equality under the law. Again, both law and justice are represented in whiteness.²⁶⁴

Both *A Time to Kill* and *Philadelphia* revolve around the subjectivity of white lawyer heroes, even when that character is not the central lawyer figure in the courtroom drama depicted. While both of these white lawyers are securely in the Dominant position as wielders of law within a courtroom, both films also align them with justice concerns, thus seeking to "borrow" the valorization of the Other. Accordingly, part of the vision of the Dominant that is whiteness is that it retains the fluidity to exercise hegemony even *outside* its usual hegemonic realm.²⁶⁵ White mastery is thus a totalizing force, able to act in a court of law and in "the streets" to achieve justice. While non-white figures may excel in the realm of the Dominant, for example the courtroom (Joe Miller), that victory is not sufficient to grant them full subject status within the narrative of the film as it would a white lawyer (Jake Brigance). Instead, non-whites in these narratives exist largely as opportunities to reveal how proficient and beneficent white lawyers can be.

B. The Denial or Displacement of the Law's Role in Constructing Race and Race-Based Discrimination

The lawyer-hero dynamic plays an important part in diverting attention from the law's role in sponsoring racial discrimination, instead focusing audiences on the individual above the institution,²⁶⁶ the personal above the political.²⁶⁷ Even when mainstream films attend to stories of racial injustice, they simultaneously suppress the role of law in constructing race and racial discrimination, displacing discrimination onto individual actors and emphasizing the overall fairness of the legal process. "The reassurance here is that, despite the evil that individual whites may do to people of color, white institutions are fundamentally good."²⁶⁸ Thus, the concrete laws and regulations that have throughout history structured race are either casually suggested or left out all together. This is sometimes facilitated by restricting representations of law to the courtroom setting.

place as an elite lawyer fighting for his rights. His disability is presented as a victimization, a lack which diminishes his power as a lawyer.

²⁶² On the place of cinematic gay characters as "white other[s]" who have only recently been coded as "white dominant[t]" figures. See FOSTER, *supra* note 12, at 137, 152

²⁶³ GUERRERO, *supra* note 180.

²⁶⁴ See DIANA FUSS, *IDENTIFICATION PAPERS* 142 (Routledge 1995). ("[E]ven otherness may be appropriated exclusively by white subjects.") (discussing from a psychoanalytic perspective the raced nature of narratives of subject and other in the writing of Frantz Fanon).

²⁶⁵ This is largely due to the fact that, as previously discussed, the entire dynamic of subjectivity and "othering" in mainstream film is constructed from the perspective of whiteness.

²⁶⁶ Greenfield, *supra* note 198.

²⁶⁷ RAY, *supra* note 28.

²⁶⁸ VERA & GORDON, *supra* note 17, at 53.

Even those films that explicitly take law as their subject fail to fully depict law's part in the construction of race and racial discrimination. For example, *Snow Falling on Cedars*²⁶⁹ purports to condemn discrimination against Asian-Americans²⁷⁰ before and after World War II. The film focuses on the murder trial of Japanese-American fisherman, Kazuo Miyamoto (Rick Yune). Kazuo is falsely accused of killing a white fisherman, Carl Heine Jr. (Eric Thal) through the use of the Japanese martial art of Kendo. Crucially, the film initially encourages the viewer to believe in Kazuo's guilt.²⁷¹ This is partly achieved by giving him motive in the form of his anger at Heine for refusing to sell him his boat and Kazuo's deeper resentment of Heine's mother for by revoking the land deal which Kazuo's father entered into with the Heine family, seeking to evade the restrictions of the alien land law.²⁷²

While Kazuo's dilemma and trial form the "moral center" of the film, the film's interest constellates around white news reporter, Ishmael Chambers (Ethan Hawke), who harbors an obsessive affection for Kazuo's wife, Hatsue Miyamoto (Youki Kudoh). Chambers gets the lion's share of the screen time, often in misty flashbacks of his childhood infatuation with Hatsue.²⁷³ In part due to his rage at Hatsue for marrying Kazuo, Chambers conceals exculpatory evidence that would free Kazuo. Just before Kazuo is to be convicted, Chambers reveals the information, thus freeing him and cementing Chambers' place as the film's hero.

The film's vague and brief mention of the alien land laws, along with the minimal focus on the internment of Hatsue, Kazuo, and their families during the war²⁷⁴ displaces the role of law onto the courtroom scenes. Thus, Kazuo's acquittal is offered as a resolution of the film's racial conflicts; as proof²⁷⁵ that the legal system itself is just. "The courtroom part of this story really is about the ultimate vindication of the legal system . . . This viewpoint perceives racism as essentially an aberration, an irrationality, in a system that otherwise works generally well and justly."²⁷⁶ The systemic legalized racism of the alien land law and

²⁶⁹ SNOW FALLING ON CEDARS (Universal Pictures 1999).

²⁷⁰ As discussed in note 10, *supra*, following Mae Ngai's notion of the "legal racialization" of Asians in the United States, I discuss these depictions in terms of racial signification.

²⁷¹ The film also activates stereotypes of inscrutable and brutal Asian masculinity through its use of camera and lighting to suggest Kazuo's guilt. While this may be done to heighten viewer suspense, it is done through raced representation.

²⁷² Laws enacted in several states which forbid certain foreign nationals from owning land, used particularly against those of Asian heritage. For example, California's first Alien Land Law was enacted in 1913 and was not repealed until 1952. See DUDLEY O. MCGOVNEY, THE ANTI-JAPANESE LAND LAWS OF CALIFORNIA AND TEN OTHER STATES, in JAPANESE IMMIGRANTS AND AMERICAN LAW (Charles McClain ed., Garland Inc. 1994). Several other states had such laws. For example, Florida had an alien land law on the books as late as 2008. See Hector Chichoni, *Florida's Alien Land Law*, FLORIDA'S EMPLOYMENT & IMMIGRATION LAW BLOG, Sept. 16, 2008, <http://www.flemploymentlawblog.com/2008/09/articles/floridas-alien-land-law/>.

