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Chapter 9
The Semiotics of Film in US Supreme Court Cases

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Abstract This chapter explores the treatment of film as a cultural object among varied legal subject matter in US Supreme Court jurisprudence. Film is significant as an object or industry well beyond its incarnation as popular media. Its role in law – even the highest level of US appellate law – is similarly varied and goes well beyond the subject of a copyright case (as a moving picture) or as an evidentiary proffer (as a video of a criminal confession). This chapter traces the discussion of film in US Supreme Court cases in order to map the wide-ranging and diverse relations of film to law – a semiotics of film in the high court's jurisprudence – to decouple the notion of film with entertainment or visual truth.

This chapter discerns the many ways in which the court perceives the role of film in legal disputes and social life. It also illuminates how the court imagines and reconstitutes through its decisions the evolving forms and significances of film and film spectatorship as an interactive public for film in society. As such, this project contributes to the work on the legal construction of social life, exploring how court cases constitute social reality through their legal discourse. It also speaks to film enthusiasts and critics who understand that film is much more than entertainment and is, in practice, a conduit of information and a mechanism for lived experience. Enmeshed in the fabric of society, film is political, commercial, expressive, violent, technologically sophisticated, economically valuable, uniquely persuasive, and, as these cases demonstrate, constantly evolving.

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9.1 Introduction

This chapter explores the treatment of film as a cultural object among varied legal subject matter. Film is significant as an object or industry well beyond its incarnation as popular media. Its role in law is also varied and goes well beyond the subject of a copyright case (as a moving picture) or as an evidentiary proffer (as a video of a criminal confession). My interest in tracing the discussion of film in Supreme Court cases is to map the wide-ranging and diverse relations of film to law – a semiotics of film in the highest US court's jurisprudence – to decouple the notion of film with entertainment or visual truth (Silbey 2004).

Usually, the interdisciplinary study of law and film takes one of three paths. One path is a "law-in-film" approach, which is primarily concerned with the ways in which law and legal processes are represented in film (Chase 1996, 2002).[1] The "law-in-film" approach considers film as a jurisprudential text by asking how law should or should not regulate and order our worlds by critiquing the way it does so in the film (Kamir 2006). The second path is a "film-as-law" approach, which asks how films about law constitute a legal culture beyond the film.[2] This approach pays special attention to film's unique qualities as a medium and asks how its particular ways of world-making shape our expectations of law and justice in our world at large (Silbey 2001; Johnson 2000). Writings in the "film-as-law" vein explore the rhetorical power of film to affect popular legal consciousness (Silbey 2001). They also may look closely at film's capacity to persuade us of a particular view of the world, to convince us that certain people are good or bad or guilty or innocent by positioning the film audience as judge or jury (Silbey 2007a, b). This "film-as-law" scholarship explains "how viewers are actively positioned by film to identify with certain points of view; to see some groups of people as trustworthy, dangerous, disgusting, laughable; to experience some kinds of violence as normal; to see some lives as lightly expendable" (Buchanan and Johnson 2008, 33–34; Lucia 2005). In this latter approach, film and law are compared as epistemological systems, formidable social practices that, when combined, are exceptionally effective in defining what we think we know, what we believe we should expect, and what we dare hope for in a society that promises ordered liberty (Silbey 2007a, b).

A third approach to film and law explores the many ways film can be used as a legal tool. Increasingly, film is used to enhance policing and investigations (think surveillance cameras, filmed crime scenes, interrogations, and confessions) (Id). Film is also used as a species of legal advocacy to augment trial tactics (opening and closing statements or evidentiary proffers) (Sherwin 2011), settlement conferences, or administrative hearings (e.g., clemency videos) (Austin 2006). The study of film

[1] Both of these books are most akin to the law-in-literature approach. Jessica Silbey, *What We Do When We Do Law And Popular Culture*, 27 Law & Soc. Inquiry 139, 141–42 (2002) (describing the law and literature movement).

[2] I deliberately reverse the nouns here. Where law-as-literature or law-as-film is a study of law as a rhetoric (be it linguistic or visual rhetoric), film-as-law is a study of filmic practices that are as pervasive and effective as legal ones in the ways in which they influence and inspire social order.

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in this area of law connects the understanding of film as a complex visual rhetoric with the practice of law as an authoritative and persuasive adjudicative mechanism.

This chapter begins a new path of law and film study. As a semiotics of film in law, it explores how film (the linguistic term and cultural object) is meaningful among Supreme Court cases. Quite literally, this chapter explores the system of meaning that is produced by a data set of Supreme Court cases that discuss film. Following Saussurean linguistics, the chapter asserts that "film" does not correspond to a preexisting concept or object outside of the legal case. To the contrary, "film" is understood only in terms of its relation to the discussion of the legal matter in the case and other like cases and, importantly, in terms of its difference from other issues and items discussed in this body of law that are "not film."[3] When analyzed this way, these cases help constitute that which is film in Supreme Court jurisprudence.

One cannot understand film, of course, without contemplating its audience. By definition, film is meaningful because of the manner in which it is experienced. Insofar as the following discussion delineates film as relating to multiple practices and objects in social life, the discussion also draws attention to the ways in which that delineation depends more or less on the court's construction of a film audience. Thus, as much as the below analysis discerns the many ways in which the court perceives the role of film in legal disputes and social life, it also illuminates how the court imagines and reconstitutes through its decisions the evolving forms and significances of film spectatorship – an interactive public for film in society.

This project contributes to the work on the legal construction of social life and should be interesting to those who wonder how court cases constitute social reality through their legal discourse.[4] It might also be interesting to those film enthusiasts and critics who understand that film is much more than entertainment and perhaps, as such, may also be a problematic conduit of information. Enmeshed in the fabric of society, film is political, commercial, expressive, violent, technologically sophisticated, economically valuable, uniquely persuasive, and, as these cases demonstrate, constantly evolving.

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[3] For a much more thorough discussion of semiotic analysis and a specific area of law, *see* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. Rev. 621, 629–633 (2004).

> In a given language, all the words which express neighbouring ideas help define one another's meaning. Each of a set of synonyms like *redouter* ("to dread"), *craindre* ("to fear"), *avoir peur* ("to be afraid") has its particular value only because they stand in contrast with one another. If *redouter* did not exist, its content would be shared out among its competitors.… So the value of any given word is determined by what other words there are in that particular area of the vocabulary.… No word has a value that can be identified independently of what else there is in the vicinity.

Beebe, 640 (quoting Ferdinand de Saussure, *Course in General Linguistics*, ed. Charles Bally and Albert Sechehaye in collaboration with Albert Reidlinger, trans. Roy Harris (Peru: Open Court, 1990), 114).

[4] See, for example, Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 Iowa L. Rev. 1253 (2009) (describing how formal law – statutes and cases – constructs and constitutes notions of intimacy).

9.2 Process

The cases for this project were found by searching the Westlaw US Supreme Court database (SCT) for terms that included "film," "video," or "moving picture." This initial search yielded roughly 885 unique results that dated from 1894.[5] In more than half of these cases, the search term occurs solely in the case caption or in a quotation in the case and was not otherwise relevant to the legal issue being adjudicated. These cases were deleted from the data set. Approximately 300 cases remained after this initial filtering process was complete.

