

August 2005

# Filmmaking in the Precinct House and the Genre of Documentary Film

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## Recommended Citation

Silbey, Jessica M., "Filmmaking in the Precinct House and the Genre of Documentary Film" (2005). *Suffolk University Law School Faculty Publications*. 20.  
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## Filmmaking in the Precinct House and the Genre of Documentary Film

Jessica M. Silbey\*

*This Article explores side-by-side two contemporary and related film trends: the recent, popular enthusiasm for the previously arty, documentary film and the mandatory filming of custodial interrogations and confessions.*

*The history and criticism of documentary film shows, and contemporary movie audiences understand, the documentary film as a tool of political and social advocacy, in which a story is told using the medium of film to convey a specific, usually not unbiased message (recent examples are Michael Moore's Fahrenheit 9/11 and Errol Morris's Fog of War). By contrast, judges, advocates and legislatures, assume that films of custodial interrogations and confessions, which also serve a "documentary" purpose, reveal truth and lack a distorting point of view. As this Article will explain, the trend at law, although aimed at furthering venerable criminal justice principles, holds a fairly naïve view of film's indexical relationship to the lived world and typically ignores consideration of the contemporary trend in cinema. Understanding the documentary as truth-revealing is a mistake, a mistake which can frustrate (if not undermine) the criminal justice goals of the legislative policies. Understanding the impulse to film custodial interrogations as an impulse born through documentary filmmaking transforms our understanding of the object of the film exercise from revealing a truth (of guilt or lack of coercion) into reconstituting (an image of) the world into one favored by the filmmaker.*

*Whatever may explain the convergence of filmmaking in the precinct house and a penchant for mainstream documentary movie-going, the trends are shaping contemporary expectations about film in contradictory ways. Investigating these*

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*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. In light of the growing use of film as a policing mechanism, better understanding of film as both an art and a legal tool is in order.*

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*“Photography implies that we know about the world if we accept it as the camera records it. But this is the opposite of understanding, which starts from not accepting the world as it looks.”*<sup>1</sup>

*“To re-present the event is clearly not to explain it.”*<sup>2</sup>

## INTRODUCTION

Reality television. Mockumentary. Docudrama. Infotainment. Faux doc. Agitprop.<sup>3</sup> These words describe a trend in contemporary film and television that combines a developing taste for documentary-like form with fiction-like content. Indeed, the surge in documentary films going mainstream confirms that the excitement for documentary-like films has reached “far beyond the art house crowd.”<sup>4</sup> 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), *SuperSize Me* (by Morgan Spurlock), *Metallica* (by Joe Berlinger) or *Biggie and Tupac* (by Nick Broomfield).<sup>5</sup> The most recent 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)—confirm the growing appreciation by the American public for documentary-style films.

1. SUSAN SONTAG, ON PHOTOGRAPHY 23 (1977) (emphasis omitted).

2. BILL NICHOLS, BLURRED BOUNDARIES: QUESTIONS OF MEANING IN CONTEMPORARY CULTURE 121 (1994) [hereinafter NICHOLS, BOUNDARIES] (emphasis omitted).

3. See, e.g., 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.”); Irene Lacher, *Documentary Criticized for Reenacted Scenes*, N.Y. TIMES, March 29, 2005, at E1, E7 (calling 2005 Oscar-winning documentary short MIGHTY TIMES: THE CHILDREN’S MARCH a “faux doc” after film directors’ “failure to disclose their use of reenactments called into question the nature of reality implied by the use of the term documentary”).

4. Elizabeth Millard, *Exposing Injustice*, ABA JOURNAL, May 2005, at 22. See also Mark Feeney, *The View Finder: Documentarian Ross McElwee Has an Eye for the Personal and the Philosophical*, THE BOSTON GLOBE, Sept. 25, 2004, at C1 (chronicling the life and films of documentarians Ross McElwee, reporting that “[I]nterest 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. . .”). See *infra* note 236 (discussing the ebb and flow of the status of documentary film in popular culture).

5. See, e.g., Louis Menand, *Nanook and Me: “Fahrenheit 9/11” and the Documentary Tradition*, THE NEW YORKER, Aug. 9 & 16, 2004, at 90 (“Whatever you think of Michael Moore’s immensely satisfying movie about the awful Bush Administration and its destructive policies—and reasonable people can disagree, of course—one thing that cannot be said about ‘Fahrenheit 9/11’ is that it is an outlaw from the documentary tradition.”). Other recent documentary films include: *Spellbound*, *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 television. Consider the series “Survivor,” “The Apprentice,” “Super Nanny” and “Queer Eye for the Straight Guy”—all television shows that, like documentary films, tantalize with the promise of unstaged and revealing images of real people.

This contemporary trend in American moving images dates to the birth of cinema in 1895, the first films being “actuality” films—films of only a couple of minutes in length documenting a single historical event, such as a train arriving in a station or factory workers being let out for the day.<sup>6</sup> These actuality films later developed into the first established film genre: the documentary. With deep roots in the history of the moving image, the contemporary trend in documentary film and reality television parallels yet another film trend, but this time a trend *at law*: the filming of custodial interrogations.

The nationwide trend requiring that custodial interrogations be filmed is based not only on documentary impulses (the ostensible recordation of a real event). The trend is also 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. At last count, approximately 238 cities and counties, including Los Angeles, San Francisco and Houston, had instituted mandatory recording of custodial interrogations.<sup>7</sup> Five states and the District of Columbia also require the filming of custodial interrogations by statute or case law, and similar legislative initiatives are under consideration in a substantial number of the states in the nation.<sup>8</sup>

This trend at law requiring the filming of custodial interrogations (and their

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6. See, e.g., GERALD MAST & BRUCE F. KAWIN, *THE MOVIES: A SHORT HISTORY* 22 (1996) (describing the Lumière brothers’ actuality films *L’arrivée d’un train en gare* and *La sortie des usines Lumière*).

7. See Appendix (compilation of legislation—pending and passed—mandating the recording of custodial interrogations). Currently, Alaska, Illinois, Maine, Minnesota, New Jersey, Texas and the District of Columbia have, by statute or case law, mandated the electronic recording of custodial interrogations. See *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (state constitutional due process); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2005) (homicide cases only); ME. REV. STAT. ANN. tit. 25, § 2803-B [1] [K] (2005) (“serious crimes”); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (exercise of supervisory powers); <http://www.judiciary.state.nj.us/notices/reports/recordation.pdf> (resulting in the adoption of a procedural rule and the endorsement of model jury instructions regarding the recordation of custodial interrogations) (last visited Feb. 25, 2006); TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2001) (oral and sign language statements); D.C. CODE ANN. § 5-116.01 (2005) (crimes of violence); see also *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-534 (Mass. 2004) (holding that a defendant whose interrogation has not been completely recorded is entitled, on request, to an instruction 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”). As of summer 2005, law enforcement agencies in at least 238 cities and counties, including Los Angeles, San Francisco, San Diego, Houston and Portland, Oregon, regularly record custodial interviews of suspects in felony or other serious investigations. See Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, Special Report of Center on Wrongful Convictions, Northwestern University School of Law, at 4, A1-A10 (2004) [hereinafter Sullivan Report], available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf>.

8. See *infra* Appendix. See also William A. Geller, *Videotaping Interrogations and Confessions*, NAT’L INST. OF JUSTICE: RESEARCH IN BRIEF (U.S. Dept. of Justice, Wash., D.C.), March 1993, at 1.

inevitable confessional climax), although based on a documentary film impulse, nevertheless develops a fairly naïve view of film's indexical relationship to the lived world. Underlying this trend is the belief that filming the custodial interrogation will streamline criminal cases because filmed interrogations uncontroversially demonstrate the voluntariness (or coerciveness) of the confession and therefore the truth of guilt (or innocence) of the accused. In other words, the criminal justice system perceives the film as objective and unambiguous.<sup>9</sup>

The other trend—the resurgence of documentary as a form of mainstream entertainment, be it in a movie theater or on television—is like the legal trend insofar as the film transforms previously mundane subject matter into a spectator sport.<sup>10</sup> Unlike the legal trend, however, mainstream documentary is (and has historically been) perceived critically by reviewers and spectators alike, so much so that the tongue-in-cheek vocabulary with which I began this article (e.g., “docudrama” and “faux doc”) has developed to describe the evolving documentary genre as an ironic (as opposed to a sincere) art form.

In other words, contemporary criticism of documentary understands the genre as political and social advocacy, *viz.* Michael Moore documentaries are perceived and reviewed critically and with skepticism. Judges, advocates and legislatures perceive filmed interrogations and confessions as truth-revealing films that purport to be unbiased and unambiguous representations of a historical event. What do we make of these conflicting contemporary trends? Why do we consider contemporary and popular documentaries such as *Fahrenheit 9/11* critically but not a precinct house film of a criminal confession?

This Article explores side-by-side these two contemporary film trends. Whatever may explain the convergence of filmmaking in the precinct house with a popular penchant for mainstream documentary movie-going, the two trends are 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.<sup>11</sup> Such an investigation also situates the

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9. See, e.g., CHARLES E. O'HARA, *FUNDAMENTALS OF CRIMINAL INVESTIGATION* 127-323 (1956) (“The ideal solution is the sound motion picture, that combination of sound and sight which most nearly represents to the senses the event itself.”).

10. For well-known essays on the wide-spread effect of reproducible and reproducing images on society (in film or television), see JEAN BAUDRILLARD, *SIMULACRA AND SIMULATIONS* (Sheila Faria Glaser trans., Univ. of Michigan Press 1998) (1981) and GUY DEBORD, *THE SOCIETY OF THE SPECTACLE* (Zone Books 1995) (1967). The latter is the origin of the phrase “society of the spectacle.” See also DAVID C. CHANEY, *FICTIONS OF COLLECTIVE LIFE: PUBLIC DRAMA IN LATE MODERN CULTURE* (1993) (distinguishing between a “spectacular society” and a “society of the spectacle,” the former being structured around ritualized and allegorical dramatization of social order, the latter being a society that lacks structure, one in which spectacles proliferate indeterminacy and dramatize feelings of isolation rather than community).

11. It is possible, of course, that one explanation for the competing norms regarding filmmaking and legal process is that films are perceived as simply entertainment, without serious consequence, and law is perceived as per se affective, the incarnation of power and control. Otherwise put, it is possible the aforementioned criticism of documentary film is a complaint that film is just film and shouldn't purport to be truth-revealing or evidentiary at all, whereas the same cannot be said of law because as a system it exactly promises a believable or justifiable truth. To be clear from the outset, I disagree with

criminal justice trend in the context of a long history of filmmaking and critical spectatorship. In light of the growing use of film as a policing mechanism, better understanding of film as both an art and a legal tool is in order.

As this Article will explain, understanding the documentary as a truth-revealing film genre is a mistake. Indeed, its history counsels otherwise. As such, if we understand the impulse to film custodial interrogations as an impulse born through documentary filmmaking, the impulse becomes not one to reveal any truth (of guilt or lack of coercion) but instead to transform (an image of) the world.<sup>12</sup>

When the use of film by police and prosecutors is realized through the lens of film history and theory—in particular the history of documentary filmmaking—the criminal justice trend becomes a misguided attempt at thwarting police misconduct and fast-tracking convictions. Film theory, generally, problematizes the epistemological claim that is popularly perceived to underlie documentary film—that documentary is a window onto some uncontested truth. The history of documentary film, specifically, teaches us that from its beginnings the genre took the form of a collaboration between the filmmaker and the state. Through the experience of ritualized spectatorship, documentary film embodied a “rhetoric of social persuasion” the goal of which was to affect some ideal political or social order.<sup>13</sup> 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 precinct house.

I have elsewhere explored similar questions regarding filmic evidence more generally, advocating the recategorization of filmic evidence—like “day in the life” films, expert demonstrations, crime scene footage and surveillance footage—from demonstrative evidence to substantive evidence.<sup>14</sup> This Article continues this

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both formulations—of film as a cultural (and not a knowledge-producing) practice and of law as truth-revealing (and not a norm-producing) system. One premise of this Article, therefore, is the affinity between law and film as systems of meaning, as discourses through which power is reproduced and enacted, and as cultural institutions that are shaped both by the formal actors in them (e.g., lawyers, judges, filmmakers, actors and writers) and by the consumers or subjects of them (e.g., litigants, defendants, victims and film audiences). For further discussion of the affinities between law and film and the promises of the interdisciplinary study combining both, see Jessica Silbey, *What We Do When We Do Law and Popular Culture*, 27 *LAW & SOC. INQUIRY* 139 (2002). See also Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 *COLUM. J.L. & ARTS* 91 (2005); Orit Kamir, *Why ‘Law-and-Film’ and What Does it Actually Mean? A Perspective*, 19 *CONTINUUM: J. MEDIA & CULTURAL STUD.* 255 (2005).

12. As will be argued *infra*, one can interpret the dominant meaning of the police film as one in which those who confess are guilty and the police who elicit confessions serve the public good.

13. Bill Nichols, *Documentary Film and the Modernist Avant-Garde*, 27 *CRITICAL INQUIRY* 580, 582 (2001) [hereinafter Nichols, *Avant-Garde*]. See also *id.* at 594 (“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.”).

14. Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 *U. MICH. J. L. REFORM* 493 (2004) [hereinafter *Judges as Film Critics*]. *Judges as Film Critics* shows how courts and advocates fail to consider film as film—as a subjective retelling of the story at issue with a point of

earlier work and develops one of the categories of filmic evidence. In particular, this Article explores the category of film I call “*evidence verité*”<sup>15</sup>—legal films that purport to be unmediated and unself-conscious film footage of actual events, such as crime scene films, surveillance films and filmed custodial interrogations. By reconsidering *evidence verité* as a species of documentary film, especially in light of the contemporary trend in documentary filmmaking, *evidence verité* is appropriately understood as a species of political or social advocacy. This Article argues that reconsidering filmed interrogations and confessions in light of the history and theories of documentary filmmaking facilitates and sustains the critique of legal films (especially *evidence verité*) as the best or truest account of the event to be adjudicated (whether the voluntariness of the confession or the crime to which it refers). This critique makes room for scrutiny of and skepticism toward some of the most recalcitrant and powerful evidentiary proffers (confessions and filmic evidence) in criminal cases.<sup>16</sup>

This comparison between police films and documentary films also informs the trend of police filmmaking through the discussion of film studies.<sup>17</sup> It will encourage thinking about police as filmmakers and about film as a policing tool.<sup>18</sup> It will also encourage the application of the critical vocabulary describing contemporary documentary to the new trend of filmmaking in the precinct house.<sup>19</sup>

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view and a distinct perspective. This failure results in missed opportunities to cure prejudice and properly direct the evidentiary calculations at trial. *See id.* at 499-501. Film, like any story, is open to interpretation and debate. That all film is fictional—that is, from the Latin *fictio* or  *fingere*, which means to shape, form, to make up and put together—does not offend our sense of the trial’s purpose because trials, of course, are “fictional” too, inasmuch as they are “made up” and “put together” by competing stories that are contested, contrasted and interpreted for their best, most persuasive ending.

15. *Judges as Film Critics*, *supra* note 14, at 501, 507-09.

16. Confessions are considered “the most potent weapons for the prosecution.” Saul M. Kassin & Holly Suckel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 27 (1997). *See also* Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 741-43 (1997) (discussing the importance of confessional evidence in the trial process); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 906-09 (1996) (surveying prosecutors, 61% of whom identify confessions as “essential” or “important” for conviction).

17. *See, e.g.*, Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 LAW & SOC. INQUIRY 139, 145 (2002) (arguing that when engaging in interdisciplinary legal scholarship, one should “mind the tenets of the disciplines we are marrying, such as those of literary [or film] theory and legal practice, so that we do not abandon the lessons already learned and established” by each).

18. 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 Arrests*, N.Y. TIMES, April 12, 2005, at A1 (reporting that videographers were used by police and protesters to prosecute or defend cases arising out of 2004 Republican National Convention). As an example of the kinds of products being sold to police departments as part of this nationwide trend, see the technology called the Nutcracker™ Interview Management System, advertised at <http://www.cardinalpeak.com/products.html>.

19. For examples of this critical vocabulary, 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, NC), Mar. 26, 2004, at D13; Jack Mathews, *Oliver Stone and “JFK”: The Debate Goes On?*, L.A. TIMES, Jan. 19, 1992, at 99.



Is it not odd that where the vocabulary exists in the popular media to critique documentarists like Michael Moore,<sup>20</sup> that same critical rhetoric is absent in circumstances in which films are made and used by the state against criminal defendants? This Article will explain this oddity as a misunderstanding of film's formal properties and signifying practice and attempt to import the robust criticism of contemporary documentary film to filmmaking at law, in order to render more precise and fair the criminal adjudication process.

Film is a language and an art, no matter how unscripted or haphazard its form. Film, like written or spoken language, is a medium through which messages are relayed. What messages are being sent by the filmed interrogation and confession? How might we understand the filming of the interrogation as an evitable part of its message? Understanding filmed interrogations as a form of state-sponsored documentary will go a long way toward challenging the view that filmed confessions record what "really happened" at the crime scene and in the interrogation room. As will be discussed further below, a film records one version of historic events, but not the only one; it is a form of fiction, recording pieces of reality that are "put together"—constructed and documented—for film. Film no more "shows" the whole truth (or lack thereof) of a confession or its referent than does the rest of the evidence that bears on the issue.

To be clear, I am not advocating that interrogations not be filmed or that filming custodial interrogations or confessions fails to promote criminal justice.<sup>21</sup> But I am suggesting that when we consider film we ought to consider it differently, not as a cure-all for police coercion or false confessions but as one version of the events in the precinct house, of which there are likely many. Recalling the debates about *Miranda* warnings forty years ago, prophylactic measures can aim to protect the accused at the same time as they can arbitrarily (and discriminatorily) authenticate or sanitize statements made by defendants after being warned of the right to be silent.<sup>22</sup> Just as *Miranda* warnings may have helped but were far from the solution

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20. See, e.g., Phil Rosenthal, *Who Do You Believe: us or Michael Moore?*, CHI. SUN-TIMES, July 13, 2004, at 47; Roger Ebert, '9/11': *Just the Facts?*, CHI. SUN-TIMES, June 18, 2004, at 55; Editorial, *Fahrenheit 9/11 Moore's Movie: Nobody in the Middle*, DALLAS MORNING NEWS, July 4, 2004, at 3H.

21. Indeed, I am persuaded by the many accounts that videotaping interrogations and confessions will have positive effects on police professionalism and defendants' constitutional rights. See, e.g., Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice* (February 14, 2005) (unpublished student paper previously posted on Student Scholarship Series website, Yale Law School) (on file with author); Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537 (2001); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 681-692 (1996) [hereinafter Leo, *Miranda Impact*]. However, these effects are in part due to the naïve, though popular, notion of film as an unbiased and objective observer of historical events.

22. As one expert on *Miranda* has written,

[T]rial judges have learned to use *Miranda* to simplify the decision to admit interrogation-induced statements and to sanitize confessions that might otherwise be deemed involuntary if analyzed solely under the more rigorous Fourteenth Amendment due process voluntariness standard. . . . *Miranda* has not changed the psychological interrogation process that it excoriated, but has only motivated police to develop more subtle and sophisticated—and arguably more compelling—interrogation strategies.

to police coercion and false confessions, the filming of custodial interviews is similarly no panacea. Filming interrogations and confessions may deter some police misconduct, and it may aid defendants to prove in a court of law that they did request to speak with an attorney, but filmmaking in the precinct house should not be mistaken for an inevitable or unalterable unbiased and moral observer that will prevent police abuse or liberate the wrongly accused.

This Article proceeds in three parts. Part One reviews the legislative enactments and policies that embody the nationwide trend toward filming custodial interrogations. It includes a discussion of the seminal cases that address the legal virtues and obligations concerning the filming of interrogations. This Part concludes with a discussion of some lower court decisions analyzing filmed confessions. It highlights several problematic assumptions motivating the cases and the underlying legislation, among them that the film form authenticates rather than shapes the truth of the event on or referenced in film.

Part Two tells the story of the documentary film genre. It traces the history of documentary from the birth of cinema in 1894 to its heyday in the 1920s and 1930s as a form of state-sponsored political activism. By focusing on the roots of documentary film, this Part explains how contemporary documentary does not aim to reveal a truth but rather, through the authority and power of the film form, aims to convince the audience of a particular point of view. This Part shows how documentary was born of an impulse to question film's epistemological significance in the first instance.

Part Three revisits the legislative history and the case law in light of the history and theory discussed in Part Two. In so doing, this last Part resituates the trend of filmmaking in the precinct house within the broader cultural context of documentary filmmaking. The goal of this last part—and indeed the Article—is to reorient the evidentiary and criminal justice debate about film as a legal tool around the idea of police as filmmakers and filmmaking as a kind of storytelling. It is commonplace to talk about law in terms of its storytelling function.<sup>23</sup> It should be

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Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1027 (2001). See also Leo, *Miranda Impact*, *supra* note 21, at 633-34 (“*Miranda* appeared to have little impact on police behavior during interrogation, since detectives continued to employ many of the psychological tactics of persuasion and manipulation that the Warren Court had deplored in *Miranda*.”); *id.* at 640-41 (“[P]olice use the warnings to their advantage in order to overcome the evidentiary burden of demonstrating that a voluntary statement was obtained. ‘Thus . . . the impact of *Miranda* on the ultimate interrogation contest seems to have been effectively neutralized.’”) (citation omitted); *id.* at 665. As an example of “getting around” *Miranda*, see the discussion in *Missouri v. Seibert*, 542 U.S. 600, 621 (2004), about the “*Miranda* two-step” where *Miranda* warnings were given mid-interrogation, after defendant gave an unwarned confession, only to have defendant repeat the confession after *Miranda* warnings were properly issued.

23. See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 2-3, 246-81 (2000) (through close readings of Supreme Court decisions, showing how the structure of storytelling shapes the high court's opinions about, among other things, race and family); SUSAN SILBEY & PATRICIA EWICK, *THE COMMON PLACE OF LAW* 28-29 (1998) (a study of law and narrative toward a theory of legal consciousness); *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Paul Gewirtz and Peter Brooks eds., 1996) (volume of collected essays exploring how law and legal practice is as

no great leap to talk about filming law as part and parcel of the stories being told.

## I. CASE LAW AND POLICY

Although currently only Alaska, Illinois, Maine, Minnesota, New Jersey, Texas and the District of Columbia mandate the recording of custodial interrogations, as the Appendix to this Article demonstrates, a substantial portion of states' legislatures are debating similar legislation.<sup>24</sup> In addition, even absent state law (whether judicially or legislatively mandated), police and sheriff departments in at least 238 cities, counties and towns, including Los Angeles, Orange County (CA), Phoenix, Denver, St. Louis, Broward County (FL) and Miami, require the recording of custodial interviews.<sup>25</sup>

The rationales underlying these laws are fairly consistent. Recorded custodial interrogations are widely believed to protect defendants from coercive police tactics, promote prosecutions of the truly guilty and preserve public confidence in the criminal justice system. These rationales, while fairly debated in the case law, state legislatures and locally, also routinely ignore the peculiarities of film as an expressive medium and a legal tool which, when considered closely, undermine the very reasons for the rule.

### A. CASE LAW

There are a variety of sources for the legal requirement of filming custodial interviews. Among them are constitutional due process, judicial supervisory authority, state legislation and local ordinance.<sup>26</sup>

Only one state's supreme court—Alaska's—has held that due process under the state constitution requires the recording of custodial interviews.<sup>27</sup> The case is twenty years old, but its discussion is instructive for the judicial and legislative policy debates that follow.

*Stephan v. State* holds that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process under the Alaska Constitution.<sup>28</sup> As a result of *Stephan*, any custodial statement under Alaska's jurisdiction that is not recorded is generally inadmissible against the defendant.<sup>29</sup> As an exclusionary rule, *Stephan* lays the

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much about rules and policy as it is about storytelling, narrative structure and performance); Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 108 AM. J. SOCIETY 1328 (2003); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996).

24. See *infra* Appendix.

25. See Sullivan Report *supra* note 7, at Appendix A. See also *infra* Appendix for a complete list of implemented legislation.

26. E.g., *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (due process); *Scales*, 518 N.W.2d at 592 (judicial supervisory authority); 20 ILL. COMP STAT. ANN. 3930/7.2 (West 2005) (state legislation); 25 ME. REV. STAT. ANN. tit. 25, § 2803-B, sub-§ 1, paragraph K (2005).