²⁷³ As Keith Aoki argues, rather than critically positioning Ethan Hawke's obsession within the history of U.S. films' construction of the mysterious, dangerous Asian female, it participates in this fetishization by obsessively centering on Hawke. See *supra* note 15.

²⁷⁴ While the film is superficially sympathetic to Japanese internment, the scenes in the camp are mostly used to portray Hatsue's thwarted relationship with Chambers.

²⁷⁵ See CLOVER, *supra* note 92 (arguing that all courtroom dramas put some larger question "on trial," in addition to the trial depicted in the film).

²⁷⁶ Aoki, *supra* note 15, at 35.

the internment camps goes without sustained critique;²⁷⁷ instead, it is washed away in Kazuo's trial.

Crucially, the court proceedings themselves are presented as just and fair.²⁷⁸ And the law's representatives in the film—the white sheriff (Richard Jenkins), judge and defense attorney (Max Von Sydow)—are depicted as racially tolerant and enlightened. Thus, the viewer is left with the sense that the system works, despite a few bad apples.²⁷⁹ The overwhelming focus on the trial and the “mystery” of whether or not Kazuo committed murder, deflects any attention to the law's role in racist legislation and executive orders.

Legal discrimination is again viewed from the perspective of white privilege, even in the context of a narrative that purports to be about discrimination against Asian Americans. Any real portrayal of the law itself as constructing race as well as being racially discriminatory is avoided. Instead, the film focuses on the justice served by the 11th-hour intercession of a white man acting from outside the legal system.²⁸⁰

Snow Falling on Cedars can be read as a kind of eroticized homage to *To Kill a Mockingbird*.²⁸¹ It follows the classic film's depiction of the law as essentially racially-tolerant and enlightened. This is famously embodied in the person of Atticus Finch, but also in the white judge and the sheriff, as in *Snow Falling on Cedars*. Tom Robinson's trial, given Atticus' brilliant defense and summation, is depicted as fair, even noble. Even the appellate court, it is suggested, would have decided in Tom's favor. Thus, the film situates the problem of raced law in the people sitting on the jury, and in some of the townspeople.²⁸² There is no suggestion of the considerable body of laws responsible for the construction of race, racial discrimination, and segregation in existence both at the time of the story and the time of the film's making.²⁸³ Obviously bound in part by the source novel,²⁸⁴ the film emphasizes the fairness of the trial in terms of Atticus' representation and the court procedure, thus displacing any racism in the function of law itself.²⁸⁵ Again, this

²⁷⁷ The film takes a shot at displacing racism onto Hatsue's mother who, tells her not to fall in love with “white boys,” while they are interned at the camp. In the context of the film's romantic narrative, this statement is framed as cruel and repressive rather than one resisting the oppression of internment.

²⁷⁸ While Chambers initially withholds exculpatory evidence, it is “extra-legal” information since it involves documents he discovers as part of his investigative reporting.

²⁷⁹ The only legal actor in the film depicted as racially motivated is the coroner who testifies against Kazuo, referring to him as a “jap.”

²⁸⁰ While Chambers is not a lawyer, he embodies the heroic white legal subject discussed *supra* Part V.A.

²⁸¹ Towards its end, the film clearly illustrates the scene where black spectators that are sitting in the segregated gallery rise when Atticus Finch leaves the courthouse. As Chambers leaves, having helped acquit Kazuo, the segregated Japanese-American audience bows to him. Aoki also compares the films, but mostly to argue that Ishmael Chambers isn't as satisfying a hero as Atticus Finch. See Aoki, *supra* note 15, at 35-36

²⁸² See Atkinson, *supra* note 241.

²⁸³ One interpretation of the historical place of *TO KILL A MOCKINGBIRD* is that the film commends white liberals for their support of the civil rights movement, while simultaneously comforting any fears they may have about black resistance becoming violent or fully decentering them from power. The racial intolerance of whites is limited to a few citizens of Maycomb, and the black characters are depicted as infantilized and isolated, thus posing no political threat to whites. For a different reading of the film's resonance for release-date audiences, see VERA & GORDON, *supra* note 17, at 43 (arguing that *TO KILL A MOCKINGBIRD* was aimed at soothing white liberals by suggesting racism was worse in the past).

²⁸⁴ Even with a film based on a novel, it makes sense to examine what choices the filmmakers make about what to include, and to inquire about why *this* particular movie is made at *this* time. See AMY LAWRENCE, *ECHO AND NARCISSUS: WOMEN'S VOICES IN CLASSICAL HOLLYWOOD CINEMA* (U. of Cal. Press 2001) (arguing that Harper Lee was deeply imaginatively bound by her lawyer father, on whom the novel is based). *SNOW FALLING ON CEDARS* is also based on a novel, which was written by David Guterson (Vintage 1995) who co-produced the film version.

²⁸⁵ Much of this is accomplished by maintaining the focus of the novel and the film on the ultimate lawyer-hero and white savior, Atticus Finch.

overarching focus on the trial as the sole indicator of, and avenue to, racial equality is key to diverting attention from law's actual role in constructing race.

I have focused in this section on so-called courtroom dramas. While, as argued above, the notion of genre can be limiting when looking at images of law in film, it's clear that Hollywood films only signal that they are "about" law when dealing with courtroom settings. Obviously then, films which do not revolve around trials also suppress the role of social and legal institutions in constructing race. A recent example of this is *Crash*,²⁸⁶ which won the best picture Oscar in 2006 and was widely hailed as a hard-hitting exposé of the persistence of American racism.²⁸⁷ Law loosely forms the core of the film as several interconnected events unfold around two central police characters, John Ryan and Tom Hansen (Matt Dillon and Ryan Phillippe), and detective Graham Waters (Don Cheadle).

