

# CASABLANCA: JUDGMENT AND DYNAMIC ENCLAVES IN LAW AND CINEMA<sup>©</sup>

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By interpreting the narrative and imagery of the film *Casablanca*, this article seeks to explore the concept of law as enclave. An enclave is a domain—physical, virtual-emotional, conceptual, social or other—defined by certain boundaries and rules of entrance and exit. We argue that *Casablanca* is about constructing and reconstructing such enclaves. The structure of a pending journey between enclaves organizes the events taking place in *Casablanca* and constitutes their dynamic nature.

Enclaves, we argue, are central to the structure and operation of the law. Recognizing the enclitic nature of law allows us a better grasp of the ethical dimensions of legal practices and reasoning. Further, it makes apparent the oft-overlooked aesthetic dimensions of normative judgments in law (and in film).

Our analysis of *Casablanca*'s legal aspects is one example of how law and film may be juxtaposed. Such juxtaposition enriches our understanding of the concepts that structure law and offers a nuanced reading of ethical judgment practiced within the legal and cinematic discourses.

En interprétant le narratif et l'imagerie du film *Casablanca*, cet article cherche à approfondir l'idée du droit comme enclave. Une enclave est un domaine « physique, virtuel-émotionnel, conceptuel, social ou autre » borné par certaines limites et soumis à des règles d'entrée et de sortie. Nous avançons que *Casablanca* porte sur la construction et la reconstruction de telles enclaves. La structure du passage imminent d'une enclave à l'autre organise les événements qui interviennent dans *Casablanca* et constitue leur nature dynamique.

À notre sens, les enclaves sont au cœur de la structure et de la marche du droit. Reconnaître la nature enclitique du droit nous permet de mieux concevoir les dimensions éthiques des pratiques et raisonnements d'ordre juridique. Par ailleurs, cela met au jour les dimensions esthétiques, souvent méconnues, des jugements normatifs dans le droit (et au cinéma).

Notre analyse des aspects juridiques de *Casablanca* illustre comment le droit et le cinéma peuvent être juxtaposés. Une telle juxtaposition enrichit notre compréhension des concepts qui structurent le droit, et propose une lecture nuancée du jugement éthique pratiqué au sein des discours juridique et cinématique.

I.	INTRODUCTION . . . . .	202
II.	CASABLANCA: THE STORY . . . . .	204
III.	“IN CASABLANCA I AM MASTER OF MY FATE”—THE CHIMERICAL ALLURE OF THE ENCLAVE . . . . .	206
	A. <i>The Geography of Enclaves</i> . . . . .	206
	B. <i>Enclaves of Emotions</i> . . . . .	211
	C. <i>The Dynamic Dimension of Enclaves</i> . . . . .	214
	D. <i>Law as an Enclave</i> . . . . .	215
	E. <i>The Path of Judgment: Ethical Choices in Dynamic Enclaves</i> . . . . .	218
IV.	CONCLUSION: “BUT IT’S STILL A STORY WITHOUT AN ENDING” . . . . .	225

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## I. INTRODUCTION

In this article we wish to revisit the seemingly well-trodden paths of the classic<sup>1</sup> movie *Casablanca*—the iconic representation of World War II-era Western sentiments<sup>2</sup>—yet this time for a legally relevant end. We wish to explore, by interpreting the narrative and imagery of the film, a thus-far unrecognized organizing element of law and legal practice: the enclave.

By “enclave” we mean a formal domain defined within certain borders. This domain can reside in the physical, social, emotional, virtual, normative or any other realm. An enclave is a territory distinct from its surrounding space.<sup>3</sup> By definition an enclave is bounded, and exit from and entrance to it are controlled if not constrained. At the same time, where border and boundary exist, so does the possibility of trespass, free pass and journey; where entrance and exit rules exist, so does the potential for exceptions, violation and transformation. We submit that enclaves are central to the understanding of both law and film, as is exemplified by *Casablanca* and by the legal references made therein.<sup>4</sup>

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<sup>1</sup> See Richard E. Osborne, *The Casablanca Companion: The Movie Classic and Its Place in History* (Indianapolis: Riebel-Roque, 1997). Osborne writes, “Webster’s New Lexicon Dictionary defines a ‘classic’ as something that has been ‘received into accepted canons of excellence.’ By the late 1950s, *Casablanca* had met this standard. Virtually every educated person knew that the word ‘Casablanca’ referred both to a city and a movie” (*ibid.* at 258). As Osborne meticulously elaborates, both the allure and standing of the film have not faded in the following decades. Alongside its continued popularity, the film and its creators have accumulated a long line of formal tokens of honor and appreciation. The film won Best Picture, Julius J. Epstein, Philip G. Epstein and Howard Koch won Best Screenplay and Michael Curtiz won Best Director at the 1943 Academy Awards. Forty-five years later, when the US Congress created the National Film Registry for the preservation of “culturally, historically and aesthetically significant” films, *Casablanca* was among the first 25 films selected (*ibid.* at 264).

<sup>2</sup> *Casablanca* is arguably more than a film; it is a representation of both the World War II generation and post-war twentieth century culture that helped shape our understanding of what World War II was about, on public and private levels. The conjunction of the acting, directing, editing, and cinematography captured our collective imagination and has held it since the movie was made in 1942. The enduring stature of the film can be attributed to various factors. Corliss, for example, claims that the script writers deserve the greatest credit: “[T]he success of *Casablanca* ultimately derives from the character development and dialogue.” See Richard Corliss, “Casablanca: An Analysis of the Film” in Howard Koch, ed., *Casablanca: Script and Legend*, 2d ed. (Woodstock, N.Y.: The Overlook Press, 1992) 233 at 234.

<sup>3</sup> The Oxford English Dictionary defines “enclave” as “a portion of territory entirely surrounded by foreign dominions.” *The Oxford English Dictionary*, 2d ed., s.v. “enclave”.

<sup>4</sup> Cf. Maltby’s suggestion that the mystery of *Casablanca* lies in its form. See Richard Maltby, “Casablanca” in John Hill & Pamela Church Gibson, eds., *The Oxford Guide to Film Studies* (Oxford: Oxford University Press, 1998) 283 at 285-86. On a conceptual level, an enclave—and its creation and representation—are all matters of form.

The use of enclaves in *Casablanca* is central to the plot. The movie is framed as a physical journey between enclaves: the movie opens with a map of Europe at war superimposed on which are images of fleeing refugees. Arrows on the map trace the possible routes to “freedom” accompanied by a voice-over that describes the “tortuous, roundabout refugee trail” from “imprisoned Europe” to Casablanca.<sup>5</sup> The movie ends with the departure of a plane for that desired destiny, the enclave of liberty. While the movie itself takes place in a static location—the city of Casablanca—we are nonetheless introduced to Casablanca as a half-way house, an in-between place. The structure of a pending journey between enclaves thus colours the events taking place in *Casablanca* and informs us of their dynamic nature. The characters—and through them the spectators—are on their way to somewhere else, and the time spent in Casablanca (and in *Casablanca*) is, at least for some, hopefully just en route. Yet enclaves in *Casablanca* are not confined to the physical domain. As we will further develop later in this article, *Casablanca* can be read as the construction and reconstruction of various enclaves.

In this article we will argue that law operates in similar ways. Law, or more specifically, legal practices and their ideal types, are structured around enclaves. Since law faces the impossible task of addressing the human condition and social reality in their entirety, it parses out segments of that reality into enclaves. Such enclaves are sometimes conceptual—sets of rules, doctrines or legal definitions that construct a certain legal domain—and sometimes physical—discrete, specifically allocated geographical spaces within which disputes are settled, behaviour governed and meaning generated.

Recognizing the enclitic nature of law is important, we submit, not only because it provides a more accurate understanding of how law is constructed, but also because it allows us a better grasp of the ethical dimensions of legal reasoning. More specifically, it highlights the oft-overlooked aesthetic dimensions of normative judgments in law (and in film).

*Casablanca*'s significance, therefore, is not confined to the realms of film and cultural studies. It is a potent vehicle for legal theory, and thus the legal observer stands to benefit from its analysis.<sup>6</sup> *Casablanca* is not only

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<sup>5</sup> Julius Epstein, Philip Epstein & Howard Koch, “The Screenplay” in Howard Koch, ed., *Casablanca: Script and Legend*, 2d ed. (Woodstock, N.Y.: The Overlook Press, 1992) 23 at 27.

