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Videotaped Confessions and the Genre of Documentary

Jessica Silbey*

There is a nationwide trend requiring that custodial interrogations be filmed.¹ At last count (as of summer 2005), 238 cities and counties, including Los Angeles, San Francisco, and Houston have instituted mandatory recording of custodial interrogations.² Currently, only six states and the District of Columbia require the filming of custodial interrogations by statute or case law,³ but similar legislative initiatives are being considered

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¹ See THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS A1-A10 (Northwestern University School of Law, Center on Wrongful Convictions 2004); see generally WILLIAM A. GELLER, VIDEOTAPING INTERROGATIONS AND CONFESSIONS (National Institute of Justice, US Dept. of Justice 1993).

² See Sullivan, *supra* note 1.

³ See *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (state constitutional due process); 725 ILL. COMP. STAT. 5/103-2.1 (2006) (homicide cases only); ME. REV. STAT. ANN. tit. 25, § 2803-B [1] [K] (2006) (“serious crimes”); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (exercise of supervisory powers); N.J. Ct. R. 3.17 (certain enumerated felonies) (2006); TEX. CODE CRIM. PROC. ANN. art. 38.22 (2001) (oral and sign language statements); D.C. CODE ANN. § 5-133.20 (2003), *temporarily repealed by* Electronic Recording Procedures and Penalties Temporary Act of 2005, D.C. Law 16-1, §§ 101-103 (dangerous crimes and crimes of violence); see also *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004) (holding that a defendant whose interrogation has not been completely recorded is entitled, on request, to an instruction

in at least sixteen states.⁴ Given this overwhelming trend toward the primacy of film as a policing mechanism, better understanding of film as both an art and a legal tool is in order.

There is another nationwide trend—the explosion of the documentary film genre (in cinema and on television) as a mainstream form of entertainment.⁵ Consider the recent blockbuster films by Errol Morris (*Fog of War*) and Michael Moore (*Fahrenheit 9/11*), or the less well-known but similarly surprising sleeper hits, such as *Control Room* (by Jehane Noujaim), *Capturing the Friedmans* (by Andrew Jarecki), or *Metallica: Some Kind of Monster* (by Joe Berlinger). The most recent documentary hits of 2005—ENRON: *The Smartest Guys in the Room* (by Alex Gibney) and *The Year of the Yao* (by Adam Del Deo and James D. Stern) corroborate the growing appreciation by the American public for documentary-style films.⁶

that “the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable” and that, because of the absence of recording, evidence of the defendant’s alleged statement should be weighed “with great caution and care”).

⁴ See H.R. 2614, 47th Leg., 1st Reg. Sess. (Ariz. 2005); S.R. 171, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2005); H.R. 771, 2005 Gen. Assem. Leg., Jan. Sess. (Conn. 2005); H.R. 1169, 2005 Leg., Reg. Sess. (Fla. 2005); H.R. 1119, 2005 Leg., Reg. Sess. (Fla. 2005); H.R. 1708, 114th Gen. Assem. Leg., 1st Reg. Sess. (Ind. 2005); H.R. 242, 2005 Gen. Assem., Reg. Sess. (Ky. 2005); H.R. 46, Leg., 2005 Reg. Sess. (Md. 2005); S.R. 988, 184th Gen. Court, Reg. Sess. (Mass. 2005); S.R. 397, 93d Gen. Assem., 2005 Reg. Sess. (Mo. 2005); H.R. 1343, 2005 Leg., 2005 Reg. Sess. (Mont. 2005); H.R. 112, 99th Leg., 1st Reg. Sess. (Neb. 2005); H.R. 636, 2005 Gen. Assem., Reg. Sess. (N.H. 2005); S.R. 287, 211th Leg., Reg. Sess. (N.J. 2005); H.R. 382, 47th Leg., 1st Sess. (N.M. 2005); H.R. 1864, 2005 Gen. Assem., Reg. Sess. (N.Y. 2005); S.R. 265, 73rd Leg. Assem., Reg. Sess. (Or. 2005); H.R. 5349, 2005 Gen. Assem., Jan. Sess. (R.I. 2005); H.R. 6071, 2005 Gen. Assem., Jan. Sess. (R.I. 2005); H.R. 204, 104th Gen. Assem., 1st Reg. Sess. (Tenn. 2005); S.R. 108, 104th Gen. Assem., 1st Reg. Sess. (Tenn. 2005).

⁵ See, e.g., Mark Feeney, *The View Finder*, THE BOSTON GLOBE, Sept. 25, 2005, at C1 (chronicling the life and films of documentarists Ross McElwee, reporting that “Lately, audience interest in documentaries as a genre has been anything but sidelong. Such films as [SUPER SIZE ME], [CAPTURING THE FRIEDMANS], and [THE FOG OF WAR] have been indie hits. [FAHRENHEIT 9/11] has been much more than that ‘The documentary universe has been expanding,’ says [director of Sundance film festival Geoffrey] Gilmore. One used to be able to speak of this as a marginal enterprise . . .”).

