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## WHAT DOES DOCUMENTARY FILMMAKING HAVE TO DO WITH PRACTICING LAW?

PEGGY COOPER DAVIS\*

The University of Maryland's 2008 Symposium on Documentary Film and the Law<sup>1</sup> featured a screening and discussion of *Omar and Pete*, Tod Lending's compelling 2005 documentary of two men's efforts to return to their communities after serving substantial prison terms.<sup>2</sup> In this essay, I compare narrative and cognitive strategies at work in *Omar and Pete* and those a lawyer might use in representing a person like Omar or Pete in a sentencing proceeding.

When the film's viewers met Omar and Pete, both were middle aged men with nearly life-long histories of drug abuse, crime,<sup>3</sup> and incarceration. By the end of the film, viewers saw that their respective lives have taken very different turns. Omar was released from prison and placed in a series of drug rehabilitation programs. Each program seemed well designed and staffed, and Omar seemed determined to succeed in each. But Omar repeatedly returned to drugs and crime; and by the end of the film he had been sentenced to another lengthy prison term. Pete, on the other hand, made a successful career for himself, married happily, and remained drug and crime free.

As I watched the film for the first time, I suspected that it had started out as a film about Omar, and that the filmmaker decided to give Pete equal billing when Omar's rehabilitation efforts failed. I thought this because the film followed Omar much more closely than it followed Pete, particularly in the first years during which it was shot. I noticed that Pete's earlier release was not chronicled, that he was doing well at the time of Omar's release, and that he spoke to Omar more as a mentor or counselor than as a peer. All of this led me to suspect that early footage of Pete was shot because of the counseling role he played with respect to Omar and that a later decision had been made to create out of the footage a story of the two men's efforts at rehabilitation.

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1. What Documentary Films Teach Us about the Criminal Justice System: Dialogues Among Filmmakers, Formerly Incarcerated Persons, Service Providers, Law Teachers, and Law Students, University of Maryland School of Law, Feb. 29 to Mar. 1, 2008.

2. OMAR & PETE (PBS 2005).

3. By their own accounts, neither man had spent a year out of prison in his adult life.

My suspicions related to my guesses about the filmmaker's goals. I assumed that Lending wanted to tell a sympathetic and hopeful story about rehabilitation from drug abuse and crime, support the unusually intensive Maryland rehabilitative programs in which Omar and Pete participated, and perhaps also take a stand against the unusually high levels of incarceration in the United States.<sup>4</sup> These motivations were confirmed in some measure by Lending's remarks at the Symposium, but I was subsequently told that the film's closer attention to Omar was a result of Pete's greater sense of privacy rather than evidence of a deliberate restructuring.

Whether or not the filmmaker deliberately restructured *Omar and Pete* in the service of a message, it is interesting to consider the film's structure in light of its apparent message. This exercise is especially valuable for criminal defense lawyers, who must regularly attempt to persuade judges to afford rehabilitative opportunities to their clients. A fundamental question for these lawyers will always be: How can I diminish the glaring salience of recidivism risk and focus decision-makers on the possibilities that Pete's story represents? How can I persuade a judge that the possibility that my client will succeed, as Pete did, is at least as important as the risk that he will fail, as Omar did?

I begin by recognizing that conscious efforts to persuade an audience are necessary to competent criminal defense work, but may be somewhat controversial in documentary filmmaking. A criminal defense lawyer is obligated to work diligently—within the bounds of professional ethics—to safeguard a client's liberty. A documentary filmmaker, on the other hand, has a less fixed mission, flowing from a complex mix of ethical, artistic, social and personal commitments. The documentary filmmaker is not obliged or encouraged—as every lawyer is, by a governing code of professional responsibility<sup>5</sup>—to be a client's diligent advocate. Despite these differences between documentary filmmaking and lawyering, it is useful to consider what lessons a film like *Omar and Pete* might hold for practicing lawyers or lawyering theorists.<sup>6</sup>

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4. "[A] higher proportion of the adult population in the United States is behind bars than anywhere else in the world." MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* 1 (2006).

