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THE CARDOZO ELECTRONIC LAW BULLETIN

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APOLOGIES THROUGH LAW AND CINEMA

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Abstract

Some recent interdisciplinary studies focused on the broad and multifaceted relationship between law and cinema. I found particularly interesting that the so called "legal movies" can help to understand aspects frequently overlooked in classical legal reasoning. By focusing on different points of view on historical and cultural backgrounds the movie's eye can help to develop a critical and realistic look over the dynamics of legal proceedings. Often is pointed out how bad is relying on adversary systems and litigation formalism rather than on pro-empathetic, pragmatic behaviors and mediation goals.

For example, some films show vividly the need of taking apologies seriously in addressing legal disputes, underlining the concrete role of apologies in rebuilding broken relationships. I've highlighted some recurring themes such as the remedial function of apologies, their ability to mitigate the feelings of revenge fed by the victim, and, as a consequence, their capacity to repair harms to dignity and to address emotional damages. Specularly the hardest part for the wrongdoer could be the acknowledgement of his errors as well as the resistance of lawyers in considering not only the negative hazardous aspects of apologies, but also the positive ones.

1. Introduction

This paper deals with apologies through an interdisciplinary perspective based on Law and Cinema. I've divided the work in 4 paragraphs. In the first one, I've drawn some introductory remarks. In the second paragraph, I've focused on the relationship between Comparative Law and Law and Cinema. The third area is dedicated to some significant apology cases depicted in famous movies. In the fourth paragraph I've drawn some conclusions.

Firstly, I would like to stress how comparative law is strictly connected with interdisciplinary studies. Some scholars have actually talked about a "subversive function" of comparative law as a discourse disrupting the theoretical and positivistic order of law[1]. Comparative lawyers also refer to different areas of knowledge in order to reach a cross-cultural dimension of law as well as to relativize local law [2].

With particular reference to law and economics it's important to stress how behaviors and economic incentives can be related to legal norms[3]. Theories like rational choice remind us that "the everyday world is a place in which the tug of wrongdoing is ever-present, with individuals purposedly

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[1] See H. Muir Watt, *La fonction subversive du droit comparé, Revue interntationale de droit comparé*, 2000, p. 505; G. Fletcher, *Comparative Law as a Subversive Discipline*, American Journal of Comparative Law, 46, 695; A. Somma, *Introduzione al diritto comparato*, Torino, 2019 (2nd ed.), 3.

[2] Ibidem.

[3] Incentives are represented by all those norms providing benefits or sanctions aimed at inducing someone to behave in a certain way. See G Calabresi, *The Future of Law and Economics. Essays in Reform and Recollection*, Cambridge University Press, 2016, p. 76.

choosing to break the law to further their won interests."[4]. In a similar perspective, literature and movies represent another important point of view to illuminate significant features of legal reasoning[5]. More explicitly, some Law Scholars have underlined the limits of adversary and rational model typical of the western legal tradition[6] and their lack of flexibility in coping with certain issues like non-rational behaviors and cognitive biases. In this sense, it was argued that legal issues can be critically analyzed through film studies in order to emphasize emotional and empathetic patterns of interpretation.

A good example is represented by the influence of apologies into the fields of tort law and alternative dispute resolution[7]. Since apologies normally lack any regulation or legal classification, jurists are mostly unaware of its potential in dealing with litigation issues. Probably a more flexible framework for apologies would be better than a strict legal classification or regulation due to its natural inherence to genuine feelings and non-mandatory duties. However the nature of such duties (social, legal, ethical, even religious) is still debated and it's also a classical cross-cultural issue[8]. As a consequence, non-

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[4] See N. HAHN RAFTER, M. BROWN, *Criminology Goes to the Movies: Crime Theory and Popular Culture*, New York, 2011, 20.

[5] See also J.W. Dellapenna (2008), *Peasants, Tanners, and Psychiatrists: Using Films to Teach Comparative Law*, International Journal of Legal Information, Volume 36, Issue 1, Article 10, 157.

[6] Ibidem. See also J. K. Robbennolt, *Apology and Civil Justice*, Chapter from book: *Civil Juries and Civil Justice: Psychological and Legal Perspectives*, New York, 2008, 217.

[7] If we intend A as the apologizer and V as the victim or person offended, we can define apology as " a speech act which is addressed to V's face- needs and intended to remedy an offence for which A takes responsibility, and thus to restore equilibrium between A and V". See Holmes, (1989), *Sex differences and apologies: one aspect of communicative competence*, Applied Linguistics, 10 (2), 196.

[8] "Apology is selected as our focus of investigation, since it is one of the most well studied speech acts in the areas of cross-cultural pragmatics, assessment and teachings". See Y. Kite, D.

compliance is probably to be treated with behavioral insights, like social pressure, rather than with coercion or punishment[9].

In order to better understand the role played by apologies in the legal arena is worth referring to specific cases and personal relationships rather than categorize it in any one area. I'm convinced that one of the goal of comparative law is to discuss such emergent methodologies of interpretation. That's why the aim of this paper is to encompass an interdisciplinary approach to apologies through law and cinema.

2. Comparative Law meets Law and Cinema

An interesting starting point is a thesis which I consider to be representative of the interdisciplinary studies about Law.

In a recent paper, Prof. Geoffrey Samuel refflects on the possibility to compare legal reasoning with reasoning and analysis in other disciplines of value?[10] Such a comparison implies definitely a lot of possible directions of analysis. Think for instance to the parallel between legal reasoning and medical reasoning. Different forms of reasoning are probably as many as the disciplines we choose to compare.

