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CIVIL TRIALS: A FILM ILLUSION?

Taunya Lovell Banks*

INTRODUCTION

The right to trial in civil cases is enshrined in the U.S. Constitution¹ and most state constitutions.² The lack of a provision for civil jury trials in the original draft of the Constitution “almost derailed the entire project.”³ According to the French social scientist Alexis de Tocqueville, the American jury system is so deeply engrained in American culture “that it turns up in and structures even the sheerest forms of play.”⁴ De Tocqueville’s observation, made in the early nineteenth century, is still true today. Most people, laypersons and legal professionals alike, consider trials an essential component of American democracy. In fact, “the adversarial structure is one of the most salient cultural features of the American legal system. The adversarial jury trial is so fundamental to the American imaginary that it has become a ‘ghost matrix’ that structures our everyday approach to social and cultural life.”⁵ Thus, real-life courtroom trials continue to be “crucial ritualistic drama[s] reinforcing the legalism of the

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1. U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

2. “The rights to trial by jury in civil . . . cases in state constitutions are not an exact mirror image of the corresponding rights in . . . [the] Seventh Amendment[] of the United States Constitution.” Randy J. Holland, *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*, 38 VAL. U. L. REV. 373, 373 (2004) (footnotes omitted). The Seventh Amendment guarantee to a jury trial in civil cases has not been made applicable to the states. See Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 160, 172–75 (2012) (citing *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916)).

3. Dmitry Bam, *Restoring the Civil Jury in a World Without Trials*, 94 NEB. L. REV. 862, 897 (2016).

4. Carol J. Clover, “*God Bless Juries!*,” in REFIGURING AMERICAN FILM GENRES: HISTORY AND THEORY 255, 256 (Nick Browne ed., 1998).

5. Kristen Fuhs, *The Legal Trial and/in Documentary Film*, 28 CULTURAL STUD. 781, 790 (2014) (citing Carol Clover, *Law and the Order of Popular Culture*, in LAW IN THE DOMAINS OF CULTURE 97, 102 (Austin Sarat & Thomas R. Kearns eds., 2000)).

dominant [American] ideology.”⁶ But real-life civil trials are disappearing from the American legal landscape.

In 2012, federal appellate Judge Jennifer Walker Elrod bemoaned the decline of jury trials.⁷ Stressing the importance of trials, she wrote:

Great trials have been an essential part of the American fabric, from the movies that inspired us to become advocates for those less fortunate, like Atticus Finch in *To Kill a Mockingbird*, to the movies that have made us laugh, like *My Cousin Vinny*, or the true-life events that captivate a nation, like *Inherit the Wind*. Not only do we lose this part of our culture, but we may no longer have the great closing arguments of real-life trials.⁸

What seems noteworthy is that although Judge Elrod discusses the decline of both civil and criminal jury trials, she only refers to great *criminal* trial films. Perhaps her comments merely reflect the fact that today, civil jury trial films are as rare as real-life civil trials. But her linking the decline of real-life civil jury trials to great film criminal trials is worth considering because it suggests that trials, whether criminal or civil, share important components that lie at the heart of American democracy. Like de Tocqueville almost two centuries ago, Judge Elrod’s comments suggest that, in her mind, the civil jury trial is an important institution that is reflected in American popular culture.

The term “popular culture” usually refers to “culture based on the tastes of ordinary people rather than an educated elite.”⁹ In her comments, Judge Elrod is referring to American popular *legal* culture, a society’s “attitudes, meanings, values, and opinions” about the law¹⁰ or “everything people know or think that they know about the law, lawyers, and the legal system.”¹¹ Films, like books designed for consumption by the general public, are cultural documents that embody a society’s attitudes about, and views of, the law and the jury system.¹² Although some scholars argue that

6. David Ray Papke, *How Does the Law Look in the Movies?*, 27 LEGAL STUD. F. 439, 446 (2003). Papke asserts that most other countries “do not employ a courtroom trial convention as frequently as the American popular culture industry.” *Id.* at 447. Professor Jessica Silbey writes that “the trial is a ritualistic aspect of the law that is often overlooked . . . but that is crucial to the law’s binding of its practice with its ideals in culture.” Jessica Silbey, *Patterns of Courtroom Justice*, 28 J.L. & SOC’Y 97, 97 (2001).

7. Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH. L. REV. 303, 319–20 (2012) (arguing that costs and alternative dispute resolution forums contribute significantly to the decline of civil trials).

8. *Id.* at 331.

9. Ronald M. Sandgrund, *Does Popular Culture Influence Lawyers, Judges, and Juries?* (pt. 3), COLO. LAW., Mar. 2015, at 51, 53 (quoting *Popular Culture*, OXFORD ENGLISH DICTIONARY ONLINE (2015), https://en.oxforddictionaries.com/definition/popular_culture [<https://perma.cc/7EXG-BLGS>]). Another scholar writes that popular culture is reflected in the “‘norms and values’ held by ordinary people at a particular point and time in the society’s history.” Katherine Lee Klapsa, *Lawyers Bring Big Screen Drama to the Courtroom: How Popular Culture’s Influence on the Law Has Created the Need for “Professional Witnesses,”* 18 BARRY L. REV. 355, 358 (2013).

10. Klapsa, *supra* note 9, at 358.

11. *Id.*

12. Papke, *supra* note 6, at 446.

almost any commercial fiction film involves the law,¹³ law films are a particular film genre. Within this genre are courtroom films, the most easily recognizable subset of films about law.

