

# Crime Victims as Subjects of Documentaries: Exploitation or Advocacy?

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### I. FILM USED IN THE SERVICE OF THE LAW

For years, Hollywood and television have produced movies that portray lawyers doing their jobs—sometimes as heroes, often as failures, as sharks, or as cowards. Now, the depiction of the law in film is finally refocusing its lens to offer the camera in the service of the law. Film, the betrayer of lawyers' secrets, has become an essential rhetorical device for lawyers and their clients. For lawyers and other justice system professionals whose advocacy for their clients does not end with the final disposition of the case, film is a versatile tool. Lawyers are increasingly using film to lobby for policy changes before the legislature, to educate, or to advocate in a more expansive capacity than the traditional lawyer's role in serving the interests of their clients.

In a legal system that has little awareness of, and even less curiosity about, the back-story of the people who seek its assistance, film offers a valuable bridge between what the justice system can provide to the parties and what the parties need to fully address their grievances.<sup>1</sup> Unlike a legal forum, film can dignify the full back-story that brought the parties to the legal system in the first place. On film, the parties are free to present the messy, subjective truths of their experiences. They can describe who they were before they became litigants; recall the events that led to the legal action; and explain how the events and the case itself have affected them. Film allows the full sweep of the back-story of the parties to come to life—to see the human harm that stems from the legal transgression. When filmmakers turn their cameras toward the justice system and its troubled participants, the potential benefits are significant.

In this emerging trend in which film serves as a tool of advocacy, documentaries hold a special position. Documentaries, which present nonfiction accounts of events or people, adhere to the factual foundation of their subject matter with a fidelity that

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<sup>1</sup> See generally THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT* (Perennial 2004) (containing an excellent critique of the legal system and the disconnection between what litigants seek and what the law provides).

distinguishes them from other film genres.<sup>2</sup> They attempt to present those facts in context, with due attention to the relevant historical or cultural landscape, generally in a nondramatic way.<sup>3</sup> Historically, many documentary filmmakers have attempted to avoid introducing an explicit viewpoint on the subject of their film, allowing the story to unfold inductively through editing and shot selection.<sup>4</sup> When attempting to accurately report a particular historical or biographical event, it is the documentary genre that filmmakers employ.<sup>5</sup> Aside from whatever biases inevitably arise

<sup>2</sup> Defining the term “documentary” is a slippery business. Even the most experienced documentary filmmakers and academics have a hard time articulating a consensus on its elements. See, e.g., Nicole Huffman, Definition of Documentary, <http://xroads.virginia.edu/~MA01/Huffman/Frontier/define.html>. The traditional meaning of “documentary” rests in the dual notions of factuality and objectivity:

Main Entry: <sup>1</sup>doc-u-men-ta-ry

1 : being or consisting of documents : contained or certified in writing  
<documentary evidence>

2 : of, relating to, or employing documentation in literature or art; *broadly*:  
factual, objective <a documentary film of the war>

MERRIAM WEBSTER DICTIONARY, available at <http://www.merriamwebster.com/cgi-bin/dictionary?book=Dictionary&va=documentary> (last visited Apr. 20, 2006).

Yet, no art form, including documentary filmmaking, is ever completely objective, and documentary filmmakers are the first to admit this. Perhaps the most persuasive approach to defining the term “documentary” is one that borders on a cop out: when asked to define documentaries, Liz Manne, partner in the NYC-based production and consulting company Duopoly, remarked, “[I]t truly does come down to ‘we know it when we see it.’” Eugene Hernandez, *Is “Fahrenheit 9/11” a Documentary Film, or What is a Documentary Film?*, INDIEWIRE, Apr. 7, 2002, [http://www.indiewire.com/ots/onthescene\\_040702docs.html](http://www.indiewire.com/ots/onthescene_040702docs.html).

<sup>3</sup> See BILL NICHOLS, REPRESENTING REALITY: ISSUES AND CONCEPTS IN DOCUMENTARY 116 (Indiana University Press 1991). See also WEBSTER’S NEW WORLD COLLEGE DICTIONARY 4TH ED. 422 (“adj. 1 consisting of, supported by, contained in, or serving as a document or documents 2 designating or of a film, TV program, etc. that dramatically shows or analyzes news, events, social conditions, etc. with little or no fictionalization – n. a documentary film, TV show, etc”).

<sup>4</sup> One obvious exception is Michael Moore, who is known for his politically motivated films such as FARENHEIT 9/11 (Miramax Films, Dog Eat Dog Films & Fellowship Adventure Group 2004) and ROGER AND ME (Dog Eat Dog Films & Warner Bros. 1989). Michael Moore’s films, like the burgeoning phenomenon of byline journalism, run (or run over) the risk of making the persona of the filmmaker as important as, if not more important than, the subject of the film itself.

<sup>5</sup> The Academy Awards Rule Book, Rule Twelve, defines documentaries, in part, as follows:

Definition: A documentary film is defined as a non-fiction motion picture dealing creatively with cultural, artistic, historical, social, scientific, economic

from the editorial decisions of the producer and director, documentaries generally present fact-bound, not inventive, narratives. Documentaries are the primary genre used when the intention is to create a narrative that is faithful to the experience of the individual who is the subject of the film.

Nevertheless, documentaries have never been completely objective.<sup>6</sup> And, in our increasingly hybridized entertainment world, the definition of documentary film suffers from the same bastardization as other forms of entertainment.<sup>7</sup> Drama and reality

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or other subjects. It may be photographed in actual occurrence, or may employ partial re-enactment, stock footage, stills, animation, stop-motion or other techniques, as long as the emphasis is on factual content and not on fiction.

Academy Awards Rule Booke, <http://www.oscars.org/74academyawards/rules/rule12.html> (last visited Apr. 20, 2006).

<sup>6</sup> Jean-Louis Comolli observed that:

The basic deception of direct cinema is really its claim to transcribe truly the truth of life, to begin the position of witness in relation to that truth so that the film simply records objects and events mechanically. In reality, the very fact of filming is of course already a productive intervention which modifies and transforms the material recorded. From the moment the camera intervenes a form of manipulation begins.

ROBERT LAPSLEY & MICHAEL WESTLAKE, *FILM THEORY: AN INTRODUCTION*, 158 (Manchester University Press, 1988) (quoting Jean-Louis Comolli, *CAHIER DU CINEMA*, 209 (1969)).

<sup>7</sup> Examples of the intermingling of "Hollywood" features and documentary forms are plentiful. For example, Oliver Stone's film *JFK* (Alcor Films, Camelot, Canal+, Ixtlan Corp., Regency Enters. & Warner Bros. 1991) was interspersed with segments of film footage from Kennedy's assassination. Two films made about the race horse *Seabiscuit* provide other examples of the cross fertilizing of these two film genres. Compare *SEABISCUIT* (Universal Pictures, Dream Works SKG, Spyglass Entm't, The Kennedy/Marshall Co. & Larger Than Life Prods. 2003) (a successful Hollywood feature that was narrated by Pulitzer Prize-winning author and historian, David McCullough) and *Seabiscuit, The Long-shot That Captured America's Heart* (WGBH television broadcast July 28, 2003). Documentary film producer Laura Ozment sees the intermingling of documentary and feature films with concern:

When feature films adopt documentary footage or even use documentary film techniques and documentaries blur the line between factual information and speculation, rumor, or unsubstantiated reports, it's confusing to the public. Viewers begin to confuse fact and fiction, and the television and movie industries have not always made the distinctions explicit. Whenever possible, the documentary genre has a responsibility to be scrupulous about the source and reliability of the information it presents.

*Conversation with Laura Ozment* (Maine Public Broadcasting Network television broadcast July 13, 2005).

have become kissing cousins, and the documentary form, originating in the notion of pure documentation, has gone the way of the single-function cell phone. There are few films that simply report objectively on a given event or biography. Documentaries, like nouveau bottled water, are more likely to be doctored with tints, flavors, or other “improvements” than to be served pure and plain.

Many documentarians unabashedly use their films to advance a position by, for example, exposing a societal wrong<sup>8</sup> or corporate wrongdoing;<sup>9</sup> or promoting or criticizing a particular political candidate or platform;<sup>10</sup> or revealing the perhaps unknown, unflattering underbelly of a cultural or religious icon, or sports

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One thing that all documentary filmmakers, it seems, agree upon is that so-called “reality TV” is precisely not what its name implies. So-called reality TV shows are only “real” in the sense that they depict people who are presumably nonactors reacting (rather than acting) in a prestaged environment, under prescribed “rules,” in predesigned “tests” or gauntlets. That *Jon Stewart’s Daily Show* (Comedy Central television broadcast), a fake newscast, won an award for outstanding news and information programming in the 2003-04 season from the Television Critics Association over several real news programs is another display of the blur between “real” and “fake” television.

<sup>8</sup> See, e.g., *SUPER-SIZE ME* (The Con 2004) (examining America’s obesity epidemic); *THE DAY MY GOD DIED* (Andrew Levine Prods. 2003) (documenting the child sex slave trade); *AMERICAN DREAM* (Cabin Creek & Channel Four Films 1991) (highlighting the economic decline of America’s industrial heartland using a strike at the Hormel company).

<sup>9</sup> See, e.g., *THE CORPORATION* (Big Picture Media Corp. 2003) (examining the concept and development of the corporation through history); *Frontline, Is Wal-mart Good for America?* (PBS television broadcast Nov. 16, 2004) (asking whether the “Wal-mart way,” which has indeed lead to lower prices on consumer goods, must result in lower wages and job loss and, in turn, lower living standards); *ENRON: THE SMARTEST GUYS IN THE ROOM* (HDNet Films & Jigsaw Prods. 2005) (focusing on Skilling’s “rank and yank” and other methods of corporate management and its connection to the corruption of the conscience of employees individually, to the workplace culture, and, eventually, to the demise of the company).

<sup>10</sup> See, e.g., *UNPRECEDENTED: THE 2000 PRESIDENTIAL ELECTION* (Alternavision Films & Los Angeles Indep. Media Ctr. 2003) (uncovering the many irregularities in the voting and Supreme Court intervention in the 2003 presidential election between Al Gore and George W. Bush); *BUSH’S BRAIN* (BeBe Films, Inc. 2004) (documenting the political partnership between George W. Bush and his senior advisor, Karl Rove); *GOING UPRIVER: THE LONG WAR OF JOHN KERRY* (Swiftboat Films, Inc. & White Mountain Films 2004) (reviewing Senator John Kerry’s Navy tour of duty in Vietnam, his subsequent involvement in the peace movement, and his later political career).

hero.<sup>11</sup> But even such propagandistic film subjects are built upon evidence, and can either lead the audience to conclusions that are aligned with the filmmaker's (e.g., that toxic waste is a corporate wrong that should be righted;<sup>12</sup> that corporations require greater oversight to prevent waste and fraud;<sup>13</sup> that human rights abuses occur behind closed doors and are offensive to civilized society;<sup>14</sup> etc.), or allow the audience to disagree with the filmmaker's viewpoint.

The most powerful potential of documentaries is the quality that distinguishes them from other film genres: their capacity to reveal truths; to accurately relate the complete story—and back-story—of the parties. Documentaries offer the possibility for authenticity that is dispensed with in “Hollywood” films,<sup>15</sup> and they therefore offer a safer medium in which to tell stories that are emotionally loaded. The story of a crime and its victim is one such example. Few subjects carry more emotional throttle than does the narrative of a crime and its impact on the victim. Because the documentary genre can convey the experience with its full range of feeling and chaos of memory, it can be an ideal medium for victims to recount the narrative of the crime.<sup>16</sup> Openly elaborating on the traumatic experience is necessary to the victim's recovery, which, in turn, is, or at least should be, the primary goal in the pursuit of justice.<sup>17</sup>

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<sup>11</sup> See, e.g., *Living With Michael Jackson* (ITV1 television broadcast Feb. 3, 2003); *The Reagans* (Showtime television broadcast Nov. 30, 2003); *AUTO FOCUS* (Sony Pictures 2002) (tracking the rise and vice-frenzied fall of Bob Crane, star of the television show *Hogan's Heroes*).

<sup>12</sup> See, e.g., *TOXIC PARTNERS* (Blackriver Prods. 1999) (reporting the effects of toxic waste on two communities, Sydney, Cape Breton and Fort Valley, Georgia).

<sup>13</sup> See, e.g., *ENRON: THE SMARTEST GUYS IN THE ROOM*, *supra* note 9.

<sup>14</sup> See, e.g., *Torture: America's Brutal Prisons*, (BBC Channel 4 television broadcast March 2, 2005).

<sup>15</sup> See *NICHOLS*, *supra* note 3, at 116–17.

<sup>16</sup> For the purposes of this article, the term “crime victim” does not refer to all victims of any type of crime. This article discusses only victims of severe, violent, interpersonal crime, such as hate crime, rape, assault, murder (as distinguished from victims of fraud, identity theft, white collar crimes, etc). Because of the nature of such crimes, this group of victims has particular sensitivities about their story and how it is used that might not be applicable to other types of crime victims.

<sup>17</sup> See *ROSENBAUM*, *supra* note 1.

However, in using documentaries to depict a crime victim's narrative, there are significant risks. If the documentary record is to serve the interests of victims and promote the restorative powers of a moral justice,<sup>18</sup> lawyers and filmmakers must be aware of the particular sensitivities of victims in the portrayal of their stories.

*A. Courtroom Testimony, Testimonials, and Storytelling*

In contrast to the documentary and certain other forms of storytelling, the courtroom is not the ideal medium for crime victims to tell their stories. At trial, crime victim narratives are shaped for the purposes of prosecution, which is useful to send felons to prison, but seldom allows victims to speak to the underlying trauma of the crime and its lasting effects.

Yet, it is exactly this opportunity to speak that many victims need to begin the process of recovery from the crime. They need a forum in which to candidly describe the harms they endured during the crime and to the physical and emotional injuries that inevitably arise from such traumatic events.<sup>19</sup> In recounting these experiences, the spectrum of documentation ranges from simple recording of open-ended, unedited reminiscences to the highly structured, heavily circumscribed testimony of a trial witness—that is, for example, from written memoirs<sup>20</sup> or the videotaped testimonies of Holocaust survivors collected by the Shoah Foundation<sup>21</sup> and the Fortunoff Video Archive,<sup>22</sup> to the “state-

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<sup>18</sup> See ROSENBAUM, *supra* note 1.

