JUSTICE, INNOCENCE, AND GESTURES IN *PRESUNTO CULPABLE*

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**Introduction**

The main goal of this paper is to analyze *Presunto Culpable* (*Presumed Guilty*) in the light of three main aspects: the construction of its protagonist’s innocence, the representation of justice, and the political use of gestures. In order to highlight some of these aspects, I will occasionally resort to *The Thin Blue Line* to compare and visualize some important elements of analysis, such as the notions of evil versus justice. Although *Presunto Culpable* and *The Thin Blue Line* are very different films, they have something in common: at some point, both films became part of the story they were narrating by intervening in the justice process of their subjects, providing ‘elements of judgement’ that led to a favourable resolution of the cases for them. In her article Mirrors without Memories: Truth, History, and *The Thin Blue Line*, Linda Williams (1998) writes, “Randall Adams is now free at least partly because of the evidence of Morris’s film” (p. 387), and “Morris’s film was instrumental in exonerating a man wrongfully accused of murder” (p. 383). She also talks about the film’s “spectacular success in intervening in the truths known about this [event’s] past”. On the other hand, in *Presunto Culpable* the intervention of the film in Toño Zúñiga’s legal case is mentioned by judge (magistrado) Salvador Ávalos Sandoval, the sole of the three judges of the Court of Appeal that agreed to talk to the camera once the decision of releasing Toño was made. After explaining that the tough discussions with his two other colleagues about Toño’s appeal took about eight hours, Ávalos Sandoval says, “I saw the witness’ depositions on video". I watched them carefully because, in the end, gestures can reveal many things. I insisted

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1 This video was edited by director Roberto Hernández and his wife and co-producer Layda Negrete.
and finally managed to convince them of—and to me it was clearly proven—the existence of a reasonable doubt.” But the main common and obvious element between *Presunto Culpable* and *The Thin Blue Line* is that both were made to defend and save the life of two innocent men who were wrongly accused, one in Mexico and the other one in the United States, and by doing so they portray not only their own justice systems, but also their national and institutional system of values (right and wrong, good and evil, innocence and guilt). In this paper, I compare these two films based on this common denominator.

Additionally, I will analyze the construction of innocence of José Antonio Zúñiga, or Toño—*Presunto Culpable*’s protagonist. I will argue that in the latter the filmmakers used *performance* strategically in order to communicate Toño Zúñiga’s innocence to the audience, and I will try to explain this by exploring what can be called *performative truth*. Finally, in the last section of this paper I will show the role of gestures—a physical movement that punctuates speech and constitutes ‘action as utterance’, in Michael Braddick’s (2009) terms—played during Toño Zúñiga’s retrial and before the viewer of the film.

*Presunto Culpable*

No public authority believed the terrifying statistics of the unbalances of the Mexican justice system towards the poorer people and inmates Roberto Hernández and his wife Layda Negrete—two socially committed lawyers—presented every time they
could. For example, more than 85% of those charged with a crime are sentenced (Luhnow, 2009) and 93% of the latter never see, or is heard by, a judge during the trial.

It was at that moment when Hernández understood that he would need more than statistics and facts to change the system of justice in México. So he sold his car, bought a video camera, and in 2005 filmed a 14-minute video about a young man wrongly accused of stealing a car, who thanks in part to this video was released soon after. This was Hernández’s first successful use of the camera ‘to do justice’ and release an innocent person from prison (Luhnow, 2009). Subsequently, Hernández and Negrete got permission to film inside four Mexican prisons, wherein they videotaped testimonies of twenty men and twenty women who claimed to have been unjustly imprisoned. The final result was *El Túnel* (The Tunnel), a 19-minute documentary video that was well received by the media (it was broadcasted by CNN) and raised public awareness about the situation of the penitentiary system in Mexico. The visibility gained by this film made also possible that Eva Gutiérrez contacted Hernández and Negrete in seek of any help they could provide to her boyfriend José Antonio Zúñiga Rodríguez.

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2 In his long article, David Luhnow (2009) also reports for *The Wall Street Journal* that according to a survey of 400 criminal cases in Mexico City carried out by National Center for State Courts, a U.S. non-profit, in nine of 10 cases, suspects were found guilty without any scientific evidence like fingerprints or DNA. “In more than six of every 10 cases, suspects were arrested within three hours of the crime, leaving little time for serious detective work, according to a study from CIDE, a top Mexican graduate school. Almost none were shown an arrest warrant, the study said. Mexican cops also lack access to basic forensic equipment, and Mexico lacks a comprehensive national fingerprint database. Most police officers are judged on the number of arrests they make, not whether they arrest the right person. The same goes for prosecutors. "You want a good career? Accuse, Accuse, Accuse," one Mexico City prosecutor said.”