The question is very challenging with particular reference to a specific area of arts. I'm talking about cinema studies. Hereinafter I would like also to

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Tatsuki, *Remedial Interactions in Film*, D. Tastsuki (ed.), Pragmatics in Language Learning, Theory and Practice, (JALT Pragmatics SIG), 2005, 102.

[9] See in general P. John, J. Robb, *Using behavioural insights for citizen compliance and cooperation*, Evidence Base, vol. 2017 issue 1, 1-14.

[10] G Samuel, *The Paradigm Case: Is Reasoning and Writing in Film Studies Comparable To (or With) Reasoning and Writing in Law?*, NoFo 13 (2016), 17.

expand the theorethical framework depicted by Geoffrey Samuels.

In fact, I'd like to focus on a specific genre of films that make possible a more punctual analysis. I'm referring to the so-called legal movies. Legal movies can be intended both as purely courtroom dramas, or, in a broader sense, such as to include expose cinema and films about civic engagement.

The difference between Law and Arts (and Cinema) matters in terms of functions and structures of languages and communication[11]. Everybody knows how the position of Law is uncertain to the distinction between hard science and social science. But Law is probably more similar to social sciences rather than to hard science as well as it implies, at least in part, discretion in order to deal with certain social needs.

We can initially sketch the differences between legal discourse and discourse on film. According to Geoffrey Samuel[12], we can find a common frame of reasoning for both law and cinema discourses. Let's look at the tripartite scheme by the Jurist Gaius: persona, actio, res (person, action, props) and their keys for interpretation. Both legal reasoning and film studies own these three elements and show a similar attitude to be interpreted through them.

But, unlike cinema discourse, legal reasoning is marked by a dichotomic way of thinking. From a legal perspective, a world of fact must always be reduced to categories and concepts that often function in terms of a dichotomy. This model is normally rooted in western legal tradition and particularly in civil law countries. According to the pandectist metaphor, legal knowledge can be considered as similar to a pyramid of concepts in which all parts are logically

[11] Ibidem.

[12] Id., *The Paradigm Case*, 19.

interconnected[13]. We find the same binary pattern at different levels of abstraction. For example, on a very high level we can take Hans Kelsen's famous metaphor about the King Midas' touch. The Austrian jurist explained the relationship between natural world and legal world very sharply as follows: "Just as everything King Midas touched turned into gold, everything to which law refers becomes law …"[14]. At a lower level the dichotomic reasoning follows stricter distinctions. For example is this a 'property' or an 'obligations' issue? Is this a 'public' or a 'private' law matter?[15] Given this pattern, either something is X or it is Y. There is usually no room for atipycal features. But the dichotomic reasoning can serve to fill such a gap as well. Referring to the role of literature to achieve a more complex view for legal analysis, Richard Posner quotes the following opposites: Formalism v. Realism; Law v. Equity, Mercy and Justice; Rigid v. Flexible; Positive Law v. Natural Law; Letter v. Spirit; Statute Law v. Common Law; Judge finds law v. Judge made law [16]. So there are several catch- all provisions or flexible features in legal discourse which allow discretional interpretive choices.

This being cleared up, I think it is worth taking into account the limits of a strict dichotomic reasoning because oversimplification might be a serious problem of dichotomies. One cannot reduce the world's representation to only two dimensions; it overestimates the judge's ability to catch hidden

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[13] Notably, this approach is similar in some respects to the Law of Reason. See M. Reimann, Nineteenth Century German Legal Science, 31 Boston College Law Rev. (1990), 860.

[14] H. Kelsen, (1967). *Pure Theory of Law*, trans. M. Knight. Berkeley: University of California Press, 161. About the law's depiction in "Apocalypse Now", see P.G. Monateri, *Diritto e Letteratura. "Apocalypse Now" tra lo Stato di Eccezione e l'analisi letteraria*, 20, C.E.L.B. [2014], 8-11.

[15] G. Samuel, The Paradigm Case, 27.

[16] R. Posner, Law and literature, Cambridge, 2009, 162.

shades and feelings in interpreting law and applying it to the real world. And, minor though it may seem, there is nothing more perverting the course of justice than oversimplification. Movie's storytelling creativity can give judge an opportunity to improve his ability to grasp and comprehend facts in order to change his point of view and look at alternative hypothesis of interpretation[17].

This point about the limits (that Law faces) can be also explained through the following difference. Unlike the discourse on film, legal discourse is subject to what might be called the authority paradigm[18]. Samuels points out that: "The texts—legislation and judgements—can be criticised but they cannot be dismissed or ignored as invalid. They have an authority that might be described as a secular divinity. Moreover the authority paradigm imposes limits on the kind of arguments that can be used in presenting a case and in justifying a legal decision. Thus it is not normally acceptable in legal reasoning to state that a particular decision in the House of Lords was caused by the Law lords dislike of the judge or judges who decided the case at a lower appeal level. In other words it is not normally acceptable for lawyers and jurists, when reasoning within the authority paradigm, to have recourse to psychological or ideological theories (although this restriction would not apply to a jurist writing from outside this authority paradigm)"[19]. And, most important thing: "Reasoning and analysis in film studies is not subject to such an authority paradigm and this means that a very much wider range of arguments, observations and assertions is likely to

[17] See G. Samuel, *The Paradigm Case*, p. 27; M.L. Mathieu, *Les représentations dans la pensée des juristes*. IRJS Editions, Paris 2014, 112-120.

