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CRIMINAL PERFORMANCES: FILM, AUTOBIOGRAPHY, AND CONFESSION

JESSICA SILBEY*

I. INTRODUCTION

The scandal that swirled around James Frey's memoir *A Million Little Pieces*¹ in January 2006 involved the book's misrepresentation of fiction as fact.² Billed as an autobiographical account of his recovery from drug addiction and a life of crime, Frey eventually admitted that he invented many of the book's gruesome and hair-raising details.³ The next scandal followed quickly from the first. It involved the ambivalence on the part of the public and the media regarding Frey's lies.⁴ As one *New York Times* writer indicated,

Mr. Frey's embellishments of the truth, his cavalier assertion that "the writer of a memoir is retailing a subjective story," his casual attitude about how people remember the past—all stand in shocking contrast to the apprehension of memory as a sacred act that is embodied in... "Night," Elie Wiesel's devastating 1960 account of his experiences in Auschwitz and Buchenwald.⁵

Evocation of the Holocaust typically paralyzes conversation. The truth matters. History can and must be told. But it is a fact of human nature that, despite our best intentions, memories are faulty. Moreover, the medium of human memory (i.e., human discourse) is slippery. Language only gets us so far, and in its travels it necessarily transforms the ideas, the persons, and even the facts that it conveys.

The legal system is fraught with this tension between the desire for truth and the constitutive nature of reality as realized through language and discourse. The courtroom trial stages a battle between two storytellers, both with compelling answers to the question of culpability. In a murder case, the truth as to "who did it"

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1. JAMES FREY, *A MILLION LITTLE PIECES* (2003).

2. Randy Kennedy, *My True Story, More or Less, and Maybe Not at All*, N.Y. TIMES (LATE ED.), Jan. 15, 2006, § 4, at 1.

3. Associated Press, *Frey Admits Lying; Oprah Apologizes to Viewers*, Jan. 27, 2006, available at <http://www.msnbc.msn.com/id/11030647>.

4. See Randy Dotinga, *How True Is That Memoir?*, CHRISTIAN SCI. MONITOR, Jan. 18, 2006, at 14.

5. Michiko Kakutani, *Bending the Truth in a Million Little Ways*, N.Y. TIMES (LATE ED.), Jan. 17, 2006, at E1.

and “how” or “why” is necessarily highly contested as lawyers fit the messy stuff of life into the language of mens rea, actus reus, mitigation, and defense.⁶

The James Frey scandals hit a particular nerve, however. Despite our “relativistic culture where television ‘reality shows’ are staged or stage-managed, where spin sessions and spin doctors are an accepted part of politics,”⁷ when a person assumes a confessional stance and then lies, he or she violates an unspoken pact and desecrates the intimacy that has been harnessed to tell the story. One can argue about whether a person was reasonably afraid for his life to act in self-defense, but if that person takes the stand and lies about his or her alleged prior history of abuse, an essential trust has been breached. Described as “a collective ‘will to believe’ in the stories people tell about themselves,” the faith in the autobiographical act is a “deeply rooted impulse.”⁸

This impulse animates the criminal justice system and its focus on criminal confessions. Criminal confession evidence is considered the “queen of proofs” because it is believed to be “the kind of speech in which an individual authenticates his inner truth.”⁹ In a legal system distinguished by the punishment of the guilty and disgraced by the incarceration of the innocent, the law desperately desires confession—but only those that are voluntary—“on the assumption that the guilt spoken from the mouth of the guilty wrong doer is unusually reliable, trustworthy, and truthful.”¹⁰

Toward this end, the legal system and state legislatures are working to make confession evidence that much more trustworthy and accessible.¹¹ As such, confessions—as well as the interrogations that precede the confessions—are regularly filmed.¹² What better way to learn of the defendant’s recounting of the crime than to see it on film? The implication here is that had we seen James Frey

6. As Janet Malcolm has so eloquently written, “The law’s demand that witnesses speak ‘nothing but the truth’ is a demand no witness can fulfill, of course, even with God’s help. It runs counter to the law of language, which proscribes unregulated truth-telling and requires that our utterances tell coherent, and thus never merely true, stories.” JANET MALCOLM, *THE CRIME OF SHEILA MCGOUGH* 1–2 (1999).

7. Kakutani, *supra* note 5, at E1.

8. Kennedy, *supra* note 2, § 4, at 1. Consider this astonishing story about one district attorney’s “will to believe” a defendant’s confession. Defendant Bruce Godschalk was exonerated of two rape convictions after fifteen years in prison when DNA tests came back proving that he was not the rapist. Saul M. Kassir & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 57 (2004). The district attorney who convicted Godschalk refused to release him, however, arguing that the DNA tests were flawed. *Id.* When asked what basis he had for his refusal, he said, “I have no scientific basis. I know because I trust my detective and [the defendant’s] tape-recorded confession. Therefore the results must be flawed until someone proves to me otherwise.” Sara Rimer, *Convict’s DNA Sways Labs, Not a Determined Prosecutor*, N.Y. TIMES (LATE ED.), Feb. 6, 2002, at A14, *quoted in* Kassir & Gudjonsson, *supra*, at 57.

9. PETER BROOKS, *TROUBLING CONFESSIONS* 4 (2000). The phrase “queen of proofs” comes from medieval Europe when confessions stood “at the very apex of the hierarchy of proofs required for the conviction 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 (1991).

10. Austin Sarat, Book Review, 7 J. CRIM. JUST. & POPULAR CULTURE 119, 119 (2000) (reviewing BROOKS, *supra* note 9).

11. Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 116–24 (2005) (describing case law and legislative initiatives that prefer the filming of confessions to discourage coercive interviews and render the confessions themselves more accessible for judicial evaluation).

12. *Id.* at 110–11.

speak the words that he otherwise made up on paper, we would have known he was telling us a lie.

One goal of this Article is to show that the notion of film as a panacea for truth is preposterous because a filmed confession or autobiographical statement is no less susceptible to manufacture or invention than a spoken or written one. A close examination of a filmed confession does not reveal its truthfulness or honesty. To the contrary, a close examination of filmed confessions illuminates the performative aspect of all confessional acts. Framing the confession through a camera lens, as police officers and detectives increasingly do, stresses the qualities of confessional speech as always in the process of forming an identity and therefore as inherently unstable and manifold. Just as spoken or written language only approximates its object and necessarily transforms the ideas, facts, and people referenced, film functions similarly. Film *constitutes* its object. A filmed confession, like a filmic autobiography, constitutes a self; it does not reveal one.¹³ In these terms, the filmed confession may or may not denote previously lived experiences that the criminal confession purports to reference and that the justice system aims to adjudicate.¹⁴ Insofar as we are looking for the truth of a confession in the film of it, we are looking in vain.

The confession as the truthful revelation of an authentic self is a notion deeply imbedded in the U.S. criminal justice system; yet it is contrary to our common experience. The rules of law are smattered with an assumption that people are truthful about things that go to the core of their being, such as their physical security (the physician hearsay exception)¹⁵ and whether they can forgive and be forgiven (the dying declaration hearsay exception).¹⁶ We want to believe that people can and do tell the truth about themselves and about the intimate details of their lives; yet we know that at quintessential confessional moments when people are most vulnerable, scared, or apprehensive, they are likely to embellish the truth.¹⁷ James Frey would tell you that this is not a result of intentional deception, but rather of human nature. When there is much at stake, when we feel that there is, or when we are experiencing physical or emotional stress, we do not think in terms of truth or lies;

13. Filmed autobiography, like a spoken or performed diary, is a form of speech that “put[s] one’s life into focus.” John Stuart Katz, *Autobiographical Film*, in *AUTOBIOGRAPHY: FILM/VIDEO/PHOTOGRAPHY* 10, 10–11 (John Stuart Katz ed., 1978).

14. In terms of speech act theory, the act of confession would be the performative and the experience the confession references would be the constative (the constative being what is said or referenced and the performative being what is done or accomplished with words). As J.L. Austin has taught us, the performative and constative aspects of the speech act do not necessarily coincide. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 1–11 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

15. FED. R. EVID. 803(4) (physician hearsay exception).

16. FED. R. EVID. 804(b)(2) (dying declaration hearsay exception). I have always thought it odd that the *Federal Rules of Evidence* have embedded in them the notion that people do not lie to physicians or to those attending death beds. It seems that there are plausible reasons for being less than truthful with our doctors, such as embarrassment or shame, and for withholding the truth from certain people just before death to spare feelings.

17. That people are prone to invention and lies during moments of physical or emotional stress is one root of the constitutional prohibition against the admissibility of involuntary confessions. SARA C. BENESH, *THE U.S. COURT OF APPEALS AND THE LAW OF CONFESSIONS: PERSPECTIVES ON THE HIERARCHY OF JUSTICE* 33 (2002); Yale Kamisar, *On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 937–38 (1995) (responding to Akhil Reed Amar and Renée B. Lettow and discussing how early U.S. Supreme Court precedent rested the exclusion of coerced confessions on untrustworthiness).

we think instead about persuading our audience to believe what we say and to believe in the person speaking. This desire to persuade might require making sense through stories, partial truths, or active imagination.

A second goal of this Article is to explore the tension between the law's reliance on the confession as exposing the inner self and on the confession as constituting one self among many in light of the history and development of the autobiographical genre, of which confessions are a subset. Scholars assert that the modern form of autobiography began with the "mediaeval practice of [Christian] confession," which institutionalized "a formal system of introspection."¹⁸ Early literary classics in the genre blended the confessional and the autobiographical styles.¹⁹ From there, modern and postmodern literature and art investigated and wrestled with the function and the possibility of autobiography,²⁰ literally "self-life-writing."²¹ These scholarly inquiries ask about the effects, limits, and purposes of writing one's life. The purpose of this Article is to question the foundations of the criminal justice system's emphasis on the filmed confession as the superlative evidentiary proffer by relying on a study of autobiographical film.

I use the word "question" because literary and film scholars debate the theoretical possibilities of accurate and reliable autobiography. Starting in the early twentieth century, structuralists began to expose the inner workings of language and speech as inherently imperfect forms of communication.²² Language by its very nature, according to the structuralists, was never identical to that which it referenced.²³ Post-structuralists believed that the point of modernist literature and art was to demonstrate just this difference, what Jacques Derrida described as "différance."²⁴ The subject of language, and hence the subject of autobiography, is always split, and its meaning is infinitely deferred and never self-identical.²⁵ The subject of autobiography, therefore, was necessarily incoherent.²⁶ Authors set out to explore

18. T.C. Price Zimmermann, *Confession and Autobiography in the Early Renaissance*, in *RENAISSANCE: STUDIES IN HONOR OF HANS BARON* 119, 121 (Anthony Molho & John A. Tedeschi eds., 1971) (discussing the "Renaissance genre of autobiography as a transmogrification of the mediaeval practice of confession").

19. See BROOKS, *supra* note 9, at 102–03 (discussing Jean-Jacques Rousseau's *Confessions*).

20. See Rachel Gabara, *Mixing Impossible Genres: David Achkar and African AutoBiographical Documentary*, 34 *NEW LITERARY HIST.* 331, 332 (2003) (exploring the possibility of autobiographical African film); see also RACHEL GABARA, *FROM SPLIT TO SCREENED SELVES* (2006) (comparing the autobiographical writings of poststructuralist authors with autobiographical films from the same period).

21. James Olney, *Autobiography and the Cultural Moment: A Thematic, Historical, and Bibliographical Introduction*, in *AUTOBIOGRAPHY: ESSAYS THEORETICAL AND CRITICAL* 3, 6 (James Olney ed., 1980).

22. See PHILIP SMITH, *CULTURAL THEORY* 99 (2001) (discussing the linguistic theory of Ferdinand de Saussure).

23. *CULTURAL THEORY: THE KEY CONCEPTS* 381–82 (Andrew Edgar & Peter Sedgwick eds., 2002) (defining the theory of linguistic structuralism).

24. JACQUES DERRIDA, *WRITING AND DIFFERENCE* 280 (Alan Bass trans., Univ. Chi. Press 1978) (1967) (describing "a system in which the central signified, the original or transcendental signified, is never absolutely present outside a system of differences").

25. See SMITH, *supra* note 22, at 117, 131; see also DERRIDA, *supra* note 24, at 280 ("The absence of the transcendental signified extends the domain and the play of signification infinitely."). Derrida's use of the word "différance" plays on a double-entendre: "to defer" and "to differ." *CULTURAL THEORY*, *supra* note 23, at 116.

26. Derrida indicated that the subject was absent, as did fellow post-structuralists Roland Barthes and Michel Foucault. See ROLAND BARTHES, *The Death of the Author*, in *IMAGE-MUSIC-TEXT* 142, 145–48 (Stephen Heath trans., 1977); DERRIDA, *supra* note 24, at 285, 287; MICHEL FOUCAULT, *What Is an Author?*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE* 113, 113–38 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977); see also *infra* Part III.A.1. Foucault described the "relationship" between an author and the text as "the

this tendency by writing their own lives and did so by drawing on fictional impulses. Some famous examples of these experiments include Barthes' *Roland Barthes* by Roland Barthes²⁷ and *Childhood* by Nathalie Sarraute.²⁸ Mary Karr's *The Liars' Club*²⁹ and Maxine Hong Kingston's *The Woman Warrior*³⁰ are more recent examples of the autobiographical act that makes no pretense about being either entirely true or entirely false. With these canonical writers, James Frey is in good company. All of these authors wrote autobiographically in the sense of writing their own lives or, in other words, bringing to life their past experiences by giving meaning to them through words. And all of them therefore understand that doing so inevitably involves imagination. As Tobias Wolff has said of the autobiography genre:

Events don't have a narrative structure....You impose that on them, thereby inevitably changing their nature. Because things don't happen in language. Language is sort of a kingdom of its own. You're transplanting the experience into another domain altogether by putting it down in words. So the very act of turning the past into the stories that your memory tells you is, probably, partly an act of the imagination, even beyond one's own awareness of what one is doing.³¹

This settled philosophy of language and identity—what has been called by one scholar “[a] hyper-awareness of the impossibility of coherent selfhood”³²—has not, interestingly enough, diminished or weakened the confession's signifying function as an emblem of legal truth.³³ In fact, the legislative initiatives throughout this nation requiring that custodial interrogations and confessions be filmed³⁴ assume that the

manner in which a text apparently points to [the author] who is outside and precedes [the text].” FOUCAULT, *supra*, at 115.

27. ROLAND BARTHES, ROLAND BARTHES PAR ROLAND BARTHES 60 (1975). “Ne sais-je pas que, dans le champ du sujet, il n'y pas de référent?” [Do I not know that, in the field of the subject, there is no referent?] *Id.* at 60.

28. NATHALIE SARRAUTE, CHILDHOOD (Barbara Wright trans., John Calder Ltd. 1984) (1983). See also GABARA, *supra* note 20, at xv (“Seeking to escape from conventional models of autobiography, both [Barthes and Sarraute] create...third-person strategies, adding second and third-person voices to the ‘I’ that we expect to find. Both split their narrating voices, resorting to reflexive commentary as they perform a double movement that acknowledges but then ultimately reclaims the pieces of their shattered selves.”).

29. MARY KARR, THE LIARS' CLUB: A MEMOIR (1995).

30. MAXINE HONG KINGSTON, THE WOMAN WARRIOR: MEMOIRS OF A GIRLHOOD AMONG GHOSTS (1975).

31. Daryl Jung, *Wily Wolff*; NOW MAG., Oct. 24–30, 1996, available at <http://www.nowtoronto.com/issues/16/08/Ent/feature2.html> (interviewing Tobias Wolff).

32. GABARA, *supra* note 20, at xiv. Gabara notes how literary scholar “Paul de Man refused the idea that external reality determined the autobiographical text and went so far as to suggest instead the reverse, that ‘the autobiographical project may itself produce and determine the life.’” *Id.* at ix (quoting Paul de Man, *Autobiography as De-facement*, 94 MODERN LANGUAGE NOTES 919, 920 (1979)).

33. LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM 1 (1993) (paraphrasing J.H. Wigmore's conclusion in his 1970 textbook *Evidence* that “confession ranks as absolutely the most influential type of evidence”); see also Saul M. Kasson & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 479–81 (1997) (describing an experiment in which mock jurors were found to give more weight to confession evidence than to eyewitness or character evidence).

34. As I have written in a previous article:

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

confession signifies the authentic subject, a subject that much of modern and post-modern language theory contends either cannot or does not exist—or at least cannot be uttered in language.³⁵

But film is different from writing, or at least that is what the legal trends that prefer film evidence to written documentary or testimonial evidence suggest.³⁶ Film, it is advised in legal opinions and legislative enactments, gives us the most direct access to the person; it paints the most complete picture of the accused.³⁷ Indeed, “film makes us impatient for a direct transcription—an actual imprint of the person, unmediated and uncreated.”³⁸ And perhaps this explains the move away from the written confession at law—which is lamented as being merely a remnant of the interrogation and of the confessant’s story—to the filmed interrogation and confession.

But film *qua* film does not resolve the tension between our desire for self-knowledge and the imperfections of discourse (filmic or written). Film does not resolve this tension precisely because it “makes us impatient.”³⁹ Film’s illusion of immediacy and its manifestation of the experience of bearing witness often overpower our analytical resources.⁴⁰ This impatience is particularly acute in the combination of confession and film, which is a form of autobiographical film that is the confluence of “two putatively...referential traditions (autobiography and nonfiction documentary)” making “[t]he urge to read autobiographical documentary as exclusively referential...undeniably strong.”⁴¹ The reality effect of film—an ideological function and not an essential characteristic—frustrates rather than fulfills the dual goals of criminal justice: procedural fairness and the pursuit of truth.⁴²

In an earlier work, I investigated the legislative trend of filmmaking in the precinct house as a form of documentary film, which is a film genre that aims not to reveal or discover some truth previously disputed (i.e., the guilt or innocence of the defendant), but instead aims to critique and temper inflexible truth claims.⁴³ In that article, I showed how the documentary film genre has its roots in state-

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. 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.

Silbey, *supra* note 11, at 110.

35. See *infra* Part III.A.1.

36. See Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 498 (2004) (describing the use of film as evidence where film is “perceived as the best evidence of some event or fact and as providing a transparent and uncontested representation of reality”).

37. See Silbey, *supra* note 11, at 124–27.

38. Gabara, *supra* note 20, at 336 (quoting Elizabeth W. Bruss, *Eye for I: Making and Unmaking Autobiography in Film*, in AUTOBIOGRAPHY: ESSAYS THEORETICAL AND CRITICAL, *supra* note 21, at 296, 308 (internal quotation marks omitted)).

39. Gabara, *supra* note 20, at 336.

40. JIM LANE, THE AUTOBIOGRAPHICAL DOCUMENTARY IN AMERICA 23 (2002); see also Silbey, *supra* note 36, at 540–42; Silbey, *supra* note 11, at 124–28.

41. LANE, *supra* note 40, at 23.

42. See Silbey, *supra* note 36, at 532–34; Silbey, *supra* note 11, at 143–45.

43. Silbey, *supra* note 11.

sponsored political advocacy.⁴⁴ Comparing filmed confession evidence to documentary film, therefore, counsels caution toward the evidentiary claims of a film's objectivity. Indeed, the comparison suggests that filmmaking in the precinct house may have the incident and short-term effect of reducing police coercion in the interrogation room, but that also it aspires to convince citizens, legal advocates, and judges of the unqualified good that police investigation and interrogation accomplish, however manipulative and coercive.⁴⁵

Examining confession evidence as a form of autobiographical discourse, which is itself a subgenre of documentary film, produces yet another critique of the value of confession evidence, particularly of filmed confession evidence. Autobiographical film accentuates what modern literary and linguistic theory has already explained. "[F]ilm merely shows us what has always already been the case in writing, [it] clarifies for us...the distance which separates the speaking subject [the confessor] from the spoken subject [the guilty],"⁴⁶ which highlights the difference between the subject who speaks and the subject who is heard and understood.