After reviewing these hundreds of cases, 153 of them contained a discussion of film in which film is relevant as film (and not as something else).[6] These 153 cases were divided into seven categories. Some cases fit in more than one category. The categories are also porous, overlapping in legal doctrine and citing one another for similar legal principles. The largest two categories concern (1) First Amendment freedoms as they relate to censorship (33 cases) and (2) the interrelation of obscenity law and privacy (44 cases). These two categories contain more than half of the 153 cases. The other categories are (3) search and seizure (14 cases), (4) publicity (6 cases), (5) evidence (11 cases), (6) antitrust (26 cases), and (7) intellectual property (19 cases). Considering these categories as whole, it would be fair to say that film becomes relevant to law and law to film when courts evaluate (1) the contours and importance of First Amendment protections at its margins, (2) the fairness and accuracy of judgments about criminal liability, and (3) the structure of economic relations in terms of an optimal efficiency in market regulation.

The remainder of this chapter will discuss each of these categories in further detail and describe the treatment of film within each category to discern the variations in the significance of film as a cultural object as well as in the resulting constitution of film audiences.

[5] The data set is on file with the author and is available for review upon request.

[6] Several other categories were created but subsequently removed from the data set because they did not relate sufficiently to the question at issue. For example, a category regarding the Federal Communications Commission (FCC) was created but not considered for this essay because they involved regulation of radio and television programming far more than "film" in any sense of the word. The cases in that category concerned interpreting FCC regulations and the extent of the FCC's power. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *U.S. v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Schreiber*, 381 U.S. 279 (1965). A group of cases focusing on religious freedom mentioned film and film equipment but not to any extent that would illuminate the meaning of film beyond that it is communicative. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Morches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Meek v. Pittenger*, 421 U.S. 349 (1975). Other categories excluded include a miscellaneous criminal category, labor law, civil rights, tax law, jurisdiction, and federal court procedure.

9.3 Categories of Analysis

9.3.1 First Amendment: Freedom of Expression and Censorship

Between 1915 and 1952, film was not protected as speech under the First Amendment. "It seems not to have occurred to anybody … that freedom of opinion was repressed in the exertion of power [via the censorship of films] …. The rights of property were only considered as involved. 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, nor intended to be regarded … we think, as part of the press of the country, or as organs of public opinion" (*Mut. Film Corp. v. Indus. Comm'n of Ohio* 1915, 236 U.S. 230, 244). *Mutual Film Corporation* begins this line of legal analysis in 1915, in which the Supreme Court upholds an Ohio statute that created a board of censors for motion picture films. Recognizing that film is a lucrative and popular business, the court also recognizes that films may be "useful, interesting, amusing, educational and moral" (Id, 241). Indeed, the court acknowledges film's "power of amusement" that might appeal to "a prurient interest" (Id, 242), that film is "[v]ivid, useful, and entertaining, no doubt, but … [also] capable of evil" (Id, 244). The court concludes, therefore, that states are within their police powers to "supervise moving picture exhibitions" when "in the interest of public morals" (Id, 242).

The court does not deny that film is a "medium[] of thought," but it says "so are many things … [like] theater, the circus, and all other shows and spectacles" (Id, 243). The argument comparing the right to exhibit films free from a censor board's approval with right to publish a newspaper article or speak at a political rally "is wrong or strained" the court says (*Mut. Film Corp. v. Indus. Comm'n of Ohio*). The court refuses to "extend[] the guaranties of free opinion and speech to the multitudinous shows which are advertised on the billboards of our cities and towns" (Id). Motion pictures and "other spectacle" are not of a "legal similitude to a free press and liberty of opinion" (Id, 243–244).

In the early years of film, it was not unheard of to compare film to the theater or a circus (*Gibson v. Gunn* 1923, 202). Film's unruly and unpredictable effect on its audience worried courts, who were charged with controlling the legal proceedings to ensure fairness and stability and applying the law to achieve the same ends. Attempting to discipline the medium of film through censor boards also made sense, given the inherent conservative nature of courts as the last place where innovative technology and cultural revolution would be embraced (Mnookin 1998).

It is nonetheless surprising to consider that the Supreme Court thought film was not sufficiently expressive – in the way that print media or public speaking could be – such that burdening it with censorship boards would not frustrate the goal of deliberative democracy that the First Amendment was intended to foster. It is fair to say that the Supreme Court, until it changed its mind in 1952 with *Burstyn v. Wilson* (1952, 343), paradoxically thought film pathetically empty in terms of its content and potentially dangerous in terms of its form.

In 1952, the court overrules *Mutual Film* declaring "motions pictures … an organ of public opinion … designed to entertain as well as inform" (Id, 501). The court has not changed its mind on the force or content of film. The Supreme Court acknowledges that "motion pictures [may] possess a greater capacity for evil," but that "the line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine" (Id, 501–502).

What has changed? The court mentions the incorporation of the First Amendment to the states through the Fourteenth Amendment and the advent of sound film in 1926. It does not mention the popular cinematic movements – film noir and classical Hollywood – both well developed and appreciated by 1952. Nor does it mention the newsreel films covering wartime events that were shown before feature films, by that time regular occurrences. Indeed, the court seems to accept without analysis what it rejected in *Mutual Film*: that "motion pictures are a significant medium for the communication of ideas" (Id, 501). The court may be adopting (albeit silently) the anticensorship arguments in lower courts and culture that raged against state censorship prior to *Burstyn*.[7] Certainly, there was a rich debate in the years between *Mutual Film* and *Burstyn* in the First Amendment realm outside the film context, in libel and privacy law, incitement, obscenity, and commercial speech.[8] Indeed, from 1915 to 1952, the Supreme Court decided several major cases in the First Amendment area, changing the doctrine significantly.[9] For example, by midcentury, commercial speech – one seemingly discrediting aspect about film in *Mutual Film* – does not

[7] *See Dennis v. U.S.*, 341 U.S. 494, 579 (1951) (Douglas, J., dissenting) (arguing organizing Communist Party organization protected by First Amendment); *Lederman v. Bd. of Educ. of the City of N.Y.*, 95 N.Y.S. 2d 114 (N.Y. App. Div. 1949) (discussing importance of free speech in schools); *Robert v. City of Norfolk*, 188 Va. 413, 426 (1948) (stating license taxes are form of censorship that infringe on freedom of the press).

[8] *Schenk v. U.S.*, 249 U.S. 47 (1919) (upholding violation of Espionage Act on the basis of distribution of anticonscription flier); *Abrams v. U.S.*, 250 U.S. 616 (1919) (upholding violation of Espionage Act on basis of distribution of perceived pro-Bolshevik pamphlets); *Near v. Minn.*, 283 U.S. 697 (1931) (invalidating state law that restricted freedom of press as applied to circumstances where paper critical of Chief of Police was perceived by state as malicious or scandalous); *Schneider v. State*, 308 U.S. 147 (1939) (invalidating state law that restricted public from distributing handbills in streets and on sidewalks); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (adding commercial speech to list of unprotected expression); *Martins v. City of Struthers*, 319 U.S. 141 (1943) (invalidating anti-leafleting law as applied to Jehovah's Witnesses who were distributing fliers door to door); Saia v. New York, 334 U.S. 558, 562 (1948) (constraints on First Amendment freedoms should be narrowly tailored); Kunz v. New York, 340 U.S. 290, 294 (1951) (licensing systems must have standards; otherwise, they are overbroad and unconstitutional); *Beauharnais v. Ill.*, 343 U.S. 250 (1952) (upholding by 5–4 decision state libel law as applied to hate speech); *Roth v. U.S.*, 354 U.S. 476 (1957) (established obscenity as unprotected speech).