[18] See G. Samuel, *The Paradigm Case*, p. 18.

[19] Ibidem.

be found in the books and articles. Indeed, in addition to this absence of an authority paradigm there are factors inherent in the object of analysis itself—the films—which are not to be found (or at least not to be found with the same intensity) in legal reasoning" [20]. As a result it can be asserted that the goal of legal theorists is to find an intelligible and coherent order in Statutes and Case Law which have been potentially subject of different interpretations[21].

Such a tendency may temper the rigidity of authoritative paradigm with a context-oriented interpretation as well as justice can be tempered with mercy, common law with equity, strict clauses with general clauses etc..

Referring to canons of interpretation Tony Weir, in an article comparing contract in English and Roman Law, pointed out that there is not an only theory to propound. In othre words, it's not one size fits all. More specifically, legal technique was, in Roman Law, casuistic and thus Roman jurists were practical lawyers who 'hypothetically varied the actual facts of the situations presented to them, and considered what the legal effect of such hypothetical variations would be'[22].

Such empiristic and relativistic thought can be really considered a counterbalance to the excess of dichotomic and authoritative reasoning. In addition, the "sanctity" of authority paradigm is also questioned by globalization challenges as well as properly criticized by behavioral and

[20] Ibidem.

[21] Id., 36-37; M. Bellomo, *The Common Legal Past of Europe, 1000-1800*. Translated by Lydia G Cochrane. The Catholic University of America Press, Washington, D.C. 1995, 181.

[22]T. Weir, *Contracts in Rome and England*, 66 *Tulane Law Rev*., 1992, 1617.

cognitivistic theories like the so called "bounded rationality"[23]. This trend is clearly related to the criticisms about positivistic-theory of interpretation.

The issue is also debated by the proponents of postmodern epistemology[24]. An interesting article use the extreme case of the film Miracle on 34th Street[25] to show how postmodern epistemology can ultimately lead to a change of interpretive paradigms[26]. Unlike the rationalist scheme that believes only those things which can be demonstratively proven, under post-modern epistemology truth is relative to the specific context and, above all, to the framework and values of the perceivers.

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[23] C. Jolls, C.R. Sunstein, *The laws of implicit bias*, (2006) *Calif. Law Rev.*, 94:969–96; R.H. Thaler, C.R. Sunstein, *Nudge*, New Haven, CT: Yale University Press, 2008; A. Dailey, *The Hidden Economy of the Unconscious* (2000) *Faculty Articles and Papers*, rs. 311. http://digitalcommons.uconn.edu/law_papers/311, 311.

[24] See, among others, *Postmodernism and Law: A Symposium*. University of Columbia Law Review (1991); R. Epstein, *Legal Education and the Politics of Exclusion*, Stanford Law Rev. 45 (1993); D. Paterson, *Postmodernism, Feminism, Law*, Cornell Law Rev., 77 (1992).

[25] This is the story of a man, "Kris Kringle", who was convinced that he was Santa Claus, meanwhile trying to convince his neighbours to believe in Christmas. The film seems "designed to advance the controversial proposition that Santa is real and children should be allowed to let their imaginations run free" (N. Murray, Miracle on the 34th Street, 12/13/06, https://film.avclub.com/miracle-on-34th-street-1798202201). "What makes *Miracle on 34th Street* so delightful is the way it constantly turns the question of belief vs. evidence […] into a question about our most essential and human values. Best of all, it does this with a jaundiced eye that admits the full spectrum of human folly. The judge assigned to the case wants do the right thing by both reason and the law, even if that means committing Kringle. But his cigar-chomping political advisor lets him know, in no uncertain terms, that jailing Santa Claus will end the judge's political career". (A. Frank, 'Miracle On 34th Street': An Old Holiday Movie For Modern Times, November 29, 2016, https://www.npr.org/sections/13.7/2016/11/29/503700215/miracle-on-34th-street-an-old-holiday-movie-for-modern-times?t=1568451693127)

[26] R. Phillips, *Miracle on the 34th Street and the problem of Postmodern epistemology*, December 24, 2009 (http://salvomag.com/blog/2009/12/miracle-on-34th-street-and-the-problem-of-postmodern-epistemology/).

There is often something more important than issues of truth and falsehood intended in the narrow letter-of-law sense[27]. The crucial point is not what is true but what you believe since our perceptions of reality are conditioned by our expectations and subjective ideological paradigms. This can be summarized by the simple question: "Why get so worked up about attacking faith if it gives meaning and purpose to people's life? Similarly, why bother telling children that Santa doesn't exist if it gives magic to their lives?"[28]

Strict legal paradigms have been considered as antagonists by socially committed cinema. As pointed out by Peter Häberle the European and American legal movies of the 50's started to deal with sensitive subjects like human rights, discrimination, equal dignity[29]. In his opinion, such movies helped significantly the development of a civic conscousness as well as political engagement. Häberle recalled among others, a movie called "The Truth", by the French director Henry Georges Clouzot: a legitimate defense case where the famous actress Brigitte Bardot plays the main character[30].

We may also think about the famous film "To kill a Mockingbird" inspired by the homonimous book by Harper Lee. The story talks about a black man, Tom Robinson, unjustly accused of sexual harassment in the Alabama of 1932. Only the lawyer Atticus Finch, played by Gregory Peck, believes that Robinson is innocent. After having rescued Robinson from a

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[27] Ibidem.

[28] Ibidem.

