

Introduction

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WHAT DOCUMENTARY FILMS TEACH US ABOUT THE CRIMINAL JUSTICE SYSTEM—INTRODUCTION

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The visual media is a powerful tool of persuasion, manipulation, and communication. Film in particular has been used effectively to shape public perceptions about the criminal justice system. Mervyn LeRoy's 1932 film classic, *I Am a Fugitive from a Chain Gang*, about a man unfairly convicted of robbery and sentenced to serve on a brutal southern prison chain gang, is an early example. The film, one of the first social reform movies produced by Warner Brothers during the 1930s, was based on a true story.¹ Public shock and outrage about the incidents portrayed in *Chain Gang*,² and others films released around the same time,³ ultimately resulted in abolition of prison chain gangs.⁴

LeRoy's fictional account was a docudrama. Whether docudrama or documentary, films that claim to be truth-bound have the power to influence the public and trigger reform. John Grierson, considered the father of the documentary genre, noted that the

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1. I AM A FUGITIVE FROM A GEORGIA CHAIN GANG (Robert E. Burns 1932). The State of Georgia learned of Burns' whereabouts weeks after the film's release but

Governor A. Harry Moore, the first of three N[ew] J[ersey] governors, officially refused to extradite him Eventually, reform of the chain gang system was successful. By 1937, chain gangs had been outlawed in Georgia Burns voluntarily . . . returned to the state in 1945, where the Georgia Pardon and Parole Board commuted his sentence to time served and restored his civil rights. But he was not officially given a full pardon (because he had admitted being guilty for the holdup).

Tim Dirks, *I Am A Fugitive From A Chain Gang (1932)*, FILMSITE, <http://www.filmsite.org/iama.html> (last visited February 20, 2009).

2. See, e.g., *Fugitive*, TIMES MAG., Dec. 26, 1932, available at <http://www.time.com/time/magazine/article/0,9171,744829,00.html>. But c.f., Jeanne Perreault, *Chain Gang Narratives and the Politics of "Speaking For"*, 24 BIO. 152, 160 (2001). Randolph Lewis argues that the film's success arises from its focus on the whiteness of the principal and supporting actors, and the gradual elimination of African American characters. The narrative offers little analysis of the chain gang system, or of the economics of poverty, power, and race that are the foundation of the system. *Id.*

3. See, e.g., THE BIG HOUSE (Cosmopolitan Productions 1930) (prison over-crowding and other inhumane conditions); THE CRIMINAL CODE (Columbia Pictures Corporation 1931) (unjustly convicted man in prison); LADIES OF THE BIG HOUSE (Paramount Pictures 1931) (wrongly convicted female in prison); HELL'S HIGHWAY (RKO Radio Pictures 1932) (another chain-gang film released a few months before LeRoy's film).

4. Dirks, *supra* note 1. But, c.f., Mathew J. Mancini, *Introduction*, in ROBERT E. BURNS, I AM A FUGITIVE FROM A GEORGIA CHAIN GANG iv, xx (1997) (questioning whether the film had any effect on the elimination of chain gangs).

documentary is an aesthetically satisfying “creative treatment of actuality” with “a clearly defined social purpose.”⁵ Given the increased popularity of documentary films among general film-going audiences, Grierson’s definition suggests why documentary treatment of the criminal justice system warrants closer examination.

The classic expository documentary conveys an air of objective and transparent representation using voiceover commentary with descriptive and informative images.⁶ In documentaries without voice narration—i.e., observational, where the filmmaker’s goal is to simply observe unfolding events⁷—there is an air of neutrality or observed reality. There are other documentary forms, all purporting to convey some truth. “Of course, saying that a documentary representation makes a truth claim is not the same as saying that it presents truth.”⁸

There is an ongoing debate between documentarians and film critics about “the legitimacy of certain techniques in the shaping of the documentary account.”⁹ Errol Morris’ *The Thin Blue Line* (1988), perhaps one of the most widely shown and controversial documentary films, illustrates one aspect of this debate. Legal scholar Richard Sherwin calls the film an “anti-documentary”¹⁰ because Morris mixes fiction and reality giving the viewer an “impenetrable commingling of fiction and reality. . . [so that] representations no longer need to be rooted in reality. It is sufficient for images simply to reflect other images.”¹¹ To Sherwin, *The Thin Blue Line* is not an objective documentary in any sense because it is clear from the beginning that the filmmaker is arguing for the innocence of Randall Dale Adams, the man convicted of Wood’s murder—and it worked.

