Documentary Law Stories

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Abstract

The paper presents an approach for exploring the relations between documentary and law. It focuses on the Australian context, where these relations have not been widely studied. The approach focuses on four considerations: the use of documentary techniques, the social relationships of filmmaking, understandings of legal processes, and the relations of law to other forms of knowledge and social regulation. The paper illustrates the approach by looking at several documentaries that deal with relations between the common law and Indigenous law and culture. The examples show that documentary law stories are a valuable means for understanding cultural, historical and political problems that have their day in court.

Introduction

Screen representations of law have attracted a measure of critical attention in relation to narrative fiction on television and in cinema (Machura & Robson, 2001; Mezey & Niles, 2004-2005; Sherwin, 1996). They have also been discussed in work on documentary, particularly in the United States, but to a lesser extent overall. Indeed, Austin (2006, p. 814) refers to a "dearth of legal scholarship on the subject of documentaries". Equally, the relations of documentary and law have not been studied systematically in the interdisciplinary field of media and communications. At least, this is the case in regard to Australia, which is the main setting for this paper. This is

at odds with the fact that numerous Australian documentaries have been concerned with the role of law and legal processes in connection with a range of social, cultural and political issues. My purpose is, therefore, to outline an approach that helps to explore relations between documentary and law in this context.

The paper considers first some general features of documentary form and practice that help to understand the means for filmmakers to represent law and related issues. It extends this combined interest in form and practice to address, specifically for documentary representations of law, the concern of the "journalism and media" conference stream with the influence of media forms and their role in "determining what events are important, whose *stories* should be told, and how" (ANZCA, 2008, para. 1, emphasis added). Then it outlines the concerns with the law, and with other practices and forms of knowledge overlapping it, that influence those documentary representations. The final section illustrates the approach to exploring documentary, with reference to work about relations of common law and Indigenous law and culture in Australia.[2]

Documentary forms and practices

Documentary offers an array of modes and genres that filmmakers can use to represent issues relating to the law, in ways that are responsive to the circumstances in which they arise. Broadly, scholars have characterised documentary modes as distinctive ways of organising sound-image relations that have been made possible by audiovisual technologies and favoured within major documentary movements. In one of the most widely cited historical analyses, Nichols (1976-1977 and 1991, pp. 32-75) identifies four modes that have developed successively. In his account, the "classical" form of documentary, a mode of exposition anchoring the meaning of images by the

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[2] My concern in this paper is with law as a specific documentary subject, or *topos*. Law's role in regulating aspects of documentary practice including copyright, access to information, privacy standards, etc is a broader subject (Collie, 2007, pp. 376-397; Gold, 2006; Leiboff, 2007, pp. 116-118, 129,174; Ricketson & Richardson, 2005, pp. 219-233), although these two concerns may converge, for instance in relation to uses of land as film locations in works about Aboriginal people (Langton, 1993, p. 69).

use of authoritative or "voice-of-god" narration, was established in cinematic documentary of the 1930s to 1950s, and played a major part in the "Griersonian" tradition of citizenship education. Observational documentary was facilitated by the advent of lightweight, portable recording equipment and was pursued in the *cinéma vérité* and direct cinema movements prominent in the 1960s. Interactive documentary developed especially through independent filmmaking from the 1970s onward. In contrast to detached observation, it promotes communicative exchanges between filmmaker and participants through, for instance, the inclusion of interview, testimony, direct witness and oral history. Finally, reflexive documentary is said to foreground the problem of representation, interrogating the ideological process in which documentaries may offer culturally bound mediations of reality while appearing to capture it objectively.