<sup>19</sup> See, e.g., *A Chance to Speak Up and Heal the Hurt*, Derby Evening Telegraph, Sept. 2, 2005, at 8 (Sept. 2, 2005), available at 2005 WL 13870064 (describing the UK government's proposal to “[rebalance] the criminal justice system more in favour of victims” by allowing them the right to speak before the judge at sentencing and noting that “[p]sychologists and victim support workers believe that the chance to speak about the effect of the crime on them is an essential part of the healing process”).

<sup>20</sup> See, e.g., ALICE SEBOLD, *LUCKY* (Scribner 1999); JULIE GREGORY, *SICKENED* (Bantam Books 2003). See generally DANIEL SCHACTER, *SEARCHING FOR MEMORY: THE BRAIN, THE MIND AND THE PAST* (Basic Books 1996).

<sup>21</sup> The Shoah Visual History Foundation was established to gather testimonies about the Holocaust from survivors, including Jews, Jehovah's Witnesses, Sinti, and Roma; political prisoners and homosexuals; and witnesses, including rescuers, liberators, and war crimes trials participants. See USC Shoah Foundation Institute, <http://www.usc.edu/schools/college/vhi> (last visited Apr. 21, 2006).

assisted storytelling”<sup>23</sup> made at Truth and Reconciliation Commissions,<sup>24</sup> to courtroom testimony, for which the appearance of a fluid narrative disguises the evidentiary tug-of-war about what parts of the story will be admitted at trial. Documentary films span the range of all of these.

The value of documentaries to crime victims rests on the premise that the documentary form affords them an opportunity to speak about their experience, free of “angles,” as part of the process of their recovery.<sup>25</sup>

However, most of us know that no story is completely without angles. And nowhere are they more prominent and more strategically employed than in the justice system. In fact, the key to “winning” in court is very much dependent on the way the angles of the parties’ accounts are hewn; the way the facts are shaped, emphasized or de-emphasized, to suit the competing versions each side is attempting to “prove.”<sup>26</sup> Yet, outside the

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<sup>22</sup> The Fortunoff Video Archive for Holocaust Testimonies rests on the premise that “the medium of video could be used successfully to document the personal memories of Holocaust witnesses,” and that “the ‘living portraiture’ of television would add a compassionate and sensitive dimension to the historical record.” The Archive is the repository for 200 videotaped testimonies, and the Emmy-winning documentary, *FOREVER YESTERDAY* (WNEW 1980) produced by the Holocaust Survivors Film Project, Inc., available at <http://www.library.yale.edu/testimonies/about/history.html> (last visited Apr. 21, 2006).

<sup>23</sup> *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 11 (Heather Strang and John Braithwaite, eds., Cambridge University Press 2001).

<sup>24</sup> See, e.g., *LONG NIGHT’S JOURNEY INTO DAY* (Reid-Hoffmann Prods. 2000) (based on the South African Truth and Reconciliation); the Peruvian Truth and Reconciliation Commission Transcripts (Spanish), <http://www.everdad.org.pe> (information about the Commission available at [http://www.soros.org/initiatives/photography/mw/8/peru\\_bio](http://www.soros.org/initiatives/photography/mw/8/peru_bio)) (last visited Apr. 21, 2006); International Criminal Tribunal for Rwanda, <http://www.un.org/ictt/statute.html> (last visited Apr. 21, 2006); <http://www.ictt.org/ENGLISH/basicdocs/statute.html> (last visited Apr. 21, 2006).

<sup>25</sup> JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* (1997), (providing one of the most cogent examinations of trauma and victimization). The author repeatedly emphasizes that recovery begins with retelling the story of the traumatic event: “In the second stage of recovery, the survivor tells the story of the trauma. She tells it completely, in depth and in detail. His work of reconstruction actually transforms the traumatic memory so that it can be integrated into the survivor’s life story.” *Id.* at 175. See also *id.* at 176–96.

<sup>26</sup> See ROSENBAUM, *supra* note 1, at 130–31. Rosenbaum describes the impulses in the context of zealous advocacy:

courtroom, in human interactions, there are few ultimate truths. And the justice system is not designed to seek any kind of truth. The criminal justice system is especially bad at disguising its mission as a truth-seeking or truth-telling enterprise.<sup>27</sup> If a trial takes place at all,<sup>28</sup> it is, in large part, an exercise in zealous advocacy,<sup>29</sup> in tempting reasonable doubt, in trumping the proof submitted by the opposition, and, very often, in putting the reputation of the victim on trial.<sup>30</sup> The criminal trial is merely a

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So much of what passes for zealous advocacy in the law is all about fudging, spinning, and explaining away the unflattering elements of a client's story. And in the worst cases, the lawyer engages in outright lying. Truth is beside the point and achieving the right moral outcome even more so . . . . While a client is speaking, the attorney is contemplating the best light in which to characterize the story. And that light is a false light. It isn't beamed in order to illuminate the truth, but rather to blind and distort it.

*Id.*

<sup>27</sup> *Id.* at 15–16. Rosenbaum observes that although Justice is depicted as fair, evenhanded, and unbiased, all she can guarantee litigants is the possibility of justice—and a weak one at that:

Justice may be about many things, but the moral complexity of distinguishing between right and wrong, or arriving at the truth of a given situation, is neither its strength nor its ostensible mission. Courts are there to administer justice, to efficiently streamline cases, to ensure the availability of a forum that offers the chance at some relief. It's the possibility of justice that it guarantees, not the quality of that justice, not the certainty that, in the end, justice will make sense, feel right, and resolve matters.

*Id.*

<sup>28</sup> As an example of the justice system's indifference to the principle of truth-seeking, Thane Rosenbaum notes the well-known rate of plea bargaining, which exceeds 90% of all cases. See *id.* at 100–03; Michael Tigar, *Lawyers, Jails, and the Law's Fake Bargain*, MONTHLY REVIEW, July-Aug. 2001, available at <http://www.monthlyreview.org/0701tigar.htm>.

If the system were single-minded in its pursuit of truth, plea bargains, under which the defendant agrees to plead guilty to a lesser charge than the actual crime and receive a correspondingly diminished sentence in exchange for forfeiting his or her right to a trial, would not occur. Such arrangements undermine the integrity of the justice system, not to mention the historical records of the crimes.

<sup>29</sup> Rosenbaum cautions that “zealotry leads to lies. In the mind of a zealot, the truth is always subject to manipulation. Find one truth, assert it, and ignore the rest. Honesty is corrupted by gamesmanship.” See ROSENBAUM, *supra* note 1, at 131.

<sup>30</sup> See, e.g., Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827, 829–30 (1999) (citing Keith Burgess-Jackson, *A History of Rape Law*, in *A Most Detestable Crime: New Philosophical Essays on Rape* 22 (Keith Burgess-Jackson, ed. 1999) (describing the typical defense strategy of putting the victim's reputation on trial). See also *State v.*

skeletal framework, no more or less moral than bone or steel, that is fleshed out by the stories presented by the defense and the prosecution. Each seeks to offer just enough flesh, the right kind of “spin,” and ample persuasion to carry a judgment in its favor.

The law wants only enough of the victim’s story that achieves a correct legal result,<sup>31</sup> which might or might not feel like a just result for the victim. Although courtrooms are the only forum in which public sanctions and punishment can be imposed on a criminal offender, they are not the only—nor the best—forum for crime victims to find healing opportunities to speak openly and be heard.

### *B. Advocating for Victims Using Film*

Documentaries about crime victims, unlike other forms of media scrutiny, usually are produced after the criminal trial is over and a judgment has been rendered. Up to this point in processing their case, victims usually have not been given an opportunity to speak freely about their experience in a public forum where the harm can be fully acknowledged, or to use the story of the crime for any purpose other than the quest for a guilty verdict. Yet, for victims, exercising control over their story and ownership of their narrative is crucial in restoring the intangible personal damage

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Budis, 593 A.2d 784, 788 (N.J. 1991) (noting that common law permitted “cross-examination of a rape victim about her prior sexual conduct [which] was traditionally considered evidence of the victim’s inclination to consent to sexual intercourse and of her lack of moral character and credibility.”); State v. Garron, 827 A.2d 243, 254 (N.J. 2003) (“The Shield Statute is intended to deter the unwarranted and unscrupulous foraging for character-assassination information about the victim.”). For an example of unsurpassed skill at using the oldest trick in the rape defense book of putting the victim’s reputation on trial, see anything reporting on the Kobe Bryant case. With the help of a willing media and the sloppiness of the other attorneys, his lawyers masterfully smeared his accuser’s reputation before the case even got to trial. See, e.g., *Suit Settlement Ends Bryant Saga*, ASSOCIATED PRESS, Mar. 3, 2005, available at <http://www.msnbc.msn.com/id/7019659>; John Sarche, *Judge Chastises Attorneys in Bryant Case*, ASSOCIATED PRESS, Feb. 2, 2005, available at <http://abcnews.go.com/Sports/wireStory?id=464909>; *The Abrams Report*, (MSNBC television broadcast Oct. 13, 2004), transcripts available at <http://www.msnbc.com/news/980125.asp?cp1=1> (remarks by prosecutor Stacey Honowitz).

<sup>31</sup> See ROSENBAUM, *supra* note 1, at 5, 32–33.

victims endure during, and as a result of, the crime.<sup>32</sup> Using their story to advocate on their own behalf or on the behalf of other crime victims is one way victims exercise ownership of their narrative.

This article presents three examples of the successful use of documentaries to advocate for crime victims and discusses the relevant features that made them successful. The first film, which depicted a crime victim's experience speaking at parole hearings against the release of the offenders who kidnapped, tortured, and raped her, was used to lobby for legislative change for all crime victims in her state. The second, which told the story of a murder victim's family confronting one of the two murderers during his prison term, was used to promote a program known as restorative justice that has been helpful for victims in their recovery from the crime. In the third film, which was privately made and not distributed, the victim of a brutal rape narrated her experience of the crime as part of a series of communications with the rapist that were facilitated by a trained mediator. These films are not strictly about legal advocacy. They illustrate a broader understanding of advocacy on behalf of crime victims—one that is geared toward healing the victim in ways that transcend what is possible during the legal proceedings of the case.

### 1. Sentencing the Victim

The documentary, *Sentencing the Victim*, was made independently by Joanna Katz, a crime victim, and Liz Oakley, a young filmmaker,<sup>33</sup> about the kidnapping, torture, and rape of Joanna and her friend. The two women were abducted at gunpoint, taken to an abandoned house, and gang-raped, beaten, and tortured for five hours by five men who were strangers to the women. In an attempt to avoid harm, Joanna told the attackers that she was carrying the AIDS virus. But the false information did not save her from rape and sodomy. In fact, as punishment for her condition ("I think that somebody with AIDS doesn't deserve to

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<sup>32</sup> See generally HERMAN, *supra* note 25 (providing one of the most cogent examinations of trauma and victimization).

<sup>33</sup> SENTENCING THE VICTIM (IVS Video, Inc. 2002).

live”), she was forced at gunpoint to watch her friend being raped by the attackers; she had one attacker blank-fire at her temple; and she was knocked unconscious with the butt of a gun. At one point during the ordeal, Joanna felt it would be better to let them kill her than to continue to endure further torture. When one of her assailants, taunting her, asked her if she wanted to die, death seemed a tempting release. “It was as though he read my mind. He [repeatedly asked], ‘Hey, you want to die?’ . . . I finally said, ‘Yeah.’”

In the film, when Jack Sinclair, Deputy Solicitor for Columbia County, S.C., described this case as “the worst crime I’ve ever prosecuted absent capital murder,” he emphasized the brutality that robbed Joanna of her will to live: “That’s what these guys did through the course of their actions. They took away from her her [*sic*] will to live.” His own revulsion at the crime was infectious, and one assumes that it was his ability to convey this resounding horror to the jury that brought a quick guilty verdict for the one defendant who went to trial.<sup>34</sup>

The title of the film, *Sentencing the Victim*, echoes an observation made by Joanna’s father, Sidney Katz, in speaking about the burden borne by crime victims who come before the parole board to enter a statement to oppose the parole of an offender. Mr. Katz remarked:

Sidney: What has to be understood is that when they sentence an offender, they are essentially sentencing the victim and the victim’s family, as well. The victim and the victim’s family are certainly not in prison, but in a way it is sort of a prison. It’s a sort of a virtual prison, because . . . as long as [the offenders] are in jail . . . and as long as they come up for parole, we’re sharing that sentence with them.

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<sup>34</sup> Of the five defendants, four pleaded guilty and were sentenced to 30 years or more. Joanna and the prosecutor did not accept the guilty plea of one defendant, who was found guilty and sentenced to a term of 30 years to life. In implicit acknowledgement of that trials are stressful and burdensome, Joanna said of her decision to accept the other guilty pleas that one trial “was all I wanted to subject myself to.”

Every state has a list of basic rights afforded to crime victims and survivors,<sup>35</sup> and the way the Katz family experienced their “sentence” was, ironically, by exercising their rights as crime victims under South Carolina law. Among these rights is the right to attend and be heard at parole hearings, where victims are permitted to speak directly to the parole board about the continuing effect of the crime in their lives and against (or for) granting parole to the offender who harmed them.<sup>36</sup> Because Joanna had multiple offenders, each of whom had a parole hearing on different days, exercising her right to oppose the release of her offenders created a much greater burden on her than on crime victims who had been attacked by only one offender.

As with any rights granted to crime victims under state statutes and constitutions, exercising these rights requires the victim’s commitment to maintain a close link with the memories of the crime and its aftermath, and to revisit those memories whenever testimony or information is required—essentially, to place the moments that encapsulated perhaps the greatest distress of the victim’s life at the disposal of the system and the professionals in it. To exercise one’s rights under state law as a crime victim is often a hardship that only prolongs the trauma that arises from the original crime. Joanna, like other crime victims, must participate in criminal justice proceedings for as long as her offenders are inmates. And, as her father rightly points out when speaking to the parole board, the victim is the one who has been given a life sentence. She never has an opportunity for parole.

