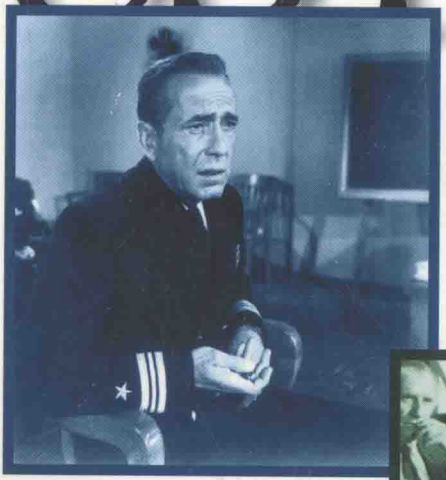
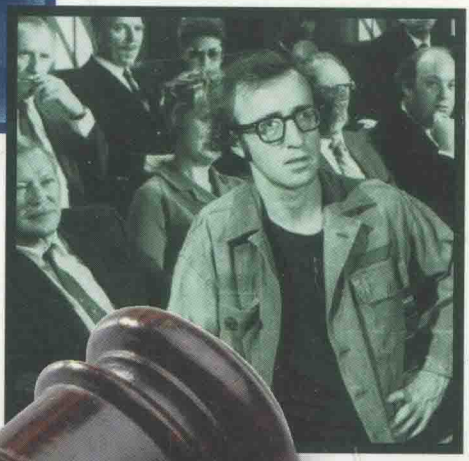
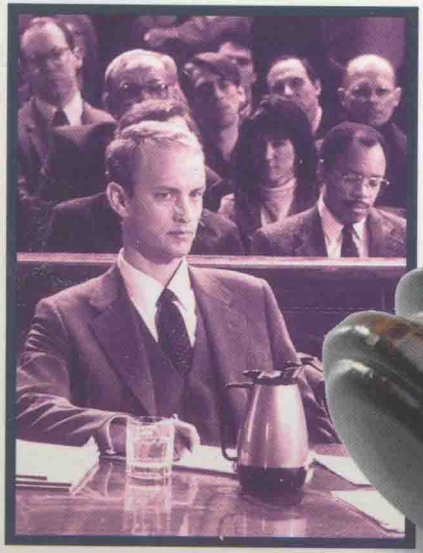
REEL JUSTICE

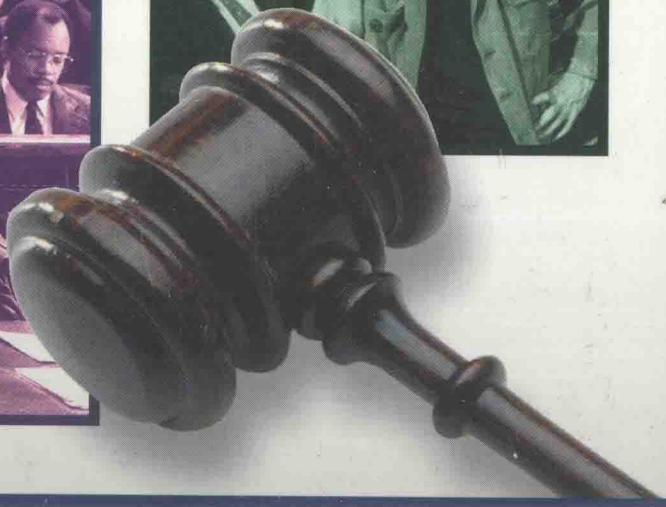
Paul Bergman
Michael Asimow

The Courtroom Goes to the Movies









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Paul Bergman
and
Michael Asimow

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Foreword

by Judge Alex Kozinski

Scratch almost any lawyer and you'll find a movie buff. That's no coincidence, for the moviemaker's art is not all that different from the lawyer's—especially the courtroom advocate's. Both must capture, in a very short space, a slice of human existence, and make the audience see a story from their particular perspective. Both have to know which facts to include and which ones to leave out; when to appeal to emotion and when to reason; what to spoon-feed the audience and what to make them work out for themselves; when to do the expected and when the unexpected; when to script and when to improvise.