In contrast to its perception as a "supreme empiricist practice,"⁴⁷ autobiographical film is always at least doubly constituted by "the mark of the personal, actual events and a consciousness that bears witness to, and forms an opinion about, these events."⁴⁸ Crudely put, these autobiographical films of defendant confessions feel like they are made by the defendant to tell his story—like a video diary documenting a day in the life of Joe citizen—but in reality they are made by police under intensely stressful circumstances for the purpose of criminal prosecution. Even if the filmed confessions were more like video diaries than precinct house film productions, the following discussion of self-made autobiographical films demonstrates that autobiographical film (such as video diaries) is nonetheless deeply self-conscious of its own referential limitations.⁴⁹ We can see this self-consciousness, a critical consciousness about the referential (im)possibilities of self-expression in film, and indeed in law, in many filmed confessions; awareness of this self-consciousness appears lost in the legal process of evaluating and judging the confession as authentic, voluntary, and truthful.

Part Two of this Article discusses the genesis of written and filmic autobiography. It is said that "[a]utobiography is both the simplest of literary enterprises and the commonest....[but that] it is also the most elusive of literary documents."⁵⁰ This part of the Article establishes certain baseline parameters for autobiography and autobiographical discourse, of which confessional discourse is a part. It discusses the traditional forms of autobiography, how these forms developed, and the functions served by autobiography that are similar to those of confession.

44. *Id.* at 169–71.

45. *Id.* at 171.

46. Gabara, *supra* note 20, at 336 (citing and quoting KAJA SILVERMAN, *THE SUBJECT OF SEMIOTICS* 198 (1988)) (third alteration in original).

47. LANE, *supra* note 40, at 22 (discussing the theories of Paul John Eakin and Paul de Man).

48. Gabara, *supra* note 20, at 332 (quoting Jim Lane, *Notes on Theory and the Autobiographical Documentary in America*, 15 *WIDE ANGLE* 21, 32 (1993)).

49. See *infra* notes 191–193 and accompanying text.

50. Olney, *supra* note 21, at 3.

Part Three launches the polemic that I, along with many literary critics before me, contend has existed as long as autobiography itself: autobiography is inexorably fictionalized. This is so in two ways. First, as every autobiography is an act of “remembering the past in the present, the autobiographer *imagines* into existence another person, another world, and surely it is not the same, in any real sense, as the past world....”⁵¹ Autobiography conjures a person and results in the existence of at least two people: the person telling the story and the person constituted by it (the one speaking and the one being spoken). Asking who the “real” or “authentic” subject is, as we do to adjudicate voluntariness and truthfulness of the confession, creates a misunderstanding about the essential dynamic of the autobiographical act and of confession.

Second, although one may assume that an autobiography or a confession is a truthful story about the person telling it, critics have shown that all autobiography is instead “already a social story,” a story of something other than the self.⁵² Autobiographies are primarily stories of the *situation* in which the act of telling occurs. What is enacted through autobiographical speech, then, is a social architecture of power relations—the assertions of the self against or in conformity with the inquiring force. Although the self may be a focal point of the story, the self of the story does not predate or independently exist outside of it; rather, the self is produced within the story itself. The connection to confessional speech should be clear: *confession concerns the confessional situation rather than the act about which a subject confesses*. A confession should be analyzed in terms of the story it tells about the relationship between the confessor and his or her audience and about how the confession produces a legal identity rather than reveals one that existed in the past. Critiques of classic autobiographical theory underscore the inevitable constitutive power of language on identity, the inventive nature of much autobiographical discourse, and the autobiographical focus on situation rather than self.⁵³ Filmic autobiographies are no different; they are simply a much more recent manifestation of the form. Part Three will also highlight the flood of autobiographical films since the 1960s and their characteristic play on these issues.

Part Four will bring these theories of autobiography to bear on filmed confessions. Close attention to the rhetoric of filmed confessions in light of their place in the history and development of autobiographical discourse, as manifested in twenty-first century film and video, demonstrates how each confessional act brings a self into being, evidencing the struggle by which that self emerges rather than any “authenticity” of that self and his representation of his past. This contrasts with the prevailing rationale for legislation requiring the filming of confessions—that the film reveals a legal actor and unambiguously exposes his or her guilt or innocence to the film audience.⁵⁴ Part Four looks closely at several filmed confessions to

51. James Olney, *Some Versions of Memory/Some Versions of Bios: The Ontology of Autobiography*, in *AUTOBIOGRAPHY: ESSAYS THEORETICAL AND CRITICAL*, *supra* note 21, at 236, 241 (emphasis added).

52. David E. James, *Lynn Hershman: The Subject of Autobiography*, in *RESOLUTIONS: CONTEMPORARY VIDEO PRACTICES* 124, 128 (Michael Renov & Erika Suderburg eds., 1996).

53. See *infra* notes 138–173 and accompanying text (discussing modern and post-structuralist autobiography).

54. Silbey, *supra* note 11, at 171.

further illuminate the tension inherent in autobiographical impulses and criminal justice goals. The analysis focuses on the filmed confession of Bernhard Goetz⁵⁵ but is supplemented by analyses of several other filmed confessions from criminal investigations that are less notorious.

Part Four aims to show that filmed confessions are not particularly helpful evidentiary proffers to expose the truth or falsity of a defendant's statement. As filmed autobiographical statements, filmed confessions describe a present situation more than any past event. They demonstrate the limits of filmic discourse (and language more generally) and undermine claims of transparency. Such an analysis shifts the discussion from one about truth and lies to one about advocacy and persuasion and from one about past intent and criminality to one about present circumstances and identity.

II. AUTOBIOGRAPHY

A. *Written Autobiography*

1. Toward a Definition of Autobiography

Many literary scholars have made it their life's work to define and discern that which makes autobiography autobiography.⁵⁶ Suffice it to say, the genre is a contested one.⁵⁷ Nevertheless, there is consensus on some parameters of the genre and on its history. Some assert that an autobiography is the history of a person's life—at least some part of that life—as told by the person him or herself.⁵⁸ Translated literally, autobiography means “self-life-writing” and first appeared as a word in the eighteenth century.⁵⁹ Long before that, however, writers undertook the self-conscious documentation of their lives. Some consider Plato's “seventh epistle,”⁶⁰ written in the fourth century B.C., to be an autobiographical document.⁶¹ Certainly Saint Augustine's *Confessions*, written sometime in the fourth or fifth century, constitutes autobiographical writing.⁶² As a form of first person writing that explains or presents one's self to an audience, autobiography has existed for thousands of years, albeit under different generic titles (i.e., memoirs, letters, or confessions).⁶³

55. See discussion *infra* Part IV.

56. See, e.g., ELIZABETH W. BRUSS, *AUTOBIOGRAPHICAL ACTS: THE CHANGING SITUATION OF A LITERARY GENRE* (1976); PHILIPPE LEJEUNE, *LE PACTE AUTOBIOGRAPHIQUE* (1975); JAMES OLNEY, *METAPHORS OF SELF: THE MEANING OF AUTOBIOGRAPHY* (1972); GEORGES GUSDORF, *LA DÉCOUVERTE DE SOI* (1948); see also *AUTOBIOGRAPHY: ESSAYS THEORETICAL AND CRITICAL*, *supra* note 21.

57. H. Porter Abbott, *Autobiography, Autography, Fiction: Groundwork for a Taxonomy of Textual Categories*, 19 *NEW LITERARY HIST.*, 597, 598 (1988) (noting that “the very elusiveness of the ‘form’ [of autobiography] has become the common thread of much current work on autobiography”). “The more the genre gets written about...the less agreement there seems to be on what it properly includes.” *Id.* (quoting WILLIAM C. SPENGMANN, *THE FORMS OF AUTOBIOGRAPHY: EPISODES IN THE HISTORY OF A LITERARY GENRE*, at xi (1980)).

58. *Id.*

59. Olney, *supra* note 21, at 6.

60. See generally Glenn R. Morrow, *The Theory of Knowledge in Plato's Seventh Epistle*, 38 *PHIL. REV.* 326 (1929) (discussing the historical and philosophical points of view presented in Plato's Seventh Epistle).

61. Olney, *supra* note 21, at 6.

62. See SAINT AUGUSTINE, *CONFESSIONS* (R.S. Pine-Coffin trans., Penguin Books 1961) (n.d.).

63. Of course, autobiography does not have to be in writing. As the next section will discuss, self-presentation exists in all forms of media, including film. “The tradition of representing oneself to others began when

Whereas some form of self-conscious expression about the self may be common across human cultures, the current and familiar manifestation of autobiography as a story about an individual life told by that individual may be a phenomenon birthed from the European Renaissance, “coming at that moment when the Christian contribution was grafted onto classical traditions.”⁶⁴ Georges Gusdorf, a foundational scholar in this area, has gone as far as to suggest that

[t]he concern, which seems so natural to us, to turn back on one’s own past, to recollect one’s life in order to narrate it, is not at all universal. It asserts itself only in recent centuries and only on a small part of the map of the world. The man who takes delight in thus drawing his own image believes himself worthy of a special interest.⁶⁵

The belief that humans are at the center of the universe—and that all truth and knowledge flow there from—is a suspicious, albeit comprehensible, impulse behind autobiographical discourse. To be sure, Descartes’ *cogito* is based in part on the belief that human existence is established through rational thought.⁶⁶ Hegel’s *Philosophy of Mind* echoes this sentiment and announces that self-revelation (which I take to be a consciousness of self and the representation thereof) is where one begins to look for truth.⁶⁷ If the rise of modern European-stylized autobiographical discourse is understood as originating with the Renaissance’s focus on reason and the individual, the more recent manifestation of popular autobiographical discourse—such as tell-all memoirs and self-help books founded on overcoming personal tragedy—resonates strongly with this centuries-old genre.⁶⁸ As Foucault has said, “Western man has become a confessing animal.”⁶⁹

the first anonymous artist traced his hand on a cave wall. Autobiographical film, then, is merely the latest manifestation of a 50,000 year old tradition of revealing oneself.” Jay Ruby, *The Celluloid Self*, in *AUTOBIOGRAPHY: FILM/VIDEO/PHOTOGRAPHY*, *supra* note 13, at 7, 7.

64. Georges Gusdorf, *Conditions and Limits of Autobiography* (James Olney trans.), in *AUTOBIOGRAPHY: ESSAYS THEORETICAL AND CRITICAL*, *supra* note 21, at 28, 29.

65. *Id.* For a well-founded critique of this Eurocentric perspective, see Gabara, *supra* note 20, at 333–34.

66. RENÉ DESCARTES, *DISCOURSE ON METHOD AND MEDITATIONS 24* (Laurence J. Lafleur trans., The Bobbs-Merrill Co. 1960) (1637, 1641) (“But I soon noticed that while I thus wished to think everything false, it was necessarily true that I who thought so was something. Since this truth, *I think, therefore I am*, . . . was so firm and assured that all the most extravagant suppositions of the sceptics were unable to shake it, I judged that I could safely accept it as the first principle of the philosophy I was seeking.”).

67. GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF MIND* §§ 385, 388 (William Wallace & A.V. Miller trans., Clarendon Press 1971) (1830). *See also* Michael Renov, *Video Confessions*, in *RESOLUTIONS*, *supra* note 52, at 78, 80 (“[T]he Western subject finds his sweetest repose in confessional discourse.”).

68. Jim Lane has written that

[s]ome historical analyses associate the rise of experiential culture and politics with the bourgeois ideology of individualism. They suggest that the rise of personal discourses is linked to American liberalism, presumes a universality of experience, and advances an arrogant individualism. The individualist position can lead to the reduction of complex social issues to problems of ego.

....

No doubt, some of the self-directed movements of the seventies created parts of the atomized, politically paralyzed world that . . . others vilify. Today discourses on the self saturate our mass media. Nationally broadcast television talk shows exhibit anonymous people airing their dirty laundry for a fee.

LANE, *supra* note 40, at 20–21.

69. MICHEL FOUCAULT, *1 THE HISTORY OF SEXUALITY: AN INTRODUCTION* 59 (Robert Hurley trans., Pantheon Books 1978) (1976).

2. The Purposes of Autobiography

At least three ambitions commonly drive the compulsion to tell one's story: understanding, justification, and preservation of self. Autobiographies are written to better understand oneself, and as one writer has said: "to put one's life into focus."⁷⁰ This makes sense. When we write, we closely examine the subject of our writing, which is an exercise that tends to result in enhanced or improved comprehension. But the autobiography is not only a means to achieve self-knowledge, rather, it is both a revelation of that individual as well as an explanation of the subject's innermost being. As Georges Gusdorf has explained:

The man who in recalling his life sets out to discover himself does not surrender to a passive contemplation of his private being. The truth is not a hidden treasure, already there, that one can bring out by simply reproducing it as it is. Confession of the past realizes itself as a work in the present: it effects a true creation of self by the self.⁷¹

Despite tendencies toward comprehension and completeness, which are markers of faithfulness in a historical representation, autobiographical discourse is also often a kind of apology—a reconstitution or interpretation of the self that is not "objective [or] disinterested...but [is] a work of personal justification."⁷² It is a form of control over one's identity and reputation,⁷³ and one way confession controls is to fix or to preserve an identity in writing.

Why, then, would anyone believe the representations contained in an autobiography? There are several reasons. Who can better explain (or "authorize") the truth of his or her motivations, feelings, and experiences than the author?⁷⁴ The person who is closest to the experience and is most connected to the story is telling it. There is an evidentiary presumption that the person who has lived the experience is the most competent to tell it accurately. To be sure, this fact "by no means establishes that every autobiography is a 'true' account, but the aura of authenticity nevertheless surrounds the autobiographer's tale."⁷⁵ The autobiography is read with the good

70. Katz, *supra* note 13, at 11.

71. Gusdorf, *supra* note 64, at 44.

72. *Id.* at 39 ("[T]he task of autobiography is first of all a task of personal salvation."). Autobiography "does not show us the individual seen from outside in his visible actions but the person in his inner privacy, not as he was, not as he is, but as he believes and wishes himself to be and to have been." *Id.* at 45; *see also* JEROME HAMILTON BUCKLEY, *THE TURNING KEY: AUTOBIOGRAPHY AND THE SUBJECTIVE IMPULSE SINCE 1800*, at 39–40 (1984) ("The ideal autobiography...describes a voyage of self-discovery, a life-journey confused by frequent misdirections and even crises of identity but reaching at last a sense of perspective and integration. It traces through the alert awakened memory a continuity from early childhood to maturity or even to old age....And as a work of literature it achieves a satisfying wholeness.").

73. Autobiographies are often written after public scandals or otherwise turbulent times. *See, e.g.*, WILLIAM JEFFERSON CLINTON, *MY LIFE* (2004) (published after the Monica Lewinsky scandal). Some autobiographies are delayed just to have the last word. *See, e.g.*, LINDA HAVERTY RUGG, *PICTURING OURSELVES: PHOTOGRAPHY AND AUTOBIOGRAPHY 4* (1997) (discussing how Mark Twain delayed the publication of his autobiography until after his death in an attempt to have "the last word on himself").

74. *See* HAVERTY RUGG, *supra* note 73, at 4 ("Autobiography is itself an exertion of control over self-image, for in writing an account of one's own life, one *authorizes* the life, claiming a kind of privilege for one's own account.").

75. *Id.*

faith presumption that the narrator is telling the truth.⁷⁶ As readers of (or listeners to) a story that we want to be told, we also want it to be true. After all, who wants to think that they are being told lies? We would think little of ourselves and less of the author if that were the case. As one scholar has indicated, there is a “collective will to believe in the stories people tell about themselves. This is a deeply rooted impulse....It is what makes autobiography matter to autobiographers and their readers.”⁷⁷ Perhaps this desire to believe is explained in part by the flattery that one feels by having the privilege to hear the private story of another’s life. We largely disregard the narcissism that underlies the autobiographical act and experience a familiarity and closeness with the autobiographer.⁷⁸ This intimacy is crucial—some might even classify it as a tactic—given that the autobiography is written to be consumed by an audience. Without successfully attracting and retaining an audience, the purposes of autobiography—understanding, justification, and preservation of self—remain unfulfilled.

The experience of “discursive transparency” is therefore essential to the “achieved life story” that is often sought to be conveyed through autobiography.⁷⁹ The expression of commitment from the subject of autobiography is so great, as is the loyalty created in the reader, that exaggerations or slippery assertions of fact may be overlooked. Confessions expert Saul Kassin describes this characteristic of the confession and of the confessor as creating an “illusion of transparency” where people tend “to overestimate the extent to which their true thoughts, emotions, and other inner states can be seen by others.”⁸⁰ This tendency also holds true for the audience of the confession, which tends to be overconfident in its ability to determine whether the confessor is telling the truth.⁸¹ This “illusion of transparency” explains the success of James Frey’s memoirs, why everyone believed its outrageous story of addiction and recovery, and the scandal that followed the disclosure of its fictions.

B. *The Filmed Autobiography*

1. Style

Expanding the mode of autobiographical discourse from writing to film seems to be a natural evolution. Insofar as autobiography aims to expose a soul, film appears uniquely suited for that task. Film is said to provide transparent access to the thing being filmed, capturing “things as they are.”⁸² Filmic representations are typically

76. This is sometimes called the “autobiographical pact.” See LEJEUNE, *supra* note 56 (attempting to define the idea of “autobiography” as based on a promise between the person telling the story and his audience that the story is based on personal experience).

77. Kennedy, *supra* note 2, § 4, at 1 (elaborating on the ideas of John Paul Eakin) (internal quotation marks omitted).

78. Similarly, we may also tend to discredit the statement of self-aggrandizement and instead believe statements against one’s self-interest. This notion is embedded in the *Federal Rules of Evidence*. See, e.g., FED. R. EVID. 804(b)(3) (statement against interest hearsay exception).

79. Abbott, *supra* note 57, at 599.

80. Kassin & Gudjonsson, *supra* note 8, at 40 (internal quotation marks omitted).

81. *Id.* at 56–58 (describing confession evidence in court and how people often overestimate their ability to differentiate between true and false confessions).

82. ROBERT STAM ET AL., *NEW VOCABULARIES IN FILM SEMIOTICS* 186 (1992) (“Since photochemical

perceived as objective and unbiased.⁸³ Indeed, Oliver Wendell Holmes described photographic reproduction as “*the mirror with a memory*,” insisting that photographic technology enabled the perfect duplication of a person or an event.⁸⁴ Autobiographies told through moving pictures (or assembled photographs) should be the pinnacle of authorial incarnation inasmuch as they “re-anchor the subject in the physical world [and] insist on the verifiable presence of an embodied and solid individual.”⁸⁵

Fundamentally referential and perceived as “uncoded” by authorial intention or cultural context,⁸⁶ film appears to enhance the truth-seeking and explanatory dimensions of the autobiographical act. “While we know on one level that photographs are the products of human consciousness, they also can (have been, are, will) be taken as ‘natural’ signs, the result of a wholly mechanical and objective process, in which the human holding the camera plays an incidental role in recording ‘truth.’”⁸⁷ As such, the filmic autobiography as evidence transcends the obstacles that written and testimonial forms of evidence present because written and oral language are semiotically motivated whereas photographic images are not.⁸⁸

But of course film is neither transparent nor objective, and although photographs may be dominantly denotative, they are also connotative.⁸⁹ Photographs are meaningful in light of historical circumstance and may mean different things depending on varying cultural contexts.⁹⁰ We “read” photographs according to certain “itineraries” of interpretation and thought, which is not unlike the manner in which we approach non-abstract painting or other mimetic art forms.⁹¹ Moreover, film is a series of photographs strung together to create a certain meaning and is infinitely more symbolic than floating photographs. That is, film operates at a higher order of

processes involve an indexical link between the photographic analogon and its referent, cinematography bears unimpeachable witness to “things as they are.””).

83. These assumptions dominate film’s use at law. See Silbey, *supra* note 11, at 124–28.

84. Oliver Wendell Holmes, *The Stereoscope and the Stereograph*, 3 ATLANTIC MONTHLY 738, 739 (1859), reprinted in CLASSIC ESSAYS ON PHOTOGRAPHY 71, 74 (Alan Trachtenberg ed., 1980).

85. HAVERTY RUGG, *supra* note 73, at 2.

86. ROLAND BARTHES, THE RESPONSIBILITY OF FORMS 5 (Richard Howard trans., Hill & Wang 1985) (1982) (“Here appears the particular status of the photographic image: *it is a message without a code....*”).

