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Can Moving Pictures Speak? Silent Film, Free Speech, and Social Science in Early 20th Century Law

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The invention and commodification of film as a mass entertainment medium at the end of the 19th century capped a century of striking new communications technologies. It also introduced a fascinating set of legal questions. In early legal cases, lawyers and justices tried to define just what and how film communicated. These questions came to a head when challengers to film censorship efforts claimed that film should be protected under free speech law. Such claims opened a legal question with philosophical as well as regulatory overtones: whether moving pictures – that is, mechanical projections that employed image and gesture without words – could "speak."

This question, whether silent films could be protected under free speech law, was most famously put forward in *Mutual v. Ohio* (1915). The case, in which the distribution company Mutual Film challenged the institution of censorship boards in Ohio on free speech grounds[1], was the most noted and binding encounter between legal definitions of speech, the press, and film in its early years. What began in federal district court was appealed to the Supreme Court, where the decision established the precedent for the application of state and federal guarantees of free speech. The case hinged on the question of whether or not films could be considered the same as speech or publications, and thus protected from censorship. The Court answered no to this question, excluding film from free speech protection until the case was overturned in the 1952 *Miracle* case. In these 37 years, *Mutual v. Ohio* withstood a sea change in legal interpretations of free speech and several changes in the role of film in American culture.

In deciding on *Mutual*, the court addressed the political question of whether film should be censored. This political decision was underwritten by a set of ontological arguments about the nature of film and how it communicated. These

[1] This was only one of the grounds upon which the original challenge was made, but it was the center of the arguments before the Supreme Court and the Court's ruling primarily set precedent in the application of free speech law/the First Amendment to film.

arguments culminated in the assertion that film was not a form of expression, but conduct. This distinction was at the heart of the *Mutual* decision, aligning film with other activities and behavior commonly regulated by law. The definition of film as conduct, and not expression, sounds strange to modern ears. By analyzing the language of Mutual and two closely related cases, I trace the logic of this classification. After introducing these cases and describing their context, I examine the language of the Mutual case, in particular its assertion that film was not an original publication but simply a representation of facts and events already known. In order to explicate this assertion and its relation to the classification of film as conduct, I explore the association of film with a closely associated term, action, in two related cases. The final section discusses the impact of social psychological ideas of influence on the categorization of film as action. Understanding the relationship of these discourses to the legal definition of film and speech in these early cases highlights the relevance of the history of social science to the study of film history, and that of the law. Analyzing the way the classification of film took on meaning and force in the law, namely through opposition to human expression and deliberation, also demonstrates the affirmative action of the state in organizing and constituting the public sphere through the legal definition of cultural forms.

The Cases and their Context

While from a contemporary position, it is tempting to see this decision as an error or the product of an out-of-touch judiciary who just didn't "get" film, in many ways the decision made sense at the time. Given the contemporaneous understanding of film and more limited understanding of free speech, it would have been unusual for the court to see the new medium as a form of speech. On face value and in its mode of reception, motion pictures seemed very different from the main types of expression protected by free speech law of the day: oration and writing. Some evidence of this strangeness comes from a 1915 law journal reaction to the argument that films should be protected under free speech law. The article

commented on the strangeness of the claim "made for freedom of speech in the product of a mechanical device on a curtain in a motion-picture theater."[2]

This paper explores this strangeness and the discourses within which it was located. Previous scholarship on the *Mutual* case has primarily focused on turn-of-the-century contests over cultural authority and the formation of classical Hollywood cinema. For example, Garth Jowett locates the *Mutual* decision within a larger struggle by Protestant cultural elites who felt themselves under siege by both mass commercial culture and Catholic immigrants. [3] And Lee Grieveson has analyzed the decision as the upshot of years of regulatory effort aimed at regulating the health and color of the "social body" – essentially, as a form of biopolitics.[4] In this scholarship, different ideas about the underlying motives or causes of the *Mutual* decision surface. For example, Jowett suggests that the political concerns animating the decision were about the immorality of films (their failure to adhere to traditional and Protestant values) and about the conditions of viewing, in which genders, races and ethnicities, ages and classes mixed together in the same space – in the dark, no less. In a different vein, Tom Gunning suggests the decision rested on a deep-seated cultural distrust of the visual.[5] And Laura Wittern-Keller reads the decision as evidence of the court's inability to see a commercial medium as art, locating it within a dualism of art and commerce or entertainment and political speech.[6]

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[2] "Freedom of Speech and Boards of Censors for Motion Picture Shows," *Central Law Journal* 80 (1915), 307, quoted in John Wertheimer, "Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America." *The American Journal of Legal History* 37, no. 2 (1993), 170.

[3] Garth Jowett, "'Capacity for Evil': The 1915 Supreme Court Mutual Decision." *Historical Journal of Film, Radio, and Television* 9, no. 1 (1989): 59-78.

[4] Lee Grieveson, *Policing Cinema: Movies and Censorship in Early Twentieth-Century America* (Berkeley: University of California Press, 2004).

[5] Tom Gunning, "Flickers: On Cinema's Power for Evil." In *Bad: Infamy, Darkness, Evil and Slime on Screen*, ed. Murray Pomerance (Albany, NY: SUNY Press, 2004), 21-38.

[6] Laura Wittern-Keller, *Freedom of the Screen: Legal Challenges to State Film Censorship, 1915-1981* (Lexington, KY: University of Kentucky Press, 2008). The art vs. entertainment/commerce opposition was operative in the 1952 case that reversed Mutual, *Burstyn v. Wilson*, but these oppositions were not key to *Mutual* itself. By 1952, the terms of the debate about free speech, as well as that about film had shifted significantly.

All of these explanations get at important political and cultural rationales and motives for the decision. However the issues and dichotomies outlined above are not the terms in which the decision was couched. The alignment of film with conduct was. This simple idea, that film was regulatable because it was not expression, but conduct, forms the rhetorical core of the decision. Yet, this aspect of the decision has not been the focus of scholarship on the subject. Many cite the court's assertion that film was a "business pure and simple"[7] as the basic rationale behind the decision. And Grieveson points out that the definition of film as commerce in various laws and policies was a tactic via which regulation of film was accomplished. The idea that film was primarily commercial was clearly operative and influential in *Mutual* and related film and speech decisions. But it was not the only–or even, I would suggest, the most important—rationale for it.

In order to explore and explain the idea of film as conduct, I draw on two other important legal decisions that bookend *Mutual*: *Kalem Co. v. Harper Bros*. (1911), a key precedent for arguing that films were a form of publication, and *Pathé Exchange v. Cobb* (1922), which cemented the legal status of film established in Mutual and applied it to newsreels. Both cases ultimately hinged on questions of the nature of film. In *Kalem*, a Supreme Court decision regarding film and copyright, the justices had to decide whether gestures and wordless performance could communicate the same ideas and sentiments as a book. And in *Pathé*, a New York Supreme Court case regarding the censorship of newsreels, the justices had to determine what, if anything, distinguished film newsreels from the press (protected by free speech laws). Examination of these cases and the language and arguments they employ demonstrates that the definition of film as conduct in *Mutual* was not merely a one-time opportunistic definition. In the language employed in these cases, an operative legal definition of film as a form of action emerges. The relevant issues, terms, and even bodies of law (from copyright to free speech) shift across these

[7] *Mutual Film Corporation v. Industrial Commission of Ohio* 236 U.S. 230 (1915). For an example of a short explanation of the case in these terms, see Steve Vaughn, "Morality and Entertainment: The Origins of the Motion Picture Code." *Journal of American History* 77, no. 1 (1990): 39-65.

decisions, but a common set of statements about the nature of film, as a form of physical action, starkly opposed to deliberation and opinion-formation, emerges.