[9] *Kunz v. New York*, 340 U.S. 290, 294 (1951) (declaring licensing systems must have standards or are otherwise unconstitutionally overbroad); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–14 (1931) (explaining different effect of restraints preventing publication versus effect of punishment following publication of illegal or improper statements and the court's preference for the latter); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that the Due Process Clause of the 14 Amendment protects freedom of expression against infringement by states).

necessarily deprive it of constitutional protection (Stone et al. 1996, 1226–27).[10] These and other influences can be read into *Burstyn* to explain the overruling of *Mutual Film* and *Burstyn*'s recharacterization of film as unprotected because it is a mere "medium of thought" resembling a circus to protected speech because it is a "significant medium for communication of ideas." This may seem like a too subtle shift in language on which to lay much emphasis, but the transformation in effect cannot be overstated. Where in the first decades of the twentieth century the transformative power of film was cause to censor, that same power in the middle of the century was reason the government could not control film unless exceptional circumstances were present (Stone, 504). What changed appears not to be film's qualities (in both cases film can be trivial and profound, dangerous and useful). The court was broadening the First Amendment's protective reach, discussing its application more frequently in the context of national security, complex commercial relations, and a diversifying cultural milieu. Film benefited from this lively debate. What changed was the perception that judges (or state censor boards) were not always the optimal evaluators of whether or not a film's content (or other expressive speech) is worthy of dissemination. Film being a subcategory of a growing volume of valuable and public speech, what changed was an appreciation for the acumen of (film) audiences and their capacity to judge for themselves.[11]

9.3.2 Obscenity and Privacy Concerns

The obscenity and privacy cases turn this analysis on its head. Obscenity is not protected speech under the First Amendment. This branch of US constitutional law is notoriously vague. Applying the standards for obscenity consistently is challenging and the reasons for the low protection (if any protection) debated. Nonetheless, the cases that evaluate allegedly obscene film – pornographic films – are consistent in the manner they treat and discuss the filmic nature of the speech. Whereas in the above section, film evolves into an expressive medium worthy of First Amendment protection, it can too easily be categorized as obscene to lose protection altogether. This is potentially the case because film's peculiar mechanism – its indexicality and exceptional capacity for verisimilitude – renders obscene films more like actions than speech (and thus outside the ambit of the First Amendment's protection of speech).

At first, reading through the obscenity cases, it seems that most state laws restricting pornographic films are upheld and those restricting other forms of alleged pornography (print media) fair worse under constitutional scrutiny. Digging deeper,

[10] "Despite *Chrestensen* and *Breard*, … [t]he mere presence of a commercial motive, for example, was not deemed dispositive, as evidence by Court's continued protection of books, movies, newspapers, and other forms of expression produced and sold for profit."

[11] I am indebted to Peter DeCherney and Simon Stern for several of the ideas contained in this section. Any errors are my own.

this is not true. But there is something about pornographic films that encourages the court to take a closer look at the state's regulation and assess it in light of the facts. There is a sense from these cases that film does something different than other media. In contrast to allegedly pornographic novels that require elucidation and interpretation (and therefore are less likely to be low-value speech), the court speaks of the films as "the best evidence of what they represent" (*Paris Adult Theater v. Slaton* 1973, 413) such that their value should be obvious upon viewing.[12] Consider Justice Stewart's famous quote: "I know [hard core pornography] when I see it, and the motion picture involved in this case is not that" (*Jacobellis v. Ohio* 1964, 378); or the much ridiculed job for the justices of taking the pornographic films into their chambers for a feature-length viewing. Experiencing the film is necessary to an evaluation, but even then, the evaluation is instinctive. The court goes on to say that expert testimony is usually unnecessary because "hard core pornography … can and does speak for itself" (Id, 197). The court nonetheless seems to think that films do not speak all that much – at least not in the "expressive speech" kind of way. Instead, films; they intrude – especially obscene films. This is the very reason obscenity is left unprotected in the first place. If "'speech' for First Amendment purposes is defined by the idea of cognitive content, of mental effect, of a communication designed to appeal to the intellectual process … [and] hard core pornography is designed to produce a purely physical effect, … a pornographic item is in a real sense a sexual surrogate…. [Thus] hardcore pornography is sex, [not speech]" (Schauer 1979). If film is the most direct transposition of that which it represents, no wonder pornographic films are more highly scrutinized. Courts see themselves as evaluating acts not expression and, therefore, more free to uphold the state restriction.

Indeed, most of the obscene film cases deal with the intrusion of the film in the community: whether if played at a drive in, offended community members could easily avert their eyes (*Erznozik v. City of Jacksonville* 1975, 422), or whether the adult-only theater could be shuttered because of the exogenous effects of the theater on the otherwise non-consenting community (*Paris Adult Theaters v. Slaton* 1973). Much of the debate over pornographic films since the World War I concerned the possible correlation between obscene material and crime. The famous Hill-Link Minority Report of the Commission on Obscenity and Pornography was cited frequently by the court in these cases as a justification for states to regulate commercial obscenity (Id, 58). As early as 1920, there was public concern at the growing number of pornographic films (*U.S. v. Alpers* 1950, 338)[13]:

> It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there…. We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places … with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.

[12] This is precisely what the court says about film evidence that is relevant to the case but not the subject of the case itself. *See* Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*.

[13] Citing to *The Motion Picture Industry*, vol. 254 of *Annals of the American Academy of Political and Social Science* (1947) 7–9, 140, 155, 157.

> Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not. (*Paris Adult Theaters v. Slaton* 1973, 59)[14]

These films intrude only because they are in public – movie houses being places of public accommodation. And of course speech seeking protection is by its very nature public as well. Only when the film is brought into the privacy of one's home do the scales tip in favor of protection because it has become, by nature of the private space, unobtrusive. Even then, however, the film does not magically become protected speech. The private space merely adds a layer of protection from scrutiny because, presumably, it protects the community from any harm.

Privacy is the counterpoint to obscenity. When the issue is the showing of an allegedly obscene film in a movie house or drive-in, or even when it is being transported as an article of commerce (*U.S. v. Orito* 1973, 413), the judges feel free to evaluate the filmic expression as obscene or not. When the film is shown privately, the focus shifts from whether the speech is of the intellect or prurient to whether a state, in controlling this speech (whether or not of value), is intolerably intruding into a person's fundamental privacy. In *Stanley v. Georgia* (1969), the defendant was convicted of possessing obscene films under a state law that prohibited the possession of all obscene matter. In this case, the court famously quotes the origins of the right to privacy in one's home, the right "as against the government … to be let alone," "to protect Americans in their beliefs, their thoughts, their emotions and their sensations" (Id, 564).[15] Whereas Brandeis in this quote from *Olmstead* may or may not have been thinking of the newest visual technology as safeguarding a "man's spiritual nature," the *Stanley* Court must be so thinking as they affirm the defendant's right to possess obscene films that are otherwise illegal to manufacture and distribute. The court does so, however, by elevating the status of the film to "the contents of [a] library" (Id, 565) and by accusing the state of Georgia of attempting "to control the moral content of a person's thoughts." "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds" (Id). Whereas in public, films are acts – they can intrude on our person, our serenity – in private, they are great books, or, at least, they are enough like great books that while potentially unconventional or objectionable are nonetheless off limits to the court's judgment.[16]

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[14] Quoting Alexander Bickel, *Dissenting and Concurring Opinions*, 22 The Public Interest 25–26 (1971).

[15] Quoting *Olmstead v. U.S.*, 277 US 438, 478 (1928) (Brandeis, J. dissenting).

[16] The court goes on to say that the Constitution's "guarantee is not confined to the expression of ideas that are conventional or shared by a majority.… And in the realm of ideas it protects expression which is eloquent no less than which it is unconvincing. Nor is it relevant that … the particular films before the Court are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this court to draw, if indeed such a line can be drawn at all. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Ga.*, 566.