3 In his 19-minute documentary *El Túnel*, the percentage of sentenced people that never see a judge is 80% (according to the Center for Investigation and Development, Mexico's top think tank). However, *Presunto Culpable* claims that 93% (instead of 80%) of defendants never see a judge. In this case, no source is cited.
In 2005, José Antonio Zúñiga, or ‘Toño’, was convicted to twenty years of prison accused of shooting and killing Juan Carlos Reyes Pacheco, a member of a Mexico City gang. The whole case was based on the testimony of the victim’s cousin, Víctor Daniel Reyes, who escaped the shooting (because of this, as he would confess later on, he never saw who actually fired the gun) and who is the sole witness of the case. But not only had Toño Zúñiga been convicted; his sentence had also been confirmed and almost all legal resources had been exhausted in his case. When Negrete and Hernández started studying Toño’s case, they discovered that he had been represented by a person who had forged a license to practice law, and this opened up the possibility of a retrial (the documentary takes off from here). Nevertheless, Toño is warned that he will be judged anew by Héctor Palomares, the judge who already convicted him and who might confirm the verdict and sentence him to twenty to fifty years in prison. Notwithstanding the risk, José Antonio decides to continue with the trial. Criminal lawyer Rafael Heredia, a top attorney who led the criminal chapter of the Mexican Bar Association, offers to litigate the retrial pro bono, and Hernández and Negrete gets permission to filming—for the first time in Mexico—the retrial. But in the retrial, Judge Palomares does not change his mind and confirms his previous verdict, yet again sentencing Toño to twenty years in prison. Hernández and Negrete take the case to the Court of Appeal and present to the judges a video with edited images of Toño’s retrial. With two votes in favour and one against, Toño is finally absolved of the charges of murder on the grounds of a ‘reasonable doubt’. This sums up the plot of Presunto Culpable.
Negrete and Hernández started filming Antonio’s case on the spring of 2006. Toño’s retrial took place between October 2007 and February 2008. Judge Héctor Palomares agreed to film the hearings. According to Hernández and Negrete (2008), five cameras were put into courtroom 26 in Mexico City; filming the retrial cost over 60,000 dollars; 20 hours of footage were collected during the case hearings and around 350 hours between 2006 and 2008 (Caballero and Cruz, 2011). Presunto Culpable was co-directed by Roberto Hernández and Australian filmmaker Geoffry Smith (the particularities of this co-direction will be analyzed later on in this article).

Toño’s case was just a routine homicide investigation for the Mexican police. This is one of the reasons that Negrete and Hernández decided to take his case. At that moment, they were not really thinking about telling a story. However, Hernández explains that they started filming Toño because “although the court records and police records are lies, if you’re not able to generate an alternative to the official record, then you can’t prove that someone is innocent…. at some point, Toño stopped being just a victim of an injustice and became a human being on camera… We found out that he liked to break-dance! So that personal story took over…” (POV, n.d.). In a nutshell, Toño’s personal and performative qualities—aside from Hernández and Negrete’s belief in his innocence—transformed him from a victim into a “human being on camera”. In other words, he turned out to be a perfect candidate to starring a documentary film.
Layers of Innocence

Renée Curry (1995) argues that *The Thin Blue Line* reopens consideration of the facts of the case regarding the murder of Dallas policeman Robert Wood by aurally and visually constructing Randall Adams’ innocence on the screen. To construct this innocence, Curry posits, Morris relies on cinematic and ordinary “telling” techniques (such as verbal monologues and newspaper graphics), replaying key re-enactment scenes, privileging the fantastical elements of cinema to make its case and dragging elements of the feature film into the domain of art as political praxis. But according to Curry, Errol Morris does not stop at personal language as telling perspective; on the contrary, he demonstrates an interplay of perspectives, both oral and visual, in order to design an overall view of the situation. “Morris documents the situation through a reflexive mode of telling that focuses on the individual plight of Randall Adams while it causes the viewer to reflect upon the machinery of the social justice system operating outside the frame of the film… Randall Adams’ ‘word’ alone never proves powerful enough to construct his own innocence… Morris clearly makes the point that personal language cannot save Randall Adams, and so the director turns to perspectives other than personal dialogue to chisel away toward a truth”. Curry remarks that Morris implicates the wider institution of social justice as having been tainted by rhetorical clichés, such as ‘children don’t kill cops’, which only served to impede thorough and ‘objective’ investigations into innocence. Linda Williams (1998) would add that Errol Morris turns his film into “a temporally elaborated palimpsest, discrediting some versions more than others but refusing to ever fix one as the truth. It is precisely Morris’ refusal to fix the final truth, to
go on seeking reverberations and repetitions that… gives this film its exceptional power of truth” (p. 388).