27. *Stephan*, 711 P.2d at 1164.

28. *Id.* at 1158.

29. *Id.*

groundwork for the comparison of policies underlying *Miranda* (the implementation of pre-interrogation warnings of right to counsel and privilege against self-incrimination) with the policies (and their implementation) underlying the requirement for filming interrogations.<sup>30</sup>

According to *Stephan*, there are two reasons the Alaska Constitution requires that interrogations be recorded: (1) to protect the accused's rights of due process and (2) to protect the public interest in honest and effective law enforcement. As to the first, recording the interrogation is "essential to the adequate protection of the accused's right to counsel, his right against self incrimination and . . . his right to a fair trial,"<sup>31</sup> which rights are specifically guaranteed by the Alaska Constitution.<sup>32</sup> An accused's waiver of his right to counsel and the admission against him of inculpatory statements made during interrogation are countenanced only upon a determination that the statements and waiver were both knowing and voluntary.<sup>33</sup> The *Stephan* court said that because an electronic recording "provides an *objective* means for evaluating what occurred during interrogation"—what statements were made, what words were spoken, what the court calls an "accurate and complete record [of] [t]he contents of an interrogation"—no legitimate reason exists *not* to require it.<sup>34</sup> Indeed, the court held that adequate protection of constitutional rights demands it.

In other words, recording an interrogation is a means of preserving exculpatory or otherwise helpful evidence for the purposes of a suppression hearing or trial. "The importance of . . . a . . . recording lies in the fact that trial courts and appellate courts tend to trust police officers' recollections of what occurred at the expense of the criminal defendant's account. Thus, in the absence of a . . . recording, the prosecuting authorities invariably win the swearing contest."<sup>35</sup> As *Miranda* explained almost forty years ago, "[t]he difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. . . . Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms."<sup>36</sup> Because the state and defendant can (and inevitably do) dispute the events that transpired in the interrogation room, "the accused[']s . . . right to a fair trial may be violated, if an illegally obtained, and possibly false confession is subsequently admitted. An electronic recording . . . protects the defendant's constitutional rights, by providing an objective means for

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30. See, e.g., *supra* notes 21-22 and accompanying text.

31. *Stephan*, 711 P.2d at 1159-60.

32. ALASKA CONST. art. I, §§ 9, 11. These are the same reasons provided for the criminal exclusionary rule generally: to deter unconstitutional methods of law enforcement and to insure judicial integrity by prohibiting courts from becoming party to "lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Stephan*, 711 P.2d at 1163 n.25 (quoting *Terry v. Ohio*, 392 U.S. 1, 13 (1968)).

33. *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1966). The state's obligation in this regard under the Alaska Constitution is the same. *Stephan*, 711 P.2d at 1161.

34. *Stephan*, 711 P.2d at 1160-61 (emphasis added).

35. *Id.* at 1158 n.6 (quoting *Harris v. State*, 678 P.2d 397, 414 (Alaska Ct. App. 1984)).

36. *Miranda*, 384 U.S. at 445-48.

him to corroborate his testimony concerning the circumstances of the confession.”<sup>37</sup>

The second reason Alaska constitutionally requires the recording of interrogations—to protect the public interest—is no less weighty, although it is given significantly shorter shrift in the decision. “[A] recording . . . protects the public’s interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics.”<sup>38</sup> Here, the court alludes to what will become more prominent themes in the state legislative debates: minimizing false charges of coercion and promoting prosecutions of the truly guilty. “A recording, in many cases, will aid law enforcement efforts by confirming the content and the voluntariness of a confession when a defendant changes his testimony or claims falsely that his constitutional rights were violated.”<sup>39</sup> This furthers the public interest in at least two ways. It helps maintain (or rehabilitate) law enforcement’s reputation for fair and upright policing, and it streamlines the criminal justice process. As to the former, recording interrogations purports to end swearing contests between defendants and police officers the effect of which is to smear the reputation of innocent police accused of illegal interrogation methods. As to the latter, recording interrogations purports to promote prosecutions by short-circuiting meritless suppression hearings. This, in turn, conserves public funds that “would have been consumed in resolving the disputes that arose over the events that occurred during interrogations.”<sup>40</sup> In sum, recording custodial interviews helps preserve the integrity of the criminal justice system, both by saving scarce judicial resources and helping “to ascertain the truth.”<sup>41</sup>

Alaska is the only state whose due process guarantee has been interpreted to require the recording of custodial interrogations. Other states have stopped short of a constitutional requirement. For example, Minnesota’s Supreme Court established an exclusionary rule much like Alaska’s but did so pursuant to its supervisory powers to ensure the fair administration of justice, requiring that all custodial questioning must be recorded where feasible.<sup>42</sup> The reasons the Minnesota court in *State v. Scales* provided for the exclusionary rule were identical to those articulated in *Stephan*.<sup>43</sup> Similarly, New Jersey’s Supreme Court established a committee, pursuant to its supervisory authority, “to study and make recommendations on the

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37. *Stephan*, 711 P.2d at 1161.

38. *Id.*

39. *Id.*

40. *Id.* at 1162.

41. *Id.* at 1161. *See also id.* at n.16 (quoting *Garcia v. District Court*, 589 P.2d 924, 930 (Colo. 1979) (“The trial of a criminal case is not a game of fox and hounds in which the state attempts to outwit and trap a quarry. It is, instead, a sober search for truth, in which not only the resources of the defendant, but those readily available to the state must be put to work in aid of that search.”)).

42. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994)

43. *See id.* at 591 (believing recorded interrogations would reduce or eliminate factual disputes about the denial of a defendant’s constitutional rights during detention, enable a defendant to challenge misleading or false testimony, protect the state against meritless claims and discourage unfair and psychologically coercive police tactics).

use of electronic recordation of custodial interrogation.”<sup>44</sup> After detailing the many sides of the debate—including “the obvious [due process] benefit derived from a recording that creates an objective, reviewable record,”<sup>45</sup> the protections against self-incrimination and the right to counsel afforded defendants by assuring that waivers and custodial statements are knowing and voluntary,<sup>46</sup> the improvement of “the overall quality of police work,”<sup>47</sup> and “[t]he potential savings that recording may have on judicial resources”<sup>48</sup>—New Jersey’s highest court announced “[t]he proverbial ‘time has arrived’ . . . to evaluate fully the protections that electronic recordation affords to both the State and to criminal defendants.”<sup>49</sup>

The Massachusetts Supreme Judicial Court has crafted yet another alternative to an exclusionary rule. In *Commonwealth v. DiGiambattista*, the high court restrained from requiring the filming of all custodial interrogations. But, because of its view that “recording all interrogations would improve the efficiency, accuracy, and fairness of criminal proceedings,” the Massachusetts Supreme Judicial Court placed the burden on the prosecution for explaining to the jury why the interrogation was not filmed. That burden is explained in a jury instruction.

[W]hen the prosecution introduces evidence of a defendant’s confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention . . . , and there is not a[ ] . . . recording of the complete interrogation, the defendant is entitled . . . to a jury instruction advising that the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation . . . , they should weigh evidence of defendant’s alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.<sup>50</sup>

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44. *State v. Cook*, 847 A.2d 530, 547 (N.J. 2004). That report has been published, *see* <http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf> (last visited Feb. 25, 2006), and its recommendations adopted almost entirely by the Supreme Court of New Jersey, *see* <http://www.judiciary.state.nj.us/notices/reports/recordingation.pdf> (last visited Feb. 25, 2006), resulting in the adoption of a procedural rule and the endorsement of model jury instructions regarding the recordation of custodial interrogations.

45. *Cook*, 847 A.2d at 543.

46. *Id.* at 542-43.

47. *Id.* at 543.

48. *Id.* at 544.

49. *Id.* at 546-57. Like Minnesota and New Jersey, New Hampshire’s Supreme Court has acted pursuant to the exercise of its supervisory jurisdiction over the state trial courts. The rule it promulgated, however, is a recording rule not based on the state constitution or the outcome of committee recommendations. In *Barnett*, the court held pursuant to its supervisory powers, that for recorded custodial statements to be admitted into evidence, the recording must be complete. *State v. Barnett*, 789 A.2d 629, 632 (N.H. 2001). Motivating the *Barnett* court is the “inequity inherent in admitting into evidence the selective recording of a post-*Miranda* interrogation” and the relatively easy way to record (and review) the entire interrogation in order “to ensure the fair administration of justice.” *Id.* For further discussion of this issue, *see infra* Part II.D(1).

50. *DiGiambattista*, 813 N.E.2d at 533-534 (Mass. 2004). The court explained this ruling in conclusion by judging the film the most reliable kind of evidence. “[W]here the utilization of recording

This is a remarkably powerful jury instruction for the defense because, as the dissent in *DiGiambattista* says, it communicates to the jury “that the court has expressed a ‘preference’ for recording and that a finding of involuntariness [and thus, likely a judgment of acquittal] may be premised on the absence of one . . . .”<sup>51</sup>

Other state courts have refrained from crafting new evidentiary rules or jury instructions, convening committees or expanding due process. These courts instead resort to moderate exhortation, “strongly recommend[ing], as a matter of sound policy, that law enforcement officers” record custodial interrogations,<sup>52</sup> as Indiana’s highest court stated. While discussing the police’s failure to record the custodial interrogation of a defendant who provided *nine* different accounts of his involvement in the crime, and who subsequently (at trial and on appeal) contested the circumstances and content of his confession, the Tennessee Supreme Court (no doubt speaking from experience) said

“that electronically recording custodial interrogations would reduce the amount of time spent in court resolving disputes over what occurred during the interrogation. As a result, the judiciary would be relieved of much of the burden of resolving these disputes. In light of the slight inconvenience and expense associated with electronically recording custodial interrogations, sound policy considerations support its adoption as a law enforcement practice.”<sup>53</sup>

This Tennessee court nevertheless goes on to say, “[h]owever, the determination of public policy is primarily a function of the legislature.”<sup>54</sup> In like fashion, the Mississippi Supreme Court praised the value of recording interrogations: “[I]t will often help to demonstrate the voluntariness of the confession, the context in which a particular statement was made, and of course, the actual content of the statement.”<sup>55</sup> But it declined to impose a new evidentiary rule on state law enforcement and the criminal justice system. In all three of these examples (Indiana, Tennessee and Mississippi), each state supreme court discusses at significant length the perceived benefits to the criminal justice system of recording custodial interrogations (as those benefits are laid out in *Stephan*), but each also nonetheless refrains from changing the legal status quo, deferring to the legislative prerogative to do so.<sup>56</sup>

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is left to the unfettered discretion of law enforcement . . . and an officer has chosen not to record a particular interrogation, we think that it is only fair to point out to the jury that the party with the burden of proof has, for whatever reason, decided not to preserve evidence of that interrogation in a more reliable form, and to tell them that they may consider that fact as part of their assessment of the less reliable form of evidence that the Commonwealth has opted to present.” *Id.* at 535.

51. *Id.* at 537.

52. *Stoker v. Indiana*, 692 N.E.2d 1386, 1390 (Ind. 1998).

53. *State v. Godsey*, 60 S.W.3d 759, 772 (Tenn. 2001).

54. *Id.* (quoting *Griffin v. Shelter Mut. Ins. Co.*, 18 S.W.3d 195, 200-02 (Tenn. 2000)).

55. *Williams v. State*, 522 So.2d 201, 208 (Miss. 1988).

56. *Stoker*, 692 N.E.2d at 1388-90; *Godsey*, 60 S.W.3d at 771-72; *Williams*, 522 So.2d at 208. See also *Commonwealth v. Craft*, 669 A.2d 394, 398 (Pa. Super. Ct. 1995) (“[T]he adoption of a rule requiring contemporaneous recording of custodial interrogation, for the reasons advanced by the Alaska and Minnesota Courts, to insure the proper administration of justice is one that either the Supreme Court or General Assembly should pronounce, not an intermediate appellate court . . .”).

Although these courts were not speaking directly to their state legislatures, they might as well have been. Almost as certainly as if these decisions had ordered the implementation of an exclusionary rule, the legislatures of Indiana and Tennessee, along with sixteen other states across the country, are in the process of debating the benefits and burdens of implementing such a criminal justice directive along the same argumentative lines discussed in *Stephan* and *Scales*.<sup>57</sup> These debates are discussed below.

### B. LEGISLATION, PENDING AND PASSED

The stated intentions of the passed and pending state legislation mirrors the reasoning of the state court decisions on the issue.

*Protect Defendants.* Many legislatures find that recording custodial interrogations (or in some cases, only confessions),<sup>58</sup> will protect defendants' rights generally. Most of the time, the language in the proposed bills regarding this issue is general, but at the core is the specific belief that filming interrogations will deter coercive police tactics, which in turn will protect a defendant's right to counsel and privilege against self-incrimination.<sup>59</sup>

For example, Arizona's legislature has proposed a bill requiring that absent the recording of any statement made by a juvenile during a detention, the statement is inadmissible. The proposed bill is based on the following legislative findings:

1. Every year, many persons are jailed because of false confessions during custodial interrogations.
2. Interrogators do not have to use force to elicit confessions from juveniles.
3. Electronic recording of interrogations would protect the innocent and provide the best evidence against the guilty.<sup>60</sup>

Florida's proposed legislation requires the recording of all custodial interrogations (not only juvenile detentions) through an exclusionary rule. In the absence of a "true, complete, and accurate electronic recording, the prosecution may rebut the presumption of inadmissibility through clear and convincing

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57. See *infra* Appendix for a complete list of pending and passed legislation.

58. See *infra* Appendix.

59. Commentators agree: "By creating an objective record of the interrogation for both internal and external review, videotaping will restrain overzealous interrogators who might otherwise resort to techniques that overstep the bounds of legality, especially in light of high profile cases in which little or no evidence exists against the suspect. Consequently, the videotaping of custodial interrogations will reduce police improprieties during interrogation." Leo, *Miranda Impact*, *supra* note 21, at 688. The Innocence Project has issued a statement encouraging "law enforcement officials to adopt the practice of videotaping custodial interrogations as a way of preventing and identifying false confessions. . . . Such a record will improve the credibility and reliability of confessions, while protecting the rights of innocent suspects." The Innocence Project, *False Confessions* (2004), <http://www.innocenceproject.org/causes/falseconfessions.php> (last visited Jan. 30, 2006).

60. H.R. 2614, 47th Leg., 1st Reg. Sess. (Ariz. 2005), 2005 AS H.B. 2614 (Westlaw).



evidence” that, among other things, “[t]he statement was both voluntary and reliable” and “[l]aw enforcement officers had good cause not to electronically record all or part of the interrogation.”<sup>61</sup> As support for this proposed bill, its authors have submitted factual findings to the effect that “many innocent persons are imprisoned and later released due to false confessions; there are many reasons innocent people confess ranging from coercion to mental illness; electronic recording of interrogations protects the innocent and provides the best evidence against the guilty.”<sup>62</sup> This bill presumes that recording custodial statements will reduce the amount of false or coerced confessions (and thus will reduce the amount of due process violations) because it will minimize coercive police tactics during interrogation, and it will provide courts and advocates with objective evidence of coercion (or mental incompetence) after interrogation.<sup>63</sup>

A bill introduced in New Hampshire’s legislature has a similar basis. Its authors propose that custodial statements be inadmissible absent a “complete and authentic . . . recording, . . . of the statement and the interrogation in its entirety . . . . Prior to the statement but during the recording the person is informed of the right to remain silent and the right to counsel.”<sup>64</sup> The bill’s authors explain that the purpose of the law “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.”<sup>65</sup>

*Promote Prosecution.* The above excerpts from state legislative factual proffers show that, in addition to protecting defendants’ constitutional rights, recording statutes also aim to promote the prosecution of criminals.<sup>66</sup> Arizona and Florida legislators contend that recorded confessions provide “the best evidence against the guilty.”<sup>67</sup> Nebraska’s proposed recording statute says that “electronically record[ed] admissions or statements [are] an effective way for the prosecution to meet its burden of demonstrating a free, knowing, and intelligent waiver of a person’s right to remain silent, to refuse to answer questions, to have an attorney present during such questioning . . . .”<sup>68</sup> Rhode Island’s and New Hampshire’s legislative proposals are the most direct on this point: “[The] legislative purpose . . . [of the recording of custodial interrogations] is to enhance the quality

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61. H.R. 1119, 107th Leg., Reg. Sess. (Fla. 2005), 2005 FL H.B. 1119 (Westlaw).

62. *Id.*

63. See also Illinois’ statute, 20 ILL. COMP. STAT. ANN. 3930/7.2 (West 2005), the findings for which state “[t]he [recording] technology will . . . provide a better means for courts to review confessions of suspects with direct evidence of demeanor, tone, manner, and content of statements.”

64. H.R. 636, 159th Gen. Assem., Reg. Sess. (N.H. 2005), 2005 NH H.B. 636 (Westlaw).

65. *Id.*

66. Consider the technology called Nutcracker™ Interview Management System, marketed to police detectives across the country, as a way to “make detectives more effective during custodial interviews” implying the “nut” to “crack” is the guilty defendant. See <http://www.cardinalpeak.com/products.html> (last visited Jan. 30, 2006).

67. H.R. 2614, 47th Leg., 1st Reg. Sess. (Ariz. 2005), 2005 AS H.B. 2614 (Westlaw); H.R. 1119, 2005 Leg., Reg. Sess. (Fla. 2005), 2005 FL H.B. 1119 (Westlaw).

68. H.R. 112, 99th Leg., 1st Sess. (Neb. 2005), 2005 NE L.B. 112 (Westlaw).

of the prosecution of those who may be guilty . . . .”<sup>69</sup>

The belief that recorded custodial interrogations will substantially reduce disputes about what occurred during detentions—i.e., what was said and whether confessions were made knowingly and voluntarily—underscores the legislative goal of promoting the prosecution of criminals. As a Florida bill stated in an alternative proposal for a recording statute,

[L]imited trial court resources are squandered in hearing on motions seeking to suppress statements made by criminal suspects who are given the opportunity to make such claims because no recordings of their interrogations exist. . . . Low-cost technology is now available in every jurisdiction to record each and every custodial interrogation of a criminal suspect, eliminating this gross waste of resources and enhancing the reliability . . . of law enforcement.<sup>70</sup>

Here, the purpose behind the proposed legislation is not only to protect defendants’ constitutional rights under state and federal law, but to enhance (indeed, streamline) the prosecution of criminals by showing for the judge and jury that the accused voluntarily and intelligently inculpated himself during custodial detention. In this context, the recorded statements are believed to be the most reliable evidence of the conditions of the detention, of what was said during the interrogation, and of the defendant’s state of mind when making the statements.

*Preserve Public Confidence.* The third basis for the legislative proposals is to preserve or rehabilitate the reputation of law enforcement specifically, and the criminal justice system generally.<sup>71</sup> Florida’s proposed bill says as much explicitly: “The [l]egislature finds that the reputations of countless hard-working law enforcement officers are needlessly attacked by criminal suspects who falsely claim the officers have violated the suspects’ constitutional rights . . . .”<sup>72</sup> Tennessee’s bill has a similar goal: to improve the relationship between the public and the police. “It is the intention of the general assembly to reduce the risk of false confessions, to improve the administration of justice, and to better the relationship between law enforcement officers and the communities they serve.”<sup>73</sup> Indeed, many of the above-quoted legislative statements can be understood in light of a

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69. H.R. 5349, 2005-06 Gen. Assem., Jan. Sess. (R.I. 2005), 2005 RI H.B. 5349 (Westlaw); H.R. 636, 2005 Gen. Assem., Reg. Sess. (N.H. 2005), 2005 NH H.B. 636 (Westlaw).

70. H.R. 1169, 107th Leg., Reg. Sess. (Fla. 2005), 2005 FL H.B. 1169 (Westlaw) (requiring the recording of custodial interrogations only of suspects accused of capital felonies). See also H.R. 46, 2005 Leg., 2005 Reg. Sess. (Md. 2005), 2005 MD H.B. 46 (Westlaw) (“Recording the *Miranda* warnings at the start of an interrogation could reduce subsequent challenges based on a defendant’s allegation that law enforcement failed to properly advise of these rights.”).

71. “Videotaping interrogations thus lends credibility to police work—especially in urban communities, such as Los Angeles, where police are likely to be distrusted by large segments of the population—by demonstrating to prosecutors, judges, and juries both the fairness of police methods and the legality of any statements they obtain. Videotaping interrogations is also likely to improve the quality of police work and thus contribute to more professional and more effective interrogation practices.” Leo, *Miranda Impact*, *supra* note 21, at 683.

72. H.R. 1169, 107th Leg., Reg. Sess. (Fla. 2005), 2005 FL H.B. 1169.

73. H.R. 204, 104th Gen. Assem., Reg. Sess. (Tenn. 2005), 2005 TN H.B. 204 (Lexis); S.R. 108, 104th Gen. Assem., Reg. Sess. (Tenn. 2005), 2005 TN S.B. 108 (Lexis).

general distrust of police tactics and a fear of wrongly accused or convicted defendants.<sup>74</sup> Recording interrogations and confessions is believed to enhance confidence in law enforcement because filming ostensibly exposes previously secretive and guarded police procedures to public (or court) scrutiny.

### C. ASSUMPTIONS

The *Miranda* decision stated that “[i]nterrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.”<sup>75</sup> The innovation of filming interrogations and confessions purports to change this dynamic by bringing courts, advocates and juries into the interrogation room to see for themselves what happened and what was said between police officers and suspects.<sup>76</sup> But how, exactly, does the filming of custodial detentions make them less private and the resultant confessions less coercive? What assumptions about the nature of film and the act of filming render custodial statements more truthful or provide more information about the criminal suspect and the circumstances of the interrogation and the crime? This section explores the assumptions behind the filming of interrogations and confessions.

#### 1. Film’s Transparency: Transparent in Access, Transparent in Meaning

One dominant assumption is that a recording of a custodial interrogation is a window into the interrogation room.<sup>77</sup> By this I mean that viewers of the filmed recording of the interrogation believe they are witnessing the events of detention and that therefore they better understand what those events mean.<sup>78</sup> That is, if

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74. See, e.g., H.B. 46, 2005 Leg., Reg. Sess. (Md. 2005), 2005 MD H.B. 46 (Westlaw) (implying that law enforcement sometimes fail to properly provide *Miranda* warnings and that recording statute may ameliorate the problems that stem from that failure). The aim of rehabilitating the public perception of law enforcement officers is not necessarily because of intentional dishonesty of the police but against the backdrop of an understanding that “human memory is often faulty—people forget specific facts, or reconstruct and interpret past events differently. It is not because a police officer is more dishonest than the rest of us that we . . . demand an objective recordation of the critical events. Rather, it is because we are entitled to assume that he is no less human—no less inclined to reconstruct and interpret past events in a light most favorable to himself—that we should not permit him to be a ‘judge of his own cause.’” Yale Kamisar, *Foreword: Brewer v. Williams - A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 242-43 (1977-78).

75. *Miranda v. Arizona*, 384 U.S. 436, 448 (1966). See also *Stephan v. State*, 711 P.2d 1156, 1161 (Alaska 1985) (“The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado.”) (quoting *Miranda*, 384 U.S. at 445).

76. Indeed, the motivation behind the *Miranda* warnings, in some sense, is to minimize the coercive effects of the “privacy” (to some, “isolation”) to facilitate accurate and voluntary interviews between police and suspects.

77. Here, and hereinafter, I am talking particularly about film recordings, as opposed to simply audio recordings.

78. See, e.g., the promotional material for the Nutcracker™ Interview Management System, a

police misbehave and coerce a confession, or if a suspect is incompetent to waive his constitutional rights, the crucial line between a knowing and incompetent waiver, or between a coerced or voluntary confession, will be obvious to the viewer of the film. Similarly, if the suspect tells a tall tale rather than the truth, or, if, within the bounds of the law, police elicit a confession, the difference between the truth and a lie, between a coercive or voluntary solicitation, will be knowable through the film. These crucial distinctions will be so obvious, in fact, that challenges to the confession will be easily upheld or discarded based on watching the film of the interrogation.