<sup>6</sup> To the extent that classification is necessary, this article may be situated within the emerging field of law-and-film. This area of inquiry is relatively new, and its contours are still being defined. See generally Stefan Machura & Peter Robson, eds., *Law and Film* (Oxford: Blackwell Publishers, 2001)

fun to watch for the motion-picture enthusiast, the romantic soul or the history buff; its form and content are also germane to jurisprudential theory. From a broader perspective, our analysis of *Casablanca*'s legal aspects—especially since the film is not a courtroom drama<sup>7</sup>—provides one example of how law and film might be juxtaposed. Such juxtaposition is of value, we suggest, because it enriches our thinking about the concepts that structure law and offers a nuanced reading of ethical judgment practiced within the law and film.

Part II provides a brief synopsis of *Casablanca*. In Part III we explore and elaborate the concept of the enclave as revealed in *Casablanca*, and then turn to demonstrate, briefly, how this concept is relevant to law and to ethical judgment.

## II. *CASABLANCA*: THE STORY

It seems hardly necessary to retell a story as widely familiar as *Casablanca*. The brief synopsis presented below seeks only to highlight the key elements of the narrative.<sup>8</sup>

The movie is set in 1941 in the Moroccan city of Casablanca, then part of French territory. Midway through World War II, Casablanca serves as a way station for refugees en route to Lisbon and ultimately—hopefully—America. Those who arrive without immigration documents must make the rounds of foreign embassies and the black

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at 3-8; Paul Bergman & Michael Asimow, *Reel Justice: The Courtroom Goes to the Movies* (Kansas City: Andrews and McMeel, 1996); David A. Black, *Law in Film: Resonance and Representation* (Urbana: University of Illinois Press, 1999); Steve Greenfield, Guy Osborne & Peter Robson, eds., *Film and the Law* (London: Cavendish, 2001); John Denvir, *Legal Reelism: Movies as Legal Texts* (Urbana: University of Illinois Press, 1996); “Symposium, Law and Popular Culture” (2001) 48 *UCLA L. Rev.* 1293; “Symposium, Film and the Law” 22 *Okla. City U.L. Rev.* 1; Orit Kamir, “Feminist Law and Film: Imagining Judges and Justice” (2000) 75 *Chicago-Kent L. Rev.* 899.

<sup>7</sup> At first glance, our choice may seem odd. Not only is *Casablanca* not a courtroom drama, it does not feature lawyers in any capacity. Similarly, *Casablanca* does not raise traditional legal questions regarding the ethical dimensions of public international law. It is precisely because the law and legal process are seemingly *not* central to *Casablanca* that we find the film attractive for our purposes. As we will demonstrate in this article, the unarticulated attitudes towards the law woven in a non-courtroom drama reveal and regenerate a certain social and cultural reality, or more accurately, a representation thereof. This representation (or perception) of a social reality on the silver screen—a reality in which law, hidden or prominent, is an ingredient—allows us to explore law and film beyond the specific genre of “lawyer films,” if such genre exists.

<sup>8</sup> The story is based on *Everybody Comes to Rick's*, a play by Murray Burnett and Joan Allison. Warner Brothers purchased the rights to the play before it reached Broadway. See Howard Koch, “The Making of Casablanca” in Howard Koch, ed., *Casablanca: Script and Legend*, 2d ed. (Woodstock, N.Y.: The Overlook Press, 1992) 11 at 14 [Koch, “The Making of Casablanca”].

market, trying desperately to secure exit visas. For those who fail, Casablanca becomes their final destination.

Much of the action takes place in Rick's Café Americain, "an expensive and chic nightclub which definitely possesses an air of sophistication and intrigue."<sup>9</sup> It is a popular meeting place: "everybody comes to Rick's,"<sup>10</sup> including locals and strangers, smugglers and buyers, gamblers and clubbers, and anyone who wants to see and be seen. The club's owner, Richard "Rick" Blaine (Humphrey Bogart), is suave and sophisticated, able to maneuver confidently between corrupt French officials, Nazi officers and nervous patrons. His only apparent concern is keeping the club in business, and he schemes and deals to do so, convincing French Captain Louis Renault (Claude Rains) to turn a blind eye to illegal activities in the club in exchange for a share of the gambling profits. His avowed policy is "I stick my neck out for nobody." By that he also means he takes nobody's side. This he puts into practice by studiously avoiding emotional entanglements and political involvement. This delicate, carefully-negotiated balance is disturbed when resistance leader Victor Laszlo (Paul Henreid) arrives in Casablanca, accompanied by his beautiful wife Ilsa Lund (Ingrid Bergman).

Naturally, Laszlo and Ilsa come to Rick's Café, where Sam, Rick's loyal friend and piano player, recognizes Ilsa, and accompanies her arrival with the famous song, "As Time Goes By." As we gradually discover, Ilsa and Rick had a short but passionate affair in Paris. When the Germans entered the city they agreed to take the train to Marseilles but Ilsa failed to show up, instead leaving a note that read, "Richard: I cannot go with you or ever see you again. You must not ask why. Just believe that I love you. Go, my darling, and God bless you. Ilsa."<sup>11</sup>

It is only at his Café in Casablanca that the embittered, disillusioned Rick finds out that Ilsa was already married to Laszlo when they met in Paris. Now Laszlo is desperate to get two letters of transit that will enable him and Ilsa to escape to the free world. As it happens, Ugarte (Peter Lorre), a black-market dealer, deposited two such letters with Rick just before he was shot dead. Rick refuses to sell the papers to Laszlo.

In his dealings with Ilsa it becomes clear that they still love each other. Ilsa, torn between her sense of duty to and admiration of her husband and her passionate love for Rick, ultimately asks Rick to decide

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<sup>9</sup> Epstein, Epstein & Koch, *supra* note 5 at 36.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 121.

their future. At this point it becomes evident that Rick's cynical façade hides a true and determined idealist: Rick forces Captain Renault, at gun point, to let Laszlo and Ilsa leave. Ilsa protests and demands to remain with Rick, but ultimately yields and boards the plane with her husband and the necessary travel documents. At the crucial moment Captain Renault aligns himself with Rick by shooting a German officer whose sudden appearance threatened to prevent the couple's escape.

The plane takes off, and Rick and Renault "walk off together into the night."<sup>12</sup>

### III. "IN CASABLANCA I AM MASTER OF MY FATE"<sup>13</sup>—THE CHIMERICAL ALLURE OF THE ENCLAVE

#### A. *The Geography of Enclaves*

Specific movies and specific cases can be viewed as examples of concepts, ethical approaches and aesthetic representations. We propose that *Casablanca* is emblematic of a concept central to the idea and practice of law and cinema: the enclave. This concept opens a set of possibilities with which to address, or manage, ethical questions. It is also of relevance aesthetically, as enclaves are aesthetic entities, their distinctness a matter of formal congruity. In the following section we will elaborate on the concept of the enclave as represented in *Casablanca*.

The enclitic nature of *Casablanca* is first suggested by its title. The choice of the city's name as the film's title should not go unnoticed, as it reinforces the metaphor of the enclave by implying that the movie is about what happened in a certain time at a certain place.

Highlighting the location raises another enclitic element as it directs our attention to where the movie was actually made. *Casablanca* was created in the ultimate enclave: the Hollywood studio. Except for the initial airport sequence, the entire film was shot in a Warner Brothers Hollywood/Burbank studio. Howard Koch, who coauthored the script, describes the atmosphere of Hollywood in the early 1940s:

[m]otion picture production was the private preserve of a select group of professionals entrenched in a Pacific enclave called Hollywood, where art and commerce met head-on and tried to reconcile their conflicts as best they could. Reigned over by a half dozen tycoons in

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<sup>12</sup> *Ibid.* at 228.

<sup>13</sup> Renault to Rick, *ibid.* at 66.

an uneasy alliance with labor bosses of the closed craft unions, it was not an easy world to penetrate.<sup>14</sup>

It is not surprising that such environment has so aptly produced and presented the powerful Casablacian image of an enclave.<sup>15</sup>

The city of Casablanca is indeed an enclave, a centre of relative calm within a chaotic wartime environment. It is an exotic, extraterritorial place, a city infused with Western characteristics in the middle of the Levant, an oasis of luxury and certain—if corrupt—order, surrounded by desert and the laws of the desert. Casablanca appears as a territory with its own set of rules and its own logic. It has a *sui generis* legal status that establishes and preserves the enclave and its borders. Casablanca is technically ruled by the (so-called) neutral unoccupied France, and thus formally out of Nazi reach; however, this legal status does not ensure total or even adequate separation from the exterior world. The winds of war are blowing audibly, and the legally created enclave cannot be fully sealed against their imminent penetration. Legally imposed curfews and closures

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<sup>14</sup> Howard Koch, “Preface” in Howard Koch, ed., *Casablanca: Script and Legend*, 2d ed. (Woodstock, N.Y.: The Overlook Press, 1992) 1 at 1. The enclitic character of Hollywood is manifest in a famous dispute between Warner Brothers and the Marx Brothers. When the Marx Brothers were filming *A Night in Casablanca* they received a letter from the Warner Brothers demanding that they change the film’s title. Groucho Marx responded:

Apparently there is more than one way of conquering a city and holding it as your own. For example, up to the time that we contemplated making this picture, I had no idea that the city of Casablanca belonged exclusively to Warner Brothers. However, it was only a few days after our announcement appeared that we received your long, ominous legal document warning us not to use the name of Casablanca.