If the different decisions analyzed below show contradictions and slippages (in terms and their meanings), this should come as no surprise. Legal decisions exist at the intersection of multiple interests, yet they are not simple indices of the interests of the elite, or even the justices themselves. In order to maintain its function in liberal political systems, the law much strive to appear legitimate and to persuade.[8] This legitimacy is established in the argumentation of legal decisions, where justices draw upon existing discourses and knowledge in order to present their ruling as just and neutral. Thus, in what follows, I treat the law as a discursive and cultural artifact.

The *Mutual* Case

In 1913, when the *Mutual* case originated, the industrial and cultural definition of film was still in formation. Narrative film, still silent, was becoming the dominant form of production, edging out actuality, industrial, travelogue and other types of cinema more focused on the technology and spectacle of display that characterized early cinema, an arrangement Tom Gunning has famously termed the "cinema of attractions."[9] While the industry was not yet uniform or centralized, movies were big business, by some accounts the 4th largest industry in the U.S.[10] The era of nickelodeons, associated with urban and working-class audiences, was being eclipsed by the movie-house or palace, catering to a more upscale clientele and increasingly featuring narrative films over actualities.[11] Despite this shift, much of the popular and regulatory concern over film and its effects was wrapped up in

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[8] Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill, NC: University of North Carolina Press, 1991), 6.
[9] Tom Gunning, "The Cinema of Attractions: The Early Film, Its Spectator, and the Avant Garde," in *Early Cinema: Space, Frame, Narrative*, ed.Thomas Elsaesser (London: British Film Institute, 1990), 56-62.
[10] Wertheimer, "Mutual Film Reviewed," 171.
[11] Miriam Hansen, *Babel and Babylon: Spectatorship in American Silent Film*. (Cambridge, MA: Harvard University Press, 1994); Richard Butsch,*The Making of American Audiences: From Stage to Television, 1750-1990* (Cambridge, UK: Cambridge University Press, 2000).

broader concerns about the monumental social changes taking place in America, in particular immigration and the growing importance of large, diverse cities as the center of the national economy and culture.

Given the popularity and spread of cinema, censors worried about the deleterious effects of this popular new form of entertainment on the morals and health of the public. While initial efforts to regulate film focused on the sites of exhibition as physically dangerous (fire hazards) as well as morally dangerous, in the mixing of genders, races, and classes under one roof and in the dark, by 1907 regulatory efforts were shifting to policing the content of film.[12] Regulatory efforts aimed at film content were far from uniform, however. There were those who saw film as a danger to its audiences (especially children, women, workers and immigrants) and those who saw film as a potential boon to audiences, especially those who were culturally or materially impoverished. The latter group thought that film had much educative or reform potential, but that it needed the influence of reformers or some form of regulation (such as the National Censor Board) to counter commercial tendencies and achieve this potential. Many of these reformers saw in film a potential for education and uplift through entertainment, underscoring that there was not yet a strong divide between education and entertainment in the new medium. Eager to increase their respectability, many movie producers emphasized the educative and moral messages of their films, under the label of "campaigns" or "propaganda" films such as temperance films.[13]

It was in this context that cities and states began to establish censorship boards to pre-screen and license films, barring the exhibition films thought to be immoral or otherwise dangerous. In 1913, Ohio and Kansas were among the first states to establish censor boards.[14] Mutual Film Corporation, a distributor of films in

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[12] Daniel Czitrom, "The Politics of Performance: Theater Licensing and the Origins of Movie Censorship in New York," in *Movie Censorship and American Culture*, ed. Francis G. Couvares (Washington, DC: Smithsonian Institution press, 1996), 16-42; and Grieveson, *Policing Cinema.*

[13] Grieveson, *Policing Cinema*.

[14] The city of Chicago had been first in censorship, empowering the police to prescreen movies before they could be exhibited in the city in 1907. In 1911, Pennsylvania established a state censor board and in 1916, Maryland joined Pennsylvania, Kansas, and Ohio. New

Ohio and other states, launched the most successful legal challenge to these boards. Concerned about the high cost of licensing and the general disruption that state censor boards would have on business, Mutual Film filed legal suit against the Ohio law on several grounds, most pertinently that the censorship was unconstitutional prior restraint on the freedom to speak and publish.[15]

The claim was a novel one. As John Wertheimer has pointed out, the fact that the lawyers for Mutual Film developed a free speech argument was among the most remarkable aspects of the case.[16] That *silent* films might be protected under the First Amendment and state constitutional guarantees of free speech was by no means evident at the time. While interest in free speech as a political right and free speech cases were on the rise in the first decades of the 20th century, the courts' interpretations of free speech rights were much narrower than today. To begin with, until 1925, the First Amendment was interpreted as applying only to federal laws, so it did not bar states from passing laws that restricted speech.[17] Free speech legal challenges were more often based in state constitutions' guarantees of free speech, as was the case with in *Mutual* and *Pathé*.[18] Further, the ability of states to license and control their public spaces and the moral hygiene of their citizens was often given precedence over individuals' speech rights.[19]

York and Florida established censors in 1921 and Virginia followed suit in 1922. Massachusetts used existing blue laws to cobble together a censorship system when attempts to do so legislatively failed. Wittern-Keller, *Freedom of the Screen.*

[15] The initial challenge, in federal district court, emphasized the claim that the boards were an impediment to interstate commerce, with the claim that the boards broached free speech guarantees a secondary claim. In the appeal of the decision to the U.S. Supreme Court, however, the lawyers for Mutual focused their case on free speech claims.

[16] Wertheimer characterizes the argument as an original attempt to use newly popular free speech arguments to secure and extend property rights. Wertheimer, "Mutual Film Reviewed."

[17] This changed in 1925, with *Gitlow v. New York,* which held that the First Amendment applied to state as well as federal law, under the 14th Amendment.

[18] For this reason, I use the general term free speech laws to refer inclusively to the different state laws. While these laws were very similar in sentiment, the specific terminology of the laws differed from state to state, and for that reason the cases analyzed here hinge on slightly different terminology.

[19] David Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1997).

In the years before WWI, there were few Supreme Court cases involving free speech claims (*Mutual* being an interesting exception). And when free speech cases were heard, the courts—especially the Supreme Court—were not particularly expansive in their understanding of free speech, being willing for example to countenance restrictions on the ability of political protestors (often socialist, anarchist, and/or union speakers) to use public spaces to make their cases or punishing publications for contempt or libel after the fact. During WWI, the courts were particularly restrictive, the Supreme Court notoriously finding no contradiction between the punishment of pacifists and other dissenters and the principle of free speech.[20]

Given this context, the lawyers for Mutual Film faced an uphill battle in attempting to secure free speech protection for film. In making their case to the court, Mutual's lawyers argued that films—or motion pictures, as they called them—were publications, and as such, protected within free speech law from prior restraint (such as the pre-screening of films by censor boards). The focus on publication was due to the wording of Ohio's Constitution, which states "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."[21] In their brief, the lawyers offered the court a definition – that film was a form of publication – and a corresponding analogy – that thus, film was like the press.

