

University of Pennsylvania Carey Law School

## Penn Law: Legal Scholarship Repository

---

Faculty Scholarship at Penn Law

---

7-11-2006

### The Next "New Wave": Law Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy

Regina Austin

*University of Pennsylvania Carey Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Film and Media Studies Commons](#), and the [Legal Education Commons](#)

---

#### Repository Citation

Austin, Regina, "The Next "New Wave": Law Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy" (2006). *Faculty Scholarship at Penn Law*. 93.

[https://scholarship.law.upenn.edu/faculty\\_scholarship/93](https://scholarship.law.upenn.edu/faculty_scholarship/93)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

# The Next “New Wave”: Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy

Regina Austin\*

INTRODUCTION .....	810
I. LAW-GENRE DOCUMENTARIES: IMAGING/IMAGINING LAW AS A LIVED EXPERIENCE .....	813
II. “ENOUGH WITH THE TRUTH, ALREADY!” OR HOW TO APPRECIATE THAT DOCUMENTARY TRUTH IS NO STRANGER THAN FICTION.....	823
III. LAWYERS AS AN AUTHENTICATING AUDIENCE, LAWYERING AS AN INTEGRAL ASPECT OF THE CREATIVE PROCESS.....	843
IV. <i>THE DÉNOUEMENT</i> : VISUAL LEGAL ADVOCACY.....	849
REPRISE .....	868

---

\* William A. Schnader Professor, University of Pennsylvania Law School, Bacon-Kilkenny Distinguished Visiting Professor, Spring Term 2005, Fordham University School of Law. B.A., 1970, University of Rochester; J.D. (Order of the Coif), 1973, University of Pennsylvania Law School. The author would like to thank Melanie Breaux, Yan Yuan, and Rogette Esteve for their research assistance. An earlier version of this work was presented at the Public Law Workshop at the University of Minnesota Law School.

## INTRODUCTION

Documentaries are shrouded in ironies. Though they are ostensibly devoted to depicting reality, their reception is shrouded in so many myths and misconceptions that they are not taken seriously by the legal academy. This Article is part of an effort to change that.

There are roughly four general categories of misconceptions or stereotypes about documentaries that seem to make them inappropriate fodder for scholarly legal analysis and unsuitable teaching tools.

(1) **Genre-lessness.** Whereas fictional films mimic, exaggerate, or parody the law and legal practice in a way that can be provocative and provide good springboards to discussion, documentaries take the law straight on, often with mind-numbing results. Compared to narrative or fiction films, most documentaries are boring and not entertaining; they lack character arcs or plot points that hold the viewer's attention. More important, they pertain to only a limited spectrum of legal subjects and concerns. Law-related documentaries inordinately focus on criminal law and criminology, to the neglect of other areas of law that are visually harder to capture or explain on film or that do not involve adversaries engaged in a ritualized struggle between good and evil. In addition, films involving law-related subjects beyond the criminal law do not seem to be systematically linked to each other in any coherent way that facilitates critical viewing or sustained communal discourse or "film talk" by a law-trained audience.

(2) **The Elusive Nature of Documentary Truth.** Lay people tend to approach documentaries like substantive evidence admitted for the truth of the matter stated. As a result, documentaries provoke an excessive amount of fruitless discussion about the relationship between the reality that is captured on film and that which does or would exist if the camera were not present or if the subject matter were not mediated through the biased eye of the

filmmaker.<sup>1</sup> Even though filmmakers by and large agree that documentaries are not representations of the pure truth, but are instead the “creative treatment of actuality,”<sup>2</sup> their films still employ narrative or rhetorical styles that do not entirely put the question of truth to rest. If documentary filmmaking is not the pursuit of truth, what then is it? Propaganda, perhaps? Blatantly political documentary films suggest that. Unpacking a documentary’s meaning is hard work. If a documentary’s message is not muddled, it may be too one-sided and not sufficiently “objective” to warrant use in an educational environment where “fair and balanced” is supposed to be more than a slogan. Documentaries, then, fail as texts deserving of critical analysis because they do not fully develop all the dimensions of an issue in the way that law professors teach their students to do.

(3) **Fixation on Victimization.** Documentaries too often portray a reality that is negative. They are rarely uplifting or positive. They are fixated on victimization. They carry the viewer on a voyeuristic journey through someone else’s miserable life. The filmmaker cannot help but become enmeshed in her or his subjects’ lives and to use them for her or his own ends. The spectator is implicated in this too. As members of one of the helping professions, we lawyers assume that unadulterated voyeurism is exploitative. Moreover, there appears to be a conflict between the ethics of filmmaking and film spectatorship and the dictates and concerns of the law, particularly with regard to informed consent and invasion of privacy. So, to truly appreciate and evaluate a documentary film, a viewer needs to know something about the circumstances surrounding the making of the

---

<sup>1</sup> See James R. Elkins, *Reading/Teaching Lawyer Films*, 28 VT. L. REV. 813, 879 (2004) (arguing that “real-events-based films” generate too many questions about their portrayal of “reality” and therefore are prone to “side-track” discussion and “may absorb far too much psychic space” in “a jurisprudence and film course”).

<sup>2</sup> This definition is widely attributed to John Grierson. See, e.g., Paul Rotha, *DOCUMENTARY FILM 70* (1952) (citing Grierson’s definition in a discussion of the expansion of nonfiction film as an art form); Brian Winston, *CLAIMING THE REAL: THE GRIERSONIAN DOCUMENTARY AND ITS LEGITIMATIONS* (1995) (exploring the contradiction between picturing actuality and at the same time giving it a creative treatment). Grierson is also credited with coining the usage of “documentary” to refer to nonfiction films. See John Grierson, “Flaherty’s Poetic Moana” in *THE DOCUMENTARY TRADITION* 25 (Lewis Jacobs ed., 2d ed. 1979).

film, including the historical setting in which it was made, yet the information required for an adequate assessment of a documentary is rarely obvious or accessible to the audience.

(4) **No Practical Payoff.** Finally, given that documentaries are harder to analyze than fictional films, it is especially troublesome that there is no practical payoff to studying them or writing about them in the law school context.

The discussion that follows challenges most of these stereotypes and misconceptions. Part I will propose a working definition of law-genre documentaries because such a categorization is a necessary precursor to thinking or writing about the relevance of documentary films to lawyers, law students, and anyone interested in law and the pursuit of justice. The Article will go on from there to describe in Part II the various rhetorical or narrative styles or modes of filmmaking that documentarians employ. Although these styles or modes contribute to the impenetrability of documentary films, an understanding of their limitations can open up documentary films to critical analysis and greater appreciation. The discussion will suggest that reflexivity or introspection on the part of the subjects, the filmmaker, and the audience, all of whom are active constructors of “the reality” reflected on the screen, is the key to interpreting documentary film. Part III will take the analysis beyond reflexivity by suggesting how law-trained viewers constitute a critical “authenticating audience” for law-genre films because of their ability to understand not only the films’ content, but also the context of their making which significantly parallels the role law and lawyering now play in the creative process by which documentary films are produced. Finally, Part IV will describe visual legal advocacy, a form of nonfiction filmmaking done by lawyers on behalf of clients and their causes. An enhanced ability to engage in and respond to visual legal advocacy is the payoff for law students and practicing lawyers who take seriously the study of law-genre documentaries and the role law plays in nonfiction film criticism and production.

I. LAW-GENRE DOCUMENTARIES: IMAGING/IMAGINING  
LAW AS A LIVED EXPERIENCE

At the outset, let me set out a few caveats about this attempt to categorize a body of nonfiction films by their relationship to law and lawyering. First, films expressly intended to instruct law students and/or practicing lawyers in advocacy skills or the finer points of client representation are wholly irrelevant to the discussion that follows.

Second, included in the listing are feature-length nonfiction films that were made to be informative and/or entertaining (downright funny in some cases) for a general lay audience; they should not be dismissed as frivolous or tangential to the enterprise of legal education or the advancement of justice for that reason alone. *Supersize Me*, for instance, was a commercial success,<sup>3</sup> but the month-long McDonald's binge undertaken by its director was provoked by *Pelman v. McDonald's Corporation*<sup>4</sup> and the challenge that was uttered by the district court judge in the case. The text itself appears on the screen. Said the court:

The intended use of McDonalds' food is to be eaten, at some frequency that presents a question of fact. If plaintiffs can allege that McDonalds products' intended use is to be eaten for every meal of every day, and that McDonalds is or should be aware that eating McDonalds' products for every meal of every day is unreasonably dangerous, they may be able to state a claim.<sup>5</sup>

Third, although I apply the film term "genre" to my categorization, that should not be read as a sign of technical precision or critical legitimacy.<sup>6</sup> A genre is

---

<sup>3</sup> SUPER SIZE ME (Roadside Attractions, /Samuel Goldwyn Films 2004) (Morgan Spurlock, director) (recounting the health effects of the filmmaker's one-month diet of nothing but food from McDonald's).

<sup>4</sup> *Pelman v. McDonald's Corp.*, 237 F. Supp.2d 512 (S.D.N.Y. 2003).

<sup>5</sup> *Id.* at 537.

<sup>6</sup> For other attempts at the genrification of documentaries, see DANIEL LOPEZ, FILMS BY GENRE: 775 CATEGORIES, STYLES, TRENDS AND MOVEMENTS 77-81 (1993) (categorizing documentaries as "analytical" or "essay;" "committed" or "activist;" "fictionalized" or "pseudo;" "ethnographic" or "anthropological;" "feminist;" "persuasive" or "exposé;" "naturalist" or "romantic;" "sociological;" and "war"); Paul Arthur, *Extreme*

[a] group of films having recognizably similar plots, character types, settings, filmic techniques, and themes. Such conventions are repeated sufficiently from film to film to make it obvious that all these works belong to a single group and that the filmmaker is relying upon the past use of these conventions and the audience's familiarity with them.<sup>7</sup>

A genre is not simply predicated on common content, form, or production processes that are deployed by filmmakers or emphasized by distributors; rather genres are also the product of the discursive practices of communities of critics and viewers.<sup>8</sup> Insofar as critics are concerned, genres originate out of a "commitment to comment on and conserve cinema. . . . [Genrification] offer[s] a useful form of categorization, permitting simpler and more efficient configuration and consultation of our long-term cinema memory."<sup>9</sup> Given the dearth of legal scholarship on the subject of documentaries,<sup>10</sup> any categorization of nonfiction

---

*Makeover: The Changing Face of Documentary*, CINEASTE, Summer 2005, at 18, 20-21 (asserting that, while documentaries do not constitute a genre, but rather reflect a common mode of production, distribution, and exhibition, they may be divided into several genres such as "portraiture," "compilation-centered history," "essay," "tabloid," "first-person," and "the making of . . .").

<sup>7</sup> Ira Konigsberg, *THE COMPLETE FILM DICTIONARY* 164 (2d ed. Penguin Putnam 1997).

<sup>8</sup> RICK ALTMAN, *FILM/GENRE* 100-01 (1999). Communication between members of film communities is not face-to-face. Rather, it is limited to their "common orientation" toward the films comprising the genre. *Id.* at 162 (describing the characteristics of "constellated communities" that are joined by the common pleasure they imagine is shared by others who view films generically).

<sup>9</sup> *Id.* at 124.

<sup>10</sup> There is very little legal scholarship devoted to the analysis of documentary films, although the exceptions are of notable quality. See Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347 (1996) (analyzing *Who Killed Vincent Chin?*, a documentary by Christine Choy and Renee Tajima about the baseball-bat beating and murder of a Chinese American by two auto workers); Jennifer L. Mnookin, *Reproducing a Trial: Evidence and Its Assessment in Paradise Lost*, in *LAW ON THE SCREEN* 153 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., Stanford University Press 2005) (likening trials and film work about trials in terms of reflexivity via a close analysis of the HBO documentaries *Paradise Lost: The Murders at Robin Hood Hills* and *Paradise Lost 2: Revelations*); Charles Musser, *Film Truth, Documentary, and the Law: Justice at the Margins*, 30 U.S.F.L. REV. 963 (1995-96) (offering a probing

films I make here cannot be the product of a consensus about the films' common characteristics or their invocation of agreed-upon conventions that clue the audience as to what awaits them. I am focusing only on common themes and accordingly caution the reader that I invoke the term "genre" advisedly and provisionally.

As used in this Article, the term "law-genre documentaries" refers to "true" or "real" stories or narratives as to which the law is the point of departure, a central organizing theme, or such an important consideration affecting the advancement of the chronicle or story being presented that the subject matter might reasonably be characterized as "law as a lived experience." It is the last of these characteristics that truly sets nonfiction films apart from narrative or fictional works about law.

As with narrative films, the documentaries that are most likely to be categorized as "law-genre" are rather explicitly about the law, the institutions of the legal system, and their various actors and subjects, as well as their cumulative impact of on society.<sup>11</sup> The films focus on the active pursuit of justice and/or the degree to which the actual operation of the legal order falls short of the ideal and thereby produces miscarriages of justice.<sup>12</sup> The subjects are primarily legal professionals (including lawyers, judges, law makers, and law enforcers), and claimants to and disputants of legal entitlements or protections (including clients, crime victims, persons who are incarcerated, and ordinary citizens with legal problems).<sup>13</sup> The language of the law, as well as the ceremonies,

---

analysis of the truth claims of *The Thin Blue Line*, *Who Killed Vincent Chin?*, and *Aileen Wuornos: The Selling of a Serial Killer*); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994) (contrasting the coherent, traditional linear narrative of injustice with the "acausal," "antidocumentary" "skeptical postmodernist" counterplot developed in Errol Morris's documentary *The Thin Blue Line*). The pedagogical use of documentary film has been discussed in the legal literature as well. See Philip N. Meyer & Stephen L. Cusick, *Using Non-fiction Films as Visual Texts in the First-Year Criminal Law Course*, 28 VT. L. REV. 895 (2004).

<sup>11</sup> STEVE GREENFIELD, GUY OSBORN, & PETER ROBSON, *FILM AND THE LAW* 15-24 (2001).

<sup>12</sup> *Id.* at 24.

<sup>13</sup> ANTHONY CHASE, *MOVIES ON TRIAL: THE LEGAL SYSTEM ON THE SILVER SCREEN* 170 (2002).



rituals, trappings, and other cultural accouterments of the law, contributes substantially to the films' verisimilitude.

Most of the films that easily fit into the category "law-genre" deal with criminal law and the sprawling criminal justice system.<sup>14</sup>

---

<sup>14</sup> Documentary films deal with nearly every stage of the criminal justice process, including investigation, interrogation, arrest, arraignment, indictment, prosecution, incarceration, execution, parole, probation, and ultimate release. Often, the focus is on the institutions and bureaucracies of the system (the courts, the prisons, and the parole boards) and/or the actors who run them (law enforcement officers, prosecutors, public defenders, judges, prison guards, and parole and probation officers). Some of these films indict the authorities for committing greater crimes than the offenders they set out to apprehend and punish. Other films pay particular attention to the individuals who are the subjects or objects of the system's operations, including crime victims, the falsely accused, the wrongfully convicted, the unjustly executed, the exonerated, the reformed and repentant, and the notoriously remorseless.

Among the best known criminal law-genre documentaries are the following: *BROTHER'S KEEPER* (American Playhouse/Hand to Mouth Productions 1992) (Joe Berlinger & Bruce Sinofsky, directors) (following the elderly reclusive Ward "Boys" and the tight-knit community of Munnsville, New York which rallied to their cause after Delbert Ward was accused of murdering his brother Bill); *INCIDENT AT OGLALA: THE LEONARD PELTIER STORY* (Spanish Fork Motion Picture Co. 1991) (Michael Apted, director) (questioning the conviction and life sentences imposed on an American Indian Movement activist for the deaths of two FBI agents, who were wearing plainclothes and driving an unmarked car, that occurred during an exchange of gunfire on the Pine Ridge Reservation in South Dakota); *MURDER ON A SUNDAY MORNING* (HBO 2001) (Jean-Xavier de Lestrade, director) (following the ordeal of Brenton Butler, a 15-year-old black male who was wrongfully and ineptly prosecuted for the killing of a white female tourist in Jacksonville, Florida; winner of the 2001 Academy Award for Best Documentary Feature); *PARADISE LOST: THE CHILD MURDERS AT ROBIN HOOD HILLS* (Cabin Fever Entertainment 1997) (Joe Berlinger & Bruce Sinofsky, directors) (following the prosecution of three teenagers for the murder of three little boys); *PARADISE LOST 2: REVELATIONS* (HBO Creative Thinking International Ltd., Hand to Mouth Productions 2001) (Joe Berlinger & Bruce Sinofsky, directors) (following the appeals and grassroots efforts to overturn the convictions); *SCARED STRAIGHT! 20 YEARS LATER* (United Paramount Network Arnold Shapiro Production 1999) (Arnold Shapiro, director) (depicting the experiences of a group of juveniles ordered to participate in a program conducted by the Lifers' Group at Rahway State Prison in New Jersey and the subsequent life histories of the participants involved in the session); *THE FARM: ANGOLA, USA* (Gabriel Films 1998) (Liz Garbus, Wilbert Rideau & Jonathan Stack, directors) (depicting life in a maximum security prison in Louisiana); *AILEEN WUORNOS: THE SELLING OF A SERIAL KILLER* (DEJ Productions 1992) (Nick Broomfield, director) (exploring the case of Aileen Wurnous and the efforts of those around her to capitalize on her situation); *AILEEN: THE LIFE AND DEATH OF A SERIAL KILLER* (Lafayette Films 2003) (Nick Broomfield & Joan Churchill, directors) (exploring the events that followed the first film); *THE THIN BLUE LINE*, (American Playhouse, Channel 4 Television Corporation, Third Floor Productions 1988) (investigating the case of Randall Adams who was wrongfully convicted of the murder of

There are several reasons for this. The legal issues are accessible to filmmakers and audiences untrained in the law. Criminal justice provokes ritualized battles involving human adversaries and existential notions of good and evil and justice and injustice, with the outcomes often being unpredictable. Also, the stakes are high for both the principals involved and society.