Nichols' account has been criticised and, in various ways, refined and extended by others and in his own subsequent work. Burton (1984) adds the "participatory" style in which the filmmaker appears on screen and becomes a visible player in, or mediator of, the situation represented (cf. Austin, 2006, pp. 831-835). Further, Bruzzi (2000) contends that documentary is "performative". This is so not only because it presents people, possibly including the filmmaker, as on-screen characters acting themselves. It is also because documentary filmmaking entails a performance of social relationships. In the continuing critical debate about modes, it is recognised that many documentaries now assume hybrid forms, using elements of different modes for new objectives. As Nichols (1991, p. 33) argues, documentary modes "remain part of a continuing exploration of form in relation to social purpose" (cf. Plantinga, 1997, pp. 191-222). Some genres, to take this closely related term, have been more or less identified with a particular historical mode. Thus, for example, *cinéma vérité* has often been referred to as a genre, typified by apparently detached observation without narration. However, work in other genres may combine techniques from several modes. The documentary essay, for instance, may combine observational material with narration, interview or moments of reflexivity (Leahy & Gibson, 2003; cf. Arthur, 2005).

This distinction between modes and genres provides an entry point into the recent American work on the relations of documentary and law. Several writers have explored these relations by developing the idea of a *law-genre documentary* (Austin, 2006 and 2007; Robertson & Camerini, 2006). Austin uses the term law-genre documentaries to refer to works for which:

> The law is the point of departure, a central organizing theme, or such an important consideration affecting the advancement of the chronicle or story being presented that the subject might reasonably be characterized as 'law as lived experience.' (Austin, 2006, p. 815)

On the face of it, this kind of thematic grouping may run the risk of lumping disparate kinds of work together into a single category. However, the *law-genre* motif is developed flexibly in these writings to investigate the techniques and strategies – often associated with different modes – by which documentaries treat issues encountered in, and about, the law. Thus, in defining law-genre films, Austin (2006, pp. 814-815) attends to their use of narrative and narration, exposition, observation, interview and other interaction with participants, and reflexive strategies. She considers also that the communicative functions of the works depend on their audiences' familiarity with, and response to, the use made of these representational means to uncover the complexities of a subject. By these means, law-genre films deal with a "gamut of legal categories or subjects, including civil rights, labor and employment law, family law, health law, social and economic inequality," among others (pp. 818-819).

Rather than a narrowly defined single genre, the law-genre designation thus refers to many paths by which law "finds its way" into documentary filmmaking, which has long been concerned with "social conditions and social justice" (Austin, 2006, p. 821). Reciprocally, one may add, documentary finds its way into law and, in doing so, intervenes in the "lived experience" of law and becomes part of it. A documentary project sets in train certain relations between filmmakers and participants, and results in particular ways of framing issues and inviting audiences to respond to the situations portrayed. These matters are considered in Austin's discussion of interrelated usages that can be made of the term "reflexivity", referring to the filmmaker, participants and audience and their multiple kinds of agency. To appreciate and evaluate a

documentary, Austin (pp. 812-813) contends, "a viewer needs to know something about the circumstances surrounding the making of the film, including the historical setting in which it was made." Of the finished work, one can ask: "What was the nature of the filmmaker's relationship with the subject before the filming began, while the filming was occurring, and during post-production?" (p. 840). In turn, the "working relationship between the filmmaker and her or his subjects is crucial to interpreting the subject's 'performance' on screen" (p. 843). Further, in places of reception, does the film's exploration of an issue assist spectators "to take responsibility for their own involvement in the situation addressed by the film and impacting the lives of the film's subjects?" (p. 841). Through the stages of developing ideas to production and postproduction, consideration of social relations and film ethics is thus a necessary partner for documentary representations of law.

Documentary law stories

In contrast to the often formulaic use of narrative conventions in fictional dramas about "lawyers, trials, and related adversarial proceedings" (Austin, 2006, p. 821; cf Mezey & Niles, 2004-2005), a key feature of documentary is the constant invention needed to adapt the means of representation to deal with diverse historical situations and relationships. As Austin (p. 821) writes:

> Documentary films are powerful tools for putting legal disputes into context …. [They] are ideal means of bringing to life and making palpable the backdrop of contested and competing material, social, and political "realities" that underlie legal disputes in whatever fora they are waged.

For documentary, where there is no necessary premium on developing an entertainment-driven narrative of conflict, crisis and resolution, I would suggest that a form of "double vision" helps to create stories that deal with legal disputes or settlements and their underlying realities.