⁶ Other films include: SPELLBOUND, SUPER SIZE ME, CRUMB, THE WEATHER UNDERGROUND, MY ARCHITECT, MR. DEATH, BOWLING FOR COLUMBINE, BROTHER’S KEEPER, and AILEEN WOURNOS, THE SELLING OF A SERIAL KILLER. And, of course, we can go beyond contemporary film to the more mundane: television. Consider the series *Survivor*, *The Apprentice*, *Super Nanny*, and *Queer Eye for the Straight Guy*—all

The first trend—requiring the filming of custodial interrogations—is based on venerable criminal justice goals: streamlining criminal cases and protecting the constitutional rights of the accused by preserving on film evidence of guilt or innocence, police coercion or voluntary, inculpatory statements. However well-intentioned, this trend develops a fairly naïve view of film’s indexical relationship to the lived world (that film transparently represents reality). In this context, police, advocates, and courts think that filming the custodial interrogation will reduce voluntariness challenges and fast track convictions because of the belief that filmed confessions uncontroversially demonstrate the circumstances of the confession and therefore the truth of the guilt or innocence of the accused. Here the film is perceived as objective and unambiguous.

The second trend—the resurgence of documentary as a form of mainstream entertainment, be it in a movie theater (as with Michael Moore) or on television (as with reality television)—is like the first trend insofar as the film transforms previously mundane subject matter into a spectator sport. Unlike the first trend, however, mainstream documentary is perceived critically by reviewers and spectators alike, so much so that a new vocabulary has developed to describe the evolving documentary genre: “mockumentary,” “infotainment,” “faux doc,” and “agitprop” are terms circulating in popular media describing films such as Michael Moore’s *Fahrenheit 9/11* among other films.⁷ Even the

television shows that, like documentary films, tantalize with the promise of unstaged and revealing images of real people we never thought we’d know (or care) much about.

⁷ See Dave Kopel, *Bowling Truths*, NATIONAL REVIEW ONLINE, Apr. 4, 2003, <http://www.nationalreview.com/kopel/kopel040403.asp> (last visited on Feb. 1, 2005) (“In the field of mockumentary filmmaking, there are two giants. Rob Reiner created the genre with his film [THIS IS SPINAL TAP]. Michael Moore has taken the genre to an entirely different level, with [BOWLING FOR COLUMBINE].”); Peter Hogue, *Genre-busting: Documentaries as Movies*, FILM COMMENT, July-Aug. 1996, at 56 (“Once upon a time, ‘documentary’ meant ‘factual film’ or ‘propaganda,’ or both. Now, various kinds of documentary style are so prevalent in film and television—in commercials, TV news, music videos, etc.—that it may have come to mean ‘infotainment,’ or ‘promotional illustration,’ more than anything else. But many of the best recent documentaries create their own special, richly populated spaces in between the sliding and evolving expectations that go with these generic impressions Social issues and political history have always been the province of the documentary at its most prestigious, but these new films in many cases distinguish themselves as well in their handling of

term “reality television” is spoken tongue-in-cheek when describing such shows as *The Apprentice* or *Survivor*.

Whatever may explain this convergence of filmmaking in the precinct house and the current penchant for mainstream documentary movie-going, they are nonetheless shaping contemporary expectations about film in contradictory ways. Investigating these trends together exposes competing norms regarding film as a legal tool and as a knowledge-producing discourse. It also situates the criminal justice trend in the context of a long history of filmmaking and critical spectatorship.

How does exploring side-by-side these two contemporary film trends provide insight into the legal implications of the use of film as a policing tool? In what ways are these legislatively required filmed confessions like documentary films? How does understanding the filming of custodial interrogations as a form of documentary film making—including its inevitable climax in the criminal confession—further or frustrate the goals of criminal justice?

In previous work, I have explored related questions regarding the kinds of films we have been discussing—day in the life films, expert demonstrations, surveillance films, crime scene footage.⁸ The kinds of films that are used in law span a wide spectrum—from the most staged and scripted, such as day in the life films or expert demonstrations, to those that are considered more spontaneous, such as surveillance film or crime scene footage.⁹

Despite the variety and ubiquity of the kinds of films considered at law as evidence, the treatment in law of film *as film* remains a rarity.¹⁰ That is, most attorneys and judges when

narrative, character, and mise-en-scene—elements, that is, more customarily associated with dramatic feature films.); Irene Lacher, *Documentary Criticized for Re-enacted Scenes*, N.Y. TIMES, Mar. 29, 2005, at E1 (calling 2005 Oscar winning documentary short MIGHTY TIMES: THE CHILDREN’S MARCH a “faux doc” after film directors’ “failure to disclose their use of re-enactments called into question the nature of reality implied by the use of the term documentary”).

⁸ See generally Jessica Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493 (2004).

⁹ See *id.* at 501.

¹⁰ *Id.* at 499–500.

considering film as evidence fail to consider how film is meaningful as advocacy, as a distinct form of communication, with a distinct language, and a visual narrative. As such, they miss opportunities to cure prejudice and to properly direct the evidentiary calculations when film is at issue.¹¹

An example of the problem in the case law is this. Many films introduced as evidence in court are categorized as demonstrative evidence—that species of evidence that merely illustrates other evidence at hand.¹² For example, crime scene footage is admitted after the filming officer testifies to the film's content, and it is admitted as demonstrative evidence on the basis that the film is merely illustrative of the testimony and adds nothing more. Once categorized as demonstrative evidence, however—in the same way a drawing or a diagram is so characterized—the film is nevertheless independently analyzed and considered as standing for something much more than an “illustration.” Most of the time, courts will describe the so-called “demonstrative film” as “informative”¹³ and in “showing in ways no words can capture”¹⁴ the event the trial is to adjudicate. As one commentator said, such demonstrative evidence was “the thing itself.”¹⁵ In other words, although the film is admitted on the basis that it is merely cumulative and illustrative of some independently tested substantive evidence (such as testimony), the film soon thereafter takes on a more prominent and dominant role at trial, standing for an unbiased and uncontestable explanation of the disputed event (the crime, the injury, etc.).