87. HAVERTY RUGG, *supra* note 73, at 5.

88. “Semiotics” is the theory and study of signs, such as written or oral language, and the laws governing them. SMITH, *supra* note 22, at 99–100. As Ferdinand de Saussure noted, the relationship in written or oral language between words and the concepts they stand for is arbitrary and simply a matter of convention. *Id.* at 99. At first blush, film and its capacity to convey meaning appear unlike written or oral language in that film and photography seem to derive their significance not through the conventional relationship between signifier (word) and signified (concept or meaning conveyed) but because of film’s ability to capture reality unmediated.

The guiding myth...inspiring the invention of cinema, is the accomplishment of that which dominated in a more or less vague fashion all the techniques of the mechanical reproduction of reality in the nineteenth century, from photography to the phonograph, namely *an integral realism*, a recreation of the world in its own image, an image unburdened by the freedom of interpretation of the artist....

ANDRÉ BAZIN, WHAT IS CINEMA? 21 (Hugh Gray trans., Univ. Cal. Press 4th prtg. 1971) (1958–1965) (emphasis added).

89. BARTHES, *supra* note 86, at 6. (“[A]ll these imitative ‘arts’ comprise two messages: a *denoted* message, which is the *analogon* itself, and a *connoted* message, which is the way in which the society represents, to a certain extent, what it thinks of the *analogon*. This duality of messages is obvious in all reproductions which are not photographic....”).

90. See *id.* at 16–20.

91. See *id.* at 16–17.

meaning than the purely “imitative” (a word that shares an etymological root with the word “image”).⁹²

There are numerous ways in which film (and photography) “makes meaning” apart from its denotative aspect.⁹³ Frame composition (i.e., what is included in the film frame and what is excluded), frame focus (i.e., deep focus, shallow depth of field, soft focus, close up, or wide angle), camera angle, camera movement, filter, and lighting are all aspects of filmmaking that may be inadvertent but that nonetheless affect what the film means to its audience.⁹⁴ The principle of montage—how single film frames vary in significance depending on the images that precede and follow each shot—is also a central feature of film semiotics.⁹⁵ Filmmakers typically draw on montage techniques while actively filming and while cutting and slicing in the editing room. But the montage effect can also occur when the film camera is turned on and off, whether accidentally or deliberately. Analysis of any film evidence, be it autobiographical, confessional, or testimonial, should consider these filming techniques (and there are many, many more)⁹⁶ when rendering judgment of the film or judgment based on the film.⁹⁷

Ironically, when combined, these filmmaking techniques and stylizations can create a powerful experience of intimacy between the subject of film and its viewing audience. Camera angle and focus can achieve a striking feeling of closeness to the filmed subject, erasing any alienation or estrangement that the inevitable distance between the camera and its subject might otherwise engender. Whereas canted film shots (angled views in relation to the horizontal and vertical lines of the frame itself) typically distance the viewer from the object of the film, close-up head shots or

92. The words “image” and “imitative” both derive from the Latin verb *imitari*, which means “to imitate.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1128, 1129 (1993). The word “imitative” may be defined as “exhibiting some of the qualities of or formed after a model, pattern, or original.” *Id.* at 1129.

93. DAVID BORDWELL, MAKING MEANING: INFERENCE AND RHETORIC IN THE INTERPRETATION OF CINEMA 3 (1989). Bordwell described one way to interpret a film as constructing “meaning out of textual cues.” *Id.* “In this respect, meaning-making is a psychological and social activity fundamentally akin to other cognitive processes. The perceiver is not a passive receiver of data but an active mobilizer of structures and processes....” *Id.*

94. For working definitions of each of these aspects of filmmaking, see FRANK E. BEAVER, DICTIONARY OF FILM TERMS: THE AESTHETIC COMPANION TO FILM ANALYSIS (1994).

95. Silbey, *supra* note 36, at 534.

96. See generally BEAVER, *supra* note 94.

97. Anne Bowen Poulin has written persuasively on the ways in which the criminal defendant’s image and presentation are distorted by video technology during videoconferencing that takes the place of a defendant’s courtroom appearances. Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1108–09 (2004). She discusses how camera angle and frame composition change the type of information that is communicated to the court about the defendant and she accurately discusses how video minimizes or erases nonverbal cues that are essential aspects of human communication. *Id.*

For example, a panoramic shot of the defendant in the remote location will include distracting elements of the physical space around the defendant. That raises the question of whether the distraction will improperly influence the perception of those in court, or, conversely, whether those in court should be aware of the distracting elements in the defendant’s environment that might influence the defendant’s behavior and concentration. In contrast, a head shot of the defendant will eliminate the distraction but will also eliminate useful information; it cuts out many nonverbal cues from the defendant, conceals distractions in the defendant’s environment, and may create a cramped or confined feeling. In addition, a head shot exaggerates the effect of the defendant’s facial expressions, increasing the negative impact of harsh facial features or unattractive expressions.

Id. (footnotes omitted). See also Silbey, *supra* note 36, at 570 (suggesting that all filmic evidence should be analyzed in terms of its formal and symbolic filmic features).

straight-on body shots generate a sense of openness and sincerity between the film and the viewer. Narrative cohesiveness, such as following a familiar storyline or adhering to traditional generic expectations, when combined with a steady and reliable point of view (for example, a consistent voice-over narrator, or a uniform camera perspective), convey the sense of a whole, dependable, and candid person. Other variations of film techniques often have similar effects. If the goal is to invite viewers into a private world of the film subject in order to better understand his or her character, life story, traumas, and trauma resolutions—whether or not their portrayal is accurate—the distinctive combination of film technique with the ideology of filmic realism make that goal nearly foolproof. It is therefore no coincidence, whether or not it is intentional, that filmed confessions are predominantly filmed with a steady camera focused entirely on the confessant (usually only his or her torso and head) and begin (whether or not the interrogation began here) with the defendant answering the question “tell me what happened...?”

2. Genealogy

a. *Nouvelle Vague*⁹⁸

Autobiographical film did not blossom as a genre until the mid-1960s.⁹⁹ This is perplexing from the point of view of film history because of its close relation to documentary film, which was one of the first film genres to develop at the turn of the twentieth century.¹⁰⁰ Instead, in the 1950s, in the place of autobiographical film (or perhaps as a precursor to the autobiographical film), film criticism and production was dominated by discussions of *auteurs* and *auteur* theory.¹⁰¹ This theory posits that a film can be best understood in light of its maker (in most cases the director); the mark of great filmmakers, such as François Truffaut, Andrei Tarkovsky, and Federico Fellini, is sufficiently identifiable in each film such that the body of work “absorbs and reflects the personality of the *auteur*.”¹⁰² In this way, “every film is in some sense autobiographical.”¹⁰³ Consider films such as Fellini’s *8½*¹⁰⁴ (a film about a filmmaker making a film), Truffaut’s *The 400 Blows*¹⁰⁵ (a film about a troubled adolescent in Paris, as Truffaut was, and the escape that cinema provides) or Tarkovsky’s *The Mirror*¹⁰⁶ (a film about a young man’s relationship with his mother). All are deliberate combinations of fact and fiction and make “no pretense to detachment and objectivity,”¹⁰⁷ yet all are autobiographical.¹⁰⁸

98. *Nouvelle vague* (New Wave) is the movement out of which François Truffaut, Jean-Luc Godard, Alain Resnais, and other French masters came. BEAVER, *supra* note 94, at 259.

99. LANE, *supra* note 40, at 11.

100. BILL NICHOLS, INTRODUCTION TO DOCUMENTARY 82–84 (2001).

101. Gabara, *supra* note 20, at 335.

102. Fereydoun Hoveyda, *The First Person Plural*, in CAHIERS DU CINÉMA: THE 1950S: NEO-REALISM, HOLLYWOOD, NEW WAVE 53, 55 (Jim Hillier ed., Tom Milne et al. trans., Harvard Univ. Press 1985) (Apr. 1951–Dec. 1959).

103. *Id.*

104. *8½* (Cineriz, Francinex 1963).

105. THE 400 BLOWS (Les Filmes du Carrosse, Sédif Productions 1959).

106. THE MIRROR (Mosfilm Unit 4 1974).

107. John Stuart Katz, *Introduction to AUTOBIOGRAPHY: FILM/VIDEO/PHOTOGRAPHY*, *supra* note 13, at 1, 5; see also LANE, *supra* note 40, at 18–19 (noting that the emerging film styles of the avant-garde, “the rejection of observational direct cinema, and the rise of reflexivity in cinema set the stage for documentarists to turn their

Because of the abundance of films like these and the dearth of explicitly autobiographical films that were produced before the 1960s, the quasi-fictional/quasi-autobiographical style of these films marked the beginning of the film genre made by filmmakers telling stories about their own lives. Whether or not it was their intention, these *auteurs* and their celebrated films demonstrated how film is particularly well-suited to autobiographical projects. Film is well-suited to autobiography not because of its purported ability to record objective reality but because of its uniquely successful capacity to create intense feelings of intimacy between the autobiographical subject and the audience through narrative structure and film form. The experience of intimacy is a hallmark of a successful autobiography, to say nothing of a believable confession.

b. Observational Cinema and the Avant-Garde

From the height of the *Nouvelle Vague* in France, autobiographical film was born and began to mature. Autobiographical film manifested itself in two documentary styles: observational (direct cinema) and avant-garde. Observational cinema uses the camera as a tool for exploring and presenting a world.¹⁰⁹ It lacks overt narration and instead establishes credibility by appearing to have the filmmaker “look in on life as it is lived.”¹¹⁰ It thus appears neutral and objective while also necessarily being expressive and analytical.¹¹¹

Avant-garde autobiography, by contrast, was a reaction to the “objective ideal of direct cinema, which excluded the presence of the filmmaker and the cinematic apparatus.”¹¹² Autobiographical avant-garde films carefully considered the role of the filmmaker and the camera in the meaning made on screen—a heightened reflexivity in form—and developed “abstract (nonrepresentational) forms to represent the everyday” of the filmmaker who was the subject of the film.¹¹³ These filmmakers “pursued cinematic forms that metaphorically represent states of mind and emotional states. . . . consistently resist[ing] what would be perceived as realist modes of representation.”¹¹⁴ Whereas observational autobiographical film conveys an authentic sense of the filmed subject by creating a feeling in the audience of witnessing the filmed subject in his or her everyday life (a more traditional and classic documentary style), autobiographical avant-garde conveys that same authenticity by implicating abstract style to simulate the emotions and mental processes of the filmed subject.¹¹⁵

cameras inward. . . . [and to] accept[] the ‘limiting preconceptions’ [of the filmed subject] originating from their social position and the. . . actual filming process”).

108. ANNA LAWTON, KINOGLASNOST: SOVIET CINEMA IN OUR TIME 33 (1992) (discussing *The Mirror*, *supra* note 106); GERALD MAST, A SHORT HISTORY OF THE MOVIES 329–30 (D. Anthony English ed., 5th ed. rev. Macmillan Publ’g Co. 1992) (1971) (discussing *8½*, *supra* note 104); ROBERT STAM, REFLEXIVITY IN FILM AND LITERATURE 19–20 (1992) (discussing *The 400 Blows*, *supra* note 105).

109. See NICHOLS, *supra* note 100, at 109.

110. *Id.* at 110–11.

111. LANE, *supra* note 40, at 14.

112. *Id.* at 12.

113. *Id.* at 13.

114. *Id.*

115. Autobiographical avant-garde, as described by James Peterson in Jim Lane’s book on the subject, is a “type of film in which the filmmaker is personified.” *Id.* at 12.

Interestingly enough, both film styles effect the same intimacy described above as regards written autobiography and fictionalized filmic autobiography.¹¹⁶ Observational autobiographical film plays on the ideology of the camera as an extension of the audience's eye. Autobiographical avant-garde is experienced as deeply subjective, emotional, and almost lyrical; the audience feels that they are truly inside the head of the film subject. Both film styles would seemingly enhance the claim that filmic autobiographies (as well as filmed confessions) are extraordinarily affective forms of self-designation.

c. Video Diaries

Most recently these two styles have merged into a new form of autobiographical film that is a function of the pervasiveness of the small, inexpensive video camera that can turn anyone into a filmmaker.¹¹⁷ In "video diaries," filmmakers turn the camera on themselves or turn the camera into an extension of themselves to chronicle an event in their lives or to capture an expression of their lives generally. These video diaries combine aspects of observational documentary and the avant-garde. They appear to be documenting experience with minimal stylization and typically contain photographic stills of the film subject earlier in life and interviews with the subject's family or the subject him or herself. The latter type of interview is usually self-conducted—an interview with oneself, as if talking to a mirror—and is remarkably like a confession in narrative structure and style. Enhancing the authenticity of the video diary and its closeness to the subject of the film, these films are normally low-tech productions with a camera crew of one.¹¹⁸ Examples of famous video diaries include Ed Pincus's *Diaries (1971–1976)*¹¹⁹ (a 1980 film about the filmmaker's contemporary life with his family), Ross McElwee's *Sherman's March*¹²⁰ (a 1986 film about the filmmaker's search for a soul mate while exploring his family ties to the South), and Tom Joslin's *Silverlake Life: The View from Here*¹²¹ (a 1993 video record of his living with and dying from AIDS).¹²² Pincus's project exemplified the goal of many film autobiographers: to explore subjectivity through the film's unique capacity to depict the external world.

Pincus emphasized film's ability to record events as they were happening, a feature that he saw as unavailable to literary autobiographers. [He] wrote that "film autobiography can make a significant contribution to the genre of autobiography in that filming can be done in the present, and need not be a

116. See *supra* notes 74–79 and accompanying text.

117. For a discussion of video diaries, see LANE, *supra* note 40, at 48–93.

118. "Because autobiographical film is primarily concerned with conveying personal and sometimes even intimate knowledge about the filmmaker to the audience, autobiographical works, even reconstructed and experimental ones, place minimal contrivance or artifice between the filmmaker and the audience." Katz, *supra* note 13, at 11.

119. For a discussion of *Diaries*, see LANE, *supra* note 40, at 52–55.

120. For a discussion of *Sherman's March*, see *id.* at 62, 69–70.

121. SILVERLAKE LIFE: THE VIEW FROM HERE (Channel Four 1993).

122. See Lane, *supra* note 40, at 77–78, 84–93 (discussing *Silverlake Life*); ROSS CHAMBERS, FACING IT: AIDS DIARIES AND THE DEATH OF THE AUTHOR 61–80 (1998) (discussing *Silverlake Life*).

reconstruction of the past as it has been in the theatrical film and in written autobiography.”¹²³

In an attempt to represent themselves, many video diarists also rely on avant-garde film techniques.¹²⁴ Jerome Hill, in his autobiography *Film Portrait*,¹²⁵ films himself in a mirror; ¹²⁶ this infinitely duplicates the film frame and implies a shattered or fractured identity in the process of being made whole by the film. He also reverses the film stock from color positive to color negative such that his image on the screen is dark (or absent) where it otherwise would be illuminated.¹²⁷ Stan Brakhage, in his two autobiographical films *Scenes From Under Childhood* and *Sincerity*,¹²⁸ deploys a non-narrative style, what he calls “a Proustian sense...because the work is very involved in the memory process.”¹²⁹ Further, as film scholar P. Adams Sitney remarks, the film “reproduces the structures of [Brakhage’s] experience as he remembers [the facts of his life]” rather than as they may have actually occurred.¹³⁰ Both Brakhage and Hill exploit the avant-garde form in order to wrestle with and resemble the process of realizing one’s memory on film. As memories return in fits and starts in the process of self-interrogation, the films’ images of those memories are also presented as fits and starts in a non-narrative and non-classical film style.¹³¹ Here, the authenticity of the autobiographical act is in the experience of the film, not in its objective content.

Sitney considers Brakhage’s comparison of his film to Proust’s *À la recherche du temps perdu* (*Remembrance of Things Past*)¹³² less apt than a comparison to the confessions of Saint Augustine and Rousseau.¹³³ Sitney has written:

A more useful distinction can be drawn within the strict autobiographical tradition: Augustine in his *Confessions* presents himself as a *typical* man, in all else

123. LANE, *supra* note 40, at 53 (quoting Ed Pincus, Letter to the Editor, NEW BOSTON REV., Feb.–Mar. 1978, at 4, 4). This point will be important later in this Article where the analysis of filmed confessions proceeds by showing how filmed confessions depict the present confessional situation and not necessarily the confessor’s act as it occurred in the past. See *infra* Part IV.B.

124. “Filmmakers can use artifice as a defence to distance themselves from the audience and to protect themselves from personal risk or as a device to bring the viewer closer to the filmmaker’s feelings, thoughts, and psyche.” Katz, *supra* note 13, at 11–12.

125. FILM PORTRAIT (Jerome Hill, Heptagon-Noel Productions 1972).

126. P. Adams Sitney, *Autobiography in Avant-Garde Film*, in THE AVANT-GARDE FILM: A READER OF THEORY AND CRITICISM 199, 202–03 (P. Adams Sitney ed., 1978).

127. *Id.* at 203.

128. For a discussion of *Scenes From Under Childhood* and *Sincerity*, see *id.* at 207–17.

129. *Id.* at 207–08 (quoting Stan Brakhage, *Some Remarks*, TAKE ONE, Sept.–Oct. 1971, at 8, 8).

130. *Id.* at 209.

131. Ironically enough, the stylized form, as much as the observational film genre, renders the telling of one’s story about oneself all the more intimate and sincere. Given that the obsession of these video diaries is the emotional experience of the filmmaker—the subjective life of the author as he is dying, working through marital problems, or learning to be a parent—portraying that life in terms of ambiguous, random, or jumbled images and narrative structure makes sense. The filmmaker is allowed these stylistic indulgences because the audience believes it when he or she asserts that they are reflections of him or herself. Georges Gusdorf has written: “I alone have the privilege of discovering myself from the other side of the mirror...Others, no matter how well intentioned, are forever going wrong; they describe the external figure, the appearance they see and not the true person, which always escapes them.” Gusdorf, *supra* note 64, at 35–36. Gusdorf also explained that “[n]o one can better do justice to himself than the interested party, and it is precisely in order to do away with misunderstandings, to restore an incomplete or deformed truth, that the autobiographer himself takes up the telling of his story.” *Id.* at 35.

132. MARCEL PROUST, *À LA RECHERCHE DU TEMPS PERDU* (1919).

133. Sitney, *supra* note 126, at 209.

but the very fact that he writes. Rousseau, in his *Confessions*, portrays the extraordinary individual, an absolutely unique case. Brakhage has operated in both autobiographical modes.¹³⁴

Despite the distance across time and technology, the comparison to Augustine and Rousseau helps to highlight the shared goal of the video diaries and the traditional written autobiography as an exercise in self-examination and self-definition.

Video diaries, like their literary predecessors, are confessional. They are deeply private acts made either for another person or for public consumption.¹³⁵ Whereas autobiography may be less constrained and less induced than the typical confession, both “reveal secret, hidden places [in order] to face the world with a new and ‘easeful’ liberty.”¹³⁶ Both aim for transparency and believability, whether or not they achieve clarity of form, in order to realize their ultimate purposes: social acceptance and self-determination.¹³⁷ Although these goals may resonate most closely with psychoanalytic or theological confessions, they also underlie the desire to confess to criminal acts. Confessions are considered the touchstone of guilt insofar as they are brought about through the desire for expiation and acceptance.

The development of counter-autobiography since the 1960s—autobiography that critiques the very possibility of telling a “true” story about oneself—challenges these objectives and questions the advantage of film as an autobiographical tool in the United States criminal justice system. It is to these counter-autobiographies that this discussion now turns.

III. COUNTER-AUTOBIOGRAPHY

A. *Written Counter-Autobiography*

1. What Author?: The Split Subject

Some say that the post-structuralist turn in language and cultural theory marks a significant rupture in the development of modern intellectual history.¹³⁸ But in fact,

134. *Id.* This quote continues:

Scenes From Under Childhood...participate[s] in the Augustinian manner. [Its] “fictional” principle is that the film-maker allows his observation of the events of his children’s lives to stand for his own life. But insofar as this substitution is overtly declared as such, and the distance between the film-maker and the children is inscribed in the structure of the film[], the fiction dissolves....Brakhage’s Rousseausitic confession, *Sincerity*,...describes the events leading from his own childhood to the making of his first film.

Id.