Crash depicts race as a problem of personal prejudice, equally shared by individuals of all ethnicities. It focuses on racism as a moral problem rather than a structural and systemic one.²⁸⁸ Racism becomes a kind of by-product of psychological stress; we follow several Los Angeles residents who lead busy, chaotic lives and who occasionally vent by hurling racial epithets at each other. The intimate focus on individual characters defuses any structural critique of say, racial profiling, which is depicted in the film and superficially condemned.²⁸⁹ Despite the self-consciously serious surface of the film, issues of race are made to look simultaneously pervasive and extremely trivial,²⁹⁰ limited to individual behaviors rather than systemic elements of law and social order.

Crucially, the only structural critique of racism in the film is from the mouth of Anthony (Chris 'Ludacris' Bridges), a car-jacker whose control is immediately undermined as he steals the car of a white district attorney (Brendan Fraser) and his wife (Sandra Bullock), just seconds after condemning them for avoiding him on the street because they are threatened by his blackness. Thus, where legal narratives are relatively submerged, mainstream film successfully divert attention from the systemic aspects of race and its embeddedness in law by keeping the focus on the personal and psychological.

C. The Suppression or Revision of Politics and Political History

To say that Hollywood films avoid politics is not to say they are *devoid* of politics. Films model social relationships, and thus relationships of power. While films in the classic Hollywood style create the ability to avoid ideology,²⁹¹ this itself is an ideology. Many films alchemize fears and uncertainties regarding political events into more palatable,

²⁸⁶ CRASH (Yari Film Group 2005).

²⁸⁷ However, some critics accused the movie of preachiness. See e.g. A.O. Scott, *Bigotry as the Outer Side of Inner Angst*, N.Y. TIMES, May 6, 2005; see also Rotten Tomatoes, <http://www.rottentomatoes.com/m/1144992-crash/>, for representative reviews.

²⁸⁸ See Jones, *supra* note 19, at 488-89.

²⁸⁹ Policeman Ryan (Matt Dillon) stops T.V. executive Cameron Thayer (Terrence Howard) and his wife Christine Thayer (Thandie Newton) based on his race and car make. Ryan sexually molests Christine as he frisks her. I have always found the subsequent scene, in which Christine excoriates Cameron for "letting" the white policeman mistreat her, profoundly implausible. But again, rather than using the incident to reveal non-whites' shared sense of the realities of systemic racism, the film chooses to "personalize" the situation, making the wife's reaction personal (and hysterical) rather than political.

²⁹⁰ Accomplishing this contradiction is no mean feat!

²⁹¹ RAY, *supra* note 28, at 63 ("By discouraging commitment to any single set of values, this [American] mythology fostered an ideology of improvisation, individualism, and ad hoc solutions for problems depicted as crises.")

personalized narratives.²⁹² This approach is not restricted to any genre of film or any particular era. And since, as argued earlier, law is at the center of social order, almost any film can be mined for its interpretation of law's ideology.

In part keeping with Hollywood's audience-pacifying preference for personal narratives, there is an extraordinary dearth of mainstream films that tell the myriad, often "action-packed" stories of social resistance to discriminatory law. Paradoxically, despite film's preference for depicting the legal system as ultimately fair, as argued above, few films acknowledge those moments in history when the legal process has been the locus of racial justice. Even a casual survey of America's history of race relations brings to mind hundreds of compelling narratives that never make it to mainstream screens.²⁹³

Those Hollywood films that purport to be addressing resistance to racial discrimination prefer to do so in narratives of defeat rather than victory. Obvious examples of this are *Mississippi Burning*,²⁹⁴ and *Ghosts of Mississippi*. These films focus largely on the white lawyers and FBI agents who come to the aid of civil rights workers rather than the resistance of civil rights' activists themselves, again activating the lawyer-hero dynamic and maintaining the focus on white virtue.²⁹⁵ In *Mississippi Burning*, civil rights workers are depicted marching for a total of twenty seconds of screen time. The film instead displaces the conflict between law and justice onto the battle between "good ol' boy" agent Gene Hackman and "by-the-book" Northerner Willem Dafoe over investigation tactics to solve the disappearance of three civil rights workers. Predictably, Hackman's methods of violence and intimidation win the day, a further thematic displacement of the civil rights workers and their message of non-violence. Ultimately, the film focuses on white saviors who are seen as somehow *granting* non-whites some respect under law.²⁹⁶ Thus, access to and control of law remains in the hands of white legal subjects, whether implemented for discriminatory or non-discriminatory purposes.

Similarly, in *Snow Falling on Cedars*, no resistance to Japanese internment or the alien land laws is depicted. Instead, Hatsue, her family, and their neighbors silently march off to the camps. The resistance of army inductees or of people like Fred Korematsu who resisted internment is not even suggested.²⁹⁷ This lack of any narrative of strategic resistance to discriminatory law allows films to superficially manipulate the law-justice binary, obscuring the very concrete, tangible laws and legal practices that support racial discrimination.

²⁹² Under this reading, *CASABLANCA* (Warner Bros. Pictures 1942) emerges as a film which supports American involvement in World War II through empathy with reluctant hero Rick. RAY, *supra* note 28, at 57, 65-6.

²⁹³ For example, where is the full-length mainstream film regarding Japanese internment (leaving aside the unsatisfying television special *Farewell to Manzanar* (Korty Films television broadcast 1976). Films which deal with U.S. slavery (or slavery in Mexico and Central and South America) are still amazingly few, given the relative public familiarity with the topic and the undeniable dramatic potential in these events. Presumably, Hollywood will soon seek to capitalize on the growing Latino population by crafting more films which engage Latino political and legal issues, such as *BORDERTOWN* (Möbius Entertainment 2006). At present, those films are scarce. Where is the biopic of Thurgood Marshall's amazing life?