The problem with this slippery use of film as evidence is two-fold. First, once admitted as demonstrative evidence, but later weighed and considered as independently probative, the film is left untested for its bias, point of view or independent relevance or prejudice. The film's dramatic effect on the story being told in

¹¹ *Id.*

¹² *Id.* at 498–499.

¹³ *Id.* at 498 (citing *Caprara v. Chrysler Corp.*, 423 N.Y.S.2d 694, 698-99 (App. Div. 1979)).

¹⁴ *Id.* at 521 (citing *Fusco v. Gen. Motors Corp.*, 11 F.3d 259, 263 (1st Cir. 1993)).

¹⁵ WIGMORE, EVIDENCE § 24, at 944 (P. Tillers rev. 1983); *see also* Silbey, *supra* note 8, at 567 & nn. 281–83.

court is left unexamined as the film hides behind its characterization as merely illustrating some other evidence. Second, and perhaps more obvious, despite its characterization as demonstrative, the film is neither uncontestable nor objective. Film, like any story, any subjective telling, is open to interpretation and debate, riddled with fissures and unanswered questions. All film is fictional—that is, from the latin *fictio* or *ingere*, which means to shape, form, to make up and put together. That all film is fictional (even legal films) does not offend our sense of the trial's purpose because trials, of course, are “fictional” too, inasmuch as they are made of competing stories that must be contested and contrasted, interpreted for their best, most persuasive ending.

It might be clear how *some* film is “made up” and should be questioned for its subjectivity, its particular interpretation of the event. Day-in-the-life films are a good example of one such genre of legal film. Video settlement brochures and video closing arguments are other examples of film that are wholly unlike the so-called objective evidence of the story presented by an eyewitness or through a confession. With these films one can understand more easily how filmic evidence might be staged, and edited for persuasive force, for particular points of view, with a singular goal in mind.

But what about the film of a crime scene or a filmed statement from an eyewitness? What about the film of a criminal confession? How do we understand this kind of film footage as evidence? What kind of legal knowledge does it produce? Are these films less like fiction film (less like day-in-the-life films) and more like documentary? What work does the dichotomy of fiction versus documentary do anyway?

I would like to suggest that thinking about (what I have elsewhere called) “evidence verité”¹⁶—legal film that purports to be unmediated and unselfconscious film footage of actual events, like crime scene footage or surveillance footage—as a species of documentary helps us understand how all film, not only staged and scripted films, are species of advocacy. When we consider the filming of confessions and custodial interrogations in particular,

¹⁶ Silbey, *supra* note 8, at 501.

along side a history of documentary filmmaking, we can recognize and criticize the unsophisticated assumptions that describe legal film (such as evidence verité) as the “more true” representation of some real event.

Generally speaking, film scholarship problematizes the epistemological claims that are perceived to underlie documentary film and questions the popular cultural conception of the documentary as a window onto some uncontested truth.¹⁷ And specifically, the history of documentary filmmaking teaches us that from its beginnings, the institutionalization of documentary film took the form of a collaboration between the filmmaker and the state, that through the experience of ritual participation the documentary film aimed to embody a “rhetoric of social persuasion” toward some ideal political or social order.¹⁸

A comparison between police films and documentary films informs the trend of police filmmaking through a discussion of film studies. It will encourage thinking about police as filmmakers and about film as a policing tool.¹⁹ It will also encourage the application of the critical vocabulary that describes contemporary documentary concerning its relationship to truth and reality to the new trend of filmmaking in the precinct house.²⁰ When the use of film by police and prosecutors is understood through the lens of this film theory and history, the film trend at law is better understood as a misguided attempt at thwarting police misconduct

¹⁷ See discussion of film studies *infra*.

¹⁸ Bill Nichols, *Documentary Film and the Modernist Avant-Garde*, 27 *CRITICAL INQUIRY* 580, 608 (2001). (“The emergence of a documentary film practice in the 1920s and 1930s drew together various elements of photographic realism, narrative, modernism, and rhetoric at a historical moment when the technology of cinema and the techniques of persuasion could serve the needs of the modern nation-state.”).

¹⁹ It is, of course, true that police are filmmakers in the sense that the nationwide trend is that police are filming interrogations. It is also true that film is increasingly a police tool—for surveillance and for disposing of challenges to confessions, among other usages. See, e.g., Jim Dwyer, *Videos Challenge Hundreds of Convention Unrest*, N.Y. TIMES, Apr. 12, 2005, at A1 (commenting on videographers used by police and protesters to prosecute or defend cases arising out of 2004 Republican National Convention).