In contradistinction to *The Thin Blue Line*, *Presunto Culpable* does fix a final truth: the Mexican justice system is dysfunctional and corrupted, prisons are stuffed with innocent people, and José Antonio Zúñiga is just one example of that situation. I want to suggest that in *Presunto Culpable*—and not only in this film—innocence, as a category, can be analyzed by separating it in three ‘layers’: the legal layer (what the administrative apparatuses of justice decide innocence is), the symbolic layer (the way innocence is constructed and represented through a medium), and the subjective layer (the way the subject understands his or her own innocence and deals with the cultural, ethical, and moral negotiations it involves). What I call here the subjective layer of innocence is a deeply personal state of truth, and it is therefore very difficult (sometimes impossible) to communicate. Because of this, out of this subjective sphere (that is, for people other than the subject) there are only two ways to connect with someone who is accused of, let’s say, a crime and tries to communicate his innocence: to believe or not to believe him/her. So our initial engagement to somebody’s subjective layer of innocence is usually an act of faith. Ideally, the justice system exists precisely to reduce subjectivity to the minimum possible, thus privileging facts, arguments, and evidence. Consequently, the legal layer of innocence is, or is supposed to be governed by logic and rationality, and because of this it imposes its institutional truth. In *Presunto Culpable*, the legal layer of innocence (the trial) is both an indexical attachment to the facts represented in the film,
and I contend that the latter is just one of several elements used in the construction of Toño’s innocence. It seems to me that the representation of Toño’s retrial is halfway between parody and hyperrealism. Symbolically, Toño’s innocence is shown as in direct opposition to some absurdly typical characteristics of the Mexican justice system: Judge Palomares acting both as judge and as prosecutor, selectively repeating what lawyer Rafael Heredia or the witnesses say, thus turning his voice into the only thing that legally and symbolically matters; police detectives answering almost all questions with a cynical ‘I don’t remember’, which is readily accepted by the Judge, and so on. In this sense, the construction of Toño’s innocence in the film (that is, the symbolic layer of innocence) stands in direct opposition to the stink of arbitrary, injustice, and corruption deriving from the images of his retrial. However, the fact that he is still engaged in a legal process and that at a certain moment he is once again sentenced to prison by Judge Palomares, stubbornly brings us back to the ‘instrumental rationality’ of the justice system, which yet again imposes its institutional truth: “José Antonio Zúñiga is guilty. There is no doubt about that”. For this reason, I believe, directors Roberto Hernández and Geoffrey Smith create a sort of imaginary bridge between the subjective and the symbolic layers of Toño’s innocence in order to present an ‘alternative truth’ that can be strong enough to challenge the institutional truth. My argument here is that in Presunto Culpable this imaginary bridge—intended to fill the communicative gap between the subjective layer and the symbolic layer of innocence and the viewer’s unfamiliarity with Toño’s personal and legal situation—is created by incorporating performance in the film’s narrative. This use of performance as a means to turning somebody’s innocence
into an alternative truth that challenges the imposition of an institutional truth is what I understand here as *performative truth*.

**Performative Truth**

The presence of the camera is an intrusive element that inevitably puts on the table the issue of actuality versus performance, in the sense that documentaries “perform the actions they name”, as Stella Bruzzi (2000) says. In her opinion, there are two broad categories of documentary that could be termed performative: films that feature performative subjects and films that are inherently performative and feature the intrusive presence of the filmmaker. Although *Presunto Culpable* probably would not fit exactly in any of these two categories, it does contain highly important performative elements that it is worth analyzing more closely.

The first type of performance we find in *Presunto Culpable* is the one that is provoked by the sole presence of the camera. Garza Lau (2011) asserts that when judge Héctor Palomares knew the new trial would be videotaped he visited Toño at his cell and told him, “Don’t think the cameras are going to intimidate me, they will not make me change my decision.” Similarly, Negrete recognizes that nobody was pleased to have the cameras in the room: “The first time we entered the courtroom with our cameras, everyone started yelling in panic” (POV, n. d.). This awareness of the camera is also what motivated judge Palomares to dress in a black gown (normally not worn by judges in Mexico City, according to Hernández) and to preside nearly every minute of the twenty hours of hearings, an uncommon practice in Mexico City’s courts. It made also
court staff wore suits and ties as opposed to jeans and sweatshirts as they normally do and led court employees to treat Toño in a kinder way, ensuring that he felt more comfortable during the proceedings. Finally, although on the first hearing police detectives strongly opposed the recording their objections were dismissed by the judge (Hernández and Negrete, 2008). This first type of performance generated by the presence of the camera is an important part of the film, in spite of the fact that its ‘manifestation’ was out of the filmmakers’ control.