Joanna successfully used *Sentencing the Victim* to lobby the state legislature to change the laws governing victims’ rights at parole hearings. The film advocated for amending the law to benefit all crime victims in the state, and, in July 2004, South Carolina revised its victims’ rights laws to make the parole process easier on victims of crime who were assaulted by more than one offender. Rather than giving the offenders separate parole hearings

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<sup>35</sup> See S.C. Const., Art. I, § 24(10) (giving victims the right to “be informed of any proceeding when any post-conviction action is being considered, and be present at any post-conviction hearing involving a post-conviction release decision”).

<sup>36</sup> For South Carolina’s online victim services information regarding parole hearings, see [http://www.dpps.sc.gov/victim\\_services\\_parole.html](http://www.dpps.sc.gov/victim_services_parole.html) (last visited Apr. 21, 2006).

on separate days, the state legislated that their hearings should be consolidated so that their victims, who might wish to oppose parole, as the Katz's did, would no longer have to endure the emotional agony of testifying repeatedly at each separate hearing.

The film was written and shot with the specific intention of changing the law, and, thus, the excerpts from the film presented below focus on the scenes that advanced Joanna's argument before the legislature, rather than on the scenes describing the horrific crime she endured. The characters who appear in the excerpts are:

- Joanna Katz, the victim;
- Sidney and Diane Katz, Joanna's parents;
- Jack Sinclaire, the Deputy Solicitor for the Ninth Judicial Circuit in South Carolina who prosecuted the rape trial;
- Georgia Meloy, the police investigator; and
- Sherry Monk Fortenberry, a volunteer rape crisis counselor at People Against Rape.

In the seven years during which the film was made, Joanna traveled over 100 miles from her home in Charleston to the state capital of Columbia several times each year to attend separate parole hearings for each of the five men who assaulted her. The film is largely about this burden. Between the segments in which Joanna matter-of-factly described her experience of the crime, the film showed her testifying at multiple parole hearings.<sup>37</sup> Her parents and the criminal justice professionals who were part of her case commented as well. Diane Katz outlined the issues:

Diane: In the beginning, [the offenders] were scheduled to come up one at a time, which meant that she would have to go up three times one year and two times the next year, alternating years, and they managed to put two of them together so that now she goes up three times every two years for the five people.

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<sup>37</sup> For a relevant guide, see Anne Seymour, SUGGESTIONS FOR PROVIDING VICTIM IMPACT INFORMATION TO THE PAROLE BOARD (2000). See also *A Handbook for New Parole Board Members*, ch. 7 pp 83-91, (Peggy B. Burke ed.) available at <http://www.apaintl.org/Handbook/CEPPPParoleHandbook.pdf> (last visited Apr. 21, 2006)

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The Parole Board may know that there is very little chance of [the offenders] getting paroled at this point. But when Joanna wakes up on the morning of each hearing, she doesn't know. She's not sure whether they're going to be out on the street again or not. So for her it's still a terrible fear, you know, that she has . . . . The thing that we fear most is when they get out.<sup>38</sup>

In speaking before the Parole Board, Jack Sinclair placed Diane's words—and Joanna's fears—in a legal context. He urged the Parole Board to put the offenders on the same schedule to diminish the hardship to Joanna, as well as other victims of multiple offenders, and to allay her worries about the results of the hearings:

Jack Sinclair: I believe that you all have the capability to lessen the annual impact on Joanna Katz. You passed a law in 1986 that says: "Alright, victims of violent crime . . . now only have to come to parole hearings every two years." So, they tell Joanna Katz, "Hey you've been raped, but the good news is that you've only got to come and appear every two years." Well, then they turn around and say, "No, you were gang-raped, so you have to come every year."

To promote Joanna's argument before the Parole Board and the legislature, Jack Sinclair went beyond the standard role of a lawyer. He remained in contact with Joanna long after the jury gave its verdict and the offenders were imprisoned. He shepherded her through the parole hearings process, spoke on her behalf before the board, and lobbied the legislature for changes that would affect all crime victims.

Jack Sinclair: I don't see for the life of me why there hearings can't be bifurcated . . . so that, last night, she

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<sup>38</sup> For a film that starkly illustrates the experience of husband and wife survivors who must face the offender who killed their adult son in the community where they all live, see *IN THE BEDROOM* (Good Machine, Greene St. Films & Std. Film Co. Inc. 2001).

could have called an answering service and heard “[the two offenders] have been denied parole,” so that she could go to sleep last night, instead of waking up today and driving up here this morning wondering what’s going to happen.

As time passed, Joanna’s hair changes length and style, as do her clothes and her moods, but her experience before the parole board, despite its rotating faces, changes little. Notwithstanding the repeated parole denials for Joanna’s offenders, her presentations to the board seem, to her, consistently unsatisfying. *Is it any wonder?*, the film seems to ask. Some of the most telling words—words that were not remarked upon by anyone in the film and were, in fact, mere background to the commentary by Joanna and her supporters—were made by the parole board members themselves. From the first parole hearing (that of Sidney Harley) to the last (Lydell Harley), the Chairperson, who changed over time, mechanically repeated the same unanimated, perfunctory statement:

Chairperson: We have heard [Sidney Harley] and he has been rejected. You all will be notified before he comes up again. Thank you for coming in. If you’d like to make a statement you may, but it is not necessary.

Because parole boards make their decisions before a victim speaks, Joanna’s statements at each hearing were technically unnecessary. And, at each hearing, even as the board members changed, they made that fact clear. The members appeared utterly unmoved by her words, though they were unerringly punctilious in thanking her for coming.<sup>39</sup> In one of the hearings for Johnny Nathaniel Smith, after Joanna’s statement, the chairperson tripped over the words of his colleague in his haste to shoo the family out of the hearing room. He began, “O.K. We thank you so much for

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<sup>39</sup> One board member remarked, her voice trailing off at the end, “We are so very sorry for what brought you here and we hope that some day you’ll be able to, umm, get over it.” Comments such as these express a lack of understanding of the deep trauma suffered by crime victims, and the retraumatization that occurs each time the victim must revisit the story of the crime. No one “gets over” a rape or murder, and the speed or extent of their recovery is not something victims can control. *See generally*, Morton Bard & Dawn Sangrey, *THE CRIME VICTIM’S BOOK* (1986); Steven Berglas, *Why Did this Happen to Me?*, *PSYCHOLOGY TODAY*: 44–48 (Feb. 1985).

coming in; we really do appreciate it.” In a blur of rote formalities, he spoke over another Board member, who strained to offer a supercilious remark: “I was going to say, Ms. Katz,” she said, glancing harshly at the chairperson, “for some victims, it is therapeutic to come before the Board and make a statement and it helps with the anger level and I don’t know how it feels, but I think for myself it would be therapeutic. But that’s a very individual comment.”

To this, Diane rallied with one of the few appropriate responses, redirecting the exchange to the reason for their visit: “The therapeutic part is hearing that he’s been rejected.”

In the film, on a drive to visit the parole board, Joanna spoke about her reluctance to revisit the memories of the crime. She referred to her upcoming presentation as if it were a performance she was not in the mood to give (“I’m not in the mood . . . . I’m not ‘on’ today”). But Joanna’s weary boredom seemed to be a defense against the painful experience of once again recalling on cue the details of the crime. Each time a victim revisits the experience of the crime, she relives to some degree the anxiety and fear of the original event. Sherry Monk Fortenberry explained the retraumatization that victims feel when they are forced to revisit the crime repeatedly, which is necessary to maintain a kind of vigilant guard over the lock and key of their offenders:

Sherry Monk Fortenberry: These survivors have gone through so much to get on with their life, and every time they have to go back [to speak before the parole board], they’re having to relive everything that they’ve done, that’s been done to them in the past, and it’s really difficult.<sup>40</sup> They shouldn’t have to do that. But unfortunately, in our

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<sup>40</sup> HERMAN, *supra* note 25, at 37. Herman observes: Small, seemingly insignificant reminders can also evoke these memories, which often return with all the vividness and emotional force of the original event. Thus, even normally safe environments may come to feel dangerous, for the survivor can never be assured that she will not encounter some reminder of the trauma.

*Id.*

justice system, you have to do that to keep someone behind bars for the amount of time that they should be there.<sup>41</sup>

That vigilance cannot be maintained by crime victims on their own. As Joanna repeatedly points out in the film, the victims who are able to sustain this effort are well supported by family and friends during their recovery, as was Joanna following the assault. Her parents seemed nonplussed about how they were helpful to Joanna, because they were unsure how to speak or act in the immediate aftermath of the gang-rape. Diane encapsulated their role as simply “being there” for her.

Diane: It’s like being on another universe with no guidance. You find yourself in a place that you’ve never been before.

Sidney: It’s totally new territory. You don’t know what kinds of things are the right things to say. You don’t even know what the wrong things are to say.

While Joanna’s parents experienced the aftermath of the crime as “new territory,” Joanna looked to her parents for predictability and stability. The family is often the only structure where victims feel safe. They are often afraid to be in their own home, yet afraid to be away from their home; their sense of security can no longer be anchored to a geographic location. After a crime, fears that once would have seemed irrational no longer seem so farfetched, and one antidote for many victims is the certainty of family rituals.

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<sup>41</sup> The disgraceful handling of crime victims in the criminal justice system, especially victims of sex crimes, is well known in the legal community. Yet it is treated as an unavoidable evil, like the bitter taste that accompanies the taking of medicine. Few legal professionals view the mistreatment as treatable, which is perhaps the surest indication of its incurability. See generally James B. Johnston, *How the Confrontation Clause Defeated the Rape Shield Statute: Acquaintance Rape, the Consent Defense and the New Jersey Supreme Court’s Ruling in State v. Garron*, 14 SO. CALIF. REV. OF L. & WOMEN’S STUDS. 197 (Spr. 2005); Linda Robayo, *The Glen Ridge Trial: New Jersey’s Cue to Amend Its Rape Shield Statute*, 19 SETON HALL LEGIS. J. 272, 276 (1994) (recounting a rape trial that included evidence of the victim’s sexual history). For a portrayal of a courtroom experience by a victim in the prosecution of her offender, see SEBOLD, *supra* note 25, at 118–29. The language Alice Sebold uses to describe her experience of cross-examination by the defense attorney is jarringly similar to the language she uses when writing about her rape and her rapist.

Yet, victims sometimes worry about the effect their trauma will have on the people closest to them, as if victimization could spread like a contagious disease.<sup>42</sup> After taking her first bath, with the help of her mother, following the rape and the SANE examination,<sup>43</sup> Joanna glanced at her reflection in the mirror, and the visual reality of her own beaten, bruised face triggered a wave of concern about the effect of her victimization on those around her, especially her mother.

Joanna: I made a big mistake; I looked in the mirror . . . I didn't recognize myself. I had never seen myself beat up before. It was really traumatic . . . It wasn't . . . what I looked like, it was the fact that my mother saw me like this when she walked in . . . I kept worrying about what she saw, how much it must have traumatized her. I felt like they raped her.

This statement is the one moment when Joanna cries on camera while telling her story.

Her detached coolness made Joanna a solid witness at trial, while her friend and co-victim could not testify—could not even stop shaking and crying enough to walk to the witness stand. The burden to testify against the only offender who did not take a plea bargain rested on Joanna. On the stand, she found “something so quiet, so strong and so powerful, that you just didn't know you had—that everybody has—and it just doesn't make itself evident until a certain moment in your life.” She testified against the

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<sup>42</sup> The sense that the trauma suffered by the victim gets transferred to the friends and family is common among victims. Cf. CHARLES R. FIGLEY, *HELPING TRAUMATIZED FAMILIES* (1989); LENORE TERR, *TOO SCARED TO CRY* (1990). There are many terms for the contagion of trauma. Most commonly it is referred to as “secondary trauma/victimization” or “vicarious trauma/victimization.” See Elizabeth Joyce, *The Other Side of Darkness*, NATIONAL CENTER FOR VICTIMS OF CRIME, NETWORKS (Spr./Summer 2004). See generally DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1997).

<sup>43</sup> A Sexual Assault Nurse Examiner, with the victim's written consent, performs the forensic examination and collects evidence for the rape kit. See Kristin Little, OVC Bulletin, Sexual Assault Nurse Examiner (SANE) Programs: Improving the Community Response Against Sexual Assault Victims, [http://www.ojp.usdoj.gov/ovc/publications/bulletins/sane\\_4\\_2001](http://www.ojp.usdoj.gov/ovc/publications/bulletins/sane_4_2001) (last visited Apr. 21, 2006).

offender and he was found guilty and, like his cohorts, was sentenced to a term exceeding 30 years.

Georgia Meloy: I don't know whether I could have gone to trial and sat on the stand and told my story if that would have been me. I think most people would not have that strength. And that makes you wonder how many victim there are out there whose stories have gone untold, and how many perpetrators are out there committing these crimes over and over and over again because the victims can't bring themselves to go through our [criminal justice] system.<sup>44</sup>

Diane: For Joanna, it really brought closure, the fact that she was able to see this guy go to court and get convicted. It was very good for her. It was a part of her healing process, a very important part.

Reflecting on the Joanna's endurance, attending 14 hearings in six years, her father's words resonated on many levels, "This girl here received the longest sentence—for the rest of her life."

Joanna's film was used successfully for direct advocacy purposes to effect real change in the way victims are perceived and treated in the criminal justice system.<sup>45</sup> All of her statements, along with the visual depictions of Joanna and her family at the

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<sup>44</sup> The number of rapes that go unreported is the subject of much conjecture. Estimates range from 63% to 95%. The truth is no one knows what percentage of any type of crime goes unreported, and, in some cases, it is difficult to determine whether the event met the legal definition of a crime. See, e.g., VAASA Statistics Fact Sheet, <http://www.vaasa.org/vastats.html> (last visited Apr. 21, 2006); Callie Marie Rennison, BUREAU OF JUSTICE STATISTICS, SELECTED FINDINGS, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992–2000, <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf> (last visited Apr. 21, 2006). See generally *Millions of Crimes Go Unreported*, CBS NEWS <http://www.cbsnews.com/stories/2002/09/09/national/main521212.shtml> (last visited Apr. 21, 2006).