While the law that is made and applied in the criminal justice system is highly visible and accessible to lay criticism, law in general impacts real life in less structured, more informal ways in a wide range of substantive areas or situations that are perfectly suited to being captured in documentary films. Documentaries take the audience into institutions and bureaucracies (such as immigration offices, and child welfare agencies),<sup>15</sup> where the law is enforced and its authority is asserted by subjects and on subjects, all of whom experience it as an integral, inexorable, and insidious part of their everyday existences. Many ordinary people of limited means and limited power must take the law as a given and work within and around its constraints, often resorting to informal subversion in lieu of formal resistance. When broadly conceived to include documentaries about the experience of living with or within law's dictates, law-genre films range the gamut of legal categories or subjects, including civil rights,<sup>16</sup> labor and

---

a Dallas police officer based on the lies of various witnesses whose stories the filmmaker reenacts; very likely the best known of the criminal law documentary films, in part because it lead to the identification of the real culprit and the release of Adams); *WACO: RULES OF ENGAGEMENT* (Fifth Estate Productions, Somford Entertainment 1997) (William Gazeckiu, director) (dissecting the siege of the Waco, Texas compound of the Branch Davidians and their leader, David Koresh, by the ATF and FBI that resulted in the deaths of four federal agents and 74 members of the group).

<sup>15</sup> See, e.g., *FAILURE TO PROTECT: THE CASEWORKER FILES* (Frontline television broadcast Feb. 6, 2003) (Barak Goodman, director) (tracking the handling by case workers of the files of several children, removed or at risk of being removed from their homes, who had been placed under the supervision of the Maine Department of Human Services); *RED HOOK JUSTICE* (Sugar Pictures 2005) (Meema Spadola, director) (focusing on the operations of the innovative Red Hook Community Justice Center in Brooklyn, New York); *WELL-FOUNDED FEAR* (The Epidavros Project 2000) (Shari Robertson & Michael Camerini, directors) (following immigrants seeking asylum in the United States and the immigration officers working in Manhattan and Newark, New Jersey who ruled on their claims).

<sup>16</sup> See, e.g., *FARMINGVILLE* (Camino Bluff Productions, Inc. 2004) (Catherine Tambini & Carlos Sandoval, directors) (questioning whether the organized protests of local

employment law,<sup>17</sup> family law,<sup>18</sup> health law,<sup>19</sup> social and economic

---

residents against the presence of undocumented workers seeking employment at curbside locations throughout the town was racist and xenophobic); *4 Little Girls* (40 Acres & A Mule Filmworks, HBO 1996) (Spike Lee, director) (exploring the lives of the children who died in the 1963 bombing of a black church in Birmingham, Alabama in the wake of organized civil rights protests conducted earlier in the year); *MIGHTY TIMES: THE CHILDREN'S MARCH* (Tell The Truth Pictures 2005) (Robert Hudson & Bobby Houston, directors) (recounting with original footage, controversial re-enactments, and interviews the packing of the jails of Birmingham, Alabama in 1963 by protesting schoolchildren; the film won the 2005 Academy Award for Best Short Documentary); *SCOTTSBORO: AN AMERICAN TRAGEDY* (PBS 2000) (Barak Goodman & Daniel Anker, directors) (recounting the prosecution for rape brought against the black defendants who were known as the "Scottsboro Boys"); *WHO KILLED VINCENT CHIN?* (Filmmakers Library 1988) (Christine Choy & Renee Tajima-Pena) (examining the circumstances of the murder of Chinese-American Vincent Chin by two Detroit auto workers and the political mobilization by Asian Americans that resulted in a civil rights suit against his killers).

<sup>17</sup> See, e.g., *AMERICAN DREAM* (Cabin Creek Productions 1991) (Barbara Kopple, director) (recounting the ill-fated strike at a Hormel meatpacking plant in Austin, Minnesota in the mid-1980s by workers who, upset by wage cuts and the end of management's "paternalistic" philosophy, did not take into account changes in the industry and the opposition of their national union to their go-it-alone attitude and the tactics suggested by their outside consultant); *EYES ON THE FRIES: YOUNG WORKERS IN THE SERVICE ECONOMY* (UC Berkeley Labor Center & Peek Media 2004) (Casey Peek & Jeremy Blasis, directors) (describing the rise of the nonunion service economy, its impact on and lack of opportunity for young workers, and their collective efforts to make their jobs better); *FARMINGVILLE*, *supra* note 16, (recounting the responses of some residents of a Long Island town to the presence of undocumented Latino immigrants, seeking employment, that included picketing, alliances with national anti-immigrant groups, and harassment of the workers and the decision of the county legislature to forgo creating a hiring site in the wake of strong citizen protest); *FAST FOOD WOMEN* (Appalshop Film & Video/Headwaters 1991) (Anne Lewis Johnson, director) (exploring the working conditions, low pay, and other terms of employment of middle-aged women working in fast food chain restaurants in eastern Kentucky at a time of high unemployment); *Harlan County, USA* (Cabin Creek Productions 1976) (Barbara Kopple, director) (intertwining the story of the violent strike of coal miners, supported by their wives and daughters, which lead to the signing of a union contract at the Brookside Mine in West Virginia with an account of the history the national United Mine Workers of America which was itself plagued by murder and corruption).

<sup>18</sup> See, e.g., *AGING OUT* (Public Policy Productions for Thirteen / WNET New York 2005) (Roger Weisberg & Vanessa Roth, directors) (following the difficult, yet different, adjustments of three young people who at 18 "aged out" of the foster care system); *SOUND AND FURY* (New Video Group Films, Aronson Fil Associates, FilmFour, Public Policy Productions, WNET Channel 13 New York 2000) (Josh Aronson, director) (exploring the impact of cochlear implants on "deaf culture" and the dilemma they pose for the parents and grandparents of young deaf children whose best interests are unclear).

<sup>19</sup> *BREAST CANCER: SPEAKING OUT* (KCTS/TV & Filmmakers Library 1992) (depicting the range of impacts of the disease on women from personal treatment decisions to political mobilization in support of increased funding for research); *LA OPERACIÓN*

inequality,<sup>20</sup> products liability,<sup>21</sup> corporations and securities law,<sup>22</sup> real property,<sup>23</sup> environmental injustice,<sup>24</sup> intellectual property,<sup>25</sup>

---

(Cinema Guild 1982) (Ana María García, director) (recounting the impact of the U.S. Government's policy regarding population control and sterilization on the reproductive freedom of Puerto Rican women); METHADONIA (Blackbridge Productions LLC/HBO 2005) (Michel Negroponte, director) (illustrating the ineffectiveness of methadone as a treatment for heroin addiction by following several members of a therapy group who still managed to get high by combining methadone with prescription drugs).

<sup>20</sup> See, e.g., A DAY'S WORK, A DAY'S PAY (Mint Leaf Productions 2001) (Kathy Leichter & Jonathan Skurnik, directors) (depicting the political struggle of former benefit recipients placed in New York City's Work Experience Program (workfare) to win passage of an ordinance that would extend to them some of the benefits and protections accorded other city employees); LOVE & DIANE (Independent Television Service, PBS, ARTE France 2002) (Jennifer Dworkin, director) (recounting the story of a mother struggling to reconnect with her children who were placed in foster care when she became a crack addict, her daughter who was HIV+ and had psychological problems, and her daughter's son who was placed into foster care because of his mother's neglect); ONCE UPON A TIME . . . WELFARE MADE A DIFFERENCE (Community Food Resource Center, New York, NY 2003) (Lysander Puccio, director) (presenting four former recipients who recount the difficulties that put them on welfare and how they were able to achieve professional success with welfare's assistance).

<sup>21</sup> See, e.g., BLUE VINYL: THE WORLD'S FIRST TOXIC COMEDY (New Video 2002) (Judith Helfand & Daniel B. Gold, directors) (recounting, with humor and animation, the dangers of vinyl siding for the environment and the workers who produce it, as well as the difficulties of finding a practical alternative); BRIGHT LEAVES (Channel 4 Television Corp., Homemade Movies, WBGH Boston 2003) (Ross McElwee, director) (exploring the troubled history of North Carolina's tobacco industry through an examination of the life of John Harvey McElwee, an unsuccessful competitor of James B. Duke, and McElwee's descendants, including the filmmaker).

<sup>22</sup> See, e.g., ENRON: THE SMARTEST GUYS IN THE ROOM (Magnolia Pictures 2005) (Alex Gibney, director) (profiling the executives responsible for the rise and collapse of the energy giant and the accounting business practices they employed); THE CORPORATION (Zeitgeist Films 2004) (Mark Achbar & Jennifer Abbott, directors) (indicting the corporation as a business form that is by law not only entitled to the same rights accorded individuals but also mandated to maximize profits for its investors); MCLIBEL: TWO WORLDS COLLIDE (Bullfrog Films 1997) (Fanny Armstrong, director) (recounting the course of McDonald's libel suit against the British activists responsible for a leaflet entitled "What's Wrong with McDonald's" which criticized among other things the quality of its food, the veracity of its advertising especially as directed at children, the treatment of its employees, its environmental responsibility, and its treatment of animals); STARTUP.COM. (Artisan Entertainment 2001) (Chris Hegedus & Jehane Noujaim, directors) (chronicling the rise and fall of a dot.com enterprise that was fueled by massive amounts of venture capital and the friendship of its young founders).

<sup>23</sup> See, e.g., FLAG WARS (Zula Pearl Films 2003) (Linda Goode Bryant & Laura Poitras, directors) (presenting both sides of the cultural conflicts and legal disputes generated by the gentrification of a black neighborhood in Columbus, Ohio by "homesteaders" who were mainly white, bourgeois lesbians and gays); HOME (2005) (Jeffery Togman,

and even monetary policy.<sup>26</sup> Many films fall into several categories at the same time. This is not to suggest, however, that there are not gaps or inadequacies in documentary films' treatment of certain subjects or issues with which the law deals or of certain subjects or groups that are making claims under law. The inordinate focus on victims as opposed to underdog victors in the struggles over natural and man-made adversity is a serious limitation of nonfiction film work,<sup>27</sup> but there are exceptions which focus on political mobilization and activism and tend to be made by filmmakers from the affected communities.<sup>28</sup>

---

director) (following the efforts of a black divorced working mother of six to move her family out of public housing and to achieve the American Dream of homeownership in a Catholic-sponsored community development housing project under the direction of a white childless breast cancer survivor).

<sup>24</sup> See, e.g., *DARWIN'S NIGHTMARE* (Mille et Ute Productions, Coop99 filmproduktion, Saga Film 2004) (Hubert Sauper, director) (exploring the consequences caused by the introduction and harvesting, exclusively for the European market, of Nile Perch which killed of the fish indigenous to Lake Victoria that had not only supplied food for the poor people of Tanzania, but also kept bacteria in check).

<sup>25</sup> See, e.g., *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE* (Center for Social Media at American University 2004) (Pat Aufderheide & Peter Jaszi, directors) (short film exploring the impact of copyright restrictions on documentary filmmakers, including the high cost of securing rights to music picked up in filming vérité footage and the self-censorship and silencing caused by copyright-based limitations on access to primary materials); *WILLFUL INFRINGEMENT* (Fiat Lucre LLC 2003) (Greg Hittelman, director) (exploring the impact of copyright enforcement by corporate owners on artistic creativity and ordinary use of copyrighted material by schools and local entertainers).

<sup>26</sup> See, e.g., *HOME-MADE MONEY* (2004) (director, Alejo Hoijman) (recounting the story of the rise and fall of the informal currency that was generated by the barter economy that arose in Argentina when bank accounts were frozen and inflation skyrocketed); *LIFE AND DEBT* (Tuff Gong Pictures 2001) (Stephanie Black, director) (exploring the impact of the International Monetary Fund and structural adjustment on the economic life of the people of Jamaica, with voice-over text drawn from Jamaica Kincaid's *A Small Place*).

<sup>27</sup> See generally Brian Winston, *The Tradition of the Victim in Griersonian Documentary*, in *NEW CHALLENGES FOR DOCUMENTARY* 269 (Alan Rosenthal ed., 1988) [hereinafter *NEW CHALLENGES* 1] [hereinafter Winston, *Tradition*] (arguing that filmmakers' freedom of expression is intrinsically linked to the abridgement of the rights of their "victim" subjects).

<sup>28</sup> See, e.g., *FACES OF CHANGE* (Rada Film GroupFilms 2005) (Michèle Stephenson, director) (focusing on four grassroots activists who were given video cameras to film the state of human rights in their region of the world); *LAS MADRES: THE MOTHERS OF THE PLAZA DE MAYO* (Direct Cinema, Ltd. 1986) (Susana Muñoz & Lourdes Portillo, director)

Though law-genre films generally attempt to make the law understandable or accessible to a lay audience, they do not necessarily or simply present an authorized or official version of the law.<sup>29</sup> More often than not, law-genre documentaries examine the degree to which the actual operations of the legal system fall short of the ideal. The films provide critical perspectives on the law, particularly as it is actually lived with and experienced (or endured) by common people. Documentaries are ideal for understanding law's impact as a lived experience. For example, in her essay in this Symposium on the making of *Flag Wars*, a film about the gentrification of a working-class black neighborhood in Columbus, Ohio, director Linda Bryant states that she did not set out to make a law-genre film.<sup>30</sup> Her film graphically illustrates the degree to which she and the longtime inhabitants of the gentrifying Columbus, Ohio community in which she filmed were "ambushed" by the local ordinances and regulations the white, bourgeois lesbian and gay newcomers invoked to turn the area into their home.<sup>31</sup>

In truth, any documentary that relates to any substantive issue amenable to legal reform or that elaborates on the circumstances in which formal law operates or fails to operate and thereby leaves room for a regime of informal legal norms might be said to fall within the designation "law-genre documentary film."

It should be apparent that the effort to restrict the analysis of nonfiction films of relevance to the legal community to a single genre is in some sense too confining. Law finds its way into many nonfiction films because social conditions and social justice are and have long been at the core focus of documentary filmmaking. In addition, many documentary films are of relevance to legal professionals because they deal with social problems that would be amenable to legal solutions if only they were better known or

---

(recounting the origins and history of the protests by the mothers of Argentina's "Disappeared").

<sup>29</sup> CHASE, *supra* note 13, at 180.

<sup>30</sup> Linda Good Bryant, "Law Is Life!": *Flag Wars*, *Local Government Law, and the Gentrification of Olde Towne East*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* xxx, xxx (2006).

<sup>31</sup> *FLAG WARS*, *supra* note 23.

understood. Thus the study of documentaries that are of relevance to the legal community covers a far broader range of subject matters than seems to be the case with the study of narrative films where the primary focus is on lawyers, trials, and related adversarial proceedings.

In addition, documentary films are powerful tools for putting legal disputes into context. The movement to embrace the interdisciplinary study of law suggests that the legal academy no longer considers law an independent nearly autonomous field of knowledge and a separate and discreet nearly autonomous arena of conflict. As a result, it makes no sense to ignore or overlook the particular circumstances or the larger setting that frames disputes as courts are still prone to do. At the same time, the demands of lived multiculturalism have brought into relief the way in which the law glosses over or totally ignores the nuanced circumstances of particular contending parties and the groups to which they belong because of law's tendency to seek generalizable solutions to generalizable disputes. Documentary films are ideal means of bringing to life and making palpable the backdrop of contested and competing material, social, and political "realities" that underlie legal disputes in whatever fora they are waged. Documentaries are capable of both linking a face and a voice to a legal issue and situating that issue in a national or global setting at the same time.

A skeptic might ask how much of this argument on behalf of the pedagogical and intellectual merits of law-genre documentary films depends on their claims to truth. In my view, far too much emphasis has been placed on the issue of documentary films' representation of truth. Documentary films do not have to be objectively "true" for them to have a place in the study or discourse of law and the pursuit of justice. The next section will explain why I believe that is so.