135. A criminal confession in the privacy of an interrogation room may be more like modern Catholic confession in a private confessional booth than like confession in early Christianity when the

Church ordered the sinner to make a public confession as an exercise of penance. Modern Protestantism actually puts coming to terms with one’s own conscience in the place of the external confession, thus unconsciously preparing for the future development that will go beyond confession and perhaps replace religion by other social institutions.

THEODOR REIK, *THE COMPULSION TO CONFESS* 302 (1945).

136. PETER DENNIS BATHORY, *POLITICAL THEORY AS PUBLIC CONFESSION: THE SOCIAL AND POLITICAL THOUGHT OF ST. AUGUSTINE OF HIPPO* 21 (1981). John Stuart Katz has expressed a similar idea about autobiographical film: “From the point of view of the filmmaker, the process of making the film allows an individual to come to grips with questions of a personal nature.” Katz, *supra* note 13, at 10.

137. For a description of the purposes of written autobiography as understanding, justification, and preservation of self, see *supra* Part II.A.2.

138. SMITH, *supra* note 22, at 117 (suggesting that the “binary distinctions between structuralism and poststructuralism” are “simplistic”).

post-structuralism is an expansion of structuralism; it is an “outgrowth...rather than...an opposing school of thought.”¹³⁹ The central tenet of structuralism, that deep structure organizes and gives meaning to social life and language,¹⁴⁰ animates post-structuralist thought as well.¹⁴¹ Both approaches to knowledge production across the humanities and social sciences consider the structure of language (or sign systems more generally) generative of cultural norms.¹⁴² Both disciplinary endeavors decenter, or even minimize altogether, the role of the autonomous subject as the nucleus of social organization.¹⁴³ Whereas structuralism displaced the focus of study from human action and agency to the empirical lessons of the machinery of culture with language and social institutions being the primary motors, post-structuralism went further to show how the human subject or subjectivity is “constructed by arbitrary but powerful cultural and historical forces” such that culture generates the subject rather than vice versa.¹⁴⁴

The effect of post-structuralism on the study of autobiography is rather straightforward. After the “death of the subject” (otherwise called “the death of the author”), who is the subject of autobiography?¹⁴⁵ What, if anything, can we say that we know about the subject from his or her written life story? Is this the right question to ask of a literary work? Michel Foucault critically pointed out that one asks this question about the author only of personal writing (i.e., poems or novels) and not other types of works (i.e., scientific journal articles or newspaper articles) because of social convention rather than anything inherent in the relationship between the author and the text.¹⁴⁶ The “aspects of an individual, which we designate as an author...are projections...of our way of handling texts: in the comparisons we make, the traits we extract as pertinent, the continuities we assign, or the exclusions we practice.”¹⁴⁷ The author, we are told, is a function of discourse and not the other way around.¹⁴⁸ The author does not preexist the particular writing. This means that the “I” of autobiographical writing (the written subject, the author being written) is not the same as the person who was doing the writing (the writing

139. *Id.*

140. *Id.* at 97.

141. For a discussion about the similarities and differences between structuralism and post-structuralism, see *id.* at 117–32. Two of the major structuralist thinkers were Ferdinand de Saussure and Claude Levi-Strauss, the former a linguist and the latter an anthropologist. *Id.* at 99–102. Two prominent theorists of post-structuralism were Michel Foucault and Jacques Derrida. *Id.* at 121–22, 129–32.

142. *Id.* at 118.

143. *Id.* at 118–19.

144. *Id.* at 119.

145. The phrase “death of an author” comes from Roland Barthes’ essay of the same name. BARTHES, *supra* note 26, at 142, 148. However, it is closely related to Michel Foucault’s essay *What Is an Author?*, which was written shortly after, in 1969. Foucault, *supra* note 26.

146. Foucault, *supra* note 26, at 124–27. According to Foucault, a scientific text might not be considered to have an “author” because scientific facts and explanations are deemed to have existed whether or not a scientist writes about them. *Id.* at 126. In contrast, a novel must have an “author” because it exists solely as a function of the person having written the story. *Id.* Moreover, the novel can be understood in light of its authorship, whereas the ideology of science minimizes the effect of authorship on scientific results. *Id.*

147. *Id.* at 127.

148. *Id.* at 125–26.

subject, the writing author). They may be related but are not and cannot be self-identical.¹⁴⁹

This lack of identity, known as the “split subject,” has implications for autobiography and confession. First, it means that identity is fluid and not fixed (an uncontroversial position in and of itself).¹⁵⁰ Second, it means that our representation of ourselves and past experiences in language gets us only “as close as possible...to its object, while inevitably falling short....”¹⁵¹ We can never replicate our inner self or our past experiences; rather, we can only imitate or reproduce how we imagine we are, were, should be, or should have been under the circumstances.¹⁵² Third, this means that we are always in the process of recreating the past while searching for a way to give definition to our present lives and experiences. In this sense, autobiographies are primarily stories about the situation from which the writing or telling act arises. Although the self may be the focal point of the story, that self does not predate or independently exist outside of the story.

The *bios* of an autobiography...is what the “I” makes of it; yet as recent critics have observed, so far as the finished work is concerned, neither the *autos* nor the *bios* is there in the beginning, a completed entity, a defined, known self or a history to be had for the taking. Here is where the act of writing...assumes its true importance: it is through the act that the self and the life...take on a certain form, assume a particular shape and image....¹⁵³

149. Otherwise put, the subject of autobiography necessarily straddles the mutually exclusive identities of the person telling the story and the person constituted by it.

Literary and cultural critic Barthes and novelist and essayist Sarraute begin their autobiographical texts with an awareness that autobiography as the linear and coherent story of the writer’s life is no longer possible. Barthes knows that self-writing cannot reflect extratextual truth, and asks himself, Do I not know that, *in the field of the subject, there is no referent?*

GABARA, *supra* note 20, at xv (internal quotation marks omitted).

150. In terms of social linguistics, this concept of the “split subject” is often described as the problem of occupying multiple subject pronouns.

The signifiers “I”, “male”, “son”, for example, indicate a “subject position” which a speaker must enter....We become human “subjects” by entering the positions which the signifier established in advance for us. However, our identity is never stable, because the relation between signifier (“I”) and signified (the whole psychic process at work in me) is never fixed or final.

RAMAN SELDEN, *PRACTICING THEORY AND READING LITERATURE* 77 (1989). *See also* Silbey, *supra* note 11, at 130 (“We are constructed in and through language, and constructed differently each time we represent our experience.”); James, *supra* note 52, at 124, 128 (describing the video diaries of Lynn Hershman as embodying the conflicting desires of most autobiographical subjects: “the claim for a coherent, self-identified subject implicit in [the] initial protestation...[of] truth:...[and] the refutation of such a possibility as the [autobiography] reveal[s] that this truth was always subjective and that the subject herself was multiple”).

151. CHAMBERS, *supra* note 122, at 38 (discussing the “inevitable fakery” of attempting to represent death in a video diary).

152. I am not denying the existence of some authentic self. Nevertheless, any inner truth about ourselves is not utterable in language as consistent, stable, or unitary, through speech, writing, or film. This is because the effect or meaning of language itself is unstable and because we cannot know the truth about ourselves other than through language—knowledge and language being entirely interdependent. More colloquially, we might say “we don’t know what we mean until we say it out loud,” which suggests that what we mean to say about our past and ourselves is not knowable or discernable until we say it aloud or write it down.

153. Olney, *supra* note 21, at 22; *see also* LANE, *supra* note 40, at 22 (“[T]he inscribed self is historically contingent and textually postulated.”).

2. What Life?: A Story of Present Constraints

In a post-structuralist world, what does autobiographical discourse tell us if not about the author and his or her life? It tells us about the writing situation, about the constraints around which the author creates him or herself in writing, about the limits the author experiences—limits of language, of social context, and of historical circumstance—as the author tells his or her audience about him or herself. In this way, autobiographical discourse is inherently self-reflexive; it is a self-critical act that comments as much on the self being described as the self being created. Indeed, self-reflexivity in film is similar to self-reflexivity in literature in that it “draws attention to its status as an artefact in order to pose questions about the relationship between fiction and reality” undermining its claim to truth as something separate from representation.¹⁵⁴ Ironically, self-reflexivity also bolsters the authority of the discourse through the persuasive effect of self-critique. The language of humility (i.e., “I should be trusted because I understand my limits which are these...”) is very convincing.

With a focus on the self-consciousness of social conditions that produce knowledge to explain aspects of culture, post-structuralism assesses the impact of truth claims in various social settings as discursive forms that are the products of power relations.¹⁵⁵ This is not power as in the domination of one person over another, but rather, as a constitutive element of every social interaction. In Foucault’s words, it is not “who exercises power” but “how does [power] happen.”¹⁵⁶ By closely examining the “strategies”¹⁵⁷ of power and control that arise in various autobiographical contexts, including confessional contexts, one can begin to understand how the truth claims born from those discursive contexts, in which one speaks of guilt or innocence, are situational and contingent. The self-reflexive discourse of post-structuralist autobiography—a discourse that both calls attention to its referential limits and enhances its claim of sincerity and authenticity—illuminates the strategies of power that delimit the autobiographical act. The truth that emerges from that performance of self is a truth about its present constraints.¹⁵⁸ This suggests that the classic goals of autobiography discussed above—understanding, justification, and the preservation of self,¹⁵⁹ all of which aim to affect social acceptance and self-determination—cannot be understood except as

154. PATRICIA WAUGH, *METAFICTION: THE THEORY AND PRACTICE OF SELF-CONSCIOUS FICTION* 2 (1984).

155. SMITH, *supra* note 22, at 119–20.

156. MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984*, at 103 (Lawrence D. Kritzman ed., Alan Sheridan et al. trans., 1988).

157. *Id.* at 104.

158. According to Foucault,

confession is a ritual discourse in which the speaking subject is also the subject of the statement; it is also a ritual that unfolds within a power relationship, for one does not confess without the presence or (visual presence) of a partner who is not simply the interlocutor but the authority who requires the confession, prescribes and appreciates it, and intervenes in order to judge, punish, forgive, console, and reconcile; a ritual in which the truth is corroborated by the obstacles and resistances it had to surmount in order to be formulated; and finally, a ritual in which the expression alone, independently of its external consequences, produces intrinsic modifications in the person who articulates it: it exonerates, redeems, and purifies him; it unburdens him of his wrongs, liberates him, and promises him salvation.

FOUCAULT, *supra* note 69, at 61–62.

159. *See supra* Part II.A.2.

manifestations of these situational and discursive constraints, the push and pull of power and resistance, from which the speech about one's self arises.

B. Filmed Counter-Autobiography

1. Film as Exemplary of the Postmodern Condition¹⁶⁰

These post-structuralist critiques of the autobiographical form—of its referential capacity and the autobiographical subject's claims to contingent self-knowledge—point to the inevitability of the constitutive nature of language on identity (legal or otherwise) and of the inventive quality of much autobiographical discourse (i.e., the invention of self in relation to the situation). Filmic autobiographies present a similar analysis. Interestingly, filmic autobiographies embody even more starkly the tension in autobiographical discourse between authenticity and imitation but also hide the tension more readily beneath the ideology of realism that shapes film culture.

The maturation of the autobiographical film genre occurred at the same time that the literary autobiographical genre was experiencing the post-structuralist revolution described above.¹⁶¹ This is perhaps no coincidence because autobiographical film is a potent genre for exploring the post-structuralist concerns of both fluid subjectivity and the social construction of knowledge. "Because we understand that the filmic image is rooted in a physical reality, the ontology of sound and image can overwhelm the distinction between the scene (utterance) and its retroactive incorporation into a final edited documentary (enunciation)."¹⁶² As we know from observational and avant-garde cinema, film draws its power from its perceived ability to present life on screen as it is experienced in life. Thus, autobiographical film appears to present the autobiographical subject precisely as he or she is or feels—how he or she talks, gestures, remembers, and what he or she says or does. And yet film, like any form of signification, is representational and symbolic; its meaning arises from its semiotic play, from the content of the frame (inside and outside), from the juxtaposition of the images, and from the angle of the camera.¹⁶³ Therefore, the subject of autobiography that emerges from the autobiographical film is constructed from the form of the discourse and the situation in which the discourse occurs.¹⁶⁴ The narrating self (i.e., the one being filmed or doing the

160. See generally JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., Univ. Minn. Press 1984) (1979) (discussing postmodernity and coining the phrase "the postmodern condition"); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* (1989) (arguing that what is postmodern is the rise of new technologies that have created novel ways to experience time and space, and not any novel means of distribution or accumulation of capital).

161. See *supra* Part III.A.

162. LANE, *supra* note 40, at 25.

163. See *supra* Part II.B.1 and accompanying notes.

164. According to John Stuart Katz,

Because they often reflect real issues, present real people, and can be intimate in a way that fiction films usually cannot, we often become aware, watching autobiographical films, of the assumptions, conventions and expectations we bring both to life and film *per se*. We have already seen how, by viewing others questioning and examining their lives, we learn about our own. Autobiographical films raise questions not only about their subject, but about the relationship of the filmmakers to their subjects, the relationship between viewers of films to the filmmaker and/or their subject...and the effect of filmmaking on its subjects.

Katz, *supra* note 13, at 14 (emphasis added).

filming) is not, as might be presumed, the same person as the narrated self (i.e., the one that is constituted on and through the film). This split renders the filmic autobiographical subject's identity pliable; it therefore may and usually does change as a result of the interpretive possibilities embedded in filmic discourse.¹⁶⁵

Film's indexical quality—the “myth of total cinema” and the ideal of total reproduction¹⁶⁶—is so powerful that we resist acknowledging the constructed nature of all filmic images. This seems to be the case with regard to autobiographical films that promise to be true accounts of the filmmaker's life such as the autobiographical films discussed in this Article, be it Fellini's *8½* or Steve Pincus's video diaries.¹⁶⁷ We see people on film declare that they are telling us the truth or hear people say that the film they made is truly of their life, and these assertions, combined with the intimacy and immediacy engendered by the indexical nature of film, persuade us. But think about how impossible it is to make a film of your life. The person making the film cannot also be the person in front of the camera. Likewise, the life being filmed cannot also be the life being lived behind the camera. Given this, who then is the “author” (or “auto”) of the “autobiographical film”? Is it the filmed subject or the filmmaker? Who and whose authority guides what we see and hear such that we believe it—the person on film or the person directing it? With regard to confessions, who is the author of the filmed confession: the defendant, the interrogator, or the cameraperson?¹⁶⁸

This divided authorship in autobiographical film is not unique to autobiographical genres. Rather, it is uniquely made apparent by film technology. “Kaja Silverman [has noted] that film merely shows us what has always already been the case in writing, ‘[film] clarifies for us...the distance which separates the speaking subject from the spoken subject.’”¹⁶⁹ Additionally,

Jim Lane notes that the autobiographical documentary always contains at least two voices, always bears the mark of personal, actual events and a consciousness that bears witness to, and forms an opinion about, these events through documentary representation. Filmic autobiography, with its material, visible split between director or filmer and actor or filmed self...troubles our conventional notions of coherent identity and provides us with new forms in which to explore and represent fragmented subjectivity.¹⁷⁰

As is the case with literary autobiographies, this divided or fragmented authorship in film, made manifest by the material necessity of film's technological apparatus, has ramifications for the knowledge produced by the autobiographical film. What we learn of the filmed subject is inseparable from its filmic component. The knowledge produced by the film about its subject is contingent upon the constraints

165. The split in the subject of discourse can also be described in terms of its constative and performative aspects (what is said versus what is done or accomplished with words or images). For a discussion of the constative and performative aspects of language, see AUSTIN, *supra* note 14, at 4–11.

166. BAZIN, *supra* note 88, at 17. See also Bruss, *supra* note 38, at 305 (“The epistemology of representation that film adopts and extends to its logical limit is the epistemology of spectatorship....”).

167. See *supra* Part II.B.2.

168. Another authorial possibility could be the police manuals that instruct on, or even direct, the manner and purpose of filming interrogations.

169. Gabara, *supra* note 20, at 336 (quoting KAJA SILVERMAN, *THE SUBJECT OF SEMIOTICS* 198 (1983)).

170. *Id.* at 337 (internal quotation marks omitted) (footnote omitted).

of filmmaking and the normative principles of film hermeneutics.¹⁷¹ “The cinematic subject cannot...precede the cinematic apparatus, meaning that even the most ‘personal’ film is logically the product of the person whom the film itself creates.”¹⁷²

Understanding the subject of film and the story that the film recounts about its subject requires comprehending the circumstances under which the filmmaking occurs, the limitations of the film apparatus (both representational and technological), and the ways in which the presence of the camera affects what occurs in front of it. With regard to confessions, understanding the filmed confession requires paying attention to the filmed circumstances, the limits of the film frames and their sequencing, the effects of the camera on the interrogation, and the effects of the camera on the accused’s participation in the interrogation.¹⁷³

2. Counter-Autobiographical Film Examples

The autobiographical films that have emerged since the 1960s make the contingent nature of filmic identity and knowledge explicit. The film *David Holzman’s Diary*¹⁷⁴ is generative of the many autobiographical films that followed it.¹⁷⁵ It begins with the following declaration of its subject, David Holzman:

Test. Test. O.K. This is the story....This is July 14, 1967....So now I’m gonna do something that’s been on my mind for a long time....My life, though ordinary enough, seems to haunt me....And I’ve been trying to understand it,....So the noted French wit Jean-Luc Godard said, “What is film? Film is truth, 24 times a second”. So, I thought, that if I put it all down on film, and I put my thumb on it and I run it back and forth, and I stop it when I want to, then I got everything. I got it all...I should get the meaning. I should understand it. So this is what this is going to be. This. I’m going to make a diary....My diary.¹⁷⁶

The film is perceived to be a week-in-the-life of David Holzman.¹⁷⁷ It is presented in the first person with what seems to be a personal camera, by an amateur filmmaker—there are lots of out-of-focus and wobbly shots. It has the imprimatur of authenticity; it is unstaged, emotionally direct, chronologically sequenced, and motivated to search for or understand the truth about the subject’s life. It is everything a filmed confession made in a police precinct house seeks to be. As it turns out, this film was made by Jim McBride and starred L.M. Kit Carson as the fictional character of David Holzman.¹⁷⁸ An unsuspecting viewer would not know this until the film’s end credits,¹⁷⁹ and, even then, one might wonder if David Holzman had a pseudonym or a collaborator. As one of the first journal entry autobiographical films, *David Holzman’s Diary* represents an inaugural critique of

171. For a discussion of hermeneutics and its historical background, see CULTURAL THEORY, *supra* note 23, at 165–67.

172. Bruss, *supra* note 38, at 319.

173. Silbey, *supra* note 11, at 158–68; *see also supra* notes 93–97 and accompanying text.

174. DAVID HOLZMAN’S DIARY (Paradigm 1967).

175. LANE, *supra* note 40, at 33.

176. Katz, *supra* note 13, at 10–11.

177. LANE, *supra* note 40, at 33.

178. *Id.*

179. *Id.* at 34.

“direct cinema’s claim to objective truth and its aesthetic rule of erasing the presence of the camera and filmmaker.”¹⁸⁰ By promising to get as close to an accurate representation of life as the measure of twenty-four images per second, yet by fictionalizing every aspect of it, *David Holzman’s Diary* magnifies the distance between lived experience and its representation, which is negotiated every day by discursive strategies, including film.

From *David Holzman’s Diary* emerges a person who did not exist before, a person whose purpose in being filmed is to shape and direct his life and whose new identity exists only because of and through film. It is thus purposefully autobiographical, exclusively filmic, and entirely fabricated. All of this is also true of *Silverlake Life*,¹⁸¹ another journal entry autobiographical film, but one whose goal is to embrace the film form rather than to critique it. *Silverlake Life* is a film that aims to record filmmaker Tom Joslin’s dying and death from AIDS.¹⁸² As a kind of last will and testament, *Silverlake Life* is desperately autobiographical; it is the ultimate “dying declaration.”¹⁸³ Similar to a filmed confession, the weighty circumstances surrounding the filming of *Silverlake Life* imbue it with an inherent authority rooted in the earnestness of the project.