<sup>45</sup> SENTENCING THE VICTIM, *supra* note 33. The film and its website now provide general advocacy assistance to crime victims and education about crime "to spur improvements in criminal justice processes and affect how victims are viewed and treated by the justice system itself." Independent Lens website, <http://www.pbs.org/independentlens/sentencingthevictim/resources.html> (last visited Apr. 21, 2006).

parole hearings, chronicled for South Carolina legislators not only the logistical difficulties but also the emotional costs to crime victims in exercising their right to challenge the release of their attackers.<sup>46</sup> Advocacy that leads to public policy change is one way crime victims harness their experience to achieve a broader goal—for Joanna, one that developed in concert with her own knotty struggle to recover. But she could not have achieved this goal without employing the camera as a witness to her experience before the parole board.

Because she helped produce the film, she had virtually complete ownership of her narrative and control over its presentation. She spoke about her experience of the crime with a guarded neutrality, like a victim whose defenses against the pain of the memories have long been fortified. Making the film allowed Joanna to shape her recollection of the crime, to revisit the memories in a safe environment, and to give direction and purpose to the memories of her torment, her worries, her guilt.

The film also calls attention to the growing awareness among lawyers that their advocacy responsibilities can extend beyond the traditional boundaries of courtroom representation.<sup>47</sup> Advocacy also involves caretaking of the stories of crime victims, expanding the lawyers' role to such venues as parole hearings, state legislatures, alternative justice programs, and, indeed, to participating in documentaries about their clients.

## 2. Meeting With a Killer

The provocative title of the documentary, *Meeting With a Killer*,<sup>48</sup> describes exactly what the film is about: a meeting

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<sup>46</sup> One hopes that the lack of responsiveness and indeed disdain of the Board members to Joanna's and her lawyer's entreaties to change the system was not lost on the legislators, who are called upon to confirm (or reject) the Governor's Parole Board appointments. One Board member's snipe was barely audible just before the scene faded out. Reacting to Jack Sinclaire's persistent argument that the Board consider consolidating the hearings to ease the burden on Joanna, the then Chairperson grouched: "I mean I don't want to sit here and let him run all over our process. That was ridiculous." SENTENCING THE VICTIM, *supra* note 33.

<sup>47</sup> See, e.g., Stacy Caplow, *What if There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLIN. L. R. 1 (Fall 1998).

<sup>48</sup> *Meeting With a Killer* (CourtTV television broadcast Sept. 19, 2001).

between the survivors of a murder victim and the young man who committed the crime. It was made by award-winning documentary filmmaker Lisa Jackson about a restorative justice practice known as Victim-Offender Mediation Dialogue (VOMD).<sup>49</sup> In the formal structure of a VOMD, a victim or her survivors meet with the offender face-to-face, after months (or years) of in-depth preparation of all the parties by a trained mediator. The ultimate purpose of a VOMD is to allow victims to get answers to questions that only the offender can answer; to describe to the offender the impact of the crime on the victims, including friends and family; to hold the offender accountable; and to hear the offender apologize for his acts.

As in other restorative justice practices, there are several threshold matters that participants must understand and agree to. First, participation is entirely voluntary; both sides must agree to the meeting. Second, the process focuses on the harm caused to the victim and her family. Part of what is “restorative” about these practices is that the victim is at the center of the process. Third,

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<sup>49</sup> Restorative justice programs view crime differently from traditional notions of justice. Crime is never regarded as an act against the State. Restorative justice practices are steadfastly victim-oriented, and restoring the victim is the primary concern. As a secondary concern, crime is viewed as a breach of the community: of communal standards, community expectations, community trust—and, simultaneously, as a failure of the community. The offender is not relieved, however, of accountability for his actions. In any restorative justice program, the offender is required to take full responsibility for his criminal acts, apologize to those affected, and to help devise a contract that materially and symbolically redresses the damage caused by the crime. The process is focused on repairing the harm rather than punishing the offender, with a view toward reintegrating the offender back into society.

Restorative justice is about healing (restoration) rather than hurting.

Responding to the hurt of the crime with the hurt of punishment is rejected, along with its corresponding value of proportionality—punishment that is proportionate to the wrong that has been done.

RESTORATIVE JUSTICE AND CIVIL SOCIETY, *supra* note 29, at 1. Restorative justice programs are parallel to governmental justice systems, meaning that they supplement and occur outside the legal system, usually after a final disposition has been ordered in the case. They include models such as Family Group Conferencing; Circle Sentencing; Victim-Offender Reconciliation Programs, and Victim-Offender Mediation Dialogue. See generally Mark Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, WESTERN CRIMINOLOGY REVIEW 1(1) (1998), available at <http://wcr.sonoma.edu/v1n1/umbreit.html> (hereinafter Umbreit I) (last visited Apr. 21, 2006).

the offender must take full responsibility for his wrongful conduct. He must be able to express remorse for his actions and apologize to the victims. Finally, the offender obtains no benefit in his sentence or his treatment as a prisoner by participating in a restorative justice program.

*Meeting With a Killer* involves the family of Cathy White who was raped and murdered at 26 years-of-age by two 15-year-olds, who were high on drugs and alcohol and whose plan to steal her car got increasingly violent and out of control. The film begins with a brief sketch of the crime, followed by premediation conferences between the mediator and the victim's family, and separately between the mediator and the offender. The film is interspersed with informal exchanges among all the participants that explore the backstories of the family, the victim, and the offender. After the emotional mediation session, the film concludes with individual debriefing interviews in which the participants talk about their experience of the mediation.

The excerpts presented below involve the following participants:

- Ami, Cathy's daughter;
- Linda, Cathy's mother, who, along with her husband, raised Ami after Cathy's death and adopted Ami when she was 11-years-old;
- Steve, one of Cathy's brothers who, before her death, shared a house with Cathy and her fiancé;
- Gary Brown, one of two offenders; and

Ellen Halbert, the mediator who heads the Victims' Advocates Office of the District Attorney's Office in Travis County, Texas, and is a national figure in victim advocacy.<sup>50</sup>

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<sup>50</sup> As director of the Victims' Advocates Office, Ellen Halbert supervises one of the most comprehensive, well-established offices for crime victims in the United States. In the Travis County office, crime victims are carried through the system by a counselor, to whom they are assigned at entry, who remains their contact person as their case proceeds through the criminal justice system. The counselor serves as the victim's liaison to the District Attorney; he or she accompanies the victim during courtroom proceedings and answers questions; the counselor refers the victim to appropriate agencies or community

In preparing for the VOMD, Ellen Halbert spoke with Cathy's family and Gary Brown, the offender, many times. She noted that, in her role as mediator, she has been trained to know when both sides are ready for the meeting to take place, a process that usually takes a few months but can take years.<sup>51</sup>

Ellen: The preparation process can take anywhere from six months to two years before the actual mediation takes place.

Narrator: The process involves months of paper work and soul-searching. Both sides keep journals and answer questionnaires that probe their fears and motivations, complete grief inventories that examine how the crime has affected their lives.

Ellen: The philosophy behind this program is to give power back to the victims.

In preparing for the meeting, Ellen visited the White's home to review with Linda and Ami what kind of information they hope to get from Gary and what they hope to get out of their meeting with

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service providers, such as rape crisis centers, shelters, therapists, and other advocacy organizations; and the counselor connects the victim with other departments within the DA's office, including the contact person for restorative justice programs, mediations, or other extra-judicial processes, if appropriate. What Ellen Halbert and her office seems to understand that many other jurisdictions do not is that the support systems victims need in the aftermath of a crime, particularly those required to exercise the rights available to them under state law, require coordinated services from various governmental and private organizations to address short- and long-term needs—needs that involve complex emotional processes, such as anger, delayed shock, fear, power struggles, grief, and the like. For more information, see Community Action Network, Victims Services, *What System is in Place to Support Victims' Needs*, <http://www.caction.org/IssueAreas/PublicSafety/VictimsAssmt/WhatSystem.htm> (last visited Apr. 21, 2006).

<sup>51</sup> Many in the restorative justice field, for good reason, object to watered-down versions of restorative justice programs such as VOMD, in which the preparation time is shortened sometimes to a matter of days or hours and the mediator is not properly trained. See, e.g., Mark Umbreit, *Avoiding the Marginalization and "McDonaldization" of Victim-Offender Mediation*, in *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME*, 213 (George Bazemore & Lode Walgrave, eds., Criminal Justice Press 1999) (hereinafter Umbreit II). See also Robert E. Gillette, *Critical Issues in the Practice of Restorative Justice*, 7(3) *OFFENDER PROGRAMS REP.* 33, 43 (Sept./Oct. 2003).

him.<sup>52</sup> Speaking to Ami, she asks, “You wrote that you just love to hear stories about your mama. I wonder how hard it’s going to be to hear this story.”

Ami: I want to hear anything that she said to him. Anything she said to anybody, I want to hear. Any little piece of information I can get. Anything.

Her voice carries an undercurrent of desperation, which might reflect what some child survivors feel is a continual reminder of their loss—that their connection to the victim exists only through the memories of others, which can be unreliable and unclear.

In addition, Ami wanted to know whether the killers knew she was pregnant with Ami’s younger sibling when they killed her; whether they knew that Ami existed; and whether that information would have made any difference to them.

Ami: [The offender] didn’t know that Cathy had a daughter. And I want to know whether that would have made any difference. If she would have told him, “You know, I have a five-year-old daughter waiting at home for me,” would that have made any difference?

Linda wanted to know what many survivors wonders about the death of their loved one: What happened in the last few moments of her life? What was her daughter thinking and feeling? In what state of mind did she go to her death? Linda was haunted by fantasies that Cathy’s last moments before her death had been dread and terror—and that, for Linda, was almost as unbearable as the death itself.

Linda: And of course I want to know some things that happened that day. That’s been the one thing all these years that I’ve not been able to think about. Those last few moments.

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<sup>52</sup> Victims are often motivated to participate in a restorative justice program to seek information that only the offender can provide. See, e.g., Mark Umbreit, *Crime Victims Seeking Fairness Not Revenge*, 53(3) FED. PROBATION 52 (1989) (hereinafter Umbreit III).

Later in the film, Linda and Ami spoke with Cathy's brothers and her father about the upcoming VOMD. Steve, who seems to be the most affected by the prospect of the mediation, expressed ambivalence and some defensiveness about what he clearly viewed as an undertaking belonging only to Linda and Ami.

Steve: Us three guys . . . could think of a lot of things that's wrong with you doing anything *for* [the offender].<sup>53</sup> You know, we might have a problem with that. But, there's a lot of things that are right with it. What *if* you are the difference between him doing it again or not?<sup>54</sup>

When Linda asked whether there was anything the others wanted her to say or to ask the offender at the meeting, it became clear that at least one question had been haunting Steve for the past 15 years. Everyone at the table turned their attention to him, and his brother, seated next to him around the kitchen dining table, pointed his thumb in Steve's direction, giving him the floor. He rambled, in obvious discomfort.

Steve: I'd be curious to know about the car. It made a difference to me because I took responsibility for her car. At this point, I don't even want to know—*almost*—but I would like to know one way or the other. I'd like to know

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<sup>53</sup> The belief that mediated meetings with offenders are designed for or intended to benefit the offender is a misconception. VOMD, like other restorative justice programs, is voluntarily initiated by the victim or the survivors and it does not assist the offender in any tangible way. However, both sides report lasting satisfaction with the experience and, in many instances including Gary Brown's experience, in life-transformative ways. *Meeting with a Killer*, *supra* note 48. *See, e.g.*, Mark Umbreit & Betty Vos, *Homicide Survivors Meet the Offender Prior to Execution*, 4(1) HOMICIDE STUDIES 63, 78–79 (Feb. 2000).

<sup>54</sup> There are a handful of studies that attempt to determine the effect of restorative justice program participation on recidivism. To varying degrees, the results show lowered recidivism rates. *See, e.g.*, Mike Niemeyer & David Shichor, *A Preliminary Study of a Large Victim/Offender Reconciliation Program*, 60(3) FED. PROBATION 30 (1996); William R. Nugent & Jeffrey B. Paddock, *The Effect of Victim-Offender Mediation on Severity of Reoffense*, 12 MEDIATION Q. 353 (1995); MARK UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION (Crim. Just. Press 1994) (hereinafter Umbreit IV); Anne L. Schneider, *Restitution and Recidivism Rates of Juvenile Offenders: Results From Four Experimental Studies*, 24 CRIMINOLOGY 533 (1986).

if it wasn't a problem with the car, then I could totally be relieved.

In a cutaway in which Steve is being interviewed individually, he tearfully coughs out, "I don't know what it is, but, you know, I *do* feel responsible and I *cannot* accept that failure."

At the dinner table, Ami responded to the family's reluctance to speak about their fears and feelings: "It's been 15 years, and I think we . . . should be able to talk about it now. I think this can bring us together closer as a family."

Restorative justice practices, such as VOMD, are designed to restore victims. As they cycle through the program, victims, such as Linda and Ami, are given many opportunities for healing and repair. It is not simply the mediation itself that transforms the participants.<sup>55</sup> It is also the intensive preparation process and the numerous exchanges between the offender and the victims that help suture their emotional wounds. The survivors are forced to open conversations that might otherwise remain closed, to examine buried feelings that are easier to ignore, and to accept the loss of their loved one in a deeper way.<sup>56</sup> Documenting the process adds other crucial dimensions to the healing cycle by reflecting back to the participants their own fears and worries—even their intonations and facial expressions. The film gives participants reference points to map their subtle changes and allows them to be, simultaneously, "insiders" immersed in the process and outsiders observing themselves.

In the opening scene the day of the mediation, the footage shows both sides engaged in their morning rituals: brushing teeth;

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<sup>55</sup> In the film, when asked why victims would ask to participate in this kind of program, Ellen Halbert explains:

People who are victims of crime heal in different ways. And, some really want to put it behind them and they want to go forward with their lives and never think about it again. Others have many, many questions. The only person who can answer the questions that victims have is that offender.

*Meeting with a Killer*, *supra* note 48.