Consider the following from the New Jersey Supreme Court's *State v. Cook*, one of the most thorough and sophisticated case analyses on this issue to date. "A recording . . . provid[es] a more complete picture of what occurred. . . . [It] also provide[s] judges and juries with a more accurate picture of what was said, as words can convey different meanings depending on the tone of voice or nuance used."<sup>79</sup> Florida's proposed bill repeats this mantra, explaining that recording the interrogation provides a "true, complete, and accurate" account of the custodial interview.<sup>80</sup> Massachusetts goes a step further, anointing the filmed version of the custodial detention the most reliable form of evidence there is.<sup>81</sup>

Law enforcement is perhaps the most effusive concerning the virtues of film's purported transparency.<sup>82</sup> "[R]ecordings enable us to replay past events in real-time, and thus to have a far more accurate and complete understanding of what occurred than still pictures or oral recountings can provide."<sup>83</sup> A member of the Houston Police Department explains, "I like to capture the person's own words, so we can't be accused of changing what was said. Video is an especially great tool, I

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digital video recording product for police, that exclaims, "Provides a crystal-clear record of exactly what was said during police interviews," and, "Allows jury members to see exactly how the suspect looked and acted, before being cleaned up for court." See <http://www.cardinalpeak.com/products.html> (last visited Jan. 30, 2006). Compare NICHOLS, BOUNDARIES, *supra* note 2, at 121 (writing about nonfiction film and saying that "to re-present the event is clearly not to explain it").

79. *Cook*, 847 A.2d 530, 543 (N.J. 2004). See also *Williams v. State*, 522 So.2d 201, 208 (Miss. 1988) (recording helps to demonstrate voluntariness, context and content of statement). See also *Hendricks v. Swenson*, 456 F.2d 503, 506 (8th Cir. 1972) ("[W]e suggest that videotape is protection for the accused. If he is hesitant, uncertain, or faltering, such facts will appear. If he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily, the tape will corroborate him in ways a typewritten statement would not.").

80. H.R. 1119, 2005 Leg., Reg. Sess. (Fla. 2005), 2005 FL H.B. 1119 (Westlaw).

81. *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 535 (Mass. 2004). This case is all the more interesting because the circumstances under which the defendant confessed to the crime at issue (arson) involved the police lying to the defendant during the interrogation about possessing an inculpatory film of the defendant leaving the scene of the crime on the night of the fire. *Id.* at 518. Apparently, the force of the filmic evidence against the defendant (however false) was sufficient to compel a confession to a crime which, the defendant alleges, he did not commit. The Supreme Judicial Court in this case, for the second time, reversed the appellate court's determination that the confession was made voluntarily and knowingly and sets aside the verdict of guilty, remanding the case to the trial court.

82. Sullivan Report, *supra* note 7, at 6 ("Virtually every officer with whom we spoke, having given custodial recordings a try, was enthusiastically in favor of the practice.").

83. Sullivan Report, *supra* note 7, at 26.

love it. . . . Why not let what happened during an interrogation *play out before the eyes of the jury?*"<sup>84</sup> Or, as one police chief said about film cameras in police cruisers, "You're getting the real story. It's a picture. It's not, 'He said. She said,' or 'I did. He did.' You have the evidence in front of you."<sup>85</sup> In these cases, the speakers believe in film's superlative ability to transparently reproduce the circumstances of the interrogation.

A member of the Sacramento Sheriff's office goes so far as to eschew the possibility that the filmed confession, because it is filmed, can ever be interpreted in more than one way. "We like recording our interviews with suspects because later the jury may hear and see, via videotape, either their confession or their alibi. . . . The words and phrases of the suspects/defendants can be quoted without being questioned by a defense attorney, and if the suspect demonstrates how they [committed the crime], it is not up for subjective interpretation."<sup>86</sup> Other examples of this impulse abound in the literature.<sup>87</sup>

In a statement, the irony of which was probably lost on the speaker, a member of the Colorado Sheriff's Office in El Paso County says that recording "improves the image of the police in the eyes of the public. They see the fallacies shown on television are not what happens in real life."<sup>88</sup> But what about film makes this officer think that film is more like "real life" than television?<sup>89</sup> Why is this speaker's critique of television's reproduction of policing tactics and television's

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84. Sullivan Report, *supra* note 7, at 7 (emphasis added).

85. See Reid R. Frazier, *Cameras Set to be Installed in Five Shaler Police Cruisers*, TRIB. REV., Dec. 8, 2003, available at [www.pittsburghlive.com/x/tribune-review/tribnorth/news/s\\_168905.html](http://www.pittsburghlive.com/x/tribune-review/tribnorth/news/s_168905.html) (quoting Robert Amann, Chief of Pine-Marshall-Bradford Woods Police). Or, as one lieutenant in the Denver police department said about electronic recordings of interrogations, "It's a relatively unimpeachable documentary source." Adam Liptak, *Taping of Interrogations Is Praised by Police*, N.Y. TIMES, June 13, 2004, at A35. Of course, film is impeachable in many different ways (by interpreting the film's images, by learning of events not filmed that bear on the significance of the filmed content, to name a few). See *infra* Part III for further examples.

86. Sullivan Report, *supra* note 7, at 7-8. But see STELLA BRUZZI, NEW DOCUMENTARY: A CRITICAL INTRODUCTION 18 (2000) [hereinafter BRUZZI] (discussing the Zapruder video of the JFK assassination, saying "[t]he ultimate, uncomfortable paradox of the Zapruder film as raw evidence is that the more it is exposed to scrutiny, with frames singled out and details digitally enhanced, the more unstable and inconclusive the images become."); see also *id.* at 21 ("If pieces of unpremeditated archive as ostensibly uncontaminated and artless as Zapruder's or Holliday's [the Rodney King video] home movies can produce contradictory but credible interpretations, then the idea of the 'pure' documentary which theorists have tacitly invoked is itself vulnerable.").

87. A member of the El Dorado County California Sheriff's office says, "A motion to suppress is a swearing match between the suspect's word and the officer's word. Now we play the tape and the judge says, 'It's right there! Motion denied.'" Sullivan Report, *supra* note 7, at 9. Illinois' legislation adds support to this kind of cut and dry judgment, explaining that a filmed recording of a custodial interrogation "provide[s] a better means for courts to review confessions of suspects with *direct* evidence of demeanor, tone, manner, and content of statements." 20 ILL. COMP. STAT. ANN. 3930/7.2 (West 2005) (emphasis added).

88. Sullivan Report, *supra* note 7, at 16.

89. Of course, the distinction being made here is between documentary-like film and cops and lawyers television shows, such as "Law and Order" and "NYPD Blue." But what about the difference between documentary-like film and the nightly news? The issue is one of expectation (which is a question of genre, and thus a question of what work "documentary-like" does) not that film inherently delivers up "real life" more than television.

capacity to shape and mold opinion not also a critique of film's subjective content and malleable form? How would these assessments of the legislative agendas and judicial judgments change given that "documentary [filmmaking] has always implicitly acknowledged that the 'document' at its heart is open to reassessment, reappropriation and even manipulation . . . . The fundamental issue of documentary film is the way in which we are invited to access the 'document' or 'record' through representation or interpretation, to the extent that piece of archive material becomes a mutable rather than a fixed point of reference."<sup>90</sup> All of these legal explanations of the benefit of filming custodial interrogations and confessions rely on a belief in film's ability to transparently reproduce real life: that film can transport its viewers to the interrogation room to see with their own eyes what transpired there.<sup>91</sup> As Part II of this Article will explain, this understanding of film is a myth, established and perpetuated from its earliest moments as a public aesthetic.

## 2. Film as the Moral, Objective Observer

Another dominant assumption behind the case law and legislation is that the presence of the film camera in the detention room does not affect the interrogation except for the better by making it more truthful, more accurate and less coercive. The camera is presumed an unbiased and moral observer, an angel on the shoulder of the police keeping them honest.<sup>92</sup> The camera is also, in this way, presumed a friend of the detained suspect, a good doctor to whom the suspect can reveal all his troubles without the need for posturing or fear of reprisals. Although the police may pre-judge the suspect guilty, the belief is that the film does not pre-judge, it just reproduces the image of self and circumstance that is presented to it. Defendants will feel less threatened because this neutral observer ostensibly will prevent their words from being twisted and because the circumstances of their detention will be memorialized and fixed on film.

New Jersey's Supreme Court provides the most overt support for the belief that film sanitizes the custodial environment. In recommending that a committee be established to study the use of film as a tool for criminal justice, the court states that recording interviews "may improve the overall quality of police work by providing law enforcement officials with the ability to monitor the quality of the interrogation process."<sup>93</sup> When discussing the protections provided by recording interrogations, this court also suggests that it enhances the reliability of confessions, presuming that suspects who confess are more truthful when they do

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90. Bruzzi, *supra* note 86, at 12.

91. *But see Judges as Film Critics*, *supra* note 14, at 540-42 (discussing the mistaken notion of film as a kind of unimpeachable eyewitness).

92. "Officers and detectives who know they will be videotaped are more likely to prepare their strategies beforehand and to be more self-conscious about their conduct during questioning." Leo, *Miranda Impact*, *supra* note 21, at 683.

93. *State v. Cook*, 847 A.2d 530, 543 (N.J. 2004).

so on film.<sup>94</sup> A member of the Omaha, Nebraska police department echoed this sentiment, suggesting that film actually facilitates confessions. “It works out great due to the fact that you do not have to write anything down, which can make the suspect nervous and clam up . . . they clam up more when you write a lot of notes during the interview.”<sup>95</sup>

Law enforcement officers are astoundingly honest about the effects of film on their interrogation tactics and, subsequently, on the value of the statements elicited. “As the investigator, it keeps you in check, knowing the video may be seen by a judge or jury.”<sup>96</sup> These same officers also praise the revelatory aspect of film, both for its effects on police tactics as well as its effects on public sentiment. “The act of recording automatically brings with it the air of disclosure and avoids accusations of impropriety during the interview.”<sup>97</sup> In other words, to law enforcement officials and courts, film affects the interrogation and confession only by keeping them both honest and accurate and represents the custodial interview without bias or partiality.

But no film—not even documentary or observational cinema or *evidence verité*—are objective representations of reality.

To be sure, some documentaries claim to be objective—a term that seems to renounce an interpretive role. The claim may be strategic, but it is surely meaningless. The documentarist, like any communicator in any medium, makes endless choices. He selects topics, people, vistas, angles, lenses, juxtapositions, sounds, words. Each selection is an expression of his point of view, whether he is aware of it or not, whether he acknowledges it or not.<sup>98</sup>

Although films may certainly convey a sense of moral righteousness, this is because of the particular film’s point of view, which, as explained below in Part II, is constructed by and through the film’s art.

### 3. Voluntary Speech Means Truthful Speech

Yet another assumption behind the case law and legislation is that speaking voluntarily means speaking truthfully. Knowing what was exactly said in the detention room helps reveal the mystery of the legal truth—the presumptive goal of

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94. *Id.* at 555 (citing *People v. Holt*, 937 P.2d 213, 241-43 (Cal. 1997)).

95. Sullivan Report, *supra* note 7, at 11.

96. *Id.* at 16 (Kenwood, Michigan Police Department). Of course, this supposed corrective effect of film on police interrogations can be perceived as intrusive. See, e.g., Reid R. Frazier, *Cameras Set to be Installed in Five Shaler Police Cruisers*, TRIB. REV., Dec. 8, 2003, available at [www.pittsburghlive.com/x/tribune-review/tribnorth/news/s\\_168905.html](http://www.pittsburghlive.com/x/tribune-review/tribnorth/news/s_168905.html) (“Mannell [director of public safety in Cranberry, PA] said he was uncomfortable with some types of video cameras that are on from the time the key is turned in a car’s ignition. ‘If you have them . . . running all the time, you’re turning (into) Big Brother.’”) (parenthesis in original).

97. Sullivan Report, *supra* note 7, at 9 (Mesa, Arizona Police Department).

98. BRUZZI, *supra* note 86, at 4 (citing ERIK BARNOUW, DOCUMENTARY: A HISTORY OF THE NON-FICTION FILM (1993)). See also Menand, *supra* note 5, at 94 (discussing documentary filmmaker Frederick Wiseman’s films (“There may be a neutral style, but there is no neutrality.”)).

the criminal case—which is whether the defendant is criminally culpable or not. Here, the assumption is that seeing and hearing on film what was said correlates to knowing the truth of those words—whether the statement was made voluntarily and intelligently, and, more crucially, whether it corresponds to the “truth” of guilt or innocence that investigators seek to uncover.<sup>99</sup>

The problems here are many. First, the presence of film as a legal tool alters the constitutional analysis from one that protects the process—e.g., a privilege against self-incrimination and the right to counsel—into one in which truth alone is the touchstone. In other words, the filmed interrogation, capable of review and analysis by advocates and a court, blesses the custodial statements the same way *Miranda* warnings do. Confessions are admissible against the defendant but not because film per se preserves constitutional rights but because it ostensibly reveals the truth of the matter. The analysis has therefore shifted from one that prioritizes individual integrity over his guilt or innocence (such that even if guilty, the state cannot force him to inculcate himself) to one that places truth above all else, such that if guilty, and the film shows it, few (if any) defendants will go free. This is explained by film’s ability to reproduce what feels like reality (whereas *Miranda* warnings promised nothing of the kind<sup>100</sup>), which is perhaps film’s most alluring attribute in a system whose distinction is the punishment of those who are guilty and whose disgrace is the incarceration of the innocent. Filming interrogations only furthers *Miranda*’s goals if it demystifies the due process analysis of custodial statements as knowing and voluntary. Filming interrogations complicates the pursuit of due process—perhaps even subverts it—if it is mistakenly understood as transparently and objectively representing the truth of the matter.

Second, film’s use as a legal tool frustrates the promise of due process if film is assumed capable of exposing the suspect’s genuine self. Here, the belief is that speaking voluntarily and knowingly about one’s self and one’s circumstances on film means speaking the truth about one’s self and one’s circumstance in general. Disregarding the rich literature on the psychology of false confessions,<sup>101</sup> there is

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99. *But see* BRUZZI, *supra* note 86, at 16 (“[T]he truth that [a nonfiction film’s] frames can reveal is restricted to verisimilitude of image to subject; the non-fictional image’s mimetic power cannot stretch to offering a context or an explanation for the crude events on the screen, thus proposing two levels of truth: the factual images we see and the truth to be extrapolated from them.”); *see id.* (discussing the Zapruder film in this light, “[o]ne of the consistently complicating aspects of the Zapruder film is that it has been both ‘unimpeachable’ and ‘constantly open to multiple interpretations,’ an open series of images that can be used to ‘prove’ a multitude of conflicting or divergent theories about the assassination. . . . [A]s an authentic record, it functions as incontrovertible ‘evidence,’ whilst as a text incapable of revealing conclusively who killed President Kennedy it functions as an inconclusive representation”).

100. Although there are some aspects of the Fifth and Fourteenth Amendments that are concerned with truth in the criminal justice context (e.g., assuming that absent coercion people will only speak the truth), much of the jurisprudence is about protecting the individual from the power of the state. *See, e.g.,* Leo, *Miranda Impact*, *supra* note 21, at 678 (“By elevating the form of legal process over the substance of legal outcomes, appellate courts have frequently lost sight of the underlying rationale of *Miranda*—the prevention of compelled self-incriminating testimony.”).

101. *See, e.g.,* WELSH S. WHITE, *MIRANDA’S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 139-190 (2003) (discussing false confessions and providing examples);



substantial literary and film scholarship that demonstrates the absence of any true or coherent self in language (be it written, spoken or filmic).<sup>102</sup> We are constructed in and through language, and constructed differently each time we represent our experience.<sup>103</sup> Importantly, this does not suggest (absurdly) that the person who confesses on film and who in fact committed the crime to which he confessed are sufficiently distinct to defend on that basis. This suggests only that film does not enable its viewers to really know the person in front of the camera, even though it feels like it does, and that film is not uniquely exposing, even though it feels like it is. Indeed, one's identity on camera and through film (and therefore the way one's filmed statements are interpreted) may be entirely different from one's identity off-camera. Film theory incorporates this critique into its understanding of film's capacity to document lives and recreate lived experience. It is time that law, when incorporating film into its endeavor, does, too.

Examples abound of the third assumption that film can expose the "true self" of the person being filmed. As regards hierarchization of truth over process, many of the legislative initiatives explain that filmed confessions are the "best evidence against the guilty,"<sup>104</sup> suggesting, I assume, that if the confession is true, it is admissible and should be believed. A central reason for passing recording statutes is to promote prosecutions, which, as I have explained, may have less to do with actual guilt and more to do with confessions as the most compelling evidence.<sup>105</sup>

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LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, *CONFESSIONS IN THE COURTROOM* 84-93 (1985) (same). See also Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *DENV. U. L. REV.* 979 (1997).

102. See, e.g., KAJA SILVERMAN, *THE SUBJECT OF SEMIOTICS* 198 (1983) (explaining how film demonstrates what has always been implicit in writing, "the distance which separates the speaking subject from the spoken subject"); EMILE BENEVISTE, *PROBLEMS IN GENERAL LINGUISTICS* 223-230 (Mary Elizabeth Meek trans., University of Miami Press 1971) (1966); JACQUES LACAN, *ÉCRITS: A SELECTION* 1-7 (Alan Sheridan trans., Norton 1977) (1966) (challenging through psychoanalysis the concept of the coherent, unitary self by elaborating a theory of language and culture as based on the inevitability of shifting subject positions); LOUIS ALTHUSSER, *ESSAYS ON IDEOLOGY* 1-61 (1984) (perception of coherent subjectivity maintained through state institutions perpetuates illusion of freedom and a true self in society); MICHEL FOUCAULT, *TECHNOLOGIES OF THE SELF* 145 (Luther H. Martin, Huck Gutman & Patrick H. Hutton eds., 1988) (noting a shift in society away from querying "what are we in our actuality?" to "what are we today?"); JEAN-FRANÇOIS LYOTARD, *THE DIFFEREND: PHASES IN DISPUTE* 98-99 (Georges Van Den Abbeele trans., University of Minnesota Press 1988) (1983) (challenging the idea of the autonomous subject by showing how the act of announcing oneself always presupposes prior enunciations and enunciators, none of which can claim to be originary); FREDERIC JAMESON, *POST MODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* 26-27 (1991) (describing postmodern schizophrenia as a realization that personal identity is the effect of an illusory temporal unification of past and future with one's present and that "such active temporal unification is itself a function of language").

103. Colloquially, we say "we have many roles in life" (translated: we each have many identities—professor, spouse, mother and lawyer, for example), which are created and perpetuated by and through language and demeanor. (For example, what I say and do as a wife (to and with my husband) should be understood in that context and not, crucially, in the context of what I say and do as a professor (to and with my students)).

104. H.R. 1119, 107th Leg., Reg. Sess. (Fla. 2005), 2005 FL H.B. 1119 (Westlaw); H.R. 2614, 47th Leg., 1st Reg. Sess. (Ariz. 2005), 2005 AS H.B. 2614.

105. The moniker "queen of proofs" (*regina probatorium*) comes from medieval continental Europe when confessions stood "at the very apex of the hierarchy of proofs required for the conviction

Courts and law enforcement officers repeat this call to truth above all else. As the vanguard case *Stephan v. State* explained, “a recording will help trial and appellate courts to ascertain the truth.”<sup>106</sup> Of course, this is not to imply that seeking the truth is not a goal of the criminal justice system. I add merely that when due process is subordinated to truth, in particular to the notion of a singular, morally objective truth (as primarily located in the state’s story), the pursuit of criminal justice appears detached from the social order it was designed to preserve, and lacks a basis in the individual dignity it was designed to protect.<sup>107</sup>

As regards the belief in a film’s unique capacity to expose a person’s authentic self, studies have been commissioned to address the effect of film on a person’s demeanor and willingness to talk. The findings are that “[t]here is little conclusive evidence to show that the use of videotape has any significant effect on the willingness of suspects to talk. While some are willing to talk or even play to the camera, others are reluctant.”<sup>108</sup> Police and prosecutors have used this finding to support their continued use of film in the interrogation room because “the majority of agencies that videotape found that they were *able to get more incriminating information* from suspects on tape than they were in traditional interrogations.”<sup>109</sup> If film is not a controlling factor in determining *whether* a suspect talks, it nevertheless appears to affect *what* a suspect says—i.e., the suspect appears to play to the camera, speaking more (whether or not truthfully) in its presence. The inherent contradiction in this study is inoffensive only if both the “incriminating information” elicited from the police in the filmed interview and the suspect’s demeanor as represented on film is a fair and truthful representation of the suspect’s person and circumstance. Otherwise, this finding suggests there are more

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of the criminal defendant.” Aaron M. Schreiber, *The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Criminal Law, Jewish Law and the United States Supreme Court*, 11 PACE L. REV. 535, 538-39 (citing EDWARD PETERS, TORTURE (1985)).

106. *Stephan v. State*, 711 P.2d 1156, 1161 (Alaska 1985). See also Sullivan Report, *supra* note 7, at 9 (“It can serve as a valuable tool to the criminal justice system, assisting the Court in the seeking of the truth.”) (DuPage County, Illinois Sheriff’s Office).

107. As criminal and constitutional scholar David R. Dow has written about death penalty jurisprudence and its representation in popular culture, “all this talk of innocence is a moral distraction. Death row is full of guilty men, but they are yet men: human beings who committed vile and despicable acts, yet still human beings.” David R. Dow, *Fictional Documentaries and Truthful Fictions: The Death Penalty in Recent American Film*, 17 CONST. COMMENT. 511, 552 (2000).

108. Sullivan Report, *supra* note 7, at 22. See also *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 531 (Mass. 2004) (“The principal objection to recording of interrogations springs from the fear that suspects will refuse to talk at all, or will decline to make a full confession, if they know they are being recorded. Based on experience to date in other jurisdictions, those fears appear exaggerated.”); See also William A. Geller, *Videotaping Interrogations and Confessions*, NAT’L INST. OF JUSTICE: RESEARCH IN BRIEF (U.S. Dept. of Justice, Wash., D.C.), March 1993, at 1, 6 (suspects are no less likely to confess in the presence of an electronic recording device). But see Leo, *Miranda Impact*, *supra* note 21, at 685-86 (suspects may be reluctant to speak candidly in front of camera); Major Joshua E. Katzenberg, *A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact*, 26 SEATTLE U. L. REV. 783, 812 (2003) (recording interview can stymie interrogation because suspects may be more willing to talk when what is said is perceived as private as only between themselves and officers).

109. Sullivan Report, *supra* note 7, at 22 (emphasis added).

actors in the precinct house than one would think or hope.

This San Diego prosecutor's explanation of the value of filming confessions makes this point, clarifying the impulse as a mistaken belief in film's revelatory capacity rather than its play to the poser in all of us: "Consider . . . the immeasurable value of giving the eventual jury the opportunity to hear, if not see, the defendant before he has thought to temper his attitude, clean up his language . . . and otherwise soften his commonly offensive physical appearance, and you begin to appreciate the tremendous value of a taped interview. . . . Not even Richard Gere [as the defense lawyer in the motion picture *Chicago*] will be able to tap dance his way around the truth that an audio or videotape recording so obviously displays."<sup>110</sup>

As Professor Jennifer Mnookin has written recently about the two films that followed the murder trials of the so-called West-Memphis Three, *Paradise Lost: The Murders at the Robin Hood Hills*<sup>111</sup> and *Paradise Lost 2: Revelations*,<sup>112</sup>

[T]hey offer a fascinating case study in the effects of observation, or, more specifically, in the ways that the making of a documentary can affect the matters being observed. That observers affect what they watch is practically axiomatic; the very presence of the camera may change what is seen. . . . But the issues raised . . . go well beyond the ordinary and familiar (though nonetheless important) questions about how the presence of cameras may change the dynamics of, say, the courtroom. In fact, the trial itself and the films that depict it turn out to be mutually constituted to an extraordinary degree, and tracing out these interconnections can provide a significant object lesson in the way that the media mediates and creates what it represents.<sup>113</sup>

Few if any of the court cases, and none of the legislative findings, consider how the camera mediates, or otherwise affects, the interrogation and its subjects being filmed (except to sanitize the environment, making it less coercive and therefore

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110. *Id.* at 12-13 (brackets in original). The reference to a fiction film based on a true story as an example of what is *not* going on in the interrogation room is profoundly ironic, although, I gather, not intended by the prosecutor making the statement. Is there not an affinity between films of custodial interrogations (the film and the way it is used in court) and the genre of Hollywood "truth tales" (films based on true crime, such as *SWOON* (American Playhouse 1991) or *COMPULSION* (20th Century Fox 1959))? Aren't both films (the police film and a Hollywood film) versions of a recounting of the crime and the legal process that followed? Don't both films explain the crime or justify the legal outcome? Don't both films refer to facts beyond the film frame to authenticate its story as being based on historical events? For further discussion of "truth tales" and their relation to documentary filmmaking, see Jennifer Mnookin & Jessica Silbey, *Truth Tales and Trial Films* (Aug. 25, 2006) (unpublished manuscript, on file with author).