²⁹⁴ *MISSISSIPPI BURNING* (Orion Pictures Corp. 1988).

²⁹⁵ ROCCHIO, *supra* note 43, at 102-13. This positive portrayal of the FBI's involvement in the civil rights movement has been justly called to task for its complete historical inaccuracy. The FBI was notoriously hostile to the movement. *Id.*; See also VERA & GORDON, *supra* note 17, at 45.

²⁹⁶ VERA & GORDON, *supra* note 17, at 45.

²⁹⁷ See Kim, Hyung-chan, *A LEGAL HISTORY OF ASIAN AMERICANS 1790-1990* (Greenwood Press 1994); YUJI ICHIOKA, *JAPANESE IMMIGRANT RESPONSE TO THE 1920 CALIFORNIA ALIEN LAND LAW, in ASIAN AMERICANS AND THE LAW: JAPANESE IMMIGRANTS AND AMERICAN LAW* (Charles McClain ed., Garland Publ'g. Inc. 1994). See also WILLIAM MINORU HOHRI, et al., *RESISTANCE: CHALLENGING AMERICA'S WARTIME INTERNMENT OF JAPANESE-AMERICANS* (The Epistolarian 2001).

Again, this narrative allows for whites to remain the subject-center, whether in denying rights or granting them. In films where the results of the legal system are discriminatory, (e.g. *To Kill a Mockingbird*,²⁹⁸ *A Time to Kill*), justice must be obtained outside the legal system. Yet the political activism and resistance of non-whites to racially discriminatory laws, which have brought about very real changes in the legal system, go largely ignored.

When films do depict political movements, they police the line between law and politics, cautioning that to “mix” them is to risk the loss of individual freedom and violent chaos.²⁹⁹ For example, in *A Time to Kill* (a movie that crudely mirrors *To Kill a Mockingbird*) political organizations are reduced to gross caricature. The film’s portrayal of the NAACP is comparable to its portrayal of the Ku Klux Klan. When the local chapter of the NAACP discovers that Hailey is represented on a death penalty charge by Brigance, who has never even taken a criminal case, it raises a defense fund and brings in a fast-talking, big-city death penalty lawyer to take over. While this has historically been a role the NAACP has played, which contributes to fair judicial process, so that the film can underscore the focus on white lawyer-hero Brigance, the NAACP’s motivations are depicted as faintly sinister. The NAACP representative emphasizes that Hailey’s defense must be “sensitive to the needs of the movement” (a phrase which sounds oddly archaic when set in 1996). Thus, the notion of the trial being “politicized” is cast as a threat, a soulless, institutional oppression of personal freedom. In a gesture only plausible in Hollywoodland, Hailey throws off the experienced lawyer for Brigance (while managing to convert the defense fund to his own use).³⁰⁰

In its attempt to separate the political from the legal, *A Time to Kill* depicts communal political protest as at best futile, and at worst a threat to social order. The film suggests an equivalence between the Klan and the protestors who oppose the execution of black criminal defendant Carl Lee Hailey. At the rally outside the courthouse, the camera cross-cuts between both groups of roughly equal number as they collide. Each group is pictured selling its promotional t-shirt, vendors side by side: “Free Carl Lee” for the NAACP and black activists, “Fry Carl Lee” for the Klan and supporters. The camerawork and editing of these scenes creates a visual equivalence that translates into a simple “pro vs. con” opposition, rather than distinguishing between a white supremacist organization and a civil rights organization. This portrayal is undoubtedly used to create conflict and drama, but when the crowds of protestors repeatedly erupt into violence outside of the courthouse, the film suggests that political action is futile and only leads to anarchy.

This message is further underscored by the character of attorney Lucien Wilbanks (Donald Sutherland), mentor to Jake Brigance. Wilbanks was disbarred; initially the audience is lead to believe this was for drunkenness. But later in the film it is revealed that Wilbanks took part in political protests in the 1960s, as he relates to Jake on the eve of trial, thus limiting his effectiveness as a lawyer. “I belonged in the courtroom,” Wilbanks tells

²⁹⁸ With its obsessive focus on the beneficent white lawyer, *TO KILL A MOCKINGBIRD* presents a world where *noblesse oblige* is the only option, when, at the time of the book’s writing, the film’s production, and during the events set, organizations like the NAACP were advocating for the rights of non-whites.

²⁹⁹ I do not mean to suggest that law is truly outside of politics, rather that popular film participates in the narrative that they *are* separable (as do other American cultural products). See RAY, *supra* note 28.

³⁰⁰ In discussions I have had teaching this film, some viewers remark that Hailey’s actions in this scene show that he is “in control.” But again, only by the hero-worshipping logic of the film would a defendant be exercising good judgment about his case by dismissing an experienced lawyer in a death penalty case. The film constructs the illusion of Hailey’s subjectivity momentarily in order to ultimately cement Brigance as the heroic white lawyer, as well as to reinforce the “biracial buddy” formula that weaves in and out of the film.

Jake.³⁰¹ Thus, *A Time to Kill* draws a clear line between political activism and lawyering; one must do one or the other. In addition, the film valorizes lawyering above politics. Wilbanks is depicted as an alcoholic failure in the film, a vaguely tragic figure due to his abandonment of the profession for politics. His cautionary tale to young Jake is to stay out of the streets, advice that is reinforced by the film's depiction of the anarchy attendant to political protest.

The suppression of political responses to racial injustice made by those who suffer under such oppression is part of the overall suppression of non-white subjectivity. When race is politicized in film, white actors remain in charge of acquitting civil rights or procedural fairness (e.g., *Snow Falling on Cedars*; *A Time to Kill*; *To Kill a Mockingbird*; *Mississippi Burning*). Thus, non-white characters remain marginal figures, objectified by white characters who act as their saviors. Political solutions and organizations are either absent, corrupt, or ultimately socially-destructive.