<sup>56</sup> See, e.g., T. Roberts, Evaluation of the Victim Offender Mediation Program in Langley, B.C., Focus Consultants (1995); Center for Restorative Justice and Peacekeeping, [http://rjp.umn.edu/img/assets/18485/Roberts\\_1995\\_VOM.pdf](http://rjp.umn.edu/img/assets/18485/Roberts_1995_VOM.pdf) (last visited Apr. 21, 2006).

brushing hair; nervously picking at their breakfast. As Gary apprehensively walks toward the meeting room, the narrator intones, "Fifteen years of grief, guilt, and soul-searching have come down to this moment."

Gary entered the room, already crying, and, seeing this, Linda mumbled, "Oh my goodness." She put her hand over her mouth. Gary wiped his nose with his wrist. Silent, Ami blinked at Gary, glanced at Ellen, and swallowed. Linda and Ami held hands. In opening the meeting, Ellen remarked, "My role in this meeting is the same as it's always been. I'm just here to support all of you."

Linda: One of the problems we have, Gary, is that we never did have enough of what really happened to put things together.

Gary (tearfully): I'm hoping that by going through this all over again not on my behalf but on y'all's behalf that y'all don't wind up hating me even more and never even considering a thing about me being good and changing, which I've dealt with all these years.

\* \* \*

She's always having trouble with the station-wagon —

Linda: Can I just interrupt you long enough to ask: Where were you when this was going on?

Gary: At the gas station.

Ami: And do you know why she was at the gas station?

Gary: She was getting gas. I remember that.

Linda: She was just getting gas.

For Linda and Ami, this information is crucial. The fact that Cathy was not at the gas station because her car broke down answers the worry that Steve had carried all these years. Had her life ended because it intersected with the murderers due to the happenstance of car trouble? Car trouble that, after all, he could have prevented?

Gary: I led her down, told her where to go, down a road that I knew was leading to nothing, down a pasture. And when she asked why, [my partner] pulled a gun, he had the gun, and told her don't worry about it just do what we're telling you.

Ami: And those were, like, pretty much the last things she said was just, "Why?"

Gary (sputtering out the last words): She said, "You can take the car; you can take anything you want. I won't say nothing." And then as [my partner] pointed the gun toward [her], she said, "I forgive you and God will too." Then she put her head down. And if I don't remember anything else that night as clear as I do it was that right there.

Linda (turning to Ami and recovering from a long pause during which everyone at the table was crying): That was your mama. Down to the very last moment of her life.

The story of the last moments of Cathy's life was information only the killer could provide. Linda's deepest grief had stemmed from the worry that her daughter had been in a state of terror, alone and frightened, when she was killed. Later in the film she comments on the strange relief she felt at Gary's account of Cathy's last moment, saying, "If she could say that at the moment just before she was killed, then she couldn't have been in the state of terror I had always imagined she was in."

Ami: Did you know that Cathy was pregnant?

Gary: No, Ma'am. It did not show.

Linda: No, she was only two months pregnant. But, she didn't tell you?

Gary: No, Ma'am . . .

Linda: We thought she might have told you to keep her from killing her.

Gary: Honestly, I didn't know this until almost a little bit after the conviction . . . There were a lot of things I didn't even know. [To Ami] I didn't know about you.

Ami: I was just wondering what she told you, like if she said anything about her being pregnant or if she said anything about me. Because I just wondered if that would have saved her.

Gary admitted Ami that he thought her mother had said as little as possible to avoid creating more hostility toward her. He never really explained whether it would have made a difference, but, by this point in the dialogue, it seems safe to assume that he wouldn't have known the answer to that question.

As the meeting is winding down, Gary, still remorseful and wishing to ease their sorrow, grasps at anything that he can do to redress the devastating harm he caused.

Gary: Please don't ever think about anything y'all ask me to do. Don't think it's going to frustrate or be an inconvenience or hurt me. As long as you all will allow me to show you the ways, I will continue to til y'all say stop or y'all say I can't.<sup>57</sup>

After a full day meeting, during which both sides asked questions and spoke fully about themselves and the crime, Linda and Ami took photos arm-in-arm with Gary in a sequence that some viewers have found perplexing, if not repugnant. Even Gary was shocked. Linda explained, "For me it was the most logical thing in the world after this time together, what we gave each other, to have a hug at the end."

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<sup>57</sup> One requirement of any restorative justice program is that the offender name the crime, speak about the harm he caused openly but with remorse, and apologize to the victim for his actions. *See, e.g.,* Umbreit III, *supra* note 61, at 52. Part of the mediator's job is to guide offenders through this process, and it is not unheard of for the mediator to gently take an offender aside and coach him to speak frankly about the criminal acts or suggest an opportune moment to apologize. When Ellen meets with Gary individually, she wants to get him "to own what he did . . . in a way he that hasn't done before. The words that he has used, they're minimizing it, and [I want to] get him to look at that." She reminds him that he must be able to replace phrases like "took advantage of her" and "what we did to her" with stark words of accountability like "rape" and "murder."

In individual interviews a month after the VOMD, they each talked about how they benefited from the meeting.

Gary: The ending surprised me for a couple of reasons. It felt really good to be thinking that here are the two people who are supposed to be hating me, but they were still willing to, you know, embrace in a picture. I felt like I was hit with a baseball bat, you know, knocked into left field, because, I mean, that really surprised me.

Ami: It's been a month and I feel like a whole different person . . . Not only do I feel closer to Cathy, which is the most amazing feeling you could ever feel . . . But not only that, I feel closer to myself . . . I know my strength and I know that there is not one fear that I can't face, that there is not one obstacle I can't overcome . . . It was so hard, the hardest this I've ever had to do, but it definitely was—it was amazing.<sup>58</sup>

Linda: The other big piece is the fact that [Cathy] said, "I forgive you and God will forgive you too." If she could say that, in the last moments of her life, then she was not in the same kind of terror that I have always imagined she was. It gives me peace that she had some peace in those last few moments. It gives me another kind of affirmation that doing this mediation was exactly, 100% the right thing for Ami and I to do.

Ellen: I could have never predicted that this photo of the three of them arm-in-arm would have ever happened. I could have not predicted that . . . The impact of what happened in that room—the emotion that was created in that room among those three people . . . and I can tell you, it spilled over on me. I really loved it and I thought it was enormously successful. For everyone. For me. I think [Gary] could have been a wonderful son to someone.

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<sup>58</sup> Feelings of being relieved, unburdened, or cleansed are typical among victims who have participated in VOMD. See, e.g., Umbreit & Vos, *supra* note 63, at 78.

Gary: Yeah, that was definitely one of the most important days of my life. I've never even had anything turn out that special. I've never had anything that had that much fulfillment . . . I do feel better about myself because I did accomplish something good. I'm not fixing to do something that's going to make my conscience bother me anymore, and if it's my conscience's going to bother me, it means I'm not doing something right. I'm not going to make that mistake no more. I do feel changes within me. I didn't do all this for nothing. I can't stop now.<sup>59</sup>

The qualities that made Gary a good candidate for VOMD are exactly the sympathetic traits that made him genuinely remorseful. He apologized with deep sincerity; he did not veer from using direct, even uneuphemistic language to name his criminal acts; he reserved no defenses. It was clear that he truly regretted killing Cathy—in his words, there “will always be a part of me that hates myself for what I did”—and because of his deep remorse, he was grateful for Linda's and Ami's interactions with him. The scant information noted in the film about Gary's prison history and his youth makes it clear that, as the prison warden remarked, “He never had a chance.”<sup>60</sup> When Gary expressed dedication to continue the changes that the mediation inspired in him, it was easy to believe him.

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<sup>59</sup> If properly prepared by the mediator, offenders have been shown to experience maturation in their understanding about their crimes and their effects. While single episodes don't rehabilitate felons, there is mounting evidence that such meetings have positive effects on offenders and these effects are reflected in lower recidivism rates, especially for juvenile offenders. See, e.g., William Nugent et al. *Participation in Victim-Offender Mediation Reduces Recidivism*, 3 VOMA CONNECTIONS 1 (1999).

<sup>60</sup> In a conversation between Ellen Halbert and the warden of the prison where Gary is housed, the warden tells Ellen about Gary's background:

It's obvious to me he's had problems his whole life. Let's see, at age of eight, admitted use of cocaine, heroine, methamphetamines, LSD. Quaaludes at the age of 12. Intravenous use of cocaine, LSD, and methamphetamines at age 13. And an admitted alcoholic. Ten suicide attempts, mostly by overdosing on pills. Doesn't excuse what he did, but this kid never had a chance.

*Meeting with a Killer*, supra note 48.

Gary, who was abandoned as an infant and spent his childhood in and out of foster homes and juvenile detention centers, tells about the choice of punishment he was given by his step-father when he was 8-years-old: a beating with a belt or performing sexual favors on his step-father.

As a method of advocacy, this film operated on two levels. First, the family was deeply changed by the experience. They had gnawing questions about the circumstances of Cathy's death, and each family member was able to put to rest his or her particular concerns after meeting with Gary. While their embrace at the end of the meeting in no way implies that they were "at peace" with Cathy's murder or have "forgiven" the offender, the VOMD was successful in resolving specific anxieties and moving the family as a whole, and its members individually, to another point in the healing process.<sup>61</sup> The family learned enough from Gary to "let go"—an experience we are all familiar with on some level—of the worries that had plagued them. This was possible for Linda and Ami because they were able to confront the offender face-to-face and overcome their fear of the "monster" offender, and, as Ami states in the debriefing interview at the end of the film, they were emboldened by their courage.

Second, the film offers viewers another perspective on justice. Documentaries can (and should) be effective in molding viewers' understanding of subjects and issues in the film: "Touching on the viewer's emotions and imagination, a law film may introduce a viewer to jurisprudential issues and value systems while provoking

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<sup>61</sup> Accepting an offender's apology and being moved by an offender's remorse do not necessarily translate into forgiveness. The case of Victoria Ruvolo, who was nearly killed in an accident when teenager Ryan Cushing threw a 20-pound frozen turkey, that might have just as well been a large rock, at her car windshield, illustrates the difference. Cushing's deadly prank mangled the steering wheel of the car, seriously disfigured Ms. Ruvolo's face, and left her in a coma for two weeks. Still, she insisted that her offender, who faced up to 25 years on multiple felony charges, receive the lightest possible sentence, which the judge honored, setting Cushing's sentence at six months in jail and five years of probation. Ruvolo remarked upon the difference between forgiveness and what she felt. Without granting Cushing any kind of absolution, she did acknowledge that his sincere apologies made a significant difference in her reaction to the offender and the events:

God gave me a second chance at life, and I passed it on [to the offender] . . .  
When he came up to me in court, he was so remorseful; there was no way anyone had coached him. He was crying profusely, and I guess I needed to hear that. My motherly instincts came out. I said to him, "It's O.K., it's O.K.," but that didn't mean I said it was O.K. to throw fresh meat in my face.

Robin Finn, *Pushing Past the Trauma to Forgiveness*, N.Y. TIMES, Oct. 28, 2005, at B3.

a host of emotive responses and powerful impressions.”<sup>62</sup> This film introduced viewers to another form of justice and to a more complex understanding of healing, accountability, rehabilitation, and the possibilities of repair in human relationships.<sup>63</sup> In contrast to the criminal justice system, in which “justice” is equated with legally correct outcomes detached from any notion of victim healing, restorative justice programs view “justice” as inextricably linked to victim healing, reaffirmed communal values, and meaningful offender reintegration—all of which were illustrated by this film.<sup>64</sup>

### 3. Denise’s Story

The third film presents the narrative of a compelling crime victim, Denise, who was brutally raped in her home by a man she believed to be a maintenance worker at the condominium complex where she lived. He was, in fact, a serial rapist who had been previously convicted of rape and was suspected in 45 unsolved sex crimes. He received a life sentence for raping Denise.

For years, both Denise and her offender, Jim, met with a highly skilled mediator, Jon Wilson,<sup>65</sup> in anticipation of a VOMD. Like the preparation in *Meeting With a Killer*,<sup>66</sup> any communication between Denise and Jim was monitored by Jon. Jim had admitted to four other rapes, at least one of which had occurred at the same

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<sup>62</sup> Orit Kamir, *Cinematic Judgment and Jurisprudence*, in *LAW ON THE SCREEN*, 30–31 (Austin Sarat et al. eds. Stanford University Press 2005). See also Naomi Mezey & Mark Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 *COLUM. J.L. & ARTS* 91, 95 (Winter 2005) (exploring the effects of depictions of the law on television on “collective expectations, societal myths, and the national psyche”).

<sup>63</sup> The legal “indoctrination” by films is another way that documentaries can “train audiences in judgment while examining—and often reinforcing—legal norms, logic, and structure.” *Id.*

<sup>64</sup> Restorative justice recognizes that “justice” cannot be achieved without several key components: participation of key stakeholders, including the community and other parties affected by the crime; formal disclosure of the truth about the crime and its impact; offender accountability; and a victim-centered plan for repair.

<sup>65</sup> Jon Wilson, the Director of Just Alternatives, a nonprofit focused on promising practices in justice and corrections, is a Victim Offender Dialogue mediator and trainer specializing in crimes and violations of severe violence, and was recently appointed Chair of the Maine State Prison Board of Visitors, a prison oversight and advisory committee.