The second type of performance clearly present in Presunto Culpable is closer to Bruzzi’s notion of the term. She posits that for a performance to be real it has “to pass for straight and not to be open to ‘reading’ or ‘shade’ which are differing levels of critical repartee engaged in after having detected and found fault in the ‘realness’ of someone’s performance. The successful performance is that which cannot be read” (p. 156). The first sequence of Presunto Culpable shows Toño doing a backflip and talking about breakdancing: “I left breakdancing because I felt kind of old. But in prison, it makes me feel free”. At different moments of the film, Toño appears dancing or doing acrobatics along with other inmates, some of them even more skilled than him. Paradoxically, the ‘imperfection’ of Toño’s movements in comparison with the other inmate-dancers, as well as having the prison as background, contributes to make his performance ‘successful’ and ‘unreadable’, that is, trustful. In Presunto Culpable, I would posit, breakdancing is both a linguistic and a visual metaphor used to translate the complexity of the legal process into simple words, images, and sounds, thus making it
understandable for the general audience (nationally and internationally). Four sequences help illustrate this point: the initial image of Toño Zúñiga doing acrobatics and talking about breakdancing; the moment when he is being prepared to interrogate the prosecutor’s witnesses and he is afraid of not being able to remember all the questions he must ask (“When dancing we have a rule: if you screw up, dance over it”); when being asked whether he believes or not that judge Palomares will release him (in break dancing “there is only one way to do a backflip: I run, kick, and land; but you can’t be sure that you’ll land on your feet”), and when narrating the moment in which he is informed of the verdict releasing him (the narration is juxtaposed with images of Toño doing backflips with a blue sky as background). Emphasizing ‘Toño’s artistic qualities and opening spaces for him to perform throughout the film not only makes the narration more dynamic, but it also places him closer to the viewer and, perhaps more important, turns performance into a key, easy-to-grasp signifier in the construction of his innocence.

Music is another important performative element used to reinforce the construction of innocence in Presunto Culpable. In documentary films, as John Corner (2002) posits, “musical relations are likely to become more self-conscious, and less intimate, than when watching fiction” (p. 358). Toño composed and sang all the hip-hop songs of the film’s soundtrack, something of which the viewer becomes aware soon during the film. In minute 24, after watching Toño practicing breakdancing over a hip-hop music, his lawyer Rafael Heredia appears on camera wearing big headphones and asking rhetorically, “Toño wrote this song?” Director Roberto Hernández says that Toy
Hernández, a rap artist, made Toño Zúñiga’s original rap songs “sound louder”. I would contend that Toño’s songs were rearranged and produced professionally\(^4\) with three specific purposes: firstly, to adjust it to the quality standards of the film; secondly, to polish and enhance Toño’s image as a talented artist; and thirdly, to create an emotional connection between his subjectivity and the viewer’s sensibility. The effective use of these ‘techniques’, in combination with Toño’s courage, maturity, and lack of resentment against his ‘adversaries’ is what one imagines made Gruzenberg (2011) describe him as “charming, charismatic, intelligent, articulate and, most importantly, dedicated to the cause”.

As regards its mode of address, *Presunto Culpable* includes elements of what Bill Nichols (cited in Kilborn and Izod, 1997) calls ‘reflexive documentary’, such as the encounter between viewer and filmmaker. Throughout the film, we see and/or hear co-director Roberto Hernández meeting Toño’s girlfriend, friends, and family; we see him studying the case with criminal lawyer Rafael Heredia, reading Toño’s *expediente* in a library, or installing a microphone around the bars of a cell in the prison where Toño is incarcerated. Also, police detectives José Manuel Ortega and Mario Arrona Salmerón approach Judge Palomares to complain about being filmed without their consent and accusing Layda Negrete of “threatening” them with the camera. We never see co-

\(^4\) Marta Sosa and Yissel Ibarra, co-producers of *Presunto Culpable*, brought Lynn Fainchtein—from the film ‘Precious’—as music supervisor. She in turn invited Milo Froideval and Raúl Vizzi, the top musicians from *Capadocia* and other Mexican TV dramas. Martín Hernández edited the sound (Hernández, 2011).
director Geoffrey Smith, though. But the reflexive elements mentioned so far clearly suggest to the viewer that *Presunto Culpable* is an interpretation of the facts, and not the facts per se.

‘Lawyers with Camera’ is therefore more than a catchy name. The detectives’ complaint about the presence of the camera in the courtroom is brought about by the tacit acknowledgement that the camera bestows Hernández and Negrete a power they would not have otherwise: the institutional, political power of media. This is why Negrete explicitly said in an interview that her favourite character in the film was precisely the camera: “… its presence has incredible importance in a system that is corrupt and that is used to operating in the shadows. The camera illuminates so many things, and there’s a hope that the illumination it brings will also bring change… the camera is a weapon in the courtroom… we’re not filmmakers; we’re just lawyers with cameras” (POV, n. d.). But let’s see where the camera led these two lawyers (also director and co-producers). They convinced Cinépolis (the biggest movie theater chain in Mexico) to distribute pro bono *Presunto Culpable* throughout the country. The opening gala drew 900 celebrities, with Mexico’s First Lady among the crowd. The film launched on February 18, 2011, with 130 prints; by early March it “had exceeded everyone’s expectations, and Cinépolis decided to add copies, bringing the total to 200 prints in circulation. When Toño Zúñiga and his family showed up to see the film one Saturday afternoon, they couldn’t get tickets!” (Hernández, 2011). Soon after its launching, judge Blanca Lobo banned the projection of the film in movie theaters...
alleging that the witness Víctor Daniel Reyes had been filmed without his consent and that the film was generating a negative impact on his personal image and integrity. A couple of days later a superior court reversed Judge Lobo’s injunction, and the film returned to theaters. Hernández says that the judicial ban was a “blessing in disguise” because it was perceived as an attempt of censorship, and this made people run off to watch it. As a result of this successful call, Cinépolis decided to go up to 300 prints. And all this started with a couple of lawyers entering a camera into a courtroom during the trial of an everyday case in the Mexican justice system… So Negrete is right: the camera is definitively one of the main characters of *Presunto Culpable*.