This does not apply to cases of the possession of child pornography where the film is again seen as an "act" rather than "expression" because of what it has done to the child. *U.S. v. Williams*, 553 U.S. 285 (2008); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Here again, we see a shift from the court as protector of a public by regulating acts to the court recognizing the capacity of the public – here in private – to decide for itself.[17] Necessarily, the court's construction of the film audience evolves. As the century progresses and film (and pornography) becomes disseminated more widely, the court appears to be tolerating more of it by trusting audiences to do the same. The court does so, while still reserving the power to control the most severe form of pornography by declaring those film renditions acts not speech, but not without close scrutiny of the film itself. As we will see later, this correlates to twenty-first century thinking about film as evidence in criminal cases (such as filmed confessions or surveillance film), where the act caught on film is not expressive or subject to interpretation but more like the thing itself. It therefore speaks for itself, unmediated by representational frames.[18]

9.3.3 Search and Seizure

The category of cases concerning the lawful search and seizure of films is an iteration of the above themes but distinguishes film as a cultural object in yet another way. Obscene film is categorically unlike other kinds of contraband – such as narcotics or a weapon – which the court says are "dangerous in themselves" (*Roaden v. Ky,* 1973). This makes sense only, however, if we understand film to have two components: a physical embodiment and an expressive existence.[19] Otherwise, what would distinguish one form of contraband, cocaine, from another kind of contraband, hard-core pornography? Both may be illegal; both may be harmful. But films are expressive in ways that narcotics are not. So we have in these cases a repetition of the notion of film as expressive and, therefore, specially treated by courts because they fall within the First Amendment ambit. But we also have in these cases, as we did in the obscenity cases, a concern about how to properly police the line between legal and illegal (constitutionally protected speech and unprotected *speech acts*) and concerns over who does that policing, how, and when.

[17] Where previously film acts were akin to circus entertainment, here pornographic film is akin to sex acts.

[18] As one Supreme Court justice has said recently about the believability of a film of a car chase, "I see with my eyes … what happened…." Transcript of Oral Argument at 45, *Scott v. Harris*, 550 U.S. 372 (2007) (No. 05–1631) [hereinafter Transcript of Oral Argument].

[19] This is the essence of much intellectual property – there is a tangible form (a book) and the intangible aspect (the expression). Law protects the two components differently, the former under real property statutes and the latter under intellectual property statutes. *See* 17 U.S.C. § 109 (2006) (first sale doctrine in copyright law drawing the distinction between selling a copy and thereby losing control over it, but retaining ownership rights over the original expression and preventing others from reproducing it).

The divisibility of film into a physical object and intangible expression is particularly clever in the search and seizure cases (to say nothing about the fact that it is true as a matter of intellectual property).[20] The court draws on national history to remind us that the "use by the government of power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new" (*Walter v. U.S* 1980).[21] In this way, lawful possession of an object (the film reel) must be distinct from the possession of its contents (the images on the reel or the story told by it). Otherwise, the government could use its police powers to control the dissemination of expression with which it disagreed under the auspices of emergency seizure of tangible goods. "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression" (*Marcus v. Search Warrant*, 729).

The duality of film (as a tangible object and an intangible expression) manifests in the search and seizure cases in terms of the warrant requirement. "When contents of the package are books or other materials arguably protected by the First amendment and when the basis of the seizure is disapproval of the message contained therein, it is especially important that [the warrant] requirement be scrupulously observed" (*Walter v. U.S* 1980*,* 655). What does this mean? It means more than that a warrant must issue before a search can be effectuated. It means that the warrant must include both the film itself and the reason for viewing it, viewing being an independent search for which probable cause must exist (Id, 655). It means that a warrant must be supported by particular facts setting forth the basis of searching the contents of the film in addition to possessing the film itself (*Lee Art Theater Inc. v. Va.* 1968). Moreover, where the seizure of the film includes both the tangible item and the intangible expression (i.e., a copy of the film and a viewing of it), seizure must be for the basis of preserving evidence for trial and accompanied by an opportunity for prompt post-seizure judicial determination of obscenity (or other basis for illegality).[22] That is to say, the court requires a preliminary assessment of the content of the film – the nature of its expressivity and whether it is likely protected speech or not – before a warrant may issue at all. All of these requirements safeguard the evil of a prior restraint on speech.

Because there is no exigency exception to the Fourth Amendment when seizing allegedly obscene material (in contrast to the case of seizing weapons or narcotics) (*Roaden v. Ky*, 505–06), the method by which the determination that a warrant is necessary is much debated by the court. Here, the above-described aspects of the obscenity cases come to the fore. Except in the case of a large-scale seizure, an

[20] *See supra* note 19 and the discussion *infra* of intellectual property cases in the main text.

[21] Citing *Marcus v. Search Warrant*, 367 U.S. 717, 724.

[22] *Heller v. N.Y.*, 413 U.S. 483 (1973). "Seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particular where … there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film." *Lo-Ji Sales, Inc. v. N.Y.*, 442 U.S. 319, 328 (1979) (citations omitted).

adversary proceeding to determine probable cause for the search and seizure of the film is not necessary (*N.Y v. P.J. Video* 1986). But the determination of probable cause for that search must be made by a neutral, independent, and detached judge (*Heller v. N.Y,* 488). The determination can be based on having viewed the film in a theater before issuing warrant (Id, 488–89, n. 4) or after reviewing particularized factual assertions on the warrant request, which are not conclusory and provide the judge with adequate reasons for finding probable cause to declare the films illegal (*Walter v. U.S,* 656–57). The goal here is to enable the judge "to focus searchingly on the question of obscenity" (*Heller v. N.Y,* 489).

These cases tell us, then, that the viewing of a film is a kind of search. This in itself is an interesting proposition. Viewing a film is both a search of a possession and a search of a mind; at least this must be true if we understand these cases to be about protecting freedom of thought and freedom of one's person (the intangible and the tangible). Viewing becomes a kind of personal intrusion (another interesting proposition) one against which the Constitution protects under certain circumstances.

These cases also tell us that a judge's viewing is not as harmful or intrusive as an FBI or police search because of the focus and independence the judge brings to the task. The court explicitly says that a judge's review of a film for purposes of probable cause is less troubling than an FBI or police viewing of the film, calling the latter inherently harmful (*Walter v. U.S,* 657).[23] It is as if the judge is a doctor viewing the patient's naked body – detached and impersonal – and the police officer is a voyeur or interloper – lewd and unrestrained. Judges, here, are the best kind of critic, necessary and fair.[24] Given the instinctive mode by which judges have been known to interpret expression as obscene or not (behind closed doors, "I know it when I see it") and the fact that judges are unlike the mass of popular audiences in their moving-going ways (Silbey 2008), this aspect of the search and seizure cases distinguishing judges from other kinds of law enforcement officers is puzzling. It nonetheless comports with other lines of cases in which judges are deemed the most appropriate gatekeeper for evaluating the extent of the state's use of force.

As much as these search and seizure cases redefine the nature of film (as an object and an expression) and of search (as a physical and mental intrusion), they are also about the nature of the viewer and searcher (the judge, police, or other state actor). Here again, film audiences are inseparable from the construction of film as a cultural object with political and social significance. Given the narrowed focus of the film audience here – judge or police – as opposed to the more diverse public from previous categories above, these cases affirm judges' conceit in their ability to interpret film astutely. Whether there is an alternative to judges as film critics, "Who else would decide whether the film was lawfully seized?" is a question I have

[23] *See also Wilson v. Lane*, 526 U.S. 603 (1999) (determining that media accompanying a search is unlawful intrusion in suspect's Fourth Amendment rights).

