Introduction

Taunya Lovell Banks
tbanks@law.umaryland.edu

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/rrgc

Part of the Law and Society Commons

Recommended Citation
Available at: http://digitalcommons.law.umaryland.edu/rrgc/vol8/iss1/2

This Conference is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in University of Maryland Law Journal of Race, Religion, Gender and Class by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
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. Public shock and outrage about the incidents portrayed in *Chain Gang*, and others films released around the same time, ultimately resulted in abolition of prison chain gangs.

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
documentary is an aesthetically satisfying "creative treatment of actuality" with "a clearly defined social purpose." 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. In documentaries without voice narration—i.e., observational, where the filmmaker's goal is to simply observe unfolding events—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."

There is an ongoing debate between documentarians and film critics about "the legitimacy of certain techniques in the shaping of the documentary account." 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" 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." 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." 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

---

7. Id at 21–22.
8. Id at 10.
9. Izod & Kilborn, supra note 5.
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. 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. A small, but growing body of legal scholarship looks at the "documenting" of the criminal justice process by police and other law enforcement officials as well as the increase in documentary films about various aspects of the criminal justice system. Three articles on this subject appear in this issue of the


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.

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

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).


\(^{19}\) *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.\(^2^0\) 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..."\(^2^1\) 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*,\(^2^2\) which she argues sets out a counter and more accurate narrative about women in prison and helps the public better understand hard questions 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,"\(^2^3\) 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.


\(^2^1\) Id. at 149.

\(^2^2\) FINDING DAWN (Welsh 2006).

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.