[29] P. Häberle, *Poesie und Verfassung-unter Einbeziehung von Drehbüchern aus Filmen*, Rivista di Diritti Comparati, n. 1/2018, 72-73.

[30] Ibidem.

lynch mob, the Lawyer will prove his innocence , thereby avoiding a very probable death sentence.

We may think about a 2007 Mexican-Spanish film called "The zone", directed by Rodrigo Plá. The film describes a failed break-in attempt in a gated community thereby recalling the sanctity of private property as a vexatious and somehow violent and discriminatory form of social exclusion.

Law can be manipulated and interpreted and manipulated to change rapidly his attitude. Soon it become an ally of social engagement and fundamental rights when someone (the hero) achieves the goal to make the legal system more sensitive and flexible in order to open the eyes of justice. But it's normally a very challenging target and you can't get ahead of it without having a tremendous breakthrough, a genius stroke.

I'm not saying anything new here about storytelling's main technique. Basically it's just the same struggle of Oedipus against the Sphinx narrated in the play "Oedipus The King" by Sophocle[31]. There are many examples of such archetypes: the above mentioned To Kill a Moking Bird, the classic 12 Angry men, by Sydney Lumet (a film of 1957), The Rainmaker, another class-actions movie by Francis Ford Coppola, until the famous case of Portia's closing argument in the popular Film "The Merchant of Venice"

[31] "What's important is that Oedipus was admitted to Jocaste's side because he had triumphed at a trial of truth" (J. Lacan, - (1969-70) *The Seminar of Jacques Lacan. Book XIX. The Other Side of Psychoanalysis* (Trans. Rusell Grigg), Ed. Jacques-Alain Miller (New York/London: Norton, 2007) p. 117. As well known Freud and Lacan refer to the Oedipus myth and to Sophocles' homonymous tragedy. See also G. Deleuze, *Présentation de Sacher-Masoch: Le froid et le cruel,* Editions de Minuits, *1967*: "L'objet de la loi et l'objet du désir ne font qu'un, et se dérobent à la fois."

(with Al Pacino, 1994), inspired by the homonymous Shakespearian Drama[32].

The film discourse, with the above mentioned struggle, can often be an alternative interpretive tool in order to deal with the complexity of a certain issue[33]. Additionally or alternatively to classic authority paradigm, we may think to a more complex method of analysis[34]. Samuels calls "resonance" such a broader methodological framework for interpretation. Leaving aside the strict hierarchical patterns of analysis the idea is one of empathetic way of dealing with legal problems, trying to encompass human experiences taken from the real, ordinary world. This depiction of litigation mechanism contributes to shed a critical light on the sensitive issue of professional ethics of lawyers[35]. The audience is often led to ask himself the rhetorical question:

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[32] About the Shakesperean influence on judicial reasoning in Common Law, see C. Costantini, Nomos e rappresentazione. Ripensare metodi e funzioni del diritto comparato, Milano, 2017, 569-570.

[33] See K. Laster, *The Drama of the Courtroom*, 2000, The Federation Press, vii: "Movies seemed to offer great promise. For students of law and legal studies, courtroom films in particular appeared to be an ideal way of demonstrating the vagaries and complexities of law in action." See also J.W. Dellapenna (2008), *Peasants, Tanners, and Psychiatrists: Using Films to Teach Comparative Law*, International Journal of Legal Information, Volume 36, Issue 1, Article 10.

[34] See Samuel, *The Paradigm Case*, p. 36-37: "As has been seen, the goal of the legal theorist is to find an intelligible order in the cases and statutes that are the objects of the interpretation. Indeed Dworkin has argued that the role of the judge is to participate in a grand project that is analogous to writing a chain novel and thus the judge as interpreter is indeed working towards the idea that each instance is part of a greater general theory. In short coherence has been a major objective in legal reasoning, especially since the 16th century (Samuel 2012, 448). Yet Carroll's assertion has perhaps some resonance for lawyers. Tony Weir, in an article comparing contract in English and Roman law, once attacked theorists in asserting that he had no theory to propound. Legal technique was, in his view, casuistic and thus Roman jurists were practical lawyers who 'hypothetically varied the actual facts of the situations presented to them, and considered what the legal effect of such hypothetical variations would be' (Weir 1992, 1617)".

[35] L. E. Ribstein, *Wall Street and Vine: Hollywood's View of Business*, Manage. Decis. Econ.33: 211–248 (2012).

imagine how much as peaceful and fair the society would be if legal system would pay a closer attention to this matter.

Given this change of ermeneutical structures why not teach legal topics as contract, tort etc. through empirical focal points, like debts or personal injury, that statistically are the more relevant?[36] One might go further and group the cases and statutes around concrete topics which find a correspondance in movies' subgenres[37]. A case in point could be large scale pollution and class actions movies or, for instance, stories ending with resolutive apologies.

Film studies show how individual relationships and human passions could temper the rigidity of hierarchical structures and authoritative paradigms. Judges, and even more juries, have to cope with real world experiences and they should adopt some flexibility in the application of abstract principles and categories. Cinema studies often teach us that sometime legal reasoning needs also compassionate and empathetic feelings[38]. For example, I think it's interesting to take into account movies which represent a critical voice against the prone position of law to neocapitalist ideology with his claim about rational behavior and maximum profit. As underlined by Samuel, some films suggest that "the tension between the individual and the political

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[36] Ibidem.

[37] Samuel, The Paradigm Case, 38.