The arguments and decision in *Mutual v. Ohio* would in fact hinge on the proper analogy. This was not unusual; justices often assimilate new technologies into the law through comparisons to an existing technology or practice, controlled by a body of precedents.[22] Which analogies were used and the specific ways they were employed show how the lawyers and justices were attempting to think through what and how film communicated and to define the new technology. In

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[20] Ibid.
[21] Ohio State Constitution, http://www.legislature.state.oh.us/constitution.cfm?Part=1&Section=11
[22] Jennifer Mnookin, "The Image of Truth: Photographic Evidence and the Power of Analogy." *Yale Journal of Law and the Humanities* 10, no. 1 (1998): 1-74.

Mutual, much of the discussion centered on which was the proper analogy, the press (newspapers and other publications) or the theater ("exhibitions" or "shows").[23] The press was a fresh analogy, asking the court in effect to see "the product of a mechanical device on a curtain in a motion-picture theater."[24] as essentially the same sort of representation and expression as written publications.

In order to make this comparison, the lawyers for Mutual Film pointed out that films presented adaptations of current events and literature. Building on this, they emphasized the similarity of film content and uses to those of the press: first, they argued that that current events films often employed the same images that were used as still photographs in newspapers; second, they offered an extensive list (20 pages) of "Mutual Weekly" current events films in circulation in Ohio as an exhibit of the news-like qualities of film; and third, they included a typology of films in circulation that emphasized educational films and those aimed at shaping public opinion ("propaganda" films).[25] The brief went on to say that the definition of publication could not be held to only refer to those means of publication available at the time of the writing of state and federal constitutions, pointing out that law regularly adapted to new technologies.

In the end, the justices rejected this analogy, finding that films were more like the theater (as argued by the lawyers for Ohio) than the press—and thus they were, like theatrical performances, subject to licensing. They granted that films were a "medium of thought" and had educational value. However, the justices ruled that this "thought" was not equal to the "opinion" protected by free speech and publication guarantees. There is something paradoxical in this assessment to the

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[23] Interestingly, none of the parties involved compared film to photography (used copyright cases so often did).

[24] "Freedom of Speech and Boards of Censors for Motion Picture Shows," in Wertheimer, 170.

[25] Films were grouped into five main types: 1. Scripted Dramas 2. Educational films (generally scientific, depicting plant life, electricity, etc.) 3. Historical 4. "Special Films" depicting literary works and 5. Depiction of religious subjects and stories. Affidavit of John Collier, *Mutual Film Corp v. Industrial Commission of Ohio*, 236 U.S. 230, (1915), Transcript of Record, 46. U.S. Supreme Court Records and Briefs, 1832-1978.

contemporary reader. If films may convey ideas and sentiments and be considered a medium of thought, how can they not be publications – or speech?

The key idea that enabled the justices to say that film was not speech or publication, even though it expressed ideas, was the assertion that films were conduct. This little commented upon point was central to the rhetorical construction and legal logic of the decision. Legally, behavior, or conduct, is subject to regulation, whereas speech--or, in the terms of different state constitutions, publication or expression--is not. (Just as the intent to commit a crime is not subject to legal restraint, but the actual commission of a crime is.)[26] By asserting that film is a form of conduct, the justices distanced it from concepts associated with ideas and mental activity, such as speech and expression.

The decision first rehearses and accepts the arguments about film's educational and moral uses put forth in Mutual Film's brief, accepting the artistic and educational merit of film,[27] but then reminds "that opinion is free and that conduct alone is amenable to the law." The next paragraph begins with the question, "Are moving pictures within the principle, as it is contended they are? They, indeed, may be mediums of thought, but so are many things. So is the theater, the circus, and all other shows and spectacles…." In this single passage, the justices establish the analogy of theater as the operative one (the controlling body of precedent), align film with regulatable conduct, and suggest that there is a hierarchy of thought, with lower (circuses and shows) and higher forms (opinion and expression). Thus begins the rest of the decision, in which the justices lay out why regulating film is not a violation of free speech:

> It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded…as part of the press…. They are mere

[26] The speech-conduct divide has become a difficult one to maintain as communication technologies have proliferated and speech law transformed across the 20th century. At the time of *Mutual*, this distinction seemed simpler.

[27] It is worth noting that the commercial character assigned to film here is not opposed to art (this was a later framing of the issue, which was central to the 1952 *Miracle* decision), but to the press and processes of opinion-formation

> representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but as we have said, capable of evil, having power for it the greater because of their attractiveness and manner of exhibition.[28]

This much-cited passage is densely packed, with allusions both to the political concerns animating efforts to regulate and to the justice's conception of the nature of film. The ideas that are offered as the logical justification for the decision, that can fit within the common sense and discourses of the day, however, were that film was commerce and that films were a different, distinct, and lesser form of communication ("mere representation") than typical expression or publication. The idea of film as a "business pure and simple" and so in need of regulation is a powerful undercurrent to *Mutual*, and later *Pathé*. In each, it is clear that the justices think that a business, or at least a business thought to be as shady as the film business, is not to be trusted with such a powerful medium. Conduct implies agents. The agents in Mutual are businesses and the businessmen who run them. In this light, films are subject to regulation and restraint in part because they are the conduct of business.[29]

Yet, as noted above, there is more to the decision than this suspicion. The status of film as commerce alone would not have dictated a need for regulation; as Wertheimer has pointed out, the decision was a rare restriction on business for the era, a reversal of the court's laissez-faire leanings.[30] The argument that film should not be considered part of the press, and in fact required a stronger regulatory hand than the press, was bolstered by ideas about the nature of the medium, and its unique attractiveness and power, its very ontology.

Fostering a particular understanding of the nature of film, the previously cited passage dismisses the definition of film as a publication that was so central to Mutual's free speech claim on the grounds that film is "mere representation" of

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[28] *Mutual v. Ohio*, 236 U.S. 230, 245 (1915).
[29] Grieveson, *Policing Cinema*, argues *Mutual* was the culmination of a trend in regulatory discourse and law defining film as commerce, in effect that the description of film as a business pure and simple was productive of the situation it purported to describe.
[30] Wertheimer, "Mutual Film Reviewed," 179-181.

events and ideas already known. In so doing, the justices were contrasting film to their definition of publication as "a means of making or announcing publicly something that otherwise might have remained private or unknown."[31] In this distinction between mere representation and publication, the justices pose film as less than the spoken or written word.

This way of talking about film as "mere representation," and thus distinct from publication, differs from contemporary understandings. Today, we use the terms expression and representation almost interchangeably; representation is a form of expression. In the rhetoric of *Mutual* (and the other cases examined here), in contrast, representation is distinct from expression. Within the legal reasoning of *Mutual*, films are depicted as the enactment or re-presentation of ideas that originated elsewhere.[32] A publication presents an idea; it is treated in the law as the expression of that idea.[33] Within this logic, film represents—or even more materially, enacts—not an idea but a publication that has already taken place; it is a mechanical reproduction of someone else's artistic originality or politically protected opinion. As such, film is assimilable to conduct rather than (human) expression.