D. Conclusion: The Interrelation between Representational Strategies

As we have seen, the cinematic lawyer-hero model is not simply a model of objective legal mastery, but rather an active construction of the mastery of the Dominant as inextricably linked with whiteness. While the cinematic white lawyer may work for justice on behalf of socially-marginalized clients, his doing so becomes a method for keeping authority and power (as well as audience attention) centralized in the white subject. In addition, mainstream film's obsession with heroic figures deflects attention from larger social forces and institutions that shape laws which both define race and discriminate. And even in narratives that revolve around the acquittal of rights of non-whites (e.g., *A Time to Kill*; *To Kill a Mockingbird*; *Snow Falling on Cedars*), the actual role of law in constructing race and racism is obscured, leaving the overall legal system unchallenged.³⁰² These hero-centered narratives usually depict political movements or solutions as either non-existent (*Snow Falling on Cedars*; *To Kill a Mockingbird*; *Crash*), hopelessly anarchic (*A Time to Kill*), or ultimately dependent on white savior figures (*A Time to Kill*; *Mississippi Burning*; *Ghosts of Mississippi*).

VI. MOVIES THAT RECAST THE MOLD: POSSIBILITIES FOR MAINSTREAM FILM

Some scholars have chosen to focus on art and independent films' racial signification, in a sense giving up on the possibilities of mainstream cinema.³⁰³ Certainly one cannot compare art house, truly independent films with mainstream films in terms of the possibilities they present for constructions of race.

However, while the means of production of art films may allow more freedom for directors and producers both formally and narratively, even films which "look" mainstream

³⁰¹ That this is a message directed at the audience is underscored by the fact that Brigrance is depicted as politically conservative, in favor of the death penalty, and is only with the civil rights protestors so that he may act as savior once the bullets fly.

³⁰² As Jessica Silbey argues, whatever flaws in the system a mainstream law film may propose, by its end the audience is led to believe they have been fully resolved. See Silbey, *supra* note 157, at 112, 115.

³⁰³ See generally, e.g., GLADSTONE L. YEARWOOD, *BLACK FILM AS A SIGNIFYING PRACTICE* (Africa World Press 2000); MARK REID, *REDEFINING BLACK FILM* (U. of Cal. Press 1993) (arguing that film criticism overemphasizes images of blackness in white produced and directed mainstream films rather than examining films where black people control film production).

and follow the classic Hollywood style can de-center whiteness or complicate ideas of race. Accordingly, the manipulation of audience identification³⁰⁴ so essential to mainstream Hollywood cinema is not an inevitable obstacle to progressive or transformative cinema. Rather, as Vera and Gordon argue, “[f]ilms are powerful weapons to maintain white privilege, and thus could serve equally well to produce new object relations to eliminate it.”³⁰⁵ Thus, to reprise the argument from earlier in this article, it is not the case that mainstream films simply are “naturally” or “inevitably” white-centered. There are other options even within the context of classic Hollywood form.

What follows briefly are some examples of films which, while revising genre conventions somewhat, make no radical departures in film narrative form. Yet these films manage to reveal the raced nature of traditional film depictions of law, while simultaneously suggesting different ways of figuring race.³⁰⁶ Not all of the films I discuss here are as formally successful or as seamless as standard Hollywood fare. My choices here are not meant to be read as endorsements of every aspect of the films I survey. In addition, law and lawfulness play a central role in the plot and world of all of these films, even though two of the films do not focus on law explicitly. But all of these films reveal the nexus between notions of race and law with some critical complexity.

A. Murder on the Border³⁰⁷: *The Non-White Lawyer as Hero*

Murder on the Border is a novice, low-budget film, the production values of which may frustrate viewers who are more used to seamless Hollywood product. It is also important to note that this film signals early on that it is not directed solely at a white audience by its frequent use of Spanish dialogue without subtitles. However, *Murder on the Border* follows the standard narrative and formal systems found in classic Hollywood films. The plot centers on Arizona-based, Mexican-American attorney Eduardo Martinez (Gabriel Traversari) who is assigned to defend border patrol officer Scalo (North Roberts)³⁰⁸ who mistakenly shot a Mexican boy playing along the U.S.-Mexican border. Crucially, a

³⁰⁴ See *supra* Part IV; see also YEARWOOD, *supra* note 190. The narrative of the hero as it currently stands is problematic in its reinforcement of individual narcissism and an essentially anti-social outlook. However, that narrative can be positioned critically. See e.g. THE SWEET HEREAFTER (Alliance Communication Corp. 1997) the Canadian film which follows the classic lawyer-hero mode in presenting a central white lawyer protagonist ostensibly fighting for justice for parents who lost their children in a bus crash. However, the film reveals the lawyer as deeply personally flawed in a way which causes viewers to question his professional motivations and thus his mastery.

³⁰⁵ VERA & GORDON, *supra* note 17, at 191. While I take issue with the authors' suggestion here that film alone can remake racial representation, I see no reason film cannot aid in remaking the narrative of race it has participated in constructing.

³⁰⁶ While arguably there may be progress in film's representations of race and law over time, as the opening of this article suggests, that progress is neither linear nor predictable. Vera & Gordon argue that while images of non-whites in film have changed, images of “whites have not, and thus overall race relations remain the same.” VERA & GORDON, *supra* note 17, at 186, 191. See also Gene Seymour, *Black Directors Look Beyond Their Niche*, N.Y. TIMES, Jan. 11, 2009 at A11 (tracing the diminution and increased restriction in access for black directors from the heyday of the mid-1990's when they enjoyed a ‘boomlet.’); Gladstone YEARWOOD, *supra* note 303. We shouldn't be surprised if more progressive films continue to appear sporadically in mainstream cinema for some time to come. Thus, while I end my examples with a very recent film, I do not mean to suggest a teleological history of film.