111. *PARADISE LOST: THE MURDERS AT THE ROBIN HOOD HILLS* (Home Box Office 1996).

112. *PARADISE LOST 2: REVELATIONS* (Home Box Office 2000).

113. Jennifer Mnookin, *Reproducing a Trial: Evidence and Its Assessment in Paradise Lost*, in *LAW ON THE SCREEN* 154-55 [hereinafter Mnookin] (Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey eds., 2005). Mnookin describes this precise effect on one of the unindicted suspects in the case of the West Memphis Three. "[John Mark] Byers is asked why he behaves differently when the cameras are pointed in his direction. He is accused of being nice to the advocates of the West Memphis Three whenever the cameras are off and changing completely when he is on film. Which Byers is the 'real' one? He refuses to answer, responding 'I guess it'll stay a mystery.'" *Id.* at 185-86.

according to the state, more truthful). That there is some constitutive effect—that the camera makes a substantive difference in what is seen (and therefore what is known and how it is understood) is “axiomatic”—and yet it is ignored by the legal actors and criminal justice processes making use of film.

#### D. CASES AND PROBLEMS

These three assumptions—film’s transparency, its moral objectivity and its capacity to expose the so-called true identity of the person being filmed—manifest in the case law analyzing the admissibility of the confessions themselves. Specifically, these assumptions arise in the context of two rules of admissibility, regarding (1) completeness of the statement and (2) competence of the speaker. This section draws on several court cases to demonstrate the problem with these assumptions.

##### 1. Rule of Completeness

The rule of completeness generally requires that a recorded custodial statement may be admitted only if complete and available for review by the court and opposing counsel.<sup>114</sup> A primary reason for the rule is to prevent misleading courts and juries when “portions of a statement are taken out of context.”<sup>115</sup> In the criminal context, the rule has been interpreted to be “protective, merely. It goes only so far as is necessary to shield a party from adverse inferences, and only allows an explanation or rebuttal of the evidence received.”<sup>116</sup>

There are two problems that arise in the application of this rule to the cases considering the admission of filmed custodial statements, both of which implicate the above three assumptions about the perceived nature of filmic recordings.

###### *a. Incomplete Films*

First, there are a handful of cases that discuss faulty or intermittent use of film technology (surely a ubiquitous problem). The camera was turned on and off several times during the interrogation (at strategic or random points); it broke half-way through the interrogation or it was turned on only toward the end of the interrogation. In these circumstances, the court has to evaluate whether the

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114. This common law rule has been codified in the Federal Rules of Evidence. FED. R. EVID. 106 (“When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”). As applied in the context of filmed interrogations, see, e.g., *State v. Ayer*, 834 A.2d 277, 293 (N.H. 2003) (“In order to admit into evidence the taped recording of an interrogation . . . the recording must be complete.”); *Stephan v. State*, 711 P.2d 1156, 1164 (Alaska 1985); *State v. Cook*, 847 A.2d 530, 544 (N.J. 2004).

115. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 n.14 (1988).

116. *United States v. Moussaoui*, 382 F.3d 453, 481 (4th Cir. 2004) (quoting *United States v. Corrigan*, 168 F.2d 641, 645 (2d Cir. 1948)); see also *Echo Acceptance Corp. v. Household Retail Servs., Inc.*, 267 F.3d 1068, 1089 (10th Cir. 2001) (“The rule of completeness . . . functions as a defensive shield against potentially misleading evidence proffered by an opposing party.”).

admission of only portions of the interview violates the rule of completeness. As might be expected, the defendant routinely charges in such circumstances that the scenes missing from the film of the interrogation would demonstrate a coercive atmosphere or would put into favorable light the inculpatory statements sought to be admitted by the prosecution.

The case of *Taylor v. State* exemplifies this problem. In *Taylor*, defendant Latashia Michelle Taylor was convicted of killing Brandee Whitehead while kidnapping his infant child.<sup>117</sup> Taylor was convicted primarily because of the admission of her confession following a lengthy interrogation. Taylor appealed the denial of several motions to suppress her confession on the basis, among others, that it was involuntary. Specifically, she contended that one of her interrogators, Police Captain Ezell, threatened and intimidated her and that it was only after the “tougher tone” of Ezell (as opposed to the other police officers) that Taylor confessed. The interrogation was filmed almost in its entirety, except for the time when Ezell was in the detention room with Taylor.

On appeal, Taylor argued that regardless of whether there was deliberate interference with the camera, her confession should have been suppressed, because had the court seen her interview with Captain Ezell, it would have agreed that her confession was unconstitutionally coerced. Without the missing scenes from the film, Taylor implied, the confession should not have been admitted.

The facts surrounding the filming of Taylor’s interrogation are fishy, to say the least. First, the videotape was turned on at “some undetermined time.”<sup>118</sup> The camera then was turned off (either deliberately or by accident) when Ezell entered the room for the first time, just after he is heard saying to Taylor, “I’m going to explain some things here.”<sup>119</sup> The camera restarted “moments later capturing [the other interrogator’s] continuing . . . interview of Taylor”<sup>120</sup> without Ezell. Ezell entered the interrogation room a second time on his Chief’s instructions in order to “tell [Taylor] to quit lying.”<sup>121</sup> This, too, was not caught on camera. According to Ezell’s testimony, when “he went into the interrogation room, [he] ‘assumed’ that the video camera was still running. [He] did not know what had caused the camera to turn off [again].”<sup>122</sup> The Chief of Police testified on Ezell’s behalf, saying that earlier “he [had] attempted to adjust the focus of the camera because the picture on the monitor had become unfocused. Once Ezell returned from the interrogation room, . . . Ezell pointed out [to the Chief] that ‘he didn’t think the camera was running.’ . . . [The Chief] stated that he did not intentionally turn the camera off, and he had ‘no idea’ how it had been turned off . . . .”<sup>123</sup>

In affirming the trial court’s admission of Taylor’s confession despite the lack of complete record, the court relies on testimony from the other officers present

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117. *Taylor v. State*, 789 So.2d 787, 789 (Miss. 2001).

118. *Id.* at 790.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 790-91

during the interrogation.<sup>124</sup> “We agree with the trial court’s finding that testimony at the hearing adequately supplemented the missing portion of the tape and that Taylor’s propensity to make a confession was not affected by Ezell’s raising of his voice or the use of profanity.”<sup>125</sup> In reaching this conclusion, the court says that it believed a testifying officer’s statement (corroborated by subsequent film footage after Ezell left the room) that “Taylor didn’t appear to be scared when Ezell left the interrogation room, but that Taylor exhibited the same demeanor of calm and that Taylor stuck to her story . . . for quite sometime.”<sup>126</sup>

The irony in this ruling is manifold. First, the rule of completeness is to prevent precisely the kind of alleged prejudice at issue here. Where auxiliary statements not admitted will clarify or add context to admitted evidence, the rule of completeness counsels their admission or risk reversible error. Second, a central reason for filming custodial interrogations is the benefit of presumptively seeing with one’s own eyes the exact circumstances the defendant contends renders the statements involuntary in order to most effectively protect a defendant’s constitutional rights. A film of the entire interrogation is presumed the most reliable of evidence. But here, where a partial film of Taylor’s interrogation and subsequent confession is admitted against her (the part that only helps the police and hurts the defendant), and where the part of the film missing is precisely that which she claims will show the coercion that renders her statements involuntary, the purposes of the evidentiary rule and of the camera’s presence are turned on their head. Nevertheless, the court admitted the partial film as evidence of the interrogation’s impartiality. And it resolved a swearing match between the officers and the defendant, which the filming of interrogations was intended to prevent,<sup>127</sup> by finding the police officers more credible than the defendant on precisely the issue of coercion and without the (presumptively) most reliable evidence on the issue. Under these circumstances, how, if at all, does the film (its use and its interpretation) further the legislative purposes for which filmmaking in the precinct house was instituted?

*b. Too Complete Films*

The rule of completeness as concerns the admissibility of filmed interrogations gives rise to yet another problem: what happens when a filmed interrogation admitted in its entirety contains statements made by the police lying to suspects linking them to the crime or discussing uncharged acts of misconduct? In these circumstances, the issue is not that the film is incomplete, it is that the admitted evidence (the entire film) is *too* complete. It contains prejudicial and irrelevant statements that are not otherwise admissible and practically impossible to rebut.<sup>128</sup>

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124. *Id.* at 796.

125. *Id.*

126. *Id.* at 791 (quotations omitted; brackets in original).

127. Sullivan Report, *supra* note 7, at 9. *See also* Stephan v. State, 711 P.2d 1156, 1160 (Alaska 1985); State v. Cook, 847 A.2d 530, 544 (N.J. 2004).

128. “[R]aw videotape may include testimony that is inadmissible on evidentiary grounds, forcing

For example, in *State v. Cordova*,<sup>129</sup> the filmed custodial interview, which was admitted into evidence at trial, contained untrue statements from the officer that he was an expert in detecting deception. Cordova argued at trial and on appeal that including the portions of the film in which the officer falsely states “he has gone to school for many years to learn how to detect lies, that he is an expert in deception detection and that, therefore, he knows Cordova is lying” was prejudicial and reversible error.<sup>130</sup> The trial court allowed the entire film into evidence on the basis that the officer’s statements were necessary to give context to Cordova’s statements (i.e., applying the rule of completeness) and because Cordova could call the officer to examine his qualifications.<sup>131</sup> But, of course, the Federal Rules of Evidence prohibit an expert witness from testifying absent qualifying as one.<sup>132</sup> And, further, testimony regarding a person’s credibility (whether expert testimony or not), is prohibited unless admissible under the limited rubric of character evidence.<sup>133</sup> In this context, these errors are particularly troubling given that the officer was lying—he wasn’t actually an expert at all. How does showing the film with the false statements to the jury do anything but provide damaging “context” to Cordova’s incriminating statements? How do the police’s false statements (whether or not understood as such by the jury) help clarify the accuracy and voluntariness of Cordova’s confession? This Idaho appeals court recognized the trial court’s error, concluding that the “officer’s comments that he is an expert in deception detection are not necessary to give context to Cordova’s answers. The officer’s comments . . . are not connected to a question, but instead made as a statement to Cordova. Those comments could have been easily redacted without harming the context of Cordova’s later admissions.”<sup>134</sup> It nonetheless ruled the admission of the entire film harmless.<sup>135</sup>

The contrast between the rulings at the trial and appellate level highlights several dilemmas. Whereas the purpose of admitting the filmed confession in its entirety is to satisfy the rule of completeness, and the purpose of filming the confession in the first place is to provide a comprehensive context for evaluating

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the court to become a video-editor and leaving the jury with a perplexing and incomplete version of the interrogation.” Matthew Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, at 46 (February 14, 2005) (unpublished student paper originally posted on Student Scholarship Series website, Yale Law School) (on file with the author).

129. *State v. Cordova*, 51 P.3d 449 (Idaho Ct. App. 2002).

130. *Id.* at 453.

131. *Id.*

132. FED. R. EVID. 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . .”).

133. FED. R. EVID. 608(a); *see also* *United States v. Sanchez-Lima*, 161 F.3d 545, 548 (9th Cir. 1998) (“Testimony regarding a witness’s credibility is prohibited unless it is admissible as character evidence.”); *United States v. Awkard*, 597 F.2d 667, 671 (9th Cir. 1979) (“Under the Federal Rules, opinion testimony on credibility is limited to character; all other opinions on credibility are for the jurors themselves to form.”).

134. *Cordova*, 51 P.3d at 455.

135. *Id.* at 456.

the voluntariness and accuracy of the confession, the appeals court said that the *redaction* of the film would have been the better route. Indeed, instead of implying that the film provides the most thorough and accurate perspective on the interrogation and confession—the film is often compared to a window into the detention room and into the suspects’ state of mind, the appeals court encouraged redaction (a form of film editing) indicating that the optimum evidence of truthfulness and accuracy is not the “whole story” but only part of it. “[A]n interrogator’s comments that he or she believes the suspect is lying are only admissible to the extent that they provide context to a relevant answer by the suspect. Otherwise, interrogator comments that result in an irrelevant answer should be redacted.”<sup>136</sup> As a general principle, this is not surprising given that “redacting” evidence—e.g., not admitting it or limiting its applicability—is what trial courts do all the time. What is surprising is the court’s encouraging of the redaction of the film when the underlying rationales of using film as a legal tool is its supposed comprehensive quality.<sup>137</sup>

But why encourage redaction when film is believed to depict what, in fact, happened in the detention room: what words were spoken, in what manner and when? If film is as transparent and objective and as much of a moral observer as the case law and legislation intimate, why are redactions necessary at all? Indeed, don’t redactions corrupt the otherwise transparent and objective story being told through film? In the case of *State v. Cordova*, one could argue that the deception arose most overtly from the police officer, not from the film.

## 2. Rule of Competence

A third set of cases that consider the admissibility of filmed confessions turn on a different rule of evidence: the rule of competence. For the defendant’s inculpatory statements to be admitted against him, he must be competent to have waived his *Miranda* rights and he must have thereafter spoken knowingly and voluntarily under a “totality of the circumstances.”<sup>138</sup> Here, the issue for the court is not whether or not the film is sufficiently complete (or too complete) to prevent a suspect’s statements from being taken out of context, but whether, in the first instance, the defendant as seen on film can be adjudged competent to have

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136. *Id.* at 455.

137. For other cases that evince this problem, see, e.g., *State v. Delconte*, No. COA03-462, 2004 WL 1824227, at \*3 (N.C. Ct. App. Aug. 17, 2004) (holding it was harmless error to admit filmed statements containing references to uncharged acts of misconduct); *State v. Midgett*, 680 N.W.2d 288, 290-93 (S.D. 2004) (holding it was reversible error to permit a jury to review an entire film of custodial interrogation when the entire film was not admitted into evidence). These cases are similar to *Cordova*. In both cases, the courts encourage redaction of the film and hold it was error (whether or not harmless) to admit the entire film, suggesting that partial films can be better than whole films and implying such a meaningful distinction exists.

138. “[T]he ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination.” *Williams v. Taylor*, 529 U.S. 362, 403-04 (2000) (quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985)) (emphasis omitted).



voluntarily and knowingly inculpated himself while discussing the circumstances of the crime for which he was accused.

In most cases, the issue of competency concerns mental acumen and its degradation due to some combination of coercive conditions, youth, illness, alcohol or drugs. Prior to the filming of confessions, mental competency, though decided by the trial court, was an issue informed by the testimony of experts, often based on an expert's interview with the defendant.<sup>139</sup> Where confessions are filmed, however, competency becomes an issue for the court based on its assessment of the defendant's appearance on film. In other words, by and large, judges as film critics supplant scientific experts.<sup>140</sup> The film viewing takes the place of (or, in many cases trumps) the result of the medical or psychological interview. In these cases, the assumption is that the film unambiguously conveys the defendant's competence (or lack thereof) without a need for (or even when contrary to) previously routine expert testimony. But what about the film turns the judge into an expert on mental capacity? What about the filmed interrogation improves on (to the point of replacing) the medical expert's testimony?

Consider the case against Kenneth Gray, a juvenile (just over sixteen years of age) charged and convicted as an adult of second degree murder and of burglary.<sup>141</sup> Gray was interviewed several times over the course of several days, sometimes in the presence of his mother and sometimes alone.<sup>142</sup> During one of the interviews (without his mother), he became "increasingly nervous" (according to an interviewing officer) and subsequently confessed to breaking a window, entering the victim's home and, when the victim returned home unexpectedly, shooting him dead.<sup>143</sup> It was only after this confession that the defendant agreed to have his inculpatory statement videotaped. Juvenile *Miranda* warnings were provided but were not filmed.<sup>144</sup> On appeal, Gray asserts that his confession was neither intelligently nor voluntarily given because, among other things, he was only sixteen years old, had an IQ of only 73 and was taking medication for depression, anxiety and attention deficit disorder that interfered with his judgment.<sup>145</sup>

The trial court and appellate court rejected Gray's challenge. According to appellate court, the defendant had some familiarity with the criminal justice system already (through juvenile officers at his school), and he was therefore more savvy than most young men his age concerning the interrogation procedure. The court also considered Gray to be sufficiently competent because he terminated the custodial interviews several times "by telling [the officers] 'he didn't want to talk anymore.'"<sup>146</sup> According to this court, this "hardly bespeaks a person so

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139. See, e.g., *United States v. Aripa*, No. 97-30071, 1997 WL 787487, at \*4 (9th Cir. Dec. 22, 1997); *State v. Setser*, 932 P.2d 484, 486 (N. M. 1996).

140. *Judges as Film Critics*, *supra* note 14, at 522-26, 557-61.

141. *State v. Gray*, 100 S.W.3d 881 (Mo. Ct. App. 2003).

142. *Id.* at 884-85.

143. *Id.* at 885.

144. *Id.* at 885-86.

145. *Id.* at 886.

146. *Id.* at 887.

unsophisticated, unintelligent, and uninformed that he could not understand the context of what was occurring.<sup>147</sup> The appeals court next explained away the defendant's low scores on the juvenile aptitude tests, (which showed Gray to be in the borderline range of intellectual development (IQ of 73 to 75)), by pointing to slightly higher verbal IQ scores (78 to 84) and suggesting that the anxiety of test-taking impacted negatively on Gray's testing performance.<sup>148</sup>

This last conclusion conflicted with the court's other determination: that Gray's medication successfully calmed his nerves and treated his anxiety and panic attacks. Gray's mother stated (and her testimony was uncontroverted) that defendant's medications were "'too strong [for] him' and made him 'light-headed and [caused] dizzy spells.'"<sup>149</sup> But the court concluded that the medicines seem to be working as they should, without the alleged side-effects, because "there [was] no evidence [Gray] was experiencing those problems while being interrogated. . . . [T]he evidence supports a finding that Defendant's medicines aided him in making an intelligent, understanding, and voluntary waiver of his constitutional rights, rather than impairing his ability to do so."<sup>150</sup> The court drew this conclusion despite the evidence from Gray that during the interrogation he felt "[s]cared. Nervous. . . . [P]anicked."<sup>151</sup>

The inconsistencies in the documentary and testimonial evidence regarding Gray's state of mind did not concern the court, however, because the videotaped confession said it all. The defendant's "overt performance during the videotaped confession, does not bespeak a person of such 'dull' intellect that he was incapable of understanding his rights."<sup>152</sup> "The videotape reveals Defendant was physically mature, and his demeanor belies his claim that his confession was 'the product of ignorance of rights' and of 'adolescent fantasy, fright or despair.'"<sup>153</sup> Although the court acknowledged that "[d]efendant appears to cry or sob occasionally during the videotaped statement,"<sup>154</sup> it nevertheless concluded that "[t]he videotape *alone* is persuasive evidence that Defendant knowingly and voluntarily waived his juvenile *Miranda* rights."<sup>155</sup> In sum, this court asked that we disregard the contrary evidence of test scores, youth and unrefuted diagnoses of panic and attention deficit disorders, and instead that we trust the court and its interpretation of the film of the defendant as calm, knowing and intelligently presenting himself and his role in the crime under investigation.

Like many other courts who are faced with a film of an interrogation or confession, on the one hand, and scientific (or other documentary) evidence suggesting involuntariness or incompetence, on the other, this court fell prey to the

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147. *Id.*

148. *Id.* at 888.

149. *Id.* at 888-89 (some brackets in original).

150. *Id.* at 889.

151. *Id.* at 890.

152. *Id.* at 888 (quotations in original).

153. *Id.* at 891.

154. *Id.*

155. *Id.* (emphasis added).

lure of film's ideological reproduction of reality.<sup>156</sup> Why did the court go to such lengths to describe the parts of the defendant's interrogation that were not on film—a description that goes on for five pages of the opinion—only to conclude that “[t]he videotape alone is persuasive evidence that Defendant knowingly and voluntarily waived his juvenile *Miranda* rights”?<sup>157</sup> Why did the court catalogue Gray's juvenile record—“fighting with a school principal, disrupting classes, causing fights”<sup>158</sup>—when none of it relates to the kind of custodial interrogation Gray experienced in these circumstances? What is the purpose of elucidating the defendant's illnesses—his various hospitalizations, his diagnoses and his treatment—if not to undermine the court's ultimate finding that the defendant's mental handicap failed to render his interrogation constitutionally infirm?<sup>159</sup> How do Gray's awkward and inconsistent responses to the officer's questions evidence what the court comprehends as Gray's sophistication and “familiarity with the criminal justice system”?<sup>160</sup> (At first, Gray said “he didn't want to talk any more.”<sup>161</sup> Later, after being Mirandized, he agreed to waive his rights and he answered questions, declaring he “did not want Mother present.”<sup>162</sup> Still later, he asked for his mother before continuing further and refused to consent to gun powder residue tests.<sup>163</sup>)

One reason for the rich detail, I suggest, is to underscore the court's impression that it truly got to know Kenneth Gray.<sup>164</sup> Although none of these details are

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156. See the discussion of ideology of film *infra* at Part II.A. For other like cases, see, e.g., *State v. Pinkston*, No. 89502, 2004 WL 2160677, at \*2 (Kan. Ct. App. Sept. 24, 2004) (affirming trial court's admission of videotaped confession despite defendant's claims of being under the influence of marijuana during interrogation and his confession therefore involuntary because from the videotape “[i]t did not appear to me [the court] that [defendant] was high, and I don't know because I don't know him from the past, but it did not appear to me that he was under the influence of drugs or alcohol. He signed the waiver.”); *Warner v. Commonwealth*, No. 2003-CA-000452-MR, 2004 WL 1046367, at \*1 (Ky. Ct. App. May 7, 2004) (denying funds for psychiatric evaluation regarding mental state of defendant to determine voluntariness of confession on the basis that “it was apparent” from “videotape of [defendant's] confession” that he “was ‘of normal or above normal intelligence’”); *Baird v. State*, 849 So.2d 223, 233 (Ala. Crim. App. 2002) (affirming admission of confession despite claim of intoxication (Xanax) and coercion on the basis of trial court's viewing of videotaped confession that revealed nothing “on there about anybody being coerced or tricked”); *State v. Campbell*, 738 N.E.2d 1178, 1195 (Ohio 2000) (affirming trial court's finding that defendant was not intoxicated when confessing to charged crime, despite having recently drunk at least forty ounces of beer, which finding was based on “trial court's viewing of the videotape, which showed ‘no indication whatsoever’ of intoxication”); *Foster v. Kansas*, No. 99-3157-DES, 2002 WL 13785, at \*5 (D. Kan. Jan. 2, 2002) (affirming trial court's refusal to admit evidence that defendant was “immature, and easily manipulated” and that “his demeanor on the videotape [on which he confesses to charged crime] was not his usual demeanor” on the basis that the videotape “provides clear evidence of its voluntary nature and fails to disclose any evidence that the confession was coerced”).

157. *Gray*, 100 S.W.3d at 891.

158. *Id.* at 887.

159. *Id.* at 888.

160. *Id.* at 887.