[38] See S. A. Bandes, J. A. Blumenthal, *Emotions and the Law*, Annu. Rev. Law Soc. Sci. 2012. 8:161–81; M. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life*. Boston: Beacon Press, 1996. Pp. xvii, 137. About this book, see T. Morawetz, (1996) *Empathy and Judgment*, . Yale Journal of Law & the Humanities: Vol. 8: Iss. 2, Article 8, p. 3, noting that "She seeks to show that judicial decisions informed by "the literary imagination" are likely to be sounder and wiser than judgments reached by other means. Secondarily, she argues that legal education and the perspectives of lawyers should similarly be tempered by literary study".

whole is part of a human structural relationship in which the 'fallibility' of the individual relationship is always going to be the weak point in the best devised political and holistic Leviathan monoliths. Such monoliths are not designed for such individualist 'deviations' just as economic models of society are not designed to cater for the *homo economicus* who is not a self-interested and rationally greedy individual"[39]. Structuralism and functionalism (holism) are up against actionalism and agency (individualism)[40].

The power of such human relationships, whatever their fatal consequences, are never dismissed by the viewer and will haunt him after leaving the cinema[41]. So empathy can be the cathartic moment of a legal drama as well as the added value in deciding on a court case: a quite human "deus ex machina". Hollywood just does this with some emotional and entertaining force. And this is something that the comparative law textbook might not be so good as achieving[42]. That's why Law and Cinema can be so important for Comparative Law studies.

3. Apologies discourse and legal movies

[39] G. Samuel, *Cinema and Law- Ten films for the Comparatist?*, (https://british-association-comparative-law.org/2017/05/22/geoffrey-samuel-cinema-and-law-ten-films-for-the-comparatist/).

[40] Ibidem.

[41] Ibidem.

[42] Ibidem.

We can get many suggestions about apology by studying Law and Cinema. Apology scholars are quite aware that lack of regulation and weackness of authority paradigms are at stake, especially in civil law systems. In general, this fact is knowingly due to the suspicion with which adversary culture looks at apologies, although the latter could brilliantly serve different forms of reconciliation or redress purposes.

Since legal reasoning confirms an highly self-referential attitude because of its reluctance in dealing with psychological or social issues, some movies help significantly to underline how the social pattern can interfere with legal position in an original and sometime complex way. Think about the function typically performed by film to report facts that should be regarded as indicator of a larger or emerging social problem. For example many environmental legal dramas are inspired by real cases. In a film you can see, from a privileged point of view, how a complaint initially stemming on the individual, is in fact a matter of collective interests. As a consequence, people at large, or a growing number of victims, may give voice to collective values as public health, freedom, right to dignity, notwithstanding the person involved in a legal dispute was initially alone (or at least in a small group).

Usually the discovery of truth doesn't depend entirely on a legal-adversary paradigm in itself, but on an altruistic and somehow idealistic effort. This role is often played by the positive hero of the story, sometimes a Lawyer, who fight against the system to bring some misdeeds into the public eye. In piercing the viel he is similar to a Don Quixote tilting at windmills. According to this pattern, the film's message in itself expresses a plaintiff empathetic point of view whereas the spectator is treated likes a metaphoric juror. Someone that could be persuaded by the multifaceted

cinematographic representation.

We can try to focus on such interferences between law and film with particular reference to apologies. We've seen that a first pattern is represented by the storytelling about an individual, the small and vulnerable, who fights againts the powerful, that could be either police, public authority or the large and greedy company[43]. The latter is usually suspected of carrying out abominations or concealing serious, or even large-scale, crimes. But, little or nothing can be done: the situation appears to be hopeless until something happens. Again, someone, slightly the hero, takes it to heart.

According to this pattern, some parallels can be drawn between case law and movies. Think about cases of people taken into custody by the police and then died under suspicious circumstances. For example, let's look at the Italian Cucchi case[44], a boy who died in prison after being arrested for dealing.

What horrified and stunned the public most was the conspiracy of silence (in Italian expressed by the untranslatable word "omertà"). The Stefano Cucchi story inspired a very moving italian film called "On my skin" that won the David di Donatello award in 2019. In telling the Stefano Cucchi's martyrdom, the movie definitively contributed to stir up strong reactions of disappointment in the public sphere[45]. After a large debate, the case itself had a major break. One of the offenders- also a key test- apologised to Ilaria Cucchi (the Stefano's sister) and also the High Command of the Italian Carabinieri started to change his opinion on the events.

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[43]L. E. Ribstein, *Wall Street and Vine: Hollywood's View of Business*, 212-213.

[44]L. Tondo, *Trial gripping Italy hears police beat detainee who later died*, The Guardian, Wed. 10 Apr 2019.

[45] Ibidem.

Although it took quite so long to dig it out of the muck, the whole truth came out and prevailed due to the fight carried on by the family and due to the film's success.

I've found similarities between the Cucchi's story and the case cited by Robyn Carroll about discrimination and vilification against an aboriginal man[46]. In that case, the New South Wales Administrative Decisions Tribunal found the complaints substantiated and, in addition to ordering the payment of damages, ordered the Commissioner of the New South Wales Police Service and each of the police officers named in the orders, individually, to write a letter of apology to the parents of the late Mr Russell[47].