But *Silverlake Life* also complicates the autobiographical drive, which supposedly originates in a specific and motivated individual. In narrative structure and point of view, *Silverlake Life* shifts the focus of autobiography from self to community and from the individual author to the inevitability that the idea of self is but a product of social relations. Like *David Holzman’s Diary*, *Silverlake Life* was shot with relatively simple recording equipment that required little amplification for clarity of sound or image.¹⁸⁴ These qualities are subsequently perceived to “make[] reality [seem] less intruded upon,” which enhances the intimacy of the scenes.¹⁸⁵ Contrary to our expectations of autobiography, however, the film is narrated in large part not by Tom Joslin but by Tom’s former student Peter Friedman and by Tom’s partner Mark Massi. Indeed, the two-hour film is framed by Mark’s remembrances of Tom, which foreshadow Tom’s death. The film is about Tom—made by and about him—but it could not have been made without Mark and Peter, who help with the film when Tom becomes sick and who finish the film when Tom dies. Although the film uniquely exposes and reveals Tom’s person and his death—through crying and a shaky camera, we see what Mark tells us is Tom’s body on the day that he dies—the film does not end there but continues in the present tense with Peter and

180. *Id.*

The film invokes the realist conventions of direct cinema by using familiar stylistic gestures such as spontaneous action, . . . synch-sound footage, an abundance of hand-held shots, and grainy black-and-white imagery. Yet by presenting the life story of the filmmaker and acknowledging the presence of the camera, the film puts into play a set of reflexive self-referential signifiers. These signifiers initially suggest a more ideologically aware orientation of reality. . . . [but] the film’s fictional status undermines the autocumentary promise of reference and truth.

Id.

181. SILVERLAKE LIFE, *supra* note 121.

182. See LANE, *supra* note 40, at 84.

183. See FED. R. EVID. 804(b)(2) (hearsay exception that allows out-of-court statements made by declarants on their death bed to be entered into evidence at trial).

184. LANE, *supra* note 40, at 85.

185. *Id.*

Mark.¹⁸⁶ Interestingly, the effect of the on-going narrative, despite Tom's visual absence and physical death, does not shift the focus from Tom to others, rather, it *congeals* Tom's identity with his loved ones. We hear Mark confess that he always thought death was "the end" but now "Zoom!" he feels Tom all around him, "leaning in" with "a strange energy."¹⁸⁷ This autobiographical film is narrated by Tom's friends and is permeated with the aura of Tom's spirit. Ultimately, the end of the film is experienced as a transformation of Tom's death—the ostensible subject of the film—into a new life in and through the film as a form of survival.

In this way, *Silverlake Life* entirely fails to show what it presumably intended, Tom's death or disappearance, and instead creates a new life. The documentary impulse is thwarted here, just as it was mocked in *David Holzman's Diary*. For the same reasons that police detectives and prosecutors film confessions, Tom Joslin filmed his slow death from AIDS in order to bear witness to it (to prove it or to reckon with it), which was a discursive activity that ironically inspired its opposite: a continued existence and an interpretative chain reaction.

While this may be comforting, it also confirms the dynamic of *David Holzman's Diary* and of autobiographical film generally: the unavoidable invention of a person and the failure to convey the person as he or she was before the filming began. *Silverlake Life* does not passively record a death; rather, it kindles a resurrection in the joint enterprise of filmic discourse. As will be discussed in Part Four of this Article, filmed confessions accomplish this same magic. They do not passively record a confessional statement, but rather, they conjure a criminal (or an innocent detainee) whose legal identity is one result of the film form.

There are many other examples of autobiographical films that appear to undermine the goal of faithfully recording a life by reflecting on, however unintentionally, the summoning power of film and the constraints of filmic representation. Lynn Hershman's films, mostly all video diaries, are no exception.¹⁸⁸ What is helpful about Hershman's work for the present analysis is the way in which her abstract film style accesses her emotional life. Her abstract films are of a different sort than observational-style films such as *Silverlake Life* because Hershman's films appear to represent her mental state and processes by using the camera as an extension of her mind.¹⁸⁹ Although she directly addresses the camera in a mock-psychotherapy session, she also blurs the images by way of double exposure, for example, and superimposes images on each other to represent the instability and confusion that she experiences as a woman struggling with eating disorders and memories of past abuse. Using the camera and its resulting images as

186. *Id.*

187. CHAMBERS, *supra* note 122, at 73.

188. James, *supra* note 52, at 124–33.

189. Elizabeth Bruss has described these two polar perspectives in autobiographical film:

It should now come as no surprise that...we find a tendency for [autobiographical films] to fall into two opposing groups—those that stress the person filmed and those that stress the person filming....The problem for the first group of films...is how to indicate that the life we see is an act of self-perception, an autobiography and not just a biography. For the second group, the problem is how to make the film express the personality of a particular perceiver without at the same time allowing it to collapse in the opposite direction, into abstract expressionism, fantasy, or surrealism.

Bruss, *supra* note 38, at 309.

extensions of her body and her mind (i.e., paralleling her camera malfunctioning with her self-destructive eating binge) helps to reproduce the experience, at least by analogy, of her mental breakdown. It makes us feel close enough to her by making us see and experience what she sees and experiences so as to allow us to feel capable of judging her.

The irony, of course, is that film cannot capture emotions the way it captures the observable phenomena of lived experience with near certainty. Hershman mobilizes video technology to document the part of her life that is *invisible*. Her films nonetheless feel authentic and real—they certainly move us as if they were real—despite their non-representational style. In this way, her films are like many autobiographical films in that they embody the tension between “the documentary impulse to objectively record a historical world ‘out there’ and...the autobiographical impulse to subjectively record a private world ‘in here.’”¹⁹⁰ Highlighting this tension in her choice of subject-matter and style, Hershman’s films are yet another example of self-reflexive filmmaking and the laying bare of the material conditions under which the self and the film are made. The point is that the “talking cure” or the “filming cure” is not necessarily the way to encounter the self, but rather, it is a manner in which one’s self-image is constructed. The use of a video camera to tell a story may transcend certain obstacles concerning determinable facts (i.e., whether the subject is clothed or crying), but the film’s value is irrelevant—or at least no more superior than other forms of communication—in explaining our innermost personal experiences (i.e., feelings of fear, threat, or anxiety). If the legal system aspires to capture criminal confessions that accurately reveal, rather than imaginatively generate, a defendant’s innermost motivation and mindset at the time that the crime was committed, film (as Hershman’s video experiments show) is of little help.

3. Filmed Confessions in the Autobiographical Film Context

One mark of the autobiographical film as a genre is its self-consciousness of its referential limitations.¹⁹¹ This self-consciousness—a self-knowledge that film can only re-present and re-imagine a life or a circumstance and in so doing fails to discover a historical fact but instead creates history anew—should counsel against the use of filmed confessions as the preeminent source of the truth in law about the confessant and his or her crime. Instead of being “the most potent weapons for the

190. LANE, *supra* note 40, at 4.

191. All film is, in some way, self-reflexive. It is preoccupied with the epistemology of the image (what we can say we know by looking at a photographic reproduction). “Reflexivity in film—drawing attention to film’s constructed nature by either making manifest its formal qualities or breaking with its illusion to draw the audience into the meaning making of the film’s story—was born with the earliest of films.” Silbey, *supra* note 36, at 536. Some might say that autobiographical film stands apart from film genres that are self-reflexive and critical of their epistemological status because of the promise or “autobiographical pact” at the heart of all autobiography that the subject of the film is making a good faith effort at representing him or herself as authentically as possible. See, e.g., LEJEUNE, *supra* note 56 (defining the autobiographical pact). If a promise is all that distinguishes autobiography from fiction, however, we are no further along in determining whether the words spoken are truthful or whether they are believable. The analysis of the confession, therefore, remains a matter of persuasion and belief.

prosecution,”¹⁹² the filmed confession should be just one piece of evidence among many. However, the intensity and intimacy that we experience from the film of the confessant stands in our way. It is no mystery to us or to government actors that film is powerfully persuasive to the point of being able to control and determine reality.¹⁹³ As such, film has overtaken the criminal justice system and enraptured courts, legislatures, police departments, and prosecutors.

Assuming that filmed confessions are enough like contemporary filmed autobiographies (i.e., they are self-reflexive in style and purpose) that they assert a “subjectivity as a site of instability—flux, drift, perpetual revision—rather than coherence,”¹⁹⁴ what can they tell us about the defendant that we see on film?¹⁹⁵ In each of the above examples, as well as in the filmed criminal confessions discussed in Part Four of this Article, the experience of intimacy—the exposure and discovery of the confessor through film—is created and amplified through stylized film form. These stylizations, whether a result of the intentional or inevitable craft of film, mark the estrangement and self-consciousness of the filmed subject who, in these moments, makes the audience aware of the limits of his or her self-analysis and mode of self-representation.

The “truth exposed” in these moments is therefore not of any historical event, act, person, or motive but of the realization that the autobiographical act, which is the confession in this instance, is always mediated by discursive structure. Rather than reveal a self whose motives and character either are or are not relevant to the crime under investigation, the filmed confession establishes a relationship between the confessor and the audience. Analyzing the rhetoric of the filmed confession exposes the constraints on the subject and the contours of the relationship that has generated the confession.¹⁹⁶ It also clarifies the possibility or impossibility that certain identities, guilt or innocence, will emerge from that relationship.

192. Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 27 (1997); see also 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 of whom sixty-one percent consider confessions as either “essential” or “important” for conviction); 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).

193. In Leninist Russia in the early twentieth century, “of all the arts...cinema [was] the most important” in propagating the values of the Revolution of 1917. See JAY LEYDA, *KINO: A HISTORY OF THE RUSSIAN AND SOVIET FILM* 161 (3d ed. 1983) (quoting Letter from Lunacharsky to Boltyansky (Jan. 9, 1925)).

194. LANE, *supra* note 40, at 26 (quoting Michael Renov, *The Subject in History: The New Autobiography in Film and Video*, AFTERIMAGE, Summer 1989, at 4, 5).

195. If the law demands an answer to the question of whether a person is telling the truth about his or her past, and film can only make the contingencies of identity and knowledge explicit, then, as this Article demonstrates, film may not be the best vehicle for addressing the legal question.

196. Rhetoric is the art of persuasion through discourse that functions as a relation between at least two speakers and in light of the specific situational context. James Boyd White has described rhetoric in terms of the community that legal language creates in the following way: “[O]ur subject is rhetoric, if by that is meant the study of the ways in which character and community—and motive, value, reason, social structure, everything, in short, that makes culture—are defined and made real in performances of language.” JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY*, at xi (1984); see also JAMES BOYD WHITE, *JUSTICE AS TRANSLATION*, at xiv (1990) (defining legal argument as a “branch of rhetoric,” as the “art of persuasion,” as “the art of deliberation, that is, as the art of thinking well,” and as constitutive because “it creates a set of actors and speakers and offers them possibilities for meaningful speech and action that would not otherwise exist”).

This extended discussion of autobiography lays the groundwork for a discussion about the ways in which filmed confessions are similar to autobiographical films. This comparison aims to expand the treatment of filmed confessions at law from gut-reactions about truthfulness to more nuanced and particular analyses about the construction of identity and personal history in light of the constraints of film language and police interrogation. In particular, the preceding study of autobiographical film (1) highlights the power of film to persuade rather than to portray, (2) exposes the limits of self-expression through the rhetorical struggle between the how the subject wants to be seen and how he or she may otherwise be understood, and (3) demonstrates the instability of film as evidence of truth such that one filmic autobiography may spawn multiple narratives of identity, character, and legal subjectivity.

IV. FILMED CONFESSIONS AS FILMED COUNTER-AUTOBIOGRAPHY

The fourth part of this Article encourages a rethinking of the legal value of filmed confessions and specifically of the presumed superlative evidentiary nature of such confessions in light of the history and theory of filmic autobiography. Analyzing several filmed confessions, Part Four compares the constraints of language (written or filmic) on self-presentation with the constraints of the confessional context. Comparing the constitutive force of language and film on legal identities with the constitutive force of the criminal interrogation on confession reveals the inherent constraints of both language and the law. In this way, a filmed confession, which is a function of both language *and* law, is understood as always mediated by power and resistance. Understanding this should weaken the criminal justice system's reliance on confession as the "product[] of free and rational will."¹⁹⁷

Filmed confessions are perceived as providing transparent and unambiguous access to the confessional context in order to facilitate determinations of truth and volition. The reality, however, is different—filmed confessions are helpful because a careful analysis of them renders evident the inevitable performative nature of all confessions. Despite our confidence in the filmed confession, what we see with our own eyes on film is not the truthful statement of guilt from the mouth of the accused—a confidence that confession expert Saul Kassin has called the "illusion of transparency"¹⁹⁸—but the process by which the criminal defendant's identity as guilty is produced through the autobiographical discourse of particular criminal justice constraints, the newest form of which is film.

Applying some lessons from the history of autobiographical films discussed above¹⁹⁹ to filmed confessions, one becomes aware of the following. The defendant in a filmed confession, much like the subject of an autobiographical film, constructs

197. BROOKS, *supra* note 9, at 63.

198. The "illusion of transparency" is the

tendency for people to overestimate the extent to which their true thoughts, emotions, and other inner states can be seen by others. This illusion was evident in a study in which mock suspects erroneously assumed that their guilt or innocence would be judged correctly both by their questioner and by other people who would observe their denials.

Kassin & Gudjonsson, *supra* note 8, at 40 (citations omitted).

199. *See supra* Part III.B.

his or her identity in relation to the interrogation process (the discursive situation) in which the filming occurs rather than in an environment that is free from constraint. Attention to the contours of filmic discourse and the limits of its produced subject²⁰⁰ brings an understanding about how a defendant's statement and his or her identity are authorized not necessarily personally but by the camera, the filming situation, and the interrogation process. As in the autobiographical films discussed above, the film camera (here in the precinct house) acts as a declaring witness whose interest and perspective may diverge from the defendant's. Finally, the autobiographical subject's identity (here the legal identity of guilt or innocence) is produced by the autobiographical film of the defendant's confession rather than preceded by it.

These findings result in an awareness of the constructed nature of self, an awareness of the knowledge of the circumstances under which the self comes into being, and an awareness of the creation of a new self and circumstances, which form the basis for the legal judgment. As with the above autobiographical films, it is therefore a mistake to think that when we are watching a filmed confession we are judging past acts, motives, or character.²⁰¹ Moreover, if the film fools us into conflating the present enactment of self with a past enactment, or if we think that we truly know the confessant and his or her history rather than the manner in which he or she presently performs for the camera, the ideology of film has triumphed and the knowledge that it produces is suspect.²⁰²

A. *Qualitative Sampling*

The analysis of filmed confessions that follows is based on an examination of select films. In a qualitative analysis of this type, selecting the samples is challenging. The data set consists of thirteen filmed confessions²⁰³ that vary with respect to certain independent variables that, for reasons discussed in this Article, I consider central to the analysis of the filmed confession: whether the interrogator is in the film frame, whether the camera angle is straight or canted, and whether *Miranda* warnings and permission to film are offered on the video.²⁰⁴ All of these variables affect how the defendant is perceived on film. The presence of the interrogator and a straightforward camera angle have been shown to affect the

200. See *supra* Part III.B.1.

201. Otherwise put, inasmuch as law tries to recreate the past to justly adjudicate criminality, it will inevitably fail.

202. According to Jim Lane, "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 40, at 26.

203. Four of the confessions are discussed here, and the remainder are analyzed in the Appendix. See *infra* Table 1.

204. See *infra* Table 1. Collecting filmed confession is difficult and time consuming. For confidentiality as well as other reasons, police and attorneys are sometimes unwilling to share the films. Also, some of the films that I watched are unclear both visually and aurally at parts. For some confessions, I was only given access to those clips that were played in court. I continue to collect samples beyond this Article and to pursue the fuller versions of the films of which I have only had the opportunity to view in part. Given the limited sampling of the filmed confessions, I hesitate to consider my analysis qualitative as opposed to anecdotal. Nevertheless, there exist scholarly examples of small-sample qualitative analyses upon which I base the present one. See, e.g., Jan E. Trost, *Statistically Nonrepresentative Stratified Sampling: A Sampling Technique for Qualitative Studies*, 9 QUALITATIVE SOC. 54 (1986). I hope to augment this Article's analysis with a larger sample in future scholarly projects.

likelihood that the confession appears voluntary.²⁰⁵ The timing and clarity of *Miranda* warnings in relation to the confession is considered crucial for determining whether the subsequent confession is admissible as a matter of law.²⁰⁶ Filming *Miranda* warnings would therefore seem as important to the police as filming confessions.²⁰⁷

I make no claim that this is a statistically representative sample or that there are no other variables worthy of consideration.²⁰⁸ By sampling a variety of films that embody certain iterations of independent variables, I am interested only in understanding the dynamics and variety of filmed confessions, not in making estimates about the film's determinable effect. My purpose is to show that, despite the variables, these filmed confessions resemble autobiographical films inasmuch as they reveal the constraints of autobiographical speech and filmic representation rather than the underlying truth or voluntariness of the defendant's confession. I suggest that this is the case no matter how much of the confession is filmed or how much of the filmed confession is seen by the fact-finder.²⁰⁹ I would also suggest that the more of the interrogation that is filmed and the more of the filmed interrogation that is seen by the judge or jury, the more like counter-autobiographical film the confession appears to be: fragmented, unstable, and ambiguous.

Many of the sampled films are of confessions with essentially uncontested facts.²¹⁰ The defendant committed the acts of which he or she was accused. The only remaining questions were whether the acts were justified under the law or whether the defendant's confession was admissible as voluntary. In other words, the question for many of these defendants was not whether their filmed confession accurately conveyed incriminating information that could be independently corroborated, but whether the filmed confession could convince its audience that the defendant had the requisite state of mind when he or she committed the crime and confessed to it.²¹¹ Film studied for its emotional content instead of its factual content is

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

206. See, e.g., *Missouri v. Seibert*, 542 U.S. 600, 621 (2004) (plurality opinion) (holding that *Miranda* warnings given mid-interrogation and after defendants have given unwarned confessions are constitutionally defective).

207. Likewise, playing the filmed confession without showing the *Miranda* warnings could affect how the film is interpreted by the finder of fact at trial.

208. See *supra* note 204. For example, another variable may be whether the defendant has a prior record or prior experience with police interrogations. If that record or experience is discussed on film, it may have an effect on the interpretation of the voluntariness of the confession. See, e.g., *State v. Gray*, 100 S.W.3d 881, 887 (Mo. Ct. App. 2003) (citing the defendant's prior record as support for his "familiarity" with the interrogation procedure, which weighed against a finding of police coercion).

209. Not all jurisdictions require that the entire interrogation be filmed. See Silbey, *supra* note 11, app., at 175. And no matter how much of the interrogation is filmed, it is rarely shown in its entirety to the fact-finder.

210. The confessions that are uncontested include those of Bernhard Goetz, Deanna Laney, J.C., G.C., K.S., T.W., T.D., and C.E. See *infra* Table 1. In the following sections of this Article, I discuss in detail the confessions of Bernhard Goetz, G.C., J.C., and Deanna Laney.

211. Another potential use of filmed confessions could be to learn whether the interrogators planted facts in their questions that only the perpetrator would know, hoping that the accused suspect would incorporate those facts in his or her statement thereby unknowingly inculcating him or herself in a crime that he or she may not have committed. This occurred in the Central Park Jogger case. Sharon L. Davies, *The Reality of False*

particularly rich for analyzing whether and in what way film facilitates the legal determinations necessary for a just adjudication. Such an analysis shifts the legal focus from authenticity and truth to persuasion and due process.²¹²

The film of Bernhard Goetz' confession is a prime example of this dynamic at work in autobiographical films.²¹³ It is also a film that is readily accessible to anyone with a videocassette player.²¹⁴ For this reason, I discuss it at length in hopes that others have the opportunity to view it and respond to my analysis. Bernhard Goetz' filmed confession is not unique, however, despite the subject's renown. Indeed, the commonality in style, emphasis, and effect among the thirteen films analyzed in the preparation of writing this Article suggests that Goetz' filmed confession is no outlier. To demonstrate this commonality—as well as to demonstrate how these filmed confessions share generic components with autobiographical film—I discuss the relevant parts of three other filmed confessions alongside the lengthy discussion of the Bernhard Goetz film.