161. *Id.*

162. *Id.*

163. *Id.*

164. Another reason is to narrate the film, and by doing so, to render the court's conclusion of voluntariness and competence inevitable. See *infra* Part II.A.2 for an analysis of film narrative in this

caught on film, when reading the opinion (and certainly, when the court views the film after having already heard all this other evidence), one gets the sense that to the court the film is the ultimate and best source of its insight into Kenneth Gray: his motivation, his aptitude, his demeanor and his truthfulness. The court's final statement on the issue before it—"the videotape alone is persuasive evidence"—masks the fact that little, if any, of the evidence the court discussed concerning Gray's competence came from the film itself. And yet, the film is the best evidence, according to this court, of the fairness of the custodial interrogation and the truthfulness of his confession.<sup>165</sup>

This court's conclusion only makes sense if this film is understood as a window into the person of Kenneth Gray—that, despite evidence to the contrary, the film reveals Gray's true self: a street-wise youth, sharp-witted and poised beyond his sixteen years. This Missouri court believed it could see in the film of Gray's confession (though, crucially, not a film of the entire interrogation) an innate competence in Gray as he told the story of what happened during the burglary. I believed that the film revealed to its audience a mature person who not only knew what he was saying but did what he said he did—that is, commit armed burglary that resulted in the victim's death. In this way, as much as the court's opinion is about Gray's competence, it is also about Gray's guilt. The details of the interrogation rehearsed at length by the court appear to justify both the charge and the conviction by telling the story of a young man who had the requisite criminal capacity to be charged and convicted as an adult. To this court, the film of Gray confessing to the crime revealed a person through his own words, the confession serving as a kind of security blanket, conferring confidence on the court to affirm the judgment below.<sup>166</sup> The court was confident in its judgment of Gray as a person competent to inculcate himself in the most serious of crimes because the film feels uniquely revelatory. To the court it was therefore secondary that the film also seems to confirm that Gray confessed of his own volition and that his judgment was not clouded by medication or immaturity.

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As manifested in the application of evidentiary rules, these assumptions about film—its transparency, its moral objectivity, and its capacity to expose the truth of the person being filmed—are unsustainable after even a cursory study of film

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case.

165. See also *State v. George*, 855 So. 2d 861, 872 (La. Ct. App. 2003) ("The saying that a picture is worth a thousand words applies to this case. As did the trial court, we have reviewed defendant's videotaped confession in light of his claims that the statement should have been suppressed because he was hungry, thirsty and exhausted when he was questioned. . . . The trial court's conclusion that defendant's statement was freely and voluntarily given is fully supported by the evidence.").

166. In discussing the problematic nature of confessions, Mnookin writes, "a confession appeases our anxieties about our own responsibility for the judgment of guilt; when the guilty party admits culpability, the declaration of guilt becomes *his* rather than *ours*; we passively concur with his own judgment of himself rather than making an independent judgment about his guilty. A confession makes it psychologically easy for us to hold him responsible, *both* for the act to which he confesses and for the act of confession itself." Mnookin, *supra* note 113, at 161.

history and theory. Indeed, the puzzles posed by the case law in which these assumptions are manifest—the dilemma of film’s restricted frame (in time and space) and of its simulated revelation of the defendant and his crime as they really are—are not puzzles at all when film is understood as *representation*, as a particular kind of language (a semiotic system) with its own codes and signs that create and reproduce meaning. The principal legislative and judicial grounds for filming custodial interrogations and confessions (to protect defendants, promote prosecutions and preserve public confidence in the criminal justice system) pervert the correct understanding of film as an art form, one that inherently problematizes the relationship between sight and knowledge, witnessing and judging. Although the case law and recording statutes imply that filming what “really happened” in the precinct house is a cure-all for involuntary and false confessions, the history of film making and viewing counsels the opposite.

As the next Part will show, film—even documentary film—records only one version of the lived reality; film is “put together” (from the Latin “fictio” or “fingere”) and constructed from lived experience. Because of this, one can no better “see” the competence of the suspect or the coercion by the interrogators than one can judge the confession knowing and voluntary based on all the other evidence of record. It is the ideology of film—that it exposes a fixed and determinable reality to us—that mistakenly emboldens courts and legislatures to assert that “what really happened” is obvious when seen on film as opposed to when described in sworn testimony.

## II. DOCUMENTARY FILM

This second Part aims to establish a limited contention from a vast body of film theory and history and to demonstrate its relevance to the legal analysis of filmed interrogations and confessions. This Part shows how contemporary documentary, including filmmaking in the precinct house, is a species of early documentary film. Contrary to existing idealized expectations of documentary film, the documentary genre has never aimed to objectively depict real life. It has always been a form of artistic and politicized expression, representing at least one version of some historic event. This is not to say that documentary film fails to capture some aspect of real life, but instead to explain that upon making a film, the event captured on celluloid can never be divorced from its filmic aspect. The film’s images are an embodiment of a particular point of view (and not of others) shaped by the essential filmic storytelling devices of narrative and montage. And the film’s images (the fact of their existence and their significance) are inevitably influenced by the presence of the camera. Filmmaking in the precinct house is therefore never an objective rendering of a custodial interrogation (whatever that could be). Its product—the documentary film—is, and should be, controversial and indefinite in meaning and consequence. It must therefore be evaluated and judged in the appropriate context, in light of its history (as a film genre and a policing tool), its form (as a constructed filmic medium) and its purposes (as evidence and as advocacy).

### A. EARLY DOCUMENTARY AND THE PLAY OF THE REEL

The documentary film genre is as old as the film medium. In fact, the documentary genre is said to be one of the first to emerge in the burgeoning art and business of film entertainment.<sup>167</sup> Tracing the development of several central features of the documentary form (and, indeed, of film generally) shows how the documentary's aim was never to expose some truth of history or reality but to question whether film could be the basis of knowing or witnessing history or reality at all.<sup>168</sup>

Cinema is said to have been born in 1895 in France, with the Lumière brothers' actuality films, such as *L'Arrivée d'un Train en Gare* [The Arrival of a Train in the Station].<sup>169</sup> 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 platform 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 never saw the end of the film.<sup>170</sup> With this, the film as a collective experience began and, with it, the notion that film has a peculiarly “real” feel, enabling the audience to publicly bear witness to some historic event projected on screen.

In the beginning, film—or moving pictures, “the movies”—was a marvel because of its apparently unique relationship to reality. Its so-called mythic capacity for total world making began 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. This indexical linkage gave rise to theories suggesting that film appears to “bear[] unimpeachable witness to ‘things as they are.’”<sup>171</sup>

The actuality films of the Lumière brothers are as close to a representation of

167. NICHOLS, INTRODUCTION TO DOCUMENTARY 82-83 (2001) [hereinafter NICHOLS, INTRODUCTION]. Bill Nichols is one of the foremost documentary film scholars and his work has dominated—if not shaped—the field.

168. Writing about reflexive documentaries (those that take their filmic status into account in authoring a story about the world), Jim Lane says that “[w]hile . . . these documentaries reject[] the illusory mimetic flow of the documentary sound and image, reference is not so much eradicated but held up to rigorous critique.” JIM LANE, THE AUTOBIOGRAPHICAL DOCUMENTARY IN AMERICA 32 (2002) [hereinafter LANE]. The point is that historical events are not denied, but their representation is understood and analyzed as just that. Jennifer Mnookin has written about documentaries and courtroom trials in much the same way: “To succeed, such a documentary must walk a tightrope between skepticism and belief, engendering doubt about the evidence presented without also losing its own epistemological authority. The flip side of this irony reveals the structural affinity between documentary film and the trial: whatever their ostensible topic, both the trial and the documentary are always in part about what it means to know. Both embody and engender ruminations on the structure of knowledge and the processes of its construction, especially the relationship between seeing and knowing and the complex connections between narrative and belief.” Mnookin, *supra* note 113, at 158.

169. GERALD MAST & BRUCE F. KAWIN, THE MOVIES: A SHORT HISTORY 22 (1996).

170. *Id.*

171. ROBERT STAM ET AL., NEW VOCABULARIES IN FILM SEMIOTICS: STRUCTURALISM, POST-STRUCTURALISM AND BEYOND 185-86 (1992) (discussing the writings of film theorist André Bazin).

“things as they are,” or what I have called “*evidence verité*,” as one might find in the history of film.<sup>172</sup> Like *L’Arrivée d’un Train en Gare*, other Lumière films—*La Sortie des Usines Lumières* (Workers Leaving the Lumière Factory), *Repas de Bébé* (Feeding the Baby)—are “but a small step from documentary film proper.”<sup>173</sup> As documentary film scholar Bill Nichols has written, these films

are but a single shot and last but a few minutes, [but] they seem to provide a window onto the historical world . . . The departing workers in Workers Leaving the Lumière Factory, for example, walk out of the factory and past the camera for us to see as if we were there, watching this specific moment from the past take place all over again.<sup>174</sup>

One might call this kind of filmmaking “realism,” a fascination with the way the camera can capture a truth of historical action in time. However, as even the Lumière brothers understood, a

sense of photographic realism, of revealing what life has to offer when it is filmed simply and truly, *is not, in fact a truth but a style*. It is an effect achieved by using specific but unassuming, definite but self-effacing means. It corresponds to . . . three important ways in which the term ‘realism’ has significance for documentary film. Photographic realism . . . generates a realism of time and place through location photography . . . and continuity editing. . . . Psychological realism involves conveying the inner states of characters or social actors in plausible and convincing ways. . . . Emotional realism concerns the creation of an appropriate emotional state in the viewer.<sup>175</sup>

And so the “realism” of early documentary film was a constructed reality, one intentionally conjured by the film (and filmmaker) to project onto and reproduce in its viewing audience a specific rendering of how “reality” might look and feel.

As such, the perception of film’s capacity to wholly and truthfully reveal the world is and was always a myth, “an idealistic phenomenon . . . as if in some platonic heaven.”<sup>176</sup> Film is not a mechanism for witnessing reality; film is not a window onto some fixed historical event. Indeed, as we know from our own experience of film, film no more reveals the world than it reconstructs it. Film, like any representational form, must be interpreted. Regardless of its particular way of making meaning, be it that of “realism,” “avant-garde,” or “expressionist,” filmmaking as a representational practice must be accounted for.<sup>177</sup> How we

172. I have defined “*evidence verité*” elsewhere as a kind of film evidence, such as filmed interrogations, “that purports to be unmediated and unselfconscious film footage of actual events.” *Judges as Film Critics*, *supra* note 14, at 507.

173. NICHOLS, INTRODUCTION, *supra* note 167, at 83.

174. *Id.*

175. *Id.* at 92-93 (emphasis added).

176. ANDRÉ BAZIN, WHAT IS CINEMA? 17 (Hugh Gray trans., Univ. of Cal. Press 1967).

177. As Louis Menand has written recently about the documentarist Frederick Wiseman, with every film, Wiseman urges on his audience questions about film’s form, its particular perspective and its way of making meaning.

Part of the experience of watching his movies . . . is asking yourself: Why these scenes, where nothing much seems to be happening, and not other scenes, where something might actually be

account for that meaning through celluloid images depends on our familiarity and understanding of film technique and form.

### B. NARRATIVE, VOICE AND POINT OF VIEW

One way that early documentary film developed its message is through narrative. The actuality films of the Lumière brothers did not capture audience's attention for long. Within a decade, the actuality genre evolved with the expectation of narrative.<sup>178</sup> Audiences began to anticipate that a film, no matter its documentary intent, had a story to tell—a beginning, a conflict and a resolution.<sup>179</sup> 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. Edwin Porter's 1903 film *The Great Train Robbery* is credited as the first pseudo-documentary. Its narrative subject was "how to rob a train."<sup>180</sup> With the popularity of this film came the fears and hopes, unabated today, that film serves as the most effective teaching tool for encouraging both the perpetration of crimes and beneficial participation in civic society.

*Nanook of the North*, Robert Flaherty's 1914 film about the Inuit in northern Canada, which is renowned among early narrative documentaries, was such a worldwide hit that it led to early branding of merchandise. "[I]n Germany, an ice-

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happening? And then: What about those other scenes? Could they open onto a different side of the story? Wiseman's point, in talking about his movies as fictions, seems to be that these are questions that people always *should* be asking. There may be a neutral style, but there is no neutrality.

Menand, *supra* note 5, at 94.

178. In fact, even actuality films were narratives, but narratives that were structured around time and space (when to begin and when to end and where to point the camera) and less around editing (where and how to cut and paste different beginnings, middles and endings together).

179. When I invoke the concept of narrative, I recognize that I am invoking something much more complex than just a story with a beginning, conflict and resolution. In literary studies, narrative theory is a dense, diverse field of scholarship, the details of which are beyond the scope of this article. Generally speaking, however, the study of narrative is the study of life shaped by plot, character and genre, organized by time and moral significance. "Narratives resolve conflict and achieve order." NICHOLS, *BOUNDARIES*, *supra* note 2, at 91. It is, in short, the study of "the story-like qualities of social life." PHILIP SMITH, *CULTURAL THEORY: AN INTRODUCTION* 183 (2001). See also PAUL RICOEUR, *TIME AND NARRATIVE I* 52 (Kathleen McLaughlin & David Pellauer trans., Univ. of Chi. Press 1984) ("[Historical time becomes human time] to the extent that it is articulated through a narrative mode, and narrative attains its full significance when it becomes a condition of temporal existence."). As such, the study of narrative, while perhaps originating with the study of literature and the arts, crosses disciplines in service toward understanding the fabric of meaning within and connecting each—from anthropology, to sociology, to history, to law. See, e.g., *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz, eds., 1996) (law); Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, in 29 *LAW & SOCIETY REV.* 197-226 (1995) (sociology and law); HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* (1987) (history); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973) (anthropology).

180. MAST & KAWIN, *supra* note 6, at 42.



cream sandwich was named after the protagonist—a Nanuk.”<sup>181</sup> According to most historians and critics, the film “owed its popularity to Flaherty’s decision to tell the story of a family rather than try to document a whole community. The opening scene, in which Nanook’s large family adorably crawls, one by one, out of an impossibly tiny kayak, is the perfect audience hook.”<sup>182</sup>

With the story of Nanook and his family, Flaherty intended both to teach audiences and to please them. “What I want to show is the former majesty and character of these people, while it is still possible—before the white man has destroyed not only their character, but the people as well.”<sup>183</sup> In order to accomplish this, Flaherty resorted to common techniques and process of filmmaking and storytelling: shaping sets, choreographing scenes and editing takes.<sup>184</sup>

Flaherty arranged . . . to film a walrus hunt in order to show how indigenous people once gathered food. The Inuit had long since stopped walrus-hunting, [however,] and they ended up struggling to drag a harpooned walrus out of the Arctic surf and begging Flaherty to shoot it with his rifle. . . . Later on, Nanook and his family are shown building an igloo out in the wilderness. It was too dark inside the igloo to film, so a special igloo—in other words, a set—was constructed with one wall removed, and the family was filmed, in daylight, pretending to go to bed. When a shot didn’t work, Flaherty asked his subjects to repeat what they were doing until he was satisfied.<sup>185</sup>

While some might feel betrayed by Flaherty’s staging of Nanook’s family activities, this is the essential stuff of narrative—emphasizing certain events and facts and omitting others—and therefore of early documentary.

Some contemporary critics discredit instances of reenactment as inauthentic. . . . But . . . the use of reenactment and arranged scenes has a long and illustrious history in nonfiction film, both in the United States and abroad. There is even evidence that arranging scenes was once considered a central and normative documentary technique. American newsreels, for example, are notorious for their reenactments. . . .<sup>186</sup>

This is not to say that the documentary genre was a fictionalized one from the beginning, but rather that all films, whether based on real events, are the product of certain essential choices that determine the shape and focus of the tale. Indeed, the

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181. Menand, *supra* note 5, at 92.

182. *Id.*

183. *Id.*

184. See CARL PLANTINGA, RHETORIC AND REPRESENTATION IN NONFICTION FILM 35 (1997).

185. Menand, *supra* note 5, at 92.

186. PLANTINGA, *supra* note 184, at 36. One scholar comments that “although reenactment and staging were thought for years to be prototypical documentary techniques, today many critics and filmmakers think of them as improper for the documentary, and reserve staging for the kitchy [sic] ranks of ‘reality’ television.” *Id.* at 37. It is interesting that reenactments and staging would be more easily accepted (by critics and audiences) under the rubric of “reality” television than motion picture film, especially given that television is where many of us receive our news and the movie theater where we go for entertainment.

inevitability of narrative—inescapable plot and character selections, who to include in the story, when and how, when to begin the story, when to refocus it—provides Flaherty, as well as other documentarists, with a defense to the accusation of fraud.

With narrative comes the development of voice, or point of view. It is unavoidable that films have such a voice: there is always a filmmaker whose perspective—and not others—is being captured by the camera. “The documentarist, like any communicator in any medium, makes endless choices. He . . . selects topics, people, vistas, angles, lens, juxtapositions, sounds, words. Each selection is an expression of his point of view, whether he is aware of it or not, whether he acknowledges it or not.”<sup>187</sup> For documentary, in particular, the stakes in the shape of that voice were particularly high. A documentary can tell a story from the point of view of an omniscient narrator—one that is perceived as telling a story from a superior vantage point, one that is without reflection understood as unbiased and whole. A documentary can also present its story from the points of view of multiple characters in the film, thereby self-consciously fragmenting the story and giving the viewer the experience of seeing the story from different perspectives.<sup>188</sup>

The development of these different perspectives in documentary film provoked significant epistemological uncertainties. One was to highlight the by-now obvious fact that all stories, even true ones, can be truthfully told from different angles, with different morals and objectives. Another was to enable (perhaps even encourage) a judgment by the film audience about the authority of the film voice (whether it be an implicit or explicit narrator). Indeed, given the combination of factual assertions and epistemological uncertainties that were embedded in the documentary genre from the outset, attention to documentary voice—although varied—almost always concerns building credibility and authority for the story being told. On the one hand, documentaries “use sound and image as evidence to make an argument about the social and historical world.”<sup>189</sup> On the other hand, documentary film practice questions the very possibility of having faith in the value of what you see.<sup>190</sup> In this way, the most that can be said with certainty about the authenticity of the

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187. See Bruzzi, *supra* note 86, at 4 (quoting Eric Barnouw).

188. NICHOLS, INTRODUCTION, *supra* note 167, at 91, 97.

189. LANE, *supra* note 168, at 14

190. Jennifer Mnookin, writing about the affinities of trials and documentaries, notes that

it is not simply that each is a representation, inevitably partial, inevitably selective (this is true, but not surprising). What is more interesting is the way that both rhetorical forms have something deeper in common, the way they hide their constructed nature in plain sight. They each offer performances that are just that: performances—and yet, when they succeed, these performances manage to stand in for the actual, they manage to be accepted as both persuasive and true.

Mnookin, *supra* note 113, at 190-91. I agree with this observation. I would go further and say that while the documentary genre historically aims to persuade, it does not aim to propagate truth. Instead of truth, I would suggest that documentaries aim toward right or righteousness, persuading toward a good or just or beneficial view of the world (or one that might enact such a view of the world). Law and legal trials aspire similarly.

documentary film's story is that the event filmed actually occurred, even if it "occurred, like most fiction-based acts, solely for the purpose of being filmed."<sup>191</sup>

Bill Nichols has developed a typology of narrative perspectives, or voices, for documentary film that roughly follows the development of the documentary film form over its 110-year history. The four types he identifies are expository, observational, participatory and reflexive.<sup>192</sup> These perspectives are each variations on the documentary balance between factual assertions and epistemological doubt. The first two types of documentary film voice attempts to build credibility through a sense of objectivity. Expository film, the earliest of documentaries, accomplishes this objective stance with an omniscient narrator, or "Voice-of-God" commentary.<sup>193</sup> Observational film, which developed much later in the 1950s and 1960s (and was also known as direct cinema), did away with overt narration and instead established its credibility by appearing to have the filmmaker "look in on life as it is lived."<sup>194</sup> Without overt narration, direct cinema seems to be the most neutral of all film styles, although its lack of conscious aestheticization does not mean it is not framed, interpretable or mutable in meaning. As with expository documentaries, observational films "tend . . . to reveal aspects of character and individuality."<sup>195</sup> And, like expository documentaries, direct cinema style raises questions of staging and authenticity. As Nichols asks of observational film and its subjects,

Do people conduct themselves in ways that will color our perception of them, for better or worse, in order to satisfy a filmmaker who does not say what it is he wants? Does the filmmaker seek out others to represent because they possess qualities that may fascinate viewers for the wrong reasons? . . . Has the filmmaker sought the informed consent of participants and made it possible for such informed consent to be understood and given? To what extent can a filmmaker explain the possible consequences of allowing behavior to be observed and represented to others?<sup>196</sup>

The second two styles of documentary—participatory and reflexive—advance

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191. Nichols, *Avant-Garde*, *supra* note 13, at 589.

192. NICHOLS, INTRODUCTION, *supra* note 167, at 99-138. Nichols also includes poetic documentary (early films that are fragments and collages) and performative documentary (akin to expressive or avant-garde cinema that emphasizes subjectivity over the possibility of objective knowledge) in his typology. I exclude them from discussion here because these kinds of films are neither received as nor intended to be objective portrayals of historical events. Rather they are considered responses to the notion that there is such a thing as objective knowledge and coherent meaning. "Performative documentary underscores the complexity of our knowledge of the world by emphasizing its subjective and affective dimensions." *Id.* at 131. "The poetic mode began . . . as a way of representing reality in terms of a series of fragments, subjective impressions, incoherent acts, and loose associations." *Id.* at 103.

193. PLANTINGA, *supra* note 184, at 101. Examples of expository documentary include Pare Lorenz's *The Plow That Broke The Plains* (1936), Jon Else's *Yosemite: The Fate of Heaven* (1988) (narrated by Robert Redford), and television news. PLANTINGA, *supra* note 174, at 101.

194. NICHOLS, INTRODUCTION, *supra* note 167, at 111. Examples of observational cinema include Richard Leacock's *Primary* (1960) and Leni Riefenstahl's *Triumph of the Will* (1934). NICHOLS, BOUNDARIES, *supra* note 2, at 111.

195. *Id.*

196. *Id.*

their credibility not through a put-on sense of impartiality or detachment, but rather by revealing all: the filmmaker, the film form and the process of filmmaking. Participatory and reflexive documentaries include the filmmaker more overtly in the film, either with interviews (performative) or with making apparent the filmmaking process itself (reflexive).<sup>197</sup> The intention in doing so is not to challenge the integrity of the event or persons represented on film, but, to the contrary, to attempt to incorporate the “ethics and politics of encounter” into the story being told.<sup>198</sup> With reflexive documentaries, “[i]nstead of seeing through documentaries to the world beyond them, [they] ask us to see documentary for what it is: a construct or representation.”<sup>199</sup> The strategy behind these kinds of films is to expose the manner in which the film is made and the story is told so that the viewer is provided the tools with which to judge for herself the film’s authority or credibility.<sup>200</sup>

All of these documentary “voices” are choices of presentation, the aim of which is to authorize the story, to convince the audience of the integrity of the facts revealed. Each voice contributes differently toward a common effect of film, “the viewer’s neglect of his or her actual situation, in front of a movie screen, interpreting a film, in favor of imaginary access to the events shown on the screen as if it is only these events that require interpretation, not the film.”<sup>201</sup>

The development of distinctive voices in documentary film results in competing tendencies. On the one hand, the experimentation with documentary voices and their development over time might be an attempt to effect the most authentic and true portrayal of lived experience.<sup>202</sup> On the other hand, it emphasizes the very fact

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197. For a more in depth discussion of reflexive filmmaking and its effect on the authority of the message it conveys, see *Judges as Film Critics*, *supra* note 14, at 536-39. Examples of participatory documentary include Ross McElwee’s *SHERMAN’S MARCH* (1985) and *SHOAH* (1985). Examples of reflexive documentary include Dziga Vertov’s *CHELOVEK S KINO-APPARATOM* [MAN WITH A MOVIE CAMERA] (1929), as well as DAVID HOLZMAN’S *DIARY* (Jim McBride 1968) and Trinh Minh-ha’s *REASSEMBLAGE* (1982).

198. NICHOLS, INTRODUCTION, *supra* note 167, at 116.

199. *Id.* at 125 (emphasis omitted).

200. “[T]he experience of film is less about the quality of the information film conveys about the thing or event filmed, but about identifying the film’s point of view and, through that identification, being able to judge the source and making of the film itself.” *Judges as Film Critics*, *supra* note 14, at 539.

201. NICHOLS, INTRODUCTION, *supra* note 167, at 125. This is true even with the reflexive mode of documentary.

[S]elf-reflexivity in film enables both a critique of film’s fictive nature and the confirmation of film as an objective form of knowledge. Spectators understand that what they are viewing is a point of view—a filmic point of view—and, because they are made aware, they feel capable of making judgments about what they see as true.

*Judges as Film Critics*, *supra* note 14, at 538-39.