In this way, film is presented as less than the spoken word. It does not rise to the level of originality of publication or expression and it does not rise to the intellectual level of opinion. Yet, the need to regulate film was expressed in terms of films "capacity for evil" and its unique power of "attractiveness." The arguments of the lawyers for *Mutual* drew heavily on the idea of film's unique power and force in arguing why film was different from the written or spoken word – and why it required regulation. They argued that films communicated with a force greater than words: "a force that if used to effect a libel of a person could approach assault and

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[31] *Mutual v. Ohio*, 236 U.S. 230, 244 (1915).
[32] This elsewhere presumably would be the site of publication, open to free speech protection.
[33] See James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, MA: Harvard University Press, 1996); and Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: NYU, 2001).

battery in effects."[34] In comparing the effects of film to those of assault and battery, the lawyers for Ohio argue that film communicated in a qualitatively different, more forceful, and more material way than words. If film had physical effects similar to those of conduct or deeds, it followed that it should be subject to regulation on the same grounds.

In order to understand this paradoxical set of statements in which film was posed as both more than and less than the word, I turn to a key legal precedent and a later interpretation of *Mutual*. In these cases, the basic ideas underpinning *Mutual*, and in particular this central paradox, are laid out. The two cases are grounded in different discourses; *Mutual* draws on both.

Film as Action in *Kalem* and *Pathé*

In order to better understand *Mutual*'s consideration of film, I turn to two other, closely related cases: *Kalem Co v. Harper Bros* (1911) and *Pathé Exchange v. Cobb* (1922). *Kalem*, the copyright infringement case that became a key precedent for the argument that films were publications, offers an early articulation of film as action. In the *Pathé* case, which elaborated on and confirmed *Mutual*, the justices base their decision that film is not expression on the basis that it is expression's opposite: action. In this opposition, action is aligned with the body, movement and interaction, as opposed to the mind, consciousness, rationality, and the site of creative activity. Definitions of action include not only human deeds, gestures, and behavior, but also movement of parts of a machine (i.e., the action of a gun). The term conduct, at the heart of *Mutual*, is a subset of action, referring more narrowly to behavior or deeds. At the time, the term action was used in many venues to refer to human social interactions, often, either in a so-called primitive state or the collective action of the masses. These use of "action" were the central concern of much turn of the century sociology and was a central term of debate in discussions of audiences and audience psychology, where as Richard Butsch points out, "Debate

[34] Brief of Appellees, *Mutual Film Co v. Industrial Commission of Ohio*, 236 U.S. 247, (1915), Transcript of Record, 26. U.S. Supreme Court Records and Briefs, 1832-1978.

[was] an exercise of the mind; action [was] one of the body."[35] This alignment of action and body or physicality can be seen in the legal decisions below. Yet, the implications of categorizing film as action differ.

Both *Kalem* and *Pathé* use the term action to characterize film or denote its essential quality. In both decisions, they are often referring to what was conveyed in silent film: the physical performance and movement of the bodies of actors. However, action connotes more than what is communicated on the screen, being implicated in the discussions of how film communicates that are at the core of these decisions, as in *Mutual*. In the trajectory from *Kalem* to *Pathé*, the central assertion that film is action moves from one used to demonstrate the mechanical nature of film and its status as pure copy to a way of talking about the power of film to act upon the mind or psyche of the viewer – as influence.

The *Kalem* case revolved around whether a film adaptation of the book *Ben Hur* amounted to copyright infringement. In order to determine whether or not a film could infringe copyright on a book, the justices had to determine whether film could tell the same story, communicate the same ideas, as a theatrical performance. Or, as they put it, whether drama could be "achieved by action as well as speech." In other words, whether silent film could through gesture alone tell the same story as the words in a book. The lawyers for Kalem Co., the production company that produced the film of *Ben Hur*, argued that a film was not a dramatization of the book, a copyright infringement, but a mere mechanical animation of photographs illustrating the book, which were not.[36] They stressed the difference of pictures from literature and the mechanical nature of film, comparing it to the perforated sheets of a player piano and arguing it was part of the machine.

This argument was located within broader debates over where the machine ended and human creativity began in contemporaneous copyright debates. In the

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[35] Richard Butsch, *The Citizen Audience: Crowds, Publics, and Individuals* (New York: Routledge, 2008), 15.

[36] Copyright law of the time did not consider a series of photographs illustrating a book to be copyright infringement. It was a translation into the very different, visual idiom of the still photograph. The animation of stills in motion pictures enabled the question of whether film could be considered a similar form of representation as a print story. The answer here was yes, though elsewhere, for free speech purposes, it was no.

first few years of the 20th century, discussions of film copyright evidenced uncertainty of whether celluloid was part of the machine, covered by patent law, or an artifact of human creativity – in Peter Decherney's analogy, whether film was hardware or software.[37] And as producers increasingly sought to copyright films and thus protect their investment, there was no immediate consensus on how to copyright them: as a photograph, as a series of photographs, or by copyrighting the screenplay.[38] This uncertainty demonstrates that it was not apparent to early producers, lawyers, or judges exactly where the originality or expressivity of film resided.

The court did not accept Kalem Co.'s definition of film as the mechanical animation of photographs. They took the mechanical nature of film to mean something else: that film was a mechanical copy of a silent performance or pantomime. At issue was whether the expression in one form (performance or movement without words) could be considered the same, a copy of an expression in words (the book), thus infringing on intellectual property, understood as an imprint of personality left by the author in his or her literary expression.[39] The decision of the court, written by Oliver Wendell Holmes Jr., found that:

> Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion, without the aid of a word. …if a pantomime of *Ben Hur* would be a dramatizing of *Ben Hur,* it would be none the less so that it was exhibited to the audience by reflection from a glass and not by direct vision of the figures—as has been sometimes done to

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[37] Peter Decherney, "Copyright Dupes: Piracy and New Media in Edison V. Lubin (1903)." *Film History* 19, no. 2 (2007): 109-24.

[38] André Gaudreault, "The Infringement of Copyright Laws and Its Effects (1900-1906)," in *Early Cinema: Space, Frame, Narrative*, ed. Thomas Elsaesser (London: British Film Institute, 1990), 114-22. This was resolved in 1912, when film was included as a copyrightable medium in the law in the Townsend Amendment.

[39] Copyright of a photograph was premised on the fact that one person took the photograph and thus that the imprint of that person's vision or personality was left in the photo—as Gaines shows, via the remnants of the Romantic vision of authorship entwined in intellectual property law, Gaines, *Contested Culture*. Film must have posed a problem within this particular way of adjudicating copyright, as there was no one single person who was clearly imprinting his or her personality: it could be the cameraman, the director, the editor, or the scriptwriter.