³⁰⁷ MURDER ON THE BORDER (also known as LA MIGRA) (Breakaway Films 2005).

³⁰⁸ Another limitation of the film is its rather over-the-top performances of white evil. The one-dimensional white characters here are somewhat reminiscent of white characters in the so-called blaxploitation films of the 1970's.

reluctant Martinez is told by his African-American boss that he is being put on the case due to his ethnicity (“You know how the game is played” the partner chides Martinez).

Martinez’s relationship with his client is adversarial and he openly displays his distaste for his client’s overt racism. During the course of his representation, Martinez learns that his own family is planning to enter the United States illegally after months of failed visa applications. When Scalo offers to help Martinez’s family cross the border using his corrupt connections in exchange for a guaranteed acquittal, Martinez is conflicted. The film avoids portraying Martinez as purely opportunistic by suggesting that his family may be harmed if he does *not* accept Scalo’s help. But significantly, Martinez is shown as supporting his family’s illegal immigration.³⁰⁹ Ultimately, Martinez does his job as a lawyer, but also takes advantage of his position as the Dominant to protect his family as they immigrate to the United States.

Like the classic lawyer-hero movies discussed above, *Murder on the Border* keeps the attorney as the central character. And like those movies, attorney Martinez is depicted as highly competent at his craft; he wins a dismissal for the client he so despises, suppressing hearsay evidence of Scalo’s confession along the way. In addition, Martinez is confronted with the “law vs. justice” binary popular in these films.³¹⁰ Ultimately, he goes outside the law to acquit what the film constructs as justice—helping his beleaguered family come to the U.S.—while simultaneously zealously representing an avowedly racist client. Additionally, at the end of the film, when he expresses regret about representing “the enemy” to his reporter confidant (Siboney Lo), she assuages his doubt, insisting that Scalo would have simply found another lawyer to do the same thing. The film ultimately emphasizes the value of winning outside of the system, as do many classic law films. However, in this case, the victory is both personal and political: getting Martinez’s family to the U.S.

Within this standard law film paradigm, *Murder on the Border* reveals the raced nature of law and re-situates the attorney-hero’s neutral legal mastery³¹¹ within a political context. First, rather than simply being the “hired gun” or the lawyer representing a poor victim who serves to burnish the white cinematic lawyer’s reputation as a savior, Martinez’s relationship with his client is mediated by his politics and his sense of his identity as a Mexican-American immigrant. His position is in opposition to Jason, the white attorney in his firm who traffics in racial stereotypes and views Scalo as simply another paying client. Second, the “law vs. justice” binary Martinez faces is situated within his personal life and the politics of the debate over illegal immigration. Crucially, the film makes clear the conflation of nation and race in the U.S. vis-à-vis Mexican immigration.³¹²

³⁰⁹ Martinez’s family situation is portrayed very sympathetically. His father is ill and we are told the only reason he has not been allowed to immigrate is because he served time in jail for stealing food for his family. In addition, Martinez’s young sister is depicted as vulnerable to assault in the poor Mexican neighborhood in which she lives.

³¹⁰ Tushnet, *supra* note 183.

³¹¹ See *supra* Part V.A. (discussing the lawyer-hero figure).

³¹² See *supra* note 10. For a sophisticated cinematic take on the relationship between race and nation, see *FROZEN RIVER* (Cohen Media Group 2008), which tells the story of a poor white woman, Ray Eddy (Melissa Leo), who lives on the edge of an Indian reservation on the New York-Canada border. In collaboration with her Native American neighbor, Lila Littlewolf (Misty Upham), Ray moves across the boundaries of race and nation as she crosses the reservation from New York to Canada to assist the entry of undocumented immigrants. While the film arguably follows the familiar formula of centering more on its white protagonist than on its non-white protagonist, it also reveals, through Ray’s rising self-awareness, the often transparent nature of the power of whiteness and U.S. citizenship.

Rather than going outside the boundaries of law³¹³ simply as an expression of dominance, Martinez does so in part as an act of resistance against what are portrayed as unjust immigration laws. While the white cinematic lawyer acts out of dominance without acknowledging its raced nature, here the lawyer character is positioned within a world where the raced nature of law is not only relevant but a motivating factor.³¹⁴ Ultimately, Martinez performs his role as a lawyer with high competence but without sacrificing his politics: he is not depicted as *either* political *or* a lawyer but as both. Additionally, he receives the positive focus and anointing as hero common to the white cinematic lawyer figure discussed above.³¹⁵

B. Devil in a Blue Dress: Recognizing Law's Role in Racial Discrimination

*Devil in a Blue Dress*³¹⁶ is based on the novel of the same name, from a series written by Walter Mosley about African-American detective Easy Rawlins. The movie's plot follows Rawlins (Denzel Washington), a World War II veteran in Los Angeles. Rawlins is unable to find work due to racial discrimination, and in an effort to keep up the mortgage payments on his house, he picks up his first detective job from a thuggish white man, DeWitt Albright (Tom Sizemore). Significantly, Rawlins' assignment is explicitly framed in terms of race: Albright tells Easy to find Daphne Monet (Jennifer Beals), a white woman who frequents black clubs. What subsequently unfolds through the twists and turns of the neo-film noir is that Monet is in fact biracial, but has been passing for white. This causes problems for her wealthy white boyfriend, Todd Carter (Terry Kinney) who is being blackmailed with the information by his rival in the LA mayoral race, Matthew Terrell (Maury Chakin).

Devil in a Blue Dress takes on the form and tone of a detective film noir (though it is in color), with the voiceover of a hard-boiled Rawlins leading the audience through the unexpected plot twists. Ultimately, the mystery is solved, but in this neo-noir there is an emptiness to the resolution of the case, as it represents the triumph of race discrimination: Daphne is ultimately rejected by her white lover due to her race.