It seems that in 1471, Ferdinand Balboa Warner, your great-great-grandfather, while looking for a shortcut to the city of Burbank, had stumbled on the shores of Africa and, raising his alpenstock (which he later turned in for a hundred shares of common), named it Casablanca.

Cited in Groucho Marx, *The Groucho Letters* (London: Sphere Books Limited, 1969) at 15-16. However, Warner Brothers’ concern is not as ridiculous as it may first appear. Their actual claim is that it is the movie (*Casablanca*) that constituted Casablanca as such. Or put differently, without the movie, the term Casablanca would have carried a meaning sufficiently different, and thus it is somewhat of a feigned pretense to assert that the Warner Brothers are attempting to appropriate something that is totally within the public domain.

<sup>15</sup> See Robert B. Ray, “Hollywood and ideology” in Hill & Gibson, *supra* note 4 (“Eventually I realized that movies not only reflected the world but also excluded the world”: *ibid.* at 363). The movie industry, then, is enclitic on several levels: it invites the audience to some places (theatres) but not others (studios); it invites the audience to participate—indeed immerse itself—in the reproduction of certain value systems, while excluding some morally relevant facts and points of view.

(and the consequences flowing from their breach) define the ambience as well as daily routine of the place.<sup>16</sup>

Entrance to and exit from the enclave are controlled by law; the law establishes the borders, and the law imposes the penalties for stealing across them. In order to leave Casablanca legally, one must have a letter of transit. The law appears very precise and readily applicable. In Casablanca either you are allowed to leave or not, or even to live or not, on the basis of whether you carry the appropriate papers to authorize your actions. This is made graphically clear in an early scene, when an anonymous civilian is shot trying to escape police custody after he is found with expired documents.<sup>17</sup>

However, as we realize from the first moments of the film, the clarity the legal system attempts to generate in Casablanca is misleading. The legal system bears little or no relationship to any morally defensible justification, beyond its sheer force. Legal documents are obtained in Casablanca not by the realization of one's rights, but by fraud, shrewd manipulation, intricate intrigues and bargaining (including the exchange of one's dearest possessions, even one's body). The law, or legal authority, is thus revealed as a commodity to be bought or sold, a mere chip devoid of any moral content.

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<sup>16</sup> The spatial dimension of the enclave is not unproblematic. Technically speaking, the borders of Casablanca must be clearly drawn—the basic requirement for the creation of an extra-territorial enclave is that it be geographically well-defined. The desert, however, has its own rules, some of which defy positive law and constructed boundaries. It is therefore unsurprising that the borders of Casablanca are continuously challenged by smugglers. It is against this backdrop that the story of *Casablanca* is plotted.

<sup>17</sup> Policeman asks a civilian to see his papers. The civilian brings out his papers and the other policeman examines them, and tells the civilian that the papers expired three weeks ago and he has to come with them. Then, as the script describes:

*Suddenly the civilian breaks away and starts to run wildly down the street. A shot rings out, and the man falls under a large poster of Marshal Petain which reads: "Je tiens mes promesses, meme celles des autres." The policemen frantically search the body merely to find Free France literature against the Vichy government.*

*An inscription, "Liberte, Egalite, Fraternite," is carved in a marble block along the roofline of a building. The camera pans down the façade, French in architecture, to the high-vaulted entrance over which is inscribed, "Palais de Justice."*

The unfettered market, where legal authority is traded via any conceivable scheme,<sup>18</sup> appears to be premised on a crude utilitarianism: provided that interests (no matter how base) are met, any deal goes. The law within the enclave is thus not a manifestation of an ethically defensible system. Quite contrary to law's intrinsic aspiration to reflect reasonableness and justifiability, the application of the "law" in these circumstances is patently removed from any notion of justice or meaningful legal rights.<sup>19</sup> While still "law" it is nevertheless grotesque and represented as such. The empty slogans adorning the government buildings in Casablanca—liberté, égalité, fraternité<sup>20</sup>—sharpen the dichotomy between reality as experienced in *Casablanca*, that is, the manner in which the justice system is being portrayed in the film, and law's promise to embody liberty, equality and fraternity. Such a representation of law calls into question the distinction between law and raw power.<sup>21</sup> Similarly, the institutions of government—the municipality, the court of law, the police—serve as ironic background for the immoral but legally sanctioned killings that take place in *Casablanca*. Law is being used in a manner that actually preserves arbitrariness. Law appears as nothing more than an artificial construct to which we cling or which clings to us. This positivistic construct can be pragmatically conducive to achieving and maintaining order, but it can also be despotic, cruel and destructive, as the environment of *Casablanca* chillingly demonstrates.

Law constructs the outer shell of Casablanca. The geographical enclave, defined by physical borders and the applicable laws, is only one enclitic layer. Within this space, Rick's Café Americain is itself an enclave, where Rick is "the law" and certain otherwise illegal acts are "permitted" while other illegalities carry casually inflicted yet harsh penalties.<sup>22</sup> Rick, in

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<sup>18</sup> See Corliss' description: "For some, Casablanca is a purgatory where their worldly sins—money, jewels, political connections—must be bartered away in order to get out. For others—the omnipresent but unseen poor—Casablanca is sheer hell, with no hope of redemption." *Supra* note 2 at 239.

<sup>19</sup> Rick himself notes that the application of law in Casablanca is not necessarily related to formally established legal rights: "We have a legal right to go, that's true" he tells Inspector Renault when discussing the options open for Ilsa and him, "but people have been held in Casablanca in spite of their legal rights." Renault *de facto* affirms Rick's realistic assessment by inquiring as to the reasons he might possibly have to hold Rick and Ilsa. See Epstein, Epstein & Koch, *supra* note 5 at 202.

<sup>20</sup> *Ibid.* at 29.

<sup>21</sup> See Herbert Hart's critique of Austin's description of law as power: H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 6-7, 16-17, 18-25.

<sup>22</sup> Ugarte (Peter Lorre), a black market dealer in exit papers, succeeds in weaseling his way into Rick's gambling room, but is not aided by Rick when Strasser and his Nazi troops are about to seize him. The incident is described in the script:

fact, has created a quasi-autonomous zone, where his interaction with the outside world is controlled and kept to a minimum. It would seem that Rick is self-sufficient. He has reached an agreement or an understanding—akin to a treaty—with the authorities, outlining their respective codes of conduct. Rick will not deal in stolen visas, and the authorities will not bother Rick about the other illegal acts that take place in the Café. The essence of the understanding is that it makes economic sense to each party.

Rick's model of governance appears efficient, as it waives the need for cumbersome checks and balances and any separation of powers. It is also efficient in the sense that it is organized around a simple axis: maximizing self-interest. For Rick there is no need to dwell on a complex balancing of rights and correlative obligations. Rick appears first as a hand signing a cheque (a legal document), which identifies him as the executive; the camera then introduces his slight nod of the head, indicating that he determines who is permitted to enter his chambers and whose request is denied (that is, he exercises judicial power). A subsequent appeal is denied; Rick cares very little about external authorities the "appellant" cites. In Rick's Café, Rick is the source of authority. Soon thereafter Rick's "legal" authority is reinforced when it becomes clear that Rick also sets rules for himself: he does not drink with customers (following a Weberian model of formal separation between official government and citizens, contrary to the *gemeinschaft* model of familiarity),<sup>23</sup> the casino does not cheat; Sam ought not to play a certain song. All these rules are eventually broken by Rick himself, a fact which underlines Rick's legislative competence, and at the same time hints at the artificiality of rules, which are, after all, made to be broken.