B. *Filmed Criminal Confessions*

Bernhard Goetz was a “meek” white man who, in December 1984, thought that he was about to be beaten and mugged by four black men on a New York subway car.²¹⁵ He maintained that in order to protect himself, he pulled out a gun and shot all four men. He shot one man (Darrell Cabey) twice.²¹⁶ Goetz then fled through the subway tunnels, rented a car, and drove to New England. He turned himself into law enforcement officials a week later in Concord, New Hampshire.²¹⁷ Over the course of many hours, Goetz confessed first to the New Hampshire police and then to an assistant district attorney and two New York City detectives. The second confession was videotaped.²¹⁸ Despite claiming that he was not going to fight the charges, Goetz eventually pled self-defense and was acquitted at trial on charges of attempted

Confessions—Lessons of the Central Park Jogger Case, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 233–35 (2006) (discussing the “information transfer” of incriminating facts from the police to rape suspects during their custodial interrogations). Film may be helpful in discerning whether this interrogation tactic was used in any given case, but not whether the defendant was unduly influenced by it.

212. See Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 LAW & SOC. INQUIRY 139, 156–57 (2002) (reviewing RICHARD SHERWIN, *WHEN LAW GOES POP* (2002)) (describing how the “truth” has less to do with criminal legal process than one might think). For the proposition that legal trials are not about finding the truth but about some other good, see Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1358–68 (1985) (arguing that “the object of judicial factfinding is the generation and projection of acceptable verdicts”), Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1230 (2001) (“[The] rules governing what happens *inside* the courtroom can be understood adequately only in the context of the state’s central project of regulating behavior *outside* the courtroom....”), and Ronald J. Allen & Brian Leiter, Comment, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1500 (2001) (“Federal Rule [of Evidence] 102 defines the ‘purpose’ of the rules as that ‘the truth may be ascertained,’ but some of the rules themselves have no veritistic dimension, while others mix veritistic and non-veritistic concerns.” (footnote omitted)).

213. See discussion *infra* Part IV.B.

214. THE CONFESSIONS OF BERNHARD GOETZ (MPI Video News 1987).

215. GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 10 (1988).

216. *Id.* at 1–2.

217. *Id.* at 2–3.

218. *Id.*

murder and aggravated assault. His filmed confession was key evidence at his trial.²¹⁹

The film of Goetz' confession shows his awareness of (1) the power of film to persuade and (2) the imaginative capacity of film—its rhetorical and fictive qualities. Goetz struggles during the interrogation to control the terms on which his identity will be shaped by the filmed confession. This struggle demonstrates an awareness on Goetz' part of the (im)possibilities of self-expression that the post-structuralist theory of autobiography makes manifest—the battle between presenting oneself as one wants to be understood and as one might otherwise be seen.²²⁰ The film's role in Goetz' trial further demonstrates the instability of film as an evidentiary proffer; his filmed confession was perceived as evidence for a slam dunk conviction by the prosecution, but the jurors interviewed after the “not guilty” verdict said that the film of the confession was the turning point in reaching an acquittal.²²¹ Goetz' filmed confession starkly demonstrates how a single confession can spawn multiple (and even opposing) narratives of identity, character, and legal subjectivity. There is no singular truth to be found in Goetz' filmed confession. There is only the construction of his guilt or innocence by the film in relation to the custodial interrogation and his diverse audiences.

Goetz' own self-consciousness of being filmed and narrating his story demonstrates his awareness of the instability of the meaning of his filmed statement. Whether consciously or not, Goetz called attention to this instability through various discursive gestures. For example, while confessing he compulsively reiterated his message of self-defense so that his audience would unambiguously understand his perspective. By doing so, however, he showed recognition of the volatility of his own discourse. Contrary to revealing his true self, then, Goetz' self-consciousness, experienced by the jury as a feeling of intimacy or revelation (a hallmark of classic autobiography),²²² is a mark of estrangement. The self-conscious moments of his confession, as with the self-reflexive qualities of counter-autobiographical film, make the audience aware of the limits of Goetz' self-analysis. The truth exposed in these moments is not of any historical event (i.e., his crime, his character, or his past motivation) but of the realization that the confession as an autobiographical act is always a function of its discursive situation. These moments expose his confession as forming a relationship between the confessor and audience (the essence of rhetoric)²²³ and not necessarily as revealing the truth of the act to which Goetz confesses.

1. Self-Conscious Storytelling

a. As Narrator

Bernhard Goetz. Perhaps the most obvious way that Goetz acknowledges the rhetorical aspect of his confession is when he calls attention to the fact that he is

219. *Id.* at 120, 174. The content of Goetz' confession has been recorded on videotape. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214. On the videotape, Goetz exclaims that he does not want a trial, that he will plead “no contest,” and he says, “I don't care what you do to me.” *Id.*

220. See discussion *supra* notes 138–144 and accompanying text.

221. See *infra* notes 273–274.

222. See *supra* notes 76–79 and accompanying text; see also *supra* Part II.B.2.

223. See *supra* note 196 (defining rhetoric).

narrating a story. He says frequently, “Do you want to hear [the story] one more time?,” “Should I tell it to you again?,” and “Listen, I’m going to tell you what this is and you want to understand.”²²⁴ By asking his audience whether they want him to keep talking, he seeks affirmation of his role as creator and facilitator of the terms of these two important events: the confession and the crime. He is alone and centered in the film frame, and the interrogators are off to the side. His apparently isolated central position imbues his role as a chronicler with a special status. The audience sees not only a criminal defendant, but also an emcee or a leading-player who is directing the action. In this vein, he frequently mentions how many times that he has told the story or how complex and long it is—“This is the third time I’ve told this” or “The story takes three to four hours to tell, it’s disgusting.”²²⁵ At times, he even becomes annoyed with his interrogators for interrupting him and causing him to lose track of his story. He holds his head and says, “Let me finish,” “I lost my train of thought,” and “What I was saying?,” which indicates the importance that he ascribes to the sequence and continuation of the story that he had in his head.²²⁶

*G.C.*²²⁷ *G.C.*’s manner of speaking during his custodial interview, conducted by a Manhattan detective and a Manhattan district attorney, contains similar discursive gestures. *G.C.* is suspected of robbing a New York subway booth during a routinely scheduled money pick-up. During the first two hours of the three hour interview, *G.C.* asserts his innocence and accuses his uncle of committing the crime, of which *G.C.* knew nothing until after it was completed. In the last hour of the interview, when *G.C.* starts to change his story and admit to having accompanied his uncle to the designated subway stop, *G.C.*’s expressions and style of speech change. He begins to demonstrate an awareness of his importance as a believable storyteller. For example, he uses the word “truthfully” for the first time and then repeatedly uses it as an introductory phrase of a detail that he is about to recount: “Truthfully, like...he don’t tell me stuff like that,” “Truthfully, I don’t know. I don’t get involved. My mother’s a very argumentative person....,” and “Truthfully, I see certain stuff. I seen the gun. Truthfully,...I didn’t really care.”²²⁸ At one point, he repeats the phrase six times in as many minutes. *G.C.* appears to feel that he must be listened to and believed at this moment. He is grabbing his audience with a new emphasis on the word that he knows they want to hear: the “truth.”

Like Goetz, *G.C.* is alone in the film frame. His interrogators are side-lined, although they advise him of his *Miranda* rights from off-screen at the beginning of the interview. Indeed, the interrogators do much of the talking in the beginning, while *G.C.* sits in silence. But when *G.C.* begins to talk—monumental in its own right given the drawn-out silence from the subject center-screen—he begins to gesticulate. During the first two hours of the interview, *G.C.* barely moves from his armless straight-back chair in the corner of what looks like a very small and

224. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

225. *Id.*

226. *Id.*

227. Videotape: Confession of *G.C.* (June 26, 2003) (on file with author and with the New Mexico Law Review). The names of several of the defendants included in this Article have been abbreviated to protect their privacy.

228. *Id.*

porcelain-tiled room. He sits with his elbows against his side and his hands in his lap looking off into the distance. However, during the last hour of the interview, when G.C. confesses to being an accomplice to the robbery, he is significantly more animated. He changes his physical position many times—from being folded over in his chair, to stretching his arms to the ceiling, to turning away from his interrogators and folding his arms against his chest. Because the camera rarely moves (sometimes it zooms closer in on G.C.), his gesticulation and movement add dynamism to his story. It is here where he also laughs and smiles for the first time during the interview. Although G.C. is not a particularly articulate person (he speaks in sentence fragments and uses a limited vocabulary), he appears to recognize that supplementing his thin factual account with physical liveliness satisfies his interrogators as a form of compliant behavior. It also makes for a much more engaging film.

Toward the end of the interview, when the detective and the district attorney are closing in on certain details of the crime for which they are ostensibly seeking corroboration, G.C. demonstrates just how aware he is that the story that he is telling must be captivating. The district attorney asks G.C., “Who grabbed the bags [of money]?” and G.C. pauses for a moment and then smiles, as if he knows that he is in control of the story’s suspense.²²⁹ He responds by asking, “Who you want me to say grabbed the bags?”²³⁰ Unlike Goetz, who has a particular story that he wants to tell and insists on telling it a certain way, G.C.’s narrative approach is more fluid and responsive to his interrogators’ cues. Both defendants make it clear, however, that they understand how crucial it is that they succeed at telling the story well. In classic autobiographical style, both Goetz and G.C. draw the reader in with promises of faithfulness. Yet, contrary to popular assumptions about autobiographical discourse, both men also consciously craft their personal story and are aware that maintaining believability is a matter of artifice.

b. As Editor

Bernhard Goetz. Goetz is so attached to his words and his role as narrator that he winds his way to a point that he considers essential to his message and, in light of that point, he *edits* his previous statements. For example, when talking about the four men that he shot and his certain knowledge that they were not carrying guns, he says,

These guys are too smart to carry guns. You’ve told them they can’t carry guns. Okay. And I knew it was just a bullshit threat. And even if he is carrying a gun, I knew it was bullshit, it’s irrelevant...in my mind that was irrelevant. And you

229. *Id.*

230. *Id.* This is similar to an earlier moment in the interview when the district attorney tells G.C. that the police know the details of the robbery but that they want “[G.C.] to tell us.” G.C., frustrated, says in response: “You keep saying that, but how [do you want me to tell you]?” *Id.* Not until later in the interrogation does G.C.’s tone of frustration about his inability to find a pleasing way to tell the story turn into a game where G.C. feels more in control of the outcome. He says later, “You want to know where the gun is at?” To which the detective and district attorney respond eagerly: “Definitely.” G.C. finally looks relieved and says, “I only know where one gun is at, what you want to know about it?” *Id.* Not until much later in the interview does he appear to take pleasure in his ability to create suspense by revealing or withholding information. *Id.*

can judge me on that, if that's one of your technicalities. I could claim, I could claim that that bothered me, and it didn't bother me. I don't care whether I live or die, whether you believe that, *that should be in my statement*.²³¹

What does Goetz mean by the phrase “that should be in my statement”? Isn't the film his statement? By pointing to the possibility of a bounded story—there are things in the statement and things not in the statement—he questions the evidentiary nature, reliability, and completeness of the film that he is making. By pointing to these boundaries, he attempts to control the narrative, to shape it, and to give it certain contours:

I just want to say a couple of things about the statements that have been made. People have said the response was out of proportion. Now, when a person when you take any person in New York, I'm not talking about me, I'm talking about other people, when they have been deliberately maimed and beaten and the powers that be they essentially, they fill in their paperwork and shrug their shoulders and turn their back and go home and have another cup of coffee—this is the issue.²³²

Here, Goetz recasts his already filmed statements regarding his use of force in reaction to his own past victimization. He previously provided statements about his mental state when he shot the four men on the subway, and now he is retelling the story again—this time as an analysis. When he says, “I just want to say a couple of things about the statements that have been made,” he highlights a metanarrative function; he is both narrating a story of the crime and narrating the narration.²³³ In this way, his filmed confession follows the generic conventions of post-structuralist autobiographical film inasmuch as it contains two voices, which are “the mark of personal, actual events and a consciousness that bears witness to, and forms an opinion about, these events.”²³⁴

G.C. G.C. also edits his words, but not by reworking previous statements the way Goetz does. Instead, G.C. explicitly self-censors. He is acutely aware of the possibility that what he says may be used against him and expresses this concern directly to his interrogators. In the first few minutes of the interview, he says, “What kind of deal we gonna do....I don't wanna tell you everything....Come on, man.”²³⁵ He repeats this sentiment an hour into the interrogation in response to the district

231. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214 (emphasis added).

232. *Id.*

233. A “metanarrative function” is the way a story comments on its own storytelling role and draws attention to its story-creating capacity. It is a form of reflexivity. See STAM ET AL., *supra* note 82, at 200 (defining “metafiction” as “fiction about fiction that comments on its own narrative or linguistic identity” and “self-conscious fiction” as fiction that “call[s] attention to [its] status as artifact”).

234. Lane, *supra* note 48, at 32. Interestingly, at this moment in his confession, Goetz cocks his head to the side and leans into the camera. Although the camera angle does not change throughout his confession, by cocking his head, the appearance is as if Goetz is being filmed with a canted camera angle, which is often used by filmmakers to designate something odd or unusual. See THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214; see also *supra* note 92–94 and accompanying text (discussing film techniques such as canted shots). Insofar as Goetz is self-reflective of his storytelling role, he appears to be marking it here with traditional traits of the metanarrative genre, which is frequently marked in film and literature by a change in style. STAM, *supra* note 108, at 164 (“Reflexive art constantly reminds us of the multiplicity of styles available to an artist.”).

235. Videotape: Confession of G.C., *supra* note 227.

attorney's statement that "[e]verything is in the balance. What you say to us will make a difference [in how you're treated at sentencing]." ²³⁶ To this, G.C. sits back, folds his arms, and says, "I don't want to say anything that's gonna mess me up later." ²³⁷ Instead of analyzing his previous statements to drive home a point, the way Goetz does, G.C. comments on the effect of speaking at all in his situation. This is also a form of metanarrative. It is not a narration of the story already told of the crime, as was Goetz', because G.C. has not yet told a story of the crime; it is a narrative comment about the way that stories unfold in the confessional context and how they are retold later in court. G.C. becomes quietly angry at one point early in the interview and rehearses this same criticism of the way the story of the crime will eventually play against him: "Bottom line, I'm f---ed regardless....[because] I'm gonna tell you something, you're not gonna tell me nothing. Come on, man.... You sit here, say help yourself [shakes his head] but you know it's over for me." ²³⁸ G.C.'s filmed confession shows him to be acutely self-conscious of the lack of control that he has over defining or representing the innocent identity that he seeks to construct and assert.

c. As Dramatist

Bernhard Goetz. Like a dramatist, Goetz revels in his role as storyteller. He pauses before describing particularly striking images and repeats such descriptions for emphasis. For example, he pauses before he describes the "shiny eyes" on the face of one of the men he shot—the man's expression and stare being central to Goetz' knowledge of "what they were going to do to [him]." ²³⁹ He repeats over and over—as if it were the theme of his oratory—that he considers himself to be an "animal," a "monster," a "reptile," or a "rat." ²⁴⁰ When he finally arrives at what he considers to be the climax of his statement—when, after more than an hour of constant talking, he finally describes how he shot the four men and then returned to shoot Darrell Cabey again—he melodramatically foreshadows this climax with the conclusion that he wants his audience to draw. He says, shaking his head, "This is all very cold-blooded. This is going to offend everyone." ²⁴¹ And then he continues with that which becomes the crux of the legal case. Turning toward the camera and leaning into the table in front of him, he says,

I went back to the other two to check on them. And the fellow who was standing up, I was sure I'd shot him. It was funny...I was wondering if I'd missed him, but I went to him a second time and I looked at him and he can't verify this because he was probably out of it by then if I shot him I don't know...and I said "You seem to be doing all right, here's another." ²⁴²

236. *Id.*

237. *Id.*

238. *Id.* In this same vein, G.C. says toward the end of the interview, "Doesn't matter what I say, you're gonna believe what you believe." *Id.*

239. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

240. *Id.*

241. *Id.*

242. *Id.*

Like an actor on stage, Goetz' physical gestures, vocal intonation, and discursive emphases combine to make this a chilling and extraordinarily incriminating confessional statement.

J.C.²⁴³ Like Goetz, J.C. dramatizes the story that he tells of the crime for which he has been accused. J.C. is a middle-aged, thin, black man who is being interrogated for having shot a man with a handgun near his home in New York City. J.C. claims to have been acting in self-defense. His interrogation lasts approximately thirty minutes during which J.C. tells the same story over and over, no matter what questions he is asked. He is sitting across from the camera with his arms occasionally resting on the table in front of him. His colorful and animated descriptions of the events that transpired are magnified by his full-presence (however small he may be in person) on camera.

He describes how "Phil" came at him "like a gorilla" saying "give me two dollah, three dollah."²⁴⁴ J.C. says, "I shot him, that's all."²⁴⁵ When asked how Phil approached him, J.C. repeats, "like a Gorilla...he grabbed me...and I turn around and shot him."²⁴⁶ When the detective asks, "Did you aim the gun at Phil?," J.C. repeats again "[He grabbed me] right here [pointing to his shoulder], and I just turned around and shot him."²⁴⁷ When the detective pushes J.C. for more details, asking about what transpired before and after the shooting, J.C. does not directly answer the question but instead speaks of how just beforehand he had greeted a neighbor. He then repeats the same story. "I hollered, 'How ya doing, Bubbles?,' like that....[And Phil] followed me....I wasn't even thinking about [hurting Phil]....He grabbed me right here...[and I] just turned around and shot him."²⁴⁸

J.C.'s interrogation is filmed like Goetz': with a full-frontal shot of the defendant's torso while he is seated at a table. The interrogators are seen on film only at the beginning of the recording when they enter the room. Despite the detective's questions, J.C.'s confession is very much like a dramatic monologue. Filling the screen and talking to the camera, J.C. is focused on his storytelling. At one point, when J.C. is reminded that the interrogation is being filmed, he looks up and smiles at the camera as if to acknowledge the larger audience for the story that he is about to tell.²⁴⁹ J.C. was advised of his *Miranda* rights on film, which he quickly waived. The swiftness with which he waived them (whether it suggests a knowing or an unintelligent waiver) buttresses the sense that he very much wants to get to his point. He does so with vivid words that animate his story—calling his attacker a "gorilla" and describing how he "hollered at Bubbles, 'How ya doing?'"²⁵⁰

243. Videotape: Confession of J.C. (May 13, 2004) (on file with author and with the New Mexico Law Review).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. This is similar to Goetz' comment near the end of his confession when he says, "but they're gonna give you a copy of this tape. Of course they will, of course they will...just watch this tape again." THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214. Both men appear to be comforted by the enduring existence of their filmed statement. See *infra* Part IV.B.3.

250. Videotape: Confession of J.C., *supra* note 243.

Like Goetz, J.C. repeats his story several times. To most questions, whether or not responsive, J.C. responds, “I don’t pay no attention.”²⁵¹ When he is not telling his story, he stares vacantly into space and avoids interacting when it distracts from his story. He only comes alive when he can say again how Phil grabbed him and how he “just turned around and shot him.”²⁵² Like Goetz, J.C. does not move around much when he talks except to emphasize how he believes that he acted in self-defense. Then he leans into the interrogators to tell them how he forcefully pushed Phil away and said, “Get your hands off me.”²⁵³ The physical closeness created by leaning into the interrogators in combination with the alternation of physical animation and static body posture creates a sense of intimacy, trust, and intentionality regarding the story he tells. This is true with respect to both the interrogators in the room as well as the viewers of the film who share a visual point of view with the interrogators. This intimacy and trust comes at a time when both Goetz and J.C. are describing how they not only defended themselves in the face of perceived attack but also how they did it successfully—with strength, power, and determination. Goetz’ appeal to a sense of machismo—“You look alright, have another”²⁵⁴—is more overt than J.C.’s—“I said get your hands off me”²⁵⁵—but both are delivered at the end of the interrogation and both effectively punctuate the act of self-defense with an exclamation point, as if to say, “I may have been acting in self-defense, but I’m no weakling.” Both confessions are overtly dramatic in their thematic emphases, descriptive word choices, and rhythmic repetitions but both also aspire to transparency and believability in order to garner acceptance and achieve self-determination.²⁵⁶

d. As Fabulist

Bernhard Goetz. Goetz is sufficiently self-conscious of his role as storyteller that he draws on parables to make his point, which is another form of self-reflective narrative. For example, he tells the story of a city rat, which, after being poked over and over with a stick, will inevitably become a “vicious killer.” He never explicitly says that he is like that city rat, but the point is effectively made. He also compares the rising tide of violence in New York City to water pressure against a dam. And, in perhaps the most metaphorical and imaginative parable of his confession, he describes the effects of the city’s indifference to street violence on him by comparing his emotional state with that of a skull with a glass globe in its center. He says, “You can break the teeth, the jaw, . . . and the city will help patch it up, but the glass globe is shattered. As long as things on the surface are patched up, it’s fine. But it’s not fine.”²⁵⁷ Here, he seeks sympathy by suggesting that the city only

251. *Id.*

252. *Id.*

253. *Id.*

254. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

255. Videotape: Confession of J.C., *supra* note 243.

256. See *supra* Part II.A.2 (describing two purposes of autobiography as the achievement of social acceptance and self-determination).

257. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

superficially fixes the problems of its citizens and that underneath all New Yorkers are permanently damaged by the city's violence.

*Deanna Laney.*²⁵⁸ Deanna Laney, a Texas mother of three who, in 2003, killed two of her sons by stoning them to death, provided a dramatic and wrenching confession to the police. Her confession is wrenching not because of her heightened emotional state—she is nearly emotionless throughout the entire confession—but because of the vivid detail that she provided about the death of her two sons. Laney claims that she was following God's command when she killed her boys. One of the moments when she is the most animated and distraught during her confession is when she tells a story of a bird's nest outside of her kitchen window that she noticed the morning of the murders. Like Goetz' parables, Laney is making a larger point with a short and simple story. She recalls noticing that the birds were learning to fly. She says, "And I remember thinking, 'I wonder where its mother is? She's not around.' [pause] And all of a sudden, she just popped up. She was there all the time, I just didn't see her."²⁵⁹ Laney begins to cry at this moment, and then continues:

And she fed that little baby bird. And it was just like the Lord spoke to me and said, "You're like that little baby bird. I'm right here all the time. And you'll learn to fly. You're learning right now. You'll learn to fly. I'm teaching you right now." And I watched that little baby bird, and it would just sit there, its momma would feed it,...and I realized that because the Lord was coming in spurts to me, it wasn't coming all the time, and I wondered about that, I wondered why, why it was in spurts. And that's just what he showed me, that I was like that baby bird. He's right there all the time, but I just need to be fed by him every now and then....²⁶⁰

Like Goetz' stories about defenseless animals or overwhelming natural forces, Laney's story about young birds and God's omnipresence is meant to explain how lost she feels and yet how miraculous God's love is. She embraces the telling of this story in order to "clarify" how she followed God's command to kill her children.²⁶¹ Like Goetz and J.C., Laney pauses dramatically before crucial moments: "I heard him breathe one more time, [pause] and then he was dead."²⁶² The most striking aspect of her confession, however, is not how she embraces its telling like an actor delivering a monologue, but rather, how her confession is about her and her relationship with God—not about her children's deaths. She is hardly moved in the recounting of her children's stoning but is intensely moved by her previous awakening to the knowledge that God is always with her.

Laney sits still in a chair during the confession. The camera does not move except to zoom in on her face several times. Otherwise, all that the audience sees are her torso and face. Her hands are mostly in her lap, and that is where she often focuses

258. Deanna Laney's confession can be viewed in part on Court TV's website, <http://www.courtstv.com/video/archive/> (scroll down to "Not Guilty; Not Sane"; then follow "Describes the killings" hyperlink) [hereinafter Not Guilty; Not Sane]. Because Deanna Lacey's confession is already in the public domain, I chose not to abbreviate her name.

259. *Id.* (follow "Describes receiving divine message" hyperlink).

260. *Id.*

261. *Id.*

262. Not Guilty; Not Sane, *supra* note 258.

her eyes. Infrequently, she looks at the interrogator, whose pad of paper is sometimes visible on the left hand edge of the film screen. In her monotone and quiet presentation, Laney appears calm and resigned. The horrifying details of her story draw in the audience, and her parable about a young bird learning to fly and God's omnipresence is evocative and otherworldly. Despite the dreadful details of the murders, it is easy to feel soothed and relaxed by her passive demeanor. She is all that the audience sees, and her words describing the murders are all the audience hears. The audience is convinced that she believes in the moral of her own story—that God is always there, willing her to action and “teaching [her] right now [how to fly].”²⁶³

But this is not the inevitable conclusion of her story. The story could have just as easily been one of Laney recounting how, when she thought the little bird was all alone in the nest, she realized how she had committed a sin far worse than deserting her children. She could have been telling a story about how good mothers are always present for their children, even when their children do not realize it. The bird in her story could have represented her children and she the mother out of sight. Instead, Laney's parable was about her relationship with God. When she says explicitly, “[The mother bird was] there all the time...I was like that baby bird...,”²⁶⁴ she shatters our expectation of a coherent narrative of guilt. Is she, or is she not, delusional? As a fabulist with a moral to share, she is the subject of her fable, yet her explanation fails to clarify her mental state according to the law.²⁶⁵ The multi-layers of her storytelling, especially its self-reflexive analytical quality, leave little flexibility for her audience to interpret the parable other than as she does. But what does it say about her guilt or innocence? Although Laney's story about her own awakening to God is uniquely persuasive as to her belief, it is uncomfortably ambiguous as to the requisite *mens rea*. In keeping with post-structuralist autobiographical form, both Goetz and Laney resort to self-reflexive and self-analytical storytelling in order to explain their innermost being. Ironically, this autobiographical style generates a discursive distance between the referent and its representation and between legal guilt and its representation, the legal guilt and the confession. The relevance of her confession to the legal case therefore remains uncertain. Is it evidence of guilt or of something else?

2. The Point: Constraints and Limitations of Discourse

Bernhard Goetz. The point of Goetz' creative storytelling, which he makes with his insistent and zealous style, is exactly the point that the jury took home. His confession convinced the jury that the circumstances of urban living made him into a monster. Escalating street violence, of which he was a victim years before,

263. *Id.* (follow “Describes receiving divine message” hyperlink).

264. *Id.*

265. In Freudian terms, Laney is both the analyst and analysand. She both recounts the story and interprets it for her audience. BROOKS, *supra* note 9, at 53 (describing Freud's psychoanalytic technique and “the roles played by analysand [patient] and analyst [psychotherapist] in constructing the story of the past. The analyst takes the raw material...provided by the analysand and attempts to construct it as a story, feeding it back to the analysand to see what effect it will have”).

combined with an incompetent legal system caused him to take matters into his own hands. Otherwise, as he lamented, he would have been “just one more statistic.”²⁶⁶

Goetz never explicitly states that he was justified in shooting the four men on the subway. At one point, he shakes his head and says, “My ass is grass. I broke so many rules”; he later says, “I don’t care what you do to me” and “You decide what is right and wrong.”²⁶⁷ The rhetorical force of these phrases is as strong as if he had explicitly called for exoneration. By explaining that he is abdicating responsibility for judgment and transferring that responsibility to “you,” he empowers his audience to be the arbiter of his words. Goetz is a shrewd narrator, one who understands that for a story to be effective it must feel as if it is being spun by both the addressee and the addressor. In this case it is. The audience of the film (i.e., the jurors) believes him because it feels that it can see the honesty of his words. Goetz’ superlative performance as the victim and as an advocate for himself ironically makes the film’s audience think that he is not performing or advocating at all.²⁶⁸

At one point, Goetz even goes so far as to dare his audience to condemn him based on the “truth” as he tells it. He says,

I consider what I am doing is throwing myself to a bunch of wolves, that’s what I look at you as being. Fine. I’ll come back to New York. You have the truth. You have other recordings, you should have the details. You got everything you want. Okay? I gave you everything. You guys you can make me look like a piece of shit. You can parade me around for the public and say and prove I was wrong. New York is going to have a need to show that I’m not a nut...they have a need to show that this act is not correct.²⁶⁹

As one of his final statements on the film (and of his confession), this sentence is also exemplary of the filmed confession as a whole. It embodies the performative/constative divide—the inevitable doubling—that defines all speech acts, especially confessions.²⁷⁰ He claims to be exposing his soul and surrendering to the inquisition. He says, “Do with me what you will,”²⁷¹ and yet, he is still deftly controlling the outcome. Why does he figuratively stand naked before his audience, indifferent to their judgment, unless it is to embolden it? “You can make me look like a piece of shit,”²⁷² he tells the viewers, strongly suggesting that they are unconstrained in their conclusions about him and his criminal liability. But of course they *are* constrained. The essence of being an addressee is that you are, in substantial part, defined by the story. Goetz says that he is giving himself up, but his words affect the exact opposite of what they mean.

One key to the tragedy of the Bernhard Goetz trial is that the jurors understood Goetz’ words literally and considered themselves free and unaffected by the film of

266. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

267. *Id.*

268. *See id.* *See also infra* notes 274–276.

269. *Id.*

270. *See* AUSTIN, *supra* note 14, at 4–11; BROOKS, *supra* note 9, at 21.

271. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

272. *Id.*

his confession “to do with [him] what [they] will.”²⁷³ They admitted that the film changed their minds about Goetz—from guilty to not guilty—but failed to recognize that it was the film (and not Goetz) that affected such an outcome. Juror Diane Serpe said,

After the courtroom instructions, my impression was that the tape was going to hang him. In fact, the tape in itself reversed my voting because I felt the tape showed that he himself...was affected by the media and that it had seeped in as far as recounting his own actions...I thought, let me think about people, and let me think about their actions, about how they act or react in situations. And I began to say to myself how many times have I been in a situation—a heated situation, a disagreement with a salesclerk or something like this—and I acted very civilly, but then as I walked away from it I thought “I should have done this” or “I should have said this.” Or, I might have repeated the story to someone else and put a lot of emphasis on the things I thought I should have said in order to justify my actions. And that’s, in a sense, if you can understand that, that’s what I feel he was doing in recounting this because as he told the story again and again there was more and more emphasis put on the actions. I think a lot of what he said is what he thought he should have said...I don’t believe that he really acted the way he did, as far as walking over to...the person and saying, “You look alright have another.” I don’t believe those words were ever uttered.²⁷⁴

Juror James Moseley noted: “He was just being totally honest, which is fine, but on a videotape at the precinct, that’s not a good time to be so honest.”²⁷⁵ The jurors interviewed (along with several attorneys) experienced the film of the confession as something so intimate, so affective, and so completely transparent—classic autobiography—that they arrived at the end of the filmed confession feeling much closer to Bernhard Goetz, as if they really got to know him.²⁷⁶ The jurors understood him so well after watching this film—it was such a compelling and presumptively authentic presentation of Goetz—that they could tell when he was truthful and when he was not.²⁷⁷ Most astounding is that the jurors forgave what they believed were lies about how he returned to shoot Darrell Cabey again, which, had they believed was the truth, would have been enough to convict Goetz of attempted murder. Goetz’ words of guilt and surrender successfully freed the jury to exonerate him.

By disregarding Goetz’ statements of guilt (both *actus reus* and *mens rea*) but believing the rest of his story of victimization, it appears that the jury understood that confession evidence can be faulty and that even well-meaning people misspeak,

273. *Id.* The central tragedy of the Bernhard Goetz story, of course, concerns the four wounded men (one permanently disabled) and the underlying racism and machismo of Goetz’ actions, which haunted the legal case and the popular media’s recounting of the crime. See FLETCHER, *supra* note 215, at 201–08. Goetz’ racism, in particular, has been the subject of numerous writings. See, e.g., *id.* at 199–217.

274. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

275. *Id.*

276. This is a typical illusion that film creates. See Silbey, *supra* note 11, at 140.

277. *But see supra* notes 1–5, 7, 8 and accompanying text (discussing the James Frey controversy). Recall that people were shocked to learn that James Frey’s memoir was partially invented. They did not suspect that it was a mixture of fact and fiction. I would venture to assert that, if later asked to discern which parts were true and which were not, readers would have no basis on which to make that determination. Why, then, did the jurors feel differently about the Goetz confession?

embellish, and tell tales.²⁷⁸ The decision rendered by Goetz' jury would seem to imply that confessions must be scrutinized closely for signs of duress and compulsion. This is true except for the fact that this jury still assumed that they could spot the real Bernhard Goetz somewhere in the filmed confession. The jury made the substantial error of assuming that Goetz' confession revealed, rather than remade or represented, a man. They mistakenly believed that there was a man hiding behind the performance rather than being constituted by it.

Another key to the Bernhard Goetz trial is that the jury failed to recognize that in his filmed confession Goetz was not freely confessing his crime; he was not "pristine, . . . unstudied," or "full of honesty" as one juror said.²⁷⁹ Goetz confesses out of compulsion, perhaps not in the unconstitutional sense, but nevertheless in the sense of personal urgency. His emphatic attempts to explain and his expressions of frustration that he might be misunderstood demonstrate a deep desire to control or otherwise shape the stories that are told about him. He suffers from "the problem of an autobiographer, when he considers the material of his own past, [and] . . . is confronted not by one life—which he sees from the outside—but by two. One of these lives is himself as others see him—his social or historical personality. . . ."²⁸⁰ Goetz' confession can be said to have been compelled because it proceeded "from a state of dependency and abjection rather than from one of autonomy and dignity."²⁸¹ In contrast to the free persona that the jurors perceived in Goetz, which he attempted to embody,²⁸² he was in fact pathetically dependent on expressions of understanding and acceptance that he was seeking through confession. This is troubling because, at law, we only accept confessions as proof of guilt when they are the product of "autonomy and dignity"²⁸³ spoken by one who chooses whether or not to speak. But Goetz' confession demonstrates that there would have been no confession absent the compulsion to narrate his version of New York's crime problems, to expatiate upon his perspective, and to tell his own personal story.²⁸⁴

G.C. *G.C.*'s interrogation expresses a similar dynamic of abjection and dependency. Desperate to limit his culpability in the armed robbery for which his

278. FLETCHER, *supra* note 215, at 194–96. Fletcher noted that, "[e]ven though the media had accepted the reliability of the confession for the last two years, [the jury] would have to think it through on their own. They would accept nothing at face value." *Id.* at 194. Fletcher continued:

The explanation that emerged was that Goetz was distraught and confused after nine days of being on the run and several hours of talking to the New Hampshire police before he put his confession on tape. Many jurors believed that Goetz . . . was influenced by . . . early press reports that Goetz shot a fifth shot downward at someone sitting. Their doubts were bolstered . . . by Waples's [sic] [the prosecutor] having conceded in his summation that perhaps Goetz merely said, "You seem to be [doing] all right; here's another," in his mind. "It made everyone think," [juror Perlmuth] says, "that these processes could have taken place mentally rather than actually."

Id. at 196 (footnote omitted) ("[doing]" in original).

279. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

280. See Stephen Spender, *Confessions and Autobiography*, in *AUTOBIOGRAPHY: ESSAYS THEORETICAL AND CRITICAL*, *supra* note 21, at 115, 116.

281. BROOKS, *supra* note 9, at 72.

282. At one point, Goetz says, "I don't want an attorney because attorneys tell you what to say and what not to say." THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

283. BROOKS, *supra* note 9, at 72.

284. As Peter Brooks has written, "the act of confessing may in its very nature undercut the notion of human agency that the law wishes to . . . promote." *Id.* at 74.

uncle is the prime suspect, G.C. at first tells a story of his minimal involvement. He maintains that he was with his uncle when his uncle disposed of the gun used during the crime and only later augments that story with one of his reluctant involvement in the robbery. His interrogation ends with a statement that he was roped into the commission of the crime and was kept in the dark about the extent of the crime until he was in the act of committing it. Whether or not intended, G.C.'s reluctance to speak parallels the reluctance that he says that he expressed to his uncle about engaging in the robbery. The film of G.C.'s interrogation convincingly depicts a man who is heavily burdened, hesitant, and anxious. But, does this counsel in favor of believing that he acted without premeditation and out of compulsion in committing the armed robbery? Or, to the contrary, does it suggest that he would never have done anything criminal without sufficient planning and only after overcoming significant inhibition?

Answering these questions lies at the heart of the interrogators' mission. Yet, the answer can only be determined by the interrogators themselves. G.C. himself articulates that whatever he says will have little effect. In the same way that Goetz rhetorically hands the reins over to his interrogators—"you have the truth" and "I consider what I am doing as throwing myself to a bunch of wolves"²⁸⁵—G.C. admonishes his interrogators for suggesting that he has any control over the outcome of the interrogation. He says, "I'm gonna tell you something, you're not gonna tell me nothing, come on, man. You know it's over for me, come on."²⁸⁶ G.C. repeats throughout the interrogation: "you know everything already," "you the one that knows," "you know what I know—I know you out for me," and "doesn't matter what I say, you're gonna believe what you believe."²⁸⁷ These statements are expressions of exasperation and resignation about the interrogation process and the criminal justice system. While resisting being specific as to his role in the robbery in order to minimize his culpability, G.C. nevertheless effectively surrenders to his interrogator's prior knowledge and understanding of the crime. Ironically, by withholding information—a form of resistance to the interrogation procedure—G.C. empowers his interrogators to narrate the crime for him, inserting the details they already know about his involvement in the crime into G.C.'s pithy story.

The effect of G.C.'s filmed confession is not a confirmation of his guilt or innocence but, rather, a recognition of the constrained circumstances under which he speaks. The film portrays a man who is entirely controlled by his circumstance. It is hard to understand his confession except in light of these constraints because his self-serving and incriminating statements are responsive only to the situation in which he finds himself. His speech is halting, his reluctance is acute, and his anxiety and sadness are manifest. He is a muscular and tall black man who un-stereotypically cries throughout the interrogation. He constantly wipes his eyes, face, and forehead. He regularly shifts in and out of a semi-fetal position in the armless chair with his knees bent, his arms folded over his chest, and his elbows resting on his thigh. At one point, he wraps himself in his white t-shirt by pulling his

285. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

286. Videotape: Confession of G.C., *supra* note 227.

287. *Id.*

arms inside the shirt and pulling it tight around his chest so that it looks like he is wearing a straightjacket. The camera focuses solely on him, and he fills the screen as he sits against the tiled wall in the corner of what appears to be a cramped and windowless room. The interrogation lasts for over three hours, but he has been in the precinct house for over twelve hours. He never gets up from the chair during the entire interrogation. G.C.'s character is created by these images and arises out of the film and the criminal interrogation; it is entirely compelled by the situation. The audience would have no basis for concluding from the film alone that, under different circumstances (the circumstances of the crime), he is or would be the same kind, nervous, anxious, hesitant, and emotional person. Ironically, however, G.C.'s failure to clarify the situation, his reluctant demeanor, and his complaint that the interrogators "know everything already" reinforce his interrogators' accusation that he participated in the robbery with malice aforethought.²⁸⁸ G.C.'s presentation as a hesitant and anxious man, like Goetz' performance as a soul-bearing one, seals his fate despite the doubt as to whether such a portrayal is representative of the criminal that he is accused of being. The *film* of the man, not the man himself, becomes the subject that the law judges.

J.C. The same conclusion could be drawn about the filmed confession of J.C. His repetitive and stiff style combined with his awareness of and nod to the film camera evidence the circumstance of the confession more than the truth of any historical event in his past. J.C. is preoccupied with getting his story straight and connecting with his larger audience, not the interrogators before him. This says nothing about whether his story is true or not and says much more about his feelings toward and experience of the interrogation itself. He recognizes it as a time when he must be persuasive (i.e., consistent and direct) and when there are forces beyond him (i.e., the interrogators' distracting questions and their effect on the interpretation of his story) that he must resist.

Deanna Laney. Laney's confession is similarly compelled and constrained. Although her demeanor is more relaxed than Goetz', G.C.'s, and J.C.'s, her story about the baby bird evidences abjection and despair. She is not free, as she herself admits, but is called to God, at his command. God is acting and speaking through her. Her calm resolve, she implies, is only evidence of Him. Her dependency (as opposed to her freedom) is further evidenced by her shame when she admits through her story that she thought that God had deserted her. Her confession is therefore not about the murder of her children, as already explained, but obliged penance for the sin of disbelieving in the Lord's omnipresence. Her story does not reveal a woman who embraces her autonomy and freedom in the face of God's punishment; instead, it constitutes a person who is deeply repressed and who speaks only to deflect or resist the reality that she fears the most: that she alone is responsible for killing her children.