> produce ghostly effects. The essence of the matter in the case last supposed is not the mechanism employed but that we see the event or story lived. The moving pictures are only less vivid than reflections from the mirror.[40]

The first assertion is that *action* can tell a story: here, the action in question is the movement and gestures of the performers on the screen. What appears on the screen is a copy (likened to a reflection) of this action. The justices are, again, clearly deliberating about a new medium, tackling the way that this medium communicates and whether this is legally commensurate with older forms of communication. In this passage, Holmes in effect theorizes the new medium as a reflection of real action occurring elsewhere, in what film scholars would call the pro-filmic event. The film itself was figured as a mere mechanical copy, or reproduction, of that event/action. The discussion of film as not simply a series of photographs, but something more. What distinguished film from photographs enabled the justices to find that it was indeed a dramatization, and so an infringement of Harper Bros.' copyright, was its ability to tell a story—here denoted by the idea of action. This infringement was all the worse due to film's mass communication capabilities, that the same dramatization could be shown to many different audiences at the same time.

Because in *Kalem* the justices ruled that film could tell a story and copy written expression, the lawyers for Mutual Film presented *Kalem* as a precedent for considering films to be publications, equal to words in their communication. The justices in *Mutual*, however, chose a different lesson from *Kalem*: that films were like stage performances (rather than like publications). Later, in *Pathé*, films would be described as "mere action," more akin to physical than mental activity. The *Kalem* decision allowed for this ambiguity, suggesting that films could be considered a copy of written expression but doing so through an alignment of film with the performance and through an understanding of film as mechanical. The decision rested on the idea that film was essentially characterized by the embodied but mute performance of actors and the idea that as mechanical capture and projection, film

[40] *Kalem Co v. Harper Bros.*, 222 U.S. 55, 62 (1911).

was a simple copying device (like the camera). Holmes Jr.'s comparison of film to a mirror in fact echoed his father's famous 1859 description of the camera as the perfect instrument for reflecting and copying life: one of the machines that promised a more objective assessment of the world.[41] That film was a mechanical reproduction and projection was important, as the mechanical nature of this reproduction meant that there was essentially no transformation to the pro-filmic event, a physical performance.[42] The projection was, Holmes said, a mere passive conduit in the presentation of the performance, which took place elsewhere. It was mechanical reproduction, thus communicating via the action of a machine.

Both the idea of film as mechanical action and as characterized by physical performance enabled the different understanding of film as expression or communication that emerged in *Mutual*. The rejection of the press analogy in *Mutual* hinged in large part on the idea that film did not bring anything new to light, that it was not a producer of knowledge, but merely a disseminator of things known—a distinction perhaps enabled by the fact that Mutual was a film distributor rather than producer. While Mutual's lawyers had used the *Kalem* decision to argue that the court had already recognized filmic representation as equal to literary publication, *Kalem* just as easily reads as an argument that film is essentially a derivative form of expression, presenting (paraphrasing *Mutual*) ideas and events already known. These decisions implicitly oppose film to original expression and authorship, an idea that is made explicit in the1922 *Pathé* decision. While finding film to be a form of original expression would not have been a sufficient argument for providing free speech protection at the time, both *Mutual* and *Pathé* go to some lengths to distance filmic representation from the type of expressivity associated with authorship.

In *Pathé Exchange v. Cobb,* the New York Supreme Court considered whether newsreels could be given free speech protection, as part of the press; in essence,

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[41] Oliver Wendell Holmes, "The Stereoscope and the Stereograph," *The Atlantic Monthly* (June 1859).

[42] This of course is the association of machine and copy so famously commented in Walter Benjamin's famous essay, "The Work of Art in the Age of Mechanical Reproduction," and Lewis Mumford's *Technics and Civilization*.

whether the *Mutual* decision applied to news on film. The applicability of *Mutual* was upheld, effectively cementing the regulatory status of film. While the case was decided in New York State Supreme Court, it took on a wider legal significance, discouraging constitutional challenges to film censorship in any state for many years.[43] In the case, the New York censor board refused to license a newsreel containing images of a female bather in a one-piece suit, which the censors found too revealing.[44] Pathé Exchange, a producer and distributor of newsreels and other films, argued that the newsreel was news; it did not matter whether the news was expressed in words or pictures, it was still part of the press, protected in the state constitution—that it was the news that was protected under free speech, not the medium of its conveyance. Pathé went on to argue that protecting only the written word would drastically reduce the meaning of publication and the state constitution's free speech guarantees. They even made an argument about pictorial language, stating that because the written word was really only a permutation of hieroglyphs, making a strong distinction between writing and images spurious.

In its decision, the NY Supreme Court also focused on the distinction between moving pictures and the written word. The decision sidelined the argument that newsreels conveyed the same information as newspapers to focus on the more ontological question of whether film could be considered expression. After the prevalence of newsreels in providing information about WWI to those at home, it would no doubt have been difficult to argue that newsreels were not an effective means of conveying current events. In fact, the court found newsreels to be a fine example of news, but said that news had little to do with free speech. What was protected in (state) Constitutional guarantees of free speech, the justices argued, was not news or the press per se but "freedom of expression of thought, involving conscious mental effort, not mere action."[45] Given the privileged position that

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[43] Most legal challenges to censorship in the 20s and 30s rested on the designation of films as immoral, not on challenges to censorship itself. Laura Wittern-Keller and Raymond J. Haberski Jr., *The Miracle Case: Film Censorship and the Supreme Court*. (Lawrence, KS: University of Kansas Press, 2008).

[44] Wittern-Keller, *Freedom of the Screen,* 46.

[45] *Pathé Exchange v. Cobb*, 202 A.D. 450, 458 (1922). The state constitution guaranteed,

newspapers and magazines have historically had in free speech law (greater than art and literature), this seems a bit disingenuous. Yet, this language and logic was presented as legitimate argument.

In this surprising passage, the justices outline that expression of thought was defined by the presence of mental activity, placing an emphasis on thought. They elaborate on what is protected under free speech law: "It is the right to 'publish' one's 'sentiments' on all subjects to which the Constitution expressly refers. 'Sentiments,' according to Webster, mean 'a decision of the mind formed by deliberation or reasoning; thought; opinion; notion; judgment.'"[46] In their emphasis on thought as mental activity and in the centrality of reason and deliberation to their definition of the type of expression and publication protected, an outline of a conception of film as akin to physical action emerges. That is, the basis for their distinction between film and expression was the association of the former with the body and the latter with the mind:

> We cannot say that the moving picture is not a medium of thought but it is clearly something more than a newspaper, periodical or book and clearly distinguishable in character. It is a spectacle or show rather than a medium of opinion and the latter quality is a mere incident to the former quality. It creates and purveys a mental atmosphere which is absorbed by the viewer without conscious mental effort. It requires neither literacy nor interpreter to understand it. Those who witness the spectacle are taken out of bondage to the letter and the spoken word. The author and the speaker are replaced by the actor of the show and of the spectacle. [47]

In this summation, the justices oppose film to opinion through a contrast in the mental processes thought to be involved in each and through the figure of the author. Film is not a medium of opinion because it does not require mental activity

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"every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press," *Pathé Exchange v. Cobb*, 202 A.D. 450, 456 (1922).

[46] Ibid, 458.