5. See MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007).

6. Lawyering theory is the multidisciplinary study of law in use. For a rich introduction, see ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000). For a succinct introduction, see Peggy Cooper Davis, *Law and Lawyering: The Interactive Study of Law in Use*, 37 N.Y.L. SCH. L. REV. 185 (1992).

Scholars of the arts and human sciences have given systematic thought to methods of persuasion and have developed concepts that can be useful in legal practice<sup>7</sup> as well as in everyday negotiations with friends, colleagues, and strangers.<sup>8</sup> Because lawyers are obligated to advocate as effectively as possible within the bounds of propriety, some legal scholars have begun to borrow from these fields in an effort to systematize how we learn and think about persuasion.<sup>9</sup> The structure of *Omar and Pete* can be analyzed using three concepts that lawyering theorists have borrowed from the arts and sciences: loss aversion, attribution bias, and narrative form.

### I. LOSS AVERSION

Human beings choosing among alternative courses of action will usually avoid choices that appear to carry a greater risk of loss.<sup>10</sup> Indeed, this is so even when the appearance of risk of loss is illusory.<sup>11</sup> I would not be willing to pay for a plastic mug, but if you give me a plastic mug, I am likely to want to hold onto it even if you offer to buy it for a small sum. Similarly, a person making a long term investment may have access to data showing that over time it is more profitable to ride out the ups-and-downs of the stock market than to switch in down times to an investment with less risk of short term losses. It hurts to lose things. Behavioral scientists will tell us that it hurts even more to lose things conspicuously. We are better able to wait out a bad stock market if we do not pay too much attention to our monthly statements and do not follow the market's ups-and-downs.

In a criminal justice context, decision-makers are likely to see recidivism and the harms it would cause as looming and urgent risks of loss. The defendant may be a danger to others, and he stands, safely controlled, before a tribunal. There is a natural hesitation about losing that control and taking the risk that the defendant will commit another crime. Other risks—like the loss of human potential or a child's loss of

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7. See AMSTERDAM & BRUNER, *supra* note 7.

8. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., Penguin Books 2d ed. 1991) (1983); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984).

9. The best account of these efforts is contained in Ty Alper, Anthony G. Amsterdam, Todd E. Edelman, Randy Hertz, Rachel Shapiro Janger, Jennifer McAllister-Nevins, Sonya Rudenstein & Robin Walker-Sterling, *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 1–20 (2005).

10. See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias Sequentiality and the Law*, 2 U CHI. L. SCH. ROUNDTABLE 139, 148 (1995).

11. *Id.* at 149.

an imprisoned parent's support and guidance—tend to be less salient. Moreover, the failure to guard against other risks is unlikely to be reported to or blamed on the decision-maker: a judge who imposes a long-term prison sentence on a man or woman on the brink of rehabilitation will not suffer accusatory tabloid headlines; a judge who sentences a person who later commits a serious crime may well make the front pages. Decision-makers can therefore be expected to shy away from dispositions that would release a criminal defendant from custody. And it is likely that defense lawyers will emphasize, while prosecutors will downplay, the hidden losses that unwarranted or excessive incarceration carries—for the defendant, the defendant's family, the criminal justice system, and for society as a whole.<sup>12</sup>

It makes perfect sense, then, that a filmmaker sympathetic to criminal defendants would want to pair the story of Omar, the recidivist, with the story of Pete, the compassionate rehabilitation counselor and settled family man. A wise defense lawyer will adopt a similar strategy. S/he will take pains to make the perhaps more frequent losses associated with punitive sentencing as vivid as the apparent and fearsome risk of recidivism.

## II. ATTRIBUTION BIAS

Human beings considering another's conduct or culpability are more likely to attribute negative outcomes to individual character than to circumstances.<sup>13</sup> The benefits of simplicity and efficiency draw us to imagine that our problems have single causes and simple solutions. Failures of empathy and patience lead us to imagine that bad outcomes are the fault of bad characters (who can be isolated or eliminated) rather than the result of a variety of circumstances (that can not be easily identified and controlled).