It's not surprising, then, that lawyers and trials are a perennial subject of moviemaking. Trials, by their nature, concentrate human conflict; they force a head-on clash of opposing forces. Any trial has the potential (especially in the movies) to raise difficult questions about the cornerstones of society: law, justice, morality, and the conventions that hold us together. Trials also raise one of the most fundamental doubts of human existence: whether, and to what extent, we can achieve an objective, true account of past events. Fair trials present the tantalizing possibility that the little guy can take on the big guy and win, because brains, wit, and justice count far more than money, power, and influence. Unfair trials make excellent tragedies: The outrage of justice betrayed, coupled with often pitiful consequences, can stir the blood with empathy.

It was while contemplating such matters that I first got the notion of becoming a lawyer. I remember exactly when it happened: It was 1963 or 1964 and I was living in Baltimore. We had come to the United States only a year or so earlier and I was in the process of absorbing American culture (and language) by plugging myself into the endless stream of black-and-white images that materialized in our living room through an ancient round-tube TV set. I found much of what I saw interesting, if strange; some of it funny; but not much of it very memorable.

One exception I still remember vividly: The scene was a small room filled with a bunch of guys sitting around a conference table arguing about the fate of someone who wasn't there to stand up for himself. I almost changed channels when the vote was eleven to one to convict, but there was something in the quiet determination of the lone dissenter that kept me from turning the knob. (For those too young to remember, channels in those days were changed by clicking large knobs on the front of the TV set, rather than by pushing buttons on a remote control.) He wasn't sure the defendant was innocent, the holdout told the others; he wanted to talk about it.

No reader has failed to recognize that I was watching *12 Angry Men,* or that the dissenting juror was the young Henry Fonda. As I sat there watching, struggling a bit with the language, trying to figure out the jury's function in American law (Why, I wondered, didn't they just convict by a vote of eleven to one and go home?), my whole adolescent conception of certainty, of knowledge itself, was shaken. The case against the defendant sounded so airtight; the reasons offered by the eleven sounded so irrefutable. I couldn't imagine how (or why) anyone could reach a different conclusion. Then, as one reason after another started to come apart, as inconsistencies crept into the picture, as jurors began changing their votes, I came to understand that truth does not spring into the courtroom full-blown, like Athena from the head of Zeus. Rather, facts have to be examined carefully and skeptically, moved around and twisted like pieces of a puzzle before they will yield a complete picture. Could it, might it be, that I had the talent for this type of work?

Further research was clearly necessary before I could sort out the realities of law practice. Were real trials, real jury deliberations anything like what I was seeing? As my interest in law grew, and along with it my interest in law-related movies and TV shows, I came up with more unanswered questions: Was the Scopes monkey trial anything like it was portrayed in *Inherit the Wind?* Did the War Crimes Tribunal bear any resemblance to *Judgment at Nuremberg?* I eventually went to law school, passed the bar, and became a judge, but questions of this sort persisted. What *was* the true story behind *Breaker Morant?* Was Sir Thomas More's defense as it was portrayed in *A Man for All Seasons?* To be sure, the answers could be found out there somewhere, given enough time and effort. But, human nature being what it is, I put it off.

And a good thing, too: When Michael Asimow (who taught me most of what I know about tax law) told me about the book he and Paul Bergman were writing, I immediately realized they were on to

something that could be quite useful. Selected background material would supply the real story (if there was one) and the historical context of the action. Carefully researched legal analysis would help you figure out what might have happened (or did happen) in a real trial. No longer would inquiring minds have to wonder whether the trial judge's outrageous actions in *The Verdict* were at all plausible, or the procedures in *Whose Life Is It Anyway?* or *Nuts* bore any resemblance to reality. I wondered why no one thought of writing a book like this before.

The book is, of course, more than a disconnected series of answers to questions one might have in watching law-related movies. It is a thoughtful collection of some of the best—and a few of the worst—movies having to do with the legal process. And law-movie buffs desperately need such a guide. The advent of home video as a staple of entertainment in most American households has opened up the possibility of seeing great movies of the past—including movies concerning the law. Video has emancipated our movie viewing from the whims of local TV station program managers. (It took me almost twenty-five years before I saw *12 Angry Men* again.) But freedom can be treacherous without some compass to guide your steps. Stroll into your vast neighborhood video store with no plan and several friends or family members of divergent tastes, and you're likely to emerge three hours later with a made-for-TV comedy about Albanian werewolves. In these challenging times, *Reel Justice* gives you an edge in the movie-selection game. By giving just enough information up front to help you know whether a particular movie is likely to be of interest, it allows you to select a movie you haven't yet seen (or vaguely remember), to cajole your friends and family into concurring, and, later, to fully understand and enjoy the film.