II. “ENOUGH WITH THE TRUTH, ALREADY!” OR HOW  
TO APPRECIATE THAT DOCUMENTARY TRUTH  
IS NO STRANGER THAN FICTION<sup>32</sup>

Much more attention has been devoted to fiction films about law than to nonfiction films about law. There is a paradox there—that films which present themselves as fictional fabrications, the product of fancy and imagination, should receive a more favorable reception in law school classrooms and legal academic writing than films that purportedly reflect the realities of legal actors, legal institutions, and law’s impact in context. I suspect that the truth claims of documentaries make them more suspect than even docudramas as to which a viewer may freely speculate as to the distance between truth and fiction or ignore the question all together.<sup>33</sup> Law professors and law students are used to working with hypotheticals and fictional films seem closer to hypotheticals than documentary films. Discussions of a documentary film are easily sidetracked by speculation as to exactly how close the film comes to depicting the objective reality, which is assumed to be the essence of nonfiction film work. In lieu of such an inquiry, a documentary may seem no better than a fictional account as a springboard to scholarly analysis or as the source of a complex problem ripe for Socratic dissection.

Conversely, the more a film reflects what actually happened or the way things really are, the more truthful it seems. Yet, the more truthful the film seems, the harder it is to criticize. At the same time, it is assumed that the truth is easier to distort with film than with the written word and that manipulation is harder to detect. Cynicism with regard to the veracity of filmed evidence is widespread and not easily surmounted. As a result, documentaries are considered to be less objective and less balanced pieces of advocacy than written works of nonfiction.

---

<sup>32</sup> The proverb “Truth is stranger than fiction” has been attributed to Lord Bryon’s Don Juan XIV (1823). *THE CONCISE OXFORD DICTIONARY OF PROVERBS* 261 (John Simpson & Jennifer Speake eds., 1992).

<sup>33</sup> A docudrama is “any dramatization that seeks to re-create actual people and events. Such a presentation uses performers and sometimes alters events, but seeks to achieve an effect of authenticity and credibility.” KONIGSBERG, *supra* note 7, at 103.



Documentary films seem impervious to critique because of the narrative or rhetorical styles they employ. Arguably, some styles open a film up to criticism or invite debate over its representation of reality or its assertion of truth, while others do not. Moreover, each style is said to capture truth better than the others. But as they say in the vernacular, “Don’t believe the hype!” If the viewer understands the styles and their limitations, she or he has a portal into critical viewing.

*A. The Five Rhetorical or Narrative Styles of Documentary Film*

Film scholars, most notably Bill Nichols, have identified roughly five narrative or rhetorical styles that are employed in documentary films.<sup>34</sup> A cursory survey of these styles is useful in explaining why documentary films seem immune to criticism or challenges to their claims of truth. Although a style or mode may have developed or come to prominence as a result of progress in the development of media technology (cameras, microphones, and editing equipment), they do not follow a linear pattern of usage; newer styles have not completely displaced older ones. The styles or modes are not pure; several may be employed in any given film. There is much debate about the superiority of each style or mode among film scholars and documentarians. Advocates or proponents of each mode or style have reasons for claiming that it is more honest with regard to nonfiction film’s relationship to “the truth” than the others. Opponents and critics of each are not without responses, of course.

The five narrative or rhetorical styles employed in documentaries and their most distinctive characteristics may be summarized as follows:

- (1) *Expository*—“Voice-of-god” narration, to which the visual images are subservient, that pitches an argument directly to the audience;

---

<sup>34</sup> See generally BILL NICHOLS, INTRODUCTION TO DOCUMENTARY 99-138 (2001) [hereinafter NICHOLS, INTRODUCTION] (elaborating a typology of modes of representation characteristic of documentaries). The discussion that follows in the text largely accepts Nichols’s categorization.

(2) *Direct or Observational*—“Fly-on-the-wall” filming that captures with the camera “a slice of life” as it is occurring, without the apparent intervention of the filmmaker;

(3) *Interactive*—Interviews (mostly “talking heads”) conducted by the off-screen filmmaker which figuratively put her or him in the picture;

(4) *Participatory*—Onscreen performance by the filmmaker which literally puts her or him in the picture

(with both the interactive and the participatory styles calling attention to the constructed nature of reality or “truth” in nonfiction film and offering honesty, authenticity, sincerity, and ethical virtue in its place); and

(5) *Reflexive*—Direct questioning of the possibility of representing reality through the use of dramatizations, reenactments, simulations, and “performances” by the filmmaker and her or his subjects, all of which subvert documentaries’ conventions by exposing the mechanisms by which verisimilitude is normally constructed.<sup>35</sup>

Identifying the rhetorical style or mode of a film or a film segment is a good place to begin a critique since each style or mode has its limitations with regard to its ability to represent “truth.”<sup>36</sup> The most salient limitations may be summarized as follows:

(1) *Expository*—Overly didactic or insidiously subjective in a way that undermines the objective message visual images alone might convey; subordinates the visual images to the voice-over which drives the narrative or storyline;

(2) *Direct or Observational*—False representations or suggestions of the unadulterated transparency of film; unstructured and superficial content that leaves the

---

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

filmmaker's message unclear or inconsequential;  
exploitative of subjects;

(3) *Interactive*—Unchallenged or biased content, devoid of the filmmaker's own distinct voice or critical perspective;

(4) *Participatory*—Insufficiently reflexive or self-critical; narcissistic; performance elevated over substance; paternalistic and meddlesome in the treatment of subjects; and

(5) *Reflexive*—Too abstract or evocative to be informative; too remote from reality.<sup>37</sup>

#### (1) The Expository Style

The "Expository" style or mode produces the classic documentary film. Its dominant characteristics are (a) an authoritative commentary or voice-over narration, sometimes referred to as "the voice of god" and (b) images, which may be metaphorical, that illustrate the verbal text.<sup>38</sup> According to film scholar Stella Bruzzi,

[B]y blending omniscience and intimacy, [expository films] address the spectator directly; they set out an argument (thus implying forethought, knowledge, the ability to assimilate); they possess a dominant and constant perspective on the events they represent to which all elements within the film conform; they offer a solution and thereby a closure to the stories they tell.<sup>39</sup>

The seminal examples of films in the expository mode are Pare Lorenz's *The Plow That Broke the Plains* and *The River*.<sup>40</sup>

---

<sup>37</sup> *Id.*

<sup>38</sup> See generally *id.* at 105-09.

<sup>39</sup> STELLA BRUZZI, *NEW DOCUMENTARY: A CRITICAL INTRODUCTION* 42-43 (2000).

<sup>40</sup> See generally Charlie Keil, *American Documentary Finds Its Voice: Persuasion and Expression in The Plow That Broke the Plains and The City*, in *DOCUMENTING THE DOCUMENTARY: CLOSE READINGS OF DOCUMENTARY FILM AND VIDEO* 119 (Barry Keith Grant & Jeannette Sloniowski eds., 1998).

Films made in the expository mode with a “voice-of-god” narration have been criticized for being “boring,” untrustworthy, and insufficiently “filmic,” which is to say they do not exploit to the fullest the visual potential of film to tell a story.<sup>41</sup> Voice-overs tend to tell viewers exactly what to think and may thereby leave little or no room for them to formulate their own views.<sup>42</sup> The narrator speaks with too much authority; the narration stifles competing interpretations of the visual presentation and tightly controls the reception.<sup>43</sup> Additionally, it is argued that “an anonymous narrator” can be distracting and distancing in a way that dilutes a film’s “reality and credibility.”<sup>44</sup>

Of course, there is also opinion to the contrary touting the merits of narration. Stella Bruzzi defends the use of commentary “as an economic device able to efficiently relay information that might otherwise not be available or might take too long to tell in images,” or as “an ironic and polemical tool.”<sup>45</sup> Filmmaker Jon Else argues, “If an audience can’t trust the narration, why should it trust anything else in the film? Is there any less potential for manipulation in editing, music, composition?”<sup>46</sup> The filmmakers of the Kartemquin Group have found that “a narrative voice that comes from the subject is the most honest and persuasive. . . . [L]etting the narrative bias show, instead of hiding it, lets the audience know that [the filmmakers] respect them, that [they] are not trying to manipulate them with subtle narrative tricks.”<sup>47</sup>

Voice-overs are not all the same, of course. They have a range of different impacts to which the astute critical viewer should be attuned in a way that opens up expository films to critical analysis. It may be hard to argue with “the voice of god” when “god” is the

---

<sup>41</sup> Barbara Zheutlin, *The Politics of Documentary: A Symposium*, in NEW CHALLENGES FOR DOCUMENTARY 153 (Alan Rosenthal & John Corner eds., 2d ed. 2005) [hereinafter NEW CHALLENGES 2].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 232 (offering the opinions of filmmakers Connie Field and the Kartemquin Collective).

<sup>45</sup> Bruzzi, *supra* note 40, at 43.

<sup>46</sup> Zheutlin, *supra* note 42, at 155.

<sup>47</sup> *Id.* at 155-56.

Edward R. Murrow of *Harvest of Shame*<sup>48</sup> and the *McCarthy Years*,<sup>49</sup> but the narrative spoken by the more benevolent sounding Morgan Freeman in *The March of the Penguins* leaves room for the audience members to interpret the reproductive behavior unfolding on the screen against the backdrop of their own political and social agendas.<sup>50</sup> Harvey Fierstein, the narrator of *The Times of Harvey Milk*,<sup>51</sup> sounds authoritative, but his identification with the subject matter (gay rights) signals a partisanship that surely increased the receptivity of some viewers to the film's message.<sup>52</sup>

---

<sup>48</sup> *CBS Reports: Harvest of Shame* (CBS Broadcast International 1991) (Edward R. Murrow & Fred W. Friendly, executive producers) (exposing the hardships of the lives of migrant workers and their families; originally broadcast Thanksgiving Day 1960).

<sup>49</sup> *The McCarthy Years* (CBS International 1991) (CBS Broadcast International 1991) (Edward R. Murrow & Fred W. Friendly, executive producers) (compiling programs from the *See It Now* series that were originally broadcast in 1953 and 1954 in which Murrow takes on Wisconsin Senator Joseph R. McCarthy and the abuse of power that is known as "McCarthyism").

<sup>50</sup> *MARCH OF THE PENGUINS* (a/k/a *THE EMPEROR'S JOURNEY*) (Warner Independent 2005) (Luc Jacquet, director). The success of this film, which follows the mating and reproductive rituals of the emperor penguins of Antarctica, is partially attributable to its direct or *vérité* filming style and non-didactic narration for the American audience by Morgan Freeman. See Jonathan Miller, *March of the Conservatives: Penguin Film as Political Fodder*, N.Y. TIMES, Sept. 13, 2005, at F2 (reporting on the political interpretations of the film by advocates of monogamy and "intelligent design"). But see *About that March . . .*, N.Y. TIMES, Sept. 20, 2005, at F4 (offering a range of reader opinions expressing contrary views about the significance of the reproductive behavior of the penguins depicted in the documentary). Conservatives are not the only group attempting to score points by analogizing penguins' sexual behavior to that of humans. See Jonathan Miller, *New Love Breaks Up a 6-Year Relationship at the Zoo*, N.Y. TIMES, Sept. 24, 2005, at B1 (describing the social and political implications—for humans—of the sexual affairs of two male penguin inhabitants of the Central Park Zoo). While the French version of the film uses a narration that anthropomorphizes the animals and turns them into storytellers, the American version uses a human narrator. See Doreen Carvajal, *Compared with Their Filmmakers, the Penguins Have It Easy*, N.Y. TIMES, Sept. 28, 2005, at E1 (describing the post-production difficulties encountered by the French producers of *March of the Penguins/La Marche de l'Empereur*). The change in voice-over did not prevent the American version from generating anthropomorphism. One can only wonder if the anthropomorphism will prove a greater impediment to the penguins than destruction of their natural habitat.

<sup>51</sup> *THE TIMES OF HARVEY MILK* (Black Sand Productions, Inc. 1984) (Rob Epstein & Richard Schmiechen, directors) (recounting the career and assassination of the San Francisco supervisor or councilman who was its first openly gay elected city official).

<sup>52</sup> See BRUZZI, *supra* note 40, at 46-50.

The same can be said for black novelist Toni Cade Bambara who narrates *The Bombing of Osage Avenue*, a film about the near-destruction of a Philadelphia neighborhood that resulted from the city's misguided efforts to deal with a radical organization known as MOVE.<sup>53</sup> The use of two narrators in *Fire Eyes*,<sup>54</sup> a film about female genital surgery or mutilation, reflects the contradictions that exist within feminist circles over how best to combat the practice. (Note that the controversy extends to the debate over the correct term for the procedure). One narrator is the filmmaker herself; she was born in Somalia, underwent the procedure, had it reversed, and advocates for a dialogue between its opponents and the ambivalent African Muslim men *and women* who will ultimately be responsible for its continuance. The other seems to be the "voice of Western, largely white feminism" which is quite firm in its conviction that the practice is wrong and that the power of the West should be employed to bring about its cessation. The ambivalence of the filmmaker about the role of outsiders to the culture applying pressure to stop it seems to be echoed in the competing narrations. To what extent the dual narrations may represent a nod to the strong sentiments of the film's funding sources or likely audience is not clear.

## (2) Observational or Direct Cinema Style

The "Observational" or "Behavioral" style or mode is most often referred to, in the United States, as "Direct Cinema."<sup>55</sup> It is occasionally erroneously referred to as "cinéma vérité."<sup>56</sup> It developed with the advent of smaller cameras and portable sound

---

<sup>53</sup> THE BOMBING OF OSAGE AVENUE (Scribe Video Center 1987) (Louis Massiah, director) (examining the events surrounding the bombing of a Philadelphia rowhouse, the deaths of 11 people, and the near destruction of an urban neighborhood by the police).

<sup>54</sup> FIRE EYES: FEMALE CIRCUMCISION (Filmmakers Library 1994) (Soraya Mire, director) (exploring female genital surgery or mutilation with a focus on its social, psychological, and physiological consequences, particularly as it is practiced among Somalians).

<sup>55</sup> KONIGSBERG, *supra* note 7, at 96.

<sup>56</sup> "Cinéma vérité," which is identified with the French documentary *Chronicle of a Summer* (*Chronique d'un été*) and its directors Jean Rouch and Edgar Morin, would be characterized as "interactional" according to the typology developed by Nichols. Rouch and Morin appear in their film, interact with their subjects on screen through probing interviews, and reflect together on camera about the reception the film will have. See BRUZZI, *supra* note 40, at 99.

recording devices. In lieu of “the voice of god,” direct cinema offers the viewer the perspective of “the fly on the wall” which, through its “window on the world,” is able to take in “a slice of life” or “life as it is.” (Clichés associated with direct cinema abound.) There are no commentary, no interviews, and no reenactments. The subjects talk to each other, not to the audience. The director does not address the subjects on camera and does not direct their behavior off camera. The editing emphasizes “real time” in real space. Direct cinema has the virtues of having an “overriding interest in people as subjects over theses; the prioritization of the mundane occurrence over the monumental event; [and] a predilection for following subjects and actions as opposed to leading and constructing them.”<sup>57</sup> Observational cinema puts much of the burden of extracting meaning from the film on the audience which is not told what to make of the film. Rather, “[a] spectator of direct cinema is invited to extrapolate significance from the action as represented.”<sup>58</sup>

The best-known law-genre exemplar of direct cinema is former law professor Frederick Wiseman, who directed such films as *Titicut Follies*,<sup>59</sup> *High School*,<sup>60</sup> and *Domestic Violence*.<sup>61</sup> *Flag Wars*<sup>62</sup> and *Love and Diane*,<sup>63</sup> two more recent law-genre films, were shot in the style or mode of direct cinema.

The claims made about the ability of the observational or direct cinema style to capture reality have provoked widespread rebuke. Consider the lambasting of direct cinema offered by compilation filmmaker Emile de Antonio, one of the legends of American documentary cinema.

---

<sup>57</sup> *Id.* at 73.

<sup>58</sup> *Id.* at 87.

<sup>59</sup> *TITICUT FOLLIES* (Zipporah Films 1967) (Frederick Wiseman, director) (exposing the disturbing treatment of inmates/patients confined at the Bridgewater State Prison for the Criminally Insane in Massachusetts).

<sup>60</sup> *HIGH SCHOOL* (Zipporah Films 1968) (Frederick Wiseman, director) (depicting the educational process at Northeast High School in Philadelphia, Pennsylvania).

<sup>61</sup> *DOMESTIC VIOLENCE* (Zipporah Films 2001) (Frederick Wiseman, director) (offering two perspectives on domestic violence in Tampa, Florida, one gained through accompanying the police as they respond to citizens’ calls and the other from following workers and clients at a shelter for battered women).