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*Ugarte starts to walk out, followed by the gendarmes. At the doorway, he suddenly rushes through and slams the door behind him. By the time the gendarmes manage to get the door open again, Ugarte has pulled a gun. He fires at the doorway. The shots bring on pandemonium in the Café. As Ugarte runs through the hallway he sees Rick, appearing from the opposite direction, and grabs him.*

**Ugarte:** Rick, Rick, help me!

**Rick:** Don't be a fool. You can't get away.

**Ugarte:** Rick, hide me. Do something! You must help me Rick. Do something!

*Before he can finish, guards and gendarmes rush in and grab Ugarte. Rick stands impassive as they drag Ugarte off.*

See Epstein, Epstein & Koch, *supra* note 5 at 69-72.

<sup>23</sup> For a succinct overview of the Weberian model see Bryan S. Turner, *Status* (Minneapolis: University of Minnesota Press, 1988), especially c. 2.

The interior of Rick's Café reveals subsequent enclaves within enclaves, nesting inside one another like a set of Russian dolls (Matryoshkas). The Café itself contains spatial divisions—different rooms—and different permission rules (or entrance rules) apply to the different spaces. The architecture is of importance<sup>24</sup> since it represents not only physical but also social space. This point is not lost on us lawyers, who are well aware of the importance of the architecture of a court room, where social roles are represented spatially, with a place assigned to each counsellor, the spectators, the witnesses, jury and judge. Like Rick's Café, a courtroom also contains inner enclaves, such as the judge's chambers. The design of Rick's Café thus shares attributes paradigmatic of the spatial design of a courtroom, and perhaps of other social spaces where confrontation, advocacy, deliberation and judgment take place.<sup>25</sup>

The metaphor of the enclave, then, is an organizing one; it establishes the geographical space and thus affects the actions that take place within the space, namely the plot. *Casablanca* is constructed as an ex-territorial enclave—a legally construed one—but only to a degree. Law does not ensure its ex-territoriality or its safety. In fact, law is itself one of the tools that are used to undermine the idea of a “true” safe haven.

### B. *Enclaves of Emotions*

Rick's Café is unique because the enclaves it contains serve not only to represent different social spaces but also to reflect Rick's internal compartmentalization. If we read Rick's Café as a reflection of Rick, we come to see Rick as a complex fellow with several layers, some of which are extroverted (that is, the public persona, walking the public room) and others introverted (that is, the private persona, ensconced in the inner chamber). The abundance of mirrors hung throughout the Café also reveals Rick's different facets, yet the basic premise is maintained: what we see is

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<sup>24</sup> Umberto Eco employs a similar metaphor in evaluating *Casablanca*'s transcendence of kitsch: “when the repertoire of stock formulas is used wholesale [as he argues it is in *Casablanca*], then the result is an architecture like Gaudi's Sagrada Familia: the same vertigo, the same stroke of genius.” Umberto Eco, “Cult Movies and Intertextual Collage” in David Lodge, ed., *Modern Criticism and Theory: A Reader* (London: Longman, 1988) 446 at 449 [footnotes omitted].

<sup>25</sup> For a discussion of the spatial element of courthouse design, see Jonathan D. Rosenbloom, “Social Ideology as Seen Through Courtroom and Courthouse Architecture” (1998) 22 *Colum.-V.L.A. J. L. & Arts* 463. We suggest that such spatial analysis is relevant to other social domains, such as the corporate world, academia, local and national governance, where “political” practices and decision-making processes are carried out in actual-physical spaces, designed for such purposes. Such spaces often, if not always, contain “inner chambers” and “public halls.”

only a reflection. Without digressing into psychoanalysis, the image produced by Rick's enclave is one of multiplicity and compartmentalization.

The operational metaphor of the enclave is particularly pertinent to Rick's existence in Casablanca. While he is the master of his domain, he nonetheless appears emotionally depleted. As Corliss suggests, Casablanca is for Rick a place of "Limbo, a state of suspended spiritual animation."<sup>26</sup> As the movie continues, Rick gradually breaks out of suspension by taking a clear ethical stance, reclaiming passion and action. And yet the enclaves do not disappear, they are simply transformed into a different dimension. When Rick tells Ilsa "we'll always have Paris,"<sup>27</sup> he constructs a different kind of enclave, one into which their relationship can be diverted and where it can continue to exist. This process of deconstruction and reconstruction allows Rick, and us, the spectators, to manage his emotional transformation.

It is worthwhile to examine the "solution" to the emotional dilemma in which Rick finds himself, namely the virtual enclave to which Rick and Ilsa's relationship is relegated. The virtual enclave—the emotional space where Rick and Ilsa will always have Paris—is an exercise of active and continuous memory, a narrative that allows the characters and the spectators to accommodate the tension between a number of irreconcilable "right things to do." Rick, Ilsa and Laszlo chose a certain path. Their decision was not necessarily the only reasonable "solution"; other decisions could have been equally defensible, at least as seen from the removed position of the critic. The virtual enclave provides us with a space in which to preserve the paths not taken. We maintain the "actual" past between Rick and Ilsa and their potential future—what could have been or might have been—in this virtual space, and thus their relationship remains with us, yet sealed apart from the tangible, actual daily existence.

This fanciful enclave requires more than an exercise of active memory. It would seem that a certain element of trust, or faith, is necessary in maintaining this enclave, and perhaps all other enclaves (constructs, myths) as well. The Café Americain remains an enclave as a result of the trust between Rick and the French Inspector (Renault), their code of honour among thieves. Trust and faith are essential ingredients for an enclave to survive; yet the other side of the coin should also be stated clearly: faith means a suspension of disbelief, a relaxation of critical analysis. Virtual—if not all—enclaves are maintained by the decision to

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<sup>26</sup> Corliss, *supra* note 2 at 239.

<sup>27</sup> Epstein, Epstein & Koch, *supra* note 5 at 219.

turn a blind eye, to purposefully ignore aspects of reality. Rick's enclave—his Café—collapses because he faces, or is forced to face, truths he wishes to ignore or remain blind to. Other enclaves may face a similar fate if exposed to a critical eye.<sup>28</sup>

The decision to believe and thus take part in the construction of the enclave is not a purely subjective one. The enclave “works” because its integrity is maintained. In order for us to be able to accept an enclave as genuine, its form must meet our inter-subjective appreciation of its internal logic and ethical dimensions. It must offer us a meaningful way to manage discord by acknowledging the presence of all involved. In that respect, it appears that the logic of *Casablanca's* enclaves works, and the ethical boundaries of the enclaves appear to have carried the day by reflecting a defensible moral code of conduct. For the enclave to secure our suspension of disbelief, its different components, including its ethical premises, must fit. Yet fit, as stated earlier, is a requirement that resides in the sphere of aesthetics. The relationship between ethics and aesthetics is therefore a key element in the composition of the enclave.

For example, in *Casablanca*, Rick's detached if not “anti-social” enclave is reflected in the aesthetics of the Café Americain: out of place, detached from its environment,<sup>29</sup> a transplant from a different world. Yet Rick's stand-offishness dissolves when he finds himself forced to choose sides. The message, perhaps, is that enclaves so detached from their surroundings are unstable. The attempt to construct a fully separated enclave was doomed to fail. The movie suggests that the alternative enclaves—those that “communicate” with their surroundings, those where the moral presence of others and the greater good are taken into consideration—achieve a more stable equilibrium. This equilibrium is authentic because it offers some kind of sense, a meaning that we can accept, in part because it acknowledges the presence and weight of the other and because it is not blind to the contingencies of reality (the circumstances). In this enclave growth and hope are possible. The first enclave Rick establishes in *Casablanca* is barren; the second is potentially fertile.

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<sup>28</sup> The virtual enclave where Rick and Ilsa will always have Paris can be understood as a mere gloss on their failure to establish an honest, attainable, real-life relationship, and the construction of the enclave would thus be revealed as a manifestation of that failure, a misleading illusion. Such critical analysis would, it goes without saying, deconstruct the virtual enclave.

<sup>29</sup> The Café's site—at the edge of the city near the airport—is another indication of its ex-territoriality.