In the melodrammatic movies of the 50", the plot's pathos was framed as a moral rescue of positive values that were apparently doomed to perish. The possibility to save someone from an evil and tragic destiny depended upon a higher, somehow sacrated, force. This scheme creates a typical

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[46] R. Carroll, Apologies as a legal remedy, (2013) 35 *Sydney Law Review*, p. 329-330. "In Russell v Commissioner of Police, New South Wales Police Service82 Mr Russell, an Aboriginal man, was found to have been the subject of unlawful racial discrimination and vilification while being taken into custody. The enquiry by the Equal Opportunity Tribunal related to a complaint under the Anti-Discrimination Act 1977 (NSW) lodged by Helen and Ted Russell on behalf of their son, Edward John Russell. The complaint was lodged with the Anti-Discrimination Board on 6 February 1998. At that date Edward John Russell was alive but was in prison. He subsequently died, in late 1999, in circumstances that were not the subject of the Tribunal's enquiry. The New South Wales Administrative Decisions Tribunal found the complaints substantiated and, in addition to ordering the payment of damages, ordered the Commissioner of the New South Wales Police Service and each of the police officers named in the orders, individually, to write a letter of apology to the parents of the late Mr Russell in the following terms.
On the 11 December 1993, eleven police officers stationed at the Bathurst Police Station apprehended and arrested Edward John Russell, an aboriginal person, on the Wiseman's Creek Road at Oberon. The Equal Opportunity Division of the Administrative Decisions Tribunal has found that the conduct of the police officers, and the language used by them, towards Mr Russell during his arrest, were in breach of the racial discrimination and the racial vilification provisions of the Anti Discrimination Act. The Tribunal also found that the NSW Police Service was liable under the Act for the conduct of the officers on that occasion. On behalf of the NSW Police Service I wish to apologise to you for the conduct of the police officers on that occasion".

[47] Ibidem.

tension in the audience, called pathos, a greek word that means passion, sentiment but also sufferings.

Speaking of damages in a legal perspective, we know how much pathos can be linked to "pain and sufferings" cases in Tort Law. In fact a moral prejudice implies mirroring in the victim's experiences and most important thing it cannot be easily compensated.

Romans used to say "factum infectum fieri nequit" which sounds like: "what's done is done and cannot be changed". Here, apologies play an important role as a turning point to reach the victim's need for justice. In such cases, apologies are often the first critical step for ascertaining the truth and compensate the injured party.

We may also see how personal/individual cases can rekindle larger social conflicts.

Let's look at the film "The Insult"[48] which is set in Beirut, Lebanon, a city still experiencing the economic and emotional repercussions of the 15-year civil war that ended in 1990. After an emotional exchange between a Lebanese Christian, Tony, and a Palestinian refugee, Yasser, escalates, the men end up in a court case. An important point I would like to stress is the role of their lawyers, father and daughter. Since the father and daughter relationship is very turbolent, this is another important level of conflict. Although they could help the two litigants to mediate and reconciliate each other, they are more more interested in exacerbating the conflict, rather than in moving forward mutual apologies and concrete pragmatic steps. Both father and daughter (but definitively more the father than the daughter) are

[48] A.O. Scott, *Review: In "The Insult", the Dispute Is Personal. And Political*, The New York Times, Jan. 10. 2018.

only worried to be in the limelight. As a consequence a trivial, personal litigation explodes into something much larger: a broader conflict consuming a society and a nation. Will Tony and Yasser manage, notwithstanding their lawyers, to find a way to apologize properly and reach a settlement? Again I won't spoil that for you.

We may see a similar interference between two litigation's dimensions, an individual one and a social one, in the Film "A civil action"[49]. The real case that inspired the film (and the book on which the film is based) is Anderson v. Cryovac, Inc, 805 F. 2d 1 (1st CIR 1986). The film talks about some people severely injured by water pollution and therefore entitled to (and then awarded with) compensation as members of a class-action lawsuit. A lawyer tries to explain them the advantages of pleading out this case. But the mother of a young victim answer that she is not interested in money, she just wants the apologies of the tortfeasor. And this is going on while the victim's families are joining a listening group. Damages appear clearly as a collective issue, since the whole life of a community was severely tried just for economic interests of a business. When the mother says "I want only apologies, not money", she is expressing in a somehow naivety but very simpathetic way: my aim is that they regret what they did, I guess my only wish would be that nothing so terrible would ever happen to anyone else ever again. On the contrary, the lawyer thinks immediately about evidence. Absent a "smoking gun", or an irrefutable proof, asking for an apology is like asking for the moon! For his part the lawyer is more worried to look for evidence rather than for apologies. Since apologies can amount to a statement of fault, asking to the defendant to admit wrongdoing is, absent a smoking gun, probably an

[49] See J. Herman, *A civil action: is there room for apology in the adversary system?*, Picturing Justice. The On-Line Journal of Law and Popular Culture , January 20, 2005.

unrealistic and unreasonable goal.

Thinking about this film can be particularly helpful to shed light on the relationship between lawyers and parties and their incompatible attitudes about apologies. If transposed into the legal arena, apologies are an elusive, but not less important, topic that lay between evidence and remedies, substantive law and procedural law, rational and irrational features. Legislation often treats them only to protect those who apologise from the risk of self-incrimination. Some statutes, for example, make clear which features are needed to consider an apology statement as an admission of wrongdoing or, otherwise, what it needs to keep them outside the realm of 'general admissions of fault' mandatory law[50]. Unike common law countries which tend to protect, although with different intensity, apologies statements, most of the civil law countries haven't got any legistation protecting apologies. The assessment is left to the judges interpretation about the specific evidence of confession.