**Too Local to Be Good**

As it happens to Randall Adams in *The Thin Blue Line*, not only is Toño Zúñiga’s word insufficient to prove his innocence, but it is in fact ignored or even used against him by the Mexican justice system. As Hernández and Negrete (2010) observes, what is on record in the trial is only what the judge says. “The expediente [the legal file or dossier of the trial], symbolically and literally is the judge’s voice… With the dictation and repetitions [of questions by the judge] involved… the trial is lasting at least 6 times longer than it should, full of unnecessary bureaucratic routines that not only slow the unveiling of information but distort it”. This is the reason that makes Hernández refer to *Presunto Culpable* as “an alternative to the official record”, that is, a strategy that from the beginning was thought to be both legal and communicational and which
benefited Toño by impacting on the final decision of the Court of Appeal. It is important to differentiate this initial moment, when the film had not been edited yet, from the time when co-director Geoffrey Smith got involved to produce the final version of Presunto Culpable.

In 2008, with Toño out of prison, Hernández worked on a rough cut of the film. “I knew we had a powerful story,” Hernández says, “but I also knew it was somewhat lacking in structure and fluency… We showed the rough cut film as part of the sidebar of an international film festival that had given us money, and the film received sixth place for the audience award… then Martha Sosa found Geoffrey [Smith] when he was visiting Mexico City, and she showed him our rough cut. Geoffrey was confident that we could tell the story in a better way…” Smith did not participate in the shooting of the film, nor was he emotionally involved with the story or its characters—at least not the way Hernández was. Smith joined Roberto Hernández in the cutting room for two months in Valle de Bravo, Mexico, and his approach was “to keep the storyline as simple as possible, eliminating subplots and secondary characters” (Hernández, 2011).

5 In April 2011, the Supreme Court of Mexico City announced that it would request Hernández and Negrete the more than 300 hours of footage that were used to produce Presunto Culpable so that an Ethics Committee review all the material in detail. The Supreme Court argued that the aim was to analyze in a “more objective way” judge Héctor Palomares’ performance during Toño’s retrial. As Hernández puts it, the Court wanted to check “whether the editing was tricky, whether we chose the judge’s and the authorities’ worst moments” for the film (Caballero and Cruz, 2011). The case is still in court. On December 1st, a judge ordered Distrimax to stop the commercial distribution of Presunto Culpable in DVD format, this way favouring Víctor Daniel Reyes’ plaint against the film. Reyes argues that he was filmed without his consent and that the way the film portrays him undermines his personal integrity.

6 The Jan Vrijman Fund (a Dutch Fund) gave financial support to filming Toño’s case. In exchange, Hernández had to prepare a long version of the film to be presented at the Amsterdam International Documentary Film Festival, which they did with the first, rough-cut version of the film edited by Hernández.
His main goal was to make the film more accessible and popular, instead of delivering “a really dry and boring human rights story that doesn’t get an audience and, in the end, doesn’t change anything” (Gruzenberg, 2011). In *Presunto Culpable*, I suggest, Simth’s co-direction is in direct opposition to Kim Longinotto’s idea of collaborative direction. In a broad sense, Longinotto’s collaborative practice is aimed to offset her European point of view and provide to her first-world audience a ‘true’ dimension of the ‘local’ shown in her films. “Longinotto’s collaborative practice is a particular kind of citation or series of statements that positions her auteur status in the field of documentary as non-normative…. This expression of collaboration and its attendant reciprocity entails a translation of meaning between authoring subjects, frequently in the interests of a mutual social agenda” (Smaill, 2009). In the case of *Presunto Culpable* this mutual social agenda is also present, but Australian director Smith is brought aboard to build a narrative that can be easily understood by Mexican and international audiences alike. In other words, the “translation of meanings” undertaken by Hernández-Smith is aimed to make *Presunto Culpable*’s local story ‘universal’, and not—as I think is the case of Longinotto’s films—to emphasize the local dimension of the story per se (without compromising, of course, the universal comprehensibility of a story). This becomes somehow explicit in the way Roberto Hernández refers to Smith’s participation in *Presunto Culpable*: “… it was just so generous of him to put his name behind the film, elevate it and help it get seen” (POV, n. d.).
Smith manages to ‘universalize’ Toño’s story by building a narrative based on binary, dychotomous ideas, a technique borrowed from fiction films: good versus evil, innocence versus guilt, transparency versus corruption, individual dignity versus institutional truth, David versus Goliath. Smith himself says that when documentaries have “the right level of trust” they are better than drama and that he tries to bring as many dramatic and cinematic devices as he can to telling each story. “My works are conceived, shot, structured, edited and scored like a drama - that’s why they feel different to most documentaries” (Moon, 2010). It is worth noticing that Smith manages to do this in a non-intrusive way, that is, using the characters and stories already filmed by Hernández to create a new narrative. So even if he was brought aboard to universalize the story, the local aspects of the story he included in the final version work well for the communicative purpose of the film.