²⁰ See, e.g., Roger Ebert, “9/11”: *Just the Facts?*, CHI. SUN-TIMES, June 18, 2004, at 55; Cynthia Greenlee-Donnell, *Hybrid Series to Test Documentary Limits*, HERALD-SUN (Durham, N.C.), Mar. 26, 2004, at D13; Jack Mathews, *Oliver Stone and “JFK”: The Debate Goes On*, L.A. TIMES, Jan. 19, 1992, at 99.

and streamlining the criminal justice process. Resituating filmed custodial interrogations and confessions in terms of both film theory generally and documentary history specifically demonstrates how the criminal justice trend and the use of film as a policing tool perpetuate the misunderstanding of film as the best evidence of historical events and as the most trustworthy source of information about what happened in the police station.

Consider two important features of documentary film. First, it was one of the first genres of film to develop and thus set the expectations for the film experience.²¹ Cinema is said to have been born in 1894 in France, with the Lumiere brother's actuality film: *L'Arrive d'un Train en Gare*.²² The story goes that upon showing this particular film to the first film audience at the Grand Café in Paris—it was a film of a train arriving into the station, the camera stationed on the quay such that the train grew larger and larger on screen as it got closer to the station—the audience screamed and ran from the theater, afraid the train would run them down. Not at all accustomed to the illusion of reality in motion that film creates, this 1895 audience feared for their lives and fled before seeing the end of the film.²³ With this, the film as a collective experience began, and with it, the notion that film has a peculiarly “real” feel, enabling the audience as a group to bear witness to some historic event projected on screen.

As a significant development of the photographic medium, film was an evolutionary marvel. This is because of its perceived unique relationship to the real and its so-called mythic capacity for “total world making”²⁴ beginning with what has become the basic premise of film's unique language, the ontological bond between the filmic representation and the thing or event filmed, an indexical linkage, giving rise to later theories suggesting that film appears to “bear[] unimpeachable witness to ‘things as they are.’”²⁵

²¹ BILL NICHOLS, INTRODUCTION TO DOCUMENTARY 83 (2001).

²² GERALD MAST, A SHORT HISTORY OF THE MOVIES 20–21 (4th ed. 1986).

²³ *Id.*

²⁴ ANDRE BAZIN, WHAT IS CINEMA? 17–22 (Hugh Gray trans. 1967).

²⁵ ROBERT STAM ET AL., NEW VOCABULARIES IN FILM SEMIOTICS: STRUCTURALISM, POST-STRUCTURALISM AND BEYOND 185–186 (1992).

But film is not a mechanism for witnessing;²⁶ the perception of film's capacity to wholly and truthfully reveal the world is a myth, "an idealistic phenomenon . . . [a] some platonic" ideal.²⁷ Indeed, as we know from our experience of film, film no more reveals the world than it reconstructs it. Film, like any representational form, must be interpreted and its specific language, its ways of making meaning, accounted for. Since its inception, then, film's form and function as a public aesthetic has been centered around a basic heuristic of the relationship between knowing and seeing. Preoccupations with what it means to know and to see, with witnessing and judging, and with the role of spectatorship in forming a political community, were embedded in and shaped the theories of film and filmmaking from its early stages.

The actuality films of the Lumiere brothers did not capture audience's attention long. Combining the photographic realism of the actuality with narrative structure, the documentary film genre began to ripen. Trains were not now only heading toward film audiences, but these trains were populated by bank robbers and good citizens getting from here to there. I am referring to Edwin Porter's film *The Great Train Robbery*, which is credited as the first pseudo-documentary: its subject being "how to rob a train."²⁸ With the popularity of this film came the fears and hopes—that have not abated today—that film is the most effective teaching tool, encouraging both the perpetuation of crimes and the beneficial participation in civic society. *The Great Train Robbery's* other contribution to film is its editing structure. By juxtaposing shots of otherwise discontinuous images—what was dubbed "montage" by early filmmakers—the film creates logic where there was none before. This relational editing or "montage" would become one staple for film meaning.²⁹

²⁶ See Silbey, *supra* note 8, at 540–541.

²⁷ BAZIN, *supra* note 24, at 17.

²⁸ MAST, *supra* note 22, at 36–38.

²⁹ See Silbey, *supra* note 8, at 532–35 (discussing montage and other camera framing techniques). The Kuleshov Experiments were the most famous to illustrate the montage effect:

Kuleshov cut the strip of Mozhukin's face into three pieces. He juxtaposed one of the strips with a shot of a plate of hot soup; he juxtaposed the second with a shot of a dead woman in a coffin; he juxtaposed the third with a shot of a little

The central hermeneutic problems of the film form—what it means to know through sight—matured through the development of montage and narrative. Narrative was particularly successful in “introduc[ing] the moralizing perspective or social belief of an author and a structure of closure . . . giv[ing] an imprimatur of conclusiveness to the argument . . .”³⁰ Thus, the famous early documentary films, ostensibly “documenting” some lived experience from the point of view of the witness-filmmaker were also fictional—made up, put together—constructing a world (and expectations and relationships) where none existed before. Consider, as other early examples *Nanook of the North*, a film about Inuit life now widely understood to be an entirely staged production,³¹ or the socialist realist films of the Soviet era by Dziga Vertov, which were spliced and edited newsreels that told one version of the proletariat revolution.³²