202. As I have said elsewhere,

In one sense, the first person narrative helped perpetuate the sense of singularity and wholeness in the viewing audience, the sense that they were seeing with their own eyes the events on screen as if live before them; in another sense, however, knowing and seeing, from that singular perspective, was problematized as based on the trustworthiness of the individual doing the

of a point of view. Every story being told—even if taken directly from lived experience—is only a part of that experience; it is only one perspective on that historical event with varying degrees of obfuscated involvement by the filmmaker in shaping the event as it unfolds.

### C. MONTAGE AND FRAMING TECHNIQUES

Film's other basic story-telling device, montage, is "the creation of sense or meaning not objectively contained in the images themselves but derived exclusively from their juxtaposition."<sup>203</sup> The famous "Kuleshov experiments" of the Moscow Film School in the 1920s established the principle of montage. By taking the same film of an actor (Mozhukhin's face), inserting it into three different contexts, and showing the sequence to student-audiences, Kuleshov demonstrated how the meaning of a single shot could change dramatically depending on the images that preceded and followed it.

Kuleshov cut the shot of Mozhukhin'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 child (in some accounts, an old woman) in a coffin; he juxtaposed the third with a shot of a little girl playing with a toy bear. When viewers . . . saw the finished sequence, they praised Mozhukhin's acting: his hunger when confronted with a bowl of soup, his sorrow for "his dead child" (their interpretation), his joy when watching "his daughter" playing. Mozhukhin's neutral expression was identical in all three pieces of film. The juxtaposed material . . . evoked the concept or emotion in the audience, which then projected it into the actor. Editing alone had created the scenes, their emotional content and meaning, and even a brilliantly understated performance!<sup>204</sup>

Montage is not only the juxtaposition of discrete images to evoke specific emotions or concepts. It also entails searching throughout the film footage for transitions between scenes—that is, cutting and splicing film sequences to adjoin and contrast those filmed.<sup>205</sup> Montage attempts to move beyond a cinema of attractions (like the early films of actuality) and toward narrative film form, while still building upon film's "capacity to represent the historical world with photographic fidelity."<sup>206</sup> Sergei Eisenstein and Dziga Vertov were two pioneers of montage—and of documentary. While portraying purportedly truthful stories of the Soviet revolution, these documentarists also explicitly served that political cause. Where Eisenstein's films were about historical revolutionary elements or

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storytelling and to whose view the audience is privy.

*Judges as Film Critics*, *supra* note 14, at 535.

203. BAZIN, *supra* note 176, at 25. In addition to its claim to fame as the first "faux doc," *The Great Train Robbery's* other contribution to film is its relational editing, a narrative form of montage. By juxtaposing shots of otherwise discontinuous images and cutting back and forth between different scenes, the film creates narrative logic where there was none before.

204. MAST & KAWIN, *supra* note 6, at 176.

205. NICHOLS, INTRODUCTION, *supra* note 167, at 95-96 ("[Montage entails] hunting for montage fragments . . . to capture the essential link shots . . . [to] bring[] out the core of the film-object....").

206. *Id.* at 96.

moments—the Battleship Potemkin (*Potemkin*) and the October revolution (*October*)—Vertov’s films, which unfolded like newsreels, were more overtly documentary.

Vertov, like the observational filmmakers of the 1960s, eschewed all forms of scripting, staging, acting, or reenacting. He wanted to catch life raw-handed and then to assemble from it a vision of the new society in the process of emergence. His own term for the cinema, *kinopravda* (film-truth), insisted on a radical break with all forms of theatrical, literary structure for film.<sup>207</sup>

Both filmmakers mobilized montage techniques—jarring editing, the juxtaposition of divergent images to evoke strong emotion or intelligent response—in order to “serve the revolutionary aspirations of the moment.”<sup>208</sup> “[T]he ways in which views of the world were recast in shooting and editing . . . demonstrated that complex films could be constructed from fragments of the historical world rejoined to give expression to a particular viewpoint.”<sup>209</sup> Their intention was both to document and to foment the revolution through film, recognizing that the public meaning of the revolution—that is, how it was understood and appreciated—would in significant part take shape through their films. They asked: “[H]ow could [film] represent the ‘new man’ of communist society; how could it construct a distinct culture freed from bourgeois tradition?”<sup>210</sup> The techniques of montage and the new art of cinema “laid the groundwork for the didactic emphasis that [later filmmakers in Europe would] g[i]ve to documentary . . . [in] the 1930s.”<sup>211</sup>

Another way of making meaning uniquely through film is by carefully manipulating the camera, including its perspective (angles) and breadth of view (wide shots and focus).<sup>212</sup> D.W. Griffith, the initial master of this kind of film language, was the original engineer of the close-up, deep focus, the long shot, pan shot and traveling shot.<sup>213</sup>

Griffith had learned . . . [that] [f]ilms were capable of mirroring not only physical activities but mental processes. Films could recreate the activities of the mind: the focusing of attention on one object or another (by means of a close up), the recalling of memories or projecting of imaginings (by means of a flashback, flash forward, or mind-screen), the division of interest (by means of the cross-cut). Griffith had come to realize . . . the importance of the interplay between events presented on the screen and the spectator’s mental synthesis of those events. Griffith’s “discovery” was far more than mere technique . . . it was the way to make film narrative, storytelling with

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207. *Id.* at 143.

208. *Id.* at 142.

209. *Id.* at 97.

210. *Id.* at 142.

211. *Id.* at 97.

212. Carl Plantinga discusses other methods of making meaning in non-fiction film, what he calls “nonfiction discourse”—selection, order, emphasis and voice—but, in my view, these categories are not unique to film but apply to any work of non-fiction. I therefore do not discuss them here. PLANTINGA, *supra* note 184, at 83-100.

212. MAST & KAWIN, *supra* note 6, at 57.

213. *Id.* at 54.

moving images, consistently coherent.<sup>214</sup>

These film techniques are now ubiquitous in all film genres, including documentaries. “The beginning and ending of *The Times of Harvey Milk*, for example, use slow motion . . . [t]ogether with the synthesized music, . . . [to] evoke a dreamlike quality that suggests the importance we often attribute to assassinated leaders. . . . [This] scene clearly preserves the unity of the film’s rhetorical emphasis by mythologizing the fight for gay rights in the person of Harvey Milk.”<sup>215</sup>

Although documentaries may have been one of the first film genres to develop due to film’s inherent capacity to photographically represent historic circumstances, it shares its formal features—its modes of expression—with those of fiction film.

[T]hose who adopt the documentary as their vehicle of expression turn our attention to the world we already occupy. They do so with the same resourcefulness and inventiveness that fiction filmmakers use to draw our attention to worlds we would have otherwise never known. Documentary film and video, therefore, display the same complexity and challenge, the same fascination and excitement as any of the genres of fiction film.<sup>216</sup>

The effects of montage on the interpretation of filmed confessions will be discussed below in Part III.

#### D. DOCUMENTARY AS ADVOCACY

Both montage and narrative, although film elements developed by early documentarists to reveal a world to its audience, are also formal features of film that self-consciously and intentionally construct a world, as well as expectations and relationships in and about that world.

Narrative not only facilitates the representation of historical time, it also supplies techniques by which to introduce the moralizing perspective or social belief of an author and a structure of closure whereby initiating disturbances can receive satisfactory resolution . . . giv[ing] an imprimatur of conclusiveness to the arguments . . . advanced by the film.<sup>217</sup>

*Nanook of the North*, Flaherty’s effort to eulogize the Inuit, is just one example of moral narrativizing. Dziga Vertov’s spliced and edited newsreels is an example of the power of montage to “remake the world in the image of a revolutionary new society.”<sup>218</sup> Even without excessive montage or overt narrativizing, observational

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214. *Id.* at 58-59 (emphasis omitted). Indeed, it is clear from Griffith’s films, in particular BIRTH OF A NATION, that one of the stories he was actively cultivating through the new art of film was of American racism and white supremacy. *Id.* at 69-70.

215. PLANTINGA, *supra* note 184, at 152-53. THE TIMES OF HARVEY MILK (Richard Schmiechen 1984) was directed by Robert Epstein.

216. NICHOLS, INTRODUCTION, *supra* note 167, at xiv.

217. Nichols, *Avant-Garde*, *supra* note 13, at 589-91.

218. NICHOLS, INTRODUCTION, *supra* note 167, at 96.

documentary or “direct cinema” can remake or affect a new reality. Leni Riefenstahl’s *Triumph of the Will* is the quintessential example. It gains its power as advocacy—for the glory of Nazi citizenship—by seeming not to narrate its tale.<sup>219</sup> That much of *Triumph of the Will* was staged precisely for the camera, “including the repeat filming of some speeches at another time and place when the original footage proved unusable,”<sup>220</sup> does not decrease its effectiveness as journalism and political advocacy.

These three examples highlight documentary film’s perhaps most important and overlooked feature: its activist goals, which, in the beginning, were partnered (if informally) with the power of the state.<sup>221</sup> “Due to its rhetorical potency as a tool for nation building, public education, and advocacy, the documentary form has consistently been harnessed to the manufacture of social consent.”<sup>222</sup> To be sure, there are exceptions to this rule, but at least the heyday of documentary, the 1920s and 1930s, saw the “value of [documentary] cinema . . . in its capacity to . . . enact the proper or improper terms of individual citizenship and state responsibility.”<sup>223</sup> As 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 direct service of various, already active efforts to build national identity.”<sup>224</sup>

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.<sup>225</sup>

Of course, the state-encouraged documentary was not uniquely an engine of communist or fascist societies. Some of the most famous documentaries were made in Britain and the United States on behalf of or in service to democratic governments. The work of John Grierson is the preeminent example. He is said to have coined the word “documentary” and to be the “documentary film movement’s greatest champion.”<sup>226</sup> His 1929 film *Drifters*, about the North Sea herring fleet, emphasized the economic importance of the fishing industry in Britain. With this film, he persuaded the British government to do with film in 1930 what the Soviet

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219. *Id.* at 113. Nichols continues, “*Triumph of the Will* demonstrates the power of the image to represent the historical world at the same moment as it participates in the construction of aspects of this historical world itself. Such participation...carries an aura of duplicity. . . . [Y]et the underlying act of being present at an event but filming it as if absent, as if the filmmaker were simply a ‘fly on the wall,’ invites debate as to how much of what we see would be the same if the camera were not there or how much would differ if the filmmaker’s presence were more readily acknowledged.” *Id.* at 114-15.

220. *Id.*

221. Nichols, *Avant-Garde*, *supra* note 13, at 582.

222. MICHAEL RENOV, *THE SUBJECT OF DOCUMENTARY* 130 (2004).

223. Nichols, *Avant-Garde*, *supra* note 13, at 582.

224. *Id.*

225. *Id.* at 592.

226. *Id.* at 580.



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.<sup>227</sup> By establishing a film unit at the Empire Marketing Board from 1930 to 1933, Grierson gave the documentary film an institutional base and encouraged a specific set of audience expectations.<sup>228</sup> Grierson's later films, such as *Housing Problems*, a 1935 film that highlights the social problem of poor housing, advocated its solution in the British government's slum clearance program and the rebuilding of new homes with gas appliances.<sup>229</sup>

We were instructed, in effect, to use cinema, or alternatively to learn to use it, *to bring alive* the industries, the harvests, the researches, the productions, the forward-looking activities of all kinds; in short, to bring the day-to-day activities of the British Commonwealth and Empire at work into the common imagination. . . . [I]f you are to make citizenship in our vast new world imaginative and, therefore, possible, cinema is, on the face of it, a powerful weapon.<sup>230</sup>

The United States had its own Grierson in the person of Pare Lorentz, a man who worked for the United States government as a filmmaker. Lorentz directed, among other films, *The River*, which depicted the flooding of the Mississippi and touted the achievements of the Tennessee Valley Authority.

When documentary does not serve the state's interests but instead contests the power of the state, the form of the contest is nevertheless a similar "rhetoric of social persuasion" based in an ideology of the film as an evidentiary form.<sup>231</sup> In this vein, recall where we began, with Michael Moore's *Roger and Me* and *Fahrenheit 9/11* or Errol Morris's *A Thin Blue Line* and *Fog of War*.<sup>232</sup> These are films very much like the earliest of documentaries—including Vertov's and Grierson's films—despite being critical of the government. As social and political advocacy, these films are simultaneously rooted in "dreams of universal reason,

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227. This recalls Lenin's prediction that "of all the arts, for us the cinema is the most important." JAY LEYDA, *KINO: A HISTORY OF THE RUSSIAN AND SOVIET FILM* 161 (1973).

228. NICHOLS, INTRODUCTION, *supra* note 167, at 145.

229. Grierson was said to have "forged a British documentary film movement. Recruiting talented young men fresh out of Cambridge. . . . Grierson created a sizable and quite prolific film production group enthusiastic in its pursuit of a single mandate: 'to bring the Empire alive.'" RENOV, *supra* note 222, at 134.

230. *Id.* (emphasis added).

231. Nichols, *Avant-Garde*, *supra* note 13, at 582. Although its roots are in state-sponsored or state-encouraged stories of political participation and glory, the evolved 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 [. . . .]" *Id.* at 608. A documentarist's goal of activism through photographic realism remains. "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.*

232. See LANE, *supra* note 168, at 14 ("Documentarists mobilize sounds and images both to establish proof about the world and, through editing, structure, and rhetorical devices, to build an overall position toward the evidentiary pieces exhibited in the body of the work.").

[their] predilection for Truth in History,”<sup>233</sup> as well as in the power of the public aesthetic whose central heuristic contrasts seeing with knowing and facts with rhetoric.<sup>234</sup> Preoccupations with what it means to see and then to know, with what it means to witness and then to judge, with the role of spectatorship in forming a political community—these shaped filmmaking and the experience of film from its earliest stages.<sup>235</sup> As such, film, from its beginning, was a political tool, a species of political and social advocacy—as all art can be.<sup>236</sup> And documentary film was a particularly effective tool because of its impression of authenticity.<sup>237</sup>

### III. FILMMAKING IN THE PRECINCT HOUSE

Keeping in mind this history of film and of documentary, especially as the latter developed into a disciplinary device as regards state interests and power, this Part III resituates the trend of filming custodial interrogations and confessions as a form of advocacy on behalf of the state.

Filmmaking in the precinct house attempts to address some of the problems that constitutional and criminal law have identified regarding confessional evidence. A confession, when believable, is considered the “queen of proofs” due to its “mark of authenticity, par excellence the kind of speech in which the individual authenticates his inner truth.”<sup>238</sup> Exposing a person’s inner truth—whether and why they committed the crime at issue—is, of course, one goal of a criminal investigation. But confessions are provided under inherently coercive conditions,

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233. RENOVA, *supra* note 222, at 137.

234. Several recent examples of documentary as legal advocacy are PARADISE LOST: THE CHILD MURDERS AT THE ROBIN HOOD HILLS (Home Box Office 1996) and CAPTURING THE FRIEDMANS (Andrew Jarecki 2002). On the former, Jennifer Mnookin has written that it is “a call to action, an explicit appeal . . . . While this extralegal form of instrumental advocacy is directed toward the viewing public rather than appellate courts, and thus to an audience both broader and less empowered to effect direct legal change, the films’ diction of persuasion, fundamentally evidentiary, is not wholly dissimilar from the languages of legal appeal.” Mnookin, *supra* note 113, at 154.

235. Like law (and particularly trials), documentaries “both generate and partially satisfy a craving for knowledge,” what Bill Nichols calls “epistophilia.” *Id.* at 158 (citing BILL NICHOLS, REPRESENTING REALITY 31 (1998)). Both trials and documentaries “create a belief that through observing we—we the jurors, we the viewers, we the public—can join the ranks of those who know, but simultaneously they risk engendering a fraught anxiety about whether we can know at all.” *Id.* This recalls Ludwig Wittgenstein’s famous statement that “[a]t the foundation of a well-founded belief lies the belief that it is not well-founded.” LUDWIG WITTGENSTEIN, ON CERTAINTY para. 253 (G.E.M. Anscombe & G.H. von Wright eds., Paul D. Anscombe trans., Harper & Row 1972).

236. The ebb and flow of the popularity of the documentary film genre is beyond the scope of this Article. Suffice it to say, however, despite its status as an “in” genre in the early years of film given its foundational role in film practice and theory, and its more marginal status during the heyday of, for example, the film noir and classical Hollywood periods, the central principles described here underlying documentary film practice remained constant throughout the history of filmmaking.

237. The still photograph preceded film in its role as a state disciplinary tool, reinforcing the status quo. See, e.g., JOHN TAGG, THE BURDEN OF REPRESENTATION 61-64 (1988) (describing how photography contributed to the governmental control, in the 1840s and 1850s, of newly developing urban areas).

238. PETER BROOKS, TROUBLING CONFESSIONS 4 (2000). See also *supra* note 105.

thus tarnishing their truth claims.<sup>239</sup> This is the first problem.

Another problem, intertwined with the first, is that confessions take place in private—as between parishioner and priest, patient and therapist, suspect and interrogator. The privacy of the act at once authenticates the confession (we confess to things about which we are ashamed and thus dare not say in public) and renders it nearly impossible to judge (as judging requires scrutiny and analysis by others). Yet confessions are routinely judged. With regard to criminal confessions in the precinct house, they are elicited, often after hours of questioning during which the “suspect, isolated from all familiar surroundings, ‘[is] deprived of every psychological advantage[,]’” written down (most often by police officers) and then signed by the confessor-accused.<sup>240</sup> “The idea . . . is to get the suspect to confirm ‘the preconceived story the police seek to have him describe.’ At this point, one must ask of the confession made: whose story is it?”<sup>241</sup> Determining whose story it is—the truthful revelation by the confessant provided of his own will or the coerced story pieced together by police and suspect in order to end the interrogation—is made exponentially more difficult by the fact of the “closed room.”<sup>242</sup> Courts are left to compare a suspect’s statements about coercion and deprivation with police testimony about proper procedure and the suspect’s “storytelling without fear.”<sup>243</sup> These “swearing contests,” as the cases discussed above in Part I explain, more often than not result (and perhaps without good reason) in a judgment confirming the state’s case: that the confession is voluntary and reliable and the suspect is guilty.

How does the camera affect the rendering, analysis and judgment of confessions? The legislation and case law urging the filming of custodial interrogations explain that the film solves at least some of the above-mentioned problems of the stationhouse confession. First, the camera ostensibly opens up the “closed room” to the court and advocates, allowing for direct scrutiny of the interrogation procedure without the mediating factor of the suspect’s and officer’s testimony. Second, the camera makes the interrogation less private. The suspect and the police are aware of speaking (and perhaps of performing) not only for each other but for all the others who may watch the film. Less isolated, the suspect feels less pressure, less fear that his words will be twisted. With someone else watching, the officers know they have to behave themselves. All this presumably leads to more truthful confessions and more humane police practices.

In these two important ways, police films of custodial interrogations and

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239. See *Miranda v. Arizona*, 384 U.S. 436, 458 (1965).

240. BROOKS, *supra* note 238, at 13 (describing Chief Justice Warren’s opinion in *Miranda*).

241. *Id.*

242. *Id.* (discussing how Chief Justice 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”). See also Saul Kassin, Op-Ed., *Videotape Police Interrogations*, BOSTON GLOBE, Apr. 26, 2004, at A13 (advocating filming custodial interviews to lift the “veil of secrecy” from the interrogation room) [hereinafter Kassin, *Videotape*].

243. BROOKS, *supra* note 238, at 11. Note that Brooks entitled the first chapter of this book “Storytelling without Fear? The Confession Problem.” *Id.* at 8.

confessions are also quintessential documentaries: they intend to show us what happened and what was said, to reveal a world or circumstance that desires and benefits from exposure.<sup>244</sup> They are a powerful kind of documentary in that confessions themselves imply “something secret and hidden, something that has long resisted [articulation].”<sup>245</sup> As spoken and revealed on film, the documentary of the stationhouse interrogation—the filmed interrogation that climaxes in confession, the intention of which is to prove that the words and circumstances of the confession (and therefore the crime) were as the state says they were—is the ultimate of solved mysteries.

Nevertheless, both of these aspects of a camera’s effect on confessions can be subverted in light of the documentary tradition. As described in Part II, documentary film is no less a species of artistic expression and persuasive rhetoric than it is a sequence of a historic moments. This is not to say that the person or event being filmed neither is nor was “real” (whatever that may mean for the legal analysis). It is simply to emphasize that the camera and the process of filmmaking is always already “a part of the actual world of the [filmed] . . . subject.”<sup>246</sup> Given this, the camera is not a window into an otherwise closed room, a peep hole into a private scene. It fundamentally changes the room from one into which no one is watching to one that is intended to be watched, one that is almost exclusively made for watching over and over.<sup>247</sup> It turns the interrogation room into a film set, the suspect and officers into film stars, performers and directors.<sup>248</sup>

Watching the film of the interrogation is not direct scrutiny of the interrogation procedure; it is scrutiny *of the film* of the interrogation procedure. The scrutiny remains of something that is mediated, not by speech and memory but also by moving celluloid images. Indeed, it is entirely likely that a film of an interrogation will provide different details of the interview than will sworn testimony. A film of an interrogation provides a unique perspective—in many instances, a singular perspective—on the interrogation and resulting confession. However, as the history and study of documentary film explains, a filmed version of a historic event

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244. These stationhouse films are also a kind of autobiography of the criminal and of his criminal act (a subgenre of documentary inasmuch as autobiography is an attempt at telling one’s story, a personal history). For problems and critiques of autobiographical film, see, e.g., LANE, *supra* note 168; Elizabeth Bruss, *Eye for I: Making and Unmaking Autobiography in Film*, in *AUTOBIOGRAPHY: ESSAYS THEORETICAL AND CRITICAL* 296-320 (James Olney, ed., 1980). Re-situating the confession on film as a kind of autobiographical film is a much larger project and for another day.

245. Peter Brooks, *The Future of Confession*, in 1 *LAW, CULTURE & THE HUM.* 53, 74 (2005).

246. LANE, *supra* note 168, at 18 (“[Documentary film does not] eradicate the real as much as [it] complicate[s] referential claims . . .”). See also Nichols, *Avant-Garde*, *supra* note 13, at 584-85 (stating that all that direct cinema authenticates is that the event filmed actually occurred, even if solely for the purpose of being filmed).

247. “The ways that the making of a documentary can affect the matters being observed. That observers affect what they watch is practically axiomatic; the very presence of the camera may change what is seen.” Mnookin, *supra* note 113, at 154-55.

248. Consider confession expert Saul Kassin’s comment that, even unfilmed, a “confession produced by a trained interrogator is like a Hollywood drama: Scripted by his or her theory of the case, rehearsed during hours of interrogation, and enacted on camera by the suspect. Often the result is a compelling but false illusion.” Kassin, *Videotape*, *supra* note 242.

or a person or a culture is not necessarily the most accurate (or authentic) record of what happened, who the person is, or how the culture manifests. Likewise, the camera's rendition of the custodial interrogation and confession is not necessarily the best evidence of what happened in the precinct house as between the defendant and his interrogators; it is only one version of what happened. Of course, this status of "best" evidence is precisely the intended goal of the recording statutes and case law establishing a presumption that any non-recorded confessions are inadmissible.<sup>249</sup> Whereas "film makes us impatient for a direct transcription—an actual imprint of the person, unmediated and 'uncreated,'"<sup>250</sup>—the nature of film and of the documentary form precludes that very possibility.<sup>251</sup>

As this Part III will do, we must learn to ask at least the following questions to temper this impatience: whose perspective is the camera capturing? In whose service is the film being mobilized? How, if at all, does the film's frame and point of view aid the endeavor at hand, which is presumably to solve the crime and effect justice?

## A. REORIENTING LEGAL ANALYSIS

### 1. Montage, Fields of Vision, and Film Frames

Recall the state's case against Lataisha Michelle Taylor, convicted of capital murder while she was kidnapping the victim's infant child, and who was subsequently sentenced to life imprisonment without the possibility of parole.<sup>252</sup> On appeal, Taylor asserted various trial errors, one of which was the failure to suppress the film depicting much of her custodial interview and all of her confession. She alleged that her confession was the product of coercion and false promises of leniency. None of the evidence to which she points was caught on film, however, because of unexplained, intermittent filming. Despite condemning police coercion and "the practice whereby law enforcement . . . convey to suspects the impression . . . that cooperation . . . might be of some benefit,"<sup>253</sup> the court affirmed the admission of Taylor's confession. In other words, despite the incomplete film (in the face of the completeness rule) and the concern about pitting an officer's testimony against a defendant's testimony (a reason for filming interrogations in the first instance), this court affirmed Taylor's guilty conviction and life sentence.