A dog-eared copy of *Reel Justice* will find a place in the living room of most thoughtful movie-watchers. Its only defect, alas, is that it is too short: Where do you get the skinny on *First Monday in October, The Story of Qiu Ju, The Return of Martin Guerre,* and *Hang 'Em High?* I, for one, have already put in my order for *Reel Justice II.*

Alex Kozinski
United States Circuit Judge

Pasadena, Calif.
December 1995

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Introduction

Audiences have an enduring love affair with trial movies. One reason why trial stories work so well is that they provide the drama of one-on-one confrontations—attorney versus witness, attorney versus opposing counsel, attorney versus judge, attorney versus client. And trial movies have a built-in suspense factor. When the judge says, "Ladies and gentlemen of the jury, have you reached a verdict?" we never know whether this mysterious group of twelve strangers will send the defendants to the chair or let them walk out of the courtroom to freedom.

Another reason for the popularity of trial movies is that producers are smart enough not to make movies about the usual grist of the trial court mill, such as slip-and-fall cases or speeding tickets. Instead, memorable movie trials feature such eternally fascinating themes as murder, treachery, and sex—the same topics that Will Shakespeare used to capture his audiences' imaginations a few centuries ago.

Trial movies can also present controversial legal and moral issues in a sugarcoated package that we swallow with pleasure. Would you rather read another book about capital punishment or see it up close and personal in *I Want to Live!?* Browse a treatise on war crimes or see *Judgment at Nuremberg?* Debate whether a quadriplegic has the right to die or watch *Whose Life Is It Anyway?*

Many trial movies are based on true stories—some of them famous or infamous trials of the past. It's enthralling to watch Clarence Darrow and William Jennings Bryan come to life as they square off in *Inherit the Wind,* the story of the Scopes Monkey Trial. The legendary Darrow reprises in *Compulsion,* in which he managed to keep thrill-killers Leopold and Loeb from being sent to the gallows. And *10 Rillington Place* and *Let Him Have It* will introduce you to two of the cases that led to abolition of the death penalty in England.

Trial movies can get away with presenting simple clashes between good and evil, right and wrong. Most audiences today are too sophis-

ticated to cheer the Hero and hiss the Villain. But a movie lawyer fighting for Morality and Justice is the modern counterpart of the 1920s hero who untied the damsel from the train tracks just before the train roared by. Who can forget Atticus Finch in *To Kill a Mockingbird* standing up in a rural southern courtroom for a black man wrongly accused of raping a white woman?

You'll laugh out loud as expert witness Mona Lisa Vito discusses tire tracks and Positraction in *My Cousin Vinny*. You'll reach for the hankies as Ted Kramer loses custody of his little boy in *Kramer vs. Kramer*. You'll tingle with terror in the closing scenes of *Jagged Edge*. And you'll seethe with rage when a kangaroo court-martial sentences three innocent soldiers to death in *Paths of Glory*. Trial movies run the whole emotional gamut.

Our book selects sixty-nine trial movies of the present and from the past. We've written about the great classics of the genre, but we've also covered some not-so-great trial movies that present interesting legal and ethical issues. We hope this book will help you choose which video to rent next Friday night when you feel that gnawing hunger for a good cross-examination along with your microwave popcorn. To help you make the perfect choice, we've ranked each film on a scale of one to four gavels. Our ranking system is based on the quality, dramatic power, and authenticity of the trial scenes in the movie. Four gavels is a classic, three is good, two is just okay, and one means ask for a new trial.

This book is more than just a video guide. Do you ever wonder how much of what you see in trial movies is "real?" When you see a monster devouring a subway train or a fiend chopping off his aunt's head with a chain saw, you immediately recognize it as a movie trick. But legal sleight of hand is harder to detect. We think it's important to know how Hollywood bends the rules to inject drama or humor into trial movies, and we try to alert you to when the filmmakers do so.