First, making law stories requires an attempt, and generates opportunities, to understand the institutional and processual nature of law. Documentary makers (like journalists) need not have a professional knowledge of law to practice their craft. But a realistic treatment of socio-legal topics needs to give due weight to the specialised

and technical nature of legal categories and reasoning, without rushing to judgment over their outcomes. The second consideration, superimposing itself on the first, is the relations of law with other kinds of authority and social norms that intersect with it in particular historical circumstances. The point may be made in part by recalling Foucault's conception of the "infra-legal." This term applies to a miscellany of institutions and disciplinary or expert organisations of knowledge (eg. criminological, medical and psychological) that overlap with the law and can inform legal codifications and judgments (Foucault, 1977, pp. 251-308 and 1980, pp. 42-48). But the infra-legal, with its suggestion of that which is "further on" to the law, can be extended to include the relations of law to diverse forms of cultural and ethical regulation, and sources of social order, that are subtended by definite practices, roles, role-modeling, formations of identity and conditions of moral authority.

The workings of law, perceived in relation to issues and interests arising from surrounding forms of regulation and competing social realities, provide many directions for documentary projects: historical inquiry, contemporary analysis, concerns with justice and fairness, advocacy and so on. The various means of documentary story-telling – exposition, commentary, compilation, narration, observation, re-enactment, dramatisation, interview, or filmmaker participation and reflection – can then be used in more or less innovative ways to treat the issues. In film theory, particular documentary modes and techniques are sometimes seen to have a specific function and power, such as the imposition of ideological meaning by authoritative exposition and narration, under the guise of representing reality as it is (a theoretical approach challenged, for instance, in Plantinga, 1997). In turning to examples of law stories, I suggest that the meaning such techniques may have is not pre-determined in this way but depends, rather, on how they are used to work within and explore the contexts and relationships encountered.

Some documentary stories of common law and Indigenous law

To illustrate these ideas about law stories, I shall discuss some Australian documentaries that deal with the common law system in relation to Indigenous culture and law. Many documentaries have been made about, with and by Indigenous people

that relate directly or indirectly to the role of law.[3] For present purposes, I look at works that reflect concerns with the relations between what have been called "two laws", and issues in the legal and broader cultural construction of rights and responsibilities. The works are *Two Laws* (dir. Carolyn Strachan and Alessandro Cavadini, 1981), *The Fair Go: Winning the 1967 Referendum* (dir. Pat Laughren, 1999), and *Lonely Boy Richard* (dir. Trevor Graham, 2003).

At this point, the convention in academic papers of citing films, like those just mentioned, with first reference to the name of the director, or directors, calls for a comment on authorship. These works have been made through various forms of collaboration and liaison between Indigenous and non-Indigenous people, in creative and participatory roles and/or in production and distribution organisations. Direction is crucial, of course, and it may be combined with research, writing and producing. In the examples, we find that the film projects entail collaboration between filmmakers and participants and negotiations over forms of representation and self-representation.

There is continuity here with longer-term considerations of the politics of representation in policy and practice (Australian Film Commission, 2008; Ginsburg, 1995; Langton, 1993; Meadows, 1996). With reference to institutional policy, in her influential paper for the Australian Film Commission, Langton (1993, p. 84) writes that criteria for assessing individual and community scripts and proposals for support should include "a knowledge of and sensibility towards Aboriginal cultural values and the impact of history." At the level of everyday media practice, self-representation and collaborative work with non-Indigenous people can make "intellectual and aesthetic interventions which change the way Aboriginal people are perceived" (p. 10).

Two Laws is recognised as significant in this regard. It was made by the Borroloola Indigenous community in the gulf region of the Northern Territory, in collaboration

[3] Among the sources that help to provide an overview is the Australian Screen web site listed in the references under this name. It lists 52 works under "Indigenous documentary", for instance, and provides information, clips and resources for a wide range of works with Indigenous content.

with Carolyn Strachan and Alessandro Cavadini. On the web site for this documentary, a description of the project is reproduced:

> The Aboriginal people of Borroloola have a traumatic history of massacres, institutionalisation and dispossession of their lands. Reflection upon this history is increasingly part of the Borroloola people's basis for action and the consolidation and definition of aims. The request for this film to be made is part of this process. (Red Dirt Films, n.d., para. 12)

The collaboration extended from pre-production into technical negotiations on how scenes were to be filmed and edited (Eaton, 1983). These negotiations permitted forms of story-telling to be captured in ways that communicate a historical understanding of living under two laws. The collaborative impulse – essential to communicating an understanding of both *culture* and *history* (to cite Langton's terms of reference again) – continues in the later documentaries to be discussed. But there is also a contrast to note before looking at these more recent works in detail.