[24] *But see* Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*.

discussed elsewhere (Silbey 2004). Suffice it to say, there are alternatives. The court's default in these cases to preferring themselves over other decision-makers or institutions speaks to their belief in film's exceptionality as well as to their own.[25]

9.3.4 Publicity

Courts are often called to determine whether the press' use of film to titillate rather than to inform violates due process. The cases about restrictions on pretrial publicity conceive of film first as a conduit of information – about the accused, about the crime, about the proceedings that will judge both – and second as a game changer, an ostensible neutral observer that nevertheless effects what is being observed.

The films in these publicity cases start out being made and distributed to expose a problem or solve a crime. In *Wiseman v. Massachusetts* (1970), the documentary filmmaker Frederick Wiseman appealed to the Supreme Court a judgment from the Massachusetts Supreme Judicial Court (SJC) that enjoined the commercial distribution to general audiences of his film *Titicut Follies* about life in the Bridgewater State Hospital for the criminally insane. The Massachusetts SJC enjoined the film's distribution ostensibly to protect the privacy of the inmates, despite the very obvious benefit that would ensue from a public airing of the inhumane conditions at the prison. The Supreme Court denied certiorari, but Justice Harlan dissented from that denial, and, joined by Justice Brennan, wrote that because "the conditions in public institutions are matters which are of great interest to the public generally," "there is the necessity for keeping the public informed as a means of developing responsible suggestions for improvement and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestion or protest" (*Wiseman v. Mass* 1970*,* 961). They argued that the informational quality of the film far outweighed any privacy harm its exposure would cause the inmates. Indeed, neither court doubted the accuracy of the film as a conduit for factual information.

There are other cases that affirm this perception of film as conduit. In *Chandler v. Florida* (1981), the court affirmed a criminal conviction despite the public broadcast of the trial. In this case, the court highlighted the state of Florida's implementing guidelines for film coverage of a judicial proceeding. Film equipment "must be remote from the courtroom. Film, videotape, and lenses may not be changed while the court is in session. No audio recording of conferences between lawyers, between parties and counsel, or at the bench is permitted. The judge has sole and plenary discretion to exclude coverage of certain witnesses, and the jury may not be filmed"

[25] Whether film is in fact exceptional as a representational medium is of course one of the questions this essay and others I have published explore. Film is not uniquely truthful or transparent, despite its treatment as such in law. And it is certainly not necessarily the "best evidence" of what happened. *See* Jessica Silbey, *Cross-Examining Film* (criticizing Justice Scalia's interpretation of the film in *Scott v. Harris*).

(*Chandler v. Fla* 1981, 566). In this case, the film is welcomed *because* it would be a conduit of information and not a distorting influence.

The *Chandler* Court explicitly contrasted the methodical and unobtrusive filming of the criminal trial in its case with the "Roman circus" or "Yankee Stadium" atmosphere admonished in *Estes v. Texas* (1965, 532), where due process was found to have been denied. In *Estes*, a "mass of wires" and "at least 12 camera men with their equipment" and "photographers roaming at will" turned the courtroom into a "forest of equipment" (Id, 553). At one point, the court pointed out that the rebroadcasting of a hearing from the case was in place of the "late movie" (Id, 537). The *Estes* Court accuses the filming as being an "insidious influence" that runs counter to the solemn purpose of the trial which is to ascertain the truth (Id, 540–41). In a case 10 years earlier, *Rideau v. Louisiana*, a filmed jailhouse confession that aired on television three times prior to the trial rendered the subsequent judicial proceeding "a hollow formality" (*Rideau v. LA* 1963, 373). The filmed confession became the de facto trial by which the accused was judged. In both *Estes* and *Rideau*, the filming was transformative – it failed in its role as conduit – and frustrated justice.

Chandler reiterates that filming a trial does not inherently deny due process. Cases before and since *Estes* confirm that the film may render the judicial proceedings an uncontrolled "carnival" (*Murphy v. Fla* 1975, 421) or "spectacle" (*Rideau v. La,* 725) and, as such, the jury may be poisoned against the accused. As with *Wiseman*, where the court was asked to assess the extent of the intrusion by the film into its subject's private lives, in the case of filmed judicial proceedings, the court is charged with assessing the "extent and degree of saturation of the public mind with the TV films" to determine whether pretrial publicity such as filmed interviews with the defendant, victim, attorneys, or politicians rendered the subsequent trial unfair (*Whitney v. Fla* 1967, 389). Additionally, courts must determine based on the orderliness and invisibility of the camera crew whether the filming had an undue influence on witnesses, the defendant, or the jury (*Chandler v. Fla,* 575–76). In *Chandler*, the court discusses studies and amici briefs that discuss the potential adverse psychological impact on trial participants that are associated with filming the proceedings (Id, 576–78). It also praises the safeguards Florida put in place to minimize negative impact and to amplify the public good that flows from broadcasting criminal trials (improving confidence in the judicial system). Concluding that there is no inherent violation of due process in the filming of a criminal trial because film itself is not inherently harmful, courts must nonetheless assess where on the line the particular film at issue falls – mere conduit or injurious meddler.

Of course film is neither, just like language is neither. Film, like language, is constitutive of the social situation. Nonetheless, in these cases on publicity, the court seems to worry mostly about film's physical embodiment – the space it takes up or intrudes upon – and not about its expressive or constitutive force. When it becomes physically more tangled in the proceeding (with wires, lighting, or camera crew) or when it physically dominates the proceeding's representation in the media (with repetitious playbacks of dramatic moments of the case), the court flinches at film's presence. Otherwise, it is like a conveyor belt, neutrally moving information from speaker to listener, broadcaster to audience member.

9.3.5 Evidence

Judges are not necessarily the best judges of film. We know this because of the naïve realism judges inject into their opinions assessing the truth or transparency of film content despite the history of film as an art that counsels otherwise (Silbey 2005). And yet, courts are called to interpret films regularly, most often as either obscene speech or as evidentiary proffers: a criminal confession, an interrogation, a crime scene, a surveillance film, an FMRI, or a filmed deposition (Silbey 2008). The Supreme Court decides cases about this latter kind of evidence less frequently, but it has addressed film evidence enough over the past 100 years to raise alarm bells.[26] How does the court consider film evidence when it has to decide whether it was properly admitted into the trial? This is different from the obscenity cases where the film is the object to be assessed – its relevance undisputed – the determination being whether the film is obscene or not. In the evidence cases, the court assesses the film precisely for its relevance (Is it probative of a fact at issue?) and for its potential prejudice (Does it affect the jurors emotionally and, therefore, degrade their rational deliberation?). The evidence cases are therefore like the publicity cases in which the film has the potential to be a heckler out to spoil the fairness of the game.

But these evidence cases share something with the obscenity cases as well. Recall from the obscenity cases that the court understands film to act on us when it is less expressive (less open to interpretation) and more prurient (arousing). In these instances, it is less protected and can be regulated without violating the First Amendment. With the cases on film evidence, the court also worries that the film will act on us, will trigger emotional responses rather than rational ones, and will therefore cloud our judgment. Unlike the obscenity cases, however, in the cases on film evidence, the court provides a basis for its judgment that film evidence may prejudice the proceeding. Because the film is so much like real life, so traumatizing with its "in your face" quality, the court fears that audiences will see film representations of pain or violence, experience it as if live before their very eyes, and will seek vengeance, whether or not punishment is warranted under the law.[27]

The court holds inconsistent positions on film evidence. At times, the court appears capable of recognizing filmic conventions, its manipulative effect, and its need for interpretation. At other times, the court appears seduced by film's reality effect despite its inherent partiality and ambiguity (Silbey 2005). Most recently, in *Scott v. Harris*, the court fell for a trick that has seduced moviegoers for more than a century: it treated film as a depiction of reality. The court held that a Georgia police officer did not violate a fleeing suspect's Fourth Amendment rights when the

[26] *See* Jessica Silbey, *Cross-Examining Film* (criticizing Justice Scalia's interpretation of the film in the 2007 case *Scott v. Harris*). *See also* Dan M. Kahan et al. (2009).