C. *The Dynamic Dimension of Enclaves*

Enclaves are dynamic. Their boundaries change. The rules governing entrance and exit alter. People migrate from one enclave to another. People and issues move about within enclaves. Indeed, the dynamic element is quite apparent in *Casablanca*: “Perhaps tomorrow we’ll be on that plane,”<sup>30</sup> wistfully sighs Annina, a young Bulgarian refugee, to her husband Jan, while looking up at a plane landing in Casablanca airport. The enclitic nature of Casablanca is thus constructed vis-à-vis the aspiration to exit its boundaries and depart. Situating Casablanca as a way station highlights the static-dynamic divide that is characteristic of all enclaves. For an enclave to exist, some of its elements must be taken as relatively static at any given moment. Yet people within enclaves are hardly static. In that respect, enclaves offer the possibility, and sometimes impose the necessity, of journeys—internal and external, physical, emotional and ethical. Moreover, enclaves themselves are dynamic. Their boundaries and nature change. Enclaves merge, collapse and split. The actual history of the city of Casablanca is a prime example; *Casablanca*’s *mise-en-scène* and editing are others.<sup>31</sup>

The dynamic dimension of the enclaves is thus reflected, on a basic level, in the journeys available (or called for) between enclaves. These journeys are goal-oriented and purposive. The sense of purpose also allows us, the spectators, to obtain an “external” or elevated point of view from which to perceive and appreciate the overall map of enclaves.

Moreover, recognizing the purpose of those travelling from one enclave to another allows us to distinguish the enclaves in which we as spectators are situated from the web within which the characters in the movie operate. In that respect, the sense of purpose of the journeys epistemologically organizes our understanding of the enclaves, the characters operating within and between enclaves, and our own position as spectators. Such organization is, of course, of great importance to our ability to exercise sound ethical judgment within enclaves, as well as to determine whether to relocate to another enclave.

The move from Europe to Casablanca and then the possible next step to the United States—that is, the central journey between enclaves in *Casablanca*—is not just about purposive physical relocation, although in

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<sup>30</sup> Epstein, Epstein & Koch, *supra* note 5 at 32.

<sup>31</sup> Corliss suggests that director Michael Curtiz’s “occasionally hurried, perfunctory *mise-en-scène*” is responsible for much of the film’s “verve.” *Supra* note 2.

*Casablanca* physical relocation appears as a necessary element of transformation. The journey that takes place in *Casablanca* is internal—a search for truth, integrity and the “right” (ethical) course of action given one’s moral and relational commitments. Practically all the protagonists partake in that journey, in accordance with their individual characters and points of view. In a way, the question that organizes *Casablanca*—where do we go from here—is as much an ethical and emotional<sup>32</sup> question as it is a geographical one.

As mentioned above, the physical journey corresponds to the emotional one. The physical borders and the emotional boundaries coalesce, at least to a certain degree; both inform the dimensions and direction of the journey. The map showed at the very beginning of the movie etches borders, fences and lines. The main motivation of the characters in *Casablanca* is to “steal the border”—the border between liberty and occupation, between the old and the new, between the corrupt and the ethical, between authenticity and falsehood. Ilsa, Rick and Laszlo succeed in stealing the external border only after they succeed in eroding the internal walls and boundaries behind which they ensconced themselves. These boundaries separated each of the characters from the full range and depth of their emotions and those of the persons they cared about, as well as from the community at large. *Casablanca* thus suggests that the emotional journey towards awareness corresponds with the physical journey undertaken by the characters.

#### D. *Law as an Enclave*

At this point our reader could hardly be surprised by our proposition that law could also be conceptualized as an enclave. Law, conceptually and as a matter of practice, fits the prototypic features of an enclave. As we suggested earlier, law operates through parsing out segments of reality and focusing on these segments while ignoring all other dimensions or aspects of the social world as “irrelevant.” It thus creates a construct that is secluded, if only slightly, from the totality of the social world. As an enclave, law cannot be fully sealed off from other practices;

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<sup>32</sup> For a representation of an emotional journey to be genuine, *Casablanca* teaches us, the journey must be an authentic one: the emotional choices must be presented in their entirety. *Casablanca* was able to successfully represent the full scope and meaning of the different choices—what it would mean for Rick and Ilsa to stay in Casablanca, what it would mean for them to depart to the United States, and what would it mean for Ilsa to leave with Laszlo—through their effective cinematographic articulation. Ilsa’s look, Rick’s stance, Laszlo’s ethical—yet aloof—leadership, are all tangibly conveyed. The medium of film allows the characters to materialize before our eyes and within our hearts.

an enclave is not an island. Moreover, for the enclitic construct of law to “work” an aspiration to internal coherence, or integrity, must be an organizing element. As a leading philosopher of law has noted, “law’s empire” requires us to treat legal norms with integrity and as an expression of integrity.<sup>33</sup>

These two features—law’s distinctness and law’s aspiration to consistency—reinforce each other. Treating law as integrity is premised on the realization that law’s morality is distinct from the “general morality” in the sense that consistency with previous norms could lead us to adopt a norm that we would otherwise not adopt. Thus the requirement to maintain law’s internal logic implies a certain separation between law and other ethical domains of the social world.

Other enclitic features are also evident in law: As a construct, the practice of law requires a kind of conviction. At some level, we have to be convinced of the existence of the construct for the construct to exist. More specifically, we put our faith in the ability of rules—external speech acts that contain normative instructions—to govern us. If we lose faith in law, legal reasoning will be taken as a mere façade, apt for deconstruction, at which point we have reached the end of law; law evaporates into a myth, a cloud of words barely veiling raw power.

In such circumstances, the fragility of law becomes evident. The Vichy regime and the character of inspector Renault exemplify the thinness of pure positivism: Vichy and Renault are the law, but “there [is] little distinction between the Vichy authorities who [a]re supposed to enforce the laws and the criminals who ma[k]e a living by breaking them.”<sup>34</sup> Nevertheless, even corrupt law is, according to the prevalent teachings of positivism, law. As thin as it may be, it still grants the state official power and authority. Even in corrupt Casablanca, we may talk of law and a legal system, or, in our terminology, a legal enclave. The unethical manner in which law is being applied amplifies the dissonance between law and morality, and thus exposes the human-made nature of positive (and in this case negative) law. When human-made law is not only arbitrary but also patently unethical, the enclave of law becomes unstable. We sense such instability in *Casablanca*.

Like any enclave, law has its own blind spots. In *Casablanca*, law’s myopias are dynamic: certain blind spots are removed and law is forced to “see” narratives or aspects of reality it ignored. As a result legal enclaves

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<sup>33</sup> Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 225-76.

<sup>34</sup> Koch, “The Making of Casablanca”, *supra* note 8 at 16.

collapse. At the same time, other enclaves are constructed—must be constructed—or law “dies.”<sup>35</sup> Our call to recognize the dynamic nature of legal enclaves is not a call for their automatic deconstruction or their automatic validation but rather an invitation to creative observation. Such observation can lead to a better understanding of the intrinsic grammar of the enclave and its governing poetics, and allow for change, growth and relocation.

The enclitic nature of law, we argue, is not accidental. Like other enclaves in the social world, its existence is an expression of the human condition. In the case of law, it seems to us that its enclitic nature reflects our temporally-bounded existence. Our time is limited, as is our ability to comprehend fully our factual and ethical reality. Since we are faced with disagreements, we have no choice but to manage conflicting demands and coordinate multiple, polycentric interests. Law is a venue in which we accommodate such conflicts, without necessarily reaching the ultimate resolution of the tensions at their core. Its enclitic nature allows us to manage the tensions in real life, given that we are social creatures of reason and emotion who require justification for action, but at the same time are unable to reach ultimate justice. We thus construct norm-based enclaves, and call them “law.”

Finally, a word on aesthetics. As mentioned above, the aesthetic dimension is central to our conception of the enclave. Aesthetics are apparent in law’s many facets, from the design of the physical aspects of the practice of law to the architecture of legal reasoning. As Dworkin has argued, the ideal legal claim must fit precedents, legal doctrine or basic legal principles.<sup>36</sup> The need for such a fit cannot be understood if we fail to appreciate the significance of aesthetics and form. Moreover, the aesthetics and form of argument are some of the features that set the legal process apart from other reason-based social practices, such as politics.

Law’s aesthetic elements have thus far received little scholarly attention,<sup>37</sup> and further exploration of the field would require a separate article. We would like, however, to point, even if only cursorily, to some salient aesthetic elements of law that make the practice what it is. The attire that players in the legal process are expected to wear is one such element; another is the language the players are expected to use. The graphic design

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<sup>35</sup> See Owen M. Fiss, “The Death of Law?” (1986) 72 Cornell L. Rev. 1.

<sup>36</sup> Dworkin, *supra* note 33 at 67.