Two Laws belongs to a period of independent documentary that was generally made and distributed outside mainstream cinema and television with their standard constraints on form, style, program length and even subject matter. However, since the late 1980s in particular, independent documentary has become increasingly oriented towards television, particularly because broadcast sales have become a pre-condition for much Commonwealth screen production support. Over recent years, independent documentaries have accounted for the majority of Australian documentaries screened on Australian television (Australian Film Commission, 2007, p. 4).[4] These assistance arrangements have provided independent filmmakers with access to increased financing, in-kind support from broadcasting institutions, and wider audiences than they could previously have reached. But they have also raised the problem of whether documentary can continue to explore social issues in meaningful ways, given the constraints on time and funding for research and

[4] The Australian situation is thus the reverse of that in the USA. Mezey and Niles (2004-2005, p.170) explain that there are more "distribution options" (and production and financing options) for independent work – and this would include the kinds of law-genre documentaries discussed in the current literature – in the film medium through theatrical release than there are in network television.

development, and demands to maximise audience appeal (Porter, 1998; Thomas, 2002). With that question in mind, I turn to the recent documentary law stories.

The Fair Go developed out of support from, and negotiations between, the Department of Education, Training and Youth Affairs under the Discovering Democracy program, Open Learning Australia and the ABC. It deals with the 1967 referendum, in which there was a 90.2% "Yes" vote to amend the Constitution to count Aboriginal people in the census, and give the Commonwealth Parliament the power to make laws relating to Aboriginal and Torres Strait Islander people. The documentary is thus about the constitutional framework in which law is made, from the perspective of Indigenous people's rights and statuses of citizenship.

The initial purpose of the project was to explore both the institutional processes and the grass-roots forms of participation that are important to building a civic culture, one in which it is possible to resolve conflicts peacefully through law and government yet enact reforms for inclusive citizenship. The program was to have an educational use but also screen on the ABC's prime-time *Inside Stories* series. Research enabled the use of exposition and compilation to trace the institutional processes of the democratic referendum. Liaison with a range of participants in the campaign for the "Yes" vote yielded new interviews. Elements of these were combined with footage of previous interviews, testimony, meetings with politicians and other events, to form an oral history of the campaign and record of the exclusions motivating it. The materials on the broader political processes and on the campaign were edited together to create a story with a positive outcome, giving coherence to the story as a television program. The story in which the referendum outcome is seen in terms of the campaign leading up to it also reaffirms what Pearson (2007, p. 272) refers to as "the symbolic significance of the event."

On this point, however, there is a tension in the film, when Charles Perkins, reflecting more than thirty years later on the events in which he played a leading part, says that the referendum was the only time "the fair go" meant something in Australia. This registers the distance between the hopes associated with, to cite Pearson (p. 272)

further, the marking of "a new era in Indigenous history and policy" and the continued "struggle for socio-economic advancement and equality." The documentary story establishes the referendum's success in the civil rights context as symbolically significant not merely in the sense that it legitimised constitutional change without immediate or necessary substantive changes in laws, policies and rights. The success story can be seen as an ethical appeal to maintain in the public domain what Pearson (p. 282) sees as necessary ideals capable of securing change "through close attention to reality."

The analysis offered by Pearson (2007) is useful in situating the next example, *Lonely Boy Richard*. After the recognition of civil rights, Pearson argues, "the politics of 'victimhood' came to dominate black advocacy and public policy thinking" (p. 272). "Black responsibility" was eroded and realisation of rights became a "white responsibility", based often on guilt and defensiveness (p. 275). The consequences, including alcohol abuse and violence, are critical in remote Indigenous communities where "the moral and cultural authority which had provided structure to life" have been undermined (p. 273). They are compounded by non-Indigenous responses based on "moral vanity" (p. 275). This is the predilection to treat the situation of those who experience racism as a pretext for asserting one's own "moral superiority" over political opponents (p. 276). Moral advantage (and impasse) is established by treating any suggestion about "the personal responsibility of Indigenous people" as blaming the victims (p. 276).