Courtroom films are popular and memorable because they have the “potential to engage viewers.”¹⁴ Although the films in this subgenre vary in content, they usually involve or lead to a trial.¹⁵ The courtroom and trial in these films provide the stage for an examination of some aspect of a trial—juries, lawyers, litigants, laws, or the legal process itself. Except in films like *12 Angry Men* or *The Runaway Jury*, juries are seldom the focus of criminal or civil courtroom films. Juries, when present in films, are usually secondary “characters” appearing at the selection process or when announcing the verdict—a climax because it signals, in most films, that justice has prevailed. More specifically, in civil law films, the jury’s determination of damages is often the climax.¹⁶ The jury’s role in assigning damages is present in films like *Philadelphia*, *Runaway Jury*, and *The Verdict*.¹⁷ More importantly, some commentators suggest that juries seldom appear in courtroom films because the validity and place of the jury in the American legal system is uncontested by the American public.¹⁸ Thus, from a filmmaker’s perspective, most directors treat the viewing audience as the jury; and the film’s narrative calls on the audience to perform the judging function.

Judge Elrod makes two claims about the importance of jury trial films to American popular culture. First, she suggests that some great trials become the basis for films that not only entertain viewers but also have the potential to inspire some viewers to become lawyers.¹⁹ Second, she claims that courtroom films about important real-life trials have the capacity to educate the public about the law and the American legal system.²⁰ Law and film scholar Anthony Chase adds that legal films generally “draw[] into question the legitimacy and fairness of [the] system.”²¹ Thus, these commentators contend that legal films have the capacity to teach and encourage film audiences to think more critically about the legal system.

As Judge Elrod’s comments suggest, the most well-known courtroom film classics, like *12 Angry Men*, *Anatomy of a Murder*, or *Witness for the*

13. DAVID A. BLACK, *LAW IN FILM: RESONANCE AND REPRESENTATION* 3 (1999).

14. Papke, *supra* note 6, at 446.

15. STEVE GREENFIELD ET AL., *FILM AND THE LAW: THE CINEMA OF JUSTICE* 45 (2010).

16. *Id.* at 144.

17. *See* PHILADELPHIA (Clinica Estetica 1993); RUNAWAY JURY (Regency 2003); THE VERDICT (Twentieth Century Fox 1982).

18. *See* Fergal Davis, *The Jury as a Political Institution in an Age of Counterterrorism*, 33 *POLITICS* 5, 11 (2013); David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 *MARQ. L. REV.* 471, 481 (1999).

19. *See* Elrod, *supra* note 7, at 331.

20. *See id.* at 330.

21. ANTHONY CHASE, *MOVIES ON TRIAL: THE LEGAL SYSTEM ON THE SILVER SCREEN* 164 (2002).

Prosecution are about criminal trials.²² This fact may be unimportant because the distinction between criminal and civil trial films often is lost on the general public. Unanswered is whether the distinction between criminal and civil trials is important when determining the *impact* of the decline in real-life civil trials on American popular culture and courtroom films in particular. This question is the focus of this Article.

Law Professor James Elkins asks scholars to look at how popular culture impacts the legal system.²³ The impact of popular culture on the legal system is a relevant inquiry because if one cannot answer this question, one cannot answer the related question of whether real-life changes in the legal system impact popular culture. Because scholars do not know much about the effects of popular culture on the law, it is fair to assume that they do not know much about the impact of the legal system on popular culture. To provide context for this discussion, Part I briefly discusses the decline in civil trials.

I. THE DECLINE OF CIVIL TRIALS: A BRIEF OVERVIEW

Although trials today are increasingly less frequent, historically the American trial was important.²⁴ Court days were community events where the rural populace came to see justice in action.²⁵ Long after the demise of court days, law schools perpetuated the centrality of the courtroom to the American justice system. Legal scholar Marc Galanter wrote in 2004 that foreign visitors to law schools in the United States

readily conclude that the trial is the central pivot of the American legal process.

Curiously the view from the law school classroom bears a resemblance to that from Mars—although the medium is appellate opinions, the message is the centrality of trial. The world of hearings, depositions, conferences, bargaining, maneuvering, and routine processing in which lawyers and judges are immersed is barely visible.²⁶

Legal education continues to perpetuate this view. Yet, a growing body of legal literature readily acknowledges that, increasingly, real-life lawyers spend little time trying civil cases.²⁷ According to the Civil Jury Project at New York University School of Law, the rate of jury resolutions in federal civil cases has dropped from 5.5 percent in 1962 to less than 1 percent since 2005.²⁸ The situation is much the same in state courts. For example, “in

22. See 12 *ANGRY MEN* (Orion-Nova Productions 1957); *ANATOMY OF A MURDER* (Carlyle Productions 1959); *WITNESS FOR THE PROSECUTION* (Edward Small Productions 1957).

23. James R. Elkins, *Popular Culture, Legal Films, and Legal Film Critics*, 40 *LOY. L.A. L. REV.* 745, 747 (2007).

24. See William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 *SUFFOLK U. L. REV.* 67, 78 (2006).

25. See, e.g., OLIVER P. CHITWOOD, *JUSTICE IN COLONIAL VIRGINIA 94–95* (1971).

26. Marc Galanter, *A World Without Trials*, 2006 *J. DISP. RESOL.* 7, 7.

27. Elrod, *supra* note 7, at 318; Young, *supra* note 24, at 73.

28. CIVIL JURY PROJECT N.Y.U., <http://civiljuryproject.law.nyu.edu/> (last visited Mar. 25, 2017) [<https://perma.cc/2LL4-BL67>].