The second important feature of documentary film is its activist goals, which, in the beginning, were partnered (if informally) with the power of the state.³³ To be sure, there are exceptions to this rule, but the heyday of documentary, in the 1920s and 1930s, saw the “value of cinema . . . in its capacity to . . . enact the proper, or improper, terms of individual citizenship and state responsibility.”³⁴ As film scholar Bill Nichols has argued, although the “documentary form was latent in cinema from the outset,” the solidification of the documentary as a film genre “takes shape at the point when cinema comes into the direct

girl playing with a toy bear. When viewers . . . saw the finished cutting they praised Mozhukin’s acting: his hunger when confronted with a bowl of soup, his sorrow for his dead “mother” (their interpretation), his joy when watching his “daughter” (another interpretation) playing. Mozhukin’s expression was identical in all three cuts the actor’s emotion never changed. The context of the juxtaposed material evoked the emotion in the audience, which then projected it into the actor. Editing alone had created the emotion.

MAST, *supra* note 22, at 156.

³⁰ Nichols, *supra* note 18, at 589–91.

³¹ See Louis Menand, *Nanook and Me: Fahrenheit 9/11 and the Documentary Tradition*, THE NEW YORKER, Aug. 9, 2004 (Vol. 80 Issue 22), at 90, 92 (“In verité terms, ‘Nanook’ is largely a fake.”).

³² See NICHOLS, *supra* note 21, at 96.

³³ See Nichols, *supra* note 18, at 594.

³⁴ *Id.* at 582.

service of various, already active efforts to build national identity”³⁵

Like newspapers and radio before it, cinema contributed a powerful rhetorical voice to the needs of the modern state. The modern state had to find ways to enact popular, compelling representations of the state’s policies and programs. Such enactments engage its members in ritual, participatory acts of citizenship. Documentary film practice became one such form of ritual participation.³⁶

Other examples of activist and state-sponsored documentary filmmakers include John Grierson from Great Britain and Pare Lorentz from the United States. Grierson, who is said to have coined the word “documentary,” directed the 1929 British film *Drifters*, about the North Sea herring fleet that emphasized the economic importance of the fishing industry on Great Britain’s economy.³⁷ He also produced *Housing Problems*, a 1935 film that highlights the social problem of poor housing, its solution in the British government’s slum clearance program, and the rebuilding of new homes with gas appliances.³⁸ Pare Lorentz worked for the United States as a filmmaker and directed (among other films) *The River* about the flooding of the Mississippi and the achievements of the Tennessee Valley Authority.³⁹ And, of course, there is Leni Riefenstahl, probably best known for her film, *Triumph of the Will*, commissioned by Hitler’s administration and that glorified Nazi citizenship.⁴⁰

³⁵ *Id.* at 582-83.

³⁶ *Id.* at 604.

³⁷ See Nichols, *supra* note 18, at 581, 583; see also NICHOLS, *supra* note 21, at 145 (“[A]long with Flaherty, [Grierson] is often called the father of documentary He persuaded the British government to do with film in 1930 what the Soviet government had done since 1918: make use of an art form to foster a sense of national identity and shared community commensurate with its own political agenda.”).

³⁸ See Nichols, *supra* note 18, at 591.

³⁹ See *id.*

⁴⁰ TRIUMPH OF THE WILL has been described as one of the first “observational” documentaries, which, like cinema vérité, is a form of documentary filmmaking that purports to film an event uninterrupted or unaffected by the camera. NICHOLS, *supra* note 21, at 113.

After an introductory set of titles that set the stage for German National Socialist (Nazi) Party’s 1934 Nuremberg rally, Riefenstahl observes events with no further commentary.

Of course, not all documentary film served the state's interests. Some contemporary documentary filmmakers, such as Michael Moore (*Fahrenheit 9/11*), Errol Morris (*Thin Blue Line* and *Fog of War*), Frederick Wiseman (*Titicut Follies* and *Juvenile Court*), Nick Broomfield (*Aileen Wournos: Life and Death of a Serial Killer*), contest the power of the state.⁴¹ These documentaries are no less documentary-like in form and function, however.⁴² They too were exercises in the "rhetoric of social persuasion" for similar reasons as were the state-sponsored films: to persuade its audience of the righteousness of its perspective through film's uniquely materially affective representational form.⁴³ In this vein, recall where we began, with the recent trend of documentaries going mainstream, and with the critical vocabulary that describes the endeavor as an overt form of social or political advocacy.⁴⁴

Events—predominantly parades, reviews of troops, mass assemblies, images of Hitler, and speeches—occur as if the camera simply recorded what would have happened anyway. At two hours running time, the film can give the impression of having recorded historical events all too faithfully and unthinkingly. And yet, very little would have happened as it did were it not for the express intent of the Nazi Party to make a film of this rally. Riefenstahl had enormous resources placed at her disposal, and events were carefully planned to facilitate their filming, including the repeat filming of portions of some speeches at another time and place when the original footage proved unusable. (The repeated portions are reenacted so that they blend in with the original speeches, hiding the collaboration that went into their making.)

Id. at 113–14.

⁴¹ See, e.g., Michael Moore's *FARENHEIT 9/11* (2004), Errol Morris' *THIN BLUE LINE* (1988) and *FOG OF WAR* (2004), and Nick Broomfield's *AILEEN WOURNOS: LIFE AND DEATH OF A SERIAL KILLER* (2003).