While Pearson's arguments have been presented in journalism and media commentary, as well as policy, I would argue that documentary practice is a connected site in which to engage with these issues. This can be indicated in the collaboration that allows *Lonely Boy Richard* to deal with the subject of alcohol abuse and violence in the Yirrkala community in northeast Arnhem Land. From the writer/co-producer's account (Hesp, n.d., para. 7), it appears that the filmmakers' interest shifted, through re-negotiation of a documentary proposal with Yirrkala leaders, from initial "outrage" over mandatory sentencing (and absence of social programs to address problems) in the Northern Territory to a focus on "the underlying

law and order problems besetting Indigenous communities." By spending a long time with the community, as invited, the filmmakers found the "personal focus" that they sought for an observational documentary in presenting the story of Richard Wanambi, who had "committed a terrible crime and was clearly addicted to alcohol" (p. 7).

However, the film does not perpetuate a belief in victimhood by invoking history in order to make violence "understandable" and hence tolerable, given past oppression (Pearson, 2007, p. 278). Rather, it allows history to be told from the perspective of the community, which reflects the ways in which members have taken responsibility, resisting the introduction of a pub in a nearby white mining township, and running a night patrol in an attempt to minimise the damage of alcohol. It gives voice to the attempts to sustain community and family care, particularly from Nami White, the woman known as Richard's mother. The film also follows the procedures by which such testimony and knowledge of culture and history are sought in Richard's trial. It shows that, ultimately, this is only for the purpose of mitigation. However, the implication that the legal and penal system only provide limited solutions does not turn into mere indignation at the law for (to adapt a phrase) its "relative failures" (Pearson, 2007, p. 276) to solve underlying problems. For the seriousness of the crime is recognised, and acted on, within the Yirrkala community. It is by representing – in a way made possible by the documentary collaboration – the moral authority of the participants taking responsibility themselves and seeking it of others, that the film makes an ethical appeal to viewers, in turn, "to take responsibility for their own involvement in the situation addressed by the film" (Austin, 2006, p. 841).

Conclusion

This paper has developed an approach for exploring the role of documentary law stories, based on considering four variable factors. These are the use of available techniques and technologies of representation, the social relations of film production and distribution, the understanding of legal processes, and the acknowledgement of law's interrelations with infra-legal and cultural practices. In documentary law stories, filmmakers can use diverse, and mixed, genres and modes to respond to the cultural, historical and political realities in which law plays a role. The documentaries selected

to illustrate the approach avoid formulaic patterns such as narrative crisis and dramatic resolution in dealing with the relations of common law and Indigenous people and culture in Australia. Their stories take shape in a more extemporised fashion through the interplay of knowledge, perspectives and voices. This form of storytelling invites viewers to consider the problems arising in, and about, the law in a context where they can witness not only the contending arguments and concerns, but also the historical and cultural grounds on which they are expressed. In this regard, the documentary law stories help to create the possibilities for civic conversations, based on analysis, listening, and examining one's own position in relation to the realities represented.

The examples show that documentaries have engaged with legal and cultural issues by invention and experimentation in the process of screen production. In the recent examples, the filmmakers have negotiated the demands of the popular medium of television – developing both a coherent narrative and an appeal to see issues as still needing attention – to reach new and wider audiences. At the same time, they have continued the project of collaborating in filmmaking, to seek authenticity of representation, such that the works have found wider distribution and culturally relevant use within, and beyond, the participating communities. Of course, there are features of documentary stories and undertakings that are specific to the area of common law and Indigenous law that furnishes the examples for this paper. I hope, however, that the illustrations – arguing the need for context-specific negotiations of film form and technique, social relations of production and distribution, knowledge of law, and infra-legal and cultural forces – suggest that the approach presented may also have the potential to apply to other documentary representations of law.

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