1997, there were 3,369 civil jury trials in Texas state courts; in 2012, even as the number of lawsuits had risen substantially, there were fewer than 1,200 [civil trials]. Similar trends are evident in states across the nation.”²⁹ Today civil juries do not hear most private lawsuits.³⁰

As Professor Kent Syverud, writing twenty years ago, observed, “One of the most remarkable things about reading a jury verdict reporter today is how extreme and unusual most of the tried cases seem to anyone familiar with legal disputes. These odd cases are increasingly the only visible part of civil litigation for the public.”³¹ A vast array of civil cases involving contracts, other commercial matters, or property do not go to trial; today most civil jury trials involve tort cases—especially personal injury or accident cases.³² According to Syverud, the use of civil trials by “governments and businesses, of all sizes, when suing as plaintiffs . . . has effectively disappeared in most of the United States.”³³

Scholars disagree about the reasons for the decline in civil jury trials. One scholar speculates that civil trials are becoming less common because their defining features³⁴ are no longer necessary to the resolution of civil disputes.³⁵ Other legal scholars offer different explanations: the high cost of civil litigation,³⁶ the increased use of alternative dispute resolution (ADR) forums,³⁷ better case management by judges,³⁸ and transformations in the legal system over the last half of the twentieth century.³⁹ Still others blame changes in pretrial procedural rules like “the substitution of discovery-induced settlements and dismissals” that are more efficient because they facilitate justice at a lower cost and more quickly than a full

29. *About*, CIVIL JURY PROJECT N.Y.U., <http://civiljuryproject.law.nyu.edu/about/> (last visited Mar. 25, 2017) [<https://perma.cc/6LR6-5T25>].

30. See Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1938 (1997).

31. *Id.* at 1943.

32. *Id.* at 1938.

33. *Id.*

34. The author identified five “defining traits” of civil trials: (1) “Concentration” (trials are uninterrupted); (2) “The Pretrial/Trial Division” (pretrial procedure to narrow the scope of the trial); (3) “Bifurcation and Jury Control” (“procedural and evidentiary law to regulate the internal relationship between” the judge and the jury); (4) “Orality, Immediacy, and Public Access” (jury trials as public educational exercises); and (5) “Partisan Investigation and Presentation of Fact; Cross-Examination” (lawyer as fact gatherer). John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 529–38 (2012).

35. *Id.* at 551.

36. Galanter, *supra* note 26, at 13.

37. Elrod, *supra* note 7, at 319; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD., 459, 515 (2004). This argument is contested by some scholars who argue that ADR is a beneficiary, not the proximate cause, of the decline in civil trials. See Syverud, *supra* note 30, at 1943.

38. Young, *supra* note 24, at 81 (noting that there is a judicial preference for arbitration and a trend to “manag[e] cases toward settlement”).

39. See Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35, 39. The decline may be caused by a change in court administration, nontrial outcomes like nonfinal terminations, or settlements via arbitration or mediation.

civil trial.⁴⁰ Thus, one scholar speculates that “the main reason . . . the jury is disappearing is that litigants who are entitled to demand trial decide to settle, either because they no longer need trial [due to pretrial procedures], or because they cannot afford it” because the pretrial procedures are so expensive.⁴¹

This Article, however, does not attempt to explain the reasons for the decline in civil trials. Rather, its focus is on the possible effect this decline will have on popular culture, especially legal films. To gauge the impact on the public, it is necessary to determine public attitudes about civil trials. Unfortunately, the empirical record about public perceptions of civil trials is incomplete.

Syverud argues that the civil jury trial is defective in three ways: (1) it is extremely expensive and takes a long time to resolve; (2) liability insurance (coupled with the contingent fee system) effectively commodifies civil claims; and (3) governments and businesses almost universally elect to “opt out of fact finding by a civil jury.”⁴² A 1988 study about the experiences of small claim litigants mirrors some of these complaints, particularly the cost and time litigation takes and the perceived lack of efficiency.⁴³

The social scientists interviewed small claims court litigants “to gain some understanding of the perceptions, attitudes, and assumptions that litigants bring to the system.”⁴⁴ They found that laypersons had varied understandings of the civil justice system.⁴⁵ Survey responses reflected three themes. First, survey participants failed to understand their role and corresponding responsibility in civil litigation.⁴⁶ Many litigants expected the system to be more hands on like the criminal justice system.⁴⁷ One litigant, for example, believed that law enforcement should be responsible for serving his defendant.⁴⁸ Another “litigant seem[ed] to view the civil court as more active and inquisitorial than it is in reality and to underestimate his own role in prosecuting his case.”⁴⁹ Second, litigants also misunderstood the civil courts’ power—many thought the court would ensure they would be made whole.⁵⁰ Finally, litigants expressed an overall dissatisfaction with the legal system.⁵¹ These litigants’ disappointment and

40. Langbein, *supra* note 34, at 571. John Langbein also recognizes the “presence of institutional litigants” and increasing sophistication of attorneys who specialize in specific types of lawsuits as factors contributing to the decline of the civil trial. *Id.* The thought is that attorneys become so familiar with subject matter that they become better and better at driving cases toward settlement.

41. *Id.* at 572.

42. Syverud, *supra* note 30, at 1943.

43. See generally William M. O’Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC’Y REV. 137 (1988).

44. *Id.* at 140.

45. *Id.* at 159.

46. *Id.*

47. *Id.*

48. *Id.* at 147.

49. *Id.* at 146.

50. *Id.* at 154.

51. *Id.* at 159. For example, one party did not like that she was not guaranteed her money and another did not like the service process. *Id.* at 149, 154–55.

dissatisfaction with the civil justice system may simply be the result of their limited exposure to, and understanding of, the legal process.⁵²

II. AMERICAN COURTROOM FILMS

Most members of the public learn about the legal system from films and, increasingly, television.⁵³ Thus, this part looks at American trial films and what messages they transmit about the value of civil trials in a democracy.