[47] *Pathé Exchange v. Cobb*, 202 A.D. 450, 456 (1922).

and reasoning on the part of audiences. The justices further distance film from opinion and more lofty expression by drawing a stark line between actors on the screen and the expressive work of authorship; they do this in part by focusing only on what is on the screen, ignoring the expressive labor behind it. Underlying this contrast is a strong mind/body dichotomy. What distinguishes the actor from the author or the speaker are the centrality of the body as the object of attention and display and the mode of reception. Whereas authors communicate via words, actors communicate via bodies. And while attending to a speaker requires concentration and language, the spectacle does not. While both authors and speakers of course have bodies, linguistic performance has frequently in the Western tradition been a technology of abstraction, a way of appearing in the guise of abstract reason rather than embodied particularity.[48] The body is less often thought of as the site of expression and authorship in Anglo-American thought and law. In saying the actor replaced the author and speaker, the decision was undercutting the expressive capacity of film, its ability to *say* anything meaningful or original.

Again, the terms that differentiated film from speech did not hinge on political vs. non-political speech, nor art vs. commerce. Rather, it was the mind vs. body dichotomy. Film was depicted in terms of physicality and bodies—from the bodies on the screen to the (receptive or vulnerable) bodies of viewers—that distanced it from mental activity, and legal concepts of expression and authorship associated with it. The central opposition between "mere action" and expression points to the notion of authorship as a central differentiating factor. Following *Mutual*, the decision suggests there is no authorship in film itself. The romantic notion of authorship, which animates legal concepts of expression, locates authorship in the imprint of the originality or personality of a unique creator in the form of the expression.[49] In *Pathé*, the distance of film from this idea of authorship is signaled not only by the term "mere action," but also by the assertion that the speaker and the author are replaced by the actor. In this, all of the other creators

[48] See, for example, Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2001).
[49] See Gaines, *Contested Culture*; Boyle, *Shamans, Software and Spleens*.

(including the writer and director, who would take on such a strong authorial mantle in later discourse on film) were removed from the picture. An analogy and a trace of this type of thinking about performance, as a non-mental activity devoid of creativity, can be found in the way contemporary copyright law deals with dance. Performances themselves are not copyrightable but choreography is; one way that choreography is copyrighted is through videotaping dancers performing the moves (to give the dance a fixed form, required in copyright law). Within this legal setup, the moves of the dancers become evidence of the mental originality of the choreographer rather than evidence of originality in physical execution or interpretation on the part of the dancers themselves. In *Pathé*, however, the performances of the actors were not even allowed to point to another's mental activity, but to reality and the physical world itself.

This evacuation of expressivity from physical performance explains the idea that film is a mere representation of events and ideas already known, part of the justification of the *Mutual* decision. This idea was usefully elaborated in *Pathé*:

> [Film's] characteristic feature is that it is a "spectacle" and it is because it is a spectacle or a show that spectators are attracted to see with their own eyes the thing already published in the papers. The purveyance of thought and instruction is just as incidental to the "show", in principle, as it is with the circus or any other theatrical performance.[50]

The concept of film as a physical form of representation, within the mind/body dichotomy, carried over into the idea of film as spectacle. In focusing on film as spectacle, the justices were not only referring to the economic basis of film, that it was designed as an attraction to bring in large audiences, but also to the mode of viewing that spectacle implies. In elaborating why newsreels could not be considered speech, the justices stated in *Pathé* that film was a particularly powerful form of communication because it "carries its own interpretation" and "creates and purveys a mental atmosphere which is absorbed by the viewer without conscious

[50] *Pathé Exchange v. Cobb*, 202 A.D. 450, 458 (1922).

mental effort."[51] By implication, films bypass the interpretive or critical faculties of audiences, acting directly upon them (the action here is that of the film; the audience is passive). The realism of film as well as contemporaneous ideas about the psychology of its projection enabled such assertions. These factors also enabled the assertion that films constituted community between audiences and actors on the screen: "The actors in the picture become in fact the associates of the child as effectually as though they were their living and breathing companions, so realistic is the picture, so perfectly photographic of real life."[52]

The definition and discussion of film within these decisions is not fully consistent or coherent. Some common, even coherent points emerge from them, however. They all treat film as a material and physical form of communication, distinct from other types of representation. Out of this, the decisions articulate their rationales for treating film as a distinct and eminently regulatable form of communication. The different ideas about film as action or conduct combine to position film as a form of communication that is both more than and less than speech: more forceful than words and less intellectual and rational. The use of the term action aligned film with the physical and social world and gave it a materiality that literature and oratory did not have at the time—and that communication, expression, and representation do not have today. This figuration of film as a material, embodied form of communication corresponds with and makes sense within contemporaneous philosophical and social scientific inquiry into communication.

Action, Thought, and the Science of Influence

In the cases outlined above, there is a shift in the discourses within which the idea of film as action is deployed. In *Kalem*, it is within a modern discourse on the machine and machine culture, concerned with the divide between mechanical copies and human creation. In *Mutual* and later in *Pathé*, there is a shift from the idea of film as mechanical action to film as psychological influence, within which

[51] Ibid, 457.
[52] Ibid.

film becomes a type of direct stimulus to the mind. This set of ideas, instantiated and substantiated as an institutionally-backed discourse with all the trappings of scientific knowledge, was employed in the *Mutual* case but came into full force in *Pathé*, where it provided the core propositions in the decision. It is to this latter discourse of influence that I now turn.

This discourse, which proliferated in universities, in particular in emerging social sciences of sociology and social psychology, circulated as well through the efforts and practices of Progressive Era reformers. Both Mark Anderson and Lee Grieveson have noted the influence of the emerging social sciences on popular discussions of film, reform efforts, and censorship through concepts such as mimesis and influence and figures such as Hugo Munsterberg and the Chicago School of sociologists.[53] As Anderson suggests:

> The cultural ascendancy of the modern human sciences coincided with the rise of mass culture. Tradition was losing its preserve as the development of mass communications – the tabloid press, motion pictures, radio – freed culture from geographical and sociopolitical restrictions. When a set of ideas, practices, and peoples formerly separated by a host of social barriers came to share a common space within mass society, the category of 'influence' became and area for scientific investigation and social intervention.[54]

Anderson and Grieveson argue that such social science concepts shaped the formation of a realm of media expertise and reform and censorship discourse, respectively. Similarly, Richard Butsch has demonstrated how influential crowd psychology was in turn of the century thought and discourse on audiences.[55]

I want to suggest that emerging social scientific ideas and expertise also provided ground for the legal classification and regulation of film in the early 20th century. Film was opposed to expression and authorship through the specific logics

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[53] Mark Anderson, "Taking Liberties: The Payne Fund Studies and the Creation of the Media Expert," in *Inventing Film Studies*, ed. Lee Grieveson and Haidee Wasson (Durham, NC: Duke University Press, 2008), 38-65; Lee Grieveson, "Cinema Studies and the Conduct of Conduct," in *Inventing Film Studies*, ed. Lee Grieveson and Haidee Wasson (Durham, NC: Duke University Press, 2008), 3-37.
[54] Anderson, "Taking Liberties," 39.
[55] Butsch, *The Citizen Audience*.

of influence supplied by sociology and psychology. In these cases, the word was aligned with expression, mental action, rationality, and self-governance. Film on the other hand was treated as emotive and tied to "primitive" thought (more motor than cognitive), forwarding the idea that film both shows and acts on bodies. While there is a long tradition of logocentrism and iconophobia upon which this distinction rests, it was rationalized by classifying films as conduct. This classification in turn drew on the new scientific language of influence.