Morris plays upon our pre-existing “notions of truth and justice to save ourselves from the anxiety and doubt that might otherwise plague our judgments.”¹² Sherwin urges us not to succumb to the filmmaker’s manipulation. Instead, we must question our reliance on familiar narratives—short cuts—that open decision-makers like

5. John Izod & Richard Kilborn, *The Documentary*, in *THE OXFORD GUIDE TO FILM STUDIES* 427 (John Hill & Pamela Church Gibson eds., 1998).

6. KEITH BEATTIE, *DOCUMENTARY SCREENS: NONFICTION FILM AND TELEVISION* 21 (2004).

7. *Id.* at 21–22.

8. *Id.* at 10.

9. Izod & Kilborn, *supra* note 5.

10. RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* 125 (2000).

11. *Id.* at 128.

12. *Id.* at 125.

judges, jurors, and lawyers to more vulnerable unreliable and misleading forms of persuasion.

The use of film to “document” real life aspects of the criminal justice process is becoming commonplace. Videotaped jailhouse confessions are an example of visual documentation.¹³ Viewers, often judges and juries, mistakenly assume that visual evidence of a “voluntary” confession is more reliable than other evidentiary forms. But the camera can lie and mislead the viewer; and when it does, injustices may result.

Thus the documentary form has power to convict or release a defendant, as well as to disclose the positive and negative aspects of the criminal justice system.¹⁴ A small, but growing body of legal scholarship looks at the “documenting” of the criminal justice process by police¹⁵ and other law enforcement officials as well as the increase in documentary films about various aspects of the criminal justice system.¹⁶ Three articles on this subject appear in this issue of the

13. See, e.g., Jessica Sibley, *Criminal Performances: Film, Autobiography and Confession*, 37 NEW MEX. L. REV. 189 (2007) [hereinafter *Criminal Performances*]; Jessica Silbey, *Videotaped Confessions and the Genre of Documentary*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 789 (2006) [hereinafter *Videotaped Confessions*]; Jessica Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107 (2005) [hereinafter *Filmmaking in the Precinct House*].

14. According to film studies scholar Linda Williams, in documentaries generally: [t]he contradictions are rich: on one hand the postmodern deluge of images seems to suggest that there can be no a priori truth of the referent to which the image refers; on the other hand, in this same deluge, it is still the moving image that has the power to move audiences to a new appreciation of previously unknown truth.

Linda Williams, *Mirrors without Memories: Truth, History, and The Thin Blue Line*, in DOCUMENTING THE DOCUMENTARY: CLOSE READINGS OF DOCUMENTARY FILM AND VIDEO 380 (Barry Keith Grant & Jeanette Sloniowski, eds., 1998).

15. See, e.g., *Videotaped Confessions*, *supra* note 13.

16. See, e.g., Regina Austin, *Engaging Documentaries Seriously*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 707 (2006); Regina Austin, *The Next ‘New Wave’: Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809 (2006); Christopher J. Buccafusco, *Gaining/Losing Perspective on the Law, or Keeping Visual Evidence in Perspective*, 58 U. MIAMI L. REV. 609 (2004); *Criminal Performances*, *supra* note 13; David R. Dow, *Fictional Documentaries and Truthful Fictions: The Death Penalty in Recent American Film*, 17 CONST. COMMENTARY 511 (2000); *Filmmaking in the Precinct House*, *supra* note 13; Charles Musser, *Film Truth, Documentary, and the Law: Justice at the Margins*, 30 U.S.F. L. REV. 963 (1996); Roslyn Myers, *Crime Victims as Subjects of Documentaries: Exploitation or Advocacy?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733 (2006); Shari Robertson & Michael Camerini, *Seven Ambiguities: Lawyers and the Making of Well-Founded Fear, a Law-Genre Documentary*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 725 (2006); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 7 STAN. L. REV. 39 (1994).

UNIVERSITY OF MARYLAND LAW JOURNAL OF RACE, RELIGION, GENDER AND CLASS and add to this body of scholarship.

These articles stem from papers and presentations given at a day-and-a-half symposium entitled *What Documentary Films Teach Us about the Criminal Justice System*.¹⁷ Professor Michael Pinard and I organized the symposium—hosted by the University of Maryland School of Law—which was held February 29th through March 1st of 2008. Our goal was to foster a series of dialogues among and between a number of individuals: filmmakers who tell and interpret real stories through documentaries; formerly incarcerated individuals whose stories have been told in film; service providers who work with incarcerated and formerly incarcerated individuals; law teachers who use documentary films to reach pedagogical goals; and law students who take away certain lessons from these films and sometimes make films themselves. These dialogues informed the authors whose work appears in this issue.

Like persuasive filmmaking, effective legal advocacy relies heavily on a strong narrative. The essays by Elizabeth Cooper Davis and Professors Peggy Cooper Davis, Rebecca Johnson and Jessica Sibley discuss the importance of narrative in legal advocacy. Each essay explains why effective visual narratives often adversely influence attempts by lawyers and other legal actors to tell their clients' stories.