A. Generally

Federal District Judge William G. Young writes that jury trials are important because “the jury achieves symbolically what cannot be achieved practically—the presence of the entire populace at every trial.”⁵⁴ He continues, “Through the jury, we place the decisions of justice where they rightly belong in a democratic society: in the hands of the governed.”⁵⁵ Scholars who favor this position argue that juries are a democratic counterbalance to a largely unelected judiciary.⁵⁶

Since most discussions about the importance of trials in popular culture revolve around criminal trials, one unanswered question is whether the stated importance of trials applies equally to civil trial films. This inquiry is hampered by the low number of civil courtroom films. A survey of top courtroom film lists finds that an overwhelming majority of these films involve criminal matters.⁵⁷ The prevalence of criminal, as opposed to civil, courtroom films stems from the real-life difference between the two. Criminal trials are fact dependent, and, according to Anthony Chase, the American public is “addict[ed] to the facts of crime.”⁵⁸ In contrast, real-life civil trials tend to be less fact dependent because most of the facts are known before trial due to pretrial discovery and conferences; thus, there are fewer opportunities for courtroom confrontations. Nevertheless, films

52. Not all survey participants misunderstood the nature of the civil trial system. One of the litigants was “a street person in fact and appearance,” but he had a “remarkably accurate” understanding of the civil system. *Id.* at 155. This participant’s knowledge might be a result of the popularity of television reality court shows like *The People’s Court*. See, e.g., Margot Slade, *The Law; ‘The People’s Court’: The Case for and Against It*, N.Y. TIMES (May 5, 1989), <http://www.nytimes.com/1989/05/05/us/the-law-the-people-s-court-the-case-for-and-against-it.html> (noting that *The People’s Court* had “vastly increased public awareness of court procedures and the law”) [<https://perma.cc/7QNQ-M9PB>].

53. See, e.g., Steven A. Kohm, *The People’s Law Versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV*, 40 LAW & SOC’Y REV. 693, 694 (2006) (“American television programming focusing on the law forms a significant part of the cultural legal landscape for many Americans.”).

54. Young, *supra* note 24, at 69 (quoting PAULA DiPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 21 (1984)).

55. *Id.* at 69–70.

56. *Id.* at 70.

57. See, e.g., Richard Brust, *The 25 Greatest Legal Movies*, A.B.A. J. (Aug. 1, 2008), http://www.abajournal.com/magazine/article/the_25_greatest_legal_movies/ (listing seven civil trial movies and seventeen criminal trial movies, as well as one set in law school) [<https://perma.cc/4JDS-7QB7>].

58. CHASE, *supra* note 21, at 104.

about social issues like sexual harassment (*North Country*),⁵⁹ employment discrimination (*Philadelphia*),⁶⁰ civil disputes about divorce (*Kramer v. Kramer*),⁶¹ child custody (*I Am Sam*),⁶² or property matters (*The Social Network*),⁶³ where there are possibilities for confrontation, have the potential to fascinate film audiences as much as criminal trial films.⁶⁴ Granted, under conventional definitions of a trial, *The Social Network* does not qualify, but, as I explain later, this film about intellectual property disputes has the adversarialness of a jury trial, albeit without a jury.⁶⁵ Based on Mark Zuckerberg's disposition, his lawyers "adjudge" him an unsympathetic defendant and advise Zuckerberg to settle the cases against him.

Another factor that contributes to filmgoers' preference for criminal law films is that the themes of civil films may be less well defined. Criminal law films involve a clear "villain," a defendant or enemy of the defendant, or an abuse of public power by an ambitious and corrupt prosecutor; and the harm of injustice extends beyond the innocent victim or defendant to society at large. In contrast, "[m]ore than three-quarters of all civil jury verdicts concern personal injury disputes,"⁶⁶ and the villain is not clearly defined.

The "villain" in civil courtroom films might be some private party like the big law firm in *Philadelphia* that fires a young associate it has just promoted upon learning that he is HIV-positive or the doctors in *The Verdict* who negligently give a pregnant woman the wrong anesthetic, leaving her permanently comatose.⁶⁷ But in popular civil courtroom films like *I Am Sam* and *Kramer v. Kramer*, where child custody is an issue, the villain is less clear. The villain may even be the law itself. Both *I Am Sam* and *Kramer v. Kramer* highlight biases in child custody proceedings: the "tender years doctrine,"⁶⁸ which gives custodial preference to the mothers of small children, in *Kramer v. Kramer*⁶⁹ and the willingness of the law to sever a close and loving relationship between a child and her biological parent with diminished mental capacity in *I Am Sam*.⁷⁰ These films reflect filmmakers' efforts to highlight family laws thought to be antiquated or unjust.

59. *NORTH COUNTRY* (Warner Bros. 2005).

60. *PHILADELPHIA*, *supra* note 17.

61. *KRAMER V. KRAMER* (Columbia 1979).

62. *I AM SAM* (The Bedford Falls Co. 2001).

63. *THE SOCIAL NETWORK* (Columbia 2010).

64. *CHASE*, *supra* note 21, at 104–05.

65. *THE SOCIAL NETWORK*, *supra* note 63.

66. Syverud, *supra* note 30, at 1938.

67. *CHASE*, *supra* note 21, at 108.

68. See Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 *LAW & SOC'Y REV.* 769, 770 (2004) (describing the doctrine as basing child custody decisions on "the notion that mothers have superior, 'natural' nurturing abilities and a biological connection to their infants").

69. *KRAMER V. KRAMER*, *supra* note 61.

70. *I AM SAM*, *supra* note 62.

B. Civil Trial Films More Closely Examined

In real life, few civil law plaintiffs sue with the idea of securing justice for the larger society. For example, when 735 California lawyers involved in civil jury trials between 1990 and 1991 were asked “why their cases went to trial, only three . . . said the case was tried because of a desire for public vindication in the litigation.”⁷¹ Two of these lawyers were from the same case.⁷² As mentioned previously, the civil trial films that resonate with the American public usually involve social issues, like environmental justice or employment discrimination, because they have the potential to impact people other than the plaintiff. If the connection between doing justice is stronger in criminal, as opposed to civil cases, then the absence or demise of civil courtroom films, should it occur, may not greatly impact public perceptions about the civil law system. Civil trial films, especially those films that do not involve larger social issues, may have little value beyond telling a good story about an individual plaintiff or group of plaintiffs. In fact, these films may contribute to negative public perceptions about the civil trial system.