[27] *Kelly v. Cal.*, 129 S.Ct. 567 (2008) (J. Breyer, dissenting from denial of certiorari). *Yamashita v. Styer*, 327 U.S. 1, 54 n. 20 (1946) (J. Murphy, dissenting partially on grounds of prejudicial documentary film purporting to show the war crimes at issue in the case).

officer intentionally caused a car crash, rendering the suspect a quadriplegic (*Scott v. Harris*, 550 U.S. 372 (2007)). The court's decision relied almost entirely on the film of the high-speed police chase taken from a "dash cam," a video camera mounted on the dashboard of the pursuing police cruiser (Id, 379). Although obviously not the first time the Supreme Court has acted as film critic,[28] *Scott v. Harris* may be the first time the Supreme Court disregards all other evidence and declares the film version of the disputed event *as the unassailable truth* for the purposes of summary judgment. Indeed, the Supreme Court said that, despite the contrary stories told by the opposing parties in the lawsuit, the only story to be believed was the one the video told: "We are happy to allow the videotape to speak for itself" (Id, 393, n. 5). And then, for the first time in history, the Supreme Court linked video evidence to the slip opinion on its website to encourage people to "see" for themselves.[29] In *Scott v. Harris*, the court fell victim to the widespread and dangerous belief – to the degree of enshrining this belief in our national jurisprudence – that film captures reality.[30] As Justice Breyer stated at oral argument, seemingly flabbergasted by the contrary findings below: "I see with my eyes … what happened, what am I supposed to do?"[31]

Here, the worries the court expressed about film's undue influence for other fact finders haunt its own assessment of film. There are other ironies in the court's jurisprudence on film evidence: the perception of film as potentially misleading and prejudicial, on the one hand, and as the conveyor of the most accurate account of the truth, on the other. What happened to film being expressive and creative, like a deep thought (whether despicable or not)? What happened to the film having a dual existence – real and intangible – where form and function intertwine but may be analyzed independently? Is film the epitome of reality and truth or is it so raw that it is for a judge's eyes only? According to these cases on film evidence, it may be both. And yet this is not what we understand about film according to its development as an art form. In these cases where film is assessed as evidence under the more prejudicial than probative standard of Federal Rule of Evidence 403, unlike other evidence such as testimony or business records, film is divorced from its context and history and is either assessed as a street sign that needs no interpretation or as a weapon that is safe only in certain hands. As should be clear by now, however, film

[28] *See supra* discussions in main text, particularly those assessing allegedly obscene films to determine whether they conflict with contemporary community standards. *See also Miller v. Cal.*, 413 U.S. 15, 18–30 (1973) (discussing the evolution of the standards that the court employs when reviewing obscenity cases).

[29] *See Scott v. Harris*, 550 U.S. 372 (2007). The video is available at http://www.supremecourt.gov/media/media.aspx

[30] This was not the first time the court was taken in by film despite other evidence at trial. *See* C*ox v. State of La.*, 379 U.S. 536, 547 (1965).

[31] Transcript of Oral Argument, 45. Justice Stevens was the lone dissenter in the 8–1 decision and the only Justice who recognized that the film was not the whole story. *Scott v. Harris*, 550 U.S. at 389–97 (Stevens, J., dissenting).

is much more than a sign, and it is hardly a lethal weapon. The very meaning of film as a cultural object is contested in the court's *own* jurisprudence. Why the film's message would be so unambiguous in this particular case is therefore perplexing, to say the least.

9.3.6 Antitrust

Even in the cases where film is considered primarily for its commercial element, film's character takes on complex dimensions. Upon first read, the cases in the antitrust category discuss film and the film industry in light of its substantial contributor to the national economy. It is no surprise, then, that film (as a cultural object and practice) is largely considered an "item of commerce" in a large number of Supreme Court cases in this category for the purpose of determining anticompetitive practices. One of the earliest antitrust cases that concerns "motion picture films" equates filmmaking and distribution with the "manufacturing [of a] commodity" (*Binderup v. Pathe Exchange* 1923, 291, 309). At the conclusion of the case, in comparing the film industry to other growing or developed national industries, the court says the "transactions here are essentially the same as those involved in the foregoing cases, substituting the word 'film' for the word 'live stock,' or 'cattle,' or 'meat.' Whatever difference exists is of degree and not in character" (Id, 311). After so many cases in which film is considered a thing apart – exceptional as a medium of communication or cultural object – it is a relief to see the court considers film like so many other kinds of everyday practices.

This characterization of film as an article of commerce does not change, but rather is augmented approximately 20 years later when the courts start to consider the copyrightability of film in their antitrust analyses. More will be said about the relationship between film and intellectual property below, but suffice to say that in the antitrust context, the fact that films are copyrighted – and therefore are monopolies of a sort – can raise the scrutiny (or at least alter the analysis) over the reasonableness of the restraint of trade and the concern for anticompetitive business relationships (*Interstate Circuit v. U.S., Paramount Pictures Distrib.* 1939, 208, 230). In most of these cases, the copyrightability of film only furthers the argument that the film and the film industry are well propertied and commercially and socially valuable. Restraint of trade in the film business, no more so in the livestock business, may run afoul of the Sherman Act. "An agreement [found to be] illegal because it suppresses competition is not any less so because the competitive article is copyrighted" (Id, 230).

But then a kind of film exceptionalism eventually does rear its head, as it did in other categories of cases. In the antitrust cases, film is accorded a special kind of economic status because of the fluctuation in ticket price depending on whether it is a first-run or second-run film. Complicated licensing arrangements attempting to restrict first-run films to specific, noncompeting geographic regions and venues and to restrict the prices of tickets for first-run and second-run shows were met with

disapproval.[32] The combination of the drawing power of a new film (akin to the drawing power of a live prize fight) (*U.S. v. Int'l Boxing Club of N.Y* 1955, 236) combined with its "legal and economic uniqueness" as a copyrighted object made for a distinct analysis under antitrust law (*U.S. v. Loews* 1962, 38, 48). Whether in a theater or on television, the presentation of a film to a live audience garnered "sufficient economic power" that imposing a restraint on the competition in the film product became per se suspect (Id, 48). As one case reads, "forcing a television station that wants 'Gone with the Wind' to take 'Getting Gertie's Garter' as well is taking undue advantage of the fact that to television as well as motion picture viewers there is but one 'Gone with the Wind'" (Id, 48). This per se rule based on the patented or copyrighted nature of the tying product was not abrogated until 2006 (*See Ill. Tool Works v. Indep. Ink* 2006, 28). For nearly all of the twentieth century, film held a special status in antitrust law as a particularly economically powerful product.

This film exceptionalism continues further in the antitrust cases in terms of the Sherman Act's reach over the film industry. When analyzing film as an article of commerce, the court discusses film as both a local and interstate phenomenon. The Sherman Act regulates only interstate commerce. Some film industry players seeking exemption from antitrust regulations therefore argued that film is "a local affair" (*U.S. v. Crescent Amusement Co* 1945, 348).[33] Sometimes the defendants also argued that film is like a sports event or a theatrical attraction, "intangible and evanescent" and, therefore, cannot be regulated under Congress' commerce power (*U.S. v. Shubert*, 227 n. 9). In both situations, the court rejected defendants' arguments concluding that the object of film cannot be divorced from its industry, which is highly complex and nationwide in scope (*U.S. v. Crescent Amusement Co.*, 184–85). In so doing, the court drew an intriguing distinction between the professional baseball industry (which was left unregulated) and vaudeville theater business (which was subject to the Sherman Act). Where the business of baseball was granted immunity despite the interstate travel of players because travel was "a mere incident, not the essential thing" in baseball, for vaudeville, traveling theatrical productions was "more important" to the business (*U.S. v. Shubert*, 228–29). In other words, film was more like vaudeville than baseball. "This court has never held that the theatrical business is not subject to the Sherman Act" and with that held that unlike major league baseball, the film industry would not be categorically exempt from antitrust laws (Id, 230). The film industry's complicated structure and film's unique combination of a mass popular appeal with its reproducible embodiment made it a focal point of antitrust analysis.