This case is uncomfortable not only from the perspective of traditional Fifth and Fourteenth Amendment jurisprudence, but from the perspective of consistently and

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249. See *infra* Appendix (Nebraska, New Mexico, New York, Oregon and Texas).

250. Bruss, *supra* note 244, at 308.

251. Although a larger discussion, it seems to me that this impatience with the mediated nature of film is in fact a reflection of our impatience with the mediated nature (and uncertainty) inherent in law and legal processes.

252. Taylor v. State, 789 So. 2d 787, 789 (Miss. 2001).

253. *Id.* at 794.

adequately considering this new and powerful species of filmic evidence. On the one hand, the court appears almost entirely to ignore the film of the interrogation and confession except when it corroborates the state's case. On the other hand, it discusses the benefit of filmic evidence in terms of "reliability," the most reliable being a complete film, which this film is not.<sup>254</sup> The discomfort arises from these seeming contradictions.

Additionally, this court's analysis of the film as preferred to other evidence (such as testimony) runs counter to the policies underlying recording statutes. Both the rule of completeness and the preference for uninterrupted filmic evidence presume that an absence of gaps in a film means it is complete and not misleading (a manifestation of the misguided assumptions of film's transparency and its presumed moral objectivity). The legislation requiring the filming of the entire interrogation for any part of it to be admitted (absent exceptional circumstances) underscores this point.<sup>255</sup> Here, a film is thought to be the whole story of the interrogation as long as it begins when the interrogation began and ends when the interrogation concluded. As another court has noted, "[t]o create a detailed and complete record, [certain] commentators argue that recording must begin with the initial contact."<sup>256</sup> Indeed, the *Taylor* court devoted an entire section of its opinion to the problem of intermittent and incomplete filming, emphasizing its belief that filmic evidence is most reliable when "whole."<sup>257</sup>

Saul Kassin, a professor of psychology and of legal studies at Williams College and an expert on confessions, has written for years advocating the videotaping of custodial interrogations as a way to protect the police and the accused, promote accurate decision making at trial and bolster the public's trust in the criminal justice system.<sup>258</sup> "The best way to ensure and determine the truth of a confession is to record and see the entire picture," Kassin wrote in 2002, commenting on the revelation of the false confessions in the Central Park jogger case. But what is the "entire picture" when it comes to a film with its inevitable film frame? What does it mean for the film of the custodial interrogation to be "whole" or "complete" (and hence "reliable")? Kassin urges that any filmed interrogation should "cover all custodial interviews and interrogations—and with a camera focused on all participants."<sup>259</sup>

Kassin would have criticized the *Taylor* court's admission of an "incomplete" film and its suggestion that the film was nonetheless reliable, despite its gaps in time. How can film be treated as the most reliable kind of evidence for its

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254. *Id.* at 796.

255. *See infra* Appendix (Connecticut, New Hampshire and Maryland).

256. *State v. Cook*, 847 A.2d 530, 544 (N.J. 2004).

257. *Taylor*, 789 So. 2d at 795-96.

258. *See, e.g.*, Kassin, *Videotape*, *supra* note 242; Saul Kassin, Op-Ed., *False Confessions and the Jogger Case*, N.Y. TIMES, Nov. 1, 2002, at A31.

259. Kassin, *Videotape*, *supra* note 242; *see also* The Innocence Project, False Confessions, <http://www.innocenceproject.org/causes/falseconfessions.php> (last visited Nov. 22, 2005) (saying that "[t]aping the confession without taking the hours of interrogation preceding it is inadequate. The video may contain or lack certain details that undermine or enhance confidence in the confession.").

comprehensiveness and inclusiveness when it clearly has neither quality? What does it mean in the context of the *Taylor* case for the film to be reliable but not “whole”? Then again, what is a film of the “whole” interview anyway? Does it depend on the structure of the interrogation or on the film capturing the crucial parts of the interview? What would those be? Would Kassin be satisfied if the entire interrogation was filmed, from beginning to end? What is the beginning and end of an interrogation exactly? Does it begin with the initial arrest? Does it begin after the suspect has been waiting in the police station but before formal questioning begins? Should the camera be turned on for the “pre-interrogation” stage to subvert the police technique sometimes called “question-first” or the “Miranda two-step”?<sup>260</sup> Should any film of a custodial interview include the provision of *Miranda* warnings?<sup>261</sup> Does a film of the “entire” interview require multiple cameras or parallel editing back and forth between interviewer and interviewee? If so, who controls the camera movement? Who makes the choices of when to film the interrogator and when to cut to the suspect? Or, does Kassin envision a multi-screen viewing of the different films, each focusing on different participants, like a sports event filmed by cameras placed at various vantage points around a field? Would the fact finder then be invited to watch all the screens at once in order to make her determination as to voluntariness, competence and accuracy? Or would someone put together a compilation of all these films, and if so, how?<sup>262</sup>

Despite the intuitive appeal of Kassin’s approach, Kassin hopes for the impossible with film.<sup>263</sup> There is no such thing as the “entire” picture, “all” of the

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260. See *Missouri v. Seibert*, 542 U.S. 600 (2004) (holding, in plurality, that *Miranda* warnings given mid-interrogation, after defendant gave an unwarned confession, were ineffective, and thus a confession repeated after warnings were given was inadmissible at trial). But see *United States v. Thomas*, 2004 WL 3059794, at \*8 (S.D. Ind. 2004) (applying *Seibert* where pre-interrogation interview was not filmed, but post-*Miranda* statements were, holding that statements were nevertheless admissible against defendant).

261. See, e.g., *State v. Ayer*, 834 A.2d 277 (N.H. 2003) (recording of *Miranda* warnings not needed). But see *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (requiring all custodial interrogations, including information about rights, waiver of those rights, and all questioning to be electronically recorded); *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985) (holding that recording of custodial interrogation must “clearly indicate” that it recounts the entire interview).

262. And who is to say that filming all the participants in the interrogation captures the entire interrogation with all the relevant influences? As with a sports event, there are a limited number of cameras and an unlimited number of places to point the camera and perspectives from which to do so. The growing ridiculousness of these scenarios demonstrates how the “solution” of filming the “entire” interrogation is no solution at all.

263. What would Kassin do with the state’s case against Danny Cordova in which all of the film of his interrogation and confession was admitted, even the deceitful statements of the police that unfairly skewed the evidence in the state’s favor? *State v. Cordova*, 51 P.3d 449 (Idaho Ct. App. 2002). Does it nonetheless satisfy Kassin despite its obvious problems of prejudice (even acknowledged as such by the court) because it is a film without gaps in time? Even the film of Cordova’s interrogation, which did not suffer the alleged mechanical troubles as in *Taylor*, nevertheless had an arbitrary (or not so arbitrary) beginning and end. Someone made a decision to begin filming at Time A and stop filming at Time B. Someone made the decision to point the camera in a certain direction and, presumably, not to move it during the interrogation. Someone focused the camera (presumably) on Cordova and failed to include the interrogating officers in the film frame. These decisions not only implicate montage editing but

interview or the “whole” story on film.<sup>264</sup> Films are perspective-based. Each shot of the film is from a particular angle with its inherent, built-in framing problems of the camera’s lens depth, width and color. All filming requires choices of perspective, timing and framing (whether conscious or unintentional), all of which affect the interpretation of the event or person filmed.

The *Taylor* court failed to consider these elements of film form. Indeed, it suggested they do not matter. But they must and do. Gaps in a film are as meaningful as shots that are included in a film. Gaps do not simply indicate an absence—a place holder to be filled in by other evidence, such as testimony. They are meaningful in and of themselves. Perhaps the gaps indicate an intentional obfuscation of events? Perhaps they signal that the unfilmed events are unimportant? Perhaps the gaps are the places in the film most pregnant with meaning, most open to interpretation? In any of these cases, it is impossible to interpret the film and to understand its representational effort as if it did not contain those gaps.

These breaks in the film inevitably make a difference in how we understand it. When watching a film, we “fill in” scenes not shot with our imaginings of what might have happened. We draw connections between the presented shots, the juxtaposition of otherwise disconnected scenes adding significance to the overall story. Indeed, the juxtaposition of otherwise disconnected film frames is precisely how meaning is made in film, i.e., through montage editing.<sup>265</sup> Here, the court glosses over the unshot scenes of Officer Jenkin’s promises of leniency, Captain Ezell’s allegedly coercive behavior and the defendant’s response to both. The court wrongly suggests that these “missing” scenes from the film do not affect its interpretation of what it sees in the film as a knowing and voluntary confession to the murder. This, despite the defendant’s claim that all the following occurred, but was not caught on film:

Ezell pointed his finger at her, yelled that the officers were tired of her wasting their time with her lies, and told her that if she did not tell the truth, she and her boyfriend were “going down.” Taylor also testified that Ezell “cursed twice.” When asked whether Jenkins had offered her any assistance, Taylor testified, “she said that if I would tell her the truth, or tell her what happened, that she would help me the best she could. Taylor testified that because she thought Jenkins “was going to help” her, she gave a confession . . . [S]he testified that she thought she was “going home” if she made a statement.<sup>266</sup>

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narrative structure, as will be discussed *infra*.

264. For that matter, there is no such thing in historical writing as an account of the “entire” event either. All histories require choices of what to depict and what to omit. See, e.g., HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* (1987). As it would be impossible to recount the entire interrogation in written or spoken language, it is impossible to represent the entire interrogation on film. As Hayden White explains, it is the desire for coherence and plenitude of life’s experiences that propels the ideology of singularly truthful or complete histories of those experiences. *Id.* at 4, 9.

265. See *supra* Part II.C (discussing Kuleshov experiments).

266. *Taylor v. State*, 789 So.2d 787, 791 (Miss. 2001).



Had these moments been filmed, is it not possible that the court (or jury) would have been convinced of the coercive environment in which Taylor confessed? Are the emotions evoked by film images not sufficiently powerful to present that possibility? Is that not precisely why film is as persuasive a tool as it is? Is it not possible that the failure to film these moments suggests that someone is hiding the coercion that was exerted on Ms. Taylor just as much as it is possible that the failure to film these moments was simply serendipitous?

In any case, instead of filming these moments crucial to the defense's case, the camera was off. The court found no meaning in that, or at least nothing that changed its view on whether Taylor's confession was erroneously admitted at trial. Importantly, the court did not assume these events did not happen; it merely said that had they happened it would not have changed what we understand from the filmic evidence to be the right result in the case. This is akin to saying that had the film been shot differently, it would mean the same thing. Filmmakers, rhetoricians, or anyone who carefully chooses words or symbols to craft messages should be distressed by this pronouncement.

How a film is made, what it shows (or does not show) and how its shots are strung together are essential to its interpretation. As applied to the circumstances of filmed confessions, 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.<sup>267</sup> Lassiter placed cameras in different parts of the interrogation room and filmed the interrogation and the subsequent confession from different camera angles. Some cameras focused solely on the suspect, others equally on the suspect and the interrogator, and others 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."<sup>268</sup> 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."<sup>269</sup> In the *Taylor* case, Lassiter's studies likely

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267. G. Daniel Lassiter & Audrey A. Irvine, *Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion*, 16 J. APPLIED SOC. PSYCH. 268 (1986) [hereinafter Lassiter & Irvine, *Impact of Camera Point*]; G. Daniel Lassiter et al., *Videotaped Confessions: Is Guilty in the Eye of the Camera?*, 33 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 189 (2001) [hereinafter Lassiter et al., *Guilty in the Eye*].

268. Lassiter & Irvine, *Impact of Camera Point*, *supra* note 267.

269. Lassiter et al., *Guilty in the Eye*, *supra* note 267.

would not have affected the significance of the gaps in the film, but they might have suggested that the film was something other than an objective representation of the interrogation room. In view of Lassiter's studies, the court should have paid more attention to the possibility that Taylor's confession was perceived to be voluntary precisely because the camera focused on her alone (and failed entirely to capture the allegedly offending police officer).

Because of film's perceived veracity and objectivity, both of which, as I have mentioned, are not inevitable results of the film form but part of its ideological play, film is a uniquely persuasive criminal justice tool. This is especially true of a filmed confession. For one, when interrogations are filmed, they are typically filmed "with the camera positioned behind the interrogator and focused squarely on the suspect."<sup>270</sup> As such, filmed confessions are predisposed to being interpreted as voluntary. For another, confessions are outcome determinative in a majority of criminal cases.<sup>271</sup> 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.<sup>272</sup>

Lassiter's studies show what film studies explain: that camera angle, framing and montage—how film frames are structured and sequenced and how that structuring and sequencing makes meaning that is not inherent in the film frame itself—can affect the interpretation of the filmed event. Such is the case with Lataisha Taylor or with any other defendant who confesses on film. 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 language and form. Other than the gaps in the film of Taylor's interrogation and confession, what about the angle from which she was shot? What about the blurriness of the film? (There was testimony that at one point the Chief "attempted to adjust the camera's focus."<sup>273</sup>) What was happening outside the film frame (beyond the shot of Taylor's torso) but in the interrogation room that might have affected Taylor's state of mind? These are not questions we can answer with certainty—indeed, we do not aim for certainty in law or in life—but that does not mean we should refrain from asking them. Indeed, asking them is the first step toward understanding the effects of this most "important art" of film as used at law.<sup>274</sup>

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270. *Id.* at 195.

271. WRIGHTSMAN & KASSIN, *supra* note 101, at 1-2.

272. This is true even if the filming of confessions keeps police coercion in check and the defendant is in fact innocent. If, for example, the trend in filming interrogations is as Lassiter reports it is (presenting the police in the least coercive light), and the understanding of film by courts and advocates is as unsophisticated as I contend it is (as an objective and complete portrayal of the interrogation), if the defendant is innocent but has nonetheless confessed, the confession will be perceived as intelligent, truthful and voluntary.

273. *Taylor v. State*, 789 So.2d 787, 791 (Miss. 2001).

274. LEYDA, *supra* note 227.

## 2. Film Narrative

Far from being transparent or singular in meaning, all films are molded by narrative. The way we understand film is not inherent in the event filmed but rather subject to the film's form. The courts' analyses of the filmed confessions of both Danny Cordova and Kenneth Gray illustrate how narrative can drive the meanings we take from the filmed event.

According to the appeals court, Danny Cordova was only questioned for an hour and a half.<sup>275</sup> During that time, however, Cordova alleges that the police "badgered him, used extremely leading questions, and placed undue pressure on him."<sup>276</sup> In particular, Cordova "cites statements by the interviewing officers' to the effect that one was an expert in detecting deception, that the officers knew what had happened and that they knew Cordova was lying."<sup>277</sup> These statements were not true. But the court held that despite the officer's lies, the atmosphere was not sufficiently coercive to be in violation of the Fifth and Fourteenth Amendments. Nevertheless, according to the court, these statements, as seen on film and in conjunction with Cordova's confession, would have misled the jury.<sup>278</sup> As such, it was error to have played the entire film for the jury.<sup>279</sup> In other words, the court believed that, although the officer's lies did not amount to coercion for the defendant, they would have amounted to confusion for a jury seeking to understand his confession.

The appellate court directed that the trial court should have redacted the film of Cordova's confession. Despite film's purported ability to show the whole picture—one of its touted virtues as a legal tool, this court considered that the whole picture could not be trusted in the hands of the jury. "Those comments [that the officer was an expert in deception detection] could have been easily redacted without harming the context of Cordova's later admissions."<sup>280</sup> But why encourage redaction when a film (at least this film) is believed to depict what, in fact, happened in the detention room? If film is as transparent and objective and as much of a moral observer as the case law and legislation intimate, why are redactions necessary at all? Do they not corrupt the otherwise transparent and objective story being told? Indeed, do redactions not corrupt the untainted reality transmitted through the film medium?

By taking on the role of film editor, the court is wrestling with questions of narrative, with decisions about which details to include and which to exclude from the story being told, in order to achieve the story's ostensible goal. (A fair trial? An affirmation?) In debating whether certain of the officer's statements should be played for the jury, the court is also acknowledging that the story being told is susceptible to different interpretations based on the inclusion or omission of the

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275. State v. Cordova, 51 P.3d 449, 451 (Idaho Ct. App. 2002).

276. *Id.* at 452.

277. *Id.*

278. *Id.* at 454.

279. *Id.* at 456.

280. *Id.* at 455. Other comments—those made by the officers indicating that they believed Cordova was lying—were deemed admissible as part of the film properly shown to the jury.

details discussed.<sup>281</sup> This is a far cry from the assumption about film that underlies the policies instituting recording requirements: that film is a valuable tool because of its ability to capture the whole truth.

Insofar as the function of narrative in documentary film is also to affect the film's credibility and its moral tone,<sup>282</sup> it is particularly ironic that here the court disputes the inclusion in the film of its subject's own meditations on credibility. Whereas an officer may lie to a suspect about his expertise in deception detection and all the while maintain a constitutionally acceptable custodial atmosphere (calling into question the officer's trustworthiness while he judges the suspect's), these same lies are perceived to poison the jury's perception of the truthfulness of the confession. In other words, seeing the "whole story" on film enables the court to determine whether the confession was in fact involuntary although it also renders the jury's verdict suspect. In this way, the court's narrative choices—what aspects of a story make it more or less believable and what should or should not be included in the jury version of the film—are perceived as necessary to affect due process.

According to this court, the film has at least two implicit narrative impulses:<sup>283</sup> one that is dominated by the interrogating officer who directs the jury's interpretation of the film and of the suspect's inculpatory statements,<sup>284</sup> the other that results when the court excises the officer's lies from the film. In other words, the film of Cordova's confession embodies a conflict between the officers' statements and Cordova's. That conflict is implicitly narrated by the officer's authoritative position: it is because of the credibility inherent in the officer's law enforcement role that the court worries about the jury's perception of his deceptive statements. The conflict is then narrated again by the film itself, its framing and its perspective, and once again by the court's interpretation of the film through its redaction for the jury. No doubt, Cordova could tell yet another story about his interrogation using the same basic facts as mobilized by the state and the court but that reaches a different conclusion. Each of these different versions is a function of narrative choice and of voice.<sup>285</sup> And the fact of these different versions

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281. Otherwise put, if the details didn't effect the story's reception, there would be no discussion at all.

282. "Narrative not only facilitates the representation of historical time, it also supplies techniques by which to introduce the moralizing perspective or social belief of an author and a structure of closure whereby initiating disturbances can receive satisfactory resolution . . . giv[ing] an imprimatur of conclusiveness to the arguments . . . advanced by the film." Nichols, *Avant-Garde*, *supra* note 13, at 589-91.

283. "This hierarchy of voices reveals a dynamic in which views of the world are [at least] doubly constructed. A scene presents historical events [the interrogation and confession] in which voices [the police officers' and the suspect's] . . . may compete and [also] presents the narrator's retroactive perspective on the historical events." LANE, *supra* note 168, at 24-25. Lane is discussing narrative in autobiographical documentary, of which I believe confessions are a subgenre.

284. See Kassin, *Videotape*, *supra* note 242 ("A confession produced by a trained interrogator is like a Hollywood drama: Scripted by his or her theory of the case, rehearsed during hours of interrogation, and enacted on the camera by the suspect. Often the result is a compelling but false illusion.")

285. See, e.g., Barbara Herrnstein Smith, *Narrative Versions, Narrative Theories*, 7 CRITICAL

demonstrates that filmic evidence—even purportedly unscripted films like *evidence vérité*—is subject to multiple, compelling (and sometimes conflicting) interpretations based on the narrator’s perspective on or bias toward the event narrated.

The case of *State v. Gray* illustrates a different aspect of narrative film: its cohering and totalizing function. Recall that Kenneth Gray was a juvenile accused of home invasion and murder. The confession he eventually gave to the police was filmed, but the lengthy interrogation that led up to the confession was not.<sup>286</sup> Gray contested the admission of the film of his confession at trial on the basis that he was incompetent to knowingly and voluntarily confess due to youth and mental illness.<sup>287</sup> The appellate court rejected the appeal, despite significant inconsistencies in the documentary evidence that supported Gray, because the film of Gray’s confession was perceived by the court to be direct and persuasive evidence of Gray’s competence and maturity.

Like many courts that are presented with a film of an interrogation or confession on the one hand, and scientific (or other documentary) evidence suggesting involuntariness or incompetence on the other, this court considers the film the most reliable depiction of the subject it purports to represent. The film makes the court feel present at the interrogation—in the same way that the audience of the Lumière brothers’ first public showing of *L’Arrivée d’un Train en Gare* felt present at the arrival of the train in the station. The court feels so comfortable after seeing the film that it vouches for the fact of Gray’s competence despite all else that is not visible on film or that went on before, after and around the film and that was supported by credible evidence. Film’s ideological and illusory reproduction of reality grabs this court and convinces it.

Given the film’s power of persuasion, what do we think of the details of the defendant’s personal circumstances not caught on film that the court nevertheless rehearses and with which it later dispenses?<sup>288</sup> Why does the court paint such a vivid picture of defendant’s interrogation (the details of which were not on film) only to conclude that “the videotape alone is persuasive evidence that Defendant knowingly and voluntarily waived his juvenile Miranda rights”?<sup>289</sup> I have suggested that the court describes the interrogation with such particularity in order to lend credibility to its sentiment that the film of Kenneth Gray’s confession exposes Gray’s true character—his criminal culpability and his mature demeanor. The details serve another purpose, however: to lend credibility to the film as the most coherent account of Gray’s state of mind and of the crime under investigation. Not only is the film believed to be a transparent rendering of Gray’s person, but it

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INQUIRY 213-236 (1980).

286. *State v. Gray*, 100 S.W.3d 881, 885 (Mo. Ct. App. 2003).

287. *Id.* at 886.

288. The court describes, among other things, Gray’s juvenile record, *id.* at 887, his mental illnesses, *id.* at 888, and his halting responses to interrogator’s questions, *id.* at 887, all of which arguably undermine the court’s conclusion that Gray voluntarily and knowingly confessed to the murder.

289. *Id.* at 891.

is the most coherent rendering of the story of the crime and Gray's involvement in it. The film—its beginning, middle and end (and because of that which was left out)—is a neat package with few, if any, loose ends. The court repeats the details of the interrogation not caught on film to explain how messy that other story would be—ostensibly to explain how convoluted the story becomes when forced to make the tangible and testimonial evidence consistent with the court's interpretation of the film—as compared to the supposedly lucid and consistent presentation of Gray's person and confession on film.

The court advises that the film is the most cogent rendering of the confession, confessant and crime. Yet in a world that has embraced (at least to a significant extent) a post-structuralist critique of singular, unified truths (qua stories or histories or historical accounts), any story captured on film that claims to be the whole truth because it is the most coherent is epistemologically suspect. Indeed, narrative theory teaches us as much.<sup>290</sup> “For any particular narrative, there is no single *basically* basic story subsisting beneath it but, rather, an unlimited number of other narratives that can be *constructed in response* to it or *perceived as related* to it.”<sup>291</sup> This is true for film, just as it is for any storytelling medium.<sup>292</sup>

And so, the excess in film, just like the excess in law—such as the tangible and testimonial evidence cited by the *Gray* court—“is the random and inexplicable, that which remains ungovernable within a textual regime [be it film, literature or law] presided over by narrative.”<sup>293</sup> Narrative binds the telling, renders it authoritative and significant. “Far from being a problem, then, narrative might well be considered a solution to a problem of general human concern, namely, the problem of how to translate knowing into telling, the problem of fashioning human

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290. “The new [film] subject is never totalizing and unified. According to this logic, if any autobiographical documentary constructs the subject in a totalizing position, in the mold of ‘classical’ autobiography, the documentary is epistemologically suspect.” LANE, *supra* note 168, at 26.

291. Herrnstein Smith, *supra* note 285, at 221. Herrnstein Smith goes on to say:

2. Among the narratives that can be constructed in response to a given narrative are not only those that we commonly refer to as “versions” of it (for example, translations, adaptations, abridgements, and paraphrases) but also those retellings that we call “plot summaries,” “interpretations,” and, sometimes, “basic stories.” None of these retellings, however, is more absolutely basic than any of the others. . . .