The narratives of race and law in *Devil in a Blue Dress* are especially significant in the context of the tropes of film noir, which it implicitly critiques. Some critics have seen the overall tension, explosive violence, and pervasive anxiety common to the classic film noir as symptoms of the destabilization of traditional race and gender definitions and roles after World War II.³¹⁷ In addition, the visual style of film noir with its sharp contrasts between dark and light evokes narratives of race.³¹⁸ “[F]ilm noir is always and everywhere about race.”³¹⁹ Oliver & Trigo argue that, rather than connecting darkness to evil and thus

³¹³ See Greenfield, *supra* note 199.

³¹⁴ This is not to suggest that lawyers should be motivated by race. Nor do I mean to support the proposition that lawyer's should cut private side deals with their clients. Rather, I am talking about the narrative in the context of the world the film participates in, not the world of legal ethics.

³¹⁵ See *supra* Part V.A.

³¹⁶ DEVIL IN A BLUE DRESS (Clinica Estetico 1995). Note that this film was produced by a company which was, at the time, co-owned by Jonathan Demme, director of PHILADELPHIA.

³¹⁷ KELLY OLIVER & BENIGNO TRIGO, NOIR ANXIETY xiii (U. of Minn. Press 2003).

³¹⁸ *Id.* at 4.

³¹⁹ *Id.* at 4.

implicitly marking blackness as evil,³²⁰ film noir instead lends “blackness” to white characters in a way that problematizes clear racial boundaries.³²¹ Thus, at the core of the film noir’s racial anxiety is the fear of racial indeterminacy, not simply a fear of blackness.³²² Oliver & Trigo argue that this anxiety—often overlooked by scholars in favor of an analysis of noir as embodying existential anxiety—is a key aspect of film noir’s problematic of subjectivity.³²³

As Oliver & Trigo point out, *Devil in a Blue Dress* brings out the *noir* in film noir.³²⁴ Race is marked in Rawlins’ experience of discrimination, and is not simply important to Rawlins’ detective work, but is in fact the core of his assignment. Significantly, Rawlins’ work literally constructs race: he is asked to investigate the racial affinities of Monet, which ultimately leads to a realization of her racial indeterminacy. The “racial instability” of Daphne Monet is the central mystery of the plot, thus foregrounding the constitutive anxiety at the heart of film noir. In the tradition of the classic detective genre, Rawlins initially believes he is on the trail of objectively knowable facts. His discovery of Daphne’s secret not only throws a wrench into Rawlins’ assignment, but also destabilizes the very notion of race as an objective fact, revealing its fluidity as a concept.³²⁵

Film noir is rich territory for analysis of the interrelationship between narratives of race and law. While literal courtroom scenes and lawyer characters are rare in classic noir films, themes of law and criminality are central. As John Denvir argues, film noir “. . . subverts the ‘rule of law’ assumption [in American society], forcing us to reexamine myths about law and America . . .”³²⁶ And just as Oliver & Trigo argue that noir films are about issues of racial identity and subjectivity, so too are they about *legal* identity, most commonly revealed in the characters’ relationship to the larger social order. Thus, noir films exhibit overdetermined narratives of law and race.

Two interrelated tropes present in some noir detective films are reworked in *Devil in a Blue Dress*, revealing the raced nature of law and representation. First, the law may be represented as an obstacle to the detective’s work.³²⁷ However, the detective may also occasionally be depicted as a “semi-official adjunct” of the legal system, working alongside the police (if not entirely amicably so).³²⁸

In *Devil in a Blue Dress*, the law is both a motivating factor for Easy’s work (and the mayoral candidate who hires him), and an obstacle, in that it restricts him through racial discrimination. Thus, the estrangement of the detective from the legal order is not depicted as chiefly an existential or moral state, but rather is grounded in the marginalized status of the non-white detective. And unlike Phillip Marlowe, Easy cannot act as “semi-official adjunct” to the police due to his race. Instead, Easy is repeatedly trailed, harassed, and beaten by white cops who are racially profiling him; the subplot of intermittent

³²⁰ Here, Oliver & Trigo analyze Eric Lott’s well-known argument from *The Whiteness of Film Noir*, 9 AM. LITERARY HIST. 542 (1997). (arguing that film noir displaces evil and wrongdoing onto narratives and stylistic depictions of “darkness” that deflect ultimate moral responsibility from its predominantly white characters).

³²¹ OLIVER & TRIGO, *supra* note 317, at 4-5.

³²² *Id.*

³²³ *Id.* at xiv.

³²⁴ *Id.* at 166.

³²⁵ The fluidity of racial designation is further reinforced by the casting of Jennifer Beals as Daphne Monet, an actress who has perhaps “passed” as white in prior films, but who is in fact biracial.

³²⁶ John Denvir, *Law, Lawyers, Film & Television*, 24 LEG. STUD. FORUM 279, 281 (2000).

³²⁷ Rosenberg, *supra* note 65, at 1459.

³²⁸ *Id.* Rosenberg uses *THE BIG SLEEP* (Warner Bros. Pictures 1945) as an example.

collaboration and competition with the police common in detective narratives cannot be played out.³²⁹

Thus, Easy's race functions both on the narrative level of the film as a source of conflict with the law, and on the formal level of the film as a barrier to the acting out of certain detective film genre conventions concerning the law. The connection between race and law is announced from the film's very beginning, as Easy narrates being pushed into employment on the margins of legality due to pre-Civil Rights Act job discrimination. The film ends with another direct statement of the interrelationship of race and law: Easy reads the newspaper on his front porch, its headline proclaiming racially discriminatory redlining in mortgage lending. Thus, *Devil in a Blue Dress* converts the film noir detective narrative into a self-conscious narrative of race and law.