A study by political scientists Michael McCann and William Haltom seems to confirm this last point.⁷³ The authors argue that the civil law films they reviewed portrayed both lawyers and the civil justice system negatively.⁷⁴ Unsurprisingly, most of the cases they discuss are tort claims, once again reflecting real life. Their conclusion about civil law films portraying dissatisfaction with the system seems consistent with the findings of the survey of small claims litigants discussed above.⁷⁵ In reaching their conclusion, the social scientists compared the 2000 film *Erin Brockovich* about a paralegal turned environmental activist with seven late twentieth-century and early twenty-first-century films with similar public interest themes—*Class Action*, *The Rainmaker*, *The Sweet Hereafter*, *A Civil Action*, *The Insider*, *North Country*, and *Runaway Jury*.⁷⁶ They conclude that civil law films tend to reflect the American public’s “ambivalen[ce] about lawyers . . . [and] civil lawsuits.”⁷⁷

McCann and Haltom classify *Erin Brockovich* as an antilawyer film.⁷⁸ It is Brockovich’s diligent research, they argue, that turns what starts out as a real estate transaction into a major class action against a large utility company whose activities polluted the area groundwater.⁷⁹ It is Brockovich, not the plaintiffs’ lawyers, who gets the plaintiffs to agree to a

71. Syverud, *supra* note 30, at 1942.

72. *Id.*

73. See generally Michael McCann & William Haltom, *Ordinary Heroes vs. Failed Lawyers—Public Interest Litigation in Erin Brockovich and Other Contemporary Films*, 33 LAW & SOC. INQUIRY 1045 (2008).

74. *Id.*

75. *Id.* at 1052.

76. *Id.* at 1052–58.

77. *Id.* at 1046.

78. See *id.* at 1047.

79. See *id.* at 1048.

just settlement with the company.⁸⁰ In the film, Brockovich repeatedly denigrates lawyers, saying things like, “Ya know why everyone thinks that all lawyers are back-stabbing, blood sucking scum bags? Cause they are!” and “All you lawyers do is complicate situations that aren’t complicated.”⁸¹ The social scientists found this antilawyer theme in the other films they compared. Specifically, McCann and Haltom argue that the films they compared portray what they call public interest lawyers “as incapable of securing any semblance of justice or satisfaction for their clients or for anyone else.”⁸² Justice in these films, according to the social scientists, occurs through the actions of “‘outside’ agents,” that is, “ordinary people who are not lawyers.”⁸³

McCann and Haltom identified four common themes in the seven films they examined: “(1) innocent victims seek corporate accountability but are stymied by (2) armies of amoral defense attorneys who best (3) an overmatched and socially maladroit plaintiffs’ attorney until (4) a lay ‘outsider’ ensures the eventual plaintiffs’ victory—dramatizes a plucky heroine’s triumph over a biased, indifferent system of civil disputing.”⁸⁴ The social scientists concede that these four motifs are not invariable.⁸⁵ It is not, for example, always the layperson or outsider who helps achieve a just result in civil law films. In the trial film *Class Action*, for example, the person who ensures victory is another lawyer, a member of the defense team who turns on her firm.⁸⁶

Philadelphia, a film not examined by McCann and Haltom, also fits some of the motifs they identified.⁸⁷ The plaintiff, Andrew Beckett, is seeking accountability from a big law firm for what he sees as his wrongful termination. His lawyer, Joe Miller, seems overmatched as he faces an army of “amoral” defense attorneys (the people who fired him because he had AIDS). Miller and his client appear alone in the courtroom facing a team of defense lawyers. Miller, a black solo practitioner, also could be seen as a legal outsider or fringe member of the legal profession. He is depicted as an ambulance chaser (a type of lawyer frowned upon by the legal profession), but he secures a victory for his client and thus a just result.

According to the social scientists, film audiences may not expect justice to be served in the typical civil law film because, in the civil law films they examined, filmmakers tend to use stereotypes “to ridicule ‘civil justice’ as an oxymoron.”⁸⁸ It also is noteworthy that, as Judge Elrod suggested, five of the eight films discussed by McCann and Haltom—*Erin Brockovich*, *A Class Action*, *The Sweet Hereafter*, *The Insider*, and *North Country*—are

80. *See id.*

81. *Id.* at 1045, 1050 (quoting ERIN BROCKOVICH (Universal Pictures 2000)).

82. *Id.* at 1047.

83. *Id.*

84. *Id.* at 1052.

85. *Id.* at 1058.

86. CLASS ACTION (Twentieth Century Fox 1991).

87. PHILADELPHIA, *supra* note 17.

88. McCann & Haltom, *supra* note 73, at 1052.

drawn from real-life cases.⁸⁹ Of course, the filmmakers took dramatic license in omitting or adding elements to tell a more engaging story, but any positive outcomes in these cases was achieved despite the formal legal system. As McCann and Haltom conclude, these films portray a flawed civil justice system, a conclusion with which some real-life litigants might agree.⁹⁰

The social scientists, however, do not squarely address whether the portrayal of the civil justice system in these films is an accurate reflection of prevailing public attitudes, and, if not, whether these films distort public notions about the civil justice system. Instead, they write:

We cannot say with any confidence how these cinematic images and narratives are interpreted by most people in society. . . . If these films undermine faith in lawyers as unqualified moral heroes and nurture faith that ordinary people can struggle successfully for social justice, that is probably a good thing. If they nurture a more complex insight that lawyers and the legal system generally are most effective when they learn to understand and respond to the different worlds of meaning that their disadvantaged clients inhabit, we sing “Amen.”⁹¹