⁴² See Menand, *supra* note 31, at 91 ("Whatever you think of Michael Moore's [*Fahrenheit 9/11*] . . . and reasonable people can disagree, of course—one thing that cannot be said . . . is that it is an outlaw from the documentary tradition.")

⁴³ The documentary form has since disengaged from its governmental sponsor and taken on a new partner—what film scholar Bill Nichols calls "alternative subjectivities and identities involving issues of sex and gender, ethnicity and race . . ." Nichols, *supra* note 18, at 608. Its goal of "realist persuasion" remains, however. "Collaboration between filmmakers and their subjects replaces collaboration between filmmakers and government agencies. With this shift the form and style of documentary representations expand to encompass a breadth of perspectives and voices, attitudes and subjectivities, positions and values that exceed the universal subject of an idealized nation-state." *Id.*

⁴⁴ Other like documentaries of recent vintage include Joe Berlinger's *PARADISE LOST: THE CHILD MURDERS AT ROBIN HOOD HILLS* (1996), Jehane Noujaim's *CONTROL ROOM* (2004), and Andrew Jarecki's *CAPTURING THE FRIEDMANS* (2003).

With these two documentary film characteristics in mind, especially as it developed into a disciplinary tool as regards state interests and power, let us rethink the trend of filming custodial interrogations.

Across the nation, the legislative agenda requiring the filming of custodial interrogations is uniformly about reducing the number of voluntariness challenges to criminal confessions and protecting against coercive police tactics. For example, the New Hampshire legislature said: “The legislative purpose is to enhance the quality of the prosecution of those who may be guilty while affording protection to the innocent. It is intended to create a verbatim record of the entire custodial interrogation for the purpose of eliminating disputes in court as to what factually occurred during the interrogation.”⁴⁵ Consider the Nebraska bill’s similar intent: “Providing a precise record of circumstances of a custodial interrogation . . . will reduce speculation and claims that may arise as to the content of the custodial interrogation.”⁴⁶

The dominant idea behind these recording statutes is that film of custodial interrogations is transparent in meaning. Interrogations will curtail police abuse because police will behave themselves if they are being watched. If, however, police misbehave and coerce a confession, or, within the bounds of the law elicit a confession, that line between coercion and voluntary solicitation will be obvious on film..

The more subtle idea behind these recording statutes is that they will rehabilitate the reputations of the abusive police and a broken criminal justice system. Although still a tough pill to swallow, the nature of false confessions and the fact that innocent people are imprisoned is becoming more widely known and understood.⁴⁷ Recording statutes aim to counter this bad press.

⁴⁵ H.R. 636, 2005 Gen. Assem., Reg. Sess. (N.H. 2005); *see also* H.R. 5349, 2005 Gen. Assem., Jan. Sess. (R.I. 2005).

⁴⁶ H.R. 112, 99th Leg., 1st Sess. (Neb. 2005).

⁴⁷ *See, e.g.*, WELSH S. WHITE, *MIRANDA’S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 139–90 (2003) (discussing false confessions and providing examples); LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, *CONFESSIONS IN THE COURTROOM* 85–93 (1985) (same); *see also* Richard J. Ofshe &

Consider Florida's statement supporting the passage of one such statute: "The legislature finds that the reputations of countless hardworking law enforcement officers are needlessly attacked by criminal suspects who falsely claim the officers have violated the suspect's constitutional rights [and] that limited trial court resources are squandered in hearings on motions seeking to suppress statements."⁴⁸

Both the dominant idea—protecting defendants' rights and streamlining criminal processes—and the more subtle idea—rehabilitating the reputation of the criminal justice system—pervert the understanding of film as a particular art form, as a form that inherently problematizes the relationship between sight and knowledge, witnessing and judging. Where these recording statutes appear to think that film is a cure-all for forced confessions, because it records what "really happened" in the precinct house, the history of the film counsels the opposite. A film records one version of the lived reality, but not the only one; a film records a reality that is "put together," documented and perhaps even constructed for film. My suggestion is that you can no better "see" the coercion in a filmed confession than you can judge the confession coerced based on testimony. It is only the ideology of film—that film exposes a fixed and determinable reality to us—that makes these state legislatures believe that coercion is obvious when seen on film as opposed to its ambiguous status when described in sworn testimony. To be sure, a filmed interrogation might provide different details than sworn testimony. It might provide a unique perspective on the interrogation. But this is not the same as anointing the film as the most accurate record of what happened in the precinct house as between the defendant and his interrogators, which is precisely what these recording statutes hope to achieve by creating a presumption that any non-recorded confession is inadmissible.⁴⁹

Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997).

⁴⁸ H.R. 1119, 2005 Leg., Reg. Sess. (Fla. 2005).

⁴⁹ See, e.g., H.R. 112, 99th Leg., 1st Sess. (Neb. 2005) (creating a presumption against admitting confession unless it was filmed by the police); H.R. 382, 47th Leg., 1st Sess. (N.M. 2005) (same); H.R. 1864, 2005 Gen. Assem., Reg. Sess. (N.Y. 2005) (same); S.R. 265, 71st Leg., Reg. Sess. (Or. 2005) (same).