I noticed this tendency in myself as I watched *Omar and Pete*. On the occasion of an arrest for violating the probation condition that he remain drug-free, Omar slips out of the thoughtful and self-effacing soliloquies that characterized his earlier appearances in the film. He is suddenly full of denial and hostility. He claims innocence in the face of clear evidence of his drug use; he blames probation officials for betraying him. *Ah, ha!* I thought, *He's jive. He's no good after all.* I quickly lost sight of Omar's economic, social and personal circum-

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12. See *id.* at 150–52 (discussing the analogous stances of lawyers representing child protective agencies and lawyers representing parents accused of abuse or neglect).

13. NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 56–62 (Am. Psychol. Ass'n 2001).

tances, and focused on his character. *There it is*, I thought. *He's bad*. I turned from the man's potential and his struggles, and began to focus on the risk of his recidivism. *He needs to be put away*.

Why did the filmmaker choose to show this moment? Was it so striking that he could not in good conscience conceal it from his audiences? Were there other unattractive Omar moments that he chose not to show? Did the filmmaker struggle over the decision to show this one?

Were there similarly unattractive Pete moments? None was shown, and I think this fact contributed to my sense that Omar failed because he was Omar—and that Omar is, after all, just a bad person.

A defense lawyer cannot conceal all of a client's faults and weaknesses. It is therefore incumbent upon the defense lawyer to create a story of the client in which bad moments are not seen as windows on an intrinsically evil character, but as downs in the ups-and-downs of a worthy life. This is inordinately difficult—not only because of our tendency to attribute others' bad acts to their characters—but also because we are trapped in narrative patterns that lend themselves so readily to melodrama.

### III. NARRATIVE AND MELODRAMATIC FORM

In a book that all students of the law should read—*LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS*—Neal Feigenson examines how the attribution biases discussed above combine with other cognitive biases to yield, at least in our culture, a human tendency to understand accounts of possibly blameworthy events as melodrama.<sup>14</sup> Feigenson begins with the widespread (but not entirely uncontroversial) theory that we are prone to understand events in a standard, four part narrative form: (1) a positive, steady state of affairs; (2) a trouble that disturbs the steady state; (3) efforts to redress the trouble; and (4) restoration of the steady state, (or, more rarely, acceptance of a new steady state).<sup>15</sup> Because, as I have said, the story of the crime is the most obviously salient story in a criminal trial, the crime and its consequences are likely to be taken as the “trouble” in a plot that proceeds through efforts to redress the crime and restore the peace that it disturbed and ends with the punishment of a villain.

The standard narrative form itself operates to the defendant's disadvantage in a story of crime. This is because it chops reality into

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14. *Id.* at 151–69.

15. AMSTERDAM & BRUNER, *supra* note 7 at 110–14.

short-story-sized units and features a trouble that can be identified and resolved. The defendant, of course, is the obvious candidate to be the source of trouble. It follows that the defendant's conviction and isolation satisfy the narrative progression by restoring a state of peace. This point is more easily understood if an alternative form is considered: if we were inclined to view the world in epic rather than standard narrative terms, our focus might be drawn to forces other than—and larger than—the defendant. We might then see the crime as having complex and multiple causes. And we might imagine the defendant over the larger arc of a lifetime rather than within the context of a single and blameworthy action.

A melodrama takes the standard narrative form, but it has additional features that compound the anti-defendant/pro-prosecution biases associated with the form itself. Following our tendencies to blame trouble on single, character-driven causes, the melodrama features trouble that is caused by the deeply villainous character of the troublemaker rather than by the circumstances in which the agent and the victim of trouble have found themselves. Following our need for simplification and our wish for closure, the melodrama ends when a virtuous hero defeats or destroys the villain in an act that restores a peaceful steady state. It is a simple story with very good characters and very bad characters, and it ends happily because good characters prevail. It is also a story of restoration rather than a story of transformation. The steady state—so easily read as the maintenance of proper and lawful norms—is restored; the audience is not led to question settled norms or to imagine adjustment to a different way of thinking or getting on in the world.