On the other side, apologies could be considered as remedies. However, considering apologies as a legal remedy seems to change significantly the rational paradigm of law. I mean essentially that the right to keep silence, purported by Rule of Law and Due Process can be obvously incompatible with a compelled self-incrimination. However, the situation could change slightly in the case of a smoking gun, or if there is a hard evidence against the potential apologizer. In a previous comparative law study[51] I argued that such a remedial function of apologies has been mostly framed overtime by certain cultural paths (path dependency). For example, it is traditionally

[50] For a comprehensive analysis, see R Carrol, J Chiu, P Vines, *Apology Ordinance (CAP. 631): Commentary and annotations*, Hong Kong, 2018

[51] N. Brutti, Law & Apologies. Profilo comparatistico delle scuse riparatorie, Torino, 2017.

viable in most far eastern countries according to a religious and collectivist view of the human relationships[52], meanwhile in other countries (i.e. Australia, South Africa) one should consider the previous and very peculiar influence of political reconciliation processes on legal cultures and legal systems etc.This is mainly a charateristic of historical or post-colonial experiences[53].

A further aspect I would like to focus on is the interpersonal-psychological function of apologies as a tool to mediate a dispute[54], since the legal system used to be not so sensitive to such a goal especially in civil law countries[55]. Apologies asked by the victims of a large scale pollution case, like the one in the film "A civil action", can be interpreted not so much as a mean to achieve evidence or truth, which are in any case achievable elsewhere, but rather as a form of moral redress, a symbolic gesture, or as an important step towards a possible reconciliation[56].

We can take into account the dialogue between a tortfeasor and a victim, and the resulting apology ritual, as a mean aimed at bridge a moral

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[52] See the seminal work by H. Wagatsuma & A. Rosett, *The Implications of Apology: Law and Culture in Japan*, 20 Law & Society Rev. 461 (1986).

[53] For a comparative-historical perspective, Jan Hallebeek & Andrea Zwart-Hink, Claiming apologies: a revival of amende honorable?, Comparative Legal History, 5:2, 194-242.

[54] "…apologies will generally be a part of the negotiated corrective interaction between the parties and that legislation should accommodate the process without being overly prescriprive and that lawyers should therefore refrain from judging the apologies their clients offer or accept." See A. Allan, J. Strickland, M.M. Allan, *Interpersonal Apologies: A Psychological Perspective of Why They Might Work in Law*, *Oñati Socio-legal Series*, v. 7, n. 3 (2017)- *The Place of Apology in Law*, 390; see also D.L. Levi, Note, *The Role of Apology in Mediation*, 72 NYU L. Rev., 1165, 1167 (1997)..

[55] See W. Vandenbussche, Introducing Apology Legislation in Civil Law Systems. A New Way to Encourage Out-of-Court Dispute Resolution (August 23, 2018). Available at SSRN: https://ssrn.com/abstract=3237528 or http://dx.doi.org/10.2139/ssrn.3237528.

[56] A. Zwart-Hink, A. Akkermans, K. Van Wees, Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction, (2014), 38 Australian Law Rev., 100.

gap between the tortfeasor and the victim. We see how legal systems can incorporate this technique in order to reduce the distances between the parties. If the attempt would be successful, that'll probably allow a mitigation of both damages and sanctions.

We can see that in the 2011 movie "Le gamin au vélo" (The kid with a bike)[57], produced through companies in Belgium, France and Italy, Cyrille is an eleven years boy abandoned by his father and about to head a bad path. The film shows very accurately and empathetically the feelings of anger, frustration and abandonement experienced by Cyrille. The kid ends up running away from his foster mom, after having stabbed her, and, after that, he commits an assault against a man and his son with the intention to rob. However the situation will significantly change when Cyrille starts to realize this is no way for him to live. But his entry into such a conscious, and somehow adult, stage occurs while he realizes the possibility to be accepted and loved notwhitstanding his past errors. In fact, his foster mother is ready to forgive him. Sometimes the one who is really sorry is afraid he is never going to be forgiven and he refrains from taking the first step.
Finally Cyrille apologises to the woman who took care of him, and also to the victims of the assault at a pre-trial settlement conference. One of the victims doesn't accept the apologies but I don't want reveal you the ending, because what follows would be beyond your imagination: you must see such a moving film!

In "I am Sam", an American drama film starring Sean Penn as a single father with an intellectual disability, the audience is brought to simpathize with Sam

[57] The film, directed by Jean-Pierre et Luc Dardenne, received the Grand Prix at the Cannes film Festival, 2011.

since he is in danger of losing his daughter's custody because of his intellectual gap. At the trial Sam looses his custody since the best interest of the daughter Lucy is assessed without caring about emotional issues, but in a very formalistic and efficiency oriented way[58]. Afterwards, Lucy resides in a foster home with the foster mom Randy, but she continually escapes in the middle of the night to go to his apartment, though Sam immediately returns her to Randy. However, the foster parents decide not to adopt Lucy and Randy apologize to Sam for trying to take away his kid[59]. Randy finally assures that she will tell the judge Sam is the better parent for Lucy. In turn, Sam shows his wisdom and humility in asking Randy if she will help him raise Lucy, because he feels she needs a mother figure.

