

SYMPOSIUM: DOCUMENTARIES & THE LAW

FOREWORD

ENGAGING DOCUMENTARIES SERIOUSLY

Summer 2005. Documentaries were all the rage.¹ *March of the Penguins*, which recounts the reproductive lives and loves of the emperor penguins of Antarctica, was screened in cool air-conditioned theaters in parts of the country experiencing heat waves.² *Rize*, the story of the South Central LA hip hop dance craze known as “krumping,” schizophrenically played in indie film houses and cineplexes in “urban” neighborhoods.³ *Mad Hot Ballroom*,⁴ *Murderball*,⁵ and *Grizzly Man*⁶ had theatrical releases

¹ Caryn James, *Nonfiction Is Flavor of Moment for Films*, N.Y. TIMES, May 25, 2005, at E1. But see Paul Arthur, *Extreme Makeover: The Changing Face of Documentary*, CINEASTE, Summer 2005, at 18 (suggesting caution in celebrating the “mainstreaming” of documentaries in the face of concerns over their linkages to particular political and legal causes, opportunities for female and minority filmmakers, copyright clearances, the use of reenactments, and miscellaneous ethical quandaries).

² MARCH OF THE PENGUINS (a/k/a THE EMPEROR’S JOURNEY) (Warner Independent 2005) (Luc Jacquet, director). This film is the second highest grossing documentary film after Michael Moore’s FAHRENHEIT 9-11. See William Booth & Sonya Geis, “Brokeback” Riding High In Oscar Race; Gay Love Story Leads with 8 Nominations, WASH. POST, Feb. 1, 2006, at C1 (reporting on films nominated for the 2006 Academy Awards).

³ RIZE (Lions Gate Entertainment 2005) (David LaChapelle, director).

⁴ MAD HOT BALLROOM (Paramount Classics 2005) (Marilyn Agrelo, director) (following the rehearsals and performances of teams of New York City 5th graders who compete in a city-wide Latin dance contest).

⁵ MURDERBALL (ThinkFilm 2005) (David Adam Shapiro & Henry Alex Rubin, directors) (profiling the members of the United States Quad or Wheelchair Rugby Team and a former player who, when left off the U.S. team, became coach of their Canadian rivals).

in first-run venues as well. *The Aristocrats*, in which a host of comedians purportedly (who admits to having seen it?) tells and retells the world's filthiest joke, sparked controversy when it was rejected by a major theater chain purportedly on the ground that it had limited appeal.⁷ Two documentaries—*Super Size Me* (through its director's highly personal investigation of the link between fast food and myriad physical ills, especially obesity)⁸ and *The Untold Story of Emmet Till* (through its uncovering of evidence of a wider conspiracy in one of the most notorious murder cases of the Jim Crow Era)⁹ had an impact on the real world of law and social justice.

Meanwhile, in law schools, where the study of narrative or fiction films may finally be coming into its own and degrees in media studies are reportedly competing with MBA's as credentials

⁶ GRIZZLY MAN (Lions Gate Films 2005) (Warner Herzog, director). The film deals with Timothy Treadwell's dangerous fascination with grizzly bears, and his ultimate death (along with that of his girlfriend) from an attack by a bear in an Alaskan reserve.

⁷ See Gregory Kirschling, *A Rhapsody in Blue Humor*, ENT. WKLY., July 29, 2005, at 30 (describing how *The Aristocrats*, a documentary on "the filthiest joke of all time," generated both controversy because of its rejection by AMC Theaters and laughs even from detractors); *No Joke for AMC Theaters*, UPI NEWS, July 13, 2005 (reporting on the conflict over whether AMC Theaters and distributor ThinkFilm had made a deal on which AMC reneged).

⁸ SUPER SIZE ME (Roadside Attractions/Samuel Goldwyn Films 2004) (Morgan Spurlock, director) (recounting the health effects of the filmmaker's one-month diet of nothing but food from McDonald's). See Tara Bahrapour, *Arlington Banishes Sodas, Some Snacks; Schools Will Soon Sell Water, Juice and More Nutritious Vending-Machine Fare*, WASH. POST, Sept. 24, 2005, at B5 (reporting that adoption of toughened guidelines on items sold in vending machines in Arlington public schools was partly spurred by the movie *Super Size Me*); Peter C. Beller, *Boycott or No, Students Get Results*, N.Y. TIMES, Apr. 10, 2005, '14LI, at 8 (reporting on the changes provoked by a boycott of a middle school cafeteria that began after the students were shown an edited version of *Super Size Me*).