Decision-makers' tendency to analyze events in melodramatic terms is, then—like their tendencies toward loss aversion, attribution biases and standard narrative focus—excellent news for prosecutors and bad news for defense lawyers. Decision-makers will be easily lured to blame crimes on and villainize criminal defendants. Defense lawyers will have the difficult task of focusing judges and juries on plots other than the story of the crime and its punishment and/or combating the appeal of melodrama. Changing the plot is sometimes possible; Anthony Amsterdam and Randy Hertz brilliantly demonstrated this in their analysis of how a defense lawyer's closing argument transformed a homicide case from a story of the murder, into a story of the juror's struggle to try the defendant fairly.<sup>16</sup> But, particularly at the punishment phase of a criminal trial, the defense will also need to con-

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16. Anthony Amsterdam & Randy Hertz, *An Analysis of the Closing Arguments in a Jury Trial*, 37 N.Y.L. SCH. L. REV. 55 (1992).

front and complicate melodrama's simple story of the crime, melodrama's villainous characterization of the accused or convicted criminal, and the decision-makers' urge to play the hero by convicting the villain and having him locked away or killed.

*Omar and Pete* gives us ideas about how the defense can break out of the melodramatic form. It is not a crime story, but a story about rehabilitative programs and efforts. The steady state is life as a free citizen. The troubles are drug abuse and related crimes. Former prison inmates are the heroes; their helpers and co-stars are those who design and support rehabilitative programs and those who work in them. The focus is not on a single criminal act, but on years of effort to shake drugs and earn a living lawfully. Indeed, the audience learns very little about the individual crimes committed by Omar or Pete, but is focused on agendas for recovery and reform.

Unfortunately, this plot shift does not guarantee that the film's audience will be sympathetic to the rehabilitative model. Omar fails. The addition—if it was such—of Pete's success leaves the apparent odds of success at only fifty-fifty. The pains taken to give Omar a rehabilitative chance seem extreme, and the efforts to help him seem costly. Loss aversion rears its head again as the audience is forced to confront ugly realities of rehabilitative failure and recidivism.

If the film gave us a basis for distinguishing the situations or characters of Pete and Omar, defense lawyers might seize on that difference and attempt to align their clients with Pete and distinguish them from Omar. Unfortunately, Pete's success remains something of a mystery, while Omar's failure is chalked up to unexplained aspects of his character: Omar is just Omar. This character-based thesis sends us back to the world-view of a melodrama: There are bad apples. Good people should learn to identify them and toss them out before they spoil the peck.

#### IV. BEYOND LOSS AVERSION, ATTRIBUTION BIAS, AND MELODRAMA

We have come to an uneasy peace with the notion that it is better to allow a guilty person go free than to convict and punish an innocent person. The idea that an innocent would be executed or confined to a prisoner's existence is sufficiently intolerable that we are willing—albeit not always happy—to protect against false positives when conviction is at issue. That is why we require proof beyond reasonable doubt to convict a person of a crime.

But false positives seem more tolerable when disposition is at issue. Why is that? How can we construct stories that will sensitize de-



cision-makers to the tragedy of human lives unnecessarily spent in steel cages? The creators of *Omar and Pete* were right to offset the anxiety aroused by Omar's story by directing their audience's attention to Pete. Moreover, it is fair enough that the filmmakers did not address recidivism's odds or instruct their audience in how to distinguish the Omars and Petes of the world. Recidivism's odds are subject to a morass of unknown variables, and however they are stated, they entail a residue of risk that may well seem too great to a decision-maker who may bear public responsibility for harms a released defendant might do to others. Further, the human and social sciences have not taught us to predict dangerousness or criminality with sufficient precision to justify a sacrifice of life or liberty.

