Can Moving Pictures Speak? Film, Speech, and Social Science in Early Twentieth-Century Law

by JENNIFER PETERSEN

Abstract: This article revisits the key 1915 Mutual v. Ohio legal decision, which endorsed censorship of film in the United States. Placing the decision in the context of two other related decisions (Kalem Co. v. Harper Bros. [1911] and Pathé Exchange v. Cobb [1922]) highlights the importance of the Supreme Court justices’ conception of the nature of film as more akin to physical action than to opinion and expression. The article locates this conception in contemporaneous popular discourse on technology and the social scientific discourse on influence.

The invention and commodification of film as a mass entertainment medium at the end of the 1800s 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 Film Corp. v. Industrial Commission of Ohio (1915). The case, in which the distribution company Mutual Film challenged the institution of censorship boards in Ohio on free speech grounds, was the most noted and binding encounter between legal definitions of speech, the press, and film in its

1 Early film included movies with intertitles and those without. While films with intertitles technically did include words, the legal discussion of film analyzed here does not acknowledge this, instead explicitly opposing film and the written (or spoken) word.

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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 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 case *Burstyn v. Wilson* (also known as the *Miracle* decision). In these thirty-seven 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 *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 arguments culminated in the assertion that film was a form not of expression but of 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 the 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. 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. In each, the classification makes sense within contemporaneous discourses on film as mechanical reproduction and on influence. *Mutual* drew on both of these discourses in its rationale. The latter discourse, the emerging social scientific one on influence, is familiar in film and media studies as a set of anxieties about film audiences and attempts to determine how to control them. I highlight the way that the arguments for censorship of film in *Mutual* and a later decision upholding censorship of newsreels drew on this discourse to argue that these ideas shaped legal decisions. In the decisions, then, a set of anxieties and fears about people, or audiences, is transferred to the technology and industry of film.

Analyzing how the classification of film took on meaning and force in the law, namely through opposition to human expression and deliberation, demonstrates the affirmative action of the state in organizing and constituting the public sphere through the legal definition of cultural forms. More than this, tying the discourses outlined earlier to the legal definition of film and speech in these early cases highlights the relevance of the history of social science not only to the study of film history (as others have so astutely done) but also to that of the law. A set of ideas about technology, mind, and the relation of self to the social world produced in turn-of-the-century philosophy and social sciences materialized in the law and the practices of censorship that it legitimized.

**The Cases and Their Context.** Today it is tempting to see the *Mutual* decision as an error or the product of an out-of-touch judiciary who just didn’t “get” film, but in many

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2 This was only one of the grounds on 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 to film.
ways the decision made sense at the time. Given the contemporaneous understanding of film and legal definition of free speech in the 1910s, it would have been unusual for the Court to see the new medium as a form of speech. On face value and in their 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 how little silent film resembled speech at the time comes from a 1915 law journal reaction to the argument that films should be protected by the First Amendment. 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.”

I highlight this peculiarity to locate Mutual and subsequent decisions upholding film censorship in the legal orthodoxy of the day. To do so, I revisit Mutual and two closely related decisions with a close reading of the legal discussion of the status of film as communication, thus performing an archaeology of the key rationales and assertions about film within the decisions. Many discussions of Mutual explain the decision to censor film as based on a deep-seated distrust of the visual, or the more common assertion that film was a “business pure and simple.” Both were important aspects of the Mutual case. There are clear iconophobic undercurrents in the rhetoric surrounding the case. The commercial status of film was also a key factor; film had already been defined as a commercial commodity in earlier regulation and thus cast as a regulatable object, distinct from opinion and expression. Yet there was more to the outcome than the commercial or visual status of film. At the core of the decision was the stranger and more ambiguous assertion that film was conduct, or a form of action, and thus open to regulation—an assertion that places the decision and the censorship of film it endorsed as the product of contemporaneous oppositions of mind, body, and machine as well as ideas about the influence of social context on individual selves.

In unearthing this central assertion and placing it in the context of contemporaneous discourses on film technology and influence, this article adds to existing scholarship on Mutual and early film regulation. The definition of film as action, which takes on different meanings across the cases examined here, provides the intellectual foundation for the political work of film regulation traced by others. The Mutual decision, as well as the broader efforts to censor film that surrounded it, as Garth Jowett shows, were ensnared in struggles over cultural authority as old methods of social control


and gatekeeping were eroded by new, mass culture.6 These struggles were also, and importantly, about the increasing diversity of the social body. Lee Grieveson, in particular, shows how the regulation of film leading up to and including Mutual was a way of “policing” this increasingly diverse social body and the public sphere.7

This article locates the discursive foundations for the political work of film regulation described in this scholarship. The scholars cited already point to the ways in which the law provided tools for social regulation and control and shaped the institution of cinema in the United States. In particular, Grieveson shows how the law acts as a site for the production and legitimation of knowledge that has strong political and cultural implications. I point out that, although the law may produce knowledge, it is also based on contemporaneous knowledges. In other words, if film regulation was a way to govern the conduct of an increasingly diverse social body, the classification of film itself as conduct, or action, was the intellectual underpinning that enabled such governance.

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 mute performance were equivalent to the expression of a book. And in Pathé, a Supreme Court of New York 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 employed, demonstrates that the articulation of film as conduct in Mutual was not merely a onetime opportunistic classification. In the language of 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 decisions, but a common set of statements emerges about the nature of film as a form of physical action, starkly opposed to deliberation and opinion formation.

If the different decisions analyzed here 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 indexes of the interests of the elite or even of the justices themselves. To maintain its function in liberal political systems, the law must strive to appear legitimate and to persuade.8 This legitimacy is established in the argumentation of legal decisions, where justices draw on existing discourses and knowledge to present their ruling as just and neutral. Thus, in what follows, I treat the law as a discursive and cultural artifact.

7 Grieveson, Policing Cinema.
The Ambiguous Roots of Censorship in Mutual v. Ohio. 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 characteristic of early cinema, an arrangement that Tom Gunning has famously called the “cinema of attractions.” Although the industry was not yet uniform or centralized, movies were becoming big business and were clearly perceived as such: some at the time estimated film to be the fourth largest industry in the United States. The era of nickelodeons, associated with urban and working-class audiences, was being eclipsed by movie palaces, which catered to a more upscale clientele and increasingly were featuring narrative films over actualities. Despite this shift, much of the popular and regulatory concern over film and its effects was entangled in broader concerns about the immigrant audience 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 (e.g., fire hazards) as well as morally dangerous (e.g., the mixing of genders, races, and classes under one roof and in the dark), by 1907 regulatory efforts were shifting toward policing the content of film. 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 (e.g., the National Censor Board) to counter commercial tendencies and achieve its potential. Many of these reformers saw in film a potential for education and uplift through entertainment, which underscores the fact 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” such as temperance films.

It was in this context that cities and states began to establish censorship boards to prescreen and license films; boards would bar the exhibition of films thought to be immoral or otherwise dangerous. In 1913, Ohio and Kansas were among the first

13 Grieveson, Policing Cinema.