<sup>66</sup> *Meeting with a Killer*, *supra* note 48.

apartment complex where Denise lived—and where the offender had once been a resident. However, because he refused to admit to raping Denise, they could not move forward with the VOMD. Admissions, which are central to offender accountability, are a prerequisite to any restorative justice program. Thus, Denise and Jim were at a stand still.<sup>67</sup>

Denise continued to wait and prepare—for eight years. Finally, with Denise frustrated and determined to confront the offender, the mediator, Jon, suggested that they use a variation of a traditional VOMD in which Jon would film Denise describing her experience of the crime, as if she were speaking to Jim. Jon would then make a second video—this time of Jim as he watched Denise’s video of her story, recording Jim’s immediate reactions and remarks. Jon would show this video of Jim to Denise so she could hear and see Jim’s unedited, unrehearsed responses to her story. Through the alternating videotapes, they were able to create a kind of “conversation” that allowed Denise to communicate with her offender. While this method of remote viewing and delayed interaction does not supplant the immediacy and opportunities for confrontation and resolution that are possible in a face-to-face dialogue, the approach was successful for Denise. She was able to verbalize every moment of the day of the rape, revealing many parts of the crime that were deeply shameful to her, and to watch her offender’s reactions—all from the safe distance of a front-row movie seat.<sup>68</sup>

One of Denise’s primary motivations to make the video was her desire to challenge Jim’s denial that he was her rapist. She offers a richly detailed chronology of the day of the rape, recounting everything from the music she heard on the car radio that morning to the sound of the offender’s belt buckle hitting the

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<sup>67</sup> In the interim, Denise participated in a surrogate VOMD, a restorative justice program in which the victim meets with an offender whose crime was similar to the one she endured. Although surrogate VOMDs do not offer the same opportunity for learning specific information as traditional VOMDs, such as the meeting between Ami, Linda, and Gary in *Meeting With a Killer*, they do allow the victim to tell the offender about the impact of the crime; they allow the offender to answer general questions; and they require the offender to speak words of apology and remorse about his actions, which are crucial to victim healing.

<sup>68</sup> The excerpts that appear in this section are selections from Denise’s video.

floor; from his disarming smile when he first appeared at her door to the animalistic look in his eyes during the rape itself.<sup>69</sup> When thinking aloud about identifying the offender, she declares, “I *know* who you are; I’ve *seen* who you are,” and we understand that she means this both literally and figuratively. In the video, she presents the offender with extensive evidence of his guilt to denounce his claims of innocence. It is as if she is demanding that he look at her, look at what he has done, and legitimize her grief by admitting to his actions.

Among the noteworthy aspects of Denise’s film is the absence of anger in her demeanor as she described the horrible rape she endured. Rather than angry, she seemed truly perplexed; her tones and expressions are all wonderment and surprise. At one point she asked the question that all victims ask themselves, “Why me?”<sup>70</sup> In the first moments of the attack, when she still did not understand what was going to happen to her, she wondered, “What had I done to make the maintenance man mad at me? What had I done to deserve this anger?”<sup>71</sup>

Her narrative is an almost bewildered play-by-play that recounts the minutiae of her experience as if it all happened slowly enough to be burned into her memory in perfect sequence. But she

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<sup>69</sup> Judith Herman explains the necessity for victims to retell as much about their emotional experience during the traumatic event as possible:

The recitation of facts without the accompanying emotions is a sterile exercise, without therapeutic effect. As Breuer and Freud noted a century ago, “recollection without affect almost invariably produces no result.” At each point in the narrative, therefore, the patient must reconstruct not only what happened but also what she felt. The description of emotional states must be as painstakingly detailed as the description of facts.

HERMAN, *supra* note 252, at 177 (citations omitted).

<sup>70</sup> Herman notes that “[s]urvivors of atrocity of every age and every culture come to a point in their testimony where all questions are reduced to one, spoken more in bewilderment than in outrage: Why? The answer is beyond human understanding.” *Id.* at 178.

<sup>71</sup> In *AGAINST OUR WILL: MEN, WOMEN & RAPE*, Susan Brownmiller’s renowned book about “men, women, and rape,” Brownmiller cites studies that conclude that most rapes are premeditated, not “spontaneous explosion[s] by an individual with pent-up emotions and uncontrollable lusts.” What is relevant for victims who ask “Why me,” about this pattern of preplanning is that, in many cases, “the *decision* to rape was made in advance . . . but the *selection* of the female was left to chance.” SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN & RAPE*, 183 (1975).

tells us that this is not so; it happened quickly. So quickly, in fact, that she was unable to react swiftly enough at times, to grasp where the attack was leading, to control her reflexes, to slow down her thoughts, or to defend herself, if that was even possible given Jim's size and strength relative to hers. Early in the film she says, "The thoughts raced through my mind so quickly that it was painful."

During their ordeal, victims operate on a survival level, negotiating each moment as part of a decision-tree leading toward life or death, linking them as if swinging limb to limb, as if each could be their last grasp on life. It is, in part, this acquaintance with extreme vulnerability that makes crime victims fascinating to us. The excerpts below illustrate this phenomenon, as well as a common sensitivity that all crime victims share: the self-blame that often accompanies victimization, shown in the fleeting moments when she sighed, rolled her eyes, or shook her head at her own misunderstandings and miscalculations.

As Denise described the day of the rape, Jon occasionally prompted her, asked for clarification, or offered reassurance. Even as she began telling her story, the difficulty and pain of the memories were obvious. She held back tears, her eyes welling up as she glanced from side to side as the memories surfaced. "You know, it's amazing to me . . . almost twelve years later, I can remember so much detail. I forget things on a daily basis, and I remember that day very clearly."<sup>72</sup>

When the rapist knocked on her door in the late afternoon heat of Houston, Texas, he identified himself a maintenance worker for the property and told her he was there to fix a leak that had been reported to the management. Denise wasn't aware of any leak in the apartment, but she offered to phone the office for confirmation.

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<sup>72</sup> Daniel Schacter notes that there is substantial evidence to support the idea that "memory for emotional trauma is frequently more accurate than memory for ordinary events." He cites research indicating that memory for emotionally traumatic events . . . differs fundamentally from memory for nonemotional events," the former being more accurately preserved and the latter subject to greater decay and distortion. SCHACHTER, *supra* note 20, at 205. Schacter attributes this difference between the "burned-in visual impressions" of traumatic memories and the yielding quality of mundane memories to the stress-related hormones marshaled by the brain's amygdala, which regulates emotions and influences the emotional aspects of memories. *Id.* at 202, 213, 217.

Jon: So [before you made the call] he was backing down the stairs.

Denise (rolling her eyes in exasperation with herself): Yees, he was going to go.

Jon: It's okay. I think it's good to tell this. I know it's hard.

Denise (tearily, voice cracking): I felt guilty about that for a lot of years, and I was very ashamed to tell anyone that I knew he was leaving. But I wanted to be *helpful*.<sup>73</sup>

When she closed the front door and turned away, the offender silently stepped inside. After he entered the apartment and before Denise could react, he yanked the phone from the wall and grabbed her throat.

Denise: He looked up, and [chuckling] so did I. And I remember feeling a very strange pain and, it was almost slow motion . . . [pausing frequently] And it occurred to me that the pain was that I was being choked and I heard the worst scream . . . I have never heard anything so terrible, and it took me a minute to realize that it was me. I tried to several times throughout the attack not to scream and I couldn't stop it. And, many times still, I can hear that scream, and it's very sad to me. It's very scary, it's very embarrassing, but, you know, I had no control.

It is impossible to recount Denise's manner of speech—her pauses and croaks, her slight Texas twang and the syllables she draws out—that adds another important dimension to her statements. She paused frequently, though briefly, between words, as if she was having difficulty being both in the memory and the present description of it simultaneously. She appeared at times to

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<sup>73</sup> Self-blame is not unusual among crime victims, especially victims of sexual assaults. And societal blame is pervasive. See Bonnie Katz & Martha Burt, *Self-blame in Recovery From Rape: Help or Hindrance*, in 2 SEXUAL ASSAULT, 345–8 (Anne Burgess, ed. 1988); ANN WOLBERT BURGESS, RAPE AND SEXUAL ASSAULT II (1988). P. Gilmartin-Zena, *Attribution Theory and Rape Responsibility*, 4 DEVIANT BEHAVIOR 357-74 (1983).

be laboring to revisit the memories while keeping them at a safe distance.

After the initial attack, Denise described a seemingly interminable struggle with the offender during which he threatened and cursed her. She tried to hit him with the iron, which he was easily able to turn against her.<sup>74</sup> Kicking and hitting were futile. So she tried to escape by throwing herself out the window.

Denise: At one point, I remember facing . . . a patio glass window . . . and I was running. I was going to go through the glass. I would have fallen onto some air conditioner units out of the second story. But I was so terrified of not knowing what he was going to do that that option actually seemed better. [softly] But he was able to grab me and pull me back.

Rape victims who are able to fight their attackers often describe a moment, frequently after an aborted attempt to escape, when they shift from fighting to avoid the attack itself to resisting each degradation within the attack. The inevitability of the rape becomes apparent, and the struggle is no longer about whether the rape will occur but how bad it will be. This moment is a major defeat for the victim and leaves her feeling shocked, bewildered, and helpless. She must rapidly process reactions similar to the stages of grief and loss—shock, denial, anger, acceptance—within a matter of seconds and rally to new battle, despite her flagging confidence and physical strength.

Denise: That was the first time [voice croaking; shedding tears] I remember feeling small. I felt very helpless . . . I didn't understand anything of what was going on other than that I was *in trouble* . . . And then it became very clear to

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<sup>74</sup> Earlier in the video, Denise described a scuffle between them when she attempts to hit the rapist on the head with the iron, which she had left in the dining room that morning. He easily overpowered her and turns the appliance against her, knocking her head so hard she almost fell unconscious. Later in the struggle, before he pinned her to the kitchen floor, she noticed her kitchen knives and made a conscious choice to stay away from them, because "he was able to take the iron away from me so easily. It amazes me that I was able to rationalize something and actually leave the knives alone." Jon remarked, "That could have saved your life." Denise replied, "Right. I'm very grateful that I didn't choose to pick up the knives."

me what was going to happen, because he said, “Now let’s get these clothes off.” And I remember being so stunned. And it occurred to me that this was going to be a rape.

\* \* \*

My scream was haunting me, but I was still unable to stop . . . I assumed that after I would be raped, then I was going to be killed. I couldn’t reason anything else . . . because everything had been so painful, you know, even my thought process became painful. I just assumed that death was the end result of it all.

Denise described how, in preparing to rape her, the offender pinned her to the floor and knocked the wind out of her by dropping his body on top of hers, in what she likened to heavy push ups, which was “excruciating.”<sup>75</sup> While this was happening, she was desperately trying to regain control over her motor skills so she could continue to fight.

Denise: I remember my arm was laid out to the side and . . . telling—begging—my finger, inside my head [to move] . . . but I could not move my finger. I was trying to get my brain just to make my finger move and that was so scary, knowing that I had no strength even to lift a finger . . .

Jon: [You felt] paralyzed?

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<sup>75</sup> Denise described her disgust and revulsion at the experience. She seemed to want to convey this abhorrence to her offender, perhaps, in part, because the surrogate offender with whom Denise met told her that he believed that his victims “liked” what he did to them, that they weren’t really hurting, and that they “enjoyed” being raped.

Denise: I remember being overcome with nausea as this man I didn’t know anything about . . . was on top of me. And he was making strange noises. It sounded very much like an animal to me . . . I was lying there unable to move even my finger at that point. I felt very lifeless. And everything hurt. The noise he was making was painful for me to listen to—

Jon: There was nothing pleasurable—

Denise: No, it was very gross, it was very disgusting to me in many ways . . . I was fighting vomiting the entire time.

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He got even a little more grotesque . . . It reminded me of, maybe, a dog that was starving. And it just didn’t sound normal.

Denise: I did, I felt paralyzed. I was overwhelmed. With everything.

Throughout the video, Denise described a profound feeling of powerlessness. Almost by definition, crime victims experience a complete loss of autonomy, physically and mentally. Their ability to move is constrained by the offender; their mental processes are a bundle of shock, incomprehension, and desperation.<sup>76</sup> Even while they are engaged in a constant exhausting assessment of potential avenues out of the situation, they cannot think beyond the present moment. They are in terror.

Time seems to slow down, and every moment becomes laden with the details of what is happening. Victims become acutely aware of the most subtle cues around them; they register every sensation, every inflection of the offender's voice, even seemingly insignificant features of their environment become noticeable. For Denise, the flashing digit on a kitchen clock marked time during the rape.

I saw the clock in the kitchen. It was on a coffee pot . . . . And, for some strange reason, I wanted to know exactly when I died. And I would watch the clock [during the attack] when I could get my vision back to it, I would look, and it seemed like forever—everything was happening very quickly and very slowly at the same time.<sup>77</sup>

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<sup>76</sup> At the end of the video, Denise said she told the police officers that she had just had a nightmare in which she was raped—"the worst nightmare I had ever had" — but if they would just give her a few minutes, she would wake up. Jon observed, "So it was ven hard then to believe it had been real, even in that immediate aftermath."

<sup>77</sup> HERMAN, *supra* note 25, at 43 ("Time sense may be altered, often with a sense of slow motion, and the experience may lose its quality of ordinary reality").

Denise described her experience this way:

Denise: I keep saying it happened fast, and it happened slow. And it was both at the same time. That's something that I still don't understand because I've never experienced it since. But that was a painful process in my own mind . . . . I heard his belt buckle and zipper and things — very loudly. I could hear that he was exposing himself. My shorts had already been ripped off and my panties came off with it. And I was ashamed.

Jon: That you were so exposed as well as being violated?

Denise (choking back tears): Yes. Yes. And I could do *nothing* about it.

When he tried to cover Denise's eyes with a shirt after the rape, she believed he was going to stab her or shoot her, so she fought him to keep the shirt off her head. She thought he didn't want her to see him aiming the weapon at her, or that he didn't want her to be able to identify him.

Denise: I know exactly what he looked like. I fought him—

Jon: Face-to-face.

Denise: Right. I can see him any time I want to. I know what he looks like. I saw him much too often the first few years [after the rape] . . . . His face was engraved in my mind . . . . I wanted to tell him that "I *know* who you are." You know, I mean, "I've *seen* who you are. I won't *ever* forget who you are." But I didn't want him to have another reason to kill me and I still thought he was going to kill me. If he was covering my head for the purpose of me not seeing the weapon, the curiosity was too great. I would have rather seen. [pausing] I think I would have rather seen. [pausing again] I don't know.

After the attack, the rapist dressed himself, went to the mirror in the foyer of her apartment, smiled at himself in the mirror, and "straightened himself up . . . . He adjusted his hair in the mirror, and his pants and then—I was lying there trying to find strength to move and I felt very vulnerable because I couldn't move. And he said, 'What are you going to do about it, bitch?'"<sup>78</sup> And then he opened the door and he walked out."