What more can we do as advocates? We might address the problem of false positives by educating decision-makers to the fact that cognitive biases will cause the odds of rehabilitative failure to loom with disproportionate effect.<sup>17</sup> This may help, but I do not think it will be sufficient. Just sentencing requires more than a realistic assessment of risk. In my view, it requires an empathetic appreciation of each defendant's human dignity and value. It was a commitment to respect for human dignity that enabled the Constitutional Court of South Africa to outlaw capital punishment while the Supreme Court of the United States continues to find it constitutionally tolerable.<sup>18</sup> This kind of commitment grows, I think, from an empathetic appreciation of each defendant's humanity and potential, regardless of factors like class or race or personal history that might seem to set a defendant apart. Defense lawyers must struggle against the pulls of loss aversion, attribution bias and melodramatic form to encourage decision-makers to recognize a clients' human dignity and become allies in clients' struggles to realize their human potential.

I have often relied in my teaching on techniques developed by Augusto Boal, the Brazilian artist/politician who uses theater to encourage political agency and awareness among oppressed people.<sup>19</sup> At the heart of Boal's method is a strategy for disrupting the standard narrative and melodramatic forms.<sup>20</sup> Instead of creating plays that preach to his audiences by telling them settled stories, Boal works with

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17. See Davis & Barua, *supra* note 11, at 148.

18. Compare *State v. Makwanye* 1995 (3) SA 391 (CC) (S. Afr.), with *Gregg v. Georgia*, 429 U.S. 1301 (1976).

19. For descriptions of Boal's work, see *PLAYING BOAL: THEATRE, THERAPY, ACTIVISM* (Mady Schutzman & Jan Cohen-Cruz eds., Routledge 1995) [hereinafter *PLAYING BOAL*]; *AGUSTO BOAL, THEATER OF THE OPPRESSED* (Theatre Communications Group 1993) (1979).

20. See generally *PLAYING BOAL*, *supra* note 19; Boal, *supra* note 19.

his audiences to construct scenarios that pose problems and the possibility of trouble. These scenarios are first acted out with a predictably unfortunate ending. But this is only the beginning of the drama. The scenario is repeated, perhaps many times, with audience members invited to step in for one of the characters in an effort to change the outcome.<sup>21</sup> Instead of a steady state, trouble, and restoration story, Boal helps people to create stories of struggle. He empowers his audiences to feel that by their actions they can prevent bad outcomes instead of settling for punishing them.

Reflecting on Boal's methods has helped me to pinpoint a discomfort with *Omar and Pete*: because the film seemed to document contrasting stories of failure and success rather than an ongoing story of struggle, I never felt fully engaged with Pete's rehabilitative progress. As a result, I was unable to imagine a role for myself as Pete's ally or helper. By contrast, I was drawn—in part because of cognitive biases and in part because of a loss of empathy—to speculate that Omar, who had the benefit of a number of allies and helpers over the course of the film, was a bad apple who would inevitably have to be isolated.

The documentary filmmaker has an obligation to tell the story s/he is documenting; this may well override the filmmaker's ability to tell the story that would be most persuasive in behalf of its central characters. The story of Omar and Pete as ex-offenders put me in the position of comparing and judging their success or failure. It was engrossing drama, but its message was, appropriately, ambiguous.

How might defense lawyers, with a clear duty of persuasion, speak differently about Omar and Pete? We would want to resist melodramas' pull to see people as very, very good or very, very bad. We would want to resist the natural pull to attribute negative conduct to an inherently evil character rather than to complex and multiple circumstances that might be collectively controlled. And we would want to encourage our audience to worry as much about loss of opportunity and potential as about loss of security. All of this would be exceedingly difficult, and I have no confidence that we would succeed. But here are some things we might try: We might tell the story of Pete the counselor rather than the story of Omar and Pete. We might encourage a decision-maker to identify, not with Pete's self-rehabilitative efforts, but with his efforts to save others. We might offer Pete as a model of faith in each ex-offender's human dignity and potential. With all of this, we

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21. This process, known as "forum theater," is described in Augusto Boal, *She Made Her Brother Smile: A Three-Minute Forum Theater Experience*, in *PLAYING BOAL*, *supra* note 19.

would hope to draw the decision-maker into being an agent in the struggle to make rehabilitation successful, rather than a critical observer of rehabilitative efforts that succeed or fail.