**Systematic Injustice and Banal Evil**

The construction of innocence implies stating who and what a victim is. In *Presunto Culpable*, the film’s victim (Toño Zúñiga, who is unjustly convicted to prison) is not the same victim of the legal case (Juan Carlos Reyes Pacheco, who was actually murdered). Geoffrey Smith has said, “Toño doesn’t sink into bitterness and recrimination and revenge. He’s able to stand above it because he sees all the other people in the system as victims of the same thing, really. He doesn’t take it personally, and he brings a certain nobility to the screen.” (Gruzenberg, 2011) In this sense, one of the main criticisms that have been made about *Presunto Culpable* is that it does not pay
any attention to the fact that someone was actually murdered. The film, critics argue, does not tell us anything about Juan Carlos Reyes Pacheco, nor does it show what his family thinks about Toño, about the case, or about what could have happened. Director Roberto Hernández’s rebuttal is that Presunto Culpable was never meant to be objective: “Through the magic of cinema, viewers gradually acquire Toño’s point of view. They share his dread as he chooses to risk his life in order to make the documentary. They are there as he fights his unequal courtroom battle. They experience his doom and his hope, just as we did” (Hernández, 2011).

The process of turning Toño Zúñiga into the main victim of the film requires, at the same time, defining who is his main adversary or opposed character. As it was somehow outlined before, I would contend that in Presunto Culpable the main adversary are neither the judge, nor the policemen, nor the witness, nor the prosecutor. They all are just different faces of the ‘Medusa’ Toño is truly fighting against: the banal evil embedded in the Mexican justice system and embodied by its bureaucratic authorities and functionaries. This is why Toño (and the filmmakers too) “sees all the other people in the system as victims of the same thing”.

In their Dictionary of Genocide, Samuel Totten and Paul Bartrop (2008) explain that “Banality of Evil” is a term introduced by Hannah Arendt in her 1963 book Eichmann in Jerusalem: A Report on the Banality of Evil, about the trial in Israel of Nazi bureaucrat Adolf Eichmann, one of the major architects of the “Final Solution of the
Jewish Question”. Arendt’s major conclusions were that Eichmann was simply a career bureaucrat working within a totalitarian system that condoned mass murderer and that his own “evil” was neither outside the human experience nor anything other than normal within its time-and-place setting. She argues that he was, in fact, a petty civil servant who did not question his orders because it was not within his professional competence to do so. In that regard, Arendt asserts, Eichmann was the epitome of how the phenomenon of evil can be quite banal and ordinary. Davin Pendas (2007) adds that banal evil describes the ethical failure of perpetrators to think, to grasp the meaning of their actions and that it can result from thoughtlessness—the inability to think—of ordinary, normal people. And thoughtlessness, he asserts, “is the psychological prerequisite for the social enactment of superfluousness” (p. 81). The banality of evil in Presunto Culpable is portrayed as a bureaucracy that has come to a point where it exist only to justify its own existence (that is, the existence of those working to perpetuate and impose the logic of that system), with disregard of the damage it does to people. This is the same logic that rules a system where everybody is considered guilty until, and only if, proven otherwise. 

Presunto Culpable clearly shows how this perverse logic operates in Mexico without raising the question of “whose fault is it?” because in the end, as Hernández has said, it is everybody’s fault and everybody’s responsibility to act in order to change that system. “We must nurture a culture of systematic distrust of everything that is shown to us as the official truth of a case”, Roberto Hernández said in an interview (Garza Lau, 2011). Banal evil is policeman and prosecutors being rewarded for sending people (guilty or not) to jail, as the film argues. But the most striking evidence of the banality of evil in
the Mexican justice system appears almost at the end of Toño’s retrial, when he asks the prosecutor to explain in simple words the grounds of her accusation against him, to which she responds giggling: “Because it’s my job.” This scene, I believe, makes stridently visible and audible the logic ruling the administration of (in)justice in Mexico and helps illustrate one of the main arguments of the film: that Mexican prisons are stuffed with innocent people because the justice system is inefficient and corrupt.