<sup>62</sup> *FLAG WARS*, *supra* note 23.

<sup>63</sup> *LOVE AND DIANE*, *supra* note 20.

There lies behind *cinéma vérité* the implication of a truth arrived at by scientific instrument, called the camera, which faithfully records the world. Nothing could be more false. The assumption of objectivity is false. Filmmakers edit what they see, edit as they film what they see, weight (sic) people, moments, and scenes by giving them different looks and values. As soon as one points a camera, objectivity is romantic hype. With any cut at all, objectivity fades away. It is why so many *soi-distant vérité* filmers made rock-docs. The least appetizing of all *cinéma vérité* is Wiseman's watery stew, made up of his debt to light cameras and my use of non-narration structure. Suitable pap for PBS. Bland, floury stuff offensive to no one, only to the art of films.<sup>64</sup>

Brian Winston, who has been among the harshest critics of direct or observational cinema, charges that, because of the lack of structure and closure, much direct cinema work is "confused,"<sup>65</sup> "ill thought out,"<sup>66</sup> "ad hoc,"<sup>67</sup> and compiled without rigor. In his estimation, nonfiction television of the observational sort "runs away from social meaning", "[f]or it substitutes empathy for analysis [and] privileges effect over cause."<sup>68</sup> The fixation of documentarians with the lives of deviants and the poor and working classes exacerbates the harm done by sloppy craftsmanship. "The constant examination of social problems in a highly personalized and intrusive way . . . cannot be justified by the public's right to know. . . . [F]ilmmakers should have an absolute duty of care to protect the subject, even, if necessary from themselves."<sup>69</sup> Winston concludes: "[T]he superficiality of much documentary work encouraged by the *vérité* style, makes it difficult to see how the information given could achieve opinion-changing effects."<sup>70</sup>

---

<sup>64</sup> Zheutlin, *supra* note 42, at 158.

<sup>65</sup> Brian Winston, *Documentary: I Think We Are in Trouble*, in *NEW CHALLENGES 1*, *supra* note 27, at 21 [hereinafter Winston, *Trouble*].

<sup>66</sup> *Id.* at 25.

<sup>67</sup> *Id.* at 33.

<sup>68</sup> Brian Winston, *Tradition*, *supra* note 27, at 274.

<sup>69</sup> Winston, *Trouble*, *supra* note 65, at 33.

<sup>70</sup> *Id.* at 31.



The criticisms may be summed up as follows. The more the filmmaker succeeds in (disingenuously perhaps) presenting the subjects' action with transparency, the more passive the filmmaker seems and the less certain the audience may be of the filmmaker's point of view or message.<sup>71</sup> Similarly, the more micro or personal the focus, the more likely it is that macro or systemic factors influencing the subjects' lives have been ignored or distorted. Filmmakers relying on observational techniques tend to scrimp on context and history, which makes their film harder to read.<sup>72</sup> Finally, the focus on the minute details of the subjects' lives sets them up for exploitation by the filmmaker and voyeurism by the audience.

In part, other rhetorical styles of nonfiction filmmaking directly respond to these criticisms. Moreover, technology is altering the critical landscape of documentary films once again. To a great extent, the uncertainty and lack of closure associated with direct cinema techniques are rectified by the proliferation of director's commentaries and outtakes found on the DVDs of, as well as the extensive websites devoted to, many of the newer nonfiction films. Such supplemental material offers insights into the backstory or context of the making of documentary films<sup>73</sup> and thereby enables the viewer to better appreciate and interpret works employing the direct or observational rhetorical style.

### (3) Interactive Style and (4) Participatory Style

As the credits rolled for *March of the Penguins*, the filmmaker indulges in a bit of reflexivity by showing footage of the cinematographers in their orange snowsuits working with their bulky cameras, pulling sleds over the frozen tundra to keep up with the animals, and sending aloft a camera tied to a balloon to record the action from above. When the filmmaker was done, many viewers were no doubt ready for another film, one on the making

---

<sup>71</sup> BRUZZI, *supra* note 40, at 99-100.

<sup>72</sup> Bill Nichols, *The Voice of Documentary*, in *NEW CHALLENGES 2*, *supra* note 42, at 17, 18 [hereinafter Nichols, *Voice*].

<sup>73</sup> The importance of the backstory or context to the appreciation of a documentary film is discussed in greater detail in the next section on the interactive and participatory styles and in Part IV below.

of *March of the Penguins*. It was easy for the audience (lulled by the voice of Morgan Freeman) to forget that god had not made the film but that people had, with the cooperation of the penguins of course. Whatever adversity the penguins weathered, the cinematographers did too. The postscript reminds the viewers (a bit late perhaps) that documentary films qua films are creative, collaborative works of art, wholly apart from their content and that the creative process which produces a documentary film may be relevant to its interpretation and reception.

Critical evaluation of a great many documentary films would be enhanced if the viewer had data about the origins of the idea for the film, the political and social conditions affecting its production, the backgrounds of the filmmakers and subjects, the nature of the relationship between and among them, and the technological and economic constraints to which the filmmakers were subject. Furthermore, with regard to observational or direct cinema, viewers are particularly curious about the amount of the action seen on screen that would not have occurred had the camera been absent and the filmmaker nowhere on the scene. The interactive and participatory styles respond to viewers' needs in these regards.

The interactive and participatory styles or modes can be discussed together. Both are considered correctives to the limitations of direct cinema. They put the filmmaker in the picture so to speak, either figuratively or literally. The presence of the filmmaker, though unseen and/or unheard by the viewer, may be felt in her or his interaction with the subjects and other social actors through the interviews by which the film's thesis is developed. Alternatively, the filmmaker may become an on-camera, "self-conscious" actor or performer herself or himself. Ken Burns's PBS films (*The Civil War*,<sup>74</sup> *Jazz*,<sup>75</sup> and *Unforgivable*

---

<sup>74</sup> THE CIVIL WAR (American Documentaries Inc. 1990) (Ken Burns, director) (recounting the history of the American Civil War in nine episodes beginning with slavery and ending with the assassination of President Lincoln and an analysis of the conflict's consequences and meaning).

<sup>75</sup> JAZZ (General Motors Mark of Excellence Productions 2001) (Ken Burns, director) (exploring the uniquely American art form in a ten-part series that starts with jazz's roots in New Orleans in the 1890s and ends with its revival in the 1980s and 1990s under the moving force of trumpeter of Wynton Marsalis).

*Blackness: The Rise and Fall of Jack Johnson*<sup>76</sup>) are examples of the former, while Michael Moore's films (*Roger & Me*,<sup>77</sup> *Bowling for Columbine*,<sup>78</sup> and *Fahrenheit 9-11*<sup>79</sup>) are examples of the latter.

The focus of interactive and participatory documentaries is on authorship and the construction of truth or reality. The interactive style acknowledges that the presence of the camera makes a difference in the way in which subjects behave, as does the presence and performance of the filmmaker. The illusion of film's transparency and objectivity is broken. An interactive documentary purports to offer the viewer "the performance of reality,"<sup>80</sup> not the whole truth and nothing but. In this respect, the interactive mode or style represents a conscious break from the claim associated with the expository and observational modes that documentary film can "capture" reality without complication or a loss of objectivity.

Not all interviews in documentary films are the same, of course. Some are of experts, while others capture the views and responses of random people on the street. Some are shot against the backdrop of a formally staged *mise-en-scène*; others occur in settings identified with the interviewee or the subject matter of the shot. Especially where the interviewee would not qualify as a professional expert or authority on the topic, the filmmaker shooting in the interactive mode is offering up in lieu of truth honesty in self-representation and authenticity that is based on the informant's right or entitlement to bear witness to or testify about a

---

<sup>76</sup> UNFORGIVABLE BLACKNESS: THE RISE AND FALL OF JACK JOHNSON (Florentine Films & WETA 2005) (Ken Burns, director) (analyzing the life of the first African American heavyweight boxing champion whose victories over white opponents sparked race riots and whose relationships with white women resulted in his imprisonment for violating the Mann Act).

<sup>77</sup> ROGER & ME (Dog Eat Dog Films 1989) (Michael Moore, director) (recounting the role assertedly played by General Motors and its president Roger Smith in Flint, Michigan's deindustrialization, decline, and decay).

<sup>78</sup> BOWLING FOR COLUMBINE (Alliance Atlantis Communications 2002) (Michael Moore, director) (Academy Award winning account of the origins of gun violence in the United States).

<sup>79</sup> FAHRENHEIT 9-11 (Miramax Films 2004) (Michael Moore, director) (criticizing the Bush Administration for taking the U.S. into a war in Iraq).

<sup>80</sup> BRUZZI, *supra* note 40, at 123.

lived reality.<sup>81</sup> Thus, director Jon Else speaks of seeking out “‘people, not for their views but for their credibility as characters, their storytelling charm, and their depth of knowledge.’”<sup>82</sup> Josh Hanig makes much the same point: “‘I like to look for the ‘common wisdom’ in normal non-analytical people—the simple truth.’”<sup>83</sup> Says director Connie Fields, who directed *Rosie the Riveter*, “‘interview documentaries can be extremely powerful if people are revealed in such a way that you can care and feel for them and can receive their stories as drama.’”<sup>84</sup>

Ideally, one might suppose, an interactive film would reveal the active engagement by the filmmaker in the process of gathering information, building a body of knowledge of the subject matter, juxtaposing multiple interpretations and viewpoints, and ultimately arriving at her or his own, all through encounters with her or his subjects.<sup>85</sup> Too often, though, interactional films offer the viewer only “‘talking heads” whose statements do not seem spontaneous; nearly every word appears rehearsed, if not scripted. It takes an expert to challenge a filmed expert. Unless the film puts the interviewees’ statements in doubt, the viewer may have little choice but to accept their expressions as gospel.<sup>86</sup> Moreover, because the interviewees do not necessarily speak for the filmmaker, her or his message may be in doubt, particularly if the film does not otherwise challenge or contradict the interviewees.<sup>87</sup> As Bill Nichols notes, “[d]ocumentarians with a more sophisticated grasp of the historical realm establish a preferred reading by a textual system that asserts its own voice in contrast to voices it recruits or observes.” Nichols’ example of a director with the requisite degree of sophistication is Emile de Antonio who made *Point of Order* (about the Eugene McCarthy Army Hearings)

---

<sup>81</sup> Cindy Hing-Yuk Wong, *Communities Through the Lens: Grassroots Video in Philadelphia as Alternative Communicative Practice* 12-13 (1997) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with author).

<sup>82</sup> Zheutlin, *supra* note 42, at 160.

<sup>83</sup> *Id.* at 159.

<sup>84</sup> *Id.* at 157.

<sup>85</sup> BILL NICHOLS, *REPRESENTING REALITY: ISSUES AND CONCEPTS IN DOCUMENTARY* 49 (1991) [hereinafter NICHOLS, *REPRESENTING REALITY*] (discussing the interactive mode of representation).

<sup>86</sup> *Id.* at 24-25.

<sup>87</sup> *Id.* at 24.

and *The Year of the Pig* (which explores the origins of America's involvement in the Vietnam War). The consciousness exhibited in de Antonio's compilation films, Nichols argues, "probes, remembers, substantiates, doubts. It questions and believes, including itself. . . . Neither omniscient deity nor obedient mouthpiece, de Antonio's rhetorical voice seduces us by embodying those qualities of insight, skepticism, judgment, and independence we would like to appropriate for our own."<sup>88</sup>

When the filmmaker puts herself or himself in the picture (as she or he might in adopting the interactive or participatory rhetorical style), the audience is reminded that everything in the film is mediated through her or him. This diminishes the film's claim to objective reality or truth, and suggests the subjective, structured vision of the finished film. The final product, however, cannot be critically evaluated without the viewers having information regarding the filmmaker and the process by which the film was made.<sup>89</sup> Reflexivity on the part of the filmmaker is required.<sup>90</sup> According to Jay Ruby, "being reflexive means that the producer deliberately and intentionally reveals to [her or] his audience the underlying epistemological assumptions that caused [her or] him to formulate a set of questions in a particular way, to seek answers to these questions in a particular way, and finally to present [her or] his findings in a particular way."<sup>91</sup> It should be apparent to the audience that the revelations are "purposive, intentional, and not merely narcissistic or accidentally revealing."<sup>92</sup> Unfortunately, focusing on the filmmaker as a performer may accentuate style and performance to the detriment of substance and unpretentious self-disclosure. Moreover, a host of ethical issues are raised by the interactive or participatory filmmaker's assumption of the role of social worker, advocate, or go-between vis-à-vis the subjects, not unlike those associated with the

---

<sup>88</sup> *Id.* at 27.

<sup>89</sup> Jay Ruby, *The Image Mirrored: Reflexivity and the Documentary Film*, in *NEW CHALLENGES 2*, *supra* note 42, at 34, 35.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 35.

<sup>92</sup> *Id.*

exploitation of the subjects of direct cinema.<sup>93</sup> These criticisms will be explored further below.

#### (5) Reflexive Style

Though the matter is not without doubt, it appears that “reflexivity” when used in connection with the documentary film rhetorical style or mode known as “reflexive” calls attention to the way in which the act of describing, depicting, or portraying reality is linked to the act of constructing reality. Reality is not just out there, waiting to be captured by the camera; rather, reality is what the camera constructs through the deployment of the various rhetorical or narrative devices by which reality is described.

The “reflexive” mode or style is characterized by self-consciousness “not only about form and style, . . . but also about strategy, structure, conventions, expectations, and effects.”<sup>94</sup> The style uses “fabrication, [such as] imaginative reenactments,” “genre conventions [borrowed from narrative films or the theater] as a challenge to any window-on-reality,” and other “breaks in verisimilitude which alert audiences to the uncertainties that can inform documentary truths.”<sup>95</sup> A reflexive documentary film may have many of the “poetic and expressive dimensions” of a narrative or fictional film; for example, attention will be paid to “mood and atmosphere.”<sup>96</sup> The reflexive style problematizes the audience’s role in the construction of a film’s message.<sup>97</sup> It forces the viewer

---

<sup>93</sup> Cf. BRUZZI, *supra* note 40, at 76 (pointing out the problems raised by docusoaps which entail greater interaction between subjects and filmmakers, not unlike that involved in the interactive and participatory modes of nonfiction filmmaking).

<sup>94</sup> NICHOLS, REPRESENTING REALITY, *supra* note 85, at 57.

<sup>95</sup> Searle Kochberg, *Narrativity and Intent in Documentary Production*, in INTRODUCTION TO DOCUMENTARY PRODUCTION: A GUIDE FOR MEDIA STUDENTS 33 (Searle Kochberg ed., 2002).

<sup>96</sup> WARREN BUCKLAND, TEACH YOURSELF FILM STUDIES 145 (2003).

<sup>97</sup> Documentaries or faux docs, which borrow the rhetorical styles of documentaries, may be the best examples of films that provoke reflexivity on the part of the viewers of nonfiction film. See Jane Roscoe & Craig Hight, *Building a Mock-Documentary Schema*, in NEW CHALLENGES 2, *supra* note 42, at 230 (examining how narrative films appropriating the styles or aesthetics of documentaries force the audience to be reflexive about the documentary genre); Vivian C. Sobchack, No Lies: *Direct Cinema as Rape*, in NEW CHALLENGE 1, *supra* note 27, at 332 (discussing *No Lies*, a fictional film about rape,

to draw connections between the subjective and the objective, the individual and the collective, and the personal and the political.<sup>98</sup> In this way, the filmmaker respects the audience's critical capacities. Filming done in the reflexive mode challenges the notion that the filmmaker, subjects, and audience have fixed identities or roles in regard to the film; rather all three may be self-consciously active players in producing the film's meaning.

*The Thin Blue Line* is the best example of a law-genre reflexive documentary.<sup>99</sup> Director Errol Morris offers the viewers multiple reenactments of the murder of a police officer that are drawn from accounts by witnesses and informants to bring into relief the truth that matters, which is that the wrong man was very likely convicted of the crime.<sup>100</sup> Morris uses "strategies of fictional construction" to "approach relative truth" or rather "to reveal the seduction of lies."<sup>101</sup> The film was scored by Philip Glass.<sup>102</sup> The tone or mood is that of a B-movie, the kind of films references to which are a thread running throughout *The Thin Blue Line*. Most significantly, using interview techniques that are not revealed to the audience, Morris extracts statements, nay performances, from his interviewees that expose their motivations and biases.

The chief complaint voiced against the reflexive style or mode is that it can be too abstract, self-indulgent, and unfocused to address pressing political and social issues adequately.<sup>103</sup> The reflexive style has many of the limitations of direct cinema with regard to closure and certainty regarding the filmmaker's message.<sup>104</sup> However, documentarian Jill Godmilow, who has used

---

shot in vérité style, that "victimizes" or tricks the viewer in order to generate a better understanding of what it means to be raped).