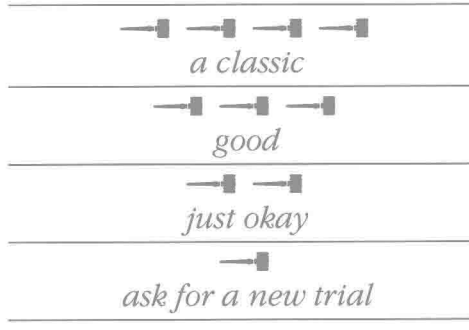
Viewers are often left with unanswered questions after they see trial movies. Is the plot legally plausible? Just what is circumstantial evidence or hearsay evidence, and what's wrong with it? Who should wind up with the child when both parents seek custody? Can the devil enforce a contract in which he's bought a soul? Can a lawyer turn down a plea bargain without consulting the client? Would a judge allow evidence about the defendant's prior crimes to be introduced? And what's a mutiny, or a privilege, or a crime against humanity, or an irresistible impulse? Can a lawyer browbeat a distraught witness from a distance of two inches, like Dancer's cross-examination in *Anatomy of a Murder?* Were the cops right not to search for a murder weapon,

in *Presumed Innocent?* Are lawyers allowed to interrupt their questioning of witnesses to make speeches, like Joe Miller in *Philadelphia?* If the trial is one drawn from real life, did it really happen that way or did the writer fictionalize it? We try to answer these questions in a way that everybody, lawyers and nonlawyers alike, can understand, enjoy, and learn from.

Trial movies almost always present difficult ethical and moral dilemmas. Should a lawyer represent a client that the lawyer thinks is guilty? What if the client might kill again? Must a lawyer represent a client who is extremely unpopular or who has a repulsive personality or who can't pay a fee or who doesn't even want a lawyer? These are not simple questions, in theory or in practice, and we think that viewers should wrestle with them just as real lawyers do. We don't have all the answers, but we will take our best shot at the questions.

This book is written for everybody, lawyers and nonlawyers, who enjoy trial movies. We'll introduce you to some you haven't seen and, we hope, help you appreciate even more the ones you've already seen. We'll try to answer your questions and bring issues to the surface that you hadn't considered. Writing this book has increased our appreciation of this entertaining and enduring art form, and we hope our descriptions and analyses will do the same for you.

The Gavel Rating System



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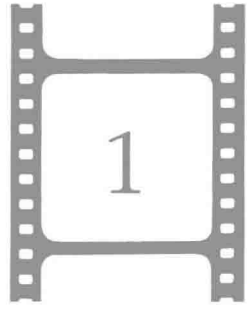

The Story You Are About to See Is True . . .

Dramatic trials have always been great media events. The Scopes monkey trial, dramatized in *Inherit the Wind,* for example, was as much a media circus in 1925 as the O.J. Simpson case was in 1995. Certainly, the Nuremberg war crime trials, in *Judgment at Nuremberg,* were major news stories in the late 1940s. For that matter, the treason trial of Sir Thomas More *(A Man for All Seasons)* was undoubtedly the hottest news story of 1535. Read today's headlines, and imagine next year's movie lines.

Many trial movies are based on real trials. Screenwriters can compress the events of weeks or months into a couple of hours. They cut out the boring details and instead give us insights and perspectives about the defendants, the victims, the lawyers, and the judges that the daily news coverage cannot provide. Failing that, they make up a pack of lies.

This chapter focuses on movies based on real trials (and there are many others throughout the book). Some of them are historically important—the execution of an innocent man in *10 Rillington Place* and of a mentally retarded youth in *Let Him Have It* led to abolition of the death penalty in Britain. Some of them bring to life the great lawyers of the past, like Clarence Darrow *(Inherit the Wind* and *Compulsion)* or Abraham Lincoln *(Young Mr. Lin-*

coln). In each case, we'll tell you what happened in the real trial, so you'll know what is fact and what is make-believe.

The Accused

Synopsis: The victim of a gang rape seeks justice against the barflies who cheered on the rapists.