What Does Documentary Filmmaking Have to Do with Practicing Law?, the collaborative essay by law professor Peggy Cooper Davis and performance artist/audio documentarian, Elizabeth Cooper Davis, represents the kind of cross-fertilization we hoped would occur as a result of the symposium.¹⁸ Using the symposium's keynote event, the airing of Tod Lending's documentary *Omar & Pete*,¹⁹ about two ex-offenders trying to re-enter the world they left behind in Baltimore, Peggy and Elizabeth Davis compare and contrast the methodology of documentary film storytelling and legal storytelling in a criminal setting. Their focus is on the obstacles that prevent lawyers from being effective advocates of their clients' stories.

The Davis' suggest, among other things, that legal decision-makers expect a trial story that comports with the typical melodramatic

17. See University of Maryland School of Law, *What Documentary Films Teach Us about the Criminal Justice System*, <http://www.law.umaryland.edu/programs/arts/lawandfilm08/> (last visited February 20, 2009).

18. Peggy Cooper Davis, *What Does Documentary Filmmaking Have to Do with Practicing Law?*, 8 MD. L. J. RACE, RELIGION, GENDER & CLASS 7 (2008).

19. OMAR & PETE (Lending 2005).

film that portrays people as either good or bad. This expectation works against criminal defense lawyers and their clients, leading to unjust results. Therefore defense lawyers, to be effective advocates, must “disrupt” the tendency of decision-makers to prefer conventional melodramatic narratives over the more complex narratives surrounding real life criminal prosecutions.

Canadian Law Professor Rebecca Johnson, in her essay, *Mothers, Babies and Jail*, looks at public reaction in Canada to that government’s decision to allow an aboriginal woman—a convicted murderer—to raise her newborn child in prison.²⁰ This decision outraged Canadians because earlier the mother, a former substance abuser, lost custody of her other children. According to Johnson, some commentators argued that the mother was unfit, that jail was an improper place for an innocent child, or that indigenous female felons were getting preferential treatment.

The public’s perception of prison, prison life, and aboriginal women, Johnson argues, was influenced by film, and most prison films leave the public with “an imaginative gap when it comes to thinking . . . [more deeply] about the relationship of gender and children to prison. . . .”²¹ With few exceptions, films encourage us to be spectators and not to identify with women in real prisons. Thus, legal actors must be mindful of pre-existing public perceptions and strongly held stereotypes when crafting legal narratives. Professor Johnson ends by discussing a documentary, *Finding Dawn*,²² which she argues sets out a counter and more accurate narrative about women in prison and helps the public better understand hard question surrounding the imprisonment of women.

Jessica Sibley’s essay, *Cross-Examining Film*, reinforces Professors Sherwin and Johnson’s point that audiences fail to draw a distinction between reality and what they see in the movies. She argues that not only does the public “treat[] film as a depiction of reality,”²³ but more alarmingly, so does the judiciary when viewing films made by police officers. Courts, including the United States Supreme Court, view these films as capturing the reality of situations like police car chases or jail house confessions.

20. Rebecca Johnson, *Mothers, Babies and Jail*, 8 MD. L. J. RACE, RELIGION, GENDER & CLASS 47 (2008).

21. *Id.* at 149.

22. FINDING DAWN (Welsh 2006).

23. Jessica Silbey, *Cross-Examining Film*, 8 MD. L. J. RACE, RELIGION, GENDER & CLASS 17, 17 (2008).

Cross-Examining Film adds to Professor Sibley's growing body of scholarship on the use of film by police in criminal justice settings.²⁴ She reminds us that "film is a constructed medium. The camera always presents a certain point of view and a frame that includes some images and excludes others These conventions produce images that resemble and represent reality, but are not reality in fact."²⁵ Her essay explains why police film evidence is misleading and how courts (mis)use police film evidence. She argues that misleading police film narratives can be countered through more effective cross-examination questions.

In the 1990s, trial lawyers supplemented their oral arguments with PowerPoint presentations, day-in-the-life documentaries, and video depositions. Now, the availability and affordability of digital technology makes it easy for more legal actors at different levels of the legal system to make their case using the persuasive power of film. Visual advocacy is a reality of twenty-first century legal practice.

Lawyers today must have a degree of visual literacy to effectively represent their clients. The changing legal practice reality means that law schools must prepare law students for a more visually based practice. Judges, moreover, need to be more attuned to the power and methodology of visual legal advocacy and appraise more critically visual evidence submitted to the court. Like it or not, visual legal advocacy is here to stay.

24. See *supra* note 13.

25. Sibley, *supra* note 23, at 102.