<sup>98</sup> NICHOLS, INTRODUCTION, *supra* note 35, at 133.

<sup>99</sup> THE THIN BLUE LINE (American Playhouse, Channel 4 Television, Third Floor Productions 1988) (Errol Morris, director). *See generally* Musser, *supra* note 10; Sherwin, *supra* note 10.

<sup>100</sup> Musser, *supra* note 10, at 193.

<sup>101</sup> Linda Williams, *Mirrors Without Memories: Truth, History, and the New Documentary*, in NEW CHALLENGES 2, *supra* note 42, at 59, 72-73.

<sup>102</sup> *See* THE THIN BLUE LINE, *supra* note 99.

<sup>103</sup> NICHOLS, INTRODUCTION, *supra* note 35, at 138.

<sup>104</sup> *See id.*

reenactments in such films as *Far from Poland*, offers a counter perspective on these criticisms that is worth noting:

The documentary films that I most respect don't come to closure and don't produce audiences of compassionate spectators of the dilemmas of others. They don't produce identification with heroics or sympathy for victims, both of which are dominant strains in American documentary tradition. The welfare mother, the native American, and the family with the Downs syndrome child—these are the typical subjects of films that produce caring audiences who feel they're somehow part of the solution, because they've watched and cared. The filmmakers I admire, who might approach those same subjects, would be doing so to deconstruct the subject, to take apart that exact relationship with the audience. They would have a much more complex set of intentions and would resist closure.<sup>105</sup>

Notice that the limitations of one style or mode are the strengths of another. If a film done in the expository mode is overly didactic and tells the viewer too precisely what to think, a film shot in the observational or direct mode lays the images before the viewers who can make of them what they will, although, as it happens, viewers may be at a loss as to what the filmmaker intended. Of course, if a topic or theme that is largely filmed in an observational or direct cinema style needs to be contextualized, an expository voice-over narration can supply the necessary information with economy and certainty.<sup>106</sup> The purpose of this summary of the rhetorical modes or styles of documentary filmmaking is not to determine which mode is superior to the others, but to use the debate over their relative strengths and weaknesses to pierce or deconstruct the styles' general claims to depicting "truth" so as to arrive at an approach or technique by which to render documentary films more accessible to analysis and judgment. All of the styles point to an understanding of the complex negotiation of the relationship among the filmmaker, her

---

<sup>105</sup> Jill Godmilow & Ann-Louise Shapiro, *How Real is the Reality in Documentary Film?*, HIST. & THEORY, Dec. 1997, at 80, 85-86.

<sup>106</sup> BRUZZI, *supra* note 40, at 43.



or his subjects, and the audience as the key to a discerning appreciation of documentaries.

*B. Analyzing Documentary Films in Terms of Reflexivity*

Reflexivity, rather than truth, holds the key to opening up documentaries to criticism and serious engagement. The term “reflexivity” has three different definitions or usages that are of relevance to the issue at hand. First, *reflexivity* refers to the notion that reality is a reflection of our discourse about reality, rather than being a fixed object in the universe. In addition, an investigator or artist exhibits *reflexivity* when she or he openly reflects on her or his own intellectual or creative processes. Finally, *reflexivity* is introspection, self-examination, and self-criticism. Reflexivity so variously defined is not a characteristic of one or two rhetorical styles or modes and not others. Each style or mode can be used to produce or reveal reflexivity as a challenge to any conceit that rejects the role of self-interested human agency in the construction or representation of truth and reality. Moreover, it is possible for the subjects, the filmmakers, and the viewers all to exhibit some kind of reflexivity in the context of a documentary film.

A really good documentary exhibits and stimulates one or more of the three forms of reflexivity on the part of its participants. The subjects are presented as complex, deeply contextualized or situated in a time and place, and introspective with regard to their own situation and the impact of filming it. The filmmaker is self-critical, in a way that is reflected in her or his film, about the integrity of her or his dealings with the issues and the subjects and the possible exploitation of them, as well as about her or his fidelity to the obligation to be honest with the viewers about the ways in which she or he has shaped the story or sliced the truth. The concern is less with the existence of bias than it is with the extent to which a filmmaker has failed to provide the audience with sufficient clues to decipher or decrypt the code by which she or he has constructed, with images, words and music, her or his own interpretation of actuality. Finally, the audience is provoked to be reflexive about its spectatorship, *i.e.*, it is challenged to consider honestly and profoundly its own role in (passively perhaps) producing or benefiting from the situation in which the

subjects find themselves and then in actively constructing the film's vision of reality against the backdrop of that involvement.<sup>107</sup> Instead of assessing a film's faithfulness in depicting, without partiality or distortion, an "objective truth," the critical viewer should measure a film's quality in terms of its success in revealing or provoking the struggles that all of us—subjects, filmmakers, and spectators alike—have in reconciling objective reality with our subjective and highly interested performance, representation, or understanding of it.

In sum then, a documentary film should be assessed in terms of the reflexivity it captures and generates in its content, its context or the circumstances surrounding its production, and its reception.<sup>108</sup> The following queries are accordingly relevant to its evaluation:

*Content*—What is the film's rhetorical or narrative style? How does that style affect the kind and amount of information that can be extracted from the film's visual imagery, narration, dialogue, interview content, and/or music? Does the filmmaker give the audience sufficient data to enable it to critically assess the truth of the filmed text or to judge the authenticity of the representations of the subjects and subject matter? Does the film otherwise explore the subject matter in a complex way? Are multiple or opposing sides of the issues presented? If not, can the viewer discern or understand why not? If human subjects are portrayed, are they presented as deeply contextualized, socially connected, and individually complex figures? Are they revealed to be reflexive with regard to their own situation and the impact of the camera on their lives and behavior? If not, why not? If the topic is historical,

---

<sup>107</sup> See THE PENGUIN DICTIONARY OF SOCIOLOGY (Nicholas Abernethy, Stephen Hill & Bryan S. Turner eds., 4th ed. 2000) (defining "reflexive/reflexivity" to refer to "the way in which, particularly in modern societies, people constantly examine their own practices and, in light of that examination, alter them).

<sup>108</sup> This outline elaborates on the three-part analytical framework employed by a number of documentary film theorists. See Ruby, *supra* note 89, at 34-35 (exploring reflexivity in terms of the producer, the process, and the product); John O'Connor, *Historical Analysis, Stage One: Content, Production, and Reception*, in NEW CHALLENGE 2, *supra* note 42, at 382 (likening questions asked by historians regarding any document or artifact to those that should be asked in approaching a film or television program).

does the film's recounting of the past contextualize the present and illuminate how the present came to be as it is?<sup>109</sup>

*Context or the Circumstances of Production*—What is the filmmaker's relationship to the subject matter? How might the filmmaker's background have impacted the film? “[W]hat influences were at work in shaping the filming and, perhaps served to limit or bias the information that it conveys?”<sup>110</sup> What was the relevant political situation at the time of the film's production and distribution? How might economic considerations or the standards and demands of pertinent copyright owners, funders, distributors, exhibitors, and insurers have impacted the filming and the final editing of the film? What was the nature of the filmmaker's relationship with the subjects before the filming began, while the filming was occurring, and during post-production? Was informed consent obtained from the subjects? Does the film itself reflect the voluntary participation of the subjects? Does the film invade the subjects' privacy or defame or otherwise lay them open to shame or ridicule in a way that is not justified by the benefit of the disclosures to the creation of an enlightened public?<sup>111</sup>

*Reception*—Does the film provoke reflexivity on the part of spectators? Does the film draw the spectators into it so as to force upon them the role of active constructors of its meaning? What response should the filmmaker have expected the film to have? Does the film provoke the spectators to question their initial assumptions about the subject matter and the subjects? Does the film provoke the spectators to take responsibility for their own involvement in the situation addressed by the film and impacting the lives of the film's subjects?<sup>112</sup> What response did the actual audience of the film have to the subject matter or the subjects? Did the film have any effect on events occurring at the time of its initial screening?<sup>113</sup>

---

<sup>109</sup> Williams, *supra* note 101, at 59, 66-67.

<sup>110</sup> O'Connor, *supra* note 108, at 382.

<sup>111</sup> *Id.* at 389-91.

<sup>112</sup> See Godmilow & Shapiro, *supra* note 105, at 87 (criticizing traditional documentaries for affirming the moral order of spectators and allowing them to avoid accepting responsibility for the situations of the subjects).

<sup>113</sup> O'Connor, *supra* note 108 at 382, 392-93.

It should be obvious from this template that the law-trained viewer might have critical insights regarding documentary films that would not occur to the lay spectator. As the next section details, for legal professionals, there is more to analyzing law-genre documentaries than the search for reflexivity.

### III. LAWYERS AS AN AUTHENTICATING AUDIENCE, LAWYERING AS AN INTEGRAL ASPECT OF THE CREATIVE PROCESS

Where law-genre documentaries are concerned, the legal profession might legitimately consider itself (to use the phraseology of the late novelist Toni Cade Bambara) an “authenticating audience,” *i.e.*, “the audience that can really call you out if you’ve got it wrong or applaud you because they know you’re right.”<sup>114</sup> An authenticating audience is itself authentic. It speaks from genuine experience and draws on an engaged, organic or grounded expertise. Knowledge of the law and immersion in legal culture qualifies law-trained spectators to evaluate and appreciate the content of law-genre nonfiction films. Beyond that, the law-trained audience is in a position to assess documentaries in terms of the role the law or law-like normative considerations have or should have played in the creative process of their production. Moreover, lawyers may have greater say as to the content of documentary films as more of them cross the line separating information from entertainment and as the protections of the First Amendment accordingly shrink and the impact of tort doctrines like defamation and invasion of privacy expands. Finally, law-trained spectators are not (or should not be) merely passive or disinterested viewers because the critical attention they focus on law-genre documentaries enhances their ability to produce better visual legal advocacy themselves.

With regard to the content of law-genre documentaries, the law-trained audience is special in that it is in a position to determine if the information regarding the law, the operation of legal institutions, and the conduct of legal actors or subjects is

---

<sup>114</sup> B. Ruby Rich, “State of the Cinema,” Address to the 47th San Francisco International Film Festival (April 18, 2004), <http://www.sffs.org/pt/articles/state04.pdf>.

within the range of what the community of law-trained viewers, their clients, and constituents would recognize as plausible. Furthermore, truth claims should not be a great impediment to critical analysis. The role truth plays in the law is much like the role truth plays in documentary films. Lawyers should be accustomed to the idea that “the truth” emerges from the exercise of the artistry of persuasion and argument applied to a problem or conundrum that arises out of a context of material disparities and competing points of view and ideologies. Lawyers should be well acquainted with the idea that “the truth” is what can be proven or performed. In both law and documentary film, reality or the truth of the real world is mediated by the senses; essentially the eyes see what they want to see and the ears hear what they want to hear. The object of both good legal practice and good documentary practice is to expand the field of sight and sound to the realm of what justice requires.

If the importance of reflexivity is taken to heart and honesty, rather than truth, and authenticity, rather than accuracy, are taken to be the standards by which documentary films should be judged, then the immediate context surrounding the making of the films is important. By context, I am referring not simply to an account of a film’s origins or the disclosure of the political orientation of the filmmaker and other possible sources of “bias.” “Backstory” may be a more appropriate term than “context” to delineate the scope of the inquiry required. “Backstory” (sometimes spelled “back story”) refers to “a history or background created for a fictional character in a motion picture or television program or “similar background information about a real person or thing that promotes full understanding of it.”<sup>115</sup> Law is increasingly likely to have played a role in the backstory or production process of any significant documentary film made today. This gives law-trained viewers a distinct advantage.

Especially with regard to footage employing a direct cinema or interactive narrative style, the actual working relationship between the filmmaker and her or his subjects is crucial to interpreting the

---

<sup>115</sup> THE NEW OXFORD AMERICAN DICTIONARY (Erin McKean ed., 2005), <http://www.Oxfordreference.com>. See also William Safire, *Back Story: Surging to the Vogue-word Front*, N.Y. TIMES, Aug. 7, 2005, §6 (Magazine), at 16.

subject's "performance" on screen. The viewers might rightly puzzle over how much of the action or the statements uttered by the subjects or interviewees is the product of their own unconstrained choice and how much can be attributed to the prompting, coaching, scripting, staging, and directing of the filmmakers. Some subjects of documentary films seem particularly vulnerable to improper financial incentives, unconscionable overreaching, or downright fraud. Others may be incompetent to control their own affairs or be operating under a disability. The content of the film may appear to the lay viewer to invade the subjects' privacy or expose them to ridicule or disgrace. Whether the filmmaker has procured the informed consent of the subjects is important to the viewers' reception of the film. A filmmaker's possible mistreatment of her or his subjects implicates the implicit contract or obligation that exists between filmmakers and their audiences to present stories that are authentic, fair, and honestly told.

Concern about documentary subjects and audiences has produced a great deal of scholarly attention devoted to the issue of ethics in documentary practice.<sup>116</sup> The law-trained viewer, however, might approach these same issues in more legalistic terms. The behavior that raises ethical issues within the film community would appear to involve possible violations of law to a lawyer. Consent procured through false promises about the filmmaker's intentions may be actionable fraud.<sup>117</sup> Legally

---

<sup>116</sup> See, e.g., BRIAN WINSTON, LIES, DAMN LIES AND DOCUMENTARIES 132-56 (2000) (proposing approaches to the ethical issues of subject consent and the audience's right to know); John Stuart Katz, *Family Film: Ethical Implications for Consent*, in IMAGE ETHICS IN THE DIGITAL AGE 327 (Larry Gross, John Stuart Katz & Jay Ruby eds., 2003) (exploring how drawing on family ties impacts the ethical responsibilities of a filmmaker with regard to consent); Laura Grindstaff, *Daytime Talk Shows: Ethics and Ordinary People on Television*, in IMAGE ETHICS IN THE DIGITAL AGE 115 (emphasizing the class dimensions of the exploitation of guests on programs like *Jerry Springer* and *Oprah*).

<sup>117</sup> See *Veilleux v. NBC*, 206 F.3d 92 (1st Cir. 2000) (finding actionable fraud in the promise of a television documentary's broadcaster, producer, and reporter that an organization founded to combat the dangers of tired and sleepy drivers would not be included in a program on the regulatory difficulties of long-distance truckers). *But see Weil v. Johnson*, 2002 WL 31972157 (N.Y. Sup. Ct.) (rejecting claim of fraudulent inducement to participate in the documentary film *Born Rich* where the subject's assertion that he was told that the film was a student project was contradicted by three

enforceable informed consent of the subject is relevant because the subject's privacy may be invaded,<sup>118</sup> the subject may wind up being defamed in the edited or completed version of the film, or the subject may be put at risk of physical or psychological injury as a result of participation in film-related activities. Surveillance is regulated by the law of trespass and invasion of privacy in the form of intrusion on seclusion. Furthermore, the ethical issue of fair representation parallels the concerns of invasion of privacy (false light) to some extent. Thus, the treatment of subjects in documentary films is circumscribed not only by ethics, but also by the law of misrepresentation, defamation, invasion of privacy, intentional infliction of emotional distress, and negligence.

On the other hand, the First Amendment operates as a significant restraint on legal regulation of the content of a documentary. Regardless of consent, the newsworthy nature of a film will protect a filmmaker from liability for invasion of privacy.<sup>119</sup> In addition, public figures who must prove actual malice in order to prosecute a defamation action successfully have a nearly insurmountable burden of proof to overcome.<sup>120</sup>

---

signed releases that indicated that the production was a commercial project undertaken by a professional studio).

<sup>118</sup> See *Comm. v. Wiseman*, 356 Mass. 251, 249 N.E. 2d 610 (1969) (denying the filmmaker the right to screen *Titicut Follies* except to audiences with a professional interest in custodial care and mental infirmity because of his failure to conform to the terms of the permission to film and the completed film's invasion of the privacy of many of the patient/inmates). See generally Barry Keith Grant, "Ethnography in the First Person": *Frederick Wiseman's Titicut Follies*, in *DOCUMENTING THE DOCUMENTARY*, *supra* note 41, at 238 (exploring the social issues and the ethical issues raised by the film).

<sup>119</sup> See *Delan v. CBS, Inc.*, 91 A.D.2d 255, 458 N.Y.S.2d 608 (1983) (ruling that use of plaintiff's appearance in a documentary about the deinstitutionalization of mentally ill patients was "a matter of legitimate public interest" privileged under the state invasion of privacy law; failure of the consent obtained from the plaintiff to extend to telecast of the documentary or to conform to Department of Mental Hygiene regulations was irrelevant); *Weil v. Johnson*, 2002 WL 31972157 (finding that the First Amendment's protection of a film about the lives of the heirs of fortunes which was "an informative sociological documentary of considerable 'public interest'" outweighed the plaintiff-subject's right of privacy).