288. See Kassir & Gudjonsson, *supra* note 8, at 37 ("Nervousness, fear, confusion, hostility, a story that changes or contradicts itself—all are signs that the man in an interrogation room is lying, particularly in the eyes of someone as naturally suspicious as a detective. Unfortunately, these are also signs of a human being in a state of high stress.") (quoting DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 219 (1991)).

3. The Truth of the Matter Is Made of Celluloid

Bernhard Goetz. The central paradox of Goetz' confession is that what is spoken and what is affected unavoidably diverge. When Goetz says, "What I did was cold and ruthless," what is enacted through the legal system and the jury verdict is: "I had justified fear." When he says, "I'm not going to play the [legal] game" and "I'm just going to say no contest," what nonetheless transpires is a show trial with one of the most skilled criminal defense attorneys in New York.²⁸⁹ Although Goetz explains his confession as an attempt to cast the story from his perspective, recognizing the power of the last word amidst rivaling narratives, he nevertheless fails to take the stand in his own defense, abdicating the literal last word to his attorney. Indeed, his attorney's argument at trial was that Goetz' confession was unreliable and should be disregarded.²⁹⁰ In doing so, Goetz' defense attorney attempted to obliterate the personal authority that Goetz tried to create with his confession.²⁹¹ Goetz claims that he rejects the title of hero—"I'm a coward.... Anyone can pull the trigger"—but his statement incites signs throughout New York that read "Criminals, Watch Out! We Will Goetz You."²⁹² Through his story, as told in his confession, Goetz became an icon.²⁹³ Indeed, his personal story is characteristic of those in which the little man finally stands up to the bully and risks everything to reassert his prominence amidst the brutal machine of the urban landscape.²⁹⁴ Goetz can claim on film that he is not a hero because he understands that his filmed confession might make him into one.

These examples show how, through Goetz' filmed confession, his words help to constitute their semantic opposite. What he says and what he becomes effectively diverge. This exemplifies how the narrating self, the one being filmed or doing the filming, is different from the narrated self, the one that is constituted by film. Goetz' insistence on his identity as a coward in the past gives rise through film to a new and contrary identity as a hero in the future. His performance—insisting on one characterization of his acts and person that nonetheless gives way to an entirely different characterization of his acts and person—evidences the fluidity and uncontrollability of identity that contemporary film and video autobiographical practices embody.²⁹⁵ Recreating his past for the film, he redefines his past actions, which becomes the basis of the jury's judgment. The truth of the matter—the basis of the legal judgment—lies not in the person, but rather, it lies in his filmic incarnation.

A third key to Goetz' trial, therefore, is the jury's failure to understand Goetz' confession as he does, which is as a performance in a film and a plea for sympathy for acting like a vicious beast. When Goetz complains that his interrogators do not understand him, he says, "That's fine, but they're gonna give you a copy of this

289. See FLETCHER, *supra* note 215, at 9.

290. See *id.* at 113, 175.

291. In addition to undermining the truth of Goetz' confession, the defense also tried to win the case by "prosecuting" Goetz' victims. *Id.* at 106–07.

292. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214; see also Otto Friedrich, *Not Guilty*, TIME, Monday, June 29, 1987, available at <http://www.time.com/time/magazine/article/0,9171,964773-1,00.html>.

293. FLETCHER, *supra* note 215, at 28.

294. *Id.* (describing Goetz as a "folk hero" who brought "arrogant predators to their knees").

295. See *supra* Part III.B.1–2.

tape. Of course they will. Of course they will.”²⁹⁶ He instructs them to “just watch this tape again, or whatever.”²⁹⁷ Goetz repeatedly and explicitly relies on the film as a discursive object to construct his person, to explain his actions, and to modify the stories publicly circulating about him. He is self-conscious of his role as a storyteller and as a filmmaker, and, thus, he is aware of his burden to construct a person with whom the audience can identify.²⁹⁸ This self-reflexivity highlights not only the impossibility of transparency in film, in narrative, in character, and in confession, but it also demonstrates *Goetz*’ *understanding* of this impossibility. He understands what the jury does not: there is no unmediated access to the person who is Bernhard Goetz.²⁹⁹ The more that he attempts to show us who he is and why he did what he did, the more it becomes clear that confessions generally, and his confession specifically, do not reveal the truth about a set of facts or circumstances surrounding the crime, but, like autobiographical acts, they situate truth as one effect of specific social and discursive constraints. Here, that situational truth is a legal and moral identity of a victimized urban-dweller that the law, as embodied by a jury, must judge and may likely acquit.

J.C. *J.C.* embraces the filming of his confession in a similar way and toward similar ends as Goetz. In response to the prosecutor’s statement at the beginning of the interrogation that the interview is being filmed, *J.C.* smiles, looks up at the camera, and says, “It don’t make a difference.... I want to tell the truth.”³⁰⁰ Addressing the camera directly in this manner accomplishes two things. First, it personifies the film camera, as if to establish a pact between two trustworthy people: “I will tell the truth and you will record it faithfully.”³⁰¹ This transparency is an ideology, not an inevitability, of film and autobiographical form.³⁰² By breaking the “fourth wall”³⁰³ of performance space to directly acknowledge, address, and embrace the audience, he is also saying, “I know you’re watching and listening, and that’s okay because I want to speak with you, too.” Once *J.C.* establishes this intimacy with the larger audience as well as a keen awareness of it, he frustrates the detective’s and the prosecutor’s attempts at gleaning more information about the event under investigation. He merely repeats his assessment that “[Phil] grabbed me and I turned around and shot him.”³⁰⁴ *J.C.*’s pithy thirty-minute statement contains

296. THE CONFESSIONS OF BERNHARD GOETZ, *supra* note 214.

297. *Id.*

298. *See supra* Part IV.B.1.

299. *See* FLETCHER, *supra* note 215, at 197 (quoting juror Perlmuth as saying that “[Goetz] was disturbed on the tape” and “it was obvious that [Goetz] was a kind of a quirky person beforehand also”).

300. Videotape: Confession of *J.C.*, *supra* note 243.

301. This exchange signals *J.C.*’s empowerment, which is typical of defendants faced with film or video recording. Defendants seem to think that the camera—or at least the filmed version of their story—will help exonerate them. As one assistant district attorney said to me, “Defendants seem to want to talk to the camera.” Telephone conversation with Adrienne Lynch, Assistant District Attorney for Middlesex County, Cambridge, Mass. (July 11, 2006).

302. *See supra* Part III.A.1–2.

303. The phrase “breaking the fourth wall” originates with Bertolt Brecht’s theory of epic theater and the “alienation effect.” STAMET AL., *supra* note 82, at 199. It involves actors breaking with their character on stage to directly address the audience, thereby breaking the illusion of reality that the theater creates and “making strange” the previously very real-feeling experience of the play before them. For a description of Brecht’s “epic theater,” see *id.* at 198–201.

304. Videotape: Confession of *J.C.*, *supra* note 243.

little relevant information beyond his belief that he acted in self-defense. Like Goetz, J.C. calls on the film to carry his message forward. And whether or not his filmed statement accurately represents the event under investigation, J.C. seems to understand that it will stand for his legal persona and will (hopefully) explain his actions and shape the stories that his opponents will circulate about him. Like Goetz, J.C. appears self-conscious of his role as an autobiographer and as a filmmaker, and, thus, he is aware of his task to construct a person that his audience wants to believe and with whom they can identify. It is impossible to know from J.C.'s statement whether he acted with reasonable fear when he shot Phil. The legal truth that the prosecutor seeks cannot be found in the film—just like it cannot be found in Goetz' film (although the jury ultimately thought otherwise). Instead, the truth of the filmed confession lies in its form, through which the discursive constraints under which the confession was provided are revealed and which J.C. harnesses toward his own ends.

G.C. Likewise, *G.C.* aims to minimize his culpability by saying as *little* as possible and by only uttering that which will mitigate his criminal liability. Yet, his interrogators aim to learn as *much* as possible regarding his involvement in the robbery under investigation. And both the interrogators and *G.C.* rely on the fact of the film to strategize toward opposite goals in the interrogation. Consider the following exchange:

G.C.: I've never been in anything like this before. I've been incarcerated but I've never talked to no D.A. before....

D.A.: I'm prepared to listen to anything you have to say. It's your option.

G.C.: But do you know how much time I'm gonna get?

D.A.: I can't tell you. I don't know because I don't know how much you're gonna tell me. I am telling you you can only help yourself in talking to me....that you're facing a lot of time in jail, that [your talking to me] is something we take into consideration....I'm a man of my word. If you can help yourself...get a gun off the street...I have to think about that. It's up to you.

[Pause]

G.C.: You know I've been locked up before, but it's hard to trust people. I got problems trusting people....I don't want to trip myself up.

D.A.: If you've never talked to a D.A. before, never been on video when you talked to a D.A. before, you've never been in a position to talk [like this]... what guarantee is there? My guarantee is I will take it into consideration...and when we make that promise we always keep it.

G.C.: So you want to know where the gun is at?...If I tell you where it's at, then what?³⁰⁵

Here, the camera zooms out and includes the detective in the frame, who points to the district attorney and says, "He's the man who makes the decision."³⁰⁶ The camera only shows the district attorney's hands, which are held open face up like a balanced scale. Gesticulating with his hands still open and face up, the district attorney says from off screen:

305. Videotape: Confession of *G.C.*, *supra* note 227.

306. *Id.*

D.A.: I can promise you that we'll take it into consideration. We weigh it in the whole part of the case. The person that makes the ultimate decision is me...the person you're talking to right now. [clapping his hands together] And everything is being recorded.

G.C.: [Nodding] You want to know where the gun is right?...I was there when he put it there. [The camera zooms back to G.C. alone.]³⁰⁷

Here, both the district attorney and the defendant believe that the film will authenticate the statements that are made, like corroborating witnesses to the facts that their statements reference. Despite his lack of trust, G.C. seems appeased that the camera will record what he perceives to be the prosecutor's promise of leniency. The district attorney, however, will certainly argue that the film shows that he promised nothing that would amount to coercion. It is difficult to say with reasonable certainty whether G.C.'s filmed confession evidences a promise of leniency or a lack of coercion. The film leaves these questions unanswered despite each party's assumption that the film will answer the legal question in their respective favor. Indeed, the film fails entirely to reveal whether G.C. was coerced into confessing or whether his confession is otherwise truthful. The film also fails to reveal the truth of where the gun is located. G.C. says that he watched his uncle dispose of the gun down a gutter in Queens five months ago, but it remains uncertain if that is the case and whether, in fact, he committed the crime of which he was accused.

What the film does show is that the fact of the film made a difference in the interrogation and the confession. The film empowered G.C. to confess to his role as an accessory and the presence of the camera enabled the district attorney to speak as he did, encouraging the defendant to open up and "help himself." By facilitating the interrogation and confession, we see how the film creates a confession as well as underscores the constraints of confessional discourse. Both parties seem to think that words are not enough; filmed images are better. And yet, the film does not prove anything. Moreover, the film itself points to its own limits, as it zooms out to include only a partial image of the district attorney—his symbolically open hands—and zooms back onto G.C. when G.C. begins to divulge the location of the missing gun. These camera movements underscore the inherent limits of the film frame and "draw[] attention to its status as an artefact."³⁰⁸

In their efforts to control the terms of the conversation and any future incarnation, the defendant, the district attorney, and the cameraman display moments of self-consciousness of the limits of their efforts at communication. This is ironic in the same way that Goetz' instruction to "just watch this tape again" is ironic. Goetz relies on the film to have the last word on his behalf, yet, at the same time his performance demonstrates that he understands that the film will have an uncertain, but substantial, effect on his legal subjectivity. In G.C.'s case, both he and the district attorney humble themselves before the filmic apparatus by relying on it to generate only that story which will achieve their respective goals. At the same time, they tussle over the terms of the interrogation, recognizing that its readable form

307. *Id.*

308. WAUGH, *supra* note 154, at 2.

makes the legal outcome unpredictable.³⁰⁹ The “truth” exposed by the film is therefore not any essential truth of the words spoken or personalities portrayed, but instead, that film can create a legal identity and that studying the film and its discursive properties exposes the social conditions that produce it.³¹⁰

V. CONCLUSION: WHAT NEXT?

*Does a self create its autobiography, or does an autobiography create its self?*³¹¹

The filmed confessions above demonstrate how the self-reflexive discourse of autobiography—one that calls attention to its referential limits to enhance its claim of sincerity and authenticity—illuminates the strategies of power that structure the autobiographical act.

[C]onfession is a ritual discourse in which the speaking subject is also the subject of the statement; it is also a ritual that unfolds within a power relationship, for one does not confess without the presence or (visual presence) of a partner who is not simply the interlocutor but the authority who requires the confession, prescribes and appreciates it, and intervenes in order to judge, punish, forgive, console, and reconcile....³¹²

Foucault suggested that the classic goals of autobiography discussed above—understanding, justification, and preservation of self, all of which aim to affect social acceptance and self-determination—cannot be understood except as manifestations of power enacted through the performance of identity in discourse. The truth that emerges from that performance of self is therefore a truth about constraints. A filmed confession is not uniquely an attempt to expose an essential identity, such as a criminal act or a person, or an attempt to reveal an essentially coercive environment, such as during an interrogation. Instead, the filmed confession creates an identity in relation to a specific environment. In the same way that we sometimes do not know what we want to say until we say it aloud or write it down, the criminal identity may not exist prior to the film “proving” its existence. This has substantial ramifications on the criminal justice process as well as on the use of filmed confessions as evidence of guilt.

309. “Readability” is a term coined by Roland Barthes. See ROLAND BARTHES, *S/Z* (Richard Miller trans., Hill & Wang 1974) (1970). Another scholar has explained that

”[r]eaderly” texts claim the power to produce new meanings in ever new circumstances...but at the same time they are concerned, if not to claim a single univocal sense as central to their meaning, then at least to define the range of possible meanings that they can admit, to the exclusion of other possible meanings and relevances.

ROSS CHAMBERS, *STORY AND SITUATION: NARRATIVE SEDUCTION AND THE POWER OF FICTION* 26 (1984).

310. Cognitive psychologists studying confessions have come to very similar conclusions within the discipline of psychology. See, e.g., GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS* (2003) (proposing that confessions arise from the suspect’s relationship to the environment and significant others in that environment and can be understood by examining the antecedents and consequences of confessing); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 911–12 (2004) (describing Gudjonsson’s “Decision-Making Model” of confessions); Stephen Moston et al., *The Effects of Case Characteristics on Suspect Behaviour During Police Questioning*, 32 BRIT. J. CRIMINOLOGY 23, 26–28 (1992) (proposing that characteristics of the suspect and case combine to influence the interrogator’s style of questioning, which in turn shapes the suspect’s behavior and confession).

311. HAVERTY RUGG, *supra* note 73, at 1.

312. FOUCAULT, *supra* note 69, at 61–62.

Peter Brooks has written that “[c]onfession...remains one of the most complex and obscure forms of human speech and behavior.”³¹³ It “implies something secret and hidden, something that has long resisted speech.”³¹⁴ As such, confession struggles for representation and form; it is always in the process of becoming something or shaping someone. This struggle takes shape when the reasons to confess crystallize, either because of or through an interrogator’s prodding or other situational affects. “Confession may serve a number of motives—guilt, revenge, self-justification, self-abasement—which means that it is not necessarily the royal way to truth. The need to confess speaks *of* guilt, certainly, but it does not necessarily speak *the* guilt.”³¹⁵ Whereas many scholars who study confessions are concerned with false confessions, examining why innocent people confess and how one can tell a false from a true confession,³¹⁶ I hope that this Article demonstrates that the phrase “false confession” is itself a misnomer. It implies the certain existence of its opposite—a true confession, one that refers exactly to the crime and the legal guilt for which the accused will stand trial. As the foregoing discussion of autobiography and film shows, a filmed confession can hardly ever mean or be what police and prosecutors want it to be: unqualified proof of culpability. Georges Gusdorf has explained that

[t]he man who in recalling his life sets out to discover himself does not surrender to a passive contemplation of his private being. The truth is not a hidden treasure, already there, that one can ring out by simply reproducing it as it is. Confession of the past realizes itself as a work in the present: it effects a true creation of self by the self.³¹⁷

Resituating filmed confessions as forms of filmed autobiography exposes the mistake of considering filmed confessions as the quintessential telling of the definitive story of the crime. A person’s identity (as criminal) and his autobiography (as confessed through speech or on film) is a site of instability and contest precisely because of its evolving existence and reactive nature in discourse.

To be clear, I am not advocating that confessions not be filmed. Film can be helpful, just as testimony and documentary evidence can be helpful. For the reasons discussed above, however, filmed confessions should not be considered superlative evidence of guilt or voluntariness. Despite the overwhelming cultural norms associated with observational cinema³¹⁸—its objectivity and authenticity—precinct house filmmaking should be weighed alongside all of the other evidence, if not also partially discounted, because of the subconscious bias of accepting as true what is seen on screen. Confession evidence used to be viewed with more suspicion than it

313. Peter Brooks, *The Future of Confession*, 1 *LAW, CULTURE & HUMAN* 53, 74 (2005).

314. *Id.*

315. *Id.* at 71.

316. See, e.g., Paul G. Cassell, *The Guilty and the “Innocent”*: An Examination of Alleged Cases of Wrongful Conviction from False Confessions, 22 *HARV. J.L. & PUB. POL’Y* 523 (1999); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *DENV. U. L. REV.* 979 (1997); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 *HARV. C.R.-C.L. L. REV.* 105 (1997).

317. Gusdorf, *supra* note 64, at 44.

318. See generally NICHOLS, *supra* note 100, at 109–15 (discussing “the observational mode” of documentary films).

is today.³¹⁹ And there exists today substantial social science data to support a more critical reception of confession evidence in our criminal justice system.³²⁰ This Article aims to further support that social science literature by reaching the same conclusion through an alternative disciplinary path: by injecting into our legal community the insight of literary and film studies as to the fluidity and contingency of the autobiographical subject. An analysis of filmed confessions as filmed autobiographies illuminates the strategies of power that delimit the autobiographical act and the criminal confession such that the truth that emerges from the performance of self is a truth about present constraints, constraints of language, film, and law, rather than about past actions.

319. *E.g.*, WRIGHTSMAN & KASSIN, *supra* note 33, at 20–21 (“[B]y the beginning of the 19th century, a time emerged during which the judiciary was generally cynical about all confessions and tended to repudiate them if given the slightest justification.”).

320. *See, e.g.*, Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda’s Defenders*, 90 NW. U. L. REV. 1084 (1996) (replying to Professor Stephen Schulhofer’s comments regarding the “social costs of *Miranda* and possible alternatives to it”); Drizin & Leo, *supra* note 310; Kassin & Gudjonsson, *supra* note 8, at 57; Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC’Y 189 (1997).

TABLE 1: STATISTICALLY NONREPRESENTATIVE STRATIFIED SAMPLING OF FILMED CRIMINAL CONFESSIONS³²¹

Include Interrogator in Frame				No Interrogator in Frame			
Camera from Angle		Camera Straight-On		Camera from Angle		Camera Straight-on	
Miranda on Film	No Miranda on Film	Miranda on Film	No Miranda on Film	Miranda on Film	No Miranda on Film	Miranda on Film	No Miranda on Film
D.C. , 1999, Kentucky (sexual assault).	T.D. , 1999, Nevada (murder); R.D. , 1999, Missouri (murder).	J.C. , 2004, New York (assault with a deadly weapon); T.W. , 1997, Missouri (aggravated assault and murder).	C.E. , 2002, Florida (home invasion, kidnapping, murder); Bernhard Goetz , 1984, New York (assault, attempted murder, criminal possession of unlicensed weapon).	D.N. , 2000, Santa Fe (aggravated battery).	J.V. , 2003, California (rape).	K.S. , 2004, New York (home invasion and murder); G.C. , 2003, New York (armed robbery and assault with a deadly weapon); E.O. , 2003, New York (assault).	Deanna Laney , 2003, Texas (murder).

321. To keep individual identities confidential where the individual confessions remain confidential (not already in the public domain), this Table contains only abbreviated names. All films are on file with author.