<sup>37</sup> For one recent contribution on the topic see Shulamit Almog & Ely Aharonson, “Law as Film: Representing Justice at the Age of Moving Images” (2004) 3 C.J.L.T. 1.

of the documents through which the players communicate is worthy of aesthetic analysis, as is the physical design of the special places wherein interactions with representatives of the legal process take place—the courtroom, the firm and the branches of government. All these can be seen to contain an aesthetic dimension, and all doubtlessly warrant further study. All partake, we claim, in the creation and maintenance of the legal enclave. The aesthetics of a trial—like the aesthetics of cinema—are not merely a matter of artistic taste, but a constitutive element of the practice. Therefore, being mindful of such aesthetic aspects in law and film is an important component of the project of conceptualizing the organizing themes that are constitutive of the social models at the basis of cultural practices such as law and film.

E. *The Path of Judgment: Ethical Choices in Dynamic Enclaves*

“Oh, I don’t know what’s right and wrong any longer,”<sup>38</sup> says Ilsa to Rick in one of the movie’s pivotal moments. *Casablanca* essentially revolves around a decision each of the characters has to make at a certain point, confronted by opposing emotional and ethical pulls. It is this exercise of judgment that ultimately attracts our attention: What will they do under the circumstances? What do we, the spectators, want them to do? What would we have done in their place under the same circumstances?

Needless to say, judgment is a constitutive element in law.<sup>39</sup> Law is often seen as a dramatic practice precisely because it forces the court to exercise judgment and choose between the opposing parties, or more accurately, between the warring claims presented by the opposing parties. As students of the courts, when cases are pending we often ask ourselves: what will the court do under the circumstances? What do we expect it to do? What would we do, were we members of the bench?

We submit that such judgment—both in *Casablanca* and in equivalent “hard cases” in law—is made possible, or at least meaningful, within dynamic enclaves. As mentioned earlier, law parses out segments of reality, and within these segments some elements are deemed salient, and therefore legally relevant. Such is the operation of legal enclaves. These enclaves are dynamic since the law is not static; developments in technology

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<sup>38</sup> Epstein, Epstein & Koch, *supra* note 5 at 195.

<sup>39</sup> Aharon Barak, *Judicial Discretion*, trans. by Yadin Kauffman (New Haven, Conn.: Yale University Press, 1989) at 5-18, 261-66; William L.F. Felstiner, Richard L. Abel & Austin Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming” (1980-81) 15 *Law & Soc’y Rev.* 631 at 631-32, 653-54.

and in our understanding of the moral dimensions of social life ensure that the path of law is not a finite journey. Enclaves are constructed, doctrines are developed, and then they are reshaped, deconstructed and reconstructed.

Enclaves are needed in law and in cinema since both practices are limited in epistemological resources: we do not have access to the necessary amount of time and knowledge to be able to present, deliberate and reach the ultimate ethical decision in each case, all things considered. Law is thus a mechanism for deciding controversies under partial knowledge and conditions of uncertainty. Cinema is likewise a mechanism for presenting and thus in a way also resolving conflicts, under limited time and partial available data.<sup>40</sup>

As described earlier, the dynamic enclaves within which judgment in social practices is made possible exist in numerous dimensions, from the physical through the cognitive-purposive to the emotional. *Casablanca* portrays a rather intricate relationship between emotional processes and ethical judgment. Emotional progress informs ethical decisions. When each character is faced with making an ethical decision, she or he is forced to weigh not only crude self-interest but also, if not primarily, the emotions of all involved. Each must ask, How will my judgment affect the emotional well-being of all concerned? Yet emotions are related to ethical judgment on a deeper level also. The dynamics of the emotional journey are part of the judgment itself. It is ultimately what “feels” right, or feels more right

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<sup>40</sup> The basic fact of limited resources is present in the three axes that form the cinematic experience: the axis where the creator resides, the axis where the fictive characters reside and the axis where the spectators reside. The creators—writer, director, producer, etc.—must create within a certain budget, time constraints and scope of available technology, such as the frame of the camera. For the plot to maintain the suspension of disbelief, the fictive characters must be seen as operating under believable conditions. The fictive characters are thus limited by the structure of the narrative: in *Casablanca*, Rick and Ilsa cannot take all the time in the world to ponder their future and existential options. They must decide what to do “here and now.” The spectators are also located in a well-bounded time and space, limited by the duration of the movie, the walls of the movie theatre and the technology of the projection. Despite their limits, and obvious static nature, these axes are nonetheless constitutive of dynamic enclaves because each axis does not bind the creative power of imagination. It should be noted that such categorization is present in law as well, where judges, lawmakers and lawyers “produce” the law and the legal proceeding, where parties, witnesses and other altering figures play the role of “fictive characters” and where the professional community and to a lesser extent the public at large, form the audience. It is beyond the scope of this paper to fully analyze the importance of this observation—a task we hope to pursue in the future. At this point suffice it to note that when law is conceived as a set of practice-based enclaves “it may become possible for us to imagine engaging in them and transforming them and criticizing them in new ways.” See James Boyd White, *Acts of Hope* (Chicago: University of Chicago Press, 1994) at 306. See also James Boyd White, “Imagining the Law” in Austin Sarat & Thomas R. Kearns, eds., *The Rhetoric of Law* (Ann Arbor: University of Michigan Press, 1994) 29.

than the alternative, that carries the day for each of the characters, and ultimately for us, the spectators, as those in a position to pass judgment on the fictive decisions of the characters. At the end of the day, once all logical arguments have been exhausted, judgment is sense-based. The conclusion we reach is what we sense to be an appropriate—or *the* appropriate—resolution of the ethical “dilemma.” The emotional dimension, where senses reside, is an essential component of moral knowledge and decision-making.<sup>41</sup>

The emotional dimension of the enclaves constructed and presented in *Casablanca* is a reflection of the human condition. As an essential element of the concept of an enclave, it plays a role in organizing our social world and enabling judgment in many, if not all, social practices.<sup>42</sup> The genuine representation of the web of emotions and senses, broadly defined, is pivotal to the success of the movie in generating a suspension of disbelief that remains even when the movie is over and the lights are turned on. The same, of course, can be said about good case law, that it remains with us long after judgment has been rendered.

In *Casablanca*, judgment within dynamic enclaves is not a static matter. This is so not only because the emotional processes that the leading characters undergo allow the exercise of ethical judgment to evolve, but also because the seat of judgment, the very authority to judge, shifts. Each of the characters is charged, at certain points in the movie, with the task of deciding the path of events. To substantiate this point, let us examine what could be viewed as the pivotal moments for each of the characters.

The most obvious juncture where judgment is due is when Rick decides to send Ilsa with Laszlo to the United States, leaving himself with Inspector Renault to embark on a new, purposive path as freedom fighters. Rick was explicitly authorized to exercise judgment by Ilsa, who granted him the power to “think for both of us, for all of us.”<sup>43</sup> We thus see that by investing Rick with the power to decide—by suspending her power to exercise judgment herself and transferring it to Rick—Ilsa placed upon Rick the demand to take into account the well-being of all. Rick’s reply and

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<sup>41</sup> For an illuminating discussion of the role emotions play in ethical decision making, see Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995).

<sup>42</sup> Compare Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* (Cambridge, Mass.: Harvard University Press, 2000).

<sup>43</sup> Informed by her emotions, Ilsa realizes that she should entrust Rick with the judgment. “You’ll have to think for both of us, for all of us,” says Ilsa to Rick. Epstein, Epstein & Koch, *supra* note 5 at 195.

actual decision indeed demonstrate that Rick met her—and our—expectations.<sup>44</sup>

A similar pattern of investing the other with the power to make crucial decisions by suspending one's power to exercise judgment is revealed when Laszlo grants Ilsa the power to decide on the future path of their relationship. When Ilsa decides not to disclose the nature of her relationship with Rick and not to name it as an affair, she in fact decides to protect Laszlo; Laszlo gives her the option to leave him, and she decides to stay.<sup>45</sup> The same pattern begins, chronologically, in Paris, when Ilsa assumes the power to decide for both Rick and herself by writing him the letter instead of showing up at the train station for their planned escape.<sup>46</sup> Yet in that instance, Rick refuses to accept Ilsa's exercise of judgment for the both of them, doubting both her and her motivation. Two of the options he could have pursued—staying in occupied France and fighting for Ilsa, or leaving for freedom trusting that Ilsa had made the right choice—he soundly rejects.<sup>47</sup> Instead, he feels betrayed, denies the ethics of Ilsa's choice, denounces their relationship and retreats to the enclave he constructs for himself in Casablanca. It is from this enclave he is later

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<sup>44</sup> Rick's reply ["All right. Here's looking at you, kid" (*ibid.*)] affirms the relational premise of judgment in *Casablanca*. Rick is not exercising judgment as an atomistic individual, but as a person within a relationship, whose well being is not severable from the well-being of the others who are part of the relationship, from Ilsa to "all of us."