Denise: I ran out of the apartment. The only thing I had on was the shirt hanging from around me and, I remember, I was too terrified to stay in my own home, yet I was ashamed and terrified to be outside. And I watched him walk away [voice trailing off].

Jon: He just walked away.

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<sup>78</sup> Susan Brownmiller reports that inflicting further humiliation on the victim, beyond the rape itself, is common in sexual assault crimes. See BROWNMILLER, *supra* note 71, at 196–97. Alice Sebold remembers her rapist taunting, "You're going to have a baby, bitch. What are you going to do about it?" SEBOLD, *supra* note 20, at 12.

Denise: He just walked away. And he looked back at me and smiled. And I was outside. Naked. Screaming. Destroyed.

Every crime victim describes a feeling of violation and astonishment—"Why me?" And many victims of severe violent interpersonal crimes, like Denise, suffer intangible damage that is life-transformative and leaves them "destroyed." Although Denise told her story fluidly, with no interruptions or forgotten asides, her emotions were still quite raw. Even twelve years later, she is still moved by the agony of recollections of the crime, and we, as viewers, are moved to compassion for her. The excerpts from *Denise's Story* describe in painful detail the trauma experienced by crime victims that makes them unique—both as subjects of documentaries and as clients of lawyers.

It is taken for granted that the social conventions that dictate appropriate behavior in relationships and norms about personal privacy, bodily integrity, the security of one's home, and a sense of fundamental trust among others. After a crime, especially a rape or other sex crime, victims can no longer invest in common expectations about such conventions. During a crime, victims often feel confused and blunted by each progressively worse boundary violation by the offender. They cannot comprehend one invasion before the next one occurs.

For Denise, the offender first invaded her home and her immediate personal space; then, her clothes and her body; even the offender's violent, demeaning curses throughout the attack were violations she cannot forget. She was fighting off these attacks—"fighting for my life"—or, more accurately, struggling to maintain enough physical strength to continue fighting, which rapidly deteriorated into a battle to regain enough energy to simply move her finger. In that decline, Denise lost more than just her physical power. Physical injuries heal over time, until the blood and bruises are no longer visible. Internal scars, however, do not mend so easily. Denise's pained expressions, her difficulty speaking about her sense of shame, and her frequent pauses to weep silently during especially graphic parts of her narrative poignantly demonstrate the depth of the emotional trauma she suffered. As Georgia Meloy

observed in *Sentencing the Victim*,<sup>79</sup> sexual assaults “take something from the victim that can never be replaced.”

Despite the longevity of their effects, the law gives scant regard to violations that injure a crime victim’s dignity or sense of safety. The law is only prepared to address physical harms, not spiritual or emotional damage.<sup>80</sup> Film, however, provides a venue where victims can speak to the wounds that exist beneath the surface of the skin and to the full impact of the crime on their lives and their loved ones. Denise used the video to communicate with the rapist, to confront his denials at a safe distance, and observe him reacting to her narration in a way that was not possible at the trial.

Denise, like many crime victims and survivors including Joanna, Ami, and Linda, sought a forum in which to record her narrative, however unlike these others, Denise is adamant about maintaining control over how her film is used. Her film was not—and will not be—publicly disseminated. Her testimony was publicized only to the offender, with whom she wished to communicate. This is not simply a matter of privacy. Ownership of her narrative is one way victims attempt to regain autonomy lost during the crime. Denise had owned this story for eight years before she was able to successfully employ video as a tool to speak to Jim and hear his responses. Like Ami, using video gave Denise courage and promoted her recovery. The desire to exercise ownership of a narrative should have special significance for documentary filmmakers.

*C. Lessons for Documentarians on Victim Recovery and Restorative Justice*

Crime victims hold a special interest to documentarians. Crime itself is relevant historically and culturally, and the tale of a specific crime and its impact on the victims and survivors interests viewers. Indeed, as a society, we have an ongoing fascination with crime and its participants. The topic is disquieting, and there is a voyeuristic appeal to acts that are taboo and reveal the extremities

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<sup>79</sup> SENTENCING THE VICTIM, *supra* note 33.

<sup>80</sup> See generally, ROSENBAUM, *supra* note 1.

of the human capacity to, among other things, harm its own kind. If the story of the crime culminates in judgment and punishment of the offender, so much the better.

As a subject for media scrutiny, people who have suffered severe, violent, interpersonal crime, the group this article focuses upon, are different from other subjects.<sup>81</sup> They are different and they require unique treatment for many of the same reasons that victims of such crimes make compelling subjects for documentaries: they have suffered something out-of-the-ordinary; something sensational, if horrifying; something most audience members will only experience vicariously from the safe distance of an armchair in front of a television screen.<sup>82</sup> And, the event that made the victim a compelling subject, although unpredictable and seemingly random, was not altogether accidental, nor attributable to natural forces. For victims, the event remains largely inexplicable. The question “Why me?” can never be satisfactorily

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<sup>81</sup> Although any attempt to summarize the effects of severe trauma is destined to fail, Judith Herman’s description of “the damaged self” touches upon many key features of the experience of victims of severe, violent, interpersonal crime:

Traumatic events violate the autonomy of the person at the level of basic bodily integrity. The body is invaded, injured, defiled . . . [A]t the moment of trauma, almost by definition, the individual’s point of view counts for nothing . . . The traumatic event thus destroys the belief that one can be oneself in relation to others.

HERMAN, *supra* note 25, at 52–53.

Traumatized people suffer damage to the basic structures of the self. They lose their trust in themselves, in other people, and in God. Their self-esteem is assaulted by experiences of humiliation, guilt, and helplessness. Their capacity for intimacy is compromised by intense and contradictory feelings of need and fear. The identity they have formed prior to the trauma is irrevocably destroyed.

*Id.* at 56.

<sup>82</sup> *See id.* at 33.

In 1980, . . . traumatic events [were defined by the scientific community] as “outside the range of usual human experience.” Sadly, this definition has proved to be inaccurate. Rape, battery, and other forms of sexual and domestic violence are so common a part of women’s lives that they can hardly be described as outside the range of ordinary experience . . . Traumatic events are extraordinary, not because they rarely occur, but rather because they overwhelm the ordinary human adaptations to life. Unlike commonplace misfortunes, traumatic events generally involve threats to life or bodily integrity, or a close personal encounter with violence or death.

*Id.*

answered. These qualities make the story of the crime victim an alluring topic—and one that demands greater sensitivity and a stronger ethical awareness than other documentary fare.

Collisions occur when the media's desire to exercise free speech conflicts with the victim's right to privacy and her entitlement to control her own story. Documentary films that treat the victim's story as "fair game" because telling a victim's story is "in the public interest" fail to understand the particular sensitivities of crime victims that override the public's right to know.

### 1. Loss of Autonomy

As Denise's narrative reminds us repeatedly, victims of severe, violent, interpersonal crime undergo an acute loss of autonomy during the crime.<sup>83</sup> Not only is their physical mobility compromised, but their thinking becomes transfixed on simply staying alive from one moment to the next. When victims are depleted of physical strength or are threatened with a weapon and unable to fight back, their thinking often becomes compressed to a tight mental search for ways to extricate themselves from the situation. They are physically and mentally subjugated to the offender. "At the moment of trauma, almost by definition, the individual's point of view counts for nothing. In rape, for example, the purpose of the attack is precisely to demonstrate contempt for the victim's autonomy and dignity."<sup>84</sup>

After victims reports the crime, they are further stripped of their autonomy. From the moment they report the event to law enforcement, victims often describe feeling that they become something less than a person. They begin, essentially, as pieces of evidence. Everything about their physical condition is scrutinized and swabbed, photographed and noted in medical charts, analyzed

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<sup>83</sup> See, e.g., Jones, *supra* note 30, at 829–30.

Rape contributes to a social, emotional, and political environment in which women's bodies, lives, experiences, and realities are improperly restrained. It has meanings at the deepest level of human symbolism, and serves as an excruciating reminder of how a culture that disinhibits the aggressive exercise of power fosters callous oppression at the cost of female autonomy.

*Id.*

<sup>84</sup> HERMAN, *supra* note 25, at 53.

and measured. The indications of the crime they endured become elements in the investigator's follow-up notes, and later, in the prosecutor's file.

Some victims, as they regain their bearings after the crime, are able to take charge of their own story by, for example, adding to the statements they made at the scene, demanding to be kept fully informed of the investigation, and exercising their rights to be present and heard at legal proceedings and to consult with the prosecutor. Joanna Katz in *Sentencing the Victim*<sup>85</sup> illustrates this type of ownership, but she did not start out in this mode.<sup>86</sup> Most victims of severe violent crimes do not begin as owners of their own narrative. Rather, ownership belongs to law enforcement.

The extreme loss of autonomy and ownership can be exacerbated by other accounts, such as films or books, which retell the crime narrative without consulting the victim. A filmmaker who flaunts his or her prerogative to report the "newsworthy" event, without regard to the victim's needs and desires, frustrates the victim's wish to exercise control over her experience and risks retraumatizing her.<sup>87</sup>

## 2. Unwanted Celebrity

Documentary filmmakers believe it is their job—and arguably it is—to tell any story that is "newsworthy."<sup>88</sup> What is considered "newsworthy" is a broad, virtually all-encompassing category that gives filmmakers unfettered permission to "document" just about anything.<sup>89</sup> On this basis alone, documentarians often claim

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<sup>85</sup> SENTENCING THE VICTIM, *supra* note 33.

<sup>86</sup> In fact, in the film, Joanna's mother describes finding Joanna curled up in a fetal position under the desk at her apartment during the period shortly after the crime. She had been there for three days.

<sup>87</sup> HERMAN, *supra* note 25, at 134 ("the principle of restoring control to the traumatized person has been widely recognized.")

<sup>88</sup> See, e.g., *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200,202, 74 Cal. Rptr. 2d 483, 955 P.2d 469 (1998) (placing the media's First Amendment right to disseminate information as a priority over an individual's right to privacy such that the media may report a "newsworthy" story even when the information consists of private, embarrassing facts).

<sup>89</sup> See, e.g., *ETW Corp. v. Jireh Publ'g, Inc.*, 99 F. Supp. 2d 829, 834 (N.D. Ohio 2000) (coining the phrase the "majesty of the newsworthy moment.").

entitlement to a victim's story, no matter the effect its report might have on the victim, because the crime is a "newsworthy event."<sup>90</sup> While revealing stories that are vital to the public interest—that expose cover-ups; that expose corporate or political fraud; that call attention to activities that violate law or offend our sense of morality—is an admirable occupation, crime victims deserve greater deference and respect as subjects of documentaries.

Crime victims become notable and newsworthy for something they wish never to have happened in the first place. Victims are interesting because of the criminal event. They make good subjects for documentaries precisely because the crimes that marred their lives are sensational and therefore fascinating to the public. The subjects of crime-based documentaries are not notable for their achievements or talents, their personal qualities or skills. They become celebrities not because of who they are as people, but simply because they have suffered. With the help of documentary films, this unwanted celebrity can be transformed into an advocacy role that gives victims a sense of purpose and gives meaning to their suffering.

### 3. Fight Against Invisibility

The act of storytelling, especially for crime victims, has been called a fight against invisibility. This struggle for narrative ownership begins early. If a report is filed with law enforcement, this is the first formal declaration in the fight. It is later woven into the trial process, when the victim testifies and the prosecutor places evidence before the jury that sets forth the facts that lead to the victimization. The victim's fight is given fuller voice when she presents a victim impact statement at sentencing and, as in Joanna's case, at parole hearings.

But the struggle is barely noticeable in the filed documents and the rule-bound testimony. Given the legal requirements of the proceedings, victims often find themselves losing the fight against invisibility. The criminal justice system runs roughshod over the

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<sup>90</sup> Cf. Robert D. Richards & Clay Calvert, *Suing the Media, Supporting the First Amendment: The Paradox of Neville Johnson and the Battle for Privacy*, 67 ALBANY L. REV. 1097, 1128–29 (2003–04).

victim's need to be recognized and heard, to own and control her narrative. First, a victim is not a party to her own criminal case; her name is not mentioned in the title to the historical record of her case.<sup>91</sup> Victims are mere onlookers in vindicating a crime that, by a legal fiction, makes the State the victim and the victim a witness.<sup>92</sup> Although victims are the engines that initiate and drive the proceedings, they often find themselves sidelined, required to appear conservatively dressed with a spotless reputation and to appear mentally composed.<sup>93</sup> If the possibility of a trial is foreclosed by a plea bargain, the victim and her story are eclipsed by these judicial efficiencies.<sup>94</sup> When the official record of the offender's story, which is an "alter-ego" to the victim's, is distorted in the public record, the victim's story is also affected. The victim's story loses the anchor of historical truth, and the

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<sup>91</sup> Thane Rosenbaum notes:

The State vicariously but disingenuously accepts the burdens of being the victim without having to endure the pain, loss, and humiliation that are experienced by an actual real-life victim. The State, in fact, deludes itself into thinking that it *is* the victim, that the injury was inflicted on the fibers of the nation rather than on the flesh of a person.

ROSENBAUM, *supra* note 1, at 85.

<sup>92</sup> Although victims' rights laws have been passed in every state, granting crime victims and their survivors greater participation in and respect from the system, these rights are, in a sense, merely advisory. They carry no sanctions if they are violated. A few courts that have heard complaints from victims about failures to observe these rights have held hearings and fashioned case-specific remedial results, but the rights afforded to victims are basically toothless.

<sup>93</sup> See Roslyn Myers, *Part I: Victims as Storytellers: The Importance of Victim Impact Testimony in Criminal Justice Proceedings*, 5 (6) CRIME VICTIMS REP. 85 (Jan./Feb. 2002); *Part II*, 6 (2) CRIME VICTIMS REP. 17 (May/June 2002); *Part III*, 6 (3) CRIME VICTIMS REP. 33 (May/June 2002).