[32] See, for example, *U.S. v. Paramount Pictures*, 334 U.S. 131 (1948); *Shine Chain Theaters v. U.S.*, 334 U.S. 110 (1948).

[33] *See also U.S. v. Shubert*, 348 U.S. 222, 227 (1955).

9.3.7 Intellectual Property

Overlap exists between the treatment of film in antitrust cases and in the intellectual property cases. This is because some of the cases are simply the same. But it is also because the commercial aspect of intellectual property directly engages the concern with commercial competition in antitrust law. In many of the intellectual property cases, film is either a stand-alone species of intangible property (as a copyrighted work) or is restricted to being played on a patented machine. Either way, film facilitates a revenue stream, and policy dictates its protection as intangible personal property.[34] In *Dowling v. United States*, the Supreme Court distinguished film as a physical object (which may or may not be owned lawfully) from film as intellectual property (whose legal status is altogether different from that of the physical object) (*Dowling v. U.S.* 1985, 207). In that case, the court had to determine whether the National Stolen Property Act would reach the interstate transportation of infringing copies of Elvis films, among other items. The court held that unauthorized copies (infringing copies) were not "stolen, converted or taken by fraud" as required by the Act, which has heretofore involved only "physical goods, wares or merchandise" (Id, 217). The Copyright Act codifies its own criminal penalties in light of the specific nature of copyright and the particularized harms that flow from infringement. To be sure, the court recognized the physical nature of film as film,[35] but in this category of cases regarding intellectual property, the focus on film's value concerns its copyrighted nature or its tie to a patented machine.

There are several cases in this category in which film is discussed specifically in light of the right to make derivative works under copyright law. Under the Copyright Act, copyright owners enjoy the exclusive right to "recast, transform, or adapt" their work to make a new "derivative" work. Traditionally, derivative works include translations from one language to another or adaptations of the original expression for a new media (e.g., a novel to a film). Cases of this sort span the entire 100 years of cases contained in the current film data set. As early as 1911, when moving pictures were only 16 years old, the Supreme Court decided a case concerning the filmic dramatization of *Ben Hur*:

> The appellant and defendant, the Kalem company, is engaged in the production of moving-picture films, the operation and effect of which are too well known to require description. By means of them anything of general interest from a coronation to a prize fight is presented to the public with almost the illusion of reality …. The defendant employed a man to read

[34] *Eldred v. Ashcroft*, 537 U.S. 186 (2002) (Appendix to Opinion of Breyer, J. at B) (discussing how films account for dominant share of export revenues earned by new copyrighted works of potential lasting commercial value); *Mills Music v. Snyder*, 469 U.S. 153, 176–177 (1985); *Sony Corp of America v. Univ. City Studios*, 464 U.S. 417 (1984); *Teleprompter Corp. v. Columbia Broad. Sys.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968); *Educ. Films Corp. of America v. Ward*, 282 U.S. 379 (1931); *Fox Film Corp. v. Knowles*, 261 U.S. 326 (1923); *Motion Picture Patents Co. v. Universal Film Mfg.*, 243 U.S. 502 (1917).

[35] *See Eldred v. Ashcroft*, 239–40 (Stevens, J. dissenting) (discussing the interest in preserving perishable copies of old copyrighted films).

> *Ben Hur* and to write out such a description or scenario of certain portions that it could be followed in action …. It then caused the described action to be performed, and took negatives for moving pictures of the scenes, from which it produced films suitable for exhibition. These films it expected and intended to sell for use as moving pictures in the way in which such pictures commonly are used. It advertised them under the title "Ben Hur." (*Kalem Co. v. Harper Bros.* 1911, 22)

Holding for copyright owner, the court decided in *Kalem* that the new film *Ben Hur* was an infringing derivative work of the book *Ben Hur*. We see similar discussions in other cases from the same period, one discussing the film version of a poem (*Fox Film Corp. v. Knowles* 1923) and another discussing the film version of a play (*Manners v. Morosco* 1920), and in later cases when film versions of books or short stories become particularly lucrative.[36]

In these cases, analyzing film as a derivative work, the court discusses the derivative film as a distinct expressive form, one that the author of the original work would have wanted to avoid or control. Again, we see the idea of film's exceptionalism structuring the court's analysis. The special features of film – its illusion of reality, its mass produced and mass performed nature – significantly enhance (or change) the underlying work (*Kalem Co v. Harper Bros.* 1911, 60; *Manners v. Morosco*, 327). For these reasons, it made sense to the court that the author of the original work would like the right to control film versions of it. These cases also evidence a suspicion and awe of film as it grows both in mass appeal and as a national industry with its increasing specialization. Combined with the early cases discussing the patented machines on which film was played where the court marveled at the power of "talkies" (*Paramount Publix Corp. v. American Tri-Ergon Corp.* 1935, 464; *Altoona Public Theaters v. American Tri-Ergon Corp.,* 1935, 477), the court's cases in the derivative work area paint a compelling picture of film's emergent cultural and economic dominance as mass entertainment.

Despite film's forceful presence in culture as a medium of expression and national commerce, throughout these cases about intellectual property, film retains its nature as personal property. It is alienable at will and can be exploited only with permission of the owner. Despite its obvious expressive function and the benefit derived from disseminating expression, "any copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work" (*Stewart v. Abend*, 229). This is another way of saying that the property aspect of film dominates over its intellectual aspect. In some instances, the court refuses to limit the monopoly that putative film owners claim over the dissemination of their work despite the personal nature of the property right (*Sony Corp. of America v. Univ. City Studios* 1984, 417). But it has done so only because property lines as drawn by statute are clear and not because of film's expressive value. In the recent case of *Dastar v. Twentieth Century Fox Film Corporation*, the Supreme Court declared that Fox Film, despite making the film at issue, was not entitled to control its subsequent distribution under either copyright

[36] *Steward v. Abend*, 495 U.S. 207 (1990) (evaluating whether the blockbuster Orson Wells film *Rear Window* is an authorized derivative work of the short story "It Had to Be Murder"); *Mills Music v. Snyder*, 469 U.S. 153, 176–177 (1985).

or trademark law because the copyright had fallen into the public domain (*Dastar v. Twentieth Century Fox Film Corp*. 2003, 23, 35). The court recognized that the public owed the existence of an important film to a genealogical line of filmmakers and contributors, but once the copyright in the filmic expression expired, no one had a legal claim to control it. There was nothing left to protect as property, even if the full value of the copyright had not been realized by its originators. The film was relinquished to the public domain for no other reason than its owner was derelict and let the copyright lapse.

These cases on intellectual property and film are interesting inasmuch as they discuss less the intellectual aspect than they do the property aspect of film. Even in the famous case of *Sony Corp of America v. University City Studios*, in which the court was closely divided over whether home recording of television shows and films was fair use under the Copyright Act, the court focused more on the potential harm to the market in television and film as an economic matter than whether it was in the public interest to facilitate building private film libraries (*Sony Corp. of America v. Univ. City Studios* 1984, 417). Ironically enough, in the category of cases in which film could be analyzed most intricately as both intellectual expression and a tangible good, the court's focus is on the latter, leaving the discussion of film's expressivity to other categories of cases.