<sup>120</sup> See, e.g., *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413 (Tex. 2000) (affirming summary judgment against a family court judge who was allegedly defamed by an HBO documentary with regard to his rulings in cases where mothers accused their children's fathers of child abuse).

The point at which legal mandates end and ethical discretion and professional norms of best practices take over should be the topic of extended dialogues between documentary filmmakers and film scholars on the one side and lawyers and legal scholars on the other. Discussion of the ethical treatment of subjects would benefit from input from lawyers drawing on their experiences with informed consent in the medical context, the ethical treatment of human subjects in scientific research, and protection of the rights of crime victims.<sup>121</sup> On the other hand, funders and distributors may be better at promoting professional production standards and protecting gullible audiences than the law because free speech concerns prevent the state from regulating content. The scope of the fair use doctrine under the copyright laws is a topic that is already being hotly debated in law and film circles alike. Documentary filmmakers, film scholars, and law-trained experts are now engaged in a collective endeavor to promulgate a code of best practices regarding the fair use of copyrighted material in nonfiction film.<sup>122</sup> A broader range of common concerns should be subjected to similar investigation and analysis.

Increasingly, what the documentary viewer sees on the screen reflects the impact of the law's involvement as a constraint on, and protector of, the creative process of nonfiction filmmaking. A film may not be considered finished until it has been worked on or vetted by lawyers representing directors, scriptwriters, crew members, subjects, artists and musicians who supply copyrighted material incorporated into the film, funders, distributors, broadcasters, or insurers underwriting any phase of the project.<sup>123</sup>

---

<sup>121</sup> See Roslyn Myers, *Crime Victims as Subjects of Documentaries: Exploitation or Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733 (2006).

<sup>122</sup> See generally Documentary Filmmakers' Statement of Best Practices in Fair Use (American University Center for Social Media 2005) (advocating recognition of fair use when copyrighted material is used in media critiques, in illustrating an argument, and in historical sequences, or when captured in vérité footage), available at [www.centerforsocialmedia.org/fairuse.htm](http://www.centerforsocialmedia.org/fairuse.htm). See also MARJORIE HEINS & TRICIA BECKLES, BRENNAN CENTER FOR JUSTICE, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL (2005) (assessing the impact of threats to fair use experienced by various kinds of artists including documentary filmmakers and proposing greater legal assistance and changes in the law to promote free expression).

<sup>123</sup> See generally Derek Paget, *Dramadoc/Docdudrama: The Law and Regulation*, in NEW CHALLENGES 2, supra note 42, at 435 (describing the work of lawyers involved in



The increasing impact of the law on the creative process gives the law-trained audience an advantage in both appreciating and evaluating documentary films.

The way in which a documentary is received by its audience is the final factor on which a documentary film should be evaluated. All viewers should be considered active constructors of the films they view, not simply passive absorbers of an intended message. Legal professionals should think of themselves as the audience that has the most to learn from law-genre documentaries. These films can teach us to be reflexive about our work by forcing us to consider how we interact with our clients, how we represent them and their problems to others, and whether we will be able to convince others to consider their responsibility for or involvement in our clients' situations.<sup>124</sup> When fully engaged as viewers, lawyers should realize that they occupy a role nearly identical to that of the nonfiction filmmaker.

Each area of inquiry (content, context, and reception) promises a special payoff for law-trained critics of law-genre documentary films. The content to be critically analyzed relates to what ordinary people are likely to know about the law and the legal profession and whether the information they are getting from such films is correct. Many of the factors that facilitate or constrain the production of nonfiction film are concerns lawyers confront as integral players in the creative process by which such films are made. Examining how the law operates in the backstories of documentary films will produce better lawyer advocates and advisors for the documentary film craft or industry and better lawyer-critics of documentary films. Finally, focusing on audience reception of documentaries, including their own reception, will better enable lawyers to be more reflexive about their work and to enhance their ability to mount persuasive arguments of their own. However, the biggest payoff for legal professionals comes in their enhanced ability to engage in visual legal argumentation or visual

---

"legalling" or checking mixed fiction/nonfiction television films for violations of UK regulatory and common law).

<sup>124</sup> Cf. Elkins, *supra* note 1, at 832-33 (arguing that students should learn to read fictional lawyer films as texts "that might prompt critical self-engagement and self-study, . . . that might prompt reflection on lawyers and their work").

legal advocacy when they assume the role of filmmakers themselves.

#### IV. *THE DÉNOUEMENT*: VISUAL LEGAL ADVOCACY

Lawyers are taking what they have learned from watching the law-genre work of documentary filmmakers and television news producers, as well as the receptivity of professional and lay decisionmakers to visual evidence and argumentation, and engaging in various forms of extra-judicial visual legal advocacy of their own. As the kinds and amount of videotaped legal evidence admissible in criminal proceedings themselves is growing,<sup>125</sup> advocates are employing visual images to increase the

---

<sup>125</sup> Surveillance cameras, strategically located on urban streets, are capable of catching on film ordinary speeding drivers, common criminals, and international terrorists. ALEXIS GERARD & BOB GOLDSTEIN, *GOING VISUAL: USING IMAGES TO ENHANCE PRODUCTIVITY, DECISION MAKING AND PROFITS* 212 (2005). Police cars in some jurisdictions have been equipped with video cameras to record traffic stops; in some cases wireless video capability is triggered to back up ten seconds and begin saving images as soon as the lights mounted on the roofs of the vehicles are switched on. *Id.* at 8. Cameras serve the dual function of policing the police at the same time that they are protecting them from danger. In prisons, special units are taping their encounters with unruly inmates.

In addition, the video recording of confessions is required by law in many jurisdictions, see Jessica Silbey, *Videotaped Confessions and the Genre of Documentary*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 789 (2006). Confessions are arguably examples of video advocacy because the confessor, possibly cognizant of the use that will be made of the tape, may use the opportunity to explain her or his behavior in a way that a jury will find excusable or defensible. See *THE CONFESSIONS OF BERNARD GOETZ* (MPI Video News 1987) (presenting in a video that was commercially-produced for mass distribution substantial segments of Goetz's confession—along with interviews with jurors, experts, and people on the street—all of which go a long way toward explaining why Goetz was exonerated of the most serious charges against him); *THE TIMES OF HARVEY MILK*, *supra* note 51 (indicating that the taped confession of Dan White, the ex-San Francisco City Supervisor who killed Milk and Mayor George Moscone, favorably impressed the jury). Memorial videos (which recount the life of a deceased person and are generally shown at funerals and memorial services) and similar filmed evidence have been introduced during the sentencing phase of capital cases as victim impact evidence. Compare *Hicks v. Arkansas*, 327 Ark. 727, 940 S.W.2d 855 (1997) (upholding the introduction of a videotape composed of photographs of the victim, his family (including his children), and his friends, the significance of which was explained by his brother who took the stand and cried throughout) with *Salazar v. State*, 90 S.W.2d 330 (Tex. Crim. App. Ct. 2002) (ruling that the introduction of a portion of a memorial film was prejudicial because of the film's length and the inclusion of pictures of the victim as a child).

persuasive power of their arguments outside of the courtroom.<sup>126</sup> For example, crime victims and criminal defendants are producing visual legal advocacy themselves to have an impact on the cases in which they are involved. Joanna Katz, a survivor of kidnapping and sexual assault, co-produced the film *Sentencing the Victim*,<sup>127</sup> as part of her effort to change the procedure by which the parole board of South Carolina reviewed the cases of multiple offenders who jointly perpetrated a crime against the same victim or victims. Because the five perpetrators in her case were on different parole hearing cycles, Ms. Katz had to attend several hearings a year, several years in succession, even though it appeared that the parole board had decided to deny the petitions for release prior to Ms. Katz's appearance. The viewer experiences through vérité footage the impact repeated needless appearances before the board had on not only Ms. Katz, but also her parents and the prosecutor in the cases who accompanied her to the hearings which were held in Columbus, South Carolina, almost 100 miles from the Kates' home. Ms. Katz ultimately succeeded in winning a legislative reform of the parole process to better protect victims' rights,

---

The closing argument of the prosecution in the trial of Michael Skakel for the murder of Martha Moxley more than a quarter century after her death is a good example of the use of visual advocacy in a criminal proceeding. See Brian Carney & Neal Feigenson, *Visual Persuasion in the Michael Skakel Trial: Enhancing Advocacy Through Interactive Media Presentations*, 19-SPG CRIM. JUST. 22 (2005) (defending the use of high-tech presentations in criminal cases as being both proper and persuasive). The closing attracted a great deal of commentary for its use of an interactive media presentation which allowed the jury simultaneously to hear segments of an audio recording of an interview by Skakel with a journalist and read the text which was projected on a screen with the crucial language appearing in red. At points, pictures of the victim alive and dead were also shown. *Id.* at 28-29.

<sup>126</sup> Video clemency petitions filed on behalf of death-row inmates and persons who maintain that their convictions or sentences are unfair are an excellent example of visual legal advocacy. Many video clemency petitions are available on the internet. See, e.g., the video petitions for Maryland Death Row prisoner Vernon Evans Jr., <http://www.savevernonevans.org/ClemencyVideo.html> (last visited Apr. 18, 2006); for the late Stanley "Tookie" Williams who was executed in California, <http://www.doar.com/movies/tookie.asp> (last visited Apr. 18, 2006), and for The Norfolk Four, sailors who were convicted of the murder of the wife of a fellow sailor, a murder they deny having committed, <http://nmmstream.net:8080/ramgen/deathpenalty/norfolk4.rm> (last visited Apr. 18, 2006).

<sup>127</sup> SENTENCING THE VICTIM (IVS Productions 2002) (Liz Oakley, director).

including the right to submit a statement via film or videotape, or over a closed circuit television system.<sup>128</sup>

On the other side of the coin, in Bucks County, Pennsylvania, six men (all between 20 and 21 years of age) used film in a successful effort to minimize their prison sentences, after they burned down one of the area's much-loved covered bridges.<sup>129</sup> They and their parents were very concerned that their prosecutions for arson would result in extended incarceration which would "ruin" the men's lives. The defendants voluntarily participated in a taped three-hour victim-perpetrator mediation conference with their families and members of the community impacted by their crime.<sup>130</sup> In addition, the defendants made a film in which they begged for the community's forgiveness.<sup>131</sup> After the men pled guilty, the court looked at the footage and rendered sentences of eighteen days to twenty-three months in jail plus five years probation and restitution of \$66,000 each.<sup>132</sup>

In the civil context, there are numerous instances in which domestic clients have made films in support of their efforts to obtain administrative relief or legislative reform. For example,

---

<sup>128</sup> See 2004 S.C. Act 263 §2, §§ 13-14 (providing that all parole hearings involving a single victim be heard on the same day; that administrative recommendations be made available to the victim before a hearing is conducted; and that victims have access to the closed circuit television system run by the Department of Corrections in order to appear before the parole board). See also Clay Barbour, *Law to Ease Crime Victims' Burden*, POST AND COURIER (Charleston, S.C.), July 9, 2004, at 1A (reporting on the role played by Joanna Katz and her film in the passage of a bill to reform the parole process); Donna Isbell Walker, *Filmmaker Captures Rape Survivor's Quest for Justice*, GREENVILLE NEWS (Greenville, S.C.), Aug. 2, 2004, at 16D (reporting on the response of the film's director to the enactment of the parole hearing reform advocated therein).

<sup>129</sup> See generally BURNING BRIDGES—MOOD'S COVERED BRIDGE (International Institute for Restorative Practices 2004). See also Pervaiz Shallwani, *Pennridge Hosts Movie on Mood's Bridge*, MORNING CALL (Allentown, Pa.), June 22, 2005, at B5 [hereinafter Shallwani, *Movie on Mood's Bridge*] (announcing the screening of *Burning Bridges* in the impacted community); Pervaiz Shallwani, *6 Charged with Arson of Upper Bucks Covered Bridge*, MORNING CALL (Allentown, Pa.), Aug. 19, 2004, at B1 (reporting that the accused faced maximum sentences of 10-to-20 years after confessing to burning the bridge with gasoline after failing to ignite it with alcohol-soaked newspapers).

<sup>130</sup> Shallwani, *Movie on Mood's Bridge*, *supra* note 129.

<sup>131</sup> Pervaiz Shallwani, *6 Men Get Jail Time for Bridge Arson*, MORNING CALL (Allentown, Pa.), Dec. 16, 2004, at A1 (reporting on the court proceeding in which the arsonists were sentenced).

<sup>132</sup> *Id.*

tenants of public housing in Chapel Hill, North Carolina, shot a video of the poor conditions in which they lived, strategically screened or sent it to key political decisionmakers, and prompted a major investigation of housing conditions.<sup>133</sup> *Eyes on the Fries: Young Workers in the Service Economy* stars members of the San Francisco Minimum Wage Coalition which waged a successful campaign in support of a city-wide minimum wage increase.<sup>134</sup>

Perhaps the most ubiquitous form of visual legal advocacy is the video settlement documentary or brochure. Video settlement documentaries are short films about personal injury cases produced by plaintiffs' lawyers to facilitate settlement or mediation of claims. As works of visual legal advocacy or storytelling, these films generally proceed in a linear fashion, beginning with the events surrounding the accident or wrong perpetrated by the defendant or defendants, elaborating on the theory of liability and the admissible evidence that supports it, continuing with proof of damages, and concluding with the sort of arguments plaintiff's counsel might address to a jury during closing. Video settlement documentaries employ many of the rhetorical devices or narrative tools found in documentaries in general: authoritative voice-overs;<sup>135</sup> background music; interviews with victims, survivors, friends, and experts; clips from video depositions and reenactments or simulations; animation; footage of the victim dealing with the everyday consequences of her or his injury, physical therapy sessions, and the scene of the accident, all generally shot in *vérité* or fly-on-the-wall mode; pre-existing footage from various sources including television news segments, advertisements, training or educational films, and home movies; and still photographs of the

---

<sup>133</sup> See David Whiteman, *Out of the Theaters and into the Streets: A Coalition Model of the Political Impact of Documentary Film and Video*, 21 POL. COMM. 51, 57-59, 65-67 (2004) (describing the production and distribution of *Living Conditions in Public Housing* by amateur videographer Maxcine Mitchell).

<sup>134</sup> See EYES ON THE FRIES, *supra* note 17.

<sup>135</sup> Attorneys are generally advised to let someone else do the narration. See Stephen F. Malouf, *Every Picture Tells a Story: Using Videos in Mediation*, Ass'n Am. Trial Law., Convention Reference Material, Feb. 2001, at 163.

accident or crime scene and the victim, both in happier or healthier times and after the injury.<sup>136</sup>

The video settlement documentary essentially allows the plaintiff's lawyer to "speak pass" defense counsel and minor functionaries and reach the principal decisionmakers on the other side of the case directly.<sup>137</sup> A video documentary gives the parties on the defense side (defendants, their agents, representatives of the insurance carriers, defense attorneys) a preview of the evidence that the plaintiff will produce at trial. "The video documentary can help plaintiff's counsel communicate the true value of the case and the likelihood that a jury may award the plaintiff the true value."<sup>138</sup> Video settlement documentaries can also be given to the client as proof that the attorney "has . . . absorb[ed] the client's story, appl[ied] the law to it, and [is] aggressively advocating an integrated narrative."<sup>139</sup> The documentaries may additionally satisfy the clients' need for an opportunity to have "his or her side of the story" told, especially if the case settles.<sup>140</sup>

The concerns of attorneys who produce settlement documentaries mirror those of nonfiction filmmakers in general. The attorneys have to make sure that the subjects are comfortable and confident while being filmed so that they project credibility and honesty; stage or direct the interviews and presentations in a way that advances the case and illustrates how favorably a jury would react to the evidence; work the line between admissible and inadmissible evidence and acceptable and unacceptable arguments to maximize the film's impact; and assure that the final film does not invade the client's privacy or inflict emotional harm on her or him.

Advocacy films made by the defense in tort cases are a rarity but they do exist. In cases of catastrophic injury, defense counsel

---

<sup>136</sup> See *id.* (describing the elements of an effective video presentation to be used in connection with mediation).

<sup>137</sup> Telephone Interview with J. Ric Gass, Esq., Senior Partner, Gass, Weber & Mullins, in Milwaukee, Wis. (Sept. 28, 2005).

<sup>138</sup> Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 2004 (2004).

<sup>139</sup> *Id.* at 2008.