Consider how specific features of the filmic art can change the meaning of the exact same confession if filmed in different ways. Daniel Lassiter, a social psychologist at Ohio University conducted studies on videotaped confessions and the impact of camera point of view on judgments of coercion.⁵⁰ Lassiter placed cameras in different parts of the interrogation room and filmed the interrogation and the subsequent confession from different camera angles: some focusing solely on the suspect, others focusing equally on the suspect and the interrogator, and others focusing solely on the interrogator. He then asked groups of audience-subjects to view one of the three videotapes. The result was that the audience watching the “suspect-focused [film] . . . judged that the confession was elicited by means of a small degree of coercion; subjects in the equal-focus condition judged that it was elicited by means of a moderate degree of coercion; and subjects in the detective-focus condition judged that it was elicited by means of a large degree of coercion.”⁵¹ In other words, the exact same confession filmed from different vantage points, some directly focusing on the defendant, some focusing also on the interrogator, were interpreted differently, some as relatively voluntary and others as relatively coercive. Lassiter also explains that “[i]n none of our experiments was there even a scintilla of evidence to indicate that participants spontaneously, and on their own, became aware that their judgments were being affected by the camera angle.”⁵²

Lassiter’s studies show what film studies explain: that point of view and montage—how film frames are sequenced and how that sequencing makes meaning not inherent in the film frame itself—can affect the interpretation of the film narrative. Contrary to the policy assumptions that film will provide the truth of the confession (is it accurate? is it coerced?), film, like any other representational form, must be interpreted in light of its specific

⁵⁰ See generally G. Daniel Lassiter, *Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion*, 3 J. APPLIED SOC. PSYCH. 268 (1986) [hereinafter Lassiter, *The Impact of Camera*]; G. Daniel Lassiter et al., *Videotaped Confessions: Is Guilty in the Eye of the Camera?* 22 ADVANCED EXPERIMENTAL SOC. PSYCH. 189 (2001) [hereinafter Lassiter, *Is Guilty in the Eye*].

⁵¹ Lassiter, *The Impact of Camera*, *supra* note 50, at 268.

⁵² Lassiter, *Is Guilty in the Eye*, *supra* note 50, at 189, 243.

language and form. Film is particularly dangerous as a legal tool, I would argue, because of its perceived veracity and its illusion of revelation, both of which, as I have mentioned, are not inevitable results of the film form but part of its ideological play.

In the criminal justice context especially, the conception of film as truth-revealing rather than as revealing one version of the many stories one could tell is particularly dangerous. This is especially so when a confession has been elicited on film. For one, when interrogations are filmed, they are typically filmed “with the camera positioned behind the interrogator and focused squarely on the suspect.”⁵³ As such, filmed confessions are predisposed to being interpreted as voluntary. For another, confessions are outcome determinative in a majority of criminal cases.⁵⁴ Given this, the practice of filming interrogations and confessions does not help defendants (contrary to stated policy intentions), but sinks them, whether or not in fact their confession was knowing, voluntary or accurate.⁵⁵

In light of the history of documentary film, are state-sponsored films of custodial interrogations and confessions more or less like the documentaries of the 1920s and 1930s, aimed to convince general audiences of the political and social value of their subject matter? How might it make sense, in light of this film theory and history, to rethink the filming of custodial interrogations as a film project aimed to rehabilitate the reputation of the criminal justice system and its inherently coercive police tactics regarding criminal suspects?⁵⁶ Isn't the social and political value of these state-sponsored film projects (be they judicially or legislatively

⁵³ *Id.* at 195 (citing Geller and Kassin).

⁵⁴ WRIGHTSMAN & KASSIN, *supra* note 47, at 1–2.

⁵⁵ The defendant-friendly part of the policy initiative becomes ineffective, if the trend in filming interrogations is as Lassiter reports it is, and the understanding of film by courts and advocates is as unsophisticated as I contend it is in this Essay. All that is left for purposes behind the legislation, then, is to rehabilitate the reputation of the criminal justice system and to streamline convictions.

⁵⁶ See PETER BROOKS, TROUBLING CONFESSIONS 4 (2000); *id.* at 13 (discussing how C.J. Warren, in his *Miranda* opinion, “uses the secrecy of interrogation to create a dramatic story of the closed room, and the dramas of humiliation, deception, and coercion played out behind the locked door, convincing us that compulsion is ‘inherent’ in custodial interrogation”).

mandated) that of convincing audiences (be they jurors, judges or a more general, civic audience) that the detectives eliciting confessions are serving the public good, that most people who confess do so voluntarily and that when they confess they are guilty.? To be sure, there is a defendant-friendly impulse behind the filming of interrogations: deterring and exposing police abuse. Ironically, however, given the way these police films are shot (suspect-focused) and the hegemonic effect of filmic representation (that th dominant story of the filmed confessions is of the defendant's guilt), this defendant-friendly legal tool in most cases forecloses the possibility of a not-guilty verdict.

Thinking about filmed confessions as documentary film does not, in my mind, reduce the filmed confession's value as a legal tool. To the contrary, it reminds audiences that even though film is made of images of lived experience, it is also a species of advocacy, one version of the event, thereby encouraging analysis and attention to the film's perspective and its argument. Importantly, resituating filmed confessions as a species of documentary film does not replicate the mistake of believing that filmic images tell the whole truth, whatever that is and whether we can know it.⁵⁷

Consider filmed custodial interrogations in light of the resurgence of overtly political documentary films that are mainstream "infotainment," that are not state sponsored, but are critical of the government (otherwise a form of propaganda not unlike the documentaries of the 1920s and 1930s⁵⁸). In light of the developing vocabulary of "faux doc" and "mockumentary," describing Michael Moore's films and reality television, for example, why aren't these critical spectators equally critical of precinct-house filmmaking? Why doesn't the learned skepticism

⁵⁷ See *infra* notes 59–61 and accompanying text.