4. The form and features of any “version” of a narrative will be a function of, among other things, the particular motives that elicited it and the particular interests and functions it was designed to serve.

*Id.* at 225.

292. See, e.g., TOM GUNNING, D.W. GRIFFITH AND THE ORIGINS OF AMERICAN NARRATIVE FILM 17 (1991) (“The primary task of the filmic narrator must be to overcome the initial resistance of the photographic material to telling by creating a hierarchy of narratively important elements within a mass of contingent details. Through filmic discourse, these images of the world become addressed to the spectator, moving from natural phenomena to cultural products, meanings arranged for a spectator. *The filmic narrator shapes and defines visual meanings.*”) (emphasis added).

293. NICHOLS, BOUNDARIES, *supra* note 2, at 141 (1991).

experience into a form assimilable to structures of meaning. . . .”<sup>294</sup> This is no less true of law and the evidentiary and constitutional questions presented in *State v. Gray* than it is of film. “Real-life stories cohere only incompletely. . . . [P]ersuasion [of guilt or innocence] requires a story, but a compelling story requires both less and more than the evidence itself. It requires us to ignore what doesn’t fit, and simultaneously to invent or imagine the missing pieces.”<sup>295</sup> The *Gray* court’s reliance on the film as the most persuasive evidence of defendant’s competence and guilt because of its coherent character (and its exclusion of the “excess” facts about Gray’s mental illness or medication, for example) is really a comment on the film’s narrative force rather than its epistemological value or legal relevance.

As it is with so many filmed confessions (or filmic representations generally), Kenneth Gray’s filmed confession becomes his destiny. Yet that need not be the case. The value of narrativity, so to speak,<sup>296</sup> is not only its cohering effect (and thus its inherent logic) but its inevitable multiplicity. There is always already more than one story to be told<sup>297</sup>—that is, by its nature, the reason for a trial. Finding the alternative stories that the film tells or could have told will go a long way toward demystifying the effect of filmic evidence and truly furthering law’s promise of due process.<sup>298</sup>

## B. RESITUATING POLICY

Film scholar Bill Nichols writes:

Every film is a documentary. Even the most whimsical of fictions give evidence of the culture that produced it and reproduces the likenesses of the people who perform within it. In fact, we could say that there are two kinds of film: (1) documentaries of wish-fulfillment and (2) documentaries of social representation.<sup>299</sup>

Are filmed custodial interrogations the former or the latter? Likely, they are both. How are filmed interrogations documentaries of wish fulfillment? We wish that they help preserve constitutional rights and enable the incarceration of only

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294. Hayden White, *The Value of Narrativity in the Representation of Reality*, 7 *CRITICAL INQUIRY* 5, 5 (1980) (emphasis omitted).

295. Mnookin, *supra* note 113, at 170-71.

296. This is the title of Hayden White’s famous essay. See *supra* note 294.

297. See Herrnstein Smith, *supra* note 285, at 213.

298. One can access those alternative stories by asking at least the following questions: How does it matter to the meaning garnered by the film that it begins and ends where it did? Would there have been a different climax? A briefer or more drawn out sense of time? Whose voice or point of view is dominant in the film? Whose voice or point of view is subordinate? What other points of view are omitted from the film? Do the various voices embody a conflict? Would that conflict resolve differently if the film ended at an alternative point? How would the film have looked different and therefore how would it have told a different story if it had been shot from a different perspective? How would the film have been differently understood had the camera’s focus been better? Worse? How would the film have been differently interpreted had the lighting for the camera been brighter? Darker? Are there voices or activities going on outside the film frame that are evident but not seen? How would the film have been differently understood had the camera filmed that activity instead of what was filmed?

299. NICHOLS, *BOUNDARIES*, *supra* note 2, at 1.

those guilty of the crime for which they have been accused. How are they documentaries of social representation? They preserve a slice in time of a social interaction between suspect and police officer, a drama birthed from legal culture, no doubt influenced and shaped by the very act of the filmmaking itself.

As either wish-fulfillment or social representation, all documentary has its origins in the state-sponsored political art of the 1920s and 1930s. Are contemporary films of custodial interrogations and confessions just like those early films (by Vertov, Flaherty and Grierson, for example), aiming to convince general audiences of the political and social value of their subject matter? How might it make sense, in light of the film history and theory discussed above, to rethink the filming of custodial interrogations as a film project aimed to rehabilitate the reputation of the criminal justice system? Is not the social and political value of these state-sponsored film projects (be they judicially or legislatively mandated) that they convince 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, that when they do so they are in fact guilty and that, as such, a trial is a waste of limited time and resources? To be sure, there is a defendant-friendly impulse behind the filming of interrogations: deterring and exposing police abuse. Ironically, however, these suspect-focused police films use the hegemonic effect of filmic representation to render the defendant's guilt the dominant thrust of their narrative. Thus, this ostensibly defendant-friendly legal tool in most cases forecloses the possibility of a not-guilty verdict.<sup>300</sup> Is it not true that the films discussed in *State v. Gray*, *State v. Cordova* and *State v. Taylor* precisely accomplish the state's goals of rehabilitation and conviction? In each of these cases, the film was interpreted to corroborate the officer's account of the custodial detention as noncoercive and voluntary. In each of these cases (despite other possible outcomes and in the face of compelling evidence), the film was described as exposing the interrogation room to public scrutiny and affirming the work of police officers and detectives in their fight against crime. In each of these cases, the defendant's conviction was affirmed.

Thinking about the filming of confessions as state-sponsored documentary—as a form of advocacy on behalf of the state—does not reduce the film's value as a legal tool. To the contrary, it reminds audiences that even though film consists of images of lived experience, it is also a species of advocacy, one version of the event. It is molded by the camera's technology and the filmmaker's influence. Thinking about filmed confessions as advocacy encourages analysis and attention to the film's perspective, its argument. This is how lawyers and judges deal with all sorts of other evidence, whether compelling or not. Doing so with film should therefore become second nature.<sup>301</sup> Importantly, thinking about filmed confessions as a

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300. This, of course, presumes a filmed confession or at least a filmed interrogation containing inculpatory statements.

301. The by-now classic example of attorney argument about film—persuasively interpreting it contrary to its “obvious” meaning—occurred in the first Rodney King trial. There, the attorneys who were defending the police officers (whose brutal beating of Rodney King was caught on videotape by a bystander) slowed down the film and interpreted it frame by frame. By so doing, the defense showed



species of documentary film does not repeat the mistake of believing that filmic images are objective, transparent or tell the whole truth (whatever that is and whether or not we can know it).<sup>302</sup> Finally, thinking about the filmmaking in the precinct house as a kind of documentary filmmaking resituates the legal process—of evidence-gathering specifically and of criminal investigation generally—as a kind of storytelling, which of course it is.<sup>303</sup>

In light of the developing vocabulary of “agit prop” and “mockumentary” describing Michael Moore and reality television, why are those same spectators who are critical of these mainstream films and television programs not equally critical of precinct-house filmmaking? Why doesn’t the learned skepticism of film audiences toward independent filmmakers and cable television translate into a skepticism toward police station productions? Where is the developing critical vocabulary contained in popular film reviews as applied to filmed confessions?<sup>304</sup> Surrounded as we are by moving images, we are all film critics of a sort. The resurgence and popularity of overtly political documentary films, those that are not state sponsored but are critical of the government, could readily jumpstart a trend

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how the film, when closely analyzed, failed to show the police beating a defenseless man but instead portrayed the police working to subdue a violent and aggressive detainee. To my mind, this is the exception that proves the rule: advocates can successfully argue about film’s meaning; they just don’t. See NICHOLS, *supra* note 2, at 22-25 (discussing the Rodney King video and its use in the first trial). See also *Judges as Film Critics*, *supra* note 14, at 550-552 (drawing on the King trial as an example of what to do and what not to do with filmic evidence in a courtroom).

302. For the proposition that 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 verdicts”); see also Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1230 (2001) (“[T]he 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) (“Fed. R. Evid. 102 defines the purpose of the rules as ‘that the truth may be ascertained,’ some of the rules themselves have non-veritistic dimensions, while others mix veritistic and non-veritistic concerns”); *What We Do When We Do Law and Popular Culture*, *supra* note 11, at 156-57 (“Th[e] process of social construction [in cultural analysis of law] 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.”).

303. See Mnookin, *supra* note 113, at 157 (“[U]npacking the specific ways in which the films are ‘produced’ also sheds refracted light on the trial itself as a production. That trials, too, are ‘productions’—elaborate staged dramas whose relation to the real is very far from indexical—also almost goes without saying: a naïve realist interpretation of the trial as a cultural form is perhaps even less plausible than a naïve realist take on the genre of documentary.”).

304. It is not a response 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 minds and alter legal or political outcomes). The legislative agenda promoting filmmaking in the precinct house is indeed aimed at changing people’s minds (about law enforcement in particular). It is also not a response to say that the police aim for justice—making sure guilty persons are convicted and innocent people freed—whereas Michael Moore aims to entertain and grow his audience base. 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 harnessing (even pushing the limit of) the power of the state in doing so, all in the interest of the community generally and crime victims specifically.

toward critiquing filmmaking in the precinct house as a form of legal advocacy.

Indeed, 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. Instead, we know right answers at law to be coherent answers in light of all other circumstances and in light of the policies underlying the legal prohibition and its exceptions. For example, we do not 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 whether he did so for justifiable or excusable reasons (however those may be explained). Stated this way, there will likely be multiple, perhaps even mutually inconsistent, right answers to a given legal question.<sup>305</sup> A film of a confession may appear to the naïve viewer to be the most coherent answer to the legal question (“Did he voluntarily and knowingly confess? Is the state correct when it accuses this defendant?”). However, it is the advocate’s job, and the role of the adjudicative process generally, to seek out all other possible coherent answers and to challenge the most obvious one—the accusation launched by the state against the individual. Resituating filmed confessions as contemporary documentary, therefore—as one offspring of the long documentary tradition—triggers the crucial legal demeanors of skepticism and scrutiny. And, 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 through mass media and about the power of the state.

In this light, the purpose of filming custodial interrogations cannot properly be understood as a way to expose the truly guilty and to control coercive police tactics, or, by consequence, to free the truly innocent and document police abuse. Instead, the trend toward filmmaking in the precinct house is better explained as a continuation of the partnership between the filmmaker (the police or prosecutor) and the state, the primary aim of which is to convince the film audiences that accused persons who confess are guilty<sup>306</sup> and interrogators who elicited the confessions have served the public well.

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305. 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).

306. 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. As Peter Brooks has written,

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 238, at 21.

#### IV. CONCLUSION: THE LIMITS OF LOOKING

The subtitle for this conclusion—"Limits of Looking"—comes from an essay by Malcolm Gladwell in which he compares mammography technology to spy plane photography. He writes:

You can build a high tech camera, capable of taking pictures in the middle of the night, . . . but the system works only if the camera is pointed in the right place and even then the pictures are not self explanatory. They need to be interpreted, and the human task of interpretation is often a bigger obstacle than the technical test of picture taking.<sup>307</sup>

Gladwell was commenting that photography and film are only as revealing as their interpreter is convincing. As interpreting mammograms and spy plane film can often be a matter of life and death, interpreting filmed evidence can be as well. Certainly, it is a matter of liberty.<sup>308</sup>

Take, as a recent example, the hundreds of people who were arrested in the streets of New York while protesting at the Republican National Convention.<sup>309</sup> In prosecuting and defending these cases, advocates have been mobilizing filmic evidence of the protests and the arrests. Dennis Kyne was accused of disorderly conduct and resisting arrest during the convention. He allegedly put up such a fight that it took four police officers to haul him down the steps of the New York Public Library. The prosecutor dropped the charges a day into the trial after the defense produced a videotape (shot by a bystander at the scene) showing Mr. Kyne agitated, but plainly walking under his own power down the library steps.<sup>310</sup> The N.Y.P.D. also arrested Alexander Dunlop. Against Dunlop, the state marshaled a police video showing him resisting arrest.<sup>311</sup> However, the defense counsel discovered *two* versions of the same police tape: one that was to be used as evidence against him and one with additional film frames that had been edited out of the police version. What was taken out of the video to be admitted against Mr. Dunlop? Images showing him behaving peacefully. The prosecutor's only explanation was that "a technician had cut the material by mistake."<sup>312</sup>

From these limited incidents, it would seem that both the protesting public and the police understand filmic evidence to be incontrovertible. But by now we should understand this to be a mistake—a mistake about film meaning and form

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307. Malcolm Gladwell, *The Picture Problem: Mammography, Air Power, and the Limits of Looking*, THE NEW YORKER, Dec. 13, 2004, at 74.

308. The same might be said of fingerprint and DNA evidence as well. See, e.g., Jennifer L. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 BROOK. L. REV. 13, 38-39 (2001) (drawing on fingerprinting and DNA evidence as examples and arguing that forms of evidence may escape careful scrutiny when they comport with broader understandings of what is plausible).

309. The New York Times reported over 1,670 criminal cases relating to the arrests at the Republic National Convention. Jim Dwyer, *Videos Challenge Accounts of Convention Unrest*, N.Y. TIMES, Apr. 12, 2005, at A1.

310. *Id.*

311. *Id.*

312. *Id.*

and about legal process and its promise.<sup>313</sup> Indeed, reporting further about the growing use of videotape by the public and the state (for pleasure and for policing), an ABC news journalist recently quoted Miami Police Chief John Timoney, speaking about the police riot in Tompkins Square Park in New York City in 1988, as saying,

From that day forward, more and more protesters were armed with these camcorders . . . to the point where now, a dozen years later or so, . . . it's very hard to find a protester without a camera. And the police are very aware of that. And they are ready with camcorders of their own. . . . If protesters were going to get cameras to show their side, then the police ought to have cameras to show their side of the event.<sup>314</sup>

The point of these recent examples of filmic evidence is to show that we are simultaneously persuaded by film's powerful truth-affect and that we understand we can spin through film precisely the tale we want to tell. What is the lesson learned? That film, like any representational form, must be interpreted and its specific language, its ways of making meaning, accounted for. We must judge film as a mediated discourse and not as reality lived in front of our eyes.

Let me be clear about what I am not saying. In critiquing the legislative and judicial treatment of film in the criminal justice context, I am not suggesting that film is ineffective or harmful as a legal tool. Rather, I am hoping that the critical eye with which we view documentary film (and its subgenres such as reality television) will be cast toward the documentary films made in precinct houses. In the twenty-first century, technology reigns. We should not give ourselves up to its effects without mobilizing the intelligent faculties that created it in the first place.

I will end with a bit of revisionist history in the spirit of there being many versions of a story. I wrote of the Lumière Brothers and their film *L'Arrivée d'un Train en Gare*—one of the first films to be shown to a public audience. Louis Menand has reported that recent film scholarship argues that the story of the audience running from the theater in panic is baseless. Menand says

Audiences did not think that the train on the screen was going to run them over. They knew what was happening: they were watching a movie. Movies are powerful means of expression, but watching one is not the equivalent of being hit over the head with a brick. You can still think. If you don't, it's not the filmmaker's fault. You can withhold your assent to a lot of what Michael Moore implies about George Bush, and still take pleasure in the way he makes [the Bush Administration] look bad. You can

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313. See *supra* note 11.

314. Dave Marash, *Some Turn to Videotape to Challenge Police, Protesters, Officers Use Videotape to Break Case after Protests*, ABC NEWS, June 12, 2005, <http://abcnews.go.com/Nightline/Technology/story?id=833389> (story originally reported on *Nightline* (ABC television broadcast June 7, 2005)). Reminding us that the camera inevitably affects what is being filmed, even in the midst of protests and police emergencies, Chief Timoney goes on to say that "video cameras help his officers, too, by reminding them that at any moment the whole world could be watching. . . . [T]he demonstrators of this generation tend to be much more restrained than demonstrators of their parents' or grandparents' generation—maybe, in part, because they, too, want to look better on videotape."

even think the reason they look bad is that they are bad. It's only a movie.<sup>315</sup>

I would only add to this that lawyers and judges can, and should, withhold judgment on what a filmed confession appears to imply about the suspect and the interrogators, until all other evidence is considered, and until the film is analyzed and understood as the peculiar medium it is. Because so much is at stake, we must remember that, after all, "it's only a movie."

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315. Menand, *supra* note 5, at 96. This highlights one of the greatest differences between film and law, which is, of course, that one can't say "it's just a criminal trial" with the same levity one can muster about a movie. This difference says nothing, however, about the similarly persuasive effects of criminal trials and films on their audiences. This comparison merely draws attention to the fact that law is a manifestation of the legitimate use of force (the justifiable deprivation of property or liberty), whereas film and the film industry (at least most films, filmmaking in the precinct house excluded) may be equally affective and inciting but lack a state function.

## APPENDIX

## State cases and statutes mandating recording of custodial interrogations

State	Case	Statute	Status	Film/ Audio	Specified Crime	Confession or Entire Interrogation
AL	Baird v. State, 849 So.2d 223 (Ala. Crim App. 2002)	X	X	X	X	X
AK	Stephen v. State, 711 P.2d 1156, 1158 (Alaska 1985)	X	Passed	X	X	X
AZ	X	H.R. 2614, 47th Leg., 1st Reg. Sess. (Ariz. 2005), 2005 AS H.B. 2614 (Westlaw) (applies only to juveniles)	Pending	X	X	X
AR	X	X	X	X	X	X
CA	X	S.R. 171, 2005-06 Gen. Assem., Reg. Sess. (Cal. 2005), 2005 CA S.B. 171 (Westlaw).	Passed house, awaiting action in senate	Videotaping not mandatory	X	X
CO	X	X	X	X	X	X
CT	X	H.R. 771, 2005 Gen. Assem. Leg., January Sess. (Conn. 2005), 2005 CT S.B. 771 (Westlaw).	Pending	Film	Capital felony or Class A, B felony	Entire interrogation
DE	X	X	X	X	X	X
D.C.	X	DC Statute 5- 133.20	Passed; later repealed	Not specified	Dangerous crimes and crimes of violence	Not specified

State	Case	Statute	Status	Film/ Audio	Specified Crime	Confession or Entire Interrogation
FL	X	H.R. 1119, 107th Leg., Reg. Sess. (Fla. 2005), 2005 FL H.B. 1119 (Westlaw); H.R. 1169, 107th Leg., Reg. Sess.(Fla. 2005), 2005 FL H.B. 1169 (Westlaw).	Proposed	Not specified	Capital felonies	Not specified
GA	X	X	X	X	X	X
HI	X	X	X	X	X	X
ID	X	X	X	X	X	X
IL	X	20 ILL. COMP. STAT. ANN. 3930/7.2 (West 2005).	Passed	Film and audio	First degree murder investigations	Not specified
IN	X	H.R. 1708, 114th Gen. Assem. Leg., 1st Reg. Sess. (Ind. 2005), 2005 IN H.B. 1708 (Westlaw).	Pending	Film or audio	Murder or other felony investigations	Not specified, but failure to record is a criminal act**
IA	X	X	X	X	X	X
KS	X	X	X	X	X	X
KY	X	H.R. 242, 2005 Gen. Assem., Reg. Sess. (Ky. 2005), 2005 KY H.B. 242 (Westlaw).	Pending	Not specified	Not specified	Not specified
LA	X	X	X	X	X	X
ME	X	ME. REV. STAT. ANN. tit. 25, § 2803-B (2005) (requiring law enforcement agencies to adopt written policies regarding recording)	Passed	Any electronic form	"Serious crimes"	Not specified

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State	Case	Statute	Status	Film/ Audio	Specified Crime	Confession or Entire Interrogation
MD	X	H.R. 46, 2005 Leg., Reg. Sess. (Md. 2005), 2005 MD H.B. 46 (Westlaw).	Pending	Not specified	Miranda warnings and custodial interrogations relating to a criminal investigation of a crime punishable by death	Entire interrogation
MA	X	S.R. 988, 183rd Gen. Court, Reg. Sess. (Ma. 2005), 2004 MA S.B. 988 (Westlaw).	Pending	Not specified	Not Specified	Not specified
MI	X	X	X	X	X	X
MN	State v. Scales, 518 N.W.2d 587 (Minn. 1994)	X	Passed	Not specified	Not specified	Not specified
MS	X	X	X	X	X	X
MO	X	S.R. 397, 93rd Gen. Assem., 2005 Reg. Sess. (Mo. 2005), 2005 MO S.B. 297 (Westlaw).	Effective 8/28/05	Any electronic form	Serious violent crimes, as well as learning disabled and juvenile (both witness and suspects)	Not specified
MT	X	H.R. 1343, 59th Leg., 2005 Reg. Sess. (Mont. 2005), 2005 MT M.D. 1343 (Westlaw).	Pending	Not specified	All felonies	Not specified
NE	X	H.R. 112, 99th Leg., 1st Sess. (Neb. 2005), 2005 NE L.B. 112 (Westlaw).	Pending	Film or audio	Not specified	Not specified, but any statements made that are not recorded are inadmissible*



State	Case	Statute	Status	Film/ Audio	Specified Crime	Confession or Entire Interrogation
NV	X	X	X	X	X	X
NH	X	H.R. 636, 159 <sup>th</sup> Gen. Assem., Reg. Sess. (N.H. 2005), 2005 NH H.B. 636 (Westlaw).	Pending	Any electronic form	Not specified	Entire interrogation
NJ	X	S.R. 287, 211 <sup>th</sup> Leg., Reg. Sess. (N.J. 2004), 2004 NJ S.B. 287 (Westlaw); <i>see</i> <i>also</i> N.J. Ct. R. 3.17	Pending; N.J. Ct. R. 3.17 (effective 1/1/06)	Not specified	Certain enumerated felonies	From <i>Miranda</i> warnings
NM	X	H.R. 382, 47 <sup>th</sup> Leg., 1st Sess. (N.M. 2005), 2005 NM H.B. 282 (Westlaw).	Pending	Film and audio	Not specified	Not specified, but any statements made that are not required are inadmissible absent waiver by suspect*
NY	X	H.R. 1864, 2005 Gen Assem., Reg. Sess. (N.Y. 2005), 2005 NY A.B. 1864 (Westlaw).	Pending	Film and audio	Not specified	Not specified, but any statements made that are not required are inadmissible*
NC	X	X	X	X	X	X
ND	X	X	X	X	X	X
OH	X	X	X	X	X	X
OK	X	X	X	X	X	X

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State	Case	Statute	Status	Film/ Audio	Specified Crime	Confession or Entire Interrogation
OR	X	S.R. 2079, 72nd Leg., 2003 Reg. Sess. (Or. 2003), 2003 OR H.B. 2079 (Westlaw); S.R. 265, 71st Leg., Reg. Sess. (Or. 2005), 2005 OR S.B. 265 (Westlaw).	Pending	Film and audio	Not specified	Not specified, but any statements made that are not required are inadmissible*
PA	X	X	X	X	X	X
RI	X	H.R. 5349, 2005-2006 Gen. Assem., Jan. Sess. (R.I. 2005), 2005 RI H.B. 5349 (Westlaw); H.R. 6071, 2005-2006 Gen. Assem., Jan. Sess. (R.I. 2005), 2005 RI H.B. 6071 (Westlaw).	Pending	Film and audio	Capital cases	Not specified
SC	X	X	X	X	X	X
SD	X	X	X	X	X	X
TN	X	H.R. 204, 104th Gen. Assem., Reg. Sess. (Tenn. 2005), 2005 TN H.B. 204 (Lexis); S.R. 108, 2005 104 <sup>th</sup> Gen. Assem., Reg. Sess. (Tenn. 2005), 2005 TN S.B. 108 (Lexis).	Pending	Film and audio	Not specified	Not specified
TX	X	Tex. Crim. Proc. Code Ann. § 38.22 (Vernon 2005).	Passed	Any electronic recording	Not specified	Not specified, but any statements made that are not required are inadmissible*
UT	X	X	X	X	X	X

State	Case	Statute	Status	Film/ Audio	Specified Crime	Confession or Entire Interrogation
VT	X	X	X	X	X	X
VA	X	X	X	X	X	X
WA	X	X	X	X	X	X
WV	X	X	X	X	X	X
WI	X	X	X	X	X	X
WY	X	X	X	X	X	X

\* Evidentiary rule; presumption of inadmissibility.

\*\* Presumption of admissibility accompanied by criminal sanction.