The social scientific concern with influence grew out of questions about social control. The question of how social organization happened and could be regulated in post-traditional societies became a pressing one with the social transformations wrought by industrialization and commercialization. In the late 19th century, new technologies seemed to many to offer a way to reconstitute community on a national scale, enabling the "great community."[56] Yet, at the same time, the mechanical nature of these new technologies meant that community was being fostered not by traditional authorities or gatekeepers, but by machine and commerce. Popular discussion of the impact of the telephone and film both exhibited anxieties about the way these technologies elided the oversight of cultural authorities.[57] In the case of cinema, this worry was amplified by the commercial nature of film; film's exertion of influence was that of commerce and industry rather than traditional gatekeepers of culture (elites, church, head of the household, school, etc.). The establishment of local censor boards was as much about attempting to retain local control over culture in the face of mass commercial culture as about prudery.

The study of influences was one of the institutional permutations of such concerns. European scholars such as Gustave LeBon and Gabriel Tarde were interested in the influence of others, specifically the role of imitation in child development and the formation of social norms. This work was influential in the

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[56] Daniel Czitrom, *Media and the American Mind: From Morse to McLuhan* (Chapel Hill, NC: University of North Carolina Press, 1982).
[57] See, for example, Jowett, "'Capacity for Evil'"; Vaughn, Steven. "Morality and Entertainment"; Carolyn Marvin, *When Old Technologies Were New: Thinking About Electric Communication in the Late Nineteenth Century* (Oxford: Oxford University Press, 1990).

emerging sociology of the U.S., especially through the Chicago school, where they influenced the work of founding members Robert Park and Albion Small, among others. In addition, U.S. scholars such as Charles Cooley and George Herbert Mead were at the time studying the role of communication in forming and coordinating society—and (particularly in Mead's case) individuals.[58] In addition to all being in some way concerned with the constitution and control of the social, this scholarship also focused in on influence as a key factor in social organization and the formation of norms. It elucidated the particular venues, vehicles and mechanisms of influence within the "scientific" language of sociology and psychology, given further authority through their basis in esteemed academic institutions. This social scientific discourse of influence was not restricted to academic discussion. The discourse of influence filtered as well into popular-political discussions, especially Progressive Era reform campaigns.[59]

Influence informed, among other things, the reformers' interest in film, both as a force of education and socialization and as a source of atomization and "disorder." Films were one of many new technologies of communication that enabled a greater social interaction and sharing of symbols. But their impact was seen as greater through both their visual nature and the fact that film capitalizes upon the psychology of perception. These concerns were most famously discussed in the 1930s in the Payne Fund studies, but were already in formation in the first decades of the century. In a 1911 address to popular educational group, the People's Institute, film regulation advocate Rev. Herbert Jump decried film's ability to work via "psychologic suggestion."[60] Jane Adams notably spoke of the "mimic stage" in her 1909 book, *The Spirit of Youth and the City Streets*. A 1912 *American Journal of Sociology* article likened cinema to hypnosis and portrayed audiences as being

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[58] Butsch, *The Citizen Audience*; Grieveson, "Cinema Studies and the Conduct of Conduct"; Andrew Feffer, *The Chicago Pragmatists and American Progressivism* (Ithaca, NY: Cornell University Press, 1993).
[59]Feffer, *The Chicago Pragmatists*; Mary Jo Deegan,.*Jane Addams and the Men of the Chicago School, 1892-1918* (New Brunswick, NJ: Transaction Books, 1990).
[60] Butsch, *The Citizen Audience*, 43.

"under the spell" of the cinema.[61] Hugo Munsterberg most famously articulated these ideas in his 1916 book, *The Photoplay*. Munsterberg's work on film is of particular interest as an explicit treatise on the psychological mechanisms by which film was thought to exert influence. For Munsterberg, this influence was a "penetrating" one in which "The more vividly the impressions force themselves on the mind, the more easily must they become starting points for imitation and other *motor* responses" (emphasis mine).[62] This was not all bad. Munsterberg, like reformers such as John Collier, saw in the very vividness of film, its perceived ability to bring audiences into contact with others on the screen, a potential tool of socialization. Films could, they suggested, be used to bring the poor and immigrants into better community than the physical ones in which they resided.

Munsterberg believed that film's ability to influence came from the ability of visual film techniques to replicate internal mental processes such as attention and memory. In phrases noting how film images "force themselves upon" or "penetrate" the mind, and in his suggestion that films directly induced motor and sensory responses, he articulated filmic influence as a form of action upon the brain, prompting attention, excitation and imitation that bypassed reflection or intention. These are mental processes, but "lower" ones. Visual techniques such as the close-up and the crosscut so closely mirrored mental processes that they directly evoked them (involuntarily, or without mental activity) when the spectator watched them upon the screen.[63] In all, Munsterberg suggests that many of the effects of film are in the direct action of the succession of visual images upon the minds and bodies of spectators, arousing sensations and even eliciting actions.

In these ideas about influence, there is an implicit idea of a malleable self, open to filmic influence. Indeed, a more open and social constituted vision of the self was central to much of the study of influence: scholars from Charles Cooley to Gustave LeBon and Gabriel Tarde discussed the impact of others and the social

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[61] Elliot Howard George, "Social Psychology of the Spectator," *American Journal of Sociology* 18 (1), 40, quoted in Grieveson, "Cinema Studies and the Conduct of Conduct," 12.
[62] Hugo Munsterberg, *The Photoplay: A Psychological Study*. (Project Gutenberg, 1916), Chapter 11.
[63] Ibid, chapters 4 and 5.

environment on the formation of the self. This permeable self is far from the autonomous and stoic self at the core of much liberal thought on free speech, which is supposed to stand (far) apart from the speech surrounding it: perhaps offended, perhaps enriched, but not deeply touched or shaped by it.[64] Given this, the twinned introduction of these social psychology concepts and new technologies of visual communication that appeared to work via manipulation of the senses added up to a legal and political conundrum.

In many ways, Munsterberg's applied 19th century concerns about crowds, individuals, and society to an emerging 20th century site of concern about individuals and the masses: the audience. Psychology and sociology provided a "scientific" language for rationalizing elite fears about the power of the working classes and labor (collective action). For example Gustave Le Bon's 1895 book *The Crowd: A Study in the Popular Mind* argued that in crowds individuals lost their individuality and ability to reason and self-govern; he thought that people in crowds were especially susceptible to influence by images and theatrical performances. Similarly, Gabriel Tarde thought crowds such as audiences were irrational and open to easy influence. He discussed audiences as crowds, made susceptible by the visuality of theater and being part of a mass of spectators. Such places were inimical to opinion formation. Tarde added the idea of another, more dispersed type of collectivity that used reading and reason to filter and deflect such influence and emotionality and to form opinion: the public.[65] In contrast to crowds, publics were collectivities defined by deliberation, reflection, and opinion-formation; publics subsumed collective social action to reason. Not only Tarde, but also those who followed after, including Robert Park and Walter Lippmann, thought that print was more amenable to deliberation than visual or theatrical communication. These ideas would be very influential in early U.S. sociology and later mass communication research; as Richard Butsch points out, many tools and terms of both these fears and