C. *Be Kind Rewind*³³⁰: Rewinding the Origin of Filmmaking

Be Kind Rewind is both a love letter to the history of cinema and a re-visioning of its rules of racial representation. Because *Be Kind Rewind* explicitly takes film as its subject, it is in a particularly resonant position to critique Hollywood tropes and techniques of representation. Ultimately, it re-imagines film production as deeply collaborative, multi-ethnic, and communal.

Be Kind Rewind tells the story of two interracial friends, Mike (Mos Def) and Jerry (Jack Black), who live in economically-challenged Passaic, New Jersey. Mike works in a decaying video store owned by Elroy Fletcher (Danny Glover). Jerry is a hapless eccentric who lives in a trailer by a power generating station. When he accidentally becomes magnetized and erases all the videotapes in the store, Mike must somehow keep the business going while Fletcher is out of town.

The two friends hit upon the idea of recreating popular films such as *Ghostbusters*, *The Lion King*, *Rush Hour*, and *Robocop* by themselves with an old video camera, ad hoc props and hometown locations (a process they call "Swedeing")³³¹. Improbably, their amateurishly brief, lo-tech videos become a runaway hit and customers line up around the block demanding the new videos as fast as Mike and Jerry can make them.

As news of the "Sweded" films spreads, a group of lawyers show up, accuse Mike and Jerry of copyright violations, and destroy the entire stock of videos they have made. Fletcher returns to find his inventory in ruins. He pitches to the city conversion of the shop into a Blockbuster-type DVD rental outfit, but is told the property is to be torn down to make way for condominiums.

Mike and Jerry decide to make one more film, an original film this time, a biography of Fats Waller who, Fletcher had earlier in the film confided, was born in Passaic. When pressed, Fletcher admits the Waller origin story is false, but he teams up with Mike and Jerry to make the film. Faithful store customer and long-time friend of Fletcher, Mrs. Falewicz (Mia Farrow), encourages the project despite the factual indiscrepancies: "Our

³²⁹ This depiction resonates with D. Marvin Jones' notion of black men as archetypal "anticitizens" explicitly foregrounding the link between race and law. Jones, *supra* note 19, at 493. The concept of "anticitizen" is particularly resonant in the film noir context with its stark visual juxtapositions of black and white.

³³⁰ BE KIND REWIND (New Line Cinema 2008).

³³¹ For yet another metatextual aspect of BE KIND REWIND, see Michel Gondry's "Sweded" version of Fine Line Cinema's trailer for the film, http://www.dailymotion.com/video/x49x9v_michel-gondry-swedes-his-own-be-kin_shortfilms.

past belongs to us. We can change it if we want,” she exhorts to her neighbors. Indeed, the entire town —white citizens, black citizens, Latino citizens, etc.—pitch in to help tell the story of Fats Waller, playing extras, building sets, and helping with production.

Be Kind Rewind ends with a screening of the Fats documentary-cum-biopic, shot in Fletcher’s shop, with the bulldozers waiting just outside to tear the building down. The store is packed with viewers, and the film ends with a long shot of the townspeople gathered into an audience outside Fletcher’s shop, transfixed by the film of their own making.

By ending with the Fats Waller film (which exhibits some formal aspects of pre-classic Hollywood cinema style), *Be Kind Rewind* effectively “rewinds” the history of American film to its origins.³³² In rewinding this history, Gondry allows for the imagining of an inclusive origin for American film, both in content and means of production. Crucially, the film is presented as the *community’s* story, not the *African-American* community’s story. For example, the Fats Waller film acts as a “remaking” of the origin of American film sound in *The Jazz Singer*³³³ with its demeaning use of black face, supplanting that image with the image of Mos Def as Fats Waller.³³⁴ In addition, the film-within-a-film effects a kind of erasure of the first full length American feature, *The Birth of a Nation*,³³⁵ both in its subject matter and its use of a thoroughly racially diverse cast. The Waller film acts as an alchemical transfiguration of the “biracial buddy movies” like *Rush Hour* that Mike and Jerry earlier in the film “Swede” for store patrons, displacing the simplistic, dualistic representations of race that film genre constructs.

Significantly, the Fats film is made as a response to the law, represented by the film studios’ lawyers. The production of the Fats film is a collective, communal response to privatized ownership of stories and entertainment. It is a response that unifies the heretofore passive consumers of Mike and Jerry’s videos into an active, diverse community of filmmakers. The film’s DIY aesthetic empowers both the townspeople audience it depicts and the actual film audience of *Be Kind Rewind* to believe that they can participate in recasting film’s representational terms. Thus, the prohibition of law ultimately generates a creative reaction, one which rejects Hollywood’s narratives in favor of community-generated, local narratives. This new approach simultaneously embraces ethnic and racial diversity while recasting the representational terms of race itself.

VII. CONCLUSION

Importing theoretical approaches from other disciplines, I have tried to show that narratives of race in popular law-themed films go far beyond negative portrayals and stereotypes, but rather construct *subjectivity itself* as raced. The image of law in film is key to this raced subjectivity. Mainstream film’s obsessive focus on constructing and maintaining white superiority dovetails with narratives of legal mastery in the form of the lawyer-hero character. In addition, films displace law’s role in constructing race onto personal narratives of courtroom triumphs, thus suppressing the image of law as systemically and structurally racist, and, as suppressing narratives of political resistance.

³³² BE KIND REWIND also begins with the Waller movie, further reinforcing the feeling that it operates as a kind of representational “rewind” of the origin of early American film.

³³³ THE JAZZ SINGER (Warner Bros. Pictures 1927).

³³⁴ This subtext is reinforced by the repeated refusal to allow Jerrys to don blackface and play Fats in the movie, culminating in an off-screen lecture on blackface that Fletcher delivers to Jerry.

³³⁵ THE BIRTH OF A NATION (D. W. Griffith Corp. 1915).

Finally, I have offered case studies of formally-mainstream films that suggest other options for racial representation, proving that Hollywood's current practice is neither unavoidable or inevitable.