⁹ THE UNTOLD STORY OF EMMETT LOUIS TILL (ThinkFilm 2005) (Keith A. Beauchamp, director) (investigating the involvement of conspirators beyond the two men indicted for the murder of Till and exonerated in a state court proceeding in 1955). See Michael Weissenstein, *Film Recounts Till's Untold Story; Director's 1st Work Helped Reopen Case*, CHI. TRIB., Aug. 28, 2005, at C14 (describing the effort of Keith Beauchamp and others to get the Justice Department to investigate the case). See also Charles Sheehan, *FBI Closes Probe into Till's Death*, CHI. TRIB., Nov. 24, 2005, at C31 (reporting that the results of a federal investigation into Till's murder would probably be sent to Mississippi officials, though prosecuting conspirators who were still alive and whose involvement could be proven was unlikely).

held by competitive prospective law students,¹⁰ little or no attention was being paid to documentaries. This dearth of interest is truly surprising given the number of connections that exist between documentary or nonfiction films and the law. The law is the subject of a burgeoning number of works that might be categorized as law-genre documentaries because their central focus is justice and the maintenance of a fair and equitable society.¹¹ A few law-related documentaries have even attracted the public's attention as if they were fiction films. Consider the reception accorded *Capturing the Friedmans*,¹² *Super Size Me*,¹³ and *Enron: The Smartest Guys in the Room*.¹⁴ In some cases, the filmmakers themselves are lawyers. *Farmingville*,¹⁵ which is co-directed by Chicago law grad Carlos Sandoval, and *After Innocence*,¹⁶ which was co-written and co-produced by Cardozo law grad Marc Simon, are two recent examples of documentary films by lawyers. French law-trained director Jean-Xavier de Lestrade even won an academy award for *Murder on a Sunday Morning*, his exposé of racism in the American criminal justice system.¹⁷

¹⁰ See Elizabeth Van Ness, *Is a Cinema Studies Degree the New M.B.A.?*, N.Y. TIMES, Mar. 6, 2005, § 2, at 1.

¹¹ See Regina Austin, *The Next "New Wave": Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809 (2006) (grouping law-related nonfiction films into a genre).

¹² CAPTURING THE FRIEDMANS (Magnolia Pictures 2003) (Andrew Jarecki, director) (recounting the collapse of a middle-class Long Island family under the weight of charges of pedophilia brought against the father and youngest son as captured in home movies).

¹³ SUPER SIZE ME, *supra* note 8.

¹⁴ ENRON: THE SMARTEST GUYS IN THE ROOM (Magnolia Pictures 2005) (Alex Gibney, director) (explaining the collapse of the energy trading giant Enron through a focus on its leading executives and the scandalous business culture they promoted or condoned).

¹⁵ FARMINGVILLE (Camino Bluff Productions, Inc. 2004) (Catherine Tambini & Carlos Sandoval, directors) (depicting the controversy over the creation of a designated hiring site that pitted local residents who organized protests against the presence of undocumented workers seeking employment at curbside locations throughout their town and the workers and their supporters who found the protestors' behavior racist and xenophobic).

¹⁶ AFTER INNOCENCE (New Yorker Films 2005) (Jessica Sanders, director) (depicting the lives of seven wrongly convicted men after they were exonerated by DNA testing and released from prison without compensation or expungement of their records by their state governments).

¹⁷ MURDER ON A SUNDAY MORNING (Maha Productions 2003) (Jean-Xavier de Lestrade, director) (following the criminal trial of a young black man falsely accused of murdering

In addition, the law (especially copyright and the intentional torts of fraud, defamation, and invasion of privacy) is impacting the creative process of nonfiction filmmaking and the related phenomenon of reality television to an unprecedented extent. Noteworthy instances of this can be found in the effort to obtain the copyright clearances required to rebroadcast and redistribute the award-winning *Eyes on the Prize* series which tells the story of the Civil Rights Movement,¹⁸ and in the fraud action brought by a woman whose appearance on the ABC reality program “Extreme Makeover” was allegedly canceled the night before the surgery because her recovery would take too long.¹⁹

Finally, lawyers and clients are themselves producing a great deal of visual legal advocacy, by that I mean legal argumentation made on behalf of a client and employing the techniques of documentary or nonfiction filmmaking. Much of this visual legal advocacy exists below the law school radar screen. The proliferation of law-related documentary films and television news magazine segments that present legal cases and controversies in visual formats, as well as the increasing use of digital technology in the production of evidence and exhibits for the courtroom and other legal settings, have produced professional and lay legal decisionmakers who are highly receptive to and persuadable by filmed argumentation. Visual legal advocacy capitalizes on this predilection.

a white tourist in Jacksonville, Florida in 2000 and the public defender who successfully represented him).

¹⁸ Lisa Helem, *Civil Rights: A Televised Movement?*, NEWSWEEK, Feb. 14, 2005; Thom Powers, *“Eyes on the Prize,” Off the Shelf Due to Copyright Issues*, BOSTON GLOBE, Jan. 16, 2005, at C5. See generally Patricia Aufderheide & Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, available at http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf (recounting the views of filmmakers who are both users and creators of copyrighted material regarding the impact of the “clearance culture” which seems to dictate that “all rights must always be cleared”).

¹⁹ Michelle Caruso, *“Ugly” Mom Sues ABC for Nixing Makeover*, N.Y. DAILY NEWS, Sept. 18, 2005, at 3 (reporting on the lawsuit brought by a rejected makeover subject whose sister allegedly committed suicide because of the guilt brought on by the negative remarks she made about the subject’s appearance at the prompting of the show’s producers).