[64] For more on "heard-hearted" liberalism, see John Durham Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (Chicago: University of Chicago Press, 2005).
[65] Park in particular drew upon these ideas in his own discussion of publics, crowds and opinion formation. Grieveson, "Cinema Studies and the Conduct of Conduct"; Butsch, *The Citizen Audience*.

the concerns of psychology migrated to mass culture and audiences in the 20th century, fears of mobs gradually being replaced by fears of suggestion in the media.[66] The 19th century concerns about the physical power and irrationality of the masses, symbolized by the mob and the riot, surface in the discussion of film's effects in Munsterberg's model of direct sensory and motor stimulus—and in the distancing of film (aligned with action) from expression and deliberation. The incipient divide between crowds and publics, in which crowds were emotive while publics were enjoined through reading and conversation (deliberation),[67] can also be seen in both psychological and legal discussions of film. Film is positioned as a stimulus on the emotions, "lower" mental processes, and even the body. This is in sharp contrast to the mental activity, defined in terms of creativity and opinion-formation (closely linked to deliberation), associated with print in social psychology as well as the legal decisions cited here.

These "scientific" terms and concerns about the influence and power of film were operative in the question of whether film could be considered a form of speech or publication in *Mutual* and *Pathé*. The *Mutual* decision drew on ideas of film as mechanical reproduction (as in *Kalem*), and thus less than speech or publication; as "mere representation" it did not bring new ideas to public light (did not truly display the type of originality of expression usually associated with romantic notions of authorship). It was also, however, located within the discussion of the unique effects of film, a discussion occurring in both academic and popular reform circles. The decision itself cited the power of films—they were "capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition"—as a valid rationale for regulation. The idea that films had a power and force greater (more emotive and physical) than the printed or spoken word was in fact an important part of the legal argument put forth by the lawyers for Ohio.

In their brief to the court, the lawyers for Ohio made a number of arguments, including that the case was about property rights and not speech and that film was

[66] Butsch, *The Citizen Audience*.
[67] Gabriel Tarde, Gustav LeBon and Robert Park thought that the printed word was more conducive to public formation than other forms of communication. Ibid.

qualitatively different from the speech and publication protected under free speech law, going so far as to stipulate that if a film of purely written material, it would not be subject to censorship. In order to make this distinction, they elaborated on the unique force of film communication, cited earlier: that "the liberty of displaying life-like reproductions of human activities [would be] an unrestrainable privilege to use a force that could not inhere 'in the words themselves' with which human activity might be communicated or published in speech or upon the printed page; a force that if used to effect a libel of a person could approach assault and battery in effects."[68] This idea about the force of film was important in their argument that the regulation of film came under the state's police powers, or the state's right to take action to preserve the safety, health, welfare and morals of their citizenry. It was easy enough to argue that the ability to "display immorality and vulgarity in nearly all its nakedness,"[69] might have a bad effect on the morals of the citizenry, especially children and other particularly malleable individuals. However, asserting that film had a greater force (due to realism and to its reliance on the psychology of perception) went a step further. Assault is a key example of the type of conduct that is subject to regulation. In arguing that cinema had a force that took on physical dimensions, the brief contended that filmic communication had a particularly material dimension that likened the effects of film to physical ones. As such, film could be seen as impacting health and safety of the citizenry. The decision of the Supreme Court in *Mutual*, in its core argument that film is conduct, indirectly embraces this argument, assimilating film to the realm of physical action rather than mental expression.[70]

The notion of film as influence came to a head in the *Pathé* decision, providing the essential rationale for the decision. Film was discussed as more than words precisely because of its perceived effect on its audience, acting as a direct

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[68] Brief of Appellees, *Mutual Film Co v. Industrial Commission of Ohio*, 236 U.S. 247, (1915), Transcript of Record, 26. U.S. Supreme Court Records and Briefs, 1832-1978.
[69] Ibid, 29.
[70] There is a long-standing tendency in U.S. law to treat images as more visceral and emotive than words; see Rebecca Tushnet, "Worth a Thousand Words: The Images of Copyright," *Harvard Law Review* 125, no. 3 (2012): 683-759.

stimulus. The idea that films carry their own interpretation and influence their audiences by creating a "mental atmosphere" that is absorbed by the audience presents a very different type of thought than that involved in opinion formation or deliberation. As the decision stated, the author/speaker function was replaced by the performance of the actor (and spectacle). The distinction between film as "mere action" and film as the publication of thoughts or sentiments, protected in free speech law, gains coherence in light of the discourse on film as a form of sensory stimulation or hypnotic suggestion. As stimulation, film is action upon the emotions and bodies of the audience. The legal classification of film as action in a sense projects concerns about the audience (as a crowd) onto the technology and its form of communication. Unable to regulate the actual thought processes of the populace, the courts enabled censorship of communication that stood outside the recognized bounds of deliberation. The idea of the sensory, direct influence of film enabled this displacement of concern about the minds of the masses onto a technology of projection.

Conclusion

In the three cases examined here, the idea of film as action repeats itself. The classification took on importance and force through different discourses, from that of mechanical reproduction (and the distinction between this reproduction and human creativity) to that of influence. In all, these were attempts to think through the new medium and distinguish it from other forms of communication. The questions that the courts asked about communication in these cases could have been asked earlier. They apply to pantomime and the stage as well as to the screen. Yet, it was the intersection of the arrangement of technology and commerce into a new form of mass culture and discourse that and made the questions meaningful and forced the consideration of film as a form of communication, as well as legal definitions of speech. In these early confrontations between law and new technology, the justices were forced to revisit and specify their normative definitions of communication. The specifics of the decisions did not hold forever: films were assimilated to opinion-formation in the 1952 *Miracle* decision (which

overturned *Mutual*) and the legal notion of expressive conduct expanded the purview of deliberation in the 1930s.[71]

The decisions analyzed here nevertheless show how legal categorizations and definitions of media actively construct the communicative and political infrastructure of the public sphere. In other words, in these decisions, the judicial apparatus effectively defined the boundaries of the political. It did so in part through a set of ontological statements about film. As shown here, the legal question of "what is film?" was answered through reference to ideas about the machine and social scientific knowledges about communication and society, in particular emerging ideas about publics. These knowledges became political legally meaningful because they drew distinctions and exclusions about what counted as social order. Sedimented within the law, they came to structure the political through the regulation of culture.

In giving preference and protection to forms of communication thought to promote deliberation, the justices sought to protect only those media that might cultivate social control and order by subsuming collective action to reason. The very definition of film as a medium with greater power to both represent and incite human action rendered it both subject to and in need of regulation, associated with the unruly, embodied action of crowds. This set of definitions functioned as a technique of governance, rendering film as conduct, within the jurisdiction of legal restraint, and positioning film as a vehicle for social coordination and control. These political functions of the definition of film in these early decisions were, in turn, enabled by the late 19th century discourse of the machine and the early 20th century one of influence. The particular constellation of film, law, and psychology in the latter relationship shows how new technology and social science impacted the norms and structural conditions of the early 20th century public sphere.

[71] In addition, the deliberative criteria for defining speech within First Amendment law expanded in the 1940s with the introduction of the legal concept of expressive conduct.