It is interesting to compare the depiction of evil in Presunto Culpable with that of The Thin Blue Line to see how differently this aspect was treated in these two films. When asked whether he thought Randall Adams’ case was emblematic of the American justice system, Morris asserted Adams’ exceptionality: “Most of the people in jail are guilty. I interviewed thirty-five inmates who had been sentenced to death and I believe they were all guilty—with the exception of Randall Adams. My film is not an argument for the innocence of people in jail, nor a story about how the American justice system produces unfair convictions and puts the wrong people in jail” (Curry, 1995). One of the main questions Morris poses to himself in The Thin Blue Line is the following: “… given that Randall Adams didn’t do it… how could such a thing happen? How did this miscarriage of justice come to pass? … Put very simply and crudely, do people commit evil acts knowingly, or do they do it thinking that they’re doing good?” (Grundman, 2000). Morris’ premise seems to reaffirm the ‘efficacy’ of the American justice system, but at the same time he undertakes an in-depth exploration of the irrational mechanisms (i.e., rhetorical clichés of the kind ‘children don’t kill cops’) that coexist and in
occasions ‘miscarriage’ the administration of justice. In *The Thin Blue Line*, the root of all evil is not institutional or systemic but individual, and it is represented by David Harris (we remain unaware of it until his last interview with Morris). But Harris, I argue, is just the tip of the iceberg of a more complex and disconcerting matter for which there is not clear answer. He makes us ask ourselves about the very essence of humanity, about good and evil, about that dark area in human nature that has made necessary to invent moral and ethics. The representation of evil in *The Thin Blue Line* appears almost at the end of the film when Errol Morris interrogates David Harris, who at that moment is on Death Row for murdering Mark Walter Mays. Harris responds impassibly, as if reciting a boring litany; his voice shows no emotion.

**Morris:** What do you think about whether or not he [Randall Adams] is innocent?

**Harris:** I am sure he is.

**Morris:** How can you be sure?

**Harris:** ‘Cause I’m the one that knows.

**Morris:** Were you surprised that the police blamed him?

**Harris:** They didn’t blame him. I did.

**The Power of Gestures**

In *Camera Lucida*, Barthes says that when glancing through an illustrated magazine a photograph drew his attention: “Nothing very extraordinary: the (photographic) banality of a rebellion in Nicaragua”. Subsequently, he comments that in inspecting other photos of the same reporter he found an image of a mother and daughter sobbing over the father’s arrest. Quoting Baudelaire, he suggests that the aforementioned
image reflects “the emphatic truth of gesture in the great circumstances of life” and finally asks: “for whom are these gestures?” (p. 23).

When the law and the justice system were no longer viable mechanisms for defending Toño Zúñiga’s innocence, Roberto Hernández and Layda Negrete decided to try one last resort: gestures. In *Presunto Culpable* gestures and non-verbal communication offer a great amount of information about the relations of power that rules personal and institutional relationship between authorities, administrative staff, and the ‘users’ (portrayed as victims in the film) of the Mexican justice system. In her analysis of Sophocles’ *Antigone*, Melissa Muller (2011) says that while bodies are always the medium of theatrical mimesis, they can sometimes also be the message itself (p. 425). On the screen, I suggest, bodies are always both medium and message, and in *Presunto Culpable* gestures turn their “emphatic truth” into symbolic and political power.

In order to better understand this point, I will borrow Michael Braddick’s (2009) concept of ‘the politics of gesture’. This author states that a desire to unlock a cultural history persistently pushes us towards the unspoken and inexplicit or the physically communicated. He defines gesture as a physical movement that punctuates speech and constitutes ‘action as utterance’. “Distinct from other forms of visible action which give off meaning, gestures are ‘used in conjunction with spoken expressions, at other times as complements, supplements, substitutes or alternatives to them. These are the utterance
uses of visible action and it is these uses that constitute the domain of “gesture”” (p. 11). Gestures encapsulate and express framing ideas about the structure of society and may therefore be an arena in which structural politics are played out or contested. But they also express partisan identities and are therefore crucial to politics in the narrower sense too. Braddick asserts that manners, gesture, and deportment are crucial to the enactment of social orders, and to the expression of partisan identities within them. In an important sense, the expressive and political potency of gesture lies in the very ambiguity that what is registered is often not the detail, but the impression; not only what is given out but what is given off. In short, the politics of gesture studies “how power relations, cultural or partisan identities and divergent social interests were expressed and contested non-verbally” (p. 12).

For whom are these gestures? Roland Barthes would ask. In the film, Salvador Ávalos Sandoval, the sole judge of the Court of Appeal who agreed to talk to the camera, says: “I saw the witness’ depositions on video. I watched them carefully because, in the end, gestures can reveal many things. I insisted and finally managed to convince them [the other two judges] of—and to me it was clearly proven—the existence of a reasonable doubt”. This statement openly evinces the power of gestures and the use Roberto Hernández and Layda Negrete—Lawyers with Camera—gave to gestures while defending/documenting Toño’s case. Nonetheless, co-director Geoffrey Smith, too, seems to be aware of the communicative potential of gestures, judging by the key role gestures plays to frame certain actions with specific meanings or to suggest a
particular reading of a moment or a character. For instance, at the end of the film, just before the credits, Judge Héctor Palomares and police detective José Manuel Ortega (see images 1 and 3 in the Appendix) are shown making gestures that can be easily associated with the typical cynicism of power and impunity. This association is not gratuitous or merely cultural. In fact, they explicitly editorialize the Judge’s performance during the trial/film (the caption reads: “Judge Palomares is still on the bench.”)