Chase, in his book *Movies on Trial*, discusses three of the films analyzed by McCann and Haltom—*Class Action*, *A Civil Action*, and *The Rainmaker*—and adds *Philadelphia* to his list of courtroom tort films released between 1982 and 1997.⁹² His take is slightly different and more positive than that of McCann and Haltom. Chase argues that these tort films “express[ed] a single story or narrative [T]he villain in tort cinema is private, not public, power.”⁹³ The civil lawyers in these films, like their criminal counterparts, are depicted as either heroic young lawyers, like Joe Miller in *Philadelphia* or Rudy Baylor in *The Rainmaker*, or “old warriors” seeking redemption, like Jed Ward in *Class Action* or Frank Galvin in *The Verdict*.⁹⁴

More often than not, civil film lawyers, like their criminal film counterparts, secure or facilitate justice for their clients. Granted, sometimes the victory is illusory. Rudy Baylor, the young lawyer in *The*

89. *Erin Brockovich* is a dramatization of the named character’s efforts to highlight the litigation against Pacific Gas and Electric. *A Civil Action* is based on *Anderson v. Cryovac, Inc.*, 862 F.2d 910 (1st Cir. 1988), which formed the basis of Jonathan Harr’s 1995 book by the same name. JONATHAN HARR, *A CIVIL ACTION* (1995). *The Sweet Hereafter* is based on an actual 1989 bus crash in Alton, Texas. Author Russell Banks changed the location to Canada in his 1991 novel by the same name. RUSSELL BANKS, *THE SWEET HEREAFTER* (1991). *The Insider* is a fictionalized account of the struggle of tobacco industry whistleblower Jeffrey Wigand and CBS producer Lowell Bergman to combat the industry’s efforts to discredit a segment on *60 Minutes* about Wigand. *North Country* is based on *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997), chronicled in the book CLARA BINGHAM & LAURA LEEDY GANSLER, *CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW* (2002).

90. McCann & Haltom, *supra* note 73, at 1062.

91. *Id.* at 1067–68.

92. See generally CHASE, *supra* note 21.

93. *Id.* at 105, 108.

94. *Id.* at 106–07.

Rainmaker, wins an insurance bad faith case for his clients only to have the defendant insurance company declare bankruptcy, wiping out the substantial punitive damage award.⁹⁵ At the end of the film, Baylor is so disgusted with the outcome of his case that he abandons the practice of law altogether to teach legal ethics!

In *A Civil Action*, the plaintiffs lose their case to the corporations who are polluting their community and the plaintiffs' lawyer ends up in bankruptcy court after losing his family and home.⁹⁶ The film's ending, especially the negative consequences faced by the plaintiffs' lawyer, may be unsettling to some viewers, reinforcing the public's rather pessimistic view of the civil law system. Audiences learn in an epigraph that the Environmental Protection Agency comes to the aid of the plaintiffs. But in the end, the first three motifs identified by McCann and Haltom are not much different from the components that make a good legal film, whether civil or criminal.⁹⁷ The quest for justice while facing overwhelming odds makes for good storytelling.

C. "Trials" Redefined in Recent Films

More than a decade ago, Judith Resnik wrote, "to the extent that 'trials' are defined as fact finding by government-employed judges and government-deployed juries in courtrooms situated in buildings called courthouses provided by the state, then the rates of trials . . . have declined."⁹⁸ But if redefined as a proceeding that "occurs before any neutral third party, anywhere, as long as empowered to impose a judgment that is enforced through the state,"⁹⁹ then perhaps the United States is simply moving toward "an inquisitorial judiciary superintending fact development."¹⁰⁰ Under this alternative definition of a "trial," certain kinds of discovery, like depositions, arbitration, and mediation, might satisfy the adversarial requirements.¹⁰¹

Applying this alternative definition, several recent critically acclaimed films qualify as civil trial films. One is *The Social Network*, which is about the lawsuits filed against Facebook founder Mark Zuckerberg by his cofounder Eduardo Saverin and website developers the Winklevoss twins.¹⁰² The film uses the depositions of the parties as the framework within which to tell the Facebook story. Another recent film that also satisfies this alternative definition of a trial is *Woman in Gold*, a

95. *THE RAINMAKER* (Paramount 1997).

96. *A CIVIL ACTION* (Paramount 1998).

97. See McCann & Haltom, *supra* note 73, at 1047.

98. Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 3 J. EMPIRICAL LEGAL STUD. 783, 790 n.15 (2004).

99. *Id.*

100. *Id.*

101. *Id.* ("[W]ere we to entertain the idea that trials are to be equated with adversarial fact finding, we might also understand that discovery (superintended in some respects by judges) is a form of 'trial,' for it provides a mechanism for adversarial quests into facts.")

102. See *THE SOCIAL NETWORK*, *supra* note 63.

fictionalized version of the successful real-life effort to recover art works stolen from an Austrian Jewish family by the Nazis during World War II.¹⁰³ Randy Schoenberg, the lawyer protagonist in the film, argues his case before an American court, an Austrian art restitution board, an Austrian court, and finally Austrian arbitrators. Thus, just as notions of what constitutes a trial may be changing, so too are the characteristics of some twenty-first-century civil trial films. Even *The War of the Roses*, a black comedy about a divorce proceeding stymied by a fight over marital property,¹⁰⁴ might qualify as a trial under this broad definition.