UIP/Paramount (Sherry Lansing and Stanley Jaffe). 1988. Color. Running time: 110 minutes

Screenplay: Tom Topor. Director: Jonathan Kaplan

Starring: Jodie Foster (Sarah Tobias), Kelly McGillis (Kathryn Murphy), Bernie Coulson (Kenneth Joyce), Leo Rossi (Cliff "Scorpion" Albrecht), Ann Hearn (Sally Frazer), Steve Antin (Bob Joiner), Carmen Argenziano (Paul Rudolph).

Academy Award: Best Actress (Jodie Foster).

Rating: —■ —■

The Story

Sarah Tobias has a fight with her boyfriend. To teach him a lesson, she goes to The Mill, a local bar. There, Tobias fires up male fantasies thought to be extinct. She dresses provocatively, smokes dope, and performs a variety of dance steps not generally taught at Arthur Murray. Suddenly Tobias finds herself pinned on the pinball machine getting raped by three men. A number of the barflies cheer them on.

After D.A. Kathryn Murphy charges the three attackers with rape, Tobias learns about another kind of mill—the criminal justice system. Murphy doubts that she can prove rape, and so strikes a plea bargain without consulting Tobias. The rapists plead guilty to "reckless endangerment" and will probably serve no more than nine months in jail. A furious Tobias thinks that Murphy sold her out.

Murphy decides to square things with Tobias by prosecuting three of the barflies for "criminal solicitation." Her boss, D.A. Rudolph, thinks this is a waste of resources and threatens to fire her, but Murphy plunges ahead. Murphy lucks out and uncovers a key witness. Ken Joyce, a fraternity brother of one of the rapists, was at The Mill, saw the rape, and feels ashamed that he didn't interfere. Very reluctantly, he agrees to testify. Joyce's evidence is critical, since Tobias can't identify which bystanders were egging on the rapists. Joyce's trial testimony unfolds in the form of a flashback to the brutal rape scene. The jury believes Joyce, and the three barflies are convicted.

Legal Analysis

Rape is a hard crime to prove. Often, victims have been treated in court as if they were "the accused," rather than the accuser. "Rape shield laws" now exclude most evidence about a rape victim's prior sexual conduct and even their manner of dress. Nevertheless, when rape defendants argue that a victim consented and the victim seems somewhat less than virginal, juries often refuse to convict.

Given this pattern, Murphy's plea bargain probably was a good deal for the prosecution. The rapists stood a good chance of acquittal if they had gone to trial. The prosecution had no eyewitnesses except Tobias (Joyce hadn't yet surfaced), and everyone in the bar was going to testify that Tobias invited the sexual intercourse. Add in some dope, booze, sexy dancing, and making out on the dance floor, and you have both a typical TV family-hour sitcom and a very shaky rape case. Even though Tobias hated Murphy's plea bargain, the deal was pretty good—after all, the defendants did go to jail.

Murphy's relationship with Tobias is entirely different from a private attorney–client relationship. Tobias is not Murphy's client, so Murphy has no obligation to consult her about whether to settle the case or about any other tactic. A prosecutor represents the community at large, not individual victims. This is sensible, since most victims would demand that prosecutors shoot for the maximum possible sentence, regardless of the weakness of the case.

Rudolph, Murphy's supervisor, ordered Murphy not to prosecute the onlookers. He thought it was a waste of resources that would make her and the entire office look bad. Rudolph's job is to make calls like this. District attorneys are always short of resources and can't prosecute every case. They drop the losers. And the solicitation case looked like a loser—especially before Joyce surfaced. When Rudolph tries to stop her, Murphy threatens to quit and to sue everyone in sight, including the prosecutor's office. This is utter nonsense. Prosecutors are immune from being sued for decisions about which cases to prosecute. Rudolph might well have fired her on the spot.

The barflies were charged with "solicitation," which consists of inciting or encouraging another person to commit a crime. To convict someone of solicitation, you don't have to prove the crime was actually committed—just that the defendant encouraged it. Perhaps that's why Murphy chose to prosecute for solicitation—she wouldn't have to prove that rape occurred, just that the onlookers wanted it to occur.

Since Tobias was actually raped, the barflies could have been charged with a more serious crime—aiding and abetting rape. They encouraged the rapists to commit a crime—and the crime was com-