On May 5, 2005, a Documentaries & the Law Workshop was held at Fordham Law School to address some of the issues that are generated by a serious engagement with nonfiction film in the context of the legal academy.²⁰ The Workshop brought together documentary filmmakers, film studies scholars, practicing lawyers, law professors, and law students. The program focused on three areas of inquiry:

Video Literacy for Lawyers: The basic knowledge of documentary film criticism and the rudiments of nonfiction filmmaking that lawyers should have given the explosion of documentary films dealing with legal subjects, the seemingly ephemeral line between fiction and truth in documentary film, and the potential (for good or bad) of documentary film as a medium for educating the public about the law.²¹

Bringing Law to Life: The challenges of making a law-genre documentary film, including achieving access to institutions; obtaining the consent of subjects; negotiating the filmmaker/subject relationship; controlling events during filming; recognizing or adhering to legal and ethical constraints during editing; anticipating or shaping the reception by a lay audience of the subjects and the finished film; and presenting a coherent, yet complex critique of law on film.²²

Legal Advocacy on Film: The production and efficacy of nonfiction films by lawyers and their clients, including Day-in-the-Life films, video settlement brochures, taped confessions, taped

²⁰ The Workshop would not have been possible without the generous support and assistance of Fordham Law School; the Bacon-Kilkenny Distinguished Visitor Professorship Fund; Dean William Treanor; Associate Dean Matthew Diller; the entire staff of the Law School's Office of Public Programming and Continuing Legal Education; Judith Haskell, assistant to the faculty; and Trudy Fenster, Fordham Law Class of 2005.

²¹ The panelists who addressed this topic were Paul Levinson, Professor and Chair of the Department of Communications & Media Studies, Fordham University; Charles Musser, Professor of Film Studies, Yale University; Jennifer Dworkin, director of *Love and Diane*; and Michèle Stephenson, Esq., director of *Faces of Change*.

²² The panelists who addressed this topic were Linda Goode Bryant, co-director of *Flag Wars*; Michael Camerini and Shari Robertson, directors of *Well-Founded Fear*; and Victoria S. Cook, an entertainment lawyer with the firm of Frankfurt Kurnit Klein & Selz in New York City. Filmmakers Bryant, Camerini, and Robertson have essays in this Symposium.

victim statements, video closing arguments, and feature-length case studies.²³

The Workshop generated the essays and articles that comprise this Symposium. The pieces reflect the marvelous combinations of expertise possessed by their authors, and suggest the extent to which the study of documentaries and the law is a full-fledged interdisciplinary area ripe for further development. Jessica M. Silbey, a law professor who has a Ph.D. in film studies, writes about the limitations of filmed confessions. Shari Robertson and Michael Camerini, filmmakers with a background in anthropology, describe their ambiguous relations with lawyers. Documentarian Linda Goode Bryant explores the impact of local government law on the gentrification of a black working-class community in Columbus, Ohio. Roslyn Myers worked in documentary film before becoming a lawyer and lecturer in law; now she writes about victims' rights and documentary film. Finally, I have long used documentaries in my teaching²⁴ and in my writing which generally advances the proposition that contextual analysis, which is grounded in research from the humanities and the social sciences and draws on the legacy of legal realism, is crucial to a complete understanding of legal controversies.²⁵ As my contribution to this

²³ The panelists who addressed this topic were Martin K. Brigham, Esq. of Raynes, McCarty, Philadelphia, PA; M. Richard Merklinger, Esq. of Hack, Piro, O'Day, Merlinger, Wallace & McKenna, Florham Park, NJ; Roslyn Myers, Esq., Adjunct Professor of Law, Fordham University; and Jessica M. Silbey, Assistant Professor of Law, Suffolk Law School. Ms. Myers and Dr. Silbey have articles included in this Symposium.

²⁴ The syllabus of the advanced torts course in which I make extensive use of documentaries can be found on the website of the Documentaries and the Law Project at Penn Law. See <http://www.law.upenn.edu/academics/institutes/documentaries>. The syllabus for the Documentaries & the Law course is also posted there.

²⁵ See, e.g., Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U. L. REV. 1217 (2005) (examining predatory lending in the context of the cultural choices of, and financial alternatives available to, small-loan borrowers); Regina Austin, "The Shame of It All": *Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173 (2005) (relying on sociological data in analyzing the efficacy of common law tort remedies in combating the stigma of incarceration); Regina Austin, "Bad for Business": *Contextual Analysis, Race Discrimination, and Fast Food*, 34 J. MARSHALL L. REV. 207 (2000) (linking employment discrimination and customer discrimination through sociological and anthropological studies of the fast food industry); Regina Austin, *Of False Teeth and Biting Critiques:*

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Symposium, I respond to the myths that exist regarding non-fiction films with a manifesto in support of a full-blown embrace of documentaries as an important component of the intellectual and pedagogical project of the legal academy. All of the pieces taken together are a preview of the rich intellectual and professional discourse that would be generated among law professors, law students, and practicing lawyers by a serious engagement with documentary films.

—Regina Austin

Jones v. Fisher *in Context*, 15 *TOURO L. REV.* 389 (1999) (illustrating contextual analysis with a case involving an abused nursing home worker and ethnographic research involving domestic workers).