<sup>140</sup> *Id.*

may offer a “Choices and Challenges” video that shows what persons with similar demographic characteristics, avocational interests, injuries, and physical limitations have in fact been able to do.<sup>141</sup> The video is intended to challenge the plaintiff’s “day-in-the-life” footage by illustrating “what a person with a disability could do if they chose to do so.”<sup>142</sup> The images of successful adjustment to disability included in the video are drawn from generally available sources like newspapers, magazines, and television; specialized written and filmed materials produced by nonprofit support and advocacy organizations representing persons with disabilities, footage from the cable television disability channel; and written and filmed material videos used by rehabilitation centers to motivate patients.<sup>143</sup> The narration is typically supplied by a rehabilitation expert. As another response, defense counsel in a case involving a severely burned plaintiff cut up a video settlement documentary made by the attorney for the plaintiff, inserted material favorable to the defense, and produced a composite video (a real mini-trial) so that key decisionmakers for the defendants, his clients, could gauge the strength or weakness of all the relevant evidence.<sup>144</sup>

In citing video settlement documentaries for being among the few instances in which lawyers in a civil action produce narratives integrating law and fact so as to present a case for early resolution,<sup>145</sup> Stephen N. Subrin and Thomas O. Main point out that these films are a form of informal procedural practice in that they are not filed in court or made a matter of public record, and even if introduced in mediation and arbitration proceedings tend to

---

<sup>141</sup> See J. Ric Gass, *Controlling Damages in Major Injury Cases with Defense Videos*, 496 PRAC. L. INST. /Lit § 11 (1994) (describing a litigation documentary film form entitled “Challenges and Choices” that is intended to counter the impact of plaintiff’s “Day-in-the-Life” footage or video settlement documentaries).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> M. Richard Merklinger, Senior Partner, Hack, Piro, O’Day, Merlinger, Wallace & McKenna, in Florham Park, N.J., Remarks at the Fordham Law School Documentaries & the Law Workshop (May 5, 2005) (transcript on file with the Fordham Intellectual Property, Media & Entertainment Law Journal).

<sup>145</sup> See generally Subrin & Main, *supra* note 138, at 1983-84.

remain private and confidential.<sup>146</sup> This makes them hard to analyze, research, or teach as a form of visual legal advocacy.<sup>147</sup>

I have been able to see samples of video settlement documentaries or brochures. A superior example of one involves the death of Kevin Hayes, a 16-year-old black high school football star, student athlete, and innocent bystander who was gunned down in a parking lot adjacent to a hip/hop club in Tampa, Florida. The documentary is only eight minutes, 27 seconds long, but conveys a vast amount of information in a short amount of time. (The economy of the documentary's method of argumentation will be apparent from the verbosity of my effort to summarize its content and impact in words.) The film apparently did not result in the complete settlement of the case. It went to trial against the parking lot owners; a jury assigned fault among the parking lot, the club, and the victim's parents; and, based on the findings, the parents were awarded a judgment of \$1.2 million.<sup>148</sup> The events surrounding the killing,<sup>149</sup> the responses of those who knew the

---

<sup>146</sup> *Id.* at 2020.

<sup>147</sup> *Id.*

<sup>148</sup> Marcus Franklin, *Jury Awards \$1.2-Million in Death of Teenager*, ST. PETERSBURG (FLA.) TIMES, Mar. 15, 2005, at 4B.

<sup>149</sup> See Josè Patinò Girona, *Kevin Hayes, 16, Was An Innocent Bystander When He Died Outside The Garage Nightclub, Authorities Said*, TAMPA TRIB., July 21, 2002, at 1 [hereinafter Patinò, *Kevin Hayes*] (recounting that the death of the victim stemmed from an argument between the perpetrator and another man who accused the perpetrator of stealing his tire rims); Kathryn Wexler, *Student Gunned Down at Nightclub*, ST. PETERSBURG (FLA.) TIMES, July 21, 2000, at 1A (reporting on events in the parking lot on the night of the shooting and the following morning when the victim's mother visited the scene); *High School Student Killed Outside Club*, TALLAHASSEE DEMOCRAT, at B6 (reporting on the death of Kevin Alexander Hayes at 3 a.m. outside of a nightclub); Anwar Richardson, *We All Share Blame for Senseless Deaths*, TAMPA TRIB., July 27, 2000, Central Tampa §, at 10 (indicting the violence "plagu[ing] the minority community" and the belief spawned by popular culture that "the only way to handle tough situations is by killing your opponents"); Josè Patinò Girona, *Mistake Put Suspect Back onto Streets*, TAMPA TRIB., July 29, 2000, Metro §, at 1 (explaining the circumstances surrounding the perpetrator's release on \$4,000 bail after having been "charged with aggravated assault, discharging a fire arm in public and carrying a concealed weapon" after the first incident in the parking lot when he was already on probation in connection with a drug possession offense); Kathryn Wexler, *Official Wonders Why Suspect Was on Street*, ST. PETERSBURG (FLA.) TIMES, July 30, 2000, at 3B (reporting that the perpetrator could have been jailed prior to the murder of Kevin Hayes for a probation violation based not only on the prior shooting, but also in connection with a traffic stop during which marijuana was found on his dashboard and a trespass warrant



victim,<sup>150</sup> the successful prosecution of the shooter,<sup>151</sup> and the civil litigation brought by the victim's parents against the owners of the

---

issued when he refused to leave another nightclub); Chris Frates, *State Inquiry Cites Records Confusion for Early Release of Suspect*, TAMPA TRIB., Aug. 1, 2000, Metro §, at 3 (reporting that Tampa authorities did not know that the perpetrator was on probation for drug possession and should not have been allowed to post bail in the wake of the first incident at the parking lot because he was listed in the records "as both a black male and a white male" and "had three dates of birth, two of which were false").

<sup>150</sup> José Patinó Girona, *Kevin Hayes*, *supra* note 149 (quoting the victim's father as saying that the victim "was just in the wrong place at the wrong time," while his uncle said that underage young guys need to learn to "stay out of nightclubs"); Anwar S. Richardson, *Schoolmate Mourns over Slain Player*, TAMPA TRIB., July 21, 2000, Nation/World §, at 5 (reporting that the victim had never gone to the club before and that he was not "the type of person who hung out at night or did drugs"); José Patinó Girona, *Relatives Cope with Teen's Fatal Shooting*, TAMPA TRIB., July 22, 2000, at 6 (reporting on grief, shortly after the shooting, of the family and friends of the victim, who was "known for his kindness and fashionable clothes"); Steve Gorten, *Hayes Tragedy Crosses Any County Line*, TAMPA TRIB., July 23, 2000, Pasco §, at 6 (describing the reaction of the quarterback of the victim's high school football team and other young people to the dangers associated with the victim's use of fake identification); José Patinó Girona, *1,500 Attend Shooting Victim's Funeral*, TAMPA TRIB., July 30, 2000, Metro §, at 2 [hereinafter Patinó, *1500 Attend*] (describing victim Kevin Hayes as "mature, respectful and smart"); Robbie Neiswanger, *Chief's Ceremony Honors Slain Teammate*, TAMPA TRIB., Oct. 26, 2000, Northeast §, at 16 (describing rituals observed by the victim's best friend, his coaches, and his teammates to honor his memory); Mike Readling, *Inspired Chiefs Hang On*, ST. PETERSBURG (FLA.) TIMES, Oct. 28, 2000, at 10C (noting that Chamberlain High players look up at the sky after an especially good play in honor of their slain teammate whom they honored by retiring his number and creating a scholarship fund in his name); Rozel A. Lee, *Golden Helmet Honors 4*, TAMPA TRIB., Mar. 3, 2001, Sports §, at 6 (reporting that the death of the victim was one obstacle that honored Chamberlain High quarterback lead his team past); Eddie Daniels, *Keeping Kevin*, TAMPA TRIB., Nov. 22, 2001, Sports §, at 1 (describing how the memory of the victim served as an inspiration to his former teammates more than a year after his death); *6 Hillsborough High Schools Congratulate Seniors*, TAMPA TRIB., May 30, 2002, Metro §, at 3 (reporting that the graduating class of Chamberlain High observed a moment of silence in honor of the victim and gave his father a standing ovation when he accepted his son's posthumously awarded diploma); Matt Middleton, *Wolfpack's Clark Making His Mark*, UNIVERSITY WIRE, Oct. 8, 2003 (reporting on a North Carolina State University football receiver, a former teammate of the victim, who honored the victim by wearing "a rubber band on his wrist with the inscription 'I promise K.H. #9'").

<sup>151</sup> *Hillsborough (County): 3 Indicted in Separate Slaying Cases*, TAMPA TRIB., July 27, 2000, Metro §, at 2 (reporting that Jose Fabian Santiago had been indicted for the murder of Kevin Alexander Hayes and for the attempted murder of Derrick Phillips); Gary Sprott, *Jury Finds Man Guilty in Killing on City Street*, TAMPA TRIB., Jan. 29, 2002, Metro §, at 1 (reporting the jury verdict against the perpetrator on charges of first-degree murder, attempted murder of two other victims, resisting arrest, and aggravated flight; the perpetrator was acquitted of assaulting the police); Gary Sprott, *Killing of Bystander*

club and of the parking lot where the victim was shot<sup>152</sup> were extensively covered by the local newspapers. As a result, the information revealed in the video is a matter of public record.<sup>153</sup>

The basic facts surrounding the young man's death as gleaned from the video are as follows: The shooter got into a fight with some other men (not the victim) in the club, went to his car, waited for them to reach the parking lot, opened fire, and shot the victim in the head by mistake. The shooter had been arrested for doing nearly the exact same thing three months before. No one was killed on that occasion and the shooter had been released on bail. Though the club had private security guards working outside, bouncers working inside, and a metal detector, it did not have a picture of the assailant or any mechanism in place for keeping the shooter out of the establishment. The parking lot meanwhile had previously been the scene of a third shooting and a stabbing, yet it had no security at all.

The club was guilty of violating the liquor laws of the state. A person had to be 18 years old to get into the club and 21 years old to drink. Security checked drivers' licenses and identifications at the door. The perpetrator, who was only 19 years old and used his

---

*Brings Life Term*, TAMPA TRIB., Feb. 28, 2002, Metro §, at 4 (reporting that the shooter, whose actions were attributed to previously-suffered brain injuries, claimed that he shot in self-defense and apologized to the family); *Man Gets Life Sentence in Student's Fatal Shooting*, ST. PETERSBURG (FLA.) TIMES, Mar. 1, 2002, at 3B (reporting on the conviction of Santiago for "gunning down Kevin A. Hayes with a bullet meant for someone else").

<sup>152</sup> *Nightclub, Parking Lot Owners Sued by Parents of Slain Teen*, ST. PETERSBURG (FLA.) TIMES, Apr. 23, 2002, at 3B (reporting initiation of negligence action alleging that the defendants failed "to provide proper security, patrols, lighting, equipment and other reasonable measures to help prevent such an incident"); Franklin, *supra* note 148 (reporting on results of civil litigation arising out of the murder of Kevin Hayes); Anthony McCartney, *Parents of Dead Teenager Win \$1.2 Million Decision*, TAMPA TRIB., Mar. 15, 2005, Metro §, at 2 (reporting on verdict and the possibility of an appeal based on the ruling of the trial court to ask the jury to consider the parents as possible responsible parties); *Jury Awards \$1.2-Million in Death of Teenager*, ST. PETERSBURG (FLA.) TIMES, Mar. 15, 2005, at 4B; *Jury Awards \$1.2-Million in Chamberlain Teen's Death*, ST. PETERSBURG (FLA.) TIMES, Mar. 20, 2005, Week in Review §, at 2 (reporting on verdict and argument of defense counsel for the parking lot that "security measures wouldn't have prevented Hayes' murder" because the shooter was "undeterred and unpreventable").

<sup>153</sup> The author also undertook to procure the consent of the parents of Kevin Hayes to discuss the documentary in this Article. Copies of the signed consent forms are on file with the author.

own license to gain entry, consumed three tequilas and a beer on the night in question. The underage older sister of the victim who had accompanied him to the club was served alcohol as well. The victim was able to get into the club using the identification of a relative whom he looked nothing like. A blood test done after his death determined that he had consumed no alcohol.

The video also shows that the victim was an exemplary young man. He was a “terrific player” and “up and coming star” of his high school football team. He worked summers at Busch Gardens to earn money for college. Through the victim’s sister the viewer learns that hundreds of people attended his funeral and his hometown held a memorial service in his honor.<sup>154</sup> His family describes his fine qualities, how his death had affected them, and what a successful life he would have lived had he not been killed.

As a piece of *visual* legal advocacy, the short tape tells a story with still photographs, newspaper clips, interviews, words, and a bit of a hip hop music video. The film starts with the sound of gunshots and flashes (rapid cutting to black) of still photographs of the club and victim lying on the ground, covered by a bloody white sheet. The first words one hears are curses which are followed by clips from what appears to be a music video by the late rapper Tupac Shakur about thug life. The lyrics from the song playing on the soundtrack appear on the screen with significant words highlighted in color: “thugs,” “guns,” “pistols,” and “gunfire.” The commentary that follows is critical of hip hop (arguably fair use is being made of the video clip). The voice-over or narration is done by a professional whose voice is sonorous; he speaks with authority. The narrator talks about hip hop’s “glorification of violence” and describes it as “musical mayhem,” “musical mayhem targeting young people.” He describes hip hop as “an art form that’s left a bloody trail.” There is an implicit linkage of the club and the parking lot to violence via their association with rap music.

The male narrator uses picturesque language or hyperbole to convey the basic facts surrounding the young man’s death. The

---

<sup>154</sup> The sister put the figure at 2500, while a newspaper report said that 1,500 were in attendance. See Patinõ Girona, *1500 Attend*, *supra* note 150.

perpetrator was “not the first to go postal in the parking lot.” “People liked [the victim]; all right, people loved [the victim].” The club made only a “pathetic effort at security.” The sister uses clichés or catch phrases in describing her brother: he would have been “a great role model” and would have “given back to his community.” The club was accused of “luring in youngsters whom they made money off of and did nothing to protect.”

To some extent, the victim’s survivors are “on trial” too. The documentary indirectly gives the viewers information about the victim’s loved ones, and how they might appear to a jury. The family members are interviewed sitting on a sofa in what appears to be their home. The lighting is a bit dark. Drawn blinds and a light sheer curtain serve as a backdrop. The victim’s father and sister do most of the talking. At some point, the father reads a recruiting letter sent to the victim by a college. The letter is reproduced on the screen. The father does not sound entirely comfortable reading aloud. The sister is the family’s principal spokesperson. She is more articulate and poised than her parents. She offers opinions about the course the victim’s life would likely have taken had he not been gunned down. To some extent, her presence confirms her brother’s promise and may to some extent offset her seemingly poor judgment in taking him to a hip hop club.

The young man’s mother does not have much to say. She appears to be too distraught or overcome by emotion to speak. The sister’s hand is shown stroking the mother’s in an effort to comfort her. The mother’s limited role is a departure from one scenario the viewer might have expected drawing from the visual archive that popular culture give us, i.e., the standard story of the black mother who nurtures the young black athlete who in turn loves her more than anyone else and excels to give her the material things she deserves. Of course, in most of those cases, dad is nowhere in the picture. Dad is front and center here. The impression the viewer gets (or is supposed to get) is of a solid, intact working class/lower middle-class black family that tried to raise its children right. If the son had any interest in hip hop, it was pure curiosity, not a commitment to pursue the thug life; the narrative tells the viewers that twice. It appears that the son was the shining star of the

family, its best hope for true upward mobility, and as such his loss would be materially felt.

This reading is confirmed by information gleaned from press reports that followed the trial.<sup>155</sup> The mother, a teacher's aide, was hospitalized after reporting her son missing and searching for him despite his having been murdered and buried. The young man's father, a longshoreman, reportedly continued to wear his "son's clothing and cologne, nearly five years after the killing."

Finally, the film gives the viewers lasting visual impressions of the victim and the perpetrator. There are no home movies, but many still photographs of the victim show that he was a tall, good-looking young black man at the time of his death. He had been a cute kid, and developed into a strikingly handsome adolescent. He appears older or more mature than sixteen years old in pictures of him at work and on the playing field. There is an oft-repeated picture of him lying on the ground with a white sheet covering most of his body. His physical absence is felt via newspaper stories about his funeral and memorial service and shots of the club, the parking lot, and the nearby street, the scene of the crime. Of course, the perpetrator was convicted of murder and sentenced to life in prison. There are headshots (but not quite mugshots) of the perpetrator with unexplained scrapes on his cheek and forehead and a ruler measuring their dimensions. There is a picture of his car with the gun in the door.

As a piece of visual *legal* advocacy intended to facilitate settlement of the case, the documentary had to highlight the strengths and shore up the weaknesses of the plaintiffs' case for a specialized audience of decisionmakers that knows the law and is resistant to finding the injury covered by it. Of course, it was part of their job to predict how the ultimate determiners of the outcome of the case—the jury—would react to the evidence.

In this case, liability was hardly a foregone conclusion given the unsettled state of the law regarding landowner liability for the criminal acts of third parties. Not only did the plaintiffs have to prove the existence of duties owing to their child on the part of the defendants, but they also had to establish that those duties were

---

<sup>155</sup> Franklin, *supra* note 148 (reporting on evidence introduced at trial).

breached and that the breaches were the causes in fact of the young man's death. Generally, the existence of a duty depends on the foreseeability of harm based on either prior similar incidents or the totality of the circumstances; the extent of the duty depends on the burdensomeness of the precautions called for in preventing it; and the causal link depends on the breach being a but for cause of the harm.