<sup>45</sup> Here is how it goes:

**Laszlo:** When I was in the concentration camps, were you lonely in Paris?

**Ilsa:** Yes, Victor, I was.

**Laszlo:** (*sympathetically*) I know how it is to be lonely. (*Very quietly*) Is there anything you wish to tell me?

**Ilsa:** (*she controls herself, speaking low*): No Victor, there isn't.

*There is silence*

**Laszlo:** I love you very much, my dear.

**Ilsa:** (*barely able to speak*) Yes. Yes, I know. Victor, whatever I do, will you believe that I, that ...

**Laszlo:** You don't even have to say it. I'll believe.

*Ibid.* at 183.

<sup>46</sup> *Ibid.* at 121.

<sup>47</sup> In that respect, we can understand Ilsa's decision to stay with Laszlo as motivated not only by her "public" reason, that is, by her assessment that her relationship with Laszlo will better serve the fight against Nazism, but also by the very private fact that Laszlo, when confronted with the choice of endangering himself yet staying with her or leaving her and saving his skin (and the torch of the resistance), he chose to stay with Ilsa. When Ilsa asks why he remained with her in Lille and Marseille at danger to himself he responds "Something always held me up." *Ibid.* at 148.

redeemed by accepting Ilsa's previous judgment and by replicating her original choice.<sup>48</sup> A circle is thus closed. The dynamic transfer of judgment from one character to another, it seems, is not just a matter of aesthetics, but adds to the quality of judgment. The process, then, adds to its validity if not to its authority.<sup>49</sup>

It is of course the very nature of judgment in law to be based upon the transfer of authority by the citizens to the state's courts and judges. It is perhaps this observation that led Professor Soifer to claim that on occasion "[w]e assign the court the Bogart role in 'Casablanca.'"<sup>50</sup> By that we think he means that we turn to the court to decide for us when a decision is called for and no other person or institution is available, since there seems to be no one right answer (or, as Ilsa puts it, we no longer know what's right any longer). Soifer identifies three themes in the depiction of Bogart's exercise of judgment in *Casablanca* that are paralleled in law (or more specifically, constitutional theory): an ahistorical stance, a neutral pose and the unexplained happy ending.

Without engaging with Soifer's constitutional points, we think this representation is only partly correct. As stated above, we think *all* three leading characters in *Casablanca* exercised judgment, not just Rick. Moreover, we submit that Rick did not exercise legalistic judgment, that is, he did not decide the case by referring to externally-enacted rules. He did not rely on the authority of an external law-maker, or sovereign, nor did he see his primary role as implementing decisions made elsewhere. The authority of Rick's judgment was internal; it drew its viability from his relationships with the other characters. Furthermore, we do not think that

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<sup>48</sup> Rick's reasoning is somewhat unconvincing: "[I]ve got a job to do, too. Where I'm going you can't follow. What I've got to do, you can't be any part of. Ilsa, I'm no good at being noble, but it doesn't take much to see that the problems of three little people don't amount to a hill of beans in this crazy world. Someday you'll understand that. Not now. Here's looking at you, kid" (*Ibid.* at 219). We must admit that this sounds less than authentic, since it denies the role Ilsa plays in the resistance, places Rick as the public persona who all of a sudden assumes the utilitarian perspective that prefers the benefit of the many over the hardships of the few, and belittles Ilsa by casting her as less perceptive. At least Rick reaffirms his bond of trust with Ilsa by icon of ratification—"here's looking at you, kid." A charitable explanation for Rick's uncharacteristic choice of reasoning and rhetoric is perhaps his immediate audience: Laszlo. It is Laszlo who speaks in the language of sum-totals and grand scales. Such "public" reasons can serve as an effective preemption for any possible objection by noble Laszlo.

<sup>49</sup> After more than fifty years of living with Rick's choice it seems hardly feasible to imagine Rick making a different decision. Yet if indeed the process adds to the validity of the judgment, had Rick made the decision to send Laszlo to the United States or to join the couple, his decision would have been also legitimate; he was empowered to make the judgment call, he empathically took everything under consideration, and thus the actual decision would have been valid either way.

<sup>50</sup> Aviam Soifer, "Compacency and Constitutional Law" (1981) 42 Ohio St. L. J. 383.

courts of law can or should exercise judgment as exercised by Rick. We expect judges to exercise judgment according to rules. Lastly, the reasoning Rick offers for his decision is hardly the reasoning we would expect from a court of law.<sup>51</sup> It is an open question whether Soifer is nonetheless correct that good law, like the actual judgment reached by Rick, is a synthesis of internal and external authorities. It is possible, if not probable, that good case law is made where judges internalize the ethics of justice and the ethics of care. In any event, it would appear to us that Rick's decision stands because he was able to transcend the intricate web of conflicting emotions and contain love of and loyalty to both Ilsa and the cause of freedom.

Whereas Soifer suggests that we turn to the court as Ilsa turned to Rick—for a decision—it seems to us that judgment in law and in *Casablanca* share a deeper feature: both are a product of an adversarial process. Judgment is the culmination of a struggle.<sup>52</sup> *Casablanca* is framed within the struggle against the Nazis and represents a struggle for freedom, understood not only as self-fulfillment but also, if not primarily, as a struggle against unadulterated self-interest and egoism. Rick is portrayed as morally unattractive when all he cares about is his own economic success, without taking into account any ethical duties. Thus *Casablanca* is also about the struggle for a balance between autonomy and solidarity. The struggle in *Casablanca* is also a struggle between doing what feels right—clinging to those we love—and doing what we know is right—respecting our convictions, our marriage vows, and our commitment to a certain social order. As in law, the struggle in *Casablanca* is not

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<sup>51</sup> See *supra* note 48. Even if we agree with Soifer that in constitutional cases courts often adopt an avoidance technique that leaves their reasoning under-articulated (*ibid.* at 405-7) thus conveying only the sense of “right and wrong” so as to guide the exercise of judgment in future judgments, we think that Rick's rhetorical technique has failed to do that.

<sup>52</sup> As Ralph Gleason writes, “[t]hose were times when things were so much simpler; the good guys so much more clearly defined and the struggle itself, the moral imperative for man, so much more easily seen.” See Ralph J. Gleason, “Introductory Note to the First Edition” in Howard Koch, ed., *Casablanca: Script and Legend*, 2d ed. (Woodstock, N.Y.: The Overlook Press, 1992) 3 at 3. Gleason's point is that things have changed, and have become more complex these days. Whether our times are perceived as more complex is less relevant; it would be difficult for us to argue that the human condition nowadays is any less centered around the idea of a struggle, including a moral struggle between the good and the bad. While we might be more skeptical regarding the clear line between good and evil, we are nonetheless very much aware of the centrality of the struggle. It is this struggle that transcends *Casablanca*'s times and makes it relevant today and for future generations. It is the same struggle that makes old case law, and future case law relevant, as it touches on this aspect of the human condition.

coincidental, it is pivotal.<sup>53</sup> It is a multilayered struggle both between opposing parties and conflicting virtues and loyalties.

Yet the struggle is contained: it has its logic, its procedures and its ethics. The fabric of the enclave generates things that are worth fighting for and at the same time delineates means and sketches ways through which the struggle may be meaningfully conducted. Enclaves can be seen as inviting the possibility of significant, yet contained, struggles.

The availability of dynamic enclaves offers no stairway to heaven; human judgment within these enclaves is not a recipe for a celestial order,<sup>54</sup> where all conflicts are fully and permanently resolved. As *Casablanca* makes clear and as we know from our engagement with the law, the exercise of judgment, while essential to prevent chaos, never terminates the struggle. It only contains its repercussions, or allows us to accept a certain provisional resolution, while the struggle continues in other forms and shapes. *Casablanca* did not fully resolve the issues it addressed—only offering a possible way of accommodating the dilemma, thereby allowing us to move to the next stage. Thus judgment within dynamic enclaves offers a certain respite, a temporary relief so as to ensure that the experience of struggle does not drown life altogether. This observation seems equally applicable to the legal process. Law also generates and frames human conflicts as ongoing contained struggles. As an enclave, law offers aesthetic forms and substantive claims with which to address and manage the struggle. It offers the parties, including judges and juries, salient elements with which to understand what the struggle is about, and how such struggles may be concluded, without fully resolving the underlying tensions that fuel the conflict. It also offers all concerned a sense of what counts as “good” or “reasonable” judgment, namely judgment that corresponds to or fits with the aesthetic and ethical elements that constitute the enclave within which judgment takes place. In that respect, the judgment exercised in *Casablanca* does resemble judgment exercised in law.