<sup>94</sup> Negotiating a lesser charge for a criminal offense is standard fare for virtually every criminal who enters the criminal justice system. Crime victims are seldom notified, let alone permitted to opine on the deal, though many states require prosecutors to "consult" with crime victims before proceeding with plea bargains. See, e.g., CODE OF ALA. §15-23-71 (2005) (requiring prosecuting attorney to make "reasonable efforts" to confer with the victim before submitting plea agreement to court); ALASKA STAT. §12-62.015 (2006) (requiring the prosecutor to "confer with the victim of a crime involving domestic violence concerning a proposed plea agreement before entering into an agreement"); ARIZ. REV. STAT. ANN. CONST. § 2.1 (stating that victims have the right to "[t]o confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.").

silencing of truth itself can be retraumatizing.<sup>95</sup> For these various reasons, victims may find that “visibility” is not possible in criminal justice proceedings.

For many, narrative ownership outside the courtroom becomes essential. The desire to fight against invisibility is, in part, what drives victims to participate in restorative justice programs, such as the VOMDs shown in *Meeting With a Killer* and *Denise’s Story*, and to speak out on behalf of other victims, as Joanna did in *Sentencing the Victim*.<sup>96</sup>

#### 4. Voice and Recovery

After what has been taken in the criminal act and the justice system, victims often feel on some level that the only thing they have that is still entirely their own is their story. They have lost their autonomy and control over their lives; their biography has been forever transformed. The one thing about which they can be certain is that their memory of the experience of the crime and its aftermath can and will never be taken away from them.

What documentaries can offer victims that the legal system cannot is the ability to retell their stories free of the redactions, interruptions, and legal cautions that the evidentiary rules impose on courtroom testimony.<sup>97</sup> Documentaries are fundamentally

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<sup>95</sup> The retraumatization and indignity of the silencing of truths is jarringly depicted on film in the movie *THE ACCUSED* (Paramount Pictures 1988), starring Jodie Foster as gang-rape victim Sarah Tobias and Kelly McGillis as Kathryn Murphy, the prosecutor. When the prosecutor negotiates a plea that reduces the offender’s crime to criminal recklessness, Sarah Tobias becomes livid, shouting, “I didn’t get raped, huh? I never got raped? . . . I’m lying there with my pants down and my crotch hung out for the world, and you’re telling me that that’s the best you can do? Well, your best sucks. I hope to shit whatever you got for selling me out was worth it.” Later in the film, after Sarah is in a car accident with one of the men who had cheered and encouraged the offenders during the rape, Kathryn Murphy visits her in the hospital and Sarah quietly mumbles, “They all think I’m a piece of shit. And why not? You told them . . . I never got to tell nobody nothing. You did all my talking for me.” *Id.*

<sup>96</sup> *SENTENCING THE VICTIM*, *supra* note 33; *Meeting with a Killer*, *supra* note 48; *Denise’s Story*

<sup>97</sup> See ROSENBAUM, *supra* note 1, at 107–113. Rosenbaum notes that evidence rules, while intended to maintain orderly administration of the proceedings, serve to “undermine truth and storytelling.” The imposition of evidentiary rules on witness’ testimony “rob[s] it of all the nuance and emotion of the human experience.” *Id.*

storytelling devices, and storytelling itself serves an important function for victims.<sup>98</sup> “[T]he telling of the story and the public acknowledgment of the wrong is an important value even if it produces nothing concrete, other than the story itself.”<sup>99</sup> Reconstructing the story of the trauma is part of the process of recovery.<sup>100</sup> Victims need to tell something about themselves, to put themselves in context. They need to explain the particular meaning they attributed to various aspects of the crime and their experience of it.<sup>101</sup> At this most basic level, documentaries give the victim a voice — a compelling and persuasive voice; a forum from which to make their stories heard.

### 5. Communal Repair

The passage of time alone does not heal all wounds. Victims’ sensitivities linger even after victims have recovered physically from the attack.<sup>102</sup> Communities also experience lingering damage after a crime, and they too need a forum in which to address the communal damage. Neither the victim nor the community can experience genuine healing unless the truth surrounding the crime is honestly confronted, the anguish fully acknowledged, and the offender’s accountability recognized.

Formal documentation, like a public trial, serves not only the individual victim, but also the larger community in which the crime occurred. Creating an historical record of the crime, including its effects on both the victim and the community, places the event in the community’s formal memory, and the public nature of the documentation is the first step in repairing the breach caused by the crime. Furthermore, the act of documenting a crime publicly legitimizes the victim’s status as the injured party, which is the first step in restoring her dignity. Publicly admonishing the offender reaffirms core communal values and reflects the community’s compassion for the victim. If the offender

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<sup>98</sup> See *supra* notes 21–24, discussing forms of documenting victim testimony.

<sup>99</sup> See ROSENBAUM, *supra* note 1, at 81.

<sup>100</sup> See HERMAN, *supra* note 25, 176–95.

<sup>101</sup> *Id.* at 178 (“Reconstructing the trauma story also includes a systematic review of the meaning of the event, both to the patient and to the important people in her life.”)

<sup>102</sup> See *supra* note 41 (quoting HERMAN, *supra* note 25, at 37).

acknowledges his breach of community norms and values, he also reaffirms them. These elements—documentation; victim recognition; public admonishment; and offender accountability—establish the interrelatedness of the victim, the community, and the offender, which is pivotal in making all participants stakeholders in the community's healing.<sup>103</sup> “[C]ollective shame which is acknowledged collectively can motivate just transformation.”<sup>104</sup>

But trials are not about community restoration. The goals of a trial are retribution and punishment, and any sanguine effects on the community that might result from the trial are incidental to these goals. Documentaries, however, are able to capture for viewers much more than the quest for guilt or innocence. They can be used to reveal the full story of a crime—with all its cruelty, violence, messy back-story, complex human emotions, and interrelationships—which is necessary to community healing. Documentaries allow viewers to participate in this experience. “Video . . . offers its . . . viewers a seductive invitation to take on a sociocultural persona and become part of an imagined (judging) community, sharing the worldview constituted by the law of the film.”<sup>105</sup> The film *Meeting With a Killer*, for example, joined its subjects (Linda and Ami) with its viewers (the “judging community”) in learning the details of Cathy's murder, understanding the effects of crime on Cathy's family, and hearing the offender express sincere remorse for the crime, which is a relatively rare event.

Like documentaries, and often in combination with them, restorative justice programs directly involve the community—not just as viewers but as participants—in the process of repair. In the restorative justice model known as Circle Sentencing, for example, a group of representatives from the community gather with the victim and offender to hear them speak about the crime, to discuss its broader effects on the community, and to create a plan for the

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<sup>103</sup> Truth and reconciliation commissions are a good example of this process of community healing. The TRC in South Africa is perhaps the purest example, because the model was a straight exchange of information for amnesty, with the goal of moving the community into a new history.

<sup>104</sup> RESTORATIVE JUSTICE AND CIVIL SOCIETY, *supra* note 23, at 11.

<sup>105</sup> Kamir, *supra* note 62, at 28.

offender to make reparations to both the victim and the community.<sup>106</sup> Another model known as Family Group Conferencing, which is typically used when juvenile offenders have committed low level offenses, such as vandalism or truancy, follows a structure similar to Circle Sentencing, but the “community” comprises the offender’s immediate family, school and religious officials, and sometimes members of the offender’s peer group. Because everyone who has a “stake” in the damage to the community is given an opportunity to be heard and to be part of the resolution, and because the resolution sought is a restorative one, not a punitive one, these programs stimulate lasting transformation.

Truth and Reconciliation Commissions (TRCs), which are recorded on film, are venues for community healing on a national level. TRCs are intended to uncover and formally document, as thoroughly as possible, the nature and extent of abuses perpetrated against a particular societal group, so that the country can move forward having reconciled with the lessons of the past. TRCs tacitly recognize that the effects of past violence and trauma do not vanish with the passage of time. Every corner of the story must be explored if healing is to begin. The “truth” of a truth and reconciliation commission comes from both victims and offenders, who testify about their individual experiences and, in some cases, dispute the state’s official version of events. These personal testimonies become the cornerstones of the nation’s moral accountability and redemption, and they restore individual citizens’ human and civil dignity. In establishing the South African TRC, which offered offenders amnesty for their testimony, Nelson Mandela emphasized the overriding value of a formal and complete historical record to achieve a kind of collective catharsis that would move the country toward closure on its violent and racist past. Although the process has critics, the South African

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<sup>106</sup> Circle Sentencing gets its name from the circle in which the group sits and its primary goal, which is to find a “sentence” that can meaningfully restore the victim and the community—which would not include jail time. See Mark Umbreit et al., *The Impact of Restorative Justice Conferencing: A Review of 63 Empirical Studies in Five Countries*, Center for Restorative Justice & Peacemaking (2002). The model is not appropriate for cases of severe violent interpersonal crimes.

TRC demonstrated the power of truth-telling and the importance of seeking more back-story in its decision to deemphasize punishment.<sup>107</sup> Like restorative justice programs, TRCs recognize that harm to a community cannot be repaired if it is not first identified and openly confronted.

Documenting testimony that creates an accurate story of the events promotes community healing. It forces the community to join the victims in reliving the traumas; it acknowledges the enormity of the impact on their lives; and it creates a context that gives historical meaning to their trauma.

#### *D. Victim Narrative, Restoration, and Justice*

No one signs up to become a crime victim; victims are given that mantle involuntarily. They are brought into the criminal justice system unwillingly and unwittingly,<sup>108</sup> just as they join the cast of “newsworthy” events that make suitable subjects for documentaries. To the extent that documentaries are about truth-

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<sup>107</sup> Some victims of apartheid actively opposed any amnesty in South Africa because of the de-emphasis on retribution for the victims. See, e.g., Ken Wells, *South Africa Police, In Bid for Amnesty, Own up Killing Biko*, WALL ST. J., Feb. 6, 1997, at A1 (describing the facts and mysteries surrounding Biko’s death in September 1977, when his body was delivered to his family, bruised and battered, after several weeks in a Pretoria jail hospital). The article states:

Though many in South Africa, including Mr. Biko’s widow, Ntiski, have criticized the commission as potentially too lenient toward the racist murderers of the old regime, many believe it is the only reasonable way to get to the bottom of myriad crimes of the apartheid era.

The benefit of the commission is that “it puts on trial the entire system of apartheid, and not just the foot soldiers of the regime,” says Shun Chetty, a South African lawyer, once exiled to Australia, who helped represent Mr. Biko’s family during the inquest into his death two decades ago. “In that way, I think it’s vital to the future of the country. But unquestionably it means that some individuals and some families who suffered heinously under the system will be asked to sacrifice for the greater good.”

*Id.* See also Cyrille Hugon, *In South Africa, 20 years After Steven Biko’s Death, the Truth Commission Grapples With the Meaning of Justice*, <http://www.columbia.edu/cu/sipa/PUBS/SLANT/SPRING97/hugon.html> (last visited Apr. 21, 2006).

<sup>108</sup> Nils Christie, *The Ideal Victim*, in FROM CRIME TO VICTIM POLICY: REORIENTING THE CRIMINAL JUSTICE SYSTEM 17–30 (Ezzat A. Fattah, ed., St. Martin’s Press 1986).

seeking and truth-telling, and avoid exploiting victims, this form of documentation can support a crime victim's recovery.<sup>109</sup>

In her handbook, *Ethics in Victim Services*,<sup>110</sup> Melissa Hook enumerates a list of guiding principles, or "values," that apply to professionals who deal with victims, including lawyers, documentarians, victim advocates, and even medical professionals. Among these principles, the core value is "Respect for People's Rights and Dignity." The section cautions that, when dealing with crime victims, victim assistance providers must "be committed to the victim's right to privacy, confidentiality, and self-determination."<sup>111</sup>

Dignity, in part, requires being "heard." The psychological and spiritual unburdening of her trauma is key to restoring the intangible losses victims suffer as a result of the crime. A victim can be encouraged to "articulate the values and beliefs that she once held and that the trauma destroyed."<sup>112</sup> Reconstructing the traumatic event "actually transforms the traumatic memory, so that it can be integrated into the survivor's life story."<sup>113</sup> Grappling with this process of narrative ownership is one method of achieving self-determination.

In publicizing their traumatic memories, victims take ownership of their story and engage in self- and community healing that is its own form of advocacy. Both law and film, as public venues, share a communal aspect through which viewers participate in the event by watching and by reflexively imagining themselves as part of the subject matter. "Both law and film are dominant participants in the construction of concepts, such as subject, community, identity, memory, gender roles, justice, and

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<sup>109</sup> See HERMAN, *supra* note 25. Retelling the story of a past event changes the memory of the event. "It appears, then, that the 'action of telling a story' in the safety of a protected relationship can actually produce a change in the abnormal processing of the traumatic memory." *Id.* at 183. See also, SCHACTER, *supra* note 20, at 70 (describing the process of recalling a past event as a transformation of the encoded material that makes up the memory in combination with present sensations).

<sup>110</sup> MELISSA HOOK, *ETHICS IN VICTIM SERVICES* (2005). Melissa Hook is the Executive Director of the Victim Assistance Legal Organization.

<sup>111</sup> *Id.* at 14–15.

<sup>112</sup> HERMAN, *supra* note 25, at 178.

<sup>113</sup> *Id.* at 175.

truth; they offer major sociocultural arenas where collective hopes, dreams, beliefs, and anxieties, and frustrations are publicly portrayed, evaluated, and enacted.<sup>114</sup> When film turns its lens on the legal arena, it forces us to examine our perceptions about crime and crime victims, and our understanding of justice.

If justice has meaning beyond meting out punishment, then the outcome of legal proceedings must contribute to the repair of the parties who have been harmed: the victim and, secondarily, the wider community.<sup>115</sup> Such a restorative form of justice is dependent on victim recovery and the community repair, in addition to restitution and punishment. To achieve these ends, victims must have a public forum where they can fully recount their experiences, speaking with the natural flow, sidesteps, stammers, hiccups, and tears that are inherent to any emotionally weighted memory, and where the community can bear witness. Although many Hollywood depictions of the legal system, inspired by idealism, sometimes suggest otherwise, the criminal justice system is not calculated to serve these ends. But documentary films, in the service of lawyers and crime victims, provide crucial opportunities for healing and transformation that the search for correct legal results can never achieve, and, in doing so, promote a form of justice that is meaningful to victims.

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<sup>114</sup> Kamir, *supra* note 62, at 28.

<sup>115</sup> ROSENBAUM, *supra* note 1 at 227