III. EDUCATIONAL VALUE

Another commonly held notion is that courtroom films educate the public about the judicial system. In this regard, *Philadelphia* and *The Verdict* are the best examples of civil jury trial films from an educational perspective because they best mirror civil trial practice. *The Verdict*, for example, is one of the few civil law films where the role of the civil court system is mentioned. In his closing argument, Frank Galvin, the plaintiff's lawyer, reminds the jury that the courts are there to do justice. He tells the jury, "Act as if ye had faith . . . and faith will be given to you."¹⁰⁵ Chase interprets these words to mean that "we have to believe in the system itself before we will take the risks, and go to the trouble, to make use of those courts."¹⁰⁶ Thus, *The Verdict* embodies the idea that juries serve to render justice, a theme also found in criminal courtroom films.¹⁰⁷

Likewise, *Philadelphia* depicts a successful employment discrimination lawsuit and in doing so captures, fairly accurately, much of the civil litigation process. In the film, the audience sees the plaintiff's lawyer, Joe Miller, engaged in most aspects of the case: client intake, weighing the legal issues, preparation (research and brief writing), service, opening statements, examination and cross-examination, and jury deliberation. The film even reveals some substantive law—case law and statutes—and how lawyers form novel arguments. Additionally, the film mentions the different kinds of damages available and the availability of appeal. Thus, *Philadelphia* may come as close as a civil trial film can get to having meaningful educational value.

Nevertheless, as mentioned previously, there is no hard empirical data regarding the effects of legal films on the public's perceptions of the legal system. Professor Michael Asimow, for example, argues that American popular culture portrays trials as a way of "uncover[ing] the truth about past events."¹⁰⁸ In doing so, the public absorbs film narratives about lawyers

103. See *WOMAN IN GOLD* (Origin Pictures 2015).

104. See *THE WAR OF THE ROSES* (Twentieth Century Fox 1989).

105. *The Verdict: Quotes*, IMDB, http://www.imdb.com/title/tt0084855/trivia?tab=qt&ref_=tt_trv_qu (last visited Mar. 25, 2016) [<https://perma.cc/WK62-DVHC>].

106. CHASE, *supra* note 21, at 106.

107. *Id.* at 106–07.

108. Michael Asimow, *Popular Culture and the Adversary System*, 40 *LOY. L.A. L. REV.* 653, 655 (2007).

that portray them as “champions of justice and liberty,” in contrast to judges who occasionally are portrayed as getting in the way of justice.¹⁰⁹ Asimow notes, while American popular legal culture tends to disfavor giving “judges any more responsibility than they already have,”¹¹⁰ but a 1999 American Bar Association (ABA) poll found that the public has more confidence in judges than in lawyers.¹¹¹ Although the public may be divided over whether to trust lawyers, its faith in the jury system persists.

James Elkins observes that scholars writing in the area tend to make a “string of assumptions and presuppositions about popular culture [based] more [on] speculation than actual solid information.”¹¹² Political scientists McCann and Haltom agree, asserting that “each film might impart little lasting knowledge”¹¹³ and that, after watching legal films, lawyers “remain the objects of whatever shaken faith or unshakeable cynicism moviegoers brought to the movie.”¹¹⁴ They suggest that because civil legal films have so little impact on the lay public, their “inaccuracies and absurdities regarding civil procedure” should be of little concern.¹¹⁵ Nevertheless, Elkins adds, no one argues, given the amount of misinformation contained in these films, that these film representations are “better than having *no* education about law.”¹¹⁶

Uncertainty about the educational value of legal films leads Elkins to opine, “If . . . the basic propositions of what we learn about law and lawyers from popular culture is more mystery than science, more speculation than serious critique . . . what are we to learn from (and about) the depictions of lawyers and law in popular culture?”¹¹⁷ As the 1999 ABA survey suggests, any lessons learned from films about the legal system may not offset deeply held public perceptions about the American adversarial system.¹¹⁸ Although the decline in civil trials is unsurprising given negative public perceptions about the civil judicial system, there is no evidence that this long decline has impacted the number of civil trial films. Nevertheless, Part IV asks whether television portrayals of civil trials will offset any concern about the possible decline in this film subgenre.

109. *Id.* at 656.

110. *Id.* at 684.

111. *Id.* at 654–55 (“[O]nly 14% of the public were extremely or very confident in lawyers and 42% were only slightly or not all confident. People had far more confidence in judges: 32% were extremely or very confident in judges and only 22% had slight or no confidence in judges.”).

112. Elkins, *supra* note 23, at 747–48.

113. McCann & Haltom, *supra* note 73, at 1058.

114. *Id.* at 1059.

115. *Id.* at 1058. Of course it could be that any inaccuracies or absurdities are the reason the lay public misunderstands and is disappointed with the civil justice system. See O’Barr & Conley, *supra* note 43, at 137 (finding laypersons fail to understand the power of the civil justice system).

116. Elkins, *supra* note 23, at 750.

117. *Id.* at 753–54.

118. See Asimow, *supra* note 108, at 654–55.

IV. TELEVISION AS A VISUAL ALTERNATIVE TO FICTIONAL CIVIL TRIAL FILMS

The relative paucity of civil trial films does not mean there are few images of civil trials in visual popular culture. As Michael Asimow reminds us, the general public consumes “massive amounts” of pop culture,¹¹⁹ but it is television, as opposed to film, that “stands alone in its ability to shape the opinions of mass audiences.”¹²⁰ Kent Syverud, writing two decades ago, remarked that despite the decline in civil jury trials, television has made the civil trial more visible than ever before.¹²¹ Thus, members of the public who have never seen a civil trial or served on a civil jury “can directly observe the process, often aided in notorious cases by sophisticated play-by-play coverage and analysis”¹²² on their television screens.

Once again, it is not the mundane civil case that captures the interest of television audiences. Instead, it is judge reality court shows like *Judge Judy* that are the civil “trials” seen most often on American television today.¹²³ To some, these reality shows may seem like the modern day counterparts to the old county court days when the local community showed up to observe court proceedings, gossip, and socialize.¹²⁴ Although these TV courtroom shows mirror small claims courts, in reality they are televised arbitration proceedings.¹²⁵ They portray “trials” without lawyers or juries, modern day versions of trials in the sense of adversarial proceedings before a decision maker. But television viewers of these shows may gain little insight into the traditional civil trial process.