But the path towards apologies is not necessarily straight and easy. It could be narrow and insidious. The film Carnage (2011), directed by Roman Polansky, is inspired by the book *God of Carnage* by the French playwright Yasmina Reza. It's considered a black-comedy drama and conveys a pessimistic and somehow nihilistic message. The original story is set in France, but the Polansky's film is adapted to a New York left-wing atmosphere. The parents of a boy who assaulted another boy meet the

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[58] From the Movie's script (http://www.script-o-rama.com/movie_scripts/i/i-am-sam-script-transcript.html): "Given the fact that the father...was arrested for solicitation...couldn't control his emotions... endangering other children. No, you can't! It's her birthday! Ms. Calgrove also cites...Mr. Dawson's mental delays which raise serious questions...about his ability to properly parent. Run! I find at this time...it's not in the best interest of the child to remain in the home. And I order her detained...until a formal jurisdictional hearing. Mr. Dawson. Is there anything you'd like to add? I wanted to make it a really special surprise party. So I went, and I got plates at the Pic 'n' Save...in yellow and in pink--Like a princess. And then I went to the toy store...and I got balloons with the helium in them. -Mr. Dawson? -Yeah. It sounds like you gave her such a lovely party. Yes, I'm sure it was. Right now, I want to talk to you about your legal rights. OK. There's room at this table...if anybody wants to sit next to me. I just want to talk to you about your legal rights...so if you have not already retained legal counsel...the court will appoint someone for you..."

[59]Ibidem: "I have to apologize to you...because I was gonna tell that judge...that I could give Lucy the kind of love she never had. But I can't say that, because I'd be lying."

victim's parents to apologize and settle the dispute. The attempt fails because apologies lack any consciousness and analysis about the remote causes of the event. Instead of sincere and heartfelt apologies, the offender's parents brings out the worst: selfishness, inner conflicts, neurotic personality traits. As soon as each character takes his mask off, expressing himself genuinely, the public can see the weackness of human relationships as well as primordial and disruptive instincts. Polanski's provocative thesis casts a critical and pitiless sad eye over the shortcomings of "politically correct". That becomes also an occasion for showing the dark side of apologies, notably the utter meaninglessness of fake apologies and "cosmetic reconciliation".

How it would have been different if they had taken that chance… Let's look at "Two solutions for one problem" (1975), a pedagogical short film by the Iranian director Abbas Kiarostami. The plot seems very familiar to legal reasoning because it rests upon a predictive and dichotomic structure. But it's also related to a classical Law and Economics issue: the advantages of cooperation[60]. Given a certain background, that is two friends are at school and one borrows a book by the other and returned it damaged, two opposite scenarios are developed. In the first plot, since the book returned is damaged the owner gets angry and suddenly his little revenge becomes a fight. The conclusion is that the amount of damage increases for both kids. In the second version, the same event (the book damaged by its borrower) has an opposite development. After having made heartfelt apologies to his friend, the borrower will fix the book with glue. By taking things calmly they find a solution together. Here is the importance of dialogue and cooperation. Through such alternative structure of narration, the author seems to warn

[60]See R. Axelrod, *The Evolution of Cooperation*, New York, 1984.

the public on the importance of thinking about our actions before it's too late. Admitting fault and repairing errors is the best option if there is still time to cooperate and prevent serious reactions from the other side[61]. Also the roman jurists used to warn people from making the wrong choice and to invite them to take responsibility of their actions by the saying: factum infectum fieri nequit (what's done cannot be undone!).

4. Final remarks

The discussion about apologies in the legal arena is very challenging because it implies a change of paradigms in legal reasoning.

As well known, apologies- especially the so-called full apologies- can be deemed as so many admissions of wrongdoing by most legislations in the world. As a consequence, lawyers are traditionally reluctant to recommend their clients to apologize. According to an adversary culture, this is considered a classical "reasonable man" pattern. There is no room for mercy and forgiveness in a trial.

Although apparently rational, that solution could come up against the real needs of the parties involved in a dispute. We may think about those asking for apologies or for a new opportunity. Sometimes such needs can't be assessed without a compassionate and empathetic view. Given the limits of the traditional and rational approach, a more nuanced and casuistic method is recommended to comprehend the peculiarities of the relationships

[61] "Working within such a framework, Kiarostami could reflect on the advantages of cooperation over conflict (in 'Two Solutions for a Problem')". See J. Rosenbaum, *Before He Was Famous (Kiarostami's Early Shorts)*, Posted April 17, 2018 (https://www.jonathanrosenbaum.net/2018/04/before-he-was-famous-kiarostamis-early-shorts/).

and remedies at stake. However some scholars acknowledge that apologies could be important and should be encouraged[62]. But they often advocate a modified apology, such that it avoids the admission of wrongdoing[63]. On the other hand, apologies could be the result of a settlement negotiation on an impartial basis, as judge or mediator. But such a possibility must be explored carefully by taking into account the specificities of the case and by introducing adequate incentives to cooperation. As we've seen, some films offer significant insights about specific situations in which apologies can play an important role. They can facilitate the empathic attitudes of parties, judges, jurors and lawyers in most cases involving moral damages, psychological harms, child's custody and the child's best interest. Such a psychological and interdisciplinary view seems to help the interpreter to get more tailored and refined results suitable to complex needs. Only thus will it be possible to attach a more realistic legal value to apologies as a recognition of the other.

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[62] J. Herman, *A civil action: is there room for apology in the adversary system?*, Picturing Justice. The On-Line Journal of Law and Popular Culture , January 20, 2005, 3; M. H. Tanick & T. J. Ayling, Alternative Dispute Resolution by Apology: Settlement by saying I'm Sorry, The Hennepin Lawyer 65 (6) (July-Aug 1996) 22.

[63] Ibidem.