9.4 Conclusion

This chapter represents a preliminary foray into a semiotics of film and law. It goes without saying that more elaborate analysis can and should be done following this brief exegesis on the assorted treatment of film in US Supreme Court cases. Recently, the Supreme Court decided two new cases in which its discussion manifests many of the varied relationships discussed above between film and commerce, expressive and dangerous speech, truthful evidence and invasive action.[37]

One of those cases is *Citizens United v. Federal Election Commission* (2010, 876). At the center of this controversial case is a film called *Hillary: The Movie*, which described itself as a documentary about then-Senator Hillary Clinton. The film aimed to expose Senator Clinton's flaws and dissuade voters from electing her to the Presidency (*Citizens United v. Fed. Election Comm'n* 2010, 887). One question presented by the case was whether a film such as *Hillary* was "electioneering communication" and "express advocacy or its functional equivalent." Another question presented was whether the kind of speech here – a film made by a political action committee (PAC) and a nonprofit corporation and one that would be shown

[37] *U.S. v. Stevens*, 130 S.Ct. 1577 (2010) (invalidating as overbroad a criminal statute that prohibits the depiction of animal cruelty, which would include films of animal sacrifice, mutilation, and maiming); *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010) (invalidating portions of campaign finance law that banned certain corporate-sponsored speech within several weeks of an election).

shortly before an election – could be regulated as the FEC sought under the Bipartisan Campaign Reform Act of 2002 (as it amended 2 USC §441b).

In deciding that *Hillary* was political speech that deserved the maximum protection under the First Amendment, the court recognized the film's diverse characteristics as "more suggestion and arguments than facts." It also said, however, that "there is little doubt that the thesis of the film is that she [Hillary Clinton] is unfit for the Presidency," and that "there is no reasonable interpretation of [the film] other than as an appeal to vote against Senator Clinton" (Id, 890). The court determined that the film "qualifies as the functional equivalent of express advocacy" and rejected its classification as a documentary (Id). It also said that the film required some interpretation but not in any sophisticated manner; reasonable people could *not* differ as to its message, albeit as argument rather than facts.

Later in the opinion, however, the court considered that some people "might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates" (Id, 918). And so although the film's message may be clear, the import of that message remains up for grabs. This is not very different from the court's reasoning in *Burstyn* half a century earlier. In 2010, as in 1952, the court prefers to trust the public with the film's reception. In 1952, the court said "what is one man's amusement, teaches another's doctrine." In 2010, the court says "[o]ur Nation's speech dynamic is changing…. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-h news cycle" (Id, 912). In both cases, the court accepts the affective quality of film – be it fictional or factual – and then trusts the public to do the work of filtering and processing it on its own. The 2010 court says, "[t]hose choices and assessments … are not for the Government to make" (Id, 917). And then in a remarkable conclusion whereby the court compares *Hillary: A Documentary* to the 1939 Hollywood film *Mr. Smith Goes to Washington*, the court said "it, like *Hillary*, was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force" (Id). With this, it seems the court's view on the roles and capacities of film as First Amendment speech over 50 years has not evolved. The court concludes that film, like so much other revered and mythical speech – such as that of "the individual on a soap box and the lonely pamphleteer" (Id, Roberts, J., concurring) – deserves protection for the purposes of deliberative democracy (Id, 915–17).

But so much *has* changed in 50 years. We need only look to the Internet and e-mail, Facebook, YouTube, and the decentralization of video and filmmaking by amateurs who reach a worldwide audience in a short time at low cost.[38] These social

[38] The court mentions these changes but does not discuss whether they merit a new application of First Amendment principles. *See Citizens United v. Fed. Election Comm'n*, 917. Indeed, the court lumps all speech together as undifferentiated. This seems odd given how in other contexts film's exceptionalism sets it apart.

facts make film potentially even more powerful as a medium. It is not necessarily film that has changed, but the world and manner in which the film is made and distributed. The dissent, written by Justice Stevens and joined by three other colleagues, recognizes this. Justice Stevens does not say that the film should be restricted within weeks of an election, only that for it to be shown up to and on the day of an election for maximum impact it need to "abjure business contributions or use of the funds in its PAC" (Id, 944, Stevens, J., dissenting). Stevens goes on to say:

> Let us be clear: [our precedent does not] impl[y] that corporations may be silenced; the FEC is not a 'censor,' and in the years since these cases, corporations have continued to play a major role in national dialogue. Laws such as [those at issue here] target a class of communications that is especially likely to corrupt the political process,… and that may not even reflect the views of those who pay for it. Such laws burden political speech, and that is always a serious matter demanding careful scrutiny. But the majority's incessant talk of a 'ban' aims at a straw man…. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. (Id)

Stevens' dissent recognizes the various degrees of "free" that are part of First Amendment jurisprudence. And he does not differentiate film among them, but instead distinguishes the person or entity who speaks through the film (here a corporation). Calling the majority's application of the First Amendment "wooden" (Id), Stevens recognizes that the First Amendment has come far, expanded in application, and that this is good. But he also cautions that what is at issue here is not the film per se but the wholesale protection of "general treasury electioneering expenditures by corporations" (Id). To him, the film at issue was the output of corporate power and not of individual speech that the majority's First Amendment mythologizes. To Stevens, and the others who signed on to his dissent, the twenty-first century is vastly different from the early to mid-twentieth century precisely because of the magnitude of corporate influence over daily life; corporate entities are not simply aggregates of individual will or ideas. "Films" are not the issue, it is their authors.

Interestingly enough, in this most recent of cases discussing film and speech, the dissent and the majority do not disagree about the film's message or about its forceful way of making meaning. Instead, they disagree because of *who* is speaking through the film. Both sides agree that film may be uniquely powerful as speech, even exceptionally so. But the court remains divided as to the import of the film's authorship. The majority romanticizes the film as the product of a single entity, with a voice worthy of protecting in a democratic society. The dissent sees the film as a product of a corporation composed of diverse actors and thus as impossibly claiming to represent the unified voices of the company's shareholders. In *Citizens United*, film spans the distance between a soapbox speech and a corporate prospectus. The film at issue, *Hillary: A Documentary*, is of course very much like *both* of these things. And perhaps this variable and malleable nature of film as a complex speech act accounts for the irreconcilable positions taken by the justices in the case.

These cases, taken as a whole, are full of contradictions and puzzles such as this one. They describe a Supreme Court that asserts that it (and other courts) is uniquely capable of evaluating film content but also that film is best left to its audience to interpret. These cases demonstrate that the court recognizes film's diverse and strong economic hold on the national economy because of its mass appeal and complex industry, but also that these facts should not disqualify film from First Amendment protection. Finally, these cases describe an exceptionalism whereby film, although like other ubiquitous market goods and other forms of protected speech, should nonetheless be handled with care, as if it is still not entirely understood in terms of its social and cultural influences. This final point recalls the prescient statement of Vladimir Lenin that "of all the arts, for us the cinema is the most important."[39] To be sure, these cases from the US Supreme Court recognize the extraordinary influence of film on politics, culture, and economic life in the United States. It is not mere fringe entertainment, but deeply part of the fabric of our everyday life. It will be interesting to see whether in the next 100 years of cinema the court's special care of film is replaced, and if so, with what.

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[39] This recalls Lenin's prediction that "of all the arts, for us the cinema is the most important." Jay Leyda, *Kino: A History of the Russian and Soviet Film* (Princeton: Princeton University Press, 1973), 161.

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