Other television legal shows about civil practice do not focus on civil trials. *Damages* was a TV drama about a prominent and highly successful civil litigator, Patty Hewes.¹²⁶ Hewes was most often seen in conference rooms rather than in courtrooms. Perhaps this realistic picture of a big-time civil practice proved insufficiently entertaining. As the series progressed, the storyline focused more on Hewes’s criminal behavior than on the litigants she represented in civil matters. On the other hand, *Boston Legal*, a spin-off of the highly popular show *The Practice*, featured courtroom scenes in both civil and criminal matters.¹²⁷ But, like *The Practice*, most of *Boston Legal*’s storylines revolved around what happened outside the courtroom, although depositions were frequently part of the storyline. Like

119. *Id.* at 670.

120. *Id.* at 676.

121. Syverud, *supra* note 30, at 1935.

122. *Id.* at 1935–36.

123. See Kimberlianne Podlas, *Blame Judge Judy: The Effects of Syndicated Television Courtrooms on Jurors*, 25 AM. J. TRIAL ADVOC. 557, 560–61 (2002).

124. CHITWOOD, *supra* note 25, at 94–95.

125. Philip Z. Kimball, *Syndi-Court Justice: Judge Judy and Exploitation of Arbitration*, 4 J. AM. ARB. 145, 145–47 (2005).

126. *Damages* (FX television broadcast 2007–2009, Audience Network television broadcast 2010–2012).

127. *Boston Legal* (ABC television broadcast 2004–2008).

their film counterparts, the educational value of these TV shows is debatable.

In addition to television shows, there are documentary films about the law on both the big and small screen. Documentaries, because they claim to tell true stories, may be better vehicles than television or fictional films to transmit educational information about the civil trial system. Arguably, the similarities “between the cinema and the trial [are] . . . more pronounced in documentary films.”¹²⁸ Few real-life trials have the same capacity “for broad cultural influence” as documentary trial films.¹²⁹ But there are important differences. Documentaries like *Hot Coffee*, about the McDonald’s lawsuit and tort reform,¹³⁰ reflect the perspective and editorial decisions of the director. Thus, some scholars argue that trial documentaries “intervene in the production of cultural memory and shape the social legacy of their trial narratives.”¹³¹ In other words, documentaries about real trials “become both an alternative ‘public’ trial for their subjects and a meta-trial on the legitimacy of the actual trials.”¹³² They are subject to distortions, even about the legal system.

CONCLUSION

With the increased popularity of settlements, arbitration, and mediation, civil justice in real life is no longer a public event—justice is determined by fewer people, in a more private space. Nevertheless, “popular film and media representations of the courtroom influence the way in which the public comes to see the law in action.”¹³³ American film and television audiences remain the real jury, judging criminal and civil disputes. As Professor Carol Clover writes, “[W]e are a nation of jurors, and we have created an entertainment system that has us see just about everything that matters—from corporate greed to child custody—from precisely that vantage and in those structural terms.”¹³⁴ She continues, “The jury may be up for grabs in the world of law and politics, but in the world of popular culture, it remains serenely untouchable.”¹³⁵

Further, the influence of the American trial film is global. To outsiders like the editors of the French language film magazine *Cahiers du Cinema*, “it is ‘America itself which constitutes the Jury, and who cannot be wrong, so that the truth cannot fail to manifest itself by the end of the proceedings.’”¹³⁶ The jury is so sacrosanct in the United States that American courtroom dramas do not critique the jury. Thus, it could be that

128. Fuhs, *supra* note 5, at 782.

129. *Id.* at 804.

130. *HOT COFFEE* (The Group Entertainment 2011).

131. Fuhs, *supra* note 5, at 784.

132. *Id.*

133. *Id.* at 782.

134. Clover, *supra* note 4, at 272–73.

135. *Id.* at 271.

136. *Id.* at 272.

any decline in feature civil trial films will have no real impact on the public's perception of the civil trial.

More worrying is that many of the classic late twentieth- and early twenty-first-century civil law films discussed in this and many law and film articles are no longer readily available for purchase or streaming. Thus, there may be few readily available fiction films that depict traditional civil trials. What may become more common film images are the more modern civil trial films, like *The Social Network* and *Woman in Gold*. More troubling, from an educational perspective, however, is another recent twenty-first-century film, *Michael Clayton*.

The critically acclaimed *Michael Clayton* probably is unrecognizable to the general public as a law film. Yet throughout the film, the viewer sees evidence explaining the decline of civil jury trials and the changing nature of civil practice.¹³⁷ The murder and attempted murder in *Michael Clayton* notwithstanding, the film reflects the changing nature of twenty-first-century law practice. The protagonist, Michael Clayton, is a well-compensated, experienced trial lawyer who does no legal work. Rather he "fixes" or tries to control situations for his big law firm's corporate and wealthy clients. Over six years, the law firm earned millions of dollars representing U-North, an agro-chemical corporation, in the pretrial proceedings of a class action, hoping that the overmatched plaintiffs would become exhausted and settle quickly, a theme from civil trial films mentioned previously. When the corporation's culpability becomes clear, there is an attempt to hide the evidence from the plaintiffs, and U-North decides to quickly settle before this evidence is discovered. There was no trial and only a snippet of a disrupted deposition. Yet the film is a scathing critique of the civil justice system.

In the end, perhaps it is because "American courtroom films have created a manner of portraying legal procedure which has been followed in courtroom films set in other countries and other legal systems"¹³⁸ that they will continue to be produced in the United States. So, real-life jury trials may continue to decline. But the American civil courtroom film, whether flawed or not, is too deeply embedded in American popular culture to disappear entirely. Perhaps more importantly for film companies looking to turn a profit, the trial format is too appealing to film audiences to discard.

137. See MICHAEL CLAYTON (Castle Rock Entertainment 2007).

138. Stefan Machura & Stefan Ulbrich, *Law in Film: Globalizing the Hollywood Courtroom Drama*, 28 J.L. & SOC'Y 117, 123 (2001).