⁵⁸ The term "propaganda" is not necessarily negative in connotation. Literally, propaganda means to actively spread a philosophy or point of view, which was the aim of the documentaries in the 1920s and 1930s and is the aim of contemporary documentaries. Neither aimed to monopolize communication nor suggested that the particular view espoused was the only view. "Propaganda" has negative connotations when the effect of the message conveyed is to hide or inhibit other messages, especially those that are critical of the dominant view, or when the way in which the message is conveyed is illogical and manipulative in its use of emotion and reason.

of film audiences toward independent filmmakers and cable television translate to a skepticism toward police station productions? Where is the developing critical vocabulary to describe filmed confessions?

It is not enough to say that the police have no intention to sway the audience's opinion (unlike Michael Moore or Errol Morris, who do intend to change individual minds and incite social change) because the police (and the legislatures passing the laws) have like intentions, as I have described earlier. It is not enough to say that the police intentions are about justice, making sure guilty persons are convicted and innocent people freed, whereas Michael Moore aims to entertain and grow his audience base, because neither is the whole story. Intentions are complicated, multiple and conflicting. Michael Moore can be a historian as well as an entertainer, a political activist as well as a film journalist, just as police officers can be searching for the truth behind the crime as well as abusing the power of the state in doing so, all in the interest of the community generally and crime victims specifically.

Theorizing filmed interrogations as contemporary documentary, as a species of political and social advocacy, captures the nature of legal knowledge and its effects. Film, such as evidence *verité*, no more reveals the truth of lived experience than the right answer at law corresponds to a preexisting, singular fact.⁵⁹ Instead, we know right answers at law to be coherent

⁵⁹ As I have written elsewhere, “[U]nderstanding that reality and truth—in so far as we can talk about them as variables that are crucial to our decisionmaking process—are constructed like anything else This process of social construction does not abandon truth; it situates it. It understands that speculation about what the Real and the True might be, divorced from the discourse in which we designate each, is impossible. . . . Indeed, the Real and the True have very little to do with it. If this seems a bold statement with regard to law, consider that defense attorneys declare their allegiance to the process above the truth of factual guilt (guilty or not, a fair trial is the goal). . . . Consider also that the rules of evidence are mostly about filtering (as in choosing among) facts that are appropriate for the jury to consider, even at the risk of suppressing the crucial document or testimony that ‘tells the whole story’ (whatever that may mean and however that hypothetically might be achieved).” Jessica Silbey, *What We Do When We Do Law and Popular Culture*, 27 *LAW & SOCIAL INQ.* 139, 156-57 (2002). For the proposition the legal trials are not about finding the truth but about some other good, see Charles Nesson, *The Evidence of the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 *HARV. L. REV.* 1357, 1359 (1985) (purpose of adjudication is to produce “acceptable

answers in light of all other circumstances and in light of the policies underlying the legal prohibition and its exceptions. For example, we don't ask whether the defendant is simply guilty or not, we ask whether he acted in a way the law proscribes (however that is interpreted under the statute) and did so for reasons that are not justified (however those justifications are explained).⁶⁰ Stated this way, there will be multiple answers to a given question. The filmed version may be one of the more coherent versions, but not necessarily an uncontestable version.⁶¹ Resituating filmed confessions as contemporary documentary, therefore—as one offspring of the long documentary tradition—triggers the crucial legal demeanors of *skepticism* and *scrutiny*. Theorizing filmed custodial interrogations in light of contemporary documentary comes with the added bonus of an already critical audience, an audience primed to ask questions about the social construction of knowledge and history and about the power of the state.

verdicts”); see also Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1230 (2001) (“the rules governing what happens inside the courtroom can be understood adequately only in the context of the state’s central project of regulating behavior outside the courtroom”); Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1500 (2001) (although “Fed. R. Evid. 102 defines the purpose’ of the rules a ‘that the truth may be ascertained,’ some of the rules have non-veritistic dimensions, while others mix veritistic and non-veritistic concerns”).

⁶⁰ In the case of guilty or not, what could the preexisting truth of guilt be anyway? As Peter Brooks has written, people confess for all sorts of reasons, not only (or if) they are guilty of the crime for which they have been accused, but because they have been accused in the first instance. He asks:

How can someone make a false confession? Precisely because the false referentiality of confession may be secondary to the need to confess: a need produced by the coercion of interrogation or by the subtler coercion of the need to stage a scene of exposure as the only propitiation of accusation, including self-accusation for being in a scene of exposure.

BROOKS, *supra* note 56, at 21.

⁶¹ For that matter, there are multiple, mutually inconsistent but right answers to scientific questions as well. See, e.g., BRUNO LATOUR, *SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY* (1987) (describing generally the social construction of scientific facts); THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (describing scientific inquiry as controlled by socially determined disciplinary paradigms that guide and inform fact-gathering).