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<sup>53</sup> “The dramatic question at the heart of the picture was [h]ow would Rick act in a crisis when confronted with unavoidable choice between taking one side or the other or, to put it another way, between his own interests and his real sympathies?” Koch, “The Making of *Casablanca*”, *supra* note 8 at 18.

<sup>54</sup> Compare Jerome Frank, *Law and the Modern Mind* (Gloucester, Mass.: Peter Smith, 1970), suggesting that our attraction to the legal myth is a less-than-conscious desire for a (father-figured) order.

#### IV. CONCLUSION: “BUT IT’S STILL A STORY WITHOUT AN ENDING”<sup>55</sup>

World War II was a heroic era, the fight between good and evil, clear and real. *Casablanca*, as a product of this momentous time in both politics and arts, uses the melodramatic form unreservedly in creating a synergy between genre and theme.<sup>56</sup> As Corllis puts it, “[l]ike the very best Hollywood films... *Casablanca* succeeds as allegory, popular myth, clinical psychology or whatever, and as a superb romantic melodrama.”<sup>57</sup> Umberto Eco, in critically scrutinizing the film’s rhetorical and visual devices, suggests that *Casablanca*, “a hodgepodge of sensational scenes strung together implausibly”<sup>58</sup> and an “extreme banality,” nonetheless allows us to catch a glimpse of the “sublime”<sup>59</sup> since it provides a rare instance where prevailing clichés “talk among themselves.”<sup>60</sup> Indeed, Eco’s creative observation captures an important dimension. Yet assuming *Casablanca*’s success is not merely a historical accident<sup>61</sup> Eco fails to explain why other

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<sup>55</sup> Epstein, Epstein & Koch, *supra* note 5 at 194.

<sup>56</sup> While acknowledging the movie’s stature, we wish to avoid validating the general “themes” of the movie - for instance that the United States is the ultimate Promised Land (the home of the brave and the land of the free, so to speak), that French bureaucrats are utterly despicable, that unselfish love conquers immorality, that sheer heroism and sacrifice, spiced with cynical wit, is the way to combat Nazi evil and win our hearts, that the silent, strong brooding man is the ideal type of romantic love, etc. While it would appear that at least some of these underlying assumptions are woven into, if not promoted by the movie, it is difficult, at least today, to subscribe unreservedly to such attitudes. *Casablanca* was so obvious in these respects, that on numerous occasions its views on love, good and evil, and the like, were parodied if not ridiculed in later works. Cf. Woody Allen’s Broadway play “Play it Again, Sam”, in which Allen played a film critic that calls upon Bogart’s spirit for advice in his failing career and love life. In 1972 a movie version was released, *Play it Again, Sam* (Paramount/APJAC/Rollins-Jaffe 1972) (directed by Herbert Ross). It should be noted that such works of satire contributed, ironically, to the film’s canonic stance. Of course, on particularly candid days, we cannot deny that its “pure, sweet nostalgia” (Gleason, *supra* note 52 at 3)] has touched us all, and we still, to a degree, cannot fully disengage ourselves from viewing the United States, love and unselfishness along similar lines.

<sup>57</sup> Corllis, *supra* note 2 at 246.

<sup>58</sup> Eco, *supra* note 24 at 446.

<sup>59</sup> *Ibid.* at 454.

<sup>60</sup> *Ibid.* at 453.

<sup>61</sup> Eco himself suggests that we cannot attribute *Casablanca*’s success to the creators’ intentions, because the scale of the internal dialogue between the clichés is beyond human capability. *Ibid.* at 454.

attempts to make abundant use of prevalent clichés have not been able to replicate *Casablanca*'s impact.<sup>62</sup>

The quest to identify the force that made *Casablanca* a classic is perhaps in vain.<sup>63</sup> Nevertheless, we suggest that the dynamic of the different elements at the core of the movie—the plot, the acting, the cinematography—succeed in composing a unique representation of “the same old story.”<sup>64</sup> This is a story we all know so well, and yet it continuously demands our consideration and attentiveness because it is one of those stories that remain unresolved. We are compelled, time and again, to seek appropriate endings, which in turn become fertile sources for new endless stories.

The narrative framework in *Casablanca*, the “fight for love and glory, a case of do or die”<sup>65</sup> is easily recognizable. It evokes echoes of an eternal theme present in numerous legends, tales, stories and chronicles: the conflict between opposed yet equally commendable ends, the dilemma of conflicting ethical duties. Familiar as it may be, we never tire of listening to, watching and interpreting this story, because it still lacks, and probably will forever lack, a definitive ending.

The interpretation suggested here—*Casablanca* as an intricate manifestation of a dynamic enclave—can be viewed as a structural element in this “same old story” of dialectics. On one hand, it is the story about a conflict to which we can all easily relate because it is so familiar. On the other hand, it is an all-new—or ever-regenerating—story because it contains within itself the possibility of change, evolution and modification.<sup>66</sup>

As we maintained in this essay, the story of law advances along similar lines. The idea of law is premised on what “is,” namely an existing set of predetermined norms, accessed through certain “rules of the game.”

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<sup>62</sup> Osborne provides some examples: *Sirocco* (Santana Corporation, 1951), in which Bogart plays a gun runner in Damascus; *Tokyo Joe*, in which Bogart was a night club owner (Santana Corporation, 1949); *Beat the Devil* (Santana Corporation, 1954), in which Curtiz directed Bogart and Lorre as escaped convicts. *Supra* note 1 at 254-55. All those, together with other films that tried to duplicate *Casablanca*'s success, faded into obscurity.

<sup>63</sup> Yet its force, or classic stature, cannot be ignored. See text at note 1.

<sup>64</sup> The lyrics to the musical theme of *Casablanca* (“As Time Goes By”) include the lines: “It’s still the same old story, a fight for love and glory, a case of do or die.” Herman Hupfeld, “As Time Goes By” (Warner Brothers).

<sup>65</sup> *Ibid.*

<sup>66</sup> An interesting recent example to this unique trait of *Casablanca* is the following suggestion: “I argue that cyberspace is the electronic equivalent of the very best melodramatic, story-based narrative film ever made. Cyberspace is *Casablanca*.” Michael J. Madison, “The Narratives of Cyberspace Law (or, Learning from *Casablanca*)” (2004) 27 *Colum. J. L. & Arts* 249.

At the same time, law has long been recognized as a dynamic practice. Doctrines emerge and change, interpretation is dynamic.<sup>67</sup> The path of law<sup>68</sup> indicates a journey; the nature of the judicial process<sup>69</sup> assumes that the practitioners are engaged in motion.<sup>70</sup>

The concept of enclave, then, is relevant to the way both law and the cinema are organized. We have argued that this concept is of relevance in the other two dimensions where law and cinema can be juxtaposed: ethics and aesthetics. This article attempted to highlight a certain fragile and relentlessly changing equilibrium between enclave and journey, between paths and destinations, between constancy and transformation. Such dynamic equilibrium enables meaningful judgment and in particular ethical judgment in law and cinema.

We submit that it is worthwhile to look at *Casablanca* as an artistic expression that still works—as it would be to examine other such artifacts—since it offers us a vantage point from which to further examine the balance between everlasting stability and incessant dynamism. Such an examination, needless to say, is highly pertinent to our understanding of law’s unremitting struggle to achieve a similar balance between boundaries and journey, permanence and growth.

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<sup>67</sup> William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Cambridge, Mass.: Harvard University Press, 1994) c. 2. But see the critique of the dynamic approach in J.F. Manning, “Textualism and the Equity of the Statute” (2001) 101 Colum. L. Rev. 1 and the reply in William N. Eskridge, Jr., “All About Words: Early Understanding of the ‘Judicial Power’ in Statutory Interpretation, 1776-1806” (2001) 101 Colum. L. Rev. 990.

<sup>68</sup> Oliver Wendell Holmes, “The Path of the Law” (1897) 10 Harv. L. Rev. 457. See “Symposium, *The Path of the Law After 100 Years*” (1997) 110 Harv. L. Rev. 989. Louise Weinberg, “Holmes’ Failure” (1997) 96 Mich. L. Rev. 691.

<sup>69</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921).

<sup>70</sup> The legal *process* bears a linguistic and conceptual similarity to the *motion* picture as both terms represent synergy between enclave (legal norms, static visual frames) and the necessary dynamism (process, motion) that breath life into them.