According to Roberto Hernández, the three detectives participating as witnesses in Toño’s retrial responded “I don’t remember” to 40% of the questions, something Judge Palomares accepted readily. That is why Ortega’s image is followed by the caption “Comandante Ortega Saavedra has been promoted”. The subtext here is that this promotion is, to say the least, an irony.

Another crucial moment when gestures impose its symbolic and political power in the film occurs right after Rafael Heredia, Toño’s attorney, asks the Judge to separate the witness Víctor Reyes from the detectives, accusing the latter of lying and intimidating the former. We then see Víctor Reyes chatting amicably with detective Mario Arrona Salmerón (see image 2 in the Appendix). This ‘amicably’ chat (they talk, smile, nod) suggests complicity, agreement, a blatant corruption the Judge does not even care about because, we infer, he is part of it. One last example: when Toño finishes asking prosecuting attorney Marisela Miranda Galván (see image 4 in the Appendix) that she explain in everyday language the grounds of her accusation against him—and just before she answers “because it is my job”—the film shows a close-up image of the
woman cleaning her ear with her index finger. I have the impression that this sequence has been edited expressly to highlight a ‘bad habit’; to suggest distraction, boredom, lack of interest, and so on. She may or may not have done that gesture while Toño was asking the question (it is not possible for the viewer to know), but the filmmakers decided to put those images together to frame the interpretation they wanted the viewer to make of prosecutor Marisela Miranda Galván and to bring about a reaction.

**Conclusion**

I have studied in this paper the representation of justice, the construction of innocence, and the political use of gestures in the Mexican documentary film *Presunto Culpable*. Finding a common denominator between *Presunto Culpable* (Roberto Hernández and Geoffrey Smith) and *The Thin Blue Line* (Errol Morris), I have resorted to the latter to compare two main aspects: the construction of innocence and the relation between justice and evil in those films, with the purpose of making easier to visualize the points I wanted to discuss.

To better understand the way Toño Zúñiga’s innocence is constructed in *Presunto Culpable*, I have proposed to separate this category in three layers: the legal layer (what the administrative apparatuses of justice decide innocence is), the symbolic layer (the way innocence is constructed and represented through a medium), and the subjective layer (the way the subject understands his or her own innocence and deals with the cultural, ethical, and moral negotiations it involves). What I have called here the subjective layer of innocence is a deeply personal state of truth, and it is therefore very
difficult (sometimes impossible) to communicate. I contend that in *Presunto Culpable* the legal layer of innocence (the evidence and arguments presented by the defense) is just one of several elements used in the construction (symbolic layer) of Toño’s innocence. I have also argued that directors Roberto Hernández and Geoffrey Smith creates a sort of imaginary bridge that is intended to fill the communicative gap between the subjective layer and the symbolic layer of innocence with the viewer’s unfamiliarity with Toño’s personal and legal situation. This is partly achieved by incorporating *performance* to the narrative and by using it as a metaphor that gives Toño a voice in the film and helps translate the complexity of what happens in the courtroom into simple terms everybody can understand. This use of performance as a means to turning somebody’s innocence into an alternative truth that challenges the imposition of the institutional truth of a justice system is what I have called *performative truth*.

I have also argued that whereas *The Thin Blue Line* highlights the exceptionality of an innocent man (Randall Andams) who was sentenced to death based mainly on the accusation of David Harris (the source of evil is not institutional or systemic, but individual), *Presunto Culpable* shows the perverse logic that rules the Mexican justice system and the banal evil stemming from the actions of the countless bureaucrat’s that perpetuate the problem without knowing or even caring about. In addition, this documentary publicly calls for a “systematic distrust of everything that is shown to us as the official truth of a case”, as co-director Roberto Hernández has put it.
Finally, I have argued that *Presunto Culpable* turns what Baudelaire calls “the emphatic truth of gesture” into symbolic and political power. This is achieved twofold: firstly, by providing substantial non-verbal information underscoring crucial elements of analysis that made the Supreme Court release Toño Zúñiga from prison; and secondly, by strategically using gestures to frame certain actions with specific meanings or suggest a particular reading of a moment or a character.
REFERENCES


APPENDIX

Image 1: Judge Héctor Palomares

![Judge Héctor Palomares is still on the bench. El juez Héctor Palomares sigue siendo juez.](image1)

Image 2: Witness Víctor Daniel Reyes friendly chatting with detective Mario Arrona Salmerón

![The prison term will be doubled.](image2)
Image 3: Detective José Manuel Ortega Saavedra during the trial

Mr. Ortega Saavedra has been promoted.

El comandante Ortega Saavedra fue ascendido.

Image 4: Prosecuting Attorney Marisela Miranda Galván

what her grounds are for accusing me?