There appear to have been two or three theories on which the owners of the club and the parking lot might be charged with failing to protect the victim from the criminal acts of the third-party perpetrator. The victim was a customer and therefore occupied a special relationship vis-à-vis both the club and the parking lot owners. Arguably, the club was remiss in exposing an underage patron to the violence with which establishments catering to a hip hop audience are prone; allowing onto the premises and failing to exercise control over a patron who had previously been guilty of perpetrating acts of violence against other patrons; supplying alcohol to an underage drinker who went on to perpetrate acts of violence against other patrons; and failing to take appropriate measures to protect a patron from conduct by other patrons that spilled over from the Club's premises to the parking lot across the street.<sup>156</sup> The film makes the case against the club seem fairly straightforward. If the club had had even a list of persons to be excluded, given that it checked identifications and the shooter used his own license, it would have been easy for the club to have excluded the shooter. If the club had carded the shooter before serving him drinks, he would not have ingested alcohol.

The parking lot, which had no security, might have been liable for failing to undertake preventive measures to protect customers on its premises from the criminal acts of third parties, which acts

---

<sup>156</sup> See generally *Allen v. Babrab, Inc.*, 438 So.2d 356 (Fla. 1983) (ruling that a tavern may be held liable for assault on a patron in its parking lot where the owner had either specific knowledge of the dangerous propensities of the particular perpetrator or could foreseeable the likelihood of disorderly behavior by third parties in general); *Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322 (Fla. Dist. Ct. App. 1991) (upholding liability based on the foreseeable shooting of patrons by another customer in a parking area adjacent to the defendant's property at closing time).

were foreseeable based on the occurrence of three prior similar incidents (two shootings and a stabbing).<sup>157</sup> Parking lots, however, do not customarily engage in close scrutiny of their customers, though the lot here might have had someone on duty to check the license plates of the cars being parked so as to exclude the vehicles of known troublemakers. A security guard might have been able to spot trouble in the making and alert the authorities in a timely manner. Whether the mere presence of a guard would have deterred the violence is an open question. If, as the video suggests, the shooter “went postal” in the parking lot, it may be that the shooter was unstoppable. Moreover, given that the lot was across the street from the club, there was plenty of ground on which the shooter might have waited to confront patrons of the club with whom he had a gripe. That the shooting occurred in the parking lot might arguably be a mere happenstance. On the other hand, the unguarded lot may have provided more cover for the shooter lying in wait. Since he had gotten away with gun play in the parking lot before, he may have had a reasonable expectation of doing so again. Even if the defendant’s obligation is limited to using reasonable care and not guaranteeing absolute protection, the cost of a security guard, especially at bar closing time, might still be less than the benefit generated in the way of safety for its customers.

One of the real dilemmas confronting the lawyer/filmmaker in making the case for the plaintiff is that the violence of hip hop cuts both ways. If the club and the parking lot are painted with the broad brush of hip hop’s violence, some of that taint rubs off on the victim and his sister. Although there may be no defense that would allow the jury to consider that the child was “asking for trouble” in using someone else’s ID to get into a hip hop club that had previously been the scene of violence, and then leaving the place at 3:00 a.m. in the morning, it might nonetheless reach that conclusion. The jurors’ assessment of the equities in the case

---

<sup>157</sup> On the considerations impacting the liability of parking lot owners for attacks on customers by third-party assailants, see *Monk v. Temple George Associates*, 273 Conn. 108, 869 A.2d 179 (2005) (overturning summary judgment where nightclub patron was attacked in lot by someone she knew, the crime was foreseeable based on a totality of the circumstances, and public policy supported liability).

might cause it to reduce the amount of the judgment or to shift the allocation of fault to favor the defendants as opposed to the victim and his survivors. The documentary anticipates the problem by emphasizing how out of character the victim's actions were, how it was curiosity that took him to the club, how conscientious his parents were, and how much potential he knew he had. Aficionados and cultural critics alike have struggled with the janus-like quality of hip hop. On the one hand, rap brings black cultural tropes to bear in promoting resistance to a repressive, racist status quo in a way that appeals to even "good" (meaning solidly working-class and middle-class) kids; on the other hand, it justifies its violent, misogynistic, homophobic content by boasting—all the way to the bank—that it is a reflection of the "(keeping it) real" voice of the black urban poor. Although those with a sophisticated understanding of the music may categorize its message of violence as metaphorical, the lawyer/filmmaker probably had little choice but to concentrate on hip hop's apparent ability to generate deadly deeds that mirror its words as evidence of the defendants' responsibility for the murder of Kevin Hayes.<sup>158</sup>

The documentary also makes the case for damages; it is on much firmer ground here. In Florida, parents who lose an adolescent child are entitled to recover for loss of support and services for a period determined by the overlapping life expectancies of the parents and the deceased child, as well as past and future pain and suffering attributable to the child's wrongful death.<sup>159</sup> Whereas the costs of raising a young child are presumed to offset the tangible benefits the child will ultimately bestow on her or his parents,<sup>160</sup> no such presumption should operate when the child dies as a teenager. The near certainty that the victim would have gone to college and speculation about his potential as a

---

<sup>158</sup> See generally IMANI PERRY, *PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP-HOP* (2004).

<sup>159</sup> See Fla. Stat. Ann. § 768.21(1), (3), (4) (West 2005); *Williams v. U.S.*, 681 F. Supp. 763, 764 (N.D. Fla. 1988) (addressing question of measure of recovery for the death of a young child); cf. *U.S. v. Dempsey*, 635 So.2d 961 (Fla. 1994) (ruling that parents seeking recovery of loss of services in excess of those generally attributed to the loss of consortium must prove the existence of child's "extraordinary income-producing abilities prior to injury").

<sup>160</sup> *Williams v. U.S.*, 681 F. Supp. at 764.



professional ballplayer drive home the point that he would have had income-producing abilities that greatly exceed those of his parents and that the tangible benefits that would have accrued to his family from his success would have been substantial.

The actual course of events subsequent to the making of the documentary, as reported in the newspapers, confirm this reading of the film. The case against the club was apparently settled, while that against the parking lot went to trial.<sup>161</sup> The defense argued that there were no security measures that would have deterred the perpetrator, that the club was more culpable in allowing him into the club, and that the parents were negligent in not knowing about and controlling the activities of their son, while attorneys for the plaintiffs argued that the parents breached no legal duty.<sup>162</sup> According to news accounts, the jury returned a verdict for \$6 million which was reduced to \$1.2 million based on findings that the club was 40% at fault, the mother 25% at fault, the father 15% at fault, and the parking lot only 20% at fault.<sup>163</sup>

There is much research that needs to be done regarding the efficacy, ethics, and economics of nonfiction film or visual legal advocacy by lawyers. Based on the documentaries that I have been able to see thus far, my preliminary assessment is that the video format is particularly strong in addressing those aspects of a case in which legal argumentation and lay storytelling overlap. Based on interviews with professional documentary makers, it seems as if many come from television journalism. Like television news magazine segments, the narratives of the documentaries are clear and the images make a strong impression. The films effectively

---

<sup>161</sup> See Franklin, *supra* note 148 (reporting on tort trial stemming from the death of Kevin Hayes).

<sup>162</sup> See *id.* It would appear that fault was assigned to the parents based on a theory of negligent supervision. There is Florida precedent holding an infant's mother, who did not speak or write English, responsible for giving her baby medicine obtained through a pharmacist's error. *Machin v. Walgreen Co.*, 835 So.2d 284 (Fla. Dist. Ct. App. 2003). The court stated that "parents have a constant and continuous duty as ordinary, prudent persons to watch over, supervise, and protect their children who are too young to exercise judgment to care for themselves." *Id.* at 285 (citations omitted). Of course, controlling the behavior of a nearly emancipated teenage son is a great deal harder than being responsible for the health of a 3-month-old daughter.

<sup>163</sup> *Jury Verdicts and Settlements*, BROWARD DAILY BUSINESS REVIEW, Apr. 4, 2005, at 16 (reporting the results of *Estate of Hayes v. Seven-One-Seven Parking Services Inc.*).

incorporate illustrations and animations that convey technical or medical information pitched at a level a lay jury can understand. The documentaries are an excellent means of presenting evidence of the victim's good character and the nature and extent of damages the victim and other claimants have incurred. They seem to do a fine job too of cluing the opposing side as to the strengths (and weaknesses) of prospective witnesses. Moreover, visual presentation of the cases permits an attorney a measure of freedom to bring into relief the equities arising from the political, social, and cultural context surrounding the action. The similarity between the format of the typical legal advocacy documentary and television news magazine segments primes the viewer to consider and draw conclusions about what underlies the dispute.

On the other hand, settlement documentaries seem less effective at addressing complex issues related to legal liability, especially where there are multiple defendants and/or possible contributory fault on the part of the victim or claimants. It may be that the lawyers are choosing to gloss over the rough patches in the proof. Or it may be that insufficient thought has been given to cogently transferring the arguments that the lawyers will make at trial to the screen. Lawyers who are technically the producers of the documentaries may be giving the videomakers too much control over content because, as lawyers, they have limited experience and no formal training in the techniques for making legal arguments with images, sound, and music. Bringing visual literacy training into the law schools will help to remedy this deficiency.<sup>164</sup> It seems clear too that studying law-genre documentary films and learning the rudiments of nonfiction film production are likely to make lawyers better producers and directors of visual legal advocacy. Actually trying their hand at

---

<sup>164</sup> For a description of a course on visual literacy entitled Visual Persuasion in the Law that is taught at New York Law School, see Christina O. Spiesel, Richard K. Sherwin, & Neal Feigenson, *Law in the Age of Images: The Challenge of Visual Literacy, in CONTEMPORARY ISSUES OF THE SEMIOTICS OF LAW: CULTURAL AND SYMBOLIC ANALYSES OF LAW IN A GLOBAL CONTEXT* 231, 255 (Anne Wagner, Tracey Summerfield & Farid Benavides Vanegas eds., 2005) (elaborating on the goal of the course to teach "students how to self-reflectively tell and critique the visual stories and visual arguments that are being presented in the courtroom, and that circulate within the popular legal imagination in the culture at large").

documentary filmmaking, particularly editing, should reduce some of the suspicion that exists among legal professionals regarding filmed evidence and lead to its increased legitimacy and admissibility.

At this point, visual legal advocacy is expensive (estimates range between \$10,000 and \$15,000 per settlement documentary film), and it is primarily used in those cases where the projected return is substantial or the stakes are particularly high (as with clemency videos in death penalty cases). As the costs of production decline and the degree of acceptance and legitimacy of visual argumentation increase, video legal advocacy will likely expand to other areas of practice. It is likely to blossom first where vast sums are at stake. For instance, notices of the settlement of class action lawsuits now appear on television and on radio, but they seem to be fairly bare bones;<sup>165</sup> more information might be conveyed to the class if the notifications took the form of a short explanatory documentary with voice-overs, graphs, and visuals that could be distributed on DVDs or streamed on the web.

Slower progress will be seen in those areas where the sums involved are smaller and/or the clients have limited resources. But for concerns of cost, it is easy to envision visual legal advocacy being useful in connection with social security disability claims, workers' compensation cases, victims' rights advocacy, and any other legal proceeding where the central issue is the extent of an individual's physical or psychological impairments and the circumstances that gave rise to them. Filmed documentation would be very advantageous in matters where the context of a person's life is in issue, as with petitions for pardon or expungement of criminal records submitted by persons who were formerly incarcerated and have become well-integrated members of society. Any sort of adjudicatory context in which the lifestyle of the participants is in issue (take custody matters) would be an ideal forum for visual legal advocacy that includes *vérité* "day-in-the-life" footage. Visual legal advocacy would be helpful in advancing the cause of tenants involved in disputes with their

---

<sup>165</sup> For examples of class action notifications that have been broadcast on television and radio, visit the website of Hilsoft Notifications, [www.hilsoft.com/our-leadership.html](http://www.hilsoft.com/our-leadership.html) (last visited 2/6/2006).

landlords and homeowners opposing eminent domain initiatives, zoning changes, or liquor license applications that threaten the security and economic value of their property. Similarly, filmed presentations would bolster the claims of community groups seeking greater attention from governmental authorities with regard to environmental justice issues, whether their concern be police patrols, pest control, or park maintenance.

If there is going to be a revolution in the means available to lawyers for arguing clients' cases, it is imperative that the people who are impoverished or who have modest incomes not be left out. A movie camera can be a powerful ally of the vulnerable and a potent weapon in the hands of the disadvantaged. That was clear to the Black Panthers who filmed street encounters between citizens and the police.<sup>166</sup> It is clear to Witness, the international human rights organization, "which places video cameras in the hands of local human rights defenders and trains them to use video technology as well as computers, imaging and editing software in the fight for basic human rights."<sup>167</sup> Lawyers who serve clients of limited means must begin to develop models of visual legal advocacy that address their clients' legal problems and should link up now with community-based cinematographers in order to guarantee that wealth does not determine who has access to visual forms of legal argumentation. In some cases, making cameras available to clients so that they can engage in visual advocacy on their own behalf may be an even better alternative.

---

<sup>166</sup> See Charles E. Jones, *The Political Repression of the Black Panther Party 1966-1971: The Case of the Oakland Bay Area*, 18 J. BLACK STUD. 415, 417 (1988) (stating that the members of the Panther Police Patrol carried tape recorders and cameras to monitor police stops of black citizens, as well as guns to protect them from police retaliation).

<sup>167</sup> SEEING IS BELIEVING: HANDICAMS, HUMAN RIGHTS AND THE NEWS (Necessary Illusions Productions 2002) (Katerina Cizek & Peter Wintonick, directors) (illustrating the impact of the camcorder in documenting human rights campaigns around the world, with particular emphasis on Joey Lozano, a Filipino political videographer and journalist who risked his life to chronicle the effort of the Nakamata to reclaim their ancestral lands). See also Witness, *Video for Change: A Practical Guide for Activists* (2000), available at <http://witness.org> (a training manual prepared under the editorial direction of Michèle Stephenson, a Fordham Law School Workshop on Documentaries & the Law panelists) (last visited 2/6/06).

In sum, visual legal advocacy hitches the persuasive power of nonfiction film to law's demand for pointed argumentation, orderly documentation, and the ethical treatment of clients and others and puts them to practical use in the pursuit of justice. It deploys film on behalf of clients whose cases call for the effort to reach the eyes and the ears as well as the minds of those with the power to decide their fates.

#### REPRISE

The legal profession has an enormous stake in influencing the production, distribution, and reception of law-genre nonfiction or documentary film work in its myriad forms, because lawyers are the subjects, the consumers, and (perforce) the critics of many such films; they are advisors and counsel to filmmakers, producers, funders, distributors, broadcasters, and insurers who are engaged in the creative process of their production; and finally they are (or will soon be) themselves the producers and directors of various kinds of nonfiction visual legal advocacy films (including feature-length films and documentary shorts) made to further the interests of clients and their causes.

This Article envisions at least three ways in which the study of documentaries should figure in the educational mission of law schools, in regard to both theoretical scholarship and practical skills training. Documentaries should be dissected as critical legal texts in scholarly writing and law school courses. Furthermore, the context in which documentaries are generated and distributed should be analyzed in courses examining the role of law and lawyering in the creative process of filmmaking and the production of other forms of the visual arts. Finally, law schools should teach the production and critical reception of documentary or nonfiction films as a component of a program of instruction in visual legal advocacy. As an adjunct to such instruction, law schools should take the lead in increasing the legitimacy of visual forms of argumentation and in producing models for the delivery of visual legal advocacy services to clients of limited means. It should be emphasized that this list is in no way intended to exhaust the possible ways in which the study of documentary or nonfiction

film might be integrated into the legal curriculum or legal scholarship.

In 1994, Philip N. Meyer, in an essay entitled *Visual Literacy and the Legal Culture: Reading Films as Text in the Law School Setting*, wrote that “lawyers operate in a predominantly fact-based ‘narrative’ legal culture—an increasingly visual (imagistic) and aural story culture—discrete from the ‘paradigmatic’ text-bound analytical culture of the law school. Films provide a unique mechanism for structured critical reflection on the dynamics of legal cultural storytelling.”<sup>168</sup> The world of technology has undergone a sea change since Meyer wrote. The legal profession has to some extent attempted to keep pace, but the standard law school curriculum has hardly changed. There is limited use of films, especially documentaries, as critical texts, and instruction in visual legal advocacy apart from courses in oral legal history is virtually nonexistent. Law schools ought to be in the vanguard of the movement to take advantage of digital technologies’ power to argue and persuade. If law schools fail to seize the initiative, the entire profession will lag behind.

---

<sup>168</sup> 17 LEG. STUD. F. 73, 73 (1993).